



**Yeah! Someone
Applied for the Job**

...

Now What?

TIMES MAY BE CHANGING

October 1, 2018, the United States Supreme Court heard argument in *Mount Lemmon Fire District v. Guido*

Issue is whether the ADEA (Age Discrimination) applies to Public Employers with less than 20 employees

If SCOTUS holds that ADEA only applies to employers of 20 or more people, whether public or private, all federal anti-discrimination laws with the size minimum for employers may be challenged.



Applications

- ✓ Read it before you interview
- ✓ Make sure to follow up on any unanswered questions
- ✓ If conviction revealed, get details in writing
- ✓ If disability revealed, make sure you provide the applicant with the bona fide occupational qualifications of the job and a detailed job description



QUESTIONS NOT TO ASK DURING AN INTERVIEW

- Race, age, sex, sexual preference, gender identity, religion, and national origin. You can ask if an applicant is 18 or older and has a legal right to work in the United States through citizenship or status as a resident alien.
- Marital status, maiden name, and number, names, and ages of children or other dependents.
- Employment of spouse and child-care arrangements (unless you routinely ask both male and female applicants).



QUESTIONS NOT TO ASK DURING AN INTERVIEW

- A woman's pregnancy or related condition.
- Arrest records that don't result in convictions. You may ask about convictions (deferred adjudication is not a conviction) or pending felony charges.
- The existence, nature, or severity of a disability. Instead, ask if the applicant is able to perform specific job functions.
- Height and weight, except in specific professions such as law enforcement, which has guidelines.



QUESTIONS NOT TO ASK DURING AN INTERVIEW

- Organizational affiliates, except professional memberships related to the job.
- Military history unless the job requires a military background.
- Status as a high school graduate. You may request the applicant to provide educational history details.
- **Lowest salary acceptable for a specific position.**



Obtaining Information the Right Way

- Can you meet the attendance requirements of this job?
- How many days did you take leave last year?
- Did you have any unauthorized absences from your job last year?



THE AMERICANS WITH DISABILITIES ACT AND AMENDMENT ACT

**The ADA and the ADAAA
prohibit inquiries that directly
seek information about
disabilities except as part of the
“interactive process” .**





- **Do you have AIDS?**
- **Are you an alcoholic?**
- **How many days were you sick last year?**
- **How many separate episodes of sickness did you have last year?**

LAWFUL INQUIRY



This job requires an employee to transport 20-pound purple and pink bags of frozen frog legs from a loading dock, down two flights of steps, to an orange polka dot processing machine. Can you perform this function with or without a reasonable accommodation?

The Innocent Question



- What if you ask such a question in all innocence, without the slightest discriminatory intent?
- **Doesn't matter.** Intent is not a prerequisite to a finding of discrimination.

DON'T FORGET YOUR SENSES!

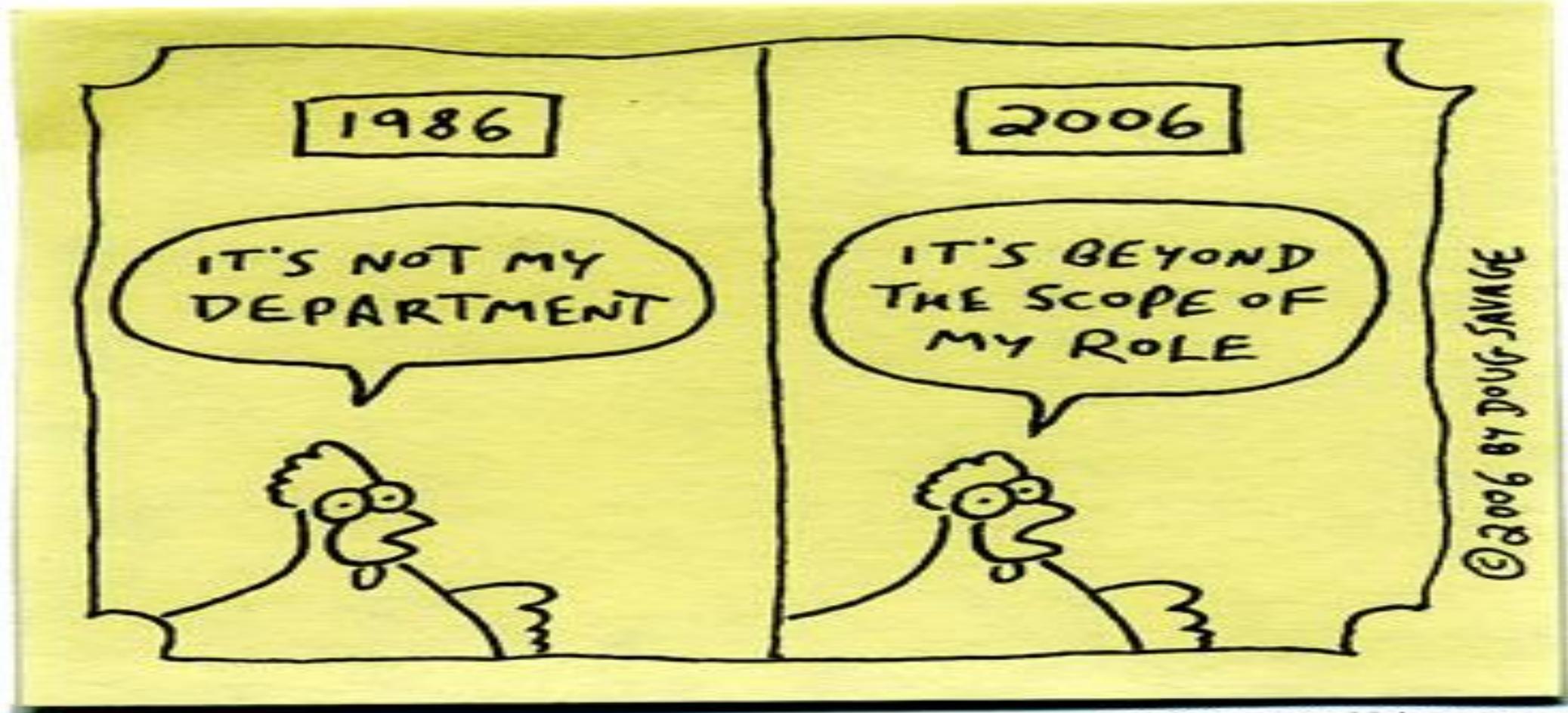
You could figure out something about a candidate's age, color, sex or disability without asking a single prohibited question. For instance, an applicant who wears a skirt, has Asian features, and keeps bumping into the furniture, is likely to be a visually impaired woman of Far Eastern ancestry.



The Importance of Job Descriptions

Savage Chickens

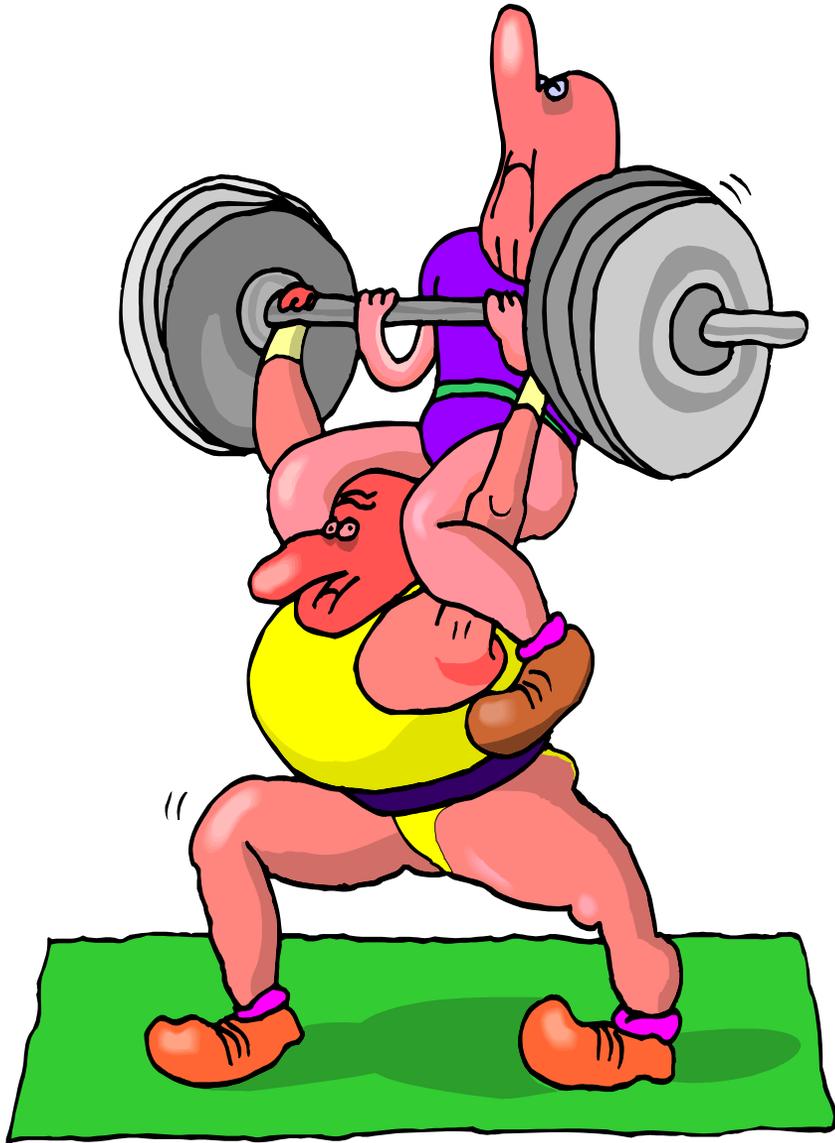
by Doug Savage



The Importance of Job Descriptions

- Sets forth the Bona Fide Occupational Qualifications of the job
- Useful in determining whether employee is “released” to return to work and/or whether accommodation is required
- Sets forth performance standards by which employee may be evaluated





- Physical requirements should be specific and job connected
- Use most extreme physical needs of the job
- Be specific with regard to length and duration of physical exertion

**Overtime
Or
No Overtime**



There are only 2 classes of employees under the Fair Labor Standards Act

Exempt (3 most common exemptions)

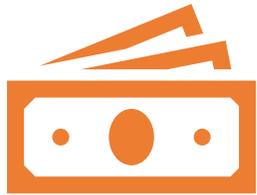
- ❖ Executive
- ❖ Professional
- ❖ Administrative

All white collar exemptions must be paid on a salary basis

Non-Exempt: Everyone else



Exemption



Salary Test



\$455 per week
(\$23,600 per year)



With minimal exceptions, the base pay of the salary basis employee may not be reduced based on the quality or quantity of the work performed

Executive Exemption

Duties Test

- **Manage an enterprise or subdivision or department**
- **Regularly direct the work of at least 2 other employees**
- **Genuine input in the job status of other employees (such as hiring, firing, promotion or assignment)**
- **Mere supervision is not sufficient**

Professional Exemption

Work which requires advance knowledge in a field of science, learning or teaching

The employee must consistently exercise discretion or judgment

Short test: Does the employee possess a 4 year bachelor's degree in an area in which employee works?

Administrative Exemption

- Job duties directly relate to the employer's management policies or general business organization and
- The employee should regularly exercise discretion, independent judgment and make decisions of significant import.
- Administrative does not mean clerical. Administrative exemption relates to running the employer's business, not the employer's primary business.
- Helpful hint: This person helps "keep the business running."

How Overtime is Calculated

Work hours in excess of 40 hours in a single work week, not including hours for “sick time, vacation or other time off.”



How can time be docked from an exempt employee?

- Full day increments
- Partial day increments if governed by policy for disciplinary reasons
- Any day in which “no work” occurs, defined as less than 2 hours of work in a given day

Comp Time = Overtime

Non-Exempt Public Employees may be paid at the Employer's election with compensatory time versus cash compensation in paycheck

Comp Time is calculated just like overtime at 1 and ½ hours per hour worked over 40 hours in a work-week

Exempt Employees are not entitled to Comp Time either!

Counseling (Employee Write-Ups)



- **All violations of Company policy should be documented.**
- **Be specific in documentation**
- **Be consistent**
- **Base counseling on a performance related issue only**
- **Consider using a preprinted discipline slip**

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**"That looks like an unauthorized ride on the
mail cart."**

Firing and References

The importance of documentation



At-Will States



EXCEPTIONS TO EMPLOYMENT AT WILL DOCTRINE



See Title VII, 42 U.S.C. 2000e-k;
The Family and Medical Leave
Act, 29 U.S.C. 2601-2654.

As retaliation for filing a workers'
compensation claim. Tex. Rev. Civ.
Stat. Ann. Art. 8307c (Vernon 1986).





An employee's job cannot be terminated for filing a personal bankruptcy or for having their wages garnished. See 11 U.S.C. 525; Consumer Credit Protection Act 15 U.S.C. 1964.

An employer cannot terminate an employee because of jury service or compliance with a valid subpoena. See Protection of Jurors Employment, 28 U.S.C. 1875; Judiciary and Judicial Procedures Act, 28 U.S.C. 1875; Tex. Civ. Prac. & Rem. Code 122.001-122.003 (Vernon 1987); Tex. Rev. Civ. Stat. Ann. Art. 5207c (Vernon 1990 Supp.).



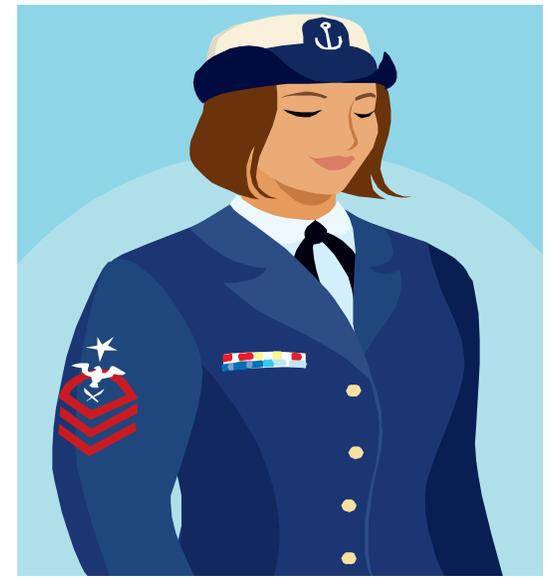
Additionally, employment cannot be terminated for exercising rights to retirement benefits. See Employment Retirement Income Security Act, 29 U.S.C. 1140



Employers are also prohibited from firing employees in retaliation for filing a complaint concerning payment of minimum wage, payment of overtime compensation, or safety in the work place. See Fair Labor Standards Act, at 29 U.S.C. 215(a)(3); The Occupational Safety and Health Code Ann 502.013 (c)(d) (Vernon 1990).



An employee cannot be terminated for serving in the military. See Tex. Govt. Code Ann. 431.005, 431.006 (Vernon 1990).



There is a public policy exception to the Employment At Will Doctrine, which prevents an employer from being able to fire an employee for refusing to perform a criminal act at the employer's request. See *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985); *Berry v. Doctors' Health Facilities*, 715 S.W.2d 60 (Tex.App.-Dallas 1986, no writ).



References

Employers are NOT required to provide references

Suggest: Date of hire

Date of termination

Eligibility for rehire

Absent obtaining a release for further reference

Procedures that help employers AVOID LITIGATION

- Make sure that what you tell a job applicant and how you handle employees does not deviate from application form and policy manual.
- Guard against making employment promises or “overselling” job security.
- Confirm employment terms in writing.



Avoiding Litigation

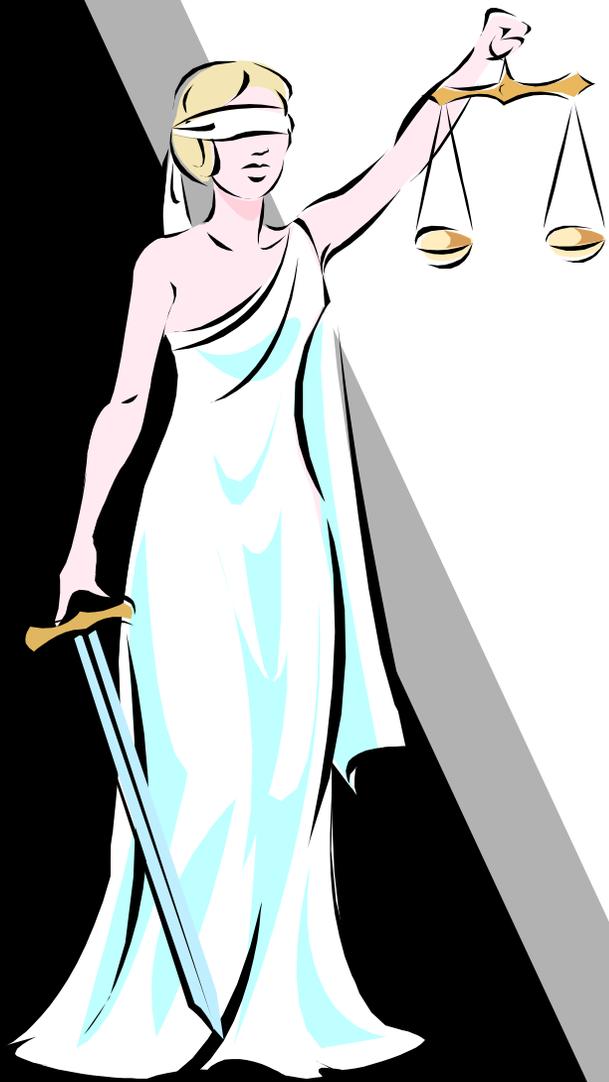


- **Keep enough records to document why a person wasn't hired or to document your procedure for determining suitability and competence of prospective employees.**
- **Give written warnings to employees on undesirable job performance and keep them on file.**
- **Bar contracts between employer and employee which could open the door to potential litigation**
- **Perform credit and background checks on employees up for promotion and advise the employee of this action.**

Avoiding Litigation

Be consistent in policies and practices with all employees regardless of race, religion, demographic background or gender.

**Situations involving internal theft must be handled with “kid gloves.”
Never accuse an employee of stealing cash or inventory unless you have more than circumstantial evidence. A direct accusation without proof may result in a suit.**



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