

**Legal Aspects of Hiring and
Interviewing**

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The Do's and Don'ts

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- NYT 10-28-12 Interview with CEO of KWL Enterprises. Asked about favorite questions to ask interviewees:
- “How do you feel about philanthropy? What is your purpose in life? Tell me about your family.”

Implicit Bias

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- Some questions may perpetuate unconscious, unlawful biases; some questions help us to get past them
- <https://implicit.harvard.edu>
- <http://www.projectimplicit.net/index.html>

Applicant/Employee Rights

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- Free Speech/Free Association
- Right to Petition Government for Redress
- Freedom from Unwarranted Intrusion into Privacy
- Right to Protest Illegality
- Freedom from Discrimination
- Right to Work Together for Mutual Aid/Protection
- Right to Engage in Legal, Off-Work Activity
- Freedom from Unreasonable Search and Seizure

Golden Rule in Hiring

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- All questions should relate to the ability to do the job

Impermissible Inquiries

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- “Any non-job-related inquiry that expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age or sexual orientation.” Govt Code 12940(d)

Impermissible Inquiries

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- May not ask questions about childbearing, pregnancy, birth control, or family responsibilities unless they are related to specific and relevant working conditions of the job. 2 CCR 7290.9(b)(3)

Impermissible Inquiries

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- Ed Code 45293/88112: No questions relating to political or religious opinions or affiliations, or relating to any protected characteristic, shall be asked of any applicant, or any candidate whose name has been certified for appointment.

Internet Searches

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- Possible risks
 - Discrimination
 - GINA
 - Privacy violation
 - Consumer report laws

UGESP

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- Selection procedure: Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

Hiring Standards

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- Hiring standards may be the basis for a disparate impact case if they negatively impact applicants based on a protected characteristic
- Hiring standards must be job-related and consistent with business necessity.

Business Necessity

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- Is ... An overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of a business and that the challenged practice effectively fulfills the business purpose it is supposed to serve
- AND there is no alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact. 2 CCR 7286.7(b)

Validity

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- Content Validity
- Construct Validity
- Criterion Validity

Age

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- Is "overqualification" a pretext for age discrimination?
- *EEOC v. Insurance Co. of North America*, 49 F.3d 1419 (9th Cir. 1995)

English Fluency

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- An applicant's accent or inability to communicate well in English may be considered only if lack of fluency would materially interfere with job performance. 29 CFR 1606.6(b)(1)
- Otherwise, this may constitute national origin discrimination

Religion

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- EEOC regulations: Employers should be wary of questions that inquire as to an applicant's ability to work during an employer's scheduled working hours. 29 CFR 1605.3
- EEOC suggested wording (see 29 CFR 1605.3(b)(ii))

Organizations/Activities

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- Must avoid general questions regarding organizations, clubs, societies and lodges (may ask about job-related organizations, clubs or professional societies that do not indicate protected characteristics). See DFEH-161, Employment Inquiries Fact Sheet

Disabilities

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- The ADA prohibits qualification standards, tests or other selection criteria that tend to screen out individuals with disabilities unless the standard, test, or criterion is related to the position AND is consistent with business necessity. 42 USC 12112(b)(6)
- Even if job-related, must consider if applicant could meet standard with reasonable accommodation. 42 USC 12112(b)(5)

Medical Inquiries

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- Employers may not ask questions that are likely to reveal the existence of a disability before making a job offer
- Includes written and oral questions, as well as medical exams

Medical/Psychological Exams

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- Under FEHA, employer cannot require applicants to take a medical or psychological exam or inquire as to a disability or medical condition. Govt Code 12940(e)(1)
- May only ask about an applicant's ability to perform job-related functions
- Post-offer exams are permitted if job-related and consistent with business necessity. Must be required of all entering employees

Psychological Tests

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- Psychological tests are considered medical exams (which are prohibited prior to offer) if they provide evidence that leads to identifying a mental disorder or impairment.
- Certain psychological tests, such as the Minnesota Multiphasic Personality Inventory, assess personality traits in addition to revealing mental disorders. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2005)

Medical/Psychological Exam

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- From the EEOC: “An employer gives applicants the RUOK test (hypothetical), an examination which reflects whether applicants have characteristics that lead to identifying whether the individual has excessive anxiety, depression, and certain compulsive disorders.”
- Is this permissible?

Privacy Rights

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- US Constitution (Implicit Right)
- California Constitution, Article 1, Section 1
- Tort Protections
- Labor Code 98.6

Personality Tests/Inquiries

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- May seek to measure emotional adjustment
- May cross the line into unlawful pre-employment medical inquiries/exams
- May not be valid in terms of relating to the job at issue
- May violate right to privacy

Behavioral Questions

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- Questions are designed to elicit information as to how the applicant handled a particular situation in the past
- Example: Give me a specific example of a time when you used good judgment and logic in solving a problem.

How to Construct the Questions

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- Determine the performance criteria for the job to be filled
- Design questions that will elicit information needed to decide if the applicant meets this criteria
- Consider the types of answers that will demonstrate the needed skills

What to do about Unwanted Information

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- Refocus the discussion back to the question posed. Do not pursue the applicant's comments
- Ignore the information when making the selection
- Keep notes as to the legitimate, non-discriminatory reasons for the selection

Questions??

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- Thank you for attending!
