

OAPT Annual Training Program

CAN I ASK THAT? INTERVIEWING TIPS AND BEST PRACTICES



CONSULTANTS TO MANAGEMENT

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BAN THE BOX

- **Illinois:** Yes – prohibits employers from considering or inquiring into a job applicant's criminal record or history until the individual has been determined qualified and notified of impending interview, or if not interview, after a conditional offer.
- **Indiana:** No. Senate Bill 312 – pending signature – prohibits any political subdivision from enacting "ban the box" legislation.
- **Iowa:** No. SF 2240 – introduced but not signed into law
- **Michigan:** No.
- **Minnesota:** Yes – employers must wait until the applicant has been selected for an interview, or until a conditional job offer has been extended, before inquiring about the applicants history
- **Nebraska:** No.
- **Ohio:** Yes - Prohibits Public Employers from inquiring about criminal convictions on the job application
- **Wisconsin:** Yes – prohibits employers from inquiring about criminal convictions on the job application

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EEOC's 2012 ENFORCEMENT GUIDELINES

- Issued April 25, 2015
- Excluding individuals from jobs based on criminal records shown to have a disparate impact on race.
 - Result: Employers must show that excluding an applicant from employment based on a conviction or arrest is "job related and consistent with business necessity."
- *Green v. Missouri Pacific Railroad*
 - To show a business necessity, the screening process must consider three factors: 1) The nature/gravity of the crime; 2) time elapsed; and 3) Nature of the position sought.
- Employers must also provide an opportunity for "individualized assessment."

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EEOC's 2012 ENFORCEMENT GUIDELINES

- The National Equipment Rental Company uses the Internet to accept job applications for all positions. All applicants must answer certain questions before they are permitted to submit their online application, including "have you ever been convicted of a crime?" If the applicant answers "yes," the online application process automatically terminates, and the applicant sees a screen that simply says "Thank you for your interest. We cannot continue to process your application at this time." The Company does not have a record of the reasons why it adopted this exclusion, and it does not have information to show that convictions for all offenses render all applicants unacceptable risks in all of its jobs, which range from warehouse work to delivery to management positions.

Permissible? **Exclusion Is Not Job Related and Consistent with Business Necessity.**

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EEOC's 2012 ENFORCEMENT GUIDELINES

- Leo, an African-American male, has worked successfully at PR Agency as an account executive for three (3) years. After a change of ownership, the new owners adopt a policy under which it will not employ anyone with a conviction. The new owners, who are highly respected in the industry, pride themselves on employing only the "best of the best" for every position. The owners assert that a quality workforce is a key driver of profitability. Twenty (20) years earlier, as a teenager, Leo pled guilty to a misdemeanor assault charge. At PR Agency, all of Leo's supervisors assessed him as a talented, reliable, and trustworthy employee, and he has never posed a risk to people or property at work. However, once the new ownership of PR Agency learns about Leo's conviction record through a background check, it terminates his employment.

Permissible? **NO**; exclusion is **Not Job Related and Consistent with Business Necessity**.

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INTERVIEWING

INQUIRIES BEFORE HIRING	LAWFUL	UNLAWFUL
1. Name	Name	Inquiry into any title which indicates race, color, religion, sex, national origin, handicap, age, military status, or ancestry.
2. Address	Inquiry into place and length of current address.	Inquiry into foreign addresses which would indicate national origin.
3. Age	Any inquiry limited to establishing that applicants meet any minimum requirements that may be established by law.	A. Requiring birth certificates or baptismal record before hiring. B. Any other inquiry which may reveal whether the applicant is at least 40 years of age.

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INTERVIEWING

INQUIRIES BEFORE HIRING	LAWFUL	UNLAWFUL
4. Birthplace or National Origin		A. Any inquiry into place of birth. B. Any inquiry into place of birth of parents, grandparents, or spouse.
5. Race or Color	For applicant flow data.	Any inquiry which would indicate race or color.
6. Sex	For applicant flow data.	A. Any inquiry which would indicate sex. B. Any inquiry made of members of one sex, but not the other.

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INTERVIEWING

INQUIRIES BEFORE HIRING	LAWFUL	UNLAWFUL
7. Religion		A. Any inquiry which would indicate or identify religious denomination or custom. B. Applicant may not be told any religious identity or preference of the employer. C. Request pastor's recommendation or reference.
8. Disability	Whether applicant can perform the essential functions of the position (before conditional selection). Whether candidate requires an accommodation to perform essential functions (after conditional selection).	Any inquiry concerning need for accommodation (before conditional selection). Any inquiry regarding disability or medical conditions, workers compensation filings, etc.
9. Citizenship	A. Whether a U.S. Citizen B. If not, whether applicant intends to become one. C. If U.S. residence is legal. D. If spouse is citizen. E. Require proof of citizenship after being hired (I-9 Form).	A. If a native-born or naturalized. B. Proof of Citizenship before hiring. C. Whether parents or spouse are native-born or naturalized.

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INTERVIEWING

INQUIRIES BEFORE HIRING	LAWFUL	UNLAWFUL
10. Photographs	May be required after hiring for identification purposes.	Required photograph before hiring.
11. Arrests and Convictions	Inquiries into conviction of specific crimes related to qualifications for the job for which application is made.	Any inquiry which would reveal arrests without convictions.
12. Education	A. Inquiry into nature and extent of academic, professional, or vocational training. B. Inquiry into language skills such as reading and writing foreign languages.	A. Any inquiry which would reveal the nationality or religious affiliation of a school. B. Inquiry as to what mother tongue is or how foreign language ability was acquired.

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INTERVIEWING

INQUIRIES BEFORE HIRING	LAWFUL	UNLAWFUL
13. Relatives	Inquiry into name, relationships, and address of person to be notified in case of emergency.	Any inquiry about a relative which would be unlawful if made about the applicant.
14. Organizations	Inquiry into organization memberships and offices held, excluding any organization, the name or character of which indicates the race, color, religion, sex, national origin, disability, age, or ancestry of its members.	Inquiry into all clubs and organizations where membership is held.
15. Military Status	For applicant flow data.	In Ohio, Illinois, any inquiry into military service past or present is prohibited. Military status is now a protected class similar to race, sex, and age.

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INTERVIEWING

INQUIRIES BEFORE HIRING	LAWFUL	UNLAWFUL
16. Work Schedule	Inquiry into willingness to work required work schedule.	Any inquiry into willingness to work any particular religious holiday.
17. Other	Any question required to reveal qualifications for the job applied for.	Any non-related inquiry which may reveal information permitting unlawful discrimination.
18. References	General personal and work references not relating to race, color, religion, sex, national origin, handicap, age, military status, or ancestry.	Request references specifically from clergymen or any other persons who might reflect race, color, religion, sex, national origin, disability, age, military status, or ancestry.

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HOW TO SUCCEED

- **Preparation.**
 - Create a written list of questions that you will ask **ALL** applicants.
 - Make sure that the job description is up-to-date and that all of the questions asked relate to the essential functions of the job.
 - Create a system for recording the results of the interviews.
 - Review resumes closely
 - Are there gaps in employment?
 - Are there jobs that ended within one (1) year of hire?
 - Exaggerations?

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INTERVIEW FORMAT

- **Level 1 Questions:**
 - Questions asked to all applicants.
- **Level 2 Questions:**
 - "Behavioral" interview questions
- **Level 3 Questions:**
 - Questions specific to each applicant

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THE ADA

- **Medical Exams**
 - Post offer, pre-employment
- **Can you ask about the applicant's ability to perform the essential functions of the job without violating ADA?**
 - Yes. You can ask an applicant if they can perform the essential functions of the job with or without an accommodation.
- **Provide job description**

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REFERENCE CHECKS

- **Commandment 1:** Employers **SHALL** require applicants sign a written release when seeking references from individuals.
- **Commandment 2:** Employers **SHALL** use caution when providing references to requesting parties.
 - Why?
 - Defamation of character. Intentional interference with future business activities. Etc. Etc.

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SOCIAL MEDIA

- Can we use it?
 - Yes.
- What risks come with using social media for interviews?
 - **Discrimination.** *Gaskell v. Univ. of Kentucky*, No. CIV.A.09-244-KSF, 2010 WL 4867630 (E.D. Ky. Nov. 3, 2010)
 - Invasion of privacy.
 - **Retaliation.** *Jaszczyszyn v. Advantage Health Physician Network*
 - **Stored Communications Act.** *Pietrylo v. Hillstone Restaurant Group*

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CASE STUDIES

- *EEOC v. Abercrombie and Fitch*, 135 S. Ct. 2028 (2015)
 - **Hijab Discrimination.** Employer had a "look policy" prohibiting any type of headware. The case stemmed from the company's decision to reject a job applicant whose headscarf, which she wore in observance of her Muslim religious beliefs, was deemed to violate the company's dress code.
 - The Supreme Court found that "an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed." *Id.*, 135 S. Ct. 2033. The Court then declared that "the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." *Id.* In an 8-1 vote, the Supreme Court reversed the Appellate Court decision and remanded the case back to the 10th Circuit for further proceedings. The parties subsequently settled out of court.

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CASE STUDIES

- *Barbano v. Madison County*, 922 F.2d 139 *Barbano v. Madison Cnty.*, 922 F.2d 139, 141 (2d Cir.1990)
 - Can panel interviews protect against discrimination claims?
 - Discriminatory questions by one member can taint the entire process!
 - Plaintiff alleged she was rejected from employment due to her sex. Plaintiff was interviewed by a six member panel. Prior to entering the interview room, plaintiff heard someone say "here are copies of the next resume," followed by "oh, another woman." One member asked plaintiff her plans for having a family and whether her husband would object to her transporting men. The same member stated that the questions were relevant because he did not want to hire a woman who would get pregnant and quit.

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CASE STUDIES

- *EEOC v. Service Temps, Inc. d/b/a Smith Personnel Solutions*
 - The EEOC alleged that Service Temps refused to hire Jacquelyn Moncada for a stock clerk position, despite her qualifications and experience, upon learning that Moncada is deaf. Through a sign language interpreter, Moncada attempted to explain to the company that she was fully capable of performing the job and that she had several years of stock clerk experience. The company refused to conduct an interview or consider Moncada for the position. A Service Temps manager explicitly told Moncada that she would not be hired because she could not hear.

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CASE STUDIES

- *EEOC v. High Speed Enterprise, Inc., d/b/a/Subway*, (D.Ariz. 2011)
 - "You're pregnant. We can't hire you."



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QUESTIONS???



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