EMPLOYMENT TESTING AND INVESTIGATION

WHY CONDUCT EMPLOYMENT TESTING?

An organization's success often depends on the reliability and quality of its employees so it is understandable that organizations want employees with the best qualifications and the best fit possible in each position. To achieve that goal, most employers invest a significant amount of effort and money on recruiting, interviewing, and screening prospective employees and employees being considered for new positions.

Employers also screen candidates and employees to limit potential legal liability. Courts can hold employers liable for the negligent acts of their employees in a variety of ways, most importantly for negligent hiring and for vicarious liability.

- 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 way. Michigan common law recognizes negligent hiring as basis for a legal claim, including for an employee's non-employment related acts and, under certain circumstances, for post-discharge acts.

- Vicarious liability, or *respondeat superior*, holds the employer liable for the negligent 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.

In today's litigious society, with increasing discord and even violence in general society and in the workplace, conducting thorough employment testing and investigations is 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 the Knowledge, Skills, or Abilities (KSA) or other qualifications of candidates for employment or promotion. The goal of all tests should be to accurately measure job-related KSAs and other qualifications.

Such testing may include:

- interviews, written or computerized testing, agility, personality, skill, performance, or psychological tests. A high or passing test score on such tests should be proven through validity studies to indicate high job performance;

- medical examinations, drug screening, background investigations including internet and social media, criminal or motor vehicle record investigations, credit checks, and reference checking.

Please note that the information presented here applies to testing for new employee candidates and for current employees being considered for promotion or moves to other positions.

CONCERNS ABOUT EMPLOYMENT TESTING

Employment tests can be useful tools for the employer. However, they also have potential issues which can be harmful and even unfair to candidates and employees.

- Some tests, such as drug and alcohol tests that require blood or urine collection, can be intrusive. Unless employers ensure strict procedures are followed to control the process of collecting samples, such testing can infringe an individual's legitimate right to privacy.

- Positive test results for some drugs may not mean that the person was using or would use drugs on the job or come to work impaired. It may, instead, indicate legal recreational use during non-work hours. Courts have generally considered employees to have greater rights to privacy regarding activities in non-work hours than regarding activities during their working hours.

- Employment tests can lack accuracy. The test itself may be inherently fallible or possess an unacceptable margin for error. Additionally, inaccurate test results can occur when employers fail to administer the test properly.

- Unless carefully designed and carried out, employment tests may discriminate against candidates or employees based on protected characteristics. Several federal, state, and local laws prohibit discrimination in employment.

- Internet and social media investigations may find "information" about a candidate or employee that is anywhere from misleading, to completely false, to the work of malicious actors. Employers should not base employment decisions solely on internet or social media findings. They should make serious attempts to validate the information through other sources and means, including giving candidates and employees the opportunity to respond regarding the legitimacy and accuracy of the findings.

LEGAL RESTRICTIONS ON EMPLOYMENT TESTING

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

1) Federal and state laws expressly prohibit employers from using certain types of tests to make hiring decisions. Outright bans of a test are rare and usually result because the test has an unacceptable history of inaccuracy or is too intrusive.

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.

3) 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]).

4) Federal, state and local anti-discrimination laws also affect the way in which employers can administer and use 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. 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.

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

- Federal Rehabilitation Act of 1973;
- Americans with Disabilities Act of 1991;
- Age Discrimination Act of 1967;
- Immigration Reform and Control Act of 1986; and
- Genetic Information Nondiscrimination Act of 2008.

These laws and similar state laws affect the use of 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. The most common of these 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. Courts and the agencies responsible for upholding anti-discrimination laws have interpreted BFOQ very narrowly.

TYPES AND METHODS OF EMPLOYMENT TESTING

There are numerous types of employment tests and methods for administering them. Skill tests, for example, are as varied as the jobs available in today's workplace. Technological advances have increased the availability and administration of such tests. Below are highlights of the most commonly-used tests. Many of the principles discussed apply to other tests and testing methods as well.

Background Checks

Employers often conduct background investigations of prospective employees. Such investigations occur most frequently for positions that involve handling large amounts of money, working closely with children, or for positions involving the public trust. However, the practice has become more common for other positions as the number of claims against employers for negligent hiring has steadily increased.

Background investigations 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 as long as the employer avoids pitfalls that can lead to claims of discrimination or invasion of privacy. The scope of the background investigation has to be job-related and consistent with the responsibilities the prospective employee will be assigned.

Caution must be used regarding internet and social media elements of a background investigation. As noted previously, the information obtained may be misleading or false and should not be the basis of employment decisions without attempts to validate and give candidates or employees an opportunity to refute or 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 credit reports on prospective employees. Employers are required to inform candidates if they decide not to hire them because of information in the 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. To avoid claims of discrimination, they should perform such checks on all individuals applying for the same or similar positions.

Title VII can also restrict an employer's use of financial information if hiring decisions based on the credit information disparately affect minorities or other protected groups.

Criminal Records

Most jurisdictions prohibit employers from asking about a candidate's arrest record. An arrest does not indicate that a person has actually committed a crime – only that the police suspect they may have committed a crime.

Most jurisdictions give employers greater freedom to investigate whether someone has been convicted of a crime, but still within certain limitations. 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 of the Civil Rights Act holds 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 employee's arrest or conviction record. For instance, 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, and 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' work eligibility 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

Inappropriate use of drugs and alcohol is a widespread problem in today's society. Drug and alcohol testing policies commonly require testing as a pre-employment screening and as a requirement for continued employment. The Americans with Disabilities Act (ADA), 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 on their application form an agreement to submit to such tests.

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 for certain types of positions. 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*. Michigan common law has long recognized the employer's obligation to protect employees' safety and health. This obligation is clearly relevant to the use of 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*. If an employer intrudes upon candidates' or employees' private affairs, publicly discloses private facts, or publicly places someone in a false light, for example publicizing that a candidate wasn't hired because of drug test results, the employer may be found to have violated the person's right to privacy. However, if an employer establishes a reasonable drug-testing program for sound reasons and protects the privacy of candidates and employees, the employer can avoid charges of invasion of privacy.

- *Defamation*. Defamation usually occurs when an individual makes a false statement about another person knowingly or with reckless disregard for 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 intentional infliction of emotional distress and negligent infliction of emotional distress as grounds for liability. When employers, unintentionally, but negligently, administer employment drug and alcohol tests, the law may hold them liable for causing severe emotional stress. As a result, employers should conduct 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.

While the recreational use of marijuana has been legalized in Michigan, drug screening is required for employees in safety-sensitive positions, such as law enforcement and corrections officers, health care workers, or positions requiring a commercial driver's license (CDL).

HIV/AIDS Testing

The Department of Justice has ruled that a person with AIDS qualifies as a person with a disability. The Federal Rehabilitation Act, the ADA, and the Michigan Persons with Disabilities Civil Rights Act all prohibit discrimination based on disability. The ADA expressly prohibits the use of HIV testing on prospective employees for screening purposes. However, once an offer of employment has been made, employers may require HIV testing, but with certain constraints. The employer must test all candidates or, at least, all candidates for the same position. The employer must also show that the test is essential to determining fitness for holding the offered position. Due to the considerable effectiveness of current medications, the latter would be almost impossible.

Genetic Screening

The Genetic Information Nondiscrimination Act of 2008 (GINA), bans discrimination by employers, health care plans and insurers based on genetic information. The law prohibits the improper collection, use or disclosure of genetic information by employers or health insurers. It also prohibits employers from discriminating in hiring, pay, promotions or other job factors because of the genetic information of the individual or a member of their family.

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 also 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 results 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 ADA 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, the ADA requires that they maintain the confidentiality of such records. Employers are also responsible for making sure that the doctor uses due care in focusing the exam on the ability of the candidate to perform the essential job functions defined in the written job description, and/or whether the candidate meets requirements established as Bona Fide Occupational Qualifications for the position.

One final note: during the examination, the medical professional may ask anything about a person's health and medical history. However, the employer should ensure that the medical professional issues to the employer only a conclusive statement that the prospective employee is able to perform the essential job functions, able to perform them with restrictions, or not able to perform them.

Polygraph Examinations

The Federal Employee Polygraph Protection Act (EPPA) covers all private employers in interstate commerce, which includes just about every private company that uses the United States Postal Service, the telephone system, or the internet. 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 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. Additionally, 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 candidates' or 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 Michigan's regulations about valid 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 those 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, so-called “intelligence” tests are particularly susceptible to disparately affecting minorities. Unless there is a close correlation between “intelligence” test scores and the documented job requirements, employers should avoid this type of test.

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 of the Civil Rights Act, employers had to establish that strength was essential to performing the job. The ADA has imposed 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 allow a candidate who is otherwise qualified to successfully perform the job’s essential functions, despite a lack of strength and agility.

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 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 follow EEOC guidelines to assure they are administering testing appropriately.

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

Other Written Tests

Written tests have met with disfavor in recent years due to the difficulty and expense of validating such tests. The federal government has 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 problems:

- 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 the position for which it was designed is similar to the position you are seeking to fill.
- 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 employment testing. Employers face major pitfalls if they choose to make employment testing a part of their selection process. Employers should recognize that whether a specific 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 employment testing.

INFORMATION RESOURCES

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

- Disability Protections in Employment
- Disciplining and Discharging
- Discrimination in Employment
- Hiring Process and Decisions
- Laws that Affect Employment

Contact MML Risk Management Services Staff
or your Loss Control Consultant for more information.

Important Phone Numbers

MML Risk Management Services	800.653.2483
Loss Control Services	800.482.2726
Michigan Department of Civil Rights	313-456-3701
Equal Employment Opportunity Commission	800-669-4000

Note:
This document is not intended to be legal advice.
It only identifies some of the issues surrounding this topic.
Public agencies are encouraged to review their procedures with an expert or a competent attorney who is knowledgeable about the subject.

michigan municipal league | liability & property pool | workers' compensation fund

RISK MANAGEMENT SELF-ASSESSMENT

EMPLOYMENT TESTING AND INVESTIGATION

Many employers use employment testing as part of their screening process when filling open positions because an organization's success often depends on the reliability and quality of its employees. Employers also screen candidates to limit the risk of legal claims for negligent hiring and vicarious liability. Meanwhile, numerous federal, state, and local laws and regulations are in place to protect the rights and privacy of persons seeking employment. This represents an additional area of potential liability if an organization is not careful to design and implement their employment testing program in compliance with all applicable laws and regulations.

This self-assessment guide presents key elements of related laws, regulations, and standards. Evaluate your operations against best practices by asking the questions below. A response of "No" to any question indicates an area that may require further evaluation and an action plan for improvement or correction.

Organization Name _____ **Completed by** _____ **Date** _____

Yes	No		Does Your Organization:
		1.	Have a written policy and procedure that controls the purpose, scope, and administration of employment testing?
		2.	Inform all candidates that various types of testing are a part of the selection process?
		3.	Have an attorney and/or human resource specialist review all tests for compliance with federal, state, and local laws?
		4.	Prior to choosing to use a test from a test provider, confirm 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?
		5.	Administer tests in strict accordance with the test provider's instructions?
		6.	Maintain the results of all testing in strictest confidentiality?
		7.	Conduct background checks consistently to avoid claims of negligent hiring?
		8.	Include a release to perform a background check on the application form?
		9.	When applicable, inform candidates that they must submit to drug and alcohol tests?
		10.	When applicable, include an agreement to submit to drug and alcohol tests on the application form?
		11.	Protect the confidentiality of all candidates who must submit to drug and alcohol tests?
		12.	Respond appropriately to a candidate's claim of a false result on a drug or alcohol test?
		13.	Confirm positive drug or alcohol test results by an alternative testing technique?
		14.	Require medical examinations only when they are job-related?
		15.	When applicable, inform candidates that employment is contingent on passing a medical examination?
		16.	Require medical examinations only after making the job offer?
		17.	Ascertain that psychological and personality tests, if used, have a direct correlation to the job for which the candidate is applying?
		18.	Administer psychological and personality tests only after making the job offer?

CONCLUSIONS

If you can honestly answer "yes" to all applicable questions, your risk management program for Employment Testing is on solid footing – congratulations! Following the recommended practices reduces your organization's exposure to future claims in this area. Remain vigilant for new or changing risks and address them promptly.

If you answered "no" to one or more questions, your organization faces increased exposure to disability discrimination claims and the associated direct and indirect costs. Each "no" response indicates a possible deficiency in your risk management program. You should consider these carefully and take one or more of the actions below:

- Correct any deficiency that may exist;
- Contact MML Risk Management Services;
- Contact MML Loss Control Services;
- Contact the Michigan Department of Civil Rights;
- Contact the Equal Employment Opportunity Commission..

Contact MML Risk Management Services Staff
or your Loss Control Consultant for more information.

Important Phone Numbers

MML Risk Management Services	800.653.2483
Loss Control Services	800.482.2726
Michigan Department of Civil Rights	313-456-3701
Equal Employment Opportunity Commission	800-669-4000

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