



Biden Administration Extends Title IX Protections to LGBTQ Individuals

January 28, 2021

Shortly after taking the Oath of Office on January 20, 2021, President Biden signed a series of executive orders. One such order was an “[Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation](#),” which states that “all persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.” With the signing of this executive order, protections against discrimination on the basis of sex, afforded under various laws, including Title IX of the Education Amendments of 1972 (Title IX), are now extended to members of the LGBTQ community.[\[1\]](#)

This executive order is based on the Supreme Court’s ruling in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020). In *Bostock*, the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of sexual orientation and gender identity.[\[2\]](#) The decision in *Bostock* extended federal workplace protections to gay, lesbian, and transgender employees across the country.[\[3\]](#)

The new executive order extends the Court’s ruling in *Bostock* beyond Title VII. “Under *Bostock*’s reasoning, laws that prohibit sex discrimination — including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations — prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.”

The executive order directs the heads of each federal agency administering statutes or regulations that prohibit sex discrimination to: (i) review all existing orders, regulations, guidance documents, and policies that prohibit sex discrimination under federal law; and (ii) consider whether to revise, suspend or rescind actions, or promulgate additional actions, to address discrimination on the basis of sex. Federal agencies, such as the Department of Education and Department of Justice, have 100 days to consider whether to issue new guidance documents “as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this order.”

This executive order comes just weeks after the U.S. Department of Education’s Office for Civil Rights (OCR) released a [memorandum](#) implementing a different reading of *Bostock*.[\[4\]](#) Specifically, in the memorandum, OCR emphasized that *Bostock*’s definition of “sex” only applies to Title VII, and thus for Title IX purposes, “sex” should be construed to mean a person’s biological sex (male or female). In furtherance of this point, OCR stated that the

Court in *Bostock* assuaged fears that the decision would implicate other federal and state laws that prohibit sex discrimination by asserting that such questions were not before them, and that they would not “prejudge” these laws.

President Biden’s executive order effectively nullifies OCR’s January 2020 memorandum. Higher education institutions should review President Biden’s executive order and review their policies, handbooks, and training materials to ensure compliance. Institutions should expect further guidance on this topic in the coming months and increased activity at the U.S. Department of Education, the U.S. Equal Employment Opportunity Commission, and the Occupational Safety and Health Administration.[5] We will continue to monitor changes and update clients as more information becomes available.

If you have questions regarding any aspects of higher education law and any implications this executive order will have on your institution, feel free to contact Kevin P. McDonough at (516) 357-3787 or via email at kmcdonough@cullenllp.com and Dina L. Vespia at (516) 357-3726 or via email at dvespia@cullenllp.com.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Footnotes

[1] Title IX applies to all federally funded educational programs, including K-12, vocational programs and higher education programs.

[2] For more information on *Bostock*, please see <https://www.cullenllp.com/blog/u-s-supreme-court-rules-that-title-vii-applies-to-sexual-orientation-and-gender-identity/>.

[3] While some states have enacted laws prohibiting LGBTQ employment discrimination, nearly half of U.S. states do not afford gay, lesbian, and transgender employees legal protections in the workplace, and, prior to the Court’s decision in *Bostock*, there was no protection at the federal level prohibiting an employer from terminating or otherwise taking adverse employment action against employees based on their sexual orientation or gender identity.

[4] Contrary to the Biden administration, the Trump administration previously asserted that Title VII affords protections on the basis of “the ordinary meaning of sex” including neither sexual orientation nor gender identity. On January 17, 2021, the Justice Department issued a 23-page memorandum limiting the scope of *Bostock*, writing that the ruling should not extend to areas in which gender-based policies are relevant (i.e. on bathrooms or sports teams). This memorandum was revoked on January 22, 2021.

[5] On January 21, 2021, President Biden issued an [Executive Order](#) directing the Secretary of Labor to issue guidance, and consider emergency temporary standards, to protect workers from COVID-19 under the Occupational Safety and Health Act (OSHA).

Practices

- Higher Education
- Title IX

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