

Beware The Legal Risks Of Personality Tests In Hiring

By **Daniel Schwartz** (April 6, 2023)

Personality tests are the next big thing for employers looking to ensure that they are hiring employees who will be a good fit for them.

Indeed, a recent New York Times article describes the use of such personality tests as a burgeoning \$2 billion industry.[1]

The use of the personality tests is not actually a new endeavor.

One of the first personality tests to gain widespread use in hiring was the Woodworth Personal Data Sheet, developed in 1917 by Robert S. Woodworth, a psychologist at Columbia University. The test was designed to identify soldiers who were at risk of developing shell shock during World War I, but it was later adapted for use in hiring and personnel selection.



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However, with new technology and artificial intelligence promising benefits, far more sophisticated personality tests are finding new traction.

It's particularly seen as helpful as employers hire for remote work positions that have a different skill set than in-office positions.

According to The New York Times:

Some managers find them particularly useful for remote teams, because personality tests can prompt much-needed conversations about who workers are as humans and how they like to interact.

However, before employers sign up to use personality tests, there are some significant legal concerns that should be addressed.

Indeed, in 2018, Best Buy Co. Inc. settled a claim by the U.S. Equal Employment Opportunity Commission that the company's use of personality tests/assessments during the application process allegedly adversely affected applicants based on race and national origin.

That claim was based, in part, on a 2007 fact sheet released by the EEOC that further raised concerns about their usage.[2] It noted, in some measure, that employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used.

The fact sheet raises certain suggestions — which may seem obvious — but are still relevant today:

- Employment tests and selection procedures should be job-related and consistent with business necessity. Employers must ensure that these tests and procedures are based on valid and reliable criteria that are directly related to the job in question.

- Employers should use multiple methods of assessment to make employment decisions. A single test or procedure should not be the sole basis for making a decision about an applicant's suitability for a job.
- Employers must ensure that their tests and procedures do not have a disparate impact on any protected group. Disparate impact refers to a situation where a test or procedure appears neutral on its face but has a disproportionate impact on people in certain protected groups.
- Employers should ensure that their tests and procedures are administered fairly and consistently. All applicants should be given the same instructions, time limits and testing conditions.
- Employers must provide reasonable accommodations for applicants with disabilities. If an applicant requests an accommodation to take a test or participate in a selection procedure, the employer must provide the accommodation unless doing so would cause an undue hardship.
- Employers should regularly review and validate their tests and procedures to ensure they are still job-related and nondiscriminatory. Validation should be done by a qualified professional who has expertise in testing and statistical analysis.

Personality tests — and the use of artificial intelligence in hiring decisions — seem neutral on their face. This is particularly true in how some of the firms making such tests market them.

The producers tout certain advantages such as increased hiring accuracy, time and cost savings, legal compliance, and improved retention and engagement.

But employers should try to look behind the curtain if possible.

Time and again, research has demonstrated that not all tests are created equal. Moreover, reliance on such tests for hiring decisions opens the employer up to criticism — and even liability — if not done properly.

Do your research and ask questions to ensure that the test can withstand scrutiny.

There are several legal issues that should further be considered:

- Does the test have the potential to violate the Americans with Disabilities Act? For example, suppose that testing for a certain trait is connected to a particular medical

condition. Thus, the use of such screening may be seen as a proxy for the protected class.

- Is the employer using personality tests in an equitable manner? For example, an employer should try to use the same criteria and test across candidates. The use of different criteria or different test scores for candidates could result in a claim that the tests are being implemented in a discriminatory manner.
- Relatedly, even if the test is validated, employers should be mindful of any disparate impact claims that could arise. Is a protected class being screened out at a higher rate than a similar group? If so, employers should review the data with the makers of the personality test to ensure its accuracy and its scientific support.
- Employers should also check on state or local laws. While there are still relatively few to be concerned about, Massachusetts has a law that prohibits any written test designed to determine an applicant's integrity. New York City delayed enforcement of a separate law until this month that bans the use of automated employment decision tools to screen out candidates.
- Finally, employers should establish a procedure as to how these tests are to be used. For example, an employer could start by conducting a job analysis to identify the essential functions of the job and the knowledge, skills and abilities required to perform it successfully. It should then use tests that are validated for the specific job in question. And it should determine what record-keeping policies should be applied and how results will be monitored and spot-checked for compliance.

Employers — and likely not the test makers — that fail to do their research will be the ones facing liability.

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[1] <https://www.nytimes.com/2023/03/05/business/remote-work-personality-tests.html>.

[2] The EEOC's fact sheet can still be accessed

here: <https://www.eeoc.gov/newsroom/eeoc-issues-fact-sheet-employment-tests-and-selection-procedures-screen-applicants-0>.