

## INTRODUCTION

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These laws and guidelines apply to **employment decisions** such as:

- whom to hire, promote, or transfer, and
  - whom to select for a training program.
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The purpose of this document is to discuss legal topics that are particularly relevant to using the WorkKeys system within an employment setting. In particular, when the job profile results are used with WorkKeys assessment scores to make employment decisions (e.g., hiring, promotion), an employer will want to ensure that the use of the WorkKeys tests will stand up to legal scrutiny. This requires that an employer be able to demonstrate that the profiled skill levels are critical to successful job performance as determined through an analysis of the job that complies with laws, regulations, and professional standards. While this section is intended to deal with the typical legal concerns of clients in a concise manner, the information presented should *not* be considered a legal document or a legal opinion.

In addition to providing an overview of Employment Law issues, information regarding the *Americans with Disabilities Act of 1990* (ADA) and English as a second language (ESL) is included. Original document sources are cited and should be referred to for full technical details. Reference lists are also provided at the end of each section along with some additional resources for more information about the topics. These topics are most likely covered in detail by recent editions of introductory industrial-organizational psychology and human resource management textbooks that can also serve as a helpful resource.

Please be aware that information in this document, successful completion of ACT's job profiling training, use of SkillPro, conducting job profiles, or use of any other ACT product or service do not qualify profilers to advise employers on compliance with the laws and regulations governing personnel issues. This is the purview of Industrial-Organizational Psychologists or employment law attorneys who are recognized experts in selection requirements and regulations. Job profiling training is not intended to train profilers to be Industrial-Organizational Psychologists or lawyers. Therefore, if you are not professionally qualified to assist businesses in making personnel selection decisions, ACT recommends seeking professional assistance (see the section entitled *Expert Assistance* at the end of this topic).

If you or your client have specific questions, you should direct them to an ACT Industrial-Organizational Psychologist or to consult their legal counsel or an employment law attorney.

## EMPLOYMENT LAW

The WorkKeys system was designed to comply with relevant employment laws, guidelines, and professional standards for high-stakes employment decisions when used following ACT’s procedure. Specifically, the system was designed to withstand legal scrutiny when it is used for employee placement or pay decisions including (but not limited to) choosing:

- whom to hire, promote, or transfer, and
- whom to select for a training program (e.g., selection into a management training program that leads to a promotion).

### Overview of Laws, Regulations, and Professional Practices

When working with an employer, there are employment laws to become familiar with. These are presented below along with descriptions of relevant professional standards because they provide the expectations for establishing evidence of the valid use of a test for employment decisions. In the event that there are inconsistencies between regulatory guidance and professional standards, the professional standards are given deference.

Laws, Regulations and Standards	Description
<b>Title VII of the Civil Rights Act of 1964</b>	<ul style="list-style-type: none"> <li>• Protects people against discrimination based on race, color, religion, sex, or national origin</li> <li>• Applies to Congress, federal state and local governments, private employers (of 15 or more employees), employment agencies, and labor unions</li> </ul>
<b>Title I of the Civil Rights Act of 1991</b>	<ul style="list-style-type: none"> <li>• Upholds the earlier Civil Rights Act of 1964</li> <li>• Requires demonstration of job-relatedness and business necessity when there is adverse impact</li> <li>• Prohibits the use of different cut-off scores for different groups of test-takers and other race-norming practices</li> </ul>
<b>Equal Employment Opportunity Commission (EEOC)</b>	The agency responsible for administering: <ul style="list-style-type: none"> <li>• Title VII</li> <li>• Age Discrimination in Employment Act</li> <li>• Portions of the Americans with Disabilities Act of 1990</li> </ul>
<b>Age Discrimination in Employment Act of 1967 (ADEA)</b>	<ul style="list-style-type: none"> <li>• Protects employees over the age of 40</li> <li>• Applies to governmental entities and private employers (of 20 or more employees)</li> </ul>
<b>Americans with Disabilities Act of 1990 (ADA)</b>	<ul style="list-style-type: none"> <li>• Protects “qualified individuals with disabilities”</li> <li>• Covers governmental entities and private employers (of 15 or more employees)</li> </ul>
<b>Uniform Guidelines on Employee Selection Procedures (1978) (Uniform Guidelines)</b>	<ul style="list-style-type: none"> <li>• A set of regulations to guide employers in interpreting the Civil Rights Act with respect to the proper use of tests for employment decisions</li> <li>• Adopted by the EEOC, Civil Service Commission, Department of Labor, and Department of Justice</li> </ul>
<b>Standards for Educational and Psychological Testing (1999)</b>	<ul style="list-style-type: none"> <li>• Provide the expectations for developing tests and standards for evaluating testing practices.</li> </ul>
<b>Principles for the Validation and Use of Personnel Selection Procedures (2003)</b>	<ul style="list-style-type: none"> <li>• Provide guidance for appropriate test practices within the employment setting</li> </ul>
<b>States and Municipalities</b>	<ul style="list-style-type: none"> <li>• Provide their own fair employment practice laws</li> <li>• When there is a contradiction, federal laws and regulations supersede state and local laws</li> </ul>

**Summary of Employment Laws, Regulations and Standards.** *These laws and guidelines regulate all employment decision practices (including the use of tests).*

If you are interested in use within educational settings you may not have legal concerns as long as the system is used to determine the status and progress of students. However, the use of professionally developed assessments and a legally compliant method of determining skill standards may be preferred to obtain credible training and development results. ACT's statement on the development of the WorkKeys system and its compliance with professional standards can be found in the box below.

### **The WorkKeys System and Professional Standards: ACT's Statement**

In developing the WorkKeys system, including WorkKeys assessments and job profiling, ACT has and will continue to be guided by professional documents such as the *Standards for Educational and Psychological Testing* (1999; developed by the American Education Research Association, American Psychological Association and National Council for Measurement in Education), the *Principles for the Validation and Use of Personnel Selection Procedures* (2002, Society for Industrial and Organizational Psychology); and the *Uniform Guidelines on Employee Selection Procedures* (1978), which has been adopted by the Equal Employment Opportunity Commission (EEOC) and various other federal agencies (Ref: 29 C.F.R. Part 1607). ACT believes that use of the WorkKeys assessments that is consistent with ACT's guidelines will meet the standards set forth in the professional standards.

The WorkKeys system can be used to determine an individual's level of proficiency in a given skill area and to identify pools of qualified applicants who have achieved the levels of proficiency needed to perform the job. The ultimate employment decision remains with the employer, of course, who will use whatever additional tests, interviews, or other selection procedures are deemed appropriate in order to hire the right applicant from within the pool of qualified applicants or to make other employment decisions.

The job profiling component of the WorkKeys system is available to employers as a method of identifying the important tasks as well as the levels of skills needed to perform those tasks. Scores on the WorkKeys assessments are given by level and reflect what individuals can do relative to job requirements. Thus when a job profile indicates a Level 3 of the Applied Mathematics skill is required for a job, this corresponds to an individual scoring a Level 3 or better on the assessment. This approach to testing is referred to as criterion-referenced as opposed to norm-referenced testing, which indicates how individuals did compared to others who took the assessment.

Under the *Uniform Guidelines*, employers "are responsible for compliance with the guidelines" when they use procedures that have been developed by others in making employment decisions. However, they may support their use of a particular procedure by referencing research conducted by test publishers or distributors, in addition to any studies, such as validity studies, that the employer itself may have done and other relevant evidence. Although ACT cannot accept responsibility for any individual's or organization's compliance with applicable laws, ACT intends to take all reasonable steps necessary to defend the WorkKeys system, generally, and its use by a given employer in a particular instance. If an employer's use of the WorkKeys system is challenged and becomes subject to the requirements set forth in the *Uniform Guidelines*, ACT will make the results of its research available to the employer at no cost to help demonstrate the employer's compliance with those requirements. In addition, upon request by an employer and upon such reasonable terms as the parties agree, ACT will provide additional assistance in demonstrating that the employer's use of the WorkKeys system meets established standards.

## Basis for Legal Challenges

Legal challenges, with regard to the laws mentioned above, are usually based on an employer's actions that result in discrimination and are considered *unfair*. In order to make hiring decisions, the decision-maker discriminates between job candidates using relevant criteria such as job experience, skill level requirements, and education. However, discrimination can also be defined as using categorical or prejudicial criteria to make distinctions, such as choosing between candidates based upon their race, national origin, or gender classifications. This definition of discrimination is considered unfair, is illegal, and is used in this way throughout the rest of this document.

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**Adverse Impact** exists when there is unfair discrimination, regardless of whether an employer's actions were intentional or unintentional.

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Legal challenges typically fall under two specific definitions of discrimination, *disparate treatment* and *adverse impact*. **Disparate treatment** is the use of protected class status (e.g., race, color, religion, sex, or national origin) as a basis for treating people unequally. This requires intent on the part of an employer's action such as deliberately hiring only Caucasian employees. In a case of disparate treatment, the party who filed the lawsuit (plaintiff) must establish intent to discriminate on the part of the employer's actions (defendant) using a four-step framework. The steps in the framework established by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) requires the plaintiff to demonstrate that:

1. the job candidate belongs to a protected class;
2. the candidate applied and was qualified for the job;
3. despite his or her qualifications, the candidate was rejected;
4. after the candidate's rejection, the position remained open and the employer continued to seek applicants.

**Adverse impact** (also called disparate impact) occurs even when an employer is *not* motivated by discriminatory intent. Under this definition, an employer is prohibited from using employment practices that are apparently neutral, but result in an unjustified adverse impact on members of a protected class, such as the effect of hiring only Caucasian employees. When a job candidate files a complaint with the EEOC, and there is evidence that an employer's selection system results in adverse impact, an employer will have to defend their employment decision practices.

Evidence of **adverse impact** is found to exist when there is statistical proof that the selection rate for a subgroup is less than 80% of the group with the highest selection rate. For example, if ten out of ten applicants of the majority group were hired and fewer than eight out of ten applicants of a protected group were hired, there would be evidence of adverse impact. Selection rate differences between groups, however, don't always result in adverse impact. The table illustrates selection rate differences between males and females—one that results in adverse impact and one that does not. Employer's can also follow the steps in the table to perform one type of adverse impact analysis on their selection rates.

	Adverse Impact			No Adverse Impact		
	Apply	Hire	%	Apply	Hire	%
<b>Males</b>	30	25	83%	80	60	75%
<b>Females</b>	20	10	50%	30	20	67%
<b>Step 1:</b>	Calculate selection ratio: $50/83 = 60\%$			Calculate selection ratio: $67/75 = 89\%$		
<b>Step 2:</b>	Compare to 4/5ths rule: $60\% < 80\%$			Compare to 4/5ths rule: $89\% > 80\%$		
<b>Conclusion:</b>	<b>Adverse Impact</b> —women are hired at less than 80% the rate of men.			<b>No Adverse Impact</b> —women are hired at 80% or greater than the rate of men.		

**Comparison of Selection Rate Scenarios.** *Selection rate differences between applicant subgroups does not automatically result in adverse impact.*

Even though an employer may meet the four-fifths rule, they may still be subject to an EEOC investigation. According to Section 4D of the *Guidelines*, “smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user’s actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group.”

The *Uniform Guidelines* recommend that employers avoid adverse impact if possible. Defenses against allegations of adverse impact may involve proving that the use of the selection instrument is based on a knowledge, skill, or ability that is critical to success on the job, and is therefore a business necessity. ACT has developed the WorkKeys system to aid employers with using assessments that are job related and critical to successful job performance. However if there is adverse impact, evidence that there are other instruments measuring the same knowledge, skill, or ability that do not result in adverse impact will establish grounds for employment discrimination.

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The **WorkKeys system** was developed to help employers use tests that are:

- Fair
  - Job-related
  - Legally defensible
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### Case Law—Adverse Impact

Precedent for determining adverse impact or disparate treatment has been set by certain instrumental court cases. A summary of each is given below by topic.

**Disparate treatment.** *McDonnell Douglas Corp. v. Green* (1973). Green was a mechanic who worked at a McDonnell Douglas plant until he was laid off. Then, when the company advertised for mechanics, he reapplied and was rejected. He sued the company, saying that he had been rejected because of his race and his involvement in the civil rights movement. In deciding this case, the Supreme Court ruled that people can show a *prima facie* case of disparate treatment if (1) they are in a minority group, (2) the employer was looking for applicants for the job they applied for, (3) they were qualified but were still rejected, and (4) the employer continued to seek applicants with their qualifications after turning them down.

**Adverse or disparate impact.** *Civil Rights Act, Section 703(h)* (1964). It is an unlawful employment practice to give and to act upon the results of any professionally developed ability test that is designed, intended or used to discriminate because of race, color, religion, sex, or national origin.

*Griggs v. Duke Power* (1971). Willie Griggs applied for a coal-handler position at the Duke Power Company, and was not hired because he did not have a high school diploma. Griggs argued that requiring a high school diploma was discriminatory because it had nothing to do with success on the job and it adversely affected protected classes. This case established that (1) discrimination can exist even if it is not overt or intentional, and (2) it is up to the employer to demonstrate that any employment requirement is directly related to job tasks.

*Albemarle Paper v. Moody* (1975). The principles laid out in *Griggs* were reinforced and the value of the *Uniform Guidelines* was highlighted. The Court found that job applicants at the Albemarle Paper Company could not be required to pass tests that were not valid predictors of success on the job. It ruled that test items must (1) be related to job tasks, and (2) be able to predict success in the specified job, if the test is used for selection, promotion, or performance reviews.

**Job-related requirements.** *Washington v. Davis* (1976). The Washington, D.C. police department gave a reading comprehension and aptitude test to applicants. Part of the test used material that would be taught in the subsequent training program. White men passed the test at a much higher rate than did blacks and women, but the Supreme Court ruled that the test was legal because it was job related. The city demonstrated that there was a relationship between success in the training program and success on the job.

**Title VII.** *St. Mary's Honor Center v. Hicks* (1993). The Supreme Court ruled that to win a suit under Title VII, the jury must determine that (1) the reason the employer gave for rejecting an individual was false and that (2) the decision was really based on discrimination. This clarified an earlier decision, which had indicated that a finding of discrimination could be based on falsity, alone.

## VALIDATION EVIDENCE

An effective selection system and its components can predict an applicant's likelihood of success for a particular job. To be legally defensible against charges of disparate treatment or adverse impact, an employer must be able to establish a credible link between the job and the measures used to select employees. In other words, the validity of a test for selection purposes is generally based upon (1) the development of the test, and (2) the relationship between the test and the job.

## Recommendations Regarding Validation

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WorkKeys job profiling uses a **content validity strategy** to establish evidence that the WorkKeys tests measure skills that are representative of the content of the job *and* are critical to job performance.

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The *Uniform Guidelines* require that employers use valid employment procedures. The methods used to establish validity evidence are led by the professional standards contained in the *Guidelines, Standards, and Principles*.

Validation is a process of determining whether the procedure or instrument is effective in distinguishing individuals who will perform well on the job from those who will not perform well on the job. The *Guidelines* support using one of the following strategies:

- **Content validation:** requires evidence that the selection procedure is representative of the content of the job
- **Criterion-related validation:** requires statistical evidence of the relationship between performance on a selection procedure and job performance
- **Construct validation:** requires evidence of the relationship between a construct measured by the selection procedure and the related work behavior(s) for the job

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Comparison between **employee test scores** and the **profiled skill levels** is useful in setting individual employee training and development goals, but is incomplete for evaluating the validity of the profile.

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Validation is not determined by only **testing job incumbents** and using their scores to compare to the profile. Though this may be useful for determining individual employee training and development needs, it is not thorough enough to qualify as validity evidence according to the professional standards contained in the *Guidelines, Standards, and Principles*. While there are many reasons for this, it is primarily because there needs to be a way to compare a group of incumbent test scores to their job performance before drawing a conclusion.

## WorkKeys Test Development

The development of the WorkKeys assessments was guided by professional standards for testing contained in the *Guidelines, Standards, and Principles*. For example, the items on the WorkKeys assessments go through a series of screens before the test development process is completed. Below is a description of characteristics of the WorkKeys tests to ensure that they are job related and fair to test-takers:

- A. The assessments are criterion-referenced (they use job requirements as the reference).
- B. The test specifications are well defined.
- C. People who are familiar with various work situations and have insight into the use of a particular skill in different employment settings write the items.
- D. Items measure a particular workplace skill.
- E. Prior to construction of the released assessment, content and fairness experts review the items to determine possible differences in responses among racial groups and between men and women.
- F. Statistical analyses at the item and test level are conducted to monitor the performance of various subgroups. For example, a DIF (Differential Item Functioning) analysis, a statistical procedure for identifying bias for race, gender, etc., is run for each item.

Paper-and-pencil tests that are intended to replicate a work behavior are most likely to be appropriate when work behaviors are performed in paper-and-pencil form (e.g., editing and bookkeeping). Paper-and-pencil tests of effectiveness in interpersonal relations (e.g., sales or supervision), or physical activities (e.g., automobile repair) or ability to function properly under danger (e.g., firefighters) generally are *not* close enough approximations of work behaviors to show content validity. For these behaviors, a different validity strategy would be more appropriate.

In order to demonstrate the content validity of a test of job knowledge, the following requirements must be met. There must be a defined, well-recognized body of information and knowledge, and the information must be prerequisite to performance of the required work behaviors. The work behavior(s) to which each knowledge is related should be identified on an item-by-item basis. *The test should fairly sample the information that is actually used by the employee on the job, so the level of difficulty of the test items should correspond to the level of difficulty of the knowledge as used in the work behavior.* Additional technical information regarding the development of the WorkKeys assessments is available from ACT. Excerpts from the *Guidelines* for establishing content validity are on the following page.

## **Excerpts from the *Uniform Guidelines***

### Section 14C (p. 38302) *Technical standards for content validity.*

A selection procedure can be supported by a content validity strategy to the extent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledge, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples if [they] can be operationally defined as provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance . . . .

Content validity is also not an appropriate strategy when the selection procedure involves knowledge, skills, or abilities which an employee will be expected to learn on the job.

### Section 14C(2) (p. 38302) *Standards for demonstrating content validity.*

To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job.

In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined.

In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job.

In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job.

For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability; and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s).

In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product.

If a test purports to sample a work behavior or to provide a sample of work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation.

The closer the content and the context of selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity.

As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resembles the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

### Section 14C(4) (p. 38302) *Job analysis for content validity.*

Any job analysis should focus on the work behavior(s) and the tasks associated with them.

The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

## Relationship Between WorkKeys and the Job

The WorkKeys system employs the **content validation strategy** to show the WorkKeys assessments reflect the content of the job. This allows employers, regardless of their size, to establish legally defensible validity evidence. First, WorkKeys test items are developed from samples of a variety of work situations so items on the assessment reflect situations that might be found on the job. Next, the job profiling process establishes a link between tasks performed on the job, the WorkKeys skills needed to perform the tasks, and the skills and skill levels measured with the WorkKeys assessments.

### The WorkKeys System Uses a Content Validation Strategy

Skills or Knowledge measured are operationally defined through:

- Skill definitions
- Skill level definitions

Critical skills are established as prerequisite to performance of critical tasks. Critical tasks are documented through:

- Collecting *Importance* ratings
- Collecting *Relative Time Spent* ratings
- Calculating *Criticality* ratings

Skills required at entry into the job are established during job profiling

Selection procedure closely approximates observable work behaviors because:

- Job tasks that require the skill are identified on the *Final Task List*
- Job specific examples are collected

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Profilers can use these tools to help employers provide **representative samples** of job incumbents in each session:

- Requirements for SMEs
  - General Company Information Form
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During a job profile, groups of subject matter experts are used who are **knowledgeable** about the job and are **representative** of the job incumbents in terms of such characteristics as age, race, gender, national origin, and religion. The groups convene to describe the tasks performed on the job and the skills required for completing the tasks. Using the definitions and sample items that match the specifications of the assessment, they then match the levels of skill needed for the job with the levels of skill measured by the WorkKeys assessments.

In order to establish a legally defensible employment selection system, the *Guidelines* require that employers conduct a **job analysis** to establish both critical work behaviors and the knowledge, skills, and abilities needed for fulfilling these work behaviors. **WorkKeys job profiling** was developed to meet this requirement by determining the critical tasks of a job (based on Importance and Relative Time Spent ratings) and their skill requirements. This is an essential component of the WorkKeys system.

Many methods of job analysis have been developed for a variety of purposes. One of the methods often used to collect information for job analysis is called “task analysis,” which is part of the WorkKeys job profiling process. Using this approach, a representative group of subject matter experts (SMEs) for the job being analyzed—usually incumbent employees—meets and generates a list of tasks that are required for adequate job performance. Through an additional rating step, these tasks are ranked in order of criticality. These task lists can then be used for a variety of organizational purposes, such as establishing criteria for employee selection and promotions (e.g., establishing WorkKeys skill levels using the job profiling procedure) and for developing training programs.

### Alternate Forms of Validity Used by ACT

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#### Criterion-related validity studies:

- Administer assessments to at least 100 incumbents
- Obtain performance measure for same incumbents
- Calculate the relationship between test and job performance

ACT will provide assistance

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**Criterion-related validity.** ACT continues to collect empirical evidence with employers upon request. These validation studies use a *criterion-related validity* strategy by correlating job performance with scores on the WorkKeys assessments. Conducting such studies is in line with the *Uniform Guidelines* statement that employers “are responsible for compliance with the guidelines” when they use procedures that have been developed by others in making employment decisions.

Employers may support their use of WorkKeys assessments by referencing validity and fairness studies conducted by ACT, in addition to any validity studies that the employer itself might have conducted and other relevant evidence. In order to conduct a criterion-related validity study, there needs to be an adequate criterion (e.g., performance appraisals, absenteeism), a sufficient sample size, and the calculation of the statistical relationship between test and job performance (see the *Conducting Criterion-Related Validity Studies* box on the next page).

To further explore these issues and criterion-related validity studies, please contact the WorkKeys Industrial-Organizational Psychology Department at (319) 337-1724.

**SkillMap™.** ACT has developed a web-delivered tool that enables employers to gather information about jobs and their requirements from the people in their organization who know those jobs best. *SkillMap* uses their input to identify the tasks of the job and the WorkKeys skills and skill levels that are necessary for job performance. An *Administrator* coordinates the SkillMap activities used to collect data for each job from *Job Experts*. Following a content validity strategy, the WorkKeys skill levels for the job are automatically reported in a *Job Inventory Report*.

Additional information is available through the ACT web site or by contacting the Industrial-Organizational Psychology Department at (319) 337-1724.

## Conducting Criterion-Related Validity Studies

Trained professionals in the field of employee selection conduct validity studies to investigate the relationship between an assessment and job performance when the assessment is used to select employees. There are three types of studies: content validity, criterion-related validity, and construct validity. Content validity studies establish that the assessment is representative of the content of the job; criterion-related studies establish a mathematical relationship between the assessment scores and an index of job performance; and construct validity studies demonstrate that the construct measured in the assessment is required by the job.

Limitations of statistical techniques indicate that employers pursuing criterion-related studies will be best served by focusing on jobs with large numbers of employees (i.e., 100 or more). In addition, care should be taken to obtain a sample of job incumbents who are representative of the characteristics of all those who currently hold the job.

Professional standards provide the methodological requirements for conducting a criterion-related validity study. Testing job incumbents and comparing their scores to the levels of a profile does not provide evidence to conclude the validity of a test for employment decisions. To discuss a specific situation, please call the WorkKeys Industrial-Organizational Psychology Department at 319/337-1724. In general, criterion-related validity studies are conducted by following the steps listed below.

1. Conduct a job profile using six to eight subject matter experts. This profile will describe the WorkKeys skills required by the job, and will rank the WorkKeys skills in terms of their importance to the job.
2. Conduct a replication session.
3. Talk to the company's selection expert about which WorkKeys skills should be added to the company's existing selection battery, based on information provided by the subject matter experts during profiling.
4. Develop a performance evaluation form to be completed by the supervisors of people who hold the job at issue (typically, the task list developed during the job profile is used in this step).
5. Determine what additional performance data is available for each employee participating in the validity study.
6. Decide when and how to implement the study, how best to inform the employees who will participate in the validation study, and how to handle information obtained from the study.
7. Assess a representative number of incumbent employees using WorkKeys assessments to be included in the selection system.
8. Determine the type of information that will be shared with the examinees.
9. Obtain performance data using the performance rating form developed in step 4.
10. Collect other performance data from the company for each employee in the study.
11. Match the performance data with the assessment data and conduct the data analyses.
12. Report the findings of the validity study.

We encourage you to obtain the assistance of an employee selection expert when conducting a validity study.

## Modification of the Job Profiling Procedure

If necessary, ACT will suggest ways to accommodate specific circumstances that do not fit our standard procedure. However, all authorized profilers are expected to follow the WorkKeys job profiling procedure for legal protection. For example, should a client be investigated by the EEOC, ACT can only attest to the legitimacy of how the WorkKeys job profiling procedure establishes the content validity of the assessments used for hiring and promotion decisions. Without evidence to support changes to the method, ACT cannot attest to the appropriateness or legitimacy of any unauthorized modifications, nor can ACT assure a client or the EEOC that the modifications made will result in profiles identical to those using the prescribed WorkKeys job profiling procedure. If called upon to respond to an EEOC investigation or to testify in court, the job profiler would have to explain and justify the equivalence of the adjusted procedure with ACT's procedure.

## Additional Recommendations

**Documentation.** ACT requires that every step of the job profiling process be documented in the form of:

Worksheets	Computer Records
Importance Rating sheets	Final Task List
Relative Time Spent Rating sheets	Profile Results
Skill Rating sheets	SME Information
Skill Ranking forms	Final Report (word processing file) <ul style="list-style-type: none"><li>• general comments</li><li>• results and recommendations</li><li>• skill analysis write-up for each skill</li></ul>
SME Information sheets	

**Job Profiling Records.** *Job Profilers need to develop a plan for safely storing these records and keeping them confidential.*

To further support legal defensibility using content validity, the job profiler should retain all documents generated in the job profiling process, including the documents listed above, and all ratings generated by the SMEs.

In order to support the content validation process, during both the tour and the job profiling session, the profiler should compile additional documentation regarding:

1. brief descriptions of work operations, materials, and equipment,
2. an explicit statement with supportive examples of the way in which a particular skill is used to perform the job tasks,
3. job-specific examples that establish what entry and effective skill levels are required to perform the job,
4. rationale with examples that match the characteristics of each required skill level to the performance of the majority of tasks that require the skill, and
5. the consequences of a lack of the skill or the reasons why possession of a lower level of the skill would not be sufficient.

As to how long one should keep documentation, Gutman (1993) says that it depends on the state laws. The Supreme Court ruled in *Johnson v. Railway Express Agency* (1976) that “having no precedent for time limits in constitutional claims, the controlling period is the most appropriate one provided by state law.” Laws will vary from one state to another but their scope may include the following: 1) they may limit all state court actions; 2) they may be designed to facilitate court action, rather than administrative resolution; and/or 3) their coverage may include personal injury cases.

**Quickly Learned Knowledge, Skills and Abilities.** The *Uniform Guidelines* recommend that employers not make employment selection decisions on the basis of knowledge, skills, and abilities that can be quickly learned on the job or in training. The WorkKeys job profiling system works with the incumbent workers who are knowledgeable about the job (i.e., SMEs) to set the skill level required for entry into the job rather than the level that is expected to be acquired in training. In other words, at the end of the skill analysis, the subject matter experts complete the following statement at the bottom of the skill rating sheet: “Skill Level \_\_\_\_ is required for entry into the job. Employees should be expected to come into the job with this skill level; they are not expected to learn this skill on the job.”

**Skill Levels for Higher-Level Jobs.** The *Uniform Guidelines* state that applicants for a job may not be evaluated against the requirements of higher level jobs unless they are expected to progress to those jobs within a reasonable period of time. The WorkKeys job profiling system ensures that the skill level selected is the level of skill that is required to perform the job satisfactorily upon entry. SMEs may set a higher skill level as the requirement to perform the job effectively after entry, however, selection decisions should be based on the entry-level requirements.

**Cut-off Scores.** The *Uniform Guidelines* recommend that cutoff scores be consistent with the normal expectations of workers. The WorkKeys job profiling system ensures that the skill level requirements are determined by incumbent workers who are knowledgeable about the job based on the requirements of the job, not on personal capabilities or “wish-list” expectations.

When determining the skill requirements, the participation of supervisors is only recommended when the supervisors have had recent experience on the job.

**Ranking Applicants.** The *Uniform Guidelines* suggest that evidence that is sufficient to justify pass/fail selection may not be sufficient to justify the ranking of applicants. ACT has found that WorkKeys assessments are most often used as screening instruments in a multiple hurdle selection model in which multiple instruments are used in different stages to select employees for a particular job. For example, if *Applied Mathematics* is included in the second stage of the screening process, job applicants who have passed the first screen must meet the requirement for that skill. They either meet the requirement or they do not (pass or fail). They should not be ranked according to their performance level on the *Applied Mathematics* assessment.

**Equal Treatment of Applicants.** In principle, all applicants should receive the same treatment—the same kinds of interviews, tests, application forms, and hiring standards. Singling out some people for special interviews, tests, waivers, and so forth, is different, or disparate treatment (Guion, 1998, p. 177).

Disparate treatment occurs when evidence exists that a candidate from a protected group is rated differently from other candidates in the employment process. This point is made in the wording of the *EEOC Compliance Manual* where it states that the risk of discriminatory employment decisions can best be reduced “by establishing written objective criteria for evaluating candidates for hire or promotion and applying those criteria consistently to all candidates” (p. 9).

The *Standards for Educational and Psychological Testing* provide the following advice on the equal use of tests for all individuals.

- To the extent possible, test content should be chosen to ensure that intended inferences from test scores are equally valid for members of different groups of test takers.
- The testing or assessment process should be carried out so that test takers receive comparable and equitable treatment during all phases of the testing or assessment process (Standard 7.12).

## ADDITIONAL COURT CASES—EMPLOYEE SELECTION

Decisions from court cases provide an important source of additional information as to how to effectively implement a fair and legally defensible system for employment decisions. Summaries of court decisions that are most relevant to employment selection issues are presented below.

### **Paper-and-Pencil Tests Upheld as Content Valid**

***U.S. v. South Carolina (1978)***. The Supreme Court refused to review (and therefore upheld) a lower court decision regarding the use of the National Teachers Examination for certifying and hiring teachers. The exam was upheld as content valid even though it did not measure ability to teach.

***Bridgeport Guardians v. Bridgeport Police Department (1977)***. The court upheld the use of a paper-and-pencil knowledge test as content valid despite its adverse impact on African Americans.

***Association of Mexican-American Educators v. California (1996)***. The court upheld the use of a generic skills paper-and-pencil knowledge test called the California Basic Educational Skills Test (CBEST) as content valid despite its adverse impact on Latinos, Asians, and African Americans. The cutoff score requirement was also shown to reflect reasonable judgments about minimum level requirements of basic skills for purposes of business justification.

### **Paper-and-Pencil Tests Struck Down**

***Guardians Association of the NY City Police Department v. Civil Service Commission (1980)***. A cutoff score unrelated to job performance may well lead to the rejection of applicants who were fully capable of performing the job.

***Vanguard Justice Society v. Hughes (1984)***. A job knowledge test could not be considered valid where items were written and selected for inclusion on the test in a “haphazard” manner.

***Kirkland v. NY Department of Correctional Services (1974)***. In the absence of an adequate job analysis, content validity of a test could not be proven. Thus, the manner and documentation of the job analysis procedure are important.

***Easley v. Anheuser Busch, Inc. (1983)***. The attributes selected for examination must be critical to the job. The job analysis must measure the relative importance of work behaviors, not just identify work behaviors.

***Bigby v. City of Chicago (1984)***. The court criticized the city for not keeping relevant documentation (“source” material) of how the job analysis was conducted, such as what questions were asked, which employees participated, and how the employees responded.

## **Bottom-Line Defense**

***State of Connecticut v. Teal et al. (1982).*** The U. S. Supreme Court established the right of a plaintiff to challenge any component of the selection system as being discriminatory, even when the total selection process did not show evidence of adverse impact. In this case, the rate of promotion for blacks was 169% that of whites. However, there was significant adverse impact against blacks on the written examination, which was the first step in the selection process. The presence of adverse impact against blacks on the written exam was considered sufficient evidence to establish a *prima facie* case of discrimination.

## **Equal Treatment of Applicants**

***U.S. v. H.K. Porter Company (1968).*** The court finding was in favor of the company who used the same tests and the same standards for both blacks and whites, with no evidence of adverse effects. The court rejected the argument that different tests and selection standards should be applied to different ethnic groups.

***U.S. v. Plumbers, Local 24 (1972).*** The criteria for admission into the union were not uniformly applied to all applicants, resulting in an almost all white membership. The union was required to offer full membership to all applicants with 6 months experience, or who had passed an exam that was validated according to the EEOC Guidelines.

***McDonnell Douglas Corp. v. Green (1973).*** Broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions, which are indicated by applying the same criterion alike to members of all races. (*See the other review of this case earlier in this document*).

***Regents, University of California v. Bakke (1978).*** The university had two admissions programs, one for most applicants, and one for protected minorities. Bakke was a white applicant. The Supreme Court ruled that the admissions program was unacceptable, and that while racial diversity was a legitimate concern of the University's medical program, having different admissions tracks violated constitutional protections.

***Gratz v. Bollinger (2003) and Grutter V. Bollinger (2003).*** In the recent Supreme Court rulings involving the affirmative action plans for undergraduate and law school admissions at the University of Michigan, the court ruled that all racial classifications are subject to strict scrutiny. Such plans must (1) advance a compelling interest, (2) be "narrowly tailored" indicated by no lesser intrusive alternative and must closely fit the compelling interest, (3) be limited in duration, and (4) present no "trammeling" of interests of the majority (Fisher and Phillips, LLP and W.M. Gibson & Associates, Inc., 2004).

## **Cut-off scores**

***Bew, et al. v. City of Chicago and Illinois Local Government Law Enforcement Officers Training Board (2001)***. The majority of the people who failed the Illinois Law Enforcement Officers Certification Examination were in minority groups. The U. S. Court of Appeals for the Seventh Circuit found adverse impact because the difference in passing rates was statistically significant. *But* the court also ruled that the test was *not* discriminatory because (1) there was a relationship between the exam and the job, and (2) the cutoff score was “reasonable, justified, and consistent with professional standards,” meeting the requirement of the *Uniform Guidelines*. The *Bew* decision was in line with *Lanning v. SEPTA (2001)*. In *Lanning*, the Third Circuit set a standard for business necessity—finding that it was appropriate to include an aerobic capacity measure in a physical abilities test taken by job applicants because aerobic capacity was linked to the need for job incumbents to run, which was a critical and essential job task.

## **Professional Standards**

***U.S. v. State of South Carolina (1977)***. The decision in this case, and later affirmed by the U.S. Supreme Court, established that professional standards will be given deference when inconsistencies appear between regulatory guidance and professional standards.

## **Job Profiling Upheld**

***Ogodor v. City of New York (2001)***. The City offered sufficient evidence to establish that the Listening examination, including the written portion, was related to the tasks that the caseworker job performs. The court reviewed the WorkKeys job profiling methodology and determined that it sufficiently established that the WorkKeys Listening skill was a job requirement for the caseworker job in question.

## **EXPERT ASSISTANCE**

In working with an employer, you may find that you need to seek help from employee selection experts. For example, if WorkKeys assessments are used to make employee selection decisions, profilers may need to seek the assistance of employee selection experts such as:

- Human resources personnel in the company,
- Human resources consultants operation in the local area or nationally,
- Industrial-Organizational Psychologists at ACT or elsewhere, or
- Employment law attorneys.

ACT recommends answering the questions in the box below while considering the employer's situation. These may help to determine whether to consult experts in employee selection.

### Employee Selection Questions

1. Is the WorkKeys system used for deciding whom to hire or promote?
2. Is the information related to occupational profiles or benchmarking proposed as the basis for employee selection decisions?
3. Is a particular WorkKeys assessment used in the selection process even though a training program will be implemented for that skill, and the skill level used in selection decisions is the same as the skill level expected after training is completed?
4. Does the employer intend to use the WorkKeys system for a job that has employees who do not speak English as their native language (see the section on *English in the Workplace*)?

**When Do You Need Expert Advice?** *If the answer to any of these questions is "Yes", you may benefit from the advice of an employee selection expert.*

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