**PRE-EMPLOYMENT TESTING OF
READING AND WRITING ENGLISH RESOURCE**



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# INTRODUCTION

Employers today face an increasingly diverse workforce applicant pool and an ideal candidate for a position may not speak English as their first language. While some employers may view this as a drawback, other employers may see the very positive potential of a bilingual applicant, especially in times of heightened competition for employees and serving an increasingly diverse older adult population.

Pre-employment testing is permissible only if a certain level of English skills is required for the safe and effective performance of the position for which it is imposed. Therefore, it is very important to understand the considerations around such testing. The information provided below is a list of questions and answers about pre-employment testing of reading and writing English that long-term care employers might want to consider before implementing such employment activities.

# PRE-EMPLOYMENT TESTING OF READING AND WRITING ENGLISH

**May an employer implement an English proficiency test as part of the application/hiring process?**

Yes, but an English proficiency requirement is permissible only if a certain level of English skills is actually required for the safe and effective performance of the position for which it is imposed. In this connection, it’s important to note that a worker’s lack of English fluency or proficiency may interfere with job performance in some jobs, but not in others.

Because the degree of English fluency or proficiency that may be lawfully required varies from one position to the next, applying uniform fluency or proficiency requirements to a broad range of dissimilar positions or requiring a greater degree of fluency than is necessary for a position may result in a violation of federal or state law.

Thus, an employer’s use of an English proficiency test should be carefully considered, narrowly deployed, and closely monitored.

**What laws should I be concerned about?**

At the federal level, Title VII of the Civil Rights Act prohibits discrimination in the employment context based on race, color, sex, national origin, and religion, among other protected classes. Also, the Americans with Disabilities Act prohibits employers from discriminating against qualified individuals with disabilities based on their disabilities.

At the state level, the Minnesota Human Rights Act prohibits discrimination in the hiring process based on race, color, creed, religion, national origin, sex, gender identity, marital status, status with regard to public assistance, familial status, membership or activity in a local commission, disability, sexual orientation, or age.

For an employer to avoid liability, any English proficiency test must be administered in accordance with these laws.

**How do these laws limit the type of test an employer may administer?**

Federal guidance on testing from the Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing the federal non-discrimination laws, states the employment tests in general, including an English proficiency test, are allowed “as long as they are not ‘designed, intended or used to discriminate because of race, color, religion, sex or national origin.’” Similarly, state law allows for such a test as long as it is not given for the purpose of discriminating against any protected class.

In addition, the EEOC guidance notes that:

An English fluency or English proficiency requirement is permissible only if required for the effective performance of the position for which it is imposed. An individual's lack of fluency in English may interfere with job performance in some circumstances, but not in others. For example, an individual may be sufficiently proficient in English to qualify as a research assistant but, at that point in time, may lack the fluency to qualify as a senior scientific writer who must communicate complex scientific information in English.

Because the degree of fluency that may be lawfully required varies from one position to the next, employers are advised to assess the level of fluency required for a job on a case-by-case basis. Applying uniform fluency requirements to a broad range of dissimilar positions or requiring a greater degree of fluency than is necessary for a position may result in a violation of Title VII.[[1]](#footnote-2)

**How do employer’s avoid discrimination claims?**

First, as the EEOC notes, all tests must be administered equally. For example, it would be discriminatory if an employer only tested the reading and writing ability of only foreign-born applicants not that of applicants who appear to have been born in the United States.

Critically, however, to have a valid test, the employer must be able to show that the test is truly required for the “effective performance of the job.” In other words, the test must be job-related and consistent with business necessity.

How can employers meet this standard? The EEOC Guidance states that “[a]n employer can meet this [job related and business necessity] standard by showing that the test is necessary to the safe and efficient performance of the job.”

In addition, the test must evaluate the skills necessary to perform the specific job in question successfully. In other words, an employer cannot test for more skills than the job requires, and the skills tested should be ones that lead to a safe and efficient job performance.

Consider the following examples:

* A retirement community-employer did not discriminate when it terminated an employee after she failed an English proficiency test. First, the employer’s English proficiency standard applied to all individuals who worked in a housekeeping position. Second, the English proficiency requirement was job related because the employer provided evidence that its housekeepers needed to be able to speak English to respond to elderly residents in distress during an emergency because they were the “eyes and ears” for resident issues because of their contact with the residents in their homes.[[2]](#footnote-3)
* A hotel’s decision to terminate a purchasing clerk was justified by business necessity because the employee’s inability to adequately speak and understand English prevented him from performing the duties required of the position.[[3]](#footnote-4)
* A hotel lawfully denied a front office cashier position to an employee who worked as a housekeeper because the hotel believed that the employee was not qualified for the position due to her inability "to articulate clearly or coherently and to make herself adequately understood in the English language."[[4]](#footnote-5)
* On the other hand, an employer was found liable for discrimination when it administered a test that required a significantly higher skill set to pass the test than what was actually required of the employee to successfully do the job.[[5]](#footnote-6)
* An employer was also found liable for discrimination when it arbitrarily set cutoff scores for their test. The employer needed to be able to justify the score for accepting or rejecting applicants or employees. In other words, needed to “connect the dots” between the test and job performance. The same employer’s test was also struck down because they could not show a business necessity for implementing the test. There was no evidence that workplace injuries or claims were a concrete problem prior to the implementation, and there was no evidence the test significantly reduced injuries or claims once it was implemented.[[6]](#footnote-7)

**Are there specific considerations for testing in a healthcare setting?**

Legally, it does not appear so. Practically, however, there are compelling arguments that testing for basic English proficiency is required for certain healthcare position. For example, because of resident/patient care facing work and safety concerns, Long Term care providers have a compelling reason to require basic English proficiency. Similar to the employer in the Baez case referenced above, basic English proficiency is required to assist residents who are in distress.

It must be emphasized that the skill assessment has to be narrowly tailored to meet the job requirements. For example, does a housekeeping employee need to have the same skills as a nursing assistant, does a nursing assistant need to have the same skills as an RN, or an RN the same skills as a PA? When evaluating testing for English proficiency, one test will not be able to assess skills for every position.

**Can I ask only the applicants I’m worried aren’t proficient in English to take the test?**

No. The test must be given to all applicants who are applying for the same job. Requiring only certain applicants, such as only those with foreign sounding names, would likely violate Title VII and the MHRA.

**When should I administer the test? During the application process or post-offer?**

For non-medical preemployment tests only, such as an English proficiency tests, the test may be administered pre- or post- job offer. To be clear, however, this rule does not apply to medical exams.

**If I implement a new test, must I test all of my current employees as well?**

Possibly, but with two important caveats. First, an employer must be able to show that the test was not implemented for discriminatory purposes, in other words to screen out specific employees.

Second, while it is not clear that an employer has an obligation to test current employees, if an employer has a group of employees who have not been tested, but are able nonetheless to satisfactorily perform their duties, this fact raises the question of whether an employer needs to have a test in the first place.

For example, in 2006, a Utah candy maker implemented an English proficiency exam and applied it to existing employees, including employees who performed manual labor jobs that involved the scraping of candy out of bowls and into machines. Several of these workers were fired after they failed the English test, even though they had worked for the employer for six years without any performance problems. After the EEOC brought suit, through mediation, the employer agreed to drop the test, pay "appropriate monetary compensation" to the fired workers, and establish a scholarship fund to help its employees with language skills training.[[7]](#footnote-8)

If an employer has current non-English speaking employees, carefully consider whether the employees are satisfactorily performing their duties. If the answer is yes, consider how and why those employees are successful, and evaluate how you can assist a current employee or applicant to be successful in the same role. Is testing the only way to measure future success? Is it possible to assist individuals who are not native English speakers to be successful in some other way, for example, language training skills. Similarly, if an employer concludes that current employees are not successful, consider why, and what steps you can take to assist them to be successful short of termination.

1. Available at: <https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#_Toc451518824> [↑](#footnote-ref-2)
2. Baez v. Hill at Whitemarsh, No. CV 20-5989, 2022 WL 103188 (E.D. Pa. Jan. 11, 2022). [↑](#footnote-ref-3)
3. Stephen v. PGA Sheraton Resort, Ltd., 873 F.2d 276, 280-81 (11th Cir. 1989). [↑](#footnote-ref-4)
4. Mejia v. N.Y. Sheraton Hotel, 459 F. Supp. 375, 377 (S.D.N.Y. 1978). [↑](#footnote-ref-5)
5. E.E.O.C. v. Dial Corp., 469 F.3d 735 (8th Cir. 2006). [↑](#footnote-ref-6)
6. U.S. Equal Emp. Opportunity Comm'n v. Stan Koch & Sons Trucking, Inc., 557 F. Supp. 3d 884 (D. Minn. 2021). [↑](#footnote-ref-7)
7. Available at: <https://www.deseret.com/2006/4/3/19946419/sweet-candy-eeoc-settle-bias-complaint/> [↑](#footnote-ref-8)