



**EEOC ISSUES NEW FACT SHEET ON EMPLOYMENT
TESTING AND SELECTION PROCEDURES**

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According to old adage, “the best way to avoid a legal claim from a disgruntled employee is to not have hired them in the first place.” How often have we discovered, after the fact, that a new employee has long-standing propensities for absenteeism or workplace injuries, or emotional or psychological issues that create serious safety concerns, or exhibits other behaviors or has a less than stellar work history that could or should have been detected with a more thorough hiring process?

In this post-911 world, safety and security concerns, immigration concerns, rising workers compensation costs, rising health plan costs, increasing training costs, increasing numbers of employee lawsuits, new claims of “negligent hiring” and the need for ever-more efficient and competent workforces (often existing in “lean” personnel environments) have required employers to significantly improve and expand their scrutiny of job applicants, regardless of how desperate the need to fill the position.

To meet this need, a multitude of procedures and options have been developed to assist employers in hiring proper talent for an open position. The primary goal remains to hire a candidate who is the most qualified -including mentally, scholastically, physically and otherwise, and who presents the lowest risk of injury to themselves or others. Examples of

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these options include criminal, personal, educational, and work background checks, drug tests, credit reports, physical and medical examinations, reading, writing and other cognitive tests, personality and integrity tests, tests requiring applicants to perform sample job tasks and other procedures to ensure their hiring goals are properly met. (Some employers have even considered genetic testing – a futuristic concept that has resulted in various laws banning the practice).

With the advent of these new pre-hire strategies, the Equal Employment Opportunity Commission has become concerned that some options may directly or indirectly exclude certain classifications of job applicants, most notably women, minorities and applicants with disabilities. These concerns have led to a number of lawsuits challenging several common pre-hire processes. In connection with those lawsuits and its heightened concerns, the EEOC has issued a new “Employer Fact Sheet” (found at www.eeoc.gov) which discusses the legalities of pre-employment testing and recruitment procedures. This article discusses the “Fact Sheet” and emphasizes the need for every employer to re-evaluate its hiring procedures to ensure that they are compliant with the complicated laws surround those procedures.

1. Intent to discriminate: The first rule is that an employer cannot administer any pre-hire test, examination or other procedure that has the goal of discriminating against a protected classification, such as older workers, female workers, minorities, or individuals with disabilities. This is prohibited conduct under Title VII, the ADA, the ADEA, and other state and federal laws. Thus, if you are creating a testing or prehire process in order to avoid hiring older workers, workers with a medical condition or female workers for a job that may have extensive physical duties associated with it – that is unlawful. Such unlawful intentions may be established if the test or examination does not directly relate to or reflect actual job duties,

or if the test or examination is given or designed in a way that the test process itself makes satisfactory completion more difficult for those groups of applicants.

2. Unintentional Discrimination (Disparate Impact). Even if a test, examination or background investigation process is facially neutral, the results of administering the test or examination can have an unequal consequence on certain protected classifications. If it does, the employer can again find itself in dire legal straits. Take the case of the Armour Star sausage plant in Fort Madison Iowa (referenced in the EEOC Fact Sheet). Many of the jobs in the sausage plant included strenuously physical tasks, primarily overhead lifting and carrying. The company, attempting to mirror the actual job requirements, required job applicants to demonstrate that they could lift 35 pounds to a height of just over 5 feet. The company felt that the test would be an objective way to measure applicant's abilities to perform the strenuous jobs, and to assist in reducing workplace injuries. Unfortunately, after the tests were implemented, the percentage of female new hires fell from 46% to 15%. One of the female applicants filed a complaint, and the Milwaukee EEOC office pursued a lawsuit against the company and received a \$3.3 million award in favor of the rejected female applicants.

This case presents a major lesson for Green Bay SHRM members in a number of respects. First, by all accounts the company was attempting to mirror the actual job duties; however the court felt that the test was just a bit more difficult than the actual job. Thus, it is critical that any physical testing be reviewed to see how closely it mirrors actual job functions. Second, the Court challenged the company to prove an actual reduction of workplace injuries after the test. Unfortunately, as most of us know, injury reduction must be measured on a long term basis. Because of the timing of the case, the employer was not able to statistically demonstrate success in the goal of injury prevention. Third, there was no claim that the

company's motives were unlawful – and no evidence that the company intended to discriminate against female applicants. Yet, the company had to pay unqualified job applicants a total of \$3.3 million, an extremely costly punishment for an unintentional act. The magnitude of the verdict demonstrates the need to continuously perform disparate impact testing in relation to every pre-employment process used by your company. Finally, Green Bay SHRM members should take note that it was the Milwaukee EEOC office that secured the victory for the applicants. Thus, we can expect our local office to be very critical of any pre-employment testing or examinations brought to its attention by disgruntled job applicants.

3. Cognitive Tests. In another recent case, Ford Motor Company paid a settlement of \$8.55 million to a class of rejected job applicants who failed a cognitive test measuring verbal, numerical, and spatial reasoning to evaluate mechanical aptitude. Successful applicants were admitted into an apprenticeship program that ultimately led to high-paying skilled jobs. The tests were shown to have a disparate impact against African-Americans who took the test. Besides the enormity of the award, another compelling twist to this case was that the test had been validated under applicable government standards in 1991. However, the EEOC claimed that since the initial validation, less discriminatory testing procedures had been developed that would have involved equal testing criteria, but less of an impact on African Americans. However, Ford had never updated its testing procedures. Ford, of course, likely had substantial sums of money invested in its original testing procedures, which had been fully validated, and changing those procedures within a few years of implementation would have involved significant modifications of its procedures and new investments in tests and training of testers. This case reminds employers of their duty to continually update their tests and continually test for disparate impact results.

4. Validation Criteria. The new EEOC Fact Sheet also reminds employers of the need to validate any testing or examination process using the Uniform Guidelines on Employee Selection Procedures (UGESP). These Guidelines were developed in 1978, but are still the applicable standard for test validation today. (Several experts have requested EEOC to update the Guidelines, arguing that they are overly complicated to understand and apply, and use outdated principals, but the EEOC has re-affirmed the continued enforceability of the Guidelines). Green Bay SHRM members should ensure that they have applied the Guidelines to any testing or examination procedures currently being used, or, if their testing or examination are purchased from or applied by outside vendors, that they receive a written certification from the vendors that the Vendor has applied the 1978 Guidelines to validate the tests or examinations. Even with such validation, continued disparate impact testing remains a requirement.

5. Credit Reports. In the public hearings that preceded the new EEOC Fact Sheet, EEOC experts and employee rights advocates continued their criticism of the use of credit reports as a prehire procedure. Experts contended that there is no statistical proof that poor credit reports bear any relevance to poor job performance, even for job positions that involve the handling of money. Experts contended that the use of credit reports frequently result in disparate impact on minorities and applicants with disabilities, who may have trouble making financial ends meet, or even female applicants or immigrant applicants who have not yet established a credit history. Applicants may not be aware of their credit history, and may not be told why their applications are being rejected by a prospective employer, while employers can obtain such reports at a nominal cost. Green Bay SHRM members who rely on such reports while making employment decisions should be aware of the significant legal risk

associated with that procedure.

6. ADA restrictions on Medical Examinations. The Fact Sheet also reminds employers that the Americans with Disabilities Act restricts the use of medical examinations until after a bona fide job offer has been made, and requires that the exam be applied to all individuals entering the same job category. Once again, disparate impact testing should be performed to ensure that the test is not unintentionally screening out qualified applicants who just happen to have some form of disability. In addition, the EEOC warns that a variety of tests might qualify as a “medical examination”, even though the test might be offered for another purpose. For example, some tests believed to be cognitive tests, were found to qualify as “medical examinations” when tests scores were analyzed using the Minnesota Multiphasic Personality Inventory (MMPI). Employers should review all forms of examinations to determine whether they qualify as “medical examinations”, and if so they should ensure that they are administered only post-offer in conformance with the ADA regs.

In summary, the issuance of the new EEOC Fact Sheet should send a strong signal to HR professionals to scrutinize all pre-hire procedures to ensure that there is no evidence of direct discrimination, to ensure that there is no disparate impact resulting from the tests, to ensure that the tests and examinations have been properly validated under the 1978 Guidelines, and that the tests and examinations satisfy the other legal concerns reflected in the Fact Sheet. Moreover, this analysis should be performed annually, to ensure that tests and examinations do not become outdated. The consequences of an improper test procedure can be catastrophic, as several unfortunate employers have recently discovered. Lets not find ourselves in their shoes.