2020 NILG 2020 VIRTUAL CONFERENCE WEBINAR SERIES

July 6-August 27

AFFIRMATIVE ACTION REPORTS: METRICS AND ANALYSES

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Patrick is the President of Biddle Consulting Group, Inc. Patrick has over 20 years of experience in the EEO/AA industry and has worked with hundreds of clients of all sizes to develop their Affirmative Action Plans and support them during audits. He has conducted training in cities across the nation and has authored numerous articles and software programs in the areas of affirmative action, disparate impact, test validation, compensation analysis, and EEO. Patrick is also the primary author and editor for the book titled, Compensation Analysis: A Practitioner's Guide to Identifying and Addressing Compensation Disparities.

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Agenda

Introductions

History, Regulations, Purpose, Jurisdiction, and Enforcement

- Brief historical summary of affirmative action and a basic understanding of the laws requiring Affirmative Action Plans (AAPs)

Metrics Overview

- Metrics included within your AAP (and what they show)

Incumbency v. Availability

- The how, what and why of job group creation, determining external and internal availability, weights and feeders, final availability, and goals

Disparity Analyses

- You have to provide personnel transactions. Do you know the story they tell?

History, Purpose, Regulations and Enforcement Agencies

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History

Historically, America was a heavily segregated nation

- Extensive and often legally sanctioned discrimination existed

Dramatic changes in society occurred during the 1960s

- Civil rights movement
- Entry of women into the workforce, educational institutions, and government
- Growing dissatisfaction with the Vietnam War and disillusionment with government

The Civil Rights Act of 1964

- Adopted in the wake of President Kennedy's death
- Provided protections in various realms, including employment, to individuals and groups based on race, color, religion, sex, or national origin
- Employment included in Title VII
- Equal Employment Opportunity Commission established

History

Executive Orders Leading Up to Modern Affirmative Action

- Executive Order (EO) 8802 (Roosevelt 1941)
  - Outlawed discrimination based on race, color, creed, and national origin in the federal government & defense industries
- Executive Order (EO) 10925 (Kennedy 1961)
  - Prohibited discrimination based on race, color, creed, or national origin and required affirmative action by federal contractors and subcontractors
- Executive Order (EO) 11246 (Johnson 1965)
  - Assigned enforcement responsibilities for classes protected under EO 10925 to Department of Labor (DoL)
- Executive Order (EO) 11375 (Johnson 1967)
  - Added sex as a protected classification

Regulations

Race, Color, Sex, Religion, National Origin, Sexual Orientation, & Gender Identity.

Executive Order 11246 (41 CFR sections 60-1, 60-2, 60-4, 60-20, 60-50)

- Requires companies to take **affirmative action** for females and minorities
- **Prohibits discrimination** against applicants and employees based on race, color, sex, religion, national origin, sexual orientation, and gender identity
- Also prohibits action against applicants and employees for discussing pay
- Provisions apply to federal contractors/subcontractors

Regulations

Individuals with a Disability

Section 503 of the Rehabilitation Act (41 CFR section 60-741)

- Regulations require federal contractors and subcontractors to take **affirmative action** for and **prevent discrimination** against individuals with disabilities

Protected Veterans

VEVRAA (41 CFR section 60-300)

- Regulations require federal contractors and subcontractors to take **affirmative action** for and **prevent discrimination** against the four classes of veterans found in the Jobs for Veterans Act

- Organizations must take various actions to advance the employment of protected veterans

AAP: Definition and Purpose

Technical Definition: An AAP is a written, results-oriented program in which a federal contractor details the steps it will take to ensure equal employment opportunity. It includes goal-oriented management policies and procedures designed to identify and eliminate barriers to employment opportunities for minorities, women, protected veterans and individuals with disabilities that are not based on specific job requirements.

Consider an AAP a “road map” designed to lead federal contractors toward compliance with EEO rules and regulations. It is intended to foster equal opportunity (not necessarily equal outcome) so everyone has a fair chance to succeed in the workplace.

They are required to be updated annually to provide a report on the progress (or lack thereof) of a contractor’s efforts regarding the use of “Best Practices” to ensure EEO in the workplace.

AAP: Definition and Purpose

<u>Practical Definition:</u> An Affirmative Action Plan (AAP) is just like any other business plan . . . it's just related to diversity and equal employment opportunity.

- You start by establishing a baseline
- You measure your organization against that baseline
- You create a plan to address areas in need
- You implement the plan
- You come back next year to see if the plan worked
- You make changes when/if necessary to get better results

AAP: Definition and Purpose

Ultimately, a well-designed AAP will:

- Tell the story of your organization's efforts toward EEO, Affirmative Action, and diversity,
- Indicate what your organization does look like (i.e., your utilization), should look like (i.e., your availability), and the transactions that got you there, and
- More importantly, tell the story of those efforts your organization has made to improve or address any identified issues! *Blow your own Horn!*

Who Must Create and AAP

Federal contractors meeting certain thresholds/requirements

Two types of contracts, each with separate AAP thresholds and/or requirements:

- Supply and Service*
- Construction

Two types of contractors, each with similar AAP requirements:

- Prime Contractors - Hold a direct contract with the Federal Government (*Example:* vehicle manufacturer supplying vehicles to the government
- Subcontractors – Hold a subcontract with a prime contractor to provide goods and services to fulfill government contract (*Example:* the company supplying tires to the motor vehicle manufacturer)

*These may include colleges, universities and institutions of higher learning at 60-1.7 (a-b)

Content of an Affirmative Action Plan:

The Primary Metrics

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AAP Content

- CFR §60-2.10 (b) Contents of affirmative action programs. (1) An affirmative action program must include the following ***quantitative analyses***:

— (i) **Workforce Analysis/Organizational profile**—§60-2.11

— (ii) **Job group analysis**—§60-2.12

— (iii) **Placement of incumbents in job groups**—§60-2.13

— (iv) **Determining availability**—§60-2.14

— (v) **Comparing incumbency to availability**—§60-2.15

— (vi) **Placement goals**—§60-2.16

Workforce Analysis

Workforce Analysis

- Overview of workforce headcounts by Department
- Shows a “Line of Progression”
- Used to determine (visually) whether barriers may exist to equal employment opportunity within the organization
- Each Workforce Analysis must display the following:
  - Name of the Unit
  - Job titles must be listed by in order of wage rate or salary ranges
  - For each job title, the total number of incumbents by gender and total number of males and females within each race group

Incumbency vs. Availability:
What We Look Like Compared to What We “Should” Look Like

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Job Group Analysis

Job Groups

- All other reports/metrics are based on AAP ***job groups***
- Aggregations of jobs w/ similar ***content***, ***wage*** and ***opportunity***
- Job groups are used to increase sample size (to yield meaningful results), and to reduce the number of analyses conducted
- Identifying appropriate job groups is critical (they are the OFCCP's first look at your data)

Workforce Analysis

- ***Jobs by department***

Job Group Analysis

- **"Similar" jobs regardless of department**

Determining Availability: What We "Should" Look Like

- What we "should" look like is referred to as the "final availability."
  - It is an estimate of the number of ***qualified*** minorities or women available for employment in a given job group
  - It's a combination of ***internal*** and ***external*** data (i.e., factors) used to identify what those qualified to work in the job group are "supposed" to look like
  - In the "comparison of ***incumbency*** to ***availability***" analysis, the final availability will be compared to the job group headcounts to determine the existence of underutilization

Determining Availability: What We "Should" Look Like

- External Factor (i.e., census data):
  - Step 1: Define local labor area
  - Step 2: Identify/select census occupation codes (487)
  - Step 3: Mathematically weight census codes based upon representation within each job group
  - Step 4: Identify relevant data other than local (e.g., state/national – if any)

Important Note: Results are only as good as the amount of effort put into this process!

Determining Availability: The Local Labor Area

Example: Business of the Sunshine State (BSS) – Food Manufacturing

BSS HQ: 500 Employees

Determining Availability: The Local Labor Area

Computer Programmers (2006-2010)

	Male	Female	White	Black	Hispanic	Asian	NHOPI	AIAN	2+
SF MSA	80.0%	20.0%	42.3%	1.3%	3.1%	52.0%	0.1%	0.3%	0.9%
	Male	**Female**	**White**	**Black**	**Hispanic**	**Asian**	**NHOPI**	**AIAN**	**2+**
SJ MSA	78.1%	21.9%	30.1%	0.8%	2.3%	65.5%	0.0%	0.2%	1.2%

Employee/applicant ZIP code analysis to identify the most precise local labor area(s):

San Mateo: 37.2%
Santa Clara: 32.1%
Alameda: 15.6%
Santa Cruz: 8.7%
San Francisco: 5.1%

Marin: 1.0%
Contra Costa: 0.2%
Portland: 0.1%

What remains is the local labor area (with corresponding weights)

"Trim" spurious and/or misleading labor areas, including those that have negligible contributions

Determining Availability: Census Occupation Codes

- Census occupation codes (aka “census codes”) are links between your jobs and the external census data
- Each distinct job is assigned to one of 487 codes

2006-2010 Census Code Toolkit

- The census data for each code is weighted based upon it’s representation within each job group

Determining Availability: External

								Snapshot Date: 12/31/2019			
		External Availability (Raw)									
AAP:	BSS HQ										
Job Group:	7-03: Skilled Machine Operators										
Labor Area:	Local										
		Raw (%)									
Cns Code	**Census Code Title**	**M**	**F**	**MIN**	**W**	**AA**	**H**	**A**	**NA**	**PI**	**2+**
783	Roasting, Baking Machine Ops	68.3	31.7	39.1	60.9	16.3	16.5	3.0	1.5	0.4	1.4
784	Food Batchmakers	44.2	55.8	38.4	61.6	11.7	19.9	4.4	1.2	0.2	1.0
Labor Area:	National										
		Raw (%)									
Cns Code	**Census Code Title**	**M**	**F**	**MIN**	**W**	**AA**	**H**	**A**	**NA**	**PI**	**2+**
783	Roasting, Baking Machine Ops	29.0	71.0	42.6	57.4	20.1	22.5	0.0	0.0	0.0	0.0
784	Food Batchmakers	32.0	68.0	75.5	24.5	17.1	56.0	2.4	0.0	0.0	0.0

Determining Availability: External

Snapshot Date: 12/31/2019

External Availability (Weighted)

62.3% of the employees in this job group are in jobs assigned to code 783

37.7% of the employees in this job group are in jobs assigned to code 784

AAP: BSS HQ
Job Group: 7-03: Skilled Machine Operators

Labor Area: Local

Cns Code	Census Code Title	Weight (%)	Weighted (%) M	F	MIN	W	AA	H	A	NA	PI	2+
783	Roasting, Baking Machine Ops	62.3	42.5	19.8	24.3	37.9	10.2	10.3	1.8	0.9	0.2	0.9
784	Food Batchmakers	37.7	16.7	21.1	14.5	23.3	4.4	7.5	1.7	0.4	0.1	0.4
		100.0	59.2	40.9	38.8	61.2	14.6	17.8	3.5	1.3	0.3	1.3

Labor Area: National

Cns Code	Census Code Title	W	Weighted (%)							NA	PI	2+
783	Roasting, Baking Machine Ops	62.3	18.0	44.2	26.5	35.8	12.5	14.0	0.0	0.0	0.0	0.0
784	Food Batchmakers	37.7	12.1	25.7	28.5	9.2	6.4	21.1	0.9	0.0	0.0	0.0
		100.0	30.1	69.9	55.0	45.0	18.9	35.1	0.9	0.0	0.0	0.0

Determining Availability: Internal

- Internal Factor:
  - Positions are not always filled via external sources
  - It's also necessary to identify internal sources of availability information
  - Step 1: Identify "Feeders" for all jobs/job groups
  - Step 2: Weight feeders based on historical promotions data (for starters . . . with a heavy dose of personal review and approval)

Target Job Group	Weight	Feeder Job Group
7-03: Skilled Machine Operators	75.0	7-04: Entry Machine Operators
	25.0	8-01: Laborers

Determining Availability: Internal

								Snapshot Date: 12/31/2019			
			Internal Availability (Raw)								
AAP:	BSS HQ										
Job Group:	7-03: Skilled Machine Operators										
		Raw (%)									
Plan	**Feeder**	**M**	**F**	**MIN**	**W**	**AA**	**H**	**A**	**NA**	**PI**	**2+**
BSS HQ	7-04: Entry Machine Operators	58.1	41.9	35.9	64.1	11.4	4.6	19.9	0.0	0.0	0.0
BSS HQ	8-01: Laborers	40.0	60.0	29.5	70.5	9.5	3.9	16.1	0.0	0.0	0.0

Determining Availability: Internal

Snapshot Date: 12/31/2019

Internal Availability (Weighted)

AAP: BSS HQ

Job Group: 7-03: Skilled Machine Operators

75.0% of the internal movements ***into*** this job group come from job group 7-04

			Weighted (%)									
Plan	**Feeder**	**Wght (%)**	**M**	**F**	**MIN**	**W**	**AA**	**H**	**A**	**NA**	**PI**	**2+**
BSS HQ	7-04: Entry Machine Operators	75.0	58.1	41.9	35.9	64.1	11.4	4.6	19.9	0.0	0.0	0.0
BSS HQ	8-01: Laborers	25.0	40.0	60.0	29.5	70.5	9.5	3.9	16.1	0.0	0.0	0.0

25.0% of the internal movements ***into*** this job group come from job group 8-01

Determining Availability: Factor Weights

- Factor Weights:
  - The weight given to the internal and external availability data (i.e., factors) for each job group
  - Identifies the relative “importance” of each set of data

- Assigning factor weights requires the user ask the following question:
  - “Out of 100 hypothetical movements into this job group, what number do I expect to come from a local recruitment area, reasonable recruitment area, or an internal pool?”

Determining Availability: Factor Weights

Raw (%) x Factor Weight = Weighted (%)

Snapshot Date: 12/31/2019

Final Availability

Job Group: 7-03: Skilled Machine Operators

	Raw (%)			Weighted (%)		
Factor	**Fem**	**Min**	**Factor Weight**	**Fem**	**Min**	**Source**
External Factors						
Reasonable (National)	69.9	55.0	0.0	0.0	0.0	National Labor Area
Local	40.9	38.8	30.0	12.3	11.6	Employee ZIP Code Analysis
Internal Factor						
Feeders	46.4	34.3	70.0	32.5	24.0	Feeders
		Final Avail (%)	100.0	44.8	35.6	

Sum of Weighted (%) = Final Availability (%)

Final Availability (%) = Goal

Comparison of Incumbency to Availability

		Snapshot Date: 12/31/2019
Comparison of Incumbency to Availability		
Job Group: 7-03: Skilled Machine Operators		
Test: Whole Person		
Total Employees (#): 24	**Total**	
	Female	**Minority**
Employee (#)	12	4
Employee (%)	50.0	16.7
Availability (%) – Goal	44.8	35.6
Test: Whole Person	No	Yes
Additional Needed to Eliminate Problem Area (#)	0	5

Comparison of Incumbency to Availability

- Regulations require contractors to compare the percentage of minorities and women in each job group with the availability for those job groups determined in the availability analysis

- When the percentage of minorities or women employed in a particular job group is ***less than would reasonably be expected*** . . . the contractor must establish a placement goal and create action-oriented programs associated with that goal

Comparison of Incumbency to Availability

- What is “less than would reasonably be expected”?
  - Any Difference: Is there any difference between incumbency and availability?
  - Whole Person Rule: Is the difference between incumbency and availability at least one whole person?
  - 80% Rule: Is incumbency at least 80% of availability?
  - Statistical Significance: Is the difference between incumbency and availability statistically significant?

Comparison of Incumbency to Availability

Statistical Significance
- Least proactive
- Legally-oriented
- Least goals

Any Difference
- Proactive
- Diversity-Oriented
- Most goals/misleading?

80% Test
- Has historical value
- Misleading?

Whole Person
- Focus on tangible issues
- Good with small orgs/job groups
- Balanced

Important Note: ***Identifying underutilization is NOT a declaration of discrimination.*** Choose a rule that best represents your organizational size/structure and how it views/perceives affirmative action.

Comparison of Incumbency to Availability

External Census Data

Internal Availability Data

Assign factor weights . . .

Final Availability Data

Compare to . . .

Actual Representation (Incumbency/Headcount) Data

If goal exists . . .

Create Goal/Action-Oriented Program

Strategies and Recommendations

- Understand your AAP metrics (and periodically re-evaluate census codes, local labor area, feeders, etc.)
- Don’t get stuck in the weeds – this is as much art as math/science
- Prioritize the big ticket issues – this is where you should focus!
- Review outreach/recruitment efforts – documentation is the key!
- Hire the best: Do not leap frog more qualified applicants with lesser qualified applicants
- Addressing goals is so much more than just a recruitment/hiring issue – actually look for “why” there is a goal
- Track all good-faith efforts related to AAP goals!

Disparity Analyses
(An Analysis of Personnel Transactions)
How We Got This Way?

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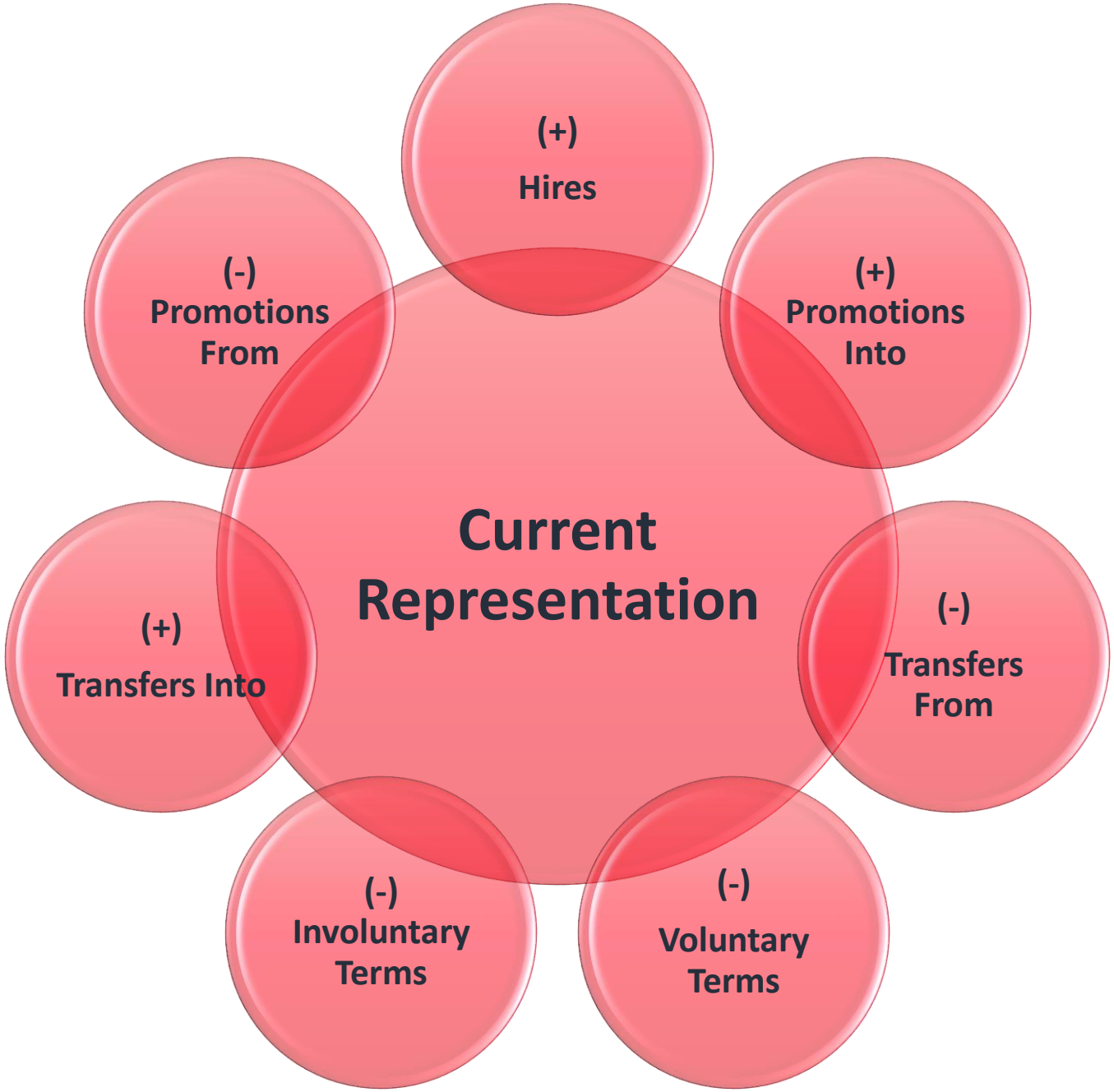
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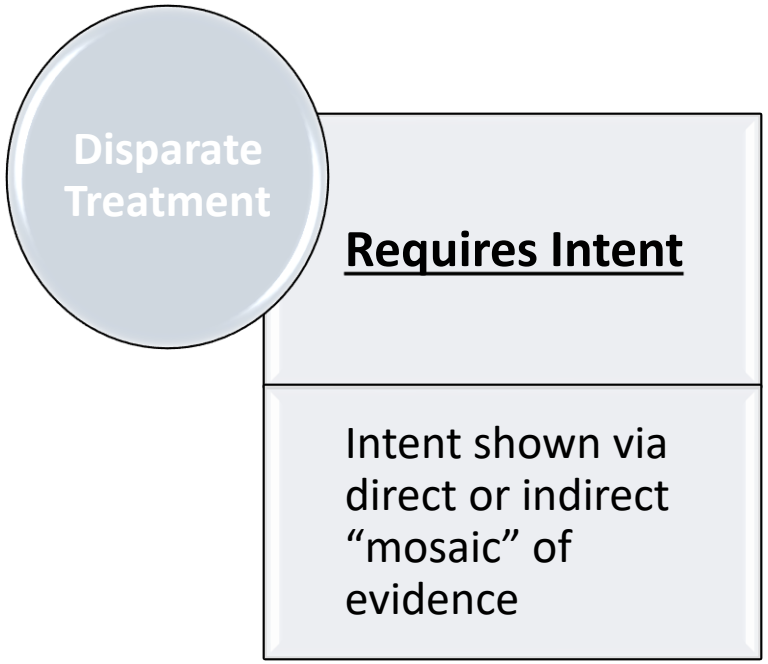
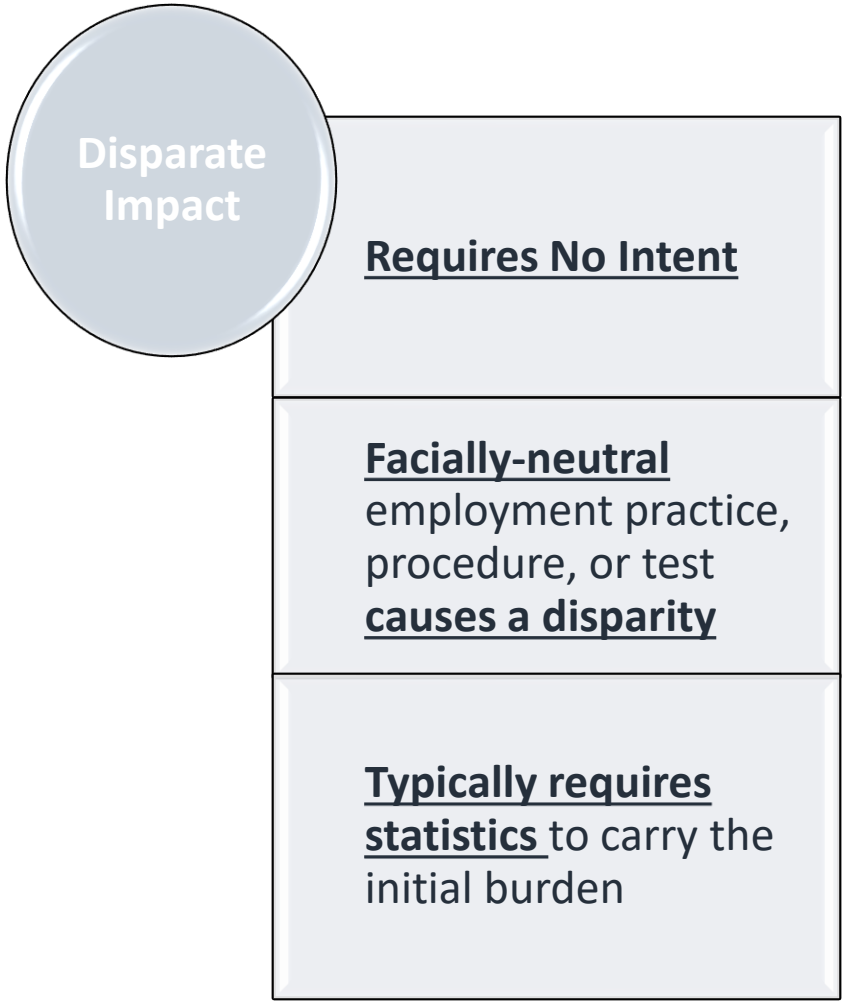
Disparity Analyses: Disparate Treatment

Disparate Treatment: Defined

- Plaintiff must show that applicants were treated differently because of their race, sex, gender, religion, age, or national origin
- Involves some type of deliberate act(s) that implies discriminatory intent
- Plaintiff must show intent, from either direct evidence or inferred from the circumstances



Disparity Analyses: Disparate Impact



Disparate Impact: Defined

- A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group
- Plaintiffs are not required to show intent

Disparity Analyses: Evaluating Personnel Transactions

Personnel Transactions Summary

Job Group: 1.1 - EXECUTIVE/SENIOR LEVEL

	Applicants				*Hires*			*Terminations (I)*			*Terminations (V)*		
	Males	Females	UNKNOWN (GENDER)	TOTAL RACE	Males	Females	TOTAL RACE	Males	Females	TOTAL RACE	Males	Females	TOTAL RACE
White	1	0	0	1	1	0	1	2	0	2	0	1	1
Afr. Amer.	1	0	0	1	0	0	0	0	0	0	0	0	0
Hispanic	0	0	0	0	0	0	0	0	0	0	0	0	0
Asian	1	0	0	1	0	0	0	0	0	0	0	0	0
Nat. Amer.	0	0	0	0	0	0	0	0	0	0	0	0	0
NHOPI	0	0	0	0	0	0	0	0	0	0	0	0	0
Two or More	0	0	0	0	0	0	0	0	0	0	0	0	0
Unknown (Race)	0	0	0	0									
Total	3	0	0	3	1	0	1	2	0	2	0	1	1
Total Minority	2	0	0	2	0	0	0	0	0	0	0	0	0

	Promotions From			*Promotions Into*			*Promotions Within*		
	Males	Females	TOTAL RACE	Males	Females	TOTAL RACE	Males	Females	TOTAL RACE
White	1	0	1	1	0	1	0	0	0
Afr. Amer.	0	0	0	0	0	0	0	0	0
Hispanic	0	0	0	0	0	0	0	0	0
Asian	0	0	0	1	0	1	0	0	0
Nat. Amer.	0	0	0	0	0	0	0	0	0
NHOPI	0	0	0	0	0	0	0	0	0
Two or More	0	0	0	0	0	0	0	0	0
Total	1	0	1	2	0	2	0	0	0
Total Minority	0	0	0	1	0	1	0	0	0

Adverse/Disparate Impact: A Legal Framework

DISPARATE IMPACT

An unlawful employment practice based on disparate impact is established only if:

1. A complaining party demonstrates that a respondent uses a particular employment practice that causes an adverse impact

   and

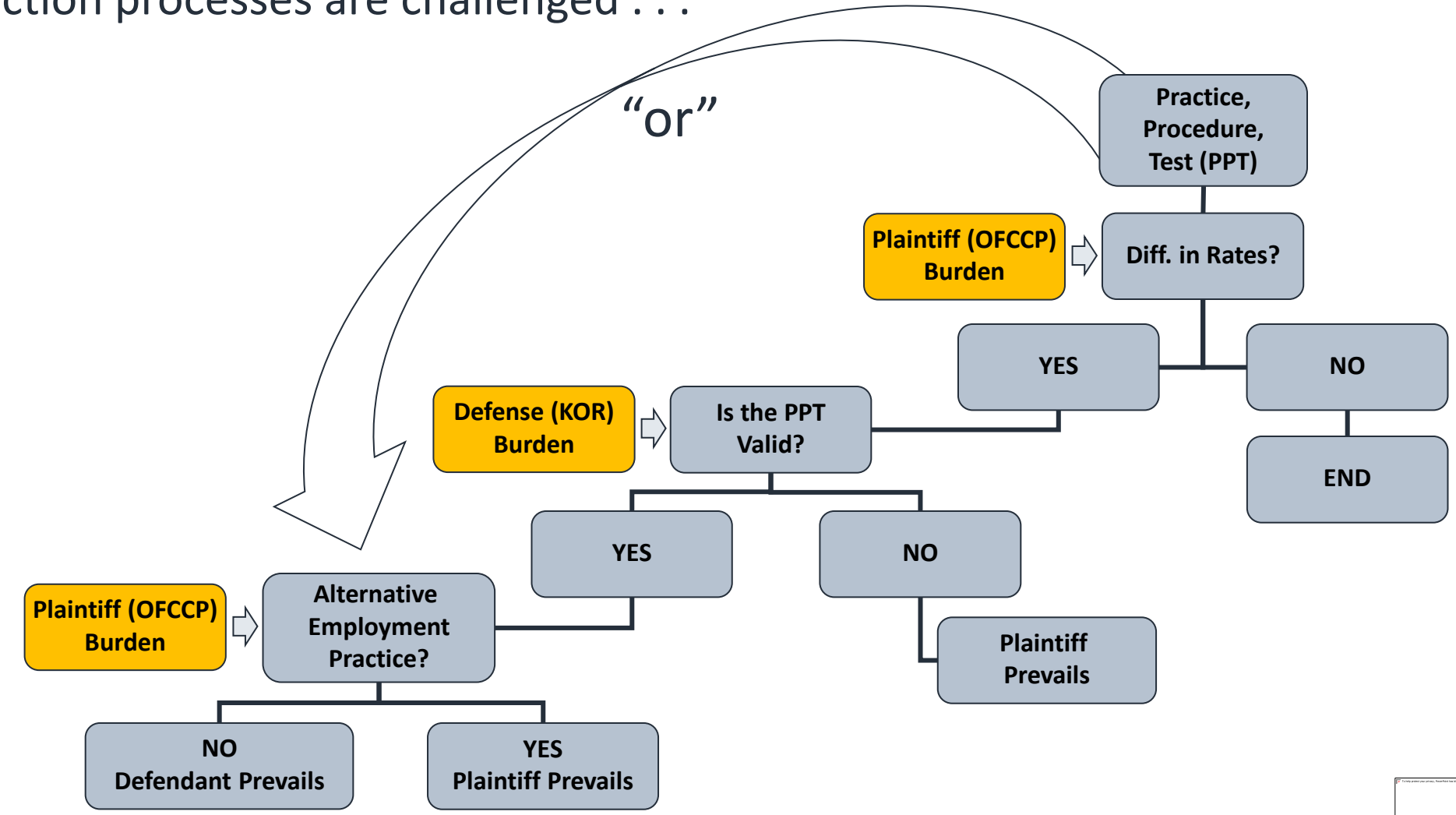
2. the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity

   or

3. the complaining party makes the demonstration described above with respect to an alternate employment practice, and the respondent refuses to adopt such alternative employment practice.

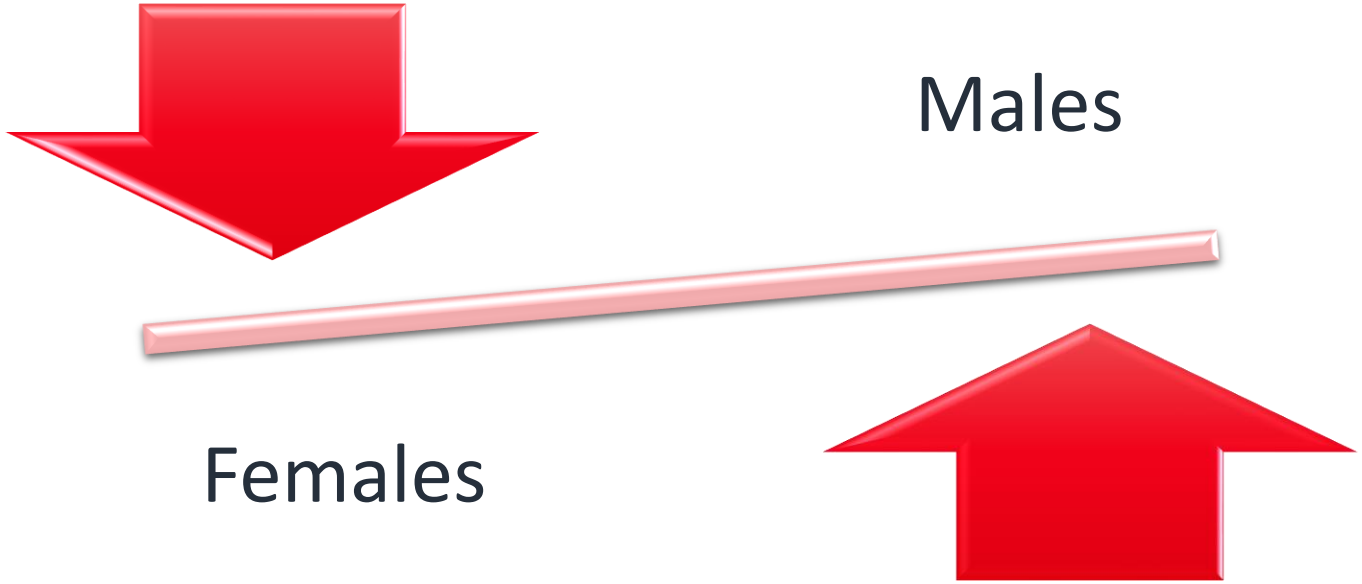
Adverse/Disparate Impact: A Legal Framework

How selection processes are challenged . . .



Plaintiff Burden: Identify if Disparate Selection Rates Exist

Does a practice, procedure or test (PPT) result in **disproportionate selection rates** by gender, race/ethnicity, or age group?



Plaintiff Burden: Identify if Disparate Selection Rates Exist

- Same for hires, promotions, terminations, transfers, etc.
- 2 X 2 Table Comparison
- Impact Ratio Analysis (IRA)
- Fisher Exact / Chi-Square / 80% Test

Men Pass (50)	Men Fail (50)	Men Passing Rate (50%)
Women Pass (25)	Women Fail (75)	Women Passing Rate (25%)

Results in a value indicating if the observed difference in rates is due to chance (i.e., statistically significant).

<u>Important note</u>: Discrimination can impact any group. Make sure to analyze men and individual minority groups as well.

Plaintiff Burden: Identify if Disparate Selection Rates Exist

Significant:

- Plaintiff/EEOC/OFCCP Burden Met
- Validation Requirement
- Additional Data Requests Likely
- Investigation More Likely to Get Ugly

Not Significant:

- Burden Not Met
- No Validation Requirement
- Investigation Less Likely to Get Ugly

Component “Step” Analyses

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Component “Step” Analyses

Title VII of 1964/1991 Civil Rights Act

An unlawful employment practice based on disparate impact is established under this title only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact . . .

Important Note: Enforcement agencies have every right to investigate the practices, procedures, and tests contractors use to screen applicants. However, in the past, due to resource constraints they wouldn’t typically do so unless there was adverse impact in the overall hiring process.

Times have changed!

Component "Step" Analyses

Male v. Female			
Steps	**Starting**	**Completing**	**Result**
Overall (App vs. Hired)	**Male - 100** **Female - 100**	**Male - 50** **Female - 30**	**2.81 SD**
1. Basic Qualifications	Male - 100 Female -100	Male – 79 Female - 77	0.25 SD
2. Test	**Male - 79** **Female - 77**	**Male – 65** **Female - 35**	**4.80 SD**
3. Interview	Male - 65 Female - 35	Male – 60 Female - 32	0.18 SD
4. Final Selection	Male - 60 Female - 32	Male – 50 Female - 30	0.00 SD

Component "Step" Analyses

Important Note: Aside from being legally required, why would an employer want to conduct step analyses?

Adverse Impact Alone ≠ Discrimination

If the employer can "pin" the impact on a specific step, then they are able to use a validity defense. In the absence of this, the enforcement agency is allowed to use the overall (applied v hired) analysis.

Strategies and Recommendations

- Educate managers and decisions makers on the significant disparities
- Ensure applicants aren't being funneled based upon gender stereotypes
- Make sure "analyses reflect reality"
  - Data must reflect reality (do your clean-up)
  - Statistical analysis must reflect reality – it's up to you (or your expert) to ensure the plaintiff/EEOC/OFCCP is looking at things the right way
- Focus on the "big ticket" items
- Find the step causing the impact, then correct it
- **Document. Document! DOCUMENT!** Be able to justify all decisions! Accurate documentation is key! If not, there's a presumption that….! 60-1.12 (e)

Summary and Conclusion

OFCCP remains very active from an enforcement perspective!

- **It is imperative that practitioners (at least conceptually) understand the following:**
  - Evaluating and Comparing Incumbency to Availability
  - Disparity/Adverse Impact Analyses (hiring, promos, terms etc.)
  - Compensation – How it's analyzed
  - Evidence of Outreach/Recruitment Data and Analyses
  - High-volume positions are the low-hanging fruit in an audit (Admin Assistants, Call Center employees, laborers, merchandisers, etc.)
  - Audit and reporting/measuring GFE

Note: Make sure to read/understand your Affirmative Action Plans (especially the analyses/results) – Ask questions and have answers available upon request during the process – Anticipate next steps!

Questions/Comments

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