LEGAL UPDATES

Executive Order Shifts Federal Enforcement Away from Disparate Impact Theory of Discrimination Liability

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An Executive Order signed by President Trump on April 23, titled "Restoring Equality of Opportunity and Meritocracy," directs federal agencies to shift their enforcement of civil rights laws away from disparate impact theories of discrimination liability and toward a focus on intentional discrimination – instructing agencies to eliminate the use of disparate impact liability "to the maximum extent permitted by law."

Although this directive represents a notable change in federal enforcement priorities, it does not amend the statutory language of Title VII of the Civil Rights Act of 1964 or other federal, state or local discrimination and civil rights laws. It also does not change existing court case law. Employers should continue to maintain legally compliant practices to avoid disparate impact claims by private litigants and state and local enforcement agencies under state and local civil rights statutes.

A Brief History of the Disparate Impact Theory

The disparate impact theory has been part of federal anti-discrimination law for more than 50 years. The U.S. Supreme Court first recognized the theory in its unanimous 1971 decision, *Griggs v. Duke Power Co.*, 401 U.S. 424. In *Griggs*, the court examined an employer's requirement that employees pass two aptitude tests and obtain a high school diploma to qualify for internal transfers to higher-paying roles. Although these requirements were facially neutral, they resulted in a statistically significant disproportionate exclusion of African American workers without a demonstrated connection to job performance. The court held that Title VII prohibits not just intentional disparate treatment discrimination, but also employment practices that are "fair in form but discriminatory in operation."

In 1991, Congress codified the disparate impact theory recognized in *Griggs* through amendments to Title VII. To provide unlawful disparate impact under 42 U.S.C. § 2000e-2(k), a claimant must show that a specific employment practice causes a disparate impact on a legally protected demographic group. The burden then shifts to the employer to demonstrate that the practice is job-related and consistent with business necessity. Even if the employer satisfies this burden, a

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claimant may still prevail by showing that a less discriminatory alternative was available and not adopted.

The Role of the Four-Fifths Rule

Over time, courts and enforcement agencies have used statistical tools to assess disparate impact and determine liability. One common method is the "four-fifths rule," which provides that a selection rate for a protected demographic group that is less than 80% of the selection rate for the more favored selected group may be evidence of adverse impact. While the four-fifths rule is not a strict legal standard, it has historically served as a guideline for preliminary compliance reviews and investigations.

President Trump's recent Executive Order may lead federal agencies such as the EEOC to place less reliance on statistical disparities, including the four-fifths rule, when determining whether to initiate investigations or pursue or continue enforcement actions.

Changes Directed by the Executive Order

This order states that it is the policy of the United States to eliminate the use of the disparate impact theory of liability to the maximum extent permitted by law. It revokes prior presidential approvals of regulations that incorporated disparate impact theories under Title VI of the Civil Rights Act. It also directs federal agencies to review and, where appropriate, propose amendments to any regulations, guidance or internal policies that apply disparate impact standards.

The Department of Justice and the Equal Employment Opportunity Commission (EEOC) are specifically tasked in the order with reviewing ongoing investigations and litigation to ensure consistency with its policy objectives.

Practical Considerations for Employers

As noted above, despite the shift in federal enforcement emphasis, the underlying law prohibiting employment practices with an unlawful disparate impact remains unchanged. Employers should continue to assess workplace policies, hiring practices, promotion criteria, and disciplinary and termination actions for potential adverse impacts on protected groups. However, it is very likely that, at least in the short term, employers will see reduced EEOC activity regarding disparate impact cases.

In addition, maintaining records demonstrating that employment policies and practices are job-related and consistent with business necessity remains critical. Statistical audits using benchmarks like the four-fifths rule, although perhaps less emphasized by federal agencies going forward, continue to be a useful internal compliance tool, especially when defending against private actions.

In addition, employers operating in multiple jurisdictions should remain mindful of state and local laws that may impose separate or stricter disparate impact standards.

Looking Ahead: Enforcement Priorities Can Evolve

Executive Orders reflect the policy decisions of the current White House administration and can change with future political leadership. A subsequent administration could reverse or modify this order, restoring disparate impact liability as a priority for federal enforcement agencies.

Accordingly, employers should maintain stable, legally permissible compliance programs that are resilient to regulatory shifts and focused on minimizing risk from private litigation and state or local enforcement actions.

While the Executive Order alters federal enforcement priorities, employers should continue maintaining compliant and well-documented employment practices to ensure they are prepared for legal obligations that arise from private

litigation, as well as state and local regulatory actions. We will continue to monitor developments and provide updates as further guidance is issued.

If you have questions about how this Executive Order may impact your business, please contact Jake Lorence or your regular Lathrop GPM attorney.