THE IMPORTANCE OF RUNNING EMPLOYMENT DATA ANALYTICS IN 2025 AND BEYOND

DirectEmployers Association

ROFFMAN HORVITZ, PLC
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HUMAN RESOURCES COMPLIANCE AND EMPLOYMENT DATA ANALYTICS

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MEET THE TEAM

JOSHUA S. ROFFMAN

MANAGING ATTORNEY

Joshua Roffman is the Managing Attorney of the Firm. Josh's practice focuses on advising and assisting employers with using data and statistical tools to evaluate their employment practices. He has been advising federal contractor employers about compliance with federal and state equal employment opportunity and "affirmative action" requirements for over twenty years. He currently is guiding employers in assessing their DEIA and similar programs for risk mitigation and compliance with nondiscrimination laws.

Josh also advises and assists employers with privileged pay equity statistical analyses. He develops and runs the statistical analyses and combines that with knowledge of the law and a pragmatic understanding of businesses and other employers to ensure analytical rigor, usefulness, and legal soundness.

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MEET THE TEAM

ALISSA A. HORVITZ

MEMBER ATTORNEY

Alissa Horvitz is a Member Attorney in the firm she co-founded with Josh Roffman. Alissa focuses her practice on evaluating nondiscrimination and equal opportunity throughout all phases of employment using data and employment analytics. This includes analysis and advice regarding EEO in recruiting, hiring, promotions, terminations, and compensation (pay equity), as well as DEI reviews for government contractor employers seeking to unwind their compliance with EO 11246. Alissa also does live and virtual training on relevant employment law topics.

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JAMES M. MCCAULEY

ASSOCIATE ATTORNEY

James McCauley is an Associate Attorney with Roffman Horvitz. James's experience includes evaluation and analysis of employment practices to ensure equal opportunity; preparation of EEO-1, VETS-4212, and California Pay Data Reporting filings; pay equity analyses; and analysis of applicant and hire records to address potential claims of hiring disparities.

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OUTLINE

- Use of Statistical Analysis in Assessing Employment Practices and Decisions
- EO 14281 ("Restoring Equality of Opportunity and Meritocracy")
- EO 14173 ("Ending Illegal Discrimination and Restoring Merit-Based Opportunity") Implementation
- Artificial Intelligence Tools
- Compensation Practices
- Advantages of Running Analyses Outside of Federal Affirmative Action Plan Requirements
- Attorney-Client Privilege

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USE OF STATISTICAL ANALYSIS IN ASSESSING EMPLOYMENT PRACTICES AND DECISIONS

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APPLICATION OF STATISTICAL ANALYSIS TO EMPLOYMENT PRACTICES AND DECISIONS

- Hires v Applicants
  - Specific Policy or Practice
    - Resume Review
    - **Artificial Intelligence Tools**
    - Employment Test
    - Selection for Interview
    - Selection for Job Offer
    - Background Checks
    - Job Qualifications and Requirements
- Promotions
- Terminations
- Pay Equity

- Typical Defense Regardless of Liability Theory
  - **Job Related and Consistent with Business Necessity**
    - Required showing to overcome inferences from statistics
    - In compensation, use of a regression analysis to show that the difference in pay is job-related and consistent with business necessity (control variables speak to those elements)

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EXECUTIVE ORDER 14281: RESTORING EQUALITY OF OPPORTUNITY AND MERITOCRACY

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WHAT DOES EO 14281 DO?

- What It Does
  - Defines the executive branch's view of disparate impact liability
  - Instructs federal agencies not pursue disparate impact claims
    "all agencies shall deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability"
- What It Can't and Doesn't Do
  - Remove disparate impact from Title VII and other federal civil rights laws
  - Override state laws and practices related to disparate impact that don't "have constitutional infirmities"
  - Eliminate the use of statistics in employment discrimination cases

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LEGAL STATUS OF ADVERSE IMPACT THEORY

- EEOC
  - The Trump administration EEOC won't pursue cases on a disparate impact theory
  - If the EEOC does not conduct an investigation or elects not to enforce alleged violations, the Charging Party will receive a Notice of Right to Sue and may file a lawsuit in federal court within 90 days.
  - Litigation
- Civil Rights Act of 1991
- State Laws

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DISPARATE IMPACT

In the context of employment practices, disparate impact liability establishes that if a **facially neutral employment practice** has a disparate impact on the basis of race, religion, sex, or national origin, the **employer must show that the practice is job related for the position and consistent with business necessity**

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DISPARATE TREATMENT, INTENTIONAL DISCRIMINATION

- Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin
- Title VII prohibits both (1) intentional discrimination (known as disparate treatment) and (2) practices that are not intended to discriminate but in fact have a disproportionately adverse effect on a race or sex (known as disparate impact)
- A disparate treatment plaintiff must establish that the employer had a discriminatory intent or motive for taking a job-related action.

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DISPARATE TREATMENT, PATTERN AND PRACTICE

- The Supreme Court in 1977, in a case involving the Teamsters, recognized that if an employer engaged in a systemwide pattern or practice of employment discrimination by regularly and purposefully treating minorities less favorably than Whites, which the government could demonstrate using "pervasive statistical disparities" bolstered by "considerable testimony of specific instances of discrimination," the government had proven its case.

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DISPARATE TREATMENT, PATTERN AND PRACTICE

- The use of statistics to try to establish an inference that the employer was discriminating against a race or sex was often how the OFCCP would allege discrimination during compliance evaluations
  - If the employer was following principles of equal opportunity in decision-making, then we would expect roughly the same proportion to exist in its selection decisions
  - But if the pattern of decisions favored one race or sex, and mathematically we would not expect that to happen, the data could create an inference that the employer was not following principles of equal employment opportunity, and then it would be important for the employer to offer evidence of a legitimate, nondiscriminatory reason.

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EEOC CHAIR ANDREA LUCAS STATEMENT ABOUT THE USE OF STATISTICAL EVIDENCE IN PURSUING UNLAWFUL DEI

"[E]mployers should take care not to conflate disparate impact claims arising from neutral employment practices with a materially different type of Title VII claim: intentional discrimination claims proven via the "pattern or practice" model of proof first set out by the Supreme Court in Teamsters v United States, which may entail the use of statistical evidence, along with other evidence, to prove disparate treatment.

"The Commission will continue to relentlessly combat unlawful patterns or practices of intentional discrimination in violation of Title VII, including race and sex discrimination that may arise from DEI programs and national origin discrimination involving anti-American bias."

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EXECUTIVE ORDER 14173 IMPLEMENTATION

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EXECUTIVE ORDER 14173 IMPLEMENTATION

- Executive Order
  - May 21 Attorney General's Report
  - Plan to Deter Illegal DEI
    - All agencies to identify up to 9 civil compliance investigations of:
      - Publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more
      - State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars
- DOJ Civil Rights Fraud Initiative

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DOJ CIVIL RIGHTS FRAUD INITIATIVE

- May 19, 2025 Deputy Attorney General Memo
- Utilize the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws
- Encouragement of private party qui tam action under the False Claims Act

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CONTRACTOR CERTIFICATION

- That compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of the False Claims Act
- It does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws

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FALSE CLAIMS ACT

- Consequences
- Qui tam actions
- What makes something a “false claim”
  - Falsity and knowledge of falsity
  - Knowledge is subjective
    - Actual knowledge
    - Deliberate ignorance
    - Reckless disregard

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TRUMP ADMINISTRATION USE OF DATA AND STATISTICS

- EEOC Letters to Large Law Firms
- Investigations of educational institutions
  - IPEDS data to monitor race-based admissions
    - August 7, 2025 Presidential Memorandum
- EEOC Chair Andrea Lucas Social Media Post

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CONSENSUS

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EMPLOYMENT PRACTICES AND DECISIONS SHOULD BE MERITOCRATIC AND NONDISCRIMINATORY (1 of 2)

- Trump Administration Executive Orders
  - 14173: "Ending Illegal Discrimination and Restoring **Merit-Based** Opportunity"
  - 14281: "Restoring Equality of Opportunity and **Meritocracy**"
- Why did our organization embrace DEI?
  - What was it designed to do?
- We still care about nondiscrimination
- Use of data is relevant to this assessment

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EMPLOYMENT PRACTICES AND DECISIONS SHOULD BE MERITOCRATIC AND NONDISCRIMINATORY (2 of 2)

- Why would we now ignore the data?
- Use to ensure nondiscrimination/meritocracy
  - Typical claims of discrimination
  - Certifications under the EO 14173 / False Claims Act
- Achieves what we always wanted as employers and what Trump administration wants now
- Can be done under attorney-client privilege
  - Not being done to comply with a regulatory requirement

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ARTIFICIAL INTELLIGENCE TOOLS

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VALIDATION STANDARDS AND GENERALLY APPLICABLE NONDISCRIMINATION LAWS

- UGESP – 29 CFR Part 1607 (1978)
- SIOP Principles for the Validation and Use of Personnel Selection Procedures (2018)
  - SIOP Statements: Considerations and Recommendations for the Validation and Use of AI-Based Assessments for Employee Selection (2023)
- Title VII
  - Disparate treatment, pattern and practice
  - Disparate impact (Civil Rights Act of 1991)
- State Laws

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LEGAL CHALLENGES TO EMPLOYERS' USE OF AI IN THE HIRING AND PROMOTION PROCESSES

- *Mobley v. Workday, Inc.* (Age Discrimination in Hiring)
- *D.K. v. HireVue and Intuit* (Disability Discrimination in Promotion Process)

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STATE LAWS REGULATING THE USE OF ARTIFICIAL INTELLIGENCE IN EMPLOYMENT – CALIFORNIA (1 of 2)

- Employment Regulations Regarding Automated-Decision Systems – approved June 27, 2025; effective October 1, 2025
  - "It is unlawful for an employer or other covered entity to use an automated-decision system or selection criteria (including a qualification standard, employment test, or proxy) that discriminates against an applicant or employee or a class of applicants or employees on a basis protected by the Act, subject to any available defense."
  - "Relevant to any such claim or available defense is evidence, or the lack of evidence, of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results."
  - "Automated-Decision System"
    - "A computational process that makes a decision or facilitates human decision making regarding an employment benefit . . ."
    - "An Automated-Decision System may be derived from and/or use artificial intelligence, machine-learning, algorithms, statistics, and/or other data processing techniques."

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STATE LAWS REGULATING THE USE OF ARTIFICIAL INTELLIGENCE IN EMPLOYMENT – CALIFORNIA (2 of 2)

- Employment Regulations Regarding Automated-Decision Systems (continued)
  - Automated-Decision Systems perform tasks such as:

    (A) Using computer-based assessments or tests, such as questions. puzzles, games, or other challenges to: (i) Make predictive assessments about an applicant or employee; (ii)Measure an applicant's or employee's skills, dexterity, reaction-time. and/or other abilities or characteristics; (iii) Measure an applicant's or employee's personality trait, aptitude, attitude, and/or cultural fit; and/or (iv) Screen, evaluate, categorize, and/or recommend applicants or employees.

    (B) Directing job advertisements or other recruiting materials to targeted groups;

    (C) Screening resumes for particular terms or patterns;

    (D) Analyzing facial expression, word choice, and/or voice in on-line interviews; or

    (E) Analyzing employee or applicant data acquired from third parties.
- "Any policy or practice of an employer or other covered entity that has an **adverse impact** on employment opportunities of individuals on a basis enumerated in the Act is **unlawful unless** the policy or practice is **job-related and consistent with business necessity**."
- "The Council herein adopts the **Uniform Guidelines on Employee Selection Procedures** promulgated by various federal agencies, including the EEOC and Department of Labor."

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OTHER JURISDICTIONS WITH EXISTING, NEW, OR PENDING LAWS ADDRESSING USE OF AI TOOL IN EMPLOYMENT

- New York City
- Illinois
- Colorado
- Texas

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EU REGULATION OF ARTIFICIAL INTELLIGENCE (1 of 2)

- EU Artificial Intelligence Act – Passed July 2024
- Article 2 (Scope) – Applies to:
  - (a) providers placing on the market or putting into service AI systems or placing on the market general-purpose AI models in the Union, irrespective of whether those providers are established or located within the Union or in a third country;
  - (b) deployers of AI systems that have their place of establishment or are located within the Union;
  - (c) providers and deployers of AI systems that have their place of establishment or are located in a third country, where the output produced by the AI system is used in the Union;
  - (d) importers and distributors of AI systems;
  - (e) product manufacturers placing on the market or putting into service an AI system together with their product and under their own name or trademark;
  - (f) authorized representatives of providers, which are not established in the Union;
  - (g) affected persons that are located in the Union.

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EU REGULATION OF ARTIFICIAL INTELLIGENCE (2 of 2)

- "Employment, workers management and access to self-employment" AI systems are classified as high risk:
  - AI systems intended to be used for the recruitment or selection of natural persons, in particular to place targeted job advertisements, to analyze and filter job applications, and to evaluate candidates;
  - AI systems intended to be used to make decisions affecting terms of work-related relationships, the promotion or termination of work-related contractual relationships, to allocate tasks based on individual behavior or personal traits or characteristics or to monitor and evaluate the performance and behavior of persons in such relationships.

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COMPENSATION PRACTICES

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PAY EQUITY

- Applicable Federal Laws
  - Equal Pay Act
  - Title VII – Ledbetter Fair Pay Act
- State Pay Equity Laws
  - Most states have equal pay laws; most frequently similar to federal Equal Pay Act (typically encompass protected categories other than gender)
  - Notable alternate approaches:
    - California
    - Massachusetts

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PAY DISCLOSURE TO EMPLOYEES AND APPLICANTS

- Require employers to disclose minimum and maximum salaries for positions
  - In job advertisements
  - At certain stages in the selection process
  - Upon request by employees or applicants
- Scope
  - Positions that could be filled by candidates in the state
  - Positions where the employee will report to a worksite or supervisor in the state
- May require a description of other types of compensation
- Some laws also may require employers to provide information on the salary range for an employee's current position upon request

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BANS ON SALARY HISTORY CONSIDERATION

- Prohibitions on inquiring about or seeking salary history
  - Exception: May seek salary history to confirm information voluntarily provided by applicant after hire
- Prohibitions on relying on salary history to make offer or set starting pay
  - Exception: When salary history is voluntarily disclosed
- Prohibitions on retaliating against applicants for refusing to provide information on salary history

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BANS ON EMPLOYER PAY SECRECY POLICIES

- Bans on employer policies that prohibit employees from discussing compensation
  - Exception for employees that have access to compensation information disclosing information to employees not authorized to access the information
- Bans on employers requiring that employees sign documents that purport to prohibit discussion of compensation

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STATE PAY REPORTING REQUIREMENTS

- California
- Illinois
- New Jersey
- Massachusetts

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EUROPEAN UNION PAY TRANSPARENCY DIRECTIVE

- Member State Transposition Deadline – June 7, 2026
- Elements
  - Pay Disclosure
  - Ban on Asking for Pay History
  - Pay Reporting
  - Pay Gaps
- **Equal Pay for Work of Equal Value**
  - Must be based on:
    - Skill
    - Effort
    - Responsibility
    - Working Conditions

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CANADA

- Pay Equity Plans
  - Ensure equal pay to men and women doing work of equal value
  - Process and criteria for establishing the value of work for employee job classifications
    - Skill
    - Effort
    - Responsibility
    - Working Conditions
- Legislated Employment Equity Program (“LEEP”)
- Provincial Pay Transparency Laws

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ADVANTAGES OF RUNNING ANALYSES OUTSIDE OF FEDERAL AFFIRMATIVE ACTION PLAN REQUIREMENTS

- Analytical flexibility/discretion – not bound to establishments or AAP job groups
- Employer claims of attorney-client privilege are stronger

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ATTORNEY-CLIENT PRIVILEGE

- Because of the sensitive and self-critical nature of these analyses, it is advisable to involve counsel in the project so that the analyses won't be discoverable in litigation or need to be submitted in a government audit.
- Attorney-Client Communication – protects from disclosure communications between an attorney and client involving the rendering of legal advice
- Work Product Doctrine – protects from disclosure materials that were prepared in anticipation of litigation, and whose creation was motivated by the litigation
- Actions that bolster/undermine the privilege
  - Who conducts the actual analysis
  - Who directs the analysis
  - Who evaluates the analysis
  - How are results handled

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