

UNITED STATES PATENT AND TRADEMARK OFFICE

**AGENCY ADMINISTRATIVE ORDER 214-03
Agency Administrative Order Series**

SEXUAL ORIENTATION AND GENDER IDENTITY

Date of Issuance:

Effective Date:

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UNITED STATES PATENT AND TRADEMARK OFFICE

AGENCY ADMINISTRATIVE ORDER ON ISSUES RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY

I. Purpose

This Agency Administrative Order (AAO) supplements AAOs 202-955 (Anti-Harassment Policy and Complaint Procedure) and 214-01 (Non-Discrimination Policy) by providing additional guidance concerning issues related to sexual orientation, gender identity, gender transition, and gender nonconformity.

II. Policy

It is the policy of the United States Patent and Trademark Office (USPTO or Agency) to provide a safe and inclusive workplace for all individuals, regardless of sexual orientation and/or gender identity. The Agency will provide a supportive environment concerning gender issues while recognizing that the needs of individual employees will vary on a case-by-case basis. The Agency will provide appropriate support and assistance to employees engaged in the process of gender transition. Discrimination or harassment based on gender transition, gender identity, or gender nonconformity will not be tolerated. The protections, reporting and investigation procedures, and obligations in AAO 202-955 (Anti-Harassment Policy and Complaint Procedure) and AAO 214-01 (Non-Discrimination Policy) apply to complaints of discrimination or harassment based on sexual orientation and gender identity. This policy does not give employees an independent cause of action against the Agency.

The Office of Equal Employment Opportunity and Diversity (OEEOD), in consultation with the Office of Human Resources (OHR) and the Office of General Law (OGL), will establish guidance and/or training to implement this AAO. This shall include procedures to assist employees in the workplace who are in undertaking gender transition and guidance concerning access to restrooms and other facilities. *See* Appendices.

III. Scope

This AAO applies to all employees and applicants for employment at the USPTO.

IV. Authorities

- Title VII of the Civil Rights Act of 1964, as amended, 24 U.S.C. § 2000e et seq.
- The Civil Service Reform Act of 1978, as amended, 5 U.S.C. § 2302.
- *Bostock v. Clayton County, Georgia*, 590 U.S. ___, 140 S. Ct. 1731 (2020).
- Executive Order 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 FR 7023 (Jan. 25, 2021).

- Executive Memorandum for the Heads of Executive Departments and Agencies on Federal Benefits and Non-Discrimination, June 17, 2009.

V. Accountability

It is the policy of the Agency to hold its officials, managers, and employees accountable for violations of this AAO and related misconduct. In the event the Agency finds that an employee has violated this AAO and/or engaged in unlawful employment discrimination or retaliation, the Agency will take appropriate corrective, disciplinary, or adverse action.

ISSUED BY:

Bismarck Myrick
Director, Office of Equal Employment
Opportunity and Diversity, United States Patent
and Trademark Office

Date

APPROVED BY:

Andrew Hirshfeld
Performing the Functions and Duties of the Under
Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office

Date

APPENDIX A

Key Terminology

Terminology related to sexual orientation and gender identity has evolved. The following list contains examples of generally accepted terminology. Like all workplace communications, these terms are to be used respectfully and professionally. These terms—and commentary about an individual’s gender transition, gender identity, or gender nonconformity—should never be used in a derogatory or demeaning manner.

Gender identity is the individual’s internal sense of being male, female, or some other gender (see “gender nonbinary” below). Gender identity may be different from the individual’s body and/or sex assigned at birth.

Gender expression is the way an individual expresses their gender identity and may or may not conform to social stereotypes associated with a particular gender. Gender expression, similar to the term **gender presentation**, refers to how a person presents or expresses their gender identity to others through appearance, dress, mannerisms, speech patterns, social interactions, and other characteristics or behaviors. Gender expression and gender presentation are sometimes used interchangeably.

Gender nonconforming is a broad term that is sometimes used to describe people who do not appear or behave in accordance with, or conform to, traditional or societal expectations of a particular gender; their gender expression does not fit neatly into commonly used categories.

Gender nonbinary is a term that has sometimes been used for an individual who may not have the gender identity of either a male or a female, or who may identify as both male and female, or who may identify their gender as fluid. Some people who identify as gender nonbinary also identify themselves as “gender queer” or “gender expansive.”

Transgender is an umbrella term that refers to people whose gender identity and/or expression is different from the sex assigned to them at birth (i.e., the sex listed on an original birth certificate). The term “transgender woman” is typically used to refer to someone who was assigned the male sex at birth but who identifies as a female. Likewise, the term “transgender man” is typically used to refer to someone who was assigned the female sex at birth but who identifies as a male. A person does not need to undergo any medical procedure to be considered transgender. Further, not all individuals who fall under the definition of transgender identify as “transgender” per se. For example, an individual assigned the male sex at birth but who identifies as a woman may simply identify (and want to be known and thought of) as a woman, rather than a “transgender woman.”

Gender transition is the process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. There is no one set process an individual has to follow to transition. For some individuals, it will include changing their name and/or gender on legal documents, and for others, it may include medical treatment such as hormone use, counseling, and/or surgery. However, surgery or other medical treatments are not necessary for someone to transition to the gender with which they identify.

Cisgender is a term used for an individual who internally identifies as the same sex that they were assigned at birth.

Sexual orientation is a person's physical, romantic, or emotional attraction to people of the same or opposite sex (and sometimes to both/all sexes or to no one). Sexual orientation is distinct from gender identity. A person's gender identity does not have anything to do with sexual, romantic, or emotional attraction. For example, transgender individuals, just like cisgender individuals, may identify as gay, lesbian, bisexual, asexual, or heterosexual.

LGBT is an acronym that is often used as an umbrella term referring to lesbian, gay, bisexual, and transgender individuals.

APPENDIX B GENDER TRANSITION PLANNING

The following guidance will be used when an employee is contemplating, going through, or has gone through a gender transition.

A. Confidentiality and Privacy

Some employees may discuss their gender identity or transgender status openly; others may choose to keep that information private. Like any other personal information, if an employee shares information regarding their gender identity or transgender status, the information should be treated with appropriate sensitivity and kept confidential. Medical information received about individual employees is protected under the Privacy Act, 5 U.S.C. § 552a, and/or the Rehabilitation Act of 1973, 29 U.S.C. § 501 et seq. Gossiping and other inappropriate commentary about an individual's gender identity, transgender status, or gender-related transition are prohibited and may constitute misconduct and/or be a violation of the Agency's anti-discrimination and/or anti-harassment AAOs.

If any Agency staff member learns that an employee is going through, has gone through, or is contemplating a gender transition, the information should be treated with the same sensitivity and confidentiality as would be accorded to information about any other employee who is going through a significant life experience. This will leave the employee free to decide when, with whom, and how much to share information that the employee may consider private.

Workplace changes or a workplace transition plan may not be necessary or appropriate in all circumstances. For example, some transgender employees may not request any workplace changes, or may only seek discrete changes that need not be disclosed to other employees. Additionally, if a newly hired or transferred employee presents as the gender they identify with when the employee first meets coworkers, management, and supervisory officials, a gender transition plan and changes may not be requested at all. In this situation, the employee may either disclose the information or not, in accordance with the employee's preference.

B. Creating a Transition Plan for the Workplace

Employees who desire a transition plan for the workplace may contact a member of management, OEEOD, or OHR. Employees are encouraged to initiate transition planning as early as possible to allow sufficient time to plan and coordinate. Agency managers and officials are required to cooperate with the employee to develop a reasonable transition plan and shall not seek to delay or prevent an employee's gender transition. To the extent necessary, a transition team comprising representatives from the business unit, OEEOD, OHR, and OGL may be formed to provide further assistance with transition planning and implementation. The employee may also request the participation of a bargaining unit representative.

OEEOD will maintain sample transition plans to guide the employee's consideration of key issues with management. The employee's input will be the primary factor in transition planning, subject to legal and other practical requirements. Examples of items the transition plan may address include:

1. **Workplace Transition Date.** This is the date on which the transgender employee will begin to present full-time in the workplace consistent with the employee's gender identity. The date chosen is entirely within the discretion of the transgender employee. This includes the date the employee will begin using the restroom and other facilities for the gender with which the employee identifies.

Note: An employee is not required to give the Agency advance notice of when they will begin to present full-time as the gender with which they identify because the employee may not know for certain. At the same time, the employee should keep in mind that providing advance notice allows the Agency time to consider workplace changes the employee requests as part of the transition process.

2. **Use of Preferred Name and Pronouns.** This refers to the employee's preferred name and pronouns, and the date the employee would like to begin being referred to by the preferred name and pronouns.
3. **Information Regarding Notifying Others About the Transition.** The transitioning employee has discretion concerning whether, how, and when to inform others of their gender transition, including managers and/or supervisors, coworkers, and external parties (i.e., individuals who do not work for the Agency but who may interact with the transgender employee on a regular basis for work purposes). The employee may choose to tell others about the transition personally, or may ask Agency management or a supervisory official to help communicate transition-related information. Similarly, the employee may choose to tell managers, supervisors, coworkers, and/or external parties individually or as part of a group. A guiding principle is that only information that the employee wishes to share should be shared, in any appropriate manner the employee requests.
4. **Leave or Other Medical Options.** Not all employees undergoing a gender transition will have medical issues or undergo medical treatment or surgery. To the extent necessary, the Agency will provide the employee its standard Medical Options Letter.
5. **Training.** The transition plan should also address whether training will be provided to coworkers and supervisors, and the date by which the training will be provided.

C. **Name Changes and Use of Preferred Name and Pronouns**

OHR will maintain a sample list of record changes that may be requested due to a gender transition, provide information to the employee concerning the requirements (including documentation, if necessary) to complete the requested change(s), and assist as needed in processing. Record changes should occur as soon as possible, subject to any timing

considerations requested by the employee during transition planning and the fulfillment of any documentation requirements.

A court-ordered name or gender change is not required for employees to change the name used at work due to transgender status or gender identity. All employees should be addressed by and referred to by their preferred name and pronouns, both verbally and in writing. Intentional misuse of an employee's name or pronouns is inappropriate and will not be tolerated, and may result in disciplinary action. However, certain Agency information technology (IT) systems and security-related requirements may make it necessary for the employee to secure a court-ordered name or gender change before the Agency implements the name change in such IT systems or documents. The Agency will endeavor to facilitate name changes in Agency systems as quickly as is feasible and legally possible.

APPENDIX C
RESTROOMS AND OTHER FACILITIES

Employees must be allowed to use restrooms and other facilities designated for use by a particular gender (e.g., locker rooms) consistent with their gender identity. The Agency will not require an employee to have undergone any particular medical procedure or to provide proof of gender to have access to such facilities. While use of unisex or single-user restrooms and other facilities may be incorporated into a transition plan at the employee's request (and may be an appropriate subject for training coworkers or managers if desired by the employee), the Agency will never require that an employee use such a facility instead of the common restroom designated for the sex corresponding to the employee's gender identity.

APPENDIX D REFERENCES

Statutes

Title VII of the Civil Rights Act of 1964, as amended, 24 U.S.C. § 2000e et seq.
The Civil Service Reform Act of 1978, as amended, 5 U.S.C. § 2302.

U.S. Supreme Court

Bostock v. Clayton County, Georgia, 590 U.S. ___, 140 S. Ct. 1731 (2020) (holding that title VII of the Civil Rights Act of 1964’s prohibition of discrimination on the basis of sex includes sexual orientation and gender identity).

Executive Order

Executive Order 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 FR 7023 (Jan. 25, 2021).

U.S. Equal Employment Opportunity Commission (EEOC)

Macy v. Dep’t of Justice, EEOC Appeal No. 0120120821 (Apr. 20, 2012) (decision by the Commission holding that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on ... sex,’ and such discrimination therefore violates Title VII”).

Jameson v. U.S. Postal Service, EEOC Appeal No. 0120130992 (May 21, 2013) (“intentional misuse of a transgender employee’s new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment”).

Complainant v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120133123 (Apr. 16, 2014) (an allegation of discrimination on the basis of sex involving the failure to revise agency records pursuant to a change in gender identity stated a valid title VII claim).

Lusardi v. Dep’t of Army, EEOC Appeal No. 0120133395 (Apr. 1, 2015) (decision by the Commission holding that Agency restrictions on a transgender female’s ability to use a common female restroom facility constituted disparate treatment on the basis of sex and that the restroom restrictions, combined with a team leader’s intentional, repeated pronoun misuse, created a hostile work environment on the basis of sex).

U.S. Office of Special Counsel (OSC)

U.S. Office of Special Counsel Report of Prohibited Personnel Practice, OSC File No. MA-11-3846 (Aug. 28, 2014).

U.S. Department of Labor

Occupational Safety and Health Administration, A Guide to Restroom Access for Transgender Workers.

U.S. Office of Personnel Management

Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace.