

DOJ Gender Equality Network: Recommendations for Moving Toward Gender Equality at DOJ

Dear Administration Leaders:

The DOJ Gender Equality Network (DOJ GEN) warmly welcomes you to the Justice Department. We look forward to working closely with you toward what we know is a mutual goal—gender equality in DOJ’s workforce.

DOJ GEN is an employee-run advocacy and resource organization with approximately 700 members hailing from across the Department. Since our founding in 2016, we have worked diligently to promote the equal and supportive treatment of Department employees and contractors regardless of gender. To that end, DOJ GEN strives to eradicate pay inequities and sexual harassment, while encouraging the Department to increase its diversity and promote workplace flexibility. You can read more about our group at www.dojgen.org, and what we have done at <https://www.dojgen.org/what-we-have-done>.

We have compiled a collection of briefing documents discussing the primary issues we have tackled, listed below, including detailed recommendations for how the administration can address each one.

If we can answer question or be of any assistance, please do not hesitate to email us at dojgenderequalitynetwork@gmail.com, or contact our president Stacey Young at stacey.young2@usdoj.gov or (202) 305-4154. We wish you the best of luck.

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I. SEXUAL HARASSMENT

On paper, the Justice Department maintains a “zero tolerance” policy on sexual harassment, requiring supervisors “to take immediate and appropriate corrective action” to address all allegations. In practice, as Inspector General Michael Horowitz identified, the Department has “significant systemic issues” with components’ handling of complaints. These issues remain largely uncorrected, and many DOJ Gender Equality Network (DOJ GEN) members can personally attest that sexual harassment remains a pervasive problem at DOJ.

Recommendations

DOJ GEN urges the incoming administration to enact new reforms, including the following:

- **Establish a table of penalties consisting of recommended disciplinary actions for sexual harassment to help standardize responses across DOJ.**

A 2017 [report](#) issued by the House Committee on Oversight and Government Reform revealed that the Justice Department is one of the few federal agencies to lack an agency-wide table of penalties. We believe this contributes to DOJ components’ inconsistent and often inadequate handling of substantiated sexual harassment cases, as illustrated in two damning reports from DOJ’s Office of the Inspector General (OIG). We agree with the Oversight Committee’s conclusion that any agency without an agency-wide table of penalties should create one.

- **End the practice dubbed “pass the trash,” whereby serious offenders are moved from one office to another rather than being removed.**

DOJ has a long and well-documented history of addressing substantiated allegations of serious sexual harassment by merely transferring offenders to other parts of the Department. This practice telegraphs a permissive attitude toward hazardous behavior and exposes employees in new offices to future incidents. We believe that a harasser who must be removed from a victim should usually be removed from the Department.

- **Provide employees who seek redress through the Equal Employment Opportunity process with access to a victim advocate.**

The EEO process is notoriously daunting and convoluted. And while DOJ is almost always represented by agency counsel in EEO cases, many DOJ employees cannot afford their own representation. Moreover, employment attorneys are often reluctant to represent federal employees due to statutory caps on compensatory damages and the unavailability of punitive damages. *See* 42 U.S.C. § 1981a(b). Providing employees with objective, trained advocates would encourage victims to come forward and help mitigate the EEO process’s inherent power imbalance.

- **Ensure that reporting officials are properly trained.**

All individuals who handle sexual harassment complaints—e.g., supervisors, EEO officers, front-office or human resources staff—should be educated about sexual violence and trauma.

- **Conduct an agency-wide climate survey to assess the effects of sexual harassment and examine employees' perceptions about the Department's response to it.**

A 2017 Department of Interior [workplace survey](#) revealed that in a 12-month period, 35% of employees had experienced some form of harassment or assault, much of which was gender-based or sexual in nature. Nearly 30% of those who reported the behavior were punished for doing so and nearly 40% were encouraged to drop the issue. We believe that the Bureau of Justice Statistics or an outside contractor like RAND—which FEMA used to design a recent [survey](#) on gender- and race-based discrimination at the agency—should conduct a climate survey at DOJ, the results of which would better equip the Department to respond to the problem. DOJ GEN offers our assistance in helping the Department shape its response to the results of any such survey.

History

One of the reasons DOJ GEN was founded was to advocate for improvements to DOJ's longstanding problems responding effectively to sexual harassment allegations. After the #MeToo movement catapulted sexual harassment and abuse into the national spotlight, DOJ's mishandling of sexual harassment allegations become front-page [news](#). Stories about sexual harassment at components such as the [FBI](#), [BOP](#), [ATF](#), the [immigration courts](#), the [Office of Justice Programs](#), the [Criminal Division](#) and the [Civil Division](#) have appeared in national media outlets.

In 2018, then-Deputy Attorney General Rosenstein issued new [sexual harassment directives](#) for components. That was in response to Inspector General Horowitz's [Management Advisory Memorandum](#) to the DAG and OIG's 48-page [report](#) detailing specific, egregious incidents of sexual harassment and DOJ's mismanagement of them. The directives took some important steps by advising components to update procedures for reporting substantiated allegations to oversight bodies, educate employees about reporting avenues, examine the consistency of discipline, and create procedures for granting awards to those found to have committed sexual harassment. But they left components with far too much discretion in creating new policies and failed to include many crucial and common-sense reforms. To meaningfully improve a system that still fails to protect victims and properly discipline perpetrators, the Department must do more.

What We've Done

DOJ GEN has pushed for reforms to DOJ's policies on sexual harassment over the last four years:

- Before DAG Rosenstein issued his sexual harassment directives, DOJ GEN provided his office—both in a [letter](#) and during an in-person meeting—a list of steps we believed DOJ needed to take in order to live up to its “zero tolerance” policy.¹
- After Inspector General Horowitz issued the Management Advisory Memorandum and the 2018 report on sexual misconduct at the Civil Division, DOJ GEN hosted a moderated [discussion](#) with him before a packed audience in the Great Hall about how DOJ can reduce instances of sexual harassment and better handle allegations.
- DOJ GEN submitted comments to the U.S. Commission on Civil Rights for its investigation into sexual harassment in the federal government, and DOJ GEN's president testified at the Commission's hearing on the topic. The Commission referenced the comments and testimony in its 252-page report titled [Federal #MeToo: Examining Sexual Harassment in Government Workplaces](#). It is an essential resource on the topic.
- DOJ GEN has provided direct support to employees who have experienced or witnessed sexual harassment, supplying them with information about the EEO process and informal advice about reporting options. DOJ GEN's working group on sexual harassment has also devised creative and implementable solutions for components seeking to reform their policies and practices.

Sexual harassment is antithetical to DOJ GEN's goal of gender equality and the Department's mission of equal justice for all. We look forward to working with you on ways to make our workplace safer for everyone.

¹ DOJ should be mindful that characterizing a policy on sexual harassment as one of “zero tolerance” carries risks. The EEOC's 2016 task force report, which is available at <https://www.eeoc.gov/select-task-force-study-harassment-workplace>, helps explain why:

Although not intended as such, the use of the term ‘zero tolerance’ may inappropriately convey a one-size-fits-all approach, in which every instance of harassment brings the same level of discipline. This, in turn, may contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-worker to lose their job over relatively minor harassing behavior—they simply want the harassment to stop. Thus, while it is important for employers to communicate that absolutely no harassment will be permitted in the workplace, we do not endorse the term ‘zero tolerance’ to convey that message.

Further Reading

Sari Horwitz, *Inspector General Says Mishandling of Sexual Harassment Complaints at Justice Department is a ‘Systemic’ Problem*, WASH. POST (Dec. 26, 2017), available at https://www.washingtonpost.com/world/national-security/inspector-general-says-mishandling-of-sexual-harassment-complaints-at-justice-department-is-a-systemic-problem/2017/12/26/ed51abf6-dc35-11e7-b1a8-62589434a581_story.html.

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Katie Benner, *At the Justice Dept.’s Death Penalty Unit, Accusations of Favoritism, Gender Bias and Unwanted Groping*, N.Y. TIMES (March 31, 2018), available at <https://www.nytimes.com/2018/03/31/us/politics/justice-department-harassment-bias.html>.

Caitlin Dickerson, *Hazing, Humiliation, Terror: Working While Female in Federal Prison*, N.Y. TIMES (November 17, 2018), available at <https://www.nytimes.com/2018/11/17/us/prison-sexual-harassment-women.html>.

Zoe Tillman, *They Allowed It: A Justice Department Employee Said She Was Raped by A Senior Official. New Documents Show A Pattern Of Harassment At The Department*, BUZZFEED NEWS (November 5, 2019), available at <https://www.buzzfeednews.com/article/zoetillman/justice-department-metoo-sexual-harassment-assault-aponte>.

Jim Mustian, *‘Under the Rug’: Sexual Misconduct Shakes FBI’s Senior Ranks*, Associated Press (Dec. 10, 2020), available at <https://apnews.com/article/fbi-sexual-misconduct-investigation-a0d33e4770acef8ff5f4a48f0267202c>.

Tal Kopan, *Bad conduct, leering ‘jokes’—immigration judges stay on bench: U.S. Justice Department lacks strong harassment oversight for judges* (January 22, 2020), available at <https://www.sfchronicle.com/politics/article/Sexually-inappropriate-behavior-runs-rife-in-15889003.php>.

DOJ OIG, *The Handling of Sexual Harassment and Misconduct Allegations by the Department’s Law Enforcement Components, Evaluations and Inspections Report* (March 2015), available at <https://oig.justice.gov/reports/2015/e1504.pdf>.

DOJ OIG, *Management Advisory Memorandum, the Handling of Sexual Misconduct and Harassment Allegations by Department of Justice Components* (May 2017), [available at https://oig.justice.gov/reports/2017/1705-v2.pdf](https://oig.justice.gov/reports/2017/1705-v2.pdf).

DOJ OIG, Review of the Handling of Sexual Harassment and Misconduct Allegations by the Department's Civil Division, Evaluation and Inspections Report 17-03 (May 2017), available at <https://oig.justice.gov/reports/2017/e1703.pdf>.

Committee on Oversight and Government Reform, U.S. House of Representatives, 115th Cong., Tables of Penalties: Examining Sexual Misconduct in the Federal Workplace and Lax Federal Responses (Oct. 19, 2017), available at <https://republicans-oversight.house.gov/wp-content/uploads/2017/10/Tables-of-Penalties-FINAL2.01.pdf>.

Department of the Interior Work Environment Survey on Sexual Harassment (December 2017), available at https://www.doi.gov/sites/doi.gov/files/uploads/doi_wes_graphical_overview.pdf.

DOJ GEN's Letter to Deputy Attorney General Rod Rosenstein's Office Demanding Reforms to Sexual Harassment Policies (December 22, 2017), available at <https://www.dojgen.org/s/Thank-you-SH-note-122117.pdf>.

Deputy Attorney General Rod Rosenstein's Directives on Sexual Harassment (April 18, 2018), available at <https://int.nyt.com/data/documenthelper/9-sexual-harassment-misconduct-dab-memo/4c1f2d38ad339baf23b2/optimized/full.pdf#page=1>.

DOJ GEN's Comments to the U.S. Commission on Civil Rights (June 10, 2019), available at <https://static1.squarespace.com/static/5a7097c0d55b41a81fbefaec/t/5db1f844758b22702e71fc67/1571944516697/DOJ+Gender+Equality+Network+comments+to+USCCR.pdf>.

U.S. Commission on Civil Rights, Federal #MeToo: Examining Sexual Harassment in Government Workplaces (April 2020), available at <https://www.usCCR.gov/pubs/2020/04-01-Federal-Me-Too.pdf>.

II. WORKPLACE FLEXIBILITY

Department of Justice employees—like employees elsewhere—have to balance caretaking responsibilities with demanding work schedules. And as the COVID-19 pandemic has made clear, such responsibilities continue to fall [disproportionately on women](#)—forcing some out of the workforce entirely. DOJ employees also lead full lives beyond their obligations to others. Greater workplace flexibility stands to help all employees, while enhancing productivity.

Before the COVID-19 health emergency, the Department had taken some steps towards implementing telework and flexible work schedules, but the policies were implemented in an inconsistent and often opaque manner across different components. In past years, many offices and managers had treated telework and workplace flexibility as a reward, only to be granted to certain employees, rather than as a necessity for successful recruitment and retention of an effective and diverse workforce. The pandemic has upended this thinking; the Department adopted a maximum telework posture for employees and contractors, and telework and workplace flexibility are now essential to our working lives. DOJ employees and contractors have adapted quickly and have been teleworking successfully throughout the pandemic.

However, as with many policies at DOJ, significant discretion has still been left to individual components, which has resulted in an inconsistent array of flexible work options across the Department. Some offices have recognized that it is unsustainable for certain employees to face extensive family care obligations while managing full workloads, and granted excused-absence pay. But the amount offered varies by component, and some components have granted none. Some components recognize that providing access to emergency back-up childcare is a business necessity and make this service available; other offices do not. The need for all components to give the highest level of support to caregiving employees, and the disparities among components in what is currently offered, have never been clearer than during this extraordinary period.

Recommendations

Research shows that employees with access to flexible work arrangements tend to be more engaged, satisfied, and committed to their workplaces.² These employees stay longer in

² The Sloan Center on Aging and Work, [Schedule Flexibility in the Workplace: The Business Case for Workplace Flexibility](#) (2013) (“Workplace flexibility is believed to have an overwhelmingly positive effect on engagement, motivation and satisfaction. The main reason employers develop workplace flexibility is the retention of employees, helping employees manage work and family life, and improving morale.”); Urban Institute and Georgetown Law, Workplace Flexibility, [The Business Case for Flexible Arrangements](#) (2010) (Employees with access to flexible work schedules “tend to be more satisfied, committed, and engaged with their jobs.” Flexible work arrangements

their jobs while their employers benefit from significant reductions in employee turnover³ and the ability to recruit a wider range of employees of all ages,⁴ including working parents.

There is much the Department can do to improve its workplace flexibility policies, both during and after the COVID-19 health emergency. DOJ GEN urges the new administration to take the steps outlined below.

During the COVID-19 health emergency:

- **Protect DOJ workers by continuing to maximize telework.**

We all know that teleworking protects employees and contractors from the spread of COVID-19. As infection rates soar ever higher, it is important that the Department require all offices to allow employees and contractors who can perform their duties remotely to do so.

For employees with dependent care obligations, the Department should permit maximum telework until their caretaking arrangements return to normal.

- **Expand and support excused-absence pay for employees whose caretaking arrangements have been interrupted.**

The pandemic-induced reduction in caretaking options has exacerbated gender inequality and rolled back many gains seen in recent decades. Excused-absence pay has been vital for employees working in extraordinarily difficult circumstances.

As it explained in its April 1, 2020 memo to all DOJ employees, JMD authorized components to grant a limited amount of excused-absence pay, pursuant to the evacuation pay authority under 5 C.F.R. § 550.409, to telework-eligible employees whose caretaking arrangements are interrupted. In response, many components have allowed such employees to take up to 20 hours per pay period. But some components have offered only 10 hours per pay period, or have not granted the benefit to everyone who is eligible, or have not offered the benefit at all.

We urge you to not only continue this program, but require components throughout the Department to offer it, whenever possible, to all telework-eligible employees who need it.

“improve retention and recruitment; foster greater employee satisfaction, commitment and engagement; and are correlated to increased productivity.”)

³ Catalyst, [Beyond a Reasonable Doubt: Building the Business Case for Flexibility](#) (2005) (showing that lawyers with positive views of work-life culture at their law firms tend to stay longer than those with negative perceptions).

⁴ McKinsey & Company, [Preparing for a New Era of Work](#) (2012) (finding that older workers often seek flexibility to help care for family members, while younger workers prefer workplaces offering flexibility).

After the COVID-19 health emergency abates:

We offer the following recommendations as permanent ways to modernize the ways we work, both during and after the COVID-19 health emergency.

- **Require components to develop and make available clear written policies explaining permissible alternative work schedule and telework options.**

In recent years, many DOJ employees and contractors have expressed frustration about the lack of clear policies explaining alternative work schedule (AWS) options, saying the lack of transparency causes confusion and inconsistencies in schedules that are made available in their offices. We urge the incoming administration to support broader availability of telework and AWS across the Department, and to require components to work toward greater transparency and uniformity by drafting clear written policies. In particular, we hope the administration will support greater flexibility for employees in managing their work schedules by expanding telework, maxiflex,⁵ reduced hours,⁶ and glide schedules allowing employees to vary arrival and departure times.

- **Encourage components to permit telework and AWS for more employees, including attorneys, legal administrators, and support staff.**

There are conflicting rules and policies across the Department about who is eligible to telework and use AWS. After the COVID-19 emergency, we encourage the administration to require components that previously did not permit AWS or telework options to reevaluate those policies and provide a rationale if they decline to modernize.

Components should also allow more employees to telework and increase the frequency with which they are allowed to do so. Before the pandemic, employees in many components were routinely only permitted to telework once a week, or once a pay period, if at all, and managers were often excluded from telework privileges. The pandemic has demonstrated that these artificial limitations are unnecessary. Restrictions on managers' ability to telework often discouraged employees, particularly women, from considering management positions.

Finally, many offices also have policies prohibiting telework for new employees, including employees who are simply changing positions within the Department. These rules

⁵ Maxiflex is a type of flexible work schedule that contains core hours on fewer than ten workdays in the biweekly pay period, and in which a full-time employee has a basic work requirement of 80 hours for the biweekly pay period. An employee may vary the number of hours worked on a given workday or the number of hours each week within the limits established for the organization.

⁶ Reduced hours or part-time schedules permit employees to work at a reduced rate for a proportionally reduced pay. For example, some components allow employees to work 32 hours per week for 80% pay. Employees on such schedules may temporarily increase their tour of duty as needed, so long as it does not exceed more than two consecutive pay periods.

serve little purpose and make the Department less competitive in recruiting and retaining highly experienced employees.

- **Increase the number of available back-up care days and expand back-up care options to include all components.**

Some DOJ components currently operate a back-up care program that enables employees to find emergency dependent care when illness, weather, last-minute cancellations, or other circumstances render their normal arrangements unavailable. Certain components provide up to 15 days of dependent care for the entire year, other components provide up to five days, and some do not offer the program at all. We believe that all employees in every component should be allowed access to 15 days of this critical service, which includes a reimbursement option for care provided by a personal contact, an important additional layer of flexibility during the COVID-19 health emergency.

Further, we recommend that the administration expand the program’s offerings by contracting with day-care centers to be designated back-up care sites where employees can reliably send their children in emergency situations. Many private employers provide this benefit, which allows employees to place their children in known and trusted back-up care arrangements. Improving and expanding access to reliable care options will ensure the Department is better equipped to meet operational goals both now and in the future.

- **Expand affordable childcare options for Department employees.**

DOJ used to subsidize numerous daycare centers to help employees find affordable and convenient day care. Today, that program barely exists. We encourage the incoming administration to expand affordable childcare options for Department employees by opening additional federal daycare centers and subsidizing a number of centers that already exist.

- **Ensure that all components follow the law by allowing workers sufficient time to express breast milk in private, easily accessible lactation rooms.**

Some DOJ employees and contractors still report needing to use bathrooms, cars, or vacant offices to express milk. Any component not providing lactation accommodations is in contravention of the important provisions of the 2010 Affordable Care Act, which apply to the federal government.⁷ Every DOJ office space should have an easily accessible lactation room, which would ideally have a door lock, fridge, chair, table, and sink.

⁷ The Patient Protection and Affordable Care Act (P.L. 111-148, known as the “Affordable Care Act”) requires employers to provide “reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.” Employers are also required to provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.” See 29 U.S.C. § 207(r).

- **Ensure that components reimburse employees on official travel for the use of breastmilk shipping services.**

DOJ GEN members in components such as the Civil Rights Division, the Civil Division, and the Antitrust Division have successfully petitioned their offices to reimburse employees for using services, such as Milk Stork, that allow employees to ship breast milk home while on official travel. These programs are a solution for many breastfeeding parents who need to maintain a travel schedule, and they should be funded in every component.

What We've Done

DOJ GEN has actively pushed for reforms to DOJ's policies on family leave and workplace flexibility. Here are some highlights of our work:

- In 2018, members of DOJ GEN and DOJ Pride collaborated in drafting a survey to solicit feedback and ideas on family leave and workplace flexibility. The [survey results](#) and corresponding proposed recommendations were compiled in DOJ GEN's [Workplace Flexibility and Family Leave Report](#).
- DOJ GEN and DOJ Pride then met with JMD to discuss the Workplace Flexibility and Family Leave Report's recommendations, which included having JMD become a centralized clearinghouse of information and standardizing more practices across the Department. Other requests included improved teleworking and flexible schedule policies, increased access to back-up care, and milk-shipping services, as discussed above.
- In late 2018, DOJ GEN presented the Workplace Flexibility and Family Leave Report at a DOJ executive officers' meeting, which the executive officers from each component are required to attend.
- In the fall and winter of 2019, DOJ GEN engaged in a nationwide [campaign](#) to lobby Congress to pass the Federal Employee Paid Leave Act (FEPLA). We collected and organized dozens of compelling, often heartbreaking [stories](#) from about 40 DOJ employees who experienced professional, physical and financial hardships caused by the lack of paid family leave; sent those stories and letters urging FEPLA's passage to all 535 members of Congress; made lobby visits on Capitol Hill; and mailed personalized letters to the White House and the members of the [Senate](#) and House Armed Services Committees. Additionally, DOJ GEN designed and regularly updated a DOJ GEN paid family leave webpage; appointed regional coordinators who shepherded DOJ GEN members, their families, and others throughout the country in their lobbying efforts; created original advocacy materials; and launched a social media campaign. In December 2020, FEPLA was signed into law, and all federal employees are now entitled to 12 weeks of paid leave to care for a new child.

- On March 13, shortly after the pandemic lockdowns began, DOJ GEN sent a [letter](#) to former Attorney General Barr and the former OPM director asking them to immediately authorize telework arrangements and take other appropriate action to protect federal workers. CNN [covered](#) our outreach.
- On March 26, DOJ GEN sent a series of [recommendations](#) regarding administrative leave and communications about possible COVID-19 exposure to then-Deputy Attorney General Jeffrey Rosen and Assistant Attorney General of JMD Lee Lofthus.
- On April 13, DOJ GEN wrote again to DAG Rosen and AAG Lofthus about DOJ’s pandemic response, this time [urging](#) them to ensure that components allow caretakers to benefit from maxiflex schedules, temporary part-time status, and at least 20 hours of excused absence every pay period. We also recommended stronger protections for BOP and immigration court workers. [BuzzFeed](#) covered our outreach.
- In May 2020, DOJ GEN sent a [letter](#) to members of Congress asking for the closure of the implementation gap that resulted from the fact that FEPLA was signed into law on December 20, 2019 but did not go into effect until October 1, 2020. Many employees who welcomed children during this period struggled with a shortage of paid leave in the middle of a pandemic.
- DOJ GEN also repeatedly lobbied JMD to close the FEPLA implementation gap. Seven DOJ GEN members who welcomed children during the gap and several members of the board appealed to JMD leadership during an in-person meeting, and DOJ GEN sent JMD a [package of materials outlining a series of proposals](#), which JMD declined to accept.
- In September 2020, 13 members of DOJ GEN’s Family Leave and Workplace Flexibility Working Group received the Attorney General’s Award for Equal Employment Opportunity for their advocacy work on paid family leave and improved workplace flexibility.
- In January 2021, DOJ GEN conducted a survey of its approximately 700 members. The vast majority of respondents listed family leave and workplace flexibility as a top-priority issue. Many members expressed concerns that when the pandemic recedes, the Department will revert back to outdated policies strictly limiting telework options and alternative work schedules.

Further Reading

Jeremy Herb, Barbara Starr, Kylie Atwood and Kristen Holmes, “Federal Government Ramps Up Work from Home Amid Worker Frustrations,” CNN (March 13, 2020), available at <https://www.cnn.com/2020/03/13/politics/federal-telework-ramps-up-amid-worker-frustrations/index.html>.

Zoe Tillman, “The Justice Department Isn’t Giving Employees Enough Guidance on Working During the Coronavirus Pandemic, Workers Say,” BUZZFEED (April 13, 2020), available at <https://www.buzzfeednews.com/article/zoetillman/justice-department-employees-coronavirus-work>.

Report from the DOJ GEN and DOJ Pride 2019 DOJ-wide Survey on Family Leave Policies and Workplace Flexibility, available at <https://static1.squarespace.com/static/5a7097c0d55b41a81fbefaec/t/5ffb60c23e8417325192d04e/1610309826951/Workplace%2BFlexibility%2Band%2BFamily%2BLeave%2BReport+%2810%29.pdf>.

Family Leave and Workplace Flexibility Survey results themselves, available at <https://static1.squarespace.com/static/5a7097c0d55b41a81fbefaec/t/5f88fd3215d12d1f04325ca0/1602813235285/Appendix+I+survey+results.pdf>.

Collection of stories from 39 DOJ GEN members documenting the hardships they faced due to their lack of paid family leave, available at <https://dojgen.squarespace.com/s/DOJ-GEN-Paid-Family-Leave-Stories-yap7.pdf>.

November 18, 2019: sample DOJ GEN letter to senators urging them to support Federal Employee Paid Family Leave Act, available at <https://dojgen.squarespace.com/s/DOJ-GEN-Letter-re-FEPLA.pdf>.

January 28, 2020: DOJ GEN sends letter and original materials to Justice Management Division providing suggestions for how DOJ can close the paid parental leave implementation gap (Jan. 28, 2020), available at <https://dojgen.squarespace.com/s/DOJ-GEN-paid-parental-leave-materials.pdf>.

DOJ GEN letter to members of Congress (sample) asking for the closure of the paid parental leave implementation gap (May 24, 2020), available at <https://dojgen.squarespace.com/s/DOJ-GEN-thank-you-letter-to-Rep-Connolly.pdf>.

DOJ letter to former Attorney General Barr and the former OPM director asking them to immediately authorize telework arrangements and take other appropriate action to protect federal workers (March 13, 2020), available at <https://dojgen.squarespace.com/s/DOJ-GEN-Letter-on-COVID-19.pdf>.

DOJ GEN recommendations to then Deputy Attorney General Jeffrey Rosen and JMD AAG Lee Lofthus regarding administrative leave and communications about possible COVID-19 exposure (March 26, 2020), available at <https://dojgen.squarespace.com/s/DOJ-GEN-letter-to-DAG-and-JMD-re-COVID-19.pdf>.

Letter to DAG Rosen and AAG Lofthus about DOJ’s pandemic response, this time urging them to ensure that components allow caretakers to benefit from maxiflex schedules, temporary part-time status, and at least 20 hours of excused absence every pay period, and also recommending stronger protections for BOP and immigration court workers (April 13, 2020), available at <https://dojgen.squarespace.com/s/41320-DOJ-GEN-letter-to-DAG-and-JMD.pdf>.

III. PAY EQUITY

Like many employers, the Justice Department is under the mistaken belief that it is lawful and fair to use salary history to set employee pay. That practice disproportionately harms people of color and women, and it should end. The Equal Pay Act, 19 states/territories, and over 20 municipalities render this practice unlawful;⁸ and DOJ GEN members' own experiences illustrate the unfair disparities that result in DOJ.

Currently, JMD leadership acknowledges that factors other than prior salary are more relevant when determining a candidate's pay. However, several DOJ components (including the Civil Rights Division) routinely required or solicited the information for years, and other components continue to solicit it. The consequences are unsurprising: numerous female members reported to DOJ GEN that they were hired close in time to less-experienced male colleagues who received higher salaries because the men came from higher-paying jobs. Women and people of color are more likely to have lower-earning positions and be victims to wage discrimination,⁹ and it is inexcusable for this disadvantage to carry forward to their positions at the Justice Department.¹⁰

Recommendations

DOJ GEN asks the new administration to enact the following reforms:

- **Prohibit the use of prior salary when determining pay.**

By taking prior salary history into account, DOJ perpetuates past wage discrimination. This must end. Although 5 C.F.R. § 531.212(c)(2) permits the government's consideration of prior salary history under certain circumstances, its use conflicts with the Equal Pay Act and the

⁸ A compilation of relevant laws is available here: <https://www.hrdive.com/news/salary-history-ban-states-list/516662/>. These laws have already withstood judicial review. In *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, the Third Circuit upheld Philadelphia's ordinance prohibiting employers from: (1) asking for an applicant's wage history, and (2) determining an individual's salary based on previous wages. 949 F.3d 116, 121 (3d Cir. 2020). The Court noted that "prior wages of women and minorities is [sic] more indicative of compounded discrimination than an accurate assessment of the individual's value to their prior employer. Thus, information obtained to assess the applicant's market value only perpetuates wage disparity." *Id.* at 131.

⁹ See, e.g., National Partnership for Women and Families, *Quantifying America's Gender Wage Gap by Race/Ethnicity*, available at <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/quantifying-americas-gender-wage-gap.pdf>.

¹⁰ See, e.g., Center for American Progress, *Rhetoric vs. Reality: Making Real Progress on Equal Pay* (March 26, 2019), available at <https://www.americanprogress.org/issues/women/reports/2019/03/26/467778/rhetoric-vs-reality-making-real-progress-equal-pay/>.

goal of many state/local laws. *See, e.g., Rizo v. Yovino*, 950 F.3d 1217, 1229 (9th Cir. 2020) (holding that Fresno County’s use of a new employee’s previous pay to determine appropriate level/step was not a “factor other than sex” that could be used to defeat an employee’s prima facie claim under the Equal Pay Act); *cf. EEOC v. Maryland Ins. Admin.*, 879 F.3d 114 (4th Cir. 2018); *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir. 1992).

Critics of DOJ GEN’s proposal may argue that individuals coming from higher-paying jobs, such as those at law firms, will be dissuaded from joining DOJ because they will take a greater pay cut. Even if true, this argument does not justify wage differences that at best are demoralizing, if not discriminatory. Indeed, for DOJ employees who have a history of public service, their reward for helping under-served communities is to be paid less at DOJ than a colleague who has already had the benefit of making more money in the private sector. For DOJ to continue this wage benefit despite individuals performing similar jobs is unfair and likely illegal. The Justice Department should pay its employees based on the experience that we bring, not the salary we leave behind.

- **Eliminate reliance on federal pay when determining DOJ salary.**

The federal government, including the Justice Department, openly uses prior federal pay (as reflected on the Form SF-50) when setting a transferring federal employee’s salary in a way that harms those who make less and benefits those who earned more. Specifically, it ties a lower rate of pay to individuals who earned a lower salary in a prior federal position, but it permits a higher rate of pay if the individual joins an agency from a higher-paid federal job.

As in the private sector, this policy likely results in pay disparities since women and people of color are more likely to experience hiring and wage discrimination. Similar to our position regarding individuals coming from jobs in the private sector, DOJ GEN believes that previous federal pay should not determine the value of the person’s work once arriving at DOJ. Instead, pay equity demands that a person’s experience, coupled with the job DOJ hires them to perform, should determine the appropriate salary.

- **Conduct pay audits and adjust salaries for victims of wage disparities.**

There is no dispute that due to the use of prior salary history the Justice Department currently pays some less-experienced men more than their female counterparts for doing the same work. This inequity should not continue. To eliminate this problem, DOJ should offer all employees the option of requesting a confidential audit of an office’s GS/step assignments so that if an employee’s starting salary was less than a counterpart with comparable or less experience, DOJ will augment the employee’s salary accordingly. DOJ components may also wish to conduct a global review to proactively make pay adjustments for its employees.

What We've Done

On August 19, 2020, DOJ GEN and several other resource/affinity groups sent a [joint letter](#) to leadership at every DOJ component to ask that they stop soliciting or considering salary history. The letter included examples of salary solicitation in 2020 and 2014 job postings as examples. JMD responded to say that it agrees that components should not solicit salary history from applicants, but because 5 C.F.R. § 531.212(c)(2) permits it to use prior salary when setting pay, it will continue to do so when appropriate. DOJ GEN sent a [response](#) pointing out that law's allowance for prior salary as a pay-setting factor does not diminish its discriminatory impact on women and people of color when used.

As explained above, DOJ GEN believes that there is no appropriate use of salary history in light of the discriminatory implications for women and people of color.

Further Reading

Sample letter DOJ GEN and five other affinity groups sent to every DOJ component seeking action on pay inequity at DOJ (August 19, 2020), available at <https://www.dojgen.org/s/DOJ-Salary-History-Letter-8-19-20-NSD.pdf>; and the affinity groups' reply to JMD's position that salary history inquiries are appropriate (September 21, 2020), available at <https://static1.squarespace.com/static/5a7097c0d55b41a81fbefaec/t/5fff401d6a08386769e264e8/1610563613513/DOJ+GEN+salary+history+follow-up+to+JMD.pdf>.

Nicole Ogrysko, *Hiring Nuance Raises Pay Equity Concerns, DOJ Employees Say*, Fed. News Network (August 28, 2020), available at <https://federalnewsnetwork.com/workforce/2020/08/hiring-nuance-raises-pay-equity-concerns-doj-employees-say/>.

Equal Employment Opportunity Commission, *Facts About Equal Pay and Compensation Discrimination*, available at <https://www.eeoc.gov/laws/guidance/facts-about-equal-pay-and-compensation-discrimination>.

IV. DIVERSITY IN LEADERSHIP, RECRUITMENT AND RETENTION

One of the top concerns DOJ GEN’s members have expressed since our founding in 2016 is the lack of diversity in DOJ leadership. There has been an astounding dearth of gender diversity, in particular, in the top ranks of the Department over the past four years. DOJ GEN helped expose the extent of this seemingly intractable problem.

We know from experience what happens when an agency is helmed by largely homogeneous leaders: the lack of varied perspectives inhibits innovation and insights, workers’ morale suffers, the organization becomes less able to attract and retain top talent, fewer diverse career officials are promoted to management positions, and the problem becomes self-perpetuating.

We’re heartened that the incoming administration has already made diversifying the federal workforce, including at DOJ, a top priority. Consistent work is required to reset damaging messages sent by the outgoing administration’s recruitment and hiring decisions.

Recommendations

DOJ GEN endorses and helped create the recommendations that DOJ’s Department-wide affinity groups submitted to the incoming administration’s transition team. Those recommendations are outlined in this memorandum: <https://www.dojgen.org/s/Affinity-group-recommendations-for-the-transition-team.pdf>.

In short, all of the affinity groups recommend that the incoming administration narrow the scope of its implementation of Executive Order 13950, which bans “divisive” diversity training; issue an inclusive Equal Employment Opportunity Statement under the EEOC’s Management Directive 715; appoint officials in the Office of the Attorney General to serve as liaisons with affinity groups and invite each group for a separate meeting with the new Attorney General; help spread the word to incoming and current employees about the affinity groups; reestablish the Diversity Management Advisory Council; address diversity in the Senior Executive Service and other leadership positions; and gather and share more data about workforce diversity.

DOJ GEN also recommends that the administration create permanent, full-time positions to work on diversity, equity and inclusion. There was a short-term position designed to address some of these issues created during President Obama’s administration, but it no longer exists. Many of the current efforts to move DOJ’s policies and practices closer to the goal of workplace equality have come from affinity group leaders, working mostly on their own time. These issues deserve dedicated attention from within DOJ’s chain of command.

But the way the Department fills its highest-ranking, public- and employee-facing positions speaks loudest of all. After an administration overwhelmingly helmed by white men, to the exclusion of nearly everyone else, we are eager to see our leaders reflect our workforce and our country.

What We've Done

DOJ GEN repeatedly urged the outgoing administration to diversify DOJ's leadership, tracked trends in gender diversity in leadership positions, attempted to have a speaker event on the topic of diversity in leadership, and, when the Executive Order censoring "divisive" diversity training at federal agencies was issued, issued a forceful response:

- In 2019, DOJ GEN collected and released the first data of its kind tracking gender diversity among top leadership positions at DOJ. The results were staggering. In the [litigating components](#) alone, only one of 50 top-level positions was occupied by a woman.
- After we released the diversity data, DOJ GEN sent a [letter](#) to former Attorney General William Barr and the Assistant Attorneys General of each litigating component decrying the dearth of gender diversity in DOJ leadership. Two AAGs agreed to meet with us and committed to improving the situation. Unfortunately, the diversity statistics throughout the Department have improved only marginally since then.
- DOJ GEN planned a panel discussion on gender diversity in leadership that was scheduled for October 21, 2020, which would have featured former U.S. Attorney for the District of Columbia Jessie Liu and Acting ATF Director Regina Lombardo. Shortly before the event would have taken place, JMD informed DOJ GEN that we could not hold the event in light of Executive Order 13950, *Combating Race and Sex Stereotyping*, which bans "divisive" diversity and inclusion training at federal agencies.
- We advocated against DOJ's expansion of the Executive Order's scope. The plain language of the Executive Order and corresponding OMB and OPM memoranda make clear that the Order only applies to diversity and inclusion training; however, JMD's interim guidance implementing the Order covers not only training, but also "programs, activities, and events." We believe that JMD's overly expansive interpretation of the Order is why our event and others were cancelled. DOJ and the other affinity groups met with Assistant Attorney General Lee Lofthus and other JMD officials to request that they narrow its guidance, and followed up by sending JMD a [letter](#) outlining our position.
- A minority of DOJ GEN board members were among those who filed a [disclosure](#) to Congress, the Office of Special Counsel, and DOJ's Office of the Inspector General stating that the Executive Order on diversity training constitutes a violation of law, abuse of authority, gross mismanagement, and gross waste of funds.

Further Reading

Jessica Schneider and Kate Sullivan, *DOJ Employees Call Out Lack of Women in Leadership Positions*, CNN (Feb. 13, 2019), available at <https://www.cnn.com/2019/02/13/politics/doj-lack-of-women-leaders/index.html>.

Zoe Tillman, *DOJ Employees Sent A Letter Highlighting the Lack of Gender Diversity in Top Positions*, BUZZFEED (Feb. 13, 2019), available at <https://www.buzzfeednews.com/article/zoetillman/justice-department-gender-diversity-equality-letter>.

Zoe Tillman, *There Are 93 US Attorneys. Seven Are Women and Only Two Are Black*, BUZZFEED (June 28, 2020), available at <https://www.buzzfeednews.com/article/zoetillman/trump-us-attorneys-lack-diversity-justice-department>.

Jacqueline Thomsen, *Jessie Liu Event on Gender Diversity Canceled Due to Trump Order, DOJ Group Says*, NATIONAL LAW JOURNAL (Oct. 16, 2020), available at <https://www.law.com/nationallawjournal/2020/10/16/jessie-liu-event-on-gender-diversity-canceled-due-to-trump-order-doj-group-says/?slreturn=20210010165043>.

Jacqueline Thomsen, *Trump Executive Order Forcing Cancellation of More Diversity Events, DOJ Groups Say*, NATIONAL LAW JOURNAL (Nov. 3, 2020), available at <https://www.law.com/nationallawjournal/2020/11/03/trump-executive-order-forcing-cancellation-of-more-diversity-events-doj-groups-say/>

Jacqueline Thomsen, *Investigations Over Trump's Diversity and Inclusion Order* (Dec. 22, 2020), available at <https://www.law.com/nationallawjournal/2020/12/22/doj-staff-request-federal-investigations-over-trumps-diversity-and-inclusion-order/>.

Carrie Johnson, *DOJ Whistleblowers Call For Investigation Into Canceled Diversity Programs*, NPR (Dec. 23, 2020), available at <https://www.npr.org/2020/12/23/949384358/doj-whistleblowers-call-for-investigation-into-canceled-diversity-programs>.

DOJ GEN and other affinity groups sent letter to former Attorney General Jefferson Sessions decrying the lack of diversity in DOJ leadership (February 27, 2018), available at <https://dojgen.squarespace.com/s/22718-letter-to-Sessions-from-all-aff-groups-on-lack-of-diversity-in-leadership.pdf>.

DOJ GEN’s charts detailing dearth of diversity in political leadership generally, available at <https://static1.squarespace.com/static/5a7097c0d55b41a81fbefaec/t/5f88fc2435c7b3571a992255/1602812965516/10-22-18++DOJ+GEN+Chart+on+Gender+Diversity.pdf>; political leadership in the litigating components, available at <https://static1.squarespace.com/static/5a7097c0d55b41a81fbefaec/t/5f88fc2435c7b3571a992255/1602812965516/10-22-18++DOJ+GEN+Chart+on+Gender+Diversity.pdf>; and in SES positions, available at <https://dojgen.squarespace.com/s/DOJ-GEN-gender-representation-in-SES-positions.pdf>.

DOJ GEN letter to former Attorney General William Barr decrying the lack of gender diversity in DOJ leadership (May 14, 2019), available at <https://static1.squarespace.com/static/5a7097c0d55b41a81fbefaec/t/5db1f8e1471a0d65be026210/1571944673475/DOJ+GEN+Barr+letter.pdf>.

Letter from DOJ GEN and other affinity groups to JMD asking that it narrow its implementation guidance of the White House’s executive order censoring “divisive” diversity & inclusion trainings (Nov. 3, 2020), available at <https://dojgen.squarespace.com/s/Affinity-Group-Follow-Up-Letter-to-AAG-Lofthus-11-3-2020-Final-with-Exhibit.pdf>.

Whistleblower complaint to Congress, the Office of Special Counsel, and DOJ’s Office of the Inspector General stating that Executive Order on diversity training constitutes a violation of law, abuse of authority, gross mismanagement, and gross waste of funds (Dec. 22, 2020), available at <https://dojgen.squarespace.com/s/Letter-from-GAP-Re-Cancellation-of-Diversity-Initiatives.pdf>.