

Jim Parry, M.Ed., CPT, Compass Consultants, LLC

Jamie Armstrong, Questionmark

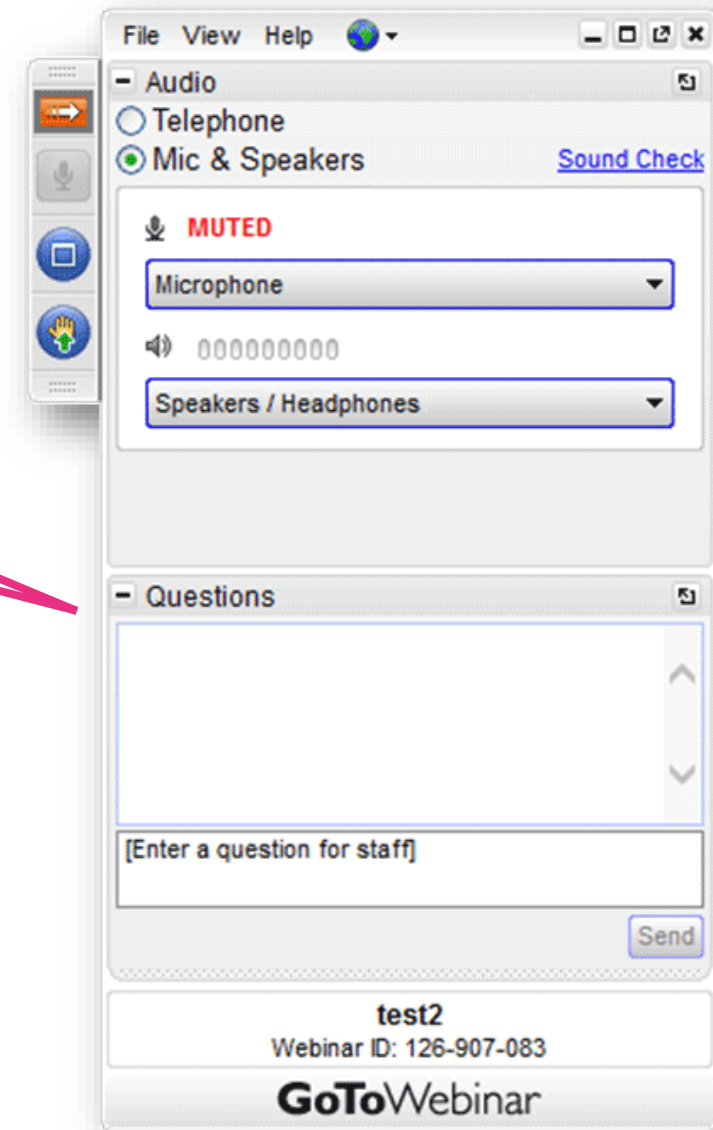
December 1, 2021



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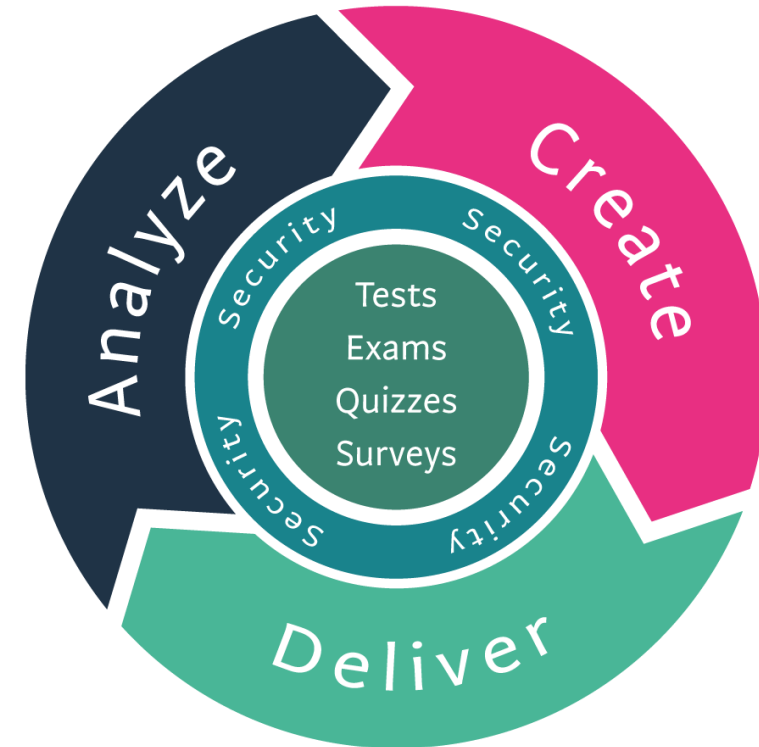
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About Questionmark

Background

- Founded in 1988
- Assessment solutions to measure knowledge, skills, abilities and attitudes securely for certification, regulatory compliance, workforce learning, sales-force readiness and higher education
- ISO/IEC 27001 Certified (Learn more: www.questionmark.com/trust)



- *Questionmark OnDemand*
- *Questionmark OnDemand for Government*
- *Questionmark OnPremise*

Today's Presenters

Jim Parry, M.Ed., CPT, Compass Consultants, LLC

Owner and Chief Executive Manager of Compass Consultants, LLC

Over 40 years' experience in course design, development, presentation and assessment design and analysis

Holds a Master of Education degree from the University of West Florida and is a Certified Performance Technologist (CPT), awarded by the International Society of Performance Improvement (ISPI)

Has been presenter of pre-conference workshops and educational sessions at various professional conferences for many years

Internationally recognized consultant providing services concerning test design, development, establishment of cut scores, and analysis

Jim is a consulting partner of Questionmark



Today's Presenters

Jamie Armstrong, Questionmark

Group Legal Counsel and Data Protection Officer at Questionmark

Attorney in New York. Authorized in-house counsel in Connecticut. Solicitor in England and Wales, and Scotland

Holds law degrees from University of Aberdeen, United Kingdom/University of Maastricht, the Netherlands and Georgetown University Law Center, USA

Certified Privacy Professional (US; Canada; EU; Privacy Management; Privacy Technology) and Fellow of Information Privacy – International Association of Privacy Professionals

Association of Test Publishers (ATP) International Privacy Subcommittee member and contributing publication author

Presenter at ATP conferences on legal and privacy issues relevant to testing, assessment and measurement



About Compass Consultants, LLC

Background

- Founded in 2010
- A leader in the application of Human Performance Technology (HPT), specializing in the design, development and presentation of training interventions and the psychometrics of test development and analysis.
- Learn more:
www.gocompassconsultants.com



Legal Disclaimer

- The presentation may include information about legal issues and legal developments. Such materials are for informational and/or educational purposes only and may not reflect the most current legal developments. These informational/educational materials are not intended, and should not be taken, as legal advice on any particular set of facts or circumstances. You should contact an attorney for advice on specific legal problems or questions.
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Agenda

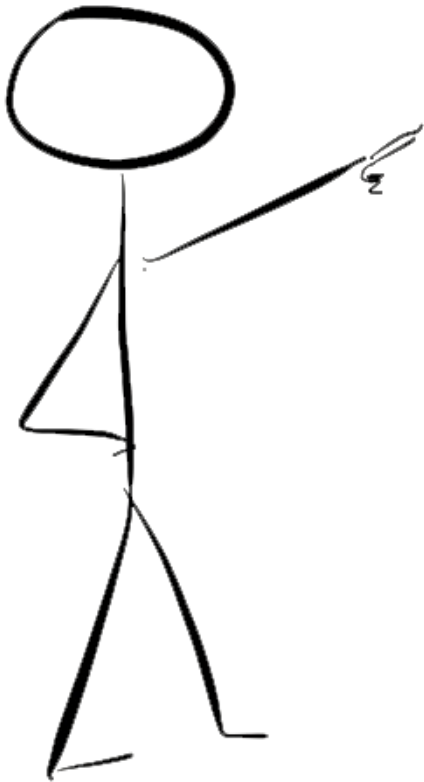
- Selected employment selection laws and regulations in the United States and European Union
- Discussion of selected legal challenges to testing in employment selection
- How to balance testing with employment anti-discrimination laws
- A description of selected accommodations for special needs test-takers
- The importance of test validation to job content
- Documentation used to maintain legal defensibility of workplace testing materials



We realize there are numerous laws and regulations concerning testing in the workplace as well as other locations such as schools, universities, the military, etc. Some of these include:

- Civil rights including equal opportunity
- Adverse hiring practices
- Accommodations for disabilities
- IP and data protection including EU General Data Protection Regulation (GDPR)
- Content theft
- Personal privacy
- Copyright protection

Due to the time constraints of this webinar, we cannot address all possible legal issues associated with testing in the workplace. You are encouraged to consult with legal counsel should you have any concerns in your environment.





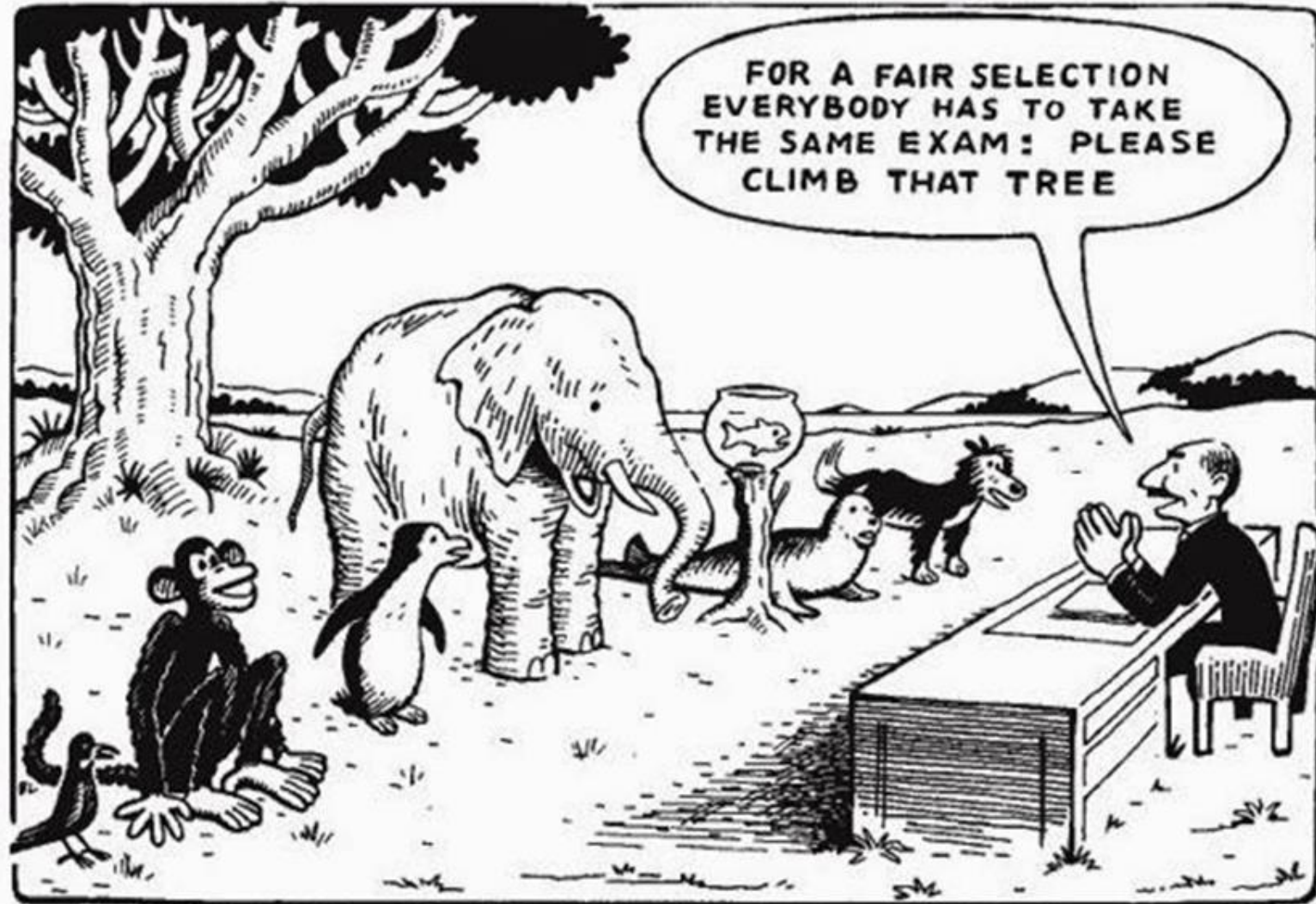
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Overview of Selected Employment Selection Laws and Regulations in the United States and European Union

Quick Poll

Has your organization experienced any challenges complying with workplace testing laws and regulations?

- Yes
- No



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U.S. Equal Opportunity Employment Commission



U.S. Equal Employment Opportunity Commission (USEEOC)

- **Employment Tests and Selection Procedures**

- The use of tests and other selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job
- However, use of these tools can violate the federal anti-discrimination laws if an employer intentionally uses them to discriminate based on race, color, sex, national origin, religion, disability, or age (40 or older)
- Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law



Types of Employment Tests and Selection Procedures

- Cognitive tests assess reasoning, memory, perceptual speed and accuracy, and skills in arithmetic and reading comprehension, as well as knowledge of a particular function or job;
- Physical ability tests measure the physical ability to perform a particular task or the strength of specific muscle groups, as well as strength and stamina in general;
- Sample job tasks (e.g., performance tests, simulations, work samples, and realistic job previews) assess performance and aptitude on particular tasks;
- Medical inquiries and physical examinations, including psychological tests, assess physical or mental health



Types of Employment Tests and Selection Procedures (cont.)

- Personality tests and integrity tests assess the degree to which a person has certain traits or dispositions (e.g., dependability, cooperativeness, safety) or aim to predict the likelihood that a person will engage in certain conduct (e.g., theft, absenteeism);
- Criminal background checks provide information on arrest and conviction history;
- Credit checks provide information on credit and financial history;
- Performance appraisals reflect a supervisor's assessment of an individual's performance; and
- English proficiency tests determine English fluency.



Governing EEO Laws

- Title VII of the Civil Rights Act of 1964
 - Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin
 - With respect to tests in particular
 - Title VII permits employment tests as long as they are not “designed, intended or used to discriminate because of race, color, religion, sex or national origin.” 42 U.S.C. § 2000e-2(h)
 - Title VII also imposes restrictions on how to score tests. Employers are not permitted to (1) adjust the scores of, (2) use different cutoff scores for, or (3) otherwise alter the results of employment-related tests on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(l)



Disparate Treatment Discrimination

- Title VII prohibits intentional discrimination based on race, color, religion, sex, or national origin
 - For example, Title VII forbids a covered employer from testing the reading ability of African American applicants or employees but not testing the reading ability of their white counterparts
 - This is called “disparate treatment” discrimination



Disparate Impact Discrimination

- Title VII also prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not “job-related and consistent with business necessity.”
 - This is called “disparate impact” discrimination
- Example:
 - If an employer requires that all applicants pass a physical agility test, does the test disproportionately screen out women?
 - If the employer shows that the selection procedure is job-related and consistent with business necessity, can the person challenging the selection procedure demonstrate that there is a less discriminatory alternative available? For example, is another test available that would be equally effective in predicting job performance but would not disproportionately exclude the protected group?



Employer Best Practices for Testing and Selection

- Administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability
- Ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used
- If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure
 - For example, if the selection procedure is a test, the employer should determine whether another test would predict job performance but not disproportionately exclude the protected group



Employer Best Practices for Testing and Selection (cont.)

- To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly
- Employers should ensure that tests and selection procedures are not adopted casually by managers who know little about these processes



Uniform Guidelines on Employee Selection Procedures—1978

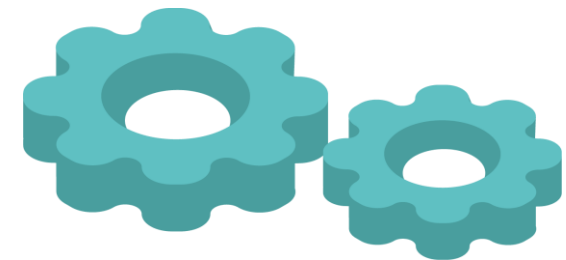


Uniform Guidelines on Employee Selection Procedures—1978

- In 1978, the EEOC and three other federal agencies—the Civil Service Commission (predecessor of the Office of Personnel Management) and the Labor and Justice Departments—jointly issued the Uniform Guidelines on Employee Selection Procedures. (<https://www.uniformguidelines.com/>)
 - The Guidelines incorporate a set of principles governing the use of employee selection procedures according to applicable laws
 - They provide a framework for employers and other organizations for determining the proper use of tests and other selection procedures
 - The Guidelines are legally binding under a number of civil rights laws, including Executive Order 11246 and the Civil Rights Requirements of the National Job Training Partnership Act and the Wagner Peyser Act
 - In reviewing the testing practices of organizations under Title VII, the courts generally give great importance to the Guidelines' technical standards for establishing the job-relatedness of tests
 - Also, federal and state agencies, including the EEOC, apply the Uniform Guidelines in enforcing Title VII and related laws

Contents of the Uniform Guidelines

- Section 1: Statement and Purpose
- Section 2: Scope
- Section 3: Discrimination defined: Relationship between use of selection procedures and discrimination
- Section 4: Information on impact
- Section 5: General standards for validity studies
- Section 6: Use of selection procedures which have not been validated
- Section 7: Uses of other validity studies
- Section 8: Cooperative studies
- Section 9: No assumption of validity
- Section 10: Employment agencies and employment services



Contents of the Uniform Guidelines (cont.)

- Section 11: Disparate treatment
- Section 12: Retesting of applicants
- Section 13: Affirmative action
- Section 14: Technical standards for validity studies
- Section 15: Documentation of impact and validity evidence
- Section 16: Definitions
- Section 17: Policy statement on affirmative action (see section 13B)
- Section 18: Citations



Employee Selection in The European Union



Workers Rights in the European Union

- **Health and Safety at Work:** general rights and obligations, workplaces, work equipment, specific risks and vulnerable workers
- **Equal Opportunities for Women and Men:** equal treatment at work, pregnancy, maternity leave, parental leave
- **Protection Against Discrimination** based on sex, race, religion, age, disability and sexual orientation
- **Labour Law:** part-time work, fixed-term contracts, working hours, employment of young people, informing and consulting employees



European Commission –Employment, Social Affairs & Inclusion

- Employees in the EU have similar rights and responsibilities as employees in the US
- EU countries' employment policies: guidelines from the EU to EU member states (2018) - (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum%3A4384450>)
 - EU countries should:
 - promote inclusive labour markets, open to all, by putting in place effective measures to fight all forms of discrimination and promote equal opportunities for all –
 - *ensure equal treatment for under-represented groups*
 - *foster equal opportunities for all by addressing inequalities in education and training systems;*
 - *support an adapted work environment for people with disabilities*
- Consider individual EU member state laws.

Handbook on European Non-discrimination Law (2018)

- This European Union Agency for Fundamental Rights publication provides guidance on non-discrimination practices
 - Main contents includes:
 - European non-discrimination law: Context, evolution and key principles
 - Discrimination categories and defences
 - The scope of European non-discrimination law
 - Protected grounds
 - Evidential issues in non-discrimination law



<https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition>



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Overview of Legal Challenges to Testing in Employment Selection

EEOC v. Ford Motor Co. and United Automobile Workers of America

- Title VII and Cognitive Tests: Less Discriminatory Alternative for Cognitive Test with Disparate Impact.
 - A nationwide class of African Americans who were rejected for an apprenticeship program after taking a cognitive test known as the Apprenticeship Training Selection System (ATSS). The ATSS was a written cognitive test that measured verbal, numerical, and spatial reasoning in order to evaluate mechanical aptitude. Although it had been validated in 1991, the ATSS continued to have a statistically significant disparate impact by excluding African American applicants. Less discriminatory selection procedures were subsequently developed that would have served Ford's needs, but Ford did not modify its procedures.
 - In the settlement agreement, Ford agreed to replace the ATSS with a selection procedure, to be designed by a jointly-selected industrial psychologist, that would predict job success and reduce adverse impact. Additionally, **Ford paid \$8.55 million in monetary relief.**

EEOC v. Daimler Chrysler Corp

- ADA and Test Accommodation: Employer Must Provide Reasonable Accommodation on Pre-employment Test for Hourly, Unskilled Manufacturing Jobs
 - The EEOC settled EEOC v. Daimler Chrysler Corp., a case brought on behalf of applicants with learning disabilities who needed reading accommodations during a pre-employment test given for hourly unskilled manufacturing jobs. The resulting settlement agreement provided monetary relief for 12 identified individuals and the opportunity to take the hiring test with the assistance of a reader. The settlement agreement also required that the employer provide a reasonable accommodation on this particular test to each applicant who requested a reader and provided documentation establishing an ADA disability. The accommodation consisted of either a reader for all instructions and all written parts of the test, or an audiotope providing the same information

EEOC vs. Target Corporation

- EEOC found reasonable cause to believe that three employment assessments formerly used by Target disproportionately screened out applicants for exempt-level professional positions based on race and sex.
 - The tests were not sufficiently job-related and consistent with business necessity, and thus violated Title VII of the Civil Rights Act of 1964, EEOC found
- EEOC found that Target also committed record-keeping violations by failing to maintain records sufficient to assess the impact of its hiring procedures

California Department of Fair Employment and Housing (“DFEH”), the United States of America and the Law School Admission Council, Inc. (“LSAC”)

- On May 29, 2014, Judge Edward M. Chen approved a Consent Decree
 - The Consent Decree resolves lawsuits filed by DFEH and the United States of America alleging that LSAC discriminated against individuals with disabilities who take, or seek to take, the Law School Admission Test (“LSAT”) with testing accommodations, in violation of the Americans with Disabilities Act (“ADA”).
 - Among other requirements, the Consent Decree provides that “LSAC shall implement best practices as established by a panel of experts to be agreed upon by the parties.” (Consent Decree (ECF 203), § 7).
 - It charges the panel with examining LSAC’s existing testing accommodation practices and establishing best practices that comport with the requirements of the ADA. (Id. at § 7(b)--(c)). The Consent Decree also provides that the “Panel shall complete its written report within six (6) months after the fifth Panel member has been appointed” but could seek “additional time if necessary to complete its report.”

The Bottom Line!

- Test must be fair
- Test must be based on job requirements
- Test must NOT be biased towards any particular class or protected class
- Cut score must be defensible
- Records must be maintained





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Balancing Testing With Employment Anti-Discrimination Laws

Is Testing Legal in the Workplace?

- Yes!
 - No federal, state or local laws prohibit proper use of pre-employment or post-employment testing
- U.S. Law does prohibit discrimination against anyone on the basis of personal qualities that are not job related
 - U.S. Civil Rights Act of 1964
 - U.S. Americans With Disabilities Act of 2009
- Personal characteristics cannot be used as a basis to fail a job candidate for a job they are otherwise qualified for



Employers Required to Monitor Adverse Impact

- Uniform Guidelines on Employee Selection Procedures (1978)
 - What is Adverse Impact?
 - If hiring process excludes some job candidates at a higher rate than others – there is evidence
 - *Requires employer to study the details of entire process and make necessary changes to eliminate any step that causes discrimination*
 - Typically happens when job applicants in a legally protected class (women, minorities, etc.) are hired at a lower rate than non-protected classes
 - Uniform Guidelines set protected class hiring rate at 80% - called the “4/5ths rule”



4/5ths Rule Example

- 10 Caucasians apply for a job, 8 are hired
 - Selection ratio is 8/10 or 80%
 - This becomes the decision standard for that employer
 - Minority applicants should be hired at a minimum of 80% (4/5ths) as high
 - This employer's minority selection rate should be 80% of the 80% majority hiring rate or 64%
 - 80% times 80% = 64%
 - Employer receives 5 minority applicants and hires 4 – no problems – selection rate is 80%
 - Employer receives 5 minority applicants and hires 3 – PROBLEM – selection rate falls to 60% (3 out of 5) which creates an adverse impact
 - Employer must determine causes of lower hiring rate and make changes
 - Advertising in different areas, lowering educational requirements, changing interviewing procedures, etc.

Avoiding Adverse Impact

- If testing is the cause (lower scores from protected class)
 - Provide evidence the tests are valid
 - Based on job performance requirements (JTA)
 - Test-items linked or referenced to valid tasks
 - Cut score set using accepted method
 - Test-items not biased
- Use more than test to determine selection of candidate
- Carefully examine all relevant information about candidate before making decision





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Accommodating Special Needs Test-Takers

Quick Poll

Have you had to make special accommodations to support special needs test takers?

- Yes
- No

Americans with Disabilities Act (ADA)

- U.S. Department of Justice – Civil Rights Division – Disability Rights Section
 - The ADA ensures that individuals with disabilities have the opportunity to fairly compete for and pursue such opportunities by requiring testing entities to offer exams in a manner accessible to persons with disabilities
 - Individuals with substantial limitations of major life activities are eligible to receive accommodations



https://www.ada.gov/regs2014/testing_accommodations.html



What Types of Tests are Covered and What Must Be Provided?

- Examinations administered by any private, state, or local government entity related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes are covered by the ADA and testing accommodations, pursuant to the ADA, must be provided
- Testing entities must ensure that the test scores of individuals with disabilities accurately reflect the individual's aptitude or achievement level or whatever skill the exam or test is intended to measure
- A testing entity must administer its exam so that it accurately reflects an individual's aptitude, achievement level, or the skill that the exam purports to measure, rather than the individual's impairment (except where the impaired skill is one the exam purports to measure)



What are Testing Accommodations?

- Testing accommodations are changes to the regular testing environment and auxiliary aids and services that allow individuals with disabilities to demonstrate their true aptitude or achievement level on standardized exams or other high-stakes tests
 - **Examples:**
 - Braille or large-print exam booklets;
 - Screen reading technology;
 - Scribes to transfer answers to Scantron bubble sheets or record dictated notes and essays;
 - Extended time;
 - Wheelchair-accessible testing stations;
 - Distraction-free rooms;
 - Physical prompts (such as for individuals with hearing impairments)
 - Permission to bring and take medications during the exam (for example, for individuals with diabetes who must monitor their blood sugar and administer insulin).





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The Importance of Test Validation to Job Content

Quick Poll

Have your tests and assessments been validated to job content or certification requirements?

- Yes
- No

The Job Task Analysis (JTA)

- A job task analysis (JTA) is a type of analysis traditionally used to provide amplifying information about jobs or to validate current curricula associated with the specific job or certification under review
- A JTA will delineate the tasks and steps to perform a specific job
 - Asks individuals currently performing the job if they do or do not perform specific tasks
- To be defensible, test must be linked to a proper analysis



Is a JTA Required?

- Yes!
 - 5 USC §2301 – Merit Promotion Principles
 - Requires that selections be made from qualified candidates and that the employees be selected and educated on the basis of merit
 - 5 CFR §300 §§103 – Each employment practice shall be based on a job analysis
 - 29 CFR §1607 - Uniform Guidelines on Employment Selection Procedures, 1978
 - States that a thorough job analysis is needed for supporting a selection decision



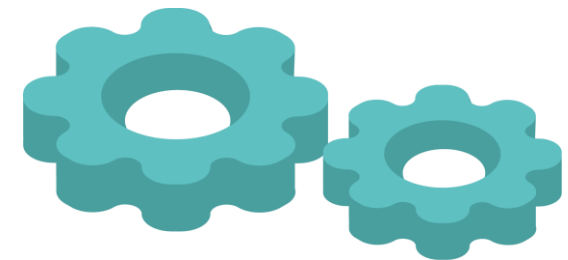


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Documentation Used to Maintain Legal Defensibility of Workplace Testing Materials

Validation Required

- Once a test or assessment is designed and developed, it must be administered and analysis must be performed
 - The first step towards validation is to ensure all test items can be related to an authoritative reference and actually test the objectives that they are designed to test
 - Next is to have a plan to follow.
 - Test plans strengthen the defensibility of tests and are highly recommended for all high-stakes tests



Validation Elements Required for the Test Plan

Developing a Test-Plan

- Steven Downing (Downing, S. M. & Haladyna, T. M., (Ed.). (2006)) in his paper, *Twelve Steps for Effective Test Development*, discusses the requirement for a systematic, well-organized approach to test development
 - Refer to *Handbook of Test Development* for detailed explanation
 - The twelve steps provide a framework for collecting and reporting all sources of validity for the test plan

Twelve Step Test-Plan

1. Develop Overall Plan
2. Provide Content Definition
3. Define Test Specifications
4. Establish Item Development Procedures and Develop Items
5. Design and Assemble Tests
6. Print/Publish Tests
7. Address Test Administration
8. Establish Scoring Criteria
9. Establish Cut/Passing Scores
10. Define Procedure for Reporting of Test Results
11. Establish Item Banking Procedures
12. Produce Test Technical Report

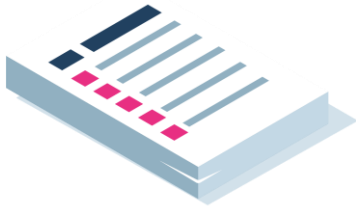
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Questions?



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Defensibility and Legal Certainty for Tests and Exams: <https://www.questionmark.com/download-defensibility-legal-certainty-tests-and-exams/>

Workplace Assessment: <https://www.questionmark.com/resources/whitepapers/download-workplace-assessment/>

Privacy Considerations in Online/Remote Proctoring:

https://www.testpublishers.org/assets/privacy%20in%20practice%20bulletin%209_%20remote%20proctoring_final_04072020.pdf

ALSO:

The **Association of Test Publishers (ATP)** is an excellent source of information concerning best practices for testing and privacy concerns. Please visit their website at www.testpublishers.org.

Upcoming Webinars

The Challenge? Shift a Global Certification Program from Pencil-and-Paper Testing to Online in 2 Months

◆ December 14, 2021 - 11:00 am to 12:00 pm (EDT)

In this session, TÜV Rheinland, the leading provider of technical services worldwide, outlines how they transformed TÜV's well-established Global Certification program from a paper-and-pencil program to a fully online Certification Hub in a matter of weeks.

[Click to Register](#)

Introduction to Questionmark's Assessment Platform

◆ December 16, 2021 - 11:00 am to 12:00 pm (EDT)

Learn the basics of authoring, delivering and reporting on surveys, quizzes, tests and exams. This introductory webinar explains and demonstrates key Questionmark features and functions.

[Click to Register](#)



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Thank you for attending!

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or request a demo at <https://www.questionmark.com/request-demo>

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