

New Presidential EO Says Federal Government Recognizes ‘Two Sexes’ Only

By Samia M. Kirmani, Laura A. Mitchell, Michelle E. Phillips & Ian N. Landman

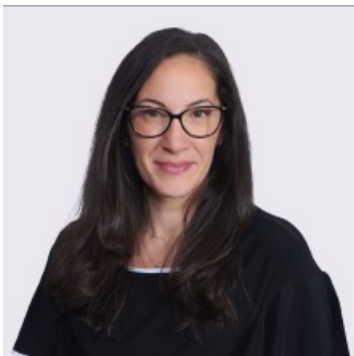
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Meet the Authors



Samia M. Kirmani

Principal
(617) 367-0025
Samia.Kirmani@jacksonlewis.com



Laura A. Mitchell

(She/Her)
Principal
303-225-2382
Laura.Mitchell@jacksonlewis.com



Michelle E. Phillips

Takeaways

- Federal agencies should only recognize two sexes, male and female, according to a new executive order released on Day 1 of the second Trump Administration.
- The executive order applies to federal agencies and their employees and appears likely that future directives and restrictions will be applied, through agency action, to federal contractors and recipients of federal funding.
- All employers, not just federal contractors, should carefully consider policies and practices with respect to restroom access and keep in mind that several states require employers to provide restroom access to employees based on gender identity while others restrict access to sex assigned at birth.

Related link

- [Defending Women From Gender Ideology Extremism And Restoring Biological Truth To The Federal Government](#)

Article

On his first day in office, President Donald Trump acted swiftly to ensure federal agencies recognize only two sexes, male and female, and to reject the concept of “gender ideology.” Among the slew of his Day 1 executive actions, President Trump signed executive order (EO) on “[Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government](#),” declaring “[i]t is the policy of the United States to recognize two sexes, male and female” and reversing President Joe Biden’s stance on diversity, equity, and inclusion and transgender rights. The EO has broad implications for federal agencies and, potentially, for employers in general.

What Does the EO Say?

The EO’s stated purpose is to keep women safe from men who “self-identify as women and gain access to intimate single-sex spaces and activities designed for women, from women’s domestic abuse shelters to women’s workplace showers.” The EO states that the “erasure of sex in language and policy has a corrosive impact not just on women but on the validity of the entire American system” and that the “administration will defend women’s rights and protect freedom of conscience by using clear and accurate language and policies that recognize women are biologically female, and men are biologically male.”

The EO describes “gender ideology” as a false construct that “replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true. Gender

(She/Her)
Principal
914-872-6899
Michelle.Phillips@jacksonlewis.com



Ian N. Landman

Associate
914-872-8025
Ian.Landman@jacksonlewis.com

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ideology includes the idea that there is a vast spectrum of genders that are disconnected from one's sex. Gender ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body."

In addition to recognizing only two sexes, male and female, the EO directs federal agencies and employees acting in an official federal capacity use the term "sex" and not "gender" and take other actions to effectuate the EO's two-sex only policy. The EO addresses "privacy" in intimate spaces in prisons and shelters and directs that agencies take appropriate action to ensure intimate spaces designated for women, girls, or females (or for men, boys, or males) are designated by sex and not identity.

The EO also directs the attorney general to issue guidance to ensure the "freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federally funded entities covered by the Civil Rights Act of 1964."

The EO further provides that "[i]n accordance with that guidance, the Attorney General, the Secretary of Labor, the General Counsel and Chair of the Equal Employment Opportunity Commission, and each other agency head with enforcement responsibilities under the Civil Rights Act shall prioritize investigations and litigation to enforce the rights and freedoms identified."

The EO requires each agency to report to the administration on the changes it is making to comply with the EO and on "agency-imposed requirements on federally funded entities, including contractors, to achieve the policy of this order." The EO goes on to rescind a number of Biden-era guidance and policy documents, including the Equal Employment Opportunity Commission's (EEOC's) "Enforcement Guidance on Harassment in the Workplace" (April 29, 2024). The EEOC Enforcement Guidance – now rescinded, at least for purposes of the EO – instructed employers that sex-based discrimination and harassment under Title VII includes discrimination based on sexual orientation and gender identity (or expression in the case of harassment) and that using incorrect pronouns or denying of access to a bathroom or other sex-segregated facility could constitute unlawful harassment. Of importance is the fact President Trump signed this executive order right after he appointed current commissioner Andrea Lucas as Interim Chair of the EEOC. Lucas was one of three EEOC commissioners who voted against the April 2024 Enforcement Guidance specifically because of its gender identity-based protections. Acting Chair Lucas lists "defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work" as one of her four enforcement priorities.

What Employers Should Know

The EO explicitly applies to federal agencies and their employees. It also appears likely that in the future directives and restrictions will be applied, through agency action, to federal contractors and recipients of federal funding; the EO directs agencies to report to the administration on "agency-imposed requirements on federally funded entities, including contractors, to achieve the policy of this order." The EO does not, by its terms, explicitly impose requirements on non-governmental and non-contractor employers, but litigation and challenges concerning its applicability undoubtedly will arise.

All employers – whether or not federal contractors – should carefully consider policies and practices with respect to, for example:

- Restroom access
- Gender transitions
- Misgendering
- Gender-identity harassment
- Religious accommodations requests

Finally, despite the administration's two-sex only policy, several states require employers to provide restroom access to employees based on gender identity while others restrict access to sex assigned at birth.

This is a developing situation, and we are continuing to analyze and understand the implications for employers. Please reach out to your Jackson Lewis attorney with questions and for potential solutions.

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