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Federal Employment Law Update

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5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
Phone 561-241-1919

U.S. FEDERAL EMPLOYMENT LAW UPDATE

Neil C. Schur

ANDERSON KILL

June 8, 2026

NEIL C. SCHUR

267-216-2713 / nschur@andersonkill.com

Neil Schur is a shareholder in Anderson Kill's Philadelphia office and a member of the Firm's Commercial Litigation Group. He is a leading litigator in state and federal courts, a frequent speaker and writer, and the co-chair of Anderson Kill's Labor and Employment Group and Antitrust and Unfair Competition Group.

Neil has litigated cases at the trial court and appellate levels in several states. He represents clients in commercial litigation, employment and antitrust matters, including cases involving contracts, fraud, unfair competition, Title VII, state laws related to employment discrimination, the Americans with Disabilities Act, the Sherman Act, and the Robinson-Patman Act.

Neil has substantial experience in commercial litigation, antitrust and unfair competition matters, and franchise litigation. He has also handled – and is currently handling – wrongful termination and employment discrimination cases under Title VII and other state and federal employment laws. Neil is also available for consultation and drafting of separation agreements, employment manuals and employment policies.

He also has substantial appellate experience and has successfully handled appeals in the U.S. Court of Appeals for the Third Circuit, the U.S. Court of Appeals for the Second Circuit, the Superior Court of Pennsylvania, and the Appellate Division of the Supreme Court of New York.

Brief Overview of Federal Employment Law

- In the U.S., most employees are at will. The well-known summary of at will employment is that an employee can be terminated or resign for good reason, bad reason, or no reason at all.
- As you likely know, this pithy summary is not accurate because a U.S. employer cannot, in fact, terminate an employee for an illegal, discriminatory reason.

Source: Lbisoftware.com

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Brief Overview of Federal Employment Law (Cont'd)

- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act of 1967 (ADEA)
- Americans with Disabilities Act of 1991 (ADA)
- Pregnancy Discrimination Act (PDA)
- *Bostock v. Clayton County* (U.S. 2020)
- Family Medical Leave Act

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Brief Overview of Federal Employment Law (Cont'd)

- **<u>Takeaway</u>:** Although Congress has not repealed any of these statutes or the *Bostock* decision, U.S. federal employment law has nonetheless shifted materially during the second administration of President Trump.

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The 2025 Executive Order

- Trump's Jan. 21, 2025, Executive Order 14173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity"
  - Directs all agencies to "enforce our longstanding civil rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs and activities."
  - "Illegal DEI … policies not only violate the text and spirit of our longstanding federal civil rights laws, they also undermine our national unity, as they deny, discredit, and undermine the traditional American values of hard work, excellence, and individual achievement in favor of an unlawful, corrosive, and pernicious identity-based spoils system."

Source: Foxnews.com

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The 2025 Executive Order (Cont'd)

➢ The Trump administration considers at least the following to be illegal:

- **Quotas** (e.g., 30% of new hires must be women);
- **Set-asides** (e.g., reserving a vacant position for someone other than a white man); and
- **Preferences** (e.g., giving a "plus" to a woman or person of color because of their protected characteristic, even if the plus is given to break a tie).

www.youtube.com

www.govcontractai.com

Source: usatoday.com

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The 2025 Executive Order (Cont'd)

- In the business world, the response to Trump's executive order was mixed.
  - Some companies preemptively scaled back on DEI or "DEI-adjacent" practices and policies.
    - *See, e.g.*, Amazon, Amtrak, Boeing, Disney, Ford, Google, Harley Davidson, Lowe's, McDonald's, Meta, Molson Coors, Pepsi, Target, and Walmart.
  - Others either publicly continued to embrace DEI or affirmatively reaffirmed their commitment to DEI policies and practices, with investor support.
    - *See, e.g.*, Apple, Cigna, Cisco, Coca-Cola, Costco, Deutsche Bank, Deloitte, Delta, Gap Inc., Goldman Sachs, Honda, Hyundai, John Deere, Johnson & Johnson, JPMorgan Chase, MassMutual, Procter & Gamble, NFL, Nike and Tiffany.

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The 2025 Executive Order (Cont'd)

- For perspective, DEI initiatives were under attack prior to the order.
- The opposition to DEI gathered momentum following a June 2023 ruling of the U.S. Supreme Court that admissions policies of Harvard University and the University of North Carolina taking race into account were unconstitutional, after certain students claimed the policies were a violation of the equal protection clause of the Fourteenth Amendment and unfair to white and Asian American applicants. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina*, 600 U.S. 181 (2023).
- Following that ruling, conservative groups and activists launched pressure campaigns and filed lawsuits against race-focused hiring practices in the private sector.

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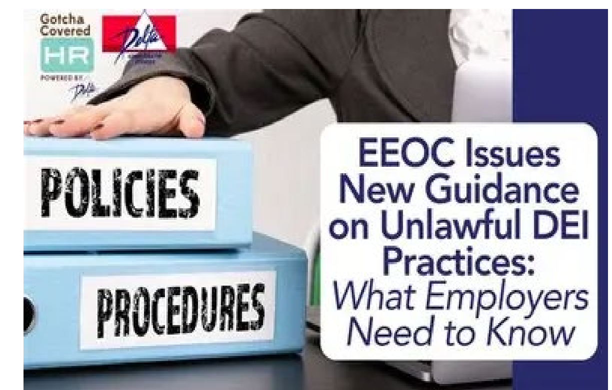
EEOC Guidance re DEI

➢ "What You Should Know"

- "Title VII's protections apply equally to all workers. Different treatment based on race, sex, or another protected characteristic can be unlawful discrimination, no matter which employees or applicants are harmed. This has been the long-standing position of the EEOC and the Supreme Court."
- "The EEOC does not require a higher showing of proof for so-called 'reverse' discrimination claims. The EEOC's position is that there is no such thing as 'reverse' discrimination; there is only discrimination. The EEOC applies the same standard of proof to all race discrimination claims, regardless of the victim's race."



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EEOC Guidance re DEI (Cont'd)

- **"What To Do If You Experience Discrimination Related to DEI at Work"**
  - DEI-related discrimination might include the following:
    - Disparate Treatment (in hiring, firing, promotion, demotion, compensation, training)
    - Limiting, Segregating and Classifying (limiting membership in workplace groups, or ERGs)
    - Harassment (possibly including DEI training)
    - Retaliation (for objecting to or opposing employment discrimination related to DEI, participating in employer or EEOC investigations, or filing an EEOC charge)

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EEOC Alleges Unlawful DEI at Law Firms

- In March 2025, the EEOC alleged DEI-related practices in some law firms were unlawful and discriminatory.
- Four of the country's largest law firms settled and affirmed their commitment to merit-based hiring, promotion, and retention. They agreed:
  - Not to engage in discrimination or preferences based on race, sex, or other protected characteristics
  - To no longer categorize any lawful employment or practices as DEI; and
  - To be subject to compliance monitoring.

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The 2026 Executive Order

- In March 2026, Trump issues Executive Order, "*Addressing DEI Discrimination by Federal Contractors,*" setting out strict directives for government agencies to follow within 30 days.
- Requires contractors to certify compliance, report subcontractor violations, acknowledge potential False Claims Act liability, and make records available for inspection.
- Mandates the inclusion of a new clause in all federal agreements restricting contractors and subcontractors from engaging in "racially discriminatory DEI activities," defined as "disparate treatment based on race or ethnicity" in employment, recruitment, program participation, contracting, and resource allocations.
- Federal contractors that fail to comply could face termination or suspension, False Claims Act liability, or a declaration of ineligibility for future contracts.

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Subpoena Enforcement Actions

- EEOC typically serves information requests and only serves subpoenas when it is unable to resolve disputes regarding information requests.
- EEOC through DOJ has filed several subpoena enforcement actions.
  - *NIKE, Inc.*
  - *University of Pennsylvania* (investigating allegations of antisemitism)
  - *Northwestern Mutual*
  - *Children's Hospital of Philadelphia* (appeal dismissed)
  - *Genuine Parts Co. (dba NAPA Auto Parts)*
  - *Gallup-McKinley County Schools, New Mexico*

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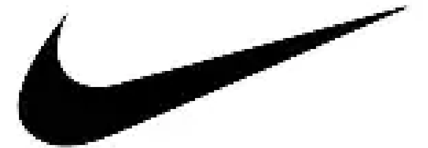
Subpoena Enforcement Actions (Cont'd)

NIKE, Inc.

- 1/24 → America First Legal sent letter to EEOC alleging that NIKE, Inc. ("NIKE") violated Title VII by setting specific diversity representation percentages for women and minorities in vice president and higher level roles and challenging NIKE's employee resource groups (ERGs) and other training, development and networking opportunities that were allegedly open only to members of ERGs.
- 1/9/25 → NIKE signs conciliation agreement.
- 2/18/25 → EEOC withdraws settlement and issues information request seeking information on all programs in place since 1/1/22 implemented in an effort to increase representation of racial and ethnic minorities
- 2/4/26 → EEOC files an action in federal court to compel NIKE to produce information related to allegations that the company discriminated against white workers, including as a result of NIKE's DEI-related 2025 Targets and other DEI-related objectives.
- The court has not yet decided whether NIKE must comply with all of the EEOC's requests.



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Subpoena Enforcement Actions (Cont'd)

Northwestern Mutual

- 3/1/25 → White male employee files charge claiming discrimination on basis of race, gender, and national origin, alleges that he (and other employees) applied for and were denied promotions due to Northwestern's DEI initiatives.
- 5/25 → EEOC issues information request seeking information about advancement within the aggrieved individual's work group; Northwestern Mutual's DEI practices; the firm's HR information systems; and company metrics used for financial rewards.
- Northwestern Mutual partially complies by producing the charging party's personnel files but refuses to provide the broader corporate DEI data and executive testimony
- 7/25/25 → EEOC issues subpoena for documents it did not receive.
- 11/20/25 → EEOC files subpoena enforcement action.
- The Wisconsin court has not yet decided whether to limit the EEOC's inquiries.

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Subpoena Enforcement Actions (Cont'd)

University of Pennsylvania

- 12/23 → EEOC charge cites public statements of antisemitism directed at Jewish faculty. Incidents include a swastika painted on an academic building, disturbing emails and pro-Hamas rallies.
- 7/25 → EEOC issues administrative subpoena and requests lists of groups and organizations "related to the Jewish religion," including personal contact information for Penn employees in those groups.
- Penn refuses to comply; EEOC files subpoena enforcement action.
- On 4/1/26, the U.S.D.C., E.D. Pa. denied Penn's motion to quash the subpoena, holding that identifying Jews on staff will not deter them from practicing their religion. The court did not agree that the subpoena would prevent Jews from participating in events on campus and said a proposal to give staff the contact information for the EEOC is inadequate.
- Penn has appealed the ruling to the U.S.C.A. for the Third Circuit and stated that it is "committed to confronting antisemitism and all forms of discrimination."

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Subpoena Enforcement Actions (Cont'd)

- ***Takeaways:***
  - Although the EEOC has always had authority to subpoena private employer records while an investigation is pending, the agency has increased its use of this authority.
  - EEOC is seeking data and documents regarding both diversity initiatives broadly and specific employer programs that appear to have used race/ethnicity, national origin, sex, or sexual orientation in limiting membership or establishing eligibility criteria.
  - Employers should consider running analyses by race/ethnicity and gender to ensure hiring, promotion and termination data does not show disparities or a pattern or practice of disparate treatment.
  - Subpoena enforcement actions may also be a signal that workforce decision-making, documentation, and internal controls were not strong enough to resolve questions early and efficiently.

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Additional Noteworthy EEOC DEI Cases

Coca-Cola Beverages Northeast, Inc.

- 2/17/2026 → EEOC files complaint in D.N.H. alleging that Coca-Cola Beverages Northeast, Inc. ("Coca-Cola") violated Title VII by denying male employees the same compensation, terms, conditions, or privileges of employment offered and provided to female employees.
- Coca-Cola sponsored a trip and networking event in September 2024 to which male employees were allegedly excluded. In addition to damages, the EEOC also seeks a court order compelling Coca-Cola to "institute and carry out policies, practices, and programs which provide male employees with equal access to employer-sponsored events."
- Case is pending and is being closely watched by private employers nationwide.

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Additional Noteworthy EEOC DEI Cases (Cont'd)

The New York Times

- 5/5/26 → EEOC files complaint alleging that the NYT violated federal law when it passed over a white male employee for a promotion because of his race and/or sex.
- EEOC alleges NYT did not include a longtime editor with extensive experience in real estate journalism in final panel interviews for a vacant Deputy Real Estate Editor position in early 2025 and ultimately hired a non-white female with little experience in real estate journalism.
- Case is pending.

The New York Times

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EEOC's 2026 Withdrawal of 2024 Guidance re Harassment Based on Sexual Orientation and Gender Preference

- The Trump Administration has officially withdrawn 2024 Biden administration guidance on whether harassment based on sexual orientation and gender identity is unlawful.
- The 2024 anti-harassment guidance recognized harassment based on sexual orientation and gender identity as unlawful under Title VII.
- The Trump administration has defined sex as immutable and binary.
- Critics have argued that the Trump Administration's position conflicts with the Supreme Court's 2020 ruling in *Bostock* that Title VII prohibits employers from making hiring or termination decisions as to employees or applicants based on their gender identity (including being transgender) or sexual orientation as unlawful sex discrimination.
- EEOC Chair Lucas has recognized that *Bostock* remains good law as to hiring, firing, and promotion decisions but disagrees as to harassment. She contends that repeatedly misgendering someone cannot be considered unlawful harassment.

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EEOC's 2026 Proposed Revocation of Rule Shielding Affirmative Action Plans From Title VII Liability

- In late 5/26, the EEOC submitted a proposal to the White House regulatory office to eliminate the Commission's 1979 regulation that provides guidance on implementing affirmative action plans voluntarily without violating Title VII.
- Under the 1979 rule, companies were required to perform a reasonable self analysis to determine if their employment practices currently have or have had an adverse impact on protected groups of workers, which helps create a reasonable basis to conclude if affirmative action is appropriate. Those companies would formulate plans to implement "reasonable" actions, including goals and timetables to eliminate discriminatory patterns.

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DOJ Dismissal of Litigation

- Trump DOJ has dismissed pending litigation and withdrawn from settlements.
- It is not unusual for new administrations to change course in litigation.
- Some commentators have noted that some of these examples were noteworthy because the cases had advanced procedurally or were resolved and/or were non-controversial and strong.
  - *U.S. v. Mississippi State Senate [Metcalfe]*
  - *Police Department Cases*
    - *South Bend, Indiana Police Department*
    - *Maryland Department of State Police*
    - *Fire Department in Durham, North Carolina*

Source: cbs6albany.com

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NLRB Update

- In 1/25, President Trump fired National Labor Relations Board ("NLRB") member Gwynne Wilcox, the first time in the board's 90-year history that a member was removed.
- Wilcox sued, arguing that the National Labor Relations Act provides that the President can only remove NLRB members in cases of "neglect of duty or malfeasance in office, but for no other cause," and then only after "notice and hearing."
- In response, Trump argued that Article II of the U.S. Constitution requires that the President "shall take Care that the Laws be faithfully executed."
- The D.C. Circuit Court reinstated Wilcox but on April 9, 2025, the Supreme Court temporarily blocked her return.

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NLRB Update (Cont'd)

- On May 22, 2025, the U.S. Supreme Court granted the President's emergency application to stay the D.C. Circuit Court orders, effectively leaving Wilcox terminated for now.
- The ruling underscores the President's power to remove executive officials at will, drawing a sharp distinction between independent federal agencies and the Federal Reserve (which the Court described as a "uniquely structured, quasi-private entity" warranting special independence)
- The D.C. Circuit will weigh the merits of the legality of Wilcox's removal, with a forthcoming appeal to the Supreme Court likely to follow.

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NLRB Update (Cont'd)

Quorum

- For nearly all of 2025, the NLRB was left with one member, short of the three members needed to take action.
- In 12/25, the U.S. Senate approved two Trump appointees, restoring a quorum with two Republicans and one Democrat.
- Despite having a quorum, the NLRB was unlikely to reverse any employee-friendly cases decided during the Biden administration, including bans on captive audience meetings and restrictions on employer work rules, as its long-standing tradition requires three votes to overturn established precedent.
- However, in 4/26, Trump nominated another Republican to join the NLRB and nominated the Democrat to a second term. If they are confirmed, **this would give Republicans a 3-1 majority and give them the three votes needed to overturn established precedent.**

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Significant NLRB Rulings

Source: natlawreview.com

- In early 2026, the NLRB issued the 2026 Rule for determining joint-employer status under the National Labor Relations Act (NLRA), formally rescinding the 2023 Rule and reinstating the 2020 standard.
- Under this rule, an entity is a joint employer only if it possesses and exercises substantial direct and immediate control over one or more essential terms or conditions of employment, including wages, benefits, hours, hiring, discharge, discipline, supervision, or direction. This approach emphasizes actual control rather than indirect or theoretical authority.
- The 2026 Rule reflects a pro-business shift, rolling back the Biden-era 2023 Rule, which had expanded joint-employer liability based on indirect or unexercised control.

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Significant NLRB Rulings (Cont'd)

- In early 2026, the NLRB confirmed that regional directors have authority to certify union election results and handle representation cases when the Board lacks a quorum.
- This decision prevents paralysis in union election processes, even if the Board temporarily lacks the minimum three members required for a quorum.

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Nschur@andersonkill.com
(267) 216-2713

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