

## Rules For Mass. Discrimination Claims Could Get Revamped

By **Brian MacDonough** and **Jaclyn McNeely** (April 8, 2019, 2:11 PM EDT)

By letter dated Jan. 14, 2019, the commissioners of the Massachusetts Commission Against Discrimination, or MCAD, provided the public with “an early opportunity” to review a draft of proposed procedural regulations. In other words, the MCAD is allowing the public to review and comment on proposed regulations prior to the statutorily required formal comment and public hearing process.

When and if promulgated, the proposed regulations will substantially revise the existing procedural regulations that have been in effect since 1999.[1] Needless to say, attorneys whose clients appear before the MCAD should make use of this opportunity to review the proposed draft and submit feedback to the MCAD at [MCADProRegs@mass.gov](mailto:MCADProRegs@mass.gov).

While not an exhaustive list, the following is an overview of some of the key changes contemplated by the MCAD, the bulk of which appear to be designed to streamline MCAD procedures.

### Time Frame for Respondents to Challenge a Probable Cause Finding

One of the most significant changes in the proposed regulations is the expansion of the time respondents will have to appeal a finding of probable cause. Under existing regulations, a respondent has 30 days from the date of the probable cause finding to file a motion for reconsideration. Under the proposed regulations, a motion for reconsideration may be filed for good cause at any time up until the certification conference, or within 45 days of the case being certified for public hearing.

These events occur, essentially, on the eve of public hearing — often months, if not years, after the MCAD investigation concluded and discovery has been completed. This change may in practice insert the equivalent of a summary judgment motion practice into MCAD proceedings.

### Position Statements and Rebuttals

For decades, the MCAD has welcomed, and often requested, that a complainant submit a rebuttal to a respondent’s position statement — thereby ensuring, as in many other adjudicatory proceedings, that the complaining party gets “the last word.” Under the proposed regulations, this practice would be codified.



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While not required, rebuttals are strongly encouraged and may be specifically requested by the MCAD to assist in investigation. Also, the proposed regulations would impose firm deadlines for filing both position statements and rebuttals; specifically, investigators, upon written request and for good cause shown, may grant extensions of no more than 21 days absent “exceptional circumstances.”

### **Equitable Tolling**

The doctrine of equitable tolling is expressly incorporated into the proposed regulations. Specifically, the proposed regulations provide that the statute of limitations (a 300-day filing deadline) may be equitably tolled in those cases where the “complainant is excusably ignorant of their rights or of facts giving rise to a claim within the Commission’s jurisdiction, or where complainant has been misled, either by the Commission or the respondent, as determined by the Investigating Commissioner.”

Although facially favorable to complainants, this proposed change may provide a trap for the unwary, e.g., the pro se complainant. To be safe, complainants should still file their charges within the 300-day filing deadline to fully protect their rights and avoid unnecessary litigation.

### **Contractual Grievance Procedures, the Elimination of “Tolling” of Filing Deadlines**

Under the current regulations, employees who, pursuant to an employment contract, enter into grievance proceedings concerning discriminatory conduct are permitted to file a charge of discrimination with the MCAD within 300 days of the outcome of such grievance proceedings. The proposed regulations eliminate this “tolling” for contractual grievance proceedings. (The proposed regulations provide that the MCAD may stay its investigation pending the outcome of those proceedings but only if such proceedings are pursuant to a collective bargaining agreement.)

Again, this creates a trap for the unwary. Regardless of what their contracts say or their employers may tell them, complainants who are subject to contractual grievance procedures must file their charges of discrimination within 300 days of when they first knew, or should have known, of the discriminatory conduct. Needless to say, complainants who abide by what they understand to be their contractual obligations to their employers, e.g., to pursue an internal grievance before going to the MCAD, may find themselves at risk of litigation over the timeliness of their filings.

### **Motion Practice**

The proposed regulations expand upon, and clarify, MCAD motion practice procedures. For example, the requirement that represented parties confer prior to the filing of a motion has been expanded beyond discovery-related motions. Instead, such requirement will apply to all motions unless otherwise exempted under the regulations. Under the proposed regulations, exemptions apply to pro se parties, “emergency motions” (as delineated under the proposed regulations), and certain predetermination motions, including motions to amend the charge of discrimination and motions for extension of time.

### **Predetermination Discovery**

While parties do not have an automatic right to conduct discovery during the MCAD’s predetermination investigation, in some circumstances an investigator may permit a party to conduct such “predetermination” discovery. When such discovery has been permitted, the proposed regulations provide a formal mechanism for sharing the outcome of such discovery with the investigator. Specifically,

the party conducting such predetermination discovery would now be required to file “a memorandum describing facts relevant to a causal determination” at the conclusion of the predetermination discovery period.

### **Attorney Withdrawal**

The proposed regulations limit the ability of attorneys to withdraw from pending MCAD matters where no appearance of successor counsel has been filed. Specifically, the proposed regulations require leave from the MCAD’s general counsel for an attorney to withdraw after a probable cause finding has been issued. Under the existing regulations, an attorney may withdraw, without leave from the MCAD, at any time prior to certification for public hearing.

### **Access to Commission Materials**

Although the current regulations provide public access to charges of discrimination filed with the MCAD, under the proposed regulations, charges will only be available “post-determination.” Despite the current regulation, the MCAD has already put this restriction to access in place.[2] Such restriction is currently being challenged in court.[3]

### **Conclusion**

In sum, the bulk of the most significant proposed changes appear to be designed for the convenience and efficient operation of the MCAD, a worthy goal given the MCAD’s limited budget, but some may leave some complainants, especially those of limited means and/or without counsel, at a disadvantage. It is expected that, after collecting comments, the MCAD will prepare revisions to the proposed procedural regulations and begin the formal comment and public hearing process. No time frame has yet been disclosed.

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[1] See 804 CMR 1.00 et seq.

[2] See MCAD: Guidelines on Public Records, Sept. 14, 2018.

[3] See Larrabee v. MCAD, Appeals Court of Massachusetts, 2018-P-0464.