Having Employees in 2025

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Executive Orders: AA, OFCCP, and DEI, Oh My!

Affirmative Action Generally?

Voluntary Affirmative Action in the Private Sector and the *Weber/Johnson* Standard.

- Employers generally must **not** consider a protected class when making an employment decision and **cannot** have a protected class be a "plus factor"
- An employer may only undertake preferential classification when it has a legally sufficient rationale to engage in discrimination on behalf of minorities and women.
- Legally sufficient rationales:
  - There exists either a "manifest imbalance" or potential liability for prior unlawful discrimination.
  - Preference must be temporary and must not unnecessarily trammel the legitimate interests of those not subject to the preference.
  - The affirmative action must do no more than necessary to attain a balance.
- Any preference must be narrowly tailored.

College Affirmative Action Struck Down By U.S. Supreme Court

- In June 2023, the U.S. Supreme Court struck down affirmative action in college admissions.

- The decision may impact how courts interpret private employment-related affirmative action and diversity programs.

Employment Implications

Increased scrutiny

Increased litigation

Choppy waters

OFCCP and AAP

What is affirmative action in OFCCP land?

Affirmative Action

Executive Order 11246, Section 503 of the Rehabilitation Act, VEVRAA

- Certain federal contractors and subcontractors were required to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin."
- Later added sexual orientation, gender identity, disability, and veteran status

Bottom line:

- Illegal for federal contractors and subcontractors to discriminate in employment
- Federal agency audited contractors to ensure compliance

What is the OFCCP?

Office of Federal Contract Compliance Programs

OFCCP enforced/enforces:

- ~~**Executive Order 11246 –** minorities and women~~
- **Section 503 of the Rehabilitation Act of 1973** – individuals with disabilities
- **Vietnam Era Veterans' Readjustment Assistance Act** – protected veterans

Ending Illegal Discrimination and Enforcing Merit-Based Opportunity EO

- Rescinds EO 11246 (AAP for women and minorities)
- Directs agencies to enforce civil rights to combat "illegal private-sector DEI preferences, mandates, policies, programs, and activities"
- Required the AG to report within 120 days:
  - "most egregious and discriminatory DEI practitioners" in private sectors of concern
  - Identifying up to 9 targets for potential compliance investigations who are either foundations with assets of over 500 million dollars or more; institutions of higher learning with endowments of over 1 billion dollars; or publicly traded companies

Ending Illegal Discrimination and Enforcing Merit-Based Opportunity EO

- Requires every federal contract or grant award to include
  - A certification that the contractor or recipient does not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws
  - A term noting that compliance with federal anti-discrimination laws is material to the government's payment decisions under the False Claims Act
- Required the AG and Secretary of Education to provide guidance within 120 days to all local educational agencies and institutions of higher education that receive federal funding regarding how those institutions are to abide by *Students for Fair Admissions*

The Attorney General's Response

- New AG Pam Bondi issued a memorandum on February 5, 2025, related to "enforcing federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences."
- The order signals the potential for the DOJ to intervene in pending cases through amicus briefs as well as possible regulatory action or guidance.
- Required a report by March 1, 2025, with recommendations for enforcing the EO.
- A footnote specifies that the memo doesn't prohibit observances such as Black History Month or International Holocaust Remembrance Day, or similar events that "celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination."

What's left for OFCCP?

- Veterans and disabled employees
- VEVRAA and Section 503
  - Invitations to self-identify
    - Pre-offer (both)
    - Post-offer (both)
    - 5-year employee resurvey (503)
  - Veterans hiring benchmark (VEVRAA)
  - Disability utilization goals (503)
  - Documentation and written assessment of outreach and positive recruitment efforts (both)
  - Job listings (VEVRAA)
  - Review of personnel processes (both)
  - Physical and mental qualifications (both)
  - Reasonable accommodations (both)
- EEO-1 / EEO-4
- VETS-4212

Government DEI Programs

Ending Radical and Wasteful Government DEI Programs and Preferencing EO

- Eradicates DEI programs and activities within the federal government, federal contractors, and grantees – no matter what name is used for the program or activity
- Terminates all DEI-related federal positions
- Requires OMB to provide a list of all DEI-related expenditures and an assessment of whether they have been re-named to escape impact by the EO
- Requires OMB to provide a list of federal contractors who have been contracted to provide DEI-related training to the federal employees since 2021
- Prohibits DEI from being used as a factor for any program, activity, union contract, contract, training, or employment practice in the federal government

Ending Radical and Wasteful Government DEI Programs and Preferencing EO

- Calls on OMB and OPM to work together to stop all "discriminatory programs" in the federal government, particularly DEI
- Calls on agencies to provide the "operational impact" of DEI programs and policies in the past
- To the extent legally possible, cancels "equity-related grants or contracts"
- Requires federal agencies to identify grantees who provide or advance DEI, DEIA, or environmental justice programs, services, or activities since January 20, 2021

The Attorney General's Response

- AG Pam Bondi issued a memorandum on July 29, 2025, related to "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination"
- Lists examples of "unlawful" practices:
  - Race-based scholarships or programs
  - Preferential hiring or promotion practices
  - Access to facilities or resources based on race or ethnicity
  - Cultural competence requirements
  - Geographic or institutional targeting
  - Diversity statements
  - Race based training sessions
  - Segregation in facilities or resources

The Attorney General's Response

- Examples of "unlawful" practices continued:
  - Implicit segregation through program eligibility
  - Race based diverse slate policies in hiring
  - Sex-based selection for contracts
  - Race or sex based program participation
  - Training that promotes discrimination

The Attorney General's Response

- Lists "Best Practices" as "Non-binding suggestions"
  - Ensure inclusive access
  - Focus on skills and qualifications
  - Prohibit demographic driven criteria
  - Document legitimate rationale
  - Scrutinize neutral criteria for proxy effects
  - Eliminate diversity quotas
  - Avoid exclusionary training programs
  - Include non-discrimination clauses in contracts
  - Establish clear anti-retaliation procedures and create safe reporting mechanisms

Gender Identity

Defending Women from Gender Ideology Extremism EO

- Defines “sex” as “individual’s immutable biological classification as either male or female”
- Directs the Secretary of Health and Human Services to provide clear guidance on sex-based definitions and that women are biologically different from men
- States that sex is not a synonym for “gender identity” and that “gender identity” cannot be recognized as a replacement for sex
- Applies definition of sex government-wide and directs the government to use “sex” not “gender”
- All federally issued government documents must list the holder’s sex as assigned at birth

Defending Women from Gender Ideology Extremism EO

- Directs all federal agencies to bring enforcement actions in line with the definition
- Instructs the AG to issue guidance related to "protecting sex-based distinctions" and "ensur[ing] the freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federally funded entities covered by the Civil Rights Act of 1964" – directs the DOL, EEOC, and other agencies to prioritize "investigations and litigation to enforce the rights and freedoms identified"
- Prohibits federal funds from being used to support or promote "gender ideology"
- Ensures that prisons are segregated in accordance with the definitions of sex
- Directs agencies to rescind the Department of Education's guidance documents related to Title IX and LGBTQ+ students
- Directs the EEOC to rescind the EEOC's Enforcement Guidance on Harassment in the Workplace

Issues

- *Bostock v. Clayton County* (2020)
  - Discrimination on the basis of sexual orientation and gender identity unlawful under Title VII prohibition of discrimination "because of sex"
- Practical application

The EEOC

Statement by Acting Director of EEOC

Bostock does not direct any action related to pronouns or single-sex spaces (bathroom, locker rooms)

It is not harassment to maintain single-sex spaces

The EEOC will enforce the right to single-sex spaces

It is not harassment to "repeatedly" call someone by the wrong pronouns

Agency will remove the pronoun app and other things related to gender identity

EEOC Guidance

The following may run afoul of the law:

- Limiting membership in workplace groups, such as Employee Resource Groups (ERG) or other employee affinity groups, to employees with certain protected characteristics;
- Separating employees into groups based on race, sex, or another protected characteristic when administering DEI or other trainings, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources.
- DEI training, depending on content, application, or context.
- Access to leadership development programs.
- Intentionally diverse slates or diverse hiring pools.
- Providing meeting space or time for employee-led clubs viewed as segregated or exclusionary.
- Informal mentoring networks

Disparate Impact EO

- Disparate Impact – Is it still a thing?

EEOC Sued?

- Democracy Forward and National Women's Law Center sued EEOC in July for allegedly failing to process discrimination complaints raised by transgender employees
- In April, the EEOC directed staff to classify charges of gender identity discrimination as meritless and put them on hold
- In a July email to staff, the director of the EEOC's field operations, said the agency would only process cases that "fall squarely" under the Supreme Court's 2020 ruling in Bostock v. Clayton County, which found that firing transgender workers because of their gender identity violates Title VII of the Civil Rights Act of 1964 – NOT harassment cases

Reverse Discrimination

What is Reverse Discrimination?

- Title VII of the Civil Rights Act of 1964 protects employees from discrimination based on their race, color, religion, sex, sexual orientation, or national origin
- ***Title VII protects those on both sides of the "minority/majority" divide***
- Reverse discrimination claims can arise when employers consider protected or non-protected characteristics for employment decisions

Ames v. Ohio Department of Youth Services

- Plaintiff, a heterosexual woman, sued DYS, alleging discrimination based on sexual orientation and sex when she was passed over for a promotion.
- She claimed that DYS favored homosexual employees as both her replacement and the person hired for the promotion she sought were homosexual
- Sixth Circuit held that Plaintiff didn't have "background circumstances" to suggest employer was the rare type that discriminated against the majority
- SCOTUS reversed – nixed the "background circumstances" requirement
- There is no reverse discrimination – there is only discrimination
- Justice Thomas went further in his concurrence – taking a shot at the *McDonnell Douglas* framework used by courts for decades to evaluate discrimination (and other) cases

Consequences

- Plaintiffs who succeed on reverse discrimination claims may recover the same categories of damages as other Title VII plaintiffs:
  - Front pay
  - Back pay
  - Reinstatement
  - Compensatory damages
  - Punitive damages
  - Attorneys' fees and costs

Litigation

National Association of Diversity Officers in Higher Education, et al. v. Trump

- Judge Adam B. Abelson in the District of Maryland
- Judge Abelson asked, “Let’s say for example the Department of Education funds computers in elementary schools. Would it constitute illegal DEI for teachers to use one of those computers to teach about Jim Crow?” DOJ attorney Pardis Gheibi replied “I can’t answer that question.”
- Judge Abelson further asked whether discussing inclusive leadership, diversity and cultural sensitivity is “suddenly” illegal. Gheibi said that she could not answer that question, either. EOs leave "the private sector at a loss for whether the administration will deem a particular policy, program, discussion, announcement etc., to be among the 'preferences, mandates, policies, programs and activities' the administration now deems 'illegal.'"

National Association of Diversity Officers in Higher Education, et al. v. Trump

- A three-judge panel of the Fourth Circuit stayed, pending appeal, the district court's 2/21/25 injunction
- The decision is based on the administration's representation that the enjoined provisions apply only to conduct that violates existing federal anti-discrimination law
- Federal agencies may terminate contracts and require certifications pursuant to the EOs
- The appeal of the 2/21/25 preliminary injunction remains pending

Other Litigation

- In the Sixth Circuit, there are 18 cases pending dealing with DEI or DEI-related challenges or reverse discrimination
- Nationwide?
  - 5 cases on director's duties
  - 30 cases on freedom of speech and religion
  - 57 cases on targeted programs
  - 14 cases on diversity targets
  - 46 cases related to government programs
  - 48 cases on workplace discrimination
  - 18 cases on diversity training
  - 9 cases on school and university admissions

DOL 2024 Guidance on Independent Contractors

DOL's 2021 "Core Factors" Test

- Employer friendly
- Concentrated on two "core" factors:
  1. Control over the work, and
  2. Opportunity for profit or loss.
- If two core factors were not determinative, the rule also considered three additional factors:
  1. the amount of skill required for the work;
  2. the degree of permanence of the working relationship; and
  3. whether the work was part of an integrated unit of production.

Final Independent Contractor Rule

- Issued by US Dept. of Labor, effective March 11, 2024
- Rescinded 2021 rule
- Restored six-factor totality of the circumstances analysis, with no predetermined weight assigned to any one factor:
  - Opportunity for profit or loss depending on managerial skill
  - Investment by the worker and employer
  - Degree of permanence of the work relationship
  - Nature and degree of control
  - Extent to which the work performed is an integral part of the employer's business
  - Skill and initiative of the worker

DOL May 1, 2025 Guidance

The 2024 Guidance on EE and IC classification will no longer be applied in FLSA investigations.

DOL will temporarily rely on the 2008 Fact Sheet and 2019 Opinion Letter before determining the appropriate standard to determine EE and IC.

No retroactive penalties: applies to matters for which no penalty payment has been made to workers or DOL.

The 2008 Fact Sheet

- Considers the "economic realities" of the relationship between a worker and a potential employer.
- Immaterial factors:
  - Place where the work is performed;
  - The absence of a formal employment agreement;
  - Whether an alleged independent contractor is licensed by a state or local government
  - The time or mode of pay
- More flexible compared to the 2024 Final Rule.

Economic Reality Factors

- The extent to which the services rendered are an integral part of the principal's business;
- The permanency of the relationship;
- The amount of the alleged contractor's investment in facilities and equipment;
- The nature and degree of control by the principal;
- The alleged contractor's opportunities for profit and loss;
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor;
- The degree of independent business organization and operation.

The 2019 Opinion Letter

Addressed whether service providers working for a "virtual marketplace company" ("VMC") are EEs or ICs.

Provided six factors DOL would consider when determining economic dependence.

Concluded that service providers working for a VMC are ICs.

FLSA Analysis: Changing DOL Rule

Pre 2021

Economic Realities Test

2021

"Core Factors" Test

2022

Proposed Rule - Economic Realities

March 2024

Final Rule – Economic Realities

Jan. 2025…

Return to Core Factors Test?

Independent Contractor vs. Employee: Why Does it Matter?

Independent Contractors

- Pay their own taxes (paid on 1099)
- Not covered by workers' compensation
- Not entitled to unemployment
- Not entitled to benefits
- Fewer protections under NLRA
- Not covered by anti-discrimination laws
- Not covered by the FLSA
- Not entitled to FMLA

Employees

- Are subject to payroll taxes (paid on W2)
- Covered by workers' compensation
- Covered by unemployment compensation
- Generally entitled to benefits
- More protections under NLRA
- Covered by anti-discrimination laws
- Covered by the FLSA
- May be entitled to the FMLA

Misclassifying EE as IC

- Misclassified employees are often denied:
  - Minimum wage
  - Overtime pay
  - Health insurance
  - Workers' compensation
  - Unemployment insurance

A Worker May Be an EE Even If They:

- Agree to be paid by cash or by check, on the books or off the books.
- Receive a 1099 tax form.
- Sign an independent contractor agreement.
- Engage in work away from company property.
- Are registered as an independent contractor or other business entity under state law.

Expectations For 2025 and Beyond

1. With Final Rule, DOL signaled enhanced focus on misclassification with employee-friendly test
2. Trump administration may lead to many "employer-friendly" changes at DOL
3. Potential reversal back to 2021 "Core Factors" test

Practical Steps: Be Mindful of "Control"

1. Have a written agreement
2. Have contractors complete a W-9
3. Do not assign job titles
4. Store files separately
5. Do not "control" the contractor (i.e., discipline, evaluations, tools, etc.)
6. Do not give an employee's job to a contractor

AI and HR

2025 Executive Order on AI Development and Use

January 23, 2025 - Removing Barriers to American Leadership in Artificial Intelligence (AI Executive Order)

1. Large step toward deregulation of AI at the federal level by rolling back Biden's previous executive order and focusing on technological development as a priority.

2. Development of an AI action plan over the next 180 days.

3. Involves developing artificial intelligence ("AI") **"free from ideological bias or engineered social agendas."**

Impact of Order

- EEOC and DOL removed or updated its AI-related publications from their websites

- Look for new guidance to be issued by the EEOC and the DOL

Proceed with Caution

- Tracking Work Time
- Monitoring Break Time
- Waiting Time
- Work Performed at Multiple Geographic Locations
- Calculating Wages
- FMLA Certification and Tracking

Privacy

- Protect confidential information, trade secrets, and intellectual property.

- What data is being inputted into the AI?
  - Is it a public source?
  - Are trade secrets being compromised?
  - Is confidential information being disclosed?
  - Are intellectual property rights being lost?

Tips for Using AI in Your Workforce

- Stay Informed and Plan Ahead
- Assess Technology Trends
- Leverage AI for HR Functions

Tips for Using AI in Your Workforce

ETHICAL CONSIDERATIONS

HUMAN-AI INTERACTION

LEGAL REVIEW OF VENDOR AGREEMENTS

CALL YOUR FAVORITE LAWYER

Ohio State Law Updates

Ohio Pay Stub Protection Act ("PSPA")

Effective: April 9, 2025

Every employer in the state must provide each of their employees with a written or electronic pay statement that includes the employee's earnings and deductions for each pay period, on the employer's regular paydays.

Ohio Pay Stub Protection Act ("PSPA")

- The pay statement must also include:
  - The employee's name;
  - The employee's address;
  - The employer's name;
  - The total gross wages earned by the employee during the pay period;
  - The total net wages paid to the employee for the pay period;
  - A listing of the amount and purpose of each addition to or deduction from the wages paid to the employee during the pay period;
  - The date the employee was paid and the pay period covered by the payment; and
  - For an employee who is paid on an hourly basis, all of the following information:
    - The total number of hours the employee worked in that pay period;
    - The hourly wage rate at which the employee was paid; and
    - The employee's hours worked in excess of 40 hours in one workweek.

Ohio Law Poster Bill

- Effective July 20, 2025
- Employers will be permitted to publish the following required labor law notices on an internal company website, intranet, or HR portal, provided that the information is reasonably accessible to all employees:
  - The Ohio Minor Labor Law Notice
  - The Ohio Minimum Fair Wage Standards Law Notice;
  - The Ohio Civil Rights Law Notice;
  - The Ohio Prevailing Wage Law Notice;
  - The Ohio Workers' Compensation Notice;
  - The Ohio Public Employment Risk Reduction Program ("PERRP") Notice

Ohio Law Poster Bill – Employer's Responsibilities

The new legislation does not alter or change any existing workplace posting obligations under federal law and applies only to Ohio's workplace posting requirements.

Employers must ensure that employees know how to access the platform where the digital postings are placed.

Employers need to communicate the change clearly.

Employers may combine digital postings with email reminders, onboarding materials, or periodic employee updates about employees' legal rights and responsibilities.

Important Caselaw Updates

The Sixth Circuit Expands Coverage of FMLA to Sibling Care

- *Chapman v. Brentlinger Enterprises*, 124 F.4th 382 (6th Cir. 2024)
  - Relevant Facts: EE intended to take FMLA leave to take care of her sister, who was dying of cancer. ER denied the FMLA request. EE struggled to balance her duty to take care of her sister and the job duties and was terminated for attendance and punctuality issues. EE sued, in the relevant parts, under the FMLA. EE argued that she should be considered as her sister's in loco parentis parent for the purpose of taking FMLA leave.
  - The Sixth Circuit Ruling: The Court decided that a loco parentis relationship can form between adults, including adults who also happen to be siblings. The case was reversed and remanded.

You Don’t Need to Know the Exact Weight of the Saw

Porter v. Jackson Township Highway Department, June 24, 2025, 6th Cir.

- Employee injured his shoulder outside of work.
- Employee underwent surgery and began taking FMLA leave. His doctor’s note stated he was “totally disabled” and unable to work for approximately 5 months and would not be able to lift more than 10 pounds upon return.
- After 5 months there were no “light duty” assignments. Employee was told to request unpaid leave.
- During this time, the Township hired a private investigator to observe Employee. The investigator filmed the employee bending at the waist while using a tape measure and chalk line, using both arms as he worked in the yard, and operating a concrete saw.
- Based on this investigation, the Township terminated the employee for not complying with his doctor’s medical restrictions
- The employee subsequently sued, asserting claims under the FMLA and state law.
- Case dismissed. The Employer reasonably believed the saw in the video weighed 16 pounds, exceeding the 10-pound weight restriction.

Under the Sixth Circuit’s “honest belief rule,” a claim of pretext may be defeated based on conclusive evidence that the defendant “honestly believed” its proffered reason, and that the belief was reasonably based on particularized facts that it had at the time the decision was made

Return to Work Gone Wrong

Harter v. Franklin County Board of Commissioners., 08/22/2025, 6th Cir.

- Employee worked as Finance Administrator. She worked remotely full-time for over a year.
- Several months after working, Employee experienced a flare-up related to her medical conditions. She requested to work from home 100% of the time, which her supervisor approved.
- Employee continued to receive positive performance reviews.
- Later that year, the county implemented a new telework policy that required employees to telework no more than 40% of their assigned schedule.
- Employee requested to continue to work from home full-time indefinitely. Her request was denied. Employee went on FMLA leave and was fired after she did not return from leave.
- Employee sues, alleging ADA discrimination. Case goes to trial.
- Employee's supervisor remarked in evaluation that Employee is "readily available for any meeting, or even a simple phone/video call" even while "working 100% remotely."

Reasonable jurors could come to different conclusions about (1) whether Employee was to blame for not following up with a medical provider or refusing to propose another arrangement, and (2) whether the Board was to blame for proposing an unreasonable counterproposal and refusing to make an exception

Just Because its True… Does not Mean it is Legal

Gray v. State Farm Mutual Automobile Insurance Co., 07/25/2025, 6th Cir.

- Employee worked as a claim's specialist for 15 years. Her colleague with a different supervisor had an ADA accommodation that exempted her from working overtime.
- Supervisor told colleague that Employer would no longer accommodate her work schedule and placed her on leave until she agreed to work overtime.
- Asked by her colleague for help, the employee researched ADA law and Employer policies, talked to HR, filed a complaint against the supervisor, and advised her to contact an attorney.
- While Employee's supervisor went on vacation, her colleague's supervisor filled in.
- Colleague's supervisor examined Employee's time records and noticed several instances in which she reported time while she was logged off her computer. Supervisor told HR the employee had manually adjusted her time to hide long lunches and early departures and was coached for this behavior. The coaching allegation was not true.
- Employee argued she was being targeted for helping her colleague secure an accommodation. Not long thereafter, she was fired for falsifying her timesheets. **Other employees with same supervisor were not scrutinized or fired for the same issue.**
- Employee sues, alleging retaliation under the ADA and Ohio law.
- Case goes to trial

"a supervisor does not have to lie in order to be biased," said the court, and "a supervisor can cause an employee's termination by reporting true yet selective information."

Questions?