

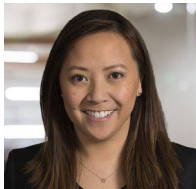
# New Executive Order Takes On Disparate Impact Discrimination: 7 Major Takeaways for Employers

A Practical Guidance® Article by

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In another major shift for workplaces, President Trump issued an executive order yesterday with huge implications for employment discrimination claims. For decades, employers could face liability for policies and practices that didn't intentionally discriminate but had a "disparate impact" on a group of job applicants or employees based on a protected characteristic, such as race or sex. The president is now aiming "to eliminate the use of disparate impact liability in all contexts to the maximum degree possible." Although courts nationwide apply the disparate impact theory of liability in employment discrimination claims—and the law hasn't changed yet—we expect federal agencies to immediately halt

related enforcement activities and take steps to influence broader reform. Here's what employers need to know about this development and how it may impact your practices.

## Understanding Discrimination Claims

- **Disparate treatment.** As you likely know, employers cannot intentionally discriminate against job candidates or employees based on a protected characteristic. For example, Title VII of the Civil Rights Act of 1964 prohibits such discrimination based on national origin, race, color, religion, and sex. So if an employer decides, for example, to hire only women for a certain role, this would be considered intentional employment discrimination, and the employer may face "disparate treatment" liability unless there is a [bona fide occupational qualification](#).
- **Disparate impact.** Under current law, an employer can also be held liable for seemingly neutral policies or practices that have a disproportionate impact on a particular group of individuals based on a protected characteristic. In other words, a worker doesn't need to show that the employer intentionally discriminated against them, just that the practice had a disproportionate impact, even if unintentional.

The U.S. Supreme Court has recognized disparate impact liability under Title VII since 1971 in *Griggs v. Duke Power Co.*, and it was ultimately codified by Congress in the Civil Rights Act of 1991. In the *Griggs* case, SCOTUS found that requiring a high school diploma or a passing score on an intelligence test was unlawful because these practices had a disproportionate impact on Black employees and were not proved to be job-related. Notably, disparate impact liability has been recognized under other laws, including the Age

Discrimination in Employment Act and the Americans with Disabilities Act, though the legal analysis varies.

- **Employer defenses.** In Title VII disparate impact claims, employers can defend their facially neutral employment practices by showing a legitimate, nondiscriminatory reason for the policy or practice that is consistent with business necessity. For example, a job that requires heavy lifting may disproportionately screen out women, but an employer may be able to show that this requirement is necessary to perform the job.
- **Challenges for employers.** Defending disparate impact claims is often time consuming and costly for employers, as it generally involves complex statistical analyses. [You can read more about the analysis in this insight.](#) Furthermore, these are generally class claims, as they involve alleged discrimination toward whole groups of job candidates or employees.

## Key Aspects of the Executive Order

President Trump's [April 23 executive order](#) aligns with his goal to "encourage meritocracy and a colorblind society, not race- or sex-based favoritism." The order asserts that the disparate impact liability theory "violates the Constitution's guarantee of equal treatment for all by requiring race-oriented policies and practices to rebalance outcomes along racial lines." It broadly addresses federal actions, including those related to Title VI (which applies to programs that receive federal funds) and Title VII of the Civil Rights Act. According to [a White House Fact Sheet](#), the order:

- **Revokes former presidential actions** that approved of disparate impact liability and sets in motion broader reform.
- Directs all agencies to **deprioritize enforcement** of statutes and regulations that include disparate impact liability.
- Instructs the Attorney General to **repeal or amend all Title VI regulations** on race discrimination that consider disparate impact liability.
- Directs the administration to **assess all pending investigations, lawsuits, and consent judgments** that rely on a theory of disparate impact liability and take appropriate action.

The order also calls for the administration to review laws or decisions at the state level that impose disparate impact liability and may be deemed unconstitutional. But as we noted above, the executive order does not immediately change the law.

## 7 Major Takeaways for Employers

1. **Federal focus is shifting.** While the executive order does not change federal statutes or Supreme Court precedent, it has the most impact on federal agency priorities and enforcement activity. You can expect the Equal Employment Opportunity Commission (EEOC) and other applicable federal agencies to swiftly end all enforcement activity related to disparate impact claims. Indeed, guidance has [already been removed](#) from the EEOC's website.
2. **AI guidance dropped.** In 2023, during the Biden administration, the EEOC issued [a technical assistance document](#) saying it will apply long-standing legal principles in an effort to find possible Title VII violations when employers use AI to assist with hiring or employment-related actions. The agency focused particularly on disparate impact liability. As of April 24, 2025, this guidance has also been [removed](#) from the EEOC's website.
3. **Tool for litigation defense.** Although employees can continue to bring disparate impact claims under federal and state law, employers may now have another tool to defend against such claims as the Trump administration seeks broader reform.
4. **Track legal battles.** Disparate impact liability is still a litigation risk for employers, as courts will continue to apply federal law and SCOTUS precedent—and we expect to see worker advocates challenge the executive order. However, the Supreme Court could ultimately revisit the constitutionality of disparate impact liability and potentially reverse its position. [Sign up for our FP Insights to stay informed as these issues develop.](#)
5. **Discrimination based on protected characteristics is still unlawful.** [Recent guidance from the Trump administration](#) reminds employers that Title VII prohibits employment discrimination based on protected characteristics, including race, color, national origin, sex, and religion. The EEOC has explained that the law protects against such discrimination "no matter which employees are harmed," and noted that Title VII's protections "apply equally to all racial, ethnic, and national origin groups, as well as both sexes."
6. **Stay tuned for more guidance.** We expect additional guidance from the EEOC on how the new executive order will affect the agency's interpretations and enforcement activities.
7. **Prepare an action plan.** This major shift from the federal government will certainly cause confusion

for employers that must comply with varying federal, state, and local anti-discrimination laws. Reach out to your Fisher Phillips attorney to help prepare your compliance plan, and if necessary, your litigation strategy.

## Conclusion

We will continue to monitor developments that impact your workplace and provide updates when warranted. If you have any questions about these developments or how they may affect your business, please contact your Fisher Phillips attorney or the authors of this Insight. Visit our [New Administration Resource Center for Employers](#) to review all our thought leadership and practical resources, and make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information.

## Related Content

### Executive Order

- [Restoring Equality of Opportunity and Meritocracy – The White House](#)

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- [Presidential Executive Actions Tracker](#)
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### Practice Notes

- [Disparate Impact Claims: Key Considerations](#)
- [Disparate Impact Analysis: Key Steps and Tests](#)

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### Sheila M. Abron, Partner, Fisher & Phillips LLP

Sheila Abron is a Partner in the Columbia office and Co-Chair of the Firm's Affirmative Action and Federal Contract Compliance Practice Group. She is committed to finding practical, real world solutions to her clients' employment law needs. She represents companies—large and small—as they navigate employment issues related to hiring, discipline, investigations, employment discrimination, unemployment, and other related issues. Sheila provides guidance to higher education institutions on Title IX Compliance and investigations. She has extensive experience providing compliance advice to federal contractors on affirmative action and OFCCP regulations and audits. Sheila also has extensive experience working on collective actions under the Fair Labor Standards Act (FLSA) and class actions under wage and hour state laws. Sheila also provides training for supervisors and managers on harassment, Equal Employment Opportunity (EEO) compliance, the Family Medical Leave Act, diversity and inclusion, and many other areas.

Sheila is involved in various professional and community activities. She is a past president of both the South Carolina Women Lawyers' Association (SCWLA) and the South Carolina Bar Young Lawyers (SCYLD) Division. She also serves on the Board of Directors for Columbia – Society for Human Resource Management (SHRM) and the board of the National Conference of Women's Bar Associations. Sheila is active in the Richland County Bar, American Bar Association, and is a member of the Junior League of Columbia.

Prior to attending law school, Sheila was a member of store leadership for a Fortune 500 retail company, providing employee supervision and managing a variety of employee issues related to wage and hour, workers' compensation, discrimination issues, performance management, and other personnel issues.

Sheila is a 2019 recipient of the Silver Compleat lawyer Award from the University of South Carolina School of Law Alumni Association. This award recognizes alumni who have made significant contributions to the legal profession and who exemplify the highest standard of professional competence, ethics, and integrity.

She has also been named to the *Columbia Regional Business Report's* list of 2018 Women of Influence, *Columbia Business Monthly's* 2018 Best and Brightest 35 and Under, *Columbia Business Monthly's* Legal Elite of the Midlands in 2017 and the American Bar Association's On the Rise – Top 40 under 40 in 2018. She is also a 2018 South Carolina Super Lawyers – Rising Star and a 2019 recipient of the Leadership in the Law award. She was awarded the Johnathon Jasper Wright Award by The Honorable Matthew J. Perry Chapter of the Black Law Students Association at the University of South Carolina School of Law, is a three-time recipient of the President's Award and a four-time recipient of the Start of the Quarter award from the South Carolina Bar Young Lawyers' Division.

### Jessica D. Causgrove, Partner, Fisher & Phillips LLP

Jessica Huynh Causgrove is a partner in the Chicago office. She handles matters across all facets of labor and employment law, including employment discrimination claims before federal and state courts throughout the country.

Jessica's practice focuses on providing day-to-day counseling involving internal investigations, workplace accommodations, leave requirements, high-risk terminations, reductions in force, wage and hour issues, and drug/alcohol testing in the workplace. Jessica has litigated significant cases involving sexual harassment, sexual orientation discrimination, age and national origin discrimination, disability discrimination, and a host of other claims, as well as a series of class action cases involving the Illinois Biometric Information Privacy Act (BIPA). She also has experience with OSHA and Department of Labor investigations and has handled traditional labor matters, including ULPs.

Jessica was selected by Fisher Phillips to be a Fellow on the Leadership Council on Legal Diversity for 2020-2021. She also serves on the firm's Pay Equity, Diversity and Inclusion, and Women's Initiative Leadership Counsel (WILC) committees.

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**Samantha J. Monsees, Partner, Fisher & Phillips LLP**

Samantha Monsees is a partner in the firm's Kansas City office with an active litigation practice in state and federal courts. Samantha defends employers across multiple industries, including hospitality, manufacturing, construction and automotive dealers in claims arising from all aspects of the employment relationship. She is admitted in Iowa, Kansas and Missouri. As the former Vice President of Legal and Operations at a marketing technology company, she keenly appreciates her clients' needs and the importance of prompt, efficient legal advice in enabling them to keep their businesses running smoothly.

Samantha litigates wage and hour claims under the Fair Labor Standards Act (FLSA), the Missouri Minimum Wage Law and the Kansas Wage Payment Act. She also represents management in trade secret and restrictive covenant matters, and defends harassment, discrimination, retaliation and wrongful termination claims brought under state or federal law such as the Family and Medical Leave Act (FMLA), Fair Credit Reporting Act (FCRA), Americans with Disabilities Act (ADA), Title VII and the Missouri Human Rights Act. She represents employers before state and local administrative agencies including the Equal Employment Opportunity Commission (EEOC), Occupational Safety and Health Administration (OSHA), Missouri Commission on Human Rights (MCHR), Iowa Civil Rights Commission (ICRC), Kansas Human Rights Commission (KHRC), Department of Labor (DOL), National Labor Relations Board (NLRB), Office of Administrative Law Judges (OALJ), Occupational Safety and Health Review Commission (OSHRC), and the Administrative Review Board (ARB). Samantha has experience negotiating collective bargaining agreements in both the private and public sector. Samantha regularly provides advice and counsel to employers on day-to-day compliance issues and litigation avoidance, assists with regulatory audits and administrative complaints, facilitates internal investigations, conducts management training, and drafts employer policies and procedures that are tailored to clients' needs.

Additionally, as a member of the Firm's Workplace Safety Practice Group, Samantha regularly assists clients with related issues, including OSHA inspections arising from amputations and fatalities, contesting OSHA citations, and OSHRC litigation. She represents employers during OSHA inspections and investigations, defends OSH Act 11(c) whistleblower and retaliation claims, and provides OSHA compliance advice to clients.

Samantha keeps up to date on legislative and regulatory changes affecting employers, frequently authors legal alerts for the firm, and is often interviewed by local and national publications on developments in employment law.

During the COVID-19 pandemic, Samantha was an active member of the firm's COVID-19 Taskforce, COVID-19 Vaccine Subcommittee and its SBA Loan Team and advised employers on the ever-evolving local, state and federal COVID-19 legislation and guidance, including how to handle COVID-19 outbreaks in the workplace, implementing vaccine and masking programs, vaccine incentive policies, and return to the office and hybrid policies, all while avoiding legal liability.

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