

AN IMPOSSIBLE CHOICE: LGBT WORKERS AND FAMILY LEAVE LAWS

November 2013



From time to time, workers may need extended leave due to the birth or adoption of a child, a serious illness or injury, or to provide care for a family member with a serious health condition. The United States is one of the few developed nations lacking mandatory paid parental, sick, or family leave for workers. Currently, federal law provides limited, *unpaid* job-protected leave for eligible employees. Some U.S. states have passed similar, usually more expansive laws (see sidebar).

Yet many lesbian, gay, bisexual, and transgender (LGBT) workers cannot take job-protected leave to care for themselves or their families. Many LGBT workers cannot establish legal relationships to their loved ones. In the majority of states, same-sex couples cannot be legally married. This means employers in these states are free to say “No” when an employee asks for time off to care for a same-sex partner. In addition, LGBT parents in some states are prevented from creating legal relationships with their children, prohibiting them from taking time off to care for a sick or new child. Additionally, there is no federal law protecting LGBT workers from employment discrimination, and LGBT workers receive fewer benefits and pay more taxes, putting LGBT workers and their families at risk. Finally, employers may deny transgender workers leave for transition-related care, incorrectly claiming that such care does not constitute a “serious health condition.”

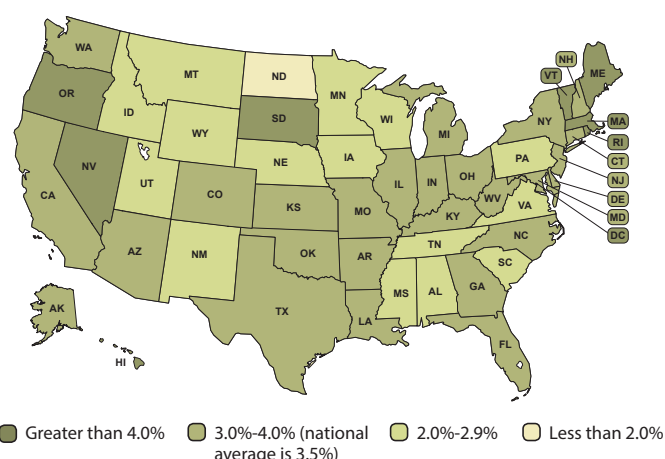
All too often, LGBT workers and their families are forced to make an impossible choice. Taking leave to care for themselves or a family member could get them fired and cost hundreds or even thousands of dollars in lost income as they try to find another job. On the other hand, staying at work through an illness, a child's birth, or a crisis at home could mean getting sicker, not being there for family, and potentially racking up thousands of dollars in added costs for healthcare, child care, and other expenses.

Who Are LGBT Workers?

There are an estimated 5.4 million LGBT workers in the United States. They live in virtually every county in the nation and are racially and ethnically diverse.¹ One reason why leave is an important issue for LGBT workers is that many of them are raising children; new analyses show that 37% of LGBT adults have had a child.²

The conventional wisdom is that LGBT individuals and couples are more financially secure than the general population, but statistics show this is not true. Married or partnered LGBT individuals raising children are twice as likely to have household incomes near the poverty line compared to married or partnered non-LGBT parents. Among LGBT workers, rates of poverty and joblessness are higher than those for non-LGBT workers. This makes LGBT workers and their families especially vulnerable. Taking leave from work could cost them their jobs and push them into the ranks of the long-term poor and unemployed.

Figure 1: LGBT Population By State
Percent of Population Identifying as LGBT



Source: Gates, Gary J. and Frank Newport. "LGBT Percentage Highest in D.C., Lowest in North Dakota." *Gallup Politics*. February 15, 2013. <http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx>

Among transgender workers, the choice can be even starker. Unemployment rates among transgender people in the United States are twice the rate of the population as a whole, with rates for transgender people of color reaching as high as four times the national unemployment rate.⁴ Transgender people are also nearly four times more likely to have a household income under \$10,000 per year than the population as a whole (15% vs. 4%).⁵

What is Family and Medical Leave?

Federal Family and Medical Leave Act. The Family and Medical Leave Act (FMLA) allows eligible workers to take up to 12 weeks of unpaid, job-protected leave upon the birth or adoption of a child, or because of the serious illness of the employee or a spouse, child or parent. More than 40% of all American workers, however, are completely ineligible for FMLA leave, due to the law's threshold requirements on business size, hours worked, and duration of employment.³

State family and medical leave. Several states have adopted more expansive family leave laws that cover more employees, expand the criteria of who is eligible for leave, and/or increase the period of leave beyond the federal FMLA. A few states also have expanded leave requirements to include paid leave.

THE PROBLEMS

Transgender Workers Can Be Denied Medical Leave

There is a well-established consensus among medical associations (such as the American Medical Association) that gender identity is a deep-seated, inherent aspect of human identity and that some transgender people require medically necessary, individualized medical treatment.

But getting job-protected leave for transition-related care can be difficult for transgender workers. First, some physicians and employers may not correctly categorize transition-related healthcare as a "serious health condition," meaning a transgender employee could be unfairly denied leave.

Additionally, employees requesting medical leave may be required to share information that could reveal their transgender status. Because transgender people lack explicit workplace nondiscrimination protections in most states, this could pose a serious risk for transgender workers and dissuade them from seeking necessary medical care or time off.

LGBT Workers May Be Denied Leave to Care for a Spouse or Partner



The federal Family and Medical Leave Act only allows workers leave to care for a "spouse," not an unmarried partner. The Department of Labor recently clarified that a worker in a married, same-sex couple who lives in a state that fully recognizes the marriage can take FMLA leave to care for his or her spouse (see sidebar). However, the majority of LGBT workers live in the 34 states that ban same-sex couples from marrying, meaning they cannot take FMLA leave to care for a partner.



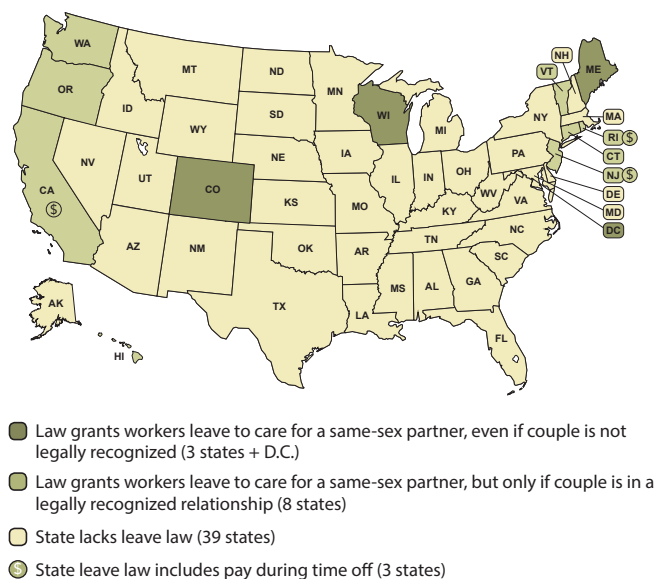
Only 11 states and the District of Columbia have laws allowing an LGBT employee to take leave to care for a same-sex spouse or partner; of these, eight states require that the spouse or partner be in a legally recognized relationship. In total, same-sex couples in only 18 states and D.C. (16 marriage-equality states plus Colorado and Wisconsin) are covered by either a state family leave law or the FMLA; in the remaining 32 states, same-sex couples are denied family leave.

LGBT Workers May Be Denied State Leave to Care for a Child



When it comes to caring for children, the federal Family and Medical Leave Act uses a broad definition of family, defining a worker's "son or daughter" as a biological, adopted or foster child; a

Figure 2: State Family Leave Laws for Spouse and Partner



Source: Movement Advancement Project, Equality Maps, current as of November 15, 2013. For updates see http://www.lgbtmap.org/equality-maps/fmla_laws.

FMLA and the Defense of Marriage Act

In 2013, the Supreme Court overturned a key section of the Defense of Marriage Act, which had prohibited married same-sex couples from taking federal FMLA to care for one another. The Department of Labor issued a memo clarifying that, as a result of the Court's ruling, only employees who are married and currently living in a marriage equality state qualify for FMLA to care for a spouse. Federal employees are exempt from this restriction; all married federal employees may qualify for FMLA, regardless of their state of residence. Moving forward, the Department of Labor should amend the FMLA regulations to allow all married employees, private and public, to qualify for federal FMLA leave, regardless of their state of residence.

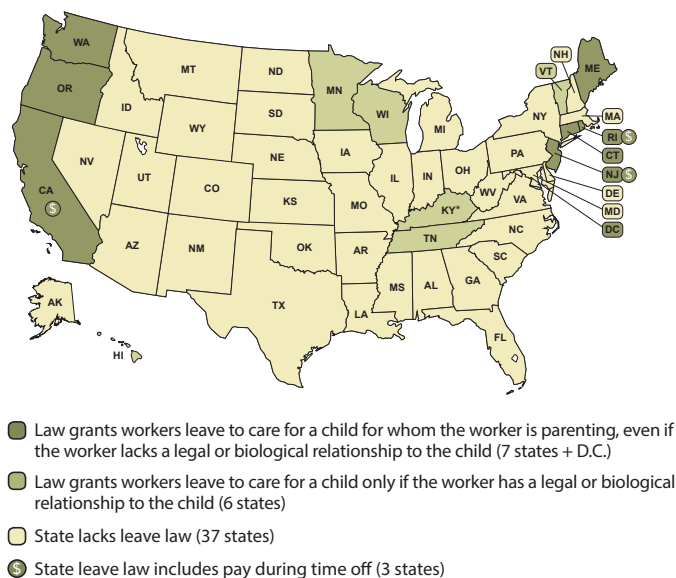
stepchild; or "a child of a person standing *in loco parentis*" (meaning the worker acts as a parent for the child). This allows an LGBT worker to take time off to take care of his or her child, regardless of whether the worker is legally recognized as the parent of that child.



Of the 14 states that currently have more expansive laws allowing workers to take leave to care for a child, only seven states and the District of Columbia broadly permit leave to care for a child who may not have a biological or legal tie to the worker. The remaining six states require a legal parent-child relationship. In these states, parents who lack legal ties to their children may still be covered by the federal FMLA. However, given the strict employer regulations, it can often be more difficult to qualify for FMLA leave than state family and medical leave.

Even when LGBT parents qualify for leave, another concern is that LGBT employees may not be able to take time off to care for a same-sex spouse/partner's child without revealing their sexual orientation. For employees in states that lack employment protections for LGBT workers, this poses a serious problem. A worker might be granted time off to care for a child under federal law, only to be unfairly fired because requesting such leave required the worker to directly or indirectly disclose his or her sexual orientation. And finally, only three states have passed family leave insurance laws that provide paid leave to bond with a new child or care for a seriously ill loved one. Unpaid leave is a better solution than no leave at all, but may still create difficult choices for LGBT families who are living paycheck-to-paycheck.

Figure 3: State Family Leave Laws for Child



Source: Movement Advancement Project, Equality Maps, current as of November 15, 2013. For updates see http://www.lgbtmap.org/equality-maps/fmla_laws.

* Leave available for parents upon the adoption of a child under the age of seven only.

SOLUTIONS

LGBT workers should have the same access to job-protected, unpaid leave as their coworkers. And federal and state leave laws should be expanded to give all workers, including LGBT workers, the opportunity to take paid leave to care for themselves or their loved ones. Asking LGBT workers to make an impossible choice between losing a job or taking care of themselves or their families is unfair and harmful to families, communities, and our economy. A 2013 Small Business Majority survey found that 54% of small business owners agree that federal medical and family leave law should be changed to treat LGBT workers fairly.⁶ The following are among the key solutions to these problems:

Recognize the families of all LGBT Americans.⁷ States should allow same-sex couples to marry and ensure that parentage laws allow LGBT parents to be legally recognized as parents. In addition, the federal government should clarify that the FMLA covers all legally married same-sex couples, even if the couple lives in a state that does not recognize their marriage. Federal regulations currently look to the state in which a worker lives to determine his or her eligibility for FMLA. With marriage equality banned in the majority of states, these regulations prohibit many married workers from taking leave for which they would otherwise be eligible.

Provide equal access to individual and family medical leave. Congress should revise FMLA to broaden the definition of covered caregivers to ensure that employees can take

leave to care for a domestic partner or same-sex partner. States also should pass family leave laws inclusive of same-sex couples. In addition, federal and state medical leave laws should be clarified to make certain that transgender workers can take needed individual medical leave.

Ban public and private employment discrimination on the basis of sexual orientation and gender identity/ expression. Congress should pass federal legislation prohibiting employment discrimination on the basis of sexual orientation and gender identity/ expression. The president should issue an executive order prohibiting discrimination against employees of federal contractors. State and local lawmakers should also ban employment discrimination in states without explicit current protections for gender identity/ expression and/ or sexual orientation. In the absence of nationwide and state-level protections, local lawmakers should take local action to protect LGBT workers.

Expand FMLA to cover more workers and make federal and state paid family and medical leave available for all working families. Congress should amend the Family and Medical Leave Act to allow more workers to qualify. Currently, the FMLA does not cover workers in businesses

with fewer than 50 employees or any workers who have not worked for 1,250 hours in the past year at the same job. Congress should reduce the minimum number of employees and the minimum number of months worked to broaden eligibility. Congress should also create a National Family and Medical Leave Insurance Program that would allow workers to receive a portion of their pay while they take a limited amount of time away from work. The insurance program would provide paid leave for employees, funded by contributions from both employers and employees. State leave laws should make explicit that workers can take leave to care for a domestic partner or same-sex partner, and state laws should follow the FMLA definition of parent to include workers who are standing *in loco parentis*.

Create a right to paid sick days. Congress should follow the lead of several cities and states by guaranteeing workers a right to paid sick days for their own routine illness or health care need or to care for a loved one. The Healthy Families Act is a federal bill that would allow workers to earn paid sick days to care for themselves or their families, including LGBT families. State and local laws should include LGBT families in paid sick days legislation as well.

ENDNOTES

¹ Movement Advancement Project, Human Rights Campaign and Center for American Progress, *A Broken Bargain: Discrimination, Fewer Benefits and More Taxes for LGBT Workers* (Full Report), May 2013.

² *Id.*

³ A Better Balance. *Time for a Change: The Case for LGBT-Inclusive Workplace Leave Laws and Nondiscrimination Protections*. (2013).

⁴ *Id.*

⁵ *Id.*

⁶ Arensmeyer, John. Foreword to Movement Advancement Project, Human Rights Campaign and Center for American Progress, *A Broken Bargain: Discrimination, Fewer Benefits and More Taxes for LGBT Workers* (Full Report), May 2013.

⁷ See Movement Advancement Project, Family Equality Council and Center for American Progress, "All Children Matter: How Legal and Social Inequalities Hurt LGBT Families (Full Report)," October 2011.

ABOUT THIS BRIEF

This brief is based on content from *A Broken Bargain: Discrimination, Fewer Benefits and More Taxes for LGBT Workers*, a report which examines how job discrimination without legal protection makes it harder for LGBT workers to find and keep a good job; and how LGBT workers receive fewer benefits and pay more taxes, which puts LGBT workers and their families at risk. The report also offers recommendations for how federal, state and local governments, as well as employers, can reduce barriers to finding and keeping a good job and provide equal access to individual and family benefits. For more information, visit www.lgbtmap.org/lgbt-workers, www.americanprogress.org, or www.hrc.org.



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