

GUIDE:

THE FAMILY AND MEDICAL LEAVE ACT: WHAT SHOULD LGBTQ FAMILIES KNOW?

The Family and Medical Leave Act of 1993 (FMLA) is a federal law designed to help working parents and other caregivers balance work and family. The FMLA guarantees workers at large employers unpaid leave to recover from a serious health condition, bond with a new child, care for a seriously ill family member, or address certain needs related to a family member's military service.

LGBTQ workers have gained new rights under the FMLA in recent years. In 2010, the U.S. Department of Labor (DOL) clarified that the FMLA's definition of "son or daughter" is broad enough to include LGBTQ parents who have no biological or legal relationship to the children they are raising.¹ And in June 2015, the Supreme Court ruled in favor of nationwide marriage equality in *Obergefell v. Hodges*. As a result of the Court's decision, it is now clear that workers covered by the FMLA will be able to take leave under the law to care for a same-sex spouse, regardless of where they live.

Although the FMLA provides important protections to covered workers and their loved ones, the law falls short for many LGBTQ families, due to the FMLA's narrow definition of family and restrictive eligibility requirements.

AN OVERVIEW OF THE FMLA

What does the FMLA provide?

The FMLA guarantees covered workers up to 12 weeks of unpaid but job-protected time off to:

- Care for a parent, child, or spouse with a serious health condition;
- Care for and bond with a newborn child or an adopted or foster child recently placed with you;
- Recover from your own serious health condition (including pregnancy) that makes you unable to perform the functions of your job; or
- Deal with certain obligations arising from a spouse, parent or child being on, or called to, active duty in the military.

The FMLA also provides up to 26 weeks of unpaid leave per year for workers to care for a child, spouse, parent, or next of kin who, while a member of the armed services, incurred or aggravated a serious illness or injury in the line of duty.

With a few exceptions, you must be restored to your original job or a position equivalent in pay, benefits, and other terms after you return from FMLA leave.²

Am I covered by the FMLA?

The FMLA's eligibility requirements exclude many workers employed in smaller businesses, as well as many newly employed and part-time workers. For a worker to be covered by the FMLA, all of the following requirements must be met:

- You must work for an employer that has 50 or more employees within a 75-mile radius.
- You must have worked for this employer for at least one year.

- You must have worked at least 1,250 hours for this employer in the 12 months before taking leave.

CARING FOR SAME-SEX PARTNERS OR SPOUSES UNDER THE FMLA

Can I take FMLA leave to care for a same-sex spouse?

Yes. Workers who are legally married to a person of the same sex are eligible to take FMLA leave to care for a same-sex spouse.

If I am not married, but have a domestic or civil union partner, can I take FMLA leave to care for my same-sex partner?

No. Unfortunately, domestic partners and civil union partners are not covered under the FMLA. To date, Congress has not expanded the definition of “spouse” in the law to include domestic or civil union partners, even if individuals in these relationships have the same rights and responsibilities as spouses under state law.³

Even if you are not covered by the FMLA, or the law doesn’t recognize your civil union/domestic partnership, it’s possible that your employer’s policies are more generous or another law could be helpful to you. If you need to care for a same-sex partner (either because your partner is seriously ill or related to your partner’s military service), we recommend getting in touch with an attorney, legal assistance organization, LGBTQ rights group in your city or state, or A Better Balance to assess whether any other laws could be helpful to you. There is also a growing movement to pass state and local workplace leave laws, and some states have laws providing leave to care for domestic or civil union partners.

CARING FOR PARENTS AND CHILDREN UNDER THE FMLA

How does the FMLA define “son or daughter”?

A covered worker can take FMLA leave to care for a “son or daughter” with a serious health condition, bond with a new “son or daughter,” address certain needs related to the military service of a “son or daughter,” or care for a “son or daughter” who was seriously injured while a member of the armed services. The FMLA broadly defines “son or daughter” to include a biological, legally-adopted, or foster child, a stepchild, a legal ward, or a child of a person standing “in loco parentis.”

The term “in loco parentis” means one who is acting in the place of a parent. DOL has made it clear that this type of parent-child relationship can include an LGBTQ parent who is raising a child but has no biological or legal relationship to the child.

How do I know if I am standing “in loco parentis” to a child?

Whether or not you stand “in loco parentis” to a child is fact-specific. The key question is whether you have assumed the role of a parent towards the child and have intended to act as a parent. The FMLA defines “in loco parentis” to include individuals who have day-to-day responsibilities to care for and financially support a child. In 2010, however, DOL clarified that one does not have to provide *both* day-to-day care and financial support in order to stand “in loco parentis” to a child. For example, if you provide daily care for a child with

whom you have no legal or biological relationship, you may stand “in loco parentis” to the child even if you do not provide financial support.

DOL also explicitly recognized in 2010 that the definition of “in loco parentis” could include same-sex parents. The agency says that “an employee who will share equally in the raising of an adopted child with a same sex partner, but who does not have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child had a serious health condition, because the employee stands in loco parentis to the child.”⁴

If I stand “in loco parentis” to a child and want to take FMLA leave to care for this child, is my employer allowed to ask for proof that we have a family relationship?

Yes. You may be required to provide reasonable documentation or verification. However, the requirements for documenting that you stand “in loco parentis” to a child are minimal; you only have to give your employer a simple statement asserting that an “in loco parentis” relationship exists.⁵

If I am raising a child—who is not biologically or legally related to me—and the child also has a relationship with his or her biological parent(s) and/or stepparent(s), is it possible for me to take FMLA leave to care for the child?

Yes, if you stand “in loco parentis” to the child, as described previously. The federal government has not restricted the number of parents a child may have under the FMLA.

If I am in a same-sex marriage, do I have to prove an “in loco parentis” relationship in order to take leave to care for my stepchild?

No. If you are legally married to a person of the same sex, you can take FMLA leave to care for your stepchild *without* having to establish that you stand “in loco parentis” to the child.

If I was raised by an LGBTQ parent or another individual who is not biologically or legally related to me, is this individual considered a “parent” under the FMLA?

Yes, if the person acted “in loco parentis” to you when you were a child.

If my parent is in a legal same-sex marriage, and I need to take FMLA leave to care for my stepparent, do I have to prove an “in loco parentis” relationship existed with my stepparent during my childhood?⁶

No. If your parent is legally married to a person of the same sex, you can take FMLA leave to care for your stepparent *without* having to establish that your stepparent stood “in loco parentis” to you when you were a child.⁷

CARING FOR OTHER LOVED ONES UNDER THE FMLA

Can I take FMLA leave for loved ones other than my spouse, parent, or child?

No. Unfortunately, other types of family relationships, like parents-in-law, siblings, and other extended family are not covered by the FMLA.⁸ The FMLA also does not cover “chosen family members” (individuals who have a close relationship with the worker that are equivalent to a family relationship).

TRANSGENDER HEALTH CARE AND THE FMLA

Can I take FMLA leave for transition-related health needs or transgender health care? Can I take FMLA leave to provide transition-related care to a transgender parent, child, or spouse?

Possibly. Eligible workers can take FMLA leave to care for a spouse, child, or parent with a “serious health condition” or “[b]ecause of a [worker’s own] serious health condition that makes the employee unable to perform the functions of the position” The FMLA defines a covered “serious health condition” as an “illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider”⁹ Therefore, transition-related care or other health needs involving an overnight stay in the hospital are likely to qualify for FMLA leave, as this is “inpatient care.” Transition-related care or other health needs that require you to be out of work for three consecutive days and involve treatment from—or under the supervision—of a health care provider are also likely to qualify for FMLA leave.

Despite this general guidance, determination of whether a “serious health condition” is covered is fact-specific and depends on your individual circumstances. In addition, transgender workers or workers who are providing care for a transgender family member should be aware that the FMLA includes a number of requirements around medical certification; it is possible that these certification requirements could reveal a person’s transgender status, raising concerns around privacy and employment harassment or discrimination (see page 5 for more on employment discrimination). Therefore, we recommend getting in touch with an attorney, legal assistance organization, LGBTQ rights group in your city or state, or A Better Balance if you need more information about your specific circumstances.

STATE FAMILY LEAVE LAWS

Do any states have laws that expand on the FMLA?

Yes. Some states have family leave laws that are broader than the FMLA and expand upon the FMLA’s purposes, family definitions, and/or coverage criteria. In addition, several states have family leave laws that allow eligible workers to care for same-sex spouses or partners. Depending on eligibility requirements, LGBTQ workers may be able to take family leave under state law to care for a seriously ill same-sex partner or spouse if they work in: California, Colorado, Connecticut, D.C., Hawaii, Maine, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, or Wisconsin.¹⁰

Depending on general eligibility requirements, LGBTQ workers may also be able to take family leave under state law to care for and bond with a new child if they work in: California, Connecticut, D.C., Hawaii, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, Tennessee, Vermont, Washington, or Wisconsin.¹¹ Kentucky also has a state law that only provides leave to certain adoptive parents.

Furthermore, four states—California, New Jersey, New York, and Rhode Island—have LGBTQ-inclusive *paid* leave laws that provide partial pay to workers who need time off to bond with a new child or care for a seriously ill loved one, as well to attend to a worker’s own serious health needs. Starting in 2020, Washington State and the District of Columbia will both begin providing LGBTQ-inclusive paid leave for addressing a workers’ own health, bonding with a new child, or caring for a seriously ill relative. Both New York and Washington State’s paid family leave laws also include time off to attend to certain military family needs.¹²

If you take leave under state law for a purpose—or to care for a loved one—not covered by the FMLA, you may be able to take leave under state law and still remain eligible for up to 12 weeks of leave under the FMLA. The interaction between state workplace leave laws and the FMLA can be complex and may depend on your state’s particular law. Therefore, we recommend consulting with an attorney or legal services organization for information specific to your circumstances.

FMLA ENFORCEMENT AND MORE INFORMATION

I want to take FMLA leave, but I’m worried about how my employer will react. Does the FMLA provide any protection if my employer tries to interfere, retaliate, or discriminate against me?

The FMLA protects eligible employees from interference with their rights under the law and from retaliation or discrimination for taking leave. Therefore, if you are eligible for FMLA leave and you are fired or demoted because you took protected leave or attempted to take protected leave, the FMLA protects you. But if you are not covered by the FMLA or if your employer takes action against you unrelated to the taking of FMLA leave, the FMLA will not protect you.

Unfortunately, there is no federal law that explicitly prohibits workplace discrimination against LGBTQ employees based on sexual orientation or gender identity. Many states also fail to explicitly protect LGBTQ workers from employment discrimination, which means that disclosing the need to care for LGBTQ family members, acknowledging a same-sex spouse or partner, and/or disclosing one’s gender identity could lead to discrimination and harassment. You should check your company’s personnel policy, as well as local and state laws, to determine your rights as an LGBTQ employee.¹³

What should I do if I have questions about my rights or a potential violation of the FMLA?

The information in this fact sheet is not exhaustive or intended to constitute legal advice. It is possible that additional FMLA provisions or rules not described here may apply to your specific circumstances, so we recommend consultation with an attorney, legal services organization, or A Better Balance if you believe your workplace leave rights have been violated.

- If you have questions about your FMLA rights or want to share your story to help advocate for stronger, LGBTQ-inclusive family leave laws, please contact A Better Balance at 212-430-5982.

¹ Administrator’s Interpretation No. 2010-3 (Dep’t of Labor June 2010), www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm.

² Your employer is not required to give you your job back if you would have been laid off during this period anyway. For example, you can be laid off if general downsizing occurs during your period of leave. Also, if you are a salaried employee who is among the highest paid 10% of all employees at your workplace, your employer can decide not to give you your job back after FMLA leave if your restoration would cause a “substantial and grievous economic injury” to the employer’s operations.

³ The Department of Labor has clearly stated that domestic partners are not covered and that the lack of coverage for domestic partners under the FMLA is a statutory issue beyond the scope or authority of the department’s rules regarding the spouse definition. *See* 80 Fed. Reg. 9991 (Feb. 25, 2015) (to be codified at 29 C.F.R pt. 825).

⁴ Administrator’s Interpretation No. 2010-3 (Dep’t of Labor June 22, 2010).

⁵ *Ibid.*; 29 C.F.R. § 825.122(j).

⁶ Under the FMLA, parent “means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents ‘in law.’” 29 C.F.R. § 825.102.

⁷ 80 Fed. Reg. 9994 (Feb. 25, 2015) (to be codified at 29 C.F.R pt. 825).

⁸ The only exception is that an eligible worker who is “next of kin” of a covered servicemember with a serious injury/illness may take FMLA leave to care for the servicemember. *See* www.dol.gov/whd/fmla/finalrule/MilitaryFAQs.pdf to determine if you qualify as “next of kin.”

⁹ 29 C.F.R. § 825.113(a). *See* 29 C.F.R. §§ 825.114, 825.115 for guidance on what constitutes inpatient care and continuing treatment by a health care provider.

¹⁰ In Colorado, D.C., Maine, and Wisconsin, it is possible that some same-sex partners—who meet certain requirements—will be recognized by the state’s (or district’s) unpaid leave law even if they aren’t in a legally registered relationship (like a same-sex marriage, registered domestic partnership, registered civil union, or similar type of relationship). New York’s paid family leave law includes a broad domestic partner definition that does not require legal registration or legal formalizing of the relationship. For more information on the New York paid family leave law, visit <http://www.FamilyLeaveWorks.org>

¹¹ In California, Connecticut, D.C., Maine, Maryland (pursuant to a pending regulation), New Jersey, New York, Oregon, Rhode Island, and Washington, state law provides leave to care for a child even if the parent lacks a legal or biological relationship to the child (similar to the FMLA’s *in loco parentis* standard discussed earlier).

¹² Hawaii (as well as Puerto Rico) has a temporary disability insurance law that provides wage replacement to biological mothers who are unable to work while recovering from childbirth or due to a pregnancy-related disability. Three states—Iowa, Louisiana, and Montana—also have disability laws that provide unpaid leave for biological mothers who are recovering from childbirth. For more details, visit <http://www.abetterbalance.org/resources/paid-family-leave/>.

¹³ To find out whether your city or state has a nondiscrimination law that protects LGBTQ employees, see “Employment Non-Discrimination Laws,” Movement Advancement Project, October 2016, www.lgbtmap.org/equality-maps/non_discrimination_laws; “In Your State: Workplace,” Lambda Legal, July 2016, www.lambdalegal.org/states-regions.