

¶ 81,701 EEOC statements on pre-employment inquiries.—

PRE-EMPLOYMENT INQUIRIES CONCERNING A JOB APPLICANT'S RACE, COLOR, RELIGION, OR NATIONAL ORIGIN*

Adopted by

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Pre-employment inquiries.—Some state fair employment practice laws expressly prohibit inquiries on applications for employment concerning the applicant's race, color, religion or national origin, and state Commissions have determined that such direct inquiries, as well as the elicitation of indirect indicia, such as former name, past residences, names of relatives, place of birth, citizenship, education, work and military experience, organizational activities, references and photographs, may be unlawful.

Title VII of the Civil Rights Act of 1964 does not expressly prohibit pre-employment inquiries concerning a job applicant's race, color, religion or national origin. The legislative history of the statute is silent as to the Congressional intent on the subject.

Although Title VII does not make pre-employment inquiries concerning race, color, religion or national origin *per se* violations of law, the Commission's responsibility to promote equal employment opportunity compels it to regard such inquiries with extreme disfavor. Except in those infrequent instances where religion or national origin is a bona fide occupational qualification reasonably necessary for the performance of a particular job, an applicant's race, religion and the like are totally irrelevant to his or her ability or qualifications as a prospective employee, and no useful purpose is served by eliciting such information. The Commission is also mindful that such inquiries traditionally have been used to deprive individuals of employment opportunities and to discriminate in ways now proscribed by Title VII.

Accordingly, in the investigation of charges alleging the commission of unlawful employment practices, the Commission will pay particular attention to the use by the party against whom charges have been made of pre-employment inquiries concerning race, religion, color or national origin, or other inquiries which tend directly or indirectly to disclose such information. The fact that such questions are asked may, unless otherwise explained, constitute evidence of discrimination, and will weigh significantly in the Commission's decision as to whether or not Title VII has been violated. Pre-employment inquiries which are made in conformance with instructions from, or the requirements of, an agency or agencies of the local, State, or Federal Government in connection with the administration of a fair employment practices program will not constitute evidence of discrimination under Title VII.

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PRE-EMPLOYMENT INQUIRIES AND EQUAL EMPLOYMENT OPPORTUNITY LAW *

Pre-Employment Inquiries. Employment application forms and pre-employment interviews have traditionally been instruments for eliminating, at an early stage, "unsuited" or "unqualified" persons from consideration for employment and often have been used in such a way as to restrict or deny employment opportunities for women and members of minority groups.

The law, interpreted through court rulings and EEOC decisions, prohibits the use of all pre-employment inquiries and qualifying factors which disproportionately screen out members of minority groups or members of one sex and are not valid predictors of successful job performance or cannot be justified by "business necessity."¹

In devising or reviewing application forms or in seeking information from job applicants, employers should ask themselves: (1) Will the answers to this question, if used in making a selection, have a disparate effect in screening out minorities and/or members of one sex (i.e. disqualify a significantly larger percentage of members of a particular group than others)? (2) Is this information really needed to judge an applicant's competence or qualification for the job in question?

Business Necessity and Job Relatedness. The concept of business necessity has been narrowly defined by the courts. When a practice is found to have discriminatory effects, it can be justified only by showing that it is necessary to the safe and efficient operation of the business, that it effectively carries out the purpose it is supposed to serve and that there are no alternative policies or practices which would better or equally well serve the same purpose with less discriminatory impact.²

An employer should be able to demonstrate through statistical evidence that any selection procedure, which has a "disparate effect" on groups protected by the law, is job related (i.e. validly predicts successful performance in the type of job in question). If this cannot be shown or if the employer cannot or does not wish to perform a technical validation study, the use of that procedure should be discontinued or altered in such a way that there is no longer a discriminatory effect.³ Even when a procedure having an adverse impact can be validated, it may not be used if there are other procedures which would accomplish the same goal and have less of a discriminatory effect.

Specific Issues Addressed by Court and EEOC Decisions:

Race, Color, Religion, Sex or National Origin. Under Title VII of the Civil Rights Act of 1964, as amended, pre-employment inquiries concerning race, color, religion, sex or national origin are not considered violations of the law in and of themselves. However, inquiries which either directly or indirectly disclose such information, unless otherwise explained, may constitute evidence of discrimination prohibited by Title VII.

Some state fair employment practice laws expressly prohibit inquiries on employment applications concerning the applicant's race, color, religion, sex or national origin. In some states it may also be considered illegal to seek related data (e.g. former name, past residence, names of relatives, place of birth, citizenship, education, organizational activities, photograph and color of eyes and hair) which could indirectly reveal similar information.

Denial of equal employment opportunity to individuals because of marriage to or association with persons of a specific national, ethnic or racial origin, or because of attendance at schools or churches, or membership in organizations identified with particular racial or ethnic groups, may be considered a violation of Title VII.⁴ Charges

presented to EEOC alleging such discrimination will be examined with particular concern to determine if, indeed, the alleged discrimination was based on national origin. These determinations will be made according to general Title VII principles, such as disparate treatment and adverse impact.

An employer may justifiably and legitimately seek and obtain information needed for implementation of affirmative action programs, court-ordered or other government reporting or recordkeeping requirements, and for studies to identify and resolve possible problems in the recruitment and testing of members of minority groups and/or women to insure equal employment for all persons.

However, the employer must be able to demonstrate that such data were collected for legitimate business purposes. Such information should be kept separate from the regular permanent employee records to insure that it is not used to discriminate in making personnel decisions.

Height and Weight. EEOC and the courts have ruled minimum height and weight requirements to be illegal if they screen out a disproportionate number of minority-group individuals (e.g. Spanish surnamed or Asian Ameri-

¹ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

² *Griggs v. Duke Power Co.*, supra; *Robinson v. Lorillard Corp.*, 444 F.2d 791 (C.A. 4, 1971); *U.S. v. St. Louis-San Francisco R.R. Co.*, 464 F.2d 301, 308 (C.A. 8, 1972); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (C.A. 10, 1970).

³ EEOC Guidelines on Employee Selection Procedures, Code of Federal Regulations, Title 29, Chapter XIV, Part 1607.

⁴ EEOC Guidelines on Discrimination Because of National Origin, Code of Federal Regulations, Title 29, Chapter XIV, Part 1606; EEOC Decision No. 71-969 (1970).

cans) or women, and the employer cannot show that these standards are essential to the safe performance of the job in question.⁵

Marital Status, Number of Children and Provision for Child Care. Questions about marital status, pregnancy, future child-bearing plans and number and age of children are frequently used to discriminate against women and may be a violation of Title VII if used to deny or limit employment opportunities for female applicants. Employers are cautioned against use of such non-job-related questions. Information needed for tax, insurance or social security purposes may be obtained after employment.*

It is a violation of Title VII for employers to require pre-employment information about child-care arrangements from female applicants only. The U.S. Supreme Court has ruled that an employer may not have different hiring policies for men and women with pre-school children.⁶

English Language Skill. When the use of an English language proficiency test has an adverse effect upon a particular minority group and English language skill is not a requirement of the work to be performed, there is a violation of Title VII.⁷

Educational Requirements. The U.S. Supreme Court has found an employer's requirement of a high school education discriminatory where statistics showed such a requirement operated to disqualify blacks at a substantially higher rate than whites and there was no evidence that the requirement was significantly related to successful job performance. This standard applies to all groups protected under Title VII and is relevant to all questions relating to educational attainment, where no direct job related requirement or business necessity can be proven.⁸

Friends or Relatives Working for the Employer. Information about friends or relatives working for an employer is not relevant to an applicant's competence. Requesting such information may be unlawful if it indicates a preference for friends and relatives of present employees and the composition of the present workforce is such that this preference would reduce or eliminate opportunities for women or minority group members.⁹ However, a "nepotism" policy which prohibits or limits employment opportunities of a spouse or other relative also may be illegal if it has an adverse impact on job opportunities for either women or men as a group.¹⁰

Arrest Records. Because members of some minority groups are arrested substantially more often than whites in proportion to their numbers in the population, making personnel decisions on the basis of arrest records involving no subsequent convictions has a disproportionate effect on the employment opportunities of members of these groups. The courts and the Commission accordingly have held that without proof of business necessity an employer's use of arrest records to disqualify job applicants is unlawful discrimination.¹¹ EEOC has ruled that even if an employer does not consider arrest information, the mere request for such information tends to discourage minority applicants and is therefore illegal.

Conviction Records. Federal courts have held that a conviction for a felony or misdemeanor may not by itself lawfully constitute an absolute bar to employment, but that an employer may give fair consideration to the relationship between a conviction and the applicant's fitness for a particular job.¹² These decisions indicate that conviction records should be cause for rejection only if their number, nature and recentness would cause the applicant to be unsuitable for the position. If such inquiries are made, they should be accompanied by a statement that a conviction record will not necessarily be a bar to employment, and that factors such as age and time of the offense, seriousness and nature of the violation, and rehabilitation will be taken into account.

Discharge from Military Service. Employers should not, as a matter of policy, reject applicants with less than honorable discharges from military service. According to a Department of Defense study, minority service members receive a higher proportion of general and undesirable discharges than non-minority members of similar aptitude and education.

Thus, an employer's requirement that to be eligible for employment ex-members of the armed services must have been honorably discharged has a disparate effect upon minorities and may be a violation of Title VII.¹³

One federal district court has held that an employer may inquire into an applicant's military service record if information regarding discharge status is used not in making a hiring decision but in deciding whether further investigations should be made into the applicant's background and qualifications. If further inquiry reveals non-discriminatory

⁵ *Davis v. County of Los Angeles*, 566 F. 2d 1334 (C.A. 9, 1977), vacated and remanded as moot on other grounds, 440 U.S. 625 (1979); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

⁶ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

⁷ EEOC Guidelines on Discrimination Because of National Origin, *supra*. Uniform Guidelines on Employee Selection Procedures (1978).

⁸ *Griggs v. Duke Power Co.*, *supra*.

⁹ *Local 53, International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler*, 407 F. 2d 1047 (C.A. 5, 1969); *Lea v. Cone Mills Corp.*, 438 F. 2d 86 (C.A. 4, 1971), *aff'g*. 301 F. Supp. 97 (D.C.N.C., 1969); EEOC Decision No. 74-13 (1973).

¹⁰ EEOC Decision No. 75-239 (1975).

¹¹ *Carter v. Gallagher*, 452 F. 2d 315 (C.A. 8, 1971); *Gregory v. Litton*, 472 F. 2d 631 (C.A. 9, 1972).

¹² *Carter v. Gallagher*, *supra*; *Green v. Missouri Pacific R.R. Co.*, 523 F. 2d 1290 (C.A. 8, 1975).

¹³ EEOC Decision No. 74-25 (1973).

* See section on "Data Required for Legitimate Business Purposes."

grounds for denying employment, the employer may then refuse to hire the applicant.¹⁴

Since a request for this information may discourage minority workers from applying and therefore be grounds for a discriminatory charge, employers should avoid such questions unless "business necessity" can be shown. As in the case of conviction records discussed above, questions regarding military service should be accompanied by a statement that a dishonorable or general discharge is not an absolute bar to employment and that other factors will affect a final decision to hire or not to hire.

Age. The Age Discrimination in Employment Act of 1967, as amended, prohibits discrimination on the basis of age with respect to individuals 40 to 70 years of age.

A request that an applicant state his age may tend to deter older applicants or may otherwise indicate discrimination based on age. Consequently, employment application forms which request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Age Discrimination in Employment Act. Permissible purposes are limited to when the age requirement or limit is a bona fide job qualification (e.g., actors required for youthful roles) or is based on reasonable factors other than age.

Further information on age discrimination is contained in EEOC pamphlet *Persons 40-70 Note: Age Discrimination is Against the Law*. This pamphlet is available from EEOC's Office of Public Affairs, Washington, D.C. 20506.

Citizenship. EEOC *Guidelines on Discrimination Because of National Origin* indicate that consideration of an applicant's citizenship may constitute evidence of discrimination on the basis of national origin.

The law clearly protects all individuals, both citizens and non-citizens domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex or national origin.

Where consideration of citizenship has the purpose or effect of discriminating against persons of a particular national origin, a person who is a lawfully immigrated alien, legally eligible to work, may not be discriminated against on the basis of his/her citizenship, except in the interest of national security or determined under a United States statute or presidential executive order respecting the particular position or premises in question.

If states have enacted laws prohibiting the employment of non-citizens that are in conflict with Title VII, the laws are superceded by Section 708 of Title VII.¹⁵

The U.S. Supreme Court has found that a state civil service law which restricted state employment to U.S. citizens was unconstitutional and a denial of equal protection and benefit of the laws. A flat ban on employment of aliens without regard to the type of position or to the characteristics of the applicant involved was not justifiable on grounds of public interest.¹⁶

Economic Status. Rejection of applicants because of poor credit ratings has a disparate impact on minority groups and hence has been found unlawful by the Commission, unless business necessity can be shown.

Inquiries as to an applicant's financial status, such as bankruptcy, car ownership, rental or ownership of a house, length of residence at an address, or past garnishments of wages, if utilized to make employment decisions, may likewise violate Title VII.¹⁷

Availability for Work on Weekends or Holidays. Employers and unions have an obligation to accommodate the religious beliefs of employees and/or applicants, unless to do so would cause undue hardship. EEOC has determined that the use of pre-employment inquiries that determine an applicant's availability has an exclusionary effect on the employment opportunities of persons following certain religious practices. Questions relating to availability for work on Friday evenings, Saturdays or holidays should not be asked unless the employer can show that the questions have not had an exclusionary effect on its employees or applicants who would need an accommodation for their religious practices, that the questions are otherwise justified, and that there are no alternative procedures which would have a lesser exclusionary effect.¹⁸

Data Required for Legitimate Business Purposes. Data on such matters as marital status, number and age of children, and similar issues, which could be used in a discriminatory manner in making employment decisions but which are necessary for insurance, reporting requirements or other business purposes, can and should be obtained after a person has been employed, not by means of an application form or pre-employment interview.

Another means of collecting such data that has been approved by the courts is use of a "tear-off sheet," preferably anonymous. After completing the application and the tear-off sheet, the latter is separated from the application and used only for purposes unrelated to the selection decision.

It is reasonable to assume that all questions on an application form or in a pre-employment interview are for some purpose and that selection or hiring decisions are made on the basis of the answers given. In an investigation of charges of discrimination, the burden of proof is on the employer to show that answers to all questions on application forms or in oral interviews are not used in making hiring and placement decisions in a discriminatory manner prohibited by the law.

To seek information other than that which is essential to effectively evaluate a person's qualifications for employment is to make oneself vulnerable to charges of discrimination and consequent legal proceedings.

It is therefore in an employer's own self-interest to carefully review all procedures used in screening applicants for employment, eliminating or altering any not justified by business necessity.

¹⁴*Lewis v. Western Airlines*, 379 F. Supp. 684, (D.C.ND Cal., 1974).

¹⁵EEOC *Guidelines on Discrimination Because of National Origin*, supra.

¹⁶*Sugarman v. Dougall*, 413 U.S. 634 (1973).

¹⁷*Johnson v. Pike Co.*, 332 F. Supp. 490 (C.D. Calif., 1971). EEOC Decision No. 74-02 (1973).

¹⁸EEOC *Guidelines on Discrimination Because of Religion*, Code of Federal Regulations, Title 29, Chapter XIV, Part 1605.