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The Massachusetts Transgender Public Accommodations Law: What Should My Business Do to Comply?

BY ARIEL G. SULLIVAN • OCTOBER 7, 2016

By now, most people in the Commonwealth are aware that Massachusetts [passed a law](#) that prohibits discrimination based on gender identity in places of public accommodation. In order to assist businesses and other places of public accommodation comply with the law, which became effective October 1, 2016, the Attorney General has issued [Gender Identity Guidance for Public Accommodations](#).

In addition to providing definitions and general information about obligations under the law, the guidance provides specific information regarding the use of sex-segregated facilities such as restrooms and locker rooms and how to respond to complaints from patrons who complain about the presence of a transgender person in a sex-segregated facility. The guidance suggests reminding such patrons that Massachusetts law protects the right of all people, including transgender people, to access sex-segregated facilities most consistent with their gender identity. While the guidance also suggests that another option to alleviate concerns from patrons would be to provide accommodations such as a privacy screen, curtained area, or single-occupancy facility, it clarifies that such accommodations are not required. In the event that businesses choose to provide accommodations, the guidance reminds them that they: must make them available to everyone, regardless of gender identity; and cannot require or encourage any patron to accept an accommodation based on gender identity. In other words, businesses should not ask a transgender individual to use a private facility to accommodate other patrons who might be uncomfortable in his or her presence.

The guidance also provides suggestions for businesses on how to address circumstances involving improper assertions of gender identity. As reports of the improper assertion of gender identity have been exceedingly rare in states with similar laws, a place of public accommodation should presume that an individual is using the appropriate facility unless there is a legitimate reason to believe otherwise. According to the guidance, a legitimate concern arises where, due to the behavior of the person in question, the place of public accommodation is reasonably worried about potentially improper or unlawful conduct. Under such circumstances, the guidance suggests that an employee attempt to resolve the issue through a private and discrete conversation with that person by asking, for example: “Are you using the appropriate facility?” The guidance states that in most cases, if the person confirms that they are using the facility

most consistent with their gender identity, that should be the end of the inquiry. However, if an employee still has reasonable grounds to believe that the person is engaged in improper or unlawful conduct, the employee may address the situation through whatever means the business typically addresses misconduct by a patron, including asking the patron to leave, or calling security or law enforcement.

Finally, the guidance provides that places of public accommodation may seek documentation, but only in the rare instance that the person is, or is seeking to become, a member in an organization that regularly requires documentation of gender for all members on an equal basis, such as a health or sports club. In that circumstance, an individual's gender identity may be demonstrated by any one of the following: (1) a driver's license or other government issued identification; (2) a letter from a doctor, therapist, or other healthcare provider; (3) a letter from a friend, clergy, or family member regarding the person's routine conduct, such as dress, grooming, and use of corresponding pronouns; or (4) any other evidence that the gender identity is sincerely held as part of the person's core identity. Under no circumstances may the request for documentation be used to harass, intimidate, embarrass, or otherwise discriminate against a person based on gender identity.

As with many laws prohibiting forms of discrimination, there are few affirmative steps that public accommodations businesses, such as retail stores, restaurants, recreation facilities and educational institutions, can take aside from modifying employee training. Business owners should stress to employees the importance of respecting the gender identities of patrons and train employees to appropriately respond to the complaints of other patrons.