Hiring Law

Legal considerations your organization should follow during the hiring process

The employment interview, like any other selection or promotion tool, is evaluated in terms of its “fairness.” In general, the issue of fairness is concerned with the impact that the interview has on various groups (e.g., women, individuals with a disability, minority groups) protected by equal employment opportunity (EEO) legislation.

A series of federal and state laws, court decisions and administrative rulings have established public policy regarding the conduct of employment staffing. The intent of that policy has been to eliminate illegal discrimination in all aspects of personnel practices, including: recruitment, screening, selection, training, compensation, promotion and treatment of employees.
**Griggs Rule:** places the “burden of proof” on the employer to demonstrate the validity of a hiring or promotion decision.

**Brief history of hiring laws**

The following is a brief overview of the major laws and landmark cases dealing with staffing practices:

**CIVIL RIGHTS ACT OF 1964 (TITLE VII)**
Prohibits discrimination in employment on the basis of race, color, religion, sex or national origin. Applies to all personnel actions and established the Equal Employment Opportunity Commission as the primary enforcement agency.

**CIVIL RIGHTS ACT OF 1991**
Reestablishes the “Griggs Rule,” whereby a pattern of underutilization of a protected group places the “burden of proof” on the employer to demonstrate the validity of the hiring or promotion decision. Bans the practice of “race norming” when using standardized tests.

**AMERICANS WITH DISABILITIES ACT OF 1990**
Prohibits discrimination against the disabled who can perform the “essential functions” of the job in question with or without reasonable accommodation.

**AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967**
Prohibits discrimination on the basis of age for individuals over the age of 40.

**GRIGGS V. DUKE POWER (1971)**
If selection or promotion procedures have disparate impact (i.e., treating applicants or employees differently because of their membership in a protected class), the burden of proof is on the employer to demonstrate job relatedness.

**U.S. V. GEORGIA POWER**
Identified appropriate professional standards for validation of selection procedures. Reaffirmed the EEOC guidelines as standards employers should follow.

**CONNECTICUT V. TEAL (1982)**
Employers must examine all steps in the selection process (resume screen, interview, test and so on) for disparate action.

**WATSON V. FT. WORTH BANK & TRUST**
If interview has disparate impact, it must be validated by the same procedures used to validate any other test.
Determining employment discrimination

When discrimination occurs and laws are violated, individuals may seek legal redress. Legitimate claims that are adjudicated typically proceed through a series of steps where the burden of proof shifts from the plaintiff (person alleging discrimination) to the defendant (the organization) depending on the type of discrimination alleged. There are basically two types of employment discrimination—disparate treatment and adverse impact.

**DISPARATE TREATMENT**

Disparate treatment is what we typically think of when discussing the issue of discrimination. It occurs when the individual(s) suffers intentional or purposeful discrimination on the part of the organization. For example, if a woman is not considered for a management position because the person doing the hiring feels that women don’t make good managers, then disparate treatment has occurred.

Because intent is difficult to demonstrate, the plaintiff must argue that he or she was differentially treated in some way. In the example above, the woman may show that the male hired to fill the management position she was applying for had less experience or education. Or she could argue that she was not afforded the same opportunity to demonstrate her capabilities. This is why we contend in our interview training program, InterviewRight, that every candidate should have the same opportunity to perform in the interview (i.e., standardized content and process) and be evaluated using the same criteria.

There are basically two categories of employment discrimination—disparate treatment and adverse impact.
Adverse impact: occurs when identical standards are applied to everyone, but the results lead to significant differences in employment outcomes.

ADVERSE IMPACT

The first employment discrimination cases settled by the Supreme Court (Griggs v. Duke Power, 1971) established that if a selection or promotion procedure has disparate impact (a different hiring rate) against a protected group, the burden of proof shifts to the employer to demonstrate job relatedness:

“Statistics showing an under-representation of a particular class have been held to establish a prima facia' case of unlawful exclusion and to infer the existence of discrimination.”

This principle is further clarified in the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines):

“The fundamental principle underlying the guidelines is that employer policies or practices which have an adverse impact on employment opportunities of any race, sex or ethnic group is illegal under Title VII and the Executive Order unless justified by business necessity...This normally means that it must show a clear relation between performance on the selection procedure and performance on the job.”

Thus, adverse impact occurs when identical standards or procedures are applied to everyone, but the results lead to significant differences in employment outcomes (e.g., hiring rates, promotion rates). So the question becomes: How different must the acceptance rates be to indicate adverse impact? Again, the Uniform Guidelines provide guiding principles for making that determination in terms of what is referred to as the 80% or four-fifths (4/5) Rule:

“A selection rate for any race, sex or ethnic group which is less than four-fifths (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...”

In essence, the 80% Rule allows for some differences in selection rates, but stipulates that if the selection rate for a protected group falls below a certain level (i.e., 80%) of the majority group, then adverse impact is assumed and the burden of proof for justifying that discrepancy falls to the defendant (i.e., the organization).
80% RULE

The following example demonstrates how the 80% principle is applied in practice (determined by a two-step process):

<table>
<thead>
<tr>
<th></th>
<th>White</th>
<th>Black</th>
<th>Hispanic</th>
</tr>
</thead>
<tbody>
<tr>
<td># Interviewed</td>
<td>200</td>
<td>80</td>
<td>60</td>
</tr>
<tr>
<td># Hired</td>
<td>100</td>
<td>28</td>
<td>27</td>
</tr>
<tr>
<td>Selection rate</td>
<td>50%</td>
<td>35%</td>
<td>45%</td>
</tr>
</tbody>
</table>

**Step 1: Calculate group selection rates & determine the highest rate**

In our example, the selection rate for the White group (i.e., group with the highest rate) is 50%. This rate is acquired by dividing the number of persons hired from a group by the number of applicants from that group. That rate is then multiplied by .80 (i.e., 80% Rule) to obtain the “adverse impact threshold” of 40%.

**Step 2: Calculate impact ratios & identify adverse impact situations**

If we examine the Hispanic group’s selection rate, it is obvious that while the 45% rate is lower than the White group, it does not fall below the 80% threshold and, as such, does not constitute adverse impact. However, the Black or African American group’s selection rate of 35% does fall below the threshold and adverse impact would be inferred. This is concluded by dividing the selection rate for this group (35%) with the selection rate for the highest group (50%), which equates to 70% (i.e., 10 percentage points lower than the adverse impact threshold).

**Note:** More sophisticated statistical techniques are sometimes used, particularly in court cases, but the 80% Rule is the accepted standard and provides an excellent opportunity for any organization to monitor the impact of its selection tools and processes.

We encourage organizations to track the impact of their interview process on protected groups and take appropriate action if adverse impact is discovered.