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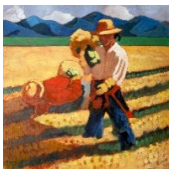

Employment Law Note

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Disparate Impact: Gutted?

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The Trump Administration has continued to legislate via Executive Order. In recent months, these Orders have had the effect of upending some federal employment policies that have been in effect for half a century. This note explores one of those changes: the President's direction that all federal agencies eliminate use of disparate impact theory and its implications for employers.

Disparate-Impact Liability

Under Title VII of the Civil Rights Act of 1964 ("Title VII"), an employer may be liable for disparate-impact discrimination. The disparate impact theory, first enunciated by the Supreme Court in *Griggs v. Duke Power Co.* in 1971, prohibits neutral employment practices that, while facially non-discriminatory, impose an adverse or disproportionate impact on a statutorily protected group. For example, federal cases have held that uniformly excluding individuals from employment based on their criminal history has a disparate impact on historically disenfranchised minorities in violation of Title VII.

Because disparate impact does not involve intentional discrimination – just a neutral practice – the threshold for liability is exacting. A disparate-impact plaintiff must prove that the facially neutral employment practice had a "significant discriminatory impact" on a protected group. Anecdotal or testimonial evidence is largely useless. Instead, courts require rigorous expert statistical and/or empirical analysis sufficient to show a hiring practice resulted in discrimination. The statistical analysis is closely scrutinized for scientific validity, sample size, inconsistencies, and so on. For example, a company may hire mostly men. However, if mainly men apply, the hiring practices would have a disparate impact on women, yet there would be no claim because women did not apply in the first place.

Consequently, judges have found that a disparate-impact claim is "more difficult – not easier" to prove than a disparate treatment claim.[1]

The Executive Order

On April 23, 2025, President Trump issued an Executive Order entitled, "Restoring Equality of Opportunity and Meritocracy." The Executive Order identifies disparate-impact liability as a "key tool" prosecuting a "pernicious movement" that is endangering a "bedrock principle of the United States," namely, "that all citizens are treated equally under the law." The Order explains, "disparate-impact liability … holds … 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 … involved."

The Order continues, stating, "[d]isparate-impact liability all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability" and "has hindered businesses from making … employment decisions based on merit and skill."

The Order mandates the following:

- Federal agencies, including the Equal Employment Opportunity Commission, "deprioritize

[1] Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA Law Rev. 701, 706 (2006).

enforcement of all statutes and regulations to the extent they include disparate-impact liability," including Title VII;

- The Attorney General take steps to repeal or revise federal agency regulations incorporating disparate-impact liability;
- The Attorney General report all laws, rules, and regulations – including state-level enactments – that impose disparate-impact liability and recommend measures to remediate those enactments to be consistent with the Order, including federal preemption actions;
- The EEOC reassess all "pending investigations, civil suits, or positions taken" that rely on disparate-impact liability and take action to ensure such matters are resolved consistent with the Order's policy; and
- All federal agencies reevaluate all consent judgments and permanent injunctions based on disparate-impact liability.

Implications

The Executive's Order binds only federal administrative agencies. An individual may still assert a disparate-impact claim against an employer in state or federal court. Neither Congress nor the Supreme Court has negated the viability of a disparate-impact claim. Employers should continue to be mindful of the local, state, and federal laws proscribing unlawful disparate impact in employment outcomes.

Yet the Executive Order reflects a burgeoning norm embracing a "color-blind" attitude in public and private affairs. And as Justice Cardozo has aptly explained, "[t]he great tides and currents which engulf the rest of men do not turn aside in the course and pass the judges by."[2] While the Executive Order does not reach the purview of the federal courts or private parties, we may nonetheless see downstream judicial, legislative, or cultural changes. The extent of these changes is yet unknown.

Employers with questions about their obligations under federal, state or local employment discrimination laws are encouraged to contact Sebris Busto James.

For more information about this month's Employment Law Note
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[2] Benjamin J. Cardozo, *The Nature of the Judicial Process*, Yale Univ. Press, p. 168 (1921).