Making the Grade: Employers Face Increased Scrutiny of Pre-Employment Testing Programs

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Employers frustrated with the poor training or skill level of new employees, employee turnover and the increased number and cost of workers’ compensation claims may turn toward pre-employment tests to assess a potential employee before hiring the individual. However, if your company administers a test as part of its hiring process, you should ensure that it passes the “sniff test.”

The Office of Federal Contract Compliance Programs (OFCCP) recently filed a complaint with the Department of Labor’s Office of Administrative Law Judges against mozzarella cheese producer Leprino Foods Company, a federal contractor. In its complaint, the OFCCP claims that Leprino utilized a pre-employment test that adversely affected minority applicants and was not shown to be valid or job related. In its news release, the OFCCP stated that it found that only 49 percent of otherwise-qualified minority applicants passed the exam, while more than 72 percent of nonminority applicants passed the exam. Furthermore, the OFCCP stated that Leprino could not substantiate its claim that the test “measured applied math, workplace observation and information location skills related to the essential functions” of the applied-for position, that of an on-call laborer.

The OFCCP seeks at least 17 job offers for the original applicants, back wages and interest for at least 270 class members, that Leprino’s existing federal contracts be canceled and the company be debarred from entering future contracts until the alleged violations are resolved.

With regard to the complaint brought against Leprino Foods, OFCCP Director Patricia A. Shiu stated that “Leprino Foods’ hiring process simply doesn’t pass the sniff test. When workers are denied employment because of factors that have nothing to do with their ability to perform the job, something is not right. Our message to the company is clear: Correct your discriminatory practices and make restitution to the victims, or lose your lucrative federal contracts.”

The message is also clear to those in the contractor community: Tests used during the hiring process will be scrutinized during a compliance review, and tests that adversely impact minority candidates may lead to OFCCP findings of discrimination and substantial liability if the contractor cannot demonstrate that skills tested are required to perform the job in question and are properly vetted through a validation study. Employers using a test as a pass/fail screen that eliminates a failing applicant from further consideration are particularly exposed to possible adverse impact challenges.

The OFCCP has been especially active in this area. In 2009, Kraft Foods Global paid $227,500 and Gerber Products Co. paid $900,000 to settle findings of hiring discrimination based on conclusions that the pre-employment tests used by the employers had an adverse impact on minority applicants with insufficient evidence of validity for the positions at issue.

Federal contractors are not the only ones who need to worry about employment testing issues. The EEOC has also been active in challenging pre-employment testing and, because employer tests can impact a large number of employees or applicants, disputes related to employer testing are susceptible to class action and pattern and practice lawsuits.

The Uniform Guidelines on Employee Selection Procedures (the Uniform Guidelines) adopted by both the EEOC

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and OFCCP and relied upon by the courts set technical standards for establishing job-relatedness and the validation of employer tests. These standards apply to all enforcement actions brought under Executive Order 11246 and enforcement actions or private litigation brought under Title VII. Pre-employment tests that have an adverse impact on employment, based on an individual’s race, sex or national origin, will constitute employment discrimination unless the pre-employment test is job related for the position in question and consistent with business necessity.

A validation study, which includes an assessment of the knowledge, skills and abilities required for the position, is a critical component to successfully defend any employer test, whether the test is administered on a pre-employment basis or as part of an internal transfer or promotion process. Although engaging a qualified test publisher is an important part of the equation, employers should not simply accept the publisher’s conclusions or assertions of validity. For instance, the publisher of the test used by Leprino is a well-respected major test publisher. Although the Uniform Guidelines authorize employers to rely on the “generalized validity” of a test, based on the publisher’s validation studies drawn from data on the test’s use by other employers, each employer must be prepared to demonstrate that the test is valid for use in selecting hires or promotions in its own workforce. To do so, an employer must show that the skill requirements and job responsibilities of the jobs used in the test publisher’s general validity studies are sufficiently similar to its own jobs’ skill requirements and duties. The key to this showing is the performance of an underlying job task analysis that identifies the essential job duties and skill requirements of the jobs for which the test is used as a selection tool.

Even having an appropriate validation study in hand may not be a sufficient defense to an adverse impact challenge to a pre-employment test. The EEOC and OFCCP interpret the Uniform Guidelines as also requiring an employer who uses a test with demonstrated adverse impact to investigate whether there are alternative selection tools or uses of the test, e.g., a lower pass score or use on a non-pass/fail basis that serves its business needs but has no or a lesser adverse impact.

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