DirectEmployers Association

DE Masterclass | How To Test Whether The AI You Are Using For Employment Selections Is Lawful

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Today's Presenters

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DISPARITY ANALYSES

Rejected applicants and employees will attack Artificial Intelligence ("AI")-aided Human Resource selection systems (for hire/promotion/transfer/compensation, etc.) using one or both of the following two class-based (or "systemic") statistically-based discrimination law causes of action:

1) Disparate Treatment (intentional) class-type discrimination claims aka "Disparity Analyses;"

and/or

2) Disparate Impact class-type discrimination claims (no bad employer intent) known as "Disparate Impact Analyses"

DISPARITY ANALYSES (con't)

- "Disparity Analyses" are different from "Adverse Impact Analyses," although they are both statistical analyses.
- The US Supreme Court created "Disparity Analyses" in two decisions in 1977 as the way for Plaintiffs to prove up an intentional discrimination law cause of action on a "class-type" basis. [*Hazelwood School Dist. v. United States*,433 U.S. 299 433 (1977) *and Teamsters v. United States,* 431 U.S. 324 (1977)]

- OFCCP calls these "IRAs" *("Impact Ratio Analyses")*

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DISPARITY ANALYSES (con't)

- "Disparity Analyses" allege a "long-lasting" "pattern and practice" (meaning over a period of usually 2-3 years, or more) of unlawful exclusions of members of a Protected Group (i.e. Black/White/Female/Male, etc.) from employment opportunities as demonstrated through proof of a statistical disparity in selections (between the "Most Favored Group" as compared to all other Protected Groups: Whites; Blacks; Hispanics; Asians; Native Americans, etc.)
  - The noted statistical disparity must also be "gross" in nature (i.e., 2-3 Standard Deviations different from what we would expect in the absence of discrimination or some other explanation).
- Such a "long-lasting" and "gross" statistical disparity must thus be the "standard operating procedure" of the employer

"ADVERSE IMPACT" ANALYSES

- An "Adverse Impact Analysis," by contrast to a "Disparity Analysis," examines any "neutral" and "specific" and "particular" employer selection policy (written) or practice (what the employer does) to determine whether the application of that policy or practice as to any Protected Group(s) produces a statistical disparity of 2 or more Standard Deviations from the rejection rate of the Most Favored Group (not the vague "2-3" standard deviations used as proof in a "Disparity Analysis)

"ADVERSE IMPACT" ANALYSES (con't)

- The U.S. Supreme Court created this theory of employment discrimination law in the case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) to address the "effects" of employer policies or practices NOT INTENDED to unlawfully discriminate but which nonetheless had a disproportionate statistical effect on the employment rights of Protected Group members

"ADVERSE IMPACT" ANALYSES (con't)

❑ THE GUTS OF IT: Unlike a "Disparity Analysis" (which combines in its statistical analyses, for example, all "Applicants" during the at-issue period of time and all the usually very many different reasons for rejection…or what I call a "Bouillabaisse Analysis"), an "Adverse Impact Analysis" zeroes in on a neutral, specific and particular employment policy(ies) or practice(ies)

❑Example: like a pre-screen employment test (imagine a background check) or an employment test for hire or promotion to see if that specific neutral and particular policy or practice is causing the disproportionate rejection from employment

- Could be one "knockout" question on a "paper & pencil" test

"ADVERSE IMPACT" ANALYSES (con't)

- Also, there is no requirement that the proponent of an Adverse Impact Analysis must identify a "long-lasting" policy/practice to thus detect a "pattern and practice:"
  - a paper and pencil test given on a given day could give rise to an "Adverse Impact" claim

"ADVERSE IMPACT" ANALYSES (con't)

❑ If the EEOC/OFCCP/a Plaintiff can show that any particular employment policy or practice (at any "step") results in 2 or more Standard Deviations in the selection for hire, for example, of any Protected Group relative to the Most Favored Group, it has put forward sufficient "preliminary" proof (what lawyers call a "*prima facie*" case) to now cause the defendant employer to have to go forward with evidence to prove either:

- that the plaintiff's statistics are inaccurate, or
- its "business need" (the so-called "business necessity defense:" that is, that the challenged policy or practice is "job related and consistent with business necessity")