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EEOC Issues Fact Sheet on Employment Tests and Selection Procedures to Screen Applicants, Workers

Lawyers for Employers®

Breaking Developments In Labor and Employment Law 12/11/07

Employers often use tests and selection procedures to identify qualified applicants or to promote current employees. These tests might include cognitive tests, physical ability tests, sample job tasks, medical examinations, criminal and credit background checks, and English proficiency tests.

On December 3, 2007, the Equal Employment Opportunity Commission ("EEOC") issued a lengthy fact sheet addressing such screening procedures. In the fact sheet, the EEOC recognized that administering various employment tests can be an effective means of selecting the most qualified candidate for a particular job, as well as efficiently screening large numbers of online applicants. The EEOC also suggested that employers are increasingly using certain forms of pre-employment testing due to post 9-11 security concerns.

The EEOC cautioned, however, that using such tests may violate federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex or other protected basis. For example, some pre-employment tests may be considered prohibited "disability-related inquiries" that could run afoul of the Americans with Disabilities Act. Even tests that may appear neutral could have a discriminatory impact on individuals in protected classes.

The EEOC fact sheet includes a section on "Employer Best Practices for Testing and Selection" that provides advice to help avoid the perils that may arise from employment tests. The EEOC's recommendations include:

- Employers should administer any employment tests without regard to a protected class.
- Employers should take steps to ensure that tests are properly validated for the purpose used. The test or procedure must be job-related and consistent with business necessity. Although the vendor of a test might provide documentation validating the test, the employer is ultimately responsible for ensuring that any tests used by the employer do not violate the anti-discrimination laws.
- Employers should update any employment test or selection procedure when there

- are changes in the job requirements.
- No test or procedure should be administered without an understanding of test effectiveness, appropriateness for specific job, and whether it can be properly administered and scored.

What This Means for Employers

Although the overall quantity of EEOC discrimination charges arising from employment testing has remained relatively low, the number of such charges has increased more than five-fold since 2003. Employers must be vigilant to ensure that any pre-employment tests or selection procedures they administer will pass muster with the EEOC and the courts. While the EEOC has made it clear that employment testing and the use of screening procedures is now squarely on its radar screen, plaintiffs' attorneys may also begin targeting employment testing as the basis for claims of discrimination.

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