Pre-Employment Testing

The Legal Overview of Testing

Pre-employment testing has become a widely accepted practice. Such testing is regulated by both federal and state employment laws. These laws strictly limit the type of testing that may be conducted, as well as when testing is allowed, how pre-employment testing may be conducted, and whether job offers can be rescinded based upon test results.

If a pre-employment test has a disparate impact on groups protected by Title VII, the test may only be used if it is "job-related and consistent with business necessity." If there is no disparate impact on any particular protected group, a test generally may be used regardless of validity or job-relatedness. Numerous Title VII cases suggest, however, that such testing, regardless of employer intent, often has an adverse impact on minorities. *See, e.g., Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *cert. dismissed*, 393 U.S. 801 (1968), *aff'd, Smuck v. Hobson,* 408 F.2d 175 (1969).

As mentioned above, when a particular test has a disparate impact on a protected class, an employer can avoid liability under Title VII by proving the business necessity defense, i.e*.,* by demonstrating that the test accurately predicts successful job performance. The burden of proof necessary to demonstrate that a particular test predicts successful job performance varies by jurisdiction. No matter what standard is followed, however, employers will be required to demonstrate that they meet the applicable standard using validated, relevant studies and evidence. Validation studies must be conducted in a professionally acceptable manner, preferably by a professional who is familiar with the EEOC's Uniform Guidelines and other applicable legal principles.

Because of the highly technical nature of test validation, courts have struggled to strike some balance between protecting the rights of individuals excluded from employment by tests that are not job-related and allowing employers to conduct reasonable testing. Thus, while the courts have indicated that the Uniform Guidelines are to be given weight in determining whether validation is proper, they have also noted that deviations from the Uniform Guidelines may be acceptable in certain circumstances.

Medical Examinations

The federal and state fair employment laws limit an employer's ability to ask for medical information during the hiring process, especially before a conditional offer has been extended to the job applicant. The federal Americans with Disabilities Act ("ADA"), for example, prohibits employers from requiring medical examinations prior to offering employment, except for examinations conducted to establish current illegal drug use. This prohibition reflects the belief that results from such pre-employment examinations and inquiries frequently are used to exclude disabled

applicants from jobs without consideration of whether they are truly able to perform the essential job functions.

Notwithstanding the foregoing, the ADA recognizes that employers may need to conduct physical examinations to determine whether an applicant can perform certain jobs safely and effectively. Accordingly, an employer may condition a job offer on the satisfactory result of a post-offer physical examination. An employer may not refuse to hire a person who has been extended a conditional offer of employment based upon the results of a medical examination unless the reason is job-related and justified by business necessity, however. Moreover, all prospective employees must undergo the same examination, regardless of disability, except that the employer may limit examinations to appropriate categories of employees based on legitimate business reasons.

Drug Tests

Many employers require job applicants to successfully pass pre-employment drug tests as a condition of hire. Private employers generally have wide latitude to conduct pre-employment drug testing, although a few states require that job applicants be extended a conditional offer of employment before being asked to submit to such a test.

The Americans with Disabilities Act ("ADA") prohibits pre-employment medical examinations before a conditional offer of employment has been extended. A test to determine whether an applicant is illegally using drugs is specifically exempted from the definition of what constitutes a medical examination, however. In contrast, pre-employment *alcohol testing* is considered a medical examination, and thus can be conducted only after an employer has extended the applicant a conditional offer of employment.

Drug tests also implicate employee privacy interests. Indeed, many of the California cases construing the right to privacy in the workplace have involved drug testing. Accordingly, it is imperative that the intrusiveness of any testing procedure be minimized. Finally, employers must be careful to implement the same testing program for all applicants or applicants in a particular category, in order to avoid any implication of discrimination.

Polygraphs and Other Honesty Tests

The federal Employee Polygraph Protection Act ("the EPP") imposes severe restrictions on the use of lie detector tests, effectively eliminating the use of polygraph testing as a pre-employment screening mechanism. 29 U.S.C. §§ 2001-2009. The EPP prohibits most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph or lie detector test, and from using the results of such tests. The Act further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant: (1) for refusing to take a lie detector test; (2) based on the results of such a test; or (3) for taking any actions to preserve employee rights under the Act.

It is important to note that the EPP only prohibits mechanical or electrical devices, not paper-and-pencil tests, chemical testing, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. Chemical testing is specifically excluded from the definition of lie detector, so as to affirmatively permit

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the use of medical tests to determine the presence of drugs or alcohol in an individual's bodily fluids.

The EPP contains several limited exceptions to the general ban on polygraph testing. For example, the Act permits the testing of prospective employees of certain security guard firms. Also, there is an exemption for employers who manufacture, distribute, or dispense controlled substances. A third exception, and the only exception applicable to most private employers, permits a covered employer to test current employees who are reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. Obviously, this exemption only applies once an employment relationship has been established, and then, only if a variety of strict requirements have been satisfied.

Employers are required to post a notice informing employees and prospective employees of their rights under the EPP in a prominent and conspicuous place customarily used to display such notices. A copy of the notice will be sent to employers by the Department of Labor upon request or may be obtained from local offices of the Wage and Hour Division of the Department of Labor.

Employers who violate the Act are subject to a civil penalty in an amount not to exceed $10,000 per violation. Moreover, employees or applicants who have been unlawfully subjected to a lie-detector test or who are otherwise adversely affected by an employer's violation of the Act may bring a civil suit within three years of a violation.

Most states have enacted statutes that mirror the federal law. Some of these states place greater restrictions on testing by prohibiting lie detector or similar" tests. These similar tests may include pencil-and-paper and honesty tests. Massachusetts, for example, specifically prohibits written honesty examinations.

Genetic Tests

A relatively recent development in the area of applicant and employee testing is the use of genetic screening. Proponents of these tests contend that they help to prevent certain occupational diseases by identifying workers who are unusually susceptible. Opponents of such screening argue that denying employment on the basis of genetic factors may have a disproportionate impact on selected racial and ethnic groups.

While genetic screening is clearly still in its infancy, the courts and state legislatures are beginning to set the boundaries for permissible genetic screening. Labor laws, privacy laws, health and safety laws, and discrimination laws may all pose problems for genetic screening.

In 2000, President Clinton signed an executive order prohibiting federal agency employers from requiring or requesting genetic tests as a condition of being hired or receiving benefits. To date, no federal legislation regulating the use of genetic information by private employers has been enacted, although language has been introduced and debated for a few years.

The Ninth Circuit weighed in on the propriety of genetic testing in *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998). The court found that a national research laboratory, run by the University of California, violated employees' state and federal privacy rights, specifically the constitutionally protected privacy interest in avoiding disclosure of personal matters, when it tested workers for genetic disorders, venereal disease, and pregnancy. Employees at the laboratory

submitted to blood and urine tests but were never informed that the samples would be tested for pregnancy or other personal maladies. The court found that these tests, in and of themselves, gave rise to Title VII claims because only African-Americans were subjected to testing for sickle-cell anemia, and only women were subjected to the pregnancy testing. The court also made it clear that federal privacy rights require that if an employer is going to test for medical conditions, the employer must have the consent of the employee, even if the testing is intended to protect the employee.

Over 30 states have enacted some form of genetic privacy and/or antidiscrimination statute. Massachusetts, for example, has enacted a broad statute banning disclosure of genetic testing results without informed consent. The legislation further identifies genetic information as a characteristic protected under the Massachusetts Law Against Discrimination. Outside of the employment context the law prohibits requirements that consumers take or disclose the results of genetic tests in order to obtain insurance.

Another example is a Minnesota statute prohibiting employers from using genetic testing in employment-related decisions. The law is modeled after Rhode Island legislation and prohibits employers from administering genetic tests to their workers. While violations will not result in criminal prosecutions, aggrieved employees can seek civil penalties up to three times their actual damages, punitive damages and attorneys' fees and costs. Minn. Stat. § 181.97.