

THE APPLICANT, THE INTERVIEW, THE LAWSUIT

Interviewing Techniques: What's Legal and What's Not

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Interviewing Techniques

Why Are We Having This Discussion?

- Ensure consistency and quality of new hires
- Keep interviewers focused on task at hand
- Avoid legal liability



Interviewing Techniques

The Hiring Process - Overview

- Three Critical Phases:
 - The written or online application
 - The interview
 - First day orientation
- Today's focus is on the interview



Interviewing Techniques

Why Do We Engage in Live Interviews?

- Gather Information about the applicant
- Assess character, demeanor and “fit”
- Interest the applicant in the company

Interviewing Techniques

What are the Risks of Live Interviews?

- Lawsuit by rejected applicant
- Provides evidence of discrimination/harassment in lawsuit by applicant long after she/he is hired
- Provides evidence of discrimination/harassment in lawsuit by other employees who secure applicant's testimony

Increased risk due to lack of documentation



Interviewing Techniques

What is the Relevant Legal Landscape?

- Title VII, ADEA, ADA, etc.
 - Race, color, national origin, gender, religion
 - Age
 - Disability
 - Veteran status
- State and local human rights laws
 - Sexual orientation
 - Marital status, family responsibilities
 - Matriculation
 - Political affiliation
 - Appearance



Interviewing Techniques

What is the Relevant Legal Landscape?

- FMLA
- FLSA
- Retaliation (SOX, whistleblower laws, workers comp)

In other words: Almost any employment-related law

Interviewing Techniques

How Can a Good Interview go Bad?

- Improper questions
 - asking for medical information
- Poorly worded questions
 - may suggest an improper motive or consideration
- Bad answers to applicant's questions
 - may suggest ignorance or non-compliance
- 'Chit chat' and 'small talk'
- Flirting (Yes, it happens . . .)



The Interview “Foul”

Race, Color and National Origin

- Poor Questions
 - Family background, lineage
 - Accent
 - Length of US residency
 - Language proficiency
 - Country of origin
 - Arrest records
- Poor commentary
 - ‘We’ve been looking for minorities’

The Interview “Foul”

Gender, Pregnancy and Marital Status

- Poor Questions
 - Regarding marital status
 - Regarding childcare, family commitments
 - Regarding romantic interests
- Poor commentary
 - ‘We’ve had too much maternity leave lately’
 - ‘Men don’t get paternity leave here’
 - ‘I assume your wife takes care of the kids’



The Interview “Foul”

Age

- Age-based comments and questions
- Code words
- Retirement issues



The Interview “Foul”

Religion

- ‘We adhere to Christian values here’
- ‘Is that a Jewish name?’
- ‘Are there any holidays you cannot work?’
- ‘Where do you go to church?’



The Interview “Foul”

Miscellaneous

- Military Service
- Sexual Orientation
- Retaliation Issues



The Interview “Foul”

Disability

- Watch out for different requirements:
 - Must not discriminate
 - Also must provide reasonable accommodations
- Two stages with different rules:
 - Pre-offer
 - Post-offer



The Interview “Foul”

Disability – Pre-Offer Stage

- You may not ask disability-related questions or require medical examinations
- You may not ask about need for accommodations unless applicant brings it up
- If applicant discloses disability in response to fair question, or if disability is obvious, it does not mean “open season” on medical questions

The Interview “Foul”

Disability – Pre-Offer Stage (cont’d)

- Exceptions:
 - You may ask an applicant with a known and obvious disability to explain how he or she would perform the position’s essential functions
 - You may ask an applicant to demonstrate how she or she would perform the position’s essential functions, if asked of all applicants
- Otherwise, limit questions to non-medical qualifications and essential functions generally

The Interview “Foul”

Disability – Post-Offer Stage

- You may ask about disabilities and can require medical examinations if:
 - Required of all applicants, and
 - Required by business necessity
- You may ask whether accommodations are needed
- Questions regarding drug and alcohol abuse are generally OK, as is testing in compliance with state drug-testing laws

The Interview “Foul”

How to Avoid Interview Fouls – Preparation

- Review company EEO policies in advance
- Review handbook and benefit information
- Review the position description and advertisements or postings; know the qualifications sought and hiring objectives
- Review the written application and resume thoroughly
- Prepare script for each position and follow for each applicant

The Interview “Foul”

How to Avoid Interview Fouls – Practical Tips

- Be professional and courteous
- Focus questions on the job qualifications
- Ask same/similar questions of all candidates
- Don't make assumptions
- Be careful with 'why' questions
- Don't tell jokes
- Don't flirt



The Interview “Foul”

How to Avoid Interview Fouls – Practical Tips

Overall:

- Use common sense
- Listen more than you speak

When in doubt – DON'T ASK!!