

## Massachusetts Signs Law Prohibiting Gender Identity Discrimination

#### **November 30, 2011**

On November 23, Governor Deval Patrick of Massachusetts signed House Bill 3810 into law. The law prohibits private employers with six or more employees in Massachusetts from discriminating against employees and applicants on the basis of gender identity. Gender identity will become a protected category with respect to private employment, and will be added as a protected category to several laws designed to protect people from hate crimes and harassment. It will also affect public or charter school policies, public accommodations, credit and lending services, and certain other civil rights protections. The new law will go into effect on July 1, 2012.

#### **House Bill 3810**

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. The definition covers transgender individuals. It is estimated that approximately 33,000 citizens of the Commonwealth of Massachusetts will be covered by the new law.

Gender-related identity may be shown by providing evidence including, but not limited to, a person's medical history, the 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 law specifies, however, that gender-related identity may not be asserted for any improper purpose.

The law protects transgender employees by making it an unlawful employment practice to refuse to hire or employ or to bar or discharge from employment any individual on the basis of a person's gender identity or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment, unless differential treatment is based upon a bona fide occupational qualification.

#### A Hot Topic for Employers

Massachusetts joins the 15 other states of California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and

Washington<sup>1</sup> and the District of Columbia that have enacted laws preventing private employers from discriminating on the basis of gender identity or expression. Similar legislation affecting private employers is pending in 13 other states: Arizona, Florida, Indiana, Kansas, Michigan, Missouri, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, Texas, and Virginia. Further, although case law varies by jurisdiction, a number of federal courts have held that transgender employees qualify as a protected class under Title VII or its state-law equivalents, or have found that such employees qualify for protection under state disability discrimination laws. Several state administrative agencies have concluded similarly. Attention should also be given to local government laws, especially where an employer is a contractor or provides services to cities and counties and their agencies.

### **Implications**

In order to reduce the risk of litigation and ensure a more effective workplace, employers should examine their equal opportunity, disability, and harassment policies. Not only do a number of state and local laws protect employees and applicants from unfair employment practices based on transgender status or gender nonconformity, but some laws also may require an employer to allow a transgender person to use the restroom consistent with his or her gender identity while at work. Most state statutes also prohibit retaliation for opposing discriminatory practices, and many of the gender identity laws prevent employers from requesting information about an employee's or applicant's transgender status.

If you have any questions or would like more information on the gender identity laws in the states identified above, please contact any of the following Morgan Lewis attorneys:

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<sup>1.</sup> Additionally, both Indiana and Ohio have laws preventing discrimination based on gender identity or expression, which cover all public employees, and New York and Pennsylvania each protect some subset of public employees. Currently, it is estimated that more than 100 counties or cities have enacted statutory protections for gender identity.

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