

**MASSACHUSETTS PROHIBITS DISCRIMINATION
BASED ON “GENDER IDENTITY”**

What You Need to Know

Gender identity is now a protected status under Massachusetts law. It is illegal for employers to refuse to hire, fire, harass, or otherwise discriminate against an employee based on the employee’s gender identity.

On November 23, 2011, Massachusetts Governor Deval Patrick signed into law “An Act Relative to Transgender Equal Rights.” The new law prohibits—among other things—workplace discrimination on the basis of a person’s “gender identity.” Massachusetts is now one of sixteen states and the District of Columbia to provide some level of protection to employees based on gender identity and/or expression.

Effective July 1, 2012, Massachusetts’s existing anti-discrimination laws, including the Massachusetts Fair Employment Practices Act—sometimes referred to as Chapter 151B—will be revised to make “gender identity” a protected category. The employment-related provisions of the new law will be enforced by the Massachusetts Commission Against Discrimination (MCAD). The law does not make any changes to public accommodations—facilities like stores, restaurants, movie theatres, malls, and public restrooms that are open to the public for the purpose of providing goods or services.

Who Does the New Law Protect?

The law defines “gender identity” as a person’s “gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth.” Transgender persons may demonstrate their gender-

related identity with evidence that includes their “medical history, care or treatment of the gender-related identity, [a] consistent and uniform assertion of the gender-related identity[,] or any other evidence that the gender-related identity is sincerely held, as part of a person’s core identity.” The only limitation is that the person’s gender identity may not be asserted for an improper purpose.

Notably, the definition of “gender identity” is fairly broad and encompasses gender expression by referring both to an person’s appearance and behavior. Intended to be inclusive, protections are not limited to those who have undergone—or are in the process of undergoing—sexual reassignment surgery. As a result, a person’s “gender identity” will not always be obvious and may be difficult to recognize. Employers will need to determine, often on a case-by-case basis, which behaviors are protected and which are not.

To avoid discrimination or harassment claims, employers should incorporate gender identity into training provided to all employees, particularly Human Resources staff, management, supervisors, and other decision-makers. This training should emphasize the importance of sensitivity to all types of gender identity or expression, regardless of whether such expressions conform to traditional notions of what it is to be “male” or “female.” Some examples of employment-related conduct that would violate the new law include:

- A job applicant is rejected solely because the employer learns that he is transgender;
- A woman in a sales position is denied a promotion because she acts and dresses in a manner that her employer considers too “mannish”;
- A male employee is ruthlessly teased and tormented by his colleagues because he has mannerisms that they perceive as effeminate; and

- An employee is denied a leave of absence to obtain treatment for a gender identity disorder, while employees with other types of medical problems are granted leave.

- Dress codes and other policies concerning appearance standards; and
- Codes of conduct between employees.

How Employers Can Comply with the New Law

Employers should be aware that there are MCAD and court cases in which the conduct described above was held to constitute unlawful discrimination on the basis of gender, disability, and/or sexual orientation. In short, it was already illegal for an employer to engage in this conduct. The new law makes these existing protections explicit, uniform, and visible.

In anticipation of the July 1, 2012 effective date of these amendments, employers should review and revise their anti-discrimination, anti-harassment, and other policies to ensure compliance. Gender identity should be added as a protected category. Other policies that may require modifications include, but are not limited to:

- Equal employment opportunity;
- Privacy, maintenance of personnel files, and other policies concerning confidential information;
- Employee leave;

The law does not expressly address whether an employer may require its employees to use restrooms, locker rooms and other gender-specific facilities associated with their biological sex. Employers should consider whether they should make any changes in the provision and usage of these facilities. It is common for employers to permit employees to use these facilities based on their stated gender identity. Employers may also consider designating a gender neutral bathroom.

In light of the new law, employers should be prepared for the possibility of complaints of discrimination and/or harassment based on a person's gender identity. Employers should consider developing an action plan, or a formal gender transition policy, for accommodating employees who are undergoing a gender transition. This will allow employers to be prepared, in advance, to address such issues as changing the employee's name and gender in company records and educating co-workers about the person's transition. Finally, employers should be sensitive to an employee's wishes to be referred to by a name that is different from the employee's legal name and use appropriate pronouns and other gendered language that is respectful of the employee's stated gender identity.

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