



This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

What to Ask and What Not to Ask When Interviewing Job Candidates

When considering what questions to ask a job applicant during an interview, nonprofit employers (like all other employers) must consider federal employment discrimination laws, as well as state and local discrimination laws. As a general rule, pre-employment inquiries should be limited to those essential for determining if the applicant is qualified for the job.

Applicable Law

Numerous federal laws, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, prohibit discrimination based on certain personal characteristics of applicants and employees. While Georgia does not have a comprehensive anti-discrimination law, it does have a law prohibiting age discrimination and another prohibiting disability discrimination that applies to employers with 15 or more employees. The Georgia Workers' Compensation Law prohibits discrimination or retaliation based on the filing of a workers' compensation claim. All of these laws have implications in determining questions that can be asked in interviews by Georgia employers. See this Employment Law Table, <http://www.pbpatl.org/resources/employment-law-table>, to determine which federal and Georgia laws apply to your organization.

In addition, the City of Atlanta has an ordinance prohibiting discrimination based on sexual orientation, gender identity, domestic relationship status, parental status, and familial status that applies to private employers operating in the city with 10 or more employees (including part-time and temporary employees). The Atlanta ordinance imposes broader restrictions on employment activities than the federal discrimination laws, and provides that violations could result in unlimited damages, as well as revocation or suspension of various city licenses.

Improper Questions May Be Evidence of Discrimination

The Equal Employment Opportunity Commission ("EEOC"), which is the federal agency charged with enforcing federal discrimination laws, and the courts have indicated that any questions asked or comments made during the application or interview process are assumed to be used to make the hiring decision. That means questions or comments related to protected personal characteristics of applicants that are asked by prospective employers can be used as evidence of employment discrimination. Therefore, the best approach an employer can take is to ensure that all pre-employment inquiries focus on

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an applicant's **ability to do the job**, and not on the personal characteristics of the applicant. Even if they are meant as a compliment or to break the ice in the interview, comments or questions about personal characteristics unrelated to the person's ability to perform the job can be problematic, and can lead to discrimination claims.

How to Conduct an Interview

So, how do you avoid problems when questioning applicants? The first step is to base your interview questions on the job description and the essential functions of the job, which should be a part of the job description. Focus on the person's job qualifications, work skills, and experience, and avoid inquiries or even comments about the individual's physical attributes (such as skin color, accent, disability, age, height or weight) or personal life (including family, home, friends, medical history, or activities outside of work). It is helpful to develop an interviewing script for any position for which you are hiring, and to be consistent in the use of that script. Ask each applicant the same questions. The second step is to train any managers or supervisors who are interacting with applicants to be sure that they understand these rules. Finally, it is important to remember to keep a record of the interview process, in case there is any question about what was said or done. Keep the script so that you can later show what was asked, and be sure that any notes taken are factual, objective, concise, and focused on the qualifications for the position, and how the applicant does or does not meet them. If the applicant raises an issue or area of discussion that is not permissible, do not pursue it, change the subject, and do not include it in the meeting notes.

Several federal and Georgia laws prohibit employers from asking questions that relate to a person's religion, race, color, national origin, gender (including pregnancy, childbirth, or related medical conditions), age, disability, genetic information, or workers' compensation injuries or claims. Here are some examples of particular questions that can result in potential issues for the organization:

Religion: While an employer can ask whether an individual is able to work on the scheduled workdays for the job, or if the person can work on Saturday or Sunday (if either of those days is a workday), the employer cannot ask if the individual goes to religious services on Saturdays or Sundays, whether the person practices a religion, where the individual goes to church, or what religious holidays the person observes.¹ An employer can ask about professional organizations to which the applicant belongs that are relevant to the job, but should avoid more general questions about clubs or organizations to which the individual may belong, as those inquiries could reveal personal information about the individual such as the individual's race, religion, or age.

¹*Special Rules Related to Religion:* While it is generally impermissible to ask an applicant about his or her religion, there is a narrow exception to this rule for positions that are religious in nature in a religious organization. A religious organization can prefer candidates who share the organization's religious beliefs if the position being filled is a religious one, such as a minister. Questions about religion still cannot be asked if the position being filled does not directly relate to the organization's religious mission (such as an office worker or a kitchen employee). Please seek legal advice if you are hiring for religious positions in a religious organization to ensure the position and the workplace fit into this narrow exception.

Race, National Origin and Gender: While an employer can explain that a job requires someone who speaks more than one language and ask in what languages the candidate is fluent, the employer cannot ask an applicant to disclose where he or she grew up (which may reveal his or her national origin), his or her native language, his or her race, or the color of the applicant's skin. Interviewers should avoid any questions or comments that relate to the applicant's gender or appearance, even if a comment is meant to be a compliment. Do not ask a female applicant how she would manage a team of men or whether she thinks a woman can succeed in the position and do not compliment her hair or her clothes. Similarly, do not ask these sorts of questions or make comments of this nature with male applicants. Instead, focus on the applicant's experience managing a team of people, and ability to perform the job functions. In addition, while an employer can ask about the applicant's ability to work the hours required for the job or to show up on time for work, the employer cannot ask how many children the applicant has, whether the applicant has made childcare arrangements, whether the applicant is married, or whether the applicant plans to have children.

Age: While an employer can ask about an applicant's long-term career goals, whether the applicant is over the age of eighteen, or about experience in a specific type of work, the employer should avoid asking questions that relate to or may reveal an applicant's age, such as asking how old the person is, how much longer the applicant is planning to work before retirement, or what year the applicant graduated from high school.

Disability, Genetic Information and Workers' Compensation Claims: Before making an offer of employment, an employer may not ask job applicants about the existence, nature, or severity of a disability or other medical condition, or about his or her family health history (which may reveal genetic information). Avoid asking whether the individual has a disability, about his or her health or the health of his or her family members, or even whether any accommodation will be necessary to allow the person to perform the job functions. Similarly, employers are prohibited from asking applicants about their history of workers' compensation injuries or claims, so do not ask if a person has previously been injured or filed a workers' compensation claim.

While the organization may have an obligation to accommodate the disability of an applicant or employee, the only permissible inquiry in the interview is whether the person can perform the job with or without a reasonable accommodation. Any exploration of what accommodation may be needed, if any, must wait until after the person has been hired. These rules do not preclude inquiries into the applicant's ability to perform essential functions of the job or to show up for work, such as asking if the individual can perform lifting, bending, or other physical functions if they are required for the job, or asking whether the individual has ever been terminated from a position due to excessive absences.

Sexual Orientation and Gender Identity: In addition to these prohibitions, in the City of Atlanta prospective employers may not ask an applicant about his or her sexual

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orientation, gender identity, domestic relationship status, parental status, and familial status. Therefore, the employer cannot ask about whether the applicant is married or single, the number and ages of the applicant's children, a spouse's job, a spouse's or applicant's family responsibilities or child care responsibilities, support orders, pregnancy, or sexual preference.

Immigration Status: The Immigration Reform and Control Act makes it illegal for employers to discriminate with respect to hiring based on an individual's citizenship or immigration status. The law prohibits employers from hiring only U.S. citizens or lawful permanent residents unless they are required to do so by law, regulation or government contract. It also prohibits employers from hiring based on a preference for certain types of immigration status, such as preferring temporary visa holders or undocumented workers over qualified U.S. citizens, refugees, or individuals granted asylum. However, under the law, an employer can choose not to employ persons who require sponsorship for an employment visa, such as an H-1B visa. With regard to interview questions, an employer can ask if an individual is lawfully authorized to work in the United States but the employer cannot ask where the individual was born or if the individual is a U.S. citizen.

Military Service: Under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), it is not permissible to discriminate against persons who served in the uniformed services. USERRA also provides certain reemployment rights if an employee is called to active duty. While an employer can ask if an applicant has experience or skills related to the job, including experience or skills that may have been obtained in the military, an employer should avoid questioning former service members about their military service, including asking about time off needed for reserve service and discharge from service.

Union Activity: The National Labor Relations Act protects employees' right to form, join, or assist labor organizations and to engage in other concerted activities. It also protects the right of employees to refrain from all such activities. The Act applies to all employers. Therefore, an employer cannot ask a job applicant about his or her previous union activity.

Arrest Record: While, at times, employers either want or need to conduct background checks prior to hiring, the scope of the pre-employment background check and any inquiries connected to it must be limited. There are significant restrictions on the type of information an employer can seek, how that information can be used, and the communications that have to be provided to the applicant. Employers are permitted to obtain some information about criminal convictions, but cannot ask for information about arrests at all, as the EEOC views a request for arrest records as evidence of race discrimination. For additional information on how to conduct proper background checks, please see the following webcast: <http://www.pbpatl.org/resources/background-checks>.

Summary: Tips for Effective and Legal Interviews

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Do:

- Focus on the job description, and the ability of the individual to perform job requirements.
- Avoid inquiries about personal characteristics of the applicant.
- Develop a script for interviews for the position that asks all applicants the same questions.
- Train managers and supervisors.
- Keep notes of the interview concise and focused on whether or not qualifications for the position are met.
- Seek assistance from an attorney if you have any questions about what you can and cannot ask in an interview.

Don't:

- Ask questions about the applicant's physical attributes
- Ask questions about the applicant's medical history.
- Ask questions about the applicant's personal life or family.
- Ask questions that could reveal information that is impermissible for the organization to consider.
- Pursue an inappropriate area of discussion. If an applicant raises an area that should not be discussed, do not ask any further questions about it, do not take notes about it, and change the subject.

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