Are You Committing Accidental Discrimination?

Despite your best intentions, regarding employees and candidates the same can lead to claims of discrimination based on adverse impact. Even committing accidental discrimination can become an HR nightmare.

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The best way to avoid allegations of workplace discrimination is to treat everyone equally, right? Even if you're committing accidental discrimination without knowing it can result in a human resource nightmare. Wrong. Equal treatment can actually lead to claims of discrimination. In other words, sometimes the most well-meaning, or even seemingly inoffensive, efforts can backfire on businesses that just want to do the right thing. What's more, unlike obvious forms of discrimination against people in legally protected classes (based on age, race, gender, etc.), "accidental discrimination" is often far less apparent, but can still bear the same negative consequences and legal liabilities. Unless that is, you understand the difference between the two most common types of discrimination.

Not All Discrimination Is Equal

1. **Disparate treatment** happens when you treat a job candidate or an employee differently because of the person's membership in a protected class. Examples include screening out older applicants, crafting different job requirements for women than for men, or disciplining black employees differently than their white counterparts for violating the same rules. Basically, the sort of actions that make you a total – actually, we're too classy to use some words that come to mind to describe such managers and companies.
2. **Disparate impact** (also known as adverse impact) occurs when a neutral policy ends up having a discriminatory effect. For instance, an employer that requires an educational diploma for candidates applying for janitorial positions – such a nonessential requirement for a job can impact minority groups that have had limited access to educational opportunities. Another example is if an organization creates nonessential height or weight requirements for roles – they may risk inadvertently impacting women. Yet another case may entail an unwarranted dress code that conflicts with some workers' religions or cultures.

Here's how the Society for Human Resource Management (SHRM) summarizes the main distinctions between disparate treatment and disparate impact:

Disparate Treatment	Disparate Impact

Direct discrimination	Indirect discrimination
Unequal treatment	Unequal consequences or results
Intentional	Usually unintentional
Prejudiced actions	Neutral actions
Different standards	Same standards but different consequences

When Discrimination Isn't Discrimination

It's important to point out that under the Civil Rights Act of 1964, disparate impact – and disparate treatment – is only illegal if an employer is unable to justify the practice in question. Generally, there are four exceptions that companies may cite:

- **Work-related requirements,** like if a certain role has a demand that is genuinely job-related and required by business necessity. For instance, a fire department that can prove that job candidates must be strong enough to carry heavy equipment may be able to justify a strength requirement that adversely impacts women.
- **Bona fide occupational qualifications,** like if religion, sex, or national origin (but never race) is necessary to carry out a job function. A Catholic church, for example, has the right to hire only Catholics to serve as clergy. (However, it cannot specify religion for, say, a janitorial role.)
- **Bona fide seniority systems —** as long as they weren't explicitly designed to discriminate.
- **Affirmative action plans —** that is, selective selection can be a "consideration" in employment decisions.

The 80 Percent Rule

Because disparate impact most often occurs during the recruitment process, in 1978 the federal government created the Uniform Guidelines on Employee Selection Procedures. They cover all aspects of the selection process, including recruitment, assessment, and interviewing. Simply put, the guidelines specify the standard for determining adverse impact. Oftentimes, that standard is commonly referred to as the 80 percent rule, which says that adverse impact takes place when the selection rate for an employment decision puts a protected class at a disadvantage. More specifically, this usually happens when the selection rate for a protected class is below 80 percent of the rate for the class that has the highest selection rate. There's an important caveat, though: The guidelines also include a "bottom-line concept," which states that employers do not have to ensure that every aspect of their selection process is free of adverse impact so long as the process as a whole does not create adverse impact.

Commiting Accidental Discrimination in Action

What does all this mean in practice? To borrow an example from SHRM, suppose you interviewed the following people for a certain type of position at your company:

Group	Number Interviewed	Number Hired
Males	40	20
Females	30	6

To determine the adverse impact:

1. Identify the selection rate for each group (number hired / number interviewed). For men, it's 50 percent (20 ÷ 40 = 50). For women, it's 20 percent.
2. Identify the group with the highest selection rate. Here, it's males (at 50 percent). This is your majority group.
3. Divide the lowest selection rate (minority group) by the highest selection rate (majority group): 20 ÷ 50 = 40 percent.
4. Now, remember that adverse impact occurs if the selection rate of the minority group is less than 80 percent of that of the majority group. Thus, the female selection rate must hypothetically be at least 40 percent to avoid possible claims of adverse impact – because 40 ÷ 50 = 80 percent. But because in this case, the female selection rate is only 20 percent, the organization may be guilty of creating an adverse impact.

To fix the adverse impact:

Should you find yourself in such a predicament, you have a few options:

1. Analyze the data more thoroughly to be certain that all the stats and the math are correct.
2. Modify or choose a different procedure. For instance, you might want to make sure that you're crafting objective job descriptions. That is, don't list requirements that aren't relevant to a role. In addition, try to use neutral gender-neutral language (like "server" instead of "waitress"). And remember, just because you might already include the typical disclaimer that you are an equal opportunity employer doesn't mean you actually are.
3. Validate whether your selection process is truly grounded in requirements that relate to the job and that your procedures are consequently a necessity of business.

Finally, you can only achieve the spirit of equality – that is, making sure that everyone has opportunities to succeed – by addressing its unintentional consequences. Indeed, what you

ultimately want are practices that instill not a dictionary definition of *equality* so much as *fairness* in your workplace.

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