

Year One of the Second Trump Administration in Employment Law

Eric Kinder, Spilman, Thomas and Battle, PLLC

New administrations always result in significant policy changes, especially when the political party in power changes. But the first year of the second Trump administration has seen more significant changes than normal. These changes have also come more quickly as a result of the administration's reliance on Executive Orders to effectuate these changes. Executive Orders can be drafted and implemented quickly, as opposed to legislative changes which need to survive two houses of edits and revisions before becoming law. The result has been changes in the policy starting on literally Inauguration Day.

Policy by Executive Order and a Spotlight on DEI

The current administration's antipathy towards workplace diversity, equity and inclusion ("DEI") policies has put all employers, public and private alike, on notice that efforts to create and maintain a diverse workforce while honoring long-standing obligations to provide equal employment opportunities will be under scrutiny.

Federal Contractor Issues

One of the President's first acts was to issue an Executive Order No. 14173 regarding federal contracts and contractors. In short, Order No. 14173 fully revoked Executive Order No. 11246—including its requirements for certain federal contractors to institute an Affirmative Action Program and that applicable federal contracts and subcontracts include provisions that that businesses take affirmative action to ensure equal employment opportunities. (*See* Order No. 14173, Sec. 3(a),(b)(i)).

Executive Order No. 11246 was issued by President Lyndon B. Johnson in 1965 and generally required (considering subsequent revisions) federal contractors to: (i) take affirmative action to ensure equal employment opportunity; (ii) not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin; and (iii) not take adverse employment actions against applicants and employees who ask about discuss or share information about pay. Under this EO, based on the size of the employer and size of their federal contract, some contractors were required to adopt written affirmative action plans to make their workplaces look more like the communities from which they recruited. Those requirements, at least as to race and sex, have been eliminated. The new EO also bars federal contractors from considering race, color, sex, sexual preference, religion, or national origin in their employment, procurement or contracting practices "in ways that violate the Nation's civil rights laws." As will be discussed later, this has long been the law of the land, but the implication places a different emphasis on what is considered a violation.

The Order further mandates the Office of Federal Contract Compliance Programs ("OFFCP") to "immediately cease . . . (A) Promoting diversity (B) Holding Federal contractors

and subcontractors responsible for taking affirmative action; and (C) Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.” (See Order No. 14173, Sec. 3(b)(ii))(internal quotation marks omitted).

For existing federal contracts, the Order requires the Director of the Office of Management and Budget to “excise references to DEI and DEIA principles from Federal . . . contract[s], grants, and financial assistance procedures . . .” (See Order No. 14173, Sec. 3(c)(ii))(internal quotation marks omitted). As to new federal contracts, each federal agency must include in every contract or grant:

- A provision that makes the federal subcontractor/contractor/grant recipient “agree that its compliance in all respects with applicable Federal anti-discrimination laws is material to the government’s payment decisions.” (See Order No. 14173, Sec. 3(b)(iv)(A)).
- A term requiring the federal subcontractor/contractor/grant recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws. (See Order No. 14173, Sec. 3(b)(iv)(B)).

Notably, while EO 11246 has been abolished, the requirements of Section 503 of the Rehabilitation Act, 29 U.S.C. 793 and the Vietnam-era Veterans Readjustment Assistance Act, 38 U.S.C. 4202 are unchanged. They are both enforced by OFCCP and remain in effect, including the obligations of certain federal contractors to have Affirmative Action Programs in place for certain veterans and individuals with disabilities.

Disparate Impact is No More?

Since the 1971 Supreme Court decision of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), Title VII has been construed to prohibit “not only overt discrimination but also practices that are fair in form, but discriminatory in operation,” *id.* at 431, or as more commonly described, practices that have a “disparate impact.” In 1991, Congress explicitly codified the concept of disparate impact into Title VII with the Civil Rights Act of 1991. That law remains unchanged, but on April 23, 2025, the administration entered Executive Order 14281 entitled, Restoring Equality of Opportunity and Meritocracy, which announces the administration’s position that it does not recognize claims of disparate impact discrimination.

The Order established the policy of the administration to eliminate the use of disparate impact liability in all contexts to the maximum degree possible. The Executive Order orders agencies to deprioritize enforcing anti-discrimination laws to the extent they rely on disparate impact liability; orders a review of existing statutes and regulations, including at the state level, and recommendations about how to amend or repeal those statutes and regulations that rely on disparate impact liability; and directs the Attorney General and the EEOC Chair to assess all pending investigations, civil suits, or positions taken in ongoing matters that rely on a disparate impact theory and “take appropriate action” regarding those matters consistent with the announced policy.

The EEOC's response was reportedly to issue an internal memorandum that directed the end of EEOC investigations of disparate-impact charges by September 30, 2025 and to administratively close and issue a right to sue on every pending charge of discrimination premised solely on disparate impact liability by October 31, 2025. In accordance with the policy of Executive Order 14281, the EEOC would not be commencing, developing, or continuing to pursue litigation advancing disparate impact causes of action. At least one former claimant is now suing the EEOC for dropping its investigation into her charge of disparate impact discrimination, alleging that the EEOC violated its statutory obligations. *See Cross v. U.S. EEOC* (No. 1:25-cv-03702 in D.D.C.).

Focus on DEI

The EEOC has also joined the fight against DEI programs. Early in 2025, the Commission published guidance to employees and employers regarding “What You Should Know About DEI-Discrimination At Work” that spelled out the administration’s position.

To an extent, this guidance reaffirms doctrines long-established under Title VII of the Civil Rights Act of 1964 (“Title VII”). For instance, it states that the protections under Title VII “apply equally to all workers.” This is not new for the EEOC, as the agency’s 2006 Compliance Manual stated “Congress drafted the statute broadly to cover race or color discrimination against anyone – Whites, Blacks, Asians, Latinos, Arabs, American Indians and Alaska Natives, Native Hawaiians and Pacific Islanders, persons of more than one race, and all other persons.” *See* EEOC, Section 15 Race and Color Discrimination, Compliance Manual § 15-II, EEOC-CVG-2006-1 (Apr. 19, 2006); *see also McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (holding that Title VII protects all races, including white employees, from employment discrimination and observing that the EEOC “has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites”).

In doing so, the EEOC states that it will apply the same standard of proof to all race discrimination claims, regardless of the victim’s race because “the EEOC’s position is that there is no such thing as ‘reverse’ discrimination; there is only discrimination.” Notably, this term the Supreme Court supported that position in *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303 (2025), where the Court rejected the Sixth Circuit’s requirement that claims of “majority-group” plaintiffs must meet a heightened evidentiary standard of showing “background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority” to prevail on a Title VII claim. The Court concluded unanimously “that Title VII does not impose such a heightened standard on majority-group plaintiffs.” *Id.*, at 313.

Some examples offered by the EEOC in its Guidance of workplace violations include:

- Implementing “quotas” or “otherwise ‘balancing’ a workforce by race, sex, or other protected traits”;
- Excluding individuals from training, fellowships, mentoring or sponsorship programs on the basis of their protected characteristics;

- Selecting candidates for interviews, including placement on candidate slates, based on their protected characteristics;
- Limiting membership in workplace groups, such as employee resource groups (“ERGs”) to certain protected groups;
- Separating employees into groups based on protected characteristics when “administering DEI or other trainings or other privileges of employment [···].”

In the Guidance, the EEOC also explained that “an employer initiative, policy, program or practice may be unlawful if it involves an employer... taking an employment action motivated-in whole or in part-by an employee’s or applicant’s race, sex, or another protected characteristic.” Again, this is not new. It is based on the language of Title VII, 42 U.S.C. § 2000e-2(m), and employers have long known they cannot take race into account in almost any employment decision, not just hiring, firing, compensation, or work assignments. The EEOC, however, pointed to forty-year-old guidance that prohibited segregation of employer sponsored employee activities, *see* EEOC, CM-618 Segregating, Limiting, and Classifying Employees, EEOC-CVG-1984-2, Part 618.4, (Oct. 1983), to also prohibit limitations in “membership in workplace groups, such as Employee Resource Groups (ERG), Business Resource Groups (BRGs), or other employee affinity groups, to certain protected groups.” According to the EEOC, an employee’s success may depend on their integration into important workplace networks and thus “[e]mployers cannot allow racial bias to affect an employee’s ability to become part of these networks.” At a minimum, the EEOC seems to have announced that employee affinity groups must be open to all, if they are to continue.

The Guidance also announced that DEI training, or really any workplace training, can potentially create an actionable hostile work environment. According to the EEOC, “depending on the facts, an employee may be able to plausibly allege or prove that a diversity or other DEI related training created a hostile work environment.” One prohibition would be “limiting, segregating, or classifying workers” based on race when providing the training “even if the separate groups receive the same programming content or amount of employer resources.”

In doing so, the EEOC points to a decision out of the Eastern District of Pennsylvania, *De Piero v. Pa. State Univ.*, No. 23-cv-2281, 2024 WL 128209 (E.D. Pa. Jan. 11, 2024). In *De Piero*, a university employee complained that on a number of occasions he alleged he was required to attend training sessions which “discussed racial issues in essentialist and deterministic terms-ascribing negative traits to white people or white teachers without exception and as flowing inevitably from their race.” *Id.* at *7. Further, when he complained, he was allegedly told “[t]here is a problem with the white race.” *Id.*

Despite the Guidance, *De Piero* is an extreme example – importantly the case was decided on a Motion to Dismiss, and so the Court was bound to consider all of the allegations as true. Indeed, the case cites to decisions in other states (when the court had the benefit of full discovery) where the court ruled that allegedly similar training sessions did not create a hostile work environment. *Id.* (citations omitted). One of those cases was later affirmed on appeal, *Young v. Colo. Dep’t of Corr.*, 94 F.4th 1242 (10th Cir. 2024). The court in *Young* considered an allegation that training demeaned him on basis of his race and promoted divisive racial and political theories, but held the training was not severe and pervasive to create a hostile work

environment under Title VII. The Tenth Circuit panel observed race-based training programs can create hostile workplaces when official policy is combined with ongoing stereotyping and explicit or implicit expectations of discriminatory treatment; however, Young did not meet the standard. *Id.* at 1253. Similarly, the Western District of Washington held that “DEI and anti-discrimination trainings are not per se unlawful,” and that “sweeping allegations about the effect of” such programs are not sufficient to transform a workplace into a racially hostile environment for a plaintiff and other white people. *Diemert v. City of Seattle*, 776 F. Supp. 3d 922, 940 (W.D. Wash. 2025), *appeal docketed*, No. 25-1188 (9th Cir. Feb. 25, 2025).

Nonetheless, the Guidance signals that the EEOC is going to take a critical eye to anti-discrimination and/or pro-diversity trainings and has empowered individuals to bring hostile work environment claims with the EEOC for these mandatory trainings. In addition, the EEOC and courts consider opposition to a DEI training as constituting protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII.

As would be indicated from this scrutiny being given to DEI programs, the EEOC has stated they are focused on eliminating what they have termed “Anti-American Bias.” Early in the new administration, then acting chair Andrea Lucas, pledged rigorous enforcement by the EEOC of civil rights laws against companies that allegedly show bias for foreign workers, including visa holders, over US citizens.

This goal is now explained in a technical assistance document published November 19, 2025. Pursuant to *Discrimination Against American Workers Is Against The Law*, “employment policies, programs, or practices may be unlawful national origin discrimination if they involve an employer . . . taking an action motivated—in whole or in part—by an applicant’s or employee’s national origin.” While this has been the law since the passage of Title VII, the EEOC says it is looking to prevent:

- Discriminatory job advertisements that say “the employer prefers or requires applicants from a particular country or with a particular visa status (for example, “H-1B preferred” or “H-1B only”).
- Disparate treatment of natural born American, such as “a company terminating American workers who are on the “bench” between job assignments at a much higher rate than employees who are visa guest workers,” or by” making it more difficult for applicants from one national origin to apply for positions (for example, subjecting U.S. workers to more laborious application methods than H-1B visa holders during the PERM labor certification process).”
- Harassment by unwelcome remarks or conduct based on an employee being born in the United States.

The EEOC then warned that common business reasons do not justify national origin discrimination, reasons such as customer or client preference; lower cost of labor “(whether due to “under the table” payment, or abuse of certain visa-holder wage requirement rules); [or] “beliefs that workers from one or more national origin groups are “more productive” or possess a better work ethic than another national origin group.

The Flip Flopping World of the NLRB

On February 14, 2025, Acting General Counsel of the NLRB issued Memorandum GC 25-05 rescinding more than 30 memoranda issued under the prior General Counsel. This included prior guidance that:

- Non-disparagement and confidentiality provisions in severance agreements were unlawful, and interpreted the Board’s February 2023 *McLaren Macomb* decision to apply retroactively to agreements already signed and extend the statute of limitations as long as an employer maintains or enforces such terms.
- Declared that the “proffer, maintenance, and enforcement” of noncompete agreements and other restrictive covenants in employment contracts and severance agreements violated the NLRA by unlawfully interfering with employees’ Section 7 rights.
- Protected concerted activity could include actions taken by a single employee, if they were clearly related to broader workplace concerns and representative of a collective interest.
- Identified “stay-or-pay” provisions that require employees to remain with their employer for a specific period of time or repay certain costs as potentially unlawful.
- Addresses what employers could and could not say in handbooks and internal policies.

The Board has also been immersed in membership drama. The NLRA says that the President can remove a NLRB Board Member only for “neglect of duty or malfeasance.” Nonetheless, the President dismissed Board Member Gwynne Wilcox on January 27, 2025, without cause, more than three years prior to the end of her scheduled term in 2028. The dismissal was challenged, and briefly enjoined by the District Court for the District of Columbia, but the U.S. Supreme Court stayed an order compelling Ms. Wilcox’s reinstatement. *Trump v. Wilcox*, No 24A966, 605 U.S. ___ (U.S. May 22, 2025). In doing so, Chief Justice Roberts opined: “[T]he Government faces a greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty.” *Id.* at 1. The Fifth Circuit further supported that decision in *Space Expl. Techs. Corp. v. Nat’l Lab. Rels. Bd.*, 151 F.4th 761, 778 (5th Cir. 2025), that the structure of the NLRB itself violates the Constitution to the extent the President is limited in the ability to remove Board Members by the NLRA.

That dismissal left the Board with only two members for most of 2025, one shy of that needed for a quorum. The U.S. Supreme Court in *New Process Steel v. NLRB*, 560 U.S. 674 (2010), previously held that the NLRB cannot act without a quorum. Scott Mayer and James Murray have been nominated to be members of the NLRB, but these nominations await Senate approval. As a result, there is no timetable for when the NLRB will achieve a quorum.

And if that was not enough, the Fifth Circuit in *SpaceX* also enjoined ALJ proceedings before the Board because “forcing the Employers to appear before an unconstitutionally structured agency inflicts irreparable harm.” *Space Expl. Techs. Corp.*, 151 F.4th at 780. New

York and California are now rushing in to fill the “enforcement hole,” New York Senate Bill S8034A was signed into law in September and says private sector workers fall under the scope of the state’s Labor Relations Act unless the NLRB “successfully assert[s] jurisdiction over any employer, employees, trades, or industries” first.

Increased Focus on Immigration Issues

Also on day one of his second administration, the President issued Executive Order No. 14159, which requires strict enforcement of Immigration laws through Immigration and Customs Enforcement (ICE), Department of Homeland Security (DHS). According to the Order, “[t] is the policy of the United States to faithfully execute the immigration laws against all inadmissible and removable aliens, particularly those aliens who threaten the safety or security of the American people. Further, it is the policy of the United States to achieve the total and efficient enforcement of those laws, including through lawful incentives and detention capabilities.” (See E.O. 14159, Sec. 2). This enforces Immigration and Nationality Act (8 U.S.C. § 1302), that states:

(a) every immigrant who is 14 years of age or older and remains in the U.S. for thirty days or longer has to apply for registration and be fingerprinted before the expiration of the thirty days; and

(b) Parents of children under 14 years of age have to apply for their child’s registration so they can be fingerprinted.

Immigrants who do not comply with registration requirements could receive fines, be removed from the U.S., or be detained. Within the first seven months of the administration, ICE has reported at least forty worksite enforcement actions resulting in 1,100 arrests. <https://www.americanimmigrationcouncil.org/fact-sheet/understanding-ice-worksite-raids/>. Large businesses have been targeted, including the largest single-site worksite enforcement action in its history, in which 475 individuals were arrested at a Hyundai battery plant. “The majority of those detained were South Korean nationals (about 300) alongside workers from other countries. ICE alleged that, in addition to workers without an immigration status, other workers were in violation of the terms of their visas or entered under visa waiver programs that prohibit employment. However, lawyers and advocates say many of those detained were lawfully authorized to work on the site.” *Id.*

The latest EEOC litigation trends

The EEOC filed 93 lawsuits in FY 2025, marking a ten-year low in Commission litigation activity (for example, there were 144 lawsuits filed the prior year), though one possible cause is that the EEOC was without a quorum for most of the year after leadership positions were being changed.

The EEOC continued its focus on Title VII and the Americans with Disabilities Act. Still, there have been significantly fewer cases filed asserting race or national origin discrimination, with FY 2025 being the lowest number of filings on the subjects in at least a decade. Only three cases were filed, two of which were grounded in theories of reverse discrimination. Regarding claims brought under the ADA, the EEOC built on a trend that started the prior year by

continuing to sue on behalf of individuals with hearing or vision impairments, and those whose alleged disabilities may be difficult for employers to identify and accommodate, such as depression, anxiety, PTSD, and other mental health conditions.

Furthermore, aligning with statements made by EEOC Chair Lucas about putting an emphasis on enforcing protections for sex and pregnancy related issues, the EEOC filed 10 lawsuits under the Pregnancy Discrimination Act/and or the Pregnant Workers' Fairness Act. On the other hand, lawsuits concerning transgender workers or other identity issues brought during the Biden administration were dismissed. EEOC Newsroom, Removing Gender Ideology and Restoring the EEOC's Role of Protecting Women in the Workplace (Jan. 28, 2025). This is in keeping with Executive Order 14168, that directed federal agencies to enforce laws governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes, and to remove all statements, policies, regulations, forms, communications, or other internal and external messages promoting gender ideology.

There has also been a focus on protecting religious freedom in the workplace as the number of religious based claims increased from 4 in Fiscal Year 2024 to 11 in this prior year.