



## Lawful and Unlawful Pre-Employment Inquiries in Arizona

By Barry H. Uhrman

In the past, some employment applications and interviews requested information about an applicant's race, religion, physical and/or mental condition. This information was often used to exclude an applicant before his or her ability to perform the job was even evaluated.

With the advent of statutes that protect applicants from discrimination based on immutable characteristics,

pre-employment inquiries that discriminate on the basis of race, color, creed, religion, national origin, sex, sexual orientation, age, marital status, or disability are prohibited by law. In addition, pre-employment inquiries that objectively cause to a reasonable person to think that the information will be used in for a discriminatory purpose are prohibited.

Below is a general summary permissible and prohibited pre-employment inquiries. The following information applies to any type of employment inquiry made of applicants, particularly through pre-employment interviews and reference checks.

SUBJECT	ACCEPTABLE PRE-EMPLOYMENT INQUIRIES	UNACCEPTABLE PRE-EMPLOYMENT INQUIRIES
<b>Name</b>	Name of applicant and any other names applicant may be known by	
<b>Address or Residence</b>	Place and length of residence, telephone number.	
<b>Age</b>	Statement concerning employment subject to verification that applicant meets legal age requirements	It is unlawful for an employer to print or publish any notice or advertisement relating to employment indicating any preference, limitation, specification or discrimination based on age, except when age is a bona fide occupational qualification for employment.  It is unlawful to limit, segregate or classify applicants for employment in any way that would deprive or tend to deprive employment opportunities based on a person's age.
<b>Birth Place/ Citizenship</b>	Employers may ask about the status of residency – if the applicant is a citizen of the United States or has the legal right to remain permanently in the United States.  Employers may also tell an applicant, that, if hired, the applicant may be required to submit proof of citizenship or the legal right to remain in the United States.	Before an offer of employment is made, it is unlawful to require proof of citizenship or residency.
<b>National Origin</b>	Inquiry into languages an applicant speaks, reads, or writes fluently, if this information is job-related.	Inquiry into the language commonly used by an applicant.  Inquiry into how an applicant acquired ability to read, speak or write a foreign language.

SUBJECT	ACCEPTABLE PRE-EMPLOYMENT INQUIRIES	UNACCEPTABLE PRE-EMPLOYMENT INQUIRIES
<b>National Origin</b>		<p>Inquiry into an applicant’s lineage, ancestry, national origin, descent, parentage, or nationality.</p> <p>Nationality of an applicant’s parents or spouse.</p> <p>Inquiring, limiting, segregating or classifying applicants in any way that deprives or tends to deprive employment opportunities based on that applicant’s national origin.</p>
<b>Gender</b>		<p>Limiting, segregating or classifying for employment in any way that would deprive an applicant of employment opportunities based on that applicant’s gender.</p>
<b>Religion</b>		<p>Inquiring into an applicant’s religious denomination, religious affiliations, church, parish, or religious holidays observed.</p> <p>Inquiring as to whether an applicant regularly attends a house of worship.</p> <p>Inquiring, limiting, segregating or classifying applicants for employment in any way that would deprive or tend to deprive employment opportunities based on that applicant’s religion.</p>
<b>Race/Color</b>	<p>Statement that a photo may be required after hiring.</p>	<p>Requirement that an applicant affix a photograph to the employment application form.</p> <p>Request an applicant, at his/her option, to submit a photograph.</p> <p>Requirement of a photograph after interview, but before hiring.</p> <p>Employers may not inquire about an applicant’s skin color or limit, segregate, or classify applicants in any way that would deprive an applicant of employment opportunities based on that applicant’s race, color or physical description.</p>
<b>Marital Status</b>		<p>All inquiries into an applicant’s marital status.</p>
<b>Sexual Orientation</b>		<p>All inquiries into an applicant's sexual orientation.</p>

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<b>SUBJECT</b>	<b>ACCEPTABLE PRE-EMPLOYMENT INQUIRIES</b>	<b>UNACCEPTABLE PRE-EMPLOYMENT INQUIRIES</b>
<b>Medical</b>	<p>Make pre-employment inquiries into ability of an applicant to perform job related functions.</p> <p>Employers may require a medical examination after an offer of employment has been made to a job applicant but before commencement of employment duties. Employers may condition an offer of employment on the results of such examination if both of the following apply:</p> <p>(a) All entering employees are subjected to the examination regardless of disability.</p> <p>(b) Information obtained regarding the medical condition or history of the applicant, including any genetic information, is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.</p>	<p>The prohibition against discrimination based on a disability includes medical exams and inquiries. Employers should not conduct a medical exam or make inquiries as to whether an applicant is disabled or as to the nature or severity of the disability.</p> <p>Failing or refusing to hire, or otherwise discriminating against, any individual based on the results of a genetic test received by the employer.</p> <p>Employers may not use qualification standards, exams, tests or other selection criteria that screen out or tend to screen disabled individuals, unless the standard test or other selection criteria is shown to be job-related for the position in question and consistent with business necessity.</p>
<b>Education</b>	<p>Inquiry into the academic, vocational or professional education of an applicant and the public and private schools he has attended, as well as any degrees received.</p>	<p>Specific inquiry into the nationality, racial or religious affiliation of a school.</p>
<b>Criminal Record</b>	<p>Employers may ask about prior criminal convictions, including the time and location and the final disposition of the case. Employers must include a statement that a conviction will not be an absolute bar to employment.</p>	
<b>References</b>	<p>Employees may ask an applicant to list the person who referred the applicant, names of the applicant's relatives currently employed by the employer, and former employers.</p>	<p>Requirement of the submission of a religious reference.</p>
<b>Organizations</b>	<p>Employers may ask applicants to list all organizations of which an applicant is a member excluding those that indicate race, color, religion, gender, age, national origin, or sexual orientation.</p>	<p>List all clubs, societies and lodges to which an applicant belongs.</p>

Employers should provide notice to applicants that any misstatements or omissions of material facts in the application may cause for dismissal. In addition, employers should take these steps to comply with laws prohibiting discrimination in the workplace:

- ◆ Direct all individuals who participate in any part of the hiring pre-employment process to comply with the guidelines provided above.
- ◆ Review all hiring procedures and related forms for compliance with these guidelines.
- ◆ Direct all individuals who make inquiries to obtain applicant information or recommendations to comply with the guidelines above.

Employee handbooks and other written policies need to be continuously updated to comply with state and federal laws governing discrimination. Most importantly, employers must ensure that all human resources personnel and supervisors are properly trained regarding pre-employment inquiries to avoid costly litigation. ◆

*Jones, Skelton and Hochuli's Employment Law Practice Group will continue to keep you apprised of all future developments concerning employment law. Please feel free to contact Barry H. Uhrman [(602) 263-1706, buhrman@jshfirm.com] with any questions you may have regarding these important developments.*

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accessibility requirements. The owner settled with HUD for a large sum of money and sued the architect and contractor in contract and tort. The contract claims were dismissed because the statute of repose had run. The issue on appeal was whether the owner could assert a negligence claim against the architect and whether the ELR applied as a defense.

Reversing the Court of Appeals (Division One), the Arizona Supreme Court held that a contracting party is limited to its contractual remedies for purely economic loss from construction defects. The Court went on to state that a plaintiff who contracts for construction cannot recover in tort for purely economic loss, unless the contract provides otherwise. Accordingly, the Court upheld the trial court's dismissal of the architect because the owner was limited to its contractual remedies, even though the statute of limitations had run on those claims.

*Flagstaff Affordable Housing* explained that the ELR was designed to encourage private ordering of economic

**Speaking Engagements**

**David Cohen** will present “Legal 101 Q&A” at the Arizona Health Care Association’s (AHCA) 2011 Annual Conference and Trade Show on August 24, 2011 in Scottsdale.

**Eileen GilBride** and **Lori Voepel** presented “Winning Appellate Briefs and Oral Arguments” at the 14th Annual Public Practice Legal Seminar on May 6, 2011 in Prescott.

**Bill Schrank** presented “Are Your Bases Covered?” at the Canadian Trucking Alliance Conference held on April 18-19, 2011.

**Mark Zukowski** was a panel member for the “Managing the Media in Today’s World: Why You Do Not Respond to Media Inquires with No Comment” session at the Spring 2011 USLAW Client Conference on April 1, 2011.

**Georgia Staton** presented “Whatever Happened to Atticus Finch” at the District of Arizona’s Annual Conference on March 11, 2011 in Tucson.

relationships and to uphold the expectations of the parties by limiting a plaintiff to contractual remedies for loss of the benefit of the bargain. The Court recognized, however, that these concerns are not implicated when the plaintiff lacks privity and cannot pursue contractual remedies. In such instances, courts are to evaluate whether the applicable substantive law allows for liability in the particular context. For example, a contractor who is not in privity with an architect, but who sustains economic losses such as increased costs from relying upon the architect's negligent and erroneous plans, would have no contractual remedies. The contractor could, however, potentially sue for tort remedies such as negligence or negligent misrepresentation in that particular context.

The significance of *Flagstaff Affordable Housing* is that the Supreme Court has foreclosed application of the ELR in negligence cases where no contractual remedies are available to a plaintiff. The Court ultimately found it

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## About The Authors



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Mr. Leach joined Jones, Skelton & Hochuli as a partner in 2005 and is the chair of the firm's Employment Law Practice Group. He concentrates his practice on employment law, public entity/school district defense, aviation law, general tort defense and insurance

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