



CLIENT ALERT FEBRUARY 2012

THE NEW TRANSGENDER EQUAL RIGHTS LAW

ARE YOU READY?

In November, 2011, the Massachusetts Legislature approved, and the Governor signed, the new Transgender Equal Rights Law. The law is effective July 1, 2012. Companies should review their practices and documents and be pro-active in assuring compliance. Here are some tips and suggestions.

Overview – The law now adds “gender identity” as a class protected from discrimination, including in the workplace. Gender identity means a person’s self-expressed identity, appearance or behavior. It is not necessary for the gender identity to be different from the person’s physiology or sex assigned at birth. It is not necessary that one be in the process of any medical procedure to be protected. Gender identity may be shown by a broad range of evidence, including but not limited to medical history, care or treatment of the gender related identity, or consistent and uniform assertion of the gender-related identity. It is only necessary that the gender identity be sincerely held as a part of the person’s core identity and not asserted for any improper purpose.

Tips:

- Look over your handbook and personnel forms. Ensure that on all documents your company now expressly respects “gender identity/expression” as a protected class against which it will not discriminate. It is not sufficient for your company merely to insert “gender identity” in the employee handbook as a protected class. All company forms should be reviewed to determine if they ask for sex classification. If so, one should question if there is a legitimate reason for asking. If not, sex classification should be removed.
- Gender expression. Gender expression is contained within the new definition of gender identity. Nonetheless, when documents refer to protected classes, we recommend that one write “gender identity/expression” rather than just “gender identity.” Not all states include gender expression in gender identity and the US Office of Personnel Management separates the two. (For clarification, gender identity is the internal identification of sex as male, female, both or neither; gender expression is how an individual presents one’s gender identity to others. Gender identity also differs from sexual orientation, the latter being a person’s romantic and physical attractions to others.)
- Access to facilities. An individual’s sincerely held choice of gender identity must be respected in all settings. There are no exclusions for areas that may make others uncomfortable, such as locker rooms and bathrooms. If a transgender



female asks for the key to the women's bathroom, it must be given. It is not permissible to set as an alternative a one-person bathroom for use by the transgender person (a separate but equal facility).

- Protect against a hostile work environment. All employees need to be trained on the ramifications of the law. Subtle to obvious wrongful acts or words need to be addressed clearly and swiftly by the employer. Examples of wrongdoing are such things as using the wrong pronoun, such as referring to a transgender female by "he," using the birth name "Mark" when she has asked to be called "Maria," or teasing about whether the employee is a "real woman".
- Communications. If an employee is undergoing a medically-directed gender change, the employer needs to develop an action plan with the employee and co-workers to respond. In advance, discuss with the employee how much (s)he wants shared with co-workers, publish a statement of support to all co-workers, change administrative records as necessary and quickly respond to any insulting responses upon the employee's return. Stay in touch with the employee through the transition.

Contracts with State Agencies. Since February 2011, by Executive Order No. 526, all companies doing business with any state agency must certify that they do not discriminate on the basis of gender identity or expression, among other protected classes. Complaints of noncompliance will be processed by the Office of Diversity and Equal Opportunity or referred to the Massachusetts Commission Against Discrimination ("MCAD").

Enforcement. The MCAD does not specifically have jurisdiction to enforce complaints of discrimination based on gender identity in the areas of public accommodation or education. However, the MCAD takes the position that it has the right to protect transgendered individuals in these fields under the general protection against sex, sexual orientation and disability (gender dysphoria) discrimination, under G.L. c. 151B.

Those who are not transgendered may have a claim if they are retaliated against for supporting a transgendered person's claim of discrimination or a hostile work environment.

Need Further Advice? There are resources for companies to educate their employees about transgendered individuals and how to comply with the [law. Masstpc.org](http://law.masstpc.org) has a series of "I am" videos to introduce transgendered individuals to others, since many may not know a transgendered individual. If a company wants to schedule a training session on the law and right and wrong practices, the Massachusetts Transgender Political Coalition or the Gay & Lesbian Advocates & Defenders can refer the company to a qualified trainer.

Please contact Casner & Edwards, LLP if you would like to discuss this further.

This alert may be considered advertising under Massachusetts Supreme Judicial Court Rules
This client alert has been prepared for clients and friends of Casner & Edwards, LLP. Its purpose is to provide general information about legal developments and is not a substitute for professional advice on your particular situation.