



# TRANSGENDER FEDERAL EMPLOYEES: YOUR WORKPLACE RIGHTS

February 2012

*In recent years, the federal government has provided new guidance and protections for transgender federal employees. Federal employees have many of the same rights as other workers, as well as some additional protections. The processes for addressing workplace discrimination for federal employees are also unique. This resource outlines the rights and procedures transgender federal workers have. While NCTE does not provide legal services, we encourage any transgender federal worker who cannot resolve workplace issues through their agency's internal equal employment opportunity (EEO) process to seek legal counsel. We also encourage federal workers to share their experiences with NCTE to aid our advocacy efforts on behalf of all transgender people in the federal workforce.*

## WHAT FEDERAL LAWS PROTECT YOU?

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The following laws offer protection for transgender federal workers:

- **Title VII of the Civil Rights Act of 1964** prohibits sex discrimination in employment. In recent years, courts have increasingly held that discrimination because an employee or job applicant is transgender or gender non-conforming, or because he or she fails to conform to gender stereotypes, is sex discrimination under Title VII. Indeed, many agencies now specifically list gender identity as a form of sex discrimination in their EEO policies. However, your legal protection under Title VII does not depend on whether your agency has made that change in its EEO policy.
- **The Civil Service Reform Act of 1978** prohibits discrimination by the federal government on the basis of "conduct which does not adversely affect the performance" of an applicant or employee. Pursuant to a June 17, 2009 memorandum by President Obama, the Office of Personnel Management (OPM) has issued guidance clarifying that protection includes gender identity and being transgender.
- **Executive Order 13087** prohibits discrimination in federal employment based on actual or perceived sexual orientation. If you experience discrimination because of the gender of your partners or because you are or are perceived as gay, lesbian or bisexual, you are protected.

## WHAT ARE YOUR RIGHTS AT WORK?

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### **You have the right to be treated with respect and not be harassed.**

Gender-based harassment is unlawful and against federal employment policy when it is severe and pervasive and the agency does not take reasonable steps to stop it. Jokes or derogatory comments about transgender people or intrusive, disrespectful personal questions constitute harassment, and supervisors should take steps to stop it.

### **You have the right to transition at work.**

If you are ready to transition at work, you should contact the HR department and your immediate supervisor and inform them of your transition plans. You should be prepared to inform them about what exactly your needs will be. They should be respectful and help you plan the necessary steps to transition at work, including how and when you wish your co-workers to be informed. Once you begin presenting consistently with your gender identity at work, you should be treated accordingly in all respects.

## WHAT ARE YOUR RIGHTS AT WORK? (CONTINUED)

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### **You have the right to dress according to your gender identity.**

Dress codes should be applied to transgender employees the same way they are applied to other employees of the same gender. Dress codes should not be used to prevent you from living full-time in the role consistent with your gender identity. Once you have informed management that you are transitioning, you can begin wearing the clothes associated with the gender to which you are transitioning.

### **You have the right to be called by your preferred name and pronoun.**

At the time you begin presenting consistently with your gender identity in the workplace, managers, supervisors, and coworkers should use your preferred name and pronoun, and should use the correct name and pronouns in employee records and in communications with others about you. Continued, intentional refusal to use of your correct name and pronouns is inappropriate. It may also breach your privacy.

### **You have the right to use restrooms and locker rooms consistent with your gender identity.**

Once you have begun living and working full-time in the gender that reflects your gender identity, your agency should allow access to appropriate restrooms and locker rooms. Occupational Safety and Health Administration (OSHA) guidelines require employers to make adequate facilities available as freely as possible for all employees. Under no circumstances may an agency require you to use facilities that are unsanitary, potentially unsafe, or located at an unreasonable distance from your work station. Transitioning employees should not be required to have undergone any particular medical procedure in order to have access to restrooms or locker rooms.

### **You have the right to privacy concerning your transgender status and medical information.**

Information about your transition should be shared only with your consent. Medical information about individual employees is protected under the Privacy Act. You should never be required to share specific medical information as a condition of transitioning at work or using appropriate facilities. However, there are situations where you may be required to disclose your status as transgender, such as when obtaining or renewing a security clearance. Confidential information about employees should not be disclosed except where legally necessary.

### **You have the right to have your employee records fully updated.**

To correct the gender you will need to submit updated government-issued identification or a letter from a physician confirming that you have had “appropriate clinical treatment for gender transition.” To correct the name you will need to show a court order granting you a legal name change or an updated passport. More specific medical information should never be required.

## WHAT ARE YOUR RIGHTS REGARDING HEALTH INSURANCE?

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### **You have the right to the health insurance coverage offered by your agency in your location.**

You must be allowed to choose to participate in your employer’s health insurance plan. If you already have Federal health insurance benefits before you transition, you must be allowed to keep those benefits when you transition.

### **You have the right for your insurance records and cards to reflect your gender.**

Health insurance carriers should allow you to correct the gender designation on your records. Carriers who issue ID cards listing gender should issue you an appropriate card after this correction.

### **You have the right to coverage of medical exams and screenings regardless of your gender.**

You should be provided the care you need when those services are covered by your insurance plan, including procedures that are not typical for your gender. For example, a transgender man may still require mammograms or pap smears; a transgender woman may still require a prostate exam.

## WHAT ARE YOUR RIGHTS REGARDING HEALTH INSURANCE? (CONTINUED)

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### **You have the right for your marriage to continue to be recognized.**

If you are validly married at the time of transition, the transition does not affect the validity of your marriage. Spousal insurance benefits and other benefits should be continued even though your records reflect a new name and/or gender.

### **Most federal health plans still exclude transition-related care.**

Your insurance plan may exclude coverage for transition-related care in the fine print of your plan documents. An exclusion may be worded very broadly or may be worded narrowly to exclude only hormones and/or surgery. There is currently no explicit legal requirement for group or individual insurance plans to cover transition-related care. While this situation may change in the future, for now you should check your plan documentation. If you are a new employee choosing a Federal Employees' Health Benefit (FEHB) plan carrier, or when there is an open season for the FEHB, you should also carefully check the coverage of plans available in your area (plan documents are available on the OPM FEHB website). Some FEHB plan carriers in the future may offer coverage that does not exclude transition-related care.

## WHAT CAN YOU DO ABOUT DISCRIMINATION?

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### **OPM guidance may be helpful for informal resolution of a conflict.**

In 2011, OPM issued guidance for federal employers dealing with transgender employees, which covers many of the issues discussed in this document. While this guidance does not create new legal rights, it could be useful to present to a federal employer who may not be aware of it. If your agency is not clear about your rights or is not sure that the steps presented above are appropriate for your transition, consider bringing OPM's guidance to their attention. You may also contact the OPM Office of Diversity and Inclusion, which answers questions from agencies and individuals and provides guidance to agencies regarding the interpretation and implementation of this guidance. If you encounter mistreatment that cannot be resolved informally, your agency and your union both have formal procedures for resolving claims of discrimination.

### **Tips for the complaint process:**

- **Document everything.** Your complaint will be more effective if you can present solid factual information. It is important to begin collecting your evidence and keeping records in preparation. Keep a log of the date, time, location, witnesses, and people involved in any events that were disrespectful or discriminatory. Also keep any documents that your agency gives you, such as performance reviews or disciplinary notices. If you present your case in an organized way, you raise the chance of your complaint getting full attention and an appropriate resolution.
- **Stay on top of deadlines.** Timelines for the formal complaint process are very strict, and they are shorter for federal employees than for private workers. If you feel that you have experienced a pattern of ongoing discrimination, it is safest to assume that the time limit began as soon as you recognized that pattern. Make sure you make a note of the date when you first file your complaint. Mark your calendar at every stage of the process so that you know all the relevant deadlines.
- **Be assertive.** Do not assume that once you file a complaint, the complaint process will proceed automatically. You will have to stay aware and be assertive. Check in periodically to find out what is happening with your case. If the action or inaction of the EEO counselor handling your case is causing you problems at work, call that to their attention.
- **Be specific.** You cannot rely on your local EEO office to state the basis of your claim, or to state it correctly. You must state that you are claiming that the acts you describe constitute sex discrimination. Describing the acts that you believe are discriminatory is not usually enough.

## Tips for the complaint process (continued):

- **Be persistent.** In the past, Federal EEO offices have dismissed informal and formal complaints from transgender employees, sometimes without investigation. To keep your claim alive after a dismissal or denial, you must appeal it upward at every stage. No dismissal is final until it comes from the EEOC, and even then, you have the right to appeal to a court. Again, you must meet all deadlines in order to keep your rights.

## Union grievance procedures

If you are a member of a union, your union will have a negotiated grievance procedure to resolve disputes between employees and your agency. This process may specifically exclude discrimination complaints, or may have rules about the interaction between the grievance procedure and your agency's EEO process. Your union membership will not prevent you from bringing a formal EEO complaint, but bringing a formal EEO complaint may prevent you from using your union procedure. Your union procedure may have strict deadlines and fewer safeguards or appeal rights than an EEO complaint, but it may also be faster or require less legal assistance. Contact your union representative for details and decide how it would be best for you to proceed based on the seriousness of your issue, and your relationship with your union.

## Your agency's internal EEO processes

### Counseling or Alternate Dispute Resolution.

The first step is to contact an EEO Counselor at the agency where you work or where you applied for a job. You must contact your agency's EEO Counselor within **45 days from the day the discrimination occurred or you became aware of the discrimination.** (Note: this is a shorter time period than applies to the private sector.)

You may choose to participate in either counseling to resolve the problem or Alternative Dispute Resolution (ADR) if your agency offers it. Ordinarily, counseling must be completed within 30 days and ADR within 90 days. If the counseling or ADR are unsuccessful your EEO Counselor will give you notice of how to file a formal complaint, which must be done within 15 days.

### Formal complaint and investigation.

If you choose to file a formal complaint, you should know that some agencies list gender identity as a separate category for EEO complaints. However, only complaints filed under the category of sex discrimination can be appealed to the EEOC, as discussed below. Regardless of what an EEO counselor may tell you, you may file a complaint of discrimination based on your transgender status under the category of sex discrimination.

Once you have filed a formal complaint, your agency will review the complaint and decide whether the case should be dismissed for a procedural reason (for example, you contacted the EEO counselor too late or you filed your claim too late). If your agency doesn't dismiss the complaint, it will conduct an investigation. The agency has 180 days from the day you filed your complaint to finish the investigation.

If your claim is dismissed with a statement that it is not covered under Title VII as sex discrimination, please contact NCTE immediately. We will help you appeal that procedural dismissal to the EEOC.

### After the investigation.

When the investigation is finished, your agency will issue a notice giving you two choices: either request a hearing before an EEOC Administrative Judge or skip the hearing stage and ask your agency to issue a final order as to whether discrimination occurred. In either case, your agency will ultimately issue a final order on your complaint. You will then have the right to appeal that final order to the EEOC.

**Hearing before an EEOC Administrative Law Judge.** If you wish to have a hearing, you must make your request in writing within 30 days from receiving notice about your hearing rights. An EEOC Administrative Judge will conduct the hearing, make a decision, and order relief if discrimination is found. Once your agency receives the Administrative Judge's decision, the agency will issue a final order which will tell you whether the agency agrees with the Administrative Judge and if it will grant any relief the judge ordered. The agency will have 40 days to issue the final order, which will also tell you about your right to appeal to the EEOC, your right to file a lawsuit, and the deadlines for both.

**Appealing your agency's final order to the EEOC.** If your agency issues a final order and no discrimination is found, or if you disagree with some part of the decision, you have the right to appeal the decision to the EEOC in Washington, DC, or challenge it in court. If you appeal the order, your appeal will be decided by the EEOC's Office of Federal Operations in Washington, DC.

You must file your appeal with the EEOC no later than 30 days after you receive your agency's final order. If you do not agree with the EEOC's decision on your appeal of the agency's final order, you can ask for a reconsideration of that decision within 30 days. The agency also has the right to ask the EEOC to reconsider the decision. Once the EEOC has made a decision on your request for reconsideration, the decision is final. If your agency has lost, the agency cannot appeal to court. However, if you have lost before the EEOC, you may appeal the EEOC's decision in court.

### **Filing a lawsuit**

You must go through the administrative complaint process described above before you can file a lawsuit. There are several different points during the process when you have the right to file a lawsuit:

- If your agency does not finish investigating your formal complaint in 180 days.
- Within 90 days from the day you receive your agency's decision on your complaint, so long as no appeal has been filed.
- If the EEOC does not issue a decision on your appeal in 180 days.
- Within 90 days from the day you receive the EEOC's decision on your appeal.

This type of lawsuit is complex and you will probably need to hire a lawyer to help you. Deadlines are still very important, so if you feel you may ultimately need to sue you should begin looking for a lawyer early in the process.

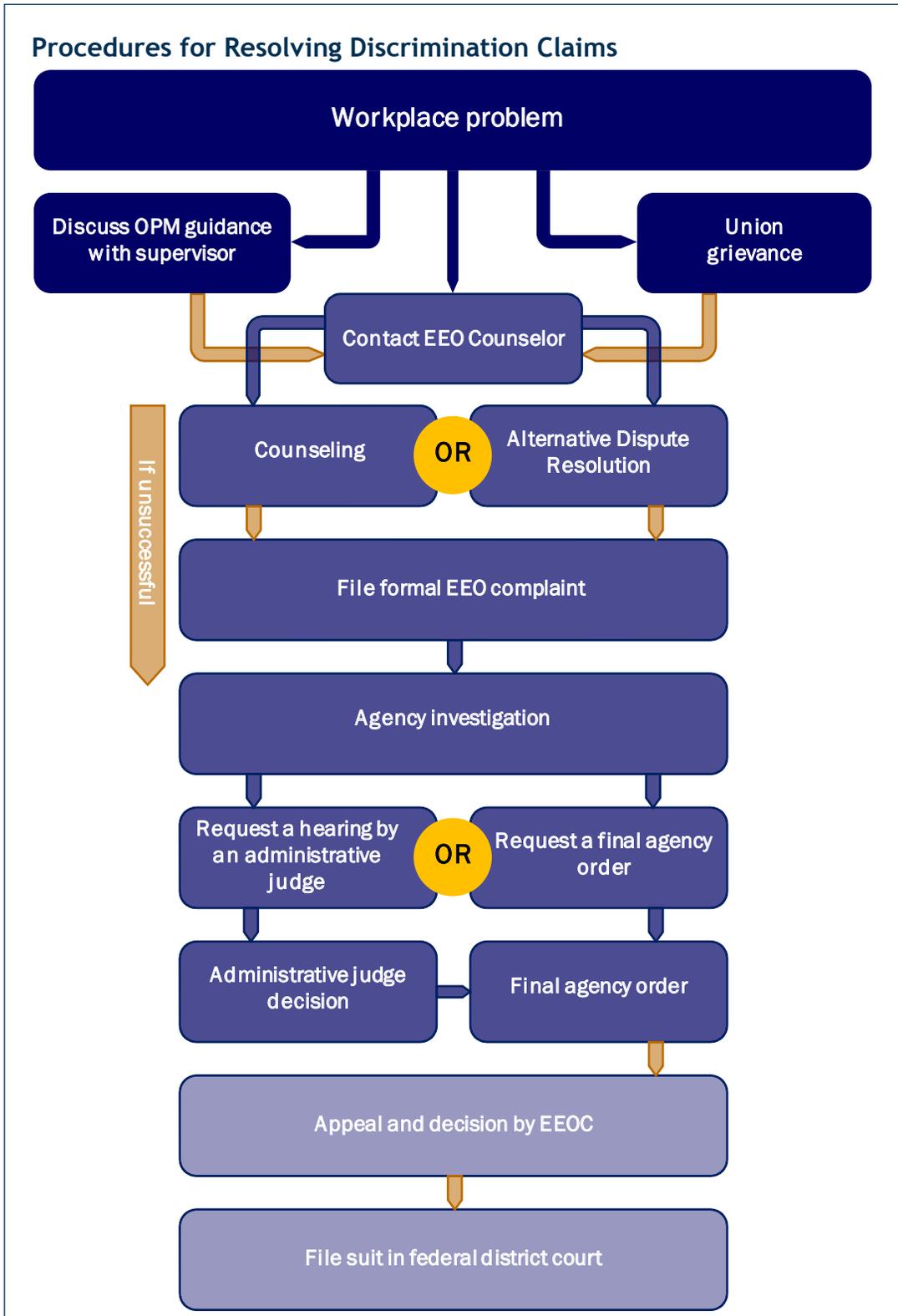
### **Alternatives to an Appeal to the EEOC**

If you experienced discrimination because you are transgender or because you did not conform to gender stereotypes and your claim is filed under the category of sex discrimination, you can appeal it to the EEOC to decide whether your claim does constitute sex discrimination. If your claim is filed under the separate category of sexual orientation discrimination, or (if included in your agency's policy) is filed under the separate category of gender identity discrimination, you cannot currently request a hearing or appeal to the EEOC. Your agency may have a separate internal complaint process for these claims.

The Office of Special Counsel (OSC) an independent agency that investigates violations of federal employees' rights under the civil service laws, including discrimination based on gender identity or sexual orientation. Complaints filed with OSC are not subject to deadlines like EEO complaints, and OSC has the power to seek a delay or "stay" of a personnel action pending further investigation.

If OSC finds that a prohibited personnel action has occurred, it will seek corrective action from the Merit Systems Protection Board (MSPB). The MSPB can order corrective action by a federal agency (such as reinstatement and back pay) and disciplinary action against employees responsible for discrimination. Employees may also choose to file an appeal directly with MSPB instead of seeking help from OSC.

Each of these procedures has advantages and disadvantages. We recommend reviewing the resources listed in this document and consulting an attorney for more information.



## GETTING HELP

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Obtaining redress for workplace discrimination, whether through agency procedures or the courts, can be a complicated process. Don't hesitate to seek help from your union representative or a lawyer (or both). While NCTE does not provide legal services or referrals, there are many other groups that may give you referrals or maintain lists of local employment lawyers. You can try your local legal aid or legal services organization, or national or regional organizations such as Lambda Legal, the National Center for Lesbian Rights, the ACLU, the Transgender Law Center and others listed on NCTE's website.

## SHARE YOUR STORY

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If you are facing discriminatory treatment, consider sharing your story with NCTE so we can use it in advocacy efforts to change policy, improve education, and reduce future discrimination. If you successfully resolve issues in your workplace, and especially if any of the material here helped, we want to hear from you as well.

### Other Resources

**OPM Guidance on the Employment of Transgender People in the Federal Workplace**

<http://www.opm.gov/diversity/Transgender/Guidance.asp>

**OPM Guidance on Reconstructing Personnel Files**

[http://www.opm.gov/feddata/Ch4\\_ReconstructPersonnelFolder.pdf](http://www.opm.gov/feddata/Ch4_ReconstructPersonnelFolder.pdf)

**OPM Guide to Addressing Sexual Orientation Discrimination in Federal Civilian Employment**

<http://www.opm.gov/er/address2/Guide01.asp>

**FEHB Carrier Letter on Gender Reassignment**

[http://www.opm.gov/carrier/carrier\\_letters/2011/2011-12.pdf](http://www.opm.gov/carrier/carrier_letters/2011/2011-12.pdf)

**USAJobs EEO Statement**

<http://www.usajobs.gov/EEO>

**EEOC Federal Sector page**

<http://eeoc.gov/federal/>

**Office of Special Counsel**

<http://www.osc.gov>

**Merit Systems Protection Board**

<http://www.mspb.gov>

**Links to LGBT Legal Organizations**

<http://transequality.org/Resources/links.html#legal>

**Pride at Work**

<http://www.prideatwork.org/>