



The Uniform Guidelines Part 1 – Foundations of Merit-Based Selection

Vicki Lipnic, Esq., Valentin Estevez, Ph.D., Dan Kuang, Ph.D.



Presenters



Vicki Lipnic, Esq.
Resolution Economics
vlipnic@resecon.com



Valentin Estevez, Ph.D.
Charles River Associates
vestevez@crai.com



Dan (dk) Kuang, Ph.D.
Resolution Economics
dkuang@resecon.com

Disclaimer

The information in this PowerPoint and the related webinar presentation is provided for general information purposes only and does **not constitute legal advice**. You should consult your legal counsel for advice regarding the applicability of the information presented to your specific situation.

Agenda

- **What is Merit-Based Decision Making**
- **Uniform Guidelines (“Guidelines” or “UGESP”)**
 - History & Background
 - Purpose
- **Uniform Guidelines & Merit-Based Decision Making**
 - Validity
- **Adverse Impact Analysis**
 - Selection Rate Analysis
 - Job Related and Consistent with Business Necessity
- **Crystal Ball—Future of Uniform Guidelines**

[illegible]

Purposeful, Explainable, Efficient Selections!

Top 5 Words in UGESP	Count
Selection	263
Procedure	261
Job	200
Validity	166
Study	129

What is “Merit-Based” Hiring?

- Merit-Based hiring is about evaluating and selecting candidates based solely on their **skills, experience, and qualifications** – the attributes that directly relate to their **ability to perform a job**.

Why are “Merit-Based” Selections Important Now?

President Trump’s Executive Orders & Merit-Based Hiring

- President Trump’s Executive Orders have focused on “merit-based” hiring and de-emphasized disparate impact
- Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, January 21, 2025
- Executive Order 14281, *Restoring Equality of Opportunity and Meritocracy*, April 23, 2025

What is “Disparate Impact?”

Disparate Impact

- “Disparate Impact” – If a selection method has a disproportionately negative effect on individuals of a particular race color, sex, religion origin (“protected group”), it can’t be used unless it actually helps identify good employees (is “job related and consistent with business necessity”).

Uniform Guidelines on Employee Selection Procedures ("Guidelines"/"UGESP")

Uniform Guidelines: History & Background

Title VII of the Civil Rights Act of 1964

- Prohibits discrimination on the basis of race, color, national origin, sex, and religion
- When passed, the idea that neutral practices (e.g. tests) could be discriminatory was becoming more common. As protection for employers, Congress added Section 703(h) to the statute:
 - Employers may “act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate”

Uniform Guidelines: History & Background

Title VII of the Civil Rights Act of 1964

- In **1970**, the EEOC provided its nonbinding interpretation of what qualifies as a “professionally developed ability test” under 703(h).
 - These 1970 EEOC Guidelines adopted the idea of purely *effects-based* discrimination, which the US Supreme Court endorsed in **1971** in *Griggs v. Duke Power*.
 - UGESP was adopted in **1978** by the EEOC, the Civil Service Commission (now the federal Office of Personnel Management), the Department of Labor, and the Department of Justice. They were “designed to provide a framework for determining the proper use of tests and other selection procedures.”

Uniform Guidelines: History & Background

Title VII of the Civil Rights Act of 1964

- Each agency adopted its own regulations or guidelines.
- EEOC Guidelines @ 29 CFR §1607
- OFCCP Regs @ 41 CFR Part 60
- “These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.”

Uniform Guidelines: History & Background

Civil Rights Act Amendments of 1991 -Title VII

- In **1991**, Congress codified the theory of “disparate impact” when Title VII amended; liable unless employer can show “job-related and consistent with business necessity.” CRA of 1991 neither incorporated nor invalidated the 1978 Guidelines.
- The Guidelines require employers to search for alternative selection procedures that have less impact, but under Title VII the plaintiff has the burden of identifying a less discriminatory alternative that the employer refused to adopt.
- Main purpose of the Guidelines under Title VII is to provide non-binding guidelines that employers can use to avoid liability and agency scrutiny.

Guidelines Process

- Guidelines describe four-stage process –
 1. Maintain applicant flow data
 2. Determine whether the procedure has adverse impact on a protected group
 3. If so, validate
 4. Additional considerations
- Q&A issued in 1979 by EEOC to address issues that arose in public comments but were omitted from UGESP

Guidelines: “Bottom Line” Assessment

- First step: assess whether the procedure as a whole has adverse impact
- Determine selection rates for protected groups
- A rate equal to or less than four-fifths of the highest rate is considered “evidence of impact” (29 CFR §1607.4D.)
- If numbers are too small, external data may be considered in appropriate circumstances
- Failure to maintain necessary records is also considered “evidence of impact” if the protected group is underrepresented relative to the labor pool (29 CFR §1607.4D.)

Guidelines: Standards for Validity

UGESP allows for three types of validity studies:

- **Criterion-related**: evidence of criterion-related validity should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance.
- **Content-related**: should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which candidates are to be evaluated.
- **Construct-related**: should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job.

Uniform Guidelines & Merit-Based Decision Making

What's Merit? – The Labor Economist's View

- Selection **(Word #1)** = Choice
- Economics is about choice: making the most out of the available resources.
- To achieve efficient outcomes
 - Identify needs, i.e., skills, abilities, jobs **(Word #3)**
 - Design the process, i.e., a procedure **(Word #2)**
 - Ensure the process is working, i.e., study **(Word #5)** and validate **(Word #4)** your actions.
- Human capital is a company's most valuable asset.
 - Deliberate selection practices are efficient.

Thorough Selection Processes Have High Value

- “Extensive selection procedures” have shown promising value in [boosting productivity](#).
- [Minni \(2024\)](#) finds that good managerial practices in matching individuals to tasks mean:
 - Better performance and output
 - Higher earnings
 - Improved career outcomes

Unstructured Selection Processes Have High Costs

- HR departments are chronically understaffed.
 - Time spent reviewing candidates is time not spent on other vital HR functions.
- Following inefficient practices means higher operating costs
 - Restart the process
 - Lower productivity and reputational costs
 - Legal risks
- A few cost estimates of selection mistakes:
 - 30% to 150% of the selection's [salary](#)
 - Reduction in output from holding on to [inefficient selections](#): \$208 billion

Like the UGESP, Labor Economics Prescribes Monitoring Selection Practices

- So, what's a merit selection?
 - One that identifies the candidate that best matches the talent or skill need.
- A merit selection involves a thorough understanding and formulation of:
 - What's the selection trying to accomplish?
 - What sources will provide candidates?
 - What are the skills, abilities, relevant experiences of the candidates?
 - What are the assessment process steps?
 - What levels of the hierarchy will be involved in the assessment process?
 - What benchmarks will determine whether the process works?

How about the “standard deviations” (SDs) and all that?

- A statistical analysis of selections is more useful when informed by robust data on the process.
- Statistics based on a list of candidates and a selection flag rarely provide deep insights into HR practices. Without a carefully designed process and supporting documentation:
 - Indicators (i.e., SDs over 2) may be due to incomplete models and data.
 - Lack of indicators may also be due to incomplete models and data.
- Given what’s at stake for companies and candidates, taking the time to ask questions and design the selection process has high returns.

Guidelines and Merit-Based Decision Making

- **IO Psychologists:** Personnel Decision Making Experts
- **Guidelines:** Framework To Understand if Decisions are Job Related
- **Standards for Validity (Job Relatedness)**
 - 41 CFR Section 60-3.5: General Standards for Validity Studies
 - 41 CFR Section 60-3.14: Technical Standards for Validity
 - 41 CFR Section 60-3.15: Documentation of Validity Evidence
- **Job Performance**
 - Visible
 - Non-Visible

Guidelines and Merit-Based Decision Making

Job Performance—Visible

- **Content Validity** (§ 60-3.5B, § 60-3.14C, § 60-3.15C)
 - Duties and Tasks
 - Knowledge, Skills, and Abilities

Guidelines and Merit-Based Decision Making

Job Performance—Non-Visible

- **Criterion Validity** (§ 60-3.5B, § 60-3.14B, § 60-3.15B)
 - Criteria
 - “...represent important or critical work behavior(s) or work outcomes...”
 - “Certain criteria may be used without a full job analysis if the user can show the **importance of the criteria to the particular employment context.**”
 - e.g.: production rate, error rate, tardiness, absenteeism, and length of service.
 - Relationship between Decision and Criteria

Adverse Impact Analysis and Defense Strategy—Validation

Measuring Adverse Impact: Impact Ratio Analysis

- The “2x2” standard
- UGESP lays it out clearly
 - 4/5ths or 80% rule of thumb
 - Statistical tests (e.g., Fisher’s Exact Test, Chi-square)
- Selection Ratio: Comparison of Selection Rates for focal and reference groups

	Pass	Fail
Male	M_{pass}	M_{fail}
Female	F_{pass}	F_{fail}

$$\textit{Selection Ratio} = \frac{\frac{F_{pass}}{F_{pass} + F_{fail}}}{\frac{M_{pass}}{M_{pass} + M_{fail}}}$$

Adverse Impact: Validity Defense

- Decision Validity:
 - “Job Related and Consistent with Business Necessity”
- **Content** Validity
 - Face Validity—Work Sample

JOB



Selection Test—DECISION



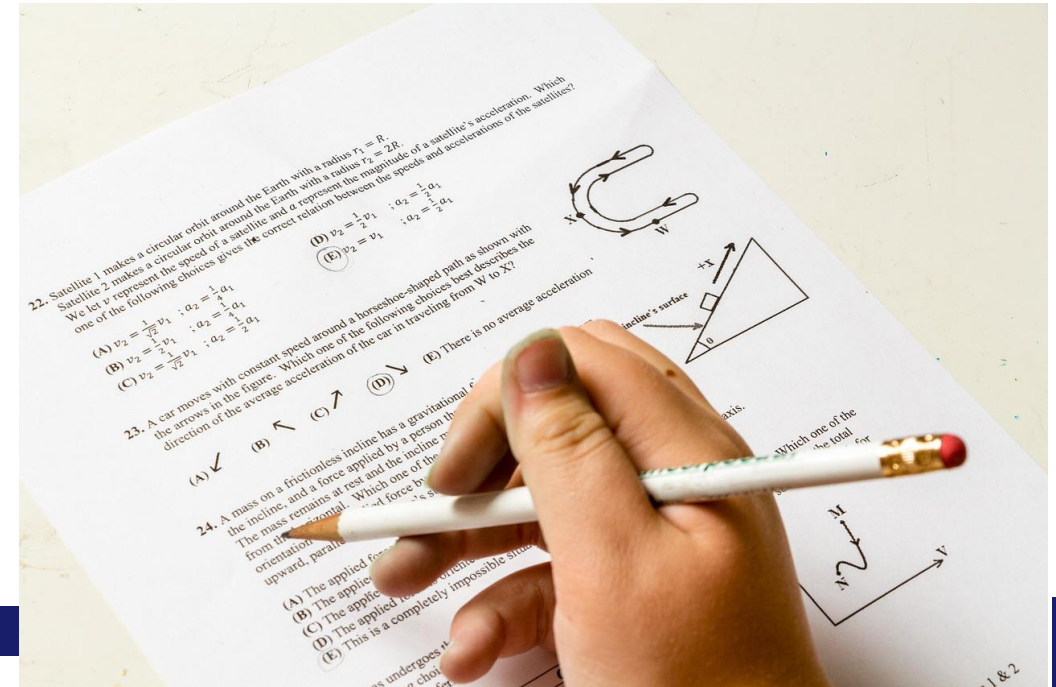
Adverse Impact: Validity Defense

- Decision Validity:
 - “Job Related and Consistent with Business Necessity”
- **Criterion** Validity
 - Non-Visible Performance—**STRONG FACE VALIDITY**

JOB



Selection Test—DECISION



Crystal Ball— The Future of Uniform Guidelines

Crystal Ball: The Future of Uniform Guidelines

- OMB
- Executive Order 14281: Disparate Impact
 - <https://www.whitehouse.gov/presidential-actions/2025/04/restoring-equality-of-opportunity-and-meritocracy/>
- Practitioners and IO Psychologists
 - Society for Industrial and Organizational Psychology (SIOP)
 - Principles for the Validation and Use of Personnel Selection Procedures (updated regularly to reflect current scientific research and best practices in hiring and promotion)
 - SIOP Statement on the use of Artificial Intelligence (AI) for Hiring, January 29, 2022
 - SIOP Statement on Title VII and Job-Relevant Employment Practices, May 20, 2025 (following Executive Order 14281)

HR Multiverse: What if UGESP Never Existed?

- We would be dealing with similar questions.
 - The benefits and costs would still be here.
- UGESP started an important conversation: How do you evaluate selections?
 - Added benefit: UGESP provided guidelines.
- Many considerations impact the answer to this question.
- Many disciplines have valuable knowledge to contribute to the conversation.
- Regulatory compliance is the icing on the cake. Correct selections are the primary goal.

Recap—Key Takeaways

Recap

- Title VII remains
- Guidelines provide consistent roadmap and benchmark to Merit-Based decision making
- Business case for Merit-Based decisions
- Validation of selection decisions

Questions



Supplemental