

You Can't Ask That! A Review of Agency Employment Application Do's and Don'ts

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Legally Nanny®



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Ground Rules

- Let me sound like a lawyer . . .
 - Disclaimer: Information; not legal advice
 - Federal and state laws apply
 - Questions: No privilege



Applicable Laws

- Applicable agency laws
 - Depends on the number of employees
 - Some examples:
 - ADEA: 20
 - ADA: 15
 - Title VII: 15
 - Section 1981 (race & national origin):
All Employers



And Regardless . . .

- Agencies are also subject to many other anti-discrimination laws
 - State laws, lower thresholds
 - Laws re: employment agencies
 - Not good business



Application Overview

- Hiring: A critical process
- Applications for clients & caregivers
- Ask what you need for a good fit
- Maintain confidentiality





Legally Protected Categories

○ DARN MRS. PEG

- Disability
- Age
- Religion
- National Origin
- Marital Status
- Race
- Sexual Orientation
- Pregnancy
- Ethnicity
- Gender

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Age

- At the application stage, can't ask:
 - Date of birth
 - Graduation dates from schools
 - Dates of licenses
 - How long lived in U.S.
- "Younger caregiver"
- Can ask: Are you over 18 and can you submit proof of age?

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“So Where Are You From?”

- Can't ask about national origin, citizenship, birth place, ethnicity, or for Social Security number
- But can ask: “Are you legally eligible to work in the U.S.?”

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Communication

- Can't ask about "native" English speakers or accents
- Can ask if you can communicate fluently in written and spoken English

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Let's Get Physical: Disability and Medical Conditions

- Height, weight, eye or hair color
- Physical fitness and diet
- Diseases
- Medical conditions
- Surgeries
- Prescriptions or legal drug use

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Disability and Medical Conditions

- Can't ask if you need time off for doctor's appointments
- Have you been out ill
- What will you do if a family member becomes ill





Disability and Medical Conditions

- Mental conditions
 - Depression
 - Emotions
 - Counseling
- Health insurance
- Workers' compensation injuries/claims

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Disability and Medical Conditions

- Provide job description
- Can you perform the essential functions of the job with or without accommodation?
- Focus on ability to do the job, not candidate's medical condition





Religion

- Can't ask about religious affiliations, practices or beliefs
- Be careful about questions that might elicit religious observances
- Also true for other questions that might reveal legally protected characteristics

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I Shot The Sheriff . . .

Criminal History

- Felonies
- Generally not misdemeanors (with some exceptions)
- Convictions, not arrests
- Disclaimers!!!!

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Ban The Box

- Prohibits inquiries into prior criminal convictions at the application stage
- After providing a conditional offer of employment, you can inquire
- Complicated process if you reject based on prior criminal conviction



Ban The Box

- 29 states and 150 cities and counties nationwide have some form of Ban The Box law
- Be aware of these legislative developments





So, Are You Married? Family Status

- Family or marital status
 - No “maiden name” questions
- How many children do you have?
- Pregnancy, intent to have children, and birth control

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Family Status

- Relatives' names and addresses
 - Instead: References and emergency contacts
- Siblings
- Mom and dad's occupations
- Family medical history

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Specifying Gender

- Generally can't make employment decisions based on legally protected characteristics such as gender
- However, can do so based on privacy concerns
 - Bathing, toileting, personal care and dressing

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Money, Money, Money

- Can't discriminate based on a person's financial status
 - Bank account information
 - "Own" a car
 - Home ownership & residency status
- Bankruptcies and credit reports

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Protected Activities

- Lawsuits
- Workers' compensation filings
- Charges with government agencies
- Legal non-work activities

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Compensation History

- Four states and four major cities prohibit inquiring about prior compensation history
- Monitor legislative developments



So What CAN I Ask?

- Name
- Contact information
- References
- Education
 - Names of schools
 - Did you graduate?
 - Subjects studied/grades received



So What CAN I Ask?

- Paid and unpaid work experience
 - Dates of employment
 - Employer's name and address
 - Position and job duties
 - Reason for leaving
 - Permission to contact
- Desired employment

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You Also Can Ask

- Can you perform the job's essential functions with or without accommodation?
- Can you meet the job's attendance requirements?





You Also Can Ask

- Hypothetical Questions
 - Provide scenarios and ask what the caregiver would do

- Narrative Questions
 - Why do you want to be a caregiver?
 - What experiences have you had?

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After a Conditional Offer

- Verify information
- Can also do:
 - Drug screening – only illegal drugs and follow all procedures
 - Physical, but only as it relates to job's essential functions **and** for all employees

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Background Checks

- Must be compliant with Fair Credit Reporting Act and applicable state laws
- Disclosure and written consent on separate sheet of paper
- Greater requirements for investigative reports



Background Checks

- Understand the reporting limits
 - 10 yrs.: Bankruptcies
 - 7 yrs.: Civil suits, judgments, tax liens
 - Criminal convictions vary by state law
- “Nationwide” criminal search can be misleading



Background Checks

- Pre-adverse action notice
 - Include copy of report you relied upon & consumer rights summary
- Adverse action notice
 - Contact info for background check co.
 - Notice that background co. didn't make decision
 - Right to dispute info. and get free report in 60 days

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It's All In How You Say It

- “Maiden” names vs. “other” names
- U.S. citizen vs. legally eligible to work in the U.S.
- Disabled vs. able to perform job’s essential functions

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It's All In How You Say It

- A Mexican caregiver
- A younger caregiver
- A Jewish caregiver
- Native English speakers
- Bottom line: Don't honor discriminatory requests

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Other Issues

- “Optional” questions
- Applicants volunteering answers
- Verbal vs. written questions
- Photos



More Application Language

- At the end:
 - True, accurate, complete and correct
 - Or else – spell out consequences
- We don't discriminate!
- No guarantees

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Final Steps

- Applicant signs and dates, either personally or electronically
- Agency keeps original
- Applicant can print out and should receive hard copy
- Regularly review your documents



Questions

- Feel free to contact our firm:
 - info@legallynanny.com
 - 714-336-8864
- Or visit our Web site:
www.legallynanny.com

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Questions

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