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## Mobile Devices

### Do Talent Selection Technologies Pose Age, Disability Discrimination Risks?

BY ALEXIS KRAMER

**E**mployers rushing to adopt new talent selection technologies designed to make screening and recruiting employees easier may want to proceed with caution as they don't come risk-free.

Although these technologies, sometimes referred to as digital hiring platforms, assist employers and applicants in matching the right person to the right job, employers must ensure the technology doesn't inadvertently discriminate on the basis of age or disability against applicants who can't complete the required tasks on an equal footing with others, employment lawyers told Bloomberg BNA.

**Employee Selection Procedures**

- July 2, 1964: ● President Lyndon B. Johnson signs Civil Rights Act of 1964; Title VII bans discrimination of protected classes in workplace.
- Aug. 25, 1978: ● EEOC adopts Uniform Guidelines on Employee Selection Procedures to assist employers in determining proper use of employment tests.
- July 26, 1990: ● President George H.W. Bush signs Americans With Disabilities Act; Title I bans discrimination of job applicants with disabilities.
- Dec. 3, 2007: ● EEOC issues fact sheet providing best practices for administering employment tests and other selection procedures.
- Present: ● Employers begin to use a host of new technologies to screen, interview and hire job applicants.

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An explosion of new technologies to screen, interview and recruit job applicants—including personality assessments, online interview tools and emerging mobile application games—has flooded the market, according to a 2015-2016 Sierra-Cedar white paper surveying human resources systems.

The report said that 45 percent of organizations surveyed use behavior assessment technologies in their hiring processes, with 24 percent evaluating potential use. Video screening and interviewing were utilized by 38 percent of organizations responding to the survey, while 26 percent are considering using those tools.

An employee selection procedure incorporating one of these technologies could run afoul of Title VII of the 1964 Civil Rights Act if it has a disproportionately adverse impact on a particular group of job applicants. It could violate Title I of the Americans With Disabilities Act if it has the effect of excluding people with disabilities and the selection criteria doesn't relate to the applied-for job.

There is a growing trend of human resources-based technologies, including mobile employee screening games, Adam S. Forman, an employment, labor and workforce management attorney at Epstein Becker & Green PC in Detroit, said. "These technologies indeed have some risks of discrimination," he said.

Jonathan T. Hyman, an employment partner at Meyers Roman Friedberg & Lewis in Cleveland, Ohio, said the filing of discrimination suits are imminent. "As these technologies become more and more prevalent, it's not a question of if but a question of when we will start to see these claims pop up," he said.

**Protected Classes at Risk?** A growing number of companies have developed and offer talent selection technologies in a variety of forms:

- Software company OutMatch offers ChequedFit, a pre-employment assessment test that measures candidates on ten different personality traits.
- HireVue Inc.'s digital interview platform allows employers to conduct interviews online and use predictive analytics to rank them.
- MosaicTrack uses artificial intelligence to sift through resumes and find talent for companies.
- New York-based start-up SHFuse Inc.'s Stockfuse mobile app is a virtual stock trading platform that quantifies players' behaviors and personality traits and allows employers to filter through players based on the traits they are looking for.

One of the selling points of these platforms and games is that they are designed to be neutral, Daniel A. Schwartz, an employment partner at Shipman & Goodwin LLP in Hartford Conn., said. "Employers may be trying to remove bias from their decision-making process, but they must be aware that these games have limitations on their use."

**“As these technologies become more and more prevalent, it’s not a question of if but a question of when we will start to see these claims pop up.”**

JONATHAN T. HYMAN, MEYERS ROMAN FRIEDBERG & LEWIS

Title VII of the 1964 Civil Rights Act prohibits discrimination on the basis of race, color, national origin, sex, and religion in the workplace. Title VII prohibits employment tests that appear neutral but have the effect of disproportionately excluding a protected class, unless the challenged practice is related to the applied-for job and is consistent with business necessity.

Forman said the algorithms that talent selection technologies use to make hiring recommendations appear to be facially neutral, but they could have an adverse impact on protected categories of people. For example, mobile app games might exclude older applicants who may be unfamiliar with downloading and playing an app, or applicants with a disability, if the app is not accessible, he said.

Sean McCormack, chief executive officer and co-founder of Stockfuse, told Bloomberg BNA that although the primary age range of Stockfuse’s 100,000 users is early to mid-twenties, there is also a large group of users in their forties and fifties. He added that in building the app, the company made sure that it was intuitive and easy for people of all ages to use.

“Our goal is to lower the barrier for entry to absolutely everybody,” McCormack said.

**Assessment Must Be Job-Related.** Hyman said that if an employer can show the technology is job-related and necessary to the business, it is going to pass muster on a Title VII disparate impact analysis. “If you can link the technology to the job, you are going to have an easier time showing it isn’t discriminatory,” he said.

**What Should Employers Do?**

**Equal Employment Opportunity Commission Guidance recommends that employers:**

- ensure tests are properly validated for the positions and purposes for which they are used;
- determine whether there’s an equally effective alternative procedure with less adverse impact; and
- keep abreast of changes in job requirements and update selection procedures accordingly.

**Adam Forman, Epstein Becker & Green P.C., recommends that employers:**

- consult with legal counsel to review the technology for employment law issues;
- perform due diligence on the vendor by asking critical questions, such as whether the technology has demonstrated an adverse impact;
- train employees to ensure they understand the limitations of the product;
- proactively monitor how the product is being used and analyze overall selection rates after it has sufficient data; and
- ensure that any pre-employment arbitration agreement provided in the platform is readily available and understandable.

Forman echoed Hyman’s comment. The main question is whether these technologies’ selection criteria relate to the essential functions of the applied-for job, For-

man said. For example, a virtual mobile app game asking applicants to serve food in a virtual restaurant may require technological skills that aren’t necessary to serve food in an actual restaurant.

McCormack said that the company’s virtual stock trading game was designed for those in or seeking to enter the financial industry. He said the game tracks players’ interactions with the platform and other players to determine their personalities, behaviors and skillsets. It then “quantifies those soft metrics” to enable employers to find applicants possessing the exact traits they are seeking for the open position.

For example, algorithms within the game can determine how much an applicant is an “influencer,” McCormack said. The game looks at whether after a player takes an action, his or her followers followed suit. An employer looking to fill positions such as a salesperson or a researcher may be looking for someone who has an influence on others, he said.

Carol Jenkins, vice president of talent solutions at OutMatch, told Bloomberg BNA that the company has taken steps to ensure the personality traits measured in each assessment relate to performance on the job. Each ChequedFit assessment must not only be a valid predictor of job performance, but also appear relevant to the job, be reliable and demonstrate return on investment to the business, she said.

Jenkins said that to ensure each assessment meets these requirements, OutMatch takes the time to understand the requirements of the job by conducting job observations, interview top performers and analyze traits of existing top performers to determine what leads to success on the job.

“We want to make sure we can predict success in the job, but in a way that’s fair to all applicants,” she said.

**Personality Test or Medical Exam?** Title I of the Americans With Disabilities Act, 42 U.S.C. § 12112(a), prohibits employers from discriminating against individuals with disabilities in job application procedures, hiring, advancement, and other privileges of employment.

Under Title I, employers may not use employment tests or other selection criteria that tend to screen out people with disabilities unless the criteria is job-related and consistent with business necessity. Title I also bans employers from conducting medical examinations or asking whether a job applicant has a disability until after they make a conditional offer of employment.

**“Employers may be trying to remove bias from their decision-making process,” but they must be aware that these platforms have limitations that may make the process difficult for certain groups of people.**

DANIEL A. SCHWARTZ, SHIPMAN & GOODWIN LLP

Forman said it remains unclear whether the use of online personality tests to evaluate an applicant’s mental or emotional status could qualify as medical exami-

nations, which are prohibited before an employment offer is made.

Jenkins, in response, said that OutMatch evaluates its assessments regularly to ensure that they adhere to the uniform guidelines and avoid elements that would discriminate against individuals with disabilities.

“As industrial organizational psychologists, we strictly measure job-related traits and ensure the assessment isn’t going to tap into any clinical elements,” she said.

**Reasonable Accommodations.** The ADA requires employers to offer reasonable accommodations to qualified individuals with disabilities unless the employer can show that the accommodation would impose an undue hardship.

Employers need to ensure that the visually-impaired and other disabled individuals have the opportunity to request an accommodation or alternative to the technology being used, Schwartz said. And the results of an alternative screening method must be sufficiently similar to that of the technology, he added.

“As with all types of testing, you need to look at it on a case-by-case basis,” Schwartz said.

Jenkins agreed that employers need to provide reasonable accommodations for applicants that meet the basic job requirements. She said that to accommodate hearing-impaired individuals, the audio content of OutMatch’s video assessments is also provided in written form for applicants to read. In the case of a blind or visually-impaired user, employers often provide an option for the applicant to have a hiring manager read the assessment questions to them, she said.

McCormack said an audible-only version of Stockfuse is in development to allow for use by visually-impaired people. The audible version is in alpha-testing, and before it is released, he said the company will make sure that both the audible and full versions effectively test for the exact same things.

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