Legal Interviewing - Asking the Right Questions
Leader's Guide

Whether you are a seasoned manager with hundreds of job interviews under your belt or you are conducting job interviews for the first time, understanding the legal aspects of interviewing is critical. Job interviews are full of potential legal land mines and if you aren’t careful one wrong comment or question could generate legal trouble for you and your organization.

In 1964, federal and local government agencies began enacting laws that protect employees from workplace discrimination, including discrimination in hiring practices. A person cannot be denied employment because of race, color, national origin, religion, gender, sexual orientation, marital or family status, pregnancy, disability, genetic information or age - for employees 40 and over. Therefore, questions on these topics are strictly off limits in an interview or on an application.

In addition, some questions about arrest records, personal appearance, drug or alcohol use, club affiliations, organizational membership, home ownership and finances should be avoided as well.

So what can you ask? You can ask questions directly related to the essential functions of the job that you are hiring for. However, even these questions can be tricky, so let’s go over each of these topics individually and discuss what you can and cannot say.

**Race, Color and National Origin**

**Illegal**

**Sample Interview Question:** "That’s an interesting accent. Were you born in the United States?"

**Sample Interview Question:** "So are you Pakistani or Indian?"

**Sample Interview Question:** "Is English your first language?"

Questions related to the topics of race, color and national origin are strictly off limits. It is illegal to consider any of these factors when making a hiring decision, therefore asking questions about these protected characteristics can do nothing but put you in legal jeopardy and you should avoid them entirely.

However, there are job-related instances where you may need to know facts related to national origin such as immigration status and language fluency. In these cases, the most important thing to do is to keep it job-related. Ask, the questions like this.
Legal:

Sample Interview Question: "If hired, will you be able to provide proof of the legal right to work in the United States?"

Sample Interview Question: "In this job you will communicate with customers from many different countries. What languages can you speak fluently?"

In both of these instances the interviewer kept questions job-related and asked for legitimate information relative to the position. There was no need to broach the dangerous topic of national origin.

Religion

Illegal

Sample Interview Question: "What holidays do you celebrate?"

Sample Interview Question: "Will your religious beliefs always require you to wear a turban?"

A candidate’s religious beliefs and practices are irrelevant when making a hiring decision and therefore any questions pertaining to religion should never be asked.

In almost all cases, employers must make exceptions to company dress and grooming policies to accommodate religious practices. Asking a question related to these practices could imply bias if the candidate is not hired.

If you need to know whether a candidate is available to work during religious holidays and on the weekends, it’s much better to simply ask without making any reference to religion whatsoever.

Legal

Sample Interview Question: "This job requires that employees work on the weekend. Is there any reason you might be unavailable to work on Saturdays and Sundays?"

Organizations such as churches, religious schools and religious associations whose primary focus or mission is religious in nature are exempted from this rule and may ask about a candidate’s religion.

Gender, Gender Identity and Sexual Orientation

While the gender of a candidate is clear in most cases, you should refrain from asking gender identification questions if you are unsure. The EEOC has held that discrimination against an individual because of gender identity or sexual orientation falls into the category of sex
discrimination. Therefore any questions referencing these topics could lead directly to a discrimination lawsuit and should be avoided entirely.

Also, be very careful not to imply that a position is gender specific unless there is a compelling reason for the job to be given to one sex or another such as locker room attendant.

Illegal

Sample Interview Question: "Usually we have men do this job, are you sure you are strong enough to lift 40lbs?"

This question strongly suggests that the interviewer has a bias against women when hiring for this particular job. Because gender is irrelevant for most jobs, it’s much better to keep it job-related and ask the question like this.

Legal

Sample Interview Question: "This job requires lifting boxes that weigh 40lbs. Is there any reason that you would not be able to lift this much weight?"

By keeping the question about specific skills, and by asking it of every candidate male or female, you will help protect yourself from liability.

Marital Status, Family Status & Pregnancy

Illegal

Sample Interview Question: "Will your spouse mind if you are required to work long hours?"

Sample Interview Question: "Do you plan on having more children?"

Sample Interview Question: "Are you having any complications with your pregnancy?"

Questions about marital status, family status or pregnancy should never be asked in an interview. These personal facts about a candidate are irrelevant and cannot be used as part of a hiring decision. Therefore, asking questions about them will almost always imply bias.

However, sometimes there are legitimate reasons to know about a person’s family. For instance…concerns about conflict of interest. If you need to ask a family related question, make sure it is job related and limit the scope to the information you need to know.

Legal

Sample Interview Question: "Our company requires that we check for conflict of interest issues. Do you have relatives employed by this company or by one of our competitors?"
**Disability**

**Illegal**

*Sample Interview Question*: "Do you have any physical disabilities or illnesses?"

*Sample Interview Question*: "Have you ever filed a worker’s compensation claim?"

Questions about disabilities, illnesses or workers compensation claims are never allowed in a job interview. However, you may ask a candidate if they can physically perform the essential functions of job.

**Legal**

*Sample Interview Question*: "Will you be able to perform all of the essential functions of this job with or without reasonable accommodation?"

Be sure you ask every candidate the same question, not just candidates you believe are disabled.

A reasonable accommodation is a change to the work environment or to the normal way things are done that is not an “undue hardship” on the employer as defined by the ADA. Most accommodations are not expensive or difficult and are generally required to be implemented if needed.

You may ask a candidate to perform a job duty, however you must ask every job candidate who interviews for the position to perform the same demonstration…not just the candidates you suspect are disabled.

Also, the interviewing location must be accessible to all candidates, so there is an equal opportunity for everyone to interview for the position.

**Genetic Information & Medical History**

**Illegal**

*Sample Interview Question*: "Is there a history of cancer in your family?"

Job applicants are protected from discrimination based on their family medical history and from the information gathered in genetic tests. Questions related to these topics should be avoided altogether in the interviewing and hiring process.
Age

Illegal

Sample Interview Question: "When do you plan on retiring?"

Sample Interview Question: "You didn’t grow up working with computers, did you?"

Age is another legal land mine for interviewers. Employers cannot discriminate against candidates who are 40 years of age or older. Therefore, questions that might pinpoint a candidate’s age should be avoided entirely.

Legal

If you are concerned that the candidate may not stay with the company very long, simply ask about the future in a job-related way.

Sample Interview Question: "What are your long-term career goals?"

Keep in mind that if you ask a question like this, it should be asked of every candidate you interview…not just the candidates over 40.

Arrest and Criminal Records

Illegal

Sample Interview Question: "Have you ever been arrested?"

An arrest alone is not proof of guilt, therefore questions about arrest records are not allowed in an interview. However, it is legal to ask about convictions. When asking questions about criminal history, it’s critical that every candidate get asked the same questions. Asking only a certain segment of candidates…such as African Americans about convictions could lead to a bias lawsuit. If you have to ask about criminal records, then make sure you keep the question job related.

Legal

Sample Interview Question: "This job requires you to work with valuable merchandise, so I have to ask you…have you ever been convicted of a crime?"
It’s critical that discrimination does not occur when judging criminal history. For instance, hiring white candidates with criminal records, but not Hispanic candidates with similar criminal histories would very likely be construed as demonstrating bias.

**Affiliations**

**Illegal:**

**Sample Interview Question:** "Are you a member of any clubs?"

It is very dangerous to ask if a job applicant is a member of any organization, club or society because membership often indicates the applicant's race, sex, national origin, disability status, age, religion, color or ancestry. This is information you cannot use when making a hiring decision, so the job interviewer should avoid these questions entirely. If a candidate volunteers this information or if it is included in a resume, do not ask follow up questions and do not reference it in your notes.

**Drug or Alcohol Use**

**Illegal**

**Sample Interview Question:** "Do you drink alcohol socially?"

**Sample Interview Question:** "Have you ever been treated for an addiction?"

Questions regarding past treatment for addiction or current use of legal prescription drugs and alcohol are not legally permissible and this information cannot be used when making hiring decisions. However, you can ask the candidate if they currently engage in illegal drug use.

**Height, Weight and Personal Appearance**

**Illegal**

**Sample Interview Question:** "You are a really big guy. How much do you weigh?"

Unless you can prove that a candidate’s height and weight are relevant to job performance, they should not be required on an application or asked about during a job interview. In addition, you should make no mention about a candidate’s personal appearance in your notes.

Also, it is illegal to ask for a photograph of a candidate prior to a job interview. It is legal, however, to take a picture of the employee after they have been hired for identification purposes.
Military Service

While military service is generally seen as a positive attribute in a prospective candidate, there are some important legal pitfalls to avoid.

Illegal

Sample Interview Question: "Were you honorably discharged from the Navy?"

Sample Interview Question: "Are you a member of the National Guard or Reserves?"

Asking about a candidate’s discharge from the military is always off limits in an interview. In addition, asking a candidate if they are in the National Guard or Reserves could imply bias if they are not hired for the position. It may be inconvenient when an employee leaves to fulfill a military obligation, however this information cannot be used to disqualify an applicant.

Relevant job specific questions about the candidate’s experience in the military are legal to ask in an interview.

Legal

Sample Interview Question: "What job skills did you learn during your service in the Coast Guard?"

Finances

Federal law does not prohibit employers from asking about financial information such as credit history and bankruptcy if they are relevant to the position. However, employers need to tread lightly on the subject. Job applicants should be informed if their credit history will be examined and you should follow all applicable laws related to personal credit information as defined by the Fair Credit Reporting Act. Employers should be careful that financial information is not used to exclude one particular race, religion or nationality. In addition, exceptions must be made for persons who do not meet financial criteria due to a disability.

Residence

Illegal

Sample Interview Question: "Do you live close to here?"

Sample Interview Question: "Do you own your own home or do you rent?"

You can never ask where a candidate lives or whether they rent or own a home. If you need to know about the candidate’s ability to get to work, keep it job related.
Legal

Sample Interview Question: "If you are hired, will you be able to arrive at work by 8 AM?"

Sample Interview Question: "This job requires you to be “on call” several days a week. If hired, would you be able to arrive at work within 30 minutes of being called in?"

Preparation

There certainly is a lot to remember and it’s understandable if your head is spinning, however there is a simple way to make sure you never ask questions that could put you in legal jeopardy and that’s by asking pre-planned interviewing questions.

Preparing for a job interview is the most critical part of the process. An up-to-date and accurate job description must be maintained that explicitly spells out the essential and non-essential functions of the job. The essential functions are the core functions and responsibilities of the position. In other words, the reason the job exists. Essential functions should be performed in practice and not just on paper. Make sure that the functions in your job description are actually performed on the job.

Using the essential functions, develop a list of the skills that are necessary for the position and then develop your interviewing questions around those skills. Having a list of pre-planned interviewing questions that focus solely on finding out if the candidate has the skills needed for the position will help you avoid asking irrelevant questions which could be construed as discriminatory. All you need to do is stick to the script.

Candidate Interjections

Sometimes you will be completely prepared with your pre-planned script of interviewing questions and suddenly the candidate will volunteer information that you don’t need or want to know.

Sample Candidate Interjection: "I’m so happy to be interviewing for this position. With 6 kids and a husband in the military I just need to get out of the house!"

The best thing to do in this situation is to ignore the statement with tact. Don’t write anything about it in your notes and do not ask any follow-up questions about it. You may not be able to control what the candidate tells you, however you can control how you use this information.

Notes

Interviewing notes can be subpoenaed in a discrimination lawsuit and any notation about a candidate’s protected characteristics like race or religion could be used to demonstrate bias. A good rule of thumb is to include only job specific information in your notes. If the information cannot be legally used to make a hiring decision, then it should left out.
Resumes & Social Media

Interviewers need to be very careful about using some of the information found on resumes. For instance, a candidate might list a club or society membership that reveals a characteristic such as race or religion. If this occurs, do not follow up on this information in the interview or use this information as part of your hiring decision.

The same is true with social media. It has become common practice to research candidates’ social media accounts as part of the applicant review process. It is very easy to learn information about a candidate such as race or gender that would not have been cited in a resume as well as information such as religion, national origin or disability that would not have been discovered in an interview. The courts will assume that you know this information the moment you access a social media account. This information should not be addressed during an interview nor used in the selection process.

If you check social media information for one candidate, it must be done for every candidate. Consistency in the interviewing process will ensure that everyone receives equal treatment and opportunity.

Interview Length

Once you have your pre-planned interviewing questions written, it is imperative that you stick to the script. Every candidate that you interview should be asked the same questions. In addition, every interview should be roughly the same length. If, for example, it is discovered that white candidates received on average more time in their interviews than persons of color, your organization would open itself up to a discrimination lawsuit.

Selling the Position

Be careful you do not oversell the position. Promising a candidate pay raises or future promotions that aren’t part of the employment contract could come back to bite you in the form of a lawsuit when the employee does not receive what you promised.

In Conclusion

The interviewing process is full of legal hazards, but you can take reliable steps to protect yourself. By pre-planning interviewing questions to focus on job related skills only and by carefully checking that none of your questions imply bias, you can protect your organization and yourself from potential lawsuits while increasing your chances of finding the best candidate possible.
Legal and Illegal Basic Interviewing Questions

Indicate whether the following questions are legal or illegal to ask in an interview.

1. Do you plan on having children in the next year? Legal / Illegal
2. Why did you only stay three months at your last job? Legal / Illegal
3. Did you work the register at your last job? Legal / Illegal
4. That’s an interesting accent. Where are you from? Legal / Illegal
5. How old are you? Legal / Illegal
6. You have to be 16 to work in this state. If hired, can you provide proof that you are at least 16 years of age? Legal / Illegal
7. Are you available to work nights and weekends? Legal / Illegal
8. Have you ever been arrested? Legal / Illegal
9. Are you an American citizen? Legal / Illegal
11. Can you perform the duties of this job with or without reasonable accommodation? Legal / Illegal
12. What religion are you? Legal / Illegal
13. Do you have any responsibilities that would stop you from performing functions such as traveling which are essential to the job? Legal / Illegal
14. Have you ever been convicted of a crime? Legal / Illegal
15. Do you own your own home? Legal / Illegal

*Note that these questions themselves may not be legal or illegal but hiring practices based on these answers may be.*
Legal and Illegal Basic Interviewing Questions - Answer Key

Indicate whether the following questions are legal or illegal to ask in an interview.

1. Do you plan on having children in the next year? **Illegal**
2. Why did you only stay three months at your last job? **Legal**
3. Did you work the register at your last job? **Legal**
4. That’s an interesting accent. Where are you from? **Illegal**
5. How old are you? **Illegal**
6. You have to be 16 to work in this state. If hired, can you provide proof that you are at least 16 years of age? **Legal**
7. Are you available to work nights and weekends? **Legal**
8. Have you ever been arrested? **Illegal**
9. Are you an American citizen? **Illegal**
10. How much do you weigh? **Illegal**
11. Can you perform the duties of this job with or without reasonable accommodation? **Legal**
12. What religion are you? **Illegal**
13. Do you have any responsibilities that would stop you from performing functions such as traveling which are essential to the job? **Legal**
14. Have you ever been convicted of a crime? **Legal**
15. Do you own your own home? **Illegal**

*Note that these questions themselves may not be legal or illegal but hiring practices based on these answers may be.*
Discussion Questions

1. How do you go about writing questions for the interview?
2. When is it okay to ask a candidate questions about his/her finances?
3. What steps do you need to take to prepare for the interview?
4. What should be included in your interviewing notes?
5. Discuss some of the legal vs. illegal questions to ask in an interview.
Quiz

1) Which questions regarding drug and alcohol use are legal to ask in an interview?
   A) Questions regarding drug rehabilitation and therapy
   B) Questions about drug related arrests
   C) Questions about current use of illegal drugs
   D) Questions about the drug use of friends, family members or associates

2) All candidates should be given the same amount of interviewing time?
   A) True
   B) False

3) How can you legally ask if a candidate can work Sundays and holidays?
   A) Ask if he/she attends church services on Sundays.
   B) Ask what, if any, religious holidays he/she observes.
   C) Ask if he/she is a practicing member of any faith.
   D) Explain that the position requires some Sunday and holiday hours and ask if this would be a problem.

4) If you find a candidate you really like, be sure to promise future raises, bonuses and promotions to entice them.
   A) True
   B) False

5) Social media accounts can reveal a lot about a candidate. How should you use these tools to assess a candidate?
   A) Use everything you can find - this shows the "real" candidate.
   B) Think twice about looking at these accounts as you may learn dangerous information you would not have otherwise known.
   C) Only search accounts for candidates that you are unsure about and for whom you would like additional information.
   D) All of the above

6) If you have concerns about a candidate's ability to do the job because they look older and you are trying to gauge their age, which question can you ask?
   A) Do you plan on retiring soon?
   B) Do you have any medical problems or tire easily?
   C) Do you have any grandchildren?
   D) Is there any reason you would not be able to work long days during the busy season?
7) How should you handle seeking financial information on a candidate?
   A) You may seek answers to questions about credit history or bankruptcy if it is critical to the job.
   B) Be sure to never ask financial questions of a person with a disability.
   C) You can ask or look up anything you want as there are no rules in place for this type of information.
   D) Run a credit report if the address on the resume or application is in a low income area.

8) When taking notes what information should you include?
   A) How a candidate looks and is dressed.
   B) Answers to the pre-planned questions.
   C) Your best guess at the candidate's age.
   D) Any information given about his/her personal life and activities.

9) Which of the following questions is okay to ask a person with a disability?
   A) Will we have to buy special equipment for you to be able to do your job?
   B) Can you perform the essential functions of the job with or without reasonable accommodation?
   C) Can you be as productive as someone without the same challenges you face?
   D) Will your condition worsen?

10) When is it okay to ask about foreign languages?
    A) When you don't want to hire a foreigner.
    B) When you are trying to learn a person's citizenship.
    C) When you need to hire someone fluent in another language.
    D) Never

11) A recommended question for learning about a candidate's personal responsibility and finances is to ask if they are a homeowner.
    A) True
    B) False

12) Which of the following is a safe question to ask in an interview?
    A) Your resume states you are a volunteer at Alcoholics Anonymous. Are you a recovering alcoholic?
    B) You mentioned your kids earlier - how many do you have?
    C) I see you went on a mission trip. Was this with your church?
    D) What leadership experience did you gain on your mission trip?
13) It is illegal to ask a candidate questions about:
   A) Age
   B) Race
   C) Sexual Orientation
   D) All of the above

14) Which of the following should be used to write your pre-planned interview questions?
   A) Scripted questions from the internet
   B) Questions gathered from department employees who know the job.
   C) An updated job description.
   D) Don't use pre-planned questions. Let your intuition drive the interview.

15) It is perfectly fine to ask a candidate about any currently military obligations or service so as to avoid a situation where an employee may have to go on military leave.
   A) True
   B) False
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   A) True
   **B) False**
Legal Interviewing - Asking the Right Questions
Training Acknowledgement

I acknowledge that I have attended (your organization name) legal interviewing training and completed the attached quiz.

Signature:

__________________________________________________________

Print Name:

__________________________________________________________

Date:

__________________________________________________________