

State of New York

Executive Department

NEW YORK STATE DIVISION OF HUMAN RIGHTS

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RECOMMENDATIONS ON
EMPLOYMENT INQUIRIES

Relating to Age, Race, Creed, Color, National Origin, Sexual Orientation,
Military Status, Sex, Disability, Predisposing Genetic Characteristics,
Marital Status and Arrest and Conviction Records

Under the New York State Human Rights Law
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1. FOREWORD

Section 296 of the New York State Human Rights Law prohibits pre-employment and certain other inquiries as to age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, and/or arrest records which expresses, directly or indirectly, any limitation, specification or discrimination, unless based upon a bona fide occupational qualification or other exception.

The Division's recommendations as to appropriate and inappropriate inquiries may be used by employers, employment agencies, applicants for employment, and others as a guide in the interpretation of Section 296 of the Human Rights Law. A separate guide is available from this Division entitled "Housing Inquiries," which specifically addresses the Division's recommendations relative to inquiries in the sale, rental and leasing of housing, land or commercial space.

2. NEW YORK STATE CONSTITUTIONAL PROVISION AGAINST DISCRIMINATION

"No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

(New York State Constitution, Article 1, Section 11, as adopted by the Constitutional Convention of 1938 and approved by vote of the people, November 8, 1938.)

3. NEW YORK STATE HUMAN RIGHTS LAW

(The following provisions are selected portions of the Human Rights Law. For the complete text, please refer to Sections 290-300 of the Human Rights Law, Article 15 of the Executive Law.)

Sec. 291. Equality of Opportunity a civil right.

1. The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex or marital status is hereby recognized as and declared to be a civil right.
2. The opportunity to obtain education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and commercial space without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex or marital status as specified in section two hundred ninety-six of this article, is hereby recognized as and declared to be a civil right.

The New York State Human Rights Law prohibits unlawful discriminatory practices and defines these practices, in part, as follows:

Sec. 296. Unlawful discriminatory practices.

1. It shall be an unlawful discriminatory practice:
 - (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sexual orientation, military status, sex, predisposing genetic characteristics, disability, or marital status of any individual, to refuse to hire or employ or to bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.
 - (b) For an employment agency to discriminate against any individual because of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.

(c) For a labor organization, because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status, or any intent to make any such limitation, specification, or discrimination unless based upon a bona fide occupational qualification; provided, however, that neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service examinations concerning any of the aforementioned characteristics for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons regardless of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status.

(e) For any employer, labor organization or employment agency to discharge, expel, or otherwise discriminate against any person because he has opposed any practices forbidden under this article, or because he has filed a complaint, testified or assisted in any proceeding under this article.

(g) For an employer to compel an employee who is pregnant to take a leave of absence, unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.

1-a. It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs:

(b) To deny to or withhold from any person because of race, creed, color, national origin, sexual orientation, military status, sex, age, disability, or marital status, the right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, executive training program, or other occupational training or re-training program;

(d) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for such programs, or to make any inquiry in connection with such programs, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, military status, sex, age, disability or marital status or any intention to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

3-a. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency to refuse to hire or employ or license or to bar or to terminate from employment an individual eighteen years of age or older, or to discriminate against such individual in promotion, compensation or terms, conditions, or privileges of employment because of such individual's age.

(b) For any employer, licensing agency or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses directly or indirectly any limitation, specification or discrimination on account of age respecting individuals eighteen years of age or older, or any intent to make any such limitation, specification, or discrimination.

(c) For any employer, licensing agency or employment agency to discharge or otherwise discriminate against any person because he/she has opposed any practices forbidden under this article or because he/she has filed a complaint, testified or assisted in any proceeding under this article.

(d) Notwithstanding any other provision of law, no employee shall be subject to termination or retirement from employment on the basis of age, except where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business, where the

differentiation is based on reasonable factors other than age, or otherwise specified in paragraphs (e) and (f) of this subdivision or in article fourteen-A of the retirement and social security law.

(g) In the event of a conflict between the provisions of this subdivision and the provisions of article fourteen-A of the retirement and social security law, the provisions of article fourteen-A of such law shall be controlling.

6. It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.

7. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he/she has opposed any practices forbidden under this article or because he/she has filed a complaint, testified or assisted in any proceeding under this article.

10. (a) It shall be an unlawful discriminatory practice for any employer, or an employee or agent thereof, to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forgo a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his or her religion, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business. [See also § 296.10(b) through (d).]

12. Notwithstanding the provisions of subdivisions one, one-a and three-a of this section, it shall not be an unlawful discriminatory practice for an employer, employment agency, labor organization or joint labor-management committee to carry out a plan, approved by the division, to increase the employment of members of a minority group (as may be defined pursuant to the regulations of the division) which has a statewide unemployment rate that is disproportionately high in comparison with the statewide unemployment rate of the general population. Any plan approved under this subdivision shall be in writing and the division's approval thereof

shall be for a limited period and may be rescinded at any time by the division.

13. [The New York State Human Rights Law prohibits boycotts and blacklisting because of race, creed color, national origin, sexual orientation, military status, or sex, but does not apply to boycotts connected with labor disputes or to protest unlawful discriminatory practices.] (i)

14. [The New York State Human Rights Law prohibits discrimination against persons with disabilities on the basis of their use of a guide dog, hearing dog, or service dog.]

15. It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his/her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based upon his/her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-a of the correction law.

(i) Material in brackets summarizes applicable sections of the Human Rights Law.

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, however that the provisions hereof shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms, and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law.

The following recommendations as to employment inquiries should be considered in conjunction with *In the Matter of Delta Air Lines, Inc. v. New York State Division of Human Rights, et al*, 666 N.Y.S.2d 1004, 91 N.Y.2d 65, 74, 689 N.E.2d 898, 1997, in which the Court of Appeals stated:

"[A]ppellants challenge Delta's preemployment inquiries and medical examinations. They specifically argue that Delta unlawfully asked preemployment questions regarding age, disabilities and physical impairments, family relations, marital status, roommates, and prior treatment for drug or alcohol abuse. We agree with the Appellate Division that the record does not support the contention that the interview inquiries by Delta's representatives contributed to the eventual decision not to hire them. Merely establishing that a particular question was asked, even one that might be viewed as objectionable out of context or in the abstract, is insufficient, without some causal consequence or relevant relationship, to establish a claim for discrimination under the New York Human Rights Law in these circumstances.

"The State Executive Law declares unlawful the making of 'any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color or national origin, sex, or disability or marital status, or any intent to make any such limitation' (Executive Law s 296[a][d]). The interview inquiries here are not actionable or sustainable because appellants fail to produce any evidence or suggest any inference that the subject inquiries reflected a "limitation, specification or discrimination"' (see, *Matter of New York Times Co. v. City of New York Commn. on Human Rights*, 41 N.Y.2d 345, 349, 393 N.Y.S.2d 312, 361 N.E.2d 963; see also, *Alexander's, Inc. v. White*, 115 A.D.2d 424, 426, 496 N.Y.S.2d 227)."

4. DIRECTLY REVELATORY INQUIRIES

The law expressly prohibits employers, (ii) employment agencies, landlords, and real estate sellers, brokers and salespersons, and creditors from asking certain questions either in an application form or in a personal interview before selecting an employee, apprentice or tenant or making a real estate sale or lease, or extending credit, where such inquiries express, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color or national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification.

The following are examples of different types of inquiries that are recommended or not recommended:

SUBJECT	RECOMMENDED(ii)	NOT RECOMMENDED
Age	Are you 18 years of age or older? If not, state your age.	How old are you? What is your date of birth? What are the ages of your children, if any?

(ii) Inquiries which are unlawful when made by employers are also unlawful when made by polygraph testers or other agents for employers. Under U.S. Labor Law 29 §2002 it is unlawful for an employer to require an employee or prospective employee to submit to any lie detector test. Under N.Y. Labor Law §735 it is unlawful to require an employee or prospective employee to submit to a Psychological Stress Evaluation.

(iii) See Section 6, Disparate Impact Inquiries.

An employer may inquire only whether a prospective employee can perform specific tasks in a reasonable manner. See discussion of reasonable accommodation, page 19, infra. An employer may not disqualify an applicant/employee because of suspected FUTURE risk to his/her health while performing a specific job.

The above limitations apply equally to questions which may be asked of an employee who applies for or is under consideration for promotion, transfer, upgrading, etc.

They also apply equally to questions asked by a prospective employer, either in person, by telephone, in writing or otherwise, of a former employer, with reference to an application or a person under consideration for employment.

SUBJECT	RECOMMENDED	NOT RECOMMENDED
Arrest Record	Have you ever been convicted of a criminal offense?(iv) (Give details)	Have you ever been arrested?(v)
Disability(vi)	None	Do you have a disability? Have you ever been treated for any of the following diseases. . .? Do you have now, or have you ever had, a drug or alcohol problem?
Predisposing genetic characteristics	None	Do you have any genetic predisposition to disease? Do any diseases run in your family? Inquiries as to the health status of parents or other family members.
Marital Status	None Is your spouse employed by this employer?	Do you wish to be addressed as Miss? Mrs.? Ms.? Are you married? Single? Divorced? Separated? Name or other information about spouse.

iv. An applicant may not be denied employment because of a conviction record unless there is a direct relationship between the offense and the job or unless hiring would be an unreasonable risk. An ex-offender denied employment is entitled to a statement of the reasons for such denial. Factors to be considered in analyzing whether employment may be lawfully denied because of an individual's ex-offender status are found in Correction Law, Article 23-A.

v. The provisions of the Human Rights law governing unlawful inquiries relative to arrest records does not apply to the licensing activities of governing bodies, in relation to the regulation of firearms, or in relation to an application for employment as a police officer or peace officer.

vi. The HRL extends coverage to those individuals who either have a record of a disabling condition or who are regarded by others as being disabled. See definition of disability, infra.

SUBJECT	RECOMMENDED	NOT RECOMMENDED
National Origin	None	Inquiry into applicant's lineage, ancestry, national origin, descent, parentage or nationality. (vii) Nationality of applicant's parents or spouse.
Sexual Orientation(viii)	None	Inquiries as to sexual orientation. Are you married or single? Do you have a girlfriend/boyfriend? Requirement that applicant produce any document that would reveal marital status.
Race or Color	None	Complexion or color of applicant's skin, eyes, hair, and so forth.
Religion	None	Inquiry into applicant's religious denomination, religious affiliations, house of worship, religious holidays observed.(ix)
Sex	None	Inquiry as to gender. Inquiries as to capacity to reproduce, use of any form of birth control or family planning.

(vii). Documentation needed to satisfy the requirements of the Immigration Reform and Control Act of 1986 should be obtained after the individual has been hired even if it is related to the Federal Form I-9 process.

(viii). The term "sexual orientation," means heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived. However, nothing contained herein shall be construed to protect conduct otherwise proscribed by law. N.Y. Executive Law, Section 292.27.

(ix) But see Human Rights Law §296(11). "Nothing contained in this section 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, from limiting

employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained."

5. INDIRECTLY REVELATORY INQUIRIES

It is unlawful to ask questions the answers to which will indirectly reveal information as to race, creed, color, national origin, sexual orientation, military status, sex, marital status, disability, predisposing genetic characteristics, age or arrest record in cases where such inquiry expresses, directly or indirectly, any limitation, specification or discrimination, unless based upon a bona fide occupational qualification.

The following are Division recommendations on inquiries which may be considered indirectly revelatory of race, creed, color, national origin, sexual orientation, military status, sex, marital status, disability, or age:

SUBJECT	RECOMMENDED (x)	NOT RECOMMENDED
Address or Duration of Residence	Applicant's place of residence How long a resident of this state or city?	How long have you lived in this country? In what country did you live before?
Birthday	None	Requirement that applicant submit birth certificate, naturalization or other record showing age. Requirement that applicant produce proof of age in form of birth certificate or other record.
Birthplace	None	Inquiries as to birthplace of applicant or birthplace of applicant's parents, spouse or other relatives.

(x) See Section 6, Disparate Impact Inquiries, infra

SUBJECT	RECOMMENDED	NOT RECOMMENDED
Citizenship	Are you a citizen of the United States? If not a citizen of the United States, do you intend to become a citizen of the United States? If you are not a United States citizen, have you the legal right to remain permanently in the United States? Do you intend to remain permanently in the United States?	Of what country are you a citizen? Inquiries as to whether an applicant or an applicant's parents or spouse are naturalized or native-born citizens; Requirement that applicant produce naturalization papers.
Driver's License	Do you possess a valid NYS driver's license (if a driver's license is necessary for the position applicant is seeking)?	Requirement that applicant produce license prior to offer of employment.
Education	Inquiry into applicant's academic, vocational or professional education and the public and private schools attended.	Year(s) of attendance; Date(s) of graduation.
Experience Language	Inquiry into work experience. If the duties of the position applicant is seeking require fluency in a particular language, inquiry may be made into whether applicant speaks or writes that language fluently.	What is your native language? Inquiry into how applicant acquired ability to read, write or speak a foreign language.
Military Experience	Inquiry into applicant's military experience in the Armed Forces of the United States or in a State Militia.(xi) Inquiry into applicant's service in a particular branch of the United States Army, Navy, etc.	Inquiry into applicant's military experience other than in the Armed Forces of the United States or in a State Militia.

(xi) The Human Rights Law prohibits discrimination based on an applicant's military service in the Armed Forces of the United States or a State Militia.

SUBJECT	RECOMMENDED	NOT RECOMMENDED
Name	Have you ever worked for this company under a different name? Is additional information relative to change of name, use of an assumed name or nickname necessary to enable check on your work records? If yes, explain.	Inquiries as to original names of an applicant whose name has been changed by court order or otherwise. Inquiries as to the birth name of a married woman. If you have ever worked under another name, state name and dates.
Notice in Case Of Emergency	None	Requirement that applicant provide name and address of relative to be notified in case of an accident or emergency.(xii)
Organizations	Inquiry into applicant's membership in organizations which the applicant considers relevant to his or her ability to perform the job.	Requirement that applicant list all clubs, societies, and lodges to which applicant belongs.
Photograph	None	Requirement or option that applicant affix a photograph to employment form at any time before hiring.
Relatives	Inquiry as to names of applicant's relatives already employed by the company.	Inquiry as to names, addresses and ages of applicant's spouse, children or relatives not employed by the company.

6. DISPARATE IMPACT INQUIRIES

Selection criteria which are facially neutral in their treatment of different groups but which impact more severely on one protected group and cannot be justified by business necessity are unlawful. [See *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)].

Thus, inquiries which would otherwise be deemed lawful may, in certain circumstances, be deemed as evidence of unlawful discrimination when the inquiry seeks to elicit information about a selection criterion which has a disproportionately burdensome effect and the criterion is not job related. Such criteria may not be used as a basis for selecting employees, apprentices or tenants or as a basis for deciding whether to make a real estate sale or lease. The inquirer may justify the making of such inquiry by the showing of a business necessity.

(xii) This inquiry, as well as inquiries for information required for reasons related to employee benefits, may be made after a person has been hired.

7. EXCEPTIONS TO THE RULINGS ON DIRECTLY REVELATORY, INDIRECTLY REVELATORY AND DISPARATE IMPACT INQUIRIES.

A. BONA FIDE OCCUPATIONAL QUALIFICATION

1. Bona Fide Occupational Qualification -- The statutory prohibitions against making discriminatory pre-employment inquiries is subject to one general exception: It is permissible to make pre-employment inquiries relating to the applicant's age, race, creed, color, national origin, sex, sexual orientation, military status, marital status or freedom from disability, where such inquiries are based upon a bona fide occupational qualification.

In construing the term "bona fide occupational qualification" the Division has consistently followed the general principle that, subject to the particular facts in specific cases, the age, race, creed, color, national origin, sexual orientation, military status, sex, marital status or freedom from disability of an employee or an applicant for employment will not be deemed a bona fide occupational qualification unless these attributes are necessary to job performance. Neither the preference of customers, co-workers, or employers, nor historical usage, tradition or custom will justify a request for a bona fide occupational qualification. It should be noted that the corresponding provision of the federal Civil Rights Act of 1964, Title VII, Sec. 703(e) does not recognize race or color as the basis of a bona fide occupational qualification. Race or color would rarely, if ever, be recognized as a basis for a bona fide occupational qualification.

2. Consideration may be given to sex as a bona fide occupational qualification in such circumstances, among others, as follows:

(a) Where sex is a bona fide factor in job performance, e.g., a male to model men's clothes, a female to play the role of a woman in a theatrical production.

(b) Where sex is a bona fide factor in terms of personal privacy, e.g., a man to work as an attendant in a men's washroom, a woman to work as a fitter in a women's undergarment establishment.

3. Consideration may be given to age as a bona fide occupational qualification to fulfill the provisions of other statutes. Otherwise, an individual's ability to perform the job duties, and not the individual's age, is the appropriate criterion.

4. An employer, employment agency or any member of the public desiring a supplemental interpretation of the bona fide occupational qualification provision may file with the Division a statement supported by the facts claiming the existence of a bona fide occupational qualification. When such a statement is filed in good faith, the Division may, at its option, in a clear case, furnish such a supplemental interpretation. Such supplemental interpretations are intended to serve merely as working presumptions until challenged. A Division order enforceable by court proceedings can be made only after a hearing upon a complaint as provided by statute. In such proceedings the Division must be governed by the facts in each case.

B. RESEARCH BY CIVIL SERVICE DEPARTMENTS

The New York State Department of Civil Service and the New York City Department of Personnel have statutory authorization to request information from applicants for civil service examinations concerning certain protected categories. This may be done only for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups in order to insure equal employment opportunities in civil service for all persons.

C. INQUIRIES MADE AFTER SELECTION

After an employee has been hired, it may be lawful to maintain certain records showing the workforce's composition as to national origin, race or sex, in order to comply with governmental requirements such as the EEO-1 report. However, inquiries into race, creed, color, national origin, sexual orientation, military status, sex, marital status, disability or age may not be considered in connection with promotions or other post-hire job determinations.

Furthermore, in taking ethnic surveys of employees, even when permissible, employers should be mindful of the disquieting effects which such surveys may engender. The results of those surveys should be maintained separately, and not as part of an individual's personnel file.

8. SPECIFICATIONS IN ADVERTISEMENTS

A. The Law prohibits the printing or circulation of any advertisement seeking employees which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, military status, sex, marital status or age.

B. It is an unlawful discriminatory practice for an advertiser to place, or for a newspaper or other advertising medium to publish, any advertisement for a job covered by the Human Rights Law if such advertisement contains anything which directly or indirectly reveals that an applicant of a particular race, creed, color, national origin, sexual orientation, military status, sex, age, marital status or disability is desired or undesired. For example, a help-wanted ad for a "stenographer under 35" or for a "young man" or "young woman" is unlawful. No advertisement may set forth any prima facie discriminatory specification. An advertisement placed in a newspaper is considered to be unlawful if it specifies a barrier limiting the job applicants of a particular race, creed, color, national origin, sexual orientation, military status, sex, marital status, age, or with a disability.

C. It is an unlawful discriminatory practice for an advertiser to place, or for a newspaper or other advertising medium to publish, any advertisement for a job covered by the Human Rights Law, in a column classified on the basis of protected classifications.

D. The same exemptions apply as are applicable to the recommendations on other inquiries. A newspaper may rely on an employer's written certification that the employer is not covered by the Human Rights Law or that a bona fide occupational qualification is applicable.

E. Advertisers and publishers should not use job titles which indicate a sex preference unless based on a bona fide occupational qualification. Listed below are a few examples of job titles which indicate preference as to gender

and which therefore should not be used unless based on a bona fide occupational qualification.

NOT RECOMMENDED	RECOMMENDED SUBSTITUTES
Bell Boy	Bell Person
Male, Female, Lady, Gentlemen	Applicant, Candidate, Trainee
Steward/Stewardess	Flight Attendant
Foreman	Supervisor
Draftsman	Drafter
Fireman	Firefighter
Policeman	Police Officer

9. LABOR ORGANIZATIONS

The prohibition contained in section 296, subdivision 1, paragraph (c) of the Law with respect to labor organizations is that they may not, because of the race, creed, color, national origin, sexual orientation, military status, sex, marital status, disability, predisposing genetic characteristics, or age of any individual exclude or expel from their membership such individual or discriminate in any way against any employer or an individual employed by the employer. The paragraph does not mention inquiries.

Section 296, subdivision 1-a, dealing with apprenticeship and training programs, expressly applies to inquiries by labor organizations and by joint labor-management committees controlling apprenticeship training programs.

Most labor organizations either use membership application forms or make oral inquiries of applicants for membership. It would therefore appear that the prohibition against pre-employment inquiries as to race, creed, color, national origin, sexual orientation, military status, sex, marital status, disability, predisposing genetic characteristics and age should apply equally to labor organizations. Nevertheless, the Law does not expressly so provide except with respect to guidance, apprenticeship and other training programs.

Recognizing the lack of such express prohibition in section 296, subdivision 1 (c) and (d) of the Law, the Division ruled that inquiries appearing on membership application forms used by labor organizations which express, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, military status, sex, marital status, disability, predisposing genetic characteristics, and age are inconsistent with the intent of the Law and are undesirable(xiii). When a

complaint is filed against a labor organization, such inquiries will be regarded as corroborative evidence of intent to accomplish a discriminatory exclusion.

(xiii) The prohibition against inquiries about arrest records expressly applies to "any person. . .or association," including labor organizations and applies to inquiries before or after admission to membership.

10. DISABILITY

A. GENERAL RULE

The Human Rights Law prohibits discrimination based on disability in employment. An employer must attempt to accommodate an employee's disability if to do so does not cause the employer undue hardship and permits the employee to perform the duties of the position in a reasonable manner.

The Law defines disability as:

- (a) a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, or
- (b) a record of such an impairment, or
- (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held. (Human Rights Law §292.21)

The Law does not require the hiring or retention of applicants/employees who are unable to perform their duties in a reasonable manner.

B. PRE-EMPLOYMENT MEDICAL AND PHYSICAL EXAMINATIONS

Employers may require applicants/employees to demonstrate capacity to perform the physical demands of a particular job, in the same way as they ask applicants to demonstrate competence and qualifications in other realms.

Employers may conduct tests of physical strength, agility, endurance, stamina, etc., insofar as such tests are non-discriminatory, can be demonstrated to be related to the specific duties of the position applied for, and are uniformly given to all applicants for the particular job category.

An employer may not disqualify an applicant/employee because of suspected future risk to the person's health of performing a specific job. Neither may an employer disqualify an applicant/employee based on medical information about his/her current health, unless the applicant/employee is unable to perform the job tasks in a reasonable manner.

An employer may not require a job applicant to submit to a medical examination, including laboratory and psychological tests, as part of the application process, unless based upon a bona fide occupational qualification(xiv). An employer may require an individual who has been offered a job to have a physical exam, but only if such an exam is required of all entering employees(xv).

C. REASONABLE ACCOMMODATION

Human Rights Law section 292.21 provides that the term "disability", as applied to the employment sections of the Human Rights Law, shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent an individual from performing the employment activities in a reasonable manner.

Section 292.21-e of the Human Rights Law provides as follows:

The term "reasonable accommodation" means actions taken which permit an employee, prospective employee or member with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on

the business, program or enterprise of the entity from which action is requested.

Section 296.3 of the Human Rights Law provides:

3. (a) It shall be an unlawful discriminatory practice for an employer, licensing agency, employment agency or labor organization to refuse to provide reasonable accommodations to the known disabilities of an employee, prospective employee or member in connection with a job or occupation sought or held or participation in a training program.

(b) Nothing contained in this subdivision shall be construed to require provision of accommodations which can be demonstrated to impose an undue hardship on the operation of an employer's, licensing agency's, employment agency's or labor organization's business, program or enterprise.

(xiv) Testing of job applicants or current employees to determine whether an applicant or employee is engaging in the illegal use of drugs does not violate the disability provision of the Human Rights Law, which protects only those individuals who are either rehabilitated substance abusers, or in the process of being rehabilitated. Cf., 42 U.S.C. §12114.

(xv) It is unlawful to discriminate based on an individual's predisposing genetic characteristics. HRL §296.1. It is unlawful to require genetic testing as a condition of employment, except in the limited circumstances set out in HRL §296.19. Even if such a test is permitted, the results may not be used as the basis for a discriminatory employment decision. The terms "predisposing genetic characteristic" and "genetic test" are defined in HRL §292.21-b and 21-c.

In making such a demonstration with regard to undue hardship the factors to be considered include:

(i) The overall size of the business, program or enterprise with respect to the number of employees, number and type of facilities, and size of budget:

(ii) The type of operation which the business, program or enterprise is engaged in, including the composition and structure of the workforce; and

(iii) The nature and cost of the accommodation needed.

The second paragraph of Section 296.3-a(g) permits the termination of an individual who, even upon the provision of reasonable accommodations, is physically unable to perform his or her duties, and provides further that the provision of reasonable accommodation shall not affect the implementation of the employee's retirement benefits or insurance coverage.

The Division's rules relating to the reasonable accommodation of the disabilities of employees and applicants for employment are found at 9 NYCRR §466.11.

D. TERMINATION OF EMPLOYMENT BECAUSE OF INABILITY TO PERFORM DUTIES

An employer may terminate the employment of any person who is physically unable to perform his or her duties in a reasonable manner, even with the provision of reasonable accommodation by the employer (see below).

Examples:

1. An employer has prescribed minimum physical standards as a condition for continuance in employment. Such minimum standards are reasonably necessary for the work to be performed and are uniformly applied to all employees in the particular job category. An employee is found, upon medical examination, to be unable to meet such minimum standards even with the provision of reasonable accommodation and his or her employment is terminated. THIS IS LAWFUL.
2. As a result of a physical, medical or mental condition, an employee is found, upon due examination of work performance, to be unable to perform the duties of the job in a reasonable manner even with the provision of reasonable accommodation and such condition is not temporary and is substantial. The employee is terminated. THIS IS LAWFUL.
3. An employer establishes the policy of terminating all employees when they reach the age of 60. THIS IS UNLAWFUL.

4. An employer establishes the policy of terminating at age 60 employees in a specific occupational category demanding a high level of physical qualification, without reference to their actual physical condition at termination. THIS IS UNLAWFUL.

(xiv) Testing of job applicants or current employees to determine whether an applicant or employee is engaging in the illegal use of drugs does not violate the disability provision of the Human Rights Law, which protects only those individuals who are either rehabilitated substance abusers, or in the process of being rehabilitated. Cf., 42 U.S.C. §12114.

(xv) It is unlawful to discriminate based on an individual's Predisposing genetic Characteristics. HRL §296.1. It is unlawful to require genetic testing as a condition of employment, except in the limited circumstances set out in HRL §296.19. Even if such a test is permitted, the results may not be used as the basis for a discriminatory employment decision. The terms "predisposing genetic characteristic" and "genetic test" are defined in HRL §292.21-a and 21-b.

11. PREGNANCY

An employment policy or practice which excludes employees because of pregnancy is an unlawful discriminatory practice based on sex, and an employer may not ask a prospective employee if she is or intends to become pregnant, or plans to have children in the future, or uses birth control. It is an unlawful discriminatory practice for an employer to compel an employee who is pregnant to take a leave of absence, unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner. (Section 296.1(g))

Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities, and should be treated as such under any health or temporary disability insurance or sick leave plan or reinstatement plan available in connection with employment.

12. FILING A COMPLAINT.

N.Y. Executive Law, Section 297. Procedure.

Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself/herself or his/her attorney-at-law, make, sign and file with the Division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the Division.

N.Y. Executive Law Section 297.5 provides that any complaint filed with the Division pursuant to this section must be so filed within one year after the alleged discriminatory practice. Where a complaint has not been filed at the Division, a complaint may be brought directly in state court within three years of the alleged discriminatory practice. *Pan American Airways v. NYS Human Rights Appeal Bd.*, 61 N.Y.2d 542, 475 N.Y.S.2d 256 (1984).

Further information about Division procedures is available at the Division's web site, which is www.NYSDHR.com, or by contacting the Division at One Fordham Plaza, Bronx, New York 10458; (718) 741-8400.