TO: **Office of Federal Contract Compliance Programs Staff**

FROM: **National Center for Transgender Equality**

RE: **Recommendations for Executive Order 11246 Implementing Regulations**

DATE: **October 3, 2014**

We greatly appreciate the OFCCP's work to ensure equal employment opportunities for transgender workers. Because of the persistent and pervasive nature of employment discrimination against transgender people, it is essential that OFCCP use all available enforcement tools to address it—including strong regulations, guidance, public education, outreach, and technical assistance that specifically address anti-transgender bias.

Strong regulations from OFCCP would bring needed clarity to this area of employment law. Federal and state agencies and courts have developed a set of clear and coherent principles to address these issues, but these principles are still not widely known or understood by many employers around the country. These principles apply equally under Title VII, as interpreted in *Macy*, and under Executive Order 11246, as amended. In this memorandum, we outline those well-supported principles that should be included in regulations and that should also guide OFCCP's other enforcement activities in this area. The issues covered in this memo arise again and again and constitute the main barriers for transgender workers today—this is truly where the rubber meets the road for equal opportunity.

I. General Principles

If the recognition that gender identity discrimination as sex discrimination is to have real meaning for transgender people, it must protect a transgender woman's ability to live and work as a woman, and a transgender man's ability to live and work as a man. This is the essence of cases such as like *Schroer v. Billington*,[1] *Glenn v. Brumby*,[2] and *Macy v. Holder*.[3] In each case, the adverse action targeted the employee's decision to live, dress, and work in a manner consistent with their gender identity. It must be clear to employers that just as they cannot terminate an employee for transitioning on the job, they also cannot discriminate against an employee for failing to live, dress, and work as their birth-assigned sex, contrary to their gender identity. In both examples, Title VII –and by extension EO 11247 – prohibits an employer from demanding that a transgender person suppress his or her gender identity in the workplace. Put more simply, gender identity nondiscrimination requires that all employees be permitted to live, dress, and work in a manner consistent with their gender identity.

State human rights agencies and courts have overwhelmingly adopted this principle in interpreting gender identity nondiscrimination laws. For example, the District of Columbia's implementing regulations on gender identity begin by stating they are intended to "ensure that

[1] Schroer v. Billington, 577 F. Supp. 2d 293, 304 (D.D.C.).
[2] Glenn v. Brumby, 663 F.3d 1312, 1316–17, 1319–20 (11 Cir. 2011).
[3] Macy v. Holder, E.E.O.C. App. No. 0120120821, 2012 WL 1435995 (E.E.O.C. 2012). *Cf. also* Doe v. McConn, 489 F. Supp. 76, 80 (S.D. Tex. 1980) (holding ordinance prohibiting wearing clothing of "the opposite sex" unconstitutional as applied to transgender defendant); Chicago v. Wilson, 389 N.E.2d 522, 522–25 (Ill. 1978) (same).

transgender people are treated in a manner that is consistent with their identity or expression, rather than according to their presumed or assigned sex or gender."[4]

An essential corollary to this principle is that an employer must generally accept the sincerity of an employee's asserted gender identity, and cannot single out transgender employees to demand medical or other evidence of their gender identity. At least five states (Connecticut, Delaware, Maryland, Massachusetts, and Vermont) have, through interpretive guidance or specific statutory language, clarified that an employer may not condition equal opportunity on evidence of gender identity apart from an employee's assertion of that identity, absent some specific reason to doubt the employee's sincerity.[5] This approach is consistent with the Commission's approach to the sincerity of religious beliefs.[6]

II. Dress and Grooming Standards

Employees, including transgender and gender nonconforming employees, have the right to comply with company dress codes in a manner consistent with their gender identity or gender expression.

> Example A: An employee tells her supervisor that she is transitioning from male to female and intends to come to work dressed as a female. The supervisor instructs her that she must continue to follow the male dress code policy, which includes wearing a tie and not wearing facial makeup or a skirt or dress. This is a violation of EO 11246.

To the extent they are otherwise lawful, gender-specific dress codes cannot be invoked to prevent transgender employees from dressing in a manner consistent with their gender identity. The facts of cases like *Schroer*, *Billington*, and *Glenn* demonstrate that preventing transgender employees from dressing and presenting themselves in a manner consistent with their gender identity constitutes discrimination on the basis of sex under Title VII, as well as discrimination based on gender identity under EO 11246.[7]

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[4] D.C. Mun. Regs. Tit. 4, § 800.

[5] Connecticut Safe School Coalition, Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws 4 (2012) [hereinafter Connecticut Guidance] (interpreting Ct. Gen. Stat. § 46a-51(21)), *available at* http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf; 19 De. Code § 710(8) (West 2014); Mass. Dep't of Elementary and Secondary Educ., Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity 11 (2013) [hereinafter Massachusetts Guidance], *available at* http://www.doe.mass.edu/ssce/GenderIdentity.pdf; 2014 Md. Laws Ch. 474 § 20-101, to be codified at Md. State Govt. Code § 20–101(e); Vermont Human Rights Commission, Sex, Sexual Orientation and Gender Identity: A Guide to Vermont's Anti-Discrimination Law for Employers and Employees (2012) [hereinafter Vermont Guidance], *available at* http://hrc.vermont.gov/sites/hrc/files/pdfs/other%20reports/trans%20employment%20brochure%207-13-12.pdf.

[6] *See* EEOC Compliance Manual: Religious Discrimination, at § 12-I (2008).

[7] *See* notes 8-10 and accompanying text. This principle applies not only to transgender women and men, but also to workers whose gender identity is not male or female. It is now well-recognized that a non-binary gender identity may also be a deeply rooted aspect of personal identity. *See, e.g.*, AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, VERSION 5 451-53 (2013) (defining gender identity to include identities other than male or female, and specifying diagnostic criteria for gender dysphoria to include such identities); WPATH Standards of Care, *supra* note 1, at 171, 175 (same). To the extent that an employer may

The Office of Personnel Management (OPM)'s *Guidance on the Employment of Transgender Individuals in the Federal Workplace*, which establishes policy for the federal sector, follows this principle. OPM's guidance states that dress codes must be applied to a transgender employee in the same way that they are applied to other employees with the same gender identity and that dress codes should not be used to prevent a transgender employee from dressing in a manner consistent with their gender identity.[8] The Department of Labor (DOL)'s own internal gender identity policy, which supplements the OPM guidance, mirrors this position.[9]

States with explicit gender identity discrimination statutes follow this approach. To date, ten states (California, Colorado, Delaware, Iowa, Maryland, Massachusetts, Nevada, New Jersey, Vermont, and Washington) and the District of Columbia have, by specific statutory language, regulations, or guidance, clarified that state laws prohibiting gender identity discrimination require that individuals be permitted to dress in a manner consistent with their gender identity and that dress and appearance rules may not be applied to prohibit their doing so.[10] Guidance from the Iowa Civil Rights Commission is representative, providing that:

> An employer may establish and require an employee to adhere to reasonable workplace appearance, grooming and dress standards that are directly related to the nature of the employment; dress codes are not precluded by state or federal law as long as an employer allows an employee to appear, groom and dress consistent with the employee's gender identity.[11]

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lawfully maintain workplace policies or facilities that are segregated along binary gender lines (*i.e.* male and female), employees must be treated on the basis most consistent with their gender identity or expression.

> Example A.1. Alex is a transgender employee with a non-conforming gender identity and a feminine gender expression. Using female restrooms is consistent with her gender identity and expression, while using male restrooms is not. Denying Alex access to female facilities based on a perceived inconsistency between her gender identity and expression and her birth-assigned male gender violates EO 11246.

As with any transgender employee, restricting the employee from following policies or accessing facilities consistent with their gender identity or expression solely due to a perceived inconsistency between their gender identity or expression and their birth-assigned gender is a form of disparate treatment.

[8] *See* OPM, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace (2011) [hereinafter OPM Transgender Workplace Guidance], *available at* http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/.

[9] *See* DOL, DOL Polices on Gender Identity: Rights and Responsibilities 3 (July 12, 2013) [hereinafter DOL Gender Identity Policy], *available at* http://www.dol.gov/oasam/programs/crc/20130712GenderIdentity.htm.

[10] *See* CAL. GOV'T CODE § 12949 (West 2014); 19 DEL. CODE § 711(l) (West 2014); NEV. REV. STAT. ANN. § 613.350.6 (West 2014); N.J. STAT. ANN. § 10:5-12(p) (West 2014); 2014 Md. Laws Ch. 474 § 20-605(a)(2); 3 COLO. CODE REGS. § 708-1:81.10 (West 2014); D.C. MUN. REGS. tit. 4, § 804 (West 2014); Iowa Civil Rights Commission, Guidance on Sexual Orientation & Gender Identity (2012) [hereinafter Iowa Guidance], *available at* https://icrc.iowa.gov/sites/files/civil_rights/publications/2012/SOGIEmpl.pdf; Massachusetts Guidance, *supra* note 5, at 11; Vermont Guidance, *supra* note 5; Washington State Human Rights Commission, Guide to Sexual Orientation and Gender Identity 4–5 (2014) [hereinafter Washington Guidance], *available at* http://www.hum.wa.gov/Documents/Guidance/GuideSO20140703.pdf.

[11] Vermont Guidance, *supra* note 5.

State and federal courts followed the same approach under sex discrimination laws,[12] and no jurisdiction has adopted a contrary interpretation.

III. Sex-segregated facilities

A. Equal access to sex-segregated facilities

Transgender and gender nonconforming employees have the right to use sex-segregated facilities, including restrooms and locker rooms, consistent with their gender identity. They should not be required to provide proof of any particular medical procedure or be subject to a higher burden of proof than non-transgender employees with respect to facilities access.

> Example B: An employee tells his supervisor that he is transitioning from female to male and would like to use the men's restroom from now on, not the women's restroom. The supervisor requires the employee to provide documentation that he has had sex reassignment surgery and must use the women's restroom until he does so. This is a violation of EO 11246.

Denying transgender employees access to sex-segregated facilities consistent with their gender identity amounts to treating them differently from non-transgender employees based on a perceived inconsistency between their gender identity and sex assigned at birth—in other words, based on being transgender.[13] Doing so singles out and humiliates transgender workers, invites further harassment and discrimination, and places workers in the untenable position of enduring this humiliation or avoiding restroom use at work altogether, risking serious negative health effects.[14]

While it is best practice for the needs of all workers to provide for visual privacy in restrooms and changing rooms (such as full-length locking stalls and privacy curtains), the configuration of a particular facility is not a legitimate, nondiscriminatory reason for denying access to transgender workers.

OPM's Transgender Workplace Guidance states that transgender employees expressing their gender identity at work have the right to access restrooms and locker room facilities consistent with their gender identity and that employers are not permitted to require proof of any particular medical procedure before providing access to sex-segregated facilities.[15] DOL's

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[12] *See* Logan v. Gary Cmty. Sch., No. 2:07-CV-431, 2008 WL 4411518, at *1, 5 (N.D. Ind. Sept. 25, 2008) (transgender student stated Title IX claim for denial of entry to prom for wearing a dress); Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Sup. Ct. Oct. 11, 2000) (disciplining transgender student for wearing female clothes permitted for non-transgender female students was gender discrimination), aff'd sub nom., Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399, at *1 (Mass. App. Ct. Nov. 30, 2000).

[13] *See supra* Part I; *see also* Massachusetts Guidance, *supra* note 5, at 4 (declaring that within the education context, "[t]he responsibility for determining a student's gender identity rests with the student or, in the case of young students not yet able to advocate for themselves, with the parent. [Because o]ne's gender identity is an innate, largely inflexible characteristic of each individual's personality that is generally established by age four . . . the person best situated to determine a student's gender identity is that student himself or herself").

[14] *See, e.g.*, Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation and its Impact on Transgender People's Lives*, J. PUB. MGMT. & SOC. POL'Y 19:65-80 (2013) (reporting survey findings that transgender individuals who feared denial of access or harassment in workplaces, schools, and public accommodations avoided restroom use and commonly reported resulting physical symptoms or medical problems).

[15] *See* OPM Transgender Workplace Guidance, *supra* note 9.

internal gender identity policy guidance takes the same position.[16] Interpreting the Violence Against Women Act's prohibition on gender identity discrimination, the Department of Justice (DOJ) has taken the same approach.[17] A recent and highly publicized resolution agreement by DOJ and the Department of Education is also consistent with this approach. Resolving a Title IX complaint that a transgender boy had been denied access to boys' restrooms and accommodations on overnight trips, the agreement provides for the student to be treated as male in all respects by this school.[18] Finally, the Office of Special Counsel recently found that refusal to permit a transgender employee to use restrooms consistent with her female gender identity without providing invasive medical evidence not only violate the civil service law but also likely constituted sex discrimination.[19]

To date, ten states (California, Colorado, Connecticut, Iowa, Massachusetts, Nevada, New Jersey, Oregon, Vermont, and Washington) and the District of Columbia have, by regulations, guidance, or specific statutory language, clarified that state laws prohibiting gender identity discrimination require that transgender individuals have access to sex-segregated facilities consistent with their gender identity.[20] For example, guidance from Nevada's Equal Rights Commission states that:

> An employer may not prevent or discourage an employee who identifies with a particular sex from using the dedicated bathroom for that particular sex.[21]

State case law from California, Colorado, Iowa, and Maine also supports this understanding.[22] As discussed later in this memo, two older state cases taking a contrary position are inconsistent with *Macy* and Supreme Court precedent.

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[16] *See* DOL Gender Identity Policy, *supra* note 10, at 3.

[17] *See* Department of Justice, Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013 [hereinafter VAWA FAQ], at 9 (Apr. 9, 2013), *available at* http://www.ovw.usdoj.gov/docs/faqs-ngc-vawa.pdf ("A recipient that operates a sex-segregated or sex-specific program should assign a beneficiary to the group or service which corresponds to the gender with which the beneficiary identifies [unless the beneficiary requests a different or specialized placement due to individual safety concerns] . . . . *The recipient may not, however, ask questions about the beneficiary's anatomy or medical history or make burdensome demands for identity documents*." (emphasis added)).

[18] *See* Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division at 1-3 (OCR No. 09-12-1020) (DOJ No. 169-12C-70) (July 24, 2013) [hereinafter Arcadia Resolution Agreement], *available at* http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia_Resolution_agreement_07.24.2013.pdf.

[19] Report of Prohibited Personnel Practice, OSC File No. MA-11-3846 (Jane Doe) (Aug. 28, 2014).

[20] *See* CAL. EDUC. CODE § 221.5(f) (West 2014); N.J. STAT. ANN. § 10:5-12(f)(1) (West 2014); 3 COLO. CODE REGS. § 708-1:81.11 (West 2014); D.C. MUN. REGS. tit. 4, § 802.1 (West 2014); OR. ADMIN. R. 839-005-0031(2) (2014); Connecticut Guidance, *supra* note 15, at 7-8; Iowa Guidance, *supra* note 11; Massachusetts Guidance, *supra* note 5, at 9–10; Nevada Equal Rights Commission, Facts About Gender Identity or Expression Discrimination, http://detr.state.nv.us/Nerc_pages/NERC_docs/Facts_About_Gender_Identity_or_Expression_Discrimination.pdf; Washington Guidance, *supra* note 11, at 5; Vermont Guidance, *supra* note 5.

[21] Nevada Equal Rights Commission, Facts About Gender Identity or Expression Discrimination, http://detr.state.nv.us/Nerc_pages/NERC_docs/Facts_About_Gender_Identity_or_Expression_Discrimination.pdf. While guidelines from a few jurisdictions distinguish between an equal access standard for certain types of facilities and a "reasonable accommodation" standard for others, such distinctions are not legally sound and reinforce anti-transgender stigma. Recent guidelines from jurisdictions such as Massachusetts and Connecticut clearly address how privacy concerns of all persons can be addressed as needed without limiting equal opportunity for transgender people. *See* Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC'Y 301, 323-26 (2013) (comparing these approaches).

B. Access to gender-neutral facilities

Where facilities already exist that are designed for use by only one person at a time, the use of gender-specific designations also constitutes gender identity discrimination. This form of segregation is facially discriminatory in the most obvious terms.[23] Unnecessary sex segregation of single-user facilities also tends to negatively impact the status of transgender workers—particularly those with non-binary gender identities— as employees by drawing unwanted attention and scrutiny to their gender identity and expression, contributing to workplace harassment.[24] Under Title VII case law, employers may not segregate workers in a way that negatively affects employees based on a protected characteristic.[25] In the context of single-occupancy facilities, it cannot be seriously argued that any legitimate, nondiscriminatory reason or bona fide occupational qualification exists for this form of segregation.[26] Following this principle, implementing regulations for the gender identity provision of the D.C. Human Rights Act state:

> All entities covered under the Act with single-occupancy restroom facilities shall use gender-neutral signage for those facilities (for example, by replacing signs that indicate 'Men' and 'Women' with signs that say 'Restroom').[27]

OFCCP should take the same approach in its regulations. While required by a correct application of law, local jurisdictions are also increasingly taking this step as a matter of policy.[28]

IV. Sex-specific job duties (BFOQ)

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[22] Dept. of Fair Employment & Housing v. Amer. Pac. Corp., Case No. 34-2013-00151153-CU-CR-GDS (Cal. Sup. Ct. Mar. 13, 2014); Doe v. Regional School Unit 26, 86 A.3d 600 (Me. 2014) (holding that Maine Human Rights Act prohibits singling out transgender students for exclusion from facilities consistent with their gender identity); Coy Mathis v. Fountain-Fort Carson School District 8, Charge No. P20130034X, Determination (Colo. Div. of Civil Rights Jun. 18 2013) (holding that Colorado's Anti-Discrimination Act prohibits denying transgender girl access to restroom facilities consistent with her gender identity); Jones v. Johnson County Sheriff's Department, CP No. 12-11-61830, Finding of Probable Cause (Iowa Ct. Rts. Comm'n Feb. 11, 2013) (holding that barring a transgender woman from using restroom facilities consistent with her gender identity constituted discrimination).

[23] *Cf.* E.E.O.C., *Facts about Race/Color Discrimination* ("Title VII is violated where minority employees are segregated by physically isolating them from other employees"); E.E.O.C., *Religious Garb and Grooming the Workplace: Rights and Responsibilities* ("With respect to religion, Title VII prohibits among other things…workplace or job segregation based on religion).

[24] *E.g.*, Herman, *supra* note 15 ("Eighteen percent of respondents have been denied access to a gender-segregated public restroom [at work, school, or a public accommodation], while 68 percent have experienced some sort of verbal harassment and 9 percent have experienced some form of physical assault when accessing or using gender-segregated public restrooms");

[25] *See* 42 U.S.C. § 2000e-2(a)(2) (prohibiting "segregat[ion] [of] employees … in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's…sex").

[26] *Compare* Int'l Union, United Auto., Aerospace and Agr. Implement Workers of Am., UAW v. Johnson Controls, 499 U.S. 187, 206 n. 4 (1991) (suggesting in dicta that Title VII may permit "considerations of privacy as a basis for sex-based discrimination").

[27] *See* D.C. MUN. REGS. tit. 4, § 802.2 (West 2014) (providing that all single-occupancy restroom facilities shall use gender neutral signage for those facilities).

[28] Phila. Code § 16-104 (2013); *see also* Resolution No. 2014-0828-04, Austin City Council (Aug. 28, 2104) (directing city manager to prepare code amendments to require gender-neutral signage for single-user restrooms).

In those narrow circumstances where sex is a bona fide occupational qualification (BFOQ), transgender employees should be treated in a manner consistent with their gender identity.

> Example C: A Transportation Security Administration (TSA) employee who conducts passenger screening (including pat-down searches) tells his supervisor that he is transitioning from female to male. The supervisor forbids him from conducting pat-down searches for either men or women and reassigns him to the baggage department with no traveler contact. This is a violation of EO 11246.

Where otherwise valid, a sex BFOQ may not be applied in a discriminatory manner to transgender workers. Any BFOQ must be applied consistently with the principle that employees are able to live and work in accordance with their gender identity. Assignment of job duties or disqualification from a position on the basis of an individual's transgender status, related medical history, bodily anatomy or non-conformity with gender stereotypes has no basis in Title VII case law, and EO 11246 creates no BFOQ exception for gender identity discrimination. Similarly, a policy requiring transgender employees to submit sensitive medical information as a condition of particular work assignments—such as information about an individual's surgical history and bodily anatomy—where other employees are not required to submit such information—also would be facially discriminatory.[29]

An employer may impose a facially discriminatory policy on the basis of a BFOQ, provided (a) that the BFOQ is related to the essence of the employer's business operation; (b) the employer has some "factual basis" for believing the BFOQ is reasonably necessary—not merely reasonable or convenient—to the normal operation of its business; and (c) no reasonable alternatives exist.[30] Since the BFOQ exemption is "extremely narrow," the employer must prove that only an individual of a specific gender can perform the duties of the job appropriately and that the criteria is not based on gender stereotypes,[31] and the employer also has the burden to prove the BFOQ defense by a preponderance of the evidence.[32] While courts have permitted male or female gender to be used as a BFOQ in certain circumstances where close physical contact or observation with clients or members of the public raises real and substantial privacy concerns,[33] they have also consistently cautioned—and EEOC regulations also state—that gender-related BFOQs may not be based on mere gender stereotypes or customer preferences.[34]

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[29] A practice of conditioning employment of transgender people in such positions on treatment in accordance with one's birth-assigned gender would also be facially discriminatory. In *Schroer*, the court found sex discrimination where a federal agency retracted a job offer because the plaintiff intended to work consistent with her gender identity rather than her birth-assigned gender. 577 F. Supp. 2d at 306–08. It would be absurd to conclude that retracting a job offer because a transgender woman intends to work as a woman is discrimination, but conditioning employment on a transgender woman agreeing not to work as a woman is not discrimination.

[30] *See* Everson v. Mich. Dep't of Corr., 391 F.3d 737, 748-49 (6th Cir. 2004); *Macy*, 2012 WL 1435995, at *6; EEOC Compliance Manual § 625.1, *available at* http://www.eeoc.gov/laws/guidance/compliance.cfm.

[31] *See Macy*, 2012 WL 1435995, at *6.

[32] *See, e.g.*, Breiner v. Nevada Dep't of Corr., 610 F.3d 1202, 1210 (9th Cir. 2010).

[33] *See, e.g.*, EEOC Compliance Manual § 625.9.

[34] *See, e.g.*, Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971); Olsen v. Marriott Int'l, Inc., 75 F. Supp. 2d. 1052, 1063-65 (D. Ariz. 1999); Pratt v. Reno, No. 01972502, 2000 WL 1218185 (E.E.O.C. Aug. 18, 2000); 29 C.F.R. § 1604.2; EEOC Compliance Manual §§ 625.5, 625.6; *see also* Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981).

Application of a sex BFOQ based on a worker's transgender status, medical history, bodily anatomy or conformity with gender stereotypes cannot meet this exacting standard.[35]

Applying a sex BFOQ based on an employee's gender identity or gender expression, in contrast, meets the legitimate needs underlying the BFOQ without limiting employment opportunity for transgender workers. The Los Angeles County Sheriff's Department (LASD), one of the largest enforcement agencies in the country, operates the largest jail in the country, and specifies in its Transgender Employee Guide that "[f]or sex-segregated job assignments, transgender employees will be classified and assigned in a manner consistent with their gender identity, not their sex assigned at birth," with no exceptions.[36] LASD's policy is consistent with the longstanding practice of other major law enforcement agencies, including major metropolitan police departments in cities such as Chicago, Dallas, New York City, San Francisco, and San Jose.[37] The experiences of these major employers demonstrate that transgender workers may satisfy a legitimate BFOQ of sex based on their gender identity and that applications of a BFOQ that limit employment opportunity for transgender workers cannot withstand scrutiny.[38]

V. Health benefits

The most common, and most blatant, form of gender identity discrimination in employment today is in health insurance. Employers that offer healthcare benefits must provide access to the same healthcare benefits for transgender and non-transgender employees, and the health plans may not deny or exclude services on the basis of gender identity and related medical conditions. Because discrimination in employer-based plans is often insulated from state-law challenges by ERISA preemption, clarifying the guarantee of equality for transgender workers under federal law is especially important in this context.

> Example D: An employer's health policy covers medically necessary surgical care, including mastectomies for non-transgender women diagnosed with breast cancer, but excludes medically necessary chest reconstruction surgery for transgender men, pursuant to an exclusion for "all services and supplies related to sex reassignment or gender dysphoria." This is disparate treatment in violation of EO 11246.

Title VII requires that covered employers not discriminate in pay and benefits to their employees, including health benefits.[39] The EEOC has found that health plan exclusions that do

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[35] Similarly, requiring that an employee's transgender status be disclosed to third parties in the performance of sex-specific duties would also violate EO 11246. *See* section VII, *infra*.

[36] *See* LASD, An LASD Guide: Transgender & Gender Non-conforming Employees 6 (2014).

[37] Personal communication with Lt. Stephan Thorne, San Francisco Police Department (April 2011); Personal communication with Julie Marin, President of Transgender Community of Police and Sheriffs (TCOPS) (August 2011). While local agencies generally do not have written policies on this issue, TCOPS recently surveyed contacts in several departments with known experience with transgender officers.

[38] One such case, filed in New Jersey state court and recently settled, involved transgender man hired as a urine monitor in a drug treatment facility and then fired after his transgender status was disclosed. Devoureau v. Camden Treatment Assoc., Civ. Case No. L-001825-11 (N.J. Sup. Ct., Camden Cty. Apr. 8, 2011); Transgender Legal Defense and Education Fund, "TLDEF Helps Transgender Man Achieve Settlement in Discrimination Suit," (Nov. 26, 2013), http://www.transgenderlegal.org/headline_show.php?id=429.

[39] *See, e.g.*, Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 684 (1983) (Title VII violated where "the husbands of female employees receive a specified level of hospitalization coverage for all conditions"

not explicitly distinguish between specific groups are still facially discriminatory where "100 percent of the people affected by [an employer's] policy are members of the same protected group."[40] Presently, many employer-provided insurance plans have exclusions that either specifically bar transition-related care, or that deny transgender people health care services that are otherwise covered for non-transgender people with certain medical conditions.[41] In these scenarios, 100 percent of the people affected by the employer's policy are members of the same group: transgender people.[42] In addition, most if not all treatments excluded for transgender workers and dependents are routinely covered for non-transgender individuals with other medical conditions.[43]

Transgender-specific exclusions cannot be justified on any neutral basis, such as medical necessity or cost-effectiveness.[44] Every major medical association in the United States recognizes the safety, efficacy, and medical necessity of hormonal and surgical treatments for gender dysphoria and opposes transgender exclusions.[45] This reality has recently been recognized in the Department of Health and Human Services' (HHS) determination invalidating Medicare's ban on transition-related surgery, in which HHS explicitly recognized such procedures as an "effective, safe, and medically necessary" treatment for gender dysphoria.[46] Thus, health care plans that exclude transition-related care bar transgender people from accessing medically sanctioned and medically necessary health care services, violating Title VII's bar on sex discrimination in benefits conferral. As a recent bulletin from the Massachusetts Commissioner of Insurance puts it simply:

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but "the wives of male employees receive such coverage except for pregnancy-related conditions"); Comm'n Decision on Coverage of Contraception, 2000 WL 33407187 (E.E.O.C. Guidance Dec. 14, 2000).

[40] Comm'n Decision on Coverage of Contraception, 2000 WL 33407187 at *4.

[41] *See* Center for American Progress, Why Gender-Identity Nondiscrimination in Insurance Makes Sense 2 (2013), *available at* http://cdn.americanprogress.org/wp-content/uploads/2013/05/BakerNondiscriminationInsurance-6.pdf.

[42] Because such exclusions are facially discriminatory, an employee need not establish a medical diagnosis or necessity for a particular service in order to assert a Title VII claim. *See* Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991) ("For the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law." (internal quotation marks omitted)).

[43] *See, e.g.*, 10 Cal. Code Reg. § 2561.2(a)(4)(A) (listing hormone therapy, hysterectomy, mastectomy, and vocal training as illustrative examples of treatments commonly covered for other conditions which may not be excluded for gender dysphoria); Insurance Div., Oregon Dep't of Consumer & Business Services, Bull. No. INS 2012-1, Application of Senate Bill 2 (2007 Legislative Session) to Gender Identity Issues in the Transaction & Regulation of Insurance in Oregon 3 (2012) [hereinafter Oregon Insurance Guidance], *available at* http://www.oregon.gov/DCBS/insurance/legal/bulletins/Documents/bulletin2012-01.pdf (same).

[44] While a facially discriminatory policy cannot be defended on the basis of cost, *e.g.*, City of Los Angeles, Dept. of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978), transgender health exclusions also do not require any significant cost increase as a factual matter. Jody L. Herman (Williams Institute 2013), *Costs and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefit Plans: Findings from a Survey of Employers*, available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Cost-Benefit-of-Trans-Health-Benefits-Sept-2013.pdf; Department of Insurance, State of California (2012), *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance*, available at http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf.

[45] *See* WPATH Standards of Care, *supra* note 1, at 171.

[46] *See* NCD 140.3, Transsexual Surgery, DAB No. 2576, 2014 WL 2558402, at *15 (H.H.S. May 30, 2014).

The Division has concluded that excluding coverage of gender identity or gender dysphoria-related treatment will be considered prohibited sex discrimination because it would be a limitation based on coverage based on the sex of the insured."[47]

To date, eight states (California, Colorado, Connecticut, Illinois, Massachusetts, Oregon, Vermont and Washington) and the District of Columbia have, by regulations or guidance, interpreted state laws prohibiting gender identity discrimination to prohibit insurance exclusions that target services for gender dysphoria for transgender people.[48] Four states (Illinois, Massachusetts, Vermont, and Washington) have also cited state and federal bans on sex discrimination in adopting these rules.[49]

VI. Name and pronoun use

Transgender and gender nonconforming employees have the right to be addressed by the name and pronoun corresponding to their gender identity or gender expression. A persistent and intentional refusal to use an employee's preferred name and pronoun rather than those corresponding to the employee's gender assigned at birth may constitute illegal gender identity-based harassment if it creates a hostile environment.

Example E: Jason tells a supervisor that she is transitioning from male to female and would like to be referred to as "Jane." Six weeks later, the supervisor and other managers,

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[47] Div. of Insurance, Massachusetts Office of Consumer Affairs & Business Regulation, Bull. No. 2014-03, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Transgender Surgery and Related Health Care Services (2014) [hereinafter Massachusetts Insurance Guidance], *available at* http://www.mass.gov/ocabr/docs/doi/legal-hearings/bulletin-201403.pdf.

[48] *See* 10 Cal. Code Reg. § 2561.2 (2012); Brent A. Barnhart, Director, Dep't of Managed Health Care, California Health & Human Services Agency, Letter No. 12-K, Gender Nondiscrimination Requirements (2013) [hereinafter California Insurance Guidance], *available at* http://www.dmhc.ca.gov/Portals/0/AboutDMHC/DirectorsLetters/dl12k.pdf; Div. of Insurance, Colorado Dep't of Regulatory Agencies, Bull. No. B-4.49, Insurance Unfair Practices Act Prohibitions on Discrimination Based Upon Sexual Orientation (2013) [hereinafter Colorado Insurance Guidance], *available at* http://www.one-colorado.org/wp-content/uploads/2013/03/B-4.49.pdf; Connecticut Insurance Dep't, Bull. No. IC-37, Gender Identity Nondiscrimination Requirements (2013), *available at* http://www.ct.gov/cid/lib/cid/Bulletin_IC-37_Gender_Identity_Nondiscrimination_Requirements.pdf; District of Columbia Dep't of Insurance, Securities, & Banking, Bull. No. 13-IB-01-30/15 (Revised), Prohibition of Discrimination in Health Insurance Based on Gender Identity or Expression (2014), *available at* http://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Bulletin-ProhibitionDiscriminationBasedonGenderIdentityorExpressionv022714.pdf; Illinois Dep't of Insurance, Bull. No. 2014-10, Healthcare for Transgender Individuals (2014), *available at* http://insurance.illinois.gov/cb/2014/CB2014-10.pdf; Massachusetts Insurance Guidance, *supra* note 43; Oregon Insurance Guidance, *supra* note 41; Div. of Insurance, Vermont Dep't of Financial Regulation, Insurance Bull. No. 174, Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity Including Medically Necessary Gender Dysphoria Surgery and Related Health Care (2013), *available at* http://www.dfr.vermont.gov/sites/default/files/Bulletin_174.pdf [hereinafter Vermont Insurance Guidance]; Letter from Mike Kriedler, Washington State Insurance Commissioner, to Health Insurance Carriers in Washington State (June 25, 2014) [hereinafter Washington Insurance Guidance], *available at* http://www.insurance.wa.gov/about-oic/news-media/news-releases/2014/documents/gender-identity-discrimination-letter.pdf.

[49] *See* Illinois Dep't of Insurance, Bull. No. 2014-10, Healthcare for Transgender Individuals (2014), *available at* http://insurance.illinois.gov/cb/2014/CB2014-10.pdf; Massachusetts Insurance Guidance, *supra* note 43; Vermont Insurance Guidance, *supra* note 48; Washington Insurance Guidance, *supra* note 37.

supervisors, and employees are pointedly continuing to call her "Jason" and refer to her using male pronouns. This is a violation of EO 11246.

Title VII and EO 11246 bar the use of slurs and other forms of discriminatory harassment that create an abusive work environment.[50] A court-ordered name or gender change should not be required. Refusing to use the name and pronouns consistent with an employee's gender identity amounts to disparate treatment of the employee based on the perceived inconsistency between the employee's gender identity and sex assigned at birth—in other words, based on being transgender.[51]

The Equal Employment Opportunity Commission has stated in a decision that "Intentional misuse of the employee's new name and pronoun [of a transgender worker] may cause harm to the employee, and may constitute sex based discrimination and/or harassment."[52] Guidance from OPM and the DOL are in accord with this position.[53] The interpretation of explicit state gender identity laws follows this approach. To date, at least three states (Colorado, Connecticut, and Iowa) and the District of Columbia have, by regulation or guidance, clarified that consistent refusal to use the name and pronouns consistent with an individual's gender identity may constitute discriminatory harassment.[54] Case law from New York also follows this approach.[55]

Employers should apply the same standards to name changes, including changing employer records, for transgender people as for non-transgender people. The EEOC has recently held that an on-going refusal to process a name change for a transgender employee states a sex-based harassment claim under Title VII.[56] Although many jurisdictions still permit a legal name change by common usage, the demand for a court order of name change is also a common pretext for discrimination, and may have a disparate impact on transgender workers.

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[50] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993) (holding that verbal slurs and harassment need not rise to the level of "seriously affect[ing an employee's] psychological well-being" to constitute actionable conduct under Title VII).

[51] *See supra* Part I; *see also* Arcadia Resolution Agreement, *supra* note 18, at 3 (agreeing to "treat the Student the same as other male students in all respects in the education programs and activities offered by the District"); *see also* DOL Gender Identity Policy, *supra* note 10, at 2; Connecticut Guidance, *supra* note 5, at 6 ("School personnel should use the name and pronouns appropriate to the student's gender identity regardless of the student's assigned birth sex."); Massachusetts Guidance, *supra* note 5, at 4 (declaring that within the education context, "[t]he responsibility for determining a student's gender identity rests with the student or, in the case of young students not yet able to advocate for themselves, with the parent. [Because o]ne's gender identity is an innate, largely inflexible characteristic of each individual's personality that is generally established by age four . . . the person best situated to determine a student's gender identity is that student himself or herself"); Washington Guidance, *supra* note 11, at 5 ("For all [non-legal purposes], employers should ask a transgender employee what name and sex-specific pronoun he or she prefers, and use them consistently.").

[52] Jameson v. Donahoe, E.E.O.C. App. No. 0120130992, 2013 WL 2368729, at *2 (E.E.O.C. May 21, 2013).

[53] *See* OPM Transgender Workplace Guidance, *supra* note 9; DOL Gender Identity Policy, *supra* note 10, at 2–4.

[54] 3 COLO. CODE REGS. § 708-1:81.8(A)(4) (West 2014); Connecticut Guidance, *supra* note 5, at 6; Iowa Guidance, *supra* note 10; D.C. Mun. Regs. Tit. 4, § 808.2(a) (West. 2014).

[55] Doe v. City of New York, 42 Misc.3d 502, 976 N.Y.S.2d 360 (N.Y. Sup. Ct. 2013) ("the purposeful use of masculine pronouns in addressing plaintiff, who presented as female, and the insistence that she sign a document with her birth name despite the court-issued name change order, is not a light matter, but one which is laden with discriminatory intent"

[56] *Complainant v. Shinseki*, No. 0120133123, 2014 WL 1653484 (E.E.O.C. Apr. 16, 2014).

VII. Confidentiality and Privacy

Intentionally disclosing highly personal information relating to an employee's transgender status, gender transition, or related medical history may constitute discriminatory harassment under EO 11246.

Transgender employees have the right to discuss their gender identity or expression openly, or to keep that information private. The transgender employee gets to decide when, with whom, and how much to share their private information. Management, human resources staff, or coworkers should not disclose information that may reveal an employee's transgender status or gender nonconforming presentation to others. That kind of personal or confidential information may only be shared with the transgender employee's consent and with coworkers who truly need to know to do their jobs.

> Example F: In the context of providing necessary documentation for the I-9 form, an employee informs his supervisor that he transitioned from female to male prior to starting employment, but he wants to keep this information private for now. The supervisor, believing that his co-workers "have a right to know," disseminates news of the employee's transgender status to his entire department. This is a violation of EO 11246.

Federal courts have recognized that transgender status is one of the especially private, personal matters that enjoys heightened privacy protection under the Constitution, stating, "The excrutiatingly [sic] private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate."[57] Federal law also places strict limits on employers' disclosure of employees' personal medical information.[58] Like other highly personal information, disclosure of this type of information can create a hostile environment, and such disclosure frequently singles out transgender employees as objects of curiosity and social stigma.

OPM's Transgender Workplace Guidance states that "[e]mploying agencies, managers, and supervisors should be sensitive to these special concerns and advise employees not to spread information concerning the employee who is in transition: gossip and rumor-spreading in the workplace about gender identity are inappropriate. Other employees may be given only general information about the employee's transition; personal information about the employee should be considered confidential and should not be released without the employee's prior agreement." DOL's internal gender identity policy guidance takes the same position.[59]

To date, two states (Delaware and Washington) and the District of Columbia have, by regulations or guidance clarified that under state laws prohibiting gender identity discrimination,

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[57] *See, e.g.*, Powell v. Schriver, 175 F.3d 107, 111 (2d Cir. 1999) (holding transgender prisoner had constitutional right to informational privacy regarding transgender status); *see also* Wyatt v. Fletcher, 718 F.3d 496, 513 (5th Cir. 2013) (applying *Powell* to privacy of sexual orientation); Sterling v. Borough of Minersville, 232 F.3d 190, 196 n. 4 (3rd Cir. 2000) (same); K.L. v. State of Alaska, Department of Administration, Division of Motor Vehicles, Case No. 3AN-11-05431 CI, 2012 WL 2685183 (Alaska Super. Ct. Mar. 12, 2012) (holding refusal to update gender designation on driver's licenses violated privacy rights of transgender people).

[58] *See* 42 U.S.C.A. § 12112(d) (West 2014) (permitting, under the ADA, only disclosures of personal medical information that are "job-related and consistent with business necessity"); *see also* Shaver v. Indep. Stave Co., 350 F.3d 716, 722 (8th Cir. 2003) (citations omitted) (holding that ADA disclosure provision applies even if the employee does not have an ADA-covered disability).

[59] *See* DOL Gender Identity Policy, *supra* note 10, at 2–3.

intentional disclosure of information regarding an employee's transgender status without the employee's consent may constitute unlawful discrimination.[60]

To protect their privacy, former employers should not disclose the transgender status of their former employees to new employers when responding to a background check or reference request.[61] Employers also may not single out transgender employees for intrusive requirements such as psychological or medical examinations solely based on their transgender status.[62]

VIII. Hiring practices

An employer may not require the disclosure of an employee's transgender status or sex assigned at birth in the hiring process or take adverse action based solely on the failure to disclose this information. Adverse action based on an employee's failure to disclose a prior name associated with a different gender, absent a legitimate non-discriminatory motive, may also constitute unlawful discrimination.

> Example G: An employer rescinds a job offer after a background check reveals that Judy used to be called "John." The employer finds no adverse information, but asserts that the employee was dishonest by failing to disclose her former name. This is a violation of EO 11246.

Failure to disclose information relating to an employee's gender is a common pretext for discrimination against transgender workers, who have no obligation to affirmatively disclose this information.[63] At least one jurisdiction, the District of Columbia, has established by regulation that it is unlawful discrimination for an employer to take adverse action solely based on an employee's giving their "publicly and consistently used name" and self-identified gender in an application rather than their legal name or assigned gender.[64]

VIII. Contrary Case Law Is Unsound

In contrast to the prevailing view of federal and state agencies and courts, a few courts have held that denying equal access to transgender people in sex-segregated facilities does not constitute unlawful discrimination. In *Goins v. West Group*, the court stated with little discussion that the legislature could not have intended to upset what it termed "the cultural preference for

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[60] *See* Delaware Guidelines on Equal Employment Opportunity and Affirmative Action Gender Identity Guidelines 4, *available at* http://www.delawarepersonnel.com/policies/docs/sod_eeoc_guide.pdf ("Transgendered [*sic*] employees have the right to be who they are without unnecessary disclosure of medical information….The gender identity status of an employee is considered confidential and should only be disclosed on a need-to-know basis, and with the consent of the employee"); D.C. Mun. Regs. Tit. 4, § 808.2(c) ("Causing distress to an individual by disclosing to others that the individual is transgender" may constitute evidence of a hostile environment); Washington Guidance, *supra* note 11, at 6 ("The privacy of the transitioning employee must be respected.").

[61] *See* Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding that former employees are included within the category of "employees" for purposes of Title VII's anti-retaliation provision).

[62] Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (allegation that managers "schemed to compel Smith's resignation by forcing [her] to undergo multiple psychological evaluations of [her] gender non-conforming behavior" stated Title VII claim).

[63] *See* Lopez v. River Oaks Imaging & Diagnostic Group, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (finding that transgender employee stated Title VII claim where employer claimed she "misrepresented" herself by failing to disclose her transgender status in hiring process).

[64] D.C. MUN. REG. § 4-807.1

restroom designation based on biological gender."[65] In *Hispanic AIDS Forum v. Estate of Bruno*, the court, over a strong dissent, adopted the *Goins* holding without discussion.[66] And in *Etsitty v. Utah Transportation Authority*, the court held that a transgender worker's termination, based on the mere possibility of customer complaints or (admittedly baseless) litigation over her use of public restrooms along her bus route, did not violate Title VII.[67]

All three decisions rest on flawed premises that are contrary to Supreme Court precedent and directly contrary to *Macy*:

1) *Goins* and *Hispanic AIDS Forum* rest entirely on presumed legislative intent, and specifically the notion that lawmakers did not have this particular situation in mind.[68] This approach is contrary to *Oncale v. Sundowner Offshore Oil Services*, as explained in *Macy*.[69]

2) *Etsitty* was premised on the assumption that "Etsitty may not claim protection under Title VII based upon her transsexuality per se,"[70] a premise rejected by the Commission in *Macy* and by other courts. In fact, the *Etsitty* panel conceded that its result would likely be incorrect if Title VII did cover anti-transgender bias, stating: "It may be that use of the women's restroom is an inherent part of one's identity as a male-to-female transsexual and that a prohibition on such use discriminates on the basis of one's status as a transsexual."[71]

3) *Etsitty* also relied on the view that a fear of even frivolous lawsuits constitutes a non-discriminatory motive. This approach would allow customer preferences to be recast as a fear of lawsuits. This view has since been rejected by the Supreme Court, which instead held that fear of litigation is not a defense absent evidence that a hypothetical lawsuit would have merit.[72]

Equal opportunity for transgender workers creates no infringement on the rights of other workers nor any other basis for third-party liability. In fact, the only court to be presented with such claims—specifically sex and religion discrimination claims by an employee who objected to sharing a restroom with a transgender coworker—roundly rejected them, holding that the

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[65] Goins v. West Group, 635 N.W.2d 717, 723 (Minn. 2001).
[66] Hispanic AIDS Forum v. Estate of Bruno, 792 N.Y.S.2d 43, 47 (2005).
[67] Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1218 (10th Cir. 2007).
[68] *See Goins*, 635 N.W.2d at 723 (stating that ruling for plaintiff would create results "not likely intended by the legislature"); *Hispanic AIDS Forum*, 792 N.Y.S.2d at 47 (following *Goins*).
[69] *See* Macy, 2012 WL 1435995, at *10 ("To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals. But as the Supreme Court recognized in *Oncale v. Sundowner Offshore Services, Inc*…. "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discrimination . . . because of . . . sex" in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements'").
[70] *Etsitty*, 502 F.3d at 1224.
[71] *Id.*
[72] Ricci v. DeStefano, 557 U.S. 557, 563 (2009) (holding that a fear-of-litigation defense requires "a strong basis in evidence that, had it not taken the [challenged] action, it would have been liable" to third parties").

employee suffered no cognizable harm.[73] It is well settled law that the discomfort of third parties that is based on a protected characteristic, however sincere, cannot constitute a legitimate, nondiscriminatory motive for adverse treatment.[74]

IX. Additional Best Practices

In addition to adopting strong regulations incorporating the above nondiscrimination principles, OFCCP should also recommend the following best practices for employers. Several of these best practices will also benefit many other workers, such as those with certain disabilities and parents with young children.

- Include the terms "gender identity or expression" in the employer's EEO policy statement and related documents. This may be included as a separate category or as a parenthetical to sex discrimination (*e.g.*, "sex discrimination (including pregnancy and gender identity or expression)").
- Adopt gender-neutral dress and grooming policies.
- Permit employees to use a preferred name or initials for ID badges and other purposes where a legal name is not required by law.
- Designate one or more restrooms at each worksite for use by all employees without regard to gender. Ensuring access to facilities that are open to all employees regardless of gender, including designating some multi-user restrooms for use by all employees where single-user facilities are not available, eliminates any question of gender and prevents harassment of employees perceived as using the "wrong" facility.
- Ensure visual privacy in restrooms and changing facilities using cost-effective means such as full-length locking stalls and privacy curtains.
- During the hiring process, be sensitive to the possibility that applicants have transitioned. Background or reference checks may disclose a prior name and/or gender. If an employer requires all other applicants to discuss another name that was disclosed during a background or reference check, the employer may make the same inquiry of a transgender employee. An employer who is aware of an applicant's transition should ask the applicant which name and/or gender should be used when checking references.
- Include discussion of gender identity and expression, as well as respectful communication about these issues, in routine staff cultural competence training.
- Adopt a written workplace policy on gender identity and expression incorporating:
    - expectations of workplace respect (*e.g.*, use of appropriate names and pronouns);
    - rights with respect to any gender-specific workplace facilities and policies;
    - procedures for changing name, gender, and/or photo in records and ID badges;
    - employee privacy and confidentiality; and,
    - staff roles and expectations in communicating with coworkers and/or clients regarding a workplace transition.

[73] Cruzan v. Special Sch. Dist., #1, 294 F.3d 981, 983–84 (8th Cir. 2002); *see also* Crosby v. Reynolds, 763 F. Supp. 666, 670 (D. Me. 1991) (rejecting a similar claim in the prison context).

[74] Schroer v. Billington, 577 F. Supp. 2d 293, 302 (D.D.C. 2008) ("Deference to the real or presumed biases of others is discrimination, no less than if an employer acts on behalf of his own prejudices."); *see also* Lam v. Univ. of Hawai'i, 40 F.3d 1551, 1560 n.13 (9th Cir. 1994); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276–77 (9th Cir. 1981); EEOC Decision No. 78-47, 1978 WL 5798, at *3 (Oct. 2, 1978).

X. Conclusion

We urge OFCCP to swiftly issue strong regulations that addresses the core, everyday issues of equal opportunity for transgender people. These principles have already largely been laid out by state agencies, courts, and increasingly by other federal agencies. Enforcement guidance taking clear positions on nondiscrimination requirements, supplemented with the best practices included here, is absolutely critical to make EO 11246's ban on gender identity discrimination meaningful for transgender workers. We look forward to working with OFCCP to make the promise of equal employment opportunity a reality for transgender people.