



U.S. Commission on Civil Rights Urges Federal Agencies to Vigilantly Enforce Civil Rights Laws During and in the Wake of the COVID-19 Crisis

April 17, 2020

The U.S. Commission on Civil Rights urges all federal agencies to remain vigilant in enforcing civil rights laws during the current COVID-19 pandemic, and to stand ready to address potential civil rights violations that arise in relation to the crisis. Congress charges the federal government with enforcing federal civil rights laws providing protection from discrimination on the bases of race, color, religion, national origin, sex, disability, age, and several other protected characteristics in a broad range of areas including education, employment, healthcare, housing, and voting, among others. The Commission also calls on Congress to provide necessary funding for civil rights enforcement for Fiscal Year 2021, including for COVID-19 associated enforcement. The unprecedented disruption to American life and commerce requires extraordinary measures to sustain life and well-being; nevertheless the federal laws that guard against discrimination in the United States remain vital.

As the Commission noted recently, current circumstances associated with the rise of COVID-19 may pose additional civil rights risks.¹ For instance, available data suggest an uptick in the number of hate crimes and bias-motivated incidents targeting Asian Americans during the COVID-19 pandemic.² Additionally, the nation has suffered pronounced racial disparities in deaths due to coronavirus in many regions of the

¹ See U.S. Commission on Civil Rights, “The U.S. Commission on Civil Rights Expresses Concern Over Growing Anti-Asian Racism and Xenophobia Amid the COVID-19 Outbreak,” Mar. 20, 2020, <https://www.usccr.gov/press/2020/03-20-Racism-and-Coronavirus-Stmt.pdf>; U.S. Commission on Civil Rights, “The U.S. Commission on Civil Rights Calls for Adequate Healthcare in Prisons and Detention Centers During the COVID-19 Outbreak,” Mar. 20, 2020, <https://www.usccr.gov/press/2020/03-20-COVID-19-Detention-Prison-Healthcare.pdf> (Chair Catherine E. Lhamon took no part in consideration of this statement).

² See U.S. Commission on Civil Rights, “The U.S. Commission on Civil Rights Expresses Concern Over Growing Anti-Asian Racism and Xenophobia Amid the COVID-19 Outbreak,” Mar. 20, 2020, <https://www.usccr.gov/press/2020/03-20-Racism-and-Coronavirus-Stmt.pdf>. The STOP AAPI HATE reporting center received over 1,100 claims of coronavirus-related discrimination against Asian Americans in the first two weeks of the reporting center’s launch. STOP AAPI Hate, “STOP AAPI HATE Receives Over 1,100 Incident Reports of Verbal Harassment, Shunning and Physical Assault in Two Weeks,” Apr. 3, 2020, http://www.asianpacificpolicyandplanningcouncil.org/wp-content/uploads/Press_Release_4_3_20.pdf. See, e.g., Xiumei Dong, “UCLA Law Students Rip Prof’s ‘Xenophobic’ COVID-19 Tweet,” Law360, Apr. 13, 2020, <https://www.law360.com/articles/1263004/ucla-law-students-rip-prof-s-xenophobic-covid-19-tweet>.

country, including Alabama,³ Connecticut,⁴ Louisiana,⁵ Michigan,⁶ New York,⁷ Chicago,⁸ and Milwaukee.⁹ These pronounced disparities and the need to better protect the health of all Americans from current and future catastrophic viral risks make it imperative that the federal government require data broken down by demographics like race, national origin, sex, gender, ability status, and age to investigate the causes and craft appropriate policy to prevent potential civil rights violations.¹⁰ The Commission applauds the calls for the Department of Health and Human Services (HHS) to act on this issue, pointing to the severe disparities already apparent in data collected locally.¹¹

The Commission recognizes the federal agencies that have issued policy guidance regarding civil rights obligations.¹² While COVID-19 related guidance is instructive, the

³ Kim Chandler, “Alabama numbers show race disparity in COVID-19 deaths,” Associated Press, Apr. 7, 2020, <https://apnews.com/ca48e15ae178c14036ed795ccac857c3>.

⁴ Alex Putterman, “Black and Latino residents hit particularly hard by COVID-19 in Connecticut, as experts fear disparities will widen,” Hartford Courant, Apr. 8, 2020, <https://www.courant.com/coronavirus/hc-news-coronavirus-covid-19-racial-disparities-0407-20200408-jsrg2au2fnab5fbxhpu4ioqmb4-story.html>.

⁵ Emily Lane, “Coronavirus deaths of African Americans not fully explained by health differences, experts say,” WDSU News, Apr. 8, 2020, <https://www.wdsu.com/article/coronavirus-deaths-of-african-americans-not-fully-explained-by-health-differences-experts-say/32073602#>.

⁶ Marlowe Alter, “African Americans lead in coronavirus cases, deaths in Michigan,” Detroit Free Press, Apr. 2, 2020, <https://www.freep.com/story/news/local/michigan/2020/04/02/michigan-coronavirus-by-race-deaths-african-americans-tests-covid-19/5116025002/>.

⁷ Zack Budryk, “Cuomo vows to investigate racial disparities in COVID-19 deaths: ‘Why do the poorest people always pay the highest price?’” The Hill, Apr. 8, 2020, <https://thehill.com/homenews/state-watch/491797-cuomo-on-disproportionate-minority-covid-deaths-why-do-the-poorest>.

⁸ Elliott Ramos and Maria Inez Zamudio, “In Chicago, 70% of COVID-19 Deaths Are Black,” WBEZ.org, Apr. 5, 2020, <https://www.wbez.org/stories/in-chicago-70-of-covid-19-deaths-are-black/dd3f295f-445e-4e38-b37f-a1503782b507>.

⁹ Akilah Johnson and Talia Buford, “Early Data Shows African Americans Have Contracted and Died of Coronavirus at an Alarming Rate,” ProPublica, Apr. 3, 2020, <https://www.propublica.org/article/early-data-shows-african-americans-have-contracted-and-died-of-coronavirus-at-an-alarming-rate>. See also David Bowen, “Wisconsin’s primary subjected people of color to yet another Covid-19 disadvantage,” The Guardian, Apr. 8, 2020, <https://www.theguardian.com/us-news/2020/apr/08/wisconsin-coronavirus-black-communities-inequality> (discussing the compounding effects of health disparities and disparities in voter access).

¹⁰ See U.S. Commission on Civil Rights, “Are Rights A Reality? Evaluating Federal Civil Rights Enforcement,” Nov. 2019, <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf> at 63 (discussing how “data collection and reporting are essential to effective civil rights enforcement, and that a lack of effective civil rights data collection is problematic”) (hereinafter “USCCR, *Are Rights A Reality?*”).

¹¹ Aaron Morrison, “Democratic lawmakers call for racial data in virus testing,” Associated Press, Mar. 30, 2020, <https://apnews.com/coe58c2e0de70169ef00ce3666c285a>; Vanessa Williams, “U.S. government is urged to release race, ethnicity data on covid-19 cases,” The Washington Post, Apr. 6, 2020, https://www.washingtonpost.com/politics/government-urged-to-release-race-ethnicity-data-on-covid-19-cases/2020/04/06/7891abao-7827-11ea-b6ff-597f170df8f8_story.html; see also Allison Aubrey, “CDC Hospital Data Point to Racial Disparity in COVID-19 Cases,” NPR, Apr. 8, 2020, <https://www.npr.org/sections/coronavirus-liveupdates/2020/04/08/830030932/cdc-hospital-data-point->.

¹² See, e.g., Letter from Kenneth L. Marcus, Assistant Secretary for Civil Rights, to Education Leaders, dated Mar. 4, 2020, available at <https://content.govdelivery.com/accounts/USED/bulletins/27f5130>; U.S. Department of Health and Human Services, Office for Civil Rights, “Bulletin: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19),” Mar. 28, 2020,

Commission notes that this federal civil rights guidance is not collected in one easy to find place. The efficacy of such guidance, including the examples described below, might be increased if it were placed together with other critical COVID-19 guidance, including at the federal government’s homepage for coronavirus-related resources, coronavirus.gov. Moreover, the Commission reminds the federal government of existing requirements to ensure that its resources are equally accessible to all; for example, guidance around relief efforts should be made accessible in languages other than English.¹³

The Department of Education’s Office for Civil Rights (ED OCR) appropriately advised schools and educators that, “[i]n an environment of fear . . . some individuals may regrettably turn toward racial or ethnic stereotypes. Worse, ethnic harassment or bullying exacerbates hatred, harms students, and is never justified. These incidents can create a climate of misunderstanding and fear. This hurts all of us.”¹⁴ ED OCR also reminded educational institutions of their obligations under Title VI of the Civil Rights Act of 1964, which requires schools to “investigate bias incidents and take reasonable steps to end unlawful harassment, eliminate hostile environments, prevent the harassment from recurring, and as appropriate, remedy its effects.”¹⁵

HHS’ Office for Civil Rights (HHS OCR) reminded healthcare providers of their obligations under Section 1557 of the Affordable Care Act and Section 504 of the Rehabilitation Act which, among other protected characteristics, guards against discrimination on the basis of disability in HHS-funded health programs or activities.¹⁶ HHS OCR was explicit about the meaning of these nondiscrimination laws: “persons with disabilities should not be denied medical care on the basis of stereotypes, assessments of quality of life, or judgments about a person’s relative ‘worth’ based on the presence or absence of disabilities or age. Decisions by covered entities concerning whether an individual is a candidate for treatment should be based on an individualized assessment of the patient based on the best available objective medical evidence.”¹⁷ The

<https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>; U.S. Department of Housing and Urban Development, “Coronavirus Information for HUD Participating Housing Counseling Agencies,” Mar. 6, 2020, <https://www.hudexchange.info/news/coronavirus-information-for-hud-participating-housing-counseling-agencies/> (reminding stakeholders that “[e]xigencies associated with important and timely responses to issues surrounding COVID-19 are not the basis for unlawful discrimination based on race, color, religion, national origin, sex, disability, or familial status”); U.S. Equal Employment Opportunity Commission, “Coronavirus and COVID-19,” <https://www.eeoc.gov/coronavirus/> (last accessed Apr. 7, 2020).

¹³ See, e.g., Exec. Order 13,166, *Improving Access to Services for Persons with Limited English Proficiency* (2000), <https://www.lep.gov/executive-order-13166>.

¹⁴ Letter from Kenneth L. Marcus, Assistant Secretary for Civil Rights, to Education Leaders, dated Mar. 4, 2020, available at <https://content.govdelivery.com/accounts/USED/bulletins/27f5130>.

¹⁵ Letter from Kenneth L. Marcus, Assistant Secretary for Civil Rights, to Education Leaders, dated Mar. 4, 2020, available at <https://content.govdelivery.com/accounts/USED/bulletins/27f5130>.

¹⁶ U.S. Department of Health and Human Services, Office for Civil Rights, “Bulletin: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19),” Mar. 28, 2020, <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>.

¹⁷ U.S. Department of Health and Human Services, Office for Civil Rights, “Bulletin: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19),” Mar. 28, 2020, <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>.

Commission is particularly concerned with state guidance that appears to run counter to this guidance from HHS OCR.¹⁸

The Equal Employment Opportunity Commission (EEOC) has established a page to collect all of its coronavirus-related guidance, including a statement on “unlawful national origin and race discrimination against Asian Americans and people of Asian descent in the workplace during the pandemic,” guidance about ensuring compliance with the Americans with Disabilities Act and the Rehabilitation Act, and an assurance to the public that the EEOC will continue to enforce employment non-discrimination laws.¹⁹

The Federal Emergency Management Agency (FEMA) issued a Civil Rights Bulletin, grouped with its other resources on coronavirus, reminding state, local, tribal, and non-governmental organizations that “[c]ivil rights laws and legal authorities remain in effect, and cannot be waived, during emergencies.”²⁰ Jo Linda Johnson, Director of FEMA’s Office of Equal Rights (OER), emphasized this point during a public teleconference hosted by her office and HHS’ Office for Civil Rights to share information and address civil rights-related concerns, stating in no uncertain terms: “civil rights laws remain in effect.”²¹

Contrary to other agencies’ reminders of federal civil rights laws, the Environmental Protection Agency has issued guidance that has essentially suspended their entire enforcement activity, declaring that when it comes to facility operations with clean air and water impacts, EPA will “consider the circumstances, including the COVID-19 pandemic, when determining whether an enforcement response is appropriate.”²² The Commission recently found that “[a]gency emphasis of reliance on voluntary compliance, ignoring or denigrating compulsory enforcement as an available tool, can send a message that an agency will not use all of the tools at the agency’s disposal if necessary to secure compliance.”²³ The new EPA directive leaves behind the implicit message and instead directly communicates to the regulated community that their compliance is merely voluntary. EPA’s civil rights enforcement office, the External Civil Rights Compliance Office (ECRCO) testified to the Commission that compliance monitoring is critical to the office’s enforcement of civil rights laws because many

¹⁸ See Neil Romano and Samuel Bagenstos, “Don’t deny ventilators to disabled patients,” The Washington Post, Apr. 6, 2020, <https://www.washingtonpost.com/outlook/2020/04/06/coronavirus-ventilators-disabled-people/>.

¹⁹ U.S. Equal Employment Opportunity Commission, “Coronavirus and COVID-19,” <https://www.eeoc.gov/coronavirus/> (last accessed Apr. 7, 2020).

²⁰ Federal Emergency Management Agency, “FEMA Civil Rights Bulletin – Ensuring Civil Rights During the COVID-19 Response,” Apr. 13, 2020, <https://www.fema.gov/media-library-data/1586893628400-f21a380f3db223e6075eeb3be67d50a6/EnsuringCivilRightsDuringtheCOVID19Response.pdf>.

²¹ FEMA Office of Equal Rights, Teleconference, April 16, 2020.

²² U.S. Environmental Protection Agency, Memorandum from Susan Parker Bodine to All Governmental and Private Sector Partners re COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program, Mar. 26, 2020, <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf> at 5.

²³ USCCR, *Are Rights A Reality?* at 498.

recipients lack focus on “foundational nondiscrimination programs,” which include “procedural safeguards required by EPA regulations.”²⁴

The Commission has previously found that the “intersection between race and poverty compounds the health impact of environmental pollution in communities of color.”²⁵ At a time when public health is at risk, it is imperative that the civil rights implications of detrimental environmental conditions are not ignored. Indeed, recent research indicates that exposure to chronic air pollution increases the likelihood of severe COVID-19 cases.²⁶

The Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) issued a declaration exempting contractors from affirmative action obligations for “contracts entered into specifically to provide Coronavirus relief.”²⁷ As the Commission has previously reported in *Are Rights A Reality? Evaluating Federal Civil Rights Enforcement*, one of the primary mechanisms that OFCCP has for ensuring equal opportunity is through affirmative action obligations.²⁸ While the Commission recognizes that OFCCP has clarified that it will continue to investigate complaints of discrimination against contractors who have contracts related to coronavirus,²⁹ the Commission underscores that OFCCP’s model largely relies on proactive compliance evaluations which can point to “systemic equal employment issues . . . that likely would not come to light in a complaint-based approach.”³⁰ OFCCP also uses data about contractors’ certification of their affirmative action programs as part of a preliminary assessment on further evaluation of contractors’ civil rights compliance,³¹ thus, even a temporary suspension of these obligations will impact OFCCP’s ability to fulfill its legal obligations to ensure nondiscrimination.

The Commission is also concerned about an exception detailed in the HHS OCR guidance, which includes a provision that might provide civil immunity against

²⁴ *Id.* at 400.

²⁵ U.S. Commission on Civil Rights, “Environmental Justice: Examining the Environmental Protection Agency’s Compliance and Enforcement of Title VI and Executive Order 12,898,” Sept. 2016, https://www.usccr.gov/pubs/2016/Statutory_Enforcement_Report2016.pdf at 89.

²⁶ Lois Parshley, “The deadly mix of Covid-19, air pollution, and inequality, explained,” Vox, Apr. 11, 2020, <https://www.vox.com/2020/4/11/21217040/coronavirus-in-us-air-pollution-asthma-black-americans>; see also Oliver Milman and Emily Holden, “Trump administration allows companies to break pollution laws during coronavirus pandemic,” The Guardian, Mar. 27, 2020, <https://www.theguardian.com/environment/2020/mar/27/trump-pollution-laws-epa-allows-companies-pollute-without-penalty-during-coronavirus>.

²⁷ U.S. Department of Labor, Office of Federal Contract Compliance Programs, Memorandum from Craig Leen, Director, to All Contracting Agencies of the Federal Government, dated Mar. 17, 2020, <https://www.dol.gov/sites/dolgov/files/OFCCP/National-Interest-Exemption-Memo-Coronavirus-Relief-Efforts.pdf>.

²⁸ USCCR, *Are Rights A Reality?* at 285-86.

²⁹ U.S. Department of Labor, Office of Federal Contract Compliance Programs, Coronavirus National Interest Exemption Frequently Asked Questions, <https://www.dol.gov/agencies/ofccp/faqs/covid-19#Q13> (last accessed Apr. 7, 2020).

³⁰ USCCR, *Are Rights A Reality?* at 291.

³¹ *Id.* at 292.

enforcement of civil rights laws by private actors.³² HHS OCR should issue a clarification on this provision so that healthcare providers understand that HHS OCR will enforce the civil rights laws under its jurisdiction.

While it is still early in assessing the impacts of this global pandemic, the Commission urges Congress to account for early signs of potential civil rights violations when appropriating civil rights enforcement funds in Fiscal Year 2021. The Commission recently praised the bipartisan budgets from Congress that increased federal civil rights enforcement between Fiscal Years 2016 through 2018, but the Commission also made clear the pressing need to continue to devote appropriate resources to federal civil rights enforcement.³³ The Commission is concerned about initial reports of possible civil rights violations related to the coronavirus outbreak, including in areas such as hate crimes,³⁴ voting rights,³⁵ prisoners' rights³⁶ and Native American community needs.³⁷

Chair Catherine E. Lhamon said, "The nation's attention in addressing the coronavirus pandemic must include addressing and guarding against potential civil rights violations to ensure the health and safety of all Americans, regardless of race, national origin, ability status, or any other protected characteristic. There is no time when civil rights violations are acceptable, and our collective survival of this outbreak depends on the federal government upholding our critical civil rights laws."

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*The U.S. Commission on Civil Rights, established by the Civil Rights Act of 1957, is the only independent, bipartisan agency charged with advising the President and Congress on civil rights and reporting annually on federal civil rights enforcement. Our 51 state Advisory Committees offer a broad perspective on civil rights concerns at state and local levels. The Commission: in our 7th decade, a continuing legacy of influence in civil rights.
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³² U.S. Department of Health and Human Services, Office for Civil Rights, "Bulletin: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19)," Mar. 28, 2020, <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf> (citing the Secretary's PREP declaration: <https://www.phe.gov/Preparedness/legal/prepact/Pages/COVID19.aspx>). See also Valerie Bauman, "Virus Guidance Waiving Civil Rights Rules Spurs Calls for Clarity," Bloomberg Law, Apr. 6, 2020, <https://news.bloomberglaw.com/pharma-and-life-sciences/virus-guidance-waiving-civil-rights-rules-spurs-calls-for-clarity>.

³³ See generally USCCR, *Are Rights A Reality?*

³⁴ See U.S. Commission on Civil Rights, "The U.S. Commission on Civil Rights Expresses Concern Over Growing Anti-Asian Racism and Xenophobia Amid the COVID-19 Outbreak," Mar. 20, 2020, <https://www.usccr.gov/press/2020/03-20-Racism-and-Coronavirus-Stmt.pdf>.

³⁵ Astead W. Herndon and Jim Rutenberg, "Wisconsin Election Fight Heralds a National Battle Over Virus-Era Voting," The New York Times, Apr. 6, 2020, <https://www.nytimes.com/2020/04/06/us/politics/wisconsin-primary-voting-coronavirus.html>.

³⁶ U.S. Commission on Civil Rights, "The U.S. Commission on Civil Rights Calls for Adequate Healthcare in Prisons and Detention Centers During the COVID-19 Outbreak," Mar. 20, 2020, <https://www.usccr.gov/press/2020/03-20-COVID-19-Detention-Prison-Healthcare.pdf> (Chair Catherine E. Lhamon took no part in consideration of this statement).

³⁷ Debby Warren, "COVID-19: A 'Perfect Storm' for Indian Country," Non Profit Quarterly, Apr. 7, 2020, <https://nonprofitquarterly.org/covid-19-a-perfect-storm-for-indian-country/>; Maria Givens, "The coronavirus is exacerbating vulnerabilities Native communities already face," Vox, Mar. 25, 2020, <https://www.vox.com/2020/3/25/21192669/coronavirus-native-americans-indians>.