



## Lawful and Unlawful Inquiries During Pre-Employment Interviews

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Dear Reader:

The following document was created from the MTAS website ([mtas.tennessee.edu](https://www.mtas.tennessee.edu)). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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## Lawful and Unlawful Inquiries During Pre-Employment Interviews

**Reference Number:** MTAS-1563

Any inquiry is prohibited that, although not specifically listed among the pages below, is designed to elicit information as to race, color, ancestry, age, gender, religion, genetic information, disability, military status or arrest and court record, unless based upon a bona fide occupational qualification.

### Lawful Inquiries: Name, Family Status, Age, Disability

**Reference Number:** MTAS-1555

#### **Name**

- Have you worked for this company under a different name?
- Is any additional information relative to a change of name, use of an assumed name or nickname necessary to enable a check on your work and educational record? If yes, explain.

#### **Marital/Family Status**

- **NONE** about marital/family status but may ask:
  - Whether applicant can meet work schedules or activities; commitments that may hinder the meeting of work attendance requirements.
  - Inquiries as to duration of stay or anticipated absences that are made to males and females alike.

#### **Age**

- **If a minor**, require proof of age in the form of a work permit or a certificate of age.
- Require proof of age by birth certificate after being hired.
- Inquiry as to whether or not applicant meets the minimum age requirements as set by law confirmed with a birth certificate or other forms of proof of age.
- If age is a legal requirement: "If hired, can you furnish proof of age?" or that hire is subject to verification of age.
- Inquiry as to whether or not an applicant is younger than the employer's regular retirement age.

#### **Disabilities**

The applicant could be asked:

- Can you perform the essential functions of this job?
- Are you able to perform these tasks? (If the applicant indicates that he or she can perform the tasks with an accommodation, you may ask:
- Can you show me how you would perform the task?

Under the Americans with Disabilities Act, an employer may ask questions to determine whether an applicant can perform specific job functions. The questions should focus on the applicant's ability to perform the job, not a disability.

### Unlawful Inquiries: Name, Family Status, Age, Disabilities

**Reference Number:** MTAS-1556

The following inquiries should not be asked during the application process:

#### **Name**

- Inquiries about the name that would indicate applicant's lineage, ancestry, national origin or descent.
- Inquiry into previous name of applicant, whether it has been changed by court order or otherwise.
- Indicate: Miss, Mrs., or Ms.

### **Marital/Family Status**

- Any inquiry indicating whether an applicant is married, single, divorced, engaged, etc.
- Number and age of children.
- Information on child-care arrangements.
- Any questions concerning pregnancy.
- Any questions that directly or indirectly result in the limitation of job opportunities in any way.

### **Age**

- How old are you?
- When is your birthday?
- What year did you graduate from high school?
- Requirements that applicants produce proof of age in the form of a birth certificate or baptismal record prior to an offer of employment.

The Age Discrimination in Employment Act of 1967 forbids discrimination against persons over the age of 40 in your employment process.

### **Disabilities**

- The Rehabilitation Act of 1973 and Americans With Disabilities Act (ADA) forbids employers from asking job applicants general questions about whether they are "handicapped/disabled" or asking them about the nature and severity of their "handicap/disability".
- An interviewer may not ask questions about a disability.
- Where an applicant has a visible disability or volunteered information about a disability, the interviewer may not ask questions about:
  - The nature of the disability;
  - The severity of the disability;
  - The condition causing the disability;
  - Any prognosis or expectation regarding the condition or disability;
  - Whether the individual will need treatment or special leave because of the disability; or.
  - **Whether the applicant needs accommodations.**
- An interviewer may not ask questions about the results of an individual's or family member's genetic tests.

An employer must be prepared to prove that any physical and mental requirements for a job are due to "business necessity" and the safe performance of the job. Except in cases where undue hardship can be proven, employers must make "reasonable accommodations" for the physical and mental limitations of an employee or applicant.

## **Lawful Inquiries: Sex, Race, Residence, Birthplace**

**Reference Number:** MTAS-1557

Employers may make inquiries into the following areas:

### **Sex**

- Inquiry or restriction in employment is permissible only where a bona fide occupational qualification (BFOQ [1]) exists. The bona fide exception is interpreted very narrowly by the courts and the EEOC and is defined as being based on the need for the individual to be a particular sex.
- The burden of proof rests on the employer to prove that a bona fide occupational qualification does exist and that all members of the affected class are incapable of performing the job.

### ***Applicant's Race***

- **NONE** but may ask about:
- General distinguishing physical characteristics such as scars, etc.

### ***Address or Duration of Residence***

- Applicant's address.
- Inquiry into place and length of previous address.
- Length of time a resident of this state or city.

### ***Birthplace***

- Are you either a U.S. citizen or an alien authorized to work in the United States?
- "Can you, after employment, submit a birth certificate, other proof of U.S. citizenship or authorization to work documents?"

## Unlawful Inquiries: Sex, Race, Residence, Birthplace

**Reference Number:** MTAS-1558

Employers may not make inquiries in the following areas:

### ***Gender (the state of being male or female)***

- Gender of the applicant.
- Any other inquiry that would indicate gender.
- Name or relationship of persons with whom applicant resides.
- Gender cannot be used as a factor to determine whether or not an applicant will be satisfied in a particular job.

Gender is not a bona fide occupational qualification even if a job involves physical labor (such as lifting) beyond the capacity of some women. Employment cannot be restricted to a particular gender just because the job is traditionally labeled "men's work" or "women's work."

### ***Applicant's Race***

- Color of applicant's skin, eyes, hair, etc., or other questions directly or indirectly indicating race or color.
- Applicant's height or weight where it is not relative to the job.

### ***Address***

- Specific inquiry into foreign addresses that would indicate national origin.
- Names or relationship of persons with whom applicant resides.
- Whether applicant owns or rents home.
- Whether applicant has an automobile.

### ***Birthplace***

- Birthplace of applicant.
- Birthplace of applicant's parents, spouse or other relatives.
- Requirement that applicant submit a birth certificate, naturalization or baptismal record before employment.

- Any other inquiry into national origin.

## Lawful Inquiries: Religion, Military, Photo, Citizenship, Education, Conviction

**Reference Number:** MTAS-1559

Employers may make inquiries into the following areas:

### **Religion**

- An applicant may be advised concerning normal hours and days of work required by the job to avoid possible conflict with religious or other personal conviction.

### **Military**

- Type of education and experience in service as it relates to a particular job.

### **Photo**

- A photo may be required after hiring for identification.

### **Citizenship**

- Whether applicant is prevented from lawfully being employed in this country because of visa or immigration requirements.
- Whether applicant can provide proof of citizenship (passport), visa, alien registration number after hiring.
- "If you are not a US citizen, do you have the legal right to remain permanently in the US?",
- "What is your visa status (if no to the previous question.)",
- Are you able to provide proof of employment eligibility upon hire?"

### **Ancestry of National Origin**

- Languages applicant reads or writes frequently (**based on job requirements**).

### **Education/Experience**

- Applicant's academic or professional education, school attended.
- Inquiry into language skills such as reading, speaking and writing foreign languages (based on job requirements).
- Applicant's work experience, names and addresses of previous employers, dates or reasons for leaving and salary history.
- Other countries visited.

### **Conviction**

- Inquiry into the actual convictions that reasonably relate to the applicant's fitness to perform a particular job. (A conviction is a court ruling where the party is found guilty as charged. An arrest is merely the apprehending or detaining of the person to answer the alleged crime.) If an employer's exclusionary policy or practice is *not* job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability.<sup>14</sup>
- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity

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[14] *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991)

## Unlawful Inquiries: Religion, Military, Photo, Citizenship, Education, Conviction

**Reference Number:** MTAS-1560

Employers may not make inquiries in the following areas:

### ***Religion***

- Applicant's religion (affiliation, church, parish, pastor or religious holidays).
- Applicants may not be told that any particular religious groups are required to work on their religious holidays.
- Any inquiry to indicate or identify religious denomination or customs.

### ***Military***

- Current military status.
- Type or condition of military discharge.
- Applicants experience in other US armed forces.
- Request for discharge papers.

### ***Photo***

- Request for a photograph before hiring.
- Requirement that applicant affix a photograph to the application.
- Request the applicant, at his/her option, submit photograph.
- Requirement of photograph after interview but before hiring.

### ***Citizenship***

- Are you a citizen of the US?
- Of what country are you a citizen?
- Whether applicant or his/her parents or spouse are naturalized or native-born U.S. citizens.
- Date that applicant or parents or spouse acquired a U.S. citizenship.
- Requirement that applicant produce his/her naturalization papers.
- Whether applicant's parents or spouse are citizens of the U.S.

### ***Ancestry of National Origin***

- Inquiries into applicant's lineage or ancestry, national origin, descent, birthplace or native language.
- Asking how applicant acquired the ability to speak, read or write a foreign language.
- National origin, descent, birthplace or native language of applicant's parents or spouse.

### ***Education***

- Any inquiry asking specifically the nationality, racial or religious affiliation of a school.
- Inquiry as to the applicant's native language or how foreign language ability was acquired.

### ***Conviction***

- Any inquiry relating to arrests.
- Asking or checking into a person's arrest.
- Court or conviction record if not substantially related to functions and responsibilities of the prospective employment.

## Lawful Inquiries: Relatives, Organizations, Credit Rating, References

**Reference Number:** MTAS-1561

Employers may make the following type of inquiries:

### **Relatives**

- Names of applicant's relatives employed by this company.
- Names and addresses of parents or guardians of minor applicants.

### **Notice in Case of Emergency**

- Names of persons to be notified in case of accident or emergency.

### **Organizations**

- Inquiry into the organizations of which an applicant is a member providing the name or character of the organization does not reveal the race, religion, color, or ancestry of the member (must relate to the applicants professional qualifications).
- "What offices are held, if any?"

### **Credit Rating**

- None

### **References**

- "By whom were you referred for a position here?"
- Names of people willing to provide professional or character references of applicant.

### **Miscellaneous**

- Notice to applicants that any mis-statements or omissions of material facts in the application may be cause for dismissal.

## Unlawful Inquiries: Relatives, Organizations, Credit Rating, References

**Reference Number:** MTAS-1562

Employers may not make the following type inquiries:

### **Relatives**

- Name or address of any relative of adult applicant.
- Questions concerning spouse, or spouse's employment, salary, child care arrangement, or dependents.

### **Notice in Case of Emergency**

- Name and address of relatives to be notified in case of accident or emergency.

### **Organizations**

- "List all the organizations, clubs, societies and lodges to which you belong."
- The names of organizations to which the applicant belongs if such information would indicate, through character or name, the race, religion, color or ancestry of the members.

### **Credit Rating**

- Any questions concerning credit rating, charge accounts, etc.

### **References**

- Require the submission of a religious reference.



- Request reference from applicant's pastor.

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**Links:**

[1] [https://www.eeoc.gov/laws/practices/inquiries\\_gender.cfm](https://www.eeoc.gov/laws/practices/inquiries_gender.cfm)

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