Special Edition Webinar: Labor and Employment Law Update 2025 and What's Ahead for 2026

January 13, 2026

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BOND SCHOENECK & KING ATTORNEYS

President Trump's Executive Orders

- January 2025
- "Gender Ideology Extremism" Executive Order
- "Restoring Equality of Opportunity and Meritocracy" Executive Order
- "Ending Illegal Discrimination And Restoring Merit-Based Opportunity" Executive Order

“Gender Ideology Extremism” Executive Order

- Directs federal agencies to define "sex" only as a binary biological classification determined at conception
  - Explicitly rejects "gender identity"
- Requires sex-segregated spaces (like restrooms) to be based on biological sex rather than gender identity in federal facilities
- Requires Federal systems and identification documents (including passports) to recognize “male” and “female” designations based on sex assigned at birth
- Directs the Attorney General to issue guidance about "single-sex spaces" in workplaces more broadly

"Restoring Equality of Opportunity and Meritocracy" Executive Order

- Creates a policy to "eliminate the use of disparate-impact liability in all contexts to the maximum degree possible…"
- **Note** – the EO does not change statutes or overturn case law – on the federal or state level

"Illegal Discrimination" Executive Order

- Eliminates federal contractor affirmative action requirements
  - **Note** – disability and veteran aspects of affirmative action are not impacted by this EO
- Prohibits Office of Federal Contract Compliance Programs ("OFCCP") from
  - Promoting diversity
  - Holding contractors responsible for taking affirmative action
- Requires OFCCP to cease investigative and enforcement activity

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"Illegal Discrimination" Executive Order

- Directs federal agencies to take "all appropriate action" to advance "individual initiative, excellence and hard work" in the private sector
- Directs the Attorney General to provide recommendations for enforcing federal civil rights laws and encourage the private sector to end illegal discrimination and preferences, including DEI

From the Chair of the EEOC

"Consistent with the President's Executive Orders and priorities, my priorities will include 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."

US DOJ Guidance for Recipients of Federal Funding

- Outlines “the significant legal risks of initiatives that involve discrimination based on protected characteristics and provides non-binding best practices to help entities avoid the risk of violations.”
- **Note** – while not directed at employers who do not receive federal funding, the guidance provides insight into the administration’s enforcement priorities

US DOJ's Guidance – Unlawful Discriminatory Policies or Practices

1. Granting preferential treatment based on protected characteristics, including:
   - Preferential hiring or promotion practices
   - Access to facilities or resources based on protected status (e.g., "safe spaces" designated for individuals of a specific group)

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US DOJ's Guidance – Unlawful Discriminatory Policies or Practices

2. "Proxies for protected characteristics" – use of neutral criteria that function as substitutes for explicit consideration of protected characteristics.
   - Such criteria become legally problematic when they are either:
     - Selected because they correlate with, replicate, or are used as substitutes for protected characteristics or
     - Implemented with the intent to advantage or disadvantage individuals based on protected characteristics
   - Example – requiring applicants to demonstrate "cultural competence," "lived experience," or "cross-cultural skills" in ways that effectively evaluate candidates' racial or ethnic backgrounds

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US DOJ's Guidance – Unlawful Discriminatory Policies or Practices

3. Segregation based on protected characteristics, such as:
   - Race-based training
   - Segregation of facilities or resources (e.g., LGBTQ lounge)
4. Unlawful use of protected characteristics, such as:
   - Race-based "diverse slate" hiring – requiring that all interview slates for positions include a minimum number of candidates from specific racial groups (e.g., at least two "underrepresented minority" candidates)
   - Tying program participation to protected status – internship program requiring X% of selected participants be from "underrepresented racial groups" or female students

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US DOJ's Guidance – Unlawful Discriminatory Policies or Practices

5. Training that promotes discrimination or hostile environments
   - Requiring employees to complete a DEI training that includes statements stereotyping individuals based on protected characteristics, such as:
     - "All white people are inherently privileged"
     - "Toxic masculinity"

EEOC/DOJ Guidance on "Unlawful Discrimination" Related to DEI in the Workplace

- Title VII protection is not limited to only "minority groups" and women
- Employer policies and practices motivated in whole or in part by a protected characteristic may be unlawful (e.g., quotas or "balancing" practices)

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EEOC/DOJ Guidance on "Unlawful Discrimination" Related to DEI in the Workplace

- Limiting or segregating employees based on protected characteristics is prohibited
  - DEI-related examples:
    - Limiting membership in ERGs/Affinity Groups
    - Separating workers into groups based on protected characteristics when administering training
- Employers cannot justify unlawful DEI activities based on their interest in promoting diversity, including preferences by the employer's clients or customers

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EEOC/DOJ Guidance on "Unlawful Discrimination" Related to DEI in the Workplace

- Unlawful DEI training may create a hostile work environment
  - "Role reversal" exercise where men were subjected to conduct/behavior that mimicked conduct directed at women
- Opposing unlawful employment discrimination related to an employer's "DEI" policy or practice may be protected activity
  - Opposition to a DEI training may constitute protected activity when the employee provides a fact-specific basis for their belief that the training is unlawful

From the US DOJ

- Private parties are strongly encouraged to file lawsuits and litigate claims under the False Claims Act ("FCA") or New York False Claims Act ("NYFCA").
  - Defrauding the state
  - Protecting whistleblowers from retaliation
- Anyone with knowledge of discrimination by federal-funding recipients is encouraged to report that information to the appropriate federal authorities.

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

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on protected characteristics such as race and sex. Different treatment based on race, sex, or another protected characteristic can be unlawful discrimination, no matter which employees are harmed. Title VII's protections apply equally to all racial, ethnic, and national origin groups, as well as both sexes.

Before you can sue in federal court, you first must file a charge of discrimination with the EEOC. The U.S. Equal Employment Opportunity Commission (EEOC) investigates charges of discrimination and can file a lawsuit under Title VII against businesses and other private sector employers. The Department of Justice can file a lawsuit under Title VII against state and local government employers based on an EEOC charge, following an EEOC investigation.

What can DEI-related discrimination look like?

Diversity, Equity, and Inclusion (DEI) is a broad term that is not defined in the statute. Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action **motivated**—in whole or in part—by an employee's race, sex, or another protected characteristic. In addition to unlawfully using quotas or otherwise "balancing" a workforce by race, sex, or other protected traits, DEI-related discrimination in your workplace might include the following:

Disparate Treatment

DEI-related discrimination can include an employer taking an employment action motivated (in whole or in part) by race, sex, or another protected characteristic. Title VII bars discrimination against applicants or employees in the terms, conditions, or privileges of employment, including:

- Hiring
- Firing
- Promotion
- Demotion
- Compensation
- Fringe benefits
- Exclusion from training
- Exclusion from mentoring or sponsorship programs
- Exclusion from fellowships
- Selection for interviews (including placement on candidate slates)

Limiting, Segregating, and Classifying

Title VII also prohibits employers from limiting, segregating, or classifying employees based on race, sex, or other protected characteristics in a way that affects their status or deprives them of employment opportunities. Prohibited conduct may include:

- Limiting membership in workplace groups, such as Employee Resource Groups (ERG) or other employee affinity groups, to certain protected groups
- 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

Harassment

Title VII prohibits workplace harassment, which may occur when an employee is subjected to unwelcome remarks or conduct based on race, sex, or other protected characteristics. Harassment is illegal when it results in an adverse change to a term, condition, or privilege of employment, or it is so frequent or severe that a reasonable person would consider it intimidating, hostile, or abusive. Depending on the facts, DEI training may give rise to a colorable hostile work environment claim.

Retaliation

Title VII prohibits retaliation by an employer because an individual has engaged in protected activity under the statute, such as objecting to or opposing employment discrimination related to DEI, participating in employer or EEOC investigations, or filing an EEOC charge. Reasonable opposition to a DEI training may constitute protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII.

Who can be affected by DEI-related discrimination?

Title VII protects employees, potential and actual applicants, interns, and training program participants.

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

If you suspect you have experienced DEI-related discrimination, contact the EEOC promptly because there are strict time limits for filing a charge. The EEOC office nearest to you can be reached by phone at 1-800-669-4000 or by ASL videophone at 1-844-234-5122.

www.EEOC.gov

Takeaways

- Need not abandon all initiatives, but may need to reevaluate, refocus and evolve
- Focus on equal opportunity as opposed to equal outcomes
  - Merit-based decisionmaking
- Train supervisors and managers on what is and is not permissible

US DOL Developments

Liquidated Damages Relief

- New guidance on June 27th, the US DOL will no longer automatically seek liquidated damages in wage and hour investigations
  - Liquidated damages will only be available as a judicial remedy in lawsuits brought by employees or the Secretary of Labor
  - WHD will not demand, accept, or leverage liquidated damages in any way in a pre-litigation administrative resolution
- **Note** – New York's Labor Law permits both the NYS DOL and courts to impose liquidated damages of up to 100%

US DOL Re-Launches Opinion Letter Program

- In June, the US DOL re-launched an opinion letter program that will allow employers to receive legal advice on how labor laws apply to certain situations.

- Notable Opinions Include:
  - FMLA Leave with Mandatory OT and Voluntary OT: Count any hours employee would normally work, including regular mandatory OT; voluntary OT should not be deducted from leave entitlement
  - Six new opinions issued last week on FLSA and FMLA

Independent Contractor Status – Reversion to July 2008 "Economic Realities" Guidance For Enforcement

- Factors considered under the economic reality test –
  1. Extent to which the services rendered are an integral part of the principal's business
  2. Permanency of the relationship
  3. Alleged contractor's investment in facilities and equipment
  4. Nature and degree of control by the principal
  5. Alleged contractor's opportunities for profit and loss
  6. Amount of initiative, judgment, etc. required for the success of the claimed independent contractor
  7. Degree of independent business organization and operation
- **Note** – the NYS DOL's position on independent contractor status remains unchanged

EEOC Updates

EEOC – Status Update

- From January 28 to October 27, 2025, the EEOC did not have a quorum of Commissioners and could not vote on rulemaking, issue new policies or rescind guidance documents
- On October 27th, Republican Brittany Panuccio was sworn in – giving the EEOC a quorum
- On November 6th, President Trump named Andrea Lucas Chair of the EEOC
- ***Takeaway*** – buckle your seatbelts…

Pregnant Workers Fairness Act (PWFA)

- Statute took effect June 27, 2023
- Regulations took effect June 18, 2024
- EEOC Chair Andrea Lucas voted against the PWFA regulations and has made clear her intent to reconsider them
  - Specifically – the definition of "pregnancy, childbirth, or related medical conditions" to include "virtually every female reproductive–related condition", such as infertility, fertility treatments, menstruation, contraception.
- Lucas has indicated the PWFA's protection should be limited to known limitations of pregnancy and childbirth, and medical ailments caused or exacerbated by the pregnancy or childbirth
- ***Takeaway*** – stay tuned

EEOC & Gender Identity

- The EEOC has indicated it will classify all new gender identity-related discrimination cases as its lowest priority
  - Agency employees were told to code cases involving gender identity with a "C," the agency's lowest ranking for cases, which classifies them as meritless or lowest priority (effectively halting investigations)

EEOC / NYSDHR Cooperation

- Under work sharing agreements, state and local civil rights agencies investigate 2/3 of the discrimination charges filed with the EEOC
- On May 20, 2025, the EEOC informed state and local human rights agencies that they would not pay them to process claims involving transgender workers or those based on disparate impact
  - The NYS DHR receives approximately 5% of its funding from the EEOC

New York State Developments

Paid Prenatal Leave

- Effective January 1, 2025, New York employers are required to provide eligible employees up to 20 hours of paid prenatal leave during “any 52-week period”
- Leave is provided under the Paid Sick Leave Law (PSL) but is in addition to current allotment of PSL
- Leave can be used in 1-hour increments for any qualifying reason (i.e., health care services during pregnancy or related to pregnancy including physical exams, medical procedures, monitoring, testing and discussions with a health care provider related to the pregnancy)

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Paid Prenatal Leave – FAQs

- **Can spouses, partners, or other support persons use Paid Prenatal Leave to attend prenatal appointments with a pregnant person?**
  - No, Paid Prenatal Leave may only be used by the employee directly receiving prenatal health care services
- **Does an employee accrue Paid Prenatal Leave?**
  - No, all employees automatically have 20 hours of Paid Prenatal Leave

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Paid Prenatal Leave – FAQs

- **Does this law apply to fertility treatment or care appointments, including in vitro fertilization?**
  - Yes
- **Are employees required to submit medical records or documents to their employer?**
  - No, and employers cannot ask employees to disclose confidential information about their health condition(s)
- **Can an employer ask employees for details about my prenatal appointments?**
  - No, and employers cannot ask employees to disclose confidential information about their health condition(s)

Reproductive Health Notice of Rights

- New York Labor Law § 203-e enacted (2019)
  - Employers cannot access employee's personal information regarding reproductive health decision making without prior written consent
  - Prohibits discrimination and retaliation based on reproductive health decision making
  - Required employers to include notice of rights and remedies under law in employee handbooks by January 7, 2020
- March 29, 2022 – federal district court enjoined enforcement of notice provision
  - Found notice requirements compelled employer to deliver message contrary to their religious beliefs as related to reproductive health choices (cont.)

Reproductive Health Notice of Rights

- January 2, 2025 – Second Circuit vacated injunction
  - Found the notice requirement is similar to other federal and state law-required workplace disclosures
- Employers that provide an employee handbook must comply with NYLL § 203-e(6) and include a reproductive health notice of rights
- ***Takeaway*** – Review your handbook to ensure it has been updated to reflect this change

Jury Duty Pay

- Effective June 8, 2025, the minimum daily jury duty compensation in New York increased $40 to $72 per day for the first three days of service

- Reminder – Exempt employees who perform any work during a week in which they are on jury duty must be paid their full salary under applicable wage and hour laws

Unemployment Insurance Update

- As of October 1, 2025, the Maximum Weekly Benefit increased from $504 to $869

Update to NY Executive Law § 296(7) – Prohibits Retaliation for Reasonable Accommodation Requests

- The New York State Human Rights Law (NYSHRL) was amended to prohibit retaliation for accommodation requests, which went into effect December 5, 2025.

- The amended language now provides:

  - It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because ~~[he or she]~~ **such person** has **(i)** opposed any practices forbidden under this article**, (ii)** filed a complaint, testified, or assisted in any proceeding under this article ~~[or because he or she has]~~**, or (iii) requested a reasonable accommodation under this article**. Retaliation may include, but is not limited to, disclosing an employee's personnel files because ~~[he or she]~~ **such employee** has **(i)** opposed any practices forbidden under this article ~~[or because he or she has]~~**, (ii)** filed a complaint, testified, or assisted in any proceeding under this article**, or (iii) requested a reasonable accommodation under this article,** except where such disclosure is made in the course of commencing or responding to a complaint in any proceeding under this article or any other civil or criminal action or other judicial or administrative proceeding as permitted by applicable law.

WHAT'S AHEAD FOR 2026

NY Secure Choice Savings Program – Quick Facts

1. New York has officially launched the Secure Choice Savings Program. It requires certain private-sector employers without retirement plans to facilitate employee access to state-sponsored Roth IRAs.
2. The Program covers all employers in New York who meet certain criteria.
   - Businesses must have employed 10 or more employees in the state during the prior calendar year, have been in business for at least two years and not currently be sponsoring a qualified retirement plan for their employees.
3. The Program will notify employers by mail or email of their requirement to register. Businesses can also take proactive steps to register, though.

NY Secure Choice Savings Program – Employer's Role

- Under the Program, an employer's role is limited to facilitating employee access to a Roth IRA in the employee's name. Employer obligations are generally limited to:
    1. Providing informational materials to their employees;
    2. Registering with the Program;
    3. Uploading employee information; and
    4. Coordinating with payroll providers and submitting participating employee contributions through payroll deductions each pay period.
- Employers are not required to make monetary contributions, nor do they have any fiduciary responsibilities with respect to the Roth IRAs created under the Program.

NY Secure Choice Savings Program – NY Communication Requirements

- Once employees are added to the Program, the State will communicate with them directly to inform them of the 30-day period they have to customize their savings rate and investment choices.
- Following this 30-day period, employers will record their employees' choices, begin payroll deductions and submit contribution information and funding for the employees who choose to stay in the program.

NY Secure Choice Savings Program – Deadlines for Employers to Implement the Program

- **March 18, 2026:** Employers with 30 or more employees.
- **May 15, 2026:** Employers with 15 to 29 employees.
- **July 15, 2026:** Employers with 10 to 14 employees.

New York Minimum Wage Increases

Year	NYC, LI & Westchester	Upstate NY
2025	$16.50	$15.50
2026	$17.00	$16.00
2027+	$17.00+	$16.00+

- Effective January 1, 2027 annual adjustments will be based on Consumer Price Index CPI-W (northeast, urban and clerical workers)

Paid Family Leave ("PFL") – 2026 Edition

	2025	2026
Payroll Contribution Rate (as a % of AWW)	0.388% of wages per pay period	0.432% of wages per pay period
Maximum Annual Employee Contribution	$354.43	$411.91
Length of Leave	12 Weeks	12 Weeks
Benefit (as a % of AWW)	67%	67%
Cap on Benefit Rate	$1,177.32	$1,228.53
Maximum Total Benefit	$11,893.32	$14,742.36

New Legislative Changes in New York State

- The following bills have passed the Senate and Assembly and have been signed into law by the Governor:

1. **Ban on Credit History in Employment Decisions:** Employers are barred from using a candidate's consumer credit history when making employment decisions. Exceptions include roles involving high-level security access or significant financial control. This bill becomes effective 120 days after signed (April 18, 2026).

2. **"Trapped at Work" Act:** Employers are prohibited from requiring workers to agree to reimburse the employer for training provided to the worker by the employer or a third party. Legitimate repayment agreements – such as for wage advances – would still be permitted.

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Questions?