



## Episode 12: “Can I Ask That: Job Postings and Applications”

Speaker: Ari Kwiatkowski and Scott Rogoff,  
Barclay Damon

**[Ari Kwiatkowski]:** Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

**[Ari]:** Hey, everyone, welcome to “Can I Ask That: Job Postings and Applications.” This is the first episode of a three-piece segment where we tell you what you need to know, what questions you can and can’t ask of prospective employees or applicants on job postings, applications and in employee interviews. I am thrilled to announce that Scott Rogoff, a partner in our Rochester office, is going to be joining us for this segment, so for the next couple of episodes. Scott is a seasoned labor and employment attorney. He’s been with the firm for years, and he is also the chair of our Hotels, Hospitality, and Food Services Group. Scott, welcome.

**[Scott Rogoff]:** Hi, how are you? What’s happening?

**[Ari]:** I’m great. Thank you so much for joining us, Scott. So I’m sure you probably have watched or listened to some of our episodes, and one of the first things we do is kind of like an icebreaker moment. So, you know, I’m going to put you on the spot to just tell us something fun or interesting about you, a hobby, or it could be a professional fact, just something so we get to know you.

**[Scott]:** Well, what I’m going to tell you is something I may not be happy that you get to know me by, but I actually drove the wrong way in a presidential motorcade. So, when I was 23 years old, I volunteered on a political campaign. I won’t tell you who it is, but I don’t want to age my own self, and there was a very small contingency. So I was asked to drive the press van in a presidential motorcade.

**[Ari]:** Oh my gosh.

**[Scott]:** We were at a stoplight and I swore that my instructions were to go left towards the airport. But everybody else in front of me was going to the right towards the hotel. But I’m an independent thinker and I don’t bow to conformity. So I went to the left, and all of a sudden Secret Service people came forward, jumped out. Where are you going? Pulled me over and kicked me out and made me walk. This was way before 9/11. So there was no federal charges. This was in the early ‘90s. We’ve got to figure it out. But yeah, so I have the distinction of driving the wrong way in a presidential motorcade.

**[Ari]:** That is not ...I was not expecting that at all. So, bravo! But sounds very interesting and also simultaneously scary.

**[Scott]:** Oh well, I was pretty scared too, and I had to walk all the way back. That was the worst part of it. Yes. It wasn’t a large airport. It was a small island in South Carolina where I was living at the time.

**[Ari]:** Got it. Well, thanks for sharing, Scott. That is something I definitely did not know about you, but I’m glad now that I know. So let’s dig right into it, guys. As I mentioned a few minutes ago. You know, this is a three-part segment where basically we’re telling you the ins and outs of what is permissible and

impermissible in the context of questions on job applications for job postings and for employees or prospective employee interviews. So a lot to get through today. Scott, just to kind of lay the groundwork. You know, I think a lot of our listeners are employers or, you know, managers, or in the space. So they're pretty familiar. But when an employer is looking at their job application or preparing to conduct an interview, there are a lot of laws at play. Can you kind of give us a bit of a primer on what we're going to be talking about today?

**[Scott]:** Sure. So we have to be concerned about when you—even from the beginning, when you post a job, let alone when you invite somebody in for an interview. There are various protected classes, both under state law here in New York and also under federal law. So just to give you a broad range of them, there are protected classes such as race, sex, disability, age, family status, or military status, predisposing genetic status, so in other words, if a particular illness or disease runs in your family and you disclose that, the employer can't discriminate against you thinking, oh well, since it runs in your family, this person might get it too, so we're not going to hire them. So there's a whole host of protected classes, including just, you know, some or more recent ones, conviction record, you know, arrest record. Let's see. Marijuana now is a relatively new one. So there's a whole panoply of protected classes that come into play here that employers have to be cognizant of when they're conducting interviews.

**[Ari]:** Yeah. And we're definitely going to get into all of those that you mentioned, Scott. And you know, the aim is really to prevent claims of unlawful discrimination in hiring and interviewing. That's really what I think we're here to talk about today.

**[Scott]:** Right. Yeah. Because if something goes wrong and let's say somebody who is in one or more of these protected classes does not get the job and they follow up with you. What they can ... and if they are to see if they file suit or they bring a claim before the State Division of Human Rights or the EEOC, those agencies are going to ask you for any notes, why did you make your determination. And the employer's going to have to show an objective basis, why they went with one candidate over another candidate? And if there's any even remote suggestion that a protected class was one or more of the reasons why the applicant did not get the job, then the employer could be subject to liability, including damages they could be offering the person they are making the individual receive the job, other, what we call injunctive relief, so they can make you put posters up in training and all those sorts of things. But obviously it can hit you in the pocketbook. So we want to make sure that employers know what they can ask, what they can't ask, and when they make determinations as to who's going to be hired, it's based on an objective basis, having nothing to do with an individual's protected class.

**[Ari]:** Exactly all. Good point, Scott. So I think the best way to do this is just kind of jump into some of those protected classes. And I think, you know, we'll start with the easy ones. So, you know, race, for example, pretty straightforward. Don't ask about this on employment applications.

**[Scott]:** Right. I have not seen any that say, please disclose what race you are. Yes. Now, having said that and all kidding aside, you know, depending on the employer, some employers are required to keep track of race. Yes. One or some housing employers, you'll have to keep track of that information, so you may need it at some point down the road. But obviously, that's not something to inquire, nor if you're not sure. So let's say you interview somebody and they come in. Don't ask, geez, I can't really tell from the color of your skin. Are you a member of a particular race? It's not relevant to the job qualifications, and it shouldn't be asked at all. Period.

**[Ari]:** Exactly. Let's talk a little bit more about these couple other preliminary ones that are a little less complicated, Scott. So what about gender or sex?

**[Scott]:** So it's the same thing. With an exception, there are some situations, it's called a it's called a bona fide

qualified, but I forget the language, but it's a bona fide exception, basically, what it means is, let's say it's a health care setting, and I think it applies to gender only, and if a position is say, bathing one particular sex, there can be—depending on the circumstances—but there can be a situation where only someone of the same sex would be hired. Those exceptions are very far and few between. I strongly suggest if you're considering that, any of the employers listening the podcast get legal counsel's advice on it. But there are some limited situations where we've seen where that can be a genuine reason other than that it should have no bearing whatsoever, the sex or of a person or gender of a person. We also know that sex and gender can be fluid, it may not be constant throughout the entire course of employment. So I just I'm just trying to think of any reason why someone in an employer would want to ask those questions. And I can't think of a good one other than, again, the very unique circumstances where it's important that the same sex provides a service to same sex recipient.

**[Ari]:** Yes, the “bona fide occupational qualification,” I think, is what it is called.

**[Scott]:** Thank you! I knew bona fide was in there, I knew it.

**[Ari]:** Yeah, you had it. We're just mincing words at this point, Scott.

**[Scott]:** Is don't do it unless you have a really good reason. Yes. Then ask your attorney.

**[Ari]:** Yes, right? So I want to transition Scott and just hit really quickly, you know, age-related questions. What you can ask. So, you know, just to get the conversation started on this topic, is it advisable to ask an applicant for their date of birth on an application?

**[Scott]:** No, no. Technically, it's not illegal. Like there's certain questions that we'll probably get into a little later, like disability. You can't ask somebody, do you have a disability? You can't ask a general question about medical condition and age. There really is no per se prohibition. How old are you? But you open yourself as an employer up to potential claims, if you do ask that question now, you can certainly say, are you of legal age? You know.

**[Ari]:** Are you 18 or older, right? Like that.

**[Scott]:** Or depending on the situation you could be up to I think 15, 16, and 17 with proper working papers. So you can certainly ask those sorts of questions. But beyond that, it's not at all advisable to ask an applicant about their age. Now, perhaps in the onboarding process, you're probably going to need to know that because there's forms, yes, for health insurance or whatever. But by that time you've already made your determination. So I would strongly suggest in the interview and the application process, there is no question made of an applicant or interviewee, how old are you?

**[Ari]:** Yes, I think, you know, I've gotten this question before and I've seen a lot of applications that say, you know, list the schools you graduated from and when you graduated from them. And I feel like we're also kind of shying away from providing the graduation date as well.

**[Scott]:** Yeah, like I say, if they volunteer it on a resume or an application, you deal with it and we can talk about ways to deal with information that's voluntarily disclosed to you and ask, we can talk about that a little later. But other than that, you really don't need to ask, you know, when did you go to such and such college? When did you attend that? Now you can certainly ask about experience and educational experience. Yes. Tell me a little bit about where you went to school or, you know, hopefully you'll have their resume or application at the time and you already know that. So you'll pick one out. Gee, I see that you went to the university of blank. Can you talk a little bit about some of the activities that you were involved in. Or, and the same thing with work history, I see that you were at such and such a company for several years. Can you tell me a little bit about? That's fine, but that's a far cry from

“How old are you?” “What were the dates of education?” What were the dates of your first job? You can get the information at different way.

**[Ari]:** Good point, Scott. So I think we talked about, you know, race, religion, age, let’s talk a little bit about some questions that we see on applications or even information on job posting about national origin and citizenship because that is a protected class. I think, as you mentioned earlier in the episode. Can you ask about citizenship on an application?

**[Scott]:** Well, again, whether you can or you can’t, you cannot. It’s not a good idea. You can certainly ask, are you authorized to work in the United States; in this particular state. Where you can certainly ask those questions. And I would ask those questions because you want to go through the entire process only to find out you have somebody who is not lawfully authorized to work in the United States into this particular position. So, yeah, you can certainly ask those questions, but there’s really not a good reason to ask “Where are you from originally” or what is your immigration status.

**[Scott]:** Yes, there’s the better phrasing is, are you authorized to work in the United States?

**[Ari]:** Yes. And also, I think we should let our listeners and employers know to the extent they don’t, that you really shouldn’t be asking those types of questions about family members or spouses or anything like that as well.

**[Scott]:** Yeah. Family status is another protected class. And in fact, there was a recent development in the law, which I have a case on. This is ending right now. The old rule used to be—this is when someone’s already hired—that let’s say you got family members working together. And one of the family members is a real pain in the neck and you fire not only them, but the other family member who’s actually doing a good job. You just don’t need the aggravation. So I have a case now where that was the claim of a wife who was... she and her husband work for this company. They loved him. He was great. And he retired or left, and they fired her because they thought she was a pain in the neck. So she brought a claim before the Human Rights Division and initially got dismissed, and they said, no, the employer has many couples, you know, married couples, and therefore that’s not a family status discrimination claim. It went up to the state court, though, and the court said no, it’s more expansive. So if you are terminated, having anything to do with your spouse that is a protected class. Now between all of us on the call, I think they’re wrong, and I hope someone will take that up on appeal. But that’s the status right now. So you want to be very, very careful interviewing people who... maybe they already have a family member working for you. Because if you do, there’s a whole other set of laws that need to be in play. And if you don’t hire someone and they go, well, you didn’t hire me because of my, my spouse or my brother or sister, that’s a protected class, too. So, you know, Ari, sometimes we do see, though, like, you know, on applications, do you know anyone else who works here? Or were you referred by...

**[Ari]:** Yes. That’s common.

**[Scott]:** Right? I mean, when they go, yeah, my brother works here, OK? I mean, I’m not saying, don’t hire, you know, family members. I’m just saying it’s something that you need to be aware of when you’re considering whether to hire somebody in the same family.

**[Ari]:** Yeah, and that’s an interesting point you made, Scott, about the case that you have right now, because I think that as you just pointed out, it is pretty common for employers to ask, do you know anybody who works here? Or, you know, because a lot of employers get new employees, through referrals, like that’s a very common way to get new employees. So I think that’s a really important point and is a nuanced point. But I mean, I think it’s important to make. So I appreciate it.

**[Scott]:** Some employers even give bonuses.

**[Ari]:** Exactly.

**[Scott]:** If you refer somebody will give you 50 bucks or 100 bucks for somebody and you know it can work. You know, obviously, if you've got a high performing employee and they go, oh, guess what? I know somebody, it happens to be a member of my family, the employer might go sounds great. No, we love you, maybe we'll love them too. It can go bad as well.

**[Ari]:** Yes. So, Scott, I think you touched on this briefly few minutes ago, but just kind of closing the loop on this, the citizenship, national origin, you know, issues we've been talking about. So I think it's important to point out if you give an employee an offer or an applicant an offer of employment and they accept, then you are free to conduct whatever you know, I-9 or e-verify processes are associated with verifying proof of citizen citizenship, et cetera. But prior to that time, it's really it should not be any type of factor in the decision-making context.

**[Scott]:** That's right. Now, you know, employers may have an issue with that because it we'll talk, I guess, a little bit about criminal conviction and be on the box later. But you know, the pushback from employers is, yeah, but if I known that day one, I wouldn't have gone through the time and effort.

**[Ari]:** Mm hmm.

**[Scott]:** I've had clients who sometimes the application is a two-, three-, four-week process where you interview with many people and now you see the conditional offer. And then then you ask the I-9 question or the eligibility question or the conviction, they go, oh yeah, here's what I didn't. You didn't ask me, so I didn't tell you. And now that blows everything up. So I understand the frustration. But to answer your question, that is the law. You can't make those inquiries until a conditional offer.

**[Ari]:** Yes, Scott. And just on this a little bit related. You know, I've had some questions from employers about languages. If you're on your employment application, can you ask, you know, about languages, or what languages an applicant may speak?

**[Scott]:** Well, if you do, it should be tied to the particular job. So, a lot of my clients are in the housing industry, and the tenants are bilingual or multilingual. So, and if that is important to the particular, let's say, you're a leasing agent. Yes. And you note that your applicant pool is or a health care, that's some health care clients that serve individuals and communities that are overwhelmingly diverse, right, and multilingual, and at least bilingual. I don't there's no problem asking, do you speak this? No, I don't. I don't know that I'd say, "What other languages do you speak." I would identify your clientele and note, OK, a lot of our clients speak this particular language, and then ask the applicant, "Do you speak this particular language?" Now notice I didn't ask, "where are you from."

**[Ari]:** Or your native language? That's like one. That's a no-no.

**[Scott]:** Right? I mean, I could well, I was born in Buffalo, New York. I live in Rochester. But if I spoke Chinese, I would say, yeah, I speak Mandarin, or whatever right? So but you can ask that question, do you speak any of these languages without asking, like you said, Ari, what is your native language? What other languages you speak, that that's going to open the dialog? Yes. Oh well, I have family and such and such. And now you've got an answer to a question that you didn't need to know the answer. You didn't need that. But no, I don't have any problem if it's job-related and it's consistent with business necessity that having a particular other language fluency would be helpful or in some cases, mandatory. Absolutely, ask the question, do you speak such and such?



**[Ari]:** Yes. Great, Scott. So I think let's move on to a different topic. Probably our last topic for this particular episode of our segment. You mentioned it a little bit in the beginning, but let's talk disability related questions. Easy first question. Can you ask whether an applicant has a disability? If you're listening, you can see I'm smiling because I think we know the answer to it, but we get the question. So go ahead.

**[Scott]:** Obviously, Ari, you know, went to the school of law school that says, don't ask a question you don't know the answer to, right?

**[Ari]:** Isn't that every law school?

**[Scott]:** Well, I hope so. You know, Cross-examine 101, right? Yes. So you don't know the answer? No. All kidding aside, you can never ask that question. Right? There are times when physical requirements of the job or even mental or emotional requirements of the job are very, very important. And you can ask pointed questions specifically tied to the job that may elicit that kind of thing. So for example, let's take a manufacturing client. The job you have applied for is a machine operator. You can give them the job description. This job requires frequent standing, lifting, pushing, pulling, carrying objects 50 pounds and over. You can say here is the job description. Are you able to perform these tasks with or without a reasonable accommodation? You can ask that. You can't say you got to be pretty strong to do this job. Tell me about your health. You ok, can you do this? OK. Yes. But those inquiries absolutely can and should be made. I think you really got to pin it to the particular job. You know, if it's a more sedentary 9 to 5 office job, you may not want to ask that, although you could certainly say we work long hours, you know, is there anything about your condition that would prevent you from doing that with or without an accommodation? You can certainly ask those sorts of questions because now you'll get the information, and it can also help later on because you know a lot of what I do is defense, employment discrimination defense cases. And you know, it's nice when the interview notes point out, you know, show the applicant the job description, ask them. They checked no, or said "no problem." And then two weeks into the job, they go, "Oh, I've got this issue," and then we can successful well, most of the time successfully defend it by saying, "You didn't tell us that," you know, so we're not even on disability land. You kind of lied to us. We asked you that right? So how can you complain of it now when we asked you that question. So very, very important, if the job duties and skills are tied to a physical capacity, you can absolutely ask those sorts of questions. You've got to be careful with physicals, you know, pre-employment physicals.

**[Ari]:** Mm-hmm.

**[Scott]:** If you're going to do that, make sure everybody is subject to them. So you can't single somebody out and say, well, we're going to ask you to do a few weeks, go to a physical. But we don't ask anybody else applying for the job and do that you can't.

**[Ari]:** Yes. So that was going to be you anticipated my next question, Scott, which was, [overlapping talk]

**[Scott]:** That's what we did. We anticipate.

**[Ari]:** Yes. If you're listening to this podcast, you will just become wise to all of the many skillsets that we have.

**[Scott]:** We're going to lose our jobs. Everyone can be lawyers now!

**[Ari]:** Yeah. So what I so just circling back on that, Scott. So, you know, basically don't say anything about being able-bodied or in good health on an application or a job posting. But you know, if you're in a particular field, you can have duties-based questions, basically or have information, the job description, as you pointed out, and that should be OK. What I was going to ask you and again, you anticipated

it, was if you could tell us a little bit about, you know, what's permissible in the context of, you know, pre-employment medical screening, medical examinations, things like that. If you could just tell our listeners, you know briefly about that.

**[Scott]:** Yeah. They're generally OK as long as they are necessary, you know, if there's a legitimate business reason to do it and if it's uniform across the board or at least for the position. So if you say we don't subject our administrative staff, we don't ask them to get a physical or anything like that. But the folks who work on the floor with the heavy machines, yeah, we ask them. But we see this a lot, Ari, where, yes, where employers will try to single people out because of something they've said in the interview. They'll go, all right, well, we want you to go. Well, that's subject to potential liability. You can't do that.

**[Ari]:** So it's going to be an across-the-board requirement.

**[Scott]:** At least by position or a department, et cetera, et cetera. So you can do it. I think you really want to think about why you want to do it because you know, it's the old "be careful what you wish for." You know, things are going great. They told you they don't have a problem. Terrific. And now they get a physical and something is disclosed and now you're on notice of it. And now if you decide not to hire the person and they bring a claim, they're going to go, "Yeah, the reason you didn't hire me is because of a disability." And this is something you may not have known about or had any need to do it. So I really think you need to think very hard and fast before subjecting applicants to pre-employment physicals after a conditional offer has been made. I think you want to be really careful. Sometimes there's a great reason to do it. Other times...probably not.

**[Ari]:** Good advice, and I think it's a good thing for our listeners to keep in mind, Scott. So, I think that brings us to the end of our first episode in the "Can I Ask That" segment? Thank you so much for joining to our listeners. We are going to pick right back up where we left off next week, and we are going to tell you what you need to know about salary history, band the box issues, criminal conviction issues and drug testing and cannabis issues as it relates to job postings and employment applications. So, Scott, thanks so much for joining us this week, I really appreciate it.

**[Scott]:** Thank you.

**[Ari]:** And we will talk to you next week.

**[Scott]:** Sounds good. Thanks.

**[Ari]:** Thanks.

**[Ari]:** The Labor Employment Podcast is available on [barclaydamon.com](http://barclaydamon.com), YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Podcasts. Like, follow, share, and continue to listen. Thanks.

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