

New EEOC Chair Says There Will be No “Major Changes” But – the DOJ Seems to be Calling a Truce in the Transgender Battle – What Direction Are We Heading?

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Are we getting a mixed message from the new administration on priorities in the civil rights area?

In her first public comments since her appointment as the new acting chair of the EEOC, Victoria Lipnic just last week (February 8) said that the agency will not be making major changes and “is committed to its core values and mission, to enforce civil rights laws in the workplace.”

Yet – just a few days later on Sunday, February 11, [The New York Times](#) reported that the new administration has decided not to appeal a nationwide injunction issued by a judge in Texas to block Department of Education guidelines which stated that schools had to give transgender students access to facilities according to their chosen gender, as a matter of law. It is not clear now whether this signals that the Trump administration’s position on transgender rights, a significant initiative of the EEOC in the Obama administration, will change and what position the new DOJ will take in the *Grimm v. Gloucester County* case, now pending before the US Supreme Court.

One is a statement from one agency and the other is a decision by another, but clearly there is going to be a shift of focus and priorities.

The New EEOC Chair

Lipnic, a Republican, was appointed EEOC Commissioner in 2010 by President Obama, and was appointed Acting Chair by President Trump on January 25, 2017.

During a panel discussion on February 8, Lipnic stated that the EEOC will continue to focus on the enforcement of anti-discrimination laws, stating, “We are an enforcement agency.” But she also stated that there may well be a shift away from the larger ‘systemic’ cases that were a focus under the prior Commissioner, and more of a focus on individual claims.

Lipnic left no doubt that under the Trump administration, there will be a strong focus on job growth. Lipnic said, “President Trump has made it very clear that he is interested in job, jobs, jobs,” and the agency will echo that tune through its policies.

In terms of other agency priorities, the EEOC will focus on equal pay cases and age discrimination

cases, as this year marks the 50th anniversary of the Age Discrimination in Employment Act. Lipnic said, “I am very interested in equal pay issues. It’s something I would consider a priority.”

Lipnic also mentioned that she would like a re-evaluation of the costs and benefits of a recent and controversial new EEO-1 Rule. The rule requires private employers with 100 or more employees to submit pay data with their EEO-1 reports. Lipnic said that she voted against the new rule and said that it is something she looks forward “to having a conversation with my colleagues about. We need to make a hard assessment of how we are best using our resources.” “If that means a bit of a course correction on systemic, we should look at it. It’s important to do systemic cases, but we have to be strategic about them,” Lipnic said.

Lipnic also said it is important for the agency to handle “a significant amount” of cases on behalf of individuals, saying that each of those cases “has a story to tell” that can be easily communicated to the public. “Individual cases matter,” she said. “I’m not of the view that it should be all systemic all the time.”

Lipnic also addressed one of the agency’s more recent controversial measures — its finalization of regulations that expand the information about employee compensation many businesses have to disclose as part of the EEOC’s broader effort to combat pay discrimination. The regulation expands the scope of the EEO-1 report, and would require all businesses with 100 or more workers to submit pay data by gender, race and ethnicity on their employer information report. The new report will require employers to submit data on salary, in two different salary bands, and how many workers fall within each band. The deadline for the new report is March 31, 2018. Many employers, large and small, have complained that the scope and detail required by this new report will make it extremely burdensome to produce, especially for those who do not have sophisticated salary systems which can analyze such data. Lipnic made it clear on Thursday that she voted against the modification, but noted that she was the only current commissioner who did so. She was clearly skeptical of the new report saying, “Overall, there needs to be a re-evaluation of the costs and benefits.” But she was careful to point out that the commission operates by vote, meaning that no one commissioner can change the agency’s current position. “It’s something I look forward to having a conversation with my colleagues about,” she said.

Lipnic also signaled that she may be giving less independent discretion to the general counsel, stating that she thought the commissioners should be voting before cases are pursued in court. To quote Ms. Lipnic, “I’m a big believer that commissioners who are appointed by the president should speak first ...We don’t have to vote on every piece of litigation, but we have to vote on more.”

The Transgender Litigation

On the transgender front, [we reported last year](#) when the Department of Education and Justice Department took the position that Title IX required schools to give transgender students access to the locker rooms and bathrooms of their chosen genders, even if this was different from the gender assigned at birth. In a position that generated a great deal of controversy, the federal government took a very hard line, and told school districts that they could face lawsuits or a loss of federal funds if they did not follow this directive. “A school may not require transgender students to use facilities inconsistent with their gender identity....”

Under that interpretation, transgender students have access to facilities like bathrooms and locker rooms that correspond with their gender identity, a proposition to which social conservatives strongly object. They argue that allowing transgender students to use those facilities poses a threat to the privacy and safety of other students.

Later, a number of states sued to challenge this position and in August Judge Reed O'Connor in Texas enjoined its enforcement. The Justice Department appealed, and the oral argument of that appeal was scheduled for Tuesday, February 14th. Last Friday, February 10th, the DOJ withdrew the appeal.

The immediate effect of the withdrawal is that the injunction remains. However, commentators are noting that this could well indicate a departure by the new administration from the Obama DOJ's emphasis on aggressive enforcement of what it perceived as the civil rights of transgender individuals.

Of course, that position was not without controversy – as neither Title IX nor Title VII specifically mention transgender rights – and many saw this position as stretching these laws beyond their express language or intent.

The New York Times quoted Mara Keisling, the executive director of the National Center for Transgender Equality, who called the move a “callous attack” on “the dignity and safety of transgender students.” She said in a statement, “While the immediate impact of this initial legal maneuver is limited, it is a frightening sign that the Trump administration is ready to discard its obligation to protect all students. Transgender students are not going away, and it remains the legal and moral duty of schools to support all students.”

It is also not clear whether this is a harbinger of a new position on the Grimm case, which is scheduled for oral argument before the Supreme Court in March. That lawsuit was filed by a transgender student in Virginia, Gavin Grimm after he was denied access to the male bathroom. The Virginia Appeals court ruled for the student, relying on the DOE guidelines.

It remains to be seen how SCOTUS will view that decision, especially if the Trump nominee Judge Gorsuch has been confirmed and is on the court by then.

WHAT DOES THIS MEAN FOR EMPLOYERS?

In the immediate, the law remains the same and the recent comments by the EEOC do not send a signal that the agency will cease its enforcement activities. Most clearly, Commissioner Lipnic stated that the agency will continue to bring claims and enforcement of individual rights, thus, the investigation of a single plaintiff's claims and charges will be given the same priority as before.

As for the area of transgender rights, employers are best advised to stay the course and watch the legal developments as they unfold. This is not the time to roll back any policies or processes which you put in place in recent years, in order to comply with recent guidance on transgender rights. As always, the best employers are both aware of and in compliance with the law and sensitive to the rights and needs of their employees.