

Recruiting, Interviewing, & Hiring Issues to Watch For

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What's the Big Deal?

- Although employers generally understand that they must avoid making discriminatory employment decisions, not all employers are aware of the significant liability risk the recruiting, interviewing, and hiring process presents.
- Employers can be liable for the discriminatory conduct of their employees, even in the recruiting, interviewing, or hiring processes.
- As a result, employees involved in these processes should be trained to spot and avoid potentially discriminatory practices.

Overview of Applicable Federal Anti-Discrimination Laws

Protected Classes Under Federal Law

Federal employment anti-discrimination laws prohibit discrimination on the following bases:

- Race
- Color
- Religion
- Sex (including pregnancy, sexual orientation, gender identity, and transgender status)
- National origin and citizenship
- Age (40 and over)
- Disability (including perceived disability)
- Genetic information
- Veteran or active-duty military service status (including individuals who have applied to the uniformed services)

Situations Where Discrimination Can Arise

Where Discrimination Can Occur

- **Location of advertisements**
- **Language of job description**
- **Application forms**
- **Selecting interviewees**
- **Location and timing of the interview**
- **Interview questions**
- **Pre-employment tests**
- **Final selection**

Location of Advertisements

- Advertisements are generally targeted to particular audiences, and the choice of where to advertise can exclude certain groups.
- Limited or targeted ad placement can form the basis of a discrimination claim, especially if the same limitation continues over time.
- Example: If an employer only advertises its positions in publications whose audiences are mostly of one class (such as a particular race or age group), someone from another protected class may make a claim alleging that her class is disproportionately excluded.

Language of Job Description

A job description should:

- **Outline the essential functions of the position**
- **Always include a statement that the employer is an equal opportunity employer**
- **Never suggest a non-BFOQ preference for or bias against any particular protected class, whether overt or implicit**

Application Forms

- Always use employment applications in the recruitment process
- Application forms should be accessible in a variety of media and locations to avoid discrimination claims
- Application questions should be limited to those reasonably related to the position for which the applicant is applying
- Applications should not express an unlawful preference or limitation, or request information about a protected category unless doing so is based on a BFOQ

Application Form No-No's

Examples of inquiries to avoid on an application form include:

- Religion
- National origin
- Marital or family status
- Military status
- Information about arrests
- Criminal convictions when unrelated to the job or prohibited by law
- U.S. citizenship (as opposed to the right to work legally in the U.S.)
- Childcare plans and plans to have children in the future
- Health history, including the existence of any disability
- Physical or mental impairments
- Medications
- Workers' compensation history
- Salary history

Application Form Best Practices

The application form should include statements telling the applicant that:

- The employer is an equal opportunity employer.
- Any information collected about equal employment opportunity characteristics is for the purpose of monitoring employment statistics only.
- The applicant authorizes the employer to obtain information from the applicant's former employer, academic institution, and so on.
- The applicant acknowledges that all information provided is true and complete.

Selecting Interviewees

- To avoid actual or perceived discrimination in the selection of interviewees, ensure that only those individuals whose qualifications are best matched to the written job requirements are selected for interviews.
- Consider documenting the reasons for the selection of the chosen individuals to minimize the risk of discrimination claims.
- It is helpful to have more than one individual making these decisions to ensure that no one person's biases, whether conscious or subconscious, affect the hiring process.

Location and Timing of the Interview

- Interview locations should be accessible to all individuals, including those needing wheelchair access or accommodation of various disabilities, such as sight or hearing impairments.
- Make every effort to accommodate a candidate's request for reasonable accommodation unless it imposes an undue hardship on the employer.

Pre-Employment Tests

- Many employers require applicants to take various aptitude tests to demonstrate typing, data entry, computer proficiency, or other skills relevant to the job they are applying for.
- An employment test that gives some classes an advantage or disadvantage over others exposes an employer to disparate impact discrimination liability.
- Before using a non-medical pre-employment test, analyze any disparate impact on protected classes or hire an outside consultant (such as an industrial/organizational psychologist) to do so.
- Any type of medical test or examination must not be performed until after a contingent offer of employment has been extended.

Final Selection

- **Do not allow discriminatory bias, whether obvious or not, to influence any final decision.**
- **Final selection decisions should ideally be made by more than one person.**
- **Record the reasons for the final hiring decision in writing so they can be defended later, if necessary.**

Interview Questions to Avoid

The Need to Avoid Discriminatory Questions

- Inappropriate interview questions create a risk of discrimination claims.
- Polite personal conversation may accompany an interview, but indirect or inadvertent questions about a protected class characteristic can provide grounds for discrimination claims.
- Questions should focus on gathering information necessary to determine the applicant's suitability for the position for which the applicant is interviewing.
- Employees conducting interviews should not inquire into personal details that might reveal protected class information.

Interview Questions to Avoid

To avoid the appearance of unlawful discrimination, the interviewer should not ask an applicant questions relating to:

- Age, including the applicant's:
 - Age or date of birth.
 - Dates of school attendance.
- Marital and family status, including:
 - Whether the applicant is married, divorced, separated, widowed, or single.
 - Why the applicant is not married (assuming he is known to be unmarried).
 - What the applicant's spouse's name is (if known to be married).

Interview Questions to Avoid

- **Marital and family status:**
 - What the applicant's maiden name was (if known to be married).
 - Who resides with the applicant.
 - Whether the applicant is pregnant, adopting, hosting foster children, or planning any of those.
 - How many children the applicant has and their ages.
 - The applicant's childcare or any other caregiver responsibilities.
- **Sexual orientation, including:**
 - Whether the applicant is gay, straight, bisexual, or transgender.

Interview Questions to Avoid

- **Race and nationality, including:**
 - The applicant's nationality or where he or she was born.
 - Whether the applicant is a U.S. citizen.
 - Whether English is the applicant's first language.
 - What foreign languages the applicant can speak, read, or write (unless it is a job requirement).
 - The applicant's mother's and father's last names.
- **Religion, including:**
 - What church or other religious institution the applicant attends or the name of the applicant's priest, rabbi, minister, or other religious leader.
 - Whether the applicant would need to miss work to attend religious services on holidays.

Interview Questions to Avoid

- **Health**, including questions related to family medical history and whether the applicant receives or requires any medical benefits.
- **Military status**, including:
 - Whether the applicant has ever served in the U.S. military (unless job-related), and whether the applicant was discharged honorably or dishonorably.
 - Whether the applicant will need to miss work because of service in the Armed Forces.
 - Whether the applicant ever served in the military of another country.

Interview Questions to Avoid

- **Political affiliations**, if any.
- **Criminal records**, including:
 - Whether the applicant has ever been arrested.
 - Criminal convictions when unrelated to the job or otherwise prohibited by law (for example, ban-the-box jurisdictions).

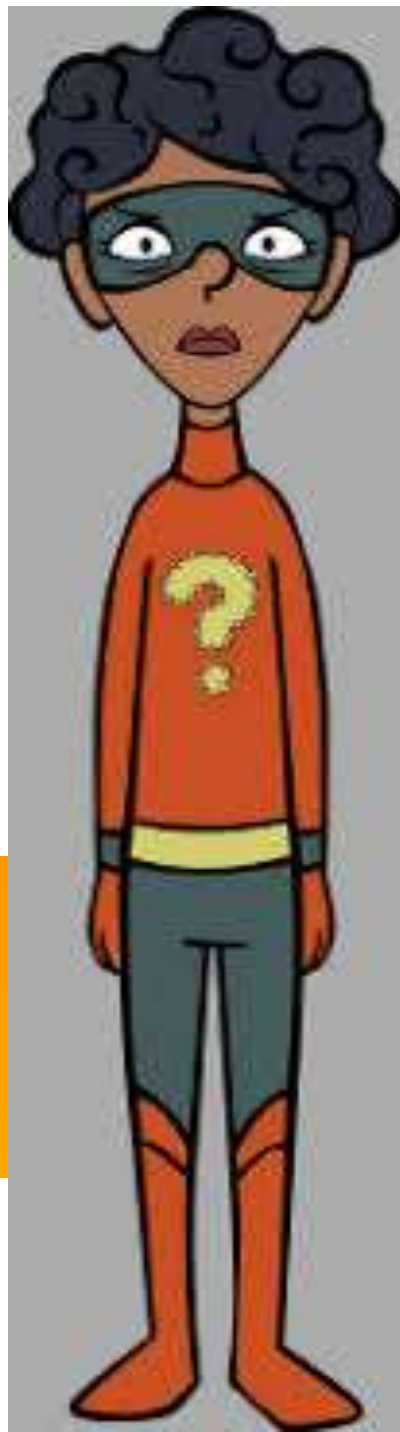
Disability-Related Questions to Avoid

The following types of questions may suggest a discriminatory bias against disabled individuals and should not be asked:

- Whether the applicant has a disability that may affect his or her ability to perform the job.
- Whether the applicant has a disability generally.
- Whether the applicant is in good health.
- Whether the applicant has ever been to therapy.
- Whether the applicant has ever been injured.
- Whether the applicant has had any major illness in recent years.
- If the applicant suffers or has ever suffered from depression.

Disability-Related Questions to Avoid

- How the applicant became disabled.
- What the applicant's prognosis is.
- If, or how often, an applicant will be required to leave work for treatment.
- If the applicant has taken leave from work in the past.
- If the applicant has ever had a drinking or drug problem.
- If other family members or acquaintances of the applicant have a disability.
- What kind of prescriptions the applicant is taking or if the applicant has a medical marijuana registration card.
- How many sick days the applicant took the previous year.



Questions

COKINOS

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The logo for COKINOS features the word "COKINOS" in a bold, blue, sans-serif font. Above the letters "O" and "K" are horizontal bars: a grey bar above the "O" and a blue bar above the "K".