LAW360 Employment Authority

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4 Trump-Era Bias Policies That Biden Stymied In 2021

By **Vin Gurrieri**

Law360 (December 22, 2021, 5:50 PM EST) -- In President Joe Biden's first year in office, his administration has reversed course on numerous Trump administration policy positions, erasing changes to the U.S. Equal Employment Opportunity Commission's pre-suit conciliation process and a rule extending to certain federal contractors a religious carveout from antidiscrimination law.

Here, Law360 looks at four key regulatory rollbacks from 2021.

EEOC Conciliation Update Is Short-Lived

About five months after his inauguration, Biden **signed a resolution** to rescind a divisive Trump-era rule that modified the EEOC's pre-suit conciliation process.

President Joe Biden signed a resolution in June to rescind changes to the EEOC's pre-suit conciliation process. His administration argued the changes had made it harder to remedy unlawful behavior by employers. (Saul Loeb/AFP via Getty Images)

Biden's signature came shortly after both houses of Congress passed resolutions to pull the plug on the EEOC's rule under the Congressional Review Act. The statute gives lawmakers the ability to upend executive branch regulations within 60 legislative days of when they are issued and bars substantially similar regulations absent an explicit authorization from Congress.

In the EEOC's case, that means current and future commissioners — including the three Republican members of the commission who **voted to finalize the rule** in a party-line January 2021 vote — may not be able to pursue new rulemaking that seeks to alter the conciliation process.

The commission's overhaul had set baseline requirements for information the EEOC had to share with employers that choose to participate in conciliation, a process by which employers can settle charges of discrimination before the agency sues them. The commission is obligated to offer conciliation under many of the laws it enforces.

One of the EEOC's **key justifications** for issuing the rule was that it would bring "greater transparency and consistency to the conciliation process," according to a statement it issued when the rule was finalized.

Business groups and supporters of the conciliation update backed that rationale, but workers' advocates and the Biden administration argued that the rule severely undermined the EEOC's

enforcement efforts and prevented aggrieved workers from being able to adequately redress unlawful behavior.

Linda Correia, president of the board at the National Employment Lawyers Association, a professional organization of attorneys who represent workers, told Law360 that the rule would've been unfair to workers.

As a result, NELA pushed for it to be repealed during the first 100 days of Biden's presidency.

"Under that rule, the idea is that employers would have gotten more information than the complaining party had in the process to resolve a discrimination charge and in the mediation process," said Correia, who is also a plaintiffs-side civil rights attorney at Correia & Puth PLLC. "So that obviously put employees at a disadvantage, and we thought that was unfair."

OFCCP Backtracks on Religious Contractor Rule

Also on the regulatory front, the U.S. Department of Labor's Office of Federal Contract Compliance Programs, which polices bias among federal contractors, **unveiled a proposed rule** in November. It would repeal Trump-era regulations that afforded faith-based contractors the same carveout from antidiscrimination obligations that churches, religious schools and other nonsecular employers receive under federal civil rights laws.

The proposed rule, if finalized, would scrap a version adopted by the administration of President Donald Trump in **late 2020** — a move the Biden DOL **disclosed in a court filing** in a case challenging the Trump-era regulations.

The Trump administration's rule effectively allowed religious contractors to make hiring and other employment decisions based on their faith. But the OFCCP's updated version reinstalls a standard that it says the Trump-era rule strayed from — the "long-standing reliance on Title VII principles and case law" when assessing whether faith-based contractors should be exempted from their antidiscrimination obligations.

A coalition of states led by California and New York had **challenged the validity** of the Trump-era rule. The coalition told a federal court that it undermined critical civil rights protections for a large swath of American workers and gave contractors too much leeway to mistreat women, LGBTQ workers and other minority groups under the guise of their faith.

A 30-day public comment period on the Biden administration's proposed rule ended in early December.

Beyond the specifics in the OFCCP's latest rule, McDermott Will & Emery LLP partner Rachel Cowen said the issue that the regulations raise — the friction between religious and LGBTQ rights — is a "just the tip of the iceberg" for a trend that will increasingly play out in numerous contexts across employment law.

"As the courts got more conservative under the Trump administration, I think the OFCCP is sort of the harbinger of disputes to come — and that is this tension between LGBTQ rights and religious freedom," Cowen said. "I think you're going to see more and more of that conflict, even beyond the regs, and I think that the administration's withdrawal of those regs is their sign that this EEOC, this DOL … are going to be advocating for LGBTQ rights."

Biden Administration Eyes Use of Wage Data

Around the same time that it was crafting its latest rule governing faith-based contractors, the OFCCP backtracked on another of its Trump-era policies — the eschewing of pay data information known as Component 2 as part of the agency's enforcement work.

In a September **regulatory filing**, the contractor watchdog said it "would be valuable to analyze" two years' worth of Component 2 data that **had been collected** by the EEOC. It followed a federal court order to determine whether the EEOC would aid the OFCCP's enforcement actions and help the agency figure out which contractors are chosen for compliance audits.

The EEOC's Component 2 pay data survey, which required businesses to report W-2 wage information and hours worked for employees within 12 specified pay bands, was a controversial Obama-era addition to EEO-1 employer information reports that scores of employers must submit annually. The EEOC has long collected so-called Component 1 demographic data on race, gender and ethnicity by job category.

The OFCCP's move rescinded a **November 2019 notice** that said the agency would "not request, accept or use" Component 2 data.

Jon Zimring of Greenberg Traurig LLP said the OFCCP's decision to devote resources to looking at how it may use Component 2 pay data and whether it uses it to select government contractors for audit could have various practical implications for employers. It means that federal contractors "have to really be concerned now about what they're submitting in a way that they never had to be concerned about before — and how it may affect their compliance efforts in their affirmative action programs," he said

"That's a big change at the OFCCP because the government contractor community really now has to worry about what the EEO-1 Component 2 pay data submissions are going to mean," Zimring added.

In addition to the OFCCP's move, the EEOC reversed on another Trump-era policy related to EEO-1 data by **eliminating restrictions** on the agency's pay and demographic data sharing policies amid a legal challenge to those restrictions by a half-dozen states.

In early April, the EEOC reinstituted an Obama-era practice of allowing state and municipal fair employment practice agencies, known as FEPAs, to access EEO-1 information for employers within their jurisdictions. The revised policy noted that FEPAs can access Component 2 data for the two years the EEOC has already collected "in addition to any past and future data collections" through EEO-1 reports.

The California federal judge overseeing the states' suit challenging the Trump-era restrictions had in February given then-newly appointed EEOC Chair Charlotte Burrows 45 days to reconsider the restrictions. Following the policy reversal, the commission and the states **settled the case**.

While the EEOC has **curtailed its collection** of Component 2 data for the time being, it voted last year to **fund an independent study** by the National Academies of Sciences, Engineering and Medicine to assess how useful the data is for the agency.

If the commission decides at some point to resume its collection of Component 2 information, Zimring said it is "going to be of concern to employers because employers are going to be submitting their, in many situations, confidential pay data to the government without any idea of what the government is actually going to do with it."

"Even if the government says that they're not going to do anything with it right now, they could change their minds," Zimring said. "And as we know in our United States of America, we have a federal government and 50 state governments and local governments that might decide to get in on the act."

Agencies Align With Bostock on LGBTQ Bias

In 2020, the U.S. Supreme Court issued one of its most consequential civil rights decisions in decades when a six-justice majority held in Bostock v. Clayton County, Georgia, that Title VII — which outlaws workplace bias based on sex and other categories — protects employees and job applicants against sexual orientation and gender identity discrimination.

With that ruling still only months old, President Joe Biden in **one of his first executive orders** directed federal agencies to interpret all federal anti-bias laws that mention sex discrimination by using the Supreme Court's reading of Title VII in Bostock.

Among them was the U.S. Department of Education, which issued a notice of interpretation and a related fact sheet **in June.** The notice said the agency will read Title IX of the Education

Amendments of 1972 — which bans sex-based bias in federally funded schools and educational programs — as covering discrimination based on students' sexual orientation or gender identity.

Although Bostock arose in the employment context and asked the justices to interpret the sex bias provision as it appears in Title VII, courts often look to Title VII jurisprudence when interpreting Title IX since the language is essentially the same in both statutes. This is a point the Education Department made in its notice.

The Education Department's move came after the U.S. Department of Justice's Civil Rights Division said **in an April memo** that discrimination based on sexual orientation and gender identity is barred under Title IX, with the agency citing Bostock for its updated stance.

Those moves signaled a **clear shift** from the previous administration's take on the issue. In 2017, Trump revoked guidance from the Obama administration that required public schools to allow transgender students to use bathrooms and other facilities that match their gender identity.

Correia, speaking in her personal capacity as an attorney who often represents students, coaches and school employees in Title IX matters, told Law360 that she believes it is important for Bostock's influence to be felt beyond just the employment context under which it arose.

"I think Bostock is the most important Supreme Court case that has come down in a while, and so I think it's going to be important to make sure that it is enforced in any way it can be for other kinds of discrimination claims," Correia said.

--Additional reporting by Anne Cullen, Amanda Ottaway, Rachel Stone and Mike LaSusa. Editing by Aaron Pelc and Neil Cohen.
