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Regulatory Alert

# New Executive Order Attacks 'Disparate Impact' Liability

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On April 23, 2025, President Donald Trump signed the "Restoring Equality of Opportunity and Meritocracy" executive order (the Disparate Impact EO) directing federal agencies to eliminate the use of disparate impact liability "in all contexts to the maximum degree possible … ." Generally, disparate impact liability arises when a facially neutral policy or practice causes adverse impacts to a group based on protected characteristics, and the employer cannot legally justify it. This EO follows earlier indications from the Department of Justice that it deprioritize and, where possible, eliminate disparate impact liability.

**A Brief Overview of Disparate Impact in Title VII Cases**

Disparate impact liability arises where the employer uses (or refuses to abandon) a facially neutral policy or practice that adversely impacts individuals because of a protected characteristic. The classic example is an employment test administered to applicants that causes disparate impact on the basis of race, sex, etc. Unless an employer can demonstrate that the test is job-related for the position in question and consistent with business necessity, liability follows a showing of disparate impact.[1] Disparate impact liability for employers is statutory, per the Civil Rights Act of 1991 (which amended Title VII). In other contexts, such as under Title VI (nondiscrimination in government funded programs), disparate impact liability is a function of federal regulations and the subject of agency rules and guidance documents.

**Key Elements of the Disparate Impact EO**

The EO reflects the administration's view that disparate impact liability "all but requires" consideration of race in decision-making and, therefore, "racial balancing to avoid potentially crippling legal liability." Disparate impact liability, according to the Disparate Impact EO, is "wholly inconsistent with the Constitution."

According to the EO, "[i]t is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible." To that end, it orders the following actions be taken:

- **Deprioritizing Enforcement of Disparate Impact:**
  - The EO orders federal agencies to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability," including but not limited to Title VII and the implementing regulations of Title VI.

- Most importantly, the EO directs the Department of Justice, the Equal Employment Opportunity Commission (EEOC), the Consumer Financial Protection Bureau, the Federal Trade Commission and the Department of Housing and Urban Development to assess all ongoing matters and pending proceedings that "rely on theories of disparate-impact liability" and to "take appropriate action ... consistent with the policy of this order."

- **Revoking Approval of and Taking Measures to Appeal Disparate Impact Liability Regulations:**
  - The EO revokes prior presidential approvals of disparate impact liability regulations.
  - The EO also orders the attorney general to identify all federal or state laws, regulations, policies or practices that impose disparate impact liability and to "take appropriate measures to repeal or amend the implementing regulations for Title VI of the Civil Rights Act of 1964 for all agencies to the extent they contemplate disparate impact liability" and determine "whether any Federal authorities preempt State laws, regulations, policies, or practices that impose disparate-impact liability."

- **Future Guidance:**
  - The EO orders the attorney general and EEOC to jointly craft and issue guidance (or likely technical assistance) to employers "regarding appropriate methods to promote equal access to employment regardless of whether an applicant has a college education, where appropriate."

**What Does This Mean for Employment Discrimination Claims?**

The Disparate Impact EO does not alter existing federal law prohibiting employment discrimination. Plaintiffs may still bring disparate impact claims under the 1991 Amendment to Title VII of the Civil Rights Act. Additionally, Title VII explicitly states that it shall not be interpreted to "require any employer" to grant "preferential treatment" to any individual or group because of their protected characteristic.[2] However, this EO signals a stark directive regarding enforcement aimed at the EEOC's investigation and enforcement of Title VII disparate impact claims.

We are here to support and collaborate with employers as they navigate the potential impact of the evolving federal legal landscape and related executive orders (discussed in our previous client alerts[3] and our presidential actions hub).

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[1] A plaintiff may still prevail by showing that there are other reasonable alternatives that would result in less of a disparate impact. *Id*. § 2000e-2(k)(1)(A)(ii) and (C); *see also Ricci v. DeStefano*, 557 U.S. 557, 578 (2009).

[2] 42 U.S.C. § 2000e-2(j).

[3] The "Ending Illegal Discrimination" Executive Order: What Does it Mean for Employers, The Defending Women Executive Order Presents Potential Clash Between Federal and State Antidiscrimination Law, Federal Contractors With DEI Policies at Increased Risk of False Claims Act Liability, Fourth Circuit Court of Appeals Stays Preliminary Injunction of Anti-DEI Executive Order