



## Episode 13: “Can I Ask That: Job Postings and Applications, Part 2, With Scott Rogoff”

Speakers: 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 back to “Can I Ask That?”—this is “Job Applications And Job Postings,” continued. We are back with Scott Rogoff. And we are going to pick up our conversation from last week and dig right into some additional topics and inquiries that are permissible and some that are not permissible. But before we do, if you listened last week you heard Scott tell us how he basically almost got arrested by the Secret Service. I mean, he over-exaggerated that. But before we do, Scott hit us with another interesting fact, because that was not what I was expecting at all. And now I’m just curious what else you have in your arsenal.

**[Scott Rogoff]:** So other than don’t drive with me right?

**[Ari]:** Yes.

**[Scott]:** So another...I think it’s interesting. So before I went, after college, just before law school, I was living in Hilton Head, South Carolina, and I became friendly with some people in the golf community. And they told me that there was a new cable, local cable television show, Southern Links Magazine, and they needed a young roving reporter to go report on golf trends. And they would get a spot on the show every week. So I did that and it was kind of cool. So I had a, I was a young roving reporter, and I would go out and I would meet golf professionals. And one time, Arnold Palmer was there, so I got to walk around with Arnold Palmer a little bit. I got to interview golf course designers and report on trends, and every week for five to seven minutes, I had a little segment on Southern Links magazine, and the island is so small, but there are a lot of year-round people who live there that over time I would go to the grocery store and sometimes I would get recognized. Aren’t you the guy on Southern Links? And that was kind of cool! And so I taped everything; my mother kept them, I don’t know where they are. My mother kept all the tapes. So somewhere in a dusty box are my Southern Links magazine segments.

**[Ari]:** So bad driver, local celebrity!!

**[Scott]:** That’s an interesting combination, no wonder nobody liked me...

**[Ari]:** All right. Well, I mean, I don’t know. I like it. And, you know, you keep talking about Hilton Head and like, it’s just making me you know, I’m in Buffalo our listeners know, Scott’s in Rochester. Brutal time of year for those of us in upstate New York and downstate I think this year. So I like that you’re talking about a warm place, I guess is what I’m getting at.

**[Scott]:** Mental imagery. Yes.

**[Ari]:** Mental imagery. Exactly. Manifesting that. I like it, Scott, you know, I’ve never been a golfer. I guess it’s

like pretty anti-lawyer of me. But it's one of those things where I just I'm not good at it and it is what it is, you know.

**[Scott]:** You don't have to! I'm not good at it either.

**[Ari]:** But I also don't find it to be fun. And so I feel like that's the more important point to make. Right.

**[Scott]:** We'll work on it...

**[Ari]:** There we go. All right Scott, so last week, you know, we talked a bunch about questions you can ask, questions you can't ask, things you can and cannot include in job postings. We left off talking about disability. Let's kind of transition. And this is actually an issue you know, I know it as chair of the Hotels, Hospitality and Food Services practice area here at Barclay Damon. I know you guys put something out really recently on this issue, but salary history, salary range is kind of a more hot-button issue. Can you tell us if you can, in New York—and we'll put New York City aside because for our employers who are in New York City, you know, we'll note certain exceptions or different things there—but generally, are you allowed in New York to ask an applicant about their salary history?

**[Scott]:** Not anymore. The law was recently changed in that regard. And it used to be a very common question because you would want to weed out people whose salary expectations were not in line with what the job was offering.

**[Ari]:** Yes.

**[Scott]:** You know, you often would ask that question, “What was your salary history before, what were you making,” etc., etc. So you can't ask those questions anymore either on a job application or during the interview. You can, however, ask about expectations, you know. So, you alluded to the New York City where now the job postings have to have the minimum and maximum salary range. But before that gets widespread, let's say you do a job posting and you do not list the salary range because you're outside of New York City. And the applicant comes in... You can certainly say, can you give us a sense of the salary range that you might be looking for? You can ask that question. You can't say, I see you worked at X, Y, Z company before you came here. What did you make at that place? But it's certainly permissible to ask them what their expectations are in terms of a salary range, and then you can go from there. So that's really the best you can do if you'd like to elicit that. And it's actually a good question to ask because you'll get almost the same information, you know, if this is a minimum wage job and someone says, Yeah, I'm looking to get \$30, \$40 an hour, that's going to tell you a lot about that person.

**[Ari]:** Yes.

**[Scott]:** Whereas the opposite is true. If the job is going to pay \$75–\$80,000 a year and the person who goes well I'm hoping to get \$40, \$50, that's going to tell you some things too and that's going to open the door for some more discussion. So I still think it's a fair and good idea to ask them about their expectations. Just don't specifically say “What did you earn in your previous job?”

**[Ari]:** Yes. And as you pointed out, and I think this law goes into effect in May in New York City, but I think as of like May, I forget the exact date, employers have to basically put a range, so the minimum and the maximum salary for each job in like a job posting.

**[Scott]:** That's right.

**[Ari]:** So, Scott, so can you tell us what an employer should do if, you know, an applicant basically voluntarily

discloses their salary history information? And you know what, what you should do with that information, how you can respond?

**[Scott]:** Yeah. You can certainly remind or tell them or remind them that this was... “thank you for volunteering that,” you know, make it clear that you didn’t ask for it and then you can use it for whatever purpose that that you deem is relevant. Because again, you... the prohibition is on an employer asking for it. If the employee volunteered it to let’s say. Okay. Let me I’ll let you know this position has a salary of \$50,000 a year and they go, oh well I was making \$75 at my previous job.

**[Ari]:** Yes.

**[Scott]:** You want to say, okay, well look, I really didn’t ask you about your previous salary. You know what, I wasn’t going to ask you about that, but this is what the salary is. Is this something that, you know, you like to continue, like to pursue along those lines? So you want to acknowledge that they said it and you didn’t. Right. Once the genie is out of the bottle you can’t put her back, obviously.

**[Ari]:** Yes.

**[Scott]:** There’s no prohibition against hearing it, obviously. Nor could there be. So the way you could handle it is that I understand that you’re telling me that you made more at your last job. This is what it pays, that there is obviously well, not obviously, but there may be an opportunity for salary increases, there may be bonuses. There may be a commission, you know, or part of commission. You might be able to earn something along those lines. But this is the... focus in, again, on this job. This is what this job pays. And then say we more than we love to continue this process with you. It’s up to you, right? So that’s what you could do. And if they storm off, they storm off. But you’re not making a decision based on a question that you asked. You are listening to what they told you and now you’re trying to see if you can still make this work.

**[Ari]:** Thanks, Scott. And you know, next week when we go over kind of tips for interviews and how to conduct interviews, we’ll talk a little bit more about, you know, what to do when an employee volunteers certain information that we as an employer probably just don’t want to hear. But so, yeah, I think that’s a good primer on the salary history. Scott, I want to move on to a topic that I think has been, you know, over the past couple of years, more of a hot button issue. And I know you have some insight into it, which is criminal convictions. And, you know, “ban the box” laws. And these are things that, you know, as I mentioned, have been more over... more recent developments in the law, I would say. But basically “ban the box” when we say that we’re talking about laws that prohibit employers from asking applicants about criminal history on an application. So banning that box where an employee or applicant, prospective employee applicant would check, you know, yes or no. So I think it’s good to provide that context because sometimes I think employers hear “ban the box” and they’re like, what is that? So I think that’s technically where the idea comes from. But, Scott, is there any type of statewide local, excuse me, statewide ban the box law with respect to asking that question on applications?

**[Scott]:** Yeah, my understanding is that it’s a citywide ...So I know that here in Rochester, we have banned the box. Buffalo has banned the box. Syracuse has banned the box.

**[Ari]:** Yes.

**[Scott]:** And I believe New York City has banned. I’m not sure of other cities. But the law basically says that employers whose workforce is primarily within the city limits, however, that’s defined in the ordinance cannot ask on an application or in the interview process anything about a conviction record.

**[Ari]:** Right.

**[Scott]:** You can't ask this question. Now, that's not to say you can't ask it later, you know, and in fact, many employers will and can ask it later once a conditional offer has been made. So they've gone through everything. The employer is satisfied with references and interviews and skills, etc., etc.. And now you're ready to go forward but you say this offer is contingent upon a background check, which is going to include, among other things, a criminal conviction history. So you can do that. Now, I do want to spend a couple of minutes on this because...

**[Ari]:** Yes.

**[Scott]:** ...there is a kind of cases and claims brought before the New York State Division of Human Rights on conviction history. Just a little aside, a couple of years ago, I was on a panel for the Monroe County Bar Association representing employers. It was someone representing employees. And the regional director of the Rochester Human Rights Division was there. And the topic of conviction records came up. And the director basically said, I expect to see more of these, you know, and I should see more of these. So it's definitely on their radar. So let me talk a little bit about what that means. So we've got this section of the New York State Corrections Law. It's called Article 23A, and it's incorporated into the New York State Human Rights Law. So just when you have protected classes like race, sex, disability, gender, etc., etc., conviction history as considered under Article 23A is one of those categories. Employers might be thinking, wait, you're telling me if someone was convicted of murder, I can't say we're not going to hire you? Course you can! You absolutely can. And it may be appropriate. However, Article 23 A lists, I think what are the six, seven or eight factors...

**[Ari]:** Yes.

**[Scott]:** ...that an employer has to consider. And it is critical to go through this process. So let's give an example. Employee goes to the application process that we do a criminal background check and now we get something that comes back that they were convicted of DWI, driving while intoxicated 15 years ago. And their job does not require them to drive a car. They can walk to work, they can get a ride, etc., etc.

**[Ari]:** This is not an uncommon scenario, by the way. I feel like this hypothetical that you're coming up with is pretty common.

**[Scott]:** Yeah. So what the employer must do is take...and I won't run down all the factors, but some of the big ones are, 1) How long ago did it happen? How old was the person at the time. Is there a direct correlation between the offense—in this case, drunk driving—and the job that they're hired to do? It's not. This is under Article 23, but nothing to consider. What has their work history been since then? Because if other employers have hired them, they can go, "They didn't have a problem with this."

**[Ari]:** That's right.

**[Scott]:** Yes. And a very, very important I have to stress that if the applicant has what's called a certificate of relief from disability, or a good standing certificate from the court about the same thing. Yep. It is presumed that they are rehabilitated. Let me say that again.

**[Ari]:** Yeah. Very important.

**[Scott]:** The wording is on the employer. So I've got the seminal case right now. During the application process there. And by the way, and I don't mean to scare anybody, but I will anyway: if the employers on the line: there are professional applicants who are criminal convicts...

**[Ari]:** Oh, yes.

**[Scott]:** ...who make a career out of applying for jobs.

**[Ari]:** Yes.

**[Scott]:** ...knowing. And one of them, in fact, our firm, Ari. I know that you know. What we're talking about

**[Ari]:** No one in the group hasn't been involved in one of these with that individual,.

**[Scott]:** It's almost like initiation, it's like hazing. Have you had the blank?

**[Ari]:** The blank? Yes. Yes. And, Scott, and we should point out to our listeners what Scott is saying in this individual we're talking about is somebody who will challenge job postings in other cities, meaning they live here and they're challenging a post downstate. But continue, Scott.

**[Scott]:** And this guy, I got to give him credit. I mean, if you're going to be... do this, he is dynamite. So this is a convicted sex offender, okay. And he records phone calls with the hiring person before he's even interviewed. And he'll call up, "Gee, I you have a posting for blah, blah, blah. I'm interested in." The person goes, oh, terrific. Goes, but I got to tell you right off the bat, I'm a convicted sex offender. You know, I have to register. I have registered. Is that going to prevent me from working for your company? And when you get an uneducated HR person or employer who doesn't know the law (and I've had a couple of these), they go, well, yeah, sorry, we don't hire sex offenders. Once you say that, you have violated the law. And what our clients are... I don't often understand is they jump to the result. They go you got to be kidding me. This person applied for a job working with kids. I can't refuse a job to a sex offender. Yes, you can. And must go through the process. You have to because—and I've got two of these pending right now—and again, like I said, this guy had it on tape, and he was good. He had a script. So he said, oh, well, I see you, you don't hire sex offenders. But let me ask the questions. Do you consider how long ago the offense was? No, so.

**[Ari]:** He's got the Article 23A factors. Yeah.

**[Scott]:** In front of him. Reads it. So want one of them? I did and I did my position statement. Oh, we didn't say that and that's ridiculous. To his credit, he's called me because, "Scott, I know you're representing a client, but I have an audio tape that I'm going to send you" and he sends it to me and sure enough, it was boom, boom, boom. And the client paid out on it, and they did. And so if you take away nothing else from this segment of our podcast here, as you're going through the application process, if you do a background check and there is a criminal history noted on it, please get counsel. But whether it's us or somebody that doesn't match. Hopefully you'll ask us. But the more important thing is you get professional advice from a lawyer not and all due respect to our colleagues. Don't ask your neighbor down the street who's a real estate lawyer or your uncle so-and-so or your nephew just got out of law school. Talk to someone who specializes in labor and employment law, and this particular area, because you can get to where you want to go. You can make that decision. But if you don't go through the steps, you're going to be in trouble because another part of that same statute is if the employee or the applicant asks about why they weren't hired, you've got to put in writing, the specific. And here's what we considered and we've done those letters. Yes, I've seen it on the positive side for the employer where they just write, and we won. I've seen it on the negative side where they just jumped you. Sorry, we don't hire sex offenders. That's it. Once you say that, you've actually violated the law. The law, but that is so important. We're seeing more and more of these.

**[Ari]:** Yeah. And I'm glad we're spending some time on this topic because I think you'd be hard pressed to

find anybody, you know, in our Barclay Damon Labor and Employment Group who hasn't come across these issues. You know, I know you have, I know I have. And, you know, I'm seeing it, too, in the context of prospective and applicants, you know, basically like I have a matter right now where a prospective applicant, not an applicant, did not fill out an application, basically contacted our client and said, you know, I have a criminal background, is this going to be a problem? But had not filled out the application and had not, you know, it was posted on, you know, Indeed or some similar type site and basically filed a complaint when our client you know, didn't answer, because the answer was "it depends; please fill out the application through, you know, Indeed," or whatever the third-party source was. So, you know, I think it's definitely very important. And I'm glad you point out it doesn't mean that you can't not hire someone, but it's just you have to go through the analysis that's required.

**[Scott]:** And it could happen at any stage. So the example you gave, Ari, that was even the pre- application stage.

**[Ari]:** Yes.

**[Scott]:** It can happen there. It can happen when you interview somebody you know, so let's say you're in a city which has ban the box, so you don't know that going into the and the first thing. Hi. Nice to meet you, Miss So-and-So, good to meet you, too. By the way, before we begin, I need to tell you, I'm a convicted felon. You got to be ready for that, you know, and if you're an employer, you say, okay, well, we're not there yet. Let me let me ask you some other questions first. Right. And then you go through it through the interview. So that's how I would handle that. Now, if they put you on the spot and they say, look, I'm not going to waste my, the applicant now—I'm not going to waste my time in an interview with you for half an hour, if you tell me that my conviction record is going to prevent me from being hired. And your answer is "Not at all. That's not what I'm telling you at all. We go through a process. I think you're jumping the gun a little bit. Let's go through this. If and when we make you a conditional offer, we are going to ask for a background check and we're going to take a look at it. But no, there is no automatic disqualification. There's no automatic prohibition. But I think you're three or four steps ahead. So why don't we go through this process first?" Because that's how I look at it.

**[Ari]:** I think that's a great way to handle it. Scott, a good piece of advice for our listeners. And before we move on, I did want to just touch briefly on New York City. New York City has a fair chance act, and the city has issued a bunch of guidance on this. We have a client that, I'm working on the matter right now who basically had some, not New York City-based client, but has job postings for positions in New York City. And it said something, the posting said something to the effect of, you know, must be willing to consider a criminal background check or, something to that effect. And basically the New York City's guidance says eliminate any reference to criminal background checks, criminal history, etc. when you're in job postings, applications, etc. So, you know, I think it's probably just sage advice at this point to just eliminate any reference to it if you're looking to hire employees in New York City, because I think it's very stringent down there.

**[Scott]:** Yeah, and again, keep in mind, you can consider it.

**[Ari]:** All right, Scott, anything else you want to add on this issue before we move on to our last topic for the episode?

**[Scott]:** Like I said, if you encounter it, please seek legal advice in this area. It's very delicate.

**[Ari]:** Yes. All right, Scott. So let's just transition a little bit. I want to just talk briefly about drug testing, cannabis-related issues, because in New York, you know, these are developing and this is also more of a recent hot button issue. So just a couple questions on this topic. You know, in New York State, can employers always ask about drug use on applications?

**[Scott]:** Well, they can't ask or test for cannabis. They can't do that. New York has well there is several recent laws—we have a recreational activities law that says if you're doing something lawful on your own time, that you can't be discriminated against. I could be wrong, but I think the origin was way back, it had to do with the tobacco lobby because smokers were getting fired. So but you can't, you know, no one's going to stop. Most people, I think, would not support a law. You know, smokers need to be able to do this, especially at a time when there was a negative perception. So let's figure let's broaden it so it's not just smoking. If you're you know, if you're a hang glider and, you know, you can't say, I'm not going to hire you cause you're going to break your neck, you're not going to come to work. You know, cannabis now, to a large degree is legal in New York. And I know a lot of municipalities are voting on that. And it's Monroe County where we are. I just heard on the news there several towns that voted on certain aspects of it. But generally speaking, you know, where to where it's legal. An employer cannot ask the question and nor can they rely on it. And they go, wow, the guy or the woman is a pothead, so therefore we're not going to hire him. Can't do that anymore. Now, it doesn't mean you can show up to work stoned, just like alcohol. But to answer the question, as an employer, you don't want to ask about marijuana use, you don't want to test for cannabis.

**[Ari]:** Yes. And that's the same, Scott, just to, you know, briefly touch on it in New York City. And here, if you're an employer in New York City, you know, you are not permitted to require prospective employees to submit for testing for the presence of THC or marijuana specifically as a condition of employment. So, Scott, I want to just talk about this briefly, though. You know, are there any exceptions to these rules that you have?

**[Scott]:** If there's a state or a federal law that requires it, or if it would cause the employer to lose a federal contract... There are certain exceptions, they're kind of narrow, but you've got to check to see what, if any bodies regulating your industry. And if like, again, if you have federal government contracts, take a look at the contract as it might have something in there that says everyone working on this contract must be tested for everything, including cannabis. Then you have to do that to comply with the contract. But unless there's a specific law, state or federal law, or a specific contract issue, then you cannot. Now, I don't think, Ari, and we can follow up on that, but I don't think that applies to private companies contracting with each other. So let's say you're a staffing agency, right? And you are contracting with a host employer, a potential host employer. I don't know that those two could contract and say you've got to test everybody for cannabis, and if you don't, you're going to lose the contract. But I don't think that it applies there. So be careful that you have those provisions if you're in any of those industries. But the exceptions that you referenced that I'm aware of, again, are for, you know, government, federal or state laws or government contracts.

**[Ari]:** Great. Thanks, Scott. So I think that takes us to the end of episode two in our “Can I Ask That” segment. Before we sign off, Scott, is there anything you want to add or maybe anything we didn't talk about?

**[Scott]:** No, I again, I guess we apologize if we're overwhelming anybody with all this done, there is a lot to consider.

**[Ari]:** Yes.

**[Scott]:** But hopefully this is giving a pretty good overview as to some of the things at least to watch out for. And the third section, what we'll get in the weeds a little bit even more with what happens actually during the interview when someone volunteers these facts. But overall, like I say, just it's just to raise your awareness that these should not be rote interviews, meaning we do the same thing over and over again and we don't listen, etc., etc. Because you got to be nimble when you interview people and consider applicants for employment in New York.

**[Ari]:** Yes. Thanks, Scott. To our listeners as Scott mentioned, next week I will be back with Scott and we will give you some tips as it relates to employee interviews. So moving on from applications and job

postings, you definitely won't want to miss it. We'll see you then. Thanks, Scott.

**[Scott]:** Thank you. Bye.

**[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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