**SHRM Employment Law**

Module 4: Employment & Authorization to Work





Time:  2 minutes

Running time: 2 minutes

**Objective**: Introduce the topic of Employment & Authorization to Work  
**Description**:  Introduction to the topic and why it is important.

**Instructional Method**: Lecture/ice breaker

**Script:**

Every employment relationship begins with the hiring process, which is unique to each organization. However, the hiring process in any organization can be an area of significant risk if not handled properly. In this module, we will learn how the hiring process works, discuss various employee selection methods and the importance of verifying employment eligibility.

**Facilitator Notes:**

Add your name or any other information to this slide in the subtitle.

Graphical user interface, application

Description automatically generated

Time:  2 minutes

Running time: 4 minutes

**Objective**: Introduce the learning objectives.

**Description**: Show the objectives.  Answer any questions.

**Instructional Method**: Lecture

**Script**:

Here are the student objectives for this module:

* Define the key terms related to Employment & Authorization to Work
* Determine the appropriate laws to apply to given employment situations.
* Discuss various components of the hiring process.
* Practice completing employment verification documents.
* Identify illegal interview questions.

**Facilitator Notes:**

Use the objectives topics to create evaluation for the review.

Graphical user interface, table

Description automatically generated with medium confidence

Time:  10 minutes

Running time: 14 minutes

**Objective**: Define key terms for Employment & Authorization to Work

**Description**: Identify and define key terms for Employment & Authorization to Work

**Instructional Method**: Game

**Script**:

Let’s play a game to define some key terms used in the compensation and benefits profession.

**Exercise**:  Key terms Game

Note: The winning group will have the most key terms listed correctly

7 Minutes

1. Put students into groups of 3 – 6
2. Have each group number a list from 1 – 23.
3. Read the definition of the term (note what number you read)
4. Have 1 student write the name of the term on their list.

3 minutes

1. Give students the answers.
2. The team with the most is the winner.

**Facilitator Notes:**

Key Terms

1. **Affinity bias**- Preference for those you have something significant in common with.
2. **Applicant pool**- The group of applicants applying for an open position from which the employer hopes to hire.
3. **Background check**- A verification of information about an applicant that verifies whether or not the applicant has any disqualifying factors in their background.
4. **Ban-the-box legislation**- “legislation that generally prohibits employers from requiring job applicants to reveal that they have a criminal conviction on their record until after they have been selected for an interview or otherwise deemed qualified for a position” (Rassas, 2020, p. 574).
5. **Beauty bias**- Persons who are prejudiced against those they deem less attractive or make assumptions about others based on their physical appearance.
6. **Business Necessity**- Any job requirements must be directly related to the successful operation of the business.
7. **Cognitive tests**- “pre-employment selection test that measures basic skills as well as skills specific to a particular position” (Rassas, 2020, p. 574).
8. **Confirmation bias**- Forming an initial opinion about something and then looking for evidence to support the initial opinion, whether or not it is accurate.
9. **Conformity bias**- A strong desire to fit in with the group, so they do not share their own opposing opinions.
10. **Consumer Credit report**- “Any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for employment purposes” (Walsh, 2018, p. 747).
11. **Consumer reporting agency**- “Any entity that regularly gathers or evaluates information on consumers to furnish reports to third parties” (Walsh, 2018, p. 747).
12. **Eligibility testing-** One or more tests are given to job applicants to determine if they can perform the job's essential functions or which applicant is most capable within a group of applicants.
13. **Essential job functions**- The tasks or functions that make up the job.
14. **Four-fifths (or 80%) rule**- A rule from the EEOC that helps organizations determine if they have a disparate impact in hiring. According to the ruling, companies should hire persons in protected classes at least 80% of the rate they hire white males.
15. **Gender Bias**- Preference for one gender over another.
16. **Job-Relatedness-** Any criteria required for a position must be directly related to the job.
17. **Negligent hiring**- “Employment of a person who causes harm that could have been prevented if the employer had conducted a reasonable and responsible background check on the employee. The standard against which the decision is measured is when the employer knew or should have known that the worker was not fit for the job” (Bennett-Alexander, 2022, p. 968).
18. **Nepotism**- hiring immediate family members of an employee.
19. **Personality test**- “pre-employment test that analyzes different components of an individual’s character to determine whether the individual possesses desirable traits for a position (Rassas, 2020, p. 581).
20. **Polygraph test**- “A test that measures changes in physiological responses, including respiration, blood pressure, and perspiration (galvanic skin response) (Walsh, 2018, p. 755).
21. **Reference check**- “verification of an individual’s past work history and other information submitted on an employment application to assess the applicant’s suitability for a position (Rassas, 2020, p. 583).
22. **Selection test**- “pre-employment test used to determine whether an applicant has the minimum qualifications necessary to perform the essential functions of a job (Rassas, 2020, p. 584).
23. **Undue hardship**- A burden put on an employer as part of the duty to accommodate employees that is very expensive or otherwise prohibitive.

Chart, funnel chart

Description automatically generated

Time:  5 minutes

Running time: 19 minutes

**Objective**: Discuss various components of the hiring process.

**Description**: Define the hiring process.

**Instructional Method**: Lecture

**Script**:

Every organization has an established *hiring process*, but not every organization has an effective and legal hiring process. Ideally, a hiring process should establish a set of policies and procedures that identifies the best candidate for the position and protects the employer from claims of discrimination in the recruitment and hiring process.

This graphic shows the hiring process to select the best candidate.

**Facilitator Notes:**

All aspects of the hiring process must be in compliance with anti-discrimination laws in the city and state where the business is located, in addition to federal laws such as the Civil Rights Act of 1964, the Americans with Disabilities Act, etc.

Recruitment

The hiring process necessarily begins with recruitment activities to create an ***applicant pool*** from which an employer can choose a qualified candidate to fill an open position. Each step of the recruitment process is subject to legal scrutiny, starting with the job descriptions.

Graphical user interface

Description automatically generated with low confidence

Time:  11 minutes

Running time: 30 minutes

**Objective**: Discuss various components of the hiring process.

**Description**: Discuss job descriptions step 2 of the hiring process.

**Instructional Method**: Lecture - Individual exercise – pair and share - Large group discussion

**Script**:

Job descriptions are legal documents that describe the duties and expectations for the position. While they are legal documents, they are also fluid documents that can and should be updated regularly to reflect the true nature of the position accurately.

Individual Exercise: Job description

1. Have students create a job description for the job they wish they had.(5 minutes)
2. Have students share their descriptions with another to see what they may have left out and if it fits the criteria. (4 minutes)

Large group discussion Review

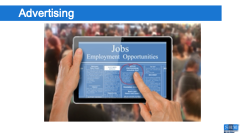
**Facilitator Notes:**   
According to the Americans with Disabilities Act and Amendments (ADAAAA), employers must accommodate employees’ requests for work accommodations when doing so would not create an ***undue hardship*** on the employers. Some examples of undue hardship include a large financial investment, removing essential functions from the job descriptions, or causing another employee to be displaced.

While the employer is required to provide accommodations to employees who request them, employees must be able to perform the ***job's essential functions***, with or without accommodation. The essential functions of a position are a group of tasks that are considered essential to the successful completion of the job. If an employee requests an accommodation, employers are required to provide it, so long as it is not an undue hardship and the employee can perform the job's essential functions as a result of the accommodation.

Two additional factors must be considered when reviewing the job description.

***Job-Relatedness-*** Any requirement for the position listed in the job description must be directly related to the job. For example, if you are hiring for a host/hostess position in a restaurant, you cannot reasonably include duties on the job description that include cooking and meal prep. These are two completely different positions within the same organization that are related to each other but do not share related duties.

***Business Necessity-*** Additionally, any requirement for a position listed in the job description must be necessary for the successful operation of the business. For example, an employer may not add a requirement to a job description to force an employee to play on the company softball team because you happen to know they are a good player- especially if your company produces greeting cards!



Time:  10 minutes

Running time: 40 minutes

**Objective**: Discuss various components of the hiring process.

**Description**: Discuss advertising as it relates to recruitment and the hiring process.

**Instructional Method**: Lecture - Exercise – Large group discussion

**Script**:

Every time an employer has a job opening, the most common practice is to advertise that opening to the public. Job ads are as simple as a sign posted in a shop window, and word-of-mouth notices to friends and family, to full media campaigns with internet/radio/television campaigns, high-paid headhunters, and targeted recruitment.

**Exercise**: Job Ad

1. Put students into pairs
2. Pairs create a job advertisement for one of the jobs they created in their job description. (6 minutes)
3. Share ad with entire group (any method that works) – white board, Walk around, etc. (4 minutes)

**Facilitator Notes:**

Be sure to point out the difference between the job description and ad.

Regardless of the advertisement method, employers must refrain from including discriminatory job requirements in the ad.

Section 704 of the Civil Rights Act of 1964 provides:

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

So, to simplify, employers may not advertise for or against any particular protected class of persons. An advertisement may not require an applicant to be of a certain race, gender, nationality, etc. An employer may state job requirements in an ad but may not use exclusive language that would lead an applicant to believe they would be excluded based on a protected characteristic.

However, employers should seek to advertise for open positions in various venues to attract and retain a diverse pool of candidates. If an organization wants to ensure that the hiring process is fair and equitable to all applicants, placing advertisements that intentionally target a diverse applicant pool will help ensure that there is less opportunity for disparate impact.

Employers should also ensure accommodations for those with disabilities during the application process. Accommodations can include providing applications and job information in large print, braille, or by reading it to the applicant (or allowing someone to read it to them), providing sign language interpreters, moving interviews to accessible locations, or additional time limits to complete tasks.



Time:  4 minutes

Running time: 44 minutes

**Objective**: Discuss various components of the hiring process.

**Description**: Discuss identifying candidates as it relates to recruitment and the hiring process.

**Instructional Method**: Lecture

**Script**:     
Once a position is posted, interested candidates begin to apply. Applications are used to ascertain if the applicant has at least the ***minimum qualifications*** for the position and to determine if they have the additional desirable qualifications. The ***applicant pool*** is the group of applicants that apply for an open position from which the employer can choose. Since this is a course on employment law, we will not spend a tremendous amount of time on this subject, but there are a few things that warrant mention.

**Facilitator Notes:**   
Application Methods

Regardless of the method of application, employers must ensure that the method used is non-discriminatory and accessible to persons who have disabilities. It’s not uncommon in 2023 for most companies to post and accept applications online. This can be as a part of the website, posted on a job site like Indeed.com, on a state employment agency, or even tweeted, texted, posted on Instagram- you name it. In this scenario, the initial application is filled out online and submitted to the firm via the site or email. Again, the online method may not be programmed to exclude any applicant based on protected characteristics. If an applicant is applying for a position, they may be asked for protected information such as race, sex, nationality, etc. However, they may not be asked until the initial application has been completed, and the protected information may not be used to make employment decisions; it may only be used for [EEO reporting](https://www.eeoc.gov/employers/small-business/legal-requirements) purposes.

Per the [EEOC website](https://www.eeoc.gov/employers/small-business/legal-requirements):

Employers who have at least 100 employees and federal contractors who have at least 50 employees are required to complete and submit an [EEO-1 Report](https://www.eeoc.gov/data/eeo-1-data-collection) (a government form that requests information about employees' job categories, ethnicity, race, and gender) to EEOC and the U.S. Department of Labor every year.

Some organizations, especially small businesses, may require you to apply in person and fill out a paper-based application when you do so. Depending on the company's number of employees, some federal discrimination regulations may not apply. Recall that Title VII of the Civil Rights Act of 1964 typically applies to employers having 15 or more employees, but many states have similar anti-discrimination regulations that apply to even small employers, so it is essential to be aware of the rules in your state.

The [EEOC provides guidance](https://www.eeoc.gov/employers/small-business/small-business-requirements) to employers about which laws apply to them:

If you have at least one employee: You are covered by the law that requires employers to provide [equal pay](https://www.eeoc.gov/equal-paycompensation-discrimination) for equal work to male and female employees.

If you have 15 to 19 employees: You are covered by the laws that prohibit discrimination based on [race](https://www.eeoc.gov/racecolor-discrimination), [color](https://www.eeoc.gov/racecolor-discrimination), [religion](https://www.eeoc.gov/religious-discrimination), [sex](https://www.eeoc.gov/sex-based-discrimination) (including [pregnancy](https://www.eeoc.gov/pregnancy-discrimination), sexual orientation, or gender identity), [national origin](https://www.eeoc.gov/national-origin-discrimination), [disability](https://www.eeoc.gov/eeoc-disability-related-resources) and [genetic information](https://www.eeoc.gov/genetic-information-discrimination) (including family medical history). You are also covered by the law that requires employers to provide equal pay for equal work.

If you have 20 or more employees: You are covered by the laws that prohibit discrimination based on race, color, religion, sex (including pregnancy), national origin, [age](https://www.eeoc.gov/age-discrimination) (40 or older), disability and genetic information (including family medical history). You are also covered by the law that requires employers to provide equal pay for equal work.

For state-specific information, you can visit Nolo.com provides links to [Employment Discrimination Laws in Your State](https://www.nolo.com/legal-encyclopedia/employment-discrimination-in-your-state-31017.html).

Nepotism

***Nepotism*** is the hiring of family members to work in an organization. This has been a common practice throughout history and is still exceedingly prevalent in small, family-owned businesses. Nepotism can sometimes lead to discriminatory activities, such as promoting a family member over a more-qualified protected applicant. Because of this, nepotism is also attributed to employee dissatisfaction and higher rates of turnover- not to mention the fact that employees who are not family members are also often exposed to family drama/trauma that bleeds over into the workplace.

Nepotism is expressly forbidden in federal and most state government organizations and forbidden by a policy in many others. However, there are no laws forbidding a private employer from hiring and promoting family members unless that employer violates discrimination laws either federally and/or locally.

Ban the Box Laws

Many states have passed what are known as [Ban the Box Laws](https://www.paycor.com/resource-center/articles/ban-the-box-state-by-state/). These laws prohibit employers from seeking information about an applicant’s criminal history on an initial job application. Employers can ask questions about an applicant’s criminal history before making a job offer, but not in the initial screening process. Removing criminal history questions allows a potentially strong applicant to avoid being eliminated from the screening process before their qualifications can be otherwise considered.

A picture containing graphical user interface

Description automatically generated

Time:  16 minutes

Running time: 60 minutes

**Objective**: Identify illegal interview questions.

**Description**: Identify illegal and legal interview questions

**Instructional Method**: Lecture - Game

**Script**:

In reality, the selection process begins before interviews occur. Every interaction an organization has with an applicant is part of the selection process and, therefore, subject to employment laws.

Interviews are perhaps the biggest area of risk for employers. While most people like to think they are good judges of character, the fact is that untrained interviewers who rely on ‘gut instincts’ are the most likely to ask illegal questions and make the poorest hires.

Interview questions cannot be designed to solicit information otherwise protected by law. Interviewers may not ask questions about age, race, sex, religion, national origin, pregnancy status, disability, marital status, family responsibilities, sexual orientation, gender identity, and genetic information. Additionally, an interviewer must not ask questions that trick applicants into giving away protected information.

Some examples of illegal interview questions are listed in the study aid EL 4 Illegal Interview Questions and EEO Guidelines

**Game**

1. Pair students
2. Have the pairs create legal and illegal questions
3. Have 2 pair share their questions with another pair in a game format.

Or

1. Use the questions from the students and put in a Ka hoot game format.
2. Play the game with the entire class.

Graphical user interface, application, website

Description automatically generated

Time:  5 minutes

Running time: 65 minutes

**Objective**: Discuss various components of the hiring process.

**Description**: Discuss Verification of information and why it is so important

**Instructional Method**: Lecture - Discussion

**Script**:

After completing the interview and narrowing down the applicants to a few candidates, an organization should verify the information gleaned in the initial interview and application process. Some organizations wait until they have made a conditional offer of employment, but it isn’t necessary to wait for all types of information verification. Keep in mind that every part of the hiring process must be non-discriminatory and job-related. An employer may not run a credit check (for example) on every applicant without regard to the nature of the position, they may only require ***background checks*** that are required for all employees or only for security-sensitive positions.

**Ask**: Which type of reference do you think is the most important and why?

**Facilitator Notes:**

Reference checks can begin before a conditional offer of employment. Calling to verify dates of employment and determine if an employee is eligible for rehire is an important part of most hiring processes. Keep in mind that employers may be unwilling to provide very much information about a former employee, particularly if negative information exists. Employers don’t want to be accused of sharing negative information about a former employer because so many employers have been sued for doing so.

If you are checking references on an applicant, it is critical to ask job-related questions, and not those designed to solicit protected information about the applicant.

*Personal Reference Checks*

Frequently, application blanks have a spot for references and some employees will fill these sections with personal references; aka- their friends or family.

These interactions can be especially risky if questions are asked that could be construed as discriminatory. An easy way to avoid this is to ensure that the application blank requests **work** reference information only.

*Transcript Verification*

An employer can request official or unofficial copies of college transcripts following the initial offer of employment. These documents include information that could be used to discriminate in hiring, so it can only be requested after the offer is made. This information can only be requested if the position requires a college degree. If a college degree is not job-related, don’t request transcripts.

*Criminal Background Checks*

Criminal background checks should not be completed until a conditional offer of employment has been made. However, an employer can legally check public records such as sex offender databases and local and national ‘Most Wanted’ websites without having an applicant sign any kind of release or gather any information other than their name.

In order to run a criminal background check through the FBI or a state government, an employer should obtain a signed release from the applicant that includes identifiers such as birthdate, driver's license number, and/or Social Security number. These types of background checks require very specific forms that must be completed for that agency.

Do employers have a legal duty to make good hiring decisions? What if an employee injures another employee, customer, or vendor and the employer didn’t know that the employee has a record of workplace violence? Is the employer liable for the injuries to the victim?

The issue of ***negligent hiring*** is addressed in the case of *Navarete v. Naperville Psychiatric Ventures (2011*). In this case, the court had to determine if an organization that operates a mental health facility is liable for the negligent hiring of an employee who sexually assaulted a patient. The court ultimately determined that an employer can be held liable under the law if they failed to exercise due diligence in conducting background checks and especially if, as in this case, the offending employee was placed in a position to have and exercise authority over a victim.

*Credit Checks*

Does a good credit score indicate that a person is honest? Does it mean they are less likely to steal if they pay all their bills on time? When and why can an employer require a credit check for a job?

Once an initial offer of employment is made, an employer may obtain a ***consumer credit report***from a ***credit reporting agency*** for an applicant if the credit check is job-related to the position they are seeking.

According to Rodgers (2022), the [Fair Credit Reporting Act (FCRA) of 1970](https://www.ftc.gov/legal-library/browse/statutes/fair-credit-reporting-act) provides the following rights to consumers:

* The right to informed consent before a pre-employment background check is performed.
* The right to review background check information and correct any mistakes.
* The right to be informed when information from a pre-employment background check about them is used to make decisions that adversely affect them.
* The right to appeal adverse decisions made based on the data in their pre-employment background checks when they believe the information used to make the decision is inaccurate.

Again, the need to obtain consumer credit report information must be job-related, just as with any other position. While an employer might feel it is important to obtain a credit history on the accountant that will be handling the company funds, it is less likely that the same company’s janitorial staff would require a credit check, due to the fact that they wouldn’t be in charge of company finances, nor have the opportunity to do so in the course of their duties.

The [Fair Credit Reporting Act (FCRA) requires](https://iprospectcheck.com/fcra-background-check/) that employers who use a third-party to conduct background checks must:

1. Inform the applicant that their background is going to be checked, and what will be included in the the inquiry.
2. Obtain written permission from the employee to initiate the inquiry.
3. If the background check returns information that makes the applicant ineligible for hire, they must be provided with a copy of a [Summary of Your Rights Under the Fair Credit Reporting Act](https://www.ecfr.gov/current/title-12/chapter-X/part-1022/appendix-Appendix%20K%20to%20Part%201022)” from the Federal Trade Commission’s website. Additionally, the applicant must be given 5 days to dispute negative information that might influence the outcome of the employment decision.
4. If an employer decides not to hire an applicant based on the background information, they must inform the applicant with a notice that includes the name, phone number, and address of the consumer credit reporting agency that conducted the background check.

Violations of the FCRA are serious and expensive, both in terms of finances and negative publicity. Employers should be certain they are choosing a quality credit reporting agency and informing applicants of their rights throughout the background check process.

Chart

Description automatically generated

Time:  5 minutes

Running time: 70 minutes

**Objective**: Discuss various components of the hiring process.

**Description**: Discuss pre-employment testing.

**Instructional Method**: Lecture - Discussion

**Script**:

Many employers use some type of ***eligibility*** or ***selection testing*** to help aid in the identification of the best candidate for an open position. There are a wide variety of standardized selection tests available to employers and there are no rules to dictate which tests employers may use. However, as discussed repeatedly throughout this course, the selection tests used must directly related to the job and the skills that is being tested must be necessary to the successful completion of the essential functions of the position.

Recall our discussion of disparate impact and disparate treatment from Module Three.  Employers must choose selection tests that don’t create a disparate environment towards any protected class of applicants. Therefore, each selection test used should be job-related, should test skills necessary for the successful completion of the essential elements of the position, and non-discriminatory in nature. This includes accessibility issues for persons with disabilities. The great thing about using a published selection tool from a reputable vendor is that those tests have usually been validated to ensure that they are unbiased and non-discriminatory in nature. It is critical to use tests that have been validated to ensure they are actually measuring what the employer is intending to measure.

Adverse impact in employment is measured by the [***Four-Fifths rule***](https://www.uniformguidelines.com/uniformguidelines.html) which essentially states that if the selection rate of any protected group is less than 80% of the group with the highest selection rate, that adverse impact against the protected group is occurring. So, an employer can measure the effectiveness of the selection procedure by doing the math for their organization.

**Ask**: What types of pre-employment testing have you taken or delivered?

**Facilitator Notes:**

The EEOC provides guidance on pre-employment testing in the [Uniform Selection Guidelines](https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures). The guidelines outline how employers can prove that their pre-employment selection tests and other criteria are job-related and necessary for the business. There are three types of validity tests discussed: criterion-related studies, content validation, and construct studies.

Fields and Cheeseman (2022) provide an excellent definition and example of each method of establishing validity of a selection test (p.68).

1. Criterion-related studies establish by statistical data that the test can predict or provide a significant correlation with successful work behaviors. The employer must have thoroughly analyzed the jobs assigned to its workers.

Example: A job applicant takes a performance test which accurately predicts how well the employee will perform the job functions.

1. Content validation establishes that the content of the test represents the important aspects of job performance.

Example: The content of the selection procedures (the items being measured) are strongly tied to important work behaviors, activities, and desired work outcomes.

1. Construct studies demonstrate that the test measures the degree to which job candidates have the significant characteristics important for job performance.

Example: A job applicant takes a test to measure qualities needed for the position, such as mechanical aptitude.

*Sample Job Tasks*

This type of selection test asks applicants to perform actual job tasks that they would be performing if hired. A common example of this would be a typing test or a welding test, but this could be literally any combination of job tasks that the employer feels is representative of the job.

*Physical Ability Tests*

Some jobs require specific physical abilities in order to be qualified to perform the essential functions of a position, so physical ability tests are frequently required to ensure that applicants can meet these minimum qualifications for the position. Examples would be hand/eye coordination, the ability to lift a certain amount of weight, climb stairs, tightening bolts, stretch to work overhead, bend to clean a dog kennel, stand on a ladder, etc. Again, these tests must be directly related to performance of the essential functions of a position.

*English Proficiency Tests*

Employers can legally require employees to speak, read, and write English in the U.S., but they may not require them to be native speakers of English. For example, a college professor from Venezuela whose first language is Spanish can be required to pass a reading, writing, and speaking proficiency test for English because the job requires that courses are taught in the English language.

*Cognitive Tests*

Cognitive test measure an applicant’s intellectual abilities. Common examples are reading comprehension, mathematical ability, or overall intelligence tests, but they intended to to measure how an applicant thinks more than what the know. These types of tests can also measure other mental skills such as problem solving, critical thinking, and attention to detail. The requirements of the job description must support the job-relatedness of this type of testing.

*Integrity Tests*

Employers like to be able to identify potential team members that are honest, especially when that employee will have access to confidential information, or handle money in any manner. ***Polygraph tests*** (also known as lie detector tests) measure physiological reactions to statements questions from an examiner. The test measures how quickly and deeply a test subject breathes, their heart/pulse rate, and how much they perspire when asked a question. This is compared to a set of baseline measures taken at the beginning of the test which indicates the probability that the response is truthful or not.

While most employers would love to be able to require this type of test, the [Employee Polygraph Protection Act of 1988 (EPPA)](https://webapps.dol.gov/elaws/elg/eppa.htm?_ga=2.96118620.112364176.1672183814-1907791254.1672183814) prohibits most private employers for pre-employment screening or during the course of the employment relationship.

There are a few exceptions:

* Subject to restrictions, the Act permits polygraph (a type of lie detector) tests to be administered to certain job applicants of security service firms (armored car, alarm, and guard) and of pharmaceutical manufacturers, distributors, and dispensers.
* Subject to restrictions, the Act also permits polygraph testing of certain employees of private firms who are reasonably suspected of involvement in a workplace incident (theft, embezzlement, etc.) that resulted in specific economic loss or injury to the employer.

The law does not apply to Federal, state, and/or local governments.

*Drug Screens*

Most private employers are not required to have a Drug-Free Workplace Policy, but due to the safety risks, legal risks, and security risks connected with not having such a policy, most organizations have at least some formal statement in their employee policies about the drug use and many have fully-developed testing procedures as well.

Organizations who operate in the transportation, medical, and pharmaceutical industries, for example, frequently require not only pre-employment drug screens, but also require random testing and/or testing in the event of an emergency due to the nature of the work.

Drug testing for illegal drugs has become slightly more complex since so many states have now legalized medical and/or recreational marijuana. Since marijuana is still a federally illegal drug as of the writing of this course, employers will need to refer to [individual state laws concerning off-duty marijuana use](https://www.nolo.com/legal-encyclopedia/state-laws-on-off-duty-marijuana-use.html). Employers are still free to prohibit use of legal marijuana in the workplace itself, but there is some question as to the legality of prohibiting off-duty use for many types of jobs.

Prescription drugs are another workplace issue, especially in safety and/or security-sensitive industries. Many types of prescription drugs can have side effects that can impact a person’s ability to successfully perform their job. Employers may test for those prescriptions, but only after a conditional offer of employment is made.

The [Drug-Free Workplace Act of 1986](https://www.samhsa.gov/workplace/employer-resources/contractor-grantee-laws) authorized drug testing of federal employees and federal contractors with contracts of $100,000 or more and requires them to have drug-free workplace policy.

*Medical Examinations*

Many employers require medical examinations to ensure that applicants are physically capable of performing the essential functions of the position. This is very common in jobs that require an ongoing standard of physical fitness such as police, fire, military, transportation workers, etc. An employer is free to require a job-related medical exam upon making an initial offer of employment, and completing all other pre-employment testing. The results of a pre-employment workplace medical exam can only be used to determine if the employee can perform the essential functions of the position and no other medical information should be released to the employer.

Pre-employment medical exams can only be required after the initial offer of employment has been made, and all other background checks, drug screens, and all other selection tests have been successfully passed so that employers may not use information about a disability discovered in a medical exam as a reason to exclude an applicant from employment. Remember, the disabled individual does not have to reveal a disability at all so long as they can perform the essential functions of the job, so allowing an employer to know of unrelated disabilities could lead to the applicant being denied the employment opportunity.

Genetic Testing

[The Genetic Information Nondiscrimination Act of 2008 (GINA)](https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/statutes/genetic-information-nondiscrimination-act-of-2008/guidance) prohibits employers from discriminating against employees or job appliants on the basis of genetic information. Employers may not use information obtained in medical exams that might indicate an increased risk of developing diseases in the future and genetic mapping or testing for particular diseases in pre-employment testing is not job-related and therefore illegal.

ADA Considerations

The Americans with Disabilities also providence guidance concerning pre-employment selection testing guidance concerning when an employer can require a medical exam and/or ask the applicant or others about observed or suspected disabilities.

According to the [EEOC](https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures) website:

* When hiring, an employer may not ask questions about disability or require medical examinations until after it makes a conditional job offer to the applicant. 42 U.S.C. �12112 (d)(2);
* After making a job offer (but before the person starts working), an employer may ask disability-related questions and conduct medical examinations as long as it does so for all individuals entering the same job category. *Id.* at � 12112(d)(3); and
* With respect to employees, an employer may ask questions about disability or require medical examinations only if doing so is job-related and consistent with business necessity. Thus, for example, an employer could request medical information when it has a reasonable belief, based on objective evidence, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition, or when an employer receives a request for a reasonable accommodation and the person’s disability and/or need for accommodation is not obvious. *Id*. at � 12112(d)(4).

The ADA also makes it unlawful to:

* Use employment tests that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test, as used by the employer, is shown to be job-related and consistent with business necessity. 42 U.S.C. � 12112(b)(6);
* Fail to select and administer employment tests in the most effective manner to ensure that test results accurately reflect the skills, aptitude or whatever other factor that such test purports to measure, rather than reflecting an applicant’s or employee’s impairment. *Id*. at � 12112(b)(7); and
* Fail to make reasonable accommodations, including in the administration of tests, to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such accommodation would impose an undue hardship. *Id*. at � 12112(b)(5).

*Test Cut-off Scores*

A test cut-off score is the line below which an applicant’s score eliminates them from consideration for a position. This is easy to think of if you think of it in terms of ‘passing’ or ‘failing’ in high school. On a grading scale of 1-100 points, any score below a 50 would be considered a failing grade. A cut-off score works the same way, only each employer gets to determine what the cut-off score should be and this is where the opportunity for discrimination occurs. According to the [UGESP guidelines](https://www.govinfo.gov/content/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1607.xml), cutoff scores should be “reasonable and consistent with normal expectations or acceptable proficiency within the workplace.” Employers should be aware that by making the cut-off scores too high, they may be creating a disparate impact situation. This can be avoided by having a variety of employees already performing the work to take the selection test to determine a realistic range of acceptable scores from employees already successfully performing the job upon which to base the cut-off decision.

Graphical user interface

Description automatically generated

Time:  10 minutes

Running time: 80 minutes

**Objective**: Practice completing employment verification documents.

**Description**: Have students download and complete the e-Verify process.

**Instructional Method**: Lecture - exercise

**Script**:

Employers cannot legally hire undocumented workers. The [Immigration Reform and Control Act of 1986 (IRCA)](https://www.congress.gov/bill/99th-congress/senate-bill/1200), “introduced civil and criminal penalties to employers who knowingly hired undocumented immigrants or individuals unauthorized to work in the U.S.” (<https://guides.loc.gov/latinx-civil-rights/irca>). Additionally, the [Immigration and Nationality Act of 1952](https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1324a&num=0&edition=prelim) also prohibits the hiring of unauthorized workers within the U.S.

Employment eligibility is verified through completion of the I-9 form and the use of the E-Verify System. The system “compares information from an I-9 form to records available from the Social Security System and the U.S. Department of Homeland Security to confirm your identity and that you are authorized to work in the United States” (E-verify.gov/employees).

The use of the E-verify system is not federally mandated for all private employers, but it is required for government employees and federal contractors, and it is also required for all employers in a number of states. Those employers who do choose to participate in the E-verify program must apply it consistently to all employees within 3 days of hire, and appropriately file the forms online.

**Exercise** - E-Verify

Visit <https://www.uscis.gov/i-9> and download the latest I-9 form and directions and complete it as if you were hiring a new employee. Use your own identification documents to identify what should be included on the form and follow the directions carefully. ***Please be sure to change the identification numbers so your privacy is protected before you submit your form!*** Then, visit the E-Verify website and [create a myE-verify](https://www.e-verify.gov/employees/mye-verify) account using the links provided. Here, you can enter your own information so that if a future employer enters incorrect information about you, you will be notified so that you can address the error. After you register and enter your information, you will receive a welcome message and can see if you’ve had any open cases (an employer has verified your employment) in the past several years. **Please complete the self-authorization and submit your result- being certain that any self-identifiers (like Social Security Numbers) are redacted**

If E-verify isn’t required, why do employers use it?

For employers, the consistent and effective use of the E-verify system is an affirmative defense against accusations of hiring illegal persons, it’s free, and it helps to reduce and eliminate risks associated with violating the IRCA.

Graphical user interface, text

Description automatically generated

Time: 5 minutes

Running time: 85 minutes

**Objective**: Determine the appropriate laws to apply to given employment situations.

**Description**: Students will review the material by answering the questions on the slide.

**Instructional Method**: Pair and share discussions, exercises, homework

**Script:** Now, let’s dive deeper into Employment & Authorization to Work.

**Exercise**:

1. Pair students
2. Have students discuss and answer the questions on the slide.
3. Have students share their answers.

**Individual Exercise:**

1. Have each student write a one-page answer to question #2
2. Have students get into groups of 3-5 and discuss their answers
3. Have students share with the entire class (optional)

**Discussion Prompts:**

1. Discuss a positive and a negative interview experience you’ve had. What made it so good or bad, and why? If the interview experience was bad, did you still go to work there? What guided that decision and how did it work out?
2. Do you think that employers should post the selection tests they use online so that applicants can be aware of what they will be asked to do prior to applying? Why or why not? What about just posting them for all interested parties to take before they even bother to apply and using cut scores to determine who is allowed to apply? What legal issues could apply to this practice?

**Relevant Laws**

* Drug Free Workplace Act of 1986
* Employee Polygraph Protection Act (EPPA)
* Fair Credit Reporting Act of 1970
* Genetic Information Nondiscrimination Act of 2008 (GINA)
* Immigration and Nationality Act of 1952 (INA)
* Immigration Reform and Control Act of 1986 (IRCA)

**Case Law in the Spotlight**

* Goode v. LexisNexis Risk & Information Analytics Group 848 F. Supp. 2d 532 (E.D. Pa. 2012)
* Navarete v. Naperville Psychiatric Ventures 2011 III. App. Unpub. LESIS 3163 (2d App. Dist.) appeal denied, 968 N.E.2d 82 (Illinois Supreme Court 2012).

**State Employment Law Focus**

* Visit NOLO.com’s [State Laws on Off-Duty Marijuana Use](https://www.nolo.com/legal-encyclopedia/state-laws-on-off-duty-marijuana-use.html) and review the laws of the various states concerning the rules for employers on medical and/or recreational marijuana. Compare and contrast several of these states and determine which states offer the most protections for employers under the law.

Logo, company name

Description automatically generated

Time:  5 minutes

Running time: 90 minutes

**Objective**: Review main points in this module. Determine the appropriate laws to apply to discrimination.

**Description**:  Be sure that students have a fun way to remember the material.

**Instructional Method**: Game – Review

**Script**:

Let’s see how much we remember about this module.

**Facilitator Notes:**

Review Exercise:  Create a fun game to review the material.  Remember to use the objectives to measure learning:

* Define the key terms related to Employment & Authorization to Work
* Determine the appropriate laws to apply to given employment situations.
* Discuss various components of the hiring process.
* Practice completing employment verification documents.
* Identify illegal interview questions.
* Have each student submit a question on a piece of paper, crumple it up and toss it in a bucket (clean wastebasket), Instructor will then read them and give points to each team with the correct answer.
* Any game show – Family Feud, Jeopardy, $10,000 pyramid, Password, Tic Tac Toe
* Extra credit quizzes

There are many ways to review material virtually or in person.  Students can use their phones or computers to navigate to various online review websites.

A few are:

* Kahoot
* Quizlet