

Pre-employment testing of applicants: Legal guidelines



Pre-employment tests can help pinpoint ideal candidates for hiring. But they can also spark employee discrimination lawsuits if employers don't follow employment law guidelines laid down by state regulations and federal laws, including the ADA.

1. *What is the potential legal liability of using pre-employment testing to aid in the hiring process?*

Whenever employers use employment tests—whether they are skills tests, psychological tests or personality tests—they face the risk that applicants turned down due to test results will claim that the test discriminated against them based on disability, age, sex, race, religion, etc., or invaded their privacy.

This is not to say that you should avoid using tests to help choose the most qualified candidates. You just need to make sure they're conducted properly and fairly. Here are some tips.

- Use only trained professionals to administer a test and evaluate the results.
- Scrutinize the test questions to ensure they're job-related.
- Obtain applicants' written consent before the test to reduce your exposure to legal liability.
- Request that the developers of tests verify the tests' validity and reliability.
- Ask for an indemnification guarantee from the test distributor or test developer.
- Use only the most up-to-date version of the test.
- Keep all test results confidential.

2. *Can job applicants be required to submit to drug testing?*

The controversy concerning drug testing involves the random testing of present employees. Most states allow for the drug testing of job applicants, providing employers follow testing procedure requirements. Some states require that you can only test applicants who have been offered a conditional position.

3. *Is it discriminatory to require pre-employment physicals and drug testing for all full-time employees, but not for part-time employees?*

It is not discriminatory to test full-time employees and not part-time workers. Just be sure that you have a good business reason for doing so; that you have clearly-written policies and procedures outlining the procedure; and that you follow those policies and procedures to the letter—for every employee.

4. *How can an employer ensure that its pre-employment tests are legal?*

Use the following audit to ensure your hiring tests "pass" legal and practical muster.

- Pinpoint the business necessity of the test. Make sure that the skills or knowledge the test measures are job-related and consistent with business needs.
- Assess your cutoff score. To avoid claims of discrimination, this score should reflect the minimum qualifications needed to successfully perform the job.
- Stick to essential functions. The skills being tested should be primary, not secondary, to the position. Otherwise, you may clash with the Americans with Disabilities Act.
- State what is being tested in the job description. For example, if the job calls for manipulating small parts or getting a part to run, make sure these tasks are a legitimate part of the job description. That way, you'll have a legal leg to stand on if slapped with a discrimination lawsuit.
- Evaluate the need for, and effectiveness of, the tests. It's permissible to subject current employees to tests, as long as they are not administered in a discriminatory manner.
- Scan test scores. Compare the pass rates of minorities with those of nonminorities. A disproportionate difference should send up a red flag.

5. Is the result of a polygraph examination sufficient grounds to deny a job applicant employment?

The Employee Polygraph Protection Act prohibits employer from using lie detector tests to screen applicants for employment or to take any action against them for refusing to take a polygraph examination.

6. Can employers use genetic testing to determine if applicants and employees are predisposed to developing a work-related injury?

Under the Genetic Information Nondiscrimination Act of 2008 (GINA), employers are prohibited from discriminating against employees based on genetic information.

Under GINA, effective Nov. 21, 2009, employers, employment agencies, and labor organizations are prohibited from:

- Requesting or acquiring genetic information, except in limited circumstances.
- Using genetic information to make decisions related to hiring, firing, job assignments, job training, and promotions, or to otherwise discriminate with respect to the compensation, terms, conditions, or privileges of employment.
- Using genetic information to limit, segregate, or classify employees in any way that would deprive them of job opportunities, or otherwise affect their status as employees.
- Disclosing genetic information, except in limited circumstances.
- Retaliating against employees who exercise their rights under GINA.

Employers are not in violation of GINA based on the use, acquisition or disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition of an employee or family member, including a manifested disease, disorder, or pathological condition that has or may have a genetic basis.

In addition, a number of states prohibit the use of genetic testing in employment and/or limit the use of genetic information in making employment decisions. Where federal and state law conflict, employers must abide by the law most generous to employees.