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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XXXXIV, Issue 8 August 2026

SUPREME COURT GIVES PRESIDENTS POWER TO FIRE HEADS OF MOST INDEPENDENT FEDERAL AGENCIES

In a ruling expanding the power of the President to change the leadership of so-called independent federal agencies in a change in administrations or otherwise, the U.S. Supreme Court has ruled that the President has the authority to fire at will government officials of independent federal agencies exercising at least some executive power. *Trump v. Slaughter*, No. 25-332, ___ U.S. ___ (6/29/26). The 6-3 decision arose when President Trump fired Democratic Federal Trade Commission member Rebecca Kelly Slaughter, despite a law that says commissioners can be removed only for specified reasons. The Court held that the Federal Trade Commission's (FTC) for-cause removal provision is contrary to the separation of powers set forth in the Constitution. The Constitution vests "the Executive power" in a "President of the United States of America" and instructs that he "take Care that the Laws be faithfully executed." The Court suggested that to vest the executive power in one person meant that he had below him various "assistants or deputies" who "derive their offices from his appointment" and remain "subject to his superintendence." Thus, to remain accountable to the President, those officers must be removable at the will of the President.

Because the Court found the activities of the FTC are within the heartland of executive power, the Court does not address the bounds of what such power entails. That is, not all offices created by Congress necessarily come with executive power. The Court gave an example that the Federal Reserve was outside the scope of its ruling. The Court's ruling only indicates that those who fall within the President's "general administrative control," must be removable by the President at will.

It is highly likely that the scope of this ruling will affect government bodies that oversee labor relations, like the National Labor Relations Board (NLRB) and the Equal Employment Opportunity Commission (EEOC), as well as numerous other government agencies. The effect will be that when an administration changes, the incoming President will be able to immediately terminate the roles of the heads of various independent federal agencies, resulting in an immediate potential for policy change in regulatory and enforcement priorities. Even during the term of the new President, the President will have authority to immediately remove agency heads that do not comply with his policies. The result would be that these agencies operate much less independently, and have a greater tendency to support the agenda of the Presidential Administration. Previously staggered terms and partisan balancing among agency commissions and/or members made it likely to lead to a change over a period of time for the application of the policies of the new administration, while now such changes can occur quite quickly. Some agencies will become more likely to support the agenda of the incoming Presidential Administration. Further, such independent agencies, boards and commissions will be more likely to modify their positions in policy matters to be consistent with that of the new administration, as otherwise they would be subject to termination at will. Congress, of course, will still retain the power to eliminate federal agencies as part of its powers.

NEW DOJ MEMO AFFECTS DISPARATE IMPACT LIABILITY AND FINDS UNINTENTIONAL WORKPLACE BIAS NOT ILLEGAL

A new Justice Department memo was issued 6/9/26, finding the prior EEOC Guidance on unintentional workplace bias illegal and constitutionally inappropriate, and finding disparate impact liability under Title VII of the 1964 Civil Rights Act unconstitutional. In the disparate impact theory, an employer can be liable for discrimination even under a neutral policy if it lacks a legitimate business justification and the policy disproportionately impacts a protected class, regardless of intent. The Department of Justice (DOJ) opinion believes that the disparate impact guidance violates the Equal Protection Clause, and may serve as a challenge in the future of the U.S. Supreme Court ruling in the 1971 *Griggs v. Duke Power* decision, which established the doctrine before it was later codified into Title VII.

The new opinion supports recent rulings that the Constitution is "color blind," suggesting that Title VII requires equal treatment, not equal outcomes. It can be argued from the new opinion that an employer using various types of employment tests and background screenings need only cite a business reason for their validity, and that statistical disparities alone are insufficient to prove a violation. On 6/30/26, the U.S. Equal Employment Opportunity Commission (the EEOC) announced that it had rescinded longstanding guidance relating to voluntary affirmative action plans. The now-defunct guidance includes a 1979 interpretive rule called "Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964," which outlined how employers can voluntarily implement affirmative action plans. The EEOC also eliminated a section of its Compliance Manual, Section 607, that discusses affirmative action.

On 6/25/26, the U.S. Department of Veterans' Affairs (VA) issued a proposed rule to amend regulations implementing Title VI of the Civil Rights Act of 1964, to eliminate disparate impact liability and prohibit only intentional discrimination. The rule will remove text prohibiting federal funding recipients from using criteria that "have the effect of subjecting individuals to discrimination. . ." It would also rescind a provision concerning the use of "affirmative action." The VA said that there are "serious and Constitutional concerns with the legality" of the current regulations, that go beyond the scope of Title VI's explicit bar on intentional discrimination by prohibiting facially neutral policies that have an unintentional disparate impact. The VA cites the Supreme Court's 2001 ruling in *Alexander v. Sandoval*, that Title VI only bars intentional discrimination and permits facially neutral policies that result in disparate outcomes when there is no discriminatory intent. The U.S. Department of Transportation (DOT) similarly finalized a rule eliminating disparate impact liability from its Title VI - Implementing Regulations on 6/10/26.

HOW NEW EEOC NATIONAL ENFORCEMENT PLAN AFFECTS EMPLOYERS

The EEOC's new "National Enforcement Plan for Fiscal Years 2025-2029," issued on 6/4/26, significantly affects equal employment opportunity (EEO) policies and enforcement procedures. Among other things, the new plan commits the EEOC to:

- Prioritize disparate treatment theories of liability;
- Eliminate the use of disparate impact liability theories in investigations "to the maximum degree possible;" and
- Not commence, develop, or continue to pursue litigation advancing disparate impact claims.

The EEOC is stating that, while disparate impact remains a valid statutory theory codified in the Civil Rights Act of 1991, the EEOC will no longer be the vehicle through which these claims are advanced. Private plaintiffs of course remain free to pursue such disparate impact theories.

Diversity, Equity and Inclusion (DEI) and similar initiatives will be targeted. The Agency will prioritize investigations or programs labeled as Diversity, Equity and Inclusion or "similar euphemisms." This includes using race or sex-based quotas or "aspirational goals;" including training, internship, and mentorship programs; sharing employee race or sex data with managers or other non-HR or legal personnel; and tying compensation or bonuses to diversity goals.

Another priority is to develop and apply recent Supreme Court decisions. These new decisions include *Ames v. Ohio Department of Youth Services,* finding there is no higher standard of pleading in cases by members of "majority" classes; *Muldrow v. St. Louis*, expanding the scope of actionable employment decisions to any that demonstrate "some harm;" *Students for Fair Admissions v. Harvard*, addressing the consideration of race in college admissions; and *Groff v. DeJoy*, raising the burden for employers seeking to deny religious accommodation requests as undue hardships.

Attention is also shown in the new plan regarding LGBTQ issues. The EEOC will apparently seek to clarify or limit the scope of a prior Supreme Court ruling in *Bostock v. Clayton County*, in respect to employees' right to single-sex intimate spaces, and to employees' right to religious accommodations for sincerely held religious beliefs.

The priorities will address first, repeated, overt and intentional discrimination, including job advertisements excluding or encouraging certain individuals to apply; staffing agencies that exclude individuals from employment based on protected characteristics; mass denials of accommodation; and systematic harassment. There is specific mention of protecting American workers from being disadvantaged in favor of visa holders.

A third priority is a focus on vulnerable workers, "including teenage workers, persons with limited literacy or education, individuals employed in low wage jobs, survivors of sexual assault, and workers with developmental or intellectual disabilities."

A fourth priority is protecting the EEOC's enforcement process, including claims of retaliation, or denying the EEOC access to information.

Another priority is "evenhanded enforcement," suggesting that the EEOC does not view enforcement limited to historically disadvantaged groups.

CURRENT STATUS OF REMOVAL PROTECTIONS FOR HAITIANS AND SYRIANS IN THE U.S.

The U.S. Citizenship and Immigration Services (USCIS) has not yet updated the Temporary Protection Status (TPS) webpage indicating terminated status for either Syria or Haiti. It is unclear whether the Department of Homeland Security (DHS) will revoke their status and work permits before the Supreme Court cases are remanded to a lower court, which could take more than 30 days, and DHS has refused all requests for comment.

It appears that employers enrolled in the electronic federal E-Verify Program should receive notice directly if workers' employment authorization connected to TPS expires. It would be up to each employer to determine if those flagged by the system can demonstrate another form of valid employment authorization or can no longer work legally without TPS status. It remains possible that DHS and USCIS will issue formal guidance, which may adopt, modify, or replace otherwise applicable termination dates.

The bottom line is that employers should begin planning for re-verification obligations as well as the transformation, but should await official DHS confirmation before taking any adverse employment action against those affected.

Employers may, for example, immediately begin the process of identifying all TPS populations, and can do this through examining I-9 forms and associated work authorization documentation. Who is impacted would have used an EAD bearing Category Code A12 or C19 and will reference the applicable country designation and specific expiration dates.

Once the USCIS provides formal direction on timing and implementation, employers must initiate re-verification in accordance with I-9 requirements. Employees must be given an opportunity to present alternative evidence of work authorization. If they are unable to do so, they must be terminated, or suspended without pay.

Employers must remember they may not demand specific documents to verify work eligibility, and workers must be given a chance to show any other valid employment authorization they may have. It is possible that some of them may have already secured another lawful status, including a Green Card. Simply seeking a Green Card will not allow TPS holders to stay in the U.S. until the end of that process. Others may seek protection using the asylum process to avoid deportation or may have already submitted asylum claims. Asylum seekers usually are not eligible for a work permit until six months after filing their claim, meaning they would lose their employment even if they are not immediately deported. There may be assistance available to return to their home countries.

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