

# Employment Practices *Update*

Bringing important information to emergency service organizations

VOLUME 14 • NUMBER 2



## You asked what?

### *Questions may lead to discrimination claims*

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*When an emergency service organization (ESO) is accused by an applicant, employee or volunteer of discrimination, most people assume there must be evidence of intentional discrimination. In actuality, a lawsuit can often be the result of innocent and unintentional discriminatory questions asked on an application, during an interview or while engaged in casual conversation between co-workers.*

This article examines common questions and topics of discussion that could give rise to costly and damaging discrimination claims based on gender, race, color, national origin, religion, age (40 or older), disability, genetic information, sexual orientation, political affiliation, marital, parental or family status or other protected grounds. It's important for emergency service professionals to understand the fine line between showing genuine interest in an applicant, employee or volunteer and asking questions or discussing personal issues that may violate anti-discrimination laws. The intent can be to build rapport and instigate meaningful dialogue, but the result can be increased exposure to litigation.

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#### **Common legal pitfalls**

It is a sound business practice for an ESO to analyze its membership application form to determine whether there are any questions that could be perceived as discriminatory. Similarly, prepare interview questions that are strictly job-related and do not delve into subjects that are personal and potentially discriminatory. Perhaps the greatest legal risk for an ESO involves members who feel comfortable asking an existing co-worker personal questions or engage in conversation about personal matters. Avoid inquiries that either directly or indirectly disclose information about protected grounds or class status.

**Gender, marital status and sexual orientation** – A good rule of thumb is to confirm interview questions are asked consistently of men and women. Gender stereotyping may occur when interviews or discussions after selection reinforce negative stereotypes. An example in the fire service could be asking a female applicant how she would assimilate in a predominately male

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Published by the  
Glatfelter Insurance Group  
York, Pennsylvania

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## You asked what? Questions may lead to discrimination claims

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work environment. Regardless of the interviewer's intent, this question may be perceived as exclusionary toward female candidates.

Consider avoiding the following additional questions that could lead to real or perceived discrimination based on gender, marital or family status:

- Do you have kids or are you planning to have children in the future?
- How many children do you have? What are their ages?
- If you went on maternity leave, would you return to the job afterwards?
- Will you need to make childcare arrangements if you take this job or position?
- Are you single/married/divorced?
- Do you have a serious boyfriend/girlfriend?

**National origin** – It may be natural to want to know about an applicant or co-worker's background. However, it is unlawful to deny employment, membership or other work-related opportunities because of one's national origin, ancestry or birthplace. Be aware of the following questions that could lead to real or perceived unlawful discrimination:

- Where were you born?
- That is an interesting last name, what is your ancestry?
- Where is your accent from?
- Is English your native language?

**Religion** – There would not be a legitimate job-related reason to ask an applicant or ESO member a question about his or her religious beliefs, affiliation or practices. Discussion about religion can increase the risk of an individual claiming he or she was denied employment, membership or job opportunities (e.g. promotion, training) because of not having certain religious beliefs. Thus, questions to avoid include:

- What church do you belong to?
- What religious holidays do you observe?
- Can you provide a reference from one of your church officials?

**Disabilities** – Only ask questions about whether an applicant or current ESO member can perform the essential functions of the job in a safe manner, with or without a reasonable accommodation. Up-to-date job descriptions help define essential and non-essential job tasks. Questions or topics to avoid real or perceived discrimination include, but are not limited to:

- Are you in good health?
- Do you have any past or current medical conditions we need to know about to help accommodate you?

- Do you have a disability, injury or other physical or mental limitation that would not allow you to safely perform your job?
- How many sick days did you take last year?
- Have you ever filed a workers' compensation claim before?
- Have you ever been in an alcohol or drug rehabilitation program?

**Clubs and organizations** – Beware of asking applicants or ESO workers questions about current and past membership in clubs and organizations that are not work-related, as information could be revealed about the person's religion, race, national origin, political affiliation, sexual orientation or other legally protected status. It is appropriate to discuss professional or trade group affiliations because of relevance to the job in question.

**Other questions to consider avoiding** – The following inquiries can lead to heightened legal risk:

- Have you ever filed or threatened to file a civil lawsuit against a former employer, such as harassment, discrimination, retaliation or wrongful termination?
- What type of discharge did you receive in the military?
- How long do you intend to work for the ESO?
- How tall are you? How much do you weigh?
- With whom do you live?
- Do you own your own home?
- Is your spouse employed? What is his or her occupation?
- Have you ever been arrested?
- Have you ever been a member of a union or attempted to organize a union?

### **ESO applicant raises the topic**

Job candidates may voluntarily divulge personal information about issues like religious denomination, national origin, family planning, political affiliation or sexual orientation. In these situations, the conversation should be directed back to the job, organization and what makes the candidate qualified to perform the duties required.

### **Conclusion**

To maintain equity in the work environment, maintain performance based interview questions designed to highlight an applicant's job-related skills and qualifications. Likewise, while it may be impossible to keep a current employee or volunteer's personal discussions out of the workplace, strive to steer conversations away from issues related to individuals' protected class status.