

Hiring & EEO Issues

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The Interview

- Can lead to legal liability
- Tips to try to avoid legal liability
 - Train managers/supervisors who will be conducting interviews
 - Write down questions in advance
 - Tie questions to functions of the position
 - Ask the same questions of all applicants
 - Stick to the script



Avoid Questions Related to . . .

Among others



Sex/gender

Age

National Origin

Race

Arrest Record

Color

Religion

Disability

Citizenship

Marital Status/Children

Examples

Not Permissible

- What is your date of birth? What year were you born? What year did you graduate high school?
- Where were you born? Where were your parents born? Of what country are you a citizen? Are you a U.S. citizen?

Permissible

- If hired, can you provide proof that you are of legal age to work in the United States?
- If hired, can you provide documentation that you are legally authorized to work in the United States?

Examples (con't)

Not Permissible

- What religion are you? What church/synagogue do you belong to? What holidays do you observe?
- What is your native language? What is your nationality? What is your ancestry?

Permissible

- You may be required to work Saturdays and/or Sundays in this job. Are you able to do so?

Examples (con't)

Not Permissible

- Are you married? Are you pregnant? Do you plan to have children?
- Do you own a car to enable you to get to work?

Permissible

- This job requires you to work between the hours of X and Y. Can you work those hours? Are you able to work overtime, if necessary?

Examples (con't)

Not Permissible

- Are you handicapped? Do you have a disability?
- Have you ever been injured on the job?
- What is your workers compensation history?
- How many work days did you miss last year due to injury/illness?

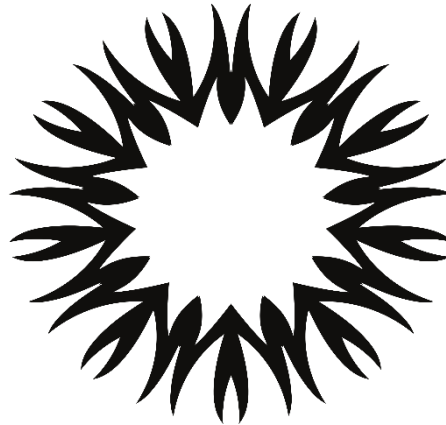
Permissible

- Are you capable of performing the essential functions of this position, with or without a reasonable accommodation?

A Focus on Specific Statutes and Guidance



EEOC's ADA Enforcement Guidance: Pre-employment Disability-Related Questions & Medical Exams



A Summary

- Can only ask disability-related questions and require medical exams of applicants **after** making a conditional offer of employment
- After conditional offer of employment made, can ask disability-related questions/require medical exams **provided** done for all entering employees in that job category



What is a Disability-Related Question?

- Any question that is likely to elicit information about a disability



What is a medical examination?

- A procedure or test that seeks information about a physical or mental impairment or health
- EEOC Guidance contains factors to consider to determine whether something is a medical examination



Pre-Offer

- Cannot ask disability-related question or require a medical exam BUT can
 - Ask applicant about his/her ability to perform specific job functions
 - Ask applicant about non-medical qualifications/skills (certifications, licensure)
 - Ask applicant to describe/demonstrate how he/she would perform particular job tasks if asked of all applicants in job category

Pre-Offer: Questions



- Can ask if applicant can meet attendance requirements
- Can ask about the number of days absent from last job BUT cannot ask about number of days applicant was sick
- Cannot ask about job-related injuries or workers compensation history
- Cannot ask what medications currently taking

Pre-Offer: Questions (con't)

- Can ask about *current illegal* use of drugs
- Can ask about prior illegal drug use BUT not about prior drug addiction
- Cannot ask if ever addicted to drugs or treated for drug abuse



Pre-Offer: Examinations

- Can require physical agility test
- Can require physical fitness test – as long as not a medical examination
- Can give test to determine current illegal drug use
- Cannot give alcohol test

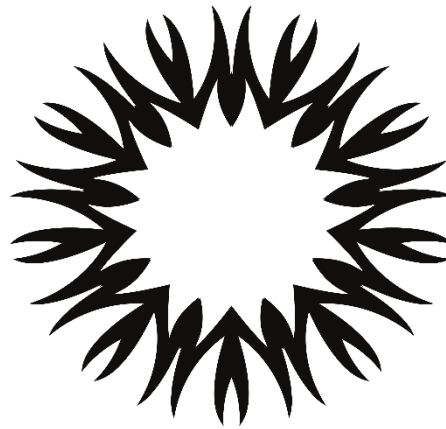
Post-Offer

- Can ask disability-related questions and perform medical exams
- Can ask about prior workers compensation history, prior sick leave usage, illnesses / diseases / impairments, general physical / mental health

Post-Offer (con't)

- Required procedures if ask disability-related questions/conduct medical examinations:
 - Must inquire of or examine all entering employees in the same job category, regardless of disability
 - Must keep medical information confidential (subject to certain exceptions)

EEOC's Title VII Enforcement Guidance: Consideration of Arrest/Conviction Records



Arrests

- Cannot exclude from job based solely on fact of arrest
- BUT can make employment decision based on the underlying conduct IF it renders the individual unfit for the position at issue



Convictions

- EEOC ***recommends*** not asking about convictions on job application
- EEOC recommends that inquiry be job related and consistent with business necessity – i.e., there is a connection between the criminal conduct and the duties of the position at issue



BUT Be Aware of State / Local Legislation – i.e. “Ban the Box”



States with “Ban the Box” Legislation for Private Employers Include:

- Connecticut
- Hawaii
- Illinois
- Massachusetts
- Minnesota
- New Jersey
- Oregon
- Rhode Island
- Vermont
- Washington, D.C.

Source: National Employment Law Project, Ban the Box Guide, May 2017, Michelle Natividad Rodriguez and Beth Avery



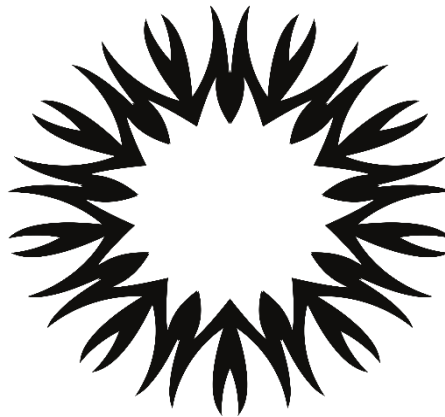
Local Jurisdictions with “Ban the Box” Legislation for Private Employers Include:

- Los Angeles, CA
- San Francisco, CA
- Chicago, IL
- Baltimore, MD
- Montgomery County and Prince George’s County, MD
- Columbia, MO
- Newark, NJ
- Buffalo, New York City and Rochester, NY
- Portland, OR
- Philadelphia, PA
- Austin, TX
- Seattle, WA

Source: National Employment Law Project, Ban the Box Guide, May 2017, Michelle Natividad Rodriguez and Beth Avery



EEOC's ADA Enforcement Guidance: Disability-Related Inquiries & Medical Exams of Employees



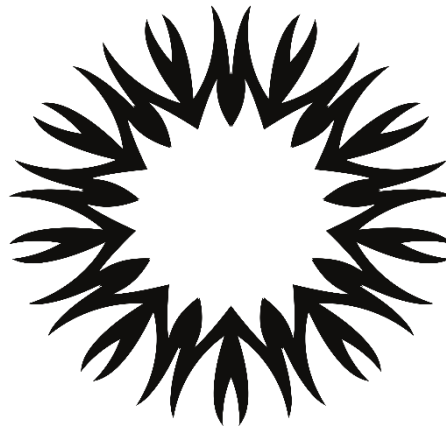
General Standard

- Inquiry or exam must be “job-related and consistent with business necessity”
- Employer has a “reasonable belief,” based on “**objective evidence**” that either
 - Employee’s ability to perform essential functions of the job will be impaired by medical condition
OR
 - Employee will pose a direct threat due to medical condition

Examples Which Generally Satisfy the Standard

- Employer has knowledge of medical condition and observes performance problems which can be attributed to medical condition
- Employee requests reasonable accommodation and disability or need for accommodation is not known/obvious
- Employee seeks to return from medical leave and employer believes ability to perform essential job functions may be impaired

EEOC's ADA Enforcement Guidance: Reasonable Accommodation & Undue Hardship



Reasonable Accommodation

- Required to enable qualified individual with a disability to perform the “essential functions” of the job, unless poses “undue hardship”
- May include:
 - Making facilities accessible
 - Job restructuring
 - Modified / part-time work schedule; leave of absence
 - Acquiring or modifying equipment
 - Changing tests / training materials
 - Reassignment to a vacant position

Reasonable Accommodation – Request & Response

- Request need not use term “reasonable accommodation” or mention ADA
- Request need not be in writing
- Request triggers “interactive process”
- Employer is not required to provide the requested accommodation, but must provide an effective accommodation

Undue Hardship

- Determined on a case-by-case basis
- Whether accommodation would result in significant difficulty or expense

Undue Hardship



- Factors to consider:
 - Nature and cost of accommodation
 - Overall financial resources of facility; number of persons at facility; effect on expenses and resources of facility
 - Overall financial resources, size, number of employees, type/location of facilities of employer
 - Type of operation
 - Impact of accommodation on the operation of facility

Questions?



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