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# Putting Your Employment Tests To The Test

Law360, New York (March 06, 2013, 11:52 AM ET) -- With the rise of online application systems and increased competition for jobs, many employers have sought out and implemented pre-employment testing in recent years. One of the key advantages of effective employment tests is that they efficiently "screen out" candidates who lack the knowledge, skills and abilities necessary to perform a specific job and "screen in" those individuals most likely to succeed.

Employment tests can also help employers identify current employees for promotion. As one would expect, this increased demand for testing tools has led to the establishment of a sizeable test development industry.

As employment testing has become more prolific and, in many ways, more sophisticated, the use of such tests by employers has also faced increased scrutiny, especially from the Equal Employment Opportunity (EEO) enforcement agencies (e.g., Equal Employment Opportunity Commission and Office of Federal Contract Compliance Programs). In fact, employers frequently face lawsuits for using a test that allegedly discriminates against individuals based upon protected characteristics such as race or gender.

The number of charges of discrimination stemming from employment testing and prescreening background checks filed with the EEOC reached a high point in 2007 (the last year with available statistics on these specific charges) when 304 charges were filed.[1] Furthermore, the number of charges filed with the EEOC in total has steadily increased since then, with 82,792 charges filed in 2007 and 99,412 charges filed in 2012.[2]

## Testing the Test

As a result of the increased focus on "adverse impact" discrimination stemming from employment testing, many companies, understandably, have been reluctant to use employment tests. However, employers should keep in mind that the use of an employment test is not patently unlawful (even if it has an adverse impact on protected groups) and, in many instances, may be extremely useful in identifying the best candidates.

While Title VII of the Civil Rights Act of 1964 generally forbids the use of employment tests that are discriminatory in effect, an employer may nonetheless use a test that has an adverse impact on protected groups if it can show that the assessment has a manifest relationship to the position at issue.[3] In other words, companies can use tests that have an adverse impact, provided that the employer can show that it is not being used to discriminate intentionally and can demonstrate that the test is job-related and consistent with needs of the employer from a business standpoint.

In general, to prove that an employment test is job-related, the employer must show either that the test accurately reflects the tasks performed on the job or requires the test-

taker to demonstrate that he or she possesses the necessary underlying knowledge, skills or abilities to successfully perform the job.

For example, a test for a warehouse position, in which employees must repeatedly lift a 50 -pound box should be related to the applicant's ability to lift 50 pounds, not his or her overall health or ability to lift 150 pounds. Specifically, the test cannot be considerably more difficult than the job itself.

The alternative to a test that mimics the tasks performed on a job is a test which looks to see whether the test-taker has the necessary underlying knowledge to perform the job. This type of test must look for skills that actually are necessary and critical to the duties of the job.

For example, in July of last year, the OFCCP found that a pre-employment test, which examined applicants' mathematical and information-locating ability, did not test skills critical to an entry-level, on-call labor position. This is reminiscent of EEOC v. NationsBank of Tennessee, a 2001 case that settled after the EEOC alleged that Hispanic employees were discriminated against because English proficiency was a component of the company's test, but not a competency required on the job.

Employers are not completely without written guidance when it comes to test development and analysis. In 1978, at the behest of several federal agencies, practitioners developed the "Uniform Guidelines on Employee Selection Procedures," which provide the technical rules for demonstrating a test is job-related — otherwise known as "validated."

Pursuant to the uniform guidelines, if an employer finds a statistically significant adverse impact against a particular gender or racial or ethnic group (typically at or above two standard deviations), the company must validate the test.

## Consider Test Validation Even Without Adverse Impact

But what about tests that do not have an adverse impact? Given the resources employers dedicate to purchasing and administrating a test, best practice dictates that they evaluate if the test accomplishes its business objective, regardless of whether there appears to be an adverse impact.

While most employers do not possess the resources to validate their own tests, they should understand the elements of a properly validated test. A validated test will be reliable, fair and minimize the potential for adverse impact. More specifically, a good test can be shown to be reliable through studies that are large enough to establish a confident reliability coefficient (consistently producing the same results under the same circumstances).

Furthermore, a test should be evaluated in the context for which it will be used to ensure that it assesses the skills or knowledge the employer is actually trying to predict. Finally, the test should appear fair, should not reflect any racial, cultural or gender stereotypes and should be coupled with a back-and-forth reasonable accommodation dialogue, if necessary, for individuals with disabilities.

If a properly validated test creates a statistically significant indication of adverse impact, an employer should consider if alternative means, which produce less adverse impact, exist that will effectively accomplish the same objectives. In addition, employers should keep in mind that previously validated selection procedures may "expire" as technology improves.

## One Size Does Not Fit All

Finally, employers must pay close attention to the representations that test vendors make regarding adverse impact and validation. While a test vendor may claim that it has validated a test, that does not mean that it has done so for the company hoping to use the test.

Accordingly, before purchasing a testing tool, employers should discuss the issue of test development and validation with the test vendor and have any information on this subject reviewed by legal counsel and an independent third-party expert with the appropriate statistical and/or industrial organization background.

As applicant pools continue to grow, employers should use all available tools to improve their ability to identify the most qualified candidates. If a company feels that an employment test efficiently accomplishes this goal, then it should, even with the recent increase in employment testing-based charges of discrimination, reach out to appropriate experts in the legal and industrial organizational psychology industries to secure an appropriately-validated test.

While having a test properly developed and validated may prove costly, it will save money in the long run by minimizing litigation and improving the effectiveness of job placement.

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[1] EEOC Fact Sheet on Employment Tests and Selection Procedures, www.eeoc.gov/policy/docs/factemployment_procedures.html (last visited Jan. 30, 2013).

[2] EEOC Charge Statistics FY 1997 Through FY 2012, http://www1.eeoc.gov//eeoc/statistics/enforcement/charges.cfm?renderforprint=1 (last visited Jan. 30, 2013).

[3] See Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).