



## CHAPTER 5

# Diversity and Equal Employment Opportunity

***After you have read this chapter, you should be able to:***

- Define *diversity management*, and discuss what it encompasses.
- Differentiate among diversity management, equal employment opportunity (EEO), and affirmative action.
- Discuss several arguments supporting and opposing affirmative action.
- Explain how to identify when illegal discrimination occurs, and define five basic EEO concepts.
- Discuss the key provisions of the Civil Rights Act of 1964, Title VII, and the Civil Rights Act of 1991.
- Discuss the two general approaches that can be used to comply with the 1978 Uniform Guidelines on Employee Selection Procedures.
- Define *validity* and *reliability*, and explain three approaches to validating employment requirements.

## HR TRANSITIONS

# Diversity and Law Enforcement

Law enforcement takes place in many venues and with all citizens regardless of background. Yet law enforcement officers as a group do not reflect the diversity of the citizenry. For years, police work was seen mostly as men's work—and white men filled most officer's jobs. Increasingly it has become clear that having a more diverse group of law enforcement officers has some real advantages, yet making the transition to that more diverse workforce has presented some challenges.

Recently, a suspect was handcuffed in front of his three young children and became agitated, demanding an apology. The male deputy who handcuffed him was not in the mood for debate, and the atmosphere grew very tense. Fifteen-year police veteran Cheryl Peck stepped in and calmly pointed out, "Look, we don't know you. We don't know what your intentions are." Peck's words and female presence evidently reduced tensions. The results were the same—the suspect was taken into custody—but the circumstances were different (and less threatening) thanks to the female officer's presence.

Local law enforcement agencies began hiring women in the early 1970s. They still employ fewer women than men, but the number of women is growing. A survey of 800 police departments throughout the United States found that about 12% of nearly 600,000 officers are female.

Early on, some female officers noted an "overprotective" attitude on the part of their male colleagues. Other observers have noted that departments are much more professional with a mix of male and female officers.

"Some of the guys could get pretty raunchy—with women there they had to

quit. But that is the way it should be," Peck notes. Further, a shift to community policing requires that officers reflect the makeup of the community, and that in turn requires adding more women officers. Additionally, a number of law enforcement officials believe women possess superior interpersonal skills and want to recruit more.

But despite the benefits, changing the diversity mix of law enforcement agencies reflects the same challenges of doing so in other sectors of U.S. industry. One controversy focuses on the tests required to become officers. About 83% of law enforcement departments require applicants to pass a test on reading, writing, and

around its use. For example, in Suffolk County, New York, where African Americans make up 4.8% of the county and Hispanic Americans 6.6%, their representation on the police force was only 2.2% and 4.6% respectively. The county devised a plan to improve those numbers, under pressure from the U.S. Justice Department. Forty-three new African American and Hispanic American cadets were assured officer's jobs if they earned junior college criminal justice degrees and passed an entrance exam. While completing their degrees, these promising applicants worked part-time as unpaid police clerks. Most also enrolled in a prep course designed to

*It has become clear that having a more diverse group of law enforcement officers has some real advantages.*

reasoning—the so-called cognitive skills. Because the Federal Department of Justice was concerned that cognitive tests keep out more racial minority applicants than whites, it designed a new police exam that focuses on personality variables instead. The only remaining cognitive section was a reading test. To pass, applicants had to score only as well as the bottom 1% of current officers. Many argued that the test was "watered down." They pointed out that if police forces cannot test for intellectual skills, they will end up with recruits who cannot learn, write crime reports, or do well in court when confronted by defense lawyers.

Whether or not the test is a valid one for recruiting good police officers, other controversies have surfaced

help them with the exam. In the course the instructor offered test questions and some "preferred answers" on the test. Consequently, all of the candidates passed the test. However, controversy flared about "cheating," fairness, and reverse discrimination. Further, the New York supreme court ruled that Suffolk County did not explore sufficient alternatives before recruiting on the basis of skin color. The candidates, caught in the middle, felt they were being penalized because the county had devised a faulty program.

Even with its advantages, diversity is sometimes controversial and difficult to achieve. The Police Commissioner in Suffolk County says that he wants more diversity, but admits "I'm not sure how we get there."<sup>1</sup>

“The notion that diversity had a business imperative and gave us a strategic advantage came later.”

JOHN BRYAN

Differences among people at work are both a managerial plus and minus. It has been clear for many years from classic studies done in social psychology that groups made up of very different people are more creative and more able to see all sides of an issue. But groups often do not choose to be diverse in makeup, and do not always get along as well as groups made up of more similar members.

People have many dimensions—age, gender, race, color, and religion are only a few. The concept of **diversity** recognizes the differences among people.

### Diversity

Differences among people.

## The Nature of Diversity

The existence of diversity is apparent in most organizations. As suggested in a number of studies, diversity has both positive and negative consequences. On the positive side, it provides organizations opportunities to tap a broader, more diverse set of people, ideas, and experiences. Diversity is particularly valuable in a business organization because it often reflects the diversity of customers and the marketplace. By capitalizing on the diversity internally, business organizations may be able to adapt better to the subtle differences in various customer markets.

On the negative side, diversity may initially lead to increased tensions and conflicts in the workplace. In some organizations, people who are part of well-established groups with relatively similar backgrounds and racial or ethnic heritages have demonstrated reluctance to accept people who are “different.” Fortunately, outright hostility and physical resistance have occurred in relatively few work situations. But tensions have increased in other circumstances as diversity efforts have been instituted in work settings. Communication difficulties and conflicts between workers may occur more often in organizations having greater diversity of people. Consequently, organizations must be *proactive* not only in addressing diversity concerns by existing employees but also in supporting individuals with different backgrounds and heritages.

Probably the worst response to diversity is to ignore it. Because of its many dimensions, the concept of diversity should be viewed broadly (see Figure 5–1). Any of these dimensions can create conflicts between people at work, but they can also bring the advantages of different ideas and viewpoints, which is why organizations address diversity as a strategic human resource issue.

### Demographics and Diversity

Diversity is seen in demographic differences in the workforce.<sup>2</sup> The shifting makeup of the U.S. population accounts for today’s increased workforce diversity as many organizations hire from a more diverse pool of potential workers.

Organizations have been seeing the effects of these demographics trends for several years. A more detailed look at some of the key changes follows. According to the U.S. Department of Labor:

- Total workforce growth will be slower between 1996 and 2006 than in previous decades.

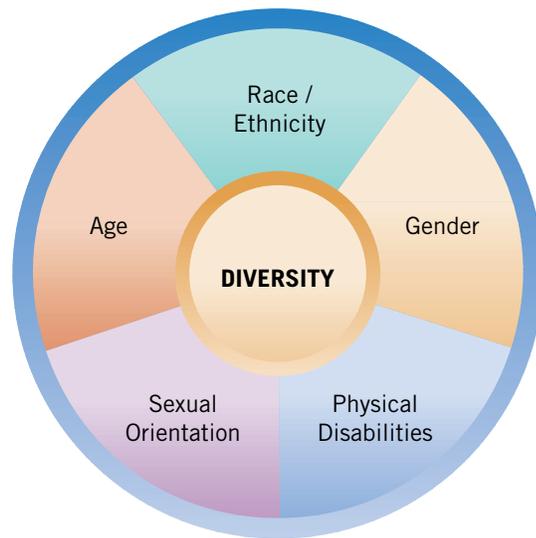


#### LOGGING ON . . .

##### The Diversity Forum

This website provides extensive links to companies committed to diversity, job opportunities, diversity resources, and research capabilities.

<http://www.diversityforum.com/>

**FIGURE 5-1** *Dimensions of Diversity*

- Only one-third of the entrants to the workforce between 1990 and 2005 will be white males.
- Women will constitute a greater proportion of the labor force than in the past, and 63% of all U.S. women will be in the workforce by 2005.
- Minority racial and ethnic groups will account for a growing percentage of the overall labor force. Immigrants will expand this growth.
- The average age of the U.S. population will increase, and more workers who retire from full-time jobs will work part-time.
- As a result of these and other shifts, employers in a variety of industries will face shortages of qualified workers.

**WOMEN IN THE WORKFORCE** The influx of women into the workforce has major social and economic consequences. It is projected that 63% of all women of working age, and over 80% of women from 25 to 40 years old, will be working or looking for work by 2000. This increase will mean that women will make up 47% of the total workforce by 2005. Further, about half of all currently working women are single, separated, divorced, widowed, or otherwise single heads of households. Consequently, they are “primary” income earners, not co-income providers.

One major consequence of having an increased percentage of women in the workforce is that balancing work and family issues will continue to grow in importance. Also, as more women enter the workforce, greater diversity will be found in organizations. Some other implications for HR management of more women working include the following:

- Greater flexibility in work patterns and schedules to accommodate women with family responsibilities, part-time work interests, or other pressures.
- More variety in benefits programs and HR policies, including child-care assistance and parental-leave programs.

- Job placement assistance for working spouses whose mates are offered relocation transfers.
- Greater employer awareness of gender-related legal issues such as sexual harassment and sex discrimination.<sup>3</sup>

**RACIAL AND ETHNIC DIVERSITY IN THE WORKFORCE** The fastest-growing segments of the U.S. population are minority racial and ethnic groups, especially Hispanic Americans, African Americans, and Asian Americans. By 2000, about 30% of the U.S. population will be from such minority groups. Already, “minority” individuals make up a majority in many cities of at least 100,000 population in California, Texas, and Florida. Some of the changes in racial and ethnic groups are as follows:

- The population of Asian Americans is expected to jump fivefold from 1990 to 2050, with half of these people being foreign born.
- The number of African Americans in the labor force grew twice as fast as the number of whites from 1990 to 2000.
- Hispanic Americans will be the largest minority group by 2010. Projections are that about 20% of the U.S. population will be Hispanic by 2020, with the number of Hispanic Americans having tripled by then.

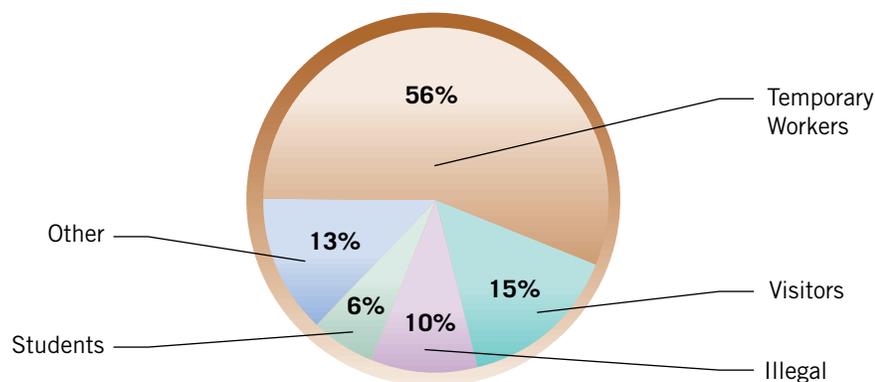
Much of the growth in the various racial and ethnic groups is due to immigration from other countries. Approximately 700,000 immigrants are arriving annually in the United States. As Figure 5–2 shows, immigrants come into the country as temporary workers, visitors, students, illegals, or in other situations.

During the 1950s most immigrants were Europeans, whereas in the 1990s, Hispanics and Asians predominated. Today, about one-third of immigrants have less than a high school education, while about one-fourth are college graduates. Increasingly, people with advanced degrees in science and engineering being hired by U.S. firms are foreign born.<sup>4</sup>

Possible implications of the increase in racial and ethnic cultural diversity are as follows:

- The potential for work-related conflicts among various racial and ethnic groups could increase.

**FIGURE 5–2** *Status of Immigrants in the United States*



SOURCE: U.S. Department of Labor, Bureau of Labor Statistics, 1999.

- Extensive employer-sponsored cultural awareness and diversity training may be required to defuse conflicts and promote multicultural understanding.
- Training in communication skills for those with English as a second language will increase, and job training will have to accommodate the different language abilities of a multicultural workforce.
- Employees skilled in more than one language will be vital, particularly in service industries in certain geographic locales.
- Greater cultural diversity in dress, customs, and lifestyles will be seen in workplaces.

**AGING OF THE WORKFORCE** Most of the developed countries—including Australia, Japan, most European countries, and the United States—are experiencing an aging of their populations. For the United States, the median age will be 39 in 2000—up from 31.5 just 15 years earlier. This increase is due partly to people living longer and partly to a decrease in the number of young people, particularly in the 16–24 age bracket. Little growth in this age group is projected until after 2005.

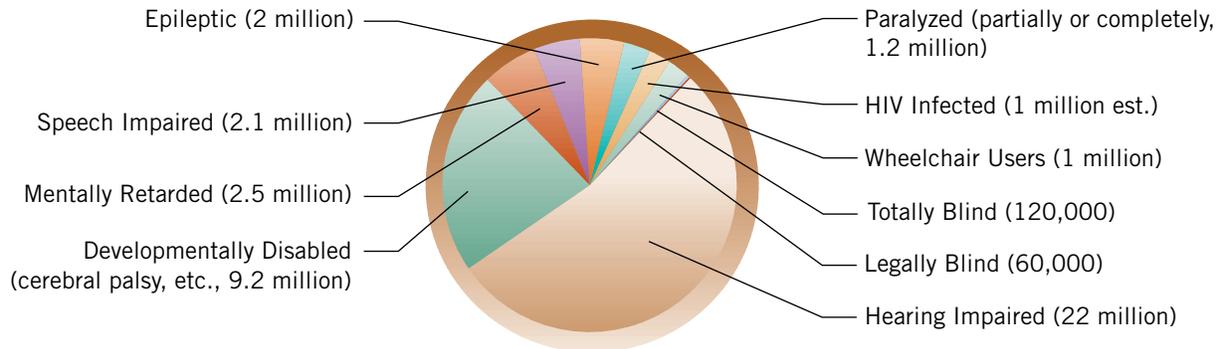
A major implication of this age shift is that employers such as hotels, fast-food chains, and retailers will continue to face significant staffing difficulties. Many employers are attracting older persons to return to the workforce through the use of part-time and other scheduling options. According to the U.S. Bureau of Labor Statistics, the number of workers aged 55 to 64 holding part-time jobs has been increasing. Many of these older workers are people who lost their jobs in organizational restructurings or who took early retirement buyout packages.

A change in Social Security regulations allows individuals over age 65 to earn more per year without affecting their Social Security payments. As a result, it is likely that the number of older workers interested in working part-time will increase, and that they will work more hours than previously.

Implications of the shifting age of the U.S. workforce include the following:<sup>5</sup>

- Retirement will change in character as organizations and older workers choose phased retirements, early retirement buyouts, and part-time work.
- Service industries will actively recruit senior workers for many jobs.
- Retirement benefits will increase in importance, particularly pension and health-care coverage for retirees.
- Fewer promotion opportunities will exist for midcareer baby boomers and the baby busters below them in experience.
- Baby boomers will have more “multiple” careers as they leave organizations (voluntarily or through organizational restructurings) and/or as they start their own businesses.

**INDIVIDUALS WITH DISABILITIES IN THE WORKFORCE** Another group adding diversity to the workforce is composed of individuals with disabilities. With the passage of the Americans with Disabilities Act (ADA), employers were reminded of their responsibilities for employing individuals with disabilities. At least 43 million Americans with disabilities are covered by the ADA. The disabilities of this group are shown in Figure 5–3. Estimates are that up to 10 million of these individuals could be added to the workforce if appropriate accommodations were made. The number of individuals with disabilities is expected to continue growing as the workforce ages. Also, people with AIDS or other life-threatening illnesses are considered disabled, and their numbers are expected to increase. The ADA is discussed further in Chapter 6.

**FIGURE 5-3 Disabled Population in the United States**

SOURCE: Office of Special Education and Rehabilitative Services, Centers for Disease Control.

Implications of greater employment of individuals with disabilities include the following:

- Employers must define more precisely what are the essential tasks in jobs and what knowledge, skills, and abilities are needed to perform each job.
- Accommodating individuals with disabilities will become more common by providing more flexible work schedules, altering facilities, and purchasing special equipment.
- Nondisabled workers will be trained in ways to work with coworkers with disabilities.
- Employment-related health and medical examination requirements will be revised to avoid discriminating against individuals with disabilities.

**INDIVIDUALS WITH DIFFERING SEXUAL ORIENTATIONS IN THE WORKFORCE** As if demographic diversity did not place pressure enough on managers and organizations, individuals in the workforce today have widely varying lifestyles that can have work-related consequences. A growing number of employers are facing legislative efforts to protect individuals with differing sexual orientations from employment discrimination, though at present, only a few cities and states have passed such laws. In addition, there are growing concerns about balancing employee privacy rights with legitimate employer requirements.

Some implications of these issues include the following:

- The potential for workplace conflicts is heightened as people with different lifestyles and sexual orientations work together. Training to reduce such conflicts will be necessary.
- Access to employee records will be limited, and the types of information kept must be reviewed.
- Generally, managers must recognize that they should not attempt to “control” off-the-job behavior of employees unless it has a direct, negative effect on the organization. Even then, difficulties may exist.

## HR PERSPECTIVE

## Best Companies for African, Asian, and Hispanic Americans

Many organizations make “politically correct” statements about diversity, but which firms do something about it? What do they do, and how well does it work? *Fortune* magazine considered these questions and listed the 50 best companies for three racial minority groups. The article concludes that there are common characteristics involved in being a “good” company for people of color:

- The racial and gender mix of management (especially senior management)
- Whether the company hires, promotes, and retains minorities
- Open discussion of delicate race matters

- Manager’s bonuses tied to performance in diversity issues

But even the best firms are by no means perfect. Many of the 50 companies rated best for racial minorities and women have been sued for discrimination at some point and paid the settlements when they lost cases. However, it is interesting to note that none of the companies seem concerned about quotas, even though numbers are often used to measure diversity. Members of racial minority groups represent 14% of the officials and managers at the 50 companies—higher than the 12.4% nationally.

The result has been that the 50 best companies outperformed the

Standard and Poor’s in average return on investment (ROI) over both a 3- and 5-year period: 125% to 112% ROI for 3 years and 201% to 171% for 5 years. The top 10 companies in this “diversity elite” are:<sup>6</sup>

- Pacific Enterprises (California)
- Applied Materials (California)
- Advantica (South Carolina)
- Bank America (California)
- Fannie Mae (Washington, DC)
- Marriott International (Maryland)
- Edison International (California)
- Computer Associates (New York)
- Ryder System (Florida)
- Pitney Bowes (Connecticut)

## Managing Diversity

As organizations become more aware of both the advantages and inevitability of diversity in the workplace, they are finding that the advantages do not happen automatically—sensible management of diversity is necessary. (See the HR Perspective.) For example, failure to manage the potential difficulties associated with diversity can lead to the following problems:<sup>7</sup>

- **Higher turnover costs:** The turnover rate for African Americans in the United States is 40% higher than for whites, and women turn over twice as often as men. The lack of opportunity for career growth is a primary reason why professionals and managers in these groups leave their jobs.
- **Higher absenteeism costs:** Similarly, absenteeism is often higher for women and for minority-group men. This costly absenteeism is related to many minority individuals feeling that they are not being valued by the organization. For women workers who are mothers, the lack of work/family balance also has significant effects on absenteeism.
- **Lawsuits:** Employee plaintiffs win two-thirds of the discrimination lawsuits filed. The average jury award is \$600,000. Failure to train and monitor managers’ behaviors in this area can be quite expensive.
- **Failure to compete well for talent:** Recruiting and retaining diverse employees is more difficult. Companies cited as the best places to work for women and minorities tend to be more successful in attracting and retaining the best employees in these labor market segments.



### LOGGING ON . . . The Eastern Point Approach to Managing Diversity

This is an example of one company’s approach to managing a diverse workforce, which has resulted in increased performance and productivity.

<http://www.eastpt.com/divers.htm>

- *Reduced organizational performance:* The often-mentioned potential business advantages of diversity—better marketplace understanding, creativity and problem solving, and global effectiveness—simply do not happen unless the diverse workforce is given the opportunity and means to contribute to these goals.

### Common Components of Diversity Management Efforts

There are many different sources of advice and opinions about how to approach the challenges of diversity in an organization. Figure 5–4 summarizes the most commonly cited components of diversity management efforts. For diversity to succeed, it should be approached from the standpoint of its advantages. Training, diversity committees, promotion, and mentoring are all common means for achieving the positive benefits from diversity. Establishing management accountability for diversity can take many forms.<sup>8</sup> Tying bonuses to performance in diversity is a powerful approach. Many organizations, including Allstate Insurance Company, also survey employees on how well their managers are doing on diversity—and the resulting index determines 25% of each manager’s bonus.<sup>9</sup>

### Prevalence of Diversity Programs

Larger organizations are more likely to have diversity programs. Roughly three-fourths of the *Fortune* 500 companies have diversity programs, and another 8%

**FIGURE 5–4 Major Components of Successful Diversity Management**



were planning to implement programs, according to a survey by the Society for Human Resource Management. However, only about 50% of the firms have a mechanism in place to measure the impact of the programs.

Smaller companies have diversity programs as well, but only about one-third of the smaller companies have such programs. Diversity training is most commonly found in companies with diversity programs. Approximately 90% of the larger organizations surveyed include diversity training, with middle managers being most often trained. However, for several reasons (discussed next) the effectiveness of diversity training is uncertain.<sup>10</sup>

## Diversity Training

Diversity training seeks to eliminate infringements on legal rights, and to minimize discrimination, harassment, and lawsuits. Approaches to such training vary but often include at least three components.

- *Legal awareness:* Focuses on the legal implications of discrimination. Diversity training typically addresses federal and state laws and regulations on equal employment, and examines consequences of violations of those laws and regulations.
- *Cultural awareness:* Attempts to deal with stereotypes, typically through discussion and exercises. The desired outcome is for all participants to see the others as valuable human beings.
- *Sensitivity training:* Aims at “sensitizing” people to the differences among them and how their words and behaviors are seen by others. Some training includes exercises containing examples of harassing and other behaviors. These exercises are designed to show white males how discrimination feels.

Although diversity training is designed to correct problems, in many cases it appears to have made them worse. In both public- and private-sector organizations, very mixed reviews about the effectiveness of diversity training suggest that either the programs or their implementations are suspect.<sup>11</sup> Common complaints are:

- Diversity training tends to draw attention to differences, building walls rather than breaking them down.
- Diversity training without other initiatives (such as accountability) becomes meaningless.
- The diversity training is viewed as “politically correct,” which is an idea that lacks credibility for a significant proportion of the workforce.
- Diversity training is seen as focused on “blaming” majority individuals for past wrongs by those with an “axe to grind.”<sup>12</sup>

Some argue that diversity training has failed, pointing out that it does not reduce discrimination and harassment complaints, often produces divisive effects, and does not teach the necessary behaviors for getting along in a diverse workplace. This last point, focusing on behaviors, seems to hold the most promise for making diversity training more effective. One statement capturing this focus said, “Employers are not liable for the beliefs of their employees. But employers *are* responsible for the illegal behavior and conduct of their employees.”<sup>13</sup> Teaching appropriate behaviors and skills in relationships with others is more likely to produce satisfactory results than focusing just on attitudes and beliefs among diverse employees.



### LOGGING ON . . . The Diversity Training Group

This website is produced by a consulting firm specializing in diversity training. It contains articles on the new training issues, information on products and services, and a Diversity IQ Quiz to test your own knowledge.

<http://www.diversitydtg.com/>

## Diversity, Equal Employment, and Affirmative Action

It is very easy to note that diversity exists, and most people recognize that there are differences between themselves and others. However, acceptance of diversity is another matter when the rights of an individual are affected because of such differences. The debate about differences and how they should be handled in employment situations has led to various effects. To assist in identifying the issues involved in workplace diversity, it is critical that terminology often used generally and incorrectly be clarified.

Figure 5-5 shows that diversity management is the highest level at which organizations have addressed diversity issues. To review, diversity management is concerned with developing organizational initiatives that value all people equally, regardless of their differences. In managing diversity, efforts are made by both the organization and the individuals in it to adapt to and accept the importance of diversity.

As the figure shows, organizations can also address diversity issues in more restricted ways: equal employment opportunity and affirmative action. These levels are discussed next.

### Equal Employment Opportunity

#### Equal employment opportunity (EEO)

The concept that individuals should have equal treatment in all employment-related actions.

#### Protected class

Those individuals who fall within a group identified for protection under equal employment laws and regulations.

**Equal employment opportunity (EEO)** is a broad concept holding that individuals should have equal treatment in all employment-related actions. Individuals who are covered under equal employment laws are protected from illegal discrimination, which occurs when individuals having a common characteristic are discriminated against based on that characteristic. Various laws have been passed to protect individuals who share certain characteristics, such as race, age, or gender. Those having the designated characteristics are referred to as a protected class or as members of a protected group. A **protected class** is composed of individuals who fall within a group identified for protection under equal employment laws and regulations. Many of the protected classes historically have been subjected to illegal discrimination. The following bases for protection have been identified by various federal laws:

- Race, ethnic origin, color (African Americans, Hispanic Americans, Native Americans, Asian Americans)
- Gender (women, including those who are pregnant)
- Age (individuals over 40)
- Individuals with disabilities (physical or mental)
- Military experience (Vietnam-era veterans)
- Religion (special beliefs and practices)

For instance, suppose a firm that is attempting to comply with EEO regulations has relatively few Hispanic managers. To increase the number of Hispanics, the firm will take steps to recruit and interview Hispanics who meet the minimum qualifications for the management jobs. Notice that what the firm is providing is equal employment opportunity for *qualified* individuals to be considered for employment. To remedy areas in which it appears that individuals in protected classes have not had equal employment opportunities, some employers have developed affirmative action policies.

**FIGURE 5-5** *Diversity Management, Equal Employment Opportunity, and Affirmative Action*



## Affirmative Action

**Affirmative action** occurs when employers identify problem areas, set goals, and take positive steps to guarantee equal employment opportunities for people in a protected class. Affirmative action focuses on hiring, training, and promoting of protected-class members where they are *underrepresented* in an organization in relation to their availability in the labor markets from which recruiting occurs. Sometimes employers have instituted affirmative action voluntarily, but many times employers have been required to do so because they are government contractors having over 50 employees and over \$50,000 in government contracts annually.

**AFFIRMATIVE ACTION AND REVERSE DISCRIMINATION** When equal employment opportunity regulations are discussed, probably the most volatile issues concern the view that affirmative action leads to *quotas*, *preferential selection*, and *reverse discrimination*. At the heart of the conflict is the employers' role in selecting, training, and promoting protected-class members when they are underrepresented in various jobs in an organization. Those who are not members of any protected class have claimed that there is discrimination in reverse. This **reverse discrimination** may exist when a person is denied an opportunity because of preferences given to a member of a protected class who may be less qualified. Specifically, some critics charge that white males are at a disadvantage today, even though they traditionally have held many of the better jobs. These critics say that white males are having to "pay for the sins of their fathers."

It has been stated by some that the use of affirmative action to remedy underrepresentation of protected-class members is really a form of *quotas*, or "hiring by the numbers." However, the Civil Rights Act of 1991 specifically prohibits the use of quotas. It also sets limits on when affirmative action plans can be challenged by individuals who are not members of a protected class. Some phrases used to convey that affirmative action goals are not quotas include "relative numbers," "appropriately represented," "representative sample," and "balanced workforce."

Along with the economic restructuring of many organizations has come a growing backlash against affirmative action.<sup>14</sup> As noted, some see it as an unfair

### Affirmative action

A process in which employers identify problem areas, set goals, and take positive steps to guarantee equal employment opportunities for people in a protected class.

### Reverse discrimination

A condition that may exist when a person is denied an opportunity because of preferences given to protected-class individuals who may be less qualified.

## Debate: Why Affirmative Action Is Needed

Supporters have offered many reasons why affirmative action is necessary and important. Some common reasons are given here.

**1. Affirmative action is needed to overcome past injustices or eliminate the effects of those injustices.**

Proponents of affirmative action believe it is necessary because of the historical inequities that have existed in the United States. In particular, women and racial minorities have long been subjected to unfair employment treatment by being relegated to lower positions (such as clerical and low-paying jobs), not being considered qualified, and being discriminated against for promotions. Without affirmative action, the inequities will continue to exist for individuals who are not white males.

**2. Women and minorities have taken the brunt of the inequality in the past; but now more equality can be created, even if temporary injustice to some may result.**

White males in particular may be disadvantaged temporarily in order for affirmative action to create broader opportunities for all—the greatest good. Proponents argue that there must be programs to ensure that women and minorities be considered for employment opportunities so that they can be competitive with males and nonminorities. An often-cited example is that in a running contest, someone running against a well-trained athlete starts at a disadvantage. Women and minorities have had such a dis-

advantage. Consequently, for a period of time, they should be given a head start in order to ensure that a truly competitive contest occurs.

**3. Raising the employment level of women and minorities will benefit U.S. society in the long run.**

Statistics consistently indicate that the greatest percentage of those in lower socioeconomic groups belong to minority groups. If affirmative action assists these minorities, then it is a means to address socioeconomic disparities. Without affirmative action, proponents believe that a larger percentage of the U.S. population will be consigned to being permanently economically disadvantaged. When economic levels are low, other social ills proliferate, such as single-parent families, crime, drug use, and educational disparities. Ultimately, then, a vicious circle of desperation will continue unless special efforts are made to provide access to better jobs for all individuals.

**4. Properly used, affirmative action does not discriminate against males or nonminorities.**

An affirmative action plan should help remedy a situation in which disproportionately few women and minorities are employed compared with their numbers in the labor markets from which they are drawn. The plan should have a deadline for accomplishing its long-term goals. All individuals must meet the basic qualifications for jobs. Once all of these

job criteria are established, qualified women or minorities should be chosen. In this way, those not selected are discriminated against only in the sense that they did not get the jobs.

Proponents of affirmative action also stress that affirmative action involves not *quotas* but *goals*. The difference is that quotas are specific, required numbers, whereas goals are targets for “good faith” efforts to ensure that protected-class individuals truly are given consideration when employment-related decisions are made.

**5. Affirmative action promotes long-term civility and tolerance through forced interaction.**

The United States is a diverse country facing social integration issues, and change is occurring rapidly. In order to staff their jobs, employers will have to tap the talents of the diverse members of the U.S. labor force and to find ways for all inhabitants to work together effectively. When women and minorities are placed in widely varying work environments and males and nonminorities interact and work with them, there will be greater understanding among the diverse peoples in the United States. Additionally, women and minorities who are given opportunities can become role models who will make preferences in the future unnecessary. Thus, if successful, affirmative action ultimately may no longer be necessary.

## HR PERSPECTIVE

## Debate: Why Affirmative Action Should Be Eliminated

While proponents argue in favor of affirmative action, opponents argue against it. They offer the following reasons why affirmative action should be eliminated.

- 1. Creating preferences for women and minorities results in reverse discrimination.** Those opposed to affirmative action believe that discriminating *for* someone means discriminating *against* someone else. If equality is the ultimate aim, then discriminating for or against anyone on any basis other than the knowledge, skills, and abilities needed to perform jobs is wrong. Equal employment opportunity means that people should compete for jobs according to their qualifications. If any factor such as gender or race is considered in addition to qualifications, then there is discrimination in reverse, which is counter to creating a truly equal society.
- 2. Affirmative action results in greater polarization and separatism along gender and racial lines.** The opponents of affirmative action believe that affirmative action establishes two groups: women and minorities who are in protected classes, and everyone else. For any job, a person will clearly fall into one group or the other. In reality, according to affirmative action classification efforts, women may or may not fall into the “special” category, depending on whether there has been disparate impact on them. Thus, affirmative action may be applicable to some groups but

not to others in various employment situations. Regardless of the basis for classification, affirmative action results in males and nonminorities being affected negatively because of their gender or race. Consequently, they become bitter against the protected groups, leading to greater racism or prejudice.

- 3. Affirmative action stigmatizes those it is designed to help.** The opponents of affirmative action cite examples wherein less-qualified women and minorities were given jobs or promotions over more-qualified males and nonminorities. When protected-class individuals perform poorly in jobs because they do not have the knowledge, skills, and abilities needed, the result is to reinforce gender or racial stereotypes.  
Because affirmative action has come to be viewed by some people as placing unqualified women and minorities in jobs, it reinforces the beliefs held by some that women and minorities could not succeed on their own efforts. Thus, any women or minority members who have responsible positions are there only because of who they are, not because of what they can do and have done.
- 4. Affirmative action penalizes individuals (males and nonminorities) even though they have not been guilty of practicing discrimination.** Opponents argue that affirmative action is unfair to “innocent victims”—males and nonminorities. These innocent victims had nothing to do with past discrimination

or disparate impact and were not even present at the time. Thus, the opponents of affirmative action wonder why these individuals should have to pay for the remediation of these discriminatory actions.

- 5. Preferences through affirmative action lead to conflicts between protected groups.** In this argument, opponents cite examples that illustrate how using preferences for one underrepresented racial minority group has led to discrimination against women or members of another racial minority group when these groups were adequately represented. Conflicts between African American organizations and Asian American organizations are one example. Another is the situation in which Hispanic Americans have sued employers because African Americans were overrepresented.  
Closely related is the difficulty of “classifying” people at all. While gender is a bit clearer, melding of races and backgrounds has made racial/ethnic classification difficult. If someone has parents and grandparents from three different ethnic groups, it is difficult to determine how the person should be classified. Thus, focusing on someone’s racial/ethnic background may lead to multiple or inaccurate classifications. This process points out the difficulties of classifying people in any way other than by their qualifications and abilities, according to those opposed to affirmative action.

quota system rather than sound HR management. Proponents of affirmative action maintain that it is a proactive way for employers to ensure that protected-class members have equal opportunity in all aspects of employment, and that it is indeed sound management. The accompanying HR Perspective provides both viewpoints.<sup>15</sup>

**COURT DECISIONS AND LEGISLATION ON AFFIRMATIVE ACTION** Increasingly, court decisions and legislative efforts have focused on restricting the use of affirmative action. California's Civil Rights Initiative stipulated that the State of California:

Shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

More evidence comes from a federal court decision regarding admission standards at the University of Texas Law School. The university used separate admissions committees to evaluate minority and nonminority applicants. The suit was brought by Cheryl Hopwood and three other students who were denied admission to the law school, even though they had test scores and grade point averages significantly higher than those of a majority of African Americans and Hispanic Americans who were admitted. Clarifying an earlier case, *Bakke v. University of California*, the Fifth Circuit Court of Appeals in *Hopwood v. State of Texas* ruled:<sup>16</sup>

The use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes, but just as likely, may promote improper racial stereotypes, thus fueling racial hostility.

Finally, a federal court in Washington voided a government requirement that radio and television stations must seek minority job applicants. The Federal Communications Commission (FCC) had required stations to go out and find minority and female applicants, which resulted in the broadcasting companies granting special hiring preferences to minorities. The judge noted, "We do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any of these techniques induces an employer to hire with an eye toward meeting the numerical target. As such they can and surely will result in individuals being granted a preference because of their race."<sup>17</sup>

That clear statement illustrates the idea that affirmative action as a concept is under attack by courts and employers, as well as by males and nonminorities. Whether that trend continues will depend on future changes in the makeup of the U.S. Supreme Court and the results of presidential and congressional elections.

The authors of this text believe that whether one supports or opposes affirmative action, it is important to understand why its supporters believe that it is needed and why its opponents believe it should be discontinued. Because the "final" status of affirmative action has not been determined, we have presented the arguments on both sides of the debate without advocating one of the positions.<sup>18</sup>

## Civil Rights Acts of 1964 and 1991

Numerous federal, state, and local laws address equal employment opportunity concerns. As the chart in Figure 5–6 indicates, some laws have a general civil

**FIGURE 5–6 Major Federal Equal Employment Opportunity Laws and Regulations**

Act	Year	Provisions
Equal Pay Act	1963	Requires equal pay for men and women performing substantially the same work
Title VII, Civil Rights Act of 1964	1964	Prohibits discrimination in employment on basis of race, color, religion, sex, or national origin
Executive Orders 11246 and 11375	1965 1967	Require federal contractors and subcontractors to eliminate employment discrimination and prior discrimination through affirmative action
Age Discrimination in Employment Act (as amended in 1978 and 1986)	1967	Prohibits discrimination against persons over age 40 and restricts mandatory retirement requirements, except where age is a bona fide occupational qualification
Executive Order 11478	1969	Prohibits discrimination in the U.S. Postal Service and in the various government agencies on the basis of race, color, religion, sex, national origin, handicap, or age
Vocational Rehabilitation Act Rehabilitation Act of 1974	1973 1974	Prohibit employers with federal contracts over \$2,500 from discriminating against individuals with disabilities
Vietnam-Era Veterans Readjustment Act	1974	Prohibits discrimination against Vietnam-era veterans by federal contractors and the U.S. government and requires affirmative action
Pregnancy Discrimination Act	1978	Prohibits discrimination against women affected by pregnancy, childbirth, or related medical conditions; requires that they be treated as all other employees for employment-related purposes, including benefits
Immigration Reform and Control Act	1986 1990 1996	Establishes penalties for employers who knowingly hire illegal aliens; prohibits employment discrimination on the basis of national origin or citizenship
Americans with Disabilities Act	1990	Requires employer accommodation of individuals with disabilities
Older Workers Benefit Protection Act of 1990	1990	Prohibits age-based discrimination in early retirement and other benefits plans
Civil Rights Act of 1991	1991	Overtures several past Supreme Court decisions and changes damage claims provisions
Congressional Accountability Act	1995	Extends EEO and Civil Rights Act provisions to U.S. congressional staff

rights emphasis, while others address specific EEO issues and concerns. At this point, it is important to discuss two major broad-based civil rights acts that encompass many areas. In Chapter 6, specific acts and priorities will be discussed.

Even if an organization has no regard for the principles of EEO, it must follow federal, state, and local EEO laws and regulations to avoid costly penalties. Whether violations of such laws occur intentionally, accidentally, or through ignorance, many employers have learned the hard way that they may be required

to pay back wages, reinstate individuals to their jobs, reimburse attorneys' fees, and possibly pay punitive damages. Even if not guilty, the employer still will have considerable costs in HR staff and managerial time involved and legal fees. Therefore, it is financially prudent to establish an organizational culture in which compliance with EEO laws and regulations is expected.

## Civil Rights Act of 1964, Title VII

Although the first civil rights act was passed in 1866, it was not until the passage of the Civil Rights Act of 1964 that the keystone of antidiscrimination legislation was put into place. The Civil Rights Act of 1964 was passed in part to bring about equality in all employment-related decisions. As is often the case, the law contains ambiguous provisions giving considerable leeway to agencies that enforce the law. The Equal Employment Opportunity Commission (EEOC) was established to enforce the provisions of Title VII, the portion of the act that deals with employment.

**PROVISIONS OF TITLE VII** In Title VII, Section 703(a) of the act it states:<sup>19</sup>

It shall be unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.

**WHO IS COVERED?** Title VII, as amended by the Equal Employment Opportunity Act of 1972, covers most employers in the United States. Any organization meeting one of the criteria in the following list is subject to rules and regulations that specific government agencies set up to administer the act:

- All private employers of 15 or more persons who are employed 20 or more weeks per year
- All educational institutions, public and private
- State and local governments
- Public and private employment agencies
- Labor unions with 15 or more members
- Joint (labor/management) committees for apprenticeships and training<sup>20</sup>

## Civil Rights Act of 1991

The major purpose for passing the Civil Rights Act of 1991 was to overturn or modify seven U.S. Supreme Court decisions handed down during the 1988–1990 period. Those decisions made it more difficult for individuals filing discrimination charges to win their cases. Also, the 1991 act amended other federal laws, including Title VII of the 1964 Civil Rights Act and Section 1981 of the Civil Rights Act of 1866. The major effects of the 1991 act are discussed next.

Supreme Court decisions made it more difficult for protected-class individuals to use statistics to show that illegal discrimination had occurred. The 1991 act reversed those rulings, relying on earlier reasoning in the *Griggs v. Duke Power* decision. The Civil Rights Act of 1991 requires employers to show that an

employment practice is *job-related for the position* and is consistent with *business necessity*. The act did clarify that the plaintiffs bringing the discrimination charges must identify the particular employer practice being challenged.

**DISCRIMINATORY INTENT** The Civil Rights Act of 1991 overturned several court decisions that had made it more difficult for plaintiffs to bring suits based on intentional discrimination. Under the 1991 act, the plaintiff charging intentional discrimination must show only that protected-class status played *some factor*. For employers, this means that an individual's race, color, religion, sex, or national origin *must play no factor* in the challenged employment practice.

**COMPENSATORY AND PUNITIVE DAMAGES AND JURY TRIALS** The 1991 act allows victims of discrimination on the basis of sex, religion, or disability to receive both compensatory and punitive damages in cases of intentional discrimination. Under the 1991 act, compensatory damages do not include back pay or interest on that pay, additional pay, or other damages authorized by Title VII of the 1964 Civil Rights Act. Compensatory damages typically include payments for emotional pain and suffering, loss of enjoyment of life, mental anguish, or inconvenience. However, limits were set on the amount of compensatory and punitive damages, extending from a cap of \$50,000 for employers with 100 or fewer employees to a cap of \$300,000 for those with over 500 employees.

Additionally, the 1991 act allows jury trials to determine the liability for and the amount of compensatory and punitive damages, subject to the caps just mentioned. Prior to passage of this act, decisions in these cases were made by judges. Generally, this provision is viewed as a victory for people who bring discrimination suits against their employers, because juries tend to more often find for individuals than for employers.

**OTHER PROVISIONS OF THE 1991 ACT** The Civil Rights Act of 1991 contained some sections that addressed a variety of other issues. More detailed discussions of most issues appear later in this chapter or in Chapter 6. Briefly, some of the issues and the provisions of the act are as follows:

- **Race norming:** The act prohibited adjustment of employment test scores or use of alternative scoring mechanisms on the basis of the race or gender of test takers. The concern addressed by this provision is the use of different passing or cut-off scores for protected-class members than for those individuals in nonprotected classes.
- **International employees:** The act extended coverage of U.S. EEO laws to U.S. citizens working abroad, except where local laws or customs conflict.
- **Government employee rights:** Responding to criticism that some government employees were being excluded from EEO law coverage, Congress extended such coverage to employees of the Senate, presidential appointments, and previously excluded state government employees.

**EFFECTS OF THE CIVIL RIGHTS ACT OF 1991** By overturning some U.S. Supreme Court decisions, the 1991 act negated many of the more “employer-friendly” decisions made by the Supreme Court from 1988 to 1990. Allowing jury trials and compensatory and punitive damages in cases involving allegations of intentional discrimination means that the costs of being found guilty of illegal discrimination have increased significantly. The number of EEO complaints filed likely will

continue to increase because of some of the provisions of the 1991 act. Consequently, more than ever before, employers must make sure their actions are job related and based on business necessity.

## Enforcement Agencies

Government agencies at several levels have powers to investigate illegal discriminatory practices. At the state and local levels, various commissions have enforcement authority. At the federal level, the two most prominent agencies are the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP).<sup>21</sup>

### Equal Employment Opportunity Commission (EEOC)

The EEOC, created by the Civil Rights Act of 1964, is responsible for enforcing the employment-related provisions of the act. The agency initiates investigations, responds to complaints, and develops guidelines to enforce various laws. The EEOC has enforcement authority for charges brought under the following federal laws:

- Civil Rights Act of 1964, Title VII
- Civil Rights Act of 1991
- Equal Pay Act
- Pregnancy Discrimination Act
- Age Discrimination in Employment Act
- Americans with Disabilities Act
- Vocational Rehabilitation Act

The EEOC has been given expanded powers several times since 1964 and is the major agency involved with employment discrimination. Over the years, the EEOC has been given the responsibility to investigate equal pay violations, age discrimination, and discrimination based on disability.

An independent regulatory agency, the EEOC is composed of five members appointed by the President and confirmed by the Senate. No more than three members of the commission can be from the same political party, and members serve for seven years. In addition, the EEOC has a staff of lawyers and compliance officers who do investigative and follow-up work for the commission. For an example of one EEOC enforcement activity, see the HR Perspective on testers.

### Office of Federal Contract Compliance Programs (OFCCP)

While the EEOC is an independent agency, the OFCCP is part of the Department of Labor, established by executive order to ensure that federal contractors and subcontractors have nondiscriminatory practices. A major thrust of OFCCP efforts is to require that federal contractors and subcontractors take affirmative action to overcome the effects of prior discriminatory practices. Affirmative action plans are discussed in detail in the next chapter.

### Enforcement Philosophies and Efforts

Since 1964, the various U.S. presidential administrations have viewed EEO and affirmative action enforcement efforts from different philosophical perspectives. Often the thrust and aggressiveness of enforcement efforts have varied depend-



#### LOGGING ON . . .

##### U.S. Equal Employment Opportunity Commission

The commission's website provides information about its purpose, facts about employment discrimination, enforcement statistics, and details on technical assistance programs.

<http://www.eeoc.gov>



#### BNA: 1892

##### EEOC and OFCCP Offices

A directory of the local offices of the EEOC and OFCCP are contained in this section.

## HR PERSPECTIVE

### “Testers”

Beginning several years ago, the EEOC started using “matched-pair” testers who posed as consumers, or applicants for jobs to determine whether employers would discriminate in their treatments of the individuals. One tester might be white and the other African American, for instance. The two individuals apply for a job and then compare their treatment. These testers can then testify in court as to their differential treatment if necessary. Unlike abstract statistical arguments about whether there is evidence of different treatment for different races with a certain employer, this testing has a direct, concrete kind of impact.

Testing has been used previously in housing discrimination, but its

status in employment cases was doubtful until the advent of amendments to the Civil Rights Act and a district court ruling supporting the right of testers to give testimony about their treatment in civil rights cases seeking damages. Critics say the technique is like “entrapment” on the criminal side, and that it sets up fake encounters and is intrusive. Further, critics charge that it is unrealistic for testers to apply for jobs, thereby initiating the employment process with no intention of working for that employer.

The use of testers has outraged employers, whose argument is that because the testers are not truly applicants, they should not be able to file charges. As a result of pres-

sure from U.S. congressional representatives, the EEOC for one year reversed its stand on the use of testers in discrimination cases. Controlled by Republicans, the House Appropriations Committee threatened to withhold \$37 million requested from the EEOC budget request. However, if the composition of the U.S. Congress changes, it is likely that the EEOC will resume use of testers.

Interestingly, some employers are seeking to use the technique themselves as an “audit” of their own HR employees. These firms would rather find out about and correct problems themselves, before an outside group does tests.<sup>22</sup>

ing on whether a Republican or Democratic president and Congress were in office. The purpose of pointing this out is not to suggest who is right or wrong but rather to emphasize that laws are enforced by agencies staffed by presidential appointees. Differing degrees of activism and emphasis result, depending on the philosophical beliefs and priorities held by a particular administration.

### State and Local Enforcement Agencies

In addition to federal laws and orders, many states and municipalities have passed their own laws prohibiting discrimination on a variety of bases. Often, these laws are modeled after federal laws; however, state and local laws sometimes provide greater remedies, require different actions, or prohibit discrimination in areas beyond those addressed by federal law. As a result, state and local enforcement bodies have been established to enforce EEO compliance. Fortunately, the three levels of agencies generally coordinate their activities to avoid multiple investigations of the same EEO complaints.

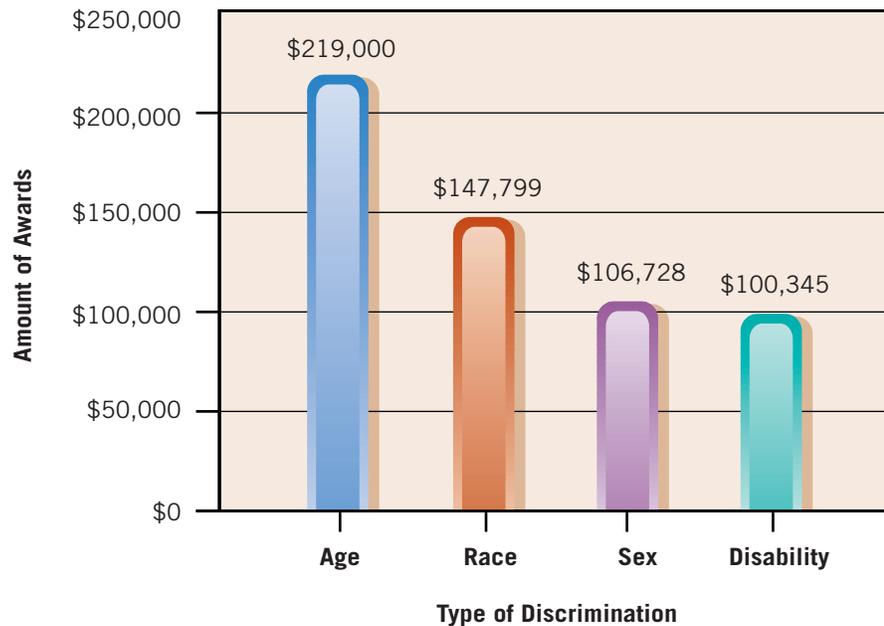
## Interpretations of EEO Laws and Regulations

Laws establishing the legal basis for equal employment opportunity generally have been written broadly. Consequently, only through application to specific organizational situations can one see how the laws affect employers.



### **BNA: 1895** **Equal Employment** **Agencies**

A history of state and local agencies is contained here. Identify the agencies and their locations that are closest to you.

**FIGURE 5-7 Average EEO Awards in Discrimination Cases**

SOURCE: Based on data in Sheldon Steinhauser, "Age Bias," *HR Magazine*, July 1998, 87.

The broad nature of the laws has led enforcement agencies to develop guidelines and to enforce the acts as they deem appropriate. However, agency rulings and the language of those rulings have caused confusion and have been interpreted differently by employers. Interpretation of ambiguous provisions in the laws also shifts as the membership of the agencies changes.

The court system is left to resolve the disputes and issue interpretations of the laws. The courts, especially the lower courts, have issued conflicting rulings and interpretations. The ultimate interpretation often has rested on decisions by the U.S. Supreme Court, although Supreme Court rulings, too, have been interpreted differently.

Thus, equal employment opportunity is an evolving concept that often is confusing. However, for employers equal employment violations are costly, as Figure 5-7 indicates.

### When Does Illegal Discrimination Occur?

Equal employment laws and regulations address concerns about discrimination in employment practices. The word *discrimination* simply means that differences among items or people are recognized. Thus, discrimination involves choosing among alternatives. For example, employers must discriminate (choose) among applicants for a job on the basis of job requirements and candidates' qualifications. However, discrimination can be illegal in employment-related situations in which either: (1) different standards are used to judge different individuals, or (2) the same standard is used, but it is not related to the individuals' jobs.

When deciding if and when illegal discrimination has occurred, courts and regulatory agencies have had to consider the following issues:

- Disparate treatment
- Disparate impact
- Business necessity and job relatedness
- Bona fide occupational qualification
- Burden of proof
- Retaliation

**DISPARATE TREATMENT AND DISPARATE IMPACT** It would seem that the motives or intentions of the employer might enter into the determination of whether discrimination has occurred—but they do not. It is the outcome of the employer's actions, not the intent, that will be considered by the regulatory agencies or courts when deciding if illegal discrimination has occurred. Two concepts used to activate this principle are *disparate treatment* and *disparate impact*.

**Disparate treatment** occurs when protected-class members are treated differently from others. For example, if female applicants must take a special skills test not given to male applicants, then disparate treatment may be occurring. If disparate treatment has occurred, the courts generally have said that intentional discrimination exists.

**Disparate impact** occurs when there is substantial underrepresentation of protected-class members as a result of employment decisions that work to their disadvantage. The landmark case that established the importance of disparate impact as a legal foundation of EEO law is *Griggs v. Duke Power* (1971).<sup>23</sup> The decision of the U.S. Supreme Court established two major points:

- It is not enough to show a lack of discriminatory intent if the employment tool results in a disparate impact that discriminates against one group more than another or continues a past pattern of discrimination.
- The employer has the burden of proving that an employment requirement is directly job related as a “business necessity.” Consequently, the intelligence test and high school diploma requirements of Duke Power were ruled not to be related to the job.

**BUSINESS NECESSITY AND JOB RELATEDNESS** A **business necessity** is a practice necessary for safe and efficient organizational operations. Business necessity has been the subject of numerous court decisions. Educational requirements often are based on business necessity. However, an employer who requires a minimum level of education, such as a high school diploma, must be able to defend the requirement as essential to the performance of the job. For instance, equating a degree or diploma with the possession of math or reading abilities is considered questionable. Having a general requirement for a degree cannot always be justified on the basis of the need for a certain level of ability. All requirements must be *job related*, or proven necessary for job performance. Determining and defending the job relatedness of employment requirements through validation procedures is discussed later in this chapter.

**BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ)** Title VII of the 1964 Civil Rights Act specifically states that employers may discriminate on the basis of sex, religion, or national origin if the characteristic can be justified as a “bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise.”<sup>24</sup> Thus, a **bona fide occupational qualification (BFOQ)** is a legitimate reason why an employer can exclude persons on otherwise illegal bases of consideration. What constitutes a BFOQ has been subject to different interpretations in various courts across the country.

### Disparate treatment

Situation that exists when protected-class members are treated differently from others.

### Disparate impact

Situation that exists when there is a substantial underrepresentation of protected-class members as a result of employment decisions that work to their disadvantage.

### Business necessity

A practice necessary for safe and efficient organizational operations.

### Bona fide occupational qualification (BFOQ)

A characteristic providing a legitimate reason why an employer can exclude persons on otherwise illegal bases of consideration.

**Retaliation**

Punitive actions taken by employers against individuals who exercise their legal rights.

**BURDEN OF PROOF** Another legal issue that arises when discrimination is alleged is the determination of which party has the *burden of proof*. At issue is what individuals who are filing suit against employers must prove in order to establish that illegal discrimination has occurred.

Based on the evolution of court decisions, current laws and regulations state that the plaintiff charging discrimination (1) must be a protected-class member and (2) must prove that disparate impact or disparate treatment existed. Once a court rules that a *prima facie* (preliminary) case has been made, the burden of proof shifts to the employer. The employer then must show that the bases for making employment-related decisions were specifically job related and consistent with considerations of business necessity.

**RETALIATION** Employers are prohibited by EEO laws from retaliating against individuals who file discrimination charges. **Retaliation** occurs when employers take punitive actions against individuals who exercise their legal rights. For example, an employer was ruled to have engaged in retaliation when an employee who filed a discrimination charge was assigned undesirable hours and his work schedule was changed frequently. Various laws, including Title VII of the Civil Rights Act of 1964, protect individuals who have (1) made a charge, testified, assisted, or participated in any investigation, proceeding, or hearing” or (2) “opposed any practice made unlawful.

To implement the provisions of the Civil Rights Act of 1964 and the interpretations of it based on court decisions, the EEOC and other federal agencies developed their own compliance guidelines and regulations, each agency having a slightly different set of rules and expectations. Finally, in 1978, the major government agencies involved agreed on a set of uniform guidelines.

## Uniform Guidelines on Employee Selection Procedures

The Uniform Guidelines on Employee Selection Procedures apply to the federal EEOC, the U.S. Department of Labor’s OFCCP, the U.S. Department of Justice, and the federal Office of Personnel Management. The guidelines provide a framework used to determine if employers are adhering to federal laws on discrimination. These guidelines affect virtually all phases of HR management because they apply to employment procedures, including but not limited to the following:

- Hiring (qualifications required, application blanks, interviews, tests)
- Promotions (qualifications, selection process)
- Recruiting (advertising, availability of announcements)
- Demotion (why made, punishments given)
- Performance appraisals (methods used, links to promotions and pay)
- Training (access to training programs, development efforts)
- Labor union membership requirements (apprenticeship programs, work assignments)
- Licensing and certification requirements (job requirements tied to job qualifications)

The guidelines apply to most employment-related decisions, not just to the initial hiring process. Two major means of compliance are identified by the guidelines: (1) no disparate impact and (2) job-related validation.

## No Disparate Impact Approach

Generally, regarding discrimination in organizations, the most important issue is the *effect* of employment policies and procedures, regardless of the *intent*. *Disparate impact* occurs whenever there is a substantial underrepresentation of protected-class members in employment decisions. The Uniform Guidelines identify one approach in the following statement: “These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results.”<sup>25</sup>

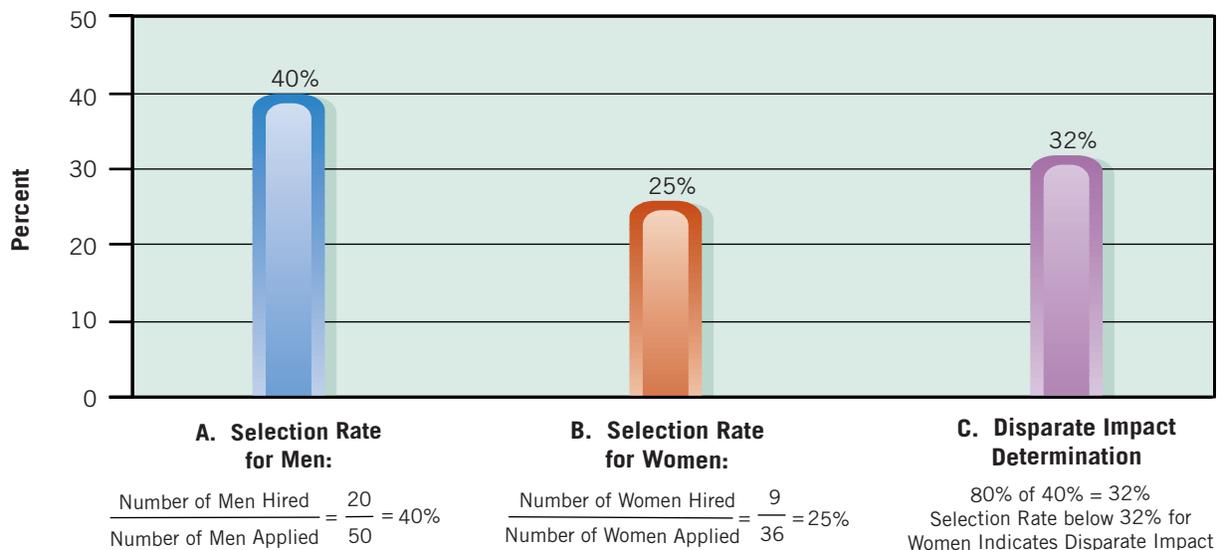
Under the guidelines, disparate impact is determined with the **4/5ths rule**. If the selection rate for any protected group is less than 80% (4/5ths) of the selection rate for the majority group or less than 80% of the group’s representation in the relevant labor market, discrimination exists. Thus, the guidelines have attempted to define discrimination in statistical terms. Disparate impact can be checked both internally and externally.

**INTERNAL** Checking disparate impact internally compares the treatment received by protected-class members with that received by nonprotected-group members. As shown in Figure 5–8, the Standard Company interviewed both men and women for jobs. Of the men who applied, 40% were hired; of the women who applied, 25% were hired. The selection rate for women is less than 80% (4/5ths) of the selection rate for men ( $40\% \times 4/5 = 32\%$ ). Consequently, Standard Company’s employment process does have “disparate impact.”

### 4/5ths Rule

Rule stating that discrimination generally is considered to occur if the selection rate for a protected group is less than 80% of the group’s representation in the relevant labor market or less than 80% of the selection rate for the majority group.

**FIGURE 5–8 Internal Disparate Impact at Standard Company**



HR activities for which internal disparate impact can be checked internally most frequently include:

- Candidates selected for interviews of those recruited
- Performance appraisal ratings as they affect pay increases
- Promotions, demotions, and terminations
- Pass rates for various selection tests

**EXTERNAL** Employers can check for disparate impact externally by comparing the percentage of employed workers in a protected class in the organization with the percentage of protected-class members in the relevant labor market. The relevant labor market consists of the areas where the firm recruits workers, not just where those employed live. External comparisons can also consider the percentage of protected-class members who are recruited and who apply for jobs to ensure that the employer has drawn a “representative sample” from the relevant labor market. Although employers are not required to maintain exact proportionate equality, they must be “close.” Courts have applied statistical analyses to determine if any disparities that exist are too high.

To illustrate, assume the following situation. In the Valleyville area, Hispanic Americans make up 15% of those in the job market. RJ Company is a firm with 500 employees, 50 of whom are Hispanic. Disparate impact is determined as follows if the 4/5ths rule is applied:

Percent of Hispanics in the labor market (15%)

× 4/5ths rule (.8)

Disparate-impact level (12%)

15%

× .8

12%

*Comparison:*

RJ Co. has 50/500 = 10% Hispanics.

Disparate-impact level = 12% Hispanics.

Therefore, disparate impact exists because fewer than 12% of the firm’s employees are Hispanic.

The preceding example illustrates one way external disparate impact can be determined. In reality, statistical comparisons for disparate-impact determination may use more complex methods. Note also that external disparate-impact charges make up a very small number of EEOC cases. Instead, most cases deal with the disparate impact of internal employment practices.

**EFFECT OF THE NO DISPARATE IMPACT STRATEGY** The 4/5ths rule is a yardstick that employers can use to determine if there is disparate impact on protected-class members. However, to meet the 4/5ths compliance requirement, employers must have no disparate impact at any level or in any job for any protected class. (The next chapter contains more details.) Consequently, using this strategy is not really as easy or risk-free as it may appear. Instead, employers may want to turn

to another compliance approach: validating that their employment decisions are based on job-related factors.

## Job-Related Validation Approach

Under the job-related validation approach the employment practices that must be valid include such practices and tests as job descriptions, educational requirements, experience requirements, work skills, application forms, interviews, written tests, and performance appraisals. Virtually every factor used to make employment-related decisions—recruiting, selection, promotion, termination, discipline, and performance appraisal—must be shown to be specifically job related. Hence, the concept of validity affects many of the common tools used to make HR decisions.

**Validity** is simply the extent to which a test actually measures what it says it measures. The concept relates to inferences made from tests. It may be valid to infer that college admission test scores predict college academic performance. However, it is probably invalid to infer that those same test scores predict athletic performance. As applied to employment settings, a test is any employment procedure used as the basis for making an employment-related decision. For a general intelligence test to be valid, it must actually measure intelligence, not just vocabulary. An employment test that is valid must measure the person's ability to perform the job for which he or she is being hired. Validity is discussed in detail in the next section.

The ideal condition for employment-related tests is to be both valid and reliable.

**Reliability** refers to the consistency with which a test measures an item. For a test to be reliable, an individual's score should be about the same every time the individual takes that test (allowing for the effects of practice). Unless a test measures a trait consistently (or reliably), it is of little value in predicting job performance.

Reliability can be measured by several different statistical methodologies. The most frequent ones are test-retest, alternate forms, and internal-consistency estimates. A more detailed methodological discussion is beyond the scope of this text; those interested can consult appropriate statistical references.<sup>26</sup>

### Validity

The extent to which a test actually measures what it says it measures.

### Reliability

The consistency with which a test measures an item.

## Validity and Equal Employment

If a charge of discrimination is brought against an employer on the basis of disparate impact, a *prima facie* case has been established. The employer then must be able to demonstrate that its employment procedures are valid, which means to demonstrate that they relate to the job and the requirements of the job. A key element in establishing job-relatedness is to conduct a *job analysis* to identify the *knowledge, skills, and abilities (KSAs)* and other characteristics needed to perform a job satisfactorily. A detailed examination of the job provides the foundation for linking the KSAs to job requirements and job performance. Chapter 7 discusses job analysis in more detail. Both the Civil Rights Act of 1964, as interpreted by the *Griggs v. Duke Power* decision, and the Civil Rights Act of 1991 emphasize the importance of job relatedness in establishing validity.

Using an invalid instrument to select, place, or promote an employee has never been a good management practice, regardless of its legality. Management also should be concerned with using valid instruments from the standpoint of operational efficiency. Using invalid tests may result in screening out individuals

who might have been satisfactory performers and hiring less satisfactory workers instead. In one sense, then, current requirements have done management a favor by forcing employers to do what they should have been doing previously—using job-related employment procedures.

The 1978 uniform selection guidelines recognize validation strategies measuring three types of validity:

- Content validity
- Criterion-related validity (concurrent and predictive)
- Construct validity

## Content Validity

### Content validity

Validity measured by use of a logical, nonstatistical method to identify the KSAs and other characteristics necessary to perform a job.

**Content validity** is a logical, nonstatistical method used to identify the KSAs and other characteristics necessary to perform a job. A test has content validity if it reflects an actual sample of the work done on the job in question. For example, an arithmetic test for a retail cashier should contain problems that typically would be faced by cashiers on the job. Content validity is especially useful if the workforce is not large enough to allow other, more statistical approaches.

A content validity study begins with a comprehensive job analysis to identify what is done on a job and what KSAs are used. Then managers, supervisors, and HR specialists must identify the most important KSAs needed for the job. Finally, a test is devised to determine if individuals have the necessary KSAs. The test may be an interview question about previous supervisory experience, or an ability test in which someone types a letter using a word-processing software program, or a knowledge test about consumer credit regulations.

Many practitioners and specialists see content validity as a common-sense way to validate staffing requirements that is more realistic than statistically oriented methods. Consequently, content validity approaches are growing in use.

## Criterion-Related Validity

### Criterion-related validity

Validity measured by a procedure that uses a test as the predictor of how well an individual will perform on the job.

Employment tests of any kind attempt to predict how well an individual will perform on the job. In measuring **criterion-related validity**, a test is the *predictor* and the desired KSAs and measures for job performance are the *criterion variables*. Job analysis determines as exactly as possible what KSAs and behaviors are needed for each task in the job. Tests (predictors) are then devised and used to measure different dimensions of the criterion-related variables. Examples of “tests” are: (1) having a college degree, (2) scoring a required number of words per minute on a typing test, or (3) having five years of banking experience. These predictors are then validated against criteria used to measure job performance, such as performance appraisals, sales records, and absenteeism rates. If the predictors satisfactorily predict job performance behavior, they are legally acceptable and useful.

A simple analogy is to think of two circles, one labeled *predictor* and the other *criterion variable*. The criterion-related approach to validity attempts to see how much the two circles overlap. The more overlap, the better the performance of the predictor. The degree of overlap is described by a **correlation coefficient**, which is an index number giving the relationship between a predictor and a criterion variable. These coefficients can range from  $-1.0$  to  $+1.0$ . A correlation

### Correlation coefficient

An index number giving the relationship between a predictor and a criterion variable.

coefficient of  $+ .99$  indicates that the test is almost an exact predictor, whereas a  $+ .02$  correlation coefficient indicates that the test is a very poor predictor.

There are two different approaches to criterion-related validity. *Concurrent validity* represents an “at-the-same-time” approach, while *predictive validity* represents a “before-the-fact” approach.

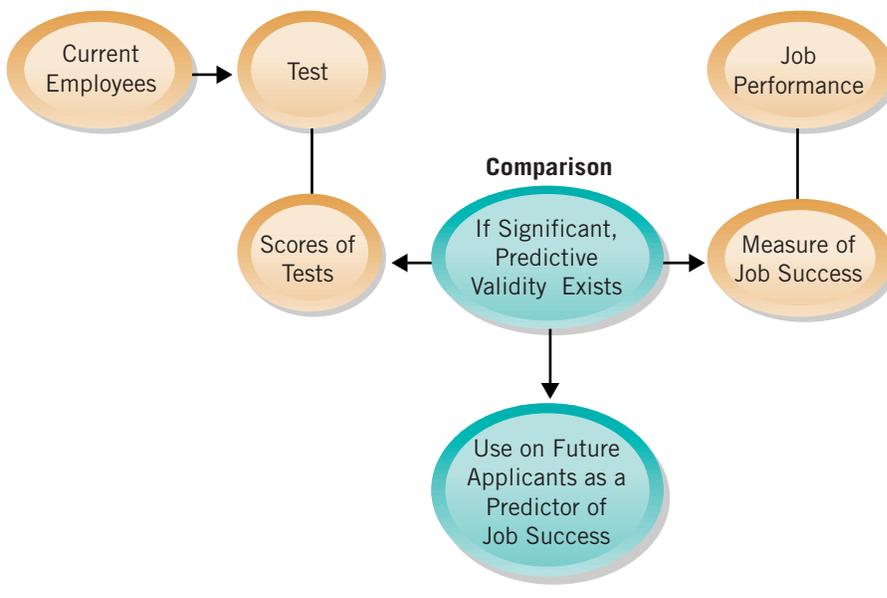
**CONCURRENT VALIDITY** *Concurrent* means “at the same time.” As shown in Figure 5–9, when an employer measures **concurrent validity**, a test is given to current employees and the scores are correlated with their performance ratings, determined by such measures as accident rates, absenteeism records, and supervisory performance appraisals. A high correlation suggests that the test can differentiate between the better-performing employees and those with poor performance records.

A drawback of the concurrent validity approach is that employees who have not performed satisfactorily are probably no longer with the firm and therefore cannot be tested, while extremely good employees may have been promoted or may have left the organization for better jobs. Furthermore, an unknown is how people who were not hired would have performed if given opportunities to do so. Thus, the firm does not really have a full range of people to test. Also, the test takers may not be motivated to perform well on the test because they already have jobs. Any learning that has taken place on the job may influence test scores, presenting another problem. Applicants taking the test without the benefit of on-the-job experience might score low on the test but might be able to learn to do the job well. As a result of these problems, a researcher might conclude that a test is valid when it is not, or might discard a test because the data indicate that it is invalid when, in fact, it is valid. In either case, the organization has lost because of poor research.

### Concurrent validity

Validity measured when an employer tests current employees and correlates the scores with their performance ratings.

**FIGURE 5–9** *Concurrent Validity*



**Predictive validity**

Validity measured when test results of applicants are compared with subsequent job performance.

**PREDICTIVE VALIDITY** To measure **predictive validity**, test results of applicants are compared with their subsequent job performance. The following example illustrates how a predictive validity study might be designed. A retail chain, Eastern Discount, wants to establish the predictive validity of requiring one year of cashiering experience, a test it plans to use in hiring cashiers. Obviously, the retail outlet wants to use the test that will do the best job of separating those who will do well from those who will not. Eastern Discount first hires 30 people, regardless of cashiering experience or other criteria that might be directly related to experience. Some time later (perhaps after one year), the performance of these same employees is compared. Success on the job is measured by such yardsticks as absenteeism, accidents, errors, and performance appraisals. If those employees who had one year of experience at the time when they were hired demonstrate better performance than those without such experience, as demonstrated by statistical comparisons, then the experience requirement is considered a valid predictor of performance and may be used in hiring future employees (see Figure 5–10).

In the past, predictive validity has been preferred by the EEOC because it is presumed to give the strongest tie to job performance. However, predictive validity requires (1) a fairly large number of people (usually at least 30) and (2) a time gap between the test and the performance (usually one year). As a result, predictive validity is not useful in many situations. Because of these and other problems, other types of validity often are used.

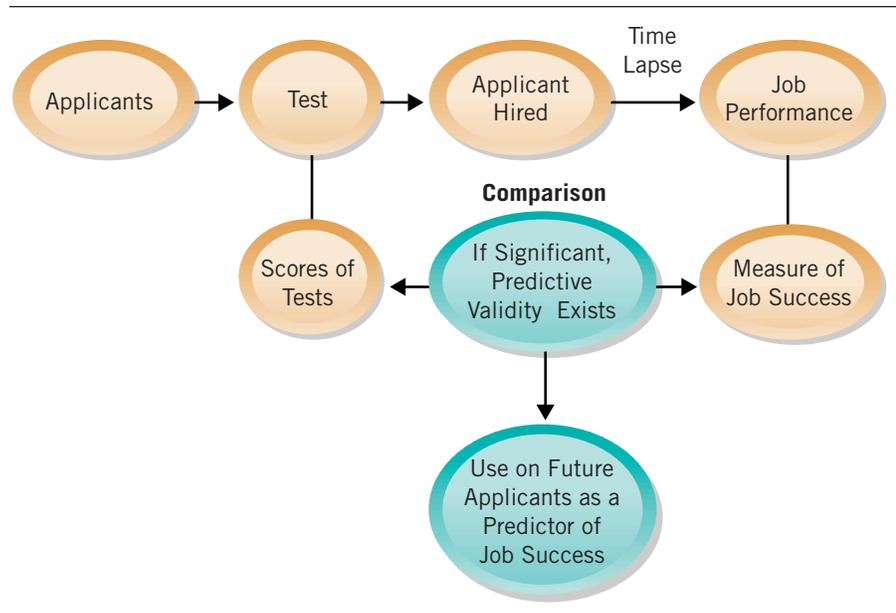
**Construct validity**

Validity showing a relationship between an abstract characteristic and job performance.

**Construct Validity**

**Construct validity** shows a relationship between an abstract characteristic inferred from research and job performance. Researchers who study behavior have

**FIGURE 5–10 Predictive Validity**



given various personality characteristics names such as *introversion*, *aggression*, and *dominance*. These are called *constructs*. Other common constructs for which tests have been devised are creativity, leadership potential, and interpersonal sensitivity. Because a hypothetical construct is used as a predictor in establishing this type of validity, personality tests and tests that measure other such constructs are more likely to be questioned for their legality and usefulness than other measures of validity. Consequently, construct validity is used less frequently in employment selection than the other types of validity.

## Validity Generalization

**Validity generalization** is the extension of the validity of a test with different groups, similar jobs, or other organizations. Rather than viewing the validity of a test as being limited to a specific situation and usage, one views the test as a valid predictor in other situations as well. Those advocating validity generalization believe that variances in the validity of a test are attributable to the statistical and research methods used; this means that it should not be necessary to perform a separate validation study for every usage of an employment test. Proponents particularly believe validity generalization exists for general ability tests.

Although the approach is controversial, it has been adopted by the U.S. Employment Service, a federal agency, for the General Aptitude Test Battery (GATB). Also, it has been adopted for use throughout the United States in many state and local job service offices. As more and more such jobs services adopt the approach, more detailed records of results will be available. Anyone interested in learning more about the GATB and validity generalization should contact a state job service office in a specific locale to find out how it is used.

### Validity generalization

The extension of the validity of a test to different groups, similar jobs, or other organizations.

## Summary

- Diversity, which recognizes differences among people, is growing as an HR issue.
- Organizations have a demographically more diverse workforce than in the past, and continuing changes are expected.
- Major demographic shifts include the increasing number and percentage of women working, growth in minority racial and ethnic groups, and the aging of the workforce. Other changes involve the need to provide accommodations for individuals with disabilities and to adapt to workers with different sexual orientations.
- Diversity management is concerned with advancing organizational initiatives that value all people equally regardless of their differences.
- Effective management of diversity often means that it must be differentiated from affirmative action.
- Diversity training has had limited success, possibly because it too often has focused on beliefs rather than behaviors.
- Equal employment opportunity (EEO) is a broad concept holding that individuals should have equal treatment in all employment-related actions.
- Protected classes are composed of individuals identified for protection under equal employment laws and regulations.
- Affirmative action requires employers to identify problem areas in the employment of protected-class members and to set goals and take steps to overcome those problems.
- The question of whether affirmative action leads to reverse discrimination has been intensely litigated, and the debate continues today.
- EEO is part of effective management for two reasons: (1) it focuses on using the talents of all human resources; (2) the costs of being found guilty of illegal discrimination can be substantial.
- Disparate treatment occurs when protected-class members are treated differently from others, whether or not there is discriminatory intent.

- Disparate impact occurs when employment decisions work to the disadvantage of members of protected classes, whether or not there is discriminatory intent.
- Employers must be able to defend their management practices based on bona fide occupational qualifications (BFOQ), business necessity, and job relatedness.
- Retaliation occurs when an employer takes punitive actions against individuals who exercise their legal rights, and it is illegal under various laws.
- The 1964 Civil Rights Act, Title VII, was the first significant equal employment law. The Civil Rights Act of 1991 altered or expanded on the 1964 provisions by overturning several U.S. Supreme Court decisions.
- The Civil Rights Act of 1991 addressed a variety of issues, such as disparate impact, discriminatory intent, compensatory and punitive damages, jury trials, and EEO rights of international employees.
- The Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) are the major federal equal employment enforcement agencies.
- The 1978 Uniform Guidelines on Employee Selection Procedures are used by enforcement agencies to examine recruiting, hiring, promotion, and many other employment practices.
- Under the 1978 guidelines, two alternative compliance approaches are identified: (1) no disparate impact and (2) job-related validation.
- Job-related validation requires that tests measure what they are supposed to measure (validity) in a consistent manner (reliability).
- Disparate impact can be determined through the use of the 4/5ths rule.
- There are three types of validity: content, criterion-related, and construct.
- The content-validity approach is growing in use because it shows the job relatedness of a measure by using a sample of the actual work to be performed.
- The two criterion-related strategies measure concurrent validity and predictive validity. Whereas predictive validity involves a “before-the-fact” measure, concurrent validity involves a comparison of tests and criteria measures available at the same time.
- Construct validity involves the relationship between a measure of an abstract characteristic, such as intelligence, and job performance.

## Review and Discussion Questions

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1. Discuss the following statement: “U.S. organizations must adjust to diversity if they are to manage the workforce of the present and future.”
2. Explain why diversity management represents a much broader approach to workforce diversity than providing equal employment opportunity or affirmative action.
3. Regarding the affirmative action debate, why do you support or oppose affirmative action?
4. If you were asked by an employer to review an employment decision to determine if discrimination had occurred, what factors would you consider, and how would you evaluate them?
5. Why is the Civil Rights Act of 1991 such a significant law?
6. Why is the job-related validation approach considered more business-oriented than the no disparate impact approach in complying with the 1978 Uniform Guidelines on Employee Selection Procedures?
7. Explain what validity is and why the content validity approach is growing in use compared with the criterion-related and construct validity approaches.

## Terms to Know

4/5ths rule 163	correlation coefficient 166	protected class 150
affirmative action 151	criterion-related validity 166	reliability 165
bona fide occupational qualification (BFOQ) 161	disparate impact 161	retaliation 162
business necessity 161	disparate treatment 161	reverse discrimination 151
concurrent validity 167	diversity 142	validity 165
construct validity 168	equal employment opportunity (EEO) 150	validity generalization 169
content validity 166	predictive validity 168	

## Using the Internet



### Defining and Managing Workplace Diversity

Imagine that you are the training and development manager at a company with a very diverse workforce. Some tension among employees has been noticed by the senior-level staff. They believe the organization is in need of some diversity training and have asked you to develop the program. They have posed several questions to you.

Using the following website, answer their questions.  
**<http://www.aphis.usda.gov/mb/wfd/>**

1. Name five items contributing to diversity not including gender, sex, or national origin.
2. Give examples of the four layers of diversity.
3. What can we do to take full advantage of diversity in organizations?

## CASE

### Hooters

Hooters is a company that has staffed its restaurants with attractive women, known as Hooters Girls. The uniforms of the Hooters Girls consist of short shorts, tank tops or half-shirts, and suntan-colored hose. In approximately 150 Hooters restaurants, the food staff was virtually all female, and males tended to be hired into kitchen, cook, or “back-room” jobs. Many women’s groups criticized the “blatant sexist” appeal used at Hooters restaurants to attract and entertain customers.

Meanwhile, employment practices at Hooters caused enough concern that the EEOC began an intensive investigation of Hooters. The EEOC concluded that Hooters was violating EEO laws and regulations by refusing to hire men as wait staff, bartenders, and hosts. Hooters and the EEOC held initial discussions in which the EEOC demanded the following:

- Hooters would establish a fund estimated at over \$22 million for men who had been denied employment. Any male who claimed to have applied for one of the “female-designated” jobs would be entitled to up to \$10,000.
- Hooters would run newspaper ads inviting males to file claims and encouraging them to apply at Hooters.
- Hooters henceforth would be guilty of violating EEO laws anytime the number of men hired fell below 40% of the total hiring rate.
- Hooters would discontinue using the Hooters Girls in advertising, to avoid discouraging males from applying for jobs.
- Hooters would provide sensitivity training to teach Hooters employees how to be more sensitive to men’s needs.

Hooters rejected the EEOC demands and ran full-page ads in many newspapers showing a burly, mustached man—wearing a blond wig, tank top, short shorts, and tennis shoes. In one hand the man was holding a plate of chicken wings, and in the other a sign saying, “Washington—Get a Grip.” Specifically in response to the EEOC, Hooters’ legal counsel stated that “The business of Hooters is predominantly the provision of entertainment, diversion, and amusement based on the sex appeal of the Hooters Girls.” Hooters felt the EEOC was being so unreasonable that it decided to take the offensive.

Ultimately, the EEOC’s position was rejected. Therefore, Hooters was allowed to continue hiring attractive young women for its waitstaff and other customer-contact jobs.<sup>27</sup>

## Questions

1. Make the argument that selecting only attractive women is a violation of EEO.
2. When is an approach like Hooters’ aggressive response to the EEOC’s demands likely to be effective, and when might it backfire?

## Notes

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15. The authors acknowledge the assistance of Christina Harjehausen in structuring the content of the debate on affirmative action.
16. *Bakke v. the University of California*, 109 S.Ct. (1978); and *Hopwood v. State of Texas*, 78 F.3d 932 (1996).
17. Steven A. Holmes, “FCC Rule on Hiring Minorities Tossed Out,” *The Denver Post*, April 15, 1998, 1A.
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19. Civil Rights Act of 1964, Title VII, sec. 703a.
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21. Leon G. Wynter, “Business and Race,” *The Wall Street Journal*, July 1, 1998, B1.
22. Based on Linda Micco, “EEOC Under Congressional Pressure, Suspends Use of Testers,” *HR News*, September 1998, 15; and Rochelle Sharp, “EEOC Backs Away from Filing Race-Bias Suit in Face of Congressional Opposition to Testers,”

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