



The very real—and growing—attack on gay rights

LGBT, NEWS, POLITICS, RIGHTS

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After the hateful tone of political rhetoric during the presidential campaign, many in the LGBTQ community were spooked by Donald Trump's election. Would decades of hard work and [huge advances](#) in the fight for equal rights be undone by the new administration?

With President Trump now past his first 100 days in office, there are indications of the kind of changes people can expect during his term. Were people right to be concerned about LGBTQ rights?

“Yes,” says [Rena McDonald](#) of the [McDonald Law Group](#) in Las Vegas, Nevada and member of Executive Pride, a nonprofit that organizes for LGBTQ workplace equality. “You should be concerned.” After years of focusing on federal protections, McDonald says activists are going to find the federal government taking a less active role in protecting civil rights.

“Your rights haven’t changed,” she explains, “Supreme Court decisions are still valid and enforceable. But you should be concerned that the federal government is empowering local governments to limit civil rights.”

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“Despite what President Trump said before the election, many of his appointments and selections for positions of power and authority have a stated agenda to limit civil rights in general and in particular LGBT rights,” adds Michelle Phillips, [principal attorney](#) at Jackson Lewis P.C. in White Plains, New York. “One of the more likely things that could occur is carve-outs based on religious beliefs or restrictions from prior protections, especially those established by executive order.”

Both strategies—punting civil rights decisions to states, and limiting existing protections through executive orders and appointments—have already been put to use by the new administration.

Reversing transgender restroom access

The most obvious example was Trump’s first “[Dear Colleague](#)” letter, the document that takes away federal protections for transgender students’ right to use the restroom corresponding to their gender identity. Citing a need for greater legal review, the new executive order does not give replacement guidance on what facilities should be used by transgender students. Responsibility for interpreting the decision now falls on the states.

“You’re going to have conflicting laws depending on where an employee or student is placed,” says Phillips. Fourteen states have restroom protections for transgender students, while ten states, including Texas and North Carolina, want to restrict access. Other states had complied with Obama’s executive order, and have no legislation of their own, leaving students in limbo.

Limiting marriage equality

Limited equality sounds like an oxymoron, but it is the reasoning behind attempts to narrow interpretations of *Obergefell v Hodges*, the 2015 Supreme Court decision that [legalized same-sex marriage](#) throughout the country.

After the Obergefell decision, a judge tossed out a previously existing lawsuit against the City of Houston for providing benefits to married same-sex couples. The Texas Supreme Court refused to hear an appeal last September.

But after an [amicus brief](#) from Texas’ governor, lieutenant governor, and attorney general urged the court to reconsider, oral arguments were heard on March 1. The Texas Supreme Court cannot overturn the federal Obergefell decision, but is genuinely considering drawing a line between “recognizing” a marriage and equal treatment of all married couples.

“Post-Obergefell we’re seeing cases dealing with businesses’ rights to reject services based on religious beliefs,”

Phillips says. Most recently, the Washington State Supreme Court ruled against a florist who denied wedding services to a gay couple. “We’ll continue to see these types of cases, and they could be vulnerable in the future. There are vacancies at all levels in the federal courts, and how those are filled might influence the direction those cases take,” says Phillips. “The ACA remains vulnerable. Instead of a complete repeal, there could be carve-outs that would jeopardize medical benefits for same-sex couples.”

Keyword: “Orientation”

This “carve-out” approach has already struck a blow to Title VII, limiting its application to federal contractors. Trump’s executive order, signed March 27, directs the Department of Labor and other executive agencies to reconsider implementation of Obama’s “blacklisting” executive order, which, among other things, required federal contractors to prove that they’ve complied with federal laws banning discrimination based on sexual identity or orientation.

“Sexual orientation is not set forth in the wording [of Title VII]. Since the Price Waterhouse decision in 1989, it has been understood that gender stereotyping is implicit in sexual orientation discrimination,” says Phillips. “Now we are seeing a circuit-by-circuit review of sexual orientation discrimination.”

On March 10, in *Evans v Georgia Regional Hospital*, the Eleventh Circuit Court of Appeals ruled against a female security guard who claimed she was dismissed because of her sexual orientation and nonconformity with stereotypically feminine behavior and appearance. Also in March, the Second Circuit ruled in favor of the plaintiff in *Christiansen v Omnicom*, specifically stating that only the harassment he experienced based on gender stereotyping was relevant to the case—harassment relating to his sexual orientation was not cognizable sex discrimination under Title VII.

“These results are creating an atmosphere where each circuit has a different opinion. Typically, the Supreme Court would fix the division to create an overlying national rule. But the Supreme Court is anybody’s guess right now,” says McDonald. Currently, 28 states lack any legal prohibition against firing employees for sexual orientation.

What about the EEOC?

Unlike the White House website, which deleted its page on LGBTQ rights on inauguration day, the U.S. Equal Employment Opportunity Commission website remains clear in its stance: “EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation. These protections apply regardless of any contrary state or local laws.”

The EEOC Commission’s five members, however, are presidential appointees. With one open position and another opening in July, Trump will have the opportunity to establish a Republican majority on the Commission. Although the EEOC’s 2017-2021 Strategic Enforcement Plan identifies LGBTQ cases as a priority, there may be less emphasis on these cases after the composition of the Commission changes.

Resources

In this uncertain climate, it’s important for individuals to know their rights and be willing to fight for them. In addition to personal legal representation, there are many organizations working on behalf of LGBTQ rights.

- **American Civil Liberties Union:** Now representing Aimee Stephens. the ACLU brought its first LGBTQ

rights case in 1936. Today the organization brings more LGBTQ cases and advocacy initiatives than any other national organization. Visit their [website](#) to learn about LGBTQ rights, current issues and cases, and to report discrimination.

- **Executive Pride:** It shouldn't take a lawsuit to receive equal treatment at work. [Executive Pride](#)'s network of companies, business leaders, and employees amplifies the call for LGBTQ equal rights.
- **Human Rights Campaign:** [HRC](#) advocates for LGBTQ equality and educates the public about LGBTQ issues through a variety of programs and campaigns.
- **National Center for Transgender Equality:** [The National Center for Transgender Equality](#) is an intersectional social justice advocacy working at the local, state, and federal level to change laws, policies, and society.
- **Lambda Legal:** A nonprofit organization, [Lambda Legal](#) works to achieve full recognition of LGBTQ civil rights through impact litigation, education, and public policy.
- **Avvo:** Whether it's asking a question through the [free and anonymous Q&A service](#), or searching for a local and highly-rated [civil rights lawyer](#), Avvo is ready to help anyone looking for legal help and information.

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