

Avoid These Top Mistakes in Your Employment Application



As a general rule of thumb, during the hiring process, employers should avoid asking applicants questions that elicit information that cannot be considered in making a hiring decision. This is especially critical in the employment application, which is one of the employer's first contacts with a potential employee.

Avoiding these common mistakes can help your organization maintain best practices for employment application materials:

1. **Requesting a photograph.** According to the EEOC, employers are not permitted to request applicants to provide a photograph as a part of the job application. If your organization requires a photograph for a legitimate business purpose (e.g. for identification purposes), it is recommended that you request the photograph after the applicant accepts an offer of employment.
2. **Inquiring about marital/familial status.** In many states, an individual's marital/familial status is a protected class. This means that asking questions about an applicant's marital status, the applicant's children (e.g. number of kids, the ages of his or her children, or childcare) could be constitute sex/gender discrimination.
3. **Inquiring about citizenship.** Federal law (the Immigration Reform and Control Act) prohibits employers from discriminating against an applicant because he/she is not a U.S. citizen. Rather than inquiring about citizenship, ask whether the applicant is legally qualified to work in the United States.

NOTE: Employers should use the Form I-9 to determine a new employee's citizenship status.

4. **Requesting graduation dates.** Many applications include inquiries about degrees obtained. However, including in this inquiry a request for graduation dates may violate the Age Discrimination in Employment Act (ADEA) because it enables the hiring committee to guess the age of an applicant and may support an argument that an older candidate was not hired because of his/her age. This is especially true where an employee's graduation date has no bearing on the qualifications for the position.

NOTE: If relevant to a job qualification, it is appropriate to ask questions regarding an applicant's experience.

5. **Inquiring about arrests and convictions.** Many states (and an increasing number of localities) have enacted "ban the box" laws, which make it unlawful for employers to inquire about an applicant's criminal history on an employment application. In addition, the EEOC has recommended that employers only inquire about an applicant's criminal convictions to the extent that excluding an applicant on the basis of his/her conviction is "job related for the position in question and consistent with business necessity." With respect to an applicant's arrest record, the EEOC recommends that employers refrain from asking about arrests on applications at all – because an arrest does not mean that the applicant actually engaged in the criminal conduct.

NOTE: The EEOC has said that an employer may make an employment decision based on the conduct underlying the arrest if the underlying “conduct makes the individual unfit for the position in question.” However, before excluding an applicant on that basis, it is recommended that you speak with an HR Professional or qualified legal counsel.

6. **Including disability-related or medical questions.** Questions related to whether an employee is disabled or has a medical condition likely violates the Americans with Disabilities Act (ADA) and related state laws. In addition, the EEOC has expressly recommended against including any such inquiry in an employment application. If such questions are included in an application, a court may presume the prohibited information was a factor in the hiring decision.
7. **Excluding information about how to request a reasonable accommodation to apply or participate in the interview process.** The ADA and related state laws require employers to provide reasonable accommodations to applicants during the application process. In light of this obligation, it is strongly recommended that employers include instructions on the employment application on how to request reasonable accommodation.
8. **Including a background check acknowledgement in the application.** Many employers elect to conduct a background check as a part of the application process. The federal Fair Credit Reporting Act (FCRA) requires that employers disclose their intent to obtain a background check to any applicant before the check is performed. In addition, under the law, this disclosure must be in a “stand-alone” document separate from the application.
9. **Excluding a non-discrimination statement.** While not required, it is strongly recommended that any employment application include an EEO statement.

NOTE: Sample EEO statement – “The company is an equal opportunity employer and does not discriminate in hiring based on race, color, national origin, ancestry, religion, sex, disability, veteran status, age (40 or over), genetic information, sexual orientations marital status and/or any other category protected under federal or state law.

10. **Excluding an at-will disclaimer.** While not required, it is strongly recommended that any employment application include an “at-will” statement. Including this disclaimer can help you (a) avoid a claim that the application is an offer of guaranteed employment or (b) defend a claim of breach of contract if the applicant is not hired or is later discharged.

NOTE: Sample at-will statement – “This employment application does not create a contract or offer of employment. If hired, employment with the company will be on an at-will basis and can be terminated at the will of either you or the company.”

A sample employment application is available on the Online Knowledge Center under HR Tasks —> Application/Interview/Screening Process. Please contact an HR Professional for assistance in downloading the sample application.