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Re: Request from The Institute for Workplace Equality for an Opinion Letter on Adverse Impact Calculations for Small Sample Sizes

Dear Director Leen and Deputy Director Gaglione:

The Institute for Workplace Equality (“IWE” or the “The Institute”) respectfully requests from the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”) an opinion letter on the methods used to conduct adverse impact analyses of selection procedures where there are small numbers of particular racial/ethnic categories.

Background on The Institute for Workplace Equality

The Institute is a national non-profit employer association based in Washington, D.C. The Institute’s mission includes the education of federal contractors regarding their affirmative action, diversity, and equal employment opportunity responsibilities. Members of The Institute are senior corporate leaders in EEO compliance, compensation, legal, and staffing functions who represent many of the nation’s largest and most sophisticated federal contractors.

As detailed below, The Institute is requesting that OFCCP address in an opinion letter specific questions regarding how adverse impact analyses are conducted.

Adverse Impact Analyses and the UGESP Requirements

Adverse impact analyses are conducted as part of a federal contractor’s affirmative action program. It is often the case that sample sizes are small and this is particularly the case for adverse impact analyses conducted upon racial subgroups. When more than two racial/ethnic categories are included in an analysis, a practical question relates to which groups should be compared to each other. The Uniform Guidelines on Employee Selection Procedures

(“UGESP”) (1978)¹, which are codified in OFCCP’s regulations at 41 CFR Part 60-3, and the UGESP follow up Questions and Answers (Q&A, 1979),² help to answer which groups should be compared. Various sections of the Guidelines and their Q&A instruct on how to identify who the “highest selected” group is, and then compare each other “disadvantaged” or “lower selected” racial subgroup, one by one, to the “highest selected” group.

This is noted in the definition³ of adverse impact:

D. Adverse impact and the “four-fifths rule.” A selection rate for any race, sex, or ethnic group which is less than four-fifths ($\frac{4}{5}$) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

This guidance is not new. This notion has existed in the Uniform Guidelines since 1978 and was most recently evaluated and supported by a Technical Advisory Committee⁴ that included over 70 experts on EEO analytics and related topics. Perhaps this is most clearly defined in Question 12⁵ from the UGESP Q&A, which asks: “How is adverse impact determined”?

- (1) Calculate the rate of selection for each group (divide the number of persons selected from a group by the number of applicants from that group).
- (2) Observe which group has the highest selection rate.
- (3) Calculate the impact ratios, by comparing the selection rate for each group with that of the highest group (divide the selection rate for a group by the selection rate for the highest group).
- (4) Observe whether the selection rate for any group is substantially less (i.e., usually less than $\frac{4}{5}$ ths or 80%) than the selection rate for the highest group. If it is, adverse impact is indicated in most circumstances. See Section 4D.

Identifying which group is the “highest selected” can be challenging when sample sizes are small. The Uniform Guidelines acknowledge this by what has become known as the “2% rule.”⁶ More specifically, the Guidelines instruct that any group that does not make up at least 2% of the relevant labor market or 2% of the pool being analyzed should not be considered as part of determining which group is highest selected. Question 16⁷ of the Q&A directly informs on this issue:

¹ 29 C.F.R. § 1607 (2020).

² 44 Fed. Reg. 11996 (March 2, 1979); available at https://www.eeoc.gov/policy/docs/qanda_clarify_procedures.html.

³ 29 C. F. R. § 1607.16 B (1979).

⁴ Technical Advisory Committee Report on Best Practices in Adverse Impact Analyses, *CCE*, September 2010; available at <https://content.dciconsult.com/whitepapers/technical-advisory-committee-report-best-practices-adverse-impact-analyses/>.

⁵ 44 Fed. Reg. 11996, 11998.

⁶ 29 C.F.R. § 1607.15 (A)(2).

⁷ 44 Fed. Reg. 11996, 11998.

16. Q. Should adverse impact determinations be made for all groups regardless of their size?

A. No. Section 15A(2) calls for annual adverse impact determinations to be made for each group which constitutes either 2% or more of the total labor force in the relevant labor area, or 2% of more of the applicable workforce. Thus, impact determinations should be made for any employment decision for each group which constitutes 2% or more of the labor force in the relevant labor area. For hiring, such determination should also be made for groups which constitute more than 2% of the applicants; and for promotions, determinations should also be made for those groups which constitute at least 2% of the user's workforce....

This notion is intuitive, and is intended to avoid a situation where, for example, a group making up a very small percentage of the population is the highest selected comparator. Groups making up a very small percentage of the applicant pool may provide little useful information related to adverse impact analyses and often provide low statistical precision and often misleading statistical results.

OFCCP's Current Analytical Standards

We understand that the OFCCP's desk audit software program now conflicts with the UGESP. Specifically, it appears that the OFCCP is using a "2% plus a minimum of five applicants per cell" rule in order to identify a group as the "highest selected". Stated differently, OFCCP requires that a particular individual race include at least 5 applicants and be at least 2% of the overall applicant pool in order to be identified as the favored race.

There is no formal guidance in any resource that requires a minimum of five people.⁸ This additional "five or more" requirement departs from guidance from both the UGESP as well as the Federal Contractor Compliance Manual ("FCCM"), which are seminal guidance documents for federal contractors conducting these analyses. OFCCP's current approach also is inconsistent with how the agency has historically identified the highest selected group in adverse impact analyses. This departure from OFCCP's regulations and the agency's past practice is important for the following, significant reasons:

- Federal contactors need to understand the standards that they will be measured against. Transparency in how the agency will analyze data is important. It is unclear how contractors should conduct adverse impact analyses when samples are small. Is it possible that the agency will choose a different minimum sample size at some later point, without notification to the contractor community? In order to proactively identify and correct problem areas, will contractors need to analyze all possible subgroup comparisons?

⁸ Minimum samples sizes are discussed across a wide range of statistical resources. However, Fisher's exact test, which is a commonly used to measure statistical significance in the context of adverse impact analysis, and one that OFCCP uses in practice, has no minimum cell size requirements.

- Federal contractors and vendors have software programmed to analyze adverse impact in the way in which the UGESP and FCCM require, and as such a change would put additional burden on federal contractors and their vendors to adjust their processes and software. In addition, lack of transparency on the issue of how personnel activity data should be analyzed places additional burdens on small employers, who may prepare their affirmative action plans without third party expertise.
- If the UGESP regulations and FCCM are no longer being followed by OFCCP, then OFCCP needs to provide proper notice to the contractor community, including following the Administrative Procedure Act's procedures for modifying the OFCCP's regulations. The contractor community needs to understand when standards under the UGESP and FCCM will be followed by OFCCP as compared with situations when the agency has the flexibility to disregard that guidance.
- Adding a minimum sample size required to identify the "highest selected" group could have much broader implications. If the agency is hesitant to analyze groups with less than five people to identify which group is "highest selected", is it ever appropriate to analyze groups with fewer than five people? Sample and related statistical precision considerations generalize across all employment decisions, including hiring, promotion, termination, and pay. If five is not enough to identify which group is "highest selected" with confidence, then it follows that five is not enough to compute selection rates for any group with confidence. The decision to exclude groups with fewer than five would be a major change for the federal contractor community. Given the consequences of arbitrary and potentially improper aggregation, the most appropriate response to this new requirement may be to simply exclude all groups with less than five across all employment decisions and EEO analyses.

The Institute's Request for an Opinion Letter on Adverse Impact for Small Samples

On behalf of our members, The Institute for Workplace Equality respectfully requests that OFCCP publish an opinion letter to fully address and to clarify the following specific questions:

1. Why is the agency failing to follow the methods prescribed and codified in the UGESP and OFCCP's regulations, 41 CFR Part 60-3, and the applicable UGESP Q&A, and the FCCM?
2. What specific methodology should federal contractors use to identify the "highest selected" group in adverse impact calculations with small sample sizes?
3. If OFCCP is formally endorsing a "minimum of five" rule for identifying "highest selected", please state the legal basis and explain why this change is being implemented?

If the explanation relates to statistical precision, should all groups with less than five be excluded across all EEO analyses moving forward?

4. Relatedly, in recent audit activity, we have seen the agency identify small samples of “two or more” as the “highest selected” group. Is “two or more” a protected group that OFCCP can analyze under EO 11246? Would adverse impact results involving “two or more” as the “highest selected” or “lower selected” group be actionable under 11246?

Conclusion

We look forward to additional dialogue on these topics, and receiving written clarification in the form of an Opinion Letter from OFCCP.

Respectfully,

The Institute for Workplace Equality



David B. Cohen



David S. Fortney



Mickey Silberman

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