Coates' Canons Blog: House Bill 2, Local Government Employers, and Bathrooms

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After HB 2, may a North Carolina city adopt a personnel policy providing that it will not discriminate against applicants or employees on account sexual orientation, gender identity, or gender expression?

If it already has such policy in place, may it continue to apply it?

Suppose the city has an employee whose gender identity is female but whose sex assigned at birth was male. Suppose further that that employee has been using the women's bathroom facilities provided by the city for its employees. May the city permit that employee to continue to use the women's bathrooms?

Is there anything that a North Carolina city or county (or other unit of local government) must do in its capacity as an employer to comply with HB 2?

HB 2 is the statute passed in a special, one-day session of the General Assembly on March 23, 2016, and signed into law by Governor McCrory that night. It is effective now. This blog post focuses on its effect on units of local government as employers. To understand what that effect may be, we have to step back and look, very briefly, at what HB 2 does with respect to employment law more broadly. And we have to look at the HB 2 bathroom rules.

Amendments to the North Carolina Equal Employment Practices Act

HB 2 amends the state's Equal Employment Practices Act in three ways.

Changes the list of unlawful discrimination grounds. First, it amends the state's Equal Employment Practices Act to change the Act's list of employment discrimination grounds. Before HB 2, the act expressed the public policy of the state that everyone should be free from discrimination in employment on the basis of

- race
- religion
- color
- national origin
- age
- sex or
- handicap

HB 2 amends this list to change the term "sex" to "biological sex," which it defines to mean the male or female designation on a person's birth certificate. So after HB 2, the list of non-discrimination grounds under the Equal Employment Practices Act is

- race
- religion
- color
- national origin
- age
- biological sex (as shown on a birth certificate) or
- handicap

No lawsuits under the act. Second, it further amends the Equal Employment Practices Act to provide that "no person

may bring any civil action based upon the public policy expressed herein."

No employment discrimination ordinances. Third, it provides that the Equal Employment Practices Act, as amended by HB 2, is the sole source of law on the subject of employment discrimination in North Carolina, and no city or county (or other unit of local government) may enact any ordinance or policy dealing with the subject at all.

The consequences of these changes. Here's what these three changes together mean.

- *State law does not prohibit discrimination on account of sexual orientation*. Before "sex" was changed to "biological sex," there was some argument that the state's Equal Employment Practices Act was meant to establish a policy against discrimination on account of a person's sexual orientation, gender identity, or gender expression. Now the policy of nondiscrimination is limited to "biological sex" as shown on the birth certificate. It is therefore clear that the Act does not prohibit discrimination on account of sexual orientation, gender identity, or gender expression.
- *No state lawsuits for employment discrimination of any kind—race or age or sex*. Before HB 2's "no lawsuits provision" was put into place, employees fired because of their race or religion or color or national origin or age or sex or handicap could bring a wrongful discharge lawsuit. That has been the courts' interpretation of the Equal Employment Practices Act for many years. Now, no such lawsuit can be brought. If I am fired because of my race, I have no right to sue in North Carolina state court under North Carolina state law. I could still seek relief under federal law, but no longer under state law.
- *Cities and counties may not prohibit sexual orientation discrimination by employers.* No city or county may enact any ordinance or adopt any policy regulating discrimination in private employment, so clearly no city or county could may expand upon the categories in the state law.

Special provision for a local government's own employees. HB 2 says, as laid out above, that cities and counties and other units of local government may not enact ordinances or policies dealing with employment discrimination in private employment. HB 2 contains an exception for "regulations applicable to personnel employed by that body." The section entitled "Applying these Amendments to Cities and Counties as Employers" below sets out what this appears to mean for local governments as employers.

Amendments to the North Carolina Wage and Hour Act

HB 2 amends the state's Wage and Hour Act, which deals with minimum wage, overtime pay, youth employment and a few other matters. The state's Wage and Hour Act is not a major concern for units of local government as employers. As employers, they are exempt from many of its provisions (and they are fully governed by the federal Fair Labor Standards Act, which covers the same subject matter and is a big deal).

Chiefly, the HB 2 amendments provide the Wage and Hour Act is the sole source of law on its subjects in North Carolina, and no city or county or other unit of local government may enact any ordinance or adopt any policy dealing with the subjects at all.

And, as with the amendments to the Equal Employment Practices Act, HB 2 contains an exception for "[a] local government regulating, compensating, or controlling its own employees. The section entitled "Applying these Amendments to Cities and Counties as Employers" below lays out what this appears to mean for local governments as employers.

Amendments Related to Cities and Counties as Contractors

HB 2 amends statutes that relate to the public contracting authority of cities and counties. Sometimes cities and counties have required that a contractor, in order to do business with the city, must meet certain employment-related requirements, such as certifying that the contractor does not engage in employment discrimination. HB 2 provides that no city or county may impose "regulations or controls on the contractor's employment practices" as a condition of bidding on a contract.

This provision of HB 2 has no direct effect on cities or counties in their capacities as employers of their own employees.

Applying these Amendments to Cities and Counties as Employers

Under HB 2, cities and counties (and other units of local government) may not enact ordinances or adopt policies regarding employment discrimination by employers in their jurisdiction, and they may not impose any rule related to employment discrimination on businesses who contract with them. They may not enact ordinances or adopt policies regarding minimum wage or overtime requirements for employers in their jurisdiction or businesses who contract with them.

But how does HB 2 affect cities and counties as they enact ordinances or adopt policies dealing with their own employees? That is, how does HB 2 affect cities and counties as employers?

To answer these question, we have to look at the two special provisions regarding cities and counties as employers that are found right in HB 2 itself.

The first special provision. The first one deals with the changes to the Equal Employment Practices Act. HB 2 says that its limitations on employment discrimination provisions—that "sex" means "biological sex" and that no city or county may enact any employment discrimination regulations—do not apply to "such regulations applicable to personnel employed by that body that are not otherwise in conflict with State law."

In my view, this provision says that a city or county may enact an ordinance or adopt a policy regarding employment discrimination with respect to its own employees that is broader than HB 2 allows under the Equal Employment Practices Act as it's amended. That means, it appears to me, that a city or county could enact a personnel ordinance or adopt a personnel policy that would, for example, prohibit discrimination within its own workforce on the grounds of sexual orientation, gender identity, or gender expression. It could not impose such a requirement on employers within its jurisdiction or require it of contractors, but it could impose such a requirement on itself.

The special provision that permits employment discrimination regulations that are "applicable to personnel employed by that body" contains a restriction. It says that such a regulation must not be "otherwise in conflict with State law."

So, would a city's personnel policy banning employment discrimination in its own workforce on account of sexual orientation be "otherwise in conflict with State law"? I think not. It would clearly be in conflict with the Equal Employment Practices Act as amended by HB 2, but this special provision is itself an exception to the Employment Practices Act as amended by HB 2. The phrase "otherwise in conflict with State law" must refer to elements of state law other than the Equal Employment Practices Act.

The second special provision. The second special provision for local governments as employers applies to changes to the Wage and Hour Act. HB 2 says that no city or county may enact any ordinance or adopt any policy dealing with minimum wage or overtime requirements at all. But the special provision says that the prohibition does not apply to "a local government regulating, compensating, or controlling its own employees."

This provision says that a city or county may adopt minimum wage and overtime protections for its own employees that are greater than the law allows. It could not impose such a requirement on employers within its jurisdiction or require it of contractors, but it could impose such a requirement on itself.

The Bathroom Rules

HB 2 requires all units of government in North Carolina to mark every bathroom that is designed to be used by more than one person at a time as either Male or Female and to require that such bathroom be "only used by persons based on their biological sex." And, as we have seen, that means the sex shown on a person's birth certificate.

The statute appears to permit cities and counties to have single-person bathrooms that can be used, one person at a time, by individuals of either sex.

Unlike the HB 2 changes to the Equal Employment Practices Act and to the Wage and Hour Act, there are no special provisions regarding a city or county's own employees. The same rules apply to employees and to the public generally.

Applying the Bathroom Rules to Cities and Counties as Employers

It would be lawful, it appears, for a city or county to have available to its employees only single-person bathrooms. In that case, under HB 2, the city or county could designate some as Male and some as Female, and restrict usage accordingly. Or it could designate some or all as "unisex," available, one person at a time, without regard to sex.

The vast majority of city and county employers, however, will already have in place bathrooms designed to be used by more than one person at a time. In that case, HB 2 requires that they be marked Male and Female and that usage be restricted accordingly. I will guess that every city and county already does this and that very few have ever encountered an issue.

It is possible, however, for an issue to arise. It would arise when an employee's apparent sex does not match (for whatever reason) the sex with which that employee identifies and wishes to be perceived.

May the city or county as employer permit the employee to use the multi-person bathroom of the sex with which the employee identifies? Under HB 2, the answer is clearly No, unless the sex with which the employee identifies is the same as that indicated on the employee's birth certificate. (There is a question, of course, of how the city or county would know what sex is shown an employee's birth certificate. May it simply take the employee's word for it?)

The fact that HB 2 clearly answers the question No may not, however, be the end of the matter. That is because the law of sex discrimination under Title VII of the federal Civil Rights Act of 1964, as interpreted by the Equal Employment Opportunity Commission and to some extent by the courts, is moving to protect individuals from discrimination on account of sexual orientation, gender expression, or gender identity. This development of the law is ongoing and uncertain. It is not possible at this point to say that an employer's refusal to allow an employee to use a bathroom other than that of the employee's "biological sex" is a violation of Title VII, but it is extremely likely that test cases will be sought. Where the law will go cannot now be fully predicted. It is possible to imagine a time, however, when the state-law HB 2 bathroom restrictions are unenforceable as unlawful under expanded federal-law protections.

Questions and Answers

After HB 2, may a North Carolina city adopt a personnel policy providing that it will not discriminate against applicants or employees on account sexual orientation, gender identity, or gender expression?

Yes, I think so.

If it already has such policy in place, may it continue to apply it?

Yes, I think so.

Suppose the city has an employee whose gender identity is female but whose sex assigned at birth was male. Suppose further that that employee has been using the women's bathroom facilities provided by the city for its employees. May the city permit that employee to continue to use the women's bathrooms?

No. To continue to allow the employee to use the women's bathroom would violate HB 2. (Of course, to refuse to allow the employee to use the women's bathroom might, down the road, be found to be a violation of Title VII and thus a violation of federal law for which the city could be liable. But for the moment the law under HB 2 is much clearer than the law under Title VII.) The city could identify any single-person bathroom that it has as for use by either sex, one person at a time.

Is there anything that a North Carolina city or county (or other unit of local government) must do in its capacity as an employer to comply with HB 2?

Yes. The city or county (or other unit of local government) must designate all its multi-person bathrooms as Male or Female and limit use accordingly. In the overwhelming majority of cases, that will not constitute a change of any kind.

Plus, for any city or county that currently has an employee using a bathroom that does not match the employee's

biological sex as shown on the employee's birth certificate, an immediate conference with the city or county attorney is in order to figure out how best to comply with HB 2, protect that employee's privacy and dignity, and avoid liability under Title VII.

For an overview of HB 2, see this post by my colleague Trey Allen.

For a closer look at the contracting provisions of HB 2, see this post by my colleague Norma Houston.

For the criminal law implications, see this post by my colleague Jeff Welty.

Links

- www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v4.pdf
- canons.sog.unc.edu/the-general-assembly-preempts-local-antidiscrimination-measures/
- canons.sog.unc.edu/beyond-bathrooms-special-session-legislation-impacts-city-and-county-contracts/
- nccriminallaw.sog.unc.edu/crime-transgendered-person-use-wrong-bathroom/