

# BARNES & THORNBURG LLP

## Labor and Employment Update for Employers

**January 22, 2025**

### **Presented by:**

**Mitchell Berry**, Associate, Barnes & Thornburg LLP

**Jason Clagg**, Partner, Barnes & Thornburg LLP

**Mark Scudder**, Partner, Barnes & Thornburg LLP





**Mitchell Berry focuses his practice on labor and employment litigation and education law. He prides himself on guiding businesses and schools through difficult situations, standing up for clients in the courtroom whenever necessary.**

Mitchell is thorough and strategic in his work and is driven to finding solutions, even in the toughest situations. Having experience working in a prosecutor's office and in-house for one of the largest mortgage lenders in the Midwest, Mitchell brings a balanced perspective to business clients.

He represents employers facing employment litigation, including disputes over the disclosure of confidential information and violations of restrictive covenants (e.g., non-compete agreements and non-solicitation agreements), as well as in Equal Employment Opportunity Commission (EEOC)-related issues. He also drafts and responds to written discovery for cases in federal and state courts, and prepares position statements on behalf of employers in response to administrative charges of discrimination and retaliation.

Additionally, Mitchell assists public and private schools (K-12) and higher education, with employment and student disability matters through dispute resolution and in court, as needed.

## **Professional and Community Involvement**

Member, Allen County Bar Association

Former board member, Wellspring Interfaith Social Services

Former volunteer, Volunteer Lawyer Network

## **Mitchell Berry**

### **Associate**

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### **EDUCATION**

Notre Dame Law School, (J.D.), cum laude, 2020, articles editor for the Notre Dame Journal of Law, Ethics & Public Policy

Indiana University-Purdue University Fort Wayne, (B.A.), political science, with distinction, 2017, Pi Sigma Alpha Honor Society, Withers Scholar, Dean's List

### **BAR ADMISSIONS**

Indiana

### **COURT ADMISSIONS**

U.S. District Court for the Northern District of Indiana

U.S. District Court for the Southern District of Indiana

### **LANGUAGES**

English

### **PRACTICES**

Labor and Employment



**Jason Clagg is a labor and employment lawyer who serves as the vice chair of the firm's education law practice group. Understanding the competitive nature of the marketplace, Jason provides his clients with prompt attention and clear, definitive guidance.**

For roughly two decades, Jason has helped employers draft, defend and contest non-compete agreements and addressed the misappropriation of trade secrets throughout the country. In addition to contested matters, he provides daily client counseling, drafts employment agreements and trains personnel on a variety of topics.

With a practice focused exclusively on management interests, Jason routinely represents employers in state and federal court, before administrative agencies such as the Department of Labor (DOL), National Labor Relations Board (NLRB) and Equal Employment Opportunity Commission (EEOC), and in labor arbitrations. He has also effectively defended employers in Fair Labor Standards Act (FLSA) collective actions, unfair labor practice proceedings under the NLRA, and against claims of harassment, discrimination and wrongful discharge.

Further, Jason practices in the specialized area of education law, with a focus on employment and student disability matters. He has represented public and private schools from the elementary to the collegiate level, in numerous courts and administrative settings, including before the Office of Civil Rights (OCR), the Department of Education (DOE) and in special education due process matters. With extensive experience with Section 504 of the Rehabilitation Act, the Individuals with Disabilities Education Act and Indiana's Article 7, he regularly trains and advises schools on these laws.

Jason is appreciated for his ability to help clients through stressful and potentially costly situations. Committed to exceeding expectations while coming in at or under budget, his focus is on seeking out efficient and practical solutions.

## Jason T. Clagg

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### EDUCATION

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Purdue University, (B.S.)

### BAR ADMISSIONS

Indiana  
Iowa  
Ohio

### COURT ADMISSIONS

U.S. Supreme Court  
U.S. Court of Appeals for the Sixth Circuit  
U.S. Court of Appeals for the Seventh Circuit  
U.S. District Court for the District of Colorado  
U.S. District Court for the Northern District of Indiana  
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U.S. District Court for the Western District of Michigan  
U.S. District Court for the Eastern District of Missouri

Professional and Community Involvement

- Member, National School Boards Association
- Member, Council of School Attorneys
- Board member, Aboite Girls Basketball League
- Former board member, Fort Wayne Cinema Center

Honors

- The Best Lawyers in America, 2018-2025
- Indiana Super Lawyers, Rising Star, 2012-2017
- Fort Wayne Monthly, Top Lawyer
- Fort Wayne Business Weekly's, Forty Under 40, 2015

- U.S. District Court for the District of Nebraska
- U.S. District Court for the District of New Mexico
- U.S. District Court for the District of North Dakota
- U.S. District Court for the Northern District of Ohio
- U.S. District Court for the Southern District of Ohio
- U.S. District Court for the Western District of Tennessee

LANGUAGES

- English

PRACTICES

- Accessibility and Disability
- Arbitration and Grievances
- Class and Collective Actions
- Collective Bargaining
- Disability, Leave and Medical Issues
- Discipline and Termination
- Discrimination Defense
- EEO Compliance
- Employment
- Employment Litigation
- Government Litigation
- Human Resource Audits
- Immigration Compliance - Worksite Enforcement Services
- Labor and Employment
- Labor Relations
- Management and Employee Training
- Mergers and Acquisitions - Labor Issues
- National Labor Relations Board (NLRB)
- Non-Compete and Trade Secrets
- Non-Compete Litigation
- Sarbanes-Oxley and Dodd-Frank Acts
- Student Disability
- Union Avoidance
- Wage and Hour
- Workplace Counseling
- Workplace Culture 2.0

INDUSTRIES





**Mark D. Scudder is a partner in Barnes & Thornburg's Labor and Employment Law Department in the Fort Wayne, Indiana office. Mark's practice covers virtually all areas of labor and employment law, including litigation concerning discriminatory practices, worker's compensation benefits, collective bargaining agreement administration, and grievance and arbitration proceedings. Mark also handles commercial and general litigation matters.**

He has represented clients in state and federal courts at all stages of litigation, from pre-litigation counseling, alternative dispute resolution, trial and appeal. He has also represented clients before a variety of administrative agencies including the EEOC, ICRC, and the Indiana and Michigan Worker's Compensation Agencies.

In addition to labor and employment matters, Mark is also a member of the firm's School Law Practice Group, in which he provides a broad range of legal services to primary, secondary, and post-secondary public and private schools. He has represented school corporations on matters pertaining to teacher and student discipline, discrimination complaints, sports and other extra-curricular issues, and civil litigation.

## Professional and Community Involvement

School board member, Bishop Dwenger High School

Board of directors, Saint Anne Communities

## Honors

The Best Lawyers in America, 2024-2025

## Mark D. Scudder

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### EDUCATION

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Communications Law Journal, 2001

Indiana University-Bloomington, (B.A.),  
economics and political science, Herman  
B Wells Scholar

### BAR ADMISSIONS

Indiana

Michigan

### COURT ADMISSIONS

U.S. Court of Appeals for the Seventh  
Circuit

U.S. District Court for the Northern  
District of Indiana

U.S. District Court for the Southern  
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### LANGUAGES

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### PRACTICES

Accessibility and Disability

Arbitration and Grievances

Class and Collective Actions

Collective Bargaining

Disability, Leave and Medical Issues

Discipline and Termination

Discrimination Defense

Downsizing and WARN Act

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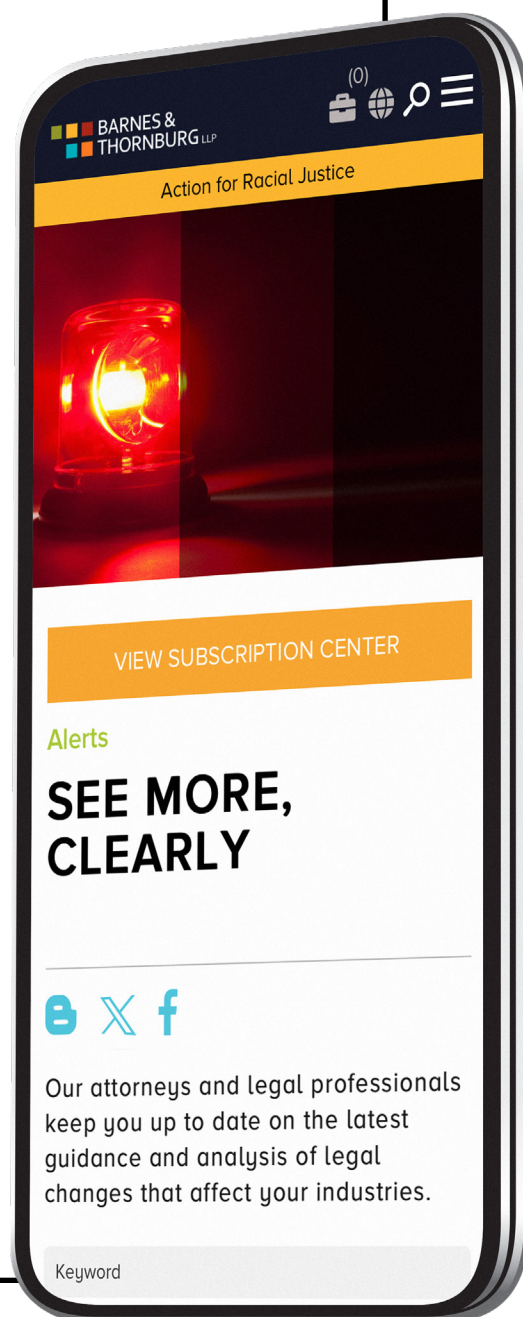
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## THE BASICS—TITLE VII AND *BOSTOCK*



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## Illegal Discrimination

- Harassment or discrimination is illegal based on:
  - Race, color, sex, age (over 40), disability, religion, national origin, pregnancy, FMLA leave, military status, sexual orientation, transgender status, and any other legally protected characteristic
- Discrimination can include hiring, firing, discipline, pay, promotions, job assignments, etc.



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## *Bostock v. Clayton County: U.S. Supreme Court (6/15/20)*

- Title VII of the Civil Rights Act of 1964 barred employment discrimination “because of” race, sex, and other characteristics
  - Sex was likely added at the last minute to derail the passage of the law’s prohibition on racial discrimination
- Supreme Court in 2020 issues a 6-3 decision written by Neil Gorsuch
  - Gorsuch is seen as very conservative and was Trump’s first appointee

## The Decision

- “An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.”
  - Ex. - An employee is attracted to men → It is ok if they are female, but they are fired if they are male → That is an action “because of” sex
  - Focus is on the individual → discriminating against all gay people (men and women) is still discrimination because of sex
- Main counter-argument was that this was not Congress’ intent, it had not been the interpretation for a half century, and a court should not make new law
  - But could not escape the law’s text

## The Potential Implications for Employers

- Majority claims “we do not purport to address bathrooms, locker rooms, or anything else of the kind”
- Dissent noted the decision “is virtually certain to have far-reaching consequences” as “[o]ver 100 federal statutes prohibit discrimination because of sex”
  - Specifically, discussed Title IX, including bathroom and locker room access, assignment of roommates, participation in women’s sports, and pronoun use



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## 2021 EEOC Guidance on Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity

- EEOC affirmed that workplace bias laws encompass issues related to:
  - **Bathrooms:** Policies must respect employees' gender identity
  - **Pronouns:** Employers must honor employees' chosen pronouns as a matter of respect and inclusion



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## ***Texas v. EEOC (2022): 2021 Guidance overturned***

- Struck down the EEOC guidance
- Reasoning:
  - *Bostock* held Title VII prohibits employment discrimination because of sexual orientation and gender identity status, but did not necessarily prohibit all correlated conduct
  - The EEOC went too far in prohibiting conduct relating to dress codes, bathrooms, and pronouns
  - *Bostock* said those issues were for later cases

❶ In October 2022, a federal district court vacated this document in [Texas v. EEOC et al.](#), 2:21-CV-194-Z (N.D. Tex.).



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## **2024 EEOC Guidance on Harassment in the Workplace**

- Explains the EEOC's view that discrimination based on sexual orientation or gender identity is a form of unlawful sex-based discrimination under Title VII.
- Identifies misusing pronouns as potential harassment.
- Identifies the denial of bathroom access aligned with an individual's identity, as potential harassment.



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## ***Tennessee, et al. v. EEOC, et al. (E.D. Tenn., May 13, 2024)***

- A coalition of 18 states filed a lawsuit against the EEOC, seeking to vacate the EEOC's 2024 Guidance for the same reasons the 2021 Guidance was vacated by the Texas court.
- On January 27, 2025, a hearing is set on Plaintiffs' Motion for Preliminary Injunction.



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## ***Texas, et al. v. EEOC, et al. (N.D. Tex., Aug. 15, 2024)***

- The State of Texas and the Heritage Foundation, on behalf of employers, filed a new lawsuit against the EEOC seeking to vacate the EEOC's 2024 Guidance for the same reasons the 2021 Guidance was vacated.
  - They tried to do so by filing a Motion for Further Necessary or Proper Relief in the pre-existing Texas case which vacated the EEOC's 2021 Guidance. The Court rejected this approach, requiring a new lawsuit be filed, finding it is a separate controversy.
- On October 23, 2024, Texas filed a Motion for Summary Judgment that remains pending in this case.



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## TRANSGENDER: USE OF PRONOUNS



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### *Kluge v. Brownsburg Cmty. Sch. Corp.*

- In an Indiana case from 2020, a teacher brought religious discrimination claims after requesting not to use preferred names/pronouns.
- In the summer of 2021, the School moved for summary judgment on the religious accommodation claim.
- The district court granted the School's motion saying the request to use last names only was an "undue hardship"
  - The teacher did not dispute "refusing to affirm transgender students in their identity can cause emotional harm."
  - Employers (such as schools) are not required to "provide accommodations that would place them on the 'razor's edge' of liability."



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## ***Kluge v. Brownsburg (cont.)***

- In April 2023, the 7<sup>th</sup> Circuit affirmed summary judgment in favor of the School
- “Title VII does not require that employers accommodate religious practices that work an undue hardship on the conduct of the employer's business; that sometimes means that a religious employee's practice cannot be accommodated.”



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## ***Groff v. DeJoy: Religious Accommodation***

- Decided by the U.S. Supreme Court on June 29, 2023
- Facts
  - Employee worked for the USPS for years, but did not have to work on Sunday as there was no Sunday delivery
  - USPS added Sunday delivery, Groff said Sunday work violated his religious beliefs
  - USPS refused to accommodate Groff’s beliefs, saying it was an undue hardship
- Key question: When can an employer reject an employee’s request for religious accommodations because it is an “undue hardship?”



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## *Groff v. DeJoy (cont.)*

- Court of Appeals:
  - Relied on a 1977 Supreme Court case *TWA v. Hardison*
  - “to bear more than a de minimis cost in order to give [an employee] Saturdays off is an undue hardship.”
- Unanimous Supreme Court remands the case to reconsider whether this is an “undue hardship”
  - “understands *Hardison* to mean that ‘undue hardship’ is shown when a burden is substantial in the overall context of an employer’s business.”
  - Rejects theory that anything more than a “de minimis cost” constitutes an undue hardship.



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## *Kluge v. Brownsburg--Remand*

- The Seventh Circuit remanded *Kluge* to the Southern District of Indiana to reconsider the case in light of *DeJoy*
- In April 2024, the District Court again granted summary judgment to the school, even under the *DeJoy* standard for religious accommodation
  - The accommodations caused harm to students and disruption to the School’s business
  - The accommodation exposed the School to an unreasonable risk of litigation



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## ***Trueblood v. Valley Cities Counseling & Consultation***

- Applying *DeJoy*, held it would be an unreasonable accommodation to allow employee at a nonprofit counseling and treatment center whose patients included transgender youth to opt out of the facility's pronoun policy
- The court says allowing Trueblood to refer to transgender persons by last name only, but others by either their name or preferred pronoun, could constitute sex discrimination
  - Exposing the employer to a potential sex discrimination lawsuit is NOT a reasonable accommodation



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## ***Brown v. Alaska Airlines, Inc.***

- Airline terminated flight attendants after they posted comments on coworker's post on an internal website supporting the proposed Equality Act
  - "As a company, do you think it's possible to regulate morality?"
  - "Giving people the ability to enter bathrooms of the opposite sex enables sexual predators to exploit."
  - They were terminated for the comments, and later argued they should have received a religious accommodation.
- The court found that it is an undue hardship if an exemption would require an employer to permit employees discriminating against other employees and/or creating a hostile work environment
  - "Alaska has no obligation to wait until religiously motivated discriminatory behavior arises to an actionable level to take action to curb that behavior."



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## ***Geraghty v. Jackson Loc. Sch. Dist. Bd. of Educ.***

- The school denied a 7<sup>th</sup> Grade teacher permission not to address transgender students by their preferred names/pronouns. The teacher quit and sued the school for violations of the free speech and free exercise clauses of the First Amendment (no Title VII claim)
- Court denied summary judgment on the First Amendment claims
  - Does requiring teachers to use preferred names/pronouns create a “safe and supportive environment for students”—the only interest the court found could be “compelling”
  - Were the School’s actions narrowly tailored to meet that interest
  - Whether the denied accommodation caused the teacher’s resignation



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## **TRANSGENDER: BATHROOM ACCESS**



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## ***A.C. v. M.S.D. of Martinsville (S.D. Ind. April 24, 2022)***

- 13-year-old transitioning from female to male
- Sought to use restroom of choice
- School acknowledged name/pronoun change, but only offered a gender-neutral restroom
- Local state court judge granted student's request for name change and changed the student's gender marker



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## ***A.C. v. M.S.D. of Martinsville (cont.)***

- Indiana federal court required the School to allow restroom choice
  - Name change was not necessary before allowing restroom choice
- Minimal review required to support request for transgender status
- Appealed to the Seventh Circuit



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## ***B.E. and S.E. v. Vigo County School Corp. (S.D. Ind. June 26, 2022)***

- High school transgender twin students (female to male) seek access to male restrooms/locker rooms
- No surgery until 18 years old
- The local state court changed the students' names and gender markers
- School gives name/pronoun accommodation, with gender neutral restroom



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## ***B.E. and S.E. v. Vigo County School Corp. (cont.)***

- Boys locker room has a group shower area, without dividers
- School requires surgical change for locker room access
- The Court granted an injunction allowing the students access to the boys restroom and locker room
  - The Plaintiffs said they would not use the shower
- The School appealed to the Seventh Circuit



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## ***Adams v. Sch. Bd. of St. Johns Cty. (11<sup>th</sup> Cir. 2022)***

- “. . . Title IX allows schools to provide separate bathrooms on the basis of biological sex. That is exactly what the School Board has done in this case; it has provided separate bathrooms for each of the biological sexes. And to accommodate transgender students, the School Board has provided single-stall, sex-neutral bathrooms, which Title IX neither requires nor prohibits. Nothing about this bathroom policy violates Title IX.”



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## ***A.C. v. M.S.D. of Martinsville and B.E. and S.E. v. Vigo County School Corporation (7<sup>th</sup> Cir. Aug. 1, 2023)***

- Seventh Circuit says schools must allow the students to use the boys restrooms
- Says all three students had their gender markers changed—questions whether denying the students access to the boys restroom violates Indiana law
- Says none of the amicus briefs presented evidence of any situation at a school where a student pretended to be transgender to gain restroom access



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## Seventh Circuit Decision (cont.)

- “Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall.”
- “Martinsville has not identified how A.C.’s presence behind the door of a bathroom stall threatens student privacy.”
- Leaves open “reasonable measures . . . to ensure that a student genuinely need the requested accommodations.”
  - Students “demonstrated that their gender identities are enduring.”
  - Had medical diagnoses
  - Had legal gender marker changes
- Nothing “restricts a school district’s ability to monitor student conduct in bathrooms and locker rooms.”
  - Schools can always discipline for misconduct in the restroom/locker room.



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## Seventh Circuit Decision (cont.)

- Does not address sex-segregated living facilities, educational programs, or sports teams
- Notes a split in the Circuits, so the dispute is eventually headed to the Supreme Court
  - But in January 2024, the Supreme Court refused to hear Martinsville’s appeal, leaving the Seventh Circuit’s opinion in place
- Judge Easterbrook questions whether the word “sex” under Title IX is used in a biological or genetic sense, or instead in a social sense (gender identity).
  - While he seems to prefer the latter, he says Congress is free to do either.



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## TITLE IX DEVELOPMENTS AND OTHER POTENTIAL CHANGES UNDER PRESIDENT TRUMP



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## Biden Title IX Regulation Highlights

- More protections for LGBTQ+
- Change definition of sexual harassment to match Title VII standard
- Provide protections and accommodations for pregnancy/lactation
- Allow single investigator model
- Permit informal resolution
- Modify live hearing requirements in sexual assault cases



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## Title IX Regulation Whiplash

- Biden Administration Regulations Immediately Challenged in multiple courts
- Initially the courts enjoined the Biden Regulations in 26 states and at 700 institutions with students/members from certain groups
- January 9, 2025: Eastern District of Kentucky enjoins the regulations throughout the country



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## Tennessee v. Cardona

- Eastern District of Kentucky finds the regulation arbitrary and capricious, enjoins its application anywhere in the country
- “Although it relies primarily on *Bostock*, the Supreme Court was clear that the decision was limited to the context of Title VII and did not purport to address “bathrooms, locker rooms, or anything else of the kind.” See *Bostock*, 590 U.S. at 681. Given the Court's express disclaimer and the striking differences between Title VII and Title IX, *Bostock* is a very shaky place for the Department to hang its hat.”



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## What's Next?

- President Trump will not appeal these decisions, so the Biden Regulations are effectively defeated
- President Trump's early actions:
  - Executive Order rolls back Biden's DEI initiatives in federal government
  - Federal government will only recognize two genders
  - Eliminating requirements to use preferred names/pronouns in federal employment



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## Open Questions?

- Will Congress try to amend Title VII or Title IX to address these questions?
- Will the EEOC (or other agencies) act aggressively to support employees bringing religious accommodations claims (or other claims) counter the position of transgender employees?
- 



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## Action Steps for Employers

- **Make sure your policies reflect the law and your employees understand those policies:**
  - Employers cannot discriminate because of an individual's sexual orientation or gender identity
  - Make sure regular anti-harassment training covers these issues

## Action Steps for Employers, Cont'd

- **Make sure managers understand and apply the new standard for religious accommodation:**
  - In practice, the new standard is very similar to the standard for accommodating disabilities
  - The effect will be granting more request for religious accommodations than in the past

## Action Steps for Employers, Cont'd

- **Address problems pragmatically:**
  - Emphasize to employees that they do not have to agree—but they need to work together respectfully
  - Most workplaces have a history of people working together effectively even though they disagree about important issues: politics, religion, etc.
  - Most employees are people of goodwill who are NOT looking to make headlines—work with them and find a compromise



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## Action Steps for Employers, Cont'd

- **Tips for dealing with potential objections:**
  - Don't automatically assume that an employee's objection to an issue is religious—ask the employee to explain their objection
  - Distinguish between religious objections and political, scientific, or philosophical objections
  - Assure employees that standard conduct rules will be enforced:
    - Example: some actions in a restroom are inappropriate, regardless of one's gender



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## Action Steps for Employers, Cont'd

- **Consider architectural solutions:**
  - More privacy in restrooms/locker rooms
  - Options for individual restrooms/showers
- **Make sure everyone feels respected and included:**
  - Genuinely listen to employees, even if you personally disagree with them (and even if they are rather difficult)
  - Treat everyone equally



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## Action Steps for Employers, Cont'd

- **Make sure the courts are a last resort**
  - The law is in flux, so decisions in this area are more unpredictable than usual
  - Make sure lower-level managers understand your position and do not take aggressive positions without authorization
  - These cases have potential to draw significant press coverage from both sides of the political spectrum. Make sure you are prepared.
  - Consult with counsel proactively



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