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DOJ SAYS EEOC GUIDANCE ON UNINTENTIONAL BIAS IS UNCONSTITUTIONAL: 5 THINGS EMPLOYERS NEED TO KNOW

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DOJ Says EEOC Guidance on Unintentional Bias Is Unconstitutional: 5 Things Employers Need to Know

The Trump administration has continued its efforts to step back from enforcing "unintentional" workplace bias liability and is focused on intentional discrimination instead. The EEOC announced earlier this month that it would continue to only prioritize enforcement in intentional discrimination cases (known as **disparate treatment liability**), with a focus on bias in DEI programs. The agency will not focus on workplace discrimination stemming from a policy or practice that unintentionally discriminates against a population of employees (which is known as **disparate impact liability**). Notably, the Department of Justice (DOJ) backed that position in a June 9 memo giving its opinion that the disparate impact theory of liability is likely unconstitutional. According to the DOJ, the government has been holding employers to an unfairly high standard when it comes to defending everyday workplace practices like background checks, skills tests, and education requirements. The DOJ's position has not been tested in court at this time, but here are the top five things you need to know about the DOJ's memo – and five things you should consider doing now.

Trump Administration's Shifting Workplace Priorities

EEOC Chair Andrea Lucas has been clear that her priorities include rooting out unlawful DEI-motivated race and sex

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discrimination, as well as a commitment to "merit-based, evenhanded enforcement of our nation's civil rights laws."

The agency's new National Enforcement Plan, which was released earlier this month, extends Chair Lucas' goals by prioritizing disparate treatment claims over disparate impact claims.

Chair Lucas also asked the DOJ to weigh in on its opinion as to whether disparate impact liability is legally sound. The DOJ's short answer was "no."

In a 25-page opinion, the DOJ concluded that the EEOC's longstanding interpretations of Title VII of the Civil Rights Act – including its Uniform Guidelines on Employee Selection Procedures – "embrace an unconstitutional reading of Title VII."

Under the disparate impact theory, employers can face liability because a workplace practice – such as hiring, promoting, or disciplining employees – produces disproportionate harm to a particular demographic group, even if the employer had no intention to discriminate. According to the DOJ, this approach actually forces employers to make decisions based on protected categories to avoid getting sued – which is the exact conduct anti-discrimination laws are supposed to prevent.

DOJ Points to 3 Main Issues

According to the DOJ, the following three key changes would align these rules with the Constitution:

1. A reasonable business reason is enough. To the DOJ, when a practice is challenged, you should only have to show it's rational, convenient, or helpful for a valid business purpose. Common practices like running background checks, giving skills tests, requiring a high school diploma, or using standardized test scores – which have been shown to have a disproportionate impact on certain demographic populations in certain circumstances – should be considered job-related unless proven otherwise. Under this view, the DOJ contends that employers should only face liability for practices that have no logical connection to the job. This is a major departure from the EEOC's current rules, which ask employers to conduct reviews to evaluate whether their employment practices are providing equal employment

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opportunities – i.e., are correlated with job success – across all demographic groups.

2. The plaintiff has to pinpoint the cause. The DOJ also contends that a job applicant or employee bringing a discrimination lawsuit must identify the specific workplace practice, policy, or procedure that caused the unequal outcome, not external factors or other employer practices. The DOJ reasoned that without this safeguard, any employer whose workforce population is racially imbalanced could face a lawsuit, thereby effectively forcing employers to hire by quota to avoid being sued.

3. The plaintiff has to offer a better alternative that works. The DOJ said that a person challenging your workplace practice should be made to identify an alternative employment practice and prove two things:

- that it would cause less disparate impact; and
- that it would be equally effective at meeting your business goals, cost and other burdens included.

The DOJ's position is that only your refusal to adopt a genuinely equal alternative supports an inference that the practice is a pretext for intentional discrimination.

Impact on Day-to-Day Workplace Practices

The DOJ also flagged two historic EEOC guidelines that may affect your business operations:

- **The validation requirements.** Current rules can require a formal "validation study" proving a selection procedure (like a pre-employment assessment, skills analysis, or other scored selection procedure) for a role is actually related to the job. This is especially true if the practice produces differing outcomes across demographic groups. The DOJ called these requirements "incomprehensible" to the typical employer, with 19 to 34 mandatory documentation steps that push businesses to hire consultants or drop reasonable standards.
- **The affirmative action rules.** The DOJ also contends that the EEOC's voluntary Affirmative Action Guidelines are likely unconstitutional because the guidelines encourage race-based preferences in response to workforce imbalances. The DOJ's opinion states that the rules

amount to open-ended racial balancing with no clear stopping point.

Does the DOJ's Opinion Have Teeth?

While a DOJ opinion is not a court ruling – and does not rescind any guidance or regulations or change the law – it does carry real weight because it tells federal agencies how to interpret the law and signals the direction in which enforcement is heading. The EEOC and any other federal agency that utilizes disparate impact liability theories will likely conform their enforcement practices to align with the DOJ's opinion. But the DOJ's opinion has not been tested in court, and it will be the courts that determine whether the DOJ's interpretation is correct.

Your 5-Step Action Plan

In light of recent guidance from the Trump administration, including the EEOC and DOJ, employers should consider taking the following five steps:

1. Don't scrap your compliance programs, but take a fresh look. Job applicants and employees can still sue for workplace bias. Employers should be reviewing their policies and practices to ensure they are providing equal employment opportunities and not treating employees differently based on their demographic characteristics.

2. Review your hiring processes. If you use background checks, aptitude tests, or other similar selection criteria for making employment decisions, this opinion provides additional support for those practices – including if you have not validated their effectiveness or potential discriminatory impact. However, it is important to remember that your state may have its own rules, and federal courts in your area may have a different interpretation, so don't assume you're compliant everywhere.

3. Evaluate your diversity, equity, and inclusion programs. In addition to federal priority shifts, if you operate in certain states, like Texas or Florida, or are a federal contractor, you may see increased scrutiny of DEI programs. Examine all DEI-related policies and ensure that they do not give preference or impose illegal requirements based on protected characteristics. This includes reviewing job postings, application forms, internal training materials, and

programs. Work with legal counsel to evaluate whether those programs are still on solid legal ground.

4. Anticipate changes from the EEOC. Since the EEOC's own leader asked for this DOJ opinion, expect the agency to update additional guidance in the coming months. This could impact your litigation strategy, as well as your workplace practices, policies, and procedures.

5. Remember that federal and state laws still apply. Even if federal enforcement relaxes, federal, state, and municipal laws exist that have their own anti-discrimination provisions, many of which are stricter than federal enforcement practices. Make sure you know the rules in jurisdiction where you have employees.

Conclusion

Now is a good time to revisit your workplace practices, policies, and procedures across the board and ensure compliance with evolving rules. If you have questions, reach out to your Fisher Phillips attorney, the authors of this Insight, or any member of our DEI and EEO Compliance Team. We will continue to monitor developments related to all aspects of workplace law. Sign up for alerts from Fisher Phillips' Insight System to stay on top of information that could impact your business.