

The Hiring Process: Legal Do's and Don'ts

Among the most notable "red flag" issues and topics are:

Age

An employer can ask about an employee's age if the particular job carries legally mandated minimum age requirements. For example, an employer can and should ensure that a potential employee whose job would entail the sale of alcoholic beverages is at least 21 years old. In the absence of such legal requirements, an employer should not ask about the dates when a candidate attended grade school, high school or even college, as the courts may regard such questions as subtle evidence of age discrimination. Also, replacing a 50-year-old employee with a 25-year-old employee could be considered discrimination if there is no legitimate, bona fide reason for the replacement.

National origin

An employer can require an applicant to prove that he or she is eligible to legally work in America. The proof must be a form that would be accepted by U.S. Citizenship and Immigration Services. An employer can require the employee to provide original documentation, as opposed to copies, to verify authenticity. However, an employee can present a certified copy of a birth certificate. An employer cannot ask about an applicant's nationality, or that of his relatives; about where an applicant or his relatives were born; or about any foreign addresses. An employer cannot ask about what other languages a candidate speaks, unless there is a legitimate employment reason. If an employer must ask about language abilities, the employer must not ask how or where the candidate acquired his or her ability to speak a foreign language.

The law presumes that "English-only" rules are illegal, such as requirements that employees speak only English while at work. An employer who requires that a candidate speak English must be able to demonstrate that this is because of a legitimate occupational qualification or business need. However, an employer cannot require an employee to speak only English at all times, such as during lunchtime or while on break. Some legitimate reasons for requiring a candidate to be fluent in English include communication with customers, co-workers or a supervisor who only speaks English, or the ability to communicate in emergency situations.

Race/color

An interviewer cannot ask about a candidate's race or color, or racial/familial background. An employer should not ask specific questions of certain races or colors but not others. The employer should ensure that it asks the same types of questions of all potential employees.

Gender

An employer cannot ask about a candidate's gender, or pose questions that may only apply to one gender. For example, the employer should not ask if the candidate plans on having children, even if this question is asked of all candidates. A court may consider such a question as an attempt to avoid hiring women. An employer cannot inquire about a candidate's plans for child care.

An employer must be careful not to have requirements that are unrelated to the job. For example, an employer should avoid imposing height requirements unrelated to job performance; as such a requirement could potentially exclude women.

Religion

The employer should not ask about a candidate's religious beliefs, whether or where the candidate attends church, or about any religious customs. The employer must not tell the candidate about the employer's religious beliefs or affiliations. Courts may consider such discussions as an attempt to pressure or unduly influence a candidate when there is no legitimate employment reason for the employer to disclose such information.

Disability

An employer can ask whether a candidate is capable of performing tasks that are required for the job. The employer, however, should carefully phrase the question to avoid potential problems. For example, the employer may properly explain that a job may require lifting boxes weighing 25 pounds, and then ask if an employee is able to meet that requirement. However, it is not appropriate to simply ask an employee if he or she is disabled, and then attempt to justify that question by explaining that the employer was attempting to elicit information regarding the candidate's ability to lift heavy boxes.

The employer must avoid questions that could be misconstrued as inquiring about non-job-related disabilities, or that could force an applicant to reveal any such disabilities. The employer may not ask if a candidate has a history of filing workers' compensation claims, or ask about any current or prior medical conditions.

Additional points to consider:

- An employer can ask a candidate if they belong to organizations that are related to the job in question. However, the employer cannot ask about a candidate's involvement in organizations that may disclose the candidate's membership in a protected group.
- An employer can also ask if a candidate would be willing to work overtime. An employer, however, should not ask why a candidate cannot work a required schedule, or if there are religious holidays which would prevent a candidate from working. Such questions could open the door to claims of religious discrimination.
- An employer can ask for references. However, the employer must not ask for references that reveal the candidate's membership in a particular protected group. For example, the employer should not ask for a reference from a priest or a rabbi.
- An employer cannot ask for a photograph from a candidate who is only being considered for hiring. However, once a candidate is actually hired, the employer can obtain a photograph for purposes of identification.
- It is also advisable for the application to include a statement of nondiscrimination, and indicate that the employer is an equal opportunity employer. Further, unless the employer intends to create a specific employment contract, all candidates should be reminded that anyone hired is an at-will employee. At-will employment means that the employer can

fire the employee for any reason at any time, and that the employer is not required to provide notice.

- The application should remind the candidate that the employer is not creating a contract of employment, nor is the employer providing any guarantee that the candidate will, in fact, be hired. The application should require the candidate to acknowledge that the information included is complete and accurate, and that the employer may take adverse action, including firing the employee, if it turns out that false information was provided. Finally, the application should include a section for candidates to sign acknowledging their understanding of these important points.

(Source: <http://mranet.org>)