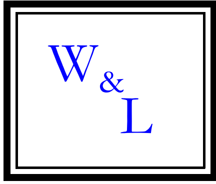
Wimberly, Lawson, Steckel, Schneider & Stine, P.C.
Suite 400, Lenox Towers, 3400 Peachtree Road, N.E., Atlanta, Georgia 30326
E-MAIL:Lawyers@wimlaw.com
(404) 365-0900 FAX (404) 261-3707

EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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SURVEY SHOWS TOP EMPLOYER CONCERNS ARE DEI AND IMMIGRATION CHANGES

In a recent survey, 55% of responding employers ranked the scrutiny of Diversity, Equity and Inclusion (DEI) programs as a top issue, while 75% found the immigration policy changes to be on the list. Over half of the respondents indicated they were considering further changes in their DEI programs in response to Trump's executive orders. The main concerns from the prior year were reduced, such as concerns about labor union activity, wage-hour laws, and the use of AI tools.

HOW THE DOJ AND EEOC GUIDANCE AFFECTS DEI PROGRAMS

Guidance from the United States Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC) issued on March 19, 2025, have some suggestions as to how those agencies view the most common DEI programs. This review summarizes the Guidance and the implications that come from the Guidance as well as the President's executive orders as to how most common DEI programs will be interpreted.

1. The Terms "DEI" and "Affirmative Action." These terms are not illegal, but they do subject programs with these labels to further scrutiny by government agencies and private plaintiffs due to some history of interpreting such programs as requiring or encouraging some type of racial or sexual preference, preferences that are now clearly prohibited by applicable law. Employers may wish to consider using different terminology.

2. Affirmative Action Goals and Timetables. Affirmative action goals and timetables were previously mandated by executive orders for federal contractors, but now those executive orders have been revoked. Further, the use of "goals and timetables" may suggest that preferences will be given in hiring or promotion to under-represented groups, a result currently deemed unlawful. Therefore, the use of employment "goals and timetables" should now be deemed as a risk.

3. Affinity Programs. In these programs, employers recognize and support so-called "affinity groups," generally viewed as racial, ethnic, sexual–based groups in which matters of particular interest to that race, sex, or ethnic group, are discussed and addressed. One thing clear from the recent developments is that whatever the affinity group is, it must be open for participation by members of any race, sex, or national origin. There has been no guidance on what type of subject matter can and should be addressed in such groups, or whether each group can be designated to discuss issues pertaining to a certain race,

sex, or ethnic group. The Guidance simply refers to limiting participation to members of any race, sex, or national origin as a form of "unlawful segregation."

4. Equal Employment and Harassment Training. A great amount of attention has been given to this subject, and such training has generally been deemed constructive. However, it has been a concern that no racial or ethnic group would be "stereotyped" or made to feel guilt by being a part of that group. Some claims have been brought before the EEOC and in court of a claimed "hostile environment" created by equal employment or harassment training that relates to these concepts.

5. Efforts to Widen Recruiting Pools. Most consider this is an area that employers can lawfully pursue to improve diversity. Legal limitations may develop, but efforts to encourage applicant flow of a particular racial or sexual group that is unrepresented, is currently generally considered legal.

6. Mentorship Programs. Mentorship programs under the current concepts must be open to persons of each and every race, sex, or national origin group. There is a potential to have mentorship preferences based upon underprivileged status rather than race, sex, or national origin.

7. Removal of Barriers. It is generally considered lawful to remove certain barriers to equal employment affecting racial, ethnic, and sexual groups which have been shown to be disadvantaged by certain hiring or promotion criteria that adversely impacts their selection, even if the criteria are applied equally to everyone. Employers could likely lawfully remove criteria that adversely affect equal employment opportunity. For example, the requirement of certain education degrees may impact certain groups, and not others, so the removal of such educational requirements could create the potential for more hiring of the adversely affected group. Employers can thus review their criteria for hiring and promotions and eliminate certain requirements disproportionately affecting specific groups.

The Guidance points out the broad nature of eliminating any form of discriminatory disparate treatment, including citing the following examples of prohibited disparate treatment:

- "Access to or exclusion from training (including training characterized as leadership development programs)";
- "Access to mentoring, sponsorship, or workplace networking/networks";
- "Internships (including internships labeled as 'fellowships' or 'summer associate' programs";
- "Selection for interviews, including placement or exclusion from a candidate 'slate' or pool"; and
- "Job duties or work assignments."

The Guidance addresses common justifications for DEI programs, concluding that actions are still considered unlawful even if a protected characteristic "was just one factor among other factors contributing to the employer's decision or action." The Guidance also notes that neither "client or customer preference," nor "general business interests in diversity and equity" are valid defenses to discrimination. The bottom line is that each specific employment action should be guided by the principle of not considering race, color, sex, sexual preference, religion or national origin. The Guidance also warns against retaliation because an individual has opposed unlawful employment discrimination related to an employer's policy or practice labeled as "DEI."

Federal government contractors have a specific need to be compliant with these principles, as Executive Order No. 14173 requires federal agencies to include a provision in every contract and agreement about which the awardee certifies that it "does not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws." Under the False Claims Act (FCA), employees may bring FCA suits on behalf of the government giving them a portion of the proceeds of the action or settlement of claim, if the representation to the government is deemed material and false. The potential of such a powerful legal action creates a heightened risk for government contractors.

ENFORCEMENT OF BIDEN'S INDEPENDENT CONTRACTOR RULE ENDED

The U.S. Department of Labor (DOL) on May 1, 2025, issued Wage & Hour Memorandum No. 2025-1, stating that the 2024 Independent Contractor Rule issued during the Biden Administration will no longer be applied by Wage & Hour. Instead, Wage & Hour will act in accordance with its Fact Sheet No. 13 (July 2008), while also currently reviewing and developing an appropriate standard for determining FLSA employee vs. independent contractor status.

Fact Sheet No. 13 is cited in the Memorandum, in which the U.S. Supreme indicated there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

1. The extent to which the services rendered are an integral part of the principal's business.

2. The permanency of the relationship.

3. The amount of the alleged contractor's investment in facilities and equipment.

4. The nature and degree of control by the principal.

5. The alleged contractor's opportunities for profit and loss.

6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.

7. The degree of independent business organization and operation.

The independent contractor issue is not over, as the U.S. Department of Labor is being urged to bring back the 2021 independent contractor rule promulgated during the previous Trump-Era. The previous 2021 rule put greater weight on how much control workers have over their job duties and their opportunities for profit or loss in determining a worker's status. The approach was not only simpler, but gave companies more opportunities to continue treating staff as contractors.

FEDERAL GOVERNMENT TO DROP DISPARATE IMPACT BASIS FOR DISCRIMINATION CLAIMS

In an extremely important development, on April 23, 2025, President Trump issued an executive order declaring: "It is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible." This theory of liability sprung from a 1971 ruling of the U.S. Supreme Court in *Griggs v. Duke Power Co.* ruling individuals could sue for discrimination even over neutral employment policies that adversely impacted protected groups disproportionately. Acting EEOC Chair Andrea Lucas immediately pointed out that the EEOC would fully comply with the order, and clarified the use of different bias theories. Thus, she stated that the EEOC would "continue to relentlessly combat unlawful patterns or practices of intentional discrimination in violation of Title VII . . . ." The legal basis for intentional discrimination claims is known as disparate treatment, and has been the most commonly used theory of discrimination over the years. The most common way to prove disparate treatment is to show that a member of a sexual or racial group is treated less favorably than another group, based on the protected characteristic. An employment action may be illegal under the disparate treatment approach if "motivated - in whole or in part" by the protected characteristics of race, sex, national origin, etc.

According to The Economist magazine, the concept that discrimination could occur without deliberate intent was revolutionary. The EEOC promulgated a "four-fifths" rule, saying that procedures resulting in "a selection rate for any race, sex, or ethnic group" less than the 80% of the highest-performing group would be regarded as "adverse impact." The disparate impact concept even carried on into other areas, such as where President Obama pushed schools to remake their discipline policies because Black pupils were suspended and expelled at greater rates that White pupils. Although disparate impact is written into the law in some areas and the Supreme Court opinion in Griggs remains in effect, a new Supreme Court case might strike down the whole concept as unconstitutional. Justice Scalia noted in an opinion a number of years ago that ducking this Constitutional question "merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"

The most common examples of unintentional discrimination, as opposed to disparate treatment discrimination, occur with employment criteria such as artificial intelligence decision making, personality tests, specific educational requirements, and other such criteria that have the effect of disproportionately excluding protected groups.

While the adverse impact type of discrimination liability may no longer be enforced by the federal government, the executive order does not eliminate the right for private actions to be brought to enforce the disparate impact theory of liability under the federal discrimination laws. Also, certain questions are raised in terms of state or local government laws, as the executive order also calls for a review to determine whether the federal government can pre-empt state laws or regulations that "impose disparate impact liability based on federally protected characteristics such as race, sex, or age."

Editor's Note: Although the federal government will no longer be enforcing disparate impact discrimination liability theories, employers face the same obligations as before, including disparate impact liability, in private litigation not brought by the government.

HEAT SAFETY RULE APPEARS TO BE MOVING FORWARD

The U.S. Occupational Safety and Health Administration (OSHA) announced that it is moving forward on a public hearing over the Biden-Era heat rule. Some wish that the heat rule proposed during the Biden Administration would simply go away, but others feel that moving forward on the proposed heat rule would be better than leaving it in the hands of another Democratic administration. Another reason for employers to support a federal standard is to avoid a State's effort to address heat-related injuries in workers. There is a belief that modifications to the Biden proposal will be made, with a particular hope that the heat rule will allow more flexibility. Some desire a shift from a specification standard, which is very explicit, towards a more performance-based standard allowing more flexibility.

E-VERIFY+

E-Verify+ is a new tool that streamlines the employment eligibility verification process for employers and new hires.

E-Verify+ combines aspects of the current E-Verify service with Form I-9 creating a new method of employment eligibility verification that is almost entirely electronic. Employers using the service can create cases through their E-Verify account for new hires and employees will receive an e-mail containing a link to electronically complete Form I-9.

If an employee's supporting Form I-9 documents result in a tentative non-confirmation or mismatch, E-Verify+ will notify the employee, and the employer will see the employee's online case status changed to "Needs More Time."

It is the employee's choice whether to take action and address the issue. If the employee chooses to take action, the employee will have eight (8) federal working days to contact the Department of Homeland security or visit the Social Security office to rectify the matter. If the issue is not resolved, the employer may receive a final non-confirmation case result in E-Verify+, which means the system cannot confirm the employee's employment eligibility status. At that point, the employer can terminate the employee without being subject to civil or criminal liabilities.

If an employee successfully completes Form I-9 online and includes proper supporting documentation, E-Verify+ notifies the employer that the form is ready for review. The employer or its authorized agent must review the employee's Form I-9 documents in real time to make sure that they reasonably appear genuine and relate to the employee. The document review process can either be done in person or remotely through live video.

Assuming the documents and Form I-9 pass muster, the employer can electronically sign the form. E-Verify+ will create a PDF version of the form and supporting documents, which the employer must download and maintain in accordance with Form I-9 record keeping requirements.

Although E-Verify+ reduces the amount of time and effort an employer needs to verify the employment eligibility of new hires, it contains some limitations. Currently, E-Verify+ is only available for "employer

access" companies, which are those that access E-Verify solely through a web browser. Employees may also choose to opt out of using E-Verify+ in which case the employer must use the traditional E-Verify process.

Employers must have an E-Verify account to access E-Verify+, and only the employer's program administrator for the account can enable E-Verify+.

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WIMBERLY, LAWSON, STECKEL,
SCHNEIDER & STINE, P.C.
Suite 400, Lenox Towers
3400 Peachtree Road, N.E.
Atlanta, GA 30326-1107
ADDRESS SERVICE REQUESTED