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# Pros And Cons Of Using Personality Tests In Hiring Process

By **Joyce Smithey and Reuben Wolfson** (July 3, 2019, 12:16 PM EDT)

This article summarizes and analyzes integrity tests (which focus on individuals' honesty and trustworthiness) and personality tests (which focus on individuals' personality traits) as tools for employers in selecting candidates for employment and assessing employees for promotion. We provide an overview of integrity and personality testing, discuss pros and cons, and advise practitioners of potential legal concerns, including issues under the Americans with Disabilities Act of 1990<sup>[1]</sup> and Title VII of the Civil Rights Act of 1964.<sup>[2]</sup>



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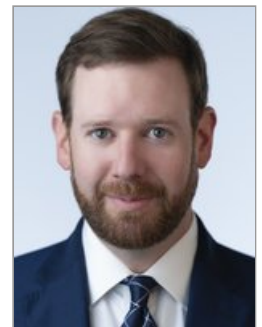
## What Is Personality and Integrity Testing?

Personality and integrity tests are tools that an employer may use to decide whether to hire job applicants and or promote employees.

### Personality Tests

Personality tests — also called personality inventory tests or covert integrity tests — assess a job candidate's or employee's integrity and suitability for a given employer or position based on various personality traits. Personality tests can be implemented in the form of:

- Interviews;
- Exercises;
- Observation and ratings;
- Questionnaires.



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Employers can use the information learned from personality tests to generate a profile to predict job performance and success for a given candidate or employee. Personality tests typically assess a number of personality traits. According to the U.S. Office of Personnel Management, the personality traits most frequently assessed are (1) extroversion, (2) emotional stability, (3) agreeableness, (4) conscientiousness, and (5) openness to experience. These traits are referred to collectively as the "big five" or the "five-factor model."

### Integrity Tests

Integrity tests — sometimes referred to as overt integrity tests or clear-purpose tests — assess a candidate's or employee's integrity, specifically focusing on honesty and trustworthiness. In short, an integrity test may be thought of as a credibility assessment. Integrity tests seek to identify honest candidates versus those with a potential penchant or predisposition for theft, misappropriation of employer finances or resources, absenteeism, or other red flags indicative of dishonest behavior.

## Should Employers Use Personality and Integrity Tests to Assess Job Candidates and Employees?

Employers naturally have a significant and vested interest in hiring honest and trustworthy employees with personalities suited toward success in a given position or that mesh with company culture. Employment lawyers sometimes must advise employers on the utility, advantages and pitfalls of implementing personality and integrity testing for their business with the goal of hiring candidates and promoting employees who both fit the employer's corporate culture and who appear to have more than a mere modicum of integrity so that they will likely succeed with the employer.

A prudent employment attorney stands ready to discuss the pros and cons of implementing such tests with employers, including assessing the legality of specific tests, test questions, and categories of inquiry to ensure clients do not run afoul of ADA or Title VII prohibitions.

Ethical and privacy concerns may also arise for employers using such tests. Employers should consider whether asking candidates test questions that many candidates would consider private in nature squares with the employers' culture and corporate ethics. Employers should determine whether test questions solicit information that may not be related to honesty or directly to the job for which the candidate is applying. Employers should also avoid invading candidates' or employees' privacy via impermissible inquiries that solicit confidential medical information or that potentially violate applicable state privacy laws.

Further, employers should consider test cost and return on investment when deciding to administer personality and integrity tests. In considering whether to advise employers to use personality and integrity testing, exercise caution and keep in mind that such testing may not be the right fit for every business, may not be worth the investment, and may invoke legal challenges down the road from prospective employees or employees for a failure to hire or failure to promote based on protected class discrimination, whether it be related to Title VII, the ADA, or state statutes or common law.

### ***Polygraph (or Other Lie Detector) Tests***

Some employers may ask why not just give job candidates for key positions a polygraph (or other lie detector) test to assess honesty. Some employers do provide job candidates with a polygraph test, particularly in the fields of law enforcement and security. That said, the Employee Polygraph Protection Act of 1988[3] and various state laws widely restrict the use of the polygraph and other lie detector tests.

In addition to cost and potential illegal use for many employers, polygraph results can mean many things and are unreliable in detecting actual lies. Accordingly, courts usually refuse to admit polygraph results as evidence.

Are personality and integrity tests any better for weeding out dishonest employees or those who lack conscientiousness, attention to detail, or ability to take directives from superiors? The same concerns are present, and it is up to employers to determine if investing in, and implementing, across the board personality and/or integrity testing for candidates or employees for a given position is a worthwhile business practice.

### ***Applicable State Laws Limiting Integrity and Personality Testing***

In advising employers, keep in mind that state law may limit an employer's ability to implement personality and integrity testing. For example, Massachusetts has a broad law prohibiting employers from using any written examinations to render a diagnostic opinion regarding an individual's honesty.[4] In other words, Massachusetts has effectively banned honesty exams. In addition, Rhode Island has a law stating that written integrity exams cannot be the "primary basis" for deciding whether to hire job candidates or to terminate or promote employees.[5]

### ***Americans With Disabilities Act Issues***

A legal issue with personality and integrity testing arises when a specific test methodology or set of questions implicates the ADA's ban on preemployment medical and mental health examinations.[6] The area employers often run into problems with is when an integrity test bleeds into a psychological test. Depending on the specific test and its parameters, criteria, and lines of inquiry, some courts have found tests to constitute an impermissible mental health examination under the ADA.[7]

Running afoul of the ADA in this context can open an employer up to liability for a failure to hire or promote claim based on a candidate's or employee's disabled status.

### **ADA Restrictions on Medical Examinations**

Historically, employers often asked job candidates and employees for information regarding potential physical and/or mental disabilities. Not surprisingly, such inquiries led to discrimination and rampant discriminatory hiring practices by employers based on disability, especially regarding invisible (often mental) impairments.

The ADA defines "disability," with respect to an individual, as:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment[8]

As the U.S. Equal Employment Opportunity Commission notes in its enforcement guidance[9] for disability-related inquiries and medical examinations of employees under the ADA, the ADA's provisions concerning disability-related inquiries and medical examinations protect the rights of applicants and employees to be assessed solely on merit. The enforcement guidance also explains these ADA provisions also protect the employers' right to ensure that employees can efficiently perform the essential functions of their jobs.

At the application/interview stage, the ADA prohibits all disability-related inquiries and medical examinations, regardless of whether they are related to the job, but note that the ADA does not prohibit employers from taking measures to uncover illegal drug use at this point in the hiring process.[10]

When an employer makes a conditional offer to a job candidate, but before he or she begins employment, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, if the employer acts accordingly for all employees hired to the same position or in the same job category.[11] But note that "if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation." [12] By acting in the same manner for all employees hired to the same position (or same job category), an employer guards against claims alleging disparate treatment or disparate impact discrimination based on disability.

After employment formally begins, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.[13]

### **Applicable ADA Legal Authority**

An analysis of applicable case law addressing psychological and integrity tests provides caution and guidance to employers regarding impermissible psychological inquiries that could discover information related to an invisible disability and/or mental impairment that would run afoul of the ADA provisions set forth above. Such case law, and the guidance therein, provides a lens through which you can advise clients about acceptable commercially available personality and integrity tests to purchase and implement or how to develop in-house testing that steers clear of impermissible medical inquiries under the ADA.

*Advise Employers That Some Personality Tests Are Designed to Diagnose Psychiatric Conditions and Therefore Are Medical Exams That May Violate the ADA*

Preliminarily, you should advise employers that some personality tests are specifically designed to diagnose psychiatric conditions (e.g., paranoia or schizophrenia) rather than the purposes of personality and integrity tests, which seek to determine work-related personality traits or character

for truthfulness. Any test specifically designed to reveal psychiatric disorders or other mental disabilities will qualify as a medical examination. Thus, such personality tests will violate the ADA when the ADA prohibits medical exam (as detailed above) and could potentially subject an employer to liability pursuant to a failure to hire or promote claim. Examples of such medical tests include the Minnesota Multiphasic Personality Inventory, which is discussed in detail below, and the Millon Clinical Multi-Axial Inventory.

As discussed above, the ADA permits medical examinations under specific circumstances after an employer has made an offer of employment. Thus, if an employer implements certain personality or integrity tests that have psychological components that may elicit mental disability information, an employer should use such tests only for deciding whether to hire individuals after making conditional offers of employment or for assessing internal promotions. And, even in those circumstances, employers would be wise to entirely avoid personality or integrity tests that elicit such potential disability-related information. Eliciting such information not only brings liability in play under the ADA for a potential failure to hire or promote claim, but also implicates privacy concerns regarding keeping and maintaining job candidates' or employees' medical information confidential.[14]

### *Minnesota Multiphasic Personality Inventory*

Federal circuit courts of appeals have come to different holdings as to whether the Minnesota Multiphasic Personality Inventory constitutes a medical examination that violates the ADA. The U.S. Court of Appeals for the Seventh Circuit found that the MMPI constituted a medical examination that used as a personality or integrity test violated the ADA.[15] In contrast, the U.S. Court of Appeals for the Eighth Circuit stated that the MMPI was a valid job-related screening tool and held the employer's use of it did not violate the ADA.[16]

### *Key ADA Takeaways*

Employers may require medical examinations under certain circumstances. Advise clients to err on the side of caution in design, implementation and use of personality and/or integrity tests by avoiding any questions or inquiries, whether overt or subtle, that could reveal confidential medical information that could allude to or solicit information regarding a job candidate's or employee's disability. Such questions can give a job candidate or employee grounds and motivation to raise a claim for failure to hire or failure to promote based on inquiries that potentially violate the ADA.

### **Title VII Considerations**

Title VII prohibits testing designed to, or that tends to, discriminate based on race, sex, religion, or national origin. While not as prevalent as claims under the ADA related to personality/honesty tests, personality and integrity tests can also spawn litigation alleging violations of Title VII based on theories of disparate treatment or disparate impact. That is, claimants may bring Title VII failure to hire or failure to promote claims arguing that an employer's personality and/or integrity test discriminates against them on the basis of their protected class (e.g., race, sex, religion, or national origin) because the employer either applies the test in a discriminatory fashion or the test has an adverse impact on them and those similarly situated to them (other candidates or employees of the same protected class).

A claimant may argue that a personality or integrity test is discriminatory on its face and explicitly treats a given minority class (e.g., female job candidates or employees) disparately. Such a claim is referred to as disparate treatment discrimination. A job candidate may be able to assert such a claim for a failure to hire, and an employee may be able to bring such a claim for a failure to promote.

A claimant may also argue that a personality or integrity test, while facially neutral, has an adverse impact on them because of their protected class (i.e., Christian job candidates or employees). Such a claim is referred to as disparate impact discrimination. A job candidate may be able to assert such a claim for a failure to hire, and an employee may be able to bring such a claim for a failure to promote.

It is important to work closely with employers to scrutinize personality and integrity tests to ensure they do not include questions that explicitly violate Title VII or facially neutral questions that could potentially discriminate against a protected class.

## **Considerations Regarding an Employee's Right to Privacy**

Privacy is a fundamental value in the United States protected by the U.S. Constitution. Integrity and personality test questions and lines of inquiry can infringe upon job candidates' or employees' privacy. However, the protection of the U.S. Constitution does not extend to private employers. Accordingly, employers should consider whether there are applicable state constitutional provisions and/or statutes to evaluate integrity and personality tests for impermissible inquiries that run afoul of such state privacy laws.

Further, assuming that no such state constitutional provisions or statutes are applicable to your client's situation, you should advise your client on making a serious value judgment regarding tests and test questions that may implicate privacy concerns and solicit confidential information from candidates or employees not directly related to the job at issue or trustworthiness.

A California appellate court case, *Soroka v. Dayton Hudson Corp.*,<sup>[17]</sup> provides caution to employers using integrity and personality tests that violate a state constitution and/or statute by invading a job candidate's privacy.

In *Soroka*, three applicants for security positions at Target stores challenged a psychological test that Target required known as the "Psychscreen," which constituted a combination of the Minnesota Multiphasic Personality Inventory and the California Psychological Inventory.<sup>[18]</sup> The test included questions regarding candidates' religious attitudes and questions that may have revealed a candidate's sexual orientation.<sup>[19]</sup> The court stated that Target must demonstrate a compelling interest and establish that the test serves a job-related purpose.<sup>[20]</sup> It found that Target could not do so.<sup>[21]</sup>

The court held that Target's preemployment requirement of psychological screening violates both the constitutional right to privacy and statutory prohibitions against improper preemployment inquiries and discriminatory conduct by inquiring into its applicants' religious beliefs and sexual orientation.<sup>[22]</sup>

*Soroka* provides sound guidance for employers considering integrity and personality testing. Its message to employers is to ensure integrity and/or personality tests solicit information that is job-related and serves a compelling interest.

## **Using Integrity and Personality Tests to Reduce Exposure to Negligent Hiring Claims**

Most states have recognized a tort claim for negligent hiring, which can open employers up to liability for the acts of their employees that fall outside the scope of employment when the employer knew or should have known the employee had a propensity to commit such acts. Integrity and personality tests can prove effective in immunizing employers from such claims as they constitute reasonable inquiries into candidates' honesty and trustworthiness. While implementing such testing consistent with the parameters described herein will not prove dispositive in defending a negligent hiring claim, employers can offer such testing as a persuasive defense to such claims.

## **Best Practices When Using Personality and Integrity Tests**

If an employer is implementing or using personality and integrity testing as part of its hiring or promotion process, you should provide the following advice.

### ***Do not request inapplicable personal information.***

Do not ask applicants or employees to disclose personal information about themselves unrelated to honesty or to the jobs for which they are applying or performing. Consider that privacy is a fundamental value and, as stated above, invading one's privacy may run afoul of various state tort laws and cross ethical boundaries that would result in an undesirable and potentially negative reputation for the employer.

### ***Assess other factors besides personality and integrity testing when making decisions.***

Use personality and integrity testing as one means for assessment of job applicants or employees, rather than as the primary or sole measure. When considering employees for promotion, performance history and track record with the employer should be paramount. Personality and integrity testing can, however, help identify skills vital to the employer at the management level when determining who to promote among a cadre of similarly skilled workers who have strong performance records but do not have experience or expertise supervising employees.

***Review the ADA and corresponding state laws regarding disabilities.***

Perform a thorough analysis to guard against ADA or similar state law violations regarding job candidates' or employees' disabilities. Review applicable federal and state court authority, which references specific tests that are either illegal or that may lead to legal challenges if utilized. For example, avoid tests or test questions that solicit medical information, particularly if that information relates to mental disabilities and/or could lead to the diagnosis a disability.

***Determine Title VII and similar state law implications.***

Perform a similar thorough analysis to guard against Title VII or similar state law violations regarding job candidates' or employees' protected classes such as race, sex, religion or national origin. Ensure that tests do not have questions or criteria that disparately treat any protected class and also analyze test results over time to ensure that tests do not have a disparate impact on any protected class even though said impact may not have been noticed or anticipated upon test implementation. Along those lines, administer the test in a nondiscriminatory and standardized fashion. When assessing test results, apply ratings and analyses across-the-board to ensure equal treatment of all test takers, which will also avoid claims of disparate treatment.

***Make sure questions are job-related and serve a business necessity.***

In conjunction with applicable legal authority discussed, ensure that test questions are job-related and crafted to conform to business necessity.

***Tie employer-created personality/integrity tests to confidentiality agreements and confidential and proprietary information policies.***

If the employer decides to create its own test, make sure to protect the employer by including references to the personality/integrity test in confidentiality agreements and confidential and proprietary information policies.

***Consider business needs for use of personality and integrity tests.***

Be mindful that personality and integrity tests may be prudent for many businesses, but not for all businesses. Consider each employer's unique needs before advising them to implement personality and integrity testing. The metrics these tests attempt to predict are not uniformly applicable to all jobs or employers.

Example. A small startup may be looking for entrepreneurial characteristics and outside-the-box thinking for which many personality and integrity tests may not be suitable. Some businesses may be in the market of undercutting competition (albeit legally) with a focus on guerrilla marketing or positioning for a hostile takeover. An employee's penchant for consistently complete honesty or conscientiousness may not be paramount to employers with such mandates.

Accordingly, employers must think critically about the utility of such personality or integrity tests for their overall mission and for specific positions. Ask whether personality and integrity tests will be helpful to hire, retain, and promote the type of employee who is best suited for the employer in general or for a particular position with the employer. In other words, consider whether a personality or integrity test will serve and advance the employer's key interests and goals.

***Work with the employer to select the best personality/integrity test to suit the employer's needs.***

There are currently many available personality/integrity tests for employers' use. Some well-known personality/integrity tests to screen applicants and evaluate employees include:

- DiSC;[23]
- Hogan Personality Inventory;[24]
- Caliper Profile.[25]

You should conduct research in your jurisdiction to see if a court has addressed the validity of any of these personality/integrity tests or any other personality/integrity test the employer is considering.

Personality and integrity tests can be a useful tool for employers in assessing the best job candidates to hire or best employees to promote. However, you should advise employers to use such tests in conjunction with other means of assessment and carefully evaluate them, both before, during, and after implementation. These steps are necessary to ensure that the tests do not discriminate against job candidates or employees and do not expose employers to potential liability for claims such as failure to hire or failure to promote.

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[1] 42 U.S.C. § 12101 et seq.

[2] 42 U.S.C. § 2000e.

[3] 29 U.S.C. § 2001 et seq.

[4] Mass. Gen. Laws ch. 149, § 19B.

[5] R.I. Gen. Laws § 28-6.1-1(b).

[6] 42 U.S.C. § 12112(d).

[7] See, e.g., *Karraker v. Rent-A-Center Inc.*, 411 F.3d 831, 837 (7th Cir. 2005) and *Griffin v. Steeltek*, 160 F.3d 591 (10th Cir. 1998).

[8] 42 U.S.C. § 12102(1)(A–C) (emphasis added).

[9] <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>

[10] 42 U.S.C. § 12112(d)(2); 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3.

[11] 42 U.S.C. § 12112(d)(3).

[12] 29 C.F.R. § 1630.14(b)(3).

[13] 42 U.S.C. § 12112(d)(4)(A).

[14] See 42 U.S.C. § 12112(d)(4)(C) (requiring that employers keep information obtained during medical examinations and disability-related inquiries confidential and make it available only to employees who are responsible for determining whether a job applicant or employee can perform job-related tasks).

[15] See *Karraker v. Rent-A-Center Inc.*, 411 F.3d 831, 837 (7th Cir. 2005).

[16] See *Miller v. City of Springfield*, 146 F.3d 612, 615 (8th Cir. 1998).

[17] 18 Cal. App. 4th 1200 (1st Dist. 1991),

[18] See *Soroka*, 18 Cal. App. 4th at 1204.

[19] *Soroka*, 18 Cal. App. 4th at 1205.

[20] *Soroka*, 18 Cal. App. 4th at 1214.

[21] *Soroka*, 18 Cal. App. 4th at 1214–16.

[22] *Soroka*, 18 Cal. App. 4th at 1218.

[23] See <https://www.discprofile.com>

[24] See <https://www.hoganassessments.com/assessment/hogan-personality-inventory>

[25] See <https://caliper.com.au>