

804 CMR: MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

804 CMR 3.00: DISCRIMINATION IN EMPLOYMENT

Section

3.01: Employment Discrimination Guidelines

3.02: Reference Chart Regarding Permissible Inquiries

3.01: Employment Discrimination Guidelines

(1) Definitions. As used in 804 CMR 3.00:

Age: The term "age" includes any duration of time since an individual's birth of greater than 40 years.

Employee: The term "employee" means an individual employed by an employer in a full or part time capacity.

The term "employee" does not include any individual employed in the domestic service of any individual.

The term "employee" does not include independent contractors.

Any individual employed by his or her parent(s), spouse or child, may not maintain a claim against his or her parent(s), spouse or child under the Fair Employment Practices Law.

Employer: The term "employer" means one or more individuals, governments, government agencies, political subdivisions, labor organizations, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, or receivers, having six or more employees.

The term employer does not include a club exclusively social, or a fraternal association or corporation, if such club, association or corporation is not organized for private profit. Non-profit clubs, associations, or corporations which are not exclusively social are not excluded.

Employment Agency: The term "employment agency" includes any person or entity undertaking to procure employees or opportunities to work.

Fair Employment Practices Law: The term "Fair Employment Practices Law" refers to M.G.L. c. 151B.

Protected Class: The term "protected class status" shall include race, color, religious creed, national origin, sex, sexual orientation, age and ancestry. Qualified handicapped persons shall be deemed as members of a protected class and as such shall have protected class status.

Sexual Orientation: The term "sexual orientation" shall not include persons whose sexual orientation involves children as the sex object.

(2) Applicable Law. The Fair Employment Practices Law, found in M.G.L. c. 151B, §4 guarantees that no person shall suffer discrimination in the terms, conditions or privileges of his or her employment because of his or her protected class status, unless based upon a *bona fide* occupational qualification.

(3) Bona Fide Occupational Qualification.

(a) Application. M.G.L. c. 151B does not define the term "*bona fide* occupational qualification [BFOQ]," but the Commission in applying the term takes the position that it provides only the narrowest of exceptions.

(b) Examples. The Commission will decide BFOQ issues on a case by case basis, but the following examples may provide guidance.

1. A stereotypical view of a category of people will never be a BFOQ, *e.g.*, "women cannot do heavy, physical labor." Thus, employment decisions based on a stereotype that the turnover rate among women is higher than men, or that women are less likely than men to assent to transfer to other locations of the employer in other cities or states, do not benefit from the BFOQ defense.

2. A mere customer or coworker preference is not a BFOQ, *e.g.*, "customers prefer to deal with people of the same race" or "employees are uncomfortable working with people of

different sexual orientation."

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3. There are some circumstances, involving customer preferences which may constitute BFOQs, including:
 - a. The need for a "genuine" member of a class to satisfy a job requirement may be a BFOQ, *e.g.*, an actor to play a male role or a female to model feminine apparel.
 - b. Where considerations of personal privacy may be a necessary element of the conduct of a business, and therefore, a BFOQ, *e.g.*, hiring only men or women respectively for duty in men's or women's washrooms or locker rooms.
 4. The fact that the employer may have to provide separate facilities for a person of the opposite sex is not a BFOQ.
 5. The fact that members of one group have been traditionally hired is not a BFOQ.
- (4) Unlawful Employment Practices.
- (a) Unlawful Employment Practices By Employers.
1. Applications/Advertising. It is unlawful for an employer, his or her agent, or an employment agency, to print or circulate any statements or to use any form of application for employment or to make any inquiry or record or advertisement in connection with employment, which expresses, directly or indirectly, any limitation, specification, preference or discrimination as to the protected class status of any prospective applicant for employment unless based upon a *bona fide* occupational qualification.
 The publication by newspapers or other publications of help wanted or classified advertisements which violate the Fair Employment Practices Law may be viewed by the Commission as aiding or abetting an act of discrimination.
 2. Hiring/Discharge. It is unlawful for an employer or his or her agent to discharge or refuse to hire or to bar from employment any individual because of protected class status, unless based upon a *bona fide* occupational qualification.
 3. Terms of Employment. It is unlawful for an employer, or his or her agent, to discriminate against any individual in matters relating to compensation, terms, conditions or privileges of employment because of protected class status, unless based upon a *bona fide* occupational qualification.
 4. Sexual Harassment. It is unlawful for an employer personally or through an agent to sexually harass any employee. The term "sexual harassment" shall mean sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
 - a. submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions;
 - b. such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. Discrimination on the basis of sex shall include but not be limited to sexual harassment.
 5. Marital Status. Any distinction made by an employer between married and unmarried women which is not made between married and unmarried men, or vice versa, is unlawful discrimination.
- (b) Unlawful Employment Practices By Labor Organizations. It is unlawful for a labor organization, on the basis of protected class status, to do the following, unless based upon a BFOQ:
1. To exclude from full membership rights such individual.
 2. To expel from its membership such individual.
 3. To discriminate in any way against any of its members or against any employer or any individual employed by an employer.

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- Any distinction made by a labor organization between married and unmarried women which is not made between married and unmarried men, or vice versa, is unlawful discrimination.
- (c) Unlawful Employment Practices By Employment Agencies.
1. It is unlawful for an employment agency to make any statements to a prospective employer which are intended to directly or indirectly disclose the protected class status of the prospective applicant for employment, unless based upon a *bona fide* occupational qualification.
 2. It is unlawful for an employment agency to solicit and interview job applicants on the basis of protected class status unless such status is a *bona fide* occupational qualification.
 3. An employment agency which accepts a job order containing an unlawful specification will share legal responsibility with the employer placing the job order.
 4. It is unlawful for an employment agency to accept or process job orders from employers which directly or indirectly limit or specify the protected class status of any applicant for employment, unless based upon a *bona fide* occupational qualification.
 5. Any distinction made by an employment agency between married and unmarried women which is not made between married and unmarried men, or vice versa, is unlawful discrimination.
- (d) Unlawful Employment Practices By Employers, Labor Organizations, Employment Agencies or other Persons or Entities:
1. Aiding and Abetting. It is unlawful for anyone, whether an employer, employee, or other person, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under the Fair Employment Practices Law or to attempt to do so.
 2. Interference. It is unlawful for any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected under the Fair Employment Practices Law, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right, granted or protected by the Fair Employment Practices Law.
 3. Retaliation. It is unlawful for any person, employer, labor organization, or employment agency to retaliate or otherwise discriminate against any individual because that individual has opposed any practices forbidden by the Fair Employment Practices Law, or has testified or assisted in any proceeding or investigation under that law.
- (5) Unlawful Employment Practices With Respect To Handicapped Individuals.
- (a) The term "handicap" means:
 1. a physical or mental impairment which substantially limits one or more major life activities of a person;
 2. a record of having such impairment; or
 3. being regarded as having such impairment. The term "handicapped person" means any person who has a handicap. The term "major life activities" means functions, including, but not limited to, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.
 - (b) The term "qualified handicapped person" means a handicapped person who is capable of performing the essential functions of the position, with or without reasonable accommodation.
 - (c) An accommodation is "reasonable" if it does not impose undue hardship on the employer.
 - (d) It is unlawful for any employer, personally or through an agent, to dismiss from employment, or refuse to hire, rehire or advance in employment or otherwise discriminate against a qualified handicapped person because of his or her handicap.
 - (e) In determining whether an accommodation would impose an undue hardship on the conduct of the employer's business, factors to be considered include:
 1. the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;
 2. the type of the employer's operation, including the compensation and structure of the employer's workforce; and

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3. the nature and cost of the accommodation needed.
 - (f) Any physical or mental job requirement with respect to hiring, promotion, demotion or dismissal from employment or any other change in employment status or responsibilities shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job.
- (6) Special Provisions Relating to Age Discrimination. Notwithstanding any provision of 804 CMR 3.00, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to:
- (a) observe the terms of a *bona fide* seniority system or any *bona fide* employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of 804 CMR 3.01(6), except that no such employee benefit plan shall excuse the failure to hire any person, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any person because of age except as permitted by 804 CMR 3.01(6)(b).
 - (b) require the compulsory retirement of any person who has attained the age of 65 and for the two year period immediately before retirement, is employed in a *bona fide* executive or high policy-making position, if such person is entitled to an immediate non-forfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan, or any combination of such plans of the employer, which equals in the aggregate, at least \$44,000.
 - (c) require the retirement of any employee who has attained 70 years of age and who is serving under a contract of unlimited tenure or similar arrangement at an independent institution of higher education, or to limit the employment in a faculty capacity of such an employee, or another person who has attained 70 years of age who is formally employed under a contract of unlimited tenure or similar arrangement, to such terms and to such a period as would serve the present and future needs of the institution as determined by it; provided, however, that in making such a determination, no institution shall use as a qualification for employment or re-employment the fact that the individual is under any particular age.
- (7) Special Provisions Relating to Religious Discrimination.
- (a) Definition of Religious Organization. Although religious organizations are included in the definition of employer, nothing in the employment practices law shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, and which limits membership, enrollment, admission or participation to members of that religion, from giving preference in hiring or employment to members of the same religion or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.
 - (b) Reasonable Accommodation to the Religious Needs of Employees or Prospective Employees.
 1. It is unlawful for an employer to impose upon an employee or prospective employee as a condition of obtaining or retaining employment any terms or conditions which would require the individual to violate or forego a practice required by his or her religion. This includes but is not limited to requiring an employee or prospective employee to work on any day or portion thereof that the employee observes as a sabbath or holy day.
 - a. In requesting an absence for religious purposes, the employee or prospective employee:
 - i. must demonstrate that observance of the sabbath or holy day is a required practice of his or her religion;

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- ii. must notify his or her employer at least ten days in advance of the requested absence that he or she intends to take the absence for religious purposes;
 - iii. may include a reasonable amount of time for travel to and from work in the request for time off.
 - b. The employer may require the employee to make up the absence at a mutually convenient time.
 - c. The employer is not required to compensate an employee for any religious absence requested in accordance with the requirements of the statute.
2. The employee shall have the burden of proof as to the required practices of his or her religion.
3. An employer shall make reasonable accommodation to the religious needs of employees or prospective employees provided that such accommodation shall not pose an undue hardship in the conduct of the employer's business.
- a. Examples of undue hardship include:
 - i. Inability to provide services which are required by federal or state law or regulation;
 - ii. Situations which compromise public health and safety;
 - iii. Inability to transact business without the employee's presence, where his or her work cannot be performed by another employee who has substantially similar qualifications during the period of absence;
 - iv. The employee's presence is needed to alleviate an emergency situation.
 - b. It is the employer's burden to demonstrate that making the accommodation poses an undue hardship.

(8) Special Provisions Relating to Maternity Leave.

- (a) Definition. The term "maternity leave" means a period of time, not exceeding eight weeks, that a female employee is absent from employment for the purpose of giving birth or adopting a child.
- (b) Eligibility for Maternity Leave. A female employee is eligible for maternity leave if:
- 1. she has completed the initial probationary period, if any, set by the terms of her employment; or has been employed by the same employer for at least three consecutive months as a full-time employee; and
 - 2. she is absent from such employment for a period not exceeding eight weeks for the purpose of:
 - a. giving birth; or
 - b. adopting a child under the age of 18; or
 - c. adopting a child under the age of 23, if the child is mentally or physically disabled; and
 - 3. she gives her employer at least two weeks' notice of her anticipated date of departure and intention to return.
- (c) Rights of a Maternity Leave Employee to Return to Employment. If a female employee is eligible for maternity leave, as set forth above in 804 CMR 3.01(8)(b), she shall:
- 1. be restored to her previous, or similar, position with the same status, pay, length of service credit and seniority, wherever applicable, as of the date of her leave, and
 - 2. such maternity leave shall not affect her right to receive vacation time, sick leave, bonuses, advancement, seniority, length of service credit, benefits, plans or programs for which she was eligible, wherever applicable, at the date of her leave; and
 - 3. such maternity leave shall not affect her right to be included in any system of accruing seniority or accruing benefits, if such benefits would accrue while an employee is on leave for sickness, disability or any other leaves. In all such cases, when such employee returns, her seniority date will remain the same as it was prior to her maternity leave.
- (d) Rights of the Employer. An employer is not required to:
- 1. pay a female employee on maternity leave, such payment is at the discretion of the employer; or

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2. restore an employee on maternity leave to her previous position, or similar position, if other employees of equal length of service credit and status in the same or similar position have been laid off due to economic conditions or other changes in operating conditions affecting employment during the period of such maternity leave. Notwithstanding the previous sentence, the employee on maternity leave shall retain any preferential consideration for another position to which she may be entitled as of the date of her leave; or
 3. include the maternity leave of a female employee in the computation of benefits, rights, and advantages incident to her employment position; or
 4. provide for the cost of any benefits, plans, or programs during the period of maternity leave unless such employer so provides for all employees on leave of absence.
- (e) The provisions of 804 CMR 3.01(8) shall be applicable to both married and unmarried females.
- (f) Nothing in 804 CMR 3.01 shall be construed to affect any bargaining agreement or company policy which provides for greater or additional benefits than those required under 804 CMR 3.01.

(9) Pre-Employment Inquiries. As a general rule, an employer may seek information which is directly related to the applicant's ability to perform the job for which he or she is applying. As a general rule, an employer may not make inquiries, the response to which would likely disclose the applicant's protected class status. An employer may invite applicants to voluntarily disclose their protected class status for purposes of assisting the employer in its affirmative action efforts. The following chart explains the application of these principles with respect to different areas of inquiry during employment interviews or on application forms.

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3.02: Reference Chart Regarding Permissible Inquiries

TOPIC	EMPLOYERS MAY ASK	EMPLOYERS MAY NOT ASK
Age	<p>Generally, the only proper question is, "Are you under 18, yes or no?"</p> <p>Questions about age may be allowed if necessary to satisfy the provisions of a state or federal law (for example, certain public safety positions have age limits for hiring and retiring). Also, if the Commission has previously identified age as a <i>bona fide</i> occupational qualification for the position.</p>	<p>Inquiry into the date of birth or age of an applicant, except as indicated to the left.</p>
Disability/ Handicap		<p>Inquiry into whether the applicant has a physical or mental disability/handicap or about the nature or severity of the disability/handicap.</p> <p>Inquiry into whether an applicant is alcoholic or drug addicted.</p> <p>Inquiry into whether an applicant has AIDS.</p>
National Origin/ Ancestry/Citizenship	<p>"Are you legally authorized to work in the United States?"</p> <p>An employer may require an employee to produce documentation which evidences his or her identity and employment eligibility under federal immigration laws.</p>	<p>Inquiry into the birthplace of an applicant or the birthplace of his or her parent(s), spouse and/or other close relatives.</p> <p>Inquiry into the national origin, ancestry or ethnicity of an applicant.</p> <p>Inquiry into whether an applicant for employment or an applicant's parent(s), and/or spouse are nationalized or native born citizens of the United States.</p>
Medical Examinations	<p>Once an offer of employment has been made, an employer may condition that offer on the results of a medical examination conducted solely for the purpose of determining whether the employee, with or without reasonable accommodation, is capable of performing the essential functions of the job.</p>	

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TOPIC	EMPLOYERS MAY ASK	EMPLOYERS MAY NOT ASK
Race/Color	No questions.	Inquiry into the race or color of an applicant.
Photograph	No questions.	An employer cannot ask for a photograph to accompany an application.
Religious Creed	No questions, except by religious organizations as provided in 804 CMR 3.01(7)(a).	Inquiry into the religious denomination or practices of an applicant, his or her religious obligations, or what religious holidays he or she observes.
Sex (Gender)	Generally, no questions. However, questions regarding gender may be permissible if they relate to a <i>bona fide</i> occupational qualification, which has been ruled to be a legitimate requirement for a particular position, as provided in 804 CMR 3.01(3)(b)3..	Inquiry into an applicant's maiden name or any question that pertain to only one sex (for example inquiries into marital status only asked of women). Inquiries into whether applicant has children, plans to have children, or has child care arrangements.
Sexual Orientation	No questions.	Inquiry into applicant's sexuality (gay, bisexual, lesbian, heterosexual).

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TOPIC	EMPLOYERS MAY ASK	EMPLOYERS MAY NOT ASK
Criminal Record	<p>Employers may ask the following series of questions:</p> <ol style="list-style-type: none"> 1. Have you been convicted of a felony? Yes or no? 2. Have you been convicted of a misdemeanor within the past five years (other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace)? Yes or no? 3. Have you completed a period of incarceration within the past five years for any misdemeanor (other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace)? Yes or no? 4. If the answer to question number 3 above is "yes" please state whether you were convicted <u>more than five years ago</u> for any offense (other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace)? Yes or no? <p>Some employers are authorized to request, receive, view and/or hold criminal offender record information pursuant to state or federal law.</p> <p>Any inquiry into the criminal record of an applicant must also contain language pursuant to M.G.L. c. 276, § 100A.</p>	<p>It is unlawful for an employer to make any inquiry of an applicant or employee regarding:</p> <ol style="list-style-type: none"> 1. An arrest, detention or disposition regarding any violation of law in which no conviction resulted; 2. First convictions for the misdemeanors of drunkenness, simple assault, speeding, minor traffic violations, affrays or disturbance of the peace. For the purposes of 804 CMR 3.02 minor traffic violations include any moving traffic violation other than reckless driving, driving to endanger and motor vehicle homicide. 3. Any conviction of a misdemeanor where the date of the conviction or the completion of any period of incarceration resulting therefrom, which ever date is later, occurred five or more years prior to the date of such inquiry, unless such person has been convicted of any offense within five years immediately preceding the date of the inquiry. <p>No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by 804 CMR 3.02.</p>
Education/ Experience/ References/ Organizations	<p>Inquiry into the academic, vocational or professional education of an applicant for employment. Inquiry into the work experience shall also contain a statement that the applicant may include in such history any verified work performed on a volunteer basis.</p> <p>Inquiry into references.</p>	<p>Questions about education designed to determine how old the applicant is.</p> <p>Inquiry into the organizations which the applicant for employment is a member, the nature, name or character of which would likely disclose the applicant's protected class status.</p>
Lie Detector Test	No questions.	It is unlawful to require or administer a lie detector test as a condition of employment or continued employment.

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REGULATORY AUTHORITY

804 CMR 3.00: M.G.L. c. 151B, §3.