The Top 10 Imperatives You Need to Know About Adverse Impact

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Nothing is to be construed as legal advice, other than it's a good idea to use lawful procedures.
WHY I'M HERE

We don't need your business.

But if you hand us an adverse impact case, we'll take it.

Systemic discrimination cases are a priority; by its nature, adverse impact is systemic.
ADVERSE IMPACT: DEFINITION

- Facially neutral selection mechanism.
- “Substantially” different rate of selection that works to the disadvantage of members of a legally protected class (e.g., race, sex, ethnic group).
- Does not simultaneously involve disparate treatment; intent is otherwise not relevant.

(But there are some variations.)
ADVERSE IMPACT: REASONS

- Chance
- Measurement problems
- Test score use
- Difference in group distribution size
- Reliable subgroup differences in approach to test-taking
- Test bias
- True population differences
1. ADVERSE IMPACT BASICS

- Plaintiff establishes prima facie case by showing of numerical disparity.
- Defendant rebuts prima facie case by proving (burden of persuasion) that the selection procedure is job-related and consistent with business necessity.
- Plaintiff proves less discriminatory alternative.

Variations with ADEA ("reasonable factor other than age") and ADA ("tends" to have impact).
1. TAKEAWAYS

• The basic paradigm still holds.
• Which law is involved may make a difference in what plaintiffs can assert and what employers have to defend.
• Actual cases can be much more complicated than the basic paradigm would imply.
2. CONCEPTUAL BLURRING

- Adverse impact vs. pattern-or-practice
  Intent: *Griggs vs. Teamsters*

- Persistence: Impact becomes treatment (*U.S. v. NYC*)?

- Not always neutral procedure (*Adams*)

- For “unconscious bias?”

- Not always numerical disparity (*Hernandez*)
  For everything, just ADA, or nothing?
2. TAKEAWAYS

- A suit can be brought under both treatment and impact theories, to be resolved later.
- Make your intent clear.
- Do not neglect ongoing adverse impact—even with an old validation study in place.
- “Unconscious bias,” if viable, will not fall through the cracks between impact and treatment.
- Anticipate a practice's potential adverse impact.
3. AGGREGATION AGGRAVATION

PART 1: WHEN TO COMBINE

• Same procedure applied across different time & space: pool instances for AI calculation
• What if there are variations (applicant pools, cut scores, local discretion)?
• Unified process or multiple hurdles (*Kaplan*)?
3. TAKEAWAYS

• Know your own operation—what’s similar and what’s different across units, time periods, or procedures.

• Know where the decision points are in your process, including situations where data may enter the decision process more than once.
4. CALCULATIONS

- Four-Fifths Rule versus statistical significance
- Applicant flow versus labor pool
- “2 or 3 standard deviations,” Fisher's Exact Test, and mid-$p$
- Assumptions
- “Infinite variety:” Courts will take anything (or several things) that look reasonable (Bazile)
- EEOC asking SIOP about this topic
4. TAKEAWAYS

- There are no definitive answers.
- Don't base everything on one approach.
- State your approach to avoid defaulting to the other side's, or to the court's.
- Courts will not take junk arguments, but may be inclined to hear plaintiffs who have “something.”
5. WHAT GROUPS TO COMPARE

- EEOC analyses follow theory of the case.
- UGESP Q&As: race/ethnic comparison, sex comparison.
- Every major group against every other?
- An omnibus test, plus subsequent partitioning?
- Assumptions again.
5. TAKEAWAYS

- Is the analysis to establish a prima facie case, or “just looking” (e.g., self-audit)?
- Is it just bad methodology?
- Apart from statistical niceties, has a practical problem been exposed?
6. STATISTICAL AND PRACTICAL SIGNIFICANCE

- Short answer: No necessary correspondence.
- Better answer: start of discussion, different issues
- Large numbers $\rightarrow$ certainty of difference
- Effect size: Cohen’s $d$, correlation, 4/5s Rule (with flip-flop rule?), shortfall
- Scientific journals expect effect size
- Court cases: *Apsley*, *Stagi*, *Teamsters*, *Matrixx*
6. TAKEAWAYS

• Courts may be disinclined to increase plaintiff’s initial burden.

• Defendant can always argue that difference is not “substantial;” plaintiffs can argue “substantial” although not statistically significant.

• Shortfall seems a natural practical measure, but with what parameters?

• What is the statistical standard for practical significance (see Cohen, Murphy & Jacobs)?
“Divide and Conquer:” small units where statistical significance tests likely inconclusive.

Pooling together all units may be inappropriate: Simpson’s Paradox (UC-Berkeley case)

Applicant flow: Cochran-Mantel-Haenszel test for group differences across units, Breslow-Day test for consistency of differences

Availability: generalized binomial test

Another EEOC question for SIOP
7. TAKEAWAYS

• Slicing-and-dicing the data into small units will not necessarily defeat statistical significance tests.

• As with all aggregation, understand how units are the same or different regarding selection practices, labor pools, etc.

• Statistics should follow the theory of the case.
8. HOW TO COUNT APPLICANTS

- “Frequent Filer” problem (Dunleavy et al.)
- Multiple consideration
- Deficient demographics
- Expectations of applicant-selectee proportionality
- Context variables explain subgroup differences
- Expanded use of industry information (Census, EEO-1) is a recurring idea
- Subclasses of protected classes
8. TAKEAWAYS

• “Ignorance is bliss” on demographics not likely to hold up.

• Look to commonly-accepted practices (e.g., Cohen et al.) and apply sensibly.

• If applicant gets a fresh consideration, then generally it’s a fresh applicant; frequent filer is a possible exception to that rule.

• Document anomalies that may be driving adverse impact and any adjustments.
9. FUTURE OF ADVERSE IMPACT

• Pundits discuss “EEOC” or “court-invented” theory
• Make it all pattern-or-practice?
• Labor pool and population ability distributions
• “Class plus” cases: subsets of protected classes
• Populations, samples, and comparitors
• “Infinite variety” of statistical proof
9. TAKEAWAYS

• Expectation of applicant-selectee proportionality may be unrealistic in some cases, but no viable alternatives yet.

• While context variables explain subgroup differences, the selection procedure triggered the adverse impact.

• Expanded use of industry information (Census, EEO-1) is a recurring idea; know if you’re an outlier, and why.

• Subclasses of protected classes need to be sorted out.
10. SNAKE OIL SOLD HERE

- BQs can’t have adverse impact.
- My process never has adverse impact.
- There’s no AI with this instrument, EEOC guaranteed.
10. TAKEAWAYS

• There are no guarantees in this business.
• Adverse impact is not completely controllable.
• For legal/historical reasons, employers have the burden of explaining it if it occurs.
• Lack of clear-cut rules can make explaining difficult.
• In the end, it’s a rational argument backed by data that will carry the day regarding adverse impact (and test validation).
REFERENCES


FEDERAL COURT CASES

Adams v. City of Indianapolis, No. 12-1874 (7th Cir. February 4, 2014)
Apsley v. Boeing, 691 F.3d 1184 (9th Cir. 2012)
Bazile v. City of Houston, No. H-08-2404 (S.D. Texas February 16, 2012)
Stagi v. AMTRAK, No. 09-3512 (3rd Cir. August 16, 2010)

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