



# Employment Law Update

## Can I Ask That?

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# Overview

1. Essential information employers need to know to do an effective hire
2. Unacceptable vs. acceptable interview questions
3. Practical techniques to obtain the essential information without creating a possible discrimination claim

# Introduction

- Purpose
- Relevant Laws
  - Title VII of the Civil Rights Act
  - Wisconsin Fair Employment Act
  - Americans With Disabilities Act
  - Rehabilitation Act
  - Age Discrimination in Employment Act
  - Equal Pay Act
  - And many more ...
- Bona Fide Occupational Qualification (BFOQ) Defense

# Essential Information for an Effective Hire

WHAT  
DO YOU  
NEED TO  
KNOW



# What Do Employers Need to Know?

- Job-related information provided by the applicant
  - Education
  - Past employment
  - Other information included on their resume
- Information needed to be legally employed
  - Age
  - Citizenship
  - Other personal information

# Unacceptable Vs. Acceptable Interview Questions



# Age

- Unacceptable Questions
  - How old are you?
  - What is your date of birth? What is your birthday?
  - In what year were you born?
  - In what year did you graduate from college/high school?
  - Suggesting the candidate is overqualified
  - Asking how the candidate would manage millennials or deal with a younger boss
- Acceptable Questions
  - Are you over the age of 18?
  - If hired, can you furnish proof of age?
  - Can state that hire is subject to age verification
- Why?

# Marital or Familial Status

- Unacceptable Questions
  - Are you married or do you have a permanent partner? With whom do you live?
  - How many children do you have? Are you pregnant? When do you expect to have a family?
  - What are your child care arrangements?
  - What is your maiden name?
- Acceptable Questions
  - Travel is an important part of the job—do you have any restrictions on your ability to travel?
  - Do you have responsibilities or commitments that would prevent you from meeting specified work schedules?
  - Do you anticipate any absences from work on a regular basis? If so, please explain.
  - Have you used a different name in prior employment?
- Why?



# Sex, Gender, Sexual Orientation, and Gender Identity

- Unacceptable Questions
  - Are you male or female?
  - Do you wish to be addressed as Mr., Mrs., Miss, Ms., etc.?
  - What gender do you identify as?
- Acceptable Questions
  - What are your preferred pronouns?
  - Otherwise, none. Unless there is a bona fide occupational qualification, which is rare.
- Why?

# Disability

- Unacceptable Questions
  - Do you have a disability that would substantially impair your ability to do the job? Are there any health-related reasons why you might not be able to do the job?
  - Avoid questions about health, doctors, prescriptions, medical treatments, alcohol, physical or mental conditions, etc.
  - Have you ever been injured on the job or filed a workers' compensation claim?
- Acceptable Questions
  - This job requires \_\_\_\_\_. Can you perform the duties of the job you are applying for?
  - Inquiring into the applicant's ability to perform essential job-related functions (with or without reasonable accommodation), such as whether the applicant can stand for two hours at a time or whether the applicant can carry 50 pounds from point A to point B.
  - Informing the applicant of the employer's attendance or punctuality requirements and asking if the applicant can comply (with or without reasonable accommodation).
- Why?

# National Origin, Citizenship, and Ancestry

- Unacceptable Questions
  - What is your native language? How/where did you learn the language?
  - What type of accent is that?
  - What is your nationality/national origin/country of citizenship/ancestry?
  - Where did you grow up? Where are you or your parents from?
- Acceptable Questions
  - Are you legally authorized to work for the company in the U.S.?
  - Do you require sponsorship for an employment visa now or in the future?
  - If a particular language is required for the position (a requirement which should be in the written job description and job posting)—to do this job, you must be able to speak \_\_\_\_\_. What is your fluency level?
- Why?

# Religion or Creed

- Unacceptable Questions
  - What church do you attend?
  - Inquiries into applicant's religious denomination, religious customs, religious affiliations, church, parish, pastor, or religious holidays observed.
- Acceptable Questions
  - May advise applicant about normal hours and days of work required by the job and ask if the applicant is willing to work that schedule on a regular basis
- Why?

# Race or Color

- Unacceptable Questions
  - All questions regarding or geared towards determining the candidate's race, complexion, and color of skin are unacceptable.
- Acceptable Questions
  - None
- Why?

# Arrest or Conviction Record

- Unacceptable Questions
  - Have you ever been arrested?
- Acceptable Questions
  - Have you ever been convicted of a felony? (legal if reasonably relevant to the job, e.g., embezzlement for a banking job.)
  - Are there any pending charges?
- Why?

# Personal Information

- Unacceptable Questions
  - How tall are you? How much do you weigh?
  - Do you have a car?
  - Have you changed your name?
- Acceptable Questions
  - Are you able to lift a 40-pound weight and carry it 100 feet, as is required of the job?
  - Do you have a reliable way to get to work everyday? Is there anything to prevent you from being at work on time?
  - Have you worked for us before under a different name?
- Why?

# Miscellaneous

- Unacceptable Questions
  - Use or Nonuse of Lawful Products
    - Do you smoke? How often do you consume alcohol?
  - Salary, Wages, Credit, or Garnishment Record
    - Questions about salary or wage history
    - Have your wages ever been garnished?
    - Have you ever declared bankruptcy?
  - Military
    - Direct questions about discharge or service
  - Affiliations or Organizations
    - What clubs or social organizations do you belong to?
- Acceptable Questions
  - Use or Nonuse of Lawful Products
    - Our smoking/alcohol policy is such— can you adhere to it?
  - Salary, Wages, Credit, or Garnishment Record
    - Salary expectations
  - Military
    - What experience and training did you receive while serving that would be beneficial to this job?
  - Affiliations or Organizations
    - What professional or trade groups do you belong to that you consider relevant to your ability to perform this job?



# Practical Techniques to Obtain Essential Information

PRACTICAL



# Practical Techniques

- Before the interview
  - Carefully craft the job description
  - Develop interview questions
- During the interview
  - Exercise caution when describing the job
  - Questions should remain job-related
  - Do not inquire into personal details that might reveal protected class information
- After the interview
  - Once officially hired, obtain other essential sensitive personal information
- What if the applicant volunteer's information?
  - Do not ask follow-up questions
  - Consult HR or Legal

# Takeaways

- To avoid potential discrimination claims in the hiring process, the most important things to keep in mind are:
  - Your role as the interviewer and what information you need to obtain;
  - Which questions to ask and how to ask them; and
    - Think—job-related
  - Which questions not to ask.
    - Think—protected classes

# Thank you!



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