



NORTHERN ILLINOIS UNIVERSITY

## Affirmative Action and Equity Compliance

### Prohibited Employment Policies/Practices

Under the laws enforced by EEOC, it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

**The law forbids discrimination in every aspect of employment.**

The laws enforced by EEOC prohibit an [employer or other covered entity](#) from using neutral employment policies and practices that have a disproportionately negative effect on applicants or employees of a particular race, color, religion, sex (including pregnancy), or national origin, or on an individual with a disability or class of individuals with disabilities, if the policies or practices at issue are not job-related and necessary to the operation of the business. The laws enforced by EEOC also prohibit an employer from using neutral employment policies and practices that have a disproportionately negative impact on applicants or employees age 40 or older, if the policies or practices at issue are not based on a reasonable factor other than age.

#### **JOB ADVERTISEMENTS**

It is illegal for an employer to publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

For example, a help-wanted ad that seeks "females" or "recent college graduates" may discourage men and people over 40 from applying and may violate the law.

#### **RECRUITMENT**

It is also illegal for an employer to recruit new employees in a way that discriminates against them because of their race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

For example, an employer's reliance on word-of-mouth recruitment by its mostly Hispanic work force may violate the law if the result is that almost all new hires are Hispanic.

#### **APPLICATION AND HIRING**

It is illegal for an employer to discriminate against a job applicant because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not refuse to give employment applications to people of a certain race.

An employer may not base hiring decisions on stereotypes and assumptions about a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

If an employer requires job applicants to take a test, the test must be necessary and related to the job and the employer may not exclude people of a particular race, color, religion, sex (including pregnancy), national origin, or individuals with disabilities. In addition, the employer may not use a test that excludes applicants age 40 or older if the test is not based on a reasonable factor other than age.

If a job applicant with a disability needs an accommodation (such as a sign language interpreter) to apply for a job, the employer is required to provide the accommodation, so long as the accommodation does not cause the employer significant difficulty or expense.

## **JOB REFERRALS**

It is illegal for an employer, employment agency or union to take into account a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information when making decisions about job referrals.

## **JOB ASSIGNMENTS AND PROMOTIONS**

It is illegal for an employer to make decisions about job assignments and promotions based on an employee's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not give preference to employees of a certain race when making shift assignments and may not segregate employees of a particular national origin from other employees or from customers.

An employer may not base assignment and promotion decisions on stereotypes and assumptions about a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

If an employer requires employees to take a test before making decisions about assignments or promotions, the test may not exclude people of a particular race, color, religion, sex (including pregnancy), or national origin, or individuals with disabilities, unless the employer can show that the test is necessary and related to the job. In addition, the employer may not use a test that excludes employees age 40 or older if the test is not based on a reasonable factor other than age.

## **EMPLOYMENT REFERENCES**

It is illegal for an employer to give a negative or false employment reference (or refuse to give a reference) because of a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

## **GENERAL PRE-EMPLOYMENT INQUIRIES**

As a general rule, the information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job; whereas, information regarding race, sex, national origin, age, and religion are irrelevant in such determinations.

Employers are explicitly prohibited from making pre-employment inquiries about disability.

Although state and federal equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to, or disproportionately screen out members based on race, color, sex, national origin, religion, or age, such inquiries may be used as evidence of an employer's intent to discriminate unless the questions asked can be justified by some business purpose.

Therefore, inquiries about organizations, clubs, societies, and lodges of which an applicant may be a member or any other questions, which may indicate the applicant's race, sex, national origin, disability status, age, religion, color or ancestry if answered, should generally be avoided.

Similarly, employers should not ask for a photograph of an applicant. If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.

## **PROHIBITED PRE-EMPLOYMENT INQUIRES**

**RACE:** In general, it is assumed that pre-employment requests for information will form the basis for hiring decisions. Therefore, employers should not request information that discloses or tends to disclose an applicant's race unless it has a legitimate business need for such information. If an employer legitimately needs information about its employees' or applicants' race for affirmative action purposes and/or to track applicant flow, it may obtain the necessary information and simultaneously guard against discriminatory selection by using a mechanism, such as "tear-off" sheets. This allows the employer to separate the race-related information from the information used to determine if a person is qualified for the job. Asking for race-related information on the telephone could probably never be justified.

**HEIGHT/WEIGHT:** Height and weight requirements tend to disproportionately limit the employment opportunities of some protected groups and unless the employer can demonstrate how the need is related to the job, it may be viewed as illegal under federal law. A number of states and localities have laws specifically prohibiting discrimination on the basis of height and weight unless based on actual job requirements. Therefore, unless job-related, inquiries about height and weight should be avoided.

**FINANCIAL INFORMATION:** Financial information" includes current or past assets, liabilities, or credit rating, bankruptcy or garnishment, refusal or cancellation of bonding, car ownership, rental or ownership of a house, length of residence at an address, charge accounts, furniture ownership, or bank accounts.

Federal law does not prevent employers from asking about your financial information. But, the federal EEO laws do prohibit employers from illegally discriminating when using financial information to make employment decisions.

- Employers must not apply a financial requirement differently to different people based on their race, color, national origin, religion, sex, disability, age, or genetic information.
- An employer must not have a financial requirement if it does not help the employer to accurately identify responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular race, color, national origin, religion, or sex.
- An employer might have to make an exception to a financial requirement for a person who cannot meet the requirement because of a disability.

Employers also must follow the Fair Credit Reporting Act (FCRA), which is not enforced by EEOC. It is enforced by the U.S. Federal Trade Commission. This law requires employers to tell you in writing if they will do a background check. It also requires them to get your written permission to do it, and to send you certain notices when they use the information. If you would like to know more about FCRA, please visit the Federal Trade Commission's (FTC) [website](#) or contact the Federal Trade Commission at 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261.

Depending on the state you live in, there also may be state laws governing employers' use of financial information.

**UNEMPLOYED STATUS:** "Unemployed status" includes current or past periods of unemployment. Federal law does not prevent employers from asking about unemployed status, but the federal EEO laws do prohibit using this information to discriminate. If an employer does reject job applicants based on unemployed status, it must do so consistently, without regard to race, color, national origin, religion, sex, disability, age, and genetic information.

- Employers must not screen out job applicants based on unemployed status if it does not help the employer to accurately identify responsible and reliable employees and if, at the same time, it significantly disadvantages people of a particular race, color, national origin, religion, or sex.
- An employer may have to make exceptions to a policy of rejecting applicants based on unemployed status for applicants whose unemployed status was caused by a disability.
- Depending on the state you live in, there also may be state laws governing employers' consideration of unemployed status.

**BACKGROUND CHECKS:** When making personnel decisions -- including hiring, retention, promotion, and reassignment -- employers sometimes want to consider the backgrounds of applicants and employees. Except for certain restrictions related to medical and genetic information, it is not illegal for an employer to ask questions about an applicants or employees background, or to require a background check. But the employer cannot conduct background checks or use the information obtained in a manner that denies equal employment opportunity to anyone on a protected basis, by intent or by unlawful disparate impact.

**ARREST/CONVICTION:** Federal law does not prohibit employers from asking about your criminal history. But, federal EEO laws do prohibit employers from discriminating when they use criminal history information. Using criminal

history information to make employment decisions may violate Title VII of the Civil Rights Act of 1964, as amended (Title VII).

Title VII prohibits:

- Employers from treating people with similar criminal records differently because of their race, national origin, or another Title VII-protected characteristic (which includes color, sex, and religion).
- Employers from using policies or practices that screen individuals based on criminal history information if:
  - They significantly disadvantage Title VII-protected individuals such as African Americans and Hispanics; AND
  - They do not help the employer accurately decide if the person is likely to be a responsible, reliable, or safe employee.

### **DIFFERENCE BETWEEN ARREST RECORDS AND CONVICTION RECORDS**

The fact that an individual was arrested is not proof that he engaged in criminal conduct. Therefore, an individual's arrest record standing alone may not be used by an employer to take a negative employment action (e.g., not hiring, firing or suspending an applicant or employee). However, an arrest may trigger an inquiry into whether the conduct underlying the arrest justifies such action.

In contrast, a conviction record will usually be sufficient to demonstrate that a person engaged in particular criminal conduct. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.

Several states' laws limit employers' use of arrest and conviction records to make employment decisions. These laws may prohibit employers from asking about arrest records or require employers to wait until late in the hiring process to ask about conviction records. If you have questions about these kinds of laws, you should contact your state fair employment agency for more information.

### **CONSUMER PROTECTIONS AND CRIMINAL BACKGROUND CHECKS**

Employers that obtain an applicant's or employee's criminal history information from consumer reporting agencies (CRAs) also must follow the Fair Credit Reporting Act (FCRA). For example, FCRA requires employers to:

- Get your permission before asking a CRA for a criminal history report.
- Give you a copy of the report and a summary of your rights under FCRA before taking a negative employment action based on information in the report.
- Send you certain notices if it decides not to hire or promote you based on the information in the CRA report.

If you would like to know more about FCRA, visit the Federal Trade Commission's (FTC) website (the federal agency that enforces FCRA). Or contact the FTC at 1-877-FTC-HELP (1-877-832-4357); TTY: 1-866-653-4261.

**SECURITY/BACKGROUND CHECKS FOR RELIGIOUS OR ETHNIC GROUPS:** If the employer requires all other applicants to undergo background checks before being offered a position, the employer may require members of religious or ethnic groups to undergo the same pre-employment investigations.

Of course, as with its other employment practices, the employer may not subject only particular religious or ethnic groups, such as Muslims or Arabs, to heightened security checks.

Some employers, such as defense contractors, may require a security clearance for certain jobs pursuant to a federal statute or Executive Order.

Clearance determinations must generally be processed and made without regard to race, religion, or national origin. However, security clearance determinations for positions subject to national security requirements under a federal statute or an Executive Order are not generally subject to review under the equal employment opportunity statutes.

**RELIGIOUS AFFILIATION OR BELIEFS:** Questions about an applicant's religious affiliation or beliefs (unless the religion is a bona fide occupational qualification (BFOQ)), are generally viewed as non job-related and problematic under federal law.

Religious corporations, associations, educational institutions, or societies are exempt from the federal laws that EEOC enforces when it comes to the employment of individuals based on their particular religion. In other words, an employer whose purpose and character is primarily religious is permitted to lean towards hiring persons of the same religion. This exception relieves religious organizations only from the ban on employment discrimination based on religion. It does not exempt such organizations from employing individuals due to their race, gender, national origin, disability, color, and/or age. Other employers should avoid questions about an applicant's religious affiliation, such as place of worship, days of worship, and religious holidays and should not ask for references from religious leaders, e.g., minister, rabbi, priest, imam, or pastor.

**CITIZENSHIP:** Employers should not ask whether or not a job applicant is a United States citizen before making an offer of employment. The Immigration Reform and Control Act of 1986 (IRCA) makes it illegal for employers to discriminate with respect to hiring, firing, or recruitment or referral for a fee, based on an individual's citizenship or immigration status. For example, the law prohibits employers from hiring only U.S. citizens or lawful permanent residents unless required to do so by law, regulation or government contract; it also prohibits employers from preferring to hire temporary visa holders or undocumented workers over qualified U.S. citizens or other protected individuals, such as refugees or individuals granted asylum.

IRCA requires employers to verify the identity and employment eligibility of all employees hired after November 6, 1986, by completing the Employment Eligibility Verification (I-9) Form, and reviewing documents showing the employee's identity and employment authorization. The law prohibits employers from rejecting valid documents or insisting on additional documents beyond what is legally required for employment eligibility verification (or the Department of Homeland Security (DHS) Form I-9), based on an employee's citizenship status or national origin. For example, e.g., an employer cannot require only individuals the employer perceives as "foreign" to verify their employment eligibility or produce specific documents, such as Permanent Resident ("green") cards or Employment Authorization Documents. It is the employee's choice which of the permitted documents to show for employment eligibility verification. As long as the document appears reasonably genuine on its face, and relates to the employee, it should be accepted.

Because of potential claims of illegal discrimination, employment eligibility verification should be conducted after an offer to hire has been made. Applicants may be informed of these requirements in the pre-employment setting by adding the following statement on the employment application:

"In compliance with federal law, all persons hired will be required to verify identity and eligibility to work in the United States and to complete the required employment eligibility verification document form upon hire."

The Immigration Reform and Control Act of 1986 (IRCA) also prohibits discrimination on the basis of national origin by smaller employers (with 4 to 14 employees). IRCA prohibits retaliation against individuals for asserting their rights under the Act, or for filing a charge or assisting in an investigation or proceeding under IRCA. Discrimination charges under IRCA are processed by the [Department of Justice, Office of Special Counsel \(OSC\) for Immigration- Related Unfair Employment Practices](#). For more information, contact the OSC at:

- Voice for employees/applicants 1-800-255-7688
- TTY for employees/applicants 1-800-237-2515
- Voice for employers 1-800-255-8155
- TTY for employers 1-800-362-2735

**MARITAL STATUS, NUMBER OF CHILDREN:** Questions about marital status and number and ages of children are frequently used to discriminate against women and may violate Title VII if used to deny or limit employment opportunities.

It is clearly discriminatory to ask such questions only of women and not men (or vice-versa). Even if asked of both men and women, such questions may be seen as evidence of intent to discriminate against, for example, women with children.

Generally, employers should not use non job-related questions involving marital status, number and/or ages of children or dependents, or names of spouses or children of the applicant. Such inquiries may be asked after an employment offer has been made and accepted if needed for insurance or other legitimate business purposes.

The following pre-employment inquiries may be regarded as evidence of intent to discriminate when asked in the pre-employment context:

- Whether applicant is pregnant
- Marital status of applicant or whether applicant plans to marry
- Number and age of children or future child bearing plans
- Child care arrangements
- Employment status of spouse
- Name of spouse

**GENDER:** Questions about an applicant's sex, (unless it is a bona fide occupational qualification (BFOQ) and is essential to a particular position or occupation), marital status, pregnancy, medical history of pregnancy, future child bearing plans, number and/or ages of children or dependents, provisions for child care, abortions, birth control, ability to reproduce, and name or address of spouse or children are generally viewed as non job-related and problematic under Title VII.

Any pre-employment inquiry in connection with prospective employment expressing or implying limitations or special treatment because of sex (unless based upon BFOQ) or any inquiry made of members of one sex and not the other, is similarly troublesome.

**DISABILITY:** Under the law, employers generally cannot ask disability-related questions or require medical examinations until after an applicant has been given a conditional job offer. This is because, in the past, this information was frequently used to exclude applicants with disabilities before their ability to perform a job was evaluated.

Employers are permitted to ask limited questions about reasonable accommodation if they reasonably believe that the applicant may need accommodation because of an obvious or voluntarily disclosed disability, or where the applicant has disclosed a need for accommodation.

Employers may ask if the applicant will need an accommodation to perform a specific job duty, and if the answer is yes, the employer may then ask what the accommodation would be.

The employer may not ask any questions about the nature or severity of the disability.

**MEDICAL QUESTIONS/EXAMINATIONS:** The ADA places restrictions on employers when it comes to asking job applicants to answer medical questions, take a medical exam, or identify a disability.

An employer may not ask a job applicant, for example, if he or she has a disability (or about the nature of an obvious disability). An employer also may not ask a job applicant to answer medical questions or take a medical exam before making a job offer.

An employer may ask a job applicant whether they can perform the job and how they would perform the job. The law allows an employer to condition a job offer on the applicant answering certain medical questions or successfully passing a medical exam, but only if all new employees in the same job have to answer the questions or take the exam.

Once a person is hired and has started work, an employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to support an employee's request for an accommodation or if the employer has reason to believe an employee would not be able to perform a job successfully or safely because of a medical condition.

The law also requires that the employers keep all medical records and information confidential and in separate medical files.

### **DRESS CODE**

In general, an employer may establish a dress code which applies to all employees or employees within certain job categories. However, there are a few possible exceptions.

While an employer may require all workers to follow a uniform dress code even if the dress code conflicts with some workers' ethnic beliefs or practices, a dress code must not treat some employees less favorably because of their national origin. For example, a dress code that prohibits certain kinds of ethnic dress, such as traditional African or East Indian attire, but otherwise permits casual dress would treat some employees less favorably because of their national origin.

Moreover, if the dress code conflicts with an employee's religious practices and the employee requests an accommodation, the employer must modify the dress code or permit an exception to the dress code unless doing so would result in undue hardship.

Similarly, if an employee requests an accommodation to the dress code because of his disability, the employer must modify the dress code or permit an exception to the dress code, unless doing so would result in undue hardship.

### **CONSTRUCTIVE DISCHARGE/FORCED TO RESIGN**

Discriminatory practices under the laws EEOC enforces also include constructive discharge or forcing an employee to resign by making the work environment so intolerable a reasonable person would not be able to stay.

Created by: [Affirmative Action and Equity Compliance \(AAEC\)](#)

Source: [US Equal Employment Opportunity Commission](#)