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EEOC Rescinds 40-Year-Old Guidance; Former Agency Leaders Call DOJ's Disparate Impact Opinion a Risk to Employers

Service

Labor & Employment

Professionals

KEVIN KORONKA
AUSTIN:
512.479.1162
KEVIN.KORONKA@
HUSCHBLACKWELL.COM

CATARINA A. COLÓN
MILWAUKEE:
414.978.5534
CATARINA.COLON@
HUSCHBLACKWELL.COM

SARAH VINCENT
KANSAS CITY:
816.983.8000
SARAH.VINCENT@
HUSCHBLACKWELL.COM

On June 9, the Department of Justice's Office of Legal Counsel (OLC) issued a memorandum opinion challenging the constitutionality of the Equal Employment Opportunity Commission's (EEOC) longstanding interpretation of Title VII's disparate-impact provisions. These provisions have, for decades, prohibited employment practices creating unjustified barriers based on race, color, religion, sex, or national origin. The opinion has drawn swift responses from the employment law community.

Weeks later, on June 30, the EEOC rescinded two nearly 40-year-old documents—"Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964 as Amended" (Affirmative Action Guidance) and the related "Compliance Manual Section 607 on Affirmative Action"—containing guidance for employers related to voluntary workplace affirmative action plans. The following day, former agency leaders, including former federal EEOC officials and practitioners ranging from former chairs and general counsel (collectively self-titled "EEO Leaders"), published a detailed rebuttal contending that the DOJ opinion is legally flawed and risks misleading employers. This alert summarizes both responses and highlights their practical implications for employers.

EEOC Votes to Rescind Affirmative Action Interpretive Guidance

In justifying the decision to rescind the two documents, the EEOC stated that the Affirmative Action Guidance ran afoul of Title VII and contradicted existing case law. The stated purpose of the Affirmative Action Guidance was to protect "employers, labor organizations, and other persons subject to Title

VII [who] have changed their employment practices and systems to improve employment opportunities for minorities and women" via "race, sex, or national origin conscious … decisions." The Commission also voted to rescind the related Compliance Manual, which addressed those guidelines and the agency's enforcement positions with respect to permissible affirmative action and affirmative action plans.

The Affirmative Action Guidance and related Compliance Manual explained that voluntary affirmative action plans were permissible under federal equal employment opportunity laws only when designed to remedy past or present discrimination or address imbalances in traditionally segregated job categories. Such plans also had to be carefully designed to avoid unlawfully disadvantaging other employees.

To be lawful, a plan had to be temporary, flexible, and narrowly tailored, and could not unnecessarily trammel the rights of non-beneficiaries. In short, the documents sought to ensure that affirmative action efforts corrected existing or past discrimination without creating new discrimination.

Notably, the rescission of this guidance does not overturn the Supreme Court's decisions in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), or *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). These decisions recognized that Title VII may permit certain voluntary affirmative action plans in limited circumstances. Although the EEOC stated that rescinding the guidance "is consistent with the text of Title VII and Supreme Court precedent," only the Supreme Court can determine whether *Weber* and *Johnson* remain good law.

Former EEO Leaders Respond to DOJ's Disparate Impact Opinion

On July 1, EEO Leaders—a group of former EEOC leaders including former chairs Charlotte Burrows and Jenny Yang— published a statement characterizing the DOJ's June 9 OLC opinion as "legally flawed" and warning that it "risks misleading employers."

The EEO Leaders' statement rests on five principal arguments, each of which directly challenges a core element of the DOJ's legal reasoning:

Statutory Text and History. EEO Leaders contend that the DOJ opinion "ignores the text of Title VII in several respects" and "departs from decades of legal precedent." Specifically, they argue that Title VII has never been limited to intentional discrimination. Further, that the DOJ's characterization of the statute's prohibitions as exclusively "motive-based" cannot be squared with Title VII's original text, which since 1964 has also prohibited employment practices that "deprive or tend to deprive" individuals of employment opportunities.

Supreme Court Precedent. The response argues that Supreme Court decisions addressing Title VII disparate impact over many years have concluded that both the disparate-treatment and

disparate-impact provisions can be enforced as written without conflict and without raising Equal Protection Clause concerns. EEO Leaders criticize the DOJ's heavy reliance on Justice Scalia's solo concurrence in *Ricci v. DeStefano*—a concurrence that did not garner another Justice's support. Simultaneously, the DOJ ignores the *Ricci* majority's resolution of the purported conflict between the statute's disparate-treatment and disparate-impact provisions.

Burden-Shifting Framework. EEO Leaders take particular issue with the DOJ's proposed evidentiary standards. The DOJ opinion advances the position that employment selection procedures are "presumptively job-related" and that only practices with "no plausible job-relatedness" can create disparate-impact liability. EEO Leaders say this standard contradicts both the terms of Title VII and Supreme Court precedent and would encourage employers to use a wide range of selection criteria without demonstrating that they are job-related for the position in question.

Constitutional Analysis. EEO Leaders reject the DOJ's constitutional arguments as unsupported, contending that the DOJ opinion, without identifying any evidence, argues that the long-established interpretation of Title VII's disparate-impact protections pressures employers to make race-based decisions and is therefore constitutionally suspect. The response also disputes the DOJ's reliance on *Louisiana v. Callais*, arguing that that case arose from a fundamentally different legal and factual setting (intentional, race-based congressional redistricting) and provides no basis for narrowing Title VII's employment protections.

AI and Emerging Technology. EEO Leaders flag a forward-looking concern: they argue that disparate-impact protections are "one of the few legal guardrails" for ensuring that employers examine whether automated decision systems create unjustified and discriminatory barriers. In addition, they argue that the DOJ opinion appears designed to afford employers broad latitude to use untested or inadequately validated screening mechanisms, including AI tools, without validating them against job requirements.

Practical Guidance for Employers

Despite the DOJ opinion, EEO Leaders urge employers to continue complying with Title VII as written. They note that EEOC and DOJ non-enforcement does not alter the statute, which remains in full force, and warn that employers who adopt unvalidated employment practices in reliance on the DOJ opinion may face private litigation and state and local enforcement actions grounded in the statutory text and existing precedent. EEO Leaders specifically urge employers to assess whether their employment practices, including selection criteria used in hiring and other employment decisions, are job-related and consistent with business necessity.

Conclusion

Employers should proceed with caution and resist the temptation to restructure employment practices in reliance on the DOJ's OLC opinion. An OLC memorandum is not law: it does not amend Title VII, override Supreme Court precedent, or bind federal courts. The statute and the substantial body of case law interpreting it remain the controlling authority. Private plaintiffs retain the right to sue under Title VII regardless of the federal government's current enforcement posture. State and local agencies may also enforce parallel statutes that mirror or exceed Title VII's protections. Until Congress amends the statute or the Supreme Court revisits its precedent, employers that abandon validated, job-related selection criteria do so at their own legal risk. The prudent course is to continue applying the established disparate-impact framework—ensuring that employment practices are job-related and consistent with business necessity—while monitoring litigation and regulatory developments closely.

If you have questions about how this may affect your business, please contact Kevin Koronka, Catarina Colón, Sarah Vincent, or your Husch Blackwell attorney.