



the work and family legal center

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FACT SHEET:

THE FAMILY AND MEDICAL LEAVE ACT: WHAT SHOULD LGBT 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 care for a new child or a seriously ill family member. Unfortunately, the law's restrictive definition of family, and its failure to recognize same-sex marriages, means that LGBT families have not been able to enjoy the full benefits of the FMLA.

The U.S. Department of Labor (DOL) recently made the FMLA more accessible to LGBT families. In June 2010, the DOL clarified that the FMLA's definition of "son or daughter" is broad enough to include LGBT parents who have no biological or legal relationship to the children they are raising.¹ Despite this progress, however, the FMLA still fails to recognize same-sex partners and spouses.

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;
- Care for and bond with an adopted or foster child recently placed with you; or
- Recover from your own serious health condition (including pregnancy) that makes you unable to perform the functions of your job.

After you return from leave under the FMLA, you must be restored to your original job or a position equivalent in pay, benefits, and other terms. However, 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.

Am I covered by the FMLA?

For an employee 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 in the 12 months before taking leave.

¹ Administrator's Interpretation No. 2010-3 (Dep't of Labor June 22, 2010), available at http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm.



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

No. An employee cannot take FMLA leave to care for a same-sex partner.

But can I take FMLA leave to care for my same-sex partner or spouse if I live in a state that recognizes our relationship?

No. Even if your state recognizes same-sex domestic partnerships, civil unions, or marriages, the FMLA cannot be used to care for your same-sex partner. Due to the Defense of Marriage Act of 1996 (DOMA), the federal government does not recognize same-sex unions or marriages. As a result, the FMLA limits the definition of “spouse” to a person of the opposite sex.

If my state has a family leave law that recognizes same-sex partners or spouses, can I take leave under the state law to care for my partner or spouse and take FMLA leave for another purpose?

If your state provides family leave to care for seriously ill same-sex partners or spouses, you can take this leave and still remain eligible for other leave covered by the FMLA. To learn more about whether your state has a family and medical leave law, please visit the websites of the National Conference of State Legislatures and the National Partnership for Women & Families.²

How does the FMLA define “son or daughter”?

Under the FMLA, a covered employee can take unpaid leave to care for a “son or daughter” with a serious health condition, or to care for and bond with a new “son or daughter.” The FMLA broadly defines “son or daughter” to include a biological child, a legally-adopted child, a 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. The recent DOL interpretation makes it clear that this category can include an LGBT parent who is raising a child but has no biological or legal relationship to the child.

² See, for example, “State Family and Medical Leave Laws that Differ from the Federal FMLA,” National Conference of State Legislatures, Sept. 2008, available at <http://www.ncsl.org/Portals/1/documents/employ/fam-medleave.pdf>; “State Family and Medical Leave Laws that are More Expansive than the Federal FMLA,” National Partnership for Women & Families, available at <http://www.nationalpartnership.org/site/DocServer/StatesandunpaidFMLLaws.pdf?docID=968> (last visited Dec. 1, 2010).



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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. However, the DOL recently 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.

The DOL has explicitly recognized that the definition of “in loco parentis” can include LGBT 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.”³

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 parents and/or stepparents, 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 above. The federal government has not restricted the number of parents a child may have under the FMLA.

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 of a family relationship, adoption, foster care placement, or medical condition. However, the requirements for documenting that you stand “in loco parentis” to a child are minimal. According to the recent DOL interpretation, you only have to give your employer a simple statement asserting that an “in loco parentis” relationship exists.

If I was raised by an LGBT 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. Under the FMLA, covered employees can take unpaid leave to care for a “parent” with a serious health condition.

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



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I would like to take FMLA leave, but I am concerned 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. However, 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 LGBT employees. You should check your company's personnel policy, as well as local and state laws, to determine your rights as an LGBT employee. To find out whether your city or state has a nondiscrimination law that protects LGBT employees, consult the websites of the Human Rights Campaign and the National Gay and Lesbian Task Force.⁴

Where can I get more information on the FMLA?

For a more comprehensive overview of the FMLA, please visit www.abetterbalance.org.

What should I do if I think my rights have been violated?

You have several options if you think your rights under the FMLA have been violated:

- Call the U.S. Department of Labor's Wage and Hour Division, toll free, at 1-866-487-9243. You may file a complaint with the agency, which can investigate and resolve claims.
- You may also bring a private claim in court against your employer for violating the FMLA. You do not need to file first with the Wage and Hour Division.
- If you live in New York and have questions, or want to share your story, please contact A Better Balance at 212-430-5982 or info@abetterbalance.org.

⁴ See, for example, "Employment Non-Discrimination: Federal, State and Local Laws and Legislation," Human Rights Campaign, available at http://www.hrc.org/issues/workplace/equal_opportunity/8752.htm (last visited Dec. 2, 2010); "Nondiscrimination Laws Map," National Gay and Lesbian Task Force, July 2009, available at http://www.thetaskforce.org/reports_and_research/nondiscrimination_laws.