

Hold Your Tongue: What Not to Say When Interviewing Applicants

NATHAN J. OVERBERG
AHLERS & COONEY, P.C.
100 COURT AVENUE, SUITE 600
DES MOINES, IOWA 50309
(515) 243-7611
noverberg@ahlerslaw.com

HYPOTHETICALS:

(1) You are interviewing the daughter of an old law school classmate who you know was recently in the hospital. During the interview you discuss the father's illness and learn he had heart failure. You ask whether he had a history of heart problems and/or whether it ran in the family. Any problems with that?

(A) Under Title II of the Genetic Information Nondiscrimination Act (GINA), it is illegal to discriminate against employees or applicants because of genetic information. Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, **as well as information about any disease, disorder, or condition of an individual's family members (i.e. an individual's family medical history). Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future.**

(2) An individual walks into the room for an interview to be your runner with a noticeable limp. You ask him what happened. Issues?

(A) The Americans with Disabilities Act and the Iowa Civil Rights Act pose particular problems because they both generally prohibit pre-employment medical inquiries. If information is disclosed that an applicant has a medical condition or disability, or the condition is obvious, the only purpose for discussing a mental or physical impairment is to ascertain the employee's views on how the disability does not interfere with performance of essential job functions and the nature of accommodation by the employer that should be considered. The specific requirements of the job should be discussed and, to the extent the applicant is willing to do so, compared with the applicant's ability to perform those functions with or without accommodation.

(3) A blond-haired, blue-eyed young woman walks into the interview room. You notice that her last name is Mohamed, and you notice that she went to the same high school with your daughter. You ask her for her maiden name. Any problem with that?

(A) There are many situations where proper questions can be asked in an improper way. For example, asking a female applicant her maiden name can be construed to be discriminatory, as it may disclose national origin (discrimination against an individual based upon individuals

they marry may be actionable), marital status, or because male applicants may not have been asked for prior names. However, if all applicants, male and female, are asked to provide all names that may have been used by them in the past and as are necessary to permit a check on work and education records, such a question has less of a chance of being considered discriminatory.

(4) You have previously made an offer to an individual, only to later learn that he had recently been arrested for shop lifting. So you start asking interviewees if they have ever been arrested. Any issues with that new practice?

(A) The EEOC has opined that asking for arrest histories has a disparate impact on minority applicants. In Iowa it is acceptable to ask all employees about CONVICTIONS. It is better practice to ask about recent convictions that may have some relevance to the job being filled.

(5) An applicant who attended your High School shows up for an interview. You ask the applicant what year he graduated. Any concerns?

(A) Any questions that tend to identify the age of an applicant, especially, anyone who is over 40, opens up the risk of an age discrimination claim. Other questions to be avoided include dates of attendance at college, years degrees obtained, whether the individual went straight through undergraduate and graduate school. The better course of action is to simply ask for education history (without dates of degrees obtained).

(6) A female applicant volunteers that she has two young children at home. You ask who takes care of the children. Ok?

(A) Unless you make a habit of asking the same question of all male applicants, this question would be a bad idea. Any questions which suggest that you are assuming a female applicant has child care responsibilities that may make her a less qualified candidate can lead to a claim of sex discrimination. A better approach is to generally ask all candidates if there is anything that may interfere with their ability to meet regular attendance expectations.

(7) An applicant has a significant accent. You ask-where are you from originally? Is that an acceptable question?

(A) No. Questions which elicit information about past residency or suggest you are interested in the applicant's national origin can give rise to claims of discrimination. Any concerns about eligibility for hire can occur after an employee is offered a job through the I-9 authorization process.

(8) An applicant's resume suggests he attended a school that was affiliated with some religion. Is it ok to ask what church it was affiliated with? OR What if the individual volunteers that he has 9 children. Is it ok to ask if he is Mormon or Catholic?

(A) No, not unless you want to defend a religious discrimination claim.

(9) You recently had to fire a secretary for stealing from the petty cash. When interviewing her replacement, you want to determine if the applicants have any credit problems that may make them a risk to do the same thing. Is it a problem to ask if they have had any personal bankruptcies?

(A) Possibly. The bankruptcy act makes it illegal to discriminate in employment on the basis of an individual having been a debtor in the bankruptcy process.

(10) So you successfully hire an employee and they stick around for 30 years. However, due to efficiencies in the practice brought on by new electronic processes, you have decided that staff should be reduced and your assistant is selected for the cull. To sooth the transition you want to treat the departure as a retirement. Should you offer to throw her a retirement party?

(A) No. The adage no good deed goes unpunished applies to this situation. On more than one occasion we have seen such an approach result in an age discrimination claim. Go forward with the reduction as you would for anyone else. Now, if she raises the idea, you can work with her on it, but don't be initiating any conversations about the "R" word.

OVERVIEW

Pre-employment inquiries are designed for one purpose--to elicit information from which an intelligent employment decision can be made. Therefore, questions which are not relevant to the employee selection process must be avoided. Secondly, prospective employees are protected by a number of rights. Some of the rights are established by anti-discrimination laws. As a general proposition, many inquiries are not unlawful per se. However, if a negative employment decision is made, absence of a legitimate reason for making the inquiry can constitute persuasive evidence that the employment decision was made with discriminatory intent. Therefore, during interviews and reference checks, you may not ask any questions concerning the following, except as permitted in limited situations described below:

- ▶ Questions as to race, sex, sexual orientation, gender identity, religion, national origin, physical or mental disability, or age.
- ▶ Questions as to marital status, child care responsibilities, intentions as to pregnancy or birth control.
- ▶ Questions as to height, weight, type of military discharge, or arrest records.
- ▶ Questions as to economic status such as credit information or prior bankruptcy or garnishments.
- ▶ Questions about religious views or associations.
- ▶ Questions about personal matters, such as sexual habits or preferences, and questions about association or church memberships.¹
- ▶ Medical or disability questions.
- ▶ Family medical history.

There are many situations where proper questions can be asked in an improper way. For example, asking a female applicant her maiden name can be construed to be discriminatory, as it may disclose national origin, marital status, or because male applicants may not have been asked for prior names. However, if all applicants, male and female, are asked to provide all names that may have been used by them in the past and as are necessary to permit a check on work and education records, such a question has less of a chance of being considered discriminatory.

It is also important that all applicants and all individuals who are contacted for references be asked the same questions. An employer was sued for discrimination because questions were

¹For certain jobs, leadership skills are important and desirable. In those instances, questions could be asked whether the applicant had any positions of leadership, rather than asking questions about memberships and associations.

asked about a female applicant's alleged extra-marital affair when no similar questions were asked about male applicants. Although such questions should be avoided because of the privacy implications of such questions, if such questions can ever be justified as job related, they surely must be asked of all applicants and not just one classification of applicant.

If any information is provided that was not elicited by the questions asked, you must make an assessment whether the information is job related. If not job related, the information should not be further pursued or considered. If job related and further pursued, it must be pursued in terms of how the facts affected the applicant's ability to perform the work. Further, even if job related, if similar information was not pursued for other applicants, it should not be pursued for any applicant. All applicants must be treated the same.

Acceptable Pre-employment Inquiries	Subject	Unacceptable Pre-employment Inquiries
<ul style="list-style-type: none"> ● Name ● Is there any additional information relative to change of name, use of an assumed name, or nick-name necessary to permit a check on your work and education records? If yes, explain. 	Name	<ul style="list-style-type: none"> ● What was your maiden name?
<ul style="list-style-type: none"> ● None 	Marital Status ²	<ul style="list-style-type: none"> ● What is your marital status or living arrangements ● Do you go by “Miss, Mrs. or Ms.?” ● With whom do you reside? ● Do you live with your parents?
<ul style="list-style-type: none"> ● None 	Dependents	<ul style="list-style-type: none"> ● How many dependents do you have?

²Questions regarding marital status are rarely job related and information that is needed for tax, insurance, social security or other legitimate purposes may be obtained after employment begins.

<ul style="list-style-type: none"> For those applicants who appear to be too young, questions may be asked to insure that they meet the minimum age requirements. Therefore, if you have reason to question whether an applicant is 18, you may ask whether the applicant is 18 years of age or older, and if not, what the applicant's birth date is so that the city may comply with the Child Labor Laws. 	Age	<ul style="list-style-type: none"> How old are you? What is your date of birth? Questions which tend to identify applicants over the age of 39.
<ul style="list-style-type: none"> At what address can we reach you? 	Residency	<ul style="list-style-type: none"> Where do you live? Have you had any foreign residences?
<ul style="list-style-type: none"> Is there anything that would interfere with your regular attendance at work? 	Child Care Arrangements	<ul style="list-style-type: none"> Who is responsible for taking care of your children? Do you have children at home?
<ul style="list-style-type: none"> None. 	Color of Eyes and Hair	<ul style="list-style-type: none"> What color are your eyes and hair? Do you die your hair?
<ul style="list-style-type: none"> Are you capable of performing the essential functions of the job with or without reasonable accommodations? Can you perform specific functions with or without reasonable accommodations? 	Health History	<ul style="list-style-type: none"> What is your health history? Does your family have a history of health problems? Have you been absent frequently due to sickness? Have you had any workers' compensations claims? Who is your doctor? Have you ever been turned down for health or life insurance?
<ul style="list-style-type: none"> None 	Height and Weight	<ul style="list-style-type: none"> How tall are you? How much do you weight?

<ul style="list-style-type: none"> Do you have the legal right to work in the United States and can you provide verification of that right?³ 	<p>Birthplace and Citizenship</p>	<ul style="list-style-type: none"> What citizenship do you hold? Where were you born? Are you American? What is your spouse's or parent's nationality or origin? How did you acquire the ability to speak a foreign language?
<ul style="list-style-type: none"> Generally none. May be considered only if it is a bona fide occupational qualification considered essential to a particular position. This determination should be made in advance of interviews with assistance from counsel. 	<p>Sex</p>	
<ul style="list-style-type: none"> Are you available to work the days and hours of the job? 	<p>Religion, Work days and Shifts</p>	<ul style="list-style-type: none"> What is your religious denomination? What church do you attend? Was your school or college associated with any religious group?

³ After the decision to hire is made, to satisfy the verification requirements, employers must ask all new hires for documents establishing both identity and work authorization. Certain documents can establish both, such as a U.S. passport, a certificate of U.S. Citizenship, a certificate of naturalization, an unexpired foreign passport, (but only if it contains an unexpired endorsement of the Attorney General authorizing employment in the U.S.), a resident alien card that contains a photograph of the person or other identifying information. If an individual cannot produce a document establishing identity and work authorization, then the employer must request two documents, one establishing identity and the other work authorization. Documents establishing "work authorization only" are a social security card (unless the card specifically says the individual is not authorized to work in the U.S.), a birth certificate issued in the United States, or a certificate establishing a birth abroad of a U.S. Citizen, or other work authorization documents deemed acceptable under Federal regulation. Information can be obtained from the INS at (202) 786-4764. Documents establishing "identity only" are a driver's license or any other state identity documents, provided they contain a photograph of the person or a detailed description of the person or other identity documents deemed acceptable under Federal regulations.

<p>Are you capable of performing the essential functions of the job with or without reasonable accommodations?</p>	<p>Disability</p>	<ul style="list-style-type: none"> ● Do you or have you had any disabilities? ● What is your health history? ● Have you been absent frequently due to sickness? ● Have you had any workers' compensation claims? ● Who is your doctor? ● Have you ever been turned own for health or life insurance?
<ul style="list-style-type: none"> ● What is your educational background (without giving dates to degrees, diplomas, etc.)? 	<p>Dates of Public School Attendance</p>	<ul style="list-style-type: none"> ● What are the dates of your high school or elementary school attendance?
<ul style="list-style-type: none"> ● What is your educational background (without giving dates to degrees, diplomas, etc.)? 	<p>Dates and Location of Colleges Attended</p>	<ul style="list-style-type: none"> ● What are the dates of your college attendance? ● Where is your college located? ● What activities did you participate in while attending college?
<ul style="list-style-type: none"> ● Do you have any problems that would interfere with your ability to perform you job? 	<p>Credit Record, Charge Accounts, Home Ownership</p>	<ul style="list-style-type: none"> ● Do you own your own home? ● What are your credit card balances? ● Have you been involved in bankruptcy? ● Have you had anything repossessed?
<ul style="list-style-type: none"> ● Only if a specific mode of transportation is required for the job, may you ask whether the applicant has that mode of transportation available and an operator's license for the needed mode of transportation. 	<p>Transportation</p>	<ul style="list-style-type: none"> ● Do you have a driver's license? ● Do you drive? ● Have you had your driver's license revoked?

<ul style="list-style-type: none"> Only if information as to licenses or certificates is relevant to the job may you ask questions about specific licenses or certificates. For example, if you are interviewing an applicant for a position as a driver of a commercial motor vehicle, you may ask whether the applicant has a commercial motor vehicle license. 	Licenses and Certificates	<ul style="list-style-type: none"> What licenses or certificates do you have?
<ul style="list-style-type: none"> What is the name and address of a person we can notify in case of an emergency? 	Notice in Case of Emergency	<ul style="list-style-type: none"> What is the name and address of a relative we can notify in case of an emergency?
<ul style="list-style-type: none"> None. 	Photograph	<ul style="list-style-type: none"> Any requirement or request for a photograph prior to hire.
<ul style="list-style-type: none"> None. 	Arrests	<ul style="list-style-type: none"> Have you been arrested?
<ul style="list-style-type: none"> Are you a member of any organizations which have relevancy to your ability to perform the job? 	Organizations	<ul style="list-style-type: none"> List all clubs, societies and lodges to which you belong.
<ul style="list-style-type: none"> None. 	Relatives	<ul style="list-style-type: none"> Do you have any relatives working for us?
<ul style="list-style-type: none"> Will you accept a starting salary of \$_____? Will you accept a starting salary within the range of \$ _____ and \$_____? 	Lowest Acceptable Salary	<ul style="list-style-type: none"> What is the lowest salary you will accept?

The regulations implementing the ADA state that the following questions may not be asked as part of the employment application process:

1. Have you ever had or been treated for any of the following conditions or diseases? (followed by a checklist)
2. Please list any conditions or diseases for which you have been treated in the past three years?

3. Have you ever been hospitalized? If so, for what condition?
4. Have you ever been treated by a psychiatrist or a psychologist? If so, for what condition?
5. Have you ever been treated for any mental condition?
6. Is there any health-related reason that you may not be able to perform the job for which you are applying?
7. Have you had a major illness in the past five years?
8. How many days were you absent from work last year because of illness?
9. Do you have any physical defects which prevent you from performing certain kinds of work? If yes, describe such defects and specific work limitations.
10. Do you have any disabilities or impairments which may affect your performance in the position for which you are applying?
11. Are you taking any prescribed drugs?
12. Have you ever been treated for drug addiction or alcoholism?
13. Have you ever filed for workers' compensation benefits or had a work-related injury?