LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • IMMIGRATION

May 15, 2025

Latest Employment-Related Executive Order Takes Aim at College and College-Level Math

On April 23, 2025, President Trump issued a new Executive Order, entitled "Restoring Equality of Opportunity and Meritocracy," which labels disparate impact theory a "key tool" of a "pernicious movement" to destroy American meritocracy, and instructs various federal agencies, including the EEOC, to review existing and pending litigation for reliance on a disparate impact theory, and to "take appropriate action" with respect to such litigation. President Trump also ordered the Attorney General and EEOC Chair to issue guidance or technical assistance to employers regarding "appropriate measures to promote equal access to employment regardless of whether or not an applicant has a college education, where appropriate." (emphasis added).

What is Disparate Impact Discrimination?

A History Lesson

As a theory of discrimination, disparate impact theory took the main stage in the case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In that case, it was accepted as true that, prior to Title VII taking effect in 1965, the Power Company had openly discriminated against Black employees and applicants in the hiring and assignment of employees at its Dan River Plant. After Title VII became the law, for an employee to transfer out of the lowest-paying Labor Department (historically the only department Black employees were allowed to work in), the employee had to have a high school diploma or get passing scores on a general intelligence test (the Wonderlic) and a comprehension test. Due to systemic discrimination in the educational system in North Carolina (which the Supreme Court had expressly found in a prior North Carolina voter discrimination case), Black employees and applicants were far less likely than White employees or applicants to have a high school diploma or to pass the other two tests, which did not measure any particular job-related skill. Because there was no evidence that these standards were not actually applied, Duke was successful in arguing to the courts below that it could not have violated Title VII because it was simply applying a neutral criteria, that happened to have a discriminatory effect. The Supreme Court rejected that, holding that "practices that are fair in form, but discriminatory in operation" violated Title VII as well.

In the Civil Rights Act of 1991, Congress amended Title VII to expressly recognize disparate impact liability, and lay out the burden of proof for such claims. 42 U.S.C. §2000e-2(k).

The Current State of Disparate Impact Litigation: Costly and Rare

While this portion of Title VII does not specifically require statistical evidence that a policy or practice is discriminatory in outcome, disparate impact claims are unlikely to survive a motion for summary judgment without a statistician's or labor economist's testimony and are unlikely to survive a motion to dismiss without allegations that a policy or practice disproportionately affected

a protected class to a statistically significant degree. Because disparate impact cases require statistical analysis early and often devolve into a battle of the $1,000+/hour Ph.D. mathematicians, they are seldom brought by private plaintiffs' attorneys.

The Effect of the Latest Executive Order on Disparate Impact Theory

While President Trump obviously and evidently disfavors statistical analysis of employment decisionmaking for evidence of discrimination, he cannot by Executive Order amend Title VII; only Congress can do that. However, with this Executive Order and the prior rescission of E.O. 11246 (which had required federal contractors to analyze employee populations by race and sex against the expected representation), he appears to have ensured there will be no more federally-prosecuted civil actions against employers based exclusively on statistical evidence, which is likely to bring an already rare species of employment discrimination into near extinction.

What's This Other Part About College Education as a Job Requirements?

Interestingly, the Order doesn't expressly tell the EEOC, DOL, DOJ, and/or OPM to review the Uniform Guidelines of Employee Selection Procedures. (These Guidelines could fall within the general review and report requested by Section 5(b) of the E.O.). But, it *does* tell the EEOC and the Attorney General that they need to jointly issue guidance or technical assistance to employers to promote equal employment opportunities "regardless of whether an applicant has a college education, where appropriate." It is certainly interesting that this Executive Order critiquing disparate impact also asks the Commission to issue guidance to discourage employers from requiring, preferring, or screening employees and applicants based on non-job-related educational attainment, one of the very practices at issue in *Griggs v. Duke*. It will also be interesting to see how the Commission ties this guidance about employee selection or screening based on non-job-related educational achievement (one's educational accomplishment not being a protected class under the law) to the scope of the laws it administers (ADEA, ADA, Title VII, GINA, PWFA) without relying on statistical evidence

If you have any questions or would like additional information, please contact Whitney Brown at 205-323-9274 or wbrown@lehrmiddlebrooks.com.