

Systemic Discrimination? Let The Statistics Talk

Law360, New York (October 21, 2011, 1:23 PM ET) -- In recent years, the Equal Employment Opportunity Office has prioritized charges of systemic discrimination, which involve the “pattern or practice” of discrimination by a company and often constitute class actions. The EEOC receives around 2,000 charges of systemic discrimination annually and, by the end of 2010, more than 60 cases were being actively litigated, representing around 14 percent of the EEOC’s docket.[1]

Pregnancy discrimination cases, in particular, have been on the rise. Over the last decade, the number of pregnancy discrimination complaints received by the EEOC has increased by approximately 47 percent, and the EEOC has collected more than \$160 million dollars in monetary settlements on behalf of pregnancy discrimination victims.[2] In fiscal year 2010 alone, well over 6,000 complaints were received.

While filing a series of single-plaintiff pregnancy discrimination cases against companies, the EEOC also has pursued a series of broader disparate treatment cases based on pregnancy and gender. For example, the EEOC recently settled a case against Akal Security Inc. for “nationwide pattern and practice of forcing its pregnant employees, working as contract security guards on U.S. Army bases, to take leave and discharging them because of pregnancy.”[3] Similar cases have been brought against Novartis Pharmaceuticals and Bloomberg LP.

The growth in systemic discrimination cases, coupled with the requirement of increasingly greater statistical evidence at the class certification stage, leads practitioners to ask: What statistics and statistical methodologies qualify as robustly sufficient in these types of litigations? Taking pregnancy discrimination as the example, we first discuss the relevant legal standard and then outline some statistical techniques that have proven to be acceptable methods to demonstrate sufficient evidence of classwide discrimination in these types of cases.

The Legal Standard For Pregnancy Discrimination Claims

In a discrimination matter, the law requires the claimant to prove that differences in pay are the result of the individual’s protected status.[4] For pregnancy discrimination claims, specifically, this means the claimants must demonstrate that the cause of any disparate treatment was their pregnancy status and not the result of their general leave-taking status. That is, the discrimination must have resulted from being pregnant rather than just being on leave.

Any other factors that may affect the claimants’ compensation beyond their pregnancy status — for instance, the overall performance of the company or nondiscriminatory employee-specific factors such as job performance — must be accounted for before a conclusion of discrimination can be reached.

Statistical Methodologies Useful in Pattern or Practice Discrimination

This legal standard for discrimination claims dictates some specific statistical methodologies. Below we highlight some important statistical techniques to consider when evaluating class certification in pregnancy discrimination claims; these techniques may also lend themselves to analyzing other claims of systemic discrimination.

1) Getting the Control Group Right

Recent EEOC class actions have stressed the need for statistical evidence that employs the appropriate control groups as comparisons. In *Velez v. Novartis*, a recent case involving claims of alleged discrimination on the basis of pregnancy, the court explicitly rejected an approach that compared the compensation of women taking maternity leave to the compensation of employees who did not take a leave.

The court found, “[t]he Pregnancy Discrimination Act requires the employer to ignore an employee’s pregnancy, but ... not her absence from work, unless the employer overlooks the comparable absences of non-pregnant employees” and further that “[i]t is not discriminatory to treat pregnancy-related leave the same as other forms of leave.”[5]

Moreover, the EEOC’s own regulations on pregnancy discrimination state: “women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work.”[6]

The statistical evidence called for in these cases are real-world examples of what is known in econometrics as measuring the “treatment effect.”[7] The “treatment effects” literature constructs an experimental design, whereby outcomes for the allegedly discriminated-against class are compared to outcomes of a “control group” of individuals who did not receive the treatment. The implication of cases like *Velez v. Novartis* is that experts had better identify the “control group” correctly, otherwise they risk having their testimony excluded.

In a statistical analysis of employment outcomes, determining the correct control group means drawing comparisons based on a group of similarly situated individuals — i.e., those who are similarly able or unable to perform the same tasks. In pregnancy discrimination lawsuits, typically the most similarly situated individuals are those who took leave for reasons other than pregnancy.

Both groups of employees were unable to perform their duties, thus making them similarly situated. Comparison with this group allows the effects of pregnancy to be isolated from other nondiscriminatory effects of leave-taking, such as possible lower growth rates in compensation. Statistical analyses that compare the alleged class group to employees who did not take leave would inappropriately attribute any impact on compensation following a maternity leave entirely to pregnancy discrimination, rather than other, possible nondiscriminatory effects related simply to time away from work.

2) What Are Regression Analyses?

While comparisons of average outcomes for the proposed class group and the appropriate control group are informative and relevant statistical measures, properly testing their implications using econometric techniques can confirm their robustness. Regression is a statistical technique that isolates the effect of various factors on the outcome of interest. In the case of pregnancy determination, a regression analysis can be used to determine:

- if other observable factors are correlated with a change in compensation after a leave (for instance, the duration of the leave, performance ratings, geographic location, relative success of an employee's business unit); and
- if, after accounting for these observable factors, the relationship suggested previously between compensation outcomes and pregnancy leave continues to hold.

A regression should capture information from these other observable factors in addition to a variable that indicates whether the employee is either a member of the proposed class or the appropriate treatment group, as discussed above. Should the coefficient on the class indicator variable be significant, the relationship demonstrated by the simple means comparisons holds.

3) Further Demonstrations of Statistical Robustness

Statistical evidence is most conclusive when it has been subject to a number of robustness tests. Often, such testing can be specific to the case at hand. For pregnancy discrimination, should the data allow, sensitivity tests for both means comparisons and/or regression analyses may include:

- restricting the data sample to examine only the first leave of each individual;
- restricting the sample to females only;
- excluding extremely long leaves — perhaps those greater than a year;
- excluding extremely short leaves — perhaps those less than a month;
- controlling for the number of leaves an individual has taken;
- altering the time period being tested around each individual's leave; and
- excluding individuals who may have terminated their employment during a leave and returned at will later.

Conclusions

Statistical evidence has been and will continue to be at the forefront of pregnancy discrimination cases. As recent decisions in pregnancy discrimination cases have shown, the use of appropriate statistical techniques, particularly as relates to the choice of a control group that matches the relevant legal standard, is critical to the analysis. The best statistics provide a test of the underlying legal framework, are based on objective scientific principles, and yield results that are robust to meaningful variations of the underlying model.

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[1] Lessack, Susan K., The EEOC Takes Aim at Systemic Discrimination, Aug. 3, 2011 available at http://www.pepperlaw.com/publications_article.aspx?ArticleKey=2158 (viewed Aug. 25, 2011).

[2] U.S. Equal Employment Opportunity Commission, Pregnancy Discrimination Charges EEOC & FEPAs Combines: FY 1997 – FY 2010. available

at <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm>.

[3] Akal Security Pays \$1.62 Million To Settle EEOC Class Pregnancy Discrimination Claims, December 12, 2010, available at <http://www.eeoc.gov/eeoc/newsroom/release/12-1-10.cfm>.

[4] Title VII of the Civil Rights Act and 29 CFR Chapter XIV, Part 1604.

[5] Amy Velez, et al. v. Novartis Pharmaceuticals Corporation, et al., No. 04 Civ. 9194 (GEL) (S.D.N.Y., July 31, 2007).

[6] See 29 CFR Ch. XIV, Pt. 1604, App., p. 199.

[7] See, for instance, Guide W. Imbens & Jeffrey M. Wooldridge, Recent Developments in the Econometrics of Program Evaluation, 47 J. Econ. Lit 5 (2009).

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