

## Interview questions you can't ask

An employer's potential liability for workplace discrimination arises before the first interview and exists whether or not a decision is made to hire a person.

A job interview is integral to the recruitment process and provides an opportunity for the employer to ask questions, check credentials and determine a prospective employee's suitability for a position. It also provides reciprocal opportunities for candidates to find out more about the role and the organisation and to assess their interest in the position.

Naturally, both parties want to find the 'right fit' however the employer is largely in control of the interview process and may go about finding the right person in the wrong manner.

By asking a candidate certain 'illegal' questions during the interview process, employers risk breaching Commonwealth and / or State laws aimed to protect individuals against discrimination in the workplace.

### **So, what are illegal questions?**

When interviewing a candidate for a position, the primary focus of the questions asked should be to assess the applicant's inherent ability to perform the key functions of the role.

Employers should avoid asking questions about certain unlawful factors for which a candidate's answer could be construed as determinative to the success, or otherwise, of his or her application. These include questions about age, gender, sexual preference, ethnicity, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion or social origin. Essentially, these matters are considered irrelevant in determining a person's capacity to perform the role.

Even the most 'innocent' questions (such as those that might be asked during the course of social conversation) could be considered unlawful during a formal interview. The following are some examples:

- *How do you manage work with three children?*
- *How old are you?*
- *Does your disability prevent you from carrying out your job?*

These questions have something in common – they are questions that might be asked of a particular category of applicants (those with children, over 50 years of age or with a disability) that would not necessarily be asked of other applicants.

Other questions that may result in a discrimination complaint include:

- *What is your religion?*
- *Where were you born?*
- *Are you working at the moment?*
- *Have you had a workers' compensation claim?*

These questions are unnecessary when determining an applicant's ability to carry out the duties required of the role and should be avoided. Deciding that an applicant is unsuited for the position based on an answer to one or more of these questions may result in discrimination action.

### **Asking the right questions**

Potential claims for discrimination can be minimised by re-thinking your approach to how questions are asked and having a detailed job description to refer to during the interview process. This helps keep the interview on track and ensures only the essential requirements of the position are addressed.

Organisations are encouraged to implement a set of standard interview questions that focus on the key skills and requirements of the position. This may include asking applicants to demonstrate how their skills and personal qualities make them an ideal choice for the role. An effective way to achieve this is to ask for examples of how the applicant has achieved certain outcomes or reacted to particular situations in previous roles. For example, you might ask, *'please explain how you managed an irate customer during your time as service representative with XYZ'*.

Following are some examples of discriminatory questions, together with an alternative approach that can be used to obtain the necessary information from a candidate.

- **Injuries / physical disabilities** – it may be necessary to discuss an applicant's injuries or physical condition to determine objectively whether he or she would be able to safely perform, without personal risk or risk to others, the duties required.

Rather than asking directly about his or her condition, the interviewer should go through each element of the job and, where relevant, discuss what adjustments to the workplace might be required to assist the applicant perform these duties. Appropriate questions may include:

*'Are there any reasons why you may not safely be able to lift 5 kg?'*

*'Are there any specific adjustments we would need to make so you could carry out the duties required?'*

This demonstrates that the employer has genuinely considered the applicant who may be an ideal fit, with a few minor modifications to the workplace.

- **Age** – asking an applicant his or her age is unlawful particularly if the employer is assuming that the person, due to age, lacks the energy, drive or technical ability to carry out the role. Basing questions on the applicant's skills, experience and inherent ability to perform these tasks, rather than querying their age will help minimise a discrimination complaint. An appropriate question would be:

*'Tell me about your computer experience...what types of programs have you used?'*

- **Family commitments** – it is unlawful to discriminate against a candidate based on his or her family circumstances. Rather than asking applicants if they have children or family commitments, simply ask whether they are able to commit to the hours / days required of the position. For example:

*'The job will occasionally require you to work evenings and weekends – would this conflict with other commitments?'*

- **Religion / race** – it is unlawful to rule out an applicant whom you assume will be unable to work weekends due to religion, race or culture. If the job requires weekend work, simply point out the required days and ask the applicant whether he or she would have any issues working these days.
- **Currently working** – asking an applicant if he or she is currently working could be perceived as discrimination on the grounds of employment, unemployment or receiving a pension. Instead, ask when the applicant would be available to start work.

## Conclusion

Avoiding workplace discrimination starts before the recruitment process and continues throughout the employment relationship (including opportunities for career progression), during workplace investigations and termination processes.

Framing questions appropriately to minimise potential action for unfair discrimination and to give candidates an opportunity to demonstrate whether they can perform the job requires sound procedures and ensuring those involved in the recruitment process are aware of their obligations.

If you or someone you know wants more information or needs help or advice, please contact us on (03) 9600 0162 or email [info@lordlaw.com.au](mailto:info@lordlaw.com.au).