

Practical Steps for Navigating a New Federal Enforcement Era: Building Legally Defensible Employment Decisions

Presented by:

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Today's Agenda

Shifting Legal Landscape



Trump Executive Orders



EEO, Anti-Discrimination, & DEI Risk



EEO, Anti-Discrimination, & DEI Compliance Toolkit



Remote Work & Accommodations



H-1B Considerations



Selections & Exits/Performance & Pay

A stylized world map with landmasses in light beige and oceans in light blue. The map is centered on the Atlantic Ocean, showing North and South America on the left and Europe, Africa, and Asia on the right.

Shifting Legal Landscape

Existing Federal EEO Law Remains Unchanged

- Title VII, Section 1981 and Equal Protection HAVE NOT CHANGED
- EEO laws *prohibit making employment decisions in whole or in part based on protected characteristics*, including race and sex
 - Prohibit using protected characteristics as a negative or positive factor (even if not the “deciding” factor)
 - Prohibit using protected characteristics as a preference or “plus” versus others
 - Some exceptions such as voluntary affirmative action, BFOQs, etc.
- Section 1981 “offers relief when *racial discrimination blocks the creation of a contractual relationship*, as well as when racial discrimination *impairs an existing contractual relationship*, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship.”



But the Law is *Evolving*

- *Students for Fair Admissions*
- *Fearless Fund*
- *Muldrow*
- *Ames*
- *Skrmetti*
- *Loper Bright*
- *Obergefell, Lawrence and Loving next?*
- State and local protections both receding & expanding

Expansion of What is Actionable under Title VII

- Lateral transfer involving a move*
- Suspension without pay*
- Suspension with pay
- PIP and unfavorable performance rating
- Requiring work on holidays
- Requiring training not required of others or lack of training
- Changing a work schedule without notice
- Failing to respond to emails or show up for 1:1 meetings

What's the Impact on Employers?

- Federal agency enforcement focus has shifted
- More and different types of claims pursued based on priorities
- Stating and proving claims easier
- Name/shame and overwhelm
- More public, leaked and multi-faceted investigations
- Enhanced risk to federal contractors and money recipients
- Private lawsuits uptick from single plaintiff and class/collective firms
- State agency filings and state law claims filling the gap

Why More Claims Survive

- Doctrinal shifts lowering the bar
- Agency and plaintiff playbook
 - EEOC systemic/”pattern and practice”
 - DOJ’s FCA use strengthens settlement leverage
 - State law and private class/collective will fill gaps
- Procedural dynamics favoring survival
 - Expect better pleading with data points, policy documents, etc.
 - Inconsistent or incomplete documentation will result in more courts finding material facts on comparators, intent and impact
 - Evidence trends that carry claims past early stages
- What this means
 - More claims and class issues
 - Increase in defense costs and business disruption

A stylized world map with landmasses in light beige and oceans in light blue. The map is centered on the Atlantic Ocean, showing North America, South America, Europe, and Africa.

Trump Executive Orders ...

Level Set on Executive Orders

- Executive Orders (EO) are NOT laws
- EOs do not NOT change existing federal law
- EOs are directives issued by the President that manage the operations of the federal government
- EOs direct federal agencies on how to interpret and implement existing federal law
- EOs are subject to judicial review
- EOs can be overturned on legal grounds



EOs by the Numbers

- 210 Executive Orders issued as of October 16, 2025
- 100 proclamations and 54 memoranda
- More than 470 legal challenges
- Legal challenge/injunction trackers (Bloomberg, JustSecurity.org, etc.)
- Wide subject matter distribution

presidential power Medicare FEMA foreign affairs transportation reproductive health elections civil rights education
environment trade food police cyber security health childcare housing immigration labor reproductive rights unions media census
energy student loans reorganization personnel DEIA Medicaid staffing economy accountability intel LGBTQIA FAA criminal justice
defense public assistance technology TSA aid taxes

EO 14173 – “Ending Illegal Discrimination & Restoring Merit-Based Opportunity”



“Private sector” employers is not defined but seemingly includes any employer subject to U.S. non-discrimination laws; can include:

Federal contractors
Federal grant recipients
Employers with no federal business (contracts or grants)



Within 120 days, the Attorney General will create strategic enforcement plans identifying targets for “illegal” DEI in private sector



Identify key sectors of concern, most “egregious” DEI practitioners in each sector, specific measures to deter “unlawful” DEI, up to 9 civil compliance investigations, and strategies to encourage ending “illegal” DEI, including litigation and regulation

The EO 14173 Certification Requirement

[T]he head of each agency “shall” include in every contract or grant award:

“A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with *all applicable Federal anti-discrimination laws* is material to the government’s payment decisions for purposes of section 3729(b)(4) of title 31, United States Code.”

“A term requiring such counterparty or recipient to certify that it *does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.*”

Executive Order 14281 – Restoring Equality of Opportunity and Meritocracy



All executive agencies should de-prioritize enforcing statutes and regulations with disparate impact, including Title VII.



Attorney General

Repeal or amend regulations on disparate-impact under Title VII

Report to White House by May 23 on regulations with repeal suggestions

Review all consent judgments/injunctions by July 22 for action

Assess if federal laws preempt state disparate-impact laws and act accordingly



Attorney General and acting EEOC Chair

Review all ongoing investigations, civil suits, and matters based on disparate-impact theory and take necessary action

Provide guidance to employers on promoting equal employment access regardless of an applicant's education background

A stylized world map in the background, with landmasses in a light beige color and oceans in a light blue color. The map is centered on the Atlantic Ocean.

EEO, Anti-Discrimination, & DEI Risk

Department of Justice – Enforcement

- Civil Fraud Initiative announced May 19th
- False Claims Act (**criminal and treble civil damages**) to enforce federal antidiscrimination laws

The Department recognizes that it alone cannot identify every instance of civil rights fraud. Congress likewise has ... authorized private parties to protect the public interest by filing lawsuits and **litigation** claims under the False Claims Act—and, if successful, sharing in any monetary recovery. The Department strongly encourages these lawsuits.”

Todd Blanche, Assistant Attorney General of the United States



U.S. Attorney General – Enforcement Plan

- *Oral Arguments – National Association of Diversity Officers in Higher Education v. Trump*
 - DOJ to Fourth Circuit: “I learned that the report was in fact provided to the President back in June.”
- DOJ - Civil Investigative Demands
- 2019 or 2020 to present
 - Hires, Promos, Terms, Compensation
 - Pay Equity
 - Goals or metrics with race/gender/sex
 - Many more data/document requests

EEOC – Trump 2.0 Enforcement Priorities

“Rooting out unlawful DEI-motivated race and sex discrimination;

protecting American workers from anti-American national origin discrimination;

defending the biological and binary reality of sex and related rights, including women’s rights to single-sex spaces;

protecting workers from religious bias and harassment; and

remediating other areas that have been historically under-enforced by the agency.”

EEOC – Enforcement

- “Technical” quorum established October 3, 2025
- **“Notable” and “large-scale” systemic focus is coming**
- “Employers should take care *not to conflate disparate impact claims* arising from neutral employment practices with a materially different type of Title VII claim: *intentional discrimination* claims proven via the ‘*pattern or practice*’ ... which may entail the *use of statistical evidence*, along with other evidence, to *prove disparate treatment*” –
Acting Chair Andrea Lucas



EEOC's Successful Systemic FY2024 Enforcement Activity

Background checks

Denying women jobs in fields such as truck drivers, dockworkers, laborers

Refusal to hire African American, Hispanics and older workers for front of the house positions

Ending staffing agency use of referring applicants based on customer preferences

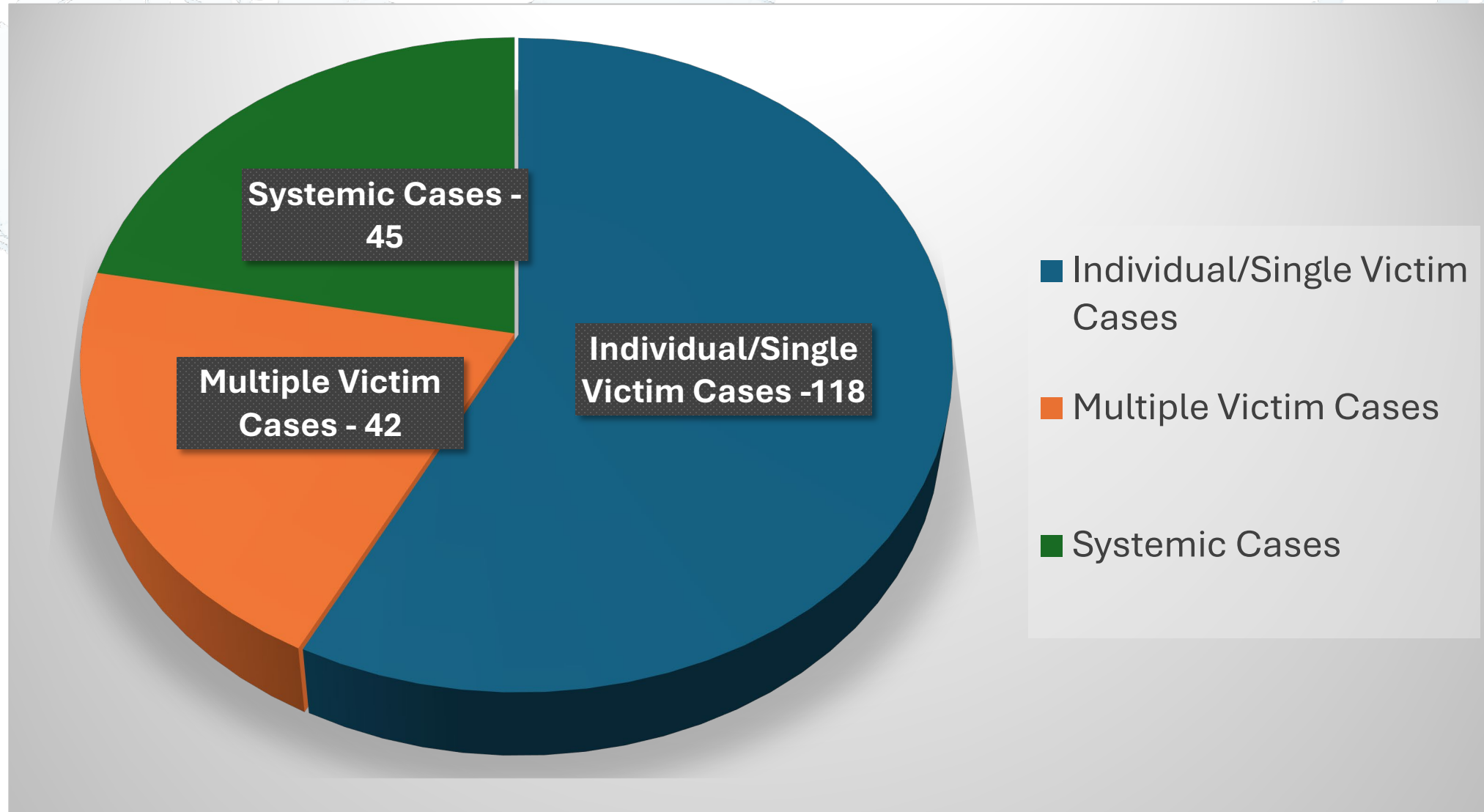
Widespread sexual harassment of teenagers in fast food chains

Racially hostile displays such as nooses and racist graffiti

Eliminating tap on the shoulder recruiting in favor of job posting

Challenging policies of issuing attendance points for medical related absences, without accounting for disabilities

EEOC's FY 2024 Active District Court Cases



EEOC's Strategic Enforcement Plan (24-28)

Systemic Docket Priorities



- Classic Focus Areas
 - Hiring and recruitment barriers
 - Multi-Site Harassment
 - Equal Pay
 - ADA/PWFA Accommodations

The New EEO Litigation Pipeline

- Hot fact patterns -
 - Selections/hiring
 - Multi-site harassment
 - Religious Liberty
 - Equal Pay
 - PWFA/ADA accommodation
 - DEI disparate treatment
- EEOC systemic + private class/collective + state-law overlays
- Cost driving remedies –
 - Injunctive terms, monitors, data reporting, training mandates, plus back/front pay

The DEI Litigation Bridge – EO to FCA

- EO 14173 certifications make anti-discrimination compliance “material” to payment decisions
- False Claims Act exposure: DOJ civil fraud initiative + qui tam filings leveraging DEI/program materials
- Parallel risk: Title VII/ADA suits + agency inquiries + FCA claims from the same conduct
- What becomes evidence: goals vs. quotas language, “plus-factor” phrasing, training decks, metrics, vendor statements

A stylized world map with light blue oceans and light yellow landmasses. The map is centered on the Atlantic Ocean, showing North and South America on the left and Europe and Africa on the right.

EEO, Anti-Discrimination, & DEI Compliance Toolkit

Turning Policies into Proof: Discovery Targets in EEO Cases

- What becomes evidence: written criteria, comparator files, calibration notes, interview guides, and disposition codes aligned to decisions.
- Systems trail: ATS/HRIS audit logs, workflow timestamps, and versioned job descriptions that show consistent application.
- Pay and accommodations: comp architecture, leveling rubrics, request logs, interactive process notes, and undue hardship analyses.
- Consistency and data hygiene: tie each chosen candidate to documented, job-related criteria; avoid post-hoc rationales.
- Privilege and preservation: segregate counsel-directed audits, memorialize business fixes separately, and issue holds early.

Lenses of Review



Lens 1:

Existing law, including Title VII and state/local analogues

Lens 2:

Your organization's risk tolerance based on lenses 1 and 3, plus other factors

Lens 3:

Trump administration's and federal agencies' priorities, including EEOC, DOL, and DOJ

Creating Your EEO, Anti-Discrimination and EEO Compliance Toolkit

- *All* employment decisions
 - Establish objective criteria
 - Document all decisions and actions
 - Continue to collect race/ethnicity and gender data
 - Leverage Applicant Tracking System capabilities
 - Outline each stage of selection process and document accordingly
 - Ensure disposition reasons align with business and legal needs
 - Maintain all data
 - Test data to identify and mitigate risk

Potential Barriers in Employment Life Cycle

Recruitment

Selection

Compensation

**Career
Development**

Performance

**Career
Advancement**

Retention

Separation

Remote Work

Accommodations

**Anti-American
Bias – H-1B
Preferences**



A stylized world map with a light blue background. The landmasses are depicted in a light cream or off-white color. The map is centered on the Atlantic Ocean, showing North and South America on the left and Europe, Africa, and Asia on the right.

Remote Work and Accommodations

Approval Analysis

[← Landing Page](#)

Performance

Tenure Analysis

Approval Analysis

Disparity Analysis

Establishment

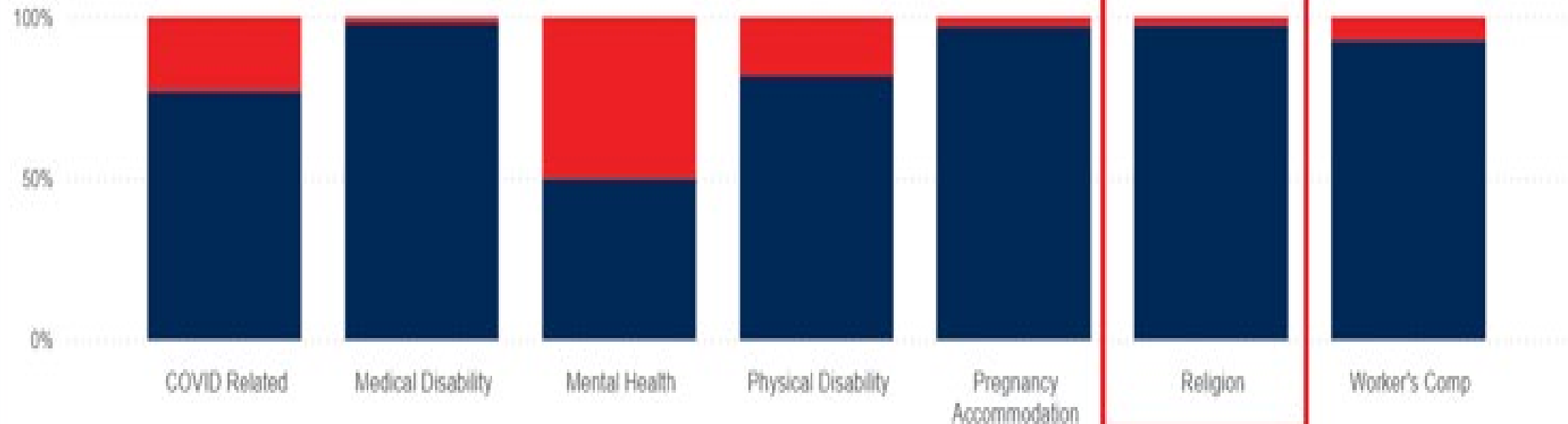


All



Disability Approval Rates

Approved/Denied ● Approved ● Denied



Disparity Analysis

Sex

Race

Clear Selections

Performance

Tenure Analysis

Approval Analysis

Disparity Analysis

Analysis Group

- Select all
- LOA
- Medical Accomodation
- Physical
- Remote Work
- Work Schedule
- Workplace Accommo...

Analysis Group

All

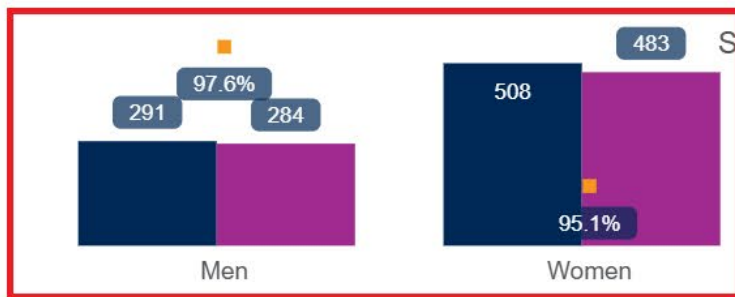
Analysis Group
Selection Rate

96.0%

Number of Impacted
Groups in Analysis Group

2

● Pool ● Approvals ■ Selection % Approvals



▲ 2.5%

Selection % Difference

98%
96%
94%

Flagging Groups

Analysis Group	Favored Group	Adversely Impacted Group	Pool	Approvals	Shortfall	Std Dev
Medical Accomodation	White	Hispanic	4	3	0	-2.95
Remote Work	Men	Women	72	52	3	-2.15

Pool By Sex

Men 291 (36%)

Women
508 (64%)

Approval Rate by Sex

Men 284 (37%)

Women 483 (63%)

A stylized world map with a light blue background. The landmasses are depicted in a light beige or cream color. The map is centered on the Atlantic Ocean, showing North and South America on the left and Europe and Africa on the right.

Anti-American Bias – H-1B Considerations

Summary Statistics

Regression Results

t-test Results

Meta Analysis

Year Over Year

Software Engineers

54.2%

Adjusted R-Squared

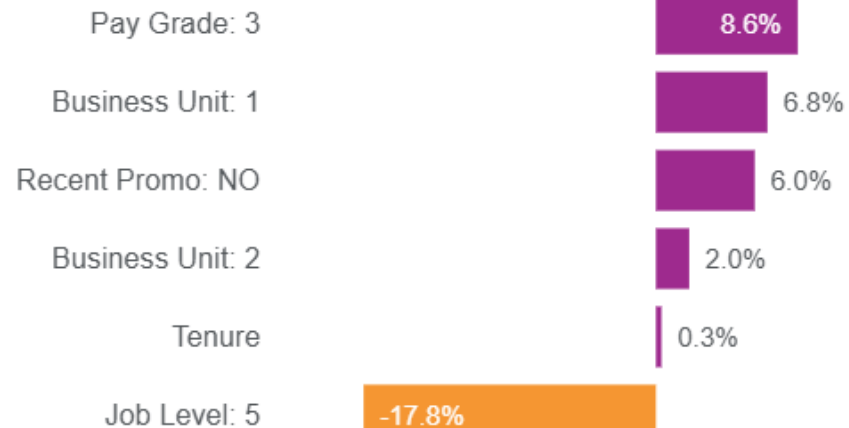
Yes

Flag

Flagging Groups

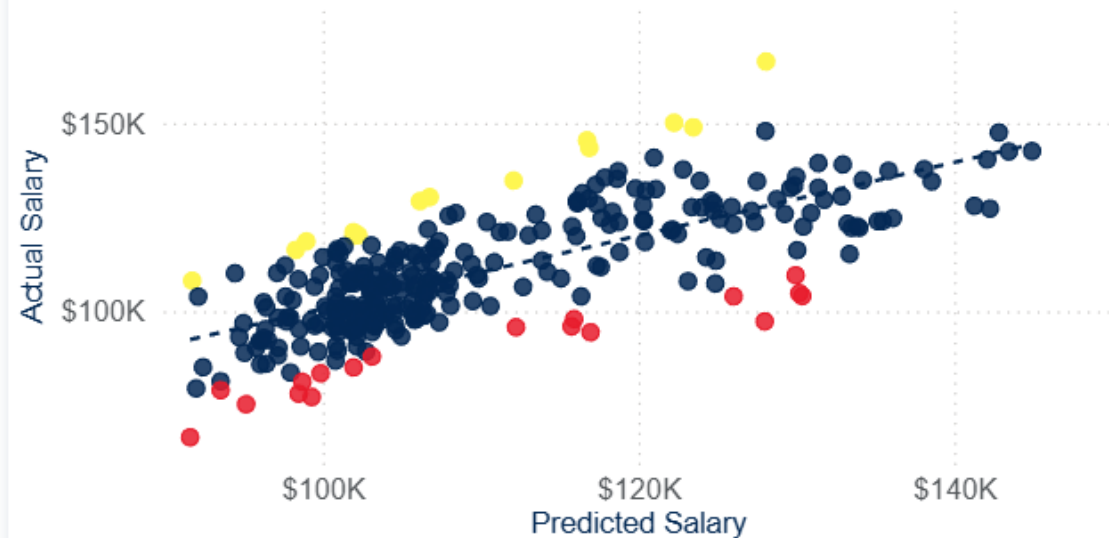
Favored Group	Impacted Group	p-Value	Adjusted Difference
H1B	No H1B	0.017	\$3,616

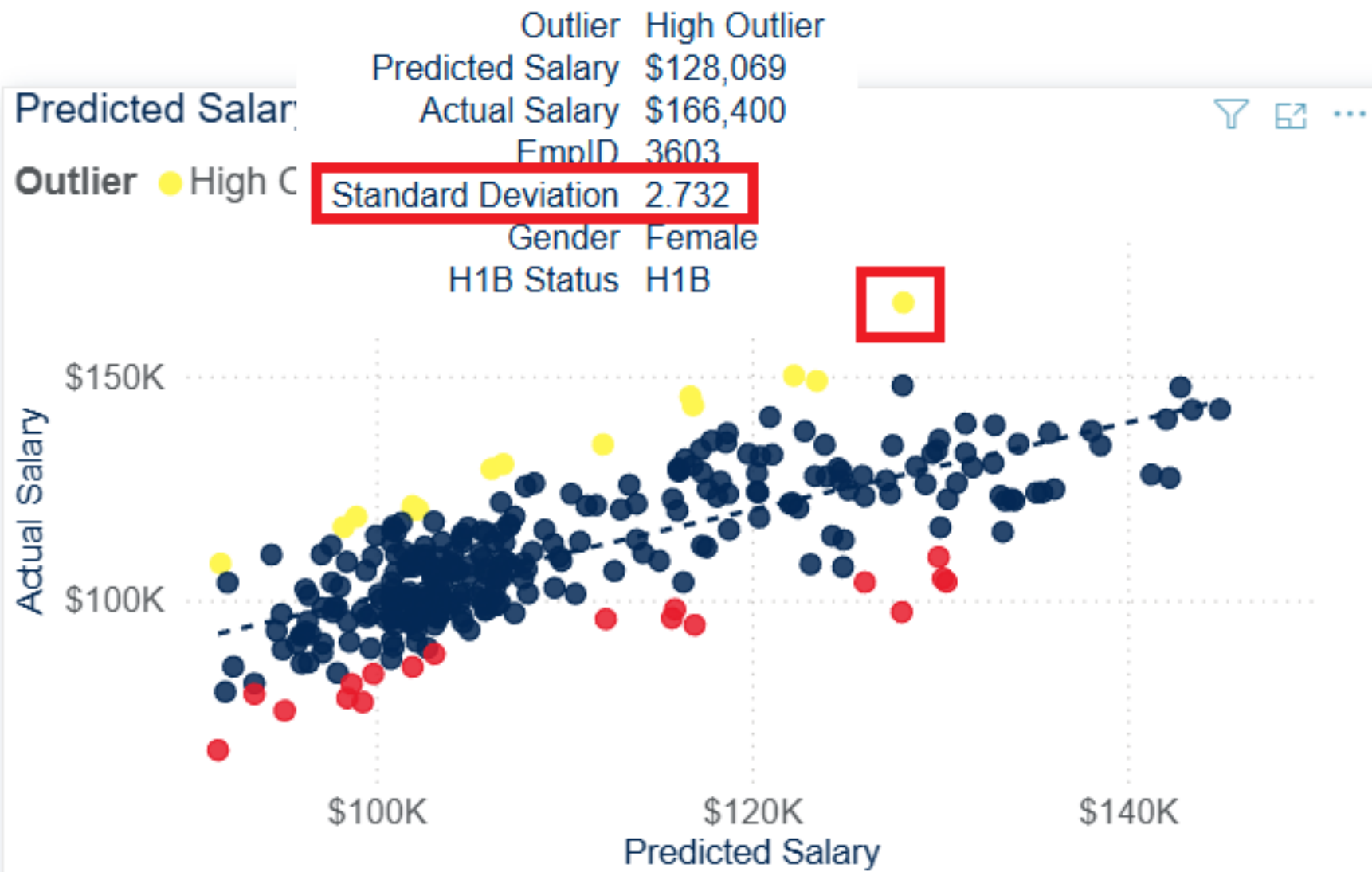
Coefficients



Predicted Salary v. Actual Salary

Outlier ● High Outlier ● In Range ● Low Outlier





A light blue and white world map serves as the background for the slide. The continents are outlined in white against a light blue ocean. The text is centered over the Atlantic Ocean.

Selections Performance Terminations Compensation

Client - Workforce Intelligence Platform

Attorney-Client Privileged Work Product

Interactive Buttons

Summary / Overview

Legally Recommended Pool

Career Progression & Compensation

Pay Gap Analysis

Pay Outlier Analysis

Pay Statistical Analysis

Tenure Analysis

Promotion & Competitiveness

Internal Selections Disparity Analysis

Competitive / Non-Competitive Analysis

Time to Promotion

Hiring & Recruitment

External Selections Disparity Analysis

Disposition Analysis

Stage Analysis

Separations & Exits

Separations & Exits Disparity Analysis

Involuntary / Voluntary Analysis

Termination Reason (Dev)

Performance & Representation

Performance Distribution

Summary

Legally Recommended...

Pay Analysis

Pay Outlier Analysis

Pay Statistical Analysis

Tenure Analysis

Internal Selections -...

Time to Promotion

Hires Disparity Analysis

Stage Analysis (Summary)

Stage Analysis (Results)

Disposition Analysis

Terminations Disparity...

Performance Distribution

Business Unit

☐ A1☐ C1☐ C2☐ S1☐ T1

Selected Business Unit

ALL

Average TTP (Years)

3.2

Number of Flags

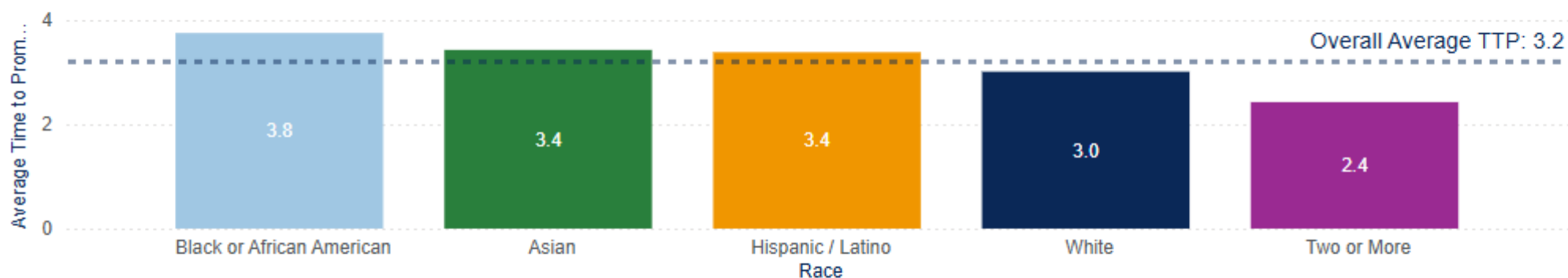
0

Race

Sex

Average Time to Promotion by Race

Race ● Black or African American ● Asian ● Hispanic / Latino ● White ● Two or More



Business Unit	Protected Class	Impacted Group	Favored Group	Flag	TTP_Impacted	TTP_Favored	Difference in Averages	Standard Deviation
C1	Race	Hispanic	White		5.70	4.19	1.51	-1.48
A1	Race	White	Hispanic		2.75	2.33	0.42	-1.35
C2	Race	Asian	White		3.08	2.76	0.33	-1.30
T1	Race	Asian	Black		3.22	2.39	0.83	-1.30
S1	Race	Two or More	Hispanic		3.42	2.39	1.03	-1.24
C2	Race	Asian	Hispanic		3.08	2.67	0.42	-1.04
T1	Race	Asian	Hispanic		3.22	2.67	0.55	-1.00
C2	Race	Asian	Two or More		3.08	2.39	0.69	-0.96

Landing Page

Summary

Legally Recommended...

Pay Analysis

Pay Outlier Analysis

Pay Statistical Analysis

Tenure Analysis

Internal Selections -...

Time to Promotion

External Selections...

Stage Analysis (Summary)

Stage Analysis (Results)

Disposition Analysis

Terminations Disparity...

Performance Distribution

Race

Sex

Business Unit

☐ A1☐ C1☐ C2☐ S1☐ T1

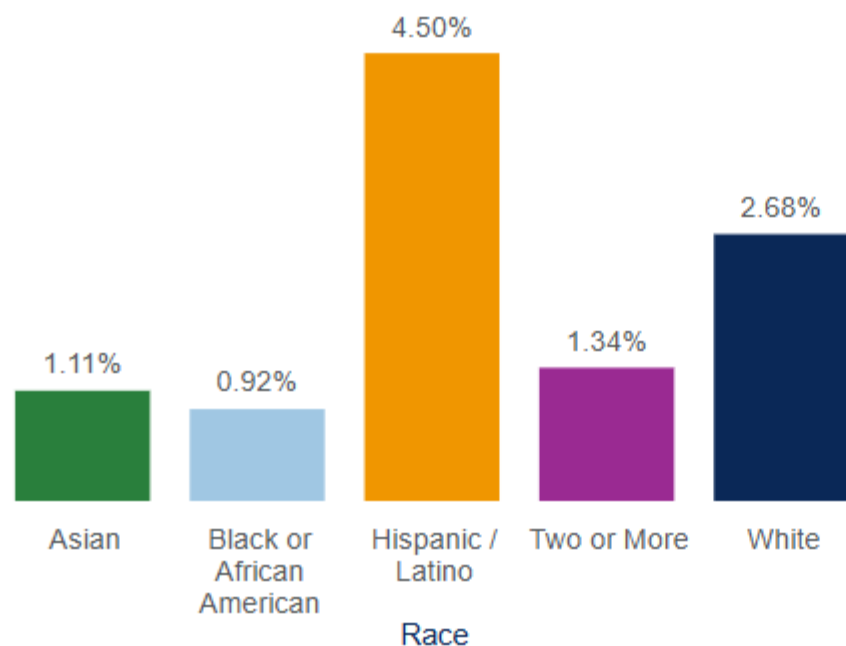
Job Requisition

Search

☐ 1013422☐ 1015984☐ 1030156☐ 1030415☐ 1030628☐ 1030629☐ 1030632

Business Unit	Analysis Group	Favored Group	Adversely Impacted Group	Incumbents	Hires	Shortfall	Std Dev
S1	1260943	Hispanic	Asian	375	0	0	-2.92
C2	1423700	Hispanic	White	29	0	0	-2.23
C2	365961	Asian	White	50	1	3	-2.13
A1	1030629	Hispanic	White	78	0	0	-2.09
C2	659686	Black	Asian	34	0	0	-2.09
A1	1030632	White	Asian	322	0	0	-2.03
C2	564481	Hispanic	Asian	36	0	1	-2.02

Overall Selection Rate by Race



Race	Application Count	Selection Count	Selection % Hires
American Indian / Alaska Native	55	0	
Asian	5957	66	1.11%
Black or African American	2492	23	0.92%
Hispanic / Latino	1712	77	4.50%
NHOPI	14	0	
Not Disclosed	2087	0	
Two or More	523	7	1.34%
White	4925	132	2.68%

Business Unit / Requisition

ALL

ALL

Summary

Legally Recommended...

Pay Analysis

Pay Outlier Analysis

Pay Statistical Analysis

Tenure Analysis

Internal Selections -...

Time to Promotion

External Selections...

Stage Analysis...

Stage Analysis (Results)

Disposition Analysis

Terminations Disparity...

Performance Distribution

Business Unit

- ☐ A1
- ☐ C1
- ☐ C2
- ☐ S1
- ☐ T1

Race

- ☐ American Indian / Alaska...
- ☐ Asian
- ☐ Black or African American
- ☐ Hispanic / Latino
- ☐ NHOPI
- ☐ Not Disclosed
- ☐ Two or More
- ☐ White

Sex

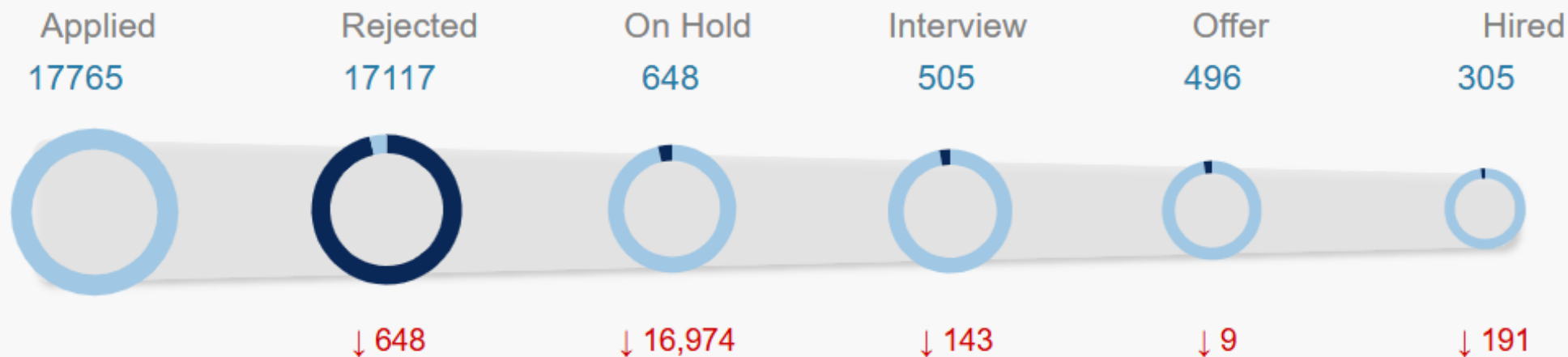
- ☐ Men
- ☐ Women

Selected Business Unit

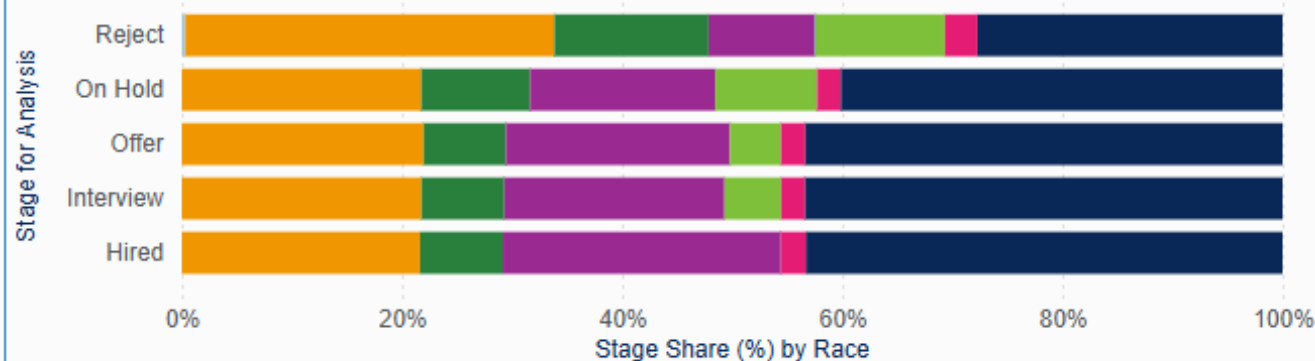
ALL

Button for additional
results

Statistical Results



Stage Share (%) by Race by Stage for Analysis and Race

Race ● American In... ● Asian ● Black or Afri... ● Hispanic / ... ● NHOPI ● Not Disclosed ● Two or ... ● White

Stage for Analysis	Men	Women
Reject	60.20%	39.80%
On Hold	56.55%	43.45%
Offer	55.70%	44.30%
Interview	55.18%	44.82%
Hired	56.39%	43.61%

Summary

Legally Recommended...

Pay Analysis

Pay Outlier Analysis

Pay Statistical Analysis

Tenure Analysis

Internal Selections -...

Time to Promotion

External Selections...

Stage Analysis (Summary)

Stage Analysis (Results)

Disposition Analysis

Terminations Disparity...

Performance Distribution



Usage Metrics



Disposition Tree

Selected Business Unit

ALL

Business Unit

☐ A1☐ C1☐ C2☐ S1☐ T1

17765

Total Dispositions

17765

Allocated Dispositions

0

Non Allocated

47

Number of Distinct Dis...

Disposition Usage by Motives Code

Experienced - Rejected - More qualified applicant selected

42.84%

Experienced - Does Not Meet the Required Criteria for th...

30.61%

Campus - More qualified applicant selected

8.01%

Experienced - Not considered (did not review applicant)

5.75%

Experienced - Salary expectations not aligned to position

3.87%

Experienced - Requisition Cancelled

2.83%

Hired onto this Req

1.92%

Hired to Another Plan - Hire Confirmed - Part of Replicati...

1.57%

Experienced - Rejected - Not Eligible to Work in This Cou...

1.43%

Experienced - Candidate Withdrew

1.18%

Summary

Legally Recommended...

Pay Analysis

Pay Outlier Analysis

Pay Statistical Analysis

Tenure Analysis

Internal Selections - ...

Time to Promotion

External Selections...

Stage Analysis (Summary)

Stage Analysis (Results)

Disposition Analysis

Separations & Exits...

Performance...

Business Unit

☐ Select all☐ A1☐ C1☐ C2☐ S1☐ T1

Selected Business Unit

ALL

Race

Sex

2999

No of Employees

25.5%

Below Expectations %

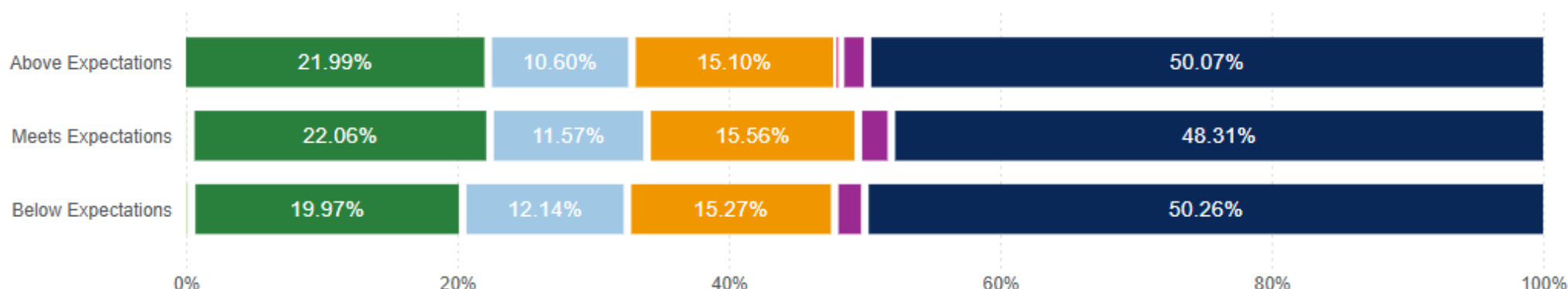
49.3%

Meets Expectations %

25.2%

Above Expectations %

Percentage of Employees By Race Group & Rating

Race ● American Indian / Alaska Native ● Asian ● Black or African American ● Hispanic / Latino ● NHOPI ● Two or More ● White

Flagging Groups

Business Unit	Analysis	Analysis Head Count	Impacted Group	Impacted Head Count	Standard Deviation
Overall	Over 60 v. Under 60	2999	Over 60	458	-2.49
C1	White v. Asian	630	White	454	-2.24

[← Landing Page](#)[Summary](#)[Legally Recommended...](#)[Pay Analysis](#)[Pay Outlier Analysis](#)[Pay Statistical Analysis](#)[Tenure Analysis](#)[Internal Selections -...](#)[Time to Promotion](#)[External Selections...](#)[Stage Analysis \(Summary\)](#)[Stage Analysis \(Results\)](#)[Disposition Analysis](#)[Separations & Exits...](#)[Performance Distribution](#)**Business Unit**

- ☐ A1
- ☐ C1
- ☐ C2
- ☐ S1
- ☐ T1

Race

- ☐ American Indian / Alaska...
- ☐ Asian
- ☐ Black or African American
- ☐ Hispanic / Latino
- ☐ NHOPI
- ☐ Not Disclosed
- ☐ Two or More
- ☐ White

Average
Tenure

8.3

Number of
Employees

2,999

Avg Pay - Below
Expectations

\$165K

Avg Pay - Meets
Expectations

\$160K

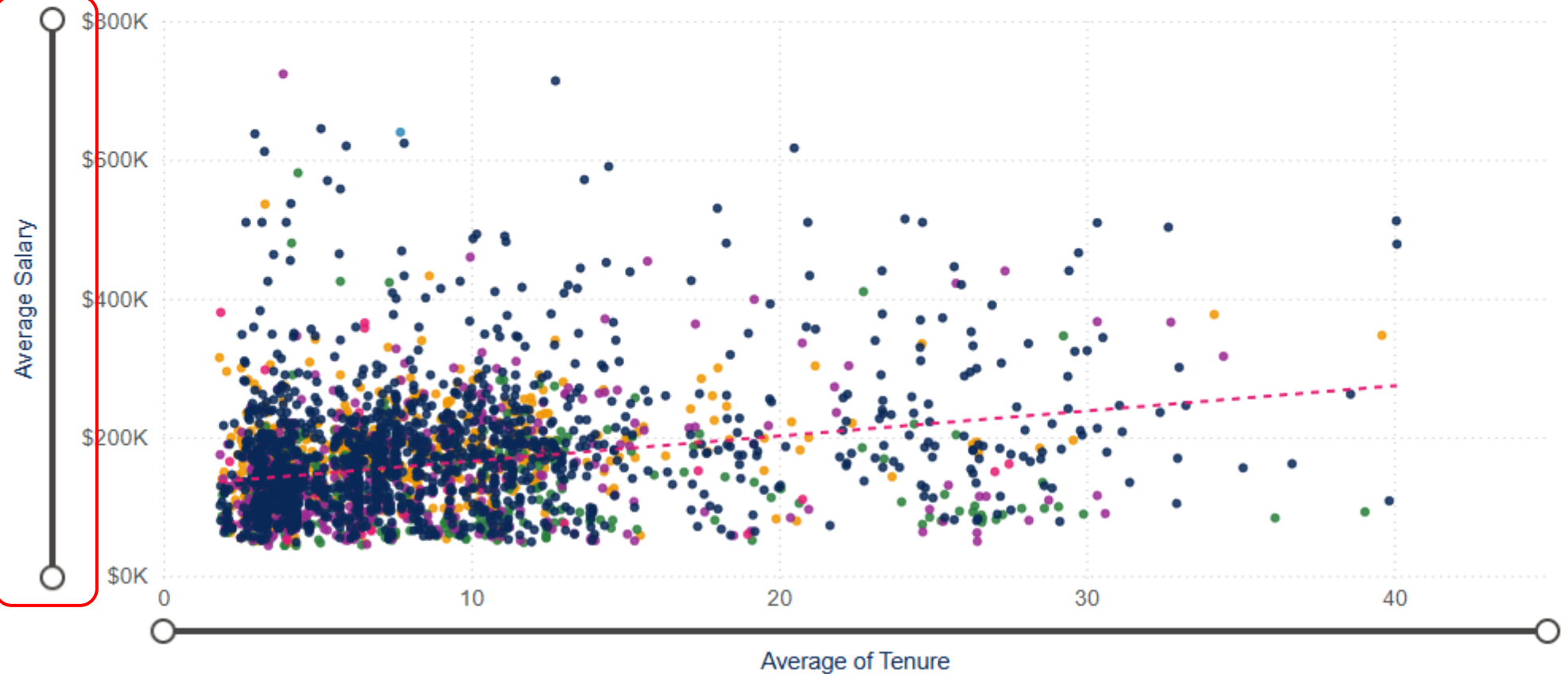
Average Pay - Above
Expectations

\$163K

Race

Sex

Correlation Scatter Graph-Tenure / Salary

Race ● American Indian / Alaska Native ● Asian ● Black or African American ● Hispanic / Latino ● NHOPI ● Two or More ● White

[← Landing Page](#)[Summary](#)[Legally Recommended...](#)[Pay Analysis](#)[Pay Outlier Analysis](#)[Pay Statistical Analysis](#)[Tenure Analysis](#)[Internal Selections -...](#)[Time to Promotion](#)[External Selections...](#)[Stage Analysis \(Summary\)](#)[Stage Analysis \(Results\)](#)[Disposition Analysis](#)[Separations & Exits...](#)[Performance Distribution](#)[Race](#)[Sex](#)**Business Unit**☐ Select all☐ A1☐ C1☐ C2☐ S1☐ T1**Analysis Group**☐ Select all☐ A3-B☐ B2-A☐ B3-A☐ B5-A☐ C1-A☐ C1-B☐ D3-A

Business Unit	Analysis Group	Favored Group	Adversely Impacted Group	Incumbents	Terminations	Overage	Std Dev
A1	B2-A	Men	Women	30	5	2	-2.30
C1	B3-A	Women	Men	208	42	6	-1.99

Overall Selection Rate by Race

Sex	Pool Count Terms	Nr of Terminations	Selection % Terms
Men	1586	307	17.4%
Women	1413	257	16.3%

Business Unit / Job Group[ALL](#)[ALL](#)

Defending Systemic Claims; Class, Experts, and Injunctions

- Early case framing: challenge class scope, commonality/predominance, standing, venue/removal; consider arbitration impacts.
- Statistics strategy: validate data, define pools, test alternatives, and prepare Daubert on opposing methods/samples.
- Decentralization defense: show documented, objective criteria and local discretion that defeats “one-policy” theories.
- Proof points: contemporaneous criteria, clean comparators, calibrated ratings, and aligned ATS/HRIS narratives.
- Remedies posture: narrow injunctive terms, limit monitors/reporting, set audit cadences, and value non-monetary relief in settlement.

Thank you!

Scott Kelly

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