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Disparate impact: Still on the books

President Trump's April 2025 executive order targeting disparate impact liability in discrimination claims may weaken federal enforcement, but California's strong state protections mean such claims remain viable and enforceable under state law.

By Jack Schaedel

On April 23, 2025, President Trump issued an executive order entitled "Restoring Equality of Opportunity and Meritocracy." The executive order is one in a series targeted at eliminating Diversity Equity and Inclusion (DEI) policies and practices throughout the federal government. Its goal: dismantling all legal claims for employment discrimination based on the "disparate impact" theory of liability initially recognized in 1971 by the Supreme Court in *Griggs v. Duke Power* (401 U.S. 242 (1971)) and codified into Title VII of the Civil Rights Act of 1964 as amended in 1991.

What does this mean for California employees seeking redress for discrimination in employment and housing? In the absence of proof of intentional discrimination based on membership in a protected class, will such plaintiffs have any hope of recovery?

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Disparate impact

Under Title VII and California Government Code Section 12940(a), the California Fair Employment and Housing Act (FEHA), a plaintiff may proceed under the disparate impact theory whenever a facially-neutral policy or practice is shown to have a disproportionately negative effect on a protected group, regardless of intent. Legal defenses to disparate impact claims may include a showing that the policy or practice is "job-related" or based on a legitimate "business necessity."

Disparate-impact claims, under both Title VII and FEHA, allow employees to challenge disparities that can be tied to facially neutral policies, without having to prove discriminatory intent.

In Griggs, the plaintiff was excluded by a company policy that required applicants to have a high school diploma and to pass two aptitude tests. This had the effect of disproportionately excluding black applicants. The Supreme Court ruled that the policies were unrelated to job performance. Because they had a discriminatory effect, they were unlawful even though they applied equally to members of all races.

Unlike disparate treatment cases, which require plaintiffs to demonstrate that discrimination was intentional and based on a protected characteristic, disparate impact cases assert that a seemingly neutral policy or practice (with no intent to discriminate) disproportionately affects a protected group negatively. Once the impact is shown, the burden of proof shifts to the defendant to justify the business necessity of the policy or practice in question.

Federal law

The executive order aims to "eliminate the use of disparate-impact liability in all contexts." Such claims, according to the order, hurt businesses and are contrary to equal protection under the law. Thus, the order directs the Equal Employment Opportunity Commission (EEOC) not to pursue lawsuits predicated on a disparate impact theory and directs the Attorney General to initiate action to repeal or amend all regulations that authorize disparate impact liability based on race, color and national origin discrimination under Title VI of the Civil Rights Act of 1964, which applies to institutions receiving federal financial assistance. The attorney general is also called upon to report to the president on disparate impact laws at the state level.

The executive order seeks to effect fundamental change in the law, but while the executive branch can deprioritize enforcement, it cannot unilaterally change the law. The Civil Rights Act authorizes individuals to file private lawsuits on either a disparate treatment or a dis-

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parate impact theory, and federal courts are obligated to enforce the law as written. Any changes to the availability of the disparate impact theory can be implemented only via a formal regulatory rulemaking process or through Congressional action, such as legislation to amend the Civil Rights Act.

While the executive order does not shield private employers from Title VII, the EEOC took another step to undermine the disparate impact theory on May 20, 2025, when it announced that it would no longer reimburse state and local enforcement agencies for their pursuit of claims based on the theory.

Clearly, the EEOC will no longer support employees and job applicants who believe they have been disparately impacted by an employer policy, but how will this impact workplaces in California?

California law

California's FEHA makes it "an unlawful employment practice, unless based upon a bona fide occupational qualification" for an employer to discriminate "because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, reproductive health decision-making, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any person."

Jury Instruction CACI No. 2502, which addresses disparate impact in employment, calls for a showing that an employer's practice or policy had a disproportionate adverse effect on a protected group, the plaintiff was a member of that group and suffered harm, and the practice or policy was a substantial factor in that harm. Significantly, no showing of discriminatory intent is necessary when practice is shown to have a discriminatory effect.

Additionally, California has been at the forefront of legal responses to the rising use of artificial intelligence (AI) in the workplace. Its laws continue to focus on the disparate impact of AI on protected groups, especially systems that are used to screen candidates, rank resumes or assess qualifications. Even with reduced federal oversight, employers must still comply with these laws and monitor AI usage in employment decisions. In fact, previous efforts by California Governor Gavin Newsom and the California Legislature to "Trump-proof" California could well be renewed to consider even stricter legislation,

Impact of the executive order

The executive order will have less impact on California employers and employees than in other states, which do not have as robust a system of employment laws. Despite federal indifference, or even hostility, to disparate impact claims, they will continue to be filed with and investigated by the California Civil Rights Department and filed and prosecuted in California Superior Court. Thus, California employers should not assume that this executive order or other actions by the administration will be a reprieve from California laws that impose liability for policies and practices that have a disparate impact on protected employees, even when not intentional.

Employers may seek to remove disparate impact lawsuits to federal court; on the theory that the newly stated policy disapproves of the theory and therefore protects all policies that do not have discriminatory intent. Some legal commentators have speculated that employers could assert that federal law preempts state law where the two conflict, but most federal employment laws (in contrast to traditional labor law) explicitly permit states and localities to diverge from federal law, as long as more, not less, protection is provided to employees. Whether federal courts accept employers' preemption arguments remains to be seen.

Conclusion

Employees who believe they have faced a disparate impact surely will not welcome the new executive order, as it creates a less hospitable environment for such claims. Some states have already followed the federal government in removing liability based on gender identity, and others are considering removing disparate impact liability. California employers, however, should not assume that the Administration's actions will reduce their potential liability.

The only certainty right now is a lack of certainty. Both employers and employees might be wise to mediate current or future disparate impact disputes, rather than roll the dice and become a test case for the Administration's supporters or detractors.