

Can I Ask That? An Interviewer's Guide to Prevent Employment Discrimination

When was the last time you reviewed the employment discrimination laws before conducting an interview? Most hiring managers have every intention of complying with employment discrimination laws but find that the time needed to keep abreast of the nuances of employment discrimination in areas such as ***race, gender, color, religion, national origin, age, marital status, physical disability or criminal record*** is hard to find. Yet failure to properly prepare can lead to questions and conversations that should be avoided. Generally, asking questions alone is not illegal unless the candidate belongs to a protected class and believes that he or she was rejected due to the information that was gathered. If this happens you will be forced to prove that employment discrimination did not occur. Interviewing with this in mind can be unsettling, and it can be hard to proceed confidently during the interview process unless you have a labor attorney by your side! But many questions that are necessary to screen for the position can tread on dangerous territory. For example, if we cannot ask a person's age, how do we find out if the candidate is above the minimum age requirement? What if it is important to check criminal or credit history due to the type of work involved? What if you want to make sure the candidate is able to work overtime due to the demands of the job? How do you determine a candidate's citizenship?

To help you avoid common pitfalls in the interview process that could leave your company exposed to a claim for employment discrimination, begin by sticking to the following two practices:

ONLY ASK JOB-RELATED QUESTIONS!

Problems can arise from questions asked before the interview even begins! Innocent conversation on topics used to break the ice and make the candidate more comfortable can cause problems if the candidate is rejected. Go ahead and talk about the news, sports or weather, but stay away from personal topics such as children and spouses. A candidate can naively reveal personal information that you did not ask for. Politely steer the conversation back to job-related questions that you have (hopefully) prepared in advance of the interview!

SUBJECT EACH CANDIDATE TO THE SAME HIRING PRACTICES!

Keeping the interview fair and equal must start by using a job application that asks the same questions of each candidate. If you require testing, make sure that all candidates applying for the job are tested with the same instrument. In advance of the interview, write a job-related, detailed and validated position description. Based on the job description it is advisable to compile a list of solid interview questions that keep to the qualifications of the job. If possible, familiarize yourself with the laws that apply specifically to discrimination, for example, *Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, the Illinois Human Rights Act, the Age Discrimination and Employment Act* and other state and local civil rights laws. The following information is meant as a guide on how to handle the most common issues that can be sources of discrimination charges.

For specific legal issues it is strongly advisable to consult a labor attorney.

QUESTIONS REGARDING A CANDIDATE'S AGE:

The only time that it becomes important to know a person's age is when you think the candidate may not be of legal working age. This information can be obtained by simply asking the candidate if they can prove that they are over 18 years of age. You can ask for a copy of the candidate's driver's license and/or social security card. You can ask if the candidate graduated high school or college, provided that this is a reasonable qualification for the job. But don't ask for graduation date; that could be viewed as a way of determining a candidate's age.

QUESTIONS REGARDING A CANDIDATE'S CRIMINAL RECORD:

If there is a need to know about a candidate's criminal record simply ask if the candidate has ever been "CONVICTED" of a felony. The objective is to steer clear of asking if the candidate was ever arrested, as this question is illegal. The candidate only needs to reveal a conviction. It is best to include this question on the application form.

QUESTIONS REGARDING A CANDIDATE'S CRIMINAL HISTORY:

In order to check a candidate's criminal history a release form must be signed stating that the candidate is aware of and agrees to the criminal check. It is important to keep the release form separate from the application form. Forms requesting criminal background usually ask for "date of birth." Ask for the month and day, but NOT THE YEAR. It is not illegal to reject a candidate based on a conviction record but be careful to maintain a consistent hiring policy for all candidates.

QUESTIONS REGARDING A CANDIDATE'S CREDIT RATING:

Checking credit rating can have a discriminating impact - especially for minorities and women. Before requesting a credit check on a candidate, determine if there is a need to know the candidate's credit history. If the candidate will be given access to financial information or funds, clearance may be prudent, if not required. You must get authorization, in writing, to obtain this information. This should be a separate attachment to the application form and required of every candidate applying for the position. If a candidate can prove that the "process" of checking credit history was used in a discriminatory manner, (this candidate was treated differently than other candidates interviewed for the job) you may be required to prove that you treated all candidates equally. Candidates have many rights with regard to the credit report, including the right to review the results of the report. The requirements of the *Fair Credit Reporting Act* are very technical and should be carefully reviewed with your labor attorney. Aside from making sure that you are in compliance with the law, you should also make certain you know the candidate's rights as well.

QUESTIONS REGARDING A CANDIDATE'S DISABILITIES:

The Americans With Disabilities Act was designed to protect qualified individuals with a disability from discrimination. There is a right way (legal) and a wrong way (illegal) to ask questions that are related to physical and mental disabilities. The difference between the two questions is that the illegal question can be construed as an attempt to disqualify a candidate. Both the right and wrong ways to ask common questions related to disabilities are illustrated below. (Please refer to Medical History for more information.)

QUESTIONS REGARDING A CANDIDATE'S PHYSICAL ABILITIES:

After a thorough job evaluation identifies that the position requires specific physical ability, such as lifting, determine the amount to be lifted (such as 40 pounds) and how far and how often this must be done (such as 25 feet repeatedly during the day.) Then ask EVERY candidate: "This position requires that you lift 40-pound boxes and move them 25 feet repeatedly. Are you able to handle this aspect of the job?"

QUESTIONS REGARDING A CANDIDATE'S MARITAL & FAMILY STATUS:

Don't ask if the candidate is married or if he or she has children. It is not relevant to the job. Sometimes an interviewer will want to find out if the candidate can handle the work schedule that the job requires. Its okay to ask the candidate if he or she is willing to work overtime, travel or relocate. You can also ask if there are any days or times that the candidate will be unable to work. It is not okay to ask if working on a particular religious holiday will be a problem. Don't ask the candidate if he or she has any children or how childcare will be handled.

QUESTIONS REGARDING A CANDIDATE'S MEDICAL HISTORY:

Questions regarding a candidate's medical history are considered discriminatory. Please refer to the section in this guide on DISABILITY to learn what questions are acceptable. A full medical exam can be part of the hiring process AFTER an offer has been made. Drug screening can be conducted prior to extending an offer. Make sure that your policy states that you do not hire anyone with a positive drug screening result.

QUESTIONS REGARDING A CANDIDATE'S MILITARY RECORD:

Do not ask if the candidate was honorably discharged from the Navy or Army. Do not attempt to find out dates that the candidate was enlisted. You can ask what branch of the service the candidate served.

QUESTIONS REGARDING A CANDIDATE'S NATIONAL ORIGIN:

Don't ask: "Where were you born?" Or "What is your native language?" You CAN ask if the candidate is authorized to work in the United States. You can also ask what languages a person speaks if this information is shown, after a thorough job evaluation, to be a requirement of the job.

QUESTIONS REGARDING THE CANDIDATE'S GENDER, SEXUAL ORIENTATION, RACE, RELIGION OR POLITICAL AFFILIATIONS - JUST DON'T ASK!!! These types of questions are strictly taboo and should not be asked or discussed at any time during an interview. Once the applicant becomes an employee, the employer may collect this information for affirmative action programs and government record keeping and reporting. Avoid gender-stereotyping questions -- sexual harassment suits can be filed no matter how many employees' work for your company.

This document contains generally accepted information on employment issues and should be used as a guideline. The law in your area may be different; for specific concerns or questions consult labor attorney for legal advice.

Specific Questions

Problematic Question:	Do you have any disabilities?
LEGAL Alternative:	Are you able to perform the requirements of this job with or without reasonable accommodation?
Problematic Question	What is your corrected vision?
LEGAL Alternative:	Do you have 20/20 corrected vision?
Problematic Question L	How many days were you sick last year or have you had any recent illnesses or operations?
LEGAL Alternative:	How many days were you absent from work last year?
Problematic Question	What medications are you currently taking?
LEGAL Alternative: :	Are you currently using illegal drugs?
Problematic Question	How much alcohol do you drink per week?
LEGAL Alternative:	Do you drink alcohol?
Problematic Question	How old are you? What year did you graduate from school?
LEGAL Alternative:	Do you meet the state min. age requirement for employment?
Problematic Question	Have you ever been arrested?
LEGAL Alternative:	Have you ever been convicted
Problematic Question	Have you ever filed bankruptcy? Do you own a house?
LEGAL Alternative:	No legal alternative
Problematic Question	What is your first language?
LEGAL Alternative:	This job requires good communication and public speaking skills do you feel you can meet those requirements.

KEEP THE CONVERSATION JOB RELATED. BE FAIR AND CONSISTENT WITH ALL CANDIDATES. USE COMMON SENSE, IF YOU AREN'T SURE, DON'T ASK!