



TRUMP ADMINISTRATION RESCINDS TRANSGENDER STUDENT GUIDANCE – WHAT DOES THIS MEAN FOR EMPLOYERS?

FEBRUARY 2017

Yesterday, February 22, 2017, the Trump Administration rescinded Department of Justice (DOJ) and Department of Education (DOE) guidance that had been issued to schools on May 13, 2016 in the form of a “Dear Colleague” letter. The letter stated that it was the DOJ’s and DOE’s interpretation of Title IX (the federal law prohibiting sex discrimination in education) that schools must allow transgender students to use the gender-specific bathroom with which they identify and that schools could not force students to use bathrooms based on their biological sex. The DOJ and DOE stated that schools that did not follow the guidance could risk losing federal funding.

The Trump Administration’s action comes on the eve of the U.S. Supreme Court’s oral argument in the *Gloucester County School Board v. G.G.* (Gavin Grimm) case, which is scheduled for March 28, 2017. Grimm is a transgender student who challenged his school’s bathroom policy. Grimm had argued that the court should defer to the DOJ’s and DOE’s May 13 letter in interpreting Title IX’s sex discrimination prohibitions. The U.S. Court of Appeals for the Fourth Circuit did, and the Gloucester County School Board then appealed the Fourth Circuit’s ruling to the Supreme Court. But with a 4-4 court and Supreme Court nominee Neil Gorsuch’s

confirmation pending during oral arguments, it is unclear what will happen with the Grimm case next month.

While the impact of rescinding the DOJ and DOE guidance on the rights of transgender students is undoubtedly interesting and on everyone’s mind, how the Trump Administration is handling transgender rights in the workplace is a similarly interesting (if not puzzling) part of the broader scope of transgender rights. Under the Obama Administration, several administrative agencies issued guidance about transgender individuals and bathroom usage. As discussed [in a previous blog](#), the Occupational Safety and Health Administration offered employers “best practices” for bathroom access for transgender workers. In addition, the Equal Employment Opportunity Commission issued a [Fact Sheet on Bathroom Access Rights under Title VII](#). Both guidance documents dictated that transgender individuals must be allowed to use the bathrooms consistent with their transgender status.

In addition, President Obama signed Executive Order 13672 to prohibit discrimination by federal contractors and subcontractors against their employees on the basis of sexual orientation and gender identity. The Office of Federal Contract



CLIENT ALERT

Compliance Programs (OFCCP), which is the federal agency that enforces anti-discrimination laws for federal contractors and subcontractors, subsequently revised its sex discrimination regulations. As part of the revisions, the OFCCP broadened the definition of sex to include gender identity. And as we previously blogged about [here](#), the OFCCP's revised sex discrimination regulations make it unlawful to deny transgender employees access to the restrooms, changing rooms, showers, and similar facilities by the gender with which they identify.

After the Trump Administration took office, many of the government agencies' websites changed. However, the OFCCP's website still includes information relating to sex discrimination regulations revisions, including a [FAQ page](#) about federal contractors' obligations relating to transgender employees and bathroom usage. In addition, as of the date of this blog, both OSHA's and EEOC's guidance documents are still available on their websites.

What does this mean? There are a number of possibilities. Perhaps one reason why President Trump kept the Executive Order

relating to non-discrimination of LGBT employees of federal contractors intact is because the OFCCP had already finalized its regulations on sex discrimination by the time that Trump came into office. Perhaps his administration decided to rescind the DOJ and DOE guidance because it was a letter sent to schools outlining its interpretation of Title IX, instead of a rule (like the sex discrimination regulations) that had gone through a formal comment and review period. Or perhaps the President wanted to draw a distinction between transgender rights for students and transgender rights for adult workers. Or maybe, perhaps, the Trump Administration has not rescinded the EEOC and OSHA guidance, because they are simply that: guidance without any "teeth," unlike the DOJ and DOE's May 13 "Dear Colleague" letter that threatened schools' federal funding.

At this time, employers likely have more questions than answers. We will have to wait to see if SCOTUS will grant us some clarity on these issues. We will also have to wait to see what further actions an unpredictable President Trump takes. In the meantime, we undoubtedly will see more activity on the state and local level relating to these issues.