

Interview Questions and The Law: Recommendations for Effective and Lawful Hiring

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One of the major success factors in a nonprofit cultural organization's advancement and sustainability lies in its ability to effectively recruit, hire, and retain the very best employees. Effective hiring—beyond identifying the right skills, experience, education, and competencies of qualified candidates in a process that minimizes unconscious hiring biases—requires compliance with local, state/province, and federal employment laws regarding job applications, background screening, and interview questions.

Many arts and culture organizations view the candidate interview process simply as a way of getting to know a prospective candidate better. Questions regarding a candidate's marital status, where they grew up, the origin of their name, and other inquiries seem harmless. But are they legal? Just one illegal question during the course of an interview can become grounds for expensive legal action against an organization, particularly if a candidate is not hired and believes the hiring decision was discriminatory.

As most employers know when making hiring, retention, promotion, or other important employment decisions, it is unlawful to discriminate against an individual on the basis of race, color, religion, sex, national origin, sexual orientation, gender identity, genetic information, age, pregnancy, or disability. When asked incorrectly, even a seemingly innocent question can violate these rules and support a claim that a hiring decision was based on impermissible criteria. This issue of *Arts Insights* provides helpful guidelines for appropriate interview inquiries. Employment laws are ever-evolving and may vary by state or province. Therefore, employers should speak with an executive search firm or attorney before establishing a set of interview questions or applicant testing mechanisms as a standard component of the hiring process.

Getting Started

As with all elements of achieving a successful outcome in the hiring process, proper preparation is important. It is critical that all persons conducting candidate interviews know the basic rules. Executive search firms often provide a framework for the types of questions that are allowed and how these questions should be asked. However, if an organization is conducting a search on its own, it is imperative that the questions the employer asks during the selection process be related to the job being filled. This rule applies to all questions—whether on the application form, during the interview, or in any testing materials administered to applicants or candidates.

The Candidate's Point of View

Even with preparation, some interviewers break the rules regarding candidate screening. Most illegal questions are asked not out of an attempt to bypass the law but rather due to the desire to develop a personal connection with candidates or due to lack of experience or knowledge. Many employers think they have a legitimate reason to know certain information, such as whether candidates have appropriate child care arrangements in place or if they plan to have children in the near future. These are not appropriate questions for the screening process.

It is often helpful to think about questions from the candidate's point of view. Candidates have several options when answering questions that they find inappropriate or intrusive. Among other options, candidates can:

1. Answer the question and risk revealing information that could result in the loss of an offer.

2. Refuse to answer a question and appear uncooperative or confrontational, depending on how the refusal is handled. For example, to politely bypass a question regarding religion, an interviewee could say, "I am not certain about the relevance of my church affiliation to the position."
3. Examine the question for its intent and provide an appropriate answer. For example, if an employer asks whether a candidate's spouse would mind if they had to work weekends, candidates can simply respond that they are available to work the hours that the job requires, without making a reference to marital status.

Even so, these options do not grant employers the right or the flexibility to ask illegal questions, and such questions should be avoided by all interviewers.

Prohibited and Permissible Questions

As a general rule, questions raised by any interviewer during the selection process should be related to the specific job, the applicant's qualifications, and examples of past performance in other organizations. That being said, an interview process can include a variety of questions that legally allow the hiring organization to learn more about a candidate. For example, some interviewees answer specific questions more broadly, which could create an opportunity to delve more deeply into a candidate's background.

Below is a guideline that can assist arts and culture organizations in distinguishing between generally prohibited and permissible interview questions during the selection process. If an interviewer chooses to ask a permissible question to one candidate, it is highly recommended that all candidates be asked the same set of questions. As appropriate, consult legal counsel on specific questions within the context of the organization as well as any local, state/province, or federal laws. Speaking with professional references, performing criminal background checks, and verifying educational degrees/certification, with signed authorization from candidates to do so, are also highly recommended when appropriate and lawful.

Generally Prohibited Questions	Generally Permissible Questions
National Origin or Descent	
<ul style="list-style-type: none"> ▪ That is an unusual name. Where is it from? ▪ Where were you born? ▪ What is your native language? ▪ From what country do your ancestors come? 	<ul style="list-style-type: none"> ▪ What is your name? ▪ Have you ever worked under a different name?
Citizenship	
<ul style="list-style-type: none"> ▪ For United States-based jobs: Are you a United States citizen? ▪ For Canadian-based jobs: Are you a Canadian citizen? ▪ Where were you born? 	<ul style="list-style-type: none"> ▪ If hired, you will be required to submit verification of your legal right to work in the United States. Are you authorized to work in the United States?* ▪ If hired, you will be required to submit verification of your legal right to work in Canada. Are you authorized to work in Canada?*
Age	
<ul style="list-style-type: none"> ▪ How old are you? ▪ What is your date of birth? ▪ When did you graduate? 	<ul style="list-style-type: none"> ▪ Can you meet the minimum age requirements as set by law? ▪ Are you over the age of 18?
Marital/Family Status	
<ul style="list-style-type: none"> ▪ Are you married, engaged, divorced, single? ▪ With whom do you live? ▪ Do you plan to have a family and, if so, when? ▪ Do you have children? ▪ What are your childcare arrangements? ▪ What is your spouse's name? 	<ul style="list-style-type: none"> ▪ Would you be willing to relocate? ▪ Would you be willing to travel as needed for the job?* ▪ Would you be willing to work evenings or overtime as necessary?*
Sexual Orientation	
<ul style="list-style-type: none"> ▪ Are you gay, lesbian, bisexual? ▪ Do you have a domestic partner? ▪ Do you need insurance for a domestic partner? 	
Salary/Compensation	
<ul style="list-style-type: none"> ▪ What is your salary history? 	<ul style="list-style-type: none"> ▪ What are your compensation expectations?

Personal	
<ul style="list-style-type: none"> ▪ How tall are you? ▪ What is your weight? <p>Note: Questions about height and weight are not permissible unless minimum standards are essential for safe job performance.</p>	<ul style="list-style-type: none"> ▪ Are you able to perform the essential functions of the job?
Disabilities or Medical Conditions	
<ul style="list-style-type: none"> ▪ Do you have any disabilities? ▪ Have you ever been hospitalized and, if so, for what condition? ▪ Have you had a major illness in the last five years? ▪ How many days were you absent from work due to illness? ▪ When and how did you lose your eyesight? ▪ Have you ever been treated for a mental condition? ▪ Have you ever been treated by a psychiatrist or psychologist? ▪ Have you ever been treated for drug addiction or alcoholism? ▪ Are you taking any prescription medication? ▪ Have you ever filed for or received workers' compensation benefits? ▪ Can you demonstrate how you would perform the following job-related functions? ▪ Please complete the following medical history. 	<ul style="list-style-type: none"> ▪ Are you able to perform the essential functions of this job, with or without reasonable accommodation? <p>Note: The interviewer must have already thoroughly described the job or provided a job description.</p> <ul style="list-style-type: none"> ▪ As a part of the hiring process and after a job offer has been made, you will be required to undergo a medical exam. <p>Note: Exams must be given to others and exam results must be kept strictly confidential, except for medical/safety personnel who may be informed if emergency medical treatment is required. Supervisors may be informed about necessary job accommodations based on exam results.</p> <p>Questions about illness cannot be asked because they may reveal the existence of a disability. However, employers may provide information on attendance requirements and ask if applicants will be able to meet them as an essential function of the job, with or without accommodation.</p>
Affiliations	
<ul style="list-style-type: none"> ▪ To what organizations or groups do you belong? 	<ul style="list-style-type: none"> ▪ Are there any professional trade groups or other organizations that you consider relevant to your ability to perform this job?
Pregnancy	
<ul style="list-style-type: none"> ▪ Are you pregnant or have you ever been pregnant? ▪ Do you plan to become pregnant? 	<ul style="list-style-type: none"> ▪ Are you currently able to perform the essential functions of the job for which you are applying?* <p>Note: This question is still risky.</p>
Religion	
<ul style="list-style-type: none"> ▪ What is your religion? ▪ What church do you attend? ▪ What religious holidays do you observe? ▪ Does your religion prevent you from working weekends? ▪ Does your religion prevent you from working holidays? 	<ul style="list-style-type: none"> ▪ Are you available to work at these times? <p>Note: This may be asked only after providing detail on the regular working days or hours.</p>
Color or Race	
<ul style="list-style-type: none"> ▪ Any questions regarding race or skin, eyes, or hair color ▪ Requesting photographs with any application 	
Arrests and Criminal Record	
<ul style="list-style-type: none"> ▪ Have you ever been arrested? ▪ Do you have a criminal record? 	<p>Refer to state/province law, which varies with respect to restrictions on criminal history inquiries. Even questions such as "Have you ever been convicted of a criminal offense?" should be avoided without reference to specific state/province law restrictions.</p>
Military	
<ul style="list-style-type: none"> ▪ If you were in the military, were you honorably discharged? ▪ Can you provide discharge papers? ▪ Have you ever served in the military of a foreign country? 	<ul style="list-style-type: none"> ▪ Did your military training provide you with skills that you think could be applied to this job? <p>Note: This can only be asked if the interviewee mentions military service.</p>

* This question is only permissible if it is asked of all applicants or finalists for the job.

Conclusion

The interview process should strive to identify the most qualified applicant for the job without inquiring about topics that are unlawful and could lead to discriminatory hiring practices. Consulting an employment law attorney and properly preparing the board, staff, and other stakeholders or persons involved in the screening process will help to ensure that an organization minimizes unconscious hiring biases and is in compliance with all applicable laws for proper hiring practices.

Editor's Note: Arts Consulting Group thanks Gina Wodarski, Esq. of the firm Outside GC in Boston, Massachusetts, for her assistance in reviewing this article.



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Dr. Bruce D. Thibodeau founded ACG in 1997 and, as its President, has been embedded in numerous projects in all practice areas to grow institutional sustainability, advance the arts and culture sector, and enhance communities served by this vibrant industry. He has guided hundreds of clients in achieving effective leadership transitions, planning cultural facilities, increasing revenues, developing dynamic institutional brands and messages, crafting strategic plans and business models, and revitalizing board governance practices. Prior to founding ACG, Dr. Thibodeau held various management roles at the Los Angeles Chamber Orchestra, Boston Symphony Orchestra, Hartford Symphony Orchestra, Santa Fe Chamber Music Festival, and Museum of Contemporary Art Los Angeles. Dr. Thibodeau has conducted extensive research in a threefold exploration of stakeholders, nonprofit arts management, and cultural facility project management to highlight how stakeholders influence, and are influenced by, the activities and practices of nonprofit arts and culture organizations. Dr. Thibodeau's recent conference papers and presentations include the Academy of Management; Social Theory, Politics, and the Arts; and *The Journal of Arts Management, Law, and Society*. Published papers and those being considered for publication include, "Bonds, Boundaries, and Unexpected Transformations: Exploring the Performativity of Stakeholder Interactions in Nonprofit Organizations," "Nonprofit Organizations, Community, and Shared Urgency: Lessons from the Arts and Culture Sector," and "Overcoming Project Inertia and Gaining Project Momentum: Strategic Adaptation in Cultural Facilities Planning." Dr. Thibodeau holds a doctorate of business administration from the Grenoble Ecole de Management (France), a master of business administration from the F.W. Olin Graduate School of Business at Babson College, and a bachelor of music from The Hartt School at the University of Hartford. He also has multiple certifications in competencies, communications, and motivations analysis from Target Training International.

Contact ACG for more information on how we can help your organization with executive search or candidate screening processes.

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