



# AI in HR: What Employers Need to Know about the Patchwork Legal Landscape

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# Agenda—AI in HR Update

- Intro: AI in HR
- Patchwork Legal Landscape Update
  - Existing Laws
  - New Laws
- Managing AI Risks
  - Bias Audit: Analytics
  - Validation: Merit-Based Decision Making



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# Intro: AI in HR



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# AI in the Workplace

- How are Employers Using AI in the Workplace?

|  |   |
|--|---|
| <ul style="list-style-type: none"><li>• Benefits</li><li>• Onboarding</li><li>• Retention</li><li>• Training</li><li>• Productivity Monitoring</li></ul> | <ul style="list-style-type: none"><li>• Recruitment</li><li>• Hiring</li><li>• Promotion</li><li>• Succession Planning</li><li>• Performance Management</li></ul> |
|--|---|

- How does it create risk?
  - Misalignment between intended use and actual use
  - Based on criteria that is not job-related
  - Developed, deployed without regard to compliance with employment laws



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# Patchwork Legal Landscape Update



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# Existing Laws

- Before a discussion of newer (State) laws, we should chat about the tried and true pillars of anti-discrimination laws
  - Title VII of the Civil Rights Act of 1964
  - Age Discrimination in Employment Act of 1967
  - Americans with Disabilities Act of 1990
- Bottom line: AI tools used to make employment decisions are covered by existing federal anti-discrimination laws

# AI in the Workplace – Lawsuits are getting started

- **Mobley v. Workday** – Applicants alleged Workday's AI-powered screening tools discriminated against them based on race (Title VII), age (ADEA) and disability (ADA)
  - Plaintiffs have been certified by the Court as a collective action under the ADEA– may be millions of plaintiff applicants
- Numerous charges working their way through the EEOC/state agency process
- EEOC v. iTutorGroup
- EEOC/ACLU/CCRD v. HireVue/Intuit
- Harper v. Sirius XM Radios
- Aon Consulting (ACLU administrative actions)
  - The “what”: ACLU challenges three Aon hiring tools (ADEPT-15, vidAssess-AI, gridChallenge) as discriminatory against people with disabilities and certain racial groups; also alleges deceptive “bias-free” marketing.

# Quickly Expanding Laws Governing AI in the Workplace

- While the new Administration rolls back federal enforcement efforts . . . States & Big Cities are filling the void –
  - **New York City One of the First to Tackle AI** - regulates AEDTs, requires bias audit
  - **California Updated its FEHA Law** – algorithmic discrimination, enhanced recording-keeping
  - **Illinois Continues to Innovate** – Artificial Intelligence Video Interview Act and amended Human Rights Act
  - **Colorado leads the way** – The most comprehensive, burdensome law governing workplace AI
  - **Texas’s Take on Workplace AI Protections** – Unique in not permitting claims based on disparate impact, requires intent to discriminate
  - **New Jersey Doubles Down on Existing Laws** – Amends its Law Against Discrimination to Include Algorithmic Bias
  - Many other laws, amendments in the works

# California's Updated "FEHA" AI Rules

- Fair Employment and Housing Act Rules amended, effective October 1, 2025
- Discrimination by Automated Decision Systems (ADS) – process for making decisions or facilitating decision-making regarding employment
- Examples –

|  |  |
|--|--|
| Screen resumes or applications                               | Make predictive assessments about an applicant or employee               |
| Rank or score candidates                                     | Measure skills, reaction-time, and/or other abilities or characteristics |
| Analyze facial expressions, voice, or behavior in interviews | Target recruiting materials to specific groups                           |

# California's Updated "FEHA" AI Rules

- No definitive requirement for anti-bias testing but. . .
  - Relevant to any such claim or available defense is evidence, or the lack of evidence, of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results
  - No mandated methodology for anti-bias testing; rules reference the Uniform Guidelines
- Liability for Agents – Employers directly responsible for bias of independent agents, including recruitment agencies, staffing firms, or other third-party vendors
- Transparency/Notice, Expanded Recordkeeping



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# Colorado – Most Comprehensive AI Law So Far

- CO's AI Act, S.B. 24-205 (amended as S.B. 25B-004), effective **June 30, 2026**
- Enacted to protect “consumers” from risk of algorithmic discrimination caused by AI systems
- First comprehensive law AI law at the state level
- Applies to decisions including **employment or employment opportunity** but also lending, govt services, healthcare, housing, insurance, legal services



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# Colorado – Most Comprehensive AI Law So Far

- Creates many requirements for “developers and deployers”
  - Transparency, ongoing disclosures, annual “impact assessments” and updated assessments within 90 days of change to the tool
  - Notice requirements and appeal rights for adverse decisions
- No prescribed methodology for impact assessments
- Enforcement limited to the Colorado Attorney General; no private right of action
- Expect the AG to issue regulations to provide needed detail on compliance requirements



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# Texas Responsible AI Governance Act

- Responsible AI Governance Act, effective January 1, 2026
- Broad coverage – Applies to most businesses connected to Texas that develop, deploy, or provide AI used by Texas residents
- Anti-Bias rule – Prohibits deployment of AI “with the intent” to “unlawfully discriminate...” Disparate impact is not unlawful
  - Includes notice rules for certain public and healthcare uses
- No mandated bias testing – Offers safe harbor and a regulatory “sandbox”, but does not require statistical analysis or bias audit reports, like some other states



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# AI in the Workplace – Lawsuits are getting started

- The “**Bottom Line**” – Expect a significant increase in “blue state” agency enforcement and private individual and class litigation
- OK, enforcement is coming, how do we respond . . . ?
- Next Section: Assessing and Managing AI Risk



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# Assessing & Managing (AI) Risk



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# Assessing & Managing (AI) Risk

- **Assessing AI Risk**

- AI Bias Audit
- Identify (potential) Adverse Impact

- **Managing AI Risk**

- Merit-based Decision Making
- Validation
  - Content Validity for AI Decisions
  - Criterion Validity for AI Decisions
  - Construct Validity for AI Decisions



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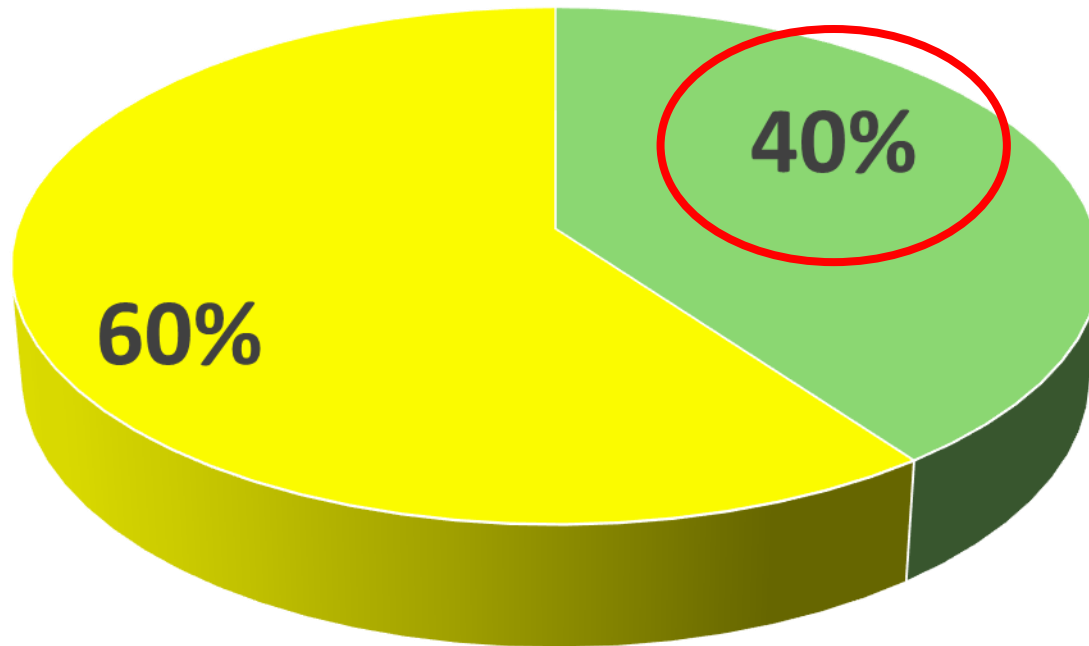
# What is Adverse Impact?

- Sub-Group Differences

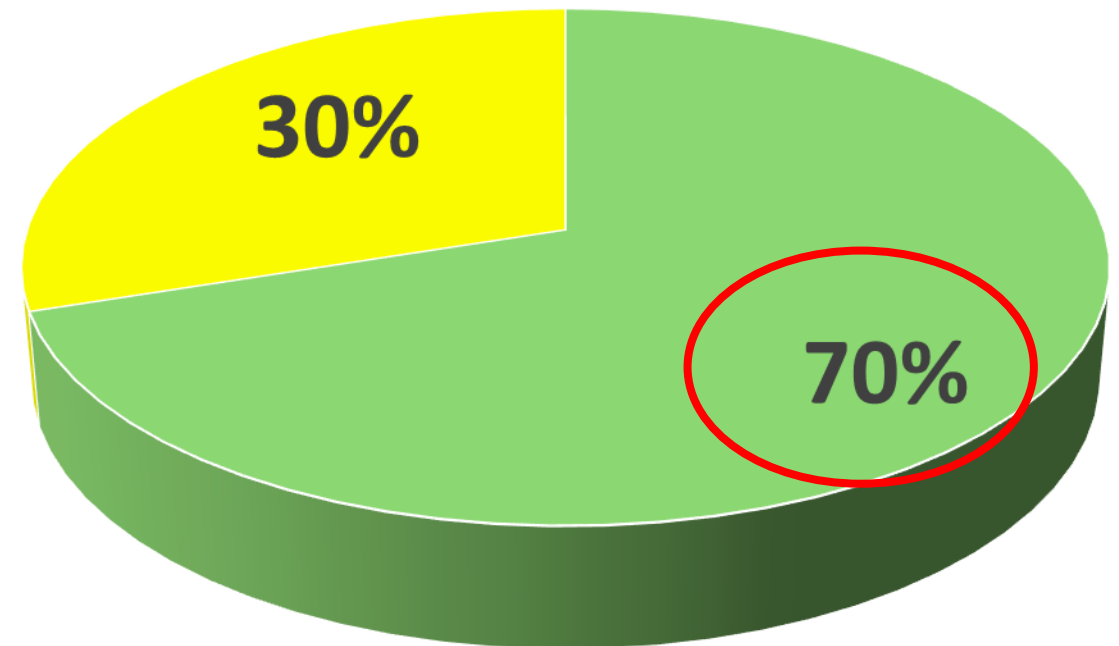
$$\frac{40\%}{70\%} = 57\%$$

Selection Ratio

Female



Male



# Measuring Adverse Impact: Impact Ratio Analysis

- The “2x2” standard
- UGESP lays it out clearly
  - 4/5ths or 80% rule of thumb
- Selection Ratio: Comparison of Selection Rates for focal and reference groups

|        | Pass       | Fail       |
|--------|------------|------------|
| Male   | $M_{pass}$ | $M_{fail}$ |
| Female | $F_{pass}$ | $F_{fail}$ |

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

# Conducting an Effective “Bias Audit” Analysis

- Descriptively

| Race     | Applicant | Pass AI | Pass Rate |
|----------|-----------|---------|-----------|
| Asian    | 2,000     | 730     | 37%       |
| Black    | 7,000     | 2,500   | 36%       |
| Hispanic | 6,000     | 2,040   | 34%       |
| White    | 10,000    | 3,750   | 38%       |

# Conducting an Effective “Bias Audit” Analysis

- Selection Rate Analysis—80% Rule

| Race     | Applicant | Pass AI | Pass Rate | 4/5ths 80%-Rule |
|----------|-----------|---------|-----------|-----------------|
| Asian    | 2,000     | 730     | 37%       | 97%             |
| Black    | 7,000     | 2,500   | 36%       | 95%             |
| Hispanic | 6,000     | 2,040   | 34%       | 97%             |
| White    | 10,000    | 3,750   | 38%       |                 |

# Conducting an Effective “Bias Audit” Analysis

- Selection Rate Analysis—Statistical (Fisher Exact Test (FET))

| Race     | Applicant | Pass AI | Pass Rate | 4/5ths 80%-Rule | Statistical (SD) |
|----------|-----------|---------|-----------|-----------------|------------------|
| Asian    | 2,000     | 730     | 37%       | 97%             | 0.84             |
| Black    | 7,000     | 2,500   | 36%       | 95%             | 2.38             |
| Hispanic | 6,000     | 2,040   | 34%       | 97%             | 4.45             |
| White    | 10,000    | 3,750   | 38%       |                 |                  |

# Conducting an Effective “Bias Audit” Analysis

- Selection Rate Analysis—Logit
  - Controlling for TIC, TIJ, Experience

| Race     | Applicant | Pass AI | Pass Rate | 4/5ths 80%-Rule | Statistical (SD) | Logit (SD) |
|----------|-----------|---------|-----------|-----------------|------------------|------------|
| Asian    | 2,000     | 730     | 37%       | 97%             | 0.84             | 3.08       |
| Black    | 7,000     | 2,500   | 36%       | 95%             | 2.38             | 1.67       |
| Hispanic | 6,000     | 2,040   | 34%       | 97%             | 4.45             | 2.93       |
| White    | 10,000    | 3,750   | 38%       |                 |                  |            |

# Validation 101: Merit-Based Decision Making



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# Assessing AI—Merit-Based Considerations



## Conversations Now:

- Technology delivers “measurable” (financial) impact

# Question...

**Adverse  
Impact**



**Discrimination**

# Validation

Ac

mination

Job Related & Consistent with  
Business Necessity

**MERIT-BASED**

Adv

mination

# In Practice: Validation

- **Validation: Three (3) Types**
  - Content Validity
  - Criterion Validity
  - Construct Validity

<https://www.ecfr.gov/current/title-41/subtitle-B/chapter-60/part-60-3>



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# Validation: Content vs. Criterion Validity

- Uniform Guidelines 3.14C(1)

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

# Guidelines: Content Validity

## Job Performance—Visible

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

# Adverse Impact: Content Validity Defense

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

## JOB



## Selection Test—DECISION



# Content Validation of AI

Job



Flight Deck

Selection Test



Flight Simulator



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# Guidelines: Criterion Validity

## Job Performance—Non-Visible (Mental Processes)

- Criterion Validity (§ 60-3.5B, § 60-3.14B, § 60-3.15B)

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

# Guidelines: Criterion Validity

## 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.

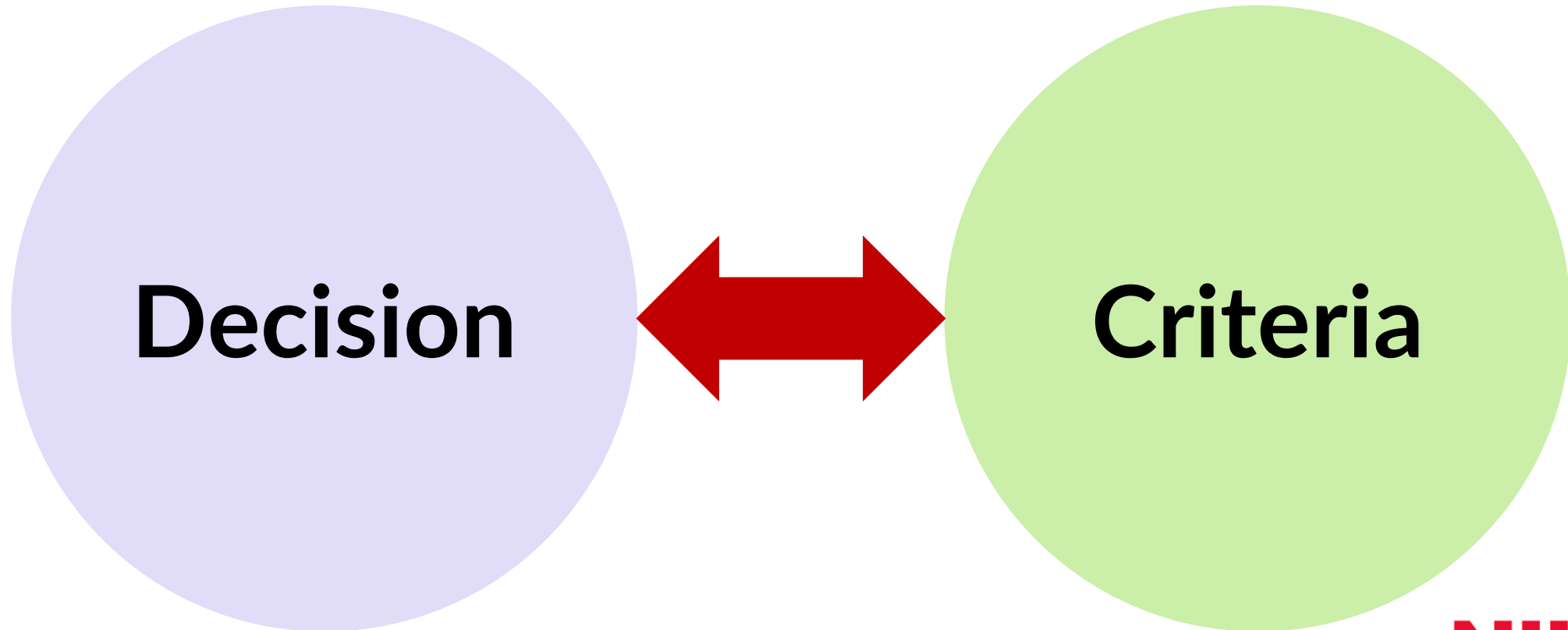
- **Criteria = Merit/Business Necessity**

- Job Analysis
- Operations Analysis
- Business/Strategic Plan

# Guidelines: Criterion Validity

Criterion Validity (§ 60-3.5B, § 60-3.14B, § 60-3.15B)

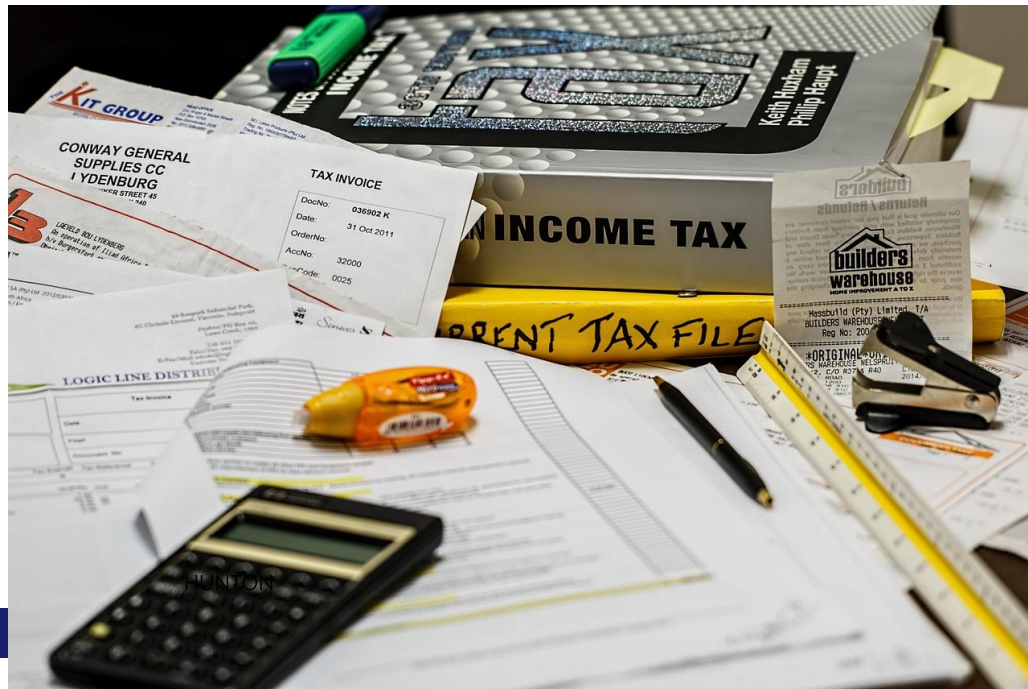
- Relationship between Decision and Criteria



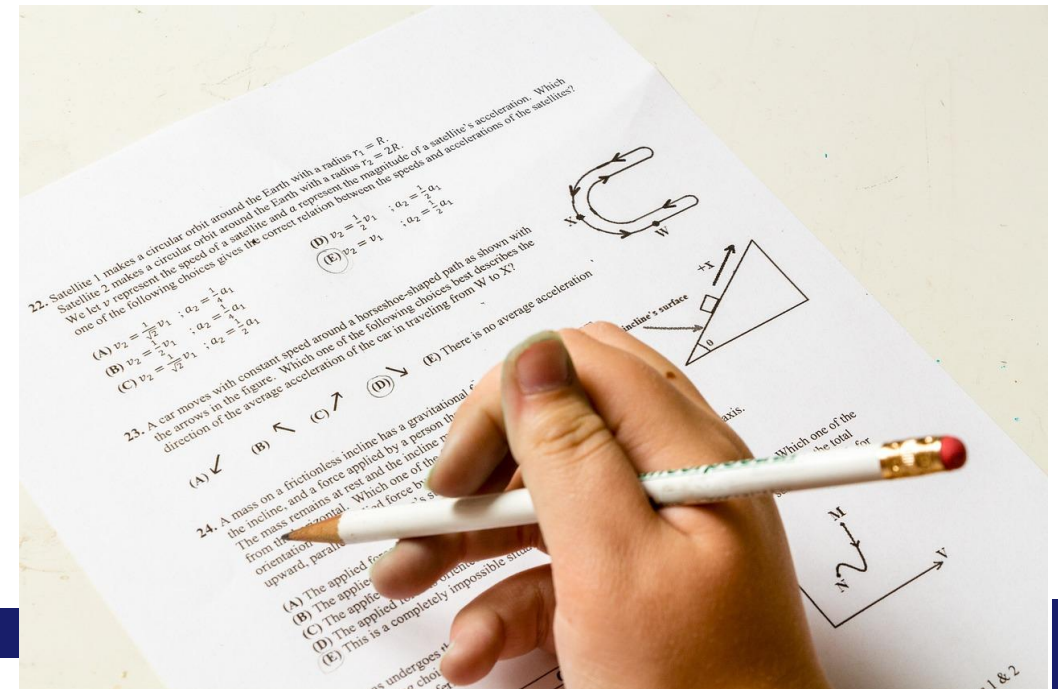
# Adverse Impact: Criterion Validity Defense

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

JOB



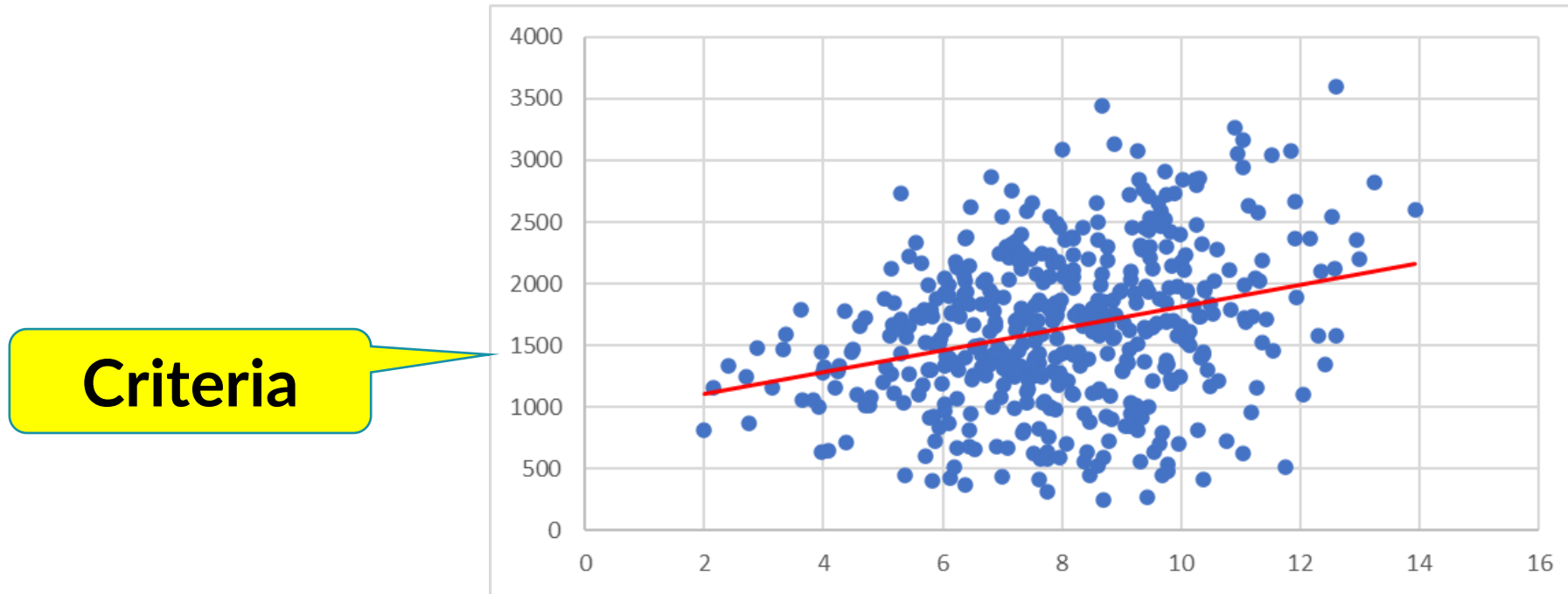
Selection Test—DECISION



# Validation: Criterion Validity (3.14B)

## Correlation-based Study

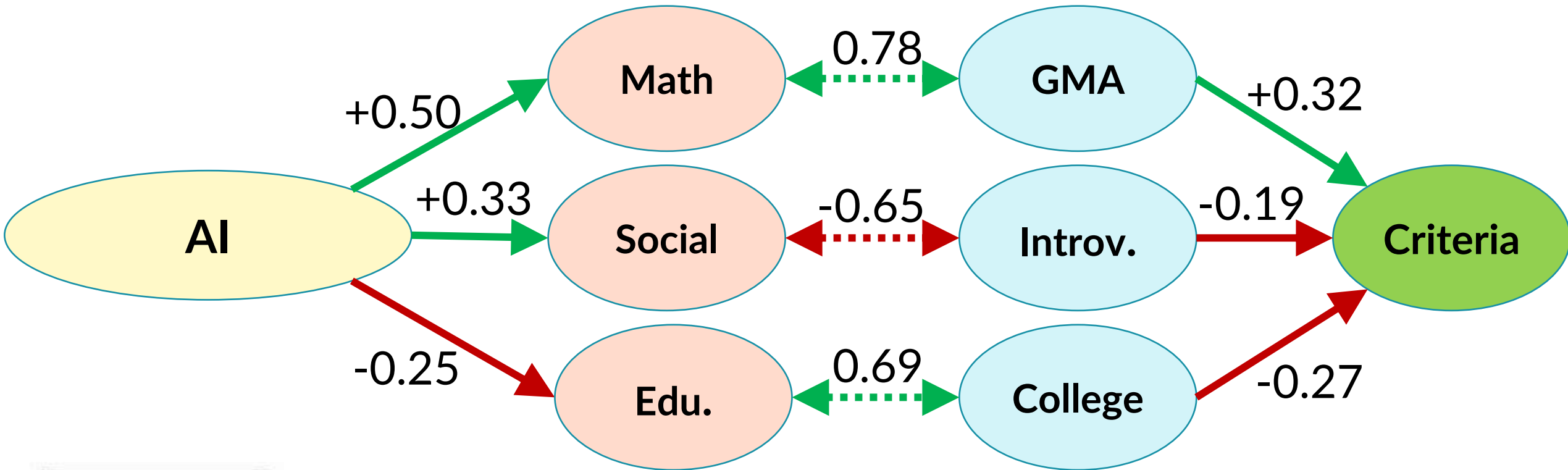
- Assessment (**Decision**) is correlated to **Criteria**
  - Criteria: job related and consistency with business necessity



Assessment

# Validation: Construct Validity (3.14D)

- Theoretical Relationships
- Assessment exhibit complex relationships with various constructs



# Recap—Key Takeaways



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# Recap—AI in HR Update

- Intro: AI in HR
- Patchwork Legal Landscape Update
  - Existing Laws
  - New Laws
- Managing AI Risks
  - Bias Audit: Analytics
  - Validation: Merit-Based Decision Making



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# Questions

