



Yes, Monitoring HR Outcomes is a Sound Business Practice

What Employers Should be Doing with their Employment Data

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Agenda

- Current regulatory environment.
 - Federal enforcement priorities and guidance.
 - States' reaction to changes in Federal enforcement.
 - [DOJ's July 29 Memo](#)
- Should government contractors collect and conduct analyses of their HR data?
- Best practices for conducting and acting on findings from privileged analyses of HR data.
- Looking ahead.

OFCCP

- Department of Labor just issued proposed rules that would eliminate EO 11246 regulations, modify Section 503 regulations, and largely retain VEVRAA regulations.
- The proposed modifications to Section 503 would retain the written affirmative action program and outreach and recruitment obligation, but would eliminate contractors being required to seek voluntary self-identification of disability status as well as the 7% utilization goal.

OFCCP

- The legal focus of the proposed rule is on the intersection of the ADA and Section 503. The policy focus is on the effectiveness of self-identification and the utilization goal, combined with whether the benefits outweigh the burdens.
- Comment period is open, with comments due on September 2, 2025.

Interplay with Federal Disability Law

- Discrimination under federal, state and local laws in the US remains unlawful, including under the Rehabilitation Act and Americans with Disabilities Act.
- *OPM* Memo
 - OPM issued a memo reaffirming accessibility and accommodations compliance by the federal government
- Federal priorities:
 - Anti-DEI, religion, veterans, and disability
- Companies may continue to advance disability inclusion in employment; great benefit and low risk

But Is “DEI” Illegal Now?

- President Trump’s Executive Orders take aim, expressly, at “Illegal DEI and DEIA policies.”
- This is a primary enforcement priority of the administration, and it is unlikely to change for the remainder of the term.
- Useful [guidance](#) released on July 29.

So, what is “Illegal DEI”?

Making employment decisions impacting employees and applicants based on their membership in a protected class

Preferences or exclusions in employment based on protected category; however, there are caveats as disability and veterans focused programs have less risk as non-veteran and non-disabled are not protected categories

Section 503

- Continue Section 503 programs
- Continue requesting voluntary self-identification of disability information
- If OFCCP ultimately continues, expect Section 503 to become a primary focus with more audits, although likely to be focused reviews
- Familiarize your compliance team with Section 503 focused review materials and seek to adopt best practices
- Look to ODEP during this time, as there is significant guidance there on compliance with Section 503 and the ADA

VEVRAA

- Continue VEVRAA AAPs
- Continue requesting voluntary veteran self-identification information
- If OFCCP ultimately continues, expect VEVRAA to become a primary focus with more audits, although likely to be focused reviews
- Familiarize your compliance team with VEVRAA focused review materials and seek to adopt best practices
- Look to VETS during this time, as there is significant guidance there on compliance with nondiscrimination obligations and promoting veterans employment
- Consider participating in VETS Medallion Program

Antidiscrimination Programs

- FAR Clauses are forthcoming incorporating antidiscrimination law compliance and no unlawful DEI compliance
- One of the FAR clauses focused on compliance with federal antidiscrimination law is likely here to stay as there is bipartisan support this is a very broad clause incorporating civil rights laws in many areas, including the ADA and Rehabilitation Act in relation to employment, customer programs, and public accommodations
- EO 11246 programs should be replaced by antidiscrimination programs to assist in certification and ensure EEO
- Open question as to which agencies will enforce the no unlawful DEI measures
- It is clear that False Claims Act liability is coming for these new FAR clauses/certifications, which involves DOJ
- Antidiscrimination Programs would include a compensation review, adverse impact analyses, and workplace trainings

Keys to a Successful Employment Practices Audit



Know your Data and Goals



Identify and Review
Unexplained Gaps



Carefully Consider Next Steps

HR Audits Require Planning

- What's the scope of the review?
- What HR databases exist to support the review?
- Who is going to be involved?
- What procedures will be followed if there are unexplained disparities (aka, indicators)?

Areas for a DEI Audit

- ✓ Job postings
- ✓ Job applications
- ✓ Interview questions
- ✓ Candidate scoring criteria for positions of employment
- ✓ Internship and scholarship programs
- ✓ Workforce training programs on DEI
- ✓ Promotion frameworks
- ✓ Compensation frameworks
- ✓ Company benefit programs
- ✓ Company policies and training programs
- ✓ Company DEI and Careers webpage messaging

Areas of High Risk

Diversity internship
or scholarship
programs

Employee resource
groups (ERGs) if not
open to allies

Company diversity
“goals”

Tying executive
compensation or
performance criteria
to diversity metrics

Employment
benefits limited to
individuals in certain
protected groups

Diversity Slates and
“Rooney Rule”
Practices

HR Audits Need to be Comprehensive!

- Decisions made years ago impact today's outcomes.
- All HR changes can potentially impact other areas.
 - Acquisitions or expansions to different states or countries.
 - Regulation changes to FLSA and independent contractor designations.
 - Reclassification of jobs can fundamentally change the employees who are considered similarly situated.
- External factors impact internal outcomes.
 - E.g., new hires can start at higher salaries than incumbents because of demand-driven market premiums.

Where to Start?

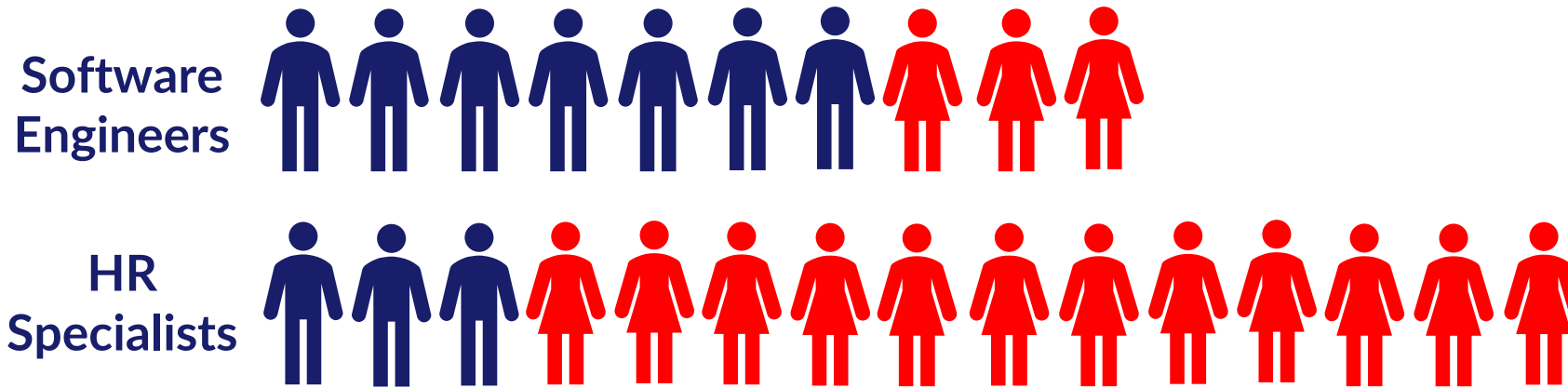
- Most reviews will be a comparison of average outcomes
 - Average salary of women v. average salary of men
 - Average hiring rate of African Americans v. average hiring rate of Whites
 - Average RIF rate of 40+ employees v. average RIF rate of under 40 employees
- Is the difference in averages large? Well, it depends.
 - \$10 gender gap? Small on \$100K salaries; large on \$38/hour rates
- Enter statistics (i.e., “standard deviations”)
 - Standard deviations put differences in averages on a common scale
 - Allows identifying “surprising” outcomes

Statistical Significance = Surprising Result

- Differences equivalent to 2+ SDs are statistically significant. But why?
 - Under certain assumptions, 2+ SDs happen less than 5% of the time.
 - Differences equivalent to 2+ SDs can be used as evidence of discrimination in legal proceedings.
- Data size and type of measurement matter.
 - Big data allows you to estimate very small differences with precision.
 - Big data = Big magnifying glass!
 - Practical significance matters
- Find a balance: statistical v. practical concerns.

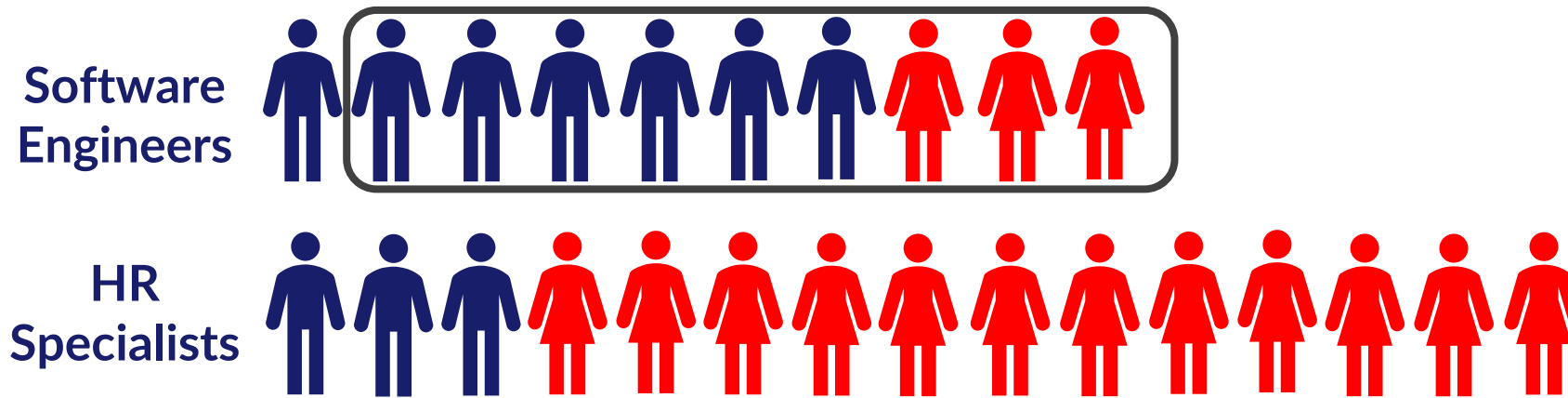
Thinking About Selections

- Pass/Fail, Selected/Not Selected, or Ranking Outcomes
- Comparing similarly situated groups.
- Check statistics
- Is the result surprising?



Selections Analyses

- Hiring freeze for HR Specialists (zero hires)
- Hiring spree for software engineers (red rectangle): 30 / 35 males and 15 / 15 females



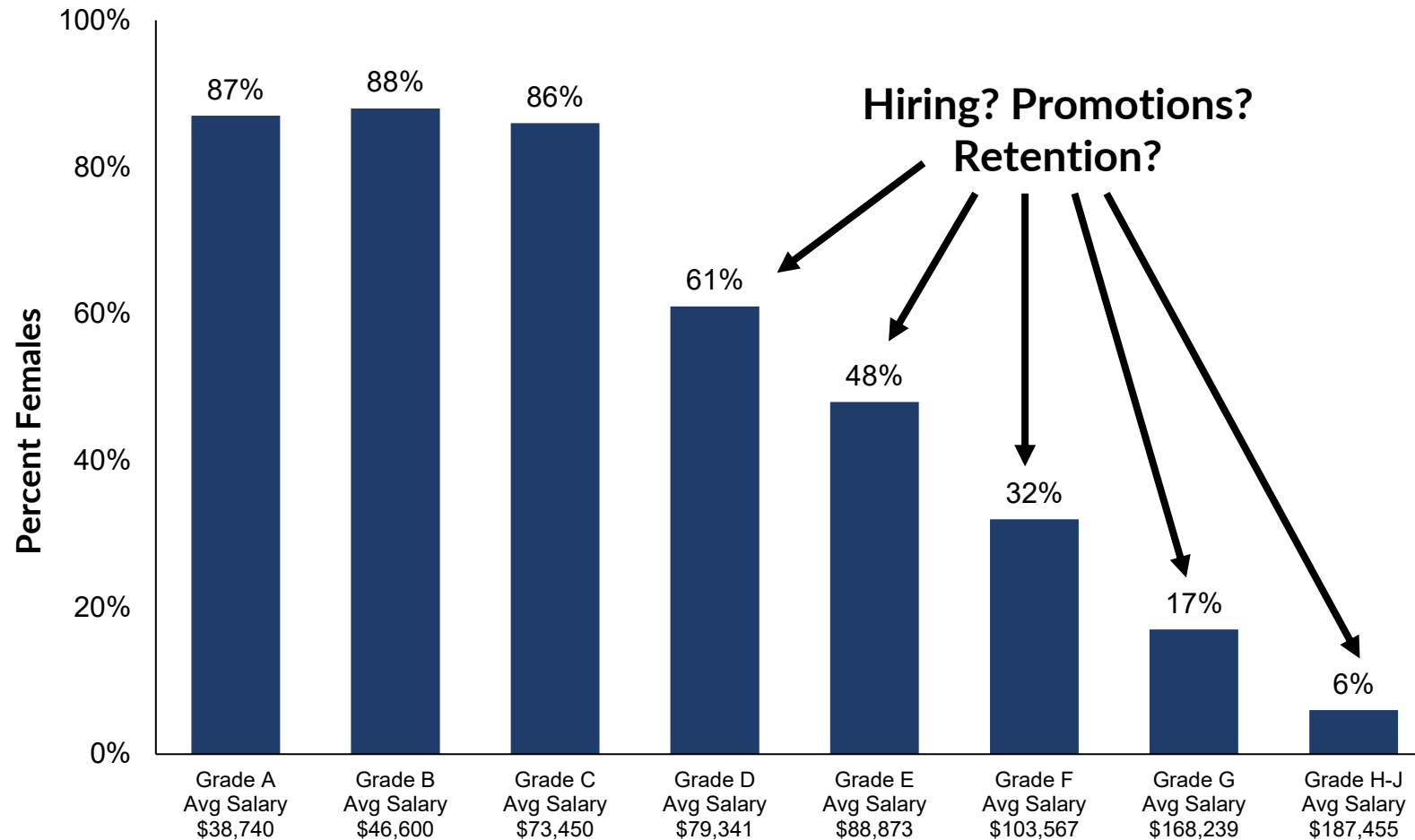
Assessing Indicators

Requisition	Female Applicants	Actual Females Hired	Expected Female Hires	Shortfall/ Excess	SDs	Stat. Sig?
Software Engineers	15	15	13.5	1.5	1.0	No
HR Specialists	60	0	0.0	0.0	0.0	No
All Reqs. – <u>Unadjusted</u>	75	15	27.0	-12.0	-4.4	Yes
All Reqs. – <u>Requisition Adjusted</u>	75	15	13.5	1.5	1.0	No

A naïve comparison that ignores hiring rate differences between requisitions incorrectly identifies a hiring indicator unfavorable to women. The indicator arises because women were a larger fraction of the HR specialists (no hires) and a lower fraction of the software engineer applicants (almost all hired).

A statistical comparison that accounts for hiring rate differences between requisitions correctly finds no adverse impact.

Why Selections Matter? They Impact Other Outcomes



After the Analyses

- Are there any areas showing unexplained disparities (aka, indicators)?
- What steps will be taken to investigate and potentially address the indicators?

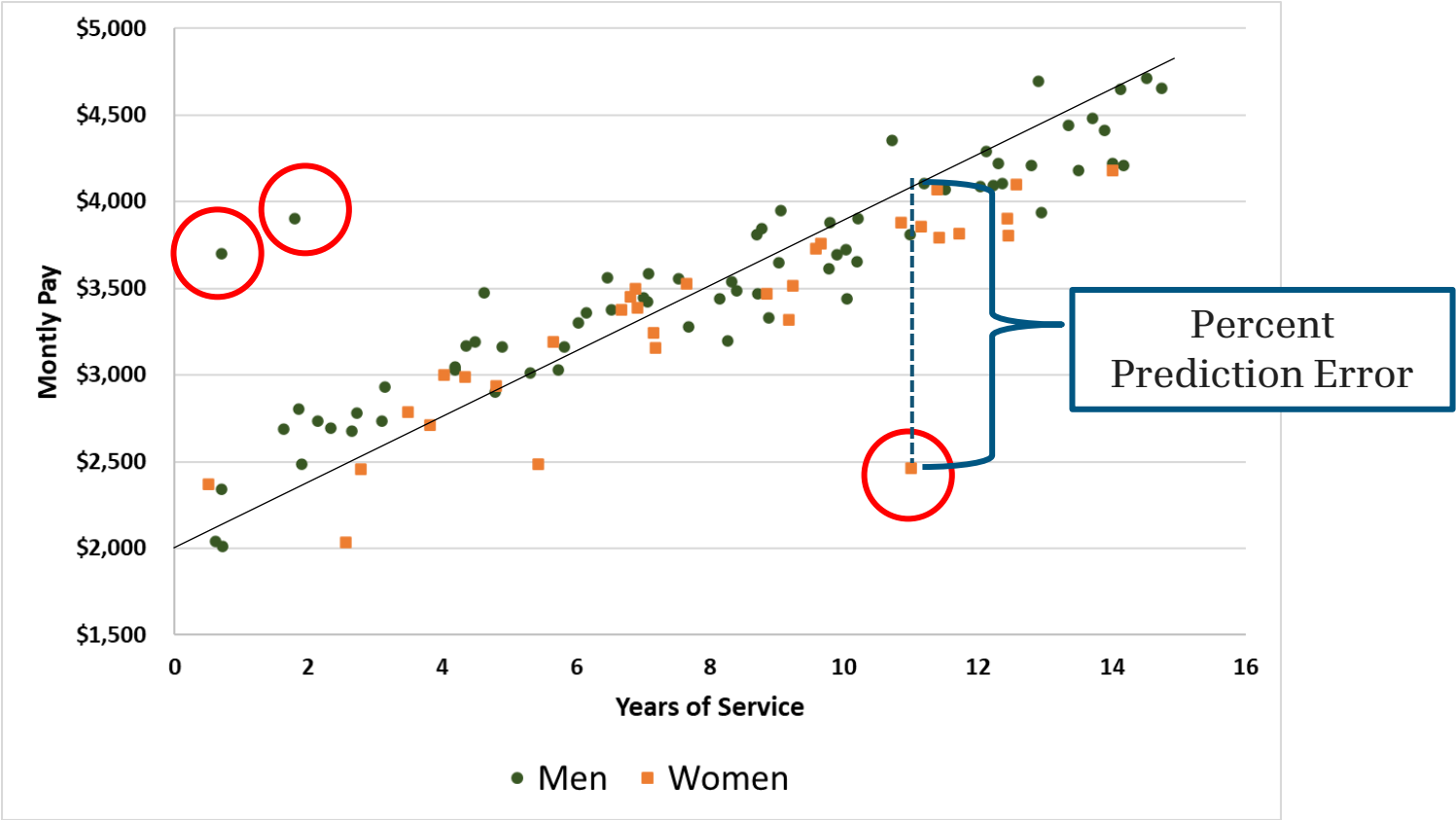
Thinking About Remediation Correctly

Remediation is more than simply adjusting outcomes for a group.

Remediation involves investigating and finding root causes.

Otherwise, remediation becomes a band-aid without long-lasting impact.

When Reviewing Indicators, Look for Outliers!



But why?

- Outliers exist because of comparators: individuals with similar characteristics but different outcomes.
 - Hence, the need to review outliers to identify comparators and potential sources of the unexplained difference.
- Statistical techniques compute an average difference.
 - Some employees from the group with indicators may have above-average outcomes.
- A below-average outcome for an individual is not sufficient to conclude that an adjustment is warranted.
 - Relevant factors not in the HR data may explain outcomes.

How to Correctly Think About Remediation?

- Outliers need comparators for context.
- Effective remediation cannot take place without a complete review of the unexplained gaps.
 - Otherwise, the same issues will arise in the next review cycle.
- Most indicators arise from data errors or the omission of relevant factors from the statistical models.
 - Many relevant factors are not in HR systems or are not easily quantifiable (e.g., relevant prior experience).
- Communication and documentation are key.

Timing of Remediation

- During your annual merit cycle?
 - Employees and their performance are being looked at and other adjustments are taking place.
- Off-cycle adjustments?
- There may be legal considerations depending on the jurisdiction.
- Keep counsel involved throughout the process
 - Employment laws are constantly changing and expanding
 - Advice on documentation and messaging
 - Maintain privilege

How to Break the Cycle?

- Adjustments usually signal that other changes are warranted
 - Are there organizations/job families/managers with indicators year after year?
 - Is the HRIS capturing all relevant factors?
 - Is the job taxonomy constantly changing?
- Adjustments rarely address the root cause of the unexplained disparity.
- Without deeper changes, the indicator(s) will return.

What should Contractors keep doing?

- Annual EEO training for the workforce
- Under privilege, an annual pay equity review
- Collecting EEO-1 demographic data, if you are required to do so
- Complying with other applicable state, local, and international legal obligations - If these appear to conflict with US legal requirements, consult with counsel
- Ensuring accessibility to applicants who seek positions of employment with your company and for employees who work for you
- Promptly and lawfully responding to legally protected leave or accommodation requests (e.g., related to disability, religion, or pregnancy)
- Disparate impact testing for employment actions that may implicate this issue (e.g., job qualifications, background check standards, layoffs)
- Reminding employees of your EAP and other workplace well-being benefits
- Not tolerating harassment in the workplace and maintaining a healthy and inclusive workplace environment where employees treat each other with respect

Questions

