Legal Update Article

Does Employer Disparate Impact Liability Still Exist? The Latest EO Pushes to Eliminate It

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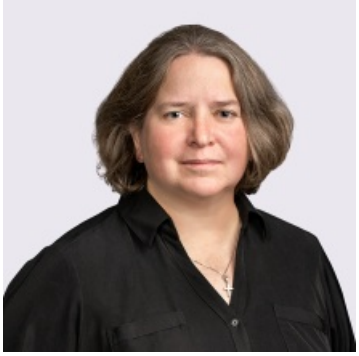

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Takeaways

- Federal agencies are expected to limit their enforcement of disparate impact discrimination claims.
- Employers should look to remove barriers to equal employment opportunity and avoid making any employment decision based on race, sex, or other protected characteristic.
- Employers may soon receive agency guidance or technical assistance regarding appropriate methods to promote equal access to employment regardless of whether an applicant has a college education.

Related links

- Restoring Equality of Opportunity and Meritocracy (EO)
- New Presidential EO Says Federal Government Recognizes 'Two Sexes' Only
- Trump Administration Revokes EO 11246, Prohibits 'Illegal' DEI: What the EO Ending Illegal Discrimination and Restoring Merit-Based Opportunity Means for Employers

Article

President Donald Trump issued the "Restoring Equality of Opportunity and Meritocracy" executive order (EO) on April 23, 2025. The stated purpose of the EO is "to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals." But the "maximum degree possible" is more limited than the words suggest.

What Is Disparate Impact?

The typical discrimination claim is a disparate treatment claim where an individual allegedly is treated differently than someone else because of their race, sex, or other protected characteristic. A disparate impact theory of discrimination would find discrimination when the application of a neutral policy or practice disproportionately affects a particular group. For example, pre-employment testing may expose an employer to disparate impact liability if the results disproportionately exclude women, individuals with disabilities, or candidates from certain racial or ethnic groups from proceeding to the next stage of hiring. The expressed concern with the disparate impact theory of liability is that employers may feel forced to engage in affirmative action or overcorrect for the impact of a neutral policy and make decisions based on race or sex to avoid the threat of liability.

The EO

The latest EO challenges the legitimacy and constitutionality of the disparate impact

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theory of liability. The EO requires the following:

1. Revokes the Presidential approvals of the parts of regulations that prohibit disparate impact discrimination under Title VI of the Civil Rights Act of 1964 (Title VI prohibits exclusion from federally funded programs or activities based on race, color, or national origin);

2. Instructs federal agencies to deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability, including under Title VI and Title VII of the Civil Rights Act;

3. Instructs the attorney general to initiate appropriate action to repeal or amend the implementing regulations for Title VI for all agencies to the extent they contemplate disparate-impact liability and also to provide a report on

- all existing regulations, guidance, rules, or orders that impose disparate-impact liability or similar requirements, and detail agency steps for their amendment or repeal, as appropriate under applicable law; and

- other laws or decisions, including at the State level, that impose disparate-impact liability and any appropriate measures to address any constitutional or other legal infirmities

4. Instructs the Attorney General and the Chair of the Equal Employment Opportunity Commission (EEOC) to assess all pending investigations, civil suits, or positions taken in ongoing matters under every Federal civil rights law within their respective jurisdictions, including Title VII of the Civil Rights Act of 1964, that rely on a theory of disparate-impact liability, and take appropriate action with respect to such matters consistent with the policy of the EO;

5. Instructs the Attorney General, the Secretary of Housing and Urban Development, the Director of the Consumer Financial Protection Bureau, the Chair of the Federal Trade Commission, and the heads of other agencies responsible for enforcement of the Equal Credit Opportunity Act, Title VIII of the Civil Rights Act of 1964 (the Fair Housing Act), or laws prohibiting unfair, deceptive, or abusive acts or practices to evaluate all pending proceedings that rely on theories of disparate-impact liability and take appropriate action with respect to such matters consistent with the policy of the EO;

6. Instructs all agencies to evaluate existing consent judgments and permanent injunctions that rely on theories of disparate-impact liability and take appropriate action with respect to such matters consistent with the policy of the EO; and

7. Instructs the Attorney General, in coordination with other agencies, to determine whether any Federal authorities preempt State laws, regulations, policies, or practices that impose disparate-impact liability based on a federally protected characteristic such as race, sex, or age, or whether such laws, regulations, policies, or practices have constitutional infirmities that warrant Federal action, and shall take appropriate measures consistent with the policy of the EO.

What Does This Mean for Employers?

The EO's most likely immediate impact will be seen at the federal agency level. Employers who are facing agency action based on a disparate impact theory under Title VII or Title

VI may be able to rely on this EO to limit or stop the federal agency (including EEOC and Department of Justice) from continuing enforcement efforts at both the charge and litigation phases based on this theory.

Employers who are subject to current injunctions or consent decrees with a federal agency that require action to correct a claimed disparate impact may be able to reduce or limit those obligations.

Employers facing litigation from private parties may use the arguments that the federal government relies upon to challenge disparate impact claims; but with statutory support in Title VII, it is unlikely that the disparate impact theory of liability disappears without further congressional or U.S. Supreme Court action.

What Should Employers Do to Avoid Litigation?

Despite uncertainty regarding disparate impact theories of liability, employers remain well-served to evaluate their practices, policies, job requirements, and tests to ensure that they are necessary and effective for purposes of making the best employment decisions and to remove any artificial barriers to equal employment opportunity. An example of such a barrier can be a degree requirement that may or may not be necessary for the job at issue. Notably, the EO also instructs the attorney general and the EEOC chair "to jointly formulate and issue guidance or technical assistance to employers regarding appropriate methods to promote equal access to employment regardless of whether an applicant has a college education, where appropriate." The current administration has made clear that it expects employers to focus on equal employment opportunity. In evaluating practices, employers should make sure opportunities are available to everyone and remove artificial barriers and avoid making a decision based on the race or sex of an individual to even out the results.

Jackson Lewis attorneys are closely watching developments in this area.