



November 1, 2023

Submitted via regulations.gov

Chair Charlotte A. Burrows
Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Re: Proposed Enforcement Guidance on Harassment in the Workplace

The National Center for Transgender Equality (NCTE) and undersigned organizations are pleased to submit this comment in response to the Equal Employment Opportunity Commission's proposed guidance on harassment in the workplace. The National Center for Transgender Equality is a national advocacy organization founded in 2003 to change policies to protect the rights of transgender people. In the nation's capital and throughout the country, NCTE works to replace disrespect, discrimination, and violence with empathy, opportunity, and justice.

The EEOC's proposed guidance affirms the right of transgender people to a workplace free from discrimination and harassment, as set forth by the United States Supreme Court in *Bostock v. Clayton County*.¹ By reiterating that Title VII of the Civil Rights Act of 1964 protects workers from discrimination based on gender identity and gender expression and expressly stating that using the wrong name or pronouns for a person is sex-based harassment, the proposed guidance strengthens the protections transgender people need at work. NCTE encourages the EEOC to expeditiously finalize its proposed guidance.

Transgender people face pervasive discrimination and harassment in the workplace on account of their gender identity, with dire consequences for their employment prospects and economic security. According to the 2015 United States Transgender Survey, about one in three (30 percent) transgender people in the workforce had experienced mistreatment in the workplace on account of their gender identity in the previous year.² Fifteen percent of transgender workers reported experiencing verbal harassment or physical assault at work within the previous year. This rate was almost twice as high among American Indians surveyed (28 percent) and 11 points higher among Middle Eastern respondents

¹ *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1742 (2020).

² James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M, *The Report of the 2015 U.S. Transgender Survey* (Washington, DC: National Center for Transgender Equality, 2016), 148, <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

(26 percent).³ A more recent 2021 study by the Williams Institute estimated that over the course of their careers, 43.8 percent of transgender people experience verbal harassment at work, usually from supervisors, coworkers, or customers.⁴

In addition to workplace harassment, transgender people face a range of other forms of mistreatment on the job. Sixteen percent of transgender people in the workforce had their privacy violated in the previous year by employers or coworkers who disclosed information about their transgender status, medical records, or other confidential information to third parties without their consent.⁵ As discussed further below, many transgender people choose not to disclose their transgender status at work for fear of harassment or mistreatment. Experiencing a privacy violation revealing sensitive information about a worker's transgender identity, the name they were given at birth, medical records, or similar information can be humiliating and make the worker a target of harassment.

Moreover, transgender people are often prohibited from or penalized for presenting and behaving in accordance with their gender identity at work. Four percent of U.S. Transgender Survey respondents who were working reported that within the previous year, they were told directly that they had to present as the gender they were assigned at birth to keep their job. Three percent were removed from external-facing positions where they interact with clients or customers and two percent were transferred to a different department or position because of their transgender status.⁶ These types of mistreatment adversely impact the mental and physical health, income, and job security of transgender workers.

One respondent to the 2015 U.S. Transgender Survey described her experience being “outed” —having one's LGBTQI+ identity disclosed without their consent—and being denied appropriate facilities. “The day before I started work, HR sent a mass email to everyone in the office ‘warning’ them about my trans status. I used the women's bathroom since starting, but a month into the job, I was called to my manager's office and told that I could not use the women's bathroom. I did not feel safe in the men's bathroom, so I told the HR manager that due to city law, I could not be denied access to the bathroom matching my gender identity. I was fired the next day for no given reason.”⁷ This respondent was not alone. Seven percent of transgender workers reported that in the previous year, they were denied access to the restroom corresponding to their gender identity or were otherwise unable to secure appropriate facilities.⁸

³ James et al., *2015 U.S. Transgender Survey*, 153-154. Black, white, and Latino/a respondents were verbally harassed or physically assaulted at a rate of 15 percent. Asian and multiracial respondents experienced this form of abuse at the rates of 13 percent and 18 percent, respectively.

⁴ Brad Sears, Christy Mallory, Andrew R. Flores, Kerith J. Conron, *LGBT People's Experiences of Workplace Discrimination and Harassment* (Los Angeles, CA: UCLA Williams Institute, 2021), 2, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

⁵ James et al., *2015 U.S. Transgender Survey*, 153-154.

⁶ James et al., *2015 U.S. Transgender Survey*, 153-154.

⁷ James et al., *2015 U.S. Transgender Survey*, 151.

⁸ James et al., *2015 U.S. Transgender Survey*, 153-154.

Because of the prevalence of transphobia in the workplace and the general public, the overwhelming majority of transgender people in the workforce change their behavior to avoid mistreatment and discrimination. According to the 2015 U.S. Transgender Survey, 77 percent of transgender workers had taken actions to avoid anti-transgender discrimination in their place of employment in the previous year. Specifically, more than half (53 percent) hid their gender identity at work to avoid mistreatment and more than one in four (26 percent) delayed their transition due to fears of adverse impacts on their career and work environment.⁹

Many respondents were forced to act in ways that detrimentally affected their career and income to protect their safety and avoid discrimination or harassment. More than one quarter (26 percent) of respondents in the workforce stayed in jobs they would have preferred to leave, and 24 percent kept a job for which they were overqualified. Fifteen percent quit their job to escape discrimination and abuse at their place of employment and thirteen percent decided not to seek a promotion or a raise.¹⁰ As a result, transgender people are more likely than the general population to be trapped in low-quality jobs. This is especially true for disabled workers and Black, American Indian, and Latino/a workers, who were even more likely to stay at a job they would have preferred to leave than their white counterparts.¹¹ These survival tactics, in combination with employment discrimination and other barriers transgender people face, result in severe economic disparities. A 2021 study by researchers at McKinsey & Company found that cisgender employees make 32 percent more money a year than transgender employees, even when the latter have similar or higher education levels.¹²

One survey respondent described the experience of making an economic sacrifice in order to work in an affirming environment. “I changed jobs from a high-paying one where I was not comfortable being out as a trans person to a much lower-paying one where I felt that my identity would be respected. Having a job where my gender identity is respected consistently, where I don’t have to constantly hide myself, has improved my quality of life more than any other aspect of my transition.”¹³ As this respondent’s story shows, harassment or fear of potential harassment comes with real economic costs.

Discrimination in the job market and harassment keep many transgender people out of the formal economy altogether, instead getting their income from the underground economy, including activities such as sex work and drug sales. In fact, about one in five transgender people report participating in the underground economy at some point in their life.¹⁴ The unique experiences and barriers transgender women of color face contribute to their overrepresentation in the underground economy, specifically sex work, both illegal and legal. One in four (24 percent) of Black transgender women have engaged in

⁹ James et al., *2015 U.S. Transgender Survey*, 154.

¹⁰ James et al., *2015 U.S. Transgender Survey*, 154.

¹¹ American Indian (40%), Black (31%), and Latino/a (28%) respondents and respondents with disabilities (30%) were more likely to stay at a job that they would have preferred to leave in order to avoid discrimination. James et al., *2015 U.S. Transgender Survey*, 154.

¹² David Baboolall, Sarah Greenberg, Maurice Obeid, Jill Zucker, *Being transgender at work* (New York, NY: McKinsey & Company, 2021) <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/being-transgender-at-work/>.

¹³ James et al., *2015 U.S. Transgender Survey*, 151.

¹⁴ James et al., *2015 U.S. Transgender Survey*, 158.

sex work—nearly five times the rate of white transgender women (5 percent).¹⁵ Sex work comes with a number of risks, including the contraction of HIV and other sexually transmitted diseases and infections that could have lifelong impacts on the worker’s health. Transgender people who engage in sex work, the drug trade, and other underground work are also exposed to police brutality and harassment, incarceration, sexual assault, and other forms of violence.

The economic outcomes resulting from anti-trans discrimination and harassment in the workplace and job market are severe. Transgender people are twice as likely as cisgender people to be unemployed and experience much higher rates of poverty and homelessness.¹⁶ In 2021, 21.2 percent of trans people experienced poverty, compared to 11.5 percent of heterosexual, cisgender people.¹⁷ Eight percent of transgender adults reported experiencing homelessness in the previous year, compared to 1 percent of heterosexual, cisgender people and 3 percent of cisgender sexual minorities.¹⁸ These poor economic conditions, in turn, compound health disparities and the elevated risk of experiencing violence.

Transgender people have the right to bring their passion, talent, and skills to the workforce as equal members of society. The EEOC’s proposed guidance will empower transgender workers by affirming their rights in the workplace against harassment based on their gender identity or expression. Moreover, by recognizing deadnaming and misgendering¹⁹ as verbal harassment, the guidance addresses the unique forms of mistreatment that transgender people face and clarifies that they constitute harassment under Title VII.

The National Center for Transgender Equality applauds the EEOC’s leadership in fighting anti-transgender discrimination in the workforce. While the guidance is undoubtedly the strongest EEOC has ever produced on this matter, NCTE requests that the Commission consider the following improvements.

1. **Address harassment faced by intersex workers.** Approximately 1.7 percent of the world population has intersex traits—physical, hormonal, or genetic attributes that do not fit binary notions of sex.²⁰ Intersex people face distinct forms of prejudice and harassment that should be directly addressed by this guidance. We recommend that the Commission include “sex

¹⁵ James et al., *2015 U.S. Transgender Survey*, 158. American Indian, Asian, and Latina transgender women each engaged in sex work at a rate of 13 percent. Middle Eastern and multiracial transgender women engaged in sex work at the rates of 9 and 12 percent, respectively.

¹⁶ Baboolall et al., *Being transgender at work*.

¹⁷ Bianca D.M. Wilson, Lauren J.A. Bouton, M. V. Lee Badgett, Moriah L. Macklin, *LGBT Poverty in the United States: Trends at the Onset of COVID-19* (Los Angeles, CA: UCLA Williams Institute, 2023) 8, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Poverty-COVID-Feb-2023.pdf>.

¹⁸ Bianca D.M. Wilson, Soon Kyu Choi, Gary W. Harper, Marguerita Lightfoot, Stephen Russell, Ilan H. Meyer, *Homelessness Among LGBT Adults in the U.S.*, (Los Angeles, CA: UCLA Williams Institute, 2020) 1, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Homelessness-May-2020.pdf>.

¹⁹ “Deadnaming” refers to the practice of referring to someone using their former name, usually the one given to them at birth in accordance with the sex they were assigned at birth. “Misgendering” is the application of gendered language, such as pronouns, that does not align with a person’s gender identity.

²⁰ Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York, NY: Basic Books, 2000).

characteristics, including intersex traits” alongside sexual orientation and gender identity within the meaning of “sex-based harassment” and provide examples of workplace harassment based on intersex traits. This would bring the guidance in alignment with extensive court precedent²¹ and numerous federal agencies, including the Department of Justice, Health and Human Services, Department of Education, and the Consumer Financial Protection Bureau, which all recognize anti-intersex discrimination as a form of sex discrimination in violation of federal civil rights law.²²

2. **Protect pregnant workers of all genders.** The proposed guidance rightly recognizes that federal law protects against discrimination based on pregnancy, childbirth, or other reproductive decisions. When finalizing this guidance, NCTE urges EEOC to consistently use gender-neutral language such as “an individual” instead of “a woman” when discussing reproductive rights to ensure that transgender men and other transgender or nonbinary people capable of bearing children are protected from harassment.
3. **Define the limits of religiously motivated harassment.** The proposed guidance notes that Title VII requires that employers accommodate their employees’ sincerely held religious beliefs while protecting workers from religiously motivated harassment. NCTE encourages the Commission to clarify when religious expression constitutes harassment and creates a hostile work environment, especially in the treatment of transgender workers.

NCTE thanks the EEOC for its proposed guidance and continued commitment to protecting workers from discrimination based on their sex, sexual orientation, gender identity, gender expression, and sex characteristics. For questions or more information about the transgender workforce you can contact Olivia Hunt, Policy Director, and Caius Willingham, Senior Policy Advocate.

Sincerely,

National Center for Transgender Equality

²¹ See, e.g., *A.C. v. Metro. Sch. Dist. of Martinsville*, ___ F.4th ___, 2023 U.S. App. LEXIS 19785, *21-22 (7th Cir. Aug. 1, 2023) (in dicta); *Grimm v. Gloucester County School Board*, 972 F.3d 586, 596, 615 (4th Cir. 2020) (in dicta); *Hughes v. Home Depot, Inc.*, 804 F.Supp.2d 223 (D.N.J. 2011); *Kastl v. Maricopa County Community College District*, No. 02–1531, 2004 WL2008954 (D. Ariz. June 3, 2004), summ. judg. granted on other grounds, No. CV-02-1531-PHX-SRB (D. Ariz. Aug. 22, 2006). See also *Hecox v. Little*, 2023 U.S. App. LEXIS 21541 (9th Cir. Aug. 17, 2023) (recognizing that the concept of “biological sex” includes intersex variations); *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 n.5 (D.D.C. 2006) (same).

²² Interpretation of *Bostock v. Clayton County* regarding the nondiscrimination provisions of the Safe Streets Act, the Juvenile Justice and Delinquency Prevention Act, the Victims of Crime Act, and the Violence Against Women Act (Mar. 10, 2022), <https://www.justice.gov/crt/page/file/1481776/download>; Title IX Legal Manual (updated Aug. 12, 2021) (internal citations omitted), <https://www.justice.gov/crt/title-ix#Bostock>; Nondiscrimination in Health Programs and Activities, 87 FR 47824 (Aug. 4, 2022); Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 FR 56144, 56159, 56178 (Oct. 7, 2021), codified at 42 CFR § 59.5.; Nondiscrimination in Health Programs and Activities, 81 FR 31375, 31389 (May 18, 2016); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 FR 41390 (Jul. 12, 2022); Consumer Financial Protection Bureau, Small Business Lending Under the Equal Credit Opportunity Act (Regulation B); Final rule, 88 FR 35150, 35166 (May 31, 2023).

Aces NYC
Adirondack North Country Gender Alliance
AIDS Foundation Chicago
Alliance For Full Acceptance SC
American Atheists
Appalachian OUTreach
Athlete Ally
CA LGBTQ Health and Human Services Network
CAMP Rehoboth Community Center
Caribbean Equality Project
Carolina Abortion Fund
Center for Applied Transgender Studies
CenterLink: The Community of LGBTQ Centers
CHLP
Clock, Inc LGBT+ Community Center
COLAGE
Colgay Pride of Columbus Georgia
Colors+
Eastern PA Trans Equity Project
Equality Center of the Rocky Mountains
Fabulous Arts Foundation
Fair Wisconsin
Family Equality
FORGE, Inc.
Forum for Equality
GLMA: Health Professionals Advancing LGBTQ+ Equality
HIV Medicine Association
interACT
International Transgender Education Organization
Jackson (MI) Pride Center
JQY, Inc.
Kentucky Health Justice Network
Kentucky Youth Law Project, Inc.
Latino Commission on AIDS
LGBT Center of SE Wisconsin
LGBT Life Center
LGBTQ+ Allies Lake County
Los Angeles LGBT Center
MA Transgender Political Coalition
Mazzoni Center
Minority Veterans of America
MomsRising
Movement Advancement Project

National LGBT Cancer Network
National LGBTQ Task Force
National LGBTQ Task Force Action Fund
National LGBTQ+ Bar Association
National Native American AIDS Prevention Center (NNAAPC)
New Haven Pride Center
NEW Pride Agenda
NJCRI
North Idaho Pride Alliance
Oasis Legal Services
One Colorado
Open Aid Alliance
oSTEM at UT Austin
OutNebraska
Pacific Pride Foundation
PFLAG Athens Area, Georgia
PFLAG Fort Collins / Northern Colorado
PFLAG Sacramento
Philly Trans March
Point of Pride
Pride Action Tank
Pride On Foot
PRISM FL, Inc
PROMO Missouri
Q Center
Resource Center
Sacramento LGBT Community Center
SAGE
Sam & Devorah Foundation for Trans Youth
SMYAL
Spectrum: The Other Clinic
SQSH (St. Louis Queer+ Support Helpline)
St. Louis Queer+ Support Helpline
Stand with Trans
StartOut
The Debra Smith Wellness Center Inc
The Mahogany Project
The Montrose Center
TRACTION
Trans Minors Rights
Trans Northland
Trans Pride Initiative
Trans Youth Equality Foundation
Transformative Justice Law Project of Illinois

Transgender Assistance Program Virginia
Transgender Law Center
Transgender Strategy Center
Transmen Rising USA
TransOhio
TransSOCIAL, Inc.
TransYouniting
True Colors United
URGE: Unite for Reproductive and Gender Equity
Waves Ahead Puerto Rico
WeCareTN
Whitman-Walker Institute

