

# Legal Risks of Applicant Selection and Assessment

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Effective personnel screening and selection processes are an important first step toward ensuring that the people an organization hires are likely to succeed in their jobs and remain with the company as valuable contributors. When skilled people are in jobs that fit their personality strengths, they can be expected to perform better, be more satisfied with their work and less likely to leave the company. Used in combination with capability information, personality-type job fit assessments are invaluable in choosing candidates with personal characteristics that make them best suited to a particular job.

Good assessment tests make a measurable difference in candidate selection when they are targeted to work-related facets of personality, and even more predictive of success when they are narrowly focused on a specific job. This also is one of the safest ways for a company to ensure tests they use are fully compliant with all federal and state laws affecting discrimination in hiring.

While it's important for companies to be aware of the potential for legal jeopardy in pre-employment assessment tests since they can expose businesses to regulatory sanctions and costly penalties for discriminatory hiring practices, the risk does not outweigh the advantages of using them to find the best job fit candidates. If companies use the right tests and apply them properly, they can avoid negative consequences.

The best defense against the legal risks associated with assessment of job applicants is establishing the pre-emptive measures of well documented and fair hiring procedures, exemplary record keeping and professionally developed psychological assessment tests. This paper discusses some legal issues surrounding assessments, and what organizations can do to minimize adverse impact and consistently and lawfully hire the right person for the job.

## Laws affecting selection and assessment testing

The variety of laws and regulations that govern selection and assessment testing are designed to prohibit unfair employment discrimination and extend equal employment opportunity to all applicants.

In order to evaluate and use assessment tests properly, companies need to keep the legal aspects in mind. At the highest level, compliance in selection and assessment means candidate evaluation should be based on knowledge, skills, abilities and other job-related characteristics, and never in any way demonstrate bias toward or against a particular segment of applicants. Note how the following five laws impact the selection and assessment processes.

### **Title VII of the Civil Rights Act (CRA) of 1964 (as amended in 1972) and the Tower Amendment to Title VII**

Title VII prohibits unfair discrimination based on race, color, sex, religion, national origin, age or disability in all terms and conditions of employment. People categorized by any of these are all protected under Title VII. The Tower Amendment allows employers to use only professionally developed workplace tests in recruitment, hiring and other decisions. Employment tests should not discriminate against any of these protected groups.

### **Age Discrimination Act in Employment Act of 1967 (ADEA)**

Prohibits unfair discrimination against applicants over the age of 40. Individuals in this group must be provided equal employment opportunity, and age discrimination associated with testing and assessment is prohibited. Companies can use age as selection criteria if they can prove it's a business necessity for the job.

### **The Uniform Guidelines on Employment Selection Procedures, 1978**

These federal regulations provide a framework for employers to determine proper pre-selection tools. The guidelines allow the use of tests or selection procedures that do not

create an adverse impact on applicants. Companies may not use substantially different applicant selection criteria that work to the disadvantage of any protected group.

### **Title I of the Civil Rights Act of 1991**

Title I of the Civil Rights Act specifically requires employers to demonstrate both the job-relatedness and the business necessity of assessments. It also prohibits the use of group-based test score adjustments to maintain a representative workforce. It specifically makes illegal the use of “race norming,” scoring adjustments that use different cut-off scores for different groups of applicants.

### **Americans with Disabilities Act (ADA), 1990**

Employers must give all qualified individuals with disabilities, who can perform the job with or without reasonable accommodation, equal opportunity in all aspects of employment. In hiring only, organizations may ask applicants directly if any special accommodations are necessary to take the assessment.

## **Understanding the legal aspects of assessment testing**

It's commonly known that 80 percent of hiring decisions are based on evaluation of an applicant's education, skills and experience. Yet in the workplace, 80 percent of hiring failures are due to behavioral incompatibility manifested when there is a poor fit between the worker's basic personality and the job's responsibilities.

Assessments can help employers determine if an applicant will be a good fit for the position and save them valuable time and resources, since they will be able to narrow the field of candidates to the ones who are most likely to be successful early in the hiring process.

Companies must abide by all the federal and state discrimination laws that govern how to assess and subsequently screen out applicants during the hiring process. However, with due care companies can gather all the employment information required to select the best person for the job and assess applicants in a way that is both fair and legally

defensible. Frequently, charges of discrimination are brought based merely on the perception of an unfair selection process, and—win or lose—the cost to companies can be significant. (See Figure 1)

## **Legally defensible assessment solutions**

Compliant and validated assessments include only fair and impartial job-related evaluation criteria administered equally for everyone applying for the job. Another indication of reliable assessments is that they have been developed by credentialed professionals, covering the full range of job-related skills and demonstrating business necessity. That means test questions are restricted to what is permissible and lawful to ask and are also broad enough to cover the whole spectrum of job-related traits and skills. Furthermore, to support legal defensibility, tests should be statistically proven to consistently measure the traits they claim to assess.

## **Non-discriminatory pre-employment assessment tests**

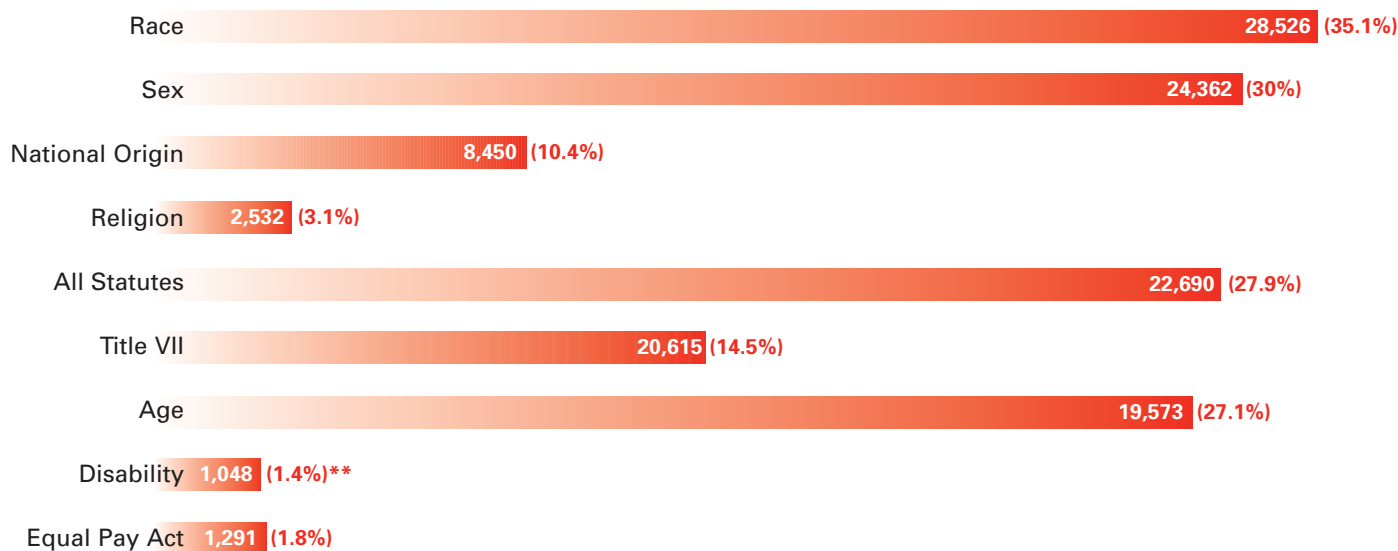
In hiring, the first selection cut is where the efficiency game is won or lost. Make a mistake early, and it's a costly waste of everyone's time. Companies need a broad-based assessment test they can count on to initially rule candidates in or out of the selection process. The test filling that bill is a personality assessment test that measures five personality traits—achievement striving, assertiveness, dependability, extroversion and stress tolerance. Extensive industry studies have shown that these particular traits are directly related to job success. In fact, this type of evaluation tool has proven to be nearly four times more predictive than face-to-face interviews. According to recent industry statistics, interviews provide a 14 percent predictability rate, while assessment tests have a predictability rate of 53 percent.

Regardless of how valuable personality type tests are in streamlining the selection process, the test itself (as well as how the results are evaluated) must abide by all federal and state anti-discrimination laws. For example, if systematic group differences in tests and test scores were to exist, the result could cause adverse impact against women or other minorities.

Figure 1:

### *Charges for Discrimination in 2003.*

Total charges: 81,293\*



\*Because individuals often file charges claiming multiple types of discrimination, the number of total charges for any given fiscal year will be less than the total of the eight types of discrimination listed.

\*\*EEOC began enforcing the Americans with Disabilities Act, July 26, 1992.

**Gender differences.** Fortunately, while this may be a concern for cognitive ability tests, extensive research indicates that personality test scores do not generally differ substantially by gender. Nonetheless, this remains reason enough for vigilance to reduce or eliminate group differences—or their perception—in tests.

**Ethnic differences.** Similarly, there is less concern for ethnic differences in personality tests than in other types of tests. Adverse impact against minority group members is not usually evident, and research has shown it to be statistically non-significant.

### Reducing liability in assessment testing

A definitive step in protecting your organization against adverse impact for protected groups is to ensure all content of your personality tests is strictly work-related and is not

generalized. Generalities could cause adverse reactions from test takers in a pre-employment setting because people may not see general test questions as relevant or fair screening procedures for the job in which they are applying. And, since the goal of the test is to predict success in a specific job, content that is tailored to the context of the workplace adds more value even as it reduces liability.

To create a personality trait test that is both relevant to the job and more acceptable to applicants, organizations using third-party assessment tests should increase assessment reliability through the processes of job analysis and benchmarking. These exercises help companies reduce their liability by clearly defining the “business necessity” requirements for the job and then tying them to consistent standards of measurement.

## Job Analysis

Organizations conduct a job analysis to determine the minimum ability level needed to adequately perform the job in their company. This provides the best evidence for “job-relatedness” of the personality traits to be assessed and, therefore, offers the most legal defensibility for the selection process.

## Benchmarking

Benchmarking is a unique method of comparing needs of an organization with characteristics of job applicants. This is a legal method of customizing tests to fine-tune job requirements with benchmarks for personality traits. Scores may be set to any desired level as long as they are applied by the same standard consistently across all groups. One caution is to ensure benchmarking strictly adheres to content that can be proven to be a “business necessity.” Employers can even defend themselves against age discrimination charges if they can show that age, as a job requirement, is a business necessity.

## Guaranteeing consistency in pre-employment assessment tests

In order to meet all federal, state and local laws, regulations and guidelines for non-discriminatory assessment practices and policies, employers should use assessments built on a strong, established foundation that is both valid and reliable.

## Validity evidence

Validity is the extent to which a test measures what it purports to measure, and decisions made using the test are accurate or justified. Test validity is affected by several factors, including the usefulness of the characteristics being measured, the content of the test, and the reliability of measurement. For example, personality tests are a valid method of making pre-employment decisions if:

1. targeted personality traits are important for successful performance on the job

2. personality traits are well represented by test content

3. test is a reliable or consistent measure of personality

Validity is demonstrated by accumulating a wide-range of evidence supporting the use of the test as a measure of work-related personality traits. The process of validating a test consists of gathering empirical or rational evidence to support the use of test scores for making particular inferences about people and their future job fit. Such evidence could include relationships between test scores and other similar measures or important outcomes, evidence regarding the measurement properties (e.g., internal consistency) of the test, or even expert judgments about test content.

## Reliability evidence

Reliability of a test ensures consistency in measuring the same things for every test-taker. The more reliable a test, the less error there will be in an individual’s scores, and the more likely the individual would receive a similar score if he or she took the test again. Test reliability is affected by several factors including length (longer tests are more reliable) and homogeneity of the items (if items are similar to each other, the test will be more reliable).

Test reliability can be represented by a coefficient. A reliability coefficient of 1.0 would indicate that an individual’s score would be exactly the same each time he or she took the test, assuming no increase or decrease in actual ability level. Though there is no absolute legal requirement for how reliable a test must be, a reliability coefficient of at least .70 is considered adequate, as determined by the Department of Labor in 1999. Somewhat lower levels of reliability may be acceptable when the test is used to make preliminary, “screen out” selection decisions. In this case, test scores are used merely to identify the most unqualified people (e.g., the bottom 25%), rather than the most qualified people (e.g., the top 25%).

A variety of methods can be used to determine the reliability coefficient of a test. One is internal consistency that evaluates



the extent to which the items on a scale or test all measure the same underlying construct. Another method, test-retest, evaluates whether people's scores remain relatively consistent over time. Because the scales of a job fit assessment test measure different traits, and because people receive separate scores for each of the five scales, reliability must be examined for each of the scales separately.

## Advantages of assessment testing

The high degree of job-success predictability provided by expertly constructed job fit assessments make them among the most efficient and helpful tools in the selection process. They have repeatedly proven their value by giving companies solid indications of how well applicants will perform in the jobs they are seeking. Yet despite a consistent track record for forecasting future success, companies cannot disregard the importance of the legal aspects of assessment testing.

Companies can minimize liability by always using assessment tests in conjunction with other selection tools, such as interviews and background checks. Assessments should never be used as the sole determinant for hiring. Additionally, to maintain complete compliance, companies should use only job fit assessments that were developed by industrial or organizational psychologists, certified by human resource professionals, and that can be proven in court to be both valid and reliable. Documenting all selection and assessment activities will also help your company avoid real—or perceived—adverse impact for protected groups of applicants, greatly reducing the threat of penalties and litigation.

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