

# Company's skill tests, health inquiries may be illegal

*My company merged with another and the rumor is that the new owners want to get rid of the older, more experienced employees because we are generally paid more than the newer and younger staff. In the last few weeks, they've given us computer skills tests — even to those who don't really use a computer as part of their job — and asked us to fill out questionnaires about our health and general lifestyle. The test results and responses go to our files. Is this legal, especially if they are using this information to find a way to fire those of us who are 50 and older?*

**Don P. Johnsen**  
Gallagher & Kennedy

The new company may indeed be breaking the law.

It is not necessarily illegal to reduce costs by terminating more experienced employees solely because they are paid more than newer workers. Any

terminations that truly are based solely on compensation would not be illegal.

However, the introduction of computer skills tests for older workers who don't use computers on the job is highly suspicious. Employers generally are free to establish their own criteria for performance and retention. But when an employer bases a termination decision on some performance factor, such as a skills test that bears utterly no relationship to the worker's actual job, a court might easily conclude that the skills test really is just being used as a cover, or pretext, for unlawful age discrimination.

The Americans with Disabilities Act also strictly regulates questions and other inquiries about health. Under the ADA, it is illegal for an employer to "make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of



Don P. Johnsen



Rose  
McCaffrey

the disability."

Focused and limited medical inquiries are not prohibited if there is some legitimate medical reason to question an individual worker's actual ability to perform the essential functions of the job. And it's not illegal to ask a worker an innocuous question like "How are you feeling?"

But employers may not ask broad questions that go into depth on workers' general health. Such a questionnaire may indeed violate the ADA.

**Rose McCaffrey**  
Kelly McCoy, PLC

This practice is probably un-

lawful because, although the employer is using an employment practice that is neutral on its face and applies to all groups of people, it could have a disparate impact on older workers if more of them are terminated based on the test results.

You indicate that the computer skills test is applied to employees even if some of the employees are not required to complete computer tasks as part of their employment. Your situation suggests that your employer is using tests to screen employees in order to identify employees to be laid off, which requires your employer to demonstrate that their choices in a reduction in force are reasonable.

When an employment policy is neutral on its face but harms older workers substantially more than younger workers, an employer must demonstrate that the practice is tied to reasonable factors other than age

and "designed and administered to achieve a legitimate business purpose," even if it includes harm to older workers.

Your employer should consider whether the practice is reasonably related to your employer's stated business purpose, adversely affects older workers and whether your employer took any steps to reduce the harm to older workers in implementing and developing the practice.

If these tests result in a disproportionate lay-off of older workers, your employer's practices could be unlawful if the employer cannot defend the practice based on factors unrelated to age. And, based on the facts you have given, it should be difficult for your employer to defend the practice using age-neutral factors.

— Compiled by Georgann Yara

Send your questions to  
asktheexperts1@gmail.com.