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Testing, Testing, 1, 2, 3

Part 1: Title VII

As one of the few attorneys who can perform math more complex than converting minutes into tenths-of-an-hour, I wanted to take just one or two tenths-of-an-hour of your time (1-12 minutes) to discuss an often-overlooked aspect of retention, promotion, and hiring decisionmaking: employee and applicant testing. There are a few sources of legal authority on this topic: Title VII, Executive Order 11246 (federal contractors and subcontractors only), and the ADA. This article will cover the Title VII part.

Agency authority disclaimer: This covers the EEOC's guidance at 29 C.F.R. §1607.1 *et seq.* These are guidelines, and not regulations, and so therefore were not even entitled to *Chevron* deference, and *Chevron* deference was dismantled by the U.S. Supreme Court in *Loper Bright Enterprises v. Raimondo* (June 28, 2024).

Who's covered? Employers large enough to be covered by Title VII (15 or more employees).

What's a "test"? Caught me already. The EEOC's guidance covers "tests and other selection procedures." Cases on "other selection procedures" that don't result in a numerical score or a pass/fail are sparing to the point of being something I've never come across. But, be aware that any filter or phase in an employment selection process may arguably be covered by the guidelines. (The EEOC will definitely be doing the arguing here). Anyway, because "test" is a shorter word, I'm going to continue to use it, but just be aware that this guidance applies to "selection procedures," which could include (but are not limited to): (i) interviews; (ii) scored interviews; (iii) written tests; (iv) skills tests; (v) personality or job fit profiles/evaluations; (vi) physical or agility evaluations. Importantly, recruitment practices (such as outreach at HBCUs or to women's networking organizations where minority and women candidates are underrepresented in the applicant pool and organization as a whole) are not tests.

What does the guidance require? The guidance requires that covered employers must track testing results for adverse impact by race/ethnicity (using the EEO-1 reporting categories) and sex. If a selection procedure has an adverse impact on any race/ethnicity or sex, the EEOC will consider it discriminatory unless it is validated.

How does the EEOC define "adverse impact"? The EEOC recommends employers evaluate adverse impact by the 80% or 4/5ths rule. That is, if the selection or pass-through rate of the test for any race or sex group is 80% or less of the selection or pass-through rate of the most-favored race or sex group, the employer should expect that the EEOC would find adverse impact. However, employers should also be aware that the EEOC could use other statistical tools or its own judgment that a differential in selection rate has practical significance.

How does an employer validate a test? To put it simply, the employer must show that the test measures important work behavior (as opposed to arbitrary characteristics or skills easily learned in orientation) and that the test is a good predictor of those important work behaviors, as proved by validity study, ideally one based on internal and position-specific outcomes, and conforming to acceptable social science methodologies. The guidelines encourage significant skepticism towards “validity studies” from third-party test providers. To be very candid, this is a nearly-impossible standard to reach, so an employer who finds its test yields an adverse impact can more efficiently spend its time finding a less discriminatory but equally effective test to administer going forward.

Could an employer learn something valuable from complying with these guidelines? Yes. Complying with these guidelines will help employers evaluate all steps of their selection procedures, rather than just the outcome. If an employer is concerned about any underrepresented group, studying testing (as well as recruitment, promotion, and retention practices generally) can show if one phase of the selection process is preventing it from reaching expected representation rates. (Reminder, no employer is permitted to engage in quota hiring/promotion/retention; however, employers can and sometimes should or must compare their workforce to the expected workforce to confirm its practices are nondiscriminatory).

If you have any questions or would like additional information, please contact Whitney Brown at 205-323-9274 or wbrown@lehrmiddlebrooks.com.