

Conducting Legal and Effective Employee Interviews

While a variety of state and federal laws prohibit employers from inquiring about certain topics when interviewing prospective employees, the interview is a critical fact-gathering opportunity for employers when performed lawfully. This edition of the *Employment Law Advisor* summarizes unlawful areas of pre-employment questioning, and suggests effective and lawful ways to get the information employers need.

Although the line is not always clear with respect to permissible and impermissible interview questions, the general rule in interviewing is that an employer should ask only job-related questions (i.e., questions about skills, experience, training and education). Employers should not ask applicants for information that pertains to any potential protected classification, nor should they ask different questions of applicants in different protected classes.

The Federal Equal Employment Opportunity Commission (EEOC) and the Massachusetts Commission Against Discrimination (MCAD) (agencies which enforce discrimination statutes) have issued guidelines on the legality of certain pre-employment inquiries, which form the basis for the following advice.

Unacceptable Inquiries

A surprising number of interviewers get into trouble at the outset of an interview just by making small talk. For example, although it may seem like a friendly overture to begin an interview by asking about an applicant's family, questions such as whether an employee plans to have children or has child care obligations can be interpreted as an unlawful attempt to screen out certain female applicants. Avoid any questions which skirt the borders of acceptability; not only can unlawful questions lead to legal liability, they may also scare off good applicants who are wary of working for an employer that appears to exhibit discriminatory attitudes.

Effective interviewing is a critical step in the hiring process, but the interview process also has the potential to create legal liability for employers. Do you want to:

- ✓ Learn how to recognize and avoid illegal interview questions?
- ✓ Discover how to obtain important information from applicants without violating the law?
- ✓ Get tips on successful interview techniques?

If so, then read on...

According to the EEOC and MCAD, the following inquiries are unacceptable:

- ✓ Are you married?
- ✓ Do you have kids?
- ✓ Do you have custody or child care obligations?
- ✓ Asking whether time commitment would be a problem for applicant;
- ✓ Inquiries concerning an applicant's religion, religious practices, or religious obligations;
- ✓ Inquiries concerning sexual orientation;
- ✓ Inquiries regarding race;
- ✓ What is your national origin/where were you born?
- ✓ Inquiries into the birthplace or citizenship of applicant's parents, grandparents or spouse;
- ✓ Inquiries relating to age, such as
 - How old are you?
 - What year did you graduate from high school? From college?
- ✓ Inquiries regarding medication;
- ✓ Inquiries concerning the existence, nature or severity of a disability
 - Do you have a disability that would interfere with your ability to perform this job?
 - Have you ever been injured on the job?
 - Do you ever get ill from stress or have you ever sought treatment for stress?

- How many days of sick leave did you take on your last job?
- Have you ever filed for workers' compensation?
- Have you ever taken workers' compensation leave?

Alcoholism is a covered disability under the ADA. Therefore, any questions likely to elicit information about alcoholism are impermissible:

- ✓ Are you an alcoholic?
- ✓ How much alcohol do you drink?
- ✓ Have you ever participated in an alcohol rehabilitation program?

Under Massachusetts law, pre-employment inquiries about an applicant's arrest or conviction record are limited. Employers may ask if an applicant has been convicted of a felony; however, employers may not make:

- ✓ Inquiries concerning an arrest, detention, or disposition in which no conviction resulted;

- ✓ Inquiries concerning first convictions for misdemeanors of drunkenness, simple assault, speeding, minor traffic violations, affrays, or disturbance of the peace;
- ✓ Inquiries concerning any conviction of a misdemeanor where the date of conviction occurred 5 or more years prior to date of inquiry, unless the applicant had been convicted of any offense within 5 years immediately preceding date of inquiry.

While not unlawful, employers should also avoid making any statements or promises that imply job security. Although an applicant may mention that he or she is hesitant to leave a good job, or to relocate, resist the impulse to reassure the employee that a job with your company will be “long term;” instead, address the merits of the position, not its length. Similarly, do not exaggerate the potential of as yet undetermined compensation or benefits (such as stock options or commissions). Statements of this nature can negate the general “at will” nature of employment, and may create a contract claim against the employer.

Acceptable Inquiries

Although the above inquiries are prohibited, employers can still obtain necessary information about job-related subjects such as an interviewee’s ability to handle the job and possible attendance problems. For example, although an employer cannot ask how many sick days an applicant took at his or her last job, the employer may ask whether the applicant can meet the attendance requirements of the job. Similarly, an employer can identify the regular work hours of the job at issue and ask whether the applicant can meet these requirements. Likewise, an employer may ask about an applicant’s prior attendance record (as long as absences for illness and for other reasons are not distinguished).

It is always appropriate to ask about an applicant’s ability to handle the job. An employer should outline the essential functions of the job at issue and ask whether the

applicant can perform them. Additionally, if an applicant volunteers the existence of a disability or if one is obvious (if the employee is in a wheelchair, for example), an employer may ask:

- ✓ Whether the applicant will need reasonable accommodation to perform the essential functions of the job;
- ✓ The type of reasonable accommodation needed to perform the job;
- ✓ If an employer reasonably believes that the applicant’s known disability would interfere with applicant’s ability to perform the essential functions of the job, it may request a description or demonstration of how the applicant will perform the function without an accommodation, regardless of whether this is asked of other applicants;
- ✓ If an employer does not have a reasonable basis to believe the applicant’s known disability would interfere with the applicant’s ability to perform essential functions of the job, it may request a description or demonstration of how the applicant will perform the function with or without an accommodation, provided such request is asked of all applicants for the job category.

Although prior drug addiction is a disability under federal law, an employer may ask whether an employee has illegally used drugs in the past, and whether the employee currently uses illegal drugs. An employer may not inquire about the extent of past illegal drug use, nor ask about the current use of lawful (prescription) drugs.

In some situations, an employer may ask only the minimum necessary to elicit required information. For example, an employer may ask employees if they are under 18 years of age (so that employers can comply with laws concerning individuals under 18), and may ask if an applicant is legally authorized to work in the United States.

Tips for Effective Interviewing

The most effective interviews are ones in which the applicants do most of the talking, and where the topics covered are related to the applicants’ potential for success in the job at issue. Let the applicants tell you about their skills and strengths before you tell them about your needs. Have more than one person present to meet the applicant,

and be sure to take notes so that you remember what is learned in the interview. Try some of these questions to get the ball rolling:

- ✓ What are you looking for in a job? In an organization? What would make you want to stay?
- ✓ What do you really enjoy doing at work? Why?
- ✓ Of your past managers or supervisors, who was the most effective? Why?
- ✓ What would your last supervisor tell me about you (or your performance)?
- ✓ What is the most creative idea you’ve put into practice at work?
- ✓ Give me an example of a difficult decision or problem you solved at your last job. What did you do?
- ✓ Have you ever been asked to carry out a policy with which you didn’t agree? How did you handle the situation?
- ✓ What sort of managers/co-workers have you found the hardest to work with? What did they do that bothered you?
- ✓ Do you prefer to work alone, or on a team? Why?

We recommend that any employee who conducts interviews be trained in the above guidelines, to avoid legal liability and improve the effectiveness of the hiring process.

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