Pre-Employment Screening and Investigation: Navigating Between a Rock and a Hard Place

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I. INTRODUCTION

Employers complain that they are caught between a rock and a hard place when it comes to the issue of pre-employment screening.⁴ They also contend that the gap is getting narrower all the time.² On the one hand, employers face mounting pressure to screen and investigate their workforce applicants.³ On the other hand, employers are encountering increased pitfalls if they do.⁴

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2. See generally id. at 31-32.
3. See id.
4. See id.
Recent legal developments have played a significant role in creating this dilemma. Traditionally, the hiring process was one of the least regulated aspects of the employment relationship. This has changed dramatically in recent years, with a complicated web of legal forces operating in a countervailing manner. As an example, employers who fail to screen out potentially dangerous applicants in the hiring process may be liable for substantial damages by virtue of the emerging tort of negligent hiring. This significant incentive for pre-employment screening is countered, however, by a growing number of legal limitations such as those posed by the Americans with Disabilities Act ("ADA"), and the expanding potential for defamation liability. Thus, employers who undertake screening and investigation efforts to avoid liability may stumble unwittingly into liability from other sources because of those very efforts.

Many scholars have written about the negligent hiring tort or about specific pre-employment screening techniques such as reference checks and drug testing. This article attempts a different approach by examining the pre-employment screening topic on a "macro" level. This approach has several advantages. First, a broad-based overview produces a helpful road map that depicts the legal landscape of pre-employment screening. Second, a "macro" analysis enables the development of an interest-based methodology for establishing a pre-employment screening strategy that will avoid both the rocks and the hard places of this landscape. Finally, the "macro" view suggests several prospects for legal reform that would appropriately balance the competing policy interests of employers and job applicants and bring more coherence to the pre-employment screening process.

Part II of this article addresses the increasing pressure on employers to engage in pre-employment screening efforts. In Part III, the article examines the various screening and investigative techniques available to employers and the legal limitations on their use. In Parts IV and V, respectively, the article suggests a method-

5. See Mark Cook, PERSONNEL SELECTION & PRODUCTIVITY 224 (2d ed. 1993).
8. See Ryan & Lasek, supra note 6, at 307.
ology for addressing pre-employment inquiries and a number of legal reforms that would enhance the treatment of the pre-employment screening topic.

II. REASONS TO SCREEN AND INVESTIGATE

A. The Rationale for Pre-employment Screening

Employers screen and investigate job applicants for many reasons. In human resource terms, employee selection involves the process of evaluating applicants for purposes of determining the likely fit between the person and the job. The selection process is premised upon predicting future success on the job by identifying those skills and characteristics critical for the position in question. This process of predictive assessment typically involves either “screening in” applicants who possess desirable characteristics or “screening out” applicants who possess undesirable characteristics.

The “screening-in” function attempts to identify attributes that correlate with good job performance. Some of these attributes, such as aptitude and good health, may be of a general nature. Other attributes, however, are specific to the job. While a college degree, good eyesight and in-flight experience may be desirable traits for an airline pilot’s position, they may be wholly irrelevant for a position as an airline mechanic.

An employer’s ultimate objective in screening for positive characteristics is to enhance work productivity. Research indicates that good employees are more than twice as productive as mediocre employees in many positions. Research further shows that many

11. See id. at 336, 389.
14. See Cook, supra note 13, at 1-10.
pre-employment screening techniques have a positive correlation with future on-the-job productivity.  

Employers also are motivated to "screen out" applicants with negative traits.  Employees who use illegal drugs or who have a propensity for violence, for example, are not only likely to be less productive, they also are more likely to subject employers to monetary liability.  In the screening-out function, employers attempt to identify applicants who have engaged in past undesirable conduct. The rationale for this inquiry is that past behavior is thought by many human resource specialists to be "the best predictor of future behavior."  

Employers typically use more than one screening device in gathering information about applicants. The desired mix of screening techniques generally reflects the nature of the position in question. For example, an employer may prefer to use "screen-in" techniques, such as an ability test, in hiring for a highly skilled job. On the other hand, "screen-out" techniques, such as a criminal records check, may be more appropriate in hiring someone for a safety-sensitive position. In general, the predictive value of pre-employment screening depends upon linking the selection plan with an accurate assessment of the qualifications relevant to successful job performance.  

15. See Cook, supra note 13, at 254-55 tbl. 13.1 (listing validity coefficients for various screening devices); Zedner & Johnson, supra note 13, at 143 (stating that pre-employment "[t]esting can save [employers'] money because employees selected by valid tests are more productive than those selected by other methods").  

16. See Ryan & Lasek, supra note 12, at 304.  

17. For a discussion of employer liability for employee misconduct see infra notes 62-105 and accompanying text.  

18. See Ryan & Lasek, supra note 12, at 304.  

19. Ryan & Lasek, supra note 12, at 293.  

20. See Cynthia D. Fisher et al., Human Resource Management 308 (3d ed. 1996) (stating that often, various selection "devices are used sequentially, in a multiple-hurdle decision-making scheme").  

21. See Ryan & Lasek, supra note 12, at 304 (stating that the use of a "screen-in" approach might look for such characteristics as typing ability or a college degree).  

22. See id. (citing the use of such "screening out" techniques as drug testing and integrity testing).  

B. Increasing Incentives for Pre-employment Screening

Pre-employment screening is on the rise.\(^24\) Over the past few years, a growing number of employers have begun using a growing number of screening techniques.\(^25\) While many factors may be contributing to this phenomenon, three deserve special mention.\(^26\)

1. Technological Advances

Pre-employment screening traditionally consisted of an interview, sometimes augmented by a reference check or an ability test.\(^27\) Employers today, however, can choose from among an increasing array of screening devices.\(^28\) In the realm of medical screening, for example, employers can readily ascertain an applicant's use of drugs or exposure to HIV.\(^29\) Similarly, computer technology now enables employers to access substantial amounts of background information concerning applicants, such as their criminal records and credit histories.\(^30\)

Two examples—genetic screening and computer-based testing—illustrate that these technological advances are likely to continue in

\(^24\) See, e.g., American Management Association, 1996 AMA Survey on Workplace Drug Testing and Drug Abuse Policies 1 (showing a 277% increase in workplace drug testing over the past decade); John Bourdeau, Employment Testing Manual: 1996 Cumulative Supplement 1.04(4)(a) (1996) (showing an increased use of both skills tests and screening tests); Mark A. Rothstein, Medical Screening and the Employee Health Cost Crisis 1-6 (1989) (depicting an increase in various types of medical screening).

\(^25\) See generally sources cited supra note 24.

\(^26\) These factors include technological advances, the "skills gap" and a fear of monetary liability. See, e.g., Hudson Institute, Workforce 2000: Work and Workers for the Twenty-First Century (1987) (discussing generally the skills gap); Rothstein, supra note 24, at (citing the use of medical screening as one of these technological advances); David L. Gregory, Reducing the Risk of Negligent Hiring, 14 Empl. Rel. L.J. 31 (1988) (discussing the possibility of substantial damages awarded due to inadequate screening of applicants).


West's Legal News reports that Multi-Health Systems of Toronto, Canada released news of its plan to begin marketing its "Emotional Quotient Inventory" ("EQ-I"), which it contends will better measure job applicants' potential for success by measuring emotional traits. See Employers May Soon be Able to Test One's Emotional Intelligence, West's Legal News, Jan. 7, 1997.

\(^29\) See Rothstein, supra note 24, at 2. HIV testing and drug testing are discussed respectively infra at notes 183-98, 212-83 and accompanying text.

\(^30\) Criminal records checks and credit history checks are discussed, respectively, infra at notes 330-44 and accompanying text.
the future. Genetic screening is a process for examining the genetic makeup of individuals for certain inherited characteristics. The development of DNA technology in the 1980's significantly enhanced techniques for locating and analyzing genes. This has fueled the worldwide Human Genome Project, which aims to identify and map the approximately 50,000 human genes over the next ten to fifteen years. This project (and related research) is expected to "increase dramatically" the number of tests available for predicting an individual's susceptibility to genetic disorders. In the workplace, such tests conceivably could be used to identify an applicant's biological predisposition to an occupationally-related disease or to identify genetic disorders that have the potential to drive up the costs associated with employment.

Computer technology provides a second example in terms of the development of sophisticated ability and work sample tests. These tests simulate the work environment and require applicants to respond interactively to tasks and problems associated with the job. Some of these tests already exist. Some employers in the petroleum industry, for example, require applicants for truck driving positions to take a computer-based test that simulates the steps taken in loading and unloading fuel. In the future, computer experts will create "virtual reality" testing systems in which applicants interact in an artificial environment that depicts real world behavior.

Technological advances increasingly make it possible for employers to access more information concerning job applicants. Some of these screening techniques, of course, raise legal and ethical concerns, which are discussed below. The mere fact that such access is

32. See Rothstein, supra note 24, at 72-76.
33. See Bourdeau, supra note 24, at 11.02(2)(b).
34. Bourdeau, supra note 24, at 11.02(2)(b).
36. See Bourdeau, supra note 24, at 1.05(4).
38. See Bourdeau, supra note 24, at 1.05(4).
39. See generally Rothstein, supra note 24.
possible, however, provides employers with a powerful incentive to avail themselves of the opportunity.\textsuperscript{40}

2. The Skills Gap

A second factor motivating employers toward more pre-employment screening is the growing skills gap in the American workplace.\textsuperscript{41} This gap results from an economy that increasingly demands more highly skilled workers and a labor supply that is failing to keep pace.\textsuperscript{42}

The increased demand for more highly skilled workers reflects the ongoing transformation of the United States from a manufacturing-based economy to a service-based economy.\textsuperscript{43} This trend is projected to continue into the near future as professional, technical and service jobs replace those in the manufacturing sector.\textsuperscript{44} These new jobs, in turn, require employees with more education and better skills.\textsuperscript{45} Even entry level jobs are demanding more complex skills, as evidenced by the computer-based abilities now required for many clerical positions.\textsuperscript{46}

The United States, however, has not developed the desired cadre of skilled workers.\textsuperscript{47} Part of the blame lies in low birth rates, which are causing "the labor force [to grow] at a slower rate than at any time since the 1930's."\textsuperscript{48} This phenomenon also results in an aging

\textsuperscript{40} See, e.g., Rothstein, supra note 24, at 79 ("With respect to genetic testing by employers, if the cost is low, the accuracy is high, and the testing can be done quickly and easily, it must be assumed that many employers would have an interest.").


\textsuperscript{43} See HUDSON INSTITUTE, supra note 42, at 20-29.

\textsuperscript{44} See id. at 96-101 (predicting, for example, a 44% increase in technicians' jobs and a 7% decrease in assembly jobs between 1984 and 2000).

\textsuperscript{45} See id. at 97-99 (predicting, for example, that 52% of the new jobs created between 1984 and 2000 will require some college education as opposed to only 42% of those jobs existing in 1984).

\textsuperscript{46} See DIANE ARTHUR, RECRUITING, INTERVIEWING, SELECTING & ORIENTING NEW EMPLOYEES 2 (2d ed. 1991).

\textsuperscript{47} See, e.g., Offerman & Gowing, supra note 42, at 386-89; Arthur, supra note 46, at 1-7.

\textsuperscript{48} HUDSON INSTITUTE, supra note 42, at 76-79 (illustrating that the labor force during the 1990's is growing at less than one-half of the 1970's growth rate); see also Arthur, supra note 46, at 2.
workforce that is less recently trained and less receptive to either retraining or relocation.\textsuperscript{49} Moreover, a large number of those who now are entering the workforce lack even rudimentary job skills, much less the more advanced skills necessary for the new technological workplace.\textsuperscript{50}

The skills gap means that employers are faced with a growing need for a scarce resource. Not surprisingly, employers are turning increasingly to pre-employment screening techniques to identify workers who either possess the necessary skills for the job or are capable of attaining those skills through on-the-job training programs.\textsuperscript{51}

\section*{3. Fear of Monetary Liability}

Perhaps the most significant factor leading to an increase in pre-employment screening activities is the fear of monetary liability for workplace-related injuries.\textsuperscript{52} Employers, of course, traditionally have been liable for injuries caused by their employees when acting within the scope of employment.\textsuperscript{53} The potential for monetary liability is greater today, however, because of two recent developments: an increase in the incidence of workplace violence\textsuperscript{54} and the emergence of the negligent hiring tort.\textsuperscript{55} Both developments provide a powerful incentive for employers to minimize potential liability by screening out applicants with a propensity for violent or otherwise injurious behavior.

\textsuperscript{49} See Hudson Institute, supra note 42, at 79-85 (projecting that the median age of workers will grow from 35 years old in 1984 to approximately 39 years old in 2000 and will result in a less adaptable workforce); Arthur, supra note 46, at 1-2 (finding that the aging workforce possesses fewer skills and has low retraining potential).

\textsuperscript{50} See John Bourdeau, Employment Testing Manual: 1996 Cumulative Supplement 1.05[1] (1996) (discussing the 1994 American Management Association survey finding that 35.5\% of job applicants were deficient in basic math and/or literacy skills); Hudson Institute, supra note 42, at 102-03 (discussing U.S. Department of Education data showing that many new workers lack the basic skills essential for employment).

\textsuperscript{51} See Arthur, supra note 46, at 3-4; Bourdeau, supra note 50, at 1.05[2].


\textsuperscript{53} See discussion infra notes 64-73 for a discussion of respondeat superior liability for injuries caused during the scope of an employee's employment.

\textsuperscript{54} See generally Levin, supra note 52.

a. Workplace Violence

Violent behavior is an all too frequent occurrence in the contemporary workplace. A recent study estimates that more than two million Americans are physically assaulted at work each year.56 Workplace homicides now exceed more than 1,000 per year and are second only to vehicular accidents as a cause of workplace fatalities.57 Taken together, one in four workers is harassed, threatened or assaulted on the job during the course of a typical year.58

Regardless of who actually inflicts these injuries, employers face a very real possibility of bearing ultimate legal responsibility. Employers, for example, may be financially liable under anti-discrimination statutes for the harassing conduct of supervisors and other employees.59 Employers also are responsible for workers' compensation benefits payable to employees injured on the job without regard to fault.60 Most significantly, however, employers may be liable for substantial compensatory and punitive damages in tort because of injuries caused by their employees, whether acting within or without the scope of employment.61

b. Tort Liability Theories

In general, employers may be held liable to third parties for injuries caused by their employees under two broad theories. First, employers may be liable vicariously for acts committed by their employees within the scope of their employment duties.62 Alterna-

56. See Northwestern Nat'l Life Ins. Co., Fear and Violence in the Workplace 4-5 (1993) (estimating that 2.2 million people had been physically attacked at work between July 1992 and July 1993); see also U.S. Dep't of Justice, Bureau of Justice Statistics, Violence and Theft in the Workplace 1 (1994) ("Each year nearly one million individuals become victims of violent crime while working . . . ").


60. Under most state workers' compensation statutes, employers may be responsible for benefits either directly as self-insurers or indirectly by purchasing insurance with premium levels established through experience ratings. See Arthur Larson, Workers' Compensation Law § 92.10 (1993).

61. See generally Levin, supra note 52, at 171.

tively, employers may be liable directly for their own negligence in failing to ascertain an employee's propensity for inflicting injury.63

i. Vicarious Liability—Respondeat Superior

Under the doctrine of respondeat superior, an employer may be liable for acts or omissions by an employee that cause injury to another's property or person.64 Respondeat superior, however, only imposes liability on employers for acts committed by an employee within the scope of employment.65 The Restatement (Second) of Agency section 228 states a general test for determining whether an act is within the scope of employment, emphasizing that conduct is not within the scope of employment "if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master."66

Though it may seem less likely that the motivation for an intentional tort will be to "serve the master," courts find intentional67 as well as negligent68 acts to come within the scope of employment. Often, the determinative aspect of the scope of employment test is the employee's purpose in committing the act. For example, in

63. See infra notes 74-105 for a discussion of employer liability for failure to ascertain an employee's dangerous propensities.

64. The Restatement states: "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." RESTATEMENT, supra note 62, at § 219(1).

65. See id. § 219(2).

66. Id. at § 228(2). The Restatement goes on further to state:

Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Id. at § 228(1).

67. See, e.g., Rivas v. Nationwide Personal Sec. Corp., 559 So. 2d 668, 670 (Fla. Ct. App. 1990) (upholding a jury verdict finding an assault to be within the scope of employment because it arose out of a job dispute); Wilson v. R.F.K. Corp., 563 A.2d 738, 741 (Conn. App. Ct. 1989) (finding the employer of a bartender who struck a patron liable for the patron's resulting injuries); see also, e.g., Birkner v. Salt Lake County, 771 P.2d 1053, 1057 (Utah 1989) ("For purposes of liability under the doctrine of respondeat superior, it is not generally relevant whether the sexual misconduct is categorized as an intentional or negligent tort.").

68. See, e.g., Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11 (1979) (holding an employer liable for fire damage caused by an employee's negligent cigarette smoking while performing work activities in a motel room and determining that "[t]o support a finding that an employee's negligent act occurred within his scope of employment, it must be shown that his conduct was, to some degree, in furtherance of the interests of the employer").
Olson v. Connelly,69 the Wisconsin Supreme Court held that “an employee may be found to have acted within the scope of his or her employment as long as the employee was at least partially actuated by a purpose to serve the employer.”70 In addition, the purpose of the employee in serving the employer does not have to be the employee’s only or primary purpose.71

Though the purpose inquiry usually applies to both negligent and intentional torts, a few jurisdictions have drawn a distinction between the standards for negligent acts and intentional acts, finding that for intentional acts, “[i]t is irrelevant whether the actual assault involves a motivation to serve the master.”72 Most courts, however, continue to place importance on employee intent when determining whether an employee’s intentional tort is within the scope of employment.73

69. 457 N.W.2d 479 (Wis. 1990).
70. Id. at 483. In Olson, a former patient sued a state university physician, the state, the clinic and the university for emotional distress allegedly resulting from the physician’s sexual contact with the patient. See id. at 479. The Court noted that in order to determine whether the sexual contact was in the scope of employment, it is proper to look at the employee’s intent—in other words, whether the employee was motivated “by an intent to serve his employer or whether he had stepped aside from his employer’s business to achieve an independent purpose of his own.” Id. at 484.
71. See id. at 483. The Seventh Circuit, applying Illinois law, has determined that an act may fall within the scope of employment even if the predominant motive is to benefit the employee, so long as one of the employee’s purposes was to further the business. See Roberson v. Bethlehem Steel Corp., 912 F.2d 184, 188 (7th Cir. 1990).
72. Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 310 (Minn. 1982); see also Maryland Casualty Co. v. Huger, 728 S.W.2d 574, 579-80 (Mo. Ct. App. 1987). The court in Maryland Casualty focused on whether an employee’s conduct in inflicting intentional injury was “authorized, usual, customary, incidental, foreseeable, [or] fairly and naturally incidental to his duties” rather than on the motive of the act or the time it was committed. Id. at 580.
73. See, e.g., Thatcher v. Brennan, 657 F. Supp. 6, 10 (S.D. Miss. 1986) (holding that a salesman was not acting within the scope of employment when he became involved in an altercation with the plaintiff because the purpose of the altercation was not to further the employer’s interest, but rather was intended to satisfy the salesman’s purely personal objectives), aff’d, 816 F.2d 675 (5th Cir. 1987); Los Ranchitos v. Tierra Grande, Inc., 861 P.2d 263, 268 (N.M. Ct. App. 1993) (determining that embezzlement was not within the scope of employment by looking in part at whether the act was executed “with the view of furthering the employer’s interest and [thus] did not arise entirely from some external, independent and personal motive on the part of the employee”); see also, e.g., Liu v. Republic of China, 892 F.2d 1419, 1429 (9th Cir. 1989) (applying California law, the court stated that the employee’s intent should be a relevant factor in determining scope of employment, especially in cases of intentional torts).
ii. Direct Liability—Negligent Hiring

Direct employer negligence is an expanding area of employer liability and thus provides a substantial motivation for pre-employment screening. An employer may be liable for negligently hiring employees when such negligence results in harm to third parties, even when the harm inflicted by the employee occurs outside the scope of employment and thus outside the scope of the respondeat superior doctrine of liability.

The tort of negligent hiring stems from an employer's duty "to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the [ir] employment, may pose a threat of injury to members of the public." In order to prove negligent hiring, a plaintiff must establish that (1) the employer owed the third party a duty of reasonable care, (2) the employer breached the duty and (3) the breach proximately caused the third party's harm.

Under the first prong of this formula, an employer owes a duty of care to those individuals "within the zone of foreseeable risks created by the employment [relationship]." "[T]his is a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as the result of the hiring." The existence of this duty, accordingly, turns on the type of position the employer is seeking to fill and the foreseeability of harm to third parties.

74. In addition to potential liability for negligent hiring, courts also have found employers liable for direct negligence in retaining or supervising current employees. See Robert L. Levin, Workplace Violence: Navigating Through the Minefield of Legal Liability, 11 LAB. LAW. 171, 175-76 (1995).

75. One court has noted that liability for negligent hiring arises from intentional employee acts, which are "almost invariably outside the scope of employment, when the employer knew or should have known that the employee was violent or aggressive and might engage in injurious conduct." Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. Ct. App. 1993).

76. Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983).

77. See id.

78. See id. at 912.

79. See id. at 915.


81. Ponticas, 331 N.W.2d at 911 n.5.

82. In Williams v. Feather Sound, Inc., 386 So. 2d 1238 (Fla. Dist. Ct. App. 1980), the court noted that "in analyzing the employer's responsibility to check out an applicant's background, it is necessary to consider the type of work to be done by the prospective employee." Id. at 1240.
Thus, courts have found apartment building owners to owe a duty of care to tenants in hiring an employee entrusted with a passkey, but not to a former employee who was killed by a custodian having no special access to the victim.

A breach of this duty occurs if an employer either “knew or should have known” of an applicant’s unfitness for the job but hired the applicant anyway.

In order to allege facts sufficient to show breach of a duty [in a negligent hiring action, the plaintiff must demonstrate] that: (1) the employer was required to make an appropriate investigation of the employee and failed to do so; (2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and (3) it was unreasonable for the employer to hire the employee in light of the information he knew or should have known.

Just as the existence of a duty often turns on the “type of work to be done,” whether the court finds a breach of that duty will also be determined with reference to the nature of the job, as well as the reasonableness of the investigation undertaken. As explained by one court:

Although only slight care might suffice in the hiring of a yardman, a worker on a production line, or other types of employ-

83. The New Jersey Supreme Court described this duty as arising where the employer “knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of the employee and could reasonably have foreseen [the risk of harm to others].” Di Cosala v. Kay, 450 A.2d 508, 516 (N.J. 1982).
84. See Kendall v. Gore Properties, Inc., 236 F.2d 673, 678 (D.C. Cir. 1956); Ponticas, 331 N.W.2d at 911.
85. In Yunker, a custodial employee, who had been rehired after serving a jail sentence for murdering a co-worker, again murdered a former co-worker. See Yunker, 496 N.W.2d at 421. The Minnesota Court of Appeals determined that Honeywell was not liable for negligent hiring because it did not owe a duty to the deceased co-worker at the time of the custodian’s hire. See id. at 423. The court focused on foreseeability of harm, concluding that the co-worker was not a foreseeable victim at the time of the hiring. See id. Significantly, the court noted that a finding of liability for negligent hiring would have the effect of labeling ex-felons as “inherently dangerous,” thus deterring the hiring of individuals with criminal records. Id.
86. Williams, 386 So. 2d at 1240.
87. Garcia, 492 So. 2d at 440.
88. Williams, 386 So. 2d at 1240.
89. See id.
90. See id.
moment where the employee would not constitute a high risk of injury to third persons, "a very different series of steps are justified if an employee is to be sent . . . to work for protracted periods in [a sensitive position posing foreseeable risks of harm]."

Accordingly, in manyhirings, such as where employment duties will bring the employee into contact with others only incidentally, an employer need not make an independent inquiry into an applicant's past. When an employee is hired for a sensitive position carrying foreseeable risks, however, the obligation of reasonable care may compel an employer to go beyond inquiries directed at applicants to include investigative inquiries directed at third parties, such as reference checks and criminal record checks.

The last element a plaintiff must prove in a negligent hiring action is proximate cause. The required showing is that "through the negligence of the employer in hiring the employee, the latter's incompetence, unfitness or dangerous characteristics proximately caused the injury." This element is satisfied, for example, where an employee inflicts harm on a foreseeable victim because of an employer's failure to undertake a reasonable investigation that would have disclosed a pattern of similar criminal behavior.

The Minnesota Supreme Court's decision in *Ponticas v. K.M.S. Investments* illustrates a typical fact pattern in which each of the above elements were found to be present. In that case, the employer of an apartment manager was found liable for negligent hiring when the manager assaulted a female tenant of the complex, even though the manager's intentional wrongful acts were outside the scope of his employment. The court found that the employer

92. *See Garcia*, 492 So. 2d at 441 (holding that "where the intended duties will require only incidental contact with others, the requisite level of inquiry is correspondingly reduced so that obtaining past employment information and personal data during the initial interview may be sufficient").
94. *See Di Cosala*, 450 A.2d at 516.
95. *Id.*
96. *See*, e.g., *Ponticas*, 331 N.W.2d at 914-15.
97. 331 N.W.2d 907 (Minn. 1983).
99. *See id.* at 915-16 (holding that the rape could not be considered a "superseding intervening cause," because a negligent hiring claim includes no such element).
owed a duty to tenants because the employer benefited from the employment relationship with the manager and entrusted the manager with a passkey to the apartment complex. Since the manager had been convicted of violent crimes prior to his employment and the employer's cursory investigation failed to uncover this information, the court found a breach of duty, noting that the employer's failure to discover information about a criminal record of violent crimes was unreasonable in light of the severity of the risk posed by furnishing the manager with a passkey to the apartments. Finally, "negligence in hiring . . . was clearly the proximate cause of the injury" to the plaintiff, because that negligence was the only reason the apartment manager was on the premises and had access to the plaintiff.

The significance of cases such as Ponticas for employer hiring practices is clear: An employer who hires an unfit employee runs the risk of liability for substantial tort damages, even where the resulting injury is inflicted outside of the scope of employment or in direct violation of stated employer policies. Accordingly, the increasing recognition and application of the negligent hiring tort creates a significant incentive for employers to investigate job applicants for dangerous propensities.

III. LIMITATIONS ON SPECIFIC PRE-EMPLOYMENT SCREENING INQUIRIES

Given the incentives discussed above, it is not surprising that employers use a variety of techniques to screen potential employees during the hiring process. Some screening activities, however, go

100. See id. at 911. The manager gained access to the plaintiff as a direct result of his employment and the employer "received a benefit from [the manager's] employment in having a caretaker for upkeep of the property and to aid tenants with complaints of property malfunction." Id.
101. See id. at 914-15.
102. Id. at 915.
103. See Maloney v. B & L Motor Freight, Inc., 496 N.E.2d 1086, 1087, 1089 (Ill. App. Ct. 1986) (denying an employer's motion for summary judgment, where the employer was sued for negligently hiring an over-the-road truck driver who assaulted a hitchhiker, even though the employer had instructed the driver not to pick up hitchhikers).
105. See Levin, supra note 104, at 182.
too far and are unlawful. Some attempts to ascertain information, for example, may be overly intrusive or have a negative impact on protected classes. This presents, then, the core dilemma of pre-employment screening: An employer who screens applicants in an attempt to limit potential liability may incur liability because of the manner or means of conducting that same pre-hire investigation.

The following sections will examine the legal issues implicated by some of the most commonly used pre-employment screening devices. More specifically, these sections will attempt to delineate the legal boundaries of pre-employment screening and investigation techniques.

A. A Word About Recruiting

Federal anti-discrimination laws prohibit employers from using advertisements that discriminate on the basis of protected-class status. Thus, "help wanted" advertisements that state a preference for applicants based on gender, age or other protected-class status are unlawful unless that characteristic is a "bona fide occupational qualification" ("BFOQ") for the particular job involved. In addition, certain advertising methods, such as reliance on word-of-mouth recruitment, may have an unlawful discriminatory

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106. See Gregory, supra note 104, at 32.
107. See generally id. (noting potential conflicts with privacy rights and employment discrimination laws).
108. See id.
109. See generally 42 U.S.C. § 2000e-3(b) (1994) (making unlawful advertisements which "indicate[e] any preference, limitation, specification, or discrimination, based on... sex..." except when these bases are "a bona fide occupational qualification for employment"); 29 C.F.R. § 1604.5 (1996) (stating that an advertisement may not disclose a "preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved").
110. See 42 U.S.C. § 2000e-3(b); 29 C.F.R. § 1604.5.
112. See, e.g., 42 U.S.C. § 2000e-3(b) (extending the ban on discriminatory advertising to "race, color, religion, sex, or national origin [except where such bases are] a bona fide occupational qualification for employment").
113. See, e.g., 42 U.S.C. § 2000e-3(b); 29 C.F.R. § 1604.5.
114. See, e.g., Thomas v. Washington County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990) (holding that a word-of-mouth hiring practice may be unlawful where it disproportionately excludes the hiring of minority employees); Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975) (holding that the recruitment of truck drivers by word-of-mouth solicitation was found discriminatory because it "perpetuate[d] the all-white composition of [the] work force"). But see EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 305 (7th Cir. 1991)
impact. The Equal Employment Opportunity Commission ("EEOC") suggests that advertisements should limit job opportunities only on the basis of necessary position-related skills and qualifications.\textsuperscript{115}

\textbf{B. Applications and Interviews}

Written job applications and face-to-face interviews are two common methods by which employers gather information directly from job applicants.\textsuperscript{116} While these initial screening devices provide a valuable means of assessing job qualifications,\textsuperscript{117} an employer's request for certain types of information may run afoul of anti-discrimination statutes, particularly Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act.\textsuperscript{118}

Title VII,\textsuperscript{119} the principal federal anti-discrimination law, does not expressly prohibit questions that elicit information concerning protected class status.\textsuperscript{120} Most courts have held that such questions are not unlawful absent proof that the responsive information actually was used in the decision-making process.\textsuperscript{121} Nonetheless, the use of such questions may give rise to an inference of discriminatory intent.\textsuperscript{122}

\begin{itemize}
\item[(holding that an employer's "passive reliance on . . . word-of-mouth recruiting" by its employees was not unlawful where the employer did not affirmatively instigate such a practice).]
\item[115. See EEOC, TECHNICAL ASSISTANCE MANUAL FOR THE ADA § 5.2 (1992). The Technical Assistance Manual, implementing the Americans with Disabilities Act, recommends that advertisements describe the essential functions of the job so as to attract applicants, including those with disabilities, who possess the appropriate qualifications. See id.]
\item[116. See CYNTHIA D. FISHER ET AL., HUMAN RESOURCE MANAGEMENT 308-09, 326 (3d ed. 1996).]
\item[117. See id.]
\item[118. See infra notes 119-69 and accompanying text.]
\item[119. 42 U.S.C. § 2000e (1994) (prohibiting discrimination in employment based upon color, race, region, national origin and gender).]
\item[120. See generally EEOC Guide to Pre-Employment Inquiries, 8A Fair Empl. Prac. Man. (BNA) 443:65 (1992).]
\item[121. See, e.g., Bruno v. City of Crown Point, 950 F.2d 355, 363-65 (7th Cir. 1991) (holding that child care questions asked of a female applicant during an interview were not unlawful where the employer's decision not to hire was based on separate, nondiscriminatory reasons, not on the applicant's response to such questions).]
\item[122. See, e.g., Barbano v. Madison County, 922 F.2d 139, 142-43 (2d Cir. 1990) (holding that interview questions concerning gender and childrearing plans tainted the hiring process and constituted evidence of discrimination).]
\end{itemize}
The EEOC has issued guidelines that interpret the impact of Title VII on application and interview questions. The EEOC Guide to Pre-Employment Inquiries ("EEOC Guide") states that questions that either directly or indirectly require the disclosure of information concerning protected class status may constitute evidence of discrimination prohibited by Title VII. Accordingly, the EEOC Guide cautions against the use of questions that directly inquire about protected class status such date of birth, religion and national origin.

The EEOC Guide also counsels against the use of questions which, while neutral on their face, may have a disparate impact in screening out members of a protected class. For example, questions concerning an employer's height and weight requirements may lead to the disqualification of a disproportionate number of women or Asian-Americans. The EEOC Guide states that the use of such information in making hiring decisions is illegal unless the information is needed to judge an applicant's competence or qualification for the job in question.

The EEOC Guide is helpful in terms of providing examples of inquiries that may constitute evidence of "disparate impact" discrimination. Among those inquiries that the EEOC suggests employers avoid, unless necessary for successful job performance, are those that ask for the following types of information:

- marital status, number of dependents, and pregnancy;
- plans for more children and child care arrangements;
- English language skills;
- height and weight;
- education;
- friends and relatives working for the same employer;
- arrest and conviction records;


125. See id.

126. See generally id. at 443:65; Griggs, 401 U.S. at 424 (holding that an employer's education and testing requirements were unlawful because they disproportionately disqualified minority applicants and were not shown to be necessary for job performance).

127. See EEOC Guide to Pre-Employment Inquiries, supra note 120, at 443:66.

128. See id. at 443:65.
—discharge status from military service;
—citizenship;
—credit history; and
—availability for work on weekends and holidays.\textsuperscript{129}

The Americans with Disabilities Act\textsuperscript{130} goes further than Title VII: It actually prohibits employers from asking about the existence, nature or severity of a disabling condition prior to the making of a conditional job offer.\textsuperscript{131} Thus, an employer may violate the ADA by asking certain questions even if the responses are not used in making an employment decision.\textsuperscript{132} According to the EEOC, which is charged with enforcing the ADA, this ban "helps ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before the employer evaluates an applicant's non-medical qualifications."\textsuperscript{133}

The EEOC also has issued the \textit{Enforcement Guidance on Pre-Employment Inquiries Under the Americans with Disabilities Act} (“\textit{Guidance}”), which interprets the ADA's regulation of pre-employment inquiries.\textsuperscript{134} The \textit{Guidance} states that an employer at the pre-offer stage may not ask "disability-related" questions, which are defined as inquiries likely to elicit information about a disability.\textsuperscript{135} This ban clearly prohibits direct inquiries, such as a checklist on an application form or an interview question that asks about the existence of a current or past disability.\textsuperscript{136} The EEOC contends that prohibited disability-related questions also include indirect inquiries that are "closely related" to disability status.\textsuperscript{137}

The "closely related" line of demarcation is not always easy to discern. The touchstone adopted by the \textit{Guidance} is to permit questions directed at abilities but not those primarily seeking informa-

\textsuperscript{129} See id. at 443:66-69.
\textsuperscript{130} The ADA prohibits discrimination in employment with respect to an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. See 42 U.S.C. § 12111(8) (1994). An individual has a qualifying disability if he or she has a physical or mental impairment that substantially limits a major life activity, has a record of such an impairment or is regarded as having such an impairment. See id.
\textsuperscript{133} Id.
\textsuperscript{134} See id.
\textsuperscript{135} See id. at 405:7192.
\textsuperscript{136} See id.
\textsuperscript{137} See id.
tion concerning impairment status. The Guidance goes on to provide examples of permissible and impermissible inquiries, including the following:

**Ability to Perform/Impairments**

Impermissible:

1. Asking about the existence of impairments;
2. Asking about limitations on major life activities;
3. Asking one applicant to demonstrate ability to perform the job but not other applicants (unless the former applicant has a known or voluntarily disclosed disability); and
4. Asking about workers’ compensation history.

Permissible:

1. Asking whether an applicant can perform the job;
2. Asking all applicants or those with a known disability to demonstrate ability to perform; and
3. Asking about required certifications and licenses.

**Attendance**

Impermissible:

1. Asking about frequency of illness.

Permissible:

1. Asking about past attendance record; and
2. Asking about ability to meet employer’s attendance requirements.

**Reasonable Accommodation**

Impermissible:

1. Asking if an applicant needs a reasonable accommodation to perform the job or a particular task.

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138. See id. at 405:7191-92.
139. See id. at 405:7191.
140. See id. at 405:7195.
141. See id. at 405:7192.
142. See id. at 405:7195.
143. See id. at 405:7191.
144. See id. at 405:7192.
145. See id. at 405:7191-92.
146. See id. at 405:7194.
147. See id.
148. See id.
149. See id. at 405:7193.
Permissible:
(1) Asking if an applicant needs a reasonable accommodation because of an obvious or voluntarily disclosed disability, and
(2) Asking if an applicant can perform the job with or without a reasonable accommodation.

Drug and Alcohol Use
Impermissible:
(1) Asking about use of lawful drugs,
(2) Asking about past addiction to alcohol or illegal drugs,
(3) Asking about an applicant's past frequency of using illegal drugs, and
(4) Asking about an applicant's frequency of using alcohol.

Permissible:
(1) Asking about current use of illegal drugs,
(2) Asking whether an applicant ever used illegal drugs in the past,
(3) Asking when an applicant last used illegal drugs,
(4) Asking whether an applicant uses alcohol, and
(5) Asking whether an applicant has been arrested for driving under the influence of alcohol.

The ADA severely limits disability-related questions, but only prior to the extension of a conditional job offer to an applicant. Once a real job offer has been made, an employer may inquire

150. See id. at 405:7193-94.
151. See id. at 405:7192.
152. See id. at 405:7195-96.
153. See id. at 405:7196.
154. See id.
155. See id.
156. See id. at 405:7195.
157. See id. at 405:7196.
158. See id.
159. See id.
160. See id. at 405:7195-96.
162. The ADA Division of the Office of Legal Counsel has determined that a job offer is "real" when "the employer has evaluated all relevant non-medical information which it
about disability status even if not related to the job. An employer, however, may not rescind an offer on the basis of disability-related responses unless the disqualifying criterion is “job-related and consistent with business necessity.”

The statutes of many states also limit pre-employment inquiries relating to protected class status and some do so in a manner more restrictive than federal law. In West Virginia, for example, state law prohibits pre-employment inquiries concerning race, religion, color, national origin, ancestry, sex or age. A Minnesota statute extends this list to cover creed, marital status, disability, status with regard to public assistance and sexual orientation. To the extent that these state laws provide the same or greater protection against discrimination, they are not preempted by federal law.

C. Medical Examinations

1. Medical Examinations and the ADA

Employers frequently use medical examinations to determine if prospective employees can perform certain jobs effectively and safely. The ADA, however, bans pre-offer examinations because of a concern that the exams may be used to exclude applicants with disabilities from jobs they are able to perform.

An employer may require a medical examination after making an offer of employment that is conditional upon the satisfactory outcome of the examination, if it is required of all new hires within the same job category. The ADA does not limit the scope of such an examination reasonably could have obtained and analyzed prior to giving the offer.”

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163. See id. at 405:7192.
165. See, e.g., CAL. GOV'T CODE § 12940 (West 1992); MINN. STAT. ANN. § 363.03 (West 1991); N.J. STAT. ANN. § 10:5-4 (West 1993); N.Y. EXEC. LAW § 296(1)(d) (McKinney 1993).
166. See, e.g., MINN. STAT. ANN. § 363.03(4)(a); N.J. STAT. ANN. § 10:5-4; N.Y. EXEC. LAW § 296(1)(d).
168. See MINN. STAT. §363.03, subd. 1(4)(a).
172. See generally 42 U.S.C. § 12101 (discussing the findings and purpose of the ADA).
examination, but provides that any disability-related criteria used to screen out a prospective employee must be "job-related and consistent with business necessity."\footnote{174}

At least one state statute is even more restrictive.\footnote{175} The Minnesota Human Rights Act mirrors the ADA in prohibiting medical examinations unless required of all applicants receiving a conditional offer for that position.\footnote{176} The Minnesota statute goes further, however, and provides that a post-offer examination may test only for essential job-related capabilities.\footnote{177}

Given these statutory restrictions, it is important to determine what constitutes a "medical examination." The Guidance defines a "medical examination" as a "procedure or test that seeks information about an individual's physical or mental impairments or health."\footnote{178} The Guidance lists a number of factors relevant in determining whether a procedure or test is a medical examination\footnote{179} and then illustrates the application of these factors with reference to a number of specific practices, such as the following:

**Physical fitness tests:** A test of an applicant's performance of physical tasks, such as running or lifting, is not a medical examination unless the employer also measures the applicant's physiological or biological responses to performance.\footnote{180}

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

\textit{Id.}

\footnote{175} See Minn. Stat. Ann. § 363.02, subd. 1(9)(i).
\footnote{176} See id. § 363.02, subd. 1(9)(f)(a)-(c).
\footnote{177} See id. at subd. 1(9)(i)(b). The ADA does not preempt state laws "that provide[ ] greater or equal protection for individuals with disabilities." 42 U.S.C. § 12201(b).
\footnote{178} EEOC: Enforcement Guidance, supra note 161, at 405:7197.
\footnote{179} The Guidance lists the following factors as helpful in determining whether a procedure or test is medical:
\item Is it administered by a health care professional or someone trained by a health care professional?
\item Are the results interpreted by a health care professional or someone trained by a health care professional?
\item Is it designed to reveal an impairment or physical or mental health?
\item Is the employer trying to determine the applicant's physical or mental health or impairments?
\item Is it invasive (for example, does it require the drawing of blood, urine or breath)?
\item Does it measure an applicant's performance of a task, or does it measure the applicant's physiological responses to performing the task?
\item Is it normally given in a medical setting (for example, a health care professional's office)?
\item Is medical equipment used?
\footnote{180} Id. at 405:7198.
Psychological examinations: "Psychological tests are medical if they provide evidence that would lead to identifying a mental disorder or impairment. . . . [But a psychological test is not a medical examination if] designed and used to measure only things such as honesty, tastes, and habits . . . ."181

Vision tests: An evaluation of an applicant’s ability to read labels or distinguish objects as part of a demonstration of the applicant’s ability to do the job is not a medical examination. An ophthalmologist’s or optometrist’s analysis of an applicant’s vision or requiring an applicant to read an eye chart would be a medical examination.182

2. Some Specific Types of Medical Examinations

a. Testing for HIV

The AIDS epidemic claims approximately 50,000 American lives each year.183 Tests of blood samples184 can detect the presence of antibodies to HIV even in individuals who have not yet progressed to the stage of full-blown AIDS.185 This testing process clearly falls within the ADA’s definition of a “medical examination” and is subject to the restrictions noted above.186

While the ADA does not preclude post-offer testing for HIV,187 employers will act unlawfully in most circumstances if they reject an offeree based upon a positive test result.188 Both case law189 and

181. Id. at 405:7198-99.
182. Id. at 405:7199.
183. See JOHN BOURDEAU, EMPLOYMENT TESTING MANUAL: 1996 CUMULATIVE SUPPLEMENT § 15.01 (1996). It is estimated that more than one million individuals in the United States are infected with HIV. See Robert B. Fitzpatrick & E. Anne Benaroya, AMERICANS WITH DISABILITIES ACT AND AIDS, § 249 (1992).
185. See Fitzpatrick & Benaroya, supra note 183, at 249.
186. See id.
ADA interpretive guidance\textsuperscript{190} recognize that a person with a positive test result for HIV is a protected individual with a disability even at an asymptomatic stage.\textsuperscript{191} Accordingly, the ADA permits an employer to rescind an offer based upon a positive test result only if the applicant is unable to perform the job\textsuperscript{192} or if the presence of the virus poses a direct threat to the health or safety of others.\textsuperscript{193} Since HIV is spread only through the exchange of bodily fluids,\textsuperscript{194} a direct threat arguably exists only with respect to those few occupations with a significant likelihood of bodily fluid exchange, such as medical personnel performing invasive procedures.\textsuperscript{195} Even here, however, the Centers for Disease Control ("CDC") does not recommend a program of mandatory testing.\textsuperscript{196}

A minority of states have enacted statutes that specifically restrict the use of HIV testing.\textsuperscript{197} One source has summarized these statutes as falling into the following categories:

[S]ome states prohibit employers from performing HIV tests or requiring the disclosure of the results of an HIV test. Other states ban HIV testing of employees but not applicants, ban only the HIV testing of current health care employees, or ban only the HIV testing of state applicants and employees. Another group of states permits HIV testing only if being HIV negative is a bona

\textsuperscript{190} See generally 29 C.F.R. app. § 1630.2(j) (1996).
\textsuperscript{191} An individual with HIV is "asymptomatic" (I) if AIDS antibodies are present in the body, without more or (2) if the virus is present but latent. See Fitzpatrick & Benaroya, supra note 183, at 250.
\textsuperscript{192} See generally 42 U.S.C. § 12113; 29 C.F.R. § 1630.14(b)(3).
\textsuperscript{193} See 42 U.S.C. § 12113(b). The ADA regulations define a direct threat as involving "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r).
\textsuperscript{194} See Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic 113, 119 (1988) (reporting that HIV is not spread through casual contact in the workplace and there is no justification of fear of transmission in the vast majority of workplace settings).
\textsuperscript{196} See Recommendations for Prevention of HIV Transmission in Health-Care Settings, 36 Morbidity & Mortality Wkly. Rep., at 155-175. The CDC recommends, instead, that health care workers who perform exposure prone procedures voluntarily monitor their own HIV status and refrain from performing those procedures if they become HIV infected. See id.
fide occupational qualification, which is certified by the state epidemiologist or proven by the employer.198

b. Genetic Screening

Genetic screening involves the detection of heritable traits, such as a predisposition to certain diseases and disorders.199 At the present, very few employers engage in any type of genetic testing.200 As noted above, however, technical advances may make such tests more viable in the near future.201

As with testing for HIV, an employer’s use of genetic screening to disqualify an otherwise qualified applicant likely will violate the ADA under most circumstances.202 For example, an applicant who is screened out on the basis of a genetic test indicating a heightened risk for developing a particular disease most likely is protected under the ADA as an individual with a perceived disability.203 At the same time, the unmanifested disease does not constitute a legitimate justification for the employer’s action since it does not impair the applicant’s current ability to perform the essential functions of the job.204

An employer may make out a more defensible case for genetic screening if the screening is limited to tests that seek to identify

198. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.23 (1994).
200. See id. at 184. At present, genetic screening tests are possible for only a fraction of the 3,000 known heritable diseases and many of these are not practical for widespread use. See JOHN BOURDEAU, EMPLOYMENT TESTING MANUAL: 1996 CUMULATIVE SUPPLEMENT § 11.02[2][b] (1996).
201. See discussion supra notes 27-40 and accompanying text.
203. Individuals protected under the ADA include those who are “regarded” as having a physical or mental impairment that substantially limits one or more major life activities. See 42 U.S.C. § 12102(2) (1994); see also 29 C.F.R. § 1630.2(l) (1996). The EEOC has issued an interpretation to the effect that an individual discriminated against because of an increased risk of a genetic disorder is regarded as having a disability and, therefore, protected by the ADA. See 2 EEOC Compl. Man. at 902.8(a) (1995).
204. See 29 C.F.R. app. § 1630.2(m).

The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. This determination should be based on the capabilities of the individual with a disability at the time of the employment decision, and should not be based on speculation that the employee may become unable in the future or may cause increased health insurance premiums or workers’ compensation costs.

Id.
genetic susceptibility to a disease because of occupational exposure. In this situation, the employer is not simply avoiding higher health care and absenteeism costs, but also the increased likelihood that individual harm will occur. EEOC regulations suggest that an employer may refuse to hire an individual who would pose a direct threat to the health or safety either of that individual or of others. This “self-directed threat of harm” defense, even if a permissible gloss on the somewhat different language of the ADA, likely would apply only in a very narrow set of circumstances.

Beyond the ADA, four states have enacted statutes specifically prohibiting pre-employment genetic screening. Two of these statutes permit an employee to consent to a genetic test for the purpose of determining the employee’s susceptibility to disease because of occupational exposure to potentially toxic substances, so long as no adverse action is taken against the employee as a result of the test.

D. Testing for Drug and Alcohol Use

The most heavily regulated area of medical screening is arguably for drug and alcohol use. Potential limitations on the ability of employers to perform drug and alcohol testing in the hiring process come from five sources: the ADA, the Fourth Amendment to the

205. See Bourdeau, supra note 200, at § 11.06[5A][a].
207. See 29 C.F.R. § 1630.2(r).
208. The “direct threat” defense as articulated in the ADA mentions only “the health or safety of other individuals in the workplace.” 42 U.S.C. § 12113(b) (emphasis added).
209. The American Medical Association’s Council on Ethical and Judicial Affairs recommends that genetic testing be used to screen out workers who have a genetic susceptibility to occupational illness only where the following conditions exist: (1) The disease in question is so serious and “develops so rapidly” that employment monitoring is not feasible; (2) the genetic test in question “is highly accurate”; (3) “[e]mpirical data demonstrate” the link between the genetic trait and the occupational illness; (4) “[i]t would require undue cost” to lower the level of the toxic substance and (5) testing occurs only with the “informed consent of the employee or applicant.” Council on Ethical and Judicial Affairs, American Medical Ass’n, Use of Genetic Testing by Employers, 266 JAMA 1827, 1830 (1991).
211. See IOWA CODE § 729.6(7)(b); WIS. STAT. § 111.372(4)(b).
United States Constitution, state constitutions, state statutes regulating drug and alcohol testing and state common law causes of action in tort.

1. The ADA and Drug Testing

The ADA distinguishes between drug testing and alcohol testing. The ADA expressly provides that testing for drug use is not a “medical examination” and is not restricted by the ADA even at the pre-offer stage. In effect, the ADA presumes that being drug-free is inherently job-related and consistent with business necessity. This presumption is consistent with the ADA’s exclusion of current illegal drug use from the definition of a protected “qualified individual with a disability.”

In contrast, the ADA treats alcohol testing the same as any other medical examination. An employer, accordingly, may test for alcohol use only after making a conditional offer of employment and may withdraw the offer based on the test result only if failing the test establishes that the applicant is unable to perform the job.

2. Public Sector Testing

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures conducted or mandated by the government. Thus, the Fourth Amendment is implicated

214. U.S. CONST. amend. IV.
216. See infra notes 251-71 and accompanying text.
217. See infra notes 272-82 and accompanying text.
221. 42 U.S.C. § 12114(a).
224. See U.S. CONST. amend. IV.

https://scholarlycommons.law.hofstra.edu/hlelj/vol14/iss2/1
when the government intrudes upon expected areas of privacy by compelling the production of bodily fluids. More specifically, the Supreme Court has held that the Fourth Amendment applies to the government, acting as an employer, for requiring employees to produce urine samples for drug testing purposes. Such "searches" are not per se illegal, but must be analyzed for reasonableness. Accordingly, the constitutional legality of public sector drug and alcohol testing programs depend upon the specific circumstances of each program.

Two Supreme Court decisions provide some guidance concerning the validity of governmental drug testing programs. In National Treasury Employees Union v. Von Raab, the Court, in a five to four decision, upheld a drug testing policy adopted by the United States Customs Service which required testing as a condition for placement in positions involving the interdiction of illegal drugs or requiring the carrying of firearms. The Court explained that where a Fourth Amendment intrusion such as this does not relate to criminal law enforcement but serves special governmental needs, neither a search warrant nor individualized suspicion is necessary to justify the search. Instead, the Court adopted a test of reasonableness, in which the government's need to conduct the search is balanced against the individual's expectations of privacy. The Court found that the government had demonstrated compelling interests in deterring drug use among those responsible for safeguarding international borders either through drug interdiction or the use of firearms. These interests, the Court concluded, outweighed the privacy expectations of prospective employees, which

227. See id. at 619.
228. See generally Fogel et al., supra note 215, at 567-83 (noting that some courts have held that an employee must have a reasonable suspicion that an employee is under the influence of drugs before it can require that employee to undergo drug testing).
231. See id. at 677.
232. See id. at 665-66.
233. See id.
234. See id. at 668.
were diminished by virtue of advance notice of the testing requirement and the sensitive nature of the job duties involved.235

The testing program at issue in Von Raab also applied to positions requiring the handling of classified material.236 The majority opinion stated that testing would be appropriate for positions exposed to truly sensitive information, but remanded the issue of determining which positions fell within this category.237

The Supreme Court also sustained a governmental drug testing policy in Skinner v. Railway Labor Executives' Ass'n.238 In that case, the Court upheld the validity of federal regulations requiring railroads to conduct post-accident drug tests of railroad crews.239 The Court found that the government's interest in the “safety-sensitive tasks” of covered railroad employees, coupled with the demonstrated connection between drug use and train accidents, justified the privacy intrusion even in the absence of any individualized suspicion of actual drug use.240

Subsequent challenges to government-mandated drug testing programs have focused on the government’s need to test.241 This determination, in turn, generally is based on a review of the responsibilities of the tested employees.242 Courts are more inclined to permit testing programs with respect to employees performing safety-sensitive tasks.243

3. State Constitutions

Employees may look for protection from unreasonably intrusive drug testing from their respective state constitutions.244 Although ten state constitutions provide either an express or an implied right

235. See id. at 672.
236. See id. at 677-78.
237. See id.
239. See id. at 634.
240. See id. at 629-33.
241. See, e.g., Harmon v. Thornburgh, 878 F.2d 484, 488-96 (D.C. Cir. 1989) (upholding the testing of Department of Justice employees with top security clearances, but not the testing of all federal prosecutors and employees with access to grand jury proceedings); AFGE v. Cavazos, 721 F. Supp. 1361, 1369-74 (D.D.C. 1989) (upholding the testing of Department of Education motor vehicle operators, but not of data processing employees).
242. See generally Harmon, 878 F.2d at 484; Cavazos, 721 F. Supp. at 1361.
243. See id.
244. See, e.g., ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; ILL. CONST. art. I, § 6; LA. CONST. art. I,
of privacy, the California Court of Appeal was the sole court to address the issue of applicant testing on that basis. In *Wilkinson v. Times Mirror Corp.*, job applicants brought a state constitutional challenge to a policy asking all job applicants to consent to a drug test as a condition of an offer for employment. The California Court of Appeal analyzed the policy under *Von Raab* and *Skinner*, ultimately determining that while not "all preemployment drug and alcohol testing by private employers is constitutional," the policy at issue did not violate the applicants' constitutional guarantee of privacy. Accordingly, no state, as of yet, has recognized any specific state constitutional limitation on the pre-employment drug testing of applicants.

### 4. State Statutes

In the absence of constitutional provisions protecting employees in the private sector, state legislatures have stepped in "to fill the void of protection," enacting statutes regulating drug testing of applicants and employees. The pace of enactment of state drug testing statutes has been fast with thirteen states currently having statutes which regulate drug testing in the private sector.

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§ 5; Mont. Const. art. II, § 10; S.C. Const. art. I, § 10; Wash. Const. art. I, § 7; see also supra note 216 and accompanying text.

245. See sources cited supra note 244.


248. See id. at 196, 197.


250. See Holtzman, supra note 246, at 74.


252. See infra note 253 and accompanying text.

Although these statutes limit the rights of employers to test employees and applicants for drug use, they vary widely in both substantive and procedural regulation.254 Significantly, these statutes generally provide fewer restrictions on applicant testing than they do for testing current employees.255

Some statutes, including Maine, Minnesota, Rhode Island and Vermont, allow applicant testing only upon a conditional job offer.256 Minnesota adds the substantive requirement that the same test must be requested or required of all job applicants conditionally offered employment for the position sought.257 Other statutes provide additional protection for job applicants, prohibiting employers from requiring job applicants to submit to drug testing as a condition of employment except in specific situations, usually involving specialized employment.258 In Montana, for example, the prohibition covers all applicants "except for employment in hazardous work environments, [or in] jobs the primary responsibility of which is security, public safety, or fiduciary responsibility"259 or in certain transportation-related positions.260 Iowa's statute restricts the employer's power to include drug testing as part of a pre-employment physical examination,261 but the restriction does not apply to drug testing for positions as Iowa peace officers or correctional officers.262

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255. See, e.g., Minn. Stat. § 181.951 (authorizing testing for all applicants receiving a conditional job offer without further restriction, but authorizing testing for current employees only in certain specified circumstances); Jonathan V. Holtzman, Applicant Testing for Drug Use: A Policy and Legal Inquiry, 33 Wm. & Mary L. Rev. 47, 74 (1991) ("A few jurisdictions, including the City and County of San Francisco, have strictly regulated employee testing but imposed no restrictions whatever on applicant testing.").


260. See id.

261. See Iowa Code Ann. § 730.5(2).

262. See id.
Connecticut gives employers more latitude, requiring only that the employer inform applicants that drug testing is a condition of employment.263 Still more latitude is afforded employers in Utah, the first state to pass drug testing legislation.264 The purpose of the Utah statute is to facilitate, rather than to restrict, employer drug testing265 and it places only procedural requirements on employers wishing to test job applicants.266

All of the state statutes providing substantive protection to job applicants provide some sort of procedural protection as well. For example, most statutes provide for a confirmatory test upon a first finding of a positive result267 and some give the employee the right to request a confirmatory retest—essentially a third test.268 Other safeguards usually found in drug testing statutes “include the use of properly certified laboratories, . . . chain of custody procedures, . . . confidentiality [requirements], written notice to applicants and employees, employee assistance programs, and procedures to ensure privacy in the collection of samples.”269

In a somewhat different vein, seven states have enacted statutes that limit an employer’s discretion to make employment decisions based upon the off-duty use of lawful consumable products such as alcohol and tobacco.270 The North Carolina statute is typical in making unlawful an employer’s refusal to hire an applicant because


264. See Taube, supra note 254, at 673.

265. See Utah Code Ann. § 34-38-1 (“[I]n balancing the interests of employers, employees, and the welfare of the general public, the Legislature finds that fair and equitable testing for drugs and alcohol in the workplace, in accordance with this chapter, is in the best interest of all parties.”).

266. See id. §§ 34-38-1 to -15.

267. See, e.g., Minn. Stat. Ann. § 181.953, subd. 10(a) (“An employer may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of a positive test result from an initial screening test that has not been verified by a confirmatory test.”); Utah Code Ann. § 34-38-6(5) (“Testing shall include verification or confirmation of any positive test result . . . .”).

268. See, e.g., Minn. Stat. Ann. § 181.953, subd. 9 (“An employee or job applicant may request a confirmatory retest of the original sample at the employee’s or job applicant’s own expense after notice of a positive test result on a confirmatory test.”).

269. Olsen, supra note 253, at 233.

of the off-duty use of alcohol or tobacco unless the use of such products adversely affects "the employee's job performance or the person's ability to properly fulfill the responsibilities of the position in question or the safety of other employees."271

5. Common Law Torts

In the absence of a state statute regulating employee or applicant testing, employees and job applicants may have causes of action under state common law for highly intrusive or negligently administered testing.272 Many of the potential claims, however—most notably the public policy exception to employment at will—are available only to employees and not to job applicants.273

The torts of intentional and negligent infliction of emotional distress and invasion of privacy are the most likely claims available to job applicants, although the former is more likely to succeed than the latter.274 An employer potentially may be liable in the drug testing arena for invasion of privacy under a theory of intrusion upon the plaintiff's private affairs275 if he/she "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . [where] the intrusion would be highly offensive to a reasonable person."276 Courts usually consider four factors significant to the success of such a claim: "(1) the

271. N.C. GEN. STAT. § 95-28.2(b).
273. The public policy exception to "employment at will" has been successfully invoked to challenge the mandatory drug testing of current employees. See Twigg v. Hercules Corp., 406 S.E.2d 52, 55 (W. Va. 1990). In Twigg, the West Virginia Supreme Court determined that a cause of action for a discharge contravening "a substantial public policy" lies when "an employer [requires] an employee to submit to drug testing, since such testing portends an invasion of an individual's right to privacy." Id. The court, however, recognized exceptions to its rule, stating:

Drug testing will not be found to be violative of public policy grounded in the potential intrusion of a person's right to privacy where it is conducted by an employer based upon reasonable good faith objective suspicion of an employee's drug usage or where an employee's job responsibility involves public safety or the safety of others.

Id.
274. See Fogel et al., supra note 272, at 658.
275. There are four causes of action recognized under the common law tort of privacy: "[i]ntrusion upon the plaintiff's private affairs, public disclosure of private facts, publicity that places the plaintiff in a false light in the public eye, and appropriation of the plaintiff's name or likeness." Id. at 666.
employer's business needs which prompted the testing, (2) the scope of the testing, (3) the manner of the testing, and (4) employee notice of, or consent to, the testing."\textsuperscript{277} Although courts have recognized that drug testing programs may intrude upon an employee's seclusion,\textsuperscript{278} they likely will uphold such tests if reasonable in light of the above four factors. Because most employers provide advance notice to applicants required to submit to drug testing, the "prior notice diminishes, and accordingly legitimizes, the employer's testing program."\textsuperscript{279}

A job applicant subjected to a drug test as a condition of employment is more likely to succeed under the theory of intentional infliction of emotional distress.

[In order to establish a claim] based on this theory, an employee must prove: (1) that the employer acted in an extreme and outrageous manner; (2) that the employer intended to cause [severe emotional distress], or acted in reckless disregard of the probability that severe emotional distress would result from the conduct; (3) that the employer's extreme and outrageous conduct actually and proximately caused the emotional distress; and (4) that the resulting emotional distress was severe.\textsuperscript{280}

In \textit{Kelley v. Schlumberger Technology Corp.},\textsuperscript{281} the First Circuit Court of Appeals, applying Louisiana law, held that the district court properly instructed the jury that "an employer . . . has a duty to use reasonable care in implementing and administering its drug program so as not to cause serious emotional distress to its employees."\textsuperscript{282} This tort thus focuses on the manner in which the drug test is administered by the employer.


\textsuperscript{278} See, e.g., Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 621-22 (3d Cir. 1992) (analyzing a public policy exception to "at will employment" claim in the light of whether the discharge was related to "a substantial and highly offensive invasion of the employee's privacy" and envisioning "at least two ways in which an employer's urinalysis program might intrude upon an employee's seclusion").

\textsuperscript{279} Cavico, supra note 277, at 1314; \textit{see also} Baggs v. Eagle Picher Indus., 750 F. Supp. 264, 272 (W.D. Mich. 1990) (recognizing that requiring urine samples is an intrusion, but that the "plaintiffs had no expectation of privacy with regard to drug testing since they had been on notice" that drug testing was a condition of employment).

\textsuperscript{280} See Fogel et al., supra note 272, at 675.

\textsuperscript{281} 849 F.2d 41 (1st Cir. 1988).

\textsuperscript{282} Id. at 43.
E. Non-medical Testing

1. Ability Tests

Ability tests are mechanisms designed to assess an individual’s capacity to perform certain desired tasks.\(^{283}\) They encompass measurements for a broad range of capabilities, including those that are cognitive, psychomotor, physical and/or sensory in nature.\(^{284}\) For the most part, these tests do not fall within the ADA’s definition of a “medical examination” and, therefore, can be used by employers at any stage of the selection process.\(^{285}\)

Anti-discrimination statutes pose the principal legal impediment to the use of ability tests.\(^{286}\) Although these tests generally do not discriminate overtly on the basis of protected class status, they may be unlawful nonetheless if they disproportionately disqualify applicants of a particular class.\(^{287}\)

This “disparate impact” form of discrimination was first recognized in the landmark case of *Griggs v. Duke Power Co.*\(^{288}\) In that case, the employer required applicants for semi-skilled positions to pass a general aptitude test measuring cognitive abilities in order to become eligible for work at an “inside” job.\(^{289}\) The test had the effect of disqualifying a substantially greater proportion of black applicants than white applicants.\(^{290}\) The Supreme Court ruled that a test having such a disparate impact is unlawful unless the employer can show that the test results are job-related and consistent with business necessity.\(^{291}\) Since some individuals hired prior to the test requirement continued to perform adequately in these positions, the Court held that the employer had failed to make the requisite showing and that the test was invalid.\(^{292}\)

\(^{284}\) See id. at 359.
\(^{286}\) See generally Mark Cook, Personnel Selection & Productivity 224-42 (2d ed. 1993) (citing Title VII and EEOC guidelines as primary obstacles to the use of many ability tests).
\(^{287}\) See id.
\(^{289}\) See id. at 428.
\(^{290}\) See id. at 429.
\(^{291}\) See id. at 431.
\(^{292}\) See id. at 431-32.
The EEOC has adopted guidelines to assist employers in avoiding liability for disparate impact discrimination. The Uniform Guidelines on Employee Selection Procedures ("Guidelines") states that employers should conduct validation studies for tests that adversely impact protected groups. These studies, often performed by industrial psychologists, attempt to determine whether scores on a particular test correlate with successful performance of the job in question. If the job analysis and test study establishes the validity of the test by one of the three methods recognized by the Guidelines, the test is considered appropriately job-related for purposes of the Griggs standard.

Some testing devices pose more problems than do others. General aptitude tests of the type invalidated in Griggs, for example, frequently result in disparate impact problems that necessitate costly validation efforts. On the other hand, work sample tests that replicate actual job tasks, such as a typing test, have a lesser incidence of adverse impact and a higher predictive relationship with on-the-job performance.

2. Polygraphs

Polygraphs, or "lie detectors" as they are often called, attempt to determine an individual's truthfulness by measuring his or her physiological reaction to a set of questions. The use of polygraphs in

294. Id. § 1607.
295. See id. § 1607.3(A).
297. See 29 C.F.R. § 1607.5. The guidelines recognize three types of validation: (1) criterion-related validation (a statistical demonstration between scores on a selection procedure and the job performance of a sample of workers), (2) content validation (a demonstration "that the content of a selection procedure is representative of important aspects of [job] performance") and (3) construct validation (measurement of an underlying human trait or characteristic that is important to job performance). Id. § 1607.5(B).
the employment setting is controversial for a number of reasons, including concerns about their scientific validity.\textsuperscript{301}

The federal Employee Polygraph Protection Act ("EPPA"),\textsuperscript{302} adopted in 1988, essentially bans polygraph testing as a prehire screening device in the private sector. The EPPA makes it unlawful for covered employers\textsuperscript{303} either to ask any prospective employee to take a polygraph test or to use the results of such a test in making an employment decision.\textsuperscript{304} The EPPA further bans polygraph testing for current employees except in connection with ongoing investigations, where an employer has reasonable suspicion of an employee's involvement in a workplace incident that results in economic loss or injury.\textsuperscript{305}

More than one-half of the states have also enacted statutes limiting the use of polygraphs for employment purposes.\textsuperscript{306} Some of these statutes are even more restrictive than the EPPA.\textsuperscript{307} Iowa's law, for example, prohibits employers, including most public employers, from asking an applicant or employee to take a polygraph test under any circumstances.\textsuperscript{308}

3. Integrity and Personality Tests

With polygraph testing essentially prohibited, employers increasingly are turning to pen-and-paper tests as alternative screening tools.\textsuperscript{309} While these tests come in many formats, two of the most common are integrity tests and personality tests.\textsuperscript{310} Integrity tests attempt to gauge an applicant's attitudes toward theft and dishon-
Personality tests are more complicated, in that they attempt to assess an individual's psychological profile, including such traits as violence, authority conflict and the degree to which an individual is prone to addiction.\textsuperscript{312}

In contrast to polygraphs, integrity and personality tests are largely unregulated by statute.\textsuperscript{313} Only two state statutes currently restrict the use of these testing devices.\textsuperscript{314} Nonetheless, future challenges are likely, since these tests are often criticized because of concerns related to privacy, reliability and potential discriminatory impact.\textsuperscript{315} A recent study of integrity tests by the Office of Technology Assessment, for example, concluded that "the existing research is insufficient as a basis for supporting the assertion that these tests can reliably predict dishonest behavior in the workplace."\textsuperscript{316}

A California decision, \textit{Soroka v. Dayton Hudson Corp.},\textsuperscript{317} illustrates some of the potential legal implications of integrity and personality testing. In \textit{Soroka}, the California Court of Appeal granted a preliminary injunction against a retail employer's use of a personality test in screening applicants for store security officer positions.\textsuperscript{318} This particular test, Psychscreen, included questions pertaining to religious beliefs and sexual practices.\textsuperscript{319} The court enjoined the use of this test on both constitutional and statutory grounds.\textsuperscript{320} The court first found that the test was likely to violate California's constitutionally-protected right to privacy.\textsuperscript{321} The court held that the privacy invasion occasioned by the test may be justified only upon a showing that the invasion serves a compelling, job-related interest and found that the employer had failed to make

\begin{itemize}
\item \textsuperscript{311} See Hanson, supra note 309, at 504.
\item \textsuperscript{312} See generally Finkin, supra note 306, at 62-66.
\item \textsuperscript{313} See, e.g., Hanson, supra note 309, at 514-18.
\item \textsuperscript{314} See Mass. Gen. Laws Ann. ch. 149, § 19B (West 1959) (banning the use of integrity tests for employment purposes); R.I. Gen. Laws § 28-6.1-1 (1995) (providing that an integrity test cannot be used "to form the primary basis for an employment decision").
\item \textsuperscript{315} See, e.g., Hanson, supra note 309; Donald H.J. Hermann III, Privacy, the Prospective Employee and Employment Testing: The Need to Restrict Polygraph and Personality Testing, 47 Wash. L. Rev. 73 (1971).
\item \textsuperscript{316} U.S. Cong., Off. of Tech. Assessment, The Use of Integrity Tests for Pre-Employment Screening 10 (1980).
\item \textsuperscript{317} 1 Cal. Rptr. 2d 77 (1991).
\item \textsuperscript{318} See id. at 79.
\item \textsuperscript{319} See id. at 79-80.
\item \textsuperscript{320} See id. at 86-88.
\item \textsuperscript{321} See id. at 86.
\end{itemize}
such a showing with respect to the questions about religion and sex. The court also concluded that the test was likely to violate anti-discrimination statutes by requiring applicants to divulge information concerning religious beliefs and sexual orientation. While this decision is based on California law and the specific attributes of the Psychscreen test, the concerns noted in Soroka undoubtedly will fuel a broader debate over the appropriateness of these screening devices.

The ADA also has the potential to be a major deterrent to psychological testing. Guidelines issued by the EEOC suggest that some psychological examinations may be construed as “medical examinations” under the ADA, which may not be administered at the pre-offer stage. The Guidance states that psychological examinations would be considered medical examinations to the extent that they provide evidence concerning whether an applicant has a recognized mental disorder or impairment. On the other hand, the EEOC guide goes on to state that a test designed and used to measure only such factors as an applicant’s honesty, tastes and habits normally would not be considered a medical examination. Even if the test is not itself a medical examination, the ADA prohibits the use of test questions at the pre-offer stage that inquire as to the existence, nature or severity of a disability. Finally, and most significantly, the ADA bans the use of information disclosing the existence of a mental impairment in making an employment decision unless necessary for successful job performance.

F. Background Checks

1. Criminal Records

Employers check criminal records to ascertain whether an applicant has a past history of dishonest or violent behavior and to avoid liability for negligent hiring. An employer’s reliance on such

322. See id.
323. See id. at 87-88.
325. See id. at 405:7198.
326. See id. at 405:7199.
327. See id.
329. Employer liability for negligent hiring is discussed supra at notes 74-104 and accompanying text.
records to disqualify applicants, however, may give rise to liability under anti-discrimination statutes if such a practice disproportionately excludes minority applicants.330

Courts generally are less tolerant of an employer’s use of arrest records, as opposed to conviction records. In addition to the disparate impact issue, arrest records also suffer from the fact that they do not establish that the individual arrested actually committed the charged crime.331 An EEOC policy statement suggests that a blanket exclusion of applicants on the basis of arrest records almost invariably will be unlawful.332 The statement goes on to state that an employer may use arrest records as evidence of disqualifying conduct only where the arrest was relatively recent, the applicant likely committed the conduct alleged in the arrest record and that conduct is related to the job at issue.333

Conviction records are more reliable than arrest records because the criminal justice system has established that misconduct actually occurred. Even here, however, courts have struck down employers’ use of convictions as an absolute bar to employment.334 The EEOC adopts the position that an employer should use conviction records only when consistent with “business necessity.”335 That is, an employer who rejects an applicant because of a prior conviction must show that its decision was justified by a consideration of the nature and gravity of the offense, the timeliness of the conviction and the nature of the job in question.336

330. See EEOC Policy Guidance on the Consideration of Arrest Records, N-915-061, EEOC Compl. Man. (CCH) ¶ 2094, at 2099-23 (discussing statistics showing higher rates of arrest for blacks and Hispanics); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (stating that minorities in the United States have historically experienced arrest and conviction rates substantially in excess of the nonminority population). The United States Supreme Court has recognized that otherwise neutral selection devices that have a disparate impact on protected classes may violate Title VII. See Griggs v. Duke Power, 401 U.S. 424, 430 (1971).


336. See id.
2. Credit Records

An employer’s investigation into an applicant’s credit history also raises disparate impact concerns. The EEOC Guide to Pre-Employment Inquiries states that the rejection of applicants based on credit records has a disparate impact on minority groups,\(^{337}\) since they tend to be poorer and to have more credit difficulties than whites.\(^{338}\) Accordingly, the EEOC advises that an employer’s reliance on credit records to exclude minority applicants is unlawful absent a showing of business necessity.\(^{339}\)

The federal Fair Credit Reporting Act\(^{340}\) also regulates an employer’s use of credit reports. This statute requires that a prospective employer “clearly and accurately” notify applicants in writing if they will be the subject of a consumer credit report prepared by a consumer reporting agency.\(^{341}\) An additional notification is required if a credit report actually is used in making an adverse decision, such as a refusal to hire an applicant.\(^{342}\) An individual who is the subject of a credit report is entitled to obtain disclosure of information on file with the consumer reporting agency, to request deletion of erroneous material and to submit a statement that disputes items in the report.\(^{343}\)

3. References

An employer may obtain significant information concerning an applicant’s work history by asking for and contacting references, particularly when the references are past employers.\(^{344}\) Though reference checks are both a useful\(^{345}\) and common\(^{346}\) tool in screening

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338. See generally Minority Loans Grew in ’95, HMDA, Reg. Compliance Watch, Aug. 5, 1996, at 1 (noting that overall denial disparity rates are twice as high for minorities as they are for whites).
339. See EEOC Guide to Pre-Employment Inquiries, supra note 337, at 443:69; see also EEOC Decision No. 72-0427 (1971) (holding that the failure to hire an applicant for a computer operator’s position because of a poor credit record was discriminatory on the basis of race).
341. Id. § 1681d.
342. See id. § 1681m.
343. See id. §§ 1681g, 1681i.
345. Professors Ramona Paetzold and Steven Willborn note:
job applicants, a former employer who provides reference information may run the risk of being sued for defamation.\textsuperscript{347} In the context of references, a past employer may be liable for defamation if false information which damages a former employee’s reputation is published to a prospective employer.\textsuperscript{348}

a. Qualified Privilege

The most frequently litigated issue with respect to reference defamation claims concerns whether the former employer abused its “qualified privilege”\textsuperscript{349} in providing information to the prospective employer. Generally, in order to serve the public interest by encouraging “accurate assessment[s]” of an employee’s qualifications,\textsuperscript{350} employers have a qualified privilege to communicate information about the employee to others.\textsuperscript{351} The Indiana Court of Appeals noted that the privilege exists because “[t]here is a self-evident social utility in free and open communications between former and prospective employers concerning an employee refer-

Although many types of individuals can serve as reference providers, former employers are generally viewed as capable of providing the most useful, beneficial reference information. . . . To the extent that other selection measures are costly and/or ineffective, and to the extent that termination of unproductive employees and turnover of dissatisfied employees become more costly, the relative value of reference information becomes even greater.


346. Paetzold and Willborn estimate that “between fifty and one hundred percent of all employers check references to screen job applicants.” Id. at 124-25.

347. See id. at 126-27.

348. See id. at 126-28; Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 259 (Minn. 1980) (holding a former employer liable for defamation because of false statements communicated to a prospective employer that was damaging to the employee’s reputation).

349. See Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306, 308 (Iowa Ct. App. 1988) (relying on the Iowa Supreme Court decision in Robinson v. Home Fire & Marine Insurance Co., 49 N.W.2d 521 (Iowa 1951), which defined a qualified privileged communication as “one made by a person who has an interest in the subject matter to one who also has an interest in it or stands in such a relation that it is a reasonable duty or a proper one for the person to make the statement”).

350. Stuempges, 297 N.W.2d at 257.

351. See, e.g., Turner v. Halliburton Co., 722 P.2d 1106, 1114 (Kan. 1986) (applying a qualified privilege to an employer who truthfully told a prospective employer that the employee in question was terminated for “‘stealing company property’”); Stuempges, 297 N.W.2d at 257 (“In the context of employment recommendations, the courts generally recognize a qualified privilege between former and prospective employers as long as the statements are made in good faith and for a legitimate purpose.”).
ence."  The privilege will be lost, however, if the information is communicated with “malice,” which is defined differently by different courts.

Some courts follow the standard of common law malice, which requires a showing of “actual ill will, or intent to causelessly and wantonly injure the plaintiff.” Other courts, however, use the “actual malice” standard in employer defamation actions, which requires a plaintiff to prove that “the statement was made with knowledge of its falsity or in reckless disregard of whether it was true or false.” The principal distinction between these two standards, as noted by the Minnesota Supreme Court, is that while the common law standard focuses on the employer’s “attitude toward the plaintiff,” the actual malice standard focuses on the employer’s “attitude toward the truth.”

b. Doctrine of Self-Publication

A fairly recent development in this area is employer liability for self-compelled defamation. Even if the former employer does not

353. See Deborah Daniloff, Note, Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace, 40 HASTINGS L.J. 687, 710-11 n.134 (1988) (citing seven cases and quoting their different definitions of malice). Daniloff lists the following:


Id.
355. Kransinski v. United Parcel Serv., Inc., 530 N.E.2d 468, 471 (Ill. 1988); see also Evely v. Carlson Co., 447 N.E.2d 1290, 1293 (Ohio 1983) (upholding a grant of summary judgment for the employer where the employee could not demonstrate that the employer acted with actual malice).
356. Stuempges, 297 N.W.2d at 258.
357. See Daniloff, supra note 353, at 688 & n.4.
communicate directly with the prospective employer, but instead communicates the information only to the former employee, the former employer may be liable for defamation under the doctrine of self-publication.\footnote{358}{See Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888 (Minn. 1986) (holding that an employer will be liable if it was foreseeable that the plaintiff would have to publish defamatory statement).} Under this theory, a former employee can recover from the employer if the employee was terminated, was given a defamatory reason for the termination and was either likely to or compelled to disclose the defamatory reason to a prospective employer.\footnote{359}{See Deanna J. Mouser, Self-Publication Defamation and the Employment Relationship, 13 IND. REL. L.J. 241, 255 (1991).} There are two different approaches to this theory: Under one, the employer will be liable if he or she “knew or could have foreseen the employee would be likely to repeat the defamatory statement” and under the second, somewhat more restricted approach, the employer will be liable only if the employer “knew or could have foreseen the employee would be compelled to repeat the defamatory statement.”\footnote{360}{Id.}

In First State Bank v. Ake,\footnote{361}{606 S.W.2d 696 (Tex. Civ. App. 1980).} a Texas court adopted the “likelihood standard” of self-publication defamation.\footnote{362}{See id. at 701.} Ake, a bank president, brought an action against the bank and its chairman for defamation when the bank filed a fidelity bond claim against him.\footnote{363}{See id. at 698-99.} Since fidelity bond claims only cover losses through an employee’s dishonest or fraudulent acts,\footnote{364}{See id. at 700.} the filing was considered defamatory.\footnote{365}{See id. at 702.} When applying for jobs with prospective employers, Ake told the employers that the bond claim had been filed against him, because the claim “was surely to be brought out during the application and interviewing process.”\footnote{366}{Id. at 702.} The court stated:

One who communicates defamatory matter directly to the defamed person, who himself communicates it to a third party, has not published the matter to the third person if there are no other circumstances. If the circumstances indicated that communication to a third party is likely, however, a publication may
properly held to have occurred. Likewise, if a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third party, the conduct becomes a negligent communication, which amounts to a publication just as effectively as an intentional communication.\textsuperscript{367}

The second approach, and the one more often followed, is the compulsion approach, under which an employer is liable only if it either knew or should have known that the employee would be compelled to repeat the defamatory statement. In \textit{Churchey v. Adolph Coors Co.},\textsuperscript{368} for example, the plaintiff, fired for “dishonesty,” asserted that publication had occurred because she “ha[d] been forced to repeat the reason for her discharge to prospective employers to her damage and detriment . . . .”\textsuperscript{369} The court adopted the compulsion approach, stating that when “‘the originator of the defamatory statement has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person,’ the originator is responsible for that publication.”\textsuperscript{370} In adopting this stricter standard, the Court reasoned that “[i]f publication could be based on the defamed person’s freely-made decision to repeat a defamatory remark . . . the defendant would be held liable for damages which the plaintiff reasonably could have avoided.”\textsuperscript{371}

Not all jurisdictions, however, recognize the self-publication doctrine. The Illinois Court of Appeals, in \textit{Layne v. Builders Plumbing Supply Co.},\textsuperscript{372} explicitly rejected the doctrine of self-publication, reasoning that the claim would be disadvantageous for the following reasons:

(1) recognizing the claim would discourage plaintiffs from mitigating damages because employees could increase damages by repeating the statement when the repetition was not necessary or when the employee could have tried to explain the true nature of

\textsuperscript{367} \textit{Id.} at 701 (quoting \textsc{Restatement (Second) of Torts} § 577, cmts. m, k (1977)).


\textsuperscript{369} 759 P.2d 1336 (Colo. 1988).

\textsuperscript{370} Id. at 1343.

\textsuperscript{371} \textit{Id.} at 1344 (quoting McKinney v. County of Santa Clara, 168 Cal. Rptr. 89, 93-94 (1980)); \textit{see also} Lewis, 389 N.W.2d at 876 (adopting the “compulsion” approach).

the defamatory situation to the prospective employer; (2) recognizing the claim would deter employers from communicating to the employee the reason for the employee’s termination; and (3) recognizing the cause of action would thwart the public interest in providing information regarding the reason an employee was discharged to prospective employers.373

The potential for defamation lawsuits and liability in tort have made former employers reluctant to give reference information to prospective employers.374 As a result, most employers currently either give no reference information or limit references to a simple confirmation of prior employment.375

IV. A COST/BENEFIT THEORY OF PRE-EMPLOYMENT SCREENING

At first glance, employers appear to be caught between a rock and a hard place in attempting to navigate the pre-employment screening landscape. The complex legal framework in this area makes employers sometimes liable if they investigate applicants and sometimes liable if they do not.

A more comprehensive review, as attempted in this article, however, reveals less a trap and more a pathway of opportunity. As with any path, its successful navigation depends upon knowing the terrain and planning the journey. The prior two sections of this article provide a road map to the legal terrain of pre-employment screening. This section suggests the outlines of a planning process for employers seeking to navigate the pre-employment screening pathway.

As the legal analysis set out in the first two sections of this article indicates, pre-employment screening efforts are sometimes desirable and sometimes not. Employers most successfully can determine whether screening efforts are desirable by using a cost/benefit analysis that focuses on the attributes of the position to be filled. Under this approach, an employer should engage in applicant screening only where the benefits of using a particular screening device to

375. See id. at 123.
select employees for the job in question outweigh the costs of using that device. 376

A. Determining the Benefits

The benefit side calculation for this comparison should encompass a three-step process. The first step requires an analysis of the functions performed in the job in question. This step recognizes the fact that the benefits of pre-employment screening may vary significantly because of the different functions performed in different jobs. 377 Unless these functions are first identified, a meaningful cost/benefit analysis is not possible. Fortunately, this process is not onerous and already is undertaken by many employers to enhance compliance with the ADA. 378

As a second step, employers should examine the identified job functions and determine whether screening for the presence or absence of certain identifiable skills or traits could have a significant impact on successful job performance. 379 On a certain level, of course, pre-employment screening has some potential benefit for the performance of every job. 380 Employers will benefit from hiring intelligent, healthy and drug-free employees in virtually all instances. 381 The importance of this step, however, is to determine more specifically if the job functions identified in the first step indicate a particularly strong need to engage in screening activities. 382

This need could be ascertained with reference to either the screen-in or the screen-out function of the applicant screening pro-


378. The ADA provides that a "qualified individual with a disability" is one "who, with or without reasonable accommodation, can perform the essential functions of [the job]." 42 U.S.C. § 12111(8) (1994). While the ADA does not require employers to develop or maintain job descriptions, "[w]ritten job descriptions prepared before advertising or interviewing applicants" are among the factors which may be relevant in determining whether a particular function is essential. 29 C.F.R. § 1630.2(n) (1996). Thus, employers have a significant incentive to analyze job functions and to prepare written job descriptions in order to minimize potential liability under the ADA.

379. See Olsen, supra note 376, at 239, 250.

380. See generally, e.g., id. at 251.


382. See generally, e.g., Olsen, supra note 376, at 269.
That is, an employer could identify significant benefits to be gained by screening in applicants qualified for a job demanding great skill and responsibility.\textsuperscript{384} Alternatively, an employer could identify significant benefits to be gained by screening out applicants who may pose too great a risk for negligent hiring exposure if placed in a particularly sensitive position.\textsuperscript{385}

In the third and final step, employers should select those screening devices that are capable of detecting the skills or traits identified in the preceding step.\textsuperscript{386} Some devices, of course, are more capable predictors than others in certain contexts.\textsuperscript{387} The amount of benefit that an employer gains by the use of a particular screening technique is a direct function of the extent to which that technique serves as a valid predictor of successful job performance.\textsuperscript{388}

\textbf{B. Determining the Costs}

The costs or burdens of a pre-employment screening program emanate primarily from three sources.\textsuperscript{389} One very basic consideration is the financial cost of screening.\textsuperscript{390} Employers bear a monetary burden with any screening program, but some devices entail a greater financial cost than others.\textsuperscript{391}

Potential legal barriers represent another “cost.”\textsuperscript{392} If the use of a screening device is clearly unlawful in a particular context, then the

\begin{itemize}
\item \textsuperscript{383} These functions are discussed \textit{supra} at notes 10-23 and accompanying text.
\item \textsuperscript{385} See \textit{id.} at 33-34 (citing operators of public carriers, police officers, firefighters and school employees as examples of such sensitive positions).
\item \textsuperscript{386} See \textit{id.} at 36-38.
\item \textsuperscript{387} See \textit{id.}
\item \textsuperscript{388} See \textit{id.} at 39-40.
\item \textsuperscript{389} The three primary sources of these costs include the financial cost of screening, legal barriers, and effects on applicant pool morale. See, e.g., \textit{Mark Cook, Personnel Selection \& Productivity} 234-35 (2d ed. 1993) (pointing out the high cost to employers of complying with legal validation requirements for certain kinds of testing); Ann Marie Ryan \& Marja Lasek, \textit{Negligent Hiring and Defamation: Areas of Liability Related to Pre-Employment Inquiries}, \textit{44 Personnel Psychol.} 293 (1991) (discussing generally the potential liability costs related to defamation associated with pre-employment screening); Sarah Rynes, \textit{Who’s Selecting Whom? Effects of Selection Practices on Applicant Attitudes and Behavior}, in \textit{Personnel Selection in Organizations} 240-74 (Neal Schmitt et al., eds., 1993) (discussing generally the effects on morale of subjecting applicants to certain types of tests).
\item \textsuperscript{390} See, e.g., Holtzman, \textit{supra} note 381, at 90.
\item \textsuperscript{391} See generally \textit{Cook, supra} note 389.
\item \textsuperscript{392} See Gregory, \textit{supra} note 384, at 39.
\end{itemize}
legal cost is prohibitive and automatically determines the cost/benefit comparison. In other circumstances, the employer or her attorney must gauge the potential impact of a legal challenge and factor that into the decision-making process.

Finally, employers should consider a less measurable, yet no less real, cost in terms of applicant-pool morale. Some screening techniques, even though arguably lawful, nonetheless may be perceived as so intrusive or unreliable as to dissuade otherwise interested applicants. Polls indicate, for example, that the vast majority of American adults disapprove of genetic testing as a prerequisite of employment. An employer considering the adoption of such a screening device should take this attitude into account in making its cost/benefit comparison.

C. A Hypothetical Application

Having assessed benefits and costs, an employer may then turn to making a relative comparison. In general, an employer's use of a particular screening device makes sense only if the benefits exceed the costs with respect to the job to be filled.

The following hypothetical illustrates the application of this cost/benefit approach. Assume that an employer is in the process of hiring home care service employees. The employer has decided to interview and check references for all finalists, but seeks legal counsel's input concerning the advisability of three other screening devices: a criminal records check, HIV testing and integrity testing.

The first step in the cost/benefit assessment process is to identify the functions of the home care worker position. Let's assume that home care workers are responsible for assisting the daily living activities of an elderly clientele. The worker visits clients in their private homes on a daily basis and provides basic care services on an "as needed" basis, including the following: bathing; changing bed linens; checking basic health signs, such as body temperatures and

393. See id. at 32, 39. The use of "polygraph, blood or urine tests to ascertain veracity, determine the presence of the AIDS virus or reveal drug or alcohol use may be prohibited." id. at 32. "Generally, employer inquiry into arrest records is unlawful." Id. at 39.

394. See Donald H.J. Hermann III, Privacy, the Prospective Employee and Employment Testing, 47 Wash. L. Rev. 73, 97-102 (1971).

395. See id. at 153-54.

396. See Rorie Sherman, Employer Use of Genetic Tests to be Restricted, NAT'L L.J., Nov. 25, 1991, at 15, 18 (reporting a poll showing that less than 10 percent of the American public believes that employers or insurers should have the right to require genetic testing).
making sure that medications are being taken and adequate food is available. The position does not entail the actual delivery of direct medical care.

The second step in this process is to ascertain whether certain skills or traits strongly correlate with the successful performance of these job functions. Looking first at reasons to "screen in" applicants, we see that the job functions of this position are essentially unskilled in nature. Some basic attributes such as diligence and friendliness are desirable, but they do not indicate a particularly strong need to engage in pre-employment screening.

The "screen-out" function, on the other hand, is much more significant. Because these workers have access to vulnerable individuals in the privacy of their own homes, they have the capacity to cause harm in a number of ways, including assault, theft or the transmission of diseases such as AIDS. Since liability may arise for any of these events under a negligent hiring theory, the employer has a significant incentive to screen out applicants who may increase the risk of their occurrence.

That brings us to a consideration of the individual screening devices. The purpose of a criminal records background check is to identify applicants who have in the past committed assaults or engaged in theft. Assuming that past behavior is a valid predictor of future behavior,397 the employer gains a significant benefit by checking such records as a means of reducing negligent hiring liability exposure. This benefit is likely to outweigh the accompanying costs. Criminal background checks are not overly expensive in most states and, because of the obvious relevance to the position in question, are not likely to be either unlawful or unexpected.

HIV testing is likely to tilt the scales in the opposite direction. The purpose of using such a test is to identify individuals who carry the AIDS virus and who pose a risk of transmitting it to others. While HIV testing is highly accurate, the risk of transmission in a position such as this, which does not involve invasive procedures, is extremely low.398 Moreover, the legal "cost" of such testing is quite high, since it is likely that the disqualification of an applicant based upon a positive test result would violate the ADA.399

398. See supra notes 194-96 and accompanying text.
399. See supra notes 183-96 and accompanying text.
The advisability of integrity testing is more difficult to predict. While honesty certainly is a desirable trait for this position, the scientific validity of integrity testing is questionable.\footnote{400} The potential benefit to the employer, accordingly, is not high. But neither are the costs. Pen-and-paper integrity tests are inexpensive and pose few, if any, legal risks.\footnote{401} The decision to use this device may come down to whether the employer believes it is more important to send future employees a message that honesty is expected or, conversely, not to lose qualified applicants who may be offended by a test perceived as unreliable. In any event, the important point is not the actual decision itself, but the fact that the decision is made in recognition of the actual benefits and costs at stake.

This hypothetical, then, illustrates how employers can successfully navigate the pre-employment screening pathway through the use of a cost/benefit comparison. It illustrates something else, as well. A pre-employment screening program that focuses narrowly on those skills and traits necessary for successful job performance are likely to be both lawful and advisable. A screening program that is not so narrowly focused is more likely to be neither.

V. SUGGESTIONS FOR LAW REFORM

As this article demonstrates, the “law” of pre-employment screening comes from a myriad of sources—state and federal, statutory and judicial. The result is an overly complicated and sometimes inconsistent web of regulation. This section suggests four ways in which the legal framework can be improved.

A. Harmonize the Permissible Scope of Pre-employment Inquiries Under Federal Anti-Discrimination Laws

Title VII and the ADA take dissimilar approaches to pre-employment inquiries made in applications and interviews. Title VII does not restrict the pre-offer acquisition of information relating to protected class status, but does ban discriminatory employment decisions made on the basis of such information.\footnote{402} The ADA, in contrast, substantially bars both the inquiry and the use of infor-

\footnote{400. See supra notes 309-28 and accompanying text.}
\footnote{401. See supra notes 313-16 and accompanying text.}
mation relating to physical or mental impairments.\footnote{See 42 U.S.C. § 12112(d)(2)-(3) (1994).} This disparate regulatory approach adds needless confusion to the application and interview process.

The preferable approach is that taken by the ADA. As the EEOC's \textit{Technical Assistance Manual for the ADA} explains, the ADA prohibits inquiries about disability status because such information is "frequently . . . used to exclude people with disabilities from jobs they are able to perform."\footnote{See \textit{TECHnICAL Assistance MANuAL FOR THE ADA} § 6.3 (1992).} Put another way, even without any intentional ill will, employers who have knowledge concerning the protected class status of applicants may make stereotypical assumptions about their capabilities or work habits. An employer who inquires into an applicant's child care plans or pattern of religious observances may have difficulty ignoring that information in making hiring decisions. The ADA takes an "out of sight, out of mind" approach to pre-offer inquiries to focus the hiring decision on ability rather than status. Title VII should be amended to do the same.

\section*{B. Permit Pre-employment Medical Examinations Only for Job-Related Capabilities or Conditions}

The ADA's treatment of medical examinations raises a somewhat similar concern. The ADA permits pre-employment medical examinations only after an employer has extended a conditional offer of employment and then only if required of all new hires within the same job category.\footnote{See 42 U.S.C. § 12112(d)(3)(A).} The ADA, however, does not place any limitation on the permissible scope of these post-offer medical examinations. Thus, an employer may require an offeree to undergo a comprehensive medical examination even in the absence of any correlation between the examination components and the planned job duties. The only substantive limitation is that an employer may not withdraw the offer for any medical reason other than an inability to perform the essential functions of the job.\footnote{See \textit{id.} §§ 12112(d)(2) (B), 12112(d)(3)(C); see also 29 C.F.R. § 1630.14(b)(3) (1996).}

This approach to medical examinations is inconsistent with the "out of sight, out of mind" notion that the ADA adopts with respect to pre-offer inquiries. It permits an employer to obtain pre-
hire access to medical information that has no relationship to the performance of job duties. Although the employer is not supposed to act on medical results that are not job-related, the ADA imposes no duty on the employer to inform the offeree about either what is being tested or the subsequent reason(s) for withdrawing an offer. At worst, this approach enables clandestine discrimination. Less egregiously, it taints the hiring process with unnecessary medical information.

The ADA should be amended along the lines of the Minnesota Human Rights Act. The Minnesota statute provides that a conditional, post-offer medical examination may test only for essential, job-related capabilities. This strikes the appropriate balance by permitting an employer to obtain medical information relevant to job performance, but without exposing the hiring decision to irrelevant information concerning medical status.

C. Pre-employment Drug Testing Warrants a Federal Statute

As noted above, a growing number of state and local governments have adopted state drug testing statutes. These statutes vary widely in both substantive and procedural effect. When coupled with common law litigation in states without drug testing laws, multi-state employers face a complex and inconsistent web of regulation.

A federal statute would bring needed uniformity to this area of the law. Statutes in states such as Vermont provide a suitable model. These statutes recognize that an employer should have the right to disqualify finalists who use illegal drugs. Accordingly, the Vermont statute authorizes employers to test applicants for illegal drug use after making a conditional job offer. On the other hand, these statutes also recognize that applicants deserve a drug testing process that is fair and reliable. Accordingly, the Vermont statute provides for such procedural safeguards as advance notice of testing, chain of custody requirements, designated laboratories and confirmatory retests of positive results. A federal statute that

408. See discussion supra notes 251-71 and accompanying text.
410. See id. § 514-15.
incorporates these provisions would represent a significant step forward.

D. Reduce the Threat of Defamation Liability for Employers in Providing Reference Information

Many employers do not provide any meaningful response to reference requests because of a fear of defamation liability. Defamation law should be adjusted to reduce the current reluctance of employers to share this socially useful information.

The prevailing practice of withholding reference information is harmful in a number of ways. First, it deprives prospective employers of information that might screen out applicants who are ill-suited or potentially dangerous with respect to the position to be filled. On the flip side, both prospective employers and “good” employees are harmed by the withholding of information that would assist in identifying those applicants who are best-suited for the job. The present disincentive to information exchange is also harmful on a societal level because it inhibits the efficient matching of employees and jobs in the national economy. In another vein, it has been suggested that the absence of references may harm the productivity of current employees who otherwise would be motivated by the prospect of a good reference. Finally, fear of liability, particularly with respect to self-publication defamation, may lead employers to withhold performance evaluations and explanations of the reasons for a discharge decision, a trend certainly not conducive to either fairness or future productivity.

The legal system, apparently recognizing the utility of employment references, recently has responded in two ways to encourage their use. One of these responses uses a “stick” as an incentive, the other a “carrot.”

The “stick” method encourages employers to provide references as an alternative to facing possible liability for negligent referral. The negligent referral cause of action, first proposed in a 1991 law

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411. See discussion supra notes 344-75 and accompanying text.
review note, was recognized in a recent California decision, Randi W. v. Murom Joint Unified School District. In that case, a student was allegedly molested by a principal who had been hired by the school district after receiving a positive recommendation from a previous school district employer. The recommendation failed to disclose that the principal had resigned from his former position under pressure because of various sexual misconduct charges. The student’s personal injury suit included several claims against the former school district that were dismissed at the trial court level. The Supreme Court of California, affirming the Court of Appeal decision reversing the trial court, held:

[T]he writer of a letter of recommendation owes to prospective employers and third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the prospective employer or third persons.

Other courts have not been receptive to the negligent referral cause of action. A New York court, for example, declined to recognize the negligent referral tort in a factual setting very similar to that of Randi W. The court explained that “[t]he mere recommendation of a person for potential employment is not a proper basis for asserting a claim of negligence where another party is responsible for the actual hiring.”

Whether or not the notion of negligent referral liability makes sense in the narrow fact setting of Randi W., the recognition of this claim will do little to encourage references in most settings. Indeed, it may do the opposite, since the majority opinion in Randi W. suggests that liability for negligent referral arises only where the for-

415. 929 P.2d 582 (Cal. 1997).
416. See id. at 582.
417. See id. at 585.
418. See id. at 586.
419. Id. at 591.
420. See Cohen v. Wales, 133 A.D.2d 94, 95 (1987). In Cohen, the plaintiff’s claim of negligence against the defendant was based on its recommendation of a former employee for a grammar school teacher’s position without disclosing past charges of sexual misconduct against the employee. See id.
421. Id.
mer employer actually provides a reference, but fails to include information concerning the applicant’s dangerous propensities. 422

The “carrot” alternative appears to be more promising. Over the past few years, several states have enacted statutes that legislatively immunize employers from defamation liability in most instances when providing accurate reference information. 423

Some of these statutes appear to do little more than codify the existing common law of defamation. An Illinois statute adopted in 1996, for example, states that an employer who provides reference “information that it believes in good faith is truthful . . . is presumed to be acting in good faith and is immune from civil liability.” 424 This presumption, however, may be rebutted by a preponderance of evidence showing that the information was “knowingly false.” 425 This language essentially summarizes already recognized principles of qualified privilege and malice. 426 One commentator has suggested that the apparent purpose of this statute was not so much to change the law, but to send a message to the courts to strike the balance slightly more in favor of free communication of references and against defamation. 427

Wisconsin’s statute, also enacted in 1996, is similar, but with one significant distinction. Under the Wisconsin law, the presumption of good faith that results in immunity may be overcome only if a plaintiff can establish by “clear and convincing evidence” that an employer knowingly provided false reference information. 428 This language changes existing law by raising the quantum of proof that a former employee must produce in order to dispel the privilege or immunity that attaches to the employer’s conduct in communicating an employment reference.

422. See generally Randi W., 49 Cal. Rptr. 2d at 473, 478-79.
425. See id.
426. The principles of qualified privilege and malice are discussed supra at notes 349-56 and accompanying text.
427. See Concerns Linger About Job Reference Immunity Statutes, supra note 423, at 3 (reporting comments made by Matthew Finkin, Professor of Law at the University of Illinois).
The Wisconsin statute represents an appropriate adjustment in reference defamation law. It expands the safe harbor available to an employer in providing reference information, yet continues to protect employees who clearly are defamed by statements made with knowing falsity. Whether the Wisconsin law or any of the other statutes will have the desired effect of encouraging employment references, of course, remains a matter of conjecture.

VI. Conclusion

The law of pre-employment screening has grown into a tangled web of regulation that is difficult for both employers and employees to negotiate. Employers, in particular, perceive themselves as caught between the proverbial rock and a hard place in deciding whether to engage in pre-employment screening activities. This perception results from the fact that employers sometimes are liable when they engage in pre-employment screening and sometimes are liable when they do not.

This article has attempted to reduce the complexity of pre-employment screening on three levels. First, the article provides a comprehensive road map to the legal landscape of pre-employment screening. Second, the article suggests a cost/benefit method of analysis to assist employers in determining when and how to engage in pre-employment screening activities in light of the current legal framework. Finally, the article proposes some basic legal reforms that would enhance both fairness and consistency in the law of pre-employment screening. Hopefully, this article will be of assistance to both employers and employees in successfully navigating the pre-employment screening process.