

& Avoiding Discriminatory Interview Questions

One of the purposes of the fair employment law is to encourage employers to evaluate job applicants on the basis of their qualifications, rather than on their membership in a particular class to which they may belong. Under section 111.322(2) of the Wisconsin Statutes it is unlawful:

To print or circulate any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which implies or expresses any limitation or discrimination based upon a person's race, color, creed, ancestry, national origin, age, sex, disability, arrest or conviction record, marital status, sexual orientation, military service, or use or nonuse of lawful products away from work.

For example, an employer might ask an applicant, "What nationality are you?" This question implies that an applicant's national origin will be a factor in the employment decision. Even if the employer does not intend to discriminate, asking the question may be unlawful.

This pamphlet deals primarily with avoiding discriminatory questions, but employers should also review their recruitment, hiring, and promotion processes to ensure they are fair.

Before Hiring You May Want To Consider The Following:

- Review the essential job functions. What skills will an applicant need to perform the job successfully?
- What kinds of interview questions will help determine if an applicant can perform the essential job functions? If you intend to pre-screen applicants, develop objective and relevant benchmarks, and apply them uniformly.
- Review how you advertise and recruit. Do you reach all areas of the community, or are some groups excluded? Note that word-of-mouth or employee referral methods of recruitment may be unlawful if the current workforce is not representative of the area population.
- If using an application form, carefully review it to ensure it does not ask for discriminatory, irrelevant, or nonessential information.
- Consider if barriers exist for applicants using wheelchairs, those who have hearing or vision impairments, learning disabilities, or other disabilities, and may need an accommodation? (See pamphlet #4 "Persons with Disabilities on the Job" for reasonable accommodation resources).
- When advertising, be careful about the language used. Ads that imply or express an unlawful preference or limitation, such as, "young, energetic" (age discrimination), should be avoided.

NEED HELP:

Job Service has trained job counselors who can assist in matching employers and qualified applicants. To locate the Job Center in your area, call 1-888-258-9966, or go to www.wisconsinjobcenter.org.

LOADED QUESTIONS TO AVOID

The key to understanding unlawful inquiries is to ask only questions that will provide information about the person's ability to do the job, with or without a reasonable accommodation. Also note that if it is unlawful to ask the applicant the question directly, it is also prohibited to ask the same question as part of pre-offer reference checks.

AGE? DATE OF BIRTH?

Avoid age-based inquiries. Both state and federal laws prohibit discrimination against persons age 40 and older. An age inquiry may be made to ensure a person is "old enough" to work for the job, or if the job is among the few where age discrimination is permitted such as driving a school bus or other physically dangerous or hazardous work.

ARRESTED? CONVICTED?

Wisconsin law 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. A current employee who is arrested may be suspended if the charge is substantially related to the job.

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.

AVAILABLE FOR WORK ON SATURDAY AND SUNDAY?

This question may discourage an applicant whose religion prohibits Saturday or Sunday work. If a question about weekend work is asked, the employer should indicate that a reasonable effort is made to accommodate religious beliefs or practices. An employer is not required to make an accommodation if doing so would create an undue hardship for the business.

CHILDREN? NUMBER & AGES? CHILDCARE ARRANGEMENTS? PREGNANT?

The purpose of these child-related inquiries is to explore what some employers believe is a common source of absenteeism and tardiness. Typically, these questions are asked only of women, making the inquiry clearly unlawful. However, even if such inquiries are made of both men and women, the questions may still be suspect. Such information has been used to discriminate against women because of society's presumption that they are the primary caregivers. If the employer's concern is regular work attendance, a better question would be, "Is there anything that would interfere with regular attendance at work?"

CITIZEN OF WHAT COUNTRY? RIGHT TO WORK?

Inquiries about a person's citizenship or country of birth are unlawful and imply discrimination on the basis of national origin. A lawfully immigrated alien may not be discriminated against on the basis of citizenship. The Immigration Reform and Control Act of 1986 requires employers to verify the legal status of, and permission to work for all new hires. Employers should not ask applicants to state their national origin, but should ask if they have legal permission to work in the United States. They should then explain that verification of that permission must be submitted after the decision to hire has been made. To satisfy verification requirements, employers should ask **all** new hires for documents establishing both identity and work authorization. For more details on these regulations, contact the U.S. Citizenship and Immigration Service (USCIS) at 1-800-375-5283.

CREDIT OR GARNISHMENT RECORD? CHARGE ACCOUNTS? HOMEOWNER?

Answers to these inquiries are almost always irrelevant to job performance. Because census data indicates minorities, on average, are poorer than whites, consideration of these factors may have a disparate impact on minorities. Therefore, requests of this nature may be unlawful unless clearly required by business necessity.

DISABILITIES? HEALTH HISTORY?

Inquiries about a person's disability, health, or worker's compensation history are unlawful if they imply or express a limitation based on disability. Under the federal Americans with Disabilities Act, **any** inquiry at the pre-employment stage which would likely require an applicant to disclose a disability is unlawful. Employers must avoid such inquiries or medical examinations before making a bona fide job offer.

However, an employer may inquire about an applicant's ability to perform certain job functions and, within certain limits, may conduct tests of all applicants to determine if they can perform essential job functions, with or without an accommodation.

EDUCATIONAL BACKGROUND?

While employers may inquire about a person's education, only clearly job-related education should be considered in making the hiring decision. Educational requirements that are not necessary for performance of the job may be unlawful if they adversely impact protected group members. Rather, find a reliable way to determine if applicants have the skills necessary to function successfully in the job.

FRIENDS OR RELATIVES WORKING FOR US?

This question is not relevant to an applicant's competence and should be avoided. Since the question implies a preference for friends or relatives, it may be unlawful if the composition of the present work force is such that this preference reduces or eliminates employment opportunity for minorities or women. This question may also reflect a rule that only one partner in a marriage can work for the employer. This tends to have a disproportionate impact on women.

HEIGHT? WEIGHT?

Minimum height and weight requirements are unlawful if they screen out a disproportionate number of women or minorities. Unless the employer can show that a height or weight requirement is essential for job performance, such inquiries should be avoided.

HONESTY TESTING BEING DONE?

An applicant may not be required to take a polygraph test. If the employers request such a test, they must inform applicants in writing and orally that the test is voluntary. Hiring decisions may not be based on polygraph test results, without the employer considering other relevant information obtained independently. Employers may use only one permitted type of mechanical device that visually, permanently, and simultaneously records the person's cardiovascular and respiratory patterns and changes. Questions must relate to a person's work performance. Display of polygraph protection posters is required for employers who use such tests.

LANGUAGE PROFICIENCY?

Some level of English skill may be necessary for many jobs, but, it is also clear that fluency or absence of an accent is not relevant for a substantial number of jobs. Employers must be careful about requiring English language proficiency and must ensure the skill level being sought does not exceed the level required for successful job performance.

LOWEST ACCEPTABLE SALARY?

Women generally hold poorer paying jobs than men and are paid less for the same work. As a result of these practices, a woman might be willing to work for less pay than a man might find acceptable. It is unlawful to pay a woman less than a man for performing the same or substantially similar work.

MAIDEN NAME? SPOUSE'S NAME? MR., MISS, MRS., OR MS.? MARITAL STATUS?

None of these inquiries is relevant to job performance and each could be used to discriminate. A woman's maiden name or spouse's name may indicate religion or national origin. Having a person check a box for Mr., Mrs., or Miss may be impermissible with regard to gender or marital status. An employer may not discriminate against a person because of their status of being married, single, divorced, separated, or widowed.

MILITARY SERVICE?

It is unlawful to discriminate against someone because of membership in the National Guard, a state defense force, or another state or federal reserve unit. Questions relevant to experience or training received in the military, or to determine eligibility for any veteran's preference required by law are acceptable.

USE OR NONUSE OF LAWFUL PRODUCTS? DO YOU SMOKE? DRINK ALCOHOL?

An employer may not discriminate against a person for using or not using lawful products off the employer's premises during nonworking hours. The law contains some exceptions, but employers generally should avoid inquiries in this area.

A FINAL NOTE

It is reasonable to assume that all questions on an application form or in an interview are for a specific purpose, and that decisions are made on the basis of the answers given. In deciding if a question is unlawful, the employer should determine why the information sought is necessary. For example, why is it important to know a person's age, or their ability to speak Spanish? If the answer does not provide job-related information to determine a person's qualifications, it is a strong indication the question should not be asked. Questions that do not produce information that helps the employer choose the most qualified applicant tend to raise questions as to the employer's motive for asking.

This is one of a series of fact sheets highlighting programs of the Wisconsin Department of Workforce Development. It is intended to provide only a general description, not a legal interpretation. The Equal Rights Division has additional informational materials explaining various aspects of the fair employment law.

PAMPHLET SERIES

#1. Fair Hiring & Avoiding Loaded Interview Questions

#2. Harassment in the Workplace

#3 Pregnancy Employment & the Law

#4 Persons with Disabilities on the Job

#5 Fair Employment Law & Complaint Process

#6 Age Discrimination in the Workplace

#7 Settlement

The Department of Workforce Development is an equal opportunity service provider. If you need assistance to access services or need material in an alternate format, please contact us. Deaf, hearing, or speech-impaired callers may reach us in Madison at (608) 264-8752 or in Milwaukee at (414) 227-4081

Questions about employment discrimination should be directed to the:

EQUAL RIGHTS DIVISION

201 E WASHINGTON AVE
ROOM A300
PO BOX 8928
MADISON WI 53708
Telephone: (608) 266-6860
TTY: (608) 264-8752

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Web Site: <http://dwd.wisconsin.gov/er>