LEGAL ISSUES IN RESIDENCY TRAINING: TOP TRENDS IN RECENT YEARS

Graduate Medical Education Program
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Today’s Topics

➢ Lawful interviews & Hiring
➢ Disability accommodation and medical leaves
➢ Retaliation
➢ #MeToo
➢ Resident evaluation
➢ References
Careless Interviewing Can Lead to

- Discrimination claims
- Negligent hiring
- Compliance issues
Protected Characteristics

- Age
- Medical conditions/disability
- Citizenship or citizenship status
- Race
- National origin
- Filing a workers’ comp claim
- Marital status

- Political beliefs
- Pregnancy
- Religion
- Gender
- Sexual orientation
- Veteran status
Reducing Liability in the Hiring Process

Questions should not elicit information that may not be considered:

• Marital status, children, or family plans
• Ethnicity
• Religion or politics
• Age
• Disability
<table>
<thead>
<tr>
<th>INQUIRY AREA</th>
<th>APPROPRIATE</th>
<th>INAPPROPRIATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age</td>
<td>Questions about age are only permitted if it is necessary to ensure that a person is legally old enough to do the job.</td>
<td>Questions about age, dates of attending school, dates of military service, requests for birth certificate.</td>
</tr>
<tr>
<td>Arrest Record</td>
<td>Never</td>
<td>Questions about arrests or pending charges</td>
</tr>
<tr>
<td>Convictions</td>
<td>May let applicant know that policy requires a background check prior to hire.</td>
<td>Never appropriate to ask about criminal history PRIOR to making a formal job offer</td>
</tr>
<tr>
<td>Citizenship/National Origin</td>
<td>May ask about legal authorization to work in the specific position if all applicants are asked.</td>
<td>Are you a US citizen?</td>
</tr>
<tr>
<td>Credit Rating or Garnishments</td>
<td>Only if the job requires a significant financial responsibility or access to cash or funds. In most cases, no question is acceptable.</td>
<td>None.</td>
</tr>
<tr>
<td>Disability</td>
<td>Are you able to perform the essential functions of this job - with or without accommodations? Questions about knowledge of skills necessary to perform the job requirements.</td>
<td>Do you have a disability? Do you have a disability?</td>
</tr>
<tr>
<td>Education</td>
<td>Inquiries about degrees or equivalent experiences that are related to the job being applied for.</td>
<td>Questions about education that are not related to the job being applied for.</td>
</tr>
<tr>
<td>Family/Marital Status</td>
<td>Whether an applicant can meet work schedules or job requirements. If asking, should ask all applicants.</td>
<td>Any inquiry about marital status: married, single, separated, divorced, and engaged; children; pregnancy or child care plans.</td>
</tr>
<tr>
<td>Health</td>
<td>None</td>
<td>Type of discharge or registration status.</td>
</tr>
<tr>
<td>Military</td>
<td>Type of education and experience in service as it relates to a particular job.</td>
<td>Questions about national origin, ancestry, or prior marital status.</td>
</tr>
<tr>
<td>Name</td>
<td>May ask current legal name. &quot;Is additional information, such as a different name or nickname necessary in order to check job references?&quot;</td>
<td>Questions about national origin, ancestry, or prior marital status.</td>
</tr>
<tr>
<td>Organizations</td>
<td>Inquiries about professional organizations related to the position.</td>
<td>Inquiries about organizations that might indicate race, sex, religion, or national origin.</td>
</tr>
<tr>
<td>Race or Appearance</td>
<td>None</td>
<td>Comments about complexion, color, religion.</td>
</tr>
<tr>
<td>Religion</td>
<td>Describe the work schedule and ask whether applicant can work that schedule. If asking, should ask all applicants.</td>
<td>Inquiries on religious preferences, affiliations, or denominations.</td>
</tr>
<tr>
<td>Sexual Orientation</td>
<td>None.</td>
<td>Inquiries about sexual orientation. Inquiries revealing stereotypes for certain sexual orientation</td>
</tr>
<tr>
<td>Work Experience</td>
<td>Applicants' previous employment experience.</td>
<td>Questions about sick leave use or worker's compensation claims in previous jobs.</td>
</tr>
<tr>
<td>Salary</td>
<td>&quot;What Are Your Salary Expectations?&quot;</td>
<td>Prior Salary History: &quot;What was your salary at prior job?&quot;</td>
</tr>
</tbody>
</table>

Attorney/client privileged; do not circulate
Exercise Due Diligence to Avoid Negligent Hiring Claims

➢ Look for red flags and follow-up:
  – Attendance at more than one medical school
  – Participation in more than one training program
  – Lack of references from particular school / program

➢ Ask about any prior discipline / probation / terminations

➢ Always check references, including the ones you know
Disability Accommodation

➢ Employers are required to reasonably accommodate qualified individuals with disabilities

➢ Need not eliminate essential functions

➢ Must make modifications to the work environment or in the way the work is performed

➢ Legally obligated to engage in the “interactive process”
What Are You Expected to Do?

➢ Don’t ignore comments by residents about needing help, feeling overwhelmed, depressed, etc.
➢ Document that assistance has been offered
➢ Tell only those who need to know about the accommodation
Medical Leaves

➢ Federal and state law entitle eligible employees to take up to 12 weeks of unpaid leave for certain medical issues or for birth, adoption, or foster placement.

➢ Additional leave for pregnancy disability

Leaves are protected; position cannot be filled during leave; resident cannot be penalized for taking leave; training may be extended as necessary.
Pregnancy Disability Leave

➢ GME Program provides 6 weeks’ paid time off as a benefit.

But

➢ California law provides up to four months of unpaid leave for those periods when the woman is disabled due to pregnancy.
  – No minimum service requirement.
Essential function of a faculty member is to evaluate the performance of residents in a fair and accurate manner

Evaluate based on overall experience, not just one event (unless appropriate)

Do not inflate ratings … “satisfactory” does not mean “poor”
When Residents Fail to Progress

➢ Provide prompt, specific feedback
➢ Identify unsatisfactory performance and what must be done to remediate it
➢ Memorialize performance communications in writing
➢ Consult with GME Office
➢ Keep process confidential
Key Challenges

➢ Evaluating issues involving professionalism versus quality of care
➢ Poor choice of ratings in Medhub
➢ Not addressing concerns promptly
➢ Not achieving some level of consensus on performance
➢ Talking to each other about the resident’s performance, but not to the resident
➢ Following GME Policies & Procedures
Avoid Retaliation

➢ Frequent resident complaint is retaliation
➢ I engaged in protected activity and then suffered an adverse consequence
➢ Must scrutinize actions subsequent to a resident’s protected activity
➢ Best practice is to have good documentation at all times
#metoo Revolution

#1 Employment Law Story of 2017
#metoo Revolution

- What’s it all about:
  - Power
  - Fear
  - Bystanders not being upstanders

Attorney/client privileged; do not circulate
How is it relevant to us:

- Always more that can be done
- Significance of leadership and culture
- Reminder to be vigilant
  - Explore even in absence of direct complaint
  - Follow-up
  - Scrutinize your own interactions

Attorney/client privileged; do not circulate
The Give and Take

➢ Employment references receive broad protection under the law

➢ Statements should be:
  – True
  – Based upon facts that are documented in the resident’s file

➢ Avoid statements that are:
  – Incomplete / misleading
  – Motivated by ill-will
➢ Disclose documented concerns, including probation
➢ Do not disclose information that might indicate the individual’s race, age, disability, or other protected characteristic
➢ If there are any unusual circumstances, seek advice before responding
Best Practices for Providing References

➢ Discuss with the resident the substance of what you will say.
➢ Unless you are a program director, you are not obligated to provide reference.
➢ Provide factual information based upon personal knowledge consistent with how you have evaluated the resident.
➢ Know that lunch discussions or “off the record” telephone conversations with prospective programs are “on the record.”
➢ Know that reference recipients won’t hesitate to disclose what you said and point fingers.
Hey Dr. Colleague, Hope all is well. Sorry to make this such a short email. I'm about to catch a flight.

Joe is the worst resident I've ever worked with. He's lazy, he dumps on other residents, he leaves call early, he shows up for call late, he forgets when he is pulled to other services, and he calls in sick when he isn't sick. I'm chief resident for another month and he has made my life a nightmare this year.

He originally was going to do KM fellowship here but the KM department told him to look elsewhere (but they weren't going to write him any letters of recommendation b/c it would embarrass them). He was trying to work something out with the psych department but word of his laziness got around there too. He is terrible. You do not want him in your program.

I'll forward you just a few emails from this year.

Please email or call me if you have any questions. You can pass any of this on to your program director. Its all true.
Parting Advice

Call for help if your gut tells you something is up