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Technical Bulletins: Interviewing and the Law (2012)

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January 7, 2013

INTERVIEWING AND THE LAW

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Congress provided federal legal enforcement for equal employment in the Civil Rights Act of 1964 with strengthening amendments added in 1972. Unlawful discrimination in the employment process also is enforced through the Age Discrimination in Employment Act and the Americans with Disabilities Act.

Title VII of the Civil Rights Act makes it unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his/her compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin, or

(2) to limit, segregate, deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his/her status as an employee because of such individual's race, color, religion, sex or national origin.¹

Congress established the Equal Employment Opportunity Commission (EEOC), a bi-partisan five-person board, to enforce Title VII.² The president appoints the members, who then must be confirmed by the senate. Although the muscle behind the EEOC's enforcement power lies in its right to file lawsuits against private employers in federal court, the commission's primary importance for public

employees centers on the guidelines it issues to clarify Title VII's reach.

Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on their age. The ADEA's protection applies to both employees and job applicants. Similar to Title VII, the ADEA makes it unlawful to discriminate against a person because of his or her age with respect to any terms, conditions, or privileges of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

Similarly, it is unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.

The Americans with Disabilities Act of 1990 prohibits discrimination against otherwise qualified individuals with a disability who can perform the essential functions of the job either with or without a reasonable accommodation. The term "disability" means a physical or mental impairment that substantially limits one or more major life activities or situations in which an individual has a record of an impairment or the individual is being regarded as having an impairment.

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The act specifies that major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major life activities also include the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

An individual is “regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under the law because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers from requesting or requiring genetic information of employees or their family members. ‘Genetic information,’ as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services. There is an exception for the inadvertent or accidental acquisitions of genetic information — the so-called “water cooler” exception — when an employer might accidentally overhear coworkers discussing health issues.

PRE-EMPLOYMENT PRACTICES

Pre-employment selection procedures, including tests and inquiries used to screen out prospective applicants

can be particularly vulnerable to adverse impact charges. Title VII allows the use of “professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin.”³ The EEOC requires employers using selection tests to justify them with “data demonstrating that the test is predictive of or significantly correlates with important elements of work behavior which comprise or are relevant to the job or jobs which candidates are being evaluated.”⁴ The EEOC also has published very technical and complicated standards for validating such tests.⁵ In most circumstances, if an employer cannot statistically tie a pre-employment test to specific characteristics necessary for successful job performance and the employer does not desire to perform a validity study, the test should be discontinued or changed.

Pre-employment screening procedures such as job application forms, interviews, and background investigations should be reviewed for their job relatedness. Employers should limit their questions to matters relevant to determining an applicant’s competence. Title VII does not prohibit questions regarding an applicant’s race, color, religion, sex or national origin, but these may be used as evidence of discrimination if an employer cannot explain their presence. In addition, these questions may be prohibited by state law. Questions about association or marriage with a particular racial or ethnic group also may be used as evidence of discrimination. Employers should avoid questions about marital status, the age and number of children, plans for pregnancy or arrangements for child care.⁶

Pre-employment investigations for the purpose of examining an applicant’s fitness or character or to verify statements made on the application should be

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reviewed carefully by employers for job relatedness. The criteria used to qualify applicants through background investigations should be precise and well defined and should state clearly the information that will disqualify an applicant; if not, some courts refuse to find them job related. For example, a police department's investigations to seek disqualifying evidence of "bad character, dissolute habits, and immoral conduct" violated Title VII primarily because the criteria were so poorly defined.⁷

Employers also must conduct investigations using the same procedures and thoroughness, regardless of the applicant's sex, race, ethnic origin or religion. Proof that an employer compared the results of an in-depth investigation of a member of a protected class with a limited investigation of a non-minority one will defeat an employer's claim that the procedure was public business related. When no proof of business necessity has been shown, courts have found that background investigations by police⁸ and fire departments⁹ into an applicant's financial history violate Title VII because they disqualify disproportionate numbers of blacks. In addition, using a less than honorable discharge from the military as a criterion for rejecting an applicant also may violate the act because statistics reveal a higher incidence of such discharges among minorities.¹⁰

Unless solid proof of public business necessity can be shown, employers also should avoid the use of arrest records to reject applicants. But, if a conviction would render an applicant unsuitable for a particular job, it might be a valid justification for rejecting the applicant. For example, a conviction for bank robbery would probably justify a bank's refusal to hire an individual as a teller or loan officer but perhaps not as a janitor. If an employer questions an applicant about prior convictions, inquiries should be accompanied by a statement that a conviction record will not

necessarily be a bar to employment and those factors such as age and time of the offense, seriousness and nature of the violation, and rehabilitation will be taken into account.

On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) updated its enforcement guidance¹¹ on the consideration of arrest and conviction records in employment decisions. The EEOC determined that compliance with federal laws or regulations is a defense to a charge of discrimination. However, compliance with a state or local law or regulation may not shield the employer from liability if the employer's policy is not job related and consistent with business necessity.

According to the guidance, the EEOC recommends that employers not ask about convictions on job applications. Employers can consistently demonstrate job relatedness and consistency with business necessity if they: validate the criminal conduct screen for the position in question based on the Uniform Guidelines on Employee Selection Procedures, or develop a targeted screening considering at least the nature of the crime, the time lapsed, and the nature of the job and then provide an opportunity for an individualized assessment for people excluded by the screening.

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INAPPROPRIATE PRE-EMPLOYMENT INQUIRIES

Listed below are examples of inappropriate pre-employment inquiries found on employment applications.¹²

Without EEOC Disclaimer

- What is your birth date?
- What is your birthplace?
- What was your age on your last birthday?
- What is your sex?
- What is your race or ethnic group?
- Do you have any handicaps or physical defects?

With or Without EEOC Disclaimer

- Are you known or have you been known by any other name(s)?
- Which do you prefer: Mr., Mrs., or Ms.?
- What is your marital status?
- How many dependants do you have?
- What is your height and weight?
- What are the dates of your education and/or degrees?
- Have you ever been convicted of a crime?
- Do you possess a valid driver's license?
- Do you have transportation to work?
- What were the dates of your military service?
- What was your rank when you left military service?
- If claiming veteran's preference, have you submitted the appropriate documentation?
- Do you read and write English?
- What is the lowest pay you will accept?
- Do you have any relatives employed by the state?
- Are you willing to travel?
- Are you willing to work shifts/overtime?
- Are you willing to lift heavy weights?
- Do any of your relatives have any disabilities or disorders?

UNLAWFUL AND LAWFUL INQUIRIES DURING PRE-EMPLOYMENT INTERVIEWS

Any inquiry is forbidden that, although not specifically listed among those below, is designed to elicit information as to race, color, ancestry, age, sex, religion, genetic information or arrest and court record, unless based upon a bona fide occupational qualification.

UNLAWFUL INQUIRIES

NAME

- Inquiries about the name that would indicate applicant's lineage, ancestry, national origin or descent.
- Inquiry into previous name of applicant, whether it has been changed by court order or otherwise.
- Indicate: Miss, Mrs., or Ms.

MARITAL/FAMILY STATUS

- Any inquiry indicating whether an applicant is married, single, divorced, engaged, etc.
- Number and age of children.
- Information on child-care arrangements
- Any questions concerning pregnancy.
- Any questions that directly or indirectly result in limitation of job opportunity in any way.

AGE

- Requirements that applicants state age or date of birth.
- Requirements that applicants produce proof of age in the form of a birth certificate or baptismal record.

The Age Discrimination in Employment Act of 1967 forbids discrimination against persons over the age of 40.

DISABILITIES

- The Rehabilitation Act of 1973 forbids employers from asking job applicants general questions about whether they are handicapped or asking them about the nature and severity of their handicap.
- An employer must be prepared to prove that any physical and mental requirements for a job are due to “business necessity” and the safe performance of the job.
- Except in cases where undue hardship can be proven, employers must make “reasonable accommodations” for the physical and mental limitations of an employee or applicant.
- An interviewer may not ask questions about a disability.
- Where an applicant has a visible disability or volunteered information about a disability, the interviewer may not ask questions about:
 - The nature of the disability;
 - The severity of the disability;
 - The condition causing the disability;
 - Any prognosis or expectation regarding the condition or disability;
 - Whether the individual will need treatment or special leave because of the disability; or.
 - Whether the applicant needs accommodations.

GENETIC INFORMATION

- An interviewer may not ask questions about the results of an individual’s or family member’s genetic tests.

SEX

- Sex of the applicant.
- Any other inquiry that would indicate sex.
- Sex is not a bona fide occupational qualification even if a job involves physical labor (such as lifting) beyond the capacity of some women.

- Employment cannot be restricted to a particular sex just because the job is traditionally labeled “men’s work” or “women’s work.”
- Sex cannot be used as a factor to determine whether or not an applicant will be satisfied in a particular job.

APPLICANT’S RACE

- Color of applicant’s skin, eyes, hair, etc., or other questions directly or indirectly indicating race or color.
- Applicant’s height or weight where it is not relative to the job.

ADDRESS

- Specific inquiry into foreign addresses that would indicate national origin.
- Names or relationship of persons with whom applicant resides.
- Whether applicant owns or rents home.

BIRTHPLACE

- Birthplace of applicant.
- Birthplace of applicant’s parents, spouse or other relatives.
- Requirement that applicant submit a birth certificate, naturalization or baptismal record before employment.
- Any other inquiry into national origin.

RELIGION

- Applicant’s religion (affiliation, church, parish, pastor or religious holidays).
- Applicants may not be told that any particular religious groups are required to work on their religious holidays.
- Any inquiry to indicate or identify religious denomination or customs.

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MILITARY

- Type of discharge

PHOTO

- Request for a photograph before hiring.
- Requirement that applicant affix a photograph to the application.
- Request the applicant, at his/her option, submit photograph.
- Requirement of photograph after interview but before hiring.

CITIZENSHIP

- “Of what country are you a citizen?”
- Whether applicant or his/her parents or spouse are naturalized or native-born U.S. citizens.
- Date that applicant or parents or spouse acquired a U.S. citizenship.
- Requirement that applicant produce his/her naturalization papers.
- Whether applicant’s parents or spouse are citizens or the U.S.

ANCESTRY OR NATIONAL ORIGIN

- Inquiries into applicant’s lineage or ancestry, national origin, descent, birthplace or native language.
- National origin of applicant’s parents or spouse.

EDUCATION

- Any inquiry asking specifically the nationality, racial or religious affiliation of a school.
- Inquiry as to the applicant’s native language or how foreign language ability was acquired.

CONVICTION

- Any inquiry relating to arrests.
- Asking or checking into a person’s arrest.
- Court or conviction record if not substantially related to functions and responsibilities of the prospective employment.

RELATIVES

- Name or address of any relative of adult applicant.

NOTICE IN CASE OF EMERGENCY

- Name and address of relatives to be notified in case of accident or emergency.

ORGANIZATIONS

- “List all organizations, clubs, societies and lodges to which you belong.”
- The names of organizations to which the applicant belongs if such information would indicate, through character or name, the race, religion, color or ancestry of the members.

CREDIT RATING

- Any questions concerning credit rating, charge accounts, etc.

REFERENCES

- Require the submission of a religious reference.
- Request reference from applicant’s pastor.

LAWFUL INQUIRIES

NAME

- Have you worked for this company under a different name?
- Is any additional information relative to change of name, use of an assumed name or nickname necessary to enable a check on your work and educational record? If yes, explain.

MARITAL/FAMILY STATUS

- Whether applicant can meet work schedules or activities; commitments that may hinder the meeting of work attendance requirements.
- Inquiries as to duration of stay or anticipated absences that are made to males and females alike.

AGE

- If a minor, require proof of age in the form of a work permit or a certificate of age.
- Require proof of age by birth certificate after being hired.
- Inquiry as to whether or not applicant meets the minimum age requirements as set by law must be submitted in the form of a birth certificate or other forms of proof of age.
- If age is a legal requirement: "If hired, can you furnish proof of age?" or that hire is subject to verification of age.
- Inquiry as to whether or not an applicant is younger than the employer's regular retirement age.

Under the Americans with Disabilities Act, an employer may ask questions to determine whether an applicant can perform specific job functions. The questions should focus on the applicant's ability to perform job, not a disability.

DISABILITIES

The applicant could be asked:

- Are you able to perform these tasks? (If the applicant indicates that he or she can perform the tasks with an accommodation, you may ask:
- How would you perform the task and with what accommodation(s)?

GENETIC INFORMATION

- As part of a health or genetic service, including wellness programs, provided on a voluntary basis.
- For FMLA certification purposes.

SEX

- Inquiry or restriction in employment is permissible only where a bona fide occupational qualification exists. The bona fide exception is interpreted very narrowly by the courts and the EEOC, and is defined as being based on the need for the individual to be a particular sex.
- The burden of proof rests on the employer to prove that a bona fide occupational qualification does exist and that all members of the affected class are incapable of performing the job.

APPLICANT'S RACE

- General distinguishing physical characteristics such as scars, etc.

ADDRESS OR DURATION OF RESIDENCE

- Applicant's address.
- Inquiry into place and length of previous address.
- Length of time a resident of this state or city.

RELIGION

- An applicant may be advised concerning normal hours and days of work required by the job to avoid possible conflict with religious or other personal conviction.

MILITARY

- Type of education and experience in service as it relates to a particular job.

PHOTO

- A photo may be required after hiring for identification.

CITIZENSHIP

- “Are you a citizen of the United States?”
- “If you are not a U.S. citizen, do you have the legal right to remain permanently in the U.S.?”
- “Do you intend to remain permanently in the U.S.?”
- Statement that if hired, applicant may be required to submit proof of citizenship.
- “If not a citizen, are you prevented from lawfully becoming employed because of visa or immigration status?”

ANCESTRY OR NATIONAL ORIGIN

- Languages applicant reads or writes frequently.

EDUCATION/EXPERIENCE

- Applicant’s academic or professional education, school attended.
- Inquiry into language skills such as reading, speaking and writing foreign languages.
- Applicant’s work experience, names and addresses of previous employers, dates or reasons for leaving and salary history.
- Other countries visited.

CONVICTION

- Inquiry into actual convictions that reasonably relate to the applicant’s fitness to perform a particular job. (A conviction is a court ruling where the party is found guilty as charged. An arrest is merely the apprehending or detaining of the person to answer the alleged crime.)

RELATIVES

- Names of applicant’s relatives employed by this company.
- Names and addresses of parents or guardians of minor applicants.

NOTICE IN CASE OF EMERGENCY

- Names of persons to be notified in case of accident or emergency.

ORGANIZATIONS

- Inquiry into the organizations of which an applicant is a member providing the name or character of the organization does not reveal the race, religion, color, or ancestry of the member.
- “What offices are held, if any?”

CREDIT RATING

- None

REFERENCES

- “By whom were you referred for position here?”
- Names of people willing to provide professional or character references of applicant.

MISCELLANEOUS

- Notice to applicants that any mis-statements or omissions of material facts in the application may be cause for dismissal.

DAMAGES

- There are a number of remedies available to employees whose Title VII, ADA and ADEA rights are violated by the employer or by others whom the employer allowed to violate them. Cases under the acts are tried without juries, and judges have much discretion in shaping each remedy to fit the particular situation. Like Title VII and the ADEA, the ADA allows for compensatory and monetary damages, injunctive relief, reinstatement, restraint from further discriminatory conduct and back pay. In addition, with the passage of the Civil Rights Act of 1991 a judge may award attorney’s fees to the winner in a Title VII suit. Punitive damages and awards for pain and suffering may be granted.

END NOTES

1. 42 U.S.C. § 2000e.
2. 29 U.S.C. § 161; 49 Stat. 455.
3. 42 U.S.C.A. § 2000e-2(h).
4. Guidelines on Employee Selection Procedures 29 C.F.R. § 1607.4(c), 35 Fed Reg. 12333 (Aug. 1, 1970).
5. 29 C.F.R. § 1607.5.
6. Romine, 518 F.2d at 332.
7. *United States v. Chicago*, 549 F.2d 415 (7th Cir. 1977) *affirmed* 567 F.2d 730 (7th Cir. 1977).
8. *Id.*
9. *Dozier v. Chupka*, 395 F.Supp, 836 (S.D. Ohio, 1975).
10. *Id.*
11. U.S. Equal Employment Opportunity Commission, Enforcement Guidance, “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964” April 2012.
12. Debra D. Burrington, “A Review of State Government Application Forms for Suspect Questions,” *Public Personnel Management Journal*, May 1982.

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