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Coates' Canons Blog: HB 2 is Repealed: What Must North Carolina Units of Government Do Now?

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North Carolina's well-known, and now repealed, House Bill 2 required that all multiple-person bathrooms in government buildings be "designated" for use by persons based on their biological sex (as shown on their birth certificates) and that those bathrooms be "only used" by persons based on their biological sex.

It was never completely clear just what obligations fell to units of government to meet the "only used" requirement. That left cities and counties and schools a little uncertain as to what to do.

Moreover, positive steps to meet the "only used" requirement could bring units of government up against potentially competing requirements of federal anti-discrimination law, especially under Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. In very recent years, the federal agencies enforcing those statutes, and to some extent the courts, have embraced interpretations that extended the statutory protections to individuals whose gender identity might not match their biological sex.

State Law Repeal and Federal Law Development

Now, HB 2 is repealed and has been replaced with HB 142. With that repeal, the bathroom requirements are no longer in the law. Laws that were in place before HB 2 are revived, as described in Norma Houston's blog post here. The obligations that HB 2 imposed, however, have been replaced with new prohibitions.

At the same time, the federal law under Title VII has appeared to expand protections for employees against discrimination on the basis of gender, while the federal law under Title IX has retreated.

Just as it was never clear under HB 2 exactly what units of local government should do to meet both state and federal obligations, it is now also not clear under the new HB 142 just what units of government must do to meet the prohibitions.

The New Prohibitions

Unlike HB 2, the new state law imposes no direct requirements on units of government. Instead, it lays out three prohibitions.

The first prohibition is against "regulation of access to multiple occupancy restrooms, showers, or changing facilities, except in accordance with an act of the General Assembly." No unit of government may engage in such "regulation." This prohibition has no expiration date; it is effective indefinitely into the future.

The second prohibition forbids units of local government from enacting or amending an ordinance "regulating public accommodations." This prohibition expires in 2020.

The third prohibition forbids units of local government from enacting or amending an ordinance "regulating private employment practices." This prohibition also expires in 2020.

On its face, it would seem to be an easy matter for a unit of government to comply with the new prohibitions. Just don't adopt a regulation on access to multiple occupancy bathrooms and don't enact or amend any ordinance regulating private employment practices or "public accommodations."

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But the task before a unit of government may not be quite as simple as doing nothing. That's because federal non-discrimination law, even as it may be changing with the transition from the Obama administration to the Trump administration, continues to embrace interpretations that protect individuals from adverse treatment based on their gender identity.

Federal Law and Gender Identity Discrimination

In the last year or so, the path of gender identity discrimination in employment under Title VII has taken a different path from gender identity discrimination in education under Title IX.

Until their paths diverged, both laws were developing quickly in the direction of gender identity protection. Under Title VII, the federal Equal Employment Opportunity Commission during the Obama administration mandated in several rulings that access to bathroom facilities for employees be allowed on the basis of gender identity, even if that identity was different from an employee's biological sex. The Trump administration, in its earliest days, considered overturning these rulings, but decided against doing so. These administrative rulings do not have the same force of law as statutes or court decisions, but they do remain in place. Then, in April 2017, the federal Seventh Circuit Court of Appeals definitively ruled that the prohibition against sex discrimination in Title VII includes discrimination on account of sexual orientation. This decision is not directly binding on North Carolina employers, but it does reinforce the EEOC interpretation that Title VII protects against gender identity discrimination. *Hively v. Ivy Tech Community College*, 2017 WL 1230393.

The law under Title IX, by contrast, has not developed in the same direction. In 2016, the federal Fourth Circuit Court of Appeals had held, in what is known as the *G.G.* decision, that Title IX did protect gender identity discrimination and required public schools to allow bathroom use based on gender identity. In that decision, it relied on an Obama-administration Department of Education guidance document to that effect. The Trump administration, however, decided to "withdraw and rescind" the guidance document, specifically referencing the *G.G.* decision. In March 2017, the U.S. Supreme Court vacated the judgment in the Fourth Circuit decision in light of the withdrawal of the guidance document. So it is now not clear whether Title IX *requires*, or even *allows*, schools to allow bathroom use based on gender identity.

With the federal law in this state of conflicting development, what is a unit of local government in North Carolina to do in complying with the new state law?

Complying with the First Prohibition

The first prohibition is against "regulation of access to multiple occupancy restrooms, showers, or changing facilities, except in accordance with an act of the General Assembly." No unit of government may engage in such "regulation." With the repeal of HB 2, there is no act of the General Assembly to regulate "in accordance with."

To comply with the first prohibition, then, no unit of government should adopt any kind of bathroom use policy at all. It should leave bathroom use regulation to state law as it now stands and as the General Assembly may eventually enact.

But what happens if an employee of a unit of government requests permission to use the employer's bathroom facilities in a way consistent with the employee's gender identity but not biological sex? The first prohibition forbids the employer from making a "regulation." The only option open to the employer appears to be a case-by-case determination, not guided by a general policy or other "regulation." If in any particular instance the employer decides not to permit use based on gender identity, there is the potential for a claim of unlawful discrimination under Title VII, as described above. To permit such use would have been prohibited under HB 2; with its repeal, it is not clear that state law now prohibits such use.

In any event, the employer must make a decision. Surely making a case-by-case decision is not a violation of the first prohibition on "regulation of access to multiple occupancy restrooms."

What if the request is from a student in a public school, community college, or campus of the University of North Carolina? There is now no North Carolina statute *prohibiting* schools from allowing students to use restrooms based on gender identity. That's because the bathroom provisions of HB 2 have been repealed. And there is now no federal law *requiring* public schools to allow students to use restrooms based on gender identity. That's because of the withdrawal of the Title IX guidance as described above. The consequence is that schools are not *prohibited* from allowing students to

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use restrooms based on gender identity and they are not *required* to do so. But like all units of government, they are prohibited by the new law from developing a policy saying which way they are going. Like other units of government, they are limited to making case-by-case determinations, not employing a policy, and hoping that a case-by-case decision process is not a "regulation" prohibited by the first prohibition.

Complying with the Second Prohibition

The second prohibition forbids units of local government from enacting or amending an ordinance "regulating public accommodations."

How broad is the reach of this prohibition? Does it literally forbid any type of regulation of any business or other facility that is open to the public? Does it prohibit zoning that affects places of public accommodation? Does it prohibit regulation of short-term rentals, like Air B&B? Does it prohibit parking regulations?

The new law gives no guidance at all on these questions. No one can say for sure how broad the prohibition is until the matter comes to an appellate court in a proper lawsuit or the General Assembly enacts a clarification.

That doesn't help a unit of government very much. How is it to comply with the second prohibition?

Here is a cautious guess. When the new law bans any ordinance "regulating public accommodations," it is speaking to ordinances regulating *discrimination* in public accommodations. That cautious guess is based on three premises. One, there is no indication that the General Assembly meant in the new law to address zoning or parking or other legitimate local government regulatory powers. The enabling laws on these subjects have not been amended or even referenced in the new law. Two, the term "public accommodations" appears only a few times in the General Statutes of North Carolina, and each time it is in the context of discrimination. And three, HB 2, before its repeal, put into the law of the state for the first time ever a general statute dealing with discrimination in public accommodations. That new statute included non-discrimination based on "biological sex" and provided that local jurisdictions could not enact broader protections. In that context, it seems likely that the new law's prohibition on regulation of public accommodations is intended to prohibit ordinances dealing with that same subject matter and no other.

Complying with the Third Prohibition

The third prohibition forbids units of local government from enacting or amending an ordinance "regulating private employment practices." Complying with this prohibition seems pretty straightforward. No minimum wage ordinances. No employee health and safety regulations. No hours of work regulations.

It could be argued that this prohibition, like the public accommodations prohibition, is limited to regulations related to *discrimination* in employment. The cautious unit of government may not wish to give this prohibition that limited interpretation, however. That is because local government regulation of private employment practices is not like local government regulation of places of public accommodation. Local government regulation of places of public accommodation—zoning and parking and so on—has a long history in this state. Local government regulation of private employment practices does not. Caution would say "stay away."

What Must North Carolina Units of Government Do Now?

First, adopt no policies regarding bathroom use.

Second, if faced with a request from an employee or student to use bathroom facilities based on gender identity, consult with your attorney and make a response on a case-by-case basis taking federal law obligations into account.

Third, consult with your attorney about the scope of the prohibition on regulation of public accommodations. Will the attorney take the view that the prohibition applies only to regulation of discrimination in public accommodations?

Fourth, avoid regulations related to private employment altogether.

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