



10 Things You May Not Know About Adverse Impact

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The idea of adverse impact was first mentioned in 1966, shortly after the passage of the U.S. Civil Rights Act. Since then, the concept of adverse impact disparate impact has been highly refined, and is generally understood. But there's still a mysteriousness to adverse impact, partly because it doesn't fit into what we typically think discrimination looks like. Here are 10 things you may not know about adverse impact:

1. Adverse impact is one element of the legal theory of disparate impact under Title VII. Adverse impact and disparate impact are sometimes used interchangeably. But in fact, they're quite different. Adverse impact measures the effect an employment practice has on a class protected by Title VII. Disparate impact measures the effect *any* practice has on a class protected by Title VII. Disparate impact outside the employment context can occur in jury selection, credit scores and lending, housing, education, and political processes.

2. Adverse impact is not always illegal. If a policy or practice has an adverse impact, its use is not prohibited if the employer can establish the business necessity of that policy or practice. For example, in *Zamlan v. City of Cleveland*, a group of women challenged a pre-employment test for firefighters. The pre-employment test required:

[W]hile wearing a custom-tailored self-contained breathing apparatus, candidates must drag two lengths of standard 2 ½" hose 180 feet (90 feet one way, drop coupling, run to the other end of the hose, pick up and return 90 feet, drop coupling in designated area), run 75 feet to pumper, remove a one-person ladder (approximately 35 lbs.) from the side of the pumper, carry the ladder into the fire tower, place it against the back rail of the first landing and continue up the inside stairwell to the fifth floor where a monitor observes the candidate's arrival. Then candidates return to the first landing, retrieve the ladder and place it on the pumper.

None of the female candidates successfully completed this test. Despite the fact that the test eliminated every female candidate - having an adverse impact by gender - the test was held to be lawful based on its direct relationship to successful firefighting.

3. Adverse impact is a statistical question. The intent of the decision-maker is completely irrelevant in claims of adverse impact. It comes down to a mathematical comparison of employment outcomes by protected group status. An employer can be found liable for adverse impact even if it was not motivated by discriminatory intent.

4. Adverse impact hides. Since adverse impact lives in an organizations' policies and practices, it's not always easy to tell if you have an issue. Employers may not even be aware that one of their policies or practices has an adverse impact until it's too late and they're faced with litigation.

5. Adverse impact can't be prevented through conventional means. Employers have traditionally approached discrimination prevention through training. Recent estimates indicate that companies in the United States spend nearly \$300 million annually on diversity training programs. Employees, managers and supervisors spend countless hours in seminars discussing conflict resolution and communications skills, the importance of having a diverse and inclusive workplace, and so forth. Adverse impact can't be solved completely through diversity training or anti-discrimination seminars. Adverse impact doesn't arise out of personal interactions, and conventional training for supervisors and managers won't effectively prevent adverse impact.

6. Adverse impact can occur in any kind of employment decision. Usually, we think of adverse impact in the context of hiring, promotion and termination. But adverse impact isn't limited to these three kinds of decisions. It can occur in compensation, discipline, performance evaluations, job assignments, and any other kind of decision involving the use of a formal policy or practice.

7. Adverse impact can occur at any stage of a decision-making process. This is easiest to understand within the context of hiring, since it's a familiar process for everyone. Here's a typical hiring process: candidates submit applications, and those applications are reviewed for minimum qualifications. Then, those candidates satisfying minimum qualifications are phone screened. Among those candidates who are phone screened, some are invited for an interview. Among those candidates interviewed, one is selected for hire. It could be the case that the minimum qualifications used at the beginning of the process have an adverse impact, which leads to a protected group disparity when hires are statistically compared to candidates. It could also be the case that the minimum qualifications don't have an adverse impact, but the criteria used in the phone screening process do. This would lead to the same protected group disparity when hires are statistically compared to candidates. Adverse impact can occur anywhere in

the decision-making process; to find out where it's actually occurring, you need to examine each stage of your process separately.

8. Adverse impact is about more than statistical significance. While statistical significance plays a big role in determining whether adverse impact exists, it doesn't tell the complete story. You should also consider practical significance, or whether the protected group disparity is big enough to matter. Although the Supreme Court established the threshold for statistical significance in their *Hazelwood School District* decision, they also noted that "gross statistical disparities" could, by themselves, constitute prima facie proof of a pattern or practice of discrimination. You won't have a complete picture unless you consider both statistical and practical significance.

9. The most common tool for studying adverse impact is completely arbitrary. The Four-Fifths Rule is the most common way to test for adverse impact. But the rule is completely arbitrary. The threshold of four-fifths, or 80%, was arrived at as part of a compromise. Here's what one of the committee members who developed the Four-Fifths Rule had to say:

I recall a heated debate that went on for way too long (as usual) with two camps: a 70% camp and a 90% camp. The 80% Test was... a way to split the middle between two camps

Not very scientific, is it?

10. Adverse impact litigation is preventable. If you proactively examine your policies and practices for adverse impact, you can dramatically minimize your risk of adverse impact litigation. It's been my experience that a lot of matters ending up in litigation could have been prevented if the employer had performed some basic statistical analysis of its data with respect to equity. Don't wait until you're faced with a lawsuit - start proactively examining your policies and practices now.