


Testing Isn't Just About Validity Anymore!

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Personnel Testing Council of Southern California
(PTC-SC)
2008 Annual Conference
October 2, 2008





Uniform Guidelines on Employee Selection Procedures

***Equal Employment Opportunity
Commission (EEOC)***

Uniform Guidelines- Statement of Purpose

- The Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers

Application of Guidelines

- These guidelines will be applied by the **Equal Employment Opportunity Commission** in the enforcement of title VII of the Civil Rights of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter “Title VII”); by the **Department of Labor**, and the **contract compliance agencies** until the transfer of authority contemplated by the President’s Reorganization Plan No. 1 of 1978, in the administration and enforcement of Executive Order 11246, as amended by Executive Order 11375 (hereinafter “Executive Order 11246”)

Consideration of suitable alternative selection procedures

- 1) Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact.
- 2) Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines.



Consideration of suitable alternative selection procedures

- 3) Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating in in accord with these guidelines.

6. Q. What practices are covered by the Guidelines?

- A. The Guidelines apply to **employee selection procedures which are used in making employment decisions**, such as **hiring, retention, promotion, transfer, demotion, dismissal or referral**.
- Employee selection procedures include **job requirements** (physical, education, experience), and **evaluation of applicants or candidates** on the basis of application forms, interviews, performance tests, paper and pencil tests, performance in training programs or probationary periods, and any other procedures used to make an employment decision whether administered by the employer or by an employment agency.

9. Q. Do the Guidelines require that only validated selection procedures be used?

- A. No. Although validation of selection procedures is desirable in personnel management, the Uniform Guidelines require users to produce evidence of validity **only when the selection procedure adversely affects the opportunities of a race, sex, or ethnic group** for hire, transfer, promotion, retention or other employment decision.
- If there is **no adverse impact**, there is **no validation requirement** under the Guidelines.


10. Q. What is “adverse impact”?

- A. Under the Guidelines **adverse impact** is:

A substantially different rate of selection in hiring, promotion or other employment decision which works to the disadvantage of members of a race, sex or ethnic group.

II. Q. What is a substantially different rate of selection?

- A. The agencies have adopted a rule of thumb under which they will generally consider a selection rate for any race, sex, or ethnic group which is less than four-fifths ($4/5$ ths) or eighty percent (80%) of the selection rate for the group with the highest selection rate as a substantially different rate of selection.




18. Q. Is it usually necessary to calculate the statistical significance of differences in selection rates when investigating the existence of adverse impact?

- **A. No. Adverse impact is normally indicated when one selection rate is less than 80% of the other. The federal enforcement agencies normally will use only the 80% (4/5ths) rule of thumb, except where large numbers of selections are made.**

32. Q.What is "validation" according to the Uniform Guidelines?


- A.Validation is the demonstration of the job relatedness of a selection procedure.The Uniform Guidelines recognize the same three validity strategies recognized by the American Psychological Association:
- (1) **Criterion-related validity**--a statistical demonstration of a relationship between scores on a selection procedure and job performance of a sample of workers.
- (2) **Content validity**--a demonstration that the content of a selection procedure is representative of important aspects of performance on the job.
- (3) **Construct validity**--a demonstration that (a) a selection procedure measures a construct (something believed to be an underlying human trait or characteristic, such as honesty) and (b) the construct is important for successful job performance.



48. Q. Do the Guidelines call for a user to consider and investigate alternative selection procedures when conducting a validity study?

- **A. Yes. The Guidelines call for a user, when conducting a validity study, to make a reasonable effort to become aware of suitable alternative selection procedures and methods of use which have as little adverse impact as possible, and to investigate those which are suitable.**

- An alternative procedure may not previously have been used by the user for the job in question and may not have been extensively used elsewhere. Accordingly, the preliminary determination of the suitability of the alternative selection procedure for the user and job in question may have to be made on the basis of incomplete information. If on the basis of the evidence available, the user determines that the alternative selection procedure is likely to meet its legitimate needs, and is likely to have less adverse impact than the existing selection procedure, the alternative should be investigated further as a part of the validity study. The extent of the investigation should be reasonable.
- Thus, the investigation should continue until the user has reasonably concluded that the alternative is not useful or not suitable, or until a study of its validity has been completed. Once the full validity study has been completed, including the evidence concerning the alternative procedure, the user should evaluate the results of the study to determine which procedure should be used.




49. Q. Do the Guidelines call for a user continually to investigate "suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible?"

- **A.** No. There is no requirement for continual investigation. A reasonable investigation of alternatives is called for by the Guidelines as a part of any validity study. Once the study is complete and validity has been found, however, there is generally no obligation to conduct further investigations, until such time as a new study is called for. See, Sections 3B and 5K.

49. Q. – continued...

- If a government agency, complainant, civil rights organization or other person having a legitimate interest shows such a user an alternative procedure with less adverse impact and with substantial evidence of validity for the same job in similar circumstances, the user is obliged to investigate only the particular procedure which has been presented.




50. Q. In what circumstances do the Guidelines call for the use of an alternative selection procedure or an alternative method of using the procedure?

- **A.** The alternative selection procedure (or method of use) should be used when it has less adverse impact and when the evidence shows that its validity is substantially the same or greater for the same job in similar circumstances.

50.Q. – continued...

- Thus, if under the original selection procedure the selection rate for black applicants was only one half (50 percent) that of the selection rate for white applicants, whereas under the alternative selection procedure the selection rate for blacks is two-thirds (67 percent) that of white applicants, the new alternative selection procedure should be used when the evidence shows substantially the same or greater validity for the alternative than for the original procedure. The same principles apply to a new user who is deciding what selection procedure to institute.



52. Q.The Guidelines require consideration of alternative procedures and alternative methods of use, in light of the evidence of validity and utility and the degree of adverse impact of the procedure. How can a user know that any selection procedure with an adverse impact is lawful?

- **A.**The Uniform Guidelines (Section 5G) expressly permit the use of a procedure in a manner supported by the evidence of validity and utility, even if another method of use has a lesser adverse impact.


52. Q. – continued...

- With respect to consideration of alternative selection procedures, if the user made a reasonable effort to become aware of alternative procedures, has considered them and investigated those which appear suitable as a part of the validity study, and has shown validity for a procedure, the user has complied with the Uniform Guidelines. The burden is then on the person challenging the procedure to show that there is another procedure with better or substantially equal validity which will accomplish the same legitimate business purposes with less adverse impact. Section 3B. See also, *Albemarle Paper Co. v. Moody*, 422 U.S. 405.



Professional and Technical Authorities & Guidelines

- (Richard Jeanneret, 2005 in Frank Landy, Editor, Employment Discrimination Litigation)



Uniform Guidelines (1978) defines discrimination and introduces concept of “adverse impact”

- Discrimination occurs when a selection procedure results in “unjustifiable adverse impact”
- Adverse impact occurs when the selection ratio for a protected group is less than four-fifths (80%) of the rate for the dominant (non-protected) group
- But – influenced by sample size and not a statistical test and null hypothesis not stated

Uniform Guidelines introduces concept of “alternative selection procedure”

- If two (or more) selection procedures are available for use with approximately equal validity, the procedure with less adverse impact should be used.
- Civil Rights Act of 1991 – if employer demonstrates validity for selection procedure with adverse impact – and plaintiff offers an alternative with approximately equal validity and less adverse impact – burden is on employer to show why it was not used.
- Justification of adverse impact – procedure is job related (valid) or justified by business necessity (necessary for the safe and efficient operation of an organization)



The Adverse Impact Judicial Scenario

- (Arthur Gutman, 2005 in Frank Landy, Editor, Employment Discrimination Litigation)



Phase I: Proving Adverse Impact

- Plaintiffs present statistical proof




Phase 2: Employer Defense

- Defendants present proof that cause of adverse impact is job related (valid) and consistent with business necessity

Phase 3: Less Discriminatory Alternatives

- Plaintiffs present alternative job-related selection procedures with less adverse impact
- *Albemarle v. Moody* (1975) – Supreme Court rules plaintiffs can prove pretext by “showing that less discriminatory alternatives to the achievement of the employers goal were available.”
- *Bridgeport Guardians v. Bridgeport* (1991) – “Near miss” – expert witness proposes scrutiny of applicants using videotaping (and other procedures) – but Second Circuit rules the extra expenses were not required.
- Alternatives to adverse impact is “evolving and is likely to garner increased attention as case law evolves (p.23).



BUT – was the defendant obligated to explore the possibility of potentially less discriminatory alternatives to demonstrably valid selection instruments that manifest adverse impact – even if the plaintiff has not introduced evidence that such alternatives exist?

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