

# ADVERSE IMPACT

Authored by  
**Mohammed looti**

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## Definition and Conceptual Foundation of Adverse Impact

Adverse impact, often used interchangeably with the legal term **disparate impact**, refers to the unintentional yet damaging consequence of an employment practice or organizational policy that appears neutral on its face but results in a significantly disproportionate exclusion of members of a protected group. This concept is fundamental within industrial-organizational psychology and employment law, particularly concerning equal employment opportunity regulations. Unlike intentional discrimination, known as disparate treatment, adverse impact focuses strictly on the outcome of a practice, regardless of the employer's motive or intent. A policy creates adverse impact when the selection rates for one or more protected groups--such as those defined by race, color, religion, sex, or national origin under Title VII of the Civil Rights Act of 1964--are substantially lower than the selection rates for the majority or most favorably treated group. The determination of adverse impact is critical because it mandates that the employer justify the use of the selection procedure by demonstrating its necessity for successful job performance and overall business operation.

The core principle governing adverse impact is that employment practices must be predictive of job performance and not merely arbitrary barriers to entry or advancement for certain demographic segments of the population. When a seemingly objective requirement, such as a physical fitness test or a minimum educational attainment level, systematically disadvantages a group protected by law, the employer faces the burden of proving that the requirement is directly related to the specific demands of the job. This requirement applies broadly across various stages of the employment lifecycle, including initial hiring, promotions, transfers, training opportunities, and terminations. The presence of adverse impact suggests a systemic bias inherent in the selection process, even if the individuals administering the test or policy harbor no personal prejudice. Consequently, organizational practices must be rigorously scrutinized and validated through empirical research to ensure fairness and legality, moving beyond subjective assessments to objective, data-driven justification.

Understanding the nuances of adverse impact requires recognizing that it pertains to groups, not individuals. While a single individual may feel they were unfairly disadvantaged by a policy, a formal claim of adverse impact necessitates statistical evidence showing that the policy significantly disadvantages an entire class of individuals protected under civil rights legislation. For instance, if a company requires all applicants for a warehouse position to lift two hundred pounds, and this requirement disproportionately screens out female applicants compared to male applicants, adverse impact exists. The focus shifts from the employer's subjective belief about the job requirement to the objective, measurable consequences of that requirement on protected classes. This legal and psychological framework ensures that organizational policies are constantly evaluated for fairness and equitability, promoting a diverse and inclusive workforce while maintaining standards necessary for operational efficiency.

## Legal Antecedents and the Landmark Griggs Decision

The legal foundation for the concept of adverse impact was definitively established by the United States Supreme Court in the landmark 1971 case, **Griggs v. Duke Power Co.** This decision transformed the interpretation of Title VII of the Civil Rights Act of 1964 by stating explicitly that civil rights laws prohibit not only overt, intentional discrimination but also employment practices that are fair in form but discriminatory in operation. Prior to 1964, the Duke Power Company had segregated its workforce. After Title VII was passed, the company introduced requirements that employees transferring between departments must have a high school diploma and pass two professionally developed standardized intelligence tests. These requirements, while seemingly neutral, disqualified a significantly higher percentage of African American employees, who had historically been denied access to quality education.

The Supreme Court ruled unanimously in favor of Griggs, establishing the principle that if employment criteria disproportionately screen out members of a protected class, the criteria must be shown to be job-related and necessary for the successful performance of the job. Chief Justice Warren Burger famously wrote that "good intent or absence of discriminatory intent does not redeem employment procedures that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." This ruling effectively shifted the focus of employment law from the employer's state of mind (intent) to the statistical and practical effects of their policies (impact). The **Griggs standard** became the cornerstone for all subsequent adverse impact litigation, requiring employers to validate any selection device that causes a substantial disparity in hiring or promotion rates among protected groups.

The principles established in **Griggs v. Duke Power Co.** were later codified and clarified by subsequent judicial decisions and regulatory guidelines, notably the Uniform Guidelines on Employee Selection Procedures (UGESP), issued by federal enforcement agencies like the Equal Employment Opportunity Commission (EEOC). These guidelines provide specific methodologies for determining whether adverse impact exists and outline the scientific standards required for validating employment selection tools. The historical context reveals that adverse impact was a necessary concept to address systemic, ingrained inequities that persisted even after overt segregation was outlawed. By examining outcomes rather than intentions, the legal framework ensures that past disadvantages do not continue to perpetuate themselves through seemingly neutral organizational hurdles.

## Distinguishing Adverse Impact from Disparate Treatment

While both adverse impact and disparate treatment fall under the umbrella of employment discrimination prohibited by Title VII, they represent fundamentally different types of discrimination, distinguished primarily by the presence or absence of discriminatory intent. **Disparate treatment**

involves intentional discrimination, meaning the employer consciously treats individuals differently based on their membership in a protected class. For example, an employer refusing to hire a qualified woman simply because of her gender, or stating explicitly that they will only promote individuals of a certain race, constitutes disparate treatment. In such cases, the plaintiff attempts to prove motive, often using direct evidence, or circumstantial evidence under the framework established in **McDonnell Douglas Corp. v. Green**, demonstrating that the discriminatory action was deliberate.

In contrast, **adverse impact**, or disparate impact, involves policies or practices that are applied uniformly to all individuals but result in disproportionate harm to a protected group. Intent is irrelevant; the focus is solely on the statistical outcome. A classic illustration involves educational requirements: if a company requires a college degree for a janitorial position, and this requirement disproportionately excludes older applicants who may lack formal degrees but possess extensive experience, this constitutes adverse impact, provided the degree requirement cannot be proven as a business necessity. The key distinction is that disparate treatment is about prejudice in action, whereas adverse impact is about systemic barriers embedded within seemingly neutral organizational systems.

The difference between the two also significantly affects the burden of proof. In a disparate treatment case, the plaintiff carries the initial burden of establishing a prima facie case of discrimination, demonstrating that they belong to a protected class, were qualified, were subjected to an adverse employment action, and that others outside the class were treated more favorably. If proven, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the action. In an adverse impact case, the plaintiff also establishes a prima facie case (usually through statistical evidence demonstrating the disparity), but the burden then shifts to the employer to prove that the practice is a **business necessity** and is job-related. If the employer meets this burden, the plaintiff may still prevail by showing that less discriminatory alternatives exist that would achieve the same business goals, a concept known as the "less restrictive alternative."

### Statistical Measurement: The Four-Fifths Rule

Quantifying adverse impact necessitates the use of robust statistical methods, the most common and widely recognized of which is the **Four-Fifths Rule**, also known as the 80% Rule. This rule, outlined in the Uniform Guidelines on Employee Selection Procedures (UGESP), provides a practical guideline for determining whether the selection rate of a protected group is substantially lower than that of the group with the highest rate of selection. The premise is straightforward: if the selection rate for any racial, ethnic, or gender group is less than four-fifths (80%) of the selection rate for the group with the highest rate, adverse impact is generally indicated, prompting further scrutiny and validation requirements for the selection procedure in question.

The calculation proceeds in distinct steps. First, the selection rate for each group must be determined. The selection rate is calculated by dividing the number of applicants hired or promoted from that group by the total number of applicants from that group. Second, the group with the highest selection rate is identified; this rate serves as the benchmark. Third, the selection rate of the benchmark group is multiplied by 80% (0.80) to determine the threshold. Finally, the selection rates of all other groups are compared to this calculated threshold. If the selection rate of any protected group falls below this 80% threshold, the organization has statistical evidence suggesting adverse impact. It is crucial to note that the Four-Fifths Rule is not a legal standard of proof in itself, but rather a practical trigger mechanism used by enforcement agencies to identify practices requiring formal validation.

While the Four-Fifths Rule is the most common metric, it is not the only acceptable statistical measure. In situations involving large sample sizes, or when greater statistical precision is required, alternative methods are often employed. These advanced statistical techniques include the use of **standard deviation analysis**, chi-square tests, or regression analysis, which assess whether the observed disparity is statistically significant, meaning the difference is unlikely to have occurred by chance. The choice of statistical method depends heavily on the nature of the data, the size of the applicant pool, and the specific employment action being analyzed. Regardless of the method used, the goal remains the same: to objectively determine if a selection procedure is systematically detrimental to a protected class, thereby necessitating immediate reevaluation or rigorous justification under the doctrine of business necessity.

## Establishing a Prima Facie Case of Adverse Impact

The initial burden of establishing a case of adverse impact, known as the **prima facie case**, rests squarely with the plaintiff (the charging party or group). This initial phase requires the plaintiff to present sufficient evidence to create a presumption that unlawful discrimination has occurred, thereby shifting the burden of proof to the employer. To successfully establish a prima facie case of adverse impact, the plaintiff must typically satisfy two primary requirements: identifying the specific employment practice causing the alleged disparity and presenting statistical evidence demonstrating the significant differential impact on protected groups.

The first requirement is crucial: the plaintiff must pinpoint the precise element of the selection process responsible for the adverse outcome. It is not sufficient to simply claim that the overall hiring process is discriminatory; rather, they must isolate the specific test, interview stage, physical requirement, or educational prerequisite that serves as the barrier. For example, if a multi-stage hiring process involves an application review, a cognitive test, and an interview, the plaintiff must demonstrate through data that the cognitive test, and not the application review or interview, is the component disproportionately excluding the protected group. This specificity is mandated to allow the employer to focus their defense on validating the necessity of that particular challenged

practice.

The second requirement involves the presentation of compelling statistical evidence that demonstrates a significant adverse effect. As discussed, this typically involves applying the Four-Fifths Rule or more sophisticated statistical measures to show that the selection rate for the protected group is substantially lower than that of the majority group. The statistics must be relevant to the labor market and the specific jobs in question. Once the plaintiff successfully demonstrates both the specific cause and the statistically significant disparity, the court presumes adverse impact exists, and the burden shifts entirely to the employer. Failure to meet these initial evidentiary requirements means the plaintiff's case will typically be dismissed without requiring the employer to present a defense.

### Employer Defenses: Job Relatedness and Business Necessity

Once the plaintiff successfully establishes a prima facie case of adverse impact, the legal burden shifts to the employer, who must defend the challenged employment practice. The primary defense available to the employer is to prove that the procedure is both **job related** and a matter of **business necessity**. This defense is stringent and requires empirical evidence demonstrating a direct, substantial relationship between the selection procedure and performance on the job. Simply asserting that the practice is beneficial is insufficient; rigorous, scientifically acceptable validation studies must be conducted and presented.

There are generally three types of validation studies recognized by the UGESP and the courts for proving job relatedness. The first is **criterion-related validity**, which demonstrates a statistical correlation between performance on the selection measure (e.g., a test score) and performance on the job (e.g., supervisor ratings, productivity metrics). The second is **content validity**, which involves showing that the content of the selection procedure accurately reflects important knowledge, skills, or abilities required for the job (e.g., a typing test for a clerk position). The third is **construct validity**, which involves demonstrating that the selection procedure measures a psychological trait (a construct) that is essential for successful job performance (e.g., leadership ability for a management role). The chosen method must be appropriate for the type of selection procedure being defended.

The concept of business necessity goes beyond mere job relatedness; it implies that the challenged practice is essential to the safe and efficient operation of the business. For example, while a high school diploma might be statistically related to success in a management training program, an employer would struggle to prove it is a "necessity" for an entry-level cleaning position. Conversely, specific strength requirements for a firefighter position, if properly validated, are likely to be deemed a business necessity due to the extreme safety requirements of the role. If the employer successfully validates the necessity of the practice, the burden of proof shifts back to

the plaintiff, who may then attempt to demonstrate that the employer could achieve the same legitimate business goals using an alternative selection procedure with less adverse impact.

## Remediation and Mitigation Strategies

Organizations committed to compliance and ethical employment practices must actively implement strategies to mitigate the risk of adverse impact before litigation arises. The most effective approach involves conducting regular, systematic audits of all selection procedures, including application processes, tests, interviews, and promotion criteria, using the statistical guidelines established by the Four-Fifths Rule. These audits should be performed periodically, especially after significant changes in hiring volume or process design, to proactively identify and eliminate procedures that create unwarranted disparities.

When adverse impact is identified, organizations must immediately adjust or eliminate the offending practice unless it can be rigorously validated as a business necessity. If validation is required, the organization should engage expert industrial-organizational psychologists to design and implement appropriate validation studies. If the practice cannot be validated, or if a less discriminatory alternative exists, the organization must adopt the alternative. Mitigation often involves redesigning selection tools to focus exclusively on essential job tasks. For instance, replacing a broad cognitive ability test that shows adverse impact with a **work sample test**--which requires applicants to perform tasks directly related to the job--often reduces adverse impact while improving predictive validity.

Other important remediation strategies include the use of **banding** and **score adjustment**, though these methods are often subject to legal scrutiny and debate. Banding involves treating scores that fall within a statistically defined range (a "band") as equivalent, allowing decision-makers to select candidates from within that band based on secondary, non-scored characteristics, potentially aiding diversity goals without sacrificing validity. Furthermore, ensuring that recruitment efforts reach a diverse pool of candidates is a proactive measure. If the applicant pool itself is homogenous, any selection procedure, regardless of its fairness, will struggle to yield diverse outcomes. Therefore, comprehensive mitigation requires addressing both the inputs (recruitment) and the process (selection tools) to ensure equitable outcomes.

## Practical Examples and Contemporary Challenges

The concept of adverse impact finds application across a vast array of organizational contexts. One classic example relates to physical ability tests, which frequently demonstrate adverse impact against women due to average physiological differences, requiring the employer to prove the exact physical standard is necessary for the job, such as lifting specific weights or running specific distances under pressure. Another common scenario involves minimum height requirements,

historically used in police or fire departments, which often exclude individuals of certain ethnic backgrounds or women, compelling validation that height itself is directly predictive of job success.

A relevant modern challenge involves the use of sophisticated, algorithmic hiring tools, including artificial intelligence (AI) screening systems. If an AI algorithm is trained on historical hiring data that reflects past adverse impact, the algorithm may inadvertently perpetuate or amplify those biases, resulting in adverse impact that is difficult to trace back to a specific line of code or decision rule. For instance, if historical data shows that successful applicants for a tech role predominantly attended specific, elite universities, the AI system might disproportionately filter out qualified candidates from less prestigious institutions, creating adverse impact based on socioeconomic status or race, even if those factors were not explicitly programmed into the system.

Navigating these contemporary challenges requires new forms of technical auditing, known as bias audits, to ensure that machine learning models and other automated decision systems are free from systemic bias before deployment. Furthermore, the global expansion of multinational corporations necessitates adherence to varying international and national employment laws, which may define protected classes and acceptable statistical deviations differently. The principle remains constant, however: any selection procedure, whether traditional or high-tech, must be continuously scrutinized for its measurable impact on protected groups, ensuring that all employment decisions are based solely on legitimate, job-related qualifications and not on arbitrary barriers.