

FIRM NEWS

NEMETH LAW ATTORNEY CAUTIONS EMPLOYERS TO FOLLOW GUIDELINES ON PRE-EMPLOYMENT QUESTIONS IN ON-LINE RECRUITING

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PROFESSIONALS
Deborah Brouwer

Deborah Brouwer, a partner with Detroit-based labor and employment law firm, Nemeth Law, P.C., notes that as more employers head on-line for their recruiting efforts, legal guidelines for pre-employment interviews still apply.

"Most employers understand there are certain questions they can and cannot ask during the hiring process. It's important to reiterate that those guidelines include on-line submission forms and email conversations with recruits as well," Brouwer said. "While some unlawful questions are fairly obvious, for example, 'What is your religion?' others are not. It is important for employers to learn about potential employees before hiring them, though, and the application and interview process are their most powerful tools, regardless of the medium. The key is to follow legal guidelines whether on-line or through a traditional hiring process."

Brouwer offers the following Do's and Don'ts of interview questions for employers.

DO

- Do ask applicants about **work history and skills**, including prior places of employment, job duties, and rates of pay. These are important questions that help determine if the applicant has the right experience for the job.
- Do ask applicants if they are **legally authorized to work in the United States**. This question helps ensure the employer is not unlawfully hiring an illegal alien. Additional questions (such as country of citizenship/national origin, whether the applicant is a naturalized or native-born citizen, etc.) asked *outside* of the federal I-9 process are likely unlawful.
- Do ask about the applicant's **academic, vocational or professional training** but not dates of attendance, as that may provide information on the applicant's age.
- Do ask applicants if they are **able to perform the essential functions of the job, with or without reasonable accommodation**. Have a job description available so applicants know what the essential job functions of the position are.

DON'T

- Don't ask about **arrest records**. While an employer may ask about felony or misdemeanor convictions, questions about an arrest not resulting in a conviction may violate the law.
- Don't ask about the applicant's **age** – except to confirm they are 18 or older for purposes of determining whether the individual is of legal employment age.
- Don't ask applicants about their **height or weight**. In Michigan, these are protected classifications subject to anti-discrimination laws; plus, an applicant's height or weight is rarely relevant to the job.
- Don't ask about the **religious denomination, affiliation, or what religious holidays the applicant observes**. This question frequently lands employers in hot water.
- Don't ask about the applicant's **race, color or national origin**.
- Don't ask about the applicant's **marital status or whether he or she has children**. Under Michigan law these are protected classifications and can be the basis for illegal discrimination.
- Don't ask about the applicant's **gender identification or sex**.
- Don't ask about the applicant's **health history or to provide genetic information** (such as family medical history). These questions are generally prohibited under both state and federal law.
- Don't ask for **a photograph of the applicant**. This can provide information that would otherwise be unlawful for an employer to ask, such as age, race/color, sex, etc.

Brouwer offers a few caveats, too.

“Some of these questions may be unlawful in one context and potentially lawful in another, depending upon the type of employer (public or private), the industry, or the particular context,” Brouwer said. “Further, an employer may be able to ask some of these questions after having made an offer of employment to the applicant. These are simply questions most employers should be wary of asking at the initial stage of the hiring process.”

As for checking up on potential employees by searching Google or looking at Facebook posts, Brouwer says such searches present risks because the employer may learn information about the applicant – an announcement that the applicant is pregnant, for example – that cannot and should not be used in making hiring decisions.

“Once an employer has personal information like that, it is difficult to prove it did not influence the hiring decision,” Brouwer said.

If internet searches are absolutely necessary, Brouwer advises they be narrowly tailored and conducted by someone who will not make the hiring decision and, further, will not share irrelevant information learned during the search with the hiring authority.

About Nemeth Law, P.C.

Nemeth Law specializes in arbitration, mediation, workplace investigations, employment litigation, traditional labor law and management consultation/training for private and public sector employers. It is the largest woman-owned law firm in Michigan to exclusively represent management in the prevention, resolution and litigation of labor and employment disputes.