

One of the purposes of the fair employment law is to encourage employers to evaluate job applicants on the basis of their qualifications, rather than on their membership in a particular class to which they may belong. Under section 111.322(2) of the Wisconsin Statutes it is unlawful:

To print or circulate any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which implies or expresses any limitation or discrimination based upon a person's race, color, creed, ancestry, national origin, age, sex, disability, arrest or conviction record, marital status, sexual orientation, military service, or use or non-use of lawful products away from work.

For example, an employer might ask an applicant, "What nationality are you?" This question implies that an applicant's national origin will be a factor in the employment decision. Even if the employer does not intend to discriminate against the applicant, asking the question may create problems.

This pamphlet deals primarily with avoiding discriminatory interview questions. Employers should also review all of their recruitment, hiring, and promotion processes to be sure that they are fair.

Before Hiring, You May Want to Consider the Following:

- Review the essential functions of the job. What skills will an applicant need in order to perform the job successfully?
- What kinds of interview questions will help determine if an applicant can perform the functions of the job? If you intend to pre-screen applicants, develop objective and relevant benchmarks, and apply them uniformly.
- Review how you advertise and recruit for positions. Do you reach all areas of the community, or are some groups excluded? Note that word-of-mouth or employee referral methods of recruitment may be unlawful if the current workforce is not representative of the area population.
- If using an application form, carefully review it to ensure that it does not ask for discriminatory, irrelevant, or non-essential information.
- Consider if barriers exist for applicants using wheelchairs, those who have hearing or vision impairments, learning disabilities, or other disabilities. If barriers do exist, consider what accommodation an applicant may need. (See pamphlet #4 "Persons with Disabilities on the Job" for resources regarding reasonable accommodations).
- When advertising, be careful about the language you use. Ads which imply or express an unlawful preference or limitation such as, "young, energetic" (which can imply age discrimination) should be avoided.

If You Need Assistance:

Job Service has trained job counselors who can assist in matching employers and qualified applicants. To locate the Job Center in your area, call 1-888-258-9966, or go to www.wisconsinjobcenter.org.

QUESTIONS TO AVOID DURING THE HIRING PROCESS

The key to understanding what inquiries might be unlawful is to ask only questions that will provide information about the person's ability to do the job, with or without a reasonable accommodation. Keep in mind that if it is unlawful to ask the applicant a question directly, it is also prohibited to ask the same question as part of the pre-offer reference checks.

1. WHAT IS YOUR AGE OR DATE OF BIRTH?

Avoid age-based inquiries. Both state and federal laws prohibit discrimination against persons age 40 and older. An age inquiry may be made to ensure that a person is “old enough” to work for the job, or if the job is among the few where age discrimination is permitted (such as driving a school bus or some types of physically dangerous or hazardous work).

2. HAVE YOU EVER BEEN ARRESTED OR CONVICTED?

Wisconsin law prohibits inquiries about past **arrest records** but permits consideration of a current arrest. If an applicant is currently under arrest for an offense that is substantially related to the job, an employer may either suspend judgment until the case is resolved, advise the applicant to reapply when the charge is resolved, or refuse to employ the applicant. A current employee who is arrested may be suspended (but not discharged) if the charge is substantially related to the job.

With some exceptions, an employer may not refuse to employ a person or discharge a person with a **conviction record** unless the circumstances of the conviction substantially relate to the circumstances of the job. Therefore, if an inquiry about convictions is made, the employer should add a clarifier, such as: “A conviction will not necessarily disqualify you from employment. It will be considered only as it may relate to the job you are seeking.” Anyone who evaluates conviction record information for the employer should be knowledgeable about how such data may be used.

3. ARE YOU AVAILABLE FOR WORK ON SATURDAY AND SUNDAY?

This question may discourage an applicant whose religion prohibits work on their Sabbath, which might be Saturday or Sunday. If a question about weekend work is asked, the employer should indicate that a reasonable effort is made to accommodate religious beliefs or practices. An employer is not required to make an accommodation if doing so would create an undue hardship for the business.

4. DO YOU HAVE CHILDREN? WHAT ARE THEIR AGES? WHAT CHILDCARE ARRANGEMENTS DO YOU HAVE? ARE YOU PREGNANT OR PLANNING TO HAVE CHILDREN?

Typically, these questions are asked only of women, which make these inquiries unlawful. However, even if such inquiries are made of both men and women, the questions may still be suspect. Such information has been used to discriminate against women because of society’s presumption that they are the primary caregivers. If the employer’s concern is regular work attendance, a better question would be, “Is there anything that would interfere with regular attendance at work?”

5. WHAT COUNTRY ARE YOU FROM? ARE YOU AN AMERICAN CITIZEN?

Inquiries about a person’s citizenship or country of birth are unlawful and imply discrimination on the basis of national origin. A person who has lawfully immigrated to this country may not be discriminated against on the basis of citizenship. The Immigration Reform and Control Act of 1986 requires employers to verify the legal status of all new hires. Employers should not ask applicants to state their national origin, but should ask if they have legal permission to work in the United States. They should then explain that verification of that permission must be submitted after the decision to hire has been made. To satisfy verification requirements, employers should ask **all** new hires for documents establishing both identity and work authorization. For more details on these regulations, contact the U.S. Citizen and Immigration Services (USCIS) at 1-800-375-5283.

6. DO YOU HAVE A GARNISHMENT RECORD? DO YOU HAVE CREDIT PROBLEMS? ARE YOU A HOMEOWNER?

Answers to these inquiries are almost always irrelevant to job performance. Because census data indicates that minorities, on average, are poorer than whites, consideration of these factors may have a disparate impact on minorities. Therefore, requests of this nature may be unlawful unless clearly required by business necessity.

7. DO YOU HAVE A DISABILITY? WHAT IS YOUR HEALTH HISTORY?

Inquiries about a person's disability, health, or worker's compensation history before a job offer is made are unlawful if they imply or express a limitation based on disability. Under the federal Americans with Disabilities Act, **any** inquiry at the pre-employment stage which would likely require an applicant to disclose a disability is unlawful. Employers must avoid such inquiries or medical examinations before making a bona fide job offer.

However, an employer may inquire about an applicant's ability to perform certain job functions and (within certain limits) may conduct tests of all applicants to determine if they can perform job functions, with or without an accommodation.

8. DO YOU HAVE FRIENDS OR RELATIVES WORKING FOR US?

This question is not relevant to an applicant's competence and should be avoided. Since the question implies a preference for friends or relatives, it may be unlawful if the composition of the present workforce is such that this preference reduces or eliminates an employment opportunity for minorities, women or individuals in other protected classes.

9. ARE YOU PROFICIENT IN ENGLISH?

Some level of proficiency in English may be necessary for many jobs, but fluency or absence of an accent is not relevant for a substantial number of jobs. Employers must be careful about requiring English language proficiency and must be sure that the language skill level being sought does not exceed the level required for successful job performance.

10. WHAT IS YOUR MARITAL STATUS? WHAT IS YOUR SPOUSE'S NAME?

These inquiries are not relevant to job performance and could be used to discriminate. An employer may not discriminate against a person because of their status of being married, single, divorced, separated, or widowed.

11. DO YOU SERVE IN THE MILITARY?

Questions relevant to experience or training received in the military, or to determine eligibility for any veteran's preference required by law are acceptable. However, it is unlawful to discriminate against someone because of membership in the National Guard, a state defense force, or another state or federal reserve unit.

12. DO YOU SMOKE OR DRINK ALCOHOL?

An employer may not discriminate against a person for using (or not using) lawful products off the employer's premises during non-working hours. The law contains some exceptions, but employers generally should avoid inquiries in this area.

A FINAL NOTE

It is reasonable to assume that all questions on an application form or in an interview are for a specific purpose, and that decisions are made on the basis of the answers given. In deciding if a question is lawful, the employer should determine whether the information being sought is necessary. For example, why is it important to know a person's age, or their ability to speak Spanish? If the answer does not provide job-related information or determine a person's qualifications, it may be better not to ask the question. Questions which do not produce information that helps the employer choose the most qualified applicant tend to raise questions as to the employer's motivation for asking the question.

This is one of a series of fact sheets highlighting programs of the Wisconsin Department of Workforce Development. It is intended to provide only a general description of the law, not a legal interpretation. The Equal Rights Division has additional informational materials explaining various aspects of the fair employment law.

PAMPHLET SERIES

- #1 Fair Hiring and Avoiding Discriminatory Interview Questions
- #2 Harassment in the Workplace
- #3 Pregnancy, Employment and the Law
- #4 Persons with Disabilities on the Job
- #5 Wisconsin Fair Employment Law and Complaint Process
- #6 Age Discrimination in the Workplace
- #7 Settlement and Mediation
- #8 Race, Color, Ancestry and National Origin Discrimination
- #9 Sexual Orientation Discrimination

The Department of Workforce Development is an equal opportunity service provider. If you need assistance to access services or need material in an alternate format, please contact the Equal Rights Division.

Questions about employment discrimination should be directed to the:

**EQUAL RIGHTS DIVISION
CIVIL RIGHTS BUREAU**

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PO BOX 8928
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