

# 2025 BUSINESS >> *of* AIRPORTS



## Employment Law: Navigating The Evolving Legal Landscape

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# Employment Law: Navigating The Evolving Legal Landscape

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Timothy B. McConnell  
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# Today's Agenda:

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1. New Administration
  - a. New personnel
  - b. New policy priorities
    - i. EEOC, DOL and NLRB
2. AI in the Workplace
3. Stay Vigilant/Prepared

# The Current State of Employment Law...



# Executive Orders

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- [EO 14151](#) directs federal government agencies to end all illegal DEI mandates, policies, programs, preferences, and activities in the federal government. It also eliminates DEI performance requirements for federal employees, contractors, or grantees.
- [EO 14173](#), revoked the longstanding EO 11246, which had prohibited discrimination by federal contractors based on race, color, religion, and national origin, and it stripped the Office of Federal Contract Compliance Programs (OFCCP) of much of its authority to enforce federal contractors' compliance with federal laws and regulations requiring nondiscrimination. The order also required organizations doing business with the government to certify that they do not have any DEI programs that are unlawful under federal antidiscrimination laws, under threat of potential liability under the False Claims Act (FCA).
  - NOTE: Two courts have held that the DEI-related EOs should not be enjoined pending legal challenges.
- On April 23, 2025, President Trump signed an EO to instruct federal agencies to stop using disparate impact theory under federal antidiscrimination law.

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“You’re fired!”



# Polishing their resumes

- Jocelyn Samuels
  - Former EEOC Vice Chair
  - Term set to end in 2026
  - Fired by President Trump on January 27, 2025
  - Apr. 9, 2025: Samuels filed suit challenging termination and seeking reinstatement
- Charlotte Burrows
  - Former EEOC Chair
  - Term set to end in 2028
  - Fired by President Trump on January 27, 2025
- Gwynne Wilcox
  - Former Chair of NLRB
  - Term set to end in 2028
  - Fired by President Trump on January 27, 2025
- Jennifer Abruzzo, NLRB General Counsel
  - Fired by President Trump on January 27, 2025
- Karla Gilbride, EEOC General Counsel
  - Fired by President Trump on January 27, 2025



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# EEOC

# EEOC Trends

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- In 2023, the EEOC received a total of 81,055 workplace discrimination charges -- the highest number of EEOC charges since FY 2017
- However, in 2024, the EEOC received almost 90,000 charges, representing a nearly 10% jump from the last fiscal year and continuing a recent upward swing in filings.
- In 2024, the EEOC had a record year in terms of monetary recovery for workers – bringing in \$700 million.

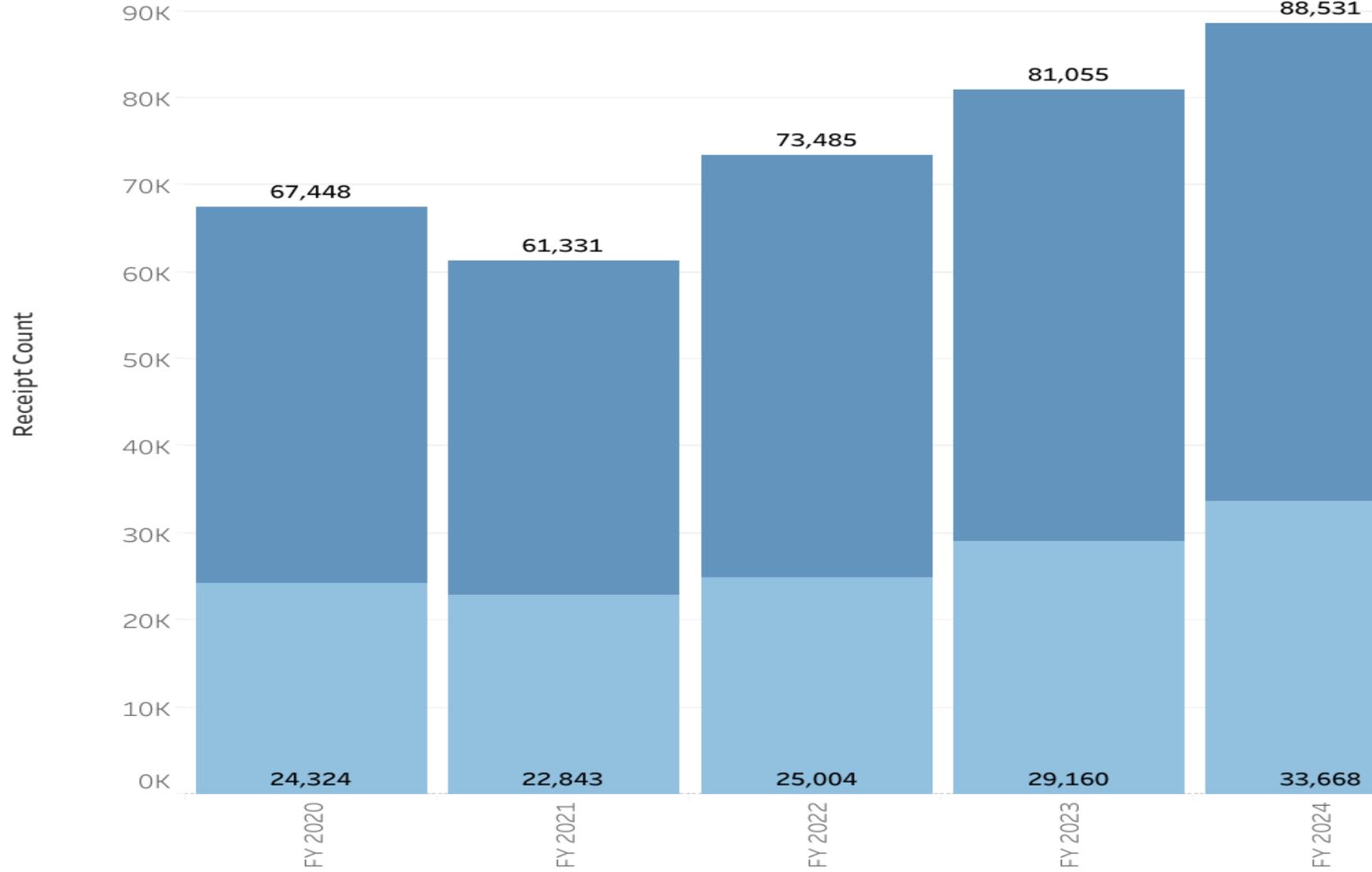
Fiscal Year  
2020 to 2024

Discrimination Type

- Age Based
- Color-Based
- Disability
- Equal Pay
- GINA Charges
- National Origin-Based
- Pregnancy Based
- Race-Based
- Religion-Based
- Retaliation-Based
- Sex-Based

*Charges that allege multiple discrimination types are included with each applicable discrimination type.*

### EEOC Disability vs Total Charges



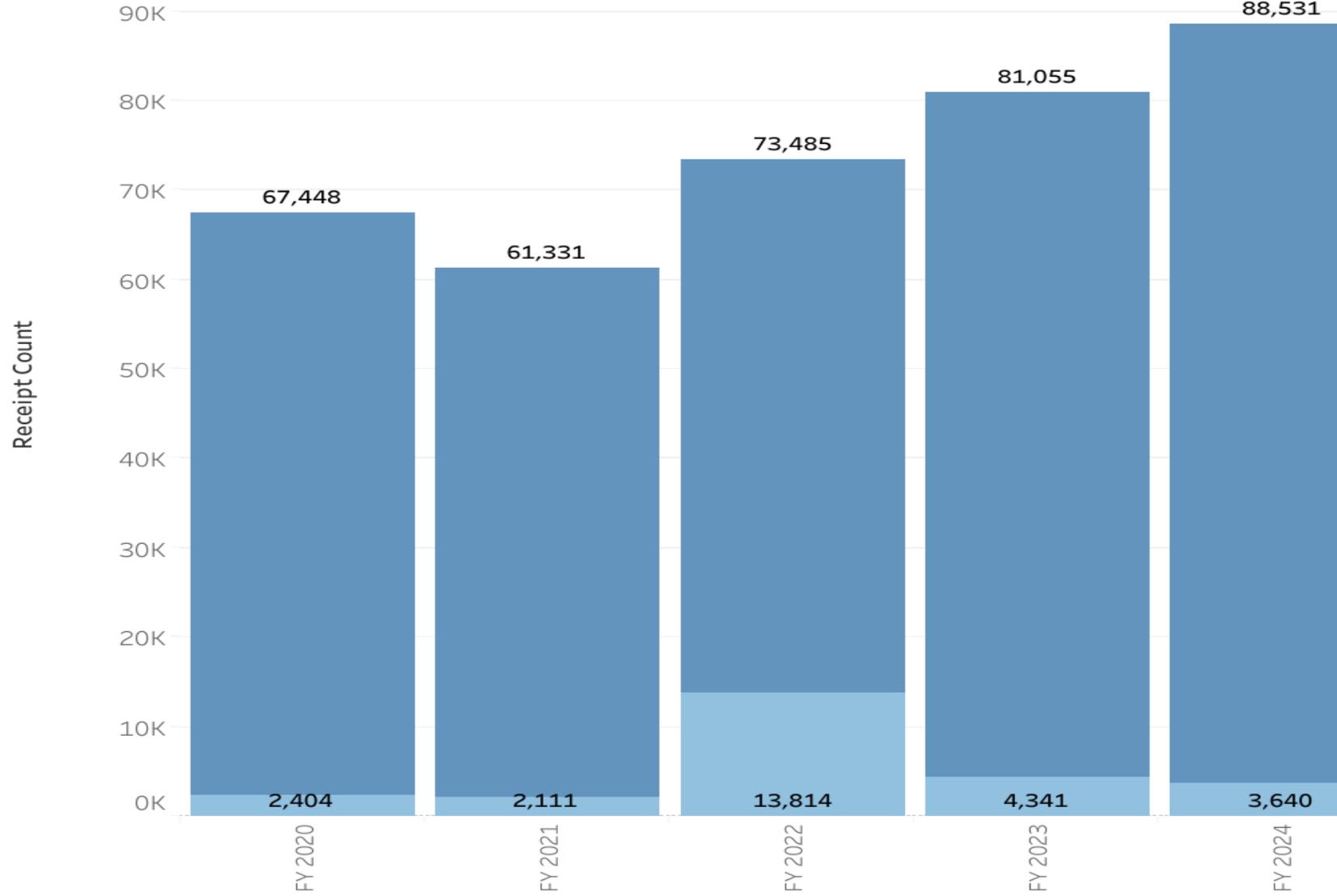
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*Charges that allege multiple  
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### EEOC Religion-Based vs Total Charges



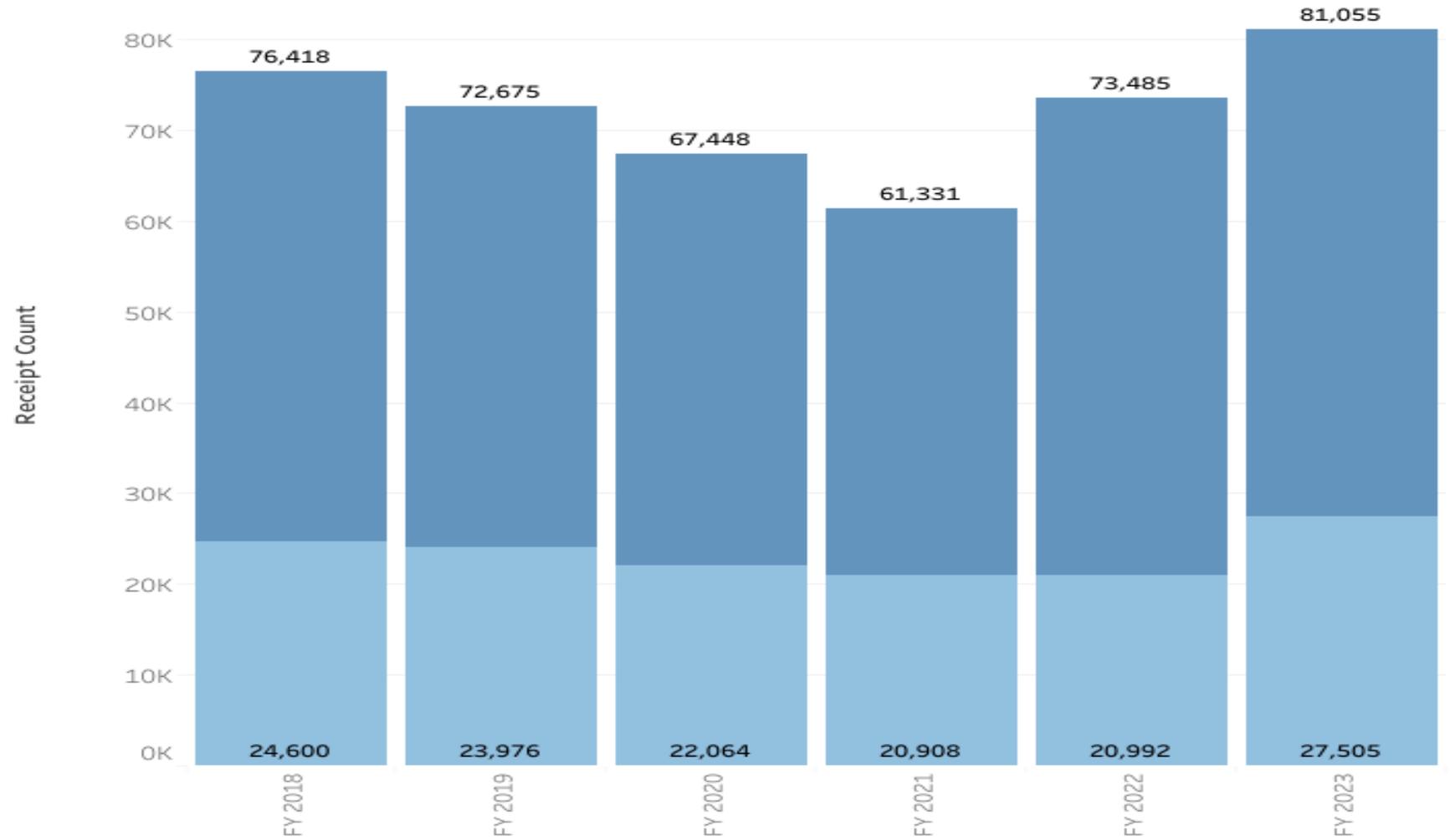
Fiscal Year  
2018 to 2023

Discrimination Type

- Age Based
- Color-Based
- Disability
- Equal Pay
- GINA Charges
- National Origin-Based
- Pregnancy Based
- Race-Based
- Religion-Based
- Retaliation-Based
- Sex-Based

*Charges that allege multiple discrimination types are included with each applicable discrimination type.*

### EEOC Race-Based vs Total Charges



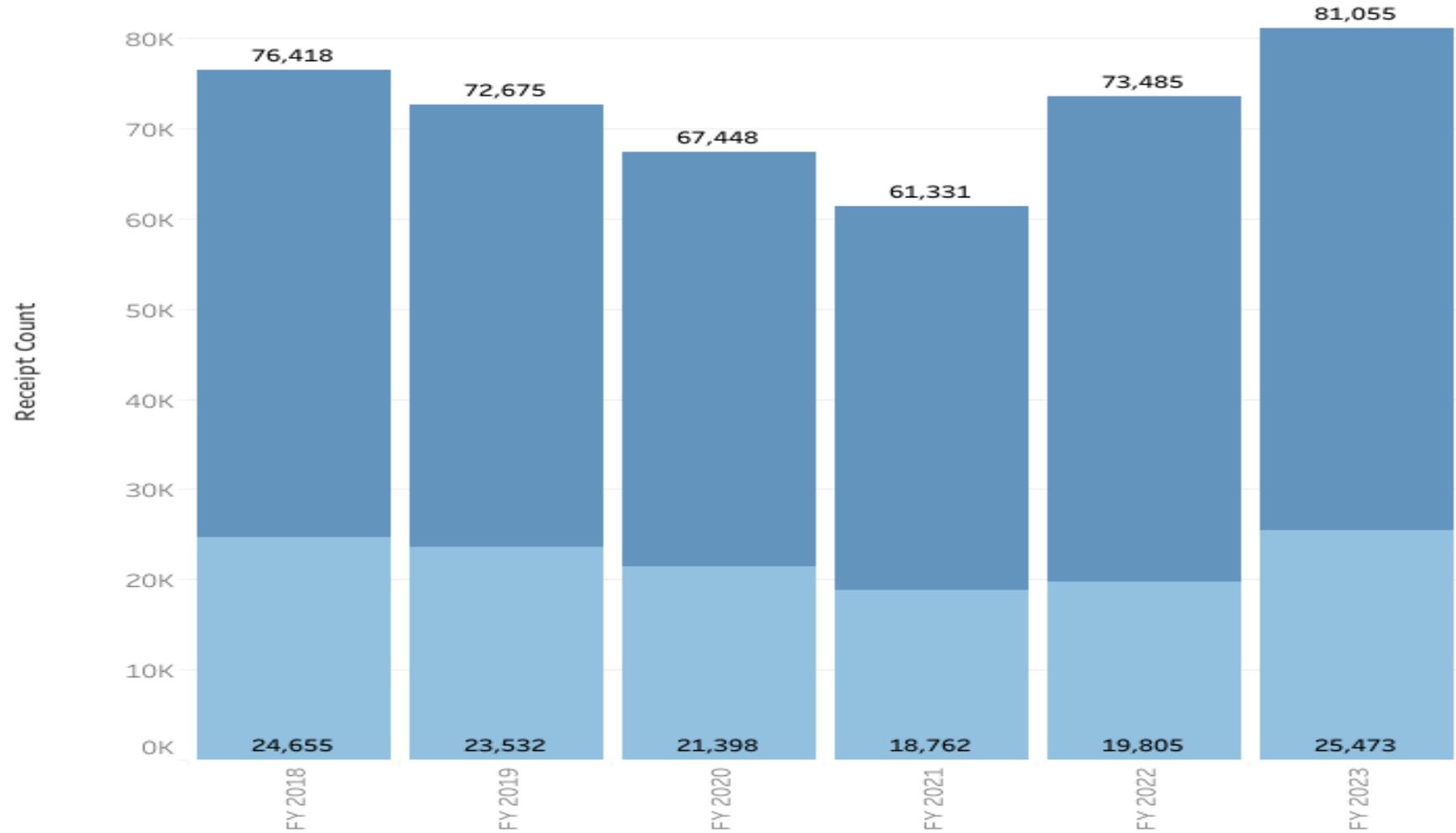
Fiscal Year  
2018 to 2023

Discrimination Type

- Age Based
- Color-Based
- Disability
- Equal Pay
- GINA Charges
- National Origin-Based
- Pregnancy Based
- Race-Based
- Religion-Based
- Retaliation-Based
- Sex-Based

*Charges that allege multiple discrimination types are included with each applicable discrimination type.*

### EEOC Sex-Based vs Total Charges



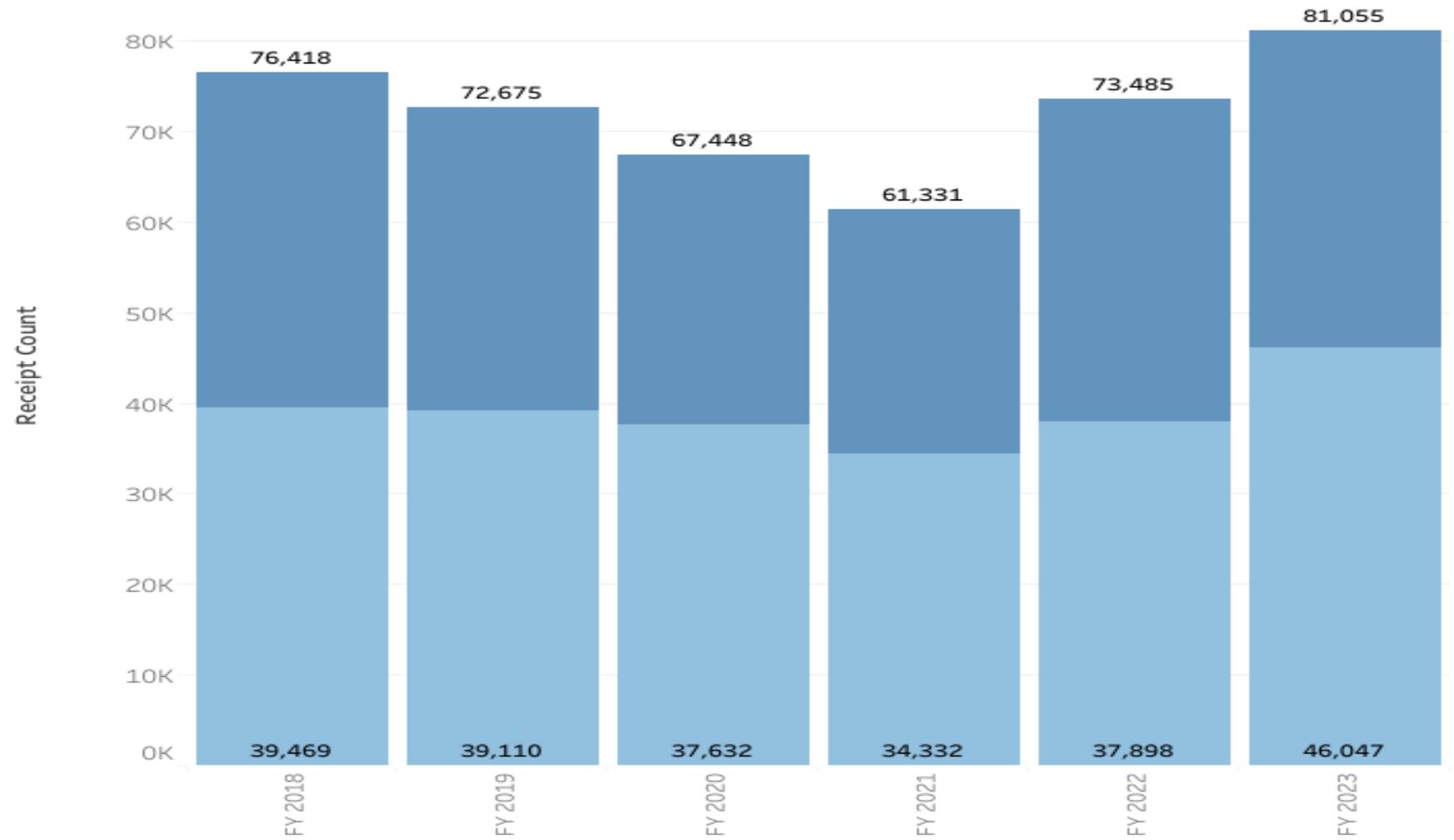
Fiscal Year  
2018 to 2023

Discrimination Type

- Age Based
- Color-Based
- Disability
- Equal Pay
- GINA Charges
- National Origin-Based
- Pregnancy Based
- Race-Based
- Religion-Based
- Retaliation-Based
- Sex-Based

*Charges that allege multiple discrimination types are included with each applicable discrimination type.*

### EEOC Retaliation-Based vs Total Charges



# Current State of the EEOC

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- Five commissioners
- Statute does not specify grounds for removal
- Five year staggered terms
- No more than three from same political party
- President designates one member as Chair

# EEOC Acting Chair

- Andrea Lucas named Acting Chair on Jan. 21, 2025
  - Joined as Commissioner in July 2020
  - Current term ends in July 2025
  - Nominated to new five-year term on Mar. 24, 2025



# Other Members of EEOC

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- With terminations of Jocelyn Samuels and Charlotte Burrows, the only Commissioner (other than Andrea Lucas) is Kalpana Kotagal, whose current term ends in 2026
- One Vacant Position

# Currently No Voting Quorum

- Means Commission cannot issue new policies or revisit Biden-era policies
  - But routine operations continue as normal
    - Investigation of charges
    - Mediation/conciliation/lawsuits
- What's next?
  - Will Samuels win and be reinstated?
  - When will President Trump appoint new Commissioners?

# “Personnel is Policy”

**Press Release**

01-21-2025

## **President Appoints Andrea R. Lucas EEOC Acting Chair**

In recent years, this agency has remained silent in the face of multiple forms of widespread, overt discrimination. Consistent with the President’s Executive Orders and priorities, my priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women’s rights to single-sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement.”

# EEOC Priorities Under Former Admin.

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- Biden admin.:
  - Focus on SO/GI discrimination
    - Updated “Enforcement Guidance on Harassment in the Workplace” as of Apr. 29, 2024
    - Expansive reading of *Bostock v. Clayton County*, 590 U.S. 644 (2020)
    - “Repeated and intentional misgendering” = harassment
    - Same for preventing access to bathroom that aligns with GI

# EEOC Priorities Under Former Admin.

- Promote DEI initiatives
  - Restrictive reading of *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181 (2023)
  - Then-Chair Burrows: SFFA “does not address employer efforts to foster” DEI in the workplace
- PWFA protections extended to abortion
  - Final Rule implementing PWFA took effect June 18, 2024
    - On Feb. 20, 2025, court in *State of TN v. EEOC*, No. 24-2249 (8th Cir.) ruled states have standing to challenge rule, reversing district court
    - Other challenges pending

# EEOC Priorities Under New Admin.

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- Trump admin.:
  - Gender identity protections hurt women
    - EO 14168 (Jan. 20, 2025) “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”
    - “It is the policy of the United States to recognize two sexes, male and female”
    - States Biden Administration misapplied *Bostock* in requiring gender identity-based access to single-sex spaces

# EEOC Priorities Under New Admin.

- Trump administration:
  - “Unlawful DEI” policies could promote “majority discrimination”
    - NOTE: decision in *Ames v. OH Dept. of Youth Services* (2025) could make it easier for majority employees to claim discrimination
    - In *Ames*, a unanimous Supreme Court held that Title VII does not distinguish between majority- and minority-group plaintiffs
    - Rejected the 6<sup>th</sup> Circuit’s heightened “background circumstances” standard that required a majority-group plaintiff to show that the employer was the unusual employer who discriminates against the majority
  - Pay more attention to claims of:
    - Religious accommodations
    - “Anti-American” discrimination

# What is “Unlawful DEI”?

- On Mar. 19, 2025, EEOC issued FAQ’s on “What You Should Know About DEI-Related Discrimination at Work”
  - Any employment action “motivated—in whole or in part—by an employee’s race, sex, or another protected characteristic” may be unlawful, even when the action is part of a DEI initiative. Examples from the guidance include efforts to:
    - “Balance” the workforce;
    - Limit, segregate, or classify employees; or
    - Make employment decisions such as hiring, promoting, or diverse interview slates; compensation, access to mentoring, sponsorship, or workplace networking; and participation in internships, fellowships, or mentoring programs based on protected characteristics.
- It also highlights that “[d]epending on the facts, DEI training may give rise to a colorable hostile work environment claim” and that “[r]easonable opposition to a DEI training may constitute protected activity” that would prohibit employer retaliation.

# What is “Unlawful DEI”?

- On same day, EEOC issued information sheet on “What to Do If You Experience Discrimination Related to DEI at Work”
- Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee’s race, sex, or another protected characteristic. Examples: unlawfully using quotas or otherwise “balancing” a workforce by race, sex, or other protected traits.
- Also EEOC issued press release about both documents, citing SFFA
- Ultimately...
  - It’s up to courts to say what DEI initiatives are unlawful
  - But it is possible/likely SCOTUS will eventually export reasoning of SFFA to employment context and decide race/sex-conscious initiatives are unlawful

# DEI Wage & Hour Issue

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- Practices likely to face scrutiny include:
  - Diversity referral bonuses (if bonuses exceed those paid for referring non-diverse candidates)
  - Compensation tied to the achievement of DEI-related goals (e.g. bonuses for executives and management – what benchmarks were used)
  - Paying for time spent in Employee Resource Groups (ERGs)
  - Paid diversity internships and fellowships

# Disparate Impact Liability Still Exists

- EO (Apr. 23, 2025) “Restoring Equality of Opportunity and Meritocracy”
  - Seeks to eliminate use of DI theory “to the maximum degree possible”
  - Instructs EEOC to deprioritize enforcement of DI cases and to reassess its position in pending investigations and lawsuits based on DI liability
- DI liability is codified in Title VII as amended in 1991 and was recognized by SCOTUS in *Griggs v. Duke Power Co.* (1971)
  - So plaintiffs can still pursue DI claims in court

# Department of Labor

# New Personnel

## Secretary of Labor

- Lori Chavez-DeRemer
- Confirmed Mar. 10, 2025
- Former House Rep from OR
- Co-owner of pain medicine clinics
- Supported by Teamsters
- Co-sponsored Protecting Right to Organize (PRO) Act
  - Would have rewritten labor law to make it easier for unions to win organizing campaigns



# Other New DOL Personnel

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- **Keith Sonderling, Deputy Secretary of Labor**
  - Confirmed Mar. 12, 2025
  - Former acting and deputy Administrator of WHD
  - Former EEOC Vice Chair
- **Jonathan Berry, Solicitor of Labor**
  - Nominated but not yet confirmed
  - Former deputy assistant secretary for policy at DOL
  - Authored Project 2025's section on the DOL
- **Andrew Rogers, Administrator of WHD**
  - Administrator of Wage and Hour Division nominee
  - Must be confirmed by Senate
  - Currently Acting GC of EEOC

# Status of OT Rule

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- Since 2019 OT salary thresholds set at \$35,568 per year for EAP and \$107,432 for HCE
- 2024 Rule would have increased to:
  - \$43,888 per year; \$132,964 for HCE as of July 1, 2024
  - \$58,656 per year; \$151,164 for HCE as of Jan. 1, 2025
  - Automatic increases every three years

# Status of OT Rule

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- Rule challenged and blocked
  - *Texas v. U.S. Department of Labor*, No. 4:24-CV-499-SDJ (E.D. Tex.)
    - Nov. 15, 2024: court enjoined and vacated Rule
    - Nov. 26, 2024: appealed to Fifth Cir.
  - *Flint Ave., LLC v. Su*, No. 5:24-cv-00130-H (N.D. Tex.)
    - Dec. 30, 2024: same, adopted reasoning in Texas
    - Feb. 28, 2025: appealed to Fifth Circuit

# Status of OT Rule

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- Trump's DOL's 2019 rule of \$684 per week for the EAP exemptions and \$107,432 for the HCE exemption remains in effect.
- Employers who raised the EAP-exempt salary threshold to \$844 week after July 1, 2024, may legally reverse course, but should consider whether that makes sense for business and employee morale reasons.
- Employers must also remain mindful of state minimum salaries for exemption.
- What's next?
  - Appealing lets DOL defend setting salary thresholds
  - Could issue revised rule
    - Increase salary levels, but by lower amounts
    - Get rid of automatic increases
    - Would involve going through rule-making process again

# No Tax on Tips?

- President Trump campaigned on eliminating federal taxes on tipped income
- On May 20, 2025, the No Tax on Tips Act, a standalone bill that would effectively exempt up to \$25,000 in tips from federal income tax for certain workers, passed by unanimous consent in the Senate.
- On May 22, 2025, the One Big Beautiful Bill Act (OBBBA), a reconciliation package that provides temporary federal income tax deductions for qualified tips and overtime, passed by one vote in the House.
- Both bills allow for a tax deduction on tips for workers making up to \$160,000 a year in an occupation that has “traditionally and customarily” received tips.
  - It is important to note that the tax deduction for tips applies only to federal income tax, meaning employees would still pay Medicare, Social Security, state, and local taxes. Both bills also extend the employer tax credit for Social Security taxes paid on tips, which is currently reserved only for restaurants, to beauty service establishments.
- A few key differences between the House and Senate bills:
  - the OBBBA proposes excluding premium overtime pay from gross income for federal income tax purposes, while the No Tax on Tips Act has no such provision.
  - the No Tax on Tips Act proposes permanent changes, allowing eligible employees to deduct up to \$25,000 a year in tips beginning with the 2025 tax year. In contrast, the OBBBA tax deductions would be temporary, applying retroactively to the beginning of 2025 and expiring at the end of 2028.

# Employers' W&H Wish List

- Reinstatement 2021 independent contractor rule
  - 2021 Trump rule: 2 “core factors” (control and opportunity for P&L)/3 additional “non-core” factors (amount of skill required, degree of permanence of the working relationship and whether the work is part of an integrated unit of production)
  - 2024 Biden rule: focus on economic reality: whether the workers are either dependent on the potential employer for work or in business for themselves:
    - (1) Opportunity for profit or loss depending on managerial skill;
    - (2) Investments by the worker and the potential employer;
    - (3) Degree of permanence of the work relationship;
    - (4) Nature and degree of control;
    - (5) Extent to which the work performance is an integral part of the employer’s business; and
    - (6) Skill and initiative
- Don’t forget states that have stricter IC tests!

# Employers' W&H Wish List

- Reinstatement 2020 joint employer rule
  - There are two generally recognized categories of joint employment:
    - Vertical joint employment, where an employee of one employer is also, with regard to the work performed for the intermediary employer, economically dependent on another employer.
    - Horizontal joint employment, where two (or more) employers each separately employ an employee but are sufficiently associated with or related to each other with respect to the employee.
  - Trump Rule:
    - Vertical joint employment. Applied a narrow four-factor test based on the employer's actual control, asking whether the employer: (1) Hired or fired the employee; (2) Supervised and controlled the employee's work schedule and conditions of employment to a substantial degree; (3) Determined the employee's rate and method of payment; and (4) Maintained the employee's employment records.
    - Horizontal joint employment: Focused on whether employers were sufficiently associated in relation to the employee's work.
- Clarify donning and doffing rules
- Reform how travel time is counted
- Make fluctuating workweek method easier to apply



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# NLRB

# NLRB Members

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- Five members
- NLRA: nominated by President, confirmed by Senate
- Can be removed for “neglect of duty or malfeasance in office, but for no other cause” ... only after “notice and hearing”
- Five year staggered terms
- Three come from party in power and two from other party
- President designates one member as Chair

# NLRB Chair

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- Marvin Kaplan named Chair on January 20, 2025
  - Board member since 2017
  - Previously Chair from Dec. 2017 to April 2018
  - Current term ends in August 2025
  - Before NLRB was Chief Counsel to Chair of OSH Review Commission
- Other Members of NLRB:
  - Gwynne Wilcox
    - Current term set to end in 2028
    - Named Chair by President Biden in Dec. 2024
    - **Fired by President Trump on Jan. 27, 2025 without notice or hearing**
  - David Prouty
    - Current term set to end in 2026
  - Two Vacant positions

# Wilcox v. Trump, No. 25-5057 (D.C. Cir.)

- Feb. 5, 2025: Wilcox sued challenging termination and seeking reinstatement
- Issue: is board member removal protection in NLRA constitutional?
- President says no because it interferes with his Art. II powers
- Mar. 6, 2025: Dist. Judge Beryl Howell ruled for Wilcox and ordered reinstatement
  - Granted Wilcox’s MSJ
  - Denied cross-motion
  - Issued DJ that firing was unconstitutional
  - Ordered reinstatement
  - Enjoined gov’t from impeding her from executing her duties
  - All based on Humphrey’s Executor v. U.S. (1935)
    - Allowed Congress to limit president’s authority to fire top officials at “independent” agencies without cause
- May 22, 2025: U.S. Supreme Court issued a decision granting the Administration’s emergency application to stay the D.C. Circuit Court order to reinstate Ms. Wilcox

# Former NLRB GC

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- GC investigates and prosecutes ULP's and oversees regional offices
  - No statutory protection from removal
- GC Jennifer Abruzzo fired by Pres. Trump on Jan. 27, 2025
  - Controversial memos
    - Non-competes in employment and severance agreements and “stay or pay” agreements violate Sec. 7 of NLRA
    - College athletes should be considered employees under NLRA
- Acting GC Jessica Rutter fired by Pres. Trump on Feb. 1, 2025

# Current NLRB GC

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- William Cowen named Acting GC on Feb. 3, 2025
  - Regional Director in LA since 2016
  - NLRB Solicitor for ten years before that
  - Served as Board Member in 2002
  - Alum of Case Western Reserve, Wesley Theological Seminary, and Cleveland-Marshall Law
  - On Feb. 14, 2025 rescinded 18 controversial memos, including memoranda regarding remedies and settlements in labor cases, electronic monitoring for employees, and the Board's *McLaren Macomb* decision, which prohibited non-disparagement and confidentiality provisions in severance agreements, and identified more that are “rescinded pending further review”
- NLRB GC nominee: Crystal Carey nominated on March 24, 2025
  - Must be confirmed by Senate
  - Former staff attorney at Board

# What's Next for NLRB?

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- Board requires three-member quorum to issue decisions
  - So for now Board cannot decide cases
- What will be outcome of Wilcox lawsuit?
- Who will Trump appoint to fill open seats and when may they be confirmed?
- NLRA remains in full effect and NLRB day to day operations continue

# Controversial NLRB Decisions

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- Once Board has quorum, expect recent controversial decisions to be re-examined and hopefully reversed
- *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (Aug. 25, 2023)
  - Union can demand recognition based on claim of majority support based on collection of signed authorization cards without election
- *Amazon Services, LLC*, 373 NLRB No. 136 (Nov. 13, 2024)
  - Requiring employees to attend “captive audience” meetings in which employer expresses its views on unionization violates NLRA

# Controversial NLRB Decisions

- *Siren Retail Corp d/b/a Starbucks*, 373 NLRB No. 135 (Nov. 8, 2024)
  - Employer statements during union campaign about effects of unionization on relationship between workers and management illegal unless "carefully phrased" based on objective facts
- *Stericycle, Inc.*, 372 NLRB No. 113 (Aug. 2, 2023)
  - Workplace rules and handbook policies are presumptively unlawful if they could – rather than would – be interpreted to limit employee rights
  - Resulted in Board taking position that many social media policies and confidentiality and non-disparagement provisions “chilled” protected activity

# AI in the Workplace

# Current State of Legislation

- No Federal legislation yet
- Under the Biden Administration, focus was on protecting employees and consumers
  - April 2024 the DOL issued guidance on AI: “responsible human oversight” is necessary to ensure that use of AI does not result in violations of federal labor law or create systemic violations across the workforce
  - May 2022, the EEOC issued guidance related to use of AI and algorithmic decision-making processes that could result in discrimination against applicants and employees with disabilities
  - May 2023, the EEOC additional guidance on the potential disparate impact of the use of AI to make applicant and employee selection decisions
  - NOTE: the EEOC’s guidance has now been removed from its website
- Under the Trump administration, shift in focus to removing barriers
  - EO 14179: “[Removing Barriers to American Leadership in Artificial Intelligence](#).”
  - “It is the policy of the United States to sustain and enhance America’s global AI dominance in order to promote human flourishing, economic competitiveness, and national security.”
  - Revoked Biden Administration AI EO
  - Calls for departments and agencies to revise or rescind all policies, directives, regulations, orders, and other actions taken under the Biden AI order that are inconsistent with enhancing America’s leadership in AI.

# Current State of Legislation

- But States are taking action:
  - **Colorado** was the first state to enact a law prohibiting employers from using AI to discriminate against employees and requiring companies to take extensive measures to avoid such algorithmic discrimination;
  - **Illinois** was the second state to pass AI workplace legislation that will require employers to provide notice to applicants and workers if they use AI for hiring, discipline, discharge, or other workplace-related purposes. The law will also prohibit employers from using AI in ways that result in workplace discrimination;
  - In March 21, the **California Rights Civil Rights Department** finalized regulations for the use of AI and automated decision-making systems. In short, the final regulations make it unlawful to use AI and automated decision-making systems to make decisions that discriminate against applicants and employees.
  - **New York City Local Law 144**: creates obligations for employers when using AI for employment purposes when AI plays a predominant role in decisions

# AI Next Steps

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1. Monitor State and Local legislation
2. If using AI in the workplace:
  - a. Maintain human oversight over employment decisions
  - b. Develop a policy on the use of AI
  - c. Training on appropriate use of AI tools
  - d. Audits by outside counsel to ensure no disparate impact on protected groups

# Stay Vigilant/Prepared

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1. Disability-based claims of discrimination are on the rise!
2. Conduct privileged audits of DEI programs
3. Continue to monitor developments at the EEOC, the DOL and the NLRB
4. Don't forgot state and local law! States have become hyperactive in this area, and I expect the "blue states" will continue in response to the Trump Administration



Questions?