Career & Workplace

Job interviews are a hotbed for lawsuits – and these common questions are illegal

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Job interviews are among the most high-stakes conversations that happen in the workplace, but it's not just because of the hiring decision.

It's because of the legal risks, and many managers admit to putting their employers at risk by asking illegal questions. It's a scenario made even more complicated by the intense hiring environment, remote work and the complex scenarios managers are facing in the post-pandemic world.

That's according to a Resume Builder survey of 1,000 hiring managers, which found 32% admitted they knowingly ask illegal questions.

Some of the most problematic topics include questions around family status, pregnancy, age and prior salaries — areas that can potentially lead to employment lawsuits.

Julia Toothacre, resume and career strategist at Resume Builder, said there are a variety of reasons why hiring managers ask illegal questions. Sometimes, it's not even intentional. For instance, companies must navigate a patchwork of varying and ever-changing state laws about what managers can ask a candidate about salary history. A question that may be legal in one state is illegal in another.

There are also reasons why candidates will answer them.

"Many job seekers are desperate for work and they believe that not answering a question might take them out of the running for a position, especially if it's a question where the answer would work in their favor," Toothacre said. "Many people also don't know what is illegal to ask, so they answer questions openly, not thinking about the consequences or bias someone might have."

The survey found hiring managers are likely to cross the line when it comes to questions around salaries, with 39% of hiring mangers saying they "always" asked about salary history despite it being illegal to do so in 30 states.

But those sorts of questions are also of limited use to employers, who often have preset salary levels based on location, industry and experience.

"A person's previous salary doesn't have any bearing on the future salary," Toothacre said. "There are too many inconsistencies between location, industry, function, and size of the company to use a previous salary to inform a future salary."

Consequences for illegal job interview questions

Renee Fellman, business improvement expert and interim CEO-for-hire, said companies should always follow the law during the hiring process. The issue is that interviewers want to find out whether the job applicant has the reliability, attendance and work ethic needed for the job.

But that's where problems with interview questions come up. Fellman stressed that companies should use the applicant's references to get a better handle on those issues. And while references aren't always forthcoming, Fellman uses a release to help remove legal liability from the reference to get them to speak more freely.

Ultimately, illegal questions are very common, said employment attorney Chambered Benton-Hayes at Benton Employment Law.

"Unfortunately, illegal questions are asked during interviews more often than they should be. Hiring managers do not always follow the law, especially if the candidate is not likely to report the violation and the manager does not think there will be any ramifications," Benton-Hayes said.

Applicants should not feel pressured to answer questions they believe are illegal, and should consult with an attorney if they believe they were asked illegal questions during the processes, Benton-Hayes stressed.

"Companies should train their managers not to ask illegal questions during interviews because it could open them up to legal liability. If they learn that a manager engages in improper behavior during an interview, they should consider corrective action against that manager," Benton-Hayes said.

Commonly asked illegal job interview questions

Josh Millet, co-founder and CEO of pre-employment assessment and interview training firm Criteria said illegal questions — and even just objectionable ones — are often made during periods of "banter" or unplanned conversations because the hiring manager or interviewer doesn't have an objective way to interview and score potential applicants. That means bias and subjectivity bleed into the process.

In a U.S.-based webinar with managers, Millet asked for any inappropriate questions they were asked when interviewing for a job. The answers included "are you currently pregnant," and "what if your husband got another job in a different state?" There was also, "what does your age and generation say about your work ethic."

The survey found women are particularly targeted by illegal questions, with common questions asking about pregnancies or future family planning.

Companies that routinely have their managers ask illegal questions – or who have managers that do so without the company's knowledge – risk legal problems if job applicants decide to take action.

"There is a lot of litigation around interviewing," Millet said. "There are more lawsuits tied to interviews than anything else in the hiring process."

He said that's likely because applicants that simply turn in a resume and cover letter are not as invested in the process and thus, less likely to take action if they feel they have been wronged. But, by the time an applicant has gone through an interview, those who are asked illegal questions are far more likely to take action.

'Another thing that structured interviewing can be is a system of record," Millet said, adding it creates a record of how the interviewee was scored and graded across similar questions. "It gives you a level of legal defensibility because you are doing something in a structured way. "

But Millet stressed that it's not just the clearly illegal questions that are problematic. He warned that extraneous or silly questions can also turn off applicants.

A survey of 2,516 job candidates by Criteria found the biggest mistake an employer can make when interviewing a job candidate is asking inappropriate or personal questions – with 64% of job candidates agreeing.

"People asking inappropriate questions is just a clear example that having an unstructured format that leads to problems," Millet said.

What kind of structure works best?

1. Come up with a list of questions that are relevant to the job — not the person.
2. Ask the same set of core questions to the applicants and score each one on how they answered the questions. Millet stressed the core questions should not get in the way of good follow-up questions about specific experiences or resume items that might be relevant to that specific person.
3. Don't discuss the scores or results within the group until each person has done their own scores.
4. Compare those scores among interviewees to see who scored best.

An over-reliance on grading for "culture" can also cause problems as groups of managers attempt to hire people that think or act like they do — which ends up ensuring they don't end up hiring those who might be the best for the job, Millet said.

"We should be hiring people based on things we know make them good at their job," he said. "Are they are hard working or are they smart. Whether I like them or not is less relevant."