

PHRC Pre-Employment Inquiries

The Pennsylvania Human Relations Commission (PHRC) is a state agency which enforces the laws prohibiting discrimination because of race, color, religion, ancestry, age, sex, national origin, non-job related disability, known association with an individual with a disability, possession of a diploma based on passing a general education development test and familial status. PHRC's jurisdiction covers employment, housing, and commercial real estate, contracting as an independent contractor (which includes contractors regulated by the Bureau of Professional and Occupational Affairs), public accommodations, education, refusal or willingness to participate in abortion procedures and monitoring racial tension situations.

The PHRC often receives inquiries and complaints regarding questions on job applications and in interviews. This pamphlet is intended as guidance to employers and applicants regarding the most common illegal or non-job related questions that are often asked on pre-employment applications and interviews. The statements are general; complaints filed with the PHRC as a result of an unlawful pre-employment inquiry would be decided on a case by case basis. The following information is designed to help employers and prospective employees know what is and is not unlawful to ask, and what questions should be avoided because of the potential for discriminatory use.

DATE OF BIRTH

Inquiries regarding the applicant's date of birth or age are unlawful.

RELATIVES/FRIENDS WHO ARE WORKING FOR EMPLOYER

It is recommended that this question not be asked. Information about friends or relatives working for the employer is not relevant to an applicant's competence. Requesting such information may be unlawful if it indicates a preference for friends and relatives of present employees and the compositions of the present work force is such that this preference would reduce or eliminate employment opportunities for minorities, or if a prohibition against hiring relatives would restrict employment opportunities for women.

MADIEN NAME

This is not relevant to a person's ability to perform a job and could be used for discriminatory purpose. For example, a woman's maiden name might be used as an indication of her religion or national origin. This item also constitutes an inquiry into marital status, which is information that may be legitimately requested after the decision to hire is made. If, however, a prospective employer needs to verify education and employment history, the question could be asked, "If any of your employment or education was under a different name, please indicate, and provide name."

MARITAL STATUS

It is recommended that questions regarding marital status not be asked since it is doubtful the information could be job-related and has been used discriminatorily in the past. Information regarding family needed for tax, insurance, social security or for other similar legitimate business purpose may be obtained after employment.

MR./MISS/MRS./MS.

This is simply another way of asking the applicant's sex and (for women only) marital status, both of which are irrelevant.

DEPENDENTS

The number of persons dependent upon the applicant for support is not relevant to a determination of whether or not the applicant can perform the job. This information can be requested after hire.

CHILD CARE ARRANGEMENTS

It is illegal to require pre-employment information about child care arrangements from female applicants only. An employer may not have different hiring policies for men and women with preschool age children. However, even if asked of both men and women, the question may still be suspect. In the past, such information has been used discriminatorily because of society's general presumption that the woman is the primary caregiver. If the employer's concern is whether or not the employee will be able to attend work regularly, the question that could be asked is, "Is there anything which would interfere with your attending work regularly?"

COLOR OF EYES AND HAIR

Eye and hair color are not related to the performance of jobs and may serve to indicate employee's race, religion, or national origin, which are illegal pre-employment inquiries.

HEIGHT AND WEIGHT

It is illegal to use this information for screening purposes unless the employer can show that height and weight requirement is essential to perform the job.

AVAILABILITY FOR WEEKEND WORK

If a question about Saturday and Sunday work is asked, the employer should indicate that a reasonable effort is made to accommodate religious needs of employees. The employer has some duty to accommodate and must show that a requested religious accommodation would present an actual undue hardship. Actual undue hardship is more than a minor financial cost or minor disruption of the employer's work policies or manner of doing business.

DATE OF PUBLIC SCHOOL ATTENDANCE

It is illegal to ask dates of elementary or high school attendance. The question should be posed as, "Do you have a high school education? If not, how many years have you completed?" This question includes attainment of a General Education Diploma (G.E.D.), but does not differentiate between it and a high

school diploma. Dates of public school attendance may be requested if completion of certain grade level is a valid, job-related requirement, and the employer uses the information to verify the applicant's education.

COLLEGE LOCATIONS AND DATES ATTENDED

Be aware that the name and location of colleges attended have been used by employers in order to determine the race of the applicant for discriminatory purposes. Be sure that if you ask this question, it is used to determine the applicant's fitness for the job and is used for legitimate purposes. Dates of college attendance have also been used by employers to determine age for discriminatory purposes. If any employer checks transcripts or credits before hire, then this information is needed.

PREVIOUS ADDRESS

It is recommended that inquiries not be made into an applicant's previous address or length of residence since it is not related to the applicant's ability to perform the job. The crucial factor here is the employer's ability to justify this request and ability to prove that it is not used in a discriminatory manner.

MILITARY SERVICE

Questions relevant to experience or training that were received while in the military or to determine eligibility for any veteran's preference required by law are acceptable. Employers should not, as a matter of policy, reject applicants with less than honorable discharge from military service. Minority service members have had a higher proportion of general and undesirable discharges than non-minority members of similar aptitude and education. If there is a job-related reason for asking information about military service and type of discharge, the question should be accompanied by a statement that dishonorable or general discharge is not an absolute bar to employment.

CREDIT RECORD/CHARGE ACCOUNT/ HOME OWNERSHIP

Answers to these questions are almost always irrelevant to performance of the job in question.

Because census figures indicate that minorities, on the average, are poorer than whites, consideration of these factors by employers can have an adverse impact on minorities. Therefore, requests, of this nature could probably be shown to be unlawful unless clearly required by business necessity.

LANGUAGE PROFICIENCY

Some English skill is probably required for most jobs. Fluency or absence of an accent may not be relevant to the job. If English language skill is not a requirement of the work to be performed, it could be a criterion that would unfairly eliminate certain minority groups. Additionally, some jobs may prefer bilingual individuals. Ultimately, however, care must be taken regarding an English language proficiency requirement, and the requirement should not exceed the level of proficiency necessary for the job in question.

ARREST OR CONVICTION RECORD

Without proof of business necessity, an employer's use of arrest records to disqualify applicants is unlawful. An employer must be able to show that inquiry into conviction is substantially related to an applicant's suitability to perform major job duties.

Conviction records should be cause of rejection only if their number, nature or recentness would cause the applicant to be unsuitable for the position. If the question is asked, it is recommended that the clarifier be added, "A conviction will not necessarily disqualify you from the job which you have applied."

LOWEST ACCEPTABLE SALARY

This information has been used by employers in a discriminatory manner. Women, for example, generally have held poorer paying jobs than men, and have been paid less than men for the same work. As a result of these past practices, a woman might be willing to work for less pay than a man would find acceptable. It is unlawful, however, to pay a woman less than a male employee who is or was performing the same or similar work. A legitimate inquiry would be whether applicants will accept a pre-determined salary or a salary within a pre-determined range, based on the value of the job, with variations depending on each applicant's job-related experience, qualifications and seniority, if relevant.

LICENSES

It is recommended that the prospective employer ask for information on licenses relevant to the job rather than information on any type of trade or professional license. Similarly, information regarding a current Pennsylvania driver's license should only be requested if a driver's license is needed to perform the essential functions of the job, and no reasonable accommodation is possible.

TRANSPORTATION

It is recommended that employers not inquire into an applicant's method or mode of transportation, unless a specific method or mode is required in the performance of the major job duties.

US CITIZENSHIP AND THE RIGHT TO WORK

The Immigration Reform and Control Act of 1986 (IRAC) requires employers to verify the legal status and right to work of all new hires. Employers should not ask applicants to state their national origin, but should ask if they have the legal right to work in the United States, and explain that verification of that right must be submitted after the decision to hire has been 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:

- 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 (ie., a physical description)

If an individual cannot produce a document establishing both identity and work authorization, then the employer must request two documents: One establishing identity, 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 United States)

a birth certificate issued in the United States, or a certificate establishing birth abroad

other work authorization documents deemed acceptable under final regulations (For more information on those regulations, contact 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 (ie., name, address, date of birth, color of eyes, height, weight, etc.)

other identity documents deemed acceptable under final regulations for cases in which state driver's licenses or identity cards do not contain photos or adequate personal descriptions, or if the individual is under 16 years of age

Information about IRCA can be obtained by contacting the Immigration and Naturalization Service (USCIS) Department of Homeland Security at <http://www.uscis.gov/portal/site/uscis>

GENDER-BASED LANGUAGE

Care should be taken to use inclusive language. Applicants should not refer to the assumed gender of applicants but should use neutral terms such as "applicants", "employees", and "candidates". Terms which describe the job in ways that indicate gender preference are unlawful. For example, instead of "waitress," use "waitress/waiter" or "server".

HEALTH AND DISABILITY

The PA Human Relations Act (PHRA) and the Americans with Disabilities Act (ADA) provide that an employer may not ask about the existence, nature, or severity of a disability and may not conduct medical examinations until after it makes a conditional job offer to the applicant. This prohibition ensures that the applicant's hidden disability is not considered prior to assessment of the applicant's non-medical qualifications. At this pre-offer stage, employers may ask about an applicant's ability to perform specific job-related functions. An employer also may ask other questions that are not disability-related and may require examinations that are not medical, provided that all applicants are asked these questions or are given these examinations.

The following examples are acceptable inquiries:

Can you perform the functions of this job with or without accommodation? (Examples: Can you carry a 20-pound bag? or Can you distinguish color for color-coded wires?) If the applicant needs reasonable accommodation to demonstrate their ability, that accommodation should be provided or the person should be permitted to explain how they could do the job with accommodation.

Please describe/demonstrate how you would perform these functions?

How well can you handle stress?

Can you meet the attendance requirements of this job? How many days did you take leave last year? Do you illegally use drugs? Have you used illegal drugs in the past two years?

Do you have the required licenses to perform this job?

The following are examples of unlawful inquiries:

Do you have AIDS? Do you have asthma?

Do you have a disability which would interfere with your ability to perform the job?

Do you ever get ill from stress?

How many sick days did you take last year?

Why do you need a wheelchair?

Have you ever filed for workers' compensation? Have you ever been injured on the job?

Have you ever been treated for drug or alcohol problems?

What prescription drugs are you taking?

After a conditional offer is made, an employer may require medical examinations and may make disability-related inquiries if it does so for all entering employees in the job category. If an examination or inquiry screens out an individual because of disability, the exclusionary criterion must be job-related and consistent with business necessity. The employer must also show that the criterion cannot be satisfied and the essential functions cannot be performed with reasonable accommodation.

Any medical information obtained must be kept confidential by the employer. This means that the employer must collect and maintain the information on separate forms and indicate separate medical files. The employer may disclose information only to the persons and entities specified in the ADA.

If the individual is screened out for safety concerns (because they are deemed to pose a “direct threat”), the employer must demonstrate that the decision was based on objective, factual evidence that these individuals pose significant risk of substantial harm to themselves or others, and that the risk cannot be reduced below the direct threat level through reasonable accommodation.

Reasonable Accommodation

Accommodations for the hiring process: An employer may inform applicants on an application form or job advertisement that the hiring process includes a specific selection procedure (ie., an interview, written test or job demonstration). Applicants may be asked to inform the employer of any reasonable accommodation needed to take such a pre-offer examination, interview or job demonstration, within reasonable time period prior to the exam, interview or job demonstration.

Accommodations for the job: An employer may ask an applicant whether they can perform specified job-related functions with or without reasonable accommodation. An employer may also ask an applicant to describe or demonstrate how they would perform job-related functions, with or without reasonable accommodation, because these inquiries elicit information about an applicant’s ability, not information about an applicant’s disability.

However, an employer may not ask whether the applicant needs reasonable accommodation for the job. For example, an employer may not ask: “Would you need reasonable accommodation in this job or to perform this specific function?”

Third Party Inquiries: At the pre-offer stage, an employer may ask third party, or a reference, anything that it could ask the applicant directly. An employer is prohibited from asking a third party anything that the employer is prohibited from asking the applicant directly.

AFFIRMATIVE ACTION SURVEY

An employer may justifiably seek and obtain information regarding job applicant's race, sex or ethnicity as needed for implementation of affirmative action programs, voluntary or court ordered, or other government reporting or record-keeping requirements and for studies to identify and resolve possible problems in the requirement and testing of members of minority groups and/or women to ensure equal employment for all persons. Indicate to prospective employees that providing the information is voluntary, unless the employer is under a specific court order to obtain it.

The employer must be able to demonstrate that such data was collected for legitimate business purposes. Such information should be kept separate from the regular permanent employee records to ensure that it is not used to discriminate in making personnel decisions.

To protect themselves against the improper use of such information by their selecting officials, employers should consider collecting such information by the use of a "tear-off sheet." After completing the application and the tear-off sheet, the latter is separated from the application and used only for purposes unrelated to the selection decision. The tear-off sheet should state the purpose for which the information is being collected, and that the information will not be available or used for making employee selections in order to allay applicants' fears that the information might be used to discriminate.

A FINAL NOTE

It is reasonable to assume that all questions on an application form or pre-employment interview are for a specific purpose and that selection or hiring decisions are made on the basis of the answers given. When deciding if an application or pre-employment interview questions is unlawful, the employer needs to determine why the information requested is necessary. For example, why is it important to know the age of the prospective employee? Why is it necessary to know what type of child care arrangements the prospective employee has? If the answers to these questions do not provide job-related information to determine the qualifications of the prospective employee, it is a strong indication that the question should not be asked. Questions that do not lead to information that helps the employer choose qualified personnel tend to raise questions as to the employer's motive for asking.

Questions asked by an employer should be asked of all applicants. For example, asking whether an applicant can lift 20 pounds cannot just be asked of women and applicants suspected of having a disability.

Please note: The information contained under the Health and Disability section was provided by the U.S. Equal Employment Opportunity Commission's "Guidance on Pre-employment Disability-Related Inquiries and Medical Examinations Under the Americans With Disabilities Act of 1990" from the Office on the Americans with Disabilities Act, Civil Rights Division, U.S. Department of Justice, P.O. Box 66118, Washington, D.C. 20035-6118

or <http://www.eeoc.gov/> TT numbers are (202) 514-0381 and (202) 514-0383.

HOW AND WHERE TO FILE A COMPLAINT

If you believe that you have been the victim of unlawful discrimination in employment, you may discuss your concerns with a Commission staff member, in your area, who will answer your questions and help you decide whether you should file a complaint with the Commission. Whatever the Commission's advice, you have the right to file a complaint, if you so desire.

The Commission is available to help you draft the wording of the complaint and prepare it in legal form for your verified signature. Before you sign the complaint, make sure it is an accurate account of what happened to you, to the best of your knowledge and belief. This is important, because Pennsylvania law provides penalties for persons who knowingly file false complaints.

You must file your complaint within 180 days of the alleged act of discrimination. You have the right to be represented before the Commission by a private attorney, if you so desire, but you may proceed without an attorney.

You have the right to contact one of the three PHRC's regional offices to file a complaint of any form of unlawful discrimination. A county map has been provided in this pamphlet to help you determine which regional office serves your county.

ADDITIONAL INFORMATION

PHRC enforces the PHRAct and the PA Fair Educational Opportunities Act. The text of these laws is contained in a booklet entitled, "Laws Administered by PHRC" and is available from PHRC's Information Division, 101 South 2nd Street, Executive House, Room 309, Harrisburg, PA 17105, or by calling (717) 783-8266 or (TT) (717) 787-4087. Information regarding the complaint process is contained in PHRC's "Guide for Complaints" and is also available at the same address. This information is also available in Braille and on tape.

The information in this pamphlet is intended as a general overview and does not carry the force of legal opinion. Material contained in this publication is in the public domain.

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