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PERSPECTIVE

Non-binary gender markers: What employers need to know

By Denise M. Visconti
and Bennett J. Kaspar

In October 2017, California enacted Senate Bill 179, otherwise known as the Gender Recognition Act, which adds a third, gender-neutral option for California birth certificates, state-issued identification cards and drivers' licenses. This gender-neutral option is available for people with a "non-binary" gender, meaning the person has a gender identity which is not described as simply "male" or "female." While these people may also identify as transgender, not all transgender people consider themselves non-binary. Non-binary people may or may not engage in social or medical gender transition.

The state will begin to issue new birth certificates beginning Sept. 1, 2018; new state identification cards and drivers' licenses will be available Jan. 1, 2019. This law makes California the third jurisdiction to add non-binary gender markers to state-issued identification documents, following Oregon and Washington D.C., which added this option in 2017, while New York, Vermont and Washington are considering similar legislation.

The California Gender Recognition Act adds to the state's robust protections for transgender and gender non-conforming people. Gender identity has been a protected category under California's Fair Employment and Housing Act since 2004, and gender expression has been protected since 2012.

These protections include requirements that employers must honor employees' choice of pronouns (i.e., whether the employee uses "he/him," "she/her," or gender neutral pronouns, such as "they/them") and name to be used at work. California law also bars employers from requiring an employee to dis-

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close information related to sex, including gender, gender expression or gender identity, unless it is requested on a voluntary basis for recordkeeping purposes. Additionally, employers cannot inquire about or request documentation or proof of someone's gender, gender expression, gender identity or sex as a condition of employment. California law specifically protects employees who are undergoing a gender transition from discrimination.

Employers in California also must: (i) allow employees to use facilities that correspond with their gender identity or gender expression, not the sex assigned to them at birth; (ii) make single-occupancy facilities under the employer's control gender neutral, using terms such as "Unisex, Gender Neutral or All Gender Restroom;" and (iii) allow employees to carry out job duties that correspond with their gender identity, not their sex assigned at birth.

What the Gender Recognition Act Means for Employers

Beginning January 2019, employers can anticipate having applicants and current employees who present identification documents containing a non-binary gender marker, which employers will need to be prepared to handle.

Employers cannot require a person with a non-binary gender marker to complete forms or other employment paperwork using only a "male" or "female" gender marker *unless it is necessary to meet a legally required obligation*. Even further, employers cannot directly or indirectly inquire about an individual's sex, gender, gender identity or gender expression, unless the employer establishes a permissible basis for the inquiry.

As a result, employers should immediately consult with their human resources providers, health care and/or insurance providers, and other third-party entities to update any database systems to include alternative gender marker options for employee records and communications. The traditional limitation to "M" and "F" no longer are applicable to the California workforce.

Additionally, employers should begin updating language

used in company handbooks, policies, codes of conduct, job descriptions, job postings and other documents, as follows:

- Add language reflecting protections for transgender, gender non-conforming and non-binary employees;
- Remove gendered language, such as "ladies and gentlemen";
- Remove gendered salutations in form letters and correspondence, or update these to include "Mx." as an option alongside "Mr.," "Ms.," and "Miss";
- Remove references to binary gender markers, such as "his or her" and "he or she."

Employers may consider allowing employees to indicate their pronouns, such as "She/Her," "He/ Him," "They/Them," etc., in conversation as well as in email signature blocks, on nametags or in other similar places. Such practice helps eliminate accidental "misgendering" in the workplace, encourages employees not to assume each other's gender identities, and normalizes employees asking about other's pronouns.

Employers should also determine whether they have any *federal* reporting requirements, such as to the Equal Employment Opportunities Commission or the Office of Federal Contract Compliance Programs. Because there is no federal non-binary option on documentation, employers may be required to select a binary "male" or "female" gender marker for employees in such reports. Accordingly, employers should establish an

internal protocol for asking employees to self-complete any required information, or otherwise solicit a response in a way that avoids directly asking a person what their binary gender marker should be.

Employers may want to consider adopting, where possible, a version of an “all gender” restroom and/or locker room facility on site to provide an accessible option for persons with a non-binary gender (or should otherwise designate some or all of the facilities as “inclusive”). At a minimum, employers should adopt policies permitting employees to choose which restroom/locker room they want to use. This can be especially important where the employer may not be able to physically alter any existing facilities. This also is a practical policy for businesses with fitting/changing rooms to accommodate non-binary patrons.

In addition to policy changes, employers should consider training personnel who are likely to encounter these issues in the workplace, such as human resources professionals, managers, public relations employees, security personnel or facilities managers, to make sure they know how to respond when they are confronted with non-binary gender markers or get questions about access to restrooms, locker rooms and other facilities.

Employers should also encourage managers and other employees to practice using non-binary they/ them pronouns in casual conversation to avoid misgendering non-binary employees. The pronoun “they” already is used as the singular pronoun in many other contexts: “employees must wash their hands before returning to work”; “an employee should be notified when they should take their lunch each

day,” etc. Similarly, employers may want to consider dropping the use of pronouns altogether — i.e., “Ben told me that Ben was going to lunch at noon.”

In sum, as the Gender Recognition Act goes into effect, employers likely will see an increase in the use of non-binary

gender markers by employees and applicants. Taking these steps now will enable employers to be prepared when they do.

Denise M. Visconti is a shareholder and **Bennett J. Kaspar** is an associate at *Little Mendelson PC*.

