Levy Employment Law, LLC

TAKEAWAYS

SO YOU KNOW WHAT TO ASK TO AVOID EMPLOYER PITFALLS

Trump Actions Create Ever-Evolving Employment Law Landscape

The basic question of how an employee proves a legal claim of discrimination has been thrown in question by an April 23, 2025, presidential executive order that directs federal agencies to deprioritize consideration of claims predicated on a disparate impact theory of liability. That order additionally revokes past presidential approvals for regulations that required federal contract and grant recipients to consider whether their conduct had a discriminatory *effect*, even if that was not the intent. The order further directs a wholesale review and intended repeal of as many references to and practices applying disparate impact theory as is legally permissible. Our five-part blog series, Employment Law in Trump's First 100 Days, provides the background, details, and implications of the President's directive for private employers.

The Trump administration's day one and two attacks on gender diversity and diversity, equity and inclusion (DEI) have prompted multiple lawsuits in federal courts across the country. A district court in Illinois granted a temporary restraining order precluding just the Department of Labor from requiring federal contractors and grant recipients to certify they were not engaged in "illegal DEI." Orders from other courts granting broader injunctive relief are currently stayed (on hold), which enables the administration to implement the executive orders in the interim period as the cases progress through the courts.

Fed Contractors Face Massive About-Face On Affirmative Action

Office of Federal Contract Compliance Programs (OFCCP) Director Catherine Eschbach has reportedly instructed agency employees to "conduct an autopsy" of all the agency's prior actions and regulations. Characterizing the affirmative action regulations as inconsistent with federal anti-discrimination laws, Director Eschbach and other leadership at the U.S. Department of Labor are reportedly taking the following actions:

- Reducing OFCCP's workforce by as much as 90%;
- Requiring federal contractors to verify that they have "wound down" their use of affirmative action plans;
- Reviewing past affirmative action plans submitted to OFCCP to evaluate whether any reflect actions that are discriminatory; and
- Reevaluating affirmative action regulations under Section 503 of the Rehabilitation Act (which protects individuals with disabilities) and the Vietnam Era Veterans' Readjustment Assistance Act (which protects certain categories of veterans), to determine if they should be designed differently.

LEVY EMPLOYMENT LAW, LLC

411 Theodore Fremd Avenue, Suite 206 South, Rye, NY 10580

Tel: 914-834-2837 Fax: 914-637-1909

www.levyemploymentlaw.com info@levyemploymentlaw.com

EEO-1 Reports Still Required

Notwithstanding the dismantling of the OFCCP, the EEO-1 reporting requirement still remains in effect for employers with 100 or more employees and federal contractors with 50 or more employees. The EEOC filed an Information Collection Request, proposing to eliminate the option on that form for employers to voluntarily report non-binary data. The current reported opening date for filing EEO-1 forms is May 20, with a June 24, 2025 closing date.

State Attorneys General Publicly Promote Lawful DEI

Responding to the January 2025 executive orders on DEI, the attorneys general of New York, New Jersey, Connecticut and other states issued multi-state-guidance on lawful workplace DEI initiatives. The guidance makes the business case for DEI as a tool to prevent unlawful discrimination. It is intended to reassure employers with examples of the types of conduct that remains lawful, effective, and legally permissible as a means of diversifying their workforces, and offers examples in the areas of:

- recruitment and hiring;
- professional development and retention; and
- assessment and integration.

USCIS has issued an Updated I-9 Form, which includes some language changes, a revised description of some of the acceptable documents, and an updated DHS Privacy Notice.

$13.30 Minimum Wage for Federal Contractors

The minimum wage for newer federal contractors has dropped as a result of a Trump Executive Order that revoked a Biden administration order applicable to contracts entered into or renewed after January 30, 2022. Still in effect, at least for now, is an Obama administration order that has required more gradual annual increases to the minimum wage. As a result, federal contractors should be paying their covered employees a minimum wage of at least $13.30 per hour for 2025.

EEOC/DOJ Warn Against Race-Related Initiatives

The Equal Employment Opportunity Commission (EEOC) may soon have sufficient commissioners to constitute a quorum, and even without one, Acting Chair Andrea Lucas has worked to move the agency in line with the new administration. That includes a recent one-page summary issued jointly with the Department of Justice to highlight the range of employment actions that must be free from racial considerations.

New technical assistance on "DEI-Related Discrimination" expands on that summary and warns employers there is no such thing as "reverse discrimination." Basing employment decisions on protected characteristics, even of those held by the majority of employees, is still a form of unlawful racial balancing. So too, the technical assistance advises, are targeted support services like training or mentorship programs, recruiting policies that require a diverse slate of interview candidates, employee resource groups that limit membership to specific groups, and some forms of DEI training.

Recent NYS Laws Focus on Workplace Safety

Amended Retail Worker Safety Requirements

Roll out of New York State's new Retail Worker Safety Act has been pushed back to June 2, 2025, as recent amendments modified some of the law's requirements. The law, as a reminder, requires retailers with at least 10 employees to maintain a violence prevention policy and training program. For employers with fewer than 50 retail employees, the state has reduced the frequency of the required training so that it need only be conducted upon hire and then once every two years.

A requirement for panic buttons in the stores has been modified to require employers with 500 or more retail employees in the state (formerly it was 500 nationwide) to provide access to a silent response button to request immediate assistance from a security officer, manager, or supervisor while in the workplace. Mobile phone-based silent response buttons can only be installed on employer-provided phones, and the law prohibits employers from using the buttons to track employees, other than when the button is triggered for help.

New Protection for Warehouse Workers

Separately, the New York Warehouse Worker Injury Reduction Act, which takes effect June 1, 2025, mandates injury reduction programs in warehouses, particularly focused on work-related musculosketal disorders. The law requires a variety of measures, including programs to identify and reduce risks, training for workers, and ongoing monitoring and reporting as to the effectiveness of injury reduction efforts.

FTC Taking Coordinated Approach to Permit Competitive Activities

Employers that thought they would see a reprieve in regulation of noncompetes with the Trump administration have received an unwelcome surprise. The FTC recently launched a "Joint Labor Task Force" from each of its three bureaus and the Office of Policy Planning that will collectively be prioritizing and harmonizing investigations, encouraging worker reporting, advocating for regulatory reforms, and coordinating enforcement.

DOL Revising Worker Misclassification Standards – and Leaves Employers Betwixt and Between

In its first Field Assistance Bulletin, the Wage and Hour Division of the U.S. DOL announced it will no longer apply the regulations adopted under the Biden administration in 2024 for classifying workers as independent contractors for purposes of its own investigations under the Fair Labor Standards Act (FLSA). Instead, the administration will apply a 2008 Fact Sheet and a 2019 Opinion Letter. Leaving employers in limbo, the DOL Bulletin further stated that for private litigation, the 2024 regulations remain in effect for now.

Both the 2008 version of the Fact Sheet and the 2024 regulations (each embodied in a document with the unhelpful title of "Fact Sheet 13") apply a version of the "economic realities" test, which considers a range of factors to determine whether the parties' relationship is more appropriately considered that of an employer/employee. The key difference is that the 2024 version emphasized the economic dependency of an individual on a particular organization, while the earlier version considered that equally among other factors.

COURT WATCH

Second Circuit Rules on When an Employee Is Entitled to a Reasonable Accommodation

Just because someone with a disability can function without an accommodation does not mean that the individual is not entitled to receive an accommodation under the Americans with Disabilities Act (ADA), according to the Second Circuit. The Court held in *Tudor v. Whitehall Central School District* (Mar. 25, 2025), that a high school math teacher who had requested to be allowed short breaks as an accommodation for her PTSD should be considered a "qualified individual" under the ADA even though she could function without the breaks. The Court said that such an individual must be offered a reasonable accommodation, absent undue hardship.

The Court observed that the ADA defines an individual with a disability as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The Court held that just because someone *can* perform without a reasonable accommodation does not mean that the person *must* do so and thereby suffer.

Supreme Court Limits Prevailing Party Fee Shifting Opportunities

Sometimes winning is not everything. The Supreme Court held in *Lackey v. Stinnie* (Feb. 25, 2025) that individuals who won a preliminary injunction in their challenge to the constitutionality of a Virginia state law could not claim attorneys' fees under the federal fee-shifting statute for civil rights claims. The individuals' claim became moot after the state repealed the statute they had challenged, and the Supreme Court held that they therefore did not qualify as a prevailing party. The Court's holding is relevant to employment law claims both for consideration of the fee-shifting provisions under the anti-discrimination laws in general, and particularly for Section 1981 race discrimination claims, which are covered by the same fee-shifting statute as was considered by the Supreme Court in *Lackey.*

NJ Supreme Court Holds Commissions Are Wages

The New Jersey Supreme Court clarified that, under the state's Wage Payment Law, when an employee is paid a commission for labor or services, it is always deemed protected as a "wage," and cannot be recharacterized as a "supplementary incentive," even if an employee receives a base salary in addition to the commission payments.

The case, *Musker v. Suuchi* (Mar. 17, 2025), involved a dispute over commissions that were to be paid to an employee when the employer capitalized on COVID by selling personal protective equipment (PPE) on a commission basis that was distinctly different from its regular sales product line. The employer had argued that, because PPE was not its primary business, the commissions paid to Musker should be classified as "supplementary incentives." The Supreme Court rejected that argument, and held that just because the employer changed its product line, it did not thereby alter the reality that the commissions paid to Musker were compensation for services, and thus "wages."

Proceed with Caution

Regulatory changes and shifts in enforcement by the Trump administration are being challenged in courts, frequently with preliminary injunctions issued by district courts then being stayed by appellate courts. Get advice on the latest status before acting.