

NC'S BATHROOM LAW GETS FLUSHED: WHAT EMPLOYERS NEED TO KNOW

Insights
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Last week, North Carolina's controversial "bathroom law" was repealed – but not without further controversy. When Governor Roy Cooper signed legislation repealing the law on March 29, 2017, many were upset that the law was repealed, while others were upset that the "repeal" did not go far enough.

House Bill 2 (HB2) had prevented local governments from passing their own laws expanding the state's antidiscrimination protections, and prohibited individuals from using public multi-use restrooms other than those that matched their biological sex. Immediately after passage, some business showed an unwillingness to do business in the state. The controversy simmered for almost a year and the NCAA threatened to pull more championship games out of North Carolina in the future if a resolution was not reached.

House Bill 142 (HB142), the repeal bill, might have resolved some controversies, but has by no means extinguished all concerns over the matter. So what do North Carolina employers need to know about the state of the so-called bathroom law and whether it really was repealed?

WHAT WAS THE BATHROOM 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 Governor signed into law HB2](#), which primarily prevented local governments from passing their own laws expanding

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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.

This law was widely seen as a reaction to an ordinance passed by the Charlotte City Council in February 2016, which never went into effect due to HB2. The Charlotte ordinance would have legally protected transgender people who used public restrooms based on the gender with which they identify.

HB2 also specified 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. Thus, it earned the nickname "the bathroom bill."

WHY WAS THE LAW REPEALED?

Passage of HB2 was met with significant criticism from the LGBT community, as well as financial hits for North Carolina, despite the fact that the [Governor signed an executive order](#) in April 2016 attempting to address some of the controversial effects of the law. Most recently, the NCAA relocated this year's championship tournament games away from North Carolina, and had threatened to eliminate more games, such as future men's Division I basketball tournaments. In fact, The Associated Press recently calculated that North Carolina stood to lose more than \$3.7 billion over the next 12 years unless HB2 was repealed.

WHAT DOES THE REPEAL DO?

The new law repeals HB2, and also gives the General Assembly the sole power to regulate access to "multiple occupancy restrooms, showers, or changing facilities." Specifically, it states that no state agencies, boards, offices, departments, institutions, branches of government, political subdivisions of the state, or education boards can regulate the access to multiple occupancy restrooms, showers, or changing facilities except in accordance with an act of the General Assembly.

In other words, while the law no longer prohibits individuals from using public multiple occupancy restrooms other than those which match their biological sex, it prohibits local

governments from passing laws which would have specifically allowed transgender individuals to use the restroom which matched the gender with which they identify. Further, this moratorium is in place through December 2020, which effectively puts the entire topic in a state of limbo for at least three years.

For now, the repeal has pleased few people. Those in favor of HB2 now miss the protection they believed the bill provided for the sanctity of the public bathroom. Those who opposed HB2 believe the repeal has done little, if anything, to protect the rights of transgender individuals. Both sides agree that the repeal is more of a compromise than a major shift in the law. Indeed, it represents a return to the status quo that existed before the Charlotte ordinance.

HOW DOES THIS IMPACT EMPLOYERS?

The Charlotte ordinance limited employers' rights with respect to how they manage their own restroom and locker room facilities. HB2 removed the requirement that transgender employees be allowed use the facilities corresponding with their gender identity. At that point, employers were free to have whatever policy they chose to have with respect to these facilities.

The repeal of HB2 does not contain an employer mandate. Employers, like other private property owners, may manage their restrooms as they see fit. For most that has meant allowing people to use the restroom of their choice. Similarly, North Carolina does not mandate, nor does it prohibit, other workplace protections for transgendered employees.

Employers can still find themselves in legal hot water if they discriminate against applicants or employees based upon their gender identity. Notwithstanding state law, you need to consider federal law before taking action on the basis of someone's gender identity. Importantly, the state 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).

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](#)).

There is a new administration in office. It could change the position that OSHA has taken with respect to restrooms as it could change the executive order. Whether it will do so remains to be seen, but it would be unwise to make decisions based upon what the new administration might do.

If you have any questions about this law or how it may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in [our Charlotte office](#) at 704.334.4565.

This Legal Alert provides an overview of a specific North Carolina law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.