

## **Employment Pitfalls: Discrimination in Interviewing and Hiring**

**By Karen Sutherland**

*Karen Sutherland is the Chair of Ogden Murphy Wallace, P.L.L.C.'s Employment Law Practice Group. She represents employers on workplace issues. Her employment law experience includes (among other things) investigating harassment and discrimination claims, sexual harassment training, employee handbooks, defending cities, counties and private employers regarding state and federal sex, age and disability discrimination law, breach of employment contract claims, Trade Secrets Act claims, tortious interference and defamation. Ms. Sutherland is licensed to practice law in Washington State only. This article is based on Washington State and Federal law.*

Sexual harassment is just one form of illegal discrimination. Other forms of discrimination that are illegal under state, federal or local law include treating employees and applicants differently because of their:

- Age (if over 40 years old);
- Race/National Origin;
- Creed (religion);
- Color;
- Gender;
- Disability (actual or perceived, physical or mental);
- Marital Status; and
- Sexual orientation (in Seattle and some other cities).

There are some circumstances where owners and managers may be allowed, in effect, to discriminate. The burden of proving that there is a legitimate basis for discrimination is on the employer, though. Examples of exceptions to the discrimination statutes include:

- BFOQ (bona fide occupational qualification, such as being able to speak Spanish if the employer's clients are Spanish speaking);
- Business necessity for not allowing a married couple to work together (such as one supervising or auditing the work of the other); and
- Inability to reasonably accommodate a disability.

Discrimination can be proven by actual conduct or a practice that has a disparate impact on a protected class (for example, all employees must be blond; all employees must be at least six feet tall). If an employee or job applicant fits within a protected class, the employer has to show that he or she was not treated differently from other employees or applicants because of the his or her status as a member of a "protected class."

Some employers try to avoid discrimination and sexual harassment claims by screening out applicants who could be "troublemakers" before hiring them. More than one employer has told me that he avoids discrimination claims by not hiring women or racial or ethnic minorities or people with disabilities. This strategy will not work, though, because the lack of such employees

in the workplace may be used to show that hiring practices have a "disparate impact" on a protected group.

Employment applications are a valuable tool for hiring, but asking the wrong questions can violate the discrimination laws, particularly where the owner or manager has few members of a protected class working for them. Washington State has developed a matrix that addresses common dos and don'ts of preemployment inquiries, whether they be on the application itself or in the interview process. It should come as no surprise that direct questions about sex, color and religion are not allowed. What follows are examples of some of the less obvious "forbidden topics:"

SUBJECT	FAIR PREEEMPLOYMENT INQUIRIES	UNFAIR PREEEMPLOYMENT INQUIRIES
* Age	Inquires as to birth date and proof of true age.	Any inquiry not in compliance with the law which implies a preference for persons under 40 years of age.
* Citizenship	Whether applicant is prevented from lawfully becoming employed in this country because of visa or immigration status. Whether applicant can provide proof of citizenship, visa, alien registration number after being hired.	Whether applicant is citizen. Requirement before hiring that applicant present birth certificate, naturalization or baptismal record. Any inquiry into citizenship which would tend to divulge applicant's lineage, ancestry, national origin, descent, or birthplace.
* Family	Whether applicant can meet specified work schedules or has activities, commitments or responsibilities that may prevent him or her from meeting work attendance requirements.	Specific inquiries concerning spouse, spouse's employment or salary, children, child care arrangements or dependents.
* Handicap	Whether applicant has certain specified sensory, mental or physical handicaps which relate reasonably to fitness to perform the particular job. Whether applicant has any handicaps or health problems which may affect work performance or which the employer should take into account in determining job placement.	Over-general inquiries (e.g., "Do you have any handicaps?") which would tend to divulge handicaps or health conditions which do not relate reasonably to fitness to perform the job.
* Height and weight	Inquiries as to ability to perform actual job requirements. Being of a certain height or weight will not be considered to be a job requirement unless the employer can show that no employee with the ineligible height or weight could do the work.	Any inquiry which is not based on actual job requirements.

SUBJECT	FAIR PREEEMPLOYMENT INQUIRIES	UNFAIR PREEEMPLOYMENT INQUIRIES
* Marital Status	None.	<input type="checkbox"/> Mr. <input type="checkbox"/> Mrs. <input type="checkbox"/> Miss <input type="checkbox"/> Ms. Whether the applicant is married, single, divorced, separated, engaged, widowed, etc.
* Military	Inquiries concerning education, training, or work experience in the armed forces of the United States.	Type or condition of military discharge. Applicant's experience in other than U.S. armed forces. Request for discharge papers.
* Name	Whether applicant has worked for this company or a competitor under a different name and, if so, what name. Name under which applicant is known to references if different from present name.	Inquiry into original name where it has been changed by court order or marriage. Inquiries about a name which would divulge marital status, lineage, ancestry, national origin or descent.
* National Origin	Inquiries into applicant's ability to read, write and speak foreign languages, when such inquiries are based on job requirements.	Inquiries into applicant's lineage, ancestry, national origin, descent, birthplace, or mother tongue. National origin of applicant's parents or spouse.
* Organizations	Inquiry into organization memberships, excluding any organization the name or character of which indicates the race, color, creed, sex, marital status, religion, or national origin or ancestry of its members.	Requirement that applicant list all organizations, clubs, societies, and lodges to which he or she belongs.
* Photographs	May be requested after hiring for identification purposes.	Request that applicant submit a photograph, mandatorily or optionally, at any time before hiring.
* Pregnancy (see also Handicap)	Inquiries as to a duration of stay on job or anticipated absences which are made to males and females alike.	All questions as to pregnancy, and medical history concerning pregnancy and related matters.
* Relatives	Name of applicant's relatives already employed by this company or by any competitor.	Names and addresses of any relative other than those listed as proper.
(While the law does not directly prohibit company policies governing the employment of relatives, any policy which has the effect of disadvantaging minorities, women, married couples or other protected classes, would be in violation of the law unless it is shown to serve a necessary business purpose.)		

<b>SUBJECT</b>	<b>FAIR PREEEMPLOYMENT INQUIRIES</b>	<b>UNFAIR PREEEMPLOYMENT INQUIRIES</b>
* Residence	Inquiries about address to the extent needed to facilitate contacting the applicant.	Names or relationship of persons with whom applicant resides. Whether applicant owns or rents own home.

Despite its length, the above list is merely an example of some (certainly not all) of the questions that cannot be asked and factors that cannot be considered in making decisions about hiring, promoting, pay rates, work hours and working conditions, discipline and termination.

The best way to avoid running afoul of the discrimination laws is to be sure that all owners, managers, and others involved in hiring, promotion, termination and other employee-related decisions are aware of the laws and the penalties for violating them. A strong, written anti-discrimination policy and periodic employee and management training can prevent claims and also increase employee diversity and improve employee and tenant relations.

---

*These materials are not intended and should not be used as legal advice or other recommendation. If you need a legal opinion on a specific issue or factual situation, please contact an attorney. Anyone using these materials should not rely on them as a substitute for legal advice.*