

**PROFILES ASSESSMENTS:**  
**An Analysis of the Use of Assessment Tools**  
**And Federal and State Regulations affecting the Workplace**

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## I. BACKGROUND

### **A. The Importance of “Hiring Right”**

Being an employer today is difficult, to say the least. The workplace is fraught with minefields for the unwary or uneducated employer. Employers are tasked with improving productivity, fostering teamwork and building morale. The best way to meet these goals is to “hire right” the first time. Turnover and time-consuming personnel issues are barriers and distractions to these goals. To complicate matters, employees and applicants have become savvy “consumers.” They have become adept at marketing themselves for the perfect job and have well-honed interviewing skills.

Hiring an employee or promoting an employee requires a substantial investment - an investment of time - in training and developing necessary skills and institutional knowledge, and of money. Investments of money not only involve salary and benefits, but also training costs. There may also be potential losses of revenue due to poor customer relations, or losses as a result of employee conflict. To ensure a good hiring decision is made, it is worthwhile to do your homework. Background and reference checks, criminal background or credit history investigations help to ensure that you are hiring someone who has not broken the law and who is not lying on their application. But how can you divine from any application or even a twenty minute interview whether the person will be a “good fit” with the company and its culture, or whether the applicant has the necessary characteristics to be a team-player, a trusted employee and an appropriate company representative in the community? It is difficult, but assessment tools can be very useful in identifying such characteristics.

### **B. The Legality of Assessment Tools**<sup>1</sup>

An employee may administer an assessment test so long as the test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, national origin, or age. See 42 USC § 2000(e)-2(h) (2000). This means assessment tests are legal as long as they do not disproportionately exclude or eliminate minority and/or women applicants. This is called adverse impact or disparate impact. Where adverse impact occurs, an employer may still not be violating the law where the tests are reliable and have been properly validated.

In general, any assessment or test purporting to be a pre-employment psychological or personality exam will raise concerns about potential discrimination in regards to equal employment opportunities, and will raise concerns about privacy rights. From this anti-discrimination perspective, there are two primary federal statutes that regulate the content and administration of personality and physiological tests: Title VII of the federal Civil Rights Act of 1964 (Title VII) and the Americans With Disabilities Act (ADA). The federal Equal Employment Opportunity Commission (EEOC), which is the agency responsible for enforcing Title VII and the ADA and its state counterparts have determined, and the U.S. Supreme Court

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<sup>1</sup> Any observations and/or conclusions set forth in this publication are necessarily subject to revision by subsequent court or regulatory rulings or statutory modifications. For more in depth analysis, please review “A Legal Analysis of Occupational Testing and the Use of Profiles’ Assessments.”

has confirmed, that pre-employment tests are not inherently or presumptively illegal. But such tests must be shown to be both reliable and properly validated.<sup>2</sup>

In order to properly assess the legal landscape several resources should be considered. As a general rule, federal and state courts as well as agencies rely on the EEOC's Uniform Guidelines on Employee Selection Procedures (referred to as the "EEOC Guidelines"). One of the reasons for such reliance on the EEOC Guidelines is the fact that comparatively little litigation has arisen concerning the specific subject of pre-employment occupational/psychological testing. It is important to consider assessment tools in light of the various federal regulations, including, among others, the federal Americans with Disabilities Act (ADA), and Age Discrimination in Employment Act (ADEA) Title VII of the federal Civil Rights Act of 1964 (Title VII), and other civil rights legislation. To supplement the federal rules and EEOC Guideline interpretations it is equally important to consider the legal attitude toward and application of other pre-employment tests on a state by state basis – such as drug tests, polygraph tests and credit reports, especially in states such as California and Massachusetts, which have the most restrictive approaches to pre-employment tests.

### **C. Profiles Assessments: Meeting Legal Requirements**

Profiles has created validated and reliable assessment tools. The assessments have been developed by an experienced team with an excellent reputation. Profiles assessments have been rigorously evaluated under both federal and conservative state standards.<sup>3</sup>

Key to Profiles Assessments is the fact that they are truly "job related." Profiles International, Inc.'s "Job Match" concept is based on the premise that some individuals are better suited by temperament and intellect for certain types of work and less suitable for other types. The Company has found that assessing candidates' behavioral traits improved the hiring success rate to thirty-eight percent (38%). When both mental abilities and behavioral traits are assessed, the success rate increases to fifty-four percent (54%). When an assessment of occupational interests is added, the rate improves to sixty-six percent (66%). The most significant results are achieved, however, when an integrated assessment is used – i.e. one that measures not only behavioral traits, thinking style and occupational interests, but also includes a specific "job match." These integrated assessments have been reported to successfully identify a potentially excellent candidate more than seventy-five percent (75%) of the time.

Profiles' Assessments have been designed to function as an integrated assessment tool that effectively uses cutting-edge technology and empirical data in order to compare the individual qualities of candidates to the qualities of employees who perform their duties in a superior manner.

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<sup>2</sup> Generally, personality tests are designed to measure an individual's emotional, motivational, interpersonal and attitudinal characteristics, as opposed to abilities. Although personality tests were originally designed for use by psychologists and psychiatrists in clinical settings to diagnose and treat mental illnesses, the increasing use of such tests by employers has spawned an entire industry focusing on developing job-specific personality testing. Only a few states (Rhode Island and Massachusetts), have enacted legislation recognizing the use of some form of psychological testing in employment and no direct regulation of personality testing currently exists. Measuring the Mind, Nexins, 109 Penn. St. L. Rev. 857, 862 (2005).

<sup>3</sup> Nonetheless, an employer utilizing assessments is advised to measure the impact of the test on their specific hiring practices independently of the reliability and validation studies set forth in the assessments' Technical Manual in order to insure that there is no disparate impact with regard their specific hiring practices.

## II. EVALUATING THE LEGALITY OF ASSESSMENTS

There are several laws affecting the legality of pre-employment tests, and most are triggered by the number of employees an employer has. Employers with 15 or more employees must comply with Title VII.<sup>4</sup> Title VII “prohibits unlawful employment discrimination by public and private employers, employment agencies, labor organizations, and training programs on the basis of several specified classifications.” 42 U.S.C. Sections 2000e-2(a)-(d) (2001). Additionally, the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA) prohibit employers from considering a person’s disability or a person’s age (if over 40) in making employment decisions. Like Title VII, the ADA and the ADEA are enforced by the Equal Employment Opportunity Commission (EEOC). In order to assist covered employers in making employment decisions that comport with Title VII (and the other civil rights laws), the federal Unfair Guidelines on Employee Selection Procedures were published. The EEOC Selection Guidelines may be afforded some persuasive authority by the courts in federal cases, and may be strictly applied in state cases where the state has adopted these Guidelines, as in the case of California.<sup>5</sup>

Title VII expressly permits the use of ability tests, including personality tests. See 42 USC § 2000(e) – 2(h), and *Colbert v. H-K Corp.*, 4 Fair Empl. Prac. Cas., (BNA) 529, 530 (N.D. Ga. 1971) (finding personality and intelligence test to be reasonably related to job performance and thus lawful under Title VII). An employer may administer and to act on the results of any professionally developed ability test, provided the test, its administration, or the employer’s actions based on the results is not designed, intended or used to discriminate on the basis of race, color, religion, sex, age,<sup>6</sup> disability or national origin. The effect of using a seemingly neutral hiring (or evaluation) tool that has the effect of disproportionately eliminating minority and women applicants is called adverse (or disparate) impact. Where an adverse impact is found, the employer must show that the test at issue is job-related for the position in question and is consistent with business necessity.<sup>7</sup>

Under the ADA, individuals with disabilities are “not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is a prerequisite to the job ... this ... requires that employment tests be administered to eligible applicants or employees with disabilities that impair sensory, manual, or speaking skills in formats that do not require the use of the impaired skill.” 29 CFR Pt. 1630, App. § 1630.11. As such, an employee must provide upon advance request, modifications or alternative accessible tests to individuals with disabilities with impaired sensory, manual or speaking skills in order to take the test, unless such alternative would pose an

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<sup>4</sup> 42 U.S.C. §§ 2000e-2000e-17 (2001), as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000(3) (2001) and the Civil Rights Act of 1991, 42 U.S.C.S. § 1981 et seq. (2001).

<sup>5</sup> We encourage consumers to be familiar with which of the Guidelines have been adopted in their respective states.

<sup>6</sup> *Smith v. City of Jackson, Mississippi*, 544 U.S. \_\_\_\_\_, (2005) (holding that a cause of action for disparate impact is viable under the ADEA.)

<sup>7</sup> In 1991 Congress amended Title VII of the civil rights Act by adding § 703(i), providing a statutory basis for disparate impact theory. To prevail on a disparate impact claim, the plaintiff must first present a prima facie case of discrimination by showing the employer uses a particular employment practice that causes disparate impact on the basis of race, color, religion, sex, or national origin. The burden then shifts to the employer to rebut the presumption of discrimination by showing either: (1) the use of the practice does not cause disparate impact; (2) the practice is a business necessity and is related to the job; or (3) no less discriminatory alternative employment practice exists, see also 29 CFR § 1630.15.

undue hardship on the employer.<sup>8</sup> Id. In addition to the accommodation requirement for testing, an employer cannot inquire whether a person has a disability or ask about an applicant's worker's compensation history at the pre-offer stage. 29 CFR Pt. 1630 App. § 1630.13(a). According to the ADA Enforcement Guidance: Pre-employment Disability Related Question and Medical Examinations, this means a question that is "likely to elicit information about a disability" may not be asked at the pre-offer stage.

### **A. Evaluating Adverse Impact**

In determining whether an adverse impact has occurred, a majority of courts rely on the "safe harbor" provided by the "four-fifths (4/5)" or "80% rule" contained in the EEOC Guidelines. Under this rule, an adverse impact is found if the selection rate for any race, sex or ethnic group is less than eighty percent (80%) of the rate for the group is determined to be less than eighty percent (80%) of the rate for the group with the highest rate. However, more restrictive state courts, like California's, may determine disparate impact by applying an alternative test using statistical significance to determine disparate impact. See Clady v. County of Los Angeles, 770 F.2d 1421, 1429 (9<sup>th</sup> Cir. 1985). The alternative "statistical significance" test is triggered once a plaintiff has established a *prima facie* case (made their initial case) of disparate impact, the burden then shifts to the employer to show "by professionally acceptable methods" that the test is "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which the candidate is being evaluated." Id. at 1429, citing Contreras v. City of Los Angeles, 656 F.2d 1267, 1274-1275 (9<sup>th</sup> Cir. 1981). Validation studies of each component of a pre-employment test must show a correlation coefficient above +.30 to be considered reliable and therefore demonstrate a "legally sufficient correlation to success at the Academy and performance on the job." Clady at 1431.

Profiles meets the 80% rule. Profiles has demonstrated that the 80% rule is met with a variety of job groups, across the races and across several Job Match Percent levels (most commonly used by clients). This finding supports the Company's position that in using assessments for the purpose of matching individuals to particular jobs, there is no reason to expect any adverse impact on a protected sub-group such as race. There is no consistent pattern reflected in Profiles studies that would suggest anything more than an occasional actual difference in individuals, unrelated to race. Even if there were any real issue, it would arguably be obviated by the Job Pattern Match process that clients use with this product.

Profiles meets the alternative statistical significance test. Profiles Technical Manual does separately and independently evaluate each of the three components. It also analyzed any potential disparate impact of the "Job Match" portion of the assessment using statistical significance to measure any adverse impact. These statistical significance evaluations mean that the Profiles Assessments are validated and appear to be appropriate even in the minority of courts that do not use the safe harbor 80% rule. Therefore, properly administered Profiles Assessments are non-biased assessment tools that conform to the requirements of federal and

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<sup>8</sup> "This provision does not apply to employment tests that require the use of sensory, manual, or speaking skills where the tests are intended to measure those skills. Thus, an employer could require that an applicant with dyslexia take a written test for a particular position if the ability to read is the skill the test is designed to measure. Similarly, an employer could require that an applicant complete a test within established time frames if speed were one of the skills for which the applicant was being tested. However, the results of such a test could not be used to exclude an individual with a disability unless the skill was necessary to perform an essential function of the position and no reasonable accommodation was available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship." 29 CFR Pt. 1630, App. § 1630.11.

even restrictive state law. Nonetheless, employers using assessments should remain aware of the effects of the specific administration of any actual test, and the results achieved.

Lastly, Profiles Assessments were analyzed in terms of whether the job patterns used in the Job Match process caused any adverse impact. The Job Match is based upon the premise that job patterns are representative of the combination of traits, interests and abilities that conform to effective performance in a particular job. The adverse impact analysis was measured under the variance test and the job pattern system was inclusive and fair with reference to ethnicity. In no case did any particular group demonstrate significantly higher matches over another group – indicating no adverse impact.

## **B. Reliability And Validity**

Profiles Assessments are reliable and have been validated under several tests. The validation of the assessment tests is critical. As indicated above, where a selection procedure has an adverse impact on the hiring, promotion, or other employment opportunities of minorities and/or women it may be considered discriminatory unless the test has been validated for establishing the job-relatedness of the tests. Reliability and validity indicate to a potential user the quality and usefulness of the test. Reliability measures the probability that an individual retaking the test would obtain a similar test score – or, how dependably or consistently a test measures a characteristic. Validity refers to the specific characteristic the test measures and how well the test measures that characteristic. Both standards must be met. Valid conclusions cannot be drawn for a test score unless the test is proven to be reliable and even if a test is reliable, it may not be valid. “Validation” in this context is a measure of the test’s adverse impact on various minority groups and women.

### **1. Reliability.**

Based on the reliability tests used by Profiles, each component of the test, and all reported reliabilities are within necessary guidelines. According to the United States Department of Labor Employment and Training Administration’s reference guide, “Testing and Assessment: An Employer’s Guide to Good Practices,” (the “DOL Guide”), each test must have a “technical manual” which sets forth in detail the reliability measurements for each component of the test. All “reliabilities” should be within the guidelines provided by the DOL Guide. There are three tests for reliability provided for in the DOL Guide, (i) test-retest reliability; (ii) split-half reliability; and (iii) co-efficient alpha reliability. In addition, the technical manual should also provide (i) the types of reliability used; (ii) the manner in which the reliability studies were conducted; and (iii) the characteristics of the sample group.

The split-half reliability and the coefficient alpha reliability tests were used to measure the internal consistency of the Profiles PS II scales. The split-half coefficient indicates how consistently the questions measure the dimensions for which it was developed. The Profiles Technical Manual describes the split-half reliabilities for the nine PS-II personality scales. The Technical Manual also describes, with reference to each of the above-referenced co-efficiencies, the manner in which the reliability studies were conducted and the relevant characteristics of the sample group. The coefficient alpha indicates the consistency of responses to individual test (scale) questions. The higher a test’s coefficient alpha, the more consistent the questions are for that test (scale). The Profiles Technical Manual contains coefficient alpha reliabilities for the personality scales based on an analysis of approximately 27,000 applicants.

## 2. Validity.

“Validity” determines whether there is a link between test performance and specific job performance. In other words, it indicates whether the characteristic being measured by a test is reasonably related to the particular job qualifications and requirements. In a discrimination case, the question becomes whether the test is job related. In order to meet this test, the employer must show the scored test validly relates to the job at issue. There are three (3) recognized methods for conducting validation studies. The EEOC Guidelines discuss the conditions under which each type of validation strategy may be considered appropriate, i.e. (i) criterion-related; (ii) content-related; and (iii) construct-related validation. Profiles utilized each of these validation tests, and, as indicated below the Profiles Technical Manual clearly conforms to all guidelines.

Criterion-related validity correlates success on the test with success in performing critical or at least important job duties.<sup>9</sup> Criterion-related validation is established when there is a significant positive correlation between comparative success on the test and comparative success with regard to some significant measure of job performance. Where the correlation is measured concurrently with the administration of the test, it is termed “concurrent” validity. Where the criterion is obtained at a later time, it is referred to as “predictive” validity.

As applied to Profiles Assessments in the Technical Manual, concurrent validity was used to analyze the statistical relationship between the scores in the Behavioral Traits section and various performance criteria – such as sales performance, customer service performance, management performance, conscientiousness, and employee turnover. Concurrent validity was also employed in the Occupational Interest section to determine whether certain groups (such as sales personnel, engineers, etc.) have occupational interest patterns that would be predicted by the Interest Inventory. The results indicated that the Interest Inventory classifies various occupational groups in ways consistent with scale meanings and therefore is a good measure of performance. Both the manner of testing and the sample group are adequately explained and justified by the Company.

Predictive validity was used in analyzing the Interest Inventory. This analysis confirmed that where the degree of similarity between an employee’s occupational interest and the interests called for by the specific employment is high, it is more likely the employee will perform the job effectively and remain in that position for some time. Concurrent and Predictive validation was used in analyzing the TOGL exam indicating the TOGL is useful in predicting job performance in any number of occupational settings.

Content-related validity requires a demonstration that the content of the test represents important job-related behaviors, for instance, a typing exam for a typing position. Generally, this type of testing is not applicable to personality testing because it is more of a measure of skills and aptitude. However, content-related validity has been used appropriately by Profiles to validate the TOGL exam. The relationship between the TOGL scores and job performance criteria has been positively demonstrated across a variety of positions in different industries.

Construct validity refers to the extent to which a psychological measure may be viewed as an accurate measure of a particular characteristic. This validity measurement establishes a relationship between a particular aspect of satisfactory job performance and a specific trait, such

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<sup>9</sup> The comparison is related to a correlated coefficient ranging from -1.0 to +1.0. A correlation coefficient of +1.0 indicates a perfect relationship.

as assertiveness, required to perform effectively as a manager. The EEOC Guidelines indicate that “construct validity” is most appropriate for personality testing.

Profiles Technical Manual describes the process used to conduct a construct validation study of the Behavioral Traits component. The construct validation was done in two parts in order to examine the correlation coefficients both among the scales within the assessments; and between the assessments and other measures of adult personality – i.e. the Guilford-Zimmerman Temperament Survey and the Gordon Personal Profile Inventory which have both been widely documented. The analysis demonstrated that the patterns of correlations are consistent with expectations. Likewise, construct validity was also used to validate the Interest Inventory occupational scales, demonstrating that these scales are also valid. Clearly the Behavioral Traits and Interest Inventory can identify character traits that indicate good job performance, and indicate whether an applicant’s interests are consistent with the performance of duties required for the job.

### **C. Profiles Assessments Are Non-Discriminatory**

In a cause of action for discrimination under many of the federal statutes, once a plaintiff has showed that a pre-employment test creates an adverse impact, the employer then must prove that the test at issue is job-related. Profiles Assessments are job-related, and the validation and reliability tests prove it.

For purposes of Title VII, tests must be accurate and provide a fair assessment of job suitability by including a thorough job analysis and proof of validity is evidence of a thorough job analysis. See Washington v. Davis, 426 U.S. 229 (1976); and U.S. v. Fairfax County Virginia, 629 F.2d 932, 943 (4<sup>th</sup> Cir. 1980), cert. den’d, 449 U.S. 1078 (1980). Applying these standards, Profiles Assessments satisfy the requirements of Title VII.

For purposes of Title I of the Civil Rights Act of 1991, tests must not adjust scores, use different cut-off scores for different groups or alter test results based on demographics. Profiles avoids these practices, as such its assessments satisfy the requirements of Title I.

For purposes of the Age Discrimination in Employment Act (ADEA), age cannot be used as a basis for hiring absent a legitimate business purpose. As there are no test questions directed to “age”, and as all questions are developed for a legitimate business purpose, the assessments satisfy the requirements of the ADEA.

For purposes of the Americans with Disabilities Act (ADA) (and the Rehabilitation Act of 1973), the employer administering the test must provide a reasonable accommodation to the applicant unless the reasonable accommodation will pose an undue hardship on the employer. Reasonable requests for accommodations may require some modifications to the assessments. For instance, larger print or providing a reader may be appropriate for visually impaired test subjects. Since Profiles Assessments are not timed, the allowance of extra-time is not a necessary accommodation. Profiles’ management team is well aware of ADA requirements and will work with employers to ensure subjects with disabilities are not denied an equal opportunity to do their best. Additionally, all testing materials request an applicant to identify if an accommodation is required. 29 CFR Pt. 1630. App. §1630.14(6).

Perhaps the greatest concern about assessment tests is whether they constitute a “medical exam” under the ADA. The ADA specifically provides that an employer “shall not conduct a

pre-offer medical examination or make inquiries as to whether such applicant is an individual with a disability or as to the nature or severity of such disability,” see 42 U.S.C. § 12112(d) (2) (A); see also 29 CFR § 1630.13 and § 1630.14. The law provides that a covered entity may make pre-employment inquiries “into the ability of an applicant to perform job related functions” and can even allow the employee to “describe or to demonstrate how, with or without a reasonable accommodation, the applicant will be able to perform job-related functions.” However, where a “pre-employment medical examination” is required, it is only permissible under the ADA where the applicant has been conditionally offered a position and where medical examinations are given to all similarly situated employees entering into a particular job classification. 42 U.S.C. §12112; see also 29 CFR § 1630.14 (b).

A “medical examination” is a procedure or test that seeks information about an individual’s physical or mental impairments or health.<sup>10</sup> According to the EEOC Guidelines, a “psychological examination” is considered to be medical in nature if it provides evidence that would lead to identifying a mental disorder or impairment listed in the American Psychiatric Association’s most recent Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).<sup>11</sup> Thus, the use of clinically oriented personality measures designed primarily to diagnose psychopathology, such as the MMPI and the CPA, would probably violate the ADA’s prohibition on medical examinations. Medical tests are normed on a population of individuals with some type of medical disorder and are designed to measure psychopathology in order to diagnose mental disorders and plan treatment. *Such tests are used for a very different purpose than Profiles’ assessment tools, which were not developed using subjects with known mental disorders and which specifically is not designed to determine a candidate’s psychological balance.*

Indeed, in defining physical or mental impairment for purposes of the ADA the definition specifically excludes “common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. 29 CFR Pt. 1630, App. § 1630.2(h). This interpretation is mirrored in the ADA Guidance - “if a test is designed and used to measure things such as honesty, tastes and habits, it is not medical.” ADA Enforcement

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<sup>10</sup> It is not always easy to determine whether something is a *medical* examination. The following factors set forth in the ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations are helpful in determining whether a procedure or test is *medical*:

- Is it administered by a health care professional or someone trained by a health care professional?
- Are the results interpreted by a health care professional or someone trained by a health care professional?
- Is it designed to reveal an impairment or physical or mental health?
- Is the employer trying to determine the applicant’s physical or mental health or impairments?
- Is it invasive (for example, does it require the drawing of blood, urine or breath)?
- Does it measure an applicant’s performance of a task, *or* does it measure the applicant’s physiological responses to performing the task?
- Is it normally given in a medical setting (for example, a health care professional’s office)?
- Is medical equipment used?

In many cases, a combination of factors will be relevant in figuring out whether a procedure or test is a *medical* examination.

<sup>11</sup> The current edition of the American Psychiatric Association’s diagnostic and Statistical Manual of Mental Disorders (now the fourth edition, DSM-IV) is relevant for identifying these disorders. The DSM-IV has been recognized as an important reference by courts and is widely used by American mental health professionals for diagnostic and insurance reimbursement purposes. Not all conditions listed in the DSM-IV, however, are disabilities, or even impairments, for purposes of the ADA. Even if a condition is an impairment, it is not automatically a “disability.” To rise to the level of a “disability,” an impairment must “substantially limit” one or more major life activities of the individual. EEOC Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities.

Guidance: Pre-employment Disability-Relation Questions and Medical Examinations. In Daley v. Koch, 82 F.2d 212 (2d Cir. 1989), the Court confirmed that a test of an individual's judgment, behavior and impulse control did not amount to a test of a "mental condition" within the context of the ADA.<sup>12</sup> Moreover, Profiles Assessments do not contain health-related questions and do not constitute a "fitness" test. As such, Profiles tests do not appear to constitute medical examinations under the ADA.

### **III. PRIVACY CONSIDERATIONS**

All forms of employee testing that are designed to probe the test-taker's mental processes and thought patterns raise privacy concerns. The United States Constitution does not specifically recognize a constitutional right to privacy.<sup>13</sup> And although there are certain "intrusions" that are considered inappropriate under United States Supreme Court case law, none of these cases address the use of pre-employment occupational/personality tests. That said, many state constitutions expressly guarantee certain privacy rights. For instance, Article I, Section 1 of the California state constitution was amended by an initiative adopted by the voters on November 7, 1972, to specifically include the right to privacy as an "inalienable" right.<sup>14</sup> The California courts have in turn specifically extended these privacy protections to employees in the private sector, see, White v. Davis, 13 Cal.3d 757 (1975), and have further held that intrusions into an individual employee's privacy must be justified by a "compelling interest." See also Semore v. Pool, et al., 217 Cal. App. 3d 1087 (1990), in which the Court of Appeals found no compelling interest to justify requiring an employee to take a "reaction test," a form of drug test.<sup>15</sup>

In fact, California has case law identifying what constitutes an unconstitutional invasion of privacy in the context of a pre-employment psychological exam. Saroka v. Dayton Hudson Corp., 18 Cal. App. 4<sup>th</sup> 1200 (1991), involved a class action lawsuit where the class was composed of job applicants who had applied for security positions at Target Stores and, as a condition of employment, were required to complete an assessment consisting of the Minnesota Multi-Phasic Personality Inventory (MMPI) and the California Psychological Inventory (CPI), tests used to assess psychological balance (true psychological tests). The test included such questions as "I feel sure there is only one religion," and "I am very strongly attracted to members of the opposite sex." Id. at 1205.

The Saroka trial court ruled the testing in question was valid, but the Court of Appeals reversed. In rejecting the Target Stores counsel's argument that the company intended the test to screen out applicants who were emotionally unstable and thus might be expected to put customers in jeopardy, the court noted that while Target had a legitimate interest in employing emotionally stable persons to be security officers, *testing applicants about their religious beliefs*

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<sup>12</sup> Personality tests, which have been professionally validated for a certain position, are arguably a more objective selection method than an interviewer's subjective responses to an applicant, whether conscious or not.

<sup>13</sup> Similarly, the U.S. Supreme Court has never directly addressed personality testing within the context of privacy.

<sup>14</sup> "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Cal. Const. Art. I, Sec. 1

<sup>15</sup> The common law is a source of privacy rights independent of the state constitution. California recognizes four distinct torts as invasions of privacy – intrusion into private affairs, public disclosure of private facts, publication of statements putting someone in a false light, and appropriation of someone's likeness. 712 PLI/Lit 199, 212 (Workplace Privacy Laws Governing California Employer) 2004.

*and sexual orientation did not further this interest.* Id. at 1214. Therefore an employer’s interest in securing psychologically fit applicants for security positions was not compelling enough to justify asking highly intrusive questions about the applicant’s religious and sexual preferences on the job application. The court reasoned that these were not “job-related” questions and Target, and other similarly situated employers, was barred from continuing to require this test for job applicants.

This does not mean that an employer may never have a compelling interest. In Hill v. National Collegiate Athletic Association, (1994) 7 Cal. 4<sup>th</sup> 1 (1994), a case that has been routinely applied to employers, the California court did find a “compelling interest” in the need for, and use of, non-discriminatory drug testing programs for student-athletes. Id. According to Hill, the critical factor in determining whether a cause of action for invasion of privacy exists is “the specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests.” Hill at 34. Likewise, an employer’s legitimate business interests would, according to the court, under the proper circumstances, constitute a “compelling interest.”

Even in restrictive states such as California (or any other state following California’s lead), it is reasonable to conclude that Profiles Assessments would not constitute an actionable invasion of privacy because the scales used do not seek to determine a subject’s “psychological balance,” sexual preference, religious or political beliefs – those areas deemed to be “private” in the Soroka case. Instead, the Profiles scales are designed to ascertain a subject’s behavioral traits, temperament and disposition. Moreover, the Job Match component establishes strong evidence of job-relatedness for each of the scales used and to the extent it may be necessary, could reasonably be utilized as justification for the “compelling interest” in asking those specific questions. Finally, the design of the assessments is such that if a question caused a test subject to feel uncomfortable, it could be left unanswered without affecting the job match percent.<sup>16</sup>

#### IV. **OTHER PRE-EMPLOYMENT TEST INTERPRETATIONS**

Employers have used pre-employment tests for many years, but only in recent years have employers begun to utilize personality profiles at the pre-employment stage. As such, a look at how various federal and state laws have been applied to other types of pre-employment tests can be instructive.

##### **A. Drug Testing**

Drug testing is a widely used employment examination, and both federal and state laws allow such testing, with some limitations.<sup>17</sup> Federal law provides that federal employees engaged in “sensitive” positions may be tested for drug use. Executive Order No. 12,564 (September 15,

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<sup>16</sup> Employers should always keep in mind that they are required to maintain records that enable analysis of the impact their selection procedures have on applicants of different race, gender and ethnic group. 29 CFR § 1607.4.

<sup>17</sup> The ADA CFR provisions reflect Title I’s neutrality toward testing for the illegal use of drugs. Such drug tests are neither encouraged, authorized nor prohibited. The results of such drug tests may be used as a basis for disciplinary action. Tests for the illegal use of drugs are not considered medical examinations for purposes of this part. If the results reveal information about an individual’s medical condition beyond whether the individual is currently engaging in the illegal use of drugs, this additional information is to be treated as a confidential medical record. For example, if a test for the illegal use of drugs reveals the presence of a controlled substance that has been lawfully prescribed for a particular medical condition, this information is to be treated as a confidential medical record. See House Labor Report at 79; House Judiciary Report at 47. 29 CFR Pt. 1630. App. § 1630.16(c).

1986). And even in California, a state known to be more “employee friendly”, municipal applicants may be tested for evidence of drug use, even in the absence of individualized suspicion. Loder v. City of Glendale, 14 Cal. App. 4<sup>th</sup> 846, 886-887, 897-898 (1997).

In considering the most restrictive interpretations of drug testing laws, California case law is instructive. California courts seem to accept the idea of testing as long as such limited invasion is only required of “prospective,” as opposed to incumbent, employees: as long as all candidates for the same or similar position are required to undergo the examination: and where each prospective employee is forewarned that any offer of employment is conditioned upon the examination.<sup>18</sup>

Because the Profiles Assessments do not seek information regarding religious beliefs, sexual orientation, and the like, and because there is currently no case law which has determined that such an occupational assessment constitutes an illegal invasion of privacy, the Profiles questions are not likely to be viewed as an “invasion of privacy” under more restrictive state laws. However, especially with respect to testing “present employees,” the most prudent course of action for an employer, especially a California-based employer, would be to test all employees who are in like positions and to make adverse decisions (such as firing an employee) on a consistent basis which can be documented as “job-related.”

### **B. Polygraph/Lie Detector Tests.**

Profiles Assessments do not constitute a “polygraph” test under the federal law. The Employee Polygraph Protection Act of 1988 (“EPPA”) deems it unlawful for any employer “engaged in or affecting commerce or in the production of goods for commerce” to directly or indirectly require any employee or prospective employee to take any lie detector test, subject to certain exclusions. 29 U.S.C. § 2002. Even in those few cases where forced polygraphs are authorized, the EPPA prohibits polygraph questions by a representative of a covered “employer” concerning an employee’s religious beliefs or affiliations, beliefs or opinions regarding racial matters, political beliefs or affiliations, any matters relating to sexual behavior, and beliefs, affiliations, opinions or lawful activities regarding unions or labor organizations. 29 U.S. C. § 2007(b) (1) (C). Under the EPPA, a “lie detector” test is defined to encompass a test involving a “polygraph, deceptograph, voice-stress analyzer, psychological stress evaluators, or any similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.” 29 U.S.C. § 2001(3). The term “polygraph” is defined as an instrument that; “(A) records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns at minimum instrumentation standards; and (B) is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty of an individual.” See, 29 U.S.C. § 2001(4).

Again restrictive states, such as California and Massachusetts, preclude private employers from requiring an applicant or employee to submit to a polygraph examination as a condition of employment or continued employment. While Massachusetts is by far the most restrictive, a California employer may, nonetheless, request that prospective employees take such a test, provided that the prospective employee is first advised in writing, at the time the test is to be administered, of his or her rights under Section 432.2(a) of the Code to refuse the request and to be protected against adverse treatment by the employer for such refusal.

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<sup>18</sup> See Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034 (1988) and Pilkington Barnes Hind v. Superior Court, 66 Cal. App. 4<sup>th</sup> 28 (1998).

As applied to Profiles, the Profiles Assessments include a “Distortion Scale,” which measures a person’s tendency to create an exaggerated false impression on the assessment. The scale is not employed to render a “diagnostic opinion” but, instead, to account for a certain margin of error in assessment tools which is unavoidably linked to the answers given by candidates. Based on the federal definition, the Profiles Assessments are not considered a lie detector test. A state-by-state evaluation of any applicable state laws is necessary to ensure that the state definition is not broader than the federal definition.

### **C. Restrictive State Laws Relating to the Use of the Assessments**

#### **1. Employment Discrimination Prohibitions.**

Even where state laws are most restrictive, Profiles Assessments can be used. The assessments, as demonstrated by its thorough validation process, do not illegally discriminate. The representative sampling of employees used to develop the assessments was carefully selected. In addition, those who participated in the validation studies were selected to represent a true cross-section of the working population in terms of race and gender. The Technical Manual sets forth these validation studies in great detail.

Furthermore, none of the questions in the assessments asks about a person’s religious beliefs. There are a comparatively very few “yes/no” questions in the Behavioral Traits section which *may* be considered to reference “ethics” or “values” in a generic sense. Examples of such questions include: “You always follow rules, staying within policies and guidelines;” “Society puts too many controls or restrictions on people;” “There are times when taking revenge is the only fair and logical thing to do.”

#### **2. Employment Sexual Orientation Inquiries.**

Some state laws provide that an actual or prospective employee may not be discriminated against based upon his or her actual or perceived sexual orientation. See e.g. Cal. Labor Code § 1102.1(a) (2001). This is not an issue as no questions or scales in the assessments attempt to illicit information regarding sexual orientation.<sup>19</sup>

#### **3. Limitations on Disclosure of Arrest and Detention Records.**

Both federal equal employment laws and state statutes specific to pre-employment inquiries govern the use of arrest-related information in the hiring process. EEOC Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 et seq. (1982) (EEOC Notice N-915-061 (September 7, 1990), indicates that an Employer’s use of arrest records or arrest-related information may implicate federal equal employment concerns and state statutory protections. Indeed, the EEOC’s guidance on the use of arrest records to make employment decisions

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<sup>19</sup> Somewhat related to this issue is whether an employer can make employment decisions based on legal off-duty conduct. This is in violation in California under California Labor Code §96, effective 1/1/00 which provides “claims for lost wages as the result of demotion, suspension or discharge from employment for lawful conduct occurring during non-working hours away from the employers premises.” Therefore, to the extent that questions asked may result in a violation of state law, local counsel should be consulted.

concludes that a requirement of a good credit record for job applicants has a foreseeable disproportionate impact on minority employees. Similarly, some federal courts have applied Title VII of the Civil Rights Act of 1964 to disapprove inquiring into and/or using arrest records because of their adverse impact on minorities and marginal or job-relatedness. While these decisions generally permit employers to make questionable employment decisions based on an investigation of the circumstances that led to the arrest, assuming either job-relatedness or the absence of disparate impact, a wholesale exclusion of people with arrest records will almost never be upheld. Green v. Missouri Pac. P.R. Co., 549 F.2d 1158, 1160 (8<sup>th</sup> Cir. 1977). Under Green, an employer must establish the “business necessity” for denying employment based solely on the applicant’s criminal record and requires the employer to use the following factors in its analysis of the applicant’s criminal record and requires the employer to use the following factors in its analysis of the applicant’s criminal record: (1) the nature and gravity of the offense or offenses; (2) the time that had passed since the conviction or arrest occurred; and (3) the nature of the job held or sought. See also, Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952 (D.D.C. 1980), aff’d, 702 F.2d 221 (D.C. Cir. 1981); Gregory v. Litton Sys., Inc., 316 F. Supp. 401 (C.D. Cal. 1970), modified on other grounds, 472 F.2d 631 (9<sup>th</sup> Cir. 1973).

Some state laws prohibit employers from asking a prospective employee to disclose, information concerning an arrest or detention that did not result in a conviction, or information concerning a referral to, and participation in, any pretrial or post-trial diversion program. See e.g. Cal. Labor Code § 432.7(a); N.Y. Exec. Law § 296 (16), and, to a lesser extent Va. Code Ann. §19.2 – 392.4. Conviction is often defined to include a plea, verdict, or “finding of guilt” regardless of whether sentence is imposed by a court. Id. This usually means that an employer may ask a prospective employee about an arrest for which the prospective employee is out on bail or on his or her own recognizance pending trial. Id.

While most of the Profiles Assessments do not ask questions regarding an employee’s arrest or detention history, the Step Two Survey does inquire into these areas. As such employers are advised to seek local counsel to evaluate this issue on a state-by-state basis.

#### **4. Filing and Copying Requirements.**

We are only aware of one state that has a filing requirement. In California, if a prospective employee is required to sign an employment application, the employer is required to file a copy of the form with the office of California Division of Labor Standards Enforcement. Cal. Labor Code § 431. A prospective employee must also be given a copy of any instrument signed by the prospective employee relating to the obtaining of such employment. Cal. Labor Code § 432.

It is not clear whether or not these regulations affect the assessments. The assessments are not an employment application although the test may be a requirement for obtaining employment, and should be signed by the applicant. Clearly the prudent course of action is to file a copy of the statement with the local office of the California Division of Labor Standards Enforcement and provide a copy to the prospective employee.

**V.**  
**CONCLUSION**

The assessment tools developed by Profiles International, Inc., have been subjected to numerous tests for validity and reliability. These assessments fit the right person to the right job. Moreover, the assessments avoid intruding into employee privacy or discriminating against any protected group in violation of federal or state laws.

The key to any pre-employment assessment is whether the test provides a reasonable basis for predicting the applicant's job performance. Used appropriately, as guided by the Technical Manual, and by providing any necessary "reasonable accommodations," by following the notice and filing requirements, by measuring any adverse impact, and by reviewing any updated developments in the law with legal counsel, a prospective employer can feel secure that the assessments of Profiles International, Inc. are legally-sound employment assessment tools.