



HR ADVISOR

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EEOC Issues Guidance on Employment Tests and Selection Procedures

The Equal Employment Opportunity Commission ("EEOC") recently issued extensive guidance on the application of federal anti-discrimination laws to tests and other selection procedures ("tests") used by employers to screen applicants for hire and employees for promotion. The following is an overview of that guidance and some related regulations applicable to most U.S. employers.

There are many different types of tests and selection procedures including interviews, cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks. Employers often use such tests, which technically could include every step in the recruitment or promotion process, as tools to identify the best qualified candidates for a particular job. However, the use of such tools can also violate the following federal anti-discrimination laws, either intentionally or unintentionally:

1. Title VII of the Civil Rights Act of 1964 ("Title VII") - Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin. With respect to tests in particular, Title VII permits them as long as they are not "designed, intended, or used to discriminate" Title VII prohibits both intentional discrimination ("*disparate treatment*") and unintentional discrimination ("*disparate impact*").

Disparate treatment discrimination occurs when an employer intentionally uses a selection procedure to discriminate on the basis of race, color, sex, national origin, religion, disability, or age (collectively "protected group members").

Disparate impact discrimination occurs when

an employer permits a selection procedure to be used in a manner that unintentionally results in the disproportionate exclusion of protected group members, where the selection procedures are not "job-related and consistent with business necessity."

Example of prohibited *disparate treatment*: Title VII prohibits a covered employer from testing the reading ability of African American applicants or employees, but not testing the reading ability of Caucasian applicants or employees. (HR Advisor tip: all selection procedures should be consistently administered to all applicants for a particular job.)

Example of prohibited *disparate impact*: Title VII also prohibits employers from permitting otherwise neutral tests (such as police record checks) from being used if they have the effect of disproportionately excluding protected group members, where the tests are not "job-related and consistent with business necessity."

How are *disparate treatment* and/or *disparate impact* identified? In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures ("UGESP") under Title VII. UGESP provides uniform guidance for employers about how to determine if their tests and selection procedures are lawful for purposes of Title VII.

UGESP outlines ways employers can demonstrate their employment tests and other selection criteria are job-related and consistent

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with business necessity. These methods are called "test validation," and UGESP provides detailed guidance about each method. The following are examples:

- "Each (test) user should maintain and have available for inspection records or other information which will disclose the impact its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group in order to determine compliance with these guidelines."
- "The records called for by this section are to be maintained by sex and ethnic group consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure the records required by this paragraph are used for appropriate purposes, such as determining *adverse impact* (defined below)." (HR Advisor tip: keep a log of all applicants for employment including name, date applied, position applied for, ethnic identification, gender, and disposition.)
- "If the information called for by this section shows the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for *adverse impact*. In the following circumstances, the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: a) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, or b) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or arrest records) is not job related in the same or similar circumstances."
- *Adverse impact* defined: "A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5 – or eighty percent) of

the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of *adverse impact*, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of *adverse impact*." (HR Advisor tip: Employers need to know and periodically check their test results for compliance with this very important measurement, referred to as the "four-fifths rule.")

- "Where the user has not maintained data on *adverse impact* as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of *adverse impact* of the selection process from the failure of the user to maintain such data, if the user has *underutilization* of a protected group in the job category as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within the applicable work force."
2. Title I of the Americans with Disabilities Act (ADA) ("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. Among the ADA's requirements are:
- The ADA specifies when an employer may require an applicant or employee to undergo a medical examination and/or when an employer may make "disability-related inquiries."
 - 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. Ref. 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. Ref. 42 U.S.C. § 12112(d)(3)

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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." Ref. 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." Ref. 42 U.S.C. § 12112(b)(7)
- "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." Ref. 42 U.S.C. § 12112(b)(5).

3. The Age Discrimination in Employment Act ("ADEA") - ADEA prohibits discrimination based on age (40 and over) with respect to any term, condition, or privilege of employment.

- The ADEA prohibits *disparate treatment* discrimination, based on age. For example, the ADEA forbids an employer from giving a physical agility test only to applicants over age 40.
- 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. Thus, if a test or other selection procedure has a *disparate impact* based on age, the employer must show the test or device chosen was a reasonable one.

A number of recent EEOC enforcement actions illustrate the importance of knowing, understanding, and ensuring compliance with

these regulations. Examples include EEOC v. Ford Motor Co. and United Automobile Workers of America, EEOC v. Dial Corporation, and EEOC v. Daimler Chrysler Corporation.

The following are some "Best Practices" for complying with the UGESP Testing and Selection guidelines:

- Take steps to ensure tests and other selection procedures are administered without regard to race, color, national origin, sex, religion, age (40 or older), or disability.
- Ensure employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. A 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 its tests are valid under UGESP.
- If a selection procedure screens out a protected group, 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, determine whether another test would predict job performance but not disproportionately exclude protected group members.
- To ensure that a test or selection procedure remains predictive of success in a job, keep abreast of changes in job requirements and update the test specifications or selection procedures accordingly.
- Ensure 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.

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Why did the EEOC feel updated guidance was needed?

Due in part to post 9-11 security concerns as well as concerns about workplace violence, safety, and liability, there has been an increase in employment testing. 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 Fiscal Year 2007 - 304 charges! EEOC's updated guidance was, in part, reacting to this increased activity.

North Carolina Mental Health Equitable Coverage Law ("MHECL", "the Act")

North Carolina enacted a new law, House Bill 973, on July 1, 2008. The new law is designed to prohibit discrimination by group health insurance plans on the basis of mental illness. Insurers are now required to:

1. "Provide for the necessary care and treatment of mental illnesses that are no less favorable than benefits for physical illness generally, including application of the same limits."
2. "Provide at least the following minimum number of office visits and combined inpatient and outpatient days for all mental illnesses and disorders (with certain exceptions):
 - Thirty combined inpatient and outpatient days per year.
 - Thirty office visits per year.
 - Durational limits for the following mental illnesses subject to the same limits as benefits for physical illness generally: Bipolar Disorder, Major Depressive Disorder, Obsessive Compulsive Disorder, Paranoid and other Psychotic Disorders, Schizophrenia, Post-Traumatic Stress Disorder, Anorexia nervosa, and Bulimia.

The MHECL also requires minimum coverage as follows:

- Mammograms and pap smears;
- Prostate-specific antigen ("PSA") tests or equivalent tests for the presence of prostate cancer;
- Reconstructive breast surgery resulting from a mastectomy;
- For qualified individuals, scientifically proven bone mass measurement for the diagnosis and evaluation of osteoporosis or low bone mass;
- Prescribed contraceptive drugs or devices that prevent pregnancy and are approved by the U.S. Food and Drug Administration for use as contraceptives, or outpatient contraceptive services; and
- Colorectal cancer examinations and laboratory tests.

The Act applies to health benefits plans that are delivered, issued for delivery, or renewed on or after the July 1, 2008 effective date.

About *HR Advisor*:

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