

## Trump's Win Tees Up Big Changes To The EEOC

By **Anne Cullen**

Law360 (November 6, 2024, 5:36 AM EST) -- Projected President-elect Donald Trump will likely swap out the U.S. Equal Employment Opportunity Commission's chief and the general counsel following his return to the White House in January, a move experts said foreshadows a sweeping shift in the agency's priorities.



Incoming presidential administrations traditionally slot members of their own political party atop the Equal Employment Opportunity Commission. (Photo by Andrew Harrer/Bloomberg, via Getty Images)

Incoming administrations traditionally slot members of their own political party atop the workplace watchdog, and the new chair is likely to be Commissioner Andrea Lucas, the de facto pick, as she's the only Republican appointee serving on the five-seat agency.

Lucas, who was **appointed by Trump** during his previous term, has often voted with the agency's three Democrats on proposals to file new lawsuits and amicus briefs. However, **she has consistently** clashed with the agency's Democratic leadership on bigger policy moves.

In April, she voted against **the final rules** that the EEOC put out for the Pregnant Workers Fairness Act, taking issue with the broad range of conditions the agency said were covered, including infertility and menopause. Those rules were ultimately approved by the commission.

She also opposed the commission's updates to **its harassment guidance**, which included strong protections for LGBTQ workers.

Lucas disagreed with the agency's official position that misgendering someone, even repeatedly, can be considered unlawful harassment. And she said the commission was endangering women by directing employers to let people use workplace facilities that correspond with their gender identity.

Esther Lander, a D.C.-based partner at Orrick Herrington & Sutcliffe LLP who previously spent nearly a decade as an employment litigator with the U.S. Department of Justice, said Lucas' installation at the helm would be a "meaningful" shift from the last four years.

"The chair has a lot of influence on what gets voted on and what policy initiatives go forward," Lander said.

### **Slow Changes to Start**

Employment attorneys predicted pivots in the EEOC's agenda under the incoming Republican administration, but they said the biggest moves would not happen immediately.

"There will be subtle changes, but there won't be a sudden massive shift," said Lander.

Lucas will probably be tapped early on to take the chair spot, and it's likely that Trump will call on the general counsel President Joe Biden appointed to the EEOC, Karla Gilbride, to resign. Shortly after Biden took office in early 2021, **he fired** Trump's appointed EEOC general counsel, Sharon Fast Gustafson, when she refused to quit.

However, there is currently a Democratic majority at the agency — Chair Charlotte Burrows, Vice Chair Jocelyn Samuels and Commissioner Kalpana Kotagal. Samuels' term is the first one up of this group, in 2026. Lucas' term is set to expire even earlier, in 2025. One of the agency's five commissioner seats is vacant.

As presidents do not kick typically commissioners out, and Congress is required to bring new ones aboard, Lucas will in all probability remain the sole Republican vote on the majority Democratic commission for some time.

This significantly restricts her ability to roll out any major policy changes, experts said.

"For those who understand how the commission works and what the chair can or can't do, the real question is: What can a chair do with only one vote — only her one vote, and three Democrats on the commission exercising their prerogatives?" said Seyfarth Shaw LLP senior counsel Rachel See, who previously served as a top EEOC adviser.

"So if we're looking at hot-button policymaking moves, we're likely not going to see votes from the commission on those issues while there's not a Republican majority, because it wouldn't get approved," See said.

Instead, employment attorneys anticipated a general downturn in EEOC activity until the Republicans secure a majority, which, in all likelihood, won't happen at least until Samuels' term is up in 2026.

"The chair could stop things from happening generally, but it's very difficult to make things happen when you don't have the votes," said Jim Paretti, a shareholder at Littler Mendelson PC's Workplace Policy Institute who previously served as a senior EEOC legal adviser.

"So, in the immediate, it means the agency is not going to do much in terms of guidance documents, or other things that will need the other commissioners' approval," Paretti said.

### **Longer-Term Revamp**

Over the next four years, however, attorneys said they expect the EEOC to adopt a new strategy.

From a broad perspective, experts said that the commission under Trump would probably focus less on litigation and more on compliance.

"We can be pretty assured that we'll see a dramatic shift away from enforcement," said Tom Spiggle, the founder of the Spiggle Law Firm, a worker-side employment firm.

Garen Dodge, a management-side attorney who is a shareholder at Odin Feldman & Pittleman PC, agreed.

"Generally, in a Republican administration as opposed to a Democratic administration, you're looking at assisting with compliance as opposed to 'gotcha,'" Dodge said. "In other words, finding an employer who inadvertently didn't do something the way the EEOC might interpret the law as requiring."

"You might see the EEOC getting more into a mode of updating specific compliance assistance, as opposed to turning machinery on," he said.

As for specific policy goals, experts said, protecting religious workers and pregnant employees would likely be high on the commission's priority list.

"The EEOC, like all federal agencies, has limited resources, so they have to pick and choose what cases to bring and what to prioritize," said Lander, of Orrick. "So, in terms of the kinds of cases they decide to file in court, you can expect protecting religious freedom to be a high priority."

Project 2025, a prominent conservative organization's playbook for the incoming Republican administration, leans heavily on **evangelical Christian values** in its vision for the EEOC. Some of the Heritage Foundation's plans include narrowing the federal interpretation of the U.S. Supreme Court's 2020 landmark ruling in **Bostock v. Clayton County**, in which the justices declared that employers **can't discriminate** on the basis of an applicant's or worker's sexual orientation or gender identity.

Other goals include deleting the terms "sexual orientation and gender identity," "diversity, equity and inclusion," "gender," "gender equality," "abortion" and "reproductive health" from all federal laws, regulations, contracts and grants.

Trump has not endorsed the handbook, but the foundation has said Trump ultimately adopted the bulk of the 2016 election cycle recommendations while in office, and the incoming vice president, JD Vance, has close ties to the Heritage Foundation.

Lucas' tenure as a commissioner also presages a religious focus for the EEOC in years to come. Just days before Biden took office in early 2021, she voted to finalize **controversial guidance** aimed at protecting workers' religious rights.

She and two other Republican commissioners **greenlit the measure**, while the Democratic appointees — just Burrows and Samuels at the time — opposed it. They said the plan "does not always strike the proper balance" between the "complementary principles of religious freedom and equal treatment under the law."

Scores of civil rights groups had raised concerns that the guidance would put certain groups, such as LGBTQ people and members of minority religions, at a higher risk of workplace bias.

In addition to a drill-down on religious bias, Lander anticipated that "protecting pregnant employees from discrimination, ensuring they're accommodated" as long as it is "pro-family and pro-life," will be a focus area for the EEOC under Trump.

This contention is also supported by Lucas' track record.

She's been a vocal advocate for pregnant workers. However, she vehemently opposed the EEOC's broad take on the protections afforded by the Pregnant Workers Fairness Act. The law, which went into effect last year, requires accommodations for pregnancy, childbirth or related medical conditions, and the EEOC has taken the position that the statute covers a wide category of workers.

According to the EEOC's finalized rules, abortion is within the law's coverage, alongside a thorough list of other pregnancy-related conditions, including a current, past or potential pregnancy; lactation; birth control usage; menstruation; infertility and fertility treatments; endometriosis; and miscarriage and stillbirth.

Lucas took issue with this interpretation, arguing that the law should only apply to "a specific, actual pregnancy and childbirth of an individual worker, and particular medical conditions related to them." The EEOC is trying to turn the law into "an omnibus female reproduction disability statute," Lucas argued in a 16-page statement explaining her "no" vote.

Workplace diversity, equity and inclusion efforts are also an arena where the EEOC **is likely to pivot** over the course of the second Trump administration.

Immediately after the conservative wing of the nation's top court **scrapped affirmative action** in college admissions last year, the EEOC's current chair, Burrows, advised employers that the ruling did not affect their diversity initiatives.

Lucas, on the flip side, **has been warning businesses** that some diversity measures were already on shaky legal ground, and she believes that the landscape is even less stable since the end of college-level affirmative action.

Little's Paretti pointed out that this was one area where Lucas had been unequivocal.

"She's made her feelings on that rather clear, so I suspect that would be the position she would want the agency to take," he said.

At large, Paretti said, the actions the EEOC embarked on during the first Trump administration offer clear insights as to what to expect in the second go-round.

"We had one Trump administration and we saw what some of their focuses were in this area, and I see no reason to believe they wouldn't return to some of the same focuses," he said.

-- Additional reporting by Vin Gurrieri, Braden Campbell, Chris Villani and Amanda Ottaway. Editing by Karin Roberts.