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Uncertain future of disparate impact: how US employers can manage the risk

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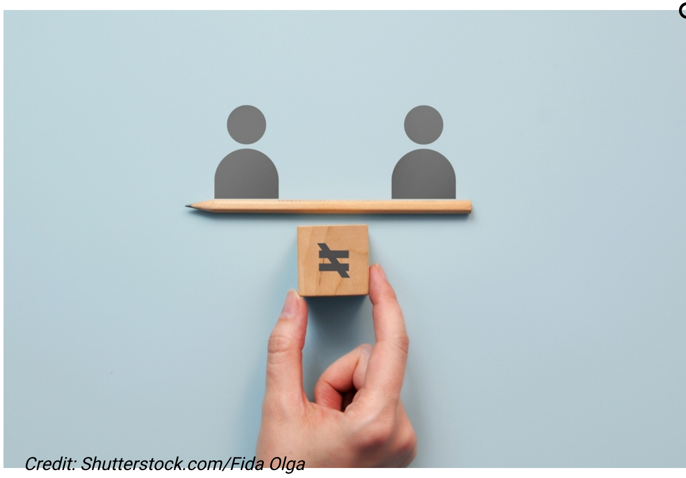
Private companies are seeing less federal enforcement against disparate impact, but courts, plaintiffs and state regulators are keeping the theory alive. Employers still need to account for its role in workplace disputes.



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During his second term, US President Donald Trump has moved to dismantle disparate impact liability as a federal enforcement priority, reflecting a broader campaign against diversity, equity and inclusion (DEI) policies in US workplaces.

But for private employers, the doctrine is not disappearing. Instead, it is entering a more uncertain phase: federal agencies are retreating from disparate impact enforcement as private plaintiffs are continuing to bring claims, and state and local governments are moving in the opposite direction.

Employers may have more room to defend neutral hiring and promotion practices, but they still need to avoid abandoning the documentation and legal analysis that could be critical in future litigation.

What is disparate impact?

Disparate impact liability applies where a facially neutral policy or practice disproportionately affects a protected group, even without proof of discriminatory intent. In employment, the theory has long been associated with practices such as aptitude tests, degree requirements, background checks, promotion criteria and, increasingly, algorithmic screening tools.

Though the disparate impact theory of liability is codified in Title VII of the Civil Rights Act 1964, the Trump administration has taken the position that disparate impact is part of a "pernicious movement" that seeks to replace equal opportunity with outcomes based on race, sex or other protected characteristics.

As of September 2025, the US Equal Employment Opportunity Commission (EEOC) has closed all pending charges based on allegations of disparate impact discrimination, as directed by Trump. Charges that allege both disparate impact and disparate treatment theories remain open, though agency staff have been directed to investigate only the disparate treatment claims, or those alleging intentional discrimination.

The federal government is campaigning against disparate impact

Disparate impact actions taken during Trump's second term

Trump issues "Restoring Equality of Opportunity and Meritocracy" EO

23 April 2025

The EO identifies disparate impact it as part of a “pernicious movement” that seeks “to transform America’s promise of equal opportunity into a divisive pursuit of results preordained by irrelevant immutable charact

EEOC closes all pending charges based on disparate impact discrimination

30 September 2025

The EEOC has stopped pursuing disparate impact Trump's April 2025 EO.

DOJ issues disparate impact rule

09 December 2025

The DOJ is focusing its enforcement efforts under Title VI of the Civil Rights Act – which protects people or organisations receiving federal funding from discrimination – on intentional discrimination rather than on disparate impact.

DOJ condemns EEOC's disparate impact g

09 June 2026

The DOJ held that Title VII “guarantees equal treatr and highlighted constitutional equal protection cor impact liability.

Most recently, the US Department of Justice (DOJ) issued an opinion to the US Equal Employment Opportunity Commission (EEOC) that its guidelines about disparate impact liability are unconstitutional. Lexology PRO’s sister brand, Law.com, reported on this on 10 June 2026. The DOJ’s opinion found that the EEOC guidelines could pressure employers to engage in racial discrimination.

The DOJ’s opinion argues that disparate impact liability should apply only where plaintiffs identify a specific policy, prove it caused a disparity and show that an equally effective alternative was available.

Doctrine survives despite federal pushback

Despite the administration’s position, companies cannot assume disparate impact is dead.

Littler Mendelson shareholder James Paretti told Lexology PRO that employers should take the DOJ's opinion "for what it's worth."

"The EEOC guidelines are just that – guidelines. Ultimately, it's not the EEOC or the DOJ that decides what the law is," Paretti said. "Disparate impact remains in [Title VII]. The DOJ's opinion doesn't tell us much that we didn't already know."

Unless Congress amends Title VII or the US Supreme Court narrows or eliminates the doctrine, Paretti said, private litigants can continue to bring claims in federal court.

That distinction is critical for employers. A reduced risk of federal agency enforcement does not eliminate litigation risk. In fact, Amundsen Davis partner Julie Proscia told Lexology PRO that employers may see more cases move into court, which would result in higher expenses for the defendants.

Assessing disparate impact in 2026

Conducting disparate impact analyses

Companies should continue reviewing neutral employment practices for adverse effects, particularly where those practices affect large groups of applicants or employees.

"There is no harm in assessing whether your practices are resulting in any disparate impact, and if there is, maybe try to look and figure out what that reason might be, even if it doesn't mean that the EEOC is going to come knocking down your door tomorrow," Paretti said. "Doing the math and seeing whether there is anything out there, and if there is trying to figure out what might be causing that, there is nothing inherently unlawful in doing that."

Companies must also keep state and local obligations in mind, Jackson Lewis principal Michelle Phillips told Lexology PRO. New York City's human rights law expressly recognises disparate impact claims, and Illinois lawmakers have advanced legislation that would expressly prohibit policies or practices with unjustified discriminatory effects.

Jackson Lewis principal Lindsey White told Lexology PRO that employers should be "focusing on processes, not on any individual applicant's or employee's protected status."

"Employers should be asking whether their hiring, promotion, testing, screening or reduction-in-force criteria are job-related, consistently applied, well-documented, and tied to legitimate business needs.," White said. "If an analysis identifies a potential concern, the response should be to examine the selection tool or process itself, not to adjust individual outcomes based on race, sex or another protected characteristic."

Reframing policies

At the same time, companies are likely to be more cautious about how they describe and respond to disparities, Proscia said. The Trump administration's position poses a risk that employers' efforts to address statistical imbalance could be perceived as intentional discrimination.

"Some of the language that companies are utilising has changed," she said. "They're not looking for targeted populations or quotas, but they're still trying to ensure that the impact of, let's say, a posting doesn't adversely impact a protected segment of the population."

Considerations for AI use, federal contractors

Companies using AI in hiring and employment decisions should also maintain vendor documentation and audit records explaining how the system works, Proscia said.

"If an employer plugs [a resume into an AI tool] and says, 'this was a great employee that I have,' it's going to scrape that data to ascertain what the background of that individual is," Proscia said. "Unless you're putting in a wide range of individuals, if the resume that you loaded up is from a school that is predominantly white, that is predominantly upper economic class . . . those are the candidates that it's going to pull."

Additionally, Phillips noted that federal contractors and recipients of federal funding face heightened pressure. These employers should review certifications and programmes connected to federal funds to ensure they are consistent with the administration's current civil rights enforcement posture.

For now, disparate impact is likely to become quieter, narrower and more contested. Federal enforcement may continue to recede, but the legal theory's future will be shaped by private plaintiffs, courts and states.

"Employers can expect that [the DOJ's opinion] is not a one-off ruling, a one-off opinion or a one-off trend by the Trump administration, but rather a continuation of a trend within the administration to alter or change the landscape of what cases are prosecuted and what types of theories are brought forth in discrimination cases," Proscia said.