



Personnel Assessment: **Avoiding the Legal Pitfalls**

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Agenda

- 🔑 Core Concepts
- 🔑 Legal Landscape
- 🔑 Current Climate
- 🔑 Hot Topics
- 🔑 Best Practices
- 🔑 Questions and Answers

Core Concepts



Personnel Assessment defined:

- A systematic approach to gathering information and evaluating applicants or current employees for new employment or promotional opportunities.

Core Concepts



Examples of Personnel Assessment Tools:

- Employment Tests
- Interviews
- Writing Samples
- Portfolios
- Background Checks
- Credit Reports
- Reference Checks

The Legal Landscape



Laws, Regulations, and Guidelines:

- Title VII of the Civil Rights Act of 1964, as amended
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Fair Credit Reporting Act and Fair and Accurate Credit Transactions Act
- Employee Polygraph Protection Act
- Uniform Guidelines on Employee Selection Procedures

The Legal Landscape



Fair and Accurate Credit Transactions Act of 2003:


- Substantially amends the FCRA.
- Prior to obtaining a consumer report: Employer must make a “clear and conspicuous” disclosure in writing that a report will be obtained. The applicant must also provide written authorization.
- Prior to adverse action: Employer must provide the applicant a copy of the report and written notice of rights under the FCRA.

The Legal Landscape

Employee Polygraph Protection Act:

- With very limited exceptions, private employers may not “require, request, suggest, or cause an employee or applicant to take or submit to any lie detector test.” Employers also may not “discharge, discipline, or discriminate” against an applicant or employee for refusing to take a polygraph.
- EPPA does not apply to federal, state, and local government employers.

The Legal Landscape

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- 🔑 The Five (5) Legal Pitfalls of Personnel Assessment:
 - Intentional Discrimination
 - Adverse Impact
 - Failure to Accommodate
 - Invasion of Privacy
 - Negligent Hiring

The Legal Landscape



Intentional Discrimination:

- Federal laws prohibit selection tools and procedures that are designed, intended or used to discriminate based on a protected category.
- Protected Categories: Race, Color, National Origin, Gender, Religion, Age, and Disability.

Core Concepts



Adverse Impact:

- A neutral test or other selection procedure that has the effect of disproportionately excluding persons in a protected category.
- The UGESP 4/5ths Rule of Thumb: A selection tool has an adverse impact when it produces a pass rate for a protected group that is less than 4/5ths, (80%), of the pass rate of the group with the highest pass rate.

Core Concepts



Adverse Impact-Shifting Burden Of Proof:

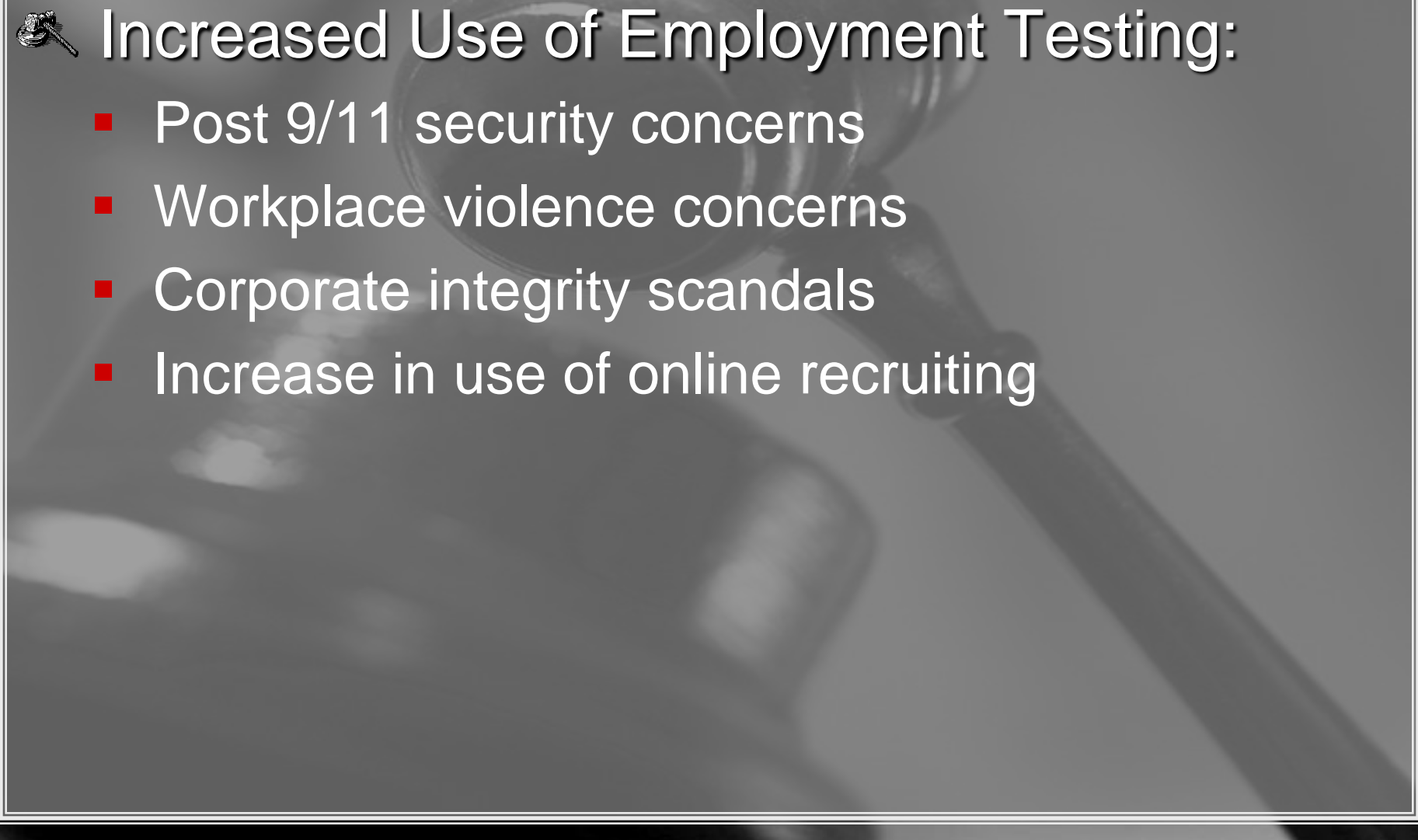
- Employee has initial burden of proving adverse impact.
- Burden then shifts to employer to show that the test or selection procedure is **job-related** and consistent with **business necessity**.
- Burden then shifts to employee to prove that there is a less discriminatory **alternative**.

Legal Landscape

Americans with Disabilities Act:

- Prohibits discrimination against qualified individuals with a disability.
- Disability defined as a physical or mental impairment that substantially limits a major life activity.
- Must make a reasonable accommodation unless undue hardship can be shown.
- Restricts the use of medical exams in the employment arena.

Current Climate

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- ⚙ Increased Use of Employment Testing:
- Post 9/11 security concerns
 - Workplace violence concerns
 - Corporate integrity scandals
 - Increase in use of online recruiting

Current Climate

- ⚖️ Increase in Selection Based EEOC Claims:
 - The number of discrimination charges raising issues related to employment testing, criminal background checks, credit reports, and other selection procedures, reached a **high point** in FY 2007 at 304 charges.

Current Climate



EEOC Focuses on Selection Procedures:

- May 16, 2007- EEOC held a public meeting on employment testing and screening to gather information and address emerging trends in workplace testing and selection.
- December 3, 2007- EEOC issued a fact sheet on employment tests and selections procedures.

Current Climate

Satchell, et. al. vs. FedEx Express

- Class action lawsuit by African-American and Latino employees alleging, in part, disparate impact due to FedEx's use of the Basic Skills Test (BST) as a selection device.
- FedEx denied any discrimination against employees and defends the BST.
- Suit settles for **\$54.9 MILLION**, discontinuation of the use of the BST, and agreement to implement other diversity based measures.



HOT TOPICS



Definition of “Internet Applicant”:

- UGESP defines “applicant” as one who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. Does not specifically address internet applicants.
- **Proposed Guidance:** In 2004, the EEOC issued proposed guidance on defining “internet applicant”:
1) The employer acted to fill a particular position; 2) The employer’s application procedures were followed; and 3) The individual indicated an interest.



HOT TOPICS



Definition of “Internet Applicant”:

- In 2005, OFCCP amends its regulations with its own definition of “Internet Applicant”:
- 1) Individual submits expression of interest through Internet; 2) Employer considers the individual for employment; 3) The individual’s expression of interest indicated that the individual possessed the advertised, basic qualifications for the position; and 4) The individual does not subsequently withdraw interest in the position.



HOT TOPICS



Definition of “Internet Applicant”:

- In March 2008, EEOC approved a 3-year extension of UGESP record-keeping requirements.
- EEOC does not address the internet applicant issue.
- EEOC plans to continue to study the issue.



HOT TOPICS



Definition of “Internet Applicant”: Big Questions Remain

- Whom should employers consider an internet applicant?
- What are the employer’s responsibilities for Internet record-keeping? Adverse impact studies? ADA accommodations?
- How much weight should the EEOC’s proposed guidance be given? The OFCCP definition?



HOT TOPICS



Online Testing:

- Increasingly popular as a faster, cheaper alternative to traditional tests.
- Are online test takers internet applicants?
- Are online testing vendors following standard industry practices in designing and validating its tests?
- How reliable are the results of unproctored internet tests given the ease of cheating?



HOT TOPICS



Succession Planning:

- Aging workforce of “Baby Boomers;” many are now eligible for retirement.
- Employers are creating succession plans to help fill the resulting vacancies with internal candidates.
- Such plans will be subject to anti-discrimination laws and the UGESP.



HOT TOPICS



Genetic Information Nondiscrimination Act:

- President Bush signed into law on May 21, 2008.
- Prohibits employers from using genetic information in hiring, firing, or promotional decisions.
- Employers must now evaluate impact of Act on their current medical testing tools and procedures and whether they are using genetic information in violation of the new law.



HOT TOPICS



Proposed ADA Restoration Act:

- Currently being considered by Congress.
- Mandates a broad construction of the ADA in order to ensure that the ADA “achieves its purpose of providing a comprehensive prohibition of discrimination on the basis of disability.”
- If Act passes, the number of applicants and employees who qualify as disabled will increase.



HOT TOPICS



Google, MySpace, and Facebook as Assessment Tools:

- Employers who use social-networking sites to research applicants and employees will likely learn more than they should know before making an employment decision.
- Information on such sites may be inaccurate.
- Potential for intentional discrimination claims.
- Potential for invasion of privacy claims.

Best Practices



Conduct Adverse Impact Studies:

- An adverse impact study should be performed by HR every time a new test or assessment tool is introduced.
- Separate applicant flow data by job.
- Review applicant flow data in the aggregate first. Also review for each stage of the recruitment process.

Best Practices



Keep Assessment Tools Job Related:

- Conduct a needs analysis prior to recruitment.
- Conduct a job analysis prior to recruitment.
- Update the job description prior to recruitment.
- Select assessment tools that are directly related to the essential functions and KSAs of the job.

Best Practices



Ensure Proper Validation of Tests:

- Do not rely on marketing materials from the testing vendor; require proof of validation. Closely scrutinize online testing vendors.
- Independently monitor & assess the test for validity.
- Give the vendor sufficient information to match the best test for the job.
- **Remember:** The courts will ultimately hold the employer responsible for the validity of the test.

Best Practices



 If Adverse Impact Found, Consider Alternatives:

- **Remember:** Even if a particular test is proven valid, the employee or applicant can still successfully sue if he or she can show there is a less discriminatory alternative.

Best Practices



Check the Collective Bargaining Agreement

- Provide notice to the union prior to making significant changes in assessment procedures for unionized positions.
- Consider seeking union input when implementing or revising assessment tools and procedures for unionized positions.

Best Practices



Assess Risk of Privacy Violations:

- Public employers must comply with the privacy-related requirements of the U.S. Constitution. As such, test administered to public employees must not be unreasonably intrusive and must be job-related.
- Private employees may also be protected under state Constitutions and statutes.

Best Practices



Standardize Assessment Procedures:

- Consistency is key. Administer the same tests under the same conditions to all applicants for a particular position.
- Have a policy and standard operating procedures for employment testing and other selection procedures.
- Monitor compliance with the policies and procedures.

Best Practices



Provide Reasonable Accommodations:

- Provide a mechanism for applicants to request a reasonable accommodation.
- Revise selection procedures to accommodate applicants with disabilities.
- **Remember:** Requiring a disabled applicant to use his or her impaired ability for an employment test is prohibited unless the test is intended to measure the ability.
- Where undue hardship exists, consider alternative accommodations.

Best Practices



Monitor Managers and Supervisors:

- Centralize recruitment through HR.
- Monitor the recruitment practices of frontline managers and supervisors.
- Draft policies and standard operating procedures on recruitment and selection process.
- Provide on-going training to management.

Best Practices



Exercise Caution with Medical Testing:

- Pre-employment medical exams are generally prohibited.
- Post-offer medical exams are permitted where 1) all new employees are subject to the exam, 2) the results and information are kept confidential, and 3) the information is not used in a manner that violates the ADA.
- Post-employment exams must be job-related and consistent with business necessity -or - voluntary.

Best Practices



Keep Medical Information Confidential:

- Collect medical information on separate forms.
- Maintain medical information separate from the personnel file.
- Divulge medical information on a “need to know” basis, for example, disclosing to a supervisor for the purpose of a reasonable accommodation.
- Obtain a HIPPA-compliant authorization before obtaining employee medical files.

Best Practices



Take the “Whole Person” Approach:

- Tests and other assessment tools are only part of the picture.
- All assessment tools are subject to some degree of error.
- No assessment tool can accurately predict how well an employee will perform with 100% certainty.

Best Practices



Do Your Due Diligence:

- Negligent Hiring: Growing number of suits against employers stemming from crimes committed by employees.
- Employer may be held liable when a reasonable pre-employment investigation would have revealed that the employee posed a threat to others.

Q&A

Questions?

