

Quad A

P. O. Box 1848
Phoenix, AZ 85001
www.azquada.org
E-mail: azquada@aol.com
E-Fax: (623) 321-6016

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(602) 300-2023

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(480) 675-5607

Quad A Administrator
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Legacy Partners Consulting
& Coaching, LLC
(602) 377-0404

Membership meetings are the
3rd Tuesday of every month
from 8:30-10:00 a.m.



U.S. Equal Employment Opportunity Commission

Employment Tests and Selection Procedures

Employers often use tests and other selection procedures to screen applicants for hire and employees for promotion. There are many different types of tests and selection procedures, including cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks.

The use of tests and other selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job. However, use of these tools can violate the federal anti-discrimination laws if an employer intentionally uses them to discriminate based on race, color, sex, national origin, religion, disability, or age (40 or older). Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law.

This fact sheet provides technical assistance on some common issues relating to the federal anti-discrimination laws and the use of tests and other selection procedures in the employment process. *(Continued on Page 3)*

September 21, 2010 Membership Meeting

Expert Panel Discussion on Testing

(See related article, Page 3)

Time: 8:30-10:00 a.m.

Location: Sundt, 2620 S. 55th Street, Tempe

NOTE: Sundt security procedures require the names of all attendees in advance. Please RSVP to azquada@gmail.com.

Sept 21 Meeting: “Expert Panel Discussion on Testing” Speaker Profiles



Jack W. Milligan, SPHR, GPHR

Jack Milligan joined Leathers Milligan & Associates in 2000 and has twenty years in client based consulting and over two decades of human resource and general management experience in American industry. Jack spent almost 20 years with ITT Corporation all over the world. He also served as the Corporate VP of Human Resources for TransTechnology Corporation. In 2003 the Society for Human Resource Management (SHRM) Arizona State Council awarded him the Professional Excellence Award given annually to only one HR Professional in the state.

Jack consults with clients on a broad range of business issues including strategic and tactical planning, organizational dynamics and succession planning, staffing and selection, compensation and reward practices, labor and industrial relations issues, business ethics and practices (he is a certified arbitrator of business issues), and other areas of concern to the human side of the business.

His blend of management skills was developed as a key member of the management team in numerous industries, including; aerospace, electronics, technical services, healthcare, semi-conductors, mining equipment, textile equipment, consumer products, and computers and applications software.

He is SPHR and GPHR certified by the Human Resource Certification Institute, and he is a past President of the Valley of the Sun Human Resources Association (VSHRA) and past Director of the Arizona State Council of SHRM. Jack also holds two Certificates in Employee Relations Law, and has taught The HRCI Prep Class locally for 16 years.

Jack earned a Master of Arts degree in Human Resources and Organizational Behavior and a Bachelor of Science degree in Management and Labor Economics from California State University – Northridge.

He is very active in his community and has served on the United Way Board, various Mayor’s committees, the East Valley Cultural Alliance and the advisory board for Desert Samaritan Hospital. He currently serves on the Board of Directors for Goodwill of Central Arizona and Merchants Information Solutions in Phoenix.



Linda Kalaf, SPHR, GPHR, MA

Linda Kalaf is Director, Human Resources, Passenger Relations and Community Engagement, Veolia Transportation. Linda is a veteran in the world of Human Resources. With over 20 years in HR, she specializes in Equal Employment Opportunity compliance and Diversity initiatives.

After serving 21 years in the airline industry, with our hometown America West / US Airways, she took some time off to enjoy time with her parents and did some consulting. After consulting for Veolia Transportation she found a new home in HR and serves as the director of Human Resources, Passenger Relations and Community Engagement for Veolia Transportation’s Tempe facility.

Linda serves as the chair of the Hispanic Women’s Corporation and is committed to Hispanic professional development; she has served as an HWC conference volunteer and on the board since 1991.

Also one of the founding members of the National Society of Hispanic MBAs Phoenix Chapter, Linda served as the Chapter President and Vice Chair on the national board. For her long term service she was recognized as an honorary member of the NSHMBA Executive Circle.

Committed to life long learning, Linda has her Bachelor of Arts in Management and Master of Arts in Organizational Management and is certified as a Senior and Global Professional in Human Resources.



James E. Kuthy, Ph.D.

Jim Kuthy is Principal Consultant with Biddle Consulting Group, Inc. He holds a Masters and a Ph.D. degree in Industrial and Organizational Psychology from the University of Akron, which is consistently ranked as one of the top graduate programs in this field. During the past 18 years, Dr. Kuthy has conducted job analysis and validation studies of testing practices for dozens of employers. His findings have consistently been accepted by the Office of Federal Contractor Compliance Programs (OFCCP) as addressing the federal Uniform Guidelines on Employee Selection Procedures (1978) and OFCCP regulations.

Dr. Kuthy has presented at more than 30 national and international conferences concerning Human Resource-related issues, and his work is highly regarded in the industry.

Employment Tests and Selection Procedures (Continued from Pg 1)

Background

- Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act of 1967 (ADEA) prohibit the use of discriminatory employment tests and selection procedures.
- There has been an increase in employment testing due in part to post 9-11 security concerns as well as concerns about workplace violence, safety, and liability. In addition, the large-scale adoption of online job applications has motivated employers to seek efficient ways to screen large numbers of online applicants in a non-subjective way.
- The number of discrimination charges raising issues of employment testing, and exclusions based on criminal background checks, credit reports, and other selection procedures, continues to rise.

Types of Employment Tests and Selection Procedures

Many employers use employment tests and other selection procedures in making employment decisions. Examples of these tools, many of which can be administered online, include the following:

- Cognitive tests assess reasoning, memory, perceptual speed and accuracy, and skills in arithmetic and reading comprehension, as well as knowledge of a particular function or job;
- Physical ability tests measure the physical ability to perform a particular task or the strength of specific muscle groups, as well as strength and stamina in general;
- Sample job tasks (e.g., performance tests, simulations, work samples, and realistic job previews) assess performance and aptitude on particular tasks;
- Medical inquiries and physical examinations, including psychological tests, assess physical or mental health;
- Personality tests and integrity tests assess the degree to which a person has certain traits or dispositions (e.g., dependability, cooperativeness, safety) or aim to predict the likelihood that a person will engage in certain conduct (e.g., theft, absenteeism);

Thinking Style										
Learning Index	1	2	3	4	5	6	7	8	9	10
Verbal Skill	1	2	3	4	5	6	7	8	9	10
Verbal Reasoning	1	2	3	4	5	6	7	8	9	10
Numerical Ability	1	2	3	4	5	6	7	8	9	10
Numeric Reasoning	1	2	3	4	5	6	7	8	9	10
Behavioral Traits										
Energy Level	1	2	3	4	5	6	7	8	9	10
Assertiveness	1	2	3	4	5	6	7	8	9	10
Sociability	1	2	3	4	5	6	7	8	9	10
Manageability	1	2	3	4	5	6	7	8	9	10
Attitude	1	2	3	4	5	6	7	8	9	10
Decisiveness	1	2	3	4	5	6	7	8	9	10
Accommodating	1	2	3	4	5	6	7	8	9	10
Independence	1	2	3	4	5	6	7	8	9	10
Objective Judgment	1	2	3	4	5	6	7	8	9	10
Occupational Interests										
Enterprising	1	2	3	4	5	6	7	8	9	10
Financial/Admin	1	2	3	4	5	6	7	8	9	10
People Service	1	2	3	4	5	6	7	8	9	10
Technical	1	2	3	4	5	6	7	8	9	10
Mechanical	1	2	3	4	5	6	7	8	9	10
Creative	1	2	3	4	5	6	7	8	9	10

- Criminal background checks provide information on arrest and conviction history;
- Credit checks provide information on credit and financial history;
- Performance appraisals reflect a supervisor's assessment of an individual's performance; and
- English proficiency tests determine English fluency.

Governing EEO Laws

Title VII of the Civil Rights Act of 1964

- Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin.
- With respect to tests in particular, Title VII permits employment tests as long as they are not "designed, intended or used to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(h). Title VII also imposes restrictions on how to score tests. Employers are not permitted to (1) adjust the scores of, (2) use different cutoff scores for, or (3) otherwise alter the results of employment-related tests on the basis of race, color, religion, sex, or national origin. *Id.* at §2000e-2(1).
- Title VII prohibits both "disparate treatment" and "disparate impact" discrimination.
 - Title VII prohibits **intentional** discrimination based on race, color, religion, sex, or national origin. For example, Title VII forbids a covered employer from testing the reading ability of African American applicants or employees but not testing the reading ability of their white counterparts. This is called

“**disparate treatment**” discrimination. Disparate treatment cases typically involve the following issues:

- ◆ Were people of a different race, color, religion, sex, or national origin treated differently?
 - ◆ Is there any evidence of bias, such as discriminatory statements?
 - ◆ What is the employer’s reason for the difference in treatment?
 - ◆ Does the evidence show that the employer’s reason for the difference in treatment is untrue, and that the real reason for the different treatment is race, color, religion, sex, or national origin?
- Title VII also prohibits employers from using neutral tests or selection procedures that have the **effect** of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not “job-related and consistent with business necessity.” This is called “**disparate impact**” discrimination.

Disparate impact cases typically involve the following issues:

- ◆ Does the employer use a particular employment practice that has a **disparate impact** on the basis of race, color, religion, sex, or national origin? For example, if an employer requires that all applicants pass a physical agility test, does the test disproportionately screen out women? Determining whether a test or other selection procedure has a disparate impact on a particular group ordinarily requires a statistical analysis.
- ◆ If the selection procedure has a disparate impact based on race, color, religion, sex, or national origin, can the employer show that the selection **procedure is job-related and consistent with business necessity**? An employer can meet this standard by showing that it is necessary to the safe and efficient performance of the job. The challenged policy or practice should therefore be associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants’ or employees’ skills, the challenged policy or practice must evaluate

an individual’s skills as related to the particular job in question.

- ◆ If the employer shows that the selection procedure is job-related and consistent with business necessity, can the person challenging the selection procedure demonstrate that there is a **less discriminatory alternative** available? For example, is another test available that would be equally effective in predicting job performance but would not disproportionately exclude the protected group?

See 42 U.S.C. § 2000e-2 (k). This method of analysis is consistent with the seminal Supreme Court decision about disparate impact discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

- ◆ In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures or “UGESP” under Title VII. See 29 C.F.R. Part 1607.¹ UGESP provided uniform guidance for employers about how to determine if their tests and selection procedures were lawful for purposes of Title VII disparate impact theory.
 - UGESP outlines three different ways employers can show that their employment tests and other selection criteria are job-related and consistent with business necessity. These methods of demonstrating job-relatedness are called “test validation.” UGESP provides detailed guidance about each method of test validation.

**13th Annual
Compliance Conference
November 16, 2010**

**See registration
information in this
Newsletter. Program
details will follow in the
October Newsletter.**

Title I of the Americans with Disabilities Act (ADA)



- Title I of the ADA prohibits private employers and state and local governments from discriminating against qualified individuals with disabilities on the basis of their disabilities.
- The ADA specifies when an employer may require an applicant or employee to undergo a medical examination, *i.e.*, a procedure or test that seeks information about an individual's physical or mental impairments or health. The ADA also specifies when an employer may make "disability-related inquiries," *i.e.*, inquiries that are likely to elicit information about a disability.
 - When hiring, an employer may not ask questions about disability or require medical examinations until **after** it makes a conditional job offer to the applicant. 42 U.S.C. §12112 (d)(2);
 - After making a job offer (but before the person starts working), an employer may ask disability-related questions and conduct medical examinations as long as it does so for **all individuals entering the same job category**. *Id.* at § 12112(d)(3); and
 - With respect to **employees**, an employer may ask questions about disability or require medical examinations only if doing so is **job-related and consistent with business necessity**. Thus, for example, an employer could request medical information when it has a **reasonable belief**, based on **objective evidence**, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition, or when an employer receives a

request for a **reasonable accommodation** and the person's disability and/or need for accommodation is not obvious. *Id.* at § 12112(d)(4).

- The ADA also makes it unlawful to:
 - Use employment tests that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test, as used by the employer, is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(b)(6);
 - Fail to select and administer employment tests in the most effective manner to ensure that test results accurately reflect the skills, aptitude or whatever other factor that such test purports to measure, rather than reflecting an applicant's or employee's impairment. *Id.* at § 12112(b)(7); and
 - Fail to make reasonable accommodations, including in the administration of tests, to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such accommodation would impose an undue hardship. *Id.* at § 12112(b)(5).

The Age Discrimination in Employment Act (ADEA)



- The ADEA prohibits discrimination based on age (40 and over) with respect to any term, condition, or privilege of employment. Under the ADEA, covered employers may not select individuals for hiring, promotion, or reductions in force in a way that unlawfully discriminates on the basis of age.
- The ADEA prohibits **disparate treatment** discrimination, *i.e.*, intentional discrimination based on age. For example, the ADEA forbids

an employer from giving a physical agility test only to applicants over age 50, based on a belief that they are less physically able to perform a particular job, but not testing younger applicants.

- The ADEA also prohibits employers from using neutral tests or selection procedures that have a **discriminatory impact** on persons based on age (40 or older), unless the challenged employment action is based on a **reasonable factor other than age**. *Smith v. City of Jackson*, 544 U.S. 228 (2005). Thus, if a test or other selection procedure has a disparate impact based on age, the employer must show that the test or device chosen was a reasonable one.

Recent EEOC Litigation and Settlements

A number of recent EEOC enforcement actions illustrating basic EEO principles focus on testing.

- **Title VII and Cognitive Tests: Less Discriminatory Alternative for Cognitive Test with Disparate Impact.** *EEOC v. Ford Motor Co. and United Automobile Workers of America*, involved a court-approved settlement agreement on behalf of a nationwide class of African Americans who were rejected for an apprenticeship program after taking a cognitive test known as the Apprenticeship Training Selection System (ATSS). The ATSS was a written cognitive test that measured verbal, numerical, and spatial reasoning in order to evaluate mechanical aptitude. Although it had been validated in 1991, the ATSS continued to have a statistically significant disparate impact by excluding African American applicants. Less discriminatory selection procedures were subsequently developed that would have served Ford's needs, but Ford did not modify its procedures. In the settlement agreement, Ford agreed to replace the ATSS with a selection procedure, to be designed by a jointly-selected industrial psychologist, that would predict job success and reduce adverse impact. Additionally, Ford paid \$8.55 million in monetary relief.
- **Title VII and Physical Strength Tests: Strength Test Must Be Job-Related and Consistent with Business Necessity If It Disproportionately Excludes Women.** In *EEOC v. Dial Corp.*, women were disproportionately rejected for entry-level production jobs because of a strength test. The test had a significant adverse impact on women – prior to the use of the test, 46% of hires were women; after use of the test, only 15% of hires were women. Dial defended the test by noting that it looked like

the job and use of the test had resulted in fewer injuries to hired workers. The EEOC established through expert testimony, however, that the test was considerably more difficult than the job and that the reduction in injuries occurred two years before the test was implemented, most likely due to improved training and better job rotation procedures. On appeal, the Eighth Circuit upheld the trial court's finding that Dial's use of the test violated Title VII under the disparate impact theory of discrimination. See <http://www.eeoc.gov/press/11-20-06.html>

- **ADA and Test Accommodation: Employer Must Provide Reasonable Accommodation on Pre-employment Test for Hourly, Unskilled Manufacturing Jobs.** The EEOC settled *EEOC v. Daimler Chrysler Corp.*, a case brought on behalf of applicants with learning disabilities who needed reading accommodations during a pre-employment test given for hourly unskilled manufacturing jobs. The resulting settlement agreement provided monetary relief for 12 identified individuals and the opportunity to take the hiring test with the assistance of a reader. The settlement agreement also required that the employer provide a reasonable accommodation on this particular test to each applicant who requested a reader and provided documentation establishing an ADA disability. The accommodation consisted of either a reader for all instructions and all written parts of the test, or an audiotope providing the same information.

Employer Best Practices for Testing and Selection

- Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability.
- Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. The test or selection procedure must be job-related and its results appropriate for the employer's purpose. While a test vendor's documentation supporting the validity of a test may be helpful, the employer is still responsible for ensuring that its tests are valid under UGESP.
- If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure. For example, if the selection procedure is a test, the employer should determine whether another test would predict job

performance but not disproportionately exclude the protected group.

- To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly.

- Employers should ensure that tests and selection procedures are not adopted casually by managers who know little about these processes. A test or selection procedure can be an effective management tool, but no test or selection procedure should be implemented without an understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored.

2010 Calendar of Events

DATE	TOPIC	LOCATION
September 21, 8:30-10:00	<i>Expert Panel Discussion on Testing</i>	Sundt 2620 S. 55 th Street, Tempe
October 26, 8:30-10:00	<i>Diversity Month</i>	MARC Center 924 N. Country Club Dr., Mesa
November 16, 7:30-4:00 COST: Members \$100 Nonmembers \$150	<i>13th Annual Compliance Conf</i>	Black Canyon Conference Center Phoenix
December 7, 7:30-10:00 COST: Members FREE Nonmembers \$75	<i>Annual Members Only Holiday Roundtable</i>	Jobing.com 4747 N. 22 nd Street, Phoenix

**Please note change for
October's meeting from
the 19th to the 26th.**



Black Canyon Conference Center
9440 N.25th Ave., Phoenix, AZ

AKA: Arizona Industry Liaison Group Affiliate (AILG)

13th Annual Compliance Conference

Tuesday, November 16, 2010

(Watch for program details in the October Newsletter)

Registration Form

(One per attendee, please)

COST (Includes Lunch & All Materials):

Payments received by November 1, 2010: \$100 Members \$150 Nonmembers

Payments received after November 1, 2010: \$125 Members \$175 Nonmembers

Name: _____ Email Address: _____

Organization: _____ Work Phone: _____

Mailing Address: _____

City, State & Zip: _____

For AMEX/Visa/MasterCard Payments, fax registration to 623/321-6016:

Card # _____ Expiration: _____

If paying by check: Please make checks payable to Arizona Affirmative Action Association and mail together with registration form to: AAAA, P. O. Box 1848, Phoenix, AZ 85001. For further information, contact us at azquada@gmail.com. Please advise us if you require special dietary or physical accommodations.

2010 Quad A Membership Application

Thank you for your continuing interest in and support of the Arizona Affirmative Action Association (Quad A). Our members include professionals in the fields of human resource management, equal employment opportunity, affirmative action, workplace diversity and other related fields. For over 25 years, Quad A has been providing its members with quality, up-to-date information through workshops, seminars and conferences. Your membership entitles you to a monthly newsletter, quarterly meetings/workshops, seminars, the Annual Conference (in April) and Compliance Conference (in the fall). Most activities are included in your membership; others are offered at a substantial discount. At only \$75 per year (Jan-Dec), membership in Quad A is a true value for the money. *(Individual memberships only; no organizational memberships at this time.)*

Goals of the Arizona Affirmative Action Association are to:

- Promote equal employment opportunity, diversity and affirmative action in the workplace.
- Promote awareness and recognition in the workplace and the community of the benefits of taking affirmative action to provide equal employment opportunities
- Share and disseminate up-to-date information on EEO, AA and diversity issues, legislation, judicial decisions, best practices and trends.
- Provide an opportunity for professionals interested in EEO, AA and diversity issues to network and communicate.

Membership fee in Quad A is a qualified tax deduction. To renew your annual membership, or to apply as a new member, please complete the following information and return it along with a check for \$75 made payable to the *Arizona Affirmative Action Association* to our office at P.O. Box 1824, Phoenix, AZ 85001.

NOTE: Please provide us with an e-mail address to which we can send your monthly newsletter. Quad A is a nonprofit 501(c)3 organization (TIN 86-0966437), and e-mailing saves the Association a considerable amount on printing and postage each month. THANK YOU!

MEMBERSHIP APPLICATION/RENEWAL

Member Name: _____

Company Name: _____

Title: _____

Mailing Address: _____

Phone: _____ Fax: _____

E-mail: _____

Visa MC Am Ex Name on card: _____

Card # _____ Expires: _____

Please return this renewal form along with a check or credit card for \$75 made payable to Arizona Affirmative Action Association to our office at P.O. Box 1848, Phoenix, AZ 85001 or eFAX to (623) 321-6016.