

Employment Law Changes and Considerations Under the New Administration

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Agenda

- I. Impact On Employers Of Recent Changes At EEOC and Executive Orders
- II. NLRB Actions Affecting Employers
- III. Disciplinary Challenges In A Post-*Muldrow* Era

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Impact On Employers Of Recent Changes At EEOC and Executive Orders

Equal Employment Opportunity Commission

- EEOC has five commissioners serving staggered terms whose purpose is to develop policy, craft regulations and implement strategic enforcement plan
- President Trump fired two EEOC commissioners on January 29, 2025 leaving three vacancies and two remaining commissioners
 - Acting Chair Andrea Lucas
 - Democratic Commissioner Kalpana Kotagal
 - Fired Democratic Commissioner Jocelyn Samuels has sued claiming removal illegal
- Trump nominated Brittany Panuccio to serve as Commissioner which would give the EEOC a quorum
- Acting Chair Lucas still issuing “guidance”
 - Ex: Guidance on EEO-I – Warns that there are no diversity exceptions to Title VII
- Unintended consequences – Without quorum, EEOC cannot rescind or change prior guidance which current Administration seeks to alter
 - Ex: PWFA guidance – specific target for rescission/modification of Trump Administration

Equal Employment Opportunity Commission (cont.)

- **Andrea Lucas appointed as Acting Chair**
- Anticipated Changes/Initiatives Under Lucas
 - Immediately issued statement outlining her views on gender identity
 - Vows to rescind recent sexual harassment guidance
 - Dismissed all EEOC lawsuits alleging based on gender identity
 - Promises to dismantle DEI-motivated discrimination
 - Protection of Religious Rights – focus on anti-semitism
 - Enforcement of “Anti-American” discrimination
 - PWFA Limitations?
 - Lucas endorses limited interpretation – voted against current rules
 - Only actual pregnancies/childbirth and resulting limitations
 - No “omnibus female reproduction system” protection



Commissioner
Andrea Lucas (R)

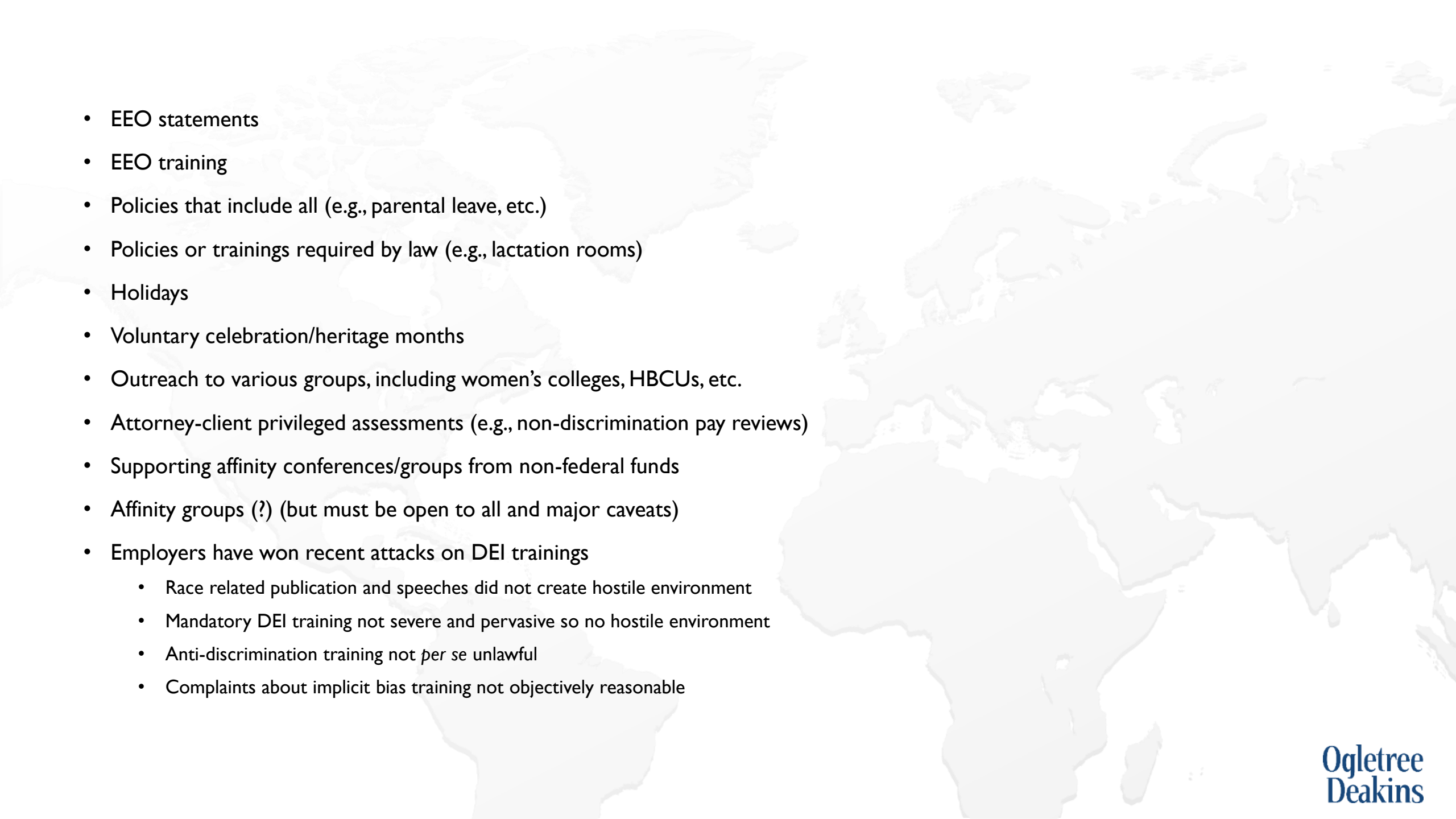


Impact On DEI Initiatives

- *Students For Fair Admissions v. Harvard* – Supreme Court case striking down racial preferences in college admissions
- EO 14173 – “Ending Illegal Discrimination and Restoring Merit Based Opportunity”
- EO 14151 – “Ending Radical and Wasteful DEI Programs and Preferencing”
- EO’s stated purpose: Enforce long-standing civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs and activities
- *EO v. LAW*

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Likely Low Risk “DEI” Activities Under Current Law

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- EEO statements
 - EEO training
 - Policies that include all (e.g., parental leave, etc.)
 - Policies or trainings required by law (e.g., lactation rooms)
 - Holidays
 - Voluntary celebration/heritage months
 - Outreach to various groups, including women's colleges, HBCUs, etc.
 - Attorney-client privileged assessments (e.g., non-discrimination pay reviews)
 - Supporting affinity conferences/groups from non-federal funds
 - Affinity groups (?) (but must be open to all and major caveats)
 - Employers have won recent attacks on DEI trainings
 - Race related publication and speeches did not create hostile environment
 - Mandatory DEI training not severe and pervasive so no hostile environment
 - Anti-discrimination training not *per se* unlawful
 - Complaints about implicit bias training not objectively reasonable



Flurry of Executive Orders

- 48+ Executive Orders since January 20, 2025
- EO 14148 “Initial Rescissions of Harmful Executive Orders and Actions”
 - 68 Eos and 11 presidential memorandums rescinded
 - EX: Rescinds EO 13985 (Jan. 20, 2021) “Advancing Racial Equity and Support for Underserved Communities through the Federal Government”
 - EC: Rescinds EO 13988 (Jan. 20, 2021) “Preventing and Combating Discrimination on the Basis of Gender Identity and Sexual Orientation”
- EO 14151 “Ending Radical and Wasteful Government DEI Programs and Preferencing”
- More EOs expected




Impact On LGBTQ Issues

- EO 14168 “Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”
- Policy of United States to recognize two sexes, male and female
- Withdrawal of lawsuits
- *Texas v. EEOC*, N.D. Tex. May 15, 2025
 - Struck down guidance on pronouns and access to bathroom and other facilities
 - Differentiated *Bostock* as not redefining “sex”
- Employer impact:
 - Facilities
 - Other



Impact on Pregnant Worker Fairness Act Guidance

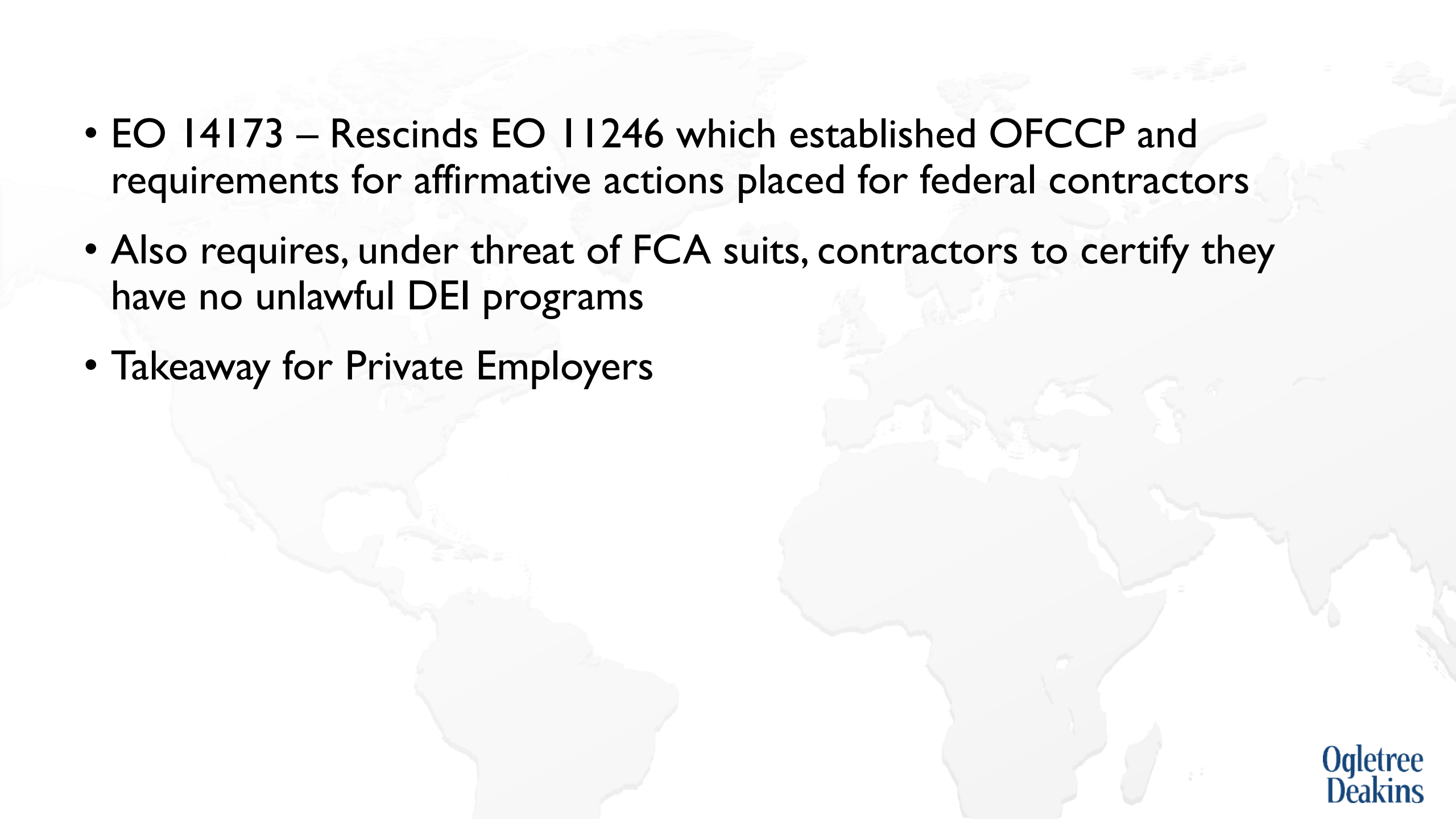
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- Lack of quorum
 - Expressed intent to revise
 - Comments by Acting Chair Lucas
 - *Louisiana v. EEOC*, W.D. LA, May 21, 2025
 - Struck requirements requiring reasonable accommodations for employees choosing to have an abortion
 - PWFA Rules exceed statutory mandates



Impact On Executive Order 11246 and OFCCP

- EO 11246 immediately revoked
 - May comply with regulatory scheme until April 21, but...
 - Untangle EO 11246 obligations
 - Remove references in statements, policies, forms, notices and documents
 - Update postings, career website, self-identification form solicitations
 - Consider risks of continuing applicant self-identification
 - Consider impact on talent acquisition and recruiting functions
 - Consider “affirmative action” references and revisions to EEO taglines
 - Update EO clause/flow down language for contracts, vendors, suppliers and unions
 - No AAP plan to prepare
 - Statutory preferences still required for disabilities and veterans

- Acting Secretary of Labor Order 03-2025
 - OFCCP cease and desist all EO 11246 enforcement
 - Section 503 and VEVRA enforcement held in abeyance
 - OFCCP issued notices of closure per Order 03-2025 on Jan. 31
- Section 503 and VEVRAA obligations remain in effect
 - Affirmative action and nondiscrimination requirements
 - Annual AAPs for Protected Veterans and Individuals with Disability
 - Disability utilization
 - Veteran hiring benchmarks
 - Job listing requirements
 - Outreach/recruitment
 - Recordkeeping

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- EO 14173 – Rescinds EO 11246 which established OFCCP and requirements for affirmative actions placed for federal contractors
 - Also requires, under threat of FCA suits, contractors to certify they have no unlawful DEI programs
 - Takeaway for Private Employers



Disparate Impact EO

- EO 14281 - Restoring Equality of Opportunity and Meritocracy
- Disparate Impact – Makes Illegal Neutral Policies with Disparate Impact
 - Established in seminal case of *Griggs v. Duke Energy*
 - No INTENT need to be proved to establish discrimination
 - Now codified in Title VII and Texas Labor Code
- EO deprioritizes use of disparate impact cases and eliminate its use
- Litigation effect

NLRB



NLRB Shake-Up

- Under Biden's former NLRB General Counsel, Board was aggressively pro-union and anti-employer
- NLRB comprised of 5 board members serving staggered terms
 - Former Chairman Lauren McFarren – term expired on 12/16/2024
 - Trump terminated Democratic member Gwynne Wilcox
 - Left 1 Democratic member and 1 Republican member
 - No quorum, so no decisions any time soon
 - Trump has not yet sought to fill the vacancies
- Trump terminated GC Jennifer Abruzzo

Actions under Acting GC

- Cowen has rescinded 29 prior memos issued by Abruzzo, including:
 - **GC Memos 2106** focused on remedies available in ULP proceedings
 - Consequential damages, an apology to the employee, etc.
 - Now back to seeing 80%-100% back pay, typical notice posting
 - **GC Memo 2107** focused on full and effective settlement that prevented E'ers from negotiating settlement that didn't include default language, non-admission language less than 100% back pay
 - **Bottom line:** with rescission of those 2 memos, the regional offices should be more reasonable in approaching settlement and trying to tackle some of backlog through amicable resolution

Actions under Acting GC

- GC 2305 attempted to apply *McLaren Macomb* retroactively
- GC 23-08 regarding non-compete agreements
- GC 25-01 regarding “stay-or-pay” provisions
- GC 22-04 regarding right to refrain from “captive-audience” meetings, but Board decision in 11/2024 banned these.
- GC 21-01 regarding propriety of mail-in ballot elections during COVID-19
- Recission of guidance on handbook rules
 - Less focus on this and suggests direction Board will go with quorum



Discipline Challenges Post-*Muldrow*

Muldrow v. City of St Louis Missouri

- Facts: female who worked as a plainclothes officer in the specialized Intelligence Division of the St. Louis Police Department transferred to a uniformed neighborhood patrol position
- Rank and Pay remained the same
- Perks, Responsibilities, and Schedule Changed:
 - Moved from regular M-F schedule to a rotating schedule with weekend shifts
 - Lost access to unmarked take-home vehicle due to FBI deputization
 - Muldrow claimed she moved from a prestigious position to a less prestigious, largely administrative role
 - Claimed fewer opportunities to work on “important investigations” and network with commanding officers
- Male employee replaced Muldrow: “better fit for the Division’s dangerous work”

The Lower Courts' Opinions

- District Court granted employer MSJ because the transfer did cause Muldrow a “significant” employment disadvantage.
- Muldrow still had a supervisory role, still investigated serious crimes; and
- Muldrow’s view of the job as “more administrative and less prestigious” unsupported by the evidence
- Eighth Circuit Affirmed.



Muldrow v. City of St Louis Missouri, 601 U.S. 346 (2024)

- Issue: Does an employee challenging a transfer under Title VII prove he/she suffered a heightened (ie. significant or material) standard of harm?
- Holding: No. An employee must only show “some harm” respecting her employment terms and conditions.
- “terms and conditions” covers more than the economic/tangible.



What does “Some Harm” Mean?

The Majority’s View



- Discriminate against means “treat worse”; statute doesn’t say much worse
- Transfer must have:
 - left employee “worse off, but need not have left her significantly so”
 - Brought about some “disadvantageous change”
 - Resulted in “worse treatment”
- “*Muldrow’s* allegations, if properly preserved and supported” satisfy the standard “with room to spare”

What Does “Some Harm” REALLY Mean?



- J.Thomas Concurrence: “more-than-trifling-harm”
- J.Alito Concurrence:
 - majority’s opinion is “unhelpful”; “I have no idea what this means”
 - “harm” necessarily incorporates “some degree of significance and impartiality”
 - We do not say “I was harmed because the supermarket had run out of my favorite brand of peanut butter”
 - “careful lower court judges will mind the words they use but will continue to do pretty much just what they have done for years”
- Kavanaugh Concurrence:
 - No separate showing of harm required. Discrimination=the harm.
 - Majority’s “some harm” requirement “appears to be a relatively low bar”

Implications for Employers



- Precise “some harm” meaning still unclear
 - Materially Adverse Standard does NOT apply
- Increase in Lawsuits over employment actions previously subject to dismissal
- Dismissal at pleading stage less than before
- Other federal statutes with same/similar language implicated;
- Likely applies outside involuntary job transfers
- Easier for plaintiffs to prevail or at least withstand MSJ;
 - “This decision . . . lowers the bar Title VII plaintiffs must meet . . . Because it does so, many cases will come out differently”

Questionable Standard Employment Practices Post-Muldrow

- Forced Unpaid Leave-Likely Adverse Employment action.
 - See, e.g., **McAllister v. Tyson Fresh Meats, Inc.**, 2024 WL 5165729, at *6 (D. Kan. Dec. 19, 2024)
- Paid Leave = Potentially Adverse Employment Action
 - **Blick v. Ann Arbor Public School District**, 105 F.4th 868 (6th Cir. 2024): “Like most courts, we have also long held that an employer does not take a materially adverse action when it temporarily suspends an employee with *full pay* while “timely” investigating the employee's potential misconduct. . . A recent Supreme Court decision calls this rationale (and our precedent) into doubt.”



Questionable Standard Employment Practices Post-Muldrow (cont'd)

See also

- **Russo v. Bryn Mawr Trust**, 2024 WL 3738643 (3d Cir. Aug. 9, 2024): “A suspension with pay might, under some circumstances, constitute an adverse employment action.”
- **Yates v. Spring Indep. Sch. Dist.**, 115 F.4th 414, 420 (5th Cir. 2024): four months of administrative leave constitutes an adverse employment action.
- **Bravo v. Kendall**: No showing of a disadvantageous charge in terms or conditions of employment from harsh words from supervisor
- **Davis v. Orange County, Fl.**: Written reprimand has no effect on employment, no harm occurred
- **Walters v. Shintech Inc.**: Denied transfer to day shift. Testimony reflected day shift was preferred and also testified to other harm caused by such
- **Ahmed v. Sch. Dist. of City of Hamtramc**, 2024 WL 4234641 (E.D. Mich. Aug. 26, 2024): Paid leave is not a disadvantageous change in a term or condition “because the ability to be justly reprimanded by an employer has always been a term or condition of employment” and an employee suffers no harm if he returns to with the same title, responsibility, pay and benefits.



Unanswered Questions



- Is harm objective? Subjective? Objective +subjective?
- Risk of future injury=some harm?
- What evidence required? Employee's own testimony sufficient?
- Impact beyond disparate treatment claims?
- Poor performance review/Harsh comments by supervisor

Recommended Practices

- Document, Document, Document legitimate non-discriminatory reason for the employment action
- Involve HR When Changing Terms of Employment, Especially Transfers
- Developing the MSJ record is essential



Thank you!

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