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Employers may administer nonmedical tests to applicants prior to extending an offer of employment. However, if any test tends to screen out individuals with disabilities, the employer must be able to demonstrate that the test is job related and consistent with business necessity. For example, the ADA regulations require that any specific abilities that a test measures must be abilities that are required to perform the essential functions of a job.

Employers may not administer a medical examination to applicants prior to an offer of employment or to employees unless the test is job related and consistent with business necessity. Additionally, courts may be likely to find that dual-purpose tests (tests that can be used to identify medical conditions as well as personality or other nonmedical traits) are medical examinations and may not be administered prior to an offer of employment.

If employers use medical examinations as a part of the hiring process, they must require **all** employees entering the same job category to submit to testing. Employers may make offers of employment contingent upon the outcome of a medical examination, if the exam is directly related to the individual's ability to perform the job. Employers may also need to make reasonable accommodations to provide applicants with equal opportunity to participate in the application testing process.

Performance and Aptitude Evaluations

Performance and aptitude tests should identify those candidates most likely to succeed. These tests determine an applicant's mastery of the skills required for the particular job. Such tests typically attempt to predict job performance by measuring an applicant's mental ability, job knowledge, simulated job performance, agility, or strength, as well as the applicant's motivation and desire.

Adverse Impact

Employers should always exercise caution when administering tests because some tests may adversely impact certain protected groups.

Adverse impact occurs when the test screens out individuals in protected groups in greater proportion than others. However, adverse impact alone does not necessarily make a test unlawful.

Generally, if a test adversely impacts any protected group, an employer must validate the results of the test by establishing the following:

- The test is a neutral predictor of job performance.
- The testing criteria used directly relates to the qualifications for the job.

Note: A physical fitness or agility test must not involve the monitoring of an applicant's physiological or biological response. Monitoring physical responses to a physical fitness test qualifies the test as a medical exam, which is prohibited before an employment offer is extended.

Drug Tests

Employers may test applicants for illegal drug use before extending a job offer, or after extending a conditional job offer, to prevent hiring individuals who illegally use drugs. Where a conditional job offer is extended, applicants agree to be tested as a condition of employment and are not hired if they fail to produce a negative test. However, employers must be aware of the ADA protections for a

person who is an alcoholic because they may be an individual with a disability under the ADA. According to the ADA, an ***alcoholic*** is a person with a disability and is protected by the ADA if they are qualified to perform the essential functions of the job. An employer may be required to provide an accommodation to an alcoholic. However, an employer can discipline, discharge, or deny employment to an illegal drug user or an alcoholic whose use of alcohol adversely affects job performance or conduct. An employer also may prohibit the use of alcohol in the workplace and can require that employees not be under the influence of alcohol.

Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use. Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations.

Existing drug-testing programs may require a modification if testing is not restricted to the illegal use of drugs only. The service or clinic used for testing should comply with the ADA and state law.

Medical Information and Testing

Traditionally, employers sought medical information about applicants to assess the applicant's abilities to perform a job. However, as medical insurance, workers' compensation, and other costs associated with disabilities and other medical impairments have increased, employers have also sought such information in an effort to control or reduce such costs. Employers must be aware of ADA protections and medical testing. If an individual is not hired because a medical examination reveals the existence of a disability, the employer must be able to demonstrate that the reasons for exclusion are job related and necessary for conduct of business. Employers also must be able to show that there was no reasonable accommodation that would have made it possible for the individual to perform the essential job functions.

Note: A number of federal and state laws have been enacted to assist in the prevention of discrimination and privacy violations against individuals with a disability or individuals with a medical impairment resulting from overzealous medical screening.

Federal Laws

Employers must comply with the following federal regulations while performing any pre-employment tests:

- The Rehabilitation Act of 1973, which applies to some government contractors, prohibits employers from discriminating against all qualified individuals with a handicap and limits how employers can collect and retain medical information about applicants.
- The Americans with Disabilities Act (ADA), which states that employment offers can be conditioned on an applicant's satisfactory passage of a physical exam. However, nonjob-related disabilities uncovered during a physical exam may not be used to disqualify an applicant.

The ADA prohibits employers with 15 or more employees from discriminating against qualified individuals with a disability in hiring, firing, establishing compensation levels, and other privileges of employment. Additionally, the ADA prohibits an employer from doing any of the following:

- Asking applicants about their physical or mental limitations.
- Conducting medical examinations before making the applicant a conditional offer of employment.
- Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the person's opportunities or status.

Importantly, certain employers are required to abide by the HIPAA privacy protections (See Genetic Information Nondiscrimination Act of 2008, below, for more information).

State Laws

Some states have laws that limit the types of medical information employers can seek from job applicants.

These laws may prohibit employers from discriminating against individuals with a disability or people diagnosed with certain conditions, such as the following:

- Acquired immunodeficiency syndrome/human immunodeficiency virus (AIDS/HIV).
- Cancer.
- Genetic diseases, such as sickle-cell anemia or Tay-Sachs.

These laws may also protect an individual's privacy in relation to specific conditions.

Other states have laws that expressly or implicitly mandate testing for communicable diseases for certain categories of workers. For example, several states require teachers to be tested for tuberculosis, and other states prohibit food industry employers from hiring an individual infected with communicable diseases.

Genetic Testing

Genetic tests determine whether individuals have genetic traits that make them susceptible to certain diseases. Employers may desire to perform genetic tests on applicants to identify those applicants who may succumb to conditions having high costs in terms of absenteeism, workers' compensation, disability, and medical insurance.

The concern about invasion of privacy and discrimination in employment increases as scientific breakthroughs make it easier to identify genes linked to specific diseases. To address this concern, the federal Genetic Information Nondiscrimination Act of 2008 (GINA) was created and many states are considering and implementing legislation to prohibit or control the use of genetic tests in the employment process and to mandate the confidentiality of test results.

Extensive regulations, found in Executive Order 13145 and enforced by the Equal Employment Opportunity Commission (EEOC), prohibit discrimination against employees in federal employment based on protected genetic information or information about a request for or the receipt of genetic services. An employing department or agency may not discharge, fail or refuse to hire, or otherwise discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment because of protected genetic information with respect to the employee or because of information about a request for or the receipt of genetic services by such employee.

According to Executive Order 13145, protected genetic information is information about **any** of the following:

- An individual's genetic tests.
- The genetic tests of an individual's family members.
- The occurrence of a disease, or medical condition or disorder in family members of the individual.

However, information about an individual's current health status (including information about sex, age, physical exams, and chemical, blood, or urine analyses) is not protected genetic information.

An employing department or agency may not limit, segregate, or classify employees in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect that employee's status, based on either of the following:

- An employee's protected genetic information.
- Information about a request for or the receipt of genetic services by an employee.

Note: In the interests of privacy, an employing department or agency may not maintain protected genetic information or information about a request for or the receipt of genetic services in general personnel files. Such information must be treated as confidential medical records and maintained separate from personnel files.

Genetic Information Nondiscrimination Act of 2008

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits discrimination in group health plan coverage based on genetic information. GINA is effective for plan years beginning after May 21, 2009 (January 1, 2010 for calendar year plans). GINA expands the genetic information protections included in the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA prevents a plan or issuer from imposing a pre-existing condition exclusion provision based solely on genetic information, and prohibits discrimination in individual eligibility, benefits, or premiums based on any health factor (including genetic information).

GINA generally prohibits group health plans and issuers from requesting or requiring an individual to undergo a genetic test. However, a health care professional providing health care services to an individual is permitted to request a genetic test. Additionally, genetic testing information may be requested to determine payment of a claim for benefits, although the regulations make clear that the plan or issuer may request only the minimum amount of information necessary in order to determine payment. There is also a research exception that permits a plan or issuer to request (but not require) that a participant or beneficiary undergo a genetic test.

GINA also prohibits a plan from collecting genetic information (including family medical history) prior to or in connection with enrollment, or for underwriting purposes. Thus, under GINA, plans and issuers are generally prohibited from offering rewards in return for collection of genetic information, including family medical history information collected as part of a Health Risk Assessment (HRA). The regulations provide several examples illustrating GINA's application to HRAs. An exception is included for incidental collection, provided the information is not used for underwriting. However, the regulations make clear that the incidental collection exception is not available if it is reasonable for the plan or issuer to anticipate that health information will be received in response to a collection, unless the collection explicitly states that genetic information should not be provided.

Polygraph and Psychological Testing

The general purpose of conducting a polygraph test is to detect whether or not an applicant or employee was involved in an incident of workplace theft or other misconduct causing economic loss. As an alternative to polygraph tests, some employers use paper-and-pencil honesty tests aimed at assessing the honesty of applicants through questions about theft. These tests are essentially a form of a psychological test.

Applicants or employees who have been asked or required to take polygraph tests have sued employers in the following instances:

- Under federal and state laws that restrict or prohibit the administration of such tests.

- For violation of federal and state constitutional rights of privacy.
- For invasion of privacy under common law theories, including negligence, defamation, and infliction of emotional distress.

Polygraph Tests

Employee Polygraph Protection Act of 1988

With few exceptions, the Employee Polygraph Protection Act of 1988 (EPPA) protects most applicants and employees from employer-required polygraph examinations by preventing employers engaged in interstate commerce from using lie-detector tests either for pre-employment screening or during the course of employment. According to the act, a ***lie detector*** includes a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or similar device (whether mechanical or electrical) used to render a diagnostic opinion as to the honesty or dishonesty of an individual, and a ***polygraph*** is an instrument that records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards and is used to render a diagnostic opinion as to the honesty or dishonesty of an individual.

Under the act, an employer **may not**:

- Require, request, suggest, or cause an employee or prospective employee to take or submit to any lie-detector test.
- Use, accept, refer to, or inquire about the results of any lie-detector test of an employee or prospective employee.
- Discharge, discipline, discriminate against, deny employment or promotion, or threaten to take any such action against an employee or prospective employee for refusal to take a test, on the basis of the results of a test, for filing a complaint, for testifying in any proceeding, or for exercising any rights afforded by the act.

However, the following are limited exceptions to the act where polygraph tests, but no other lie-detector tests, may be administered:

- Applicants and employees for jobs in government, national defense, security services (such as armored-car, alarm, and guard), or manufacturing of controlled substances may be required to take polygraph tests.
- Private sector employees may be asked to take polygraph tests in conjunction with criminal investigations of theft, embezzlement, or business espionage or sabotage, as long as the employee had access to the property that is the subject of the investigation, the employer has a reasonable suspicion that the employee was involved, and the incident resulted in economic loss or injury to the employer.

Notice

When a polygraph test is administered pursuant to the economic loss or injury exemption, the employer is required to provide the examinee with a statement prior to the test, in a language understood by the examinee, which fully explains the specific incident or activity being investigated and the basis for testing particular employees. The statement must contain, at a minimum, all of the following information:

- An identification with particulars on the specific economic loss or injury to the business of the employer.
- A description of the employee’s access to the property that is the subject of the investigation.

- A detailed description of the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.
- The signature of a person (other than the polygraph examiner) authorized to legally bind the employer.

Every employer who requests an employee or prospective employee submit to a polygraph examination, pursuant to the ongoing investigation, drug manufacturer, or security services EPPA exemptions, must provide all of the following:

- Reasonable written notice of the date, time, and place of the examination and the examinee's right to consult with legal counsel or an employee representative before each phase of the test.
- Written notice of the nature and characteristics of the polygraph instrument and examination.
- Extensive written notice explaining the examinee's rights including a list of prohibited questions and topics, the examinee's right to terminate the examination, and the examinee's right to file a complaint with the Department of Labor alleging violations of EPPA

Employers must also provide written notice to the examiner identifying the persons to be examined.

Employers who administer polygraph tests must also:

- Refrain from asking questions about religion, race, sex, politics, or union or labor affiliations.
- Refrain from taking certain actions against employees solely based on results of a test or the refusal to take a test.
- Respect the examinee's right to terminate the test at any time.
- Respect the examinee's right to not be asked degrading or unnecessarily intrusive questions or questions concerning religious or political beliefs or sexual preference.

Warning: Employers wishing to implement a polygraph testing policy should first consult an attorney and are required to comply with specific recordkeeping requirements. For example, employers and polygraph examiners must retain required records for a minimum of three years from the date the polygraph examination is conducted (or from the date the examination is requested if no examination is conducted).

Governmental Entities

When acting as an employer, the U.S. government, any state or local government, or any political subdivision of a state or local government is exempt from the EPPA.

Employers Authorized to Manufacture, Distribute, or Dispense Controlled Substances

Employers authorized by the Drug Enforcement Agency to manufacture, distribute, or dispense controlled substances may administer polygraph tests to a prospective employee who, if hired, would have direct access to controlled substances. ***Direct access***under such circumstances signifies that the position requires involvement in manufacture, testing, storage, distribution, sale, or dispensing of controlled substances.

Employers Providing Security Services

Employers whose primary business purpose is to provide security services (such as armored cars, security protection, and security alarm) may administer polygraph tests to applicants. However, such tests may only be administered to those prospective employees who are being hired to protect

facilities, materials, or operations having a significant impact on the health or safety of any state or the national security of the United States.

Psychological Tests

Some employers use psychological tests to assess an applicant's honesty or work habits. Psychological testing commonly takes the form of objective tests consisting of true or false questions, and often contains questions about private matters including religion, sexual practices and preferences, and bodily functions.

For legal and ethical reasons, psychological testing should be job related and narrowly tailored to serve a specific employer purpose. The provider of a frequently used test, the Minnesota Multiphasic Personality Inventory, cautions against uniform administration of the test and advises that only those in jobs involving safety or high stress be tested.

Employers performing psychological tests need to consider whether they will conflict with the ADA or EEOC guidelines when performing testing. Psychological tests that are designed to reveal or assess an applicant's mental impairment or general psychological health may be deemed as medical examinations and cannot be given at the pre-employment offer stage. However, psychological tests designed to reveal or assess an applicant's honesty and work habits would not be deemed as medical examinations and may be given at the pre-employment offer stage. Similar analysis must be made with respect to each question on a psychological test.

Warnings When Using Polygraph Alternatives

Employers should use extreme caution when administering personality tests as an alternative to a polygraph test that are in actuality a psychological evaluation. Personality and honesty testing may also raise privacy and discrimination issues and should be limited to assessing job-related traits.

Warning: A pre-employment offer test that identifies mental disorders would violate the ADA.

The ADA provides protections for mental disorders including major depression, bipolar disorder, anxiety disorders, schizophrenia, and personality disorders that substantiality limit one or more major life activities. Despite claims to the contrary, no guaranteed testing format exists to accurately assess honesty or personality.

However, if an employer must use an honesty or personality test an employer should refrain from using tests as follows:

- For which little or no validation research exists.
- Based on anonymously provided data or lacking data from real candidates.
- With validation studies designed, conducted, and published only by the test developer and not replicated by independent psychologists or agencies.

Contact Information

Equal Employment Opportunity Commission
www.eeoc.gov