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North Carolina Attempts to Clean Up the "Bathroom Bill": Legislature Repeals and Replaces Controversial Law

By David Lindsay, Kate Dewberry, and Erinn Rigney

On March 30, 2017, the North Carolina legislature repealed what has been known as the "Bathroom Bill" or H.B. 2, a law passed in March of 2016 that, among other things, required individuals to use the public bathroom that corresponded to the gender identified on their birth certificates. The single-page text of H.B. 142, which was signed into law by Governor Roy Cooper, repeals H.B. 2 (and its amendment, H.B. 169) in its entirety and replaces it with a three-year moratorium on any future local government ordinances regulating private employment practices or public accommodations in North Carolina. In addition, the bill preempts any prior legislation regarding "multiple occupancy bathrooms, showers or changing facilities," and prohibits local school boards and government agencies from regulating the use of public restrooms in the future. This means that North Carolina law no longer addresses which public restroom individuals are required to use, and the General Assembly has the exclusive authority to make laws regarding this issue in the future. This prohibition is not subject to the three-year time limit.

The precise scope of the moratorium is unclear. It prohibits local governments from enacting or amending any ordinances "regulating private employment practices or regulating public accommodations." Unlike H.B. 2, H.B. 142 does not preempt existing local ordinances; it only prohibits the future enactment or amendment of any such ordinances. On its face, this would mean that any local ordinances pertaining to private employment practices or public accommodations enacted prior to H.B. 2 spring back into effect. It remains to be seen how broadly the ban on new ordinances regulating "private employment practices" will be interpreted and whether it will include issues like the regulation of wage levels, benefits, and discrimination in employment. In addition, H.B. 2 added the word "biological" in front of the word sex to the list of classes protected from discrimination in the Equal Employment Practices Act ("EEPA"). With the repeal of H.B. 2, the word "biological" is removed from the EEPA, which may open the door for the legal argument that discrimination protections based on "sex" extend to gender identity and possibly sexual orientation.

This action by the General Assembly appeared to be in response to a March 30, 2017 deadline set by the National Collegiate Athletic Association (NCAA), which threatened to eliminate North Carolina sites from consideration to host college sports championships through 2022. H.B. 142 follows a failed attempt to repeal H.B. 2 in a special session in December 2016. Prior to that special session, the Charlotte City Council rescinded the public accommodation and passenger-for-hire portions of its "Non-Discrimination Ordinance" (the "Ordinance"), which extended anti-discrimination protections to gay, lesbian, bisexual, and transgender persons. The Ordinance was the initial catalyst for the enactment of H.B. 2.

As detailed in the K&L Gates LLP April 2016 Alert, H.B. 2, formally known as the "Public Facilities Privacy & Security Act" was signed by former Governor Pat McCrory and instituted

sweeping changes to various areas of local governance as well as to regulation of the employment relationship. Besides mandating that public multi-occupancy bathroom use must correspond to the gender identified on an individual's birth certificate, H.B. 2 limited the classes to which anti-discrimination protections applied to include only "race, religion, color, national origin, age, biological sex, or handicap." Local governments were prohibited from extending these protections to any additional classes of individuals outside those specifically named in H.B. 2, removing pregnancy, veteran status, gender identity, and sexual orientation as bases for discrimination claims in the workplace. In addition, H.B. 2 eliminated the private cause of action for employment discrimination, foreclosing even the traditional process for bringing claims for wrongful discharge in violation of public policy under the EEPA. Finally, H.B. 2 superseded and preempted any legislation or policy enacted by a local government that regulated employee compensation, including wage levels, benefits, and payment of wages.

In July, H.B. 2 was amended by H.B. 169, with lawmakers restoring employees' rights to pursue a claim in state court for discriminatory terminations, but limiting the time to bring claims to within one year of the alleged violation. Prior to H.B. 2, employees could bring claims based on discriminatory termination within three years of an alleged violation. The more controversial provisions of H.B. 2 remained in effect, and the political firestorm created by H.B. 2's passage continued. H.B. 2 was at the center of the recent North Carolina gubernatorial election. It was also the subject of several lawsuits and garnered significant negative publicity after numerous businesses canceled scheduled events and plans for expansion into the state.

Conclusion

Though only in existence for approximately a year, H.B. 2 has been at the center of political and economic discourse at both the state and national level. The General Assembly has now repealed the text of the controversial bathroom provisions but has continued to place limitations upon local governments in enacting various types of employment and public accommodations laws. Local governments cannot enact any laws regulating bathrooms, whether those laws could be construed as pro- or anti-LGBT. Additionally, following repeal, it appears that an employee's right to bring claims for employment discrimination will again be governed by a three-year statute of limitations, rather than the one year prescribed by the July amendment. It remains to be seen what happens to local ordinances governing private employment practices enacted prior to March 30, 2017, and whether local governments will attempt to extend anti-discrimination protections to different classes of individuals, such as the LGBT community, following the three-year moratorium. Therefore, employers should monitor potential changes in local laws regulating nondiscrimination in the workplace as well as wage and hour issues and update their policies accordingly.

Authors:

David Lindsay
david.lindsay@klgates.com
+1.919.743.7304

Kate Dewberry
kate.dewberry@klgates.com
+1.919.743.7327

Erinn Rigney
erinn.Rigney@klgates.com
+1.919.831.7046