

# Pre-Employment Screening Methods: How Much Do You Really Want to Know?

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## Introduction

In today's economy, employers have access to a greater number of applicants as unemployment rates continue to be high and the unemployed continue to look for work. With increased choice comes the opportunity to develop strategies to improve and streamline the process for hiring employees. Pre-employment screening can be one of the best ways to ensure that an organization hires the right individuals for the right positions.

## The Benefits and Drawbacks of Pre-Employment Screening

### Benefits

- Pre-employment screening allows an employer to “screen in” employees who are a good fit for the organization.
- Screening techniques can also help an employer “screen out” potential employees that do not meet the requirements of the position.
- Screening procedures can help an employer reduce its exposure to a later “negligent hiring” claim.<sup>2</sup>
- Certain types of pre-employment screening procedures are statutorily required of employers.<sup>3</sup>

### Drawbacks

- Some techniques are time consuming and/or expensive.
- If screening procedures are numerous or invasive, qualified applicants may choose not to go through the process.<sup>4</sup>
- Employers can open themselves up to additional legal liability, depending upon the way the pre-employment screening procedures are performed.

## Methods of Screening

An employer looking to use pre-employment screening techniques will find no shortage of options. The simplest technique is the interview. Although not discussed in detail in this article, there are guides for acceptable question content.<sup>5</sup> Employers should consider using the application form to screen employees, check references, test applicants, and perform background checks.

### The Application as a Screening Tool

The job application can be an effective screening tool for most employers if it asks for the right information. Every application should ask for two things:

1. A complete work history, including explanations for gaps in employment, and
2. A release that authorizes the employer to contact and obtain information from former employers and indemnifies former employers for any responses given (some are reticent to give out information on former employees).

### **Testing Job Applicants: Will your test make the grade?**

Employers are allowed to utilize tests during the pre-employment application period. Tests can be a good resource for determining the hard skills, soft skills, or physical strength of an applicant. However, depending upon the type of test chosen, the employer should verify that it is in compliance with all state and federal regulations. The four most common types are ability tests, personality tests, medical tests and polygraph tests.

- *Ability Tests.* Ability tests can be helpful if a job requires certain technical knowledge or cognitive skills, but employers wishing to use this type of test must ensure that it does not violate the anti-discrimination statutes. A test cannot disproportionately disqualify applicants of a protected class status “unless the employer can show that the test results are job-related and consistent with business necessity.”<sup>6</sup> Employers with disparate-impact tests must conduct validation studies to prove that the test has a predictive relationship to future job performance.<sup>7</sup> Validation is costly, so employers should carefully consider the use of disparate-impact tests. Historically, general aptitude tests are more likely to require validation than tests such as typing tests, which are easily related to a particular job.<sup>8</sup>
- *Personality Tests.* Employers who use a personality test to screen applicants should make sure that the test is compliant with both the Americans with Disabilities Act (ADA) and the EEOC guidelines. Questions that would require the applicant to disclose the “existence, nature or severity of a disability” would be a violation of the ADA<sup>9</sup> whereas questions related to religion or sexual orientation would likely violate discrimination laws.<sup>10</sup> Psychological exams that might reveal an applicant’s mental disorder or impairment would also be improper under the ADA.<sup>11</sup> However, tests that are designed only to assess an applicant’s honesty, preferences, and habits and do not include any of the negative factors described above are likely acceptable.<sup>12</sup>
- *Polygraphs.* Both federal and state law prohibits the use of pre-employment polygraph tests. The Employee Polygraph Protection Act of 1988 makes it illegal to require, request, cause, or suggest that a job applicant take a polygraph test.<sup>13</sup> Additionally, the State of Washington banned private employers and state and local government employers from directly or indirectly requiring a prospective employee “take or be subjected to any lie detector or similar tests as a condition of employment.”<sup>14</sup>
- *Medical Tests.* The ADA prohibits pre-employment medical tests because there is a risk that employers will use the exams to discriminate against disabled individuals.<sup>15</sup> Medical tests can include physical fitness tests, psychological evaluations, HIV testing, genetic screening, tests for alcohol use, and vision tests.<sup>16</sup> Employers can give employment offers conditional upon the completion of a medical exam if (1) all applicants are subject to the test, and (2) the results of the tests are confidential and are separately filed and stored.<sup>17</sup> Pre-employment drug tests are allowed if all applicants are subject to them at the same stage of the application process.<sup>18</sup>

### **Background Checks: Do you really need to know?**

Background checks can also be a good way to screen potential employees and there are many types of background checks that can be performed.<sup>19</sup> An employer may elect to perform a credit check on job applicants; however, because this screening method is heavily regulated and fairly complicated, it is not discussed further in

this general overview.<sup>20</sup> Employers can also check an applicant's criminal record or search the internet for information. Both of these methods should be carefully considered and are discussed in turn below.

- *Criminal Records.* Employers who wish to check an applicant's criminal record should be aware of several legal pitfalls.
  - Use of a criminal record check to disqualify applicants may be unlawful if it disparately impacts applicants from a protected class.<sup>21</sup>
  - Conviction records, rather than arrest records, should be the basis for a decision because arrest records do not guarantee with any certainty that the individual actually committed the crime.<sup>22</sup>
  - Use of an arrest or conviction record should occur only when the information is a "business necessity" meaning that the decision not to hire an applicant based on a criminal record is "justified by a consideration of the nature and gravity of the offense, the timeliness of the conviction and the nature of the job in question."<sup>23</sup>

In Washington, employers that give employees or volunteers unsupervised access to minors under 16 years of age, developmentally disabled adults, or vulnerable adults must conduct a criminal history investigation.<sup>24</sup> Employers who receive a criminal history report as part of the investigation must notify the applicant within ten days of its receipt and provide the applicant with a copy of the report furnished to the employer.<sup>25</sup>

- *Using the Internet: To "Google" or not to "Google"?* By 2007, "roughly half of U.S. employers [were] using the Internet to vet job applicants."<sup>26</sup> However, it may not be the best screening method for several reasons.
  - It "allow[s] prospective employers to discover information about candidates that would otherwise be prohibited in traditional applications and interviews such as the age, marital status, or religious affiliation of an applicant."<sup>27</sup> This can lead to potential legal liability for an employer who uses information published on the internet to screen out an applicant if that information is protected under traditional screening methods.<sup>28</sup>
  - Although Washington does not, some states prohibit employers from making adverse employment decisions based upon an applicant's lawful off-duty conduct, so employers should use caution when basing a hiring decision upon behaviors posted on the internet.<sup>29</sup>
  - While an individual has no valid expectation of privacy for information voluntarily posted and not subject to security constraints, employers who gain access to private information by circumventing security blocks could be in trouble.<sup>30</sup>
  - Information on the internet may be untrue.<sup>31</sup> It could be, at best, a mistaken identity or, at worst, a fake profile meant to intentionally defame the applicant. Information discovered should be approached with skepticism.

There are several measures that an employer can take to decrease liability related to using the internet to screen job applicants.

- Set up a process for using the internet, including whether internet searches are allowed, which sites should be used, what information should be collected, and how information should be used.<sup>32</sup>
- Have a non-decision maker perform the search and weed out irrelevant or potentially discriminatory information so the decision maker considers relevant information only.<sup>33</sup>

- Keep records of the searches performed and their results.<sup>34</sup> These can be used later to refute an applicant's claim that improper or private information was unlawfully considered in the employment decision.<sup>35</sup>
- Use other screening methods to verify and supplement information found on the internet as it is not prudent to rely solely on information that could be incomplete or inaccurate.<sup>36</sup>
- Ask applicants to sign a waiver authorizing and acknowledging use of information from the internet in the employment application.<sup>37</sup>
- Make an offer of employment conditional upon the successful completion of a search, rather than conducting pre-employment searches.<sup>38</sup>

## Conclusion

The decision process for whether or not to use pre-employment screening methods, and which ones to use, will vary for every employer. Every employer making this decision should:

- Carefully analyze the job and develop a list of desirable traits an ideal employee would have.<sup>39</sup> If there are qualifications that will weed out potential applicants, such as degree or licensing requirements, list those as well.
- Determine whether those qualifications can be adequately screened for before employment and if the cost of developing screening mechanisms is a necessary investment.<sup>40</sup>
- Consider which methods are best suited to identify or weed out applicants based upon the qualifications and traits already identified.<sup>41</sup>

It is also important to establish a general employment screening policy that will properly guide employees in charge of hiring because it can decrease the risk of litigation and reduce operating costs associated with needless screening procedures. A policy should include:

- The reason for the policy and specific references to any state or federal laws the policy is meant to comply with;<sup>42</sup>
- Who the policy will apply to, assuming that different employment positions require different screening methods;<sup>43</sup>
- The types and scope of procedures to be performed;
- The specific process to be followed for each screening method used; and
- The individual or department responsible for enforcing the policy.<sup>44</sup>

Hiring the right individual for the right position can be an arduous process. Thinking through and implementing select pre-employment screening methods will offer employers a long-term advantage when augmenting your workforce.

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<sup>1</sup> Amanda K. Maus, a third year University of Washington law student, assisted with research and preparation of this article.

<sup>2</sup> “If an employee injures someone, whether that is physically, psychologically, or financially, some people may question whether a company should have known better than to employ such a person in the first place.” Pamela Q. Devata et al., *Safe Screening, Safe Hiring*, HR ADVISOR: LEGAL & PRACTICAL GUIDANCE, July–Aug. 2009, at 3.

<sup>3</sup> *Id.* For example, all employers must verify the identity of their employees and whether they are allowed to work legally in the United States. Immigration Reform and Control Act, 8 U.S.C. § 1324. Additionally, background checks may be required if an employee will work in an environment with children or vulnerable adults. See discussion *infra* Part III.b.i.

<sup>4</sup> Stephen F. Befort, *Pre-employment Screening and Investigation: Navigating Between a Rock and a Hard Place*, 14 HOFSTRA LAB. & EMP. L.J. 365, 414 (1997).

<sup>5</sup> See Befort, *supra* note 4, at 381-86.

<sup>6</sup> Befort, *supra* note 4, at 400.

<sup>7</sup> *Id.* at 401.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 404.

<sup>10</sup> *Id.* at 403-04.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 29 U.S.C. § 2002. There are exceptions to this general rule for federal and state government employers. 29 U.S.C. § 2006.

<sup>14</sup> RCW 49.44.120.

<sup>15</sup> Befort, *supra* note 4, at 386.

<sup>16</sup> *Id.* at 387; KILLEEN, *supra* note 5, at § 2-4(a) (alcohol testing is considered a medical test).

<sup>17</sup> 42 U.S.C. § 12112(d)(3).

<sup>18</sup> *Id.*

<sup>19</sup> Employers who wish to conduct their own background checks (including reports that discuss credit history, general reputation, criminal history, driving history, education history, or personal reference checks) should be careful to not become a “consumer reporting agency” under Fair Credit Reporting Act (FCRA). See Devata, *supra* note 2. Additionally, the employer should notify an applicant if an investigation might be performed. *Id.*

<sup>20</sup> Employers wishing to use credit checks should consult additional sources for guidance. See Befort, *supra* note 4, at 406; Devata, *supra* note 2 (generally describing the use of investigative consumer reports, including credit checks).

<sup>21</sup> Befort, *supra* note 4, at 405.

<sup>22</sup> *Id.* There may be exceptions to this general rule depending upon how recent the arrest was, whether it is likely that the individual did commit the crime, and whether the behavior at the time of arrest is related to the job. *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> RCW 43.43.832.

<sup>25</sup> RCW 43.43.834(4).

<sup>26</sup> Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 LAB. LAW. 19, 20 (2007).

<sup>27</sup> *Id.* at 38.

<sup>28</sup> *Id.* at 39.

<sup>29</sup> *Id.* at 34.

<sup>30</sup> *Id.* at 32. For example, setting up a fake username and password to gain access to a site that an employer would not otherwise have access to could be a violation of the Stored Communications Act. *Id.* at 32-33.

<sup>31</sup> Apalla U. Chopra, O’Melveny & Myers LLP, *In Search of Digital Dirt: The Legal Issues Raised When Vetting Applicants On-Line*, Pacific Coast Labor and Employment Law Conference (June 2009) at 16.

<sup>32</sup> *Id.* at 67.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 68.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* An employer choosing to do this should “comply with applicable FCRA (and state equivalents) disclosure requirements.” *Id.*

<sup>38</sup> *Id.* at 69.

<sup>39</sup> Befort, *supra* note 4, at 412.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 413.

<sup>42</sup> Devata, *supra* note 2.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*