Legal Constraints in Interviewing

Federal law regulates the types of questions that can be asked during an interview. For example, Title VII of the 1964 Civil Rights Act prohibits discrimination based on race, sex, color, national origin and religion. The Age Discrimination in Employment Act prohibits questions about a person's age. The Americans with Disabilities Act of 1990, among other things, protects qualified individuals with disabilities from discrimination in employment.

Questions relating either directly or indirectly to age, sex, race, color, national origin, religion or disabilities should be avoided. If information that you need about an applicant potentially infringes on any of the above categories, be sure that the question relates to a bona fide occupational qualification or is required by law to be asked.

Employers should be aware of some of the specific prohibitions imposed by the enactment of the Americans with Disabilities Act. For example, employers may not inquire about an applicant's workers' compensation history during the pre-offer stage. Also, employers may not ask if an applicant has a disability. They may ask if there is anything that precludes the applicant from performing the essential functions of the position for which he/she is applying. The interviewer should go over the essential functions of the position with the applicant so that he/she has the information needed to make that determination.

Both human resource professionals and managers who will be interviewing should be well versed in federal and state law that regulates the types of questions that may be raised in an employment interview. If you are not sure if a question violates federal or state legislation, you are better off not asking the question and checking with your legal counsel.

Sample Questions

The way in which questions are phrased is very important. The following are examples of acceptable and unacceptable interview questions. The first question is unacceptable and the second one is acceptable.

1. No: Are you a U.S. citizen?
   Yes: Are you lawfully employable in the United States either by virtue of citizenship or by having authorization from the INS and the Labor Department?

2. No: How old are you?
   Yes: Are you over the age of eighteen?

3. No: Do you have any children? What are your child care arrangements?
   Questions about family status are not job-related and should not be asked.

4. No: What clubs or organizations do you belong to?
   Yes: What professional or trade groups do you belong to that you consider relevant to your ability to perform this job?

5. No: Have you ever filed a workers’ compensation claim?
   You may not ask this question or any related question during the pre-offer stage.

6. No: What disabilities do you have?
   Yes: Are you able to perform the essential functions of the job to which you are applying? (Be sure you tell the applicant what the essential functions are.)

7. No: When did you graduate from high school?
   Yes: What schools have you attended?
8. No: What is your maiden name?
Yes: Have you ever been known by another name? (Only ask this question if you need to contact a former employer, because a legal liability may exist if an applicant claims that you were trying to determine her ethnic background and consequently didn't hire her because of it.)

9. No: Do you smoke?
Yes: Our smoking policy is X—can you adhere to it? (Be aware of any state laws that relate to smoking. Some states prohibit an employer from excluding applicants for off-the-job smoking.)

10. No: Do you have AIDS or are you HIV-positive?
There is no acceptable way to inquire about this, or any other medical condition.

The following topics should be avoided in an interview:

- **Age** - is irrelevant unless you are concerned about child labor violations under the Fair Labor Standards Act, in which case you can ask for proof that he/she is old enough to work.
- **Arrest record** - do not ask at all - you may ask about convictions, but even then it would have to be relevant to the position in order to lead to immediate rejection.
- **Association with present employees** - this information is not relevant to an applicant's ability to perform successfully in a particular job, and the tendency to either encourage or prohibit the employment of friends or relatives of existing employees may create an adverse impact on members of protected classes.
- **Bankruptcy and credit affairs** - never ask about bankruptcy since it is illegal to discriminate on this basis under the Federal Bankruptcy Law - all credit inquiries must comply with the Fair Credit Reporting Act.
- **Citizenship** - unless required by law or regulation, you may not ask applicants if they are U.S. citizens since it is considered discriminatory under the Immigration Reform and Control Act. You may ask if candidates are authorized to work in the United States.
- **Disability** - the Americans with Disabilities Act makes it illegal to ask questions about an applicant's disability or perceived disability - it is crucial to focus on the job, not on the disability.
- **Driver's license** - avoid asking about it unless the job requires one since it could statistically screen out females, minorities and/or individuals with disabilities.
- **Educational attainment** - relevant if it is directly related to successful job performance - if not, avoid it because it could potentially screen out minorities.
- **Emergency contact information** - unnecessary at the application stage - and it can be discriminatory if it reveals information about the applicant's membership in a protected class.
- **English language skills** - only ask if it is a requirement of the job (i.e., an English teacher) - otherwise it could be construed as national origin discrimination.
- **Height and weight** - can be discriminatory against females, Hispanics, and/or Asians - it is important to focus on what the job requires, not the person's physical characteristics.
- **Marital status/name changes/spouse/children** - any questions relating to these issues may be construed as discriminatory, especially against women - - none are job-related.
- **Organization or club membership** - this might reveal protected class information and it is irrelevant (i.e., Knights of Columbus, NAACP or Diabetes Association)
- **Race, color, religion, sex, or national origin** - EEOC guidelines prohibit asking questions that may reveal this information; rejected applicants could have grounds for a discrimination suit if any of these questions were part of the application process.
- **Union affiliation** - could be considered an unfair labor practice under the National Labor Relations Act if the applicant claims he or she was not hired because of the union affiliation.
- **Veteran status/military records** - general questions about a person's background in the military should only be asked if based on business necessity or job-related reasons. If requested, such information should include a statement that general or dishonorable discharge will not be an absolute bar to employment but that other factors will be taken into consideration.
• **Weekend work/shift changes** - unless required for the job, the applicant should not have to state whether or not they can work on the weekends - this could screen out applicants who cannot work on some weekend days because of their religious beliefs.

**When Interviewing Persons with Disabilities**

*Do*

- Do ensure that the interview facility is accessible to people with disabilities.
- Do inform the applicant of any special parking available.
- Do allow the applicant at least a full day to prepare for your interview.
- Do identify the essential functions of the job.
- Do make eye contact with the person.
- Do talk directly to the person with the disability--not to an interpreter.
- Do, after the initial greeting, sit down so that a person who uses a wheelchair can easily make eye contact.
- Do ask about the person's ability to perform the job.

*Don't*

- Don't assume the person is able to shake your hand in greeting.
- Don't lean on an applicant's wheelchair.
- Don't shout or raise your voice to a person who is hearing impaired.
- Don't touch or talk to a seeing-eye dog.
- Don't ask about a person's disability history.
- Don't ask about prior workers' compensation claims.
- Don't ask how the person became disabled.
- Don't ask how a person is going to get to work.

*The preceding information in this handout is from SHRM’s website.*

**Handling Illegal Interview Questions**

*By Tom Washington*

If you're ever asked an improper question in a job interview, you face a real dilemma. If you object to the query, you may offend the interviewer. Yet, if you answer the question, the hiring manager may be encouraged to continue on a discriminatory path.

It helps to know that you don't have to answer certain questions. By knowing what types of inquiries are legal and illegal, and learning potent techniques for combating improper questions, you'll be able to respond effectively when faced with this difficult situation.

*Out of Bounds*
Interviewers sometimes ask personal questions which, while not technically illegal, are certainly inappropriate. For example, they may ask, "Do you have a boyfriend?" "Are you planning to get married?" or "Are you and your girlfriend living together?" If asked such a question, you must quickly decide whether to answer it or tactfully decline. Typically, interviewers in such cases will realize they're touching a sensitive area, and a gentle rebuff will lead them to back off. For instance, you might reply, "Mr. Hanson, I try not to get into personal issues during interviews."

Being tactful, even when the interviewer seems intrusive, is key. Making the hiring manager feel ashamed won't help you. Neither will assuming that because you were asked such questions, the employer must be terrible. Often, candidates are asked improper questions because the interviewer is poorly trained and curious, not discriminatory. Of course, curiosity doesn't excuse an employer's improper behavior. But you can give the company the benefit of the doubt for the duration of the interview, and then decide later whether it's a place where you'd want to work.

**Illegal Questions**

Unfortunately, most hiring managers are untrained in the legalities of interviewing, so it's fairly common for candidates to be asked illegal questions. Know your rights, and determine in advance how you plan to handle inappropriate queries.

Virtually all states have laws or regulations prohibiting discrimination on the basis of race, color, religion, national origin, ancestry, medical condition, physical handicap, marital status and age (40+). Generally, questions on employment applications or in interviews about national origin (including questions about your native language) are illegal. Employers also can't ask your marital status or the number and ages of your children and dependents. Nor can they ask questions about pregnancy, birth control use, or your plans for having children.

Employers can ask about disabilities in the following form: "Do you have any physical condition or handicap that may limit your ability to perform the job for which you're applying? If yes, what can be done to accommodate your limitations?" They can't, however, ask about your general medical condition or illnesses, or whether you've received workers' compensation. Nor can they ask, "Do you have any physical disabilities or handicaps?"

Employers aren't allowed to inquire about religion. A question such as, "Are there any holidays or days of the week you can't work?" would probably be held illegal, even if religion wasn't mentioned. However, it would probably be acceptable to ask, "We often work holidays and weekends. Is there anything that would prevent you from doing so?"

Employers can ask if you've ever been convicted of a felony, but not if you've ever been arrested. In some states, even questions about a felony conviction would have to be worded carefully to make sure they're clearly job-related. For example, a candidate for controller might be asked, "Have you ever been convicted of embezzlement?" but not, "Have you ever been convicted of a felony?"

**How to Respond**

There are several effective ways to deal with illegal or prying questions. Decide in advance which strategy you want to use, and then practice it. Options include:

1. Answer the question without revealing that you're offended. This is the best approach for most situations. To respond this way, assume that the interviewer is simply curious, means no harm and is unaware that people might be put off by such queries.
2. Address the apparent underlying concern of the interviewer rather than his or her specific question. For example, employers who ask, “Do you have any children?” may not be concerned about kids, per se, but whether you're likely to miss work to care for a sick child. Your response could be, “I have three children in school, and they have excellent, full-time child care” or, “If you mean, ‘Can I meet the demands of the job,’ yes, I can.”

3. Tactfully remind the interviewer that the question is illegal. You might say: “That's not a legal question. I'd rather cover other points.” Or, “I'd prefer to only be asked legal and germane questions.” Or, “I'd prefer to discuss my qualifications for this job, which are ...” If you respond in this way, continue the interview showing the same professional manner you displayed prior to the question. The interviewer may feel somewhat foolish for having asked such a question or perturbed at you for being so “sensitive.” Either way, because you've demonstrated both your assertiveness and knowledge of the law, it's unlikely you'll be asked another improper question.

Typically, you're better off answering touchy questions without confronting the interviewer about their legality. At the same time, be on the lookout for a pattern of discrimination. One illegal question can be written off as a simple mistake, but several such questions could indicate a problem. If you want the position, continue answering the questions or tactfully decline, but make a mental note of each illegal query. Write them down immediately following the interview. If you don't get the job and feel you were discriminated against, your notes will be important to any action you take. For example, you could speak to the company’s human resources director, and describe what happened. If you don't receive satisfaction there, you may wish to contact the appropriate government agency or hire an attorney.

**Suggested Answers**

Before interviews, think about which illegal questions you're likely to face, and prepare responses to them. Remember that your goal is to get a job offer. After you receive an offer, you can decide whether you really want to work for the manager or organization. Following are some common illegal questions and suggested ways to respond.

**Are you married?**
This question is usually addressed to women to assess their availability for overtime and other issues.

Tactful deflection: "I'd prefer to stay on track with job-related issues rather than personal ones."

Non-confrontational: "Yes I am. My work is very important to me, though, so I make sure nothing interferes with my giving 100 percent to my job. I can travel and work weekends when necessary."

Of course, if you're not inclined to work 50 or more hours per week, go to the office on weekends and travel occasionally, you'll need to phrase your response as positively as possible while still being true to yourself. For example, you might say: "Yes I am. My work is very important to me, so I make sure nothing interferes with my giving 100 percent. I do whatever's necessary to complete my work on schedule."

**When do you plan to start a family?**
Such a question is designed to uncover your marital and family status. Small employers may ask this because they'd have trouble covering for someone who takes a lengthy maternity leave, but that still doesn't excuse the question.

Tactful deflection: "Family issues are pretty personal for me. I can tell you that every employer I've worked for was glad to have me."
Non-confrontational: You can put the interviewer at ease by responding: "No, we’re not going to have children. We're both very career-oriented" or "I do intend to have children, but not for several years, and when I do, my leave would be very short."

**What religion are you?**
Tactful deflection: This question is so blatant that it's easy just to say, "I really don't care to discuss religion. I'd love to tell you about some of my work successes, however."

Non-confrontational: If you practice a religion you might say, "I attend church (or synagogue or mosque), but I don't mix religion with work. I get along with everyone regardless of their religion." If you don't want to reveal your religion, you can simply substitute, "I attend services," in the previous reply. If an interviewer presses you to be more specific and name the denomination or religion you belong to, decide in advance how you'll handle it. If you feel comfortable stating "I'm Baptist" or "I'm Jewish," then say so.

If you don't practice a religion, you might say, "I have my own beliefs that are very important to me, but I'm not involved with any organized religion."

**How old are you?**
Tactful deflection: "I don't really think you want to touch on age issues, do you?"

Non-confrontational: Show that you're comfortable with your age, proud of what you've accomplished and full of energy. Your answer could be a simple, "I'm 54" or "I'm 54. I've been in this field 28 years, and I've never stopped learning."

In developing answers to inappropriate questions, use the examples provided here as guides, but create responses that fit you and your personality. Then, you can enter interviews confident that you can sell yourself no matter what interviewers ask you.


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