

## Trump Second Term: Legal Tracker

# NEW EXECUTIVE ORDER TAKES AIM AT DISPARATE IMPACT DISCRIMINATION CLAIMS

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Claims under federal anti-discrimination laws can take a variety of forms depending upon the specific law under which they arise, including a disparate treatment claim (in which there is a tangible, intentional employment action at issue), a hostile work environment claim (in which an employee is subject to unwelcome remarks or conduct), a retaliation claim (in which an employer takes adverse action against an employee for engaging in protected activities), and a disparate impact claim (in which a neutral policy or practice has an unintentional and disproportionate impact on members of protected classes).

It is this latter type of claim which is the subject of [Executive Order 14281](#), which President Trump signed on April 23, 2025. Through Executive Order 14281, President Trump instructs federal agencies to stop treating disparate impact as a viable theory of liability in discrimination matters. While this policy change is significant, the statutes and case law establishing disparate impact liability remain in place for now. As such, while employers should familiarize themselves with Executive Order 14281's requirements, they should also be mindful that other sources (including state law) may continue to apply.

## EXECUTIVE ORDER 14281

### 1. Policy

According to Executive Order 14281, because disparate impact liability requires individuals and businesses to “consider race and engage in racial balancing” to avoid liability – conduct which violates the US Constitution and federal anti-discrimination laws – the Trump Administration’s policy is to eliminate the use of disparate impact liability “in all contexts to the maximum degree possible.”

### 2. Revocation of Prior Presidential Approvals

Title VI of the Civil Rights Act of 1964 (“Title VI”) prohibits private entities accepting federal financial assistance from discriminating on the basis of race, color, and national origin. The US Department of Justice (“DOJ”), the agency generally charged with enforcing Title VI, has adopted a

number of regulations regarding the law. Executive Order 14281 revokes prior Presidential approval of certain of these regulations regarding disparate impact liability.

### **3. Current and Future Federal Agency Action/Guidance**

Executive Order 14281 mandates that all federal agencies “deprioritize” enforcement of disparate impact liability under federal statutes and regulations (including but not limited to matters arising under Title VII of the Civil Rights Act (“Title VII”) and the DOJ’s Title VI regulations). In addition, Executive Order 14281 orders the US Attorney General to take a number of steps to review current disparate impact-related measures with other federal agency heads.

Specifically, Executive Order 14281 orders the US Attorney General to:

- Repeal relevant Title VI regulations.
- Work with other federal agency heads to submit a report within 30 days (i.e., May 23, 2025) that: (i) identifies federal regulations/guidance/rules regarding disparate impact liability; (ii) details the agencies’ steps to amend or repeal such regulations/guidance/rules; (iii) identifies other laws/decisions (including at the state level) that may implicate disparate impact theories of liability; and (iv) details any measures to address the legality of such other laws/decisions.
- Work with the Equal Employment Opportunity Commission (“EEOC”) Chair to: (i) assess, within 45 days (i.e., June 7, 2025), all pending investigations, suits, and positions in ongoing matters that rely on disparate impact theories and “take appropriate measures consistent with” Executive Order 14281; and (ii) issue joint guidance regarding appropriate methods to promote equal access to employment regardless of whether an applicant has a college education.
- Work with the Secretary of Housing and Urban Development, Director of the Consumer Financial Protection Bureau, Chair of the Federal Trade Commission, and other agency heads responsible for enforcement of laws prohibiting unfair, deceptive, or abusive acts/practices, to assess, within 45 days (i.e., June 7, 2025), all pending proceedings that rely on disparate impact theories and “take appropriate measures consistent with” Executive Order 14281.
- Determine, in coordination with other federal agencies, whether any federal laws preempt state laws/regulations/policies that impose disparate impact liability, and if so, “take appropriate measures consistent with” Executive Order 14281.

Finally, within 90 days (i.e., July 22, 2025), all federal agency heads are also ordered to review existing consent judgments and permanent injunctions that rely on disparate impact theories and “take appropriate measures consistent with” Executive Order 14281.

### **IMPLICATIONS FOR EMPLOYERS**

The US Supreme Court first recognized a disparate impact theory of liability in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), and in 1991, Congress codified disparate impact liability under Title VII. As such, although Executive Order 14281 may change how the Trump Administration enforces federal anti-discrimination laws with respect to disparate impact liability, the laws themselves cannot change absent action from Congress and/or the courts.

Given this landscape, employers can likely expect the following as a result of Executive Order 14281:

- The EEOC and other federal agencies will likely amend, remove, or adopt new guidance regarding disparate impact theories of liability (importantly, until there is a quorum of commissioners at the EEOC, any such guidance will be informal).
- Employees will likely continue to bring disparate impact claims, but we expect that the EEOC will not prioritize investigation of these claims and may simply issue right to sue notices upon receipt. This also means that the EEOC is unlikely to pursue new litigation regarding the same.
- Because individuals can pursue litigation on their own under a disparate impact theory of liability, adverse impact analyses will remain important despite Executive Order 14281. Moreover, given the increased visibility in this area, it is increasingly important that these analyses be conducted under the attorney-client privilege and that mitigation measures be followed. In addition, Executive Order 14281 may increase internal questions or challenges regarding the merits of continued use of adverse impact analyses in the evaluation of any selection process, so employers should be prepared to respond to these questions/challenges.
- State EEO agencies – especially those in Democratic states – may seek to overcompensate for the federal deprioritization by investigating and filing more disparate impact claims, especially in jurisdictions in which state/local law recognizes disparate impact liability (at least until those laws may be challenged as unconstitutional pursuant to Executive Order 14281).
- Like other executive action, Executive Order 14281 may be the subject of future litigation.

## CONCLUSION

The divergence between existing law and federal enforcement priorities is likely to create significant compliance challenges for employers. As such, all employers should work with legal counsel to evaluate their policies and practices for potential disparate impact liability risks and be prepared to respond to questions regarding the same.

BCLP has a team of knowledgeable employment lawyers and other professionals who are monitoring developments in this area and can help employers with this assessment. If you or your

organization would like more information on this or any other employment issue, please contact any attorney in our Employment and Labor Practice Group.

## RELATED CAPABILITIES

- Employment & Labor

## MEET THE TEAM



### **Marilyn M. Fish**

Atlanta

[marilyn.fish@bclplaw.com](mailto:marilyn.fish@bclplaw.com)

[+1 404 572 6632](tel:+14045726632)



### **Lily J. Kurland**

Washington

[lily.kurland@bclplaw.com](mailto:lily.kurland@bclplaw.com)

[+1 202 508 6106](tel:+12025086106)

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