UPDATES IN DISCRIMINATION LAW

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I. OVERVIEW

A. Understanding the current Legal Landscape and how Various Shake-Ups in Federal Government and Workforce are Impacting the Private Sector.

B. Discussing Various Techniques for Adapting to a Landscape that is Rapidly Evolving and Facing Multiple Legal Challenges.

C. Addressing Rapid Changing Landscape and how to Continue to Address Discrimination, Harassment and Retaliation Concerns within your Organization.

II. AN OVERVIEW OF THE EEOC

A. Created by the Civil Rights Act of 1964.

1. It was tasked with enforcing Title VII and ensuring compliance from employers with discrimination, harassment and retaliation in the workplace.

B. 2024 marked the 60th anniversary of the Civil Rights Act.

1. President John F. Kennedy proposed the 1964 bill in June of 1963.

2. President Lyndon Johnson signed the bill into law on July 2, 1964.

3. The Act is known as the most sweeping civil rights legislation since Reconstruction.

C. 2024 secured almost $700 million for over 21,000 victims of employment discrimination—the highest monetary recovery in its recent history.

D. The EEOC currently describes its responsibilities as: enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, childbirth, or related conditions, transgender status, and sexual orientation), national origin, age (40 or older), disability or genetic information.

1. Their role is to fairly and accurately assess the allegations in the charges by employees and issue a finding as to their investigation finding.

2. If the EEOC finds that discrimination has occurred, their primary goal is to settle the charges between the employer and employee.

3. If settlement is unsuccessful or prove unviable, they have the authority to file a lawsuit to protect the rights of individuals and the interests of the public.

III. CHANGE TO STATE LAW IN MICHIGAN: AMENDMENT TO THE MICHIGAN ELLIOT-LARSEN CIVIL RIGHTS ACT (ECLRA) – MCL 37.2202

A. After a landmark ruling from 2022 in *Rouch World v Michigan Department of Civil Rights*, the Michigan legislature codified the holdings in *Rouch World*, ensuring that discrimination on the basis of sexual orientation and gender identity is unlawful. This made Michigan the 22nd state to explicitly include sexual orientation and gender identity in its civil rights statutes.

B. The Bill was signed into law on May 17, 2023 by Governor Whitmer and applies to any Michigan employer with one or more employees.

C. Effective February 13, 2024, ELCRA was amended to include both "sexual orientation" and "gender identify or expression" to the various classes that someone could not be discriminated against for.

1. Now the Statute specifically reads that:

(1) An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, sexual orientation, gender identity or expression, height, weight, or marital status.

(b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity or otherwise adversely affects the status of the employee or applicant because of religion, race, color, national origin, age, sex, sexual orientation, gender identity or expression, height, weight, or marital status.

2. The amendment defines "gender identity or expression" as "having or being perceived as having a gender-related self-identity or expression, whether or not associated with an individual's assigned sex at birth."

3. Sexual orientation "means having an orientation for heterosexuality, homosexuality, or bisexuality or having a history of such an orientation or being identified with such an orientation."

4. The amendment explicitly codifies the protection afforded by the *Rouch* decision and expands upon it to add protection for gender identity and gender expression, which were not addressed in the Court's opinion.

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IV. UPDATES ON RECENT FEDERAL EMPLOYMENT AND RETALIATION DECISIONS

A. *Murray v UBS Securities, LLC*, 2024 WL 478566 (U.S. Feb. 8, 2024).

1. The Supreme Court unanimously held that a whistleblower bringing an anti-retaliation claim under the Sarbanes-Oxley Act (SOX) does not have to establish that the employer acted with retaliatory intent.

2. Rather, a plaintiff need demonstrate only that the protected activity contributed in some way to the adverse employment action in order to set forth a prima facie case of whistleblower retaliation.

3. The opinion held that "[s]howing that an employer acted with retaliatory animus is one way of proving that the protected activity was a contributing factor in the adverse employment action, but it is not the only way."

4. As other whistleblower protection statutes contain nearly identical language to SOX, the decision potentially has a wide-reaching impact for all federal whistleblower actions.

B. *Muldrow v City of St. Louis, Missouri,* 601 US 346, 144 S Ct 967, 218 LEd 2d 322 (2024)

1. Held that Title VII of the Civil Rights Act bars employers from discriminating in decisions like lateral transfers, without requiring employees to show that the discriminatory decision caused "significant" disadvantage.

2. The court held that employee plaintiffs do not need to demonstrate that a discriminatory decision under Title VII cases caused a "materially significant disadvantage" but rather, "need show only some injury respecting [their] employment terms or conditions" that left them "worse off" than before.

3. While the Court did not provide much guidance on the meaning of "some injury," it listed examples, including less prestigious work assignments, the assignment of only nighttime work, and decreased visibility within the relevant department.

V. UPDATES ON RECENT MICHIGAN DISCRIMINATION DECISIONS

A. *EEOC v PACE Southeast Michigan* – EDMI Case No: 2:24-cv-12424

1. Complaint alleged that PACE's (a company providing all-inclusive care for the elderly) Family and Medical Leave Act (FMLA) policy that allowed for an employee unable to return after the expiration of time provided in the FMLA to be treated as "voluntarily resigning" from said position.

2. The suit centered around two (2) employees**:**

a. Both of the employees had requested brief extensions of time with documentation supporting need for such accommodation, but were nonetheless denied an extension and were treated as though they voluntarily resigned from their positions.

b. Additionally, PACE replaced both of the employees with new-hires that did not start until *after* the requested extension period would have expired.

3. The lawsuit alleged that PACE violated the Americans with Disabilities Act (ADA) and the Consent Settlement was as follows: PACE will

a. Pay $60,000 each to the two (2) former employees,

b. Train HR employees on compliance with the ADA,

c. Develop a reasonable accommodation policy which includes examples of additional leave as a reasonable accommodation, and

d. Submit annual reports regarding any requests for leave extensions.

i. The settlement also directs that PACE will provide a list of any employees who were terminated under the same policy.

ii. Further directed that an additional $50,000 will be distributed among any of those individuals who would have qualified for a reasonable accommodation.

4. This decision should cause employers to review their current FMLA policies and carefully consider what "reasonable accommodations" they are making for employees affected by disabilities.

B. Richard Miller v Michigan Department of Corrections – MSC 164862

1. Plaintiff's Complaint alleged that they were terminated because of their association with a co-worker who has filed racial discrimination & hostile work environment complaint against their employer.

a. Specific allegations were that Plaintiffs, Messrs. Miller and Whitman were terminated from the Michigan Department of Corrections after they were involved in internal investigations that occurred as a result of their supervisor had complained to HR about harassment his wife was experiencing.

b. Plaintiffs themselves had not complained about harassment, but allege they were wrongly accused of wrongdoing and fired as a result of the MDOC's effort to retaliate against their supervisor (and his wife).

2. The question was whether the Elliott-Larsen Civil Rights Act's (ELCRA) anti-retaliation provision extended to employees who did not themselves complain about, report or oppose

discrimination, but *who were known to be friends with employees who did engage in that protected activity*.

3. While the trial court allowed the claim, the Michigan Court of Appeals rejected the claim, on May 22, 2024, the Michigan Supreme Court ruled unanimously that indirect retaliation is an allowable claim under the ELCRA.

4. The Supreme Court's reversal of the COA opinion was based on a US Supreme Court decision from 2011 – *Thompson v North American Stainless*.

5. The MSC held that because ELCRA only requires that the plaintiff suffer an adverse employment action, a causal connection exists between that action and a protected act.

   a. Therefore, the protected act does not have to be by the person filing suit, but rather if the plaintiff can evidence that due to a connection with the co-worker who engaged in the protected activity, they were terminated.

6. The required causal link in such cases, if proven, is the plaintiff's close relationship with the co-worker and the employer's desire to punish the complaining employee by firing complainant's friends.

VI. UPDATES ON EEOC GUIDANCE MANUALS

A. What is EEOC guidance?

1. EEOC's guidance provides the Commission's interpretations of the laws enforced by the agency.

2. It draws from the text of the statute/s, the legislative history, prior Commission policy and decisions, case law, and other legal sources.

3. The guidance documents are approved by a majority vote of the Commission.

4. These are not often released, prior to 2024, the last guidance issued was in early 2021.

B. Newly Issued Enforcement Guidance on Harassment in the Workplace – *Approved 4/29/2024*

1. Provides guidance on the three (3) components of a harassment claim

   a. Covered Bases (Race, Color, National Origin, Religion, Sex, Age, Disability, Genetic Information, Retaliation) and Causation

   b. Nature of the Harassment

   c. Liability Basis

2. Sex-based discrimination under Title VII includes employment harassment based on sexual orientation or gender identity, including how that identity is expressed. As an example, the EEOC notes repeated, mis-gendering, by intentional use of a name or pronoun inconsistent with the individual's known gender identity, could be considered harassment.

3. Where an employee experiences harassment not based on a protected category, there is no causation to support a claim. For workplace harassment to violate the law, not only must it be based on a protected category, but it must also affect a term or condition of employment.

4. The guidance also reaffirms that, to be actionable harassment, the conduct must be severe or pervasive and must be viewed in light of the totality of the circumstances. For example, a "one-off" offensive remark does not constitute a hostile work environment.

5. Last, there is a recognized defense for the employer in hostile environment claims where the employer takes prompt remedial action to prevent and correct the harassment and the complaining employee unreasonably fails to use the employer's complaint procedure or take other steps to minimize the harm from the harassment.

VII. RECENT ADMINISTRATION CHANGES & IMPACT ON RECENT RULINGS

A. Andrea R. Lucas, Chair of the EEOC

1. Recently appointed new Chair of the EEOM, Andrea R. Lucas has served as an EEOC Commissioner since 2020, and was nominated by President Trump during his first term.

2. In an issued statement, her goal as the chair will be to "dispel the notion" that a claimant has to be the "right sort" of litigant, and instead wants to focus on civil rights laws "ensuring equal justice under the law and to focusing on equal opportunity, merit, and colorblind equality."

3. Her statements since being appointed have it clear that her focus will be rooting out "unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women's rights to single sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement."

4. On February 19, 2025 she also asserted her commitment to protecting workers from "Anti-American bias."

   a. Her statement was was intended to send a very clear notice to Employers of ". . . if [an employer is] part of the pipeline contributing to our immigration crisis or abusing our legal immigration system via illegal preferences against American workers, you must stop." And point out that the purpose of The EEOC is " . . . to protect all workers from unlawful national origin discrimination, including American workers."

b. In her statement, she does give some clues about what she will be focusing on as to this "crackdown," stating that the below provisions are not legally permissive reasons to violate Title VII:

i. lower cost labor (whether due to payment under the table to illegal aliens, or exploiting rules around certain visa-holder wage requirements, etc.);

ii. a workforce that is perceived as more easily exploited, in terms of the group's lack of knowledge, access, or use of wage and hour protections, anti-discrimination protections, and other legal protections;

iii. customer or client preference;

iv. biased perceptions that foreign workers are more productive or have a better work ethic than American workers.

c. What she does make crystal clear is that protections under the law are not just for minorities, but for all Americans, stating: "prohibition on national origin discrimination applies to any national origin group, including discrimination against American workers in favor of foreign workers."

d. Pursuing cases by applying Title VII to bias against Americans is definitely a departure from the way Title VII has been applied historically and it is unclear currently how this will look in these next few years.

i. Possible that EEOC may focus on reasoning from an October 2024 Jury trial in California that found that Cognizant Technology Solutions, an IT Company, intentionally engaged in discrimination against non-South Asian and non-Indian employees.

ii. The Jury specifically relied upon evidence that Cognizant was 8.4 times more likely to terminate non-South Asian and Non-Indian employees.

B. Andrew Rogers, Acting General Counsel for the EEOC

1. In a statement regarding his appointment, he said his goal is: "to advance robust, high-quality, efficient, and transparent enforcement of our nation's civil rights laws via the agency's litigation program.

2. He has served as chief counsel to Lucas since October 2020.

3. He has a long history with employment law prior to his time with the EOOC as both a practicing employment and labor lawyer in private practice, as well as serving in the Wage and Hour Division of the US Department of Labor issuing opinions focusing on regulations.

C. Removals from the EEOC and NLRB

1. Jocelyn Samuels and Charlotte Burrows were both removed as commissioners. Ms. Samuels was the Former EEOC commissioner and was Trump's pick to fill a Democratic seat in 2020. The EEOC's general counsel, Karla Gilbride was removed alongside them.

2. Gwynne Wilcox was removed as a member and the chairman of the NRLB Jennifer Abruzzo, general counsel for the NRLB was also removed by President Trump.

3. These removals currently leave the EEOC and NLRB without a quorum to decide cases.

4. Guidance has also been taken down from website that was issued during the Biden Administration and as of today, this leaves the EEOC and NLRB in a state of flux.

D. On February 15, 2025, it was reported that the EEOC is seeking to drop a gender discrimination case directly following the new Executive Orders from the Trump Administration.

1. The lawsuit was against Harmony Hospitality, LLC, which operates a Home2 Suites by Hilton Hotels in Dothan, AL. The Plaintiff identified as a non-binary gay male who styled himself as a gender-conforming male while at work and as non-gender-conforming outside of work. The employer, when discovering the employee's sexual orientation and gender identity, stated the employee needed to be "hidden," and he was fired shortly thereafter.

2. The Complaint specifically accused the employer of violating Title VII of the Civil Rights Act by terminating the employee "because of his sex, sexual orientation, gender identity, and failure to adhere to male gender stereotypes."

3. The EEOC's request to now dismiss the case, marks a complete 180 from its prior interpretation of civil rights law after the Trump administration declared that the government would recognize only two sexes: male and female.

VIII. EXECUTIVE ORDERS & MUCH ADO ABOUT "DEI"

A. What is "DEI" anyway?

1. Diversity, Equality and Inclusion – its historical purpose was to foster and promote diversity in the workforce and encourage hiring of underrepresented minorities.

a. "Diversity" is intended to acknowledge and value human differences, including race, gender, sexual orientation, etc.

b. "Equity" is intended to "level the playing field" and ensure that everyone has access to opportunities.

c. "Inclusion" is meant to create an environment where all are respected, valued and included.

2. Some "DEI" mantras include the Acronym "A" for Acceptance.

3. The argument against DEI is that it threatens merit-based acknowledgment and leads to reverse discrimination that underlines quality in a range of activities, from education to the candidate pools of potential new hires.

B. What Executive Orders have been Issued that Ban DEI & What do They Mean?

1. EO 14148 (1/20/2025) - “Initial Rescissions of Harmful Executive Orders and Actions”

a. Also revoked seventy-eight (78) Orders by the Biden Administration that were designed to promote diversity and inclusion.

i. The Revoked Executive Orders from the Biden Administration were geared towards addressing prevention of discrimination of unserved communities and the LGBTQ+ population in the United States.

b. The new Trump Administration asserts that “[t]he injection of “diversity, equity, and inclusion” (DEI) into our institutions has corrupted them by replacing “hard work, merit, and equality with a divisive and dangerous preferential hierarchy.”

c. This Executive Order does not enable federal contractors and sub-contractors to disregard existing legislature regarding anti-discrimination, such as Title VII protections, Equal Pay Act, and the ADA. Much of the existing legislature, regardless of the Executive Order, has language that requires affirmative action and non-discriminatory protection for employees.

i. Title VII of the Civil Rights Act prohibits employment discrimination because of an individual’s “race, color, religion, sex, or national origin.”

ii. Also mandates that an employer shall not “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”

2. EO 14168 (1/20/2025) – “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government.”

a. The purpose of this EO is to “. . . defend women’s rights and protect freedom on conscience by using clear and accurate language and policies that recognize women are biologically female and men are biologically male.”

b. The Order further defines “gender ideology” as a “false claim” and “gender identity” is a “fully internal and subjective sense of self . . . that does not provide a meaningful basis for identification . . .”

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c. We must, once again, bring up the changes to the ELCRA in Michigan (MCL 37.2202) and the additions that were codified into state law of: "gender identity or expression."

d. This EO creates a direct conflict with current Michigan Statutory law and employers must be very careful in navigating these conflicts.

i. Employers should prepare for the shift in federal employment law away from protection of gender identity and expression.

ii. Topics such as restroom access, pronouns and preferred names will certainly need to be navigated as this progresses.

e. The Order also provides for proposed codification of terms (to be within 30 days of Order - 2/19/2025), which we are still awaiting the presentation of.

3. EO 14170 (1/20/2025) - "Reforming the Federal Hiring Process and Restoring Merit to Government Service"

a. Its basic purpose is to "attract the highest caliber of civil servants committed to achieving the freedom, prosperity and democratic rule that our Constitution promotes" and seeks to ban Federal hiring "based on impermissible factors, such as one's commitment to illegal racial discrimination under the guise of ''equity,'' or one's commitment to the invented concept of ''gender identity'' over sex."

b. The Order, in large part, seeks to "prevent the hiring of individuals based on their race, sex, or religion, and prevent the hiring of individuals who are unwilling to defend the Constitution or to faithfully serve the Executive Branch."

c. Additionally, the EO directs the Assistant to the President for Domestic Policy within the next 120 days to "develop and send to agency heads a Federal Hiring Plan that brings to the Federal workforce only highly skilled Americans dedicated to the furtherance of American ideals, values, and interests." It is unclear at this time what the plan will entail, and the potential challenges it may face within the Court systems, or how it will impact the private sector.

4. EO 14173 (1/25/2025) "Ending Illegal Discrimination and Restoring Merit-Based Opportunity"

a. This Executive Order revoked a 60-year standing Executive Order enacted by President Johnson that mandated affirmative action in federal contractors and sub-contractors.

i. According to the Department of Labor, this requirement has become deeply embedded in the operational frameworks of approximately 25,000 firms and 120,000 establishments, impacting nearly 20% of the U.S. workforce. By revoking this order, this effectively dismantles the federal mandate for race and gender-based affirmative action.

b. Additionally, the Executive Order mandates that the Office of Federal Contract Compliance Programs stop requiring federal contractors to take affirmative actions. Federal contractors must stop "promoting diversity."

c. Last, it seeks to enforce this standard on *private* sector companies as well, ordering in part that: ". . . all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities."

i. Under Sec. 4 of the Order it goes on to state:

(A) 4(a) "[t]he heads of all agencies, with the assistance of the Attorney General, shall take all appropriate action with respect to the operations of their agencies to advance in the private sector the policy of individual initiative, excellence, and hard work identified in section 2 of this order."

(B) 4(b) "[t]o further inform and advise me so that my Administration may formulate appropriate and effective civil rights policy, the Attorney General, within 120 days of this order, . . . shall submit a report . . . containing recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI.

d. By February 3, 2025 the first lawsuit in the USDC for the District of Maryland had already been filed.

i. It is unclear just how this may impact the private sector as of today.

ii. The lawsuit, *National Association of Diversity Officers in Higher Education, et al v Trump* brings a six (6) count complaint alleging that the EO is: ultra vires, unconstitutionally vague and violates the Due Process Clause, in violation of the Free Speech Clause, and in violation of the Separation of Powers in the Constitution.

e. On the flip side of the coin, as to any large companies that are upholding their standing DEI practices, some states have already shown that they intend to make good on the provision in the EO that calls on State AG's to enforce the EO in the private sector.

i. The AGs of 19 other states have already issued a warning to Costco via a letter, urging the CEO of Costco to "end all unlawful discrimination imposed by the company through [DEI] policies" within thirty (3) days of receipt of the letter. The 19 nineteen (19) AG's also urge Costco to "do the right thing."

C. Must remember that Executive Orders cannot impact the laws that are currently in place without an act of Congress, and of course, subsequent case law on the subject. Also, the distinction between the Federal sector and the private sector needs to be considered as the State would control the private sector.

1. Important to recall that Michigan has codified certain protections which could be considered DEI in its legislature. (MCL 37.2202).

2. With that said, employers should not just discontinue their existing policies and procedures geared towards preventing discrimination.

3. The general overtone of these Orders though is to focus more on a "merit-based" opportunity.

4. It goes without saying that workplaces can still promote diversity and inclusion and still hire the most meritorious of candidates who happen to be a minority, non-conforming gendered, homosexual or disabled.

D. Outside of the Federal Government – these Executive Orders do not have effect on private sector workers and Employers do not do away with the federal laws, Title VII and their own state laws regarding protections for sex, race, national origin, religion, etc.

IX. CONCLUSION

A. What to do about current policies and procedures?

1. It remains to be seen how long President Trump's Executive Orders will be held up in the Court Systems, or how they will be ultimately ruled upon.

2. Adherence to "DEI" practices or practices based on "Merit" as outlined in the Executive Orders right now is not absolute.

3. Employers need to be clear about what the Civil Rights Act provides for in addition to specific state requirements such as ELCRA in Michigan to determine how they move forward navigating updates to internal policies and procedures.

B. Further, Employers need to be careful to avoid any backlash from promoting anti-discrimination practices and keeping up to date on exactly where these Orders stand and how they are being enforced.

1. This includes staying in the know about where the Executive Orders stand and how they could eventually affect, or not affect the private sector.