



Liability & Property Pool Workers' Compensation Fund

RISK CONTROL SOLUTIONS

A Service of the Michigan Municipal League Liability and Property Pool and
the Michigan Municipal League Workers' Compensation Fund

PRE-EMPLOYMENT TESTING AND INVESTIGATION

Why Employers Should Conduct Pre-Employment Testing. An employer's success often depends on the reliability and quality of its employees. It is understandable, therefore, that many employers spend a significant amount of money recruiting and interviewing prospective employees. Employers want to hire the best possible candidate for a particular job.

Employers also screen prospective employees to limit potential legal liability. Although courts can hold an employer liable in a variety of ways, the most important are the doctrine of vicarious liability and the tort of negligent hiring.

Vicarious liability, or *respondeat superior*, holds the employer liable for the actions of employees who are acting on the employer's behalf. The rationale is that the employer can better afford the losses that an employee causes and is also better able to insure against such losses.

Negligent hiring occurs when an employer knew or should have known by conducting a reasonable pre-employment investigation that an employee was either not competent to perform the job or was deficient in some other manner. The common law in most states recognizes a cause of action for negligent hiring.

Courts may also impose liability on an employer for negligent hiring:

- (1) For an employee's non-employment related acts, and
- (2) Under certain circumstances, for an employee's acts that occur after the employer has discharged the individual.

In today's society, increasing violence in the workplace and abuse of substances makes conducting thorough pre-employment investigations essential if employers wish to avoid or reduce liability for their employees' conduct.

What are Employment Tests?

Employment tests are any tools that employers use to screen or measure knowledge, skills, or abilities (KSA) of candidates for employment with an organization. Such measures include any type of written test, interviews, agility tests, personality tests, skill tests, performance tests, psychological tests, and medical examinations. Other tests or measures are drug screening, background investigations including internet and social media, criminal or motor vehicle investigations, credit checks, and reference checking.



Keep in mind that the guidelines that we discuss in this document apply to tests for both new employees or for promotional procedures.

Why Employee Have Concerns About Pre-Employment Testing?

Pre-employment tests can be useful screening tools. At the same time, they pose various threats to prospective employees. Because certain pre-employment tests, such as drug and alcohol tests that require blood or urine collection, are intrusive, they can significantly interfere with a candidate's legitimate privacy interests. Unless employers have strict procedures to control the process of collecting samples, such testing can infringe an individual's right to privacy. In addition, a positive test result may not mean that the employee was using drugs or alcohol on the job. It may, instead, indicate recreational use during non-work hours. Employees have a greater privacy interest in what they do in their non-work hours than when they are on the job.

A lack of accuracy is another problem with pre-employment tests. There are two major types of accuracy problems associated with employment testing. First, the test itself may be inherently fallible or possess an unacceptable margin for error. Second, inaccurate test results can occur when employers fail to administer the test properly. An additional problem is that pre-employment tests may discriminate against prospective employees. This can be especially true when relying on the Internet or Social Media sites for information without validating and requiring an explanation to determine the information discovered is legitimate and accurate. The goal of all tests should be to accurately measure a job related KSA. A high or passing test score should be proven through validity studies to indicate high job performance. Several federal, state, and local laws prohibit discrimination in employment.

Legal Restrictions on Pre-Employment Testing

Generally, there are four types of restrictions that affect an employer's ability to use pre-employment testing.

- ① Federal and state laws expressly prohibit employers from using certain types of tests to make hiring decisions. Outright bans are rare and usually result because the test has an unacceptable history of inaccuracy or is too intrusive. As early as 1985, California law prohibited the use of pre-employment AIDS tests under any circumstances.
- ② Federal and state laws occasionally control when and how an employer can use a test. For example, the Employee Polygraph Protection Act of 1988 (EPPA) severely restricts a private employer's ability to administer polygraph tests. Many states also have laws that prohibit or restrict the use of such tests.
- ③ Several state constitutions have **right to privacy clauses** that expressly guarantee their citizens a right to privacy. The United States Constitution does not expressly guarantee a right of privacy. The United States Supreme Court, however, has ruled that a right of privacy can be implied from the Bill of Rights (Griswold v. Connecticut, 381 US 479 [1965]). The courts continue to debate what these "right of privacy" provisions protect and judicial determinations continue to affect an employer's use of pre-employment tests.
- ④ Finally, **federal, state and local anti-discrimination laws** also affect the way in which employers can administer and use pre-employment tests. Title VII of the Civil Rights Act of 1964 is the primary federal law that prohibits employers from discriminating against prospective employees. The law applies to private employers "in an industry affecting commerce" with 15 or more employees at least 20 weeks of each year. Under Title VII it is unlawful for covered employers to refuse to hire prospective employees because of their race, gender, color, religion or national origin.

Other anti-discrimination laws that affect the use of pre-employment testing are:

- the Federal Rehabilitation Act of 1973,
- the Americans with Disabilities Act of 1991,
- the Age Discrimination Act of 1967, and
- The Immigration Reform and Control Act of 1986.
- Genetic Information Nondiscrimination Act of 2008 (GINA)

These laws and similar state laws affect the use of pre-employment tests because such tests may -- intentionally or unintentionally -- eliminate prospective employees who are members of protected groups.

Most anti-discrimination laws permit some exceptions to their prohibition on discrimination against certain protected groups. The most common exception is the "bona fide occupational qualification" (BFOQ) exception. Under Title VII and many state anti-discrimination laws, employers may base their hiring decisions on race, gender, color, religion or national origin only if the characteristics are BFOQ. The agencies responsible for upholding anti-discrimination laws and the courts have interpreted BFOQ very narrowly.

The 1991 amendment to the Civil Rights Act prohibits the use of "norming" or adjusting test scores to facilitate the use of a discriminatory test.

Types and Methods of Pre-Employment Testing

There are numerous types of pre-employment tests and methods for administering them. Skill tests, for example, are as varied as the jobs available in today's workplace. Technological advances will increase the availability and administration of such tests. This bulletin will highlight the types of tests employers most commonly perform today. Keep in mind that many of the principles discussed here will apply to other tests and testing methods.

AIDS Testing

Acquired Immune Deficiency Syndrome remains a public health concern. The purpose of the test that screens blood for exposure to the deadly virus, approved by the Food and Drug Administration, is to screen blood, not people. The test measures antibodies in the blood that the HIV virus stimulates. When employers require candidates to take the test, they are, in reality, screening prospective employees and sometimes deciding that they are unfit workers.

Both the Federal Rehabilitation Act and the Americans with Disabilities Act (ADA) and the Michigan Handicapper's Civil Rights Act prohibit discrimination based on disability. As early as 1988, the Department of Justice issued a ruling that a person with AIDS qualifies as a person with a handicap. The ADA expressly prohibits the use of AIDS testing on prospective employees to screen out people with HIV or AIDS. However, once they have made a job offer, employers may require testing with certain constraints. To avoid singling out any individual or group (an act of illegal discrimination), the employer must test all employees or, at least, all employees holding the same position. The employer must also show that the test is essential to determining fitness for holding the offered position. The latter would be almost impossible since many individuals infected with HIV show no symptoms of ill health.

Background Checks

Employers often conduct background investigations of prospective employees. Such investigations occur most frequently for positions that involve handling large amounts of money or working closely with children, or for positions involving the public trust. However, as the number of claims against employers for negligent hiring steadily increases, the practice is more common for other positions. The investigation may include checks on the candidate's prior work history, financial status, criminal record, and immigration status. Performing complete background investigations is a good business practice when the employer avoids the pitfalls that can lead prospective employees to claims of discrimination or invasion of privacy. The scope of the background investigation has to be job-related and consistent with business necessity and responsibility that the prospective employee will be assigned.

Caution must be used if the Internet and social networking sites is part of the background investigation. The information obtained may generate a civil rights complaint and observations cannot be relied upon to be accurate or in context to the situation without providing a prospective employee an opportunity to explain. Employers should require applicants who are in the final stages of the employment decision to sign a consent form allowing for the release of information pertaining to the background investigation..

Financial Status

Employers who wish to gather information about a candidate's financial status must comply with both federal and state laws that regulate the collection and use of this information.

Under the Federal Credit Reporting Act (FCRA) employers may obtain consumer reports on prospective employees. This report typically contains information on an individual's credit worthiness and standing. Employers are required to inform candidates if they decide not to hire the prospective employees because of information in the consumer report.

Employers should be careful when deciding whether to perform credit checks. For some positions, knowing about the candidates' financial status may be necessary; for others, it may be questionable. For example, it makes sense for a restaurant to check the financial status of a cashier. However, a candidate for a dishwasher position might question the need for an employer to know such information.

Employers should be consistent when they perform financial checks. They should perform such checks on individuals applying for the same or similar positions to avoid claims of discrimination. Title VII can also restrict an employer's use of financial information if their hiring decisions based on the credit information disparately affect minorities or other protected groups. For example, if using credit checks result in the rejection of a disproportionate number of minorities, employers are open to a discrimination lawsuit. Even though the courts have generally ruled in favor of employers -- citing the employer's economic interests -- the costs of defending against a claim of discrimination can be very high.

Criminal Records

Federal and state laws regulate an employer's inquiry into the conviction record of prospective employees. Most jurisdictions prohibit employers from asking about a candidate's arrest record. An arrest does not indicate that an individual has committed a crime only that the police suspect that he or she may have committed a crime.

Most jurisdictions give employers greater freedom to investigate whether the courts have convicted a prospective employee of a crime. However, the Equal Employment Opportunity Commission (EEOC) has determined that the use of convictions has an adverse impact on Hispanics and Blacks. As a result, Title VII and many state laws state that using conviction records violates the law unless the employer can prove that use of such records is a "business necessity".

Federal or state law may, in some cases, require employers to check a prospective employer's arrest or conviction record. Many states require all individuals seeking work in day care or child care to undergo a criminal record check. The law may also require employers to conduct such checks for employees of certain financial institutions, for employees who carry weapons, for employees with access to drugs and other medications.

Immigration Status

The Immigration Reform and Control Act of 1986 (ICRA) requires employers to verify that their employees have the right to work in the United States, (I-9 Form). However, employers usually should **NOT** try to gather information about prospective employees' national or ethnic heritage **before** hiring them. Federal and state laws prohibit employers from discriminating based on national origin or citizenship. To avoid charges of discrimination, employers should make the offer of employment before asking prospective employees to prove their right to work in the United States.

Drug and Alcohol Testing

The use of drugs and alcohol are a widespread problem in today's society. Drug and alcohol testing policies are commonplace as a pre-employment screen and as a requirement for continued employment. The Americans with Disabilities Act, some state laws, and court decisions affect an employer's ability to use drug testing during the pre-employment period.

Generally, the law allows employers to require prospective employees to take drug tests if

- the candidate knows that such testing is part of the screening process for prospective employees,
- the employer has already offered the candidate the job,
- all applicants for the same or similar positions are tested similarly, and
- a state-certified laboratory administers the test.

Employers can avoid some potential problems by including an agreement to submit to such tests on their application form.

Several federal laws and regulations require certain employers to conduct pre-employment drug and alcohol tests. For example, the Federal Highway Administration requires the use of drug and alcohol testing. Those who receive federal monies must also comply with the Drug-Free Workplace Act of 1988.

Other issues that employers should consider when deciding whether to use drug and alcohol tests as screening devices are:

The duty to provide a safe workplace. State common law has long recognized the employer's obligation to protect employees' safety and health. The employer's obligation clearly has application to using drug and

alcohol tests in the workplace. However, whether this duty includes an affirmative obligation to conduct such testing on prospective employees is unclear.

Invasion of Privacy. State common law often recognizes a cause of action for invasion of privacy. Employers may violate employees' right to privacy if they intrude upon employees' private affairs, publicly disclose private facts about employees, or publicly place employees in a false light. If an employer establishes a reasonable drug-testing program for sound reasons, the employer can avoid charges of invasion of privacy. Employers should take care to protect the prospective employee's rights by not publicizing that the candidate did not get the job as a result of a drug test.

Defamation. Defamation usually occurs when an individual makes a false statement about another person knowingly or with reckless disregard of its falsity. A charge of defamation can occur if an employer ignores a prospective employee's claim of a false result. This is especially true if the employee subsequently tests negative and the employer ignores it.

Emotional Distress. Most jurisdictions recognize a cause of action for intentional infliction of emotional distress and negligent infliction of emotional distress. When employers, unintentionally, but negligently, administer pre-employment drug and alcohol tests, the law may hold them liable for causing severe emotional stress. As a result, employers should conduct pre-employment testing according to the common law or standards of care that statutes define. Such standards of care normally require that a positive test receive confirmation by an alternative testing technique.

Genetic Screening

The Genetic Information Nondiscrimination Act of 2008 (GINA), bans discrimination by employers, health care plans and insurers based on genetic information. The Federal Government enacted the law to protect employees by prohibiting the improper collection, use or disclosure of their genetic information by employers or health insurers. The Act prohibits employers from discriminating against an employee in hiring, pay, promotions or other job factors because of the genetic information of the employee or the employee's family member.

In Michigan, the Persons With Disabilities Civil Rights Act, MCL 37.120,(4), provides that, except when an employee consents and to protect the employee's health and safety, no employer may directly or indirectly acquire or have access to any genetic information concerning an employee or applicant for employment, or a member of the employee's or applicant's family. The act prohibits discrimination because of genetic information

Physical Examinations

Employers often require specific mental and physical examinations to assure a qualified work force. However, strict regulations control when employers can conduct these examinations and who can learn the result of such tests.

Employers may legally require candidates to submit to medical exams to assure they are physically able to perform their jobs. However, the Americans with Disabilities Act makes it illegal for employers to require such exams before making the job offer. Employers may make the job offer contingent on the candidate's successfully passing the exam. Employers should make certain that a medical exam is necessary and that they are not discriminating when they apply the requirement. In addition, they should maintain the confidentiality of such records according to the ADA. Employers are also responsible for making sure that the doctor uses due care with the focus on the exam being the ability of the candidate to perform the essential job functions defined in the written job description and established due to being a Bona Fide Occupational Qualification.

One final note: during the examination, the doctor may ask anything about a person's health and medical history. However, the employer should make certain that he or she only receives a stripped down conclusion that the prospective employee is able to work, able to work with restrictions, or not able to work.

Polygraph Examinations

The Federal Employee Polygraph Protection Act (EPPA) became effective on December 27, 1988. On the same day, the United States Department of Labor promulgated regulations interpreting the Act. The EPPA covers all private employers in interstate commerce. This includes just about every private company that uses the United States Postal Service or the telephone system to send messages to someone in another state. The

Act and its interpreting regulations virtually outlaw a private employer's use of polygraph tests in all areas of employment.

The EPPA does not apply to federal, state or local government or to certain jobs that handle sensitive work relating to national defense. In Michigan, the Polygraph Protection Act Of 1981, MCL 37.203, in part, states that an employer shall not as a condition of employment request or require that an applicant for employment take or submit to a polygraph examination. The statute goes on to say an employer may not administer, cause to be administered, threaten to administer, or attempt to administer a polygraph examination to an applicant for employment.

Psychological Examinations and Personality Tests

Psychological tests claim that they can determine prospective employees' ability to perform the work for which the employer is considering them. Experts have designed the tests to measure an individual's emotional adjustment, social relations, interests and motivations. Employers hope that these measurements will help them decide whether prospective employees are a good fit for the position and the company.

No federal laws expressly prohibit the use of personality tests. Employers, however, should assure that questions have a direct relationship to the job and do not violate a state's regulations about valid pre-employment inquiries.

Employers should administer personality tests carefully, following the test provider's instructions. The law considers psychological tests to be medical examinations and, therefore, employers should conduct them only after they have extended a job offer.

Skills Testing

Testing to determine skills include a variety of tests that purport to determine whether a candidate has the aptitude, strength or physical agility needed for a particular job. As with all forms of testing, employers must assure that the administration of skill tests is non-discriminatory.

Because minorities have historically had unequal access to education, they have tended to score lower on these types of tests. As a result, intelligence tests are particularly susceptible to disparately affecting minorities. Unless there is a close correlation between test scores and the job, employers should avoid these types of tests.

Certain jobs require employees to possess a sufficient level of strength or agility. Until recently, employers often required candidates to successfully pass a strength test as a requirement for employment. To avoid claims of discrimination under Title VII, employers had to establish that strength was essential to performing the job. The Americans with Disabilities Act imposes additional requirements. Covered employers must establish that strength and agility relate to the essential functions of the job. The employer must also determine if a reasonable accommodation might not allow a candidate, who is otherwise qualified, but lacks the strength and agility needed for the job to successfully perform the job's essential functions.

To assist employers in administering non-discriminatory skill tests, the EEOC published the *Uniform Guidelines on Employee Selection Procedures*. Under the guidelines, employers must monitor the effect of their pre-employment tests on minorities. If a test is having a disparate impact on a protected group, the employer must "validate" the test, using a mathematical formula that measures the extent of the disparate impact. Employers should also follow the EEOC's guidelines on the ADA to assure they are administering skills testing appropriately.

As with all testing, employers should inform candidates that such testing is part of the selection process. They should wait until they make the job offer before asking candidates to take the tests and make any job offer contingent on the outcome of the tests.

Other Written Tests

Written tests have met with disfavor in recent years. This is due to the difficulty and expense of validating such tests. The federal government challenged many municipalities on their use of written tests. The government determined that some written tests resulted in discrimination and did not measure job-related skills. Any tests that employers use must not discriminate and must only measure skills that are necessary to perform the job for

which the candidate is applying. For example, it would be inappropriate to administer a written math test to candidates who would not use mathematics in their job. In the past, municipal employers commonly used these types of tests solely to screen the large number of candidates that typically applied for municipal positions.

If you are considering using written tests, the following tips may help you avoid employment problems in the future:

- Use only professionally validated tests.
- Use a test that is specific to the position for which the individual is applying.
- If the test is “off-the-shelf,” make sure that the position for which its designers developed it is similar to your position.
- Assure the test’s provider will defend your use of the test.
- Monitor the results of the test for discriminatory results.
- Administer the test as the provider specifies.
- Ask for references of other users or if a candidate, employee, or government agency has ever challenged the test.

CONCLUSION

Federal, state and local laws and regulations restrict employers’ use of pre-employment testing. This bulletin has outlined some of the major pitfalls that employers face if they choose to make pre-employment testing a part of their selection process. Employers should recognize that whether a specific pre-employment test is legal often depends on the specific details of how the employer conducts the test. Employers should consult a human resource professional or an attorney before implementing or revising their policies and procedures concerning pre-employment testing.

For more information, contact the Michigan Municipal League, Meadowbrook Loss Control, or the appropriate state or federal agency. You may also wish to review our other documents that discuss employment-related issues:

- The Americans With Disabilities Act
- Hiring Decisions: Reducing Your Exposure to Litigation
- An Overview of State and Federal Laws That Affect Employment
- Reducing Your Exposure to Claims of Discrimination in Employment
- Disciplining and Discharging Legally

As with all employment issues, we encourage you to discuss your employment related concerns with an attorney.



Important Telephone Numbers

MML Risk Management Services	800/653-2483
MML Loss Control Services	800/482-2726 or losscontrol@mml.org
Michigan Department of Civil Rights	313/456-3700 or michigan.gov/mdcr
Equal Employment Opportunity Commission	800/669-4000

Note: This document is not intended to be legal advice. It does not identify all the issues surrounding the particular topic. Public agencies are encouraged to review their procedures with an expert or a competent attorney who is knowledgeable about the topic.



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Liability & Property Pool Workers' Compensation Fund

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PRE-EMPLOYMENT TESTING SELF-ASSESSMENT

An employer's ability to be successful often depends on the reliability and quality of its employees. For this reason, many employers use pre-employment testing as part of their screening process. Testing includes any tools that employers use to screen or measure knowledge, skills, or the abilities (KSA) of candidates for employment. Such measures include any type of written test, interviews, agility tests, personality tests, skill tests, performance tests, psychological tests, and medical examinations. Other tests or measures are drug screening, background investigations, criminal or motor vehicle investigations, credit checks and reference checking.

Employers also screen prospective employees to limit potential legal liability. The requirement to provide a safe and healthy workplace as well as increasing violence in the workplace make conducting thorough pre-employment investigations essential if employers wish to avoid or reduce liability for their employees' conduct.

Does Your Organization:

	Yes	No
1. Have a written policy and procedure that controls the purpose, scope, and administration of pre-employment testing?	<input type="checkbox"/>	<input type="checkbox"/>
2. Inform all candidates that various types of testing are a part of the selection process?	<input type="checkbox"/>	<input type="checkbox"/>
3. Have an attorney and/or human resource specialist review all tests for compliance with federal, state, and local laws?	<input type="checkbox"/>	<input type="checkbox"/>
4. Maintain the results of all testing in strictest confidentiality?	<input type="checkbox"/>	<input type="checkbox"/>
5. Conduct background checks consistently to avoid claims of negligent hiring?	<input type="checkbox"/>	<input type="checkbox"/>
6. Include a release to obtain such information on the application form?	<input type="checkbox"/>	<input type="checkbox"/>
7. Inform candidates for employment that they must submit to drug and alcohol tests ?	<input type="checkbox"/>	<input type="checkbox"/>
8. Include an agreement to submit to such tests on the application form?	<input type="checkbox"/>	<input type="checkbox"/>
9. Protect the confidentiality of all candidates who must submit to drug and alcohol tests?	<input type="checkbox"/>	<input type="checkbox"/>
10. Respond appropriately to a candidate's claim of a false result on a drug or alcohol test?	<input type="checkbox"/>	<input type="checkbox"/>
11. Confirm positive test results by an alternative testing technique?	<input type="checkbox"/>	<input type="checkbox"/>

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| 12. | Require medical examinations only after making the job offer? | <input type="checkbox"/> | <input type="checkbox"/> |
| 13. | Inform candidates that employment is contingent on passing the medical examination? | <input type="checkbox"/> | <input type="checkbox"/> |
| 14. | Require such examinations only when they are job-related? | <input type="checkbox"/> | <input type="checkbox"/> |
| 15. | Ascertain that psychological and personality tests, if used, have a direct correlation to the job for which the candidate is applying? | <input type="checkbox"/> | <input type="checkbox"/> |
| 16. | Administer such tests after making the job offer? | <input type="checkbox"/> | <input type="checkbox"/> |
| 17. | Make sure questions on such tests do not violate the state's regulations about valid pre-employment inquiries? | <input type="checkbox"/> | <input type="checkbox"/> |
| 18. | Determine that the test provider can validate the tests and will support your organization should a candidate file a claim of discrimination or intrusion of privacy? | <input type="checkbox"/> | <input type="checkbox"/> |
| 19. | Administer the test in strict accordance with the test provider's instructions? | <input type="checkbox"/> | <input type="checkbox"/> |
| 20. | Assure that strength and agility tests relate to the essential functions of the job? | <input type="checkbox"/> | <input type="checkbox"/> |
| 21. | Consider reasonable accommodations as an alternative for candidates who are otherwise qualified to perform the essential functions of the job but cannot pass the strength and agility tests? | <input type="checkbox"/> | <input type="checkbox"/> |
| 22. | Use written tests only if they measure skills necessary to perform the job? | <input type="checkbox"/> | <input type="checkbox"/> |
| 23. | Comply with the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures"? | <input type="checkbox"/> | <input type="checkbox"/> |

Conclusions

- ☺ If you were able to honestly answer "yes" to all twenty-three questions, then your organization has reduced its exposure to future liability claims. You should congratulate yourself.
- ☹ If you are unable to answer "yes" to any one or more of the twenty-three questions, your organization may have an exposure to claims resulting from your organization's policies and procedures on pre-employment testing.
 - Correct any deficiency that may exist;
 - Contact your attorney and a human resource specialist for advice;
 - Contact the Michigan Municipal League at (734) 662-3246 or (800) 653-2483; or
 - Contact Meadowbrook Insurance Group at (800) 482-2726

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