

The Rules Defining Adverse Impact Analysis

What is Adverse Impact?

Adverse impact is most commonly identified when numerical data reveals that a group of people (categorized by gender or race/ethnicity) was negatively affected by a contractor's practice, procedure, or test. Per the *Uniform Guidelines on Employee Selection Procedures* (41 CFR 60-3), analyses of selection procedures in order to identify the presence of adverse impact are required of contractors with 100 or more employees. Once adverse impact is identified, courts and compliance agencies assume discrimination unless the contractor can prove that the practice, procedure, or test causing the adverse impact is valid and justified by business necessity.

What Agencies are required to conduct analyses?

1. Employers with 100 or more employees, per the *Uniform Guidelines on Employee Selection Procedures* (41 CFR 60-3, 29 CFR 1607).
2. Employers required to have written affirmative action programs for minorities and women by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) (41 CFR 60-140[b][2],[3], 60-2.23[b][2],[3], 60-2.25).
3. California employers who are state contractors required to have written Nondiscrimination Programs for minorities and women by the Department of Fair Employment and Housing's Office of Compliance Programs (OCP) (California Administrative Code, Title 2, Division 4, Chapter 5, Section 8104[a][4][A]).

When should analyses be conducted?

- *Uniform Guidelines* requires annual analyses
- OFCCP expects the analyses to be part of the AAP development process. During an audit personnel activity data is requested for the previous AAP year.
- OCP requires annual analyses

Who needs to be analyzed?

According to the *Uniform Guidelines*, calculations must be made for men, women, and each minority group comprising 2% or more of the labor force in the relevant area (the employer's own workforce or the external labor force).

Analyses by Job Classification or Job Group?

1. The *Uniform Guidelines* require the analyses by job classification.
2. OFCCP accepts adverse impact analyses by job classification or by job group.

Which activities need to be analyzed?

1. The *Uniform Guidelines* require analysis of any selection procedure used to make an employment decision including hiring, retention, promotion, transfer, demotion, dismissal, or referral.
2. OFCCP requires an analysis of each step in selection procedures including but not limited to applications for employment, hiring, promotions, transfers, lay-offs, recall, and terminations.

...see *Adverse Impact* page 3

Call-Center Test Development Underway

Biddle Consulting Group, Inc., distributor of OPAC office-skills testing software, is creating a new computerized pre-employment test for call-center agents.

While the test will simulate the fundamental aspects of a call-center agent's job, job candidates do not need any prior training or experience to succeed on the test. The test is being designed to measure important call-center skill areas such as data entry,

decision making, and customer relations, just to mention a few.

BCG has been helping organizations select the best person for the job for over 30 years and is a leader in computerized test development.

We are looking for organizations that would like to participate in the development project. There is no obligation to purchase or use the test if

...see *Call-Center Test* page 2

Inside...

| | |
|-------------------------------------|---|
| Adverse Impact Analysis | 1 |
| OFCCP : Playing Catch-Up | 2 |
| OFCCP : Validity & Discrimination . | 3 |
| Calendar | 4 |

Key Discussion Topics: National Industry Liaison Group (NILG) May 2004 Meeting Agenda Highlights

Online AAP Submission: Procedures and process is still in development, but moving forward. No promulgation date set.

Compliance Evaluation Selection Strategy: OFCCP expects to evaluate the “Westat” statistical

Call-Center Test

continued from page 1

you are involved in its development. However, if you decide you would like to use the test, your organization would receive **50% off** the retail price on the use of the test for the first year after it is released. Also, participating organizations will help to set the national standards for selecting call-center agents.

Please contact Jim Kuthy, Director of Product Development, toll-free at (800) 999-0438 extension 239 or via e-mail at jkuthy@biddle.com for more information about how you can become involved in helping to create this exciting new call-center testing software. ☒

modeling of the EEDS system EEO-1 data, as a potential contractor selection tool. This evaluation process should involve approximately 500 compliance evaluations during the next two (2) quarters. Establishments, which received EO surveys, will not be part of this group of reviews. The Agency is searching for a reliable statistical model that can accurately predict which of the 100,000 plus U. S. Government Contractors show indicators of potential systemic issues. The EO Survey is still being evaluated by ABT an external consulting firm, as a potential Compliance Evaluation selection tool. Although the ABT study is not completed there is some doubt that the EO Survey will be effective in identifying compliance evaluation targets.

Compensation Analysis Strategy: The OFCCP is again searching for a statistical approach that will allow them to identify systemic issues within an entire contractor establishment. It appears that some type

of Regression Analysis utilizing contractor identified compensation elements on the entire AAP establishment employee population is the favored approach. The Agency has not yet decided on what type of analysis process will yield their desired result.

Active Case Management: The OFCCP is currently committed to utilizing statistics to identify potential egregious violations of the statutes and be able prepare cases, which can successfully be litigated. Once a potential systemic case is selected the OFCCP will expend necessary resources in obtaining additional anecdotal and supporting statistical evidence to prosecute it through the Solicitor’s Office. Their approach seems to involve a review of as many AAPs (Applicant to Hire and Compensation data in particular) as possible, to identify a potentially strong systemic case they can litigate. Therefore, immediate relief from large

...see NILG Highlights page 3

The Battle of Statistics: Is the OFCCP Starting to Catch-Up?

“It’s like bringing a knife to a gunfight.” These words were uttered by Charles James, Deputy Assistant Secretary of the Office of Federal Contract Compliance Programs (OFCCP) in a recent San Francisco bay area Industry Liaison Group (ILG) meeting when describing the dynamics

between his agency’s auditors and the statistical and legal experts an organization will employ to defend itself in the event of an audit. For years, largely due to the relative ease in which they are calculated, the OFCCP has relied on outdated and only somewhat accurate statistical analyses to support allegations of discrimination, only to have those analyses rebutted by more sophisticated, legally defensible analyses generated by contractors and their experts. But these days are coming to an end.

At the April 2004 ILG meeting in Sacramento, Woody Gilliland, Director of the Western Region, announced that the OFCCP had hired a statistical expert at the National Office, and that the OFCCP will be looking to hire statistical experts in each of the regions. As of the date of this publication, the OFCCP has made significant progress in achieving

this goal. What this means to the contracting community is that the OFCCP is “stepping-up” its ability to statistically analyze adverse impact and compensation by using the same types of analyses employed in EEO discrimination litigation. In defense of the OFCCP, they have been conducting these sophisticated analyses at the national office for some time, but their recent efforts indicate a desire to extend that ability to the regional and district offices. How long this initiative will take to disseminate nationwide is unknown, but if their progress in the past year is indicative, it appears as though it may be sooner than later. It is clear however, that employers should proactively analyze their own workforce to identify, and rectify, problem areas before they are uncovered during an audit, or worse yet, litigation. ☒

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It's About Time: The OFCCP is Finally Taking Validity into Account When Claiming Discrimination

Adverse impact occurs when there is a statistically significant difference in rates (e.g., hiring, promotion, termination) between members of a protected class and the appropriate comparison group. However, according to the 1991 Civil Rights Act, this difference only amounts

NILG Highlights

continued from page 2

numbers of compliance evaluation letters may not be forthcoming in the short term. However, they (OFCCP) are willing to work with contractors who may be overburdened with scheduling letters to re-position the impact. If you have twenty five (25) scheduling letters and open reviews at any one time they will rescind any additional AAP request letters until the current evaluations are closed or resolved. ❖

to discrimination if the tools causing the difference are invalid and not consistent with business necessity. In other words, numerical differences between groups, even differences that are statistically significant, are allowed as long as the tools responsible for those differences have been developed by following a rigid and legally defensible validation strategy. Unfortunately, all too often employers "believe" the components in their hiring or promotional processes are valid simply because they are loosely based on an aging job description or "seem to make sense." This belief couldn't be further from the truth.

At the April 2004 ILG meeting in Sacramento, Woody Gilliland, Director of the Western Region, announced that the OFCCP will be hiring test development and validation experts. If adverse impact is discovered during an audit, and the contractor attempts to use

a validity argument as their defense, these experts will be responsible for evaluating whether the at-issue practice, procedure, or test (PPT) is job-related and consistent with business necessity.

Typically this evaluation includes (at a minimum) a thorough review of the underlying job analysis in which the knowledge, skills, abilities and personal characteristics (KSAPC's) of the job are identified as well as a linkage study "mapping" those KSAPCs to each item in the selection process. As you can see, this goes well beyond a simple job description. Generally speaking, if adverse impact exists *and* the PPT responsible is not valid, then the employers could be facing an uphill battle in their own defense. Because of this, it's important that employers review the validity of the PPTs used for selection decisions prior to an audit and/or litigation. ❖

Adverse Impact

continued from page 1

Tests Used to Conduct Analyses:

- 80%, Four-Fifths Rule, or Rule of Thumb Test: The 80% test is based on a simple comparison of two groups' selection rates (e.g., a comparison of two group's hiring rates or passing rates on a test). The 80% test is violated (and adverse impact is assumed, if only the 80% test is being used) when a group's selection rate is less than 80% of the selection rate of the group that had the highest selection rate. It is important to note that the 80% test is a "rule of thumb" designed to allow a compliance agency to easily find an employment area to focus its attention on during investigations; the 80% test is not a legal definition of adverse impact.
- Statistical Significance Tests: Sta-

tistical significance tests answer the question: "Is the difference between the observed situation and the expected situation caused by chance or did something other than chance (e.g., discrimination) cause the difference?" Statisticians and EEO consultants usually draw conclusions of statistical significance when significance tests result in a standard deviation of 1.96 or higher.

When the standard deviation is 1.96, the probability that the difference between the observed and the expected situation occurred by chance alone is .05 (one chance in 20). This means that 19 times out of 20, something other than chance is causing the difference. As the standard deviation increases (1.97, 2.45,

4.78, etc.), the probability that the difference occurred by chance decreases (.04, .03, .01, .007, etc.).

- Practical Significance Tests: The Uniform Guidelines and court case decisions indicate that findings of both statistical and practical significance are needed in order to identify disparate percentages as "disproportionate." Practical significance addresses the concept of the effect small number changes have on statistical conclusions and an overall practical assessment of the utility of the conclusion being made with statistics in a particular situation. Thus, the concept of practical significance is applicable only in those situations where findings are statistically significant. ❖

2004 Calendar

Conferences & Expositions

: August 9-11 :
(CritiCall)
 APCO International
 Annual Conference
 Montreal, Quebec, Canada

: August 10-11 :
(AAP)
 NILG Annual Conference
 Nat'l Industry Liaison Group
 St. Louis, Missouri

: October 20-23 :
(OPAC)
 Staffing World 2004
 American Staffing Association (ASA)
 Washington, D.C.

: November 5 :
(OPAC)
 ALA Regions 1&2 Conference
 Association of Legal Administrators
 Orlando, Florida

AAP Training Workshops

: November 4-5 :
*Affirmative Action Plan
 Methodology & Software Training*
Chicago, Illinois
 Cost: \$990

For more information on any of the conferences, training workshops, or other Biddle Consulting Group, Inc. events listed, please call BCG toll-free at (800) 999-0438 or e-mail your questions to staff@biddle.com.

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