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THE FIRST 100 DAYS

Employment Law in 2021: A Look Ahead

February 25, 2021

Presenters



Susan Harthill

**Former Deputy
Solicitor for National
Operations, DOL
(2014–2018)**



Sharon Perley Masling

**Former Chief of Staff
and Senior Counsel to
former EEOC
Commissioner Chai
Feldblum (2011–2019)**



Jonathan Snare

**Former Acting Assistant
Secretary of Labor for
OSHA (2004–2006) and
former Deputy Solicitor of
Labor, DOL (2006–2009)**

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Equal Employment Opportunity Commission Overview

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The Commission and the General Counsel



Charlotte A. Burrows (D),
Chair

Term Ends: 2023



Jocelyn Samuels (D),
Vice Chair

Term Ends: 2021



Janet Dhillon (R),
Commissioner

Term Ends: 2022



Keith Sonderling (R),
Commissioner

Term Ends: 2024



Andrea Lucas (R),
Commissioner

Term Ends: 2025

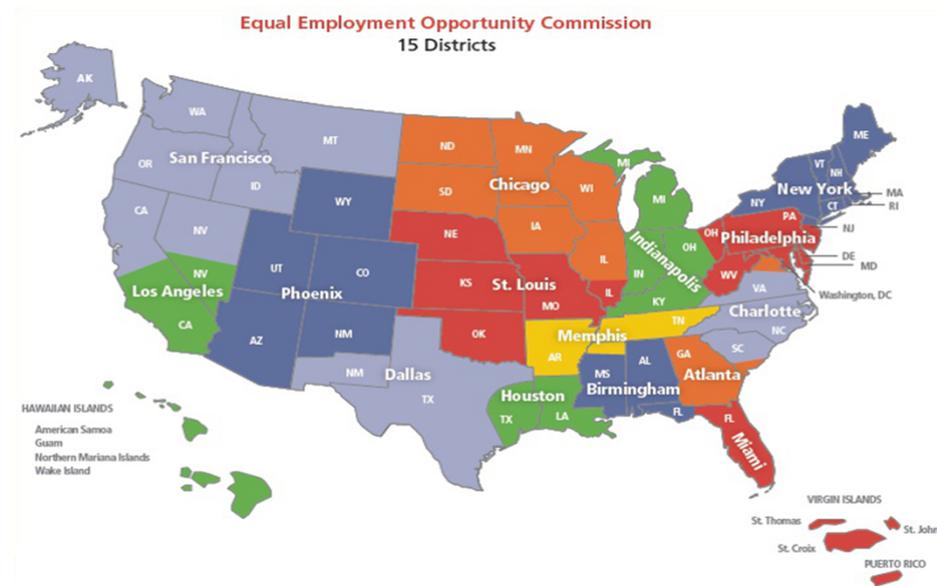


Sharon Gustafson (R),
General Counsel

Term Ends: 2023

EEOC Field Offices

- **15 District Offices**
 - Atlanta
 - Birmingham
 - Charlotte
 - Chicago
 - Dallas
 - Houston
 - Indianapolis
 - Los Angeles
 - Memphis
 - Miami
 - New York
 - Philadelphia
 - Phoenix
 - San Francisco
 - St. Louis
- **10 Field Offices (large)**
- **13 Local Offices (medium)**
- **15 Area Offices (small)**



EEOC Strategic Enforcement Priorities (SEPs)

1. Eliminating Barriers in Recruitment and Hiring

- Class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups; older workers; women; and people with disabilities

2. Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination

- National priority is on discrimination against vulnerable immigrant and migrant workers
- Each district must identify vulnerable workers and underserved communities for focused attention in that district.

EEOC Strategic Enforcement Priorities (SEPs)

3. Addressing Emerging and Developing Issues

- ADA Priorities: Leave and attendance policies; mischaracterization of qualification standards as essential functions
- Accommodating pregnant workers under the Pregnancy Discrimination Act and under the ADA
- Protecting lesbian, gay, bisexual, and transgender (LGBT) people from discrimination based on sex
- Complex employment relationships (e.g., staffing agencies and independent contractors)
- “Backlash” against those who are Muslim or Sikh or persons of Arab, Middle Eastern, or South Asian descent

4. Ensuring Equal Pay Protections on All Protected Bases (not just sex)

- Focus on compensation systems that discriminate based on gender, race, national origin, age, or disability

EEOC Strategic Enforcement Priorities (SEPs)

5. Preserving Access to the Legal System

- Focus on practices such as retaliation and overly broad waivers; includes maintaining adequate applicant and employee records

6. Preventing Systemic Harassment

- Focus on enforcement through monetary and injunctive relief; focus on prevention efforts

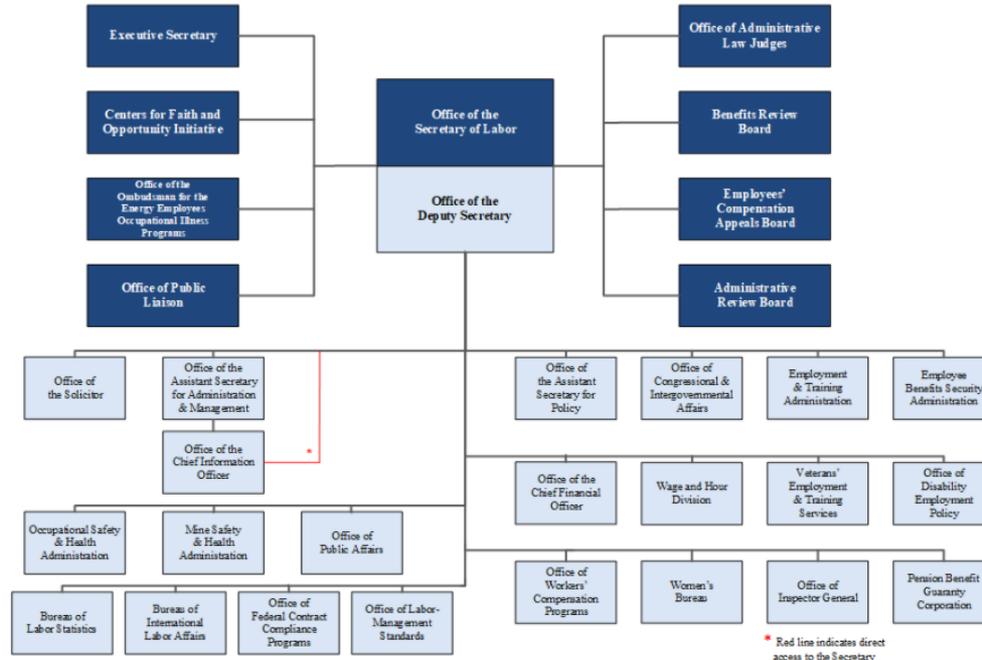
Every District Office establishes additional priorities for its district.

Department of Labor Overview

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Department of Labor – Structure

US Department of Labor Organizational Chart



Department of Labor – Leadership

- Secretary of Labor (Marty Walsh, nominee)
- Deputy Secretary of Labor (Julie Su, nominee)
- Solicitor of Labor
- Assistant Secretaries (no nominees as of February 25)
- Director of OFCCP (Jenny Yang)

COVID-19 and Workplace Safety

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OSHA

- New employer guidance on workplace safety released on January 29
- Covers workplace settings outside of the healthcare and emergency response sectors - largely reiterates prior OSHA and Centers for Disease Control and Prevention (CDC) recommendations
- Recommends that employers implement a COVID-19 prevention program, explores key measures for limiting the spread of COVID-19, and highlights other new and noteworthy recommendations
- Emergency Temporary Standard expected by March 15
- OSHA stakeholder meetings included several employer recommendations

EEOC COVID-19 Resources

An official website of the United States government [Here's how you know](#) ↓



U.S. Equal Employment Opportunity Commission

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EEOC Coronavirus Resources

- How EEOC is Serving the Public
- Coronavirus and Employment Discrimination Laws



Newsroom

[Frito-Lay Settles EEOC Religious Discrimination Lawsuit](#)

02/17/21

[Lexus of Cool Springs to Pay \\$60,000 to Settle EEOC Sex Discrimination Lawsuit](#)

02/10/21

[Medford Restaurant to Pay \\$120,000 to Settle EEOC Sexual Harassment and Retaliation Suit](#)

02/10/21

[United Precision Products Pays \\$60,000 to Settle EEOC Age Discrimination Suit](#)

02/09/21



What You Should Know

[Office Closures Due to Winter Weather](#)

[COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)

UPDATED 12/16/20

[What You Should Know About EEOC and Modified Delegation of Litigation Authority](#)

[What You Should Know about EEOC Formal Opinion Letters](#)

[EEOC and the Publication of EEO-1 30-Day Notice](#)

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EEOC – What You Should Know About COVID-19

An official website of the United States government [Here's how you know](#) ▾

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What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Technical Assistance Questions and Answers - Updated on Dec. 16, 2020

INTRODUCTION

- All EEOC materials related to COVID-19 are collected at www.eeoc.gov/coronavirus.
- The EEOC enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act. Note: Other federal laws, as well as state or local laws, may provide employees with additional protections.
- Title I of the ADA applies to private employers with 15 or more employees. It also applies to state and local government employers, employment agencies, and labor unions. All nondiscrimination standards under Title I of the ADA also apply to federal agencies under Section 501 of the Rehabilitation Act. Basic background information about the ADA and the Rehabilitation Act is available on EEOC's [disability page](#).

EEOC – Guidance on Vaccines

- May require vaccines, so long as reasonable accommodations for people with disabilities and those with religious objections
 - May only exclude from the workplace if individual poses a direct threat
- Asking about vaccination status is not a disability-related inquiry
 - Follow-up inquiries (e.g., why have you not gotten a vaccine yet?) may be
- Questions on the vaccination pre-screening questionnaire do constitute a disability-related inquiry
 - Limited exceptions to the blanket prohibition on disability-related inquiries
 - Unclear whether this will impact the types of incentives an employer can provide – awaiting additional guidance from the EEOC

FLSA/Wage and Hour Issues

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Wage and Hour Issues

- Independent contractor (I/C) rule
 - DOL has proposed to delay the effective date from March 8 to May 7
 - Comments on the proposed delay were due February 24
- Joint Employer rule
 - Vacated by a federal district court in Sept. 2020
 - DOL has appealed that decision – the appeal may be withdrawn and rule is likely to be formally rescinded and a proposed rule has been sent to OIRA
- Opinion Letters withdrawn (tipped workers, I/C, sleeping berths)
- PAID program withdrawn

Wage and Hour Issues

- \$15 minimum wage – how will the Biden administration get there?
 - COVID-19 stimulus plan
 - Raise the Wage Act
 - Federal contractors
- COVID-19 vaccination incentives
- Paid leave
 - COVID-19 stimulus plan

EEO-1 and Pay Data Collections

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New Scheduled 2021 Openings of EEOC Data Collections

After delaying the opening of the 2019 EEO-1 Component 1 and the 2020 EEO-3 and 2020 EEO-5 Data Collections on May 8, 2020 in light of the Coronavirus Disease 2019 (COVID-19) public health emergency, the EEOC is pleased to announce the data collections are now on schedule to open in 2021. Filers should begin preparing to submit data in anticipation of these openings. The EEOC will open four data collections in 2021 including the 2019 and 2020 EEO-1 Component 1 Data Collection as well as the 2020 EEO-3, 2021 EEO-4, and 2020 EEO-5 Data Collections. The collections are scheduled to open in the following months:

April 2021: **2019 and 2020 EEO-1 Component 1 Data Collection** (Private Sector Employers)

July 2021: **2020 EEO-5 Data Collection** (Public Elementary/Secondary School Districts)

August 2021: **2020 EEO-3 Data Collection** (Local Referral Unions)

October 2021: **2021 EEO-4 Data Collection** (State/Local Governments)

The precise opening dates of the collections, as well as the new submission deadline dates, will be announced by posting a notice on the EEOC's home page at www.eeoc.gov as well as on the new dedicated website for the EEOC's data collections at <https://EEOCdata.org>. As in previous years, a notification letter will also be sent to eligible filers. Please visit <https://EEOCdata.org> for more information regarding updates on the data collections. When the collections open, resources to assist filers with their submissions will be available online at <https://EEOCdata.org>. The EEOC Filer Support Team will also be available to respond to filer inquiries and to provide additional filling assistance.

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Pay Data Collection – EEOC

- 2016 – under then-Chair Jenny Yang, EEOC announces addition of pay data to annual EEO-1 reports (priority for Chair Yang and Commissioner Burrows)
- 2019 – after litigation, EEOC collects Component 2 pay data for FY 2017 and FY 2018
- 2019 – EEOC announces that it is not planning on collecting pay data for FY 2020-2022
- 2020 – announces study by the National Academies of Sciences, Engineering, and Medicine to conduct an independent assessment of the quality and utility of the EEO-1 Component 2 data for FY 2017 and FY 2018
- December 2021 – anticipated completion of the NAS assessment
- July 2022 – Commissioner Dhillon’s term ends

Federal Contractor Issues

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Federal Contractors

- EO 11246, Section 503 and VEVRAA
 - Diversity training Executive Order – rescinded
 - Religious exemption rule – notice filed in litigation that OFCCP intends to rescind the rule
- Things to watch:
 - \$15 minimum wage for all federal contractors
 - Fair Pay Safe Workplaces 2.0
 - Supplier diversity and SBA enforcement
 - Pay data/pay equity
 - EEO-1 FOIAs and potential litigation
 - Arbitration

Other DOL Activity

- OSHA's [Whistleblower Protection Program](#) is now overseeing worker retaliation complaints filed under two new statutes: the Criminal Antitrust Anti-Retaliation Act and the Anti-Money Laundering Act.
- Pulling back on IRAPs and creation of a new Advisory Committee on Apprenticeships.

Systemic Discrimination

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EEOC – Systemic Work

- “The EEOC’s mission to advance equal opportunity for all in the workplace is particularly critical as we work to rebuild the American economy and ***address the challenges of systemic discrimination.***”
 - Chair Charlotte Burrows, January 21, 2021
- The EEOC defines systemic cases as “pattern or practice, policy and/or class cases where the discrimination has a broad impact on an industry, profession, company or geographic location.”
- Systemic Enforcement at the EEOC
 - <https://www.eeoc.gov/systemic-enforcement-eeoc>

Conciliation

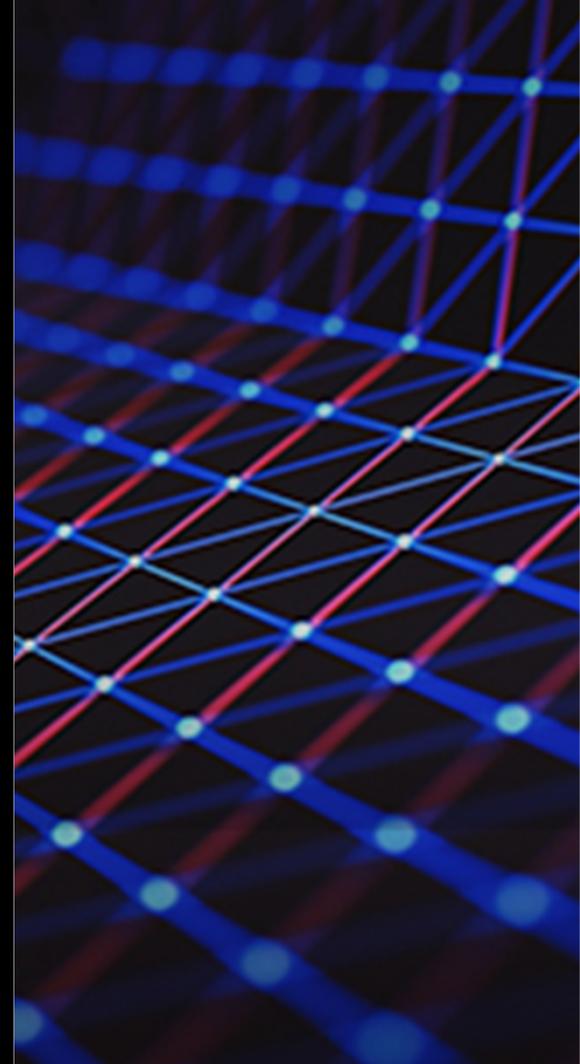
- Final rule became effective January 7 (note: Burrows and Samuels opposed)
- Under the final rule, the EEOC must provide employers with the following information:
 - A written summary of the facts and nonprivileged information that EEOC relied on reaching a finding of reasonable cause
 - A written summary of the EEOC's legal basis for finding reasonable cause
 - The basis for any requested monetary or other relief, including the calculations underlying the initial conciliation proposal and an explanation thereof in writing
 - Whether the matter has been designated as a systemic, class, or pattern or practice and the basis for the delegation
 - The EEOC will allow employers at least 14 calendar days to respond to the agency's initial conciliation proposal

Navigating the NEXT. Biden Administration's First 100 Days

We have formed a **First 100 Days Task Force** to help guide clients through the changes to regulations and policies made by the new administration.

Visit our [First 100 Days resource page](#) for related materials.

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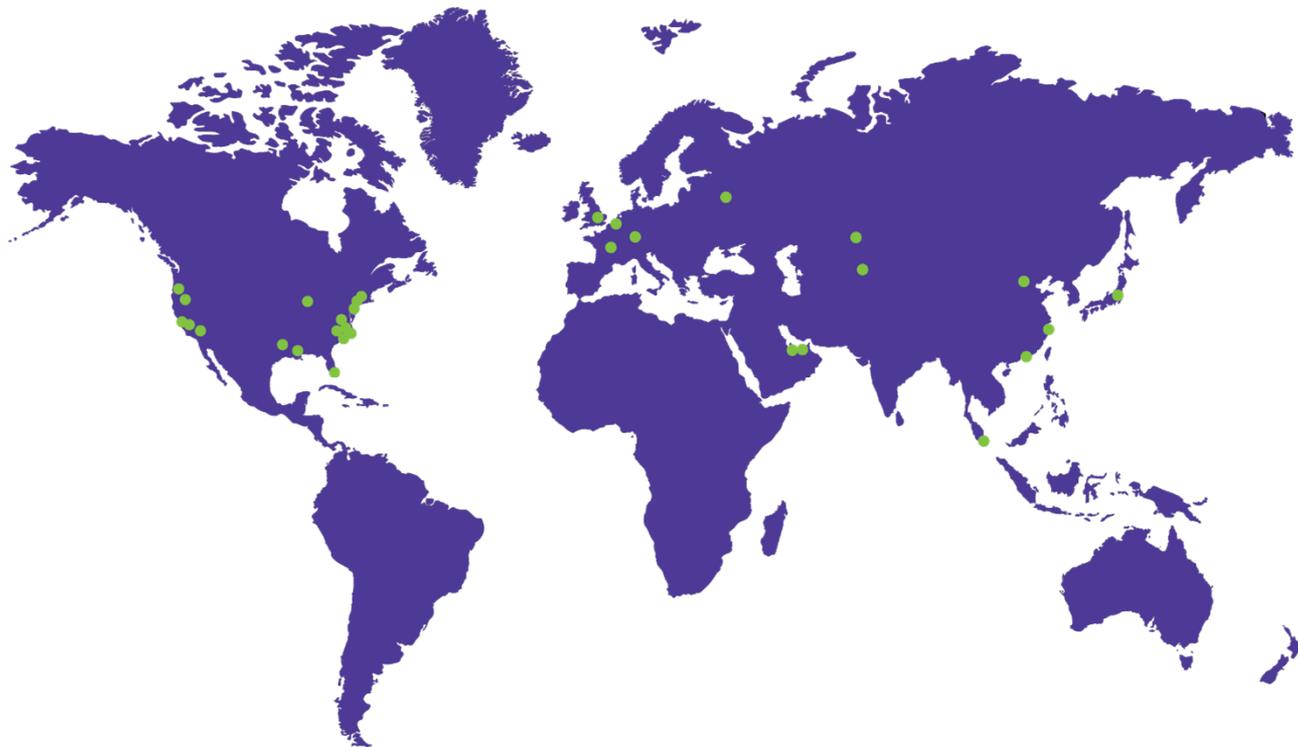


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North America

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