

BEFORE THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Federal Sector's Obligation to be a Model Employer of Individuals with Disabilities (Draft)

ADVANCE NOTICE OF PROPOSED RULEMAKING

RIN 3046-AA94

RESPONSE OF THE ASSOCIATION OF TEST PUBLISHERS

The U.S. Equal Employment Opportunity Commission (“EEOC”) has issued an Advance Notice of Proposed Rulemaking (“ANPRM”) affecting 29 CFR Part 1614, which relates to compliance with Section 501 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 (“ADA”). This ANPRM concerns the obligation of each federal sector agency and department to be a “model employer of individuals with disabilities.” Current Section 501 regulations prohibit employment discrimination based on disability and explain the standards for determining whether discrimination has occurred. The regulations also impose a separate obligation on federal agencies to be "model employers" of individuals with disabilities, but do not explain what federal agencies must do to comply with this obligation. The EEOC has invited public comment on a set of questions to help guide its deliberations in developing proposed regulations. Comments are due by July 14, 2014.

The following response to the ANPRM is submitted by the Association of Test Publishers (“ATP”). The ATP is the international trade association representing some 175 publishers and developers of assessments used in a variety of settings, including employment, education, and certification/licensure. The membership of the ATP includes both for-profit and non-profit companies, and the organization serves as the “Intelligent Voice for Testing” in providing input to the United States Congress, state legislatures, and federal and state agencies in their efforts to examine issues surrounding testing and the use of tests. A large number of ATP members provide testing products and services that

are used by employers in the United States, including the federal government. Among other activities, the ATP pursues educational efforts designed to assist its members in the development and marketing of tests and testing practices that are fair to all test takers regardless of race, age, color, gender, national origin, religion, ethnic background or disability. Members of the ATP's Industrial/Organizational Division participated in the development of these comments; those individuals and companies collectively possess hundreds of years of experience in applying the EEOC's *Uniform Guidelines on Employment Selection Procedures* (1978) (referred to as the "*Uniform Guidelines*") in an assessment setting.

The EEOC has requested comments on seven aspects of what it means to be a model federal employer of individuals with disabilities. Although the ANPRM is limited to federal employers, at some point, the ATP anticipates that the EEOC also will establish regulations covering private sector employers. Moreover, we want to caution that, although the ATP's comments address our expertise in the realm of individual assessment, the EEOC's proposals must, by necessity, cover all employment practices from recruitment to interviewing, including the use of measurement procedures that are less scientific and less accurate than psychological assessments.

The ATP's comments will focus solely on the fourth question posed by the EEOC regarding specific hiring policies and practices, especially in regard to the use of standardized employment tests. That question reads as follows:

Are there specific hiring policies and practices other than, or in addition to, establishing goals that should be part of the regulation for being a model employer of individuals with disabilities? For example, should the proposed model employer regulation require agencies to work with entities specializing in the placement of individuals with disabilities, such as state vocational rehabilitation agencies of the Department of Labor's Office of Workers' Compensation Programs; to interview all qualified job applicants with disabilities; to assign additional "points" to qualified applicants with disabilities; to subject their qualification standards (including safety requirements) to internal or external review to identify unnecessary barriers to people with disabilities; to include certain information

about affirmative action for individuals with disabilities in their job advertisements; to observe certain guidelines for determining the essential functions of the job; or to engage in additional, targeted outreach? Commenters suggesting that specific policies or practices be included in the proposed regulation are encouraged to include information about the benefits and costs of the suggested policy or practice.

As we will discuss in detail below, the ATP believes the “examples” of practices suggested in the EEOC’s question miss the target and would do little, if anything, to enhance the ability of a federal employer to become a model employer of individuals with disabilities. Rather than regulating by referencing “trends,” the ATP contends that there are meaningful best practices already existing within the assessment community’s experience that we recommend to the EEOC for inclusion in its final regulations.

I. GENERAL PRINCIPLES

As a fundamental underpinning to the specific question posed by the EEOC in regard to the obligation of the federal government to be a model employer of individuals with disabilities, the ATP articulates five principles that we contend must be respected and considered.

1. Whatever regulations/guidelines the EEOC adopts for clarifying the federal government’s obligation to be a model employer of individuals with disabilities **MUST** be consistent with current professional standards. Indeed, current professional standards well address compliance with the Americans with Disabilities Act (“ADA”) and the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”), as they pertain to personnel assessment, ranging from interviews to pre-employment testing and the use of measurement techniques for promotion and other job-related purposes. These standards include, but are not limited to the:
 - a. *Standards for Educational and Psychological Tests* promulgated jointly by the American Educational Research Association, American

Psychological Association, and the National Council on Educational Measurement (referred to as the “*Joint Standards*”);¹

- b. *Principles for the Validation and Use of Personnel Selection Procedures* developed by the Society of Industrial and Organizational Psychology, Inc. (referred to as the “*Principles*”); and
 - c. *Model Guidelines for Pre-employment Integrity Testing (3rd edition, 2009)* developed by the Association of Test Publishers.
2. Any eventual regulations MUST be consistent with current ADA and ADAAA provisions, as successfully practiced by the community of employment test publishers. Nothing in this ANPRM changes or shifts the current definition of “disability” or the basic requirements already spelled out in the law and associated regulations implementing the law that a “qualified individual with a disability is one who can perform the essential functions of a job, with or without reasonable accommodation.
3. The regulations MUST be consistent across all personnel screening systems commonly recognized or used by the federal government. Currently, for example, the Fact Sheet on *Employment Tests and Selection Procedures* (2010), as posted on the EEOC website, lists nine general types of employment tests and other selection procedures, with numerous specific examples given in several of the categories. See: (http://www.eeoc.gov/policy/docs/factemployment_procedures.html). Additionally, the *Employer’s Guide to Testing and Assessment*, published by the U.S. Department of Labor Employment and Training Administration (1999), lists seventeen kinds of assessments that may be used to measure individual attributes, including some popular selection methods not identified in the EEOC Fact Sheet such as bio-data, interviews, and assessment centers.

¹ Significantly, the EEOC’s *Uniform Guidelines on Employment Selection Procedures* (1978) (referred to as the “*Uniform Guidelines*”), favorably refer to the *Joints Standards*. The *Joint Standards* have also been cited repeatedly with approval by the US Supreme Court, beginning with the opinion in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). As the EEOC should be aware the sponsors have written an update to the 1999 version, due to be published later this year.

4. Due to the extremely idiosyncratic nature of disabilities, no single, common turnkey solution exists for dealing with each situation. Therefore, employers of necessity must rely on the professional judgment of industrial/organizational psychologists, human resource practitioners, and related subject matter experts. Potentially, then, there may be times when some individuals with disabilities cannot effectively be accommodated, even by an employer who is a model employer. The EEOC MUST clarify that, as long as the employer is in alignment with relevant laws and regulations, there is nothing preventing the use of unique and responsive solutions to dealing with individuals with disabilities.

5. The EEOC must not view the ANPRM as merely an opportunity to mandate screening and selection policies, but it also should recognize that the ANPRM represents an opportunity to promote research and development of new methods and technologies for assessing individuals with disabilities. The ATP strongly encourages the EEOC to use this ANPRM as an opportunity to enable employers and practitioners to generate viable research-based long-term solutions, rather than merely adopting trendy, stopgap interventions that are not adequately or appropriately designed, nor fully validated. Trends, such as those listed in Question 4, that simply provide compliance mechanisms to avoid censure or penalties, represent ineffective solutions.

II. Response to Question 4.

Although the ATP does not intend to address each of the examples posed by the EEOC in Question 4, we want to emphasize that overall effective use of assessments for employment-related purposes by any organization hinges on the validity, reliability and fairness of an assessment instrument or procedure, including for individuals with disabilities. *See Joint Standards*. The appropriateness of an assessment instrument or procedure for specific employment decision-making should be supported by its job relevance, as demonstrated by a job analysis or comparable methodology that identifies knowledge, skills, abilities, and other characteristics (e.g., job-relevant attitudes and personality characteristics) necessary for performance of the essential job functions. A federal employer that is planning to use assessments, whether they

are developed internally or purchased from a service provider/vendor, should evaluate the capabilities of potential test developers to ensure that they can perform in accordance with the law; the employer should review available test manuals and other resources to obtain independent analysis about the service provider it might use and the quality and appropriateness of the assessment for the intended purpose(s).

Additionally, the ATP has long stated – and we repeat our admonition here – that employment-related decisions should not rely only on assessment results from a single instrument, but should take into consideration job relevant information from multiple valid, reliable and fair sources. These recommendations are consistent with the *Joint Standards*, the *Uniform Guidelines*, the *Guidance on Americans with Disabilities Act (1992)*, the *Principles (2003)*, and the ATP’s *Model Guidelines for Pre-employment Integrity Testing (2009)*.

It is also critical that an employer (federal or private) take appropriate steps to ensure that its use of assessments occurs in a standardized environment. Standardization refers to every aspect of the testing administration for a job applicant or employee candidate for promotion (hereafter referred to as “candidate”). Examples include whether a test is administered online via computer, using a mobile device or is taken in traditional paper and pencil format, whether the test is administered in a proctored environment or is self-administered. Accommodations to each specific assessment that can be anticipated should be standardized to the extent feasible. Standardization acts to remove or at the least keep constant sources of error in measurement so that each candidate is assessed in a consistent and fair manner. By standardizing testing procedures, as well as standardizing accommodation procedures for specific disabilities deemed to be job related, each candidate is given a fair opportunity to perform successfully on the test.

Specifically, then, in response to Question 4, the ATP offers the following comments and recommendations regarding assessment best practices for candidates with disabilities. These recommendations are drawn from the *Joint Standards* and the *Principles*. Since 2010, the ATP and the Council of Chief State School Officers (CCSSO) have twice addressed accessibility practices in K-12 large-scale educational programs (*Operational Best Practices*, 2010 and 2013). The

most recent analysis provides additional important considerations in testing as related to attainment of the status as a model employer of individuals with disabilities.² Accordingly, the ATP has reviewed its own document in order to determine how best to translate the K-12 assessment program best practices into best practices for employment purposes.

Consistent with these resources, the ATP comments will focus on the following areas of best practice:

1. Accessibility;
2. Accommodations;
3. Alternate measures;
4. Assistive strategies and technologies; and
5. Scoring and decision-making.

The ATP promotes the following recommendations as general suggestions for best practices with respect to the use of employment tests and assessments. We acknowledge that employers face various constraints and that not every federal employer may have the resources at its disposal to undertake all of these suggestions within the scope of its testing practices. We also realize that different employers in the federal sector may implement these recommendations selectively and in diverse ways to meet their unique needs and situations. However, in trying to describe a “model” situation, the ATP contends that these considerations comprise a core set of best practices that represent a reasonable and effective approach to the use of employment tests and assessments in a manner conducive to being a model employer of individuals with disabilities.

1. Accessibility

The employer and its service provider should establish, implement, and evaluate a process to ensure that test items, forms, and item pools are accessible in accordance with the principles of universal design and sound testing practice for technology-based, paper-based, as well as for hybrid models using both types of assessment. Universal design, which represents a set of construction principles

² As clearly stated in the *Operational Best Practices* (2013 at p. 12), these practices are intended to enhance the quality of assessments used in educational programs by complementing, and not conflicting in any way with, the professional scientific, technical principles embodied in the *Joint Standards*.

that seeks to maximize accessibility of an assessment for all test takers by developing content without distractions or irrelevancies, has been adopted by most test publishers.

As part of the universal design process, the test developer should:

- Write items to reduce construct irrelevance (e.g., eliminate unnecessary clutter in graphics, reduce reading load on items containing text-based descriptions) to the extent possible.
 - This process should take into account how different individuals: (a) recognize and understand information presented in item instructions and content; (b) manipulate, reorganize, modify or combine item information and strategically apply construct-relevant knowledge and skills; and (c) plan, organize, and construct a response.
- To the extent possible, write items that are free of language, visuals, or other attributes that may disadvantage candidates who may request accommodation for completing the base assessment of the target construct.
 - The item development or review process should take into account language and other factors which could pose potential challenges or barriers to a disabled individual taking an assessment.
- Use field testing activities that include individuals from special populations.
 - To the extent feasible, accessibility options should be explored using small scale pilots and field testing with populations for which specific accommodations have been targeted (*see, also, Joint Standards 10.3*).
- Conduct empirical analyses to provide information regarding how items are functioning for key subgroups.
 - Such information may signal a need to revise or remove items from the eligible item pool. If feasible, these analyses should also indicate the use of accessibility features and accommodations by individuals (Test Standard 10.7).
 - It should be noted that test scales and items that are designed to optimize functioning for all key subgroups may not yield satisfactory validity overall due to reduced variance among test takers as a whole

on the target construct. A balance may need to be struck between optimization, validity, and development costs.

- Write test instructions in language that is easy to understand by all individuals.
 - When possible, sample items or tasks should be provided for practice prior to the test administration. Such sample items and tasks should include the same set of accessibility features and accommodations that will be available during actual test use.

Test specifications should be developed and implemented in accordance with principles of universal design to ensure that items, forms, and item pools are designed to be clear and comprehensible for all test takers. Such specifications should address the following test parameters, to name a few³:

- Organization and sequencing of items;
- Presentation of items including rules for alternate text (e.g., tagging, audio presentation);
- Positioning of items and passages, and/or other stimuli;
- Font and point size;
- Margins and blank space;
- Navigation within and between items;
- Ways to provide answers such as input modes, response modes, and technology-based response input modes (e.g., mouse, keyboard, touch screen, assistive devices);
- Timing requirements, if applicable;
- Clarity of graphics and/or item stimuli;
- Use of colors and shading (e.g., highlighting);
- Rules for emphasizing words or phrases (e.g., bolding, capitalizing, underlining and italicizing, audio amplification and/or speed).

³ This list runs the gamut from very easy to use all the way to more sophisticated approaches. The ATP appreciates that some of the factors may appear to be overly simple and straightforward; however, it is often easy to fail to pay attention to the most fundamental ways to design a test specification to be universal.

2. Accommodations

Appropriate allowable accommodations, as called for in a written contract between the employer and the assessment service provider, should be available for individuals with disabilities where feasible and appropriate (*see, also, Joint Standards 10.10*). A list of allowable accommodations should be developed and specified under the terms of the contract and be based on currently available evidence, including information obtained by reviewing accommodations identified by the employer's accommodation policy.

In evaluating what accommodations may be appropriate for use with a particular assessment, the test developer/service provider and the employer must consider the purpose of the test and whether any specific potential accommodation undermines the integrity of the test and test results. As part of this evaluation, the employer and its service provider must consider the impact on test scores and inferences, and must take pains to preserve the test's validity and reliability.

General categories of accommodations may often include, but are not limited to, the following:

- Presentation (e.g., repeated directions, read aloud, large print, magnification, overlays, graphic resolution, braille, labeled tactile graphics with or without text-based descriptions);
- Test site modifications to make the location accessible, or using an alternative assessment procedure (see point 2 below);
- Mode (e.g., technology-based vs. paper-based, paper-based vs. technology-based);
- Equipment and material (e.g., calculator, amplification equipment, manipulatives);
- Response (e.g., mark answers in book, scribe records response, point, speech-to-text);
- Setting (e.g., work carrel, separate conference room, individual's home, auditory calming);
- Technology accommodations (e.g., refreshable braille, text-to-speech); and
- Timing/scheduling (e.g., extended time, frequent breaks).

Once allowable accommodations are chosen to achieve accessibility and become operational, the employer and its assessment service provider should collect evidence-based data on the effectiveness of allowable accommodations. This data enables the employer to consider the feasibility of implementing those accommodations and their impact on test validity (*see, also, Joint Standards 10.7*). The employer should develop sound and consistent policies that support inclusion. Ideally, individuals from special populations should have the opportunity to practice with available accessibility tools and accommodations. For example, large print, braille, and audio test versions and other materials supporting accessibility should be available for applicants, where appropriate. Sign language versions of appropriate materials should be available for applicants who are hearing impaired; a transcript should be prepared and used by experienced, trained sign language interpreters, or using avatar technology, if appropriate. Supplemental materials should be planned for and provided when appropriate for the subject matter or behavior construct being tested.

In accordance with federal policy, the impact of accommodations, if any, on assessment results should be explained to an applicant/candidate seeking an accommodation. Accommodations should be consistent, to the extent possible, with different modes of test administration or presentation (e.g., technology-based assessments vs. paper-based assessments)⁴ or different formats (e.g., large font for technology-based vs. large print for paper-based).

3. Alternate measures

To serve candidates with disabilities for whom the base assessment (even with accommodations) is not appropriate, the employer and the service provider should agree on appropriate assessment accommodation strategies in advance, if feasible. Potentially, this may include the development and/or administration of one or more alternate assessments (*see, also, Joint Standards 10.1, 10.4*). This consideration applies not only to tests, but to all forms of measurement used by an employer; the employer and its service provider need to consider all ADA

⁴ The term “technology-based assessment” is used rather than “online.” Technology-based assessments are those administered by computer, in either stand-alone or networked configuration, or those delivered by some other technology device that is linked to the Internet or World Wide Web, where the test taker accesses a digitally formatted (non-paper) assessment directly, or remotely through a local server that caches the assessment, or stores the assessment on some other medium (e.g., CD, USB flash drive), which enables the test taker to access the assessment without access to the Internet.

requirements to make sure that the alternatives are reasonable and that the alternatives ensure that the candidate can execute essential job duties.

Since it is not always practical to develop an alternate test for limited use in just certain circumstances, or to develop alternative tests prior to fully understanding the nature of the actual need, the employer and its service provider may find it more efficient to identify existing valid assessment methods that can measure the same or similar target construct to a satisfactory degree. The alternate assessment could be another test that utilizes a different kind of measurement format, or it could also be an entirely different type of procedure and does not necessarily need to be restricted to only standardized assessment instruments. For example, a structured interview may capture the same target behavioral construct as the original test instrument. Regardless of the type of alternate assessment method used, it should comply with all relevant legal provisions.

4. Assistive strategies/technologies

The employer should make Assistive technology and/or procedures for oral reading should be available for candidates who qualify. But even more generally, the employer should provide training on choice of accessibility tools and accommodations available in a computer testing engine to test administration personnel. These actions are useful to the extent that such features are new and/or might help inform later individual accommodations options during the test administration (*see, also, Joint Standards 10.2, 10.8*).

Technology-based assessments should be designed to be highly usable by candidates with a diversity of accommodation needs and technology experience. Construct-irrelevant variance could be introduced if the testing interface is difficult to use or requires more than basic exposure to computers or assistive technologies.

Technology-based assessments should adhere to interoperability standards that allow specification of accessibility features and accommodations on a per-item and per-individual basis (e.g., IMS Global Question and Test Interoperability (QTI) Specification, Accessible Portable Item Protocol (APIP) specification, Next-Generation Assessment Interoperability Standard).

To facilitate familiarity with the technology-based testing interface, an employer should try to provide candidates with access to practice tests or tutorials prior to testing. These practice tests and tutorials should expose individuals to all item types and interfaces included in a given test.

The employer should provide assistance with the technology-based interface to a test taker at all times during testing. Such assistance should be easy to locate, accessible, and combine textual, visual, auditory and/or tactual material to support individual understanding. Animations of the use of tools and other interactive features may also be helpful.

5. Scoring and Decision-Making

Test scoring needs to be objective and consistent across candidates. There are several considerations regarding test scoring. Test scoring is often accomplished by comparison to a norm group.⁵ Typically norms for standardized tests are provided by the publisher or developer, while custom-designed and developed tests may incorporate customer-specific local norms created with help from a consultant. Whichever approach is utilized, it is important that a norm group used for scoring a test is representative of the relevant labor pool or workforce. Of course, under the Civil Rights Act of 1991, it is not appropriate to create separate norm groups or norm-referenced scoring for specific protected subgroups of test takers, or to make any score adjustments or use different cut-scores for different groups of test takers. Although not covered by the Civil Rights Act of 1991, it logically follows that , candidates with disabilities, regardless of the nature of the disability, should be included in one general population norm group; there must not be a norm that is unique to test takers with disabilities, whether treated as a whole or by the nature of the specific disability.

In addition, ATP strongly discourages adding points to an obtained test score, or in effect giving “extra credit” on the test results, to members of any protected subgroup, including individuals with disabilities. Such action undermines the validity and value of a test to differentiate accurately among

⁵ In other settings (e.g., certification or credentialing programs), assessments may be criterion-referenced, because all candidates are being measured on whether they have mastered the knowledge, skills, abilities or competency required for a particular purpose.

people exhibiting varying degrees of a measured job-related characteristic, and thus defeats the purpose of using the test. This may also distort the distribution of data points used to create norms, potentially perpetuating an issue of inaccurate results into future use of a test. A better solution is to identify an accommodation or an alternate measure of the target construct(s) as discussed in the preceding sections of this comment that preserves validity, reliability and fairness of a given test.

Application of these factors must also translate beyond achieving non-discriminatory scoring for individuals with disabilities, to ensure that the employer makes personnel decisions that comply with the law. It is crucial for the employer to be able to demonstrate that its use of any selection procedure, including an assessment, does not result in adverse impact, or at least that there is no adverse impact that can be justified. See *Uniform Guidelines*. Thus, the employer must show that there is no substantially different rate of selection in hiring, promotion, or other employment decisions that work to the disadvantage of members of a class of disabled individuals, at least where the adverse impact is not justified. Accordingly, the employer must be able to show that performance on an assessment is related to performance on the job or to some other measures of job success. See *Principles*.

Ultimately, each organization that aspires to be deemed a model employer of individuals with disabilities should take responsibility for implementing best testing practices that help achieve its mission and strategic objectives through building and developing a productive workforce. That outcome entails taking proactive steps to define appropriate testing policies and practices applied consistently and fairly across all test takers, including individuals with disabilities. As part of this process, model employers should consider the available relevant information regarding testing practices and seek guidance from authoritative sources, such as service providers or otherwise qualified testing consultants, in order to reach informed conclusions in making decisions about test utilization.

Conclusion

Question 4 of the ANPRM lists several possible practices to which the EEOC is eliciting a response. The ATP is not persuaded that any of the examples of popular trends cited by the EEOC will result in any meaningful guidance to federal

employers (or private sector employers down the road). Instead, the ATP has provided a succinct set of best practices directly related to assessment that already provide the foundation for the employer to establish fair employment practices for all candidates, including those with disabilities. Accordingly, the ATP recommends that the EEOC incorporate these best practices when it formally proposes revisions to 29 C.F.R. 1614 to assist federal employers in meeting their obligations to be “model employers of individuals with disabilities.”

If the EEOC has any questions, or would find it useful to arrange a meeting to discuss any of these comments, please feel free to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William G. Harris". The signature is written in a cursive style with a large, sweeping initial "W".

Wm. G. Harris, Ph.D.
CEO

Dated: July 14, 2014

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