

# Now & Next

## Labor & Employment Alert

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### **EEOC update: Executive order regarding gender identity**

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Employers covered by Title VII must update policies and prepare for potential legal challenges following the EEOC's new position on gender identity and sex discrimination.



#### **What's the impact?**

- The EEOC will align with the new administration's focus on biological definitions of sex, and enforcement will prioritize sex discrimination claims that are based on sex stereotypes.
- This new position could create compliance challenges and increase the potential for litigation. During this period of transition, employers can continue to uphold policies and practices that promote respect and civility in the workplace.

On January 28, 2025, the Equal Employment Opportunity Commission (EEOC) issued a statement indicating that it will no longer enforce a [2021 executive order](#) that expanded the definition of "sex discrimination" to include sexual orientation and gender identity. This statement follows the executive order issued by President Trump on January 20, 2025 (the "Order"), which [rescinded the 2021 order](#). This alert will detail the EEOC's new position and its implications for employers.

The EEOC's statement, issued by Acting Chair Andrea R. Lucas, explained that the EEOC will align its interpretation of Title VII with the Supreme Court's decisions in *Bostock v. Clayton County*, 590 U.S. 644 (2019) and will focus its enforcement efforts on sex discrimination claims based on sex stereotypes, as recognized by the Court.<sup>1</sup> Lucas further declared that the EEOC will "defend the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work."

Notably, the Order directs federal agencies to substitute the term "gender" with "sex" in official documents and end the use of the "x" gender marker, which had been used to indicate non-binary/gender non-conforming identity. The Order instructs the US Attorney General to provide guidance to federal agencies on reversing any policies that permitted access to single-sex spaces (such as bathrooms) based on gender identity.

Employers should be aware that the Order does not necessarily reflect the position of other federal agencies, such as the Department of Labor, the Department of Education, or the Department of Health and Human Services, which may have different or conflicting interpretations of Title VII or other federal laws.

## Who is affected?

The Order affects all employers covered by Title VII, which generally applies to private employers with 15 or more employees, as well as federal, state, and local government employers. Further, the Order does not affect the applicability of state or local laws that may provide broader protections for sexual orientation and gender identity.

## What are the implications for employers?

The EEOC's policy change signals a significant shift in the federal enforcement of anti-discrimination laws—by prioritizing biological definitions of sex in compliance and enforcement actions, as well as removing nonbinary gender markers and resources related to gender identity.

Employers should also continue to uphold policies and practices that promulgate respect and civility in the workplace.

This may have several implications for employers, such as:

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<sup>1</sup> The US Supreme Court in 2020 held in *Bostock v. Clayton County, Georgia*, that the ban on sex discrimination in the workplace pursuant to Title VII of the Civil Rights Act of 1964 includes protections for sexual orientation and gender identity. However, notably the *Bostock* decision specifically avoided the bathroom issue, saying it did "not purport to address bathrooms, locker rooms, or anything else of the kind." *Bostock v. Clayton County*, 590 U.S. 644, 681 (2020); see also *id.* at 655-56 (assuming that "sex" refers "only to biological distinctions between male and female").

## **POTENTIAL LITIGATION**

The Order may invite legal challenges from employees or advocacy groups who disagree with the EEOC's position and seek to enforce their rights under Title VII or other federal laws. Employers may face conflicting or inconsistent rulings from different courts or jurisdictions on the scope and meaning of sex discrimination under Title VII.

## **COMPLIANCE REVIEWS**

The Order may affect the EEOC's investigations or audits of employers' compliance with Title VII or other federal laws. The EEOC may revise its guidance, regulations, or policies to reflect its new position and may require employers to submit different or additional information or data. Given Lucas's stance, the EEOC may bolster future enforcement efforts to identify and address sex discrimination against women, especially in areas such as pay equity, pregnancy accommodation, sexual harassment, and sex-based stereotyping.

## **POLICY UPDATES**

The Order may require employers to review and update their policies, procedures, and practices to ensure compliance with the EEOC's new position and avoid potential liability or exposure. Employers may need to revise their anti-discrimination, anti-harassment, or anti-retaliation policies to clarify the definition and scope of sex discrimination and to provide appropriate reporting and resolution mechanisms. Further, employers may need to modify their employee benefits, leave, or accommodation policies to address the needs and rights of employees based on their sex, sexual orientation, or gender identity.

## **How we can help**

At Nixon Peabody, we offer comprehensive support to clients navigating the complexities of the EEOC's new position and its impact on their workplace. Our team of [experienced labor & employment attorneys](#) can assist with the defense and resolution of any litigation or claims arising from the EEOC's statement, ensuring compliance with all federal, state, and local laws. We provide guidance on conducting internal audits and responding to external inquiries or reviews from the EEOC or other federal agencies.

We also offer strategic advice on how to update and implement policies, procedures, and practices that reflect the EEOC's new position and foster a respectful and inclusive work environment. Our goal is to make the transition as smooth as possible for our clients, minimizing the risk of liability and ensuring legal and operational excellence.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:



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