

Interview Questions: Legal or Illegal?

Can you ask if an employee has been arrested? If they have a high school diploma? What organizations they belong to?

Employment application forms and pre-employment interviews are the appropriate instruments for eliminating, at an early stage, unqualified or unsuitable persons from consideration for employment.

However, applications and interviews can also be used to restrict or deny employment opportunities for women and members of minority groups.

Court rulings and Equal Employment Opportunity Commission ("EEOC") guidelines prohibit the use of all pre-employment inquiries that disproportionately screen out members of minority groups or members of one sex and are not valid predictors of successful job performance or which cannot be justified by "business necessity." See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

The guiding principal behind any questions to a job applicant is: Can the employer demonstrate a job-related necessity for asking the question? Both the intent behind the question and how the information is to be used by the employer are important to determining whether a question is an appropriate pre-employment inquiry. That is to say, an employer should consider whether the answers to the question, if used in making the selection, will adversely effect and screen out minorities or members of one sex.

The following is a representative list of questions with a short analysis of each question to determine whether it is an unacceptable or acceptable question and why. It is not all-inclusive.

1. **How many children do you have?**

This question is inappropriate for two reasons.

First, questions regarding marital status, number of children and childcare arrangements are not appropriate because they may be seen as being based upon the applicant's gender. Under Title VII of the Civil Rights Act, it is unlawful to deny a female applicant employment because she has children or is planning to have a child at some future date. Second, this question is an inappropriate way of asking about an otherwise appropriate subject: availability to work.

Questions asked to availability to work should be job-related. For example: What hours can you work? What shift(s) can you work? Can you work on weekends and/or holidays? Are there specific times that you cannot work? Do you have responsibilities other than work that will interfere with specific job requirements such as traveling?

2. **What country are your parents from?**

You may not ask an applicant where he/she was born or where his/her parents were born. You may ask if the applicant is eligible to work in the United States. Under Title VII pre-employment inquiries concerning national origin are not considered violations of the law in and of themselves.

However, inquiries that either directly or indirectly disclose such information, unless otherwise explained, may constitute evidence of discrimination prohibited by Title VII. Some state employment practice laws expressly prohibit inquiries on employment applications concerning the applicant's national origin. In some states, it may also be considered illegal to seek related data,

such as the birth, place of birth or citizenship of parents, which could indirectly reveal national origin.

3. What is your native language?

When an English language skill is not a requirement of the work to be performed, and an employer uses an English language proficiency test or requires English language proficiency, an adverse effect upon a particular minority group may result, creating a violation of Title VII.

It is also inappropriate to inquire how an applicant acquired the ability to read, write or speak a foreign language. However, if the job requires additional languages, an employer may legitimately inquire into languages the applicant speaks and writes fluently.

4. What is your height? What is your weight?

The EEOC and the courts have ruled minimum height and weight requirements to be illegal if they screen out a disproportionate number of minority group individuals or women, and the employer cannot show that these standards are essential to the safe performance of a job in question. See Davis v. County of Los Angeles, 655 F.2d 1334 (9th Cir. 1977), vacated and remanded as moot on other grounds, 440 U.S. 625 (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977).

5. Have you ever been arrested?

Questions relating to an applicant's arrest record are improper, while questions of an applicant's conviction record may be asked if job-related. The EEOC and many states prohibit the use of arrest records for employment decisions because they are inherently biased against applicants in minority groups in other protected classes.

The EEOC has issued a Revised Policy Statement covering the use of conviction by employers in making employment decisions:

First, the employer must establish a business necessity for use of an applicant's conviction record in its employment decision. In establishing business necessity, the employer must consider three factors to justify use of a conviction record: (1) nature and gravity of the offense for which convicted; (2) amount of time that has elapsed since the applicant's conviction and/or completion of sentence; and (3) the nature of the job in question as it relates to the nature of the offense committed.

Second, the EEOC's Revised Policy Statement eliminated the existing requirement that employers consider the applicant's prior employment history, along with rehabilitation efforts, if any. The Revised Policy Statement requires that the employer consider job-relatedness of the conviction, plus the lapse of time between the conviction and the current job selection process.

6. Do you own your own home?

An interviewer should not ask if the applicant owns or rents a home or car, or if wages have been previously garnished, or if the applicant has ever declared bankruptcy, unless financial considerations exist for the job in question.

Any employer who relies on consumer credit reports in its employment process must comply with the Fair Credit Reporting Act of 1970 and the Consumer Credit Reporting Reform Act of 1996.

7. Did you serve in the military? What type of discharge did you receive?

You may not ask what type of discharge the applicant received from a military service.

You may ask whether or not the applicant has served in the military, period of service, rank at time of discharge, and type of training and work experience received while in the service.

8. How old are you?

The Age Discrimination in Employment Act ("ADEA") prohibits discrimination on the basis of age with respect to individuals over the age of 40. Requests that an applicant state his age may

tend to deter older applicants, and may otherwise indicate discrimination based on age.

Consequently, employment application forms which request information such as age will be closely scrutinized to assure that the request is for permissible purpose and not for purposes prescribed by the ADEA.

Permissible purposes are limited to when age requirement or limit is a bona fide job application or is based on reasonable factors other than age. Under the EEOC's Age Discrimination Interpretive Rules, requests for date of birth on the employment application are permissible, provided that an appropriate disclaimer is shown.

In addition, any recruiting effort that is age-biased, such as seeking "recent graduates" or any question during the interview process that deters employment because of age is unlawful.

9. What church do you go to? What religion are you?

There are no job-related considerations that would justify asking about religious beliefs or convictions unless your organization is a religious institution, in which case you may give preference to individuals of your own religion.

In addition, inquiries as to the applicant's religion are also not an appropriate method of determining availability to work. Employers have an obligation to accommodate the religious beliefs of employees and/or applicants unless to do so would cause undue economic hardship.

The EEOC has determined that the use of pre-employment inquiries that determine an applicant's availability have an exclusionary effect on the employment opportunities on persons following certain religious practices.

Thus, questions relating to availability for work on Friday evenings, Saturdays or holidays should not be asked unless an employer can show that the questions have not had an exclusionary effect on its employees or applicants who would need an accommodation for their religious practices, that the questions are otherwise justified, and that there are no alternative procedures which would have a lesser exclusionary effect. EEOC Guidelines on Discrimination Because of Religion, 29 CFR 1605.

10. Are you a United States citizen?

This question is not appropriate as a pre-employment inquiry.

The EEOC Guidelines on Discrimination Because of National Origin indicate that consideration of an applicant's citizenship may constitute evidence of discrimination on the basis of national origin.

The law protects all individuals, both citizens and non-citizens domiciled or residing in the United States against discrimination on the basis of race, color, religion, sex or national origin.

A person who is a lawfully immigrated alien, legally eligible to work, may not be discriminated against on the basis of his/her citizenship, except in the interest of national security, as determined under a United States statute or a presidential executive order regarding the particular position or premises in question.

11. Do you have any disabilities?

The Americans with Disabilities Act ("ADA") prohibits employers from asking disability-related questions to employment applicants. A "disability-related question" is any question that is likely to elicit information about disability. Under the ADA, an employer cannot lawfully ask an applicant whether he has a particular disability nor ask questions that are closely related to a disability.

An employer, for example, generally may not ask an applicant whether the applicant will need

reasonable accommodations for the job. An employer may not ask an applicant how many sick days he took with a previous employer; this question directly relates to possible disabilities.

An employer may not ask an applicant about his worker's compensation history. A question of this nature is viewed as relating directly to the severity of the applicant's impairments. An employer may not ask an applicant about his current or prior lawful drug use. For example, an employer cannot ask an applicant, "What medications are you currently taking?"

An employer may ask an applicant whether he can perform the essential functions of the job for which he is applying, with or without reasonable accommodation. Or ask applicants to describe how they would perform any and all job functions, as long as all applicants in the job category are asked to do this.

When an employer reasonably believes that an applicant will not be able to perform a job function because of a known disability, the employer may ask the applicant to describe or demonstrate how he would perform the function.

If the applicant has an obvious disability or voluntarily discloses a hidden disability to the employer, the employer may ask the applicant whether he needs reasonable accommodations and what types of reasonable accommodations he will need.

For example, an applicant for a receptionist's position voluntarily discloses that he has diabetes and will need to take breaks to take his medication. The employer may ask the applicant questions about the reasonable accommodations he will need, such as how often he will need to take breaks and how long the breaks must be.

An employer should inform all applicants of the essential functions of the position and of the employer's attendance requirements. The employer may then ask whether the applicant will be able to perform these functions and meet the attendance requirements. An employer may also ask about an applicant's attendance record with a prior employer.

This question is not considered to be disability-related, because there may be many reasons unrelated to disability why a person may not have met the attendance requirements of a previous job.

12. When was the last time you used illegal drugs?

An employer may ask applicants about current and prior illegal use of drugs. An individual who is currently using illegal drugs is not protected under the ADA. For example, an employer may ask the following of an applicant: "Do you currently use illegal drugs? Have you ever used illegal drugs? What illegal drugs have you used in the last six months?"

These questions are not likely to tell the employer anything about whether the applicant is addicted to drugs. On the other hand, questions that ask how frequently the applicant has used illegal drugs are likely to elicit information about whether the applicant was a past drug addict. An employer may not ask questions that refer to past drug addiction.

13. Do you drink alcoholic beverages?

An employer may ask an applicant questions about his drinking habits, unless a particular question is likely to elicit information about alcoholism, which is a disability under the ADA. An employer may ask an applicant whether he drinks alcohol, or whether he has been convicted for driving under the influence of alcohol. These questions do not reveal whether someone has alcoholism.

On the other hand, questions about how much alcohol an applicant drinks or whether he as participated in an alcohol rehabilitation program are not permitted. Questions of this nature are likely to elicit information about whether the applicant has alcoholism.

14. Have you ever undergone psychiatric evaluation?

This is not an appropriate question.

The EEOC enforcement guidance on psychiatric disabilities limits the questions asked of any applicant about any psychiatric disability.

Under the ADA, the term, "psychiatric disability," includes mental impairments, such as any mental or psychological disorder including emotional or mental illness. It includes major depression, bipolar disorder and anxiety disorders such as panic disorder, obsessive-compulsive disorder and post-traumatic stress disorder. A mental impairment also includes schizophrenia and personality disorders.

As with physical disabilities, an employer is not permitted to ask applicants any questions that are likely to elicit information about a psychiatric disability. A limited exception comes into play when the employer reasonably believes that an applicant has a psychiatric disability for which the applicant will require accommodation.

Generally speaking, an employer can only reasonably believe that an applicant will need accommodation if the applicant discloses his psychiatric disability to the employer during the hiring process or if the applicant tells the employer during the hiring process that he will need such accommodation.

15. Are you dating anyone right now?

While this question may not be evidence of discrimination, interviewers should avoid questions of a personal nature. Personal questions are generally irrelevant to the hiring process, and may give rise to claims for invasion of privacy or sexual harassment.

There should be some direct correlation between the information requested and the applicant's ability to perform the functions of the job for which he is applying. If there is no legitimate business purpose for a question, don't ask it.

16. When did you graduate from high school?

This type of question can be considered an indirect inquiry as to an applicant's age and may create an inference of age discrimination. While such a question does not inherently violate the Age Discrimination in Employment Act, a more appropriate approach is to simply ask the interviewee if he or she has a high school diploma or equivalent.

Further, an employer must consider whether a high school education is necessitated by the duties and functions of the position for which applicants are being interviewed. The United States Supreme Court has found an employer's requirement of a high school education discriminatory where statistics showed that such a requirement operated to disqualify blacks at a substantially higher rate than whites and there was not evidence that the requirement was significantly related to successful job performance.

The standard applies to all groups protected under Title VII and to all questions related to educational achievement, if no job-related requirement or business necessity exists. While an employer may generally inquire as to the applicant's educational background, there must be some degree of relationship between the level of education required for the position and the job duties of the position.

17. Do you have any family members who work here now or who have worked here in the past?

Information about friends or relatives working for an employer is generally not relevant to an applicant's competence.

Requesting such information may be unlawful if it creates a preference for relatives of current

employees in the selection process and the composition of the present workforce is such that this preference reduces or eliminates employment opportunities for members of protected groups.

As a general rule, however, unless an adverse effect on women or minorities can be shown, nepotism is not illegal.

18. What clubs or organizations do you belong to?

As phrased above, this question is unacceptable because it could be seen as seeking information that is not job-related and which could relate to gender, national origin, religion or other status protected under Title VII.

It would be more appropriate to ask: "What professional or trade groups do you belong to that you consider relevant to your ability to perform this job?" This question would elicit similar information, but only to the extent that it is relevant to the job in question.

19. What is your maiden name?

This question could be seen as an inappropriate inquiry under Title VII because it indirectly asks a female applicant to disclose information regarding her marital status.

Questions about marital status are frequently used to discriminate against women and to deny opportunities for female applicants. If you need to contact a former employer, you may, however, ask all applicants if they have ever been known by any other name.

20. What is your race?

Title VII prohibits discrimination based on race and color. Again, pre-employment inquiries concerning protected status are not considered violations of the law in and of themselves. However, this inquiry directly asks an applicant to disclose information regarding a protected characteristic, and, unless otherwise explained, may constitute evidence of discrimination prohibited by Title VII.

An employer may legitimately obtain information needed to create and implement an affirmative action plan, or to meet other government recordkeeping requirements, or even for the employer's own efforts to recruit minorities and/or women.

The information should be kept separate from other employee records to ensure that it is not used to discriminate in making personnel decisions. One means of collecting such data that has been approved by the courts is the use of a "tear-off sheet," which is an anonymous sheet that is separated from the application and used only for purposes unrelated to the selection decision.

If It's Not Job-Related -- Don't Ask

Data on such matters as marital status, number and age of children, and similar issues, which could be used in a discriminatory manner in making employment decisions, but which are necessary for insurance, reporting requirements or other business purposes can and should be obtained if a person has been employed, not by means of an application form or a pre-employment interview.

It is reasonable to assume that all questions on an application form, or any pre-employment interview are for some purpose, and that selection or hiring decisions are made on the basis of the answers given.

When facing charges of discrimination, the employer bears the burden of proving that answers to all questions on application forms or in oral interviews are not used in making hiring and placement decisions in a discriminatory manner prohibited by the law.

The employer must establish that the questions do not seek information other than that which is essential to evaluation of an applicant's qualifications for employment. It is, therefore, in an employer's own self-interest to carefully review all procedures used in

screening applicants for employment, eliminating or altering any not justified by business necessity.