

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION GUIDELINES:
LAWFUL AND UNLAWFUL PRE-EMPLOYMENT INQUIRIES**

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 (BFOQ) 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 prescribed 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, constitutes 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.

Questions to Avoid in Pre-Employment Application Forms

1. **Age? Date of Birth?** The Age Discrimination In Employment Act of 1967 (29 USC 621-34) prohibits discrimination on the basis of age against individuals who are between the ages of 40 and 64, inclusive (amended 1978 (40-70)). A majority of states also have laws prohibiting age discrimination. Thus, the answer to this question could be used unlawfully.
2. **ARRESTS?** Consideration of arrest records is almost certainly unlawful. An arrest is no indication whatsoever of guilt, and historically minorities have suffered proportionately more arrests than others (See *Carter v. Gallagher*, 451 F. 2nd 315 [8th Cir. 1971] and *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 [C.D. Cal. 1970]). The U.S. Department of Labor has also recognized the potential for discrimination in the consideration of arrest records. See 60-2.24(d) (3) of Revised Order No. 4(41 CFR 60.2), establishing standards and guidelines for the affirmative action programs required of government contractors.

3. **AVAILABLE FOR SATURDAY AND SUNDAY WORK?** This question may serve to discourage applications from persons of certain religions, which prohibit their adherents from working on Saturdays or Sunday. On the other hand, it may be necessary to know whether an applicant can work on these days. Section 701 (j) of Title VII, as amended in 1972, prohibits discrimination on the basis of religion and defines religion to include "all aspects of religious observance and practices, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." See also "EEOC Religious Discrimination Guidelines," 29 CFR 1605.1. If this kind of question is asked, it would be desirable to indicate that a reasonable effort will be made to accommodate to the religious needs of employees.
4. **CHILDREN UNDER 18? NUMBER OF CHILDREN? AGE OF CHILDREN? WHAT ARRANGEMENTS WILL YOU MAKE FOR CARE OF MINOR CHILDREN?** The purpose of these questions is to explore what the employer believes to be a common source of absenteeism and tardiness. But why explore this area in such an indirect way, and in a way that applies only to women for all practical purposes? There are a number of common causes of absenteeism and tardiness which affect both men and women and which would be worthy of exploration if this is a matter of substantial concern to the employer. The U.S. Supreme Court has ruled that in the absence of proof of business necessity, Title VII prohibits an employer from having one hiring policy for women and another for men - each having pre-school age children. See *Phillips v. Martin Marietta*, 400 U.S. 542 (1971). It is also important to note that any selection procedure, which has an adverse effect on persons with dependent children, will affect minorities and Catholics more than other, since they have, on the average, more children.
5. **CITIZEN OF WHAT COUNTRY?** The Commission has adopted Guidelines on Discrimination because of National Origin (29 CFR 1606) which contain the following statement: "Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship," except pursuant to national security requirements required by a federal statute or executive order. At least one federal court has expressly agreed with this analysis (*Guzman v. Polich and Benedict Construction Co.*, --F. Supp. __ 2EPD 10,156 [C.D. Calif. 1970]) and one has disagreed (*Espinoza v. Farah Mfg. Co.*, 313 U.S. 811 [1973]). In addition, this question asks what country the applicant is a citizen of, thus permitting discrimination on the basis of particular national origin.
6. **CONVICTIONS (OTHER THAN TRAFFIC VIOLATIONS)?** To the extent that this question implies an absolute bar to the employment of an applicant who has a conviction record, it is probably unlawful. See *Charter v. Gallagher*, supra. This is because some minority groups in our society have conviction records substantially in excess of the average, taking into consideration their relative numbers and the extent of their "criminal" activity. On the other hand, an employer probably has the right to exclude persons who have been convicted of certain offenses from certain kinds of jobs, at least if this is done on a carefully considered basis. To avoid frightening off qualified applicants who have irrelevant criminal records, the best practice would be to obtain conviction information through local police departments rather than from applicants. If this is not possible, the application form might state the existence of a criminal record does not constitute an automatic bar to employment. In addition, each person who will evaluate information concerning criminal records should be given careful instructions as to its limited usefulness.
7. **CREDIT RECORD: (CHARGE ACCOUNTS? OWN YOUR OWN HOME? OWN YOUR OWN FURNITURE? OWN A CAR?)** Because minority persons are far poorer on the average than whites, consideration of these factors has an adverse effect on minorities and is probably unlawful unless required by considerations of business necessity. See CD 72-0427, CCH 6312. The U.S. Department of Labor has also recognized the potential for discrimination in the consideration of credit records. See Revised Order No. 4 (41 CFR 60-2.25 [d] [3]) establishing standards and guidelines for affirmative action programs required of government contractors.

8. **EYES? HAIR?** Eye color and hair color are not related to the performance of any job an may serve to indicate an employee's race or religion.
9. **FIDELITY BOND EVER REFUSED TO YOU?** This question presumably represents an indirect effort to find flaws, which may exist in an individual's past. The difficulty with this means, however, is that a fidelity bond may be denied for totally arbitrary and discriminatory reasons which the individual does not have an adequate opportunity to know of or challenge. Thus the method of ascertaining an individual's past history should be dropped in favor of some other method, which is not so likely to be infected with bias. The Maryland Commission on Human Relations has issued an order prohibiting an employer from asking about bond refusals because of the discriminatory impact this kind of question may have. See CCH 5047.
10. **FRIENDS OR RELATIVES WORKING WITH US?** This question may reflect for friends or relatives of present employees. Such a preference would be unlawful if it has the effect of reducing employment opportunities for women or minorities. It would have this unlawful effect if present work force differs significantly in its proportion of women or minorities form the population of the area from which workers are recruited. This question may also reflect a rule that only one partner in a marriage can work for the employer. There is a growing recognition that such a rule hurts women far more often than men and that the rule serves no necessary business necessity.
11. **GARNISHMENT RECORD?** In *Johnson v. Pike Corporation of America*, 332 F. Supp. 490 (C.D. Calif. 1971), the court ruled that an employer violated Title VII by discharging a black employee because his wages had been garnished several times. This district court based its conclusion on the reasoning of the Supreme Court's testing ruling, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and on the district court's findings that minorities suffer wage garnishments substantially more often that whites, and that wage garnishments do not affect a worker's ability to perform his/her work effectively.
12. **HEIGHT? WEIGHT?** Some employers have imposed minimum height or weight requirements for employees, who are not related to the job to be performed, and which have the effect of excluding above-average percentages of women and members of certain nationality groups. Unless height or weight is directly related to a job requirement, these questions should not be asked.
13. **LOWEST SALARY WILL ACCEPT.** Women generally have been relegated to poorer paying jobs than men, and have been paid less than men for the same work. As a result of this discrimination, a woman might be willing to work for less pay than a man would find acceptable. It is unlawful, however, to pay a woman less than a man would be paid because of community wage patterns, which are based on discrimination. See *Hodgson v. City Stores, Inc.*, 332 F. Supp. 942 (M.D. Ala. 1971).
14. **MAIDEN NAME?** This is not relevant to a person's ability to perform a job and could be used for a discriminatory purpose. For example, a women's maiden name might be used as an indication of her religion or national origin. This item also constitutes an inquiry into marital status, which is discussed below.
15. **MARITAL STATUS?** Some employers have refused to hire a married woman for certain jobs. Most airlines, for example, refused for many years to permit a married woman to be a flight attendant, though other employees could be married. This practice was held to violate Title VII of the civil Rights Act of 1964 in *Sprogis v. United Air Lines*, 444 F. 2d 1194 (7th Cir. 1971), and the EEOC Guidelines on Sex Discrimination (29 CFR 1604. (a)) expresses that same conclusion. It would also violate Title VII for an employer to refuse to hire a married woman or pay a married woman less than a married man for the same work because the woman's pay represents a second

income while the man's does not. Finally an employer could not refuse to hire a married woman for any job or for a particular job because of the employer's beliefs concerning morality or family responsibility.

16. **MR., MISS or MRS.?** This is simply another way of asking the applicant's sex and (for women only) marital status (see No. 15). Even asking an applicant's first name normally serves no other pre-employment purpose than to indicate the applicant's sex.
17. **PRIOR MARRIED NAME?** This question asks, in effect, whether an individual has been divorced. By its nature, however, it asks this question only of women because only a woman changes her name on marriage. Thus, the question is discriminatory unless the employer must have the information for purposes of pre-employment investigation.
18. **SEX?** Title VII prohibits discrimination in employment on the basis of sex except in the few instances in which sex may be a "bona fide occupational qualification" reasonably necessary to the normal operation of the employer's business. There are virtually no jobs, which can be performed only by one sex or the other. For this reason it would be desirable to omit any questions asking the applicant's sex from an application form that is intended for general use.

19. **SPOUSE'S NAME?** To the extent that this question asks for marital status, the comments on marital status (No. 15) apply. A spouse's name may also be used as an indication of religion or national origin.
20. **SPOUSE'S WORK?** To the extent that this question asks for marital status, the comments on marital status (No. 15) apply. In addition, some employers have been reluctant to hire a woman if that would make her the second breadwinner in the family, whereas there is seldom any objection to hiring a man if that would make him the second breadwinner in the family. Such a policy is unlawful under Title VII and other nondiscrimination law.
21. **WIDOWED, DIVORCED, OR SEPARATED?** Recent statistics show that many more black than white persons are either widowed, divorced, or separated and that a much larger proportion of women than men in the labor force is either widowed, divorced, or separated. Thus this question has a potential for adversely affecting women and blacks.