

Recent EEOC Settlements A Reminder That Employers Face Substantial Liability If Pre-Employment Exams Are Not Job-Related

Antonio Calarone

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The U.S. Equal Employment Opportunity Commission (EEOC) has been very aggressive in challenging pre-employment exams. Employers utilize an array of pre-employment exams to assess an employee/applicant's physical fitness, health, and personality traits, among other things. Pre-employment exams can implicate discrimination laws prohibiting discrimination based on sex and disability as well as other protected classes. Long ago, the EEOC issued **guidance** to employers about the legality of pre-employment inquiries, exams and the timing of when certain exams are permissible and when they are not as they relate to employees with disabilities. In recent years, the EEOC has been more aggressive in pursuing investigations and charges involving pre-employment exams, and expanded their enforcement priorities to include the impact of these exams on sex and other protected classes. On September 24, 2015, the EEOC announced a **settlement** of a sex and age discrimination charge with a California trucking company that required applicants to perform physical strength tests. According to the EEOC, the physical strength tests were not reasonably related to the job duties and had an adverse effect on female and older applicants. In August, Target Corporation **agreed** to pay \$2.8 million to resolve an EEOC finding that certain pre-employment tests given to exempt-level positions and administered by psychologists were discriminatory because they were not job-related or consistent with business necessity. The EEOC found that these exams discriminated against applicants based on race, sex and disability. Target also agreed to a

Attorneys

Antonio Caldarone

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number of non-monetary provisions, such as eliminating the use of the exams. The takeaway is that employers should carefully evaluate pre-employment exams currently in use during the hiring process, or when considering implementation of such exams, to determine the business necessity of the exam and whether the particular exam achieves the intended goal. If an employer uses such an exam, then it should structure the exam to ensure compliance with all applicable discrimination laws.