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Employee Benefit Plan Review

The New Equal Employment Opportunity Commission Enforcement Agenda

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After being named by President Donald Trump as the acting chair of the Equal Employment Opportunity Commission (EEOC) in January, Andrea Lucas is moving quickly to create a new agenda for the commission, one that departs sharply from priorities set during the Biden administration.

In an EEOC press release, Lucas pledged that "[c]onsistent with the president's executive orders and priorities, my priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women's rights to singlesex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement."

What Actions has the EEOC Taken So Far?

Gender Issues

Just last year under the Biden administration, the EEOC issued harassment guidance stating that employers cannot misgender employees or bar them from using bathrooms that align with their gender identity. Under Lucas, the EEOC plans to rescind that guidance when the confirmation of a third commissioner allows. Lucas emphasized, "Because of biological realities, each sex has its own, unique privacy interests, and women have additional safety interests, that warrant certain single-sex facilities at work and other spaces outside the home. 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 these significant privacy and safety interests."

In the meantime, the EEOC is declining to enforce the harassment guidance by dismissing its own lawsuits alleging sexual orientation and gender identity discrimination filed under the Biden administration. One such case is the EEOC's against Harmony Hospitality LLC, which operates a Home2 Suites by Hilton hotel in Alabama. Now, the EEOC has filed a joint motion to dismiss its case, just months after the agency sued the company over its firing of an employee who identifies as nonbinary male and gay.

The EEOC's intention to withdraw the guidance and dismiss related lawsuits is a departure from its prior view of Title VII of the 1964 Civil Rights Act but is in line with the Trump administration's declaration that the government recognizes only two sexes: male and female. Specifically, Trump's executive order directs federal agencies to enforce laws governing sex-based rights, protections, opportunities

and accommodations to protect men and women as biologically distinct sexes and to remove all statements, policies, regulations, forms, communications or other internal and external messages promoting gender ideology.

In enforcing Trump's order, Lucas removed the agency's "pronoun app," ended the use of the "X" gender marker in certain EEOC paperwork, commenced review of the content of the EEOC's "Know Your Rights" poster, and removed materials promoting gender ideology on the commission's internal and external websites and documents.

Lucas stated that the EEOC would continue accepting any and all discrimination charges filed by workers, although complaints that "implicate" Trump's order recognizing only two sexes should be elevated to headquarters for "review."

Foreign Workers

On February 19, Lucas announced, "The EEOC is putting employers and other covered entities on notice: [I]f you are part of the pipeline contributing to our immigration crisis or abusing our legal immigration system via illegal preferences against American workers, you must stop. The law applies to you, and you are not above the law. The EEOC is here to protect all workers from unlawful national origin discrimination, including American workers."

The EEOC's new agenda is focused on deterring illegal migration and reducing what it believes is an abuse of legal immigration programs. The EEOC aims to achieve this by increasing enforcement of employment antidiscrimination laws against employers that it believes illegally prefer non-American workers as well as staffing agencies and other agents that the EEOC believes unlawfully comply with client companies' illegal preferences against American workers.

Lucas states that the law is clear that national origin discrimination applies to any national origin group, including discrimination against American workers in favor of foreign workers.

AI

Under the Biden administration, the EEOC took the position that algorithmic hiring software and HR tools can create a "disparate impact." The theory is that neutrally applied workplace practices can discriminate if they disproportionately affect people in protected classes.

The EEOC under Lucas has since removed some AI-related documents while it reviews them in line with a Trump order that revoked Biden administration-era AI policies. The Trump administration is unlikely to prioritize disparate impact claims related to AI discrimination, and a recent memo from the attorney general directed the DOJ to limit the use of disparate impact theories.

DEI Programs

The EEOC is also likely to be more receptive to challenges to DEI programs. For example, in an EEOC charge of discrimination, advocacy groups accused the American Bar Association (ABA) of alleged bias in a diversity clerkship hiring program. The advocacy groups specifically alleged that the ABA is violating federal law by targeting applicants for a diversity clerkship hiring program based on race, age and sexual orientation. In announcing her priorities, Lucas questioned the legality of corporate DEI programs and pledged to root out unlawful DEI-motivated race and sex discrimination.

Key Takeaways

- The EEOC has already begun dismantling prior guidance from the Biden administration to fall in line with Trump's executive orders and priorities.
- Employers should expect changes to the EEOC's prior guidance on issues that include gender, hiring foreign workers and AI.
- The EEOC acting chair has questioned the legality of corporate DEI programs.

Conclusion

The EEOC is posed to quickly fall in line with Trump's priorities and executive orders. While many of the changes are employer-friendly, others, such as intensified scrutiny of employers that hire foreign workers and corporate DEI programs, pose a risk for certain employers.

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As a word of caution, it is also important to note that the EEOC's rescission of, and in some cases intent to rescind, guidance memoranda does not mean that binding federal case law on Title VII has been overturned. Employers should continue to treat those decisions as the law. In addition, many states and some cities also have their own antidiscrimination laws that embody greater protections than Title VII. Employers should continue to comply with all applicable state and local laws.

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