

# Recruiting, Interviewing, & Hiring Issues to Watch For

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## What's the Big Deal?

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- **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

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**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

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- **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

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- 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

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**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

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- **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

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**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

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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

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- **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

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- 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

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- 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

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- **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

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- 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

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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

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- **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

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- **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

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- **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

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- **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

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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

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- 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**

For Further Information or Questions Contact:

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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".