

TEXAS MANDATES BINARY SEX CLASSIFICATIONS: 5 TIPS FOR EMPLOYERS ON EMPLOYEE DATA COLLECTION AND MORE

Insights
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Texas lawmakers recently passed a slew of bills affecting transgender and nonbinary individuals, and one in particular could have a huge impact on your workplace. HB 229 makes clear that state law will recognize only two sexes – male and female – and rejects nonbinary or gender-identity based designations for all purposes including state government data collection. This will impact not only gender discrimination claims under the Texas Labor Code but also how employers collect and share demographic information. While we expect civil rights groups to challenge the new law, it is slated to take effect on September 1, and employers should be prepared for its impact on workplace operations and data collection. Here are the key takeaways and steps you can take to create both a compliant and inclusive workplace.

What Changed?

- **Definitions:** [HB 229](#) provides very detailed and specific definitions of “male” and “female” based on biological sex at birth. The new law states that, under Texas law, all people are either male or female and there is no third designation. It does, however, state that intersex individuals (although not considered to belong to a third sex) are entitled to accommodations under state and federal law.
- **Separate Spaces:** HB 229 also states that there are legitimate reasons to have different facilities for men and women, such as bathrooms, locker rooms, and other areas “where biology, safety, or privacy are implicated.”

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- **Broad Application:** The law establishes statewide definitions to apply across all Texas laws and provides that “a governmental entity that collects vital statistics information that identifies the sex of an individual for the purpose of complying with antidiscrimination laws or for the purpose of gathering public health, crime, economic, or other data shall identify each individual as either male or female.”
- **Bigger Picture:** While HB 229 does not include any penalties for violations, it strengthens efforts across the state to mandate that government-issued documents, like birth certificates and driver’s licenses, reflect a person’s biological sex at birth. The new laws align with an [opinion letter](#) from Texas Attorney General Ken Paxton, as well as an [executive order](#) from President Trump and similar efforts in a dozen other states. Proponents say these laws protect women and their safe spaces away from men, while opponents, like [the ACLU of Texas](#), say they harm the LGBTQ+ community – particularly trans, nonbinary, and intersex individuals – by taking away legal protections and failing to shield them from discrimination.

5 Steps for Employers

In light of HB 229 and similar laws that are slated to take effect in Texas, you may want to take the following five steps:

- 1. Review Your Recordkeeping Practices:** Assess how HB 229 and other new laws on gender identity impact your employee data collection and reporting process. Employee records that are used in government reporting will need to comply with new requirements. When it comes to day-to-day interactions, however, you should still refer to employees by their preferred pronouns and gender preferences.
- 2. Train Your HR Staff:** Make sure they understand any new compliance obligations and related changes to policies and procedures. They should also be prepared to address questions and concerns from employees, particularly those who are transgender, nonbinary, or intersex and whose gender identity no longer aligns with the state’s definitions.
- 3. Consult Legal Counsel:** Remember that certain accommodations for intersex employees are required under state and federal law. You may want to reach out to your

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attorney to review these and other requirements and to help you create policies that are both legally compliant and inclusive for all employees.

4. Monitor Outcomes of Legal Challenges: In addition to lawsuits challenging binary definitions of sex, we anticipate more legal battles over gender-identity discrimination in Texas workplaces. While HB 229 will likely be interpreted to bar such claims under the Texas Labor Code, challengers will likely argue that the Supreme Court's decision in [Bostock](#) still affords such protections at the federal level under Title VII of the Civil Rights Act. We may see SCOTUS pick up these issues again in the near future. You can [read more here](#) about the legal landscape on LGBTQ+ workplace rights under Title VII.

5. Continue to Combat Unlawful Workplace Bias: State and federal law still prohibit employment discrimination based on protected characteristics, including gender, race, color, national origin, sex, and religion. These can be challenging times for employers and employees alike, but this is also a great opportunity to propel your organization further. You can take this opportunity to reexamine your organizational culture and ensure you are providing a safe and professional working environment for all employees.

Conclusion

We will continue to monitor legislative developments in Texas, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in [our Texas offices](#).