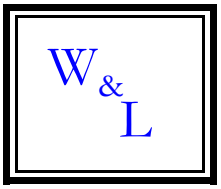
Wimberly, Lawson, Steckel, Schneider & Stine, P.C.
Suite 400, Lenox Towers, 3400 Peachtree Road, N.E., Atlanta, Georgia 30326
E-MAIL:Lawyers@wimlaw.com
(404) 365-0900 FAX (404) 261-3707

EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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NEW ADMINISTRATION FACES TEMPORARY INJUNCTIONS AGAINST DEI TERMINATION AND FIRING OF NLRB MEMBER

President Trump on January 20 and 21, 2025, issued Executive Orders 14151 and 14173, seeking to eliminate federal Diversity, Equity and Inclusiveness (DEI) programs and revoking the mandate requiring federal contractors to maintain affirmative action programs under Executive Order (EO) 11246. On February 21, 2025, a federal district court judge in Maryland temporarily halted the executive orders limiting the main DEI programs in the public and private sectors, finding that the potential harm of the orders outweighed the President's policy priorities. He found the plaintiffs were likely to succeed on their claims that the orders violate the free speech protections of the First Amendment and due process protections of the Fifth Amendment. The judge also refused to limit the injunction geographically or to stay the injunction pending an appeal.

A few weeks later, however, a panel of judges from the U.S. Court of Appeals for the Fourth Circuit granted the Trump Administration a stay of injunction pending the outcome of the appeal. The effect of the ruling is to allow the Administration to currently enforce its orders restricting DEI programs. It should be noted that the two of the three judges on the panel expressed concerns about the attack on DEI without clear definitions or what types of conduct or policies the Administration seeks to ban. One of the judges stated that the constitutionality of the executive order will be dependent on how the government enforces them.

This case does not affect enforcement actions taken by the Equal Employment Opportunity Commission (EEOC), which can challenge race or gender-based DEI programs as discriminatory under Title VII, and state anti-discrimination laws are also not affected. It should be noted that a currently pending ruling by the U.S. Supreme Court involves a case brought by a woman claiming she was passed over for promotions and demoted because she was White and straight. The Supreme Court is expected to ultimately rule that members of a majority group such as White employees should not face a higher burden of proof proving workplace discrimination than minority plaintiffs. In other words, it is expected that the federal anti-discrimination protections will be applied equally to all workers regardless of race, gender, and other protected characteristics. Thus, there is expectation for additional judicial scrutiny of any diversity, equity, and inclusion initiatives that give preferential treatment to racial minorities and women. Further, the Supreme Court ruled a year ago that workers no longer need to show they have suffered a materially significant injury or some other elevated harm in proving an act of discrimination. They need only to demonstrate "some harm" that left them "worse off" at work.

Status of Fired NLRB Member

President Trump on January 28, 2025, fired National Labor Relations Board (NLRB) member Gwynne Wilcox, mostly on the basis that her rulings were partial toward organized labor. Wilcox indicated she planned to seek legal action, and on March 6, 2025, a federal district court judge in D.C. ruled that the firing was illegal under the National Labor Relations Act (NLRA), ordering her immediate reinstatement. The judge later refused to stay her order, but the U.S. Court of Appeals for the District of Columbia Circuit blocked the order while the challenge to the judge's decision proceeds.

The right of the President to fire heads of "independent" federal agencies is controversial. The NLRB's authorizing statute allows removal only for cause, but this provision creates significant tension with Article II of the Constitution, which provides that "the executive power shall be vested" with the President, who "shall take care that the laws be faithfully executed." Independent agencies are designed to be free from political influence, and so the statutes that create them insulate agency heads from accountability to the voters and elected representatives. However, to fit within the Constitutional design, the independent agencies may be subject to the control of the Executive, the President. An old 1935 Supreme Court ruling upheld a limitation on the President's power to remove members of the Federal Trade Commission (FTC), but it did so on the basis that the FTC at the time did not exercise "executive power." This exception has been interpreted narrowly, and the Supreme Court later struck down a provision that the President could remove the Consumer Protection Financial Bureau director only for inefficiency, neglect or malfeasance. Currently, the NLRB, and the EEOC, exercise significant executive authority, so the President may have the authority to remove head agency officials as being essential to the execution of the laws. This argument suggests that the President's power to supervise the Executive Branch depends on his ability to remove officials who don't follow his policy directives. Thus, while there is "old" Supreme Court precedent supporting the district court judge's ruling reinstating NLRB Board member Wilcox, there is at least an equal chance that the decision will be reversed on appeal. In the meantime, Board member Wilcox will be reinstated and continue to function as a Board member, thus allowing the Board to now have a quorum of three members and resume normal NLRB activities. On the very first day of her reinstatement, for example, four NLRB decisions were issued, although the cases were not contested. As a result of the reinstatement, there is now a Board majority of two Democrats who will be able to continue the pro-labor tilt exercised during the Biden Administration. However, as the Acting General Counsel now has been appointed by President Trump, the General Counsel may have equal or greater influence on NLRB matters by deciding which cases to prosecute and what positions to take before the NLRB members.

TRUMP EXECUTIVE ORDER CANCELS A $17.75 MINIMUM WAGE FOR FEDERAL CONTRACTORS

During the Biden Administration, in 2021, President Biden issued an executive order establishing a $15 minimum wage for federal contractors, stating that the raise would generate "higher–quality work by boosting workers' health, morale and effort." He did this after efforts to raise the nationwide minimum wage as part of one of the COVID–19 relief bills failed. Biden's executive order also included annual adjustments for inflation, so that the current minimum wage for contractors under Executive Order 14026 is now $17.75. President Biden acted pursuant to the Procurement Act, allowing the President to implement policies that promote "economy and efficiency" in federal procurement. Several states brought litigation attacking the federal minimum wage for federal contractors, contending that the Procurement Act gave the President no broad policy making power to set a minimum wage for federal contractors. In addition, the measures seemed inconsistent with other prevailing wage federal contracting laws. Eventually the issue reached the federal appellate courts, with the Fifth Circuit and the Tenth Circuit upholding the $15 contractor wage, and with the Ninth Circuit going the other way.

On March 14, President Trump nixed this executive order and also another order directing federal agencies to incentivize the use of registered apprentices by their contractors, which tended to drive federal infrastructure investments towards companies with union contracts. Trump's recent actions rescinded Executive Orders in 14026, 14119 and 14126, favoring companies that participate in registered apprenticeships. It also rejected requiring federal agencies to prioritize grant applicants that have project labor agreements or promote "voluntary union recognition, and neutrality with respect to union organizing."

EMPLOYERS MUST KEEP UP WITH WORK AUTHORIZATION EXPIRATION DATES AND TPS STATUS

If you employ a worker with TPS status, you should pay attention to the work authorization expiration date.

You know a worker has TPS status based on the category description on the Employment Authorization Document (EAD). The EAD for a TPS worker will have a category code of either A12 or C19. The country of the worker also should be stated on the EAD. Based on information available as of March 10, 2025, the work authorization for workers from the following countries will expire this year:

COUNTRIES	NUMBERS (MARCH 31, 2024)	CURRENT EXPIRATION DATE (WORK AUTHORIZATION EXPIRES)
BURMA (MYANMAR)	2,320	11/25/25 (5/25/25)
ETHIOPIA	2,330	12/12/25 (6/12/25)
HAITI	200,005	8/3/25 (8/3/25)
HONDURAS	54,290	7/5/25 (3/9/25)
NEPAL	7,875	6/24/25 (3/9/25)
NICARAGUA	2,925	7/5/25 (3/9/25)
SOMALIA	555	3/17/26 (9/17/25)
SYRIA	3,865	9/30/25 (3/31/25)
VENEZUELA	344,335	See below
YEMEN	1,840	3/3/26 (9/3/25)

With respect to Venezuela, there are two categories of TPS workers. For those who obtained TPS status based on the 2023 designation of Venezuela for TPS, their work authorization expires April 7, 2025. For those workers who obtained TPS based on the 2021 designation of Venezuela for TPS, their work authorization expires March 10, 2025, but their status is extended through September 10, 2025.

There is litigation pending that may affect the TPS workers from Haiti and Venezuela. On Monday, March 31, 2025, a federal district court postponed temporarily the April 7, 2025 deadline for TPS workers under the 2023 designation.

A worker who has an EAD with a category code of C08 may continue to work in accordance with the expiration date on the EAD and any extensions authorized by the federal government. Category code C08 is for a worker who has an asylum application pending.

A worker who formerly had TPS or other status and who presents an unrestricted Social Security card or other unexpired List A or List C documentation has work authorization. A Social Security card that includes any of the following restrictive wording is not acceptable to demonstrate work authorization:

NOT VALID FOR EMPLOYMENT

VALID FOR WORK ONLY WITH INS AUTHORIZATION

VALID FOR WORK ONLY WITH DHS AUTHORIZATION

BIDEN ADMINISTRATION ISSUES ANTITRUST GUIDELINES FOR BUSINESS ACTIVITIES AFFECTING WORKERS

In January of 2025, during the last month of the Biden Administration, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued new guidelines explaining how business practices affecting workers may violate the antitrust laws. The new guidelines replace the Antitrust Guidance for Human Resource Professionals issued during 2016. The following is a summary of these worker guidelines, issued during the final week of the Biden Administration.

The antitrust laws protect competition for labor, just as they protect competition for goods and services that companies provide. When companies act in ways that harm competition for workers, that behavior might lead to fewer job opportunities for workers, lower wages, and worse job quality. That is why the antitrust laws prohibit certain practices that harm competition for workers. Section 6 explains that the antitrust laws apply to relationships between businesses and independent contractors. Section 7 explains that false claims about workers' potential earnings may violate federal laws against unfair, deceptive, or abusive practices. Section 8 provides information about reporting potential antitrust violations to the Agencies.

As discussed further in Sections 1-5, the Agencies may investigate certain types of agreements or business practices as potential violations of the antitrust laws. Examples of such agreements include:

1. **Agreements between companies not to recruit, solicit, or hire workers, or to fix wages or terms of employment, may violate the antitrust laws and may expose companies and executives to criminal liability.**

2. **Agreements in the franchise context not to poach, hire, or solicit employees of the franchisor or franchisees may violate the antitrust laws.**

3. **Exchanging competitively sensitive information with companies that compete for workers may violate the antitrust laws.** This includes exchanges of information about compensation or other terms or conditions of employment, and other exchanges of information that harm competition for workers.

4. **Employment agreements that restrict workers' freedom to leave their job may violate the antitrust laws.** These include non-compete provisions that prevent workers from leaving their job to join a competing or potentially competing employer; that prevent workers from leaving their job to start a new business; or that require workers to pay a penalty upon leaving their job.

5. **Other restrictive, exclusionary, or predatory employment conditions that harm competition may violate the antitrust laws.** These include overly broad non-disclosure agreements, training repayment agreement provisions, non-solicitation agreements, and exit fee or liquidated damages provisions.

This list is not exhaustive. Listed activities may or may not be an antitrust violation.

General Principles for Analyzing Agreements that Impact Workers: In many of these circumstances, the Agencies will focus on whether there is an agreement between businesses that harms competition for workers. An agreement need not be explicit or written down in order to violate the antitrust laws. Agreements - sometimes called conspiracies, gentlemen's agreements, handshake agreements, or shared or mutual understandings - that violate the antitrust laws can be formal or informal; express or implicit; and need not be written down or talked about at all.

If the Agencies identify an agreement between companies relating to workers, they assess its impact on competition and the competitive process. Some types of agreements are illegal regardless of their effects. In other cases, the Agencies perform a deeper analysis, examining the impact of the agreement on workers by impairing the competitive process, suppressing competition, or the actual or likely effects of the conduct in the affected labor market.

The Agencies also focus on whether the participants in a potential agreement compete for workers. Businesses can compete to hire or retain workers even if they make different products or offer different services. Accordingly, when assessing agreements that affect workers, the Agencies will focus on whether the businesses compete in the same labor markets even if they do not compete as sellers of products or services.

Companies can be labor market competitors even if they have some other collaborative or cooperative relationship, such as a joint venture that produces a good or provides a service. Companies can also be competitors in a labor market even if they are not competitors in downstream markets to produce a good or service.

Although antitrust issues are generally bipartisan, it is not known whether the Trump Administration will stand by these worker guidelines. Related issues were pending before the FTC, and the two Republican commissioners voted against approving the worker guidelines. In any event, the guidelines provide a statement of position taken by the government on worker issues that may be picked up by future enforcers and/or private plaintiffs.

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WIMBERLY, LAWSON, STECKEL,
SCHNEIDER & STINE, P.C.

00613152

Suite 400, Lenox Towers
3400 Peachtree Road, N.E.
Atlanta, GA 30326-1107
ADDRESS SERVICE REQUESTED