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Executive Order Seeks to Eliminate Federal Deployment of Disparate Impact Theory of Discrimination

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In an April 23 executive order titled, "Restoring Equality of Opportunity and Meritocracy," the Trump administration declared it federal policy to eliminate the use of disparate impact liability "in all contexts to the maximum degree possible." The directive applies across the entire government – meaning that this order will significantly impact litigation, compliance and enforcement priorities for federal agencies in the employment and financial services spaces, both of which have historically recognized disparate impact liability in enforcing civil rights laws.

Disparate impact theory

Disparate impact liability is a theory of liability under which facially neutral policies and practices may violate applicable antidiscrimination law if they have a disproportionate negative or adverse impact on members of protected classes. This theory of liability was first recognized in the employment context by the US Supreme Court in the 1971 case, *Griggs v. Duke Power Company*. The Supreme Court found that Duke Power's otherwise facially neutral policies requiring a high school diploma and passage of certain aptitude tests for employment and promotion opportunities had an adverse impact on Black people, and therefore violated Title VII of the Civil Rights Act. In the fair housing law context, the Supreme Court held that disparate impact claims are cognizable under the Fair Housing Act in the 2015 case, *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*.

Federal and state courts have since developed robust case law applying this theory in various contexts. Nonetheless, the executive order declares that disparate impact liability creates a "near insurmountable presumption of unlawful discrimination … 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."

Immediate deprioritization, review of existing regulations

The executive order directs all agencies to deprioritize enforcement of statutes and regulations to the extent that they include disparate impact liability. It further directs the attorney general to initiate action to repeal or amend regulations implementing the Civil Rights Act of 1964 for all agencies, to the extent that they contemplate disparate impact liability. All other agencies must work with the attorney general to report all existing regulations, guidance, rules or orders that impose disparate impact liability and determine whether to amend or repeal them, as well as review state-level laws and decisions, within 30 days.

Review of pending matters, existing judgments and injunctions

Under the executive order, the Equal Employment Opportunity Commission (EEOC) and the attorney general also must assess "all pending investigations, civil suits, or positions taken in ongoing matters under every Federal civil rights law within their respective jurisdictions" that rely on disparate impact liability and take appropriate action consistent with the order.

Within 45 days of the executive order, the Department of Justice, Department of Housing and Urban

Development, Consumer Financial Protection Bureau (CFPB), Federal Trade Commission and any other agencies with jurisdiction over the Equal Credit Opportunity Act, Fair Housing Act, or other laws prohibiting unfair, deceptive, or abusive acts or practices must assess all pending proceedings that rely on theories of disparate impact liability and take appropriate action consistent with the executive order. The CFPB already signaled in an April 16 memorandum that it will not pursue future actions for discrimination under a disparate impact theory of liability.

The executive order further directs all agencies over the next 90 days to review existing consent judgments and permanent injunctions that rely on theories of disparate impact liability and take appropriate action with respect to the matters. Notably, the CFPB already has undertaken an effort to vacate its prior settlement with Townstone Financial based, in part, on its concern that the investigation was prompted by "pure quota-style statistics" rather than actual or perceived harm.

Future agency action

The executive order directs the attorney general, in coordination with other agencies, to assess whether any federal authorities preempt state laws, regulations, policies or practices that impose disparate impact liability based on a federally protected characteristic, and whether such state laws, regulations, policies or practices have "constitutional infirmities that warrant Federal action," and take appropriate action under the order.

The EEOC also is directed to work with the attorney general to 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."

What's next?

The executive order will undoubtedly result in near-term regulatory relief from disparate impact claims for employers and financial institutions at the federal level, with expected reprieve from at least some types of fair lending and employment discrimination inquiries. However, as with most executive orders, this order is only a directive to agencies to begin making changes rather than a change to the law itself. The underlying federal regulations will remain in place unless or until appropriate action is taken to modify them in the often lengthy federal rulemaking process. Accordingly, private litigants may still bring discrimination claims against financial institutions and employers based on a disparate impact theory of liability, pursuant to the regulations and the myriad federal case law (including the Supreme Court cases discussed above), along with state case law interpreting federal and state antidiscrimination laws and adopting disparate impact liability.

The executive order also appears to anticipate that states may step in to enforce their own laws under a disparate impact liability theory – and is trying to head off state action with its directive to determine whether federal authorities preempt such state laws. Fair lending and employment statutes also have a long liability tail, meaning that a shift in enforcement approach under the next administration could potentially reach back to business practices undertaken over the next four years.

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