Disparity Analyses
And
Adverse Impact Analyses
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I. REQUIRED DISPARITY ANALYSES

- Contractors must annually undertake "Disparity Analyses" as part of their Executive Order 11246 Affirmative Action Plans (AAP) for Minorities and Women
- Contractors must also annually, but not in the AAP, undertake "Adverse Impact Analyses"
- Both are statistical analyses
- Both are common in that they measure the significance of any resulting statistical disparity in the percentages of employment selections to be compared
- Each has very different elements of proof
- Each relies on very different data inputs
- Both are WIDELY confused with each other (as though interchangeable). The HR industry is very poorly schooled in this, as are OFCCP and most AAP vendors. (As a result, beware the forms of most vendors as a guide to the needed analyses)

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I. REQUIRED DISPARITY ANALYSES (con't)

❑ Contractors must annually undertake "Disparity Analyses" as part of their Executive Order 11246 Affirmative Action Plans for Minorities and Women.

41 CFR §60-2.17 (b) :

- "Identification of problem areas. The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate:

  * * * * * * *

- (2) Personnel activity (applicant flow, **hires, terminations, promotions,** and other personnel actions) to determine whether there are selection disparities; **(red highlighting added)**

  * * * * * * *

- (4) Selection, recruitment, referral, and other personnel procedures to determine whether they result in disparities in the employment or advancement of minorities or women; and..."

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I. REQUIRED DISPARITY ANALYSES (con't)

- One performs both "Disparity Analyses" and "Adverse Impact Analyses" by racial/ethnic "subgroups"…and NOT by "Minorities" as a whole (this is NOT an "Affirmative Action Analysis"
  - i.e. not "Minorities" vs "Non-Minorities"
    - **OFCCP v. Cargill;** also (same week) **OFCCP v. Jeanswear**
  - Rather, compare legally "protected groups":
    - Whites
    - Blacks (African Americans)
    - Hispanics
    - Asians (not "Asian Pacific Islanders")
    - Native American Indians
    - Men
    - Women

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I. REQUIRED DISPARITY ANALYSES (con't)

- "Disparity" & "Adverse Impact Analyses" (con't)
  - Identify the "Most Favored Group" ("MFG") and then compare against it every other "Protected Group"
  - How do you determine the MFG: Simple: compare rejection percentages
    - If employer rejects 90 out of 100 Whites = (90% rejection percentage); and
    - Employer also rejects 46 out of 50 Blacks = (92% rejection percentage)
      - Whites are the MFG because rejected less often as a percentage: less adverse action
  - **Let's first assume that Hispanics are the MFG:**
    - Blacks……..vs…..Hispanics
    - Whites ……..vs……Hispanics
    - Asians……vs…..Hispanics
    - Native Americans…..vs…..Hispanics
  - **Let's now assume that Asians are the MFG**
    - Blacks……vs……Asians
    - Whites……vs…..Asians
    - Hispanics……..vs……Asians
    - Native Americans…….vs……Asians

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I. REQUIRED DISPARITY ANALYSES (con't)

- ❑ "Disparity" & "Adverse Impact Analyses" (con't)
- ❑ You *must* do this MFG analysis for all other Protected Groups
- ❑ Example:
  - ❑ Men vs. Women (required)
- ❑ You *could* do this MFG analysis for *other* groups the law protects:
- ❑ Example:
  - ❑ Arabs vs. Italians (national origin analysis: not required by OFCCP's Rules)
  - ❑ Catholics vs. Baptists (religious analysis: not required by OFCCP's Rules)
  - ❑ AND REMEMBER: You do Disparity Analyses for "Hires," "Promotions" and "Involuntary Terminations"
    - ❑Why not do them for "Voluntary Terminations"?

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I. REQUIRED DISPARITY ANALYSES (con't)

- "Disparity" & "Adverse Impact Analyses" (con't)

- QUESTION: Do you see "Two or More Races" in that Display of Protected Groups?

  - ANSWER: NO. Why? "Two or More Races" is not a "Protected Group"

- QUESTION? What is it then?

  - A reporting category for Census purposes

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I. REQUIRED DISPARITY ANALYSES (con't)

- "Disparity Analyses" are different from "Adverse Impact Analyses," although they are both a form of statistical analysis.

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

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I. REQUIRED DISPARITY ANALYSES (con't)

- Not only does the database you are analyzing have to be big enough, the size of the disparity measured ALSO has to be big enough to not be the result of mere random chance
- "Disparity Analyses" allege a "long-lasting" "pattern and practice" of unlawful exclusion of a Protected Group (i.e. Black / White / Female / Male, etc.) from employment opportunities as demonstrated through proof of a statistical disparity in selections which are also "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 be the "standard operating procedure" of the employer to present a legal problem

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I. REQUIRED DISPARITY ANALYSES (con't)

- To defend such a statistical disparity, the Contractor may either:

(a) attack Plaintiff's statistical computations, and/or

(b) remove from the statistical analyses all persons expressing interest who are "Not Applicants,"

AND ALSO

(c) remove from the statistical analyses those "Applicants" for whom the contractor has identified a "legitimate non-discriminatory reason for rejection"

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I. REQUIRED DISPARITY ANALYSES (con't)

- Contractors thus need to document:

  (a) which persons expressing interest for the job were "Not Applicants" (as the law defines the term "Applicant"), and;

  (b) the legitimate non-discriminatory reason(s) the contractor rejected each Applicant.

This is EXACTLY why contractors develop "Disposition Codes" (as we discussed at the last Legal Roundtable)

There is no OFCCP (or any other) statutory or regulatory requirement to create Disposition Codes documenting the facts underlying the conclusion that the person expressing interest is "Not an Applicant" or the contractor rejected the "Applicant" for a "legitimate non-discriminatory reason."

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II. REQUIRED "ADVERSE IMPACT" ANALYSES

- An "Adverse Impact Analysis," by contrast to a "Disparity Analysis," examines any:
- "neutral," and (not "or")
- "specific," and
- "particular" contractor selection policy (written) or practice (what a contractor just 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 selection rate of the Most Favored Group

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II. REQUIRED "ADVERSE IMPACT" ANALYSES (con't)

- Adverse Impact Analyses do not go into the Affirmative Action Plan for Minorities and Women (OFCCP agrees)
  - AND the contractor does not supply "Adverse Impact" reports to OFCCP, except in audit, AND ONLY upon specific request in an audit because OFCCP has "probable cause" to believe a violation of law has occurred
  - This is VERY statistically unusual.
    - Many OFCCP Compliance Officers retire before ever having once requested a contractor Adverse Impact Analysis

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II. REQUIRED "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

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II. REQUIRED "ADVERSE IMPACT" ANALYSES (con't)

- ❑ THE GUTS OF IT: Unlike a "Disparity Analysis," as a result (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…in what I call a "Bouillabaisse Analysis"), an "Adverse Impact Analysis" zeroes in on a neutral, specific and particular employment policy or practice

- ❑ EXAMPLES: like a test in the pre-screen process, perhaps, or a background check, or an experience requirement; or an educational achievement level (college degree; HS diploma. etc.) to see if that specific neutral and particular policy or practice is causing the disproportionate rejection from employment

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II. REQUIRED "ADVERSE IMPACT" ANALYSES (con't)

- Also, there is no requirement that a plaintiff attacking with 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 single given day could give rise to an "Adverse Impact" claim.

- OFCCP almost NEVER brings these claims and has not trained its current batch of employees in this vein of Title VII law

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II. REQUIRED "ADVERSE IMPACT" ANALYSES (con't)

- If OFCCP (or a Plaintiff) can show that any particular employment policy or practice (i.e. 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 contractor to have to go forward with evidence to prove either:
  - that OFCCP'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") so as to lawfully have a policy or practice causing such a disproportionate impact on the at-issue Protected Group(s)

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II. REQUIRED "ADVERSE IMPACT" ANALYSES (con't)

- Adverse Impact Analyses are the source of the notion of so-called "step analyses." This is a catch-phrase contractors have recently heard OFCCP begin to murmur as OFCCP now begins to undertake "Adverse Impact Analyses" and not just "Disparity Analyses."
- A "step-analysis" is merely another name for an "Adverse Impact Analysis" of the neutral, specific and particular challenged employment policy or practice, rather than looking at the entire Bouillabaisse of applications, rejections and offers
- Step analyses occur when there are multiple reasons for potential rejection: i.e. a multi-part selection process (think pre-screens: telephone, then test, then interviews, etc.)

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II. REQUIRED "ADVERSE IMPACT" ANALYSES (con't)

- Adverse Impact Analyses, like Disparity Analyses, are used to compare:
  - "Applicants" vs. "Hires"; and
  - "Applicants" for promotion vs. "Selections"; and
  - "Applicants" for involuntary termination v. "Selections"
    - Note: a higher selection % here is bad (i.e. more Blacks selected than Whites to be fired)

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II. REQUIRED "ADVERSE IMPACT" ANALYSES (con't)

- Example: If a selection process has 3 components including:

  (A) phone pre-screen composed of 30 pass-fail (P/F) questions;

  (B) an assembly test of Lego blocks; and

  (C) one-on-one "live" free-form interview with a recruiter using non-standardized questions in a free-flowing discussion)

  an adverse impact analysis, if appropriate, would examine the selection statistics of each individual component, or "step," in that selection process which is NEUTRAL, SPECIFIC AND PARTICULAR…NOT one big "Bouillabaisse" analysis of all three steps

- **QUESTION:** Which of the three above "steps" could you properly subject to a ***Griggs*** "Adverse Impact Analysis"?

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II. REQUIRED "ADVERSE IMPACT" ANALYSES (con't)

- ANSWER: Step A (P/F phone screen Qs) & B (Lego blocks test), but not C (free form interview Qs)
- Indeed, if EACH question in the phone screen (step A) itself were pass-fail, EACH question in the phone screen would be a "step" (i.e. there would thus exist 30 "neutral," "specific" and "particular" selection requirements…each one of which could be the proper subject of an Adverse Impact Analysis…i.e. 30 separate Adverse Impact Analyses…one for each of the 30 questions in the phone screen).
- EXTRA POINTS: Would Title VII law permit OFCCP to subject the entire set of 30 questions to a proper "Adverse Impact Analysis"?

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II. REQUIRED "ADVERSE IMPACT" ANALYSES (con't)

- ANSWER: No. WHY NOT?
- SUPER EXTRA POINTS: Could you subject the entire set of 30 P/F phone screen questions to a ***Teamsters/Hazelwood*** "Disparate Treatment Class-Type" Analysis?
- ANSWER: Yes. WHY?

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II. REQUIRED "ADVERSE IMPACT" ANALYSES (con't)

- To prove up its "business necessity" defense pursuant to ***Griggs***, and its progeny, the Kor must produce proof that the challenged policy or practice:

> "serves in a significant way, the legitimate employment goals of the employer."
>
> *Wards Cove Packing Co., Inc. et al. v. Atonio, et al.,* 490 U.S. 642 (1989).

This will not be a statistical defense. Rather, it will be a narrative discussing the needs of the job and tying the at-issue policy or practice to that job need

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II. REQUIRED "ADVERSE IMPACT" ANALYSES (con't)

- If the contractor does that, to win, OFCCP (or a Plaintiff employee under Title VII) would then have to go forward with evidence to prove that alternative policies/practices exist such that:

> "other tests or selection devices, without a similarly undesirable racial [or ethnic or gender] effect, would also serve the employer's legitimate [hiring] interest[s];" by so demonstrating, respondents [employees] would prove that "petitioners [companies] were using [their] tests merely as a 'pretext' for discrimination."

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I. REQUIRED DISPARITY ANALYSES (con't)

❑ "Disparity" & "Adverse Impact Analyses" (con't)

➢ WHEN ARE DATA SETS TOO SMALL TO MAKE FOR MEANINGFUL STATISTICAL ANALYSES?

- LIFELINE: Ask DR. Speakman if you want to test EXACTLY
- BTW: Statisticians/labor economists will tell you they can analyze ANY number set in the universe, including the number one…BUT, they will also quickly add that small number sets are not very predictive because there is not enough data to see a pattern and to disqualify the likelihood that the result was the result of random chance

➢ Here is an easy rule of thumb: the 30:5:5 rule:

- 30 in the data set; AND
- 5 of the at-issue employment transaction (hires or promotions, etc.), AND
- 5 of the at-issue Protected Group (5 Blacks; or 5 Whites, etc.)

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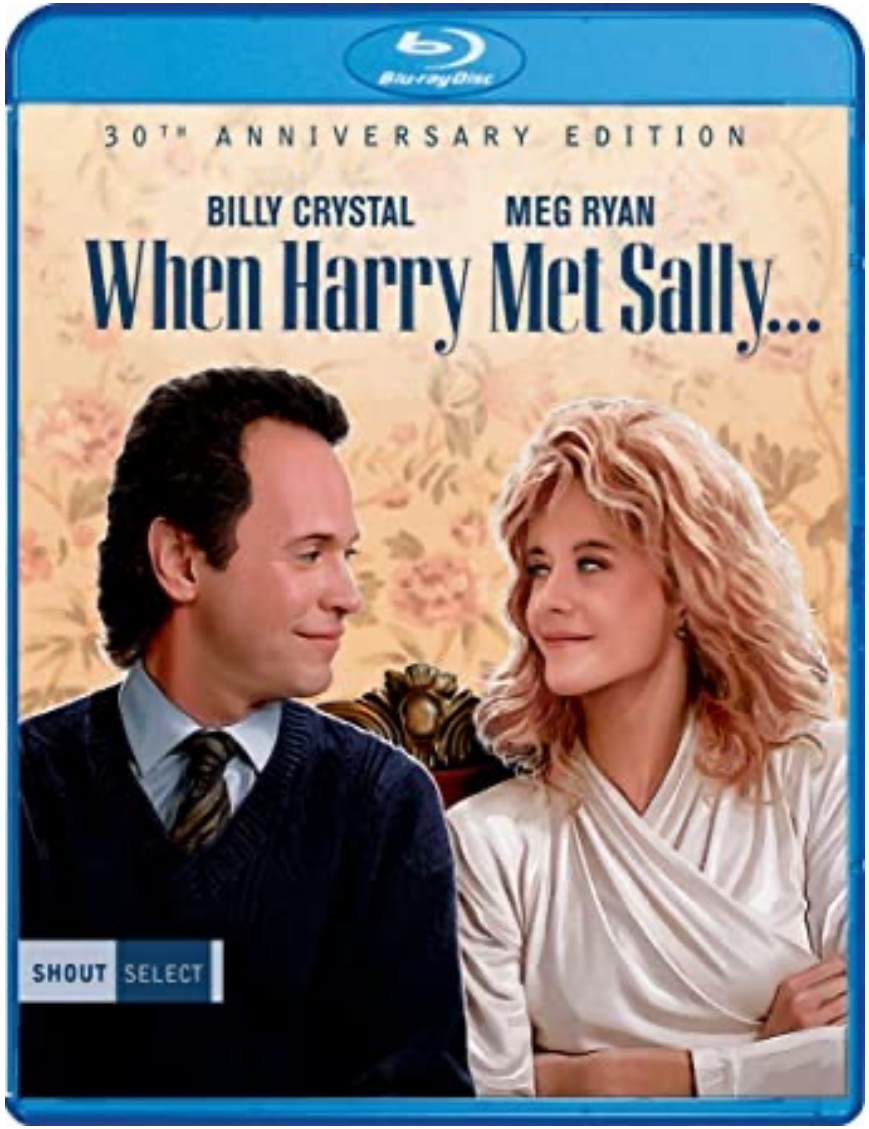
I. REQUIRED DISPARITY ANALYSES (con't)



If data are too small to make for meaningful statistical analyses, it does not mean one cannot analyze whether unlawful discrimination occurred. Rather, you just have to reach into your toolbox and use a different discrimination law finder tool…maybe a "cohort analysis" comparing Harry vs. Sally.