

ture is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices. Assume, for example, an employer who traditionally hired blacks as employees for the "laborer" department in a manufacturing plant, and traditionally hired only whites as skilled craftsmen. Assume further that the employer in 1962 began to use a written examination not supported by a validity study to screen incumbent employees who sought to enter the apprenticeship program for skilled craft jobs. The employer stopped making racial assignments in 1972. Assume further that for the last four years, there have been special recruitment efforts aimed at recent black high school graduates and that the selection process, which includes the written examination, has resulted in the selection of black applicants for apprenticeship in approximately the same rates as white applicants.

In those circumstances, if the written examination had an adverse impact, its use would tend to keep incumbent black employees in the laborer department, and deny them entry to apprenticeship programs. For that reason, the enforcement agencies would expect the user to evaluate the impact of the written examination, and to have validity evidence for the use of the written examination if it has an adverse impact.

(2) Where the weight of court decisions or administrative interpretations holds that a specific selection procedure is not job related in similar circumstances.

For example, courts have held that because an arrest is not a determination of guilt, an applicant's arrest record by itself does not indicate inability to perform a job consistent with the trustworthy and efficient operation of a business. Yet a no arrest record requirement has a nationwide adverse impact on some minority groups. Thus, an employer who refuses to hire applicants solely on the basis of an arrest record is on notice that this policy may be found to be discriminatory. *Gregory v. Litton Industries*, 472 F. 2d 631 (9th Cir., 1972) (excluding persons from employment solely on the basis of arrests, which has an adverse impact, held to violate Title VII). Similarly, a minimum height requirement disproportionately disqualifies women and some national origin groups, and has been held not to be job related in a number of cases. For example, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Court held that height and weight requirements not shown to be job related were violative of Title VII. Thus an employer using a minimum height requirement should have evidence of its validity.

(3) In addition, there may be other circumstances in which an enforcement agency may decide to request an employer to evaluate components of a selection process, but such circumstances would clearly be unusual. Any such decision will be made only at a high level in the agency. Investigators and compliance officers are not authorized to make this decision.

26. Q. Does the bottom line concept of Section 4C apply to the administrative processing of charges of discrimination filed with an issuing agency, alleging that a specific selection procedure is discriminatory?

A. No. The bottom line concept applies only to enforcement actions as defined in Section 16 of the Guidelines. Enforcement actions include only court enforcement actions and other similar proceedings as defined in Section 16L. The EEOC administrative processing of charges of discrimination (investigation, finding of reasonable cause/no cause, and conciliation) required by Section 706(b) of Title VII are specifically exempted from the bottom line concept by the definition of an enforcement action. The bottom line concept is a result of a decision by the various enforcement agencies that, as a matter of prosecutorial discretion, they will devote their limited enforcement resources to the most serious offenders of equal employment opportunity laws. Since the concept is not a rule of law, it does not affect the discharge by the EEOC of its statutory responsibilities to investigate charges of discrimination, render an administrative finding on its investigation, and engage in voluntary conciliation efforts. Similarly, with respect to the other issuing agencies, the bottom line concept applies not to the processing of individual charges, but to the initiation of enforcement action.

27. Q. An employer uses one test or other selection procedure to select persons for a number of different jobs. Applicants are given the test, and the successful applicants are then referred to different departments and positions on the basis of openings available and their interests. The Guidelines appear to require assessment of adverse impact on a job-by-job basis (Section 15A(2)(a)). Is there some way to show that the test as a whole does not have adverse impact even though the proportions of members of each race, sex or ethnic group assigned to different jobs may vary?

A. Yes, in some circumstances. The Guidelines require evidence of validity only for those selection procedures which have an adverse impact, and which are part of a selection process which has an adverse impact. If the test is administered and used in the same fashion for a variety of jobs, the impact of that test can be assessed in

the aggregate. The records showing the results of the test, and the total number of persons selected, generally would be sufficient to show the impact of the test. If the test has no adverse impact, it need not be validated.

But the absence of adverse impact of the test in the aggregate does not end the inquiry. For there may be discrimination or adverse impact in the assignment of individuals to, or in the selection of persons for, particular jobs. The Guidelines call for records to be kept and determinations of adverse impact to be made of the overall selection process on a job by job basis. Thus, if there is adverse impact in the assignment or selection procedures for a job even though there is no adverse impact from the test, the user should eliminate the adverse impact from the assignment procedure or justify the assignment procedure.

28. Q. The Uniform Guidelines apply to the requirements of Federal law prohibiting employment practices which discriminate on the grounds of race, color, religion, sex or national origin. However, records are required to be kept only by sex and by specified race and ethnic groups. How can adverse impact be determined for religious groups and for national origin groups other than those specified in Section 4B of the Guidelines?

A. The groups for which records are required to be maintained are the groups for which there is extensive evidence of continuing discriminatory practices. This limitation is designed in part to minimize the burden on employers for recordkeeping which may not be needed.

For groups for which records are not required, the person(s) complaining may obtain information from the employer or others (voluntarily or through legal process) to show that adverse impact has taken place. When that has been done, the various provisions of the Uniform Guidelines are fully applicable.

Whether or not there is adverse impact, Federal equal employment opportunity law prohibits any deliberate discrimination or disparate treatment on grounds of religion or national origin, as well as on grounds of sex, color, or race.

Whenever "ethnic" is used in the Guidelines or in these Questions and Answers, it is intended to include national origin and religion, as set forth in the statutes, executive orders, and regulations prohibiting discrimination. See Section 16P.

29. Q. What is the relationship between affirmative action and the requirements of the Uniform Guidelines?

A. The two subjects are different, although related. Compliance with the Guidelines does not relieve users of