

# But I Didn't Know That's Illegal!

Avoiding Discrimination in  
Employment Practices,  
Policies and Procedures



# Common pitfalls and preventive measures



- I. Selection procedures with unlawful disparate impact
- II. Recruitment and advertising violations
- III. Common barriers to reasonable accommodation
- IV. Safety/fitness-for-duty standards untethered to ADA standards
- V. Delegation of EEO-related tasks to unaccountable third-parties

# I. Selection Procedures and Impact

- Title VII, the ADA, and the ADEA prohibit facially neutral employment practices that have an unlawful disparate impact on employees or job applicants
- Plaintiff must prove the Defendant uses (1) a particular employment practice (2) that causes (3) a significant disparate impact because of a protected category
  - A general demographic imbalance in the workforce is not enough to prove disparate impact; must show the effect of a specific policy, practice or procedure
  - Plaintiff must show members of one demographic group are adversely affected significantly more than others by the policy, practice or procedure (e.g., female applicants pass the test at significantly lower rates as compared to male applicants)

# Significant Disparate Impact

- No disparity = no issue
- Significance is measured using statistical tests of whether a disparity is a product of chance or not (Is the disparity random or likely not random?)
  - 4/5th's Rule is a very rough estimate of adverse impact discussed in EEOC Guidelines
  - Better, more precise approach, and the one used by experts and courts, is to employ more sophisticated statistical testing of significance (e.g., Chi-Square test or similar techniques)
  - Reliable Chi-Square applications and explanation of how it done are available online

# The Defense to Disparate Impact

- An employer may defend against a disparate impact claim by showing that the employment practice is

**JOB-RELATED AND CONSISTENT WITH  
BUSINESS NECESSITY**

- In ADEA cases, the defense is more lenient “Reasonable Factor Other than Age” standard

# Job-Related and Consistent with Business Necessity

- Job-related and consistent with business necessity” under Title VII/ADA means
  - Employment practice is “necessary for the safe and efficient performance” of the particular job at issue.
  - The goal is to measure the person for the particular position, not measure the person’s merits in the abstract.
  - In the employment testing context, employers often use professional “validation studies” to demonstrate this

# Professional Validation

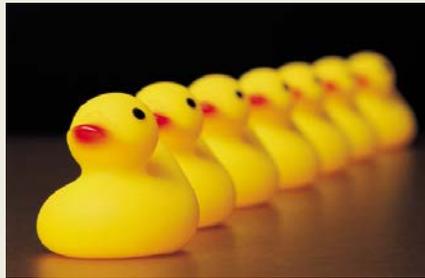
- Professional validation studies identify important aspects of the job (“work behaviors”) and then assess whether, and to what extent, the selection procedure predicts success in those important aspects of the job
- Validation usually performed by industrial/organizational psychologists, sometimes working with other experts
- Validation may not always be necessary (e.g., criminal justice history screening)
- But **failure to present professional validation evidence is often fatal** to the defense (especially testing cases)



- Validation is just smart business: Why invest time and money in a selection procedure that does not predict job performance?

# Professional Validation

- Professional standards on validation, including methodology and documentation, are found in:
  1. Joint federal agency regulations called the Uniform Guidelines on Employee Selection Procedures (“UGESP”), 29 C.F.R. Part 1607, and two sets of clarifying Questions and Answers promulgated after the UGESP; and
  2. The Society of Industrial and Organizational Psychologists (SIOP) Principles for the Validation and Use of Personnel Selection Procedures (the “SIOP Principles”)



# But Wait, We're Not Done Yet

- If Defendant proves job-related and consistent with business necessity, Plaintiff still wins if she/he proves there is an “**alternative employment practice**”
- “Alternative employment practice” is a different policy, practice or procedure that is:
  1. **comparable** in its ability to achieve the objectives of Defendant’s selection procedure causing impact (e.g., predicting successful job performance) **but**
  2. has **less disparate impact**.
- Analysis to determine if there is an “alternative employment practice” with less disparate impact is standard procedure in a validation study.

# We're Still Not Done Yet

- In **ADA cases**, the “alternative employment practice” is usually some form of **reasonable accommodation** for the disability
- In **ADEA cases**, the law **does not recognize “alternative employment practice”** as a legal element of the claim
  - Once ADEA Defendant proves its practice causing disparate impact because of age is “**reasonable**,” the Defendant prevails
  - However, availability of an alternative employment practice with less disparate impact on older workers will likely be used by Plaintiff as proof to undermine the Defendant’s argument that its practice is reasonable.

# Common Sources of Disparate Impact That We See

- Disparate impact on persons of a particular demographic group can be caused by many types of employment practices
- The most common culprits are these:
  1. General **cognitive ability** or **acquired general knowledge** testing (e.g., aptitude, verbal and math skills, etc.)
  2. **Physical performance** testing (e.g., strength and endurance tests)

# Common Sources of Disparate Impact (continued)

3. Subjective, unstructured, discretionary interview or performance rating systems
4. Word-of-mouth recruiting/tap-on-the-shoulder promotions
5. English proficiency or English-only requirements
6. “Recent” graduate requirements
7. Credit/debt history screening
8. Criminal justice history screening

# Other Possible Sources of Impact

- **Personality and integrity testing**
  - Historically thought to not have impact
  - A newer generation of tests causing disparate impact in some instances
- **Review of candidate social media**
  - Subjective, unstructured, unsupervised, reveals demographics
- **Currently/recently unemployed status as a criterion for selection**
  - Why would you ever do this?
- **“Gaps” in employment as a criterion for selection**

# Consider this scenario:

Sasquatch's Shoe Emporium is a national shoe store chain:

- Salespersons receive bonuses based in-part on customer satisfaction survey results
- Surveys submitted by customers, who are asked to rate their experience with their sales person
- Ratings are added up and salespersons are ranked according to their ratings
- Bonus amounts are made according to rankings
- Poorly scoring salespersons receive no bonus
- Sasquatch does not analyze the ratings, just adds score

There are three sets of ratings:

# Scenario (continued)

A. *How was your experience with your salesperson today, overall?*

*1. Very positive 2. Positive 3. Somewhat negative 4. A train wreck*

B. *Was your salesperson friendly today?*

*1. Very friendly 2. Friendly 3. Somewhat friendly 4. An iceberg*

C. *Was your salesperson helpful?*

*1. Very helpful 2. Helpful 3. Somewhat helpful 4. No, he/she was eating donuts and texting*

**Question: Does anyone see a potential discrimination problem with this bonus system?**

# Problems With Scenario

1. **Subjective, undefined** rating system
  - No definition of terms used
  - No specifics from the customer regarding circumstances
  - Entirely subjective perception/opinion of customer
2. Unfettered rating **discretion**
  - No way to know what is true/accurate
  - No way to know what is really motivating the customer
  - No way for employee to tell their side
3. **No effort to establish linkages**/consistency with more precise measures of job performance (supervisor rating system, sales)
4. **No analysis** of trends and patterns in rankings: disparate impact
  - Hallmarks of a process likely to create disproportionately negative outcomes based on protected traits
  - High risk of process being infected with customer prejudice or implicit bias (stereotypes, in-group preference)

# A Word About Debt/Credit History Screening . . .

- Consistently causes significant **race/ethnicity** disparate impact (relative wealth/income levels)
- Impact based on disability status and sex also possible
- Would have to be validated, but no current scientific evidence establishing that debt delinquency or debt level is a reliable predictor of on-the-job misconduct or job performance
- Generally adopted based on unfounded assumptions

# Disparate Impact and Criminal Justice History Screening

- **Race/Ethnicity** disparate impact usually found due to criminal justice system disparities
- **Sex** (male) disparate impact usually found
- Disparities found tend to be quite large and are statistically significant
- Narrowly tailored screening (fewer types of convictions deemed disqualifying, tied closely to specifics of job) tends to have less disparate impact, though may still have significant impact

# Business Necessity and Criminal Justice History Screening

- The job-related/business necessity defense is **not a general character test**.
- It's not what you think about the person in the abstract; it's whether they **currently** present a **significant** risk of harm while doing the **particular job** at issue.
  - “Any” increased risk is not the rule. Remember: “*Necessary* for the safe and efficient performance”
  - Risk: must consider both probability and seriousness of harm
- Look at the person's circumstances and the job circumstances.

# The 2012 EEOC Enforcement Guidance

- On April 25, 2012, EEOC issued a new Enforcement Guidance: “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964”
- The Guidance seeks to consolidate previous EEOC policy statements and update them to reflect developments in the law and current understanding of the issue
- The Guidance supersedes all previous EEOC policy statements on the issue

# The 2012 EEOC Enforcement Guidance: Arrests

- An employment **decision based solely on an arrest is not job-related and consistent with business necessity**
- An arrest does not show that the person committed a crime, arrest records do not show disposition (Charged? Acquitted? Dismissed?), and may contain errors
- However, an arrest record may trigger an inquiry into whether the person engaged **in specific conduct** that shows they pose a substantial risk in the job
- The focus is on **whether the person actually engaged in specific conduct making them unfit for the job, not the fact that they were arrested or charged**

# The 2012 EEOC Enforcement Guidance: Convictions

- Convictions are treated differently than arrests
- Unless later overturned, a conviction is reliable evidence that the person committed the conduct for which they were convicted
- Under the Guidance, consideration of whether an employment action based on a conviction is **job-related and consistent with business necessity is a two-step process:**
  1. Step One: *Green* factors
  2. Step Two: Individualized assessment

# Job-Related and Consistent With Business Necessity: Step One

## Step 1 (the “*Green Factors*”):

➤ The purpose of the *Green* three-factor test is to determine if the person passes the screening or requires further individual evaluation. In other words, **it is intended to include, not exclude**.

➤ Ordinarily, an exclusion based solely on the Green factors **is not job-related and consistent with business necessity unless** there is a **demonstrably tight connection** between the conviction and the job

- Examples: person convicted of arson applies to be firefighter, convicted of child abuse and seeks to work in day care center.
- This is a **very narrow exception** to doing Step Two. In the vast majority of cases, individualized assessment is necessary.

# Step One: the *Green* Factors

The *Green* Factors are:

1. The nature and gravity of the offense or conduct;
2. The time that has passed since the offense, conduct and/or completion of the sentence; and
3. The nature of the job held or sought.

Focus is on the specific offense conduct, if it likely presents risks in the specific job and, if so, whether the passage of time suggests a lower risk.

# The Nature And Gravity of the Conduct

Some considerations:

- ✓ What was the harm caused by the crime?
- ✓ What had to be proven in order to convict the person of the crime (legal elements)?
- ✓ Felony or misdemeanor conviction?

# The Time That Has Passed

- Common sense and modern research suggest that the more time that has passed since the conduct without similar conduct, the less likely there is a significant risk
- Guidance does not identify any particular time frame. All facts and circumstances considered
- Note, however, that criminology and sociology studies show that **the more time passes after a conviction without another crime, the less likely it is the person will commit another crime**

# The Nature of the Job

Must consider if there is a connection between the criminal conduct and the particular job at issue:

- ✓ What are the **specific duties of the job**, essential functions?
- ✓ What are the **circumstances** under which the job is performed? (e.g., level of supervision, oversight, interaction with co-workers or vulnerable individuals)
- ✓ What is the **environment** in which the job is performed? (outside? warehouse? private home?)

# Job-Related and Consistent With Business Necessity: Step Two

- If at Step One the employer concludes the person does not present a significant risk, the inquiry ends. The person passes the screening
- If at Step One the employer concludes the person **may** present such a risk, then Step Two is next: **individualized assessment of circumstances**
- The purpose is to assess whether this specific individual poses an unacceptable risk in the job considering their individual circumstances
- **Requires communication** with the individual

# Step Two: Individualized Assessment

Some factors that should be considered:

1. Information that the individual was not correctly identified in the criminal record, or that the record is otherwise **inaccurate**
2. The **facts or circumstances** surrounding the offense or conduct
3. The **number of offenses** for which the individual was convicted
4. Older **age** at the time of conviction or release from incarceration

# Step Two: Individualized Assessment

5. Evidence that the individual performed the **same type of work**, post conviction, with no known incidents of criminal conduct
6. The length and consistency of **employment history** before and after the offense or conduct
7. **Rehabilitation** efforts, e.g., education/training
8. Employment/character **references** and any other information regarding fitness for position
9. Whether the individual is **bonded** under a federal, state, or local bonding program

# Step Two: Individualized Assessment

- Ask the individual for the specific information that is needed to assess their circumstances
- Don't make them guess what is relevant by asking only generalized questions about why you should hire them anyway
- In a lawsuit, facts the employer did not ask about will be used as evidence that the individual did not, in-fact, pose a significant risk in the job
- If the person does not provide the information you request, you can make your decision without the information

# Other Conviction History Issues

- Federal requirements prohibiting persons with specific types of convictions from particular jobs/occupations are defense to liability
  - State and local requirements are not a defense
- Failure to obtain a required federal government security clearance is a defense to liability
- State and local laws may afford more protection to the individual
  - Disparate impact need not be shown in some states
  - “Ban the Box”

# Less Discriminatory Alternatives

- Individualized assessments
- Bonding programs
- Other possibilities

# Impact Liability Prevention



- ✓ Implement review process for new selection procedures, audit existing ones
- ✓ Change subjective into objective
- ✓ Change vague into well-defined
- ✓ Change hidden into transparent
- ✓ Research whether the selection procedure has disparate impact in any workplace
- ✓ Demand proof of efficacy; don't rely on assumptions or what is fashionable in HR

# More Impact Liability Prevention

- ✓ Require professional validation of tests, other selection procedures for your jobs
- ✓ Carefully evaluate what the job actually requires and what makes incumbents succeed in the job (job analysis)
- ✓ Think carefully about alternatives
- ✓ Remember that companies selling selection procedures don't get sued for discrimination – you do

# II. Recruiting and Advertising

## Common Mistakes:

- **Word-of-mouth hiring, tap-on-the-shoulder promotions**
  - Produces lack of diversity in applicant pool due to demographic imbalance among people making the choice of who to notify or select
  - Use of multiple sources of posting/advertising, wide-dissemination is best, competitive process is best
  - Potential class in such a case is anyone who would have applied had they known of the job!

# Recruiting

- Failure to assess diversity of applicant pool
  - If the promotional candidates do not fairly reflect demographics of qualified workforce (e.g., feeder jobs), you need to investigate why
  - If applicant pool does not fairly reflect demographics of qualified persons in local labor market, you need to investigate why
  - Could be flaw in your recruitment process, your advertising (How are you posting jobs? Where?)

# Advertising

## Discriminatory advertising - three aspects:

1. **Method of advertising** reaching demographically skewed audience
  - Examples: County, not City; Popular Mechanics
2. **Content of ad** contains reference to a qualification known to have disparate impact, **deters people** who think cannot pass
  - Example: minimum height/weight standard
  - Think carefully about effect of your qualification standards and whether mentioning them will discourage some qualified applicants

# Advertising

3. **Content of ad expresses** a demographic preference, whether intended or not
  - Examples: “Recent grad”; “Young company”; Use of single race/sex human models
  - Legal standard is not intent. It is whether **an ordinary reader would reasonably interpret the ad to express an unlawful preference.**
  - Think about how your ads could be interpreted by someone who does not know you or the context
  - Advertising affirmative action employer status and encouraging diversity without stating any preference is permissible

# III. Common Barriers to Reasonable Accommodation

- Maximum medical **leave** policies, no-fault **attendance** policies (point systems)
  - FMLA does not define ADA obligations
- **No modified duty, or limited** to workers' compensation cases
- Inflexible **appearance** or **equipment** policies (e.g., pants-only, no headgear, no facial hair)
- Inflexible **time and place of work** policies (break policies-ADA and prayer, rotating weekend shift, no transfer)

# More Common Barriers to Reasonable Accommodation

- Reasonable **accommodation request procedures** that make it difficult to obtain accommodation
  - Onerous documentation requirements
  - Legally inaccurate requirements (e.g., “must be official church doctrine”)
  - Unclear request/decisional process
- Failure of employer to take advantage of existing institutional knowledge
- Failure of employer to consult with the “right” people concerning accommodation options, feasibility, burden issues

# Some Solutions

The main solution is to realize (and train on) the fact that:

- ADA and Title VII accommodation requirements mean individualized treatment
- Equal treatment is not enough. Accommodation means special treatment of employees, including exemptions from “neutral” policies if needed to accommodate
- The employee who needs help is not the problem. It’s the barrier to their continuing employment opportunities that is the problem to be solved
- “Undue Hardship” is not “any” burden, and cannot be based on assumptions

# Some Other Solutions

- Policies should be evaluated before and after implementation for relationship to reasonable accommodation duties and possible employee needs
- Relevant policies should explicitly state that exceptions will be permitted when required by law, including reasonable accommodation of disability or religion, FMLA, USERRA, etc. and provide a procedure to request
- Train staff re:
  - accommodation requirements
  - process to be used for exemptions/accommodation
  - sources of information required

# Some Other Solutions

- Create an accommodation infrastructure:
  - Specific, written procedures to be used
  - Accountability/a review process
  - Sources of information mandated to be used
- Sources of information:
  - Mandate interaction with employee, healthcare provider if medical info needed
  - Get necessary expertise from employee SME' s, vocational rehab people, treating physicians, etc.
  - Institutional knowledge recorded/available re: accommodations granted in other places/times

# IV. Common ADA Problems Involving Safety and Fitness For Duty



- Policies prohibiting use of certain prescription medications (e.g., opiates like methadone)
- Requiring 100% healed/no restrictions return
- Improper direct threat or qualification analysis - failure to understand and apply the law
  - Significant risk of substantial harm to self or others *in context of performance of the particular job*
  - Best available medical evidence to be used
  - Must consider whether qualified “with accommodation” or if accommodation can reduce a threat to acceptable level or eliminate it

# Common ADA Problems Involving Safety and Fitness For Duty

- Failure to communicate with employee/oppositional relationship
- Failure to communicate directly with treating physician, ask questions, inform about the job
- Failure to consider how the job is actually performed
- Use of MRO's who do not apply ADA standards, failure of employer to apply ADA to MRO's findings
  - Complete deferral by HR to judgment of medical department or third-party MRO
  - Discussed more fully below

# V. Delegating EEO Functions to Third-Parties

- Someone other than the employer is playing an important role in making EEO-related decisions for the employer
- Does not violate the law by itself, but can lead to EEO violations
- Some Examples:

# Examples of Specific Delegation Problems: Temp Workers

1. Harassment of Temporary/Leased Employees
  - The “Not My Employee” accountability problem: One entity relies on other to conduct investigation, no follow-up to ensure reasonable corrective action
    - Even interviewing a witness involves decisions.
  - The “Left Hand/Right Hand” problem: Both entities divide labor with their own “employees” but little or no coordination and information sharing
  - The “politics” problem: Giving unwarranted deference to actions/decisions of client or vendor for business relationship reasons

# Examples of Specific Delegation Problems: HR Contractor

## 2. Human Resource Contractors

Examples: contract HR consultant, third-party contract investigators

- Unwarranted deference to “expertise,” not carefully examining decisions/actions
- Contractor lacks subject matter expertise with client’s operations, internal dynamics
- Employer is liable for discriminatory actions of its agents

# Examples of Specific Delegation Problems: Labor Grievances

## 3. Improper Reliance on Union Grievance Process:

- Failure to conduct impartial investigation, take corrective action because matter is the subject of a disputed grievance
- Denying requests for accommodation, then rolling them into adversarial grievance process to negotiate a resolution

# Examples of Specific Delegation Problems: Labor Grievances

- Both grievance scenarios ignore the statutory duty of the employer to *voluntarily* comply with the law *independent of* the grievance process
- Re: accommodation, ignores duty to engage in good faith, reasonably in interactive process
- Can produce adversarial posture leading to poor eeo decisions, undue delay in complying with law, etc.

# Examples of Specific Delegation Problems: Physicians

## 4. Physicians/Medical Review Officers

- These observations also apply to treating physicians
- Review fitness-for-duty (e.g., return to work, medically qualified). Important source
- Potential problem is different standards and undue deference
  - MRO's approach is to eliminate health risks to the employee and risks for the employer
  - But MRO's application of standard of care may not always comport with ADA obligations

# Examples of Specific Delegation Problems: Physicians

- The ADA (1) requires competent evidence of risk (objective evidence, “best available medical evidence”), (2) tolerates some level of risk (“significant risk of substantial harm”), and (3) requires employer actions to reduce or eliminate the risk (“with reasonable accommodation”)
- **Physician may not understand the job**, may not know how to evaluate essential functions, may not be considering accommodation
- Employers often fail to evaluate whether physician is applying proper ADA direct threat analysis. Looking for medical opinion to confirm, not inform, the employer’s decision

# Examples of Specific Delegation Problems: Physicians

- Employers sometimes fail to ask questions or the right questions – ADA-related questions
- Cannot delegate direct threat analysis to a doctor.
- Employers sometimes fail to think about the possibility of accommodation unless requested (reactive only), but ADA requires the employer to consider accommodation on its own initiative before disqualifying an employee due to disability
- Employers often fail to consult with accommodation experts (vocational counselors, industrial hygiene)

# LGBT

- But wait, I thought claims for sexual orientation or transgender discrimination weren't covered by federal law . . .



# LGBT Discrimination is “Because of Sex”

- Title VII prohibits discrimination “because of sex”
  - “Sex” is not defined
  - But courts have interpreted “sex” to include:
    - Sexual harassment
    - Hostile work environment harassment
    - Same-sex sexual harassment
    - Sex-stereotyping
  - “Sexual orientation” necessarily implicates “sex”

# How does Title VII Apply to LGBT?

- **Three ways to analyze an LGBT claim:**
  1. **But for the individual's sex, the employment action would not have been taken**
  2. **The individual is subject to an adverse action because of his/her association with someone of the same sex**
  3. **The individual is subject to discrimination because he/she does not conform to sex stereotypes consistent with his/her sex**

# An example

- Mary has a picture of her wedding to Bob on her desk



- John has a picture of his wedding to Tom on his desk



Only John is ordered to remove the photo, and is suspended when he refuses

# Another example

- John is a long-time employee, with excellent performance reviews
- John recently became engaged to Robert, and shared his good news with his co-workers
- John's manager hears about the engagement, and suddenly begins finding fault with John's work, placing him on a PIP, and then discharging him

# One more example

- John, who works at a gym, gets along fine with his co-workers
- One of John's male co-workers frequently talks about his own sexual conquests and success with women
- He later finds out that John is gay, and questions him about what he does sexually with other men
- The co-worker then begins John with anti-gay slurs

# Resources on LGBT Discrimination Issues

- [http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)
  - EEOC federal sector decisions
  - Court decisions
  - Fact sheets (e.g. bathroom access for transgender individuals)
  - Recent EEOC litigation
  - Links to other resources

# We're Done!

Thanks for your attention. 😊

Any questions?

You can reach us at:

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