



Non-Discrimination Protections for TGNB People: An Overview

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Legal non-discrimination protections for TGNB folks in employment, healthcare, and day-to-day life are critical to achieving health equity. This is because each of us are affected by social determinants of health, which are the conditions and social factors in which we interact, live, work, play, and worship, and which ultimately have an impact our health and wellbeing. Some examples of social determinants of health include experiences with racism, homophobia, transphobia and other forms of stigma and discrimination, housing instability, access to education, financial instability, and exposure to environmental hazards.¹ SPARK's approach via the reproductive justice framework is to apply an intersectional analysis and recognize the impact that social determinants have on health. This way, we can work to promote comprehensive policy and systems change that supports the whole person and our diverse and intersecting identities, as individuals and as integral members of our families and communities.

Laws prohibiting discrimination based on gender identity are one policy route to prevent TGNB folk' exposure to discrimination in day-to-day public spaces. Today, 19 states have a statewide non-discrimination law that include protections for gender identity.² Yet, Georgia is one of the 30 states that has yet to adopt any state-wide laws to protect people from discrimination based on their gender identity or expression.³ This means that a trans or non-binary person in Georgia may have little to no legal recourse if they experience discrimination for being who they are. The state of Georgia's failure to establish state-wide protections can render trans and non-binary folx vulnerable to discrimination and harassment, particularly in spaces like public bathrooms, parks, banks, or hospitals.

In some states lacking state-wide protections it is the local governments that have taken initiative to put non-discrimination ordinances in place, providing local residents with legal protections that otherwise do not exist at the state level. As of January 2018, there are 225 local and city non-discrimination ordinances throughout the United States.⁴ The city of Atlanta has instituted ordinances since 2013 that prohibit discrimination on the basis of sexual orientation and gender identity.²⁴ Atlanta is the only city in Georgia with ordinances that specifically protect TGNB people. In April of 2017, Macon Bibb County became the only county in Georgia to extend its non-discrimination protections to include gender identity and sexual orientation.²⁴

State and local ordinances provide a degree of protection, but without concrete federal protections TGNB folks are still vulnerable to discrimination outside of the specified state or local jurisdictions. Three states (North Carolina, Tennessee and Arkansas) have even gone so far as to prohibit local governments from unilaterally passing non-discrimination ordinances.²⁵ The Georgia legislature has attempted, thus far unsuccessfully, to follow suit by proposing bills that would prohibit local non-discrimination ordinances.

¹ Centers for Disease Control, *Social Determinants of Health: Know What Affects Health*, available at <https://www.cdc.gov/socialdeterminants/>.

² *LGBT Protections*, Reuters, available at http://fingfx.thomsonreuters.com/gfx/rngs/USA-LGBT-CITIES/010040570BX/index.html?utm_source=Twitter&utm_medium=Social.

³ Movement Advancement Project, *Non-Discrimination Laws*, last updated 8/24/2017, available at <http://www.lgbtmap.org/equality-maps/non-discrimination-laws>.

⁴ *Cities and Counties with non-Discrimination Ordinances that Include Gender Identity*, Human Rights Campaign (2017), <http://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender>



A lack of legal protection from discrimination can result in TGNB folks being fired, denied housing or loans, or refused healthcare services without accessible remedy or recourse.⁵ Permitting discrimination to remain unchecked undermines trans and non-binary folks' human rights, including to health and wellness, self-determination, and earning potential, undercutting one's ability to support a family, achieve financial stability and contribute to the economy.⁶ Studies show that LGBTQ people in general are more likely to experience poverty than cis and heterosexual people as a result of the persistent and systemic barriers that LGBTQ people still face in U.S. society. The impact of systems of poverty on LGBTQ folx, and particularly the T and the Q, are exacerbated for those who are people of color, elderly, disabled, or otherwise experience marginalization on multiple levels.⁷ Importantly, there is an emotional toll as well; TGNB people experience psychological harm from the prevalence of discrimination. Experiences with discrimination impact mental health and are well documented to increase the risk of emotional distress, anxiety, depression, and self-harm or suicidal idealization, particularly among young people.⁸

Although progress has been made to protect the rights of TGNB folx in Georgia, this progress remains local and may be vulnerable to change. If not on a state level, it is imperative that more cities in Georgia pass ordinances protecting trans and non-binary people, similar to what Atlanta and Macon Bibb County have done.

Federal protections in place

Federal non-discrimination protections have increasingly come to be interpreted by the courts to include the protection of a person's gender identity 'on the basis of sex.' In the 1989 sex discrimination case *Price Waterhouse v. Hopkins*, the U.S. Supreme Court held that the federal law prohibiting sex discrimination in employment settings, Title VII of the Civil Rights Act, should be interpreted to include gender stereotyping as a form of discrimination. This case laid the foundational precedent by which the Equal Employment Opportunity Commission now considers a person's identity as trans or gender non-conforming to be included under the protected class of 'sex'.²⁶

A 2011 legal decision out of Georgia, *Glenn v. Brumby*, became one of the first steps in developing legal precedent to protect transgender people from discrimination on the basis of their gender identity.³⁴ The Eleventh Circuit Court of Appeals found the Plaintiff Vandy Beth Glenn, a trans woman, had suffered discrimination when she was fired after disclosing to her employer that she was planning to transition physically to align with her female gender identity.³⁴ Since then, the courts have reaffirmed that discrimination on the basis of a person's gender identity is prohibited by the federal sex discrimination law, Title VII,²⁷ and that the recognition of gender identity as a protected class applies equally under the civil rights law ensuring protection from discrimination in educational institutions, Title IX.²⁸

The recognition of gender identity, as well as sexual orientation, as protected under the umbrella conceptualization of 'sex' under federal law was embraced throughout government agencies under the Obama Administration. The current administration has reversed much of that progress. Health and Human Services ("HHS"), the governmental agency

⁵ *LGBT Economic Security*, Movement Advancement Project, available at <http://lgbtmap.org/policy-and-issue-analysis/lgbt-economic-security>

⁶ *Paying an unfair Price: The financial penalty for being LGBTQ in America*, Movement Advancement Project and Center for American Progress (2014), available at <http://www.lgbtmap.org/policy-and-issue-analysis/unfair-price>

⁷ *Reproductive Justice Toolkit: Economic Justice for the LGBTQ Community*, National LGBTQ Task Force (2017), available at <http://www.thetaskforce.org/wp-content/uploads/2017/03/Queering-Reproductive-Justice-A-Toolkit-FINAL.pdf>.

⁸ Stephen Russel, Jessica Fish, *Mental Health in Lesbian, Gay, Bisexual and Transgender (LGBT) Youth*, national Institutes of Health (2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4887282/>; also see *State Policy Tally: Frequently Asked Questions*, Transgender Law Center, available at <https://transgenderlawcenter.org/equalitymap>.



responsible for the regulation of healthcare, employment, and US citizens' wellbeing, has instructions to identify sex as a binary concept (only male or female) that is defined by one's genitalia at birth (effectively attempting to erase trans and gender non-binary people's existence and ignoring intersex people). SPARK RJ Now! recognizes the harmful affect such a policy has, essentially giving a nod to ongoing discrimination, harassment and stigma on an institutional level and has made it a *Policy Priority* (link to Policy Priorities) to oppose the narrowing definition of sex on the federal level.

Beyond the Civil Rights Act, protections for TGNB people must be reinforced throughout state and federal legislation. Some examples of affirming and inclusive legislation are the Prison Rape Elimination Act, which requires that gender identity be taken into account when a person is searched or placed in custody;²⁹ the 2009 Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which amends the legal definition of hate speech to include speech against a person's gender identity or sexual orientation;³⁰ the 2013 reauthorization of the Violence Against Women Act (VAWA), which stipulates that organizations that are funded through the legislation are prohibited from discriminating against trans people in the workplace;³¹ and, importantly, the Affordable Care Act (ACA), under which there are explicit protections from discrimination based on gender identity in healthcare settings.

Specifically, §1557 of the ACA protects individuals from "be[ing] excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under" a health program or activity on the basis of sex.³² The rule defines "on the basis of sex" to include gender identity, in accordance with the interpretation of 'sex' under the federal civil rights law Title IX.³² People who face discrimination protected by §1557 can file a civil rights complaint, individually and without legal representation, with the Office of Civil Rights.³³ Further guidance released in May 2016 fortified the ACA's §1557 protections for TGNB people.³⁴

The legislative protections for transgender people nevertheless remain vulnerable, and too few in number. For example, on December 31, 2016, an injunction (or, a legal hold) was placed on the enforcement of the §1557 gender identity protections, preventing the government from enforcing transgender people's right to seek remedy if discriminated against in a healthcare setting. In addition to placing transgender people's rights in limbo, the lawsuit halted access to remedies available under §1557 for people who have had abortions - an outcome that also harms transgender men and non-binary people who can get pregnant.³⁵ Future regulatory instability like this can be prevented with the passage of firm federal legislation prohibiting discrimination on the basis of gender identity, in any context or capacity. While the attacks on the rights and dignity of TGNB people under the guise of religious freedom is not a new strategy of anti-LGBTQ advocates, it is a harmful trend that has recently gained exposure and clout in the Georgia legislature, in federal Executive Orders, as well as at the Supreme Court.⁹

Transgender and non-binary people need robust and sustainable legal protections from discrimination and structural violence that are strong enough to withstand the ebb and flow of partisan leadership. The progress that has been made thus far for gender justice and human rights must continue on the local, state and federal levels, and in the courts. More and more, legal precedent is being created in favor of the rights of trans and non-binary people. It is imperative for the health and wellbeing of TGNB folx that legislative action continue to follow suit and that anti-LGBTQ laws, policies and regulations, particularly those that exploit religious faith and belief, are met with resistance.

⁹ Lambda Legal to High Court: Religious License to Discriminate harms LGBTQ People from Cradle to Grave, Lambda Legal, October 30, 2017, https://www.lambdalegal.org/blog/co_20171030_masterpiece-cakeshop-amicus-filing; a/so see National LGBTQ Task ForceL Masterpiece Cakeshop Case could roll LGBTQ rights back a half-century, National LGBTQ Task Force, December 5, 2017, <http://www.thetaskforce.org/masterpiece-scotus-protest/>