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Gender Identity Guidance for Public Accommodations

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Effective October 1, 2016, Massachusetts law prohibits discrimination based on gender identity in places of public accommodation.¹ This document is intended to help businesses and other places of public accommodation comply with the law. First, it provides definitions and general information about obligations under the law. Second, it provides specific information regarding the use of sex-segregated facilities such as restrooms and locker rooms. Third, it provides guidance on how to address circumstances in which there is reason to believe an individual is asserting gender identity for an improper purpose, such as to engage in unlawful conduct.

Massachusetts law now explicitly prevents places of public accommodation from discriminating against, harassing, or providing different or inferior service to an individual based on gender identity. It also protects the right of all people – including transgender people – to use sex-segregated facilities that are most consistent with their sincerely held gender identity. In states with similar laws, reports of the improper assertion of gender identity have been exceedingly rare. Therefore, in most circumstances, a place of public accommodation should presume that an individual is using the appropriate facility. When there is a legitimate reason to believe that someone is not using the appropriate facility, a limited inquiry may be warranted in order to ascertain that person's gender identity.

This law does not allow individuals to gain access to a sex-segregated facility that is not consistent with their gender identity. Nor does it protect anyone, regardless of gender identity, who engages in improper or unlawful conduct in a sex-segregated facility or elsewhere (see Section IV below). If a person engages in improper or unlawful conduct, a business or other place of public accommodation may remove the patron and, if warranted, refer the matter to law enforcement.

I. DEFINITIONS

Gender identity, as defined under Massachusetts law, means “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.” In essence, gender identity is a person's internal sense of their own gender. The law provides that gender identity must be “sincerely held as part of a person's core identity.”

Transgender is a term that is used to refer to a person whose gender identity is different from that person's assigned birth sex. The person knows that the gender typically associated with their body does not match who they know they are inside. For this reason, many transgender people transition and live as the gender they know themselves to be.

¹ G.L. c. 272, §§ 92A and 98.

Public accommodations include businesses that are open to and serve the public. They include any place “which is open to and accepts or solicits the patronage of the general public,” regardless of whether it charges for products, goods, services, or admission. A place of public accommodation may be publicly or privately owned or operated. Examples of public accommodations include, but are not limited to: hotels, stores, restaurants, theaters, sports stadiums, health and sports clubs, hospitals, transportation services, museums, libraries, and parks.

For more information about what is considered a place of public accommodation under Massachusetts law, please see G.L. c. 272, § 92A.

II. GENERAL OBLIGATIONS

The law provides that a place of public accommodation may not discriminate against an individual based on that individual’s gender identity. Unlawful discrimination includes, but is not limited to:

- Refusing or denying service;
- Offering a different or inferior class or quality of service or a more limited set of products, goods, services, or facilities than are available to others;
- Advertising or otherwise publicizing that it does not accept business from, or the patronage of, transgender or gender non-conforming individuals;
- Providing false information about the availability of products, goods, services, facilities, or admission; and
- Harassment and intimidation.

III. SEX-SEGREGATED FACILITIES

The law provides that all people, including transgender people, may use whichever sex-segregated facilities, including restrooms, locker rooms, and changing rooms, are most consistent with their gender identity (rather than their assigned birth sex).

Does the law prohibit sex-segregated facilities, including men’s/women’s restrooms, locker rooms, and changing rooms?

No. Places of public accommodation may still maintain sex-segregated restrooms, locker rooms, and changing rooms. However, under this law, individuals may use whichever sex-segregated space is most consistent with their gender identity.

What should a place of public accommodation do if a patron complains about the presence of a transgender person in a sex-segregated facility?

This law is intended to ensure that all people, regardless of their gender identity, have equal access to places of public accommodation, including bathrooms, locker rooms, and changing rooms.

If a patron complains about the mere presence of a transgender person in a sex-segregated facility, or a patron expresses concern that someone may be using the incorrect facility based on that person's appearance, a place of public accommodation should first assess whether there is any reasonable basis to believe that person is not using the appropriate facility most consistent with their gender identity (see below).

If there is no legitimate reason to question, or that person confirms, that they are using the facility most consistent with their sincerely held gender identity, a place of public accommodation may still take certain steps to address the privacy concerns of the complaining patron. A place of public accommodation may:

- Remind the complaining patron that Massachusetts law protects the right of all people, including transgender people, to access sex-segregated facilities most consistent with their gender identity, as long as the individual is not engaged in any improper or unlawful conduct;
- Offer any patron seeking additional privacy, including the complaining patron, an accommodation, such as a privacy screen, curtained area, or private changing room, if available;
- Offer any patron, including the complaining patron, the opportunity to use a private facility, such as a unisex bathroom or changing room, if available (see below); or
- Institute a neutral policy that applies to all patrons regardless of gender identity to address privacy concerns, such as a requirement that clothing be worn in certain areas of a facility.

Businesses are not obligated to provide privacy accommodations, such as a privacy screen, curtained area, or private changing room. But if a business chooses to do so, it must make such accommodations available to everyone, regardless of gender identity. The business cannot require or encourage any patron to accept an accommodation based on gender identity (see more below).

What should a place of public accommodation do if it has reason to believe that a person is not using the appropriate sex-segregated facility?

Misuse of sex-segregated facilities is exceedingly rare. As a general matter, employees of a place of public accommodation should presume that an individual is using the correct facility (the one most consistent with their gender identity), if the person is not engaged in any improper or unlawful conduct.

Employees of a place of public accommodation should not assume an individual's gender identity solely by appearance. The fact that a woman, whether transgender or not, is perceived as having a "masculine" appearance is not a legitimate reason to exclude her from, or question her presence in, a sex-segregated facility intended for women. Similarly, the fact that a man may appear "feminine" is not a credible basis to exclude him from, or question his presence in, a sex-segregated facility intended for men.

Inquiry into a person's gender identity is generally not necessary. However, if a place of public accommodation has a legitimate concern about whether a person is using the appropriate facility,

an employee may attempt to resolve the issue through a private and discrete conversation with that person. 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, an employee may approach a patron privately, out of the earshot of others, and ask, for example: “Are you using the appropriate facility?” 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 (unless there is a reasonable basis to believe that the person is actually engaging in improper or unlawful conduct, as discussed in Section IV below).

In the vast majority of cases, it is not appropriate for a place of public accommodation to request documentation of an individual’s stated gender identity. However, a request for documentation may be permissible in the limited circumstance in which 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. A place of public accommodation may not use a request for documentation to harass, intimidate, embarrass, or otherwise discriminate against a person based on gender identity.

May a place of public accommodation provide a private or single-occupancy space or other privacy accommodation as an alternative to its sex-segregated shared facilities?

Yes. A place of public accommodation may make a private or single-occupancy space available as an alternative to its men’s/women’s facilities. If a place of public accommodation chooses to offer a private space, it must make the space available on the same terms and in the same manner to all patrons, regardless of their gender identity. Although a place of public accommodation may offer a private space, it cannot require or encourage any person to use that space instead of its sex-segregated facilities based on their gender identity.

Does the law require places of public accommodation to build gender-neutral and/or unisex facilities?

No. This law does not require places of public accommodation to build gender-neutral facilities, such as unisex or single occupancy bathrooms or locker rooms. However, places of public accommodation may do so, if they so choose.

IV. IMPROPER OR UNLAWFUL CONDUCT

What does it mean to assert gender identity for an improper purpose?

This law explicitly provides that a person may not assert gender identity for an “improper purpose.” This means that a person may not fraudulently assert gender identity to gain access to a sex-segregated facility in which they would otherwise not be permitted. It also means that a

person may not assert gender identity for the purpose of engaging in improper or unlawful conduct. Examples of improper or unlawful conduct may include, but are not limited to:

- Loitering in a facility for the purpose of observing other patrons;
- Harassment of an employee or patron;
- Threats or violence towards another person;
- Photographing or videotaping other patrons without permission; or
- Other violations of existing law, including criminal law.

This new law does not provide any protections for someone who engages in improper or unlawful conduct, whether in a sex-segregated facility or elsewhere. Nor does it provide a defense to criminal charges brought against someone engaged in unlawful conduct. Anyone who engages in unlawful conduct in a sex-segregated facility or elsewhere may properly be questioned, detained, and reported to law enforcement (see below). This new law does not affect any existing criminal laws or their applicability to any particular conduct.

Does this law allow a person to access a sex-segregated facility that is not consistent with their gender identity?

No. This law protects the right of individuals to use sex-segregated facilities that are most consistent with their gender identity. It does not allow an individual to fraudulently assert gender identity in order to gain access to sex-segregated facilities in which they would otherwise not be permitted. In such circumstances, it may be appropriate for a place of public accommodation to take action consistent with its usual policies regarding the removal or suspension of patrons who engage in improper conduct.

What should a business or place of public accommodation do if it believes a person is engaging in improper or unlawful conduct, either in a sex-segregated space or elsewhere?

If an employee of a public accommodation has reasonable grounds to believe that a person, regardless of gender identity, is engaged in improper or unlawful conduct (as discussed above), 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. If a person asserts gender identity to access a sex-segregated facility for the sole purpose of engaging in unlawful conduct, that person may properly be referred to law enforcement. In such circumstances, a place of public accommodation may take action consistent with its usual policies regarding contacting law enforcement to address the unlawful conduct of a patron.

However, any referral to law enforcement must be based on an individual's unlawful conduct, and not on the individual's gender-related identity or appearance. In no event may a place of public accommodation seek to use law enforcement or security to harass or embarrass a person based on gender identity.

Questions: If any business or other place of public accommodation has any questions about its obligations and responsibilities under this law, or how to address recurring situations that may arise, please contact the Civil Rights Division of the Attorney General's Office at (617) 963-2917.