



## UNITED STATES' EXPERIENCE IN PROTECTING TRANSGENDER PEOPLE AGAINST DISCRIMINATION IN LABOR RELATIONS AND RECOMMENDATIONS FOR VIETNAM

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**Abstract:** This study will explore the United States' experiences in promulgating regulations to protect the legal rights of transgender people in labor relations and ensure their health as stipulated in the Code of Federal Regulations of the United States (CFR). It will then provide a basis for comparison with regulations protecting transgender women in labor relations in Vietnam and make appropriate recommendations for Vietnam.

**Keywords:** *United States Law, labor relations, transgender women, legal rights and interests.*

### 1. Introduction

According to a report by the Ministry of Health, in Vietnam, there are an estimated 490,000 transgender people, including two groups: the first is from male to female (MTF: Male to Female), and the second is from female to male (FTM: Female to Male). Unlike gay or bisexual people who can hide their sexual orientation, transgender people want to express their gender identity by changing their gender; because of this factor, they are often targeted and more susceptible to stigma and discrimination in society.<sup>2</sup> Stigma and discrimination can have adverse effects on legal rights and benefits for transgender people. Nearly 75% of transgender women in Vietnam have changed their appearance in inappropriate ways with their gender identity, thereby causing obstacles such as discrimination when they participate in Vietnam's workforce, as well as their ability to ensure fairness when using medical services.<sup>3</sup> Another

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<sup>2</sup> Ministry of Health of the Socialist Republic of Vietnam (2022), Report on the current situation of transgender people in: Vietnam and the relevant legal system, <https://moh.gov.vn/documents/20182/212437/880B%25C3%25A1o%2520c%25C3%25A1o%2520th%2520c%2520trang%2520ng%2520i%2520chuy%2520n%2520gi%2520i.doc/253afe2c-0b06-46f6-b8ec-81010c742a29>, retrieved April 2, 2024.

<sup>3</sup> United Nations in Vietnam (2021), Transgender rights: need to think about the community of half a million people, <https://vietnam.un.org/vi/164561-quyền-chuyên-đổi-giới-tính-cần-nghĩ-đến-cộng-đồng-nửa-triệu-người>, retrieved 2 April 2024.

study conducted in 2019, related to a survey of the current situation of discrimination in the workplace, showed that people in the LGBT community are discriminated against in many forms and at a high rate of discrimination by one of the forms is 75.6%, and up to 30% are regularly discriminated against by all forms surveyed. Among them, standard forms of discrimination include regulations on work uniforms (12.7%), negative comments from customers (10%), refusal to work, and restrictions on work, such as promotion, bonus, or forced transfer to another job position due to the employee's sexual orientation (40%-50%).<sup>4</sup>

In the United States, since the 90s of the last century, activities to protect legal rights and interests, as well as combat discrimination against transgender people, have taken place and achieved desirable results based on the foundation of activities to protect the legal rights and interests of gay, lesbian and bisexual (LGB).<sup>5</sup> The exclusion of the view that transgender people are people with psychological diseases has helped transgender people protect their legal rights and interests in United States laws on protection provisions on equality. Specifically, legal experts in the United States have given unanimous opinions based on the request to protect the legitimate rights of a transgender person in Court (Case: Blatt's Implications). In the process of requesting protection of the legal rights of transgender people, the view that the state of "gender dysphoria" that transgender people suffer from does not stem from their gender incompatibility but comes from adverse reactions, discrimination, and aversion from employers, which leads to gender dysphoria among transgender women. Viewpoints related to protecting transgender people to enjoy legal rights related to health care and non-discrimination in the workplace... is content targeted by United States law to ensure their rights by the United States Constitution.<sup>6</sup> Studies also show that in the United States, there has been clear progress in ensuring equal rights for transgender people in the United States, to lead a safe and happy life with the respect that they deserve to receive.<sup>7</sup> Meanwhile, transgender people in general and transgender women in particular have not been mentioned in Vietnam's 2019 Labor Code, leading to ensuring the legal rights and interests of transgender women in labor relations still has many limitations. Therefore, refer to the experience of the United States in regulations

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<sup>4</sup> Nguyen Thi Kim Ngan, An Thanh Ly (2019), Current status of discrimination based on differences in sexual orientation in the workplace for gay, bisexual and transgender people in industrial parks. *Journal of Community Medicine*, Vol 4(51), 79-82

<sup>5</sup> Paisley Currah et al. eds, (2006), Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? in TRANSGENDER RIGHTS* 141- 142

<sup>6</sup> Kevin M. Barry, Brian Farrell, Jennifer L. Levi, & Neelima Vanguri (2016), A Bare Desire to Harm: Transgender People and the Equal Protection Clause, 57 B.C. L. REV. 507

<sup>7</sup> Rose Gilroy et al. (2020), Transgender Rights and Issues, *The Georgetown Journal Of Gender And The Law*, [Vol. XXII:417], 485

related to ensuring equal rights, anti-discrimination in the workplace, and health assurance policies for transgender women that propose appropriate recommendations for Vietnamese Law.

## **2. Overview of transgender people and regulations related to transgender people in labor relations in Vietnam**

### **2.1 Overview of transgender people**

The concept of transgender people relates to the structural elements within psychology and the external behavioral manifestations of human sexuality. Sexuality Information and Education Council of America (Sexuality Information and Education Council of The United States - SIECUS) has given the following definition of sexuality: "Sexuality is the whole person, including all aspects that are characteristic of boys or girls, men or women, and fluctuates throughout life. Sexuality reflects a person's personality, not just their sexual nature. Because it is an overall expression of personality, sexuality is related to biological, psychological, social, spiritual, and cultural elements of life. These factors influence personality development and human relationships and thus impact society." (SIECUS 1970). There are four factors that create a person's sexuality: i) Sexual orientation (a person's tendency to feel sexually attracted to a person of any gender); ii) biological sex (sex determined by biological characteristics of the body); iii) gender identity (a person's internal sense of whether they are male or female); iv) gender expression (the expression of a person's masculine or feminine behavior in life). It can be understood that human sexuality is all of the above four elements of that person that create their sexuality, which are also the qualities that make up their personality - the synthesis of internal psychological qualities that are characteristic of a person and revealed by that person's outward behavior in life. A study on transgender people has proposed the following concept: If a person has awareness and desires to have a gender different from the sex they were born with, it is also expected. After surgery, transgender people are called with a more complete concept of transsexuals.<sup>8</sup> From the above concept, it is understood that transgender women are people who were born with male biology and had a gender identity that wants to be female. They have had surgery to change their biological sex from male to female, and vice versa will be the concept for transgender men.

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<sup>8</sup> Truong Hong Quang (2019), Rights of homosexual, bisexual, transgender and intersex people according to current Vietnamese law, Doctor of Jurisprudence thesis, Vietnam Academy of Social Sciences

The regulations on the personal rights of individuals in the 2015 Civil Code have provisions on the right to re-determine gender and the right to change gender. Accordingly, an individual has the right to re-determine their gender in cases where their gender is congenitally disabled or has not been accurately determined and requires medical intervention to determine their assigned gender in Article 36. In case an individual who has changed gender has the right and obligation to register for a change in civil status according to the provisions of the Law on civil status and has moral rights compatible with the new gender according to the requirements of the Civil code in 2015 and other relevant laws.<sup>9</sup> Thus, after transitioning from male to female (MTF) and completing the necessary civil status changes, individuals will enjoy their rights according to the female gender in the 2019 Labor Code if they participate in labor relations. The gender transition process is carried out according to the provisions of the Law. However, until this research was conducted, the Gender Transition Law was still waiting to be passed, and the content of the draft of this Law was publicly posted on the government's electronic information portal. According to this draft, one of the top policies mentioned by the state is to recognize, respect, and ensure the civil rights and obligations of transgender people. The content of the draft also shows that there are many prohibited acts related to gender change, such as stigma, discrimination, and labor exploitation of transgender people... Furthermore, many concepts related to transgender people have been raised. Specifically, a transgender person is understood as a person whose new gender is recognized by a competent state agency after performing interventions. Medical intervention to change gender, this medical intervention is understood as applying one or more medical measures such as using sex hormones, breast and genital surgery, and complete excision surgery. All organs have reproductive functions associated with the previous sex. These medical measures aim to create a match between the transgender person's physical appearance and gender identity. In addition, transgender people are entitled to maternity benefits according to the provisions of labor law and other relevant laws.<sup>10</sup> Thus, the contents of the Draft Law on Gender Change have shown the state's orientation in regulating social relations related to transgender people in a gender-equitable, anti-discriminatory, and non-discriminatory manner against transgender people. However, in the 2019 Labor Code, there are no regulations specifically for transgender people with unique characteristics related to medical intervention, as mentioned above. Since then, access to health care measures according to policies for transgender female workers has been

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<sup>9</sup> National Assembly of the Socialist Republic of Vietnam (2015), Civil Code, No.: 91/2015/QH13

<sup>10</sup> Government of the Socialist Republic of Vietnam (2024), Draft Law on Gender Change

non-existent. It can be considered discriminatory against female workers when there are specific regulations. The forthcoming analysis will examine these regulations to assist individuals in accessing suitable health policies.

## **2.2 Regulations on ensuring gender equality and non-discrimination in labor relations in Vietnam for female workers.**

In Vietnam, everyone is equal before the Law, and no one is discriminated against in any field, from political life, economic, and social culture to civil relations. This is an essential content stated in the 2013 Constitution of Vietnam. In addition, Article 26 of the 2013 Constitution also clearly states that all male and female citizens are equal in all aspects. The state has a policy to ensure gender-equal rights and opportunities, especially for women, stating that the role of the state, society, and family is to create conditions for women to develop comprehensively and promote their role in society. In particular, the Constitution also prohibits all gender discrimination.<sup>11</sup> In addition, in Article 5 of the 2006 Gender Equality Law, several terms in the field of gender equality are explained as follows: “Gender is the characteristics, positions, and roles of men and women in all social relationships; Gender equality means that men and women have equal positions and roles, are given the conditions and opportunities to develop their abilities for the development of the community and family, and enjoy equal outcomes of that development”.<sup>12</sup> This Law also clearly states that the state's gender equality policy is to ensure gender equality in all fields and to support and create conditions for men and women to develop their abilities and have opportunities equal opportunities to participate in the development process and enjoy the fruits of development.

Gender equality regulations in labor relations are built on several principles stated in Article 13 of the 2006 Gender Equality Law, which are: i) Men and women are equal in terms of standards and age when entering recruitment, equal treatment in the workplace in terms of employment, wages, bonuses, social insurance, working conditions and other working conditions; ii) Men and women are equal in standards and age when being promoted and appointed to hold positions in industries and occupations with title standards; iii) Have measures to promote gender equality in the labor field such as regulations on the ratio of men and women when recruiting, have the training and fostering measures to improve the capacity of female workers and create favorable conditions for women's health and safety occupational

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<sup>11</sup> National Assembly of the Socialist Republic of Vietnam (2013), Constitution 2013

<sup>12</sup> National Assembly of the Socialist Republic of Vietnam (2006), Gender Equality Law. No. 73/2006/QH11.

safety for female workers working in some heavy, dangerous industries or occupations or exposed to toxic substances. In addition, related to gender equality in labor relations, the following acts are considered violations of the Law as prescribed in Clause 3, Article 40 of the 2006 Gender Equality Law as follows: i) Applying the following: Different conditions in recruiting male and female workers for the same job that men and women have the same qualifications and ability to perform, except in cases where measures to promote gender equality are applied a) Organization Organize activities to propagate knowledge about Gender and laws on gender equality for members of agencies, organizations and employees; ii) Refuse to recruit or limit employment, fire or terminate employees due to Gender or pregnancy, childbirth, or raising children; iii) Discriminatory work assignment between men and women leading to income differences or applying different salary levels to workers with the same qualifications and abilities due to gender reasons; iv) Failure to comply with provisions of the labor law specifically for female workers.

In addition to the Gender Equality Law, which stipulates policies, principles, and violations of the Law on gender equality in labor relations, the 2019 Labor Code has specific regulations on gender equality policies. State on labor, specifically in Clause 7, Article 4, has regulations on the state ensuring gender equality, regulating labor regimes and social policies to protect female and disabled employees, elderly employees, and juvenile employees. In addition, discrimination in labor is one of the prohibited acts in the field of labor, as stated in Clause 1, Article 8 of this Code. Furthermore, the Labor Code has a separate chapter regulating gender equality. These regulations are stated in Chapter X of the 2019 Labor Code as separate regulations for female workers and to ensure gender equality. The regulations in this chapter of the 2019 Labor Code, towards regulations on maternity protection policies, specifically in Article 137 are as follows: First, employers are not allowed to let female employees work at night, working overtime and going on long business trips when they are 4 months pregnant in standard cases and from the 6th month if the workplace is in highlands, remote areas, island borders, and are raising a child under 12 months old; Second, the policy of reducing working hours by 1 hour but still receiving full salary for female workers doing heavy, toxic, dangerous jobs, etc.; Third, the employer is not allowed to fire or unilaterally terminate the contract when the employee is pregnant, on maternity leave, or raising a child under 12 months old, except in cases prescribed by Law; Fourth, female employees who are pregnant or raising children under 12 months old are given priority to sign a new contract if the contract expires within the above period; Fifth, female workers are entitled to 30 minutes off every day during menstruation, and



while raising children under 12 months old are entitled to 60 minutes off every day with full pay during working time , etc. In addition, Chapter X of the Labor Code in 2019 also stipulates the right to terminate the contract unilaterally, postpone the performance of the contract when a female employee becomes pregnant in Article 138, regulations on maternity leave in Article 139, regulations on job security for employees on maternity leave to continue working in the same job after maternity leave without having their salary, rights, and benefits reduced compared to before the leave, and in the case of If the old job is no longer available, the female employee will be assigned to another job with a salary not lower than the salary before maternity leave in Article 140, and female employees will be given prenatal check-ups, miscarriages, curettage, aspiration, stillbirth, abortion, pathology, contraceptive measures, and sterilization will receive benefits as prescribed by the Law on social insurance in Article 141 of the Labor Code 2019. <sup>13</sup> The above regulations show that Vietnamese Law has regulations to ensure gender equality and protect legal rights and interests based on differences in physiological characteristics of female workers in labor relations. Meanwhile, these policies are not suitable for transgender female workers due to different biological characteristics; these different factors are not mentioned in the current Labor Code.

### **3. Experience in ensuring anti-discrimination and ensuring legal rights and benefits for transgender people in the United States**

#### **3.1 Regulations under United States Federal Law on anti-discrimination in Labor Relations and ensuring health for transgender people**

Discrimination based on the gender of transgender workers is a prohibited act under section 38.7 of Title 29 on Labor of the United States Code of Federal Regulations (CFR), with the following contents: Specific contents are as follows: In providing any aid, benefit, service, or training under a Workplace Innovation and Opportunity Act (WIOA) Title I<sup>14</sup> -financially assisted program or activity, a recipient must not directly or through contractual, licensing, or other arrangements, discriminate based on sex. An individual may not be excluded from participation in, denied the benefits of, or subjected to discrimination under any WIOA Title I-financially assisted program or activity based on sex. The term sex includes, but is not limited

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<sup>13</sup> National Assembly of the Socialist Republic of Vietnam (2019), Labor Code. No. 45/2019/QH14

<sup>14</sup> See Title I -WIOA <https://www.clasp.org/wp-content/uploads/2022/04/WIOA-Title-I-Dislocated-Worker.pdf>

to, pregnancy, childbirth, and related medical conditions, transgender status, and gender identity.<sup>15</sup> Prohibited acts related to discrimination against transgender people include:

Firstly, recipients may not make any distinction based on sex in providing any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity. Such unlawful sex-based discriminatory practices include, but are not limited to the following: i) Posting job announcements for jobs that recruit or advertise for individuals for specific jobs based on sex; ii) Treating an individual adversely because the individual identifies with a gender different from that individual's sex assigned at birth, or the individual has undergone, is undergoing, or is planning to undergo, any processes or procedures designed to facilitate the individual's transition to a sex other than the individual's sex assigned at birth; iii) Denying individuals access to the restrooms, locker rooms, showers, or similar facilities consistent with the gender with which they identify.<sup>16</sup>

Secondly, discrimination based on sex stereotypes, such as stereotypes about how persons of a particular sex are expected to look, speak, or act, is a form of unlawful sex discrimination. Examples of sex stereotyping include but are not limited to i) Denying individual access to, or otherwise subjecting the individual to adverse treatment in accessing, any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity because that individual failed to comply with gender norms and expectations for dress, appearance and/or behavior, including wearing jewelry, make-up, high-heeled shoes, suits, or neckties; ii) Denying individual access to, failing to provide information about, or otherwise subjecting the individual to adverse treatment in accessing, any aid, benefit, service, or training under a WIOA Title I-financially assisted program or activity, because the individual does not conform to a sex stereotype about individuals of particular sex working in a specific job, sector, or industry. iii) Adverse treatment of an applicant, participant, or beneficiary of a WIOA Title I-financially assisted program or activity based on sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.

Title 45 Public Welfare stipulates additional requirements on non-discrimination against transgender people when enjoying social health benefits, specifically as follows: no person shall on the ground of actual or perceived sex, including gender identity, be excluded from participation in, be denied the benefits of, or be subject to discrimination under, any program

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<sup>15</sup> US Code of Federal Regulations: at point (a) 29 CFR 38.7

<sup>16</sup> US Code of Federal Regulations: at point (b) 29 CFR 38.7



or activity funded in whole or in part through Family Violence Prevention and Service Act (FVPSA). Accordingly, this content is regulated explicitly for transgender people as follows: as with all individuals served, transgender and gender nonconforming individuals must have equal access to FVPSA-funded shelter and nonresidential programs. Programmatic accessibility for transgender and gender nonconforming survivors and minor children must be afforded to meet individual needs consistent with the individual's gender identity. Administration for Children and Families (ACF) requires that a FVPSA grantee or subgrantee that makes decisions about eligibility for or placement into single-sex emergency shelters or other facilities offer every individual an assignment consistent with their gender identity. To assign a service beneficiary to sex-segregated or sex-specific services, the grantee/subgrantee may ask a beneficiary which group or services the beneficiary wishes to join. However, the grantee/subgrantee may not ask questions about the beneficiary's anatomy or medical history or make demands for identity documents or other gender documentation. A victim's/beneficiary's or potential victim's/beneficiary's request for an alternative or additional accommodation for personal health, privacy, or safety must be seriously considered in making the placement. For instance, if the potential victim/beneficiary requests to be placed based on their sex assigned at birth, ACF requires that the provider will place the individual following that request, consistent with the health, safety, and privacy concerns of the individual. ACF also requires that a provider will not make an assignment or reassignment of the transgender or gender nonconforming individual based on complaints of another person when the sole stated basis of the complaint is a victim/client or potential victim/client's non-conformance with gender stereotypes or sex, including gender identity.<sup>17</sup> During the process, if a person feels that he or she has had a discriminatory experience, he or she can defend himself or herself by filing a complaint within 180 minutes to either of the following two places: i ) The recipient's Equal Opportunity Officer (or the person whom the recipient has designated for this purpose); ii) or The Director, Civil Rights Center (CRC), United States Department of Labor, 200 Constitution Avenue NW., Room N-4123, Washington, DC 20210 or electronically as directed on the CRC Web site at [www.dol.gov/crc](http://www.dol.gov/crc).<sup>18</sup> The above regulations show that United States federal law has specific regulations to protect the legitimate rights and interests of transgender people to help them ensure their right to fair treatment in labor relations and health assurance policies.

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<sup>17</sup> US Code of Federal Regulations: No.4 at point (a) 45 CFR 1370.5

<sup>18</sup> US Code of Federal Regulations: 29 CFR 38.35

### **3.2 Experiences in resolving lawsuits in the United States related to transgender discrimination in labor relations**

Transgender people in the United States have sued employers who have taken adverse action against transgender employees after learning of the employee's gender identity (including whether the employee has changed their gender identity, intends to change, or has changed in the past). If an employer was willing to hire the plaintiff when the employer believed the plaintiff was a man but rescinded the offer when it learned that the plaintiff was a woman, the employee could allege that the employer discriminated against her based on her gender and was violent. According to the theory of gender stereotyping, a transgender female employee could argue that she was fired for failing to meet the employer's expectations regarding dress because the employer believed that she should wear men's clothes and appear as a man.<sup>19</sup>

Typically, the 2019 lawsuit, the lawsuit of plaintiff Aimee Stephens, through the EEOC agency v. R.G. & G.R. Harris Funeral Homes, Inc,<sup>20</sup>, the text from the lawsuit is as follows: Aimee filed a petition with the Supreme Court to decide on whether the regulations under Title VII apply (Title VII is what the Civil Rights Act of 1964 regulates). It is unlawful for an employer to refuse to hire, fire, or otherwise discriminate in the terms, conditions, or benefits of employment because of a person's sex on two contents: i) their status as transgender or ii) gender bias according to lawsuits related to gender bias or not. Specifically, Aimee Stephens, a transgender woman, was hired as a funeral director at R. G. & G.R Harris Funeral Home from April 2008 to August 2013. During his employment, Stephens appeared as male and used his then-legal name. Rules relating to funeral home policies require male employees to wear suits and ties and female employees to wear business dresses and jackets. The funeral home provides clothing and allowances for male employees but does not do the same for female employees, and Aimee worked in clothing provided by the funeral home. In July 2013, Stephens sent her employer a letter outlining her lifelong struggles with gender identity and her intention to return to work as a cross-dressing woman after her scheduled vacation. Before the holiday, Stephens was fired; her employer gave the reason for the dismissal as “Stephens no longer presented himself as a man; he wanted to wear a woman's dress.” Stephens filed a

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<sup>19</sup> U.S. Equal Employment Opportunity Commission -EEOC (2012), Decision No. 0120120821, 2012 WL 1435995, case: Macy v. Holde \*10 (Apr. 20, 2012) (explaining that proving sex discrimination does not require showing evidence of gender stereotyping).

<sup>20</sup> EEOC ((2019), EEOC, Aimee Stephen v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *aff'd in part*, 139 S. Ct. 1599

charge with the EEOC, which determined there was reasonable cause to believe that the funeral home fired Stephens because of her sex and gender identity in violation of its discrimination regulations on transgender people. After failing to settle, the EEOC filed a complaint against the funeral home in district court on September 25, 2014. The district court agreed with the funeral home that transgender status was not a protected category under the Civil Rights statutes relating to discrimination in terms, conditions, or benefits of employment because of the illegality of a person's and individual's gender. It held that the EEOC could not bring a claim against Stephén based solely on transgender status. However, the district court agreed that Stephens was fired because she did not conform to the employer's desired expectations, stereotypes, or gender-based preferences. Although admitting that Stephens' claim was sexist, the district court ultimately granted summary judgment on the basis that the Religious Freedom and Rehabilitation Act (RFRA) barred enforcement against funeral homes, which provides evidence of the religiously “respectful” nature of its operations. Stephen appealed, and the Sixth Circuit reversed, holding that discrimination based on transgender status is necessarily discrimination based on sex and fully supporting his claim. EEOC. This decision of the 6th Circuit was based on the gender stereotyping theory of the previously heard case “Price Waterhouse v. Hopkins”.<sup>21</sup> However, the case was brought to the Supreme Court. The court heard oral arguments in the case on October 8, 2019. The EEOC, Stephens, and several amicus curiae asked the Court to uphold the Sixth Circuit's ruling and held that the Funeral Home and the federal defendants sought to reverse the facts. The Trump administration urged the EEOC to change its position before the Supreme Court and argued that businesses could discriminate against transgender workers.<sup>22</sup> The EEOC declined to do so, in its opinion and refused to sign the government's brief at Harris Funeral Home.<sup>23</sup> The EEOC held that Title VII requires showing that employers treat individuals of the same sex less favorably than individuals of the opposite sex by treating all transgender individuals regardless of whether they identify as male or female consistently. The government argued that because Stephens did not allege that the dress code would treat an individual with female biological sex at birth more favorably than male biological sex, she cannot demonstrate that the dress code imposes unfavorable terms or

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<sup>21</sup> PriceWaterhousev.Hopkins (1989), *Harris Funeral Homes*, 490U.S.228,250, 884F.3dat576.

<sup>22</sup> BenPenn, ChrisOpfer &PaigeSmith (2019), *Justice Department Urge sCivil Rights Agency to Flip LGBT Stance*, BLOOMBERG L, <https://news.bloomberglaw.com/daily-labor-report/justice-department-urges-civil-rights-agency-to-flip-lgbt-stance>. 4/4/2024

<sup>23</sup> Marcia Coyle (2019), *EEOC Doesn't Sign Trump DOJ's Supreme Court Brief Against Transgender Employees*, NAT'L L.J. <https://www.law.com/nationallawjournal/2019/08/16/eec-doesnt-sign-trump-doj-s-supreme-court-brief-against-transgender-employees>. 4/4/2024

conditions of employment based on sex. The government also disagreed with Stephens' interpretation of a similar earlier Price Waterhouse case. It argued that it did not consider gender stereotyping as an independent theory of liability under Title VII.<sup>24</sup> On June 15, 2020, the Supreme Court ruled by a 6-3 vote that Title VII's prohibition of sex discrimination protects employees fired for being transgender. Justice Neil Gorsuch wrote the majority opinion, saying “transgender status” is “inextricably linked to sexuality...because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.” However, the Supreme Court made clear that this ruling had limitations and explicitly stated it did not address religious exemptions to anti-discrimination laws or the ever-present topic of bathroom.<sup>25</sup> Furthermore, exemptions to Title VII still allow many employers to fire transgender employees because of their gender identity because Title VII does not apply to businesses with fewer than 15 employees. And finally, Bostock transgender plaintiff Aimee Stephens passed away on May 12, 2020, just over a month before the Supreme Court ruled in her favor.<sup>26</sup>

The lawsuit shows that after many trials, the final verdict protects transgender workers when they have to endure employers' requests to wear clothes that do not match their identity gender and the act of firing a transgender employee in case of failure to comply with the employer's desired dress requirements is an act of discrimination against transgender employees.

#### **4. Recommend improving regulations to ensure the rights of transgender people in labor relations**

A study has shown that, in Vietnam, while stigma and discrimination are still common, very few companies have public anti-discrimination policies. Even international companies with anti-discrimination policies often do not disclose these policies to employees in the Vietnam office. Interviews with LGBT-friendly company managers show that companies have not done so because they do not see the need. They claim LGBT people are working in their company, and they have not had any complaints. In the few cases where the company received a complaint, it resolved the incident internally. It should be noted that the lack of an anti-

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<sup>24</sup> Ibid (14).

<sup>25</sup> Bostock v. ClaytonCty (2020),140S.Ct.1731,1742

<sup>26</sup> Amy Howe (2020), *Opinion Analysis: Federal Employment Discrimination Law Protects Gay and Transgender Employees (Updated)*, SCOTUSBLOG <https://www.scotusblog.com/2020/06/opinion-analysis-federal-employment-discrimination-law-protects-gay-and-transgender-employees/>. 4/4/2024

discrimination policy may be the reason why people do not complain.<sup>27</sup> Through the experience of the United States, federal Law has shown specific regulations to protect transgender people against stigma and discrimination in labor relations and opportunities to access policies and ensure equitable health.<sup>28</sup> Since then, transgender people have had a legal basis for making complaints to protect themselves against discrimination in labor relations. Although United States authorities have mixed opinions on transgender discrimination based on many views under other laws related to the act, the final verdict in the case research shows that the Supreme Court still protects transgender people. From there, several recommendations were sent through this study, specifically as follows:

Firstly, there needs to be a concept of transgender people in the 2019 Labor Code. Adding this concept to Article 3 of the 2019 Labor Code is consistent with the provisions of the 2015 Civil Code and the draft Law on Gender Change is about to be promulgated, thereby recognising the subject status of transgender people in labor relations; this concept is specifically as follows: “Transgender women are people born with male biology and have gender identity wishes to be female, and they have performed surgery to change their biological sex from male to female, and for transgender men means they are people born with biological female identity gender identity wishes to be male, and they have had surgery to change their biological sex from female to male”

Second, adding the element “transgender” and Clause 8, Article 3 of the 2019 Labor Code is one of the contents that can lead to discriminatory behavior in labor. In addition, it is necessary to supplement regulations prohibiting discrimination against transgender people in employment opportunities and other discriminatory acts in labor relations related to transgender people, such as dress codes that do not match their desired gender that is different from their biological sex or career advancement opportunities that are limited because they are transgender...this content should be regulated Specifically, Article 8 of the 2019 Labor Code on prohibited acts in the field of labor. Such regulation will help increase awareness among transgender people that the Law protects them from discriminatory practices in labor relations.

Third, add specific regulations related to ensuring health for transgender women in the chapter that protects workers with female biological sex and does not include rules specifically

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<sup>27</sup> Hoàng Anh Tú, Pauline Ooterhoff (2016), Transgender at work: Livelihoods for Transgender People in VietNam. University of Amsterdam. IDS, 15. [https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/8869/ER167\\_TransgenderatWorkLivelihoodsforTransgenderPeopleinVietnam.pdf?sequence=5](https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/8869/ER167_TransgenderatWorkLivelihoodsforTransgenderPeopleinVietnam.pdf?sequence=5)

<sup>28</sup> Part of the content of the proposal is in the review stage of another study. For citations (if any), please get in touch with the author directly via email: trind@uef.edu.vn

for female workers who are male-to-female transgender (MTF). MTF groups have biological characteristics that are entirely different from female workers, so it seems that if they are recognized as female, MTF groups cannot enjoy the benefits specified in the Labor Code, such as MTF groups cannot enjoy the same rights as women during menstruation, or regulations related to maternity when female workers are pregnant, have twins, breastfeed, or pump to store milk. Accordingly, even though they are recognized as female after performing gender reassignment, the policies for female workers stipulated in the Labor Code and Social Insurance Law are also limited because they cannot have a biological body to have the same maternity status as female workers. Instead, add regulations when transgender women take some medical measures to be recognized as their new gender, such as i) use of sex hormones, ii) breast and genital surgery, iii) Complete surgical removal of organs with reproductive functions associated with the old sex; iv) Combined surgery and use of sex hormones. Thus, with these medical interventions, there are no provisions in the Labor Code to ensure employment while they implement the above measures.

Fourth, add specific regulations related to transgender people's right to complain or sue to protect their rights when there is discriminatory behavior in labor relations. This regulation helps transgender people's labor relations become balanced, assisting transgender people to be publicly protected by Law when discriminatory behavior occurs. This is the legal basis to support management agencies, and justice agencies have a basis to resolve requests related to discrimination in labor relations related to transgender people.

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