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Trump Administration Issues Executive Order Aimed at Eliminating Disparate Impact Liability Under Anti-Discrimination Laws

California Employment Law Update on **April 25, 2025**

On April 23, 2025, the White House issued an Executive Order ("EO") entitled "Restoring Equality of Opportunity and Meritocracy," which aims to "eliminate the use of disparate-impact liability in all contexts to the maximum degree possible."

First recognized under Title VII of the Civil Rights Act of 1964 ("Title VII") by the U.S. Supreme Court in *Griggs v. Duke Power Co.* (1971) and codified as part of the 1991 amendments to the law, disparate impact liability provides that a policy or practice that is facially neutral and applied without discriminatory intent may nevertheless give rise to a claim of discrimination if it has an adverse effect on a protected class, such as a particular race or gender. Disparate impact liability has also been recognized under the Age Discrimination in Employment Act, under fair housing laws and in other contexts.

The EO characterizes disparate impact liability as creating "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." The EO further states that disparate impact liability "all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability" and "is wholly inconsistent with the Constitution."

To that end, the EO, among other things:

- directs all executive departments and agencies to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability," including but not limited to Title VII;

- orders the Attorney General, within 30 days of the EO, to report to the President "(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";
- orders the Attorney General and the Chair of the EEOC, within 45 days, to "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 a theory of disparate-impact liability, and [] take appropriate action" consistent with the EO;
- orders all agencies, within 90 days, to "evaluate existing consent judgments and permanent injunctions that rely on theories of disparate-impact liability and take appropriate action" consistent with the EO;
- orders the Attorney General, in coordination with other agencies, 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 [] take appropriate measures" consistent with the EO; and
- orders the Attorney General to initiate action to repeal or amend regulations contemplating disparate impact liability under Title VI of the Civil Rights Act of 1964, which prohibits race, color, and national origin discrimination in programs and activities receiving federal financial assistance.

The EO also orders 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

This EO is the latest evidence of shifting enforcement priorities by the federal agencies tasked with enforcing civil rights laws, including the EEOC. The ultimate scope of the EO's impact remains to be seen, particularly as it relates to the potential for preemption of disparate impact liability under state or local anti-discrimination laws. Congress has the authority to amend any federal statutes to specifically address a disparate impact theory of liability, and the courts will continue to have the ultimate say on whether and to what extent such a theory is cognizable under particular statutes. We anticipate further updates in this area and will continue to monitor and report on these updates.

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Related Professionals

- **Allan S. Bloom**
  Partner
- **Elise M. Bloom**
  Partner
- **Laura M. Fant**
  Special Employment Law Counsel
- **Rachel S. Fischer**
  Partner