

CHAPTER FIVE: EEO & LEGAL ISSUES

Conflict of Interest - Search Committee members shall be required to sign the *SEARCH COMMITTEE CODE OF ETHICS FORM* to prevent potential conflict of interest situations. Search Committee members should not be related by kinship, personal relationships, or be engaged in business ventures with persons who may apply for the vacant position. Persons who are known adversaries of potential applicants likewise should not be members of a Search Committee. It is incumbent and required that a Search Committee member disclose when such a conflict arises (H&H 85).

Upon having knowledge of any conflict of issue potential, the Search Committee Chairperson should evaluate the situation to determine if the matter is resolvable at the committee level. If not, the matter should be discussed at the departmental level, followed by the next chain of command until all avenues are exhausted. In cases of conflict with the reporting hierarchy or unresolved disputes, the EEO/ADA Director is to be consulted for advice prior to contacting the Provost.

Pre-employment Inquiries

[Source: CCH Incorporated's "*Business Practices*" (2000), pp. 614-618, ¶420]

No questions should be directed to any candidate concerning race, color, religion or national origin, the Equal Employment Opportunity Commission regards such inquiries with extreme disfavor. Such questions frequently bear no demonstrable relationship to a job applicant's ability or qualification as an employee and, consequently, serve no lawful purpose. Accordingly, the use of such inquiries, either directly or indirectly, may weigh significantly in the EEOC's decision as to whether or not the law has been violated. As a rule of thumb, only information that is necessary to assess an applicant's competence or qualification for a job should be asked at the prehire stage. For example, an employer's unexplained inquiry as to an applicant's religion, coupled with the subsequent failure to hire that applicant, provided a basis for a determination that the federal ban on religious discrimination had been violated. Information on such matters as marital status, number and age of children, and other matters that may be necessary for insurance, reporting requirements, or other business purposes, can be obtained *after* a person is hired.

Subjective Qualities

Motivation, ambition, interest in the trade, willingness to accept directions, attitude toward related instruction, maturity, personality, ability to communicate, as well as subjective qualities such as attractiveness and neatness are generally permissible subjects of preemployment inquiries. For example, there was a lawful basis for refusing to hire a job applicant who demonstrated illogical behavior during her job interview. Such an attitude was unsuited for the type of employment she was seeking.

Consistency

It is clear, however, that to the extent that a preemployment inquiry is valid, it should be made with respect to all interviewees. The failure to conduct job interviews in a consistent, standardized manner from one job applicant to the next may invite charges of race, color, religion, national origin, sex or disability discrimination. Oral interviews are permissible so long as they are accompanied by objective criteria.

Chilling Effect

Inquiries that would tend to have a chilling effect on minority employment because they are based on criteria that operate to disqualify women and minorities at a higher rate than nonminorities (e.g., questions relating to intentions to have children, credit ratings, military discharge and arrest records) have been considered suspect by the EEOC, requiring a showing of job-relatedness.

Arrest and Criminal Records

Questions about arrests are extremely risky because arrests, unlike convictions, are not conclusive evidence that a crime was committed. According to the EEOC, an employer will seldom be able to justify making broad inquiries about arrests. Even if an offense alleged in an arrest record is related to the job that an applicant has applied for the employer must determine whether the applicant actually committed the alleged conduct before it can reject the applicant on the basis of the record. The employer would thus have to make further inquiry into the person's character or prior conduct.

A blanket ban on hiring persons with conviction records can have a disparate impact on women and minorities. However, rejection on the basis of conviction records may be lawful when particular types of offenses bear on an applicant's fitness for a position. For example, a recent conviction for drunken driving would reflect on an applicant's ability to safely perform a bus driving job. If inquiries about conviction records are made, they should be accompanied by a statement that such a record will not necessarily be a bar to employment, and that factors such as age of the offense, seriousness and nature of the violation, and rehabilitation will be taken into account.

Gender

Preemployment inquiries as to gender, or asking the applicant to choose among Mr. Mrs. Ms. as a title, may be made if done so in good faith for a nondiscriminatory purpose; but inquiries that express, directly or indirectly, any limitations as to gender are unlawful unless based on a bona fide occupational qualification.

Questions concerning marital status, pregnancy, future childbearing plans, or number and age of children should be avoided. Such questions can be unlawful if used to deny or limit employment opportunities of female applicants.

Religion

Inquiries concerning an applicant's availability to work during an employer's scheduled work hours can have an exclusionary effect on the employment opportunities of persons with certain religious practices. The EEOC will consider the use of such inquiries unlawful unless employer can show:

- such an inquiry did not have an exclusionary effect on employees or applicants needing an accommodation for religious practices; or
- the inquiry was justified by business necessity.

Age

As with inquiries regarding race, color, religion, gender, national origin, there is no express prohibition against inquiring about a person's age at the preemployment stage. Of course, inquiries as to age may not be made for a discriminatory purpose. A person's actual age may be ascertained *after* employment for purposes of calculating employee benefits and the like.

A request for information such as "Date of Birth" or "State Age" on an application form is not, in itself, unlawful. However, because such requests may tend to deter older applicants from applying, the EEOC will closely scrutinize them.

Disability/Handicap

An employer may shall not ask disability-related questions and may shall not conduct medical examinations until *after* it makes a conditional job offer to the applicant. This helps ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before the employer evaluates an applicant's non-medical qualifications. An employer may shall not ask disability-related questions or require a medical examination pre-offer *even if* it intends to look at the answers or results only at the post-offer stage.

Although employers may not ask disability-related questions or require medical examinations at the pre-offer stage, they *may* do a wide variety of things to evaluate whether an applicant is qualified for the job, including the following:

- Employers *may* ask about an applicant's ability to perform specific job functions. For example, an employer may state the physical requirements of a job (such as the ability to lift a certain amount of weight, or the ability to climb ladders), and ask if an applicant can satisfy these requirements.

- Employers *may* ask applicants to describe or demonstrate how an applicant would perform job tasks (U.S. EEOC p. 530-531).

Any questions regarding applicants with disabilities may be directed to the EEO/ADA Director at 646-3333.

Friends or Relatives Working for the Employer

Information about friends or relatives working for an employer is not relevant to an applicant's competence. Requesting such information should only be done in an effort to address any potential conflict of interest or family supervision situation.

According to university policy, “*Members of an immediate family may be employed by the university except when one individual will supervise the work of the other. If one member of the family is to be employed in the same department as another, approval shall be obtained from the provost prior to any offer to employment. Under no circumstances will a supervisor evaluate an immediate family member*” (NMSU Policy Manual, Section 4.45).

Avoid any questions related to the following areas: age, ancestry, color, (mental or physical) disability, gender, gender identity, national origin, race, religion, serious medical condition, sexual orientation, spousal affiliation, and veteran status. Therefore, any questions asked along such lines are regarded inappropriate and irrelevant to the person's qualifications. Similarly, questions related to whether (or not) the candidate is married and/or availed himself/herself of due process rights are not appropriate.