

Michael J. O'Brien
Editor
Human Resources Executive

Re: Editorial

Dear Mr. O'Brien:

We represent the Association of Test Publishers ("ATP"). ATP is a highly respected resource and its members include over 150 of the largest test publishers within North America, Europe and Asia. In our opinion, while the October 27, 2014 *Human Resources Executive* article entitled "Screens Under Scrutiny" contained some good insight regarding the issues surrounding employers' use of personality testing, we think your readers would be interested in the following clarifications.

First, it is important to distinguish between the two main types of personality tests. Broadly speaking, there are clinical personality tests that have been developed to identify and assess emotional stability, often in medical settings. These tests ask questions about and provide data on a person's disabilities. Pursuant to the Americans with Disabilities Act, because such tests focus on disabilities and/or generate a medical diagnosis, they can only be administered to job applicants after a conditional offer of employment has been tendered. Moreover, these tests are used almost exclusively for screening for safety-sensitive jobs (e.g., commercial pilot, police officer), where emotional stability is a strong and critical job-related requirement, which justifies their use in these limited settings. The Minnesota Multiphasic Personality Inventory ("MMPI") is one of the most well-known tests of this nature (partially attributable to litigation), and its inquiries, reporting and interpretation substantially differ from the personality tests that this article focused on. While this was acknowledged to some degree within the article, understanding the distinction is imperative to recognizing the issues surrounding the cited legal challenges.

In contrast to tests like the MMPI, the personality tests, on which the article focuses, are assessments that were developed specifically for workplace hiring and are designed to provide insight on such things as human relations skills, leadership ability, turnover propensity, customer service skills, rule compliance and sales skills—the focus is not on disabilities. Moreover, professional publishers review and research their test items to help ensure that they do not identify or penalize individuals on the basis of a disability. The Equal Employment Opportunity Commission ("EEOC") offers extensive guidance (e.g., *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, 10/10/95) that is used by test publishers and their customers to help ensure that these tests are not medical in nature or tend to reveal disabilities, which allows test administration prior to the employer tendering a conditional offer of employment.

As the article appropriately points out, the other issue beyond whether a test is medical in nature, is if it exhibits a disparate impact on individuals with a specific disability. In this vein, it is important to realize that even though criminal background checks (the most ubiquitous hiring tool other than interviews), educational requirements, physical requirements, cognitive abilities tests, experience requirements, credit checks and drug testing are all prone to exhibiting adverse impact on the basis of race or gender, and in some cases disability, they are commonly used and legally justified by showings of job-relatedness. Similarly, in the event that an applicant or the EEOC was able to demonstrate that a personality test exhibited disparate impact on the basis of a specific disability (research shows such tests generally do not have a disparate impact on the basis of race or gender), use of the test would be justified if it is an effective predictor of important work behaviors (e.g., valid/job-related). The large number of organizations that use personality tests based on the critical review of a professional publisher's research by their counsel, human resources professionals, industrial psychologists, executive management, hiring managers and other professionals, indicates there is strong evidence documenting their job-relatedness.

As a final note and to provide some perspective, the EEOC typically receives between 80,000 and 100,000 complaints per year. Also, while the article characterizes the father filing the seven suits on behalf of his son as a prior in-house corporate attorney, according to LinkedIn, for over 3 years he has been: "Leading an interdisciplinary group of professionals challenging the use of pre-employment personality testing and other elements of workforce science and talent analytics." Obviously, this individual has a significant bias against personality testing. Note, the only other referenced complaint (Kroger case), which has been pending for seven years, is not based on an applicant's hidden mental disability. That applicant has a hearing and speech impairment. Also, the applicant was interviewed and tested, which is why her complaint asserted that Kroger didn't hire her because of the way she spoke. Since Kroger's position statement indicated that their test was used as part of the decision making process, the test is at issue as well.

While these comments are not exhaustive, we believe they should provide a bit more insight and clarity regarding the article's subject matter. In the future, if you are interested in developing an article focusing on testing (employment, certification, educational, clinical), we or any of our members would be willing to assist you in identifying the most accurate and fact-based information possible.

Very truly yours,

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