

Clinton's New Form of Race-Norming

By LINDA S. GOTTFREDSON

President Clinton seems poised to jettison Lani Guinier, his nominee for assistant attorney general for civil rights, in his lurch back to the political center. Before moderates celebrate his return from the extreme left, however, they should take a close look at the latest draft of Mr. Clinton's education bill.

The Civil Rights Act of 1991 banned the practice of race-norming in employment testing (the racial curving of employment test scores). The Clinton administration tried to revive the illegal practice by smuggling it into its "Goals 2000: Educate America Act," the president's bill to raise skill levels among American students and workers. After getting caught, the administration withdrew the bill's race-norming language, but it didn't stop there. In its place, it has added language to the jobs-skills-standards section of the bill that not only would drive down standards, but would also make employers vulnerable to civil-rights litigation if they, in fact, do what the bill ostensibly seeks to do.

Disparate Impact

"Goals 2000" would create a National Skill Standards Board to develop a voluntary national system of occupational skill standards and certification procedures. Its stated purpose is to raise worker skill levels to ensure a "high skills, high quality, high performance workforce . . . that will result in increased productivity, economic growth and American economic competitiveness."

Raising standards, however, has disparate impact on less-skilled groups, principally blacks but also Hispanics. This is why the administration's original bill included a provision mandating that occupational certification tests be race-normed. Race-norming would have boosted the scores of individuals in less-skilled groups to avoid disparate impact while creating the appearance that all racial and ethnic groups are equally qualified.

The Clinton administration's revised bill would accomplish the same result in an even more pernicious way. Under the guise of raising skill levels, it would have the national board set low minimum skill standards for all workers in order to avoid disparate impact.

Employers generally want to distinguish among degrees of qualification above some minimum, because the more highly skilled and knowledgeable workers

are, the more productive they tend to be. The most effective employee-selection procedures are therefore ones that rank qualified applicants in order of skill and knowledge and then hire from the top of the list.

By contrast, Mr. Clinton's bill would have the national board develop standards that would determine only whether trainees and job applicants fall above or below some minimum level of competence. While setting floors on skill qualifications would allow employers to weed out incompetents, the marginally competent would be lumped together with the very best. Such minimum thresholds above which all job applicants are considered fungible are precisely what many civil-

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rights advocates have long sought, because they minimize disparate impact. In addition, unlike the original bill, the amended version explicitly subordinates the setting of skill standards to civil-rights laws, in the process apparently giving a nongovernmental body statutory authority to interpret ambiguous laws. For example, the national board would endorse certification standards "that are designed to achieve compliance with the civil rights laws," and would inform their users of the "requirements of relevant civil rights laws." The amended bill also expressly requires that the skill standards themselves ("the level of knowledge and skills required") not be "discriminatory with respect to race, color, gender . . . and national origin."

The legal debate on the requirements of the Civil Rights Act of 1991 has hardly begun, let alone been settled by the courts. At the same time, the procedures for determining job-skill requirements are very arcane and technical. Ignoring both of these difficulties, the bill establishes a highly partisan national board to develop the skill standards in the context of its own understanding of civil-rights law. Although it would gain the authority of something like the National Institute of Standards and Technology, the National Skill Standards Board would be made up almost entirely of Democratic appointees and be subject to a Clinton "diversity"

quota. The administration's amended bill would also require that the board contain at least one civil-rights advocate. Such a board isn't likely to raise occupational skill levels at all. Rather, it can be expected to develop low minimum standards, which it will then offer to employers as a means for "achieving compliance with relevant civil rights laws."

Although the proposed skill-standards system is ostensibly voluntary, employers could ignore it only at their peril. Civil rights lawyers would be waiting in the wings to slap them with employment discrimination lawsuits if they set skill standards higher than the national board's.

Under current law, disparate impact in hiring creates a prima facie case of illegal

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discrimination that employers can rebut by showing the job-relatedness ("validity") of the selection procedure in question. If the plaintiff then presents an alternative selection procedure that is equally job-related but has less disparate impact, the employer loses the case. In recent years, employers have become increasingly able to demonstrate the job-relatedness of selection procedures with substantial disparate impact, while plaintiffs have been hard-pressed to point to equally valid "alternatives" with less disparate impact. National board skill standards would reverse that situation.

Many judges would defer to the national board's judgment on skill standards, even in the absence of evidence that its standards are appropriate—just as courts continue to defer to the Equal Employment Opportunity Commission's onerous technical requirements for defending the legality of employment tests even though those requirements conflict with accepted professional practice. Thus, the national board's skill standards would become the "alternative" against which all selection procedures would be judged.

Employers who set higher standards than the board's would be vulnerable to discrimination lawsuits because more demanding standards tend to have more adverse impact. Moreover, such employers certainly would have been aware of the

national board's putative "alternative," and so would be guilty of intentionally ignoring it in favor of a more "discriminatory" one. (Worse yet, losing a suit alleging intentional discrimination, as opposed to disparate impact, carries the risk of punitive damages.) The national board's voluntary floor would thus become the legal ceiling for skill standards.

It's unclear how low the board would set skill standards. But the standards would have to be quite low to eliminate adverse impact, because current skills gaps among different racial-ethnic groups, for whatever reason, are quite large.

The National Assessment of Educational Progress (NAEP), which is conducted for the Department of Education by the Educational Testing Service, has documented large gaps on specific skills and knowledge among high-school students. Throughout the 1980s, for example, black 17-year-olds (excluding dropouts) had proficiency levels in math, reading, science and other subjects that were more comparable to white 13-year-olds than white 17-year-olds.

Huge Gaps in Skills

A 1987 NAEP report found similarly large gaps in the functional literacy of young adults age 21 to 25. The average black college graduate could comprehend and use everyday reading materials, such as news articles, menus, forms, labels, street maps and bus schedules, only about as well as the average white high-school graduate with no college. In turn, black high-school graduates functioned, on the average, only about as well as whites with no more than eight years of schooling.

The pervasiveness of such huge gaps in current skills and knowledge explains why employment tests typically have disparate impact, especially in mid-to-high-level jobs. Mr. Clinton's original bill would have eliminated disparate impact by boosting the scores of less skilled groups to meet a higher common standard. By contrast, his amended bill would slide the common standard down to where the least skilled groups could meet it. In effect, the administration has simply replaced a mandate for "double-standards race-norming" with one for "no-standards race-norming."

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