

Pre-Employment Tests: Does Yours Pass the Test?

Dean F. Pacific

dpacific@wnj.com

616-752-2424

Tara M. Kennedy

tkennedy@wnj.com

616-752-2717

Overview

- * What is a test?
- * Applicable laws.
- * Is your test valid?
- * Best practices.

What is a Test?

- * According to the Uniform Guidelines on Employee Selection Procedures, a test is any method used to make an employment decision.



Applicable Laws

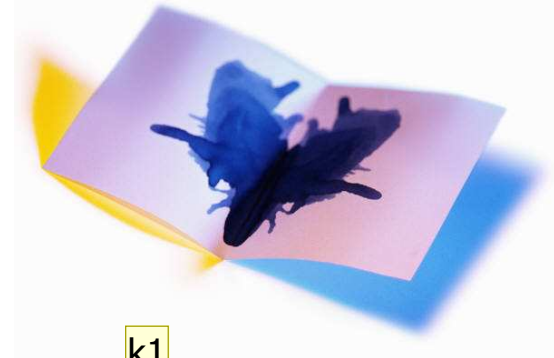
- * Title VII of the Civil Rights Act of 1964;
- * The Americans with Disabilities Act of 1990 and the Amendments Act of 2008; and
- * The Age Discrimination in Employment Act of 1967.

Applicable Laws

- * Employers may not use tests or selection procedures to intentionally discriminate against a class of individuals. This is known as **disparate treatment**.
- * Employers must not use tests or selection procedures that have a **disparate impact** on individuals.
- * What is disparate impact?
 - * 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.”

Tests Available

- * Tests may include:
 - * Cognitive Tests;
 - * Personality Tests;
 - * Medical Examinations;
 - * Credit Checks; and
 - * Criminal Background Checks.



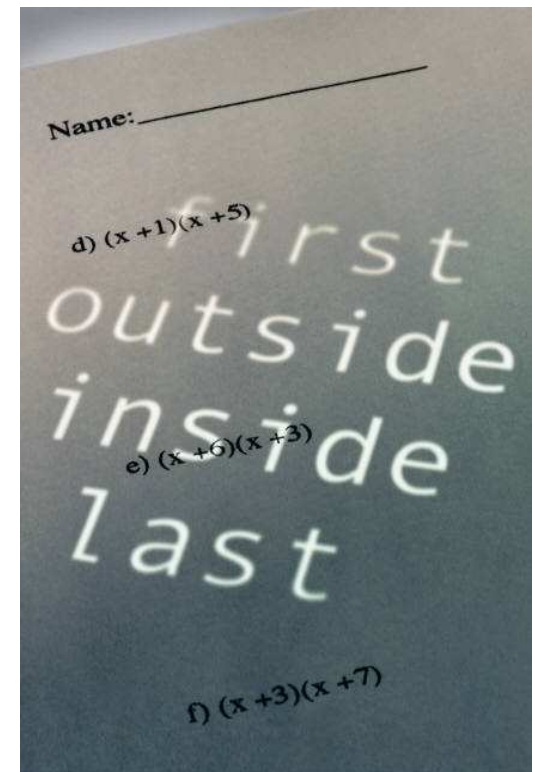
k1

Slide 6

k1 covered in the background check presentation
, 11/6/2012

Cognitive Tests

- * Measures the way a person thinks:
 - * Reasoning;
 - * Memory;
 - * Perception speed and accuracy;
 - * Reading skills; and
 - * Math skills.



Cognitive Tests

- * *Davidson v. Citizens Gas & Coke Utility.*
 - * Eight hourly African American Employees and two African American applicants alleged that a written test used to screen transfer and promotion candidates and applicants had a discriminatory impact on African Americans.
 - * The plaintiffs also claimed disparate treatment.

Cognitive Tests

- * Each plaintiff had previously met the Employer's legitimate job performance expectations. However, the Employer implemented a work competency assessment, "WCA," as a prerequisite for certain job classifications.
- * The Plaintiffs provided statistical evidence that showed that African Americans scored disproportionately lower than others taking the WCA, which disproportionately reduced their chances of promotion.

Cognitive Tests

- * Under Title VII, if there is a less discriminatory alternative for the cognitive test, then that test must be used.

Personality Tests/Medical Examinations

- * Personality tests measure the degree of a person's traits or characteristics, or aim to predict the likelihood that a person will engage in certain conduct.
- * Medical examinations include physiological tests, and physical and mental health assessments.

Personality Tests/Medical Examination

- * The Court has held that an employer's administration of a personality test may be a medical examination that violates the ADA.
- * In *Karraker v. Rent-A-Center, Inc.*, three brothers applied for manager positions within Rent-A-Center. To be considered for a promotion, the Company required employees to take a test which included the Minnesota Multiphasic Personality Inventory ("MMPI").

Personality Tests/Medical Tests

- * The MMPI assessed where an applicant placed on scales measuring depression, hypochondriasis, hysteria, paranoia, and mania. Elevated scores on the MMPI could indicate certain psychiatric disorders.
- * The Court had to determine whether the MMPI was designed to reveal a mental impairment, which would be “medical examination” under the ADA.

Personality Tests/Medical Tests

- * The Court determined that although the Company did not have the test results interpreted by a psychologist and did not specifically use the test to screen for mental disabilities, because the test was designed to reveal a mental disability, the MMPI was a medical examination prohibited under the ADA.

Personality Tests/Medical Tests

- * Under the ADA, an employer may not ask questions about disability or require medical examinations until **after** it makes a conditional job offer to the applicant.
- * After making a job offer (but before the person starts working), an employer may ask disability-related questions and conduct medical examinations as long as it does so for **all individuals entering the same job category**.
- * An employer may ask employees questions about disability or require medical examinations only if doing so is **job-related and consistent with business necessity**.
- * For example, an employer could request medical information when it has a **reasonable belief**, based on **objective evidence**, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition, or when an employer receives a request for a **reasonable accommodation** and the person's disability and/or need for accommodation is not obvious.

Credit Checks/Background Checks

- * The Fair Credit Reporting Act (“FCRA”) is a consumer protection statute designed primarily to protect the privacy of consumer information and to ensure that information supplied by consumer reporting agencies is accurate.
- * A “Consumer Report” is a report that contains information about a person’s personal and credit characteristic, character, general reputation and lifestyle, and which is used as a factor in establishing the person’s eligibility for credit, insurance, employment or other purposes listed in the FCRA.
- * “Consumer Reports include criminal background checks, credit reports or other background checks conducted by third parties.

Credit Checks

- * The EEOC has taken the position that employers should not conduct applicant credit checks unless the employer needs to do so “to operate safely or efficiently.”
- * More recently, the EEOC’s focus has been directed towards cases involving alleged disparate impact on minority groups because of the employer’s use of credit checks in employment decisions.

Credit Checks

- * In December 2010, the EEOC filed suit against Kaplan Higher Education Corporation. The EEOC alleged that Kaplan violated Title VII by rejecting job applicants based on their credit histories.
- * The lawsuit claimed that Kaplan's use of credit histories was a screening tool that discriminated against a class of black job applicants.
- * After the lawsuit was filed, Kaplan responded as follows: "We are an equal opportunity employer, and we are proud of the diversity of our workforce. Kaplan Higher Education conducts background checks on all prospective employees. For employees whose responsibilities include financial matters, such as those who advise students on financial aid, background checks also include job-related credit histories. This is not unusual."

Criminal Background Checks

- * The EEOC released a new guidance this year on criminal background checks.
- * Studies showed that Blacks and Hispanics are statistically more likely to be arrested and convicted of crimes than whites.
- * As a consequence, employers who make a blanket rule that any person with an arrest or conviction should not be hired or promoted may be unintentionally discriminating.

Criminal Background Checks

- * Recently Pepsi Beverages was required to pay \$3.13 million and provide job offers and training to resolve a charge of race discrimination.
- * The EEOC's investigation revealed that more than 300 African Americans were adversely affected when Pepsi applied a criminal background check policy that disproportionately excluded black applicants from permanent employment.

Is your test valid?

- * The EEOC adopted the Uniform Guidelines on Employee Selection Procedures (“UGESP”) which provided uniform guidance for employers about how to determine if their tests and selection procedures were lawful for purposes of Title VII disparate impact theory.
- * There are three different ways employers can show that their employment tests and other selection criteria are job-related and consistent with business necessity.

Is your test valid?

- * Employers may show their tests are valid by using:
 - * Criterion-related validity studies;
 - * Content validity studies; or
 - * Construct validity studies.

Criterion Related

- * Criterion related tests are measured by a procedure that uses a test as a *predictor* to determine how well a person will perform on the job.
- * The predictors are then validated against the criteria used to measure job performance.
- * Examples include: Aptitude tests, typing tests, etc.

Content Validity Test

- * Content validity tests are a representative sample of performance in some defined area of job-related knowledge, skill, ability, or other characteristic.
- * Examples include: Skills tests and physical ability tests.

Construct Validity Test

- * Construct validity tests will demonstrate a measure of a job-relevant characteristic.
- * Examples include: Tests that relate to job-knowledge.

Best Practices

- * Determine which tests are truly necessary.
- * Select tests that appropriately evaluate the applicant's skills and abilities that are appropriate to the job.
- * Involve your managers with the test/selection procedures.
- * Avoid questions that are overly personal in nature.

Best Practices

- * Administer the test consistently, without regard to race, color, national origin, sex, religion, age, or disability.
- * Monitor the tests to determine whether the test screens out a protected group.
- * Do not utilize blanket policies.

QUESTIONS?

Dean F. Pacific

dpacific@wnj.com

616.752.2424

Tara M. Kennedy

tkennedy@wnj.com

616.752.2717