

# Legal Defensibility of Pre-Employment Testing

Pre-employment tests, like any other selection methodology used by an employer (e.g. resumes, interviews, and experience), are governed by federal guidelines intended to ensure equitable and non-discriminatory hiring practices. Employers who use tests in accordance with these legal guidelines are therefore better prepared to defend their hiring procedures in the very unlikely event that a legal challenge to their hiring practices should ever arise.

## Legal Guidelines for Pre-Employment Tests

The most important legal standards related to testing are contained in the Uniform Guidelines on Employee Selection Procedures (UGESP), which explicitly recognizes the right of employers to use pre-employment tests to make hiring decisions as long as those tests are job-related. These guidelines are not laws, but instead are intended to provide a framework that informs the decisions made by the Equal Employment Opportunity Commission (EEOC), the federal agency that enforces federal employment discrimination laws. These guidelines apply not just to the use of pre-employment tests but also to all other selection methods, which may include screening candidates by experience and education, conducting interviews, checking references, and more.

## The Rule of Job-Relatedness

The central concept enshrined in the UGESP is the idea that tests must measure skills and traits that are related to job performance for that particular position. This is known as the rule of “job-relatedness.” No matter how valid a test is, it won’t be legally defensible if it is used in an invalid way. For example, testing fluency with basic math skills is clearly a job-related test for bank tellers who have to deal with currency and numbers as part of their everyday tasks. On the other hand, using a typing test for a forklift driver who won’t be required to type on the job is NOT a job-related selection measure.

Using well-validated tests and making sure that the tests are job-related is the best way to ensure legal compliance.

Criteria’s Job Profiler uses data on over 1000 positions derived from the US Department of Labor’s O\*Net database to help employers select job-related tests that are appropriate for a position. A dedicated account manager is also available to work one on one with customers to design a testing program that fulfills the rule of job-relatedness for all of their positions.

## Pre-Employment Tests Should Increase the Defensibility of the Hiring Process

One common misconception about pre-employment testing is that using tests as part of the hiring process increases a company’s legal exposure or somehow leads to additional legal risk. For companies that use professionally-developed, well-validated tests, the opposite is in fact true. If properly implemented, pre-employment testing actually enhances the objectivity, equitability, and legal defensibility of an organization’s hiring process, because testing makes the selection process fairer and more objective for all candidates. For example, tests are less subjective than unstructured interviews, which can be affected by the personal biases of interviewers, increasing the risk of discrimination claims. In fact, research<sup>1</sup> has shown that companies are over three times more likely to be sued because of interviews than for their use of aptitude, personality, or skills tests.

*1. Terpstra, D. E., Mohamed, A. A., & Kethley, R. B. (1999). An analysis of federal court cases involving nine selection devices. International Journal of Selection and Assessment, 7(1), 26–34.*

## Adverse Impact

Legal challenges to hiring practices are rare, but when they do occur, they are often connected to the issue of “adverse impact,” also known as “disparate impact.” Adverse impact is said to occur when members of a protected group or minority (e.g. a particular race, gender, etc.) receive unfavorable employment decisions (e.g. not being hired) more often than another nonminority group.

One common misconception is that adverse impact is an issue that is somehow uniquely associated with testing. In fact, almost every selection methodology used by employers produces a degree of adverse impact, because each factor disproportionately excludes members of a protected subgroup. Examples of common selection criteria that have adverse impact – often to a higher degree than aptitude tests – are:

- ✓ Minimum educational requirements
- ✓ Background checks
- ✓ Credit checks
- ✓ Work experience

Unlike many of the above means of evaluating potential employees, aptitude tests are generally extremely effective predictors of workplace performance. As the UGESP and several subsequent court decisions have made clear, using a test – or any hiring procedure – that results in adverse impact is legal as long as the selection methodology is job-related and “consistent with business necessity.” This last phrase means that an employer may utilize a pre-employment test even if it has adverse impact, so long as it is shown to work – i.e. it predicts outcomes.

All of Criteria Corp’s test development efforts are designed to ensure that our tests are non-discriminatory and that adverse impact is minimized as much as possible, while still retaining the validity of the test. We do this by reviewing all test content for cultural sensitivity and for differential item functioning to ensure the test is free of content bias across cultural and gender groups.

## Is it Illegal to Use Certain Types of Tests?

Selecting tests that fulfill the “job-relatedness” rule is critical. But in some situations, is it ever illegal to use certain types of tests for the purposes of employee selection? The answer is yes. For example, the Americans with Disabilities Act (ADA) prohibits the use of pre-hire tests that may be construed as a “medical exam” or a test of mental health in a pre-employment setting. One of the purposes of the ADA is to prohibit discrimination against individuals with psychiatric disabilities, meaning that clinical tests that assess an individual’s mental health should generally not be used for employee selection. None of Criteria’s tests measure medical or mental health information.

## Artificial Intelligence and Testing

Some jurisdictions in the United States have passed laws which place additional compliance obligations on employers who are using artificial intelligence to make or to contribute to employment decisions. An example is Local Law 144 in the City of New York, which requires, among other things, employers to notify candidates when their employment systems will make an automated selection decision based on AI. Regulations of a similar nature are likely to come into force in the European Union and other jurisdictions as well.

In general, the same advice that applies to non-AI-based testing also applies to testing that uses AI. Such assessments must be job relevant, they should be validated for use in employee selection contexts, they should minimize disparate impact, and the developers and users of the assessments should monitor and retain oversight over the use of the assessments.