

WHAT NORTH CAROLINA EMPLOYERS NEED TO KNOW ABOUT NEW “BATHROOM LAW”

Insights
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On April 12, 2016, North Carolina Governor Pat McCrory issued an Executive Order to clarify and somewhat lessen the impact of what has widely been referred to as the state’s new “bathroom law.” The new law, passed a few weeks ago, makes clear that the state government, located in Raleigh, will set uniform antidiscrimination laws for the entire state. Hence, North Carolina cities and counties cannot pass their own antidiscrimination laws, including any that would provide greater protections to LGBT individuals (most specifically those who are transgender).

While the Executive Order seeks to provide some measure of relief against sexual orientation and gender identity discrimination, critics are already deriding the action as a poor effort. What do North Carolina employers need to know about what has widely been referred to as the “bathroom law” and the subsequent Executive Order?

What Changed With The New State Law?

Employers and places of public accommodation in North Carolina have long been prohibited by state law from discriminating based upon someone’s race, religion, national origin, color, age, sex, and handicap. On March 23, 2016, the state General Assembly passed and the Governor signed into law House Bill 2 (HB2), which primarily prevents local governments from passing their own laws expanding the state’s antidiscrimination protections. HB2 defined the statewide protected classes as race, religion, national origin, color, age, handicap, and biological sex, which the law defines as the sex designated on a person’s birth certificate.

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Further, North Carolina has long tied its minimum wage to the federal minimum wage (currently both sit at \$7.25 per hour). HB2 also prevents cities and counties in the state from increasing the minimum wage beyond that level.

Why The Change?

The passage of HB2 is largely seen as a response to a February 22, 2016 ordinance passed by the Charlotte City Council which would have granted additional protections to LGBT people in places of public accommodation. This ordinance, which would have gone into effect on April 1, would have legally protected transgender people who used public restrooms based on the gender with which they identify.

Why Is It Called The "Bathroom Law?"

In other words, a transgender female (someone who was biologically born a male but identifies as a female) would have had the legally protected right in Charlotte to use the woman's restroom at any place of public accommodation. However, by passing HB2, the General Assembly effectively reversed Charlotte's ordinance before it even went into effect, and also preempted any similar attempts that other local governments may have been contemplating.

What Else Is Covered?

However, the law goes much further than just covering bathrooms and public bathrooms. Subject to limited exceptions, HB2 also specifies that local boards of education and public agencies "shall require every multiple occupancy bathroom or changing facility" be designated for and only used by individuals based on their biological sex.

More importantly for employers, the new law also limited how people pursue claims of discrimination. Prior to HB2, individuals in North Carolina could maintain common law cause of action for wrongful discharge based on the state's antidiscrimination statute. HB2 eliminated that claim.

How Does The Executive Order Change Things Further?

North Carolina has been facing pressure from advocacy groups and businesses that believe the new law permits discrimination against individuals based on sexual orientation and gender identity. In an attempt to clarify and improve the law, the Governor signed Executive Order No. 93 on April 12, 2016, "To Protect Privacy and Equality." The Executive Order addresses several issues related to the new law.

First, the Executive Order expands the state's employment policy for public employees to cover sexual orientation and gender identity. This provision of the Order only impacts government employers and workers, and does not affect private businesses.

Second, Executive Order No. 93 affirms that private business, nonprofit employers, and local governments may establish their own nondiscrimination employment policies covering their own employees.

Third, while state law continues to hold that every multiple occupancy restroom, locker room, or shower facility located in a cabinet agency must be used only by persons based upon their biological sex, the Executive Order states that the agencies shall make the "reasonable accommodation" of a single occupancy restroom, locker room, or shower facility upon a request due to "special circumstances."

It also calls for the General Assembly to "take all necessary steps to restore a State cause of action for wrongful discharge based on unlawful employment discrimination." Whether the General Assembly will do so remains to be seen. Executive Order No. 93 did not address HB2's prohibition on local governments from setting their own minimum wage.

How Does This Impact Employers?

The Executive Order does not appear to substantively change HB2. It makes clear that, if you are a private business in North Carolina, as far as the state is concerned, you can establish your own practice concerning LGBT employees and customers. If you choose to create and enforce a policy or practice prohibiting discrimination based on sexual orientation, gender identity, or transgender status, you may do so without running afoul of state law. Similarly, you may still choose to allow people to use the restroom of their choice.

The Executive Order also clarifies that local governments have the right to establish nondiscrimination policies for their own employees. If you are a state employer, you should know that your equal employment policy now includes sexual orientation and gender identity. Nonetheless, the extent to which this provides any real protection to state employees remains to be seen, as the Executive Order did not appear to provide any substantive rights under state law.

Do Employers Now Have Freedom To Discriminate?

If you believe that the “bathroom law” gives you license to discriminate against applicants or workers without consequence, think again. You could still find yourself in legal hot water if you do so. Notwithstanding the new state law, you need to consider federal law before taking action on the basis of someone’s gender identity or sexual orientation. Importantly, the law does not affect federal discrimination claims. Thus, aggrieved individuals may still turn to federal courts in cases of discrimination.

For example, Title VII, which applies to businesses that have 15 or more employees, prohibits discrimination on the basis of one’s sex (among other things). Over the years, courts and the EEOC have interpreted the term “sex” to mean gender identity and to include any type of bias based on sex (including same sex). As recently as last month, in fact, the EEOC filed several lawsuits against employers arguing that Title VII covers sexual orientation discrimination (read more [here](#)).

Additionally, OSHA may assess fines against businesses for creating conditions that lead to health and safety problems, or otherwise make employees feel unsafe. This could include mandating that employees use the restroom that corresponds with their anatomy at birth instead of their gender identity (read more [here](#)).

Moreover, government contractors should tread carefully. A 2014 Executive Order extends antidiscrimination protection to members of the LGBT community, meaning that you have additional obligations regardless of state law (read more [here](#)).

What Happens From Here?

Other states have also recently taken action with regard to legislation impacting the LGBT community and restroom use. Mississippi’s “Religious Freedom” law is one such example (read more [here](#)). These laws have also brought a great deal of public attention, and in some cases backlash and threats of legal challenges and boycotts.

North Carolina has not escaped this controversy. For example, Bruce Springsteen recently cancelled his concert in Greensboro because of his disagreement with HB2, and several prominent businesses have announced their decision to rethink or curtail their dealings in the state. Such public scrutiny has already resulted in the Governor

clarifying and suggesting improvements to the bathroom law through the Executive Order. A similar response to public scrutiny happened in 2015 with Indiana's Religious Freedom Restoration Act.

It does not appear as if the Executive Order has entirely solved this debate. The local ACLU chapter immediately announced that the Governor's action was a "poor effort" to address the matter and fell short of addressing its concerns. The General Assembly, which will soon convene in a short session, may be called upon to take further action in the not-too-distant future. Unless and until that happens, however, HB2 and the Executive Order are the law of the land in North Carolina.

If you have any questions about HB2 or Executive Order 93 or how they may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in our Charlotte office at 704.334.4565.

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