

Vetting Talent without Drawing a Claim: Conducting Legally Compliant Background Checks

Ashlee M. Bekish
Target Corporation
Minneapolis

Veena A. Iyer
Nilan Johnson Lewis PA
Minneapolis

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FACT SHEET
BACKGROUND CHECKS: THE BASICS

Ashlee Bekish, Director/Employee Relations Counsel
Target Corporation
ashlee.bekish@target.com

Veena A. Iyer, Shareholder, Labor & Employment Practice Group
Nilan Johnson Lewis PA
viyer@nilanjohnson.com

Fair Credit Reporting Act

*The Fair Credit Reporting Act (FCRA) is a federal statute that establishes the **procedural requirements** for employers to obtain and use background check reports for employment purposes. 15 U.S.C. § 1681a et seq.*

The FCRA's coverage

1. To what type of reports does FCRA apply?

FCRA applies to “consumer reports” and “investigative consumer reports” obtained from “consumer reporting agencies.” 15 U.S.C. § 1681a(d) - (f).

2. What is a consumer report under FCRA?

The term “consumer report” means “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for . . . employment purposes.” 15 U.S.C. § 1681a(d).

Most background check reports obtained from private third-party vendors for employment purposes are consumer reports under FCRA.

3. What is an investigative consumer report under FCRA?

An “investigative consumer report” is a type of consumer report or “portion thereof in which information on a consumer’s character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information.” 15 U.S.C. § 1681a(e). However, an investigative consumer report does not include “specific factual information on a consumer’s credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when

such information was obtained directly from a creditor of the consumer or from the consumer.”
Id.

Most background check reports obtained from private third-party vendors for employment purposes do not involve personal interviews and therefore are not investigative consumer reports under FCRA in whole or in part. However, if a private third-party vendor is speaking with any individual or organization that has personal knowledge regarding a job applicant or current employee in order to create a background check report, it is important to assess whether that report is an investigative consumer report.

4. What is a consumer reporting agency under FCRA?

A “consumer reporting agency” is “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.” 15 U.S.C. § 1681a(f).

Most private third-party background check vendors are consumer reporting agencies. Additionally, there is one case from a federal district court in Connecticut concluding that a staffing agency can be a consumer reporting agency under FCRA where (1) it was paid a fee by its client (i.e., the placement fee); and (2) it was assembling and evaluating consumer reports relating to its job candidates for the purpose of furnishing these reports to third parties by means of interstate commerce (i.e., the staffing agency was procuring background check reports from a third-party agency and sending the report to the client with a notation of whether the subject was qualified for a position). *Adams v. National Eng’g Svc. Corp.*, 620 F. Supp. 2d 319 (D. Conn. 2009).

5. As a practical matter, what type of background check reports are covered by FCRA?

FCRA applies to much more than traditional credit reports. Because the definitions of “consumer report,” “investigative consumer report,” and “consumer reporting agency” are so broad, FCRA covers almost every kind of report obtained by an employer about a prospective or current employee from a third-party vendor. For example:

- Covered:
 - Criminal background check report obtained from a background check vendor
 - Credit report obtained from a credit reporting agency
 - Education or employment verification obtained from a background check vendor

- Not covered:
 - Criminal background information obtained by the employer directly from a court or court website
 - Bankruptcy information obtained by the employer directly from the court’s website

The FCRA's requirements BEFORE obtaining a background check report

1. What must an employer do before obtaining a background check report for employment purposes?

Before an employer can obtain a background check report on a current or prospective employee, it must do two things:

- Disclose to the current or prospective employee that the employer may obtain a consumer report for employment purposes.
- Obtain the current or prospective employee's written authorization for the employer to obtain a consumer report for employment purposes.

15 U.S.C. § 1681b(b)(2).

2. What are the requirements for the disclosure?

The disclosure must be:

- in writing;
- clear and conspicuous;
- in a document that consists solely of the disclosure that a consumer report may be obtained for employment purposes; and
- provided at any time before the consumer report is requested or procured.

15 U.S.C. § 1681b(b)(2) (A)(i).

3. Can the authorization be combined with the disclosure?

Yes. In fact, the authorization is the only information that can be combined with the disclosure.
15 U.S.C. § 1681b(b)(2)(A)(ii).

4. Has the federal government issued any template disclosure and/or authorization forms for employers to use?

No. Unfortunately, neither Congress nor any administrative agency has created a template disclosure, so employers should work with their legal counsel to ensure that their disclosure and authorization forms are compliant with FCRA.

5. What type of language should be avoided in disclosure forms?

- Liability releases, *see, e.g., Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir.), cert. denied, 138 S. Ct. 447, 199 L. Ed. 2d 340 (2017); *Cunha v. IntelliCheck, LLC*, 254 F. Supp. 3d 1124, 1130 (N.D. Cal. 2017);

- Inapplicable state-specific disclosures, *see e.g., Lewis v. Sw. Airlines Co.*, No. 3:16-CV-01538-M, 2018 WL 400775, at *3 (N.D. Tex. Jan. 11, 2018);
- Unnecessary acknowledgements (e.g., re: at-will employment or non-discrimination), *see, e.g., Lewis*, 2018 WL 400775, at *3; and
- Anything that is extraneous to the disclosure and authorization.

The FCRA's requirements AFTER obtaining a background check report

1. What is an adverse action?

Any employment-related decision that adversely affects a current or prospective employee—such as rescinding a conditional offer, suspensions without pay, denying a promotion or transfer, or terminating an existing employment relationship—could be considered an “adverse action” under FCRA. 15 U.S.C. § 1681a(h).

There is some debate about whether a preliminary ineligibility adjudication or decision is itself an adverse action. Several courts have held that it is not, explaining that employers must be able to make a preliminary ineligibility adjudication in order to determine whether to take the steps required to rescind a conditional offer or terminate employment. *See, e.g., Reid v. Kroger Co.*, No. 1:16-CV-815, 2018 WL 1327242, at *7 (S.D. Ohio Mar. 15, 2018); *Costa v. Family Dollar Stores of Virginia, Inc.*, 195 F. Supp. 3d 841, 845 (E.D. Va. 2016); *Williams v. First Advantage LNS Screening Solutions, Inc.*, 155 F. Supp. 3d 1233 (N.D. Fla. 2015); *Ramos v. Genesis Healthcare, LLC*, 141 F. Supp. 3d 341 (E.D. Pa. 2015); *Obabueki v. Int’l Bus. Machines Corp.*, 145 F. Supp. 2d 371 (S.D.N.Y. 2001), *aff’d* 319 F.3d 87 (2d Cir. N.Y. 2003), *cert. denied*, 540 U.S. 940 (2003). However, other courts have held that a preliminary ineligibility adjudication or decision could be an adverse action. *See, e.g., Branch v. Gov’t Employees Ins. Co.*, 286 F. Supp. 3d 771, 785 (E.D. Va. 2017); *Wright v. Lincoln Prop. Co.*, No. CV 15-3483, 2017 WL 386602, at *7 (E.D. Pa. Jan. 27, 2017); *Culberson II v. The Walt Disney Co.*, 2018 WL 1341679 (Cal. Super. Ct. Feb. 9, 2018); *Magallon v. Robert Half Int’l, Inc.*, 311 F.R.D. 625, 637 (D. Or. 2015); *Manuel v. Wells Fargo Bank, Nat. Ass’n*, 123 F. Supp. 3d 810, 823 (E.D. Va. 2015); *Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.*, 848 F. Supp. 2d 532, 538 (E.D. Pa. 2012).

2. What must an employer do before taking any adverse action against a prospective or current employee based on the contents of a background check report?

Before an employer can take an adverse action based on the contents of a consumer report, the employer must provide the individual:

- a copy of the consumer report and the Federal Trade Commission’s notice, “A Summary of Your Rights Under the Fair Credit Reporting Act”; and
- a reasonable opportunity to dispute any inaccuracies in the report.

15 U.S.C. §1681b(b)(3).

3. How much time is a reasonable opportunity to dispute any inaccuracies in the report?

Unfortunately, neither Congress nor any administrative agency has clearly established what amount of time constitutes a reasonable opportunity to dispute any inaccuracies in the report. There is case law suggesting that five business days will generally suffice, but without definitive statutory, regulatory, or case law, this is a fact-specific inquiry, and more time may be required under the circumstances. *See Beverly v. Wal-Mart Stores*, No. 07-CV-468 (RLW) Settlement Order (E.D. Va. May 1, 2009) (approving consent decree requiring employer to mail adverse action notices no earlier than five business days after the mailing of any pre-adverse action notices); FTC Opinion Letter from Clarke W. Brinckerhoff to Eric J. Weisberg, 1997 WL 33791228 (June 27, 1997) (concluding five business day waiting period was reasonable under the circumstances).

4. What must an employer do after taking an adverse action against a prospective or current employee based on the contents of a background check report?

When an employer takes an adverse action based on the contents of a consumer report, the employer must provide the individual:

- notice of the adverse action;
- the name, address, and telephone number of the consumer reporting agency which provided the report;
- a statement that the consumer reporting agency did not make the decision and is unable to provide the individual with the specific reasons for the employer’s decision; and
- notice of the individual’s rights to receive a free copy of the report within 60 days and dispute its contents (at any time) with the consumer reporting agency.

15 U.S.C. § 1681m.

The FCRA's requirements for background check reports that are also investigative consumer reports

1. What must an employer do in order to procure or obtain a background check report that is an investigative consumer report (i.e., one that involves personal interviews with individuals or organizations that have personal knowledge of the applicant)?

An employer must clearly and accurately disclose to the applicant that an investigative consumer report including information as to his or her character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made.

2. What are the requirements for the disclosure?

The disclosure must:

- be in writing;
- include a statement informing the applicant of his or her right to request
 - a complete and accurate disclosure of the nature and scope of the investigation requested (which must be mailed or otherwise delivered to the applicant no later than five days after the date on which the request was received or the report was first requested, whichever is the later); and
 - the Federal Trade Commission's notice, "A Summary of Your Rights Under the Fair Credit Reporting Act;" and
- be mailed or otherwise delivered to the applicant no later than three days after the date on which the report was first requested.

15 U.S.C. § 1681d(a) & (b).

The FCRA's exceptions

1. Are there any exceptions to FCRA's requirements?

Yes. Under FCRA, the definition of consumer report does not include "certain communications for employee investigations." 15 U.S.C. § 1681a(y). As such, when an employer procures such communications, it is subject to far fewer requirements than when it obtains a consumer report.

The communications that fall within the exception are ones made to an employer in connection with an investigation of:

- suspected misconduct relating to employment; or
- compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer.

Additionally, the communication cannot be made for "the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity," nor can it be shared within anyone other than the employer, an agent of the employer, a government official or department, a self-regulatory organization with regulatory authority over the activities of the employer or employee, or as otherwise required by law.

The interpretation of the exception has evolved over the last few years. The District of Minnesota concluded that the exception applies to background checks conducted pursuant to statutory requirements. *Martin v. First Advantage Background Servs. Corp.*, No. CIV. 11-3357 MJD/LIB, 2014 WL 1260392, at *6 (D. Minn. Mar. 26, 2014) (holding that the exception applied to background check report procured to ensure compliance with the SAFE Act). A year and a half later, the FTC has issued an advisory letter stating that, "we view Section 603(y) as covering only investigations of current employees, rather than investigations of both current employees and job applicants." (Letter from M. Mithal to R. Fliegel (Sept. 8, 2015) (available at https://www.ftc.gov/system/files/documents/closing_letters/nid/150908chwclosingltr.pdf)). And in the last few years, several courts have concluded that the background check at issue is part of a routine background check process, not a bona fide "investigation" as required for the exception to apply. See *Banks v. Cent. Refrigerated Servs., Inc.*, No. 2:16-CV-356-DAK, 2017 WL 1683056, at *10 (D. Utah May 2, 2017); *Thomas v. FTS USA, LLC*, 312 F.R.D. 407, 422-24 (E.D. Va. 2016); *Freckleton v. Target Corp.*, 81 F. Supp. 3d 473 (D. Md. 2015); *Manuel v. Wells Fargo Bank, Nat. Ass'n*, 123 F. Supp. 3d 810, 823 (E.D. Va. 2015); *Ramos v. Genesis Healthcare, LLC*, 141 F. Supp. 3d 341, 346 (E.D. Pa. 2015); *Newton v. Bank of America*, No. 2:14-CV-03714-CBM-MRWx, 2015 WL 10435907, at *4 (C.D. Cal. May 12, 2015).

Courts are still defining the scope of the investigations exemption. However, it is likely that the investigations exemption would cover a background check of a current employee suspected of stealing from the company.

State and Local FCRA and Similar Laws

1. Are there any Minnesota-specific requirements for procuring and using a background check report for employment purposes?

Yes.

Minnesota requires that, before an employer obtains a consumer report for employment purposes, it must provide a written disclosure that is included in or accompanies any written application (if an application is provided) stating that:

- a consumer report may be obtained or caused to be prepared;
- the applicant has the right to request a complete and accurate disclosure of the nature and scope of the report (which must be in writing and must be mailed or delivered to the individual within five days after the request for the disclosure was received or the consumer report was requested, whichever date is later); and
- the applicant can check a box to receive a copy of the consumer report.

Please note: The Minnesota disclosure must include information that is not required for a FCRA disclosure, and a FCRA disclosure must be comprised “solely” of the disclosure required by FCRA, plus the authorization.

Additionally, if the individual requests a copy of the report, the employer must ask the person preparing the report:

- to send a copy to the consumer within 24 hours of providing it to the person requesting the report;
- to include a statement of the consumer’s right to dispute and correct any errors and of the procedures under the FCRA; and
- to not charge the consumer for the report.

Minn. Stat. § 13C.02.

2. Are there any other states or municipalities that have specific requirements for procuring and using a background check report for employment purposes?

Yes, and more states and municipalities are adopting such requirements each year. Multijurisdictional employers must be particularly cautious that they are complying with federal law and the laws of the states and municipalities in which they operate. In particular, multijurisdictional employers should be aware of:

- States and municipalities with FCRA or FCRA-like equivalents, particularly those that have requirements that are more onerous than FCRA, like California, New York, and Minnesota; and

- Municipalities with FCRA-like requirements, such as New York City or Los Angeles, whose Fair Chance hiring laws establish specific procedures for using criminal history to make an adverse employment decision, including dispute periods that can be longer than those required under FCRA.

In short, FCRA is one of, but not the only, statute governing the procedural requirements for background checks. Specifically, employers must carefully evaluate relevant state and municipal laws, particularly Fair Chance hiring laws, to ensure they are following all of notice, pre-adverse action, and adverse action requirements when conducting a background check for employment purposes.

Title VII of the Civil Rights Act

Title VII of the Civil Rights Act (Title VII) prohibits an employer from failing or refusing to hire an individual “because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a). The EEOC and the courts have interpreted the statute to restrict an employer’s ability to use an applicant’s criminal history for an adverse employment decision in certain circumstances. The reasoning in these cases likely applies to credit history as well.

According to the EEOC, under what circumstances may an employer use an employee or prospective employee’s criminal history as a basis for an adverse employment decision?

The EEOC’s 2012 Guidance identifies two methods by which an employer can show that a criminal background check policy is job related and consistent with business necessity:

- the employer validates its policy by using one of the approaches outlined in the Uniform Guidelines; or
- the employer develops a two-stage screening procedure for evaluating applicants with criminal records in which it (1) initially examines the nature of the crime; the time elapsed since the offense, conviction, or completion of the sentence; and the nature of the job (i.e., the *Green* factors named after *Green v. Mo. Pac. R.R.*, 549 F.2d 1158 (8th Cir. 1977).), and (2) subsequently provides the applicant with an opportunity to show that the policy is inapplicable due to mitigating factors.

Under this two-stage screening procedure, the 2012 Guidance requires an employer to allow the applicant an opportunity to produce evidence of the following mitigating factors:

- the applicant was not correctly identified in the criminal record, or the record is otherwise inaccurate;
- the facts or circumstances surrounding the offense or conduct;
- the number of offenses of which the individual was convicted;
- the applicant’s age at the time of conviction, or release from prison;

- the applicant’s employment performing the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
- the applicant’s employment history before and after the offense or conduct;
- the applicant’s rehabilitation efforts;
- the applicant’s employment or character references and any other information regarding fitness for the particular position; and
- the applicant’s bonding under a federal, state, or local bonding program.¹

State and Local Laws Regulating the Types of Criminal and Credit History Employers Can Use in a Hiring Decision

1. Are there any Minnesota-specific requirements regarding the types of criminal or credit history that can be used in the hiring process to make an adverse employment decision?

Criminal, yes; credit, no.

First, under Minnesota law, an employer cannot inquire into, require disclosure of, or consider an applicant’s criminal history until (1) the applicant has been selected for an interview, or (2) in the event there is no interview, the applicant has received a conditional offer of employment. Minn. Stat. § 364.021(a).

Second, the Minnesota Human Rights Act, like Title VII, prohibits discrimination in employment based on various protected characteristics, including but not limited to race. Minn. Stat § 363A.08. The Minnesota Department of Human Rights has indicated that the adverse impact and job-relatedness inquiries applied to criminal history under Title VII are also applicable under Minnesota law. See <https://mn.gov/mdhr/employers/hiring-and-interviewing/120-arrest-%26-criminal-records.jsp>.

2. Are there any other states or municipalities that have specific requirements for procuring and using a background check report for employment purposes?

Yes, and more states and municipalities are adopting such requirements each year. Multijurisdictional employers must be particularly cautious that they are complying with federal law and the laws of the states and municipalities in which they operate. In particular, multijurisdictional employers should be aware that:

- Many states and municipalities have “ban-the-box” laws similar to Minnesota’s which restrict when an employer can inquire about criminal history (i.e., usually not until after interview or conditional offer). States that have adopted such laws include California, Connecticut, Hawaii, Illinois, Massachusetts, New Jersey, Oregon, Rhode Island, and

¹ *Id.*

Vermont. Municipalities that have adopted such laws include Austin, Chicago, Kansas City,² New York City, Portland, Philadelphia, Los Angeles, San Francisco, Seattle and Spokane.³

- Some of these same states and municipalities go even further with their legislation. Several years ago, “ban-the-box” legislation was the new hot topic and employers had to grapple with adjusting the timing of their criminal history inquiries. But many states and municipalities have moved *beyond* mere “timing” legislation. More and more states and municipalities are passing Fair Chance hiring laws imposing complex and unique requirements regarding employers’ use of background checks. These laws vary by jurisdiction, but they include provisions like requiring specific statements in job advertisements or solicitations (e.g., San Francisco, Los Angeles); using specific notices or posters (e.g., Philadelphia, San Francisco); requiring individualized assessments and the use of specific factors or methods (e.g., New York City, Los Angeles); giving applicants the right to provide evidence of rehabilitation and/or good conduct (e.g., California, New York City); and imposing longer record retention obligations (e.g., Los Angeles, San Francisco).
- Most states and municipalities prohibit the use of expunged or sealed criminal records in making adverse employment decisions. A large proportion of states and municipalities also discourage or prohibit inquiry into or reliance on arrests that did not result in convictions.
- There are also a number of states and municipalities that specifically prohibit the use of certain criminal convictions in making employment decisions, including California, Hawaii, Massachusetts, New York, Pennsylvania, Wisconsin, New York City, Philadelphia, San Francisco, and Seattle.
- Finally, a number of states and municipalities have adopted laws regulating the use of credit history in employment decisions, including California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, Washington, New York City, and Chicago.

Additional Resources

Using Consumer Reports: What Employers Need to Know

<https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-employers-need-know>

Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964

https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

² Passed but not effective until June 9, 2018.

³ Passed but not effective until), June 14, 2018 (penalties delayed until January 1, 2019).

FACT SHEET

Employee Selection Tools & Disparate Impact: The Basics

Ashlee Bekish, Director/Employee Relations Counsel
Target Corporation
ashlee.bekish@target.com

Veena A. Iyer, Shareholder, Labor & Employment Practice Group
Nilan Johnson Lewis PA
viyer@nilanjohnson.com

Title VII of the Civil Rights Act

Title VII of the Civil Rights Act (Title VII) prohibits an employer from failing or refusing to hire an individual “because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a).

1. How can an employment screening tool violate Title VII?

An employee screening tool can violate Title VII in one of two ways:

- it is used to engage in the disparate treatment of members of a protected class (e.g., a high school diploma requirement that is applied to African American candidates, but not white candidates); or
- it has a disparate impact on a protected class (e.g., a high school diploma requirement that screens out African American candidates at a higher rate than white candidates).

42 U.S.C. § 2000e-2

2. How is disparate impact measured?

Two rules are often applied to assess whether an employee screening tool has a disparate impact on a protected class:

- the Uniform Guidelines on Employee Selection Procedures’ four-fifths rule, which states that “a selection rate for any race, sex, or ethnic group which is less than four-fifths (or 80%) of the rate for the group with the highest [selection] rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.” 29 C.F.R. § 1607.4; and
- the courts’ statistical significance rule, which indicates that a disparity is statistically significant, not the result of chance, and indicative of disparate impact if a statistical

analysis reveals a “z-score” of two- to three-standard deviations,⁴ *Castaneda v. Partida*, 430 U.S. 482, 496 n. 17, (1977); *see also Humphries v. Pulaski County Special Sch. Dist.*, 580 F.3d 688, 692 (8th Cir. 2009); *EEOC v. Dial Corp.*, 469 F.3d 735, 742 (8th Cir. 2006).

There are significant debates, however, as to the circumstances under which each of these tests should be applied and the way in which the results, which can be divergent, should be interpreted (i.e., the four-fifths rule may indicate disparate impact, while the statistical significance rule does not).

3. Under what circumstances—if any—can an employer use an employment screening tool that has a disparate impact on a protected class?

An employer cannot use an employee screening tool that has a discriminatory effect unless the employer can show it is:

- related to job performance; and
- consistent with business necessity.

42 U.S.C. § 2000e-2(k)(1)(A).

Additionally, even if an employer shows that an employee screening tool is related to job performance and is consistent with business necessity, the employer will still be prohibited from using that tool if the EEOC or a private plaintiff can show there was an alternative screening tool that had:

- less disparate impact; and
- substantially similar effectiveness.

42 U.S.C. § 2000e-2(k)(1)(A)(ii).

4. How can an employer demonstrate that an employee screening tool is related to job performance and is consistent with business necessity?

The primary method for showing that an employee screening tool is job-related is through a validity study, which is generally conducted by an industrial-organizational psychologist who assesses whether:

⁴ Standard deviation is a statistic used to measure variance in a distribution, i.e., the difference between the average (mean) and any given value. If the difference is greater than two standard deviations, then it is “statistically significant,” meaning that it is unlikely that the observed difference is due to chance. For example, if the difference between the rejection rate of African Americans and Caucasians based on criminal background checks is two or more standard deviations, it is unlikely that the difference in rejection rate is due to chance.

- The tool is content-valid, meaning that “the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated” (e.g., a typing test for a typist);
- The tool is criterion-valid, meaning that there is “empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance” (e.g., a test for executives that measures leadership ability); and/or
- The tool is construct-valid, meaning that there is “data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated” (e.g., a math test that has been shown to be a good measure of quantitative skills, which are needed for a financial position).

29 C.F.R. § 1607.5.

5. What type of records—if any—must an employer maintain regarding the impact of employee screening tools on protected classes and the validity of those tools?

Employers must maintain and have available for inspection information that will disclose the impact that employment screening tools have on employment opportunities by ethnicity, race, and sex. 29 C.F.R. § 1607.4(A). If applications are made in person, an employer may maintain a log or applicant flow chart based on visual observation, the personal knowledge of the employer, or self-identification. *Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures*, 44 Fed. Reg. 11996, 11998 (1979). If applications are not made in person and the applicants are not personally known to the employer, self-identification may be the only option available. *Id.* When a self-identification form is used, the employer should advise the applicant that identification by race, sex and national origin is sought, not for employment decisions, but for record-keeping in compliance with federal law. *Id.*

Employers must also maintain evidence of validity for employment screening tools that have an adverse impact. 29 C.F.R. § 1607.4(A)(3) & (B)-(D). For all studies, this includes:

- When and where the study was conducted.
- A description of the selection procedure, how it is used, and the results by race, sex, and ethnic group.
- How the job was analyzed or reviewed and what information was obtained from this job analysis or review.
- The evidence demonstrating that the selection procedure is related to the job. The nature of this evidence varies, depending upon the strategy used.
- What alternative selection procedures and alternative methods of using the selection procedure were studied and the results of this study.

- The name, address and telephone number of a contact person who can provide further information about the study.

Id.

The following additional information is required for each type of validity study:

- Content Validity Study
 - The content of the job, as identified from the job analysis.
 - The content of the selection procedure.
 - The evidence demonstrating that the content of the selection procedure is a representative sample of the content of the job.
- Criterion Validity Study
 - A description of the criterion measures of job performance, how and why they were selected, and how they were used to evaluate employees.
 - A description of the sample used in the study, how it was selected, and the size of each race, sex, or ethnic group in it.
 - A description of the statistical methods used to determine whether scores on the selection procedure are related to scores on the criterion measures of job performance, and the results of these statistical calculations.
- Construct Validity Study
 - A definition of the construct, and how it relates to other constructs in the psychological literature.
 - The evidence that the selection procedure measures the construct.
 - The evidence showing that the measure of the construct is related to work behaviors which involve the construct.

Id.

There are simplified record-keeping requirements for employers with 100 employees or less. 29 C.F.R. § 1607.4(A)(1).

6. What happens if an employer fails to maintain such records?

The EEOC can draw an “adverse inference” that the employee screening tool had a disparate impact on one or more protected classes. 29 C.F.R. § 1607.4(D).

State Statutes

Numerous states—including Minnesota—have adopted anti-discrimination statutes whose provisions are identical or analogous to Title VII. As such, state law—as well as federal law—may regulate employment screening processes. Additionally, many states—including Minnesota—have adopted statutes regulating specific types of employment screening practices—such as background checks.

Additional Resources

EEOC Fact Sheet on Employment Tests and Procedures (last modified 2010)

<https://www.eeoc.gov/policy/docs/factemploymentprocedures.html>

The Uniform Guidelines on Employee Selection Procedures (1978)

<https://www.gpo.gov/fdsys/pkg/CFR-2014-title29-vol4/xml/CFR-2014-title29-vol4-part1607.xml>

- The Uniform Guidelines on Employee Selection Procedures is a uniform set of principles adopted by the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice “to provide a framework for determining the proper use of tests and other selection procedures,” including the method for conducting validity studies in the event an employee selection procedure results in adverse impact. 29 C.F.R. § 1607.1.

Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures (1979)

https://www.eeoc.gov/policy/docs/qanda_clarify_procedures.html