

Expect the Unexpected: The NLRB and EEOC During Trump 2.0

By Michael D. Thomas & Mark P. Tilkens

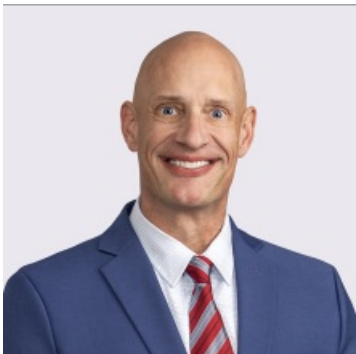
March 6, 2025

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Details

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Transcript

INTRO

Since taking office, President Trump has made significant changes at federal agencies affecting workplace regulations. In addition to appointing new leadership, President Trump swiftly removed sitting commissioners of the EEOC and NLRB, limiting a number of key agency operations.

On this episode of We get work[®], we explain the seismic shifts that have taken place in the last month and discuss what employers can anticipate from these agencies now and in the near future.

Our hosts today are Michael Thomas, co-leader of the Corporate Diversity Counseling Group, and Mark Tilkens, a core member of the Labor Relations Group, and principals, respectively, in Jackson Lewis's Orange County and Dallas offices.

Michael and Mark, the question on everyone's mind today is: How will changes at the EEOC, NLRB and other key administrative agencies affect employers, and how does that impact my business?

CONTENT

Michael D. Thomas

Principal, Orange County

The start of the Trump administration has really brought significant changes to many areas of employment law, including to federal agencies. The National Labor Relations Board and the Equal Employment Opportunity Commission are no exceptions. Some moves have been anticipated, but others were not. Some moves have occurred before in the past. So, there's at least some precedent, but some

moves are just really unprecedented. So, we're here to discuss some of the current changes to the NLRB and the EEOC and what you can do as an employer to make sure that you are being proactive.

My name is Michael Thomas. I am a principal in our Irvine, California office and co-chair of our National Diversity Consulting Group. I'm here with my good friend and colleague, Mark Tilkens.

Mark P. Tilkens

Principal, Dallas

Thank you, Michael. It's great to be here. My name is Mark Tilkens. I am a principal in the Dallas, Texas office. I have played, at least for the last decade, a primary role in our Labor Relations Group. Union relationships, the approach to handling employee relations and the effect of all of that federally protected activity on the part of employees are primary focuses of mine.

Thomas

Excellent, Mark. Let's just jump right into it. Some people are familiar with NLRB, and some people may not be. So, Mark, what is NLRB and really, what's within its jurisdiction?

Tilkens

Thank you. This is an important one for employers who don't have a represented workforce with no union in there. Oftentimes, that's something that's misunderstood. The National Labor Relations Board, or as we call it, the NLRB, is an independent agency of the federal government. It was created in 1935 by Congress in connection with enforcing the brand-new National Labor Relations Act, which was a remedial law passed at that time. The NLRB ensures that employees have the right to organize and the right to engage in collective bargaining through a representative of their choosing. Most of the time, that's a traditional union, but at times, it becomes a new or employee-created union. The NLRB is also responsible for making sure that employees have the right to refrain from such activities.

The job of the NLRB historically has been to supervise representation elections as well as investigate and remedy unfair labor practices. It's governed and commissioned by a five-person board and a General Counsel. All of those individuals, the five members and the General Counsel, are positions that are appointed by the President of the United States with Senate approval.

Thomas

Thanks, Mark, that is very, very helpful. So, what are some recent changes at the NLRB?

Tilkens

Well, these are not boring times. However, we must understand that the NLRB is an agency, unlike many parts of the federal government, that historically is one of the most volatile. So, over the course of the last 90 years, the National Labor

Relations Board has undergone incredible swings in the doctrine and the effect and meaning of the National Labor Relations Act for employers. That's because they have an incredible amount of regulatory and administrative authority, which was the intent of Congress. So, unlike other agencies that often fall under some scrutiny as of late with regard to the freedom or latitude that they've taken in connection with how they administer or interpret laws, the National Labor Relations Board is actually one that has never been boring.

These days, it's even less boring than it has been in the past. So, what we've seen lately is the expected termination of General Counsel Jennifer Abruzzo. I say expected because, for the first time in history, it was unprecedented when President Biden terminated the previous General Counsel. Normally, they were allowed to continue their term. There was litigation that followed that termination, and the litigation was unsuccessful. So, everyone who was paying attention to the change in administration expected Jennifer Abruzzo to be terminated, and indeed, President Trump did so.

What was not expected was the termination of Board member Wilcox. This was a first. We had not experienced in the history of the National Labor Relations Board a termination of a sitting and Senate-approved member of the National Labor Relations Board. Because of that change, we expect further litigation. We don't know at this point whether the litigation that she's planning to file and has already announced publicly is going to proceed or whether that will be successful.

But what we do know is whether or not that's successful, the Board has been deprived of a quorum, and this is the second time that we have had that happen. It happened during President Obama's presidency. We were without a quorum in connection with the inappropriate appointing of members, and a number of decisions had to be relitigated or reapproved by the ultimately properly appointed board. So, it's not entirely uncharted waters. But it is in some way because we have not seen the termination of a Board member before.

Finally, we are experiencing significant change. It was expected, but on Friday of last week, Acting General Counsel William Cowan rescinded a series of Guidance Memos from General Counsel Jennifer Abruzzo, where she laid out her vision for the Board. Those were all rescinded. In there were a number of prosecutorial initiatives and policy objectives, and those have all been withdrawn. We expect there will be further guidance coming from the new General Counsel, and it will look in many regards similar to what we saw during the previous Trump presidency.

Thomas

It sounds like there is a lot of change going on at NLRB, especially at a time when there is a rise or an increase in unionization. In some ways, it has become easier for employees to form a union. We don't have quorum at NLRB. So, how will these changes impact employers?

Tilkens

There are two things to think about here. One is what will change and what will not

change. I'll start with what things are not going to change in connection with no quorum. Employers will not see a paralyzing of the regional offices that are responsible for investigating unfair labor practice charges against employers. The employers will not see an inability for the regional offices to process election petitions. Those things will continue since there isn't a need for an appeal body, that is, the Board. There isn't a need for a quorum for those administrative day-to-day functions of the regional offices. We will continue to see the Board, at least at the very early stages of action, through the regional offices continuing to do business as employers had. Now, that has slowed because there's such a backlog of cases waiting for trial over the last two to three years, but we will continue to see it. So, that is what is not going to change.

What will change immediately for employers is that there are not going to be any appeals issued in connection with decisions that have been appealed to the full Board because we don't have a full Board. So, we're not going to see anything coming out of the NLRB. We are also not going to have a resolution regarding the litigation over the termination of Board member Wilcox anytime soon. Litigation through the courts is notoriously slow. It will be here. This was by design. This was intended to paralyze the NLRB.

For employers, one of the things that they have to take away from this is that the impact on them should not be viewed as something that changes their employee relations, their labor relations and their moral compass with regard to the workplace environment they create for employees. It should be something that is going on and is viewed mostly as noise because if they violate labor law, the regional offices will continue to demand investigations. There will be continued demand for documentation, and they will be held to account for those decisions. So, this is not the Wild West for employers if they're doing things correctly.

Thomas

With that in mind, what should employers do to prepare for these changes and potential changes that could be coming down the road that may or may not be expected?

Tilkens

There are a few main things employers should take away from this. They should understand that chaos is very contagious. For the last four to five years, in particular, but certainly beyond that, it has been a very significant period of turmoil and change in the workplace for employees. Chaos is very contagious, but calm is equally contagious. So, in this era of uncertainty from the National Labor Relations Board, employers have to recognize that it is important for them not to contribute to the volatile swings that we're seeing across the doctrine from the NLRB and that we're likely to see throughout the remainder of the Trump presidency.

As a takeaway from that, employers should significantly look at the issue of 'smart risk' differently than they have in the past. So, most of the time in the past, the volatile changes from the National Labor Relations Board have been things that have been evaluated by labor relations or lower-level HR people. They've made decisions about these issues because they had some prior experience with them

during previous administrations, in a previous employment life or with a union. They have more knowledge about this area than many of the people they report to because it is a very niche area, including C-suite folks. So, they would make those risk calculations in a vacuum. They would recommend policy changes. They would make decisions in connection with input of information on termination or disciplinary decisions. Those siloed risk assessments are dangerous.

With an ever-changing NLRB, this is time for employers to evaluate in what we like to call 'smart risk' analysis. Advise C-suites, advise the HR leadership, advise management leadership of what the changes mean, what their pros and cons are and make a fully informed risk decision. It's terribly unpopular for an HR person or labor relations person to answer questions when one of those leaders is surprised by some board charge or action and asks, why was I not informed that you made a change with regard to how we were going to administer our policies or practices? That's true for a lot of areas of the law, but it's one that's been a gap for employers on the labor side for a while. This is an area that we strongly recommend that they do a little better job of educating those internal stakeholders and making a fully informed 'smart risk' decision.

Thomas

I like that. Thanks, Mark. It's really helpful that staying calm versus being reactionary is the better approach.

Tilkens

Yes, thank you. Well, I'd love to ask you a few questions about areas that you know much better than I do. I have been listening and paying attention to all of the authors that are writing on the topic of DEI, and it's been a hot topic and in the news a lot lately, in light of all the executive orders and changes to the EEOC.

I'd really love to hear from you, Michael. What is the EEOC? If you could just back up for many of our listeners. What is within their jurisdiction? That would be a great starting point.

Thomas

The EEOC, Equal Employment Opportunity Commission, is charged with enforcing and setting the policy agenda for enforcing federal anti-discrimination laws. So, that's both the enforcement and setting the agenda, which becomes important. I'll talk about that a little bit later.

However, just like the NLRB, the EEOC is bipartisan. The EEOC has five Commissioners appointed by the President and confirmed by the Senate. So, there's a Chair, Vice Chair and one Commissioner who are members of the majority party. So, that's three of the five, while the two Commissioners are members of the minority party. It is a bipartisan agency, which will become important.

The five-member bipartisan agency approves policy agendas. They approve most of the litigation and make decisions regarding policy issues, litigation recommendations, federal sector appellate cases, amicus curiae briefs and subpoenas. So, the EEOC is a pretty active agency.

Tilkens

Thank you so much for that helpful background. What are some of the changes that are occurring right now that I've been reading and seeing some headlines about, even if I didn't have time to dig into those articles? What's going on out there?

Thomas

I'll try to keep it short, but we have a new administration, and as you mentioned, Mark, this new administration is moving very quickly with a whole bunch of different agencies and making a lot of changes in a short period of time. Some things are expected, some things are unexpected. So, what is expected?

What was expected was that on January 21st, Commissioner Andrea Lucas was named Acting Chair. Commissioner Lucas was appointed by Trump during his first administration. So, she's now the Acting Chair. Also, as expected, on January 27th, President Trump fired General Counsel Karla Gilbride. That same day, in an unanticipated move, President Trump removed Commissioners Charlotte Burrows and Jocelyn Samuels. That ended a Democratic Commission majority that we actually had expected to exist until 2026. So, now only Acting Chair Lucas and Commissioner Kotagal remain. Similar to the NLRB, the EEOC does not have quorum. The EEOC only has two members. I'll come back to that in a little bit to discuss what that means. The other thing that President Trump did was on February 4th, he named Andrew B. Rogers as Acting General Counsel. In some ways, it is not surprising. Mr. Rogers previously served as Chief Counsel to Chair Lucas, so there's some familiarity there.

Then, in an agency press release on January 28th, Chair Lucas set forth the policies that she intends to implement within her power now that she is chairing the agency once approved by the Senate. What she laid out was that she understands our nation's civil rights laws reject identity politics and instead focus on individual rights and equality. She prioritizes even-handed enforcement of civil rights laws for all Americans, including by rooting out 'unlawful DEI' motivated by race and sex discrimination. She focused on protecting American workers from anti-American national origin discrimination and defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces. She is going to focus on protecting workers from religious bias and harassment and remedying other areas that have been historically under-enforced by the agency, which is somewhat undefined. The statement that was released on the website is very much aligned with the President's recent executive orders regarding 'illegal DEI' and gender.

We've seen the EEOC recently take some steps to really enforce that newer policy agenda that is aligned with some of the President's executive orders. What I mean by that is, most recently, the EEOC actually moved to dismiss six of its own cases on behalf of workers alleging gender identity discrimination. In dismissing those cases, they argue that now that there is a new administration and a new EEOC, the cases conflict with President Trump's recent executive orders. These are some of the changes that we are going to see with the new composition of the EEOC.

Tilkens

That is a lot of change. Thank you, Michael. How are those changes going to impact on employers?

Thomas

So, in general, the EEOC approach to litigation and even policy direction might be starkly different than what it has been in the past. As I mentioned, they recently withdrew cases involving gender identity. But just last year, the EEOC actually updated its guidance to specifically and deliberately state that using the wrong pronouns for an employee or refusing them access to bathrooms corresponding to their gender identity constituted a form of harassment. That is now a direct reversal just one year later followed the Supreme Court's 2020 decision in *Bostock v. Clayton County* ruling that gay, lesbian and transgender people are protected from employment discrimination. So, now that focus is very different. That's one example that employers might see where the EEOC's focus is starkly different than it's been in the past.

Similar to the NLRB, without quorum, there are some changes that are not likely because they cannot occur. So, without quorum, they will not be able to revoke old guidance nor institute new guidance. They are not going to be able to revise or implement regulations. You should still comply with the EEO1 requirements. It is going to be a challenge to make changes to those. There's also going to be an impact on litigation. Again, I mentioned the focus might be a little bit different. Also, without quorum, there is no current mechanism for the Commission to approve pattern, practice or systemic cases. So, for that type of litigation, there's no quorum to approve that. Again, we're going to see a greater focus on the policy agenda laid out by Acting Chair Lucas. Some of that will focus on what the Trump administration refers to as 'illegal DEI.' Litigation is already pending and is likely to continue. Again, we saw this recently with the six cases that were on gender identity that they moved to dismiss. There could be additional cases that Acting General Counsel Rogers may choose not to pursue. Finally, there could be an impact on both charges and subpoenas as well. So, a lot for employers to keep in mind.

Tilkens

That's super helpful, Michael. If we transition and reflect on all those impacts from a prep or a best practices standpoint, what are we recommending and what do you suggest employers do to prepare for all those changes and their impacts?

Thomas

In some way, similar to what you were saying within NLRB, although this remains a fast-changing environment, existing EEOC litigation and charge investigations are likely to proceed as usual. The exception is that it is going to have a different focus. The focus will be more on the policies that I mentioned earlier. So, employers still need to take steps to comply.

Employers still need to take steps to identify what are practical solutions to mitigate the risk of charges and litigation. Employers might want to take a step back and reevaluate some of their strategies and cases now that the focus of the

EEOC is different. But again, employers need to just conduct privileged investigations and privileged DEI assessments and review their current policies and handbooks for anything that might fall within the purview of the EEOC's new focus or agenda.

Tilkens

Thanks very much, Michael. This really remains a fast-changing environment. There are some things that we really want to emphasize that have not changed. That is, specifically, employers should comply with the law. They should consider practical solutions to mitigate the risk of any changes that come from the government, including states. They should reduce litigation with an eye towards being the rock of stability in the lives of their employees while they're on the receiving end in a very tech-heavy environment of continued news stories all designed to generate a click. We're here to help you, and we're very thankful for that. So, Michael, thank you for the great conversation today and thank you, everyone, for listening. It's been our pleasure.

OUTRO

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