

Massachusetts

Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

Topics

I. Discrimination

A. Massachusetts Commission Against Discrimination Gender Identity Guide

Massachusetts law prohibits discrimination in employment based on an individual's gender identity, and includes gender identity as a specifically protected class in places of public accommodation. State law provides that it is an unlawful discriminatory practice for an employer to discriminate against any employee or applicant for employment based upon that individual's gender identity with regard to recruitment, hiring, firing, discipline, promotion, wages, job assignments, training, benefits, and other terms and conditions of employment.

The Massachusetts Commission Against Discrimination (MCAD) issued administrative guidance, entitled Gender Identity Guidance, to assist employers in understanding their obligations concerning discrimination based on gender identity. The Guidance explains that discrimination may take the form of unwelcome verbal or physical conduct, including, but not limited to, derogatory comments, jokes, drawings or photographs, touching or gestures. The Guidance provides several examples of employer conduct that would be considered discrimination on the basis of gender identity. In addition, the Guidance states that in evaluating a claim of hostile work environment based on gender identity, the MCAD will take into consideration evidence of the employer's support for the employee and other measures the employer undertook to accommodate the employee.

Massachusetts 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 Guidance provides that gender identity encompasses individuals who are transgender. Transgender individuals are people whose gender identity is different from the sex assigned to them at birth. The statutory definition of gender identity does not require the individual to have completed gender-affirming surgery, or an intent to undergo surgery, nor does it require evidence of past medical care or treatment. Further, gender identity is distinguished from sexual orientation.

The law also protects persons whose gender identity is consistent with their assigned sex at birth, but who do not adopt or express traditional gender roles, stereotypes or cultural norms. For example, it is unlawful to discriminate against a person designated as female at birth and who identifies as a woman but who does not act, dress, or groom herself in a manner consistent with feminine stereotypes.

The guidance provides that in most situations arising in employment, it will not be appropriate to request documentation of an individual's gender identity. In the limited circumstances where it is necessary, an individual's gender identity may be demonstrated by any evidence that the gender identity is sincerely held as a part of the person's core identity. The law excludes from its coverage a gender-related identity that is "asserted for any improper purpose," such as an unlawful purpose. For instance, a fraudulent representation to obtain an otherwise unavailable employment-related benefit or a fraudulent effort to evade a legal obligation or an effort to commit a crime could constitute an improper purpose.

Massachusetts defines a place of public accommodation as “any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public.” Massachusetts law provides that places of public accommodation may not discriminate against, or restrict a person from services because of that person’s gender identity. All persons, regardless of gender identity, have the right to full and equal accommodations, advantages, facilities and privileges of any place of public accommodation. The statute includes businesses that provide services, and is not restricted to a person’s entrance into a physical structure. In addition, Massachusetts law provides that a place of public accommodation may not distribute, publish or display an advertisement, notice, or sign intended to discriminate against or actually discriminating against persons of any gender identity.

Massachusetts law also provides that any place of public accommodation that lawfully separates access to a place or portion thereof based on a person’s sex shall grant admission to that place, and the full enjoyment of that place or portion thereof, consistent with the person’s gender identity. The Guidance gives the example of restrooms designated as “Men’s Restroom” and “Women’s Restroom,” and emphasizes that a business must allow its patrons to use the restroom that is consistent with their gender identity. The Guidance clarifies that Massachusetts law does not prohibit restrooms from being designated by gender. However, requiring an employee to provide identification or proof of any particular medical procedure (including gender-affirming surgery) in order to access gender-designated facilities may be evidence of discriminatory bias.

The Guidance provides several examples of discrimination in a place of public accommodation. For example, if a retailer distributes a policy requiring its customers to present a driver’s license as the sole acceptable means of identification for purposes of paying by check and requires the gender on the license to match that of the customer’s appearance, this could constitute a violation.

Finally, the Guidance sets forth the MCAD’s recommended best practices for employers, housing providers, places of public accommodation and all entities subject to the law to foster an inclusive and welcoming environment, including the following:

- revise non-discrimination, equal opportunity, non-harassment, and other employment-related policies to include a statement that discrimination and harassment on the basis of gender identity is prohibited;
- update personnel records, payroll records, email systems, and other documents to reflect employee’s stated name and gender identity, and ensure confidentiality of any prior documentation of an employee’s pre-transition name or gender marker;
- prohibit derogatory comments or jokes about transgender persons from employees, clients, vendors and any others, and promptly investigate and discipline persons who engage in discriminatory conduct;
- use names, pronouns, and gender-related terms appropriate to employee’s stated gender identity in communications with employee and with others;
- provide the public and employees access to any sex-segregated facility, i.e. bathrooms or locker room facilities, based on the employee’s stated gender identity;

- incorporate in diversity, anti-discrimination, and anti-harassment trainings information about transgender individuals and employees, whether or not there are currently transgender employees, or employees who have self-identified as transgender, at the workplace or in the place of public accommodation;
- employers should investigate and take appropriate remedial action when on notice of harassing or discriminatory conduct in the workplace; and
- avoid gender-specific dress codes and permit employees to dress in a manner consistent with their gender identity.

(Effective Date 10/01/2016).

B. Veteran Protection

Massachusetts law prohibits an employer from discriminating against an applicant or an employee on the basis of race, color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information, or ancestry. This amendment adds veteran status to the list of prohibited grounds for discrimination.

Massachusetts law also permits employees who are veterans and who want to participate in a Veterans' Day or Memorial Day exercise, parade, or service to take a leave of absence, with or without pay at the employer's discretion, of sufficient time to participate in such services in their community of residence. The amendment requires employers with at least 50 employees to grant a paid leave of absence on Veterans' Day to participate in such activities if the employee provides reasonable advance notice before taking leave.

ALM GL ch. 151B, § 4 and ALM GL ch. 149, § 52A½ (Effective Date 07/14/2016).

C. Gender Identity

Massachusetts law prohibits discrimination based on religion, creed, class, race, color, denomination, sex, sexual orientation, nationality, deafness, blindness, or any physical or mental disability in places of public accommodation. The amendments add gender identity to the list of protected classes.

The amendments make it clear that persons must be granted access consistent with their gender identity to any gender-segregated areas in places of public accommodation. Violations of this statute are punishable by a fine of up to \$2,500, imprisonment for up to one year, or both. The bill directs the Massachusetts Commission Against Discrimination and the Massachusetts Attorney General's Office to issue rules and guidance on enforcement of the amendments.

ALM GL ch. 272, § 92A, ALM GL ch. 272, § 98 (Effective Date 10/01/2016).

II. Pre-Employment Inquiry Guidelines

No new laws or regulations enacted in 2015 or 2016.

III. Family and Medical Leave

Massachusetts has overhauled its Maternity Leave Law (MLL). Among other changes, the amended law provides parental leave rights to employees regardless of sex.

Employee Eligibility

Under the MLL, employers of six or more employees must provide maternity leave to female full-time employees who have worked for the employer for three consecutive months. The amendments extend entitlement to leave to all such full-time employees regardless of sex. The amendments align the language of the statute with the position of the Massachusetts courts and the Massachusetts Commission Against Discrimination that employers must provide leave to otherwise eligible male employees to avoid sex discrimination.

In addition, the amendments clarify the provision basing employee eligibility on completion of an employer's initial probationary period. The MLL provides that in order to be eligible for leave, the employee must have worked for the employer for three consecutive months or have completed the employer's initial probationary period. Under the amended law, an employee is eligible if s/he (1) has worked for the employer for three consecutive months or (2) has completed an initial probationary period not to exceed three months for purposes of determining leave eligibility.

Length of Leave

In general, under both the MLL and the amended law, employees are entitled to eight weeks of leave. The amended law addresses the situation of two employees working for the same employer who wish to take parental leave in connection with the birth or placement of the same child. In this circumstance, the amended law provides that the two employees are entitled to eight weeks of leave in aggregate.

The amendments also provide that an employer may choose to allow employees to take more than eight weeks of parental leave. In doing so, however, the employer cannot deny the employee any rights afforded under the law unless the employer clearly informs the employee in writing prior to the commencement of the parental leave, and prior to any subsequent extension of that leave, that taking longer than eight weeks of leave will result in the denial of reinstatement or loss of other rights and benefits.

Permissible Reasons for Leave

The MLL allows employees to use leave for the birth of a child, placement for adoption of a child under age 18, or placement for adoption of a child under age 23, if the child is mentally or physically disabled. The amended law adds that an employee may use parental leave due to placement of a child with the employee pursuant to a court order.

Notification of the Need for Leave

Under both the MLL and the amended law, employees are required to give notice of the need for leave at least two weeks in advance. However, the amendment addresses the possibility that the need for leave may arise under circumstances that do not permit two weeks' advance notice. In that case, the employee must notify the employer as soon as is practicable if the delay is for reasons beyond the employee's control.

Compensation and Benefits During Leave

Both the MLL and the amended law provide that leave may be paid or unpaid at the employer's discretion, and that taking leave does not affect the employee's right to receive vacation time, sick leave, bonuses, advancement, seniority, length of service credit, or benefits for which the employee is eligible as of the date of the leave. The amended law extends employee protections with respect to eligibility for benefits during leave. If employees on other types of leave receive continued benefits during the leave, the employer must similarly provide continuation of benefits to employees taking parental leave.

Fair Employment Practices

The amended law adds the use of parental leave as a protected activity under the Massachusetts fair employment practices statute. Thus, employers are prohibited from discriminating or retaliating against an employee due to the exercise of his or her rights under the parental leave law.

Required Postings

Employers must post in a conspicuous location in the workplace a notice describing employee rights and obligations under the parental leave law, as well as a copy of any policies the employer maintains regarding the right to parental leave.

ALM GL ch. 149, § 105D (Effective Date 04/07/2015).

IV. Wage and Hour Laws

A. Act to Establish Pay Equity

The Massachusetts Legislature passed the Act to Establish Pay Equity (the "Act"), which makes it illegal for an employer to pay employees at a lower rate than the rate paid to employees of a different gender for comparable work. Under the Act, comparable work is "work that is substantially similar in that it requires substantially similar skill, effort, and responsibility and is performed under similar working conditions." The law also provides that "a job title or job description alone shall not determine comparability." Thus, under the Act, "comparable work" is not limited to employees who have the same job title.

An employer may not be held liable under the Act if it can demonstrate that a pay difference for comparable work is based on one or more of the following factors:

- a bona fide seniority system, provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority;
- a bona fide merit system;
- a bona fide system that measures earnings by quantity or quality of production or sales;
- the geographic location in which a job is performed;
- education, training or experience to the extent such factors are reasonably related to the particular job in question and consistent with business necessity; or
- travel, if the travel is a regular and necessary condition of the particular job.

In addition to the equal pay requirements described above, the Act also significantly limits an employer's ability to control the flow of information regarding employee wages. The Act makes it illegal for an employer to:

- require that an employee refrain from inquiring about, discussing or disclosing information about the employee's own wages, or any other employee's wages;

- screen job applicants based on their wages;
- request or require an applicant to disclose prior wages or salary history; or
- seek the salary history of any prospective employee from any current or former employer, unless the prospective employee provides express written consent, and an offer of employment – including proposed compensation – has been made.

The Act also provides an affirmative defense for employers. Under the Act, employers who complete a good-faith self-evaluation of their pay practices within three years of a claim, and can demonstrate that “reasonable progress has been made towards eliminating compensation differentials based on gender,” have an affirmative defense to liability for an equal pay violation.

The Act provides for a private right of action. A prevailing plaintiff may recover damages (i.e., the difference between the wages she earns and the wages earned by her comparator), as well as an equal amount in liquidated damages. Prevailing plaintiffs also may recover reasonable attorneys' fees and costs. The Act provides that a plaintiff may file a claim within three years of a violation. The Act makes clear that an equal pay violation occurs each time an employee is paid, effectively resetting the three-year limitations period after each paycheck is issued.

ALM GL ch. 149, § 105A (Effective Date 07/01/2018).

B. Withholding Orders

The UIFSA ensures that family support orders are enforced in each of the 50 states and that an obligor cannot escape his or her duty to pay support by moving out of state.

Massachusetts previously incorporated the UIFSA into its General Laws, and with this legislation amends the law to comply with the mandates of the federal Preventing Sex Trafficking and Strengthening Families Act of 2014.

Under the amendment, when an employer receives an income withholding order from another state, the employer must treat the order as though it were issued by a Massachusetts court. The employer must:

- provide a copy of the order to the obligor-employee; and
- withhold from the obligor-employee's pay and distribute the funds as directed in the withholding order.

The employer must comply with the law of the state of the obligor-employee's principal place of employment on these items:

- amount of service fee the employer may withhold;
- maximum amount the employer may withhold;
- time in which the employer must implement the withholding order and forward the child support payment; and

- priority of withholding, in the case of two or more income withholding orders from different states for the same obligor-employee.

An employer that complies with an income withholding order cannot be held liable to an individual or agency regarding the withholding. However, if an employer willfully violates a valid income withholding order from another state, the employer is subject to the penalties that Massachusetts imposes for noncompliance with Massachusetts orders.

ALM GL ch. 209D, § 5-501 through ALM GL ch. 209D, § 5-505 (Effective Date 03/31/2016).

V. Drug Testing

Massachusetts voters passed Question 4, which legalizes the possession, use, and cultivation of limited amounts of marijuana.

Of relevance to employers, the measure does not require employers to permit or accommodate the use or possession of marijuana in the workplace, and does not affect an employer's authority to create and enforce workplace policies restricting the consumption of marijuana by employees.

The new law is not yet codified.

VI. Noncompete and Other Employment Agreements

No new laws or regulations enacted in 2015 or 2016.

VII. Workplace Safety

No new laws or regulations enacted in 2015 or 2016.

VIII. Workers' Compensation

No new laws or regulations enacted in 2015 or 2016.

IX. Miscellaneous

The Code of Massachusetts Regulations provides rules that govern arbitration procedures when an arbitration is conducted by the Department of Labor Relations. The newly recodified rules largely echo the established procedures for such an arbitration. The amendments remove procedures that were outdated and that the Department no longer follows. The new procedures allow:

- A mediator to serve as an arbitrator if it is agreed to in writing by the parties.
- An arbitrator to set a date for continuance of a hearing rather than reserving that right for the Director of the Department of Labor Relations.
- An arbitrator to issue subpoenas. The amendments set forth a procedure by which a witness may revoke or modify the subpoena;
- An arbitrator to unilaterally frame the issues if the parties do not agree and to rule on all objections.

The amendments also require the parties to request clarification, modification, or correction of an arbitration award within 14 days after the award is received, rather than within a "reasonable time"

after the award is received. If the request is unilateral, the opposing party may respond or raise an objection to the request within seven days after it has received a copy of the request, rather than within a “reasonable time” after the request is received.

456 CMR 22.01 through 456 CMR 22.06 and 456 CMR 23.01 through 456 CMR 23.10 (Effective Date 09/23/2016).