



Employee Interviews and the Discrimination “Minefield”

By: Jill K. Osborne, Esq.

The interview process is one of the best ways to gain knowledge about future employees. Typical interview questions will measure applicants’ abilities, their qualifications, and whether they have the necessary skills to be successful in your organization. An interviewer must be aware that federal and state laws limit the questions that can be asked during an interview, in an effort to prevent discrimination in the hiring process. As an employer, it is important to know which questions can be asked and which subjects should be avoided.

Marital/Parental Status

During an interview, an applicant should not be asked about marital or parental status. These questions include talking about pregnancies or family planning, familial obligations, or relationship status. Problematic inquiries include questioning whether applicants are married, divorced, single, separated, or if they have children. Although the intention behind these questions might be to gauge the commitment level of the potential employee, the question could also force applicants to reveal their marital status or sexual orientation, which have been areas of contention in discrimination claims.

National Origin and Race

Employers are not authorized to ask about the nationality of an applicant but may ask if an applicant is authorized to work in this country. Additionally, employers may not ask if a particular language is a potential employee’s primary language but can ask if the applicant speaks, reads, or writes another language fluently.

Age

Asking about age is against federal and state law. Furthermore, simple questions, such as how long applicants have been working or the year they graduated from high school or college, can lead to a violation because the questions would allow an employer to gauge an applicant’s age. The employer does not want to make any inquiries that would provide future evidence that the employer knew the applicant’s age. During an interview, however, an employer is permitted to ask questions regarding how long an applicant has worked in a particular field.

Organization and Club Membership

Other topics that should not be mentioned during an interview are club and organization affiliations, religious denominations, or religious observances. Questions about these topics may indicate an applicant’s religious affiliation.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits employers from asking job applicants questions relating to disabilities. While certain disabilities, physical and mental, may affect an applicant's ability to perform, questions addressing disabilities should be avoided during an interview. The ADA qualifies "disability-related questions" as questions that could possibly extract information about a disability. The ADA does allow employers to ask if an applicant is able to perform specific job functions, details about non-medical qualifications, such as work history or certifications, and ask potential employees to demonstrate how they would perform necessary tasks.

Drugs

Under federal law, an employer may ask about current illegal drug use but may be barred from asking about current lawful or prior illegal drug use, if questions are likely to bring up information about a disability. Prior illegal drug use is considered a disability under the ADA if the applicant is no longer using illegal drugs.

Under Arizona law, an employer may test for drugs if they inform prospective hires, in a written policy, that they will undergo drug testing as a condition of employment. The written policy must include the following:

1. A statement of the employer's policy respecting drug and alcohol use by employees.
2. A description of employees or prospective employees who are subject to testing.
3. The circumstances under which testing may be required.
4. The substances for which testing may be required.
5. A description of the testing methods and collection procedures to be used.
6. The consequences of a refusal to participate in the testing.
7. Any adverse personnel action that may be taken based on the testing procedure or results.
8. The right of an employee, on request, to obtain the written test results.
9. The right of an employee, on request, to explain in a confidential setting, a positive test result.
10. A statement of the employer's policy regarding the confidentiality of the test results.

Conclusion

Being careful about the questions posed during an interview can help an employer avoid potential litigation. In general, it is good practice to limit questions to the specifics of the job requirements and the qualifications required of the future employee. If there is doubt about the legality of a question, it should not be asked during the interview. The objective is to avoid allegations at a later date that the employer did not hire someone because of an impermissible reason – such as race, color, national origin, religion, gender, or disability.

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