

Screen test

Using psych exams on your job applicants? Beware the risks

By **NORA LOCKWOOD TOOHER**

It seems like a good idea. An employer gets 100 applications for a job opening.

To wheedle the pool down to a manageable 20, the employer asks the candidates to take an online personality test, asking questions such as whether the candidate is an introvert or an extravert.

Simple enough.

The problem, however, is that if employers aren't careful about how these tests are designed and used, they could face a legitimate threat of a lawsuit.

The job testing industry is thriving, raking in an estimated \$400 million a year. As many as 5 million Americans a year take psychological tests – often over the Internet – for jobs in public safety, airlines, retail, banking and other industries.

“Personality tests have become something of the latest fad,” said Joseph Sellers, who heads Cohen Milstein Hausfeld & Toll’s employment and civil rights practice group in Washington.

Employers see the tests as “a very fast and cheap way to sepa-



Bob Giglione

Franklin: Little missteps could lead to big trouble.

rate out applicants into the group they want to take a closer look at and the people they don't want,” said Michael Kirkpatrick, an attorney with Public Citizen

Litigation Group in Washington. “Rather than have to interview people, they can have somebody take a test on the Internet, and that’s a first hurdle.”

Screening: Use of job tests could violate ADA laws

But employment law experts warn that the tests may be screening out too high a proportion of minorities and other protected groups.

“On the surface, the purpose is laudable, but it has led to an increased use of certain kinds of tests where there’s potential room for abuse,” Sellers said.

The key legal issue is whether an employment test creates a disparate impact on a particular group of applicants, such as minorities.

For instance, these tests could violate the Equal Employment Opportunity Commission’s “80 percent rule.” If a test has a pass rate of less than 80 percent for minority applicants, it suggests the test has a disparate impact. If, say, 100 percent of whites pass and only 75 percent of blacks pass a screening test, employers could have a problem on their hands.

“Without anybody really intending to discriminate, you can accidentally end up with tests that have a disparate impact that just can’t be justified,” Kirkpatrick explained.

If the test has a disproportionate effect on one group over another, he said, “the question becomes: Can the employer justify the use of that test by showing that it’s job-related and consistent with business necessity?”

Glenn Franklin, a partner with Franklin, Gringer & Cohen in Garden City, said employers can get into trouble with “something so silly” as asking a potential employee whether he or she has a car.

“Since many minorities don’t

own cars and it’s not related to the job, it could be discriminatory,” Franklin said.

Thinning the herd

Employers frequently rely on cognitive ability tests that measure vocabulary or math skills or assess knowledge of a particular field. Employers often administer these tests to star performers, use the results to set a company standard and reject candidates who fall below the benchmark.

The most reliable assessments simulate on-the-job duties, such as responding to a telephone emergency call. Experts say these exams offer the most accurate prediction of job performance while minimizing impact to minority candidates. But they’re expensive and time-consuming, making cognitive and personality tests more appealing to employers. However, unless cognitive and personality tests are well designed, they carry the greatest risks for employers.

Cognitive ability tests “almost always create a disparate impact on minorities,” Harris said. And personality tests, which have become extremely popular, can also open the door to liability. A plaintiffs’ lawyer could make a good case for challenging a personality test if it’s not clearly related to job performance.

“They are viewed as not terribly predictive of success on the job,” Sellers said. “They’re less likely to have an adverse impact than cognitive tests, but they’re not very good at distinguishing between candidates who are really good and those who are not

really good.”

With personality tests, the issue isn’t so much ethnic discrimination as a violation of the Americans with Disabilities Act.

In June, a federal court held that the Minnesota Multi-Phasic Personality Inventory qualified as a “medical examination” under the ADA. In the case, Rent-A-Center, an Illinois furniture chain required employees seeking management positions to take the exam. The court ruled that the test “likely had the effect of excluding employees with disorders for promotions.”

That’s because the MMPI is geared to diagnose mental psychological disorders, making it a medical test, said Dominique Camacho Moran, a partner specializing in labor law with Farrell Fritz in Uniondale. Over the years, the test has shifted in some people’s minds to be simply a personality inventory that measures, say, how a person is likely to interact in a group setting.

But the court’s view, and one that all employers should heed, is that the intent of the test is more important than the intent of the tester. And that raises a question that employers should ask, Moran said.

“What am I trying to test, and will that help me make a good decision about hiring someone?” she said. “Most of the time, the answer is no.”

Toohar is a writer for Lawyers Weekly USA, a sister paper.

Jeremy Harrell contributed to this report.