Answers to Questions Submitted to NILG Webinar

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

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Disclaimer: The information provided in the NILG Webinar on June 17, 2025, the accompanying Power Point and the answers below to questions submitted during the webinar presentation are provided for general information purposes only and the panel's responses (below) do not constitute legal advice. <u>You should consult your legal counsel for advice regarding the applicability of the information presented to your specific situation.</u>

1. **I think it is important to underscore that disparate impact has to be predicated on a specific employment practice – will you be addressing that?**

<u>Answer</u>: The Civil Rights Act of 1991 amended Title VII of the Civil Rights Act of 1964 to codify the disparate impact theory of discrimination. Yes, your comment/question is what the statute requires related to disparate impact claims. Section 703(k)(1)(A)(i) of the statute provides: *An unlawful employment practice based on disparate impact is established under this subchapter only if –*

> *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.*

Further, Section 703(k)(1)(B)(i) provides:

> *With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.*

Although the Uniform Guidelines, adopted in 1978, pre-date the Civil Rights Act of 1991, the concepts of a particular employment practice, job-relatedness, business necessity (validation) and the ability or inability to separate out elements of a decision-making or selection process are consistent with the Civil Rights Act and disparate impact.

2. **The Veteran's Administration has disallowed the collection of data with gender, ethnicity, and race.**

Answer: See answer to Question #8 below.

3. **What type of analysis should be done of hires, promotions, and terminations in order for a high-level company official to certify that their company does not discriminate?**

Answer: Generally, a thorough review of employment practices and selection decisions involves two types of analysis: (1) qualitative review of current HR processes, decision-making, and documents; and (2) quantitative analysis for group differences (i.e., adverse impact analysis) in hires, promotions, terminations, and compensation. Both studies are useful because a quantitative adverse impact analysis can surface potential issues that a qualitative review would not and vice-versa. The type of analysis and definition of analysis groups would vary from company to company since they must reflect the company's HR practices and workforce composition.

If the analysis indicates areas of adverse impact, employers are strongly advised to investigate these indicators and document legitimate non-discriminatory explanations. Where required, take corrective action to address any indicators. Such analyses should be conducted under legal privilege.

4. **Wouldn't doing a disparate impact analysis show you if you are potentially discriminating?**

Answer: Even in ideal analytical situations (e.g., complete data and fully specified statistical models), statistical analyses of HR data only estimate correlations between variables, not whether one variable causes another one. That is, in typical analyses of HR data, the statistical results by themselves cannot prove discrimination. When adverse impact analysis for a decision-making process identifies group differences, this is an indicator of only unexplained outcome differences between groups requiring additional review. As a next step, the employer must proceed with investigating the driver of the adverse impact.

Employers can defend the use of that decision-making process or job criteria if they can show that it is valid, *i.e.*, job-related, and consistent with business necessity. The Uniform Guidelines detail three (3) forms of validity testing: Content, Criteria, and Construct.

5. **What is the status of OIRA approval of extension of UGESP and do you expect it to get extended for another 3 years? It looks like it has been extended to 6/30/25?**

Answer: There is no further update.

6. **Is there a website you recommend that can help us when we are reviewing job descriptions? Also, what type of tests are recommended for certain technical or role specific requirements like finance and which ones should we avoid?**

Answer: There is no website we can recommend to assist with reviewing job descriptions. In line with UGESP, the most defensible job descriptions are based on a job analysis study.

Many people use O*Net[1] as a starting point and then refine and customize it to their company's unique needs. Some employers rely on certain Generative Artificial Intelligence tools as a starting point for drafting job descriptions. The panel cautions, that only a Job Analysis study can provide the necessary technical data to support the qualifications and tasks included in job descriptions' Tasks, Duties, Knowledge, Skills, and Abilities list.

With respect to the request for specific test recommendations, the panelists cannot recommend or endorse any specific test or vendor. Having said that, we do recommend assessments that are high in-content and face validity[2], such as work sample tests. These are available for technical roles, such as finance. If there are no off-the-shelf solutions, developing a customized technical assessment is a great option. Industrial/Organizational (I/O) psychologists regularly help clients vet and/or develop custom assessments. If the assessment will be used to evaluate many job candidates, it is worth engaging an I/O psychologist for support.

7. **I think a disparate impact report would tell us if we have indicators. However, if you show disparate impact then the employer has to investigate all instances of disparate impact to determine if the indicator is valid. Where does the obligation to investigate disparate impact start and end? If you have indicators and your company is large that calls for a ton of research.**

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[1] O*Net is the Occupational Information Network, a comprehensive database and classification system that serves as the U.S. Department of Labor's (DOL) primary source of occupational information. It is a program of the Employment & Training Administration at the DOL.

[2] "Face Validity" is not codified in the Uniform Guidelines but is an important assessment attribute that I/O psychologists value. Face validity essentially asks – is the assessment measuring what it is intended to measure? To the extent that an assessment is intuitively and rationally related to what we want to measure it is face valid. For example, if we want to hire a warehouse worker to stock shelves, a face valid assessment may be a work sample test that simulates the job of lifting and shelving boxes. Face validity is important because it affects applicants' perception of test fairness and the likelihood that an assessment may be challenged.

Answer: An indicator is a prompt for additional research. Statistical analyses can drill down to a specific job title and the specific selection tool or job requirement that is driving the adverse impact narrowing the scope of the investigation. Additionally, there are strategic ways to prioritize investigation resources, and it largely depends on (1) assessment type; (2) the individual employer's risk tolerance;(3) the persistence or prevalence of the finding; and (4) strategic workforce planning. As assessment and workplace experts, I/O psychologists can offer many options, e.g., modify assessment, validation, and workforce planning.

8. **What is the status of UGESP renewal with OMB?**

Answer: Here is the link to OMB: https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202412-3046-006. They are still under review. The current version is still in effect.

9. **What happens if you show adverse impact and don't investigate it? Then an executive signs off on the non-discrimination certification?**

Answer: When referring to the "non-discrimination certification" the questioner is presumably asking about the certification provisions in President Trump's Executive Order (EO) 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity (January 21, 2025).* The operative provisions in the EO are:

(iv) The head of each agency shall include in every contract or grant award:

(A) A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 3729(B)(4) of title 31, United States Code; and

(B) A term requiring such counterparty or recipient to certify that it does not operate any ***programs promoting DEI that violate any applicable Federal anti-discrimination laws****." (emphasis added).*

The EO's citation to Title 31 section 3729(B)(4) is a reference to the False Claims Act. To certify, contractors are advised to engage in a due diligence review of their employment practices. This could include a qualitative review of all diversity (DEI) efforts, as well as a quantitative review of selection processes to determine whether there is a statistically significant difference in selection rates based on gender or race/ethnicity. If, as the questioner suggests, this initial review reveals a concern, the employer should take a deeper dive to determine whether the driving force is a DEI program, and whether changes to its employment policies or practices are required before it can certify its compliance.

Note that federal contractors and employers writ-large have always had to meet their equal employment opportunity obligations and to not discriminate (on the various protected bases) in their workplaces in the terms and conditions of employment. If an internal analysis shows some adverse impact in some aspect of selections, then they may have a discrimination issue and they should follow the practices of the Uniform Guidelines to investigate, validate, and test whether the selection practice (selection) is defensible.

10. Any word on whether lobbying efforts for a "safe harbor" option have been successful relevant to federal contractor certification and False Claims Act?

Answer: The Civilian Agency Acquisition Council (CAAC) at the General Services Administration (GSA) sent a proposed Interim Final Rule to the Office of Management and Budget's Office of Information and Regulatory Affairs on April 14, 2025. *See* FAR Open Cases Report 2025-004. The CAAC is a part of the broader Federal Acquisition Regulations (FAR) Council which oversees all regulations for federal procurement.

The content of that rule is not yet public. A number of organizations (employer groups, civil rights organizations) have had "listening sessions" with OIRA about the rule. One group proposed that OIRA include the idea that if federal contractors have undertaken a review of certain internal policies and practices and done workforce analytics to see if they have any discrimination issues they could certify in good faith and obtain a "safe harbor" from the federal government's enforcement of Executive Order 14173. Because OMB is conducting "listening sessions" at this point in the process and the content of the rule is not public there is no indication as to whether such an idea is being considered.

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