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**

<table>
<thead>
<tr>
<th>Sex/gender</th>
<th>Color</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age</td>
<td>Religion</td>
</tr>
<tr>
<td>National Origin</td>
<td>Disability</td>
</tr>
<tr>
<td>Race</td>
<td>Citizenship</td>
</tr>
<tr>
<td>Arrest Record</td>
<td>Marital Status/Children</td>
</tr>
</tbody>
</table>
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)

<table>
<thead>
<tr>
<th>Not Permissible</th>
<th>Permissible</th>
</tr>
</thead>
<tbody>
<tr>
<td>• What religion are you? What church/synagogue do you belong to? What holidays do you observe?</td>
<td>• You may be required to work Saturdays and/or Sundays in this job. Are you able to do so?</td>
</tr>
<tr>
<td>• What is your native language? What is your nationality? What is your ancestry?</td>
<td></td>
</tr>
</tbody>
</table>
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
• 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
  - 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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