

Employment Tests and Selection Procedures

Employers often use tests and other selection procedures to screen applicants for hire and employees for promotion. There are many different types of tests and selection procedures, including cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks.

The use of tests and other selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job. However, use of these tools can violate the federal anti-discrimination laws if an employer intentionally uses them to discriminate based on race, color, sex, national origin, religion, disability, or age (40 or older). Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law.

On May 16, 2007, the EEOC held a public meeting on Employment Testing and Screening. Witnesses addressed legal issues related to the use of employment tests and other selection procedures. (To see the testimony of these witnesses, please see the EEOC's website at <http://eeoc.gov/eeoc/meetings/archive/5-16-07/index.html>.)

This fact sheet provides technical assistance on some common issues relating to the federal anti-discrimination laws and the use of tests and other selection procedures in the employment process.

Background

- Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act of 1967 (ADEA) prohibit the use of discriminatory employment tests and selection procedures.
- There has been an increase in employment testing due in part to post 9-11 security concerns as well as concerns about workplace violence, safety, and liability. In addition, the large-scale adoption of online job applications has motivated employers to seek efficient ways to screen large numbers of online applicants in a non-subjective way.
- The number of discrimination charges raising issues of employment testing, and exclusions based on criminal background checks, credit reports, and other selection procedures, reached a high point in FY 2007 at 304 charges.

Types of Employment Tests and Selection Procedures

Examples of employment tests and other selection procedures, many of which can be administered online, include the following:

- Cognitive tests assess reasoning, memory, perceptual speed and accuracy, and skills in arithmetic and reading comprehension, as well as knowledge of a particular function or job;
- Physical ability tests measure the physical ability to perform a particular task or the strength of specific muscle groups, as well as strength and stamina in general;

- Sample job tasks (e.g., performance tests, simulations, work samples, and realistic job previews) assess performance and aptitude on particular tasks;
- Medical inquiries and physical examinations, including psychological tests, assess physical or mental health;
- Personality tests and integrity tests assess the degree to which a person has certain traits or dispositions (e.g., dependability, cooperativeness, safety) or aim to predict the likelihood that a person will engage in certain conduct (e.g., theft, absenteeism);
- Criminal background checks provide information on arrest and conviction history;
- Credit checks provide information on credit and financial history;
- Performance appraisals reflect a supervisor's assessment of an individual's performance; and
- English proficiency tests determine English fluency.

Governing EEO Laws

- Title VII of the Civil Rights Act of 1964
 - Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin.
 - With respect to tests in particular, Title VII permits employment tests as long as they are not “designed, intended or used to discriminate because of race, color, religion, sex or national origin.” 42 U.S.C. § 2000e-2(h). Title VII also imposes restrictions on how to score tests. Employers are not permitted to (1) adjust the scores of, (2) use different cutoff scores for, or (3) otherwise alter the results of employment-related tests on the basis of race, color, religion, sex, or national origin. *Id.* at §2000e-2(l).
 - Title VII prohibits both “disparate treatment” and “disparate impact” discrimination.
 - Title VII prohibits **intentional** discrimination based on race, color, religion, sex, or national origin. For example, Title VII forbids a covered employer from testing the reading ability of African American applicants or employees but not testing the reading ability of their white counterparts. This is called “**disparate treatment**” discrimination. Disparate treatment cases typically involve the following issues:
 - Were people of a different race, color, religion, sex, or national origin treated differently?
 - Is there any evidence of bias, such as discriminatory statements?
 - What is the employer's reason for the difference in treatment?
 - Does the evidence show that the employer's reason for the difference in treatment is untrue, and that the real reason for the different treatment is race, color, religion, sex, or national origin?
 - Title VII also prohibits employers from using neutral tests or selection procedures that have the **effect** of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not “job-related and consistent with business necessity.” This is called “**disparate impact**” discrimination.

Disparate impact cases typically involve the following issues:

- Does the employer use a particular employment practice that has a **disparate impact** on the basis of race, color, religion, sex, or national origin? For example, if an employer requires that all applicants pass a physical agility test, does the test disproportionately screen out women? Determining

whether a test or other selection procedure has a disparate impact on a particular group ordinarily requires a statistical analysis.

- If the selection procedure has a disparate impact based on race, color, religion, sex, or national origin, can the employer show that the selection **procedure is job-related and consistent with business necessity**? An employer can meet this standard by showing that it is necessary to the safe and efficient performance of the job. The challenged policy or practice should therefore be associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants' or employees' skills, the challenged policy or practice must evaluate an individual's skills as related to the particular job in question.
- If the employer shows that the selection procedure is job-related and consistent with business necessity, can the person challenging the selection procedure demonstrate that there is a **less discriminatory alternative** available? For example, is another test available that would be equally effective in predicting job performance but would not disproportionately exclude the protected group?

See 42 U.S.C. § 2000e-2 (k). This method of analysis is consistent with the seminal Supreme Court decision about disparate impact discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

- In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures or "UGESP" under Title VII. See 29 C.F.R. Part 1607.¹ UGESP provided uniform guidance for employers about how to determine if their tests and selection procedures were lawful for purposes of Title VII disparate impact theory.
 - UGESP outlines three different ways employers can show that their employment tests and other selection criteria are job-related and consistent with business necessity. These methods of demonstrating job-relatedness are called "test validation." UGESP provides detailed guidance about each method of test validation.
- Title I of the Americans with Disabilities Act (ADA)
 - Title I of the ADA prohibits private employers and state and local governments from discriminating against qualified individuals with disabilities on the basis of their disabilities.
 - The ADA specifies when an employer may require an applicant or employee to undergo a medical examination, *i.e.*, a procedure or test that seeks information about an individual's physical or mental impairments or health. The ADA also specifies when an employer may make "disability-related inquiries," *i.e.*, inquiries that are likely to elicit information about a disability.
 - When hiring, an employer may not ask questions about disability or require medical examinations until **after** it makes a conditional job offer to the applicant. 42 U.S.C. §12112 (d)(2);
 - After making a job offer (but before the person starts working), an employer may ask disability-related questions and conduct medical examinations as long as it does so for **all individuals entering the same job category**. *Id.* at § 12112(d)(3); and
 - With respect to **employees**, an employer may ask questions about disability or require medical examinations only if doing so is **job-related and consistent with**

business necessity. Thus, for example, an employer could request medical information when it has a **reasonable belief**, based on **objective evidence**, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition, or when an employer receives a request for a **reasonable accommodation** and the person's disability and/or need for accommodation is not obvious. *Id.* at § 12112(d)(4).

- The ADA also makes it unlawful to:
 - Use employment tests that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test, as used by the employer, is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(b)(6);
 - Fail to select and administer employment tests in the most effective manner to ensure that test results accurately reflect the skills, aptitude or whatever other factor that such test purports to measure, rather than reflecting an applicant's or employee's impairment. *Id.* at § 12112(b)(7); and
 - Fail to make reasonable accommodations, including in the administration of tests, to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such accommodation would impose an undue hardship. *Id.* at § 12112(b)(5).
- The Age Discrimination in Employment Act (ADEA)
 - The ADEA prohibits discrimination based on age (40 and over) with respect to any term, condition, or privilege of employment. Under the ADEA, covered employers may not select individuals for hiring, promotion, or reductions in force in a way that unlawfully discriminates on the basis of age.
 - The ADEA prohibits **disparate treatment** discrimination, i.e., intentional discrimination based on age. For example, the ADEA forbids an employer from giving a physical agility test only to applicants over age 50, based on a belief that they are less physically able to perform a particular job, but not testing younger applicants.
 - The ADEA also prohibits employers from using neutral tests or selection procedures that have a **discriminatory impact** on persons based on age (40 or older), unless the challenged employment action is based on a **reasonable factor other than age**. *Smith v. City of Jackson*, 544 U.S. 228 (2005). Thus, if a test or other selection procedure has a disparate impact based on age, the employer must show that the test or device chosen was a reasonable one.

Recent EEOC Litigation and Settlements

A number of recent EEOC enforcement actions illustrating basic EEO principles focus on testing.

- **Title VII and Cognitive Tests: Less Discriminatory Alternative for Cognitive Test with Disparate Impact.** *EEOC v. Ford Motor Co. and United Automobile Workers of America*, involved a court-approved settlement agreement on behalf of a nationwide class of African Americans who were rejected for an apprenticeship program after taking a cognitive test known as the Apprenticeship Training Selection System (ATSS). The ATSS was a written cognitive test that measured verbal, numerical, and spatial reasoning in order to evaluate mechanical aptitude. Although it had been validated in 1991, the ATSS continued to have a statistically significant disparate impact by excluding African American applicants. Less discriminatory selection procedures were subsequently developed that would have served Ford's needs, but

Ford did not modify its procedures. In the settlement agreement, Ford agreed to replace the ATSS with a selection procedure, to be designed by a jointly-selected industrial psychologist, that would predict job success and reduce adverse impact. Additionally, Ford paid \$8.55 million in monetary relief.

- **Title VII and Physical Strength Tests: Strength Test Must Be Job-Related and Consistent with Business Necessity If It Disproportionately Excludes Women.** In *EEOC v. Dial Corp.*, women were disproportionately rejected for entry-level production jobs because of a strength test. The test had a significant adverse impact on women – prior to the use of the test, 46% of hires were women; after use of the test, only 15% of hires were women. Dial defended the test by noting that it looked like the job and use of the test had resulted in fewer injuries to hired workers. The EEOC established through expert testimony, however, that the test was considerably more difficult than the job and that the reduction in injuries occurred two years before the test was implemented, most likely due to improved training and better job rotation procedures. On appeal, the Eighth Circuit upheld the trial court's finding that Dial's use of the test violated Title VII under the disparate impact theory of discrimination. See <http://www.eeoc.gov/press/11-20-06.html>
- **ADA and Test Accommodation: Employer Must Provide Reasonable Accommodation on Pre-employment Test for Hourly, Unskilled Manufacturing Jobs.** The EEOC settled *EEOC v. Daimler Chrysler Corp.*, a case brought on behalf of applicants with learning disabilities who needed reading accommodations during a pre-employment test given for hourly unskilled manufacturing jobs. The resulting settlement agreement provided monetary relief for 12 identified individuals and the opportunity to take the hiring test with the assistance of a reader. The settlement agreement also required that the employer provide a reasonable accommodation on this particular test to each applicant who requested a reader and provided documentation establishing an ADA disability. The accommodation consisted of either a reader for all instructions and all written parts of the test, or an audiotope providing the same information.

Employer Best Practices for Testing and Selection

- Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability.
- Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. The test or selection procedure must be job-related and its results appropriate for the employer's purpose. While a test vendor's documentation supporting the validity of a test may be helpful, the employer is still responsible for ensuring that its tests are valid under UGESP.
- If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure. For example, if the selection procedure is a test, the employer should determine whether another test would predict job performance but not disproportionately exclude the protected group.
- To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly.
- Employers should ensure that tests and selection procedures are not adopted casually by managers who know little about these processes. A test or selection procedure can be an effective management tool, but no test or selection procedure should be implemented without

an understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored.

- For further background on experiences and challenges encountered by employers, employees, and job seekers in testing, see the testimony from the Commission's meeting on testing, located on the EEOC's public web site at: <http://eeoc.gov/eeoc/meetings/archive/5-16-07/index.html>.
 - For general information on discrimination Title VII, the ADA and the ADEA see EEOC's web site at <http://www.eeoc.gov/laws/statutes/index.cfm>
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Footnote

¹The Departments of Labor and Justice and the Office of Personnel Management (then called the Civil Service Commission) issued UGESP along with the EEOC.

Last modified on September 23, 2010.