

ALERTS AND UPDATES

Massachusetts Passes Legislation Banning Employment Discrimination Based on Gender Identity Bias

December 7, 2011

On November 23, 2011, Massachusetts Gov. Deval Patrick signed into law House Bill 3810 ("An Act Relative to Gender Identity") to outlaw employment discrimination on the basis of "gender identity." The new law takes effect on July 1, 2012, and impacts employers with six or more employees.

"Gender Identity" Defined

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. 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 that gender-related identity shall not be asserted for any improper purpose.

Some New Clarity Regarding Discrimination Claims

The law provides clarity for Massachusetts courts dealing with gender identity claims. In the past, the Massachusetts Commission Against Discrimination and some state Superior Court judges concluded that gender identity claims were protected under the Massachusetts Fair Employment Practices Act (M.G.L. c. 151B) under a theory of sex discrimination, while other judges concluded that such claims were not so protected.

Some New Questions Regarding the Law

Some of the practical implications of the new law are unanswered by its terms. If an individual, assigned a male sex at birth identifies in adult life as a woman and wears a dress to work, does an employer have a duty to accommodate that person's request to use the ladies' rest room? Will women co-workers claim that they are being subject to a hostile work environment in such circumstances? Will employers be required to bear the expense of installing a separate, single-stall unisex bathroom to avert this? These are questions that remain unanswered and present practical concerns that employers are likely to grapple with in light of the new law. When faced with these sensitive issues, employers should consider conferring with legal counsel to assist in navigating the new and uncharted waters.

Steps Employers in Massachusetts Should Consider

1. Employers may want to amend policies regarding equal employment and policies regarding discrimination and harassment prevention to address gender identity bias;
2. Employers should include gender identity as part of their discrimination and harassment prevention training, as sensitivity to gender expression may be something that has not been addressed in the past; and

- Employers should examine policies regarding dress codes and bathroom usage to determine whether revisions should be made. As noted above, the law does not on its face provide guidance on whether an employer can by policy require an employee to use the bathroom that corresponds with his or her biological sex. Some employers are adopting policies that allow their employees to use the bathroom that corresponds to either the bathroom the employee is most comfortable using or the bathroom that corresponds to the employee's gender presentation at the time.

Employers may want to address any issues raised by this statute with legal counsel to ensure compliance with the new statute.

For Further Information

If you have any questions about this *Alert*, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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