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DOJ Eliminates Disparate-Impact Liability Under Title VI. What's Next?

Client Alerts

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On December 9, 2025, the Department of Justice (DOJ) published a final rule rejecting the use of disparate-impact liability, *i.e.*, holding entities liable for discrimination due to a policy's disproportionate effect on a certain group, even without evidence of intentional discrimination. The rule removes such liability from its regulations implementing Title VI,[1] the statute that prohibits discrimination based on race, color, or national origin in programs that receive federal financial assistance.[2] Under the new rule, DOJ will no longer investigate Title VI disparate-impact claims or bring enforcement actions based on a disparate-impact theory, although the rule signals that the government will look to infer intentional discrimination when data establishes different outcomes or effects for different racial groups.

This change was directed in an April 23, 2025 executive order titled "Restoring Equality of Opportunity and Meritocracy," in which President Trump stated that disparate-impact liability "undermines our national values" by "mandating, rather than proscribing, discrimination."[3] It is the latest step in a government-wide effort to roll back civil rights protections for historically disadvantaged groups and target "illegal Diversity, equity and inclusion (DEI)" programs. We expect other agencies to be working on similar regulations—the executive order directed "all agencies" to "deprioritize enforcement" of disparate-impact liability. The Department of Education's disparate-impact regulations, for example, are still in place, but the Department previewed in the Spring 2025 Unified Agenda that it plans to rescind them.[4]

At the same time, this regulatory change does not mean that covered entities are free from liability based on a policy's disparate impact. As discussed below, disparate impact continues to be salient as (1) an important evidentiary source in intentional discrimination cases; (2) an independent statutory basis for liability for employment discrimination under Title VII; and (3) in obligations under state and local law.

Below we outline the major changes and discuss what covered entities should be thinking about as a result.

Major Changes

The final rule introduces four major changes to the Title VI regulations.

1. **Removes General Prohibition on Conduct that Creates a Disparate Impact**: The final rule removes a provision that barred recipients of federal financial assistance from generally engaging in conduct that creates a disparate impact.[5] The regulation previously barred covered entities from "utiliz[ing] criteria or methods of administration which have the effect of" either "subjecting individuals to discrimination because of their race, color, or national origin" or "substantially impairing accomplishment of the objectives of the [federally funded] program as respects individuals of a particular race, color, or national origin."[6] This language—which is substantially similar to language that other federal agencies use in their regulations—allowed DOJ to investigate facially neutral policies that resulted in the subjection of certain groups to discrimination, regardless of whether the covered entity had the intent to discriminate, or not.

2. **Removes Directive to Engage in Affirmative Action**: The final rule also removes a directive that covered entities must "take affirmative action to overcome the effects of prior discrimination."[7] The regulation also previously stated that "[e]ven in the absence of prior discrimination," entities "may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."[8] This follows other steps taken by the current Administration to roll back remaining affirmative-action requirements. For example, on January 21, 2025, President Trump rescinded Executive Order 11246, signed by President Johnson in 1965, which required government contractors to take affirmative action to prevent discrimination.[9]

3. **Removes Prohibition on Employment Practices that have a Disparate Impact**: The final rule removes a provision that prevented covered entities from using employment practices that create a disparate impact.[10] The regulation previously directed that entities may not engage in "employment practices … if discrimination on the ground of race, color, or national origin in such employment practices tends … to exclude persons from participation in, to deny them the benefits of or to subject them to discrimination under the [covered] program."[11] Title VI covers employment only in limited circumstances, however, and employers can still be held liable for disparate impact under Title VII. Title VII's bar on discrimination based on disparate impact is in the text of the statute itself, and therefore, will remain, unless the Supreme Court strikes it down or Congress intervenes.[12]

4. **Removes Prohibition on Locating Facilities in a way that has a Disparate Impact**: The final rule removes a prohibition against covered entities choosing the locations of their facilities in a way that would create a disparate impact.[13] The regulation previously barred entities from "determining the site or location of facilities" in a way that would have the "effect" of either "excluding individuals from, denying the benefits of, or subjecting them to discrimination on the

ground of race, color, or national origin" or "defeating or substantially impairing the accomplishment of the objectives of" the Civil Rights Act or its implementing regulations.[14]

DOJ issued the final rule without going through the typical notice-and-comment period, invoking the exception for rules "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." That means the changes are in full effect as of December 10, 2025.

Key Takeaways

- **New Limit on Federal Investigative and Enforcement Authority**. In the final rule, DOJ makes clear the Administration's view that Title VI's statutory prohibition on discrimination "extends only to intentional discrimination," and Title VI "permits facially neutral policies that result in disparate outcomes when there is no discriminatory intent."[15] Going forward, any claims of discrimination under Title VI must be proven under an intentional-discrimination theory—whether the claims are brought by the government or private litigants, who have only been able to bring Title VI claims for intentional discrimination, not disparate impact, since the Supreme Court's 2001 decision in *Alexander v. Sandoval*.[16] Practically, this regulatory change will prevent governmental entities investigating allegations of discrimination from making claims based on differential outcomes alone.

- **But Disparate Impact Remains a Key Tool Under *Arlington Heights***. The final rule suggests the government will look to infer intentional discrimination from differential outcomes. To do so, the government will need to rely on the *Arlington Heights* legal framework, which enables a litigant to establish intentional discrimination via a facially neutral policy so long as the policy was adopted with discriminatory intent and results in a disparate impact. While disparate impact will no longer be an independent basis for liability under Title VI, it will continue to serve as a key component of Title VI investigations and enforcement. Under *Arlington Heights*, a court considers multiple sources of circumstantial evidence in evaluating whether the covered entity had discriminatory intent, including "[t]he historical background of the decision;" "[t]he specific sequence of events leading up to the challenged decision;" the decisionmaker's departures from its normal procedures, and the relevant "legislative or administrative history."[17] In the final rule, DOJ signaled that it plans to use data on effects as a piece of evidence to support a finding of discrimination under *Arlington Heights*, asserting that "statistical disparity [can] help establish ... liability for intentional discrimination."[18]

- **Take Steps to Rebut Discriminatory Intent.** Given that discriminatory intent is necessary for Title VI liability, covered entities should take proactive steps to ensure that the sources of circumstantial evidence considered under the *Arlington Heights* framework do not give rise to reasonable inferences of discriminatory intent—whether against members of majority or minority groups. Suggested steps include documenting reasons for decision making that do not rely on

protected characteristics and ensuring counsel has a role in any adoption of new policies or revision of preexisting policies.

- **Remember Disparate Impact's Continued Relevance.** *First*, given that disparate impact is a required element for an intentional discrimination claim under the *Arlington Heights* framework, covered entities need to continue to pay close attention to whether a facially neutral policy results in a disparate impact. As noted above, under this framework, disparate impact will continue to serve as a key component of Title VI investigations and enforcement. *Second*, the statutory text of Title VII, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin, holds employers liable for discrimination on a disparate impact theory.[19] That means unlike disparate impact under Title VI, the Administration cannot eliminate disparate-impact liability under Title VII on its own. *Finally*, covered entities also need to consider their potential liability under state and local law.[20]

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Footnotes

[1] 42 U.S.C. § 2000d et seq.

[2] Rescinding Portions of Department of Justice Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281, 90 Fed. Reg. 57,141 (Dec. 10, 2025) (to be codified at 28 C.F.R. pt. 42) ("DOJ Final Rule").

[3] Proclamation No. 14,281, 90 Fed. Reg. 17,537 (Apr. 23, 2025).

[4] *See* 34 C.F.R. § 100.3(b)(2). The Unified Agenda entry is available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202504&RIN=1870-AA21

[5] 28 C.F.R. § 42.104(b)(2) (prior version).

[6] DOJ Final Rule § II.

[7] 28 C.F.R. § 42.104(b)(6) (prior version).

[8] DOJ Final Rule § II.

[9] Proclamation No. 14,173, 90 Fed. Reg. 8,633 (Jan. 21, 2025) (rescinding Proclamation No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965)).

[10] 28 C.F.R. § 42.104(c) (prior version).

[11] DOJ Final Rule § II.

[12] 42 U.S.C. § 2000e et seq.

[13] 28 C.F.R. 42.104(b)(3) (prior version).

[14] DOJ Final Rule § II.

[15] DOJ Final Rule § II.

[16] 532 U.S. 275 (2001).

[17] *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

[18] DOJ Final Rule § II.E.2. This is also consistent with the approach articulated in the Memorandum from Attorney General Pam Bondi to All Federal Agencies, *Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination* (July 29, 2025).

[19] *See* 42 U.S.C. 2000e-2(k).

[20] *See, e.g.*, *IntegrateNYC, Inc. v. State*, No. 75, 2025 WL 2979535 (N.Y. Oct. 23, 2025) (acknowledging an open question over whether “disparate educational outcomes alone could ... sustain ... a claim” under the New York State Human Rights Law).

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