

## **DOL POLICIES ON GENDER IDENTITY: RIGHTS AND RESPONSIBILITIES**

Since the Department of Labor's (DOL's or the Department's) earliest years, it has been committed to promoting equal opportunity in employment. This commitment, which has grown significantly over time, necessarily extends to all DOL employees and applicants for DOL employment. In 2020, the Supreme Court ruled in *Bostock v. Clayton County*, 140 S. Ct. 1731, that discrimination based on sexual orientation or gender identity constitutes discrimination "because of . . . sex" in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). On January 20, 2021, President Biden reaffirmed and applied these protections by issuing an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.<sup>1</sup>

### **Why do the Department's policies explicitly prohibit discrimination and harassment based on gender identity?**

The Department's policies reaffirm DOL's commitment to fair treatment of, and equal opportunity for, *all* people. Policies prohibiting discrimination based on transgender status, gender identity, or gender expression create the reasonable expectation of an environment where all employees and applicants for employment are evaluated by their performance, rather than by their gender identity or expression or others' perceptions thereof.

Further, DOL's policies are consistent with the policies of other Federal agencies, such as the Equal Employment Opportunity Commission (EEOC), Department of Justice (DOJ), and Office of Personnel Management (OPM), including OPM's *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*.<sup>2</sup> DOL's policies also comport with Executive Order 13672 and 13988, which further prohibit discrimination in the civilian federal workforce on the basis of gender identity.

Discrimination, including harassment, based on gender identity or expression is sex discrimination. In 2020, the Supreme Court in *Bostock v. Clayton County* affirmed this interpretation, cementing protections for transgender and non-binary workers.

Studies have shown that transgender and non-binary people face disproportionate amounts of discrimination in all areas of life, notably in employment. A 2015 study by the National Center for Transgender Equality indicated that 77% of transgender respondents who had a job in the preceding year reported taking steps to avoid mistreatment at work, such as hiding their gender transition at work or quitting their job.<sup>3</sup> In this same study, nearly half (47%) said they did not ask their employer to refer to them with correct pronouns (such as he, she, or they) out of fear of discrimination. Non-binary respondents (66%) were nearly twice as likely to avoid asking to be referred to by

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<sup>1</sup> Exec. Order No. 13988, 86 C.F.R. 7023 (2021).

<sup>2</sup> U.S. Office of Personnel Management (OPM), [Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace](https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/guidance-regarding-employment-of-transgender-individuals-in-the-federal-workplace.pdf), available at <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/guidance-regarding-employment-of-transgender-individuals-in-the-federal-workplace.pdf>

<sup>3</sup> [National Center for Transgender Equality, 2015 U.S. Transgender Survey](https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf), (2015), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>, at 13 & 154.

their correct pronouns compared to transgender men and women (34%). These statistics underscore the importance of the Department creating a safe environment for all of its employees.

## **Employees' and Applicants' Rights**

### **Who is protected from discrimination based on gender identity or expression?**

Discrimination based on gender identity or expression can affect anyone. Policies barring these forms of discrimination not only protect those who openly identify as transgender, femme, masc, or non-binary, but they also protect anyone who might express their gender in any way that does not conform to preconceived notions about how people of a particular gender should express themselves. Over 30 years ago, the Supreme Court in *Price Waterhouse v. Hopkins* ruled that these policies<sup>4</sup> also protect people against sex stereotyping – for instance, women who some people think are “too masculine” or men who some people think are “too feminine.”

DOL policies barring discrimination and harassment on the basis of sex protect employees and applicants for employment from being harassed, denied employment or promotion, or otherwise subjected to adverse treatment because they do not conform to societal gender expectations.

**What are my rights under DOL's gender identity policies?** DOL employees and applicants for employment have the right to experience a workplace free of discrimination, including harassment. If you believe you are being subjected to harassing conduct, please contact your Agency Workplace Equality Compliance Office (WECO), which processes allegations of harassing conduct in accordance with DOL's policy and procedures with the goal of stopping the harassing conduct before it becomes severe or pervasive, and a violation of the law. If you believe that you have experienced unlawful disparate treatment or a hostile work environment (harassing conduct that is severe or pervasive), you should contact the [Civil Rights Center \(CRC\)](#), which is responsible for ensuring nondiscrimination within the Department and processing discrimination complaints in accordance with the Federal Sector Equal Employment Opportunity (EEO) Complaint Processing Regulations, found at 29 C.F.R. Part 1614. A complaint filed with your Agency WECO is **not** the same as filing a complaint with CRC. The two processes are distinct and serve different purposes. The mission of your Agency WECO is to serve as an agency-support mechanism, including by advising agency managers on EEO issues and preventing harassing conduct from becoming so severe or pervasive as to constitute a hostile work environment. The mission of CRC is to serve as a neutral agency within the Department and to promote justice and equal opportunity by acting with impartiality and integrity in enforcing various civil rights laws. CRC's Office of Internal Enforcement (OIE) administers the Department's EEO program by counseling, facilitating mediation, investigating, adjudicating, and remedying complaints of alleged discrimination filed by DOL employees and applicants for DOL employment. CRC may be reached by phone at (202) 693-6500 (voice) or (800) 877-8339 (Relay), or by e-mail at

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<sup>4</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[CivilRightsCenter@dol.gov](mailto:CivilRightsCenter@dol.gov).

## **Workplace Equality Compliance Office (WECO)**

### **When to contact**

- Contact if you believe you are being subjected to harassing conduct<sup>5</sup>
- Harassing conduct includes but is not limited to:
  - Initial incidents that are unwelcome and unprofessional and based on a protected category
  - Conduct that may violate the harassing conduct policy, is not necessarily a violation of the law and would rise to the level of a Hostile Work Environment that is severe or pervasive

### **Mission**

- Support agency, including in compliance, settlement/alternative dispute resolution (ADR), and training
- Advise and guide agency managers on EEO issues
- Inquire into allegations of harassing conduct
- Prevent harassing conduct from becoming severe or pervasive

### **Remedy**

- Cessation of harassing conduct
- Temporary interim measures while inquiry into allegations of harassing conduct occur, including, but not limited to:
  - Reassigning or relocating alleged harasser/victim
  - Altering work hours or telework schedules to avoid contact
  - Any interim measures must not unduly burden alleged victim

## **Civil Rights Center (CRC)**

### **When to contact**

- Contact if you believe that you have experienced unlawful disparate treatment or a hostile work environment (within 45 days of the alleged action)
- Unlawful Disparate treatment includes the denial of terms, conditions, and privileges of employment, such as, termination, suspension, denial of leave, poor performance appraisal, nonselection/nonpromotion, or denial of a reasonable accommodation
- “Hostile work environment” means harassing conduct that is severe or pervasive; it can also mean a single egregious incident occurred.
- Severe or pervasive conduct includes but is not limited to:

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<sup>5</sup> There is no prescribed timeframe for raising concerns under this Policy and procedures with the Workplace Equality Compliance Office (WECO), although prompt reporting is strongly encouraged. It is important to understand that it may be more difficult to investigate and address allegations that are aged. However, the Department will review all allegations in an attempt to stop any harassing conduct, which is the only remedy available under this Policy and procedures. Filing a complaint with an EEO Counselor of the Civil Rights Center (CRC), however, must occur within 45 days of the last alleged incident of discrimination. Any incidents that occurred beyond the 45 days would still be considered under a theory of a hostile work environment, but not as an allegation of unlawful disparate treatment if the conduct affects a term, condition, or privilege of employment.

- Egregious and offensive conduct
- Retaliation for opposing discriminatory or harassing conduct
- Single use of a highly charged epithet that dredges up the history of discrimination

## **Mission**

- Maintain neutrality; subject to oversight from the EEOC
- Authorized to order findings of discrimination against the Department, including ordering corrective relief
- Promote justice and equal opportunity
- Administer Department's EEO program

## **Remedy**

- Make-whole relief, including monetary compensatory awards for:
  - Non-pecuniary damages attributed to emotional pain and suffering
  - Pecuniary damages attributed to losses caused by discriminatory conduct
  - Attorney fees
  - Back pay
  - Restoration of leave
  - Front pay
  - Other forms of equitable relief

## Responsibilities of Managers and Supervisors

**Communicate clearly.** Managers should talk *and set a good example* with employees about what type of behavior is lawful and appropriate in the workplace. They should make clear that employees should respect the gender identity and expression of all coworkers and customers. To that end, managers should discuss appropriate behavior with employees like using correct pronouns for coworkers and customers and speaking up if transgender and non-binary coworkers are demeaned because of their gender identity or expression. Managers should also make clear what consequences employees will face if they violate the law, up to and including removal.

Encourage your staff to report attempts at mockery, harassment, or otherwise prohibited conduct, including misgendering.

**Lead by example.** The most effective way for a manager to set the tone in the workplace is to lead by example. Treat transgender and non-binary employees, customers, and others with whom you may come in contact with dignity and respect. If an employee or customer approaches you regarding being transgender or non-binary, or if other employees learn that a co-worker, customer, or other person with whom they interact is transgender or non-binary, there are many ways in which your words and actions can lead to a welcoming and safe atmosphere. Some specific examples:

**Names and Pronouns.** Refer to each person by the name and the pronoun(s) *by which the person wants to be referred*. If you don't know, ask in a tactful and respectful way. For example, you can say, "what pronouns do you use?" or you can introduce yourself with the pronouns you use, which may prompt someone to share the pronouns they use. Continued intentional misuse of a person's name and pronouns – also known as misgendering – may breach the person's privacy, may put them at risk of harm, and in some circumstances, may be considered harassment.

**Inclusive Language:** Whenever possible, use gender-neutral language to avoid assumptions about employees' sexual orientation or gender identity. For instance, use words like "spouse" instead of gender-specific terms like "husband" or "wife," or the singular third-person pronoun "they" instead of "he or she" when referencing a hypothetical or anonymous person, or when you don't know the individual person's pronouns. In addition, be mindful in referring to individuals' identity, gender, partners, and relationships. Someone's sexual orientation or gender identity is one aspect of their identity, but not what may fully define them.

**Confidentiality and privacy.** A person's transgender or non-binary status should be treated with sensitivity and confidentiality, just as one would treat any other personal life experience. A transgender or non-binary employee may or may not want to discuss their gender identity or expression with co-workers. Respect the wishes of the employee.

Even if a transgender or non-binary employee has disclosed their gender identity or other personal information, such as information about their transition, they still may wish

to keep other personal information private. Respect the wishes of the employee, and do not share information about the employee's status without their permission. In addition, remember that medical information about individual employees is legally protected, and disclosure should be limited. Do not ask the employee questions about their medical information or treatment unless such questions are necessary to address any workplace issues that may arise with the employee's medical plans.

Regardless of the level of disclosure that a transgender or non-binary employee is comfortable with, do not permit employees to engage in gossip or rumor-spreading about any employee and especially not about personal issues like gender identity or expression.

**Train employees.** Managers should offer resources for employees to educate themselves about treating all of their colleagues, customers, and others with dignity and respect. Trainings enable employees to ask questions in a moderated space and are an effective way of preventing discrimination. Trainings should inform employees that it is their responsibility to report acts of discrimination or harassment and to address derogatory language, jokes, and behavior.

**Provide support.** Managers and supervisors should also **provide support for transgender and non-binary employees** in other ways:

**Dress and appearance.** As part of a transition process, an employee might alter their clothing style. Additionally, their physical appearance may change. Agencies should not maintain dress codes that restrict employees' clothing or appearance on the basis of gender. Dress codes must not interfere with a person's expression of gender identity. Transgender and non-binary employees must be allowed to comply with dress codes in a manner consistent with their gender identity or gender expression.

**Restroom access.** The Department is guided by OSHA on the use of sanitary and related facilities by transgender and non-binary employees in the federal workplace.<sup>6</sup> OSHA's guidance says employees should be permitted to use the facilities that correspond with their gender identity. That decision should be left to the employee to determine the most appropriate and safest option for them.

Employees should not be required to undergo, or provide proof of, any medical procedure to use facilities designated for use by a particular gender. Under no circumstances may an agency require an employee to use facilities that are unsanitary, potentially unsafe for the employee, or located at an unreasonable distance from the employee's work station. To ensure equal access, all single-stall restrooms in buildings or facilities controlled by DOL should be accessible to all employees and have gender-neutral signage.

**Identity documentation.** Consistent with the Privacy Act, the records in an employee's

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<sup>6</sup> Occupational Safety and Health Administration, [Best Practices: A Guide to Restroom Access for Transgender Workers](https://www.osha.gov/sites/default/files/publications/OSHA3795.pdf), available at <https://www.osha.gov/sites/default/files/publications/OSHA3795.pdf>.

Official Personnel Folder (OPF) and other employee records (pay accounts, training records, benefits documents, etc.) should be changed to show the employee's updated gender marker and legally changed name, consistent with the employee's gender identity. Employees should also be permitted to change any identity documentation, such as ID badge, email account, etc. as well upon obtaining a legal name change. Less formal identity documentation such as business cards or name plates may be changed without legal documentation.

To initiate a name change, employees will need (1) a copy of their driver's license or other legal photo identification and (2) their social security card, or confirmation from the Social Security Administration that their name has legally been changed, and initiate the name change action with the Office of Human Resources. Employees are encouraged to talk with their employee benefits specialist in the Office of Human Resources or review the guidance about name changes on LaborNet.

**Sick and medical leave.** Employees receiving medical treatment as part of their transition may use sick leave under DOL regulations. Employees who are qualified under the Family Medical Leave Act may also be entitled to take medical leave for gender-affirming care.

During the hiring process, hiring managers and supervisors should **be sensitive to the possibility that applicants may have updated their legal documents to reflect their gender identity**. The name and gender marker on the application should correspond with the person's current usage or legal status; however, background or suitability checks may disclose a previous name that is typically associated with a particular gender that appears different from the one the applicant is currently expressing. In such cases, hiring managers should tactfully ask whether the applicant was previously known by a different name and confirm with the applicant the name and pronouns that should be used when checking their references.

Should you have further questions, please contact CRC at (202) 693-6500 (voice) or (800) 877-8339 (Relay), or by e-mail at [CivilRightsCenter@dol.gov](mailto:CivilRightsCenter@dol.gov).

## Gender Identity: Key Terminology<sup>7</sup>

**What is the difference between sex and gender?** Sex (*i.e.*, male, female, or intersex) is assigned at birth based on a combination of a baby's biological characteristics, including chromosomes, hormones, and reproductive organs, and is originally documented on a person's birth certificate. The [World Health Organization](#) defines *gender* as the "socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate" based on sex.

**Agender:** An identity under the nonbinary and transgender umbrellas. Some agender individuals have no gender identity, although some define agender as having a gender identity that is neutral.

**Bigender:** An identity under the nonbinary and transgender umbrellas. Bigender individuals identify with more than one gender.

**Cisgender:** A person whose gender identity matches with the sex they were assigned at birth.

**Gender expression:** How a person represents or expresses one's gender identity to others, often through behavior, clothing, hairstyles, voice, or body characteristics. All people have a gender expression.

**Genderfluid:** Refers to an identity under the nonbinary and transgender umbrellas. Genderfluid individuals have different gender identities at different times. A genderfluid individual's gender identity could be multiple genders at once, and then switch to none at all, or move between single gender identities. For some genderfluid people, these changes happen as often as several times a day, and for others, monthly, or less often.

**Gender identity:** A person's internal sense of being male, female, or something else such as agender, binary, gender fluid, gender nonconforming, genderqueer, or nonbinary. Since gender identity is internal, one's gender identity is not necessarily visible to others. All people have a gender identity.

**Gender nonconforming (GNC) or Genderqueer:** Terms for people whose gender identity and/or expression is different from societal expectations related to gender.

**Gender-affirming care:** An inclusive term for treatments and procedures that help an individual align their physical and/or other characteristics with their gender identity, often called transition-related care.

**Intersex:** Refers to a person who is born with sexual or reproductive anatomy that does not fit within the sex binary of male or female, encompassing a variety of sex expressions.

**LGBT or LGBTQ:** Shorthand for lesbian, gay, bisexual, transgender, and queer people.

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<sup>7</sup> National LGBTQ Task Force, LGBTQ+ [Glossary of Terms](#), available at <https://www.thetaskforce.org/wp-content/uploads/2019/06/Task-Force-LGBTQ-RJ-Glossary-of-Terms.pdf> (last visited April 16, 2021).

**Nonbinary:** A term used by people who identify as neither entirely male nor entirely female. This can include people who are agender, bigender, genderfluid, gender nonconforming, and genderqueer, among others. Some nonbinary people identify as transgender, while others do not.

**Pronouns:** Terms used to substitute a person's name when they are being referred to in the third-person. Some common pronouns include he/him/his, she/her/hers, and they/them/their(s). A person's gender should not be assumed based on their pronouns.

**Queer:** An umbrella term which embraces a variety of sexual preferences, orientations, and habits of those who are not among the exclusively heterosexual and monogamous majority. Although the term was once considered derogatory and offensive, the community has reclaimed the word and now uses it widely as a form of empowerment. Younger generations tend to use the term "queer" for reasons such as the fact that it does not assume the gender of the queer person or the gender of any potential romantic partners, and/or in order to make a political statement about the fluidity of gender.

**Sexual Orientation:** A person's identity in relation to whom they are attracted to. All people have a sexual orientation. Sexual orientation, gender identity, and gender expression are distinct components of a person's identity. Sexual orientation should not be confused with a person's gender identity or gender expression.

**Transgender:** A broad term for people whose gender identity or expression is different from those typically associated with their sex assigned at birth. "Trans" is shorthand for "transgender." Note: Transgender is correctly used as an adjective, for example: "transgender people," "people who are transgender," "a woman who is transgender," etc. However, "transgenders" or "transgendered" are incorrect and disrespectful.

**Transition:** A broad term commonly used to refer to the ongoing process by which a person alters components of their gender expression and/or other personal characteristics to better align with their gender identity. A person's transition may or may not include a combination of social changes (e.g., name, pronouns, appearance and/or clothing), legal changes (e.g., legal name and/or legal gender markers), and medical changes (e.g., gender-affirming hormone therapy and/or surgeries). Note: Not all transgender and/or non-binary people want to transition or are able to access the resources necessary to do so. However, regardless of whether, how, or when a person takes any, some, or all of these actions, their gender identity is valid and should be respected and affirmed.

**Transphobia:** The hatred or fear of transgender, nonbinary, and gender nonconforming people. This sometimes leads to acts of violence and expressions of hostility. Transphobia is not confined to any one segment of society and can be found in people from all walks of life.

**Two-Spirit:** Contemporary umbrella term that refers to the historical and current First Nations people whose individual spirits were a blend of female and male spirits. This term has been reclaimed by Native American LGBTQ+ communities in order to honor their heritage and provide an alternative to the Western labels of gay, lesbian, or transgender.