

Labor Law Alert

Part I – NLRB Reset: Power Shifts & Precedent on the Chopping Block

Part II – EEOC: Privacy, Accommodations, and New Guidance

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NLRB Reset: Power Shifts & Precedent on the Chopping Block

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National Labor Relations Board – Quick Background

- Basic Background
 - The National Labor Relations Board (NLRB or the Board) is a federal government agency that enforces the National Labor Relations Act (NLRA), which protects employees' rights to unionize and in engage in other protected, concerted activities.
 - Board Members are appointed by the President to five-year terms, with Senate consent.
 - The Board's General Counsel is appointed by the President to four-year terms, with Senate consent.
 - The NLRB is a political body and labor rules often change depending on which administration is in power.
- The Current NLRB
 - In his second term, President Trump fired a Democrat, Biden-appointed Board member and the Biden-era General Counsel.
 - Due to the Board member's firing, the Board was without a quorum for nearly a year.
 - Trump has since appointed a new General Counsel, and two Republican Board Members.
 - Two vacancies continue to exist on the Board.



Power Shift: Regional Directors

- In January 2026, the new Board issued its first decision concerning Regional Director power.
- Historically, federal labor law permits Regional Directors to exercise delegated authority when the Board has no quorum.
- In a 2026 case, the company argued that those earlier delegation rulings are invalid because they relied on the court deferring to the NLRB under *Chevron v. Natural Resources Defense Council*, which the US Supreme Court later overturned in *Loper Bright Enterprises v. Raimondo*.
- The Board disagreed with the company and held that Regional Directors can certify union election results and otherwise rule in representation cases when the Board has no quorum.



Power Shift: Regional Directors

- The new General Counsel has updated Unfair Labor Practice Charge intake procedure.
- Charges are no longer immediately assigned to a Board agent for investigation.
- Increasing burden on the Charging Party to provide evidence rather than the company.
- Failure to timely provide evidence can lead to the dismissal of the charge.
- The General Counsel's top priority is reducing the case backlog and ensuring consistent, fair, and timely case resolution.



Mini-NLRBs

- Legislation in New York and California delegates authority to state agencies to process ULPs, issue penalties, seek injunctions, and conduct union elections.
- Both states explicitly position their agencies to “step into the shoes” of the NLRB when the federal Board lacks a quorum, faces constitutional challenges, or is otherwise unable to act — effectively creating parallel state systems for labor regulation.
- The NLRB has sued both states, arguing these laws unlawfully usurp federally preempted authority under the NLRA and create conflicting regulatory frameworks that could trigger significant litigation over state-versus-federal jurisdiction
- The NLRB won injunctions blocking enforcement of the legislation while litigation proceeds.



Precedent on the Chopping Block: *Cemex*

- In 2023, the *Cemex* decision required employers to either recognize a union that demonstrates majority support or promptly file for an election — and if the employer commits any unfair labor practice that would normally require setting aside that election, the NLRB will instead order the employer to bargain **without an election**.
- The new NLRB General Counsel criticized the *Cemex* ruling in a 2023 blog post she co-authored, writing, "[e]mployers and employees will find the new rules in *Cemex* to be dramatic changes that will result in mandatory union recognition in a large number of cases with no employee voting in NLRB-conducted secret ballot elections" and called *Cemex* "a watershed moment in US labor-management relations law."
- On Monday, March 9, 2026, the 6th Circuit ruled against the NLRB regarding a *Cemex*-issued bargaining order.



Precedent on the Chopping Block: *Ban on Captive Audience Meetings*

- During the Biden administration, the Board effectively out-lawed so-called “captive audience meetings”
- In comments at an ABA panel last year, the Board’s General Counsel posited that the Board's November 2024 decisions in *Amazon.com Services LLC* and *Siren Retail Corp.*, show that the Biden-era board was "looking to completely eliminate the rights of employers to have these conversations at all.”
- The Trump General Counsel is expected to re-instate prior precedent under *Babcock & Wilcox Co.*, which allowed employers to conduct captive audience meetings.



Precedent on the Chopping Block: *Joint Employer Liability*

- The Biden-era Board attempted to expand joint-employer liability.
- The NLRB recently announced the readoption of the narrower 2020 joint employer rule for determining joint employer status.
- Returning to the stricter standard reduces potential exposure, particularly for employers that contract with staffing agencies, vendors, and franchisees.
- Using the 2020 framework, an entity is considered a joint employer only if it possesses and exercises “substantial direct and immediate control over one or more essential terms or conditions...” relating to employment.



Practical Advice for a Changing NLRB Landscape

- In general, comply with Biden-era precedents — **for now**.
- Strengthen union organizing response plans.
- Monitor Board rulings and update policies & handbooks as precedent shifts.
- Don't forget about the Board's rulemaking powers.
- Supervisor training as precedent changes.





EEOC: Privacy, Accommodations, and New Guidance

The Equal Employment Opportunity Commission (EEOC) – Quick Background

- Basic Background
 - The EEOC is led by the EEOC Commission — a bipartisan Commission comprised of five presidentially appointed members (a Chair, Vice-Chair, and three additional members)
 - The Chair is generally viewed as the person most responsible for the administration and implementation of EEOC Policy
 - The Commission (and each Commissioner) has the wherewithal to issue a “Commissioner Charge” and Directed Investigations
- The Current EEOC Commission
 - Trump fired two Biden appointees at start of Trump 2.0 and has since appointed Brittany Bull Panuccio as a new Commissioner to give the Commission its quorum (confirmed by Senate on October 7, 2025, along party lines (51-47 vote)
 - Panuccio has pledged to “vigorously enforce Title VII,” and she has voiced skepticism about workplace initiatives that provide “preferential treatment” in the name of diversity.
 - Kalpana Kotagal (Appointed by Biden in 2023)
 - Andrea Lucas (Appointed by Trump in 2020) (**Appointed Chair in Jan. 2025**)
 - Two vacancies continue to exist



Early EEOC Action Under Trump 2.0

- February 2025 – EEOC moved to dismiss all pending litigation based on **gender identity**
- March 2025 - Chair Charges and Investigatory letters issued to various (20) law firms regarding their **DEI programs and initiatives** and sought information
- August 2025 – EEOC issues two federal sector appellate decisions focusing on **religious discrimination and obligations to accommodate religious beliefs**

“Religious liberty is a foundational American principle.”

“These decisions remind federal employers that their employees deserve not only equal opportunity, but also equal respect for their religious beliefs and practices.”

- EEOC Acting Chair Andrea Lucas



The Latest EEOC Action Under Trump 2.0

- **November 19, 2025** – “Discrimination Against American Workers Is Against the Law”
 - New Guidance encourages employees to file claims with the commission related to *anti-American* national origin discrimination
 - Guidance states that common business reasons (including cost of labor and customer or client preference) do not excuse an employer’s decision to hire foreign workers over American workers
 - Guidance identifies specific *anti-American* national origin discrimination examples:
 - Discriminatory job advertisement saying that the employer prefers or requires applicants from a particular country (for example, H-1B preferred or H-1B only)
 - A company terminating American workers who are on the “bench” between job assignments at a much higher rate than employees who are visa guest workers
 - An employer making it more difficult for applicants from one national origin to apply for positions



The Latest EEOC Action Under Trump 2.0

- The “Search” for plaintiffs to pursue agenda discrimination cases
- **December 2025 Lucas Video:** Are you a white male who has suffered discrimination?

“I think the agency is the tip of the spear for implementing a really ambitious civil rights agenda,” Ms. Lucas said. “I think that that mission is to restore a focus on equality as opposed to equity. It’s going back to the concept of equal treatment as opposed to equal outcomes.”

(Source: NYT Article, Jan. 2026 (*Employment Commission Chair Recasts Workplace Discrimination in Trump’s Image*))



Christian Employers Alliance – Implementation of New EEOC Agenda Objectives

- **January 9, 2026** – EEOC and the Christian Employers Alliance (CEA) enter into agreement (approved by Fed. D. Ct. N.D.) allowing CEA to ignore Biden Era regulations that (i) allowed employees to receive abortion-related accommodations, and (ii) barred workplace discrimination based on gender identity
 - The CEA had sued the EEOC over these two provisions in January
- Agreement states that CEA will not be penalized for:
 - Not accommodating or protecting employees who seek abortion
 - Using pronouns inconsistent with the person’s biological sex
 - Failing to accommodate individual exceptions to sex-specific dress codes because of gender identity or transgender status
 - Directing staff to use private spaces that do not align with their gender identity
- The Agreement foreshadows a move to rescind/rewrite rules for enforcing the Pregnant Workers Fairness Act (PWFA) and illustrates the current EEOC’s enforcement objectives vis-à-vis gender identity and religion



EEOC Issues NEW Procedures/Resolutions – Now that there is a Quorum in place

- Recall – 3rd Commissioner installed in late 2025 (October)
 - A quorum is necessary to change and implement procedures and rules
- **January 14, 2026, Resolution**
 - Removed procedures allowing individual commissioners to urge the Agency to hold public or private discussions on policy and enforcement shifts
 - The move gives Lucas the power to deny commissioner requests for public meetings ahead of anticipated policy changes
- Panuccio voted with Lucas; Kotagal opposed the measure, raising concerns about holding the chair accountable
 - Lucas said she is still committed to grant agenda votes whenever possible, but Kotagal still believes there is no longer a way to hold the chair accountable
 - Set the stage for reversing Biden-era policy/guidelines on PWFA and anti-harassment rules; other prior precedent/rules/guidance also subject to change and reversal



EEOC Issues NEW Procedures/Resolutions – Now that there is a Quorum in place

- **January 21, 2026, Resolution**

- Requires Commissioners' authority for most EEOC litigation (new and intervenor status)
 - Results in greater control over EEOC litigation in accord with Trump administration priorities
 - Limits authority of General Counsel and Field Offices to pursue litigation
- Again, Panuccio voted with Lucas; Kotagal voted against
- **Exceptions:** Cases to enforce recordkeeping and reporting requirements, as well as enforce litigation resolutions like consent decrees and settlements.
- Allows the General Counsel broader authority if the Commission lacks a voting quorum.



EEOC Commission Actions in Early 2026 – Now with a Quorum

- **February 26, 2026, EEOC Appellate Decision**
 - Voted 2–1 to approve a new **federal-sector** appellate decision that Title VII allows government agencies to *exclude* workers including “trans-identifying employees” from “opposite-sex facilities” like bathrooms, locker rooms and other intimate spaces
 - Overturned part of a 2015 landmark Obama-era decision, *Lusardi v. Department of the Army*, that had asserted denying transgender federal workers access to bathrooms that match their gender identity is a form of sex discrimination and harassment
 - *Lusardi* was a legal precursor to the Supreme Court’s 2020 ruling in *Bostock v. Clayton County*, in which the justices held that Title VII protects lesbian, gay, bisexual, and transgender workers from discrimination
 - The new EEOC Decision (*Selina S.* – pseudonym) differentiated *Bostock* based on fact that *Bostock* was not a bathroom case
 - This decision shows the EEOC doubling down on its shift away from transgender bias enforcement under Lucas as well as compliance with the direction in President Trump’s EO 14168
 - Also consistent with EEOC’s direction to dismiss all gender identity litigation/cases in 2025



DEI and Religious Discrimination – Still Front & Center

- Two Illustrative Pending EEOC Matters
 - *EEOC v. Univ. of Pennsylvania* (E.D. PA)
 - EEOC issued subpoena to Univ. in 2025 to identify “claimants” of antisemitism
 - Univ. refused to provide identities but issued notice on how complainants could reach EEOC
 - EEOC sued to enforce subpoena
 - Univ. and multiple groups oppose motion to enforce
 - Oral argument scheduled to occur this morning (March 10 at 10:00 a.m. EST)
 - *EEOC v. Coca-Cola Beverages Northeast, Inc.* (D. N.H.)
 - Complaint filed on February 17, 2026
 - EEOC alleges distributor discriminated against male employees by only inviting women employees to company-sponsored trip and networking event at a Connecticut casino.
 - *Muldrow* is now front and center as well



EEOC – What Is Coming NEXT?

- Likely “more of the same”
 - No support for gender-identity claims
 - Focus on disability and religious discrimination
 - Including failure to accommodate (remote work?)
 - Continued focus on DEI efforts: discrimination is ANY action that is taken to benefit any individual based on race — period
 - Lucas sent letters to Fortune 500 companies on February 26, 2026 (Law Firms 2.0)
 - Continued focus on anything viewed as “anti-American” as evidence of national origin discrimination



Questions?



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