RELMAN COLFAX

EXECUTIVE ORDER ON DISPARATE IMPACT: AN EXPLAINER

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On April 23, 2025, President Trump signed Executive Order 14281, titled *Restoring Equality of Opportunity and Meritocracy* ("Executive Order"). The Executive Order takes aim at disparate impact, a bedrock principle of civil rights law that courts, Congress, and the executive branch have repeatedly recognized and applied for decades.

Various stakeholders have raised questions about what effect, if any, the Executive Order has on disparate impact law and institutions' ongoing efforts to avoid disparate impact liability in housing, credit, and employment. The short answer is the Executive Order has no immediate effect on disparate impact law. Although federal agencies may try to alter disparate impact law through regulatory action, any such attempts are likely to face tough legal challenges that would take considerable time to resolve. In the meantime, private litigants and state attorneys general are likely to continue pressing disparate impact claims, and future federal administrations are likely to revert back to recognizing and applying longstanding law on disparate impact. So while the Executive Order communicates the current administration's priorities, and clearly signals that they will not apply disparate impact in their enforcement of civil rights statutes, disparate impact remains the law. Lenders, housing providers, and employers should continue with business-as-usual efforts to mitigate disparate impact risk.

1. WHAT IS DISPARATE IMPACT?

Disparate impact is a form of discrimination that has long been prohibited under federal civil rights laws, including laws that prohibit discrimination in employment (Title VII), housing (the Fair Housing Act), and credit (the Equal Credit Opportunity Act). These laws prohibit intentional discrimination based on race, sex, age, and other protected characteristics. They also prohibit actions that appear to be non-discriminatory on their face but that have an unnecessary "disparate impact"—that is, actions that disproportionately harm people who share a particular race, sex, or other legally protected characteristic, without good reason. This concept is not new: it has been enshrined in statutes and regulations and applied by courts—including the Supreme Court—for over five decades.

The Executive Order either misunderstands disparate impact law or deliberately misrepresents it. Under well-settled law, actions that have a disparate impact are lawful if (1) they are supported by a legitimate business need, and (2) there are no less discriminatory alternatives. Thus, contrary to language in the Executive Order, disparate impact has never required businesses or other organizations to sacrifice their legitimate needs to achieve equal outcomes. The law allows employers, housing providers, and lenders to freely adopt policies necessary to achieve legitimate business interests.

Disparate impact does not undermine merit-based decision making or equal opportunity, as the Executive Order suggests. The exact opposite is true: disparate impact *supports* merit-based decisions and equal opportunity by ensuring that organizations base their decisions on criteria that truly matter, rather than unexamined assumptions that unnecessarily perpetuate exclusion and discriminatory harms. Many businesses have also come to recognize that paying attention to disparate impact law in their operations is good for business because it helps them eliminate unnecessary barriers to opportunity and find more qualified customers or employees.

2. WHAT DOES THE EXECUTIVE ORDER DO?

Notwithstanding the above, the Executive Order sets forth a broad policy of eliminating the use of disparate impact liability "to the maximum degree possible." To effectuate this policy, the Executive Order does the following:

- Directs federal agencies to deprioritize enforcement of disparate impact law
- Directs the Attorney General and agency heads to report to the White House any existing regulations, guidance, rules, or orders that impose disparate impact liability, and to "detail agency steps for their amendment or repeal, as appropriate under applicable law"
- Directs federal agencies to evaluate pending investigations, lawsuits, or other proceedings that rely on a disparate impact theory of liability, as well as existing consent judgments and injunctions, and to "take appropriate action" with respect to such matters
- Directs the Attorney General to determine whether state laws imposing disparate impact liability are preempted by federal law or have "constitutional infirmities that warrant Federal action"
- Withdraws approval of Department of Justice regulations that, since 1966, have recognized disparate impact liability under Title VI (which prohibits recipients of federal funding from discriminating based on race and other characteristics), and directs the Attorney General to initiate appropriate action to repeal or amend such regulations

3. DOES THE EXECUTIVE ORDER CHANGE EXISTING DISPARATE IMPACT LAW THAT APPLIES TO EMPLOYMENT, HOUSING, AND CREDIT?

No. While the President has the power to set priorities for his administration and direct federal agencies according to those priorities, he generally does not have the power to change the law. Under the Constitution, Congress has the power to make laws, the federal courts have the power to say what the law is, and federal agencies have the power to interpret and "fill in the gaps" of statutes they are responsible for administering. Executive orders generally cannot change the law, and aside from the potential impact on Title VI discussed below, this Executive Order is no different.

Disparate impact has been cognizable under the major federal civil rights laws for decades. With respect to Title VII, the Supreme Court first recognized disparate impact in 1971, *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and Congress later codified the availability of disparate impact under Title VII when it passed the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(k).

In 2015, the Supreme Court confirmed what courts across the country had held since at least 1974: disparate impact liability also applies under the Fair Housing Act ("FHA"). *See Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 535-36 (2015) (citing *United States v. City of Black Jack, Missouri,* 508 F.2d 1179 (8th Cir. 1974) and cases from eight other Courts of Appeals that had held disparate impact liability exists under the FHA by the time Congress amended the Act in 1988).

And since 1977, federal regulations have recognized that disparate impact is also cognizable under the Equal Credit Opportunity Act ("ECOA"). *See* 42 FR 1242, 1255 (1977) (final rule issued by Federal Reserve Board stating that "[t]he legislative history of [ECOA] indicates that the Congress intended an 'effects test' concept, as outlined in the employment field by the Supreme Court in the case[ ] of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) . . . to be applicable to a creditor's determination of creditworthiness."); *see also* 12 C.F.R. § 1002.6(a) (current regulation stating the same); *Barrett v. H&R Block, Inc.*, 652 F. Supp. 2d 104, 108 (D. Mass. 2009) (collecting cases holding that disparate impact is cognizable under ECOA).

Ignoring this robust body of law, the Executive Order broadly asserts that disparate impact law "violates our Constitution." This is a fringe legal theory that has gained virtually no traction in the nearly 50 years that disparate liability has existed. No court has ever held that disparate impact runs afoul of the Constitution. In fact, just ten years ago, the Supreme Court explained that well-settled principles of disparate impact liability "avoid . . . serious constitutional questions." *Inclusive Communities*, 576 U.S. at 540.

*Title VI is unique because it requires implementing regulations to be approved by the President. 42 U.S.C. § 2000d-1 ("No such rule, regulation, or order shall become effective unless and until approved by the President."). Since 1966, Title VI regulations have prohibited disparate impact by making it unlawful for recipients of federal funding to, among other things, "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 28 C.F.R. § 42.104(b)(2). Federal agencies play a vital role in enforcing Title VI's disparate impact regulations because they are not enforceable by individuals. *See Alexander v. Sandoval*, 532 U.S. 275 (2001). The Executive Order essentially terminates this enforcement role by purporting to revoke presidential approval of Title VI disparate impact regulations and explicitly directing the Attorney General to repeal or amend Title VI regulations to the extent they contemplate disparate impact liability. But even assuming the President has the authority to revoke approval of Title VI regulations that was granted several decades ago—and it is not obvious that he does—he does not have a similar power under Title VII, the Fair Housing Act, or the Equal Credit Opportunity Act.

4. WILL FEDERAL AGENCIES TRY TO LIMIT OR ELIMINATE DISPARATE IMPACT LIABILITY GOING FORWARD?

Perhaps, but any such attempt is unlikely to affect institutions' legal risk in the near term.

Given the requirements of the Executive Order, federal agencies may try to erode disparate impact liability via rulemaking, guidance, or other agency action. For instance, HUD could try to amend its disparate impact regulations to make it more difficult to bring disparate impact claims under the FHA, as it tried (and failed) to do during Trump's first term. *See Massachusetts Fair Hous. Ctr. v. United States Dep't of Hous. & Urb. Dev.*, 496 F. Supp. 3d 600, 610 (D. Mass. 2020). Or the CFPB could try to amend Regulation B, which for decades has recognized that disparate impact liability exists under ECOA. This is far from a foregone conclusion given the administration's aggressive attempts to cut CFPB staff, but it is possible.

Any final agency action that tries to weaken or eliminate disparate impact liability would likely face strong legal challenge under the Administrative Procedures Act, in a court chosen by plaintiffs wishing to preserve existing regulations. For instance, when the first Trump administration attempted to significantly weaken existing disparate impact regulations under the FHA, *see* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 FR 60288-01 (Sept. 24, 2020), several organizations immediately sued, and a federal district court in Massachusetts preliminarily enjoined the new rule shortly thereafter. *See Massachusetts Fair Hous. Ctr.*, 496 F. Supp. 3d at 610. A similar scenario could play out again. Even if the government were to prevail in district court, that decision would probably be appealed—and the effect of any changes put on hold pending appeal—making definitive changes to disparate impact regulations unlikely in the near term.

Ultimately, the scope of disparate impact under a given statute is an issue for courts to resolve. This is especially true after the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which held that courts should no longer defer to agency interpretations of the statutes they administer (referred to as "*Chevron* deference"). After *Loper Bright*, courts must exercise their independent judgment in interpreting statutes and only look to agency interpretations for guidance. This likely means that any new disparate impact interpretations by the Trump administration will carry only limited weight, if any. Either way, we are a long way off from an appellate court ruling on these issues, and the outcome of any such ruling is uncertain.

Meanwhile, private parties and state attorneys general will continue enforcing federal civil rights laws regardless of the administration's desire to weaken them. They can sue in plaintiff-friendly jurisdictions where courts have recognized disparate impact liability, and those courts are likely to ignore regulatory changes to disparate impact laws. Absent significant changes in existing case law, any attempted rule changes would signal agency priorities in the short term. But they would not be reliable indicators of legal risk or the state of disparate impact law in the medium and long term.

5. WHAT IS THE ROLE OF STATE LAW?

Most states have their own statutes which, like federal law, prohibit discrimination in employment, housing, and/or credit. Some state laws explicitly allow disparate impact claims, and many others could be interpreted to include disparate impact given their broad language. Because these state laws have largely overlapped with federal law, they have been relatively underutilized. But state antidiscrimination laws are likely to be used more often if federal disparate impact law is weakened.

The Executive Order calls on the Attorney General to assess whether these state laws might be preempted by federal law, or whether they suffer from "constitutional infirmities." But federal law tends not to preempt state laws that are broader and more protective of consumers. And in the banking context, courts have generally rejected claims that the National Bank Act preempts state antidiscrimination laws. So the preemption angle is weak. Similarly, any claim that disparate impact is unconstitutional runs headlong into Supreme Court precedent—which spans nearly five decades—affirming the availability of disparate impact claims under multiple civil rights laws.

Again, these are ultimately questions for courts to decide. Until then, private plaintiffs and state attorneys general will continue to make use of disparate impact in forums of their choosing. In addition, the administration's stance could very well change back if a Democrat were to win the 2028 presidential election, assuming no intervening court decision that would prevent it from doing so.

6. SHOULD INSTITUTIONS CHANGE HOW THEY COMPLY WITH EXISTING DISPARATE IMPACT LAW IN LIGHT OF THE EXECUTIVE ORDER?

No. Existing law is clear: disparate impact claims are available under key federal civil rights laws, including laws that prohibit discrimination in employment, housing, and credit. The Executive Order does not change this body of law. Although the Trump administration could attempt changes to disparate impact law going forward, such attempts would face significant legal obstacles and are likely to get tied up in litigation. In the meantime, private litigants and state attorneys general will continue to make use of disparate impact liability, even if the federal government does not.

In short, disparate impact risk will continue to exist in employment, housing, and credit for the foreseeable future. Institutions should continue to diligently control for this risk unless and until there are conclusive changes to disparate impact law at both the federal and state levels.