Trump's 1st 100 Days Show That Employers Must Stay Nimble

By **Susan Sholinsky** (May 6, 2025)

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In 100 days, the executive branch under President Donald Trump has altered the legal landscape of the U.S., acting with unprecedented speed to implement an extraordinarily broad agenda, and has done so amid countless events in a saturated daily news cycle, as well as a shifting economy that demands full attention. Understandably, it is hard for employers to keep up with, much less fully comprehend, all of the implications of these changes.

Employers: It would be unwise to presume that an ostensibly conservative government is automatically employer-friendly, such that now could be a good time to worry less about compliance. It is trickier still for those organizations operating in locations where state or local laws are at odds with elements of the "golden age" agenda.

The status quo of how federal agencies have been run is over, resulting in marked differences in both the manner and the substance of regulatory oversight and enforcement. This situation includes some specific policy shifts in the realm of equal employment opportunity law, and it is critical that employers recognize that changes will affect them.

Federal Law and the Agencies That Enforce Them

Although Trump has been remarkably fast in implementing swaths of his agenda — issuing 143 executive orders in the first 100 days of his second term — he has not been quick to finalize key executive branch staffing.

As of the 100th day — April 29 — there were still no confirmations for many U.S. Department of Labor officials, including those leading the Occupational Safety and Health Administration and the Wage and Hour Division. Acting National Labor Relations Board general counsel William Cowen, acting Equal Employment Opportunity Commission Chair Andrea Lucas and acting EEOC general counsel Andrew Rogers were also awaiting confirmation.

Moreover, following the unprecedented firing of NLRB member Gwynne Wilcox and EEOC Commissioners Charlotte Burrows and Jocelyn Samuels, Trump has not nominated replacements, leaving the governing bodies of both agencies without quorums and thus hamstrung, unable to issue decisions or regulations.

While NLRB administrative law judges continue to preside over proceedings such as unfair labor practice charges, for now, there is no recourse for parties who wish to appeal an ALJ decision. Further, without a quorum, the NLRB cannot hear or decide new cases.

Thus, although Rogers rescinded numerous policies that had been set by his predecessor, the decisions reached by the NLRB under the Biden administration that shaped those policies remain law, albeit law that the general counsel is unlikely to enforce.

The EEOC's lack of quorum technically should prevent issuance of new guidance and promulgation or amendment of regulations. But that has not stopped Lucas from issuing a Q&A and teaming up with the U.S. Department of Justice to see to the release of joint guidance focused on a pet peeve of the administration: diversity, equity and inclusion and its potential as a basis for employment

discrimination.

These agencies, as well as the DOL — particularly Office of Federal Contract Compliance Programs Director Catherine Eschbach, have been clear in their intention to rigorously enforce Trump's agenda, which is frequently articulated by executive order.

DEI in Crosshairs

Two executive orders critical of "illegal" DEI — Executive Order No. 14151 and Executive Order No. 14173 — were issued shortly after Trump took office, first announcing the administration's view that DEI programming results in "shameful discrimination" and directing the removal of all references within the federal government to DEI, DEIA and environmental justice.

The second order required cessation of affirmative action plans and other DEI-related initiatives of all federal contractors and grant recipients, and directed federal agencies to "combat illegal private-sector DEI preferences, mandates, policies, programs, and activities."

Both executive orders have been the subject of numerous ongoing lawsuits and are partially blocked by preliminary injunction, but the administration has nevertheless rigorously pursued the anti-DEI mission, focusing first on law firms. In March and April, Trump issued numerous executive orders addressing risks from various law firms.

The first of these, Executive Order No. 14230, at Section 4 — Racial Discrimination, calls on the EEOC Chair to "review the practices of representative large, influential, or industry leading law firms for consistency with Title VII of the Civil Rights Act of 1964." Soon after this executive order was issued, Lucas issued public letters to 20 law firms, demanding detailed information related to their DEI programming. Subsequent EOs naming individual firms consistently cite this Section 4 provision.

The effects of these executive orders and enforcement actions against legal industry employers continue to evolve, as has been well publicized. The education sector has also received a fair amount of high-profile attention thus far, but private employers in all industries, even those that have escaped attention thus far, should not consider themselves exempt from future enforcement programs.

Rather, employers should expect forthcoming actions affecting other sectors: Contained in Executive Order No. 14173 is a directive to all federal agencies to contribute to a report recommending a strategic enforcement plan targeting the "most egregious and discriminatory DEI practitioners" at private sector organizations including publicly traded corporations, large nonprofit corporations and foundations, State and local bar and medical associations, and well-endowed institutions of higher education. The report is due on May 21.

Disparate Impact Liability

Other executive orders also make policy declarations that purport to reverse course on several matters pertaining to civil rights. Among these is Executive Order No. 14168, declaring the administration's intent to "enforce all sex-protective laws to promote" a policy that recognizes two sexes that "are not changeable and are grounded in fundamental and incontrovertible reality." Others include Executive order No. 14202, on the eradication of "Anti-Christian Bias," and Executive Order No. 14281, on restoring equality of "Opportunity and Meritocracy."

Executive Order No. 14281 takes the bold step of declaring unconstitutional a form of Title VII liability that was originally articulated by the U.S. Supreme Court in Griggs v. Duke Power Co. in 1971 and codified within Title VII 20 years later by the Civil Rights Act of 1991.

It declares an intent "to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible." Disparate impact liability, as statutorily prescribed, can attach to employers whose policies or practices have an effect of creating biased outcomes — even though they may be facially nondiscriminatory. Executive Order No. 14281 directs all federal agencies to deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability.

This mandate regarding enforcement priorities could affect not just ongoing cases initiated or joined

under prior administrations that rely on a disparate-impact claim, but those already disposed: The order includes a directive for all agencies to "evaluate existing consent judgments and permanent injunctions that rely on theories of disparate-impact liability and take appropriate action." This might result in more litigation for employers in cases they thought were over.

Compliance with Executive Order No. 14281 may not be so easy for multijurisdictional employers, particularly those operating where state or local laws address disparate impact. In particular, numerous laws regulating the use of artificial intelligence in employment decision-making require employers to assess whether such tools are prone to bias that gives rise to disparate impact.

Additionally, with an uncertain economy and lost federal business leading to reductions in force, many employers may consider avoiding disparate impact analysis that often precedes layoffs, in light of Executive Order No. 14281. But avoiding disparate impact analysis is not recommended; such analysis should be conducted in a privileged manner and construed as a risk assessment.

Multijurisdiction Organizations Face Multiplied Challenges

While the executive branch's policy has changed, so far, federal law has not: Statutes and case law remain intact and binding. However, many states and local jurisdictions are responding more nimbly to cultural and policy shifts.

For example, soon after the executive orders regarding DEI were issued, state attorneys general representing 16 states issued a reminder that their state civil rights laws encourage promotion of a diverse and inclusive workforce. In contrast, some states showed support for the president's agenda.

For example, in early April, a coalition of 12 attorneys general wrote to law firms under investigation, urging compliance with the EEOC acting chair's inquiry and demanding copies of responsive documents. The Iowa Civil Rights Act was amended soon after the issuance of Executive Order No. 14168 to remove all references to gender identity.

Other states are considering bills to restrict DEI in schools and workplaces. Such adjustments to the law have direct implications for covered employers' training programs, policies and other workforce management tools.

Certainty in Uncertain Times

While much of the law rests on precedent, there is little precedent to guide employers today, as tradition and norms are of no quarter to an administration determined to achieve its vision. It remains to be seen whether the pace and scope of this administration's ambitions, and pushback thereto, are sustainable.

As of May 6, 227 lawsuits challenging dozens of executive orders and related agency actions have already been filed;[1] most remain pending. Employers seeking to thrive in this intense environment will need to expect the unexpected, have the wherewithal to stay abreast of the administration's aggressively paced actions, and be able to withstand, or develop immunity to, the onslaught of shocks and surprises. Nothing is certain, except for continued uncertainty.

There are some practical actions that prudent leaders can consider in light of changing circumstances. For example, employers may want or need to adjust their handbooks, employee orientation and anti-harassment trainings, and internal and external communications.

Conclusion

Employers should not only endeavor to keep up with the shifting federal landscape, but also must also keep in mind that the state and local jurisdictions where they employ individuals may very well have different and potentially conflicting priorities, rules and directives.

Careful navigation is required, and different approaches in different states and cities may be warranted. For multijusridictional organizations, a one-size-fits-all approach that might seem efficient could, in fact, be a recipe for increased risk.

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[1] https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/.