



July 3, 2017

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Thomas B. Gilliam, Ph.D.
Industrial Physical Capability Services, Inc.
1696 Georgetown Rd., Unit B
Hudson, OH 44236

RE: Isokinetic Physical Capability Evaluation

Dear Dr. Gilliam:

As you know, Industrial Physical Capability Services, Inc. (“IPCS”) has requested a legal opinion on whether the isokinetic physical capability evaluation (“PCE”) may be used to test job applicants¹ in compliance with federal equal employment opportunity (“EEO”) laws and regulations, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (“ADA”), the Age Discrimination in Employment Act of 1967, Executive Order 11246, the Uniform Guidelines on Employee Selection Procedures, and applicable amendments to these laws and regulations. Based on our review of the information provided by IPCS and the applicable laws and regulations, we conclude that the PCE may be used in compliance with federal EEO laws and regulations, as outlined below.

I. PCE Background

A. Overview

The PCE is an isokinetic evaluation of an individual’s shoulder and knee flexion and extension, as performed on an isokinetic machine. The purpose of the PCE is to determine whether a job applicant or employee has the physical capability to safely perform the critical, important or essential functions of a particular job that require some level of exertion. An applicant’s performance data on the isokinetic machine is collected and combined into a single physical capability score, which is compared to a cutoff score that is established for the job. Based on this analysis, IPCS notifies the employer whether the applicant

¹ Although the PCE may be used to evaluate job applicants or employees, this opinion letter only addresses the use of the PCE for job applicants, including new hire applicants and internal applicants seeking new positions. This opinion letter does not address proper use of the PCE for current employees already holding a particular position.

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meets the minimum physical capability for the particular job in question. Armed with this information, the employer then proceeds with its hiring decision.²

B. Establishing an Appropriate Cutoff Score

1. Job-specific Information

In order to set an appropriate evaluative cutoff score for the PCE, first a job task analysis (“JTA”) should be performed to identify the physical requirements of each job, and to identify what level of exertion is required to safely perform the job consistent with normal expectations of acceptable proficiency.³ The cutoff score should be based on an evaluation of the nature, frequency and duration of the physical exertion required to perform the critical, important, or essential job duties identified by the JTA.⁴ Importantly, the cutoff score should not be higher than the minimum qualifications necessary to successfully perform the job safely. This ensures that the PCE is related to the specific job in question, and is consistent with business necessity – in particular, the safe and efficient performance of the job.

2. Case Studies and Supporting Data

In addition to the job-specific information that is critical to establishing an appropriate cutoff score for the PCE, IPCS reviews, maintains and compiles a great deal of data along with case studies, that analyze various physical exertion categories compared to individuals’ physical capabilities reflected in their PCE scores. This information demonstrates that there is a significant correlation between an individual’s score on the PCE and his or her propensity for on-the-job

² Notably, IPCS only provides testing outcomes. It does not make any hiring or other employment decisions, which are solely up to the employer. It is also worth noting that, before an employer rejects an applicant who is an “otherwise qualified individual with a disability” under the ADA, the employer may be required to engage in the interactive process with the applicant to determine whether it is possible to provide a reasonable accommodation for the applicant to enable him or her to perform the essential functions of the job.

³ The employer is responsible for obtaining a thorough JTA and ensuring that it accurately reflects the requirements of the job, including identifying the critical, important or essential job duties. Notably, a job description may not be sufficient to properly establish an appropriate cutoff score.

⁴ The employer should maintain documentation regarding why specific job duties were identified as critical, important, or essential, such as the proportion of time spent on those duties, their level of difficulty, how frequently they are performed, and the consequences of failure to properly perform those duties.

overexertion injuries of the knees, shoulders and back in jobs that require various levels of exertion. This information also demonstrates that applicants who are screened using the PCE experience significantly fewer on-the-job overexertion injuries than applicants who are not screened using the PCE. Based on this data and the job-specific information provided by the JTA, IPCS recommends a cutoff score for the PCE that will distinguish between those applicants who likely can and cannot safely perform the job in question. After a cutoff score is established for a particular job, employers may use the PCE to screen applicants for the job.⁵

II. Application of EEO Laws and Regulations

Based on our review of the PCE process, case studies and data provided to us by IPCS, as well as applicable federal EEO laws and regulations, we conclude that the PCE may be used in compliance with these laws and regulations. This conclusion is supported where a JTA is performed to identify the physical requirements that are critical, important, or essential functions of the job, and the PCE cutoff score represents the minimum qualifications necessary to successfully perform the job safely. Indeed, IPCS has numerous case studies containing “empirical data demonstrating that the selection procedure [i.e., the PCE] is predictive of or significantly correlated with important elements of job performance [i.e., safe job performance, as demonstrated by fewer on-the-job injuries].” 29 C.F.R. § 1607.5(B).

While IPCS has compiled substantial documentation supporting the validity of the PCE, it is important to note that it is the employer that is ultimately responsible for ensuring and demonstrating that its selection procedures are valid under federal EEO laws and regulations. By following IPCS’s recommended procedures, evaluating whether the PCE has any adverse impact on its hiring or employment decisions, taking appropriate steps to validate the procedure if it does, and maintaining appropriate documentation of each of these steps, an employer may ensure that the use of the PCE is in compliance with federal EEO laws and regulations.

⁵ We recommend that the PCE be administered and used only after a conditional offer of employment has been made by the employer, since the PCE may be considered a “medical examination” within the meaning of the ADA.

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Thank you for the opportunity to review the issue of employer use of the PCE in light of federal EEO laws and regulations. Should questions about this opinion letter arise, please do not hesitate to contact us.

Sincerely,



John W. McKenzie



Julie A. Trout

JWM/JAT