

CHAPTER 2

Understanding the Legal Context of Assessment- Employment Laws and Regulations with Implications for Assessment

The number of laws and regulations governing the employment process has increased over the past four decades. Many of these laws and regulations have important implications for conducting employment assessment. This chapter discusses what you should do to make your practices consistent with legal, professional, and ethical standards.

Chapter Highlights

1. Title VII of the Civil Rights Act (CRA) of 1964, as amended in 1972; Tower Amendment to Title VII
2. Age Discrimination in Employment Act of 1967 (ADEA)
3. Equal Employment Opportunity Commission (EEOC) - 1972
4. [Uniform Guidelines on Employee Selection Procedures](#) - 1978; adverse or disparate impact, approaches to determine existence of adverse impact, four-fifths rule, job-relatedness, business necessity, biased assessment procedures
5. Title I of the Civil Rights Act (CRA) of 1991
6. [Americans with Disabilities Act \(ADA\) - 1990](#)
7. Record keeping of adverse impact and job-relatedness of tests
8. The Standards for Educational and Psychological Testing - 1985; The Principles for the Validation and Use of Personnel Selection Procedures - 1987
9. Relationship between federal, state, and local employment laws.

Principles of Assessment Discussed

Use only assessment instruments that are *unbiased* and fair to all groups.

The general purpose of employment laws and regulations is to prohibit *unfair discrimination* in employment and provide equal employment opportunity for all. Unfair discrimination occurs when employment decisions are based on race, sex, religion, ethnicity, age, or disability rather than on job-relevant knowledge, skills, abilities, and other characteristics. Employment practices that unfairly discriminate against people are called *unlawful* or *discriminatory employment practices*.

The summaries of the laws and regulations in this chapter focus on their impact on employment testing and assessment. Before you institute any policies based on these laws and regulations, read the specific laws carefully, and consult with your legal advisors regarding the implications for your particular assessment program.

1. Title VII of the Civil Rights Act (CRA) of 1964 (as amended in 1972); Tower Amendment to Title VII

Title VII is landmark legislation that prohibits unfair discrimination in all terms and conditions of employment based on race, color, religion, sex, or national origin. Other subsequent legislation, for example, ADEA and ADA, has added age and disability, respectively, to this list. Women and men, people age 40 and older, people with disabilities, and people belonging to a racial, religious, or ethnic group are protected under Title VII and other employment laws. Individuals in these categories are referred to as members of a **protected group**. The employment practices covered by this law include the following:

- ◆ recruitment
- ◆ hiring
- ◆ job classification
- ◆ transfer
- ◆ training
- ◆ promotion
- ◆ performance appraisal
- ◆ compensation
- ◆ union or other membership
- ◆ disciplinary action
- ◆ termination
- ◆ fringe benefits.

Employers having 15 or more employees, employment agencies, and labor unions are subject to this law.

The *Tower Amendment* to this act stipulates that professionally developed workplace tests can be used to make employment decisions. However, only instruments that do not discriminate against any protected group can be used. Use only tests developed by experts who have demonstrated qualifications in this area.

2. Age Discrimination in Employment Act of 1967 (ADEA)

This Act prohibits discrimination against employees or applicants age 40 or older in all aspects of the employment process. Individuals in this group must be provided equal employment opportunity; discrimination in testing and assessment is prohibited. If an older worker charges discrimination under the ADEA, the employer may defend the practice if it can be shown that the job requirement is a matter of *business*

necessity. Employers must have documented support for the argument they use as a defense.

ADEA covers employers having 20 or more employees, labor unions, and employment agencies. Certain groups of employees are exempt from ADEA coverage, including public law enforcement personnel, such as police officers and firefighters. Uniformed military personnel also are exempt from ADEA coverage.

3. Equal Employment Opportunity Commission (EEOC)-1972

The EEOC is responsible for enforcing federal laws prohibiting employment discrimination, including Title VII, the U. S. Environmental Protection Agency (EPA), the ADEA, and the ADA. It receives, investigates, and processes charges of unlawful employment practices of employers filed by an individual, a group of individuals, or one of its commissioners. If the EEOC determines that there is "reasonable cause" that an unlawful employment practice has occurred, it is also authorized to sue on behalf of the charging individual(s) or itself. The EEOC participated in developing the *Uniform Guidelines on Employee Selection Procedures*.

4. [Uniform Guidelines on Employee Selection Procedures-1978](#); adverse or disparate impact, approaches to determine existence of adverse impact, four-fifths rule, job-relatedness, business necessity, biased assessment procedures

In 1978, the EEOC and three other federal agencies-the Civil Service Commission (predecessor of the Office of Personnel Management) and the Labor and Justice Departments-jointly issued the *Uniform Guidelines on Employee Selection Procedures*.

The *Guidelines* incorporate a set of principles governing the use of employee selection procedures according to applicable laws. They provide a framework for employers and other organizations for determining the proper use of tests and other selection procedures. The *Guidelines* are legally binding under a number of civil rights laws, including Executive Order 11246 and the Civil Rights Requirements of the National Job Training Partnership Act and the Wagner Peyser Act. In reviewing the testing practices of organizations under Title VII, the courts generally give great importance to the *Guidelines'* technical

standards for establishing the job-relatedness of tests. Also, federal and state agencies, including the EEOC, apply the *Uniform Guidelines* in enforcing Title VII and related laws.

The *Guidelines* cover all employers employing 15 or more employees, labor organizations, and employment agencies. They also cover contractors and subcontractors to the federal government and organizations receiving federal assistance. They apply to all tests, inventories and procedures used to make employment decisions. Employment decisions include hiring, promotion, referral, disciplinary action, termination, licensing, and certification. Training may be included as an employment decision if it leads to any of the actions listed above. The *Guidelines* have significant implications for personnel assessment.

One of the basic principles of the *Uniform Guidelines* is that it is unlawful to use a test or selection procedure that creates adverse impact, unless justified. Adverse impact occurs when there is a substantially different rate of selection in hiring, promotion, or other employment decisions that work to the disadvantage of members of a race, sex, or ethnic group.

Different approaches exist that can be used to determine whether adverse impact has occurred. Statistical Techniques may provide information regarding whether or not the use of a test results in adverse impact. Adverse impact is normally indicated when the selection rate for one group is less than 80% (4/5) that of another. This measure is commonly referred to as the four-fifths or 80% rule. However, variations in sample size may affect the interpretation of the calculation. For example, the 80% rule may not be accurate in detecting substantially different rates of selection in very large or small samples. When determining whether there is adverse impact in very large or small samples, more sensitive tests of statistical significance should be employed.

When there is no charge of adverse impact, the *Guidelines* do not require that you show the job-relatedness of your assessment procedures. However, you are strongly encouraged to use only job-related assessment tools.

If your assessment process results in adverse impact, you are required to eliminate it or justify its continued use. The *Guidelines* recommend the following actions when adverse impact occurs:

- Modify the assessment instrument or procedure causing adverse impact.
- Exclude the component procedure causing adverse impact from your assessment program.
- Use an alternative procedure that causes little or no adverse impact, assuming that the alternative procedure is substantially equally valid.
- Use the selection instrument that has adverse impact if the procedure is job related and valid for selecting better workers, and there is no equally effective procedure available that has less adverse impact.

Note that for the continued use of assessment instruments or procedures that cause adverse impact, courts have required justification by business necessity as well as validity for the specific use. The issue of business necessity is specifically addressed in Title I of the Civil Rights Act of 1991 (see next section).

An assessment procedure that causes adverse impact may continue to be used only if there is evidence that

- It is job-related for the position in question.
- Its continued use is justified by business necessity.

Demonstrating job-relatedness of a test is the same as establishing that the test may be validly used as desired. Chapter 3 discusses the concept of test validity and methods for establishing the validity or job-relatedness of a test.

Demonstrating the business necessity of using a particular assessment instrument involves showing that its use is essential to the safe and efficient operation of the business and there are no alternative procedures available that are substantially equally valid to achieve the business objectives with a lesser adverse impact.

Another issue of importance discussed in the *Uniform Guidelines* relates to test fairness. The *Uniform Guidelines* define biased or unfair assessment procedures as those assessment procedures on which one race, sex, or ethnic group characteristically obtains lower scores than members of another group and the differences in the scores are not reflected in differences in the job performance of members of the groups.

The meaning of scores on an unfair or biased assessment procedure will differ depending on the group membership of the person taking the test. Therefore, using biased tests can prevent employers from making equitable employment decisions. This leads to the next principle.

Principle of Assessment

Use only assessment instruments that are *unbiased* and *fair* to all groups.

Use of biased tools may result in unfair discrimination against members of the lower scoring groups. However, use of fair and unbiased tests can still result in adverse impact in some cases. If you are developing your own test or procedure, expert help may be advisable to make sure your procedure is fair to all relevant groups. If you are planning to purchase professionally developed assessment tools, first evaluate the fairness of those you are considering by reading the test manuals and consulting independent reviews.

5. Title I of the Civil Rights Act of 1991

Title I of the CRA of 1991 reaffirms the principles developed in Title VII of the CRA of 1964, but makes several significant changes.

As noted previously, the Act specifically requires demonstration of both the job-relatedness and business necessity of assessment instruments or procedures that cause adverse impact. The business necessity requirement, set forth in Title I of the CRA of 1991, is harder to satisfy in defending challenged practices than a business purpose test suggested by the Supreme Court earlier.

Another important provision relates to the use of group-based test score adjustments to maintain a representative work force. The Act prohibits score adjustments, the use of different cut-off scores for different groups of test takers, or alteration of employment-related test results based on the demographics of the test takers. Such practices, which are referred to as *race norming* or *within-group norming*, were used by some employers and government agencies to avoid adverse impact.

The Act also makes compensatory and punitive damages available as a remedy for claims of intentional discrimination under Title VII and the ADA.

6. Americans with Disabilities Act (ADA) - 1990

Under the ADA, qualified individuals with disabilities must be given equal opportunity in all aspects of employment. The law prohibits employers with 15 or more employees, labor unions, and employment agencies from discriminating against qualified individuals with disabilities. Prohibited discrimination includes failure to provide reasonable accommodation to persons with disabilities when doing so would not pose undue hardship.

A qualified individual with a disability is one who can perform the essential functions of a job, with or without reasonable accommodation.

- *Disability* is defined broadly to include any physical or mental impairment that substantially limits one or more of an individual's major life activities, such as caring for oneself, walking, talking, hearing, or seeing. Some common examples include visual, speech, and hearing disabilities; epilepsy; specific learning disabilities; cancer; serious mental illness; AIDS and HIV infection; alcoholism; and past drug addiction. Noteworthy among conditions **not** covered are current illegal use of drugs, sexual behavior disorders, compulsive gambling, kleptomania, and pyromania.
- *Essential functions* are the primary job duties that are fundamental, and not marginal to the job. Factors relevant to determining whether a function is essential include written job descriptions, the amount of time spent performing the function, the consequences of not requiring the function, and the work experiences of employees who hold the same or similar jobs.
- *Reasonable accommodation* is defined as a change in the job application and selection process, a change in the work environment or the manner in which the work is performed, that enables a qualified person with a disability to enjoy equal employment opportunities. Under this Act, qualified individuals with disabilities must be provided reasonable accommodation so they can perform the essential job functions, as long as this does not create undue hardship to the employer.
- *Undue hardship* is defined as significant difficulty or additional expense and is determined based on a number of factors. Some factors that are considered are the nature and net cost of the accommodation, the financial resources of the facility, the number

employed at the facility, the effect on resources and operations, the overall financial resources of the entire organization, and the fiscal relationship of the facility with the organization. An accommodation that is possible for a large organization may pose an undue hardship for a small organization.

The ADA has major implications for your assessment practices.

- In general, it is the responsibility of the individual with a disability to inform you that an accommodation is needed. However, you may ask for advance notice of accommodations required, for the hiring process only, so that you may adjust your testing program or facilities appropriately. When the need for accommodation is not obvious, you may request reasonable documentation of the applicant's disability and functional limitations for which he or she needs an accommodation.
- Reasonable accommodation may involve making the test site accessible, or using an alternative assessment procedure. Administering employment tests to individuals with disabilities that require those individuals to use their impaired abilities is prohibited unless the tests are intended to measure one of these abilities. For example, under the ADA, when a test screens out one or more individuals with a disability, its use must be shown to be job-related for the position in question and justified by business necessity.
- One possible alternative procedure, if available, would be to use a form of the test that does not require use of the impaired ability. Another possibility is to use a procedure that compensates for the impaired ability, if appropriate. For example, allowing extra time to complete certain types of employment tests for someone with dyslexia or other learning disability, or providing a test with larger print or supplying a reader to a visually impaired individual where appropriate, would be considered reasonable accommodation.
- The ADA expressly prohibits making medical inquiries or administering medical examinations prior to making a job offer. Before making medical inquiries, or requiring medical exams, you must make an offer of employment to the applicant. You may make medical inquiries or require medical exams of an employee only when doing so is work-related and justified by business necessity. All medical information you obtain about your applicants and employees is strictly confidential and must be

treated as such. Access to and use of this information is also greatly restricted. For a more detailed discussion of medical examinations see Chapter 4.

Your organization should develop a written policy on conducting testing and assessment of individuals with disabilities. This will help ensure compliance with the provisions of the ADA.

If you need assistance in complying with the ADA, there are several resources you may contact.

- The Job Accommodation Network: (800) 526-7234
- Industry-Labor Council on Employment and Disability: (516) 747-6323
- The American Foundation for the Blind: (202) 408-0200, (800) 232-5463
- The President's Committee on Employment of People with Disabilities: (202) 376-6200
- Disability and Business Technical Assistance Centers: (800) 949-4232.

7. Record keeping of adverse impact and job-relatedness of tests

The [*Uniform Guidelines*](#) and subsequent regulations 2 require that all employers maintain a record of their employment-related activities, including statistics related to testing and adverse impact. Filing and record-keeping requirements for large employers (those with over 100 employees) are generally more extensive than those for employers with 100 or fewer employees. To learn more about the specific requirements, refer to EEOC regulations on record-keeping and reporting requirements under Title VII, and the ADA, 29 CFR part 1602, and the *Uniform Guidelines*.

8. The Standards for Educational and Psychological Testing - 1985; The Principles for the Validation and Use of Personnel Selection Procedures-1987

There are two resource guides published by major organizations in the testing field that will help you set up and maintain an assessment

program. The principles and practices presented in these publications set the standards for professional conduct in all aspects of assessment.

- ***The Standards for Educational and Psychological Testing.*** This publication was developed jointly by the American Psychological Association (APA), the National Council on Measurement in Education (NCME), and the American Educational Research Association (AERA). The Standards are an authoritative and comprehensive source of information on how to develop, evaluate, and use tests and other assessment procedures in educational, employment, counseling, and clinical settings. Although developed as professional guidelines, they are consistent with applicable regulations and are frequently cited in litigation involving testing practices.
- ***The Principles for the Validation and Use of Personnel Selection Procedures.*** This publication was developed by the Society for Industrial and Organizational Psychology (SIOP). Like the *Standards*, the *Principles* are also an excellent guide to good practices in the choice, development, evaluation, and use of assessment tools. However, their main focus is on tools used in the personnel assessment context. The *Principles* explain their relationship to the *Standards* in the following way:

The *Standards* primarily address psychometric issues while the *Principles* primarily address the problems of making decisions in employee selection, placement, promotion, etc. The major concern of the *Standards* is general; the primary concern of the *Principles* is that performance on a test . . . is related to performance on a job or other measures of job success.

Compatibility of the Standards and the Principles with the Uniform Guidelines

The *Uniform Guidelines* were intended to be consistent with generally accepted professional standards for validating and evaluating standardized tests and other selection procedures. In this regard, the *Guidelines* specifically refer to the *Standards*.

It is strongly encouraged that you develop familiarity with both the *Standards* and the *Principles* in addition to the *Uniform Guidelines*.

Together, they can help you conduct personnel assessment in a manner consistent with legal and professional standards.

9. Relationship between federal, state, and local employment laws

Some states and localities have issued their own fair employment practices laws, and some have adopted the federal *Uniform Guidelines*. These state and local laws may be more stringent than corresponding federal laws. When there is a contradiction, federal laws and regulations override any contradictory provisions of corresponding state or local laws. You should become thoroughly familiar with your own state and local laws on employment and testing before you initiate and operate an assessment program.

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