Best Practices for Accommodating Nonconforming Gender Identities in the Workplace

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The number of individuals who publicly do not identify exclusively as either male or female has increased. Exactly how much is difficult to estimate, but a 2017 survey by GLAAD showed that 12 percent of millennials (i.e., adults who were then between the ages of 18 and 34) identified as something other than cisgender. To be cis is to identify exclusively as being of the sex one is assigned at birth.

That 12 percent of working-age nonbinary individuals was twice the rate for survey respondents who were members of Generation X aged between 35 and 51. It was also four times the rate for those older than 52. One implication of this survey findings is that with millennials currently constituting more than a third of the workforce, employers should be ready to address the concerns of nonbinary employees.

Understanding What It Means When Someone Identifies as Nonbinary

Nonbinary and gender-nonconforming individuals are not a uniform group. A nonbinary person may identify as both male and female, neither, somewhere in between, sometimes one or the other, or something else. Equally important, nonbinary gender identity is distinct from being transgender, which is having a gender identity that differs from the sex assigned at birth.

In all cases, gender identity is distinct from both sexual orientation and physical or genetic characteristics. The key factor is that a nonbinary person's gender identity falls outside the binary categories of male and female that are typical of many contemporary Western societies.

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Legal Protections for Nonbinary Individuals May Exist

Failing to acknowledge an employee's nonbinary identity could expose an employer to liability for discrimination under state, local or federal law. Several states, cities and counties have enacted laws that prohibit discrimination on the basis of gender identity. While those laws do not always mention nonbinary identity, an Oregon state court in June 2016 granted a petition for an individual to legally change their gender from female to nonbinary.

The Circuit Court for Multnomah County's ruling in the case known as *In re Jamie Shupe* is believed to be the first of its kind. Several courts have followed suit in the years since, and multiple states now allow residents to choose a no gender option for driver's licenses, ID cards, and other official documents.

In addition, on June 15, 2020, the U.S. Supreme Court ruled in *Bostock v. Clayton County* that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation or transgender status. Although the Court's decision did not specifically cover nonbinary gender identity, the ruling was based in part on the principle that employers cannot discriminate against employees "for failing to fulfill traditional sex stereotypes." Because nonbinary identity by definition does not align with traditional gender categories, the Bostock decision may require employers to treat nonbinary individuals as members of a protected class under Title VII.

Making Workplaces Safe and Welcoming

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According to the 2011 National Transgender Discrimination Survey, more than 70 percent of gender nonconforming persons said they had experienced some form of mistreatment at work. As a first step toward addressing this problem, employers should adopt policies that strictly prohibit discrimination and harassment for any reason.

Employers should also ensure that workplace policies and practices do not unnecessarily impose or reinforce ideas about there being only two genders. Things such as strict dress codes and norms based in traditional ideas about gender create potential liability while also possibly making nonbinary employees feel unwelcome. Individuals who feel unwelcome at work tend to have lower job satisfaction and productivity.

Accommodating nonbinary individuals in the workplace can be similar to accommodating transgender employees. For example, employers and supervisors should respect an employee's choice to use a different name from what may appear on their official ID. It also helps to go along with a nonbinary individual's preference for gender-neutral pronouns such as "they" and "their."

An easy way for supervisors to demonstrate pronoun inclusivity is to include their own preferred pronouns in their email signatures and to share their preferred pronouns when introducing themselves to new employees. Doing these things gives all employees an opportunity to voluntarily provide preferred pronouns without making nonbinary employees feel singled out.

Employers should also take steps to both avoid gendered language and favor gender-inclusive language in policy documents and everyday communications. For example, instead of "Ladies and gentlemen," announcements could begin with "Hello, everyone."

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Similarly, policy documents can be rephrased to use “their” or no pronouns at all instead of “his” and “her.” In particular, many dress codes include gendered language while listing appropriate attire in male and female categories. A more inclusive approach is aiming dress codes solely at whether employees’ attire is functional and professional looking.

On employment and benefits forms, the best practice is to avoid providing just two options for a question about gender. Such questions can be eliminated when the answer is not essential. In other circumstances, more than two choices should be available.

Note here that workforce data reports mandated by the Equal Employment Opportunity Community still require employers to classify each employee as either male or female. For these surveys, allow employees to self-identify while making it clear that they will not need to use that same gender designation for other purposes. We recommend that employers consult with trusted legal counsel to review employment policies and forms and to then make necessary revisions.

Last, single-sex restrooms, locker rooms and similar facilities can force nonbinary employees to make difficult decisions. If possible, and particularly when doing renovations or planning new facilities, employers should designate gender-neutral restrooms and locker rooms instead of or in addition to gendered facilities. Offering employees partitioned, single-occupancy changing rooms, shower stalls and bathroom stalls can help address privacy concerns.

The above article appeared in the December 2020 issue of HR News and is reprinted with the publication’s permission. For more about the employment laws related to gender and other protected classes VLCT is holding Creating a Transgender Inclusive Workplace on July 13, 2022.

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