Your organization’s recruiting process should be designed to hire the best candidate for the job. It is equally important to ensure that your organization does not run afoul of the many Equal Employment Opportunity (EEO) laws that prohibit hiring decisions based on a candidate’s protected class status. These laws exist to keep employers from intentionally or unintentionally rejecting candidates because of their protected class.

The Wisconsin Fair Employment Act (WFEA), to which all State employers are subject, prohibits employers from discriminating against employees and job applicants based on any of the following:

• Age
• Arrest and Conviction Record
• Ancestry, Color, National Origin or Race
• Disability
• Genetic Testing
• Honesty Testing
• Marital Status
• Military Service
• Pregnancy or Childbirth
• Religion
• Sex and Sexual Orientation
• Use or nonuse of lawful products off the employer’s premises during nonworking hours.

The WFEA prohibits employers from 1) advertising a vacancy, 2) using an application form, 3) or making an inquiry, such as in an interview, that “implies or expresses any limitation or discrimination” based upon a protected class. It is important to know which inquiries are likely to run afoul of EEO laws, as these may not always be apparent. The following outlines the most common concerns:

1. Age.

   Persons over the age of 40 are protected by the WFEA. Questions that solicit or refer to a candidate’s age should be avoided, including:
   • What is your age or date of birth?
   • How old are you?
   • What year were you born?
   • What year did you graduate from high school/college?
   • At what age do you plan to retire?

   Employers can ask whether someone is of an age needed to meet the requirements for the position, such as a bartender who needs to be at least age 18.

2. Arrest and Conviction records.

   Employers are barred from asking about a candidate’s past arrest record. If a job applicant is facing a pending arrest that is substantially related to the job, the employer need not hire the candidate, or can suspend the application pending an outcome of the charges. Employers can ask candidates about conviction records, as long as they make clear that a conviction will not necessarily disqualify candidates, but will be considered to the extent that the conviction substantially relates to the job.

   The substantial relationship standard has been the subject of much litigation. It is important to know how courts and the Labor & Industry Review Commission have defined and applied this standard in prior cases before denying a candidate employment.

3. Ancestry, Color, National Origin or Race.

   Questions about a person’s race, citizenship, or country of birth are unlawful and irrelevant to a person’s ability to do the job. Employers can ask candidates if they are legally authorized to work in the United States, and should explain that if hired, federal law requires appropriate documentation to verify that authorization.

4. Disability or Medical History.

   Questions such as those below are unlawful when asked before a conditional job offer is extended:
   • Do you have a disability?
   • Have you ever been injured on the job?
   • Have you ever filed a work comp claim?
   • What is your or your family’s health history?

   Prior to an offer of employment, employers can explain the duties of the
position or provide candidates a copy of the job description and ask if they are able to perform the job duties, with or without reasonable accommodation. If this inquiry is made, it should be asked of all candidates for the job.\(^4\)

5. Marital Status/Pregnancy/Childbirth.

A person's pregnancy, marital or parental status is irrelevant to an ability to do the job and should not be asked. These types of questions should be barred even in casual conversation, such as the small talk that takes place before the interview, because they could be used as evidence of unlawful discrimination.


Employers can ask about military service only for the purpose of exploring experience or training that candidates may have received in the service. It is unlawful to discriminate against candidates because of membership in the armed forces, national guard, state defense force or any reserve unit.\(^5\)

7. Religion.

Employers are prohibited from asking candidates if they attend religious services. They are permitted to ask candidates if they are able to work on the weekends, if that is a requirement of the position; employers should explain their legal obligation to reasonably accommodate religious practices that do not create an undue burden. The use of rotating weekend shifts, and allowing employees to trade or find another staff member to work a weekend shift, are examples of possible accommodations.


Questions about candidates' financial situations should be avoided, including questions such as:

- Do you have a garnishment record?
- Do you have credit problems?
- Describe your credit history?
- Have you ever declared bankruptcy?
- Are you a homeowner?

These questions often disproportionately exclude minorities from consideration and are largely irrelevant for the vast majority of positions. In addition, the federal Bankruptcy Act prohibits public sector employers from asking about or discriminating against a candidate due to the filing of a bankruptcy action.\(^6\)

9. Lawful Products.

The WFEA prohibits employers from asking about use of lawful products off of the worksite and outside of work hours, subject to some limited exceptions. Therefore, asking an applicant if they smoke cigarettes or drink tobacco should be avoided.

Due to the many different inquiries that could lead to an accusation or finding of unlawful discrimination, an organization's entire recruitment process must be designed to focus on only job-related criteria. Employers should take steps to:

1. Train anyone involved in the hiring process, including boards and commissions such as Police and Fire Commissions or Library Boards.
2. Ensure that all inquiries made in the employment application conform to EEO guidelines.
3. Develop interview questions ahead of time that are carefully tailored to the requirements of and qualifications for the position.
4. Consult employment counsel when issues arise, especially those involving arrest or conviction records and disability/reasonable accommodation situations.

The following resources contain additional guidance:

WI Equal Rights Division, *Fair Hiring and Avoiding Discriminatory Interview Questions*:

[https://dwd.wisconsin.gov/er/civil_rights/disc...](https://dwd.wisconsin.gov/er/civil_rights/discrimination/avoiding_discriminatory_interview_questions.htm)

Federal Equal Employment Opportunity Commission Hiring Guidance:

[https://www.eeoc.gov/laws/practices/](https://www.eeoc.gov/laws/practices/)

United States Office of Personnel Management:


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4. Employers also have an obligation to extend reasonable accommodations to job candidates with disabilities that permit them to participate in the recruitment process. These links provide additional information about accommodating job applicants: [https://dwd.wisconsin.gov/er/civil_rights/disc...](https://dwd.wisconsin.gov/er/civil_rights/discrimination/disabilities_on_the_job.htm); [https://www.eeoc.gov/facts/jobapplicant.html](https://www.eeoc.gov/facts/jobapplicant.html)
5. In addition to the WFEA, the Uniformed Services Employment & Reemployment Rights Act (USERRA) 38 U.S.C. §§ 4301-4335 (2008) applies to all employers in the U.S.