

November 2016

HB2: Frequently Asked Questions

On March 23, 2016, the North Carolina General Assembly passed House Bill 2, The Public Facilities Privacy & Security Act, which Governor McCrory signed later that same day. In the weeks since HB2 became law, the full scope of the discriminatory impacts permitted by the bill have become increasingly clear. At the same time, however, there remains significant confusion over what the new law means for North Carolinians. This fact sheet provides answers to a number of frequently asked questions about HB2 and additional changes after the passage of HB 169.

Overview

Q: In a nutshell, what does HB2 do?

A: HB2 makes four major changes to North Carolina law:

- **Regulates bathrooms in public accommodations:** HB2 requires schools and public agencies¹ to designate and restrict multiple occupancy bathrooms and changing facilities for use based on the user's "biological sex,"² as stated on a birth certificate.
- **Allows discrimination in public accommodations:** HB2 permits businesses to discriminate against LGBTQ customers and bans local governments' ability to prohibit this kind of discrimination.
- **Restricts local government authority over employment practices:** HB2 prohibits cities and counties from having living wage ordinances or policies that apply to private employers or to the businesses they contract with.
- **Permits employment discrimination:** HB2 allows businesses to discriminate against LGBTQ job applicants and employees. It prevents cities and counties from having ordinances or policies against discrimination by private employers, and eliminates a worker's right to sue their employer in state court if they are fired for a discriminatory reason, such as age, religion, national origin, race or sex.

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Bathrooms

Q: Under the bathroom provisions of HB2, can my opposite sex child come into a multiple occupancy bathroom or changing facility with me?

A: If you are in a school, yes, regardless of the age of the child. If you are in the building of another public agency, then your opposite-sex child may only come in the bathroom with you if he or she is 7 or younger. If your child is older than 7, you may accompany your child into the bathroom of his or her "biological sex."

Q: Can my caregiver accompany me into the bathroom of a school or public agency?

A: Yes.

Q: If I am in a non-governmental building, what bathroom may I use?

A: There is no law restricting which bathroom someone can use in a non-governmental building.

Q: If I am in a non-governmental building, can my opposite sex child come into the bathroom with me?

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building.

Q: If I am in a public agency or school, which bathroom may I use?

A: Under HB2, you may only use the multiple occupancy bathroom or changing facility that corresponds to your “biological sex,” as stated on your birth certificate. You may use a single occupancy bathroom or changing facility, or faculty facility if that is made available to you, but schools and public agencies are not required to provide single occupancy facilities.

Discrimination in Public Accommodations

Q: Can a business refuse to do business with me because of my sexual orientation or gender identity?

A: Yes. HB2 excludes LGBTQ individuals from state anti-discrimination protections in public accommodations. Additionally, there is no federal law that specifically protects persons against discrimination on the basis of sex (including sexual orientation or gender identity) in public accommodations. This means that any private business can refuse service to any person based on their sexual orientation or gender identity.

Q: My city has a policy against discrimination based on sexual orientation. Who does this protect?

A: HB2 specifies that a city or county may not forbid businesses from discriminating based on sexual orientation or gender identity in the provision of goods, services, and facilities to customers.

Local Government and Employment Practices

Q: Is my city/county’s living wage ordinance for public employees still in effect?

A: Yes, a North Carolina city or county may still have a living wage policy that applies to its own employees. However, HB2 states that such a policy may not be applied to private employers, including government contractors.

Q: Can my city or county require my employer to pay me a living wage?

A: No. HB2 makes invalid any ordinance, regulation, resolution or policy adopted by a local government relating to compensation of non-governmental employees. This means a local government may not require a private employer—even a business with which it contracts—to pay a living wage, provide paid leave or other benefits, or pay its workers on time. The only exceptions are for those businesses that receive certain economic incentive payments or federal block grants, as well as local government community development programs.

Q: I don’t want my city to do business with companies that discriminate or that don’t pay a living wage. What can I ask them to do?

A: Cities and counties can only require payment of a living wage to their own employees, or in connection with an economic development incentive, federal community development block grant, or local government community development program. Under HB2, cities and counties cannot refuse to contract with a company because it discriminates by not providing goods, services, or accommodations to certain members of the public or because it does not pay a living wage.

Employment Discrimination

Q: If my boss fires me because of my race, religion, national origin, age or sex, do I have protections under state law?

A: Some. HB2 eliminated state law remedies for employees who are fired based on their race, religion, national origin, age, or sex. Specifically, section 3.2 of the bill ended an employee’s private right to sue an employer who fires him or her for any one of these discriminatory reasons. The General Assembly passed HB169 on July 18, 2016, which reinstated a worker’s right to sue his or her employer if they are fired for reasons that violate North Carolina public policy. This section of HB169 was made retroactive to March 23, 2016, the date HB2 was passed, so there is no lapse in a worker’s right to

bring such a lawsuit.

Despite the passage of HB169, workers who are fired in North Carolina are left with less protection than they had prior to HB2. Workers must now bring suit within one year of their wrongful discharge, where previously they could wait three years. Often workers who have filed federal complaints with the EEOC wait longer than a year to receive a determination, so the shorter time frame in HB169 forces workers to file before knowing the outcome of the EEOC investigation. HB169 also does nothing to restore a worker's right to sue if they suffer sex discrimination that is not considered to be discrimination on the basis of "biological sex."

Workers are still protected under federal law from discrimination based on race, religion, color, national origin, age, sex (which includes discrimination on the basis of sexual orientation and gender identity), disability, and pregnancy. These laws allow persons who have been discriminated against to sue their employer in federal court, and frequently require that a complaint first be filed with the Equal Employment Opportunity Commission within 180 days. Though these federal protections are important, they can be more difficult to enforce because of short time limits, greater costs for filing a lawsuit, and limits on damages.

Q: Can someone refuse to hire me because I am gay?

A: If you work for a private employer, you have no recourse under state law if that employer refuses to hire you. If you are applying for employment with the state, you may be protected from discrimination on the basis of sexual orientation and gender identity based on Executive Order 93 (issued on April 12, 2016). It is unclear how that provision can be enforced, however. A job applicant who is not hired or an employee who is discriminated against because of sexual orientation can bring a claim for sex discrimination under federal anti-discrimination law.

Q: Can my city or county protect me against workplace discrimination?

A: No. HB2 prevents a city or county from enforcing any local anti-discrimination provision and invalidates any existing local anti-discrimination ordinance, regulation, resolution, or policy as applied to private employers.

Q: I am a state employee. Am I protected against discrimination?

A: Executive Order No. 93 states that Gov. McCrory affirms that the state "is committed to administering and implementing all State human resources policies, practices and programs fairly and equitably, without unlawful discrimination, harassment or retaliation on the basis of race, religion, color, national origin, sex, sexual orientation, gender identity, age, political affiliation, genetic information, or disability." But, it is unclear whether this affirmation provides any new, enforceable protections for state employees.

Executive Order

Q: What did Governor McCrory's Executive Order actually do?

A: Almost nothing. Governor McCrory's Executive Order No. 93, issued April 12, 2016 does nothing to change the sweeping changes to state law made in HB2. The Executive Order provides suggestions to public agencies interested in making accommodations in bathroom and changing facility access. It also announces a new anti-discrimination policy for state employees, stating that it provides protections against discrimination on the basis of sexual orientation and gender identity. It is not clear what authority the Governor actually has to expand state policy in this area, and does nothing to change the lack of protection for employees of private businesses. Finally, the Governor calls on the legislature to repeal the sections of HB2 that eliminate state protections for workers fired on other discriminatory grounds.

¹ "Public agency" is defined as agencies, boards, offices, departments, and institutions of the executive branch, including The University of North Carolina and the North Carolina Community College System; all agencies, boards, offices, and departments under the direction and control of a member of the Council of State; a local board of education; the judicial branch; the legislative branch; any other political subdivision of the State; certain municipal corporations; boards, agencies, commissions, authorities, and institutions. N.C.G.S. §§ 143-760(a)(2) and (4).

² "Biological sex" is defined by HB2 as "the physical condition of being male or female, which is stated on a person's birth certificate." N.C.G.S. § 143-760(a)(1). Though problematic from a terminology standpoint, for the sake of clarity this fact sheet uses "biological sex" to track the language of the statute.