

Can I Ask That?

MRA Employment Law Update

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I. Introduction

- a.** There is a variety of information every employer needs from applicants in order to make sound employment decisions and efficiently operate. Some of this information is even necessary to ensure the individual is legally able to be employed by you, such as age and citizenship status. However, asking a job applicant certain questions, such as whether he/she is a U.S. citizen, can expose you to a discrimination complaint. Instead, ask whether the applicant is legally eligible for employment in the U.S.
- b.** This is just one example among many. All the information an employer needs can be obtained. It just needs to be obtained in the proper manner.
- c.** Relevant Laws
 - i.** Inappropriate interview questions create a risk of discrimination claims under a variety of laws.
 - ii.** Employers must avoid impermissible inquiries on applications and during interviews. Impermissible inquiries are those that are directly or indirectly related to the protected status of a candidate.
 - iii.** Protected categories include: Race or color; Gender or sex (including pregnancy); National origin or ancestry; Religion or creed; Disability/handicap; Age (40+); Marital status; Sexual orientation or gender identity; Genetic information; Arrest or conviction record; Military/Veteran status; and Use or non-use of lawful products.
- d.** Bona Fide Occupational Qualification Defense
 - i.** A bona fide occupational qualification (BFOQ) is a provision that permits discriminatory practices in employment if a person's "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. §2000e-2(e). To establish the defense of a BFOQ, the employer has the burden of proving that a particular class of employees (for example, males applying for jobs at Hooters) would be unable to perform the job safely or efficiently and that the BFOQ is reasonably necessary to the operation of the business. Typically, it is difficult for most employers to invoke the BFOQ defense, as the parameters surrounding it are limited. Therefore, an applicant should be asked questions that are job-related only.

- e. Although polite personal conversation often accompanies an interview, even indirect or inadvertent questions about a protected class characteristic can provide grounds for discrimination claims. All employees expected to conduct interviews should be trained not to inquire into personal details that might reveal protected class information and should instead, should be trained to inquire into job-related details.

II. Essential Information for an Effective Hire

- a. There is a variety of information every employer needs from applicants and its own employees in order to make sound employment decisions and efficiently operate. The interview and the application provide the employer an opportunity to obtain in-depth information about a job applicant's skills, work history, employment background and references. Some of this information is even necessary to ensure the individual is legally able to be employed.

- b. Job-related information provided by the applicant:**

- i. During the interview process, it is important to confirm and expand on job-related information provided by the applicant, such as their education, past employment, accomplishments, skills, and other information included on their resume or otherwise. Questions should focus on gathering job-related information necessary to determine the applicant's suitability for the position for which he or she is interviewing.

- c. Information needed to be legally employed:**

- i. Age.**

- 1. Whether individual is over the age of majority and how old they are. If the person is a minor, there are additional steps and forms needed in order to hire him or her.

- ii. Citizenship.**

- 1. Whether the applicant is legally allowed to work in the U.S. If an employer hires someone who does not have the necessary employment eligibility, the employer could face fines, and even criminal penalties.

- iii. Other Personal information.**

1. Some personal information is necessary to know in order to determine whether a person is able to perform the job. Such information may be acquired during the interview process, but needs to be phrased appropriately.
 2. Whereas some personal information can only be obtained after an individual has been selected for employment, such as social security number, address, and emergency contact information. Much of this information is needed for new hire paperwork and the employee's tax forms. By waiting until after the employee is officially hired, this will minimize any potential appearance of impropriety that may accompany such inquiries if made during the recruiting process.
- d. It is important to be aware of what information employers need to know to effectively hire new employees. Some of this information can be accessed as early as the interview stage. Other information may need to wait until the employee has signed an offer of employment and has reached the onboarding stage.
 - e. Accordingly, it is crucial for employers to know what information they can obtain at the interview stage and how to phrase such questions, as well as what questions or topics to avoid.

III. Acceptable vs. Unacceptable Interview Questions

a. Age.

- i. A person 40 years of age or older is considered part of a protected class. As such, to avoid any potential age discrimination, employers should not ask for an applicant's date of birth on employment applications or during interviews. In addition, it is inadvisable to seek the dates of school attendance and graduation, as such information is usually not relevant to the job qualifications and could be used to determine an applicant's age. Best practice is to avoid eliciting information about a candidate's age.
- ii. The only time it is acceptable to ask how old an applicant is, is if the job requires an employee of a certain age or you are concerned about child labor violations under the Fair Labor Standards Act. Otherwise, the applicant may see it as agism.

b. Marital or Familial Status.

- i. Marital status is defined as the state of being married, single, divorced, separated, or widowed. Employers should avoid questions regarding an

applicant's spouse, children, or child-care arrangements, notwithstanding such information's apparent relation to absenteeism and tardiness. Such questions tend to have an adverse impact upon women. Interviewers should not include any reference to "Mr.," "Ms.," "Miss," or "Mrs.," as such information is both irrelevant and another way of inquiring about an applicant's sex or marital status. Likewise, employers should not inquire as to the name of an applicant's spouse or such spouse's place of employment. Asking an applicant with whom he/she lives could be interpreted as an illegal inquiry into that person's family status. It is also improper to ask for an applicant's maiden name, but—in order to check references—employers may ask if an applicant has used a different name in prior employment.

- ii. This line of questioning could lead to uncovering if the applicant is married or has children, which can be illegal to discriminate against. Questions about family status are not job related and should not be asked. Ask all candidates about outside commitments, not just relationships, or it will be seen as discriminatory.

c. Sex, Gender, Sexual Orientation, and Gender Identity.

- i. Employment discrimination on the basis of sex or gender is prohibited, unless sex or gender is a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business. Because there are virtually no jobs that can only be performed by one sex or gender, all inquiries regarding sex or gender should be eliminated.

d. Disability.

- i. In general, employers should eliminate all questions concerning past medical and accident history, physical abilities or limitations, and history of worker's compensation claims.
- ii. The ADA prohibits medical inquiries or examinations of applicants prior to a "bona fide" offer of employment.
- iii. Tests for the current use of illegal drugs do not constitute medical tests.
- iv. Any inquiries or testing must be done uniformly within job categories (except for obvious disabilities or where accommodation has been requested).
- v. The pre-offer prohibition on these questions also applies to worker's compensation history questions.

- vi. It is not permissible to ask third parties (e.g., past employers) what you cannot ask the employee directly.
- vii. Although employers must avoid disability-related inquiries that may indicate discriminatory bias, employers are permitted to determine whether an applicant can perform the job duties in question and the essential functions of the job. Additionally, if an individual with an obvious disability applies for a job, the employer may also ask the applicant to describe or demonstrate how the applicant will be able to perform the job-related functions (with or without reasonable accommodation).
- viii. Although it is acceptable to make inquiries about the employee's ability to perform the essential functions of the job, the employer should not ask these questions unless it is sure that the job-related functions are truly essential.

e. National Origin, Citizenship, and Ancestry.

- i. By asking an individual of which country he or she is a citizen, an employer can discriminate on the basis of a particular national origin. As such, this type of question should be eliminated.
- ii. Avoid asking about a candidate's birthplace (or that of their family members). Do not ask or make comments about a candidate's accent.
- iii. It is appropriate, however, to inquire as to whether an applicant is legally employable in the United States.

f. Arrest or Conviction Record.

- i. Using arrest or conviction records as a bar to employment may disproportionately exclude certain groups. Therefore, such records should not be used in this manner unless there is a business need for their use. Thus, an exclusion based on an arrest record is justified only if the conduct is job-related and relatively recent and also if the applicant or employee actually engaged in the conduct for which he or she was arrested. According to the EEOC, whether there is a business need to exclude persons with conviction records from particular jobs depends on the nature of the job, the nature and seriousness of the offense, and the length of time since the conviction or incarceration.
- ii. There are laws that prohibits inquiries about past arrest records but permits consideration of a current arrest. If an applicant is under arrest for an offense

that is substantially related to the job, an employer may suspend judgment until the case is resolved, advise the applicant to reapply when the charge is resolved, or refuse to employ the applicant.

- iii. An employer may not refuse to employ or discharge a person with a conviction record unless the circumstances of the conviction substantially relate to the circumstances of the job. If an inquiry about convictions is made, the employer should add a clarifier, “A conviction will not necessarily disqualify you from employment. It will be considered only as it may relate to the job you are seeking”. Anyone who evaluates conviction record information should be knowledgeable about how such data may be used.
- iv. Accordingly, employers may inquire as to past convictions, and whether there are any charges pending against an applicant, if reasonably relevant to the job.

g. Religion or Creed.

- i. Use care when asking questions that may reveal information about a candidate's religion, such as their ability to work on weekends or their willingness to adhere to grooming and dress codes. Ensure the questions are reasonably related to business necessity and job requirements so as to avoid the potential for discrimination on the basis of one's religion.
- ii. If a question about weekend work is asked, the employer should indicate that a reasonable effort is made to accommodate religious beliefs or practices. But note that an employer not required to make an accommodation if doing so would create an undue hardship on the business.

h. Race or Color.

- i. Questions about an applicant's race or color could lead to the assumption that the employer is discriminating against the applicant because of their answer. To avoid potential lawsuits, avoid asking questions on this topic.

i. Personal Information.

- i. Unless height or weight is directly related to the job, employers should not ask questions regarding these characteristics because such questions may adversely impact certain protected classes. Similarly, employers should not ask questions regarding skin, eye or hair color.

- ii. Some personal information can show family status, race, or other sensitive details. As such, it is best to avoid asking those questions.

j. Miscellaneous.

i. Use or non-use of lawful products.

1. Employers are prohibited from asking about an applicant's physical or mental health, and smoking and drinking alcohol fall under this category because it could suggest an applicant is more likely to suffer from smoking or alcohol related health problems.
2. Instead, mentioning the employer's policy and asking whether or not the applicant would be able to adhere to it would be permissible.

ii. Salary, Wages, Credit, or Garnishment Record

1. It is unlawful to seek wage or salary history of a prospective employee. Answers to these inquiries are almost always irrelevant to job performance. The employer should not consider that information when making interview, hiring, or compensation decisions. Any consideration of these factors may lend itself to potential discrimination claims, like gender or race.
2. Employers are, however, allowed to discuss salary expectations.

iii. Military

1. It is unlawful to discriminate against someone because of membership in the Military Services. Questions relevant to experience or training received in the military or to determine eligibility for any veteran's preference required by law are acceptable.

iv. Affiliations or Organizations

1. Avoid all questions about non-professional organizations that could be seen as a proxy question about race, age, sex, etc. Professional organizations are generally permissible.

IV. Practical Techniques to Obtain Essential Information

a. Before the interview

i. Carefully craft the job description.

1. When drafting job descriptions, an employer should describe the minimum qualifications that are actually necessary for the job, such as knowledge, skills, abilities, experience, licenses, training, educational requirements, and other attributes. It is important the qualifications are actually necessary for the job in order to avoid potential legal liability.
2. Additionally, the job description should also include the essential functions of the position.
3. The job description will be a helpful tool in crafting the interview questions.

ii. Develop interview questions

1. Consider what information you need to know, what information you can and cannot ask, and how to ask acceptable questions.
2. In crafting the questions, first determine whether this information is really necessary to judge the applicant's qualifications, level of skills and overall competence for the job in question.
3. Use the carefully crafted job description to help develop interview questions and to ensure such questions are job-related.

b. During the interview

i. Exercise caution when describing the job.

1. Avoid promises of job security, permanent employment, or other statements that arguably alter the at-will character of the position. It is permissible to be positive and describe the company's expectations and anticipated future of the role but avoid making guarantees.

ii. Questions should remain job-related.

1. Questions should focus on gathering information necessary to determine the applicant's suitability for the position for which she is

interviewing. To minimize exposure to legal liability, all questions asked of job applicants should be job-related and nondiscriminatory.

2. Even attempts to be personable or interesting often elicit information (inadvertently or otherwise) that is inappropriate or unlawful to consider during the pre-employment process. If other, non-job-related questions are asked, there is a presumption that the information thereby gathered will be used in the decision-making process. Thus, it is best practice to stay focused on the job-related questions only.
3. Overall, the guiding principle behind any question to an applicant—whether the question is asked by the interviewer or appears on the employment application—should be:
 - a. "Can the employer demonstrate a job-related necessity for asking the question?"
4. The intent behind the question, as well as how the information is used, is what the Equal Employment Opportunity Commission (EEOC) examines to determine if any discrimination has occurred.

iii. Do not inquire into personal details that might reveal protected class information.

1. Interviewers should avoid questions attempting to establish the age, race, ancestry, ethnic identity, etc. of an applicant. Such questions can provide evidence to a plaintiff in proving charges of discrimination and may also be found to have the unlawful effect of discouraging minority groups from applying.

c. After the interview

- i. Some information should be obtained after the individual is officially hired.
 1. It is important to note that, if some other sensitive personal information is needed for post-employment purposes, it can be obtained after an individual has been selected for employment. This minimizes the appearance of impropriety that may accompany such inquiries if made during the recruiting process.

d. What if the applicant volunteers information without being prompted?

- i. If a candidate volunteers information which may be inappropriate or unlawful to consider during the pre-employment process, do not ask follow-up questions.

- ii. Instead:

1. document the information and the circumstances which lead to the candidate's voluntary disclosure;
2. avoid sharing the disclosure with other hiring decisions makers, to the extent possible; and
3. consult with HR or Legal as necessary.

e. Takeaways

- i. In sum, to avoid potential discrimination claims in the hiring process, the most important things to keep in mind are:

1. Your role as the interviewer and what information you need to obtain,
2. Which questions to ask and how to ask them,
3. And which questions not to ask.