



PROGRAM MATERIALS

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After Bostock: Building an LGBTQ+ Friendly Legal Workplace

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The Bostock Decision

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LGBTQ+ employees are officially protected in the workplace under Title VII

- ▶ The U.S. Supreme Court on June 15, 2020, held that the prohibition in Title VII against employment discrimination based on sex protects LGBTQ+ employees from termination motivated in part by their sexual orientation or gender identity.
- ▶ In the case of ***Bostock v. Clayton County, Georgia***, the Court concluded that an employer that fires an employee because the employee is gay or lesbian or transgender “fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.” 140 S. Ct. 1731, 1737 (June 15, 2020).

How Did We Get to Bostock?

- ▶ In a March 1, 2016 press release, the EEOC announced that it filed two separate lawsuits related to gay employees being subjected to hostile work environments.
 - ▶ EEOC's first two sex discrimination cases based on sexual orientation.
 - ▶ EEOC's Philadelphia District Office filed suit in U.S. District Court for the Western District of Pennsylvania against Scott Medical Health Center (gay male employee), and, in a separate suit, in U.S. District Court for the District of Maryland, Baltimore Division, against Pallet Companies, dba IFCO Systems NA (lesbian employee).
 - ▶ These cases represented the EEOC's attempts to broaden the reach of Title VII to specifically include sexual orientation discrimination under the hostile work environment theory.

How Did We Get to Bostock?

Pallet Companies

- ▶ June 2016: Pallet Companies, doing business as IFCO Systems, paid \$202,200 and provided significant equitable relief to settle the case brought by the EEOC.
- ▶ EEOC had charged that a lesbian employee at IFCO's Baltimore facility was repeatedly harassed by her supervisor because of her sexual orientation. Her supervisor made numerous comments to her regarding her sexual orientation and appearance, such as "I want to turn you back into a woman" and "You would look good in a dress," according to the suit. EEOC also alleged that the supervisor also made sexually suggestive gestures to her.
- ▶ According to the EEOC's complaint, IFCO also retaliated against the female employee by firing her just days after she complained to management and called the employee hotline to report the harassment.

How Did We Get to Bostock?

Scott Medical Health Center

- ▶ The District Court denied the employer's motion to dismiss based on the argument that Title VII does not apply to sexual orientation
 - ▶ In its ruling, the Court found that sexual orientation discrimination is a type of discrimination "because of sex," barred by Title VII. "There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality."
 - ▶ The Court concluded, "That someone can be subjected to a barrage of insults, humiliation, hostility and/or changes to the terms and conditions of their employment, based upon nothing more than the aggressor's view of what it means to be a man or a woman, is exactly the evil Title VII was designed to eradicate."

How Did We Get to Bostock?

Trump Administration Intervention in Private Lawsuit

- ▶ Gay male sky-diving instructor told a female client that he was gay. He was terminated for telling her. The employee states that he only mentioned it because he was going to be tightly strapped to her.
- ▶ On July 27, 2017, the Trump Administration's Department of Justice filed an *amicus* brief in the Second Circuit (*Zarda v. Altitude Express*) stating that Title VII of the Civil Rights Act of 1964 does not cover employment "discrimination based on sexual orientation."
- ▶ "The sole question here is whether, as a matter of law, Title VII reaches sexual orientation discrimination. It does not, as has been settled for decades. Any efforts to amend Title VII's scope should be directed to Congress rather than the courts."

How Did We Get to Bostock?

- ▶ *En banc* 2nd Circuit 10-3 decision
 - ▶ “Although sexual orientation discrimination is ‘assuredly not the principal evil that Congress was concerned with when it enacted Title VII,’ ‘statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils...In the context of Title VII, the statutory prohibition extends to all discrimination ‘because of ... sex’ and sexual orientation discrimination is an actionable subset of sex discrimination.”
 - ▶ 2nd Circuit joined the 7th Circuit, which in April 2017 ruled that Indiana educator Kimberly Hively had been fired due to her sexual orientation and was protected by Title VII. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017).
- ▶ Employer filed *writ of certiorari* with Supreme Court in May 2018.

Bostock v. Clayton County

- ▶ Opinion issued on June 15, 2020
- ▶ Actually, three cases from three different circuit courts of appeals
 - ▶ *Bostock v. Clayton County* – Eleventh Circuit – long-term employee fired for “conduct unbecoming” after he began participating in a gay recreational softball league – Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay.
 - ▶ *Zarda v. Altitude Express* – Second Circuit – employee fired days after mentioning he was gay to a customer – Second Circuit allowed claim to proceed following a motion to dismiss arguing that Title VII does not prohibit discrimination based on sexual orientation.
 - ▶ *Stephens v. R.G. & G.R. Harris Funeral Homes* – Sixth Circuit – employee, who presented as a male upon hire, fired after she informed the employer she was planning to live and work as a female – Sixth Circuit allowed claim to proceed following a motion to dismiss arguing that Title VII does not prohibit discrimination based on gender identity.

Bostock v. Clayton County

- ▶ Common issue on all three cases was this question:

What is the “ordinary public meaning” of Title VII’s that it is “unlawful . . . For an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . .”

In other words, does the term “sex” in Title VII include homosexuality or transgendered status?

Bostock v. Clayton County

- ▶ The opinion (authored by Justice Gorsuch and joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan), instead of relying primarily on Supreme Court precedent such as *Price Waterhouse*, started with the premise that the term “sex” means the biological distinctions between male and female.
- ▶ No real mention or discussion of “sex stereotyping,” which had been a key issue among the lower courts.
- ▶ Majority opinion uses the concept of “but for” causation to make its point. Thus, “so long as the plaintiff’s sex was one but-for cause of [the employment] decision, that is enough to trigger the law.”

Bostock v. Clayton County

Some key points from decision:

- ▶ It is “impossible” to discriminate against a person for being gay or transgender without discriminating against that person based on sex, thus violating Title VII. “An employer who fires an individual for being homosexual or transgender fires the person for traits or actions it would not have questioned in members of a different sex.”
- ▶ “Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.”

Bostock v. Clayton County

- ▶ But what about the employer who fires all employees, male and female, who are gay or transgender? Is it “because of sex,” then?
- ▶ “Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual’s sex an independent violation of Title VII.”
- ▶ Thus, if an employer discriminates against employees because they are gay or transgender, the employer must intentionally discriminate against individual men and women “in part” because of sex, which is a violation of Title VII.

Bostock v. Clayton County

- ▶ The opinion goes on to conclude that “these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individuals men and women in part because of sex.”
- ▶ Thus, discrimination on the basis of homosexuality or transgender status is discrimination based on sex, which violates Title VII.

Bostock v. Clayton County

- ▶ Vigorous dissents from Justices Alito, Thomas, and Kavanaugh.
- ▶ Justices Samuel Alito and Clarence Thomas accused the majority of hiding behind the “textualist school of statutory interpretation.”
 - ▶ Specifically, the dissent wrote, “[t]he Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court’s opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated — the theory that courts should ‘update’ old statutes so that they better reflect the current values of society.”

Bostock v. Clayton County

What Comes Next?

- ▶ Continued refinement of the mixed-motive analysis in Title VII cases.
- ▶ Challenges based on the Religious Freedom Restoration Act.
- ▶ Continued efforts at federal and state level to pass legislation the codify this decision.
 - ▶ 27 states, including Ohio, do not have any protection for LGBTQ employees, and after *Bostock*, that situation will remain for employers with less than 14 employees.
 - ▶ While most state courts defer to judicial interpretations of Title VII, it will be curious to see if this is one of them.
 - ▶ Larger municipalities and other political subdivisions more likely to have protections in their ordinances.
 - ▶ Many employers have taken it upon themselves to include these protections.
 - ▶ If you/your client is a federal contractor, this was already the law for you under executive order. Your policies and practices should not need any changing on this issue.

Bostock: are your clients/business units ready?

Are your/your clients' policies up to date to reflect this decision?

Have leaders been advised or trained? Do they understand that transgender employees are included under the Bostock decision?

Is it time to begin diversity and inclusion initiatives if none have occurred yet? Or add some teeth to existing ones?

VALUING **TRANSGENDER APPLICANTS & EMPLOYEES:**

A Best Practices Guide for Employers

Authored by Victoria M. Rodríguez-Roldán, J.D.
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ABOUT THE NATIONAL LGBTQ TASK FORCE

The National LGBTQ Task Force advances full freedom, justice and equality for all LGBTQ people. We are building a future where everyone can be free to be their entire selves in every aspect of their lives. Today, despite all the progress we've made to end discrimination, millions of LGBTQ people face barriers in every aspect of their lives: in housing, employment, healthcare, retirement, and basic human rights; these barriers must go. They also face persecution, harassment and violence for simply being themselves; this must change. That's why the Task Force is training and mobilizing millions of activists across our nation to deliver a world where you can be you. For more information, visit www.thetaskforce.org.

ABOUT THE DISTRICT OF COLUMBIA OFFICE OF HUMAN RIGHTS

The District of Columbia Office of Human Rights (OHR) works to eradicate discrimination, increase equal opportunity and protect human rights for individuals who live in, work in, or visit the District of Columbia. The agency enforces local and federal human rights laws, including the DC Human Rights Act, by providing a legal process to those who believe they have been discriminated against. OHR also aims to end discrimination in the District through proactive policy and awareness initiatives, and by identifying and investigating practices that may be discriminatory. OHR has launched several ground-breaking initiatives intended to reduce discrimination against and improve the lives of transgender and gender non-conforming people in the District. For more information, visit ohr.dc.gov.

RECOMMENDED CITATION

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DISCLAIMER

The information provided in this publication is intended to guide employers on ensuring transgender and gender non-conforming applicants and employees are treated appropriately. This publication should not be considered legal advice. Section III: Legal Obligations, provides a review of current federal law and policies as of May 2016, in addition to requirements under law in the District of Columbia. All other sections, including "best practices," are not necessarily considered requirements under federal or District law.

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INTRODUCTION

Access to stable employment is integral to human dignity and self-worth. Unfortunately for many transgender people, employment is often inaccessible due to discrimination. According to the National Transgender Discrimination Survey,¹ more than 90 percent of transgender people have experienced harassment in the workplace due to their gender identity, and at least 47 percent said they experienced an adverse job outcome (such as being fired, not hired, or denied a promotion) due to their gender identity. In the District of Columbia, a resume testing study conducted by the DC Office of Human Rights found 48 percent of employers tested² appeared to prefer at least one less-qualified cisgender applicant over a better-qualified transgender applicant. Clearly, employers and their employees are struggling to ensure transgender people are treated with respect and fairness in the workplace.

90%
**OF TRANSGENDER
PEOPLE REPORT
EXPERIENCING
HARASSMENT IN THE
WORKPLACE**

The purpose of this publication is to provide employers with guidance and “best practices” for transgender applicants and employees that go beyond legal obligations. These best practices can help create a workplace environment that is genuinely inclusive of the transgender community, to the benefit of all employees and the employer itself. The recommendations in this publication are not exhaustive, and employers relying on this guide are encouraged to constantly evaluate their policies and workplace culture to ensure they are productive environments that are inclusive and friendly to the transgender community.

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

² For determining rates of discrimination, only tests where one or more applicant(s) received a response were considered. This is in-line with best practices on correspondence testing. The complete findings are available at ohr.dc.gov/page/QualifiedAndTransgender.

DEFINITIONS

The following are definitions for gender identity and related terms:³

Cisgender	A person who expresses as and identifies with the gender they were assigned at birth.
Gender Identity	A person's internal sense of being male, female, or something else. Since gender identity is internal, one's gender identity is not necessarily visible to others.
Gender Expression	How a person represents or expresses one's gender identity to others, often through behavior, clothing, hairstyles, voice or body characteristics.
Gender Non-Conforming	A term for people whose gender expression is different from societal expectations related to gender.
Non-Binary	A term used by people who identify as neither entirely male nor entirely female.
Transgender	A broad term for people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth. "Trans" is shorthand for "transgender." (Note: Transgender is correctly used as an adjective, hence "transgender people," but "transgenders" or "transgendered" is often viewed as disrespectful.)
Transgender Man	A term for a transgender person who identifies as a man.
Transgender Woman	A term for a transgender person who identifies as a woman.

³ The definitions are from the National Center for Transgender Equality's "Transgender Definitions," with minor adaptations. The resource is available at www.transequality.org/issues/resources/transgender-terminology.

LEGAL OBLIGATIONS

While federal law does not explicitly prohibit discrimination based on gender identity or expression, federal courts and federal government policies are increasingly interpreting discrimination against transgender people as discrimination based on sex, which is strictly prohibited in employment. The Equal Employment Opportunity Commission (EEOC) has explicitly stated it interprets and enforces sex discrimination protections from Title VII of the Civil Rights Act of 1964 as forbidding employment discrimination based on gender identity or sexual orientation, and that these protections apply regardless of any contrary state or local laws.

As of May 2016, 19 states and the District of Columbia have explicitly prohibited discrimination based on gender identity and expression. Among the most progressive and comprehensive non-discrimination laws that include gender identity or expression is the District of Columbia Human Rights Act of 1977 (HRA), which is reviewed below.

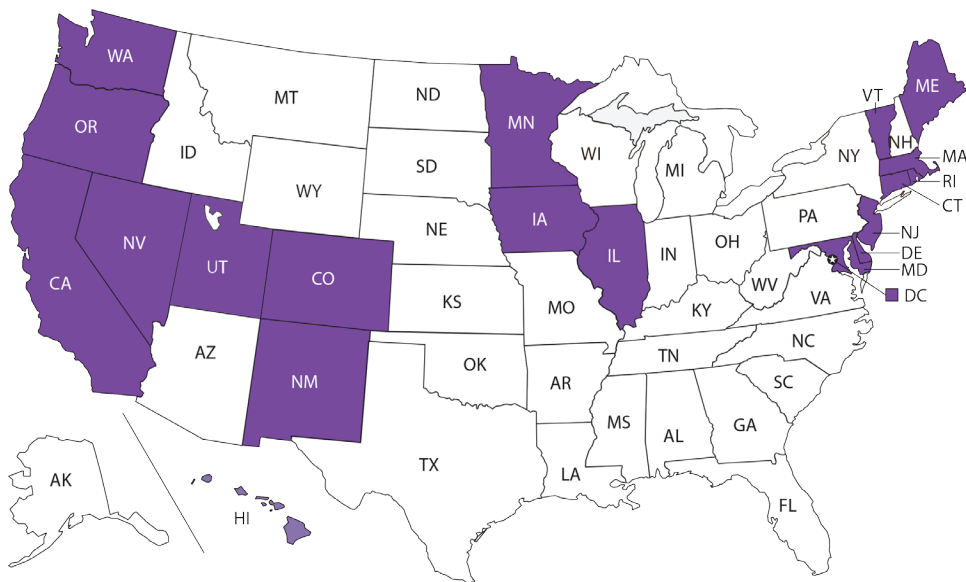
FEDERAL LAW

Gender identity discrimination as sex discrimination

In 1989, the U.S. Supreme Court decided the case known as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The case was about Anna Hopkins, an employee of the Price Waterhouse firm, who upon being denied a promotion to partner status was told she needed to behave in a more stereotypically feminine way, with one written evaluation saying she needed a “course in charm school.” There, the Court held clearly that gender stereotyping, or discrimination against an individual in employment based on their not fulfilling the expected stereotypical behavior associated with gender, constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

Applying *Price Waterhouse* (EEOC Appeal No. 0120120821, April 20, 2012), the EEOC held in 2012 in *Macy v. Holder* that refusing to hire a transgender woman due to her gender identity constituted illegal sex discrimination under Title VII. The EEOC further clarified this position a year later, when in *Jameson v. U.S Postal Service* (EEOC Appeal No. 0120130992, May 21, 2013), it held that intentional misuse of a transgender employee’s new name and pronouns may constitute sex-based

STATES WITH EXPLICIT EMPLOYMENT DISCRIMINATION PROTECTIONS BASED ON GENDER IDENTITY OR EXPRESSION



States with explicit employment discrimination protections based on gender identity or expression, as of May 2016 (19 states and the District of Columbia): Minnesota (1993), Rhode Island (2001), New Mexico (2003), California (2003), District of Columbia (2005), Illinois (2005), Maine (2005), New Jersey (2006), Washington (2006), Iowa (2007), Oregon (2007), Vermont (2007), Colorado (2007), Connecticut (2011), Hawaii (2011), Nevada (2011), Massachusetts (2011), Delaware (2013), Maryland (2014), Utah (2015).

discrimination and/or harassment. Most recently in *Lusardi v. Dept. of the Army* (EEOC appeal No. 0120133395, Mar. 27, 2015), it held that imposing restrictions on a transgender employee's ability to use a restroom facility consistent with their gender identity constitutes illegal disparate treatment under Title VII.

This constellation of case law, combined with several decisions in federal district courts and circuits across the country, confirms discrimination against transgender employees in employment is illegal sex discrimination under federal law.

DISTRICT OF COLUMBIA LAW

In 2006, the District of Columbia added gender identity and expression to the DC Human Rights Act of 1977 (HRA), prohibiting discrimination against transgender people in employment, housing, public accommodations, and educational institutions.

In employment, the HRA prohibits the following acts based on an individual’s gender identity or expression:

- Failure or refusal to hire or promote;
- Discharge;
- Treating individuals differently with respect to compensation, terms, conditions or privileges of employment;
- Verbal or physical harassment or permitting such conduct to persist in the workplace; or
- Requiring an individual to state whether they are transgender.

In addition, the HRA has regulations that serve as guidance for various issues affecting transgender employees (see 4 DCMR § 800 et seq):

Access to Gender-Segregated Facilities (4 DCMR §§ 802, 805)

Transgender people must have equal access to restrooms or other gender-specific facilities that are consistent with their gender identity or expression, including facilities where nudity in the presence of other people is common. Requiring documentation or other proof of an individual’s gender or gender identity is prohibited, except in situations where all people are asked to provide documentation or other proof of their gender for a reasonable business or medical purpose (see 4 DCMR § 805.3).

Additionally, all single-occupancy restroom facilities in the workplace must be gender-neutral.

Dress and Grooming (4 DCMR §§ 804)

Employers may not require transgender people to dress or groom themselves in a manner inconsistent with their gender identity or expression. Employers can require dress standards that serve a reasonable business purpose as long as the standards do not discriminate or have a discriminatory impact on the basis of a person’s gender identity or expression.

Accommodations for Health Care Needs (4 DCMR § 803)

When requested, employers must make reasonable accommodations (including medical leave) for gender identity-related health care needs, including but not limited to medical or counseling appointments, surgery, recovery from surgery, or any other trans-related procedures.

Gender and Name Requirements (4 DCMR §§ 806, 807)

Employers may not require an applicant to state whether they are transgender. If an employer learns through a background check that an applicant or employee is transgender, the employer may not take an adverse action based on the information and shall take reasonable steps to preserve the confidentiality of the learned information.

If an application form asks for an individual to identify as “male” or “female,” a transgender applicant may choose the sex they identify with rather than their assigned or presumed gender. Similarly, an applicant may apply for employment using their preferred name, if it is publicly and consistently used by the applicant, and the preferred name is consistent with the applicant’s gender identity or expression. A legal name can be required when there is a legitimate business reason or when required by law. An employer is prohibited from considering any of the actions above to be fraudulent or a misrepresentation, and may not take adverse action against the applicant for such designation or preference.

Harassment (4 DCMR § 808)

The following behaviors by supervisors or coworkers may be considered unlawful harassment or a hostile work environment:

- Deliberately misusing a person’s preferred name or pronoun;
- Asking personal questions about an individual’s body, gender identity or expression or transition;
- Causing distress to an individual by outing a transgender person against their will; or
- Posting offensive pictures or sending offensive communications.

The District uses the probable cause standard in determining whether the above constitute harassment or a hostile work environment.

BEST PRACTICES IN THE WORKPLACE

The adoption of best practices is essential for creating and maintaining a transgender-inclusive workplace that ensures fair and equitable treatment of transgender employees.

These recommendations act as guidelines for employers committed to being the “gold standard” in this area. The recommendations are policies that can be enacted by any employer, from the small business owner to the largest company’s human resources (HR) department.

In this section, the following Best Practices will be reviewed:

- 1. Maintain confidentiality
- 2. Use proper names and pronouns.
- 3. Ensure access to restrooms and other facilities.
- 4. Implement gender-neutral dress codes.
- 5. Address challenges with other employees and coworkers.

BEST PRACTICE 1: MAINTAIN CONFIDENTIALITY

There are many ways an employer may learn an employee is transgender. It can occur during the hiring process because of the application or a background check, or when an existing employee decides to transition into the gender with which they identify. The disclosure may occur when the employee requests an employment accommodation – such as asking a supervisor to ensure colleagues use their preferred name instead of their legal name – or it can be learned through other means, such as employee gossip or mutual acquaintances. Regardless of how an employer learns an individual is transgender, it is essential that confidentiality be maintained at all times. Information should be shared solely on a need-to-know basis or in consultation with the employee.

If a transgender employee tells a supervisor they intend to transition or already have transitioned, disclosing it to an HR official may be necessary to coordinate updating the employee’s records to reflect their appropriate gender, name or other information. However, this should be discussed with the employee and coordinated with their needs, wishes and transition timeline. Supervisors or colleagues should never out

an employee to coworkers against their will or without consulting them. Transgender people frequently face stigma, prejudice and discrimination in the workplace, and being outed can jeopardize their job satisfaction and safety. Employers should establish clear rules prohibiting employees from disclosing or gossiping about an employee’s gender identity, and ensure violations of the policy are addressed quickly.

SAMPLE SCENARIOS

SCENARIO I	Allison is about to start working at Acme, Inc. as an accountant and tells Dana, her supervisor, that she is transgender. Although her legal name is David, she goes by Allison and uses the pronouns “she” and “her.” Dana acknowledges this and asks if Allison is comfortable with Dana informing the HR department so that the name Allison is used on her email account, business cards and other outward facing documents. Allison agrees. The subject is kept confidential between them and is not discussed with co-workers except to the extent that Allison wishes.
SCENARIO II	Allison has been working at Acme, Inc. for two years as an accountant, and during that time has been perceived as male and has used the name Alexander. During their weekly check-in meeting, she informs her supervisor Dana that she is planning to transition to her desired gender of female, and plans to adopt the name Allison. Dana and Allison discuss her plans and timeline, and whether and when Allison wants Dana to talk to HR about changing her name and gender in records. They also discuss how “out” Allison wants to be with coworkers, and if this is something she would rather have Dana speak with them about or if she would prefer to do so herself. At no point should Dana assume what Allison wants or does not want without asking her. Dana should never email employees to inform them of Allison’s transition without receiving Allison’s approval, including which employees will be informed.
SCENARIO III	Allison is transgender and works at Acme, Inc. She has a close working relationship and friendship with her coworker Jane, and has confided to her that she is transgender. Allison is not out to the rest of the workplace. Jane should never disclose Allison’s gender identity to other coworkers or supervisors without Allison’s consent.

BEST PRACTICE 2: USE PROPER NAMES AND PRONOUNS

As part of living authentic lives true to their gender identity, many transgender people will adopt a name other than the one assigned at birth, as it is more congruent with their identity. Many transgender people will take steps to have their name and gender legally changed in their identification documents to more closely match their gender identity. Others, however, may not make these legal changes for a variety of reasons, including the cost, availability and accessibility of the legal process.

Regardless of the legal name and gender, employers should use an employee’s desired name and pronouns when communicating with them, and when talking about them to third parties. The employer must ensure employees respect and use a transgender employee’s preferred names and pronouns, as repeated failure to do so can be considered harassment, and can cause severe distress to a transgender employee.

Of course, employers need to know an employee’s legal name for a variety of reasons, including tax forms and paychecks. Yet nothing prohibits employers from allowing transgender employees to use preferred names and pronouns in all other settings, including on badges, business cards, email accounts, staff directories and schedules. A transgender employee’s legal name should be used solely for HR-related legal necessities, and be maintained as a confidential part of their employee file. It should only be shared on a need-to-know basis. Additionally, it is recommended employers give *all* employees the option to provide both their legal name and optional preferred name whenever possible on HR documents.

Creating a Plan and Timeline

When an employee transitions in the workplace, the employee and their supervisor should discuss how the employee wants to transition the use of their name and pronouns. This can include establishing a date the employee wants to start using their new name in the workplace, which allows the employer to complete the tasks necessary to ensure the preferred name is reflected on outward facing documents.

The employer and the transgender employee should also discuss how to best communicate the new names and pronouns to coworkers, and determine which employees are notified. Usually, communications should be limited to employees who already know the transgender employee,

GENDERED AND GENDER-NEUTRAL PRONOUNS

He	He smiled.	I met <i>him</i> .	<i>His</i> bike.	He is <i>himself</i> .
She	She smiled.	I met <i>her</i> .	<i>Her</i> bike.	She is <i>herself</i> .
Ze	Ze smiled.	I met <i>zir</i> .	<i>Zir</i> bike.	Ze is <i>zirsself</i> .
They	They smiled.	I met <i>them</i> .	<i>Their</i> bike.	They are <i>themselves</i> .

and not the entire workplace. As mentioned earlier, the employer should develop a plan in consultation with the transgender employee, and understand that some transgender employees may want to tell coworkers themselves, while others may prefer the supervisor tell them.

Developing Email Addresses

To make the transition process easier for existing employees, it is recommended all work email addresses use an employee’s surname rather than their given name. This way a change in email address is unnecessary if an employee transitions. For example, the address jsmith@company.com for employee Jane Smith would be preferable to jane.smith@company.com or jane@company.com. A transgender employee can easily be outed by a change in email address that may not be necessary if the email address does not include their given name.

Asking About Pronouns

Employers who routinely ask all employees to share their preferred pronouns can create a welcoming environment for transgender employees. Asking all to share preferred pronouns during introductions at meetings or on name badges can greatly reduce stress around pronoun usage for all employees. Employers can also provide *all* employees the option to put preferred pronouns in their email signatures, however it should be *strictly optional*, given some transgender people may not feel comfortable doing so for a variety of reasons. These proactive measures can dramatically enhance transgender employees’ comfort in the workplace and make an important statement about the desired workplace culture.

BEST PRACTICE 3: ENSURE ACCESS TO RESTROOMS AND OTHER FACILITIES

Transgender employees should at all times be able to use the restroom and other gender-segregated facilities (such as locker rooms) that they are most comfortable with. At no point should gender-segregated facilities prohibit a transgender employee from fully living according to their gender identity. Refusing to allow transgender employees to use the bathroom that is congruent to their gender identity is a form of discrimination and can place a transgender person at risk by exposing them to ridicule, harassment, and even violence.

The restroom or other gender-segregated facility a transgender employee uses should be a decision made solely by the transgender employee. At times a transitioning employee may not feel comfortable using the restroom of the gender they are transitioning to until they reach a certain point in their transition. Similarly, someone who identifies as non-binary may want to use a specific restroom because they are most comfortable with it, regardless of their personal appearance. This policy should apply to locker rooms and other changing facilities that exist in the workplace.

Use and Creation of Gender-Neutral Facilities

While a transgender employee may prefer to use, if available, a separate gender-neutral facility, they should never be required to use one. A transgender employee should be able to use a gendered facility even when a gender-neutral facility is available. If a cisgender employee expresses discomfort about sharing a gendered facility with a transgender coworker, the cisgender employee should be offered, if possible, the use of a separate gender-neutral facility.

It is also recommended workplaces make all single-occupancy restroom



#SafeBathroomsDC campaign asks DC residents to report gendered single-occupancy public restrooms.

facilities gender-neutral, and build single-occupancy gender-neutral restrooms whenever possible. This can preempt issues or discomforts that arise from employees who are hostile to or have a lack of understanding of transgender people.

BEST PRACTICE 4: IMPLEMENT GENDER-NEUTRAL DRESS CODES

Dress codes and uniforms are often an integral part of a workplace’s culture and philosophy. Workplaces should ensure dress codes or uniforms do not specifically impose disparate rules based on gender. Dress codes or uniforms that require women wear skirts or dresses and men wear slacks or neckties can be discriminatory, and can also place unnecessary burdens on transgender and gender non-conforming people.

It is recommended that workplaces with a dress code or uniforms make them gender-neutral. A dress code that says “business casual attire (such as dress pants and dress shirts or blouses or business casual dresses), no jeans and no shorts,” would be preferable to “business casual attire, (slacks for men, dresses and dress skirts for women).” If a workplace issues uniforms that are gendered in how they are sized and tailored (such as most police uniforms), an employee should be allowed to choose the issued uniform that most fits their gender identity and preferences.

BEST PRACTICE 5: ADDRESS CHALLENGES WITH OTHER EMPLOYEES AND COWORKERS

Occasionally, employees may express discomfort with a transgender co-worker, or may resist referring to them by their preferred name and pronouns. Employers should insist on a professional environment in which personal animosities do not interfere with the workplace, and ensure employees manage themselves in a professional way. The employer should always work with and/or reprimand the person expressing the discomfort and causing the issue, not with the transgender employee. Often times this can be accomplished by helping the problematic employee better understand the concept of gender identity, yet harassment or derogatory comments should not be tolerated and clear rules and guidelines should be established to that effect.

BEST PRACTICES IN HIRING

Adopting best practices on transgender issues should not be limited to existing employees. Workplaces should also establish guidelines that prevent bias when recruiting and hiring new employees. In 2015, the DC Office of Human Rights' *Qualified and Transgender* report revealed that 48 percent of employers tested⁴ in the District of Columbia appeared to prefer at least one less-qualified applicant perceived as cisgender over a more qualified applicant perceived as transgender. These are extremely high (and unacceptable) rates of discrimination, and the best practices in this section can help employers avoid intentionally or unintentionally discriminating against transgender applicants.

In this section, the following Best Practices will be reviewed:

- 6. Use proactive methods to uncover discrimination.
- 7. Ensure interviews are welcoming.
- 8. Ensure fair background checks.
- 9. Avoid irrelevant questions when checking references.

BEST PRACTICE 6: USE PROACTIVE METHODS TO UNCOVER DISCRIMINATION

Employers should use proactive methods to ensure transgender applicants do not face discrimination during the application review stage of the hiring process. This can be done by reviewing hiring processes and removing unnecessary barriers for transgender applicants, such as requiring them to select "male" or "female" on an application form. For employers that rely on online application forms, prospective employees should be given the option to provide both their preferred name as well as their legal name, and should also be asked for their preferred pronouns. If an applicant states a preferred name that is different from their legal name on an application or resume (often referred to in a parenthetical), the application should be filed using the person's preferred name.

⁴ For determining rates of discrimination, only tests where one or more applicant(s) received a response were considered. This is in-line with best practices on correspondence testing. The complete findings are available at ohr.dc.gov/page/QualifiedAndTransgender.

Proactive employers can also conduct internal testing to ensure those reviewing applications are fairly considering transgender applicants. Employers can create two pseudo applicants with resumes – one with transgender identifiers and one without – with the transgender applicant being slightly more qualified for the position, all else equal.⁵ Employers can then make sure the less-qualified cisgender applicant was not selected for an interview without the more-qualified transgender applicant being selected as well. If the internal testing reveals possible discrimination, cultural competency training and other corrective policy actions are recommended to ensure fair treatment of transgender applicants.

BEST PRACTICE 7: ENSURE INTERVIEWS ARE WELCOMING

During job interviews, it is recommended the same inclusive norms that exist in a transgender-friendly workplace also be used with prospective applicants. This includes interviewers providing their pronouns alongside their names when introducing themselves, and asking the interviewee their preferred pronouns and preferred name if it is not already known. Under no circumstances should an interviewer ask personal questions about an employee’s transition or gender identity. Asking questions about how far along an applicant is in their transition, what specific medical procedures they have undertaken, what gender they were assigned at birth, or what their “real name” was is an invasion of privacy, and raises the possibility of a biased hiring decision.

BEST PRACTICE 8: ENSURE FAIR BACKGROUND CHECKS

Some positions may require background checks, especially when the employee is entrusted with highly confidential information or firearms as part of the job. It is possible a background check may reveal that an applicant is transgender, either because of prior records under an old name, or because the individual was required to provide names they used in the past. There are many stories of anti-transgender employment

⁵ Review the methodology for the *Qualified and Transgender* report for ideas on how to conduct testing within a company using transgender identifiers on resumes. The report is available at ohr.dc.gov/page/QualifiedAndTransgender.

discrimination in which an offer was rescinded because of information revealed about their gender identity during the background check.

An applicant should not be required to disclose their gender identity for a job application or background check, and it should not be considered an act of dishonesty for a person to not disclose they are transgender. Employers conducting background checks on employees must have clear policies about when an offer should be rescinded because of the results, and ensure that a person's transition or gender identity is never a factor in such a determination, regardless of whether it was disclosed. When possible, the results of the background check should be kept confidential, and only information relevant to the individual's job duties should be disclosed to the supervisor or hiring manager.

SAMPLE SCENARIO

SCENARIO IV

After Allison receives a conditional job offer at Acme, Inc., the HR manager Brian explains to Allison they will conduct a background check, and he asks her to fill out a form that requires listing any past names she has used. Allison completes the form, and notes her previous name was David. Brian conducts the background check under both names and finds that Allison has a conviction for a misdemeanor marijuana possession from six years ago. As the HR manager, Brian concludes that the age and type of conviction is not a reason for Acme, Inc. to withdraw their offer to Allison. Brian informs Allison's future supervisor that she passed the background check, and does not disclose that Allison used to be called David.

BEST PRACTICE 9: AVOID IRRELEVANT QUESTIONS WHEN CHECKING REFERENCES

Employers should never ask about an applicant's gender identity when speaking with references from their application. Questions related to an applicant's gender identity are a violation of privacy and risk outing an individual against their will. Employers should use the preferred name provided when referencing the applicant, and should use the pronouns the applicant used to describe themselves, if applicable. If unsure, it is appropriate for the employer to ask the applicant the name and pronouns they would like the employer to use when speaking with references.

CONCLUSION

By implementing these best practices and ensuring the workplace is compliant with federal and local laws, employers can create a welcoming environment for transgender employees that can enhance productivity and job satisfaction. While some jurisdictions – such as the District of Columbia – have strong laws to protect transgender employees, other jurisdictions do not. Employers in jurisdictions with fewer protections for transgender workers, but who implement these best practices, will have an edge in attracting exceptionally talented transgender employees who desire an inclusive workplace.



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LGBTQ+ Lawyers Experience Breakthroughs and Setbacks: Comment on Blanck, Hyseni, and Altunkol Wise's National Study of the Legal Profession

Wesley Bizzell[†]

I. INTRODUCTION

The past decade has seen numerous positive developments in both legal and policy protections for those who identify as lesbian, gay, bisexual, trans, or queer (“LGBTQ+”). Progress in this area has been decidedly uneven, however, and significant barriers still exist which thwart the full legal and societal acceptance of LGBTQ+ individuals. Unfortunately, as the groundbreaking study by Peter Blanck, Fitore Hyseni, and Fatma Altunkol Wise shows, LGBTQ+ identifying lawyers, especially those with intersectional identities, continue to experience discrimination and bias in their workplaces.¹

While other studies have focused on LGBTQ+ bias and discrimination in the American workforce, few have looked at these issues in the specific context of the legal profession, a profession with an often rigid hierarchy and a woeful lack of diversity across multiple spectrums.² This consequential research, which includes a much anticipated longitudinal research component, sheds important light on the types of bias and discrimination experienced by LGBTQ+ attorneys and other legal professionals, individual and

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¹Peter Blanck, Fitore Hyseni & Fatma Altunkol Wise, *Diversity and Inclusion in the American Legal Profession: Discrimination and Bias Reported by Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 47 AM. J.L. & MED. 9, 44 (2021).

²See, e.g., M. V. Lee Badgett et. al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008*, 84 CHI.-KENT L. REV. 559, 594 (2009).

organizational mitigators, and the types of organizations in which this bias and discrimination is more likely to occur. As such, it is an immensely beneficial building block for law firms, corporate legal departments, and local and national bar organizations, such as the National LGBTQ+ Bar Association, that seek to foster a more supportive and inclusive environment for LGBTQ+ employees. Accordingly, this research advances efforts to ensure that diversity, inclusion, and equity are not only ongoing business objectives, but are also unwavering organizational obligations.

II. BREAKTHROUGHS AND SETBACKS

It is indisputable that more legal and policy protections exist today in the United States for LGBTQ+ individuals than existed ten years ago. Same-sex marriage is now legal in every state, given the Supreme Court's 2015 ruling in *Obergefell v. Hodges*.³ Last year, the Supreme Court found that Title VII's protections against workplace discrimination extend to discrimination on the basis of sexual orientation and gender identity.⁴ The federal government is once again advancing pro-equality initiatives,⁵ and various states have also enacted comprehensive anti-discrimination legislation, including the Commonwealth of Virginia, the first southern state to pass such legislation.⁶

Further, major corporations and large law firms have helped lead the way in convincing Americans that LGBTQ+ individuals should be treated equally. According to the 2021 Human Rights Campaign's Corporate Equality Index, ninety-six percent of the Fortune 500 have a non-discrimination policy that includes sexual orientation, and ninety-four percent have a policy that includes gender identity.⁷ Over two-thirds of the Fortune 500 provide comprehensive transgender-inclusive health care benefits.⁸ A growing number of corporations and law firms are also speaking out in favor of LGBTQ+ equality issues and standing up when the rights of LGBTQ+ people come under attack. For example, in 2021, almost 400 leading businesses, representing more than \$6.5 trillion in revenue and more than 13.5 million U.S. employees, joined the Human Rights Campaign's Business Coalition for the Equality Act, urging Congress to enact federal anti-discrimination legislation for LGBTQ+ individuals.⁹

As society has changed, the legal profession has concomitantly changed. Of the Am Law 200,¹⁰ 130 law firms received a perfect score and the distinction of "Best Places

³*Obergefell v. Hodges*, 135 S.Ct. 2584, 2585 (2015).

⁴*Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1731 (2020).

⁵*See, e.g.*, Exec. Order No. 14,004, 86 Fed. Reg. 7471 (Jan. 25, 2021); Lucas Acosta, *President Biden Issues Most Substantive, Wide-Ranging LGBTQ Executive Order in U.S. History*, HUM. RTS. CAMPAIGN (Jan. 20, 2021), <https://www.hrc.org/press-releases/president-biden-issues-most-substantive-wide-ranging-lgbtq-executive-order-in-u-s-history> [<https://perma.cc/SP9G-94JX>]; Geoff Bennett & Adam Edelman, *Biden Reverses Trump's Transgender Military Ban*, NBC News (Jan. 25, 2021), <https://www.nbcnews.com/politics/white-house/biden-reverse-trump-s-transgender-military-ban-n1255522> [<https://perma.cc/W33J-2Q4M>].

⁶2020 Va. Acts 1140.

⁷HUMAN RIGHTS CAMPAIGN, CORPORATE EQUALITY INDEX 2021: RATING WORKPLACES ON LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER EQUALITY 6 (2021), https://reports.hrc.org/corporate-equality-index-2021?_ga=2.203809042.386268155.1617162870-1436600013.1611731475 [<https://perma.cc/JCN5-8MCP>].

⁸*Id.*

⁹The Business Coalition for the Equality Act. HUM RTS. CAMPAIGN (March 17, 2021), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/Keep_Updated_-_Company_List_For_Website_-_Business_Coalition_for_Equality.pdf.

¹⁰The Am Law 200 is the American Lawyer magazine's top 200 revenue grossing law firms. The Am. Lawyer, *The 2020 Am Law 100*, LAW.COM (Apr. 21, 2020), <https://www.law.com/americanlawyer/rankings/the-2020-am-law-100/> [<https://perma.cc/94TA-HJSU>]; The Am. Lawyer, *The 2020 Am Law 200*, LAW.COM

to Work for LGBTQ Equality” in the Human Rights Campaign’s 2021 Corporate Equality Index.¹¹ For the past several years, all of the Am Law 100 have participated in the National LGBTQ+ Bar Association’s Lavender Law Conference and Career Fair, seeking LGBTQ+ law students to join their firms.¹²

Law schools have also become more welcoming and inclusive in the past decade for LGBTQ+ students. The National LGBTQ+ Bar Association has compiled non-discrimination policies for each U.S. law school accredited by the American Bar Association (“ABA”), noting which schools bar discrimination on the basis of sexual orientation and gender identity.¹³ Based on this research, all but two of the 204 ABA accredited law schools prohibit discrimination on the basis of sexual orientation, and fifteen of the 204 accredited law schools do not include gender identity in the school’s anti-discrimination policy.¹⁴ Moreover, the National LGBTQ+ Bar Association’s Law School Climate survey shows that many law schools are proactively working towards diversity and inclusion for their LGBTQ+ student populations and are committed to policies and programs that protect and foster the growth of LGBTQ+ law students and faculty.¹⁵

While there is much to celebrate, much work remains to ensure that our society, our law schools, and our workplaces are fully welcoming to all diverse individuals, including those who are LGBTQ+. Hate crimes against LGBTQ+ individuals remain at alarmingly high levels, after significant increases in the past few years in hate crime incidents targeting gays, lesbians, and bisexuals and a forty-one percent increase in the number of anti-transgender hate crimes.¹⁶ Further, in the past several years, anti-LGBTQ+ laws and policies have been increasingly proposed and enacted at the federal, state, and local levels.¹⁷ In fact, there appears to be a concerted backlash against the successful efforts to promote diversity and equality that is targeted at LGBTQ+ individuals, especially transgender individuals.¹⁸

(May 18, 2020), <https://www.law.com/americanlawyer/rankings/the-2020-am-law-200/> [<https://perma.cc/5K4R-E3T8>].

¹¹HUMAN RIGHTS CAMPAIGN, *supra* note 7, at app. A.

¹²For more information on the National LGBTQ+ Bar Association’s Lavender Law Conference and Career Fair, see *The 2021 Annual Lavender Law Conference and Career Fair*, NAT’L LGBT BAR ASS’N, <https://lgbtbar.org/annual/> [<https://perma.cc/GPK8-A3TE>].

¹³Law School Nondiscrimination Statements, NAT’L LGBT BAR ASS’N, <https://lgbtbar.org/climate-survey/law-school-nondiscrimination-statements> [<https://perma.cc/L57Q-GAP9>].

¹⁴A total of 205 institutions are accredited by the ABA. 204 confer a Juris Doctorate degree; the other ABA approved school is the U.S. Army Judge Advocate General’s School, which offers an officer’s resident graduate course. *Id.*

¹⁵THE NAT’L LGBT BAR ASS’N, LAW SCHOOL CAMPUS CLIMATE SURVEY: AN EXECUTIVE SUMMARY 1 (May 15, 2020), <https://lgbtbar.org/wp-content/uploads/sites/6/sites/8/2020/05/Law-School-Campus-Climate-Survey-Executive-Summary-2019-2020-5.pdf> [<https://perma.cc/33BW-JNB3>]. As the National LGBTQ+ Bar Association has noted the Campus Climate Survey “serves as a yardstick by which to measure LGBTQ+ inclusion in legal education, while our Companion Toolkit provides guidelines to help schools meet their own goals for support and inclusion. *Id.* at 6.

¹⁶Criminal Justice Info. Servs. Div., *2019 Hate Crimes Statistics Table 1: Incidents, Offenses, Victims, and Known and Offenders*, FED. BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTING (2019), <https://ucr.fbi.gov/hate-crime/2019/topic-pages/tables/table-1.xls> [<https://perma.cc/JB74-MSFN>]; see Lou Chibbaro Jr., *FBI Report Shows Increase in Anti-LGBT Hate Crimes*, WASH. BLADE (Nov. 20, 2019, 1:47 PM), <https://www.washingtonblade.com/2019/11/20/fbi-report-shows-increase-in-anti-lgbt-hate-crimes> [<https://perma.cc/8SMW-AJDJ>].

¹⁷For example, GLAAD catalogued 181 anti-LGBTQ+ statements and actions by the Trump Administration since January 2017. *GLAAD Accountability Project: Donald Trump, 45th President of the United States*, GLAAD, <https://www.glaad.org/tap/donald-trump> [<https://perma.cc/89WK-RKYK>].

¹⁸As noted by the American Civil Liberties Union, a record number of anti-transgender bills were introduced in state legislatures in 2020. *Trans Rights Under Attack in 2020*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/trans/trans-rights-under-attack-in-2020>.

Thus, while American law and culture has made great progress in terms of LGBTQ+ acceptance, much work needs to be done. Blanck et al.'s study clearly illustrates that lawyers who identify as LGBTQ+ are "often targets of negative attitudes and stereotypes" and "still encounter organizational barriers" professionally.¹⁹ A legal career is notoriously difficult to navigate, and LGBTQ+ identifying lawyers (especially those who are transgender or who have intersectional identities) often must also grapple with overt discrimination and covert bias in their workplaces. This study, which builds on what we know about the underrepresentation of LGBTQ+ individuals in the legal profession and the general challenges that diverse attorneys face, adds a key element by overlaying potential bias and discrimination with organizational characteristics, which helps identify potential structural impediments to change.

III. UNDERREPRESENTATION & DISCRIMINATION

As many surveys have shown, LGBTQ+ individuals (along with other diverse individuals) are woefully underrepresented in the senior management of corporations and in the partnership ranks of law firms. The U.S. Commission on Civil Rights estimates that between 5.4 million and 8.2 million employees self-identify as LGBTQ+, with the vast majority (85.33%) working in the private sector.²⁰ In corporate America, however, the number of LGBTQ+ CEOs and general counsels in the Fortune 500 can be counted on a single hand, and less than one half of one percent (0.02%) of directors of Fortune 500 companies are openly LGBTQ+. ²¹ For law firms, only 2.07% of law firm partners identified as LGBTQ+ in 2019, a slight decrease from 2.11% in 2018.²² Further, as lawyers advance in seniority at law firms, there is a significant drop in LGBTQ+ representation.²³

Unfortunately, but unsurprisingly, many LGBTQ+ individuals also continue to face discrimination in the workplace, at rates much higher than the non-LGBTQ+ population. Despite the popularity of diversity and inclusion programs in organizations, few are delivering on their promises to be genuinely inclusive. According to a report published by Out & Equal in 2017,²⁴ nearly one in ten LGBTQ+ employees left a job because the environment was unwelcoming and twenty-seven percent of transgender people who held or applied for a job in the last year reported being fired, not hired, or denied a promotion due to their gender identity. In 2020, one in three LGBTQ+ individuals reported

www.aclu.org/issues/lgbt-rights/transgender-rights/trans-rights-under-attack-2020 [<https://perma.cc/47TR-L5V8>].

¹⁹Peter Blanck Ynesse Abdul-Malak, Meera Adya, Fitore Hyseni, Mary Killeen & Fatma Altunkol Wise, *Diversity and Inclusion in the American Legal Profession, First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers who Identify as LGBTQ+*, 23 U.D.C. L. REV. 23, 32 (2020).

²⁰U.S. COMM'N ON CIVIL RIGHTS, WORKING FOR INCLUSION: TIME FOR CONGRESS TO ENACT FEDERAL LEGISLATION TO ADDRESS WORKPLACE DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER WORKERS 10 (2017), https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf [<https://perma.cc/B75N-W5HU>].

²¹Out Leadership Launches First-of-its-Kind Summit on Board Diversity, Releases New Research on Board Diversity Impact, Out Leadership (Feb. 2, 2021) <https://www.prnewswire.com/news-releases/out-leadership-launches-first-of-its-kind-summit-on-board-diversity-releases-new-research-on-board-diversity-impact-301219765.html>

²²*LGBT Representation Among Lawyers in 2019*, NAT'L ASS'N FOR L. PLACEMENT (Jan. 2020), <https://www.nalp.org/0120research> [<https://perma.cc/8V3Y-WZ6G>].

²³*Id.*

²⁴2017 Workplace Equality Fact Sheet: Lesbian, Gay, Bisexual, and Transgender (LGBT) Workplace Discrimination at a Glance, OUT & EQUAL (Nov. 15, 2017), <http://outandequal.org/2017-workplace-equality-fact-sheet/> [<https://perma.cc/AES5-YS8D>].

experiencing discrimination.²⁵ The intersectionality of race, gender, and ethnicity makes these statistics even more troubling. LGBTQ+ employees of color face significantly higher rates of discrimination than their White counterparts.²⁶

Clearly, LGBTQ+ individuals continue to confront challenges both in our society at large and in the workplace.²⁷ The Out Now Global LGBT2020 Study, which surveyed more than 100,000 LGBTQ+ individuals, found that twenty-four percent of lesbians, thirty percent of gay men, forty percent of bisexuals, and fifty-five percent of transgender employees in the United States believed that coming out could negatively impact future promotions.²⁸ Thus, it is not surprising that a 2016 report from Credit Suisse reports that forty-one percent of LGBTQ+ workers in the United States and seventy-two percent of senior LGBTQ+ executives say they have not come out openly at work.²⁹ As shown by Blanck et al.'s study, many LGBTQ+ attorneys have reason to share similar concerns.³⁰

IV. CHALLENGING PROFESSIONAL ENVIRONMENTS

The challenges of a legal career are well-documented. Billing pressures,³¹ client demands, long hours,³² and business development requirements combine to make the practice of law an incredibly taxing career and have fueled high levels of career dissatisfaction among lawyers for many years. According to a 2018 Law360 survey, sixty-eight percent of large law firm attorneys and fifty-nine percent of midsize law firm attorneys reported being stressed either all or most of the time.³³ In many instances, layered upon this already stressful situation is a work environment that requires an LGBTQ+ attorney to

²⁵Sharita Gruberg, Lindsay Mahowald & John Halpin, *The State of the LGBTQ Community in 2020: A National Public Opinion Study*, CTR. FOR AM. PROGRESS (Oct. 2020), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/10/06/491052/state-lgbtq-community-2020/> [<https://perma.cc/X2J5-RCCY>].

²⁶*Id.* at 4.

²⁷Alex Vandermass-Peeler et al., *Diversity, Division, Discrimination: The State of Young America*, PRRI (Jan. 1, 2018), <https://www.prii.org/research/mtv-culture-and-religion> [<https://perma.cc/JT8E-FTDF>]. Unfortunately, the experience of young Americans does not offer much positive news either. According to a recent survey of young Americans aged 15 to 24, 83% of those who identified as LGBTQ+ report having witnessed someone being mistreated because of their gender identity or sexual orientation or to have personally experienced such mistreatment. In addition, nearly one-third (32%) who identified as LGBTQ+ reported that they personally had been mistreated or targeted because of their sexual orientation or gender identity, with a majority (56%) saying they feared for their safety, and roughly as many (54%) believing the acts were direct and purposeful. Such discrimination is often also intersectional, in addition to other discrimination based on the individual's race, gender, religion, or nationality.

²⁸IAN JOHNSON & DARREN COOPER, *LGBT DIVERSITY: SHOW ME THE BUSINESS CASE 21* (2015), <http://www.outnowconsulting.com/media/13505/Report-SMTBC-Feb15-V17sm.pdf> [<https://perma.cc/FY5M-QQMD>].

²⁹JULIA DAWSON ET AL., *LGBT: THE VALUE OF DIVERSITY 3* (2016), <https://plus.credit-suisse.com/rpc4/ravDocView?docid=QYuHK2> [<https://perma.cc/4DBH-3PDM>].

³⁰Blanck et al., *supra* note 1, at 49.

³¹According to the National Association for Law Placement, in 2016, the average number of billable hours required of a first-year associate was 1,892 hours, and the average number of billable hours required for first-year associates at firms with more than 700 attorneys was 1,930 hours. *Update on Associate Hours Worked*, NAT'L ASS'N FOR L. PLACEMENT (2016), <https://www.nalp.org/0516research> [<https://perma.cc/UH8X-ZJPC>].

³²At least 55% of large law firm attorneys report working more than 60 hours per week on average. Natalie Rodriguez, *The Least-Stressed Attorneys in a Stressed-Out Profession*, LAW360 IN-DEPTH (July 23, 2018), <https://www.law360.com/articles/1065415/the-least-stressed-attorneys-in-a-stressed-out-profession> [<https://perma.cc/PJA6-GBJ9>].

³³*Id.*

navigate instances of discrimination, bias, and subtle signals of exclusion, as highlighted in the study by Blanck et al.³⁴

Thus, how can an organization create a work environment that is not only welcoming of LGBTQ+ employees, but that also allows employees to grow, thrive, and advance in their careers within that organization? Work environments are ecosystems, a complex network of interconnected systems. Mere good intentions do not create change, and no single policy, program, or training will eliminate subtle and overt bias and discrimination in corporations and law firms. As a result, organizations need a research-based, data-driven understating of the issues; otherwise, leaders will not successfully eradicate these behaviors or the challenges facing LGBTQ+ lawyers in both law firms and corporate law departments. Such data allows law firms and corporations to deeply reexamine their practices, policies, and procedures, for what Blanck and his colleagues refer to as D&I+³⁵

V. HOW LAW FIRMS AND CORPORATE LEGAL DEPARTMENTS CAN BUILD ON THIS RESEARCH

Using the research of Blanck et al. as a foundation, law firms and corporate legal departments must understand the specific experiences of their LGBTQ+ attorneys within their unique workplace environment. To do this, organizations need to utilize both self-identification and climate surveys and examine those organizational-specific findings alongside the more generalized findings of Blanck and his colleagues.

Self-identification is a best practice that asks employees to voluntarily self-identify their sexual orientation, gender identity, and gender expression. While federal laws require organizations to capture certain information related to the diversity of their workforces, there is no requirement to obtain data about LGBTQ+ employees.³⁶ Being counted is vital to ensuring that an organization fosters a diverse workplace where everyone is able to be heard, included, and valued. Thus, a voluntary self-identification program is a necessary component to achieving workplace inclusion.

A self-identification process utilizing existing human resources systems helps an organization improve recruitment, development, and advancement of LGBTQ+ employees, and allows it to track progress for its LGBTQ+ inclusion efforts, in the same way it does for other diversity data.³⁷ By harnessing this self-identification data, an

³⁴See Blanck et al., *supra* note 1, at 17-22.

³⁵See *id.* at 14.

³⁶EEO Data Collection, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (May 7, 2020), <https://www.eeoc.gov/employers/eo-data-collections> [<https://perma.cc/A38X-8ME4>].

³⁷See Kellan Baker et al., *How to Collect Data About LGBT Communities*, CTR. FOR AM. PROGRESS (Mar. 15, 2016), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2016/03/15/133223/how-to-collect-data-about-lgbt-communities/> [<https://perma.cc/DCX4-E85R>]; DIVERSITY BEST PRACTICES, SELF-IDENTIFICATION OF LGBT EMPLOYEES (2015), https://www.diversitybestpractices.com/sites/diversitybestpractices.com/files/import/embedded/anchors/files/_attachments_articles/rr_lgbt_self-id.final_.pdf [<https://perma.cc/5EZL-88XE>]; Human Rights Campaign, *Collecting Transgender-Inclusive Gender Data in Workplace and Other Surveys*, U. SASK. C. MED., <https://medicine.usask.ca/documents/research/edi-transgender-inclusive-gender-data.pdf> [<https://perma.cc/79MR-M8HL>]; OUT & EQUAL, WHERE ARE OUR LGBT EMPLOYEES? (2009), <https://www.bsu.edu/-/media/www/departamentalcontent/counselingcenter/pdfs/safezone%20out%20at%20work/hrc-where%20are%20our%20lgbt%20employees.pdf?la=en&hash=82A00EDD1EC72B18B00902827E5097116CD4FF> [<https://perma.cc/72W8-ZR66>]; STONEWALL, DO ASK, DO TELL: CAPTURING DATA ON SEXUAL ORIENTATION AND GENDER IDENTITY GLOBALLY (2016), https://www.stonewall.org.uk/sites/default/files/do_ask_do_tell_guide_2016.pdf [<https://perma.cc/4RA8-E6GR>]. While the data may be used for statistical analysis and tracking, personally identifiable information should always be kept confidential and should not be shared an employee's manager or co-workers.

organization can actively monitor promotions and advancements to ensure LGBTQ+ employees are not being left behind and determine if certain segments of the organization (or practice groups within law firms) are lagging in either LGBTQ+ representation or advancement.

While a self-identification program is foundational, it is not sufficient. Organizations must also understand and bridge the gap between policies and the lived experiences of LGBTQ+ attorneys within the workplace. Focusing on policies and procedures does not provide a complete picture. For example, while LGBTQ+ non-discrimination policies are key to creating a welcoming workplace environment, their existence alone does not indicate that LGBTQ+ employees find the workplace inclusive.³⁸ A thoughtful workplace climate survey helps organizations determine where gaps may exist between LGBTQ+ friendly policies and programs and the day-to-day experiences of LGBTQ+ employees.³⁹ When designing generalized workplace climate surveys, organizations should ensure that the survey's content is fully inclusive and addresses potential concerns by LGBTQ+ employees.⁴⁰

After collecting data from both self-identification and workplace climate surveys, law firms and corporate legal departments must parse the data to understand the perceptions of LGBTQ+ employees. Importantly, organizations must focus on employees with intersectional identities to ensure that the organization's programs and practices are not solely benefiting White LGBTQ+ employees.⁴¹ Then, using the significant research of Blanck et al. as a guide, the organization can dig further into the experiences of LGBTQ+ employees, with a special emphasis on those with intersectional identities. Combining information from these three data points will help the organization develop a deeper understanding of the true picture of workplace inclusion and what is necessary to achieve it. A program built on research will also be better able to identify root causes, set goals, create change, and measure progress.

Furthermore, a research-based and data-based grounding also minimizes the risk of "solutioneering," a term that is used to describe what occurs when someone fixates on a perceived solution before actually understanding the problem that needs solving.⁴² Oftentimes, leaders want to cut and paste initiatives from other companies, without taking the time to use both internal and external research to understand the underlying issues, or develop a solution before the problem is diagnosed.⁴³ Unfortunately, this approach does not take into account unique factors within the organization and typically results in initiatives that fail to fully deliver the intended benefit.

No single policy, program, or practice will eliminate workplace bias and discrimination against LGBTQ+ individuals, or any other individual. Instead, creating an

³⁸ See Baker et al., *supra* note 37; OUT & EQUAL, *supra* note 37, at 10.

³⁹ See OUT & EQUAL, *supra* note 37, at 6; STONEWALL, *supra* note 37, at 9.

⁴⁰ IBM has created a thoughtful guide on workplace climate surveys that include LGBTQ+ employees. GENA COX ET AL., GETTING LGBT+ INCLUSION RIGHT IN EMPLOYEE SURVEYS (2017), <https://www.ibm.com/downloads/cas/WVRO4E5Z> [<https://perma.cc/3UHA-ADRXX>].

⁴¹ Much has been written about how women's diversity programs primarily benefit white women. Similarly, efforts to make workplaces more welcoming to LGBTQ+ individuals cannot just benefit white LGBTQ+ employees and perpetuate racial disparities that already exist within the LGBTQ+ community. Cf. Courtney Connley, *How Corporate America's Diversity Initiatives Continue to Fail Black Women*, CNBC: MAKE IT (Jan. 12, 2021, 2:11 PM), <https://www.cnbc.com/2020/07/01/how-corporate-americas-diversity-initiatives-continue-to-fail-black-women.html> [<https://perma.cc/Z8U5-54PM>].

⁴² James Lawther, *Solutioneering*, SQUAWKPOINT ORGANISATIONAL MECHANICS (Dec. 29, 2015), <https://www.squawkpoint.com/2015/12/solutioneering/> [<https://perma.cc/G6RR-N6XV>].

⁴³ Cf. GENA COX ET AL., *supra* note 40 (finding that employers should start with employee listening efforts in order to better identify the unique needs of the workplace).

inclusive and welcoming workplace requires a holistic approach that utilizes thoughtful research and good data. Utilizing a three-pronged, macro- and micro-level research approach focused on data-based problem identification will help corporations and law firms develop programs and practices that ensure all LGBTQ+ attorneys have a workplace experience that is not only free from discrimination and bias but that also helps LGBTQ+ attorneys succeed.

VI. CONCLUSION

There are many strategic insights and tactical actions companies and law firms can take to develop their workplaces into ones that are open and welcoming to LGBTQ+ employees. Such actions must always be grounded in both organizational, micro-level research and societal, macro-level research. Blanck and his colleagues have added significantly to this topic by exploring the experiences of LGBTQ+ attorneys in the workplace, which will help individual corporations and law firms implement concrete initiatives to transform their workplaces to be fully inclusive and welcoming. The National LGBTQ+ Bar Association appreciates the opportunity to assist in this research effort and looks forward to further analysis by these researchers.

LGBTQ Diversity & Inclusion in the Legal Profession: The Basics and Beyond

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In the past decade, much has changed for those who identify as lesbian, gay, bisexual, trans, or queer (LGBTQ). LGBTQ characters are frequently featured in movies, broadcast and cable television shows, and advertisements.¹ Same-sex marriage is now legal in every jurisdiction in the United States, given the U.S. Supreme Court's 2015 ruling in *Obergefell v. Hodges*.² In the U.S., 21 states protect LGBTQ employees from being fired simply because of their sexual orientation or gender identity.³ In many instances, major corporations and large law firms helped lead the way in convincing Americans that LGBTQ individuals should be treated equally. However, while much progress has been made, much work remains to ensure that our society and our workplaces are welcoming to all diverse individuals, including those who are LGBTQ. Many companies, law firms, and their leaders want to support their LGBTQ employees, but may not fully understand the workplace challenges faced by this community or how to address them.⁴

Unfortunately, no single policy, program, or practice will solve the lack of LGBTQ representation in corporations and law firms or make these organizations more inclusive and welcoming. In short, diversity and inclusion are not a destination that we finally reach one day. A company is never going to be able to complete the "task", check the box, and move on. Instead, achieving diversity, inclusion, and equity is a journey that has multiple milestones.

As a starting point, corporations and law firms need to adopt basic policies, programs, and practices to attract and retain LGBTQ employees. However, they must go beyond those basics to forge a better, more inclusive, and more authentic workplace culture that truly embraces all diverse employees, including those who identify as LGBTQ. These efforts must be integrated into the organization's business and day-to-day activities. In order to succeed, such efforts cannot simply be bolted-on; they cannot be an afterthought. Instead, they must become rooted in the organization's culture, linked with the organization's

¹ A total of 10.2% of regular characters in the 2019-2020 broadcast television season were LGBTQ. GLAAD, *Where We Are on TV* (November 7, 2019), available at <https://www.glaad.org/sites/default/files/GLAAD%20WHERE%20WE%20ARE%20ON%20TV%202019%202020.pdf>.

² *Obergefell v. Hodges* (2015), available at https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.

³ In October 2019, the U.S. Supreme Court heard oral arguments in three cases that will determine whether Title VII provides anti-discrimination protections to LGBTQ employees: *Bostock v. Clayton County*; *Altitude Express v. Zarda*; and *Harris Funeral Homes v. EEOC*. Further, legislation is advancing in the Commonwealth of Virginia to add anti-discrimination protections for LGBTQ individuals in employment, housing, public accommodations, and credit. RVA Magazine, *LGBTQ Groups Celebrate Passage of 'Historic' Virginia Values Act* (February 10, 2020), available at <https://rvamag.com/gay-rva/lgbtq-groups-celebrate-passage-of-historic-virginia-values-act.html>.

⁴ Unfortunately, this lack of understanding also occurs with respect to employees who are members of racial or ethnic minority groups.

overall business strategy, and treated as a business-critical priority. However, this is not a task solely for management; it is the responsibility of each employee to determine how they can advance diversity and inclusion in their organizations in both big and small ways on a daily basis.

Where We Are

Over the last fifty years, countless articles have been written providing the business case for diversity, including LGBTQ diversity.⁵ In fact, a Google search for “business case for diversity” yields over 429 million hits, many of which offer compelling and persuasive data on the benefits of a diverse and inclusive workplace. Thus, I will not focus on the multitude of reasons that diversity, and in this case LGBTQ diversity, is vital for an organization’s success. That said, it is important to note our starting points—that LGBTQ individuals (along with other diverse individuals) are woefully underrepresented in the senior management of corporations and in the partnership ranks of law firms, and LGBTQ animus and discrimination in the workplace continues to exist.

The U.S. Commission on Civil Rights estimates that between 5.4 million and 8.2 million employees self-identify as LGBTQ, with the vast majority (85.33%) working in the private sector.⁶ However, in corporate America, the number of LGBTQ CEOs and general counsels in the Fortune 500 can be counted on a single hand, and less than one half of one percent (0.03%) of directors of Fortune 500 companies are openly LGBTQ in 2017.⁷ For law firms, only 2.07% of law firm partners identified as LGBTQ in 2019.⁸

Unfortunately, but unsurprisingly, many LGBTQ individuals also continue to face discrimination in the workplace, at rates much higher than the normal population. According to a report published by Out & Equal in 2017⁹:

- One in four LGBTQ employees has reported they experienced employment discrimination in the last five years;
- 27% of transgender people who held or applied for a job in the last year reported being fired, not hired, or denied a promotion due to their gender identity; and
- Nearly one in ten LGBTQ employees has left a job because the environment was unwelcoming.

Clearly, LGBTQ individuals continue to face challenges both in our society at large and in the workplace.¹⁰ The intersectionality of race, gender, and ethnicity makes these statistics

⁵ M.V. Lee Badgett, et. al, The Williams Institute, *The Business Impact of LGBT-Supportive Workplace Policies* (2013).

⁶ U.S. Commission on Civil Rights, *Working for Inclusion: Time for Congress to Enact Federal Legislation to Address Workplace Discrimination Against Lesbian, Gay, Bisexual, and Transgender Workers* (2017)

⁷ OUT Leadership, *Do LGBT+ Directors Count in Fortune 500 Companies* (October 2017), available at <https://outleadership.com/insights/do-lgbt-directors-count-in-fortune-500-companies>.

⁸ National Association for Law Placement, *2019 Report on Diversity in U.S. Law Firms* (December 2019), available at https://www.nalp.org/uploads/2019_DiversityReport.pdf.

⁹ Out & Equal, *2017 Workplace Equality Fact Sheet: Lesbian, Gay, Bisexual, and Transgender (LGBT) Workplace Discrimination at a Glance* (2017), available at <http://outandequal.org/2017-workplace-equality-fact-sheet/>

¹⁰ Unfortunately, the experience of young Americans does not offer much positive news either. According to a recent survey of young Americans aged 15 to 24, 83% of those who identified as LGBTQ report having witnessed someone being mistreated because of their gender identity or sexual orientation or to have personally experienced such mistreatment. In addition, nearly one-third (32%) who identified as LGBTQ reported that they personally had been mistreated or targeted because of their sexual orientation or gender identity, with a majority (56%) saying they feared for their safety, and roughly as many (54%) believing the acts were direct and purposeful. Such discrimination is often also intersectional, in addition to other discrimination based on the individual’s race, gender, religion, or nationality. Public Religion Research Institute, *Diversity, Division, Discrimination: The State of Young America, an MTV/PRRI Report* (2018), available at <https://www.prri.org/research/mtv-culture-and-religion>.

even more troubling. LGBTQ employees of color face significantly higher rates of discrimination than their white counterparts.¹¹ Thus, it is not surprising that the Out Now Global LGBT2020 Study, which surveyed more than 100,000 LGBTQ individuals, found that 24% of lesbians, 30% of gay men, 40% of bisexuals, and 55% of transgender employees in the U.S. believed that coming out could negatively impact future promotions.¹² A ground-breaking study of the legal profession, currently being conducted by the American Bar Association in partnership with Syracuse University's Burton Blatt Institute, is shedding additional light on the challenges facing LGBTQ lawyers in both law firms and corporate law departments.¹³

Further, all of us who are LGBTQ know that coming out is not a one-time occurrence. LGBTQ individuals come out throughout their lives. Coming out happens every time we change jobs, meet new colleagues, secure new clients, or move to a new office location. For us, it occurs when we place photos of our spouses or significant others on our desk and when we discuss our weekend plans in casual conversations with colleagues. The willingness of LGBTQ employees to be authentic in such situations hinges on how they believe their boss, their colleagues, and their clients will react. Sadly, too many LGBTQ employees read the situation and conclude it is necessary to hide their sexual orientation and gender identity in the workplace. A 2016 report from Credit Suisse reports that 41% of LGBTQ workers in the U.S. and 72% of senior LGBTQ executives say they have not come out openly at work.¹⁴ Such covering is harmful to both the employee and the organization, detrimentally affecting individual employee morale, engagement, and retention.¹⁵

As a result, it remains important for all law firms and corporations to routinely examine their practices, policies, and procedures to ensure that they are not only welcoming of LGBTQ employees, but that those employees can grow, thrive, and advance in their careers within that organization.

Advancing to the Basics

Even today, many companies and law firms are just beginning the journey for diversity, inclusion, and equality as it relates to their LGBTQ employees. Although it may appear to be an overwhelming task, there are a number of immediate steps a company or law firm can take to intentionally and proactively foster an inclusive and welcoming culture. Though these steps may be simple, they can quickly engender extremely positive outcomes.

Inclusive Workplace Policies. The starting point for any corporation or law firm should be examining its existing non-discrimination and anti-harassment policies to confirm the policies specifically cover LGBTQ employees. While some states and localities have enacted workplace protections for LGBTQ employees, the vast majority of jurisdictions

¹¹ M.V. Lee Badgett, et. al, The Williams Institute, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination* (2007), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-sears-lau-hobias-in-the-workplace-jun2007.pdf>.

¹² Out Now Global, *LGBT2020 Study LGBT Diversity: Show Me the Business Case* (2015), available at <http://www.outnowconsulting.com/media/13505/Report-SMTBC-Feb15-V17sm.pdf>.

¹³ To participate in this study, visit https://syracuseuniversity.qualtrics.com/jfe/form/SV_dds9YLorbjiOlsp?id=cqjx. See also, American Bar Association Press Release, *ABA launches nationwide study to expand opportunities for disabled, LGBT+ lawyers* (May 2017), available at https://www.americanbar.org/news/abanews/aba-news-archives/2017/05/aba_launches_nationw.html.

¹⁴ Credit Suisse Environmental, Social and Governance (ESG) Research, *LGBT: The Value of Diversity* (April 2016), available at https://research-doc.credit-suisse.com/docView?document_id=x695480&serialid=u0qj22TwXJAWyF%2FreBXW%2FeSFdVvYwRIZQGZP1IAumTo%3D.

¹⁵ For more information about such covering, see Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights*, (Random House 2006).

have no such laws in place. Thus, it is crucially important that an organization's policies clearly and specifically prohibit discrimination and harassment based on a person's real or perceived sexual orientation, gender identity, or gender expression. Thankfully, most large organizations already have such inclusive workplace policies. According to the 2020 Human Rights Campaign's Corporate Equality Index, 93% of the Fortune 500 have a non-discrimination policy that includes sexual orientation, and 91% have a policy that includes gender identity.¹⁶

Commitment from Leadership. As a compliance attorney, I frequently cite "tone at the top" to describe the importance of senior management in promoting ethical behavior and creating a culture of compliance. Likewise, a law firm's or corporation's leadership must be passionate and outspoken advocates for diversity, inclusion, and equality. We have found that when the Managing Partner or General Counsel is consistently visible and vocal on these issues, it is one of the engines that propels diversity and inclusion forward within the organization. However, leaders must clearly walk the talk, or their employees will conclude that these ideals are not truly valued by the organization.

Director of Diversity and Inclusion. Law firms and companies should hire individuals to direct and oversee the organization's diversity and inclusion efforts and develop the organization's diversity plan. Ideally, the role should be solely or primarily focused on diversity and inclusion and not combined with multiple other responsibilities. Further, the role should be integrated into the organization's operations, appropriately resourced, and report directly to senior management.

Parity in Benefits for LGBTQ Employees. Another foundational element is LGBTQ-inclusive benefits. Three areas should be specifically examined: benefits for transgender employees, fertility treatment for same-sex couples, and parental leave policies for same-sex couples.

For employer-provided healthcare benefits, all transgender exclusions should be removed, and clinical guidelines should permit coverage for hormone therapy, medical visits, surgical procedures, and other treatments related to gender transition. An increasing number (65%) of the Fortune 500 are now comprehensively providing transgender-inclusive health care coverage.¹⁷

Additionally, same-sex couples who are utilizing fertility treatments to create a family are often treated differently than heterosexual couples because insurance policies routinely require a medical diagnosis of infertility. While a same-sex couple may not be clinically infertile, they nonetheless are unable to biologically conceive a child together. Removing this infertility requirement makes conception services available to all employees, including same-sex couples. While many companies have not yet embraced this change, Altria, Intel, and Johnson & Johnson are several companies leading on this issue.¹⁸

¹⁶ Human Rights Campaign, 2020 Corporate Equality Index, available at https://assets2.hrc.org/files/assets/resources/CEI-2020.pdf?_ga=2.85258576.851936250.1580486136-1792851227.1578421936.

¹⁷ Id.

¹⁸ Altria Benefits, Supporting You and Your Loved Ones, (January 3, 2020), available at <https://www.altria.com/people-and-careers/Benefits/Pages/default.aspx?src=leftnav>. Intel News Fact Sheet, *Intel Announces Industry-Leading Enhancements of U.S. Benefits; Supports Diverse Needs of Working Moms and Dads*, (October 20, 2015), available at http://download.intel.com/newsroom/kits/diversity/pdfs/Intel_Expanded_Benefits_FactSheet.pdf. Johnson & Johnson, *Helping Our Employees Build Families: Enhancing Adoption, Fertility, Surrogacy & Nursing Mother Benefits* (May 5, 2016), available at <https://www.jnj.com/our-company/helping-our-employees-build-families>.

Many same-sex couples build their families through adoption or surrogacy. An organization's parental leave benefits should be provided to all new parents—maternal, paternal, adoptive, or surrogacy-assisted—regardless of how the family is formed.

Diversity Webpage. A company's or law firm's efforts on diversity, inclusion, and equality are of limited value if the organization is not communicating those efforts to its workforce and the public at large. When those efforts are not internally and externally publicized, many will doubt the organization's commitment to a truly inclusive workplace. A regularly updated, comprehensive webpage not only informs current employees and job candidates, but it also celebrates the advances the organization is making. One best practice is for the webpage to include metrics related to diverse employees, data on supplier diversity efforts, highlights of its diversity-related recruitment activities, and information on the organization's strategic diversity initiatives.

Expansion of the Talent Pool. A company or law firm must broaden its recruitment strategy if it seeks to have a diverse talent pool. A number of LGBTQ organizations host annual recruitment opportunities, including the National LGBT Bar Association's Lavender Law Conference, the Out & Equal Workplace Summit, and the Reaching Out MBA Career Expo. A law firm or corporation can also sponsor networking opportunities with LGBTQ organizations at area universities and law schools or with local LGBTQ bar associations.¹⁹ Of course, data tracking must be a part of such outreach to ensure measurable improvements in diverse hiring are occurring.

Education to Equip Management. Many corporate leaders, even those who consider themselves "progressive," may not be fully knowledgeable about the LGBTQ community. For example, when discussing the "Q" in LGBTQ, I am often asked "Isn't the term queer offensive?"²⁰ Knowledge is powerful, and the more leaders understand the LGBTQ experience, the better allies they can become.

To address these types of issues, Altria's LGBTQ Employee Resource Group ("ERG") has partnered with a local organization to create a voluntary "LGBTQ 101" workshop for executives, and we have reached over 90% of company executives. After providing basic information about the LGBTQ community, participants are asked to imagine themselves as various types of new LGBTQ employees (i.e., a transgender employee, a lesbian employee, and an employee who is gender non-conforming). They are then asked to imagine what would they hope for, what they worry about, and what the individual would want to feel welcome. It has been a powerful workshop that both educates and evokes empathy.

Going Beyond the Basics

While the basic policies, programs, and processes highlighted above demonstrate a commitment to a diverse and inclusive workplace, organizations need to move beyond mere commitment. Organizations must ensure they are actually hiring, retaining, and promoting diverse talent. Aspirations and commitments are important but are not sufficient.

Establishment of an LGBTQ Employee Resource Group. Creating an LGBTQ ERG will reap multiple benefits, if thoughtfully structured. ERGs are employee-led networks where members join together based on shared demographic factors such as gender, race, ethnicity, or LGBTQ status. ERGs can help drive change and foster a diverse and inclusive workplace, while at the same time helping the organization meet its business objectives.

¹⁹ For a listing of local LGBT bar associations, see <https://lgbtbar.org/what-we-do/affiliates/>.

²⁰ For more information about the term queer, see Juliette Rocheleau, *A Former Slur Is Reclaimed, And Listeners Have Mixed Feelings*, available at <https://www.npr.org/sections/publiceditor/2019/08/21/752330316/a-former-slur-is-reclaimed-and-listeners-have-mixed-feelings>.

But effective ERGs cannot merely be social networks. If the company or law firm is too small to sustain specific ERGs, a more general diversity ERG might be a satisfactory alternative.

ERGs are a vital component to demonstrating a commitment to diversity, inclusion, and equality. However, they are not a panacea; ERGs cannot be the sole entity within the organization advancing diversity and inclusion policies, programs, and processes. While ERGs have an extremely important part to play, senior management cannot abdicate responsibility for diversity and inclusion to ERGs. ERGs should serve as a catalyst for change, be thought leaders on diversity and inclusion, and be a sounding board for senior management, but ERGs should not be seen as the only advocates for cultural change. Leadership needs to step up and actively advocate as well.

A successful ERG allows employees to be valued, engaged, and challenged to contribute to the organization.²¹ This helps create networking and leadership opportunities for these diverse employees and also provides greater visibility with and access to senior executives. Because it allows LGBTQ employees to be a more visible part of the culture, it encourages LGBTQ employees to, as DeRay Mckesson describes it, “come out of the quiet.”²² In this way, the ERG allows individuals who have been quietly out at work to also be visibly out, where they are seen and heard as their full, authentic selves.

As one of the founders of my company’s LGBTQ ERG, I have witnessed first-hand the power of an ERG to create a better, more inclusive, and more authentic corporate culture. The ERG has empowered my company’s LGBTQ employees to be more visible, and it has encouraged sometimes difficult, but always necessary, conversations about difference, intersectionality, sexual orientation, gender identity, and gender expression. As importantly, it has inspired allies to stand up and be counted as caring about diversity and inclusion for LGBTQ employees.

Celebrate. Publicly acknowledging LGBTQ events can send a powerful message to employees, including those who do not identify as LGBTQ. In October, the LGBTQ community celebrates National Coming Out Day, and it remembers those lost to anti-trans violence on the National Transgender Day of Remembrance each November. In June, LGBTQ Pride commemorates the anniversary of the Stonewall Riots, when a group of LGBTQ individuals – led by drag queens and trans women of color – united against the discrimination they were facing on a daily basis. Pride serves as a testament to the bravery of those LGBTQ individuals who united against injustice, but it is also an acknowledgement that the struggle for full equality continues to today.

Having the organization commemorate the National Transgender Day of Remembrance in an all-employee communication, sponsor a special speaker to celebrate Pride, or host a reception for National Coming Out Day can not only make LGBTQ employees feel recognized and empowered, but it can also serve as an educational opportunity for all employees. Over the past several years, Altria has hosted Wilson Cruz, Chris Mosier, Geena Rocero, and Wade Davis for its annual Pride celebrations. Each of these Pride speakers has shared their personal journey as an LGBTQ individual, helping humanize and educate about the LGBTQ experience. For National Coming Out Day, the company has

²¹ Additional information on forming an ERG can be found at: Human Rights Campaign, *Establishing an Employee Resource Group*, <https://www.hrc.org/resources/establishing-an-employee-resource-group>; Diversity Inc., *Meeting in a Box: Employee Resource Groups* (2015), available at <http://bestpractices.diversityinc.com/medialib/uploads/2015/01/Meeting-in-a-Box-Employee-Resource-Groups.pdf>; Metropolitan Business Association, *LGBT Employee Resource Group Programming*, available at <http://mbaorlando.org/dnii/erg>; Kenneth Matos & Trenton Adams, *Best Practices For Starting An LGBTQ+ Employee Resource Group* (2017), available at <https://www.lifemeetswork.com/insights-archive/starting-lgbtq-erg-workplace>.

²² GLAAD, *#BlackLivesMatter Activist DeRay Mckesson Speaks at #glaadgala San Francisco* (November 8, 2015), available at <https://www.youtube.com/watch?v=Z15DHebDITU>.

flown the Pride flag over its corporate headquarters in Richmond, Virginia. These events serve to further demonstrate the company's commitment to LGBTQ inclusion, motivating employees at the same time.

Leadership Accountability. The leadership of corporations and law firms must not only be vocally supportive of their organization's diversity, inclusion, and equality efforts, but they must also be accountable for them. One method to drive accountability is the formation of an executive diversity council, led by the company's CEO or the law firm's managing partner and composed of other senior leaders. This council sets and governs the organization's diversity and inclusion strategy and through regular meetings serves to focus leaders' time and attention on these issues. Another, more controversial but extremely effective, method is incorporating diversity, inclusion, and equality requirements in the formal evaluation process for leaders, where their advancement and compensation is tied to certain diversity and inclusion milestones.

Self-Identification. Although each LGBTQ employee has had his or her own diverse experience, we all have one thing in common—we have each taken a journey in order to be ready to tell others who we are. Thus, all of us understand how important it is to be yourself and be included – both in life and in the workplace. While Federal laws require organizations to capture certain information related to the diversity of their workforces, there is no requirement to obtain data about LGBTQ employees.

A best-practice in this area is asking U.S.-based employees to voluntarily self-identify their sexual orientation, gender identity, and gender expression.²³ Being counted is vital to ensuring that an organization fosters a diverse workplace where everyone is able to be heard, included, and valued. A self-identification process through existing human resources systems helps an organization improve recruitment, development, and advancement of LGBTQ employees and also allows it to track progress for its LGBTQ inclusion efforts, in the same way it does for other diverse employees.²⁴

Measurement of LGBTQ Promotion & Advancement. Utilizing the self-identification data, an organization must also actively monitor promotions and advancements to ensure LGBTQ employees are not being left behind. The best diversity programs cannot help someone seize an opportunity that never materializes. Thus, an organization must use data—not anecdotal evidence—to ensure LGBTQ employees are given the opportunities to progress.

Gender Transition Framework. Law firms and companies must welcome and embrace transgender employees who are transitioning in the workplace. To ensure this occurs, these organizations should have a clear and understandable framework on how the organization responds when an employee indicates they will transition. Understandably, this may be an enormously stressful moment for the employee, and written guidelines, created in advance, will help provide structure to support a respectful and successful workplace transition for the employee.

²³ Outside of the United States, privacy laws may make self-identification programs infeasible.

²⁴ More information about self-identification can be found at: Human Rights Campaign, *Collecting Transgender-Inclusive Gender Data in Workplace and Other Surveys* (Oct. 26, 2016), available at <http://www.hrc.org/resources/collecting-transgender-inclusive-gender-data-in-workplace-and-other-surveys>; Diversity Best Practices, *Self-Identification Of LGBTQ Employees* (2015), available at https://www.diversitybestpractices.com/sites/diversitybestpractices.com/files/import/embedded/anchors/files_attachments_articles/rr_lgbt_self-id.final_.pdf; Out & Equal, *Where Are Our LGBTQ Employees?* (2009), available at <http://old.outandequal.org/wp-content/uploads/2014/12/2009-Self-ID-report.pdf>; Kellan Baker, et. al, *How to Collect Data About LGBTQ Communities* (Mar. 15, 2016), available at <https://www.americanprogress.org/issues/lgbt/reports/2016/03/15/133223/how-to-collect-data-about-lgbt-communities>; Lynn Pasterny, Stonewall, *Do Ask, Do Tell: Capturing Data on Sexual Orientation and Gender Identity Globally* (2016), available at https://www.stonewall.org.uk/sites/default/files/do_ask_do_tell_guide_2016_0.pdf.

While the framework should comprehensively address how the company will work with an employee, it is important to remember that each employee's situation will be unique. Every step of the process must hinge on the employee's consent, and the framework should reiterate the need for privacy and confidentiality. In addition, the framework should clearly set out expectations for all involved, including the transitioning employee, the human resources department, management, the employee's immediate team members, as well as other colleagues.²⁵

Executive Leadership Programs. While LGBTQ leaders face many of the same challenges as other leaders, they do so in the context of their identity as a diverse individual. For LGBTQ employees, leading as their authentic self can seem frightening, and executive leadership programs can help such individuals understand the power of authenticity.

A number of excellent leadership courses have been developed that focus on LGBTQ and other diverse individuals, including Stanford University's Graduate School of Business LGBTQ Executive Leadership Program (focusing on LGBTQ individuals who work in corporations, non-profits, and law firms) and the Leadership Council on Legal Diversity (focusing on in-house and outside counsel who are diverse).²⁶ A company or law firm should actively encourage high-potential employees to participate in such programs and underwrite such costs as part of the employee's leadership development. Doing so indicates that the organization is investing in its LGBTQ employees and provides an opportunity for LGBTQ employees to further develop their leadership skills and expand their network.

Philanthropy and Community Engagement. Companies and law firms are often involved in national and local civic organizations and bar associations. Many contribute to these organizations, volunteer, provide pro bono representation, or have employees serve in leadership roles, such as on the organization's board of directors or steering committee. Ensuring that LGBTQ organizations are included clearly demonstrates the company's or law firm's commitment to diversity, inclusion, and equity.

Supplier Diversity. Supplier diversity initiatives ensure that minority-, women-, veteran- and, LGBTQ-owned businesses have access to procurement opportunities at corporations and law firms. A company's or law firm's supplier diversity efforts should specifically include LGBTQ suppliers. Since 2004, the National LGBT Chamber of Commerce has been the certification body that verifies that eligible businesses are majority-owned by LGBTQ individuals.²⁷ Of course, merely having such a program is not enough; the organization must use data to ensure the program is effectively engaging diverse suppliers.

Speaking Out and Standing Up. A growing number of corporations and law firms are also speaking out in favor of LGBTQ equality issues and standing up when the rights of LGBTQ people come under attack. In recent years, when discriminatory legislation has been advanced at the Federal, state, or local level, many business organizations have rightfully denounced such attacks. For example, in 2016 executives from more than 100 companies, including many Fortune 500 companies, signed an open letter requesting that the North Carolina Governor repeal anti-LGBTQ House Bill 2.²⁸ Many (but not all) of the

²⁵ For more information about transgender guidelines, see Human Rights Campaign, *Transgender Inclusion In the Workplace: A Toolkit for Employers* (2016), available at <http://www.hrc.org/campaigns/trans-toolkit>.

²⁶ For more information about the Leadership Council on Legal Diversity, see: <http://www.lclcdnet.org/>. For more information about the Stanford University LGBTQ Executive Leadership program, see: <https://www.gsb.stanford.edu/exec-ed/programs/lgbtq-executive-leadership-program>.

²⁷ For more information about the National LGBT Chamber of Commerce's supplier diversity certification program, see <http://www.nglcc.org/what-we-do/diversity-inclusion>.

²⁸ Human Rights Campaign and Equality North Carolina, Letter to Governor Patrick McCrory, available at [http://assets2.hrc.org/files/assets/resources/NC_CEO_Letter_\(3\).pdf](http://assets2.hrc.org/files/assets/resources/NC_CEO_Letter_(3).pdf).

discriminatory provisions of that legislation were later repealed, due in part to the vocal and sustained business outcry. More recently, in 2019, over 200 leading businesses, representing more than \$4.5 trillion in revenue and more than 10.4 million U.S. employees, joined the Human Rights Campaign's Business Coalition for the Equality Act, urging Congress to enact Federal anti-discrimination legislation for LGBTQ individuals.²⁹

Conclusion

There are many strategic insights and tactical actions companies and law firms can take to ensure their workplaces not only are open and welcoming to LGBTQ employees but that diversity, inclusion, and equity are ongoing business objectives and corporate obligations.³⁰ This article hopefully serves as less of a checklist and more of a motivating guide, where individual corporations and law firms build upon these guidelines to implement concrete initiatives to transform their workplaces and achieve their own successes.

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Mr. Bizzell is extremely active in promoting diversity, equity, and inclusion within the legal and corporate communities. Currently, he serves as President of the National LGBT Bar Association, the leading association for LGBTQ lawyers, judges, and other legal professionals. In both 2017 and 2018, he was named by London's Financial Times as one of the 100 worldwide OUTstanding Leading LGBT+ Corporate Executives for his work on diversity and inclusion issues. Chambers and Partners also named him the 2019 In-House LGBT+ Equality Lawyer of the Year for his dedication and commitment to LGBTQ diversity programs and his efforts to advance LGBTQ professionals in the law. He is a

²⁹ Human Rights Campaign, *HRC Announces Unprecedented Support of the Equality Act from 200+ Leading Businesses*, available at: <https://www.hrc.org/blog/hrc-announces-unprecedented-business-support-for-the-equality-act>.

³⁰ Other helpful resources include: American Bar Association Commission on Sexual Orientation and Gender Identity, *Best Practices Promoting LGBT Diversity* (2011), available at https://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/sogi_best_practice_guide_1_gbt_authcheckdam.pdf; Great Place to Work and Pride at Work Canada, *Beyond Diversity: An LGBT Best Practice Guide for Employers* (2017), available at https://www.greatplacetowork.ca/images/storage/2017_white_papers/prideatwork_greatplacetowork_final_digital.pdf.

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