Record-Keeping with an Emphasis on Adverse Impact Analyses

The following presentation is not to be construed as legal advice. For specific legal advice please consult your corporate counsel or a labor attorney.

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Agenda

- Adverse Impact Analyses: An Overview

- Collecting and Retaining Accurate Data: Analyses Must Reflect Reality

- Component "Step" Analyses

- Creating Disposition Codes

Recent OFCCP Settlements

- Baldor Electric Co.
  - Adverse impact in hiring (Production and Laborer positions)
  - 795 women and minority applicants
  - $2,000,000 in damages
  - 50 job offers to "impacted" group members
- FedEx Ground Package Inc. and FedEx SmartPost Inc.
  - Adverse impact in hiring (Package Handler positions)
  - 21,635 applicants (both genders/multiple races)
  - $3,000,000 in damages
  - 1,703 job offers to "impacted" group members

Adverse Impact Analyses: An Overview

Disparate Impact Analyses:
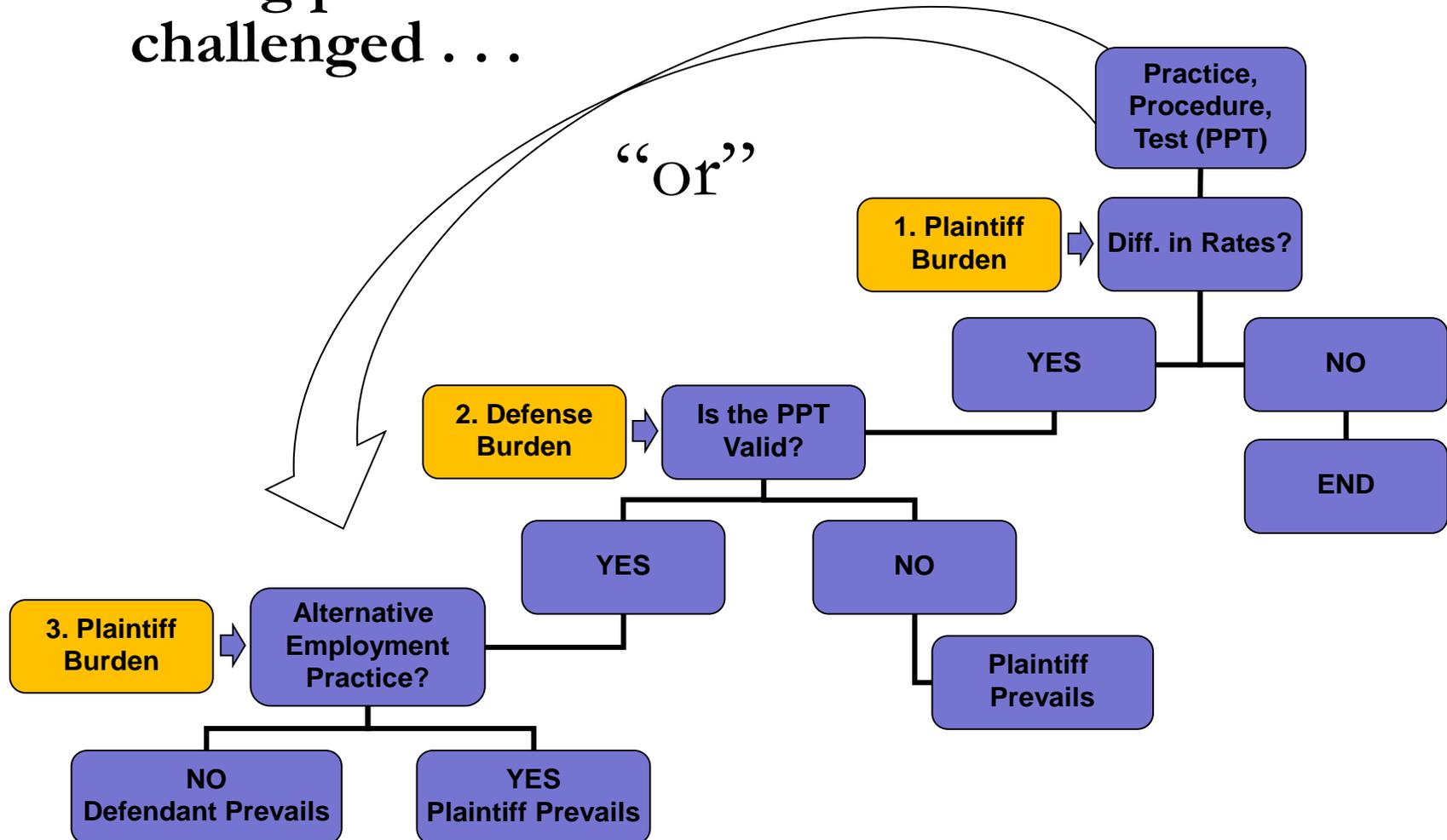# A Legal Overview

An unlawful employment practice based on disparate impact is established <u>only </u>if:

(1) A complaining party demonstrates that a respondent uses a <u>particular employment practice that causes an adverse impact</u>, **and**

(2) the <u>respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity,</u> **<u>or</u>**

(3) the complaining party makes the demonstration described above with respect to an <u>alternate employment practice,</u> and the respondent refuses to adopt such alternative employment practice.

# Title VII Disparate Impact Discrimination Flowchart

How hiring processes are challenged . . .

"or"

Practice, Procedure, Test (PPT)

1. Plaintiff Burden → **Diff. in Rates?**

YES | **NO**

NO → **END**

2. Defense Burden → **Is the PPT Valid?**

YES | **NO**

NO → **Plaintiff Prevails**

3. Plaintiff Burden → **Alternative Employment Practice?**

NO Defendant Prevails | **YES Plaintiff Prevails**

Burden 1 (Plaintiff): Selection Rate Comparison

Evaluate whether a (facially neutral) practice, procedure or test (PPT) results in **disproportionate selection rates** by gender, race/ethnicity, or age group.

Males

Females
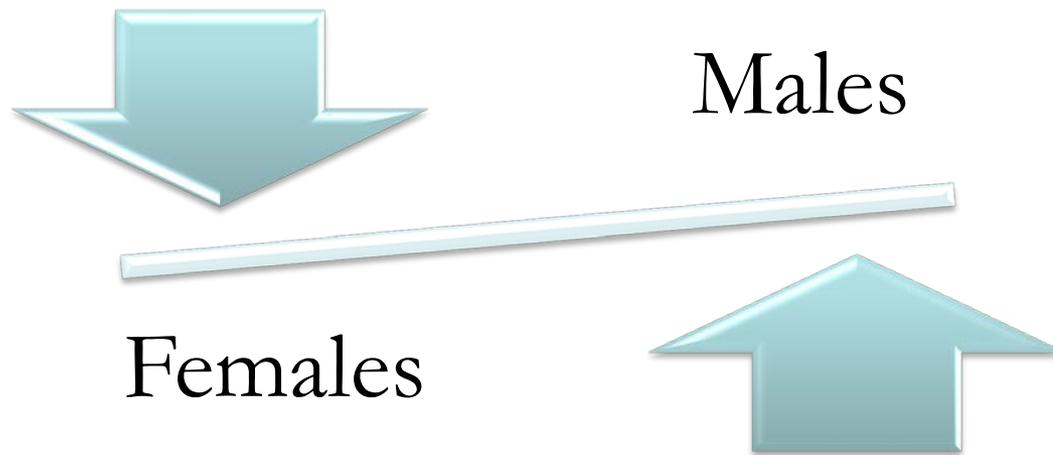
Burden 1 (Plaintiff): Selection Rate Comparison

- Adverse/Disparate Impact Analysis
- Impact Ratio Analysis (IRA)
- 80% test

| Men Pass (50) | Men Fail (50) | Men Passing Rate (50%) | Results in a value indicating if the observed difference in rates is not likely due to chance (i.e., statistically significant). |
| Women Pass (25) | Women Fail (75) | Women Passing Rate (25%) | |

Burden 1 (Plaintiff): Selection Rate Comparison

Job Group 1: Male v. Female (Overall Hires Analysis)				
Step	Start	Complete	Completion Rate (%)	Result
Overall (App vs. Hired)	Male - 100 Female - 100	Male - 50 Female - 30	50.0 30.0	2.81 SD

- This overall analysis (i.e., applied v. hired) is the basis for the OFCCP investigation
  - This is the data that is typically submitted in response to the audit
  - If there is impact (i.e., a significant disparity), then the audit becomes much more invasive/costly/time-consuming/burdensome
  - Extreme caution/care should be taken to "clean" the data (i.e., ensure the data accurately reflects reality)
  - Employers do not want to "ring a bell" with the OFCCP if the data is not accurate

Question: So if Adverse Impact is Such a Big Deal, What Can I Do About It?

Answer: By Collecting/Retaining Accurate Data (i.e., Analyses Must Reflect Reality)

Analyses Must Reflect Reality

Analyses **must** reflect reality!

Sounds simple . . . right?!?!?!

Incorrect applicant data is the number one data-related technical violation in OFCCP conciliation agreements.

As recruiters and hiring managers, you are on the front line in the battle to collect accurate data . . . the data must "tell the story" of each applicant

Analyses Must Reflect Reality

- The proper collection of applicant data involves a lot of moving parts:

  - A robust Applicant Tracking System (ATS)

  - Proper configuration of the ATS

  - Proper usage of the ATS by all personnel

  - Proper report generation

  - Proper integration of the regulations

- It is rare that all of these parts work perfectly together to generate accurate data on all occasions, as a result, "clean-up" is often necessary

Analyses Must Reflect Reality

The Four (4) Prongs of Internet Applicant:

1.   The job seeker submits an expression of interest in employment through the *internet or related electronic data technologies*;

2.   The contractor *considers* the job seeker for employment in a *particular position*;

3.   The job seeker's expression of interest indicates the individual possesses the *basic qualifications* for the position; and

4.   The job seeker at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, *removes himself or herself from further consideration* or otherwise indicates that he or she is no longer interested in the position

Analyses Must Reflect Reality

- Remove all applicants who:
  - **Actively** withdrew (e.g., no longer interested, accepted another position, moved away, etc.)

  - **Passively** withdrew (e.g., does not respond to repeated attempts to contact, no show to test/interview, etc.)

  - Were **not willing** (based on salary, location/commute, shift, etc.)

  - Were not "**considered** for a **specific position**"
    - Considered: evaluated the applicant's "substantive criteria" (i.e., opened the record and looked at it)

    - Specific position: Specific job title and/or requisition

    - Considering an applicant requires that you retain their data for (currently) two years, however, the record is only included in the analyses if they are considered for a specific position

Analyses Must Reflect Reality

- Remove all applicants who:

    - *Applied after the last hire* of the at-issue time period (they couldn't have been considered for any of the at-issue hires)

    - *Applied more than once* to the same position/requisition (leave one record - leaving all records will yield misleading results)

    - *Were hired elsewhere* within your organization (leave them as applicant for the position they were hired into - leaving all records for the same applicant will yield misleading results)

    - *Did not meet the "Basic Qualifications"* (Remember to identify which specific BQ was not met)

Analyses Must Reflect Reality

- Also ensure:

  - All applicants are properly dispositioned at the close of each requisition

  - All hires appear in the applicant file (in the proper applicant pool)

  - The job title, gender, and race of the applicant record is reconciled with the hires file

You Mean We're Required to Analyze All of the Steps Too!

Component "Step" Analyses

Title VII of 1964/1991 Civil Rights Act

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

Translation: Employers **must** be able to identify who took/passed/failed **each** step within a selection process.

Component "Step" Analyses

Important Note: Enforcement agencies have every right to investigate the practices, procedures, and tests (i.e., the individual "steps") 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	**Start**	**Complete**	**Completion Rate (%)**	**Result**
Overall (App vs. Hired)	**Male - 100 Female - 100**	**Male - 50 Female - 30**	**50.0 30.0**	**2.81 SD**
1. Basic Qualifications	Male - 100 Female -100	Male – 79 Female - 77	79.0 77.0	0.25 SD
2. Test	**Male - 79 Female - 77**	**Male – 65 Female - 35**	**82.3 45.5**	**4.80 SD**
3. Interview	Male - 65 Female - 35	Male – 60 Female - 32	92.3 91.4	0.18 SD
4. Final Selection	Male - 60 Female - 32	Male – 50 Female - 30	83.3 93.8	0.00 SD

Component "Step" Analyses

- At the heart of a well-developed (compliant) ATS are disposition codes.

- A disposition code is a device that identifies ALL specific decisions or actions that have been taken relative to an Applicant.

1. Application Received
- **Considered for a Specific Position**
- **Not Considered for a Specific Position**

2. Qualification Review
- **Pass Basic Qualifications**
- **Fail Basic Qualifications**

3. Written Test
- **Pass Written Test**
- **Fail Written Test**

4. Invitation to Interview
- **Invited to Interview**
- **Not invited to Interview**

5. Interview/Hired
- **Passed Interview/Hired**
- **Failed Interview**

Disposition Codes

Will one set of disposition codes suffice?

Job #1: General	Job #2: Above-Entry	Job #3: Entry-Level
1. Application Screening	1. Application Screening	1. Application Screening
2. Written Test	2. Written Test	2. Data Mgmt Technique
3. Selection for Interview	3. Selection for Interview #1	3. Interview
4. Interview/Hire	4. Interview #1	4. Hire
	5. Selection for Interview #2	
	6. Interview #2	
	7. Post-Offer Assessments	
	8. Hire	

What if all jobs were forced to use the same codes? How would you analyze Interview #2 if the code simply states "Passed Interview"?

Creating Disposition Codes

- Step 1: Choose a high-volume, entry-level position
  - This will help to prioritize based on legal exposure and number of applicants/hires
- Step 2: Create a flowchart of the selection process
  - This is helpful in the event of an audit, and will also be beneficial when creating disposition codes
- Step 3: Create disposition codes aligned with each step in the selection process
  - Balance it when create enough codes to capture all necessary data, but not too many that can become overly cumbersome
  - Codes must allow analysis of each step
  - (Ideally) Include secondary codes to track more granular detail (e.g., which BQ did they fail, which post-offer assessment did they fail, etc.)
- Step 4: Create additional codes that allow for refinements based on the definition of internet applicant (e.g., withdrawals, not willing, etc.)

Sample Disposition Codes

1. Application Received

2. Not an Applicant
   a) Did not complete online application process
   b) Lied on application
   c) Not considered for a specific position

3. Not Interested
   a) Shift
   b) Location
   c) Salary
   d) Hours

> This is just a starting point – specific disposition codes must be created to match your organization's hiring/selection processes.

Sample Disposition Codes

4. Passed Basic Qualification Screening
5. Failed Basic Qualification Screening
   a) Age
   b) Licenses (ex. CDL)
   c) Lifting (ex. 50lbs.)
   d) Education (ex. Bachelor's Degree)
6. Invited to Take Written Test – No Show
7. Invited to Take Written Test – Unable to Contact
8. Failed Written Test
9. Passed Written Test – Forwarded to Specific Requisition
10. Not Selected for Interview

Sample Disposition Codes

11. Invited for Interview – No Show
12. Invited for Interview – Unable to Contact
13. Failed Interview
14. Offer of Employment – Declined
15. Offer Accepted – Failed Drug Test
16. Offer Accepted – Failed Medical
17. Offer Accepted – Failed Background
18. Offer Accepted – No Show
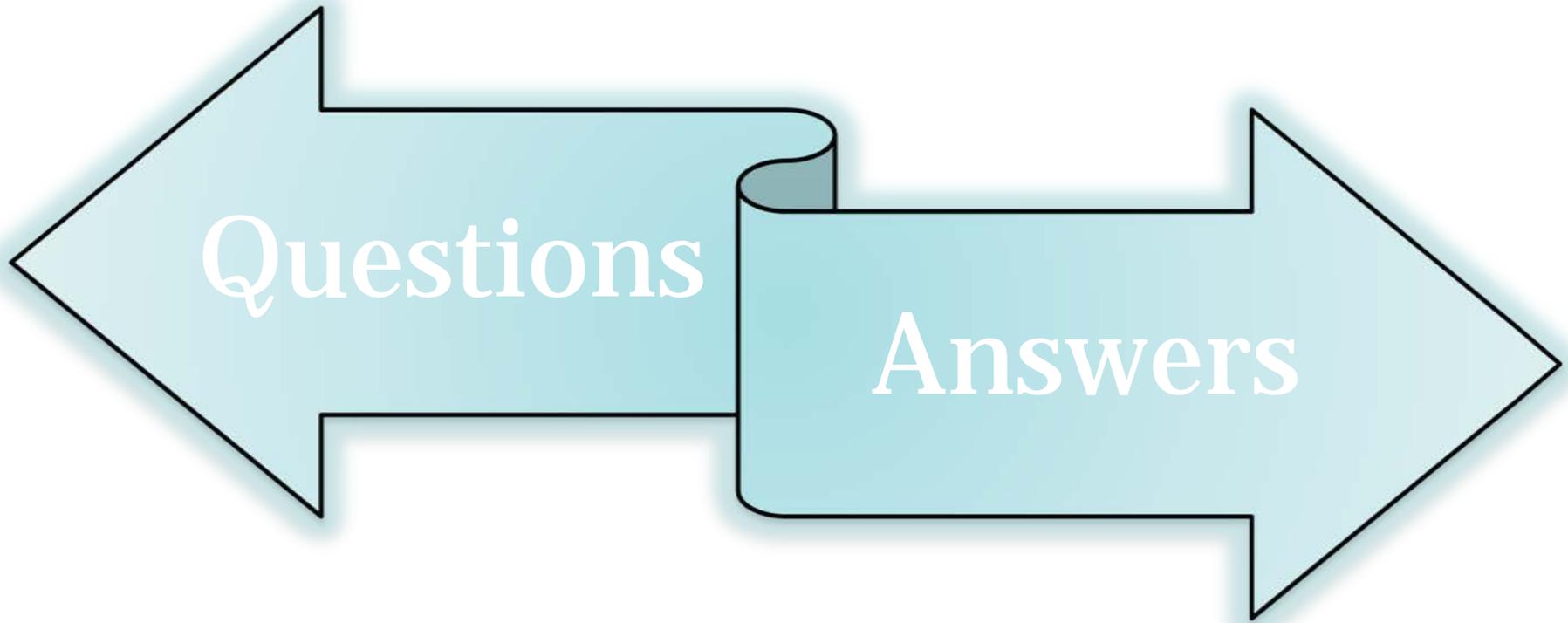19. Offer Accepted – Hired

Legal Implications for Employers

1. Lack of recordkeeping and documentation is the number one data-related technical violation in conciliation agreements

2. The OFCCP's primary focus remains adverse impact in the hiring process (which is intimately tied to the ATS)

3. Lack of proper recordkeeping allows enforcement agencies and/or plaintiff attorneys to make an "adverse inference" argument (i.e., infer guilt because you, the employer, did not collect the data you are required to collect, therefore you are guilty)

4. An inability to analyze the steps in the selection process leaves an employer vulnerable and unable to rebut overall adverse impact

5. Adverse impact in hiring leads to millions of dollars in "make-whole" relief by the OFCCP

6. Irrespective of the OFCCP, tracking this information is required by law and can leave employers vulnerable to Title VII claims (where the serious damage can occur)

Summary and Recommendations

1. Accurate and detailed applicant data is crucial to ensuring "analyses reflect reality"

2. Collecting accurate and detailed applicant data requires a comprehensive strategy including:

    – A robust Applicant Tracking System (ATS)

    – Proper configuration of the system to track applicants throughout the selection processes

    – Proper training on usage of the system

    – Proper reporting of data and usage of the system

    – Periodic evaluation and monitoring of data within the system with feedback for users

3. Recruiters and hiring managers are on the front lines when it comes to collecting and retaining accurate and complete applicant data