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Discrimination

By A. Jonathan Trafimow
Moritt Hock & Hamroff LLP, Garden City, NY

Because this chapter is written for human resources professionals, we pose the following question: How much does HR really need to know about employment discrimination law? We assume that HR knows the "First Commandment": Thou shalt not treat employees differently on the basis of legally protected characteristics. In addition to this knowledge, HR almost always has access to legal counsel when administrative charges (*e.g.*, claims brought before the Equal Employment Opportunity Commission (EEOC) or a state or local agency) or lawsuits come through the company's door. Isn't this enough?

The premise of this chapter is that the answer to the foregoing question is "No, it isn't enough." In today's challenging economy, unnecessary calls from HR to legal counsel bring a financial cost that those responsible for the company's financial health undoubtedly prefer to avoid. Equally true, however, is the risk that the failure to act when such a call is necessary might have adverse consequences (for example, a charge or lawsuit down the road that might otherwise have been avoided).

The challenges to HR, then, are manifold. How does HR recognize latent dangers when a business manager calls to bring a situation to HR's attention? What steps can HR take on its own to educate company management? How does HR identify high-risk situations? How likely is a bad outcome absent aggressive HR intervention? Does HR have sufficient internal authority to persuade business managers to take the steps that HR believes are necessary? Having done an initial assessment, when can HR appropriately decide to manage the situation on its own, and when is the call to legal counsel warranted? What are the best and worst possible outcomes for a particular factual situation?

This chapter presents the basics of employment discrimination concepts in plain English, with the hope that the reader, having finished the chapter, will be better positioned to answer these questions.[1] We have organized the chapter from the most familiar set of challenges to most HR professionals—the single-employee disparate treatment (intentional discrimination) claim—to consideration of more complex group situations. What must the individual employee prove to sustain her claim? What defenses can the employer assert? Perhaps most importantly, what can HR do, ***before it is too late***, to best position the company to prevail in such a claim, or even avoid it altogether?

The emphasized text merits some initial elaboration. Most employment law attorneys function as both litigators and counselors. Litigators function in one sense as historians: they reconstruct events that have already occurred and advance arguments on behalf of their clients based on historically closed events. As counselors, attorneys are sometimes able to influence those facts before the historical record is closed. Even in that role, however, attorneys usually function by suggesting to company officials how they should act. Often, it is HR who implements these suggestions and creates the factual record that, for better or worse, the litigator inherits, and on which the company's defense succeeds or fails. This is one reason why HR professionals who understand employment law concepts are their attorneys' best friends!

These considerations apply with equal—or perhaps greater—force in situations where many employees are involved. Again, recognizing the challenges of the current economy, we offer the reduction-in-force (RIF) as one example of these situations. What is HR's role in a RIF? What legal requirements limit the company's options? How should the RIF be designed? Should designing the RIF be a top-down process, bottom-up, or one that contains input from both directions? If bottom-up, are there particular managers (or other decision-makers) who warrant special concern? How can the company's business objectives be harmonized with applicable legal rules?

To ask these questions establishes the critical role of HR, regardless of a particular company's answers to them. While there are notable exceptions, as a rule, outside counsel is unlikely to know the company—including its financial, managerial, and personnel strengths and weaknesses—in sufficient detail to make these decisions without substantial assistance. This assistance usually comes from HR, who will bring greater value to the process with a better understanding of applicable legal rules.

In connection with group employment decisions like RIFs, this understanding must include not only disparate treatment theories, but also adverse impact (also called disparate impact) theories. Adverse impact is sometimes referred to as "accidental" discrimination (as opposed to intentional discrimination), and looks heavily to statistical analyses for support. The Supreme

1 Readers interested in case citations and a more detailed analysis will find them in the footnotes.

Court has told us that adverse impact analysis does not require employers to impose quotas.[2] Harmonizing this statement with adverse impact analysis is not always easy, as we shall see. The benefits to HR in understanding these concepts cannot be overstated.

We pause for an important caveat on the limits of this chapter. We are concerned with discrimination, but there are many other factors that HR must consider in connection with group employment actions. One example, in connection with large RIFs, is the Worker Adjustment and Retraining Notification Act (WARN), which is beyond the purview of this chapter.

Finally, we will highlight some of the issues in the discrimination area that, as of this writing, are very much in play as possible legal developments, whether through new legislation or evolving judicial doctrine. But, as promised, we begin with the basics: the single-employee intentional discrimination paradigm.

Understanding Employment Discrimination—The Basics

Employment discrimination statutes prohibit employers[3] from treating people differently on the basis of a legally protected characteristic. The statutes protect employees, as well as persons who are seeking employment and, in some cases, former employees. Major protected characteristics include: race, color, national origin, sex, age, disability, religion, and military service. Each of these distinct types of discrimination is discussed later in the chapter, but first we provide a discussion of certain basic concepts that apply to all of them.

Adverse Employment Action

In general, employment discrimination occurs when an employer subjects an employee to an adverse employment action because of the employee's protected characteristic. An employer's conduct will only qualify as an adverse employment action if it is serious enough to alter the employee's compensation or other terms, conditions, or privileges of employment. Courts generally hold that, to be "materially adverse," a change in working conditions must be more than a mere inconvenience or an alteration of job responsibilities. It must have a serious detrimental impact on the employee's current employment or opportunities to secure future employment.

Courts have articulated three general categories of actionable, materially adverse employment actions:

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2 *Ricci v. DeStefano,* 557 U.S. 557 (2009); *Grutter v. Bollinger,* 539 U.S. 306 (2003).

3 We use the terms "company" and "employer" synonymously as terms for entities that have employees, whether private, not for profit, governmental agencies, etc. Gender pronouns are used interchangeably unless otherwise indicated.

1. Those in which the employee's compensation, fringe benefits, or other financial terms of employment are diminished, including termination;
2. Those in which there is a lateral transfer with no change in financial terms, but, as a result, the employee's career prospects and job opportunities are significantly reduced, and/or the employee is prevented from using job skills and experience that may diminish or be lost; and
3. Those in which the employee's present job is not altered, but the working conditions are changed in a way that subjects the plaintiff to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment.

Because there are no bright-line rules for determining when an employment action is "materially adverse," the determination in each particular case can be very fact sensitive.

Examples of the type of action that could indicate a materially adverse change are:

- A demotion accompanied or evidenced by a decrease in wage or salary;
- A change in job title;
- A material loss of benefits;
- Significantly diminished job responsibilities; and
- A loss of supervisory responsibility.

A loss of prestige may constitute an "adverse employment action" if it affects opportunities for professional advancement. This issue often arises when an employee has been demoted, has had a change in job title or reporting responsibilities, has been transferred, or has been denied a transfer. Although a change in job title may constitute an adverse employment action under some circumstances, where the change is just a matter of semantics with no negative consequences to the employee, most likely no adverse action will be found.

Disparate Treatment

There are two broad categories of discrimination claims, "disparate treatment" and "disparate impact." Disparate treatment is the simpler and more common of the two. Disparate treatment occurs when an employer ***intentionally*** discriminates against someone because of a protected characteristic such as race, sex, or age. Examples include outright bias (such as refusing to hire members of a particular religion because of the employer's dislike for them), preferential treatment (such as favoring members of a particular ethnic group to the disadvantage of non-members), and acting on the basis of stereotypes (such as regarding older job applicants as too out of touch with current office technology). Reverse discrimination and harassment of an individual because of a protected trait also constitute intentional discrimination. We will discuss disparate impact thoroughly later in this chapter.

Proof of Intentional Discrimination

A claim of intentional discrimination requires proof that the employer treated the employee differently than others ***because of*** the employee's protected characteristic. There are two methods by which the employee can prove the company's motivation. The first is with direct evidence of the company's discriminatory motive. An example of direct evidence would be if a supervisor told an employee that he was terminating her because he thought she was too old to perform the job.

Not surprisingly, employees in disparate treatment cases often lack direct evidence of discrimination because employers generally will not engage in conduct or make statements that constitute direct evidence. For this reason, the courts have developed a means through which an employee can prove intentional discrimination through indirect or circumstantial evidence. Under this approach, the employee must initially establish a *prima facie* case of intentional discrimination by showing:

- Membership in a protected class (race, sex, age, etc.);
- Qualification for the job in question;
- An adverse employment action; and
- Circumstances that support an inference of discrimination.

If the employee does so, the company is then required to articulate a legitimate, nondiscriminatory reason for the adverse employment action that the employee claims was discriminatory. In other words, the company must explain why it took the adverse action. After the company provides this explanation, the employee can present evidence showing that the company's stated reasons for its actions are untrue and are offered merely as a pretext for discrimination.

Pretext and the Importance of Being Truthful

The burden-shifting formula described above enables an employee to succeed on a claim of intentional discrimination without any direct evidence of such discrimination. If the employee can persuade the trier of fact (typically a jury) that the explanation offered by the company is not true, the jury is permitted to infer or presume that the employer's real reason for the adverse employment action is unlawful discrimination and that the false explanation being offered is pretextual; *i.e.*, it is intended to hide the discrimination that is actually taking place.

Technically, the burden of proof in such cases remains with the employee at all times. The company is not required to prove that its explanation for the adverse employment action is true. The employee must prove that the explanation is false. As a practical matter, however, an employer confronted with such a claim often will proceed as if it bears the burden of persuasion and will make every effort to persuade the trier of fact that its explanation for the adverse employment action is true. The employer will be in the best position to do so if its explanation

is, in fact, truthful. Thus, when making personnel decisions, especially those involving hiring, terminations, and promotions, it is important that the employer have a clear and full understanding of the reasons for its decisions, that it document the decision-making process, and that it not take any actions or make any statements that are inconsistent with its actual reasons for the decision.

Courts and juries are supposed to respect the business judgment of the employer. Their role is to determine whether the reasons offered by an employer for an adverse employment action are true, not whether the action constituted a good business decision. Thus, an employee cannot establish pretext merely by challenging the employer's business judgment or showing that the employer's decision was wrong or mistaken. It is sometimes said that it is not the court's or the jury's role to second-guess an employer's business judgment and to act as a "super-personnel department." Rather, their role is limited to determining whether an employment decision is discriminatory.

Under limited circumstances, an employer may be allowed to consider attributes in a manner that, under other circumstances, would be considered discriminatory. For example, a manufacturer of men's clothing may lawfully select a male model for advertising purposes. In this example, being male is a *bona fide occupational qualification* (BFOQ) for the position. There is no BFOQ for racial distinctions.[4]

Retaliation

Retaliation cases present many of the same issues as disparate treatment discrimination cases. The elements of a retaliation case are similar:

- Participation in protected conduct (*e.g.*, complaining of illegal discrimination) of which the employer was aware;
- Qualification for the job in question;
- An adverse employment action; and
- Circumstances that support an inference of retaliation.

A key distinction between discrimination and retaliation cases is that the former focuses on status (member of a protected class) while the latter focuses on conduct.

In 2009, the U.S. Supreme Court expanded the scope of Title VII's anti-retaliation protections. Specifically, in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*,[5] the Supreme Court held that Title VII's anti-retaliation provision protects not only em-

4 According to EEOC regulations, the BFOQ is limited in scope and should be narrowly construed. Employers should consult with legal counsel in connection with BFOQ issues.

5 129 S.Ct. 846 (2009).

ployees who report complaints of harassment/discrimination on their own initiative, but also employees who speak out about harassment/discrimination while answering questions during an employer's internal investigation of a harassment/discrimination complaint brought by someone else. In so holding, the Court rejected the argument that "the lower the bar for retaliation claims, the less likely it is that employers will look into what may be happening outside the executive suite." This argument, the Court explained, is "unconvincing" because it "underestimates the incentive to enquire that follows from our [earlier] decisions."[6] While the reader is referred to Chapter 12 for a more detailed discussion of these cases, in *Crawford* the Court explained that they provide employers with "a strong incentive to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability."[7]

Causation

Causation is a necessary component of both discrimination and retaliation cases. Causation is important at both the *prima facie* stage, where the employee must show that the adverse employment action occurred under circumstances that support an inference of discrimination or retaliation, and as part of the employee's ultimate burden of proof. Indeed, in many cases, causation is the critical issue, since every employee is a member of one or more protected groups and, in the context of a termination, has suffered an adverse employment action. If the employee is also qualified for the job in question, then the element of causation may be the bedrock of the employer's defense.

Causation is a concept of virtually limitless complexity.[8] An important consideration is foreseeability. If an employer could reasonably foresee that an action it takes would lead to an adverse employment action for the employee, it is more likely that a judge or jury will find that the requirement of causation has been satisfied. But do not presume that causation and foreseeability are one and the same—they are different (if related) concepts.

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6 *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

7 *Crawford*, 129 S.Ct. at 852.

8 Readers interested in causation in the tort context are urged to read the famous decision of New York Court of Appeals Chief Judge (and later United States Supreme Court Justice) Benjamin Cardozo in the case of *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928). The facts of *Palsgraf* illustrate just how attenuated the link between a negligent act and the ultimate injury can become. A passenger hurrying to board a moving train was carrying a package. Two of the railroad's guards thought she was falling. One guard, located on the car, tried to pull the passenger into the car. The other guard, located on the platform, tried to push the passenger into the car from behind. The guards' efforts caused the passenger to drop a package she was carrying onto the rails. Unknown to the guards, the package (wrapped in newspaper) contained fireworks and exploded when it hit the rails. The shock may have knocked down scales at the other end of the platform (alternatively, a panicked bystander may have knocked down the scales), which injured Ms. Palsgraf, who sued the railroad, claiming the guards' negligent acts caused her injury. The trial court and the intermediate appeals court found for Ms. Palsgraf and sustained the jury's verdict in her favor. Long Island Railroad appealed. Writing for the Court of Appeals, Judge Cardozo explained that the causal nexus between the guards' actions and Ms. Palsgraf's injury was too attenuated to support the jury's verdict.

For purposes of this chapter, we focus on three considerations that often determine whether causation is present. First, with respect to retaliation cases, courts are very concerned with temporal proximity. As the United States Supreme Court has explained, "The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie* case uniformly hold that the temporal proximity must be 'very close,'. . . . Action taken (as here) 20 months later suggests, by itself, no causality at all."[9] Many lower courts have found that the passage of even a few months will negate any inference of causation, although the courts will look at all of the facts and circumstances in a particular case.[10]

The second principle, sometimes called the "cat's paw doctrine," applies in both the discrimination and the retaliation context. Judge Richard Posner of the Seventh Circuit coined the term "cat's paw" in the case of *Sharger v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). The reference is to Jean de La Fontaine's famous fable of the monkey and the cat. In the fable, a crafty monkey wants to eat some hot chestnuts that are roasting in the fire. Unwilling to burn his own hand, the monkey convinces the cat to reach his paw in and pull the chestnuts out for him. The cat foolishly does his bidding, and the monkey enjoys the chestnuts with a laugh while the cat licks his burnt paw.

In the employment law context, the cat's paw doctrine refers to a discriminatory (or retaliatory) subordinate (akin to the crafty monkey in de La Fontaine's fable) who dupes the unwitting supervisor into taking an adverse employment action against the employee. Not all courts use the cat's paw metaphor; some refer to such cases as presenting a theory of subordinate liability or subordinate bias liability. By any name, the causation issues in such cases are manifold, but essentially turn on the role of the biased subordinate in the process that leads to the decision to take the adverse employment action. (An employee may contend that both the supervisor and the subordinate are biased. Such a case is not a true "cat's paw" situation.)

A typical cat's paw case, then, involves a manager or supervisor who has a discriminatory or retaliatory intent toward one of his subordinates, but who also lacks the ability to terminate (or otherwise take action against) the employee. What the supervisor may do is manipulate the ultimate decision-maker(s) (whether by issuing written memoranda or otherwise making negative reports, recommending negative action, or simply influencing the decision-maker(s)' view of the subordinate). In a very large corporation, the ultimate decision-maker might not even know that the employee was a member of a protected class or engaged in protected conduct. As innocent as de La Fontaine's cat, the decision-maker(s) may nonetheless be duped into discriminatory or retaliatory conduct. In such cases causation is a critical question. Did the biased subordinate sufficiently "cause" the adverse employment action such that the employer may be liable?

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9 *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001).

10 *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87 (2d Cir. 2001); *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 102 (2d Cir. 2001).

We frame the question; we do not endeavor to answer it fully. In *Staub v. Proctor Hospital*,[11] the Supreme Court addressed the "cat's paw" theory in the context of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), and noted that its analysis was rooted in the statutory language of USERRA, which imposes liability if an employee's uniformed service "is a motivating factor" in the adverse employment action. Based on this language, for purposes of USERRA, the Court found that a manager's discriminatory animus can be sufficient to make the employer liable, even if the ultimate decision-maker was not discriminatory, if the subordinate manager's animus was *a* proximate cause of the adverse employment action:

> We do not think that the ultimate decisionmaker's exercise of judgment automatically renders the link to the supervisor's bias "remote" or "purely contingent." The decisionmaker's exercise of judgment is *also* a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes.[12]

It is not yet clear how the *Staub* decision will be applied in "cat's paw" cases arising under other federal, state, and local laws.[13]

Third, we note that the Supreme Court has recently explained that causation is analyzed differently under Title VII than under the ADEA. Under Title VII, an employee must show that his/her race or sex played "a motivating part" in the challenged employment decision.[14] In 2009, however, the Court announced a stricter standard for age discrimination claims under the ADEA.[15] To prove age discrimination, the Court explained, the employee must "establish that age was the 'but-for' cause of the employer's adverse action."[16] Among other issues, it remains to be seen how the Court will apply the "cat's paw" theory under discrimination statutes that have different standards for causation than the "motivating factor" test under USERRA.

Mixed-Motive Cases Under the ADEA

In a mixed-motive case of disparate treatment, an employee alleges that both legitimate factors and unlawful discrimination influenced the employment action in question (*i.e.*, that discrimination was a motivating factor). The U.S. Supreme Court has ruled that for employees to

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11 131 S.Ct. 1186 (2011). *Staub* also discussed *Sharger* and the "cat's paw" fable. *Staub*, 131 S.Ct. at 1189.

12 131 S.Ct. at 1192 (emphasis on original). *See also Croft v. Vill. of Newark*, 2014 U.S. Dist. LEXIS 108429 (W.D.N.Y. Aug. 5, 2014), at *27 (*Staub* "expressly authorized USERRA claims in which a service member seeks to hold his employer liable for the animus of a supervisor, even though the supervisor did not make the ultimate employment decision.")

13 *See, e.g., Simmons v. Sykes Enterprises, Inc.*, 647 F.3d 943 (10th Cir. 2011) for an application of *Staub* to an age discrimination claim under the ADEA.

14 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

15 *Gross v. FBL Financial Servs.*, 129 S.Ct. 2343 (2009).

16 *Id.* at 2350.

prevail in a disparate treatment age discrimination case, they must prove that age bias was the ultimate reason the employer took the adverse employment action.[17] In its decision, the Court ruled that the burden of persuasion is the same in alleged mixed-motive cases as in any other ADEA disparate treatment action (*i.e.*, the employee must prove that the employer took the action because of the employee's age). This ruling is different from the rules applied in mixed-motive cases under Title VII. In Title VII cases, once the employee proves that unlawful discrimination motivated the employer, the burden of persuasion shifts to the employer to prove that it would have taken the same employment action for a legitimate reason in the absence of discrimination. In its decision, the Court noted that Congress expressly amended Title VII to authorize claims in which unlawful discrimination was "a motivating factor," but did not add a similar provision to the ADEA.

As a result, it is now more difficult for employees to prevail in age discrimination lawsuits. Employees must be able to prove not only that age motivated the employer's adverse action but also that intentional age discrimination was the ultimate reason for the action.

Specific Protected Categories

Most HR professionals know that employees are members of multiple protected categories for purposes of discrimination law; at a bare minimum, every employee has a gender and a race. We pause here to identify and discuss some of the protected categories that, seemingly, are at issue in most discrimination lawsuits. We note that different federal, state, and local laws establish different levels for the number of employees an organization must employ in order to be subject to a particular statute. A discussion of these "thresholds" is beyond the scope of this chapter. Similarly, we confine our discussion of protected categories to federal statutes; the reader should consult with local counsel about state/local laws, which can vary substantially from federal law and from each other.

SEX

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits sex discrimination in all aspects of employment and also prohibits retaliation against employees who complain of sex discrimination. For example, discriminating against an employee because of his or her sex with respect to hiring, leaves of absence (*e.g.*, pregnancy or parental leave), health insurance, compensation, and termination is prohibited.

Title VII also prohibits sexual harassment, which is considered a form of discrimination. Traditionally, sexual harassment was analyzed under either the so-called *quid pro quo* theory, or under a "hostile work environment" theory.

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17 *Gross v. FBL Financial Services*, 129 S. Ct. 2343 (2009).

Quid pro quo is Latin for "this for that." In a prototypical *quid pro quo* case, a supervisor makes a specific employment benefit (a raise, a favorable job assignment, continued employment, etc.) contingent on some form of sexual activity. A "hostile work environment" occurs any time an employee is subject to unwelcome sexual conduct that is sufficiently severe and pervasive to alter the terms and conditions of an employee's employment. It is difficult to define precisely how severe the unwelcome sexual conduct must be to become actionable.[18] Nonetheless, it is clear that the more "severe" the conduct is, the less "pervasive" it must be, and vice versa. Thus, a truly egregious act (*e.g.*, a vicious sexual assault) would likely be actionable the first time it occurred, whereas a less severe act (*e.g.*, inappropriate comments) would need to occur more frequently. More recently, many courts have recognized the *quid pro quo*/hostile work environment dichotomy as perhaps didactically useful, but jurisprudentially unnecessary.

Sexual harassment is discussed in further detail in Chapter 12.

RACE

Federal statutory proscriptions on race discrimination extend back to the year after the close of the Civil War, when Congress passed the Civil Rights Act of 1866. The statute provides, in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws . . . as is enjoyed by white citizens.[19]

Congress amended the Civil Rights Act in 1991, clarifying that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[20]

Even before the 1991 amendments, Congress had augmented the employment law protections of the Civil Rights Act with the passage of Title VII in 1964. Title VII applies broadly to all aspects of employment, and makes it unlawful to discriminate on the basis of race, color, or national origin. Title VII protects persons because of their race-linked characteristics (*e.g.*, hair texture, facial features) and because of their marriage to or association with someone of a particular race, color, or national origin.

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18 As the United States Supreme Court observed, courts and juries will make these judgments drawing on "[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

19 42 U.S.C. § 1981(a).

20 42 U.S.C. § 1981(b).

Although race, color, and national origin discrimination theories overlap, they are not identical. The prohibition against racial discrimination extends to perceived racial discrimination. Color discrimination can occur between persons of the same or different races or ethnicities. "Color" is often used to refer to pigmentation, skin shade or tone, etc. Color discrimination occurs when an employee is discriminated against on the basis of these characteristics.

"National origin" most often refers to the country where an employee was born, or where his ancestors came from. Title VII prohibits discrimination on this basis, or on the basis of ethnicity.

Title VII also prohibits harassment based on these attributes. Thus, Title VII prohibits subjecting an employee to unwelcome conduct that is sufficiently severe and pervasive so as to alter the terms and conditions of a person's employment because of her race, color, or national origin.

DISABILITY

The Americans with Disabilities Act (ADA) prohibits employment discrimination against qualified persons with disabilities.[21] People could claim to have a "disability" in any of three ways: they could actually have a disability; they could have a record of a disability; or they could be (erroneously) regarded as having a disability by their employer. To have a "disability" a person must have a physical or mental limitation that substantially limits them in a major life activity.

The statute was amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). Effective January 1, 2009, the ADAAA broadened coverage under the ADA, in part to roll back several Supreme Court decisions. Interestingly, the ADAAA did not actually change the statutory definition of "disability" but, rather, directed courts to construe the term in favor of broader coverage.

The ADAAA did make several substantive changes to the ADA. A partial list of these changes includes:

The ADAAA directs that the determination of whether an individual is "substantially limited in a major activity" be made without regard to mitigating measures, with the exception of "ordinary eyeglasses or contact lenses." This provision overrules Supreme Court precedent reaching the contrary conclusion.[22]

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21 An earlier statute, the Rehabilitation Act of 1973, was a predecessor to the ADA and the first comprehensive federal statute designed to eliminate employment discrimination against qualified persons with disabilities. 29 U.S.C. § 781 *et seq.*

22 *Compare Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (vision that could be normal with corrective lenses did not constitute a disability) with *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (heart condition that could be controlled through medication did not constitute a disability) and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (squarely holding that mitigating measures must be considered in assessing whether an individual has a disability). Pending judicial interpretation of the ADAAA, it seems reasonable to assume that the statute overruled the *Murphy* and *Albertson's* decisions, while leaving the *Sutton* holding largely intact.

For purposes of determining whether a person is actually disabled, the ADAAA expands the list of "major life activities" to include "major bodily functions."[23]

The ADAAA makes clear that to be "regarded as" disabled, an employee need only show that the employer perceived her as disabled. The employee need not show that the employer perceived her as substantially limited in a major life activity.

Persons with a disability only because they are "regarded as" disabled are not entitled to a reasonable accommodation.

Having a "disability" brings an employee within the coverage of the ADA/ADAAA. To prevail in a discrimination claim, the employee must prove that he was qualified, that is, able to perform the essential functions of the job with or without a reasonable accommodation.[24] There is a great deal written about what makes a job function "essential." At bottom, an essential function means a fundamental job duty, not a marginal one.[25]

Even for a qualified individual with a disability, the ADA only requires a "reasonable" accommodation. There is no magic formula for determining whether an accommodation is reasonable. Courts will look at whether the accommodation is effective (lets the employee perform the essential functions of the job), in addition to the burden (*e.g.*, cost) the accommodation imposes on the employer. An accommodation that imposes an undue burden on the employer is not reasonable.[26] The ADA and its implementing regulations provide numerous examples.[27]

Some states have statutes that are broader than the ADA, even after the ADAAA. Employers are advised to check with local counsel. Further, the provisions of the ADA and ADAAA are discussed in further detail in the ADA chapter of this manual.

AGE

The federal Age Discrimination in Employment Act of 1967 (ADEA) makes it unlawful to discriminate against persons 40 or over with respect to the terms and conditions of their employment.[28] Some state age-discrimination laws protect even younger workers.

Congress amended the ADEA in 1990 with the passage of the Older Workers Benefit Protection Act (OWBPA) to forbid discrimination in employee benefits on the basis of age. The

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23 In *Toyota Motor Mfg.*, 534 U.S. 184 (2002), the Supreme Court defined "major life activities" as those activities that are of central importance to daily life. The ADAAA broadens this definition.

24 42 U.S.C. § 12111(8).

25 29 C.F.R. § 1630.2(n).

26 *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) ("In our opinion, that practical view of the statute [requires] reconciling the two statutory phrases ('reasonable accommodation' and 'undue hardship')."

27 42 U.S.C. § 12111(a); 29 C.F.R. § 1630.2(o).

28 29 U.S.C. § 621 *et seq.* There are limited circumstances where older employees may be treated differently; a discussion of those circumstances is beyond the scope of this chapter.

OWBPA also established strict rules for obtaining releases of ADEA claims from covered employees. Under the OWBPA, a valid waiver of ADEA claims must, at a minimum:

- Be in writing and be understandable;
- Specifically refer to ADEA rights or claims;
- Not purport to waive rights or claims that may arise in the future;
- Be in exchange for valuable consideration;
- Advise the person in writing to consult with an attorney before signing the waiver; and
- Provide the individual with at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

Special rules govern ADEA releases in the context of group terminations.

RELIGION

Title VII prohibits employers from discriminating against employees because of their religion in connection with the terms and conditions of their employment. Employers cannot force employees to participate, or refrain from participating, in a religious activity as a term and condition of employment. Employers must reasonably accommodate employees' sincerely held religious beliefs or practices that conflict with an employment requirement unless the employer can show that the accommodation would cause "undue hardship" to the employer's business.[29]

GENETIC INFORMATION

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers from discriminating on the basis of genetic information about employees, applicants, former employees, or their family members. Final regulations implementing GINA were issued by the EEOC and became effective January 10, 2011. GINA applies to all public employers, private employers with 15 or more employees, employment agencies, and labor organizations ("covered entities"). Under GINA, it is unlawful for a covered entity to:

- Fail or refuse to hire, or to discharge or otherwise discriminate in the compensation, terms, conditions, or privileges of employment because of genetic information.
- Limit, segregate, or classify employees or applicants in any way that deprives them of employment opportunities or otherwise adversely affects employment status because of genetic information.
- Request, require, or purchase genetic information about employees, applicants, former employees, or their family members.

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29 42 U.S.C. § 2000e(j).

- Discriminate in the admission to any apprenticeship, training, or retraining program.
- Harass an employee on the basis of genetic information.

Acquisition of Genetic Information. GINA places broad restrictions on the acquisition and use (including disclosure) by covered entities of genetic information. As a general rule, employers do not violate GINA if their acquisition of genetic information is inadvertent. To be covered by this exception, employers requesting medical information from an individual or health care provider must direct the individual or provider not to provide genetic information. The regulations issued by the EEOC provide the following model "safe harbor" language for employers to include with requests for medical information:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information,' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Employers should include the notice on any request for documentation to support an employee's request for reasonable accommodation. The EEOC is expected to provide additional guidance for employers regarding which types of medical information requests need the safe harbor language.

As GINA is still a relatively new statute, the case law is still developing. In one case, a court dismissed an employee's GINA claim, reasoning that, even if the employer "possessed her genetic information, she has failed to allege facts to raise a reasonable inference that [the employer] denied her STD benefits because of this genetic information."[30]

The "Watercooler" Exception. Acquisition of genetic information is also considered inadvertent if a manager or supervisor learns genetic information about an employee by overhearing a conversation between the employee and others or by receiving it during casual conversation with the employee or others.

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30 *Allen v. Verizon Wireless*, 2013 U.S. Dist. LEXIS 80228, 2013 WL 2467923 (D. Conn. June 6, 2013), at *74 (emphasis in original).

The exception does not apply if an employer follows up with "probing" questions, such as whether other family members have the condition or whether the employee has been tested for the condition.

Confidentiality. No matter how an employer obtains genetic information, the information must be treated as a confidential medical record and kept separate from personnel files. Access to medical files should be strictly limited. Information may be kept in the same files that an employer uses for confidential medical information under the ADA as long as the ADA's confidentiality requirements are met.

MILITARY SERVICE

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) advances the rights of employees to take leaves of absence from their jobs to provide military service, and, upon conclusion of that service, return to their jobs with minimal disruption to their careers.[31] Under a doctrine known as the "escalator principle," USERRA requires employers to reemploy returning servicemembers in the position and at the rate of pay they would have attained but for the intervening military service. If the returning servicemember cannot qualify for the position he would receive under the escalator principle, employers must provide alternative reemployment positions and must make reasonable efforts (*e.g.*, training or retraining) to enable returning servicemembers to enhance their skills to help them qualify for reemployment. While an employee is performing military service, USERRA deems that person to be treated as if on a furlough or leave of absence and, thus, entitled to the non-seniority rights accorded other individuals on nonmilitary leaves of absence.

Retaliation v. Discrimination Claims Under Title VII

In 2013, the U.S. Supreme Court explained that the causation requirement for a retaliation claim under Title VII is very different than the causation requirement for a discrimination claim under Title VII. This is because the language of the section of Title VII (§ 2000e-3(a)) that protects an employee's opposition to employment discrimination and support of a complaint that alleges employment discrimination differs from the language of the section of Title VII (§ 2000e-(2)) that prohibits status-based discrimination based on race, color, religion, sex, and national origin.[32] The Supreme Court explained that § 2000e-3(a) requires that Title VII retaliation claims be proved by a "but for" standard of causation, rather than the lessened "motivating" factor standard that applies to discrimination claims under Title VII.[33] It remains to be seen what impact, if any, this decision will have on judicial interpretation of other federal laws

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31 38 U.S.C. § 4301-4334.

32 *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013).

33 *Id.* at 2534.

banning retaliation for opposing discrimination or supporting of complaints of discrimination under other federal, state, and local statutes.[34]

Pay Discrimination Claims

On January 29, 2009, President Barack Obama signed the Lilly Ledbetter Fair Pay Act into law. The Act extends the statute of limitations for employees to file pay discrimination claims with the EEOC.

The Act effectively reverses the Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*[35] In that case, the Supreme Court held that the statute of limitations for filing a Title VII discriminatory pay claim with the EEOC begins to run when the employer makes the allegedly discriminatory pay decision. The Act reverses the *Ledbetter* holding by amending Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973 to provide that a new violation occurs, and an employee's time period to file a discriminatory pay claim is reset, each time the employer gives the employee a paycheck affected by the allegedly discriminatory pay decision. The Act applies retroactively to May 28, 2007, and authorizes the recovery of back pay for up to two years before the filing of the EEOC charge.

The Act may lead to an increase in pay discrimination claims. While the Act limits damages to a two-year period, employees can now file pay discrimination charges based on allegedly discriminatory pay decisions made long ago. To reduce exposure to this increased liability, employers should conduct a comprehensive review of their compensation policies and practices. It remains to be seen how the Act will be applied to state laws that provide limitations periods in excess of two years.

Use of Criminal History Information

Many employers understandably want to know whether job applicants (or current employees) have had encounters with the criminal justice system. Employers are permitted under federal law to ask job applicants for information about their criminal history (arrests and convictions). Whether employers may lawfully use that information to deny employment is more complicated.

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34 For example, the ADA provides, in pertinent part, that "[n]o person shall discriminate against any individual because such person has opposed any act or practice made unlawful by [the ADA] or ... made a charge, testified, or participated in any manner in an investigation, proceeding or hearing under [the ADA]." 42 U.S.C. § 12203(a).

35 550 U.S. 618 (2007).

CONVICTION RECORDS

Employers must be aware of their obligations under both federal and state law. We first address federal law. Although Title VII does not specifically address the use of conviction records, the EEOC has taken the position that an employer cannot adopt a "blanket rule" of refusing to hire a job applicant simply because the employee has been convicted. The EEOC has long held the view that excluding individuals from employment on the basis of their conviction records has an adverse impact on blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population. "Adverse impact" theories of discrimination are well-recognized in the law and essentially allow employment lawsuits to proceed on the theory that, even when an employer does not intend to discriminate on the basis of a protected characteristic such as race, a facially neutral policy or practice may impact a particular group more harshly. Drawing on the adverse impact model, the EEOC traditionally adhered to the view that it is unlawful to deny employment on the basis of criminal conviction history, in the absence of a justifying business necessity.

On April 25, 2012, the EEOC issued a new Enforcement Guidance titled "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" that supersedes the EEOC's previous policy on this issue. The EEOC noted the "significant increase in the number of Americans who have had contact with the criminal justice system" and that, "incarceration rates are particularly high for African American and Hispanic men." The EEOC noted that, under the federal Fair Credit Reporting Act, a consumer reporting agency generally may not report records of arrests that did not result in entry of a judgment of conviction when the arrest occurred more than seven years ago, but it may report convictions indefinitely.

The Enforcement Guidance takes the position that an employer may violate Title VII "where the evidence shows that a covered employer rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record." Further, the Enforcement Guidance asserts that "Title VII prohibits 'not only decisions driven by racial [or ethnic] animosity, but also decisions infected by stereotyped thinking,' " and offered the following example:

> **EXAMPLE** Tad, who is White, and Nelson, who is Latino, are both recent high school graduates with GPAs over 4.0 and college plans. Nelson has worked full-time for a landscaping company during summers, while Tad has only held occasional lawn-mowing and camp-counselor jobs. In a job interview, Tad discloses that he pled guilty to a felony at age 16 for accessing his school's computer system over the course of several months without authorization and changing his classmates' grades. Nelson discloses that at age 16 he pled guilty to breaking and entering into his high school

as part of a class prank that caused little damage to school property. Tad receives a second interview while the same manager sends Nelson a rejection notice citing, in part, his previous conviction. Given that Tad's criminal conduct "is more indicative of untrustworthiness," the EEOC's position is that the employer has "failed to state a legitimate, nondiscriminatory reason for rejecting Nelson."

As an alternative route to disparate treatment to proving a violation of Title VII, the Enforcement Guidance also contends that "criminal record exclusions have a disparate impact based on race and national origin," essentially because, the EEOC explains, "African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population." The Enforcement Guideline states that while an employer "may use its own applicant data to demonstrate that its policy or practice did not cause a disparate impact," the EEOC will consider evidence such as "applicant flow information...workforce data, criminal history background check data, demographic availability statistics, incarceration/conviction data, and/or relevant labor market statistics" in assessing disparate impact.

If a disparate impact on a Title VII-protected group is established, to avoid liability the employer must demonstrate that its "policy or practice is job related for the position in question and consistent with business necessity." With respect to convictions, at a minimum, the EEOC will consider the following factors relevant:

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

While arrests, as mere accusations, are not themselves a justification for an adverse employment action, an arrest "may in some circumstances trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action." It is the conduct, not the arrest, that, in some circumstances, the employer may consider. The EEOC recognizes that there are certain positions subject to federal, state, or local prohibitions or restrictions on individuals with records of certain criminal conduct that warrant special treatment beyond the scope of this chapter.

State law on the use of criminal history information varies widely; consultation with local counsel in this area is essential. We offer, by way of illustration only, a brief discussion of New York law on the subject.

New York law requires employers to consider no fewer than eight separate factors in making the ultimate determination of whether there is a "direct relationship between one or more

of the previous criminal offenses and the employment sought, or [whether] . . . the granting of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public":

1. The public policy of New York to encourage the employment of persons previously convicted of one or more criminal offenses;
2. The specific duties and responsibilities necessarily related to the employment sought;
3. The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his or her fitness or ability to perform one or more such duties or responsibilities;
4. The time that has elapsed since the occurrence of the criminal offense or offenses;
5. The age of the person at the time of occurrence of the criminal offense or offenses;
6. The seriousness of the offense or offenses;
7. Any information produced by the person, or produced on his or her behalf, in regard to his or her rehabilitation and good conduct; and
8. The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.[36]

The challenges involved in applying these factors can be considerable. The New York Court of Appeals has explained that if an employer has considered these factors, "It is, of course, improper for courts to 'engage in essentially a re-weighing' of [these] factors."[37] Importantly, the employer must actually do the analysis; a "pro forma denial... without consideration of each of the [above] factors is precisely what the statute prohibits."[38]

Disparate Impact

In the preceding section, we discussed various aspects of intentional discrimination, or disparate treatment, with some mention of disparate impact in certain contexts. We now offer a more thorough discussion of disparate impact, or what we might call "accidental" discrimination.

Disparate or adverse impact occurs when a policy or practice that is neutral on its face has a significant and unintentional negative impact on a protected group of employees—perhaps a result of the "law" of unintended consequences. Indeed, disparate impact analysis does not focus on the motivations behind employment practices, but on their consequences. Disparate impact

36 N.Y. Exec. Law § 296(15); N.Y. Correct. Law § 752.

37 *Acosta v. New York Dep't. of Educ.*, 16 N.Y.3d 309, 318 (2011) (internal citation omitted).

38 *Id.* at 319-20.

claims may be brought as class actions by protected groups of employees, or by individuals, where they often are added to claims of intentional discrimination. The discussion that follows is limited to individual claims of disparate impact.

In the seminal case concerning disparate impact claims, *Griggs v. Duke Power Co.*, the Supreme Court made clear that Title VII was not limited to claims of discriminatory intent: "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. . . Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation."[39] Thus, Title VII prohibits employment practices that are "fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice that operates to exclude [those protected under Title VII] cannot be shown to be related to job performance, the practice is prohibited."[40]

The facts of *Griggs* presented strong equitable arguments that favored the development of the adverse impact theory. In *Griggs*, the employer had required a high school education and satisfactory scores on two standardized aptitude tests as conditions for employment in, or transfer to, certain jobs at the company. The Supreme Court found that these requirements were prohibited because they had not been shown to measure the ability of an individual to perform a specific job or group of jobs and they adversely affected black employees. The Court emphasized that Title VII mandates "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of . . . [an] impermissible classification."[41]

Title VII, as discussed above, prohibits discrimination on the basis of race, color, sex, religion, and national origin. For many years after *Griggs*, it was uncertain if disparate impact age discrimination claims also would be recognized, and courts around the country were split on the issue. Finally, in 2005, the Supreme Court addressed the issue and decided that Title VII and ADEA were similar in (relevant) language and purpose.[42] Relying in part on the *Griggs* decision, the Supreme Court ruled that disparate impact claims could be brought under the ADEA.

Facially neutral employment practices also may adversely affect employees with disabilities (such as standardized written tests that may adversely impact individuals with dyslexia, the

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39 *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

40 *Id.* at 431.

41 *Id.*

42 *Smith v. City of Jackson*, 544 U.S. 228 (2005). In *Smith*, the plaintiffs, a group of older police officers, challenged the Police Department's new pay raise policy as having a disparate impact on them. The Supreme Court found that the police officers had established a threshold case of disparate impact age discrimination; they were not, however, victorious because they could not overcome the Police Department's defense. Nevertheless, *Griggs* and *Smith* established the principle that an employment policy that appears neutral on its face may be unlawful if it has an adverse impact on a protected group under Title VII or ADEA.

administration of tests without consideration of the special needs of disabled employees, or the use of communication systems without alternative formats such as Braille for employees with visual deficiencies or amplified telephones for employees with hearing impairments). Nevertheless, disparate impact disability claims are exceedingly rare. Most disability claims involve disparate treatment, focus on the issue of reasonable accommodation, and involve highly individualized inquiries. Nothing in the ADA, however, forecloses disparate impact disability claims, and the Supreme Court has recognized that "disparate-impact claims are cognizable under the ADA."[43] Nevertheless, because disparate impact disability claims are infrequent, we focus our attention here on disparate impact claims under Title VII and the ADEA.

The Elements of a Disparate Impact Claim

The elements of a disparate impact claim vary depending on the statute invoked. We consider two of the most common: Title VII and the ADEA.

TITLE VII

The legal consideration of a Title VII disparate impact claim consists of a three-part analysis. First, the employee must identify and prove that a particular employment practice "causes a disparate impact on the basis of race, color, religion, sex, or national origin."[44]

Generally, the employee makes this showing of causation through the use of statistical evidence, which the employer may challenge. Neither the courts nor the company are "obliged to assume that plaintiff's statistical evidence is reliable," and "if 'the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.' "[45] The employer may question the reliability of the employee's statistical evidence, offer rebuttal evidence, or seek to minimize the probative weight of the employee's evidence. The company also may point to weaknesses in the employee's statistical case, such as small or incomplete data sets, inadequate statistical techniques, or the use of improper applicant or employee pools that have little probative value. If the employer demonstrates that the employee's statistical evidence is unreliable, the employee will have failed to meet her burden of demonstrating adverse impact. At this point, the case (at least the disparate impact claim) would be over. If, however, the statistical evidence establishes that the challenged practice had a substantial adverse impact on the protected group, the employee will have met her initial burden.

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43 *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003). Moreover, Congress has specifically provided the same Title VII defense to adverse impact claims brought under the ADA. 42 U.S.C. § 12113(a).

44 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-28 (1975); *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982) ("the plaintiff must show that the facially neutral employment practice has a *significantly* discriminatory impact") (emphasis added).

45 *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996 (1988) (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977)).

Second, assuming that the employee establishes a disparate impact, the focus turns to the company, which must demonstrate that the "challenged practice is job related for the position in question and consistent with business necessity." In this context, "business necessity" means that the challenged employment practice has a "manifest relationship to the employment in question" and that the employer had a significant or compelling need to maintain the practice despite its disparate impact.[46] Some 20 years ago, the Supreme Court explained that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer . . . . The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice." The Supreme Court cautioned, however, that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster."[47]

Third, even if the employer proves business necessity, the employee still may prevail by proving that the employer refused to adopt "an alternative employment practice" that would accomplish the same business objectives, but which would have a smaller adverse impact.[48] In other words, pretext would be shown if the employee demonstrates that "other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"[49]

In short, for the employer to successfully defend against a Title VII disparate impact claim, it must show that the employment practice at issue was consistent with business necessity and that there was no other way with less adverse impact to achieve its legitimate business purpose.

The Tension Between Disparate Treatment and Disparate Impact

In 2009, the Supreme Court decided *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) followed by *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010). These decisions shed important light on many of the issues set forth in this chapter but, just as importantly, identify questions left open for another day.

In *Ricci*, the Court framed the issue before it as "whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination."[50] The City of New Haven, Connecticut, had used objective examinations to identify its best-qualified firefighters for promotion. On the exams at issue in the case, the white applicants performed

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46 *Id.*; *see Griggs*, 401 U.S. at 431, 436.

47 *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989).

48 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *see Albemarle*, 422 U.S. at 425.

49 *Albemarle Paper*, 422 U.S. at 425, quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

50 129 S. Ct. 2658, 2674 (2009).

substantially better than the black and Hispanic applicants. According to the Court, "[t]he pass rates of minorities, which were approximately one-half the pass rates for white candidates, fall well below the 80-percent standard set by the EEOC to implement the disparate-impact provision of Title VII."[51] Based on these results, the City's Civil Service Board (the "Board") declined to certify the examinations, arguing that it declined to do so because it did not want to subject the City to liability for adverse-impact race discrimination under Title VII.

White, black, and Hispanic firefighters who passed the exams, but who were denied a chance at promotions because the Board refused to certify the exams, sued, alleging intentional (disparate treatment) race discrimination under Title VII. The lower courts (district court and court of appeals) agreed with the defendants, but the Supreme Court reversed.

The Supreme Court announced its guiding principle as hewing to the "important purpose of Title VII" to ensure that "the workplace be an environment free of discrimination, where race is not a barrier to opportunity."[52] Reasoning that the City's rejection of the test results "solely because the higher scoring candidates were white" was an employment decision made because of race, the Court tackled the issue of "whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination."[53]

At bottom, the Court answered this question in the negative: allowing employers to intentionally make employment decisions because of race "based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact." Instead, an employer's race-based employment decisions are lawful only in "cases in which there is a strong basis in evidence of disparate-impact liability . . . ."[54] The Court explained that the "strong basis in evidence" standard permits disparate impact cases, but only in "certain, narrow circumstances."[55]

Explicitly underlying the Court's limitation of disparate impact claims was its concern that employers would resort to quotas to avoid disparate impact liability. Allowing the City's "minimal standard" of a subjective, good-faith fear of disparate impact liability to justify a race-based employment decision would, the Court concluded, "amount to a *de facto* quota system, in which a 'focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.'"[56]

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51 *Id.* at 2678.

52 *Id.* at 2674.

53 *Id.*

54 *Id.* at 2676.

55 *Id.*

56 *Id.* at 2675.

The liberal wing of the Court (Justices Ginsburg, Stevens, Souter, and Breyer, in a dissent authored by Justice Ginsburg) offered a spirited dissent. Most ominously, Justice Ginsburg prophesied that, "[t]he court's order and opinion . . . will not have staying power."[57]

Justice Ginsburg argued that the Court's opinion posed a false conflict between disparate-impact and disparate treatment: "[t]he Court today sets at odds the statute's core directives."[58] In Justice Ginsburg's view, "[s]tanding on equal footing, these twin pillars of Title VII advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity."[59] The Court failed to harmonize these "twin pillars" in light of their common objectives but, rather, undermined one pillar (disparate impact) in the name of the other (disparate treatment). Justice Ginsburg argued that the Court's "strong basis in evidence" holding imposes such a high standard on employers that, as a practical matter, employers cannot rely on attempts to avoid disparate impact liability without subjecting themselves to an unacceptably high risk of disparate treatment liability.[60] Following *Ricci*, employers are well-advised to consider Justice Ginsburg's warning carefully when planning layoffs.

In this narrow sense, perhaps ironically, the dissent might find limited common ground with Justice Scalia, who wrote separately in *Ricci* "to observe that [the Court's] resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, . . . the disparate-impact provisions of Title VII . . . [are] consistent with the Constitution's guarantee of equal protection?"[61] Like Justice Ginsburg, Justice Scalia noted the tension of the disparate treatment objective of "treat[ing] citizens as individuals," rather than members of protected classes, and queries whether that tension is of constitutional dimension under the equal protection clause. Justice Scalia warns that "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them."[62] Until that elusive day of peace arrives, however, employers must take care to not be caught in the crossfire.

Lewis, decided about a year after *Ricci*, did not signal the end of Justice Scalia's prophesied "war between disparate treatment and equal protection"; to the contrary, from an employer's perspective *Lewis* served as further notice that avoiding the "crossfire" will be an ongoing challenge for the foreseeable future.

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57 *Ricci*, 129 S. Ct. at 2690 (Ginsburg, J., dissenting).

58 *Id.* at 2699.

59 *Id.*

60 *Id.* at 2701. ("As a result of today's decision, an employer who discards a dubious selection process can anticipate costly disparate-treatment litigation in which its chances for success—even for surviving a summary-judgment motion—are highly problematic.")

61 *Ricci*, 129 S. Ct. at 2682 (Scalia, J. concurring).

62 *Id.* at 2683.

In *Lewis*, the City of Chicago administered a written examination to over 26,000 applicants seeking to serve in the Chicago Fire Department. The City divided applicants into three groups: those scoring 89 or above ("well qualified"), those scoring between 65 and 88 ("qualified"), and those scoring below 65 ("not qualified").

Over the next six years, the City drew randomly from the "well qualified" applicants on 11 separate occasions to advance to the next stage of the application process. In the last round, the City exhausted the "well qualified" pool, so it selected randomly from the "qualified" range of applicants.

Beginning on March 31, 1997, six African-American applicants filed separate charges with and obtained right-to-sue letters from the EEOC. They then sued the City, alleging, in relevant part, that the City's "practice of selecting for advancement only applicants who scored 89 or above caused a disparate impact on African-Americans in violation of Title VII."[63] The district court certified a class of more than 6,000 African-Americans who scored in the "qualified" range on the 1995 examination but had not been hired.

The City argued that the class had waited too long to sue and that it had not violated Title VII. The City argued that Title VII required the plaintiffs to sue within 300 days after the sorting of scores into "well qualified," "qualified," and "not qualified" categories had occurred. The district court rejected this argument, holding that the City's "ongoing reliance" on the 1995 test results constituted a "continuing violation" of Title VII. Regarding the merits of the claim, the City stipulated that the 89-point cutoff had a "severe disparate impact against African-Americans," but argued that the cutoff score was justified by business necessity. The district court rejected the City's business necessity defense, ordered the City to hire 132 randomly selected members of the class (reflecting the number of African-Americans the Court found would have been hired but for the City's practices), and awarded back pay to be divided among the remaining class members.

On appeal, the Seventh Circuit reversed, holding that the lawsuit was untimely because the earliest EEOC charge was filed more than 300 days after what the Seventh Circuit concluded was the only discriminatory act—the sorting of the scores into the "well qualified," "qualified," and "not qualified" categories. According to the Seventh Circuit, "[t]he hiring only of applicants classified "well qualified" was the automatic consequence of the test scores rather than the product of a fresh act of discrimination."[64]

Addressing only the issue of whether the lawsuit was timely filed, the Supreme Court looked at whether the selection of only applicants in the "well qualified" category (which the

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63 *Lewis*, 130 S. Ct. 2191 (2010).

64 *Lewis v. City of Chicago*, 528 F.3d 488, 491 (7th Cir. 2008). The Seventh Circuit argued that extending the limitations period in the manner the plaintiffs requested "would have ludicrous consequences." *Lewis*, 528 F.3d at 493.

parties agreed occurred within 300 days of the March 31, 1997, date when the first charge was filed with the EEOC) "can be the basis for a disparate impact claim *at all.*"[65]

Justice Scalia, writing for a unanimous Supreme Court, answered this question in the affirmative. Citing *Ricci*, the Court explained that "a plaintiff establishes a *prima facie* disparate impact claim by showing that the employer '*uses* a particular employment practice that causes a disparate impact.'"[66] The Court reasoned that excluding scores under 89 (until scores over 89 were exhausted) from consideration was an employment practice that the City "used" each time it filled a new class of firefighters. In so holding, the Court rejected the City's argument (and the Seventh Circuit's decision) that because the hiring decision followed inevitably from the earlier decision setting the cutoff score, it was at the time of that earlier decision that the plaintiffs' claims arose and the statute of limitations began to run.

Importantly, the Court acknowledged that the City's argument (and the Seventh Circuit's analysis) were correct under the disparate treatment model of discrimination, because where discriminatory intent is required to prevail on the underlying claim, the "deliberate discrimination [must occur] within the limitations period." The Court recognized that its holding would allow plaintiffs more time to commence proceedings under Title VII on a disparate impact theory than to bring a disparate treatment claim under the same statute. But the Court explained, if there is any irrationality to this result, it is an anomaly for Congress to correct:

> If the effect of applying Title VII's text is that some claims that would be doomed under one theory will survive under the other, that is the product of the law Congress has written. It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.[67]

The City and "friends of the Court" warned that the Court's ruling "will result in a host of practical problems for employers and employees alike."[68] Employers, they warned, may face disparate impact claims based on employment practices they have used for years; evidence (documents and witnesses' memories) may have disappeared or faded with the passage of time; and affected employees or applicants may not know they still have claims for long-standing employer practices. To all such arguments the Court responded that there would be some "puzzling results" no matter how it ruled, but "[i]n all events, it is not our task to assess the

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65 *Lewis*, 130 S. Ct. at 2194 (emphasis in original).

66 *Lewis*, 130 S. Ct. at 2197 (emphasis in original).

67 *Lewis*, 130 S. Ct. at 2199-2200.

68 *Id.* at 2200.

consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted."[69]

Ruling against the City on its principal argument (that the case was time barred), the Court pointedly refused to consider the merits of the City's defense, explaining that these issues were not before it. These issues, the Supreme Court held, were for the lower courts to consider.

Takeaway from the Decisions

The reader searches *Lewis* in vain for guidance as to how the tension between the disparate treatment and disparate impact theories discussed at length in *Ricci* should be reconciled. In *Ricci*, the City of New Haven had declined to certify examinations because minority applicants passed at a lower rate than white applicants, and the Supreme Court concluded that in this manner the City of New Haven had intentionally discriminated against qualified white firefighters. In *Lewis*, the City of Chicago solely considered applicants' test scores in determining which applicants would continue in the application process. Nonetheless, the district court in that case concluded that the City's test could not be validated under disparate impact principles, and the Supreme Court held that each use of the test constituted a fresh act of discrimination ***under a disparate impact theory only.***

Ricci and *Lewis* leave employers as potential casualties in the "war between disparate impact and equal protection."[70] Accepting the City of Chicago's assertion that its test was superior to the test given by the City of New Haven, it nonetheless appears (barring new developments as the litigation continues in the lower courts) that Chicago's test was not good enough to protect the City from liability.[71] Once the test was administered, it is not clear what, if anything, the City could have done to protect its taxpayers from financial exposure. Whether the City utilized the test or not, it would seem, it had significant exposure under Title VII. Additionally, another decision (*Briscoe v. City of New Haven*) illustrates how an employer may face liability for discrimination no matter what it does and notwithstanding the procedural solutions the Second Circuit offered in that decision.[72] Employers are left with many questions, but no easy answers.

In *Briscoe*, the court took up an issue the Supreme Court expressly anticipated in *Ricci*. In *Briscoe*, a firefighter sued the City of New Haven after the City complied with the Supreme Court's order to certify the list of firefighters. The *Briscoe* court explained that the Supreme

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69 *Id.*

70 *Ricci*, 129 S. Ct. at 2683 (Scalia, J. concurring).

71 At oral argument, counsel for the City stated that the test it developed "actually compares rather favorably to the test that was given in the City of New Haven." Oral Argument Transcript, 2010 WL 603697 (U.S.) at *38. Nonetheless, the district court invalidated the City's test, and the City on appeal did not "press [] that claim" that it had not treated the plaintiffs unlawfully. *Id.*

72 *Briscoe v. City of New Haven*, 654 F.3d 200 (2d Cir. 2011).

Court's "strong basis in evidence" standard applies to the issue of when a disparate-treatment claim is avoidable based on concerns about disparate-impact liability. However, the *Ricci* court also contemplated the reverse scenario of when a disparate-impact suit can be avoided based on concerns of disparate-treatment liability and established a symmetrical standard:

> If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.[73]

The Second Circuit made several rulings in *Briscoe*. First, the Second Circuit ruled that the Supreme Court's decision in *Ricci* did not procedurally bar Briscoe from bringing his claim. Second, given that Briscoe could bring a claim, the Second Circuit also held that the Supreme Court's mandate in *Ricci* to certify the test did not, in and of itself, supply the strong basis in evidence of disparate-treatment liability (for not certifying the results). Rather, the Second Circuit explained, Briscoe's claim must be evaluated under the settled principles for evaluating disparate-impact liability: "Conduct that is 'job related' and 'consistent with business necessity' is permissible even if it causes a disparate impact (unless there is an 'alternative employment practice' that would reduce the disparate impact, which the employer refuses to adopt)."[74] The Second Circuit sent the case back to the district court for further proceedings as to whether the City discriminated against Briscoe by certifying the list that the Supreme Court directed it to certify in *Ricci*.[75]

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73 *Ricci*, 129 S.Ct. at 2681.

74 *Briscoe*, 654 F.3d at 207.

75 The Second Circuit did purport to offer procedural solutions to the City's predicament of facing liability for discrimination no matter what course of action it took:

> We are sympathetic to the effect that this outcome has on the city, which has duly certified the test as ordered by the Supreme Court but now must defend a disparate-impact suit. The City of Birmingham faced the same issue in *Martin*. Any employer that intentionally discriminates—thinking there is a strong basis in evidence of disparate-impact liability—will face the same issue if it loses a disparate-treatment suit.
>
> The solutions already exist. First, an employer can seek to join all interested parties as required parties. *See* Fed. R.Civ.P. 19. The interested parties here were readily identifiable: The city could have joined all test-takers prior to the district court's original decision. If Briscoe had been a party, the Supreme Court's decision would have precluded this suit. Second, an employer can use the expedient provided by Congress, 42 U.S.C. § 2000e-2(n). The city could have moved, prior to the district court's original ruling, for compliance with the notice and opportunity-to-object requirements of § 2000e-2(n), which would have permitted the litigated judgment to have preclusive effect even over nonparties.
>
> *Briscoe*, 654 F.3d at 209.

ADEA

As noted, the Supreme Court recognized disparate impact age discrimination claims in *Smith*.[76] The analysis of disparate impact age discrimination claims is simpler than the analysis of Title VII claims, although the employee's initial burden remains the same. To prevail on an ADEA disparate impact claim, the plaintiff first must demonstrate that he is a member of the protected class and then identify the specific employment practice that is responsible for the statistical disparity in treatment. As in a Title VII claim, the employer may, at this stage, challenge the employee's statistical evidence.

If the plaintiff makes this showing, the burden shifts to the employer. At this stage, the analysis differs from Title VII. The ADEA specifically provides that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."[77]

Based on this provision, the Supreme Court has explained that the "scope of disparate-impact liability under the ADEA is narrower than under Title VII."[78] Because the employer may base its practices on reasonable factors other than age, this means that "unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in disparate impact on a protected class, the reasonableness inquiry includes no such requirement."[79] Even if there are other reasonable ways for the employer to achieve its goals with less of a disparate impact, the employer need not choose such alternatives if its desired choice is not unreasonable.

Thus, the employer's burden under the ADEA is merely to show that its employment practice (that caused the disparate impact) was based on a reasonable factor other than age.[80] The employer's burden under Title VII is much greater—the company must show that the employment practice in question bears a manifest relationship to the job and that there are no feasible alternatives for the employer to achieve its business objectives that would have a smaller disparate impact. The employer's business necessity for the challenged practice plays no role in the analysis of an ADEA disparate impact claim, nor does the consideration of feasible alternatives.

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76 The Court pointed to identical language in both Title VII and the ADEA (and similar purposes), which prohibits employment actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's" race or age. *Smith*, 544 U.S. at 235-36, quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (emphasis in original). The Supreme Court reiterated that such language focuses on the effects of employment decisions, and not merely their motivation. Thus, the Court concluded that the ADEA authorizes recovery on a disparate impact theory of liability.

77 29 U.S.C. § 623(f)(1).

78 *Smith*, 544 U.S. at 240.

79 *Id.*

80 *See, generally, Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395, 2403 (2008) (the focus of the employer's defense is the reasonableness of the non-age factor in its employment practice or policy).

If the employer meets the burden under the ADEA, then the employee may only challenge the employer's asserted basis for the neutral policy as unreasonable. This is a much higher hurdle for plaintiffs than that under Title VII.[81] Age-based disparate impact claims arise in a variety of contexts. Challenges have been made to reductions in force, decision-making based on seniority or rank, budgeting processes (because higher salaries may correlate with age), and refusals to rehire former employees. This list is illustrative, not exhaustive.

A retirement program that results in an age-related disparate impact may be lawful if it is a *bona fide* employee benefit or pension plan.[82] Even though years of service may have a relationship with age, they are not its equivalent. Accordingly, employment decisions based on seniority are not unlawful.[83] Employees, however, remain free to challenge the employer's assertion that employment decisions ostensibly based on seniority were, in fact, based on age.

The Statistical Analysis of Disparate Impact Claims

Statistical analysis in disparate impact cases is a complicated subject that cannot be explored fully here. A brief overview of how the employee meets his initial statistical burden, and the employer's subsequent validation of its selection procedures, follows.

STATISTICAL EVIDENCE OF DISCRIMINATION

As explained earlier, the employee must first demonstrate disparate impact discrimination by showing that a specific employment practice causes a significant adverse impact upon a protected group to which he belongs, or "a disparity so great that it cannot reasonably be attributed to chance."[84] This requires the court to assess the employee's statistical evidence to determine if the employee has made this threshold showing. The employer may, at this step, offer its own statistical evidence to demonstrate the inadequacy or inaccuracy of the employee's evidence. At bottom, the employee must show that the employer's policy has a sufficiently disparate impact on the protected group (a "significantly discriminatory pattern" of hiring selection rates is the phrase used by the Supreme Court[85]).

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81 This hurdle was too difficult for the *Smith* plaintiffs to clear: they could not show that the Police Department's justification for its pay plan—attracting and retaining qualified junior police officers—was not based on a reasonable factor other than age, or that the justification was unreasonable.

82 In *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), the Supreme Court held that ADEA exempts all provisions of a bona fide employee benefit plan from its purview, unless the plan can be shown to be a subterfuge for discrimination. Even though seniority often correlates with age, it also is a lawful basis for employment decisions. The ADEA specifically provides that it is not unlawful for an employer "to observe the terms of a bona fide seniority system that is not intended to evade the purposes of [the ADEA]." 29 U.S.C. § 623.

83 *See Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

84 *NAACP v. Town of East Haven*, 70 F.3d 219, 225 (2d Cir. 1995).

85 *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). *See also Washington v. Davis*, 426 U.S. 229, 247 (1976) (a "substantially disproportionate" disqualification rate); *Albemarle*, 422 U.S. at 425 ("significantly different" rates of hiring and promotion); and *Hazelwood Schl. Dist. v. United States*, 433 U.S. 299, 307 (1977) (a "gross statistical [disparity]").

The EEOC considers that adverse impact has been established where the selection rate for a protected group is less than 80 percent of the rate for the group with the highest selection rate (the EEOC's so-called 80 percent rule, discussed in more detail below). Courts sometimes apply a more sophisticated standard and consider that a threshold claim of discrimination has been established where the statistical analysis demonstrates a difference, greater than two or three standard deviations, between the expected value from random selection or chance and the actual number.[86] Under either standard, the objective is to determine whether the results of the reduction in force can be explained by chance.[87]

THE VALIDATION OF SELECTION PRACTICES

Does it matter how strongly an employer's selection procedures correlate to success in the position and, if so, how can the "validity" of the employer's selection procedures be tested? In *Griggs*, the Supreme Court hinted at the necessity for validation of selection procedures prior to their use or implementation. The *Griggs* Court rejected the requirement of a high school education and the use of a general intelligence test because neither had been shown to have a "demonstrable relationship to successful performance of the job for which [they] were used."[88] Thus, the crux of validation studies is to ensure that employment tests are job related and

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86 Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.4(D) (the "Uniform Guidelines"). Regression analysis may be used to examine the relationship between two or more variables to determine if there is an association between the variables. Thus, in an age-based disparate impact claim based on a reduction in force, regression analysis would seek to determine if there was a correlation between the employees being laid off and their age, controlling for factors such as length of service, skills and qualifications, or prior work performance.

87 Although the EEOC has taken a contrary position (*see* Uniform Guidelines, 29 CFR § 1607.4(C)), the Supreme Court has rejected the use of "bottom-line" statistics as a defense in disparate impact cases (although the bottom line may be relevant to the issue of intent in a disparate treatment claim). In *Connecticut v. Teal*, the Court made clear that Title VII imposes the obligation to provide "an equal opportunity for each applicant regardless of [protected class], without regard to whether members of the applicant's [protected class] are already proportionately represented in the work force." *Connecticut v. Teal*, 457 U.S. at 454-55 (internal citations omitted). "Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. . . .Each individual employee is protected against both discriminatory treatment and 'practices that are fair in form, but discriminatory in operation.' " *Id.* at 455-56, quoting *Griggs*, 401 U.S. at 431. Thus, the employer in *Teal* could not overcome a discriminatory pass-fail barrier by hiring or promoting a sufficient number of black employees to attain a nondiscriminatory "bottom-line." *Connecticut v. Teal*, 457 U.S. at 453-53. With the focus of Title VII and ADEA on individuals, employment practices or selection methods that adversely affect protected individuals cannot be salvaged by an employer's diverse overall workforce. If the selection method acts to exclude a protected employee, it may be unlawful.

88 *Griggs*, 401 U.S. at 431. The *Griggs* Court also noted that both requirements were adopted "without meaningful study of their relationship to job-performance ability." *Id.* Referring to the "infirmity of using diplomas or degrees as fixed measures of capability, the Court explained that "[h]istory is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality." *Id.* at 433.

predictive of successful job performance.[89] Often, a prudent employer will conduct a disparate impact statistical analysis ***before*** adopting new selection methods or making employment decisions, such as reductions in force. Even if an employer's selection procedure is job related and consistent with business necessity, the employer still should explore whether there is another test available that would be equally effective in predicting job performance, but would not disproportionately exclude the protected group.[90]

The Uniform Guidelines Fact Sheet also outlines "employer best practices for testing and selection." These practices provide useful guidelines and reminders for employers using various test procedures:

- Employers should administer all tests and other selection procedures, without regard to any protected category;
- Tests must be validated for the positions and purposes for which they are used;
- When a particular selection method is found to have a disparate impact on a protected group, employers must consider equally effective alternative selection procedures with less adverse impact;
- Employers should remain alert to changes in job requirements to ensure that a test or other selection device remains predictive of job success; where necessary, test specifications should be updated; and
- Managers who administer or implement tests and selection procedures must have a thorough knowledge of the procedure's effectiveness and limitations for the company, its appropriateness for a specific job, and an understanding of how the test can be administered appropriately and scored accurately.[91]

Entirely discretionary promotion policies, without objective guidelines and defined performance standards, may be subject to attack. Such a rule would allow an individual to "institutionalize" her own subjective beliefs and preferences and could entail great risk to the employer. Where possible, performance should be measured against specific and individualized standards,

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89 As the Supreme Court explained in *Griggs*, the issue is whether the employer's selection procedure is "demonstrably a reasonable measure of job performance." *Id.* at 436. Hiring and promotion practices may be " 'validated' in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability, or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question." *Washington v. Davis*, 426 U.S. 229, 247 (1976). The Uniform Guidelines authorize the use of three types of validation studies: criterion-related validity studies, content validity studies, and construct validity studies. A criterion-related validity study consists of empirical data demonstrating that the particular procedure is predictive of or significantly correlated with important elements of job performance. A content validity study consists of data demonstrating that the content of the selection procedure is representative of important aspects of performance on the job for which the applicant is to be evaluated. Finally, a construct validity study consists of data that shows that the procedure measures the degree to which candidates have identifiable characteristics that have been determined to be important in successful performance of the job for which the candidate is being considered. 29 CFR § 1607.5(A) and (B).

90 *See* Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.4(D).

91 29 CFR § 1607.4(c). The technical aspects of validation studies are beyond the scope of this chapter.

using objective standards where applicable (such as sales). When performance is measured against broad and undefined competencies only (such as the ability to work in a team), subjective appraisals may increase the likelihood of disparate impact. When compensation decisions are tied to such appraisals, the risk to the employer may be even greater.

Nevertheless, subjective selection practices are justifiable in appropriate circumstances. The Supreme Court has recognized that managerial or supervisory positions often entail the use of subjective selection criteria, such as common sense, good judgment, originality, ambition, loyalty, and tact. Such subjective criteria may be legitimate measures of performance that cannot be measured directly or objectively.[92]

Certainly, most employers will not have many of the rules or practices mentioned above. Nevertheless, it is important to recognize that many varied and apparently neutral policies can have unlawful effects. Employers should scrutinize their own practices and procedures carefully to determine whether they are falling into the trap of the law of unintended consequences. Employers must ask the pertinent questions: Does this rule have a disparate impact on a protected group? Has this requirement or test been validated—that is, is it directly correlated to the job or job performance or does it bear a "manifest" relationship to the employment? Is there a business necessity for the practice? Is there an alternative practice that would have less of an adverse impact yet still accomplish the business objective? Is the policy or practice reasonable?

Reductions in Force

Courts will entertain legal challenges to employer reductions in force under any of the discrimination theories identified above. We discuss below how businesses plan for RIFs to best accomplish their goals, how employees challenge the RIFs, and the role HR can have proactively to minimize the frequency and success of employee challenges.

Business Reasons and Planning for the RIF

RIFs offer many challenges to employers and, if carried out improperly, may expose them to disparate impact claims. The keys to a successful RIF are careful planning and thorough documentation (as in most employment decisions). First, the employer must clearly identify the reasons for the RIF and its ultimate goals, such as saving money, improving productivity to increase profits, or responding to global competition. The company's legitimate business reasons for its downsizing, carefully considered and well-documented, will be its best defense should litigation ensue.

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92 *See Watson,* 487 U.S. at 991-94. In *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541 (2011), the Supreme Court held that Wal-Mart's corporate policy of allowing discretion by local supervisors over employment matters did not provide a sufficient basis for certification of a class action lawsuit under Rule 23 of the Federal Rules of Civil Procedure.

There are many means for the company to accomplish its goals in the RIF and all feasible alternatives should be explored. The company may decide to: reduce production; abandon a line of business; close a specific facility; consolidate facilities; restructure operations; streamline or eliminate departments, functions, jobs, or layers of management; combine departments or functions; or adopt a host of other strategies, limited only by the company's ingenuity and resources. The employer may choose one of these methods or combine several, but an upper level planning and oversight committee should be formed to identify the most effective means to achieve the company's goals and to develop a specific implementation plan.

Alternatives to downsizing should also be considered. Examples include: eliminating and combining redundancies; modifying staff structures (for example, job sharing); limiting or eliminating overtime; implementing part-time work; instituting a hiring freeze; or implementing an across-the-board salary reduction.

The company must comprehensively understand the workforce both before and after the downsizing. The appointed committee should prepare an organizational chart of the current workforce and complete an EEO Category Analysis (for the overall workforce and for appropriate categories, such as classifications, skill levels, or work areas). Finally, the committee should analyze the numbers and percentages of protected categories—by EEO groupings, by job title or category, and by overall and functional employment units.

The organizational chart will help the company understand what the personnel structure will look like after the downsizing. From the organizational chart, the committee can develop an organizational plan and identify various considerations, including: individuals with unique skills that must be retained; key positions; redundant or surplus positions; product lines or services that are unneeded or unproductive; entire departments or functions that can be eliminated; departments or functions that can be outsourced economically; the positions that will be needed; employees who best fit the new organization, and those employees who do not fit; and what new skills are needed, and which current employees possess or can learn such skills.

Once the company has determined how many positions it must eliminate and from what areas those positions must come, consideration should be given to early retirements and voluntary terminations. After identifying which employees will be eligible (and which employees the company hopes to retain), the employer may offer: early retirement incentives; enhanced severance; health care continuation or subsidies; outplacement services; enhanced benefit plans, including bridges or extensions to retiree medical benefits or Medicare eligibility; or added age or service credits for retirement plans.[93]

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93 Modifications to retirement and severance plans may involve ERISA concerns and other issues that are beyond the scope of this discussion.

When it finally becomes necessary to resort to involuntary terminations to implement the RIF, the employer must consider carefully how employees are to be selected for layoff, *i.e.,* what selection methodologies are to be used. It is critical to be able to explain and justify each termination or demotion of an employee in a protected class. Short of eliminating entire departments, functions, or product lines, the company must make its selections carefully, and they may be based on seniority or on ability and performance. Seniority may be defined not only by date of hire, but also by date of entry into the job or the departmental unit.

If ability and performance are used as measures, the company must review personnel files and performance evaluations. Presumably, the company will have prior objective performance appraisals (that have been validated) upon which it may, in part, base its decisions. Records should be compared and contemporaneous comparative ratings should be completed, and supervisors should provide a list of those employees that should be retained. All supervisors and managers must be able to articulate their reasons and justify their choices; they should rate the employees whose jobs are to be eliminated, rank the incumbents by category from lowest to highest, and rank those considered for jobs in the post-RIF structure. The company should obtain a detailed narrative from each manager that specifically describes the reasons for the expressed preferences. Documentation of the entire process is vital. In the end, the employer must make termination decisions that are justifiable and legitimate—with regard to the specific employees chosen for termination and with regard to the company's business objectives.

The company should develop a preliminary list of employees to be terminated, which includes employees: whose jobs have been eliminated and who are not being placed in other jobs; eliminated for performance reasons; terminated for seniority reasons; and who have or will voluntarily resign. A statistical analysis should then be done on the preliminary list to determine the protected class composition of the workforce before and after the RIF; the protected class composition of relevant employee groups or units before and after the RIF; and the protected class composition before and after the RIF, excluding voluntary terminations or resignations. If the statistics put the underlying reasons for selections at risk and the risk is not reasonably defensible, then the employer should consider changing the selection methodologies to eliminate or ameliorate the risk. Recall that if the statistical analysis reveals two or more standard deviations between the number of protected employees selected for the RIF and the number of protected employees expected to be selected for the RIF, or if the selection of protected employees is less than 80 percent of the selection of non-protected employees, then an inference of discrimination may be justified. The employer must determine whether there are alternatives with less disparate impact (for Title VII protected groups) or if its selections have been made on the basis of reasonable factors other than age (for age protected employees).

Throughout the planning and implementation of the RIF, several considerations should guide the company:

- Select factors for the RIF that are legitimate and defensible;
- Evaluate those RIF factors on objective and measurable indices where possible;
- Train managers to make RIF evaluations as objectively as possible;
- Train supervisors and managers to avoid discriminatory statements;
- Appoint a diverse committee to review the proposed RIF decisions;
- Assess the statistical impact of the proposed RIF decisions with counsel and, where appropriate, a statistician; and
- Consult counsel about alternatives if the proposed RIF would produce adverse impact.

If the RIF is carefully planned, documented, analyzed, and implemented in these ways, the employer will minimize its risks and its exposure to potential liability for disparate treatment and disparate impact claims.

Employee Challenges to the RIF

As we have seen, most employment discrimination claims involve allegations that employees selected for an adverse employment action were chosen because of age, race, sex, national origin, disability, or other legally protected category, or in retaliation for legally protected conduct.

In the context of most large RIFs, companies will usually (although not always) be able to establish that some reduction of employees was necessary. The fact that some group of employees needed to be laid off, however, does not establish that the employees the company discharged should have been selected. Thus, RIF litigations often turn, not on the issue of whether some reduction in force was necessary, but on the selection process. Specifically, were the employees selected, intentionally or pursuant to a facially neutral policy, because of their membership in a protected category such that the employer is vulnerable to a disparate treatment or disparate impact claim?

Multi-state employers need to pay particular concern to the fact that some states and localities have passed anti-discrimination laws that are often more protective of employee rights than federal civil rights laws. For example, the federal age discrimination in employment law prohibits discrimination against employees 40 or older while some state laws, like New York's, prohibit age discrimination against employees over 18 years of age. Many state or local governments forbid discrimination on the basis of sexual orientation; others do not.

Employees alleging intentional discrimination in connection with a RIF often contend that the RIF selection criteria or the decision-maker was biased based on the employee's legally protected status. Unless the employee (or employees, if more than one sues) have direct evidence

of unlawful discrimination, such as a statement by a decision-maker that evidences bias against the employee's protected status, then courts will apply the burden-shifting paradigm discussed above. In the context of a RIF, to establish a *prima facie* case, the employee must prove that she was: (1) a member of a protected group; (2) qualified for the job; (3) terminated or laid off; and that (4) someone outside of the protected class received better treatment. If the employee establishes a *prima facie* case, the employer must show that the selection was based on legitimate nondiscriminatory reasons. If the employer establishes that showing, then the employee may still prevail if she shows that the employer's stated reason is a pretext.

Often, the employee's burden of establishing a *prima facie* case will not be difficult in the context of a RIF. Employees who sue generally fall within one or more protected classes. Because they are current employees, they will have a relatively easy time offering evidence that they were qualified for the job. (This may become harder for the employee to establish if the employer needs to change the job requirements in connection with the RIF, as we shall see.) The employee has been laid off (that's why she is suing) and, in most cases, some employee outside of the employee's protected class was not selected for layoff.

Employers sometimes challenge an employee's *prima facie* case by arguing that an employee was not qualified for the job either because of poor performance ratings or lack of experience or education. While these arguments can become highly effective later in the analysis, they often are not sufficient to defeat the employee's efforts to establish that she was "qualified." For purposes of the *prima facie* test, "qualified" means minimally qualified, not necessarily the best performer. The mere fact that the employee is still in the job at the time of the layoff may lead a court or an administrative agency to infer that an employee who was still working for the company at the time of the RIF was "qualified."

This is not to say that an employee will always succeed in establishing a *prima facie* case. Consider, for example, an employer that terminates an entire department for legitimate business reasons and discharges every employee in that department. An employee under those facts might have difficulty even establishing a *prima facie* case. Every RIF is different. What is clear is the company's need to articulate clear RIF guidelines and to consistently apply them in selecting employees for layoff.

> **EXAMPLE** Ginormous Corporation has lost 30 percent of its sales due to the deteriorating economy and the company has decided to lay off 500 employees across all departments. The justification for the layoff is the loss of business. Ginormous has decided to use a combination of years of service, performance, and skills to make the layoff selections.

Anna, a 50-year-old Hispanic female with 10 years of service and an excellent record is chosen for layoff. Bud, a 25-year-old white male with eight years of service and a good—but not excellent—record is not selected for layoff. Anna sues.

Anna will likely establish a *prima facie* case. She is within several protected categories, *e.g.,* age, sex, and national origin. Anna is clearly qualified for the job she held based on her excellent reviews and long service with Ginormous. Anna was selected for layoff while a younger white male was retained. Ginormous can prove that the reason for the layoffs was justified—*i.e.,* the loss of customers,—but can it justify the selection of Anna versus Bud?

Anna argues that Ginormous failed to follow its stated selection criteria and, instead, singled her out because of her membership in one or more protected groups. Because Anna has greater seniority and better reviews than Bud, she argues, the only reasonable explanation for selecting her for layoff rather than Bud was discrimination.

While there is some appeal to Anna's argument, what if Bud had a broader skill set or special skills that made him more valuable to Ginormous in the post-RIF environment? Assume, for a moment, that Anna did not have these skills. Before the RIF, Anna's job did not require these skills and, therefore, the fact that she did not have them did not hinder her performance. After the RIF, however, Ginormous has restructured jobs to cover the functions performed by discharged employees. In the post-RIF setting, Ginormous argues, it had every right to consider Bud's greater skill set in deciding between Anna and Bud.

If an employee establishes a *prima facie* case, the employer must then articulate a legitimate nondiscriminatory reason for the layoff. Often, employers point to factors such as loss of sales and revenue, loss of a major customer, change in technology, or discontinuation of a product line. Courts have generally held that these factors are legitimate nondiscriminatory factors for a RIF.

The battle may come down to the question of pretext. The employee contends that the company's stated reason for discharging her is false and that the true reason is illegal discrimination or retaliation. To respond to the employee's evidence of pretext, the employer must persuasively explain why the selection of the employee was based on legitimate nondiscriminatory factors (*e.g.*, job performance, seniority, skill set, etc.).

Adverse Impact in the RIF Context—Special Statistical Concerns

As noted above, employees discharged in a RIF may also assert adverse impact discrimination. Under this legal theory, the employee need not prove that the employer harbored discriminatory intent. Typically, adverse impact claims are statistically based and may come in the form of class actions where many employees, claiming to be "similarly situated," join forces. A group of people all discharged in the same RIF may claim to be similarly situated.

As discussed above, the allocation of proof in a disparate impact case differs from a disparate treatment case and is as follows. First, the plaintiff must prove, generally through statistical data, that the challenged practice or selection device has a substantial adverse impact on a protected group. The employer can challenge the employee's statistical analysis or offer different statistics.

There are several ways for plaintiffs to establish a statistical disparity in the selection process. The EEOC sometimes uses what is referred to as the 80 percent (or four-fifths) rule to determine whether there is an adverse impact in the selection process. Under this rule, the EEOC finds an adverse impact if members of a protected class are selected at a rate less than 80 percent (four-fifths) of that of another group. For example, if 20 out of 100 male employees (that is, 20 percent of eligible males) are selected for layoff, and 25 out of 50 female employees (that is, 50 percent of eligible females) are selected for layoff, then the 80 percent rule is violated. This is because the selection rate differential is 20 percent (the selection rate of males) divided by 50 percent (the selection rate of females), which equals 40 percent.

The mathematical computations aside, the conceptual argument derives from what is called the null hypothesis. Applying qualitative null hypothesis reasoning to our example, it is very unlikely that the much greater selection rate of females would occur by chance. A group of terminated employees that can show in litigation that it was disadvantaged to a statistically significant extent under null hypothesis reasoning will likely argue that chance had nothing to do with it: they will claim to be victims of discrimination.

Null hypothesis reasoning has its critics. At core, critics contend, to reject the null hypothesis (*e.g.*, that the distribution of employees laid off was due to chance) on the basis of data obtained, the expert (or judge or jury) needs to know the probability of members of the protected group being discharged in the RIF (the "adverse impact"), given the available demographic and other data about the RIF. According to its critics, null hypothesis reasoning does not provide that information. They contend that null hypothesis reasoning gives the probability of the finding given the null hypothesis, whereas the relevant question is the probability of the null hypothesis given the finding.[94] Null hypothesis testing critics contend that there is no way to overcome this problem without sophisticated analysis using a tool called Bayes' theorem. And, they contend,

94 Trafimow, D. Hypothesis Testing and Theory Evaluation at the Boundaries: Surprising Insights from Bayes's Theorem. *Psychological Review*, 110, 526-535.

there is usually insufficient information available to apply Bayes' theorem properly. Nonetheless, at least for now, null hypothesis testing provides the statistical framework for adverse impact statistical analysis.

EXAMPLE Other methodological considerations can confound statistical analysis in adverse impact litigation. Consider, for example, what academics (and courts) have referred to as the "fallacy of composition." Imagine, in a class action against Ginormous Corporation arising out of a RIF, the employees' statistical expert testifies that in the 10 departments affected by a RIF, a higher percentage of women were laid off than men; accordingly, the employees' expert reasons, the RIF laid off a higher percentage of women. Is this expert correct?

Not necessarily. Consider two chefs, Alex and Brad. Each bakes 10 batches of cookies. In each batch Brad burns a higher fraction of cookies than Alex. Yet, Brad claims, his overall "burn rate" is lower. He offers the following data, where + refers to cookies that came out well and – refers to cookies that were burned:

Batch	Alex+	Alex-	Brad+	Brad-	Alex%(+)	Brad%(+)
1	1	0	4	1	100%	80%
2	1	0	4	1	100%	80%
3	1	0	4	1	100%	80%
4	1	0	4	1	100%	80%
5	1	0	4	1	100%	80%
6	1	0	4	1	100%	80%
7	1	0	4	1	100%	80%
8	1	0	4	1	100%	80%
9	1	0	4	1	100%	80%
10	10	81	0	1	10%	0%
Total	19	81	36	10	19%	(appx.) 70%

The data proves Brad's point. A higher percentage of each batch of Alex's cookies came out well; nonetheless, overall Brad had a much higher percentage of good

cookies. The various batches of cookies, perhaps like the various departments at Ginormous, were of different sizes and, as a result, may not be directly comparable without additional consideration. This same phenomenon—the fallacy of composition—can occur when aggregating statistical percentages across departments and other decision-making units in the context of a RIF.

Other problems abound. In small RIFs, the sample size is too small to be statistically (or legally) relevant. Even where a statistically significant sample size is present, the 80 percent rule does not involve probability distributions to determine whether the disparity is a "beyond chance" occurrence, in contrast, for example, to standard deviation analysis. The courts more often find an adverse impact if the difference between the number of members of the protected class selected and the number that would be anticipated in a random selection system is more than two or three standard deviations. Balanced against the greater accuracy of standard deviation analysis is the 80 percent rule's perceived ease of application.

Statistical analysis can be complicated, and many companies retain statisticians to analyze the raw data before the layoff decisions become final. Companies should consider retaining the statisticians through their legal counsel. Should litigation arise out of a RIF, documents created by consultants hired by legal counsel have a greater chance of remaining privileged from disclosure, should the company decide that asserting privilege is to its advantage. Militating against the assertion of privilege is the difficulty of asserting privilege while still allowing the expert to testify at trial. Indeed, an important advantage of retaining a statistician is that he can explain to a jury why the layoffs do not establish a disparate impact or warrant an inference of discrimination.

If the employee establishes disparate impact, the employer must show that the challenged practice is "job-related for the position in question and consistent with business necessity" or, in an age case, prove that the selection was based on "reasonable factors other than age." Finally, even if the employer establishes business necessity or proves reasonable factors other than age, the employee may still prevail by showing that the employer has refused to adopt an alternative employment practice that would satisfy the employer's legitimate interests without having a disparate impact on a protected class.

Exploring Alternatives to a RIF

Many employers consider RIFs to be a last resort after all other cost-saving measures have failed to achieve their stated objectives. Alternatives to a RIF include freezing or reducing wages or benefits (such as eliminating matching company contributions to retirement or savings funds), eliminating bonuses, offering employee transfers and alternative employment, and implementing work sharing programs where employees reduce their hours to save jobs. Used properly, these devices can be effective alternatives to layoffs and can generate goodwill in the workforce

and in the community. These job-saving efforts can also be used effectively if litigation ensues to demonstrate that the company first looked for other ways to cut costs and that the RIF was a last resort. If these alternatives (such as reducing benefits or wages) are not implemented across the board, then they must be analyzed to ensure that the selection process is not discriminatory.

When alternative cost-saving measures are not enough, employers often consider employee inducements, such as enhanced severance pay and extended medical benefits, as a means to voluntarily reduce the workforce before implementing involuntary layoffs. These inducements, while helpful, contain their own risks, including the potential that a company can lose its best performers when they accept a buy-out package. Employees may also allege that they accepted a buy-out under false pretenses or that they were "constructively discharged," meaning they were left with no alternative but to accept the offer or be fired. To avoid a "constructive discharge" claim, employers must be able to show that the employee's decision is truly voluntary. Some companies do their best to avoid layoffs through furloughs, paying employees some fraction of their salary to not work, job sharing, and other programs.

If a RIF becomes necessary, establishing the rationale or business case for the RIF and developing a selection process that is both fair and legally defensible and properly implementing the RIF is imperative.

HR's Role in the RIF

HR can help reduce the company's exposure to adverse judgments through active participation in the design and implementation of the RIF.

HR'S ROLE IN DESIGNING THE RIF—UNDERSTANDING THE WORKFORCE

Examining the impact of a RIF on the workforce demographics is important and should be examined in the context of the reasons for the RIF. While the courts shun words such as "quotas" when analyzing RIFs and the selection data, the fact of the matter is that courts may compare the percentage of employees in protected job categories as they existed before and after the RIF. Employers must then be prepared to justify any decrease in the percentage of employees with the relevant protected characteristic in a post-RIF workforce.

Many employers already have demographic data on their current workforce because they are required by federal, state, and local government to maintain statistical data about the demographics of the workforce, especially if they do business with the government and are required to develop affirmative action plans. Moreover, many employers are required to maintain an Employer Information Report for the EEOC, otherwise known as form EEO-1. An EEO-1 is a form requiring large employers to provide a count of their employees by job category and then by ethnicity, race, and gender. This report is filed with the EEOC and the Department of Labor, Office of Federal Contract Compliance Programs.

Employers planning a RIF thus should consider gathering and maintaining confidential data representing a profile of the workforce by age, sex, race, and other protected characteristics, broken down by the entire existing workforce, by job category, and by departmental unit. Organizational charts are also critical documents, especially if departments are eliminated or combined so that the company can evaluate the impact of the RIF on its business practice and organizational units. The numbers gathered should include raw numbers and percentages. These statistics will provide crucial information in analyzing and reviewing the RIF selection process.

HR'S ROLE IN IMPLEMENTING THE RIF

Even the best-designed RIF must be carefully implemented to be successful. Often, the burdens of implementation fall heavily on HR.

Timing the RIF. The old adage "speed kills" is particularly apt to poorly planned and rushed RIFs. While many employers do not have the luxury of a lot of time to carefully plan out the RIF, moving too fast will almost always ensure that mistakes will be made. Even worse, if the company is sued in connection with a RIF, a hastily made RIF decision can create the wrong impression for a jury or government agency reviewing the layoff process, perhaps suggesting that the company's rush to judgment in cutting its workforce resulted in legally cognizable mistakes.

The timing of a large-scale RIF is often driven by external factors such as federal or state advance notice plant closing laws; collective bargaining agreements with provisions requiring advance notice; collective bargaining negotiations as to the decision to lay off employees or the impact of the RIF on employees; individual employment contracts; voluntary buy-out programs with age discrimination releases and mandated time frames for employees to consider accepting severance or buy-out packages; company policy or practice; the need for secrecy; or by exigent economic circumstances. The timing of the layoffs also poses some challenges for employers. For example, layoffs planned just before the holiday season may not be the best timing from an employee and public relations standpoint.

Assembling a RIF "Team." One of the most important first steps that the company should take is to assemble a team to design, plan, approve, and implement the RIF. Proactive HR can spearhead this effort, coordinating all steps of the RIF both internally, with senior management and lower-level managers, and externally, with outside counsel, experts, and the press. The team will serve as an oversight committee to ensure that the reason for the layoff and the selection criteria are applied appropriately.

Team members should include senior-level management who are knowledgeable about the business, as well as the reasons for the RIF, so that they can plan and develop a business case and justification for the RIF. Ideally, in-house or outside counsel should serve on the team in an advisory role to ensure that the RIF complies with the law, to protect communications covered by the attorney-client and work product privilege, and to educate company officials so that they

do not create any documents such as e-mails that can later be construed as "smoking guns" evidencing a discriminatory motive for the RIF. As noted, companies should also consider, in consultation with legal counsel, retaining an expert to analyze statistical data.

HR often plays a critical role. HR can review the business case from an employment perspective, work with managers to develop and apply the selection criteria, and also serve as a second pair of eyes to weed out potential problems.

HR'S ROLE IN DOCUMENTING THE BUSINESS CASE FOR THE RIF AND SELECTION CRITERIA

The business rationale for the RIF will establish the legitimate nondiscriminatory reason for the layoffs and will dictate the methodology used for selecting employees for layoffs. Typical reasons for downsizing include the need to cut costs, the elimination of one or more unprofitable divisions, product elimination, business consolidation or restructuring, the loss of key customers, etc.

Because the RIF may end up in litigation, the stated reasons for the RIF should be set out in a clear and consistent manner in a formal RIF plan, about which legal counsel should be consulted. A formal, documented plan will help guide internal selections that are consistent with the plan while explaining to a judge or jury why the RIF was necessary. For example, if the reason for the layoff is a loss of customers for a particular product, then the selection criteria might include employees in the departments producing those products who do not have other skill sets, since those skills are no longer necessary in the post-RIF company. Conversely, if the RIF is an across-the-board layoff, seniority and current job performance may be better suited to the selection process.

Once the business case for the RIF has been established, the next step is to identify the number of employees who will be laid off to meet the company's objectives. Then it is time to determine and begin the selection process.

Seniority can be used as a selection factor in layoffs, especially given that it offers certain advantages. Courts, jurors, and government agencies may accept, as a general proposition, that consideration of length of service is appropriate. However, there are no guarantees, and over-reliance on seniority may entail disadvantages as well. Seniority does not always correlate perfectly with strong performance, and the most-senior employees may not have the skill sets most advantageous to the company in a post-RIF environment. In other words, not all long-term employees are your best performers or have the skills needed for the future.

Employee performance, ability, speed, training, and skill set are criteria favored by many employers because the new, smaller employer will have to do more and possibly different types of work with fewer people. Thus, some employers establish the objective of keeping their best performers. This criterion raises the problem of determining who the best performers are.

Comparing performance evaluations and disciplinary reports is one way to create comparative data and establish objective criteria to rank employees' performances. It is not, however, an easy or foolproof process. Challenges include:

- The employee review process being a difficult and inherently decentralized process, in that different supervisors are familiar with and responsible for different employees;
- Supervisors being untrained on how to properly review employees' job performance;
- Lack of standardized firm procedures, or imperfect application of those that do exist;
- Supervisors having their own reasons to give more generous (or less generous) evaluations than employees believe appropriate;
- The appearance of stray or inappropriate comments on an employee review;
- Reviews having been neglected or overlooked for certain time periods;
- Reviews being based on subjective assessments of an employee, as opposed to concrete and measurable standards such as sales or production figures; and
- The supervisor's dislike of an employee and the resulting review reflecting this personal animus or bias.

Supervisors who keep their own set of employee files, with notes, e-mails, or memos that may not be contained in the company's official personnel files, can create other sets of problems. Employee disciplinary warnings and evidence of measurable standards should also be considered in the selection process.

Even beyond these problems, other selection criteria may not be quantifiably verifiable. Certain intangible qualities, such as the ability to be a "team player," willingness to "go the extra mile" for colleagues, work ethic, flexibility, and the ability to work well with others, are laudable characteristics that may be difficult to prove or quantify. While objective criteria are, well, objective, some employers conclude that subjective factors are also important measures of employee performance and, therefore, should be used in the selection process. Every company, and every RIF, is different.

Some employers create selection forms in an effort to bring uniformity to the process and promote objectivity and rationality. If the selection process is not based on completely objective data, then the forms should contain comments to explain the decision-making process. Care must be taken to avoid arguably discriminatory comments such as "you can't teach an old dog new tricks," or "we need young blood."

HR'S ROLE IN OVERSEEING THE SELECTION PROCESS

After the selection criteria are established, the selection process begins. For RIFs designed with "bottom up" inputs from line supervisors, the management team must request their input.

Some employers may ask the line supervisors to make initial layoff decisions or recommendations and to explain the basis for those decisions. Other employers may request only information from these managers, while still others solicit information and recommendations. Each method has advantages and disadvantages that must be assessed for each RIF.

"Bottom up" inputs entail certain risks, but also have their advantages. On occasion, line supervisors may perceive a RIF as an opportunity to get rid of employees they do not like, who may nonetheless be good performers who would otherwise not be selected for layoff. Even worse, some supervisors may discriminate or retaliate against certain employees due to their protected status or because the employee has raised a claim against the supervisor. Creating a second-level review process helps ensure the integrity of the selection process. It can weed out "problem" selections and it can help insulate companies from discrimination lawsuits, since the ultimate decision-makers conduct their own independent reviews without any preexisting bias or retaliatory motive against the employee selected for layoff. Of course, a "top-down" layoff, designed and implemented by a small control group without line supervisor inputs, runs less of a risk of these problems, but arguably runs a greater risk of irrationality due to the relative lack of information about the employees being considered.

Whichever method the employer adopts, HR should be vigilant to make sure it is implemented properly.

Separation Agreements

Even the best-planned and executed RIF entails some litigation risk. After the layoffs are announced, employers can reduce this risk by offering inducements to employees (*e.g.*, enhanced benefits, severance payments, COBRA contributions, and other benefits such as outplacement services) for employees who sign releases of their claims. Such releases are sometimes offered as a standard package to all affected employees (perhaps with variable terms based on compensation, seniority, and other factors) and/or on an individual basis. We offer some basic information about releases and the admonition that companies retain legal counsel to draft such releases to ensure that they are legally enforceable.

Federal and state law both impose requirements on these agreements. The starting point for releases is that they must meet the requirements of any other contract, stating the terms of the parties' agreement with sufficient clarity and providing adequate consideration. Federal law, specifically the OWBPA, requires employers to provide employees who are at least 40 years old 45 days to consider a release in a group exit incentive program (21 days for a single-employee release). These employees must also be given seven days to revoke the release after the employee signs it. The OWBPA also mandates that employers incorporate specific language in these releases, and provide certain statistical information regarding employees who were selected for layoff and those who were not selected. The release must be written in a manner

that is understandable, in other words, in plain English (unless the employee does not speak English). The release must state that rights under the federal ADEA are being waived, must not purport to waive future rights, must note that the employee waives his rights in exchange for consideration in addition to anything of value to which he is already entitled, and must advise individuals to consult with an attorney. Failure to comply with these requirements may void an otherwise valid release of ADEA claims.

Employee Communications and Exit Interviews

Telling employees they have been selected for layoff is a difficult and uncomfortable task. Employers often decide to have two representatives at this meeting, a supervisor who knows the employee and a human resources official. Be truthful.

The meeting should be held in a private room. The employee should be told, in general terms, the reason for the layoff and that, unfortunately, he was one of a number of employees selected for layoff after careful consideration and review. Employers vary in the amount of information they share about the selection criteria. At one extreme, offering too much detail can lead to problems should litigation ensue. At the other extreme, employers who offer no helpful information run the risk of antagonizing employees and, if they are sued, having to explain to a jury their reluctance to answer a former colleague's straightforward question: Why me?

Employer representatives should also think through how they will respond to the different reactions they will receive from employees during (or after) the meeting. Some employees will be silent and not ask any questions; others will ask questions but retain their composure; still others may express emotion. The employer representatives should anticipate questions and concerns—preparing an outline of what should be discussed at the meeting with sample questions and answers can be useful. Overall, keep the meeting short, to the point and, above all, truthful.

If the company offers severance pay conditioned on the employee signing a release, the payment should be explained and the employee should be provided with a copy of the release to review. If outplacement or other post-employment placement services are being offered, those should be explained as well. Medical and benefits information should also be provided at this meeting.

Concluding Comments

While HR must have ready access to competent employment counsel, this access does not relieve HR of the responsibility to understand the basics of employment law. Constraints of time and cost will often limit access to legal counsel; conversely, HR needs to "triage" situations to

determine when legal advice is needed. Understanding the fundamentals of employment law is necessary to this "triage" function.

While the litigator in part functions as a historian, HR operates in "real time" and helps shape the factual record in which the litigator operates. It is critical that HR understands what tomorrow's legal consequences will be of the actions HR takes today. These consequences may not be obvious or intuitive; they are the consequences of statutes and judicial decisions that have been shaped over decades of legislative and judicial activity. Federal and state laws sometimes impose different obligations, and even courts construing the same body of law often disagree. While HR professionals are not expected to be legal specialists, they and their employers are accountable for the employment decisions they make and implement.

This, then, is the answer to the question we posed at the beginning of this chapter: it ***does*** matter to the company if HR is well-versed in principles of discrimination law. HR brings other skill sets and experiences to the job beyond the world of "black letter" law that attorneys live in, and the value added from these skills and experiences is substantial. Nonetheless, because the ultimate determination of whether an employer's treatment of an employee (or a group of employees) violated the law occurs in the courtroom, HR functions more effectively with an understanding of the legal consequences of its (and others') decisions.[95]

95 This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.