



The Legalities in Considering Military Records for Pre-Employment Screening

Question:

I want to consider Military Records as part of my pre-employment screening policy. Are there any limitations to consider?

Response & Analysis:

Employers are permitted to ask limited questions related to an applicant's military service. Questions that are relevant to work experience and training received are permissible. However, an employer should not ask an applicant the reason they were discharged from the military. Employers can obtain information from military discharge papers (DD-214) on a limited basis, as explained in this paper, but said review should be related to the job. Military discharge questions have to be carefully asked, as such questions may result in obtaining medical disability information on an applicant - information protected by the Americans with Disabilities Act (ADA). Military discharge questions may also lead to disparate impact based upon race or violation of state military discharge anti-discrimination laws.

It is important that employers are able to obtain information about an applicant's military service; dates of military service; duties performed; rank during service at the time of discharge; pay during service and at the time of discharge; training received and work experience ("Permissible Military Information").

A veteran's discharge¹ type will be listed on their DD-214 Military Discharge Paperwork. The DD Form 214 is a Certificate of Release or Discharge from Active Duty. This documentation verifies a veteran's complete military history,

¹ A list of *Types of Military Service Discharges* appears at the end of this document.

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including full name used while in service, service number or Social Security number, branch of service, dates of service and additional information about the individual's military service. This form is provided to every service member of the U.S. Military upon discharge. The DD-214 is the most reliable documentation employers can secure and review regarding military discharge information.

If using a background check provider, Form DD-214 is considered a record that falls under the requirements of the Fair Credit Reporting Act (15 U.S.C. §1681), one of which mandates that the applicant provides authorization to the employer when requesting military records. The background check provider should only provide Permissible Military Information to employers that excludes information related to medical history or the nature of the discharge.

Court Martials

A General Court Martial is the most severe punishment that is set for each offense under the *Manual for Courts-Martial United States*. For certain offences, it can include death, confinement, a dishonorable or bad conduct discharge for enlisted personnel and several other forms of punishment. Before a case goes to a general court martial, a pre-trial investigation under *Article 32 of Uniform Code of Military Justice* is to be performed, unless waived by the accused.

Court Martials *may* appear in National Criminal Information Center (NCIC) searches via an FBI Fingerprint criminal history search. The Court Martial will always be part of the official military record in the DD-214 form, likely listed as a *Bad Conduct Discharge* or as a *Dishonorable Discharge*. Typically, the respective military service will enter this kind of information at the time of the sentence; however, if the military does not report it, the record is unlikely to appear in a background check. It is generally not advisable to seek Court Martial information outside of the DD-214 form given that employers are restricted from requesting the *reason* an applicant was discharged from the military.

Answer:

State and federal Equal Employment Opportunity (EEO) laws do not prohibit employers from asking about military discharge *types*. To obtain information about an applicant's military service, an employer is permitted, with consent, to make inquiries pertaining to dates of military service; duties performed; rank during service at the time of discharge; pay during service and at the time of discharge; training received and work experience. However, asking a veteran to reveal the *nature of their discharge* is considered private and not readily available to employers for use during the pre-employment process.

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Types of Military Service Discharges

Honorable Discharge: Issued to service members who have exceeded military standards for performance and personal conduct.

General Discharge: Issued to service members whose performance is satisfactory but not exemplary.

Other Than Honorable Conditions Discharge: The most severe type of military administrative discharge that is issued after actions such as security violations; violent behavior; conviction by a civilian court with a sentence, including prison time; or being found guilty of adultery in a divorce hearing. In most cases, veterans who receive such a discharge cannot obtain a security clearance or re-enlist in the armed forces or reserves or receive veteran benefits.

Bad Conduct Discharge (BCD): Issued only to enlisted service members after a court-martial as a result of punishment for bad conduct. This type of discharge is often preceded by time in military prison. Virtually all veteran benefits are forfeited after a BCD.

Dishonorable Discharge (DD): Issued to service members whose actions or conduct (e.g., murder or sexual assault) are deemed reprehensible by that branch of the military. Per federal law, those dishonorably discharged are not permitted to own firearms and must forfeit all military and veteran benefits.

Officer Discharge: Commissioned officers cannot receive a bad conduct discharge or dishonorable discharge, nor can they be reduced in rank by a court-martial. An officer who is discharged by a general court-martial receives a “dismissal notice,” which is the same as a dishonorable discharge.

Entry-Level Separation: Issued to individuals who leave the military before completing at least 180 days of service. ■

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