THE DISPATCH

# Biden's Anti-Discrimination Order Is Executive Vaporware

Walter Olson

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Of 14 executive orders signed by President Joe Biden during his first week in office, the most popular with the public, according to a tabulation by *Five Thirty-Eight*, is the one "prohibiting workplace discrimination based on sexual orientation and gender identity."

Which is mighty strange, because if there's anything Biden's Executive Order 13988 *doesn't* do, it is prohibit workplace discrimination based on sexual orientation and gender identity.

Any such attempt would arrive too late, since last summer the Supreme Court ruled 6-3 in *Bostock v. Clayton County* that existing federal law against sex discrimination in the workplace already prohibits discrimination based on those factors.

So what if anything does the Biden order do? Good question.

One clue is in its name: "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." Note the lack of any reference to workplaces or employment, despite a good bit of commentary assuming such a connection.

Instead, the bulk of the order is devoted to two interrelated themes. One is mostly mood music: The administration has a policy of being staunchly against discrimination. This itself is not new and in itself carries no legal force, although departments and agencies are directed to review their existing rules and practices to be sure they are consistent.

The second and arguably more substantive theme is the review of the implications of the *Bostock* decision for areas of federal law other than employment. For those who need a refresher, *Bostock* was the case in which plaintiffs advanced an ambitious argument based in textualism—the premise that the actual words of a law must prevail, even if the resulting outcome was neither foreseen nor intended by the original lawmakers. In this case, they argued that the plain language banning discrimination "because of ... sex" applied to prohibiting discrimination based on LGBT and transgender status, both of which can be understood as forms of sex discrimination. I've described this argument as "surprise plain meaning" and it persuaded a six-justice majority of the court, led by arch-textualist Neil Gorsuch. Because the argument was based in textualism, it implied that the broader reading had been there within the four corners of the text all along, just not grasped until now.

When the court ruled in *Bostock*, everyone recognized that in principle, other statutes barring sex discrimination in fields like housing, education, health care, and so forth might possibly be read to yield the same result—or might not.

There are many reasons for the uncertainty. Each of these other statutes is worded differently. One or another of them might, for example, spell out a narrower definition of sex discrimination.

In fact, even when statutes are identical or nearly so in their wording, courts frequently decide to read them differently, based on history, perceived practicality, and many other factors.

Just within the realm of employment law, you might think "discrimination" is equally prohibited for race, sex, age, and religion, but in practice not all the laws use the same language, and even when they do, courts have not always chosen to interpret it the same way for each category. So one of the things a novice HR manager learns is that it's *not* safe to assume that the rules for race carry over to religion or that either carry over to age.

All of which is to say that we are going to need to wait for the courts to clarify whether the many other sex discrimination laws on the books have been broadened by *Bostock*, and if so how.

Even if the executive order were to direct the Cabinet departments and agencies to take the most liberal reading—which it doesn't in fact do—the courts will have the last word, unless Congress steps in to clarify matters.

What we have here is mostly that now-familiar thing, a sweeping-sounding executive order that doesn't actually do much beyond kicking things down the road to agencies that will have to make the harder decisions. In particular, some agencies are going to find that the statutes they administer aren't as amenable as Title VII to the *Bostock* treatment. In these cases, the agency staff simply won't have the legal means on hand to achieve a *Bostock*-like reading—and the executive order doesn't require them to try.

If all this seems familiar, it's because we've gotten used to the idea of executive orders as vaporware—exciting announcements that thrill backers (and troll adversaries) without necessarily delivering a usable product. While President Donald Trump did not invent this kind of EO, he loved using them, and critics regularly applied the vaporware term to his headline-grabbing orders on everything from school choice to the defunding of supposedly anarchist cities.

When Trump issued an executive order on religious liberty, for example, it occasioned a great deal of whooping and stepped-up fundraising from interest groups on both sides, but actually did … very little. Here is what I wrote at the time, which can be applied almost in its entirety to the new post-*Bostock* order:

Nothing in the law itself will change, and nothing will become lawful that is now unlawful. …

It offers a general statement of policy support for religious liberty. This might help the pro-accommodation side prevail more often in future debates at the agencies. If so, the Trump White House will have joined all its predecessors in the practice of taking credit for fine-sounding, vague statements of principle while leaving to the agencies the messier and inevitably less popular responsibilities of implementation. …

Maybe bigger victories for organized religious conservatives lie ahead—but if so, they are likely to come from the agencies, not from the Oval Office.

Government by showy executive order is wearing out its welcome even in unexpected quarters these days. You can see why.