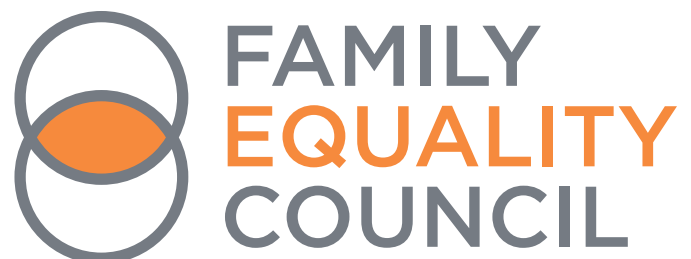




# PENNSYLVANIA LGBTQ FAMILY LAW

A Resource Guide for LGBTQ-Headed Families  
living in Pennsylvania

November 2017



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# INTRODUCTION

This guide was drafted by Family Equality Council, in collaboration with Equality Pennsylvania and Equality Pennsylvania Education Fund. It addresses many of the legal rights and issues that affect LGBTQ families currently living in Pennsylvania. As LGBTQ equality advances across the nation, there are still significant gaps in the rights of LGBTQ individuals and their families, especially at the state level. Pennsylvania has very few laws in place to protect LGBTQ families from discrimination and ensure equal access to education, employment, housing, healthcare, and public accommodations. In this type of environment, it is important to understand what the law is in each area and how best to protect your family.

## DISCLAIMER

This handbook is not intended to be legal advice but an overview of the current state of LGBTQ-family law in Pennsylvania. The law is changing quickly and dynamically, so it is important to consult an attorney or contact the authors to discuss the details of your particular situation and to ensure that information provided herein is still accurate.



# RELATIONSHIP RECOGNITION

## MARRIAGE

On May 20, 2014, marriage equality for LGBTQ families became a reality in Pennsylvania.<sup>1</sup> *The Whitewood v. Wolf* case struck down a 1996 statute that defined marriage as a “civil contract by which one man and one woman take each other for husband and wife.”<sup>2</sup> The federal court ruled that this state law prohibiting marriage between same-sex couples was unconstitutional, and the Governor announced the next day that the Commonwealth would not appeal the decision.<sup>3</sup> As such, Pennsylvania began issuing marriage licenses to same-sex couples on May 21, 2014. However, under Pennsylvania’s Religious Freedom Protection Act<sup>4</sup> and the First Amendment to the U.S. Constitution, ministers have the right to refuse to marry a couple based on their religious beliefs.

Nationwide recognition of marriages of same-sex couples came in June 2015 with the United States Supreme Court’s ruling in *Obergefell v. Hodges*.<sup>5</sup> *Obergefell* not only requires all U.S. states to issue marriage licenses to same-sex couples, but also requires them to recognize marriage

1 *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014).

2 23 Pa.C.S. § 1102.

3 Governor Corbett’s Statement of May 21, 2014, available at <http://www.epgn.com/news/breaking-news/7274-25143215-gov-corbetts-statement> (last visited October 2017).

4 71 P.S. § 2401 *et seq.*

5 *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

licenses issued in another state.<sup>6</sup>

## CIVIL UNIONS AND DOMESTIC PARTNERSHIPS

Pennsylvania has never had a separate status of civil unions or domestic partnerships statewide, and still does not. However, Pennsylvania courts have recognized civil unions entered into in other jurisdictions as marriage equivalents for purposes of divorce. Recently, a Pennsylvania state court ruled that a civil union entered into in another state could be dissolved in Pennsylvania, thus applying the state divorce provisions to a civil union.<sup>7</sup> However, that decision had no impact on the ability of same-sex couples to enter into a civil union in Pennsylvania. Some municipalities in Pennsylvania have Domestic Partnership registries, but, unlike civil unions, these are not marriage equivalents and do not provide the same rights, benefits or legal protections of marriage.<sup>8</sup>



6 *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

7 *Neyman v. Buckley*, 153 A.3d 1010 (Pa. Super. 2016)

8 *Devlin v. City of Philadelphia*, 862 A.2d 1234 (Pa. 2004)

Find more information at:

[www.familyequality.org](http://www.familyequality.org)  
[www.equalitypa.org](http://www.equalitypa.org)

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## IMPORTANT:

Any couple who has a civil union or domestic partnership issued from another state and lives in Pennsylvania should consult with an attorney as to their rights under Pennsylvania and federal law.

## COMMON LAW MARRIAGE

A recent Pennsylvania case confirms that same-sex couples in Pennsylvania have the same right to prove a common law marriage as opposite-sex couples under the United States constitution, applying the *Obergefell v. Hodges* and *Whitewood v. Wolf* cases retroactively. In *Re Estate of Carter*, states: “Same-sex couples have precisely the same capacity to enter marriage contracts as do opposite-sex couples, and a court today may not rely on the now-invalidated provisions of the Marriage Law to deny the constitutional reality.”<sup>9</sup> Since all common law marriages were abolished in Pennsylvania in January 2005, couples must have entered into a common law marriage before that date. Couples that obtained a marriage license following marriage equality in Pennsylvania (May 20, 2014) or nationally (June 26, 2015), but had a ceremony before 2005, could be eligible for a retroactive declaration of an earlier common law marriage date if they meet the requirements. This is important because some benefits (such as Social

9 *In Re Estate of Carter*, 159 A.3d 970 (Pa. Super. 2017)

Security or alimony benefits) require a certain length of a marriage in order for a spouse to access such benefits. Common law marriages come with all of the same rights, benefits and responsibilities of legal marriage, including a zero percent tax rate on Pennsylvania inheritance tax, access to Social Security survivor benefits and access to pensions and other assets. A declaration of common law marriage also allows spouses to take advantage of divorce laws, giving them access to alimony determinations and division of marital property through equitable distribution.

## FEDERAL BENEFITS AFTER UNITED STATES V. WINDSOR AND OBERGEFELL V. HODGES

In 2013, the U.S. Supreme Court, in *United States v. Windsor*, found Section 3 of DOMA unconstitutional, overturning the law that denied federal marriage benefits to married same-sex couples.<sup>10</sup> This case laid the foundation for marriage equality nationwide, which was won two years later.

As discussed above, in 2015, the Supreme Court found in *Obergefell v. Hodges* that same-sex couples have a fundamental right to marry under the Constitution, mandating that same-sex couples be permitted to marry and have their marriages recognized throughout the U.S.<sup>11</sup> Following *Obergefell*, all federal

10 *United States v. Windsor*, 133 S.Ct. 2675 (2013).

11 *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).



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marriage benefits have been extended to married same-sex couples nationwide. Such benefits include, but are not limited to, Social Security and Veterans Administration benefits, all federal tax benefits, health insurance and retirement benefits for same-sex spouses of all federal employees, and spousal benefits for same-sex spouses of military service members.

### IMPORTANT

Because marriages of same-sex couples are now recognized nationwide, married couples living in Pennsylvania should be able to access all federal benefits that are attendant to marriage. Please alert the authors if you find such benefits have been denied to you as a result of the agency failing to recognize your marriage.



## CHILDREN AND PARENTAGE

LGBTQ people and same-sex couples form families in various ways. Some have children from prior different-sex or same-sex relationships. Some LGBTQ people are single parents by choice. Some same-sex couples adopt or use assisted reproductive technologies to build their families together. While there is much progress to be made in Pennsylvania with regard to parental recognition for LGBTQ individuals and couples, there are some state rules, cases, and statutes in place that recognize and reflect the evolving landscape of modern families and diverse family structures.

All same-sex couples raising LGBTQ children should keep copies of the following documents easily accessible:

- Adoption decree
- Birth certificate
- Standby Guardianship Nomination
- Marriage Certificate
- Medical Powers of Attorney

For more information on how to access federal marriage benefits please see the post-Obergefell fact sheets at:

<https://marriageequalityfacts.org>

Please consult an attorney experienced in LGBTQ law, or the authors, if you experience discrimination from state or local agencies in recognizing your family relationships on the basis of your marriage.

Likewise, if you are an LGBTQ person or same-sex couple thinking about fostering and/or adopting children either from the public child welfare system or through private adoption, it is critical that you hire a Pennsylvania adoption attorney who has experience working with LGBTQ people and couples. It is not enough to simply hire an experienced adoption or family law attorney. There are issues unique to LGBTQ families that can, and should, only be managed by an attorney with particular experience and expertise in this area of the law. If you are unsure where to find an experienced LGBTQ adoption attorney, please contact Family Equality Council [www.familyequality.org](http://www.familyequality.org), and we will do our best to help you find one.

## ADOPTION

Adoption decrees are irrefutable and undeniable proof of parentage; and, once an adoption decree is validly issued in one state, it must be recognized and enforced in every state.

Find more information at:

[www.familyequality.org](http://www.familyequality.org)  
[www.equalitypa.org](http://www.equalitypa.org)

Pennsylvania's adoption law states that any individual may adopt.<sup>12</sup> There is no law that prohibits adoption by LGBTQ individuals or couples, but there is no explicit statutory protection against discrimination either. For this and other reasons, it is advisable to contact an adoption attorney experienced in LGBTQ family law in Pennsylvania and to engage with foster and adoption agencies who are welcoming and affirming to LGBTQ people and couples.

## Joint Adoption

Since a landmark judicial decision in 2002, Pennsylvania has allowed both married and unmarried couples to petition to adopt jointly, regardless of whether the couple is the same sex or different sex.<sup>13</sup> As further discussed below, in holding that the partner of an individual with sole legal custody of a child could petition for a second-parent adoption, the Pennsylvania Supreme Court stated that, if the sole legal parent had relinquished parental rights, the couple could have adopted the child jointly.<sup>14</sup> At the time, marriages of same-sex couples were not yet recognized in Pennsylvania, so this decision effectively sanctioned the adoption of a child by any married or unmarried couple.

Since the 2014 arrival of marriage equality in Pennsylvania, there should be no question regarding the right of same-sex couples to adopt jointly. Nonetheless, consultation with a Pennsylvania adoption attorney who has experience working with

<sup>12</sup> 23 Pa.C.S. § 2312.

<sup>13</sup> *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002).

<sup>14</sup> *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002).



An adoption decree is the single best irrefutable and undeniable proof of parentage. We strongly recommend that same-sex couples with children ALWAYS get an adoption decree that recognizes both parents as legal parents, even if you are married and appear on the birth certificate.

LGBTQ couples is essential to determine which method of adoption to pursue.

## Second-Parent Adoption

Second-parent adoption is the adoption of a child by an additional parent who is not married to the legal parent of the child. In a second-parent adoption, the additional parent can be recognized as such without the first parent losing any parental rights, and the child is entitled to the benefits of two legally recognized parents.

As mentioned above, in a landmark 2002 decision, well before marriage equality was recognized in Pennsylvania or nationwide, the Supreme Court of Pennsylvania ruled that same-sex couples in Pennsylvania were entitled to equal adoption rights as different-sex couples.<sup>15</sup> The case involved two same-sex couples who were raising children with their partners, who were the sole legal parents of the children. The partners, whose legal rights as parents were not recognized, wished to adopt the children as second-parents, but their petitions had been denied. The Supreme Court of Pennsylvania ruled in favor of the same-sex couples, holding that the Pennsylvania adoption statute did not expressly preclude same-sex partners from adopting.<sup>16</sup> Since civil unions are

<sup>15</sup> *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002).

<sup>16</sup> *In re Adoption of R.B.F.*, 803 A.2d at 1202.

not recognized in Pennsylvania and marriages between same-sex couples were not recognized until 2014, for twelve years this decision allowed unmarried same-sex couples to share the rights and responsibilities of parenthood. Now that marriage equality has been achieved, married couples have the additional option of stepparent adoption, but unmarried couples in Pennsylvania still may petition for second-parent or joint adoptions.

Second-parent adoptions, unlike stepparent adoptions discussed below, may require a home study investigation and report. This may increase the costs of the adoption and may involve a time delay.

Many states do not allow second-parent adoptions. However, a validly-granted second-parent adoption issued in Pennsylvania must be recognized nationwide, regardless of whether another state would have granted the adoption.<sup>17</sup>

## Stepparent Adoption

Another option for married same-sex couples to ensure that both parents are legally recognized is to obtain an adoption decree through the stepparent adoption procedure. Stepparent adoption is the legal adoption of a child by the spouse

<sup>17</sup> *V.L. v E.L.*, 136 S.Ct. 1017 (2016).

of the child’s legal parent. If the couple jointly conceived the child through assisted reproduction during their marriage, these adoptions are sometimes referred to as “confirmatory adoptions” to confirm the parental rights of the non-genetic parent through adoption.

In Pennsylvania, stepparent adoptions are permitted as long as the child has only one legal parent and that parent consents to the spouse’s adoption of the child.<sup>18</sup> Prior to marriage equality in Pennsylvania, same-sex couples could not adopt as stepparents because they were not “spouses” as required by Pennsylvania law.<sup>19</sup> Since Pennsylvania gained marriage equality in 2014, however, a same-sex spouse is entitled to adopt under this provision just as a different-sex spouse would. Stepparent adoption is not available to unmarried same-sex couples, but, as discussed above, unmarried same-sex couples may adopt jointly or through second-parent adoption.

Because there are no explicit statutory protections in Pennsylvania preventing discrimination, consultation with a Pennsylvania adoption attorney who has experience working with LGBTQ families is highly encouraged when proceeding with a stepparent adoption.

## Marital Presumption

The marital presumption is the idea that, when a married woman gives birth, her spouse is the other legal parent.

<sup>18</sup> 23 Pa.C.S. § 2903.

<sup>19</sup> *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002).

Historically, this concept has been applied exclusively to different-sex spouses. However, with nationwide marriage equality, the marital presumption laws should be applied to married same-sex couples on the same basis as it would for opposite-sex couples.

Pennsylvania recognizes a marital presumption. As stated by the Supreme Court of Pennsylvania, “[o]ne of the strongest presumptions in Pennsylvania law is that a child conceived or born in a marriage is a child of the marriage.”<sup>20</sup> Since the recognition of marriage equality, there have been no appellate court decisions in Pennsylvania applying the marital presumption in the context of a same-sex married couple. Additionally, under Pennsylvania law, the marital presumption thus far has been interpreted as a biological presumption, which can be rebutted if the relationship is no longer intact or through genetic testing. Same-sex couples conceiving a child through assisted reproduction where only one spouse has a genetic connection to the child should consult an LGBTQ family law attorney. While the marital presumption may be argued to apply to same-sex couples, the legal risk of relying on this presumption alone is great, especially in certain situations such as where a known individual donates sperm for the conception of the child. To avoid the great risk of relying on the marital presumption alone, it is critical for the non-genetic parent to secure parental rights through a confirmatory/stepparent adoption decree to ensure that both spouses are legally recognized as parents.

<sup>20</sup> *Brinkley v. King*, 549 Pa. 241 (Pa. 1997).

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## SURROGACY, ASSISTED REPRODUCTION, & ARTIFICIAL INSEMINATION

Assisted reproductive technology (ART) is the use of medical technology to assist with pregnancy or childbirth and includes methods such as in vitro fertilization or use of an egg donor, sperm donor, embryo donor, and/or a gestational carrier through surrogacy. Surrogacy is the carrying and delivering of a child by a woman for another person or couple, with the intention of transferring all parental rights to the intended parent(s). In “traditional surrogacy,” the surrogate contributes her own egg, while in “gestational surrogacy,” the surrogate has no genetic relationship with the fetus; an embryo created from another woman’s egg is transferred to the surrogate’s uterus.

There are no state statutes in Pennsylvania that govern ART or surrogacy, but there is case law and administrative law that protects the rights of LGBTQ intended parents using ART to conceive a child. The use of ART through donors and surrogacy is common in Pennsylvania and has been recognized by the courts.<sup>21</sup> It is essential to enter into a written surrogacy and/or donor contract with any known donor to document the expectations, intentions, and responsibilities of all parties involved in a surrogacy and known donor arrangement. Pennsylvania state courts have held that surrogacy contracts and known sperm donor agreements are binding and

21 *Ferguson v. McKiernan*, 596 Pa. 78 (Pa. 2007).

enforceable.<sup>22</sup> Couples who use known donors should also secure their rights after the birth of the child through an adoption, which would include a formal legal termination of the donor’s parental rights. Individuals or couples who use gestational surrogacy will need to petition the court prior to the birth of the child to have an order entered declaring the intended parents as the legal parents of the child, and directing the Pennsylvania Department of Health to issue the birth certificate in the names of the intended parents. Individuals or couples who use traditional surrogacy must proceed with an adoption and cannot file for a court order of parentage prior to the birth. In traditional surrogacy, the birth mother is the legal mother of the child who must formally terminate her parental rights through adoption. In contrast, in gestational surrogacy, the woman who carries a child who is not genetically related to her is not the legal mother and has no custodial rights even as a third party.<sup>23</sup>

It is imperative that any individual or couple who is considering using ART consult with a Pennsylvania attorney who has significant expertise in ART law, has worked with LGBTQ individuals and same-sex couples, and has experience drafting enforceable contracts between intended parents, donors, surrogates, and surrogacy agencies to ensure that the parental rights of the intended parent(s) are recognized. Further, as an adoption decree is irrefutable proof of parentage

22 *In re S.S.*, 128 A.3d 296 (Pa. Super.2015); *Ferguson v. McKiernan*, 596 Pa. 78 (Pa. 2007).

23 *J.F. v. D.B.*, 897 A.2d 1261 (Pa. Super. 2006).

and is valid throughout the country, it is strongly recommended that same-sex couples consult with an attorney about also petitioning for an adoption decree for a child conceived through ART even if a surrogacy or donor agreement is in place and the name(s) of the intended parent(s) appear on the birth certificate.

## BIRTH CERTIFICATES

Pennsylvania birth certificates identify each parent as a “parent” instead of as a “mother” or as a “father.” In May 2016, after the recognition of marriage equality, the Pennsylvania Department of Health issued a letter informing hospitals that, when there are two female spouses in a marriage and one is the birth mother, both she and her spouse can be listed on a birth certificate.<sup>24</sup> In June 2017, the U.S. Supreme Court held that states cannot discriminate against same-sex couples when listing both spouses on a birth certificate. In that case, the U.S. Supreme Court expressly reiterated that equal access to birth certificates is one of the many “rights, benefits, and responsibilities” associated with civil marriage.<sup>25</sup> Accordingly, states cannot discriminate against same-sex spouses with regard to the naming of each spouse on a child’s birth certificate.

Pennsylvania has an administrative procedure for birth certificates for children

24 ACLU - Pennsylvania, Issues, LGBT Rights, Same-Sex Parenting - Birth Certificate FAQs, available at <https://www.aclupa.org/issues/lgbtrights/same-sex-parenting-birth-certificate-faqs> (last visited October 2017).

25 *Pavan v. Smith*, No. 16-992 (June 2017).

born through gestational surrogacy. The Pennsylvania Department of Health’s Assisted Conception Birth Registration procedure allows for the issuance of birth certificates directly in the names of the intended parents.<sup>26</sup> The procedure requires that the intended parents file a petition to a local court, usually around the twentieth week of pregnancy. The petition is filed through an attorney, requests that the court enter an order naming the intended parents as the child’s legal parents and for the child’s birth certificate to be issued in that way. Court procedures vary significantly from county to county. Although this procedure is common in Pennsylvania, it is not governed by statute and judges may use their own discretion in granting such orders.<sup>27</sup>

As a birth certificate is not a Court Order but rather is an administrative record, it is still strongly recommended that same-sex couples petition for an adoption decree as soon as possible to ensure that both parents are legally recognized. Unlike an adoption decree, a birth certificate is not given “full faith and credit” and does not have to be recognized by other states.

After an adoption is finalized, the court will submit a certified order of adoption to the Vital Records office in the state where the child was born. Same-sex parents will be listed on the birth certificate after

26 American Bar Association, Section of Family Law, ARTful Approaches to Parental Establishment (October 17, 2015), available at [https://www.americanbar.org/content/dam/aba/events/family\\_law/2015/10/artful.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/family_law/2015/10/artful.authcheckdam.pdf) (last visited October 2017).

27 *In re I.L.P.*, 965 A.2d 251 (Pa. Super. Ct. 2009).

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completing an adoption of the child. To ensure a child's records are updated properly, send a request to Pennsylvania's Office of Vital Records. Details on how to do so are available at <http://www.health.pa.gov/MyRecords/Certificates/Pages/11596.aspx#.Wde7udFrzIU>

## CHILD CUSTODY & CHILD SUPPORT

An LGBTQ individual who is not a legal parent (is not a biological parent and has not adopted a child) may be able to petition for custody rights where they are co-parenting the legal child of their partner. If the non-legal parent's relationship with the child began with the consent of the legal parent and the non-legal parent has discharged parental duties, even if the partner did not finalize an adoption, the non-legal parent may have standing (a legal right or interest) to seek custody as a person who is *in loco parentis* or stands in the place of a parent.<sup>28</sup> While standing as a person who is *in loco parentis* may allow a partner to seek custodial time, there are certain rights and benefits that are only available to legal parents and their children such as Social Security Survivor Benefits and inheritance rights. This standing for custody may also trigger a responsibility for the *in loco parentis* partner to pay child support as well.<sup>29</sup>

28 *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); see also *Jones v. Jones*, 884 A.2d 915 (Pa.Super. 2005), app. denied, 912 A.2d 838 (Pa. 2006).

29 See *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Super. 2002); *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. Super. 2007).

## APPLYING FOR A SOCIAL SECURITY NUMBER AND CARD FOR A CHILD

To apply for a Social Security Number and Card for a child, the Social Security Administration (SSA) requires a number of different documents, personal information about the parent applying for the Card or Number, the child, and any other legal parent to the child, and a completed SS-5 application form.

These documents may be submitted to the SSA via letter or in person at a local SSA office, which can be found through this link <https://secure.ssa.gov/apps6z/FOLO/fo001.jsp>. Two same-sex parents may be listed on the application for a Social Security Card or Number. However, only parents listed on the child's birth certificate, or on a court-ordered adoption decree, are permitted to be included on the application.

For more information on the application process, please see Family Equality Council's FAQ [http://www.familyequality.org/get\\_informed/advocacy/know\\_your\\_rights/ssa\\_faqs](http://www.familyequality.org/get_informed/advocacy/know_your_rights/ssa_faqs), visit the SSA website at <https://www.ssa.gov/ssnumber>, or call the SSA at 1-800-722-1213 or 1-800-325-0778. If difficulties arise, please contact Family Equality Council.

## APPLY FOR A PASSPORT FOR A CHILD

To apply for a passport for a child, the State Department requires documentary evidence, a completed DS-11 form, a photograph of the child, and personal information about the parent applying for the passport, the child, and the child's other legal parent, if any. These documents must be submitted to the State Department in person at the nearest accepted facility or regional passport agency, listed here: <https://iafdb.travel.state.gov>

The required materials are listed here: <https://travel.state.gov/content/passports/en/passports/under-16.html>

Two same-sex parents may be listed on the application for a child's passport. Only parents listed on the child's birth certificate, or on a court-ordered adoption decree, are permitted to be included on the application.

However, if the adoptive (or legal) parent of the child is unavailable, the Department of State permits a non-adoptive parent who stands *in loco parentis* to the child to complete the DS-11 form and application. *In loco parentis* means an adult with day-to-day responsibilities to care for and financially support a child but with whom the child does not have a biological or legal relationship.

Questions about the application process and acceptable materials can be directed to the National Passport Information Center at 1-877-487-2778. The State Department website also provides helpful information at <http://travel.state.gov>

Family Equality Council also maintains an FAQ on applying for a child's passport, available at this link: [http://www.familyequality.org/get\\_informed/advocacy/know\\_your\\_rights/passport\\_faq](http://www.familyequality.org/get_informed/advocacy/know_your_rights/passport_faq), or contact Family Equality Council for assistance if problems arise in obtaining the passport.

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# NON-DISCRIMINATION PROTECTIONS

There are currently no federal laws that explicitly prohibit discrimination against LGBTQ people in employment, housing, and public accommodations. Existing federal civil rights laws have been interpreted to provide some limited protections in housing, employment, education and even in health care, but without explicit and fully inclusive federal protections against discrimination based on sexual orientation and gender identity, LGBTQ people and their families remain vulnerable.

Unfortunately, Pennsylvania state law offers no explicit protections against sexual orientation-based or gender identity-based discrimination in these areas. However, 44 municipalities – including the five most populated cities in Pennsylvania – have nondiscrimination ordinances that prohibit discrimination on the basis of sexual orientation, gender identity, or both.<sup>30</sup> Accordingly, LGBTQ individuals in these municipalities who are discriminated against in employment, housing, public accommodations, or education may file a complaint with the municipality.<sup>31</sup>

<sup>30</sup> Equality Pennsylvania, Municipalities with Nondiscrimination Ordinances, <http://www.equalitypa.org/municipalities-with-nondiscrimination-ordinances> (last viewed October 2, 2017).

<sup>31</sup> Because additional municipalities may add protections, it is important to check <http://www.equalitypa.org/municipalities> for the most up-to-date list.

## EMPLOYMENT

### State Law

Even with the arrival of nationwide marriage equality, LGBTQ people are at risk of being outed at work by simply filing an amended W-4, leading to discrimination in the workplace or even the loss of a job. Unfortunately, the Commonwealth of Pennsylvania offers no state law prohibiting employers from discriminating against an employee on the basis of sexual orientation and gender identity. Although there is no statutory protection, Pennsylvania has executive orders in place that offer some protections from employment discrimination to LGBTQ individuals. In April 2016, Governor Wolf signed two executive orders that extend employment discrimination protections to the LGTBQ community. The first prohibits discrimination against state employees on the basis of sexual orientation, gender identity or expression, or AIDS or HIV status.<sup>32</sup> Thus, LGBTQ employees of the state may report allegations of employment discrimination to the agency where the discrimination occurred. Each state agency has its own Equal Employment Officer charged with investigating complaints of discrimination, and the list of agency contacts is available here: <http://www.hrm.oa.pa.gov/eoo/Pages/default.aspx>

<sup>32</sup> Commonwealth of Pennsylvania, Office of the Governor, Executive Order No. 2016-04, Equal Employment Opportunity (April 7, 2016).

The second Executive Order signed in April 2016 protects Pennsylvanians who work for companies that contract with, subcontract with, or receive grants from the Commonwealth of Pennsylvania. This Order states that these entities must agree not to discriminate on the basis of sexual orientation or gender identity in their employment or subcontracting practices.<sup>33</sup>

Additionally, the Pennsylvania Human Relations Act, passed in 1997, prohibits discrimination in employment on the basis of “race, color, familial status, religious creed, ancestry, age, sex, national origin, handicap or disability, use of guide or support animals.”<sup>34</sup> Sexual orientation and gender identity are not listed as protected classes of people. However, the Pennsylvania Human Relations Commission, which enforces the Human Relations Act, recently proposed guidance that would classify allegations of sexual orientation and gender identity discrimination as discrimination on the basis of “sex” under the theory of sex stereotyping discrimination.<sup>35</sup> While this would not replace comprehensive anti-discrimination legislation, it would offer some protection for LGBTQ individuals

33 Commonwealth of Virginia, Office of the Governor, Executive Order No. 2016-05, Contract Compliance (April 7, 2016).

34 43 P.S. § 955.

35 Pennsylvania Human Relations Commission, Guidance Concerning Protections for Lesbian, Gay, Bisexual and Transgender Individuals in the Pennsylvania Human Relations Act (Proposed) (April 26, 2017), available at <http://www.phrc.pa.gov/Documents/Proposed%20Guidance%20Concerning%20Protections%20for%20LGBTQ%20individuals%20PHRA%204-26-17.pdf> (last visited October 2017).

against discriminatory employment-related actions.

Individuals who have experienced discrimination and want to file a complaint, can do so at: <http://www.phrc.pa.gov/File-A-Complaint/Pages/default.aspx>

Additional information about the complaint process, is available at: <http://www.phrc.pa.gov/File-A-Complaint/Pages/About-Filing-A-Complaint.aspx>

## Federal Law

While there is no explicit federal law that bars discrimination against LGBTQ people in the workplace, the definition of “sex” in Title VII of the Civil Rights Act of 1964 has been interpreted by some courts to provide employment protections for LGBTQ people. The Equal Employment Opportunity Commission (EEOC) hears and investigates complaints of employment discrimination under Title VII and looks into claims against all private employers, state and local governments, federal government agencies, employment agencies, and labor unions, as long as they have fifteen or more employees or members.

In 2012, the EEOC ruled in *Macy v. Holder* that discrimination against a transgender woman was discrimination under Title VII’s prohibition of discrimination based on sex.<sup>36</sup> In *Veretto v. US Postal Service*<sup>37</sup> and *Castello v. US Postal Service*<sup>38</sup>, the EEOC

36 No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

37 No. 0120110873 (E.E.O.C. Jul. 1, 2011).

38 No. 0120111795 (E.E.O.C. Dec. 20, 2011).

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held that employment discrimination on the basis of sexual orientation violated prohibitions of sex-based discrimination because it constituted discrimination based on sex-stereotypes. In 2015, the EEOC strengthened the protections for those who may face discrimination on the basis of sexual orientation by ruling in *Complainant v. Foxx*<sup>39</sup> that claims of discrimination based on sexual orientation inherently amount to claims of sex discrimination and are therefore actionable under Title VII.<sup>40</sup> These EEOC decisions, while not binding to courts, reflect the EEOC's view that LGBTQ individuals are protected under Title VII and may file a claim of employment discrimination utilizing the law's inclusion of "sex" as a protected class. In 2017, in *Hively v. Ivy Tech Comm. College*, a federal appellate court issued a binding decision citing with approval the EEOC's conclusions in *Complainant v. Foxx*, thus providing strong legal precedent for reading Title VII as including LGBTQ employees as a protected class.<sup>41</sup>

Victims of discrimination on any protected basis, including sexual orientation and gender identity, must file a Charge of Discrimination with a local EEOC office prior to filing a lawsuit in court alleging discrimination. The EEOC offices serving Pennsylvania can be found at <https://www.eeoc.gov/field>

39 *Complainant v. Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

40 No. 0120133080, 2015 WL 4397641 (E.E.O.C July 16, 2015).

41 *Hively v. Ivy Tech Comm. College*, 853 F.3d 339 (7th Cir. 2017).

Generally, the Charge of Discrimination must be filed within 180 days of each instance of discriminatory treatment. To file a complaint based on sexual orientation or gender identity, the complainant must list the basis for the claim as discrimination on the basis of "sex," as this is the existing basis that the EEOC and some courts have linked to sexual orientation and gender identity. More about the EEOC process and a claimant's rights and responsibilities after filing a claim with the EEOC is available at this website: <http://www.eeoc.gov/employees/charge.cfm>. Federal employees and job applicants are subject to a different timeline for making a claim (typically 45 days) and procedures for filing, which are available here:

[http://www.eeoc.gov/federal/fed-employees/complaint\\_overview.cfm](http://www.eeoc.gov/federal/fed-employees/complaint_overview.cfm)

Pennsylvanians working for companies that contract with the federal government have access to additional protections against discrimination in employment. These protections stem from a 2014 Executive Order that prohibits federal contractors from discriminating against current or prospective employees on the basis of sexual orientation or gender identity.<sup>42</sup> Contractors who do business with the federal government employ 20% of American workers, all of whom are now covered by non-discrimination protections

42 Executive Order 13672 (July 21, 2014). On January 31, 2017, President Trump issued a statement that this Executive Order will remain intact during his presidency. <https://www.whitehouse.gov/the-press-office/2017/01/31/president-donald-j-trump-will-continue-enforce-executive-order>.

under this Order. LGBTQ individuals who have been the victim of discrimination by an employer that contracts with the federal government, can file a complaint through the U.S. Department of Labor Office of Federal Contract Compliance Programs. Information about the complaint process is available here: <http://www.dol.gov/ofccp/regs/compliance/pdf/pdfstart.htm>

## Company Policies

Many employers, especially those that operate in multiple states, have enacted their own internal non-discrimination policies that prohibit discrimination against LGBTQ employees. While these policies may not be legally binding, they can often give an employee some recourse where there would otherwise be none. A company's non-discrimination policy should be available in the company's employee handbook or through the human resources department, and it is always important to be familiar with it and understand the rights and protections it affords.

Any person who has been or may have been the victim of sexual orientation- or gender identity-based discrimination in the workplace should contact an attorney familiar with LGBTQ employment law.

## HOUSING

### State Law

Pennsylvania state law offers no protection against discrimination on the basis of sexual orientation or gender identity in housing or financial assistance. As

discussed above, Pennsylvania's Human Relations Act prohibits discrimination on the basis of "race, color, familial status, religious creed, ancestry, age, sex, national origin, handicap or disability, use of guide or support animals," and this applies to all housing transactions as well as employment.<sup>43</sup> Pennsylvania's Human Relations Commission has proposed guidance that would categorize sexual orientation and gender identity as forms of "sex" discrimination, which would offer some recourse for LGBTQ individuals who are discriminated against in a housing transaction.<sup>44</sup>

Further, as previously mentioned, some localities have passed nondiscrimination ordinances that prohibit discrimination in housing on the basis of sexual orientation and/or gender identity, so LGBTQ individuals in those localities may seek recourse through their local government.

### Federal Law

The federal Fair Housing Act, which was enacted as Title VIII of the Civil Rights Act of 1968 and is enforced by the Department of Housing and Urban Development (HUD), does not explicitly prohibit discrimination against LGBTQ people and their families. However, an LGBTQ person experiencing

<sup>43</sup> 43 P.S. § 955.

<sup>44</sup> Pennsylvania Human Relations Commission, Guidance Concerning Protections for Lesbian, Gay, Bisexual and Transgender Individuals in the Pennsylvania Human Relations Act (Proposed) (April 26, 2017), available at <http://www.phrc.pa.gov/Documents/Proposed%20Guidance%20Concerning%20Protections%20for%20LGBTQ%20individuals%20PHRA%204-26-17.pdf>.

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discrimination on the basis of sexual orientation or gender identity may still be covered by the Fair Housing Act on the basis of such discrimination constituting discrimination on the basis of “sex,” similar to the employment context.

In 2012, HUD issued the “Equal Access Rule,” which prohibits discrimination on the basis of sexual orientation or gender identity by any housing or service provider that receives funding or insurance from HUD.<sup>45</sup> It also prohibits lenders from determining a borrower’s eligibility for Fair Housing Authority (FHA) insurance on the basis of sexual orientation or gender identity. For example, any landlord receiving funding through HUD is prohibited from refusing to rent, offering unequal and inflated rental prices, or mistreating potential renters based on their sexual orientation, gender identity, or HIV/AIDS status. Further, any lender or operator of HUD-assisted housing is prohibited from inquiring as to the sexual orientation or gender identity of an applicant and barred from using such criteria in assessing an application. A violation of this rule may result in HUD pursuing a number of remedies, including sanctions against the violator.

HUD allows individuals to submit housing discrimination complaints by telephone at 1-800- 955-2232, by mail, or online [http://portal.hud.gov/hudportal/HUD?src=/topics/housing\\_discrimination](http://portal.hud.gov/hudportal/HUD?src=/topics/housing_discrimination). HUD maintains field offices in Philadelphia and Pittsburgh, and the contact information for

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<sup>45</sup> [Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity](#), Final Rule (2012); 24 CFR § 5.106.

both offices is available at this link: <https://www.hud.gov/states/pennsylvania/offices>

To learn more about filing a complaint, as well as the process for filing a lawsuit, please read this page: [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/complaint-process](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/complaint-process)

## PUBLIC ACCOMMODATIONS

### State Law

Pennsylvania law offers no explicit protection for LGBTQ people in public accommodations. Public accommodations are generally defined as entities, both public and private, that are open to or offer services for the general public. Examples include retail stores, hotels, restaurants, educational institutions, hospitals, public parks, libraries, and recreational facilities, but private clubs and religious institutions are generally exempt from this definition.

In addition to housing and employment discrimination, the Pennsylvania Human Relations Commission investigates claims of unlawful discrimination in public accommodations on the basis of “race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions.”<sup>46</sup> The proposed guidance mentioned above that would categorize sexual orientation and gender

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<sup>46</sup> 43 P.S. § 955.

# SCHOOL POLICIES AND ANTI-BULLYING

## STATE LAW

identity discrimination as forms of sex discrimination also would apply to public accommodations, thereby giving the Commission the ability to investigate claims of sexual orientation and gender identity discrimination in public accommodations.<sup>47</sup> Additionally, as noted above, many localities in Pennsylvania have passed local non-discrimination ordinances that prohibit discrimination on the basis of sexual orientation and/or gender identity in public accommodations, but without explicit protection at the state level, many LGBTQ individuals in Pennsylvania have no protection from discrimination.

### Federal Law

Federal public accommodations protection provisions can be found in Title II of the Civil Rights Act of 1964 and Title III of the Americans with Disabilities Act of 1990. Unfortunately, neither law provides express protections based on sexual orientation or gender identity. However, in 1998, the Supreme Court ruled that being HIV-positive is a physical disability covered by the Americans with Disabilities Act, even if the infection has not yet progressed to the symptomatic phase.<sup>48</sup> Businesses that hold themselves open to the public (restaurants, stores, hotels, etc.) are therefore prohibited from refusing service or business to individuals because they are HIV-positive.

<sup>47</sup> Pennsylvania Human Relations Commission, Guidance Concerning Protections for Lesbian, Gay, Bisexual and Transgender Individuals in the Pennsylvania Human Relations Act (Proposed) (April 26, 2017), available at <http://www.phrc.pa.gov/Documents/Proposed%20Guidance%20Concerning%20Protections%20for%20LGBTQ%20individuals%20PHRA%204-26-17.pdf>.

<sup>48</sup> *Bragdon v. Abbott*, 524 U.S. 624 (1998).

As with employment, housing, and public accommodations, the Commonwealth of Pennsylvania offers no explicit statutory protections against discrimination, harassment, or bullying on the basis of sexual orientation and gender identity for LGBTQ students and employees in the public education system. The Pennsylvania Fair Educational Opportunities Act (PFEOA) states that “all persons shall have equal opportunities for education regardless of their race, religion, color, ancestry, national origin, sex, handicap or disability.”<sup>49</sup> Sexual orientation and gender identity are not listed, but the Pennsylvania Human Relations Commission proposed guidance pertaining to the PFEOA that is similar to the proposed guidance discussed in the previous sections for the Pennsylvania Human Relations Act.<sup>50</sup> Again, this would not take the place of comprehensive legislation, but it would offer some recourse for LGBTQ harassment, bullying, and discrimination in education. However, without explicit statutory language or

<sup>49</sup> 24 P.S. § 5002.

<sup>50</sup> Pennsylvania Human Relations Commission, Guidance Concerning Protections for Lesbian, Gay, Bisexual, Transgender and Queer/Questioning Individuals in the Pennsylvania Fair Educational Opportunities Act (Proposed) (April 26, 2017), available at <http://www.phrc.pa.gov/Documents/Proposed%20Guidance%20%20Protections%20for%20LGBTQ%20individuals%20PFEOA%20%204-26-17A.pdf>.

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authoritative decisions from the state or appellate courts in Pennsylvania, LGBTQ students and public school employees remain vulnerable.

As stated previously, many localities have passed non-discrimination ordinances that prohibit discrimination against LGBTQ individuals in education. In *Doe v. Boyertown Area School District*, four students sued the Pennsylvania school district, claiming that its policy to allow transgender students to use restrooms and locker rooms that conformed to their gender identity violated their rights to privacy. A federal court rejected their claim and upheld the school district's policy.<sup>51</sup> In another case, a federal district court in Western Pennsylvania struck down a public school district's policy of requiring students to use restrooms that aligned with their sex assigned at birth, holding that the policy violated the equal protection clause of the U.S. Constitution.<sup>52</sup> These court decisions are important in advancing transgender protections in Pennsylvania, but they were issued by lower courts and are not binding on the entire state. Without explicit statutory language or authoritative decisions from the state or appellate courts in Pennsylvania, LGBTQ students and public school employees remain at risk of discriminatory actions.

Pennsylvania law requires all school districts to implement policies and procedures that prohibit bullying, but

<sup>51</sup> *Doe v. Boyertown Area Sch. Dist.*, No. 17-1249 (E.D. Pa. 2017).

<sup>52</sup> *Evancho v. Pine-Richland Sch. Dist.*, No. 2:16-01537 (W.D. Pa. 2017).

Ultimately, because school district policies are determined at the local level, there can be wide variations on the degree to which a school district is proactive and protective of LGBTQ students, families, and employees. It is important to be familiar with your school district's policies protecting LGBTQ individuals and to reach out to your school board with questions or concerns.

the law itself does not offer an explicit prohibition against bullying or offer specific provisions regarding bullying of LGBTQ students and families or any other class of students vulnerable to bullying. Bullying is defined in the statute as an intentional electronic, written, verbal or physical act, or a series of acts, that is directed at another student or students, occurs in a school setting, is severe, persistent or pervasive, and has the effect of substantially interfering with a student's education, creating a threatening environment, or substantially disrupting the orderly operation of the school.<sup>53</sup> The state law directs the school districts to identify the appropriate staff person to receive bullying reports and to develop disciplinary consequences, but the law provides no guidance on the specific procedures that should be in place to protect children.

<sup>53</sup> 24 P.S. § 13-1303.1-A.

## FEDERAL LAW

Federal law, specifically Title IX of the United States Education Amendments of 1972, also provides some protections and support to students facing bullying or discrimination based on their sexual orientation or gender identity. Title IX specifically prohibits discrimination against students in schools and other programs that receive federal funding, where that discrimination is based on a student's sex or gender. While Title IX does not explicitly include sexual orientation or gender identity as bases for a claim of discrimination, the law has been applied to prohibit discrimination where a student is mistreated for being sex or gender non-conforming,<sup>54</sup> meaning the student faces discrimination for not subscribing to the stereotypical notions of femininity or masculinity. In past policy statements, the Department of Education (DOE) included transgender students in those classes protected by Title IX, and lesbian, gay, and bisexual students have successfully filed claims of discrimination under Title IX. In a May 2016 statement, the DOE and Department of Justice (DOJ) explained that compliance with Title IX requires schools to treat transgender students consistent with their gender identity and does not allow schools to impose a medical diagnosis or treatment requirement.<sup>55</sup>

However, in February 2017, under the

<sup>54</sup> *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015).

<sup>55</sup> United States Dept. of Education Office for Civil Rights, *Dear Colleague Letter on Transgender Students* (May 2016).

Trump Administration, the DOE and DOJ rescinded this guidance.<sup>56</sup> Despite the DOE and DOJ's withdrawal of the guidance, the underlining law that the guidance interpreted remains. Since then, the U.S. Court of Appeals for the Seventh Circuit unanimously held that transgender students are protected from discrimination under Title IX and the Equal Protection Clause of the U.S. Constitution.<sup>57</sup>

The DOE's Office for Civil Rights (OCR) investigates claims of discrimination on the basis of race, sex, national origin, sex, and disability in programs or activities that receive funding from the DOE (such as public elementary or secondary schools, vocational schools, colleges and universities, museums, libraries, and public after-school programming.). To open an OCR investigation, an individual must file a complaint on behalf of himself or herself, a group, or another person facing discrimination within 180 days of the last instance of discrimination. Since Title IX does not list sexual orientation or gender identity as separate bases for a claim, the complaint must indicate "sex" as a basis for the claim.

More details on drafting a complaint, as well as an electronic complaint form, are available on the OCR website, located here: <https://www2.ed.gov/about/offices/list/ocr/docs/howto.html>

<sup>56</sup> United States Dept. of Education Office for Civil Rights, *Dear Colleague Letter on Title IX* (Feb 2017): <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx>.

<sup>57</sup> *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. 2017).

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## STATE LAW

The Commonwealth of Pennsylvania offers no statutory protections against discrimination in healthcare and health insurance on the basis of sexual orientation or gender identity. In April 2016, the Pennsylvania Insurance Commissioner issued guidance stating the Commission's expectation that health insurance policies will not contain any terms, conditions, or benefit provisions that discriminate on the basis of sexual orientation or gender identity and should not contain a categorical exclusion of coverage for all health services related to gender transition.<sup>58</sup> While this may be helpful in stopping discriminatory policies, this guidance is not binding on Pennsylvania courts.

Healthcare benefits for state employees include transition-related services,<sup>59</sup> as does the state medicaid policy.<sup>60</sup>

58 Pa. Bulletin, Doc. No. 16-762, 46 Pa.B. 2251 (Apr 30, 2016), available at <http://www.pabulletin.com/secure/data/vol46/46-18/762.html> (last visited October 2017).

59 Pennsylvania Employees Benefit Trust Fund, Medical Plan (effective Jan 1, 2017), available at <https://www.pebtf.org/Uploads/Publications/1495554387.pdf>.

60 Pennsylvania Dept of Human Services, Medical Assistance Bulletin No. 99-16-11 (July 18, 2016), available at [http://www.dhs.pa.gov/cs/groups/webcontent/documents/bulletin\\_admin/c\\_233793.pdf](http://www.dhs.pa.gov/cs/groups/webcontent/documents/bulletin_admin/c_233793.pdf).

## FEDERAL LAW

Each year, the federal government opens enrollment for individual and family healthcare coverage under the Affordable Care Act (ACA). Historically, enrollment for the following year opened in November and closed mid-February of the following year; however, in 2017 the open enrollment period is much shorter - from November 1st to December 15th - although individuals who experience a major life change, such as moving, getting married, or having a baby, may qualify to enroll in one of the ACA's Special Enrollment Periods during another part of the year. For detailed information about plans, Special Enrollment Periods, or to find out where and how to enroll, go to [www.healthcare.gov](http://www.healthcare.gov) and select a state of residence.

Under the ACA, insurers and marketplace navigators - the people whose job it is to help individuals select an insurance plan that best matches their needs - are prohibited from discriminating against consumers based on their sexual orientation or gender identity, or on the sexual orientation or gender identity of a family member.

In addition, the ACA prohibits denial of coverage for an individual or family member because of a pre-existing condition. This includes a current illness or a history of chronic illness or disease, HIV status, receiving or having received

transgender-related care, or a prior pregnancy. However, it is important to note that, despite the fact that the ACA prohibits insurance providers from discriminating against individuals and families by denying them the ability to obtain healthcare coverage, the ACA does not mandate that insurance plans offer coverage that is inclusive of the many needs of LGBTQ individuals and families. For example, the ACA does not require insurers to cover transgender-related care or treatment for HIV and AIDS. However, insurers are prohibited from categorically denying coverage for transition-related care, nor can they refuse to cover transition-related care if they cover that same treatment for other people. While insurers are not required to cover these treatments, they may offer plans that do so; any person seeking coverage of transition-related care should speak with a navigator and investigate plans thoroughly to find the best option. Further, definitions of “family” may be too narrow to include many dependents in an LGBTQ family structure, given the myriad LGBTQ family structures that exist.

Section 1557 of the ACA prohibits discrimination based on sex in all health programs and activities receiving federal financial assistance.<sup>61</sup> The final agency rule implementing Section 1557 prohibits discrimination based upon gender identity, requiring that any healthcare provider receiving federal funding (i.e. Medicaid or Medicare, any health program administered by the federal government, and any health insurance marketplace) must treat

61 42 U.S.C § 18116.

individuals consistent with their gender identity.<sup>62</sup> The final rule also prohibits discrimination based on sex stereotyping, providing potential protections to lesbian, gay, and bisexual people.<sup>63</sup>

Anyone who has experienced discrimination on the basis of their sexual orientation or gender identity in a health care setting should immediately file a complaint with the United States Department of Health and Human Services Office for Civil Rights. More details on drafting a complaint, as well as an electronic complaint form, are available at the HHS website, located at <http://www.hhs.gov/civil-rights/filing-a-complaint/index.html>

For more information on how the Affordable Care Act and the insurance marketplaces benefit LGBTQ-headed families, this is a helpful resource developed by multiple LGBTQ advocacy organizations: Where to Start, [What to Ask: A Guide for LGBTQ People Choosing Health Care Plans](#).



62 45 CFR 92 (2016); 81 FR 31375 (2016). In *Franciscan Alliance v. Burwell*, Case No. 7:16-cv-00108-O (N.D. Texas 2016), a district court judge issued an injunction against enforcing this rule, but an appeal is pending.

63 45 CFR 92 (2016); 81 FR 31375 (2016).

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# FAMILY AND/OR PARENTING LEAVE

Pennsylvania does not have a state family or medical leave law requiring employers to provide paid family leave. Pennsylvania employees are entitled to the rights of the federal Family Medical and Leave Act (FMLA). The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. Eligible employees are entitled to up to 12 unpaid workweeks of leave in a 12-month period for:

- the birth of a child and to care for the newborn child within one year of birth;
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- the care of the employee's spouse, child, or parent who has a serious health condition;
- a serious health condition that makes the employee unable to perform the essential functions of his or her job;
- any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty."

FMLA applies to all public agencies (state, local, and federal) and all local education agencies (schools). The FMLA also applies to private sector employees who employ 50 or more employees for more than 20 workweeks in the current or preceding calendar year.

And, it entitles eligible employees to 26 workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member's spouse, son, daughter, parent, or next of kin (military caregiver leave).

In 2010, the Department of Labor issued a clarification of the definition of "son or daughter" to include a child for whom a person provides a certain amount of day-to-day care or financial support, regardless of whether or not there is a legal or biological relationship. This clarification ensures the ability of a same-sex parent and/or partner has the ability to take time off from work to care for their child without fear of losing their job. The text of the Department of Labor's clarification is available at: [http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010\\_3.htm](http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm)

In 2014, following the *Windsor* decision and the repeal of the DOMA, the FMLA's benefits were extended to married same-sex couples. Because of this, married same-sex couples became entitled to take time off to care for their spouses. This was solidified further in 2015 when the definition of "spouse" in the FMLA was expanded to include all employees in a same-sex marriage regardless of whether their state of residence recognized their marriage. Finally, the *Obergefell* decision led to all federal marriage benefits being extended to all same-sex couples across the country.

## CHANGES OF NAME AND GENDER

A transgender individual in Pennsylvania may submit a petition to a court to obtain a legal name change.<sup>64</sup> The applicant must have fingerprints taken by a local law enforcement agency, fill out a Name Change Petition, and submit a scheduling order to the local county court.<sup>65</sup> The court will return the scheduling order to the petitioner with a date and time for a hearing. Prior to the hearing, the applicant must publish a notice in two newspapers stating that a name change petition has been filed and providing the date of the court hearing, but publication requirements can be waived and records can be sealed for the applicant's safety.<sup>66</sup>

Transgender individuals in Pennsylvania may request an amended birth certificate to reflect their true sex and name and are no longer required to have proof of surgical procedures to do so. On August 8, 2016, the Pennsylvania Department of Health issued a policy that allows adults to update the gender marker on their birth certificate with a letter from a physician stating that the applicant has completed or is in the process of "appropriate clinical treatment for gender transition."<sup>67</sup> Minors may also

request an amended birth certificate, but a parent must complete the application and indicate which sex should appear on the birth certificate, and both parents must sign the application. The parents' signature must be in the presence of a notary, but no medical documentation is required.

Pennsylvania will update names and gender markers on driver's licenses. Name change requests are available in person at a local driver's license office or by mail and require a completed "Non-commercial Driver's License Application for Change/Correction/Replacement," as well as the court order documenting the name change.<sup>68</sup> To update the gender marker, an individual must obtain a "Request for Gender Change on Driver's License/Identification Card" and have a licensed medical or social service provider complete a portion of the form certifying the applicant's gender identity.<sup>69</sup>

64 54 Pa. C.S. § 701.

65 TransCentralPA, Pennsylvania Name Change, available at [http://www.transcentralpa.org/resources\\_Penn\\_Name\\_Change.cfm](http://www.transcentralpa.org/resources_Penn_Name_Change.cfm).

66 54 Pa. C.S. § 701.

67 Pennsylvania Department of Health, Policy to Change Sex/Gender on Pennsylvania Certification of Birth (Aug 8, 2016), available at <http://www.transequality.org/sites/default/files/docs/PA-BC-Policy.pdf>.

68 Pennsylvania Dep't of Transportation, DMV, Driver Services, Driver Licensing, Change Your Name or Address, available at <http://www.dmv.pa.gov/Driver-Services/Driver-Licensing/Pages/Change-Your-Name-or-Address.aspx> (last visited October 2017).

69 National Center for Transgender Equality, ID Documents Center - Pennsylvania, last updated June 5, 2017, <http://www.transequality.org/documents/state/pennsylvania>.

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# HATE CRIMES PROTECTIONS

## STATE LAW

Pennsylvania law does not currently include protections for LGBTQ people who are targeted by hate crimes. The Pennsylvania hate crimes statute defines hate crimes as crimes motivated by “malicious intention toward the race, color, religion or national origin of another individual or group of individuals.”<sup>70</sup> In 2002, Pennsylvania lawmakers expanded the law to include crimes motivated based on sexual orientation and gender identity,<sup>71</sup> but six years later the Pennsylvania Supreme Court ruled that the law was unconstitutional on procedural grounds and struck it down.<sup>72</sup> The Pennsylvania legislature has not re-instated the law protecting LGBTQ people from hate crimes.

## FEDERAL LAW

The federal government offers some protection, however. In 2009, Congress enacted the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which expands federal hate crimes to LGBTQ people.<sup>73</sup> The law allows federal law enforcement agencies, such as the FBI, to investigate and prosecute hate crimes against LGBTQ individuals when local or state authorities fail to act. Victims of a

hate crime should report the crime both to the local authorities and to the FBI. The FBI maintains field offices in Philadelphia and Pittsburg, and contact information is available through the following webpage: <https://www.fbi.gov/contact-us/field-offices>

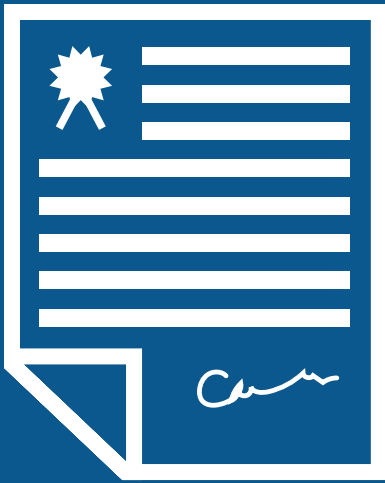
<sup>70</sup> 18 Pa. C.S. § 2710.

<sup>71</sup> 2002 Pa. Laws 143, P.L. 1176, H.B. 1493 (2002).

<sup>72</sup> *Marcavage v. Rendell*, 951 A.2d 345 (Pa. 2008)

<sup>73</sup> 18 U.S.C. § 249.





## TIPS FOR LEGAL DOCUMENTS

- ✓ Always have copies of these forms with you, we recommend carrying electronic copies on a thumb drive attached to your keychain.
- ✓ Keep several signed original copies of the forms.
- ✓ Write with a blue pen when completing or signing forms so health care providers don't question whether the document is an original.
- ✓ Always have original copies with you when you travel out of state.
- ✓ Keep an extra copy of your forms somewhere easy for a close friend or family member to find.
- ✓ Keep copies online on a secure server.

Find more information at:

[www.familyequality.org](http://www.familyequality.org)  
[www.equalitypa.org](http://www.equalitypa.org)

**PENNSYLVANIA LGBTQ FAMILY LAW**

A Resource Guide for LGBTQ-Headed  
Families

# RECOMMENDED LEGAL DOCUMENTS FOR SAME-SEX COUPLES

## LAST WILL AND TESTAMENT

A Will is a legal document by which a person directs how real estate and personal property will be distributed upon death. Unmarried same-sex couples must have Wills in which their partners are designated beneficiaries, so that the partner will be able to inherit any of the deceased partner's property. Even if married, it is best to have a Will. In addition to deciding property distribution, a Will also provides the opportunity to designate who should become guardian to any minor children. If both parents are not legally recognized as such, and the legal parent dies, a judge will decide who the guardian will be. A legally recognized parent naming the other parent in a Will expresses their wishes and increases the likelihood that a judge will respect those wishes about who should raise the children after the death of the legally recognized parent.

A Will does not affect beneficiaries that have been designated on bank accounts, insurance policies, or retirement accounts. The company that holds those funds will disburse them to the designated beneficiary. It is important to keep such designations up-to-date.

More information is available from the Pennsylvania State Bar Association at:  
<https://www.pabar.org/clips/estateplanning.pdf>

## ADVANCE DIRECTIVE FOR HEALTHCARE

An Advance Directive for Healthcare allows Pennsylvanians to direct whom they want to make medical decisions for them, as well as providing for end-of-life choices in the event they are unable to express that intent at the time that care is required. More information on Advance Directives in Pennsylvania is available at:  
<https://www.pabar.org/clips/livingwills.pdf>

## FINANCIAL POWER OF ATTORNEY

It is important that partners consider providing each other with the power to handle personal finances on their behalf through a “financial power of attorney” in the event that a partner becomes unable to manage his/her own finances due to sickness or incapacitation.

We recommend consulting a Pennsylvania attorney in drafting this document.

## DOMESTIC PARTNERSHIP AGREEMENT

A Domestic Partnership Agreement expresses an unmarried couple’s understanding as to how they will share income, expenses, assets and liabilities. It also discusses a plan for division of those things in the event the couple separates. This document is especially important for couples who are not married.

If a couple contemplating marriage wishes to enter into an agreement as to division a future a division of assets or support, they would need to enter into a Pre-Martial or Prenuptial Agreement. This would require separate legal counsel for each party and should be entered into carefully as this type of agreement may alter the statutory scheme related to the financial rights in divorce. A Pre-Martial Agreement may also be a useful tool for a couple who has been together for a long time before legally marrying to agree to treat assets acquired even before the marriage as martial property.

## CO-PARENTING AGREEMENT

A Co-Parenting agreement is a document that expresses a couple’s understanding of the manner in which they will raise children and what each parent’s rights and obligations are with respect to each child while they are together and in the event that the parents separate. They may be useful in multi-parent families, where more than two people will be actively co-parenting together.

Although the Co-Parenting and Partnership agreements are not “standard” and will require the advice of an LGBTQ aware attorney licensed in Pennsylvania (and could still prove to be not legally binding), they are often useful to have. These documents can establish a clear understanding between the parties and can provide clarification about the intent and wishes of all involved. They may be useful, at some future time, should an issue ever come before a court in the case of death, dissolution of the relationship, or other event causing separation. However, this type of document should never be seen as a substitute for an adoption decree, which is a clear legal establishment of parentage.

Find more information at:

[www.familyequality.org](http://www.familyequality.org)  
[www.equalitypa.org](http://www.equalitypa.org)

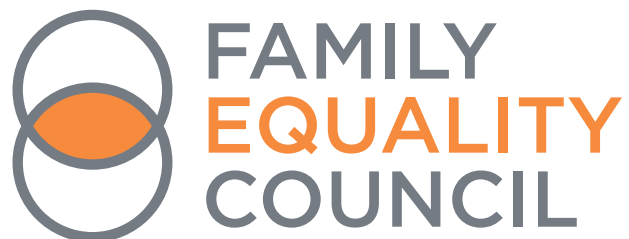
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