

The General Assembly: 2016 Second Extra Session

Legislators convened for a one-day Second Extra Session on March 23, 2016, in response to changes the City of Charlotte made to their non-discrimination ordinances.

Background

At the Charlotte City Council meeting on February 22, the Council approved amendments to the city's antidiscrimination provisions to prohibit places of public accommodation, including businesses, from discriminating based on sexual orientation, gender identity, or gender expression¹. The meeting included hours of debate and public comment, much of which focused on whether transgender individuals should be allowed to use public bathrooms corresponding to their gender identities. The changes were to take effect on April 1. The General Assembly reconvened in the weeks following the meeting to address Charlotte's actions.

Unlike the previous extra session, which was called by Governor McCrory, the Second Extra Session was called into session by the President of the Senate and the Speaker of the House of Representatives. According to Article II, Section 11(2) of the North Carolina Constitution, the President and the Speaker must issue a joint proclamation calling an extra session when they have received written requests signed by three-fifths of all of the members of each chamber. The proclamation calling the General Assembly into session was issued on March 22². According to the proclamation, the session was convened in order to consider bills to provide for single sex multiple occupancy bathroom and changing facilities and to create consistency across the state in regulating employment and public accommodations.

Session Action

The first legislation considered during the 2016 Second Extra Session was a set of resolutions establishing House and Senate Rules governing the session. Among the rules adopted for the extra session (House Bill 1 and Senate Bill 1), the only standing committees of the House for the extra session were Committee on Rules, Calendar, and Operations of the House, the Ethics Committee, the Judiciary I, II, III, and IV Committees, the Finance Committee, and the Appropriations Committee. The standing committees of the Senate were Judiciary II and Rules and Operations of

¹ More information on the meeting and amendments, can be found at <http://www.charlotteobserver.com/news/politics-government/article61786967.html>

² The proclamation is available here: <http://www.ncleg.net/sessions/2015e2/2016SecondExtraSessionProclamation.pdf>

the Senate. The rules limited bills that were allowed to be considered to bills providing for single-sex multiple occupancy bathroom and changing facilities and creating statewide consistency in regulation of employment and public accommodations.

House Bill 2 encompasses the legislation for which the session was convened. While this section will provide an overview of the act, please see the following blog posts for a more in-depth discussion of the bill: *The General Assembly Preempts Local Antidiscrimination Measures* by Trey Allen available at <https://www.sog.unc.edu/blogs/coates-canons/general-assembly-preempts-local-antidiscrimination-measures> and *Beyond Bathrooms – Special Session Legislation Impacts City and County Contracts* by Norma R. Houston, available at <https://www.sog.unc.edu/blogs/coates-canons/beyond-bathrooms-%E2%80%93-special-session-legislation-impacts-city-and-county-contracts>.

SL 2016-3 (House Bill 2) makes the following changes. The bill requires local boards of education to establish single-sex multiple occupancy bathroom and changing facilities for students under the requirements of a new GS 115C-521.2. New GS 115C-521.2 requires local school boards to establish in all public schools single-sex multiple occupancy bathroom and changing facilities for students based on their biological sex. Biological sex is defined as being male or female as stated on a person's birth certificate; multiple occupancy bathroom or changing facility is defined as a facility used by more than one person where students may be in various states of undress, such as restrooms, locker rooms, or showers; and single occupancy bathroom or changing facility is a bathroom or changing facility used only by one person at a time. All local boards of education must require all multiple occupancy bathroom or changing facilities used by students to be designated for and used by students based on their biological sex. Local boards of education are allowed to provide accommodations such as single occupancy bathrooms due to special circumstances, but an accommodation that would allow a student to use a multiple occupancy bathroom or changing facility for the opposite sex is prohibited. The new statute includes exceptions to the statute which would allow access to multiple occupancy bathroom or changing facilities by members of the opposite sex for the following purposes: (1) custodial; (2) maintenance or inspection; (3) medical assistance; (4) employees, authorized volunteers, or the student's parent or caregiver accompanying a student needing assistance; (5) other assistance in using the facility; (6) accompanying a person other than a student needing assistance; and (7) when the bathroom or changing facility has been temporarily designated for use by that person's biological sex.

The act enacts new Article 81 in GS Chapter 143, requiring public agencies to establish single-sex multiple occupancy bathroom and changing facilities for use by persons based on their biological sex. Executive branch agency is defined as all agencies, boards, offices, departments and institutions of the executive branch, including the University and Community College system and public agency is defined as executive branch agencies, Council of State agencies, units of local government and public authorities as defined in the local government budget and fiscal control act, local boards of education, the judicial and legislative branches, and any other political subdivisions of the state. The act directs all public agencies to require all multiple occupancy bathroom or changing facilities be designated for and used by persons based on their biological sex. Public agencies are allowed to provide accommodations such as single occupancy bathrooms due to special circumstances, but an accommodation that would allow a person to use a multiple - occupancy bathroom or changing facility for the opposite sex is prohibited. The statute includes five exceptions to the statute which would allow access to multiple occupancy bathroom or changing facilities by members of the opposite sex for the following purposes: (1) custodial, (2) maintenance or inspection, (3) medical assistance, (4) accompanying a person needing assistance, (5) for a minor under the age of 7 accompanied by a caregiver, and (6) when a facility has been temporarily designated for use by that person's biological sex.

The act amends GS 95-25.1 by adding a new subsection (c), which provides that the North Carolina Wage and Hour Act preempts and supersedes any ordinance, regulation, resolution, or policy adopted by a unit of local government or political subdivision of the state that regulates or imposes requirements on employers relating to employee compensation. Examples of such local measures include those pertaining to wage levels and payments, hours of labor, benefits, leave, or

minors in the work place. The following are exempted from the legislation: (1) local government regulation, compensation, or control of its own employees; (2) economic development incentives awarded under GS Chapter 143; (3) requirements of federal community development block grants; and (4) city and county community development programs under GS 160A-456 and GS 153A-376.

The act prohibits a county from requiring a private contractor to abide by any regulations or controls on the contractor's employment practices or mandating or prohibiting the contractor's provision of goods, services, or accommodations to any member of the public as a condition of bidding on a contract or submitting a proposal under a qualifications based selection solicitation unless otherwise required or allowed by state law. Language that previously provided that a county could not require a private contractor to comply with any restriction that it could also not impose on all employees in the county has been deleted. The act prohibits a city from requiring a private contractor to abide by any regulations or controls on the contractor's employment practices or mandating or prohibiting the contractor's provision of goods, services, or accommodations to any member of the public as a condition of bidding on a contract or submitting a proposal under a qualifications based selection solicitation unless otherwise required or allowed by state law. The act also deletes language that previously provided that a city could not require a private contractor to comply with any restriction that it could also not impose on all employees in the city.

The act provides that the Equal Employment Practices Act (Article 49A of GS Chapter 143) preempts and supersedes any ordinance, regulation, resolution, or policy adopted by a unit of local government or political subdivision of the state that regulate or impose requirements on employers relating to regulating discriminatory practices in employment except when those regulations apply to personnel employed by the local government or political subdivision's not otherwise in conflict with state law. The act also adds that the Equal Employment Practices Act (Article 49A of GS Chapter 143) and the above new subsection (c) does not create a statutory or common law private right of action.

The act creates new Article 49B, the Equal Access to Public Accommodations Act (Act), in GS Chapter 143. The Act declares that the public policy of the state is to protect the rights of all individuals to enjoy public accommodations without being discriminated against on the basis of race, religion, color, national origin, or biological sex, and provides that complying with the requirements to establish multiple or single occupancy bathrooms or changing facilities according to biological sex does not constitute discrimination. Adds further language that provides that this Act and other General Statutes preempt and supersede any ordinance, regulation, resolution, or policy adopted by a unit of local government or political subdivision of the state that regulates or imposes requirements relating to discriminatory practices in places of public accommodation. The new GS 143-422.12 specifies that the definition of public accommodation under GS 168A-3(8) applies to the article; under GS 168A-3(8), places of public accommodation include any place, facility, store, other establishment, hotel, or motel which supplies goods or services on the premises to the public or which solicits or accepts the patronage or trade of any person. The definition of places of public accommodation does not include private clubs or other establishments not actually open to the public. The new GS 143-13 authorizes the Human Relations Commission in the Department of Administration to receive, investigate, and conciliate complaints of discrimination in public accommodations, and provides that no statutory or common law private right of action is created by the Article.

The act includes a severability clause. Section 5 of the bill makes the bill effective when it becomes law and applies to all ordinances, resolutions, regulations, or policies adopted or amended on or after that date, and to any contract entered into on or after that date.

Sections 2.1, 2.2, 2.3, 3.1, 3.2, and 3.3 of the act preempt and supersede all ordinances, resolutions, regulations, or policies adopted prior to the act's effective date, making all such ordinances, resolutions, regulations, or policies null and void as of the effective date of the act.

The act passed by a vote of 82-26 in the House. In the Senate, the Democratic Senators walked out of chamber before the vote was taken; the bill passed in the Senate with a vote of 32-0. Governor McCrory signed the bill on the day it was approved by the General Assembly.

The following Monday, three individuals, American Civil Liberties Union of North Carolina, and Equality North Carolina filed a federal lawsuit challenging the legislation on constitutional grounds³. The suit names as defendants: Governor McCrory, Attorney General Roy Cooper, the University of North Carolina, the UNC Board of Governors, and UNC Board of Governors Chairman W. Louis Bissette Jr.

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³ The lawsuit can be viewed here: <http://media2.newsobserver.com/content/media/2016/3/28/HB2Lawsuit.pdf>