



NAVIGATING THE HIRING PROCESS TO AVOID DISCRIMINATION CLAIMS

Having good personnel on your team can be the difference between success and failure for any business. Surely, having staff that is qualified, motivated and engaged are hallmarks of any thriving business. With the inundation of email, television and radio commercials proclaiming to be the ultimate resource for finding employees, it can be difficult to navigate all the resources available to find and attract talent to your organization.

When you do find that talent,

you want to be sure that the interview process is not only streamlined to help you efficiently determine if the candidate is a good fit, but critically, from a legal perspective, you want to be sure you are asking questions that will not only help you make the correct hiring decision but that also do not run afoul of any laws that may apply in the employment context.

Employers presumably want to know as much as they can about any individual that desires to represent their company. How old are you? Where do you live?

What's your level of education? What experience do you have? These are questions that seemingly any employer would want to know of a prospective employee. But, how far can an employer go? How far is too far? Where is the line, and when have you crossed it? Avoiding situations like this will not only make you



by Justin M. Klein, Esq.

a better interviewer, but will also help to keep you from violating the law in connection with onboarding new employees. This is not only important considering your franchise agreement requires you to obey all laws, it is also critical because employment-related litigation can be protracted and expensive and can quickly become a public relations nightmare for what otherwise may be a very well run and successful business operation.

This article provides a general overview of types of interview questions that may be problematic or may have legal implications if utilized. It is by no means exhaustive of all the prohibitions that may exist in the hiring process. To that end, it is advisable for any business owner to engage qualified HR professionals to assist in the onboarding process or, at the very least, to ensure that the proper hiring policies and procedures are in place and enforced company-wide. It is also advisable to ensure that you or the members of your staff who will conduct interviews for potential hires are properly trained and aware of the types of questions that should not be asked.

From a legal perspective, the crux of concern surrounding the interview process and what questions you should not ask revolves around discrimination laws. Indeed, there are numerous federal and state discrimination laws that are applicable in the employment realm that may be implicated in the hiring process. For example, the Equal Employment Opportunity Commission oversees employment discrimination claims, including hiring discrimination, against certain classes of individuals who are “protected” under the law. These protected classes include race, ethnicity, religion, sex, national origin, age, disability, genetic information and others. Largely, these employment laws are intended to curtail employers from making employment decisions based solely on this type of information to avoid instances of discrimination, i.e. not hiring someone because they are too old or because of their religious beliefs.

Therefore, it is best to avoid areas of questioning relating to sensitive topics even if it is not per se illegal to ask the question under the law. For example, while it may not be illegal to ask a female candidate if she plans on having children in the near future, denying that applicant a job because of an affirmative answer to that question may be discriminatory under the law. Similarly, asking a candidate what

year they graduated high school may seem like an innocuous inquiry, however, if the candidate is not ultimately hired, he or she may claim that it was based on information relating to their age, which may be discriminatory.


In some jurisdictions, there are laws specifically prohibiting employers from asking certain types of questions during the interview process. As an illustration, while it may seem reasonable to ask a candidate how much income they earned in a previous job, this line of inquiry is prohibited under several states’ laws. In fact, certain states have enacted “equal pay” statutes that specifically prohibit basing hiring decisions on past earnings in another job. However, this is not absolute across the land. Employers may still utilize historical earning data from a candidate if that information is voluntarily provided by the candidate and not solicited by the employer.

Some other areas of questioning that should be avoided are questions related to mental and physical health. For example, asking someone if they use marijuana for medicinal purposes may be discriminatory. Or, asking someone if they smoke, use alcohol or certain drugs recreationally (while off duty) may be violative of certain laws. Other questions to avoid include asking about a person’s disabilities or medications they use, or for example, how many sick days they have typically used in a year during prior employment.

Another area of questioning that can be problematic is asking if the candidate has military obligations. The

Uniform Services Employment and Reemployment

Act specifically prohibits employers from discriminating against applicants and employees as a result of their participation in any armed services. Additional areas of questioning that should be off limits, or may create issues under the law, include whether the candidate has ever been convicted of a crime, asking if they are married, or if they have children and, if so, who will take care of them while they are at work.

The law in this area continues to evolve rapidly. Employers are best advised to have the best and most recent resources at their fingertips to stay abreast of all developments in this area of law. Knowing the laws and understanding how they are applied as it relates to your business will not only help avoid potentially uncomfortable interviews, it will help you avoid unwanted lawsuits for discrimination or violations of other laws. 

Justin M. Klein is a franchise and business attorney and a partner with the nationally recognized franchise law firm of Marks & Klein, LLP, which represents Planet Fitness® franchise operators throughout the United States. You can contact him at justin@marksklein.com.



THESE BOOTS WERE MADE FOR LENDING...
AND THAT'S JUST WHAT WE DO.
SINCE 1999

WEST STAR CAPITAL
Your First Choice in Finance Since 1999

892 Hicksville Road, Massapequa, NY 11758 | 516-799-9191 tel | 516-799-9193 fax | Visit our website! www.weststarcapital.com