



CAROLYN A. QUATTROCKI
Chief Deputy Attorney General

LEONARD J. HOWIE III
Deputy Attorney General

CARRIE J. WILLIAMS
Deputy Attorney General

ZENITA WICKHAM HURLEY
Chief, Equity, Policy, and Engagement

**STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CIVIL RIGHTS DIVISION**

ANTHONY G. BROWN
Attorney General

JONATHAN M. SMITH
DIVISION CHIEF

PETER V. BERNS
General Counsel

CHRISTIAN E. BARRERA
Chief Operating Officer

**Testimony of Jonathan M. Smith, Chief of the Civil Rights Division
Before the House Committee on Economic Matters
In Support of House Bill 1261
February 27, 2025**

Equal opportunity for employment is protected by Maryland law. Md. Code Ann. 20-601. Maryland Courts have long looked to Title VII of the Civil Rights Act, the federal counterpart to Maryland's antidiscrimination provisions to interpret the meaning of Maryland's equal employment laws.¹ For more than 60 years, the federal law has protected the right of employees in protected categories to be free from discrimination that arose from disparate treatment – often called intentional discrimination – and disparate impact – a generally applicable policy that had the effect of disproportionately harming a protected class.² As the Supreme Court noted, “tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox.”³ Disparate impact is under assault by the Trump Administration and HB 1261 clarifies that regardless of future interpretations of Title VII or its amendment in Congress, it remains a viable protection under Maryland law. For these reasons, we support HB 1261.

The development of the law of disparate impact has created a careful balance between the values of our anti-discrimination laws and the legitimate business interests of employers. The courts have adopted a three-part burden shifting test. First, is there a policy of general application that has a discriminatory effect on a protected class? If so, the court moves to the second step of whether there is a legitimate business interest being achieved by the policy. And finally, the burden shifts back to the question of whether the policy is the least restrictive

¹ *Chappell v. Southern Md. Hosp., Inc.*, 320 Md. 483, 494 (1990) (noting that this Court reads state antidiscrimination provisions in harmony with Title VII “in the absence of legislative intent to the contrary”)

² *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)

³ *Id.* At 431.

mechanism to reasonably achieve the business objective.⁴ The disparate impact rule was codified in Title VII as part of the 1991 Amendments to the Civil Rights Act.⁵

The vitality of disparate impact theory under a Trump Administration is in question. Project 2025 explicitly calls on the President to take steps to eliminate disparate impact liability.⁶ The President has already acted to undermine disparate impact. This includes the issuance of executive orders regarding diversity, equity, inclusion, and accessibility that sweep so broadly that they may cover efforts to address the discriminatory effects of a policy and that the Congressional Research Service have concluded “may therefore result in some employers taking a less active approach to recruiting members of certain groups and maintaining or furthering their employment.”⁷ Significantly, the new Chair of the EEOC has challenged the notion of disparate impact following the Supreme Court decision in *Students for Fair Admissions v. Harvard*, 600 US 181 (2023) asserting that an employer who takes into account the disparate impact of a policy might be engaged in unlawful discrimination.⁸

Disparate impact remains the law, however, its future is unknown. As the federal government grows hostile to civil rights enforcement, the importance of Maryland’s laws increase. While we believe that disparate impact is available under current law, HB 1261 ensures that there is no ambiguity. For these reasons, we urge a favorable report.

⁴ See, United State Equal Employment Opportunity Commission, Prohibited Employment Policies/Practices, <https://www.eeoc.gov/prohibited-employment-policiespractices>; <https://www.eeoc.gov/prohibited-employment-policiespractices> United States Department of Justice Title VI Legal Manual, Section VII – Proving Discrimination – Disparate Impact, <https://www.justice.gov/crt/fcs/T6Manual7#C>.

⁵ 42 U.S.C. 2000e.

⁶ Heritage Foundation, Mandate for Leadership, Project 2025 at 583, https://static.project2025.org/2025_MandateForLeadership_FULL.pdf.

⁷ Congressional Research Service, Rescission of Executive Order 11246, “Equal Employment Opportunity”: Legal Implications, at 4 (February 12, 2025) <https://crsreports.congress.gov/product/pdf/LSB/LSB11268>

⁸ Andrea Lucas, Chair EEOC, The Future of DEI, Disparate Impact, and EO 11246 after *Students for Fair Admissions v. Harvard/UNC*, Mary 22, 2024, <https://www.eeoc.gov/future-dei-disparate-impact-and-eo-11246-after-students-fair-admissions-v-harvardunc>.