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

Presented by:
Robert E. King, Esq.
Legally Nanny®
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
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?
“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.?”
Communication

- Can’t ask about “native” English speakers or accents
- Can ask if you can communicate fluently in written and spoken English
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
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
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
I Shot The Sheriff . . .

Criminal History

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

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

- Lawsuits
- Workers’ compensation filings
- Charges with government agencies
- Legal non-work activities
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
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?
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
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
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
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
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
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
Questions

FIND US ON FACEBOOK
www.facebook.com/legallynanny

FOLLOW US ON TWITTER
www.twitter.com/legallynanny

CONNECT WITH US ON LINKEDIN
www.linkedin.com/in/bobkinglegallynanny