EMPLOYMENT TESTS AND ASSESSMENT TOOLS

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What Kind of Tests are We Talking About?

- **Cognitive tests** – Assess reasoning, memory, perceptual speed and accuracy, math and reading skills, knowledge of a job
- **Physical ability tests** – Measure the ability to perform a particular task or the strength of specific muscle groups. May measure strength and stamina in general.
What Kind of Tests are We Talking About?

- Sample job tasks – Assess performance and aptitude on particular tasks (e.g., performance tests, simulations, work samples)
- Medical inquiries and physical or psychological examinations – Assess physical or mental health
What Kind of Tests are We Talking About?

- Personality tests and integrity tests – Assess the degree to which a person has certain traits (dependability, teamwork, safety) or aim to predict bad behavior (theft, absenteeism)
- But not polygraph tests – Employee Polygraph Protection Act of 1988 prohibits polygraph tests
- English proficiency
Why Is Testing a Hot Topic?

- Increase in testing due to security concerns, workplace violence, safety and liability, employee retention
- Technology has made testing easier
What Are The Legal Parameters?

- ADA
- Title VII
- ADEA
- NC Controlled Substance Examination Regulation Act (“CSERA”) (for drug tests)
Medical Exams - ADA

• Physical Exams
• Vision Tests
• Blood, Urine, Breath, Saliva or Hair Analyses (not drug tests)
• Blood Pressure Screening and Cholesterol testing
• Pulmonary Function test
• X-ray, CAT Scans, MRIs
Medical Exams - ADA

- Personality or psychological tests if they measure whether the applicant has a recognized mental disorder or impairment
- Other tests that might elicit information about a disability
True or False?

• I see things or animals or people around me that others do not see.
• At times I have fits of laughing and crying that I cannot control.
• My soul sometimes leaves my body.
• At one or more times in my life I felt that someone was making me do things by hypnotizing me.
• I have the habit of counting things that are not important such as bulbs on electric signs, and so forth.
Personality Test?
Karraker v. Rent-A-Center, Inc. (7th Cir. 2005)

- RAC required Minnesota Multiphasic Personality Inventory (“MMPI”) as part of management test
- Test designed to measure traits such as depression, hysteria, paranoia, and mania
- RAC claimed it used the test to measure personality traits, but Court found it sought mental health information and thus was a medical exam
- Reached this conclusion even though a psychologist did not interpret the test
- Court found RAC violated ADA
Medical Exams - ADA

- Employer may not ask questions about a disability or require medical examinations until after it makes a conditional job offer.
- After offer, medical examination may be required so long as employer requires it for all individuals entering the same job category.
Medical Exams – ADA

• Employers may ask questions about disabilities or require medical examinations only if doing so is job-related and consistent with business necessity.

• A medical exam may be required to document a request for a reasonable accommodation or if an employee poses a direct threat to safety.
Medical Exams - Confidentiality

• Information regarding medical conditions or history must be treated as a confidential medical record
• Must be maintained on separate forms and in separate medical files
Medical Exams - ADA

• Must reasonably accommodate, including in the administration of tests, for physical or mental limitations unless it would impose an undue hardship
Example - EEOC v. Daimler Chrysler Corp.

- Applicants with learning disabilities needed accommodations during a pre-employment test given for hourly unskilled manufacturing job.
- Settlement resulted in company agreeing to allow the taking of the test with the assistance of a reader or audiotape with instructions.
- Company agreed that in the future it would provide reasonable accommodations to enable all applicants with reading disabilities to take the test.
Example- EEOC v. Grisham Farm Products

• Last month, EEOC sued company that required all job applicants to fill out a three-page health history before they would be considered for a job

• EEOC alleged ADA and GINA violations

*Eliminating barriers in recruitment and hiring is one of six national priorities identified by the EEOC’s Strategic Enforcement Plan.*
Title VII

- Prohibits “disparate treatment” and “disparate impact” discrimination
Disparate Treatment

• Tests cannot be designed to discriminate on the basis of race, color, religion, sex or national origin.

• Specific rules on how to score tests. Employer cannot 1) adjust the 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.
Disparate Treatment

• Example of Disparate Treatment – White employees are not tested for English proficiency, but minority employees are
Disparate Impact

- Employer cannot use neutral tests that have the effect of disproportionately excluding persons based on race, color, religion, sex or national origin where the test is not job related and consistent with business necessity.
Disparate Impact

• Example of Disparate Impact – An employer requires that all applicants pass a physical agility test, which disproportionately screens out women
Analysis

1. Does a test create a disparate impact?
2. Can the employer show that the test is job related and consistent with business necessity?

(An employer can meet this standard by showing that it is necessary to the safe and efficient performance of the job)
3. Can the challenger of the test show that there is a less discriminatory alternative available?
Business Necessity Via Test Validation

- EEOC adopted the Uniform Guidelines on Employee Selection Procedures (UGESP) in 1978
- Provides three test validation methods that show business necessity
Criterion Validity

• Success on the test correlates with success on the job
• “Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior.” 29 CFR 1607.16.
Construct Validity

- The test correlates significantly with the identification of some trait (intelligence, leadership) which is required in the performance of the job
- “Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance.” 29 CFR 1607.16.
Content Validity

• Test closely approximates tasks to be performed on the job. Mirrors actual job tasks that are critical or important.

• “Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job.” 29 CFR 1607.16.
Example: EEOC v. Dial Corp., 469 F.3d 735 (8th Cir. 2006)

- Strength test given for entry-level production jobs
- Adverse impact on women
- Prior to test, 46% of hires were women – after test, 15%
- Dial tried to use content validity to justify the test
- However, expert testimony showed that the test was more difficult than the job
Example: EEOC v. Ford Motor Co.

- Cognitive test known as Apprenticeship Training Selection System (ATSS)
- Measured verbal, numerical and spatial reasoning in order to evaluate mechanical aptitude
- Validated in 1991, but still had disparate impact on African-American applicants
• EEOC claimed there was a less discriminatory selection procedure available that Ford did not adopt
• Settlement: Ford agreed to use different selection procedure, paid $8.5 million in monetary relief
2015 Target Settlement

• EEOC found employment assessments used by Target violated Title VII & ADA

• Title VII
  – Found assessments disproportionately screened out applicants for exempt-level professional positions based on race and sex
  – Found tests were not sufficiently job-related and consistent with business necessity
• ADA
  – Found an assessment performed by psychologists on behalf of Target was a pre-employment medical exam

• $2.8 Million settlement
  – Target agreed to perform a predictive validity study for current and future exempt assessments
ADEA

• Prohibits discrimination based on age (40 and over)
• Prohibits disparate treatment
  – Example: A physical agility test given only to applicants over 50
• Prohibits discriminatory impact unless based on reasonable factor other than age
  – Example: A physical agility test is given to all applicants, but physical agility does not impact an employee’s ability to perform the job
What are Best Practices?

- Tailor test questions or methods to particular jobs
- Make sure you test only on job-related questions: Avoid intrusive, embarrassing or demeaning questions
- Do not selectively test applicants. Test all applicants for a position in the same manner. Test without regard to race, sex, age, etc.
Best Practices, Continued

• Ensure that tests are properly validated for the position. Carefully review a test vendor’s claim of job validity.

• Seek an indemnification provision from vendor regarding test validity.

• Have an outside professional measure the validity and reliability of your tests.
Best Practices, Continued

- If there is an adverse impact document, use your efforts to find a less discriminatory alternative.
- Update test specification as jobs change.
- Do not base an employment decision solely on the results of a test. Use results as one factor in the hiring decision.
Best Practices, Continued

• Maintain confidentiality of test results
• Get consent from applicant to use test in hiring process
• Avoid using pre-employment tests when making post-hire employment decisions
• Don’t forget about reasonable accommodation requirements
NC Drug Testing

• An employer may require an employee or applicant to submit to a drug test as a condition of employment

• Testing governed by North Carolina Controlled Substance Examination Regulation Act (“CSERA”)
  – Exemptions for testing required by U.S. Department of Transportation and U.S. Nuclear Regulatory Commission
NC Drug Testing

- Employer can establish the circumstances and conditions that trigger drug tests:
  - Post-Accident
  - Random
  - Safety Sensitive
  - Pre-Employment
  - Follow-up
  - Reasonable Suspicion
Initial Notice

• Employers must provide written notice to applicants and employees of their rights and responsibilities under CSERA

• Notice must be provided when sample is taken

• Sample notices available on NC DOL website
Current Employees

• For **current employees**, employers can collect the sample on-site, but must send sample to an approved laboratory
Prospective Employees

• For **prospective employees**, potential employer can collect the sample and conduct a preliminary screening test that utilizes a single-use test device on-site

• Positive results must be sent to an approved lab for confirmation
Permissible Samples

- Urine
- Blood
- Hair
- Oral Fluids
Sample Collection

- Must be under reasonable and sanitary conditions
- Must preserve individual dignity to the extent practicable
- In a manner reasonably calculated to prevent substitution of samples and interference with the collection, examination or screening of samples
- In a manner determined to meet the reliability and accuracy criteria accepted by drug-testing laboratories
“On-site”

• Any location other than an approved laboratory
• Ex. Examiner’s place of business, hospital, physician’s office, or third-party commercial site
Single-Use Test Device

- Reagent-containing unit
- Sealed container with validity check (ex. tape to detect tampering)
- Self-contained and individually packaged
- Discarded after each test
- Does not allow any test component or constituent of a test system to interact between tests
Post-Testing Notice

• Within 30 days from when results are mailed or delivered, examiner must give notice of:
  – Any positive result
  – The applicant’s or employee’s rights and responsibilities regarding re-testing
Retesting Rights

• The lab must preserve a portion of confirmed positive samples for at least 90 days
• Applicant or employee may have a confirmed positive sample re-tested at the same or another approved laboratory
Costs

- Employer must pay for drug test expenses
- EXCEPT employer may require applicants or employees to pay all reasonable expenses for re-tests of confirmed positive results
Refusals

• An employer may remove an applicant who refuses to take a drug test from employment consideration

• An employer may terminate the employment of a current employee who refuses to take the test
Potential Pitfalls

• Collection/chain of custody issues
• On-site versus approved lab testing of samples
• Failure to adhere to notice requirements
• Failure to maintain confidentiality of an employee/applicant’s controlled substance examination
ADA Considerations
EEOC v. Randstad

• Applicant was asked to provide urine sample for a pre-employment drug test
• Applicant disclosed that she was on medically supervised methadone treatment program
• Company told applicant it would not hire her because she used methadone
ADA Considerations

EEOC v. Randstad

• EEOC alleged ADA violation
• $50,000 settlement (Feb. 2016)
• Company will also advise all applicants that they will not be rejected for hire because of a lawful prescribed medication (including methadone) or participation in a treatment program
QUESTIONS?