

# Executive Order 14168

## Implications for Travel Documents

Professor Linda Hamilton Krieger

University of Hawai'i William S. Richardson School of Law

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# So, What Has Just Happened?

Executive Order 14168 Provides:

Sec. 2. It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable . . .

(a) “Sex” shall refer to an individual’s immutable biological classification as either male or female. “Sex” is not a synonym for and does not include the concept of “gender identity.”

. . .

(d) “Female” means a person belonging, at conception, to the sex that produces the large reproductive cell.

(e) “Male” means a person belonging, at conception, to the sex that produces the small reproductive cell.”

# Contextualizing the Executive Order

1. It is federal law and does not change state law, including:
  - State laws about the meaning of “sex” or “gender”
  - State laws about the issuance or content of, or changes to birth certificates
  - State laws about the issuance, content or, renewal of, or gender markers on state identification documents, including driver’s licenses or state IDs.
2. It is not part of the U.S. Constitution or a U.S. statute
3. It has not yet been incorporated into any official federal regulations issued by any federal administrative agencies
4. The ACLU has just filed suit in D. Mass. alleging that it is unconstitutional and that its implementation by agencies would violate the Administrative Procedure Act

# Travel-Relevant Areas of State vs. Federal Authority

## State/Territorial Authority

- Birth Certificates (issuance and changes)
- State I.D. Documents and Drivers' Licenses (issuance, renewal, changes)

## Federal Authority

- Immigration (including re-entry after travel abroad) – State Dept.
- Social Security (I.D. Card) – Social Security Administration
- Issuance of Passports for International Travel – State Dept.
- Consular services in other countries – State Dept.
- Regulation of Interstate Travel (REAL ID Act – interstate travel) – Dept. of Homeland Security

# What The Executive Order Means for Travel Within Hawai'i



# Nothing. Travel Within Hawai‘i Remains the Same

- Hawai‘i law allows a person to change their name through a relatively simple administrative process; but it can be complicated by publication requirements or by criminal record;
- Hawai‘i law allows a person to select or change a gender marker on a Hawai‘i State ID or Driver’s License (M, F, or X) without need for any medical documentation;
- Hawai‘i law allows a person to change the gender marker on their birth certificate through an administrative process upon physical letter re: “appropriate treatment.”

What The Executive Order Means for Travel Between Hawai'i and Other States or Territories?



# The REAL ID Act of 2005

- Product of the “War on Terror”
- Providing minimum requirements for State ID’s or Driver’s Licenses Used in Interstate Travel;
- Implemented and Enforced by the U.S. Department of Homeland Security (Secretary Kristi Noem);
- **Goes Into Effect May 7<sup>th</sup> 2025;**
- WHAT DOES IT MEAN FOR GENDER MARKERS OR CHANGES TO GENDER MARKERS?



# Relevant Text From the REAL ID Act re: Sex/Gender Markers

“(b) Minimum driver’s license and identification card requirements. To meet the requirements of this section, a State shall include, at a minimum, the following information and features on, or as part of, each driver’s license and identification card issued to a person by the State:

“(1) The person’s full legal name.

“(2) The person’s date of birth.

**“(3) The person’s gender.**

...

# Relevant Text From the REAL ID Regulations

To be accepted by a Federal agency for official purposes, REAL ID driver's licenses and identification cards must include on the front of the card (unless otherwise specified below) the following information:

(a) Full legal name. Except as permitted in § 37.11(c)(2), the name on the face of the license or card must be the same as the name on the source document presented by the applicant to establish identity. Where the individual has only one name, that name should be entered in the last name or family name field, and the first and middle name fields should be left blank. Place holders such as NFN, NMN, and NA should not be used.

(b) Date of birth.

(c) Gender, as determined by the State.

6 C.F.R. § 37.17

## But E.O. 14168 States:

### Sec. 3

(d) The Secretaries of State and Homeland Security . . . shall implement changes to require that government-issued identification documents, including passports, visas, and Global Entry cards, accurately reflect the holder's sex, as defined under section 2 of this order . . .

# Practical Implications for Interstate Travel

1. ASAP, Get a REAL ID-Compliant Hawai'i State ID or Driver's License with Your Preferred Gender Marker.
2. In Deciding Whether to Select an M, F, or X Gender Marker, Consider the Possible Reactions of TSA Employees, Especially in Unfriendly States or Territories, in Making Your Decision.
3. Otherwise, Know Your Own Risk Tolerance and Prepare for Increased Levels of Hostility From TSA Agents and Others in Unfriendly States or Territories.

# What The Executive Order Means for International Travel



# Identity Documents Relevant to International Travel (including the FSM & RMI)

E.O. 14168 Provides That:

(3)(d) The Secretary of state shall implement changes to require that government-issued identification documents, including passports, visas, and Global Entry cards, accurately reflect the holder's sex, as defined under section 2 of this order . . .

# What We Know or Think We Know About Passports

1. Orr v. Trump filed, challenging the E.O.'s constitutionality and statutory validity; but . . .
2. There has been, as of today, no motion for a preliminary injunction filed, and until enjoined, the Administration can continue on this path;
3. The Department of State has suspended issuing or renewing passports with an "X" gender marker.
4. Secretary Rubio has told NOBUS that people can continue using passports with an "X," but that they will not be renewed.
5. We have no indication that travel documents are being seized in transit.

# What We Don't Know and When We May Know More

Section 7 of the Executive Order States:

(a) Within 120 days of the date of this order, each agency head shall submit an update on implementation of this order to the President, through the Director of the Office of Management and Budget. That update shall address:

- (i) changes to agency documents, including regulations, guidance, forms, and communications, made to comply with this order

...

(c) Each agency head shall promptly rescind all guidance documents inconsistent with the requirements of this order or the Attorney General's guidance issued pursuant to this order, or rescind such parts of such documents that are inconsistent in such manner.

...



# What One Should Plan For

1. Expect the State Dept. to reject applications for new or renewed passports with an “X” gender marker;
2. Expect federal agencies to issue new regulations requiring qualifying ID documents to prove “sex” to obtain or renew a passport or other State-Department-issued immigration or travel-related documents;
3. Expect changes to the REAL ID Act regulations to require REAL-ID Compliant State ID’s to show “sex” not “gender” on the face of the ID, thus forcing the States to change their own state laws about gender markers on State IDs. GET YOUR HAWAII REAL ID NOW!!!
4. Do not expect to obtain information on gender issues relating to travel on federal agency websites. Everything has been taken down.