

## Lesson 2: Background Checks, Testing, Privacy, Theft, and Whistleblowing

In this lesson, you will learn about testing in the workplace, a valuable tool for the employer in evaluating employees. We will cover the forms of testing, testing applications, and limitations on testing imposed by the law. In addition, you will learn about privacy in today's workplace and how to analyze employer actions that intrude on employees.



### LEARNING OBJECTIVES

- ✓ **Objective 1** Identify the variety of tests used by employers.
- ✓ **Objective 2** Determine which background checks, questions asked, and tests given are legally permissible in the workplace.
- ✓ **Objective 3** Discuss the standards for drug and alcohol testing.
- ✓ **Objective 4** Identify the concerns employers have regarding potential criminal activities of their employees.
- ✓ **Objective 5** Apply the right of privacy to a variety of employer practices.

## Text Readings

*Employment Law: New Challenges in the Business Environment*, Chapters 3 and 4

## Additional Readings

### Required Readings

- Griggs v. Duke Power Co. ([https://scholar.google.com/scholar\\_case?case=8655598674229196978&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=8655598674229196978&hl=en&as_sdt=6&as_vis=1&oi=scholar))

### Supplemental Readings

- U.S. Department of Labor (<http://www.dol.gov/>).
- Employment Tests and Selection Procedures ([http://www.eeoc.gov/policy/docs/factemployment\\_procedures.html](http://www.eeoc.gov/policy/docs/factemployment_procedures.html))

## Lecture Notes

Welcome to Lesson 2 and the strange world of employment testing, workplace searches, and the myriad situations pitting employers' quests for information against employees' desire for privacy. This is a world where no rights are absolute, where there are no black and white answers, but only shades of gray. It is fraught with traps for the unwary and uninformed. Those who work in the employment area cannot be successful without a clear understanding of the basic issues and guiding principles. Success also requires staying up-to-date on the latest cases in this area, for the courts answer most of the hard questions on where the boundaries lie. Perhaps you have been tested to qualify for a job. What thoughts did you have when you completed the testing? Did the testing seem necessary to the job requirements?

### Preemployment Testing

Preemployment testing originated in the 1950s in response to perceived inefficiencies in American business. Since that time, it has increasingly become an integral part of the selection process. In its early stages, preemployment testing was viewed as a way to weed out unqualified and ineffective applicants. Many tests, however, were administered without being validated as reliable indicators of performance. In other instances, the tests were not related to the requirements of the job.

In the 1971 landmark case of *Griggs v. Duke Power Co.*, the United States Supreme Court held that requiring employees to have a high school diploma or pass an intelligence test to continue employment or transfer positions was illegal because it had a *disparate impact* on African-American workers and was not shown to be related to job performance. *Disparate impact* is an indirect form of discrimination in an employment or education setting that negatively impacts a certain class of people. *Griggs* set the standard for the well-established principle that employment tests must be job-related and consistent with business necessity. The best approach for employers to take is to use only tests that have been validated under accepted validation methods. If a test has been validated, it may be used even though it has a disparate impact.

*Validation* is relatively straightforward for tests such as typing for transcriptionists. However, the more abstract the trait that the test is measuring, the more difficult it is to establish evidence of validity. Hence, caution is important when personality tests, for example, are under consideration. The increasingly popular personality and integrity tests can also implicate the other key boundary of the use of testing to screen employees—the individual's right to privacy.

### **Privacy**

In a highly publicized case involving Target stores, applicants for security officer positions challenged a screening test that included deeply personal true-false questions such as “I never indulge in unusual sex practices” and “I feel sure there is only one true religion.” The court found that California's state constitution afforded broad privacy protection and that Target had not demonstrated that the test served a *compelling job-related interest* sufficient to justify this invasion of privacy.

This right of privacy is a more difficult principle to apply to employment tests than the requirement that tests not discriminate, be job-related, and be consistent with business necessity. Privacy is an abstract principle that is derived from many sources. An important source is the United States Constitution. The Constitution protects individuals from wrongful invasions by the state or by any entity acting on behalf of the government. Federal, state, and local government employees are therefore protected from government intrusion into private matters. However, as you will discover, this right is not absolute by any means. Whether an action by an employer is unlawful is determined by balancing two competing interests: (1) the extent of the invasion; and (2) the individual's reasonable expectation of privacy against important employer interests. Examples of employer interests include security, safety of the workplace, and worker productivity. This constitutional protection enjoyed by government workers is supplemented by statutes such as the Privacy Act, which applies to federal employees, and the Electronic Communications Privacy Act.

Employees of private, nongovernment employers do not enjoy the protection of the United States Constitution or the Privacy Act. This does not mean that private-sector employees are without protection. Some states have recognized a constitutional right to privacy under their state constitutions and have afforded protection to employees of private-sector employees. California is an example of such a state.

Some states have enacted legislation protecting employees in the areas of medical, credit, and sensitive information. Courts, through case law, also called *common law*, have also afforded protection. Courts have recognized claims for *invasion of privacy* in a number of different forms, such as intrusion into private affairs, publication of private information, and *defamation*. Since the level of protection varies on a state-by-state basis, as an HR professional you must investigate the specific protections of each state in which an employer has employees and does business.

### **What's an Employer to Do?**

The employer may believe it is wedged between the proverbial rock and a hard place. How can an employer give a preemployment test or conduct a search and not be sued? Employers can conduct their business without incurring undue risk by following basic guidelines. In *Riley v. California*, the U.S. Supreme Court considered how much privacy cell phones should be afforded where law enforcement is concerned. In a unanimous decision, the Court ruled that in the absence of an emergency, law enforcement must have a *warrant* to execute a search of a cell phone. Although this case dealt with the actions of police officers, it bears mention here. Cases take years to work their way through any court system. Technology is and always will be leaps and bounds ahead of the justice system. It may be difficult for you to imagine, but the majority, if not all, of the current U.S. Supreme Court justices don't even know how to use email! In the interim, employers must exercise caution and consult legal counsel before conducting searches of employees.

It is the responsibility of HR professionals to understand the boundaries and ensure that the employer's practices respect those boundaries. With regard to testing, employers must analyze the job and design or adopt a test related to the job requirements. They should make sure the test is professionally validated and guard against adverse impact in the test results wherever possible. They should ensure confidentiality of test results. With regard to employer actions that implicate privacy, such as drug testing, searches, and surveillance, they should formulate appropriate policies and practices and publicize them to all applicants and employees. Employers should minimize intrusion even if it is considered justified by their own legitimate interests; and then they should safeguard information collected from unwarranted disclosure.

Employers today have the ability to monitor their employees more closely than in prior decades when punching time clocks kept track. Using cell phone technology, companies can learn if employees are taking longer breaks and lunches than allowed, and if the employees have left the building (<https://www.cbsnews.com/videos/technology-helps-bosses-track-workers-more-closely/>). While some employers are adopting this Big Brother tactic, others are taking a different approach. Netflix, for example, allows employees to take as much vacation as they want, and Google encourages its employees to daydream. Remember, with employment law there are no easy answers. Good judgment, professional conduct, and sound legal advice will help keep you on the right path.

## References

<http://www.cbsnews.com/videos/technology-helps-bosses-track-workers-more-closely/>

Moran, J. J. (2014). *Employment Law: New Challenges in the Business Environment* (6th ed.). Upper Saddle River, NJ: Prentice Hall.

*Riley v. California*, 573 U.S. \_\_\_\_ (2014)

## PowerPoint Lecture Notes

Use the lecture notes available in PowerPoint as you study this chapter by **CLICKING THE LINK BELOW**. These notes will help you identify main

concepts and ideas presented in this chapter.

If you do not have PowerPoint on your computer, you can download a free viewer from Microsoft by clicking

here(<http://www.microsoft.com/downloads/details.aspx?FamilyID=048dc840-14e1-467d-8dca-19d2a8fd7485&DisplayLang=en>).

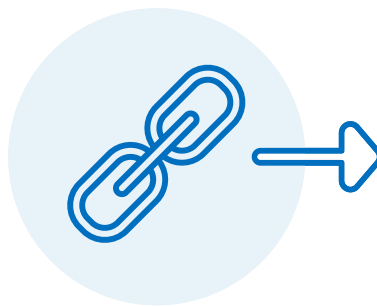
Chapter 3([https://courses.portal2learn.com/content/enforced/9112-R01V\\_20\\_1/course-system-](https://courses.portal2learn.com/content/enforced/9112-R01V_20_1/course-system-files/Lesson_02/../../V3/PowerPoints/chapter03.ppt)

[files/Lesson\\_02/../../V3/PowerPoints/chapter03.ppt](https://courses.portal2learn.com/content/enforced/9112-R01V_20_1/course-system-files/Lesson_02/../../V3/PowerPoints/chapter03.ppt)).

Chapter 4([https://courses.portal2learn.com/content/enforced/9112-R01V\\_20\\_1/course-system-](https://courses.portal2learn.com/content/enforced/9112-R01V_20_1/course-system-files/Lesson_02/../../V3/PowerPoints/chapter04.ppt)

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## [02] Lesson 2 Exam



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