President Trump's Executive Order on Disparate Impact Analysis Is Legally Incorrect and Will Undermine Meritocracy and Equal Employment Opportunity

America prides itself on being the land of opportunity, where hard work, skill, and talent can lead to success. This opportunity is key to America's global leadership and economic vitality.

For over half a century, our nation's laws have worked to maximize opportunity by dismantling unnecessary and unjustified barriers that prevent hard-working Americans from contributing their potential to our country. However, on April 28, President Trump rejected this promise by issuing Executive Order 14281, the latest in this Administration's war on civil rights. By attempting to dismantle legal protections against discrimination, Executive Order 14281 threatens to reverse decades of progress toward ensuring that ability, talent, and hard work—not artificial barriers—determine success in America.

Executive Order 14281 states that the policy of the United States is "to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible . . .." But this attack on disparate impact fails on its own terms. First, Title VII of the Civil Rights Act of 1964 (Title VII) explicitly outlaws unjustified disparate impact as well as intentional discrimination.[1] Moreover, the Supreme Court has repeatedly upheld the concept of disparate impact liability under Title VII and other civil rights laws,[2] and has rejected constitutional challenges to disparate impact under the Fair Housing Act.[3] And, disparate impact liability is a critical tool to ensure that merit—and not the nation's legacy of discrimination—grounds decision making in the workplace.

As Congress recognized, neutral policies sometimes function to disproportionately and, importantly, unjustifiably exclude people of a certain race, sex, religion, national origin, or other protected characteristic from employment opportunities. The key to disparate impact liability is not the impact alone, however, but rather that the policy is not justified as necessary for the job. Such policies thus prevent qualified applicants and employees from demonstrating their relevant skills and abilities—and thereby undermine meritocracy. Such unjustified policies also entrench persistent patterns of prior discrimination by maintaining unnecessary barriers that limit opportunities for individuals on grounds tied to their race, religion, sex, or national origin—and thus contravene Title VII's goal to promote equality of employment opportunity. Eliminating disparate impact

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[1] This document contains general legal information and the views of the authors and is provided for educational purposes only. It is not legal advice. Readers should seek advice from qualified counsel for their specific situations.

[2] *See, e.g., Watson v. Fort Worth Bank & Trust,* 487 U.S. 977 (1988) (applying disparate impact analysis to subjective employment practices); *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975)*; Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *see also Smith v. City of Jackson*, 544 U.S. 228 (2005)(upholding the disparate impact theory under the Age Discrimination in Employment Act).

[3] *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* 576 U.S. 519 (2015).

protections would thus undermine fundamental principles of civil rights law and allow discriminatory practices to artificially shrink the pool of qualified workers at a time when our economy's future depends on unlocking the potential of every American.

A new Administration may of course establish its enforcement priorities. But it must operate within the law when it does so. An Executive Order may not change a clear statutory mandate and decades of legal precedent; this document explains what that mandate and precedent require.

A. What is Disparate Impact and Why Is it Important?

The concept of disparate impact is straightforward and essential for advancing merit-based employment.

Employers making hiring decisions may use "facially neutral" practices not explicitly based on race, sex, or any other personal characteristics protected by Title VII. But in some instances, such practices nonetheless may operate to systematically exclude qualified workers in the available labor force based on protected characteristics ***for reasons that are not job-related***. Disparate impact analysis is critical to address this serious problem.

Consider a situation where an employer with a workforce that is all white requires applicants for jobs and positions at any level to be referred by a current employee. If these employees refer only applicants whom they know from their social circles and neighborhoods, it is likely that most of the applicants also will be white, even if qualified workers from all racial backgrounds are available in the relevant geographic area. In these circumstances, the practice is likely to disproportionately exclude qualified non-white workers.

Similarly, a "facially neutral" employment practice can adversely impact women. For example, assume that an employer screens out all applicants with any gap in their employment histories. This practice will tend to deny opportunities to mothers who have taken time off from the workforce to raise children or women who serve as caregivers for a sick parent. Since caregivers have been shown to be predominantly women[4], such a blanket exclusion may operate in a discriminatory manner by unjustifiably excluding disproportionate numbers of women.

But even if a worker shows that a practice has disproportionate adverse impact, there is no automatic liability. The law recognizes that employers may have good reason to use a particular employment practice despite its exclusionary effect. All that the law requires is for employers to determine if the requirement or practice is "job-related" and "consistent

[4] *See, e.g.*, Stall NM, Shah NR, Bhushan D., Unpaid Family Caregiving—The Next Frontier of Gender Equity in a Postpandemic Future. *JAMA Health Forum.* 2023. https://jamanetwork.com/journals/jama-health-forum/fullarticle/2805890.

with business necessity." As a practical matter, this means the requirement or practice is necessary for the safe and efficient performance of the job in question. It also means that the employer considers whether there are equally effective means to achieve that legitimate goal that would have less of a disparate impact.

If the requirement or practice is necessary for the business and there are no less discriminatory alternatives that the employer can use, the law authorizes the employer to proceed with its original criteria *despite the disparate impact*. But where the requirement or practice is not job-related and consistent with business necessity, or where other, less discriminatory alternatives are available that will equally serve the employer's goals, an insistence on using the original criteria will simply perpetuate discriminatory barriers and prevent the employer from fairly applying merit principles.

For example, where employers require a specific educational degree for a job, that requirement can sometimes screen out talented people who could do the job as well—or better. Of course, such a requirement can sometimes be reasonable and justifiable; for instance, an airline would be justified in demanding a pilot's license for commercial airline pilots since this is legally required for the job, even if it might have a disparate impact based on gender, race, or national origin. But for other jobs, a license or a college degree might not be necessary for successful job performance. Indeed, for many jobs, prior experience, technical training or certifications may be more relevant to successful job performance. In such circumstances, requiring applicants to have college degrees might screen out candidates unfairly and deprive the employer of access to the full range of talented people who can do the job.

The Supreme Court recognized the perniciousness of these facially neutral but disproportionately harmful and unnecessary practices as early as 1971, when in *Griggs v. Duke Power Co.,* it unanimously endorsed the concept of disparate impact liability as a core element of ensuring merit-based hiring. The Court there held that Title VII requires "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[5] According to the Court, "[t]he Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The *touchstone* is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited." *Id.* And two decades later, overwhelming, bipartisan majorities in the House and the Senate codified disparate impact in Title VII as part of the Civil Rights Act of 1991, signed by President George H.W. Bush.[6]

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[5] *Griggs*, 401 U.S. at 431 (barring an employer from requiring applicants for factory jobs to have a high school diploma when that degree was not necessary for the job and, in practice, meant that almost all Black individuals could not qualify based on lack of access to education).

[6] The vote count was 93-5 in the Senate and 381-38 in the House of Representatives. https://www.congress.gov/bill/102nd-congress/senate-bill/1745/all-actions. Both Democrats and Republicans recognized that disparate impact liability is essential as a means of ensuring merit-based employment decisions.

B. The Analysis Underlying Executive Order 14281 is Fundamentally Flawed

The description of disparate impact liability in Executive Order 14281 bears little resemblance to the actual practice of disparate impact challenges. First, the Executive Order is simply wrong in asserting that disparate impact liability results in employers using race-based preferences. Nothing in disparate impact analysis requires—or indeed permits—employers to establish a preference based on a protected characteristic.

The Executive Order further announces that disparate-impact liability "holds that 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 or practice or discriminatory intent involved, **and even if everyone has an equal opportunity to succeed."** (emphasis added.)

But the entire concept of disparate impact is that unjustified and significant differences in outcome resulting from a "neutral" policy means that people of different races or sexes are *not* being given an equal opportunity to succeed. That is why an employer is expected to justify the policy and try to find new approaches that will meet the employer's needs while reducing adverse outcomes. And those justifications must reflect the needs of the particular job the employer is filling; as the Supreme Court stated in *Griggs, "*Congress has commanded . . . that any tests used must measure the person for the job and not the person in the abstract."[7] The Executive Order's conclusory announcement that "disparate-impact liability has hindered businesses from making hiring and other employment decisions **based on merit and skill, their needs, or the needs of their customers**" (emphasis added) simply has no basis in fact or law.

Far from eliminating merit in the employment process, disparate impact liability is a means to *ensure* that merit prevails and that unnecessary and unjustified criteria do not disqualify meritorious candidates on grounds linked to their race, sex, or other protected personal characteristic. Nor is there an "insurmountable" burden on employers to justify practices that have adverse impact; an employer must simply show that the practice is indeed necessary for its business and consider whether alternative practices are available that would cause less of a disparate impact.

Additionally, in reality, plaintiffs can face substantial hurdles in bringing and winning disparate impact cases, so such actions are brought judiciously. To bring a case, a plaintiff must generally identify a specific employment practice that is causing a significant disparate impact. This requires substantial resources and statistical expertise to analyze data that is often difficult for workers to obtain. And even when workers can establish that a practice has an actionable disparate impact, that is only the initial stage of a successful claim; as noted, the law recognizes that employers may have legitimate and necessary reasons for using these criteria for the position in question.

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[7] *Griggs*, 401 U.S. at 436.

C. The Mandates in Executive Order 14281 Are Damaging and Overbroad

Based on its faulty practical and legal assumptions about disparate impact liability, the Executive Order directs the following:

- **All agencies must deprioritize enforcement** of statutes and regulations to the extent they include disparate-impact liability.
- **The Attorney General must begin actions to repeal or amend regulations** that include disparate-impact liability under **Title VI of the Civil Rights Act of 1964,** which prohibits discrimination based on race or national origin by any entity that receives federal funds.
- The Attorney General must identify **state laws or decisions that impose disparate-impact liability** and determine if they can be **preempted by federal law or invalidated as unconstitutional**, and take actions to address that.
- The Attorney General and the Chair of the EEOC **must assess all pending investigations, civil suits, or positions** that rely on a theory of disparate-impact liability. Agencies that enforce the Equal Credit Opportunity Act and the Fair Housing Act must do the same. All agencies must then "take appropriate action with respect to such matters consistent with the policy of this order."
- All agencies must evaluate **existing consent judgments and permanent injunctions** that rely on theories of disparate-impact liability and "take appropriate action with respect to such matters consistent with the policy of this order."

These sweeping directives stand to broadly endanger the consideration of disparate impact liability across numerous arenas, including in circumstances where such liability is authorized under state law or approved by court order.

D. Employers Should Continue to Adhere to the Statutory Requirements of Title VII

At the end of the day, existing statutes and case law will continue to govern employment anti-discrimination law. An Executive Order may seek to restrain the federal government from carrying out its obligations to enforce a law. But the law remains as it is, and an Executive Order cannot overrule that.

For that reason, we can expect a redoubling of efforts on the part of the private bar, as well as state and local governments, to bring legitimate disparate impact claims. Employers should not expect that they will have a free pass on disparate impact liability simply because the President has instructed federal agencies not to pursue enforcement of the law.

We can also expect that civil rights lawyers will be monitoring investigations and litigation if the federal government abandons them as a result of the Executive Order, and that these lawyers will find avenues for pursuing those claims.

Employers would be wise not to rely on the Administration's assertion that disparate impact liability is unlawful. Instead, employers should continue to monitor their practices for potential discrimination and take corrective action when needed. That is the best way for employers to comply with their responsibilities under our civil rights laws and avoid liability for discrimination.

Disparate impact liability is a necessary element of advancing equal opportunity for all, consistent with America's national commitment to equal justice. This Executive Order cannot eliminate the power of that legal protection, which was adopted in response to Americans' calls for strong civil rights protections, was enacted by a bipartisan Congressional majority, has been long recognized by the Supreme Court, and is critical to ensure merit-based employment decisions.

Signatories /s/

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