



Evolving Landscape for Disparate Impact Theory of Liability in Employment Discrimination and the Uniform Guidelines on Employee Selection Procedures (UGESP)

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Agenda

**Disparate Impact
Basics**

**Department of
Justice Slip Opinion
(June 9, 2026)**

**Federal Court
Consideration of
Disparate Impact
and UGESP**

**State Laws
Governing Disparate
Impact and the Use
of UGESP**

Where To Next?

Disparate Impact Basics

Civil Rights Act of 1964

Statutory Text

- Discrimination prohibition
 - Sec. 703. (a) It shall be an unlawful employment practice for an employer—(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
- Allowance for testing
 - Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer * * * to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not **used to discriminate because of race, color, religion, sex or national origin** designed, intended or. * * * 78 Stat. 255, 42 U.S.C. s 2000e—2

Two Legal Theories

Disparate Treatment

- *McDonnell-Douglas v. Green*, 411 U.S. 782 (1973)
- Employer treats some people less favorably than others related to their group membership
- Discriminatory motive is required
- Motive can be direct evidence or circumstantial evidence
- Direct evidence: “men need not apply”
- Circumstantial evidence: “Susan was more qualified for promotion”
- Employer states legitimate reason for action
- Claimant proves it is not the real reason for the action

Two Legal Theories

Disparate Impact

- *Griggs v. Duke Power Co.* 401 U.S. 424,431 (1971)
- Employer has a facially neutral practice (test)
- Practice results in a “disproportionate adverse effect on members of a protected class” (Title VII)
- Plaintiffs must establish a difference (statistical or four-fifths)
- Employer may prove there is no statistical impact or that the practice is job-related and serves a business necessity.

Griggs v. Duke Power

Facts of the Case

- Duke Power's Dan River Steam Station had 5 departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test
- Initially, African Americans were solely employed in the Labor department where the highest paid positions paid less than the lowest paying jobs in the other departments.
- After the claim, Duke Power allowed promotions into other departments, but the other positions required a high school diploma.
- Duke Power then started allowing promotion to those who passed two tests.
- Neither test measured the ability to perform any of the other four positions.
- Duke Power stated that the tests were to "improve the overall quality of the work force."
- District court found that there was "no showing of a discriminatory purpose in the adoption of the diploma and test requirements."

Griggs v. Duke Power

Supreme Court Holding

- Justice Brennan decision begins with Congress' intent in passing Title VII.
- Title VII includes neutral practices
 - Not limited to intentional discrimination but “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.”
- Business necessity requirement
 - “The touchstone is business necessity. If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited.”
- Provision allowing for testing
 - Court of Appeals had determined that all testing was lawful as long as it was not given for the purpose of discriminating.
 - Legislative history contradicted that because the amendments to the statutory language included the concept of job relatedness.

Three-Step Burden Shifting Framework for Disparate Impact Codified in Civil Rights Act of 1991

- **Prima Facie Case**
 - a. The plaintiff identifies a specific, facially neutral employment practice (e.g., a test, educational requirement, physical standard, or recruiting method).
 - b. Show, typically through statistical evidence, that the practice has a disproportionately adverse effect on a protected class.
- **Business Necessity Defense**
 - Employer demonstrates that the challenged practice is job-related and consistent with business necessity.
 - Established through validation of the selection procedure.
- **Less Discriminatory Alternative**
 - The plaintiff can still prevail by demonstrating that an equally valid, alternative practice exists with less adverse impact that the employer refused to adopt and that would have served the employer's needs.

Executive Order 14281

- Issued on April 23, 2025 (*Restoring Equality of Opportunity and Meritocracy*)
- “disparate-impact liability. . .holds that a near insurmountable presumption of unlawful discrimination exists where there are any differences in outcomes in certain circumstances among different races, sexes, or similar groups, even if there is no facially discriminatory policy or practice or discriminatory intent involved, and even if everyone has an equal opportunity to succeed.”
- “Disparate-impact liability all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability.”
- By May 23, identify regulations imposing disparate impact.
- By June 7, assess pending investigations, civil suits, and positions relying on disparate impact.

Department of Justice Slip Opinion (June 9, 2026)

Department of Justice, Office of Legal Counsel Slip Opinion on the “Constitutionality of Disparate-Impact Liability Under Title VII,” June 9, 2026

Divided into Four-Parts

- *Part 1: Historical Overview of Disparate Impact*
 - The 14th Amendment requires equal treatment but does not require equal outcomes.
 - Acknowledges leading cases such as *Griggs* and *Wards Cove* as well as Civil Rights Act of 1991 framework.
- *Part 2: Disparate impact “pushes constitutional boundaries”*
 - Heavy reliance on separate Scalia concurring opinion in *Ricci* that nevertheless questioned disparate impact liability in relation to the Equal Protection Clause of the 14th Amendment.
 - Also claims that very recent decisions related voting rights limiting discrimination to only intentional actions.

Department of Justice, Office of Legal Counsel Slip Opinion on the “Constitutionality of Disparate-Impact Liability Under Title VII,” June 9, 2026

- *Part 3. Disparate impact is inconsistent with Title VII so new test must be created.*
 - Plaintiff’s burden must be heightened so that employers will not resort to quotas.
 - Plaintiff offers a “viable alternative to the challenged practice that accomplishes the employer’s legitimate goals just as well.”

Department of Justice, Office of Legal Counsel Slip Opinion on the “Constitutionality of Disparate-Impact Liability Under Title VII,” June 9, 2026

- *Part 4: Uniform Guidelines on Employee Selection Procedures*
 - Opinion specifies three “corrections:”
 - “First, the business-necessity defense is not a high bar; it requires employers to demonstrate only that the challenged practice is **rational, convenient, or helpful** for serving a valid business purpose. Employment practices are presumptively job-related, and only irrational or arbitrary practices with no plausible job-relatedness can create disparate-impact liability” (p.2).
 - “Workplace requirements and selection procedures—such as background checks, aptitude tests, and SAT scores—are **presumptively job-related**. Only **irrational or arbitrary** practices with no plausible job-relatedness can create disparate-impact liability” (p.1).

Department of Justice, Office of Legal Counsel Slip Opinion on the “Constitutionality of Disparate-Impact Liability Under Title VII,” June 9, 2026

- *Part 4: Uniform Guidelines on Employee Selection Procedures*
 - Opinion specifies three “corrections:”
 - “Second, plaintiffs must satisfy a robust causality requirement by demonstrating—both at the pleading stage and beyond—that the challenged employment practice itself (not external factors or other employer practices) caused the alleged disparate impact” (p.2).

Department of Justice, Office of Legal Counsel Slip Opinion on the “Constitutionality of Disparate-Impact Liability Under Title VII,” June 9, 2026

- *Part 4: Uniform Guidelines on Employee Selection Procedures*
 - Opinion specifies three “corrections:”
 - “Third, plaintiffs must establish with particular evidence that there is an available alternative practice that causes less disparate impact and would be equally effective for serving the employer’s valid business purpose. Based on these principles, EEOC’s current validation-study and affirmative-action regulations are unlawful” (p.2).

Department of Justice, Office of Legal Counsel Slip Opinion on the “Constitutionality of Disparate-Impact Liability Under Title VII,” June 9, 2026

Frame of Reference

- *Part 4: Uniform Guidelines on Employee Selection Procedures*
 - UGESP was always intended to be advisory (except for OFCCP).

“Section 1 B. Purpose of guidelines.

These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. **These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results.** However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.”

Department of Justice, Office of Legal Counsel Slip Opinion on the “Constitutionality of Disparate-Impact Liability Under Title VII,” June 9, 2026

Frame of Reference

- *Part 4: Uniform Guidelines on Employee Selection Procedures*
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“Section 1

C. Relation to prior guidelines.

These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the **standards of the psychological profession**. These guidelines are intended to be consistent with existing law.”

Department of Justice, Office of Legal Counsel Slip Opinion on the “Constitutionality of Disparate-Impact Liability Under Title VII,” June 9, 2026

Reflections on the Slip Opinion

The slip opinion signals a continued enforcement shift at the EEOC and DOJ under the current administration.

It is not a law.

It does not have the weight of a court opinion and does not supersede any Supreme Court (or lower court) precedents.

It does not automatically overturn State laws codifying Disparate Impact Theory and UGESP.

It does not recognize that the UGESP, although dated, essentially reflects validation and more generally testing practices proscribed by testing professionals. UGESP was developed with the APA Standards as a foundation. The UGESP overlaps significantly with current SIOP Principles.

EEO Leaders' and Selection Practitioners' Concerns Regarding the DOJ Slip Opinion

- Slip Opinion ignores key cases where the Supreme Court continues to accept disparate impact analysis.
- Civil Rights Act of 1991 clearly sets forth appropriate test and Congress' will to codify adverse impact.
- Reliance on *Ricci* is misplaced because it cites to one justice's opinion and ignores the rest of the case which upholds disparate impact liability.
- It ignores Justice Sotomayor's role in *Ricci*.
- Disparate impact analyses are not intended to result in quotas but lead to evaluating validity.

EEO Leaders' and Selection Practitioners' Concerns Regarding the DOJ Slip Opinion

- Slip Opinion ignores the long judicial history of deference to the UGESP.
- Slip Opinion ignores the sources of the validation guidance in the UGESP as well as its relationship to technical guides in the selection field (SIOP Principles, APA Standards).
- Slip Opinion presents concerns about the validation requirements in UGESP with no references or citations to support where the concerns have been voiced.
- Slip Opinion presents new expectations for the standards for validation without references or citations to support their theoretical adequacy, efficacy, or acceptance by testing practitioners.
- Slip Opinion fundamentally does not consider that validation is important to employers and test takers alike and it lacks consideration of current employee selection methods.

SIOP's Response to Potential Recission of UGESP, December 16, 2025

SIOP posted a three-page policy brief for government decision makers and a full statement for SIOP members that were both entitled “SIOP Position and Advice About the Uniform Guidelines—Society for Industrial and Organizational Psychology” on its website (Society for Industrial and Organizational Psychology, 2025).

These documents strongly recommended against the rescission of UGESP and described core functions of the guidance for personnel selection practitioners.

SIOP's Response to Potential Recission of UGESP, December 16, 2025

SIOP's specific recommendations for professional practice:

1. Continue performing job analyses.
2. Continue conducting validation research.
3. Continue performing adverse impact analyses.
4. Continue documentation and record-keeping of validation evidence.
5. Provide professional development for personnel involved in selection decisions to ensure understanding of evidence- based selection tools.

Federal Court Consideration of Disparate Impact and UGESP and Other Professional Standards

Federal Court Consideration of Adverse Impact and UGESP and Other Professional Standards

Disparate impact has been cited thousands of times in court opinions.

Both the original EEOC Guidelines (1968-1978) and the UGESP (1978-Present) have been referenced in courts hundreds of times.

Federal Court Consideration of Adverse Impact and Professional Standards

	Mentions in Opinions from District Courts and Above	Mentions in Supreme Court Cases
UGESP	295	6
APA Standards*	23	1
SIOP Principles**	16	0

*American Psychological Association Standards on Educational and Psychological Testing

** Society of Industrial and Organizational Psychology Principles for the Validation and Use of Personnel Selection Procedures

Federal Court Consideration of Adverse Impact and Professional Standards

UGESP is entitled to “great deference” (*Griggs*, 401 U.S. at 434, 91 S.Ct. at 855)

“Since the Act and its legislative history support the Commission’s construction, this affords good reason to treat the **guidelines** as expressing the will of Congress” (*Griggs*, 401 U.S. at 434, 91 S.Ct. at 855)

“Compliance with these **Guidelines** is generally required absent some showing that a cogent reason exists for noncompliance” (*Watkins v. Scott Paper Co.*, 530 F. 2d 1159, 1187 (5th Cir. 1976), quoting *United States v. Georgia Power Co.*, 474 F. 2d 906, 913 (5th Cir. 1973).

There are numerous cases where employers are directed to develop **UGESP**-compliant procedures under consent decree (e.g., *Allen v. Alabama State Board of Education*, 190 F.R.D. 602, (2000); *City & County of San Francisco v. San Francisco Police Officers Association*, 621 F. Supp. 1221 40 FEP 1477 ND Cal. 1985)).

Federal Court Consideration of UGESP and Related Professional Standards

- “The EEOC **Guidelines** are intended ‘to provide a framework for determining the proper use of tests and other selection procedures.’ *Id.* at 1607.1(B). Although it has been stressed repeatedly that courts are by no means *bound* by the EEOC Guidelines, courts rely on them because following the Guidelines promotes consistency in the enforcement of anti-discrimination law. That is, the Guidelines represent ‘the administrative interpretation of the Act by the enforcing agency’ and are thus ‘entitled to great deference.’ *Griggs*, 401 U.S. at 433-34, 91 S.Ct. 849. But the EEOC Guidelines are not only the administrative agency's interpretation of Title VII's requirements for test validation, they also represent the **opinion of experts in the field** i.e., the EEOC. Because of that, courts have relied on the EEOC Guidelines since the standards for disparate impact analysis were announced in *Griggs*. Thus, although we approach the Guidelines with the appropriate mixture of ‘deference and wariness,’ *Guardians*, 630 F.2d at 91, **thirty-five years of using these Guidelines makes them the primary yardstick by which we measure defendants' attempt to validate** the LAST” (*Gulino et al. v. New York State Education Department*, United States Court of Appeals, Second Circuit, August 17, 2006)

Federal Court Consideration of Adverse Impact and Professional Standards

“On August 24, 1966, the EEOC issued *Guidelines on Employment Testing Procedures*. Those guidelines adopted the *Standards for Educational and Psychological Tests and Manuals* published in 1966 by the American Psychological Association” (*Kinsey v. Legg*, United States District Court for the District of Columbia, November 11, 1974)

“The EEOC has issued ‘Guidelines’ for employers seeking to determine, through professional validation studies, whether their *employment* tests are job related. 29 CFR pt. 1607. These Guidelines draw upon and make reference to *professional standards of test validation established by the American Psychological Association*” (*Albemarle Paper Co. v. Moody*, Supreme Court of the United States, decided June 25, 1975)

State Laws Governing Disparate Impact and the Use of UGESP

State Laws Codifying Disparate Impact Theory

California — Fair Employment and Housing Act (FEHA) amended (effective October 1, 2025)

Connecticut — Connecticut Fair Employment Practices Act amended (effective October 1, 2026)

Illinois — Illinois's Civil Rights Safeguard Act (SB 3777) amends the Illinois Human Rights Act, approved June 1, 2026

New Jersey — New Jersey's Division on Civil Rights adopted regulations (effective December 15, 2025)

New York — New York State Human Rights Law amended (effective December 19, 2025)

State Laws Codifying UGESP

California — Fair Employment and Housing Act (FEHA)
amended (effective October 1, 2025)

New Jersey — New Jersey's Division on Civil Rights adopted
regulations (effective December 15, 2025)

Where to Next?

Current state as of July 21, 2026, at 3:00 p.m.:

Title VII is still law.

Disparate Impact is still a viable theory for plaintiffs' bar.

Existing case law establishes precedence for disparate impact and UGESP.

Professional standards are still viable and advisable.

Where do you think we are going?

Wrap Up & Thank You
