

Sexual Orientation Discrimination Regulations

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As readers of the “Maine Employment Law” newsletter are well aware, the Maine Human Rights Act (MHRA) was amended in 2005 to include a prohibition against discrimination in employment based on sexual orientation. The amendment was effective in December 28, 2005. The Maine Human Rights Commission has now proposed regulations to amplify the 2005 law. In general the proposed amendments track the current regulations on sex discrimination¹, but there are at least three parts of the proposals that are worth noting for employers: 1) a more expansive definition of gender identity and expression (MHRA Regulations Section 3.02D); 2) proposed provisions of fringe benefits (Section 3.12E); and 3) a provision on reasonable accommodation based on sexual orientation (Section 3.12F).

Definition of Gender Identity and Gender Expression. The Maine Human Rights Act defines sexual orientation as “a person’s actual or perceived heterosexuality, bisexuality, homosexuality, gender identity or gender expression.” The proposed regulations provide for the first time a definition of the terms “gender identity” and “gender expression.” Because these terms are confusing for most employers, the definition will be useful. “Gender identity” is defined as “an individual’s gender-related identity, whether or not that identity is different from that traditionally associated with that individual’s assigned sex at birth, including but not limited to, a gender identity that is transgender or androgynous.” “Gender expression” is “the consistent manner in which an individual expresses gender-related traits, including, but not limited to dress, appearance, manner, speech, lifestyle, whether or not that expression is different from that traditionally associated with that individual’s assigned sex at birth.” The most important word in the definition of gender expression may be “consistent,” since it provides a temporal guideline that will be helpful in judging when accommodations may—or may not—be required, as discussed below.

Fringe Benefits. The proposed regulations require that an employer may not discriminate in the provision of fringe benefits based on sexual orientation. The regulations also provide that an employer must provide equal benefits to a married employee and a “similarly situated” employee who has a domestic partner when the domestic partnership is based on homosexual orientation. Domestic partner is defined as one of two unmarried adults who are domiciled together under a long-term arrangement that evidences a commitment to remain responsible indefinitely for each other’s welfare. Note that under the proposed regulation, unmarried domestic partners who are heterosexual or bisexual need not be offered fringe benefits equal to married employees. The Commission’s theory behind this policy decision is that eligibility for benefits is marriage-based. Because heterosexual domestic partners are legally permitted to marry, an employer is not required to provide them benefits if they choose not to marry. While the proposed domestic partner

regulation seems consistent with the 2005 law, its limited scope, if adopted as proposed, may be subject to challenge.

Reasonable Accommodation. The importance of understanding the new proposed definitions of “gender identity” and “gender expression” becomes clear as these definitions relate to the “reasonable accommodations” provision in 3.12F. This section as currently proposed states unequivocally that an employer must make reasonable accommodations in “rules, policies, practices or services that apply directly or indirectly to gender identity or gender expression” unless the employer can meet the burden of proving that compliance would pose an undue hardship. Nothing in the 2005 law amending the Maine Human Rights Act to include sexual orientation as a protected category expressly requires employers to provide reasonable accommodation based on sexual orientation. Nonetheless, the Commission has implied this requirement based on *Maine Human Rights Commission v. Local 1361*, 383 A.2d 369 (Me. 1978). The imposition of the reasonable accommodation obligation will raise issues for employers in several areas, including restroom facilities and dress codes. If this regulation is adopted, employers would be wise to audit their current policies and practices and otherwise consider in advance how they will respond to an employee who, for example, is in a gender transition or other status and asks for reasonable accommodation, before such a situation actually arises.

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¹ The proposed amendments to the Commission regulations only apply to Chapter 3: Employment and Chapter 8: Housing. No amendments have yet been proposed to cover non-discrimination based on sexual orientation in public accommodations, credit, or education even though the 2005 amendment to the Act applies to these areas as well.