

**“KNOW YOUR RIGHTS”**  
**Training on the Legal Rights and Responsibilities of**  
**People with Alcohol and Drug Problems**

**Massachusetts Laws Regarding Discrimination**  
**(April 2006)**

**I. The Basics**

**Q1.** Does Massachusetts have State laws, like the Federal laws in the *Know Your Rights* brochure, that protect people from discrimination because they have a history of alcohol or drug problems, or are in treatment or in recovery from these problems?

**A1.** Yes. The Commonwealth of Massachusetts has several major laws that prohibit discrimination against individuals on the basis of disability. We will refer to these laws in this summary as the **Massachusetts anti-discrimination laws**.

The Commonwealth’s main anti-discrimination law is **G.L. c.151B** (the “Law”). Section 4 of the Law sets out the various acts and practices that are considered unlawful; Section 5 describes the procedure for lodging a complaint with the Massachusetts Commission Against Discrimination (“MCAD”), and Section 6 describes the procedure for challenging discriminatory acts in court.

“Handicap” is defined at G.L. c. 151B, § 1, ¶17 as “(a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment, but such term shall not include current, illegal use of a controlled substance as defined in section one of chapter ninety-four C.”

**Alcoholism** is a disability covered by the Law, though recreational use of alcohol is not covered. People regarded as suffering from alcoholism, or with a past record of alcoholism, are considered “handicapped” under the Law.

People with **addictions to illegal drugs** who are currently using them illegally are not protected. The term “handicap” does, however, apply to individuals having an addiction to drugs who are *not* currently using illegal drugs, and those who have a record of an addiction to drugs or who are regarded as having an addiction to drugs. Unjustified concern regarding a potential relapse into drug use may indicate that the employer regards the employee as addicted (handicapped).

For our purposes, the most important parts of Section 4 of the anti-discrimination Law are as follows:

### **1) Massachusetts Fair Employment Practices Law (the “FEPL”)**

The statute: G. L. c. 151B, § 4, ¶ 16.

Prohibits employment discrimination.

Employers must employ six or more people to be covered by this law. The law is enforced by the Massachusetts Commission Against Discrimination (“MCAD”). MCAD, in turn, is guided by “Discrimination in Employment” regulations set forth at 804 C.M.R. §§3.01 et seq.

### **2) Massachusetts “Fair Housing Law” (the “FHL”)**

The statute: G. L. c. 151B, § 4 ¶¶ 6, 7, 7A, 8.

Prohibits housing discrimination in rental or sale of residential property, including both private and public housing. Also prohibits discrimination in rental or sale of commercial space, and requires that landlord make reasonable accommodations necessary to make space livable (or workable) for the “handicapped” person.

Prohibitions against discrimination by mortgage brokers in the act of making (or refusing to make), the mortgage loan itself, and in the terms, rates and conditions of mortgage loans, as well as in residential real estate sales and appraisals, are found at G.L. c.151B, §4, ¶ 3B.

**Important:** The anti-discrimination Law also makes it illegal to discriminate against any person who receives state or federal public benefits (which could include, for example, SSI and SSD) or state or federal housing assistance (like Section 8, for example) in the context of furnishing credit, services, or rental accommodations. G.L. c.151B, §4, ¶10.

In addition to G.L. c. 151B, Massachusetts anti-discrimination laws also include the following:

### **3) Massachusetts Public Accommodations Act (the “MPAA”)**

The statute: G. L. c. 272, §§ 92A, 98.

Prohibits discrimination in admission to, or treatment in, places of public accommodation (such as libraries, hospitals, museums and retail stores).

Violation of the MPAA is a crime punishable by fine or imprisonment.

- **§ 92A** – prohibits the owner or manager of any “public accommodation” from posting any sign, notice or advertising that is intended to or actually does discriminate against persons in certain protected classes, including persons with physical or mental disabilities “in the full enjoyment of the accommodations, advantages, facilities or privileges offered to the general public by such places of public accommodation, resort or amusement.” Punishable by fine or imprisonment.
- **§ 98** – prohibits discrimination in admission to or treatment in any public accommodation. Punishable by fine or imprisonment. In certain

circumstances, even a private club – one that is not selective in choosing its members – may be considered a “public accommodation.”

*Note* – The MPAA contains no definition of “disability.” The federal First Circuit Court of Appeals has stated that “interpretation of state disability laws like this one goes ‘hand in hand’ with interpretation of the federal disability laws.” Presumably, then, courts and the MCAD will be guided by federal law definitions of “disability,” such as that found in the federal ADA, rather than those found in the Massachusetts FEPL/FHL.

#### **4) Massachusetts Constitution – Art. 114**

This amendment to the Massachusetts Constitution provides that no “otherwise qualified handicapped individual” may “solely by reason of his handicap” be discriminated against in the context of “any program or activity within the commonwealth.” Violations are prosecuted by MCAD. Article 114 does not contain a definition of “otherwise qualified handicapped individual,” but the Massachusetts Supreme Judicial Court has ruled that “disability” in the context of Art. 114 should be given a meaning consistent with the federal Rehab Act.

**Executive Order (“EO”) 246** extends protections under Art. 114 to Commonwealth government agencies, and programs licensed or chartered by the Commonwealth.

*Important:* Massachusetts courts have held that where a violation of an individual’s rights can be addressed under an existing statute – like the FEPL or FHL – a plaintiff has no separate right of action under Art. 114.

#### **5) Massachusetts Declaration of Rights – Equal Rights Act (MERA)**

The statute: G. L. c. 93, § 103.

Gives people with disabilities equal rights to “the full and equal benefit of all laws and proceedings for the security of persons and property...”

*Important:* The MERA incorporates the rights against discrimination against handicapped persons set forth in the Mass. Declaration of Rights, but does not create a separate right of action where claims could otherwise be addressed under G.L. c.151B.

## **II. Analyzing Claims under Massachusetts Anti-Discrimination Laws**

Massachusetts anti-discrimination laws are generally interpreted and applied like their federal law counterparts. For example, because the Massachusetts FEPL and FHL are very similar to federal law, courts often interpret and apply them based on a reading of federal law.

**A. Defining who is disabled**

**Q2.** Will the MCAD take complaints from people who believe they were discriminated against as a result of alcohol or drug problems? Is an alcohol or drug problem considered to be a “disability?”

**A2.** Yes, and Yes. MCAD guidelines (which are persuasive authority, although not binding on courts) and Massachusetts courts have established that:

**Alcoholism** is a “handicap” (the term used in G.L. c.151B) covered by the FEPL and FHL. However, neither “recreational use of alcohol” nor “occasional, casual alcohol consumption,” is covered.

As noted above, people with past histories of **drug addiction** or records of drug addiction, or who are regarded as being addicted to drugs, are protected by the FEPL and FHL. Current illegal drug use, however, is not a “handicap.” Neither “occasional, casual drug use” nor “recreational” drug use is protected. Individuals with records of recreational drug use or who are regarded as engaging in recreational drug use are also not protected.

**Q3.** Do the FEPL and FHL define “**disability**” the same way as the Federal non-discrimination laws?

**A3.** Yes. The Massachusetts definition is virtually identical to that used in the ADA and the Rehabilitation Act.

**General definition.** Under the FEPL and FHL, a “handicap” means

- a physical or mental impairment which substantially limits one or more major life activities of a person;
- a record of having such an impairment; or
- being regarded as having such an impairment.

The term “major life activities,” as used by the FEPL and FHL, means “functions, including, but not limited to, caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.”

“Substantially limits” means the impairment “prohibits or significantly restricts an individual’s ability to perform a major life activity as compared to the ability of the average person in the general population to perform the same activity.”

The FEPL protects “qualified handicapped person[s]” or individuals alleging to be qualified handicapped persons, who are “capable of performing the essential functions of the position involved with [or without] reasonable accommodation.” Employers must provide an employee with reasonable accommodations unless the

requested accommodations would pose an “undue hardship” to the employer (by being excessively costly, for example).

**B. Defining “discrimination”**

**Q4.** What is, and is not, likely to be considered illegal discrimination under Massachusetts law in cases involving people with alcohol or drug problems?

**A4.** Both Massachusetts courts and MCAD generally consider these issues:

- Whether the alleged discrimination was based on the individual’s *status* as a person with a disability protected by law – i.e., whether it was motivated by the person’s disability itself – or whether it was based on the individual’s *conduct*.
- Whether the individual is qualified for the job, services or benefits.

Acting against a person because of his or her *status* as someone with a disability may be unlawful discrimination under both Massachusetts laws and Federal laws. Individuals subjected to discrimination just because they have a history of, or are in treatment or otherwise in recovery from, alcohol or drug addiction may have valid claims under Massachusetts laws, as well as the Federal laws. However, under both Massachusetts and Federal laws, current illegal use of drugs is generally not protected, although a person addicted to and currently using alcohol or other *legal* drugs could have protections.

Acting against someone because of his or her *conduct* may not be considered unlawful discrimination in violation of Massachusetts laws or Federal laws, even if that conduct is caused by, or linked or related to, the person’s disability. Courts in Massachusetts and MCAD have ruled that it is generally not unlawful discrimination to take action against someone based on the individual’s egregious misconduct, such as violating legitimate, uniformly applied rules or policies, including those relating to attendance and alcohol or drug use.

It generally will not violate Massachusetts or Federal laws to deny someone a job because she or he is *not qualified*, or is unable – even with reasonable accommodations the law may require – to satisfactorily perform the essential functions and duties of the job, or to deny someone services, government benefits or programs because she or he does not meet the eligibility requirements for participation.

### III. Anti-discrimination Protections in Specific Settings

#### A. Employment

**Q5.** Which employers are covered by the FEPL?

**A5.** The FEPL applies to all employers, public and private, and labor organizations in Massachusetts with six or more employees. The FEPL prohibits labor organizations and employment agencies from discriminating on the basis of disability unless based upon a “bona fide occupational qualification” (a term that the FEPL does not define, but that MCAD regulations state will be interpreted on a “case by case basis” and “provides only the narrowest of exceptions”).

**Q6.** Who does the FEPL protect from disability-based employment discrimination?

**A6.** A person with a past, current or perceived disability. The FEPL makes it illegal for any employer covered by the law to discriminate against such persons. A great many, but not all employees are covered by the FEPL: the term “employee” does not include any person employed by his or her parents, spouse, or child, or in the domestic service of any person. The FEPL also does not cover independent contractors. Like the ADA, the FEPL covers employees as well as job applicants.

**Q7.** When are employees with drug and/or alcohol-related conditions protected by the FEPL?

**A7.** To be protected by the FEPL, people with drug and alcohol-related conditions must have the requisite job qualifications as well as be able to perform the “essential functions” of the job, with or without a reasonable accommodation.

**Q8.** Are the FEPL’s employment discrimination provisions like those of the Federal laws explained in the *Know Your Rights* brochure?

**A8.** Yes, in most respects, the FEPL adopts the same standards and follows the same basic rules that the Rehab Act and the ADA establish.

The FEPL’s nondiscrimination requirements are very similar to the Federal laws’ requirements in the following areas:

- Definition of what constitutes unlawfully discriminatory employment policies and practices, in regard to hiring, firing, and the terms and conditions of employment
- Reasonable accommodation requirements.

Massachusetts’ highest court has ruled that a person may make a claim under the FEPL if she is disabled, *regardless* of whether she can or does mitigate the effects

of her impairment. It is unclear what effect this ruling has in the context of alcohol or drug-related impairments.

**Q9.** Are employers allowed to ask about a person’s criminal record when that person applies for a job? What if I have a record of arrests that did not lead to convictions?

**A9.** Massachusetts law prohibits employers from asking about or considering arrests that did not lead to convictions when a person applies for a job. Employers are also prohibited from asking about:

- a first conviction for “drunkenness,” simple assault or speeding
- minor traffic violations
- convictions for “affray” or disturbance of the peace
- misdemeanor convictions where the date of the conviction (or end of any period of incarceration) was more than five years ago, providing there have been no subsequent convictions within those five years, and
- any record of a court appearance which has been sealed under state law or anything pertaining to a juvenile record, including delinquency and “child in need of services” (“CHINS”) complaints, unless the juvenile was tried as an adult in Superior Court.

G.L. c.151B, §4 (9).

**Important:** An employer may not take action against an applicant or employee for refusing to acknowledge or answer questions about this protected criminal record information.

**B. Medical Examinations and Medical Leave**

**i. Medical Examinations and Drug or Alcohol Testing by Employers: generally**

**Q10.** Are the FEPL’s provisions regarding medical examinations and drug and alcohol tests similar to those of the Federal laws explained in the *Know Your Rights* brochure?

**A10.** Yes. The FEPL’s provisions regarding medical examinations are similar to those of the ADA and the Rehab Act, though there are a few differences.

The applicable Massachusetts regulations state that once offer of employment has been made, an employer may condition that offer on the results of a medical examination conducted solely for the purpose of determining whether the

employee, with or without reasonable accommodation, is capable of performing the essential functions of the job. 804 C.M.R. 301(g).

MCAD guidelines are vague on tests for illegal drug use. They explain that such tests are permissible “under certain circumstances” for applicants, individuals who have received conditional offers of employment, and employees. However, an “unjustified” requirement that individuals undergo such tests may be viewed as evidence of discrimination.

Massachusetts courts provide more detailed guidance, at least as regards drug testing of current employees. Private employers who wish to perform **drug tests** on current employees must demonstrate a legitimate business interest (the nature of the employer’s business and the nature of the employee’s duties will be examined); courts will weigh same against the employee’s statutory right of privacy (G.L. c.214, §1B). A private employers’ random drug testing program may violate the law when a drug test requirement is applied to employees in one job category (e.g. document editor), but not when applied to employees in another job category (e.g. sales manager required to drive company car more than 20,000 miles per year). Public employers, however, must in most situations have “probable cause” to conduct drug tests of employees, because a drug test by a government employer involves “state action.”

**ii. Medical Inquiries by Employers: Pre-Hire**

MCAD guidelines explain the FEPL’s provisions concerning employers’ **pre-hire** inquiries about alcohol and drug use: employers may not ask applicants what prescribed (i.e. legal) drugs they are currently taking, unless the applicant has tested positive on a test for current use of illegal drugs. Employers may ask applicants about current use of illegal drugs, as long as the questions are not likely to elicit information about past drug addiction. An employer may not ask whether a person has ever been addicted to illegal drugs or treated for alcohol or drug problems. Questions about whether a person has ever received Workers’ Compensation may likewise be prohibited.

MCAD guidelines provide that employers may not ask questions that are “likely to elicit information about” any disability an applicant may have, including whether or not an applicant needs a reasonable accommodation to perform the job. However, employers may ask applicants about their ability to perform specific functions of the job.

**iii. Medical Inquiries by Employers: Post-Offer and Post-Hire**

The FEPL does not distinguish post-offer inquiries (or medical exams) from post-hire inquiries (or medical exams), and does not expressly prohibit post-hire inquiries. Federal law, by contrast, prohibits most employers from inquiring (or

testing to determine) **post offer** whether a person has a disability or conducting post-offer medical tests unless:

- all entering employees are subjected to such an examination regardless of disability;
- information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--
- supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- government officials investigating compliance with this chapter shall be provided relevant information on request; and the results of such examination are used only in accordance with federal law.

Federal law will only permit inquiry (or testing) **post hire** as to whether an employee has a disability or inquiring as to the nature and severity of the disability where the inquiry is shown to be job-related and consistent with business necessity. MCAD guidelines provide that certain **post-hire** inquiries may be evidence of discrimination.

The FEPL has no specific provisions requiring employers to maintain the confidentiality of information they obtain through medical examinations or inquiries; thus, MCAD guidelines refer to the requirements of Federal law. The guidelines also state that failure to maintain confidentiality may be evidence of discriminatory motive or be “otherwise unlawful.”

#### **iv. Medical Leave**

Denying a qualified individual leave from work, for example to obtain treatment for an alcohol or drug problem, may violate the FEPL as well as applicable Federal non-discrimination laws.

#### **C. Housing**

The FHL forbids disability-based discrimination with respect to most housing used for residential purposes as well as all commercial space for sale or rent, and all land intended to be put to commercial use. Prohibited practices include discriminating on the basis of disability in residential mortgage lending transactions, and in selling, brokering, or appraising residential real estate, as well as limiting access to brokerage services because of disability and selectively

enforcing land use, zoning or other ordinances, or private deed covenants, against persons with disabilities.

*Note* that the FHL generally does not apply to two-family homes in which the owner occupies one apartment.

**Q11.** Can a landlord refuse to rent an apartment to a disabled person just because she receives SSI benefits?

**A11.** No. As stated above, G.L. c.151B, §4, ¶10 prohibits discrimination against any person who receives state or federal public benefits (which could include, for example, SSI and SSD) or state or federal housing assistance (like Section 8, for example) in the context of furnishing credit, services, or rental accommodations.

#### **D. Government Services and Programs**

Executive Order 246 prohibits discrimination and mandates affirmative action by Commonwealth executive agencies in order to ensure equal opportunity for people with disabilities. EO 246 applies not only to Commonwealth executive agencies' own policies and practices in employment and the granting of licenses, but also to programs licensed or chartered by the Commonwealth, and recipients of state funding, including contract and grant recipients such as municipalities. EO 246 is enforced by MCAD. Individuals generally do not have the right to bring lawsuits under EO 246.

#### **E. Education**

**Q12.** My son needs to attend a drug treatment program, which will mean he has to rearrange his school schedule. Can his public high school discriminate against him?

**A12.** Generally, no. Massachusetts Public Education Law, G.L. c.71B, §§1-14, guarantees a "free and appropriate public education in the least restrictive environment" to all school-aged children (ages 3 to 22) regardless of disability. In this context, disability is defined as "a developmental delay or any intellectual, sensory, neurological, emotional, communication, physical, specific learning or health impairment or combination thereof" that causes a student to be "unable to progress effectively in regular education and requires special education services, including a school age child who requires only a related service or related services if said service or services are required to ensure access of the child with a disability to the general education curriculum."

#### **F. Health Care**

Hospitals may not discriminate on the basis of "handicap," both because they are specifically prohibited from doing so by 105 C.M.R. 130.26, and because they are "public accommodations" covered by the MPAA. In addition, 105 C.M.R.

130.26 provides that “no hospital which participates in the Medicaid program . . . shall discriminate in the provision of service against any Medicaid recipient.” Emergency medical services may not discriminate on the basis of disability in providing ambulance, EMS, first response service, or in employment practices, per 105 C.M.R. 170.335.

#### **IV. Enforcing Your Rights in Massachusetts: Remedies and Resources for Addressing Illegal Discrimination**

**The Massachusetts Commission Against Discrimination – MCAD** – is the State administrative agency responsible for enforcing the Massachusetts anti-discrimination laws. MCAD investigates and resolves complaints alleging discrimination in violation of these laws. A person who feels s/he has been discriminated against in violation of the law has 300 days after the date said discrimination has most recently occurred in which to file a complaint with MCAD. If Federal laws also cover an individual’s discrimination claims, the MCAD can accept these for dual processing with the appropriate Federal agency. See handout, “How Does the MCAD Process Work?” and MCAD’s web site at <http://www.mass.gov/mcad/index.html>.

**Q13.** What can I do if I think I have been discriminated against because of my past or current alcohol or drug problem?

**A13.** In addition to the remedies under the federal anti-discrimination laws listed at the end of the *Know Your Rights* brochure, if you live in Massachusetts, or if the alleged discrimination occurred in Massachusetts, you have a few options.

- You can file a complaint with the MCAD. In the vast majority of cases, the complaint must be filed within 300 days of the alleged discrimination. Information on this process is available on MCAD’s website, <http://www.mass.gov/mcad/>, or by telephone at (617) 994-6000.

Note that you must generally file complaints with MCAD *in person*.

MCAD has the authority to award damages for lost pay, emotional distress, out-of-pocket expenses, and other monetary losses.

- You can also file a lawsuit in State court (or in Federal court if you are also alleging that the discrimination violated Federal law). However, in order to file in court, you must first file a complaint with MCAD and wait until 90 days after you have done so. The court complaint must be filed within three years of the alleged discrimination.

If you intend to file an employment discrimination lawsuit under the ADA or Rehabilitation Act, you must first file a complaint with the U.S. Equal

Employment Opportunity Commission (EEOC) within 180 days of the alleged discrimination. The Boston Area Office of the EEOC is located at the John F. Kennedy Federal Bldg., 475 Government Center, Boston, MA 02203, tel. (617) 565-3200, and is open Monday – Friday from 8:30a.m. to 5:00p.m. You can only file a lawsuit after receiving a “right to sue” letter from the EEOC. You may wish to check the EEOC website, [www.eeoc.gov](http://www.eeoc.gov), for more information.