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Testing and the Uniform Guidelines

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There are federal laws and regulations that govern the use of employee selection procedures. The Equal Employment Opportunity Commission (EEOC) enforces many of the laws involving personnel actions, including hiring. One of the most relevant laws focusing on employment decisions is Title VII of the Civil Rights Act of 1964 (often referred to as Title VII), which prohibits discrimination based on race, color, religion, sex, or national origin for companies with 15 or more employees. With regard to testing, Title VII authorizes the use of “any professionally developed ability test provided that such test, its administration, or action upon the results is not designed, intended, or used to discriminate” on any unlawful basis.

In a 1971 landmark case (*Griggs v. Duke Power Co.*), the Supreme Court concluded that employment practices that had an adverse impact on minorities but were not proven to have a business necessity were in violation of Title VII. In 1972 Congress amended Title VII to include this legal standard.

As a result of this Supreme Court ruling, the Federal Government set out to unify and standardize the regulation of employee selection procedures. This effort resulted in the adoption of the *Uniform Guidelines on Employee Selection Procedures* (often referred to simply as the *Guidelines*). These Guidelines outlined the government’s position with respect to the prohibition of discrimination in employment practices based on race, color, religion, sex, or national origin. These *Guidelines* apply to all private and public employers that are covered by Title VII.

Key Points of the Guidelines

Title VII and therefore the *Guidelines* apply to employers with 15 or more employees.

The *Guidelines* define a selection procedure as

“Any measure, combination of measures, or procedures used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.”

As noted above, the *Guidelines* apply not just to tests, but to all selection tools and methods, including the interview, job application, reference checks, and other screening techniques.

One of the most misunderstood issues regarding the *Guidelines* is that of validation. Professional testing products such as First Advantage’s *Identity* line are considered valid instruments based on the validation research performed during the development of the product. But what about job applications, interview processes, or assessments that are developed in-house, many of which may not go through the same rigorous development and validation process of a professionally developed test? When does a selection procedure need to be validated? The *Guidelines* state:

“These *Guidelines* do not require a user to conduct validity studies of selection procedures where no adverse impact results.”

“What is important to remember is that as long as the entire selection process does not result in adverse impact, companies are not likely to be challenged.”

Therefore, if a company were to periodically examine its hiring process to ensure that it continues to be free from bias and discrimination, chances are that company would never be legally challenged under Title VII. It is those organizations that pay little attention to the content and methods used in hiring and the potential adverse effects these procedures could have, particularly on protected groups, which can be faced with legal difficulty.

Tests and Adverse Impact

Adverse impact is represented by “a substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of a race, sex, or ethnic group.”

The *Guidelines* define adverse impact as

“A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate...”

This definition applies to all selection procedures (e.g., interviews, decisions made from job history, tests, reference checks, etc).

When assessing whether or not a particular hiring procedure or set of procedures is discriminatory, it is necessary to prove that the consequence of those procedures leads to adverse impact against a protected group. Such protected groups include women, non-Caucasian minorities, persons over the age of 40, and, as covered by the Americans with Disabilities Act, those with a physical or mental disability.

If job candidates in a protected group feel that a particular interviewer or test has discriminated against them, it is not adequate for them to point out the discriminatory elements of their interviewing or testing experience. Rather, they must first demonstrate that the outcome of the employment procedure has led to a statistically demonstrable adverse impact against one or more protected groups.

For example, if in the course of selecting candidates for a particular position, 50 non-Caucasians apply for the position and 30 are hired, this represents a 60% hiring rate among non-Caucasians. If 50 Caucasians apply for the same job and 40 are hired, this represents an 80% hiring rate among this group. Dividing the hire rate for the protected group (in this case, non-Caucasians) by the rate of Caucasians hired (60% divided by 80%) gives you a ratio to which the 4/5ths rule can be applied. In this case, the ratio is .75, below .80 and thus a case that could face challenges as an example of adverse impact.

If in the same example 35 non-Caucasians out of 50 were hired (70%) and the same 40 Caucasians out of 50 were hired (80%), the resulting ratio would be .875 (70% divided by 80%) and would thus pass the 4/5ths threshold and would likely not represent a case implying adverse impact.

What is important to remember is that as long as the entire selection process does not result in adverse impact, companies are not likely to be challenged. It is when the whole selection process (e.g., interview, reference checks, testing, etc.) results in adverse impact that the individual components of that process are scrutinized. For each individual method that is found to cause adverse impact, validity evidence is required.

When it comes to tests, some people have the misconception that they are all discriminatory, cause adverse impact, and are therefore illegal. This is simply not the case. While there is evidence that some protected classes score lower on certain types of cognitive tests, the EEOC justifies the use of these tests so long as the constructs they measure are essential for successful job performance.

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For example, if you are trying to fill an accountant position, you are justified in testing applicants on mathematical concepts that will be required to perform the job. In addition, researchers who focus on personnel selection have consistently found that

“There is no evidence that well-constructed personality inventories systematically discriminate against any ethnic or national group.”¹

All the empirical evidence, including Federal legal guidelines and standards, supports the use of testing in the employment setting as long as the tests have been professionally developed and the skills, competencies, and/or behavioral dispositions they measure are essential for successful job performance. And, as always, it is the employer's responsibility to periodically audit the entire hiring process (e.g., the interview, testing, the job application, and any other selection method used) to ensure that it continues to be fair and free from bias.

The Americans with Disabilities Act (ADA)

The ADA went into effect in July 1992. With respect to employment, it covered employers with 25 or more employees. In July 1994, it was expanded to include employers with 15 or more employees. The Act states that employers “shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.”

The ADA is intended to protect those employees with disabilities from discrimination. Behavioral and cognitive tests generally measure job-related attributes and dispositions. They do not measure, nor are they intended to measure, any form of disability. The ADA does not prohibit employers from using tools that assess applicants' sales and service ability or their level of trustworthiness, their management skills, or their job-related personality characteristics, for example.

Business Necessity

There are cases when the needs of a business (so-called “Business Necessity”) can be used as a successful defense against charges of discrimination, even if it can be proven that the businesses hiring practices show adverse impact against a protected group.

For example, some jobs (such as machine operators, drivers of commercial vehicles, and airline pilots) require certain physical attributes such as unimpaired vision. Hiring for these jobs could show adverse impact against those with vision disabilities; however the employer can make the reasonable case that business necessity requires them to make hiring decisions based on physical requirements that can lead to adverse impact against the vision impaired.

Responsibilities

The EEOC *Guidelines* describe appropriate validation procedures for testing, including Content Validity, Construct Validity, and Criterion Validity. While the use of high-quality, valid tests is an important element of building testing into an employment procedure, it is equally important that employers utilize “best practices” for testing and other elements of employment processes.

In the case of testing, these conditions are important:

- ▶ Tests are given consistently (i.e., avoid testing some candidates for a particular job but not others).
- ▶ Tests are given in a suitable environment (such as a quiet room free from distractions that could affect test scores).

¹Hogan, H., Hogan, J., & Roberts, B.W. (1996). Personality and employment decisions. *American Psychologist*, Vol. 51, No. 5, 469-477.

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- ▶ Tests are suitably proctored or delivered in another manner that ensures all candidates are given the same instructions and are not able to cheat on a particular test.

Concerning general employment practices that involve testing, the following best practices are equally critical:

- ▶ Test scores alone are not used to make hiring decisions, i.e., scores are used in conjunction with other information (resume, interview, job references, etc.) to build a more complete profile of a job candidate.
- ▶ The use of particular tests needs to be clearly demonstrated as part of a particular job. For example, a typing test is clearly appropriate in the case of hiring for clerical positions; however it would be less appropriate for other jobs such as food service or assembly line workers.
- ▶ ALL aspects of employment processes need to be clearly documented.

Given that proof of adverse impact is a necessary condition for proving discrimination that can lead to legal action, employers should monitor their own hiring and other employment procedures to ensure that the outcome of those procedures does not adversely affect any protected group.

Conclusion

This summary was intended to be a brief overview of how tests are defined and used in the employment setting. Some of the most common misconceptions about tests and the major legal issues affecting not only tests, but all selection processes were also presented. Each state may have its own set of requirements for selection tools and methods. Anyone unfamiliar with state employment requirements should consult with a qualified labor law attorney for further information.

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