



An Update On Nonbinary Gender Designations In The Workplace

Insights

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An increasing number of employees identify their gender as nonbinary. “Nonbinary” includes people who do not identify their gender within the binary of male or female. Nonbinary identification and expression may include individuals who blend elements of being a man or a woman, be different than either male or female, not identify with any gender, or whose gender may change over time.

Given rapidly developing standards in the law and with societal norms, you should ensure nonbinary employees feel comfortable expressing themselves in the workplace without fear of harassment or discrimination. What do you need to know in order to provide a professional work environment and comply with the law?

The Number Of Nonbinary Workers Is On The Rise

Although there has been increasing recognition of nonbinary individuals in recent years, there are still no clear statistics on the demographic of nonbinary individuals in the U.S. Even the 2020 census, which is a once-per-decade event, only allows responders to respond as “male” or “female.”

However, the limited research that is available shows that the number of transgender and nonbinary individuals in the U.S. are on the rise. Specifically, a [2016 survey](#) demonstrated that the percentage of adults in the U.S. that identify as transgender doubled in the previous 10 years from 0.3 percent to 0.6 percent. Of the transgender population in the U.S., approximately 35% indicated in a [2015 survey](#) that their gender identity was best described as nonbinary or genderqueer.

These numbers will likely continue to increase as Generation Z enters the workforce. A [2019 study](#) shows that roughly a third of Generation Z reports knowing someone who uses general neutral pronouns. The same study reveals that approximately 59% of Generation Z believe that forms and documents should provide gender neutral options beyond “male” and “female.” Accordingly, you should begin implementing changes to accommodate nonbinary individuals – not only to support current employees, but to also prepare for the future workforce.

Current Legal Landscape

The legal landscape regarding recognition of and protections afforded to individuals who identify as nonbinary is constantly evolving. Here is a snapshot of some of the current legal standards in place.

Nonbinary Identification On Government Forms

There are no federal laws permitting individuals to designate themselves as nonbinary on federal government-issued forms. However, several states allow residents to designate themselves as nonbinary on driver's licenses and birth certificates. 15 states and the District of Columbia permit residents to select a gender-neutral designation, typically "X," on their driver's licenses.

In 2017, Oregon and the District of Columbia were the first to allow residents to select a gender-neutral designation. Since then, 13 states – Arkansas, California, Colorado, Connecticut, Hawaii (effective July 2020), Indiana, New Hampshire, New Mexico, Pennsylvania, Vermont, Virginia (effective September 2020), and Washington – have also enacted laws permitting individuals to select a gender-neutral designation on driver's licenses.

Meanwhile, 10 states (California, Colorado, Connecticut, Nevada, New Jersey, New Mexico, Rhode Island, Oregon, Utah, and Washington) and New York City permit residents to update the gender marker on their birth certificate and select a gender-neutral designation, also typically "X." The process an individual must comply with to update the gender marker in these states and city vary. Some states require medical treatment for the individual or approval by a judge or policy official, while others have no requirements.

Title VII Workplace Protections For Nonbinary Employees

The Supreme Court's recent landmark decision, *Bostock v. Clayton County*, has changed the legal landscape regarding nonbinary employee protections. The Court ruled that workplace discrimination based on an individual's sexual orientation or gender identity is unlawful discrimination "because of . . . sex" under Title VII of the Civil Rights Act of 1964. In the majority opinion, Justice Gorsuch explained: "An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual person based on sex."

Under *Bostock*, employers are prohibited from discriminating against employees due to their gender identity and expression. However, the Supreme Court's decision only addresses discrimination under Title VII. It does not directly address other issues involving gender identity, such as bathroom and locker room issues, religious freedom issues, and healthcare issues. Expect to see federal and state courts across the country to begin to navigate these issues anew now that the Supreme Court has handed down this landmark decision.

Other Workplace Protections For Nonbinary Employees

Federal district courts have also begun wrestling with the issue of whether the Americans with Disabilities Act (ADA) requires employers provide accommodations for employees who suffer from gender identity disorders. Section 12211 of the ADA provides that certain conditions are excluded from the definition of "disability," including "transsexualism" and "gender identity disorders not resulting from physical impairments."

There is a split between the courts about whether gender dysphoria may qualify as a disability or whether it falls under the Section 12211 carve-out. However, even if an employee's gender identity does not necessarily qualify as a disability under the ADA, you should still be aware that other conditions related to being nonbinary may qualify an employee for ADA protection.

Finally, the EEOC released guidance in 2019 about how to fulfill EEO-1 reporting obligations for nonbinary employees. You are now permitted (but not required) to include additional information in the comment dialogue box on the electronic EEO-1 report portal to explain if any employees identify as nonbinary.

Proactive Steps For Employers

There are several steps you can take now to proactively address the situation and make your work environment more welcoming to nonbinary individuals:

- You should consider reviewing and revising your open-door, antidiscrimination, and anti-harassment policies to include nonbinary gender designations among the categories that should not be considered while making any employment-related decision. Moreover, you should indicate that mistreatment of nonbinary workers is not permitted in any fashion and include policies that invite employees to speak confidentially to Human Resources or a member of management regarding any nonbinary gender designation issues or concerns.
- Review your policies, handbooks, work forms, website, and other documentation to remove any specific gender designations. For example, there is no need to say "his or her," or "he or she," or "him or her." The repeated use of these words is clunky and potentially off-putting; modern English permits you to use "they," "them," and "their" as singular, gender-neutral pronouns.
- For internal demographic purposes, you may consider asking "how would you describe your gender identity?" and provide options beyond "male" and "female." You could offer additional boxes such as "in another way," or "prefer not to say," or you could provide a space for employees to describe their identity using their own words.
- Amend your training materials so that managers are aware of your company policies with respect to nonbinary individuals. Make sure they understand that you expect such employees or applicants to be treated with dignity, courtesy, and professionalism.
- Consider revising your employee dress code to eliminate gender-related restrictions and distinct categories of rules for each gender. Replace them with simplified instructions guided by principles of general professionalism. Ensure that dress codes are enforced in a non-discriminatory manner.
- All employees must be allowed access to restroom facilities that correspond with the employee's identified gender, which for nonbinary employees may mean using an alternative unisex bathroom. Review your bathroom situation and determine whether you need to create private unisex facilities that are available to any employee at any time.

Best Practices For Employers Of Nonbinary Workers

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If you learn that one of your employees prefers not to be treated as male or female, there are a number of specific steps you should take, focusing on communication, education, and accommodation:

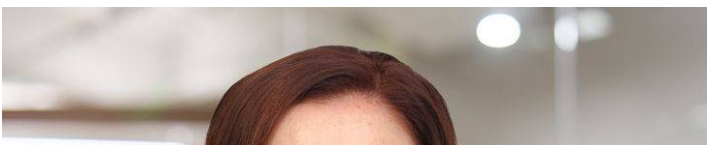
- Begin by opening a dialogue with your employee to let them know that your company accepts their status and will work with them to ensure they continue to have a professional and comfortable work environment. You can simply ask the employee what, if any, assistance they might need, and let them know that your door is always open to them if they have any problems at work.
- Find out if they have a preference with respect to gender-related pronouns and honorifics (for example, a common title in the nonbinary community is “Mx.” instead of “Mr.” or “Ms.”). Some companies are taking the extra step of allowing employees to include their preferred gender pronouns in their email signature line.
- Honor an employee’s request to use a certain name and refrain from questioning the employee on what their prior name was, unless use of the legal name is required on certain documents. This can include allowing the employee to use their chosen name on placards, email addresses, and business cards.
- You should ensure that your workforce is educated about the situation. Regardless of whether a current employee asks to be designated as nonbinary after having previously assumed a male or female gender, or if a brand-new employee identifies as nonbinary from day one, you should take steps to maintain a working environment of tolerance and mutual respect. Unlike bathroom access and dress code issues, education is not directly in the hands of employers, yet you could pay the price if an employee — especially one in a management position — fails to comply. Open forums may encourage the exchange of concerns and suggested approaches, but must be approached with caution and respect. Each situation is unique, and you should develop a game plan that takes into account the wishes and feelings of your employee.

Takeaway

Nonbinary employees should feel comfortable expressing themselves in the workplace without fear of harassment or discrimination. As the legal landscape continues to evolve, employers must be sensitive to the needs of their nonbinary employees and must continue to take steps to foster inclusive and diverse workplaces. If you have any questions on this topic, please contact your Fisher Phillips attorney.

For more information, contact the authors [here](#) or [here](#).

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