Avoiding Discriminatory Questions During an Interview

What is employment discrimination?

Unintentional or intentional discrimination can happen on farms and ranches especially in the hiring process, but it’s something everyone has the power to manage and avoid.

Legally speaking, employment discrimination happens when an employer treats an applicant or employee differently because of certain characteristics that are protected by law. On the federal level, the protected characteristics are: a person’s sex (which includes gender, gender identity, sexual orientation), physical or mental disability, age, veteran status, union status, race, color, national origin or ancestry, & religion or creed. If you factor any of these characteristics into your hiring decisions, you may have discriminated.

States can choose to follow or expand on the list of federally protected characteristics. In New Hampshire, state law adds the protected characteristics of marital status (if someone is single, widowed, divorced, or married), familial status (who the person lives with, if they have children), and tobacco use outside of work. New Hampshire state law also expands on the federally protected characteristic of age: within the state, it is illegal to discriminate on the basis of age for anyone over 18.

Some farm and ranch employers are exempt

In New Hampshire, anti-discrimination law applies to all private employers with six or more employees, and to ALL state and local government employers. Farm and ranch businesses that are below this threshold cannot have a discrimination lawsuit brought against them— but these laws are still a best practice to follow as your labor force may grow in the future! Even without a lawsuit, a lot of harm can still be done to your business if there is a claim of discrimination.

How can employment discrimination happen in an interview?

In New Hampshire, it is unlawful to inquire about the protected characteristics. The risk here is that interview questions can indirectly connect to a protected characteristic. To manage and avoid this risk, follow these best practices:

- Prepare your list of interview questions before the interview, ensuring each question addresses an essential function of the job.
- Ask the same questions of each applicant.
- If information about one of the protected characteristics is offered, unprompted, by your interviewee, don’t panic! Don’t ask for more information about the protected characteristic, and return to the list of questions you created.
Grow from risk to resilience

Below are just a few examples of legally risky questions, followed by the protected characteristic they address and a more legally resilient rephrasing.

<table>
<thead>
<tr>
<th>Legally risky question</th>
<th>Related protected characteristic</th>
<th>Legally resilient question</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you smoke tobacco?</td>
<td>Tobacco use</td>
<td>Can you comply with our no-smoking policy?</td>
</tr>
<tr>
<td>Do you have asthma?</td>
<td>Health conditions &amp; disabilities</td>
<td>Are you able to perform X job function with or without a reasonable accommodation?</td>
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<tr>
<td>Do you have kids/how old are your kids/ childcare arrangements?</td>
<td>Sex</td>
<td>Can you work during these hours…?</td>
</tr>
<tr>
<td>When did you graduate?</td>
<td>Age</td>
<td>No legally resilient option</td>
</tr>
<tr>
<td>Do you have religious obligations on the weekend?</td>
<td>Religion/creed</td>
<td>Can you manage the farm stand on Sunday mornings?</td>
</tr>
</tbody>
</table>

Preparing to interview applicants

Having your list of predetermined questions is an essential part of conducting a legally resilient interview, but there are some other ways you can strengthen your hiring process from the perspective of avoiding discrimination. Take notes during the interview, ideally in a format that is consistent for each interviewee. After the interview, have a standard process for evaluating each applicant, like a scoring rubric. In the rubric system, a person’s response to a question about overcoming a workplace problem could be rated from 1-5 based on how they demonstrated an ability to problem solve. The person with the highest score tally is your top contender for the job! Having a standardized evaluation system makes your decision-making process more objective, and it leaves a paper trail of your reasoning. In the case of a legal challenge you will need to be able to return to your notes and determine the legitimate, non-discriminatory reason for not hiring someone.

Tips for moving forward

Now that you’ve got a good basic understanding of when and why to pay salary on the farm, you’re in a better position to move forward by following these two tips:

1. Draft some interview questions and review them from an anti-discrimination perspective with a peer.
2. Take Farm Commons’ Advanced Farm Employment Law Course to build holistic, sustainable legal solutions for your farm’s employment program. Register at www.farmcommons.org.