Testimony of
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Committee on Education and Labor
Subcommittee on Health, Employment, Labor and Pensions

Hearing on
"An Examination of Discrimination Against Transgender Americans in the Workplace"

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Introduction

Chairman Andrews, Ranking Member Kline, members of the Committee, I am honored to have been invited to testify before you today on *"An Examination of Discrimination Against Transgender Americans in the Workplace."*

For the past 19 years I have represented both public and private clients in litigation of discrimination claims such as sexual harassment, equal pay, race, age, religion and disability. Prior to entering private practice, I was an Assistant Attorney General for the State of Florida, the Chief of Litigation for the Florida Department of Labor and Employment Security, and Special Counsel to the Florida Department of Corrections, where I represented public agencies in litigation, torts and constitutional challenges and oversaw legislative analyses of proposed bills. I have extensive experience in addressing discrimination in the workplace, and I have been recognized in court as an expert witness in the fields of workplace investigations and sexual harassment.

My purpose in speaking to you today is not to encourage or dissuade the Committee from passing legislation on workplace discrimination against transgender persons, specifically H.R. 3685. Rather, my intent is to provide some insight into the potential unintended legal consequences of using certain language in any proposed legislation.

Promoting a workplace free of discrimination is not only laudable it is sound business practice. However, any time new legislation is enacted impacting the workplace, there is a subsequent disruption in the workplace as managers, human resource professionals and employees all try to implement new policies and adjust their working routine to comply with the legal mandate. This disruption can be minor or significant depending upon the nature of the new legislation.

At times, well intended legislation is enacted without regard to the practical implications it will have on the every day operations of the American business. Responsibility for ensuring that the new law is applied to the workplace rests with someone in the company, often the human resource staff. But at smaller companies, for instance many of those with less than 25 employees, there is no dedicated full time human resource position and the task to implement the new law falls to an owner, or manager who is already juggling other duties. Even in those companies that have a sophisticated human resources staff, the implementation of new legislation can be difficult if the law is particularly complex, too vague, or requires drastic change to the working environment.

Legislation that is vague, overbroad, or imposes radical change frequently leaves business managers frustrated and confused trying to conform to the new law. Vague or impractical legislation significantly increases the risk of litigation. When language in a statue is unclear the consequence can be radically different interpretations of rights and responsibilities by the employer and employee. These different interpretations of the law can result in an impasse in the workplace so severe it leads to litigation. As a trial attorney I have seen numerous instances where confusion over what is required or permitted under a statute has led to a lawsuit by an employee against an employer that nonetheless had made a good faith attempt to comply

with the law. For these reasons I urge the Committee to carefully consider the implications of any legislation which might be enacted regarding transgender discrimination.

I respectfully suggest the Committee consider three specific areas when drafting any legislation on the issue: the definition of gender identity; the issues surrounding shared facilities; and jurisdiction over enforcement of rights.

While I recognize that the definition of gender beyond physiological or biological parameters is challenging, an overly broad definition will not provide the necessary guidance to a business manager to deal with the matter. Definitions which include a reference to "mannerisms" without more precise language is confusing and could inadvertently perpetuate sexual stereotypes. After all what is a gender related "mannerism"? For example, at one time a firm handshake was the hallmark of masculinity; however in our current society a business woman with a firm handshake is not perceived as 'masculine' as much as she is viewed as confident and professional. But legislation that suggests that any mannerism is still more frequently attributed to one gender more than the other inherently perpetuates the stereotype. Asking a business manager to first proscribe certain mannerisms to one gender rather than the other, then to refrain from discriminating against any employee with that mannerism because it maybe part of the employee's "gender identity", is counterproductive. Our goal should not be to label a mannerism as "masculine" or feminine", but rather to determine if certain conduct is acceptable or unacceptable in the work environment- regardless of which gender displays the mannerism.

Second, my understanding is that any legislation regarding gender identity would include a "carve out" exemption for shared facilities, where there may be showers or undressing. This exemption is crucial to ensuring that any legislation protecting one class of employee would not

adversely impact the rights of another class. However, it is vital that the language of legislation be clear and uncomplicated when defining "shared facility". Some of the proposed language which I have seen exempts "shower or dressing facilities in which being seen unclothed is unavoidable". Remarkably absent from this language is the word "Restroom". Not all restrooms contain showers, nor is being seen unclothed in a restroom, particularly a ladies room unavoidable. Yet employees do have expectations of privacy in restrooms and complaints regarding restrooms in the workplace are not uncommon to Human Resources staff. Thus restrooms ought to be included in the exemption.

Additionally, the language of the exemption must better address the process of providing adequate facilities to an employee in the process of transforming gender. Any requirement that the Employer provide comparable dressing room/restroom facilities to an employee after notification that the employee is undergoing a gender transformation needs to be examined pragmatically. At what point after "notification" must an employer act? If the employee notifies the Employer on Monday that he or she is undergoing gender transformation must the Employer permit the Employee access to the restroom or dressing room of the opposite gender on Tuesday? Or must the Employer find an alternative yet comparable facility within hours of the notification? Furthermore, if the Employer's facility is such that it is unable to provide an alternative comparable facility, at what point in the transformation process should the Employee be given access to the facility of the gender to which they are transitioning? If access is given early in the transition process the Employer risks violating the privacy of employees currently using the facility who might be offended that a co-worker currently manifesting all the physiological attributes of the opposite gender is using the same facility. Finally legislation should consider the implication of requiring a business that provides a single, same sex facility

for both employees and customers to provide a facility for an employee "undergoing" a transition to the opposite gender, and what consequence the requirement may have on the customers unprepared to share a facility with an employee still with the physical attributes of the opposite gender.

Third, any legislation should carefully consider jurisdiction issues for the enforcement of rights. With all due respect to the institution of the court state systems and the many fine members of the state judiciaries, federal courts are better equipped to deal with litigation of federal rights. Making the enforcement of rights under ENDA or its progeny, the exclusive jurisdiction of the federal courts can promote more expedient resolution of litigation as well as the likelihood of more consistent outcomes. Unlike state courts which apply each state's rules of evidence and procedure to suits, federal courts uniformly apply the same federal rules of civil procedure and evidence. State courts are often caught in the uncomfortable position of trying to apply substantive federal case precedent to an action involving a federal claim that is constrained by state rules of procedure.

Finally, on a related note, any legislation should provide for fees and costs to a prevailing party in the litigation. Even if Congress determines that federal courts should not have exclusive jurisdiction of an action brought under the bill, the legislation should nonetheless provide for fees and costs to an Employer if the Employer prevails in the litigation. Litigation costs incurred by small to medium business defending themselves from frivolous litigation are exorbitant. These costs are generally unanticipated by the business and often the company is not budgeted to absorb the costs without sacrificing another business opportunity such as adding a new position, or expanding the business.

In closing, the work of the Committee in addressing discrimination in the workplace is laudable and critical. However it is important to recognize that most Employers promote diversity and recognize that discrimination in the workplace is both costly and counterproductive. As any legislation that mandates a change in the workplace is disruptive, that disruption should be kept to a minimum and the statutory language should provide the business manager with clear guide posts which acknowledge the practicalities of the workplace.

I am honored to have had this opportunity to address the Committee and I thank you for your time and consideration this morning.