

# Transgender and Nonbinary Rights and Discrimination in the Workplace

Presenters: Tracy Wolf & Carol Barrera  
Date: April 29, 2025

1

## Agenda

### Purpose of today's webinar:

- To provide a historical view of the case law interpreting Title VII as it relates to transgender/nonbinary issues.
- To provide an overview of the Executive Orders relating to DEI related issues with an emphasis on transgender and nonbinary individuals.
- To discuss how these orders interact with the current laws and case precedent.
- To examine how these Executive Orders may impact the current status of transgender and nonbinary rights and protections in the workplace.

HUSCHBLACKWELL

2

## What this presentation will not address:

- This presentation is meant to examine and discuss the current status of the law and the recent Executive Orders under the current Administration.
- The speakers' intent is to provide information only.
- No opinions, political or otherwise, will be provided during this presentation.

HUSCH BLACKWELL

3

HUSCH BLACKWELL

# Title VII & Gender Identity - Overview

4

# Title VII & Gender Identity - Overview

## TITLE VII

- Title VII (1964) prohibits employment discrimination “because of ... sex,” among other protected traits.
- Applies to employers with 15 or more employees.
- Covers key areas: hiring, firing, promotions, and other terms of employment.

## GENDER IDENTITY AS “SEX”

- Before 2020, courts disagreed on whether discrimination against a transgender person was “because of sex.”
- Some said “sex” meant only biological sex.
- Others, along with the EEOC, said treating someone adversely for being transgender is inherently sex-based.

HUSCH BLACKWELL

5

# Bostock v. Clayton County (2020)

## Holding & Reasoning

- Holding (6–3): Firing an employee for being transgender or gay violates Title VII, as it is discrimination “because of sex.”
- “But-For” Sex Test: If sex would change the outcome, the action is illegal.
- Example: A transgender woman fired for living as a woman. Had she been assigned female at birth, she wouldn’t have been fired.
- Court Quote: “There is simply no way to discriminate against a person for being... transgender without discriminating... based on sex.”

6

## Bostock v. Clayton County (2020)

### Coverage & Textualism

- What's Covered: Gender identity (transgender status) and sexual orientation.
- Consolidated Cases: Included Aimee Stephens (transgender woman) and two gay men, all found protected by Title VII's "sex" provision.
- Textualist Approach: Justice Gorsuch emphasized the plain text of "because of sex," stating it applies even to scenarios not foreseen by Congress in 1964.
- Justice Gorsuch wrote the opinion. Chief Justice John Roberts joined in the opinion and did not author a concurring opinion.

7

## Bostock v. Clayton County (2020)

### Limits & Impact

Open Questions: The Court did not resolve religious freedom issues (e.g., RFRA, First Amendment) or questions about bathrooms, dress codes, etc. It left those for future cases.

Immediate Effect: Prohibited anti-LGBTQ+ workplace discrimination nationwide, including in states lacking prior protections.

Significance: Lauded as a monumental civil rights victory, expanding Title VII's reach for LGBTQ++ individuals.

8

# Title VII & Gender Identity - Overview

## EEOC’S POSITION (PRE-2020)

- The EEOC recognized Title VII protections for transgender workers.
- Key cases:
  - Macy v. Holder (EEOC, 2012)
  - Lusardi v. McHugh (EEOC, 2015)
- Held that discrimination based on gender identity or transition is discrimination “because of sex.”

## 2020 SUPREME COURT – BOSTOCK

- In June 2020, the Court ruled that sexual orientation and gender identity discrimination are forms of sex discrimination.
- Extended federal protection to LGBTQ++ employees nationwide.
- This was pivotal for states lacking explicit state-level protections.

## BOTTOM LINE TODAY

- Terminating or mistreating an employee for being transgender is illegal under Title VII.
- Gender identity is treated as a protected characteristic under “sex.”
- Practical details (e.g., pronouns, dress codes, bathroom access) are still evolving in the courts.

HUSCH BLACKWELL

9

## FEDERAL ENFORCEMENT & EEOC GUIDANCE

# EEOC Enforcement & Guidance

- EEOC Enforcement Post-Bostock:
  - Treating sexual orientation or gender identity bias as sex discrimination.
  - LGBTQ++ workers can file charges for firing, harassment, or hiring issues.
- 2021 Guidance (archived due to litigation):
  - Bathrooms & locker rooms: Align with gender identity, barring undue hardship.
  - Dress codes: Cannot force attire contrary to one’s gender identity.
  - Misuse of pronouns/names: Could be harassment if it creates a hostile work environment.

10

FEDERAL ENFORCEMENT & EEOC GUIDANCE

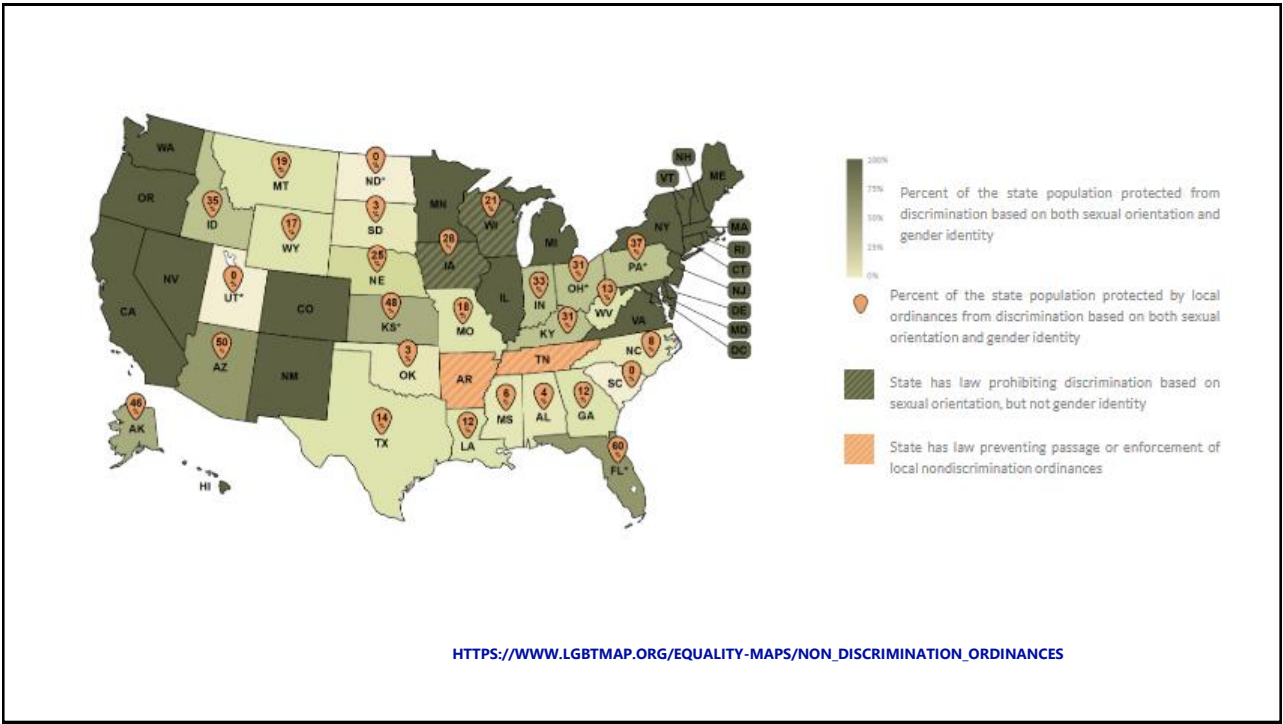
# Biden Administration Actions

- Executive Order 13988 (Jan. 2021):
  - Applies *Bostock* to all federal laws prohibiting sex discrimination (Title IX, healthcare, housing, etc.).
  - DOJ & other agencies withdrew conflicting policies from the previous administration.
  - Effect: Strengthens federal protection for LGBTQ++ individuals in multiple areas.
  - Rescinded on January 20, 2025

FEDERAL ENFORCEMENT & EEOC GUIDANCE

# EEOC 2024 Updates & Enforcement Priorities

- 2024 Guidance on Workplace Harassment:
  - Includes explicit protections for LGBTQ++ workers (derogatory remarks, misgendering, outing someone as trans).
- Federal Priority:
  - EEOC, DOJ, and other federal agencies actively pursue claims (e.g., discharge or benefit denials).
  - Some states (like Texas) challenge EEOC guidance. Nevertheless, *Bostock* remains the law unless limited or overturned.



13

## Highlights of the Four Cases

After Bostock, courts have tested and refined its scope in various contexts:

- *State of Texas v. EEOC* (N.D. Tex. 2022): Challenged post-Bostock EEOC guidance, raising “status vs. conduct” questions about the extent of Title VII protections.
- *Bear Creek Bible Church/Braidwood v. EEOC* (5th Cir. 2023): Religious employers argued for an exemption from LGBTQ++ discrimination rules under RFRA and other religious freedom principles.
- *Kluge v. Brownsburg Community School Corp.* (7th Cir. 2023): A teacher’s refusal to use transgender students’ names/pronouns was framed as a religious accommodation request, prompting debate over undue hardship and free exercise.
- *Adams v. School Board of St. Johns County* (11th Cir. 2022): Although a Title IX case, it tackled transgender bathroom access; its restrictive approach may foreshadow future challenges in employment cases.

14

RECURRING THEME

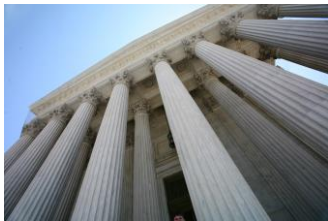
# Status vs. Conduct

- The courts have seemed to draw a distinction between “status” (being transgender) and “conduct” (workplace rules affecting transgender employees).
- Employers may argue, “We’re not discriminating based on transgender status; we’re just enforcing neutral policies”—though many courts and the EEOC disagree.
- Other courts may reach different conclusions, so this remains an evolving area of law.

15

EMERGING LITIGATION –  
AMES V. OHIO DEPT. OF YOUTH SERVICES (SCOTUS PENDING)

- Ames v. Ohio DYS is pending before the U.S. Supreme Court (argued Feb. 2025).
- Plaintiff: Marlean Ames, a heterosexual, cisgender woman.
- Allegation: She was discriminated against in favor of LGBTQ+ colleagues (“reverse discrimination”).
- Ames worked at the Ohio Department of Youth Services under a new, gay supervisor. She claims:
  - She was passed over for a promotion (awarded to a younger gay man).
  - She was later demoted, allegedly due to not fitting the supervisor’s LGBTQ+ “clique.”
  - Ames sued under Title VII, arguing sex and sexual orientation discrimination (protected post-Bostock).



16



Ames v. Ohio Department of Youth Services

LOWER COURT RULINGS:

- District court and Sixth Circuit both ruled against Ames, citing the “background circumstances” test.
- In some “reverse discrimination” cases, certain circuits require proof an employer is one of the few that discriminates against the majority.
- The Sixth Circuit held Ames lacked enough evidence of an environment hostile to straight people.

SUPREME COURT ISSUE:

- The Court is deciding whether majority plaintiffs need extra proof (like “background circumstances”) to bring a Title VII claim.
- Should straight or non-transgender individuals meet a higher standard than LGBTQ++ or transgender individuals?
- Ames argues no—Title VII protects “any individual” from sex discrimination.

Ames v. Ohio Department of Youth Services

SIGNIFICANCE:

- This isn’t *necessarily* about limiting LGBTQ++ rights; it’s more about what a majority-group plaintiff needs to prove to show they were unfairly disadvantaged.
- The Plaintiff’s argument is that discrimination works both ways.

LIKELY OUTCOME:

- Many expect the Supreme Court to reject the “background circumstances” requirement.
- If so, all Title VII plaintiffs would follow the same McDonnell Douglas framework.
- Ames would get to prove her case under the standard approach, potentially facilitating “reverse” discrimination suits in the future.

HUSCH BLACKWELL

# Executive Orders of the Trump Administration

19

## Executive Order Overview

This section focuses on Executive Orders signed in early 2025 under the current Administration. We'll examine new mandates affecting:

- (1) women's sports and transgender participation;
- (2) federal gender policies; and
- (3) diversity, equity, and inclusion (DEI) programs.

Future webinars will dive deeper into DEI programs under this Administration. Today's webinar is only meant to be an overview.

20

# DAY ONE:

## 26 Executive Orders Signed

January 20, 2025

21

**JANUARY 20, 2025**

### EO 14151 – Ending Radical and Wasteful Government DEI Programs and Preferencing

- Terminates virtually all federal diversity, equity, and inclusion (DEI) programs and offices across government.
- It directs the U.S. Office of Personnel Management (OPM) and U.S. Office of Management and Budget (OMB) to eliminate “illegal DRI” mandates, rescinds prior orders (ie President Biden’s EO 13985 on “Advancing Racial Equity”), and
- Bans practices like listing pronouns in communications.
- This EO essentially ends agency equity action plans and affirmative action initiative within the federal workforce, halting race- or gender-based preferences in government programs.

22

JANUARY 20, 2025

EO 14168 –

Defending Women from  
Gender Ideology  
Extremism and Restoring  
Biological Truth to the  
Federal Government

- Recognizes only sexes—(1) male; or (2) female based on immutable biology and rejects “gender identity” as a basis for policy.
- Agencies are directed to enforce laws using these sex definitions, remove references to transgender identity, and cease any policies accommodating gender identity.
- The order revokes multiple Biden-era protections (e.g. EO 13988 on gender identity non-discrimination) and dissolves the White House Gender Policy Council, thereby rolling back federal recognition of transgender identities.

23

JANUARY 20, 2025

EO 14170 –

Reforming the Federal  
Hiring Process and  
Restoring Merit to  
Government Service

- Overhauls federal hiring to a strictly merit-based system, barring any consideration of demographic “preferences.”
- It prohibits using factors like an applicant’s commitment to DEI or gender identity beliefs in hiring decisions.
- In practice, this EO eliminates diversity recruitment efforts or any race/sex-conscious hiring, mandating that federal jobs be filled without regard to race, sex, or other identity attributes. Expressed as “restoring merit.”

24

JANUARY 21, 2025

EO 14173 –  
Ending Illegal  
Discrimination and  
Restoring Merit-Based  
Opportunity

- Targets DEI initiatives in both government and the private sector.
- It directs the Attorney General to identify and pursue “egregious and discriminatory” DEI practices in companies.
- The order revokes Executive Order 11246 (1965), which required affirmative action by federal contractors for using race, sex, or other identity factors in employment or contracting decisions.
- It thus establishes a policy of colorblind, sex-neutral “merit-based” treatment, characterizing many DEI or affirmative action programs as unlawful discrimination.

25

JANUARY 27, 2025

EO 14183 –  
Prioritizing Military  
Excellence and Readiness

- Reimposes a ban on open transgender individuals in military service.
- The Order declares that expressing a gender identity incongruent with one’s biological sex is incompatible with the military’s standards and “unit cohesion,” deeming it harmful to readiness.
- It requires the Defense Department to issue new policy excluding transgender individuals—effectively rolling back the prior Administration’s inclusion of transgender servicemembers.
- Gender dysphoria or gender transition is disqualifying condition for service.

26

JANUARY 28, 2025

EO 14187 –

Protecting Children from  
Chemical and Surgical  
Mutilation

- This Order severely restricts access to gender-affirming healthcare for transgender youth by leveraging federal funding.
- It declares a policy whereby the U.S. Government will not fund or support any “transition” interventions for minors.
- The Order directs federal agencies to enforce this Order by withholding federal funds from hospitals, clinics, and medical program that provide puberty blockers, hormones, or surgery to transgender minors.

27

JANUARY 29, 2025

EO 14190 –

Ending Radical  
Indoctrination in K-12  
Schooling

- Prohibit K-12 schools from teaching any material considered anti-American or subversive, as well as anything promoting “gender ideology” or critical race theory.
- Law enforcement is directed to conduct investigations of education or educational-related institutions suspected of involvement in the “instruction, advancement, or promotion of gender ideology or discriminatory equity ideology” declaring such ideas to be anti-American and subversive.
- Directs law enforcement to criminally prosecute any teacher who “unlawfully facilitates” the social transition of a transgender minor.

28

**JANUARY 29, 2025**

**EO 14190 –  
Ending Radical  
Indoctrination in K-12  
Schooling**

- Examples of unlawful facilitation include psychiatric counseling by a school counselor, referring to a student using their preferred name and/or pronouns, referring to a student as “nonbinary”, and allowing the student to use segregated facilities or participate on segregated sports teams differing from those of their assigned sex.
- Schools found to be in violation would have their federal funding revoked.
- Reinstates the “1776 Commission” –an advisory committee established in September 2020 to support “patriotic education.” (This commission had been terminated on January 20, 2021 by prior Administration.)

29

**FEBRUARY 5, 2025**

**EO 14201 –  
Keeping Men Out of  
Women’s Sports**

- Prohibits transgender women and girls (whom it refers to as biological males) from competing in female sports categories in any school or college receiving federal funds.
- The Order directs agencies to enforce Title IX based strictly on biological sex, ordering that schools allowing trans athletes in women’s sports to have federal funding revoked.
- The Order cites the protection of women’s safety and fair competition as justification.

30

**FEBRUARY 5, 2025**

**EO 14202 –**

**Eradicating Anti-Christian  
Bias**

- Establishes a task force to root out alleged anti-Christian bias in federal agencies, with implications for LGBTQ+ policies.
- The Order positions certain prior LGBTQ-supportive policies as discriminatory toward religious (Christian) beliefs, and calls on agencies to end those policies.
- For example, it criticizes the previous administration for actions protecting LGBTQ+ right (like enforcing gender identity non-discrimination in foster care) as infringing on religious liberty.
- This Order may permit greater religious exemptions to LGBTQ+ anti-discrimination rules.

31

**APRIL 23, 2025**

**EO 14278 –**

**Restoring Equality of  
Opportunity and  
Meritocracy**

- Eliminates the use of “disparate impact” liability in federal civil-rights enforcement, meaning agencies will no longer treat neutral policies that yield statistical disparities as proof of discrimination absent intentional bias.
- It directs all agencies to deprioritize or rescind any rules and investigations based on disparate-impact theories—for example, it revokes prior regulations and instructs the Attorney General to repeal Title VI rules that prohibited practices with merely discriminatory effects.

32



APRIL 23, 2025

EO 14278 –

# Restoring Equality of Opportunity and Meritocracy

- This represents a major shift in legal policy under statutes like Title VI, Title IX, Title VII, and the Fair Housing Act, effectively limiting enforcement to cases of intentional discrimination and rolling back protections that address systemic or unintentional bias.
- In practice, the Order may undermine many DEI initiatives that rely on statistical disparities to drive reforms, as it embraces a “colorblind” merit-based approach—requiring decisions to be based solely on individual qualifications and forbidding adjustments for group outcomes.

33

# The Aftermath

- There have been lawsuits and challenges to many of the recent Executive Orders.
- Congress may invalidate an Executive Order through legislation, but the President still retains veto power. It take a two-thirds “supermajority” vote to override a veto.
- Courts have the power of judicial review. Courts may strike down Executive Orders not only on the grounds that the President lacked authority, but also in cases where the Order is found to unconstitutional.

HUSCHBLACKWELL

34

We will continue monitoring  
case law and Executive Orders  
from the current Administration

35

Of course, we welcome your  
thoughts and feedback.

Thank you for attending.

36