



EMPLOYMENT INQUIRIES: WHAT CAN EMPLOYERS ASK APPLICANTS AND EMPLOYEES?

The California Fair Employment and Housing Act prohibits discrimination against job applicants and employees on the basis of age, race, color, religion, sex (including pregnancy, childbirth, breastfeeding, and related medical conditions), gender (including gender identity and gender expression), sexual orientation, marital status, national origin, ancestry, mental and physical disability (including HIV and AIDS), medical conditions (such as cancer and genetic characteristics), genetic information, and military and veteran status. The law forbids both directly discriminatory practices, and neutral practices that have a disproportionately negative effect on members of protected groups, unless those neutral practices can be shown to have a business purpose.

The Department of Fair Employment and Housing (DFEH) developed this fact sheet to provide employers with guidance about questions that can be asked of applicants and employees. DFEH encourages employers, applicants, and employees to contact us for further information on the issues discussed in this fact sheet. If you are an applicant or employee who believes your rights have been violated, you may also file a pre-complaint inquiry. Please visit www.dfeh.ca.gov for further information.

In general, in order to comply with California law, employers should limit requests for information during the pre-employment process to those details essential to determining a person's qualifications to do the job (with or without reasonable accommodations). California law specifically prohibits employers from requesting, either verbally or through an application form, information disclosing an applicant's membership in the groups listed above, unless such inquiry is made pursuant to a permissible defense. And unless the employer can prove that the characteristic or basis in question is a bona fide occupational qualification, it is also unlawful to express, directly, or indirectly, any intent to limit employment or to discriminate against applicants or employees on the bases listed above. The law does allow collection of applicant flow data and other record keeping data for statistical purposes, or to help ensure broad outreach when advertising employment. But misuse of this data constitutes a violation of California law. We suggest using a tear sheet or another form separate from the application to collect such data.

NAME

It is acceptable to ask an applicant's name or previous name for purposes of checking their past work record. But an employer should not ask questions about an individual's name that would indicate ancestry, marital status, national origin, race, or religion (i.e., asking for an applicant's "maiden" name, or asking questions about the origin of a name, rather than simply asking if other names have been used).

AGE

It is acceptable to ask individuals to affirm that they meet legal age requirements during the application process, and to require proof of age after hire. But unless age is a bona fide occupational qualification, it is not acceptable to ask questions that would otherwise reveal age, such as school attendance dates. Nor may employers either directly or indirectly indicate age preferences, such as by requesting “college age” or “digital native” applicants.

RACE / COLOR

It is never acceptable to ask questions about an applicant’s or employee’s race or color, and race or color are never a bona fide occupational qualification.

SEX

It is not acceptable to ask questions about an applicant or employee’s sex, unless sex is a bona fide occupational qualification. Nor may employers use proxies for sex, such as stating height or weight preferences, unless they are a bona fide occupational qualification.

PREGNANCY / BREASTFEEDING / FERTILITY

An employer may not ask questions about pregnancy, breastfeeding, or fertility/childbirth, unless non-pregnant, non-fertile, or non-breastfeeding status is a bona fide occupational qualification. The bona fide occupational qualification defense in this context is very narrow, and cannot be based on fears of danger to the employee or her fetus, fears of potential tort liability, assumptions and stereotypes about the employment characteristics of pregnant women such as their turnover rate, or customer preference.

GENDER / GENDER IDENTITY / GENDER EXPRESSION

It is never acceptable to ask questions about an applicant’s gender identity, expression, or medical or surgical status or procedures, and an employer may ask about biological sex or gender only if it is a bona fide occupational qualification.

MARITAL OR FAMILY STATUS

An employer may make a statement of company policy regarding work assignment of employees who are related. An employer may also ask an applicant whether they have a spouse or adult child who is presently employed by the employer. This information, however, may only be used if, for reasons of supervision, safety, or morale the employer wishes to refuse to place a close relative under the direct supervision of another relative, or if the work involves potential conflicts of interests or other hazards increased by the familial relationship. Otherwise, an employer may not ask questions regarding marital status. Nor may an employer ask questions or make statements regarding age/number of children or dependents.

DISABILITY / MEDICAL CONDITIONS

It is acceptable for employers to inquire if an applicant can perform essential job-related functions with or

without accommodation; and to make inquiry as to, or request information regarding the physical fitness, medical condition, physical condition, or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.

Employers may also state that employment may be made contingent upon passing a job-related mental or physical exam, including a vision test, if required of all applicants within the same classification; or require a job-related physical agility or fitness test if required of all applicants within the same classification. Any such tests given must be non-discriminatory applied – that is, required of all applicants within the same classification – and job-related. Drug testing is generally permitted if required of applicants after a conditional offer is made.

But an employer may not make generalized inquiries as to an applicant's health, present medical condition, or any mental/physical disability; conduct medical or psychological exams at the pre-offer stage, regardless of whether they are job related; make any inquiry into medical history, including any history of substance addiction; inquire into prior on-the-job injuries, workers' compensation claims, or absences due to illness; or require genetic makeup tests or inquire as to their results.

NATIONAL ORIGIN / ANCESTRY

An employer may request information from all applicants or employees regarding language ability in languages other than English, if relevant to the job in question. But employers may not ask questions about nationality, ancestry, descent or parentage, or ask questions regarding how foreign language ability was acquired.

PHYSICAL APPEARANCE

It is acceptable for an employer to make a statement that a photograph may be required after employment. But employers may not require or request that applicants submit photographs with their applications, or require a photograph after an interview but before hiring, unless there is a defensible business reason to do so.

CITIZENSHIP

It is acceptable to make statements regarding the requirement that applicants have the legal right to work in the United States, although employers may not do so on a discriminatory basis. But employers may not ask questions about the birthplace of an applicant or the applicant's family. Employers also may not inquire into citizenship status before making an offer of employment, unless U.S. citizenship is a legal job requirement. Nor may an employer require an applicant to present a drivers' license, unless possession of a license is job related. Finally, an employer may not require an applicant to produce employment authorization documents prior to hire.

RELIGION

An employer may make a statement as to regular days, shifts and hours to be worked, or inquire into availability to work on weekends or evenings where reasonably related to normal business requirements. And an employer may ask all employees or applicants whether, apart from absences for religious observances,

the individual will be available to meet their work schedule, with reasonable accommodation if necessary. But, except when it is a bona fide occupational qualification, an employer may not ask questions regarding an individual's religion or lack thereof, or about religious practice, affiliation, or religious holidays observed. Nor may an employer ask questions about religious dress, unless it is a bona fide occupational qualification.

RESIDENCE / FINANCIAL INFORMATION / BACKGROUND CHECKS

Employers should use caution before requesting information about applicants' or employees' residences, running applicant credit checks pursuant to Labor Code 1024.5, or conducting background searches. While the law does not contain a blanket prohibition on these activities, they are impermissible if used for a discriminatory purpose and may be impermissible if they have a discriminatory impact and are not sufficiently related to a business requirement. And employers may not selectively request such reports.

Employers must comply with written notice requirements when running credit or background checks. Credit and background checks may not be used to obtain otherwise prohibited information about marital status, race, age, certain financial information, etc. Please contact DFEH for more information.