



# The Second Trump Administration: Anticipated Key Priorities and Changes for Labor & Employment Regulation and Enforcement

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**Seyfarth Shaw LLP**

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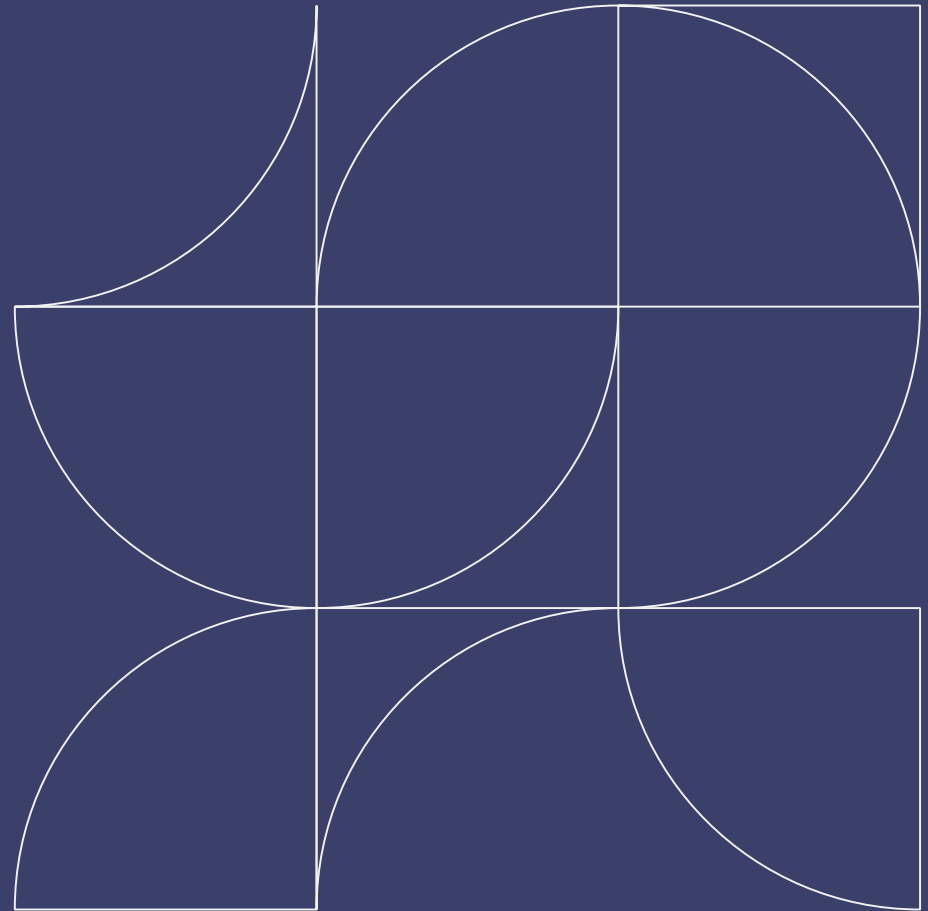


## Agenda

- 01 EEOC Priorities in the Second Trump Administration
- 02 NLRB Priorities in the Second Trump Administration
- 03 DOL Priorities in the Second Trump Administration
- 04 Immigration Priorities in the Second Trump Administration

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# EEOC Priorities in the Second Trump Administration



# EEOC Leadership Options for the Second Trump Administration

## Personnel Options

- President Trump will likely name current EEOC Commissioner Andrea Lucas as Acting Chair on Day 1.
- Assuming the current EEOC Commissioners all serve out the rest of their terms, Republicans will not have a majority on the EEOC until July 2026, when Jocelyn Samuels' term expires.
- EEOC currently has 3 Democrats and 1 Republican
  - There is currently one vacancy on the 5-member Commission.



## Much of the EEOC's Routine Work Has Bipartisan Support

- Under its current voting procedures, the EEOC votes to initiate **some** litigation, and votes on **all** amicus filings.
- The EEOC's FY24 voting records show:
  - Lucas voted to approve 22 / 24 (**92%**) of the **litigation recommendations** presented for a vote.
  - Lucas voted to approve 27 / 38 (**71%**) of the **amicus filings** presented.
  - Lucas voted to approve 14 / 26 (**54%**) of the "**non-litigation recommendations**" (category includes rulemaking).

# EEOC Litigation and Enforcement and Career Staff

- Pursuant to Title VII, EEOC litigation is “conducted” by the General Counsel.
  - The Commission votes to *initiate* litigation, but the GC “*conducts*” litigation.
  - President Trump can fire the EEOC GC, and the Senate could confirm a replacement, but on her own the GC cannot initiate new litigation without Commission approval.
- We predict that like the rest of the federal government, the EEOC will face ongoing staffing challenges, meaning fewer resources for enforcement and litigation efforts.
  - EEOC already faced budget challenges in 2024, under Democratic leadership.
  - “Schedule F” will be subject to challenge and federal hiring takes time.



## EEOC Chair's Powers

- The Chair controls what the EEOC votes on.
- Under the EEOC's current procedures, she can **prevent** litigation or amicus briefs from being presented for an approval vote.
- The Chair can control what the EEOC says in its press releases.
- The Chair can issue, on her own authority, "technical assistance" documents.
  - Frequently updated COVID-19 "what you should know" was TA issued solely under the Chair's authority.
  - Chair can also revoke prior TA.

## The EEOC as a Whole Must Vote to Approve Key Aspects of its Work

- Changing the EEOC's Strategic Plan or Strategic Enforcement Plan ***requires a vote.***
- Passing or revoking new guidance (or even starting the rulemaking process by publishing notices) ***requires a vote.***
- Initiating new data-collection efforts (such as pay data collection) or changing existing data-collection efforts (such as EEO-1 reporting) ***requires a vote.***

# Policy Priorities of the EEOC Under the Second Trump Administration

- As a Commissioner, Andrea Lucas spoke out regarding her view that many private-sector employers' DEI programs violate Title VII
- Lucas has also emphasized religious freedom and religious accommodation issue, as well as disability accommodation issues
- She praised the passage of the Pregnant Workers Fairness Act as a “tremendous, bipartisan achievement” she sharply criticizing the rule’s scope.

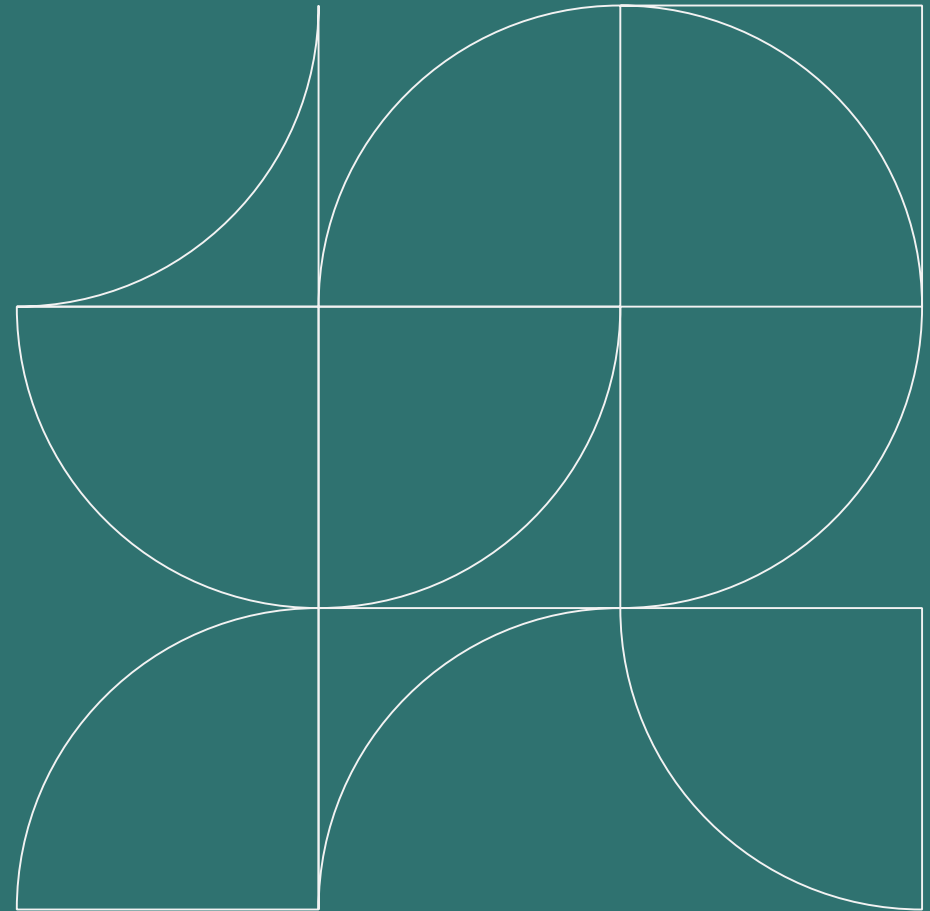
Key Questions: Will Acting Chair Lucas be able to push through reluctance from career enforcement staff in order to advance Republican policy priorities, such as challenging corporate DEI programs?

# Artificial Intelligence Priorities of the Second Trump Administration

- Many people close to Trump see AI as a national security issue.
- Traditional conservative instincts to remain “hands off” on regulation may be in conflict with concerns expressed by Trump, JD Vance, and others close to Trump that AI is too “woke” and that this is a “free speech” issue.
  - In the absence of federal action on AI in employment, “blue” state legislatures will feel increased pressure to act.
  - EEOC litigation or amicus briefs pushing the boundaries of existing law are unlikely to be approved.

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# NLRB Priorities in the Second Trump Administration



# NLRB Appointments

## Immediate NLRB Leadership Questions

- Current NLRB Chairman Lauren McFerran's term expires at the end of 2024. She has been re-nominated and her nomination has been paired with a Republican nominee.
- If the lame-duck Senate votes to confirm the package, and all of the NLRB Members serve out their entire term, then the earliest the NLRB would have a Republican majority would be the middle of 2026.

It's a near-certainty that the current NLRB GC, Jennifer Abruzzo, will either be fired (or voluntarily resign) at the start of the second Trump Administration.

## Back to Basics: What does the NLRB do?

- The 5-member NLRB **adjudicates** – they make law by deciding cases as they come before the Board.
- The NLRB General Counsel can **shape** the Board's agenda by deciding when to issue complaints to be adjudicated.
- The vast majority of NLRB decisions are unanimous, enjoying bipartisan support.

## Key Expected Policies for a Republican-Controlled NLRB

- Mandatory arbitration / arbitration deferral
- Joint employer
- Jurisdictional issue(students, independent contractors)
- Non-competes
- Terminating dues checkoff at contract expiration
- Reverse cases expanding the scope of what employer conduct is considered to chill protected conduct.
- Reverse rulings that indulge excessive employee behavior where the employees are exercising recognized rights – for example, hate speech on a picket line.
- Reverse regulations seen as allowing short-circuiting of union election procedures (and to permit more time for lawful campaigning).



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# DOL Priorities in the Second Trump Administration



# US DOL Key Appointments

## Overview of Potential Changes in DOL Leadership and Key Appointments

### Key Presidential Appointments

- **Secretary of Labor (Potential Nominees)**
  - Patrick Pizzella (former Deputy Labor Secretary under Trump)
  - Bryan Slater (former Virginia Labor secretary)
  - Andrew Puzder (Former Secretary of Labor Nominee and Former CEO of Hardee's and Carl's Jr. parent company CKE Restaurants)
  - Linda McMahon (former Director of Small Business Administration)
- **Other Key Positions**
  - Deputy Secretary of Labor
  - Solicitor of Labor
  - Wage Hour Administrator
  - Assistant Secretary of OSHA
  - OFCCP Director
  - Director of the Employee Benefits Security Administration
- **Senate Confirmation Process**

# WHD and OFCCP Rulemakings and Regulatory Challenges

- **2024 Independent Contractor Rule**
  - Pending Litigation in Multiple Forums; Leading Lawsuit is *CWI et al. v. Su*
  - Potential Return to 2021 Final Rule
- **2024 Overtime Eligibility Rule**
  - Court Challenges – *Mayfield v. DOL*
  - November 15, 2024 E.D. Texas Decision in State of *Texas v. DOL* Vacates Rule
  - Return to June 30, 2024 Salary Minimum
  - Potential DOL Appeal
- **2021 Final Rule Increasing Minimum Wage for Federal Contractors (Implementing EO 14026)**
  - Ninth Circuit vacated the Rule in *Nebraska v. Su* decision

# OSHA Rulemakings and Regulatory Challenges

- **2024 Worker Walkaround Representative Designation Process Rule**
  - Court Challenge – *US Chamber v. OSHA*
  - President Trump is not Expected to Support the “Walkaround” Rule
- **2024 Proposed Heat Injury and Illness Prevention In Outdoor and Indoor Work Settings Rule**
  - Comments Due December 2024
  - Unlikely to see Final Rule before January 20, 2025

# Additional Policy Priorities

## **Potential Impact on OFCCP**

- Executive Order 11246

## **DOL & BLS Collaboration**

- Contingent Workforce Statistics

## **DOL Resources & Enforcement**

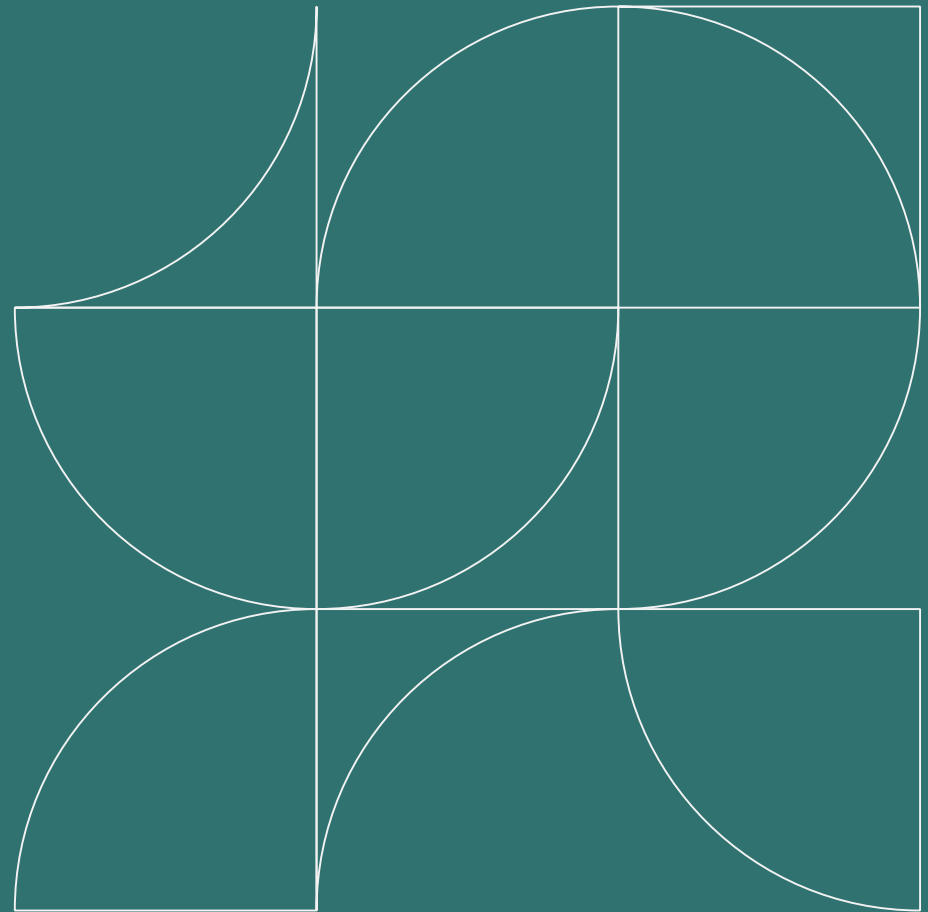
- Impact on State DOL Activities

## **Potential Legislative Activity**

- Independent Contractor
- Portable Benefits
- Modernization of the FLSA
- Uniform Federal Paid Leave, Harmonized and Consistent with State and Local Laws

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## Immigration Priorities in the Second Trump Administration



# Overview of Anticipated Immigration Changes

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- Governing Themes
  - Immigration system needs more emphasis on integrity and rule of law
  - Humanitarian immigration programs and policies have been overutilized contrary to both law and the national interest
  - Southwest US border is in crisis and federal government has lost control
  - Removal of unauthorized persons is a top priority
  - High-skilled immigration should be limited to the most skilled, educated and talented, and not operate to displace available and qualified U.S. workers
- Anticipated Actions by New Administration
  - Reversal of Biden era humanitarian parole programs
  - Restriction of humanitarian entry through SW border
  - Curtailment of other humanitarian relief pathways – e.g. – DACA, Temporary Protected Status Etc.
  - Acceleration of deportation activity
  - Expansion of worksite enforcement
  - Stricter immigration benefit processing policies

# Emerging Leadership Team

## Known Personnel Choices

- Tom Homan – Border Czar



- Kristi Noem – Secretary, DHS



- Stephen Miller, Deputy Chief of Staff





# Immigration Enforcement and Compliance Activities

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- Enforcement Activities
  - Curtailment/Closing of Southwest Border to asylum seekers
  - Interior increase in removal activity
    - including worksite raids
  - Increase in fraud investigations and enforcement
  - I-9 Inspections
- Compliance activities
  - Reduction in availability of following benefits categories:
    - Deferred Action for Childhood Arrivals (DACA)
    - Temporary Protected Status (TPS)
    - Humanitarian Parole (including CHNV program)
    - Asylum
    - Refugee admission
  - Termination of certain existing immigration benefits
- Workforce Impact – Could reduce worker availability in certain industries and occupations

## Employment- Based Immigration Changes

### What Changes Might Employers See

- Increased Request for Evidence (RFEs) and Notices of Intent to Deny (NOIDs)
- Elimination of Deference Policy
- Increased Interview Utilization
- Spousal visa changes possible
- Third-party worksite rule
- Elimination of expanded work authorization extension
- Expected changes are mostly process changes
  - substantive requirements not likely to change
  - no major legislation anticipated



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