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VIEWPOINT

Are disparate impact discrimination claims still viable?

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Recent action by the U.S. Department of Justice has created uncertainty regarding the status of disparate impact discrimination cases.

On Dec. 10, 2025, the DOJ issued a final rule entitled "Rescinding Portions of Department of Justice Title VI Regulations to Conform More Closely with the Statutory Text and to Implement Executive Order 14281."

The referenced executive order directs federal agencies to "deprioritize enforcement of all statutes and regulations to the extent they include disparate impact liability."

The net effect is that the DOJ has revised its regulations to remove liability for disparate impact discrimination under Title VI of the Civil Rights Act of 1964.

DISPARATE IMPACT AND DISPARATE TREATMENT

The DOJ rule is limited to disparate impact claims. Disparate impact discrimination occurs when a seemingly neutral policy or practice disproportionately and negatively affects a legally protected group. Disparate impact does not require a plaintiff to prove an employer's intent to discriminate.

The disparate impact theory of liability was first applied by the U.S. Supreme Court in its 1971 landmark opinion *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which involved a test used by an employer to screen applicants. The court concluded that the test disproportionately eliminated Black applicants but was not "significantly related to successful job performance."

According to the *Griggs* opinion, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

Two decades later, the Civil Rights Act of 1991 was enacted, which codifies the prohibition of disparate impact discrimination under Title VII of the Civil Rights Act.

In contrast, a disparate treatment discrimination claim requires a showing of intent. In *Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court provided the following succinct definition: "Disparate treatment is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical."

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TITLE VI AND TITLE VII

The DOJ rule applies solely to claims under Title VI, which prohibits discrimination based on color, race or national origin by any institution, activity or program that receives financial assistance from the federal government.

Title VII of the Civil Rights Act is broader in scope. It prohibits not only discrimination based on color, race or national origin, but extends to discrimination based on religion or sex, including gender identity, pregnancy status and sexual orientation. Moreover, coverage under Title VII is not tied to receipt of federal funds. It generally applies to all employers with 15 or more employees.

IMPACT OF DOJ RULE

In the final rule, the DOJ plainly describes its intent as follows: "The practical impact of this rule's modifications will be to make clear to Department Federal-funding recipients that the Department's Title VI regulations do not prohibit conduct or activities that have a disparate impact and prohibit only intentional discrimination, and the Department thus will not pursue Title VI disparate-impact liability against its Federal-funding recipients." 28 CFR Part 42, Dec. 10, 2025.

Disparate impact claims typically are proven by data and statistics. The final rule does not preclude the use of data to prove intentional discrimination under Title VI, stating that "[e]liminating disparate-impact liability does not preclude the use of data on disparate outcomes to help prove intentional discrimination. … This use of statistical disparity to help establish, as an evidentiary matter, liability for intentional discrimination materially differs from using it to impose liability for an unintentional disparate impact."

The DOJ final rule does not impact the ability of private litigants to pursue disparate impact claims under Title VII. Disparate impact claims are enshrined in Title VII, which provides, in part, that an unlawful employment practice is established if a claimant demonstrates that a "particular employment practice causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C § 2000e-2(k).

In summary, the DOJ rule has the profound effect of eliminating disparate impact claims under Title VI of the Civil Rights Act. Claimants and employers should be aware, however, that disparate impact claims are still viable under Title VII as well as under the antidiscrimination laws in many states.

Finally, the DOJ rule has no effect on disparate treatment claims under Title VI or Title VII.

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