Trump Targets a Major Legal Theory of Discrimination

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We all know what “intentional” discrimination means. But what about facially non-discriminatory policies or practices that have a discriminatory *effect*? The U.S. Supreme Court invented a then-novel, and still somewhat controversial, theory to answer that question in 1971: the so-called “disparate impact” theory of discrimination. Under it, an employer might have a perfectly legal policy with no intentionally discriminatory effect, but if applying it disparately impacts a protected group, federal anti-discrimination law may be violated.

As with so many things Trumpian, the President (or his legal policymakers) think that it may be time to revisit a 54-year-old legal theory, On April 23, 2025, President Trump issued his latest Executive Order (“EO”) entitled “Restoring Equality of Opportunity and Meritocracy,” impacting employers as it seeks to “eliminate the use of disparate-impact liability in all contexts to the maximum degree possible.”

Disparate-impact liability refers to the idea that a policy or practice may be facially neutral and applied without discriminatory intent but if it has an adverse impact on a protected class, it can still serve as the basis for a claim of discrimination. The Supreme Court in *Griggs v. Duke Power* first recognized the disparate-impact theory as a basis for liability under Title VII of the Civil Rights Act of 1964 (“Title VII”). It was then codified under the 1991 amendments to Title VII.

This new EO is the latest action as part of the Trump administration’s focus on altering the priorities of the Equal Employment Opportunity Commission (“EEOC”) and DEI policies and initiatives. As with other EOs, it creates a tension among the EO and existing federal and state laws, resulting in a new legal landscape for employers to navigate.

What Does the EO Actually Do?

The EO does the following to target the use of disparate-impact liability:

- Revokes approvals of certain prior executive orders, which are applicable to programs receiving federal financial assistance under Title VI
- Directs federal agencies to deprioritize enforcement of statutes “to the extent they include disparate-impact liability”
- Orders a report of all regulations that impose disparate-impact liability
- Orders the EEOC and heads of other federal agencies to conduct a review of current pending investigations, civil suits, and existing consent judgments and permanent injunctions and to take “appropriate action” with respect to such matters consistent with the EO

- Directs the Attorney General to determine whether federal authorities preempt state laws imposing disparate impact liability and to take “appropriate measures” in response to any identified “constitutional infirmities”
- Instructs the Attorney General and EEOC Chair to jointly formulate guidance to employers about promoting equal access to opportunity without regard to whether an applicant has a college education

The EO does not specify what “take appropriate action” entails. It could refer to dismissing litigations or not prioritizing cases where a disparate-impact liability theory has been asserted. Another complication is how federal agencies should handle cases where disparate-impact liability has been raised among other theories of liability.

What Should Employers Do?

Like other EOs, this EO does not supersede or overturn existing federal and state law. So, for example, a plaintiff bringing a federal discrimination lawsuit in federal court may still assert a claim based on a disparate-impact theory of liability. And, there are state laws codifying disparate-impact liability, such as New York. The EO does not affect those existing laws. An interesting case could arise where a complaint is jointly filed with the EEOC and a state agency, such as the New York State Division of Human Rights. The EEOC may dismiss a disparate-impact liability claim, if it is following this EO, but the New York State Division of Human Rights might allow a complainant to continue pursuing the same claim. We will continue to monitor this issue, particularly to see if any litigation arises which alters existing federal and state laws codifying disparate-impact liability.

If you have questions about the impact of this EO or any of the recent Trump administration changes, please contact a member of Kelley Drye’s Labor and Employment team.