

Employment Testing In A Recovering Job Market

Law360, New York (September 10, 2010) -- Although the U.S. economy is not back to where it was a few years ago, there are some indications that the economy is getting better, or soon will. As the economy recovers, jobs are created and employers need to make hiring and promotional decisions. Should employers choose to use employment tests or other similar selection procedures for those decisions? As is almost always the case with good questions — the answer is it depends.

One thing is certain however, following the U.S. Supreme Court decision in *Ricci v. DeStefano*, employers face potential liability from both individuals in a protected class and individuals not in a protected class when using testing or other objective selection procedures. Therefore, counseling of employers should not be limited to whether their testing complies with federal anti-discrimination laws, but instead should begin with the fundamental question whether the employer should use testing in its selection decisions.

Initially, employers must be aware that federal anti-discrimination laws prohibit the use of testing/selection procedures, including on-line tests which are part of employment applications, that disparately or adversely impact a protected class, unless the employer shows that the selection procedure is job-related and consistent with business necessity (i.e. “validation”).

Disparate impact is normally indicated when the selection rate for the protected class is less than 80 percent of the other. For instance, if the hiring rate for whites is 60 percent, for Hispanics 45 percent, and for Blacks 50 percent, a comparison should be made of the selection rate for each group with that of the highest group (whites). Accordingly, Hispanics would be impacted at a rate of 75 percent or 45/60 and Blacks at a rate of 83 percent or 50/60. Applying the 80 percent rule, on the basis of the above information alone, adverse impact is indicated for Hispanics but not for Blacks.

Validity tells you if the characteristic being measured is related to job qualifications and requirements. Basically, does the test/selection procedure measure successful prediction of job performance?

Validation is expensive, generally speaking, and must comply with the Uniform Guidelines on Employee Selection Procedures (“UGESP”) found in the EEOC regulations. Although not required, validation is generally performed by professionals who specialize in validation studies because there are several acceptable strategies and the studies usually take years to complete and are complex.

What is imperative for employers to understand is that they can face substantial legal exposure to applicants of a protected class if they are not selected for a position and the testing results disparately impacts their protected class. For instance, the Ford Motor Company, as part of a court approved

settlement, recently paid \$8.55 million dollars in damages to a nationwide class of African Americans who were rejected for an apprenticeship program after taking a cognitive test.

In addition, following the Ricci opinion, employers also can face legal exposure to applicants not in a protected class, who should have been selected for the positions based on validated testing results but were not because of fear of a lawsuit alleging the test disparately impacted a protected class. In sum, employers face potential liability from both sides when using testing or other objective selection procedures.

The current legal landscape places employers in the position that if they use testing for hiring or promotional decisions, etc., they better be prepared to defend litigation premised on test results because there is no easy way out when a protected class is disparately impacted. The stakes are high because of the litigation risk. Therefore, employers should carefully and thoroughly analyze whether implementing a testing program is the best business decision.

The decision of whether or not to implement selection testing should require a cost benefit analysis. In making that cost benefit analysis, the following factors should be evaluated:

- Cost of implementing a testing procedure that can withstand legal challenge. As stated above, validation is generally expensive.
- How large of an applicant pool does the employer expect? And, will testing effectively pare down the pool if it is large? Are there other options for quickly and efficiently reducing the applicant pool, such as using specific minimum standards that directly relate to the job duties. For instance, requiring certain years or experience performing similar duties a college degree in a certain study.
- Is the cost of making a wrong hiring decision high? For instance, will the position require costly training, are errors expensive to the company either because of repair costs, loss of revenue or customer relations, etc.? Will finding a replacement be expensive due to shortage of qualified individuals, etc?
- Does the position require attributes that are hard to develop or change through training, such as characteristics learned through extensive experience or correlated with certain personality traits? If the required attributes cannot be taught, identifying individuals with those attributes is very important and testing could be beneficial.
- Will the employer routinely be hiring for this position? Essentially, how often will the test be administered? For instance, does the employer expect a lot of turnover, exceptional job growth, or is hiring seasonal? The more a test is used, the easier it is to offset the initial cost of validation, etc.
- Has the employer been happy with its current hiring process and the results? Basically, will testing provide sufficient improvement.
- Is the hiring selection process really the problem? Or is the employer hiring the right people but they are failing because of lack of training, poor compensation, improper equipment or some other reason.
- Is testing the most cost effective way to obtain necessary information? Testing may be good to determine knowledge pertaining to computer or software repairs, but may not be good regarding assessment of interpersonal skill.

- Can the key job requirements be concisely defined and effectively evaluated by a test? Additionally, do the job requirements routinely change or are fairly consistent? Contacting an expert, such as a psychologist, may be beneficial.

- Can a test can be purchased from a third-party vendor or must it be developed? Developing a test is generally more expensive, but an off-the-shelf test may not be applicable to the employer's position. If considering an off-the-shelf test, the employer should ensure the vendor has the necessary information to support validity and the information will be made available to the employer upon request.

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