



SLS HANDBOOK

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Memo 6

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PRE-EMPLOYMENT INQUIRY GUIDELINES

Introduction

The following guidance, as contained in our February 2019 update regarding pre-employment inquiry guidelines, remains applicable to all employers, including public school districts and county offices of education. Employers are limited by federal and state laws when questioning prospective employees either verbally in interviews or other settings or in writing through the use of an application form. Certain inquiries are prohibited and can potentially expose an employer to a charge of discrimination from an unsuccessful applicant. In order to avoid potential liability, an employer should only obtain information about an applicant that is job-related and consistent with business necessity. The Fair Employment and Housing Act (FEHA), at Government Code section 12940, currently provides, in pertinent part:

“It is an unlawful employment practice, unless based upon a bona fide occupational qualification . . .

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person, to refuse to hire or employ the person....”

Thus, job applicants generally should not be asked, either directly or indirectly, questions designed to elicit information related to these matters:

Race	Religious Creed	Color
National Origin	Ancestry	Physical Disability
Mental Disability	Medical Condition	Genetic Information
Marital Status	Sex	Gender
Gender Identity	Gender Expression	Age
Sexual Orientation	Military and Veteran Status	

Additionally, an applicant should not be asked to submit or provide a physical description or photograph. General questions regarding an arrest or detention record (as opposed to a conviction record) and general questions regarding membership in non-job-related organizations, clubs, societies, and/or lodges also should not be asked.

In summary, a job application and/or interview should only include questions which relate to the actual requirements of the job and the applicant's qualifications. We advise you to continually re-examine your current job application forms and interview question banks in light of these standards. In this memorandum, we discuss some important issues pertaining to questioning applicants for employment.

Race, Religious Creed, Color, National Origin, and Ancestry

In the face of a discrimination charge or complaint based on the characteristics of race, religious creed, color, national origin, and/or ancestry, it would be difficult for a public school employer to assert an affirmative defense of a bona fide occupational qualification (BFOQ). A BFOQ is defined as an employment practice which is justified because all or substantially all of the excluded individuals in a particular classification (e.g., all women or all individuals with lower back defects) are unable to safely and efficiently perform the job in question and because the business operation would be undermined without that particular practice.¹ A defense based upon a BFOQ is generally not favored.

As to national origin and ancestry in particular, federal and state law prohibits employment discrimination against individuals because of national origin or citizenship status. Under FEHA, "national origin" discrimination includes, but is not limited to, discrimination on the basis of possessing or presenting a driver's license granted to an individual unable to prove that his/her presence in the United States is authorized under federal law.² However, information regarding citizenship is required by the Department of Homeland Security's Form I-9, Employment Eligibility Verification. A potential employee should be requested to complete the form only after an offer of employment has been made.

As to the religious creed of an applicant, Title 2 California Code of Regulations, section 11063, provides:

"Pre-employment inquiries regarding an applicant's availability for work on weekends or evenings shall not be used as a pretext for ascertaining his or her religious creed, nor shall such inquiry be used to evade the requirement of reasonable accommodation...."

¹ 2 California Code of Regulations, section 11010(a).

² California Vehicle Code section 12801.9(h)(2)(A); see also, California Government Code section 12926(v). (All further statutory references are to California statutes, unless otherwise noted.)

Despite the foregoing, a potential employee can be asked about his/her availability for work on weekends or evenings when these inquiries are reasonably related to the normal business requirements of the job in question (i.e., when the required work hours would require an individual to work at times other than traditional hours). It is a best practice to include on all job postings the specific days of the week and hours of duty required for each position so as to put potential applicants on notice as to the requirements of the position.

Sex, Gender, Gender Identity, Gender Expression, and Sexual Orientation

It is generally unlawful for a public school employer to ask the sex or gender of an applicant on an application form or pre-employment questionnaire. However, nothing in the law precludes an employer and employee from communicating about the employee's sex, gender, gender identity, or gender expression when the employee initiates communication with the employer regarding the employee's working conditions.³ For recordkeeping purposes, an employer may request an applicant to provide this information solely on a voluntary basis.⁴ If such data is to be provided on an identification form, this form shall be separate or detachable from the application form itself.⁵ After an individual is hired, the employer may then record the employee's sex for nondiscriminatory personnel purposes.⁶ Additionally, it is unlawful for a public school employer "to ask questions regarding childbearing, pregnancy, birth control, or familial responsibilities unless the questions are related to specific and relevant working conditions of the job in question."⁷

Tests of physical agility or strength should only be imposed in rare circumstances. If used, all applicants of both sexes should be allowed the opportunity to demonstrate that he/she has the requisite strength or agility for the job in question. Likewise, height and weight standards should not be used in most cases. If they are utilized, most often the same standards should apply to both male and female applicants.⁸

Public school employers are advised not to inquire about an applicant's sexual orientation or relationships arising out of that sexual orientation (i.e., marriages and registered domestic partnerships). It would be very difficult to provide a BFOQ as a defense to this line of questioning. This information is highly sensitive in nature and inquiries regarding an applicant's sexual orientation may quickly lead to a claim or charge of discrimination and/or sexual harassment.

³ 2 California Code of Regulations, section 11034(i)(B).

⁴ 2 California Code of Regulations, section 11034(h).

⁵ 2 California Code of Regulations, section 11013(b).

⁶ 2 California Code of Regulations, section 11032(b)(2).

⁷ Government Code section 12943; 2 California Code of Regulations, section 11032(b)(3).

⁸ 2 California Code of Regulations, section 11033(a), (b).

Physical Disability, Mental Disability, and Medical Condition

The term “disability” is very broad and includes physical disability, mental disability, medical condition, and disability as used in the Americans with Disabilities Act (ADA) of 1990, and as amended by the ADA Amendments Act of 2008, if the ADA and the ADA Amendments Act would result in broader protection to the applicant. A person is “disabled” if he/she has a physical or mental impairment that limits a major life activity, has a record of such an impairment, is regarded or treated as having, or having had, an impairment that makes achievement of a major life activity difficult, or is regarded or treated as having, or having had, an impairment that has no present disabling effect but might become a future disability.⁹

A **physical disability** includes, but is not limited to, any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of the body systems and limits an individual’s ability to participate in major life activities.¹⁰

A **mental disability** includes any mental or psychological disorder, such as an intellectual or cognitive disability, organic brain syndrome, emotional or mental illness, specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder.¹¹ However, a mental disability does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania or illegal drug use.¹²

A **medical condition** includes any cancer-related physical or mental health impairment from a diagnosis, record or history of cancer or a genetic characteristic. Genetic characteristic means any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, or inherited characteristic, that is known to be a cause of a disease or disorder in a person or his/her offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder.¹³

Public school employers are prohibited from asking an applicant general questions on disability. The employer cannot ask such questions as:

“Do you have any particular disabilities?”

“How severe is your disability?”

“Have you ever been treated for any of the following diseases or conditions?”

“Are you now receiving or have you ever received workers’ compensation?”

⁹ Government Code section 12926(j)(m).

¹⁰ Government Code section 12926(m); 2 California Code of Regulations, section 11065(d)(2).

¹¹ Government Code section 12926(j); 2 California Code of Regulations, section 11065(d)(1).

¹² Government Code section 12926(j)(5); 2 California Code of Regulations, section 11065(d)(9)(A).

¹³ Government Code section 12926(I); 2 California Code of Regulations, section 11065(d)(7)(A)(B).

“What prescription medications are you taking?”
“Have you ever had a job-related injury or medical condition?”
“Have you ever left a job because of any physical or mental limitations?”
“Have you ever been hospitalized?”
“Have you ever taken medical leave?”
“How many days of sick leave did you take last year?”¹⁴

Notwithstanding the foregoing, a public school employer may inquire into the ability of an applicant to perform essential job-related functions and may respond to an applicant’s request for reasonable accommodation.¹⁵ Additionally, after an employment offer is made and before commencement of employment duties, the employer can require a medical or psychological examination to determine if the applicant can perform the duties of the position.¹⁶ The examination must be job-related and consistent with business necessity. Importantly, all applicants in the job classification must be subjected to the same examination.¹⁷

Age

Both federal and state law prohibits employment discrimination against individuals over the age of 40. Pre-employment inquiries that would result in identification of applicants on the basis of age either directly or indirectly are unlawful.¹⁸ To establish that an age requirement is a BFOQ, the employer must show that the requirement is based on reasonable, business-related considerations other than age or that the law requires or compels such a requirement.¹⁹ An example of a BFOQ is the requirement that an applicant be 18 years of age, or if under age, able to submit a valid work permit.

Marital Status

In general, it is unlawful to ask an applicant to disclose his/her marital status as part of a pre-employment inquiry. This likely would include status as a registered domestic partner. It would be difficult to establish marital status as a BFOQ affirmative defense for an employer, except in some limited situations including where the applicant is the spouse of a current employee, a governing board member, or a consultant to the district.²⁰ For business reasons other than

¹⁴ Government Code section 12940(e)(1); 2 California Code of Regulations, section 11070(b)(2)(A)-(H).

¹⁵ Government Code section 12940(e)(2).

¹⁶ The Equal Employment Opportunity Commission (EEOC) and the Department of Fair Employment & Housing have advised that during the COVID-19 pandemic, an employer may screen job applicants for symptoms of COVID-19, including taking temperatures, *after* making a conditional offer of employment, provided this screening is done for all new employees in the same type of job and provided employers understand this is a medical examination and, therefore, the information must be protected. Further, the EEOC has advised an employer may delay the start date for an employee who has COVID-19 or symptoms associated with it. If the employee is needed to start work immediately, but the employee has COVID-19 or symptoms of it, the employer may legally withdraw the conditional offer. Please consult counsel before taking any such employment action.

¹⁷ Government Code section 12940(e)(3).

¹⁸ 2 California Code of Regulations, section 11079(a).

¹⁹ Government Code section 12940(a)(5).

²⁰ See Government Code section 1091.5(a)(6); 2 California Code of Regulations, section 11056(c).

ascertaining marital status, however, an applicant may be asked whether he/she has ever used another name. A permissible business reason for this inquiry would be to check the applicant's past work record.²¹

With respect to anti-nepotism rules and similar restrictions on employment of spouses, employers should note the provisions of Title 2 California Code of Regulations, section 11057, which provides, in pertinent part:

- “(a) Employment of Spouse. An employment decision shall not be based on whether an individual has a spouse presently employed by the employer except in accordance with the following criteria:
 - (1) For business reasons of supervision, safety, security or morale, an employer may refuse to place one spouse under the direct supervision of the other spouse.
 - (2) For business reasons of supervision, security or morale, an employer may refuse to place both spouses in the same department, division or facility if the work involves potential conflicts of interest or other hazards greater for married couples than for other persons.”

Military and Veteran Status

FEHA specifically protects members of the military and veterans as a distinct classification or group protected from discrimination, harassment, and retaliation. “Military and veteran status” includes a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard.²² Public school employers should not inquire, either orally or on written job applications, about an applicant's status as a member of the military or veteran. However, the law does include an exception for an employer's ability to ask about an applicant's military or veteran status for purposes of awarding a veteran's preference as permitted by law.²³ Employers may wish to add a notation at the bottom of their employment applications acknowledging that current members of the military and veterans will be given preference points. The applicant is thus invited to notify the employer of his/her status in this protected group.

²¹ 2 California Code of Regulations, section 11056(a)(b).

²² Government Code section 12926(k).

²³ Government Code section 12940(p).

Inquiries into Salary History

Effective January 1, 2018, Assembly Bill 168 added section 432.3 to the Labor Code. Section 432.3 prohibits all public and private sector California employers from seeking, either directly or indirectly, information about a job applicant's salary (including compensation and benefits) in prior employment.

Labor Code section 432.3 provides that:

- Employers cannot include any question concerning an applicant's salary history information on a job application nor ask one in a job interview.
- Employers may not ask an applicant's former employer, references, or a background investigator for the applicant's past salary history information.
- Upon an applicant's request, employers must give the applicant a pay range for the job they are seeking.

Section 432.3 also includes two important exceptions:

- An employer may seek and use salary history that is disclosable under state and federal public records laws. For example, if the applicant formerly held a position with a federal, state, or government agency whose salary is public record, the prospective employer may ask about and consider the applicant's salary history with the public employer.
- If the applicant voluntarily provides compensation history, an employer may use that information to determine what salary to offer the applicant, but may not use it to decide whether to hire the applicant.

Public school employers should review their employment applications and interview procedures to ensure they do not ask about or consider an applicant's salary history from prior private employment.

Criminal Records

The general rule is that employers may not ask an applicant to disclose information concerning an arrest or detention that did not result in a conviction. Nonetheless, nothing prevents an employer from asking an applicant about an arrest for which the applicant is out on bail or on his/her own recognizance pending trial. A conviction includes a plea, verdict, or finding of guilt regardless of whether sentence is imposed by court.²⁴ An exception to the general rule is made for persons seeking to become peace officers (e.g., campus security guards).²⁵

²⁴ Labor Code section 432.7(a).

²⁵ Labor Code section 432.7(e).

Public school employers should be aware that they have an affirmative duty not to employ sex offenders.²⁶ Additionally, public school employers may not employ a person with a controlled substance offense unless the governing board finds that the prospective employee has been rehabilitated for at least five years.²⁷ The law continues to evolve in the area of employee criminal background screening. In 2017, the California Legislature enacted further “Ban the Box” regulations in Assembly Bill 1008 (AB 1008) concerning tighter restrictions on inquiry into criminal convictions of prospective employees. Although Labor Code section 432.9 provides a general prohibition on state and local agencies from asking an applicant to disclose any conviction history until the applicant has been determined to meet the minimum employment qualifications for the job in question, this general prohibition does not apply to schools or in other cases where the public employer is required by law to conduct a background check.²⁸ Current laws requiring public school employers to conduct background checks on potential employees render AB 1008 inapplicable to school districts. Nevertheless, this is an area to be especially careful in and to be sure to consult legal counsel when needed.

References and Social Media

Public school employers routinely require applicants to provide references from previous employers. This practice is *highly recommended* and it is *strongly encouraged* that multiple references be contacted prior to offering a position to an applicant.

According to a 2014 survey of 1,855 human resource professionals, 55% have used social media to reconsider a job candidate with 61% of these reevaluations being negative.²⁹ While there is no current prohibition on employers using social media as a pre-employment screening tool, public employers should be cautious when reviewing information about applicants online. Even if displayed on a public social networking site or website, information about an applicant such as race, sex, religious creed, etc., is improper for the employer to consider when making hiring decisions.

It is illegal for an employer to require or request that a job applicant or employee disclose his/her username or password to a *personal* social media account. Further, employers may not require or request that an applicant or employee access or log on to a *personal* social media site in the presence of the employer. Social media under the law includes any electronic service or account, or electronic content, including videos, still photographs, blogs, video blogs, podcasts, instant and text messages, e-mail, online services or accounts or website profiles or locations. Notably these general prohibitions do not limit an employer’s existing rights to request that an employee divulge personal social media reasonably believed to be relevant to an investigation regarding allegations of employee misconduct or illegal conduct, provided that the social media is used solely for purposes of that investigation or a related proceeding.³⁰

²⁶ Education Code sections 45123(a) and 45124.

²⁷ Education Code section 45123(d).

²⁸ Labor Code section 432.9(b).

²⁹ Jobvite 2014 Social Recruiting Survey Results.

³⁰ Labor Code section 980.

If a school employer is going to use social media screening as a tool to vet job applicants, then the following guidelines should be followed:

1. An internet/social media screening should only be conducted after the first interview when the race, gender, and any apparent disability would already be known to the employer thus preventing a claim that a review of the employee online was used to illegally exclude the applicant based on membership of a protected class.
2. If social media screening is to be used, it should be used consistently for all applicants at the same point in the hiring process.
3. The social media screening should be conducted by a person not otherwise part of the screening or interview process for that applicant and should never be done by the interviewer, decision maker, or applicant's potential manager.
4. The social media screening should only be limited to network and internet sites that are available through a general search by a non-networked party and, pursuant to Labor Code section 980, a potential employer should never ask a candidate for a user name or password. Additionally, the screener should not attempt to join a potential employee's social network to conduct the screening.
5. The social media screening should be limited to looking for specific evidence of the candidate engaging in illegal activity inconsistent with employment by a public school (i.e. drug use, illicit sex with minors, membership in organizations advocating the overthrow of the U.S. government by force)³¹ and limited to postings by the candidate or pictures of the candidate involved in the illegal activity. The commentaries or postings by third parties and/or pictures of third parties should not be considered.
6. Only derogatory information consistent with the limited purpose with the screening should be considered and forwarded to the decision maker. Any social media page that will be used in a hiring decision should immediately, upon being found by the person conducting the screen, be printed and retained in the file and a memo documenting the basis of a decision not to hire an applicant based on social media should also be drafted and retained.
7. Before utilizing social media screening as part of the hiring process, a district should develop, in conjunction with legal counsel, a written policy outlining the procedure.

³¹ Education Code sections 44010, 44011 and 44932(a)(3).

To assist you in checking references, we recommend that the following language be placed on your job application form:

“References. The Applicant agrees that this employer may contact any prior employer listed on this form and agrees that this employer may inquire as to job performance and reason(s) for departure. The Applicant further agrees that this employer may decline to consider this application further if one or more of the Applicant's prior employers refuse to fully answer any of this employer's questions about job performance and reason(s) for departure. This application constitutes a written waiver and may be presented for that purpose to any prior employers.”

Alcohol and Drug Testing

Federal and state laws impose specific requirements for alcohol and drug testing of school bus drivers and others whose primary responsibility is transporting students in district or county offices of education vehicles. The United States Department of Transportation, Office of Drug & Alcohol Policy & Compliance, provides detailed information regarding the federal requirements and procedures for following them.

As to all other applicants for employment, current federal case law provides that drug and alcohol testing can be conducted only as part of a pre-employment medical exam given to each job applicant for positions which the employer can demonstrate a special need for testing.³² This testing should be conducted only after a conditional offer of employment has been made.

A special need for testing can be shown if the position is one that is considered “safety-sensitive” because it involves work that may pose a danger to the public and/or require the operation of dangerous equipment. Examples of such positions could include school police or security officers, maintenance workers, shop teachers, and school nurses. The courts in California have not held that all teaching or administrator positions qualify as “safety-sensitive.” However, at least one federal court in another jurisdiction has decided that teachers are in “safety-sensitive” positions due to their unique *in loco parentis* obligations and due to specific state laws making teachers the “frontline” of school security, including drug interdiction.³³

In order to provide the necessary justification for the employer’s alcohol and drug testing program, the employer must make a specific finding demonstrating the need for testing potential employees in specific positions. Therefore, the employer is advised to identify specific positions and duties of those positions that necessitate the need for testing in its board policy regarding post-offer, pre-employment alcohol and drug testing.³⁴

³² See *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008).

³³ See *Knox County Educ. Ass’n v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998).

³⁴ See CSBA Board Policy 4112.41.

Conclusion

As always, please do not hesitate to contact Schools Legal Service with any questions or requests for additional guidance regarding the information provided in this memorandum.

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