

## The New Presidential Directive on Gender Identity: The Next Steps for Florida Employers

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On January 20, 2025, President Trump enacted Executive Order (EO) 14168, which is titled “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government.” This EO mandates that various agencies, including the Equal Employment Opportunity Commission (EEOC), revoke “all guidance documents . . . or such parts of such documents that are inconsistent” with the stipulations of EO 14168. The EO identifies the EEOC’s “Enforcement Guidance on Harassment in the Workplace,” dated April 29, 2024, as a document that the administration anticipates will be fully or partially rescinded.

### The EEOC’s 2024 Enforcement Guidance on Harassment in the Workplace

The Enforcement Guidance on Harassment in the Workplace has identified behaviors that could lead to harassment claims. Specifically, the Guidance states that harassing conduct based on sexual orientation or gender identity “includes epithets regarding sexual orientation or gender identity; physical assault due to sexual orientation or gender identity; outing (disclosure of an individual’s sexual orientation or gender identity without permission); harassing conduct because an individual does not present in a manner that would stereotypically be associated with that person’s sex; repeated and intentional use of a name or pronoun inconsistent with the individual’s known gender identity (misgendering); or the denial of access to a bathroom or other sex-segregated facility consistent with the individual’s gender identity.” *Enforcement Guidance* §11(A)(5)(c). Andrea Lucas, the new Acting Chair of the EEOC, has criticized this guidance, especially concerning LGBTQ issues. However, Acting Chair Lucas has recognized that the EEOC is currently unable to revoke parts of the agency’s Harassment Guidance that conflict with the Executive Order. The Commission operates based on a majority vote, and following President Trump’s dismissal of two sitting commissioners, the agency lacks a voting quorum.

### The EEOC’s Shift in Focus

Although unable to revoke the Guidance, Lucas still holds significant influence over the types of lawsuits the agency will pursue and the procedural actions it may undertake. For example, Lucas stated that, in line with President Trump’s Executive Order, one of her key focuses for compliance, investigations, and legal actions is to uphold the biological and binary nature of sex and associated rights, which includes women’s rights to single-sex environments in the workplace. In pursuit of this goal, she declared the discontinuation of the agency’s “pronoun app,” which permitted employees to show their pronouns alongside their names in both external and internal communication platforms. Additionally, Lucas abolished the use of the “X” gender marker during the intake process for lodging discrimination complaints and will mandate modifications to official documents to remove “Mx.” from the list of prefix choices for discrimination claims. Furthermore, the EEOC’s website page on sex-based discrimination states that it is “being reviewed for compliance with the law and executive orders and will be revised.” Similarly, while the EEOC’s Know Your Rights poster is still available to download from the agency’s website, that page also includes a disclaimer that it is “undergoing revision pursuant to Executive Order: Defending Women From Gender Ideology Extremism And Restoring Biological Truth To The Federal Government – The White House.” The EEOC has also sought to terminate cases in Alabama, New York, and California claiming discrimination

against workers who are transgender or do not conform to traditional gender norms. The agency references EO 14168, which states that the government will recognize only two “immutable” sexes—male and female—as the basis for its decision to no longer pursue these cases.

### **Potential Conflicts Between the Administration’s Position and Federal, State and Local Law**

Lucas’s remarks and the agency’s actions so far indicate that the current enforcement priorities of the EEOC are in line with those of the Trump administration. Nevertheless, the administration’s understanding of Title VII is at odds with the U.S. Supreme Court’s 2020 ruling in *Bostock v. Clayton County*. In that case, the Court determined that “sex,” as defined under Title VII, encompasses “gender identity,” consequently making Title VII’s ban on sex discrimination and sexual harassment apply to discrimination and harassment based on both sexual orientation and gender identity. Employers can expect ongoing allegations of discrimination related to LGBTQ status unless the decision is reversed; however, the agency itself is unlikely to pursue these claims for the next four years, emphasizing the tension between the Court’s ruling and the stance of the EEOC. Additionally, while the Florida Civil Rights Act does not specifically prohibit discrimination based on sexual orientation or gender identity, the Florida Commission on Human Rights (FCHR) has stated that it accepts claims of discrimination based on sexual orientation or gender identity. See <https://fchr.myflorida.com/sexual-discrimination>. The FCHR’s position may change as the EEOC issues further guidance, since the FCHR’s statement links to the Biden administration’s Executive Order on preventing discrimination based on gender identity or sexual orientation, which was rescinded by EO 14168. Furthermore, many local laws prohibit discrimination based on sexual orientation and gender identity, including Hillsborough County, Pinellas County, the city of Tampa, and the city of St. Petersburg, among numerous others in Florida.

### **What Should Employers Do?**

Employers in Florida must navigate these conflicting legal landscapes carefully, as failure to comply with federal, state, and local laws and federal directives could lead to unwanted litigation. Given the contentious nature of these issues, employers may face increased scrutiny and potential lawsuits from employees who feel discriminated against due to developing changes in workplace policies regarding gender identity. The EEOC’s focus under this administration is expected to shift towards enforcing binary sex distinctions, which could complicate matters for employers who previously supported other, more inclusive practices.

Employers in Florida should consider consulting with experienced employment counsel to review their workplace policies regarding gender identity and expression of gender identity. The EO directs agencies to cease issuing guidance that supports gender-affirming practices, such as allowing employees to use preferred pronouns or access facilities corresponding to their gender identity. However, as noted above, many local laws are more protective of employee rights. Thus, employers must ensure their policies comply with local, state and federal laws.

The situation for federal contractors is even more complicated. The Executive Order prohibits these entities from using federal funds to promote what it terms “gender ideology.” This means that any programs or policies that acknowledge gender identity beyond the binary classification could face funding cuts or restrictions. Employers will need to review their practices to ensure compliance with this directive.

## Conclusion

It is imperative for employers to acknowledge that this is a deeply personal policy for some employees. Those who identify as transgender or non-binary may feel profoundly misunderstood and frustrated at this time. As such, conversations around Trumps' new Executive Order can consequently evoke strong emotional responses from advocates seeking recognition and protection for their rights and opponents who may feel threatened by changes that challenge their understanding of gender norms. It is important for employers to implement training awareness to make all their employees feel respected and welcomed at this time.

Ultimately, Florida employers should evaluate their risk management strategies. Even if federal enforcement diminishes, there remains a possibility of litigation at the state or local level. By proactively addressing potential issues related to sexual orientation and gender identity discrimination, employers can mitigate risks associated with potential lawsuits or complaints.

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