

# **IAAPA** Attractions **EXPO**

## *Legal Issues in Pre-employment Testing*

Tuesday, November 14, 2006  
8:30 AM to 9:45 AM  
Room # B406





# **Legal Issues in Pre- Employment Testing**

Prepared and Presented by:

**David W. Arnold, Ph.D., J.D.**

Wonderlic, Inc.

# **Legal Issues Surrounding Pre-Employment Testing**

## **I. Types of Pre-Employment Tests**

There is no widely accepted taxonomy with respect to pre-employment tests, which are sometimes referred to as psychological tests. These tests vary extensively in terms of their content, development and intent, as well as the legal issues that they raise. A general review of the types of tests and their contents will be helpful in best understanding the legal issues that relate to certain forms of testing.

### **A. Clinical Personality Tests**

These tests often typify the layperson's perspective of the definition of psychological test. Tests such as the Minnesota Multiphasic Personality Inventory ("MMPI"), California Personality Inventory ("CPI") and Inwald Personality Inventory ("IPI") are representative of clinical personality tests. These instruments are generally used in conjunction with a health care

professional's interview and are designed to assess psychological aberrations and risk factors. Clinical personality tests are recommended exclusively for jobs that are safety-sensitive in nature (e.g., flight crew, nuclear plant worker, air marshal, police officer). These tests contain items that are very personal, odd or medically oriented. Such as:

- I believe God controls all.
- I frequently have gas after eating a meal.
- I had a terrible childhood.
- I often sit at home alone and drink to excess.
- I sometimes hear voices when I am alone.
- I enjoy a good sex life.
- I believe my sins cannot be pardoned.

## **B. Personality Tests**

These tests are used to assess a person's attitudes, beliefs and proclivities with respect to various aspects of job performance. Rather than focusing on psychological wellness, these instruments are designed to predict various behaviors that are important to many employers, including but not limited to, management potential, sales productivity, workplace safety, customer service skills, counterproductivity, reliability and integrity. Tests such as the Wonderlic

Productivity Index (“WPI”) and Personnel Selection Inventory (“PSI”) are representative of these types of tests. Personality tests are commonly used by employers, especially those in the travel, hospitality, banking and retail sectors, as well as by the federal government. These instruments do not contain items that are perceived as odd or personal in nature. Common items include:

- I always get along with people that are hard to please.
- I would rather meet people than read a book.
- I prefer a job that is different every day.
- People have no control over whether accidents happen.
- I am uncomfortable when workplace rules are unclear.
- I am comfortable criticizing others.
- It is common for most employees to falsify expense reports.

### **C. Cognitive Skills Tests**

These skills are used to assess a person’s ability to make accurate computations, exercise good judgment and make good decisions, as well as learn and apply new information. Cognitive skills tests are commonly used for jobs that require such abilities. Tests such as the Wonderlic Personnel Test (“WPT”) and Weschler Adult Intelligence Scale (“WAIS”) are representative of these types of tests.

These instruments do not contain any items that are perceived as odd or personal in nature. Common items include:

- A customer wants to pay a bill for \$287.29. If the customer gives you two \$100 and two \$50 bills, how much change is due the customer?
- An administrative employee is ten minutes late for work for the first time during the six months they have worked for you. The best approach to this matter would be to discipline the employee, mention the matter to the employee or simply ignore that they were late?
- Dog is to bark as cat is to \_\_\_\_\_?
- If a train is traveling at 45 miles per hour, how long will it take the train to travel 430 miles?

#### **D. Conclusion**

The vast majority of tests used by employers are personality and cognitive skills tests. Misguided statements, like those published recently in *Workforce Management* magazine that the MMPI is the most commonly used employment test, are erroneous.

## **II. Employment Discrimination**

### **A. Civil Rights Act of 1964**

Title VII of the Civil Rights Act of 1964 protects applicants against discrimination in employment. Under Title VII there are two forms of discrimination—disparate treatment and disparate impact. The disparate treatment theory imposes liability for intentional discrimination, while the theory of disparate impact permits an applicant to prevail without showing that the employer intended to discriminate. Disparate impact liability is imposed on employers when a facially neutral employment procedure (e.g., test) has a substantial negative impact on the basis of an applicant's subgroup status (e.g., race, gender). However, the employer may avoid liability and justify its employment procedures if it can show that they were job-related and consistent with business necessity. Most challenges against testing allege disparate impact, rather than disparate treatment.

For the most part, pre-employment tests do not exhibit disparate impact. Specifically, personality and clinical personality tests generally do not have a disparate impact, while cognitive abilities tests tend to exhibit disparate impact—just like educational requirements, criminal background checks, credit checks, physical requirements, experience requirements, etc.

A common means of determining whether a test or other employment practice has a disparate impact is the Equal Employment Opportunity Commission's ("EEOC") four-fifths' rule. This general rule of thumb is that if a subgroup passes the test at equal to or above 4/5s or 80% of the highest subgroup pass rate, then there is no disparate impact. Note, if a test does not exhibit disparate impact, the employer does not need to legally show that it is job-related and consistent with business necessity.

**Disparate Impact Analysis**

Applicants	Hired/Passing	Selection Rate/ Percent Hired	Selection Rate Comparison
200 White	160	80	1.00
100 African American	77	77	0.96
80 Hispanic	40	50	0.63

If a test exhibits disparate impact, then an employer will need to show that it is job-related and consistent with business necessity. The employer can demonstrate this by showing the test has been validated for predicting important aspects of its jobs. Validation may be conducted specifically for an employer's work site or it may be research that has been conducted by a publisher.

## **B. Types of Validity**

**Face Validity**—If a test measures what appears to be appropriate for the job, then it is face valid. Typing tests obviously reflects a person's ability to perform a position involving typing, while a physical examination doesn't seem to relate to a police chief's position. In the area of testing, personality tests and cognitive abilities tests are generally fairly face valid, while clinical personality tests are not. While face validity has no particular value from a legal or psychometric perspective, it is important insofar as it decreases the likelihood that applicants will challenge an employer's hiring process.

**Content Validity**—The degree to which the content of a test represents the content of the job is the degree to which it is content valid. Generally, interviews, criminal background checks, typing tests, physical examinations and tests of knowledge/certification are based on content validity. Content validity generally is not relevant to personality tests, clinical personality tests and cognitive skills tests.

**Construct Validity**—The degree to which a test measures specific psychological constructs (e.g., self-esteem, depression) Research documentation involves administering a test in conjunction with other tests/measures that do and don't measure the construct of interest. Construct validity is generally only used to

support the use of clinical personality tests that attempt to assess risk factors for safety-sensitive jobs.

**Criterion-Related Validity**—The degree to which a test has been shown to be predictive of actual job behavior. This is probably the most logical and easy to understand form of validity. Research documentation shows that the test has been shown to be predictive of things such as job performance, turnover, absenteeism, sales volume and service complaints. This research may have been conducted by the publisher with various organizations or at the specific user's site.

### **C. Civil Rights Act of 1991**

The Civil Rights Act of 1991 modified the Civil Rights Act of 1964 and prohibits test score modifications on the basis of race, sex, color, national origin or religion. Historically some organizations had used different norms or cut-off scores for applicants on the basis of their subgroup status. This was typically done to minimize the disparate impact that cognitive skills tests exhibited. Now, employers cannot use different norms, cut scores or make any other modifications to tests on the basis of subgroup status.

#### **D. Likelihood of Litigation**

Some HR professionals and employment attorneys believe that pre-employment tests are a lightning rod for litigation. In reality, facts do not support these perceptions. Consistent therewith, the table below shows the number of testing complaints and overall complaints filed with the EEOC in recent years.

<b>Year</b>	<b>Total EEOC Charges</b>	<b>Testing Charges</b>	<b>Percentage of Total Charges</b>
1991	63,898	184	0.29%
1992	73,302	216	0.30%
1993	87,942	256	0.29%
1994	91,189	327	0.36%
1995	87,529	475	0.54%
1996	77,990	859	1.10%
1997	80,680	309	0.38%
1998	79,591	228	0.29%
1999	77,444	325	0.42%
2000	79,896	325	0.41%
2001	80,840	314	0.39%
2002	84,442	175	0.21%
2003	81,293	246	0.30%

**E. *Griggs v. Duke Power*, 401 U.S. 424 (1971).**

This suit was brought by black employees at Duke's power generating facility in Draper, North Carolina. The plant consisted of five departments:

- 1) Labor
- 2) Coal Handling
- 3) Operations
- 4) Maintenance
- 5) Laboratory and Test

Initially blacks were only employed in the Labor Department, where the highest paying job paid less than the lowest paying job in any of the other departments. In 1965 the company discontinued its intentional discrimination practices and allowed blacks to work outside the labor department. However, the company set up the following selection criteria. For current employees, applicants for a job outside the labor department were required to have a high school diploma or pass two intelligence tests. External applicants were required to have a high school diploma and pass the two tests.

Court held that the employer's requirements had a discriminatory (disparate) impact on blacks and hence they must bear a demonstrable relationship to the successful job performance. Given the fact that the jobs in the other departments were still relatively low level positions, the employer was unable to show the requirements were job-related and consistent with business necessity.

**F. Recent Administrative Agency Determinations Regarding Testing**

- Equal Employment Opportunity Commission Charge #21B90917, Chicago, IL (1992)
- Equal Employment Opportunity Commission Charge #31A920266, Dallas, TX (1992)
- California Department of Fair Employment and Housing Charge #E9697E0939-00-pse/0370979093, Sacramento, CA (1997)
- Utah Anti-Discrimination & Labor Division Charge #97-0621, Salt Lake City, UT (1998)

## **G. Scientific Reviews of Testing**

“The Validity and Utility of Selection Methods in Personnel Psychology: Practical and Theoretical Implications of 85 Years of Research Findings,” *Psychological Bulletin*, 1998. Concludes that cognitive abilities and integrity tests are very useful in predicting employee performance.

“Comprehensive Meta-Analysis of Integrity Test Validities: Findings and Implications for Personnel Selection and Theories of Job Performance,” *Journal of Applied Psychology*, 1993. Integrity tests are valid and non-discriminatory predictors of many aspects of workplace counterproductivity.

## **H. Conclusion**

Only cognitive skills tests tend to exhibit disparate impact. Contrary to some commentators, pre-employment tests are not particularly prone to litigation. Tests are challenged relatively infrequently, and they tend to withstand challenges due to having extensive documentation of validity.

### **III. Americans with Disabilities Act (“ADA”) Issues**

**A.** The ADA contains many provisions that impact the use of pre-employment testing. However, the two issues that are most commonly focused on involve:

1. Whether a test should be administered prior to or after a conditional offer of employment has been tendered .
2. Reasonable accommodation in testing.

#### **Pre-Offer v. Post Offer Testing**

Title I of the ADA puts limitations on when employers can request medical/disability related information from applicants and employees. According to the ADA, employers cannot make disability-based inquiries or conduct medical examinations until a conditional offer of employment has been tendered. Upon tendering a conditional offer of employment, employers may make such inquiries and conduct such examinations, but applicants must be rejected on the basis of information that is job-related and consistent with business necessity. Employers are prohibited from making disability-based inquiries or conducting medical examinations with respect to employees, unless the questions/examination is job-related and consistent with business necessity.

To issue a real conditional offer of employment, an employer must have either completed all non-medical components of the application process or be able to demonstrate that it could not have reasonably done so before issuing the offer.

***EEOC Policy Letter, 8 NDLR 373 (1996)***

An employer was interested in conducting reference checks after a conditional offer of employment was tendered. The employer argued that the employment process was slowed down due to how long it took to complete the reference checking process. According to the EEOC's policy letter, the general rule is that all non-medical information should be gathered prior to conditional offer being tendered. This is only excused if the employer can show that it could not have reasonably obtained and evaluated all non-medical information prior to tendering the conditional offer of employment.

***EEOC Policy Letter, 25 NDLR 296 (2002)***

An employer inquired as to whether it could conduct physical agility tests subsequent to tendering a conditional offer of employment. The EEOC responded that physical agility and fitness tests are not medical examinations unless they involve some type of physiological monitoring (e.g., heart rate, blood pressure). As a result these tests must be conducted prior to tendering a conditional offer of employment.

***O'Neal .v City of New Albany, 293 F.3d 998 (7th Cir. 2002)***

Kenneth O'Neal had tried to become a New Albany police officer for nearly twenty years. At one point Mr. O'Neal became the number one candidate and was employable contingent upon passing a medical examination. O'Neal did not pass the medical examination and claimed that the city's job offer was not real because it was conditioned upon passing the statewide medical and psychological examinations and any local medical and mental examinations. The court held that while the offer was contingent on O'Neal passing a number of tests, the offer was real because all of these tests (medical and mental) were medical in nature.

***Buchanan v. City of San Antonio, 85 F.3d 196 (5th Cir. 1996)***

Richard Buchanan applied for the job of police officer with the City of San Antonio. Buchanan was rejected for the position and sought recovery under the ADA. Buchanan alleged that he had been required to take a medical examination prior to receiving a conditional offer of employment. The City argued that Buchanan had signed an acknowledgement that he had received a conditional offer of employment. However, employment was conditioned upon passing a medical examination, psychological examination, polygraph examination, physical fitness test and background check. The court held that this conditional offer of employment was not real.

***Leonel v. American Airlines, Inc.*, No. 03-15890 (9th Cir. 2005)**

Plaintiffs, all who were HIV positive, applied for flight attendant jobs with American Airlines (“AMR”). Upon interviewing the applicants in AMR’s headquarters in Dallas, AMR issued conditional job offers contingent upon passing background checks and medical examinations. AMR immediately sent plaintiffs to its onsite medical facility for blood tests and to complete medical forms that list 56 medical conditions, including blood disorders like HIV. In response to the forms and in subsequent interviews with nurses the applicants never indicated that they were HIV positive. Upon running a complete blood count analysis of plaintiffs’ blood samples, AMR found elevated corpuscular volumes. Upon being contacted for an explanation, the job applicants disclosed that they were HIV positive. As a result, AMR withdrew its offer of employment due to “failure to provide full and correct information.” Plaintiffs brought suit and alleged that AMR could not require them to disclose medical information so early in the hiring process, thus their lack of disclosure should not disqualify them from employment. According to the court, the job offer was only real if the employer had completed all non-medical components of the application process or was able to show that it could not have reasonably done so. AMR’s argument that it was trying to expedite the hiring process and make the process more convenient for applicants did not justify conducting background checks and medical examinations after the conditional offer of employment.

## **EEOC Guidance**

What constitutes a medical examination/inquiry under the ADA ranges from obvious to elusive. As a rule, any inquiry that is likely to elicit information regarding a disability is considered medical in nature. Also, the EEOC has promulgated extensive guidance to assist in determining whether an employment practice is medical or non-medical. Contained within these guidelines are some general factors to consider when attempting to make these determinations. These eight factors are:

1. Test administered by a healthcare professional or trainee.
2. Test interpreted by a healthcare professional or trainee.
3. Test designed to reveal an impairment or state of physical/psychological health.
4. Test given for the purpose of revealing an impairment or state of physical/psychological health.
5. Test is invasive (e.g., drawing blood, urine, breath.)
6. Test measures physiological/psychological responses.
7. Test normally conducted in a medical setting.
8. Test utilizes medical equipment or devices.

Generally, one factor will not cause a test to be considered medical, however three or more will usually lead to the determination that a procedure is medical. Pre-employment personality tests are not considered medical in nature, while clinical personality tests are generally considered medical. According to more specific guidance, the EEOC has stated that psychological tests that are designed to identify a medical disorder qualify as medical examinations, while psychological tests that simply measure personality tests such as honesty, preferences and habits do not.

***Karraker v. Rent-A-Center, No. 02-CV-2026 (2004).***

Rent-A-Center (“RAC”) required all internal and external applicants for management positions to take a battery of nine written tests and referred to this battery as the Management Test. The Management Test was comprised of the following:

1. Minnesota Multiphasic Personality Inventory (“MMPI”)
2. Bernreuter Personality Inventory
3. Strong Interest Inventory
4. Bennett Mechanical Comprehension Test
5. Language Comprehension Test
6. Mathematical Thinking Test
7. Wide Range Vocabulary Test
8. Minnesota Clerical Test
9. Wonderlic Personnel Test

Plaintiffs filed suit against RAC’s use of the Management Test—specifically the use of the MMPI. On May 6, 2004 the U.S. District Court for the Central District of Illinois ruled that the MMPI was not a medical examination in this particular instance and hence did not need to be administered subsequent to a conditional offer of employment.

***Karraker v. Rent-A-Center*, 411 F.3d. 831 (7<sup>th</sup> Cir. 2005).**

On appeal, the Seventh Circuit Court of Appeals held that the MMPI is a medical examination and needs to be conducted after a conditional offer of employment has been tendered. The opinion does not restrict the use of the MMPI or make any determinations regarding its validity—it merely holds that the MMPI must be administered post offer. The opinion also recognized that typical personality tests used for employment purposes are not medical in nature.

**B. Reasonable Accommodation.**

The ADA and similar statutory protections did not create the requirement for reasonable accommodation; however, these laws certainly have made employers more aware of this issue. While the ADA does not define reasonable accommodation, it provides examples of it. With respect to tests, modifications to materials, provision of readers and interpreters and other similar accommodations are deemed appropriate. Such accommodations should be determined by considering the job applicant on a case by case basis. Also, the identification of an appropriate accommodation should not be a unilateral decision by either the applicant or employer. In essence, the employer cannot say that everyone with a specific disability will be given only a specific form of accommodation.

***EEOC v. EchoStar Communications Corporation*, No. 02-CV-00581 (D. Colo. May 6, 2005).**

Dale Alton, a blind individual, sought work as a customer service representative. As part of the hiring process, the employer required applicants to take a test used to assess customer service skills. Upon discussing the matter with Mr. Alton, and notwithstanding Alton's request for a reader, the employer administered a Braille test. Alton did not pass the test and sued EchoStar under the ADA. In determining whether an accommodation is reasonable, the employer must consider whether the accommodation is effective. In other words, would a Braille test provide a valid assessment of Alton's skills. The EEOC alleged that providing a reader for test administration provided a much more valid assessment of the applicant's skills and was truly a reasonable accommodation.

On May 6, 2005, after a three-day trial, a twelve person jury returned an \$8 million dollar verdict. The jury verdict awards \$2,000 in back pay, \$5,000 in compensatory damages, and \$8 million in punitive damages for Mr. Alton. In the trial, the EEOC alleged the following:

- EchoStar failed to accommodate Mr. Alton in the application process.
- EchoStar failed to accommodate Mr. Alton in the job by never trying to install adaptative software.
- EchoStar denied Mr. Alton an employment opportunity because of his disability or because of the need to provide him an accommodation.
- EchoStar violated a section of the ADA when it failed to use a proper testing device to determine an applicant's skills.

### **C. Conclusion**

If an employer is using a clinical personality test it should most likely be administered post offer. Applicants should always be invited to seek reasonable accommodation in the hiring process, including the administration of pre-employment tests.

## **IV. Invasion of Privacy**

**A.** Privacy rights have a high degree of variability in their content and application. For instance, the privacy protections afforded by the U.S. Constitution and most state constitutions generally only apply to governmental entities. An applicant for a job at Home Depot or Holiday Inn does not have a claim under the 4th Amendment of the U.S. Constitution because the prospective employer posed invasive inquiries during an interview or required the applicant to take a drug test. Additionally, in most states (California is an exception) an applicant would not have a legitimate claim for invasion of privacy under the relevant state constitution. While most states have certain statutory or common law protections with respect to applicant privacy, the protections tend not to be quite as applicant friendly as most constitutional protections.

Invasion of privacy is an issue that is legitimately raised when job applicants are required to undergo invasive testing. The most commonly challenged type of testing is drug testing, but certainly medical examinations and clinical personality tests raise privacy issues as well.

When courts analyze invasion of privacy suits, they tend to focus on two issues. First, how substantial is the invasion of privacy? While this prong of the analysis is impacted by a number of variables, an applicant's expectations are very

important. As an example from outside the employment domain, five years ago it would have been perceived as extremely invasive if you were required to remove your coat, belt and shoes to gain access to a concourse at an airport. Today it is commonplace and travelers generally do not view this practice as particularly invasive.

Secondly, courts determine the justification for the invasive practice—what societal/business need does the practice serve? Note, this is similar to the balancing analysis that is conducted with tests that have a disparate impact. With respect to being required to partially disrobe at an airport, this is justified by the fact that such procedures help protect people's lives.

With respect to pre-employment testing there has been very little in terms of challenges.

***McKenna v. Fargo, 451 F.Supp. 1355 (1978).***

The Jersey City Fire Department was using the MMPI for firefighter screening. The suit alleged that the MMPI constituted an unlawful invasion of privacy. While the court acknowledged that the test was invasive, it held that the City's interest outweighed the applicants' right to privacy.

***Soroka v. Dayton Hudson*, 235 Cal.App. 3<sup>rd</sup> 654 (1991).**

A commonly misinterpreted opinion. Target Stores was using the MMPI, CPI and Employment Index (a personality test used to help assess integrity) to screen applicants for store security positions. Mr. Soroka initially filed a suit with the California Department of Fair Employment and Housing alleging discrimination on the basis of race and religion. After the Department of Fair Employment and Housing found the complaint to have no probable cause, Soroka filed a class action suit for invasion of privacy. As part of the suit, plaintiffs sought a preliminary injunction against Target's use of the test battery. The trial court refused to grant the preliminary injunction because it did not believe that Mr. Soroka would prevail on the merits of the case. According to the trial court and consistent with the holding of one California appellate court, Soroka's privacy had been invaded, but Target's intent of having emotionally stable store security personnel was reasonable and justified invading the privacy of job applicants. Upon appeal, the appellate court granted the preliminary injunction. The appellate court held that Target needed to show a compelling interest to justify invading applicants' privacy. Hence Soroka was likely to ultimately prevail in the litigation. Parenthetically, the court opined that there would have been a compelling interest had Target's security personnel carried weapons. Target initiated an appeal to the California Supreme Court, but decided to settle the case. It is important to note that this case never went to trial. The only thing that was decided was whether a preliminary injunction should be granted and this appellate

court's opinion differed from that of another California appellate court. Also, noteworthy is the fact that the plaintiffs dropped the Employment Inventory (personality test) from the complaint due to it not containing any invasive inquiries—only the CPI and MMPI were the focus of this challenge. Finally, the appellate court's opinion regarding the need to have a compelling interest to justify invasions of privacy has been overturned by the California Supreme Court. See Loder v. City of Glendale, 59 Cal.Rpt. 2<sup>nd</sup> 696 (1997).

***Staples v. Rent-A-Center, C 99-2987 (1999).***

Rent-A-Center (“RAC”) required all internal and external applicants for management positions to take a battery of nine written tests and referred to this battery as the Management Test. The Management Test was comprised of the:

1. Minnesota Multiphasic Personality Inventory (“MMPI”)
2. Bernreuter Personality Inventory
3. Strong Interest Inventory
4. Bennett Mechanical Comprehension Test
5. Language Comprehension Test
6. Mathematical Thinking Test
7. Wide Range Vocabulary Test
8. Minnesota Clerical Test
9. Wonderlic Personnel Test.

Former employees filed suit against RAC with the major focus being invasion of privacy. The MMPI and Bernreuter Personality Inventory were the exclusive focus of the plaintiffs' complaint.

After the plaintiffs filed the suit, RAC almost immediately decided to discontinue using the MMPI and Bernreuter. RAC settled with plaintiffs and agreed to discontinue using the Bernreuter and MMPI throughout the country. The quickness of this settlement probably stemmed from the *Soroka* holding in California.

***Karraker, Karraker and Karraker v. Rent-A-Center, 02-CV-2026 (2002), 411 F.3d 831 (7<sup>th</sup> Cir. 2005).***

Same employment practices as challenged in the case above, but suit brought by three brothers in Illinois. Rent-A-Center probably did not settle case due to Illinois privacy laws not being as favorable to applicants as California protections. Case has become more a focus for Americans with Disabilities Act issue.

***Brent et al. v. The Municipality of Anchorage, No. 3AN-02-7375CI (2002).***

Plaintiffs were job applicants for the position of firefighter with the City of Anchorage. All had previous firefighting experience. According to plaintiffs' complaint, all applicants had passed the following tests: 1. Written test on firefighting; 2. Physical agility test; 3. Structured interview before an interview

board and 4. Interview with the fire chief and president of the firefighters' union. The plaintiffs were exclusively disqualified on the basis of a clinical personality test that was comprised of 900 items. The test included the California Personality Inventory, Personality Assessment Inventory, State Trait Anger Expression Inventory and Psychological History Questionnaire. Among other complaints, the applicants alleged that this test constituted an unlawful invasion of privacy.

## **B. Conclusion**

Clinical personality tests are best used and justified for jobs that are safety-sensitive (e.g., flight crew, air marshal, police officer, nuclear plant operator). While their use in other jobs may be legally supportable, such tests are likely to cultivate costly litigation and negative public relations. Additionally, clinical personality tests generally would not be valid for positions that are not safety-sensitive. Finally, the personality tests and cognitive abilities tests commonly used by employers typically do not raise issues of invasion of privacy.

## **V. State Specific Statutes**

**A.** The laws that govern the use of pre-employment tests are just about exactly the same as those which govern the use of other pre-employment practices. However, in the case of integrity testing, there are two states that have statutory restrictions that are somewhat specific to testing.

The Massachusetts polygraph statute prohibits the use of lie detectors and polygraphs for employment purposes. The language of this statute specifically prohibits the use of written tests that provide a diagnostic opinion regarding honesty. The Rhode Island polygraph statute similarly applies to written honesty/integrity tests, but it only precludes such instruments from serving as the primary basis of an employment decision. These statutes were enacted in the late 80s and subsequently no similar laws have been enacted.

Some commentators have mistakenly concluded that other state polygraph statutes, which do not contain any language pertaining to written tests, apply to written honesty/integrity tests. This seems to stem from a general misunderstanding regarding the purpose of integrity tests vs. that of the polygraph. Polygraphs and similar devices were developed to determine whether a person is lying based on their physiological responses to questions. In contrast, integrity tests were developed to predict various aspects of work performance based on a person's answers to a questionnaire.

With respect to the general application of polygraph laws to integrity tests, two state courts have held that such statutes do not cover written tests. Specifically, over 20 years ago the Minnesota Supreme Court addressed this issue in *Minnesota v. Century Camera, Inc.*, 309 N.W.2d 735 (1981). Under the relevant Minnesota statute, employers cannot require employees or prospective employees to submit to a “polygraph, voice stress analysis, or any test purporting to test the honesty” of a person. The court held that the statute applied only to tests that measured physiological changes and specifically precluded coverage of written psychological questionnaires used to gauge honesty.

Current Wisconsin law defines an honesty test as a “polygraph, deceptograph, voice stress analyzer, psychological stress evaluator or similar mechanical or electrical device” used to evaluate honesty.” However, even before the Wisconsin legislature amended and clarified the relevant statute by adding the “mechanical and electrical devices” language, a Wisconsin court addressed the issue of whether the state’s polygraph statute covers written integrity tests. Use of a written integrity test was not a violation of the state’s polygraph statute because the test did not measure physiological responses, according to the appeals court in *Pluskota v. Roadrunner Freight Systems, Inc.*, 524 N.W.2d 904 (1994). The court distinguished the devices covered by the statute from written tests, noting that paper and pencil tests are designed to measure attitudes regarding honesty, while polygraphs measure physiological changes and make determinations regarding deception.

## **B. Conclusion**

Except with respect to the use of integrity tests in Rhode Island and Massachusetts, for the most part the laws that are applicable to pre-employment testing are no different than those impact other hiring tools.

## **VI. Selection of a Test Publisher**

### **A. Research Team**

A test publisher's research team should be comprised of a team of measurement and legal specialists. These individuals will typically have graduate or professional degrees in industrial psychology and employment law. They will commonly be active members of the Society for Industrial-Organizational Psychology, American Psychological Association and American Bar Association.

## **B. Validity Documentation**

A reputable test publisher will have extensive research documentation that its tests have been appropriately validated. Additionally, the publisher will have the relevant technical staff to conduct specific validation studies for a client. Validity documentation should comply with the following guidelines and standards:

- *Uniform Guidelines on Employee Selection Procedures*—Equal Employment Opportunity Commission
- *Standards for Educational and Psychological Testing*—American Psychological Association
- *Principles for the Validation and Use of Personnel Selection Procedures*—Society for Industrial-Organizational Psychology
- *Model Guidelines for Pre-employment Honesty Testing Programs*—Association of Test Publishers.

### **C. Publisher Support**

While tests are not frequently challenged, it is important to have an adequate support team should a challenge occur. Reputable publishers will provide their subject matter experts at no cost, excluding travel expenses, to assist in defending an employer's use of their tests.

### **D. Publisher Ethics**

Look for publishers that are members of the Association of Test Publishers ("ATP"). The ATP is an international association with ethical guidelines. Most reputable publishers in North America and Europe belong to this organization. Also, publishers who have been in business for a significant period of time are generally going to be engaging in ethical practices.

### **E. Conclusion**

Similar to other products, there are significant variations in the quality of tests and the providers thereof. Employers need to be diligent in their evaluation of both.