PRESENTED AT

25th Annual Labor and Employment Law Conference

May 10-11, 2018
AT&T Conference Center, Austin, Texas

The New Gender and Sexuality

Laura M. Merritt

Author Contact Information:
Laura M. Merritt
Boulette Golden & Marin LLP
Austin, Texas 78746

laura@boulettegolden.com
512.732.8900

THE NEW GENDER AND SEXUALITY:
Legal update and practical workplace impact of social and cultural shifts with respect to the evolving terminology and variety of gender identity, gender expression, and sexual orientation.

By Laura M. Merritt

I. INTRODUCTION

Traditionally, people have accepted that sex chromosomes determine a person's sex (XX = female; XY = male). Today's science tells a different story. For example, what we traditionally consider "male" and "female" do not always match with the chromosomal structure. It is possible to have XX chromosomes, but present as mostly male in terms of anatomy, physiology, and psychology, just as it's possible to be XY and mostly female. What we call "gender" incorporates several elements: chromosomes, anatomy (internal sex organs and external genitals), hormones (relative levels of testosterone and estrogen), psychology (self-defined gender identity), and culture (socially defined gender behaviors). And sometimes people who are born with the chromosomes and genitals of one sex consider themselves transgender, meaning they have an internal gender identity that aligns with the opposite sex—or even, occasionally, with neither gender or with no gender at all.

With respect to sexual orientation, Kinsey Scale[1] notwithstanding, most of us grew up with the view that persons were either "gay" or "straight," meaning that in the romance department, you

---

[1] The Kinsey Reports are two books on human sexual behavior, published in the late 1940's- early 1950's. Among the many groundbreaking and controversial aspects of these studies was the Kinsey "scale," which, among other things, measured a subject's sexual attraction responses to members of the same sex versus the opposite sex, and takes into account both sexual experience and psychosexual reactions. Surprising to many at the time, and since, was the conclusion that most people are not exclusively heterosexual or homosexual. Kinsey, A.; Pomeroy, W.; Martin,

were either same-sex attracted or opposite-sex attracted. You picked a side, and while you might "switch teams," as people often referred to it, you generally identified as "gay" or "straight." Some bold persons might identify as "bisexual," but this was far less common. Today, it is far more common for people to refuse to identify as having any particular sexual orientation. Just keeping up with the acronyms (LGBT, LGBTQ, LGBTQIA . .) requires frequent updating.

"Members of the "millennial" and younger generation are more likely than their parents to think of gender as nonbinary. A recent survey of a thousand millennials ages 18 to 34 found that half of them think "gender is a spectrum, and some people fall outside conventional categories." And a healthy subset of that half would consider themselves to be nonbinary, according to the Human Rights Campaign. In 2012 the advocacy group polled 10,000 lesbian, gay, bisexual, and transgender teens ages 13 to 17 and found that 6 percent categorized themselves as "genderfluid," "androgynous," or some other term outside the binary box."[2]

Why does this matter to employers? It matters because both the cultural norms and legal structure relating to the employer-employee relationship is catching up to science, and the upcoming generation of employees is increasingly fluid in its approach to sexual identity and sexual orientation.

C., & Gebhard, Sexual Behavior in the Human Male (1948) and Sexual Behavior in the Human Female (1953), Philadelphia (Saunders).

[2] Henig, Robyn Marantz, "The Gender Revolution," National Geographic (January 2017).

UT LAW CLE THE UNIVERSITY OF TEXAS TEXASLAW

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the UT Law CLE eLibrary (utcle.org/elibrary)

Title search: The New Gender and Sexuality

Also available as part of the eCourse
Answer Bar: Handling Employee Investigations in Today's Workplace

First appeared as part of the conference materials for the
25th Annual Labor and Employment Law Conference session
"The New Gender and Sexuality"