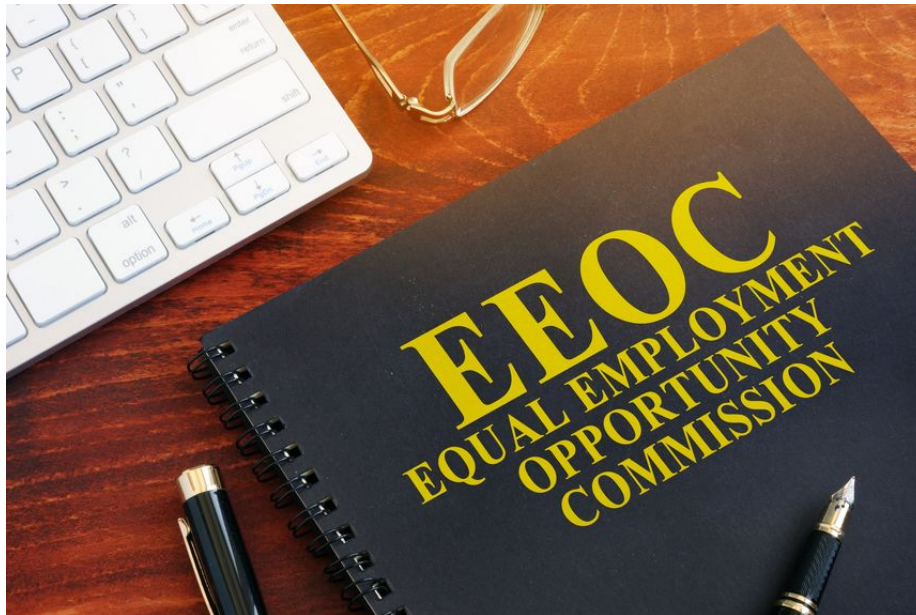


No Investigation, More Litigation: The New EEOC Disparate Impact Dilemma for Employers

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By Debra M. Leder



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Debra M. Leder

From the employer’s perspective, the EEOC’s policy of closing charges that allege only disparate impact discrimination—without investigation—could significantly increase the risk of private litigation. The EEOC’s investigative process has traditionally served as a critical filter, screening out non-meritorious or weak claims before they reach the courts. Without this step, employers are more likely to face lawsuits from private litigants based on disparate impact allegations, regardless of their underlying merit.

This shift means employers may need to defend more claims in court, leading to higher legal costs and resource burdens. The absence of an EEOC investigation also removes opportunities for early resolution or conciliation, which can clarify misunderstandings or resolve disputes before litigation. As a result, employers may encounter more protracted and expensive legal battles, even in cases that might have been dismissed or settled at the administrative level.

At issue is the extent of the EEOC's discretion to prioritize its investigative resources, and whether a blanket refusal to investigate disparate impact claims aligns with the agency's statutory obligations under or with Supreme Court precedent such as *Griggs v. Duke Power Co.*, which recognized disparate impact as a valid theory of discrimination.

Ultimately, while this policy may streamline the EEOC's workload, it potentially shifts the burden to employers, who might now face an increase in disparate impact claims in court brought by private litigants. Although claimants have always had the ability to obtain right-to-sue letters regardless of the EEOC's findings, the lack of agency vetting could lead to increased exposure to non-meritorious claims and greater uncertainty in managing workplace discrimination risks, while also reducing opportunities for early, agency-facilitated resolutions that benefit both employers and employees.

However, the policy may also benefit employers by reducing the likelihood of facing large-scale, class-wide litigation brought directly by the EEOC. When the agency pursues class actions, it can leverage significant resources and expertise, often resulting in high-profile, complex, and costly cases with substantial liability and reputational risk. In contrast, individual private lawsuits—though potentially more numerous—are typically smaller in scope and may be less likely to result in sweeping injunctive relief or large settlements. Employers may find it more manageable to address claims on a case-by-case

basis, rather than defending against coordinated, agency-led class actions that could impact company-wide policies and practices. In this sense, the EEOC's policy shift may reduce the risk of large, precedent-setting judgments and broader operational disruptions.

As courts and policymakers weigh the legality and wisdom of this approach, employers should remain attentive to both the increased risks and potential advantages that may arise from the EEOC's evolving enforcement strategy.

The commission could continue issuing these letters to charging parties with disparate impact claims, providing a possible argument they fulfilled their Title VII duties.

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