

***What you need  
to know about***

# Massachusetts' Transgender Rights Law

*October 2013*



On November 23, 2011, Governor Deval Patrick signed into law H3810, An Act Relative to Gender Identity. This law adds “gender identity” as a protected characteristic to Massachusetts’ employment, housing, credit and public education anti-discrimination laws and to Massachusetts’ hate crimes law. All of these laws also protect several other characteristics, including sexual orientation, disability, sex, age, race, ancestry and religion, but this publication focuses on the transgender protections that H3810 provides.

**The law went into effect on July 1, 2012.**

## ***How does the law define “gender identity”?***

H3810 defines “gender identity” as “a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth.”<sup>1</sup>

## ***How may a person’s gender identity be demonstrated?***

**The law allows a person to demonstrate his/her gender identity by providing evidence including:**

- medical history,
- care or treatment of the gender identity,
- consistent and uniform assertion of the gender identity, or
- any other evidence that the gender identity is sincerely held as part of a person’s core identity.

***Must a person be able to prove his/her gender identity in order to be protected by the law?***

**No.** The law prohibits discrimination on the basis of gender identity regardless of what a person's gender identity is. The law includes several ways that a person may demonstrate his/her gender identity though it does not require proof of any particular gender identity for protection. The law does state, however, that a person may not bring a claim of discrimination based on asserting a gender identity for any "improper purpose."

# EMPLOYMENT ANTI-DISCRIMINATION LAW

## ***Who does the Massachusetts employment anti-discrimination law apply to and what does it forbid?***

The employment anti-discrimination law applies to employers (state, municipal or private) who have at least 6 employees (not including the owner or certain family members).

It forbids employers from refusing to hire a person, or discharging them, or discriminating against them “in compensation, or in terms, conditions or privileges of employment” because of his/her gender identity.<sup>2</sup>

This covers most significant job actions, such as hiring, firing, failure to promote, demotion, excessive discipline, harassment and different treatment of the employee and similarly situated co-workers. The law also applies to employment agencies and labor organizations (e.g. unions).<sup>3</sup>

## **Are any companies exempt from the anti-discrimination law?**

**Yes, employers with fewer than six employees are exempt.**

An employer, agency or labor organization may defend against a discrimination claim by arguing that a “bona fide occupational qualification” of the particular job is that it have someone in it who is non-transgender. But there are no general occupational exemptions from the reach of the non-discrimination law. While that defense is allowed in the law, it is strictly applied and very rarely successful.

**Religious institutions** and their charitable and educational associations are sometimes exempt from the law.<sup>4</sup> Where an employer is operated or supervised by a religious institution, it may preferentially hire members of its own religion, and may take employment actions that it “calculate[s] will] ... promote the religious principles for which it is established or maintained.” **This exemption, however, is not a *carte blanche* for an employer to use his or her religious beliefs as a justification for discriminating against a transgender person.**

# HOUSING ANTI-DISCRIMINATION LAW

## ***What is prohibited by the housing anti-discrimination law in Massachusetts?***

The housing laws are intended to prohibit discrimination by those engaged in most aspects of the business of listing, buying, selling, renting or financing housing, whether for profit or not.<sup>5</sup> Most often, these claims involve a refusal by an owner, landlord or real estate broker to sell, or lease, or even negotiate with a person about the housing they desire to obtain.<sup>6</sup> But other practices are forbidden, too, such as inquiring into or making a record of a person's gender identity or discriminating with respect to mortgage loans.<sup>7</sup>



## ***Are any landlords exempt from the housing anti-discrimination law?***

The main exemption from the law is for owner-occupied buildings that have two units or less. The law is focused on protecting people in “multiple dwelling[s].” This is a dwelling which is usually occupied for permanent residence and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. If the building only has two apartments and the owner lives in one of them, the exemption may apply.<sup>8</sup> The other exemptions in this area of the law are fairly technical and relate to the definitions of “housing development,” “contiguously located housing,” and “other covered housing accommodations.”

# PUBLIC ACCOMMODATIONS ANTI-DISCRIMINATION LAW

## *What protections exist for transgender people in places of public accommodation?*

The new transgender rights law does not contain explicit protections for gender identity. However, transgender individuals who face discrimination in access to places of public accommodation may, in some circumstances, be able to bring sex, sexual orientation or disability discrimination claims.

### **SEX DISCRIMINATION**

If the adverse action results from sex stereotyping, that is the expectation that a person conform to the social stereotypes of how a “real man” or “real woman” must act, then this can be the basis for a sex stereotyping claim.<sup>11</sup> However, there are limits to the ability to bring such claims since restrooms that are segregated by sex are exempt from the sex discrimination prohibitions under the public accommodations law.

## **SEXUAL ORIENTATION DISCRIMINATION**

In some cases an individual's gender identity may be regarded as "a gay issue" by the person or entity perpetrating the discrimination and therefore allow a person to bring a sexual orientation claim.

## **DISABILITY DISCRIMINATION**

In *Jette v. Honey Farms*,<sup>12</sup> MCAD ruled that, unlike the federal disability laws, Massachusetts' disability law includes transgender people.

So a transgender person who is discriminated against in a public accommodation has protections under the law, but since gender identity is not one of the explicit protected classes, the person will need to find another protected characteristic (e.g. sex, sexual orientation or disability) to use in filing the complaint.

The transgender rights coalition to which GLAD belongs is continuing to work for the express inclusion of "gender identity" in the public accommodations anti-discrimination law.

## ***What is a “place of public accommodation”?***

A place that holds itself open to, and accepts the patronage of the general public is a place of public accommodation subject to the non-discrimination laws.<sup>10</sup> This definition is intentionally broad and may include a motel, restaurant, rest area, highway or hospital, as just a few examples.

# CREDIT

## ANTI-DISCRIMINATION LAW

### ***What protections exist under Massachusetts anti-discrimination law with regard to credit?***

Any person who furnishes credit, such as a bank, credit union, or other financial institution, may not “deny or terminate such credit. . . or . . . adversely affect an individual’s credit” because of gender identity.<sup>9</sup>

# PURSUING A COMPLAINT

## *How do I file a complaint of discrimination?*

You may file in person or in writing at the Massachusetts Commission Against Discrimination (MCAD). The MCAD prefers for people to file in person, unless an attorney has prepared the complaint for them. Call in advance to set up an appointment and find out what you need to bring. For more information about MCAD and a list of the MCAD offices and phone numbers go to: [www.mass.gov/mcad/](http://www.mass.gov/mcad/).

The complaint must be under oath, state the name and address of the individual making the complaint as well as the name and address of the entity he or she is complaining against (called the “respondent”). The complaint must set out the particulars of the alleged unlawful acts and (preferably) the times they occurred.

**NOTE:** In some cases you can also file a complaint of discrimination with the federal

government. In 2012, the Equal Employment Opportunity Commission (EEOC), which is the federal agency where employment discrimination complaints can be filed, announced that transgender people are protected under the federal employment sex anti-discrimination law, Title VII of the Civil Rights Act of 1964.

## ***Do I need a lawyer?***

**No.** The process is designed to allow people to represent themselves. However, GLAD strongly encourages people to find lawyers to represent them throughout the process. Not only are there many legal rules governing the MCAD process, but employers and other defendants are likely to have legal representation.

## ***What are the deadlines for filing a complaint of discrimination?***

Complaints of discrimination must be filed at the MCAD within 300 days of the last discriminatory act or acts. There are very few exceptions for lateness, and GLAD encourages people to move promptly in filing claims.

## ***What can I do if my employer fires me or my landlord evicts me because I filed a complaint of discrimination?***

It is illegal for your employer or landlord to retaliate against you for filing a complaint, and you could file an additional complaint against the employer or the landlord for retaliation. “Retaliation” protections cover those who participate in proceedings, oppose unlawful conduct, or state an objection to discriminatory conduct.<sup>13</sup>





# **PUBLIC EDUCATION**

## **ANTI-DISCRIMINATION LAWS**

### ***What protections does the new transgender rights law give to transgender students?***

Chapter 76, Section 5 of the Massachusetts General Laws prohibits gender identity discrimination in its public schools, whether committed by school employees or fellow students.

The Code of Massachusetts Regulations (603 CMR 26.00) establishes certain actions that schools must take to prohibit the harassment or discrimination of students. (<http://bit.ly/QAaKQ6>). In particular, the Code requires that all schools educate staff and students about Chapter 76, Section 5 and have policies in place to ensure that complaints of discrimination and harassment are investigated and appropriate action is taken against those who violate the provisions of the law.

The Department of Elementary and Secondary Education is current revising these regulations to include transgender students.

Also Massachusetts General Laws Chapter 151C defines fair educational practices and specifically prohibits sexual harassment by either teachers, staff or other students. Violations of this law can be brought to MCAD.

# MASSACHUSETTS HATE CRIMES LAW

## *How does Massachusetts' law define what is a hate crime?*

Under state law, a “hate crime” is “any criminal act coupled with overt actions motivated by bigotry and bias, including, but not limited to, a threatened, attempted or completed overt act motivated at least in part by racial, religious, ethnic, handicap, gender, sexual orientation or **gender identity** prejudice, or which otherwise deprives another person of his constitutional rights by threats, intimidation or coercion, or which seeks to interfere with or disrupt a person’s exercise of constitutional rights through harassment or intimidation. . .”<sup>14</sup> It also includes any violation of several other laws.

## ***What penalties exist for perpetrators of hate crimes?***

**Massachusetts law contains a “Hate Crimes Penalties Act” which provides stiff penalties for those who:**

- commit an assault or a battery; or, cause damage to a person’s real or personal property
- with the intent to intimidate a person because of his/her gender identity<sup>15</sup>

## ***How are hate crimes tracked?***

In order to track hate crimes, the State has set up a reporting system so that incidents alleged are centrally recorded.<sup>16</sup> To enter an incident of hate violence into the statistics, contact the Violence Recovery Program at Fenway Community Health, (800) 834-3242.

<sup>1</sup> Mass. Gen. Laws, chap. 4, sec. 7, Fifty-ninth.

<sup>2</sup> Mass. Gen. Laws, chap. 151B, sec. 4(1).

<sup>3</sup> Mass. Gen. Laws, chap. 151B, secs. 4(3), 4(2).

<sup>4</sup> Mass. Gen. Laws, chap. 151B, section 1(5).

<sup>5</sup> Mass. Gen. Laws, chapter 151B, sec. 4 (3B, 3C, 6, 7).

<sup>6</sup> Mass. Gen. Laws, chap. 151B, sec. 4 (6)(a)(public housing), sec. 7 (private housing).

<sup>7</sup> Mass. Gen. Laws, chap. 151B, sec. 4(3B).

<sup>8</sup> Mass. Gen. Laws, chap. 151B, sec. 1 (11).

<sup>9</sup> Mass. Gen. Laws, chap. 151B, sec. 4(14).

<sup>10</sup> Mass. Gen. Laws, chap. 272, sec. 92A.

<sup>11</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); *Rosa v. Park West Bank*, 214 F.3d 213 (1st Cir. 2000); *Millett v. Lutco, Inc.*, 23 M.D.L.R. 231 (2001).

<sup>12</sup> *Jette v. Honey Farms*, 2001 WL 1602799.

<sup>13</sup> Mass. Gen. Laws, chap. 151B, secs. 4(4), 4A.

<sup>14</sup> Mass. Gen. Laws, chap. 22C, sec. 32.

<sup>15</sup> Mass. Gen. Laws, chap. 265, sec. 39.

<sup>16</sup> See Mass. Gen. Laws, chap. 22C, secs. 32-35.

**For more information on the rights of transgender people in Massachusetts, see GLAD's publications:**

Overview of Legal Issues for Gay Men, Lesbians, Bisexuals and Transgender People: <http://bit.ly/MZpZxI>

Transgender Legal Issues: <http://bit.ly/N2n7C5>

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*This document is intended to provide general information only. Moreover, the law is constantly changing, and this publication is based upon the information that is known to us as of the date on this printing. For guidance or legal advice on your particular situation, you must consult a lawyer. The provision of this information is not meant to create an attorney-client relationship.*

# Contact us

If you have questions about the new law or any other LGBTQ/HIV legal issue in New England or need legal assistance, contact **GLAD Answers** by phone at **800-455-GLAD (4523)** or by live chat or e-mail at **GLADAnswers.org**.

The **GLAD Answers** is a free, confidential service where you will receive one-on-one assistance from a highly trained volunteer.

GLAD Answers is open **Monday—Friday** from **1:30-4:30 pm** or you can email us any time.



Gay & Lesbian Advocates & Defenders