akerman

Blog Post

The Trump Administration Targets Disparate Impact Discrimination Liability: What Employers Need to Know

May 21, 2025
By Andrew C. Karter

As we have previously reported, an early focus of the second Trump administration has been to oppose and dismantle Diversity, Equity, and Inclusion (DEI) initiatives, both in the federal government and in the private sector, with the stated goal to return to what it calls a "merit-based" employment landscape, in which diversity initiatives play no role. Now, in a continuation of those efforts, the administration has opened a new front in its anti-DEI crusade, this time seeking to eliminate employer liability under a "disparate impact" theory through a new executive order entitled "Restoring Equality of Opportunity and Meritocracy."

What Is "Disparate Impact" Liability?

Under a disparate impact theory of liability, policies or practices that appear neutral on their face may nevertheless be unlawful if the consequences of those policies in action disproportionately and adversely impact a protected class. The policy or practice at issue need not have been created and implemented with any improper motive on the employer's part; it is the *consequence* of the policy or practice that matters. This "disparate impact" analysis has long been recognized as a viable theory of employer liability, stemming back more than half a century ago. The U.S. Supreme Court initially

Related People

Andrew C. Karter

Related Work

Employment Administrative Claims Defense
Employment Training and Compliance
Labor and Employment

Related Offices

New York

HR Defense

Akerman Perspectives on the Latest Developments in Labor and Employment Law

Visit this Akerman blog

pronounced the legal concept of "disparate impact" in a 1971 case called *Griggs v. Duke Power Company.* In *Griggs,* the Court held that a standardized aptitude testing requirement for interdepartmental transfers, in conjunction with a high school graduation requirement, prevented a disproportionate number of African American employees from being hired by and advancing to higher paying departments within the company. Congress later codified the disparate impact theory into law through a 1991 amendment to Title VII of the Civil Rights Act. However, at that same time, Congress added, but limited, the availability of awards of compensatory and punitive damages, and trial by jury, only to cases of intentional discrimination, explicitly excluding disparate impact claims. Historically, the disparate impact theory has been more widely used in class action and multi-plaintiff cases, with a heavy reliance of statistical evidence to show adverse impact. In defense, the employer typically must prove that the challenged policy or practice is "job related" and "consistent with business necessity" and refute evidence, if any, that a less impactful alternative exists.

How Does the New Executive Order Address Disparate Impact Liability?

The Trump administration's new executive order provides that it is the "policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible." It claims that disparate impact liability "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." Thus, "[d]isparate-impact liability **all but requires** individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability," including when it comes to

hiring. The executive order condemns the disparate impact theory as "wholly inconsistent with the Constitution" and directs executive departments and agencies to "deprioritize" and essentially not waste their already "limited enforcement resources" on statutes and regulations to the extent they include disparate impact liability, expressly calling out Title VII discrimination provisions and its regulations. It also instructs federal agencies to identify where such practices are being applied (e.g., in regulations, guidance, rules, or orders), and to implement steps toward amending or repealing them.

However, the executive order does not stop at the federal level, but further seeks to eradicate the use of the disparate impact concept at the state level as well. To that end, the executive order directs the U.S. Attorney General, in collaboration with heads of other federal agencies, to report back to the administration within 30 days (i.e., by May 23, 2025), with recommendations for "any appropriate measures to address any constitutional or other legal infirmities" with federal and state laws or legal decisions. TheAttorney General was also tasked with determining "whether any Federal authorities preempt State laws, regulations, policies, or practices that impose disparate-impact liability based on a federally protected characteristic," or whether those "laws, regulations, policies, or practices have constitutional infirmities that warrant Federal action." Time will tell whether such "reports" will remain under wraps or shared with the public. At any rate, employers can expect further guidance in the future, as the executive order directed the Attorney General and the Chair of the EEOC to "jointly formulate and issue guidance or technical assistance to employers regarding the appropriate methods to promote equal access to employment regardless of whether a job applicant has a college education." Existing consent judgments and permanent injunctions that rely on disparate impact liability may potentially be vacated or dissolved.

Practical Implications of the Trump Administration's Targeting of Disparate Impact Liability

It appears evident that for now, investigations of disparate impact claims will no longer be prioritized at the federal level — and very possibly will not be initiated on a going-forward basis through the remainder of the current administration. Specifically, as a result of this executive order, it is now less likely that the EEOC will continue to investigate charges based solely on those grounds, or potentially even charges containing a disparate impact claim as one of numerous allegations. To the extent that the EEOC continues to investigate such claims — for example with respect to ongoing investigations — employers could conceivably find success in seeking to narrow such investigations.

Nevertheless, the executive order does not and cannot overturn existing law. As noted above, the "disparate impact" theory of liability remains recognized by the Supreme Court and codified in Title VII. Some state and local governments have also codified their own versions of disparate impact liability; for example, the New York City Human Rights Law allows a cause of action based on disparate impact. Though it remains to be seen whether a challenge to such state and local laws would succeed, employers should be mindful in the interim that applicants and employees are not prohibited from continuing to assert disparate impact claims in court. Employers are thus well-advised to stay mindful of how their policies and procedures might have differing effects on various protected classes of applicants and employees, and to ensure that they truly are "job related" and "consistent with business necessity."

For guidance or review of policies or procedures in light of this recent executive order, or otherwise in conjunction with disparate impact analysis under federal, state, or local law, contact your Akerman Labor and Employment Attorney.