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RECENT DEVELOPMENT

# EEOC Provides Guidance on EEO-1 Filing for Non-Binary Employees

**By Jim Paretti, David Goldstein, and Denise M. Visconti on August 15, 2019**

The Equal Employment Opportunity Commission (EEOC) recently released guidance in an FAQ to employers as to how they should report non-binary employees on Form EEO-1.

By way of background, the EEOC requires covered employers to file detailed demographic and compensation data on their workforce, including information about their employees' gender, on form EEO-1. This year, the agency is requiring two filings (for two calendar years, 2017 and 2018): component 1, which captures demographic information, and component 2, which requires reporting of employee compensation and hours worked. In each instance, the data on these employees must be broken out by (among other things) race, ethnicity, and gender. Both the EEOC and the Office of Federal Contract Compliance Programs (OFCCP) have taken the position that employee self-identification is the preferred method of collecting this demographic information, but have allowed employers to use existing employment records or observation to make this call where the employee fails to self-identify.

Historically, the agency has required an employer to indicate an employee's gender on the EEO-1 as male or female—with no "other" or non-binary option. In recent years, however, some employers have chosen to provide employees with other options and some states and localities have enacted laws or ordinances that required state agencies to issue drivers' licenses, state identification cards, and birth certificates with a third, non-binary gender marker. These developments have led some employers to ask how they should report to the federal government on form EEO-1 the gender of employees who identify as non-binary. EEOC now appears to have answered that question.

In the recently released FAQ, EEOC explains:

> *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".*
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> (emphasis added)

In simple terms, an employer may now use the box for comments on the EEO-1 to report the number (if any) of employees who identify as non-binary or as something other than male or female, and should provide all other required information (pay band, job category, race, ethnicity) with respect to those employees there as well. Note also that the FAQ does not appear to require employers to collect information as to whether an employee identifies as non-binary, but merely provides instructions on how to report those who do.

Although the FAQ is thus limited in scope, it is still very significant because the EEO-1 instructions generally have been interpreted as requiring employers to invite employees to identify as either male or female. To the extent that binary self-identification was a federal requirement, employers had to retain a record of every employee as either male or female in order to comply with federal law even if the employer wanted to respect broader categories of self-identification and even if state or local laws otherwise required the employer to recognize non-binary gender markers. With this FAQ, employers that operate in states with laws requiring them to recognize employees' non-binary gender markers no longer have to worry about apparently inconsistent federal requirements. Moreover, it appears that all employers are now free to offer employees broader options for gender identification if they wish to do so.

Littler will continue to monitor EEO-1 developments and will report on any significant developments.

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