

Guidelines on Interview and Employment Application Questions

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Overview

Employers must be knowledgeable about lawful and unlawful interview and application questions to ensure that the organization's employment application form and interview questions requests information from applicants in a lawful manner. 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, "Can the employer demonstrate a job-related necessity for asking the question?" 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.

Therefore, an applicant should be asked questions that are *job-related* only. Before asking the question, the interviewer should 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.

Business Case

Interviewing prospective employees and using employment applications are important tools that employers use in the selection process. The objective is to determine whether an applicant is suitable for an available position. 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. See [12 Unconventional Interview Questions That Recruiters Should Ask \(www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/12-Unconventional-Interview-Questions-That-Recruiters-Should-Ask.aspx\)](https://www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/12-Unconventional-Interview-Questions-That-Recruiters-Should-Ask.aspx).

Despite specific information employers would like to have, they must avoid asking discriminatory questions in interviews or on application forms and resist basing an applicant's evaluation on criteria that are discriminatory in nature. Many discrimination complaints and lawsuits stem from interviews and application forms. Given that the cost for an employer to defend itself against a claim of illegal employment discrimination can be several hundred thousand dollars, an employer must be sure it conducts lawful interviews and uses application forms that have been thoroughly reviewed to exclude requests for prohibited information.

Disparate Impact

The EEOC's Compliance Manual (<http://www.eeoc.gov/laws/guidance/compliance.cfm>), Discussion Letter (http://www.eeoc.gov/eeoc/foia/letters/2006/titlevii_adea_preemployment_inquiries.html) and Enforcement Guidance: Pre-Employment Disability-Related Questions and Medical Exams (<http://www.eeoc.gov/policy/docs/preemp.html>) address the issue of interview questions that, if used in making a selection decision, have a discriminatory effect by screening out protected groups for the job in question.

Hiring managers should keep in mind that even "facially neutral" (i.e., those that do not appear to be discriminatory on their face but rather are discriminatory in their effect) job requirements relating to education, experience and physical characteristics may be considered unlawful when the requirements screen out a disproportionately high percentage of candidates on the basis of protected status and are not justified by any business purpose.

This is referred to as the disparate impact theory of discrimination. The U.S. Supreme Court first described the disparate impact theory in 1971, in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-2 (1971). The Court opined that Title VII of the Civil Rights Act of 1964 "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . . Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."

Thus, to avoid problems, employers should conduct ongoing reviews of *all* job criteria and interview questions to make sure they are job- and business-related. See *Have You Seen These Gender Biases During Job Interviews?* (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/have-you-seen-these-gender-biases-during-job-interviews.aspx)

Bona Fide Occupational Qualification

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"¹ (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 that are not religious organizations to invoke the BFOQ defense, as the parameters surrounding it are limited. Title VII does permit employers to hire and employ employees on the basis of religion if religion is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Religious organizations do not typically need to rely on this BFOQ defense, however, because the "religious organization" exception in Title VII permits them to prefer their co-religionists. See EEOC: Bona Fide Occupational Qualifications (<https://www.eeoc.gov/laws/guidance/cm-625-bona-fide-occupational-qualifications>).

Pre-Employment Inquiries

As a general rule, state and federal equal opportunity laws prohibit the use of pre-employment inquiries that disproportionately screen out members based on protected status when the questions are not justified by some business purpose. The EEOC and state agencies take the position that the information obtained through pre-employment inquiries should be aimed solely at determining qualifications without regard to criteria based on irrelevant, non-job-related factors. Check your state laws for specific protections.

The EEOC offers the following guidance (<https://www.eeoc.gov/laws/guidance/questions-and-answers-about-race-and-color-discrimination-employment>) to employers that wish to avoid racial discrimination in hiring and promotions. "Race or color should not be a factor or consideration in making employment decisions except in appropriate circumstances as set forth at Section 15-VI-C of the Compliance Manual section on Race and Color Discrimination. Reasons for selection decisions should be well supported and based on a person's qualifications for the position." Accordingly, inquiries that reveal information bearing no relationship to the qualifications for the job sought (e.g., year of graduation from high school, child care arrangements, country of origin) have been viewed as evidence of an employer's discriminatory intent.

Clearly, unless the information is for a legitimate purpose (see information under "Bona Fide Occupational Qualifications" above and "Application Forms" below), pre-employment questions about disability, race, gender, religion, national origin or other protected classes can suggest that the information will be used as a basis for making selection decisions. If the information is used in the selection decision and members of particular groups are excluded from employment, the inquiries can constitute evidence of discrimination. See *Employers Sued for Rejecting Hearing-Impaired Job Applicants* (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/employers-sued-eeoc-hearing-impaired-deaf-job-applicants-ada.aspx).

Some less obvious examples of unacceptable inquiries are discussed below.

MILITARY DISCHARGE

Military discharge inquiries are not illegal, but they are likely ill-advised. By making such inquiries, employers could subject themselves to possible disparate impact claims. The EEOC has stated that basing hiring decisions solely on military discharge status violates Title VII because discharge status has been found to adversely affect African-Americans, and it is not unequivocally tied to general business necessities. Questions relative to type of military discharge should be asked only when the information sought is directly relevant to the job and should be accompanied by a statement to the effect that less-than-honorable discharges are not absolute bars to employment, depending on the nature of the job sought. See [Think Before Asking About a Veteran's Discharge Status \(www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/Think-Before-Asking-About-Veteran-Discharge-Status.aspx\)](http://www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/Think-Before-Asking-About-Veteran-Discharge-Status.aspx).

Inquiring about veteran status (i.e., "Are you a military veteran?") is not forbidden under federal law, but state laws may prohibit such discrimination. See SHRM's State and Local Updates here (www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/default.aspx). Then use the drop-down menu to access the Equal Employment Opportunity/Discrimination for each state.

The Uniform Services Employment Reemployment Rights Act (USERRA) protects against military service discrimination. As explained in the following FAQ from the Employer's Support for the Guard and Reserve (ESGR): Does USERRA protect against discrimination in initial hiring decisions? (<http://www.esgr.mil/USERRA/Frequently-Asked-Questions.aspx>):

Yes. A person, institution, organization, or other entity that has denied initial employment to an individual is in violation of USERRA's anti-discrimination provisions. Under the act, an employer need not actually employ an individual to be his or her "employer," if initial employment was denied on the basis of the individual's military affiliation application for membership, performance of service, application for service, or obligation for service in the uniformed services. For example, if the individual has been denied initial employment because of his or her obligations as a member of the Guard or Reserve, the company or entity denying employment is an employer for purposes of USERRA. Similarly, if an entity withdraws an offer of employment because the individual is called upon to fulfill an obligation in the uniformed services, the entity withdrawing the employment offer is an employer for purposes of USERRA.

EDUCATIONAL REQUIREMENTS

Certain educational requirements are obviously necessary for some jobs. However, if the educational requirement exceeds what is needed to successfully perform the job and if it disproportionately excludes certain racial groups, it may violate nondiscrimination laws. See [What You Should Know: Questions and Answers about the EEOC and High School Diploma Requirements \(https://www.eeoc.gov/laws/guidance/what-you-should-know-questions-and-answers-about-eeoc-and-high-school-diploma\)](https://www.eeoc.gov/laws/guidance/what-you-should-know-questions-and-answers-about-eeoc-and-high-school-diploma).

ARREST AND CONVICTION RECORDS

Using arrest or conviction records as an absolute bar to employment disproportionately excludes certain racial groups. Therefore, such records should not be used in this manner unless there is a business need for their use.

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.

Unlike a conviction, an arrest is not reliable evidence that an applicant has committed a crime. Thus, an exclusion based on an arrest record is justified only if the conduct appears to be job-related and relatively recent and also if the applicant or employee actually engaged in the conduct for which he or she was arrested.

See: EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)

GENETIC INFORMATION DISCRIMINATION

As stated in this EEOC summary (<http://www.eeoc.gov/laws/types/genetic.cfm>):

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits genetic information discrimination in employment, took effect on November 21, 2009. Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II (employment agencies, labor organizations and joint labor-management training and apprenticeship programs—referred to as "covered entities") from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information

Employment Application Forms

Employers should tread with caution when designing employment application forms. It is best to have company legal counsel review the form before distribution. As with interview questions, certain questions, such as those related to religion, arrest record and year of graduation from high school or college, should be avoided on application forms. Questions pertaining to race and asking for Social Security numbers are discussed below.

RACE AND GENDER

A key issue is whether race and gender can be asked on an application, as it is often legitimately needed for affirmative action purposes or to track applicant flow. One way to obtain this information and simultaneously guard against discriminatory selection is for employers to use a voluntary self-identification (www.shrm.org/resourcesandtools/tools-and-samples/hr-

forms/pages/affirmativeactionapplicantselfidentifygenderraceeo11246.aspx) form and to keep the information separate from the application. In that way, the employer can capture the information it needs and also ensure that it is not used in the selection decision.

SOCIAL SECURITY NUMBER

Employers generally should not request Social Security numbers (SSNs) on an employment application form. Obtaining SSNs on the application increases the risk of identity theft and general privacy concerns because the application is often viewed by individuals who do not have a need to know this information. The employment application should request only information directly related to an applicant's ability to perform a specific job. As a general practice, employers should request SSN information only when absolutely necessary—for example, in conjunction with a background check, when completing a Form W-4 or when enrolling the employee in a benefits plan. This information should be requested separately from the employment application, and safeguards should be in place to protect and keep this information confidential. Employers should also implement procedures for safe disposal of this information once an employment decision has been made. Some states have adopted privacy and data security laws that require employers to have security measures in place if applications asking for SSN information are transmitted over the Internet or sent by mail when not in a sealed envelope.

SALARY HISTORY

A growing trend in state and local laws prohibits asking about a job candidate's salary history due to concerns that this practice may perpetuate gender and racial pay gaps if employers base a new employee's pay on the individual's previous salary. See [More Jurisdictions Are Banning Salary-History Inquiries \(www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/more-jurisdictions-are-banning-salary-history-inquiries.aspx\)](http://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/more-jurisdictions-are-banning-salary-history-inquiries.aspx).

Sample Interview and Application Questions

Recruiters and hiring managers must be cautious to avoid inquiries based on an applicant's protected class or risk a claim of discrimination. The EEOC looks with “extreme disfavor” on questions about age, color, national origin, race, religion, gender or veteran status. If employers are asking these questions, they would have difficult time proving the questions were not used in the hiring decision. In addition, as stated previously, many state employment laws expressly forbid certain types of questions.

Following is a representative list of unacceptable and acceptable questions. **Please note that this list is NOT all-inclusive.**

Acceptable and Unacceptable Inquiries for Interviews and Employment Applications

Topic	Acceptable	Unacceptable	If Unacceptable, What Is the Reason?
Age	If age is a legal requirement, can ask "If hired, can you furnish proof of age?" or a statement that hire is subject to age verification.	What is your date of birth?	Could be viewed as age discrimination
Attendance/reliability	What hours and days can you work?	How many children do you have?	Could be viewed as discriminatory toward females
Attendance/reliability	Are there specific times that you cannot work?	What religion are you?	Could be viewed as religious discrimination
Attendance/reliability	Do you have responsibilities other than work that will interfere with specific job requirements such as traveling?	What are your child care arrangements?	Could be viewed as discriminatory toward females
Attendance/reliability	Do you have a reliable method of getting to work?	Do you own a car?	Could be considered racial discrimination
Citizenship/ national origin	Are you legally eligible for employment in the United States?	What is your national origin? Where are your parents from?	Could be considered national origin discrimination
Citizenship/ national origin	Have you ever worked under a different name?	What is your maiden name?	Could be considered national origin discrimination
National origin	None	What is your father's surname? What are the names of your relatives?	Not only are these irrelevant, but they could be considered national origin discrimination

Arrest and conviction	Have you ever been convicted of a felony? *See note below for additional guidance	Have you ever been arrested?	Could be considered racial discrimination
Disabilities	Can you perform the duties of the job you are applying for?	Do you have any disabilities?	Could be considered discrimination against people with disabilities
Disabilities	None	Have you ever filed a workers' compensation claim?	Could be considered discrimination against people with disabilities
Disabilities	None	Have you ever been injured on the job?	Could be considered discrimination against people with disabilities
Emergency contact information	What is the name and address of the person to be notified in case of an emergency? (Request only after the individual has been employed.)	What is the name and address of a relative to be notified in case of an emergency?	Could be considered national origin discrimination and could possibly violate state anti-discrimination laws relative to sexual orientation
Credit record	None	Do you own your own home?	Irrelevant and could be considered racial discrimination
Credit record	Credit references may be used if in compliance with the Fair Credit Reporting Act of 1970 and the Consumer Credit Reporting Reform Act of 1996	Have your wages ever been garnished?	Irrelevant and could be considered racial discrimination
Credit record	None	Have you ever declared bankruptcy?	Irrelevant and could be considered racial discrimination

Military record	What type of education, training and work experience relevant to the job did you receive while in the military?	What type of discharge did you receive?	Irrelevant and could be considered racial discrimination
Language	What languages do you speak and write fluently? (if the job requires additional languages)	What is your native language? How did you learn to read, write or speak a foreign language?	Could be considered national origin discrimination
Organizations	Inquiry into an applicant's membership in organizations that the applicant considers relevant to his or her ability to perform the job	List all clubs, societies and lodges to which you belong.	Could be considered racial or national origin discrimination
Race or color	None	Complexion or color of skin	Could be considered racial or national origin discrimination
Weight, height, eye color	Only if there is a bona fide occupational qualification		Could be considered racial or national origin discrimination
Religion	Only if there is a bona fide occupational qualification	What is your religious denomination, religious affiliations, church, parish, pastor? What religious holidays do you observe?	Could be considered religious discrimination
Gender	Only if there is a bona fide occupational qualification	Do you wish to be addressed as Mr., Mrs., Miss or Ms.?	Could be considered gender discrimination
Previous and current addresses	What was your previous address? How long did you reside there? How long have you lived at your current address?	Do you own your own home?	Could be considered racial or national origin discrimination

Salary history	What are your salary expectations for this position? **See note below for additional guidance.	What is your current salary? What was your starting and ending salary in any prior position?	Could be viewed as gender discrimination and may violate state law
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Education	Do you have a high school diploma or equivalent? Do you have a university or college degree? (if relevant to job performance)	What year did you graduate from high school or college?	Could be considered age discrimination
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***Note on arrest records:** Using arrest or conviction records as an absolute bar to employment disproportionately excludes certain racial 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. In addition, some states bar the use of arrest records in employment decisions.

****Note on salary history:** In general, salary history should not be a factor in setting compensation. Rather, compensation decisions should be based on the value of the position to the organization, competition in the market and other bona fide business factors.

In November 2015 President Obama announced an executive action directing federal employers to delay asking questions about a job applicant's criminal history until later in the application process. Many states, cities and private employers have already taken steps to "ban the box," which refers to the checkbox on employment applications asking if the applicant has ever been convicted of a crime. However, some federal employers and contractors still ask the question. The president's executive action will apply to federal employers, but not to contractors. See Obama's 'Ban-the-Box' Mandate Has Limited Reach (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/ban-the-box-federal-agencies.aspx) and Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated (<https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation>)

Templates and Tools

INFORMATION TOOLS

Federal Laws Prohibiting Job Discrimination Questions and Answers (<http://www.eeoc.gov/facts/qanda.html>)

Are there federal and/or state laws prohibiting employers from asking applicants about arrests and convictions? (www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Pages/askingaboutarrestsandconvictions.aspx)

Can a recruiter ask a candidate if he or she owns a car? (www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Pages/cms_020894.aspx)

Can an employer ask a job applicant about political party preferences during a job interview? (www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Pages/interviewing-can-an-employer-ask-a-job-applicant-about-political-party-preferences-during-a-job-interview.aspx)

Is there a problem with writing notes directly on applications or resumes? (www.shrm.org/ResourcesAndTools/tools-and-samples/hr-qa/Pages/writingnotesresumes.aspx)

SAMPLES

Application: Employment Application #2 (www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/application_employmentapplication2.aspx)

Application: Employment Application #1 (www.shrm.org/ResourcesAndTools/tools-and-samples/hr-forms/Pages/application_employmentapplication3.aspx)

Interview Questions (www.shrm.org/ResourcesAndTools/tools-and-samples/interview-questions/Pages/default.aspx)

BOOKS

(https://store.shrm.org/books-resources/hr-topics/recruiting-and-selection?_ga=2.234703963.458821165.1611063676-1842983318.1606318853)

SHRM Store: Staffing Management Books (<https://store.shrm.org/books-resources/hr-topics/recruiting-and-selection>)

Endnotes

¹U.S. Equal Employment Opportunity Commission. (n.d.). **Title VII of the Civil Rights Act of 1964**. Retrieved from <http://www.eeoc.gov/laws/statutes/titlevii.cfm>

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