

## EEOC Issues LGBTQ+ Restroom Guidance On One-Year Anniversary of *Bostock*

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Employers remember the seminal Supreme Court decision in [Bostock v. Clayton County, Ga.](#), where the Court held that Title VII’s “because of sex” protections extend to sexual orientation and transgender status. ([See our previous blog entry.](#)) Now, on the one-year anniversary of that influential case, the EEOC has issued guidance to clarify whether employers can segregate bathrooms by gender or sex. That question was conspicuously left unresolved in *Bostock*.

The EEOC’s position is that employers may not bar applicants or employees from using bathrooms or locker rooms that correspond to their gender identity.

The Agency’s view is explained in a technical assistance document called “[Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity](#),” now on the EEOC’s website. The guidance does not have the force of law, but it tells employers how the EEOC will deal with sex discrimination charges under these scenarios.

What this means for employers is: if the company has separate bathrooms, showers, or locker rooms for men and women, then workers must be allowed to use the facility corresponding to their gender identity (transgendered males can use men’s facilities, and transgendered women can use female facilities). Companies with unisex restrooms, etc., can continue to allow use by anyone.

The EEOC’s guidance is not surprising, since the Agency took the same position in a 2015 case involving federal sector employees. In [Lusardi v. Department of the Army](#), the EEOC found the Army had discriminated against a transgendered female when it required her to use a single user, unisex bathroom, instead of the restroom for women. The new guidance confirms that the same principles extend to private employers.

The EEOC has reiterated that an employer may not use the anxiety, confusion, or discomfort of co-workers to justify discriminatory policies.

The Agency also created a [dedicated landing page](#) that consolidates resources on sexual orientation and gender identity. The EEOC’s publications underscore the emphasis that President Biden has given to LGBTQ+ equality.

Perhaps the most interesting thing about the EEOC's observance of the *Bostock* anniversary is not the content of its guidance, but the way in which it was issued. The current EEOC Chair, Democrat Charlotte Burrows, issued the guidance unilaterally, without a vote by the five-member EEOC panel. The three majority Republican Commissioners have criticized the guidance, saying it goes beyond the scope of the *Bostock* decision. This means the guidance could potentially be reversed in the future, when there is a new EEOC Chair.

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