

Conducting A Lawful Employment Interview

Lawful Employment Interviewing

Interviewing prospective employees is one of the most important activities employers do. The employer's objective of an interview is to determine whether an applicant is suitable for an available position. The interview provides the employer an opportunity to obtain in-depth information about a job applicant's skills, work history, and employment background for this purpose. However, despite the employer's need for specific information the interviewer should avoid asking discriminatory questions, or base an evaluation of the applicant on criteria that is of a discriminatory nature. Because many discrimination complaints and lawsuits filed against employers stem from interviewing situations, this guide has been created to aid employers in conducting a lawful employment interview.

Defining Discrimination

Before an employer can avoid or remedy discriminatory interviewing practices, the employer must understand exactly what discrimination is. There are two types of discrimination that can occur in the course of the interviewing process: direct discrimination and adverse impact.

Direct Discrimination

Direct discrimination means different or "disparate" treatment between applicants because of some type of classification. An example would be when persons are treated differently because of their race, sex, age, religion, color, national origin or disability. Title VII of the Civil Rights Act of 1964 (Title VII) and the Idaho Human Rights Act (IHRA) prohibit purposeful or direct discrimination. Title VII and the IHRA prohibit discrimination in all areas of the employment relationship between the employer and the employee including hiring, firing, promotions, wages, job assignments, fringe benefits and other terms and conditions of employment. All private employers with 15 or more employees, as well as all federal, state and local government employers are subject to Title VII's discrimination prohibitions. All private employers with five or more employees, as well as all employers who contract with the state are subject to the IHRA. The bottom line for Idaho employers is that with the limited exception of bona fide occupational qualifications (explained in the "Commonly Asked Questions" section of this pamphlet), a person should not be hired or rejected because of his or her race, sex, age, religion, color, national origin or disability.

Adverse Impact

Another type of discrimination occurs when neutral conduct has an adverse impact on groups protected by law. An example would be when employers do not necessarily intend to exclude people of a particular race, sex, religion, color, age, national origin or disability, but they engage in practices that have the effect of doing so. Title VII and the IHRA prohibit employment procedures that have an adverse impact against members of a protected group. For example, requiring applicants to be at least 5'9" tall has an adverse effect against women, Asian Americans, and Hispanics who are generally shorter than white males. This means that a disproportionately higher percentage of applicants from these

groups will be rejected from employment simply because they are too short. An employer engaged in this type of selection procedure is practicing discriminatory hiring practices, even if done unknowingly. Such an employer is in violation of Equal Employment Opportunity (EEO) and IHRC laws unless the height requirement is a bona fide occupational qualification (which is discussed in the next section). The important lesson to learn from this example is that any selection procedure used by an employer must be carefully monitored for any adverse impact on applicants of a particular race, sex, religion, color, age, national origin or disability.

Commonly Asked Questions by Employers

The following questions and answers are designed to help in the practical application of current EEO and IHRC laws and regulations.

What kinds of questions are we forbidden to ask under the equal employment laws?

Under federal and state EEO laws, very few questions are expressly prohibited. In practice, however, the Equal Employment Opportunity Commission (EEOC) and the Idaho Human Rights Commission (IHRC) have stated that their responsibility to promote equal employment opportunities compels them to look with "extreme disfavor" on employment inquiries regarding an applicant's race, sex, religion, color, age, national origin or disability.

The EEOC, IHRC and the courts have found that many of these types of inquiries violate EEO laws because they either directly discriminate against or adversely affect the employment opportunities of minorities and women. The one exception to this type of violation occurs only when a specific characteristic of a person is a bona fide occupational qualification (BFOQ).

What is a bona fide occupational qualification (BFOQ)?

In recruitment, a BFOQ is an individual characteristic screened for that, under normal circumstances, would constitute discrimination if used as a requirement for a job. Examples of BFOQs might be hiring only females to model female clothing, or religious schools hiring only members of their own religion. Race can never be a BFOQ.

How can I know whether my interview questions are discriminatory?

Understanding what discrimination is should help a great deal in this area. Additionally, answering the following questions should help employers avoid most discriminatory inquiries during the pre-employment interview: Do my questions tend to have the effect of screening out persons in protected groups? Is the information I have requested really necessary to judge the individual's competence for the performance of this particular job?

What specific areas of inquiry should employers avoid?

There are a number of areas where great caution should be used in making pre-employment inquiries. Whether asked on an application form or in an interview, the EEOC and IHRC will consider questions on the subjects listed below as evidence of discrimination, unless the employer is able to show that the inquiries are job-related or that there is a business necessity for asking the question:

Arrest records, garnishment records, marital status, child-care provisions, contraceptive practices -- questions such as "What kind of birth control method do you use?", pregnancy and future childbearing plans, physical or mental disabilities, height and weight, nationality, race or ancestry.

Are those the only kinds of troublesome questions?

No, there are other questions that can, under certain circumstances, also be considered discriminatory. For example, asking whether an applicant has a high school diploma or a college degree is not discriminatory if the job really requires educational qualifications. However, the United States Supreme Court has explicitly affirmed EEOC guidelines that prohibit requiring a high school education as a condition of employment when there is no evidence that a high school education is required for performing that specific job. As a result, any employment requirements for a high school diploma or a college degree should be eliminated if these qualifications are not necessary for the specific job in question.

Other areas of potential discrimination include certain limiting physical requirements, availability for weekend work, friends or relatives working for the company, appearance standards, and fluency of the English language if no legitimate requirement for these qualifications is needed for performance of the job.

Am I allowed to have specific physical requirements for a job?

Yes, but only if they are really necessary for the particular job. The following guidelines should be helpful in this area:

The EEOC, IHRC and court decisions have all determined that height and weight requirements are discriminatory when they screen out a disproportionate number of minorities or women if the employer cannot show that these requirements are truly necessary for the particular job in question.

ADA laws require employers to "make reasonable accommodation to the physical and mental limitations" of qualified employees and applicants who may be disabled. Often, minor modifications in the physical requirements of the job will effectively remove barriers for individuals with disabilities.

An employer should not assume that every employee over a certain age is physically unable to perform certain tasks. Additionally, an employer should only set physical requirements that are necessary to job performance and apply those standards equally to all employees, regardless of age.

In setting physical requirements for a job, the employer should analyze the frequency or value of each major task. For example, the employer should determine if the requirement for lifting heavy objects is an integral part of the day-to-day work.

What about inquiring about an applicant's availability for Saturday or Sunday work?

It may be necessary for an employer to have this information, but Title VII requires that employers make reasonable accommodations for "an employee's religious observance or practice without undue hardship on the conduct of the employer's business." If weekend work questions are asked, the interviewer should indicate that reasonable efforts would be made to accommodate the religious needs of the employee. The interviewer should clearly state, however, that if accommodating the applicant's religious needs places an undue hardship upon the employer, the applicant might be required to work in spite of his or her religious needs.

What constitutes "undue hardship?"

Terms like "undue" and "reasonable" are always subject to interpretation. As a result, the EEOC and the IHRC look at each case on an individual basis. Usually, the facts of the case reveal whether the employer has suffered an undue hardship in accommodating the employee's religious needs. For example, if a Sabbath observance would prevent a prospective employee from working overtime on a Saturday, but the employee could be scheduled for Sunday overtime work with little trouble, the EEOC and IHRC would likely find that no undue hardship to the employer exists. In such a case the employer could not require the employee to work overtime on Saturday. Title VII requires only that employers make reasonable accommodations for "an employee's religious observance or practices." As a result, the employer is not necessarily discriminating when a particular skill is necessary to the employer's operation, the skill must be performed during the weekend, and the applicant is not hired because the applicant's religious needs limit his or her weekend availability.

Why do you say that "appearance" is a possible area of discrimination?

Although employers may adopt dress code policies suitable to various job categories and may insist that employees present a neat, clean appearance, certain grooming or appearance standards may be found to violate Title VII and the IHRA. For example, an employer may violate Title VII by rejecting job applicants because of their appearance or manner of speech if the applicant's appearance and manner of speech is representative of a particular racial or ethnic group. The safest ground for an employer is to simply base all employment decisions upon the applicant's qualifications and not on his or her appearance.

Is there anything wrong with talking about an applicant's military service?

Questions about military experience or training are generally permissible. However, the interviewer should not ask an individual about the type of discharge he or she received from the military.

The government requires many employers to keep records of things such as the sex and race of their employees. How can we keep these records if we can't ask questions in these areas?

The information should be obtained only after the applicant has been hired, rather than during a pre-employment interview. In those instances where employers may be required to keep data on the race, sex, etc. of job applicants, a separate self-identification form should be used. Employers should keep those records separate from the employment application and the records should not be used as part to the decision making process.

Can interviewers ask the applicant to supply references on the application form?

Yes, and the interviewer should inform the applicant that the employer will check the references he or she supplied. However, neither the interviewer nor the application form should ask for credit references. The EEO maintains that inquiries about credit ratings generally are discriminatory, since minorities have a higher percentage of poor credit ratings.

Do discrimination laws apply to temporary workers?

Yes. Temporary workers are generally covered under the anti-discrimination statutes. This is because they typically qualify as "employees" of the temporary firm, the client to whom they are assigned, or both. Thus, temporary firms and the clients to whom they assign workers may not discriminate against the workers on the basis of race, sex, age, religion, color, national origin or disability.

Is it discriminatory to refuse to hire an individual who uses drugs illegally?

No. Individuals who currently use drugs illegally are specifically excluded from the ADA's protections against discrimination. However, the ADA does not exclude:

Persons who have successfully completed rehabilitation and are no longer illegally using drugs; and persons erroneously regarded as engaging in the illegal use of drugs.

May an employer give applicants tests to determine illegal use of drugs?

Yes, but keep in mind, as with all pre-employment screenings, an employer should ensure that all applicants for a position are subjected equally to the screening device, whether or not they are members of a "protected class." Idaho employers interested in drug and alcohol testing guidelines should review Idaho Code sections 72-1700 through 72-1715. Also it should be noted that this is one area when the laws governing public employers may differ from the law governing private employers because of certain constitutional provisions that apply only to public employers.

Does the ADA protect applicants with AIDS?

Yes. The legislative history and the United States Supreme Court indicate that Congress intended ADA to protect persons with AIDS and HIV from discrimination.

Can I favor a minority over a non-minority?

Discrimination laws do not require an employer to practice "affirmative action" which means giving preferential hiring treatment to minorities in order to remedy an imbalance in an employer's work force. Further, the law does not require that a less qualified minority be preferred over a better-qualified non-minority. In fact, such a hiring practice, without a court order or a plan designed to redress past discrimination that is documented, could be a violation of Title VII and the IHRA and could result in a "reverse discrimination" lawsuit, especially against public employers because of constitutional restrictions imposed on them.

On the other hand, many employers who contract with the federal government may be required to take affirmative action. Additionally, other employers write voluntary affirmative action plans in order to redress the effects of past discrimination whether intended or unintended. Overall, the safest ground for an employer is to simply hire the applicant who is the best qualified for the available job.

May an employer ask about the "economic status" of the applicant?

Rejection of an applicant because of poor credit ratings has an adverse impact on minority groups and may be illegal. As a result, inquiries about bankruptcy, car ownership, rental or ownership of a house, and past garnishment of wages should be avoided during a pre-employment interview.

Other Issues to Consider When Interviewing

Pregnancy

The law prohibits employers from using pregnancy as a reason for rejecting applicants for employment. The basic rules that employers must understand are that:

The employer may not reject an applicant merely because she is pregnant.

Example: You are interviewing for a position and find that one of the applicants is pregnant. You may be reluctant to hire her because you know that in a few months she will be off the job due to pregnancy. If the absence could be accommodated and would not prevent satisfactory performance of the duties of the job, you must give her full consideration for employment. (Note: Pregnancy does not trigger the ADA, but you may be required to accommodate pregnancy if you also accommodate other temporary medical conditions.)

The employer may reject an applicant if pregnancy prevents her from satisfactorily performing the duties of the job.

Example: You are hiring for a position that requires extensive standing, lifting, or other significant physical tasks or activities which a pregnant applicant may be unable to perform because of her pregnancy. In this situation, it is appropriate for the interviewer to describe the physical requirements of the position and ask the applicant to obtain verification from her physician that she could safely perform these duties.

The burden is on the employer to prove that the applicant would be unable to perform the duties of the job due to pregnancy. When in doubt, contact an attorney or the IHRC for consultation and guidance.

Health Status or Disability

It is not appropriate for an employer to screen out otherwise qualified applicants on the assumption that they will not meet certain physical standards. A disability is irrelevant unless it prohibits satisfactory job performance. Additionally, an employer is required to make "reasonable accommodations" for applicants with disabilities.

An employer should be concerned only with the applicant's current ability to perform the essential functions of the job with or without reasonable accommodation.

Police Records

An employer should not automatically assume that applicants who have a police record are not capable of doing the job. A fair opportunity should be given to applicants to prove their merit even though they may have a police record. An "arrest" is not relevant and a "conviction" may or may not be relevant to the particular job in question. Each case must be weighed on its own merits.

Inquiries about the Applicant's Work Habits and Standards

Employers need to make judgments about whether an applicant will fit into the company and have the proper work habits and standards to do the job. Employers often wonder how to get information during the pre-employment interview that will help them in making this judgment without asking discriminatory questions. This problem often occurs during an interview when the employer's concerns are addressed in a way that is potentially discriminatory. The following three examples illustrate both a discriminatory and a non-discriminatory way for an employer to obtain this type of information:

EMPLOYER WANTS TO KNOW if the applicant will stay with the company for a reasonable time.

Do not assume that women will be less stable or that a minority group member will be apt to move.

Do not ask questions about marital status, age of children, childbearing plans, spouse's occupation, and spouse's career plans.

Do ask applicants if there is any reason why they would not stay with the company for a certain period of time if hired. It is usually a good idea to explain to the applicant the company's need for long-term employees. This approach is recommended even when an applicant is obviously pregnant because many women successfully combine parenting with a career. If the woman states that she plans to stay with the company, believe her.

EMPLOYER WANTS TO KNOW if the applicant will be prone to be absent or tardy.

Do not assume that women and minorities will have a higher absenteeism and/or tardiness rate than other employees.

Do not ask the applicant to state the ages or the number of children the applicant has as a means of determining whether absenteeism due to domestic matters might be a problem.

Do not inquire about the applicant's child care arrangements.

Do ask all applicants if there is any reason why, if hired, the company could not expect them to be punctual and have good attendance.

Do ask for a history of these matters at places of prior employment as a means of determining the applicant's attendance habits. Supervisors with a legitimate business need to control tardiness and excessive absenteeism are not violating the law if they refuse to hire applicants having a history of poor attendance. An employer has a legitimate right to expect employees to show up for work.

EMPLOYER WANTS TO KNOW about the character of the job applicant.

Do not ask applicants about their religion or frequency of attendance at religious meetings.

Do not ask for recommendations from religious leaders or ask applicants if they used a church job referral service.

Do not ask applicants if they are comfortable working with persons of a particular religion.

Do not ask about arrest records.

Do ask applicants if they can live up to the strict code of professional behavior the company maintains while employees are both in the office and when they are in the field.

Do ask for character references.

Do check all references.

Do ask if applicants have been convicted of any crime and, if so, what, when and where. Supervisors are not violating the law if they screen out applicants with a verifiable and pertinent record of dishonesty. In fairness to the applicants, however, the employer should consider the

kind of violation and how long ago it occurred before disqualifying an applicant for this reason. For instance, a reckless driving conviction is not job-related for a bank teller opening, but it is for a position as a school bus driver.

General Interviewing Cautions

Do not ask discriminatory questions: Any questions regarding race, color, sex, religion, age, ethnic group, national origin or ancestry, political beliefs or affiliations, or disability may be discriminatory and should be avoided. Also be careful not to ask any questions that could be construed as implying such discrimination. For example, questioning an applicant about the origin of an unusual surname could be misconstrued. Therefore, it is best to avoid such questions. Some applicants volunteer information on items such as church service or national origin. This information should be pursued only if it is job-related, such as demonstrating bilingual skills.

Do not ask personal questions: Be especially wary of this during the first few moments of the interview when the interviewer and the applicant are establishing rapport. Likewise, inquiries concerning marital status, number of children, spouse's occupation, etc., should be omitted from the employment application because they are not job-related. This information could be needed upon hiring. Therefore, the time to obtain this information is after the job offer has been accepted.

Do not allow false notions to influence your decision: Neat grooming is not an assurance of an efficient job performance. Additionally, age is not necessarily related to maturity in attitude or ability. Likewise, a firm handshake does not guarantee strong character. Having hiring standards that are not job-related will make your interview invalid. Furthermore, if these standards automatically screen out applicants whose speech, dress, hair length, social status, or personal lifestyle differs from that of the employer or the employer's staff, the employer is in jeopardy of being faced with a discrimination lawsuit. Finally, do not assume that an applicant who earned a higher salary elsewhere would be discontented with a lower paying job.

Beware of tendencies toward stereotyped thinking: Misconceptions concerning the physical, emotional or mental capabilities of women, older workers, minorities or disabled persons abound. The ability to adapt quickly to new jobs and accept the strain of increased responsibility is strictly an individual matter. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacity, not on the basis of any characteristics generally attributed to the group.

Keep the conversations during the interview on job-related items: Appropriate areas of conversation during the interview include the job itself, its duties and responsibilities. Additionally, the organization, its missions, programs, and achievements are all job related. It is especially appropriate to talk about career possibilities and opportunities for growth, development, and advancement, which the job offers. Other topics such as where the job is located, travel, mobility, equipment and facilities available are also pertinent. Finally, the individual's qualifications, abilities, experience, education, and interests are all suitable topics of conversation during the interview. Ask only for information you intend to use in making a hiring decision. Know how you will use the information to make that decision. Recognize that it is difficult to defend the practice of seeking information that is not job-related.

Applicants with Disabilities

The next area for employers to consider is interviewing applicants with disabilities. The Americans with Disabilities Act (ADA) of 1990 and the IHRA prohibits employers from discriminating against job applicants with disabilities when making employment decisions. The ADA and the IHRA require employers to provide reasonable accommodations for the known disabilities of a qualified employee as long as the accommodations do not place an undue hardship on the employer. Further, an employer may not refuse to hire a disabled applicant just to avoid making an accommodation.

Discrimination against individuals with disabilities in an employment context generally takes place on application forms and in pre-employment interviews that inquire into the existence of a disability rather than an applicant's ability to perform the essential functions of a job. Employers in Idaho need to understand the reasonable accommodation process and know how to utilize referral sources. Employers should review their individual feelings towards people with disabilities. Additionally, employers should have a clear understanding of their responsibilities to applicants with disabilities as stated in the ADA and the IHRA.

Accommodations for Disabled Applicants

The ADA and the IHRA require employers to provide accommodations if needed by a disabled applicant to enable the applicant to have an equal opportunity in the interview process. Some examples of accommodations for interviewing that meet ADA and IHRA requirements include:

An accessible location for applicants with mobility impairments,

A sign language interpreter for applicants who are hearing impaired,

A reader for applicants who are sight-impaired,

Disabled Applicant Information That Employers May Request

The overall goal of an interview is to find an individual who will be able to perform the job available. Thus, the interviewer may and should ask questions to determine whether a disabled applicant can perform specific job functions. The key is that the interview questions should focus on the applicant's ability to perform the job, not on the applicant's disability. Therefore the applicant could be asked the following question:

Are you able to perform the tasks or functions described?

If an applicant has a known disability that would appear to interfere with or prevent performance of a job-related function, the applicant may be asked to describe or demonstrate how this function would be performed, even if other applicants do not have to do so.

However, if an applicant has a known disability that would not interfere with or prevent performance of a job-related function, the interviewer cannot ask the disabled applicant to demonstrate how that function of the job would be performed unless all applicants in the job category are required to do so, regardless of disability. If an applicant indicates an inability to perform an essential job function even

with an accommodation, the applicant would not be qualified for the job in question and the employer is under no obligation to hire the disabled applicant.

Questions may be asked regarding the disabled applicant's ability to perform all job functions, not merely those that are essential to the job. However, an individual with a disability may not be screened out because of inability to perform non-essential or marginal functions of a job. The disabled applicant should be evaluated on ability to perform the essential job functions.

The interviewer may provide information on regular work hours, leave policies, and any specific attendance needs of the job, and ask if the disabled applicant could meet these requirements. Information about previous work attendance records may be obtained in the interview or on reference checks, but the questions cannot refer to illness or disability.

Post-Interview Suggestions

The risk of being faced with a discrimination lawsuit does not end when the interviewing process is over. For that reason this section on post-interview suggestions has been created to aid Idaho employers in avoiding potential problem areas of conduct after the interview.

Keep applicants informed about the decision process: One of the best ways to avoid post interview problems is to decide in advance when the hiring decision will be made. By doing this the employer can inform applicants as to when they can expect to hear from the employer and whether it will be by letter or phone. If for some reason a decision needs to be delayed, inform each applicant of the delay and give a new deadline to the applicants as to when the decision will be made.

Extend an offer as soon as a decision is made: When the interviewer finds the applicant who most nearly meets the requirements of the position, it is best to make a job offer as soon after the interview as possible. Once an offer is accepted, the employer is able to inform all of the other applicants as to the employer's decision. Alternatively, if the offer is rejected the employer has enough time to move on to the next most qualified applicant.

Employers should keep a record of interviews: Under Idaho Code 67-5907 a charge of discrimination may be made to the IHRC any time within 12 months after an alleged discriminatory act has occurred. For that reason records of interviews should be kept for at least a year to enable employers to justify hiring procedures and recent employment decisions.

Employers should keep at a minimum: A folder containing any applications or resumes and interview records on each applicant for each recently filled position. The file should include the applicant's name, the position sought, the date and time of interview, the name of interviewer, and a specific statement giving reasons for hiring or not hiring that specific applicant. In addition to listing the reasons why the applicant did not get the job the file should contain a list of the applicant's positive attributes. Having such a file not only protects employers against claims of discrimination but also provides employers with a resource for filling future positions.

Reference Checks: References should be checked during or immediately following final interviews to obtain additional information. It is helpful to use a checklist form. The items on the list bring out the job elements you have already determined to be crucial for success on the job. The questions asked

should be phrased in such a way that the former employer is asked to describe, not rate, the applicant in terms of your list of relevant job behaviors.

Idaho Code 44-201 makes it unlawful for any employer to maintain a blacklist, or to notify any other employer that any current or former employee has been blacklisted by the employer, for the purpose of preventing such employee from receiving employment. This chapter further provides that an employer who in good faith provides information about the job performance, professional conduct, or evaluation of a former or current employee to a prospective employer of that employee, at the request of the prospective employer of that employee, or at the request of the current or former employee, may not be held civilly liable for the disclosure or the consequences of providing the information.