

Answers to Questions Submitted to NILG Webinar

“Yes, Monitoring HR Outcomes is a Sound Business Practice – What Employers Should be Doing With Their Employment Data”

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Q1: We are debating whether we can continue to routinely run our minority and female impact ratio analyses under Attorney Client Privilege (ACP) or whether we can only run them now when there is an issue or complaint. Thoughts?

Response: Continue. Proactive reviews of employment practices are the best approach for identifying areas requiring attention and addressing them without the pressure of litigation. Reviews of areas with unexplained employment outcomes can be time-consuming and resource-intensive, making it more beneficial to tackle these issues on your terms rather than by external actors.

When conducting these analyses, do not assume Whites and Males are favored, as many contractors did when preparing their annual AAPs. Rather, conducting the analyses based on the most favored group as compared to all other groups. This approach to the analysis will be more persuasive if the employer is subject to an investigation by the EEOC or Department of Justice.

Finally, these analyses should be conducted under attorney client privilege.

Q2: How do you prove you are not discriminating without the data? How do you evaluate the effectiveness of your outreach efforts?

Response: Statistical analyses by themselves cannot confirm or rule out discrimination as a root cause for differences in employment outcomes between groups of individuals. However, statistical analyses allow you to identify areas with unexplained employment outcomes between groups of employees.

The analysis is just the first step. Where there are disparities, look for the root causes driving the disparity by evaluating whether legitimate explanations exist for those differences, and whether policies and practices have had the intended effect, including outreach efforts. Document the legitimate explanations. If there is not an explanation, determine the root cause driving the disparity and take appropriate action to address.

Without systematic data analyses, companies may fail to identify areas requiring review or focus on outcome differences with legitimate explanations.

Analyses and any follow up investigations should be conducted under attorney-client privilege.

Q3: Can you clarify what you mean by a barrier analysis?

Response: A barrier analysis evaluates employment practices related to advancement within the organization. Depending on the organization's structure, a barrier analysis may involve examining hiring, promotion, transfer, training, disciplinary action, and termination decisions. The goal is to identify whether groups appear advantaged or disadvantaged in outcomes that determine progress within the firm.

Q4: Aren't Female/Minority supplier programs under greater scrutiny too?

Response: Yes. Such programs are under greater scrutiny and contractors should act with care and not presume socioeconomic disadvantage based on protected class status. Keep in mind, however, that your contracts may still include language requiring compliance with such programs. If you have not received a contract amendment from the contracting agency, consult counsel before deciding to disregard these obligations.

Q5: Can you briefly talk about the impacts on diversity procurement processes under this admin?

Response: If these provisions are still included in your organization's active contracts, consult counsel before making any changes to your compliance obligations.

With that said, it is generally safer to focus on socioeconomic disadvantage as well as disability-owned and veterans-owned businesses. If a firm focuses on minority-owned and women-owned businesses because of a mandatory legal requirement, they should be careful not to presume socioeconomic disadvantage consistent with the analysis in the Ultima case and should still discuss with counsel to ensure compliance with EO 14173 and any antidiscrimination certification they are making. Also, there is risk of 42 USC Sec. 1981 being applied to racial preferences in contracting, so it is important to consider that law and discuss with counsel as well.

Q6: Can you talk about pattern and practice that EEOC is focused on? What about adverse impact – is this still acceptable to conduct?

Response: EEOC is still pursuing systemic disparate treatment claims using evidence of adverse impact. Such claims may focus on that employers' hiring, termination, promotion and compensation decisions. Statistical analyses of these employment outcomes, of which adverse impact is an example, are valuable tools to evaluate your employment practices.

Q7: Didn't OFCCP "recommend" several years ago to analyze data in full racial/gender categories? The change will be for those organizations that didn't follow that recommendation back then. Some took it and are better prepared to bob/weave under knew requirements.

Response: Yes, OFCCP did recommend that employers assess adverse impact by each race/ethnicity and gender. Importantly, the statistical tools traditionally used by firms to evaluate employment practices would identify any group, regardless of gender or race, whose average outcomes appear lower than those of a comparator group.

Q8: Because the analysis is to review for potential barriers under federal anti-discrimination laws, do you recommend conducting reviews based on AGE along with race, sex, disability and veterans?

Response: Firms experienced in evaluating their employment outcomes tend to examine outcomes by age groups for some employment practices. While similar in many respects to gender and race analyses, age comparisons add unique analytical considerations. For example, while gender and race comparisons among individuals in the same job title are thought to make "apples to apples" comparisons in terms of average skills and productivity, observing wide differences in age among employees in the same job title might indicate average differences in productivity between the groups that only a deeper dive into the data would be able to confirm.

Q9: For age analysis, how do you recommend that it be structured? Age 40 & up vs others? by age ranges like age 40s, 50s, etc.?

Response: Including age cuts other than 40 vary from company to company, depending on the composition of their workforce and legal risk tolerance. Discuss with counsel and your statistical expert before conducting the analyses.

Q10: Can we continue our established outreach programs for min/women, for example, female engineer professional groups?

Response: It is still appropriate to do targeted outreach, provided the plan includes outreach to a range of organizations giving applicants of all races/ethnicities and genders. For example, outreach to HBCUs is permitted, however you must also recruit from other organizations to ensure a diverse pool of applicants.