

Establishing the Legal Defensibility of Online Screening and Assessment: **What you need to know**

By Charles Handler, Ph.D.

Introduction

The definition of the term "legal defensibility" as it applies to employee selection is a complicated one. There is no one simple answer to the question "How do I make sure my selection system is legally defensible?" This is unfortunate because legal defensibility seems to be a critical factor when it comes to making decisions about the use of screening and assessment measures to be used for the selection of employees. While ensuring legal defensibility is an important factor in the creation of any employee selection system, it is important to understand that the benefits of doing so go well beyond simply complying with a set of legal regulations. Rather, the same factors that establish legal defensibility are also responsible for creating selection systems that help organizations to consistently and systematically select the best employees while simultaneously promoting diversity.

This whitepaper is intended to provide practical information about the topic of legal defensibility as it applies to employee selection. This information is aimed at:

- Helping readers to understand what legal defensibility is
- Providing a set of basic requirements for legal defensibility that must be satisfied when planning and implementing an employee selection system
- Providing the basic knowledge needed to evaluate the legal defensibility of a selection system

Legal Defensibility Defined

There is no one easy definition of what legal defensibility is. The main idea behind legal defensibility is protecting your organization from lawsuits related to the choices you make amongst job applicants. But legal defensibility is more than just this. It is also a philosophy that should be shared by everyone within an organization. This philosophy involves more than just protecting oneself. It also centers on promoting social responsibility and showing job applicants that they care about treating people correctly. Believe it or not policies based on these ideas can make a real difference and offer a serious competitive advantage.

At the root of a solid philosophy of legal defensibility is an adherence to three main principles. These include:

1. Valuing diversity
2. Valuing the perspective and perceptions of job applicants
3. Ensuring all selection measures are job-related, validated, and standardized

The following sections explain each of these ideas in more detail and provide information about best practices associated with each:

Principle #1: Valuing Diversity

Most legal problems related to employee selection come about because there are just too few minorities hired relative to the members of a majority group (usually white males). Avoiding legal trouble related to hiring decisions can be as simple as including more members of minority groups in your applicant pool. The more diverse the applicant pool, the more diverse the resulting group of hires will be. Remember that the EEOC monitors statistics related to the diversity of your applicants. If you are called into court and the numbers associated with your hiring practices make it clear that you have not included enough minorities in your applicant pool you will have probably already lost your case.

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It is important to note that this strategy is not the same as an affirmative action program where spots are held open for members of a particular minority group. Rather, increasing the number of minority applicants is nothing more than a numbers game. The more applicants of a specific group that are in your pool, the more likely you will be to select members of this group.

Finally, it is important not to forget that there is a reason for wanting to recruit a diverse workforce that goes well beyond any mandated corporate diversity initiative. People from different backgrounds bring different perspectives to the table. These perspectives can make a valuable contribution to the effectiveness of your organization. Remember - America was built on the collective strength of its diversity!

Simple strategies for recruiting diversity

In today's corporate environment, almost every organization has some sort of diversity initiative in place. The execution of these initiatives differs greatly however. Many times these initiatives are highly ineffective and go no further than a "training" course and the use of minorities in corporate ad campaigns. No matter what the official program in your organization mandates, you can use a few simple, inexpensive tactics to ensure that your organization's applicant pools will help you hire a diverse workforce.

These tactics include:

- Examining the representation of gender/race in your current workforce and applicant pools and using these numbers to focus your recruiting efforts on achieving balance
- Posting job ads on minority centered job boards and websites
- Advertising in publications that focus on reaching members of a professional minority community (for example the society of black engineers)
- Sending corporate recruiters to colleges and universities attended mainly by minorities
- Using current employees who are members of minority groups as role models and spokespersons

Principle #2:

Positive Applicant Reactions

Believe it or not, the experience that job applicants have while participating in every aspect of your hiring process can play a major role in its legal defensibility. Research has shown that applicants' perceptions of how they were treated in the application process can lead to positive work outcomes such as increased commitment and satisfaction amongst those hired. Satisfied, committed workers are less likely to turnover and to file grievances. Research has also shown that poor treatment during the hiring process can lead to negative impressions of the company. These negative experiences can be really damaging because they can erode an organization's brand and serve to ensure that newly hired employees start their employment experience off on the wrong foot. Rejected applicants upset by their treatment during the hiring process are also much more likely to file suits against an organization as a result of this process, so treating applicants well during the hiring process can not only help foster their commitment to the organization, it can also help avoid costly litigation.

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There are a variety of relatively simple things that can be done to ensure that applying for a job at your organization is a positive experience. Not only will doing these things help ensure that you are not sued, but it will also help you establish a positive employment brand that will provide downstream rewards such as increased employee satisfaction and commitment. The following section describes some best practices in this area.

A strategy for ensuring positive applicant reactions

This area of legal defensibility relies on commitment to a customer service like philosophy that makes the experience of applying for a job at your firm a positive one for all applicants, including those who are not hired. The basis for executing this philosophy is to communicate to applicants that your organization values the fact that they have chosen to consider working at your organization.

Here are some basic tips for helping to ensure candidates have a positive reaction to your hiring practices.

1. Build a good employment portal - Make your online application process as easy as possible. Build an attractive Web site to make it easy to find and apply for jobs. The more you can offer job seekers in return for their visit, the more positive their perceptions of your employment brand will be.
2. Communicate with applicants throughout the selection process - The process of applying for a job should be a two-way street. Let applicants know what steps are involved in the whole selection process upfront. Maintain communication to let applicants know where they stand in the process. Applicants hate not knowing what is going on behind the scenes. The more opportunity you give them to have a "me vs. them" mentality, the more likely they are to bring legal action if they are not hired.
3. Use only "face valid" assessment tools. This is a VERY important suggestion as violating it offers applicants an easy reason to bring legal action. Face valid assessment tools are those that appear to the applicant to be job related. The more the screening and assessment measures you use in your process leave applicants wondering, "Why are they asking me that - it has nothing to do with my ability to do this job?", the more likely they are to bring suit if they are not hired.

Another facet of face validity relates to the use of offensive questions used in interviews or on screening/assessment measures. When it comes to interviews, training all interviewers on what questions are legal to ask in an interview is essential. It is also essential to closely monitor the content of all screening/assessment tools you are considering for use before you decide to use them. Some inventories designed to measure personality or predict counterproductive behavior such as stealing can contain some pretty strange questions. These are to be avoided at all costs.

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Principle #3:

Ensuring all Selection Measures are Job-related, Validated, and Standardized

The third overarching principle related to legal defensibility involves making sure every tool used to make decisions is job-related, that it has been validated, and that every applicant is evaluated using the exact same standards. The importance of satisfying these requirements cannot be overstated. If you are not able to prove that a measure you have used to help you make hiring decisions is job-related or if one applicant is evaluated using different criteria than another, you will not be able to defend your selection system in court. More information about each of these practices can be found in the following sections.

Establishing Job relatedness

There are three facets to making sure your employee selection process is job-related. The first of these is the use of a Job analysis, the second is making sure that the selection measures used can be mapped onto critical dimensions of job performance identified by the job analysis, and the third is related to the appropriateness of questions asked in screening questions and job interviews.

Job analysis:

The process of establishing the job relatedness of selection tools begins with a thorough job analysis. Job analysis is a process whereby a job is studied and a blueprint of what is needed for successful job performance is developed. It is a best practice in employee selection because it offers a proven process for ensuring that all the tools used to make selection decisions are based only on characteristics critical for job performance.

In general, the more time and effort you put into your job analysis study, the better protected you are. There are many different ways to approach the process of job analysis, but no matter what process is used; all job analysis studies should result in a detailed set of specifications mapping out what is required for effective performance at the job in question. These specifications usually include a profile of the Knowledges, Skills, Abilities (some call these competencies) needed for effective job performance and the relative contribution of each to the job. It is important to document these results as well as the process used to obtain them. These results then serve as the foundation of legal compliance for a number of HR systems including employee selection.

Linking selection measures to KSAs (i.e., competencies)

This process involves making sure that all interview, screening, and selection measures are measuring only KSAs that are required for job performance. Each basic type of selection measure is best for certain KSAs so it is usually common to use several types of measures in order make sure that all of the critical KSAs needed for job performance are covered. For instance, basic job requirements such as certifications and educational experience are best measured by qualifications screening questions, interpersonal communication skills are often best measured using an interview, and cognitive abilities such as analytical reasoning are best measured using an assessment center or written test.

The bottom line here is that you must make sure each of the measures you use can be mapped directly onto a KSA needed for job performance in a manner such that the KSAs most important for job performance are given the most weight when evaluating candidates. As a general rule, the most legally defensible selection tools are also those that appear to be job related, so it is best to seek out simulations and measures that appear to be related to the job whenever possible. Measuring an applicant for a position that requires typing using a typing test is going to offer a higher degree of legal defensibility than asking the same applicant to take a soft personality measure such as a Myers-Briggs test. It does not take a scientist to understand that the typing test is clearly related to job performance.

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Avoiding inappropriate questions

Job relatedness also includes making sure that the questions asked on qualifications screening questions, application blanks, and interviews are directly related to job performance. This means making sure no inappropriate interview questions are asked and that all interview questions directly pertain to critical job behaviors.

Of all the aspects of legal defensibility, asking inappropriate questions in a job interview is probably the easiest way to get sued. This is the reason that structured interviews are such a good tool. They eliminate the chance that an interviewer will unknowingly ask an inappropriate question, and the material on can be documented as being directly job related.

As more organizations look to ATS systems to provide them with tools for filtering out unqualified candidates, establishing the job relatedness of qualifications screening questions is becoming increasingly important. One reason for this is that the EEOC's direction on the definition of a job applicant clearly states that all questions used to evaluate applicants during the earliest stages of the selection process must be able to be clearly linked to job performance. This means that technically speaking all material used in high level qualifications screening must be documented to be related to desired performance outcomes.

It is also important that application blanks and interviews do not include any questions that will place respondents of a specific group at a disadvantage. For example, it is not legal to ask someone about their plans to bear children, their date of birth, their marital status, or whether they own a car unless it can be shown that these questions are directly related to an applicant's ability to do a job.

Validation

To complicate matters a bit more, job relatedness is not the only requirement for the legal defensibility of selection measures. In order to be legally defensible, any selection test used must also be shown to have validity. Although validity can be a complex principle, for our purposes it is important to understand only the basic idea that validity means providing documentation for the fact that any tool used to select employees for a job measures the KSAs that it is supposed to measure.

There are a variety of ways to document validity. For the purposes of this paper, it is not necessary to understand each of these in detail. The most important thing to remember is that any assessment test that is being considered should come with a validation manual that explains the process of its validation and which clearly demonstrates that the selection measure is an effective measure of the KSAs needed for performance at the job in question. If you use multiple selection measures such as a screening measure and an assessment center, each measure must have validation evidence to accompany it. In some cases, such as that of qualifications screening questions, evidence that the content of screening questions is directly job related will provide sufficient evidence of validity. In other cases such as the use of a cognitive or personality test, statistical evidence documenting the relationship between test scores and job performance may be preferred.

To complicate things a bit more, if you want to be completely sure that your selection system is legally defensible, it is not enough to rely on the validation evidence that is provided by the creators of a selection measure. While this information offers the evidence you need to begin using the test, it can not ensure that the test is valid for selecting persons to fill specific jobs within your organization. If you are seeking to maximize the legal defensibility of your selection process, you must conduct a validation study of the entire selection system used to make hiring decisions.

Conducting a validation study is critical for documenting the fact that the assessments used in your organization are appropriate measures for selecting employees to fill your jobs. This documentation will be required if there is ever a lawsuit related to the decisions you have made using the selection system. It is much easier to perform a study early on in the process than it is to try and go back and recreate it after you have been sued.

Standardization across job applicants

It is also critical to make sure that each and every applicant for a specific job completes the exact same selection process. This means that all applicants must be given the exact same screening measures and assessments and that each applicant participating receives interview questions related to the same set of KSAs. Allowing your selection system to deviate between applicants is not only dangerous, but also it will reduce your ability to make good hiring decisions.

A classic example of where standardization across job applicants is critical is in the interview process. It is absolutely essential that each applicant interviewed is asked questions that measure the same KSAs. It is ok to ask slightly different questions to each applicant, but each interview must measure the same underlying job related behaviors. This is another reason why standardized interviews with behaviorally anchored rating scales are so essential to legal hiring practices. By forcing the interviewer to ask the same job related questions to each applicant, you are building standardization and thus legal defensibility into your process.

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Conclusion

It should be clear from the information in the previous sections that legal defensibility is not something that can be created overnight. It is best gained by looking at the process of selecting employees into your organization as an attitude that relies on understanding social responsibilities, the feelings of your applicants, and the critical nature of establishing and documenting the job relatedness of any measure used to make hiring decisions.

Adherence to the following basic guidelines should help ensure that your hiring practices reflect the attitude needed to ensure your organization can meet legal challenges brought against its employee selection systems:

- Promote diversity in recruiting
- Value the attitudes of all applicants, even those not hired
- Always conduct a job analysis and document the results
- Use only selection measures that can be clearly linked to the results of the job analysis
- Validate the entire selection system and document the results
- Understand the issues associated with using tests known to have adverse impact

Finally, many organizations push back on the use of screening or assessment measures because they are worried about the legal defensibility issues associated with them. It is important to understand that by not using any such measures and instead relying on a selection process in which job relatedness cannot be documented, organizations are actually leaving themselves more vulnerable to legal risk. At the same time, selecting employees based on anything other than their ability to perform the job in question within a specific organizational environment, will introduce more error into the hiring process.

About the Author

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Charles founded Rocket-Hire in order to help provide organizations of all types with solid expertise in the design, implementation, and validation of employee selection systems. He holds a Ph.D. in industrial/organizational psychology from Louisiana State University and has been working as an employee selection specialist for over 10 years. Charles is an internationally known thought leader in the development of online screening and assessment technology and has been a pioneer in the creation of online employee selection systems. He writes extensively about the impact of technology on best practices for employee selection and has recently published a book on this topic. You can contact Charles at chandler@hr.com.

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