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Anti-discrimination Law under the Second Trump Administration Part 2: The Elimination of Disparate Impact Theory of Discrimination

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President Trump has issued four Executive Orders (EOs) with significant impact on employment discrimination law. Two focus on the elimination of diversity, equity and inclusion (DEI) programs, one focuses on the elimination of the adverse impact (unintentional) theory of unlawful discrimination, and one focuses on the recognition of transgender and nonbinary status. [The first blog post in this three-part series](#) discussed the ways in which President Trump's EOs affect state and local government employment practices related to DEI. This second blog post discusses [EO 14281, Restoring Equality of Opportunity and Meritocracy](#), which seeks to eliminate the use of disparate-impact theory in anti-discrimination practices and litigation.

Background: What is Disparate Impact?

Under Title VII of the Civil Rights Act of 1964 and other federal anti-discrimination laws, there are two ways for an employee or applicant to prove unlawful discrimination. The first is called **disparate treatment**. It involves showing that an employer has *intentionally* discriminated against an employee or applicant. For example, imagine an employer who said, "I just don't like women in the workplace. I'm going to hire a man." The employer is deliberately choosing not to hire a female applicant because of her sex, which is disparate treatment.

The second way to prove unlawful discrimination is called disparate impact, or sometimes "adverse impact." It involves showing that an employer unintentionally violated anti-discrimination laws. If an employer adopts a seemingly neutral employment practice that disproportionately harms members of a protected class, then it may have engaged in unlawful *unintentional* **disparate impact** discrimination. Protected classes are race, color, sex, religion, national origin, age, disability, genetic history, and military service. Employees and job applicants *do not have to prove the employer's intent* in a disparate impact case as they must do in a disparate treatment case. They

must, however, demonstrate that a particular employment policy or practice has, **in fact**, caused a significant statistical disparity in the employment opportunities available to protected class members.

How Disparate Impact Cases Work

Once an applicant or employee has shown a significant statistical disparity, the legal burden shifts to the employer. The employer must show either that:

1. the challenged employment practice does not cause a disparate impact, or
2. even though it causes disparate impact, the practice is job-related and consistent with business necessity.

If the employer demonstrates that the challenged practice is job-related and necessary for business operations, the legal burden shifts back to the plaintiff. The plaintiff may overcome the employer's justification by proving that an alternative practice exists that would:

1. not result in disparate impact, and
2. serve the employer's stated reason for adopting the original practice equally well.

An employer will only be liable if the applicant or employee can establish the existence of such an alternate process.

Disparate impact litigation is statistics-driven and relies heavily on expert testimony. These cases are not easy for applicants or employees to win.

Common Practices That May Cause Disparate Impact

What kinds of employment practices have been shown to result in unlawful disparate impact? In the past, the Equal Employment Opportunity Commission (the EEOC) has identified the following practices as likely to cause disparate impact:

- background checks that include arrest and conviction history;
- background checks that include credit and financial history; and
- physical ability tests that measure a person's physical ability to perform a particular task, the strength of specific muscle groups, or general strength and stamina.

Whether the EEOC will continue to find these hiring practices unlawful under new EO 14281 is unclear, but the EO is explicit about the President's desire to eliminate disparate impact considerations from all federal government activities, including policies, guidance documents and

enforcement activities.

EO 14281: Eliminating Disparate Impact

The EO characterizes disparate impact as a “key tool” of a movement to move the United States away from principles of equal treatment and individual merit toward an approach under which protected characteristics dictate outcomes. According to the EO, disparate impact theory

holds that a near insurmountable presumption of unlawful discrimination exists where there are any differences in outcomes in certain circumstances among different races, sexes, or similar groups, even if there is no facially discriminatory policy or practice or discriminatory intent involved, and even if everyone has an equal opportunity to succeed. Disparate-impact liability all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability.

The EO says that disparate impact theory effectively mandates discrimination and is therefore inconsistent with the U.S. Constitution.

Federal Enforcement Changes

Section 4 of the EO tells executive agencies such as the EEOC and Department of Justice to “deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability, including but not limited to 42 U.S.C. 2000e-2.” This statutory section is at the heart of Title VII. In subsection (k), it declares disparate impact to be an unlawful form of discrimination.

Is Disparate Impact Theory Unlawful or Unconstitutional?

Legal precedent affirms that disparate impact theory is both lawful and constitutional. Disparate impact has been established law since the U.S. Supreme Court’s decision in 1971 in Griggs v. Duke Power Co.

Griggs v. Duke Power: The Foundation of Disparate Impact

The impact of the *Griggs* case has been profound. Before Title VII was passed in 1965, Duke Power had openly discriminated against applicants by race. Once Title VII took effect, the company adopted a seemingly neutral policy requiring employees to have a high school diploma

and passing scores on two standardized tests. This requirement applied to all departments except those involving manual labor.

The policy had a disparate impact by race: it disproportionately excluded Black applicants. Duke Power could not show that the requirements were related to job performance. White employees without high school diplomas who were hired into departments other than the physical labor department before the policy was adopted performed satisfactorily.

In *Griggs*, the Supreme Court held that even where there is no discriminatory intent, an employer may not use a job requirement that effectively excludes members of a protected class if those requirements bear no relation to job performance.

The Civil Rights Act of 1991

Congress codified disparate impact by amending Title VII in the 1991 Civil Rights Act, adding subsection (k) mentioned above.

Continued Legal Recognition of Disparate Impact

Subsequent Supreme Court decisions have addressed disparate impact's scope and application in various contexts. In 2015, in *Texas Department of Housing v. Inclusive Communities Project*, the Court upheld the use of disparate impact theory in the Fair Housing Act, which uses language similar to that found in Title VII.

Understanding the Administration's Position

Given that the U.S. Supreme Court has recognized disparate impact as unlawful conduct under Title VII and that Congress has expressly included it among Title VII's prohibited practices, what is President Trump's objective with EO 14281?

The EO appears to frame disparate impact within its broader critique of what it terms DEI practices (discussed in [the first blog post in this series](#)). By linking disparate impact to "divisive pursuit of results preordained by irrelevant immutable characteristics, regardless of individual strengths, effort, or achievement", the EO places disparate impact among those DEI practices that, in the administration's view, prioritize group identity over individual merit.

The EO appears to distinguish between two approaches to discrimination law: an *equity*-based

approach focused on equal outcomes versus an *equality*-based approach focused on equal treatment. The administration characterizes disparate impact theory as belonging to the former category.

Administration Policy: Deprioritize Disparate Impact

Although the EO says twice that disparate impact is contrary to the Constitution, the EO does not indicate that the administration will investigate those who promote or rely on the use of disparate impact theory. Instead, the EO says that it will be the administration's policy to try to eliminate disparate impact considerations and directs all federal agencies to stop making enforcement of disparate impact violations a priority.

The EEOC has already begun to make changes in response to EO 14281. For the time being, the EEOC lacks a quorum to rescind regulations or previously published guidance, it has removed several previously published guidance documents from its website. Most notably, it has removed guidance addressing how artificial intelligence-driven hiring tools may cause disparate impact – a significant development given the increasing use of AI in recruitment and selection processes.

What Should a State or Local Government Do in Response to EO 14281?

So far, EO 14281 has had minimal effect on state and local government employers. The Supreme Court and Congress have established the disparate impact theory of discrimination, and it remains the law of the land. Even if the EEOC does not take action on complaints alleging disparate impact, employees and applicants retain the right to file disparate impact discrimination lawsuits in federal court. Courts will continue to adjudicate these cases under existing legal precedent.

This means that state and local governmental employers should continue to monitor their employment practices to guard against disparate impact. Reduced EEOC enforcement does not eliminate the risk of legal liability or change the underlying statutory framework that governs state and local government employment practices.

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