

## **EEOC ISSUES GUIDANCE ON EMPLOYMENT TESTING**

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The Equal Employment Opportunity Commission (EEOC) released a fact sheet which provides employers guidance on employment related testing and selection methods.

Many employers use employment tests and other selection procedures in making employment decisions. According to the EEOC, examples—and what they measure—include:

- 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.

In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures (UGESP).

The UGESP outline different ways employers can show that their employment tests and other selection criteria are job-related and consistent with business necessity. These methods are

generically called “test validation.” Test validation is complex and is usually performed by experts.

Employers may rely upon “criterion-related” validity studies, “content” validity studies or “construct” validity studies, in accordance with the standards set forth in the technical standards of the UGESP. Evidence of the validity of a test or other selection procedure by a criterion related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated.

Various laws may affect testing and other selection procedures. Title VII of the 1964 Civil Rights Act prohibits intentional discrimination based on race, color, religion, sex, or national origin. 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. Employers are not permitted to (1) adjust test scores, (2) use different cutoff scores, or (3) otherwise alter the results of employment-related tests on the basis of 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.”

A test or selection procedure is job-related and consistent with business necessity if it is necessary to the safe and efficient performance of the job. The test or procedure should therefore be associated with the skills needed to perform the job successfully.

The Americans With Disabilities Act (ADA) 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 is shown to be job-related and consistent with business necessity.
- 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.

The Age Discrimination in Employment Act (ADEA) also prohibits disparate treatment. 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.

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.

Based on the foregoing, employees should consider the following “best practices” in evaluating and using tests and other selection criteria.

- No test or selection procedure should be implemented without understanding its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored.
- Ensure that employment tests and other selection procedures are properly validated.
- Administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability.
- 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.
- Keep abreast of changes in job requirements and update the test specifications or selection procedures accordingly.