

**Client Alert: The New Massachusetts Transgender Equal Rights Law**

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On November 23, 2011, Massachusetts Governor Deval Patrick signed into law “An Act Relative to Transgender Equal Rights.” The new law, effective July 1, 2012, prohibits discrimination on the basis of “gender identity” in employment, education, housing, credit and lending, and makes violence against transgender individuals a hate crime. The employment-related provisions of the new law are to be enforced by the Massachusetts Commission Against Discrimination (MCAD).

The new 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.” The law further provides that gender-related identity may be shown by “providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, 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; provided, however, that gender-related identity shall not be asserted for any improper purpose.”

One key purpose of the law was to protect transgender persons from discrimination. A transgender person is a person whose gender identity is different from the sex assigned to that person at birth. An example of a famous transgender person is Chas Bono (formerly Chastity Bono), son of the popular rock duo “Sonny and Cher.” Mr. Bono’s assigned sex at birth was female, but he now lives his life as a man; he went through a gender transition, in other words, a process by which he went from living and working as one gender to another. The law additionally protects persons whose gender identity is consistent with their assigned sex at birth, but who do not fit traditional gender roles, stereotypes or cultural norms. For example, a person may be designated as female at birth and consider herself to be female but not act in a manner that others consider feminine. Gender identity is not the same thing as sexual orientation. Sexual orientation describes the direction of a person’s physical and romantic attractions, such as whether the person is straight, gay, lesbian or bi-sexual. Gender identity deals with a person’s internal sense of their own gender and how they express that gender.

Examples of employment-related conduct that would violate the new law include the following:

- An employee takes a leave of absence to undergo a gender transition from male to female. When she returns from leave, her employer refuses to permit her to use the women's bathroom.
- A job applicant is rejected solely because the employer learns, when checking his references, that he used to live and work as a woman.
- A woman in a sales position is denied a promotion because she does not wear high heels, make-up, or skirts and behaves in other ways that do not conform to her supervisor's expectations of how a woman should look or act.
- A male employee is ruthlessly teased and tormented by his colleagues because he has mannerisms that they perceive as effeminate.
- 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.

Even before the enactment of the new law, there were 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. It was, therefore, arguably *already illegal* for an employer to engage in such conduct. The new law serves to make these existing protections explicit, uniform, and visible.

The following are steps that employers can take now to come into compliance with the new law and to promote transgender equal employment opportunity in their workplace:

- Policies and Forms: Add "gender identity/expression" to the list of protected classes in application forms, recruitment materials, and policies related to equal employment opportunity, non-discrimination, and anti-harassment. Although the new law refers only to gender identity, the concept of gender expression is incorporated into the definition. Reference to expression also tracks the language used in laws adopted in some other states.
- Access to Facilities: Permit applicants and employees to access bathrooms and other gender-segregated facilities based on the individual's stated gender identity. For example, if an employee identifies as female, she should be permitted to use the women's rest room, regardless of whether she has had gender reassignment surgery.
- Pronouns and Names: Use appropriate pronouns and other gendered language that is consistent with an employee's stated gender identity. For example, if an employee identifies as male, do not refer to the employee as "she" or "her." Use an employee's preferred name (whether or not it is the employee's legal name) in staff directories, business cards, websites, and other internal and external communications and records.

- Training: Training programs and materials related to discrimination, harassment, diversity, supervision, and leadership should address transgender issues and the new law, even if you do not have (or do not think you have) any transgender employees. The training should include a discussion of the meaning of gender identity, of the law's prohibition against discriminating against or harassing employees due to their gender identity, and of the company's expectations regarding lawful and respectful treatment of transgender workers and anyone who does not conform to traditional gender roles or societal gender norms.
- Gender Transition: Develop an action plan for accommodating employees who are undergoing a gender transition. Be prepared in advance to address such issues as changing the employee's name and gender in company records, educating co-workers, and confidentiality.
- Remedial Action: Respond quickly and decisively to any anti-transgender incidents in the workplace, such as teasing, rude comments (e.g., "you aren't a real woman"), or refusal to use correct pronouns. Promote an environment where all employees, including employees who do not conform to traditional gender norms, are treated with dignity and respect.

As with any new law, there is always a learning curve. Even the most sensitive and forward-thinking employers sometimes struggle with issues involving transgender employees. Feel free to call us if you have any questions about your obligations under the new law and for other ideas on how to promote a transgender-friendly workplace.