

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 may seem harmless. But are they legal? Just one illegal question during 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, it is unlawful to discriminate against an individual based on their 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 a helpful guideline 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 asked during the selection process are 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 to develop a personal connection with candidates. Many employers think they have a legitimate reason to know certain information, such as whether candidates have appropriate childcare arrangements in place or if they plan to have children in the future. 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. Candidates can:

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

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 professional organizations. However, 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.

The following guideline 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 question. Interviewers should also be vigilant of icebreakers that, although innocent, relate to a candidate's protected class status and are therefore unlawful. 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.

National Origin or Descent	
Generally Prohibited:	<ul style="list-style-type: none"> ▪ That is an unusual name. Where is it from? ▪ Where were you born? ▪ Where did you grow up? ▪ What is your native language? ▪ From what country do your ancestors come? ▪ What type of accent is that? ▪ Where are your parents from?
Generally Permissible:	<ul style="list-style-type: none"> ▪ What is your name? ▪ Have you ever worked under a different name?
<p>Note: If one of the essential job requirements is language-related (e.g., fluency in Spanish), then you may ask if they are able to perform that job requirement but provide the job requirement in advance and still proceed with caution.</p>	

Citizenship	
Generally Prohibited:	<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?
Generally Permissible:	<ul style="list-style-type: none"> ▪ If hired, you will be required to submit verification of your eligibility 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 eligibility to work in Canada. Are you authorized to work in Canada? *

Age	
Generally Prohibited:	<ul style="list-style-type: none"> ▪ How old are you? ▪ What is your date of birth? ▪ When did you graduate?
Generally Permissible:	<ul style="list-style-type: none"> ▪ Can you meet the minimum age requirements as set by law?
<p>Note: Age requirements should be provided before asking. Asking about high school, college, or other degrees may not only reveal age but racial disparities, so be sure that it is a job requirement stated in advance and still proceed with caution.</p>	

Marital/Family Status	
Generally Prohibited:	<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? ▪ When is the big day?
Generally Permissible:	<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? * ▪ Will you be able to meet the attendance requirements for the job?
<p>Note: Working days and/or hours must be provided prior to asking these questions. Asking if someone is willing to work evenings or overtime is only permissible if the position requires or will require working evenings or overtime.</p>	

Sexual Orientation	
Generally Prohibited:	<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?
<p>Note: Inquiries relating to sexual orientation are generally not permissible.</p>	

Salary/Compensation	
Generally Prohibited:	<ul style="list-style-type: none"> ▪ What is your salary history? ▪ How much were you paid in your last position?
Generally Permissible:	<ul style="list-style-type: none"> ▪ What are your compensation expectations?
<p>Note: Refer to the laws of the governing state, locality, or province. Many jurisdictions prohibit employers from asking and considering a candidate's current or prior wages in setting pay.</p>	

Personal	
Generally Prohibited:	<ul style="list-style-type: none"> ▪ How tall are you? ▪ What is your weight?
Generally Permissible:	<ul style="list-style-type: none"> ▪ Are you able to perform the essential functions of the job? ▪ Is there anything that you would like to tell us about your qualifications for this job?
<p>Note: Questions about height and weight are generally not permissible unless minimum standards are essential for safe job performance.</p>	

Gender	
Generally Prohibited:	<ul style="list-style-type: none"> ▪ Do you prefer to be addressed as Mr., Ms., Mrs., or a nonbinary title?
<p>Note: Avoid gender-related questions unless gender is a bona fide occupational qualification (e.g., locker room attendant).</p>	

Financial Status	
Generally Prohibited:	<ul style="list-style-type: none"> ▪ Do you own a car? ▪ Do you rent or own your home?
Generally Permissible:	<ul style="list-style-type: none"> ▪ Do you have reliable transportation?

Disabilities or Medical Conditions	
Generally Prohibited:	<ul style="list-style-type: none"> ▪ Do you have any disabilities? ▪ Have you ever been hospitalized and, if so, for what condition? ▪ Are you vaccinated? ▪ Have you had COVID-19? ▪ 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 been to rehab? ▪ 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.
Generally Permissible:	<ul style="list-style-type: none"> ▪ Are you able to perform the essential functions of this job with or without reasonable accommodation?
<p>Notes: The interviewer must thoroughly describe the job's essential functions and requirements in a job description prior to interview.</p> <p>Best practice is to not ask applicants about vaccination status until an offer of employment has been made. If proof of vaccination is an essential function of the position and a requirement for working at the organization, this must be indicated in the qualifications or requirements section of the job description.</p> <p>If the organization will require the selected candidate to undergo and pass a medical exam, this must also be disclosed in advance as an essential function. Medical exams or tests must be administered equitably and results must be kept strictly confidential, except for medical and safety personnel who may be informed if emergency medical treatment is required. Supervisors may be informed about necessary job accommodations based on medical 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	
Generally Prohibited:	<ul style="list-style-type: none"> ▪ To what organizations or groups do you belong?
Generally Permissible:	<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	
Generally Prohibited:	<ul style="list-style-type: none"> ▪ Are you pregnant or have you ever been pregnant? ▪ Do you plan to become pregnant?
Generally Permissible:	<ul style="list-style-type: none"> ▪ Are you able to perform the essential functions of the job? * ▪ Are you able to meet the attendance requirements of the job? *
<p>Note: The interviewer must have already thoroughly described the job functions/requirements or provided a job description prior to interview.</p>	

Religion	
Generally Prohibited:	<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?
Generally Permissible:	<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	
Generally Prohibited:	<ul style="list-style-type: none"> ▪ Questions regarding race or skin, eyes, or hair color ▪ Requesting photographs with any application
<p>Note: Questions relating to race are generally not permissible.</p>	

Arrests and Criminal Record	
Generally Prohibited:	<ul style="list-style-type: none"> ▪ Have you ever been arrested? ▪ Do you have a criminal record?
<p>Note: 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	
Generally Prohibited:	<ul style="list-style-type: none"> ▪ Did you serve in the military? ▪ Are you in the military? ▪ 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?
Generally Permissible:	<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. Additional inquiries may be permitted by applicable law, such as for security sensitive jobs.</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 involved in the screening process will help an organization minimize unconscious hiring biases and follow all applicable laws for proper hiring practices.

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



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Dr. Bruce D. Thibodeau founded ACG in 1997 and has guided hundreds of nonprofit, university, and government 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. He has also conducted extensive research in a threefold exploration of stakeholders, nonprofit arts management, and cultural facility project management and has facilitated numerous community engagement processes that have increased the public dialogue and stakeholder awareness of the arts and culture sector’s value and impact on communities. As both a researcher and practitioner, his expertise highlights the important roles of project champions and followers as they overcome inertia and gain momentum derived from their social connections, personal commitments, and financial capacities to support the arts and culture sector. Prior to

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

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