

Employment Practices Liability

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Trump Administration Revokes Obama's Transgender Bathroom Guidance for Public Schools

By Johanna G. Zelman, Partner; and Nancy Van der Veer Holt, Counsel; FordHarrison

Executive Summary: As previously reported by these authors in a [Legal Alert on February 17, 2017](#), the Trump Administration withdrew a motion filed in the U.S. Court of Appeals for the Fifth Circuit to limit a nationwide temporary injunction blocking enforcement of the Obama Administration's Guidance requiring public schools to permit students to use the bathroom consistent with their gender identity. Yesterday, the Trump Administration revoked that same Guidance.

Background: On May 13, 2016, the Obama Administration's Department of Justice and Department of Education jointly issued a guidance letter to public schools instructing them to allow students to use the bathroom consistent with their gender identity, not their biological sex, or risk losing federal funding ("Guidance"). The basis of the directive was Title IX of the Education Amendments of 1972 which, like Title VII of the Civil Rights Act of 1964, prohibits discrimination "because of sex." According to the Guidance, "because of sex" should be interpreted to include gender identity. Thirteen states and school districts challenged the Guidance in the U.S. District Court for the Northern District of Texas. In *Texas v. United States*, the Texas court found that the plain language of Title IX does not include "gender identity" within the definition of "sex," and issued a nation-wide preliminary injunction on August 21, 2016, enjoining the government from enforcing the Guidance. The Obama Administration appealed to the Fifth Circuit and filed a motion to limit the injunction to only those states and school districts that were plaintiffs in the lawsuit. With oral argument on the government's motion to limit the preliminary injunction set for February 14, 2017, the Trump Administration withdrew the motion on February 10, 2017, leaving questions about what President Trump's stance would be on transgender bathroom use in public schools.

Now, just two weeks later, President Trump's position has become clearer – yesterday, Wednesday, February 22, 2017, Obama's Guidance was "withdraw[n] and rescind[ed]" by the Department of Justice and Department of Education. By [letter](#) to public schools and the Fifth Circuit notifying them of this move, the Department of Justice and Department of Education jointly explained that rescinding the Guidance was necessary to "further and more completely consider the legal issues involved," namely, whether the Guidance was "consistent with the express language of Title IX." The letter cites the lack of "extensive legal analysis" or a "formal public process" before the Guidance was implemented and the number of lawsuits that have ensued as a result. At a press conference yesterday, Press Secretary Sean Spicer also noted that the Trump Administration believes this is a matter better left to state and local governments. However, the media is reporting that newly-appointed Secretary of Education Betsy DeVos, while publicly

supporting the revocation, was not initially in favor of rescinding the Guidance. When asked about this yesterday, Press Secretary Spicer stated that these reports were untrue.

Civil Rights activists and other LGBTQ advocates are now looking to the U.S. Supreme Court to resolve this issue in favor of the transgender community. Oral argument in the matter of *Gloucester County School Board v. G.G.*, which will decide the issue of whether Title IX's definition of "sex" includes gender identity, is set for March 28, 2017. While *Gloucester County* will interpret the meaning of "sex" in Title IX, the decision will have an impact on Title VII as well, given that the relevant language of Title IX mirrors that of Title VII. The Title VII meaning of "sex" is also being considered by the Second, Fifth, Seventh and Eleventh Circuits. For a discussion of the Seventh Circuit case of *Hively v. Ivy Tech Community College*, please see our Alerts published on [October 20, 2016](#), and [December 12, 2016](#).

Bottom Line: While the state of federal law on a number of LGBTQ issues affecting employers remains unresolved, and the Trump Administration's position on these issues continues to develop, employers are encouraged to review local and state laws in the locations where they operate to determine whether those laws presently provide protections to LGBTQ employees, including equal bathroom access for transgender individuals.

Furthermore, federal contractors subject to EO 11246 should note that President Trump issued a press release on January 31, 2017, stating that he will continue to enforce Executive Order 13672, which protects employees from anti-LGBTQ workplace discrimination while working for covered federal contractors. Under this EO, covered contractors are required, among other things, to ensure that their restroom access policies and procedures do not discriminate based on the sexual orientation or gender identity of an applicant or employee. Based on the Obama Administration's legal position on restroom access, this has been interpreted as requiring covered contractors to allow employees and applicants to use restrooms consistent with their gender identity. To date, there has been no change to the [OFCCP's LGBT FAQs](#) on this topic.

As cases interpreting the meaning of "sex" in Title IX and Title IV are released by the courts, we will continue to provide updates on this dynamic area of the law.

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