

## **Title: Are You Hiring? Do You Know What Questions *Not* To Ask?**

*By Pascal Benyamini, Esq.*

When you are looking to hire a new employee, you probably receive résumés from many candidates who come from a variety of different backgrounds. Some interviews may be formal and others may be less formal. Regardless, asking the wrong question during the hiring interview or having the wrong question on your company's job application can result in costly litigation.

Under California and federal law, it is forbidden to ask a job candidate questions in several categories, including but not limited to, the following: national origin, race, marital status, family obligations, age, religion, disability, sexual orientation, gender, arrest records and misdemeanor crimes, and political affiliation.

It is impossible to identify all the possible illegal questions that employers can ask during an interview. Below, please find some examples of illegal questions with some suggestions as to what employers should instead ask in each instance.

**Examples.** In attempting to determine whether the candidate has the proper documentation to work in the United States, employers often ask the candidate: "Where were you born?", "Where is your family from?", or "How long have you been in the United States?" These questions are illegal because they are targeted against the candidate's national origin. Instead, employers can ask the candidate to provide verification that he or she is eligible to work in the United States.

As another example, in attempting to determine whether the candidate can work overtime or whether the candidate can travel for work frequently, employers ask the candidate: "Do you have children?", "Can you work weekends?", or "What are your child care arrangements?". These questions are illegal because they are targeted against the candidate's family obligations and gender. Instead, employers can ask the candidate whether the candidate will be able to travel for work or whether the candidate will be able to work overtime as needed.

As a final example, in attempting to determine whether the candidate can perform the essential functions of the job, such as heavy lifting or standing for long periods of time, employers ask the candidate: "Do you have a disability?", "Do you have any serious illnesses or injuries?", or "Have you ever filed a workers' compensation claim?" These questions are illegal because they are targeted against the candidate's disability status. Instead, employers can ask the candidate whether the candidate will be able to perform the essential functions of the job (such as heavy lifting or standing for long periods of time).

**Train Your Interviewers.** The most effective way of preventing claims is to train your interviewers so they know what they can and cannot ask. Sometimes, even a *legal* question if asked in the wrong way can subject the company to liability. For example, if your interviewer tells a candidate who appears to be in his or her 50s that the company is

looking for employees who are energetic and demonstrate lots of energy, and then the company hires a candidate in his or her 20s, the older candidate could potentially file a discrimination lawsuit.

As such, it is crucial to train your interviewers not only with respect to questions they must not ask, but also with respect to questions that they should think twice before asking.

Consulting with legal counsel is paramount to limiting your potential exposure in your employment practices. Feel free to contact Pascal Benyamini at 310-478-5656 or via email at [PascalBenyamini@Reish.com](mailto:PascalBenyamini@Reish.com) should you have any questions about the foregoing or any other employment matter.

---

**Pascal Benyamini** is a Partner with the law firm of Reish & Reicher focusing on Labor & Employment Law and Employment Litigation. He defends employers in state and federal court proceedings against claims of wage and hour, wrongful terminations, discrimination, harassment and unlawful employment practices. [www.reish.com](http://www.reish.com)