

CHECKLIST | PREPARING LEGALLY COMPLIANT INTERVIEW QUESTIONS

Provided by Employco USA, Inc.

The following checklist outlines steps to help employers comply with federal and state fair employment laws that affect the process of interviewing job applicants. It also includes general information about laws that protect applicants against discrimination based on certain personal characteristics, disabilities and medical conditions, as well as laws that aim to promote equal pay by prohibiting questions about an applicant’s past salary or wages.

The checklist is divided into four distinct sections:

1. **Section 1** provides tips for designing interview questions without regard to any applicable laws.
2. **Section 2** discusses how to identify and flag problematic questions under federal law.
3. **Section 3** discusses how to identify and flag problematic questions under state laws.
4. **Section 4** provides information about legal exceptions and includes guidelines for refining interview questions.

Each section is distinct, so employers are encouraged to complete all four sections to ensure they adhere to applicable federal and state legal requirements.

This checklist is intended to be used as a guide, and not all of the following steps may be necessary to create and manage interviewing practices. Therefore, the steps in this list should be modified to meet the unique needs and situation of an organization.

Employers are encouraged to seek individualized legal counsel to address specific issues and concerns.

Section 1: Crafting Interview Questions

Create a List of All Interview Questions	Complete
<p>Draft a list of all potential questions to ask an applicant during an interview.</p> <p>At this step, employers do not need to limit the type of interview questions but instead determine any and all types of inquiries that may arise.</p> <p>The following are a few tips for creating a first draft of interview questions:</p> <ul style="list-style-type: none"> • Include questions to help determine whether the applicant is qualified for the job position. • Use the job description to determine questions about qualifications. • Include questions about anything your company may need or want to know to determine whether to hire the applicant, such as questions to determine how the applicant’s abilities compare to those of other applicants. • Include potential general and introductory questions. • Anticipate possible responses to interview questions and list possible follow-up questions. • Anticipate scenarios that may trigger an organization’s legal obligations (such as if an applicant is visibly disabled or pregnant) and include questions that each scenario might elicit. 	<input type="checkbox"/>

Section 2: Flag Problematic Questions Under Federal Law

Identify Applicable Federal Laws	Yes	No
<p>Is your company subject to federal fair employment laws that govern the types of inquiries an employer can make during interviews?</p> <p>Select “Yes” if your company has (or may have) 15 or more employees in 20 or more consecutive weeks in the current or prior calendar year. This means that the following and other federal fair employment laws, which may directly or indirectly govern the types of inquiries an employer can make during interviews, likely apply to the company:</p> <ul style="list-style-type: none"> • The Americans with Disabilities Act (ADA); • Title VII of the Civil Rights Act (Title VII); • The Genetic Information Act (GINA); or • The Age Discrimination in Employment Act (ADEA), which applies to employers with 20 or more employees. <p>If “No,” the following two parts of this section may not reflect any legal requirements for your company. However:</p> <ul style="list-style-type: none"> • Your company may be subject to the same or similar restrictions under state law (and, in some cases, local law, which is not addressed in this document), and the steps in the next two parts of this section provide a general process for identifying questions that may be problematic even if they do not clearly or currently violate any federal laws; • The steps below are generally considered best practices for all employers, even if your company is not subject to any similar restrictions; and • All employers, regardless of size, are subject to the federal Equal Pay Act (EPA), which prohibits wage discrimination based on sex. Although the EPA does not explicitly prohibit any interview questions, the Equal Employment Opportunity Commission, which enforces the EPA, has indicated that it will scrutinize employer practices involving reliance on an applicant’s past pay to set future wages. In addition, several states have laws that do explicitly prohibit private employers from asking about an applicant’s past pay. <p>Because of these factors, all employers are encouraged to complete all of the following steps. They should also be cautious about including salary history inquiries in their question lists <i>even if they answer “No” to this question.</i></p> <p>If you answered “No” to this question and do not wish to complete the steps for reviewing federal laws, go to Section 3.</p>	<input type="checkbox"/>	<input type="checkbox"/>
Review Federal Laws and Question List	Complete	
<p>Review your question list and use the steps provided under “Flag Problematic Questions Under Federal Law” below to help identify some types of questions that should be flagged. In general, you should flag any questions that may potentially elicit any information about the applicant’s:</p> <ul style="list-style-type: none"> • Medical conditions or disabilities 	<input type="checkbox"/>	

<ul style="list-style-type: none"> • Genetic information • Race • Color • Religion • National origin • Sex (including sexual orientation, gender identity, pregnancy and pregnancy-related conditions) • Age 		
Flag Problematic Questions Under Federal Law	Yes	No
<p>If your list includes questions that could elicit information about any of the following, select “Yes” and flag the questions for removal or reconsideration.</p>		
<p>The Applicant’s Personal Characteristics</p> <p>Select “Yes” and flag any questions about the applicants’ age and any questions about race, color, religion, national origin or sex (including sexual orientation, gender identity, pregnancy, childbirth and related conditions). Examples of questions that could be problematic include:</p> <ul style="list-style-type: none"> • “When did you graduate from college?” • “Are you biracial?” • “Which church do you attend?” • “What language do you speak at home?” • “Are you pregnant?” • “Do you plan to have children within the next year?” 	<input type="checkbox"/>	<input type="checkbox"/>
<p>Personal Characteristics of Anyone Associated With the Applicant</p> <p>Select “Yes” and flag any questions that may potentially elicit information about personal characteristics of anyone associated with the applicant.</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>The Applicant’s Medical Conditions or Disabilities</p> <p>Select “Yes” and flag any questions that may potentially elicit information about whether an applicant has a disability or serious health condition. Examples of questions that could be problematic include:</p> <ul style="list-style-type: none"> • “Do you have a disability?” • “What medications are you currently taking?” • “Have you filed any workers’ compensation claims?” • “What impairments do you have?” 	<input type="checkbox"/>	<input type="checkbox"/>
<p>Medical Conditions or Disabilities of Anyone Associated With the Applicant</p> <p>Select “Yes” and flag any questions that may potentially elicit information about the medical conditions or disabilities of anyone associated with the applicant.</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>The Applicant’s Genetic Information</p>	<input type="checkbox"/>	<input type="checkbox"/>

<p>Select “Yes” and flag any questions about an applicant’s genetic information, such as the applicant’s family medical history or receipt of genetic tests or counseling. Examples of questions that could be problematic include:</p> <ul style="list-style-type: none"> • “Have any of your close relatives had a heart attack or been diagnosed with a heart condition?” • “Do mental health conditions such as bipolar disorder, depression or schizophrenia run in your family?” • “Have you had genetic tests to determine whether you are at risk for cancer?” 		
<p>The Applicant’s Criminal History</p> <p>Select “Yes” and flag any questions about an applicant’s past arrests, charges or convictions. Although federal law does not directly prohibit questions about criminal history, this type of question may violate federal law if it results in a disparate impact on a protected group.</p> <ul style="list-style-type: none"> • “Have you ever been arrested?” • “Have you ever been charged with any crimes?” • “What is on your criminal record?” 	<input type="checkbox"/>	<input type="checkbox"/>

Section 3: Flag Problematic Questions Under State Laws

Identify Applicable State Laws	Yes	No
<p>Is your company subject to state fair employment laws that govern the types of inquiries an employer can make during interviews?</p> <p><i>If “No,” the steps outlined below may not be legal requirements for your company but are generally considered best practices for all employers. If you answered “No” and do not wish to review state laws as a best practice, go to Section 4.</i></p>	<input type="checkbox"/>	<input type="checkbox"/>
Review State Laws and Question List	Completed	
<p>Review your question list using the steps provided under “Flag Problematic Questions Under State Law” below (and “Flag Problematic Questions Under Federal Law” above) to help identify some of the types of questions that should be flagged. In general, you should flag any questions that may potentially elicit any information about any of the applicant’s protected traits under applicable state laws.</p> <p>Use the steps below to help identify the types of questions that should be flagged.</p>	<input type="checkbox"/>	
Flag Problematic Questions Under State Law	Yes	No
<p>Do the applicable state laws provide job applicants with general protection against refusal to hire or other discrimination based on any of the traits listed below or any similar traits?</p> <ul style="list-style-type: none"> • Medical conditions or disabilities 	<input type="checkbox"/>	<input type="checkbox"/>

<ul style="list-style-type: none"> • Genetic information • Race • Color • Religion • National origin • Sex • Age • Pregnancy and related conditions • Sexual orientation • Gender identity • Gender expression • Ancestry • Creed • Atypical hereditary cellular or blood trait and AIDS/HIV • Marital status • Civil union status • Parenthood • Citizenship status • Military or veteran status • Order of protection status • Height or weight <p>Select “Yes” and flag any questions that may elicit information about the protected traits.</p>		
Identify Special Provisions	Yes	No
Do any of the state laws that apply to your company include protections addressing the topics below?		
<p>Pay History Inquiries</p> <p>At least 19 states (including Alabama, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Missouri, Maine, Maryland, Massachusetts, Minnesota, New York, New Jersey, Nevada, Oregon, Rhode Island, Vermont and Washington) have laws that prohibit private employers from asking applicants about their pay history or using an applicant’s past pay information to determine future pay.</p> <p>Select “Yes” and flag any questions about an applicant’s pay history if any of these or similar laws apply to your company.</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>Criminal History Inquiries</p> <p>At least 15 states (including California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington) have laws that prohibit employers from asking applicants about their criminal backgrounds.</p>	<input type="checkbox"/>	<input type="checkbox"/>

Select "Yes" and flag any questions about an applicant's past arrests, charges or convictions if any of these or similar laws apply to your company.		
<p>Other Inquiries, Such As Off-duty Use of Certain Legal Products</p> <p>Some states have laws that protect applicants and employees from discrimination based on their use of certain products, such as tobacco or legalized marijuana, outside of the workplace.</p> <p>For example, Illinois law prohibits employers from discriminating against individuals for off-duty use of any legal products, which include marijuana. Effective Jan. 1, 2024, California law also prohibits employers from asking about or using an applicant's past or off-duty use of marijuana.</p> <p>Select "Yes" and flag any questions about an applicant's use of legal products if any of these or similar laws apply to your company.</p>	<input type="checkbox"/>	<input type="checkbox"/>

Section 4: Refine Question List

Remove or Justify All Flagged Questions	Complete	
Remove all flagged questions from your "Question List" and place them in a separate list.	<input type="checkbox"/>	
<p>On the separate list of flagged questions, identify any questions that do not relate to or are not necessary to determine the applicant's qualifications for the essential functions of the job. Place these questions on a separate list of "Questions to Avoid."</p> <p>Essential functions are the basic job duties an employee must be able to perform, with or without reasonable accommodation. Carefully examine each job to determine which functions or tasks are essential to performance.</p>	<input type="checkbox"/>	
<p>Determine whether any of the remaining flagged questions qualify for an exception under applicable laws.</p> <p>Use the steps below to help determine whether a flagged question may qualify for an exception.</p>	<input type="checkbox"/>	
Test for Exceptions	Yes	No
Do the following or any other exceptions apply to the remaining flagged question?		
<p>Exception for Bona Fide Occupational Qualifications (BFOQs)</p> <p>Under federal law, an employer may be allowed to ask questions about an applicant's religion, sex or national origin if any of those traits is a BFOQ that is "reasonably necessary to the normal operation of that particular business or enterprise." Questions about criminal history may also be justifiable under a BFOQ or similar standard. Many state laws provide similar exceptions, which may apply to additional protected traits.</p>	<input type="checkbox"/>	<input type="checkbox"/>

<p>Select “Yes” and consider adding the question to the original Question List if the question meets the applicable BFOQ exception.</p> <p>If “No,” add the question to the list of Questions to Avoid.</p>		
<p>Exception for Age-based Legal Requirements</p> <p>Most federal and state laws allow for questions about age under specific circumstances, such as where age is a BFOQ.</p> <p>Select “Yes” and consider adding the question to the original Question List if the sole purpose of the question is to determine whether the applicant meets an exception related to age-based legal requirements.</p> <p>If “No,” add the question to the list of Questions to Avoid.</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>Exception for Job Relation and Business Necessity</p> <p>Under federal and most state laws, questions that may result in a disparate impact based on a protected trait may qualify for an exception if the question is both job-related and consistent with business necessity. A question may meet this standard if the employer can show that asking the question is necessary for the safe and efficient performance of the job. For example, federal law allows an employer to request medical information from an applicant if:</p> <ul style="list-style-type: none"> • It has a reasonable belief, based on objective evidence, that the applicant will be unable to perform essential job functions or will pose a direct threat because of a medical condition; or • The applicant makes a request for a reasonable accommodation , and the disability or need for accommodation is not obvious. <p>Select “Yes” and consider adding the question to the original Question List if the question meets the requirements for the applicable exception.</p> <p>If “No,” add the question to the list of Questions to Avoid.</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>Make a Record to Justify Any Exceptions</p>	<p>Complete</p>	
<p>Make a written record of your analysis for any questions determined to qualify for an exception.</p> <p>Thoroughly explain how you came to the conclusion that any flagged questions qualify for an exception. Although this may not be a legal requirement, this record can be helpful in defense of any claims that may arise from a problematic question.</p>	<input type="checkbox"/>	

Successful interviewing practices will differ based on an organization’s unique needs and applicable legal requirements. Regularly evaluating interviewing practices and processes can help organizations ensure compliance with applicable federal, state and local laws and strengthen attraction and retention efforts. It can also help organizations identify any gaps in their processes and adjust to avoid incurring costly fines and penalties or losing key talent.

Use this checklist as a guide when reviewing your company’s compliance with applicable interviewing laws and legal requirements. For assistance, contact Employco USA, Inc..