preference or limitation based on age. The ad would probably be acceptable, however, if the word "young" were deleted. An advertisement seeking an "energetic" candidate would be acceptable as persons of all ages can be energetic.

3. Walk-In Hiring

While walk-in hiring is generally lawful, if the practice produces a work force that disproportionately excludes members of minority groups, exclusive reliance on that practice may be viewed as evidence of discriminatory intent.

B. Pre-Employment Inquiries

1. General Considerations

After potential employees have been identified, the employer must learn some basic information to determine whether the individual is suitable for hire. A prospective employer should elicit from a job candidate only information that is necessary to evaluate that person's qualifications for the job being filled. With temporary employees, this may not be clear because the applicant may be suitable for many types of jobs. Moreover, application forms and interviewers should not pose questions that seek information about an applicant's age, marital status, religion, disabilities, or any other characteristic that is protected by an employment discrimination statute. Such questions give rise to a suggestion of possible discrimination, because it is reasonable to assume that all questions asked on an application form or during an interview are for some purpose and that the answers given have a bearing on the selection process. ASA Tip 85

In general, employers should observe three overall principles in seeking information from job applicants:

- Determine that all areas of inquiry and information sought serve a legitimate business purpose in enabling employers to evaluate the candidate's suitability for the position.
- Avoid selective questioning or testing. Interview questions and job tests should be administered to all applicants for similar positions who reach the stage of the hiring process at which those questions are asked or tests are conducted. For example, an employer should not ask only female candidates who appear to be in their 20s and 30s (commonly thought of as childbearing age) about their attendance record at their former job or about caring for their children.
- Distinguish between information that is needed to evaluate *candidates* and information that is required only from those who actually become *employees*.

Employers often require information from employees regarding their ages, marital status, and number and ages of children in order to enroll them in insurance and pension programs and for other legitimate business purposes. Generally, however, employers need to obtain this information only from *employees—not from job applicants*. It is generally acceptable to ask newly hired employees to furnish this information provided there is a legitimate business purpose for doing so. ASA Tip 86

2. Americans With Disabilities Act

Unlike most of the other federal statutes that prohibit employment discrimination, the Americans With Disabilities Act of 1990 contains explicit restrictions on the questions an employer can ask and the tests an employer can require an applicant to take during the pre-employment process. These restrictions have been amplified through regulations and an enforcement guidance issued by the Equal Employment Opportunities Commission. (See Chapter 1 for a substantive discussion of the ADA.)

The ADA divides the hiring process between the "pre-offer" stage and the "postoffer" stage. An employer may ask disability-related questions and require medical examinations of an applicant only

Tip 85—Application Forms And Interviews Questions
Staffing firms should review their application forms and "standard" interview questions and determine why each piece of information is being sought. Any question that does not elicit information that will assist in determining the candidate's suitability for the job should be altered or eliminated.

Tip 86—Permissible Pre-Employment Inquiries
Rather than ask for such information on the application form, consider having successful applicants provide that information after they are hired. To avoid any misunderstanding, the employee should be told exactly why the information is needed. In addition, the information should not be contained in the employee's personnel file.

Many states have enacted rules regarding permissible pre-employment inquiries, and these rules should be consulted before making written or oral requests for information from applicants.

Tip 87—Attendance Rate
In posing such a question, it is important to remember that the employer's legitimate interest lies in determining the candidate's attendance rate, not the reason for absenteeism (e.g., "sick days," workers' compensation leave). For example, it is permissible to ask, "How many Mondays or Fridays were you absent last year on leave other than approved vacation leave?" It is *not* acceptable to ask, "How many days were you sick?"

Tip 88—Interview Questions
In view of the difficulties in drawing the line between an "impairment" and a "disability," it is advisable to avoid such questions. The questions are unlikely to provide meaningful information but may engender disputes as to whether the question is permissible under the ADA.

after the applicant has been given a conditional job offer, and if such questions or examinations are posed or administered to *all* applicants who have received an offer of conditional employment for any job in the same category.

The purpose of these rules is to isolate an employer's consideration of an applicant's nonmedical qualifications from any consideration of the applicant's medical condition. The prohibition against asking disability-related questions or administering medical examinations until after the employer makes a conditional job offer is intended to prevent the employer from considering an applicant's disability until *after* the employer has evaluated the applicant's nonmedical qualifications.

a. Disability-Related Questions

A disability-related question is one that is likely to elicit information about a disability. An employer cannot directly ask whether an applicant has a particular disability, nor can an employer ask questions that are closely related to disability. If, however, there are many possible answers to a question, only some of which would contain disability-related information, the question is not "disability-related."

b. Questions an Employer Can Ask During the Pre-Offer Stage

The EEOC has issued numerous enforcement guidelines to assist employers in understanding their obligations under the ADA during the hiring process. According to the EEOC, an employer may make all of the following inquiries of job applicants:

i. An employer may ask whether applicants can perform the essential job functions with or without a reasonable accommodation.

ii. An employer may ask applicants to describe how they would perform any or all job functions as long as all applicants in the job category are asked to do so.

iii. An employer may state its attendance requirements and ask whether an applicant can meet them. An employer may also ask about an applicant's prior attendance record, provided this question is asked of all applicants for the position. ASK ABOUT Tip 87

iv. An employer may ask whether an applicant has the certifications or licenses required for the particular job duties, whether the applicant intends to get a particular job-related certification or license, and why the applicant does not currently have the certification or license.

v. The ADA does not prohibit questions about an applicant's arrest or conviction records. Such questions may, however, lead to claims of discrimination under Title VII of the Civil Rights Act. In addition, a number of states prohibit inquiries related to arrest records or convictions unrelated to jobs to which the candidate is applying. (See Section F of this chapter.)

vi. An employer may ask an applicant about an "*impairment*" that does not constitute a disability (i.e., an impairment that does not substantially limit a major life activity). An employer may ask an applicant with a broken leg how she broke her leg but may not ask whether the applicant expects the leg to heal normally or whether the applicant's bones break easily. ASK ABOUT Tip 88

vii. An employer may ask an applicant about *current illegal use of drugs*. An individual who currently uses illegal drugs is not protected under the ADA. Most questions about current or prior *lawful* drug use are likely to illicit information about a disability and are therefore improper questions at the pre-offer stage. An employer may not ask what medication an applicant is currently taking or ask whether the applicant has ever taken a particular drug. Employers are permitted to ask about *prior* illegal drug use but cannot ask questions that are likely to reveal past *addiction*, because past addiction to illegal drugs

or controlled substances is a covered disability under the ADA as long as the person is not *currently* using drugs illegally. An employer may ask, "Have you ever used illegal drugs?" or "When is the last time you used illegal drugs?" But an employer cannot ask "How often" the applicant used illegal drugs.

viii. An employer may ask applicants about their *drinking habits* unless the particular question is likely to reveal information about *alcoholism,* which is a protected disability. Accordingly, an employer may ask whether an applicant drinks alcohol and whether the applicant has been convicted of driving under the influence of alcohol. This inquiry may be job-related when the applicant is applying for a safety-sensitive position, such as a bus driver or an operator of heavy machinery. Employers cannot ask how much alcohol the applicant drinks or whether the applicant is participating in an alcohol rehabilitation program; these latter questions are likely to reveal information about whether the applicant has alcoholism. Even though they are permissible under the ADA, they should be avoided.

c. Questions an Employer Cannot Ask During the Pre-Employment Stage

During the pre-employment stage, an employer may not ask questions regarding the following:

i. Whether an applicant is disabled or handicapped

ii. In general, on an application form or during an interview, whether an applicant will need a reasonable accommodation to perform the job for which he or she is being considered (there are limited exceptions to this rule, which are described below)

iii. An applicant's ability to perform major life activities unless they specifically relate to the applicant's ability to perform essential job functions

iv. About job-related injuries, illnesses, or workers' compensation history

v. A third party (such as the applicant's references or former employers) any questions that it could not pose directly to the applicant

d. Limited Ability to Inquire Regarding an Applicant's Need For Reasonable Accommodation During the Pre-Offer Stage

There are very limited circumstances in which an employer may make inquiries during the pre-offer stage regarding an applicant's possible need for a reasonable accommodation in performing the essential functions of the job being sought. It is important to note that even when these circumstances arise, the extent to which an employer can then make inquiry is still very limited.

i. Affirmative Action Programs. An employer may invite applicants to voluntarily self-identify themselves as disabled persons requiring reasonable accommodation for purposes of the employer's affirmative action program if the employer has undertaken such a program because of a federal, state, or local law requiring it to do so or if the employer is voluntarily using the information to benefit individuals with disabilities. If an employer institutes such a program and invites applicants to voluntarily identify themselves, the employer must state clearly on any written questionnaire (or state orally if such questions are posed during an interview) that the information is requested and will be used solely in connection with the employer's affirmative action obligations or efforts, that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that the information will be used only in accordance with the ADA. Employers who ask applicants to self-identify should maintain this

Tip 89—Essential Job Functions

In those limited instances when such interactive dialogue is permitted under the ADA, the purpose is to help evaluate the applicant's ability to perform the essential functions of the job with or without a reasonable accommodation—not to screen out a disabled candidate.

information separately from the application, and it should not be shared with a hiring manager or client prior to the hiring of the applicant.

ii. When the Disability Is Obvious or When the Applicant Volunteers Information About the Disability. Sometimes the applicant's disability is obvious (e.g., use of a wheelchair). Some applicants may also voluntarily disclose information about a hidden disability. In such instances, the employer may then ask that particular applicant to describe or demonstrate how he or she would perform the essential functions of the job being sought even if other applicants are not asked this question. An employer may also ask whether such an applicant will require a reasonable accommodation to perform the functions of the job and, if so, the type of reasonable accommodation that will be required. If an applicant applying for a receptionist position voluntarily discloses that she has diabetes and will need periodic breaks to take medication, the employer may ask how often she will need breaks and how long the breaks will be. Remember, however, that the employer may not ask any question about the underlying physical condition even in situations where the disability is obvious or applicant has voluntarily disclosed the condition. ASK Tip 89

e. Medical Examinations and Other Employment Tests Under the ADA

An employer cannot require medical examinations during the pre-offer stage. A medical examination is one designed to reveal information about physical or mental impairments or about an applicant's physical or mental health.

Despite these restrictions, applicants may be required to take the following tests:

i. An employer may require applicants to take *physical agility tests* designed to demonstrate the applicant's ability to perform actual or simulated job tasks. Such a test is not considered a medical examination. While such tests are permitted, an employer cannot take the applicant's blood pressure and heart rate at the conclusion of the physical agility test. Measuring physiological responses in this fashion would constitute a medical examination.

ii. A *physical fitness test* that determines an applicant's ability to perform physical tasks, such as running or lifting, is not a medical examination.

iii. An employer may ask an applicant to provide medical certification of his or her ability to safely perform a physical agility or physical fitness test.

iv. An employer may ask an applicant to assume responsibility and release the employer of liability for injuries incurred in performing a physical agility or fitness test.

v. An employer may administer *psychological examinations* provided they do not reveal information that would lead to identifying a mental disorder or impairment. A test that reflects whether applicants have characteristics that might indicate whether the individual has excessive anxiety, depression, or compulsive disorders would be a medical examination. A test designed and used to measure only such characteristics as aptitude, honesty, or reliability is not a medical examination.

vi. An employer may administer *drug tests* to determine *current* illegal use of controlled substances. Such tests are not considered medical examinations under the ADA. On the other hand, tests to determine whether or how much alcohol an applicant has consumed are considered medical examinations and therefore are not permitted under the ADA.

f. The Post-Offer Stage Under the ADA

After making a job offer to an applicant for an actual work assignment with a cli-

ent but before the candidate has started the work assignment, an employer may ask disability-related questions and perform medical examinations. The offer of a work assignment may be conditioned on the employer's evaluation of the applicant's answers to these post-offer, disability-related questions or the results of a medical examination.

At the postoffer stage, an employer may ask about an individual's workers' compensation history, prior sick leave usage, illness, diseases, impairments, and general physical and mental health. Disability-related questions and medical examinations at the post-offer stage do not have to be related to the job, but no reason suggests itself as to why such questions would be posed if they were not job-related. Tip 90

After obtaining basic medical information from all individuals who have been given conditional offers of employment in a given job category, the employer may ask specific individuals for more medical information if the follow-up questions are related to the medical information already obtained from the applicant. If an individual to whom a work assignment has been offered has stated in response to the post-offer medical questions that he or she suffers from back injuries, the employer may ask follow-up questions or require a medical examination of that individual (even though these follow-up questions and medical examinations are not administered to all offerees), provided that these follow-up questions and procedures relate specifically to the information the offeree has already given regarding his or her back injuries.

At the post-offer stage, an employer may ask all individuals whether they need reasonable accommodation to perform the job. If, at this stage, someone requests a reasonable accommodation to perform the essential functions of the job, the employer may ask the individual for documentation of the disability that causes the need for the accommodation.

3. Other Restrictions on Pre-Employment Inquiries

a. Race, Color, Religion, Sex, or National Origin

Pre-employment inquiries concerning race, color, religion, sex, or national origin do not constitute violations of Title VII in and of themselves. Some state laws, however, expressly prohibit such inquiries and may also deem it improper to seek related information that could indirectly reveal the answers to these questions. Even under Title VII, moreover, posing such questions often leads to the inference that the employer used the information obtained for illegal purposes. For this reason, these inquiries should clearly be avoided as they are not job-related.

b. Marital Status and Child Care

An employer should not ask questions about marital status, pregnancy, future childbearing plans, the numbers and ages of children, or child-care arrangements. The use of such information may constitute a violation of Title VII or state laws, particularly if it is used to deny or limit employment opportunities for female applicants. The EEOC has filed suits against staffing firms in the past for failing to assign a pregnant employee to clients. Employers often tend to seek pre-employment information about child-care arrangements only from female applicants. Such inquiries constitute sex discrimination. It is best to avoid such questions altogether.

c. Age

An employer should not ask questions of an applicant that tend to establish the applicant's age or approximate age. Application forms should not ask for birth dates or for the dates of attendance or graduation from elementary or high school. If there are legal age requirements for the job position, it is acceptable to ask a candidate whether he or she will be able to show proof of age or to produce necessary work permits if hired.

Tip 90—Post-Offer Requirements

If the employer chooses to ask such questions or require such examinations during the postoffer stage, these questions and tests must be required of all entering employees in the same job category, regardless of disability. It is also important to realize that a rejection of a candidate based on information obtained at the postoffer stage of the hiring process will be subjected to careful scrutiny if the hiring decision is subsequently challenged.

d. Arrest Records

Making personnel decisions on the basis of arrest records may have a disproportionate effect on the employment opportunities of members of some minority groups. Without proof of business necessity, an employer's use of arrest records to disqualify job applicants is unlawful discrimination. The mere request for such information tends to discourage minority applicants and has therefore been held to be illegal. In addition, a number of states prohibit employers from inquiring about arrests.

e. Conviction Records

Subject to the requirements of individual state law, an employer generally may give fair consideration to the relationship between a conviction and an applicant's fitness for a particular job. Conviction records (or guilty pleas) should not generally be automatic bars to employment. It is preferable for an employer to make case-by-case decisions, taking into account such factors as the nature and severity of the crime, when it was committed, the person's overall record, any rehabilitation efforts, and the nature of the position the applicant is seeking, and then making a reasoned business judgment as to the risks entailed in employing this particular applicant. To encourage candor, some employers advise applicants that a conviction record is not necessarily a bar to employment.

f. Nature of Military Discharge

Employers should not ask questions regarding the type of discharge an applicant received from military service unless a "business necessity" can be shown. Such inquiries should be accompanied by a statement that a dishonorable or general discharge is not an absolute bar to employment and that other factors will affect the final hiring decision. According to a Department of Defense study, minority service members receive a higher proportion of general and undesirable discharges than nonminority members of similar aptitude and education. Accordingly, a requirement that applicants have received an honorable discharge may have a disparate impact upon minority applicants and thus violate Title VII.

g. State Law Variances

Many state and local laws protect categories of persons not covered by federal law. For example, sexual preference, marital status, and off-premises smoking are protected in some jurisdictions. Questions about any protected category should be avoided.

4. Legitimate Areas of Inquiry

Despite all of the restrictions described in this section, there are still numerous areas of legitimate inquiry that may be pursued in interviewing job applicants. These areas include the applicant's education, previous and current employment, and other relevant experience, skills, and outside activities.

a. Education

It is acceptable to ask an applicant detailed questions about his or her educational experience. It is acceptable to ask a candidate which academic subjects he or she enjoyed the most and the least, and in which subjects he or she did well or poorly. It is also acceptable to ask why the candidate chose a particular major or other course of study, how the applicant's education has prepared the applicant for the job being sought, whether the applicant has any plans to continue his or her education, and whether the applicant participated in extracurricular activities or worked at a part-time job while attending school.

b. Prior Employment

A prospective employer may ask an applicant to

- Describe prior and current jobs
- Discuss major job responsibilities