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Trump's "Gender Ideology" Executive Order Meets the Workplace

By Geri L. Haight, Corbin Carter and Kevin K. Kim

In this article, the authors discuss the executive order issued by President Trump that takes aim at what it terms "gender ideology," makes clear that the federal government will recognize only male and female biological sexes (not gender or gender identity), and directs the federal government to "enforce all sex-protective laws to promote this reality" by creating and implementing the order's strict definitions.

President Trump recently issued a number of wide-ranging executive orders intended to transform the social and regulatory landscape, including in the workplace. One of the most comprehensive of these executive orders is entitled: Defending Women From Gender Ideology Extremism And Restoring Biological Truth To The Federal Government (the Order).¹ The Order takes aim at what it terms "gender ideology," makes clear that the federal government will recognize only male and female biological sexes (not gender or gender identity), and directs the federal government to "enforce all sex-protective laws to promote this reality" by creating and implementing the Order's strict definitions. While the Order is overtly targeted at erasing policies, practices, and procedures that acknowledge or support gender identity or transgender individuals across the federal government, its reach goes beyond the public sector and has broad implications for private employers as well.

The authors, attorneys with Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., may be contacted at ghaight@mintz.com, ccarter@mintz.com and kkim@mintz.com, respectively.

OVERVIEW OF THE ORDER'S WORKPLACE-RELATED DIRECTIVES

The Order establishes that it is the policy of the United States to "recognize two sexes, male and female," that "[t]hese sexes are not changeable and are grounded in fundamental and incontrovertible reality" and that "[e]fforts to eradicate the biological reality of sex . . . improperly transforms laws and policies designed to protect sex-based opportunities into laws and policies that undermine them, replacing longstanding, cherished legal rights and values with an identity-based, inchoate social concept."

As part of this substantial policy shift, the Order most significantly targets "gender ideology" in the ways relevant to the workplace discussed below.

First, the Order provides the following definitions to advance the policy that the male and female sexes are not changeable, and that the federal government will use the Order's rigid definitions to "govern all Executive interpretation of and application of Federal law and administration policy":

- "Sex" is defined as "an individual's immutable biological classification as either male or female";
- "Female" is defined as "a person belonging, at conception, to the sex that produces the large reproductive cell";
- "Male" is defined as "a person belonging, at conception, to the sex that produces the small reproductive cell";
- "Gender ideology" is defined as replacing "the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true. Gender ideology includes the idea that there is a vast spectrum of genders that are disconnected from one's sex. Gender ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body"; and
- "Gender identity" is defined as reflecting "a fully internal and subjective sense of self, disconnected from biological reality and sex and existing on an infinite continuum, that does not provide a meaningful basis for identification and cannot be recognized as a replacement for sex."

Second, the Order directs various federal actions, including that:

- Federal employees acting in official capacities on behalf of their agencies must only use the term "sex," and not "gender," in applicable federal policies and documents;
- Federal agencies must remove and cease issuing "all statements, policies, regulations, forms, communications, or other internal and external messages that promote or otherwise inculcate gender ideology," including that any agency forms that require an individual's sex shall "list male or female, and shall not request gender identity";
- Federal agencies must "take all necessary steps, as permitted by law, to end the [f]ederal funding of gender ideology"; and
- Federal agencies and federal employees must enforce laws "governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes."

Third, the Order instructs the U.S. Attorney General to issue guidance to "correct" the alleged misapplication of the Supreme Court's 2020 *Bostock v. Clayton County*² decision. That decision held that Title VII's protection against workplace "sex" discrimination applied equally to discrimination based on sexual orientation or transgender status. The Order rescinds prior Biden Administration regulations and guidance that relied on *Bostock* to require gender identity-based access to single-sex spaces in various contexts (including for transgender individuals). But the Order goes further than simply rolling back those Biden-era policies. It directs the U.S. Attorney General to "issue guidance and assist agencies in protecting sex-based distinctions" and to "ensure the freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federally funded entities covered by the Civil Rights Act of 1964." It further mandates that the Department of Justice, Department of Labor, and the U.S. Equal Employment Opportunity Commission (EEOC) "prioritize investigations and litigation to enforce" these distinctions in the Order and requires federal agencies to take "appropriate action to ensure that intimate spaces designated for women, girls, or females (or for men, boys, or males) are designated by sex and not identity."

Fourth, the Order formally rescinds numerous executive orders from past administrations as well as several specific agency guidance documents previously issued by federal agencies that the Order considers "inconsistent" with its new approach. Among the guidance documents the Order purports to rescind is the EEOC's "Enforcement Guidance on Harassment in the Workplace" issued in 2024 (the 2024 EEOC

Harassment Guidance).³ That extensive guidance focused, in part, on addressing workplace harassment based on gender identity related to sex-segregated facilities (such as restrooms) and the intentional misuse of an individual's pronouns. It included examples of the types of conduct that the EEOC believed may constitute unlawful harassment based on sexual orientation and gender identity and urged employers to identify and address such conduct in the workplace.

Fifth, the Order states that the Trump Administration will propose legislation by February 19, 2025, to codify the Order's definitions. It is so far unclear the extent to which this legislation, if enacted, might impact private employers, including whether it may seek amendments to existing federal anti-discrimination laws.

Finally, the Order directs federal agency heads to "assess grant conditions and grantee preferences" to ensure that federal funds "do not promote gender ideology" and requires agencies to submit an update by May 20, 2025, to address changes the agencies have made, including to grants and contract conditions, to effectuate the Order.

QUESTIONS RAISED

The Order's intent – taking a hardline stance to eliminate any acknowledgement of gender ideology within federal programs and policies – is clear. But the scope of the Order's impact remains ambiguous, and its dictates raises many questions.

1. How Does the Order Interact with Existing State and Local Law?

The interplay between the Order and state and local laws taking a different view is unclear. There are laws that protect individuals based on their gender, gender identity, or gender expression, including in the workplace. For instance:

- Like many other states and localities, California requires employers to provide sexual harassment training to employees. A specific component of that training is content relating to gender identity and gender expression and the prevention of sexual harassment based upon those characteristics. California employers, therefore, must provide at least a minimum explanation of "gender identity" and "gender expression" to inform employees as to what conduct is prohibited by state law.
- New York State's Human Rights Law explicitly prohibits discrimination and harassment based on "gender identity or expression," including "a person's actual or perceived gender-related

identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender." The statute includes the now-federally-prohibited word "gender" a total of 51 times.

- In New York City, the New York City Commission on Human Rights requires covered employers to permit employees to "use single-gender facilities, such as restrooms or locker rooms, and to participate in single-gender programs, that most closely align with their gender, regardless of their gender expression, sex assigned at birth, anatomy, medical history, or the sex or gender indicated on their identification" and employers are instructed not to require gender-non-conforming employees to use single-occupancy restrooms (instead of shared gendered facilities), as doing so may constitute illegal discrimination or harassment. Covered employers are also required to provide annual training for their employees and the Commission's training template devotes considerable time teaching about gender, gender expression, and gender identity and makes clear that harassment or discrimination on the basis of gender expression or gender identity is unlawful.

The Order does not explicitly preempt any of these state or local requirements or mandate that states or localities dismantle gender-related protections or pause their enforcement efforts. However, private employers (who are not federal contractors or grant recipients) should remain vigilant as new federal regulations and guidance will surely result from the Order, and those regulations/guidance efforts may regulate private employer workplaces (including by potentially targeting state/local laws).

For now, in the absence of federal preemption, private employers should continue to abide by state and local law requirements that are not directly in conflict with the Order, including those that protect employees based on gender-related characteristics. We note that employers that qualify as federal contractors or grant recipients must proceed carefully to comply with both state/local requirements and the Order (together with any forthcoming regulations and guidance implementing the Order), which may be in direct conflict with one another.

In response to the Order, the EEOC has already rolled back⁴ a number of gender identity-related initiatives, has specifically equated the use of "gender identity" in various media with impermissible "gender ideology" promotion, and has removed materials referencing gender identity in its anti-harassment training modules and other documents. The U.S. Office of Personnel Management also recently released guidance⁵ to agencies specifically directing them to, among other things, "[c]ancel any trainings that inculcate or promote gender ideology or have done so in the past."

Will federal agencies ultimately expect private employers (who are not federal contractors or grant recipients) to do the same?

2. Can the Order Rescind the 2024 EEOC Harassment Guidance?

In short, technically, no – for now, although expect the EEOC to operate in practice as if the guidance has been rescinded. The 2024 EEOC Harassment Guidance was approved by a majority vote of the EEOC's Commissioners in April 2024, and any modification would require another majority vote. President Trump has removed two sitting EEOC commissioners before the expiration of their five-year terms, leaving the EEOC with only two remaining commissioners, and thus, without a three-commissioner required quorum. Without such a quorum, the EEOC cannot initiate formal rulemaking or issue, modify, or revoke formal guidance. Although the current acting chair of the EEOC, Andrea Lucas, has already rolled back mention of gender identity in various informal Commission documents, the EEOC has itself announced that the acting chair "cannot unilaterally remove or modify certain 'gender identity'-related documents subject to the President's directives in the executive order," including the 2024 EEOC Harassment Guidance. Therefore, until the EEOC gains additional commissioners to achieve a quorum, its earlier harassment guidance remains effective. However, given the acting chair's public opposition⁶ to the guidance, in practice, we do not expect the EEOC to rely on the guidance for future enforcement actions, and employers should expect modified harassment guidance from the EEOC in the future.

3. What are the Potential Implications of Reframing Bostock?

As noted above, the Order concludes that the Biden Administration "misappli[ed]" the *Bostock* decision in requiring gender identity-based access to single-sex spaces in various contexts. The *Bostock* opinion, written by Trump-appointed Justice Gorsuch, applies Title VII workplace protections to employees based on sexual orientation and/or transgender status. Although the *Bostock* majority opinion does not directly grapple with "gender identity" (it instead repeatedly refers to "transgender status"), the opinion has been widely interpreted to provide Title VII protections to a broader set of sex-related characteristics, including biological sex, sexual orientation, and gender identity (including the gender identity of being transgender). But Justice Gorsuch was careful in the *Bostock* opinion to specifically note that the decision did not purport to address open questions as to "bathrooms, locker rooms, dress codes," or "anything else of the kind" because the Court had "not had the benefit of adversarial testing about" those issues.

The Order – and the EEOC's announcement about the Order – latches on to this *Bostock* language and seeks to “protect sex-based distinctions, which are explicitly permitted under [c]onstitutional and statutory precedent.” As *Bostock* did not address the issue of “single-sex” spaces, such as restrooms, the Order makes clear that its intent is to restrict restrooms and other single-sex spaces to biological males and females as defined in the Order. The EEOC's announcement⁷ goes even further, with Acting Chair Lucas noting: “Because of biological realities, each sex has its own, unique privacy interests, and women have additional safety interests, that warrant certain single-sex facilities at work. . . . It is neither harassment nor discrimination for a business to draw distinctions between the sexes in providing single-sex bathrooms or other similar facilities which implicate these significant privacy and safety interests [and *Bostock*] does not demand otherwise.”

Employers should expect additional measures from the EEOC that are consistent with this philosophy, particularly regarding single-sex spaces like restrooms and changing rooms (though, as noted above, this may cause conflict with existing state/local law). But employers should also expect the core holding of *Bostock* – sexual orientation and transgender status Title VII anti-discrimination protection – to remain intact unless future Supreme Court decisions overrules or otherwise modifies that holding.

4. What Does This All Mean for Government Identification?

The Order also raises questions as to how employee identification may play out in various workplace contexts. For instance, large employers are still required to submit annual EEO-1 reports (during the second quarter of each year) to provide the EEOC with employee demographic data, including information on employees' sexes. In addition to identifying male and female employees, the current EEO-1 form includes the option for employers to identify non-binary employees by using the comment section of the form. Assuming the EEOC will issue a new form that eliminates this option, how should employers identify employees who have self-identified internally as non-binary? Some non-binary employees may also have government-issued documents (including U.S. passports) that allow for a “non-binary” option, though the Order explicitly directs government agencies to “require that government-issued identification documents, including passports, visas, and Global Entry cards, accurately reflect the holder's sex” moving forward. Are government-issued identification documents that recognize individuals as non-binary still valid for I-9 work authorization purposes? In other contexts? Employers are left without answers as these developments continue to unfold.

TAKEAWAYS FOR PRIVATE EMPLOYERS

1. Monitor Continued Developments

The Order predominantly directs federal agencies and employees to take certain actions. However, in time, these federal agencies will likely issue and enforce federal laws in a manner consistent with the Order's directives. Given the current ambiguity of much of the Order's mandates, all employers should monitor developments and be prepared to adjust their programs and practices as the Order is implemented by agencies and interpreted by courts after likely legal challenges.

Further, federally-funded entities (including federal contractors and grant recipients) should be aware of the Order's instructions to cut federal funding to any contractors or grantees that "promote gender ideology" (which, as defined in the Order, includes "permitting the false claim that males can identify as and thus become women and vice versa"). Will federal agencies interpret this edict to prohibit federal contractor or grant recipient employers from maintaining policies aimed at supporting employee transitioning in the workplace (e.g., allowing employees to use names or pronouns consistent with their gender identity; permitting transgender employees to use the restroom of their choosing; providing employee benefits aimed at supporting transition; or granting employees leave for transition-related medical events)? Employers that are determined to support transgender or non-binary employees with these types of policies/practices may experience increased government scrutiny and will need to carefully craft compliant programs that can still offer meaningful support to these employee populations.

2. Contemplate a Reasoned Response

The Order, by itself, does not specifically mandate that private employers (who are not federal contractors or grant recipients) change their gender identity-related policies, practices, or procedures and – similar to DEI programs – these employers need not rush to implement any sweeping changes. While the tenor of the Order is likely meant to pressure non-federally funded private employers to eliminate or revise policies, practices, or procedures relating to gender identity or expression, there is currently no legal obligation for these private employers to do. As noted above, that may soon change, and employers would be best served by conducting a thorough review of their policies, practices, and procedures that may be implicated by the Order and forthcoming regulations/guidance and devising a plan to ensure compliance as the landscape continues to shift.

3. Continue to Account for Existing Anti-Discrimination Laws

Although the Order makes clear that the concepts of gender identity and "gender ideology" are no longer acceptable within the federal government, discrimination against transgender and non-gender conforming employees (and the broader LGBTQ+ employee population) remains illegal under federal law and many state and local laws. This Order does not remove those protections and employers should steadfastly ensure that these employees are not subject to discrimination.

4. Consider Strategies for Supporting Employees

Given executive orders aimed at rolling back legal protections for transgender and gender non-conforming individuals in various employment, education, healthcare, and other settings, some employers may wish to consider how they can support employees impacted by these measures. Employers can certainly emphasize (and re-emphasize as needed) their commitment to maintaining an inclusive and respectful workplace and the employer's expectation that all employees are to conduct themselves professionally and act with civility toward colleagues. If employees express concerns regarding safety or mental health issues, employers can work with these employees to provide information on potentially useful employee benefits including Employee Assistance Programs (EAPs) and counseling resources. Further, if employees need leaves of absence or potential reasonable accommodations for legally protected reasons, employers can share information about their policies and practices to ensure employees are informed of their options.

NOTES

1. <https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/>.
2. https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.
3. <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>.
4. <https://www.eeoc.gov/newsroom/removing-gender-ideology-and-restoring-eeocs-role-protecting-women-workplace>.
5. <https://www.opm.gov/media/yvlh1r3i/opm-memo-initial-guidance-regarding-trump-executive-order-defending-women-1-29-2025-final.pdf>.
6. https://www.eeoc.gov/sites/default/files/2025-01/Lucas_Statement_re_Harassment_Guidance_%284.2024%29.pdf.
7. <https://www.eeoc.gov/newsroom/removing-gender-ideology-and-restoring-eeocs-role-protecting-women-workplace>.

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