

# Do Your Hiring Tests Expose You to EEO Liability?

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## **BENEFITS OF HIRING TESTS**

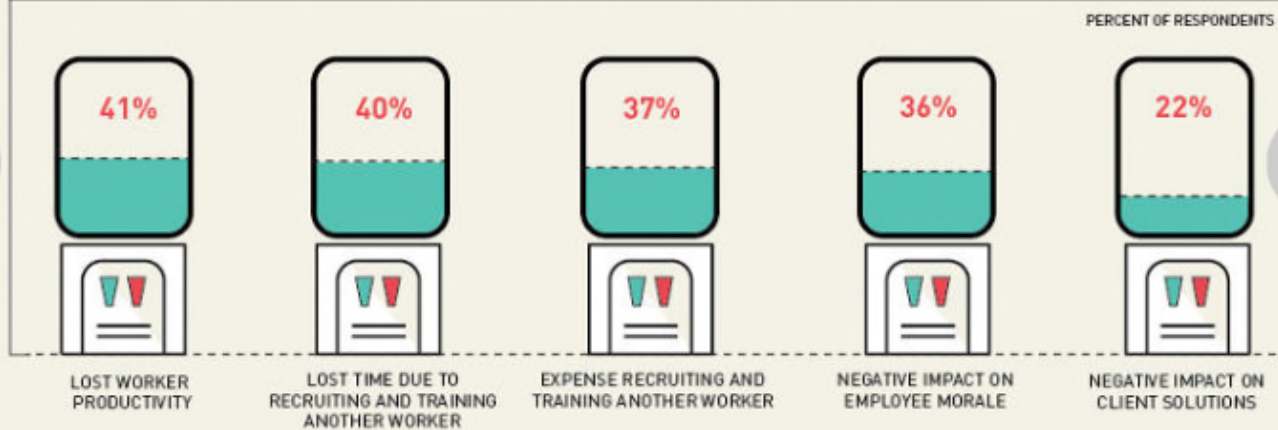
- Results in hiring, placing, and promoting greater numbers of superior employees
- Superior employees are more likely to contribute to an organization's success
- Decreases the likelihood of a bad hire
- More cohesive and effective teams
- Enhanced job satisfaction for new hires/reduced turnover
- Cost savings

# BAD HIRING DECISIONS ARE EXPENSIVE



**02 / 07 | WHAT'S THE COST?** Out of more than 6,000 hiring professionals worldwide, more than half said they have felt the effects of hiring someone who turned out to be a poor fit for the job or who did not perform it well.

BUT THE COSTS GO BEYOND JUST CASH. THE FOLLOWING ARE THE DIRECT AND INDIRECT WAYS COMPANIES SAY THEY'VE PAID FOR HIRING THE WRONG EMPLOYEE.



#### Survey Methodology

This survey was conducted online within the U.S. by Harris Interactive® on behalf of CareerBuilder among 2,494 hiring managers and human resource professionals (employed full-time, not self-employed, non-government) between August 13 and September 6, 2012 (percentages for some questions are based on a subset, based on their responses to certain questions). With a pure probability sample of 2,494, one could say with a 95 percent probability that the overall results have a sampling error of +/- 1.96 percentage points. Sampling error for data from sub-samples is higher and varies.

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# TYPES OF EMPLOYMENT TESTS

- Cognitive tests assess reasoning, memory, perceptual speed and accuracy, and skills in arithmetic and reading comprehension, as well as job knowledge
- Physical ability tests
- 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)

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# A BRAVE NEW WORLD OF HIRING TESTS – PEOPLE ANALYTICS & BIG DATA

- Software programs that source and match candidates to employers' job postings based on certain words used in resumes, applications, or social media profiles
- Online reference checking tools to assess whether an applicant would fit into an employer's culture
- Computer game tests that estimate applicants' cognitive abilities
- Online personality assessments
- <https://www.youtube.com/watch?v=hE1dBI01FfU>
- [https://www.youtube.com/watch?v=iTyjQU\\_E5Ek](https://www.youtube.com/watch?v=iTyjQU_E5Ek)

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## **BAD ASSUMPTIONS**

- Efficiencies gained always outweigh the legal risk
- Nothing to fear, the new testing company agreed to an indemnity clause

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## RECENT CASES

- September 26, 2016: The U.S. Department of Labor filed a lawsuit charging that Palantir Technologies, a Palo Alto technology company, discriminated systematically against Asian job applicants in its hiring process and selection procedures
- August 24, 2015: Target Corporation paid \$2.8 Million to resolve EEOC discrimination finding. EEOC found:
  - Target used three employment assessments that disproportionately screened out applicants for exempt-level professional positions based on race and sex
  - One of Target's pre-employment assessments violated the ADA
  - Target committed record-keeping violations by failing to maintain records sufficient to assess the impact of its hiring procedures



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## LEGAL 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 increase

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# GOVERNING EEO LAWS – TITLE VII

Title VII of the Civil Rights Act of 1964:

- Permits employment tests as long as they are not “designed, intended or used to discriminate because of race, color, religion, sex or national origin”
- 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

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# DISPARATE TREATMENT VS. DISPARATE IMPACT

## Disparate Treatment:

- Intentional discrimination based on race, color, religion, sex, or national origin
- Example: An employer tests the reading ability of African American applicants or employees but not testing the reading ability of their white counterparts

## Disparate Impact:

- 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”

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## ISSUES IN DISPARATE IMPACT CASES

Does the employer use a particular employment practice that has a disparate impact on the basis of race, color, religion, sex, or national origin?

- Example, if an employer requires that all applicants pass a physical agility test, does the test disproportionately screen out women?
- *Requires a statistical analysis*

If the selection procedure has a disparate impact, is the procedure validated, meaning, is it job-related and consistent with business necessity?

- Employer must show that it is necessary to the safe and efficient performance of the job
- The challenged policy or practice must evaluate an individual's skills as related to the particular job in question

If 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?

- Is another test available that would be equally effective in predicting job performance but would not disproportionately exclude the protected group?

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# GOVERNING EEO LAWS – AMERICANS WITH DISABILITIES ACT

Three main rules under the ADA:

1. An employer may not ask questions about disability or require medical examinations until after it makes a conditional job offer to the applicant
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
3. 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

\*An employer can ask whether an applicant can perform a job function

- Example: Can you lift 25lbs?

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# ADA'S IMPACT ON TESTING

Employers may not:

- 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. (e.g. disparate impact)
- 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
- 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

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# GOVERNING EEO LAWS: AGE DISCRIMINATION IN EMPLOYMENT ACT

## “ADEA”

- Prohibits discrimination based on age (40 and over) with respect to any term, condition, or privilege of employment
- Employers may not select individuals for hiring, promotion, or reductions in force in a way that unlawfully discriminates on the basis of age
- Prohibits disparate treatment discrimination, e.g., intentional discrimination based on age
  - For example: An employer may not give 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
- 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
- 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

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# UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

“UGESP”

- Adopted by the EEOC in 1978
- Provides uniform guidance for employers about how to determine if their tests and selection procedures are lawful for purposes of Title VII disparate impact theory
- 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



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# HOW TO CALCULATE AN ADVERSE IMPACT

- 1) Calculate the rate of selection for each group (divide the number of persons selected from a group by the number of applicants from that group)
- 2) Observe which group has the highest selection rate
- 3) Calculate the impact ratios, by comparing the selection rate for each group with that of the highest group (divide the selection rate for a group by the selection rate for the highest group)
- 4) Observe whether the selection rate for any group is substantially less (e.g., usually less than 4/5ths or 80%) than the selection rate for the highest group. If it is adverse impact is indicated in most circumstances.

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## EXAMPLE OF DISPARATE IMPACT

Applicants	Hired	Selection Rate Percent Hired
80 Caucasian	48	48/80 or 60%
40 African-American	12	12/40 or 30%

A comparison of the African-American selection rate (30%) with the Caucasian selection rate (60%) shows that the African-American rate is 30/60, or one-half (or 50%) of the Caucasian rate. Since the one-half (50%) is less than 4/5ths (80%) adverse impact is usually indicated.

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# VALIDATION ACCORDING TO THE UGESP

Construct Validity: A pre-employment test has construct validity if it measures what it is supposed to measure. For example, a cognitive aptitude test is expected to measure cognitive aptitude, or generalized intelligence. If it fails to accurately measure intelligence, it is ineffective.

Content Validity: Content validity affirms job-relatedness. Content validity measures how well the subject matter of a test relates to the capabilities and skills required by a certain job. For example, administering a sales personality test to a computer programmer does not qualify as job-related if the position does not involve interacting with or selling to potential customers.

Criterion Validity: Criterion validity is a statistical demonstration of a relationship between scores on a selection procedure and job performance of a sample of workers. Criterion validity is more difficult to measure because it requires large sample sizes for each position.

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# EMPLOYER BEST PRACTICES FOR TESTING AND SELECTION

Supervisor Training: Ensure that tests and selection procedures are not adopted casually by managers.

Don't Discriminate: Administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability.

Validate: 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. Obtain the necessary documentation from vendors regarding adverse impact and validation. 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. Consult with counsel, and potentially an Industrial and Organizational Psychology expert to ensure compliance with UGESP.

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# EMPLOYER BEST PRACTICES FOR TESTING AND SELECTION

Obtain Indemnity: Ensure vendor contracts contain strong indemnification clauses.

Keep Current: To ensure that a test or selection procedure remains predictive of success in a job, keep abreast of changes in job requirements and update the test specifications or selection procedures accordingly. Regularly assess for adverse impact. Consider alternative or new testing measures that may have less of an adverse impact.

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# QUESTIONS?



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# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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