



Third Gender Identification and U.S. Employers: Compulsory Reporting and Other Considerations

What is “Third Gender” Identification?

A third gender ID is a legal identification document such as a driver’s license, birth certificate or state ID card that allows an alternate marker beyond male (“M”) or female (“F”). The most common alternate marker is an “X” which can stand for “Undisclosed,” “Unidentified” or “Other.” Several countries including Australia, Canada, Denmark, Germany, Malta, New Zealand and Pakistan allow an “X” designation in passports and other official documentation.

Why are Third Gender or Gender-Neutral IDs Important?

Some people have gender identities and expressions that maybe different from what we most frequently think of when discussing gender. While many transgender people identify on a binary scale – as either male or female – some do not and may instead refer to themselves as “genderqueer,” “genderfluid,” “non-binary” or other terms. These gender expansive identities are generally considered part of the greater transgender community.

A gender-neutral ID allows non-binary folks a way to more accurately reflect their gender on state-issued ID. Additionally, in some circumstances they allow people of any gender increased privacy around gender disclosure on state ID. A person does not have to identify as non-binary under all policies to opt for a gender-neutral marker.

Background on Third Gender and Gender-Neutral Identification in the U.S.

Beginning in the summer of 2017, a handful of U.S. states and the District of Columbia enacted legislation or administrative guidance that allowed for a gender-neutral, non-binary marker on identification such as state driver’s licenses or official ID cards. Other states have introduced similar legislation and this trend is expected to grow.

Examples of current gender-neutral, non-binary gender ID’s:

Oregon

Effective July 2017 residents of Oregon can elect to change their gender marker to “X” on their state identification card or driver’s license. A doctor’s note will not be required and people will be allowed to self-certify their gender by going through the standard process of replacing driver’s license or state ID.

Washington, D.C.

Beginning in June 2017, administrative guidance allows Washington, D.C. residents to apply for a license or ID card and indicate their gender as “M,” “F,” or “X” on the application form. Customers will not be required to show confirmation from a medical provider or a legal gender change order.



Current Inclusive ID Practices in the U.S.:

Multiple states and the District of Columbia now recognize a non-binary gender designation for driver's licenses and equivalent identification cards including:

- Arkansas
- California
- Colorado
- Indiana
- Maine
- Minnesota
- Nevada
- Oregon
- Vermont

The following recognize a non-binary gender designation on birth certificates:

- California
- Colorado
- New Jersey
- New Mexico
- Oregon
- Washington

Note: These lists continue to grow.

Employer Considerations for Mandatory Reporting

Conflict between State & Federal Expectations

The emergence of state-issued third gender and gender-neutral IDs creates a disconnect between state and federal expectations regarding gender and the reporting of gender. Further, it is important to note that states that have gender-inclusive identification are also states that have non-discrimination protections on the basis of gender identity. These non-discrimination protections may be interpreted to provide an expectation to recognize non-binary gender identification in any manner that you would binary gender ("M" or "F") identification.

EEO-1

The EEO-1 is a compliance survey mandated by federal law and implemented by the Equal Employment Opportunity Commission for certain employers to submit information on their employees. Employees' race, ethnicity, and gender are among the key demographic data points collected, along with compensation and hours worked¹. Until recently, the EEO-1 only recognized gender as either "Male" or "Female."

Although self-identification is the preferred method of data gathering for the EEO-1, the form had forced employers to select "M" or "F" for every employee even if the employee had non-binary self-identification. In August 2019, the EEOC issued guidance via their online FAQ on the "Collection of 2017 and 2018 Component 2 Compensation Data." That guidance has since been removed.²

¹ <https://www.littler.com/publication-press/publication/eec-provides-guidance-eeo-1-filing-non-binary-employees>

² <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eec-nonbinary-individuals-comments-eeo-1-form.aspx>



Under “Reporting Non-Binary Gender Employees” the FAQ advises the following:

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”.³

The option to utilize the comment box on the Certification Page to count non-binary employees as non-binary allows for more inclusive data collection on gender and aligns with current employee self-identification best practices where gender is not limited to “Male” or “Female” options.

Inclusive employers can consider making the EEO-1 reporting process more transparent for employees by sharing this new guidance.

For more information on the EEO-1 please see:

<https://www.eeoc.gov/employers/eeo1survey/faq.cfm>

³ <https://eeocomp2.norc.org/Faq>

E-Verify

E-Verify is an Internet-based system that compares information from an individual’s Form I-9 (Employment Eligibility Verification Form) to Department of Homeland Security (DHS), Social Security Administration (SSA), and Department of State (DOS) records to confirm that the person is authorized to work in the United States. The SSA currently only recognizes gender as “M” or “F.”

While gender reporting is not a requirement of E-Verify, some companies include it. It is recommended that employers not utilize gender data in their E-Verify program so as not to cause unnecessary “no match” letters from the SSA.

Employee Travel, TSA and Gender-Neutral IDs

The Transportation Security Administration (TSA) does not yet have an official policy on how they will treat IDs with gender-neutral options. It is important to note that various other countries already issue IDs with “X” markers, so the TSA and Immigration authorities are familiar with them.

Airlines are required to collect name and gender information and submit it to TSA prior to each flight. Some airlines have added non-binary options and others are currently updating their systems to include them.



It is recommended that people who are traveling bring an ID to fly that has a gender marker that matches the gender they submitted to the airline. However, if the person does not have an ID with a gender marker that matches what was submitted to the airline, they will likely still be able to clear security although they may be subject to additional scrutiny, screening or questioning.

Other Considerations

Self-ID Programs

Employers committed to diversity and inclusion routinely invest in the lesbian, gay, bisexual, transgender and queer (LGBTQ) community with initiatives related to in recruiting, retention, professional development or other employee satisfaction measurements. Many employers want to track the impact of those investments and adopt LGBTQ self-identification programs to gather important data on the composition of their workforce with respect to sexual orientation and gender identity.

Employers generally capture employee demographic information in two ways: 1) in confidential employee records via Human Resource Information Systems (HRIS), and 2) through anonymous employee engagement surveys.

With respect to transgender and gender non-conforming employees, options must be expanded to allow employees to self-identify beyond the binary male/female. **This is a best practice regardless of whether state-issued identification includes a non-binary option.** For guidance on LGBTQ Self-Identification questions, please see HRC's resource "[Self-Identification of LGBTQ Employees.](#)"

The question of gender with only "female" and "male" options can pose a challenge for transgender and gender non-conforming people. Many transgender and gender non-conforming people do not identify with either one of the simple binary gender designations, and some may feel limited by the "female" or "male" options.

More about HRIS Systems

Many employer Human Resource Information Systems (HRIS) depend largely upon the "legal" gender of the individual to populate and drive system interactions. HRIS systems are complex and can feed information in to many other critical workplace systems such as payroll, insurance, etc., where a mis-match between what is in the system and what is on the ID card of the individual may be of concern.

It is strongly recommended that employers should work with HRIS vendors and vendors of other critical systems to ensure options for non-binary identification exist. This is particularly important where companies have employees in locations with government-issued gender-neutral ID.