



How To Complete EEO-1 Report With Non-Binary Employees

Insights

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The EEOC recently released guidance to assist those employers filling out their EEO-1 reports who have non-binary employees – those who choose not to identify as male or female – in their workforces. This question has become more pressing given the increase in the number of states permitting individuals to classify themselves as non-binary on government-issued identification forms, especially as employers begin the task of completing their EEO-1 reports before next month's deadline. What do employers need to know about this latest development?

Brief Background

As most employers know, covered employers must submit certain data about their workforce to the Equal Employment Opportunity Commission (EEOC) each year. To do so, they must complete and electronically submit an EEO-1 report. The report due to be turned over this September 30 is unique, however, as it will be the first time employers will need to produce information about their employees' compensation and working hours. A full description of this new obligation can be found here.

The information needs to be broken down by certain demographic criteria, including gender. The EEOC has long stated that self-identification is the best way for employers to track and collect all demographic data, allowing you to turn to employment records or your own observation only if the employee in question fails to self-identify voluntarily. But what if an employee does not designate a gender for themselves, and you aren't sure which category to place them in? Or what if the employee identifies a gender other than "Male" or "Female"?

New EEOC Guidance

In years past, the agency has required employers to classify each employee as either "male" or "female" on the EEO-1 report, with no option for "other" or "neither" or "non-binary." This has left some employers feeling confused and uncertain on how to proceed, fearing either offending one or more of their workers or not fully complying with a government obligation. In 2019, however, the EEOC has now addressed the matter on how employers should act in such a situation.

In a recently released FAQ, the EEOC answered this question: "Our company is now collecting gender beyond the male/female binary. We wish to report this for the EEO-1 Component 2 data collection. How do we report it?" The agency's position:

Filers may report employee counts and labor hours for non-binary gender employees by job category and pay band and racial group in the comment box on the Certification Page, please preface this data with the phrase “Additional Employee Data:”. For example, “Additional Employee Data: 1 non-binary gender employee working 2,040 hours in Job Category 4, Salary Pay Band 5, Race/ethnicity non-Hispanic White. 3 non-binary gender employees; combined work hours 5,775; in Job Category 5, Salary Pay Band 8; Race/ethnicity: Employee 1 – Non-Hispanic Black, Employee 2 – Hispanic, Employee 3 – Two or more races”.

In other words, you are now permitted (but not required) to add additional information in the comment dialogue box on the electronic EEO-1 report portal to explain if any of your workers identify as non-binary.

How You Should Proceed In 2019 And Beyond

Until and unless instructed otherwise, you now have a clear path for completing your EEO-1 reports when it comes to non-binary individuals in your workforce. To make things simple, here are some suggestions to ensure you stay compliant:

- Keep things simple. Don't use extraneous detail when providing this information; don't offer any narrative above and beyond what the agency has requested. Use the above text provided by the EEOC as a template and don't veer beyond that.
- Don't feel obligated to inspect your workforce and attempt to identify those who are non-binary. This guidance informs you how to report those who have already notified you that they identify in this manner (either expressly or through government-issued identification), but doesn't require you to conduct a fact-finding mission.
- However, if you want to collect information for internal demographic purposes, you may consider asking a question along the lines of “how would you describe your gender identity?” and provide options beyond “male” and “female.” You could offer additional boxes such as “non-binary,” or “prefer not to say.” Or, as some states do, you could permit individuals to choose “X” for gender on their demographic forms instead of simply “M” or “F.”

We will continue to assess the situation and provide necessary updates, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any member of our [Pay Equity Practice Group](#).

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