



**National Industry Liaison Group  
August 6, 2006 (3:15 – 5:15 p.m.)**

**How to Establish Defensible Basic  
Qualifications (BQs) under the new  
OFCCP Internet Applicant Regulations**

**Presented by Biddle Consulting Group, Inc.**

*The following presentation is not to be construed as legal advice. For specific legal advice please consult your corporate counsel or a labor attorney.*



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## **Overview of Biddle Consulting Group, Inc. (BCG)**

- Since 1974
- Over 200+ cases in the EEO/AA area (both plaintiff and defense cases)
- Pioneers in the EEO/AA field
- Administrative Skills Testing (OPAC)
- 911 Dispatcher Testing (Criticall)
- AAP Software and Services
- EEO Litigation Assistance (expert consulting and witness services)
- Adverse Impact and Test Validation, 2<sup>nd</sup> Ed.



# Agenda

- General Overview of OFCCP's "Internet Applicant" (IA) Regulations and Essential BQ Requirements
- Adverse Impact Theory Applied to Basic Qualifications (BQs)
- Validation 101
- Establishing Defensible BQs:
  - Training, Education, and Experience (TEE) Requirements
  - Weight Handling Requirements
  - Licenses, Certifications, and Other Requirements
- Workshop Practice: Developing Sample BQs
- Q&As



**First, some Answers to *Basic*  
Questions about Basic Qualifications...**



# Why use BQs in the First Place?

- Basic qualifications can:
  - Save the employer's money and personnel resources
  - Reduce the size of the applicant pool
  - Allow qualified applicants to rise to the top
  - Reduce the amount of time it takes to fill job openings
  - Show applicants that the employer is serious about job standards
  - Place value on applicant qualifications



# Some General BQ Issues

- Is the BQ likely to:
  - Save the employer’s money and personnel resources?
  - Result in an actual benefit to the target positions?
  - Have adverse impact?
  - Be perceived as a form of intentional discrimination?
  - Survive an OFCCP Review as:
    - Noncomparative?
    - Objective?
    - “Job relevant” and/or “job related and consistent with business necessity”?



## **Some General BQ Issues (cont.)**

- Is the BQ likely to:
  - Represent a true “minimum baseline” needed for the first day on the job?
  - Be clearly understood by applicants?
  - Be uniformly applied to all applicants?
  - Discriminate (distinguish between qualified and unqualified applicants)?
  - Allow an equal opportunity for all applicants to demonstrate that they possess the required levels?
  - Be used in such a way that addresses important OFCCP record-keeping requirements?



**General Overview of OFCCP's  
“Internet Applicant” (IA)  
Regulations and Essential  
BQ Requirements**



## The Four Criteria to be Considered an “Internet Applicant”

1. The individual submits an expression of interest through the Internet or related electronic data technologies.
2. The employer considers the individual for employment in a particular position.
3. The individual’s expression of interest indicates that the individual possesses the basic qualifications for the position.
4. The individual at no point in the contractor’s selection process prior to receiving an offer from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.



## Internet Applicant Definition -- Criteria 3

***The individual's expression of interest indicates that the individual possesses the basic qualifications for the position***

Basic qualifications are:

- Qualifications that the contractor identifies must be possessed in order for a potential applicant to be considered for the position,

**OR**

- Criteria that a contractor establishes in advance by making and maintaining a record of such qualifications prior to considering any expression of interest to a particular position



## Internet Applicant Definition -- Criteria 3

*The individual's expression of interest indicates that the individual possesses the basic qualifications for the position (cont.)*

The three criteria for establishing basic qualifications are that they are:

- 1. non-comparative** (e.g., If a minimum of three years of experience is required and three people, all with at least three years experience apply, then they are all applicants. You cannot simply consider the one with the most experience and ignore the other two. They ALL pass the minimum qualification and must be considered applicants);
- 2. objective** (e.g., a Bachelor's degree in Accounting rather than a technical degree from a good school); and,
- 3. relevant to performance** of the particular position and enable the contractor to accomplish business related goals.



# **Adverse Impact Theory Applied to Basic Qualifications**



**Adverse Impact:  
*in the beginning . . .***

80%?

70%?

90%?



# **Adverse Impact — What's Tried and True:**

- Statistical Significance
- Practical Significance



# Adverse Impact — What's Tried and True:

- Statistical Significance:
  - 5%
  - 0.05
  - 1 chance in 20
  - 2.0 Standard Deviations (*actually 1.96*)



# Two Types of Adverse Impact

## SELECTION RATE COMPARISON

- 2 X 2 Table Comparison
- Evaluates hires, promotions, terminations
- “Hypergeometric”

Men Pass	Women Pass
Men Fail	Women Fail

## AVAILABILITY COMPARISON

- Utilization Analysis
- Single Group Test
- “Binomial”

Availability %
# Women
# Total



# When Does Adverse Impact Result in “Disparate Impact Discrimination”?

## SELECTION RATE COMPARISON

- 2 X 2 Table Comparison
- Evaluates hires, promotions, terminations
- “Hypergeometric”

Statistically Significant Result



No Job Relatedness / Validity



Disparate Impact Discrimination

## AVAILABILITY COMPARISON

- Utilization Analysis
- Single Group Test
- “Binomial”
- See p. 58955 of IA Regs

Statistically Significant Result



6 “Possible Ingredients”



“Adverse Inference” or Evidence for Disparate Treatment Cases



# Adverse Impact: Selection Rate Comparison (1991 CRA) & UGESP

Amends Section 703 of the 1964 Civil Rights Act (Title VII) (k)(1)(A). An unlawful employment practice based on disparate impact is established under this title only if:

- A(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that the challenged practice is **job-related for the position in question and consistent with business necessity**; **OR**,
- A(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an **alternate employment practice**, and the respondent refuses to adopt such alternative employment practice.



# Adverse Impact—Availability Comparison

- Statistical Significance + Six Possible Ingredients for “Adverse Inference” or Disparate Treatment
  - #1 **Failure to keep applicant records** (sometimes referred to as an “adverse inference”—see 4D of the Guidelines)
  - #2 **Failure to run/keep adverse impact analyses** on the selection or promotional processes (also an “adverse inference”—see 4D of the Guidelines)
  - #3 **Discriminatory recruiting practice** (e.g., Hazelwood School District v. United States)
  - #4 **Discriminatory reputation “chilled” or “discouraged”** certain group members from applying
  - #5 **Promoting employees through “appointment only”** process (rather than conducting promotional processes)
  - #6 **Invalid “Basic Qualifications”**



## **The Applicant Regulations and Census Data (see p. 58955)**

“... OFCCP will rely on Census and other labor market data to assess contractors’ hiring practices for potential discrimination **and will carefully review the basic qualifications themselves.** The Supreme Court of the United States has authorized the use of comparisons between actual hiring rates and population or labor force statistics to prove hiring discrimination.”



# Two of the Most Important Concepts Presented in this Seminar . . .

## **Important Concept #1:**

If BQs have Adverse Impact, they Need to be “Validated”

## **Important Concept #2:**

“Validation” is a DIFFERENT STANDARD than the  
“job relevant” BQ requirement in the IA Regulations

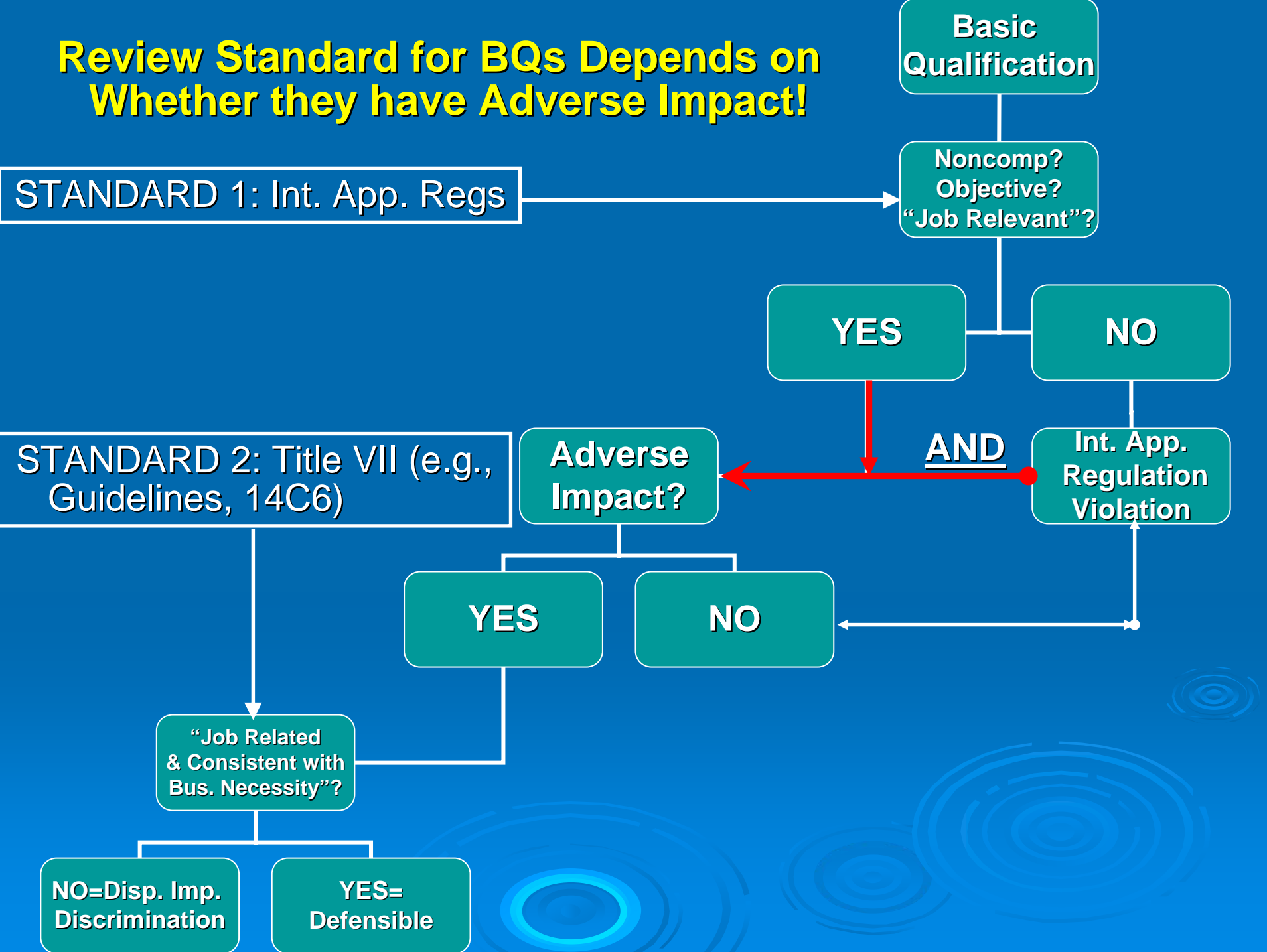
Validation *sometimes requires a different development process* than what might be used to set up “job relevant” BQs under the IA Regulations



# The Two BQ Review Standards: Subtle Differences with Huge Implications

- **Review standard for IA Regulations (applies before BQ has adverse impact and applies to recordkeeping obligations):**
  - Non-comparative
  - Objective
  - “Relevant to performance of the particular position and enable the contractor to accomplish business related goals”
- **Review standard Under Title VII of the Civil Rights Act (applies after BQ has adverse impact):**
  - “Job related for the position in question and consistent with business necessity”
  - The courts usually define this as “validation” that addresses the Uniform Guidelines on Employee Selection Procedures

# Review Standard for BQs Depends on Whether they have Adverse Impact!





# Clarification on the “Two Standards” Offered in the IA Regulations

- “That standard [the Title VII standard] is applicable as a defense where a disparate impact has already been proven” (p. 58957).
- By including the “relevant to performance of the particular position” standard in the final rule as a limitation on qualifications that could qualify as 'basic qualifications,' OFCCP intends to provide a reasonable limit on the nature of the qualifications **used only to define recordkeeping obligations.** OFCCP does not intend to define recordkeeping obligations through a presumption that every putative 'basic qualification' involves a disparate impact.



## **Clarification on the “Two Standards” Offered in the IA Regulations (cont.)**

- Of course, once it is established that a criterion caused a disparate impact, the contractor has the burden of justifying that the criterion is job related and consistent with business necessity (p. 58957).



## Review Standards for Basic Qualifications (BQs)

	<b>U.S. DOL Internet Applicant Regulations (2006)</b>	<b>Title VII (1991 Civil Rights Act)</b>
<b>Relevant Criteria</b>	U.S. DOL, OFCCP 41 CFR Part 60-1, RIN 1215-AB45, "Obligation To Solicit Race and Gender Data for Agency Enforcement Purposes: Final rule"	Uniform Guidelines on Employee Selection Procedures (1978) (see primarily Section 14C6 "Prior Training or Experience")
<b>When Applicable</b>	When Establishing BQs and for Recordkeeping Purposes	After BQ has Adverse Impact
<b>Specific Section of Review Standard</b>	BQs must be: (A) noncomparative, (B) objective, (C) relevant to performance of the particular position and enable the contractor to accomplish business-related goals (p. 58962).	Training/experience (TE) BQs must be justified based on the relationship between the content of the TE and the content of the job for which the TE is to be required or evaluated. The critical consideration is the resemblance between the specific behaviors, products, KSAs in the TE and the specific behaviors, products, KSAs required on the job, whether or not there is close resemblance between the TE as a whole and the job as a whole (Sec. 14C6).
<b>Job Information Used for Development</b>	Job Description/Job Specification Documents	Job Analysis (Including Job Duties and KSAs)
<b>Staff Typically Involved in Development</b>	HR Personnel	HR Personnel and Job Experts (Incumbents in the Target Position and Supervisory Staff)



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# **Validation 101**



# What is Validation?

- Traditionally, it is making sure a practice, procedure, or test *actually* measures what it is *designed* to measure.
- In a legal realm, a selection procedure is valid if it can be proven by an employer that it is “...job related and consistent with business necessity.”



# Why Validate?

- **It is good business**
  - Validation often results in selection devices that are better at helping to choose qualified applicants
  - Can reduce the amount of time spent training newly-hired employees
  - Sends a message to the community and your employees that you care about doing the “right thing”
  - Minimizes potentially negative legal actions
- **It is required under some circumstances**
  - If there is adverse impact against a protected group of test takers



# Uniform Guidelines Style Validation

- **Content Validity**
  - *Section 14C*
- **Criterion Validity**
  - *Section 14B*
- **Construct Validity**
  - *Section 14D*



## A Brief Overview of Each Source of Validity Evidence (*in plain English!*)

- **Content**: A connection between the important parts of the job and the selection procedure
  - *It ALWAYS requires: Ratings from Job Experts (SMEs) and a Job Analysis*
- **Criterion**: A mathematical study that proves the selection procedure predicts job performance:
  - *It ALWAYS requires: A statistical study and results that are “statistically significant” (<5% chance)*
- **Construct**: A connection between a selection procedure, a trait, and job performance:
  - *It ALWAYS requires “empirical evidence” connecting the test to the trait and the trait to the job (all 3)*

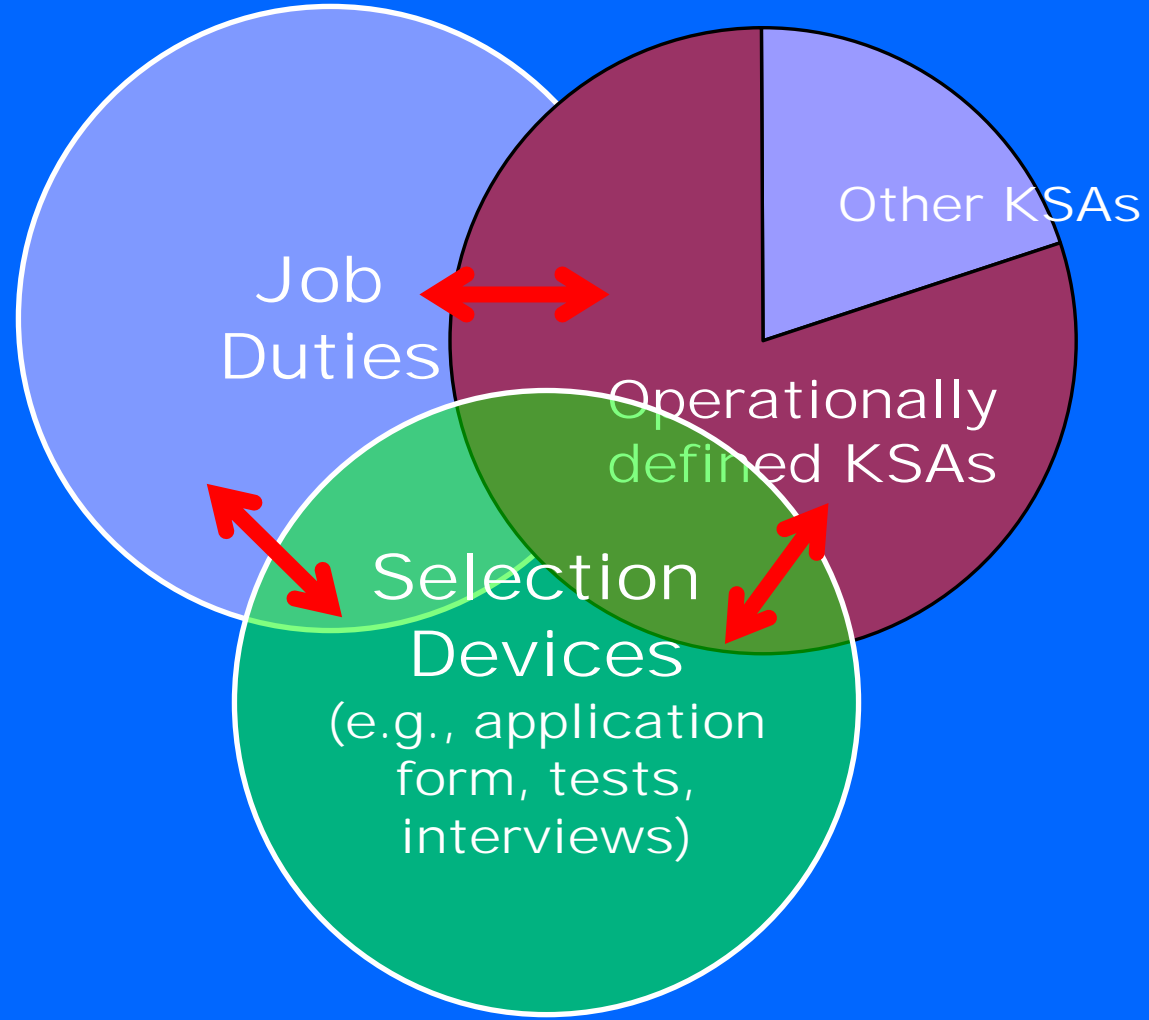


# **What Types of Validation are Really Used in Practice?**

- **Content (80%)**
- **Criterion (15%)**
- **Construct (5%)**
- For BQs, content validation will be the method of choice 99% of the time

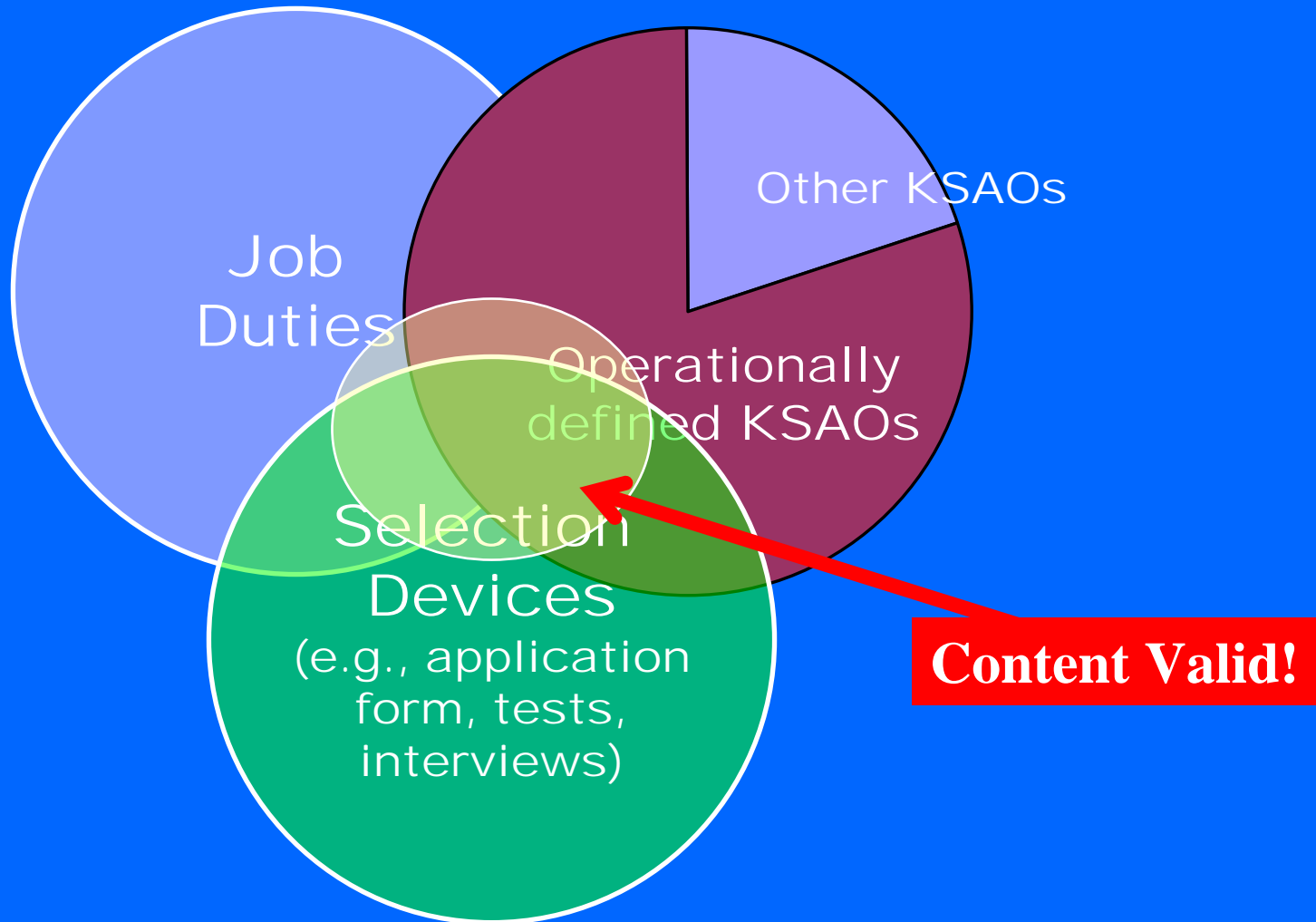


# Content Validation Process





# Content Validation Process





# Helpful Validation Resources

- Federal Uniform Guidelines on Employee Selection Procedures
  - [www.uniformguidelines.com](http://www.uniformguidelines.com)
- U. S. Department of Labor's Testing and Assessment: An Employer's Guide to Good Practices
  - [www.onetcenter.org/dl\\_files/empTestAsse.pdf](http://www.onetcenter.org/dl_files/empTestAsse.pdf)
- Adverse Impact and Test Validation: A practitioner's guide to valid and defensible employment testing (Amazon)



# **Establishing Defensible BQs:**

- **Training, Education, and Experience (TEE) Requirements**
- **Weight Handling Requirements**
- **Licenses, Certifications, and Other Requirements**



# First, a Major Clarification...

- The IA Regulation Requirements (noncomparative, objective, and relevant to the job) apply only to **pre-screening** applicants.
- AFTER the initial pre-screening process, the hiring process for many positions will benefit from using comparative, subjective, and job-related TEE scoring/rating process
  - The process of subjectively comparing job relevant applicant qualifications is exactly what's done during an interview process
  - Can also be done in hard copy if standardized and reliable



## **Establishing Defensible BQs: Training, Education, and Experience (TEE) Requirements**

- Developing TEE BQs for positions with clear qualification requirements is sometimes simple!
  - Civil servant positions (police, engineering, etc.)
  - Health/medical profession jobs
- For many positions, however, developing TEE BQs is a slippery slope!
  - Technical professions
  - Supervisory roles
  - Skilled crafts/trades



## Establishing Defensible BQs: Training, Education, and Experience (TEE) Requirements

- Where TEE requirements are **complex and broad**, the most accurate and defensible way to evaluate them is to use:
  - **Scored** Supplemental Application Form (SAF), or
  - **Scored** TEE rating process (see Chapter 5 of “Adverse Impact & Test Validation” book)
    - NOTE: These are *subjective* and *comparative* and, therefore, are essentially ‘tests’ and not BQ screens.
- This is because there are INFINITE ways that applicants can obtain the COMBINATION of training, education, and experience necessary for the job.



## Five Steps For Developing Defensible TEE Requirements

- **Step 1:** Develop a job analysis for the target position
- **Step 2:** Isolate critical knowledges, skills, abilities (KSAs) that are needed on the first day of hire
- **Step 3:** Develop multiple levels (4-9) of each BQ requirement (to be reviewed and rated by job experts)
- **Step 4:** Convene a panel of 7-10 job experts to review and rate each draft BQ statement on several factors
- **Step 5:** Set BQ at a level where ≥70% of job experts agree



- **Step 1: Develop a job analysis for the target position**
  - A job analysis is more in-depth than a “job description”
  - It includes an analysis of job duties, KSAs, physical requirements, other requirements (e.g., licenses)
  - It includes at least 7 job experts (and more with positions with >50 incumbents)
  - It must represent at least 70% agreement from job experts (e.g., “70% of job experts agree that KSA #4 is at least critically important and is necessary on the first day of the job”)
  - Link KSAs to job duties
  - Rate KSAs on importance and “when needed”



- **Step 2: Select KSAs for BQ development**
  - KSAs must be:
    - Necessary on the first day of hire (Guidelines, Section 14C1)
    - Critical/important prerequisites to the performance of the job (14C4,6)
    - Linked to critical/important job duties (14C4,6)



- **Step 3: Develop multiple levels (4-9) of each BQ requirement (to be reviewed and rated by job experts)**
  - Work with 1-2 job experts to draft BQ requirements on the same element, but multiple levels
    - Sometimes trainers/supervisors are best for this step
  - Example BQ levels for an **HR/EEO consultant** position:
    - Level 1: Must possess BA/BS in statistics, business, psychology, or HR.
    - Level 2: Must possess BA/BS in statistics, business, psychology, or HR and two years (FT/equiv.) experience in HR, personnel, or EEO field applying statistical and data analysis methods/concepts; Or, Masters degree in same fields with no experience.



- **Step 3 (cont.):**
  - Level 3: Must possess BA/BS in statistics, business, psychology, or HR and four years (FT/equiv.) experience in HR, personnel, or EEO field applying statistical and data analysis methods/concepts; Or, Masters degree in same fields with two years experience; Or, Doctorate degree in same fields with no experience.
  - Level 4: Must possess BA/BS in statistics, business, psychology, or HR and six years (FT/equiv.) experience in HR, personnel, or EEO field applying statistical and data analysis methods/concepts; Or, Masters degree in same fields with two years experience; Or, Doctorate degree in same fields with at least one year experience.



- **Step 4: Convene a panel of 7-10 job experts to review and rate each draft BQ statement on several factors**
- **Example Survey . . .**





- **Step 5: Set BQ at a level where >70% of job experts agree**
  - It is necessary that each job expert answer every question for every level of the BQ to effectively interpret results
  - Analyze the survey data:
    - Remove “outliers” (using 1.65 SD rule) and/or raters with low inter-rater reliability
    - Set final BQ at the highest level where at least 70% of job experts agree (e.g., “70% of job experts surveyed agreed on level 3 BQ or lower”)



# **Wait a minute - Why this complicated**

## **"multiple level" concept?**

- **Can't we just develop definitive and final BQ statements and have them "blessed" by job experts?**
  - Yes, you can do it this way, but only for some jobs where the requirements are very clear and highly specific.
  - Consider: Would job experts have come up with something totally different had they not be "spoon fed" the BQ you wanted them to approve?
  - For this reason, working with 1-2 job experts to draft the 4-9 "multiple levels" of BQs and having them rated by 7+ job experts is usually a more effective method.



# Wait a minute-Why this complicated

## "multiple level" concept?

- What about just having the job experts “fill in the blank” with the education and experience requirements they believe are most appropriate?
  - Such as, “*Must possess \_\_\_\_ degree and have \_\_\_\_ years experience in X, Y, Z areas?*”
  - Or, why not just average what the job experts say?  
“*Must possess BA/.5 Masters degree and have 2.97 years experience in X, Y, Z areas?*”
- Both are limited because each factor (education, experience) is compound, non-linear, and inter-related:
  - Job expert opinions on one BQ factor depends on the other, so ratings for “fill-in-the-blank” with multiple categories cannot be averaged



# Essential TEE BQ Elements

- Training/Education:
  - What level?
    - Certain # units?
    - Vocational/Rehab?
    - Finished degrees: AA, BA/BS, Masters, Doctorate?
  - What major areas of study?
    - Be specific!
    - Use: <http://nces.ed.gov/pubs2002/2002165.pdf>
      - Classification of Instructional Programs: US Department of Education National Center for Education Statistics 2000 Edition
      - Provides instructional programs and course descriptions
- Experience:
  - # Months/Years: Specify “full-time equivalent”



# Establishing Defensible BQs: Weight Handling Requirements

- Example Weight Handling BQs:
  - Must be able to lift up to 50 pounds daily.
  - Must be able to lift/carry 20-30 pounds routinely for a 8 hour shift.
  - May be required to carry, push, pull, drag or hold up to 50 pounds.
  - Person must be in excellent physical condition; be able to lift and carry 80 pounds; and be able to work under adverse conditions.



# When it Comes to Setting Weight Handling BQs for Your Job Postings . . .

## **Don't Guess!**

Honest and qualified applicants may self-select  
out of your hiring process!



# A Better Way to Develop Weight Handling BQs

- **Step 1:** Meet with management staff and create a list of the common items that are physically handled by incumbents.
- **Step 2:** Obtain weights for each item.
- **Step 3:** Survey job experts regarding:
  - the frequency with which they handle (i.e., push/pull, lift/carry, etc.) the items, and
  - how they handle the items (e.g., how far, how long, etc.)



# A Better Way to Develop Weight Handling BQs (cont.)

- **Step 4:** Analyze the survey Data:
  - Remove “outliers” (using 1.65 SD rule) and/or raters with low inter-rater reliability
  - Establish “frequent” and “occasional” requirements for various physical activities (push/pull, lift/carry, and other physical requirements)
  - Establish weight handling BQs for each position at a level where at least 70% of job experts agree (e.g., “70% of job experts surveyed agreed that they must be able to lift and carry at least 50 pounds 10 times a day or less”)
  - Final BQ should include weight, how handled (lift, carry, push, pull, drag, rolled), and duration



# A Better Way to Develop Weight Handling BQs (cont.)

- **Questions:**

- Why establish the BQ weight using “at least 70% of job experts agreed on a weight of X”
- Doesn’t that set the weight cutoff too high?
- Why not just use the average of their responses?

- **Answers:**

- After removing outliers, the dataset should represent opinions from the “normal range” of job experts
- Using the 70% rule will help insure that at least the majority of job applicants should be able to handle that weight
- The 70% rule “trims” the highest 30% of the ratings, insuring that the benchmark is set at a reasonable level
- Using the average could possibly set the weight requirement at a level that 50% of the job experts thought was too low



## What about Jobs that have Rigorous and/or Regular Weight Handling Requirements?

- Use a physical ability test!
  - Key Point: BQ screens are only self-reports!
- Rigorous physical ability tests will typically have adverse impact on women . . . therefore:
  - They must be validated!
  - Don't rely on “abstract strength tests” or “body measurement methods” without statistical validity!
  - Sometimes it's better to measure physical abilities using “work sample” tests
    - This helps insure that applicants can perform the **actual job**, not just the “inferred” job requirements
    - Applicant perception of fairness is the first trigger for lawsuits!



## **Establishing Defensible BQs: Licenses, Certifications, and Other Requirements**

- **Uniform Guidelines Sec.2(B). Employment decisions:**
  - “These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law...”



## **Establishing Defensible BQs: Licenses, Certifications, and Other Requirements (cont.)**

- The Standards for Educational and Psychological Testing (American Educational Research Association et al., 1999):
  - Primary purpose of licensure testing is to ensure that those licensed possess knowledge and skills in sufficient degree to perform important occupational activities safely and effectively (p.156).



## **Establishing Defensible BQs: Licenses, Certifications, and Other Requirements (cont.)**

- Uniform Guidelines Q&A #7:
  - Q: Do the Guidelines apply to the licensing and certification functions of state and local governments?
  - A: The Guidelines apply to such functions to the extent that they are covered by Federal law. The courts are divided on the issue of such coverage. The Government has taken the position that at least some kinds of licensing and certification which deny persons access to employment opportunity may be enjoined in an action brought pursuant to Sec. 707 of the Civil Rights Act of 1964, as amended.



# Workshop Practice: Developing BQs for “Senior EEO/AA Compliance Officer”

- Training, Education, Experience (TEE)  
Requirement:
  - BA/BS degree? In what major fields/areas?
  - Experience requirement? How long? In what areas?



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*Over 30 Years of Human Resource Consulting Experience*

*Thank you!*



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