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IS YOUR HIRING PROCESS BIASED?

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It sounds like a simple question but it's really a bit more complicated. That is because it can be answered in several ways. Ideally your hiring assessment, whether it is an interview, written test, or other form of assessment, *should* be biased—but only against poorly qualified applicants. In other words, if your test is valid it will certainly discriminate between those who can successfully perform the job and those who cannot.

The question then becomes, "is the assessment biased against or in favor of a specific *protected group*?" This is important because, in most cases, it is highly unlikely that an entire group is less able to perform a job than another. A rare exception is that of highly physically demanding jobs where it may be possible that males are much more likely to be able to excel than females. Still, if a female is able to perform the work, the assessment should never screen her out.

But how can one tell if a given hiring assessment is biased? There are two ways of answering this question. One looks internally at the assessment instrument itself. The other focuses on results of the assessment.

First, let's look at the test as a unit. If it can be assumed that the skills necessary to perform a job are randomly distributed among those applicants who meet the minimum qualifications for that job, then it should also be assumed that the average score earned on the assessment by each of the groups should be similar. This is not to say the average scores of the two groups will be exactly the same. They should just be similar.

The next question then is one of determining if the difference in average scores for each of the groups (e.g., minorities and non-minorities) is so large that one can say, "this result surely is not due to chance!" In this case it means there are real differences in how the two groups perform on the assessment. *Even* this doesn't "prove" that the test is exhibiting unfair bias. It would become an issue of determining if the test is validly measuring the skills necessary for the job. If it is, the test could still be appropriate for use. Demonstrating validity is a discussion for another day, however.

Another way of assessing test bias is through looking at actual test scores. In other words, regardless of the average scores of two groups on the assessment, what is the impact on actual *hiring decisions*? Is there a statistically significant difference in the "passing" or "selection rate" based on the test scores? If there is, it means that one group is "adversely impacted" by the use of the test. This is called a Selection Rate Comparison.

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THE STRATEGIC SIDE OF OFCCP COMPLIANCE

Nearly every manager in every organization is likely to say that discrimination is both wrong and that it negatively impacts a company's reputation, productivity, and overall competitiveness. Sometimes it can provide a challenge to the company's very survival.

For all of these reasons, it is a wonder that discrimination persists—especially given the fact that it can prove very expensive. Still, year in and year out, the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) settle cases of gender, race, age, and disability discrimination for amounts rising well into the millions of dollars.

As federal contractors are well aware, they are required to submit annual data on hiring and compensation to the government which, in turn, analyzes the data to identify and aggressively attack situations where discrimination appears to have taken root. This data collection and reporting task can be labor intensive on the part of the contractor and many see this as a burden.

However it can also have a positive side. Because they are required to report these data, contractors are forced to spend time with their numbers in a way that they might otherwise have not. In addition, the entire activity provides contractors with an opportunity to proactively conduct self-examinations. These proactive examinations allow an organization to diagnose and address potential problems before they grow into costly injuries to reputation and pocket book—not to mention employee morale.

The key to making the annual self-examination less burdensome and more effective is to make it an integral part of doing business and not simply an issue of compliance. While it may take time, try to integrate the required data queries into your HRIS. It may take a while, but with slow and steady progress you will eventually reach your goal.

Having the data, however, is not enough. It must be analyzed in a thoughtful and efficient manner. Much of this can be automated. Verifying the extent to which your recruitment pool represents your applicant pool requires simple arithmetic. Sometimes, however, it can be much more difficult. Analyzing compensation, for example, can require advanced statistics to determine whether differences in pay are legitimate or if they actually are signs of possible discrimination. Evaluating passing rates on hiring examinations can also require advanced statistical tests to determine whether there are signs of adverse impact.

While these later analyses can seem difficult, they are not beyond the ability of a generally intelligent analyst who is willing to devote the time and effort to master the techniques. Spending this time, or else hiring the expertise to help you, is particularly important because courts find this kind of statistical evidence most convincing when it comes to passing verdicts and assigning fees and liabilities.

So, next time you go through the annual ritual of gathering, analyzing, and preparing your data to submit to the OFCCP, focus on being proactive rather than either being reactive or focusing simply on compliance. While it will have legal implications, it may well have positive business repercussions as well.

For more information on best practices in identifying adverse impact:

<http://www.shrm.org/LegalIssues/FederalResources/Pages/AdverseImpactAnalyses.aspx>

California Industrial Welfare Commission Wage Orders – 1 laminated sheet

All California employers, regardless of size, are required to post the appropriate Wage Order for their industry. All together, there are 17 Wage Orders. Pick the one for your industry and get a single sheet that is laminated in plastic to prolong its life, then put it up on the wall with your other employment/labor law posters. And, you're done. Otherwise, print 15 to 30 pages on 8.5" X 11" paper and nail the package to your wall.



<http://www.management-advantage.com/products/recruit2.htm>

POTPOURRI

■ Court upholds OFCCP's jurisdiction over healthcare providers

A federal court ruled has confirmed that three hospitals providing services to U.S. government employees and receiving payments from a health plan for these services falls under the jurisdiction of the Office of Federal Contract Compliance Programs.

Source: <http://www.jdsupra.com/legalnews/healthcare-update-no-2-may-2013-cou-13668/> *

■ Federal contractors required to use new EEO census tabulation beginning in 2014

The OFCCP has posted a notice on its website that beginning on or after January 2014 federal contractors will be required to use the 2006-2010 EEO Tabulation that was released by the federal Census Bureau in November 2012. This will replace the 2000 special EEO file that has been used by federal contractors and subcontractors since 2005.

Source: http://www.dol.gov/ofccp/ofccpnews/census_eeo_tab_508c.pdf*

■ OFCCP settles hiring bias claim with Formica Corp. for nearly \$300,000

In another example of the OFCCP continuing to aggressively seek out employers whose hiring process exhibits bias in violation of Title VII of the Civil Rights Act, Formica Corp, was required to pay more than \$290,000 in back wages and interest to 400 qualified African Americans and hire 20 African American Production Workers. The claim was that Formica failed to ensure that all qualified applicants received equal consideration without regard to race.

Source: U.S. Department of Labor Newsletter, April 25, 2013

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IS YOUR HIRING PROCESS BIASED? *(Continued from page 1)*

As discussed above, "adverse impact" does not necessarily mean that the test is biased in an unfair or illegal way. This is true only if it can be shown that the test is not valid and that the adverse impact is based on factors that are unrelated to the job.

A simple way of conducting a selection rate comparison is to apply what is known as the "80% Rule." While not a legally binding methodology, it provides a good rule-of-thumb to determine whether adverse impact exists. Essentially it requires an analyst to determine whether the passing rate of the lowest scoring group is at least 80% of the rate for the highest scoring group.

A better and more legally defensible method is the use of a statistical test known as Fisher's Exact Test. This test calculates the exact probability of observing a given difference in passing rates between groups *purely by chance*. If the test shows that there is less than a 5% chance of seeing a difference in passing rates as large as was observed, then it means the result is statistically significant and adverse impact exists.

Especially in the presence of adverse impact, it is essential that your organization determine whether the hiring assessment is "job related and consistent with business necessity." It is considered essential that a careful review is made to determine whether an alternative assessment methodology is available that is essentially as valid but which is unlikely to exhibit adverse impact. Following these techniques is a good way to help identify potentially problematic hiring assessments and address them before they lead your organization into a costly legal minefield.

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