

Employee Selection: Best Practices for Reducing Legal Risk in Pre-Hire Assessments

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The Need For Selection Assessment

In an increasingly competitive domestic and international market, hiring the best people is considered one of the most critical elements of a company's success. In the course of his research, Jim Collins, author of *Good to Great*¹, found that one of the fundamental differences that distinguishes great companies from good ones has to do with a company's ability to determine "Who should be on the bus". Collins' research showed that while most companies do not pay enough attention to getting the right people on the bus, those companies that have gone from good to great practice a principle of getting the right people on the bus, the wrong people off, and then allowing the right people to point the bus in the right direction. Not surprisingly, while personnel selection is important at all levels of an organization, it is most critical at senior executive levels. Collins argues that investing resources into selecting the right people is even more critical to an organization's success than developing high-level strategy, since the wrong people will neither create nor effectively implement a good strategy. Given the importance of selecting the right people to get on the bus, it is not surprising that the popularity of selection assessments for use in hiring at all levels of the organization has increased dramatically in the last ten years and continues to rise.

Employers are recognizing that well designed and implemented assessment programs produce concrete benefits including reduced turnover, enhanced performance, lower levels of employee misconduct, as well as other tangible indices of return on investment. According to the American Management Association, 60% of Fortune 500 companies now use testing as part of their hiring process². The growth of testing in the workplace reflects a broad consensus in the business world that hiring the wrong person, particularly the wrong senior level executive, can negatively impact morale, productivity and focus.

While some might assume that the demand for selection assessment services might lessen during challenging economic periods, it turns out that during these times an increasing number of employers seek assessment programs to evaluate employees. This is particularly true in the retail industry. According to recent data published by the National Retail Security Survey³, the average loss per incident of employee theft in a retail setting is over \$1,000. To mitigate this risk, employers, in states where it is allowed, are increasingly turning to integrity tests to help identify high-risk employees.

One of North America's largest retailers recently participated in a study to ascertain whether the implementation of pre-employment testing at many of its store locations would impact the number of thefts per store and the dollar amount stolen per store. After the first nine months of implementation, the average number of employee

theft apprehensions in locations where the program was implemented was 5.72, versus 7.89 in non-participating locations. Further, the average dollar amount stolen per store in the assessed locations was \$10,743 versus \$15,829 in non-participating locations.

Selection Assessments

Any test or procedure used to measure an individual's job-related qualifications and interests can be considered a personnel selection assessment tool. A selection assessment will ordinarily include a combination of a preliminary job analysis and competency profiling, interviews, cognitive, ability, and/or personality tests, and work simulations. Ideally, an assessment should never be based solely on a single test or measure. A test or an individual procedure provides only part of the relevant information about a person. A range of selection assessment instrumentation, methodology, and legal consideration is necessary to address the particular abilities, competencies, and personality dimensions relevant to a given position. Selecting a CFO requires a different assessment approach than the process that is employed for the promotional assessment of an internal client manager, and both may vary significantly from the approach employed to assess potential cashiers at a supermarket. Yet in each case, we advise adhering to two fundamental rules: Whenever making personnel selection decisions, make sure that the competencies you are assessing for are related to the specific position for which you are recruiting, (or potential promotional positions), and use as many sources of information as possible, including work history, interviews, test findings, and references. No one piece of information, in and of itself, is sufficient to predict future job performance. By limiting the scope of the assessment to the relevant competencies and using multiple data sources, the accuracy of the prediction is increased while the risk of legal action is reduced. When challenged in a court, an employer will be in a better legal position if it is able to show that there is a business necessity for each competency measured and that testing was only one factor in the selection decision.

Legal concerns

While HR managers treasure the data and benefits that selection assessments provide, legal counsel lie awake at night concerned about the potential legal liability to which the company is exposed. Because the literature on the legality of different assessment measurements is often confusing and rife with misinformation, most of the purveyors of assessment services are unaware about whether their assessment process conforms to professional and legal guidelines. Unfortunately, this leaves no-one to mediate effectively between the internal person who promotes the use of assessment for hiring decisions (typically the head of HR, but increasingly a senior line manager) and the internal or external counsel who is trying to minimize legal risk.

As we begin to balance these seemingly competing interests, it is worth noting that a new and previously unforeseen advantage to using selection assessments has arisen: ***Well designed and implemented assessment programs may actually assist companies in the probative demonstration of due diligence in hiring, thereby reducing***

the company's exposure to negligent hiring liability claims. A properly designed and implemented selection assessment using validated, job-related tests may also help reduce legal exposure to discrimination claims. The EEOC requires companies to use “best reasonable efforts” to remove biases from their hiring process. The personal biases of interviewers often lead to discrimination claims. The use of validated tests, which have been shown not to have any adverse impact and not to discriminate based on age, sex, and race, can reduce subjective biases, thereby making the process fairer for all candidates.

Best Practices for Personnel Selection and Selection Assessment

We recommend that all pre-hire assessments for positions where many candidates are evaluated for jobs, in which they will be doing basically the same work, include a well-executed job analysis. This consists of interviewing employees and their supervisors in order to identify the essential functions required by the job. To comply with the Americans with Disabilities Act (ADA) it is important not only to identify the essential functions of a particular position, but also to distinguish between fundamental and marginal job duties. The key to ADA compliance is not whether a disabled employee is capable of performing in the role, but whether that employee could perform the essential functions of the role when reasonably accommodated. These accommodations can range from providing a stool for a cashier with arthritis to acquiring special software for a blind senior accountant.

The job analysis must also be followed up with a job description cataloging the necessary duties, responsibilities, and behavioral competencies entailed in the job, as well as other duties assigned by the employer. (The last item being an important distinction to make in the written document in order to retain flexibility in the job description from a legal perspective.) No matter what the level of the position, the job description must include objective, measurable, performance accountabilities. Behavioral competencies must result in the clear definition of the knowledge, behaviors and motivations necessary to be successful on the job. Including competencies based on soft or subjective criteria such as personal, interpersonal, and motivational competencies is acceptable as long as they are applied evenly to all applicants for a position and are job-related.

For senior level positions, or middle management positions in smaller companies, a different approach from the initial job analysis is required. Since these higher-level positions often entail individuals performing a unique function in the company, rather than performing a conventional job analysis as described above, a best practice is to employ a “job modeling” methodology to identify the personal competencies required to perform the job⁴. These competencies, behavioral descriptions of job-related knowledge, skills, and abilities, are used as the basis of comparison between different job candidates. It is strongly recommended that a trained assessment expert conduct individual assessments of this sort.

Choosing Assessment Instruments to Address Identified Competencies

Once the relevant behavioral competencies have been identified, the assessment instruments that are best suited to measure these specific competencies and characteristics must be selected or created. Since there are many different tests, each providing different information, we strongly recommend the input of a knowledgeable assessment expert to help select the specific tests to be used. Further, it is important for employers to know how the publisher expects the test to be used, and to ensure that it is used in that fashion. Otherwise the results may not be valid and the employer's legal risk may be increased.

Predictors of job performance can be divided into those that are focused on ability and those that are focused on personality. Both ability and personality predictors have been shown to be important determinants of performance across a wide range of jobs. Research on the importance of personality suggests that although ability is very important in determining if an individual *can* do a given job, it offers little insight into whether an individual *will* do a given job. Researchers have been able to improve the prediction of job performance when personality measures are added to a battery of ability tests. Incorporating both ability and personality measures has the potential for higher levels of validity than assessment systems relying solely on one type of variable.

Hundreds of aptitude and personality tests are available commercially. Selecting the right combination of assessments to answer the questions most relevant to an organization's selection process is a daunting task for HR managers and executives. Most consumers lack the background in psychology and test measurement to evaluate the value of various tests or the claims of publishers or consultants who recommend them. This is especially critical since the EEOC's Uniform Guidelines on Employee Selection Procedures hold the "user" of the test (i.e., the employer) and not the test publisher responsible if the test is found to discriminate.

The different types of tests available for assessing key competencies include:

- **Cognitive tests**, which measure learning ability, particularly the ability to learn through the use of printed material.
- **Aptitude tests**, which seek to measure and predict a job candidate's potential for learning and performing specific skills or activities. These tests seek to measure how trainable a job candidate is, rather than how well he or she has been trained.
- **Achievement tests**, which range from simple word processing tests to sophisticated online or paper and pencil tests that measure degree of knowledge in specific fields. They measure not how trainable a job candidate is, but how well he or she has been trained for a specific work activity.
- **Personality inventories**, which assess traits such as drive for results, decision-making style, and temperament. These tests can be useful in

predicting whether an applicant has the personality traits that are usually associated with success at particular jobs.

- **Integrity tests**, or "honesty tests," which are designed to determine the integrity of people who take them by measuring attitudes toward dishonesty and propensity for theft-type behavior. May not be legal in some states.
- **Work Samples**, which directly measure a person's performance in doing a job related task. Often include both interactive and noninteractive tasks.
- **Biographical Inventories**, which entail collecting and objectively scoring events from candidates' prior history related to determining what kind of people they are.

To offer some examples of which type of test instrument to use to measure which type of competency, consider that for promoting client managers, it is relevant to know if they will make good supervisors (personality inventory, biographical inventory) and if they possess the necessary critical thinking skills required to develop and understand complex strategy (cognitive test, work simulation). For selecting a CFO, it is important to know how strategic, rule conscious, motivating, and emotionally intelligent the candidates are (cognitive, personality, and abilities tests).

Research on personality has found the following five personality traits to be the most predictive of employee success. The majority of recently developed personality instruments are built around these five factors⁵:

- **Extraversion** - the extent to which individuals are outgoing, assertive and positively interactive with others instead of reserved, independent, and quiet
- **Agreeableness/Accommodation** - the degree to which individuals are cooperative, warm and agreeable versus self-focused, challenging, and power seeking
- **Openness to experience/Originality** - defines individuals who are creative and curious versus practical, conventional, and narrowly focused
- **Need for stability** - the degree to which individuals are calm, self confident, and cool versus reactive, anxious, dissatisfied and emotional
- **Conscientiousness/Consolidation** - the extent to which individuals are organized, dependable and focused on fewer goals versus non-goal directed, disorganized and unreliable

Assessing test validity

Using test instruments that are valid is critical to effectively assess candidates and reduce legal risk. A test is considered acceptable if it meets three basic criteria. First, the test itself must be validated - that is, the test must measure what it says it is measuring. Second, the test must be reliable - meaning the results must be consistently repeatable.

Reliability is often a problem with interviews, where it is not uncommon for two interviewers to get different responses to the same questions, depending on the interviewer's ability to both probe and interpret the responses or the effect of the setting in which the interview is given. Finally, the test must be job relevant and job specific. In order for the tests to be legally defensible, they must comply with the guidelines of the EEOC under Title VII of the Civil Rights Act of 1964, and the ADA.

There are three basic methods of test validation: content-, criterion- and construct-based validation. Content-validation involves analyzing the content of the tests and demonstrating that it corresponds to the job tasks as set out in a complete Job Analysis. Construct-validation involves showing that the test measures specific personal characteristics that are shown to be necessary for performance of the job. Criterion-validation involves showing a statistical correlation between performance on the test and actual job performance as measured by specific criteria. Limiting job analysis to selected jobs that are unrepresentative of the full range of work performed is inadequate for test development.

To limit legal risk, we encourage employers to deal with reputable psychologists, assessment specialists, and consulting firms and ascertain certain key information about any proposed tests. Employers should check if a proposed test has ever caused employment discrimination charges, or ever been scrutinized in any investigation. They should determine if there has ever been an invasion of privacy lawsuit or any other litigation involving the test. It is also important to know whether the test has been "validated" according to the EEOC's Uniform Guidelines On Employee Selection Procedures⁵, and, if so, the position(s) to which that validation applies. A test may be used in jobs other than those for which it has been professionally validated only if there are no significant differences between the studied and unstudied jobs.

We also suggest asking for an opinion letter from the test's publisher concerning the test's lawfulness under employment discrimination laws. It is also a good practice to ask for information on precise traits the test seeks to measure and objective prove that the test actually measures these traits.

Employers should make sure that the technical manual for the test instrument provides thorough documentation of the development of the scales used, the development of the norms, the various validation studies, and the diversity of the populations used in the studies, which should represent a mixture of appropriate ages, sexes, and races. The test instrument should have been designed for use in a selection process. Many test instruments, which were originally validated for use in counseling and self-development, are unfortunately marketed as hiring tools. Unless these measures have been re-validated as selection instruments on relevant business populations, their results are questionable and can increase the employer's legal vulnerability. The psychometric studies that generated the original norms should be revisited approximately every three years. This allows the instrument to adjust to changes in demographics and social values and attitudes.

Certain personality assessment instruments are ideal for leadership development purposes, but are problematic as selection instruments⁷. These tests reveal key insights about individual personality styles, and predict how an individual is likely to respond in different types of situations. While this sort of personality information may be important when gauging the fit between a senior level executive and an executive team, if these personality assessments were not validated on a relevant population of employees or executives, and the scales tied to specific job functions, then any conclusions drawn from them may leave the employer vulnerable to potential legal action by disgruntled job candidates. While litigation along these matters is almost unheard of at senior executive levels, it increases as you go lower down the organizational hierarchy.

To comply with ADA guidelines, selection instruments must limit inquiries to the candidate's ability to perform job-related functions. The EEOC's Enforcement Guidelines on Pre-Employment Inquiries under the ADA (1994) outlines several critical points regarding the acceptable scope of inquiries. First, it is acceptable to use instruments that measure fundamental characteristics of cognitive abilities, interests, personality, honesty, and habits that provide information that is directly related to the successful performance of a job. Instruments that measure such things as psychoses, neuroses, physical or mental disabilities or other pathological issues, however, are prohibited in the pre-offer stage of a selection process. Medically oriented tests may only be given after a job offer has been made.

Secondly, it is not acceptable to use psychological assessment instruments designed for clinical purposes that are normed on populations of individuals with some type of clinical disorder⁸. It is advisable to use non-clinical assessment instruments that are normed on a population of individuals that is consistent with the population and purpose for which the instrument is to be used (e.g. *The New Workforce Inventory*⁹ was normed on a broad based population of normal, working individuals. Psychopathology was not a criterion of the population. As a result, *The New Workforce Inventory* can only measure traits, abilities, and attitudes that are related to job performance. It is blind to psychopathology). Finally, while an instrument may not be designed as a medical test or assessment, if it is to be used at the pre-offer stage, it is important to ensure that none of the items (questions) within the instrument constitute a "medical inquiry" concerning the existence, nature, or severity of a disability; (e.g. "At times I have been so anxious, I have sought professional counseling.")

To further minimize legal risk, employers should employ a standardized selection process for each position or job category. All candidates for the same position should take the same test or assessment at the same point in the selection process. Although it is not necessary to test everyone within the same job category, it is necessary to test everyone who reaches the same point in the process where tests or assessments are used. The application of the test should not be used selectively as a means for either justifying a candidate, when another has not had the opportunity to take the test(s), or to adversely

affect someone who has taken the test(s) in favor of another applicant who was not required by the employer to take the same test(s).

Employers must insist on utilizing a selection process that provides a fair and equal opportunity for each candidate to be selected. Under the Uniform Guidelines on Employee Selection Procedures (1978), the impact of an assessment measure must be measured to ensure that a disproportionate number of individuals in protected classes (based on race, sex, or ethnic background) are not adversely impacted. Tests that have an adverse impact on protected groups may only be used if there are no alternative means with less adverse impact, and if the competency measured is a clear business necessity.

Administration

Proper administration of assessment instruments is essential to obtaining valid or meaningful scores for test takers and avoiding any increased legal risk. When administering assessment instruments, it is important to ensure that every staff member who will administer interviews, tests, or analyzing results is educated about how to do so properly and maintain appropriate confidentiality. To comply with ADA guidelines, companies must ensure that testing conditions are suitable for all test takers. Reasonable accommodation should be provided in the assessment process for people with disabilities.

In order to maintain the integrity of the assessment instrument, the test items must be kept from the test taker until the time of the actual test. Once the tests are completed and scored, it is always critical to maintain confidentiality of assessment results.

Interviewing

As noted earlier, selection tests should always be administered and interpreted along with a formal, structured, behavior-based interview. Informal and unstructured interviews are commonly used when hiring senior level managers and executives, but they increase the employer's risk of being sued for discriminatory hiring practices, particularly when given to candidates for lower level positions.

Behavior-based interview questions for executive and non-executive positions should be developed by examining successful performers or their supervisors. Critical incidents, or specific problems or challenges the job presents form the basis for the behavior descriptions. A job description should be developed based on the description of job behaviors. As with test instruments, behavior-based interviews should avoid questions relating to the candidate's marital status, age, religious identity, ethnic heritage, family status, or status in any protected group or class.

Sophisticated behavior based interviews include a variety of types of questions tapping the candidates understanding of job-related terminology, causal relations, and awareness of important ethical issues. Hypothetical questions about how they would

handle a specific situation, a specific interpersonal situation, and why they would respond in such a manner, are also important interview tools.

Giving Developmental Feedback.

Like most processes in the workplace, people's ultimate response tends to be based on their perception of being treated with respect and fairness. Just as a company can obey all of the legal guidelines around layoffs, only to elicit a negative backlash by appearing thoughtless and stingy about severance, so leaving people with no idea of their performance in the assessment can compromise the assessment process. For internal candidates in a selection assessment process, the end of the process should be recognized as an opportunity for strengthening the organization. Armed with clear, less subjective data, the sponsors of the assessment process can now offer all candidates the benefit of feedback to improve their chances for selection the next time, and can boost their performance by outlining a specific developmental agenda. Giving such feedback provides candidates, who have not been selected, the opportunity to know about their performance rather than speculate. Most legal and morale problems occur because candidates who have not been selected imagine a process that is discriminatory and unfair. Left to their own, most people will imagine a process that is prejudicial. Offering constructive developmental feedback can allay such suppositions.

Summary

Job applicants vary widely in their knowledge, skills, abilities, interests, work styles, and other personal characteristics. These differences systematically affect the way people perform or behave on the job. Companies employ a range of psychological assessment instruments to collect accurate information on job-relevant characteristics that are not often recognized by simply observing the applicant. This information helps assess the fit or match between people and jobs and has proven to have a significant return on investment for employers.

Whether assessing job candidates for a job as the company's CFO or as a cashier, potential legal vulnerabilities created by the use of selection assessments can be lessened by employing assessment experts to construct assessment protocols with appropriate safeguards. These safeguards include conducting appropriate job analyses or job modelings, developing accurate job descriptions that adhere to ADA guidelines, selecting test instruments that assess for job-related characteristics and have been proven not to have any adverse impact, using a variety of tools to measure skills, abilities, and other job-relevant characteristics, and basing hiring decisions on the aggregated data rather than a single data point.

Notes

1. Collins, J. (2001) *Good to Great: Why Some Companies Make the Leap . . . and Others Don't*, Harper Business, New York
2. 2001 American Management Association Survey: *Skills Testing and Psychological Measurement*
3. University of Florida Center for Studies in Criminology and Law's 2002 National Retail Security Survey,
4. Prien, E.P., Schippmann, J.S. and Prien, K.O. (2003) *Individual Assessment: As Practiced in Industry and Consulting*, Lawrence Erlbaum Associates, New Jersey
5. Costa, P.T., Jr., and McCrae, R.R. (1992) *NEO-PI-R: Professional Manual*. Psychological Assessment Resources, Odessa, FL
Howard, P.J. and Howard, J.M. (2001) *The Owner's Manual for Personality at Work*, Bard Press, Marietta, GA
6. Neither the EEOC nor the Office of Federal Contract Compliance validates pre-employment assessments. Their authority extends to auditing or investigating unacceptable procedures when a discrimination charge has resulted from adverse impact.
7. The publisher of the most popular personality test in use, the Myers-Briggs Type Inventory (MBTI), warns users that this instrument is not valid as a pre-employment screening tool.
8. The Minnesota Multiphasic Personality Inventory (MMPI), was designed for diagnosis of psychological disturbance and is not appropriate, or legal, for use in work-place assessments.
9. The Kingwood Group (2001) *The New Workforce Inventory*,

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