Avoiding the elephant in the womb: Questions You Can & Cannot Ask Prospective Employees during Interviews

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Imagine sifting through candidate after candidate for an employment vacancy you desperately need to fill. You think one or two of the individuals you have already interviewed may have sufficient attributes to perform the job in a satisfactory manner. However, you cannot help but feel like if you just interview a few more candidates, you will soon find not just a *satisfactory* person, but the *perfect* person for the job.

In walks a petite woman in a professional dress suit, looking every bit the part of the ideal employee you are seeking to hire. Having already reviewed her remarkable résumé, you are delighted to see that her professional appearance and the poise with which she carries herself are just as impressive as her written qualifications. As you both prepare to take your seats, she turns to the side. All of a sudden you notice an unmistakable basketball-sized baby bump nestled beneath her suit.

You are immediately torn. On one hand, you dread the prospect of hiring a new employee only to have her announce a few days later that she will be unable to come into the office for several weeks while she is caring for her newborn child. On the other hand, you would hate to miss out on employing an undeniably talented and qualified individual with an immense amount of potential. After all, you tell yourself, she clearly wants to pursue a career even though she will soon welcome a child into the world, and it goes without saying that women have been successfully juggling motherhood and careers for quite some time now. Nevertheless, at this moment, you need someone who will be able to perform the job without missing much, if any, work during the first few months of employment.

So, what do you do? Do you outright ask her about her pregnancy and how she intends to balance her job with motherhood? Do you inform her that to receive the job offer, she will need to guarantee that she will make other arrangements for the care of her infant? Do you casually discuss your own children with the hope that she will bring up the child she is carrying? Or, do you bite your tongue and proceed with the interview as though she were no more obviously pregnant than the dozens of other individuals you have already interviewed?

Luckily, both federal and state statutes provide some guidance on how employers should address protected characteristics such as pregnancy, race, gender, and religion when contemplating whether to hire an individual who is a member of a protected class. More specifically, the statutes set forth certain discriminatory actions employers must refrain from undertaking to avoid liability.

Title VII of the Civil Rights Act of 1964 prohibits

a prospective employer from "failing or refusing to hire … any individual … because of such individual's race, color, religion, sex, or national origin."[1] In addition, the Pregnancy Discrimination Act of 1978[2] amended Title VII to explicitly include discrimination based on pregnancy and related medical conditions within the definition of sex discrimination.[3] Furthermore, the Age Discrimination in Employment Act (ADEA)[4] provides that it shall be unlawful for an employer "to refuse to hire … any individual … with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." Both the federal and state statutes require an individual to be at least 40 years old to assert an age discrimination in employment claim.[5] In any event, the federal statutes provide that the restrictions regarding employment discrimination shall not apply if the characteristic on which an employer bases his employment decision is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[6]

Employers in the private sector are required to comply with the Title VII restrictions in regards to race, color, religion, sex (including pregnancy), national origin, disability and genetic information if they have 15 or more employees "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person …."[7] The employer must also be engaged in an "industry affecting commerce," a term that is liberally construed and has been applied to private law firms.[8] However, to be governed by the ADEA, an employer must have 20 or more employees and be engaged in an industry affecting commerce.[9]

As for state laws, the Louisiana Employment Discrimination Law (LEDL) prohibits an employer from intentionally failing or refusing to hire "any individual with respect to compensation, or terms, conditions, or privileges of employment" because of the individual's age,[10] race, color, religion, sex, or national origin."[11] To be governed by this provision of the LEDL, an employer must employ 20 or more employees within Louisiana "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[12] Also, in line with the federal statutes, an employer is not prohibited from hiring an individual on the basis of any of the protected characteristics listed above if the characteristic is a "bona fide occupational qualification reasonably necessary for the normal operation of that particular business or enterprise."[13]

In addition, the LEDL prohibits discrimination based on pregnancy, childbirth or related medical conditions.[14] However, an employer must employ 25 or more individuals to be governed by this provision of the LEDL.[15] More significantly, while Louisiana Revised Statutes 23:342(A)(1) provides that it shall be an unlawful employment practice (unless based upon a bona fide occupational qualification)[16] for an employer to refuse to promote or to terminate a pregnant employee, no provision of the LEDL specifically prohibits an employer from considering a prospective employee's pregnancy when considering whether to hire her. Nevertheless, in interpreting the LEDL, Louisiana courts look to Title VII because it contains similar prohibitions against discrimination.[17] Thus, claims under the LEDL are subject to the same analysis as discrimination claims under Title VII.[18] As courts analyze the LEDL under the same framework as Title VII, it is likely that a court would consider pregnancy within the scope of sex discrimination. Therefore, an employer would be wise to refrain from engaging in any pregnancy-related discussion throughout the entire interview. The same is true for all other characteristics that are protected under federal and state law, as even inadvertent comments about a protected characteristic may result in liability for employment discrimination.[19]

A cautious employer would be wise to avoid discussing other issues aside from race, color, religion, sex (including pregnancy), national origin, and disability and genetic information in the course of interviewing prospective employees. Marital status, bankruptcy and garnishment, military service, union sympathies, work-related injuries, workers' compensation claims, and lawsuits are all topics that an employer should refrain from discussing at all costs when conducting interviews.[20] The recurring exception to the aforementioned prohibitions is that an employer may make decisions regarding employing individuals with a protected characteristic if the characteristic is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[21]

In light of the foregoing discussion, how should the employer in the example at the beginning of this article handle the situation? Chances are that any short-term inconvenience that the employer may face by hiring an employee who may soon ask to take leave will ultimately be outweighed by the long-term advantages the employer will gain by hiring a stellar, promising applicant. After all, the applicant's written qualifications, professionalism and communication skills clearly demonstrate her ability to multitask, which is something mothers and fathers alike are being increasingly required to do in our changing society. Regardless of what the employer decides, one thing is for certain — he or she simply *cannot* acknowledge the "elephant in the womb" without risking exposure to liability under federal and state laws prohibiting employment discrimination.

[1] 42 U.S.C. § 2000e-2(a)(1).
[2] 42 U.S.C. § 2000e(k).
[3] *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 859 (5 Cir. 2002).
[4] 29 U.S.C. § 623(a)(1).
[5] 29 U.S.C. § 631(a); La. R.S. § 23:311.
[6] 29 U.S.C. § 623(f)(1); 42 U.S.C. § 2000e-2(e).
[7] 42 U.S.C. § 2000e(b).
[8] *See* 42 U.S.C § 2000e(b); *Evans & Kunz, Ltd.*, 194 NLRB 1216 (1972); *Kohn v. Royall, Koegel & Wells*, 59 F.R.D. 515, 521 (S.D.N.Y. 1973).
[9] 29 U.S.C. § 631(a); 29 U.S.C. § 630(b).
[10] La. R.S. § 312(A)(1).
[11] La. R.S. § 23:332(A)(1).
[12] *Id.*
[13] La. R.S. § 23:332(H)(1).
[14] La. R.S. § 23:301, et sq. [23:341-42].
[15] La. R.S. § 23:341(A).
[16] La. R.S. § 23:342.
[17] *King v. Phelps Dunbar, L.L.P.*, 89-1805 (La. 6/4/99), 743 So.2d 181; *Brooks v. Popeye's Inc.*, 11-1086 (La. App. 3 Cir. 3/14/12), 101 So.3d 59.
[18] *See Hicks v. Cent. La. Elec. Co.*, 97-1232 (La. App. 1 Cir. 5/15/98), 712 So.2d 656; *Plummer v. Marriott Corp.*, 90-2425 (La. App. 4 Cir. 4/26/95) 654 So.2d 843.
[19] Rick J. Norman, LA. PRAC. EMPLOYMENT LAW § 2:5 (2015), citing *Haag v. ADVO Systems, Inc.*, 168 F.3d 732 (5 Cir. 1999).
[20] *Id.*
[21] *See, e.g.*, 29 U.S.C. § 623(f)(1); 42 U.S.C. § 2000e-2(e); La. R.S. § 23:332(H)(1); La. Rev. Stat. § 23:342.

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