

## EEOC Provides Guidance on Reporting Non-Binary Gender Employees



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Monday, September 23, 2019

Over the last few years, many employers have implemented diversity and inclusion programs, whether official or unofficial, emphasizing a work force that includes a wide variety of individuals based on, among other categories, race, gender, and sexual orientation.

Internally, companies have updated employment policies, expanded the scope of anti-harassment trainings, created avenues for diverse mentorship, and implemented changes to create workplaces that include and support a diverse office culture.

Externally, a number of states too have begun to update government documents to accommodate diverse individuals, including those who identify their gender as non-binary. [For example](#), California recently enacted legislation permitting individuals to identify as female (F), male (M), or non-binary (X) on their drivers' licenses.

Yet many employers with non-binary employees have been concerned as to how to appropriately report all of their employees on the federal EEO-1 reports and still comply with the law. [As we previously reported](#), in 2017, the EEOC made it clear that the protections offered by Title VII include an "individual's transgender status or the individual's intent to transition," "gender identity," and "sexual orientation."

The EEOC guidance also went further, stating that "using a name or pronoun inconsistent with the individual's gender identity in a persistent or offensive

manner” is sex-based harassment. It is clear, therefore, that non-binary individuals must be afforded protections regarding their gender identity. However, the EEO-1 report, which requires employers with over 100 employees to submit data specific to their employees’ gender and race/ethnicity, limits the gender categories to either male or female. Employers with non-binary employees therefore have had no category to indicate the correct gender identity of these individuals, and several questioned whether it was appropriate (or even legally compliant) to request that non-binary employees choose a marker for which they do not identify.

Last month, the EEOC offered guidance by updating its [Frequently Asked Questions](#) to address this issue. In the FAQ, the EEOC advises that employers “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,” and further provides examples as to how employers may comply with submitting the EEOC-required data in the future for those employees who identify as non-binary.

While describing these details in a comment box as opposed to checking a pre-marked gender identity box is not as streamlined or efficient as some employers would have hoped, it is at least a step toward ensuring that employers have a means to comply with reporting requirements and support their employees by acknowledging the gender identity of their choice.

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