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President Trump's Executive Order on Recognizing Two Sexes: Implications for Private Employers

Law and the Workplace on **January 22, 2025**

On Monday, January 20, 2025, President Donald Trump issued an Executive Order entitled "Defending Women From Gender Ideology Extremism and Restoring Biological Truth To The Federal Government" (the "Order"). The Order declares that the United States will only recognize two sexes, male and female, and states that these sexes are binary, biological, and "not changeable."

The Order provides that, under the direction of President Trump, the Executive Branch will "enforce all sex-protective laws to promote this reality." As part of this enforcement, federal agencies are required to remove, and cease issuing, any statements, policies, regulations, and other messages that "promote or otherwise inculcate gender ideology," which the Order defines as "the idea that there is a vast spectrum of genders that are disconnected from one's sex." Federal agencies are also required to take all necessary steps permitted by law to "end Federal funding of gender ideology." Moreover, pursuant to the Order, all federal agencies and employees must use the term "sex" rather than "gender" when acting in an official capacity.

The Order also requires all government-issued identification documents, such as passports, visas, and Global Entry cards to "accurately reflect the holder's sex." This marks a reversal of the Biden Administration's policy which, beginning in 2022, allowed U.S. citizens to select the gender-neutral "X" on their passports. In addition, the Order mandates "privacy in intimate spaces" to ensure that single-sex spaces, such as federal prisons and rape shelters, are designated by sex and not by gender identity.

Limiting the Scope of *Bostock*

Notably, the Order explicitly states the Trump Administration's intent to limit the scope of the U.S. Supreme Court's 2020 ruling in *Bostock v. Clay County*. In *Bostock*, the Supreme Court held that Title VII of the Civil Rights Act of 1964's prohibition on discrimination "on the basis of sex" includes discrimination on the basis of sexual orientation and gender identity. According to the Order, the Biden Administration interpreted *Bostock* to "require[] gender identity-based access to single-sex spaces." The Order directs the Attorney General to immediately issue guidance to federal agencies to "correct [this] misapplication" of *Bostock* to "sex-based distinctions in agency activities." The Senate Judiciary Committee is scheduled to vote on President Trump's Attorney General nominee, Pam Bondi, on January 29.

What The Executive Order Means for Private Employers

Importantly, the Order directs the Attorney General to issue guidance 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." Pursuant to that guidance, the Order instructs the Attorney General, the Secretary of Labor, and the General Counsel and Chair of the Equal Employment Opportunity Commission ("EEOC"), as well as any other agency heads with enforcement power, to prioritize investigations and litigation to enforce the binary sex mandate. While the EEOC is generally expected to slow the pace of litigation and shift away from enforcement through investigations against employers suspected of violating discrimination laws under newly appointed Acting Chair Andrea R. Lucas, employers in the coming months and years may see more litigation and enforcement through investigations against employers who are not in compliance with the Executive Order's mandate.

Lastly, the Order states that all federal agencies must promptly rescind any guidance inconsistent with the Order and/or with the Attorney General's forthcoming guidance. Specifically, the Order also calls for the rescission of the EEOC's April 2024 guidance, entitled "Enforcement Guidance on Harassment in the Workplace."

As Proskauer previously covered, that guidance provided broad protection for LGBTQ+ workers against harassing conduct based on sexual orientation or gender identity. Among other things, the guidance also emphasized that sex-based harassment under Title VII encompasses harassment based on pregnancy, childbirth, or related medical conditions (including the decision to have, or not have, an abortion). With this guidance no longer in effect, employers should review any modifications to policies or practices implemented in response to the guidance against the other requirements of the Executive Order.

Takeaways

This Order was just one of dozens of executive actions taken by President Trump within hours of his inauguration. We expect there will be more updates in the coming days and weeks, and we will continue to monitor and report on these updates.

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