



Disruptive Forces Ahead: What 2025 Holds for Employers

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Agenda

- Developments at the EEOC
 - The EEOC Moves Forward Without a Quorum
 - Courts Oppose Anti-DEI Executive Orders
 - EEOC Withdraws Claims based on Gender Identity
 - Religious Accommodations
 - Reverse Discrimination
 - Considerations for Employers
- Developments at the NLRB
- Developments at the DOL

Big Changes at the EEOC

Diversity, Equity and Inclusion

What's the State of DEI?

- Executive Orders have eliminated explicit DEI *in the federal government*
- Relevant EOs have no direct effect on private sector, BUT:
- Executive branch *is* beginning to target private DEI programs through EEOC enforcement (big law firms like Perkins Coie)
- Private employers are reacting—and should be
- Where did the attack on DEI begin, in legal terms?

EEOC Position Post-*Students for Fair Admissions v. Harvard* (June 2023)

“It **remains lawful** for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.”

[EEOC Statement 06-29-2023](#)

Legal Challenges to DEI Persisted Anyway:

The American Alliance for Equal Rights (AARE) targeted the legal industry and law schools challenging DEI programs

The America First Legal Foundation (AFL) generated over a hundred lawsuits, EEOC complaints, amicus briefs and legal demands, including:

- Letters demanding the EEOC investigate DEI initiatives of certain airlines and large corporations (Disney, Nike, Mattel, Hershey, NFL)
- Lawsuits against school districts that promote “radical pro-transgender and pro-gay attitudes”
- Amicus briefs to protect FL minors from drag shows and protect Donald Trump from a federal jury trial



Lucas on DEI in 2023:

“There’s no such thing as ‘reverse’ race or sex discrimination under our civil rights laws ... there’s just discrimination.”



Administration's First Move - New Leadership at the EEOC

"I look forward to restoring evenhanded enforcement of employment civil rights laws for all Americans.

My priorities will include **rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work; protecting workers from religious bias and harassment**, including antisemitism; and remedying other areas of recent under-enforcement."

- Andrea Lucas, EEOC Acting Chair



1/28/2025: EEOC Reverses Biden-Era Guidance

EEOC erased 12 different pieces of guidance from its website:

- Removed all guidance on *Bostock* compliance (LGBTQ)
- Removed all guidance on discrimination by use of AI
- Kept the 2023 harassment guidance - but watch for changes there

EEOC: “The agency is reviewing and updating its website content as appropriate to maintain compliance with executive orders and administration policy.”



What is an Executive Order?

- **What it is:** Written order issued by the President, to branches of the federal government, under the control of the Executive Branch
- Do not require Congressional approval
 - Cannot be reversed by Congress
 - Can be reversed by courts
- **What it is not:**
 - Not a law, so an EO cannot violate a law (but could ignore the law)
 - Cannot change or override state or local laws
 - Not self-funding: may need Congress to enforce



The EOs impacting EEO law

- Ending Radical and Wasteful Government **DEI Programs** and Preferencing
- Ending Illegal Discrimination and **Restoring Merit-Based Opportunity**
- Reforming the Federal Hiring Process and **Restoring Merit to Government Service**
- Defending Women from **Gender Ideology Extremism** and Restoring Biological Truth to the Federal Government
- **Limiting Lame-Duck Collective Bargaining Agreements** that Improperly Attempt to Constrain the New President
- Rescinding “Harmful” Executive Orders and Actions



Trump EO - “Ending Illegal Discrimination and Restoring Merit Based Opportunity”

“Illegal DEI and DEIA policies not only violate the text and spirit of our long-standing federal civil rights laws, they also undermine our national unity...”

- Rescinded 7 older EO’s, including the 1965 EO 11246 - that prohibited federal contractors from discriminating against employees on the basis of a protected characteristic
- OFCCP - cease requiring contractors to engage in affirmative action
- DOL - must “immediately” cease promoting “diversity”
- EO - **did not alter laws that require affirmative action for disabled and veterans**

EO: “Reforming the Federal Hiring Process”

“Federal hiring should not be based on impermissible factors, such as one’s commitment to illegal race discrimination under the guise of equity, or one’s commitment to the invented concept of ‘gender identity.’”

OPM to create a “[Federal Hiring Plan](#),” which will:

- Prioritize those who want to improve efficiency
- Prevent hiring based on race, sex, or religion

Office of Personnel Management Memo 1/21/25

- Close all DEI and DEIA offices
- By 5:00 on 1/22 - inform all employees in agency of closure
- Advise all DEI employees they are on paid leave
- Take down all DEI statements on websites
- By 1/23 - make a complete list of all employees and DEI offices
- By 1/31 - Submit to OPM a plan to execute a RIF of all DEI employee



What About Private Employers?

EO - “*Encourage* the Private Sector to End Illegal DEI Discrimination” by:

- Heads of agencies - must “combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.”
- Submit a report and recommendations: “To encourage the private sector to end illegal preferences and discrimination.”
- Each agency: shall identify “up to nine” targets for compliance investigations, including corporations, foundations, non-profits, associations and institutions of higher education with endowments of over one billion dollars

The Courts Begin to Respond

- On February 21, 2025, United States District Judge Adam B. Abelson issued a 63-page opinion and accompanying order temporarily blocking provisions of two initial executive orders
 - Ending Radical and Wasteful Government DEI Programs and Preferencing
 - Ending Illegal Discrimination and Restoring Merit-Based Opportunity
- Both orders involve so-called “anti-DEI” provisions, which the court found vague and unconstitutional

Nat. Assoc. of Diversity Officers in Higher Education v. Trump

- Challenged DEI EOs as unconstitutionally vague in violation of the Fifth and First Amendments
- Three key provisions were targeted:
 - Termination of “equity-related grants or contracts” impermissibly vague, as the term invites arbitrary and potentially discriminatory enforcement
 - Requiring each agency head to certify that the contractor “does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws” is a content-based restriction on free speech rights
 - Instructing the Attorney General to take “appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI” found to be an unlawful viewpoint-based restriction on protected speech
- District Court granted preliminary injunction

Future of DEI Under Trump?

- **The EEOC is empowered to enforce the law**
 - But - who defines what the law is? Who sets the priorities of what the Agency will enforce?
 - Huge budgets
 - Public settlements / consent orders / enforcement authority
- **Private Plaintiffs can also sue**
 - Under present law - bring a claim for “reverse” discrimination and allege mistreatment on the basis of race (white) or national origin (American)

Employer Guidance - Back to Basics

- What you MAY do:
 - You can still support the concept of a diverse workplace
 - Promotions, internships, scholarships, grant programs, interviews - open to all
 - Affinity groups - open to all
- What NOT to do:
 - Watch buzzwords on websites and in policies
 - Do not use numerical quotas or goals
 - Do not tie diversity goals to compensation
- **Make decisions based on merit/qualifications**

Other Thoughts?

EEO Training

- Can and should still be mandatory
- Review topics with trainers
- Consider exemptions if there are complaints
- Avoid discipline, be creative

Remember - the backlash against DEI is NOT a license to discriminate

Gender Identity-Based Rights

1/20/25: EO: “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”

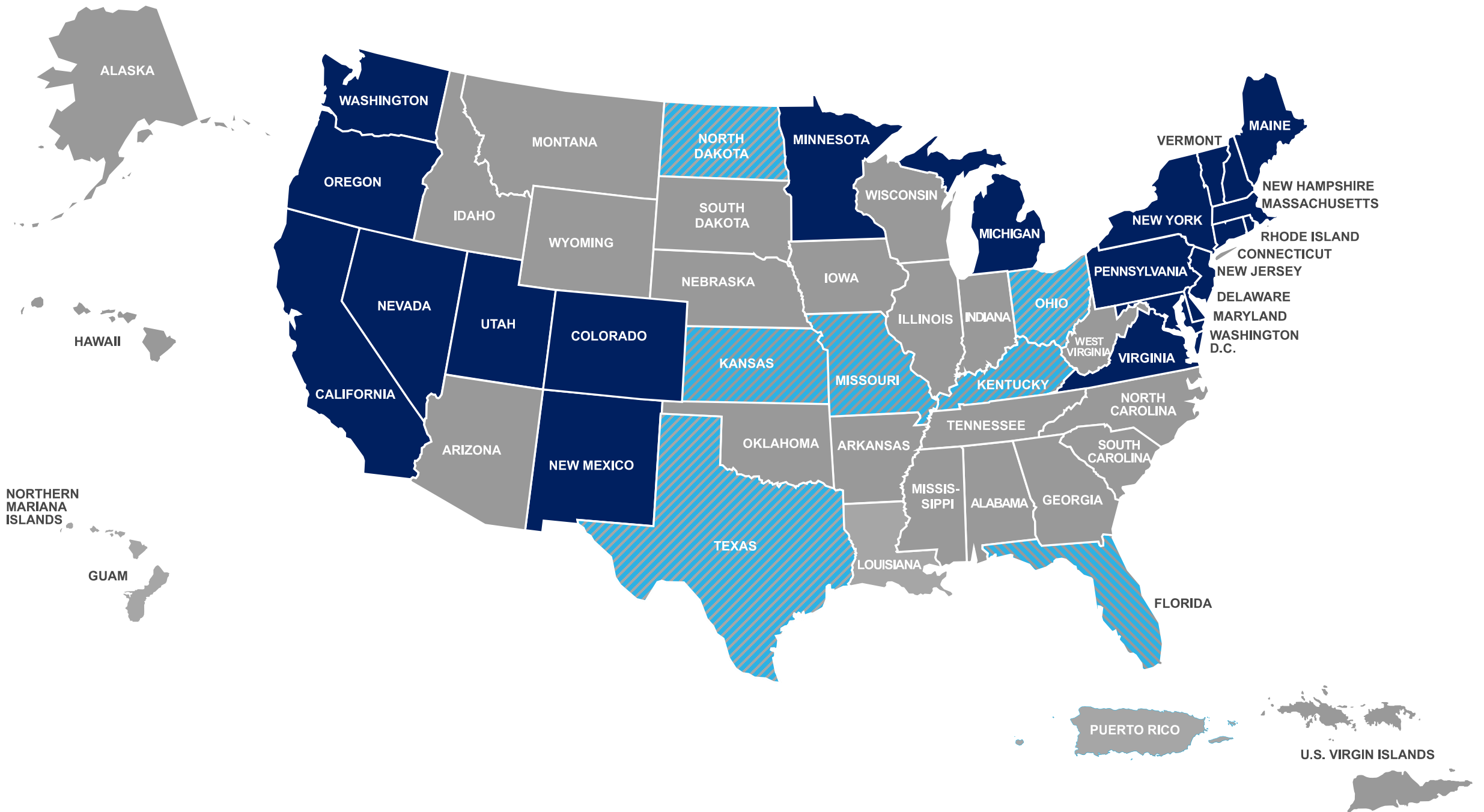
- The EO specifically defines “sex” as an individual’s “immutable biological classification as either male or female” and states that sex “is not a synonym for and does not include the concept of ‘gender identity.’”
- The Order directs a number of policy changes:
 - Federal Agencies must require all government-issued identification documents to reflect the holder’s sex
 - Federal funds must not be used to “promote gender ideology”
 - Single-sex spaces such as prisons and shelters must be designated by sex and not gender
 - Federal agencies must rescind all “inconsistent” guidance, documents and rules

Enforcing *Bostock* - Gender Identity Discrimination

- The EEOC currently enforces the 2020 landmark SCOTUS ruling *Bostock v. Clayton County*
 - *Bostock* is a 6-3 SCOTUS decision authored by Neil Gorsuch holding that Title VII prohibits discrimination based on sexual orientation and gender identity
- The Executive Order explicitly states that the current administration believes *Bostock* was wrongly decided
- While the Order lambasts the *Bostock* holding, it is critical to note is that the law has not changed
- This EO will not impact states that have specific state-level anti-discrimination laws that protect against gender identity discrimination (New York, for example)

EEOC Abandons Complainants with Gender Identity Discrimination Claims

- The EEOC has begun to withdraw from active litigations involving employees who have brought claims for discrimination on the basis of gender identity
- ACLU had to seek leave to intervene in a lawsuit in Michigan after the EEOC informed the Federal District Court that they were going to withdraw from a suit that was initially commenced last October
- In the EEOC's motion to dismiss, the agency explicitly mentioned the January 20, 2025, Executive Order and the subsequent Office of Personnel Management's "Initial Guidance" memorandum, stating that "continued litigation of the claim in this action may be inconsistent with the Order and the OPM Guidance."



Religious Accommodations

Religious Accommodations under Trump

- Even in Trump I (first term) - Executive Orders & other press releases signal renewed focus on the protection of religious rights
- Andrea Lucas has previously spoken at events sponsored by religious organizations and affiliated NGOs
- Andrea Lucas's initial press release: will “**protect workers from religious bias and harassment**” by “remediating other areas that have been historically under-enforced by the agency.”

Executive Order 13798 - Promoting Free Speech and Religious Liberty (May 2017)

Key EO on religious freedom is Executive Order 13798. Core components include:

- Government funding of religious institutions: cannot condition government funding or take adverse action on the basis expression of religious ideas by “any individual, house of worship, or other religious organization speaks or has spoken about moral or political issues from a religious perspective.”
- “Adverse action”: the imposition of any tax or tax penalty; the delay or denial of tax-exempt status; the disallowance of tax deductions for contributions made to entities exempted from taxation under section 501(c)(3)

What's the Upshot?

- Can a federal agency like the EEOC now promulgate guidance under EO 13798 that:
 - A wedding planner can refuse to provide services to a gay couple?
 - It is a form of religious discrimination to offer abortion services as part of a health plan?
 - Can a company can refuse to hire a transgender woman as a receptionist?
 - Can an employee can refuse to perform duties which go against their religious beliefs?

Reverse Discrimination

Lucas on Discrimination: Pre-Election Dissents

“There’s no such thing as ‘reverse’ race or sex discrimination under our civil rights laws,” said Lucas. “There’s just discrimination.”

“My perspective at the employer level is to encourage people to rethink whether or not you really like weighing in on every single controversy.”

“If you’re going to have Black Lives Matter discussions in the workplace, you should be prepared to have “blue lives matter” discussions as well.”

“Reverse” Discrimination?

- Important to note: federal anti-discrimination law guarantees **“equal” opportunity, not “equitable” opportunity**
- Title VII prohibits discrimination on the basis of protected characteristics, including race, color, religion, sex, and national origin
 - Following its enactment in 1964, the statute was typically used by under-represented groups in the workplace
 - However, nothing in the language of the statute prohibited an individual from bringing a claim for “reverse” discrimination or file a claim alleging discrimination because of an individual’s gender (male) or race (White)

“Reverse” Discrimination?

- Under Title VII, **it’s all just discrimination**: intentionally treating one employee (or job candidate) differently **because of** “race, color, religion, sex, or national origin”
- The only thing being “reversed”: lawsuits now by individuals who are not part of historically disadvantage groups, i.e., members of “majority groups”
- Title VII does not distinguish between “majority groups” and “minority groups for purposes of legal protections
- Significant increase in reverse discrimination lawsuits since the Supreme Court's 2023 ruling in *Students for Fair Admission v. Harvard*, which bars “race conscious” decision-making

Significant Increase in Litigation Post-*Students for Fair Admissions v. Harvard*

- Significant increase in reverse discrimination lawsuits since the Supreme Court's 2023 ruling in *Students for Fair Admission v. Harvard*, which bars “race conscious” decision-making
 - **Marlean Ames**: a heterosexual woman, was demoted and denied a promotion by the Ohio Department of Youth Services. She claimed discrimination based on her sex and sexual orientation
 - **Shannon Philips**: a regional director at Starbucks, claimed she was fired for being white. She won her case and was awarded damages
 - **David Duvall**: an executive at Novant Health, claimed he was fired despite strong performance reviews and replaced by two women. He won a jury award, but it was later reduced
- This is what the new EEOC Chair declares as a new enforcement priority

What Does All This Mean at the EEOC?

- The EEOC can pursue suits on its own (it doesn't need a private claimant)
- Expect the EEOC to put resources into targeting DEI programs that seem to run afoul of *Students for Fair Admissions* (i.e., “race conscious” decision-making)
- What does this mean for you?
 - Evaluate the language and real-world processes of your DEI program
 - Look at **impacts**
- **Why are “impacts” important?**



What Does This Mean for Your Business?

- Totally apart from allegations of intentional discrimination, think of “disparate impact” theories in your DEI programs:
 - Facially neutral
 - Intended to achieve “equity,” not strict “equality,” by fostering historically underrepresented (disadvantaged?) groups
 - **If your statistics show a disparate impact, is your DEI program unlawfully discriminatory?**
- No reason to believe that EEOC won’t use a disparate-impact theory of discrimination to sue employers
- Upshot: if you seek broad diversity, examine whether your programs *actually* create broad diversity

How Employers Should Prepare

- **Revisit** and revise your public-facing materials to avoid DEI buzzwords
- **Avoid** using explicit quota systems in hiring, firing, or promotion decisions
- **Keep all workplace programs open** to all qualified applicants
- **Examine** your statistical results

Developments at the NLRB

New Leadership at the NLRB

- Marvin E. Kaplan, Chairman (R) (Pictured)
 - Term expires Aug 2025
- David M. Prouty (D)
 - Term expires Aug 2026
- Two Vacant Seats
 - Term expires in Dec 2027
 - Term expires in Dec 2029
- Disputed Seat—Gwynne A. Wilcox (D)
 - Term was set to expire Aug 2028. Fired by Trump on Jan 27, 2025 and contesting her removal
- Acting GC William Cowen



NLRB Changes, and Changes to Come

GC Memorandum 25-05 Rescinded & Anticipated Policy Changes from the Next GC

- Restricted interpretation of **employee status** under the NLRA
- Expansive view of who qualifies as an **independent contractor** under the NLRA
- Elimination of **forced recognition** as a penalty and remedy to committing unfair labor practices
- Retreat from Biden NLRB's view of **protected concerted activity**
- End actions on **separation, severance and non-compete agreements** and other restrictive covenants
- Enhance rights of employers to fire employees who engage in **strike activity**
- Return to more lenient **contract coverage standard** when determining whether an employer has made a unilateral change.
- Expanding circumstances under which **employees lose protection under the NLRA** notwithstanding their protected activities
- **Anticipate changes to “quickie election rules”**

What's On The Horizon at the NLRB (Cont.)

Constitutional Challenges

- Unconstitutionality concerning the existence of the NLRB
- Presidential Authority to remove NLRB Board Members and ALJs

Direct Legal Challenges to Existing Precedent

- Appropriate remedies to unfair labor practices – *Thryv, Inc.*, 372 NLRB No. 22 (Dec. 13, 2022)
- Separation agreements – *McLaren Macomb*, 372 NLRB No. 58, (Feb. 21, 2023)
- Board-imposed recognition based on *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (Aug. 25, 2023)
- Conduct that Loses the Act's Protection – *Lion Elastomers LLC II*, 372 NLRB No. 83 (May 1, 2023)

Keep In Mind that A Lot Has *Not* Changed

- Risk of unionization still exists
- Conduct employee/management surveys to understand employee satisfaction/dissatisfaction
- Conduct market analyses regarding wages and benefits to assess where you fall in comparison to peers
- Assess your organization's strengths and vulnerabilities concerning an organizing campaign or shows of labor unrest from employees
- Identify organizational leadership who will be entrusted in making key labor decisions for the organization, and train them on PCA and union activity in the workplace
- Prepare response teams and procedures outlining company responses to union activity and protected activities
- For cases pending with the regions, explore reaching resolution with the region on more favorable terms or with the charging party directly

Developments at the DOL

DOL Under Lori Chavez-DeRemer

During a hearing before the Senate Health, Education, Labor, and Pensions Committee in February, Labor Secretary nominee Lori Chavez-DeRemer:

- Disavowed her previous backing of the Protecting the Right to Organize Act (H.R. 842)
- Said that she was committed to reviewing all rules and regulations at the agency, specifically the issue of joint employment, a major liability concern for businesses with franchise and contracting arrangements
- Vowed to support the independent contractor model



The DOL's New Agenda?

- Chavez-DeRemer will likely conduct a thorough review of recent DOL regulations, focusing on wage and hour policies, safety and health standards, and independent contractor classification guidelines

What Might We See?

- Reduced government oversight on workplace safety issues
- Scaling back of the Biden Administration's overtime pay hike
- Easier to classify workers as independent contractors



Looking Ahead – DOL Guidance for Employers

- It remains to be seen how aggressive (or passive) the DOL will be in promulgating future guidance
- In the absence of additional guidance, courts will continue to enforce laws via their own precedent
- Continue being careful when classifying workers as independent contractors, as fact-intensive claims by private plaintiffs will remain a possibility to guard against

Overall Takeaways

- **DO** Keep a very close eye on anything you have done to promote diversity in your workforce
- **DON'T** throw the baby out with the bathwater or overreact
- **DON'T** make yourself an obvious target
- **DO** anticipate more employer-friendly rules, but *pay attention to whether changes have actually occurred (don't jump the gun)*
 - Overtime
 - Independent contractors
 - Dealing with unions and unionization
- **DON'T** mistake the current atmosphere for a license to discriminate
- **DON'T** forget that the President is just one source of authority: states and localities have their laws, and there will be many challenges to EOs to come

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