

**Pre-employment Strength and Agility Testing
A Legal Monograph for Employers**

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This publication was undertaken in furtherance of *Cost Reduction Technologies'* mission to provide a cost-effective measure for industry to reduce workplace injuries before they occur. This legal analysis is intended to provide insight into regulations that protect and encourage pre-employment testing.



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General Review

1. Is pre-employment strength and agility testing permitted under Americans with Disabilities Act (ADA)? Yes.

Pre-employment strength and agility testing is permitted under the ADA. An employer may make inquiries or ask a prospective employee to demonstrate his or her abilities for a particular position without being discriminatory.¹

2. Can employers legally refuse employment to applicants who are not physically capable of performing the essential functions of the job without risk of injury? Yes.

Employers can legally refuse employment to applicants when they are not physically capable of performing the essential functions of the job. The employer must be able to show, however, that the tasks are of business necessity and directly related to the employment at hand. If the prospective employee cannot physically perform crucial job functions, they may refuse employment even if discriminatory.

3. Can employers deny employment to applicants who fail functional capacity evaluations when there is an adverse impact on females? Yes, possibly.

Employers, under appropriate circumstances, may deny employment to applicants who fail functional capacity (strength and agility) evaluations when there is an adverse impact on females. The stipulation is that the test cannot be created specifically to weed out females. If the test appears fair on its surface (facially neutral) but in reality, is disproportionately disqualifying females, it can be held discriminatory under the Civil Rights Act, unless the employer can show the discrimination is an uncontrollable side effect of important safety measures. See the detailed argument on "direct threat" in number 2 above.

4. Can a prospective employee claim workers' compensation if injured during a pre-employment physical agility test? Yes, possibly

The issue of Workers' Compensation depends on the state in which the claim occurs. Courts are divided on the issues. On one hand, courts have found that because the person is not an employee when taking the physical tests, they are not covered under Workers' Compensation laws.² On the other hand, courts have also held that job candidates submit to testing for the benefit of employers and therefore, have a constructive employer/employee relationship.³

Discussion

1. Strength and Agility Testing is Permitted.

A. Testing permitted under the Code - Demonstration of ability to perform job-related functions

Under the Code of Federal Regulations, employers are permitted to use strength and agility testing for pre-employment evaluation.⁴ The Equal Employment Opportunity Commission's (EEOC) ADA Enforcement Guidance specifically states an employer may require a job applicant to describe or demonstrate how they would perform job tasks. The key here is the requirement that every job applicant for the specific job category is asked to perform the same functions. The employer should state the precise physical requirements for the job, such as lifting, climbing, pulling.

The employer may ask the applicant to perform the job functions "with or without reasonable accommodation" as long as this is asked of all the applicants within the job category to avoid discrimination.⁵ In the pre-offer stage, though the employer may ask the applicant to demonstrate performance ability, the employer may not ask disability-related questions, or questions that are "likely to elicit information about a disability." In other words, the employer may ask "can you show me how you would lift this 25 lb box and carry it 20 feet" but may not ask "are there any reasons why you would not be able to, or would need help lifting this 25 lb box and carrying it 20 feet?" All of these requirements disappear once a conditional offer is extended. In the post-offer stage, the employer may inquire as to disability and may require medical testing. The best approach is to conduct all testing post-offer to avoid possible claims.

B. Testing not permitted under the code - Medical examination vs. physical agility testing.

It is important to note however, that no pre-offer test can be a medical examination. The US Code states a business entity "shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability . . ."⁶

Under the Code, it is perfectly acceptable to test a prospective employee at the pre-offer stage as to whether s/he is able to physically perform the tasks the job will require, but it is not acceptable to measure physiological impacts of these tests. The EEOC Guidance directly affirms "a physical agility test, in which an applicant demonstrates the ability to perform actual or simulated job tasks, is not a medical examination under the ADA." A physical agility test becomes a medical exam when conducted by a medical professional, or "if an employer measures an applicant's physiological or biological responses to the performance."⁷

For example, the employer may require the candidate to perform a test proving ability to lift, but not measure what the candidate's pulse or blood pressure is at the outcome of the lifting test. A post-offer medical examination is allowed under the code as an "employment entrance examination" but is only acceptable (1) after a conditional job offer has been made; (2) if "all entering employees are subjected to such an examination regardless of disability;" and (3) the medical records are kept in a separate file.⁸ At this time, disability-related questions may be asked of the applicant. Medical exams may be conducted for current employees, however, only if the exam is "shown to be job-related and consistent with business necessity."⁹

2. Employers Have the Right Not to Hire Based on Failure of Physical Agility Test.

A. Inability to perform essential job functions

Employers can legally refuse employment to applicants when they are not physically capable of performing the essential functions of the job. The employer must be able to show, however, that the tasks are of business necessity and directly related to the employment at hand. If the prospective employee cannot physically perform crucial job functions, they may refuse employment even if discriminatory. The employer must be prepared to show that "any given requirement (has) . . . a manifest relationship to the employment in question."¹⁰ The court in Dothard v. Rawlinson held "the discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge."¹¹

The Code states "qualification standards may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."¹² If an individual fails the screening process due to safety reasons, the employer must demonstrate the candidate poses a "direct threat." The ADA Guidance interprets a direct threat as when "the individual poses a significant risk of substantial harm to him/herself or others, and that the risk cannot be reduced below the direct threat level through reasonable accommodation." For example, in the service industry, 2-man lifts are a common practice. However, if one of the members does not have equal strength as the other, one team member will, in turn, carry a greater amount of the load and will often be injured in the process. The unqualified individual, by being incapable of carrying a heavy load, is creating a substantial risk of injury in the workplace and can be weeded out at the screening level.

Denying employment to such a candidate is legal because creating a substantial risk of injury is considered an inability to perform an essential job function. The Supreme Court upheld this argument in the 2002 case of Chevron U.S.A. Inc., v. Echazabal, holding that employer was justified in rescinding job offer based on failure of physical exam due to Hepatitis C. Employee's job performance would potentially endanger not only other employees but himself due to his disability.¹³ Though this was a case of illness and not physical skills, the mere fact of putting himself and others in danger kept him from getting the job.

It is important to note what would be considered an "essential job function" because only failure to perform the essential functions of the job is grounds for denying employment. The term "essential functions" means "the fundamental job duties of the employment position the individual with disability holds or desires...the function may be essential because the reason the position exists is to perform the function."¹⁴ A good example of this rule is a job opening for a "materials handler" The position itself is established for performing only the essential duty of that job, and the majority of time spent on the job will be to perform lifting tasks. If the employee cannot lift, he cannot perform the job and can be disqualified. The best way to determine what the essential functions of the job will be is for the employer to use his/her judgment in establishing those functions and preparing a written job description detailing the essential job functions. This job description should be prepared for marketing of the job position available, as well as for interviewing applicants. This way there will be no confusion when the applicant applies for the job. Therefore, discriminatory practices, if necessary and justified for the performance and safety of the job, can be defended against the claim of discrimination.

B. "Qualified" Disabled candidates requiring accommodation

A "qualified" individual cannot be discriminated against during the hiring process. An individual is "qualified" and therefore protected against discrimination if he has "the requisite skill, experience, education and other job-related requirements of the employment position... and who, with or without reasonable accommodation can perform the essential functions" of the job.¹⁵ Consequently, a candidate is qualified if he can perform the essential functions of the job. If an employer makes a decision not to hire based on the disability of an otherwise "qualified" candidate, the employer must demonstrate that the disability "cannot be eliminated or reduced by reasonable accommodation." If necessary, at this point (post-offer) the employer may conduct further medical examinations or non-medical strength and agility tests to find out what the employee is able to perform. Any other physical exams or agility testing is permitted as necessary.¹⁶ The ADA Primer for Small Businesses states that accommodations must be provided to individuals with disabilities when it does not pose an undue hardship on the employer. Undue hardships are determined on a case-by-case basis.

In summary, if an individual is unqualified but has a disability, the employer may simply choose not to hire him. If the individual is qualified and disabled, the employer must show undue hardship in accommodating before denying employment.

It is important to note that not all impairments will be disabilities, and that an impairment is only a disability "if it substantially limits a major life activity."¹⁷ Temporary injuries or medical conditions that do not affect day-to-day activities, but only restrain an employee from performing a required job function, will not be considered disabilities. That is to say, "the inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working."¹⁸

3. Employers May Use a Test that has a "Disparate Impact" Towards Women, but Must Show a Business Necessity.

Employers, following the same policy set forth above, may defend against a claim of sexual discrimination. Many discrimination claims from women stem out of a practice where the test seems fair on the surface, but statistically is weeding out a large number of females. This is known as the "disparate impact theory." The Dothard case states, "To establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern."¹⁹ This means that to set up a valid case for discrimination, the plaintiff only needs to show that what looks like a neutral, non-discriminatory testing standard is, in practice, not allowing females to pass. The employer then has the burden of showing there is a business necessity for a safe work environment that is creating the discriminatory outcome. If the employer can show it is necessary to have such standards for the safety of the applicants, the disparate impact argument can be invalidated. The employer is still required to establish the other requirements discussed above.

The case of McDonnell Douglas Corp. v. Green²⁰ established a similar requirement for establishing a discrimination action. The plaintiff has the burden of proving discrimination, and then the entity supposedly discriminating must establish a reason for the conduct. The case of Antipolo v. Navy²¹ states that in order to show discrimination of a disability, the plaintiff must first prove s/he has a disability. This court held that failure to perform in a physical agility test does not make a

person handicapped, and therefore was not disabled. The fact that the plaintiff was a woman does not make the test discriminatory either because passing the test was necessary for the safety of all job applicants due to the nature of the job. Therefore, the entity was able to show a nondiscriminatory purpose for their conduct and the court found for the entity.²²

In the case of Albemarle Paper Co. v. Moody, the court held that if the employer establishes justification for discrimination, based on the test being occupational, the prospective employee should show that alternative means exist to test without discriminatory effects.²³ If there are less discriminatory ways to test physical capabilities, the employer should explore those options that test correctly but exclude any discriminatory results. In the case of physical agility testing, it is difficult to avoid a disparate impact on females in cases where the requirement for the job is lifting a very heavy amount of weight.

4. Workers' Compensation Claims Resulting From Injury During Pre-employment Physical Agility Testing

The case of Younger v. City and County of Denver deals with the issue of workers' compensation and pre-employment testing.²⁴ The court held the injury must "arise out of and in the course of" employment in order to fall under Workers' Compensation Law. "An injury 'arises out of' employment when there is a causal connection between the employment and the injury."²⁵ There must be an established employer/employee relationship in order for an injury to be considered in the course of employment. The prospective employee in this case was found to have voluntarily applied for the position, and was not guaranteed employment if she passed the agility test, and therefore, there was no mutual agreement between employer and potential employee "sufficient to create an employer/employee relationship" and the potential employee was not a candidate for workers' compensation benefits.²⁶

The Court of Appeals in Ohio agreed with Colorado in stating there is no employment agreement and that the person is not under an employment contract, having provided no service to the potential employer.²⁷ The courts in Alabama agree there is no workers' compensation benefit provided.²⁸

A California court determined that workers' compensation benefits could apply when injured in pre-employment testing.²⁹ The court held that workers' compensation law "does not require that an applicant be receiving actual 'compensation' for his 'services' in order to fall within the workmen's compensation scheme."³⁰

The court stated that since the injury occurred by performance of tasks required by the employer, these tasks "occurred in the service of the employer."³¹ The labor code in California defines an employee as one "in the service of an employer" and due to that fact, the court held these tests were services for the employer. Therefore, the prospective employee was to be considered an employee for workers' compensation purposes.³² Other California cases follow this analysis.

In a recently decided West Virginia case (2001), the court also held that workers' compensation applied.³³ In this liberally decided case, the Supreme Court of West Virginia held that an employment contract existed between employer/employee when the prospective employee agreed to take a physical test in order to gain employment. Therefore, when he injured his back during testing, the employee was considered constructively employed for purposes of workers' compensation benefits.³⁴

It is important when reviewing workers' compensation issues to evaluate the law of the state in which the pre-employment testing will take place.

An applicant, however, may not succeed in a cause of action against an employer under ADA for injuries sustained during a strength and agility test in accordance with ADA Enforcement Guidance³⁵.

Conclusion

Pre-employment strength and agility testing is permitted under the ADA as long as it is not discriminatory. Post-offer employers may perform medical and non-medical strength and agility tests and inquire as to disabilities. If the testing becomes discriminatory in nature when denying candidates based on test results, the employer must show the tasks are of business necessity and directly related to the job. Candidates may be denied employment if they cannot perform essential functions of the job. The most protective manner to show business necessity is to have jobs evaluated by a third-party professional, certified, ergonomist for strength and agility task requirements. In the case of injury during the physical agility testing, one must look to the case law of that particular state; because some states will grant workers' compensation benefits and some will not.

General Examples

1. The employer conducted thorough job task analyses (JTA's) by a certified ergonomist of those job classifications experiencing chronic strains and sprains. The employer engaged the services of an employment screening company specializing in objective physical capability evaluations (PCE's). The screening company reviewed the physical demands of each job classification and categorized them by required strength and agility, i.e., "medium", "heavy", "very heavy", etc. in accordance with the US Department of Labor's Dictionary of Occupational Titles. Additionally, the screening company related these physical demand levels to their own proprietary testing formulas supported by a statistically significant normative database of uninjured workers. The employer required all post-offer applicants to undergo a strength and agility test and compared each individual applicant's results to the specific physical and agility demand requirements of the job for which the applicant was applying. Any applicant not meeting the minimum strength and agility requirements for the job may be denied employment for that specific job. For hiring an applicant not meeting the objectively identified physical demands of the job would create a direct threat to that applicant and possibly other employees required to assist the applicant in physically demanding work.
2. The physical demands for a delivery driver as identified in the job task analysis, require that "the driver, with the aid of a helper, supports the weights of widgets during lifting and sliding off of the back of a truck. The driver will be required to support up to 60% of the weight of the widget. Maximum force requirements are between 74 and 143 pounds. An average of 30 widgets per hour for 8 hours will be lifted, lowered and carried"

In accordance with the Human Strength Prediction Model, these job requirements will adversely affect 99% of females (only 1% of females will find the physical demands acceptable).

However, the company conducted a comprehensive job task analysis of the position, which identified the minimum strength and agility requirements of the job that could not be easily, if at all, reduced by operational or technological modifications. While this certainly adversely impacts females, the employer has complied with EEOC requirements in establishing its strength and agility standards.

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- ¹ 29 CFR §1630.14(a)
² Younger v. City and County of Denver, 810 P.2d 647 (Colo. 1991)
³ Dodson v. Workers' Compensation Division, and Brown & Root, 558 S.E.2d 635
⁴ 29 CFR § 1630.14(a)
⁵ Id.
⁶ 42 USCS §12112(d)(2)(A)&(B)
⁷ C932 ALI-ABA 375, 384
⁸ 42 USCA 12112(d)(3)(A)&(B)
⁹ 42 U.S.C. 12112(d)(4)(A)
¹⁰ Griggs v. Duke Power Co., 401 U.S. 424 (1971)
¹¹ 97 S.Ct. 2720, 2728 (1977)
¹² 42 USCA 12113(b)
¹³ 536 U.S. ___ (2002)
¹⁴ 29 CFR 1630.2 (n)
¹⁵ 29 CFR 1630.2(m)
¹⁶ EEOC Enforcement Guidance
¹⁷ Id.
¹⁸ 29 CFR 1630.2(j)(3)(i)
¹⁹ 433 U.S. at 329 (1977)
²⁰ 93 S.Ct. 1817 (1973)
²¹ 1991 WL 1187127 (EEOC)
²² Id.
²³ 422 U.S. 405, 425 (1975)
²⁴ 810 P.2d 647 (Colo. 1991)
²⁵ In Re Question, 759 P.2d 17, 20 (Colo. 1988)
²⁶ Younger at 653
²⁷ Dotson v. Conrad, et al., 1998 WL 879111 (Ohio App. 6 Dist. 1998)
²⁸ Boyd v. City of Montgomery, 515 So.2d 6 (Ct. of Civ. App. 1987)
²⁹ Laeng v. Workers' Comp. Appeals Bd., 6 Cal. 3d 771 (1972)
³⁰ Id.
³¹ Id. at 783
³² Id.
³³ Dodson v. Workers' Compensation Division, and Brown & Root, 558 S.E.2d 635
³⁴ Id.
³⁵ EEOC, ADA Enforcement Guidance 10/1995