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Massachusetts Passes Legislation Protecting Transgender Employees in the Workplace

By Christopher Kaczmarek and Joseph Lazazzero

On November 23, 2011, Massachusetts Governor Deval Patrick signed into law the "Gender Identity Bill." This makes Massachusetts the 16th state – along with California, Colorado, Connecticut, Hawaii, Iowa, Illinois, Maine, Minnesota, Oregon, Nevada, New Jersey, New Mexico, Rhode Island, Vermont, Washington, and the District of Columbia – to provide some level of protection to employees based on gender identity and/or expression.

According to some sources, an estimated 33,000 Massachusetts residents identify themselves as transgender. Moreover, a 2011 report from the Gay & Lesbian Task Force found that 76% of those transgender individuals have felt harassed on the job because of their gender identity.

The Legislation

Effective July 1, 2012, Massachusetts law will be amended to prohibit discrimination in employment based on a person's "gender identity." 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. As a result, it will be impermissible for Massachusetts employers to discriminate against job applicants or employees on the basis of gender identity. The amendment defines the term "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."

It is important to note that the legislature adopted a fairly broad definition of "gender identity." The law's protections are not limited to individuals who have undergone, or are in the process of undergoing, sexual reassignment surgery. Although an individual's "gender identity or expression" will be obvious in some circumstances, in other cases it may be extremely difficult to distinguish from other aspects of an individual's identity or expression of their identity. Notably, the law does not specify what aspects of one's identity, appearance, or behavior are "gender-related" and which are not. Employees are not required to prove their gender identity through medical documentation, and 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 train their workforce to be sensitive 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."

Employees who believe they have been discriminated against under the new law can file complaints with the Massachusetts Commission Against Discrimination.

Implications for Employers

In anticipation of the effective date of these amendments, Massachusetts employers should review and revise their anti-discrimination provisions and other policies to ensure compliance. Policies that may require modifications, include, but are not limited to:

- Equal employment opportunity and anti-discrimination policies;
- Dress codes and other policies concerning appearance standards;
- Policies regarding the provision and usage of bathrooms, locker rooms, and other gender-specific facilities; and
- Codes of conduct between employees and between employees and customers.

It is unclear under the new law whether an employer can require an employee to use only the restroom used by members of his or her biological sex. As a general matter, under similar laws in effect elsewhere, usage policies for restrooms and locker room facilities are within the discretion of the employer, so long as those policies do not contravene applicable law. It is common, however, for employers to permit employees to use these facilities based on their gender presentation to facilitate the transition for transgender employees.

In light of the new law, employers should be cautious about the possibility of claims of discrimination and/or harassment on account of gender identity. To protect against these claims, we recommend that employers develop and implement strong anti-discrimination policies and incorporate discrimination and harassment issues relating to gender identity and expression into any training provided to employees and managers.

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