WHY THE TRUMP ADMINISTRATION'S RETREAT FROM DISPARATE IMPACT DOESN'T FUNDAMENTALLY CHANGE THE LEGAL BASIS FOR EMPLOYER ANALYSIS OF SELECTION DECISIONS

DirectEmployers Association

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JUNE 25, 2025

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MEET THE TEAM

JOSHUA S. ROFFMAN

MANAGING ATTORNEY

Joshua Roffman is the Managing Attorney of the Firm. Josh's practice focuses on advising and assisting employers with using data and statistical tools to evaluate their employment practices. He has been advising federal contractor employers about compliance with federal and state equal employment opportunity and "affirmative action" requirements for over twenty years. He currently is guiding employers in assessing their DEIA and similar programs for risk mitigation and compliance with nondiscrimination laws.

Josh also advises and assists employers with privileged pay equity statistical analyses. He develops and runs the statistical analyses and combines that with knowledge of the law and a pragmatic understanding of businesses and other employers to ensure analytical rigor, usefulness, and legal soundness.

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MEET THE TEAM

ALISSA A. HORVITZ

MEMBER ATTORNEY

Alissa Horvitz is a Member Attorney in the firm she co-founded with Josh Roffman. Alissa focuses her practice on evaluating nondiscrimination and equal opportunity throughout all phases of employment using data and employment analytics. This includes analysis and advice regarding EEO in recruiting, hiring, promotions, terminations, and compensation (pay equity), as well as DEI reviews for government contractor employers seeking to unwind their compliance with EO 11246. Alissa also does live and virtual training on relevant employment law topics.

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OUTLINE

- EO 14281 – “Restoring Equality of Opportunity and Meritocracy”
- What Does EO 14281 Do. What It Doesn’t and Can’t Do
- Civil Rights Act of 1991
- Disparate Impact
- Disparate Treatment, Pattern and Practice
- Examples of Disparate Treatment and Disparate Impact
- Use of Statistical Evidence/Analysis
- Application of Statistical Analysis to Employment Practices and Decisions

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EXECUTIVE ORDER 14281: RESTORING EQUALITY OF OPPORTUNITY AND MERITOCRACY

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EXECUTIVE ORDER ATTACKING DISPARATE IMPACT LIABILITY

- "Restoring Equality of Opportunity and Meritocracy", signed on April 23, 2025
- EO states (falsely, we contend) that disparate impact liability prohibits meritocratic decisions if they have a different impact by sex, race, etc. "Disparate-impact liability all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability. It not only undermines our national values but also runs contrary to equal protection under the law and, therefore, violates our Constitution."
- Instructs the Attorney General to investigate federal preemption of state laws with disparate impact liability
- Attorney General and Chair of EEOC to provide technical assistance to promote equal access to employment regardless of whether applicant has a college education
- Significant focus on regulations under Title VI (federal financial assistance) of the Civil Rights Act of 1964
- Calls for de-prioritization of federal government enforcement of disparate impact claims under Title VII (employment) of the Civil Rights Act of 1964, the Equal Credit Opportunity Act, and Title VIII of the Fair Housing Act (aka the Civil Rights Act of 1968)

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WHAT DOES EO 14281 DO

WHAT EO 14281 DOESN'T AND CAN'T DO

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WHAT DOES EO 14281 DO

- Defines the executive branch's view of disparate impact liability
- Federal agencies are instructed not pursue disparate impact claims

  "all agencies shall deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability"

- Attorney General instructed to determine whether federal law preempts state laws and practices that rely on disparate-impact liability and whether those laws and practices "have constitutional infirmities"

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WHAT EO 14281 DOESN'T AND CAN'T DO

- Remove disparate impact from Title VII and other federal civil rights laws
- Override state laws and practices related to disparate impact that don't "have constitutional infirmities"
- Eliminate the use of statistics in employment discrimination cases

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WHAT WILL THE EEOC LIKELY DO (OR NOT DO)?

- The Trump administration EEOC won't pursue cases on a disparate impact theory
- If the EEOC is unable to conclude that there is reasonable cause to believe that discrimination occurred, the Charging Party will be issued a Dismissal and Notice of Rights. The Charging Party has the right to file a lawsuit in federal court within 90 days of receipt.
- If the EEOC decides not to investigate, or not to enforce alleged violations, the Charging Party will receive a Notice of Right to Sue and may file a lawsuit in federal court within 90 days.

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CIVIL RIGHTS ACT OF 1991

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STATUTORY LANGUAGE

"An unlawful employment practice based on disparate impact liability is established . . . only if

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party (demonstrates) that . . . respondent refuses to adopt (a less discriminatory) alternative employment practice."

42 U.S.C. « 2002e-2(k)(1)(A)

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SUPPORT WHEN PASSED IN 1991

- Disparate impact in employment codified by statute – Civil Rights Act of 1991
  - Signed by Republican President George H. W. Bush
  - Passed Senate by a vote of 93-5 (55-0 D; 38-5 R)
  - Passed House by a vote of 381-38 (252-5 D; 128-33 R)
- Congressional statutes can't be repealed by Executive Order
- Almost every state has equal employment laws that include disparate impact liability

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DISPARATE IMPACT

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DISPARATE IMPACT

In the context of employment practices, disparate impact liability establishes that if a **facially neutral employment practice** has a disparate impact on the basis of race, religion, sex, or national origin, the **employer must show that the practice is job related for the position and consistent with business necessity**

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DISPARATE TREATMENT, PATTERN AND PRACTICE

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DISPARATE TREATMENT, INTENTIONAL DISCRIMINATION

- Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin
- Title VII prohibits both (1) intentional discrimination (known as disparate treatment) and (2) practices that are not intended to discriminate but in fact have a disproportionately adverse effect on a race or sex (known as disparate impact)
- A disparate treatment plaintiff must establish that the employer had a discriminatory intent or motive for taking a job-related action.

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DISPARATE TREATMENT, PATTERN AND PRACTICE

- The Supreme Court in 1977, in a case involving the Teamsters, recognized that if an employer engaged in a systemwide pattern or practice of employment discrimination by regularly and purposefully treating minorities less favorably than Whites, which the government could demonstrate using “pervasive statistical disparities” bolstered by “considerable testimony of specific instances of discrimination,” the government had proven its case.

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DISPARATE TREATMENT, PATTERN AND PRACTICE

- The use of statistics to try to establish an inference that the employer was discriminating against a race or sex was often how the OFCCP would allege discrimination during compliance evaluations
  - If the employer was following principles of equal opportunity in decision-making, then we would expect roughly the same proportion to exist in its selection decisions
  - But if the pattern of decisions favored one race or sex, and mathematically we would not expect that to happen, the data could create an inference that the employer was not following principles of equal employment opportunity, and then it would be important for the employer to offer evidence of a legitimate, nondiscriminatory reason.

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EXAMPLES OF DISPARATE TREATMENT AND DISPARATE IMPACT

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EXAMPLES OF DISPARATE TREATMENT

- An employer has four qualified candidates for a job opportunity, and it does not ask the applicants the same questions. The two female applicants are asked whether they would have any problems attending business development and marketing events in the evenings while the married men are asked whether their wives work outside the home. The employer makes the offer to a male applicant.
- Two employees are caught falsifying timecards: one White employee and one Black employee. They have the same prior performance records with no warnings or blemishes. The White employee is suspended without pay for three days, and the Black employee is terminated.
  - What if the White employee is an hourly employee covered by a collective bargaining agreement that imposes progressive discipline, and the Black hourly employee is not part of the union?
- An employer sets the starting pay of the female software development engineer at $62,000 and the male software development engineer at $64,000. They are both recent graduates; they are working in the same department; and they had the same number of semesters as interns/co-ops for the employer while at school.
- An employer holds a leadership institute for women, but not for men.

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EXAMPLES OF DISPARATE IMPACT (1 of 2)

- Pre-employment testing: A manager has been reading all about pre-employment tests on the Internet and decides to use one in her hiring process. The company that created the test claims that it has been validated. As the test is administered to applicants, the test rejects Asian applicants at much higher rates than it rejects Whites.
- A recruiter is going through resumes and rejects any applicant who graduated from a foreign high school or college because its background checking company takes longer to complete a background check of a non-U.S. applicant's credentials than it takes to background check someone who graduated from a U.S. high school or college.

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EXAMPLES OF DISPARATE IMPACT (2 of 2)

- An employer wants to use an applicant's FICO score to prioritize qualified candidates for employment offers.
- Physical lifting tests (impact against females and older workers)
- Airline height requirements (e.g., females, Asians)
- AI resume screening tool uses applicant's zip code and rejects applicants for facilities maintenance positions that are not within a 30-minute commute because if there is a building emergency, the employee needs to be there in 30 minutes or less

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USE OF STATISTICAL EVIDENCE/ANALYSIS

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2020 REGULATIONS ISSUED BY OFCCP DURING PRESIDENT TRUMP'S FIRST TERM (1 of 2)

(1) For allegations . . . involving a **disparate treatment theory of liability**, OFCCP must:

(i) Provide **quantitative evidence** as defined in this part;

(ii) Demonstrate that the unexplained disparity is practically significant; and

(iii) Provide **qualitative evidence** as defined in this part that, in combination with other evidence, supports both a finding of discriminatory intent by the contractor and a finding that the contractor's discriminatory intent caused the disparate treatment.

(2) OFCCP may issue a Predetermination Notice under a disparate treatment theory of liability without satisfying all three components listed in paragraph (a)(1) of this section only if:

(i) The qualitative evidence by itself is sufficient to support a preliminary finding of disparate treatment;

(ii) The evidence of disparity between a favored and disfavored group is so extraordinarily compelling that by itself it is sufficient to support a preliminary finding of disparate treatment;

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41 C.F.R. « 60-741.62(a) (effective December 10, 2020; rescinded August 4, 2023)

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2020 REGULATIONS ISSUED BY OFCCP DURING PRESIDENT TRUMP'S FIRST TERM (2 of 2)

(3) For allegations . . . involving a **disparate impact theory** of liability, OFCCP must

(i) Provide **quantitative evidence** as defined in this part;

(ii) Demonstrate the unexplained disparity is practically significant; and

(iii) Identify the specific policy or practice of the contractor causing the adverse impact, unless OFCCP can demonstrate that the elements of the contractor's selection procedures are incapable of separation for analysis.

41 C.F.R. « 60-741.62(a) (effective December 10, 2020; rescinded August 4, 2023)

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OFCCP STATED PREFERENCE FOR RELIANCE ON DISPARATE TREATMENT, PATTERN AND PRACTICE

- OFCCP Federal Contract Compliance Manual 2E00 ("Types of Evidence")

"OFCCP performs statistical analyses during its compliance evaluations and also seeks a variety of other types of nonstatistical evidence. Anecdotal evidence, a type of nonstatistical evidence, often supports statistical evidence of discrimination in systemic cases. Anecdotal evidence, which may be either direct or circumstantial, may consist of first-hand accounts of personal experiences with discrimination by the contractor at issue that brings "the cold numbers convincingly to life." International Brotherhood of Teamsters v. United States, 41 U.S. 324, 339 (1977).

Documents the contractor submits may contain anecdotal evidence, or COs may obtain anecdotal evidence from interviews with managers, employees, or applicants.

In determining which cases to pursue, OFCCP will be less likely to pursue a matter where the statistical data are not corroborated by nonstatistical evidence of discrimination unless the statistical evidence is exceptionally strong. In some cases, OFCCP may find systemic discrimination based only on anecdotal evidence that directly supports a pattern or practice of discrimination."

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OFCCP STATED PREFERENCE FOR RELIANCE ON DISPARATE TREATMENT, PATTERN AND PRACTICE

- Directive 2018-05 ("Analysis of Contractor Compensation Practices During a Compliance Evaluation")

"**In determining which cases to pursue, OFCCP will be less likely to pursue a matter where the statistical data are not corroborated by non-statistical evidence of discrimination unless the statistical evidence is exceptionally strong**. Nonetheless, there may be factors, applicable in a particular case, which explain why OFCCP was unable to uncover anecdotal evidence during its investigation despite the strength of the statistical evidence of systemic compensation discrimination."

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ACTING EEOC CHAIR ANDREA LUCAS STATEMENT ABOUT THE USE OF STATISTICAL EVIDENCE IN PURSUING UNLAWFUL DEI

"[E]mployers should take care not to conflate disparate impact claims arising from neutral employment practices with a materially different type of Title VII claim: intentional discrimination claims proven via the "pattern or practice" model of proof first set out by the Supreme Court in Teamsters v United States, which may entail the use of statistical evidence, along with other evidence, to prove disparate treatment.

"The Commission will continue to relentlessly combat unlawful patterns or practices of intentional discrimination in violation of Title VII, including race and sex discrimination that may arise from DEI programs and national origin discrimination involving anti-American bias."

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APPLICATION OF STATISTICAL ANALYSIS TO EMPLOYMENT PRACTICES AND DECISIONS

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APPLICATION OF STATISTICAL ANALYSIS TO EMPLOYMENT PRACTICES AND DECISIONS

- Hires v Applicants
  - Specific Policy or Practice
    - Resume Review
    - Artificial Intelligence Tool
    - Employment Test
    - Selection for Interview
    - Selection for Job Offer
    - Background Checks
    - Job Qualifications and Requirements
- Promotions
- Terminations
- Pay Equity

- Typical Defense Regardless of Liability Theory
  - **Job Related and Consistent with Business Necessity**
    - Required showing to overcome inferences from statistics
    - In compensation, use of a regression analysis to show that the difference in pay is job-related and consistent with business necessity (control variables speak to those elements)

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UPCOMING ROFFMAN HORVITZ DIRECTEMPLOYERS PRESENTATION

- Webinar – July 23 – Six Months In - Current Status and Latest Developments Related to EEO and DEI Compliance
  - Registration Link:

    https://directemployers.zoom.us/webinar/register/WN_z0bTWViJSeikvWgswSiLhg

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THANK YOU

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