

June 3, 2013

Office of Management and Budget
Attn: Desk Officer for SSA

Social Security Administration
DCRDP
Attn: Reports Clearance Director

**Subject: Agency Information Collection Activities: Form SSA-437, Program
Discrimination Complaint (FR Doc. 2013-07616)**

To Whom It May Concern:

The undersigned organizations appreciate the efforts of the Social Security Administration (SSA) to improve its services to the public by updating the Program Discrimination Complaint form. We urge you to further improve this form by explicitly including the category of gender identity under the covered grounds of discrimination as a component of sex discrimination. This approach is very similar to the explicit inclusion of “limited English proficiency” as a component of national origin discrimination. Question 4 would thus read:

It is against the law for a program conducted by SSA to discriminate against you based on any of the following reasons: race; color; national origin (including limited English proficiency); religion; sex (**including gender identity**); disability; age; sexual orientation; and parental status. (Note: Not all bases apply to all of SSA’s programs.) It also is unlawful for SSA to retaliate against you because you filed a discrimination complaint or to retaliate against anyone who assisted you in filing a complaint. Please specify the basis or bases on which you believe you were discriminated against.¹

Inclusion of this term will make clear to members of the public that gender identity discrimination is a form of sex discrimination prohibited by federal law, and that complaints of discrimination on this basis will be accepted for investigation. Although SSA will accept such complaints currently because they are covered by law, in view of the widespread discrimination experienced by transgender people, SSA should make this coverage explicit.

**I. Transgender People Have Experienced Widespread Discrimination in
Government Services, including SSA Programs**

LGBT individuals visiting local Social Security field offices or dealing with SSA over the phone sometimes experience discriminatory treatment based on their sexual orientation or gender identity. Such conduct is unprofessional and interferes with program administration and benefit delivery. This is particularly important for SSA since so many members of the public have direct contact with SSA offices, whether to obtain or replace a Social Security card, correct SSA records, or apply for benefits.

¹ SSA could also consider explicitly listing sexual harassment and pregnancy within this parenthetical as well, since this language is already included in SSA’s Equal Employment Opportunity policy.

This problem is particularly acute for transgender people, who often need to change their SSA records to reflect their gender identity and current name. In the largest survey of the experiences of transgender people, 22% reported denial of services or unequal treatment when interacting with “a government agency” and 22% also reported verbal harassment or abuse.² In all, 32% of respondents reported having experienced some form of discrimination in a government office on at least one occasion. These encounters are frequently frustrating and demeaning, and it is essential that individuals who experience discrimination during their interactions with SSA are made aware of avenues for redress and that the language of the SSA customer complaint form make explicit to victims of discrimination based on gender identity that such complaints will be accepted for investigation.

A policy explicitly prohibiting discrimination on the basis of gender identity will guide employees’ behavior, remind them of their obligation to treat members of the public with respect, and provide a basis for employee training. Having this policy clearly reflected in the complaint form will make individuals aware of their rights, give them greater confidence in dealing with the agency, and help them determine the next steps to take if they experience adverse treatment. Historically, few transgender people have filed complaints of discrimination with federal agencies due to the absence of explicit language in law or policies addressing gender identity and the widespread belief that transgender people were not protected by existing laws.

II. Discrimination Based on Gender Identity Is A Prohibited Form of Sex Discrimination

While the prevalence of discrimination based on gender identity and SSA’s commitment to fairly serving the public are sufficient to justify expanding the listed grounds of discrimination as a matter of policy, doing so is also consistent with, and necessary to fully implement, federal law with regard to sex discrimination. Discrimination based on gender identity has been recognized by the courts, by the Equal Employment Opportunity Commission (EEOC), and by other federal agencies, as a prohibited form of sex discrimination under federal law.³ Indeed, SSA has recently joined numerous other federal agencies, in updating its Equal Employment Opportunity policy to explicitly identify gender identity as included under the prohibition of sex discrimination. Since the January 2010 addition of “gender identity” in the EEO statement on USAJobs.gov by the Office of Personnel Management (OPM), several departments and agencies (among others, the Departments of Labor, State, Agriculture, and Health and Human Services; the Merit Systems Protection Board; the Equal Employment Opportunity Commission; the US Agency for International Development; and NASA) have explicitly identified “gender identity” in their own policy statements as a component of sex discrimination.

² Overall, 32% reported some form of discrimination by a government agency. J.M. Grant, et al. (2011), *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 129-30 (Washington, DC: National Center For Transgender Equality & National Gay and Lesbian Task Force), http://transequality.org/PDFs/NTDS_Report.pdf.

³ See, e.g., *Macy v. Holder*, E.E.O.C. Appeal No. 0120120821 (Apr. 23, 2012); Memorandum from John Trasviña to FHEO Regional Directors, Assessing Complaints that Involve Sexual Orientation, Gender Identity, and Gender Expression (June 2010); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729, 736-38 (6th Cir. 2005); *Smith v. Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653, 659–661 (S.D.Tex. 2008); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008).

III. *Explicit Inclusion of Gender Identity as a Form of Sex Discrimination Is Essential to Provide Notice to the Public and Encourage Meritorious Complaints*

SSA should update its customer complaint form to explicitly list discrimination on the basis of gender identity as a prohibited form of sex discrimination. As explained further below, adding the term “gender identity” does not represent a substantive change in policy, but provides needed clarity to managers and employees. The SSA’s General Counsel asserts that it is unnecessary to add gender identity as a protected category since, per *Macy v. Holder* (EEOC 2012), it is already covered under sex. We strongly believe that while this is legally correct, as a practical matter it is essential for the form to make clear to individuals that gender identity is covered, so that persons who experience such discrimination are aware of their rights and empowered to file a complaint. Just as the current form explicitly identifies limited English proficiency as a covered component of national origin discrimination by way of a parenthetical, the form should be updated to do the same for gender identity as a form of sex discrimination. Otherwise, transgender people, who have historically been unprotected from widespread discrimination, are likely to be discouraged from filing complaints. Implementing this change will provide necessary clarification about discrimination policies and better inform victims of discrimination about their rights.

IV. Conclusion

While gender identity discrimination is already covered by law, the average member of the public is not aware of this fact, and is likely to be discouraged from filing a meritorious complaint if coverage of gender identity is not explicitly spelled out. We strongly encourage SSA to make this coverage explicit in the revised form.

Sincerely,

A handwritten signature in black ink, appearing to read 'H. J. Tobin', with a long horizontal flourish extending to the right.

Harper Jean Tobin, Esq.
Director of Policy, National Center for Transgender Equality

on behalf of

**American Civil Liberties Union
American Humanist Association
CenterLink: The Community of LGBT Centers
Family Equality Council
Human Rights Campaign
National Center for Transgender Equality
National Gay and Lesbian Task Force
Services and Advocacy for GLBT Elders (SAGE)
Transgender Law Center**