THE LITTLER REPORT

WORKFORCE REDUCTIONS AND STATISTICS: A PRIMER AND RECOMMENDATIONS

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I. Introduction.

Workforce reductions, whether in the form of hours reductions, furloughs, or layoffs, are often a last resort for employers experiencing financial pressures.[1] Nevertheless, when these actions are necessary, time typically is of the essence, because when shedding payroll is the objective, the more drawn out the process, the smaller will be any financial savings. But quick decisions need not be careless decisions. The key is to thoroughly understand the risks before making decisions that later may result in potential liability. If these risks are too great, employers may seek to mitigate these risks by considering a voluntary exit incentive program, in which employees may be offered severance and/or other benefits in exchange for releasing claims they otherwise may assert.

In our experience, employers are more vigilant regarding the duties and risks posed by laws that deal directly with job losses, such as WARN and the OWBPA, than with how discrimination laws, and particularly statistical proof under those laws, present litigation risks. The purpose of this white paper is to provide readers an overview of how statistical analysis intersects with these discrimination laws, so they may better assess the risks posed by their RIF decisions and proactively manage their exposure.

The discrimination laws prohibit employers from taking adverse actions against employees because of membership in certain protected groups. Employees who sue for discrimination may utilize two theories of unlawful discrimination. *Disparate Treatment* requires proof that the plaintiff's membership in a protected class (*i.e.*, age, race, sex, religion, national origin, disability) motivated the employer's adverse employment action. *Disparate Impact* does not require proof of such unlawful intent. This theory of liability under the discrimination laws is based on evidence that the employer's facially neutral policy or practice has an adverse impact on a protected class. Disparate impact cases typically involve employer actions affecting a large number of individuals, such as reductions-in-force (RIFs) or hiring practices, and therefore are often brought as class actions. Most individual plaintiff cases are disparate treatment cases, but class actions can also be based on the theory of disparate treatment.

Although employees whose jobs have been terminated often claim that they were selected for termination in a RIF based on a protected category such as age or race, or in retaliation for a prior complaint, we assume that most companies do not overtly use a protected category such as age or race when making RIF selection decisions. An employee whose job has been terminated, however, could also claim that a facially neutral selection procedure adversely affected a protected group of employees, which included the employee. Such claims are asserted less frequently, and therefore tend to receive little or late attention in the RIF planning process. However, they carry enormous potential liability, and arise frequently enough that the possibility of such claims merits earlier and more focused attention.

Indeed, over the past 15 years, the Equal Employment Opportunity Commission has pursued multiple class actions alleging disparate impact in relation to reductions-in-force. Several settlements were in the $3 million to $4 million range. When they settled for less, the EEOC insisted on a consent decree requiring EEOC oversight of separation agreements for reductions-in-force for a period of time. In class actions filed by private litigants, the plaintiffs also pursued claims based on disparate impact, and the published settlements reveal multi-million dollar amounts.

To demonstrate unlawful disparate impact under Title VII of the Civil Rights Act of 1964 (Title VII), a plaintiff would seek to present an analysis of a particular selection procedure used in a RIF that shows a statistically significant impact on a protected

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[1]   For ease of exposition, these various workforce adjustments may be labeled reductions-in-force, or "RIFs," because the legal risks they pose are so similar.

group. The employer has a defense to the necessary statistical analysis that the selection procedure used was job-related and consistent with business necessity.[2] The plaintiff might then offer evidence that there were less discriminatory alternatives to the selection procedure used.[3] The procedure under the Age Discrimination in Employment Act (ADEA) is slightly different. That statute requires the plaintiff challenging a facially neutral employment practice to show that the practice has a statistically significant impact on the protected age group much like under Title VII, but the employer's defense is a reasonable-factor-other-than-age rather than the more difficult business necessity standard.[4]

The EEOC specifically referred to a RIF as the example of adverse impact based on age in its comments on the revised regulations on disparate impact claims under the ADEA.[5] The EEOC indicated that considerations relevant to whether the employer used an employment practice that was a reasonable factor other than age include the extent to which the employer assessed the adverse impact of its employment practice on older workers.[6] The comments to the revised ADEA regulations indicate that employers would be prudent to assess the adverse impact of a selection procedure but state that the extent of the assessment depends on the circumstances.[7] The Q&A on Final Rule summarized this concept:

> Where an **assessment of impact** is warranted, **the appropriate method will depend on the circumstances**, including the **employer's resources** and the **number of employees affected** by the practice. For example, a large employer that routinely uses sophisticated software to monitor its practices for race- and sex-based disparate impact may be acting unreasonably if it does not similarly monitor for age-based impact. Other employers, lacking the resources or expertise to perform sophisticated monitoring, may show that they acted reasonably by using informal methods of assessing impact.[8]

We anticipate that courts will construe this language to require most employers to conduct adverse impact analyses when conducting a RIF unless the RIF involves very few selections or the employer is very small with limited resources. Moreover, the comments on the revised ADEA regulations referenced above specifically refer to the employer monitoring practices for race- and sex-based disparate impact indicating that such monitoring also should apply to other types of unlawful discrimination besides age.[9]

The careful employer routinely analyzes RIF selections for adverse impact—the idea being to "nip in the bud," so to speak, a pattern of selections that might support a statistical case of discrimination. Yet, there are pitfalls to performing this analysis mechanistically and the results of even a well-planned statistical study may raise questions to which there are no easy answers.

The simplest case occurs if the statistical report card contains only passing grades (*i.e.*, no statistically significant disparities appear that are adverse to any protected group). In that happy case, an employer may proceed in the knowledge that it has in hand powerful evidence of a nondiscriminatory motive. That fortunate employer can testify that it recognized that even neutral decision-making can adversely affect one or more protected groups, that it has carefully considered that issue—perhaps with the assistance of a highly qualified expert—and implemented the RIF only after it determined there was no adverse impact against any protected group.

2   Note the difference between the defense in a disparate impact case as compared to the defenses in a disparate treatment case. In some instances, employers evaluating possible defenses to a potential disparate impact case focus on the defensibility of individual selections, rather than on the selection criteria and processes themselves, which lie at the heart of a disparate impact case.

3   See 42 U.S.C. § 2000e-2(k); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

4   29 C.F.R. §1625.7; Questions and Answers on EEOC Final Rule on Disparate Impact and "Reasonable Factor Other Than Age" under the Age Discrimination in Employment Act, EEOC (2012) (Q & A on Final Rule).

5   77 Fed. Reg. 19080, 19089 (Mar. 30, 2012).

6   29 C.F.R. §1625.7(e)(2)(iv).

7   77 Fed. Reg. at 19089.

8   Q & A on Final Rule, Q. 15 (emphasis added).

9   Referencing protected categories also may be warranted based on other legal obligations such as affirmative action compliance under Executive Order 11246, *Fuller v. Edward B. Stimpson Co., Inc.,* 971 F.Supp.2d 1146 (S.D. Fla. 2013).

The reality is that achieving such a result is a gamble. A contrary result is quite possible and occurs often—perhaps more often: The employer's initial RIF selections adversely affects, statistically-speaking, some protected group at some level of its organization.

The disproportionate effect of a pattern of RIF selections usually is established through formal statistical tests. Courts generally require the disparity between the actual and a hypothetical, random pattern of selections to be sufficiently great to reject the hypothesis that they are consistent with the hypothetical standard of random selection. Disparities that are so great that they would be produced by a random process no more than five percent of the time usually are deemed "statistically significant." Most courts deem statistically significant disparities to be probative of discrimination[10] for purposes of establishing a case under the disparate impact theory.

> In contrast to the precision with which the statistical standard is specified stands the murkier notion of which employees are "similarly situated." The standard of "random selection" makes sense only when applied to groups of employees who are more or less equally-likely candidates to be selected for a RIF.[11] After all, it makes no sense to apply a model of random selection to groups of employees who obviously differ in the skills they provide to an employer. For example, an employer conducting a RIF in its finance department hardly could be expected to include both secretaries and accountants for layoff in a random lottery, running the risk of creating a finance department top-heavy with accountants but few secretaries, or vice versa. Yet, the statistical results may depend critically on how groups of comparators are defined.

Some courts insist that a plaintiff ought to be compared only to rival employees who were at risk of being selected in plaintiff's stead.[12] Thus, a plaintiff who is an accountant ought to be compared to other accountants, perhaps in the same facility, against whose credentials the plaintiff's qualifications actually were assessed. But that principle provides only a partial answer, for suppose the same manager who selected the accountants to be riffed allegedly based upon a discriminatory motive, also selected the secretaries. Arguably, it is relevant to search for evidence of bias on the part of that manager by considering his RIF selections within pools of *both* accountants and secretaries.[13]

The comparisons within the corporate hierarchy that are most probative depend on the claim asserted by the particular plaintiff. For example, if the plaintiff is the accountant referenced above, then it might appear initially that a statistical finding of no adverse impact within this group should end the statistical inquiry. But suppose that when accountants are appropriately combined with secretaries, because each group was subject to the same decision-maker, a statistically significant adverse impact appears? Alternatively, suppose that an adverse impact among the secretaries is accompanied by a finding of no adverse impact among a combined group of accountants and secretaries. Does this negate the secretary's statistical proof? Thus, an employer that seeks assurance that no adverse statistical evidence exists must "pass" a variety of statistical tests that comprehend these alternative views of the data.

II.   A Brief Review of the Relevancy of Statistical Evidence.

Statistical evidence may be probative of either disparate treatment or a disparate impact. Employment decisions that manifest a statistically significant adverse effect on a protected group may reflect intentional discrimination, and standing along may be legally sufficient to affirm a verdict in favor of the plaintiff.[14] Statistics also are the cornerstone of a "pattern and practice" claim

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10   The probability that any observed disparity could have occurred under a specified random process is known as its "p-value." It is conventional for courts to insist that proffered statistics have a p-value of no more than five percent to be considered probative evidence. *See, e.g., W.G. Bennett v. Total Minatome Corp.,* 138 F.3d 1053 (5th Cir. 1998). Recently, however, Judge Posner has suggested that this .05 Level of significance is arbitrary, being a carryover from the conventions applied by academic journals to limit the volume of scholarly papers that are published. Judge Posner suggests that statistics associated with p-values greater than .05 therefore might be admissible, with evidence of the p-value affecting the weight as opposed to the admissibility of those statistics. *Kadas v. MCI Systemhouse Corp.,* 255 F.3d 359, 362 (7th Cir. 2001). Judge Posner's comments reflect the trend away from the mechanical application of statistical criteria in favor of a more thoughtful, case-by-case assessment of statistical evidence.

11   *See, e.g., Doan v. Seagate Tech.,* 82 F.3d 974, 979 (10th Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997) (in age discrimination action arising out of a RIF, statistical analysis excluded because it failed to compare similarly situated employees and ignored the fact that only certain employees were subject to termination).

12   *Id.*

13   *Id.*

14   *Walther v. Lone Star Gas Co.,* 952 F.2d 119, 125 (5th Cir. 1992), *on reh'g,* 977 F.2d 161 (5th Cir. 1992).

of intentional discrimination against a class of employees. Combined with anecdotal evidence, gross statistical disparities are sufficient to establish that discrimination is an employer's "standard operating procedure," and create a presumption that each employee affected by the pattern and practice is a victim of discrimination.[15] Reductions-in-force, which by their nature affect large numbers of employees, are natural targets of pattern and practice claims.[16]

Statistics also are integral to disparate impact claims.[17] In contrast to disparate treatment, at issue in a disparate impact case is not the allegedly discriminatory intent of the employer but the effect of facially neutral decision-making criteria or practices on members of protected groups. The Supreme Court, in *Watson v. Fort Worth Bank & Trust*, recognized that this theory of liability encompasses subjective as well as objective decision-making.[18] Moreover, the Supreme Court has made it clear that whether selection criteria impact disproportionately generally is *not* assessed at the "bottom line" (*i.e.*, the representation of each demographic group among those riffed).[19] Rather, a plaintiff may target any facet of the decision-making process that can be separated for statistical analysis. For example, if layoffs are based on a combination of factors, such as attendance and performance, each weighted equally, members of a protected group may allege a disparate impact with respect to either criterion, notwithstanding that the process as a whole impacts proportionally. Indeed, the Civil Rights Act of 1991 *requires* a plaintiff to identify the particular criterion in a multifaceted decision-making process that is alleged to have a disparate impact, if the components of the process can be separated for analysis.[20]

The particular RIF criteria the employer adopts may add an additional dimension to the statistical analysis. Suppose an employer bases its RIF decisions on two or more explicit criteria, on which it assigns its employees numerical scores. These could be subjective attributes, such as "teamwork," or an objective criterion such as the score on a particular test. Because a plaintiff may challenge the adverse impact of any RIF criterion independently of the ultimate RIF selections, RIF processes of this type add a further degree of complexity to vetting the RIF for adverse impact, and further compound the number of statistical analyses that are required.

Of course, neither disparate treatment nor disparate impact theory makes employers strictly liable for a statistical imbalance. Some courts hold that, in an individual case of disparate treatment, once an employer meets its burden of production and articulates a legitimate, nondiscriminatory reason for its adverse action against the plaintiff, generalized statistical evidence no longer is relevant and the plaintiff must respond to the specific reasons given by the employer.[21] To prove a pattern and practice, a plaintiff must present, in addition to statistics, anecdotal evidence supporting the allegation that discrimination is an employer's usual way of doing business.[22] If that proof is made, an employer still may escape liability to a particular employee by proving it would have made the same employment decision notwithstanding its pattern and practice of discrimination.[23]

In a disparate impact case, the plaintiff must establish not only that an identified practice impacts adversely, but that this practice caused the adverse employment action. In the above example, a plaintiff who demonstrated that attendance impacted his group disproportionately must further demonstrate that "but for" that tainted criterion they would not have been selected for the RIF.[24] If the plaintiff establishes these elements, the employer can prevail by proving that the challenged criterion is

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15   *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336-40 (1977).

16   *See e.g., EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950 (8th Cir. 1999); *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1152-54 (7th Cir. 1997).

17   *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

18   *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 990-91 (1988).

19   *Connecticut v. Teal*, 457 U.S. 440, 442 (1982).

20   42 U.S.C. § 2000e-3(k).

21   *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1468-69 (6th Cir. 1990).

22   *Teamsters*, 431 U.S. at 339-43.

23   42 U.S.C. §§ 2000e-3(k), 2000e-5(g)(2)(B); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

24   *Watson*, 487 U.S. at 994-95.

job-related and consistent with business necessity.[25] If the selection criterion is objectively quantifiable, such as a test score, that employer may be required to formally prove the validity of that test.[26] That is, it must demonstrate that the traits the test purports to measure are job-related, and that the challenged test scores are valid measures of those traits. If traits are subjectively assessed, courts often evaluate the checks on an individual manager's discretion that are built into the selection process, the training managers receive, whether a consensus is required for a decision, whether the decision-makers are diverse in terms of their demographic make-up, whether decision-makers rely upon evaluations that impact disparately, and the extent to which initial decisions are reviewed at higher organizational levels.[27]

III. A Comprehensive Statistical Analysis Considers RIF Patterns Both Broadly and in Their Particulars.

A sophisticated employer, cognizant of the role statistics play in the discrimination theories outlined above, may enlist counsel to advise whether its preliminary RIF selections expose it to potential liability. An attorney's instincts, naturally enough, might be to have a "statistical analysis" performed to find out. However, statistical analyses, just like legal analyses, differ in their comprehensiveness, sophistication, and scope. A statistical analysis that does not probe deeply carries a potential for both missing issues that are germane and wrongly flagging issues that truly present no problem.

Consider, for example, an employer that engages in a separate statistical analysis of an upcoming RIF in each of several job titles. Perhaps because each group is small, the statistical results indicate that there is no statistically significant disparity in any job title, with respect to any protected group. If the employer then proceeds with the RIF, based upon these statistical results, it may be in for an unpleasant surprise if litigation ensues. Data that indicate insignificant results when disaggregated may produce highly significant results when properly combined.

One reason is that as the sample size increases, as a result of combining data for several job titles, small deviations from neutrality in each job may cumulate to large, and therefore statistically significant, disparities for the organization as a whole. As a result, rules of thumb, such as the "80-percent rule," [28] correctly may signal statistically insignificant results in a small sample but they can be egregiously misleading with respect to large samples. An employer that gives each of its managers the "green light" to RIF designated employees, provided that manager's selections, standing alone, show no statistically significant adverse impact, may be surprised to find that the decisions of all managers, taken together, produce a highly significant adverse affect against one or more protected groups.

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25   42 U.S.C. § 2000e-3(k). Note, again, the focus on the criterion, not on the defensibility of particular selections.

26   Uniform Guidelines on Employee Selection, 29 CFR §1607.4 (2003).

27   *Graffam v. Scott Paper Co.*, 870 F. Supp. 389, 400-404 (D. Me. 1994), *aff'd*, 60 F.3d 809 (1st Cir. 1995).

28   29 C.F.R. §1607(D). In general, whether any given deviation from proportionality is consistent with chance will depend, in part, on the number of events (*e.g.*, hires, layoffs, and so on). As a result, an absolute standard, such as the "80-percent rule," will falsely identify deviations as material when samples are small, and understate the probative value of deviations when samples are large. As a consequence, many courts have disparaged this rule. *See, e.g., Clady v. Los Angeles Co.*, 770 F.2d 1421, 1428 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986); and *NAACP v. City of Mansfield*, 866 F.2d 162, 168 (6th Cir. 1989).

The answer, however, is not necessarily to group employees, for purpose of statistical analysis, into one big pool of RIF candidates, for that may be equally misleading. Consider a numerical example in which a company is staffed by men and women who perform the distinct jobs, 1 and 2.

Job 1

	Men	Women
Employed	50	50
Riffed	0	50

Job 2

	Men	Women
Employed	50	50
Riffed	50	0

Further assume that the number of employees to be riffed from each job is determined strictly by business concerns. Women obviously are disproportionately riffed from Job 1, and men from Job 2. Yet, if employees in these jobs are pooled, without distinguishing their job categories, then the data suggest, wrongly, that no gender disparities exist. Obscured is the fact that all the women in Job 1 were riffed but none of the men. Although it may be tempting to suggest that these data should be "offset" with data from Job 2, it is far from obvious that a court would consider data regarding Job 2 to be relevant. If these selections were made by different decision-makers, perhaps in different locations, regarding a different set of jobs, a court would be unlikely to permit these data to be combined if plaintiffs complain only about their treatment in Job 1.

The facts of the case also will affect how the data that are included in the statistical model are grouped. For example, if the facts establish that layoff decisions are made independently at each of a company's facilities, it would be a misspecification to group together all employees, from all facilities, as if they were equally at risk of selection. Instead, it is necessary to define distinct pools of employees at each facility.

A similar issue arises with respect to selections in the same locations. Just as a baseball team requires a player at each of nine positions, most employers, even those faced with layoffs, require a minimum level of staffing in a variety of positions to function effectively. As a result, it is rarely the case that all employees are equal candidates for layoff irrespective of the jobs they hold. Rather, employees in certain positions may be indispensable to future operations, whereas employees in other jobs are less essential. Once again, it would be improper to group all these employees together, as if they were equally at risk of layoff.

The point is that statistical tests cannot be applied or interpreted mechanically. Only if statistics are analyzed so that comparators can be identified and compared to those actually selected, and then further aggregated at higher organizational levels, can the strength of statistical evidence accurately be assessed. In terms of the number of statistical tests, this suggests that tests for adverse impact might best be performed hierarchically. Because a potential plaintiff can adduce statistical evidence regarding their immediate group of comparators, or a larger group subject to the same decision-maker or decision-making process, a comprehensive assessment would begin with the least aggregated set of selections and proceed to progressively greater aggregations. For example, regarding our accountant, it might be useful to start by looking within a group of similarly situated accountants, then expanding to the entire accounting department, then the financial division of which it is a part, and

finally a particular division of the company or the entire company itself. Of course, any other job can serve as the starting point and lead to the same pinnacle of the corporate pyramid.

Most courts prefer tests of statistical significance used in the social sciences to determine if differences in selection rates between demographic groups are material. There are two related concepts associated with statistical significance: measures of probability levels and standard deviation. Probability levels (also called "p-values") are simply the probability that the observed disparity would occur if selections were random—the result of chance fluctuation or distribution. For example, a 0.05 probability level means that there is only a five percent chance that a disparity as large as the one observed would occur with random selection. Similarly, the greater the number of standard deviations from the expected value, the greater the likelihood that the observed results are not due to chance. To offer a sense of the relationship between these two measures, in large samples two standard deviations corresponds roughly to a probability level of 0.05; three standard deviations correspond to a probability level of 0.0027.[29]

Under the statistical significance approach, adverse impact may be found where the protected group is affected at "significantly" greater rates compared to the non-protected group. "Significance" is a statistical concept usually corresponding to a probability threshold of 0.05 or below, to distinguish disparities consistent with random selection from those that are more likely to be systematic. The .05 probability threshold closely corresponds to "two standard deviations," a metric that appears more commonly in case law and applies to larger samples.[30]

The Supreme Court has stated that "[a]s a general rule for . . . large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the [result] was random would be suspect to a social scientist."[31] Additionally, many courts accept a 0.05 probability level [p-value] as sufficient to rule out the possibility that the disparity occurred at random.[32]

A. Practical Considerations in the Adverse Impact Analysis

Adverse impact analysis has two primary uses in evaluating RIF selections. One is to aid in evaluating decision-making for selections in the reduction. The other is to evaluate legal risk and position defenses in advance of a statistical challenge after the selection process is completed.

A common mistake in adverse impact analysis is to rely on small samples. General benchmarks to keep in mind are:

- *The 30-5-5 Rule.* A general rule in conducting adverse impact analysis is that you must have 30 members in the decisional unit, 5 members of a protected group within the unit, and 5 selections (affected employees) from that unit in order to have a meaningful analysis. For example, this rule of thumb, known as the 30-5-5 rule, is used by the Office of Federal Contract Compliance Programs (OFCCP) in its audits of federal contractors. Some statistical sampling can be done at smaller-level numbers but it is generally considered too unreliable to be meaningful. Even a grouping that meets the 30-5-5 rule is subject to challenge because of its marginal nature.[33]

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29   *See Lindemann & Grossman* 126 n.85 and accompanying text; *see also Stagi v. AMTRAK*, 391 F. App'x 133 (3d Cir. 2010).

30   *See B. Lindemann and P. Grossman*, Employment Discrimination Law, Ch. 3(III) (A)(1)(4th Ed. 2007).

31   *Castaneda v. Partida*, 430 U.S. 482, 496 n.17, 97 S. Ct. 1272, (1977).

32   *See, e.g., Waisome v. Port Auth.*, 948 F.2d 1370, 1376 (2d Cir. 1991) ("Social scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for a deviation could be random and the deviation must be accounted for by some factor other than chance." (internal citation omitted)); *Palmer v. Shultz*, 815 F.2d 84, 92-96, 259 U.S. App. D.C. 246 (D.C. Cir. 1987) (noting that "statistical evidence meeting the .05 level of significance . . . [is] certainly sufficient to support an inference of discrimination" (citation and internal quotation marks omitted, alterations in original)).

33   *See OFCCP Manual*, Ch. III, pp. 239-40 (2002).

- *Sample Size.* The larger the sample size, the more precise the statistical model will be, assuming it is applied to the proper decisional unit. As the number of employees included in the analysis increases, the variability in the data around the group average decreases and the statistical comparisons between groups is more accurate.

- *The Number of Reductions in the Decisional Unit.* The configuration of the sample selections also affects the ability to generate reliable statistics. For example, if there are only three affected employees in a decisional unit consisting of 30 employees, the statistical results will be imprecise. On the other hand, if that same decisional unit of 30 employees had 10 affected employees, the statistical model will more accurately approximate the impact of variables such as race, gender, or age on the decision-making process.

1. *How to decide when to apply adverse impact analysis during the decision-making process?*

The purpose of adverse impact analysis during the decision-making process is to identify decisions that should be examined more closely. If the decisions result in group differences that exceed the bounds of chance, that is a signal to probe deeper into the criteria for eliminating one position over another, or one employee in a given position over another employee in that job. This allows the employer to assess whether a legitimate business justification supports that decision. The statistical finding is, in essence, a red flag calling for a re-examination of the selection process.

It is not appropriate to make, or require, that decisions be made based solely on statistical impact. "Reverse engineering" a RIF can create exposure to the "favored" group under a theory of reverse discrimination. The Supreme Court specifically addressed that issue in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009). The Court held that "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate impact liability if it fails to take the race-conscious, discriminatory action."[34]

Thus, it would be inappropriate to make or change selection decisions solely for the purpose of reducing statistical adverse impact on any protected category. Rather, where statistical adverse impact is found, the selection procedure should be scrutinized to ensure that the criteria applied are job-related and consistent with business necessity (if adverse impact on gender or ethnicity categories was found), or that reasonable factors other than age support the selections (if adverse impact on age categories was found).[35]

Adverse impact analysis is useful in the RIF decision-making process where the group of impacted employees in one decisional unit is (a) large enough to be statistically significant, and (b) so large that a case-by-case reassessment of each decision is not practical.

In such a circumstance, an initial set of selections is made by the decision-makers for that decisional unit. Separately, the demographic data for the protected categories are collected by someone not involved in the decisions (usually HR or Legal). The statistical impact is then run in any logical configurations for the decisional unit and reviewed by the legal team and/or consultants with expertise in statistical analysis. If an adverse impact of concern is identified, then (a) the process and procedure for the RIF itself may be examined to determine if something about the process is creating a statistical anomaly; and if not, then (b) it may be advisable to vet decisions that appear to have caused that impact for proper business justifications. The latter is

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34   *Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009).

35   *See also Taxman v. Bd. of Edu. of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (holding that employer violated Title VII when it retained an African-American employee over a Caucasian employee in reduction-in-force where employees were equally qualified and race was used as "tie-breaker"). *See also* 42 U.S.C. §2000e-2(j) (Title VII prohibits preferential treatment on account of existing number or percentage imbalances); *Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999) (reduction-in-force case noting that it was Congress's intent "that employers not be required to treat any individual or group preferentially because of a protected characteristic or to establish a numerical quota system").

more commonly the issue in a well-structured, competencies-based RIF. If the business justifications for the relevant decisions are not present or are weak, then a plan is developed for corrective measures. These will vary depending on the circumstances.

B. How to decide what adverse impact analysis is conducted for legal defense purposes?

This type of analysis is typically conducted by the legal team for legal analysis only. If it is the driver for making decisions, then it risks becoming discoverable.[36] Instead, the primary purpose should be to identify statistical anomalies in advance and to document the appropriate explanations for the groupings that were used for comparing employees.

IV.   The Statistical Analysis Should Be Privileged.

Because the statistical analysis may identify some statistical disparity, the analysis should be protected unless and until it is helpful to waive privilege and use the statistical analysis as evidence. In short, the statistical analysis, at least initially, should be prepared in a manner that will be protected from discovery. Both the attorney-client privilege[37] and work-product doctrine[38] potentially protect the statistical analysis from discovery if it is undertaken at the request of an attorney for the purpose of providing legal advice with respect to the RIF, or in anticipation of litigation arising in connection with the RIF. However, analyses undertaken at the initiative of the HR department, or those that routinely are created in the ordinary course of business, are unlikely to be protected. Although some courts recognize the "self-critical analysis" privilege, which potentially protects analyses, these courts are in a distinct minority.[39] With these principles in mind, let us consider how best to protect the statistical analysis from discovery.

An obvious complication, which distinguishes the statistical analysis from more traditional attorney-client communications or work product, such as a legal memorandum, is when the statistical analysis is not the work of an attorney. Courts recognize that an attorney may require the services of a non-lawyer professional in order to render legal advice to a client. Under appropriate circumstances, the professional's communications to the attorney made for the purpose of assisting the attorney to render advice will be privileged.[40] In *United States v. Cote*, the Eighth Circuit recognized that the attorney-client privilege attached to the work papers of an accountant retained by the attorney, not only to the communications between the accountant and the attorney or the accountant and the client.[41] The rationale is that if privileged communications could be easily reconstructed from an attorney's or consultant's confidential documents, it would undermine the privilege to permit discovery of those documents.[42]

In general, the attorney-client privilege extends to professionals hired to assist the attorney, if (1) the professional was consulted, in confidence, for the purposes of assisting the lawyer to render legal advice; and (2) the communications between the lawyer and the professional are reasonably related to the purpose for which the lawyer was consulted.[43] But if the advice

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36   *See e.g., Beck v. The Boeing Company, Inc.*, No. C00-301P, order on motion for certification and for stay pending appeal (W.D. Wash. Mar. 11, 2004).

37   *See, e.g.,* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000).

38   *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); Fed. R. Civ. P. 26(a).

39   *See Tharp v. Sivyer Steel Corp*, 149 F.R.D. 177, 181 (S.D. Iowa 1993) (surveying employment discrimination cases and finding 13 courts that rejected the privilege and nine courts that recognized it).

40   *See, e.g., Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Corp.*, 5 F.3d 1508, 1515 (D.C. Cir. 1993) (attorney-client privilege attaches where insured communicates with insurer for the express purpose of seeking legal advice); *Federal Trade Commission v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980) ("attorney-client privilege can attach to reports of third parties made at the request of the attorney or the client where the purpose of the report was to put in usable form information obtained from the client"); *United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975) (attorney-client privilege attaches to pretrial communications between defendant and psychiatrist retained by attorney to aid in preparation of insanity defense); *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (attorney-client privilege attaches to work papers of accountant retained by attorney to conduct audit of client's books and records); *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) ("if the lawyer has directed the client…to tell his story…to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege.")

41   *Cote*, 456 F.2d at 144.

42   *See United States v. Willis*, 565 F. Supp. 1186, 1194 (S.D. Iowa 1983) ("if client confidences can be inferred from . . . undisclosed notes or research materials, then those items are privileged against production.")

43   *Aull v. Cavalcade Pension Plan*, 185 F.R.D. 618 (D. Colo. 1998).

sought is merely that of the professional, no privilege exists, notwithstanding that it may have been the lawyer who retained the expert.[44]

The work-product doctrine protects from discovery materials prepared or collected by an attorney "in the course of preparation for possible litigation.[45] Generally speaking, if materials are prepared *because of* the prospect of litigation, the work-product doctrine will apply, even if litigation has not actually been commenced against the client.[46] Whether RIF planning merits work-product protection is unclear. In the eyes of some courts, RIF selections are no different from a multitude of ordinary business decisions, any of which if done unlawfully could lead to litigation.[47] In contrast, other courts recognize that the large number of decisions involved in a RIF distinguish it from the ordinary, and conclude that a reasonable attorney would recognize that there is an inherent risk of litigation.[48] The soundest approach, naturally, is to attempt to structure the statistical analysis so that it qualifies for protection both as an attorney-client communication and as work product. Whether an attorney is successful in this regard may depend upon how the following questions are answered: (1) Is the attorney who sought advice from the professional an in-house or outside counsel? (2) Is the professional who performs the statistical analysis a lawyer or an in-house or consulting statistician? and (3) Was the attorney's or the statistician's work product provided to the client?

The use of "in-house" professionals—either lawyers or statisticians—risks confounding legal advice with the non-lawyering and non-litigation activities of in-house personnel. The attorney-client privilege applies only to communications to a "lawyer."[49] Whether one is a lawyer for purposes of the privilege does not depend on whether they are admitted to the bar but on the functions they perform. Courts often find that where an in-house lawyer also functions in other roles, for example, as a human resources manager, the lawyer was consulted for business, not legal, purposes.[50] As a result, this attorney's communications are discoverable.

For similar reasons, the contention that the attorney had the statistical analysis performed in anticipation of litigation will be stronger if it is litigation counsel, either in-house or outside counsel, who performs the analysis. If the employer's typical response when faced with the threat of litigation is to retain outside counsel, then it is consistent with "anticipating litigation" to engage outside counsel when faced with the threat posed by a RIF.

Raw statistical results are not legal advice. Although the statistician's results need not be kept confidential from the client, courts may well inquire whether the statistician is the agent of the attorney or whether the attorney is but a shill for the statistician. That is, if an attorney merely provides to a client the undigested results of the various statistical tests performed by a statistician, it seems highly questionable whether courts will find this to be legal advice or attorney work product deserving protection. On the other hand, a client justifiably may look to its attorney to advise whether its pattern of layoff selections is vulnerable to statistical

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44   *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

45   *Hickman v. Taylor*, 329 U.S. 495, 505 (1947).

46   *See, e.g., United States v. Adelman*, 68 F.3d 1495, 1501 (2d Cir. 1995) (if a party expects to be sued by a particular adverse claimant, work-product protection should apply to preparatory litigation studies undertaken by party); *Linde Thomson*, 5 F.3d at 1515 ("A litigant must demonstrate that documents were created 'with a specific claim supported by concrete facts which would likely lead to litigation in mind,' not merely assembled in the ordinary course of business or for other nonlitigation purposes.") (citation omitted); *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981) (litigation need not necessarily be imminent as long as the primary motivating purpose for the creation of the materials was to aid in possible future litigation); *In re Grand Jury Investigation*, 599 F.2d 1224, 1229 (3d Cir. 1979) ("Indisputably, the work-product doctrine extends to material prepared or collected before litigation actually commences. . . . '[T]he test should be whether . . . the document can fairly be said to have been prepared or obtained *because* of the prospect of litigation.'") (quoting 8 Wright & Miller, Federal Practice and Procedure: Civil § 2024, at 198 (1970)).

47   *See, e.g., Penk v. Oregon State Bd. of Higher Educ.*, 99 F.R.D. 506, 507 (D. Or. 1982) (mere statistical reports are not privileged, except for the portions that are self-evaluative); *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211 (D. Mass. 1980).

48   *See, e.g., Maloney v. Sisters of Charity Hosp.*, 165 F.R.D. 26, 30 (W.D.N.Y. 1995) (pre-RIF statistical analysis was done in anticipation of litigation, and, thus, the work-product doctrine applies); *McDonnell Douglas Corp. v. EEOC*, 922 F. Supp. 235, 242-43 (E.D. Mo. 1996).

49   *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000).

50   *United States Postal Svc. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156 (E.D.N.Y. 1994) ("Defining the scope of the privilege for in-house counsel is complicated by the fact that these attorneys frequently have multi-faceted duties that go beyond traditional tasks performed by lawyers").

evidence. That determination depends upon an attorney's knowledge of the relevant legal theories, the burden of proof under those theories, and the evidence courts consider probative.

V. Conclusion.

Statistical analysis is an important tool for employers planning a reduction-in-force. However, its value depends upon the employer's ability to understand its limitations as well as its strengths, and the ability of attorneys to guide their clients through a potential maze of results. Because plaintiffs can attack a RIF from a multitude of perspectives, which vary with a plaintiff's protected group, job category, and location, among other distinguishing features, "innumerable groupings" of data are possible.

Thus, employers and their attorneys cannot substitute statistics for designing and implementing RIF procedures that will fairly assess employees. In the face of a statistical imbalance, evidence of an even-handed process that considers an employee's skill relative to others who are similarly situated, and the employer's business needs, may provide an effective defense against legal challenges. Finally, because litigation is unpredictable, an employer that finds the statistical deck is stacked against it may opt for alternatives that lessen the risk. Consequently, it seems sensible to consider voluntary plans and other risk-minimizing strategies along with involuntary RIF selections, so it can move expeditiously to a less-risky alternative.