

Is Pre-Employment Testing Legal?

Every so often, HR professionals and managers who are not familiar with testing ask us this question. The answer actually has several aspects. This tip sheet briefly answers the question as well as other legal questions that we frequently receive.

- **Is testing legal?**

Yes, it is. No federal, state or local law prohibits the proper use of pre-employment tests.

However, U.S. law prohibits discrimination against anyone on the basis of personal qualities that aren't job related. In particular, Title VII of the 1964 Civil Rights Act forbids discrimination on the basis of race, gender, color, creed or national origin. Besides these restrictions, the 1967 Age Discrimination in Employment Act makes it illegal to discriminate against anyone age 40 or older. The amended Americans with Disabilities Act (2009) forbids an employer from discriminating against anyone because of an actual or believed disability. In short, personal characteristics cannot be the basis for failing to hire a job candidate who is otherwise qualified.

- **What should an employer know about testing?**

The relevant U.S. regulations are the federal agencies' Uniform Guidelines on Employee Selection Procedures (1978). The Uniform Guidelines require employers to monitor the adverse impact of their complete selection process. If the entire process excludes some job candidates at a higher rate than it does other people, then there is evidence of adverse impact. An adverse impact finding requires an employer to study the details of its process and to change or eliminate any step that causes discrimination.

- **What is adverse impact and how do you determine it?**

Adverse impact happens when job applicants in

a legally protected class, for example women or racial minorities, are hired at a lower rate than non-protected classes. The threshold is 80% of the majority hiring rate, or the "4/5ths rule."

Here's an example. If an employer sees 10 Caucasian applicants for a job and hires 8, their "selection ratio" is 8/10, or 80%. That becomes the decision standard. Minority applicants should be hired at a rate at least 80 percent (or 4/5ths) as high. So, this employer's minority selection ratio should at minimum be 80% of the 80% majority hiring rate, or 64% (80% times 80% equals 64%). If the employer receives 5 African American applicants and hires 4, that selection ratio is 80%. There is no problem. On the other hand, if they only hire 3 of 5 African American candidates, the selection ratio falls to 60% (3 of 5) and there is adverse impact. The employer then is responsible for determining what the causes are, and must change any part of their hiring process that contributes to that lower hiring rate. Changes might include such things as advertising in different neighborhoods, changing educational requirements, or instituting a new interviewing procedure.

- **What can an employer do to avoid adverse impact?**

If testing during the selection process creates adverse impact, the employer must provide evidence that its test, or tests, are valid. Validity is a demonstration through research that test results are related to job performance. There are a number of ways to demonstrate validity, but these are outside of the scope of this edition. Speak with one of our psychologists to learn more.

Ideally, the employer already has conducted a job analysis to objectively determine that what the test measures is important for job performance. There also are different types of job analysis that PSI can describe for you.

- **Are any particular types of tests more likely to have adverse impact? What about personality tests?**

Reasoning and intelligence tests often result in lower average scores for African Americans. These should be used with caution and should be supported with validity evidence. Physical ability tests such as strength can discriminate against female candidates and also should be considered carefully before put into use. Any test that measures reading and writing skills can discriminate against someone whose native language is not English. Job analysis research can determine how important each of these skills is for successful performance. Then an employer can look for valid tests, if needed.

Personality tests in general meet the 4/5ths rule according to a recent independent professional review of the research on employment testing. Studies of the 16pf® Questionnaire indicate that there are only minor differences between the scores for majority group members and women, minorities, or people over 40. There is also substantial validity evidence that 16pf Questionnaire scores, and personality tests in general, predict job performance.

Pre-employment testing is legal. It is important to understand both the law and U.S. testing guidelines, however, to minimize the risk of unintentional discrimination. PSI recommends that the results of any assessment be used as only one source of job candidate information, and encourages employers to carefully examine all relevant information about a candidate before making a hiring decision.