

# STATE OF NEW YORK

7989

2019-2020 Regular Sessions

## IN ASSEMBLY

May 30, 2019

Introduced by M. of A. JOYNER -- read once and referred to the Committee on Labor

AN ACT to amend the labor law, in relation to discrimination in the use of employment tests and selection procedures

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The labor law is amended by adding a new section 215-d to  
2 read as follows:

3 § 215-d. Employment tests and selection procedures. 1. If an employer  
4 utilizes a test or other selection procedure for purposes of hiring or  
5 promotion, the employer shall select and administer the test or other  
6 selection procedure so as best to ensure that, when administered to  
7 applicants, the test or selection procedure is not designed, intended or  
8 used to discriminate, and does not have the effect of discriminating,  
9 because of an individual's race, ethnic group, or sex. In selecting or  
10 administering such test or selection procedure, the employer shall  
11 investigate alternative tests and selection procedures and shall select  
12 the alternative that poses the lowest risk of discriminatory impact.

13 2. For purposes of subdivision one of this section and paragraph (a)  
14 of subdivision one of section two hundred ninety-six of the executive  
15 law, a test or other selection procedure used by an employer for  
16 purposes of hiring or promotion shall be deemed not to discriminate on  
17 the basis of a finding of adverse impact against a specific protected  
18 class if, for the specific protected class:

19 (a) the test or selection procedure utilizes pre-audited assessment  
20 technology that, upon use, resulted in an increase in the hiring or  
21 promotion of that protected class by five percent or greater as compared  
22 to the pre-implementation workforce composition of the protected class;

23 (b) the employer conducts an annual examination of the pre-audited  
24 assessment technology to determine and document whether the technology  
25 had an adverse impact for the protected class during the audited year;

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 (c) the annual examination demonstrates that the pre-audited assess-  
2 ment technology:

3 (i) resulted in an increase in the hiring or promotion of the  
4 protected class by five percent or greater during the examined year as  
5 compared to the pre-implementation workforce composition of the  
6 protected class; or

7 (ii) resulted in no adverse impact on the protected class; and  
8 (d) the employer ceases to use any version of the pre-audited assess-  
9 ment technology that does not meet the requirements of paragraph (c) of  
10 this subdivision.

11 3. Subdivision two of this section shall not impact any other defense  
12 an employer may have to claims of employment discrimination under any  
13 other provision of law.

14 4. For purposes of this section:

15 (a) "Pre-audited assessment technology" shall mean a test or other  
16 selection procedure used by an employer for purposes of hiring or  
17 promotion that:

18 (i) prior to use by the employer, was the subject of a validity study  
19 conducted by the employer that conforms to the requirements for validity  
20 studies set forth in 29 C.F.R. section 1607.5; and

21 (ii) prior to use by the employer, was examined and demonstrated no  
22 probability for adverse impact based on race, color, national origin, or  
23 sex.

24 (b) "Adverse impact" shall be indicated where a selection rate for any  
25 race, color, national origin, or sex constituting two percent or more of  
26 the total applicant population is less than four-fifths or eighty  
27 percent of the rate for the group with the highest selection rate and  
28 where such difference in selection rates between such groups is statis-  
29 tically significant.

30 (c) "Pre-implementation workforce composition" means the demographic  
31 composition of a protected class as a percentage of the employer's over-  
32 all workforce that existed immediately prior to implementation of a  
33 pre-audited assessment technology.

34 (d) "Protected class" shall mean race, ethnic group, or sex.

35 (e) "Applicant" shall mean any individual as to whom the following  
36 four criteria are satisfied:

37 (i) the individual submits an expression of interest in employment or  
38 promotion;

39 (ii) the employer considers the individual for employment in or  
40 promotion to a particular position;

41 (iii) the individual's expression of interest indicates the individual  
42 possesses the basic qualifications for the position; and

43 (iv) the individual at no point in the selection process, prior to  
44 receiving an offer or promotion, removes himself or herself from further  
45 consideration or otherwise indicates that he or she is no longer inter-  
46 ested in the position.

47 § 2. This act shall take effect immediately.