




**Town of Arlington  
Legal Department**

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To: Board of Selectmen

Cc: Adam Chapdelaine, Town Manager  
John Leone, Town Moderator  
Christine Bongiorno, Director of Health & Human Services  
Proponents of Articles

From: Douglas W. Heim, Town Counsel 

Date: February 17, 2016

Re: Annual Town Meeting Warrant Articles ##18, 19, 20, 21, 25, 28

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I write to provide the Board of Selectmen a summary of the above-referenced warrant articles to assist in the Board's consideration of these articles at its upcoming hearing on February 22, 2016. Please also find attached reference materials in the form of excerpts of relevant Town Bylaws, General Laws, and an advisory from the Massachusetts Commission Against Discrimination ("MCAD").

## ARTICLE 18

## BYLAW AMENDMENT/EXPANDING EQUAL PROTECTION

**To see if the Town will vote to amend Title II, Article 9 of the Town Bylaws to promote equality by amending the Arlington Human Rights Commission's stated purpose to include additional and more comprehensive protected classes of persons and further to authorize the Commission to take action within the scope of its powers defined therein to protect and promote equality for such additional and more comprehensive protected classes of persons; or take any action related thereto.**

(Inserted at the request of the Arlington Human Rights Commission)

This article was inserted at the request of the Arlington Human Rights Commission ("AHRC") to expand the list of protected classes set forth in Title II, Article 9 of the Town Bylaws to include persons with non-conforming gender identities, including transgender persons. This proposal follows a May 21, 2015 resolution of the AHRC to support presently pending legislation to bolster protections regarding gender identity and expression, commit to do what it can under its currently bylaw mandates, and pursue the present warrant article to explicitly amend their duties to include gender identity and expression within AHRC's list of protected classes. While I expect the AHRC will present information supporting their article, I note that the proposed amendment brings Arlington's bylaws largely in sync with 2012 reforms to Massachusetts' anti-discrimination statute, G.L. c. 151B, which was amended to include "gender identify" in its list of protected classes of persons. (See attached MCAD Advisory provided as reference material).

It is further worth the Board's consideration that federal law per the Equal Employment Opportunity Commission ("EEOC") and a number of Massachusetts municipalities including Boston and Cambridge have similarly determined gender identity to be an essential class of persons to be afforded full protection of anti-discrimination laws. A vote to update Arlington's bylaws in sufficient fashion would read as follows:

*VOTED, that Title II, Article 9, Sections 2 and 5 be and are hereby amended by striking the word "gender" and replacing it with "sex, gender identity or expression" in relevant parts so as to read as follows:*

ARTICLE 9: HUMAN RIGHTS COMMISSION  
ART. 22, A.T.M., 5/12/93

*Section 2. Policy of the Town of Arlington*

- C. *It is the intention of this Bylaw that all persons be treated fairly and equally. The purpose of this Bylaw is to bring about the elimination of prejudice, intolerance, bigotry, unlawful discrimination, threats, coercion or intimidation based upon an individual's race, color, religious views, national origin, ~~gender sex~~, **gender identity or expression**, citizenship, age, ancestry, family/marital status, sexual orientation, disability, source of income, or military status, and the disorder occasioned thereby. Nothing in this Bylaw shall be construed as supporting or advocating any particular religious or political view or lifestyle.*
- D. *It shall be considered an unlawful practice under this Bylaw for any person to deny, interfere with, threaten or subject an individual to coercion or intimidation concerning equal access to and/or discrimination in employment, housing, education, recreation, services, public accommodation and public area where such denial, interference, threats, coercion, intimidation or unlawful discrimination against a person is based upon race, color, religious views, national origin, ~~gender sex~~, **gender identity or expression**, citizenship, age, ancestry, family/marital status, sexual orientation, disability, source of income, or military status.*

*Section 5. Functions, Powers & Duties of the Commission*

- A. *To initiate activities designed to educate and inform the Town about the effects of prejudice, intolerance, and bigotry through the following actions:*
  - 1. *To hold public hearings and public forums, make studies and surveys and to issue such publications and such results of investigations and research as, in its judgment, will tend to promote good will and minimize or eliminate discrimination because of race, color, religious views, national origin, ~~gender sex~~, **gender identity or expression**, citizenship, age, ancestry, family/marital status, sexual orientation, disability, source of income, or military status.*

## ARTICLE 19

## BYLAW AMENDMENT/ARLINGTON HUMAN RIGHTS COMMISSION EXECUTIVE DIRECTOR

**To see if the Town will vote to amend Title II, Article 9 of the Town Bylaws to modify and clarify the position of Executive Director to the Commission, including the conditions and process of appointment; or take any action related thereto.**

(Inserted at the request of the Arlington Human Rights Commission)

This article was inserted at the request of the AHRC in furtherance of a promise to examine the appropriateness of an AHRC "Executive Director" as a requirement of the AHRC's bylaw from the 2015 Town Meeting. It is my understanding that a representative of the AHRC shall present further information detailing their examination of the issue, but that their conclusions are as follows:

- The Executive Director position should be discretionary rather than mandatory; and
- The process for the appointment of an Executive Director when necessary, should be streamlined to be an appointment by the Town Manager with the consultation of the AHRC, rather than be an appointment of the Town Manager which considers the AHRC's recommendation and obtains approval of the Board of Selectmen.

I note that the AHRC may also be seeking to have the Executive Director report directly to the AHRC, rather than the Town Manager. While an Executive Director may serve the AHRC in much the same way other boards and commissions work with full-time Town employees, per Sec. 15 of the Town Manager Act, the Town Manager is the supervisor of all Town personnel not explicitly excluded under the Act. As such, should the Board move for favorable action on the AHRC's proposal, I suggest the following as a template for a vote, which maintains that any Executive Director would report to the Town Manager as the current Bylaw states:

VOTED, that Title II, Article 9, Sections 3 be and is hereby amended by striking the word "shall" and replacing it with "may" in the second paragraph of subsection B.1 and adding the words "with consultation by the Commission" at the end of the second paragraph of same; and further striking the first full sentence of subsection D so as to read in relevant parts as follows:

ARTICLE 9: HUMAN RIGHTS COMMISSION

ART. 22, A.T.M., 5/12/93

*B. Appointment & Terms of Office of Commission Members*

1. *The Commission shall consist of thirteen (13) members, five of whom will be appointed by the school committee, four by the Town Manager subject to the approval of the Board of Selectmen and four by the Town Moderator. The term of office shall be for three years except two of the initial appointments of the school committee shall be for a term of one year, one of the initial appointments of the Manager and Moderator respectively shall be for one year, two of the initial appointments of the School Committee shall be for two years, one of the appointments of the Manager and Moderator respectively shall be for two years.*

*The members shall be sworn to the faithful performance of their duties, and shall serve until their successors are appointed and sworn. There ~~shall~~ may be an Executive Director if determined necessary by the Commission, whom shall be appointed by the Town Manager with consultation by the Commission.*

- D. *Executive Director. ~~Before appointing an Executive Director, the Town Manager shall obtain the approval of the Board of Selectmen and consider the recommendation of the Commission.~~ The Executive Director shall be an employee of the Town and report to the Town Manager. The prospective Executive Director shall have demonstrable experience in human and civil rights, as well as proven ability to work cooperatively in a diverse community.*

## ARTICLE 20

## BYLAW AMENDMENT/ARLINGTON HUMAN RIGHTS COMMISSION CHAIRPERSONS

To see if the Town will vote to amend Title II, Article 9 of the Town Bylaws (Section 3.E.1 Executive Director, Officers, Quorum and Adoption of Rules and Regulations) to read, "The Commission shall elect a Chairperson or two Co-Chairpersons from among its members at the first meeting of every year"; or take any action related thereto.

(Inserted at the request of the Arlington Human Rights Commission)

This article was also inserted at the request of the AHRC to amend their bylaws to allow for the creation of co-chair positions rather than the current bylaw requirement of a single chairperson. While the proposal is straightforward, I expect a representative of the AHRC to present further details at the Board's hearing.

Should the Board decide to support this article, a motion would read as follows:

*VOTED, that Title II, Article 9, Section 3.E.1 be and is hereby amended by adding the words "or two Co-Chairpersons" to the first sentence of the first paragraph and "Co-Chairpersons" to the second paragraph so to read as follows:*

### *E. Officers, Quorum, and Adoption of Rules and Regulations*

- 1. The Commission shall elect a Chairperson or two Co-Chairpersons from among its members at the first meeting each year. The Commission shall endeavor to rotate the election of a Chairperson each year thereafter.*

*The Chairperson or Co-Chairpersons shall preside over the meetings of the Commission.*

**ARTICLE 21            BYLAW AMENDMENT/ARLINGTON COMMISSION ON ARTS  
AND CULTURE MEMBERSHIP**

**To see if the Town will vote to amend Title II, Article 8 of the Town Bylaws to increase the number of members of the Arlington Commission on Arts and Culture from seven to nine; or take any action related thereto.**

(Inserted at the request of the Arlington Commission on Arts and Culture)

By vote on January 7, 2016, the Arlington Commission on Arts and Culture ("ACAC") sought this article to expand their membership as set forth in Title II, Article 8, Section 1 of the Town Bylaws. I expect ACAC will provide further details at hearing on the rationale for adding two additional members to the Commission, as well as the appointing authority or authorities for such new members.

**ARTICLE 25            BYLAW/DEMOLITION BY NEGLECT OF HISTORIC  
BUILDINGS**

**To see if the Town will vote to adopt a general bylaw to prevent the loss of historic buildings from neglect leading to irrevocable deterioration; or take any action related thereto.**

(Inserted at the request of Carol Kowalski and ten registered voters)

This article comes via resident petition and my understanding is that its proponent will present further details at hearing. However, it should be noted that several communities in Massachusetts, including the Town of Lexington have formulated bylaws to prevent property owners from circumventing local historic preservation regulations by allowing their properties to fall into neglect and essentially become blighted properties. I anticipate that a draft motion would define "historic buildings" as those on the inventory of historically significant properties, and therefore include properties under the jurisdiction of either the Arlington Historic Districts Commission or the Historical Commission.

## ARTICLE 28

## VOTE/AUTHORIZING COMMUNITY CHOICE AGGREGATION

**To see if the Town will authorize the Board of Selectmen to commence a Community Choice Aggregation Program (CCA) and contract for electric supply as authorized by M.G.L. 164, Section 134, and through CCA decrease greenhouse gas emissions from the generation of electricity for Arlington residents and businesses by pursuing an increased amount of Class I designated renewable energy than is required by the Massachusetts Renewable Portfolio Standard (RPS); or to take any other action relative thereto.**

(Inserted at the request of the Town Manager)

Article 28 seeks Town Meeting's authorization to enter into a Community Choice Electrical Aggregation (CCA) agreement with a broker (the "aggregator") on behalf of the Town of Arlington to provide electricity services for Town residents and business owners. In short, a CCA offers Town residents the option of continuing to use Eversource as their electricity supplier (or their current alternative energy supplier) or the Town-selected provider. In this instance, the Town specifically contemplates utilizing a Metropolitan Area Planning Council ("MAPC") procurement to contract with Good Energy, a national energy consulting firm, with simultaneous purposes of providing competitive electricity rates and increasing the share of Arlington electricity derived from renewable energy sources.

By way of background, the Commonwealth enacted c. 164 in 1997 as a means of increasing competition in the utility industry. At this juncture, over seventeen (17) Massachusetts municipalities have both authorized CCA and developed plans approved by the Department of Public Utilities (DPU), with dozens more communities, including Brookline and Burlington recently authorizing CCA and working on their plans. Further, over time the goals of CCA competition have expanded to encompass not only include competitive price and stability considerations, but social considerations as well such as reducing greenhouse gas and pollutant emissions by entering CCA agreements with brokers and companies with attractive renewable energy portfolios. While markets are subject to change, it is the Town's expectation that the anticipated CCA agreement would simultaneously pursue lower priced and greener electricity.

It must be stressed that if CCA is adopted and implemented, individual residents and businesses would both be permitted to opt-out of the aggregation without penalty before aggregation takes effect, regardless of whether they elect to use Eversource or another



competitive supplier. Furthermore, while the MAPC procurement will streamline the process for Arlington, Town Meeting approval is only the first step in aggregation. As noted above, the Town's CCA agreement must be approved by DPU following at least one additional public hearing to vet the agreement. Town departments, officials, residents and other stakeholders will have ample opportunity to ensure the end CCA service is suitable for Arlington before electricity consumers have to make any choices. While there are modest variations, the complete process is generally as follows:

1. Vote to Authorize CCA at Town Meeting.
2. Issue a Request for Proposals for an Aggregator.<sup>1</sup>
3. Develop a CCA Plan with Aggregator in Consultation with the Department of Energy Resources.
4. Review of the CCA Plan by Town Manager, Board of Selectmen and Consumers.
5. Vote on the CCA Plan by Board of Selectmen for submittal to DPU.
6. Submit the Plan for DPU Approval
7. DPU conducts a Hearing
8. Issue the RFP for Competitive Suppliers
9. Selection of Competitive Supplier by Town Manager
10. Notification of Enrollment for Eligible Consumers.
11. Opt-Out Period (30 days prior to first service date).
12. Transfer of Participating Consumers to the Selected Competitive Suppliers

Should the Board support putting CCA before Town Meeting, I respectfully recommend the following for positive action:

*VOTED: Pursuant to M.G.L. c. 164 sec. 134, Town Meeting hereby authorizes the appropriate Town officials and departments to commence the process of developing a Community Choice Electrical Aggregation Program, and to research, develop and participate in a contract, or contracts to aggregate the electricity load of the residents and businesses in the Town of Arlington and for other related services, independently, or in joint action with other municipalities, and authorize the Town Manager to execute all documents necessary accomplish the same.*

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<sup>1</sup> Here, Arlington proposes to use the MAPC's RFP.

## **REFERENCE MATERIAL: RELEVANT TOWN BYLAWS**

### **Excerpts from the Town Bylaws:**

#### **TITLE II COMMITTEES AND COMMISSIONS**

##### **Article 9. Human Rights Commission**

ART. 22, A.T.M., 5/12/93.

#### **Section 2. Policy of the Town of Arlington**

- A. It is the intention of the Town of Arlington ("Town") to establish a Commission to advance issues related to the fair and equal treatment of individuals, and to create a mechanism for addressing complaints arising out of these issues.
- B. It is the policy of the Town to protect every individual in the enjoyment and exercise of his/her human and civil rights and to encourage and bring about mutual understanding and respect among all people within the Town.
- C. It is the intention of this Bylaw that all persons be treated fairly and equally. The purpose of this Bylaw is to bring about the elimination of prejudice, intolerance, bigotry, unlawful discrimination, threats, coercion or intimidation based upon an individual's race, color, religious views, national origin, gender, citizenship, age, ancestry, family/marital status, sexual orientation, disability, source of income, or military status, and the disorder occasioned thereby. Nothing in this Bylaw shall be construed as supporting or advocating any particular religious or political view or lifestyle.
- D. It shall be considered an unlawful practice under this Bylaw for any person to deny, interfere with, threaten or subject an individual to coercion or intimidation concerning equal access to and/or discrimination in employment, housing,

education, recreation, services, public accommodation and public area where such denial, interference, threats, coercion, intimidation or unlawful discrimination against a person is based upon race, color, religious views, national origin, gender, citizenship, age, ancestry, family/marital status, sexual orientation, disability, source of income, or military status.

### Section 3. Establishment of a Human Rights Commission

#### B. Appointment & Terms of Office of Commission Members

1. The Commission shall consist of thirteen (13) members, five of whom will be appointed by the school committee, four by the Town Manager subject to the approval of the Board of Selectmen and four by the Town Moderator. The term of office shall be for three years except two of the initial appointments of the school committee shall be for a term of one year, one of the initial appointments of the Manager and Moderator respectively shall be for one year, two of the initial appointments of the School Committee shall be for two years, one of the appointments of the Manager and Moderator respectively shall be for two years.

The members shall be sworn to the faithful performance of their duties, and shall serve until their successors are appointed and sworn. There shall be and Executive Director appointed by the Town Manager.

- D. Executive Director Before appointing an Executive Director, the Town Manager shall obtain the approval of the Board of Selectmen and consider the recommendation of the Commission. The Executive Director shall be an employee of the Town and report to the Town Manager. The prospective Executive Director shall have demonstrable experience in human and civil rights, as well as proven ability to work cooperatively in a diverse community.

Subject to the direction of the Commission, the Executive Director shall be responsible for the overall administration of the Commission's activities and shall serve as its executive officer. The Executive Director shall have the power and duty to initiate activities designed to educate and inform the Town about the effects of prejudice, intolerance, and bigotry; to receive and/or initiate complaints and investigations of discriminatory practices as defined by local, state, and federal law; to report his/her findings to the Commission; and to attempt mediation of any complaint alleging discrimination under applicable local, state, and federal law when there is cause for such complaint.

E. Officers, Quorum, and Adoption of Rules and Regulations

1. The Commission shall elect a Chairperson from among its members at the first meeting each year. The Commission shall endeavor to rotate the election of a Chairperson each year thereafter.

Section 5. Functions, Powers & Duties of the Commission

The function of the Commission shall be to implement the policy of this Bylaw by the exercise of the following powers and duties:

- A. To initiate activities designed to educate and inform the Town about the effects of prejudice, intolerance, and bigotry through the following actions:
  1. To hold public hearings and public forums, make studies and surveys and to issue such publications and such results of investigations and research as, in its judgment, will tend to promote good will and minimize or eliminate discrimination because of race, color, religious views, national origin, gender, citizenship, age, ancestry, family/marital status, sexual orientation, disability, source of income, or military status.

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## **TITLE II COMMITTEES AND COMMISSIONS**

### **Article 8. Arlington Commission on Arts and Culture**

(ART. 21, ATM – 05/17/93), (ART. 15, ATM – 04/30/14)

#### **Section 1. Establishment of Arlington Commission on Arts and Culture**

There is hereby established an Arlington Commission on Arts and Culture, which shall consist of seven members all of whom shall be residents of the Town.

Six members, one of whom shall be a member of the Vision 2020 Culture and Recreation Task Group, shall be appointed by the Town Manager subject to the approval of the Board of Selectmen and one member shall be appointed by the School Committee. The respective appointing authorities shall consider for appointment, but need not appoint, persons recommended by the Vision 2020 Culture and Recreation Task Group for their initial appointments and, thereafter, persons recommended by the Commission. Two of the initial appointments by the town Manager shall be for a three year term, two for a two year term and two for a one year term. The initial appointment by the School Committee shall be for a three year term. After the initial appointment each term shall be for three years. Each member shall serve until their successors are appointed and sworn. Unexpired terms shall be filled in the same manner as the initial appointment. The Commission shall organize for the conduct of its affairs and shall elect its own officers. Members may be removed by the appointing authority upon request of a majority of the Commission for three or more unexcused absences from Commission meetings in any calendar year.

**REFERENCE MATERIAL FROM THE GENERAL LAWS**

**LOAD AGGREGATION PROGRAM**

**M.G.L. c. 164 § 134(a)**

Section 134 (a) Any municipality or any group of municipalities acting together within the commonwealth is hereby authorized to aggregate the electrical load of interested electricity consumers within its boundaries; provided, however, that such municipality or group of municipalities shall not aggregate electrical load if such are served by an existing municipal lighting plant. Such municipality or group of municipalities may group retail electricity customers to solicit bids, broker, and contract for electric power and energy services for such customers. Such municipality or group of municipalities may enter into agreements for services to facilitate the sale and purchase of electric energy and other related services. Such service agreements may be entered into by a single city, town, county, or by a group of cities, towns, or counties.

A municipality or group of municipalities which aggregates its electrical load and operates pursuant to the provisions of this section shall not be considered a utility engaging in the wholesale purchase and resale of electric power. Providing electric power or energy services to aggregated customers within a municipality or group of municipalities shall not be considered a wholesale utility transaction. The provision of aggregated electric power and energy services as authorized by this section shall be regulated by any applicable laws or regulations which govern aggregated electric power and energy services in competitive markets.

A town may initiate a process to aggregate electrical load upon authorization by a majority vote of town meeting or town council. A city may initiate a process to authorize aggregation by a majority vote of the city council, with the approval of the mayor, or the city manager in a Plan D or Plan E city. Two or more municipalities may as a group initiate a process jointly to authorize aggregation by a majority vote of each particular municipality as herein required.

Upon an affirmative vote to initiate said process, a municipality or group of municipalities establishing load aggregation pursuant to this section shall, in consultation with the department of energy resources, pursuant to section 6 of chapter 25A, develop a plan, for review by its citizens, detailing the process and consequences of aggregation. Any municipal load aggregation plan established pursuant to this section shall provide for universal access, reliability, and equitable treatment of all classes of customers and shall meet any requirements established by law or the department concerning aggregated service. Said plan shall be filed with the department, for its final review and approval, and shall include, without limitation, an organizational structure of the program, its operations, and its funding; rate setting and other costs to participants; the methods for entering and terminating agreements with other entities; the rights and responsibilities of program participants; and termination of the program. Prior to its decision, the department shall conduct a public hearing.

Participation by any retail customer in a municipal or group aggregation program shall be voluntary. If such aggregated entity is not fully operational on the retail access date, any ratepayer to be automatically enrolled therein shall receive basic service unless affirmatively electing not to do so. Within 30 days of the date the aggregated entity is fully operational, such ratepayers shall be transferred to the aggregated entity according to an opt-out provision herein. Following adoption of aggregation through the votes specified above, such program shall allow any retail customer to opt-out and choose any supplier or provider such retail customer wishes. Once enrolled in the aggregated entity, any ratepayer choosing to opt-out within 180 days shall do so without penalty and shall be entitled to receive basic service as if he was originally enrolled therein. Nothing in this section shall be construed as authorizing any city or town or any municipal retail load aggregator to restrict the ability of retail electric customers to obtain or receive service from any authorized provider thereof.

It shall be the duty of the aggregated entity to fully inform participating ratepayers in advance of automatic enrollment that they are to be automatically enrolled and that they

have the right to opt-out of the aggregated entity without penalty. In addition, such disclosure shall prominently state all charges to be made and shall include full disclosure of the basic service rate, how to access it, and the fact that it is available to them without penalty. The department of energy resources shall furnish, without charge, to any citizen a list of all other supply options available to them in a meaningful format that shall enable comparison of price and product.

(b) A municipality or group of municipalities establishing a load aggregation program pursuant to subsection (a) may, by a vote of its town meeting or legislative body, whichever is applicable, adopt an energy plan which shall define the manner in which the municipality or municipalities may implement demand side management programs and renewable energy programs that are consistent with any state energy conservation goals developed pursuant to chapter 25A or chapter 164. After adoption of the energy plan by such town meeting or other legislative body, the city or town clerk shall submit the plan to the department to certify that it is consistent with any such state energy conservation goals. If the plan is certified by the department, the municipality or group of municipalities may apply to the Massachusetts clean energy technology center for monies from the Massachusetts Renewable Energy Trust Fund, established pursuant to section 9 of chapter 23J, and receive, and if approved, expend moneys from the demand side management system benefit charges or line charges in an amount not to exceed that contributed by retail customers within said municipality or group municipalities. This will not prevent said municipality or municipalities from applying to the Massachusetts clean energy technology center for additional funds. If the department determines that the energy plan is not consistent with any such state-wide goals, it shall inform the municipality or group of municipalities within six months by written notice the reasons why it is not consistent with any such state-wide goals. The municipality or group of municipalities may re-apply at anytime with an amended version of the energy plan.

The municipality or group of municipalities shall not be prohibited from proposing for certification an energy plan which is more specific, detailed, or comprehensive or which



covers additional subject areas than any such state-wide conservation goals. This subsection shall not prohibit a municipality or group of municipalities from considering, adopting, enforcing, or in any other way administering an energy plan which does not comply with any such state-wide conservation goals so long as it does not violate the laws of the commonwealth.

The municipality or group of municipalities shall, within two years of approval of its plan or such further time as the department may allow, provide written notice to the department that its plan is implemented. The department may revoke certification of the energy plan if the municipality or group of municipalities fails to substantially implement the plan or if it is determined by independent audit that the funds were misspent within the time allowed under this subsection.

**REFERENCE MATERIAL: OTHER MATERIALS ATTACHED**



# MCAD ADVISORY: AN ACT RELATIVE TO GENDER IDENTITY

On July 1, 2012, Massachusetts General Laws Chapter 151B was amended to prohibit discrimination in employment, housing, lending, credit and mortgage services based on an individual's gender identity. The Massachusetts Commission Against Discrimination (MCAD) enforces G.L. c. 151B and has developed this advisory to educate the public about discrimination based on gender identity, to inform individuals of their rights, and to assist employers, providers of housing and mortgage services and other entities in understanding their obligations under the law.

## I. Introduction

Since 2001, the MCAD has held that discrimination against transgender individuals could constitute sex and disability discrimination. In Millett v. Lutco, 23 Mass. Discrimination Law Rptr. 231 (2001), the MCAD's Commissioners, acting as the Full Commission, issued an Order stating that discrimination against a transgender individual constituted illegal sex discrimination. In Jette v. Honey Farms Mini Market, 23 Mass. Discrimination Law Rptr. 229 (2001), the Full Commission, issued another Order reasoning that transgender individuals with an underlying diagnosis of gender dysphoria may have a claim for disability discrimination under G.L. c. 151B. The Full Commission further recognized that an employer may be liable for discrimination based on sexual orientation if it perceives a transgendered individual to be homosexual, and discriminates based on that belief. Millett v. Lutco, *supra*. Pursuant to these decisions, the Commission has routinely investigated and issued findings in discrimination cases filed by transgender individuals under the Fair Employment Practices Act, G.L. c. 151B and the Massachusetts Public Accommodation Act, G.L. c. 272. For more information, see section IV.

On the federal side, the U.S. Equal Employment Opportunity Commission (EEOC) has taken steps to ensure that the rights of LGBT individuals are protected under Title VII—the federal law which prohibits employment discrimination. In 2012, the EEOC ruled that discrimination against a transgender individual, based on transgender identity specifically and gender identity generally, is prohibited under Title VII's sex discrimination provision.<sup>1</sup> In April 2015, the EEOC ruled that restricting a transgender employee from using a restroom facility consistent with the employee's gender identity and refusing to use the transgender employee's preferred name and gender pronoun constituted sex discrimination and sex-based harassment under Title VII.<sup>2</sup>

## II. The Law's coverage

This new law amended G.L. c. 151B to include gender identity as a protected class in employment, housing, credit and mortgage services. In addition to prohibiting discrimination based on gender identity, the new law expanded the definition of a hate crime to include criminal acts motivated by prejudice towards transgender individuals and prohibited discrimination based on gender identity in public schools. G.L. c. 22C, § 32 (hate crimes); G.L. c. 71, § 89 (public schools); G.L. c. 76, §§ 5, 12B (public schools). These latter provisions of the Act are not enforced by the MCAD.<sup>3</sup> The areas in which gender identity discrimination is enforced by the MCAD are described below.

<sup>1</sup> Macy v. Dep't of Justice, EEOC Appeal No. 0120120821 (April 20, 2012).

<sup>2</sup> Lusardi v. McHough, EEOC Appeal No. 0120133395 (April 1, 2015).

<sup>3</sup> In certain circumstances, the victim of a hate crime may bring an action at the MCAD. For example, if an employee is the victim of a gender-identity based hate crime perpetrated by his/her supervisor in the context of employment, this could constitute discrimination and/or harassment.

## A. Employment

It is an unlawful discriminatory practice for an employer,<sup>4</sup> or an employee or agent thereof, 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. 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. Examples of discrimination in employment include the following:

- An employee takes a leave of absence to undergo transition from male to female, and upon her return from leave, her employer reduces her hours, downsizes her office, and demotes her.
- A male job applicant is rejected solely because the employer learns, after checking his employment references, that the applicant identified as a woman in previous employment.
- A male employee is constantly harassed or made fun of by his supervisors for mannerisms perceived to be feminine.
- A transgender employee is consistently excluded from office meetings, office parties, and work-related events to which all other employees are invited.
- A transgender employee notifies his employer that his co-workers persistently mock and deride him because of his gender-identity, and the employer fails to take prompt remedial action to stop the harassment.

In evaluating a claim of hostile work environment based on gender identity, the Commission considers the employer's evidence of its support for the employee. In a case where the company president met with all staff, communicated that the employer would not tolerate discrimination or harassment of a transgender employee and directed that the employee be treated with respect; disciplined an employee who sought not to interact with the transgender employee; changed company records to reflect the employee's name change; provided a leave of absence for surgeries; assisted the transgender employee in obtaining insurance coverage for the surgeries; arranged for the employee's use of a private bathroom prior to the completion of her sexual reassignment surgery and welcomed the employee's use of the women's restroom following gender reassignment surgery, the Commission found the Complainant was not subjected to a hostile work environment. *Millett and MCAD v. Lutco, Inc.*, 30 Mass. Discrimination Law Rptr. 77, 85 (2008) (holding that "matters that might be egregious in isolation appear less so in the context of the supportive actions which the Company took on Complainant's behalf"). The Commission has set forth a list of best practices as guidance for employers in Section IV.

## B. Housing

With the exception of certain categorical statutory exclusions, G.L. c. 151B makes it an unlawful discriminatory practice for an owner, lessor, managing agent or other person having the right to sell, rent or lease or approve the sale, rental or lease of housing, to refuse to sell, rent, lease, approve the sale, rental or lease, or otherwise deny or withhold housing, or an interest therein, or otherwise discriminate against any person because of his or her gender identity. In addition, real estate brokers, real estate salespersons, and employees or agents thereof, may not discriminate on the basis of gender identity. Prohibited behavior includes all aspects of real property transactions, such as the refusal to show, rent or sell real property that is

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<sup>4</sup>An employer is generally defined under G.L. c. 151B as one that employs six or more persons. Public employers are included regardless of the number of people employed.

available for sale or lease, and the refusal to provide services or make repairs or improvements for any tenant or lessee based on gender identity.<sup>5</sup> Examples of discrimination in housing include the following:

- A landlord, whose apartment does not fall within any of the statutory exclusions in G.L. c. 151B, refuses to show a transgender male an apartment for rent for reasons related to the prospective tenant's gender identity.
- A landlord adversely changes the terms and conditions of a transgender tenant undergoing gender reassignment therapy, resulting in the tenant's eviction.
- A realtor steers a transgender individual away from an apartment because he does not feel that the individual would "be a good fit for the neighborhood."
- The owner of a commercial property refuses to lease the property to a transgender rights group because of prejudice toward transgender individuals.

#### C. Credit and mortgage services

Banks or other lending institutions may not discriminate against an applicant for credit on the basis of gender identity. Examples of discrimination in lending and credit include the following:

- A mortgage broker steers a transgender borrower, who is eligible for prime loans, into a sub-prime loan with high monthly payments and interest rate and excessive prepayment penalties.
- A credit card company refuses to issue a credit card to a transgender male because he previously identified as a female.

#### D. Retaliation

It is unlawful to retaliate against an individual who has opposed a discriminatory practice or filed a charge of discrimination, or who has testified, assisted or participated in a Commission investigation, proceeding or hearing. It is also unlawful for an employer to issue a negative reference about an employee in retaliation for that employee's protected activity, such as formally or informally charging the employer with discrimination.

### III. Definitions and Proof

#### A. Definition of Gender Identity

G.L. c. 151B 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 identity is an individual's sense of being male or female.<sup>6</sup> The way an individual expresses his or her gender identity is frequently called "gender expression," and may or may not conform to social stereotypes associated with a particular gender.<sup>7</sup>

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<sup>5</sup> The U.S. Department of Housing and Urban Development regulations explicitly require that eligibility determinations for HUD-assisted or insured housing must be made without regard to actual or perceived gender identity. They also preclude owners and operators of HUD-assisted housing or housing with financing insured by HUD from inquiring about the sexual orientation or gender identity of an applicant for, or occupant of, a dwelling. See, Final Rule issued February 3, 2012; (codified at 24 C.F.R. pts. 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982).

<sup>6</sup> U.S. Office of Personnel Management: Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, <http://www.opm.gov/diversity/Transgender/Guidance.asp>.

<sup>7</sup> Id.

The law protects individuals who are transgender. Transgender individuals are people whose gender identity is different from the sex assigned to them at birth.<sup>8</sup> Transition is the process by which a transgender person goes from presenting as one gender to another.<sup>9</sup> For some, the process of transition may be lengthy. Some transgender individuals seek medical treatment such as counseling, hormone therapy, electrolysis, and reassignment surgery. Some may not pursue medical treatment or gender reassignment surgery. The statutory definition of gender identity does not require the individual to have undergone transitional surgery or intend to undergo surgery, nor does it require evidence of past medical care or treatment. Gender identity is distinguished from sexual orientation.<sup>10</sup> Sexual orientation is based on the direction of one's physical and romantic attractions, which may be identified as heterosexual, homosexual, lesbian or bi-sexual. Gender identity refers to a person's internal sense of their own gender its expression.

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. Prior to the Act, courts and the MCAD issued decisions concluding that gender stereotypes may be the source of unlawful bias.<sup>11</sup> For example, discrimination against a person designated as female at birth and whose identity is female but who does not act, dress, or groom herself in a manner consistent with feminine stereotypes, is unlawful discrimination based on sex and gender identity.

#### B. Proof Requirements

A person may establish gender-related identity through medical history, medical/psychiatric care or treatment of the gender-related identity; by consistent and uniform assertion of the gender-related identity or by any other evidence that one's gender-related identity is sincerely held as part of one's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose, see *infra* Section III C. Examples of the type of evidence which will assist the Commission in investigating claims of gender-identity discrimination are:

- Sworn statements by a Complainant and/or witnesses relating to the Complainant's sincerely held core gender-related identity;
- Sworn statements from the Complainant and/or witnesses relating to the Complainant's routine activities and conduct, such as dress, grooming, actions and use of gendered pronouns;
- Sworn statements and/or medical records from medical and/or mental health professionals involved in the treatment/ transition of individuals seeking, in the process of, or who have completed gender reassignment;
- Evidence of hormone use, sex reassignment surgeries, and/or other procedures that alter appearance;

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<sup>8</sup> *Id.* An individual who was assigned the male sex at birth but who identifies as female is a transgender woman. Likewise, a person assigned the female sex at birth but who identifies as male is a transgender male.

<sup>9</sup> *Id.*

<sup>10</sup> *Lie v. Sky Publishing Corp.*, 2002 WL 31492397 (Mass. Super. Ct. 2002).

<sup>11</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (gender-based remarks reflecting view that female manager was not sufficiently feminine are evidence of gender discrimination); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1<sup>st</sup> Cir. 1999) (Court stated, in dicta, that just as a female may claim gender discrimination for being viewed as failing to meet stereotypical expectations of femininity, a male may base a claim of gender discrimination on evidence that he was viewed as not conforming to stereotypical expectations of masculinity); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002) (an employer who makes employment decisions based on stereotypes about sexual roles or allows the creation of a hostile or abusive work environment based on sexual stereotypes, may be liable under Title VII's prohibition of discrimination on the basis of sex); *Ianetta v. Putnam Investments, Inc.*, 142 F. Supp. 2d 131 (D. Mass. 2002) (discrimination against a male for failing to conform to gender stereotypes); *Connor v. Hub Folding Box Co.*, 15 Mass. Discrimination Law Rptr. 1494 (1993), *aff'd*, *Hub Folding Box Co., Inc. v. Mass. Comm'n Against Discrimination*, 52 Mass. App. Ct. 1104 (Rule 1:28 decision, July 12, 2001) (gender stereotype that a woman with a tattoo was a prostitute, on drugs, or from a "broken home" reflects gender bias).

- Evidence of a legal name change, revision of birth certificate, passport, or social security card, re-designation of gender on a Massachusetts Department of Transportation Registry of Motor Vehicles form, or other legal documents reflecting gender identity.

#### C. Meaning of "Sincerely Held and Part of a Person's Core Identity"/Improper Purpose

The courts have yet to give significant guidance on how to interpret the requirement that gender identity be "sincerely held and part of a person's core identity." The considerations bearing on this requirement will necessarily be developed as the case law evolves; however, evidence of consistent conduct over a period of time is likely to support a claim of sincerely held core gender identity.

The law excludes from its coverage a gender-related identity that is "asserted for any improper purpose," which would include 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 would constitute improper unlawful purposes.

#### D. Restrooms and Sex-Segregated Facilities

No provision of G.L. c. 151B prohibits restrooms from being designated by gender. Prohibiting an individual from using a restroom or other sex-segregated facility consistent with his/her gender identity may be evidence of discriminatory animus. Requiring an employee to provide identification or proof of any particular medical procedure (including gender reassignment surgery) in order to access gender designated facilities, may also evidence discriminatory bias.

### IV. Transgender Protection under the Massachusetts Public Accommodation Act and the Massachusetts Fair Educational Practices Law

While the Act did not explicitly amend the Public Accommodations Act, G.L. c. 272, § 98 and the Fair Educational Practices Act, G.L. c. 151C, MCAD investigates and adjudicates claims brought pursuant to these statutes, where there is evidence of discrimination based on gender, disability and/or perceived sexual orientation. As described in Section I, the Commission has held that discrimination against transgender individuals may be prohibited under the proscriptions against gender and disability discrimination. *Millett v. Lutco*, supra.; *Jette v. Honey Farms Mini Market*, supra. (gender dysphoria can constitute a disability). The facts of a particular case may also support a claim of discrimination based on sexual orientation. *Id*.

Examples of discrimination in a place of public accommodation are:

- A restaurant refuses to seat a group of transgender patrons on the grounds that "this is a quiet restaurant," and "you will draw too much attention from our other patrons."
- A hotel refuses to host a conference of transgender individuals.

Examples of discrimination in an educational institution are:

- A graduate school refuses to admit a male transgender applicant when it learns from the applicant's educational records that he previously identified as a female.<sup>12</sup>
- A graduate school refuses to allow a transgender female graduate student to serve as a resident assistant in a female dormitory because she previously identified as a male.

<sup>12</sup> The Fair Educational Practices Act prohibits discrimination against any person seeking admission to a vocational training institution or to a program or course of study leading to a degree, beyond a bachelor's degree, because of sex or to discriminate against any student admitted to a vocational training institution in providing benefits, privileges, and placement services.

## V. Best Practices

The Commission encourages employers, housing providers, and entities subject to the law to foster an inclusive and welcoming environment by following best practices recommended by the American Bar Association<sup>13</sup> which may include 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;
- Avoid gender-specific dress codes and permit employees to dress in a manner consistent with their gender identity;
- Provide employees access to any sex-segregated facility, i.e. bathrooms, locker room facilities, based on the employee's stated gender identity;
- Incorporate in any diversity, anti-discrimination, and anti-harassment trainings information about transgender employees, whether or not there are currently transgender employees, or employees who have self-identified as transgender, at the workplace;
- Employers should investigate and take appropriate remedial action when on notice of harassing or discriminatory conduct in the workplace;
- Landlords or property owners should take appropriate remedial action to ensure cessation of harassment by other tenants based on gender identity.

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<sup>13</sup> American Bar Association's Commission on Sexual Orientation and Gender Identity, "Best Practices for Promotion LGBT Diversity" published 2011.