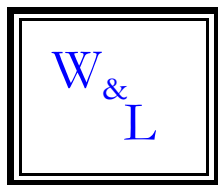


EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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SHOULD EMPLOYERS CONTINUE TO COLLECT RACIAL/SEXUAL DATA FOR THE EEO-1 REPORT LIKELY TO BE DISCONTINUED

On July 23, 2026, the Equal Employment Opportunity Commission (EEOC) published a proposed rule to discontinue EEO-1 reports. These requirements have applied to employers with 100 or more employees and require the collection and reporting of various types of racial, ethnic and sex data. Should the requirement be discontinued, employers may wonder whether they should continue to collect such data.

While no deadline has been set for filing EEO-1 reports for 2026, the requirement has not yet been legally discontinued. It would be premature to cease gathering such data now. Further, a few states have similar reporting requirements.

Second, the situation must be distinguished between gathering data for EEO-1 reports which relate to current employees, as opposed to gathering such data from job applicants. The latter issue relates to affirmative action plans under Executive Order 11246, which has been revoked. This writer believes that applicant data pertaining to race, sex and ethnicity, should not be recorded and retained. While there is an argument that the Uniform Guidelines on Employee Selection Procedures do require the collection of such data, it is a questionable view and generally not been found binding. The collection of applicant flow data makes it much easier for plaintiffs to make out a case of disparate impact discrimination, a contention that the employers hiring criteria adversely affects disproportionately certain minority or sexual groups. Therefore, this writer believes the collection of applicant flow data, currently probably not required by federal law, is not a best practice.

The collection of demographic data on current employees is a closer question. Even if not required by law, some employers may choose to gather such data to not only self-evaluate their equal employment practices, but also potentially to use such data as a defense to a discrimination claim.

A compromise answer to this question is to collect current employee demographic data for auditing purposes with the assistance of legal counsel, in hopes that the data will be protected under the attorney/client privilege. It would arguably allow the best of both worlds, as the privilege could be waived by the company if it decided to later use the data for defensive purposes in a discrimination case.

SOME EMPLOYERS DROPPING GROUP HEALTH INSURANCE

Health plan expenses forecast by Mercer reached \$18,500 per employee this year, a 6.7% increase over 2025. Such increased costs are causing some employers to consider other options, such as Health Reimbursement Arrangements (HRA). Under this model, employers provide a stipend to purchase health insurance on the

Affordable Care Act Marketplace or another exchange. Before 2020, only small companies could use HRAs to reimburse employees for individual health plans, but that has now changed due to subsequent legislation. Bloomberg reports that the median employee received a monthly allowance of \$459 in 2026 and paid a premium of \$567, and the plans available to workers vary widely by geographic location. Those plans generally have higher deductibles and are accepted by smaller networks of doctors and hospitals. HRAs require workers to put more effort into selecting the best plan for an Individual Coverage Health Reimbursement Arrangement (ICHRA). Only a small portion of American workers are currently covered by ICHRAs, but there has been a 53% increase in companies entering such arrangements from last year according to the HRA Council.

Americans with workplace coverage are expected to spend an average of \$5,297 in 2026 on healthcare, according to the benefits consulting firm Aon. The spending represents a combination of payroll deductions for premiums and out-of-pocket charges like deductibles and co-pays. This year's increases are expected to be the steepest increase in 20 years. Some of the major causes for rising costs are cancer treatments and the popular diabetes and weight-loss drugs.

USE OF CEASE-AND-DESIST LETTERS

Suppose a former employee following termination makes threatening, harassing, defamatory or otherwise inappropriate statements or violates policies on non-competition or confidentiality. What can the former employer do to stop or limit such occurrences?

Obviously, one approach is to sue the former employee. However, consider the starting point of a simpler and less controversial approach is to use a cease-and-desist letter to the former employee.

What is a cease-and-desist letter? It basically demands that the unlawful and inappropriate conduct stop immediately, and outlines consequences if it does not. It is a quick and simple method to deter such inappropriate conduct. It also creates a record of the company's objection, aids in helping the company prove damages, and in some cases may resolve the matter without litigation.

In spite of the simple and potentially effective nature of such cease-and-desist letters, the employer must have an appropriate and lawful reason for sending such letters. If there is no legal basis for the employer's letter, this strategy may backfire.

The letters should also directly address what the employer wants done. The letter might also include a deadline for responding and/or open the door for communications between the parties. Care should also be taken in that the former employees receiving the cease-and-desist letter may make a public issue of them as well, potentially creating adverse publicity. The company should exercise caution in drafting such letters so that they sound reasonable in light of the circumstances indicated.

If the cease-and-desist letter does not generate an appropriate reaction by the receiving former employee, the employer can then consider whether litigation is necessary, and the costs and benefits of such litigation, including whether the employer can show actual damages. Sometimes such letters at least open the door to a settlement that might meet the employer's needs. In at least one incident, however, the Federal Trade Commission (FTC) found the employer's use of threatening cease-and-desist letters to former employees could be an unfair trade practice.

THIRD GOP MEMBER JOINS NLRB, INDICATING CASE LAW CHANGES AHEAD

On August 17, James Macy became the third GOP-appointed member of the National Labor Relations Board (NLRB), giving the NLRB three members necessary to overturn existing precedents. One may wonder whether the first task at hand will emphasize easing the case backlog or reversing Biden-era NLRB policies.

The most popular candidate for reversal is the *Cemex* case, which allowed something similar to a card check process where the employer committed an unfair labor practice in response to a union demand for recognition. The Biden NLRB set some 20 new precedents when it was controlled by Democrats. Those likely candidates for reversal include the banning of captive audience meetings, and restrictions on what employers can say to workers during organizing campaigns. Others include the continuation of automatic dues deductions once a collective bargaining agreement has expired, and the restrictive requirements of language in employee handbooks and severance agreements.

In a related development, NLRB General Counsel Crystal Carey has called on the Board to strike down precedential rulings in seven pending cases, according to her memo released August 26, 2026. She rated the *Cemex* case at the top of her list to overturn, and there is a pending case addressing just that issue before the Board. Another Biden-era case she wishes to overturn includes one compensating workers for the downstream economic effects of labor law violations. She wants to overturn the precedent requiring employees to continue to honor dues-check off agreements even after the bargaining agreement expires. She wants to revisit cases determining if egregious employee misconduct loses the protection of the Labor Act. She notes that the Agency under her leadership has resolved 9,000 cases presenting a 50% reduction in case backlog.

DOL PROVIDES MORE CLARITY ON EMPLOYEE WELLNESS PROGRAMS

On August 26, 2026, the U.S. Department of Labor (DOL) addressed employee wellness programs that permit fees on workers' health premiums for things like tobacco use. The Guidance was in response to legal issues raised by dozens of recent class actions targeting employers' fees on workers' health plans, as part of wellness programs. Employers can legally charge such fees in appropriate circumstances, but they must offer health plan participants access to an alternative to paying the fee, such as a smoking cessation program. In addressing one of the important issues in the cases, federal agencies will not take enforcement action against plans that do not provide employees retroactive rewards of health fees if they complete an alternative to the surcharges. The new Guidance is in contrast to a 2013 rule on wellness programs explicitly stating that employers were obligated to retroactively reimburse employees who completed the program's requirements, regardless of when they did so in the plan year. The Guidance also clarifies that the plan materials merely mentioning the existence of a wellness program are not also required to disclose the availability of an alternative.

CASES NOW BEING BROUGHT UNDER THE PUMP ACT PROTECTING BREAST-FEEDING WORKERS

Federal judges have now ruled in over a dozen cases involving the 2022 Providing Urgent Maternal Protections for Nursing Mothers Act, commonly known as the Pump Act. In about half the cases, the workers have been at least partially successful. Many of the claims are surviving early employer efforts to throw them out of court,

more so than other cases. The Pump Act requires employers to provide reasonable break times and a private, non-bathroom space for nursing workers to express breast milk for up to a year after birth. It allows for a private right of action by affected workers who can sue for compensatory, liquidated and punitive damages, as well as lost wages and reinstatement.

Many of the cases arise in situations where finding a non-bathroom space or scheduling a regular break time is more difficult. Issues seem to arise more often in traditional male-dominated industries. In some cases, employers have successfully defended the claim on the basis that the workers did not adequately give notice that they lacked a proper space to pump.

EEOC BRINGS DISCRIMINATION CLAIM ON BEHALF OF WHITE MALE

In a first for at least the last decade or so, the EEOC has brought a discrimination claim alleging the New York Times promotion practices discriminated against a white male. The claim in part is a challenge to the newspaper's diversity plans, and contends the race and sex of the editor was a factor in decisions not to give him serious consideration for a promotion. In general, the EEOC takes the position that the discrimination laws protect each and every individual, not just classes of workers of particular ethnic, racial, or sexual groups.

ICE INCREASES LIABILITY FOR I-9 ELECTRONIC PROGRAMS

As a new enforcement approach, ICE has done away with an I-9 enforcement practice giving employers a period of time to correct minor or technical document errors before being fined. This period is now gone for errors like missing employee birthdays or hire dates, and penalties for each such missing employee data range from \$288 to \$2,861 for each form. This change applies to all I-9 errors, but the Guidance reflects a bigger government focus on failures in electronic programs. For example, a business with 100 I-9 forms containing errors could face a penalty of more than a quarter million dollars. It is anticipated that so-called paperwork violations take on a bigger focus in the current administration. The new Guidance turns most technical mistakes into "substantive" errors that trigger immediate penalties. In a more recent enforcement action involving Walmart, ICE issued a \$24 million proposed fine over thousands of recordkeeping violations. An audit trail for thousands of electronic I-9s allegedly did not show the employees themselves logged into the software system and submitted a signature attesting to basic information like their name and date of birth.

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