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President Trump Acts to Significantly Limit Disparate Impact Liability for Discrimination

Executive Order Curtails Federal Agencies' Enforcement of Disparate Impact Liability Provisions and Directs Agencies to Roll Back Disparate Impact Regulations and Review Possible Preemption of State Disparate Impact Laws

SUMMARY

President Trump's April 23, 2025 Executive Order establishes a federal government policy of seeking to eliminate disparate impact liability for discrimination "in all contexts to the maximum degree possible." All federal agencies are directed to "deprioritize" enforcement of disparate impact statutes and regulations. The Executive Order also directs the Attorney General to consider ways to "repeal or amend" disparate impact regulations under Title VI relating to recipients of federal funding, and to consider ways to promote federal preemption of state disparate impact laws and regulations.

Federal agencies are also instructed to assess, by June 7, 2025, "all pending investigations, civil suits, or positions taken in ongoing matters under every Federal civil rights law within their respective jurisdictions" for compliance with the policy established by the Executive Order. Furthermore, by July 22, 2025, "all agencies shall 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 this order."

OVERVIEW

On April 23, 2025, President Trump issued an Executive Order titled *Restoring Equality of Opportunity and Meritocracy* (the "Order"). The Order asserts that a theory of discrimination known as disparate impact liability—which allows plaintiffs to state a *prima facie* case of discrimination by alleging that a facially neutral

policy or practice has a negative statistical impact on a certain group, regardless of any discriminatory intent—"undermines our national values" and "runs contrary to equal protection under the law and, therefore, violates our Constitution." According to the Order, "disparate-impact liability has hindered businesses from making hiring and other employment decisions based on merit and skill, their needs, or the needs of their customers because of the specter that such a process might lead to disparate outcomes, and thus disparate-impact lawsuits." For these reasons, the Order establishes "the policy of the United States 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."

Under existing federal law and Supreme Court precedent, "a plaintiff establishes a *prima facie* [disparate impact] violation by showing that an employer uses 'a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.' An employer may defend against liability by demonstrating that the practice is 'job related for the position in question and consistent with business necessity.' Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs."[1]

A. Non-Enforcement of Federal Disparate Impact Laws and Regulations

The Order requires all federal agencies to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability." Specifically, the Order references the disparate impact liability provision of Title VII (which applies in the employment context),[2] as well as certain Title VI regulations (which apply to recipients of federal funds) that prohibit federal funding recipients from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination," or from selecting "the site or location of facilities" if doing so has the "purpose or effect of excluding individuals from" programs receiving federal funding.[3] This directive also cites Title VI regulations that allow recipients of federal funds to "take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin" "[e]ven in the absence of . . . prior discrimination."[4] It also references Title VI regulations requiring recipients of federal funds to "assure equality of opportunity" in their employment practices, if their employment practices "tend[]" to exclude individuals from participation in programs receiving federal funds.[5]

B. Revocation of Presidential Approvals of Certain Title VI Regulations

Title VI provides authority to federal agencies that provide federal funds to issue regulations to effectuate the non-discrimination provisions of Title VI, with the proviso that "[n]o such rule, regulation, or order shall become effective unless and until approved by the President."[6] The Order purports to "revoke[]" such presidential approvals for regulations under Title VI (that are discussed in Section A, above) to the extent they seek to impose disparate-impact liability.[7] The Title VI statute cited by the Order, however, is silent on the ability or authority of the President to revoke such approvals.

C. Review of Pending Investigations and Judgments

The Order directs the Attorney General and the Chair of the Equal Employment Opportunity Commission ("EEOC") to, by June 7, 2025, "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 to "take appropriate action with respect to such matters consistent with the policy of this order." The Order similarly directs 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, the Fair Housing Act, and other "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 this order." Furthermore, by July 22, 2025, "all agencies shall 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 this order."

D. Orders Attorney General to Conduct a Comprehensive Review, Including Potential Amendment of Existing Federal Regulations and Potential Preemption Challenges to State Disparate Impact Laws

The Order directs the Attorney General to "initiate appropriate action 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." In furtherance of that directive, the Attorney General is instructed to provide a report to the President by May 23, 2025 addressing "(i) 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 (ii) 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."

The Order also directs the Attorney General 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 to "take appropriate measures consistent with the policy of this order."

E. Equal Employment Based on Education Level

In addition to the Order's disparate impact liability provisions, the Order directs the Attorney General and the Chair of the EEOC 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."

TAKEAWAYS

The Order reflects a significant change to the federal government's enforcement of civil rights laws by directing all federal agencies to deprioritize enforcement of disparate impact theories of discrimination. The Order also contemplates potential legal challenges to state disparate impact laws on the basis of preemption. Employers should be mindful that the Order does not eliminate potential exposure to disparate impact claims, as private litigants and state and local governments are likely to continue to seek to enforce disparate impact laws. Employers should carefully monitor the changing landscape as we expect further developments in this area.

ADDITIONAL INFORMATION

To stay informed of litigation and regulatory developments that affect the workplace, click here to subscribe to our *Legal Developments Affecting the Workplace* blog.

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ENDNOTES

1 *See Ricci* v. *DeStefano*, 557 U.S. 557, 578 (2009) (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

2 42 U.S.C. § 2000e-2(k)(1)(A).

3 28 C.F.R. § 42.104(b)(2)–(3).

4 28 C.F.R. § 42.104(b)(6)(ii).

5 28 C.F.R. § 42.104(c)(2).

6 42 U.S.C. § 2000d-1.

7 Specifically, the presidential approval for 28 C.F.R. § 42.104(b)(2); 28 C.F.R. § 42.104(b)(6)(ii); and 28 C.F.R. § 42.104(c)(2) is revoked in full, and the presidential approval for 28 C.F.R. § 42.104(b)(3) is revoked "as applied to the words 'or effect' in both places they appear."

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