**PRE-EMPLOYMENT TESTING AND INVESTIGATION**

**Why Employers Should Conduct Pre-Employment Testing.** An employer’s success often depends on the reliability and quality of its employees. It is understandable, therefore, that many employers spend a significant amount of money recruiting and interviewing prospective employees. Employers want to hire the best possible candidate for a particular job.

Employers also screen prospective employees to limit potential legal liability. Although courts can hold an employer liable in a variety of ways, the most important are the doctrine of vicarious liability and the tort of negligent hiring.

**Vicarious liability**, or *respondeat superior*, holds the employer liable for the actions of employees who are acting on the employer's behalf. The rationale is that the employer can better afford the losses that an employee causes and is also better able to insure against such losses.

**Negligent hiring** occurs when an employer knew or should have known by conducting a reasonable pre-employment investigation that an employee was either not competent to perform the job or was deficient in some other manner. The common law in most states recognizes a cause of action for negligent hiring.

Courts may also impose liability on an employer for negligent hiring:

1. For an employee’s non-employment related acts, and
2. For an employee’s acts that occur after the employer has discharged the individual.

In today’s society, increasing violence in the workplace makes conducting thorough pre-employment investigations essential if employers wish to avoid or reduce liability for their employees’ conduct.

**What are Employment Tests?**

**Employment tests** are any tools that employers use to screen or measure knowledge, skills, or abilities (KSA) of candidates for employment with an organization. Such measures include any type of written test, interviews, agility tests, personality tests, skill tests, performance tests, psychological tests, and medical examinations. Other tests or measures are drug screening, background investigations, criminal or motor vehicle investigations, credit checks, and reference checking.

Keep in mind that the guidelines that we discuss in this document apply to tests for both new employees or for promotional procedures.

**Why Employee Have Concerns About Pre-Employment Testing?**

Pre-employment tests can be useful screening tools. At the same time, they pose various threats to prospective employees. Because certain pre-employment tests, such as drug and alcohol tests that require blood or urine collection, are intrusive, they can significantly interfere with a candidate’s legitimate privacy interests. Unless employers have strict procedures to control the process of collecting samples, such testing can infringe an individual’s right to privacy. In addition, a positive test result may not mean that the employee was using drugs or alcohol on the job. It may, instead, indicate recreational use during non-work hours. Employees have a greater privacy interest in what they do in their non-work hours than when they are on the job.
A lack of accuracy is another problem with pre-employment tests. There are two major types of accuracy problems associated with employment testing. First, the test itself may be inherently fallible or possess an unacceptable margin for error. Second, inaccurate test results can occur when employers fail to administer the test properly. An additional problem is that pre-employment tests may discriminate against prospective employees. The goal of all tests should be to accurately measure a job related KSA. A high or passing test score should be proven through validity studies to indicate high job performance. Several federal, state, and local laws prohibit discrimination in employment.

Legal Restrictions on Pre-Employment Testing

Generally, there are four types of restrictions that affect an employer’s ability to use pre-employment testing.

1. Federal and state laws expressly prohibit employers from using certain types of tests to make hiring decisions. Outright bans are rare and usually result because the test has an unacceptable history of inaccuracy or is too intrusive. As early as 1985, California law prohibited the use of pre-employment AIDS tests under any circumstances.

2. Federal and state laws occasionally control when and how an employer can use a test. For example, the Employee Polygraph Protection Act of 1988 (EPPA) severely restricts a private employer's ability to administer polygraph tests. Many states also have laws that prohibit or restrict the use of such tests.

3. Several state constitutions have right to privacy clauses that expressly guarantee their citizens a right to privacy. The United States Constitution does not expressly guarantee a right of privacy. The United States Supreme Court, however, has ruled that a right of privacy can be implied from the Bill of Rights (Griswold v. Connecticut, 381 US 479 [1965]). The courts continue to debate what these “right of privacy” provisions protect and judicial determinations continue to affect an employer’s use of pre-employment tests.

4. Finally, federal, state and local anti-discrimination laws also affect the way in which employers can administer and use pre-employment tests. Title VII of the Civil Rights Act of 1964 is the primary federal law that prohibits employers from discriminating against prospective employees. The law applies to private employers “in an industry affecting commerce” with 15 or more employees at least 20 weeks of each year. Under Title VII it is unlawful for covered employers to refuse to hire prospective employees because of their race, gender, color, religion or national origin.

Other anti-discrimination laws that affect the use of pre-employment testing are:

- the Federal Rehabilitation Act of 1973,
- the Americans with Disabilities Act of 1991,
- the Age Discrimination Act of 1967, and

These laws and similar state laws affect the use of pre-employment tests because such tests may -- intentionally or unintentionally -- eliminate prospective employees who are members of protected groups.

Most anti-discrimination laws permit some exceptions to their prohibition on discrimination against certain protected groups. The most common exception is the “bona fide occupational qualification” (BFOQ) exception. Under Title VII and many state anti-discrimination laws, employers may base their hiring decisions on race, gender, color, religion or national origin only if the characteristics are BFOQ. The agencies responsible for upholding anti-discrimination laws and the courts have interpreted BFOQ very narrowly.

The 1991 amendment to the Civil Rights Act prohibits the use of “norming” or adjusting test scores to facilitate the use of a discriminatory test.

Types and Methods of Pre-Employment Testing

There are numerous types of pre-employment tests and methods for administering them. Skill tests, for example, are as varied as the jobs available in today’s workplace. Technological advances will increase the availability and administration of such tests. This bulletin will highlight the types of tests employers most commonly perform today. Keep in mind that many of the principles discussed here will apply to other tests and testing methods.
AIDS Testing

Acquired Immune Deficiency Syndrome is a top public health concern today. The purpose of the test that screens blood for exposure to the deadly virus, approved by the Food and Drug Administration, is to screen blood, not people. The test measures antibodies in the blood that the HIV virus stimulates. When employers require candidates to take the test, they are, in reality, screening prospective employees and sometimes deciding that they are unfit workers.

HIV antibody testing does not identify people who have AIDS. The Center for Disease Control (CDC) defines the disease and, as knowledge of the disease increases, the definition continues to evolve. HIV testing does not identify all blood containing the HIV virus. As noted before, the test measures the antibodies stimulated by HIV. The test, therefore, may not identify people with exposure to the virus who have not developed antibodies -- a process that can take eight months or more to occur.

Both the Federal Rehabilitation Act and the Americans with Disabilities Act (ADA) prohibit discrimination based on disability. As early as 1988, the Department of Justice issued a ruling that a person with AIDS qualifies as a person with a handicap. The ADA expressly prohibits the use of AIDS testing on prospective employees to screen out people with HIV or AIDS. However, once they have made a job offer, employers may require testing with certain constraints. To avoid singling out any individual or group (an act of illegal discrimination), the employer must test all employees or, at least, all employees holding the same position. The employer must also show that the test is essential to determining fitness for holding the offered position. The latter would be almost impossible since many individuals infected with HIV show no symptoms of ill health.

Besides the ADA, employers may violate state and local anti-discrimination laws when they require prospective employees to take AIDS tests. Some states have extended their anti-discrimination laws to prohibit discrimination based on an employee’s sexual orientation. Because many people with AIDS have been homosexuals, pre-employment AIDS testing may violate anti-discrimination laws.

Many states have enacted or are in the process of enacting laws that regulate an employer’s use of AIDS tests. Because this area of law is rapidly changing, it is important for employers to monitor federal law as well as state and local laws for recent changes.

Background Checks

Employers often conduct background investigations of prospective employees. Such investigations occur most frequently for positions that involve handling large amounts of money or working closely with children, or for positions involving the public trust. However, as the number of claims against employers for negligent hiring steadily increases, the practice is becoming more common for other positions. The investigation may include checks on the candidate’s prior work history, financial status, criminal record, and immigration status.

Performing complete background investigations is a good business practice when the employer avoids the pitfalls that can lead prospective employees to claims of discrimination or invasion of privacy.

Financial Status

Employers who wish to gather information about a candidate’s financial status must comply with both federal and state laws that regulate the collection and use of this information.

Under the Federal Credit Reporting Act (FCRA) employers may obtain consumer reports on prospective employees. This report typically contains information on an individual’s credit worthiness and standing. Employers must inform candidates if they decide not to hire the prospective employees because of information in the consumer report.

Employers should be careful when deciding whether to perform credit checks. For some positions, knowing about the candidates’ financial status may be necessary; for others, it may be questionable. For example, it makes sense for a restaurant to check the financial status of a cashier. However, a candidate for a dishwasher position might question the need for an employer to know such information.

Employers should be consistent when they perform financial checks. They should perform such checks on individuals applying for the same or similar positions to avoid claims of discrimination. Title VII can also restrict an employer’s use of financial information if their hiring decisions based on the credit information disparately affect minorities or other protected groups. For example, if using credit checks result in the rejection of a disproportionate number of minorities, employers are open to a discrimination lawsuit. Even though the courts...
have generally ruled in favor of employers -- citing the employer’s economic interests -- the costs of defending against a claim of discrimination can be very high.

**Criminal Records**

Federal and state laws regulate an employer’s inquiry into the conviction record of prospective employees. Most jurisdictions prohibit employers from asking about a candidate’s arrest record. An arrest does not indicate that an individual has committed a crime only that the police suspect that he or she may have committed a crime.

Most jurisdictions give employers greater freedom to investigate whether the courts have convicted a prospective employee of a crime. However, the Equal Employment Opportunity Commission (EEOC) has determined that the use of convictions has an adverse impact on Hispanics and Blacks (Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 [1989]). As a result, Title VII and many state laws state that using conviction records violates the law unless the employer can prove that use of such records is a “business necessity”.

Federal or state law may, in some cases, require employers to check a prospective employer’s arrest or conviction record. Many states require all individuals seeking work in day care or child care to undergo a criminal record check. The law may also require employers to conduct such checks for employees of certain financial institutions, for employees who carry weapons, for employees with access to drugs and other medications.

**Immigration Status**

The Immigration Reform and Control Act of 1986 (ICRA) requires employers to verify that their employees have the right to work in the United States. However, employers usually should NOT try to gather information about prospective employees’ national or ethnic heritage before hiring them. Federal and state laws prohibit employers from discriminating based on national origin or citizenship. To avoid charges of discrimination, employers should make the offer of employment before asking prospective employees to prove their right to work in the United States.

**Drug and Alcohol Testing**

The use of drugs such as cocaine and alcohol has received widespread attention in recent years and many private employers now routinely test for drugs and alcohol use. However, the laws regulating drug testing are relatively new. The courts are still shaping them. At present, the Americans with Disabilities Act, some state laws, and court decisions affect an employer’s ability to use drug testing during the pre-employment period.

Generally, the law allows employers to require prospective employees to take drug tests if

- the candidate knows that such testing is part of the screening process for prospective employees,
- the employer has already offered the candidate the job,
- all applicants for the same or similar positions are tested similarly, and
- a state-certified laboratory administers the test.

Employers can avoid some potential problems by including an agreement to submit to such tests on their application form.

Several federal laws and regulations require certain employers to conduct pre-employment drug and alcohol tests. For example, the Federal Highway Administration requires the use of drug and alcohol testing.

Other issues that employers should consider when deciding whether to use drug and alcohol tests as screening devices are:

**The duty to provide a safe workplace.** State common law has long recognized the employer’s obligation to protect employees’ safety and health. The employer’s obligation clearly has application to using drug and alcohol tests in the workplace. However, whether this duty includes an affirmative obligation to conduct such testing on prospective employees is unclear.

**Invasion of Privacy.** State common law often recognizes a cause of action for invasion of privacy. Employers may violate employees’ right to privacy if they intrude upon employees’ private affairs, publicly disclose private facts about employees, or publicly place employees in a false light. If an employer establishes a reasonable drug-testing program for sound reasons, the employer can avoid charges of
invasion of privacy. Employers should take care to protect the prospective employee’s rights by not publicizing that the candidate did not get the job as a result of a drug test.

**Defamation.** Defamation usually occurs when an individual makes a false statement about another person knowingly or with reckless disregard of its falsity. A charge of defamation can occur if an employer ignores a prospective employee’s claim of a false result. This is especially true if the employee subsequently tests negative and the employer ignores it. In *Houston Belt & Terminal Railway v. Wherry* (548 S.W. 2d, 743 TX Civ. Ct. App. [1977]), the railway ignored Wherry’s report of a negative test result after having tested positive on a company administered test. When the company reported Wherry’s positive result to the Department of Labor, he successfully sued for defamation. The court ruled that the company had published inaccurate test results knowing that they were false.

**Emotional Distress.** Most jurisdictions recognize a cause of action for intentional infliction of emotional distress and negligent infliction of emotional distress. When employers, unintentionally, but negligently, administer pre-employment drug and alcohol tests, the law may hold them liable for causing severe emotional stress. As a result, employers should conduct pre-employment testing according to the common law or standards of care that statutes define. Such standards of care normally require that a positive test receive confirmation by an alternative testing technique.

**Genetic Screening**

Today, medical tests can determine whether an individual is pre-disposed to occupational diseases associated with certain workplace hazards. Such tests can be valuable because their use can help prevent employees from contracting ailments that the individuals could have avoided simply by not performing a certain type of work.

However, using these tests as a pre-employment screening device can create difficulties. First, genetic experts do not universally agree that the tests can determine which candidates are more prone to particular occupational diseases. Second, administering such tests may violate Title VII since racial and ethnic background can affect an individual’s genetic make-up. For example, some experts believe that handling benzene can make sickle cell anemia worse. A manufacturer who uses genetic screening may discriminate against Blacks in its hiring practice. Although the screening may apply to all prospective employees, it could also identify a disproportionately higher number of Blacks.

**Physical Examinations**

Employers often require specific mental and physical examinations to assure a qualified work force. However, strict regulations control when employers can conduct these examinations and who can learn the result of such tests.

Employers may legally require candidates to submit to medical exams to assure they are physically able to perform their jobs. However, the Americans with Disabilities Act makes it illegal for employers to require such exams before making the job offer. Employers may make the job offer contingent on the candidate’s successfully passing the exam. Employers should make certain that a medical exam is necessary and that they are not discriminating when they apply the requirement. In addition, they should maintain the confidentiality of such records according to the ADA. Employers are also responsible for making sure that the doctor uses due care. One final note: during the examination, the doctor may ask anything about a person’s health and medical history. However, the employer should make certain that he or she only receives a stripped down conclusion that the prospective employee is able to work, able to work with restrictions, or not able to work.

**Polygraph Examinations**

The Federal Employee Polygraph Protection Act (EPPA) became effective on December 27, 1988. On the same day, the United States Department of Labor promulgated regulations interpreting the Act. The EPPA covers all private employers in interstate commerce. This includes just about every private company that uses the United States Postal Service or the telephone system to send messages to someone in another state. The Act and its interpreting regulations virtually outlaw a private employer’s use of polygraph tests in all areas of employment. Under the act, employers may not suggest, require or ask prospective candidates to take a polygraph test. They may not ask about, use, refer to or accept the result of any lie detector test that a candidate has taken. Employers may not discriminate against applicants who refuse to take polygraph tests. EPPA does allow some limited exceptions. In the pre-employment context, employers may use a polygraph test as a screening device if they are security service providers or if they have authorization from the Drug Enforcement Administration to manufacture controlled substances. Strict rules apply to the conduct of the test.
The EPPA does not apply to federal, state or local government or to certain jobs that handle sensitive work relating to national defense. The EPPA does not preempt state or local laws that may be more restrictive.

**Psychological Examinations and Personality Tests**

Psychological tests claim that they can determine prospective employees’ ability to perform the work for which the employer is considering them. Experts have designed the tests to measure an individual’s emotional adjustment, social relations, interests and motivations. Employers hope that these measurements will help them decide whether prospective employees are a good fit for the position and the company.

No federal laws expressly prohibit the use of personality tests. Employers, however, should assure that questions have a direct relationship to the job and do not violate a state’s regulations about valid pre-employment inquiries. In 1989, several candidates for security positions with a major retailer brought a class action suit against the chain because of its personality test. As part of the application process, the employer asked candidates to answer over 700 true and false questions, including questions about sexual preferences and religious beliefs. The applicants charged that the employer violated their privacy rights and the state Labor Code that prohibits questions about sexual orientation. The employer had to pay a $2 million dollar settlement and the court prohibited the chain from testing for five years. (*Soroko v. Target Store* No. H-143579-3, CA Super. Ct. (1993))

Employers should administer personality tests carefully, following the test provider’s instructions. The law considers psychological tests to be medical examinations and, therefore, employers should conduct them only after they have extended a job offer.

**Skills Testing**

Testing to determine skills include a variety of tests that purport to determine whether a candidate has the aptitude, strength or physical agility needed for a particular job. As with all forms of testing, employers must assure that the administration of skill tests is non-discriminatory.

Because minorities have historically had unequal access to education, they have tended to score lower on these types of tests. As a result, intelligence tests are particularly susceptible to disparately affecting minorities. Unless there is a close correlation between test scores and the job, employers should avoid these types of tests.

Certain jobs require employees to possess a sufficient level of strength or agility. Until recently, employers often required candidates to successfully pass a strength test as a requirement for employment. To avoid claims of discrimination under Title VII, employers had to establish that strength was essential to performing the job. The Americans with Disabilities Act imposes additional requirements. Covered employers must establish that strength and agility relate to the essential functions of the job. The employer must also determine if a reasonable accommodation might not allow a candidate, who is otherwise qualified, but lacks the strength and agility needed for the job to successfully perform the job’s essential functions.

To assist employers in administering non-discriminatory skill tests, the EEOC published the *Uniform Guidelines on Employee Selection Procedures*. Under the guidelines, employers must monitor the effect of their pre-employment tests on minorities. If a test is having a disparate impact on a protected group, the employer must “validate” the test, using a mathematical formula that measures the extent of the disparate impact. Employers should also follow the EEOC’s guidelines on the ADA to assure they are administering skills testing appropriately.

As with all testing, employers should inform candidates that such testing is part of the selection process. They should wait until they make the job offer before asking candidates to take the tests and make any job offer contingent on the outcome of the tests.

**Other Written Tests**

Written tests have met with disfavor in recent years. This is due to the difficulty and expense of validating such tests. The federal government challenged many municipalities on their use of written tests. The government determined that some written tests resulted in discrimination and did not measure job-related skills. Any tests that employers use must not discriminate and must only measure skills that are necessary to perform the job for which the candidate is applying. For example, it would be inappropriate to administer a written math test to candidates who would not use mathematics in their job. In the past, municipal employers commonly used these types of tests solely to screen the large number of candidates that typically applied for municipal positions.
If you are considering using written tests, the following tips may help you avoid employment problems in the future:

- Use only professionally validated tests.
- Use a test that is specific to the position for which the individual is applying.
- If the test is “off-the-shelf,” make sure that the position for which its designers developed it is similar to your position.
- Assure the test’s provider will defend your use of the test.
- Monitor the results of the test for discriminatory results.
- Administer the test as the provider specifies.
- Ask for references of other users or if a candidate, employee, or government agency has ever challenged the test.

CONCLUSION

Federal, state and local laws and regulations restrict employers’ use of pre-employment testing. This bulletin has outlined some of the major pitfalls that employers face if they choose to make pre-employment testing a part of their selection process. Employers should recognize that whether a specific pre-employment test is legal often depends on the specific details of how the employer conducts the test. Employers should consult a human resource professional or an attorney before implementing or revising their policies and procedures concerning pre-employment testing.

For more information, contact the Michigan Municipal League, Meadowbrook Loss Control, or the appropriate state or federal agency. You may also wish to review our other documents that discuss employment-related issues:

- The Americans With Disabilities Act
- Hiring Decisions: Reducing Your Exposure to Litigation
- An Overview of State and Federal Laws That Affect Employment
- Reducing Your Exposure to Claims of Discrimination in Employment
- Disciplining and Discharging Legally

As with all employment issues, we encourage you to discuss your employment related concerns with an attorney.

### Important Telephone Numbers

<table>
<thead>
<tr>
<th>Service</th>
<th>Phone Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michigan Municipal League</td>
<td>734/662-3246</td>
</tr>
<tr>
<td></td>
<td>800/653-2483</td>
</tr>
<tr>
<td>Meadowbrook Loss Control</td>
<td>800/482-0626</td>
</tr>
<tr>
<td>Equal Employment Opportunity Commission</td>
<td>800/669-3362</td>
</tr>
</tbody>
</table>

**Note**

This document is not intended to be legal advice. It does not identify all the issues surrounding the particular topic. Public agencies are encouraged to review their procedures with an expert or a competent attorney who is knowledgeable about the topic.
PRE-EMPLOYMENT TESTING SELF-ASSESSMENT

An employer’s ability to be successful often depends on the reliability and quality of its employees. For this reason, many employers use pre-employment testing as part of their screening process. Testing includes any tools that employers use to screen or measure knowledge, skills, or the abilities (KSA) of candidates for employment. Such measures include any type of written test, interviews, agility tests, personality tests, skill tests, performance tests, psychological tests, and medical examinations. Other tests or measures are drug screening, background investigations, criminal or motor vehicle investigations, credit checks and reference checking.

Employers also screen prospective employees to limit potential legal liability. The requirement to provide a safe and healthy workplace as well as increasing violence in the workplace make conducting thorough pre-employment investigations essential if employers wish to avoid or reduce liability for their employees’ conduct.

Does Your Organization:

1. Have a written policy and procedure that controls the purpose, scope, and administration of pre-employment testing?

2. Inform all candidates that various types of testing are a part of the selection process?

3. Have an attorney and/or human resource specialist review all tests for compliance with federal, state, and local laws?

4. Maintain the results of all testing in strictest confidentiality?

5. Conduct background checks consistently to avoid claims of negligent hiring?

6. Include a release to obtain such information on the application form?

7. Inform candidates for employment that they must submit to drug and alcohol tests?

8. Include an agreement to submit to such tests on the application form?

9. Protect the confidentiality of all candidates who must submit to drug and alcohol tests?

10. Respond appropriately to a candidate’s claim of a false result on a drug or alcohol test?

11. Confirm positive test results by an alternative testing technique?

12. Require medical examinations only after making the job offer?
13. Inform candidates that employment is contingent on passing the medical examination?

14. Require such examinations only when they are job-related?

15. Ascertain that psychological and personality tests, if used, have a direct correlation to the job for which the candidate is applying?

16. Administer such tests after making the job offer?

17. Make sure questions on such tests do not violate the state’s regulations about valid pre-employment inquiries?

18. Determine that the test provider can validate the tests and will support your organization should a candidate file a claim of discrimination or intrusion of privacy?

19. Administer the test in strict accordance with the test provider’s instructions?

20. Assure that strength and agility tests relate to the essential functions of the job?

21. Consider reasonable accommodations as an alternative for candidates who are otherwise qualified to perform the essential functions of the job but cannot pass the strength and agility tests?

22. Use written tests only if they measure skills necessary to perform the job?


---

**Conclusions**

If you were able to honestly answer “yes” to all twenty-three questions, then your organization has reduced its exposure to future liability claims. You should congratulate yourself.

If you are unable to answer “yes” to any one or more of the twenty-three questions, your organization may have an exposure to claims resulting from your organization’s policies and procedures on pre-employment testing.

- Correct any deficiency that may exist;
- Contact your attorney and a human resource specialist for advice;
- Contact the Michigan Municipal League at (734) 662-3246 or (800) 653-2483; or
- Contact Meadowbrook Insurance Group at (800) 482-0626

**Note**

This document is not intended to be legal advice or implied to identify related exposures. Public agencies are encouraged to contact their attorney for assistance in implementing these or other changes.