



LAWS RELATED TO EMPLOYMENT TESTING AND PRACTICES

BACKGROUND

Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Uniform Guidelines on Employee Selection Procedures, the Americans with Disabilities Act, and The Uniformed Services Employment and Reemployment Rights Act are all laws that affect the development, administration, and use of employment tests and practices. These laws and their implications to employment testing and practices are reviewed below.

THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The Fourteenth Amendment of the U.S. Constitution requires that all states must guarantee equal protection for its citizens. Thus, the laws of any state must be such that all individuals are given equal opportunities regardless of their group membership. The Fourteenth Amendment also gave Congress the Constitutional power to enforce equal protection of its citizens by enacting laws to uphold this right. The Civil Rights Act of 1964 and the Civil Rights Act of 1991 are some examples that are presented below.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Under Title VII, employment discrimination based on race, color,

religion, sex or national origin is illegal. An employer can administer and use the results of any selection test so long as it does not discriminate against individuals because of race, color, religion, sex or national origin. Disparate treatment and disparate impact are both prohibited under Title VII. Disparate treatment occurs when an employer intentionally discriminates against an individual based on race, color, religion, sex or national origin. The central issue in disparate treatment cases is that employees from a protected group are *intentionally* treated differently from others. Disparate impact occurs when an employment practice or procedure is consistently applied to all employees; however, it results in a disproportionate number of individuals from protected groups in being excluded. Disparate impact is illegal under Title VII when the employment practice or procedure is not job-related or consistent with business necessity. The allocation of proof and the shifting of burdens for producing evidence differ in court between disparate treatment and disparate impact.

Disparate Treatment Cases: In disparate treatment cases, there are several methods by which a complainant can present his/her evidence to the court. The methods include the following: direct, shifting burdens, mixed motive, and pattern or practice discrimination. In

the majority of disparate treatment cases, the complainant lacks direct evidence of intentional discrimination. The Supreme Court has created a burden-shifting method following the *McDonnell Douglas Corp. v. Green* (1973) case. The complainant has a prima facie case if the following requirements are met: (1) the complainant is a member of a protected class; (2) the complainant applied and was qualified for the job; (3) the application was rejected; and (4) the position remained open after the rejection. Then the burden shifts to the employer to provide evidence that there were legitimate, non-discriminatory reasons for its actions. After the employer presents such evidence to the court, the burden then shifts back to the complainant. The complainant must persuade the court that the employer's evidence was false and/or that it was a pretext for discrimination.

Disparate Impact Cases: In disparate impact cases, the complainant makes a prima facie case by proving that the challenged practice or selection tool has substantial adverse impact on a protected group. The evidence that is used is often statistical in nature. Then the burden shifts to the employer to prove that the challenged practice or selection tool is job-related and consistent with business necessity. If the employer provides appropriate evidence that is accepted by the Court, the burden then shifts back to the complainant to offer evidence that shows that alternative selection tools exist that would satisfy their business needs with less disparate impact.

Employers have a responsibility to ensure that their employment tests and

practices do not result in discrimination. All tests used for employment decisions (e.g., hiring, promotion, etc.) need to be evaluated to assess that they are 1) job-related, 2) consistent with business necessity, and 3) free from disparate impact. If the test screens out a disproportionate amount of individuals from a protected group, then the employer needs to assess whether any alternative tests or procedures exist that would yield the same ability to predict performance but alleviate the disparate impact. Having this evidence is crucial for employers if their employment practices are ever challenged. Title VII describes the employer as being required to produce compelling evidence to support the employment test under question as being job-related and consistent with business necessity.

THE CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991 amended several sections of Title VII of the Civil Rights Act of 1964. One of the most significant additions in the Civil Rights Act of 1991 is the banning of score adjustment based on group membership. Specifically, employers are prohibited under the Civil Rights Act of 1991 from adjusting scores, using different cutoff scores, or in any way altering the scores of any test on the basis of race, color, religion, sex, or national origin.

Employers may not under the Civil Rights Act of 1991 use different cut scores or standards based on group membership. One of the selection tools that was most affected by this law was the physical ability test (PAT). Due to immutable

physical differences between men and women it was thought, before the passing of this law, that to reduce disparate impact, different physical standards could be set on PATs for men and women. However, the language in this Act makes it clear that if men and women are taking a PAT, they must pass the same standard for the same job. The same job-same standard applies to all selection tools. It is imperative that the standard that is set is based on evidence that is consistent with job-relatedness and business necessity requirements. To demonstrate that a tool and its cut score standard are consistent with business necessity, the Civil Rights Act of 1964 mentions the following pieces of evidence as permissible: “statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence.”

UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

These guidelines have been developed to enable employers to comply with legal requirements prohibiting the use of selection procedures that discriminate on the basis of race, color, religion, sex and national origin. The Uniform Guidelines have been adopted and are enforced by major Federal agencies including the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice. The Uniform Guidelines pertain to all selection tools and procedures that are used for employment decisions (e.g., hiring, promotion, demotion, retention, etc.). Employers must adhere to the

Uniform Guidelines and ensure that any selection tool or procedure used is job-related and consistent with business necessity. According to the Uniform Guidelines, any selection tool that demonstrates disparate impact on employment decisions is considered to be discriminatory and therefore illegal unless the selection tool has been validated in accordance with the guidelines set forth in this document. The Uniform Guidelines provide detailed guidance to employers regarding how to show that their selection tools or procedures are job-related and consistent with business necessity.

Any lawful selection test that is developed and used must be supported with the appropriate evidence as presented in the Uniform Guidelines. Selection tests must be shown to be job-related and consistent with business necessity through proper validation studies. Employers are ultimately responsible for ensuring that their selection test is valid under the Uniform Guidelines. Employment tests must be properly validated for the positions and purposes for which they are used with content, construct and/or criterion validation studies.

THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA) is a civil rights law guaranteeing equal opportunity to jobs for qualified individuals with disabilities and provides enforceable standards for protection. Under the ADA, employers are prohibited from discriminating against “qualified individuals with disabilities.” Qualified individuals are those who are

able to perform the essential functions of a job with or without “reasonable accommodation.” Reasonable accommodation includes any modification or adjustment that enables an individual with a disability to participate or perform essential functions of the job. Under the ADA, employers are required to make reasonable accommodations for qualified individuals with a “known” disability. The qualified individual with a disability must request an accommodation. If a qualified individual with a disability does not request an accommodation, then the employer is not obligated to provide one except when the disability impairs the individual’s ability to communicate the need for an accommodation that is obvious to the employer. The employer and the individual with a disability would work together to identify a reasonable accommodation.

Employers need to ensure that all employment tests are job-related and assess the ability of an individual to perform essential job functions. All employment tests should be given to individuals who have disabilities in a format that does not require the use of the impaired skill, unless the skill is one that is job-related and is what the test is designed to measure. Thus, all job requirements that screen out or tend to screen out individuals with disabilities are legitimate only if they are job-related and consistent with business necessity.

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is the federal law that establishes rights for returning service members and responsibilities for their civilian employers. USERRA affects employment, reemployment and retention in employment, when employees serve or have served in the uniformed services. Under USERRA, an employer cannot discriminate against any uniformed services member in initial employment, reemployment, retention in employment, promotion or any benefit of employment on the basis of his or her military service.

One of the implications of USERRA on testing and assessment practices is providing makeup opportunities for eligible reemployed employees who were on leave for service duty and therefore missed promotional testing. Unless it is impossible or unreasonable, employers must give individuals protected under USERRA an opportunity to take the same promotional test that was administered while absent for duty. Upon their return, employers should give the reemployed employees a reasonable amount of time to study for the exam. If the reemployed employees pass the exam or assessment, then their promotion must be made effective as of the date it would have occurred if they were not on leave for their service duty. Alternatively, the position of the reemployed employees on an eligibility list should be what it would have been had they not been on leave for military service.