



## MEMORANDUM

TO: Mayor and City Council  
FROM: Patrick W. Baker, City Attorney  
DATE: April 4, 2016  
RE: House Bill 2

Since its introduction and passage almost two weeks ago, I along with other staff attorneys in this Office have been reviewing House Bill 2 and in particular, the impact it may have on current Durham City government policies, ordinances and operations. I am also keeping an open line of communication with the Durham County Attorney's office as well as other municipal law colleagues around the state. Given the hasty enactment of this bill and the legal challenges that have already been filed against it in federal court, I anticipate this legislation will continue to be reviewed and scrutinized over the coming weeks and months. Nevertheless, I did want to provide you with my initial analysis of the impact this legislation, as written, may have on current City policies, ordinances and operations. This is a very narrow review that does not address many of the legitimate social, political and economic concerns that have been raised as a result of the passage of this legislation. I have attached a copy of the legislation to this memorandum for your review and will reference and analyze those sections of the legislation that appear to impact the City.

1. **Section 1.3 Single sex multiple occupancy bathrooms and changing facilities.**

This is a new statute that purports to require the City to designate every multiple occupancy bathroom or changing facility on City property for and only used by persons based on their biological sex. The statute explicitly allows the City to provide an accommodation upon request such as providing a single occupancy bathroom or changing facility but under no circumstances can an accommodation result in allowing a person to use a multiple occupancy bathroom or changing facility for a sex other than the person's biological sex. The following terms are defined in the statute.

- **Biological sex.** – The physical condition of being male or female, which is stated on a person's birth certificate.
- **Multiple occupancy bathroom or changing facility.** – A facility designed or designated to be used by more than one person at a

time where students may be in various states of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a school restroom, locker room, changing room, or shower room.

- Single occupancy bathroom or changing facility. – A facility designed or designated to be used by only one person at a time where students may be in various states of undress. A single occupancy bathroom or changing facility may include, but is not limited to, a single stall restroom designated as unisex or for use based on biological sex.

With regard to bathrooms and changing facilities, the City's longstanding practice has been to simply designate bathrooms for "Men" and "Women". The statute provides no particular guidance as to whether the City needs to further elaborate the designation "Men" or "Women" through additional signage that articulates the statutory definition of biological sex. It should also be noted that the statute does not provide a particular penalty for an individual who uses a bathroom that does not correspond to the sex identified on their birth certificate<sup>1</sup>. The directive is to the City to properly designate the restroom/changing facility. At this stage, I would not recommend the City to incur costs associated with additional explanatory signage at our bathrooms and changing facilities to articulate the new statutory definition of the term, "biological sex" beyond the current designations of "Men" and "Women". Because this statute applies to all State controlled restrooms as well, it may be prudent to monitor what if any changes in bathroom designation are enacted by the State government to comply with the statute. Additionally, if there is evidence that individuals are confused as to which bathrooms they should use, the City could take additional steps at that time to further designate these facilities on its own initiative.

## **2. Section 2.1 Wage and hour act local preemption**

This section appears to relocate a statute enacted in 2013 that prohibited cities from imposing requirements on employers pertaining to compensation of employees (i.e. wage levels of employees, hours of labor, payment of earned wages, benefits and leave) or well-being of minors in the workplace. The most common impact of this

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<sup>1</sup> Proponents of this bill have noted that this language was needed to protect women and young girls from male predators who may follow them into a woman's bathroom under the auspices of selectively identifying as a woman. While this law does not provide any criminal sanctions against an individual who enters a restroom designated for a sex that does not correspond with their birth certificate, depending on the facts of the case, a true predator could be subject to criminal penalty for among other crimes, assault, battery, trespass, indecent exposure, and peeping.

2013 law was to prohibit local governments from requiring employers to pay their employees a “living” wage. This section continues to allow a local government to pay its own employees a living wage.

While the City has made the policy decision to pay its workers a living wage, there are no local ordinances or regulations that impose wage and hour requirements on employers. The City does have a non-binding policy statement on livable wages which states as follows:

***Livable Wage** - The City of Durham desires that firms doing business with the City pay their workers an hourly wage while working on City contracts such that, if annualized, a person working 40 hours per week will earn enough money to support a family of 4 above the poverty level, as poverty is defined by the United States Census Bureau. Currently, that wage is \$12.53 per hour.*

This statement appears on the City’s bid postings website. Because this statement is not binding on employers, the City is not out of compliance with this Section and as such, this Section has no impact on current City policies and practices.

**3. Section 2.3 Prohibition of imposing local equal employment opportunity and non-discrimination requirements on public contractors.**

This section as amended prohibits a city from imposing regulations or controls on a prospective contractor’s employment practices or provision of goods and services to the public as a condition of bidding on a public contract or qualification based selection except as allowed by State law. This typically arises when a contractor is required to abide by a city’s EEO or non-discrimination policy as a condition of contracting with the city.

The City does have an EEO and non-discrimination policy statement, also posted on the city’s Bid Postings website, which reads as follows:

*Values Regarding Treatment of Employees of Contractors*

***Statement of City EEO Policy** - The City of Durham opposes discrimination in employment because of race, color, religion, sex, national origin, age, disability, sexual orientation, gender identity, gender expression, or genetic information. Therefore, it desires that firms doing business with the City:*

*Not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age, disability, sexual orientation, gender identity, gender expression, or genetic information.*

*Take affirmative action to ensure that applicants are employed and that employees are treated equally during employment, without regard to race, color, religion, sex, national origin, age, disability, sexual orientation, gender identity, gender expression, or genetic information. This action includes employment, upgrading, demotion, transfer, recruitment or advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.*

*State, in solicitations or advertisement for employees, that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, age, disability, sexual orientation, gender identity, gender expression, or genetic information.*

*Include this Statement of City EEO policy in every purchase order for goods to be used in performing City contracts and in every subcontract related to City contracts.*

The City also includes the following language in all of our contracts:

***THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.***

Neither the City's statement of EEO policy statement nor our non-discrimination policy imposes a specific regulation or requirement on any of our contractor's employment practices or their provision of goods and services to the public as a condition of bidding or receiving a contract from the City. The EEO policy statement is a non-binding and non-enforceable desire of the City that its contractors engage in certain non-discriminatory practices, and therefore does not appear to violate HB2.

#### **4. Section 3.1 Preemption of local EEO ordinances.**

HB2 Section 3.1 sets forth the public policy of the State that all persons should seek, obtain and hold employment without discrimination based on race, religion, color, national origin, age, biological sex or handicap by employers with 15 or more employees. The section then goes on to preempt cities from enacting ordinances

that impose any requirement upon an employer pertaining to the regulation of discriminatory practices in employment that are in conflict with the public policy of the state.

The City does not have any ordinances that impose any EEO requirements on employers. As such, we are not out of compliance with Section 3.1. The City does have its own internal EEO policy which reads as follows:

*The City of Durham declares and reaffirms its policy of equal employment opportunity. The City of Durham prohibits discrimination in employment because of race, color, religion, sex, national origin, age, disability, sexual orientation, gender identity, gender expression, or genetic information.*

*All recruiting, hiring, training, promotion, compensation and other employment related programs are provided fairly to all people on an equal opportunity basis without regard to race, color, religion, sex, national origin, age, disability, sexual orientation, gender identity, gender expression or genetic information.*

This internal City policy does not appear to be impacted by Section 3.1.<sup>2</sup>

#### **5. Section 3.3 Preemption of local non-discrimination ordinances in public accommodations.**

Similar to Section 3.1, this Section sets forth the public policy of the State for all individuals to enjoy the goods, services, facilities and accommodations of places of public accommodation from discrimination because of race, religion, color, national origin or biological sex. The Section goes on to unilaterally declare that the designation of multiple or single occupancy bathrooms or changing facilities as set forth in Section 1.3 does not constitute discrimination. The Section concludes by preempting cities from enacting regulations that impose any requirement pertaining to the regulation of discriminatory practices in places of public accommodation.

The City does not have any ordinances that regulate discrimination in places of public accommodation. Therefore, Section 3.3 appears to have no impact on City operations.<sup>3</sup>

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<sup>2</sup> Though this does not impact any City functions, it should be noted that in Section 3.2, the legislature has elected not to allow an individual to pursue state law civil claims of employment discrimination. An individual may pursue substantially similar claims under Title VII of the Civil Rights Act of 1964 in the federal courts.

In conclusion, though I am not recommending any changes to City policies, practices or ordinances at this time, I note that House Bill 2 continues to generate considerable legal and political controversy and interest both inside and outside of North Carolina, and that the Governor and legislative leaders have indicated the possibility that amendment of HB2 may occur. Also, in addition to recent litigation initiated as a direct result of the enactment of HB2, there is litigation pending in the 4<sup>th</sup> Circuit Court of Appeals (which has jurisdiction over North Carolina) that may ultimately address whether transgender discrimination is actionable under Title VII as a form of sex discrimination. That case out of Virginia involves a transgender student who requested to use the restroom that corresponds with their gender identity. I will monitor these legal and policy discussions and advise you of any substantive developments in this matter.

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<sup>3</sup> Though this does not impact any City functions, it should be noted that at the end of Section 3.3, it appears the legislature has elected not to allow an individual to pursue state law civil claims of discrimination in public accommodations. An individual may pursue substantially similar claims under Title VII of the Civil Rights Act of 1964 in the federal courts.