The following white paper is related to a session at the 2015 E-ATP Gaining Advantage through Assessment Conference.

Session Title:
Legal, Professional and Social/Political Trends Impacting Pre-employment Testing in Europe & US

Session Presenters:
Gary Behrens
Garrett Sherry
David Bearfield
General Dynamics IT
Prometric
EPSO
Europe ATP 2015

Legal, Professional & Social/Political Trends Impacting Pre-Employment Testing in Europe & the USA

White Paper presented in conjunction with a presentation to the Europe ATP Conference: Dublin September 2015

The legal framework in the USA and Europe has seen changes in recent years in terms of data privacy and that trend is set to continue. Interpretation of what constitutes personal information and how that should be dealt with has been the subject of specific regulation in both Europe and the USA. Obligations to ensure candidates with special needs are properly and fairly accommodated are well developed and there is an onus on test providers to ensure compliance with these provisions. Emerging trends among organisations who develop and deliver professional testing solutions for international delivery are setting new best practice standards. These are sometimes difficult to implement uniformly due to variation in local laws and regulations. All of these issues are affecting how testing is delivered and creates challenges for test providers on both sides of the Atlantic.

Different Rules and Approaches to Data Protection in Europe and the USA

The rights and obligations of organisations and individuals with respect to the collection, retention/disposal, security and accuracy of personal information constitutes data privacy. However, there is no uniformity between how this is treated in Europe and the USA. This poses challenges for organisations in terms of how they develop processes and procedures to ensure compliance with data privacy laws.

Some of the issues include:
- The definition of Personally Identifiable Information (PII) differs from country to country
- Individual state laws and approaches to privacy differ in the USA and Europe
- Many countries have different approaches to the collection and use of Biometric data
- Some EU Government organisations will not accept the U.S. ‘Safe Harbour’ provisions and insist that their data is physically stored within the EU
- Complexity and variation pose problems for testing organisations seeking to operate internationally
- Variation is ‘not your friend’ in the testing world
The definition of Personal Information may include:

- Any information relating to an identified or identifiable natural person collected or used in any manner for any professional or commercial reason.
- Any format of the information including:
  - Computer data fields
  - Paper forms, documents, correspondence
  - Email and voice mail messages
  - Telephone logs and Internet usage

PII may be defined as:

- Information relatable to an identified or identifiable individual.

Unlike the European Union, the USA has no monolithic federal data protection law and each state has its own PII breach notification laws. Most US states model their requirements on California’s Breach Notification Law (SB-1386) 2002. In the EU the European Data Protection Directive- 95/46/EC, effective 1998, covers the protection of individuals with regard to the processing of personal data and on the free movement of such data.

- Each member state develops local laws, regulations, and administrative provisions to comply with the directive.
- US and EU currently negotiating an international framework (Data Protection Umbrella Agreement).

Threats & Vulnerabilities

Threats to the security of personal data can be split into three areas: physical, administrative, and technology.

Physical

Test candidate personal data is collected by testing organisations as part of the registration and testing administration process. This can be in either paper or electronic form. Physical threats to this data can be countered by ensuring appropriate walls are put up around areas where private data is processed, ensuring data is kept under lock and key, that there is video surveillance of vulnerable areas, adequate security systems are in place and other protections such as clean desk policies and screen shields are in place.

Administrative

Testing organisations should ensure that they appoint a designated privacy officer to take responsibility for the organizational approach to data privacy. A risk assessment and audit plan should be put in place to understand what gaps exist and appropriate actions needed to implement. This would include workforce training on policies and PII breach notification protocols.
Technology

Organisations should ensure they have appropriate authorisation, authentication and accounting processes in place. This should include well-defined access controls on PII and encryption of PII during transmission and storage.

Requirements to Accommodate Candidates with Special Needs

Fairness and Equality of Treatment is the basic principle underlining accommodations for candidates with special needs. In the U.S. this is defined under the Americans with Disability Act of 1990, and in the EU is covered by the Employment Equality Directive – 2007/78/EC and various national laws such as the Disability Discrimination Act 1995 in the UK. This obligates testing organisations to ensure certain physical requirements are provided for at Test Centres such as:

- Wheelchair accessibility
- Disabled toilets on same floor
- Height adjustable desks
- Extra time in exams
- Special equipment – headphones for audio voiceovers, left handed mice, desk lamps, large monitors etc.
- Other accommodations including: reader recorders, dyslexic interpreters, sign language translation, language translators, privacy booths

It is important to ensure that when special accommodations are required and approved that the administration system is in place to deliver the service for the special needs candidate. This requires organizational commitment and that clear policies and processes are implemented to deliver uniformly across testing locations.

Delivery of a Secure 'Standardised' Testing Experience to Candidate

The underlying principle of testing services should be an objective to provide a professional environment for honest test takers to take reliable and valid tests. This means providing a standardised approach to security and test administration across all test centres internationally. Standard Operating Procedures and Processes at every test centre help to remove the risks which ‘Variability’ in test administration can introduce. Most testing organisations strive to deliver a standard approach to test administration that may include: ID verification procedures, biometric ID verification, photo capture, DVR monitoring, metal detector wanding, and remote audits.

Many countries; however, have different approaches to ‘privacy’ which can impact the delivery of standard procedures in every country. For instance:
• In Ireland, photo capture is permitted for government agency tests only if it is specifically provided by legislation. This provision required the Road Safety Authority to stop taking photos of candidates for driving license purposes and required the introduction of a manual system where candidate brought in passport photos.
• Biometric ID verification of candidates is not allowed in France and Greece for data privacy reasons.
• Wanding with metal detectors is not allowed in France and Greece for personal freedom reasons.
• DVR monitoring is not allowed in Proctor areas in: Austria, Denmark, Estonia, Finland, France, Germany, Sweden, and Netherlands as it is deemed a ‘place of work’ and precluded from monitoring.
• A ‘No Weapons Policy’ is potentially in conflict with the laws of some states in the U.S. which allow the carrying of concealed and unconcealed firearms.

These issues require actions to mitigate the risk introduced when Standard Operating Procedure is not possible. Such actions could include:

• More Secret Shops and in-person audits at test centres where DVR monitoring is not allowed.
• Different candidate monitoring processes where wanding is not permitted, such as more frequent walk through of test rooms by a proctor.
• The use of mobile blocking technology in test rooms.
• More thorough ID checks where biometric ID is not permitted – multiple forms of ID.
• Strict policy guidelines on what can and cannot be brought into the test centre and the test room.

Implications for Testing Organisations

Testing organisations face many challenges in dealing with the above issues around, data privacy, accommodations for special needs candidates and regulatory and legal blockages to best practice standard operating procedures for testing administration.

Data privacy requires active management and it is an essential part of operating internationally. Organisations need to understand the issues, their obligations and the complexities of this must be addressed and adequate policies implemented.

Accommodations for candidates with special needs is a growing obligation and responsibility. Organisations need to understand the law, embrace the spirit and appreciate the many needs they will be called upon to meet. A coherent and standardised policy for the administration and delivery of special accommodations should be put in place, to ensure equal treatment for all candidates.

Local laws will affect how organisations can operate testing in different countries. Global standards based on best practice should be adopted and the candidate experience and the security of test content considered as first priorities. They must adapt to local restrictions and put risk mitigation actions in place to maintain the integrity of the testing experience. Lobbying where possible for sensible approaches to local rules based on best international practice is something testing organisations and their representative bodies should promote.

Finally the cost implications of addressing these issues need to be understood and appreciated as these issues add complexity and operational overhead to test administration.
About Prometric

Prometric, a wholly-owned subsidiary of ETS, is a trusted and market-leading provider of technology-enabled testing and assessment. Committed to a set of values that get the right test to the right location at the right time and to the right test taker, Prometric supports candidates worldwide who take more than 9 million tests each year. Through innovation, workflow automation and standardization, Prometric advances test development and delivery solutions that are better, faster and at less expense. Prometric delivers tests flexibly via the Web or by utilizing a robust network of thousands of test centers in more than 160 countries and on behalf of more than 350 clients in the academic, financial, government, healthcare, professional, corporate and information technology markets.

http://www.prometric.com

Disclaimer – The content of this white paper is for informational purposes only, and the information provided does not qualify as legal advice. The authors expressly disclaim any - direct or indirect - responsibility or liability for damages arising from the use of the information in this presentation as legal advice.
Legal, professional and social/political trends impacting pre-employment testing: the European Union Institutions

Legally

The EU Institutions' staff selection is regulated by their Staff Regulations (n° 31/1962). In parallel to this there are two further regulations – one on data protection (n° 45/2001) and one regarding the access of EU citizens to documents (n° 1049/2001). All these regulations are complemented by case law and none take preference over another.

EPSO's selection processes are fully covered by the Staff Regulations and in particular Annex III which governs the selection of officials.

In such cases where conflict arises between these main three regulations (e.g. transparency of documents versus the protection of data) compromises need to be sought on a case by case basis, whilst respecting existing case law and legal principles.

Most importantly however, the main legal principles for selection procedures for the EU Institutions are as follows:

- Equality of treatment: the principle of equal treatment as laid down in jurisprudence implies that every candidate put in a comparable situation must be treated in the same way;

- Comparison of merits: when a selection board compares a candidate, they must compare him/her systematically with all the candidates in the same competition. This is the fundamental principle which differentiates the procedure from a classical examination process;

- Secrecy of the selection boards' workings: this principle was laid down in the Staff Regulations to protect the boards from any external influence;

- Control over any error in candidate appreciation: board decisions are liable for review and must therefore be justified so that candidates can, where necessary use the appeal procedures at their disposal. However, no Court can overrule a selection board's value judgement of a candidate.

The four pillars of appeal open to EPSO candidates - each with a different substantive scope – can be outlined as follows:

a) Review of selection board decisions within the framework of the Staff Regulations: administrative appeals (made to EPSO) and judicial appeals (made to the Court);

b) Data protection cases: administrative appeals (made to the European Data Protection Supervisor - EDPS) and judicial appeals (made to the Court);

c) Access to documents cases: administrative appeals (made to EPSO) and judicial appeals (made to the Court);

d) The European Ombudsman (for cases of maladministration).

Because no relation between these four pillars has been formalised, the situation can become extremely complicated in practice.
The principles of data protection versus transparency

Access to documents and data protection bring together two positions in terms of what information candidates are allowed to access. In the interests of fairness and objectivity for future selection processes and the protection of resources already invested in test development, EPSO has a legitimate interest to avoid disclosure of materials which may be reused. There is in fact no legal obligation to disclose candidates’ uncorrected scripts (however, disclosure is not prohibited either). Conversely, candidates cannot obtain access to the corrected scripts, since they are covered by the secrecy of the selection boards’ proceedings and in fact the Court has ruled explicitly that these are not personal data. In light of experiences of the current regulation and the new innovations in tests in EPSO selection procedures, improvements to the data protection system is an ongoing process because EPSO has to ensure that data is handled consistently in the proper manner. This means updating its privacy statements and data protection / data security guidelines.

A good case in point can be seen with the recent introduction by EPSO of remote interviewing. This poses interesting legal issues from an access rights point of view. In fact, the footage of the interview contains, in a single electronic document, the original test material (i.e. the questions), the candidate’s answers, and finally their image and voice recording which clearly constitutes personal data. The access rights to these different elements are governed by different sets of rules, the interplay of which is not entirely clarified. Hence, the question of access to remote interview footages merits a very careful examination and marries the issues of protecting personal data to accessing documents and transparency.

Social/political

The US-EU Safe Harbor programme

The European Commission’s Directive on Data Protection came into effect in October of 1998, and prohibits the transfer of personal data to non-European Union countries that do not meet the European Union (EU) “adequacy” standard for privacy protection. While the United States and the EU share the goal of enhancing privacy protection for their citizens, the United States takes a different approach to privacy from that taken by the EU.

In order to bridge these differences in approach and provide a streamlined means for U.S. organisations to comply with the Directive, the U.S. Department of Commerce, in consultation with the European Commission, developed a “Safe Harbor” framework and website to provide the information an organisation would need in order to evaluate – and then join – the U.S.-EU Safe Harbor programme. Safe Harbor Principles are designed to prevent accidental information disclosure or loss. The European Union's formalised system of privacy legislation is regarded as more rigorous than that found in many other areas of the world and applies to multinationals operating in the European Union. This legislation means that organisations are not allowed to send personal data to countries outside the European Economic Area unless there is a guarantee that it will receive adequate levels of protection. At multinational organisation level, this concerns documentation produced in respect of internal controls on personal data, or in EPSO’s case, data related to selection procedures organised by EPSO.

The many legal constraints facing EPSO can be challenging, especially when considering ongoing innovations such as IBT, remote proctoring or computer-adaptive testing. However EPSO will continue to work with its stakeholders and service providers to reconcile regulatory requirements with the need for efficient and effective selection processes.
Professionally

Building up a reliable and equitable item bank in 24 languages

EPSO has established its in-house database of test items translated into 24 languages by its trained translators, with some tests created directly in English, French or German (considered the "working languages of the EU Institutions). Strict quality benchmarks are applied to this database (length of stem, localisation, difficulty level across languages, etc…) and all items are trialled before being deployed in the field. The difficulty level attributed to any item is determined within each language (because the same item could have a different difficulty in different languages) and when the actual sets of questions that candidates receive (test forms) are created, the exact language-specific difficulties are consistently taken into account.

Within EPSO's legal framework all candidates have to be treated equally with the same number of items and same difficulty of test form being given. In order to ensure this, EPSO has developed and implemented a ground-breaking methodology for assembling test forms. This takes the form of an algorithm which ensures that each individual test is of exactly the same difficulty for all candidates across all languages to ensure the test is fair. In essence, the advantages of the algorithm can be summarised as:

• Increased fairness for candidates:
  – Improved difficulty management
  – Improved gender balance
  – Ascending order of item difficulty

• Improved ownership of the competition Selection Board:
  – Possibility to simulate expected score distributions
  – Prior knowledge of actual test forms which will be delivered to candidates

• Use of broader range of questions / improved diversity of test content
Scientifically developed and standardised psychological tests have been utilised in work settings to inform employment-related decisions for over 75 years in the United States (US). Assorted personnel tests are often given to job applicants prior to hire (thus, pre-employment) to help organisations identify those individuals who are more capable of performing a job productively, more likely to be successful, or less apt to exhibit counterproductive behaviours and qualities at work that detract from job effectiveness.

Such use of assessments for employment purposes is well established in the US, yet has only lately gained more mainstream acceptance. Even so, use of pre-employment tests by organisations can be subject in part to cultural dynamics including legal, professional, political and social factors.

For example, in the US, pre-employment testing largely fell out of favor for approximately twenty years after early legal setbacks in court (e.g., *Griggs v. Duke Power*, 1971) following the Civil Rights Act of 1964. The *Uniform Guidelines on Employee Selection Procedures* issued by the Equal Employment Opportunity Commission (EEOC) and three other federal agencies in 1978 set ground rules for using tests, which informed subsequent court decisions. However, many employers felt it was safer to avoid employment testing altogether rather than risk the real possibility of facing litigation.

---

1 This white paper supplements a professional presentation of the same title delivered at the annual conference of the European Association of Test Publishers, Dublin, Ireland, 23-25 September, 2015. This is for informational purposes only and should not be construed or relied upon as legal advice.
This white paper discusses emerging trends that already or may soon impact the use of pre-employment testing in the US.

Similarly, honesty testing was questioned in the late 1980’s as anti-testing initiatives mounted after polygraph testing was banned for employment use nationally, led by advocacy group efforts. The latter development prompted the founding of the Association of Personnel Test Publishers, predecessor to the Association of Test Publishers (ATP), with a mission to preserve the use of professionally developed integrity tests and to educate the public about the relevance of testing.

This white paper discusses emerging trends that already or may soon impact the use of pre-employment testing in the US. An awareness and understanding of legal, professional and social/political factors can help testing practitioners and test publishers to better support client organisations in gaining advantage through assessment.

Three important developments that affect pre-employment testing in the US have received growing national attention in the past few years: 1) so-called “Ban-the-Box” laws; 2) marijuana legalisation; and 3) Americans with Disabilities Act (ADA) challenges to personality testing. The first two impact mainly the assessment of job applicants in screening for high-risk behaviours and predisposing attitudes that can undermine workplace security and safety. The third one could hinder the assessment of applicants with respect to job fit and talent management.

**“Ban-the-Box” Movement**

“Ban-the-Box” refers to grass roots campaigns that push for removal of the check box common on most US job application forms which require admitting any prior criminal convictions. Typically, employers disqualify applicants with a history of conviction from further job consideration. It has been estimated that about 70 million US adults of working age, roughly 25%, have some type of criminal record (National Employment Law Project, www.nelp.org).

The driving rationale to “Ban-the-Box” is that former felons have paid their debt to society and deserve another chance to become productive, wage earning citizens. Without the means of supporting themselves and their families through gainful employment, the chances of recidivism are asserted to be much greater.

The campaigns have coalesced into a national reform movement in the US with strategic state and local objectives under the leadership of core advocacy groups. Such efforts have brought political pressure on elected officials as well as employers, and have succeeded in getting laws, ordinances or policies implemented in more than 100 non-federal jurisdictions across the country, including 13 states so far (Knedler & Welkowitz, 2015).

Although Hawaii enacted the first state law banning the box over 15 years ago, the movement recently gained renewed momentum after the EEOC issued its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions* (2012). Following several years of investigation and hearings, the EEOC concluded that protected minority groups were disproportionately overrepresented in having criminal records on a national basis. Hence, the use of criminal records would be considered likely to result in adverse impact in violation of the Civil Rights Act of 1964. Therefore, the Commission advised employers that it would closely scrutinise any blanket use of criminal history information as a basis for rejection on the presumption of de facto discrimination even in the absence of adverse impact evidence.
The number of jurisdictions with “Ban-the-Box” laws in place has almost doubled since 2012. In addition, several large and prominent US employers have elected to voluntarily remove the criminal conviction check box from their job applications at all business locations, whether or not a “Ban-the-Box” law is in effect locally.

Although the EEOC has encountered judicial setbacks in its lawsuits against national employers alleging discrimination in the misuse of criminal information (Younes, 2013), the results of the Commission’s actions are clear, as the number of jurisdictions with “Ban-the-Box” laws in place has almost doubled since 2012. In addition, several large and prominent US employers have elected to voluntarily remove the criminal conviction check box from their job applications at all business locations, whether or not a “Ban-the-Box” law is in effect locally. While about 10-15% of the current laws apply to private employers, the vast majority pertains only to public sector employers within a given jurisdiction; nevertheless, the trend seems to be toward continued passage of new laws, along with extension of existing public sector-only laws and policies, to cover the private sector as well.

One may wonder how this trend affects pre-employment testing. Despite the popular name, though, “Ban-the-Box” statutes usually go beyond the job application form to prohibit employers from asking questions or making any inquiries about a person’s criminal history, whether directly or indirectly through a third party, until a specified point in the selection process, such as after an interview is done.

While this most clearly impacts background check service vendors, a less obvious target is web-based job applications or applicant tracking systems that incorporate online behavioural assessment inventories such as honesty and integrity tests or other risk-oriented screening tools. If these instruments contain any questions explicitly seeking information about criminal history (commonly defined as publicly available records of encounters with the law enforcement and judicial systems), the employer may be at risk of violating relevant “Ban-the-Box” laws depending upon the particular circumstances, such as when the assessment is completed in relation to the time at which an inquiry is permissible.

Test publishers are responding to customer concerns about “Ban-the-Box” laws by modifying the content and scoring of integrity tests to accommodate the prohibition on asking questions related to convictions and criminal history. That has to be done carefully in order to preserve the validity of an assessment as closely to the original instrument as possible. The EEOC Enforcement Guidance does offer the option of demonstrating validity of these types of items according to the Uniform Guidelines as a justification for their continued and defensible use. This strategy may be tenable for jurisdictions where “Ban-the-Box” laws haven’t been implemented and aren’t expected to be for at least the intermediate term.

Marijuana Legalisation Movement

The trend toward legalising marijuana in the US reflects shifting attitudes and values among Americans toward marijuana use. The percentage of Americans that favor legalisation of marijuana for adult recreational use has increased by 65% in the past ten years, from 32% in 2006 to 53% this year (Pew Research, 15.4.15). The use of marijuana as a prescribed treatment for medical conditions is already lawful in nearly two dozen states – almost half of the country – and approximately one-third of US states have decriminalised marijuana possession (most in just the last decade), making it a lesser offence with lighter punishments.

\[2\] For example, General Dynamics IT offers integrity assessments without a conviction admission question for use in locations where Ban-the-Box laws exist and has shown that these are as valid as the original versions.
As with the “Ban-the-Box” movement, the drive to legalise marijuana is spearheaded by advocacy group efforts. The goal is to make personal possession and use of marijuana legal subject to government regulation and taxation. This grass roots campaign began twenty years ago and has been gaining momentum in recent years. Over the past several years, ballot referendums have passed in four states and in the District of Columbia and subsequently been implemented into law. A dozen more states are targeted for legislative action by 2019 (www.mpp.org/states).

While this movement is not aimed directly at changing employment practices, it creates important impacts for employers. Most notably, personal legal use of marijuana, whether recreational or medicinal, may pose conflicts between employee and employer interests. Many employers have a legitimate need to maintain a safe working environment for all employees. Moreover, employers that contract with the US Government must promote and maintain a drug-free work environment at all times in order to comply with federal law and continue to be eligible for contract awards.

Marijuana is still classified as a controlled substance under US federal law, which makes growing and possessing it a federal crime. The Department of Justice issued updated enforcement guidance in August 2013 stating that enforcement and prosecution in jurisdictions where it is now legal could be discretionary premised on the condition of a robust regulatory system put into place and which also is consistent with federal drug enforcement priorities (e.g., preventing marijuana distribution to minors).

Two state-level Supreme Court rulings this year have upheld employer work place drug policies in the firing of employees over marijuana use (Menditto v State of Connecticut; Coats v Dish Network). Despite these outcomes, public and media pressure is building on employers to modify drug policies to better accommodate marijuana use outside of work where recreational or medicinal use is legal.

With regard to the impact of marijuana legalisation on pre-employment testing, a similar type of issue as posed by Ban-the-Box laws occurs. That is, risk-oriented measures such as integrity tests often assess the potential for substance abuse, including marijuana. Under the Americans with Disabilities Act (ADA), the evaluation is restricted to only the current use of illegal drugs.

One approach some test publishers have taken to address this quandary is to qualify questions about marijuana use with test-taker instructions excusing them to answer if it is legal in their place of residence or if it is a doctor-prescribed treatment. Another strategy is to ask about marijuana usage only in the context of the job setting or just prior to beginning work so that it is clearly employment specific. An even simpler choice is to avoid asking any questions about marijuana use, which some test users prefer.

However, removing marijuana use questions runs the chance of losing some degree of validity for fully identifying applicants who are at risk for substance abuse and related counterproductive job behaviours, thus partially defeating the purpose of pre-employment risk screening assessment. For employers with locations regionally or nationally, it may be more appropriate to use modified instructions or contextualised questions since only a few states presently permit recreational marijuana use, especially if work place safety and/or federal policy compliance are vital considerations.
Whereas only about a quarter of businesses used pre-hire applicant testing fifteen years ago, nearly 60% of companies reported doing so in 2013.

Personality Test Challenges

In 2014, complaints filed with the EEOC against seven major US-based retailers alleged that the use of pre-employment personality tests in their online job applications violated the ADA by discriminating against persons with mental illness (*Wall Street Journal*, 29.9.2014). The attorney filed the complaints on behalf of his son, a college student seeking summer employment who had previously been diagnosed as having bipolar disorder. Although the student had prior similar job experience, the complaints allege he was not hired by any of the companies based on results of his answers to test questions ostensibly regarding emotional adjustment.

Recently, there appears to be an emerging anti-testing trend reflected in the media (CheatSheet.com, 15.7.2015, *ABC News*, 10.1.2012). This seems to be in reaction to the rapid spread of pre-employment testing by organisations, especially in the private sector. Whereas only about a quarter of businesses used pre-hire applicant testing fifteen years ago, nearly 60% of companies reported doing so in 2013 (*Wall Street Journal*, 15.4.2015). One industry observer estimates that between 60% and 70% of job applicants are tested for personality, skills, cognitive abilities and other characteristics in the US, about double the proportion of five years ago (*Wall Street Journal*, 29.9.2014). Another estimate has three-quarters of organisations with 100 or more employees using personality and aptitude tests for external hiring, with projected usage approaching 90% in the near future (*Harvard Business Review*, 15.7.15).

The ADA prohibits employers from considering a person’s disabilities as a factor in determining job suitability before making a job offer conditioned on a medical examination. The EEOC’s *Enforcement Guidance for ADA* (1994) distinguished between medical exams and personality tests, specifically citing integrity tests, which can be given pre-hire as long as they are not designed to reveal or diagnose a disability, such as an emotional disorder or other mental illness.

While the EEOC has begun investigating the complaints, no conclusions have thus far been reached. According to the initial *Wall Street Journal* article, the agency is looking into whether the personality tests used by the identified companies discriminate against people with mental illnesses despite having relevant job skills, as shown by EEOC documents. An individual familiar with the situation expressed personal concern in professional circles that the bright line established by the ADA Enforcement Guidance could potentially become blurred by the new complaints.

A consultant quoted in the article suggests that any unfavourable findings by the agency on those complaints could force employers and test publishers to show that their personality tests don’t discriminate against persons with mental illnesses. That might be challenging to accomplish since the ADA and its Amendment Act (ADAAA) prohibit employers from inquiring about disabilities unless a person voluntarily discloses a disability in seeking an accommodation in order to perform job duties.

In addition, the current protocol for soliciting voluntary demographic information from job applicants approved by the EEOC to support adverse impact reporting only addresses race/ethnic, gender, and age factors. Although some companies have ventured to begin asking employees to voluntarily self-identify disability, the prospects for effectively demonstrating lack of adverse impact by personality tests, as well as any other type of pre-employment assessment, remain uncertain. Given the myriad of disabilities and variable incidence levels in the work population as a whole, gathering sufficient data for conducting EEO impact analyses with adequate statistical power in a specific organisation may prove daunting, especially for mental illnesses.
Test developers and publishers with primary operations located in Europe that plan to offer personnel employment tests or talent assessments in the US would do well to consider how their products may be impacted by the current trends described in this paper.

In light of an apparently growing agitation about pre-employment testing, testing professionals are beginning to engage proactively with the media, practitioners and the public to help educate these stakeholders about the science, ethics and value of testing. For example, prominent members of the Society for Industrial and Organizational Psychology and representatives of test publishers, along with client organisations, contributed to the Wall Street Journal articles, bringing a somewhat more balanced perspective to the issue. The ATP also responded to the article authors and derivative media reports with informative letters to clarify facts and correct misinformation.

Separately, another testing consultant admonished HR practitioners to not over-rely on personality tests that lack satisfactory theoretical grounding and scientific evidence of validity, citing well-known research findings reported by Frank Schmidt (Harvard Business Review, 17.8.2014). More recently, the CEO of an ATP member organisation published an article offering reassurance and friendly advice to white collar business people about how to take employment tests so as to showcase their strengths and relevant job qualities (Harvard Business Review, 15.7.2015).

Recommended Best Practices

Test developers and publishers with primary operations located in Europe that plan to offer personnel employment tests or talent assessments in the US would do well to consider how their products may be impacted by the current trends described in this paper. It may be prudent to make certain adjustments in the content, scoring, reporting and/or marketing of some instruments to comply with state and local laws as well as federal laws and regulations regarding these particular issues.

Because employment testing may be subject to scrutiny as a facet of legal and social/political trends, publishers and end users of assessments should proactively stay abreast of relevant developments and conversations about our industry. The following practices are suggested based on recent experiences:

**Be vigilant** – Monitor policy and social developments around hiring and employment that involve or affect test use.

**Work within ATP** – Leverage ATP/E-ATP status and resources to address misinformation and to establish credibility for a science-grounded, responsible testing industry to educate policy makers and the public through internal and external communication.

**Foster stakeholder relationships** – Build and maintain professional and cooperative relationships with key stakeholder representatives, such as from governing institutions, enforcement agencies, corporate forums, business publications, etc.
Besides addressing specific legal and social/political trends, good professional practice suggests taking appropriate steps to adapt assessment tools and procedures as needed whenever tests are positioned for use outside the country in which they were originally developed and validated (APA Test Standards, 2015). ATP promulgated the Model Guidelines for Preemployment Honesty Testing 3rd Edition (2010) that can also serve as a basis for international test deployment. The abbreviated list of best practices below is adapted from the Model Guidelines applicable to test publishers:

- Design test versions for full compliance (Necessary)
  - Meet local country/regional professional test standards
  - Adhere to local country/regional legal requirements
- Base test translations and cultural adaptations on sound methods (Necessary)
- Document in-country reliability and validity evidence (Desirable)
- Establish norm group(s) appropriateness\(^3\) (Desirable)
  - Develop country-specific norms where feasible
- Make testing programme consistent with country-specific user qualifications and requirements (Necessary)
- Take country/region differences into account for web-based testing (Desirable)
  - Internet availability /accessibility, devices used, keyboards, etc.

**Conclusion**

Clearly there are forces in contemporary society with competing goals and agendas that can encourage or constrain the use of tests for pre-employment assessment, including legal, political, professional and social trends. In the US, three major current and emerging trends have been described by this paper: “Ban-the-Box” laws, marijuana legalisation efforts, and ADA test challenges. Perspectives on the underlying dynamics and mitigating strategies were offered to promote insight, understanding, and action planning that can help organisations and test users gain advantage through assessment.

\(^3\) Launch norms and validity could be high-end statistical analogue-based, with migration to local data sets over time. The relative merits of using global norms and validity instead might be taken into consideration as well.
References


Americans with Disabilities Act (ADA) of 1990. [http://www.ada.gov/ada_intro.htm](http://www.ada.gov/ada_intro.htm)


National Employment Law Project. (2014). Criminal records and employment. [www.nelp.org/index.php/content/content_issues/category/criminal_records_and_employment](http://www.nelp.org/index.php/content/content_issues/category/criminal_records_and_employment)


Weber, L. To get a job, new hires are put to the test. Wall Street Journal (15.4.15), Section A, page 1.
