

Disparate Impact Claims Based On Background Checks, Online Job Applications, And Other Barriers In Recruitment And Hiring

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WHY BOTHER WITH BACKGROUND CHECKS?

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Why Conduct Background Checks?

- Recruiting and training = time and money. Get it right the first time!
 - Each new employee will have to learn your systems...
- In a typical job, turnover costs can average...
 - E.g., an employee earning \$30,000 per year could cost \$75,000 per year if employees leave after 1 year (\$30,000 in salary and \$45,000 in turnover costs) but would cost substantially less annually if turnover was reduced
 - Practical Tip: Study your human resource data to establish the link between prior criminal convictions and higher turnover
- Preventative maintenance – avoid or minimize legal liability
- You may be liable for employee conduct – know if applicant is high-risk
- To hire the best candidate

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Time and Money

- Loss in Productivity/Efficiency
 - It takes employees 11.9 months on job to reach full productivity
 - New employee will have to learn your systems, programs, policies, and people. That takes time and money.
 - “Domino effect” on productivity of existing employees
 - Existing employees will be taking time to train your new employee and answer her questions.
- Turnover costs average 1.5 times the annual salary of a position
 - E.g., an employee earning \$30,000 a year would cost employer \$75,000 if leaving after only 12 months.



Negligent Hiring Claims

- California jury awarded more than \$11 million to woman whose husband was murdered by a carpet cleaner. Employer had not performed criminal background check that would have uncovered violent criminal past.
- County in Texas failed to do background check on reserve deputy sheriff who injured a passenger in a car during a traffic stop. The deputy had a record of assault and battery and had an outstanding arrest warrant. Jury awarded injured passenger \$818,000.
- Massachusetts jury awarded \$26.5 million after health care worker murdered patient with cerebral palsy and his grandmother. Had employer run background check, it would have revealed worker's six felonies.



Practical Tips

- While headline cases focus on the most serious criminal convictions (e.g., Danny El v. SEPTA), most applicants with serious crime convictions have lengthy holes in their resumes (while incarcerated)
- Jobs that require prior relevant work experience will screen out many convicted felons prior to a background check. Consequently, a primary concern will be determining the adjudication rules for less serious crimes.



EEOC ENFORCEMENT INITIATIVE ON ARRESTS AND CONVICTION RECORDS

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Why Does the EEOC Care?

- Criminal records can be
 - Incomplete
 - Accurate
- Increase in criminal records
 - 1991: 1.8% of adults spent time in prison
 - 2001: 2.7% of adults spent time in prison
 - 2007: 3.2% of adults somehow involved in correctional control
- Imprisonment rates continue to show disparate impact
 - In 2012, as compared to Caucasian men:
 - African-American Men: 6 times more likely to be imprisoned
 - Hispanic Men: 2.5 times more likely to be imprisoned
- Some studies by criminologists have shown that the likelihood of criminal recidivism appears to decline as the length of time since previous crime increases.



Disparate Treatment versus Disparate Impact

- Disparate Treatment
- Treating 2 similarly situated applicants differently because of a protected class
 - Both have similar qualifications
 - Both convicted 5 years ago of theft
 - But, the minority applicant doesn't get the interview
- Disparate Impact (Focus Here)
- Policy prohibiting the hire of all applicants with a criminal record
 - Minority candidates more likely to have a record
 - Therefore: Minority candidates will be impacted more harshly by this policy



EEOC Guidance on Arrests & Convictions

- EEOC Strategic Enforcement Plan FY2013-2016
 - Priority #1: “The EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, and people with disabilities.”
- EEOC and FTC jointly issued two technical assistance documents on March 10, 2014
 - Combines EEOC concerns regarding employment discrimination with FTC concerns regarding enforcement of the Fair Credit Reporting Act



EEOC Guidance on Arrests & Convictions

- EEOC issued most comprehensive guidance on April 25, 2012
 - Third Circuit Court of Appeals hinted that the EEOC needed to give more detailed analysis. *El v. Southeastern Pennsylvania Transp. Authority*, 479 F. 3d 232 (3rd Cir. 2007)
- This Guidance updated, consolidated, and superseded:
 - 1987 Policy Statement
 - 1990 Policy Statement
 - Relevant discussion in the EEOC's Race and Color Discrimination Compliance Manual

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EEOC Guidance on Arrests & Convictions

- On July 24, 2013, 9 state attorneys general wrote to the EEOC and requested reversal of the Commission's 2012 Enforcement Guidance
 - Argued that race discrimination could not plausibly be the Commission's actual concern and suggested purpose may be to illegitimately expand Title VII to protect former criminals
- EEOC responded on August 29, 2013:
 - Reiterated that it is not illegal for employers to conduct or use results of criminal background checks
 - Clarified that Commission encourages “two-step” process with respect to individualized assessment:
 - Step 1: “Targeted” screen of criminal records
 - Step 2: Individualized assessment of screened-out individuals



What is the Law According to the EEOC?

- Step 1
 - EEOC/Employee has the burden to show that the employer's practice causes a disparate impact
- Step 2 (only if Step 1 met)
 - Burden shifts to employer to show that the practice was
 - Job related; and
 - Consistent with business necessity
 - Hint: This is where the focus is
- Step 3 (only if Step 2 met)
 - Employer could still be liable if the employee/EEOC can show an equally valid, less discriminatory alternative employment practice



Job Related & Consistent with Business Necessity

- EEOC says 2 sure-fire ways to meet this:
- Validate the criminal conduct with data correlating the conduct and job performance (using EEOC's Uniform Guidelines on Employee Selection Procedures); or
- Individualized assessment by:
 - Considering the 3 Green factors
 - Nature and gravity of the offense or conduct;
 - Time that has passed; and
 - Nature of the job held or sought
 - Getting the applicant's side of the story

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Practical Tips

- Regularly examine applicant flow and background check data to understand which offenses are most likely to disqualify applicant
- Make sure that the offenses that most often disqualify applicants are job-related
- Consider a study to validate the correlation between prior convictions and job performance
 - Most companies have hired employees with some misdemeanor convictions and convictions further in the past
 - Compare the job performance of applicants with a conviction, who just passed the background check, to applicants with clean records in one way to validate the process
 - If applicants with misdemeanor convictions have lower performance than applicants with clean records, you have established a correlation between conviction records and job performance

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Individualized Assessment

- Arrests
- Arrest \neq Proof of Criminal Conduct (innocent until proven guilty)
- Can't assume the underlying conduct occurred
- Convictions
- Conviction = Proof of Criminal Conduct (guilty)
- Can assume the underlying conduct occurred



Individualized Assessment

- Nature and gravity of offense or conduct
 - Actual conduct of applicant giving rise to the offense
 - Age at time of offense
 - Harm caused by the crime/conduct (theft causes property loss)
 - Legal elements of the crime (is deception, threat, or intimidation a required element?)
 - Felonies are worse than misdemeanors



Individualized Assessment

- Time that has passed since the offense, conduct, or completion of sentence
 - Risk of recidivism studies
 - Any other run-ins with the law
 - Rehabilitation efforts (education or training)
 - Character references
 - Employment
 - Consistency before and after
 - Level of performance



Individualized Assessment

- Nature of the job held or sought
 - What are the duties and essential functions? (not just the job title)
 - Data entry, lifting boxes, shredding files
 - Circumstances of job
 - Level of supervision
 - Amount of oversight
 - Interaction with co-workers, public, vulnerable individuals
 - Environment of job
 - Warehouse/Factory
 - Private home
 - Outside
 - Retail
 - Health care
 - Child care

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Practical Tips

- Individualized assessment is key
- Always engage the applicant
- Different industries/jobs have different risk profile
 - Balance risk of negligent hire vs. Title VII claim
 - What is the Company's turnover? If high and need to fill jobs quickly, what level of background check meets business objectives and reacts to legal risk.
 - Customer or patient facing risk of negligent hire may be more significant risk
- Know your data
- Compare decisions based on individual assessments, possibly made by different managers
- Study the rate at which applicants are disqualified in situations where individual judgments are required



Joint Technical Assistance from EEOC and FTC

- Advises employers on complying with both federal non-discrimination laws and FCRA for background check purposes
- Provides guidance on:
 - Processes before an employer receives background information
 - Appropriate use of background information
 - Proper retention and disposal of background information

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Joint Technical Assistance from EEOC and FTC

- Helpful Hints for Employers from Joint Technical Assistance:
 - Except in rare circumstances, do not ask for applicant's/employee's genetic information (including medical history)
 - Apply the same standards to everyone (i.e., don't reject applicants of one ethnicity with certain financial histories or criminal records while accepting others of a different ethnicity with the same histories or records)
 - Preserve records for one year after (1) records are made, or (2) personnel action is taken (whichever is later), and dispose of any background reports securely



Joint Technical Assistance from EEOC and FTC

- Advice for Employees and Applicants from Joint Technical Assistance:
 - Employers may ask a variety of questions during hiring process, including about one's employment history, education, criminal record, financial history, medical history, or use of online social media
 - Unless employer is asking for medical or genetic information (with certain exceptions), it is not illegal to ask these questions or to require a background check
 - If something “negative” is found in background report, be prepared to explain the situation and why it shouldn't affect one's ability to perform the job



Reconciling with Other Federal & State Laws

- What if a law limits an employer's ability to hire someone with a conviction?
 - Licensing restriction
 - Flat-out prohibition
- Federal law
 - EEOC says this is a valid defense to a Title VII disparate impact claim
- State law
 - EEOC says this is not a valid defense to a Title VII disparate impact claim
 - Federal law trumps state law (Constitution's Supremacy Clause)
 - Title VII is a federal law



Practical Tips

- Some states (e.g., California, Massachusetts and others) specify that employers can't rely on conviction information more than 7 years in the past
- If your company operate in states with and without time limits on conviction information, you should compare the rate at which applicants are disqualified and the reasons for disqualification between these groups of states



Cases: Pepsi Pays

- EEOC charge filed against Pepsi prompted a systemic investigation by the EEOC
- Pepsi's Policy:
 - Job applicants who had been arrested pending prosecution were not hired
 - Arrests or convictions of minor offenses also precluded employment
- EEOC Decision: Found reasonable cause to believe the policy disparately impacted African-Americans. Blanket policy not relevant to the jobs.
- Pepsi settled the EEOC charge
 - Paid \$3.13 million
 - Provided job offers and training

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Cases: EEOC Failed

- EEOC sued Peplemark, Inc. (2011 WL 1707281) after 3 year investigation and 18,000 pages of documents
- Allegations: Employer had a policy of denying employment to any person with a criminal record
- Facts: 22% of the 286 people alleged to have not been hired because of felony convictions were, in fact, hired
- Result: EEOC agreed to dismiss
 - Employer was awarded \$751,942.48 in costs

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Cases: EEOC Failed

- EEOC sued Kaplan Higher Education Learning Corp. (No. 1:10-cv-02882, N.D. Ohio)
- Allegations: Employer's use of credit checks in hiring process has disparate impact on African-American applicants
- Facts: Employer instituted credit check policy after learning certain employees had misappropriated student aid payments. Because employer did not keep records of applicants' race, EEOC attempted to prove race with "race raters"
- Results: Summary Judgment for employer, 6th Circuit affirmed
 - Severe critique of EEOC methodology



Cases: EEOC Failed

- EEOC sued Freeman (D. Maryland, No. RWT 09cv2573)
- Allegations: Employer's use of background/credit checks for employment "screening," as a whole, resulted in disparate impact on African-American and male applicants
- Facts: Employer, a provider of services for expositions, conventions, corporate events, and exhibitions, had problems with embezzlement, theft, and workplace violence. Employer instituted varying levels of background checks depending on the nature of the job sought.
- Result: Summary Judgment for employer
 - Court said that action was a "theory in search of facts to support it."



Cases: To Be Determined

- EEOC v. BMW (No. 7:13-cv-01583, D. of South Carolina)
 - EEOC challenging the discharge of 88 existing contract workers after their background checks were re-run as part of transition to new warehouse contractor
 - 79.5% of workers discharged were African-American; whereas, only 55% of employee population was African-American
- EEOC v. DolGenCorp. (No. 13-cv-04307, N.D. of Illinois)
 - EEOC challenging Dollar General's alleged policy of conditioning job offers on criminal background checks and use of "matrix" to determine when criminal history warranted rejection
 - 7% of conditional offers to non-African-Americans withdrawn; whereas, 10% of conditional offers to African-Americans withdrawn



State “Focus”

- “Ban the Box” is the most significant state issue today
 - Movement to restrict timing of pre-employment inquiries into applicants’ criminal history
 - More common in public-sector, but gaining significant traction in private sector as well
- States that have “banned the box”
 - California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Mexico, Rhode Island

(Source - NELP, “Statewide Ban the Box: Reducing Unfair Barriers to Employment of People with Criminal Records”, May 2014)

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State “Focus”

“More than 60 localities have “banned the box” in the last 10 years

- California
 - Alameda County
 - Berkeley
 - Compton
 - Carson
 - East Palo Alto
 - Oakland
 - Richmond
 - San Francisco
 - Santa Clara County
- Connecticut
 - Bridgeport
 - Hartford
 - New Haven
 - Norwich
- Delaware
 - New Castle County
 - Wilmington
- Florida
 - Jacksonville
 - Tampa
- Georgia
 - Atlanta
- Illinois
 - Chicago
- Indiana
 - Indianapolis
- Kentucky
 - Louisville
- Louisiana
 - New Orleans
- Maryland
 - Baltimore
- Massachusetts
 - Boston
 - Cambridge
 - Worcester
- Michigan
 - Detroit
 - Kalamazoo
 - Muskegon County
- Minnesota
 - Minneapolis
 - St. Paul
- Missouri
 - Kansas City

(Source- NELP, “Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records”, April 2014)

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State “Focus”

- New Jersey
 - Atlantic City
 - Newark
- New York
 - Buffalo
 - New York
- North Carolina
 - Carrboro
 - Charlotte
 - Cumberland County
 - Durham City
 - Durham County
 - Spring Lake
- Ohio
 - Canton
 - Cincinnati
 - Cleveland
 - Massillon
- Oregon
 - Multnomah County
- Pennsylvania
 - Philadelphia
 - Pittsburgh
- Rhode Island
 - Providence
- Tennessee
 - Memphis
- Texas
 - Austin
 - Travis County
- Virginia
 - Alexandria
 - Newport News
 - Norfolk
 - Petersburg
 - Portsmouth
 - Richmond
- Washington
 - Seattle
- Washington DC
 - Washington DC
- Wisconsin
 - Dane County

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State “Focus”

- Other Areas of Interest:
 - “Second Chance” laws
 - These laws may simultaneously:
 - (1) Establish criminal records that applicants are no longer required to disclose upon inquiry (including to prospective employers)
 - (2) Prohibit the criminal records that criminal history providers may lawfully disclose
 - For this reason, employers should verify the content they receive from criminal history providers is compliant with state law(s)



Practical Tips

- Understand the rate at which applicants are disqualified because they falsified information on their application (did not admit to convictions that appear in their background check)
- The EEOC does not expect a company to hire applicants who have falsified information on their application
- Do not use “background check issue” as a reason for rescinding an offer in your applicant tracking database. It matters whether the “background check issue” was falsification or failing the background check.
- The ability to determine whether an applicant falsified information in his/her application varies by state



FAIR CREDIT REPORTING ACT

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FCRA: Key Facts

- Purpose: “to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer”
(15 U.S.C. § 1681(b))
 - Nothing about employers . . . ?
 - Designed to combat unfair credit reporting methods
- Penalties for Violation: Actual and punitive damages, court costs and attorney’s fees, individual liability, FTC fines



FCRA: Key Facts

- Requires Employers To:
 - Make specific disclosures to applicants and employees
 - Consumer rights
 - Employer's intentions
 - Adverse actions
- Basic Requirements Apply If:
 - Obtaining information
 - (1) Employer uses a third party
 - (2) Who is a Consumer Reporting Agency
 - (3) To obtain information covered by the FCRA
 - Taking adverse action based on information



FCRA: Key Facts

- Consumer Reports Include
 - Credit Reports
 - Criminal Histories
 - Driving Records
 - License Records
 - School Records
 - References from Prior Employers or Acquaintances
- Investigative Consumer Report
 - Consumer Report (or part of one)
 - IF...obtained through interviews



Discussion Points

- How should employers manage the tension between negligent hiring claims, their obligations under Title VII, and the EEOC's position regarding background checks?
- How should employers treat applicants who have multiple misdemeanor convictions?
- What steps should large employers, who receive thousands of applicants at any given time, take to comply with the EEOC's Guidance on Arrests and Convictions?
- How should an employer handle an applicant's or current employee's arrest for an abhorrent crime (i.e. murder, rape, or a child sexual offense)?
- How should an employer handle a long-ago conviction for an abhorrent crime?
- What best practices should multi-state employers use to manage the various federal, state, and local background check laws?
- What best practices should employers follow with regard to the timing of the various required disclosures required under the FCRA?
- How do you make sure that entry level recruiters are using sufficient judgment in evaluating background results?
- How should the process be different if your business is converting temporary contract employees into regular full time employment?

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EMPLOYMENT-RELATED TESTS: WORTH THE LEGAL RISK?

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Common Employment-Related Tests

- Job skills: performance tests, simulations, work samples, etc.
- Cognitive abilities: reasoning, memory, perceptual speed and accuracy, math, reading comprehension
- Physical abilities: physical ability to perform particular task, strength of specific muscle groups, general strength and stamina
- Personality or integrity: presence of certain traits or dispositions, likelihood of engaging in certain conduct



History of Discrimination Claims Based on Employment Testing

- 1971 – *Griggs v. Duke Power Co.* – established disparate impact theory of discrimination
- 1975 – *Albemarle Paper Co. v. Moody* – Supreme Court extended disparate impact theory to employment testing
- 1978 – EEOC adopts Uniform Guidelines on Employee Selection Procedures
 - Part of EEOC regulations at [29 C.F.R. Part 1607](#)
 - [UGESP Questions & Answers](#)
- 2007 – EEOC [Fact Sheet](#) re: Employment Tests and Selection Procedures



Analytical Framework

- Plaintiff (EEOC or private plaintiff) must show disparate impact on the basis of a protected trait
 - Must connect to particular employment practice
 - Typically requires statistical analysis using accurate data
- Employer then bears burden to show that the test or other selection procedure is job-related and consistent with business necessity
 - Must be able to show that challenged practice is associated with the skills needed to perform the job successfully
 - Typically requires validation – three types of validity studies (criterion-related, content, and construct)
 - Must validate for each job for which the test is used; must be based on empirical data – cannot rely on general validation by test vendor
- If test is job-related and consistent with business necessity, the burden shifts back to the plaintiff to show that a less discriminatory alternative is available
- Different framework under ADEA – if plaintiff shows a disparate impact based on age, employer bears burden to show that the challenged action is based on a reasonable factor other than age

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Recent Cases: Employee Victories

- *Gulino v. City of New York Bd. of Educ.*, 907 F. Supp. 2d 492 (S.D.N.Y. 2013)
 - Rejects “business necessity” defense that discriminatory test was required by state law
 - Found test not properly validated – and thus not job-related – because:
 - Test creator did not conduct a suitable job analysis
 - Test creator did not use reasonable competence in constructing the test
 - Content of the test was not directly related to teaching
 - Content of the test was not representative sample of content of the job
 - Test’s scoring requirements did not usefully select individuals who would be better teachers

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Recent Cases: Employee Victories

- *Howe v. City of Akron*, 723 F.3d 651 (6th Cir. 2013)
 - Where promotions are awarded based on rank order of score results, promotion rate rather than examination pass rate is proper measure of potential disparate impact
 - In other words, overall promotion process can be a specific employment practice for purpose of disparate impact claim
 - Might be different result if promotion process involved discretionary interviews in addition to test results
- March 2014 – City of New York settled class action relating to two civil service tests administered by N.Y.F.D. that allegedly discriminated against African-American and Hispanic applicants – \$98 million



Recent Cases: Employer Victories

- *Maraschiello v. Buffalo Police Dep't*, 709 F.3d 87 (2d Cir. 2013)
 - Discrimination claim by employee disadvantaged by new test
 - Application of *Ricci v. DeStefano*, 557 U.S. 557 (2009)
 - May not discard a test “to achieve a more desirable racial distribution of promotion eligible candidates – absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid” a disparate-impact violation
 - “Fear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.”
 - Second Circuit rejected discrimination claim by individual who passed earlier test because:
 - City chose to update test to improve understanding of job qualifications, not because of racial statistics – spent more than a year doing so
 - Plaintiff eligible for promotion for over a year prior to change
 - New test administered before challenged position became available, and Plaintiff chose not to take new test

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Recent Cases: Employer Victories

- *Campbell v. Hines*, 2013 WL 7899224 (6th Cir. 2013)
 - African-American employee forced to take test specifically designed to focus him on attaining knowledge of job – only person who took the test
 - Sixth Circuit affirmed dismissal of disparate impact claim because plaintiff could not show disparate impact, since he was the only one who took the test
- *Teasdale v. New York*, 2013 WL 5300699 (E.D.N.Y. 2013)
 - Rejected disparate impact claim because plaintiff's statistical analysis was fatally flawed – sample size too small
 - Highlights importance of investing in good experts



Recent Cases: Mixed Bag

- *Adams v. Indianapolis*, 742 F.2d 720 (7th Cir. 2014)
 - Seventh Circuit clarified that disparate impact claim can be based on any employment policy, not just one that is facially neutral
 - Plaintiffs claimed that promotion process was racially and culturally biased, and had been intentionally manipulated to achieve desired results
 - District court dismissed because the challenged policy was not facially neutral; the Seventh Circuit affirmed on different grounds, but disagreed with the district court's conclusion and held that any employment practice could be the basis for a disparate impact claim
 - The court affirmed dismissal of the disparate impact claim on *Twombly/Iqbal* grounds
 - Complex discrimination claim > required level of specificity is higher
 - Court provided detailed examples of the types of allegations it might expect to see in support of a disparate impact claim, but noted "the complete lack of factual content directed at" this theory



Recent Cases: Nobody Wins

- *Bauer v. Holder*, 2014 WL 2601733 (E.D. Va. 2014)
 - Gender-normed physical fitness test for FBI agent trainees
 - Finds that gender-normed fitness tests are *discriminatory* under Title VII, but not necessarily *illegal*
 - Rejects notion that gender-normed fitness tests are *per se* legal based on general assertion of physiological differences between men and women
 - Recognizes that fitness test with single standard could have disparate impact on women
 - Reconciles these competing concerns through BFOQ defense
 - Where women perform the same physical job tasks as men, gender-normed physical fitness standards cannot be used to measure an applicant's ability to perform discrete tasks – if both are expected to perform at the same level, then testing according to different standards cannot be an objective measure of ability to perform those tasks.
 - But because real physiological differences exist between males and females, gender norming may be appropriate for tests designed to measure *overall physical fitness* rather than the ability to perform specific discrete tasks.
 - But FBI maintains no minimum physical fitness requirements for current agents
 - But Corpus Christi recently settled disparate impact case brought by DOJ where physical fitness standards were the same for men and women – no fitness requirements for current officers, so DOJ claimed that test not job-related and business necessity

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Best Practices for Avoiding Disparate Treatment Claims Relating to Testing

- Ensure that employment tests are properly validated for the positions and purposes for which they are used – don't rely on vendor documentation
- Monitor for disparate impact
- If a test causes a disparate impact, determine if there is an equally effective alternative selection method with less adverse impact and, if so, adopt that
- To ensure that a test remains predictive of success in a job, keep abreast of changes in job requirements and update test specifications or selection procedures accordingly
- Ensure that tests and selection procedures are not adopted casually
- Invest in the professionals who develop and validate your tests

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Discussion Points

- In addition to legal risks, what practical benefits and costs should employers consider when deciding whether to use a test in hiring or promotion decisions?
- How should employers validate their employment tests?
- What are best practices for determining if a test has a disparate impact on a protected group?
- What are best practices for ensuring that a test remains predictive of success in a job?



ONLINE APPLICATIONS: RISKS AND EMERGING TRENDS

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Potential Discrimination Risks Arising from Use of Online Applications

- Lack of accessibility for individuals with disabilities
- Disparate impact based on less access to computers and mobile devices
- Obtaining information unlawfully through required questions
- Discriminatory screens based on threshold questions
- With online applications large samples are quite common and even small percentage differences in pass rates for tests will be statistically significant. Understand whether the race and gender differences in passing rates are of practical significance not just statistical significance.

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EEOC's Position re: Online Applications

- [Informal Discussion Letter, October 27, 2005](#)
 - Potential disparate impact on “seniors and economically disadvantaged individuals who lack regular Internet access or sufficient computer skills”
 - Using software to screen out applicants over age 40 or from specific zip codes
 - Whether online recruiting tools must be compatible with assistive technology used by some people with disabilities
 - Other potential ADA issues – reasonable accommodation in the application process; possible discrimination by “limiting, segregating, or classifying” individuals with disabilities in a way that adversely impacts job opportunities
 - Online application questions regarding race, gender, health status, and age
 - EEOC notes that, as of the date of the letter, there is no case law addressing any of these issues



Practical Tips

- Many online applications are incomplete or the applicant uses a fictitious name (Harry Potter). Still other applicants do not meet minimal qualifications. Take care to only include applicants with completed applications who meet minimal qualifications in adverse impact calculations.



EEOC's Position re: Online Applications

- [EEOC Strategic Enforcement Plan 2013-2016](#)
 - **“1. Eliminating Barriers in Recruitment and Hiring.** The EEOC will target class-based intentional recruitment and hiring discrimination and facially neutral recruitment and hiring practices that adversely impact particular groups. Racial, ethnic, and religious groups, older workers, women, and people with disabilities continue to confront discriminatory policies and practices at the recruitment and hiring stages. These include...restrictive application processes, and the use of screening tools (e.g., pre-employment tests, background checks, date-of-birth inquiries)....”
 - Prior 9/4/12 draft included specific reference to “date of birth screens in online applications” – revised in final version



OFCCP's Position re: Online Applications

- [41 C.F.R. § 60-741.21\(a\)\(6\)\(iii\)](#)
 - “The reasonable accommodation obligation extends to the contractor’s use of electronic or online job application systems. If a contractor uses such a system, it must provide necessary reasonable accommodation to ensure that an otherwise qualified individual with a disability who is not able to fully utilize that system is nonetheless provided with equal opportunity to apply and be considered for all jobs.”
 - “Though not required by this part, it is a best practice for the contractor to make its online job application system accessible and compatible with assistive technologies used by individuals with disabilities.”
- [Appendix B to 41 C.F.R. Part 60-741](#) at ¶ 10 (guidance for reasonable accommodation procedures)
 - “The reasonable accommodation procedures should include procedures to ensure that all applicants, including those using the contractor’s online or other electronic application system, are made aware of the contractor’s reasonable accommodation obligation and are invited to request any reasonable accommodation needed to participate fully in the application process. All applicants should also be provided with contact information for contractor staff able to assist the applicant, or his or her representative, in making a request for accommodation.”



OFCCP's Position re: Online Applications

- [Federal Contractor Compliance Manual](#) (at p. 39)
 - During compliance review, compliance officers are to review online application systems to:
 - assess whether individuals with disabilities can access the application system
 - determine whether the contractor is providing reasonable accommodation, when requested and otherwise appropriate
 - “If a contractor uses an online application system to accept applications for employment, the contractor must ensure that potential applicants with disabilities can use the system (with or without reasonable accommodation) or can submit an application in an equally effective and timely manner through alternative means. This includes providing a means for contacting the contractor, other than through the online system, to request a reasonable accommodation.”
 - “The contractor must provide information on how to obtain reasonable accommodations on its online application system, as well as on its paper applications and job announcements. Ideally, the contractor should prominently display such notices, and include them at the beginning of the online application process. At a minimum, this information must include the name and contact information of the person to whom a request for an accommodation should be made and the process for requesting an accommodation.”
- [OFCCP FAQ re: Disability Issues Related to Online Application Systems](#)



Recent Cases: EEOC Getting Aggressive

- *EEOC v. Dish Network*, D. Colo., 1:13-cv-03294
- Subpoena enforcement action
- Allegations: Online applicant for CSR position asked, “DISH is a 7 day a week customer service center. Most employees will be required to work evenings, weekends, and holidays. Are you available to work these types of shifts.” Applicant has epilepsy. Answered “No.” Online application process terminated automatically.
- EEOC issued subpoenas seeking information relevant to:
 - Whether DISH’s online application process systematically discriminates against individuals with disabilities by precluding them from applying for and being considered for positions for which they are qualified
 - The identity of individuals who were screened out by the online application process
- Result: DISH agreed to give EEOC most of requested information and was ordered to provide the rest



Discussion Points

- What are best practices for ensuring accessibility of online application systems for individuals with disabilities?
- Should employers ask for information about race and gender through online application systems?
- How should employers balance the need for efficiency in evaluating online applications with potential legal risks associated with cutoffs that can be built into an online application process?



ANY QUESTIONS?

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