



Massachusetts

Overview of Legal Issues
For Gay Men, Lesbians, Bisexuals
and Transgender People

September 2018

This document is intended to provide general information only and cannot provide guidance or legal advice as to one's specific situation. Moreover, the law is constantly changing and evolving and this publication is based upon the information that is known to us as of this printing. For guidance on your particular situation, you must consult a lawyer. You should not act independently on this information. The provision of this information is not meant to create an attorney-client relationship. Check our website, www.glad.org, for more information.

If you have questions about this publication, other legal issues or need lawyer referrals, contact **GLAD Answers** at www.GLADAnswers.org or by phone weekdays between 1:30 and 4:30 pm at (800) 455-GLAD (4523).

Contents

■ ANTI-DISCRIMINATION LAW	1
Employment	3
Public Accommodations	6
Housing	7
Credit and Services	8
Pursuing a Complaint	9
■ FAMILY LAW	16
Marriage	16
Other Legal Protections for Same-Sex Couples	18
Domestic Partnership	21
Adoption	23
Custody and Visitation	28
Domestic Violence	31
■ HATE CRIMES, SEX LAWS & POLICE	35
Hate Crimes & Violence	35
Criminal Sex Laws	43
Police Harassment	47
■ STUDENTS' RIGHTS	50
Harassment and Discrimination at School	50
Transgender Students	54
Gay / Straight Alliances	55
Commission on Gay and Lesbian Youth	56
Conversion Therapy	57

ANTI-DISCRIMINATION LAW

Does Massachusetts have an anti-discrimination law protecting LGBT individuals from discrimination?

Yes. Since 1990, Massachusetts has prohibited discrimination based on sexual orientation in public and private employment, housing, public accommodations, credit, and services.¹ Other areas of the law (e.g. education and insurance) also prohibit discrimination based on sexual orientation.

Recently, these laws have been extended to protect transgender people. In 2011, Governor Deval Patrick signed a historic executive order prohibiting discrimination based on gender identity and expression in state employment.² In 2012, Massachusetts amended its anti-discrimination laws to prohibit discrimination based on gender identity in public and private employment, housing, credit, education, and services—but not public accommodations. Finally, in 2016, Massachusetts passed the long-awaited transgender public accommodations bill, protecting transgender people from discrimination in restaurants, libraries, hotels, malls, public transportation, and beyond.³

Do the laws also protect people perceived to be LGBT?

Yes. Massachusetts non-discrimination law defines “sexual orientation” as “having an orientation for or *being identified as* having an orientation for heterosexuality, bisexuality or homosexuality.”⁴ This language has been interpreted to include discrimination based on perception. For example, if a person is fired because they are perceived to be gay, they may invoke the protection of the anti-discrimination law regardless of their actual orientation.

¹ See generally Mass. Gen. Laws, chap. 151B.

² Mass. Exec. Order No. 526 (Feb. 17, 2011), <http://www.glad.org/uploads/docs/news/ma-executive-order-526.pdf>.

³ Mass. Gen. Laws, chap. 272, secs. 92A, 98.

⁴ Mass. Gen. Laws, chap. 151B, sec. 3(6).

Similarly, the 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...⁵

Does it also protect people associated with LGBT individuals?

Most likely, yes.⁶ Furthermore, if a person is discriminated against because of their association with LGBT individuals or causes, it may be possible to show that the discrimination was because their employer or landlord believed that the person themselves was LGBT.

What kinds of discrimination do the anti-discrimination laws address?

The Massachusetts law prohibits discrimination in:

- EMPLOYMENT
- PUBLIC ACCOMMODATIONS
- HOUSING
- CREDIT
- SERVICES

⁵ Mass. Gen. Laws, chap. 4, sec. 7(59) (emphasis added).

⁶ See *Flagg v. AliMed, Inc.*, 466 Mass. 23 (2013) (holding that MA anti-discrimination law supports a claim of associational discrimination based on handicap). See also, *Supreme Judicial Court Affirms c. 151B’s Coverage Extends to Discrimination Based on Association*, Massachusetts Commission Against Discrimination (July 22, 2013) available at <http://www.mass.gov/mcad/docs/press-releases/2013-07-13-pr-sjc-affirms-assoc-with-disabled.pdf> (discussing MCAD’s longstanding interpretation that Chapter 151B extends to associational discrimination).

■ Employment

Who does the non-discrimination law apply to and what does it forbid?

The non-discrimination law applies to public or private employers who have at least 6 employees (not including the owner or certain family members). It forbids employers from refusing to hire a person, discharging them, discriminating against them “in compensation, or in terms, conditions or privileges of employment” because of sexual orientation or gender identity.⁷ 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).⁸

Example: after employer saw a male employee reading a gay newspaper, employer told him not to bring in “pornographic materials” and then disciplined the employee for making personal phone calls (but not others who made phone calls) and berated him for hanging out with his friends (although the meeting was work-related). When employee confronted employer for referring to him to another employee as a “faggot,” employee was fired. Discrimination was found and the employee was awarded damages.⁹

Example: where employee’s supervisor ridiculed employee as “pipe smoker” and “lollipop licker,” employee awarded damages for harassment.¹⁰

Example: where a gay male county corrections officer suffered persistent rumors in the workplace concerning his sexual

⁷ Mass. Gen. Laws, chap. 151B, sec. 4(1).

⁸ Mass. Gen. Laws, chap. 151B, secs. 4(3), 4(2).

⁹ *Fijal v. Kentucky Fried Chicken/JTN Food Serv., Inc.* 20 M.D.L.R. 45 (1998).

¹⁰ *Magane v. Corcoran Management Co.*, 18 M.D.L.R. 103 (1996).

orientation, slurs and shunning at work, undesirable work assignments and unsuccessful internal administrative remedies, a jury awarded him compensatory and punitive damages of \$623,000 plus interest and attorney's fees as the result of this harassment.¹¹

Are any employers exempt from the anti-discrimination law?

Employers with fewer than six employees are exempt.

Similarly, an employer, agency, or labor organization may defend against a discrimination claim by arguing that it is a “bona fide occupational qualification” of the particular job to have a non-LGBT employee fill it. Luckily, although this defense is technically allowed by law, it is strictly applied and very rarely successful.¹²

Religious institutions and their charitable and educational associations are sometimes exempt from the law.¹³ If a business is operated or supervised by a religious institution, it may preferentially hire members of its own religion, and may make employment decisions that “promote the religious principles for which it is established or maintained.”¹⁴ However, in a Massachusetts Superior Court decision brought by GLAD, *Barret v. Fontbonne Academy*,¹⁵ the court held that this exemption is only available to religious employers who explicitly limit admission or employment to members of their religion. Thus, unless a religious employer specifically restricts hiring or admission, it is not exempt from the law.

Does the Massachusetts law prohibit sexual harassment?

Yes. Sexual harassment is specifically prohibited under the law. Massachusetts law defines “sexual harassment” as:

¹¹ *Salvi v. Suffolk County Sheriff's Dept.*, 67 Mass. App. Ct. 596, 855 N.E. 2d 777 (2006).

¹² See, e.g. *Sarni Original Dry Cleaners, Inc. v. Cooke*, 388 Mass. 611, 447 N.E.2d 1228 (1983).

¹³ Mass. Gen. Laws, chap. 151B, sec. 1(5).

¹⁴ *Id.*

¹⁵ 33 Mass. L. Rep. 287 (Mass. Super. Ct. 2015).

“[S]exual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. Discrimination on the basis of sex shall include, but not be limited to, sexual harassment.”¹⁶

A claim of harassment can be pursued under Mass. Gen. Laws, chap. 151B, sec. 4 (16A).¹⁷ For employers who are not large enough to be subject to the jurisdiction of the Massachusetts Commission Against Discrimination (fewer than 6 employees), claims may be brought directly in court under Mass. Gen. Laws, chap. 214, sec. 1C.¹⁸

It is just as unlawful to sexually harass an LGBT individual as it is to harass anyone else. Some harassment is specifically anti-LGBT and may be more fairly characterized as harassment on the basis of sexual orientation or gender identity. Other harassment is sexual in nature and more appropriately categorized as “sexual harassment.” Both types of harassment can happen to the same person, and both are forbidden.¹⁹

Both the United States Supreme Court and several state courts have found same-sex sexual harassment to violate sexual harassment laws.²⁰

¹⁶ Mass. Gen. Laws, chap. 151B, sec. 1 (18).

¹⁷ Making it unlawful “for an employer, personally or through his agents, to sexually harass any employee.”

¹⁸ Setting forth right to be free from sexual harassment.

¹⁹ *Salvi v. Suffolk County Sheriff’s Dept.*, 67 Mass. App. Ct. 596, 855 N.E. 2d 777 (2006).

²⁰ *Compare Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 118 S.Ct. 998 (1998)(man can sue for sexual harassment by other men under federal sexual harassment laws); *Melnychenko v. 84 Lumber Co.*, 424 Mass. 285, 676 N.E.2d 45 (1997)(same-sex sexual harassment forbidden under state law).

■ Public Accommodations

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 Massachusetts non-discrimination laws.²¹ This definition is intentionally broad and may include a motel, restaurant, rest area, highway or hospital, as just a few examples.

What does the law say about discrimination in places of public accommodation?

Such places may not discriminate, or make any distinctions, or impose any restrictions because of a person’s sexual orientation or gender identity. “[W]hoever aides or incites” such discriminatory treatment may also be penalized under the law.²²

Example: women, who were attacked by a used car dealer when he realized they were lesbians, stated a claim under the law and were awarded damages in a settlement.

Example: two women who kissed on a bus and were then forced off of the bus by the driver were protected by the law because the driver did not order off of the bus a heterosexual couple who were kissing were awarded damages.²³

Example: couples who were forcibly ejected from a night club because customers were uncomfortable with their being physically affectionate were awarded damages.²⁴

²¹ Mass. Gen. Laws, chap. 272, sec. 92A.

²² Mass. Gen. Laws, chap. 272, sec. 98.

²³ *Rome v. Transit Express*, 19 Mass. Discrim. Law Rptr. (M.D.L.R.) 159 (1997), affirmed, 22 M.D.L.R. 88 (2000);

²⁴ *Stoll et al. v. State Street Stock Exchange, Inc.*, 18 M.D.L.R. 141 (1996).

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

In 2016, Massachusetts passed the transgender public accommodations law, making gender identity an explicitly protected class. This means that transgender people are protected against discrimination in public accommodations and may file a complaint against any person or entity perpetuating said discrimination.

■ **Housing**

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 housing business, including listing, buying, selling, renting, or financing housing, whether for profit or not.²⁵ Most often, these claims involve a refusal by an owner, landlord, or real estate broker to sell, lease, or even negotiate with a person about the housing they desire to obtain.²⁶ But other practices are forbidden, too, such as inquiring into or making a record of a person’s sexual orientation, gender identity, marital status,²⁷ or discriminating with respect to mortgage loans.²⁸

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].” If a building only has two apartments and the owner lives in one of them, the exemption may apply.²⁹ The other exemptions in this area of the law are fairly technical and relate to the

²⁵ Mass. Gen. Laws, chapter 151B, sec. 4 (3B, 3C, 6, 7).

²⁶ Mass. Gen. Laws, chap. 151B, sec. 4 (6)(a)(public housing), sec. 7 (private housing).

²⁷ Mass. Gen. Laws, chap. 151B, sec. 4(6)(c)(public housing), sec. 4(7)(private housing).

²⁸ Mass. Gen. Laws, chap. 151B, sec. 4(3B).

²⁹ Mass. Gen. Laws, chap. 151B, sec. 1 (11).

definitions of “housing development,” “contiguously located housing,” and “other covered housing accommodations.”

■ Credit and Services

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 sexual orientation, gender identity, or marital status.³⁰

Example: GLAD brought and settled a claim against a bank which refused to allow two men to apply jointly for a loan, claiming it was both sexual orientation and marital status discrimination;

Example: GLAD brought and settled a claim against a credit union which refused to allow a feminine appearing man from applying for a loan until he came back looking more masculine. A federal court ruled that this stated a claim of sex discrimination in violation of the credit non-discrimination laws.³¹

How does Massachusetts anti-discrimination law protect people receiving services?

Any person who furnishes services may not “deny or terminate such . . . services” because of sexual orientation, gender identity, or marital status.³² Many of those businesses which furnish services will also be subject to the public accommodations law.

³⁰ Mass. Gen. Laws, chap. 151B, sec. 4(14).

³¹ *Rosa v. Park West Bank*, 214 F.3d 213 (1st Cir. 2000).

³² Mass. Gen. Laws, chap. 151B, sec. 4(14).

■ Pursuing a Complaint

How do I file a complaint of discrimination under Massachusetts law?

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.

Boston: (617) 994-6000, One Ashburton Place, Room 601.

Springfield: (413) 739-2145.

Worcester: (508) 799-8010.

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

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 happens after a complaint is filed with the MCAD?

The MCAD assigns an investigator to look into your case. The parties may engage in limited “discovery” – a legal process which allows the other side to examine the basis of your claim and allows you to examine their justifications and defenses. This is conducted through written questions (interrogatories), requests for documents, and depositions. Ultimately, if the case is not dismissed for technical reasons, a Commissioner will decide if there is probable cause to credit your allegations.

If probable cause is found in an employment, credit, services, or public accommodations case, the case will be sent for “conciliation” or settlement proceedings. If negotiations fail to produce a settlement agreeable to all parties, the case proceeds further with more discovery and possibly a trial type hearing.

Even before probable cause is determined in a housing case, the MCAD may go to court to seek an order forbidding the respondent from selling, renting, or otherwise disposing of the property at issue while the case is pending. Once probable cause is found, the respondent must be notified of its right to have its case heard in court rather than at the MCAD.³³

If probable cause is found lacking, the case is over unless you appeal the “lack of probable cause” finding. There are special rules and time constraints on appeals within the MCAD that must be observed strictly.

What are the legal remedies the MCAD may award for discrimination if an individual wins their case there?

The remedies for a successful complainant may include, for employment cases, hiring, reinstatement or upgrading, backpay, restoration in a labor organization, and front pay. In housing cases,

³³ Mass. Gen. Laws, chap. 151B, sec. 5.

remedies may include damages (expenses actually incurred because of unlawful action related to moving, storage, or obtaining alternate housing) and civil fines to be paid to the state. In public accommodations cases, the MCAD may order civil fines to be paid to the state. In all cases, the remedies may also include emotional distress damages, attorneys' fees, cease and desist orders, and other relief that would fulfill the purposes of the anti-discrimination laws (e.g. training programs, posting of notices, allowing person to apply for credit on non-discriminatory terms, allowing person non-discriminatory access to and use of services).

Can I also file a discrimination complaint with a federal agency?

Yes, in many cases. Since federal law and state law contain overlapping provisions, someone bringing a discrimination claim may sometimes pursue protections under both. For example, the federal employment non-discrimination law, called Title VII, applies to employers with at least 15 employees and forbids employment discrimination based on race, sex, age, religion, and disability (which includes HIV status).

While Title VII does not expressly forbid discrimination based on sexual orientation or gender identity, a growing number of courts and government agencies have taken the position that its proscription against sex discrimination encompasses both.

For example, in 2018, in the case of *Franchina v. City of Providence*³⁴, the U.S. First Circuit Court of Appeals ruled that a lesbian who experienced extensive unchecked harassment from her co-workers at the Providence Fire Department was protected by Title VII. The court ruled that the plaintiff could bring sex-plus claims under Title VII where, in addition to the sex-based charge, the 'plus' factor was the

³⁴ See <https://www.glad.org/wp-content/uploads/2018/01/2018-01-25-Franchina-Opinion.pdf>.

plaintiff's status as a gay or lesbian individual. GLAD submitted an amicus brief³⁵ in this case.³⁶

And, the U.S. Sixth Circuit Court of Appeals recent decision in *EEOC v. RG and GR Harris Funeral Homes, Inc.*³⁷ allowed the plaintiff to bring claims of discrimination based solely on gender identity. The plaintiff in the case, a funeral home director who was born male, was terminated after informing her employer that she suffered from gender dysphoria and would begin transitioning by dressing and presenting as a woman. The employer admitted that he fired the plaintiff because of her gender identity but argued that Title VII should not be enforced against the funeral home, because it would constitute a substantial burden upon the employer's sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act (RFRA). The court rejected this argument, reasoning that the employer's religious exercise would not be substantially burdened by continuing to employ the plaintiff without discriminating against her on the basis of her gender identity.

In two separate decisions in 2012 and 2016, the EEOC itself concluded that sexual orientation discrimination, gender identity discrimination, and sex discrimination are one and the same, since the first two are based on preferences, assumptions, expectations, stereotypes, and norms associated with masculinity and femininity.³⁸

Unfortunately, the Department of Justice (DOJ) under the Trump administration is attempting to roll back this progress. Attorney General Sessions issued a memorandum³⁹ in which he stated that the position of the DOJ is that "gender identity" discrimination is not protected under Title VII. Also, the DOJ filed an amicus brief⁴⁰ with the U.S. Second Circuit Court of Appeals arguing that "sexual orientation" is not protected by Title VII.

³⁵ See <https://www.glad.org/wp-content/uploads/2018/01/2017-08-25-Franchina-Amicus-Brief.pdf>.

³⁶ See also *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (sexual orientation discrimination is sex discrimination under Title VII); *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (same).

³⁷ See <http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0045p-06.pdf>.

³⁸ See *Macy v. Holder*, EEOC Appeal No. 0120120821 (Apr. 20, 2012); *Baldwin v. Foxx*, EEOC Appeal No. 0120133080 (July 15, 2015).

³⁹ See <https://assets.documentcloud.org/documents/4067383/Attachment-2.pdf>.

⁴⁰ See <https://assets.documentcloud.org/documents/3901661/Brief-Amicus-Brief-Doj.pdf>.

LGBT people who are discriminated against in housing may also be able to file a complaint with the federal Department of Housing and Urban Development (HUD) in addition to NHCHR. For more information go to:

http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination.

However, given the position of the DOJ and the Trump administration in general, it is possible that this position of HUD may be reversed at some point.

Are there other options for filing a complaint for discrimination?

Possibly yes, depending on the facts of your particular situation.

1. Union: If you are a member of a union, your contract (collective bargaining agreement) may provide additional rights to you in the event of discipline, discharge, or other job-related actions. In fact, if you obtain relief under your contract, you may decide not to pursue other remedies. Get and read a copy of your contract and contact a union steward about filing a complaint. Deadlines in contracts are strict. Bear in mind that if your union refuses to assist you with a complaint, you may have a discrimination action against them for their failure to work with you, or for failure of duty of their fair representation.

2. Local Agencies: Several cities and towns have their own local non-discrimination laws and agencies with which you can file a complaint in addition to filing at the MCAD. Sometimes the MCAD allows the local agency to investigate the case instead of the MCAD, which might produce advantages in time and accessibility of staff. Cambridge and Boston have the most developed local agencies, although Newton, Somerville, Worcester and Springfield also have some staff for certain kinds of complaints. Even if you file with the local agency, you must still file with the MCAD within 300 days of the last act of discrimination in order for your case to be processed at all.

3. State or Federal Court: After filing with the MCAD or EEOC, or both, as discussed above, a person may decide to remove their discrimination case from those agencies and file the case in court. There are rules about when and how this must be done.⁴¹

In addition, you may wish to file a court case to address other claims which cannot be appropriately handled by discrimination agencies. For example, if you are fired in violation of a contract, or fired without the progressive discipline promised in a handbook or fired for doing something the employer doesn't like but which the law requires, these matters are beyond the scope of what the agencies can investigate and instead the matter should be pursued in court. Similarly, if your claim involves a violation of constitutional rights—for instance, if you are a teacher or governmental employee who believes your free speech or equal protection rights were violated—then those matters must also be heard in court.

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 or punish you because you filed a complaint. If they do so, you can file an additional complaint against them for retaliation. “Retaliation” protections cover those who participate in proceedings, oppose unlawful conduct, or state an objection to discriminatory conduct.⁴²

What can I do to prepare myself before filing a complaint of discrimination?

Contact GLAD Answers at www.GLADAnswers.org or by phone at 1-800-455-4523 (GLAD) any weekday between 1:30 and 4:30 p.m. to discuss options.

⁴¹ See e.g., Mass. Gen. Laws, chap. 151B, sec. 9.

⁴² Mass. Gen. Laws, chap. 151B, secs. 4(4), 4A. See also *Provencher v. CVS Pharmacy*, 76 F.E.P. Cases (BNA) 1569 (1st Cir. 1998)(upholding federal retaliation claim of gay man).

As a general matter, people who are still working with or residing under discriminatory conditions have to evaluate how filing a case will affect their job or housing, and if they will be able to handle those possible consequences. Of course, even if a person has been fired or evicted, they may decide it is not worth it to pursue a discrimination claim. This is an individual choice, which should be made after gathering enough information and advice to make an informed decision.

Some people prefer to meet with an attorney to evaluate the strength of their claims before filing a case. It is always helpful to bring the attorney an outline of what happened, organized by date and with an explanation of who the various players are (and how to get in touch with them). Try to have on hand copies of your employee handbooks or personnel manuals, as well as any contracts, job evaluations, memos, discharge letters and the like. If you are concerned about a housing matter, bring a copy of your lease, along with any notices and letters you have received from your landlord.

Can I file more than one type of discrimination complaint at once, for example, if I believe I was fired both because I am a lesbian and Latina?

Yes. The state non-discrimination laws for employment forbid discriminating against someone because of sexual orientation or gender identity as well as race, color, religious creed, national origin, sex, ancestry, age, disability or membership in a uniformed military service of the U.S., including the National Guard. In housing, the criteria are expanded to include marital status, or because the person is a veteran. In public accommodations, however, marital status and age are *not* included among the law's protections.

FAMILY LAW

■ Marriage and Civil Unions

In an historic decision, the Massachusetts Supreme Judicial Court ruled on November 18, 2003, that same-sex couples have the right to civil marriage in Massachusetts. The holding in GLAD's case, *Goodridge v. Department of Public Health*,⁴³ was the first of its kind in this country by a state high court.

Over a decade later, in *Obergefell v. Hodges*,⁴⁴ the U.S. Supreme Court made marriage equality a reality nationwide when it held that the U.S. Constitution guarantees same-sex couples the right to marry. GLAD's own Mary Bonauto represented the plaintiffs during oral arguments. Post-*Obergefell*, all 50 states are required to issue marriage licenses to same-sex couples, and all states must respect the marriages of same-sex couples performed in other jurisdictions.

For information about how to get married in Massachusetts, see: <https://www.mass.gov/topics/marriage-divorce>.

Will Massachusetts respect civil unions and registered domestic partnerships?

Yes. The Massachusetts Supreme Judicial Court has ruled that civil unions⁴⁵ and registered domestic partnerships⁴⁶ with rights and obligations functionally identical to marriage will be accorded the same respect as marriages by Massachusetts' courts.

⁴³ 440 Mass. 309, 2003.

⁴⁴ 135 S.Ct. 2584 (2015).

⁴⁵ *Elia-Warnken v. Elia*, 463 Mass. 29 (2012) (Vermont civil union creates rights identical to marriage, will be treated as a marriage in Massachusetts).

⁴⁶ *Hunter v. Rose*, 463 Mass. 488 (2012) (California domestic partnership creates rights identical to marriage, will be treated as a marriage in Massachusetts).

Will the federal government respect my marriage?

Yes. Thanks to the demise of the Defense of Marriage Act (DOMA) in *Windsor v. United States*⁴⁷, the federal government will recognize and respect the legal marriages of same-sex couples.

Unfortunately, one issue that has yet to be definitively resolved by *Windsor* and *Obergefell* concerns spousal benefits and self-insured health plans. While New Hampshire state law prohibits discrimination based on sexual orientation, self-insured health plans are governed by federal law. Title VII, the federal anti-discrimination statute, only prohibits discrimination based on race, color, religion, sex, or national origin—sexual orientation is not explicitly included.

As was discussed above in the section on “Pursuing a Complaint,” there have been some rulings by federal courts that “sexual orientation” discrimination is a form of “sex” discrimination and thus covered by Title VII, and the EEOC has also taken this position.⁴⁸

Also, both Section 1557⁴⁹ of the Affordable Care Act and implementing regulations of the Obama administration, 45 CFR 147.104(e),⁵⁰ were supposed to prohibit discrimination against LGBT people in most public and private health care plans, so that everyone would have access to health care. Unfortunately, these protections are under attack by some states and by the Trump administration.

If your employer is discriminating against you in spousal healthcare benefits on the basis of sexual orientation, contact GLAD Answers.

What happens if we need to end our marriage?

After *Obergefell v. Hodges*, same-sex spouses everywhere should be able to dissolve their marriages on the same terms as different-sex

⁴⁷ 133. S.Ct. 2675 (2013).

⁴⁸ See https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

⁴⁹ See <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>.

⁵⁰ See <https://www.ecfr.gov/cgi-bin/retrieveECFR?n=45y1.0.1.2.62.0.27.4>.

spouses. Massachusetts explicitly applies its divorce statutes to same-sex couples.⁵¹

However, spouses should note that when Massachusetts courts divide marital property and award alimony, one of the factors a judge considers is length of marriage.⁵² Unfortunately for spouses whose partnership pre-dates marriage equality, the length of the marriage may not accurately reflect the true length of the relationship, resulting in an unbalanced division of assets. With regards to alimony, Massachusetts courts may (but are not required to) consider a couple's premarital cohabitation if there is evidence of economic partnership.⁵³ If you are going through divorce proceedings in Massachusetts and believe your division of assets may be unfairly affected by length of marriage, contact GLAD Answers.

■ Other Legal Protections for Same-Sex Couples

Short of entering into a civil marriage, what steps can a couple take to safeguard their legal relationship in Massachusetts?

1. Relationship Agreement or Contract: A couple has the option of drafting a written cohabitation agreement, outlining their respective rights with regards to property, finances, and other aspects of their relationship. The Massachusetts Supreme Judicial Court has held that these agreements are generally enforceable and will be respected according to ordinary rules of contract law.⁵⁴ Although such agreements may concern the custody and support of children, a court will not uphold any agreement it finds to contravene the child's best interests.⁵⁵ Finally, couples should note that if they eventually marry, a previous relationship agreement

⁵¹ See, e.g., *Cerutti-O'Brien v. Cerutti-O'Brien*, 77 Mass. App. Ct. 166, 170 (2010) (applying divorce statute specifying "husband" and "wife" to a same-sex couple).

⁵² Mass. Gen. Laws, chap. 208, secs. 34, 49.

⁵³ See Mass. Gen. Laws, chap. 208, sec. 48.

⁵⁴ *Wilcox v. Trautz*, 427 Mass. 316 (1998).

⁵⁵ *Id.* at 334 n.7 (cohabitating couple can contract with regards to the rights of their children so long as the contract reflects the best interests of the child).

will likely no longer be valid, and any post-marital agreement will be enforceable only to the extent that it is fair and equitable to both parties.⁵⁶

2. Power of Attorney: A couple can choose to grant each other the durable power of attorney, allowing one partner to make financial decisions on the other's behalf in the event of incapacity or disability. The requirements are minimal: any competent person may appoint another person as their "attorney-in-fact".⁵⁷ If no such appointment is made, a family member will be empowered to make decisions for the incapacitated individual.

If one partner is incapacitated or disabled, the other partner may petition the court to be appointed as their guardian in order to make decisions on their behalf. Unless good cause dictates otherwise, a court should grant guardianship to whoever has durable power of attorney over the incapacitated person.⁵⁸ Thus, couples are encouraged to grant each other durable power of attorney if they believe guardianship will one day be necessary. It is important to note that an individual's choice can only be rejected for good cause—a court should not substitute its own judgement just because a family member objects to the appointment.

3. Health Care Proxy: A couple can also choose to appoint each other as health care proxies, allowing them to make medical decisions on one another's behalf in the event of an emergency. Absent a health care proxy appointment, medical care providers look to next-of-kin to make health care decisions for an incapacitated individual. Thus, if an unmarried couple wants to make decisions for one another, they need a health care proxy. Health care proxies can be revoked at any time, either by creating a new health care proxy or by a clear expression of revocation.⁵⁹ People often give a copy of the health care proxy to their doctors,

⁵⁶ *Id.* at 335.

⁵⁷ Mass. Gen. Laws, chap. 190B, Article V, secs. 5-501—5-507.

⁵⁸ Mass. Gen. Laws, chap. 190B, Article V, sec. 5-305(b).

⁵⁹ Mass. Gen. Laws, chap. 201D, sec. 7.

and sometimes to family members.

4. Will:⁶⁰ Without a will, a deceased unmarried person's property passes to: (1) their children; (2) their family; (3) if next-of-kin cannot be located, to the state. If a person wishes to provide for others, such as their partner, a will is essential. Even if a person has few possessions, they can name in the will who will administer their estate. If a person has children, they can also nominate the future guardian of the child in a will.

5. Funeral Planning Documents: Upon death, a person's body is given to their next-of-kin. This can mean that a person's own partner has no right to remove the body or make plans for a final resting place. But if a person leaves explicit written directions giving another person (such as their partner or a friend) control over the funeral and burial arrangements, any confusion can be avoided. Some people include these instructions as part of a will, but since a will may not be found for days after death, it is preferable to give the instructions to the person you want to take care of matters, as well as to family members.

6. Living Will: Within a health care proxy, language may be inserted stating what the individual wishes regarding termination of life support, preferences for types of medical care, or limits on the agent's authority.

7. Temporary Agent or Guardianship: Parents, particularly those with life-threatening illnesses, may either appoint a temporary agent⁶¹ for a period not exceeding 60 days, or appoint a guardian⁶² whose appointment takes effect when the parent dies or is unable to care for the child. Within 30 days after the appointment of a guardian, the guardian must petition the Probate and Family Court for confirmation of the appointment. The parent

⁶⁰ See generally, Mass. Gen. Laws, chap. 190B, Articles II & III.

⁶¹ Mass. Gen. Laws, chap. 190B, Article V, sec. 5-103

⁶² Mass. Gen. Laws, chap. 190B, Article V, secs. 5-201—5-212.

has the right to revoke the powers of the temporary agent or guardian at any point.

Does a person need an attorney to get these documents?

GLAD recommends working with an attorney on these documents. Although some forms are available, the form may not be suited to your individual needs and wishes. Moreover, attorneys may be able to help effectuate your goals, for example, by drafting a will in a way which is more likely to deter a will contest by unhappy family members or drafting a health care proxy to your specific instructions.

If an unmarried couple separates, what is the legal status of a Partnership or Relationship Agreement/Contract?

Upon separation, if the couple has a Relationship or Partnership Agreement/Contract, its terms will be invoked and the couple's assets will be divided as per the agreement. Without an agreement, unmarried couples may be forced to endure costly and protracted litigation over property and financial matters.

If a person has changed their mind about who should be their attorney-in-fact, health care agent, beneficiary, executor under a will, or funeral planner, then those documents should be revoked – with notice to all persons who were given copies of those documents – and new documents should be prepared which reflect the person's present wishes.

■ Domestic Partnership

What is domestic partnership?

Although it is a term used in many contexts, “domestic partnership” most often means a status which recognizes an unmarried couple and their children as a family for certain limited purposes, most commonly employee benefits. Some states, cities, and towns have also enacted

domestic partner laws, although these may be phased out now that marriage for same-sex couples is legal nationwide. In other contexts, “domestic partner” is a shorthand term for family, replacing “lover,” “friend,” and “roommate.” Some people call cohabitation agreements “domestic partner agreements.”

Does Massachusetts provide domestic partner benefits to state employees?

Generally, no. By the terms of a 1993 Executive Order,⁶³ certain managerial employees of the Commonwealth have expanded leave rights for their partners. But overall, state employees do not have equal access to health benefits or other employee benefits for their partners, and the state pension system does not allow people to name unmarried partners as beneficiaries of an employee’s pension.

Can cities and towns in Massachusetts provide domestic partner health insurance benefits to their own employees?

Probably not. While several cities and towns have done so in the past, a court ruling in 1999 found that Boston did not have the power to expand the reach of the state insurance laws by including domestic partners in the group health system.⁶⁴ Amherst has continued its domestic partner program by buying individual health insurance policies for the partners of Amherst employees who previously had group health coverage through the town. Several other cities and towns have also continued to provide coverage.

What kinds of domestic partner benefits may private employers provide?

Private employers can provide any benefits to domestic partners they wish – whether health insurance, family medical or bereavement leave, equal pension benefits, relocation expenses, or access to company facilities.

⁶³ Weld, Gov.

⁶⁴ *Connors v. Boston*, 430 Mass. 31 (1999).

However, even when employers provide these benefits, federal laws sometimes treat domestic partner benefits differently from spousal benefits, often with financial consequences. For example, employees must pay federal income tax on a domestic partner's health insurance benefits, but spousal benefits are exempt.⁶⁵ Similarly, while spousal consent is required if a married employee decides to name a third party as a pension beneficiary or survivor benefits recipient, an employee with a domestic partner can change these designations freely.

Can I use the state non-discrimination law to force my employer to provide domestic partnership benefits?

Probably not. Although the non-discrimination law says that an employer can't discriminate on the basis of sexual orientation in terms of compensation, and even though employee benefits are a form of compensation, the law contains an express exemption for employee benefits.⁶⁶ Thus, an employer *may* provide domestic partner benefits if it chooses to do so, but it probably cannot be forced to do so through the state non-discrimination law.

■ Adoption

Can a single gay individual adopt a child in Massachusetts?

Yes.⁶⁷

Can same-sex partners together adopt a child in Massachusetts?

Yes, ever since court rulings by the Supreme Judicial Court in 1993.⁶⁸

⁶⁵ See Internal Revenue Code, Private Letter Ruling 9603011 (Jan. 19, 1996).

⁶⁶ Laws 1989, chap. 516, sec. 19.

⁶⁷ Mass. Gen. Laws, chap. 210, sec. 1.

⁶⁸ *Adoption of Tammy*, 416 Mass. 420 (1993) and *Adoption of Susan*, 416 Mass. 1003 (1993).

What are joint and second-parent adoptions?

A joint adoption is when both partners adopt a child together at the same time. A second-parent adoption is when one partner adopts the other partner's biological child.

What is the advantage of doing a second-parent or joint adoption?

Both joint adoptions and second-parent adoptions ensure your child has two legal parents, which often provides greater comfort and security to everyone involved. Depending on your particular family situation, the law may not recognize both partners as legal parents without an adoption. In these cases, the non-legal parent needs special permission to make medical decisions for the child or attend school meetings and is at risk of losing custody if the couple splits up.

Adoption allows a non-legal parent to become a legal parent, entitled to make decisions for the child without special authorization. It also permits the adoptive parent to automatically assume custody of the child if their partner dies. Likewise, if the adoptive parent dies, the child will have the right to inherit from them even absent a will and may be able to collect social security survivor benefits.

Finally, if the couple separates, adoption ensures that both parents have the right to custody and visitation, and that any disputes will be decided based on what is in the best interests of the child rather than on who is the legal parent.

Who is a legal parent?

A biological parent who has a relationship with their child is a legal parent. An adoptive parent is similarly a legal parent.

Even without a biological or adoptive connection, certain individuals are presumed to be legal parents by law. For instance, a child born to a

married couple is presumed to be the child of both partners.⁶⁹ This includes same-sex couples.⁷⁰

Similarly, a child born to an *unmarried* couple is presumed to be the child of both partners so long as the couple jointly “receive[s] the child into their home and openly [hold] out the child as their child.”⁷¹ Essentially this means that the couple and the child live together as a family, with both partners acting as co-parents.

In a groundbreaking 2016 case brought by GLAD, the Massachusetts Supreme Judicial Court held that this presumption applies equally to unmarried same-sex couples. That case, *Partanen v. Gallagher*,⁷² established that even a non-biological parent can take advantage of the presumption, recognizing that a biological connection “is not a sine qua non to the establishment of parentage [in Massachusetts].”⁷³

Finally, Massachusetts has a process by which unmarried parents can establish paternity by signing a voluntary acknowledgment of paternity (VAP) and filing it with Massachusetts Registry of Vital Records and Statistics (RVRS). Although the current form uses gendered language (“mother” and “father”), a same-sex couple should be able to use it to establish legal parentage, and GLAD is working with RVRS to change the form to gender neutral language. Here is a link to the current form: <https://www.mass.gov/files/documents/2016/09/pn/voluntary-ack-of-parentage-form.pdf>. For more information about VAPs, contact GLAD Answers.

Do we need to do a second-parent adoption if we are married, in a civil union, or living together?

A second-parent adoption is the best way to ensure the ongoing parental rights of both parents. Even if Massachusetts law presumes you

⁶⁹ Mass. Gen. Laws, chap. 209c, sec. 6(a)(1).

⁷⁰ See e.g., *Hunter v. Rose*, 463 Mass. 488 (2012) (applying parentage presumption to a child born to two married women).

⁷¹ Mass. Gen. Laws, chap. 209c, sec. 6(a)(4). See also *Partanen v. Gallagher* 475 Mass. 632 (2016) (holding that a non-biological same-sex parent could bring a claim for parentage under the statute).

⁷² 475 Mass. 632 (2016).

⁷³ *Id.* at 640.

are a legal parent, another state may not respect that presumption if you or your partner moves. By contrast, adoption is a court judgment creating a parent-child relationship and is very likely to be respected by other states, even if these states are otherwise hostile to same-sex couples parenting.

If same-sex parents raise a child together, but only one is the “legal” parent, then what rights does the non-legal parent have vis-à-vis the child?

These are tricky cases, but if the non-legal parent can show that they are a “*de facto* parent,” they will be entitled to a limited number of rights vis-à-vis their children, including visitation rights.

De facto parents may also have the right to custody,⁷⁴ but the issue has not yet been definitively decided by the courts.⁷⁵

How does a non-legal parent prove ‘de facto’ parenthood?

According to the Massachusetts Supreme Judicial Court, a *de facto* parent is “one who has no biological relation to the child but has participated in the child’s life as a member of the child’s family.”⁷⁶ To establish *de facto* parenthood, a parent must:

- reside with the child;
- perform a share of the caretaking functions⁷⁷ at least as great as the legal parent, shaping the child’s daily routine and addressing his developmental needs;
- discipline the child, provide for his education and medical care, and serve as a moral guide.⁷⁸

⁷⁴ For more information, see *Partanen v. Gallagher* case at <http://www.glad.org/work/cases/partanen-v-gallagher>.

⁷⁵ See *Partanen v. Gallagher* 2016 Mass. LEXIS 759 at *22 n.17 (2016) (noting that established case law limits a *de facto* parent’s privileges).

⁷⁶ *E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E.2d 886, cert. denied, 120 S.Ct. 500 (1999).

⁷⁷ “Caretaking functions” are distinct from “parenting functions.” Caretaking focuses on interactions with a child while, for example, the provision of financial support is a parenting function but not a caretaking one. *A.H. v. M.P.*, 447 Mass. 828, 840 (2006).

⁷⁸ *Id.* at 838.

All of these actions must be performed with the legal parent's assent.⁷⁹

Regardless of the status of a person's legal rights, it is critical to remember that children form strong attachments to their parental caregivers regardless of legal labels. Separating a child from a person who has acted as their parent can be a devastating loss for a child. Moreover, court proceedings to establish de facto parenthood will be painful and costly, so anything people can do outside of court to make decisions together about a child's interests is strongly encouraged. See GLAD's publication, *Protecting Families: Standards for LGBT Families*, at <https://www.glad.org/wp-content/uploads/2017/01/protecting-families-standards-for-lgbt-families.pdf>.

Short of second-parent adoption, how can a family protect the interests of the child vis-à-vis their non-legal parent?

There are a number of steps which can be taken, although none offer the security of a second parent adoption.

Co-parenting Agreement: A co-parenting agreement is an agreement setting out the parents' expectations about each other's roles and their plans in the event of separation, disability, or death. While these agreements may not always be given full effect by courts, which are bound to make custody and visitation decisions based on the child's best interests, they are important indicators of what the couple *believed* was in the best interests of the child and may influence a court's ultimate decision.

Wills: A legal parent may nominate a guardian to take custody of the child upon the parent's death. These wishes are given strong preference by courts. However, if the child has another legal parent living, then that person will have priority over the nominated guardian.

⁷⁹ *Id.*

Co-guardianship: A legal parent may choose to name the non-legal parent as a co-guardian. This process allows the non-legal parent to make the same kinds of decisions for the child that a legal parent makes, including medical decisions. This status is not permanent and may be revoked by the legal parent.

Caregiver Authorization Affidavit⁸⁰: A parent, legal guardian or legal custodian of a minor, by a caregiver authorization affidavit, may authorize a designated caregiver to exercise certain concurrent parental rights and responsibilities relative to a designated minor's education and health care. If a conflicting decision is made under these concurrent rights and responsibilities, the decision of the parent, legal guardian or legal custodian shall supersede the decision of the caregiver.

Power of Attorney: A legal parent may choose to grant the non-legal parent power of attorney over the child, which allows the non-legal parent to make medical or financial decisions. Power of attorney documents should be updated regularly.

■ Custody and Visitation

What standards should same-sex couples with children who are breaking up maintain?

Same-sex couples with children who are breaking up should:

1. Support the rights of LGBT parents;
2. Honor existing relationships regardless of legal labels;
3. Honor the children's existing parental relationships after the break-up;
4. Maintain continuity for the children;
5. Seek a voluntary resolution;
6. Remember that breaking up is hard to do;
7. Investigate allegations of abuse;

⁸⁰ Mass. Gen. Laws, chap. 201F.

8. Not allow the absence of agreements or legal relationships should not determine outcome;
9. Treat litigation as a last resort; and
10. Refuse to resort to homophobic/transphobic laws and sentiments to achieve a desired result.

For more detailed information about these standards see the publication *Protecting Families: Standards for LGBT Families* at: <https://www.glad.org/wp-content/uploads/2017/01/protecting-families-standards-for-lgbt-families.pdf>.

How does a court generally go about making custody determinations?

When a married couple with children divorces, a court considers both parents as equals (unless one has engaged in misconduct) and makes a custody determination based on the best interests of the children. A court will weigh all relevant factors, including whether one parent has a more stable work schedule, where siblings are being raised, and whether one parent seeks to undermine the child's relationship with the other parent.⁸¹

When unmarried parents separate, the rules are different. Although the court is still bound to act in the best interests of the child, it is also required to preserve the relationship between the child and the primary caretaker parent when awarding custody.⁸² Furthermore, unmarried parents cannot be awarded joint custody unless they have agreed to do so or the court finds that they have successfully exercised joint responsibility for the child in the past and have the ability to communicate with each other about the child's interests.⁸³

⁸¹ See, e.g., *Hunter v. Rose* 463 Mass. 488, 495 (2012). See also Mass. Gen. Laws, chap. 208, sec. 31 (“the court shall consider whether or not the child's present or past living conditions adversely affect his or her physical, mental, moral or emotional health”).

⁸² Mass. Gen. Laws, chap. 209C, sec. 10.

⁸³ *Id.*

Are there different kinds of custody?

Yes.⁸⁴ Four kinds:

“Sole legal custody” means that only one parent has the right to make major life decisions for the child, including matters of education, medical care, and emotional, moral and religious development.

“Shared legal custody” means that both parents are involved in and make these decisions.

“Sole physical custody” means that a child lives with and is under the supervision of only one parent, subject to reasonable visitation with the other parent, unless a court finds that visitation is not in the child’s best interests.

“Shared physical custody” means that the child resides with both parents in a way which ensures frequent contact with both.

If I have a child from a former straight relationship, and I am now involved with a same-sex partner, can my ex use my sexual orientation against me in custody proceedings?

As stated above, Massachusetts courts base custody arrangements on the best interests of the child. As a general rule, a parent’s sexual orientation or marital status should have no bearing on a child’s best interests.⁸⁵

Nevertheless, your former partner may try to argue that your sexual orientation is detrimental to a child. Any number of reasons can be cited, such as that the LGBT parent’s sexual orientation is causing other people to tease or ostracize the child, that the parent is a bad role model,

⁸⁴ Mass. Gen. Laws, chap. 208, sec. 31.

⁸⁵ See *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 335. See also *Doe. v. Doe*, 16 Mass. App. Ct. 499 (1983) (parent’s sexual orientation insufficient grounds to deny custody in divorce action); *E.N.O. v. L.M.M.*, 429 Mass. 824, 829-830 (1999) (best interests of the child determined by considering child’s relationship with biological and de facto same-sex parents).

or that the parent's new partner is not good for the child. In the overwhelming majority of circumstances, these matters can be answered to the satisfaction of a judge in a way that does not penalize the LGBT parent or the child. Contact GLAD for further resources for dealing with such a situation.

Does it matter if my “ex” knew I was gay or lesbian before we separated?

It can make a difference with respect to future modification of court orders for custody. People can seek to modify court orders for custody only when there has been a substantial change in circumstances. If a spouse did not know of your sexual orientation at the time of the court proceedings but learns it later, they may argue that this is a substantial change of circumstances and the custody issues should be litigated anew.⁸⁶

Can a court keep my kids from visiting when my partner is present?

Courts have the power to do this, but unless the partner is causing harm to the child – a very high standard – visitation should not be restricted.

■ Domestic Violence

What is domestic violence?

In Massachusetts, domestic violence primarily falls under the Abuse Prevention Law.⁸⁷ According to the Abuse Prevention Law, abuse involves any of the following behaviors:

- attempting to cause or actually causing physical harm;

⁸⁶ See generally, Mass. Gen. Laws, chap. 208, sec. 31.

⁸⁷ Mass. Gen. Laws., chap. 209A.

- placing another person in fear of imminent serious physical harm; and
- compelling another person to engage in unwanted sexual activity, either by force, threat, or duress.⁸⁸

Do domestic violence laws apply to people in same-sex relationships?

Yes, depending on how serious you and your partner are or were. The Abuse Prevention Law applies to abuse between spouses and ex-spouses, people who are or were residing in the same household, people who have a child together, and people who are or have been in a substantive dating relationship.⁸⁹

How can the law protect me from an abusive partner?

If a partner or member of your family or household has been abusive, you can file an application with the court requesting a 209A protective order. A 209A order is a court order prohibiting the abusive person from engaging in certain behaviors, such as contacting you or coming within a certain distance of your home. You can also request that your address be ‘impounded’, i.e. kept confidential and not disclosed to your abuser. Finally, a 209A order may compel the abusive person to do things like pay temporary financial support to you or your children or compensate you for medical expenses. Violations of a 209A order are criminal offenses and can result in the immediate arrest of the abuser.

Depending on the circumstances, a 209A order may compel your abuser to do any number of the following:

- refrain from abusing you further;
- refrain from contacting you directly, indirectly, by telephone, letter, or through any third party;
- move out of your home, if they live with you;

⁸⁸ See Mass. Gen. Laws, chap. 209A, sec. 1.

⁸⁹ Mass. Gen. Laws, chap. 209A, sec. 1. See also Abuse Prevention Guidelines, No. 3:02 (Commentary) (“Unmarried persons who live together, or who did so in the past, are also within the court’s jurisdiction under c. 209A, regardless of whether the relationship between them is homosexual, heterosexual, or not sexual”).

- stay away from your residence, workplace, family's home, or school;
- temporarily relinquish custody of any minor children;
- provide you temporary financial support;
- surrender keys to the household;
- surrender firearms⁹⁰

A 209A order can be granted for a maximum of one year and can be renewed if necessary. 209A orders do not restrict the activity of the survivor.

How do I get a 209A protective order?

209A protective orders are available free of cost. You can request a 209A order at the District Court near where you live, the Probate and Family Court in your county, or the Superior Court in your county. If you live in Boston, you can also go to the Boston Municipal Court. You can get the necessary forms from the clerk at the courthouse, or from the court's webpage. In emergency situations after normal business hours, orders may be obtained at a police station.

Temporary 209A orders are generally issued upon request, provided there is a credible allegation of abuse and the Abuse Prevention Law covers the relationship between the survivor and the offender. These orders are good for ten days. The court will then schedule a hearing within the ten-day window, during which the order can be extended for up to one year. The survivor is required to be present at the extension hearing, but the defendant can choose not to attend. Although a lawyer is not needed for a 209A order, obtaining counsel may be helpful in certain cases, particularly if you believe your abuser is going to contest the order.

⁹⁰ Obtaining, Enforcing and Defending Chapter 209A Restraining Orders § 1.4 (2012).

If I go to court, will I ‘out’ myself?

Not necessarily. The courts try to be sensitive to the fact that some people seeking orders may be closeted or may be in a same-sex relationship that they do not want revealed.

Where can I go to get help?

In addition to the local police and district attorney, you can call the Violence Recovery Program at 1-800-834-3242 (toll free in MA), the Network La Red at (617) 742-4911, and Jane Doe, Inc. at (617) 248-0922.

Does domestic violence play a role in custody decisions?

Yes. Evidence that a parent has abused or is currently abusing their child or partner is evidence that said parent is not acting in the best interests of the child. If there is a pattern of abuse, or even one serious incident of abuse, a rebuttable presumption arises in the law that it is not in the child’s best interests to be placed in sole custody, shared legal custody, or shared physical custody with the abusive parent.⁹¹

⁹¹ Mass. Gen. Laws, chap. 208, sec. 31A.

HATE CRIMES, SEX LAWS & POLICE

■ Hate Crimes & Violence

Does Massachusetts have a hate crimes law?

Yes, Massachusetts has several provisions of criminal law geared toward identifying and punishing hate-motivated violence.⁹²

Most specifically, 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 race, color, religion, national origin, **sexual orientation, gender identity, or disability**.⁹³

Massachusetts also has a law which punishes those who:

- by force or threat of force,
- willfully injure, intimidate, interfere with (or attempt to do so), or oppress or threaten a person
- in the free exercise or enjoyment of any right or privilege secured to them under state or federal constitutions or laws.⁹⁴

Essentially, this law provides criminal penalties for violations of a person’s civil rights.⁹⁵ For further information, see GLAD’s publication, *Anti-LGBT Violence and Harassment*, at:

⁹² Massachusetts also has a “criminal harassment” statute, Mass. Gen. Laws, chap. 265, sec. 43A, which targets any willful and malicious pattern of conduct or series of acts directed at a specific person, seriously alarming that person, and causing any reasonable person to suffer substantial emotional distress. It could apply to homophobic statements directed against a person. *See Com. V. Welch*, 444 Mass. 80 (2005).

⁹³ Mass. Gen. Laws, chap. 265, sec. 39.

⁹⁴ Mass. Gen. Laws, chap. 265, sec. 37.

⁹⁵ *See also Commonwealth v. Stephens*, 25 Mass. App. Ct. 117, 123-24 (1987)(sec. 37 applies to hate-motivated harassment and violence).

<https://www.glad.org/wp-content/uploads/2017/01/Anti-LGBT-Harassment-Violence.pdf>.

In a typical hate crimes case, both of the above laws are charged, along with another criminal statute, such as assault and battery, assault and battery with a dangerous weapon, or assault with intent to murder and maim. Criminal charges can be initiated by the police, or by the victim themselves.

In order to track hate crimes, the State has set up a reporting system so that incidents alleged are centrally recorded.⁹⁶ To report an incident of hate-motivated violence, contact the Violence Recovery Program at Fenway Community Health, at (617) 927-6250 or 1-800-834-3242 (toll free in MA).

How does the law define what is a hate crime?

Under Massachusetts 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 seek to interfere with or disrupt a person’s exercise of constitutional rights through harassment or intimidation. . . .”⁹⁷

Technical definitions aside, law enforcement officials and others tend to use the following as guideposts for determining whether or not a crime is an anti-LGBT hate crime:

- Did the attacker use anti-LGBT language or slurs?
- Was the victim in an area associated with LGBT people (e.g., outside a LGBT bar, at a Pride parade location, at a cruising area)?

⁹⁶ See Mass. Gen. Laws, chap. 22C, secs. 32-35.

⁹⁷ Mass. Gen. Laws, chap. 22C, sec. 32.

- Was the victim identified and targeted because of appearance or behavior (e.g., holding hands with a same-sex partner, wearing a Pride flag)
- Have there been similar crimes in the area?
- Did the attack occur regardless of economic motive (e.g., was the victim attacked but not robbed)?⁹⁸

What can I do if I think I've been a victim of a hate crime?

Victims of hate crime violence have three types of legal recourse if they decide to take legal action against their perpetrators: (1) criminal prosecution under the laws discussed above; (2) injunctive relief; and (3) a civil suit for damages.

Immediately after the incident, seek medical attention if necessary. Second, consider reporting the incident to the police if you feel comfortable doing so. If you wish to press charges, a police report will be required and an investigation will often be necessary to identify the perpetrators. In addition to contacting the local police, you may also contact the Criminal Division of the Attorney General's office at (617) 727-2200. Be sure to explain all of the factors that make you think this was a hate crime.

For support and advocacy, contact the Violence Recovery Program (VPR) at Fenway Community Health. In addition to short term counseling for victims, VPR's professional advocates can assist you with reporting an incident, pursuing an investigation, or pursuing a case in court. All calls are confidential; you will not be required to provide your name. Contact VPR at (617)-927-6200 or 1-800-834-3242 (toll free in MA).

⁹⁸ See generally Mass. Gen. Laws, chap. 22C, sec. 33; 501 Code of Mass. Regs. sec. 4.04(1) (Hate Crimes Reporting Classification Criteria).

What other options do I have if I think I have been the victim of a hate crime?

In addition to pursuing your rights in the criminal justice system, you may seek a “civil rights injunction” from the Superior Court.

A civil rights injunction is a protection order issued by the court, and typically forbids a person or persons from contacting you or coming near you (or your home, or school, or workplace) because they have been determined to be threatening to you. To obtain an injunction, you must show that the person interfered or attempted to interfere with the exercise of your secured rights by using threats, intimidation or coercion. This is not always as easy as it sounds.

You can seek a civil rights injunction on your own or with your lawyer, or you can ask the Attorney General to do so on your behalf.⁹⁹ The Attorney General’s Office, Civil Rights Unit, is found at (617) 727-2200, but it cannot fulfill all of the requests it receives. In an action you bring on your own, you may also seek compensatory money damages from the perpetrator and an award of attorneys’ fees.

Although injunctions are civil in nature, violating an injunction is a criminal offense.¹⁰⁰ If a perpetrator does so, they can be fined, imprisoned, or both. For further information see GLAD’s publication, *Anti-LGBT Violence and Harassment*, at www.glad.org/uploads/docs/publications/Anti-LGBT-Harassment-Violence.pdf.

⁹⁹ Mass. Gen. Laws, chap. 12, sec. 11H (actions by Attorney General); chap. 12, sec. 11I (actions by private individuals).

¹⁰⁰ Mass. Gen. Laws, chap. 12, sec. 11J.

In what ways might the federal hate crimes law help to investigate and prosecute hate crimes?

The *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*¹⁰¹ was passed by Congress on October 22, 2009 and was signed into law by President Obama on October 28, 2009. It expands the 1969 United States federal hate crime law to include crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity or disability.

First, and perhaps foremost, the Act allows local and state law enforcement agencies to apply for the following federal assistance from the U.S. Attorney General:

- investigative, technical, forensic or prosecutorial support for criminal investigations and prosecutions,
- grants for extraordinary expenses associated with the investigation and prosecution of hate crimes, and
- grants to combat hate crimes committed by juveniles.

In providing assistance to local and state authorities, the priorities are hate crimes:

- where the offender(s) has committed crimes in more than one state, or
- that occur in rural areas which do not have the resources needed to prosecute such crimes.

Second, for hate crimes that in some way involve crossing state or national borders, or involve or affect interstate commerce, and where a state does not have jurisdiction or has requested federal assumption of jurisdiction, or where the federal government feels that justice has not been served or that U.S. prosecution is in the public interest, the Act authorizes the federal government to prosecute the case. The Federal Bureau of Investigation (FBI) encourages victims of hate crimes to make

¹⁰¹ See <https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0>:

a report to the FBI as well as local and state authorities. The Boston field office of the FBI can be reached at (617) 742-5533.

The Act also requires the Federal Bureau of Investigation to track statistics on hate crimes on the basis of gender and gender identity (statistics for the other groups are already tracked) and on crimes committed by and against juveniles. This is the first federal law to explicitly extend legal protections to transgender persons.

Does Massachusetts have a law to protect people who are being harassed or threatened?

Yes. The Harassment Prevention Law, Chapter 258E, allows people who are being harassed, stalked, or sexually assaulted to obtain a restraining order against the perpetrator. Unlike 209A orders (see above), a Harassment Prevention Order does not require the victim to have a special relationship with the perpetrator—the law can be used to protect you against anyone. You can apply for a Harassment Prevention Order free of charge at your local court (District Court, Superior Court, or Boston Municipal Court). If both the victim and the harasser are under the age of 17, you should file in the Juvenile Court whose jurisdiction covers where you live.

In emergency situations when the courts are closed, you can get a temporary order from the police, but you will still have to appear in court the next business day. Finally, although filing for a Harassment Prevention Order does not preclude pursuing other civil or criminal remedies, you must disclose any prior or pending actions with the harasser when you file your complaint.

What do I need to show in order to get a Harassment Prevention Order?

You need to document:

- that the harasser committed three or more acts against you of willful and malicious conduct that caused fear, intimidation, abuse or damage to property; or
- that the harasser forced you to involuntarily engage in sexual relations; or
- that the harasser violated any of the criminal laws in Chapter 265 that pertain to sex with a minor, indecent assault and battery, rape, stalking or the law in Chapter 272 that deals with drugging for sexual intercourse.

What measures can the court take to protect the victim from future harassment?

The first action a court will generally take is to issue a temporary Harassment Prevention Order, which remains in place until a court hearing can be held. The temporary order may instruct the harasser:

- to refrain from abusing or harassing the victim,
- to refrain from contacting the victim,
- to stay away from the victim's home or workplace, and
- to pay the victim monetary compensation for the losses suffered as a direct result of the harassment.

How does the victim extend the temporary order?

After granting the temporary order, the harasser will be notified and given an opportunity to appear in court and be heard on the question of continuing the temporary order. If the harasser does not appear, the temporary order will automatically be extended. The hearing will be scheduled within 10 business days of the court first issuing the order.

At the hearing, the judge will listen to the evidence and decide whether or not to extend the order. If the judge chooses to extend the order, it can remain in place for up to one year. At the expiration of the order, the victim can petition the court to provide another extension. The court may modify the order at any time based upon a petition from either party.

What happens if the harasser violates the Harassment Prevention Order?

Violation of the order is a criminal offense punishable by a fine of not more than \$5,000, or by imprisonment of not more than 2 ½ years, or both.

What if I have a protection order issued by another jurisdiction?

Provided the victim presents the appropriate Massachusetts court with a certified copy of the protection order and a sworn affidavit that the order is presently in effect as written, the protection order will be enforced in Massachusetts for as long as the order was in effect in the issuing jurisdiction.

For more detailed information about hate crimes, violence and harassment, see GLAD's publication, *Anti-LGBT Violence and Harassment in Massachusetts*, at <https://www.glad.org/wp-content/uploads/2017/01/Anti-LGBT-Harassment-Violence.pdf>.

■ Criminal Sex Laws

Does Massachusetts have a sodomy law?

Although Massachusetts has had two felony sodomy laws on the books since before its statehood, the Supreme Judicial Court has said (most recently in 2002) that neither law applies to private, consensual, adult conduct.¹⁰²

The first of the two laws is a “traditional” sodomy law, in that it prohibits anal sex and bestiality.¹⁰³ It can be applied to anal sex between gay or non-gay people, but has often been associated in the public mind with gay men. The second of the two laws covers “unnatural and lascivious acts.”¹⁰⁴ The courts have ruled that this language encompasses “oral and anal intercourse, including fellatio, cunnilingus, and other intrusions of a part of a person’s body or other object into the genital or anal opening of another person’s body.”¹⁰⁵

Thanks to GLAD’s 2002 case, *GLAD et al. v. Reilly et al.*,¹⁰⁶ adults engaging in private, consensual activity cannot be prosecuted under either of these laws. In a separate, similar ruling in 2003, the U.S. Supreme Court ruled that it is unconstitutional to apply sodomy laws to non-commercial sex between consenting adults in private.¹⁰⁷

How do I know whether the place where I am engaged in sexual intimacy is “private”?

That is the million-dollar question: what is “private”? For the most part, what happens in the privacy of your own home should be no concern of the police. Most people arrested for sexual activity are arrested for activity occurring out of doors. However, the courts have ruled several times that sex is not illegal simply because it takes place

¹⁰² See *GLAD et al. v. Reilly et al.*, 436 Mass. 132 (2002).

¹⁰³ Mass. Gen. Laws, chap. 272, sec. 34 (“crime against nature”).

¹⁰⁴ Gen. Laws, chap. 272, sec. 35.

¹⁰⁵ *Comm. v. Gallant*, 373 Mass. 577, 585 (1977).

¹⁰⁶ 436 Mass. 132 (2002)

¹⁰⁷ See *Lawrence & v. Texas*, 539 U.S. 558 (2003).

outdoors, in parked cars, or on public lands. It all depends on the circumstances.

In order for the conduct to be “public,” it must occur in a place where it is reasonably foreseeable that unsuspecting bystanders will happen upon it. When the participants act in deliberate disregard of that risk, their conduct is considered “public” regardless of whether they are discovered by the police or another person. Stated another way, the laws are “not designed to punish persons who desire privacy and take reasonable measures to secure it.”¹⁰⁸ So long as the sexual activity takes place in a reasonable secluded area, it should be beyond the scope of the law.

Why do people get arrested for sex outdoors if it can be considered “private”?

The Commonwealth has a legitimate law enforcement interest in protecting the general public from open displays of sex, no matter who the participants. That being said, these laws only encompass sexual activity: no one should be arrested or hassled for foot-tapping, hand-holding, or cruising, or talking, or flirting, or other non-sexual touching, regardless of where it occurs.

As a practical matter, regardless of one’s rights, having sex outdoors is a risky business. For one, based on numerous reports to us, we believe that some police will overlook outdoor sexual activity between straight couples, but arrest LGBT people engaged in the same behavior. Another concern is that some police “hunt” for LGBT people having sex outdoors in park lands and rest areas to arrest them, sometimes in uniform and sometimes as undercover decoys. A person caught engaging in public sex can be charged with either of the sodomy laws discussed above, or any other of a variety of sex offenses, some of which may require the person to register as a “sex offender.”

¹⁰⁸ *Commonwealth v. Ferguson*, 384 Mass. 13 (1981), -- even if a police officer finds them. *Comm. v. Nicholas*, 40 Mass. App. Ct. 255, 258 (1996).

GLAD has challenged these practices by many police departments and has sometimes helped to develop more constructive policing practices, such as with the MBTA. Due to a court case filed by GLAD, the Massachusetts State Police have issued training bulletins to all Troopers informing them of the limits of the sex laws in Massachusetts.

Does Massachusetts have any other criminal sex laws that can be applied to LGBT people?

Unfortunately, yes. There are numerous laws addressing public sexual activity, any number of which can be charged against an LGBT person arrested for having sex in “public.” These include “open and gross lewdness and lascivious behavior,” a felony involving public exposure of the genitals¹⁰⁹ (the Massachusetts Supreme Judicial Court has established the elements the prosecution must prove beyond a reasonable doubt in order to obtain a conviction under this statute),¹¹⁰ as well as “lewd and lascivious behavior,” a misdemeanor.¹¹¹ When an undercover police officer has been touched by someone, that individual can be charged with “indecent assault and battery on a person over age 14, another felony.¹¹² Often these laws are charged together. Sometimes police will also charge trespass or disorderly conduct, which are both misdemeanors. Occasionally, charges will also include a violation of section 34 or 35.

If you are being charged with a violation of section 34 or 35, please contact GLAD Answers.

Does Massachusetts have a “sex offender registry” type of law?

Yes. Every state now has such a law, although the terms differ from state to state. In Massachusetts, the law has been tied up in legal challenges and has been redrafted several times. GLAD successfully challenged one version of the law because of our concerns that it

¹⁰⁹ Mass. Gen. Laws, chap. 272, sec. 16.

¹¹⁰ See *Commonwealth v. Kessler*, 442 Mass. 770, 773 n.4 (2004).

¹¹¹ Mass. Gen. Laws, chap. 272, sec. 53.

¹¹² Mass. Gen. Laws, chap. 265, sec. 13H.

denominated as sex offenders people whose only “crime” was consensual adult sex or touching an undercover police officer.¹¹³

What types of crimes are deemed to be “sex offenses”?

As you would expect with a law designed to ensnare dangerous and violent predators, most of the crimes involve violence or sex with children. However, a conviction for indecent assault and battery on a person over 14 is still a “sex offense” in some circumstances,¹¹⁴ as is a “second and subsequent adjudication or conviction for open and gross lewdness and lascivious behavior,”¹¹⁵ For a full list of sex offenses, *see* Mass. Gen. Laws, chap. 6, sec. 178C.

What if I got a continuance without a finding? Or what if my conviction is very old?

The sex offender registry only applies to people who were convicted (or “adjudicated” as a youthful offender) after August 1, 1981, or who were still incarcerated, on parole or probation, or in civil commitment as of that date. If you received a continuance without a finding, that is NOT a conviction and the law does not apply to you. Similarly, if your conviction is from before August 1, 1981 and you were no long in jail or on probation by that date, the law does not apply to you.

How can I find out what charges I have been convicted of?

You can contact your local police, or call the Criminal Offender Record Information (CORI) Support Services Unit at (617) 660-4600 to request a form to get your criminal records. Alternatively, you can request your records online at <http://www.mass.gov/eopss/crime-prev-personal-sfty/bkgd-check/cori/request-rec/requesting-more-than-ten-criminal-records.html>.

¹¹³ *Doe v. Attorney General*, 426 Mass. 136, 686 N.E.2d 1007 (1997).

¹¹⁴ Mass. Gen. Laws, chap. 272, sec. 13H.

¹¹⁵ Mass. Gen. Laws, chap. 272, sec. 16.

What obligations are imposed on “sex offenders”?

Most sex offenders will have to register annually with the Sex Offender Registry Board and provide personal data, work information, and other identification. Depending on the circumstances, some or all of this information may be made available to the public.

Where can I get help if I have been convicted of a crime that qualifies me as a “sex offender”?

Because of the strict time deadlines involved in contesting the need to register at all and the classification of one’s dangerousness, it is important you hire an attorney right away. Contact GLAD Answers for a referral.

What is the age of consent for sexual activity?

Generally, the age of consent for sexual activity in Massachusetts is 16.¹¹⁶ However, there is some confusion about the age of consent for anal sex and oral sex, with case law questioning whether the age of consent for such acts is 18.¹¹⁷

■ Police Harassment

I am often told by police to “move along” from public areas. Is that legal?

Not necessarily. If the area is public and not posted as having particular hours, you generally have a right to be there as long as you are engaged in lawful activity. Public places belong to everyone, and are also often places of public accommodation to which non-discrimination rules apply. Even if a police officer wants to deter crime, or suspects some kind of unlawful intent, they have no general right to request

¹¹⁶ Mass. Gen. Laws, chap. 265, sec. 23.

¹¹⁷ *Comm. v. Zeitler*, 7 Mass. App. Ct. 543 (1979).

people to move from one place to another *unless there is unlawful conduct*.¹¹⁸

What are the general rules about interaction with police?

The presence of individuals who appear to be LGBT – whether because such individuals are displaying symbols such as a rainbow flag or pink triangle or for any other reason – should not trigger any special scrutiny by a police officer.

Police may, of course, approach a person, and make inquiries, but the officer can neither explicitly nor implicitly assert that the person must respond to their inquiries.¹¹⁹ Even if a person has been convicted of a past offense, or fails to respond, or responds in a way which does not satisfy the officer, that person cannot be arrested.¹²⁰

If an officer has “reasonable suspicion” that a crime has been committed or is about to be committed, they may briefly detain an individual, or stop the person for purposes of investigation.¹²¹ An arrest can only occur upon “probable cause” that a crime has been committed.¹²²

What can I do if I believe I have been improperly treated by the police?

Complaints may be made to any individual police department for matters concerning its officers. Call GLAD if you need to find out how to make a complaint to the local police.

Complaints to the Massachusetts State Police may be made via a Citizens Response Report, or form SP-340, which can be completed online and sent electronically (see <http://www.mass.gov/eopss/agencies/msp/citizen-concerns.html> for

¹¹⁸ *Commonwealth v. Carpenter*, 325 Mass. 519, 521 (1950) (sauntering and loitering in public places is right of every person); *Benefit v. City of Cambridge*, 424 Mass. 918 (1997) (streets and other public areas are “quintessential public forums” for expression); *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

¹¹⁹ *Commonwealth v. Murdough*, 428 Mass. 700 (1999).

¹²⁰ *Murdough*, 428 Mass. at 703; *Alegata v. Commonwealth*, 353 Mass. 287, 300-01, 231 N.E.2d 201 (1967).

¹²¹ *Murdough*, 428 Mass. at 763, *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

¹²² *Murdough*, 428 Mass. at 703.

more information) or mailed to The Massachusetts State Police, Division of Standards and Training/Citizen Response Reports, 470 Worcester Road Framingham, MA 01702. An officer assigned to the Division of Standards and Training will contact you upon receipt of your report.¹²³

Please let GLAD know whenever you make a complaint so that we can track the responsiveness of the various police departments.

In some cases, you may decide to pursue a lawsuit, either because of injuries, improper detainment, or for some other reason. These matters are highly specialized, and GLAD can make attorney referrals. People can also register serious complaints with the Attorney General's Office, Civil Rights Division.

¹²³ "Citizens Response Reports," *Public Safety*, <http://www.mass.gov/eopss/agencies/msp/citizen-concerns.html>.

STUDENTS' RIGHTS

■ Harassment and Discrimination at School

What Massachusetts laws exist to protect LGBT students?

Chapter 76, Section 5 of the Massachusetts General Laws prohibits discrimination based on gender identity, sex, sexual orientation, and perceived sexual orientation in all Massachusetts schools which accept students from the general public, regardless of whether the discrimination comes from students or employees. Similarly, Chapter 151C, which defines fair educational practices, prohibits sexual harassment by public school teachers, staff, or other students. Violations of this law can be brought to the Massachusetts Commission Against Discrimination (MCAD), a state agency that does not require the parties to have a lawyer.

Schools are also required to take certain steps to prevent the harassment of LGBT students, per the Code of Massachusetts Regulations 603 CMR 26.00, Access to Equal Educational Opportunity (www.doe.mass.edu/lawsregs/603cmr26.html?section=01). In particular, the Code requires that schools have policies in place to ensure discrimination and harassment complaints are investigated promptly, and also requires schools to educate staff annually on harassment prevention and appropriate methods of responding to harassment in a school environment.

Are there other laws which may protect me from discrimination and harassment because of my sexual orientation?

Possibly. Federal law prohibits sex discrimination in public schools that receive federal funding. Depending on the situation, harassment of LGBT students may be actionable as sex discrimination.¹²⁴ Harassment of transgender students, in particular, is actionable. Several federal

¹²⁴ See, e.g., *Ray v. Antioch Unified School District*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000) (stating that attacks based on a student's perceived sexuality constitute sex discrimination).

courts have held that the federal anti-discrimination law, Title IX, prohibits discrimination based on gender identity.¹²⁵ Complaints can be made to your school's Title IX coordinator, as well as to the federal Department of Education, Office of Civil Rights, in Boston. In cases where a school has reacted with deliberate indifference, monetary damages may be available. A student's constitutional rights may be violated by some kinds of discrimination and harassment.

Although the U.S. Departments of Education and Justice released a joint guidance in 2016 taking the position that Title IX protects transgender students from discrimination based on gender identity,¹²⁶ that guidance was rescinded by the Trump administration in February 2017.

What can I do if I'm being discriminated against at school?

There are many ways to approach the issue. One is to ask for support from a friend, teacher, or counselor, and talk to the people who are bothering you. That is not an option, however, if you don't feel safe doing so.

Take a look at your school's policies and notify whoever is supposed to be notified – usually a vice principal or Title IX coordinator. You should document any incidents of harassment or discrimination in writing. Once you meet with the right officials, make a note of what you told them and on what date, and ask when they will be getting back to you with a response. If they don't help you or don't follow through, you may wish to write to the principal and superintendent and ask for them to end the discrimination.

¹²⁵ See, e.g., *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. May 30, 2017) (holding that discrimination against transgender students constitutes sex discrimination under Title IX and the Equal Protection Clause of the U.S. Constitution) and *Bd. Of Educ. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016) (preliminary injunction granted to 11-year-old girl to permit her to use the girls' restroom and to be treated "as the girl she is.").

¹²⁶ See *Dear Colleague Letter on Transgender Students*, U.S. Department of Justice/U.S. Department of Education, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

At the same time, or after contacting the administration as set out above, you may want to file a complaint with the Problem Resolution System of the Mass. Dept. of Elementary and Secondary Education at (781) 338-3700. They will investigate and examine whether or not the school should consider taking further actions.

If the above methods fail to stop the discrimination, you may also wish to consider legal action. Contact GLAD for attorney referrals.

Does Massachusetts have a law to protect public school students from bullying?

Yes. Massachusetts has one of the strongest anti-bullying laws in the country, Mass. Gen. Laws, chapter 71, section 370.¹²⁷ It has strict requirements that schools must follow to protect students from bullying, even where the bullying includes only words, rather than physical violence, whether the bullying is on or off school grounds. These requirements apply to all public and charter schools and most private schools.

Also, schools must recognize in their bullying prevention and intervention plans that certain enumerated categories of students may be more vulnerable to being targets of bullying based on actual or perceived characteristics, such as gender identity or expression and sexual orientation. Schools must also include in the plan, the specific steps they will take to support these vulnerable students and provide all students the skills, knowledge and strategies they need to prevent or respond to bullying or harassment.

Massachusetts defines bullying broadly to include any repeated written, verbal, electronic, or physical acts that cause you physical or emotional harm, damage your property, place you in a reasonable fear of harm, create a hostile school environment for you, substantially disrupt your education or the orderly operation of your school, or otherwise infringe on your rights at school.

¹²⁷ See <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXII/Chapter71/Section370>.

Cyber-bullying includes bullying through the use of any technology, including by assuming your identity on the internet and bullying anonymously or by impersonating another person. It also includes mass communications like mass texts, or even posting something on the internet that is not directed towards you if it can be accessed by you, such as wall posts about you between two of your Facebook friends.

Every school, with the exception of some private schools, must, by law, have in place an anti-bullying policy. It must be posted on the school's website, and you can also request it from school administrators. It must include:

- A prohibition on bullying, cyber-bullying and retaliation
- Clear procedures for you to follow to confidentially and anonymously report bullying
- The procedures the school will take to respond to and investigate reports of bullying
- The range of disciplinary actions that may be taken against a bully
- Clear procedures for restoring a sense of safety to the bullied student and assessing the bullied student's needs for protection, including protection from retaliation for reporting the bullying
- Procedures to notify parents or guardians of the victim and the bully (there is a special provision for schools to take into consideration with LGBT students that "outing" the student may have serious negative consequences that should be taken into consideration)
- Procedures for providing, when necessary or requested, counseling to bullies and victims
- Teachers and other school staff must receive training on how to handle bullying and are required to report bullying to the administration

Where else can I get support if I'm having a problem?

In addition to the resources listed above, you may wish to contact the Massachusetts Commission on GLBT Youth, (617) 624-5495; or the Violence Recovery Program, 1-800-834-3242.

For additional information about youth and student issues go to:
<https://www.glad.org/issues/youth/>.

■ Transgender Students

What protections exist for transgender students in Massachusetts?

Discrimination against transgender students is prohibited in Massachusetts public schools. Chapter 76, Section 5 of the Massachusetts General Laws prohibits discrimination in public schools based on gender identity, as do the revised Access to Equal Education Opportunity Regulations, 603 CMR 26.00, and Charter School Regulations, 603 CMR 1.00.

In 2013, the Massachusetts Department of Elementary and Secondary Education (DESE) issued a set of guidelines for public schools on the equal treatment of transgender students.¹²⁸ The guidelines included the following:

- Schools should respect a transgender student's name and pronouns;
- Schools should respect transgender students' privacy regarding any medical information, previous names, etc.;
- The name and gender on a student's records should conform to the student's gender identity;

¹²⁸ See *Nondiscrimination on the Basis of Gender Identity*, Massachusetts Department of Elementary and Secondary Education (February 15, 2013), available at <http://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html>.

- Transgender students should be able to use the restroom, locker room, and changing facility that accord with their gender identity;
- In any sex-segregated activities (including athletics), transgender students should be able to participate in a manner consistent with their gender identity.

■ Gay/Straight Alliances

Do students have the right to form Gay Straight Alliances in their schools?

Yes, as to high school students; probably, as to middle school students. According to the Massachusetts Department of Elementary and Secondary Education, the Massachusetts Student Anti-Discrimination Law (Chap. 76, Sec. 5) requires school administrators to not discriminate in regard to “the advantages, privileges and courses of study of such public school on account of race, color, sex, **gender identity**, religion, national origin or **sexual orientation**”.

In addition, a federal law known as the “Equal Access Act” requires that all federally funded secondary schools provide equal access to extra-curricular clubs. So long as a school has at least one student-led extra-curricular club, it must allow additional clubs to organize, and must provide them with equal access to meeting spaces, facilities, and funding without discriminating based on a club’s purpose, be that purpose religious, philosophical, political, or otherwise.¹²⁹

For more information see GLAD’s publication, *The Right to Establish a GSA in Public Schools* at <https://www.glad.org/wp-content/uploads/2017/01/gsa-public-schools.pdf>.

If your school is preventing you from forming a GSA, contact GLAD Answers.

¹²⁹ 20 U.S.C. § 4071.

■ Commission on Gay and Lesbian Youth

The Massachusetts Commission on GLBT Youth began in 1992, when Governor William F. Weld created its precursor, the Governor's Commission on Gay and Lesbian Youth, in response to an epidemic of suicide among LGBTQ youth. On October 7th, 1998, Governor A. Paul Cellucci expanded the Commission's powers. Unfortunately, however, much of the Commission's effectiveness was stripped away under the Romney administration.

The Governor's Commission dissolved in 2006, and the General Court created the Massachusetts Commission on Gay and Lesbian Youth that same year.¹³⁰ The Commission on GLBT Youth is an independent agency of the Commonwealth with a mandate to investigate how public and private resources can be used to improve the ability of state agencies to provide services that promote the health and safety of LGBTQ youth in Massachusetts schools and communities, with a specific focus on suicide prevention, violence intervention, and the promotion of zero-tolerance policies regarding harassment and discrimination against LGBTQ youth. The Commission is also mandated to make recommendations about policies and programs supporting LGBTQ youth to the State government and its agencies, and to ask for adequate funding in the annual State budget for effective programs.

For more information call (617) 624-5485 or view their website at www.mass.gov/cgly/.

¹³⁰ Mass. Gen. Laws, chap. 3, sec.67.

■ Conversion Therapy

Does Massachusetts have a law banning therapy or treatment to change a minor's sexual orientation or gender identity?

Unfortunately, not yet. In 2018, the Massachusetts legislature was not able to pass House Bill 4464¹³¹ before the end of the legislative session. If passed, the bill would have prevented any health care provider from advertising for or engaging in sexual orientation or gender identity change efforts with a patient less than 18-years of age.

¹³¹ See <https://malegislature.gov/Bills/190/H4664>.

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders works in New England and nationally to create a just society free of discrimination based on gender identity, HIV status, and sexual orientation.

GLAD Answers and publications are provided *free of charge* to all who need them. We hope that those who are able will make a contribution to ensure that GLAD can continue the fight for equal justice under the law.

To make a tax-deductible contribution, log on to www.glad.org, or call us at (800) 455-GLAD (4523) with your credit card, or mail your check, payable to GLAD to 18 Tremont Street, Suite 950, Boston, MA 02108. If your workplace has a matching gift program, please be sure to have your donation matched. Please contact us if you would like more information on becoming a GLAD partner.

Thank You!



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