

## COMMON INTERVIEW QUESTIONS MAY TRIGGER EMPLOYMENT CLAIMS

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During job interviews, employers try to gather as much information about applicants as possible. Yet, some questions may inquire about topics that employers should not consider before making a job offer. Indeed, many common and simple questions could create employment claims against employers.

In general, employers should eschew interview questions designed to get applicants to reveal their age, race, national origin, gender, pregnancy, religion, marital status, or sexual orientation. Employers should also eschew interview questions designed to get applicants to reveal their medical, financial, or criminal histories. Instead, interview questions should generally relate to the essential job functions of the position in question, and not relate to the characteristics of the applicant as a person.

If an applicant politely declines to answer a question posed during an interview, the employer may have asked an inappropriate question. If the employer refuses to hire an applicant for declining to answer an inappropriate question, then the applicant may have a legal claim against the employer. Here are the “Top Ten” common interview questions for employers to avoid:

- 1. Have you ever been arrested?** Employers may generally ask about criminal *convictions*, but should not ask about *arrests*. An arrest involves an unproven accusation. An arrest could involve a mistaken identity. An arrest could eventually result in a pre-trial dismissal of all charges or a complete acquittal after trial. Moreover, in some states, a criminal conviction may not automatically disqualify an applicant from employment unless the underlying crime substantially relates to the position at issue. For example, a conviction for statutory rape could automatically disqualify an applicant for a position involving contact with minors.
- 2. Are you married?** Employers may want to know about an applicant’s ability to commit the requisite time to a demanding job or a position that involves extensive travel. Yet, marital status usually cannot disqualify an applicant for a position. Moreover, inquiries about marital status may indirectly require an applicant to reveal his or her sexual orientation – another forbidden criteria for a hiring decision.

3. **Do you have children?** Again, employers may want to know about an applicant's time commitments or ability to travel extensively. The question remains inappropriate because it could develop information about marital status or sexual orientation. Employers may ask directly, but only generally, whether applicants have other responsibilities or commitments that might conflict with their work schedules for the position at issue.
4. **What country are you from?** For an applicant with an accent or an unusual surname, a question about nationality may arise as an innocent curiosity or as an "ice-breaker." Yet, employers may not lawfully make employment decisions based upon an applicant's ethnicity or national origin. When relevant to the position at issue, employers may ask if an applicant has authorization to work in other countries in general or in a certain country in particular.
5. **Is English your first language?** Employers have no lawful reason to know the *first* language of an applicant. The interview itself will reveal whether the applicant speaks English adequately to perform the essential functions of the position at issue. If relevant to the position, however, employers may inquire about any ability to read, speak, or write fluently in another language.
6. **Do you have any outstanding debt?** Employers generally must have written permission, on forms that satisfy the requirements of the Fair Credit Reporting Act, to investigate the credit history of an applicant. Obviously, most applicants seek employment to earn income to pay a mortgage, or make a car payment, or to pay credit card debt. An applicant's credit history, like a criminal history, generally cannot disqualify an applicant from employment unless it directly affects the ability to perform the duties of position at issue. For example, certain positions with access to an employer's funds may require the eventual employee to obtain a surety bond. A bonding company may refuse to issue a surety bond for an applicant with a recent bankruptcy filing or other history of financial troubles.
7. **Do you drink alcohol socially?** Employers cannot inquire about an applicant's drinking or legal drug use habits. The Americans with Disabilities Act prohibits inquiries about an applicant's disabilities. A disability could include recovery from alcoholism or past drug abuse, or current treatment for alcoholism. Employers may not lawfully inquire about someone's potential disabilities before making an official job offer. The only exception to this prohibition allows employers to inquire of applicants whether they will need any reasonable accommodation to attend an already scheduled interview, such as a wheelchair accessible interview location.
8. **How long have you been working?** Employers may not lawfully ask questions designed to allow educated guesses about an applicant's age. Therefore, employers should not ask about an applicant's year of graduation from high school or college. When relevant to a

position, however, employers may generally inquire about an applicant's experiences working in a certain industry.

9. **What religious holidays do you practice?** Employers sometimes inquire about whether an applicant's lifestyle will interfere with expected work schedules for a position. Yet, questions that lead to disclosures about an applicant's religion or religious beliefs usually remain irrelevant. Employers may inform applicants that the position will require work on Saturdays and Sundays. Employers may then ask neutral questions about whether the applicant is willing to work a schedule including those days.

10. **What is the password to your Facebook account?** Some states have prohibited employers from asking applicants for access to their personal social networking accounts. Employers should exercise caution in accessing social networking information about applicants for open positions. Obviously, a prospective employer could easily access an applicant's public social networking profile and see pictures and text that disclose various demographic and other facts about an applicant. Those facts could include information about the applicant's age, race, sexual orientation, family members, pregnancy status, national origin, ethnicity, gender, disability, and even medical health details.

Yet, many legal authorities generally prohibit prospective employers from using those suspect criteria as the basis for employment decisions. Employers minimize their risk of discrimination claims if employers refrain from accessing information about applicants via social media until after employers have made a conditional offer of employment. During the post-offer but pre-employment background investigation, information that comes to the employer through social networking could lawfully permit the employer to rescind the conditional offer of employment.