

Coates' Canons NC Local Government Law

Antidiscrimination Law under the Second Trump Administration Part 3: Reinterpretation of Unlawful "Sex" Discrimination

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This is the third and final blog post in a series discussing how President Trump's Executive Orders (EOs) impact employment discrimination law at the local level. [The first post](#) focused on EOs ordering the elimination of diversity, equity and inclusion (DEI) programs, and [the second](#) focused on the EO directing federal agencies to deprioritize the adverse impact (unintentional) theory of discrimination. This blog post discusses [EO 14168, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*](#), which is fundamentally at odds with a 2020 decision of the United States Supreme Court.

BACKGROUND: THE SUPREME COURT'S *BOSTOCK* DECISION

In the 2020 case [*Bostock v. Clayton County*](#), the U.S. Supreme Court held that Title VII's prohibition on employment discrimination based on "sex" includes a prohibition on discrimination based on sexual orientation, gender identity, or transgender status. The Court consolidated three cases—two involving gay employees and one involving a transgender employee—all of whom were fired.

The Court's reasoning was straightforward:

"An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids . . . [I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

The Court emphasized that its ruling dealt only with questions of termination from employment: the employees were fired because of their sexual orientation or gender identity. Other questions

would have to wait for future cases:

“[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual “because of such individual’s sex.”“

EXECUTIVE ORDER 14168: CORE PROVISIONS

Purpose and Rationale

The EO asserts that recognition of the concepts of gender identity and transgender status has led men to self-identify as women to gain access to “intimate single- sex spaces and activities designed for women, from women’s domestic abuse shelters to women’s workplace showers.” As a consequence, the EO says, the concepts of gender identity and transgender status have transformed “laws and policies designed to protect sex-based opportunities into laws and policies that undermine them”

New Definitions of “Sex,” “Female,” and “Male”

Section 2 of the EO establishes new definitions of ‘male’ and ‘female’ that will govern all executive branch interpretation of federal law:

“It is the policy of the United States to recognize two sexes, male and female the following definitions shall govern all Executive interpretation of and application of Federal law and administration policy:

- (a) *‘ “Sex” shall refer to an individual’s immutable biological classification as either male or female. “Sex” is not a synonym for and does not include the concept of “gender identity”. . . .’*
- (d) *“Female” means a person belonging, at conception, to the sex that produces the large reproductive cell.*
- (e) *“Male” means a person belonging, at conception, to the sex that produces the small reproductive cell.“*

Relationship to the *Bostock* Decision

The EO cannot, of course, overrule the Supreme Court’s *Bostock* decision. Instead, it can, and does, redirect federal enforcement efforts in the area of unlawful sex discrimination.

EEOC Changes

The EO includes several directives that will reshape federal anti-discrimination enforcement:

Enforcement Priorities (Section 5(d)): The EO directs the Chair of the Equal Employment Opportunity Commission to prioritize investigations and litigation that enforce sex-based distinctions, particularly those that “protect women.” The clear intent is to eliminate any emphasis on investigations and litigation based on sexual orientation, gender identity or transgender status.

Rescission of Harassment Guidance (Section 7(c)(iv)): The EO specifically directs the EEOC to rescind its April 2024 Enforcement Guidance on Harassment in the Workplace, which interpreted Title VII harassment to prohibit harassment based on gender identity and transgender status. For now, the EEOC cannot rescind the guidance because it lacks a quorum of commissioners. In the meantime, however, a federal district court judge in Texas vacated those portions of the Harassment Guidance that address:

- the use of preferred pronouns,
- facilities like bathrooms that are typically divided along based on sex, and
- appearance.

The EEOC has left the Harassment Guidance on its website for now but has highlighted the sections of the document that the judge has ruled invalid.

Federal Funding Restrictions

- I. In addition to its impact on employment discrimination, the use of the new definitions of “male” and “female” may affect local government human services programs, housing and community development programs, and education programs that are funded in whole or in part by federal funds. The EO directs that
- II. Federal funds shall not be used to promote gender ideology. Each agency shall assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology.

The EO defines “gender ideology” as “an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa” Accordingly, local governments should review their grant application for federal funding and be alert to any new guidance by federal funding agencies to ensure compliance with the .

BOTTOM LINE: WHAT SHOULD LOCAL GOVERNMENTS DO IN RESPONSE TO EO 14168?

As far as employment practices, there are no new actions that local government employers must take. *Bostock v. Clayton County* remains controlling law, and employers must still guard against making employment decisions based on sex, including sexual orientation and transgender status. Harassment and hostile work environments based on those characteristics are still generally unlawful. However, whether unlawful harassment includes refusing to use an employee's preferred pronouns or their manner of presenting themselves is, in the author's opinion, something left open by *Bostock*. Expressly left open by the *Bostock* court is whether nonbinary and transgender employees must be allowed to use the bathrooms or locker rooms assigned to the sex with which they identify.

New EEOC Enforcement Priorities: The new EO directs the EEOC not to prioritize claims based on a failure to allow nonbinary and transgender employees to use the restroom of their choice. The EEOC is now likely to prioritize discrimination and harassment claims by women based on their employers allowing nonbinary and transgender employees who were born male to access to women's restrooms and locker rooms.

CONCLUSION

Individual employers will make different decisions on difficult questions. "Do we accommodate restroom and locker room preferences?" "Do we penalize employees who refuse to use a nonbinary or transgender employee's preferred pronouns?" These may be difficult decisions. They should be carefully discussed with the affected parties and no decision should be made without consulting with the city, county or agency attorney.

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