



Reminder: Conduct An Adverse Impact Analysis Prior To Any COVID-19 Reductions In Force

Insights

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As COVID-19 continues to wreak havoc on the economy, many employers are making the difficult decision to reduce a portion of their workforce – whether temporarily (via furlough) or permanently (via layoff) – to keep their business afloat. As if there weren't enough balls in the air already, employers conducting a COVID-19-related workplace reduction must also remember to ensure that their employee-selection decisions are based on legitimate, non-discriminatory reasons. Because if their reductions ended up disproportionately impacting a gender, race, or protected age demographic – even if unintentionally – a disparate impact class action lawsuit could follow once the COVID-19 dust settles. This is where an **adverse impact analysis** comes in.

What Is An Adverse Impact Analysis?

Adverse impact analyses provide a *statistical review* of the employment decision to determine whether discrimination is indicated in the decisions. Statisticians have developed, and courts and enforcement agencies have utilized, several valid methods to conduct an adverse impact analysis. The EEOC has approved several of these, and each have their advantages.

Fisher Phillips recommends conducting the adverse impact analyses using several methods before finalizing the employment action. For example, review the results using the traditional “4/5ths” or “80%” rule, as well as the more statistically robust standard deviation method currently relied upon by the courts and agencies.

Fisher Phillips also recommends using the Chi-Square method for smaller sample sizes. In particular, whenever the standard deviation for the categories being compared is two or more, that the result is considered an indicator that the difference may be caused by discrimination. Identifying statistically significant adverse impact in advance of finalizing its decision allows employers to ensure their criteria are non-discriminatory and are being applied in a non-discriminatory manner.

Other Employment Actions Could Be Caught In The Crossfire

Reductions in force decisions are not the only disparate impact concerns for employers, particularly when other workplace decisions might affect some large groups of employees but not others. For example, decisions on whether to allow telework, or provide shared work, might fall into the “conduct-an-adverse-impact-analysis” category during this unprecedented time.

Employers have a lot to think about in the time of COVID-19: the health and safety of their employees, their stability and security of their workforce, and the ability to weather the economic storm, to name a few. Conducting an adverse impact analysis may help protect your position in the aftermath of the pandemic.

Conclusion

For more guidance and assistance conducting an adverse impact analysis, please contact your Fisher Phillips attorney, or a member of the [Fisher Phillips Adverse Impact Analysis Team](#). The firm routinely performs adverse impact analyses for clients, has developed the necessary tools to conduct these three types of adverse impact analyses, and is ready to help.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center For Employers](#), maintained by our COVID-19 Taskforce.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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