

Biden's Pro-LGBTQ Order Touches Work, School And Housing

By **Amanda Ottaway**

Law360 (January 22, 2021, 9:17 PM EST) -- Within his first few hours in office President Joe Biden directed federal agencies to adopt a broad interpretation of federal bias law to prohibit discrimination against the LGBTQ community, a step attorneys and advocates said will streamline implementation of the U.S. Supreme Court's similar landmark ruling on employment last summer.

Wednesday's executive order directs federal agencies to interpret all federal anti-bias laws that mention sex discrimination by using the Supreme Court's reading in *Bostock v. Clayton County*, which found that LGBTQ workers are protected under the "because of ... sex" language in Title VII of the Civil Rights Act of 1964.

Though the main feature of the executive order is to make more groups than just employers familiar with *Bostock's* interpretation, the broad new mandate — which seems to encompass hundreds of federal anti-discrimination laws — is likely to reverberate in the employment world anyway, legal experts said.

"Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes," the order said.

Some other crucial areas affected by the mandate include housing and education, the order said. Former EEOC commissioner and current Morgan Lewis & Bockius LLP partner Chai Feldblum told Law360 that the executive order will do double duty for employers in those industries.

For example, a property management company is not only forbidden from discriminating against LGBTQ employees, but also against LGBTQ housing applicants. The same goes for educational and health care institutions, Feldblum said.

Feldblum also pointed out that in Supreme Court Justice Samuel Alito's dissent in *Bostock*, he listed some 200 U.S. laws that prohibit discrimination based on sex. The list includes laws related to federal energy administration, public health training, education, food stamps, immigration, banking, mortgage assistance, and credit. All of those areas may now see changes based on the broad federal interpretation codified by the Biden administration.

Health Plans Should be Scrubbed of Bias

Feldblum said one area where employers may benefit from the executive order is healthcare, because health plan carriers should now be evaluating whether their policies are out of compliance, for example by covering a certain procedure for cisgender but not transgender women.

As a result of the order, health plans that employers purchase for their workers in the future should have been vetted and adjusted to be nondiscriminatory if necessary, leaving all parties less open to liability, Feldblum said.

"No employer has to offer any particular type of plan, but if you're offering a health insurance plan, you can't discriminate right within it," she said.

The Affordable Care Act prohibits sex discrimination in health care and should also fall under the executive order, said Julie Wilensky, a senior staff attorney at the National Center for Lesbian Rights.

She said the executive order may lead to "increased federal enforcement or guidance" when it comes to transgender employees seeking health coverage through their employers for gender-affirming care, an issue being actively litigated including by the NCLR.

Mental Health Improvements May Follow

Christy Mallory, the legal director at UCLA Law School's Williams Institute, which conducts research on LGBTQ law and policy, told Law360 that the order will have less tangible benefits as well. That it was a first-day priority for Biden is huge, she said.

"This is so symbolically important beyond the actual legal protections that it extends," she said. "We've seen evidence in our empirical research that affirmations of LGBTQ identity have a positive impact on LGBTQ people's health and well-being, particularly mental health."

For example, marriage equality laws have a positive impact on kids, she said. Students do better if they're not stressed about which bathroom to use.

"Workplaces do better when people can be themselves, when people feel comfortable, when they're not worrying about hiding their identity, when they're not worrying about if somebody sees them with their partner at the grocery store," Mallory said.

Advocates Call for Further LGBTQ Protections

Other legal experts and LGBTQ advocates applauded the move on Biden's first week in office, calling it a common-sense implementation of last summer's legal interpretation by the Supreme Court.

Gregory Nevins is senior counsel and director of the Employment Fairness Project at Lambda Legal, a nonprofit that works to protect the civil rights of LGBTQ and HIV-positive people. He called for Biden to also repeal Trump's ban on transgender people serving in the military, one of the nation's largest employers.

A few days after Nevins spoke with Law360, the White House announced Biden would sign an executive order repealing the ban.

Nevins also said that while the executive order led to a "wonderful" day, it also didn't surprise him.

"Most people will look at that and go — I hate to use this highly technical legal term — but, 'Duh,'" Nevins said.

"Title VII's language is, if anything, more restrictive than the other statutes," he noted. "As soon as that was understood to apply to anti-LGBT discrimination, then it was just a no-brainer that all the other federal laws that prohibited sex discrimination should be interpreted similarly."

The executive order does not make law, Morgan Lewis' Feldblum said, but it should help speed up a nationwide adaptation of the Bostock findings.

"As a practical matter, the Bostock decision controls, regardless of whether you have an executive order," Feldblum said. "But I think the executive order is necessary for purposes of visibility and telegraphing the importance of quick action."

Noting the Trump administration's resistance to Bostock's scope since the June ruling, UCLA's Mallory said she imagined they would have pushed back on implementations like on-the-job bathroom access for transgender workers.

"Although it doesn't change the law of the land for employment — and I think many advocates would argue it doesn't necessarily change the law of land anyway ... it sends a message now to federal agencies that they're going to have to enforce these laws consistent with the Bostock decision, so there's no more of this pushing back and getting around Bostock," Mallory said of the executive order.

Both the NCLR's Wilensky and UCLA's Mallory pointed to the Biden administration's reference to what it called "overlapping forms of discrimination," a framework also referred to as intersectionality. Specifically, the executive order said Black transgender people face high levels of discrimination.

Mallory said the door is open for agencies enforcing other kinds of discrimination, such as racial or national origin, to include sex discrimination under their umbrellas even if it's not specified in the language, and to think of enforcing anti-bias laws as a wholesale intersectional effort. In this way, she said, agencies could fulfill their mandates by recognizing that people may be members of multiple protected groups.

--Editing by Haylee Pearl.