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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

W & L

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TRUMP'S EXECUTIVE ORDER REDEFINING SEX CREATES IMMEDIATE ISSUES FOR EMPLOYERS

President Trump's Executive Order issued the first day in office requires federal agencies, including the Equal Employment Opportunity Commission (EEOC), to change any documents, regulations or guidance to reflect that male and female are the only two sexes. It particularly challenges the Biden Administration's recent workplace harassment guidance expanding the scope of LBGTQ+ protections under Title VII of the Civil Rights Act. The EEOC Acting Chair, Andrea Lucas, appointed by President Trump, indicated she would propose a recission of that guidance when she has a quorum of three Commissioners to vote on it. Among other things, the guidance states that using a name or pronoun inconsistent with an employee's known gender identity or denying them access to a bathroom consistent with their gender identity constituted sex-based harassment under Title VII. In the guidance, the EEOC cited the U.S. Supreme Court decision in *Bostock v. Clayton County,* which held that Title VII's prohibition on sex discrimination extended to bias based on sexual orientation and gender identity. Lucas indicated, however, that the Supreme Court decision stated that it did not purport to address bathrooms, locker rooms, or anything else of the kind. Lucas also stated that the agency is already dropping litigation that cites protections outlined in the guidance. Lucas released a statement that: "It is neither harassment nor discrimination for a business to draw distinctions between the sexes in providing single-sex bathrooms or other similar facilities which implicate the significant privacy and safety interests."

Editor's Note: At least one federal judge has ruled that the Biden Administration illegally broadened Title VII's scope by saying that *Bostock* covers workplace policies on bathrooms, dress codes, and locker rooms. Regardless of the executive order and/or the EEOC's guidance, employers are still obligated to follow the statutory requirements under Title VII. That means that cases can still be litigated on legal theories supporting the positions set forth in the current guidance, and many employers are rightly unsure of where they stand. The changes do not immediately affect coverage under federal healthcare plans, but the Administration's position on transgender people suggest there may be efforts to curtail gender-affirming healthcare coverage, a move likely to trigger another legal battle. There is also the difficulty in identifying a person's sex, as some areas allow birth certificates to be altered to reflect gender identity. It is estimated that there are over 1 million persons in the U.S. of a transexual nature.

The situation suggests that employers need to be careful in navigating this legal landscape. Under current EEOC guidance, yet to be revised, employers are obligated to allow persons to use bathrooms of the gender they identify with. Under the executive order, and likely future EEOC guidance, there is no such right and presumably persons

using a bathroom could claim some type of harassment if the employer allows persons of another biological sex to use the same bathroom.

What is an employer to do? In terms of the bathroom issue, a reasonable approach would seem to be to allow such persons to use a sex-neutral bathroom, designated for that purpose. While the current EEOC guidance does not recognize this approach, in light of the legal confusion, it would seem to be a reasonable measure. That still leaves the issue of whether an employer should require employees to call transgender workers using the transgender pronouns, an issue that will probably ultimately be resolved by an interpretation of Title VII rather by the executive order.

Similarly, lawyers may wonder about the terminology in their equal employment policies and the like, recognizing protections for transgender persons. The Executive Order attempts to remove the protections of transgender persons under equal employment laws, but the Executive Order does not per se limit an employer's right to provide additional protections beyond those covered by the equal employment laws. Thus, an employer is likely to be able to maintain such policies presently, with the exception of the bathroom issue discussed above.

TRUMP'S DEI ORDER ENDS AFFIRMATIVE ACTION OBLIGATIONS OF FEDERAL CONTRACTORS

On his second day in office, January 21, 2025, President Trump issued an executive order titled: "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," and in the process revoked Executive Order 11246 that was signed by President Lyndon Johnson in 1965, and which contains the affirmative action requirements of federal contractors. The 1965 executive order is the legal authority possessed by the Office of Federal Contract Compliance Programs (OFCCP) to promote diversity and affirmative action programs. The new executive order does establish a 90-day period during which federal contractors may continue to comply with the regulatory scheme in effect. Starting April 21, 2025, contractors "shall not consider race, color, sex, sexual preference, religion, or national origin in ways that violate the "Nation's civil rights laws."

In effect, the OFCCP is ordered by the recent executive order to immediately stop "promoting diversity," holding federal contractors to affirmative action obligations and "allowing or encouraging" them to "engage in workforce balancing" based on protected characteristics. According to a fact sheet accompanying the order, it "protects the civil rights of all Americans and expands individual opportunity by terminating radical DEI preferencing in federal contracting and directing federal agencies to relentlessly combat private sector discrimination" and it "enforces long-standing federal statutes and faithfully advances the Constitution's promise of colorblind equality before the law." The January 21, 2025, executive order directs that federal contractors will be required to certify as part of the contracting process that they do not maintain any DEI programs that violate federal anti-discrimination law, and agency contracts must eliminate any references to DEI. Although the current executive order does not apply to private employers that are not federal contractors, it includes a section titled "Encouraging the Private Sector to End Illegal DEI Discrimination Preferences." It recommends deterring DEI programs in the private sector, including identifying potential targets for compliance investigations. The Acting Labor Secretary directed the OFCCP to end all pending cases, conciliation agreements, investigations, and complaints. Some commentators have even suggested that the executive order would empower employees to use the False Claims Act (FCA) with contractors covered by the FCA and seek triple damages if there is evidence that contractors defrauded the government by misrepresenting their compliance with anti-discrimination laws or Trump's executive order. Further, the order lacks specifics regarding what constitutes "promoting DEI."

Editor's Note – Contractors will now have to examine their affirmative action programs to determine whether they continue. As to the executive order, employers have no federal level obligation to create or continue affirmative action plans but may continue them with voluntary plans. The problem will be whether the process of looking at under-utilization of certain groups and taking action to address that under-utilization will cross the line of what the law will consider discrimination.

It should be noted that the OFCCP can still enforce anti-bias and affirmative action mandates based in statute, like the Vietnam Era Veterans' Readjustment Assistance Act, which protects military veterans, and Section 503 of the Rehabilitation Act of 1973, which covers disabled workers. Also, federal contractors still must comply with Title VII of the Civil Rights Act.

Some argue that the executive order does not really change the status of DEI programs, even though such programs will be subject to greater legal scrutiny now. Further, employers terminating or reducing DEI programs can still face lawsuits alleging they are discriminating against the people covered by the programs as well as by non-minorities and males. In any event, employers would be wise to review programs that could theoretically come under the DEI concept. Also, communications about DEI should also be reviewed, as third parties may be looking at such pronouncements to determine who to investigate or who to sue. The concept is to broaden the eligibility requirements of DEI initiatives to focus on all persons rather than just those of a certain race or gender. For example, an employer recognizing certain focus groups should require such groups to widen the scope of their participants. The approach will be to "rebrand" DEI programs, as the executive order refers to DEI programs "whether they are specifically denominated DEI or otherwise." One thing for sure, is that the term "DEI" has fallen out of favor.

Many companies will examine the fairness of their hiring and other standards as to applying the same standards to all candidates, without any group getting different or preferential treatment. The concept is to give everyone a "fair shake." This will require further attention to competencies that are considered important as to the persons being evaluated. The hope is that grading people on how well they will achieve company goals will help the company better achieve those goals. Also, guidance and judicial case law at this time suggests that recruitment efforts may create opportunities for candidates in under-represented communities, and that employers may maintain employee affinity groups as long as they admit persons to participate regardless of race, national origin or sex. Employers must remember that the executive order does not purport to pre-empt workplace nondiscrimination obligations under state and local law.

Of particular danger to employers' DEI programs may be goal setting affirmative action plans, so-called "aspirational" plans. Such "aspirational" plans may or may not be legal, but in any case are legally questionable. To the extent employers eliminate or reduce the DEI concept, many employers may want to "double-down" on their internal procedures for handling discrimination or harassment complaints. Most would conclude that DEI policies will only be "illegal" if they target protected groups for special treatment, as opposed to removing the bias that precludes such groups from competing on a level playing field. The executive order does emphasize "merit-based" decision making. The hope is that initiatives can satisfy the principles of meritocracy and equal opportunity.

Even prior to the current executive orders, organizations have been changing their diversity, equity and inclusion standards, such as the American Bar Association (ABA). The ABA now suggests broader language to encourage access for "all persons."

TRUMP FIRES NLRB AND EEOC MEMBERS, SETTING UP LEGAL CLASH

On January 27, 2025, President Trump removed National Labor Relations Board (NLRB) member Gwynne Wilcox, and General Counsel Jennifer Abruzzo. The removal of Wilcox leaves the NLRB with fellow Democrat David Prouty and Republican Kevin Kaplan, as the remaining members of the five-member Board. The Board no longer has a three-member quorum, and thus cannot decide cases. However, NLRB offices can continue to process cases. The General Counsel's office generally acts through authority delegated to NLRB regional offices, and thus can continue usual operations.

Abruzzo's removal was expected, as President Biden fired the prior Republican-appointed General Counsel following his swearing-in ceremony. However, the removal of Board members themselves was not expected. On the same day, President Trump removed two Democrat members of the Equal Employment Opportunity Commission, leaving the five-member Commission without a quorum. The EEOC General Counsel said that she too had been informed by the White House that the President did not want her to remain in that position.

Andrea Lucas, who was brought into the Commission in 2020, has been appointed to serve as Acting Chair. The newest member of the Commission and a Biden appointee, Kalpana Kothel, remains on the five-member Commission.

Both former EEOC Chair Charlotte Burrows, and former NLRB Chair Gwynne Wilcox at the NLRB, have indicated that they intend to challenge their removal prior to the end of their term. An old 1935 U.S. Supreme Court decision in *Humphrey's Executor v. U.S.* supports removal protections for many independent agencies. However, the Supreme Court in recent years upheld such firings for independent agencies with single directors, but hasn't addressed the President's firing of NLRB members or EEOC members for any reason.

The immediate result is that for a period of time the NLRB and EEOC will be unable to take certain actions, and issues have already arisen as to whether if Wilcox's termination is deemed unlawful, the decisions made by the NLRB in the interim even if quorum is reached, can be legally attacked.

THE TRUMP ADMINISTRATION'S EFFECTS ON IMMIGRATION AND AN EMPLOYER'S WORKFORCE

Trump's Executive Orders presently do not affect employees who are authorized to work at the present time, but may affect any workers who are determined to be illegal aliens because existing immigration laws will be enforced. Trump's Executive Orders and the Administration's expected practices may reduce the number of legal workers in the future.

The Executive Orders issued on January 20, 2025, address the following:

- Entry of illegal aliens suspended (no more catch and release)
- Illegal aliens not allowed to invoke provisions of the Immigration and Nationality Act (such as claiming asylum)
- No entry without medical and criminal history clearance
- All illegal aliens who enter on or after 1/20/25 will be removed
- Screening enhanced
- Existing immigration laws enforced
- CBP One App terminated (allowed people to apply for lawful status while outside the US and to schedule an appointment at a port of entry)

- All categorical parole programs, including "Processes for Cubans, Haitians, Nicaraguans and Venezuelans," terminated after 1/20/25 for new persons
- Refugee Admissions Program suspended until Trump decides otherwise

Most work-authorized immigrants fall into one of the following categories and the workers presently in the US in these categories are not affected by the executive orders:

- Temporary Protected Status (TPS) for certain people from 17 designated countries - approximately 863,775 as of 3/31/24 - with most from El Salvador, Haiti and Venezuela.
- Parole programs, which admit immigrants for urgent humanitarian or significant public benefit reasons - currently approximately one million persons. As noted previously, categorical parole programs will not be available during the Trump Administration, instead parole will be considered based on each individual's circumstances.
- DACA or Dreamers Program - Affects approximately one million persons (and there are maybe four million who did not apply or dropped out). Trump previously tried to end this program and stated that he wanted Congress to approve a new law for Dreamers.
- Deferred Enforced Departure - Affects people from Lebanon, Liberia, Hong Kong and Palestine who are not lawfully in the country; some have been granted temporary work authorization.
- Various guestworker programs (H-2A and H-2B), totaling around 500,000 persons, which generally not available except for seasonal workers.
- Green card applicants and non-immigrant visa applicants - During the previous Trump Administration, the government interpreted the requirements more strictly than prior administrations and that approach is returning.
- Refugees and Asylees - The previous Trump Administration substantially reduced the number of people who were treated as refugees or asylees and his executive orders will have the effect of reducing admission of new refugees and asylees.

Although there is no statutory standard, there are consequences for overstaying authorized status, including removal from the U.S. and being barred from entering the U.S. in lawful status in the future. Also, when work authorization expires, the employer is required to terminate employment or face civil and/or criminal penalties.

The work authorization for those granted TPS status or Deferred Enforced Departure has expired or will expire in 2025 or 2026. Presently, we expect the Trump Administration to terminate TPS status for people from El Salvador and Venezuela. The work authorization for people from El Salvador expires March 9, 2026. The work authorization for certain people from Venezuela expires April 2, 2026. The work authorization for TPS holders from Afghanistan, Cameroon, South Sudan and certain people from Venezuela has expired. The work authorization for TPS holders from Burma (Myanmar), Ethiopia, Haiti, Honduras, Nepal, Nicaragua, Somalia, and Syria expires this year unless extended. For those granted Deferred Enforced Departure, work authorization for those from Hong Kong expired February 5, 2025, from Palestine expires August 13, 2025, and from Liberia expires June 30, 2026, unless extended.

In January 2023, the Biden Administration announced an expedited process to grant deferred action to workers who are victims or witnesses of labor violations. The program protects illegal alien workers from deportation while a labor investigation is ongoing by any federal, state or local law enforcement agency (e.g., OSHA, NLRB, EEOC, DOL). If granted, the protection lasts for four years and comes with work authorization for four years. The Trump Administration might terminate this program because it has no statutory basis.

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