



Disparate impact theory: Dead, dying, or more important than ever?

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Important disclaimers



Not legal advice



Non-partisan



Requirements in specific jurisdictions will vary



Objectives



1



Understand the history and legal foundation of disparate impact

2



Analyze the DOJ's recent opinion

3



Identify state law disparate impact risks

4



Understand AI-related disparate impact exposure

5



Develop practical compliance strategies



Evolution – and future – of disparate impact liability



What is “disparate impact”?



A facially neutral policy or practice that **disproportionately affects** members of a protected group



Hiring
tests



Education
requirements



Criminal
history



Physical
ability



AI screening
tools



Discriminatory intent is **not** required.



Origin of disparate impact theory



Griggs v. Duke Power Co. (1971)



Employer's requirement that employees have HS degree resulted in **more limited opportunities for Black candidates.**



SCOTUS: Title VII prohibits practices that have **disparate impact** unless sufficiently **job-related.**



Uniform Guidelines on Employee Selection Procedures

ADOPTED BY DOJ, DOL, AND EEOC IN 1978



Monitor
processes



Consider
alternatives



Ensure
job-relatedness



Validate
tests



Maintain
records



Use 4/5ths rule
or statistical
analysis



Civil Rights Act of 1991

Congress amended Title VII
to **codify disparate impact liability**

ESTABLISHED:

- 1 | Plaintiff's prima facie burden
- 2 | Employer's business necessity defense
- 3 | Plaintiff's rebuttal with less discriminatory alternative practice



Common misperceptions about disparate impact theory



Myths can lead to risk.
Clarity leads to compliance.



No intent means no liability



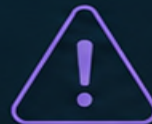
We don't have to worry
because our policies apply to everyone



The 4/5ths rule determines liability



Disparate impact is only
an issue for federal contractors



Vendors assume the legal risk



Disparate impact & the Trump Administration



Not a fan of disparate impact theory

1. Executive Order, *“Restoring Equality of Opportunity and Meritocracy”*
 - Instructs agencies to “deprioritize” enforcement of disparate impact case
2. EEOC requested opinion from DOJ on disparate impact theory of liability
3. EEOC’s Strategic Enforcement Plan prioritizes disparate treatment liability
 - We “will not commence, develop, or continue to pursue litigation advancing disparate impact claims”



DOJ opinion



**Disparate impact
is inherently
suspect**



What DOJ opinion says

Proposes “corrections” to the standard for evaluating claims:



1

The plaintiff should be required to prove that the challenged employment practice actually caused the disparate impact.



2

The business necessity defense should be an easy standard for employers to satisfy.



3

The plaintiff should be required to show that an alternative would eliminate or reduce the disparate impact *and* would be as effective in serving the employer’s legitimate business interests.



What the DOJ Opinion Does and Does Not Do



Does

- Does express the Administration's opinion
- Does invite EEOC to seek revisions to existing guidance*
- Does provide a roadmap for enforcement agencies and federal courts



Does Not

- Does not eliminate disparate impact liability
- Does not overrule Supreme Court precedent
- Does not change federal law
 - Title VII
 - UGESP*
- Does not change state law

**The EEOC has proposed to rescind UGESP*



Disparate impact & state laws



*It's Not All
About the Feds*



Disparate Impact Laws Vary. Compliance Requires a Bigger Picture.





Disparate impact & AI



AI & employment decisions

Common AI applications

Resume screening

Candidate ranking

Interview analysis

Assessments

Promotion recommendations

Workforce planning

**These systems frequently
raise disparate impact concerns**



States with AI laws that address disparate impact

States with law prohibiting disparate impact based on AI

California

Connecticut*

Illinois

New Jersey

Washington*

* Passed, but not yet effective

States that have proposed legislation prohibiting disparate impact based on AI

Alaska

Georgia

Hawaii

Maryland

Massachusetts

Michigan

New York

Oregon

South Carolina

Washington, D.C.



Practical takeaways



What does the future hold for disparate impact theory?



Continued Legislation



Greater State-Level Activity



More AI Regulation



Increased Statistical Scrutiny



Potential SCOTUS Decision



Disparate impact exists beyond Title VII

ADEA

AGE 40 AND OLDER

Protects individuals age 40 and older; employers may rely on the reasonable-factors-other-than-age (RFOA) defense.

01

ADA

DISABILITY

Covers qualification standards, tests, and selection criteria that screen out individuals with disabilities, subject to job-relatedness and business necessity.

02

STATE LAW

ADDITIONAL PROTECTIONS

May protect additional categories or apply different liability standards, burdens, and remedies.

03



Courts are currently applying disparate impact theory



***Bomar v. Board of Education of Harford County* (4th Cir. 2026) – Dismissal of disparate impact claim upheld where plaintiffs did not offer an alternative employment practice that would have produced less disparate impact while still serving the employer’s legitimate business necessities**



***Feds for Medical Freedom v. Garland* (S.D. Tex 2026) – Court analyzed appropriateness of class certification using the traditional causation, statistical-disparity, business-necessity, and alternative-practice framework**



***Mobley v. Workday* (N.D. Cal 2024) – Court denied motion to dismiss disparate impact claims under Title VII, ADEA, and ADA, alleging the recruiting and application screen tools disproportionately disadvantaged protected groups**



Data collection

Should employers still solicit race and sex information from applicants and employees?

CONSIDERATIONS:

1. Title VII still recognizes disparate impact liability; data could help defend claims
2. Cannot evaluate practices (activity or compensation) without the data
3. Some states have separate obligations to collect and/or report demographic information
4. Costs associated with stopping/starting data collection if UGESP-like standards revived



Practical takeaways



1



Remain mindful of disparate impact liability, especially in states with AI laws

2



Continue evaluating employment processes, including AI tools

3



Review vendor contracts

4



Monitor AI laws in states and localities

5



Consult your employment lawyer





Thank You

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