

NATIONAL ASSOCIATION OF PERSONNEL SERVICES

Independent Study Course Number 23

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APPLICATIONS AND INTERVIEWS: HOW CAREFUL ARE YOU?

By Paula N. Rubin, Esq.

What current or past medical problems might limit your ability to do a job? That is the \$157,700 question. At least that's what a jury thought when it required an employer to pay that sum to an employee when it asked him that question.

With the enactment of the Americans with Disabilities Act (ADA), there has been a renewed interest given to the tension between protecting the civil rights of persons with disabilities and an employer's right to effectively screen and hire employees.

One of the driving principles behind the ADA is that employers not make hiring decisions based on fears, myths, and stereotypes. However, that does not mean that employers must make these hiring decisions in a vacuum. The ADA contains mechanisms, which help employers to lawfully screen applicants to evaluate their ability to do the job.

First, however, it is important to review the basics about discrimination during the hiring process and, in particular, applications and interviews. Remember, discrimination can occur not only by virtue of an individual's disability, but also because of some other immutable characteristic.

Federal law makes it illegal to discriminate on the basis of race, color, religion, sex, age, national origin, or disability. In addition, most, if not all, states have some form of civil rights statute which prohibits discrimination.

Employment discrimination can occur while on the job or before an individual is even hired. Often an employer's first contact with a job applicant is its job application. If the application asks inappropriate questions, it could have the unintended effect of screening out otherwise qualified candidates on the basis of one of these protected classifications.

Likewise, the interview can invite opportunities to ask questions which, while innocent on the surface, may have a discriminatory effect.

Every employer should make sure that its house is in order and that its employment application and interview process can withstand the kind of scrutiny it would get from a potential adversary. Employers should conduct an internal inventory to ensure that its practices and procedures do not offend any of the anti-discrimination laws, both state and federal.

General Considerations

Employers should ask themselves three things about the questions used on an application or during an interview:

- Does this question disproportionately screen out individuals with disabilities, minorities, or women?
- Is the question asked designed to measure a person's ability to do the job?
- Is there a way to ask the question to obtain the information needed to evaluate the candidate that is not inappropriate?

A Review of some Basics

National Origin

Questions about national origin, ancestry, lineage, or foreign addresses should be avoided.

- You shouldn't ask, "Are you a citizen of the United States?" But you could ask, "Are you authorized to work in this country?"
- You shouldn't ask, "How did you learn to speak a foreign language?" But you could ask, "Do you speak any foreign languages?"

Sex

Questions about family, children, child care arrangements, pregnancy, marital status, spouse's occupation, travel or relocation plans, maiden name, or previous married name should be avoided because historically they have been used to screen out women.

- You shouldn't ask, "Do you have any children?" or "What arrangements have you made for child care?" But you could say, "Our office hours are from 8 am until 5 pm. Is there any reason why you would not be able to work these hours on a regular basis?"
- You shouldn't ask, "Does your spouse's job require him/her to relocate?" But you could say, "We will need a commitment from you to remain with us for the next 12 months. Is there anything that would prevent you from keeping this commitment?"

Age

Avoid asking questions regarding age or date of birth.

- You shouldn't ask, "When did you graduate from high school or college?" But you could ask, "Do you have a high school or college diploma?"

Religion

Don't ask about religious beliefs or holidays observed.

- You shouldn't ask, "What religious holidays do you observe?" But you could say, "Our business hours are 8 am to 5 pm Monday through Friday. Is there any reason that you wouldn't be able to work these hours on a regular basis?"

Special Focus: Disability

The ADA divides the hiring process into two distinct parts: the pre-offer and post-offer stages. Before a conditional offer of employment is made, employers may not make any disabilities-related inquiries. Likewise, applicants may not be required to take any medical exams.

Pre-Offer

Employers may not ask disability-related questions before an applicant has been given a conditional offer of employment. A "disability-related" inquiry is one that will likely elicit information regarding the applicant's disability.

- You shouldn't ask, "What is the nature or severity of your disability?"
- But you could ask, "Can you describe or demonstrate for me how you would perform the following essential functions of the job?"
- You shouldn't ask, "Do you need a reasonable accommodation to perform the essential functions of the job?" because this would likely elicit information about a disability.
- But you could ask, "Do you need an accommodation to participate in the application process?"

Inquiries about attendance are permissible in certain circumstances.

- You shouldn't ask, "How many sick days did you take last year?"
- But you could ask, "How many Fridays did you miss while on your last job?"

Employers should be very careful when inquiring about prior drug use. The ADA protects persons who were addicted to drugs (but not individuals with a history of casual or recreational use) who are in or have successfully completed rehabilitation and are not currently using them. It is permissible to ask about prior illegal use of

drugs, both prescription drugs and illicit drugs. It is not okay to ask about lawful use of drugs. Nor should employers ask about prior drug addiction.

- You shouldn't ask, "Are you currently taking or using any drugs?" Have you ever been addicted to drugs?" or "What prescription medicines do you take?"
- But you could ask, "Are you currently illegally using any drugs?" or "Have you ever been convicted for the sale or possession of illegal drugs?"

Some other inquiries that should be avoided prior to making a conditional offer of employment relate to, for instance: medical histories, workers' compensation histories, hospitalization, height, or weight. Finally, it is permissible to request documentation from a doctor or rehabilitation counselor when an applicant requests a reasonable accommodation.

In addition to disability-related inquiries, employers may not administer medical exams at this stage of the application process. Some hallmarks of a medical exam are:

- The test is administered by a health care professional or someone trained by a health care professional.
- The results of the test are interpreted by a health care professional or someone trained by a health care professional.
- The test is invasive; i.e., the taking of blood, breath, or urine.
- The test is normally given in a medical setting.
- The test uses medical equipment.
- The test is designed to reveal an impairment or something about physical or mental health.

Examples of screening devices that might be construed as medical exams include:

- Polygraph tests – because they customarily ask the person being examined if they are currently taking any medications
- Psychological tests that reveal mental impairments rather than things about a person's tastes or habits
- Medical examinations: and
- Vision exams

Drug tests and agility tests, however, may be administered at the pre-offer stage.

Post-Offer

Once the employer makes a bona fide conditional offer of employment, medical exams may be administered and disability-related inquiries may be made. A conditional offer of employment is bona fide when the employer has evaluated and considered all of the relevant non-medical, non-disability related issues. Once a conditional offer is made, the employer may secure basic medical information from the applicant and may ask the individual for more information related to the previously provided information.

Employers may not, however, withdraw the conditional offer based on the basis of an applicant disability unless doing so is job-related and consistent with business necessity.

A Final Word...

Questions on an application or during an interview can be a source for potential claims of discrimination. While there is no way to prevent a claim from being made, there are ways to minimize exposure to such claims. To the extent possible, standardize the application and interview process. Make sure that all applicants for a particular position are asked fundamentally the same questions. This decreases the chances of asking inappropriate questions. Make sure that questions are objective. Most importantly, keep questions focused on the job requirements and the skills necessary to perform those requirements.

CONTINUING EDUCATION UNIT (CEU) REGISTRATION

Complete the registration information below and forward this page, containing the independent study examination and your answers, plus payment to: NAPS, 3133 Mount Vernon Avenue, Alexandria, VA 22305. The processing fee for the continuing education units for each NAPS independent study course is \$10 for members and \$20 for non-members. Feel free to reproduce the registration and examination page to allow additional individuals to apply for CEUs.

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Current NAPS member \$10 Non-member \$20

EXAMINATION QUESTIONS

Multiple-choice and true/false questions with a section where you will need to check off the correct responses. Circle the response you believe to be correct. Be certain to answer all of the questions.

1. To avoid claims of discrimination, candidates for employment should be asked:
 - a. questions that probe their individual background and experience
 - b. fundamentally the same questions
 - c. a limited number of questions
 - d. none of the above
2. Interview questions are less likely to be considered discriminatory if they
 - a. require objective rather than subjective responses
 - b. are directly related to the questions on the job application
 - c. focus on the job requirements and skills necessary to perform those requirements
 - d. none of the above
3. Which of the following criteria should NOT be used to determine questions used on an application or during an interview?
 - a. is the question asked designed to measure a person's ability to do the job?
 - b. Is there a way to ask the question to obtain the information needed to evaluate the candidate that is not appropriate?
 - c. Will all candidates be able to answer this question?
 - d. Does this question disproportionately screen out minorities or women, or individuals with disabilities?
4. A possible safeguard against discrimination claims by applicants is to standardize the application an interview process:
True
False

5. Employers may not ask disability-related questions until the applicant has been given a conditional offer of employment:
True
False
6. The Americans with Disabilities Act does allow the medical examination to be used as a screening device during the pre-offer phase of the hiring process:
True
False
7. Employment applications could have the unintended effect of screening out qualified candidates:
True
False

Place a check mark in front of the application and interview questions in the following group that Rubin suggests are APPROPRIATE to ask for employment.

8. Are you authorized to work in the United States?
9. What year did you graduate from high school?
10. Will you have to miss work for any religious holidays?
11. Will you require reasonable accommodation to perform the essential function associated with this position?
12. Do you have a college diploma?
13. What is the severity of your disability?
14. Do you know of any circumstances that would keep you from making a commitment to be with us for the next 12 months?
15. Are you currently using any illegal drugs?