Labor and Employment Issues and Shake-Ups Under Trump 2.0

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Immigration

The Latest on H-1B Visas

- Quintessential Administration Grenade
  - $100,000 fee announced on September 19 to go into effect on September 21
  - No details: One-time or annual fee? Does it apply to current visa holders or new applicants?
- Current state
  - One-time fee, only applicable to new applicants
  - "National interest" exception is "extraordinarily rare"
    - The noncitizen's presence in the United States is in the national interest.
    - No "American worker is available to fill the role."
    - The noncitizen does not pose a threat to the national security or welfare.
    - Requiring the U.S. employer/petitioner to pay the fee would "significantly undermine U.S. interests."

"A hundred thousand dollars a year for H1-B visas, and all of the big companies are on board. We've spoken to them," U.S. Commerce Secretary Howard Lutnick said on Friday.

Project Firewall

- Data-sharing and collaboration program between DOL, EEOC, DOJ, and USCIS
- Designed to eliminate abuse in H1-B process and avoid prejudice against American workers
- Promise of DOL investigations and EEOC national origin discrimination charges
- But Trump has softened stance in recent months

Immigration Highlights

- First term was more sizzle, less steak (“Build the wall,” the rescinded travel ban)
- Current term
  - More aggressive pace: 181 executive orders in first 100 days (500% increase over first term)
    - Key orders: Revocation of multiple asylum and refugee resettlement programs, more partnerships with local law enforcement, use of military at southern border
  - Goal: 1MM removals (on pace for 600k, not including substantial voluntary departures)

Immigration Highlights

- High-Visibility Actions
  - Georgia Hyundai raid
  - *Noem v. Vazquez Perdomo* – SCOTUS stays lower court injunction, which had prohibited ICE agents from relying on criteria like appearance or language in detaining people
- Practical Effects
  - Foreign-born population has fallen by roughly 1.5MM since inauguration
  - Tightening labor markets, especially in sectors and industries relying heavily on immigrant labor
  - Tension between administration's onshoring goals and anti-immigration viewpoints of certain stakeholders

Immigration Best Practices

- Develop and cascade a worksite immigration authority visit plan
  - Train site leaders and front-desk employees on how to respond and escalate
  - Have counsel ready to review any documents (subpoena, warrant, notice of inspection) presented
- Double (triple?) check your I-9 compliance
  - Consider an audit to confirm compliance
  - For employers with many sites of employment, consider centralizing I-9 process to ensure consistency across all sites
  - Out of compliance? Obtain proper data and fix it ASAP

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Diversity, Equity & Inclusion

Executive Orders

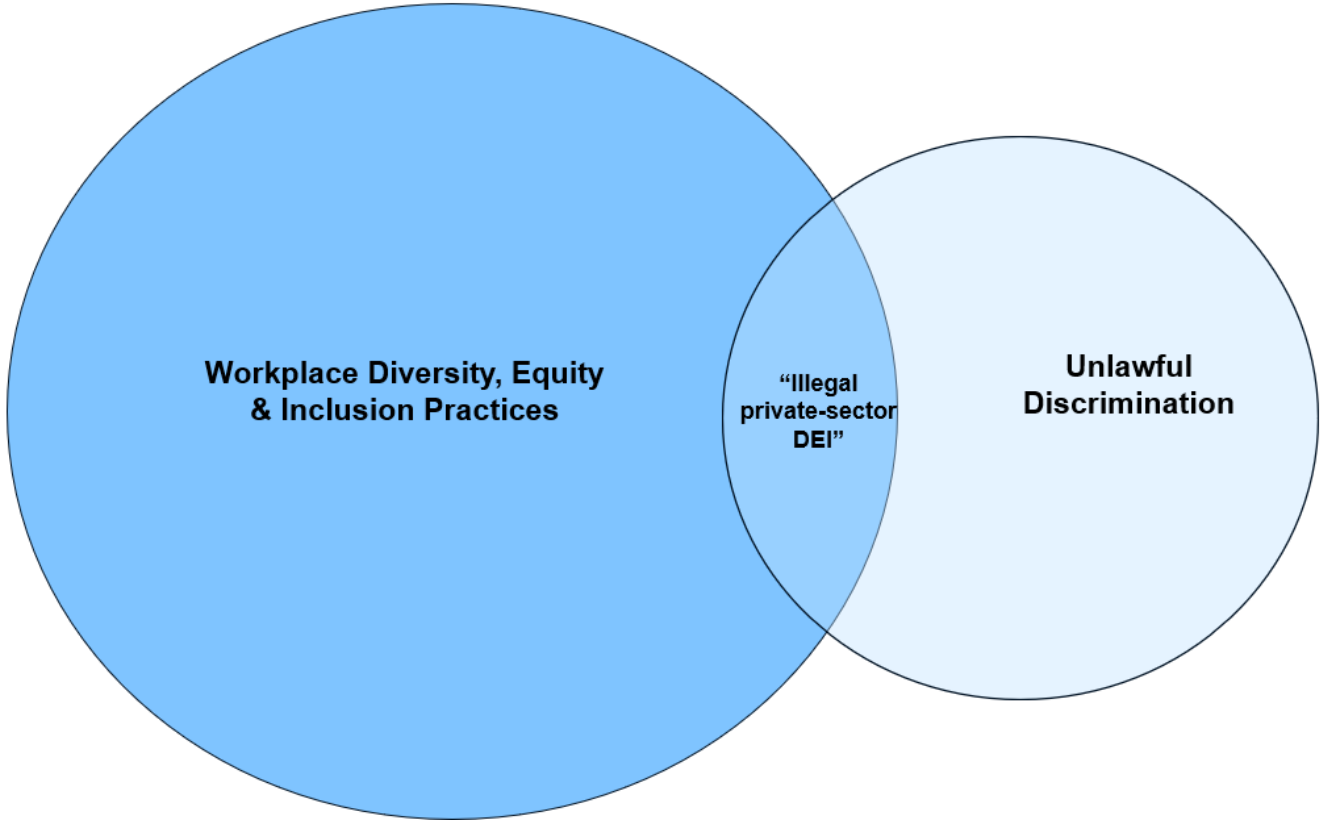
Executive Order 14151 – Ending Radical & Wasteful DEI Programs and Preferencing

- Office of Management and Budget with assistance from Office of Personnel Management and AG's offices must terminate all "illegal DEI and [DEIA]" policies, programs, etc.
- Terminate "all DEI, DEIA, and 'environmental justice' offices and positions"
- Terminate all equity initiatives, plans, or programs funded by grants or contracts

Executive Order 14173 – Ending Illegal Discrimination and Restoring Merit-Based Opportunity

- Applies to ALL federal contractors (irrespective of contract size)
- Rescinded Executive Order 11246 (1965)
- Prohibits maintenance of "illegal" DEI and DEIA programs, policies, and efforts by contractor
- Prohibits "balancing" of workforce
- Prohibits Office of Federal Contract Compliance Programs (OFCCP) from enforcing or promoting DEI and DEIA
- Directed AG to identify "egregious" cases of "illegal DEI" and act on them

What is “Illegal” DEI?



The Administration's Position

- **Attorney General Memos (February 5 and July 29)**
  - Gender-based scholarships or programs, race-based access, preferential hiring or promotions are all "illegal"
  - Facially neutral categories (e.g., "lived experience" or "cross-cultural skills") could be illegal if they are really proxies for race or gender
  - Race-based training or group (e.g., affinity groups) may also be unacceptable if they are closed to non-members of the group and confer benefits
- **Enforcement Actions**
  - Actively promoting concept of "DEI Discrimination"
  - DOJ Civil Investigative Demands
  - Use of subpoena powers to aid investigations (Northwestern Mutual)

WHAT TO DO IF YOU EXPERIENCE DISCRIMINATION RELATED TO DEI AT WORK

What can DEI-related discrimination look like?

Disparate Treatment

Limiting, Segregating, and Classifying

Harassment

Retaliation

Who can be affected by DEI-related discrimination?

What should I do if I encounter discrimination related to DEI at work?

The Federal Judiciary's Position

- Still early days — some district courts have issued injunctions against various aspects of executive orders
- *Ames v. Ohio Department of Youth Services* (June 5, 2025)
  - Plaintiff argued that she was denied promotion and demoted because she is heterosexual
  - Court of appeals dismissed, using standard that required "majority" candidates to show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority"
  - Supreme Court rejects assertion that "reverse discrimination" claims require a higher standard of proof — all plaintiffs are subject to the same standards under Title VII
  - Not politically controversial; unanimous decision, and both Biden and Trump DOJs supported said decision

DEI Best Practices

- "Lifting" vs. "Leveling" DEI
- Lifting DEI (which is usually in the form of a targeted program) is legally risky when it contains the following three elements:
  - Confers a **preference**;
  - On a **protected** group;
  - With respect to **palpable** benefit.
- Most anti-DEI lawsuits are challenging "Lifting" programs:
  - Limit eligibility to members of underrepresented groups
  - Explicitly consider race, and other alleged "preferences," like quotas/hiring set-asides (including diverse slate/Rooney Rule concepts)
  - Use a protected characteristic as a tiebreaker
  - Tie manager compensation to meeting diversity goals

DEI Best Practices

- "Leveling" DEI poses significantly lower risks

- Focus on elimination of bias in workplace processes should almost always be lawful:
  - Updating review and feedback systems to ensure meaningful and consistent feedback for all employees
  - Uniform interview questions to reduce variance in the interview and hiring process
  - Blind project assignment tools to ensure all employees have equal access to meaningful projects and professional development opportunities
  - Facially neutral training for leaders in the organization (interview training, implicit bias training, inclusive leadership education, heritage month education, etc.)

DEI Best Practices

- How you communicate your DEI efforts is almost as important as the substance of the initiatives

- Best practices
  - Emphasize “inclusion” over “diversity”
  - Emphasize the fairness of your processes, rather than particular targets or specific outcomes
  - Emphasize equal opportunity
  - Emphasize being the best place to work **for everyone**

Disparate Impact

EEOC

- Per executive order, the EEOC will no longer investigate any claims based on the "disparate impact" theory of discrimination
- Announced dismissal of all disparate impact cases in September
- *Cross v. EEOC* (November 25, 2025) – D.C. District Court denied injunction brought by former charging party on grounds she lacked standing to challenge EEOC's internal policies

Disparate Impact is not dead!

- Disparate impact is still a viable theory of discrimination sanctioned by the Supreme Court
- Even if the EEOC won't pursue claims, state discrimination enforcement agencies and private plaintiffs can still bring these claims
- Important to assess potentially discriminatory impact of large-scale employment decisions (e.g., reductions in force, hiring, promotions, wage increases, etc.)

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Religion in the Workplace

Under President Trump's leadership, we are restoring constitutional freedoms and making government a place where people of faith are respected, not sidelined."

OPM Director Scott Kupor

Religious Accommodations in the Workplace

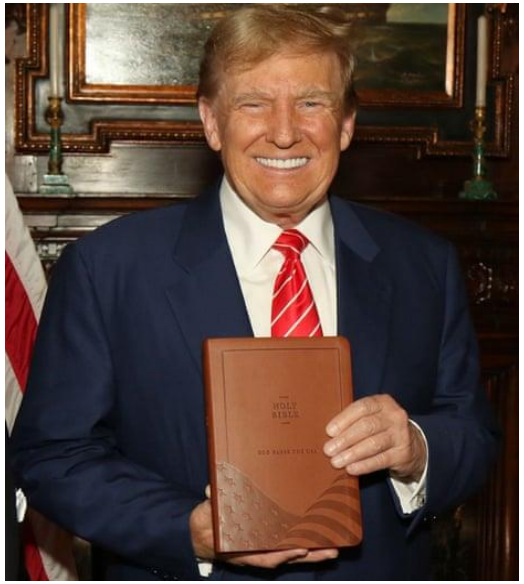
- Historical Standard: *TWA v. Hardison*, 432 U.S. 63 (1977)
  - Religious accommodations were an undue hardship if they required employers to "bear more than a de minimis cost"
- New Standard: *Groff v. DeJoy*, 600 U.S. 447 (2023)
  - Unanimous opinion
  - "An employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."
  - "Courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer."

Religious Accommodations in the Workplace

- Practical Effects
  - Previously, employers faced with employee requests to be exempt from work on the Sabbath could require the employee to find voluntary shift swaps
  - Now, even if no voluntary swaps are available, more analysis is required
- Recent EEOC Settlements
  - P.F Chang's – $80,000
  - Logic Staffing – $217,500

Additional Initiatives

Attorney General Pamela Bondi Hosts First Task Force Meeting to Eradicate Anti-Christian Bias in the Federal Government



US to allow federal workers to promote religion in workplaces

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Mercyhealth to Pay Over $1 Million to Settle EEOC COVID-19 Vaccine Mandate-Related Religious Discrimination Charges

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Overtime

One Big Beautiful Bill Act

- Allows for a tax deduction up to $12,500 ($25,000 for joint filers) in “qualified overtime compensation.”
- Because it is a tax deduction, employers do not have to adjust withholdings but will have to report qualifying overtime compensation on end-of-year tax forms.
- It is a good time to carefully assess time tracking and recordkeeping systems.

What Overtime Compensation "Qualifies"?

- "Overtime compensation paid to an individual required under section 7 of the [FLSA] that is in excess of the regular rate at which such individual is employed."
- Employees may deduct the 50% premium paid for hours in excess of 40 per week — not the entire overtime rate.

What About State Law?

- The Big Beautiful Bill applies only to overtime required under the FLSA.
- Any overtime that is required under state law is not deductible.
- Overtime due according to the terms of an employment agreement, collective bargaining agreement, or company policy that is not required by the FLSA is not deductible.
- Employees are still required to pay state income taxes on overtime amounts.

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Traditional Labor

What's Going on at the NLRB?

- Not much!
  - Mired in litigation and lack of quorum
  - Currently has only one member of five-member Board
  - No decisions issued since March
- All Biden-era rules remain in place
  - Regional offices continuing to apply union-friendly rules
  - But no mechanism for the Board to enforce them if employer appeals
- *SpaceX v. NLRB* (Aug. 19, 2025)
  - Fifth Circuit has effectively shut down the Board within its jurisdiction (Texas, Louisiana, and Mississippi)

Likely NLRB Priorities

- Joint employment standard (return to *Browning Ferris* standard)
- Neutral workplace rules (return to *Boeing* standard)
- Return to traditional election rules
- Longer election periods
- Reversal of *Cemex* “voluntary recognition or petition” requirement
- Elimination of “micro-unit” rules
- Return to traditional remedies (back pay and reinstatement)

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What's Next?

Noncompete Law

- FTC Noncompete Ban
  - The Trump administration withdrew support of the Biden FTC's near-complete ban of noncompete agreements, which was mired in legal challenges
  - Issued September RFI in support of return to "traditional" "case-by-case" approach to enforcement of unlawful noncompetes

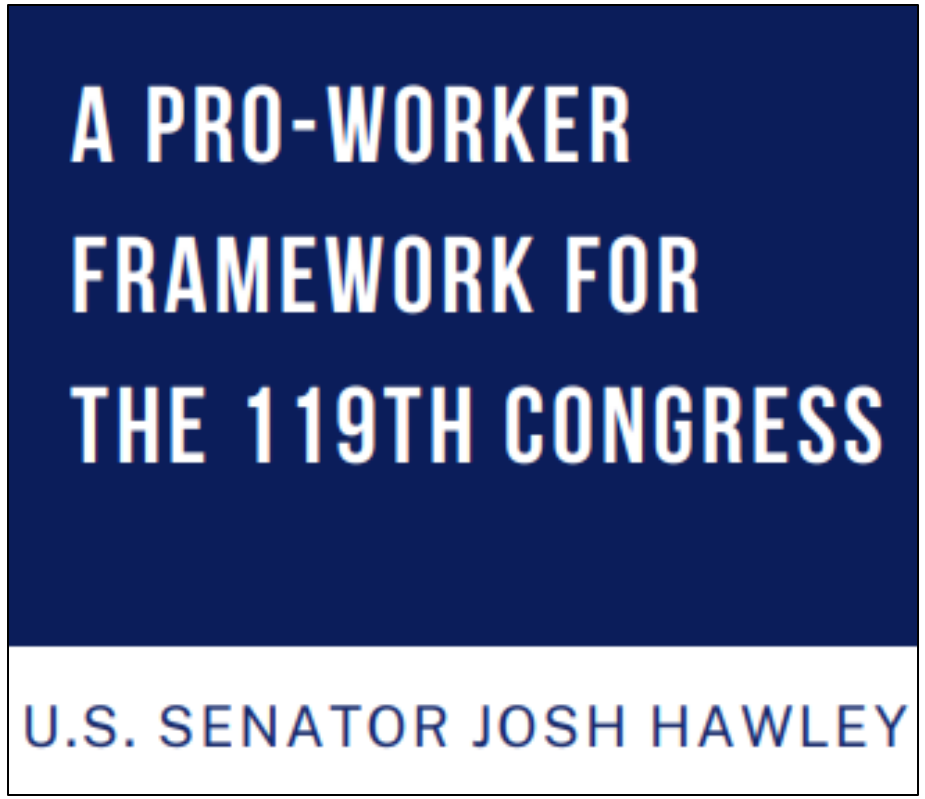
- State Laws
  - Continued trend toward skepticism of noncompetes
  - Exception: Florida

Upcoming Supreme Court Cases

- *Trump v. Cook* & *Trump v. Slaughter*
  - President Trump has asserted a broad theory of executive power that has invited legal challenges
  - Supreme Court to decide lawfulness of president's termination of FTC commissioner (Slaughter) and Federal Reserve Board governor (Cook)
  - Decision will have broad impact on president's ability to terminate other members of quasi-independent agencies (e.g., NLRB)
- Other employment-adjacent cases
  - *Little v. Hecox*: Can states ban transgender athletes from participating in high school and college teams?
  - *M&K Employee Solutions v. Trustees of IAM National Pension Fund*: How do you calculate employer liability when withdrawing from a multi-employer pension fund?

A Shift in Labor Law?

- As the GOP coalition has shifted “blue collar,” there is increased tension between the historically pro-business GOP platform and Trump-era populism
- Certain GOP leaders (Vance, Rubio, Hawley) are advocating the GOP as a “worker’s party”
- Hawley co-sponsored the *Faster Labor Contracts Act*, which would require first labor contracts to be submitted to binding arbitration after 120 days
- Post-Trump battle for the soul of the GOP



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Questions?