

June 26, 2026 | Insights

Disparate Impact Under Scrutiny: DOJ Challenges EEOC Guidance and Reframes Liability Standards

By: Ashley M. Berger, J. Allen Holland

On June 9, 2026, the U.S. Department of Justice's Office of Legal Counsel ("DOJ") issued its opinion concluding that key aspects of the Equal Employment Opportunity Commission's ("EEOC") current approach to disparate-impact liability under Title VII are unconstitutional ("Opinion"). This represents a major departure from the EEOC's current framework, which often places substantial burdens on employers to validate neutral practices that produce disparate outcomes.

The DOJ concludes that this "effects-only" framework is unconstitutional because it divorces liability from discriminatory purpose and effectively incentivizes employers to make decisions based on race to avoid risk. According to the Opinion, this structure "pressures employers to engage in race-based decision-making," raising serious equal protection concerns. Instead, the DOJ emphasizes that disparate-impact liability must function as an evidentiary tool to identify practices that strongly suggest intentional discrimination, rather than as a mechanism for enforcing racial proportionality. The Opinion highlights that even voluntary affirmative action programs are illegal.

A central theme of the DOJ's analysis is the practical pressure disparate-impact liability places on employers. The Opinion explains that because nearly all hiring and employment practices produce some statistical disparity, employers may feel compelled to either adjust decision-making processes based on race or other protected characteristics or adopt race-conscious measures to avoid litigation exposure. This creates what the DOJ describes as an unconstitutional dilemma, in that forcing employers to choose between potential liability and race-based actions may violate federal law.

The DOJ also aims at the treatment of routine hiring and employment practices under EEOC guidance. The Opinion expressly states that common selection procedures, such as background checks, aptitude tests, educational requirements, and standardized assessments are presumptively job-related and lawful. Only practices that are irrational, arbitrary, or lack any plausible job-relatedness should trigger potential liability.

Under this lower threshold, employers need only demonstrate that a challenged practice is



Related Attorneys

Ashley M. Berger

J. Allen Holland

©2026 Rich May, P.C. All Rights Reserved

rational; and serves a legitimate business purpose.

The Opinion states that plaintiffs must prove direct causation to establish disparate impact. Specifically, plaintiffs must:

- Identify a specific employment practice; and
- Demonstrate that the practice itself (and not external factors) directly caused the disparity.

The DOJ rejects reliance on generalized disparities or aggregate statistics alone, emphasizing that employers should not be held liable for outcomes they did not create.

In addition to proving causation, plaintiffs must also meet a second, demanding requirement. They must identify an alternative employment practice that:

- Is equally effective at achieving the employer's legitimate goals; and
- Produces less disparate impact.

Importantly, the DOJ underscores that merely proposing a different approach is insufficient. The alternative must be practically viable and comparable in cost, efficiency, and effectiveness. Failure to meet this burden undermines any inference that the employer's practice reflects discriminatory intent.

What This Means for Employers

While the Opinion does not itself change the law, it signals a potentially significant shift in enforcement priorities and legal interpretation.

Employers should take note of several practical implications, rather than obligations:

- Neutral policies remain defensible: Routine hiring and evaluation tools are likely to receive greater judicial deference.
- Documentation still matters: Employers should continue to articulate clear, business-driven rationales for employment practices.
- Litigation strategies may shift: Plaintiffs will face higher hurdles in proving causation and proposing viable alternatives.
- Regulatory uncertainty persists: Employers should monitor how courts and agencies respond to this opinion and whether formal rule changes follow.

The DOJ's decision reframes disparate-impact liability as a narrow, intent-focused doctrine, rather than a broad tool for addressing statistical inequality. By emphasizing causation, business necessity, and viable alternatives, the Opinion seeks to limit liability to cases that truly suggest intentional discrimination, while reducing incentives for race-based decision-making in the workplace.

©2026 Rich May, P.C. All Rights Reserved

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney(s) J. Allen Holland and Ashley M. Berger.

© 2026 by Rich May, P.C. and J. Allen Holland and Ashley M. Berger. All rights reserved.

Rich May has been elected and admitted as a member of Ally Law. This membership, which provides affiliations with more than 2,800 lawyers at over 70 firms in 50 countries, supplements our ability to assist clients throughout North America and around the world.