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## Coates' Canons Blog: The General Assembly Preempts Local Antidiscrimination Measures

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**UPDATE 4: On 30 March 2017, the Governor signed legislation repealing HB2. Some of the implications of the repeal are examined in blog posts available [here](#) and [here](#).**

**UPDATE 3: On 26 August 2016, the federal district court judge who is hearing a legal challenge to HB2 brought by the ACLU and three transgender plaintiffs issued a preliminary injunction that temporarily bars the UNC system from requiring the transgender plaintiffs to comply with HB2's bathroom provisions. Whether the injunction becomes permanent will depend on the outcome of the litigation, including any appeals. The order does not prevent the implementation of HB2's bathroom and preemption provisions applicable to cities and counties. For the potential impact of the order on public school districts, see my colleague Bob Joyce's blog post [available here](#).**

**UPDATE 2: On 3 August 2016, the U.S. Supreme Court entered an order staying the implementation of a ruling by the U.S. Court of Appeals for the Fourth Circuit in *G.G. v. Gloucester County School Board* until the Supreme Court decides whether to hear the case.**

**UPDATE 1: On 19 May 2016, the U.S. Court of Appeals for the Fourth Circuit issued an opinion in a Virginia case involving bathroom restrictions similar to those imposed by HB2 on North Carolina's public universities and school districts. In *G.G. v. Gloucester County School Board*, a transgender student alleged that the defendant school board had violated Title IX regulations by refusing to allow the student – who was classified as a female at birth but who identifies as a male – to use boys' bathrooms in the student's high school. (Title IX and its accompanying regulations prohibit sex-based discrimination in education programs that receive federal financial assistance.) Although a federal district court ruled that the board's actions did not violate Title IX, a divided Fourth Circuit Court of Appeals reversed. Because the Fourth Circuit encompasses North Carolina, federal district courts located within the state are bound by the appellate court's opinion in *G.G.*, including the court that will be hearing the American Civil Liberties Union's lawsuit challenging HB2.**

The City of Charlotte makes compliance with nondiscrimination provisions in its Code of Ordinances a condition of doing business with the city. Contractors have to agree not to discriminate based on race, gender, religion, national origin, ethnicity, age, or disability in their employment actions. Sec. 2-166. The city likewise prohibits discrimination based on race, color, religion, or national origin in places of public accommodation, which are defined to include businesses as well as refreshment, entertainment, recreational, and transportation facilities that offer goods, services, facilities, privileges, or accommodations to the public. Sec. 12-58.

On 22 February 2016, the Charlotte City Council voted seven-to-four to amend the antidiscrimination provisions in its code to encompass discrimination based on sexual orientation, gender identity, or gender expression. Much of the public debate that preceded the council's adoption of the amendments centered on the perception that they would force businesses and other private entities to allow transgender individuals to use public bathrooms corresponding to their gender identities. (Interestingly, the amendments did not expressly mandate that public restrooms be made available based on gender identity, though they did eliminate language that had exempted restrooms, shower rooms, and similar facilities from the city's prohibitions on sex discrimination.) One of the points made by supporters of the amendments was that transgender individuals, especially men who identify as women, do not always feel safe using bathrooms reserved for persons of the same biological sex. Opponents countered that the amendments would put women and girls at risk by allowing men into women's bathrooms. The amendments had an effective date of 1 April 2016.

Although not scheduled to return to Raleigh until 25 April 2016, the General Assembly held a special legislative session on 23 March 2016 in response to the council's action. The result was Session Law 2016-3 (House Bill 2), which – among

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other things – mandates that state agencies and local governments, including school districts, designate their multiple occupancy bathrooms and changing rooms for use by persons of the same biological sex. The legislation also (1) preempts local government measures that prohibit discrimination in private employment or in places of public accommodation and (2) prevents local governments from imposing their own minimum wage requirements on private employers, even employers who do business or seek to do business with them. These and other provisions in S.L. 2016-3 are considered in more detail below.

### **Bathroom Provisions**

Multiple provisions in S.L. 2016-3 involve the designation of public bathrooms for individuals of the same “biological sex,” which the law defines in each instance to mean the physical condition of being male or female as stated on a person’s birth certificate.

The first bathroom-related provisions in the legislation concern public schools. Collectively, Sections 1.1 and 1.2 of S.L. 2016-3 amend G.S. 115C-47 and add G.S. 115C-521.2 to Chapter 115C, the primary statutes governing public school systems. Taken together, the changes mandate that local boards of education limit the use of student multiple occupancy bathrooms and student changing rooms to students of the same biological sex. The term “multiple occupancy bathroom or changing facility” is defined to mean “a facility designed or designated to be used by more than one person at a time where students may be in various states of undress in the presence of other persons.” School bathrooms, locker rooms, changing rooms, and shower rooms meet this definition. The new G.S. 115C-521.2 sets out seven exceptions to its restrictions on the use of multiple occupancy bathrooms and changing rooms. The restrictions do not apply when a person enters a multiple occupancy bathroom or changing room

- for custodial purposes,
- for maintenance or inspection,
- to render medical assistance,
- to accompany a student who needs assistance, if the accompanying individual is a school employee or authorized volunteer or the student’s parent or authorized caregiver,
- to receive assistance in using the facility,
- to accompany a non-student who needs assistance, or
- when the facility has been temporarily designated for use by the person’s biological sex.

Significantly, G.S. 115C-521.2 does not entirely preclude accommodations for transgender students. The statute allows local school boards to offer accommodations such as single occupancy bathrooms or changing rooms or controlled access to faculty facilities “upon a request due to special circumstances.” So, for instance, a transgender student who is uncomfortable using a bathroom or changing room with students of the same biological sex could be given access to a single occupancy bathroom or changing room. According to the new statute, however, acceptable accommodations do not include allowing a student to use a multiple occupancy bathroom or changing room reserved for students of the opposite sex.

Section 1.3 of S.L. 2016-3 adds statutory provisions to Chapter 143 concerning multiple occupancy bathrooms and changing rooms in state agencies, including The University of North Carolina and the North Carolina Community College System, public authorities, local boards of education, and political subdivisions of the state, a term that includes cities and counties. The new provisions direct covered entities to reserve multiple occupancy bathrooms and changing rooms for individuals of the same biological sex. (Thus, all multiple occupancy bathrooms and changing rooms in a public school must be designated by sex, regardless of whether adults or students use them.) The restrictions do not apply to an individual who enters a bathroom or changing room

- for custodial purposes,
- for maintenance or inspection,
- to render medical assistance,
- to accompany a person needing assistance,
- if the individual is a minor under the age of seven and accompanied by a caregiver, or
- when the facility has been temporarily designated for use by the person’s biological sex.

As amended, Chapter 143 permits covered entities to make accommodations such as providing single occupancy

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bathrooms or changing rooms upon request due to special circumstances. A covered entity may not accommodate individuals by allowing them to use multiple occupancy bathrooms or changing rooms designated for members of the opposite biological sex.

The bathroom and changing room provisions in S.L. 2016-3 leave a number of practical questions unanswered. It is clear that a covered entity may not grant transgender individuals access to multiple occupancy bathrooms or changing rooms reserved for persons of the opposite biological sex, but it is also true that covered entities may change the designation of such rooms on a temporary basis. Does this mean that a covered entity may allow a transgender individual to use a multiple occupancy bathroom or changing room designated for members of the opposite biological sex if the entity temporarily changes the designation? Of course, a temporary change would make it possible for other persons of the transgender individual's same biological sex to use the facility, perhaps leaving the transgender individual with the same feelings of discomfort that he or she had hoped to avoid by using a bathroom or changing room consistent with his or her gender identity.

Moreover, by defining "biological sex" to mean the condition of being male or female as stated on a birth certificate, S.L. 2016-3 raises the question of whether and when a person may have a birth certificate amended to conform to the person's gender identity. While a detailed discussion of this issue lies beyond the scope of this blog post, I note that under G.S. 130A-118(b)(4) a person who has undergone sex reassignment surgery may request a change to the sex indicated on his or her birth certificate, if the request is accompanied by a physician's notarized statement certifying that the surgery took place.

### **Public Contracting**

Except as otherwise required or allowed by state law, Sections 2.2 and 2.3 of S.L. 2016-3 collectively bar cities and counties from making a contractor's compliance with locally adopted employment rules or local rules for the provision of public goods, services, or accommodations a condition of doing business with them. My colleague Norma Houston has written a blog post that addresses the contracting provisions in S.L. 2016-3 at length.

### **Private Employment Discrimination**

The courts have repeatedly observed that local governments in North Carolina have only those powers granted to them by the General Assembly. It seems that Charlotte relied on the general ordinance authority that G.S. 160A-174 confers on cities as the legal basis for its prohibitions against discriminatory practices by private employers. Section 160A-174 authorizes cities to adopt ordinances that "define, prohibit, regulate, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of [their] citizens." (Counties have the same authority under G.S. 153A-121.)

In debates that preceded the passage of S.L. 2016-3, several legislators asserted that the general ordinance authority of cities isn't broad enough to sustain Charlotte's antidiscrimination ordinances. I have written about the scope of the general ordinance authority in blog posts found [here](#), [here](#), and [here](#). Although I think it is safe to say that Charlotte's antidiscrimination ordinances represent a novel use of that authority – cities usually invoke their general ordinance power to ban or regulate things like loud noises, public nuisances, overgrown lots, junked or abandoned automobiles, and outdoor advertising – the North Carolina Supreme Court has held that the general ordinance authority must be interpreted broadly. *King v. Town of Chapel Hill*, 367 N.C. 400 (2014). Yet even if a plausible argument can be made that the general ordinance authority is broad enough to support an antidiscrimination ordinance, such an ordinance is invalid if preempted by state or federal law. Subsection (b) of G.S. 160A-174 lists the circumstances in which a city ordinance is preempted. (The same preemption rules apply to county ordinances.) One such circumstance is when an ordinance regulates a matter that cities are expressly forbidden to regulate under federal or state law.

The Equal Employment Practices Act (Article 49A of Chapter 143) declares that it is state policy to protect the right of persons to seek, obtain, and hold employment without being subjected to discrimination based on race, religion, color, national origin, age, sex or handicap. Section 3.1 of S.L. 2016-3 amends the Act to specify that "sex" means biological sex. It further amends the Act to clarify that the Act and other "relevant" state laws supersede and preempt measures adopted by any local government – cities, counties, and other political subdivisions – that regulate or impose requirements on employers concerning discriminatory employment practices. Thus, cities and counties in North Carolina simply do not have authority to adopt or enforce ordinances, regulations, resolutions, or policies that prohibit discrimination in private employment, including, for example, racial discrimination. The amendments to the Act do leave local governments free to

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adopt antidiscrimination rules for their own personnel, so long as such rules do not conflict with state law.

### **Discrimination in Places of Public Accommodation**

Section 3.3 of S.L. 2016-3 enacts the Equal Access to Public Accommodations Act (Article 49B of Chapter 143), which provides that it is state policy that everyone within the state should enjoy “fully and equally” goods, services, facilities, privileges, and accommodations offered in places of public accommodation without regard to race, religion, color, national origin, or biological sex. The Act specifies that the designation of bathrooms or changing rooms according to biological sex does not constitute discrimination.

By reference to G.S. 168A-3(8), the Act defines “place of public accommodations” to include, among other things, any place, facility, store, hotel or motel, or other establishment supplying goods or services to the public. (Private clubs and other establishments not actually open to the public are excluded from the Act’s coverage.) The Act further authorizes the Human Relations Commission in the Department of Administration to receive, investigate, and conciliate complaints of discrimination in public accommodations, though it explicitly states that its provisions do not create any private right of action. (In other words, a victim of discrimination in a place of public accommodation can’t file a lawsuit under the Act. Depending on the circumstances, however, the victim might be able to sue under federal law, some other provision of state law, or the common law.)

With regard to local governments – cities, counties, and other political subdivisions – the Act expressly supersedes and preempts local measures that regulate or impose any requirement pertaining to discriminatory practices in places of public accommodation. Consequently, no city, county, or other political subdivision may adopt or enforce an ordinance, regulation, resolution, or policy that subjects places of public accommodation to antidiscrimination prohibitions.

It is perhaps worth noting that, even if Charlotte’s gender-related antidiscrimination measures had been allowed to go into effect, state law would have prohibited a transgender person from exposing his or her private parts to an individual of the opposite biological sex in a public restroom. Such conduct amounts to a misdemeanor under G.S. 14-190.9.

### **Private Employee Compensation**

Some states and local governments elsewhere in the country have raised the minimum wage in their jurisdictions above the minimum of \$7.25 per hour set by federal law. North Carolina has not done so statewide, and in 2013 the General Assembly amended the city and county contracting statutes (G.S. 160A-20.1 and 153A-449) in a way which indicated that cities and counties lacked the power to increase the minimum wage at the local level. (See the blog post available here for more about that change.)

Section 2.1 of S.L. 2016-3 should eliminate any lingering doubts about whether North Carolina cities and counties may adopt local minimum wages for private employers operating within their boundaries. It amends the Wage and Hour Act ( Article 2A of Chapter 95) to say that the Act’s provisions supersede and preempt any local ordinance, regulation, resolution, or policy that regulates or imposes any requirement on employers pertaining to employee compensation. The term “compensation” covers wage levels, hours of labor, payment of wages earned, benefits, and leave. The amendments to the Act also stipulate that local governments may not impose employment rules concerning the well-being of minors in the workforce.

The amendments to the Act do not apply to

- a local government’s regulation or compensation of its own employees,
- economic development incentives awarded under Chapter 143B,
- economic development incentives awarded under Article 1 of Chapter 158,
- a requirement of federal community development block grants, or
- community development programs established under G.S. 153A-376 or G.S. 160A-456.

While the effective date of S.L. 2016-3 is 23 March 2016, its restrictions on local authority over the minimum wage, local government contractors, employment discrimination by private employers, and places of public accommodation extend to ordinances, regulations, resolutions, or policies adopted before that date. Finally, according to the severability clause in Section 4, if any of the legislation’s provisions are held to be invalid, the remaining provisions will remain in effect. The severability clause could ensure that the bulk of S.L. 2016-3 will continue to be the law in North Carolina even if the

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legislation's opponents succeed in having parts of it struck down in court.

## Links

- [www.ncleg.net/Sessions/2017/Bills/House/PDF/H142v5.pdf](http://www.ncleg.net/Sessions/2017/Bills/House/PDF/H142v5.pdf)
- [www.ncmd.uscourts.gov/sites/ncmd/files/opinions/16cv236moo.pdf](http://www.ncmd.uscourts.gov/sites/ncmd/files/opinions/16cv236moo.pdf)
- [canons.sog.unc.edu/hb-2-bathrooms-must-north-carolina-units-government-now/](http://canons.sog.unc.edu/hb-2-bathrooms-must-north-carolina-units-government-now/)
- [www.ca4.uscourts.gov/Opinions/Published/152056.P.pdf](http://www.ca4.uscourts.gov/Opinions/Published/152056.P.pdf)
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- [www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v4.pdf](http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v4.pdf)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=115c-47](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=115c-47)
- [www.ncleg.net/gascripts/Statutes/StatutesTOC.pl?Chapter=0143](http://www.ncleg.net/gascripts/Statutes/StatutesTOC.pl?Chapter=0143)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=130a-118](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=130a-118)
- [canons.sog.unc.edu/?p=8456](http://canons.sog.unc.edu/?p=8456)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-174](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-174)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-121](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-121)
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- [www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter\\_143/Article\\_49A.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_143/Article_49A.html)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=168a-3](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=168a-3)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=14-190.9](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=14-190.9)
- [www.dol.gov/whd/minwage/america.htm](http://www.dol.gov/whd/minwage/america.htm)
- [en.wikipedia.org/wiki/Minimum\\_wage\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Minimum_wage_in_the_United_States)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-20.1](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-20.1)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-449](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-449)
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- [www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter\\_95/Article\\_2A.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_95/Article_2A.html)
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- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-376](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-376)
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