

INFORMATION MEMO

Physical Ability Tests for City Employees

Find out the legal and practical issues cities should consider when deciding to use a physical ability test to make any type of employment decision, including hiring or continued employment. Understand the differences between physical ability testing and medical examinations.

RELEVANT LINKS:

See Appendix A, *Table of Fitness Testing Pre-Employment*.
See Appendix B, *Table of Fitness Testing Post-Employment*.

I. Purpose of testing

Cities sometimes use physical ability tests to help make hiring decisions about city job candidates or to encourage existing employees to maintain their ability to perform the physical demands of the job. However, these tests are only useful (and legal) to the extent they are a reliable and valid measure of the ability to perform the actual day-to-day physical duties of the job.

There are a number of legal and practical issues cities should consider when making the decision to use a physical ability test to make any type of employment decision. This memo discusses some of the issues in general terms; however, a city should consult with its attorney before implementing any physical ability tests for applicants or existing city employees.

II. Discrimination issues

Cities are subject to numerous laws that prohibit employment discrimination on the basis of a protected status such as race, color, sex, national origin, sexual orientation, disability, etc. Some of the major laws that apply with regard to physical ability testing include:

- Title VII of the Civil Rights Act of 1964
- The Minnesota Human Rights Act
- The Americans with Disabilities Act
- The Genetic Information Nondiscrimination Act of 2008

A. State and federal laws and enforcing agencies

The Equal Employment Opportunity Commission (EEOC) enforces most of the federal laws that prohibit discrimination in the workplace. Beginning in 1978, the EEOC issued guidelines on hiring procedures, recommending that an employer be able to demonstrate its hiring procedures are valid in predicting or measuring performance in a particular job.

RELEVANT LINKS:

[Griggs v. Duke Power Company](#), 401 U.S. 424, 91 S. Ct. 849 (1971).

LMC information page:
[Police Officer Physical Abilities Test](#).

[29 C.F.R. § 1630.2 \(n\)\(3\)\(ii\)](#).

In addition, the United States Supreme Court has ruled that selection criteria that are not directly related to job performance are not valid and are therefore prohibited.

For these reasons, cities should make every effort to develop physical ability tests that reflect the actual job duties of an employee in that job class. In other words, the physical ability test must be specifically related to the employee or applicant's position. For the position of firefighter, for example, it may be reasonable to have tests involving such things as stair climbs, hose drags, and rescue because these are duties that firefighters regularly perform as part of the job. It would not be reasonable to require a firefighter to run a mile in four minutes since generally that would not be something that a firefighter must do on the job.

A best practice is to use a testing procedure that has been scientifically validated. The League worked with a vendor with expertise in test design and validation, as well as a group of police, human resources and legal experts to scientifically validate a post-offer physical abilities exam for police officers. The test was completed in 2021 and is now available for use by cities.

While it is not a legal requirement, the Americans with Disabilities Act (ADA) encourages employers to use job descriptions that define the "essential functions" of the job, including physical requirements, before beginning any hiring process. "Essential functions" means the primary duties the city wants the person in the job to perform; duties that are rare or incidental to the job should not be defined as "essential functions." By establishing essential functions in the job description before beginning the hiring process, the city can more easily show, if challenged, that it is not discriminating on the basis of disability— i.e., that the city established the physical standards across the board for all applicants and not in reaction to an applicant who is disabled.

If challenged under the ADA, the city should be able to show that it selected physical ability tests reflecting the essential functions of the job and that it did not test for physical requirements that are incidental or rarely used on the job. This will help to ensure the physical ability test does not weed out members of a protected class who actually could perform all of the essential duties of the job if hired, even if they could not perform physical tasks rarely or incidentally used on the job.

For similar reasons (e.g., avoiding discrimination), it is also important to establish a reasonable passing mark for the tests. The level that is considered "passing" should generally be a level that most current employees in that job class are able to achieve. The city should not establish a test that requires newly-hired employees to perform at a higher physical level than employees who are already performing the job successfully.

RELEVANT LINKS:

[42 U.S.C. § 2000ff.](#)

Equal Employment
Opportunity Commission:
[GINA](#).

If it does, an argument can be made that the test illegally discriminates against job candidates (for example, females) who can perform the minimum physical requirements as well as the existing employees perform them. And, as a practical matter, standards that are too strict can reduce the candidate pool and might cause a shortage of applicants.

Another potential discrimination problem can occur if a city fails to test all qualified applicants for a job; for example, if the city decides to test only certain applicants because they do not appear to be physically fit. The city must test all qualified applicants for a job or it may be subject to claims of discrimination by members of a protected class.

The Genetic Information and Nondiscrimination Act (GINA), like the ADA, is a federal law and is enforced by the EEOC. Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. GINA prohibits the use of genetic information in making employment decisions; restricts employers and other entities covered by Title II (employment agencies, labor organizations, and joint labor-management training and apprenticeship programs—referred to as “covered entities”) from requesting, requiring, or purchasing genetic information; and strictly limits the disclosure of genetic information. One of the major ways this law impacts employers occurs when a city requires a medical exam for an employee to determine whether the employee can perform essential job duties. The clinic or doctor providing the medical exam is not allowed to ask family history of the applicant/employee as part of the medical exam. Understanding that employers have limited control over the clinic or physician, there is a “safe harbor” for employers who provide the following language to the clinic or doctor:

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic information,” as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member, or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

If this type of warning is provided, any resulting acquisition of genetic information will be considered inadvertent, and therefore not in violation of GINA.

RELEVANT LINKS:

[29 C.F.R. § 1630.2\(o\).](#)

[Minn. Stat. § 363A.08, subd. 6.](#)

[29 C.F.R. § 1630.2\(p\).](#)
[42 U.S.C. § 12112\(b\)\(5\)\(A\).](#)

In other words, use of this type of warning creates a “safe harbor” for employers who receive genetic information in response to a request for health-related information. There are also a few other, narrow exceptions to the rules about obtaining genetic information, but cities should proceed cautiously and consult with legal counsel before relying on those exceptions.

Minnesota has a state law that mirrors the requirements of the Americans with Disabilities Act. It is found in the Minnesota Human Rights Act (MHRA), which is enforced by the Minnesota Department of Human Rights. The MHRA covers employers with one or more employees so nearly all Minnesota cities are covered. The MHRA, however, does cover employers more narrowly for purposes of the reasonable accommodation requirement discussed below. Employers must comply with reasonable accommodation requirements under the Minnesota law if they have 15 or more employees.

B. Reasonable accommodation in testing

The ADA and the MHRA both require that a disabled applicant be reasonably accommodated to take an employment test. In the testing process, reasonable accommodation usually means a modification or adjustment to the testing process that allows an applicant with a disability to be considered for the position. Because the ADA covers many different types of disabilities—both physical and mental—the city should not assume that any person with a disability is automatically not qualified to perform a physically demanding job (such as maintenance worker, police officer, or firefighter). For example, a candidate could have a learning disability that causes him to need special accommodation in the testing process but does not cause him to be unable to perform the essential duties of the job.

Accommodation is not required if it causes undue hardship to the city. Undue hardship is determined based in part on the financial and other resources available to the city and is considered on a case-by-case basis. Undue hardship refers not only to financial difficulty, but also to accommodations that are unduly disruptive or those that would fundamentally alter the nature of the operation or its services. Therefore, the city should consult its attorney before refusing an accommodation on the basis of undue hardship.

In order to comply with the ADA’s reasonable accommodation provision, it is a good practice for the city to state on its application form or advertisement for the position that a test will be required. The form or advertisement should also ask applicants to let the city know about any reasonable accommodation that may be needed in order to take the test within a certain time period before it is given.

RELEVANT LINKS:

[Minn. Stat. § 13.43.](#)

[29 C.F.R. § 1630.13.](#)

[Minn. Stat. § 363.08 subd. 4.](#)
[42 U.S.C. § 12112\(d\)\(3\).](#)

If the city receives any information about an applicant's disability, it must take precautions to protect the privacy of that information, in accordance with the ADA, MHRA, and Minnesota Government Data Practices Act, and to ensure that it is not used to discriminate against the applicant.

C. Physical ability versus medical exams

Under the ADA and the MHRA, medical examinations are prohibited before an offer of employment is made. Therefore, a city must determine whether any pre-employment examinations will be considered "medical" under these laws. The following are some key factors in determining whether a test is a medical exam:

- Is it given by a health care professional?
- Are the results of the test interpreted by a health care professional?
- Is it designed to reveal the existence, nature, or severity of a physical or mental impairment (including alcoholism, emotional or mental disorders, and specific learning disabilities) or the individual's general physical or psychological health?
- Is the test physically invasive (e.g., blood draws, urine samples)?
- Does the test measure an employee's performance of a task or measure his or her physiological response to performing the test (heart rate, etc.)?
- Is it usually administered in a medical setting such as a doctor's office, clinic, or hospital?
- Is medical equipment used to give the test (e.g., stethoscope, blood pressure cuff, needles, etc.)?

Answering "yes" to one or more of the above questions could mean that the test would be considered a medical exam and should not be administered before an offer of employment.

Generally, physical agility tests that are designed to measure an individual's ability to perform job-related tasks are not medical examinations. For example, testing maintenance worker applicants for their ability to effectively use heavy tools would probably not be considered a medical exam.

Physical fitness tests that measure an applicant's strength or ability to run are not medical exams. However, if the employer measures the applicant's biological or physiological response after performing these tests, the test is likely to be considered a medical exam. For example, testing an applicant's ability to run a mile in a certain amount of time would probably not be considered a medical exam, but a treadmill "stress test" in a doctor's office is likely to be considered a medical exam.

RELEVANT LINKS:

[Minn. Stat. 363A.20, subd. 8\(c\).](#)

If any medical information adversely affects a hiring (or firing or promotional) decision concerning an applicant (or employee), the city must notify that person within 10 days of the final decision.

III. Liability issues with testing applicants

If you are requiring applicants for a city position to take a physical ability test, there are risks involved in the testing process. If an applicant were injured while taking a test, he or she would most likely be covered by workers' compensation insurance. Having applicants sign a waiver prior to taking the physical test will likely be seen by the courts as a violation of the law providing that employers have workers' compensation liability for work-related injuries. The law considers a pre-employment trainee and a person undergoing a pre-employment physical examination to be an employee for purposes of workers' compensation law.

IV. Practical issues with physical ability testing

If the physical ability test is set up appropriately (i.e., in a non-discriminatory manner), it can be a useful tool for cities. For example, the passing mark established by the city can be used on a "pass/fail" basis as part of the selection process (i.e., if someone cannot meet the minimum requirements) and save the time associated with interviewing job candidates who don't meet the minimum qualifications for the job.

The city should consider, however, that physical ability testing is expensive to administer. It requires a substantial amount of staff and/or consultant time and effort to establish a non-discriminatory test, to set up for the test, administer the test, grade the test, document the testing situation, and possibly to clean up after the test.

For these reasons and because of the potential for claims of discrimination, some cities have chosen instead to work closely with an occupational health/physical therapy clinic or medical provider to evaluate (on a post-offer basis) whether a candidate is physically able to perform the job.

Cities that use an outside provider to determine a candidate's ability to perform the physical requirements of the job should ensure that the provider has an updated job description. The job description should accurately reflect the physical demands associated with the essential functions of the job. Also, the city should receive only the minimum amount of medical information necessary to make whatever employment decision is under consideration (e.g. hiring, fitness for duty, etc.); never request or require genetic information such as family medical history; and treat that information as private data under the ADA, MHRA, and Minnesota Government Data Practices Act.

RELEVANT LINKS:

[LMC HR Reference Manual.](#)

800.925.1122

651.281.1200

HRbenefits@lmc.org

V. Further assistance

The League recommends a city work closely with its attorney in developing physical ability tests and in making any employment decision based on physical ability to perform the job.

The League's Human Resources Reference Manual has a number of resources that are related to employment decisions, and League staff members are available to discuss your physical ability testing and other hiring or continuation-of-employment concerns.

Appendix A: Pre-Employment Physical Fitness Testing for Job Applicants

(Do not rely on this chart as legal advice; consult with your attorney to address your city’s specific situation.)

	<u>Fitness Testing</u>	<u>Job Simulation</u>	<u>Post-Offer Medical Exams and/or Inquiries</u>
	<i>Description: Tests of physical agility such as running, jumping, climbing. Typically used to determine general physical fitness for jobs which can be highly physical in nature.</i>	<i>Description: Tests that use actual duties performed on the job such as dummy drag for firefighter, use of heavy equipment/tools for maintenance workers, or performing CPR for police officer.</i>	<i>Description: Sending all applicants in job class to physician/psychologist for specific medical checks such as blood pressure, pulmonary functioning, or psych exam—after conditional job offer has been made.</i>
Disability Laws	Not prohibited, but testing standards must be job-related and consistent with business necessity. City may be required to provide reasonable accommodation for testing process. If any medical measures are used in association with the testing (blood pressure, etc.), the test may be considered a medical exam and subject to requirements in column titled “Post-Offer Medical Exams.”	Not prohibited, but testing standards must be job-related and consistent with business necessity. City may be required to provide reasonable accommodation for testing process. If any medical measures are used in association with the testing (blood pressure, etc.), the test may be considered a medical exam and subject to requirements in column titled “Post-Offer Medical Exams.”	Not prohibited but must show each medical test/procedure is job-related and consistent with business necessity. Must be performed post-offer, even for public safety staff. Psychological tests, such as the MMPI, are medical exams. In contrast, personality tests and/or exercises that are intended to assess only management skills and work styles are probably not medical exams; however, city should consult with attorney on this issue for case-by-case decision.
Discrimination Laws	Not prohibited but must show that the test does not adversely impact protected statuses of race, sex, ethnic, or other groups, or must validate the test pursuant to EEOC guidelines. (Validation is usually a statistical process that must be done by experts in the field pursuant to EEOC guidelines.)	Not prohibited but must show that the test does not adversely impact protected statuses of race, sex, ethnic, or other groups, or must validate the test. (Validation is usually a statistical process that must be done by experts in the field pursuant to EEOC guidelines.)	Not prohibited but must show that the test does not adversely impact protected statuses of race, sex, ethnic, or other groups, or must validate the test. (Validation is usually a statistical process that must be done by experts in the field pursuant to EEOC guidelines.)
Union Issues	Establishing job selection criteria and testing is a management right unless bargained away.	Establishing job selection criteria and testing is a management right unless bargained away.	Establishing job selection criteria and testing is a management right unless bargained away.
Workers’ Compensation Issues	Applicants for city jobs are likely to be considered employees for purposes of Workers’ Compensation coverage of injuries sustained while completing pre-employment testing or training.	Applicants for city jobs are likely to be considered employees for purposes of Workers’ Compensation coverage of injuries sustained while completing pre-employment testing or training.	Applicants for city jobs are likely to be considered employees for purposes of Workers’ Compensation coverage of injuries sustained while completing pre-employment testing or training.

	<u>Fitness Testing</u>	<u>Job Simulation</u>	<u>Post-Offer Medical Exams and/or Inquiries</u>
Privacy Issues	Specific results are likely to be private data. However, overall test “scores” if any (in some cases may be “pass/fail”), may be public data (note that the name of the applicant is not public until he or she is considered a finalist). Consult with city attorney before releasing to anyone but the applicant or to those in the city with a clear business reason for knowing. Test should be held in private area—without others who are not involved in the testing process.	Specific results are likely to be private data. However, overall test “scores” if any (in some cases may be “pass/fail”), may be public data. Consult with city attorney before releasing to anyone but the applicant or to those in the city with a clear business reason for knowing. Test should be held in private area—without others who are not involved in the testing process.	Results of medical exam are private and/or confidential data under various laws. Can only be shared with applicant and others in the city with a clear business reason for knowing. Must keep medical records separate from personnel records. If medical records or medical information adversely affects a hiring, firing, or promotional decision, city must notify the applicant of that within 10 days of final decision. Limit medical information given to city to only what is needed to determine whether applicant can safely perform the job.

Notes:

- (1) Under the Minnesota Human Rights Act (covers employers of 1 or more employees for most aspects; 15 or more employees for reasonable accommodation requirements):
 - a. The city can administer pre-employment tests, provided that the tests: (i) measure only essential job-related abilities; (ii) are required of all applicants for the same position; (iii) accurately measure the applicant’s aptitude, achievement level, or whatever factors they purport to measure.
 - b. The city can provide special safety considerations for pregnant women involved in tasks that are potentially hazardous to the health of the unborn child, as determined by medical criteria. This is a very narrow exception, and cities should definitely consult with their city attorney before using it.
- (2) Americans with Disabilities Act (covers employers of 15 or more employees):
 - a. An employer may not ask or require a job applicant to take a medical examination before making a job offer. It cannot make any pre-employment inquiry about a disability or the nature or severity of a disability. An employer may, however, ask questions about the ability to perform specific job functions and may, with certain limitations, ask an individual with a disability to describe or demonstrate how he or she would perform these functions.
 - b. An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category.
 - c. If an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and consistent with business necessity. The employer also must show that no reasonable accommodation was available that would enable the individual to perform the essential job functions, or that accommodation would impose an undue hardship.
 - d. A post-offer medical examination may disqualify an individual if the employer can demonstrate that the individual would pose a “direct threat” in the workplace (i.e., a significant risk of substantial harm to the health or safety of the individual or others) that cannot be eliminated or reduced below the “direct threat” level through reasonable accommodation. However, an employer may not simply assume that a threat exists; the employer must establish through objective, medically supportable methods that there is significant risk that substantial harm could occur in the workplace.

- e. Information from all medical examinations and inquiries must be kept apart from general personnel files as a separate, confidential medical record, available only under limited conditions.
- f. Tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions of such examinations.

(3) For more information on the ADA and hiring police officers, see: <http://www.ada.gov/copsq7a.htm>

Appendix B Post-Employment Physical Fitness Programs for City Employees

(Do not rely on this chart as legal advice; consult with your attorney to address your city's specific situation).

	<u>Fitness Testing</u>	<u>Job Simulation</u>	<u>Periodic Medical Exams</u>	<u>Voluntary Wellness Programs</u>
Description	<i>Description: Tests of physical agility such as running, jumping, climbing. Involuntary and used for employment decisions. If voluntary, see "Voluntary Wellness Programs" column.</i>	<i>Description: Tests that use actual duties performed on the job such as dummy drag. Involuntary and used for employment decisions. If voluntary, see "Voluntary Wellness Programs" column.</i>	<i>Description: Sending all employees in job class to physician for specific medical checks, such as blood pressure or pulmonary functioning, on a periodic basis. Involuntary and used for employment decisions. If voluntary, see next column.</i>	<i>Description: Can be a wide variety of "participatory" programs designed to reward employees for <u>participating</u> in a program and include reimbursing all or part of the cost of membership in a fitness center or rewarding employees for attending no-cost health education seminars. Unlike other "health contingent" wellness programs discussed below these are not limited on the financial incentives an employer can offer under a participatory wellness program. Fitness testing and job simulation could also be included if truly voluntary and not used for any employment decisions. In contrast, "health-contingent" wellness programs reward individuals meeting a specific standard related to their health and as such must meet certain requirements to avoid being classified as discriminatory.</i>
Disability Laws	Not prohibited; associated medical screenings must be job-related and consistent with business necessity; will require employee consent. May require reasonable accommodation for testing process.	Not prohibited; associated medical screenings must be job-related and consistent with business necessity and will require employee consent. May require reasonable accommodation for testing process.	Not prohibited for public safety personnel but must show each procedure is job-related and consistent with business necessity, i.e. needed for specific job-related concerns.	Okay if truly voluntary (no adverse actions for not participating or failing to meet a specific standard related to an individual's health). Must keep medical records confidential and separate from personnel records. Must provide notice to employees informing them what information will be collected, how it will be used, who will receive it, and what will be done to keep it confidential. City may be required to provide reasonable accommodation for participation.

	<u>Fitness Testing</u>	<u>Job Simulation</u>	<u>Periodic Medical Exams</u>	<u>Voluntary Wellness Programs</u>
Discrimination Laws	Not prohibited but must show that the test does not adversely impact protected statuses (e.g., race, sex, ethnic group) or must validate the test pursuant to EEOC guidelines.	Not prohibited but must show that the test does not adversely impact protected statuses of race, sex, or ethnic group, or must validate the test pursuant to EEOC guidelines.	Not prohibited but must show that the test does not adversely impact protected statuses of race, sex, or ethnic group, or must validate the test pursuant to EEOC guidelines.	Okay if truly voluntary (e.g., no adverse actions for not participating or failing to meet a specific standard related to an individual's health and not used in any employment decisions).
Union Issues	Establishing the program is probably a management right unless bargained away; however, implementation of the program must be negotiated.	Establishing the program is probably a management right unless bargained away; however, implementation of the program must be negotiated.	Decision to conduct regular medical exams is a management right, but city must negotiate on implementation (e.g., whether second opinions are authorized, who should bear the cost). City must pay cost of initial exam.	As an incentive-based, voluntary program, most aspects must be negotiated with the union. Some unions will allow a program without much/any negotiation if it is entirely incentive-based and entirely voluntary.
Workers' Compensation Issues	If required by the city, any injuries incurred while testing are likely to be covered by workers' compensation.	If required by the city, any injuries incurred while testing are likely to be covered by workers' compensation.	Usually not applicable; employee unlikely to be injured at a medical exam. If injured en route to ordered exam, work comp may apply.	Depends on activities sponsored by city and whether they are during work hours and on city premises. Consult workers' compensation carrier for more specific information.
Privacy Issues	Results are private data. Can only be shared with employee and others with a clear business reason.	Results are private data. Can only be shared with employee and others with a clear business reason. Test should	Results are private data. Can only be shared with employee and others with a clear business reason. Must keep	Must keep medical records separate from personnel records. Most data associated with wellness program participation is private data, accessible only to the individual and those with a business reason for knowing. Limit medical information to only what is needed: group data or info needed to verify that goals were met.

	<u>Fitness Testing</u>	<u>Job Simulation</u>	<u>Periodic Medical Exams</u>	<u>Voluntary Wellness Programs</u>
	<p>Test should be held in private area—without “audience” – this may mean each applicant is tested one on one. If medical tests are performed, must be kept confidential and separate from personnel records. Limit medical information to only what is needed: group data or info needed to verify that goals were met.</p>	<p>be held in private area—without others watching. If medical tests performed, they must be kept confidential and separate from personnel records. Limit medical information to only that needed: e.g., info needed to verify that goals were met.</p>	<p>medical records separate from personnel records. If exam adversely affects a hiring, firing, or promotional decision, city must notify employee of that within 10 days of final decision. Limit medical info to only that needed to determine whether employee can safely perform the job.</p>	