

# Understanding Adverse Impact

## Overview

In most countries, companies are obligated by law to make talent decisions in a fair and unbiased manner. This includes decisions you make with employment assessments. On one hand, assessments increase fairness by providing objective data in your decision-making process. These objective data serve can help mitigate sources of subjective bias, from purposeful discrimination to more subtle forms of unconscious biases. On the other hand, assessment tools are not perfect. Some types of assessments have the potential to lead to score differences for people of different protected groups (e.g., gender, ethnicity, age). These assessments often appear neutral on the surface, but if scoring differences lead to a discriminatory effect, then adverse impact is occurring.

This document provides a high-level explanation of adverse impact, the legal implications, and how companies like yours can work to reduce legal risk. For further information or an evaluation of your own talent decision-making approach, we strongly recommend meeting with your own employment attorney.

## What is the EEOC, and how did it come about?

The Equal Employment Opportunity Commission (EEOC) was created in the U.S. as part of the Civil Rights Act of 1964. The EEOC enforces federal laws making it illegal to discriminate against a job applicant or an employee based on the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 years or older), disability, or genetic information. Employers with at least 15 employees are covered by the EEOC (although that number is 20 employees in age discrimination cases). While this document focuses on the use of assessments in hiring, EEOC enforcement applies to all work situations, including hiring, firing, promotions, harassment, training, wages, and benefits. In short, the EEOC has the authority to investigate any discrimination charges against employers covered by the law.

Although the EEOC was originally formed to reduce instances outright discrimination by race, gender, age, and other prejudice in the workplace, it was later cases like *Griggs v. Duke Power* (1971) which led to the EEOC's oversight on companies hiring procedures. In this lawsuit, the court ruled that Duke Power Company's use of intelligence tests and high school graduation requirements for hiring decisions violated Title VII of the Civil Rights Act because these selection tools deprived African American applicants of equal opportunity in hiring and promotional opportunities. The Court's Majority Decision stated:

What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification...on the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used (*Griggs v. Duke Power*, 1971).



# Understanding Adverse Impact

Initially, the court's decision created more questions than it answered. Employers didn't understand if Title VII's coverage extended beyond written tests to other selection tools, how they should evaluate whether a tool was discriminatory, or how to validate their own selection processes. In 1978, after a few years of turmoil, the EEOC, Office of Personnel Management, Department of Justice, Department of Treasury, and Department of Labor's Federal Contract Compliance Programs (OFCCP) jointly issued the Uniform Guidelines on Employee Selection Procedures to answer some of these questions.

## What are the Uniform Guidelines?

The Uniform Guidelines represent the federal position on preventing discrimination in the workplace; however, they are not legislation. Although they haven't been updated since 1978, they remain the key reference and technical guidelines for many judicial decisions and litigation concerning employment issues in the U.S. The Uniform Guidelines set the standards for the appropriate use of employment testing including:

- The definition of discrimination in testing.
- Appropriate means for validating selection procedures, which may be discriminatory.
- Methods for establishing or implementing cut-off scores.
- Documentation guidelines.
- The requirements necessary for employers to legally defend employment decisions based on selection procedures or the overall selection process.

The Uniform Guidelines define selection procedures to include any measure, combination of measures, or procedures used as a basis for any employment decision—this includes written exams, performance tests, interviews, training programs, work samples, physical requirements, etc. While this often refers to employee selection, it covers many other areas related to talent.

It is crucial to call out one last important fact: the Uniform Guidelines do not lay out any standards or professional guidelines for test construction itself. Many people believe that tests themselves are "EEOC Compliant," but the Uniform Guidelines are specific to your use of an assessment and the impact it has on your hiring decisions, not how the assessments are built or designed.

## What is adverse impact?



The Uniform Guidelines are not written to address disparate treatment, i.e., overt, intentional employment discrimination. Instead, the Uniform Guidelines stop a different type of discrimination which is legally defined as disparate or adverse impact. Unlike disparate treatment, adverse impact does not have to be intentional. It occurs when an employment practice appears neutral on the surface but nevertheless leads to unjustified adverse impact on members of a protected demographic group. It is important to note that adverse impact is not, in and of itself, illegal. You can use a practice or policy that causes adverse impact if you can show that it has a demonstrable relationship to the requirements of the job. This is the "business necessity" defense.



# Understanding Adverse Impact

The Uniform Guidelines provide a rule of thumb known as the 4/5ths or 80 percent rule as a practical way to determine if a process is resulting in adverse impact. The 4/5ths rule involves comparing the selection rate (or passing rate) for the group with the highest selection rate (focal group) with the selection rates of the other groups (subgroups). A selection procedure violates the 4/5ths rule if the selection rate for the subgroup(s) is less than 4/5ths of the selection rate for the focal group. When it is less than 4/5ths, this is considered evidence of adverse impact. In court cases, however, more advanced statistical techniques are frequently used and indeed, requested, for evaluating the presence of adverse impact. Therefore, the 4/5ths rule is a good starting point, but if a case ever progresses further, there are other statistical techniques to provide evidence for or against the occurrence of adverse impact.

To illustrate, imagine a company using a physical abilities test to make hiring decisions. At this company, 100 men apply, and 80 of them pass the physical abilities test and are hired. Their selection rate is 80%. 100 women candidates also take the assessment, but only 40 pass the test and get hired. The women's selection rate is 40%. By dividing the 40% into the 80%, we arrive at the selection ratio: 50%. In other words, for every woman who passes the physical abilities test, two men pass. This violates the 4/5ths rule and indicates that the way this company uses the physical abilities test leads to adverse impact in their hiring decision.

<b>4/5<sup>th</sup> Rule of Adverse Impact</b>		
Applicant Pool	100	100
Number Hired	40	80
Selection Rate	40%	80%
<b>Adverse Impact Ratio</b>	<b>0.40 / 0.80 = 50%</b>	

If a hiring procedure results in adverse impact, you can eliminate the procedure, thus eliminating the adverse impact. It is important for your company to monitor the selection rates or pass rates of applicants across all steps of the employment process and over time. If adverse impact is occurring and the employer wishes to continue to use the procedure, you must demonstrate the “business necessity” of the selection procedure. In the example above, the company could continue using the physical abilities test if they could demonstrate that people who do not pass the test are not physically able to do the job. In other words, you must demonstrate a clear relationship between the selection procedure and performance on the job. This process is known as validation.



# Understanding Adverse Impact

Many assessments can result in adverse impact, especially if used improperly. Tools that aren't assessments, like educational requirements, GPAs, background checks, and drug testing can also lead to adverse impact. In addition, more traditional assessments—such as integrity tests, cognitive ability assessments, physical abilities tests, and situational judgement tests—can all lead to degrees of adverse impact. Even something as simple as an English-only reading test may cause of adverse impact. Interestingly, most personality-based assessments tend to show little bias between most protected groups; however, the concern with personality assessments is the extent to which they might reflect psychological disabilities (e.g. anxiety or personality disorders), which might lead to adverse impact on the basis of disability. As a note, the PI Behavioral Assessment has a very strong record of fairness and was built from the ground up to have minimal statistical bias. The PI Behavioral Assessment doesn't measure elements of anxiety or neuroticism that tend to correlate with certain personality disorders, whereas some Five Factor Assessments may be riskier in that respect.

## How do I determine if a skill or ability is job-critical?

The Uniform Guidelines cite three types of validity that can be established for an assessment: content validity, criterion validity, and construct validity. They also document the technical standards for evaluating the strength of the validity.

**Content validity** refers to whether the test accurately represents the domain of the job content, both in terms of including relevant facets and omitting unrelated facets. In other words, an assessment with high content validity contains content that is highly similar and representative of job tasks and performance. A typing test would have high content validity for a job that requires a lot of typing.

**Criterion validity** establishes the statistical relationship between scores on the selection procedure and measures of job performance. The evidence should show meaningful and statistically significant relationships between the predictor (the selection test) and the criterion (job performance). For example, a positive correlation between a cognitive ability assessment and job performance would be indicative of criterion validity.

**Construct validity** is about identifying the extent to which a psychological construct or trait is critical for job performance and is effectively measured by the selection assessment. In this case, the evidence should show data that the selection procedure measures the degree to which candidates possess identifiable characteristics which are important to successful job performance.

There are many other technical details covered in the Uniform Guidelines. For example, a validation study should include a job analysis to support the chosen validity strategy. For example, is typing really a critical component of the job? The guidelines also explain how cut-off scores should be established (e.g., levels consistent with expectations of acceptable job performance). To learn more, we recommend you read the [Uniform Guidelines](#) and speak to an employment attorney or other expert in this field.



# Understanding Adverse Impact

## What happens when there is legal action?

In general, it is preferable to be a good steward of your hiring process so you can avoid adverse impact cases. This involves frequent monitoring of selection rates and conducting job analyses and appropriate validity studies in advance. Preventative steps to avoid a case are wise because once the case has gone too far, defendants (companies) have a 90% lose rate for an average cost of \$1.5 million (Williams, Shaffer, & Ellis, 2013). It sounds scary, but it is equally important to realize that the vast majority of EEOC cases are about the process in which the selection tool is used, not your selection tool itself.

Once a lawsuit is brought forward, the first question that a company must answer is whether their selection tools or overall processes are leading to adverse impact. If not, then the case will end there. If the answer is yes, then the company must show that the selection assessment is job-related and consistent with business necessity. As discussed earlier, this is typically accomplished by running a job analysis and a validation study. Both the job analysis and validation study should be conducted and documented according to the Uniform Guidelines to improve the chances of a favorable ruling. Even if the selection tool is job-related and consistent with business necessity, the case doesn't end there. The plaintiff has an opportunity to identify whether there was an alternative practice—an equally valid, but more fair tool available. Discussion of alternative practices are also outlined in the Uniform Guidelines, and if there is a suitable alternative, then the plaintiff typically wins.

In conclusion, if you use an assessment that results in adverse impact, the first step is to take actions to reduce risk (job analysis, validation study, monitoring selection rates). If a suit is brought against your company, your company needs to prove that the policy or procedure is job-related (e.g., validity) and that no equally valid alternative exists.

## Why use an assessment that leads to adverse impact?

Many tools that can cause adverse impact predict job success well. The reality is that companies wanting to hire top talent might need to use tools that have the risk of adverse impact. Remember, the key question is whether what you are measuring is job-related and a business necessity. For example, if you need people who will be driving trucks, then making them take a driving test is acceptable, even if a protected group disproportionately fails the test. In addition, it is probably unfair to your current staff to hire incompetent people. If your only hiring goal is to be fair, then you may lose your competitive talent advantage.

Do you feel confused? You aren't alone. The balance of fairness and validity is known in the employment sciences world as the diversity-validity dilemma. In an ideal world, companies would be able to find selection tools that could identify top talent while still building a diverse workforce. The reality, however, is that some of the most predictive selection tools tend to have the greatest differences in scores by gender or race.



# Understanding Adverse Impact

## How can I protect my business?

A thoughtful implementation of selection assessments typically reduces legal risk because it puts more objectivity into the hiring system. At the same time, it is important to be aware of the potential risks associated with any selection tool. Here is some guidance to consider:

- 1. Hire an employment law professional.** While this document outlines some highlights around employment law, there is a lot more to the design of a legally defensible selection system than could be covered in this article. When in doubt, always consult with an expert.
- 2. Be responsible.** Be a good steward to your overall selection processes. This starts at the beginning. Conduct a job analysis to identify what knowledge, skills, or abilities are needed on the job. Use that information when writing the job description, choosing the assessments, and planning the interview process.
- 3. Monitor your candidate flow.** At least once a year, conduct adverse impact analyses on your entire selection process and the tools that are used for it. The analyses should look at each step individually, starting with resume reviews and phone screening. Make sure data are carefully recorded (according to the EEOC guidelines) and that you know how to conduct the adverse impact analyses.
- 4. Do a validity study (if possible).** There are different forms of validity. Some approaches involve the judgement of subject matter experts (e.g., content validity) and are more easily documented. Criterion validation studies can be powerful tools for creating statistical links between an assessment and job performance, but to be statistically valid, they often require many people to participate in the study. For roles with very few people, it may not be possible to do a criterion validation study.
- 5. Use validated and reliable assessments.** If a lawsuit is brought against your company, you will sleep better knowing that you have assessments that meet psychometric standards. The EEOC does not mandate how tests should be built, but to demonstrate they are job-related, they should be built according to professional standards and have strong evidence that they work as intended.
- 6. Choose the right implementation approach.** Some companies use assessments in a pass/fail manner while others recommend using assessments as one of many data points. In pass/fail models, the adverse impact analysis falls squarely on the tool being used. If you are using something that may have some potential for adverse impact, it may be better to implement a “one of many data points” approach and to monitor the hiring process to make sure that is being heeded (e.g., that people really are treating it as just one data point).
- 7. Work with experienced vendors.** Qualified assessment providers understand the nuances of the law and will help keep you safe (or make you aware of your legal risk). But remember, at the end of the day, EEOC compliance is your company’s responsibility.



# Understanding Adverse Impact

## References

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