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

Insights
4.24.25

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.

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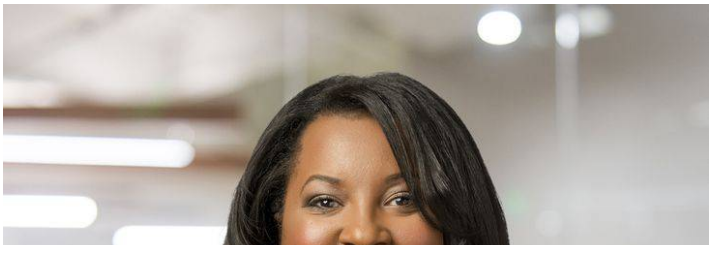

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