

CHAPTER 1:

ECONOMIC OPPORTUNITY



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More than one in four transgender adults have lost at least one job due to bias, and more than three-fourths have experienced some form of workplace discrimination.¹ Biased refusal to hire, privacy violations, harassment, and even physical and sexual violence on the job are common occurrences, and experienced at even higher rates by transgender people of color. Many report changing jobs to avoid discrimination or the risk of discrimination. Extreme levels of unemployment and poverty lead one in eight to become involved in underground economies—such as sex and drug work—in order to survive.

While 19 states, D.C., Puerto Rico, and over 200 local jurisdictions, and hundreds of employers have adopted clear laws or policies to prohibit this discrimination, half the nation still lives without these critical protections. And while transgender people face unemployment at even higher rates than the rest of the U.S. workforce,² they can also face discrimination in the public jobs programs meant to connect them with job opportunities and/or training.

In recent years, courts and federal agencies have increasingly taken the view that discrimination against transgender people is prohibited by existing laws against sex discrimination.³ This updated understanding of sex discrimination laws, accepted by the Equal Employment Opportunity Commission in 2012 and by the Attorney General in 2014, has the potential to be a powerful tool to combat employment bias. A critical EEOC decision in 2015 also clarified that denying workers access to restrooms consistent with their gender identity constitutes sex discrimination. NCTE has and will continue to work to more firmly establish this understanding of the law and the critical protection it can provide. Ultimately, however, passing a federal law to prohibit gender identity discrimination in the most specific terms is essential to ensuring that employers understand and consistently follow the law, and therefore to eliminating anti-trans discrimination.

Despite new nondiscrimination protections, many workers—including most federal government workers—are still subject to a uniquely discriminatory and baseless across-the-board exclusion of medically necessary, transition-related care from the health benefits they've earned. These discriminatory exclusions are being increasingly abandoned by large employers; 53% of companies surveyed for the 2015 HRC Corporate Equality Index provide inclusive benefits compared to less than 9% in 2009.⁴ The federal government in 2014 announced that federal employee plans would no longer be required to discriminate, but stopped short of requiring these plans cover transition-related care. Thus, more is needed to ensure all workers can access the benefits they've earned.

1 Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, at 53. Washington, DC: National Center for Transgender Equality and National Gay and Lesbian Task Force (2011).

2 *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, at 55.

3 See, e.g., *Complainant v. McHugh*, E.E.O.C. App. No. 0120133395 (Apr. 1, 2015); Attorney General Memorandum, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 18, 2014); *Macy v. Holder*, E.E.O.C. App. No. 0120120821 (April 20, 2012); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Finkle v. Howard County, Md.*, 12 F.Supp.3d 780 (D.Md. 2014).

4 Human Rights Campaign, *Corporate Equality Index 2015*, 30 (2015), available at: <http://hrc.org/cei>.

Policy Advances

- The Occupational Safety and Health Administration (OSHA) issued guidance to employers on ensuring safe and adequate restroom access for transgender workers. (2015)
- The Department of Labor issued national guidelines to all federally funded job centers and employment and training programs to prevent discrimination against LGBT people, including ensuring respect for every person's gender identity. (2015)
- The Equal Employment Opportunity Commission (EEOC) declared that workers have the right to use workplace restrooms consistent with their gender identity, with the case *Complainant v. McHugh*. (2015)
- The Department of Justice filed a landmark lawsuit against Southeastern Oklahoma State University for firing a transgender professor. (2015)
- The Department of Labor issued guidance for all Job Corps program sites to ensure equal opportunity and respectful treatment for transgender youth. (2015)
- The Attorney General issued a memorandum stating that the Justice Department will interpret federal sex discrimination laws to prohibit bias based on gender identity. (2014)
- The EEOC filed two landmark lawsuits against employers in Florida and Michigan for discrimination against transgender workers. (2014)
- President Obama signed an Executive Order explicitly prohibiting federal contractors and subcontractors from discriminating on the basis of gender identity and sexual orientation. (2014)
- The Equal Employment Opportunity Commission (EEOC) made protecting the rights of LGBT workers a top priority in its four-year strategic plan. (2012)
- The EEOC declared that anti-transgender bias is a form of sex discrimination under Title VII of the Civil Rights Act, with the case *Macy v. Holder*. (2012)
- The Federal Aviation Administration (FAA) revised its medical certification procedures for transgender pilots to reflect current medical science and eliminate unnecessary obstacles to certification. (2012)

Policy Advances: Federal Workforce

- The Office of Personnel Management (OPM) issued a carrier letter stating that all Federal Employee Health Benefits Plans must no longer contain exclusions for medically necessary, transition-related care for federal employees and their partners and dependents. (2015)
- The Office of Personnel Management (OPM) issued detailed workplace guidance for federal agencies covering employment issues for transgender employees, including privacy and confidentiality, access to facilities, dress standards, and non-discrimination expectations. (2011, updated 2015)
- President Obama signed an Executive Order explicitly protecting federal employees from discrimination on the basis of gender identity. (2014)
- OPM issued new regulations that make clear transgender employees are protected by federal sex discrimination laws. (2014)

- Most federal agencies updated their Equal Opportunity Employment (EEO) policies to reflect *Macy v Holder* which found discrimination against transgender employees to be sex discrimination in violation of Title VII. (2012-2014)
- OPM updated its procedures for personnel records to allow transgender employees to update their name and gender to be consistent with the employee's gender identity. (2011)

Needed Policy Changes

- Congress should pass legislation which would explicitly prohibit discrimination in employment based on gender identity and sexual orientation.
- Congress should raise the national minimum wage to a living wage. Congress should pass the Healthy Families Act to secure paid sick leave for all workers.
- Congress should pass the Ban the Box Act, which would prohibit questions about prior arrests or convictions in employment except in narrow circumstances.
- The President should issue an Executive Order prohibiting questions about prior arrests or convictions in applications for federal employment or federal contractor employment except in narrow circumstances.
- The Equal Employment Opportunity Commission (EEOC) should issue enforcement guidelines pertaining to transgender people based on sex discrimination under Title VII of the Civil Rights Act of 1964, covering such issues as dress codes, access to sex-segregated facilities, and employee benefits.
- The Department of Justice and the EEOC should aggressively pursue litigation to advance the rights of LGBT workers under federal sex discrimination laws and publicize positive resolutions.
- Each federal agency that has yet to do so should issue a policy directive stating that it will ensure that agency employees will not be discriminated against on the basis of gender identity and that transgender discrimination claims will be processed according to Title VII procedures.
- The Occupational Safety and Health Administration (OSHA) should issue a standards interpretation clarifying that employers must provide all workers with full access to sanitary facilities consistent with their gender identity as a matter of health and safety.
- The Occupational Safety and Health Administration (OSHA) should issue a standards interpretation clarifying that employers may designate some multi-user restrooms for use by employees of all genders.
- The Department of Homeland Security, Department of Justice, and other federal agencies should adopt policies providing for the recognition of transgender law enforcement and security officers on the basis of their gender identity for purposes of gender-specific job duties.
- The Office of Personnel Management (OPM) should ensure that all Federal Employee Health Benefits Plans provide the medically necessary, transition-related care for federal employees and their partners and dependents that is called for in OPM's June 2015 carrier letter.
- Office of Personnel Management (OPM) should further strengthen its transgender employee guidelines for federal agencies and make clear that they reflect the requirements of equal opportunity laws; to more clearly protect the rights of workers with non-binary gender identities; and to ensure workers can use their chosen name in email addresses, business cards and other daily uses regardless of whether they have a legal name.
- Office of Personnel Management (OPM) should further update the federal personnel record gender marker policy to allow for certification of gender change by licensed therapists, psychologists, and nurse practitioners.
- The Department of Labor should identify, promote and fund best practices for helping transgender people enter or re-enter the workforce.