

Overview & Update on Employment Law

The 30th International Congress on Assessment Center Methods

Jim Sharf

- **Employment Decision “Risk” History**
- **Defining An “Applicant”**
- **Testing, Assessment & Appraisal
Litigation**

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Conventional wisdom holds employment tests risky –

- **In the 1970s and '80s, conventional wisdom held that the use of employment tests was “risky” behavior likely to invite employment litigation. In 1971, the Supreme Court’s Griggs decision tossed out Duke Power’s use of both a high school diploma requirement and minimum scores on a cognitive ability test on grounds that both the test and diploma requirements had “*disparate impact*” on minorities.**

Role of Lawyer as Advocate

American Bar Assn, Code of Professional Responsibility

- **Subjective in choice of most favorable precedents to further client's interests**
- **Willfully biased in advocating most favorable “theory of law” to further interests of client**
- **INDUCTIVE in his thinking in dealing with court precedents**
- **Motivated by desire to win (gain favorable decision for client)**
- **Demands Yes/No, Right/Wrong answers**
- **Impatient with tentative nature of behavioral research and takes advantage of differing opinions to advantage of client.**

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Role of Psychologist as Behavioral Scientist (Ethical Standards of Psychologists)

- **Objective in full disclosure of data**
- **Uncompromising in seeking broad principles governing human behavior**
- **DEDUCTIVE in thought processes seeking to gain knowledge and explanations derived from broad generalizations**
- **Motivated by the need to explain and predict**
- **Impatient with Yes/No, Right/Wrong answers**
- **Has difficulty in making unequivocal statements on findings given professional constraints of judgment, caution and modesty**

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Theories of Discrimination

“Disparate Impact” (Civil Rights Act of 1991)

- **Used to allege discrimination when challenging use of objective assessments (i.e., patterned interviews, assessment centers and pencil & paper tests)**
- **Argued before a judge (twice as favorable for employer)**
- **“Make whole” award**

Theories of Discrimination

“Disparate Treatment”

- **Used to challenge subjective, non-standardized assessments (i.e., clinical judgments & casual interviews) by alleging the employer intentionally treated similarly situated people differently with regard to a prohibited classification (race, sex, etc.).**
- **Argued before a jury**
- **“Make whole” award + Punitive & Compensatory Damage\$**

Employment Testing Makes A Comeback—

- **Times have changed. In the 1990s, the use of objective assessment procedures including demonstrably “job related” employment tests turned out to be a highly effective risk management strategy for minimizing employment litigation.**
- **A 1997 American Management Association survey of employers’ assessment practices revealed that one employer in three is now using cognitive ability tests.**

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Frequency of Psychological Testing

AMA Members, 1996

Testing Type	Applicants	Employees	Appls. and/or Employees	Percents
No psych. Testing	--	--	506	55.8
Any psych. Testing	320	277	440	44.2
Cognitive Ability Test	236	137	253	27.9
Managerial assessment	145	120	183	20.2
Personality instrument	152	94	175	19.3
Physical ability test	105	53	118	13.0
Interest Inventory	70	70	101	11.1
Total	--	--	946	100.0

Source: 1997 American Management Association Survey: Workplace Testing and Monitoring Table PSY, Table AIS4

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Why this sea change in the use of employment tests?

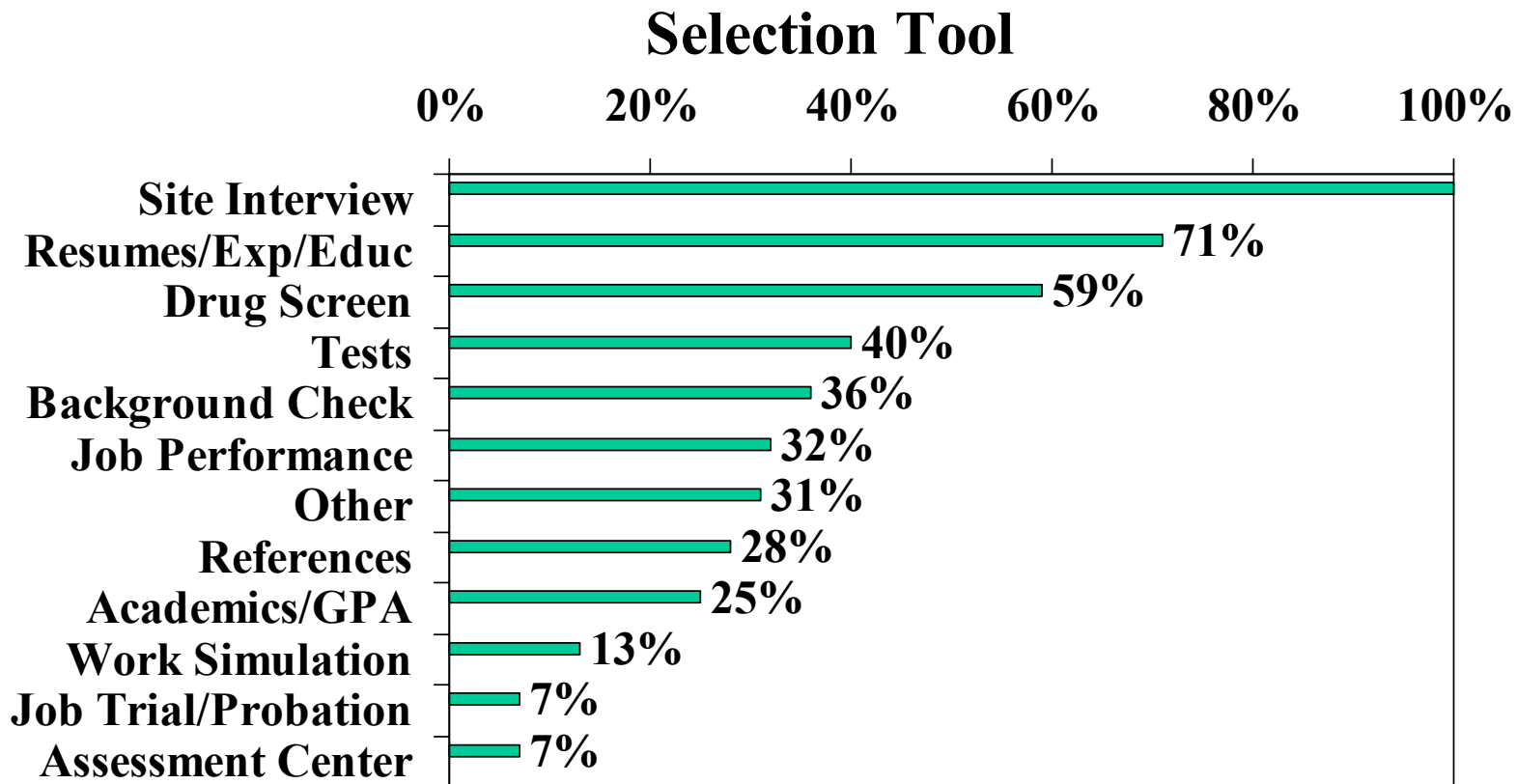
Industrial psychologists have been able

- to show conclusively that valid employment testing improves organizational productivity (i.e., is “job related”)**
- to prove in court that a validation study successfully rebuts a “disparate impact” claim of employment discrimination. Professional credentials and expert testimonials alone are not “probative” in rebutting “disparate impact” charges. However, a validity study is.**

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Objective Measures Used by 40% of Surveyed Fortune 100 Employers



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Employment Discrimination Litigation Trends

Between 1988 and 1998 class actions
increased:

- 338% in Federal Courts
- Over 1000% in State Court

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How to Profile Employment Decision Risks—

Employment testing doesn't even show up on the U.S. Equal Employment Opportunity Commission's radar. Of the more than eighty-thousand employment discrimination charges that were filed with EEOC in a recent year:

- 206 challenged employment tests (0.3%)**
- 6,244 that challenged interviews (7.7%)**

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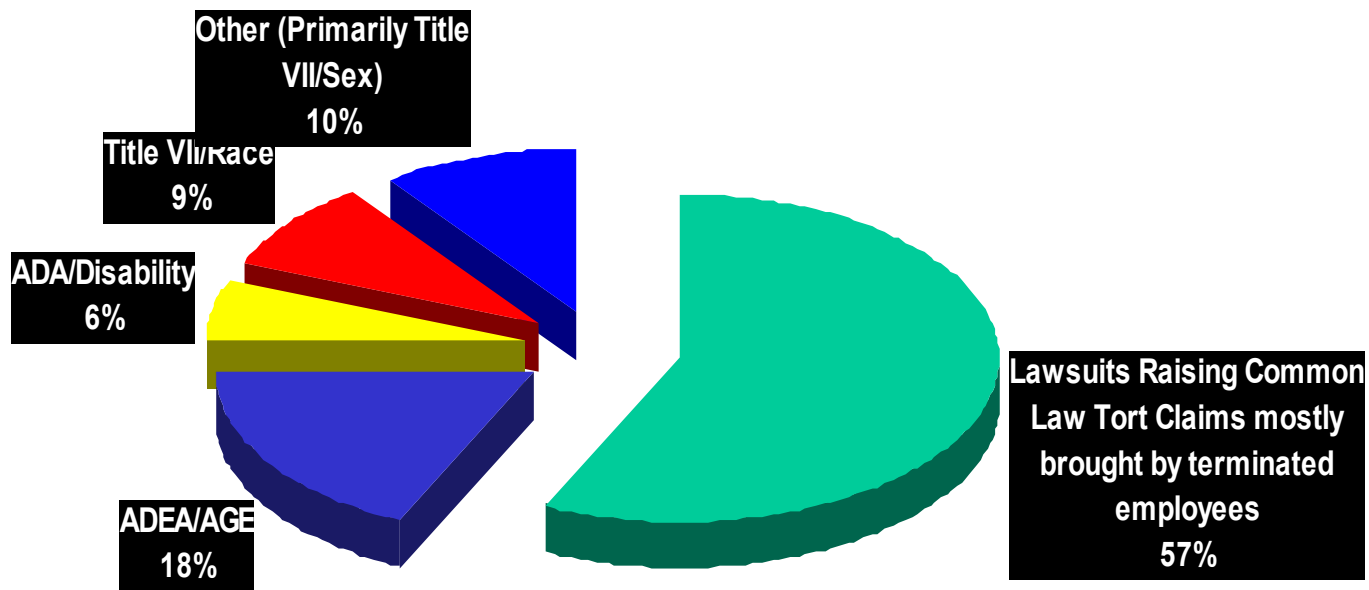
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- **In the absence of an objective employment decision-making process, the challenged employer goes to jury trial to defend “disparate treatment.” Plaintiffs win “disparate treatment” cases twice as often before a jury (44%) compared with their success rate arguing “disparate impact” at a “bench trial” before a judge (22%).**
- **Awards under both “impact” and “treatment” claims involve “make whole” contract damages (back pay). Award available under “disparate treatment,” however, include considerably more costly “pain & suffering” and “punitive” damages which are capped at between \$50,000 and \$300,000 per individual depending on the size of the employer.”[\[1\]](#)**

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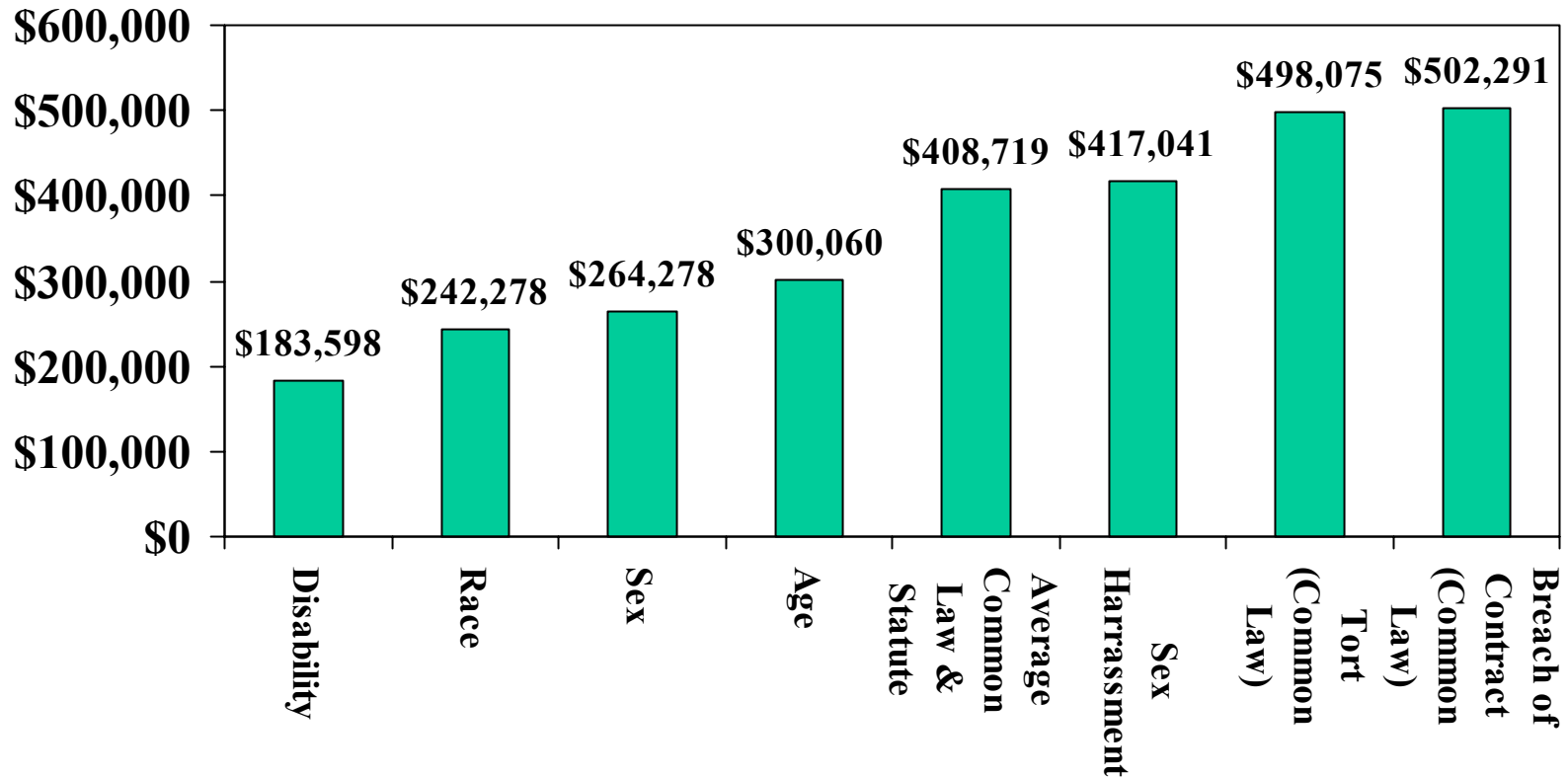
Proportion of Employment Claim Based on Federal Statues and Common Law, 1989-1995



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Basis of Average Jury Verdicts for Winning Plaintiffs, 1988-1995



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“Applicant” Defined by OFCCP (1979)

“The precise definition of the term ‘applicant’ depends upon the user’s recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion or other employment opportunities.”

Federal Register (March 2, 1979), 44(43).

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OFCACP: Executive Order 11246

- **OFCACP has proposed obligating federal contractors to identify the race and sex of everyone who either expressed interest in the employer via the Internet or whose resume is part of an electronic database queried by an employer.**

IF E.O. 11246 Changed

- **The difference of distinguishing between an “interested person” and a “qualified applicant” for record-keeping purposes is likely the difference in order of magnitude (hundreds versus thousands) when a class action of aggrieved e-applicants is certified by the court.**

Digital Applicant

- **No more paper applications (both external AND internal)**
- **Anyone interested must attach e-resume to each open position**
- **Keep them all OR toss them all**
- **Voluntary EEO self-ID**

HR Magazine (Sept. 2002), p.111-119.

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DIGITAL DIVIDE

- **People with a college degree are eight times more likely to have a PC at home and 16 times more likely to have Internet access at home than those with an elementary school education.**
- **A high-income household in an urban area is 20 times more likely to have Internet access than a rural, low-income household.**
- **A child in a low-income white family is three times more likely to have Internet access than a child in a comparable black family, and four times more likely than if he were Hispanic.**

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DIGITAL DIVIDE

- **A wealthy household of Asian descent is 34 times more likely to have Internet access than a poor black household.**
- **A child in a two-parent white household is twice as likely to have Internet access as a child in a single-parent household. If the child is black, he is four times more likely to have Internet access than his single-parent counterpart.**
- **Disabled people are nearly three times less likely to have home access to the Internet than people without disabilities.**

US Department of Commerce: “Falling Through the Net”
The Economist (24/6/2000). Government and the Internet. p.24.

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- **“Goodyear Tire & Rubber Co. abandoned a performance-rating system for salaried employees just as discrimination attorneys were planning to file a class-action lawsuit over it. Goodyear said it was dropping major parts of its program, including its so called ‘10-80-10’ feature, which essentially graded all salaried employees on a curve... Those falling in the bottom 10% weren’t eligible for raises or bonuses and were warned they might lose their job.”**

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APPRAISAL

- **”The system is similar to one developed by General Electric Co. Chairman John F. Welch Jr. and is often credited with helping him build a high-performance corporate structure.”**
- **“The lawsuit...alleges that the workers who got C ratings were humiliated and stigmatized among their peers and managers. The legal arm of the AARP, formerly known as the American Association of Retired Persons, has joined the lawsuit as co-counsel. Most of the plaintiffs are Goodyear employees who are over 50 years old and who got C rankings.”**

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APPRAISAL

- **“The lawsuit against Goodyear has many parallels to one filed last year against Ford Motor Co. In that case, also joined by the AARP, the company modified its plans in the face of a legal challenge. The Ford case was eventually settled.”**
- **“In modifying its white-collar ranking system, Goodyear said it would replace those A, B, and C rankings with the terms ‘exceeds expectations,’ ‘meets expectations,’ and ‘unsatisfactory.’ There will be no requirement to assign those rating to set percentages of employees. The company also said it was stepping up training for managers so they learn to do a better job of conducting performance reviews.”**

• Wall Street Journal (Sept.12, 2002), p.B8.

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Federal Rules of Civil Procedure

Rule 23. Class Actions

- *(a) Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) **there are questions of law or fact common to the class**, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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TESTING

ASSESSMENT

APPRAISAL

CONTENT

MEDIUM

CONTENT

Cognitive Ability

Interview

Job

Personality

Bio-Data

Performance

Knowledge

Paper & Pencil

Technical

Situational Judgment

Procedural

Work Sample

Cultural

Assessment Center

Interpersonal Skills

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SIOP g Survey: Professional Consensus

- **General cognitive ability is measured reasonably well by standardized tests.**
- **General cognitive ability will become increasingly important as the skills and knowledge required for good job performance become more complex**
- **Although cognitive ability tests are the best predictors of technical or core performance, they are not the best predictors of other facets of job performance (e.g., contextual performance)**

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SIOP g Survey: Professional Consensus

- **There is more to intelligence than what is measured by a standard cognitive ability test**
- **Tests of non-cognitive traits are useful supplement to g-loaded tests in a selection battery, but they cannot substitute for tests of g**
- **Different jobs are likely to require different types of cognitive abilities**
- **The multidimensional nature of job performance necessitates the use of both cognitive and non-cognitive selection measures**

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SIOP g Survey: Professional Consensus

- **General cognitive ability tests are fair**
- **In jobs where cognitive ability is highly important, Blacks are likely to be under represented**
- **Diversity in the workplace gives organizations competitive advantage**

Murphy, K. (in press) g survey

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SIOP Principles (2002)

Generalizing Validity Evidence

At times, sufficient accumulated validity evidence is available for a selection procedure to justify its use in a new situation without conducting a local validation research study. In these instances, use of the selection procedure may be based on demonstration of the generalized validity inferences from that selection procedure, coupled with a compelling argument for its applicability to the current situation. Although neither mutually exclusive nor exhaustive, several strategies for generalizing validity evidence have been delineated: (1) transportability, (2) synthetic validity/job component validity, and (3) meta-analytic validity generalization.

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Transportability

- One approach to generalizing the validity of inferences from scores on a selection procedure involves the use of a specific selection procedure in a new situation based on results of a validation research study conducted elsewhere. This is referred to as demonstrating the “transportability” of validity evidence for the selection procedure. When proposing to “transport” use of a procedure, a careful review of the original validation study is warranted to ensure acceptability of the technical soundness of that study and to determine its relevance to the new situation. Key points for consideration when establishing the appropriateness of transportability are, most prominently, job comparability in terms of content or requirements, as well as, possibly, similarity of job context and applicant group.

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Synthetic Validity/Job Component Validity

- A second approach to establishing generalized evidence of the validity of inferences based on scores from a selection procedure is referred to as synthetic validity or job component validity. (While some researchers distinguish these terms, others do not, and in either case several variations on each exist.) A defining feature of synthetic validity/job component validity is the justification of the use of a selection procedure based upon the demonstrated validity of inferences from scores on the selection procedure with respect to one or more domains of work (job components). Thus, establishing synthetic validity/job component validity requires documentation of the relationship between the selection procedure and one or more specific domains of work (job components) within a single job or across different jobs.

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Synthetic Validity/Job Component Validity ctd

- If the relationship between the selection procedure and the job component(s) is established, then the validity of the selection procedure for that job component may be generalizable to other situations in which the job components are comparable. The validity of a selection procedure may be established with respect to different domains (components) of work, then “synthesized” (combined) for use based on the domains (or components) of work relevant for a given job or job family. In some instances, this may involve conducting a research study designed to demonstrate evidence for the generalized validity of inferences from scores on a set of selection procedures, and then using various subsets of these procedures for selection into both jobs or job families in the original study as well as into other jobs or job families.

Synthetic Validity/Job Component Validity ctd

- **In other cases, it may involve generalizing the validity of inferences based on scores on selection procedures examined in one or more research studies conducted elsewhere to the new situation. In both cases, detailed analysis of the work is required for use of this strategy of generalizing validity evidence.**

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