

## Publications

### *Labor and Employment Alert: EEOC Issues Fact Sheet that Opens Bathrooms to All*

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In March 2016, North Carolina enacted its Public Facilities Privacy & Security Act (House Bill 2) requiring that individuals only use restrooms that correspond to the biological sex on their birth certificates. This means that transgendered people cannot use the restroom of the gender with which they associate. The law is being challenged in court and by the U.S. Department of Justice so its ultimate fate is uncertain. Jumping into the fray, the U.S. Equal Employment Opportunity Commission (EEOC) just issued a Fact Sheet on “Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964,” which is available here: <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm>.

The EEOC first notes that “a person does not need to undergo any medical procedure to be considered a transgender man or a transgender woman.” The agency then explains that Title VII prohibits discrimination on the basis of sex – “including pregnancy, gender identity, and sexual orientation.” Title VII doesn’t mention gender identity or sexual orientation, but that has not dissuaded the EEOC. In its Fact Sheet, the EEOC cites two of its own decisions holding that discrimination based on transgender status or denying an employee equal access to a common restroom corresponding to the employee’s gender identity is sex discrimination.

Because transgender status is, according to the EEOC, a protected class under Title VII, employers may not discriminate against transgendered employees on that basis. The EEOC explains that “gender-based stereotypes, perceptions, or comfort level must not interfere with the ability of any employee to work free from discrimination, including harassment.” This means that employers cannot:

- deny an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination;
- condition this right on the employee undergoing or providing proof of surgery or any other medical procedure; or

- avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it).

Moreover, an employer (in North Carolina, for example) who does so, cannot defend itself before the EEOC by claiming it was just following state law. “Contrary state law is not a defense under Title VII.”

Contact your Vorys lawyer if you have questions about this evolving area of law.