

CAN I ASK THAT? INTERVIEWING TIPS AND BEST PRACTICES

2018 Local Government Officials Conference



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Drew joined Clemans Nelson in 2011 after working for two of the most preeminent law firms in Cleveland. He received his J.D. from Cleveland-Marshall College of Law and his B.S. from Ohio University in Political Science and Biology.

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HOUSE BILL 56

- What is House Bill 56?
 - House Bill 56 is Ohio's "ban the box"
 - Prohibits Public Employers from inquiring about criminal convictions on the job application
- So now I can't ask applicants about criminal convictions?
 - **WRONG.** The inquiry is only banned from the job application itself
 - Prohibits Public Employers from inquiring about criminal convictions on the job application

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HOUSE BILL 56

- Can my application notify applicants if State or Federal law disqualifies persons with certain convictions from employment?
 - Yes.
- Can I refuse to hire persons with convictions if there is no express State or Federal law disqualifying persons with convictions from employment in a position?
 - **Maybe.** The EEOC does not have the authority to prohibit employers from obtaining or using arrest or conviction records. The EEOC simply seeks to ensure that such information is not used in a discriminatory way. See EEOC 2012 Enforcement Guidelines.

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EEOC'S 2012 ENFORCEMENT GUIDELINES

- Issued April 25, 2015
- Excluding individuals from jobs based on criminal records were shown to have a disparate impact on race.
- Result: Employers must show that the excluding an applicant from employment based on a conviction or arrest is "job related and consistent with business necessity."
- *Green v. Missouri Pacific Railroad*
 - To show a business necessity, the screening process must consider three factors: 1) The nature/gravity of the crime, 2) The time elapsed, and 3) The nature of the position sought.
- Employers must also provide an opportunity for "individualized assessment."

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EEOC'S 2012 ENFORCEMENT GUIDELINES

- The National Equipment Rental Company uses the Internet to accept job applications for all positions. All applicants must answer certain questions before they are permitted to submit their online application, including "have you ever been convicted of a crime?" If the applicant answers "yes," the online application process automatically terminates, and the applicant sees a screen that simply says "Thank you for your interest. We cannot continue to process your application at this time." The Company does not have a record of the reasons why it adopted this exclusion, and it does not have information to show that convictions for all offenses render all applicants unacceptable risks in all of its jobs, which range from warehouse work to delivery to management positions.

Permissible? Exclusion Is Not Job-Related and Consistent with Business Necessity.

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EEOC's 2012 ENFORCEMENT GUIDELINES

- Leo, an African-American man, has worked successfully at PR Agency as an account executive for three (3) years. After a change of ownership, the new owners adopt a policy under which it will not employ anyone with a conviction. The new owners, who are highly respected in the industry, pride themselves on employing only the "best of the best" for every position. The owners assert that a quality workforce is a key driver of profitability. Twenty (20) years earlier, as a teenager, Leo pled guilty to a misdemeanor assault charge. At PR Agency, all of Leo's supervisors assessed him as a talented, reliable, and trustworthy employee, and he has never posed a risk to people or property at work. However, once the new ownership of PR Agency learns about Leo's conviction record through a background check, it terminates his employment.

Permissible? Exclusion Is Not Job-Related and Consistent with Business Necessity.

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INTERVIEWING

INQUIRIES BEFORE HIRING	LAWFUL	UNLAWFUL
1. Name	Name	Inquiry into any title which indicates race, color, religion, sex, national origin, handicap, age, military status, or ancestry.
2. Address	Inquiry into place and length of current address.	Inquiry into foreign addresses which would indicate national origin.
3. Age	Any inquiry limited to establishing that applicants meet any minimum requirements that may be established by law.	A. Requiring birth certificates or baptismal record before hiring. B. Any other inquiry which may reveal whether the applicant is at least 40 years of age.

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INTERVIEWING

INQUIRIES BEFORE HIRING	LAWFUL	UNLAWFUL
4. Birthplace or National Origin		A. Any inquiry into place of birth. B. Any inquiry into place of birth of parents, grandparents, or spouse.
5. Race or Color	For applicant flow data.	Any inquiry which would indicate race or color.
6. Sex	For applicant flow data.	A. Any inquiry which would indicate sex. B. Any inquiry made of members of one sex, but not the other.

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INTERVIEWING

INQUIRIES BEFORE HIRING	LAWFUL	UNLAWFUL
16. Work Schedule	Inquiry into willingness to work required work schedule.	Any inquiry into willingness to work any particular religious holiday.
17. Other	Any question required to reveal qualifications for the job applied for.	Any non-related inquiry which may reveal information permitting unlawful discrimination.
18. References	General personal and work references not relating to race, color, religion, sex, national origin, handicap, age, military status, or ancestry.	Request references specifically from clergymen or any other persons who might reflect race, color, religion, sex, national origin, disability, age, military status, or ancestry.

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HOW TO SUCCEED

- Preparation.
 - Create a written list of questions that you will ask ALL applicants.
 - Make sure that the job description is up-to-date and that all of the questions asked relate to the essential functions of the job.
 - Create a system for recording the results of the interviews.
 - Review resumes closely
 - Are there gaps in employment?
 - Are there jobs that ended within one year of hire?
 - Exaggerations

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INTERVIEW FORMAT

- Level 1 Questions:
 - Questions asked to all applicants.
- Level 2 Questions:
 - "Behavioral" interview questions
- Level 3 Questions:
 - Questions specific to each applicant

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THE ADA

- Medical Exams
 - Post offer, pre-employment
- Can you ask about the applicant's ability to perform the essential functions of the job without violating ADA?
 - Yes. You can ask an applicant if they can perform the essential functions of the job with or without an accommodation.
- Provide job description

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REFERENCE CHECKS

- Commandment 1: Employers **SHALL** require applicants sign a written release when seeking references from individuals.
- Commandment 2: Employers **SHALL** use caution when providing references to requesting parties.
 - Why?
 - Defamation of character. However O.R.C. 4113.71

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SOCIAL MEDIA

- Can we use it?
 - Yes.
- What risks come with using social media for interviews?
 - Discrimination. *Gaskell v. Univ. of Kentucky*, No. CIV.A.09-244-KSF, 2010 WL 4867630 (E.D. Ky. Nov. 3, 2010)
 - Invasion of privacy.
 - Retaliation. *Jaszczyk v. Advantage Health Physician Network*
 - Stored communications act. *Pietrylo v. Hillstone Restaurant Group*

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CASE STUDIES

- *EEOC v. Abercrombie and Fitch*, 135 S. Ct. 2028 (2015)
 - **Hijab Discrimination** Employer had a "look policy" prohibiting any type of headware. The case stemmed from the company's decision to reject a job applicant whose headscarf, which she wore in observance of her Muslim religious beliefs, was deemed to violate the company's dress code.
 - The Supreme Court found that "an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed." *Id.*, 135 S. Ct. 2033. The Court then declared that "the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." *Id.* In an 8-1 vote, the Supreme Court reversed the Appellate Court decision and remanded the case back to the 10th Circuit for further proceedings. The parties subsequently settled out of court.

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CASE STUDIES

- *Barbano v. Madison County*, 922 F.2d 139 *Barbano v. Madison Cnty.*, 922 F.2d 139, 141 (2d Cir.1990)
 - Can panel interviews protect against discrimination claims?
 - Discriminatory questions by one member can taint the entire process!
 - Plaintiff alleged she was rejected from employment due to her sex. Plaintiff was interviewed by a six member panel. Prior to entering the interview room, plaintiff heard someone say "here are copies of the next resume," followed by "oh, another woman." One member asked plaintiff her plans for having a family and whether her husband would object to her transporting men. The same member stated that the questions were relevant because he did not want to hire a woman who would get pregnant and quit.

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CASE STUDIES

- *EEOC v. Service Temps, Inc. d/b/a Smith Personnel Solutions*
 - The EEOC alleged that Service Temps refused to hire Jacquelyn Moncada for a stock clerk position, despite her qualifications and experience, upon learning that Moncada is deaf. Through a sign language interpreter, Moncada attempted to explain to the company that she was fully capable of performing the job and that she had several years of stock clerk experience. The company refused to conduct an interview or consider Moncada for the position. A Service Temps manager explicitly told Moncada that she would not be hired because she could not hear.

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CASE STUDIES

- *EEOC v. High Speed Enterprise, Inc., d/b/a/Subway (D.Ariz. 2011)*
- "You're pregnant. We can't hire you."



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EXIT INTERVIEWS

- Do you conduct Exit Interviews?
- Has your agency improved because of Exit Interviews?
- A survey of 6900 HR Executives answered this question:
 - Thirteen (13) said "Yes" exit interviews helped their organization.

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EXIT INTERVIEWS

- Why do Exit Surveys Fail?
 - Too long
 - No Truth
 - We accept "better opportunity"
 - No accountability
 - Autopsies but not as effective

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EXIT INTERVIEWS

- What is the purpose?
 - To learn where the employer can improve itself;
 - To make sure employees leave feeling good about their service; and
 - In some cases, to encourage the employee to stay under new circumstances

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EXIT INTERVIEWS

- Exit Interview Practices
 - The Employer should have a formal policy regarding exit interviewing
 - Exit interview should be reserved for voluntary separations, because issues raised by layoffs and terminations will require a special approach
 - Exit interviews should be extended to all departing employees – not just key performers or long-timers

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EXIT INTERVIEWS

- Voluntary or Mandatory?
 - Exit interviews should be required as a formal part of the out-processing.
- Who Should Interview?
 - A neutral manager or third party who has good interviewing skills
 - Third party cost v. confidentiality benefit

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EXIT INTERVIEWS

- Formal v. Informal?
 - Exit interviews must have a mechanism or structure to capture the information that is gathered.
 - The formality isn't as important as capturing the information
- Sharing the Findings
 - It should be included in the employer's annual review, strategic planning, recruiting strategies, training plans, management development program and any tool employers use to evaluate themselves

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STAY INTERVIEWS

- What is a Stay Interview?
 - A structured discussion a leader conducts with each individual employee to learn the specific actions needed to strengthen that employee's engagement and retention with the organization.

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STAY INTERVIEWS

- Bring information that can be used today?
- Focus on individual employees including top performers
- Put managers in the solution seat
- Separate from Performance Review
- Create individual stay action plans

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STAY INTERVIEWS

- Top 5 Stay Interview Questions:
 1. What do you look forward to each day when you come to work?
 2. What are you learning here? Want to learn?
 - Assign mentor, offer CLE, etc.
 3. Why do you stay here?
 4. What could cause you to leave us?
 5. What can I do to make your job better for you?

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QUESTIONS???



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