

## **Spousal Interviews of Applicants for Employment: A Legal and Ethical Dilemma**

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*This article analyzes the legal and ethical issues of an employer asking a job applicant to provide his/her spouse for an interview, presumably to inquire whether the spouse is aware of the applicant's job duties/requirements. These interviews are permitted under many state laws, while forbidden for most federal employment interviews. Aside from the legality of the interview, the associated ethical philosophies that may impact the decision to interview an applicant's spouse are discussed. The practical implications of interviewing the applicant's spouse are the most important consideration in determining the wisdom of the spousal interview.*

### **INTRODUCTION**

Teaching a course on ethics in a business school is not easy. Not that it is harder work than teaching other subjects, but it is amorphous in nature. What is ethical in a classical investor oriented corporation may be regarded unethical in a stakeholder oriented corporation. What may be on the verge of legality today, and many would consider unethical, may tomorrow indeed become illegal. Society frequently reacts to perceived unethical behavior and presses for legislative mandated change to make the conduct illegal.

The purpose of this article is to provide a legal and ethical analysis of a pre-employment practice some companies use, particularly for sales candidates, of requesting an interview with the candidate's spouse. Many of these jobs require flexible work hours and often have no salary, because the income is derived from commissions earned. To assure that the candidate's spouse is "on board" with the hours and fluctuating income, the employer may request that the spouse be interviewed as well as the candidate.

Little can be found in the body of research literature dealing with this important subject; yet it is apparent that the subject surfaces from time to time, since it is addressed in some government publications, as well as university hiring regulations.

The research and discussion in this article leads to practical suggestions for employment and interviewing managers.

### **HIRING SALES PEOPLE**

When discussing sales positions, we focus on what is functionally called the outside sales job. These may often involve a territory or district. The sales people may travel throughout a territory promoting their products or services. Many such jobs have no base salary and income is derived from the

commissions earned on each sale. A good example is an insurance sales associate and financial services representative.

Insurance companies invest large sums of money to develop good sales men and women. The larger insurance companies usually pay a limited small upfront salary for the initial training period, but soon the sales person must survive on straight commissions. Understandably, insurance companies do not want to hire an applicant for a sales job without some idea of whether the candidate could meet the rigorous job requirements in the field. The candidate has to be able to prospect and find customers; take a beating when told “I’m not interested, don’t call me again”; go weeks without making a sale, which means not having a pay check; and work hours when the customer can meet with them such as at night, weekends or whenever.

Most major insurance companies ask candidates for sales positions to take some kind of personality test. An organization that does key research for insurance companies is LIMRA International that conducts research for hundreds of companies around the world. LIMRA developed a personality test for candidates for insurance sales. (LIMRA, 2005) One key aspect of the test is to identify dynamic — ambitious, competitive, and assertive candidates. (LIMRA, n.d.). These tests, it is hoped, will identify the right candidate for the job.

“Make the sale” kind of person is what these companies are looking for. The general description is one who is confident, self imposing, and independent. The successful financial services representative can make hundreds of thousands of dollars a year and may be considered a workaholic. These sales men and women also make the companies they work for large profits.

Of course these personality tests cannot identify family issues and pressures that may have an effect on the applicant outside his or her personality traits.

The hiring interview process is an important step to find the right person, for which a company is willing to invest time, training, and money. Applicant testing is one way to obtain personal traits information, but this information needs further validation through probing interviews. Some companies use these personality tests as the only determinate criteria for hiring. This article does not delve into the ethical issues in this regard, but others have explored this area. What will be discussed are the legal and ethical considerations of continuing the interview process to include an interview of a candidate’s spouse.

## **THE SPOUSAL INTERVIEW**

Some companies request or even require an applicant for a sales position to provide the opportunity to interview the spouse. Presumably this interview is to make sure the spouse understands the positive and negative aspects of the sales career. (Corkhill, 1991) The sales position requires long hours, possible weeks before pay checks, and in need of caring support at home when times get tough. Most insurance companies are members of GAMA International, an organization which supports the industry with research and education. GAMA Foundation commissioned a study in 2002 which, among many factors in recruiting successful sales people states: “High-performing field leaders involve spouses in the selection process to ensure that they are aware of the time commitment required for success.” (GAMA, 2003, p. 2). The study shows that those taking the survey in the study indicated that the spousal interview was of moderate importance.

Of course these concerns are not limited to insurance sales people, outside sales people, or territorial managers. CEOs of companies, General Managers, Managing Directors, Executive Vice Presidents, Presidents, Senior Vice Presidents, and so on have similar pressures, job time consumption and a need for a caring person at home, too. What they don’t have, however, is the possibility of receiving no pay check for a period of time. Not having a regular weekly income may be problematic for many households.

If the job requires living abroad, companies certainly want to know what the spouse of the candidate thinks about moving the family, and most spouses would welcome the opportunity to explore the living arrangements, schooling for the children, etc..

At this point it should be noted that a request to interview an employee’s spouse has less risks than a request to interview the spouse of a candidate for an employment position. While there may be questions

raised about employment discrimination in promotions of employees, there is always a question of discrimination in the pre-employment process of hiring candidates.

On the face, it appears that an interview of the spouse of a candidate for employment presents legitimate business interests. Could there be, however, other underlying issues that the employer wishes to explore, which are masked by the legitimate business interest? Is there a legal or ethical concern when asking for the interview with a candidate's spouse?

## LEGAL ANALYSIS OF INTERVIEWING THE SPOUSE

The question arises: Is asking about a spouse looking into the marital status of the applicant for employment? Is marital status a protected class under anti-discrimination employment law? Is it legal to request a potential hire to provide his/her spouse for a job interview? If it is illegal, generally a discussion about the ethics of it becomes moot.

The Equal Employment Opportunity Commission (2006), which investigates and enforces federal employment law states:

“The federal antidiscrimination laws do not prohibit discrimination on the basis of marital status, but some states do prohibit such on this basis. Moreover, the federal prohibition against sex discrimination would be violated if an employer were to treat men and women differently based on their marital status or existence of dependents. For example, an employer would violate Title VII if it would hire men with children but not women with children. *See* EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.4.”

Interestingly, Federal Employees have more protection as mentioned by the Chairwoman of the EEOC in January 2011:

“EEOC employees are protected by federal laws prohibiting discrimination on the basis of race, religion, color, sex (including pregnancy and gender identity), national origin, age, disability, family medical history, or genetic information. Moreover, consistent with Presidential Executive Orders and other laws designed to protect federal employees, we must vigilantly prevent discrimination based on sexual orientation, parental status, marital status, political affiliation, military service, or any other non-merit based factor.” (Office of the Chair).

The Equal Employment Opportunity Commission what may be considered “best practices”:

“Generally, employers should not use non job-related questions involving marital status, number and/or ages of children or dependents, or names of spouses or children of the applicant. Such inquiries may be asked after an employment offer has been made and accepted if needed for insurance or other legitimate business purposes. The following pre-employment inquiries may be regarded as evidence of intent to discriminate when asked in the pre-employment context: Whether applicant is pregnant. Marital status of applicant or whether applicant plans to marry.” (EEOC, n.d.).

The lesson here is that should an employer, such as Wal-Mart<sup>1</sup>, be accused and sued for gender discrimination, the legal prohibition cannot be based on discrimination because of marital status in a Federal lawsuit. Should the employer have inquired into the marital status of a potential employee during the interview, this may juxtapose evidence of the gender bias, for which the complaining employees seek damages. For the employer to request to speak to a spouse, with the intent to interview the spouse of the candidate, is an obvious inquiry into marital status.

For example, if the employer inquires about the family of a female employee during a job interview and consistently does this with female employees, this may help establish a pattern of conduct, which indicates a nonbusiness interest in the matter. If later the female employees believe that they are passed over for promotions, because of their family responsibilities as mothers, this is alleged gender based discrimination. The pre-employment interview questions about the family is not prohibited, but may be evidence pointing to the alleged gender discrimination.

The Federal Question is not the end of the legal concerns, because there are states which have passed stricter laws than the Federal Code on employment discrimination. California Department of Fair Employment and Housing published a guide (n.d.) for legal and illegal questions that may be asked during an interview. Questions which indicate the applicant's marital status or number of children are unacceptable questions. Thus in California it would appear to be illegal to ask to interview an applicant's spouse, because the question would be an inquiry into the marital status of the applicant.

The Center for WorkLife Law, housed at the University of California Hastings College of the Law, published an Employer Alert (2010). The alert addresses "How to Avoid Family Responsibility Discrimination in Interviews?" It states:

"We are often asked if it is illegal to ask questions about family responsibilities in an interview. The answer is, like all good legal answers, "it depends." If the employer is in Connecticut, the District of Columbia, or one of the counties or cities that has expressly prohibited family responsibilities discrimination by statute, then the answer is that it is most likely illegal. If the employer is not in one of those jurisdictions, the answer is that it is illegal if the questions are asked (and the answers presumably relied upon) only of female candidates. In such a situation, the questions would likely constitute sex discrimination. Regardless of whether such questions are illegal, they certainly are too risky to be a good business practice." (Emphasis added)

Clearly asking a candidate to interview the spouse implicates a desire to determine family responsibilities. In the interview of a spouse it would be difficult to avoid discussions about family needs, income, children, and the work requirements of the spouse. "Are you a working mother?" "Who would take care of the children?" "Do you have any concerns if your wife were required to work late evening hours?" Once that door is opened, then the employer must walk a thin line to not discriminate in hiring based on the information obtained about the family responsibilities. Employers must be aware of the legal prohibitions in job discrimination<sup>2</sup> in the states they make hiring decisions.

Today there are other questions that arise when discussing spousal interviews. In same-sex relationships, commitments, unions, or even legal marriage a request for a spousal interview takes on other dimensions. There are no federal laws prohibiting sexual orientation discrimination in private sector employment, however, President Clinton did sign an order "to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, age, or sexual orientation...of civilian employees of the federal government..." (Executive Order 13087).

Complicating the issue of asking same-sex couples to provide the non-applicant "spouse" for an initial interview, is whether the employer provides health and other benefits to same-sex couples, and how are these benefits determined? Some corporations do not provide any benefits to such couples, and therefore, a request to speak to the other partner of the applicant is suspect. Other employers, who do provide some benefits, may determine the status of the couple from various perspectives, thus complicating further this entire inquiry (Becker, 1995, p. 96). Should the employer, prior to hiring, inquire into what kind of relationship the applicant is in; is there a legal basis for the relationship under city, county, or state law; are unmarried heterosexual relationships included in a request to interview the applicant's significant other?

Could the request to interview a candidate's spouse be an attempt to determine the sexual orientation of the candidate? If discrimination in employment on the basis of sexual orientation follows, it may violate local law. There are 139 cities and counties which have banned discrimination in employment

based on sexual orientation and twenty states prohibit such discrimination, while 12 states ban it indirectly under gender bias laws. (Human Rights Campaign).

An employer's request to interview the spouse of a potential employee is probative evidence that could help establish a sexual orientation employment discrimination case, if the employer has been sued in that respect.

As reviewed, Federal employee law doesn't directly affect our inquiry into employment spousal interviews, but state law may, depending on where the employment is situated. Beyond the legal ramifications there are questions of appropriateness and ethics?

## **ETHICAL ANALYSIS OF INTERVIEWING THE SPOUSE**

This preliminary question should be asked: Is it wise to conduct spousal interviews, when it is not illegal?

If an applicant is asked whether they are married in the interview process, followed by a request to interview the spouse, it may put a veil of suspicion on the hiring process. "The employer's initial moral obligation is to acquire and retain only such individually identical employee information that is directly pertinent to, and necessary for, effective performance, competent management, or some other appropriate business purpose. The employer generally does not possess a legitimate right to know certain aspects of an employee's personal life..." (Cavico & Mujtaba, 2009, p. 253)

The question of what is an appropriate business purpose is an ethical issue, but it also enters a mine field which may affect legal actions under the jurisdiction of the Equal Employment Opportunity Commission. "Absent a business need, it would be prudent to avoid making such inquiries because...if a selection decision is challenged, the inquiries will be evidence that those factors influenced the employment decision..." (2006) in other illegal status discrimination.

When an ethical issue is not addressed and left to over-ripen, it often becomes an ethical dilemma where there is no good resolution of the matter left. The issue may be just a set of circumstances that leave the "decider" no good choices. Clearly in the pre-employment interview process, when an employer requests to interview the spouse of an applicant for employment an ethical issue arises. What if the candidate is a great candidate, did well on job aptitude tests, and has an excellent background, but in the interview with the spouse, it is determined that she/he is not comfortable with the candidate spouse taking this position? Has the interview developed into an ethical dilemma? If the qualified candidate is not hired for the job, is this a good decision? If the applicant is hired, and it causes trouble at home, was this a good decision, knowing the spousal concerns from the interview?

From the philosophy of teleology's utilitarian view, if the interview of an applicant sales person's spouse creates more good for the company in selecting the best candidate and helps the applicant's home relations, then the interview is appropriate. This then is an ethical basis for the decision to interview a candidate's spouse, which should bring about the most good for all involved. Tranquility at home is preserved and the company should have a more productive worker, with the spousal support. Consider whether the utilitarian would actually come to this conclusion. If the spousal interview results in an ethical dilemma, described above, the utilitarian may reach a different conclusion.

It may be reasoned that interviewing the spouse of an outside sales candidate is a moral obligation, because of the high divorce rates in the country and divorces can affect work production of the employee. If the candidate's spouse does not want his/her spouse to take this kind of job, ultimately it could lead to divorce. Two problems occur with this reasoning: (1) research does not confirm that outside sales people have an extreme rate of divorce, and (2) the individual, if given the typical personality test for this kind of position, is ambitious, competitive, and assertive, but is also warm and friendly, which are general qualities sought for an outside sales person. (LIMRA) A married person with these attributes has probably worked out any personal problems regarding personality with his/her spouse prior to landing the outside sales job.

Research (McCoy & Aamodt, 2010) shows that sales people in this category represent 17.65% divorce rate, about half way down the occupational list, and far down from number one - dancers and

choreographers at 43.05% or telemarketers at 28.10%. Other research indicates that white-collar workers, who work nonstandard work schedules such as nights and weekends, do have more stress which tends to spill over into the family relationship (Davis, Goodman, & Almeida, 2008) and creates strain on marriages. In research conducted by Presser (2000) some correlation was found between nonstandard work schedules and instable marriages, but only under certain variables such as ages and presence of children.

While there may be other “means justify the ends” ethical arguments made, there is no evidence that reducing the divorce rate of employees in sales jobs is an end result of interviewing the applicant’s spouse to detect any frustrations about the potential job that may be derived from such an interview.

Fortune reports that in the unemployed rich market, caused by the down turn in the economy, many companies have introduced a new interview process consisting of asking applicants ridiculous questions to narrow their hiring decisions. How many balloons would fit in this room? Rate yourself in how weird you are? (Fisher, 2011) If narrowing the field of available and qualified applicants is the purpose of these questions, why not use them in an interview? If these questions are appropriate, why not interview the applicant’s spouse, with the purpose of narrowing the applicants?

A deontologist would see an interview of an applicant’s spouse as an employee privacy rights issue and conclude that even asking an employee about marital status - married, divorced, engaged, or in a same-sex union, is an unethical act. This invasion of privacy is impermissible regardless that the end result is to find an effective sales person.

Unlike the schools of teleology where the end result is justified by the means to obtain a desirable good, those of deontology ethical persuasion focus on established rights that must be used in decisions which produce the end. It makes no difference if the end results in a poor outcome. (Ferrell, Fraedrich & Ferrell, 2009, p. 154).

Many scholars believe that there are some basic principles that we can all agree on that should be the beginning of ethical conduct. Respect for human beings seems like a good place to start. In Immanuel Kant’s early writings, he believed that treating humans as an end and not as a means is a “practical imperative” (Kant, 1959, p. 47). The principle, therefore, is to treat people with respect. Thus humans should not be used as a means. Understanding that people have dignity and free will is why they deserve respect, is an underlying proposition of Kant. (Bowie, 1999, p. 63-78).

The Global Sullivan Principles (The Sullivan Foundation, n.d.), is an attempt to achieve basic principles of ethics for corporations conducting business in other countries and multinational corporations. The foundation of these principles synchronizes with Kant’s philosophy. These principles may be redacted to respect for human rights by corporations. If global principles are Kantian based, then perhaps the ethical answer to the issue of this article has more relevance through Kant and deontology.

In a simpler way, The Golden Rule may suffice: do unto others as you would have them do unto you. Or perhaps Josias Franklin’s teaching of young Benjamin Franklin that “what is not strictly honest can never be truly useful” (Weems, 1854, p. 12) would be supportive of the proposition for an honest business reason to know the thoughts of the spouse of an applicant for employment.

While universities are not outside sales agents, their business schools turn out thousands of graduated business professionals with bachelor degrees and MBAs. It is important for universities to set standards of ethical behavior that must be adhered to and a culture for all of the stakeholders. (Smith, 2002). Many graduates of these schools go on to be the interviewers in the hiring process for corporations.

Are universities more influenced by the deontology philosophy when it comes to job interviews? Cunningham (2007, p.154) argues that universities would be more ethically responsible, were they to use the philosophy of justice. While justice is associated with deontology, it is more specific in its goals. In hiring professors and staff, a university may target demographics of the candidate. If justice demands a more diverse demographic organization, would it be appropriate to ask an applicant whether or not they have a civil union, and if so may the interviewer ask to interview the significant other? Cunningham understands alternative views and invites discussion on university ethical philosophy. He asserts a dominant theory focuses on the end, i.e. to be the best university. (p. 158)

In his excellent and thought provoking article describing a good professor, J. Angelo Corlett (2005, p. 38) makes the case that deontology rules are paramount standards for a good professor. If deontology is the ethical foundation, then the hiring of good professors would likely follow the same basic concepts. If so, it is not surprising that some universities strictly forbid asking questions of applicants for employment about their marital status. The University of North Carolina's legal office forbids such questions (n.d.). In Purdue University's publication, *The Hiring Process* (2005), this example is given:

"In an actual university interview, an applicant was asked what his wife did for a living. He answered. 'What does my wife have to do with me and this job?'...These types of questions can be considered discriminatory, and you're asking them could cause legal problems. Here's the rule: If the question is not job related, don't ask it."

At the beginning of this article, I mentioned that a course on Business Ethics is difficult to teach. I have been giving students an ethical assessment at the beginning of my Business Ethics course. The fact situation is this issue about an employer asking an applicant for an outside sales position to interview the applicant's spouse. Approximately 80% of the students believe that there is some ethical problem with the request to interview the spouse. This first impression about ethics, prior to sitting through the course is interesting. The perception that the spousal interview is not right is given from many view points, i.e. it is illegal, it is discriminatory, it is an invasion of privacy, it is none of the employer's business, etc.

The women students in particular, took offense of the request to interview the husband spouse, when it was suggested that the woman was the applicant. Many felt it was asking the husband for permission to allow his wife to work. Many women stated that they would not work for an employer, who asked this question.

This unadulterated feeling of my students may be the general view of society. The overwhelming feeling that such an interview is unethical drives home the point that ethical or not, is it a good business practice for employers to impose upon the private realm of an applicant?

## **ADVICE FOR EMPLOYERS**

In the end, the perceptions of what is right or wrong are likely the practical guide to our question about interviewing an applicant/candidate's spouse in the hiring process.

Employers have dealt with the various Federal and State laws which deal with employment discrimination for years. Recently there has been a trend in the decisions of the United States Supreme Court (*Gross v. FBL Financial Services, Inc.*) to weaken the ability to successfully bring these discrimination suits against employers. For now, employers would be well advised to consider the legacy of forty years of implementation of these laws as just good business practice and continue the policies of the previous legal interpretations.

Employers do not make business decisions just to comply with laws and regulations. Culture and ethical values influence decisions as well. If a company has a caring culture, where employees are valued highly, asking a potential employee to provide the spouse for an interview seems to be counter-culture. Even a company which values production over its employees concerns may find this issue as counter-productive, particularly if it operates throughout the United States. The company is faced with many state laws that forbid asking marital questions of interviewees for employment. The burden of policing the interviewers from state to state with different policies does not help productivity.

According to Ciulla, Martin & Solomon (2011):

"Business often try to devise objective standards for hiring, salaries, firing, and promotion, but these standards do not always take into account the fact that fallible human beings implement them and apply them to a varied pool of people, some of them very different from themselves." (p. 2).

The recently enacted New York Marriage Equality Act (New York, Bill A08354 2011) which permits same-sex marriage, increases the number of jurisdictions that legalize same-sex marriage and civil unions. An employer who requests a spousal interview may be intruding further into the potential employee's private life. Should such applicant not be hired, it would be good evidence supporting a sexual orientation discrimination claim, in states, counties and cities which make this illegal.

In my Business Ethics class ethical assessment, I asked an additional question of whether an employee in a same-sex union should be required to provide his/her partner for the "spousal" interview. Nearly all of the students responded that if the employer required a spousal interview, then it should include an interview with the spouse of a same-sex union. Nearly all of the students also concluded that this was unethical, but required in order to be consistent with the company policy.

Just how far should an employer take our question? Should an inquiry be made about a "significant other"? If the issue that is to be vetted is whether there may be problems in the applicant's personal life because of the long hours and uncertain income in a sales position, and this could harm the employee's job performance, then the conclusion must be that the interview process extends further than legal marriage. Logical conclusions do not always make practical sense.

An article in *HR Magazine* (Wells, 2007) suggests employers may want to know about the marital status of employees in order to balance the inequities single individuals may see in the variant treatment of employees. If an employer provides more benefits/funding of benefits for married employees than for single employees, or if the employer permits a different work schedule for married employees to accommodate family needs, these may create problems in the work place. The question of marital status should be asked after employment to rectify these human resources concerns. Asking prior to employment continues to be problematic, while asking afterward may justify the business need to know.

## CONCLUSION

While many employers believe that there is good justification to ask for an interview of a prospective employee's spouse, certainly to interview every candidate's spouse for all kinds of jobs is not appropriate in any situation. The possible bad that can come from such a policy is evident: Is the employer really looking for insurance coverage requirements verging into disability discrimination? Could it be a desire to discriminate in employment based on gender? Without a business need to know, such questions are lurking in the background. If the job requires the applicant to move to another country and thus move the family, there is an obvious business need to know whether the applicant's spouse is prepared to make such move. In this circumstance interviewing the spouse appears appropriate.

Between these two ends is the general outside sales job. Whether it is ethical or unethical depends on personal and corporate culture values in answering the question about interviewing the applicant's spouse. Whether it is legal or illegal depends on the state law that is controlling. If there are other alleged violations of anti-discriminatory Federal employment law, the interview of the spouse of an applicant helps, evidentiary, make the case for discrimination.

It is likely that a spousal interview will create an ethical dilemma, which leaves the employer in a quandary. What may be the best answer is if it is not directly job related don't ask.

## ENDNOTES

1. The Supreme Court of the United States determined that Wal-Mart could not be sued in a class-action lawsuit for gender discrimination. The suit claimed that women at Wal-Mart were treated differently than men in pay and promotions. The Court did not reach the substantive claims, but rather ruled against the method of the lawsuit procedure, i.e. a huge class action suit. *Wal-Mart Stores, Inc. v. Dukes, et al.* (10-277) \_\_\_ US \_\_\_ (2011).

2. Alaska Statute §18.80.220; D.C. Code § 2-1402.11, Human Rights Act, Conn. General Statute § 46a-60(a)(1); Wisconsin Fair Employment Act §111.345; California Government Code § 12940-12951, *et al.*

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