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MCAD PROVIDES GUIDANCE TO EMPLOYERS ON GENDER IDENTITY ISSUES; PLACES OF PUBLIC ACCOMMODATION MAY NOT DISCRIMINATE BASED ON GENDER IDENTITY

By Madiha M. Malik and Michael C. Harrington

Effective October 1, 2016, places of public accommodation in Massachusetts are prohibited from engaging in discrimination based on an individual's gender identity. This comes in addition to the current prohibition on discrimination on the basis of gender identity in places of employment, housing, lending, credit and mortgage services.

Gender identity refers to a person's gender-related identity, appearance, or behavior, regardless of whether it is different from that traditionally associated with the person's physiology or assigned sex at birth.

Employers

Since 2012, employers have been prohibited from discriminating against an employee or applicant for employment based on the individual's gender identity with regard to the terms and conditions of employment. In guidance published early last month, the Massachusetts Commission Against Discrimination (MCAD) outlined examples of unlawful discrimination based on gender identity:

- Retaliating against employee for taking leave of absence to obtain gender affirming surgery by reducing hours, downsizing her office and demoting her.
- Denying a job applicant after learning that the male applicant previously identified as a woman.
- Refusing to respect employee's request to use gender appropriate pronouns.
- Repeatedly excluding an employee from office meetings and work-related events.
- Failing to promptly take remedial action to stop harassment.
- Denying access to the restroom that corresponds to the employee's gender identity.

Employers who are aware that an employee is being harassed because of their gender identity should promptly address the situation. To the extent a policy does not exist, employers should adopt a policy stating that harassment and discrimination against transgender employees will not be tolerated.

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The MCAD considers the extent to which an employer is supportive of a transgender employee when determining whether the employee was subject to discrimination. Employers should not only take prompt steps to address any harassment, but the MCAD will likely look favorably upon employers who make efforts to accommodate the employee in their process of transitioning. These accommodations include updating company records to reflect the employee's name change, providing a leave of absence for surgeries, arranging bathroom usage, and other acts of support during the transitional period.

Requiring an employee to provide identification or proof of a particular medical procedure as a condition to accessing gender designated facilities (e.g., bathroom and locker rooms) may be evidence of a discriminatory bias.

Places of Public Accommodation

Places of public accommodation now must ensure that individuals are not being discriminated against based on their gender identity.

A place of public accommodation is one that is open to the public and accepts or solicits business from the general public. This includes a wide variety of private and public places, including retail stores, restaurants, hospitals, and public agencies. Businesses that provide a public service, even if they are not housed in a physical structure (e.g., insurance companies or taxi cabs), are also subject to the law.

It is unlawful for a place of public accommodation to publish or display an advertisement, notice, or sign that intends to, or actually does, discriminate against a person of any gender identity.

The MCAD advises that it is not appropriate for employers or places of public accommodation to request documentation to prove an individual's gender identity, unless, in limited circumstances, it is necessary.

Though designating restrooms by gender is legal, prohibiting someone from using the restroom or other sex-segregated facility consistent with their gender identity may be considered a violation of the law. The MCAD has issued guidance interpreting Massachusetts' statute to require a place of public accommodation to allow an individual to use whichever restroom that is consistent with the person's gender identity. The MCAD's position is in line with the position taken by the Equal Employment Opportunity Commission (EEOC) and Occupational Safety and Health Administration (OSHA). Consequently, despite someone's biological sex, a place of public accommodation (including health club locker rooms or public swimming pools) may be required to allow a person to use the facility of the person's chosen gender identity.

In light of the new law, Massachusetts employers and businesses should revise their policies and procedures to include gender identity. The following actions should be considered:

- Revising policies to include a statement that discrimination or harassment on the basis of gender identity is prohibited.
- Ensuring confidentiality of prior documentation of an employee's pre-transition name or gender marker.
- Prohibiting harassment, including derogatory comments or jokes, related to transgender employees, clients, or vendors, and promptly investigating and addressing such conduct.
- Using an employee's requested name, pronoun, and gender-related terms in communication with the employee and with others.
- Avoiding gender-specific dress codes and allowing employees to dress consistent with their gender identity.

The MCAD's guidance can be accessed [here](#).

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