

LEGAL RIGHTS Q&A FOR LGBT INDIVIDUALS

This brochure includes information about legal rights related to marriage, nondiscrimination law, adoption and fertility, and spousal retirement benefits.

Asian Development Service Group NFP (ADSG)
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MARRIAGE

On June 26, 2015, the United States Supreme Court ruled in *Obergefell v. Hodges* that it was unconstitutional to prevent same-sex couples from marrying, which made same-sex marriage legal in all fifty states.

Green-card application for partners of us-citizens/permanent residents with lawful status

Q: I am in the U.S. legally on a non-immigrant visa and I am married to a U.S. citizen (or a permanent resident). Can my spouse file a green card application for me?

A: It depends on what kind of visa you are holding. If you are holding a visa that allows you to have the intention to stay in the U.S (e.g. H1B or L1 visa), then yes, as long as the two of you are lawfully married, and you meet the other general immigration marriage requirements. However, if you are holding a non-immigrant visa (for example a tourist or student visa) that required you to demonstrate that you did not have the intent to immigrate to the U.S., then it would depend on the specific case. It is generally acceptable that you change your intention and decide to stay in the U.S. as your life circumstances change over a period of time. But if you apply for a green card within weeks of entering the U.S., USCIS may decide that you did not properly present your immigration intent to the immigration official at the airport when you arrived, and your application might be denied.

Green-card application for partners of us-citizens/permanent residents with unlawful status

Q: I entered the U.S. with a visa several years ago and never left. Can my U.S. citizen (or permanent resident) spouse file a green card application for me even though I am now here without legal status?

A: If your spouse is a U.S. citizen, then yes. The general rule under the U.S. immigration law is that you cannot change your status from unlawful to lawful from within the U.S., but an important exception is for spouses of U.S citizens.

However, if your spouse is not a U.S. citizen, but a permanent resident, then you cannot change your status from unlawful to lawful.

Application for family member visa after marriage

Q: My spouse and I are both citizens of a foreign country. I am currently in the U.S. on a skilled worker visa (e.g. an H-1B) to work in the U.S. Can my spouse come with me?

A: Yes, your spouse will qualify for an H-4 “derivative” visa, which means he or she can accompany you for the duration of your visa, but, as with different-sex spouses, your spouse cannot work while in the U.S.

Becoming a U.S. citizen from a permanent resident after marriage

Q: If I am a green card holder and I am married to a U.S. citizen, when can I become a U.S. citizen?

A: Same-sex marriages, like opposite-sex marriages, reduce the residence period required for naturalization from five years to three years. During the three year period, you will need to live with your U.S. citizen spouse in “marital union”.

NONDISCRIMINATION IN EMPLOYMENT, HOUSING AND PUBLIC ACCOMMODATIONS

Employment Equality

Q: Are there any laws that prevent employment discrimination against LGBT workers? What counts as employment discrimination?

A: Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion. It applies to all private sector and state/local government employers with at least 15 employees. While Title VII does not explicitly include sexual orientation or gender identity, the EEOC (U.S. Equal Employment Opportunity Commission) and courts have said that **sex discrimination** includes discrimination based on an applicant or employee's sexual orientation or gender identity. State or local laws might also explicitly prohibit employment discrimination based on sexual orientation or gender identity.

Examples of sex discrimination involving sexual orientation include:

- Denying spousal health insurance benefits to an employee because he or she has a same-sex spouse
- Harassing an employee because of his or her sexual orientation, or because his or her appearance does not conform to a certain gender stereotype.
- Dismissing an employee because he or she is transition gender.

Q: Am I protected if I am a foreign citizen? How do I report workplace discrimination?

A: You are protected regardless of your citizenship and work authorization status. You can contact EEOC by visiting www.eeco.gov to report workplace discrimination. EEOC will investigate your complaint and seek remedies on your behalf **for free**. Please note that there are also time constraints for applicants and employees to contact EEOC after they experience discrimination, depending on what category the employer belongs to.

Housing nondiscrimination

Examples of housing discrimination include:

- A landlord evicts his tenant because he believes the tenant is gay.
- A property manager refuses to rent an apartment to a prospective tenant because he or she is transgender.

Q: Are there any laws against housing discrimination based on sexual orientation and gender identity?

A: Unfortunately, there is no federal law that protect LGBT from housing discrimination unless the housing program is offered by Department of Housing and Urban Development (HUD). Nondiscrimination state laws on housing vary state by state.

States that prohibit housing discrimination based on **sexual orientation and gender identity** include:

California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington.

States that prohibit housing discrimination **based on sexual orientation** include:

Maryland, New Hampshire, New York and Wisconsin.

Public accommodations nondiscrimination

Q: What are public accommodations?

A: Public accommodations include private and public facilities open to the public, such as retail stores, restaurants, hotels and hospitals. Examples of public accommodations discrimination include:

A restaurant owner kicks a gay couple out of his restaurant because they kiss each other in public

A hotel owner refuses to offer a room to a transgender woman because of her gender identity.

Unfortunately, there are no current federal laws that protect LGBT individuals from discriminations based on sexual orientation or gender identity in public accommodations. Nondiscrimination state laws on housing and public accommodations vary state by state.

States that prohibit discrimination in public accommodations based on **sexual orientation and gender identity** include:

California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington

States that prohibit discrimination in public accommodations **based on sexual orientation** include:

Massachusetts, New Hampshire, Wisconsin

ADOPTION AND FERTILITY

Joint Adoption and single-parent adoption

Q: What kind of legal processes are available if I would like to adopt a child previously legally unrelated to me? Can my partner and I jointly adopt a child if we are not married?

A: There are two ways of adopting a child that was not previously legally related to the adopter(s), joint adoption and single parent adoption.

Joint adoption is when a couple together adopts a child who was not previously the legal child of either member of the couple. After the adoption, both members of the couple will be legal parents of the child. Depending on the state, your opportunity of getting an adoption may or may not be related to whether you and your partner have a legal status, such as a marriage.

It is also quite common for LGBT individuals to adopt a child through single parent adoption. A single parent adoption is when a person adopts a child as an individual, even if other adults live with the adoptive parent. After the adoption, the child has one legal parent.

Donor insemination

Q: My spouse and I are a legally married female same-sex couple. If one of us gives birth to our child through donor insemination, are we both recognized as parents?

A: Not necessarily. In all states, the law presumes that the spouse of a person who gives birth is a parent of the child. However, some states or courts may not respect you as a legal parent based only on your marriage to the biological parent of the child, if you are not an adoptive parent of the child. Some states have donor insemination laws that say that when a married person gives birth to a child conceived through donor insemination, the person's spouse is automatically a legally recognized parent. However, these laws vary state by state, and even if you live in a state that respects you as a parent under its laws based on your marriage, you may not be protected if you travel to other states. For these reasons, it is strongly recommended that every parent who is not a biological parent get an adoption, or a court judgment of parentage, if possible.

Surrogation

Q: My spouse and I are a gay male couple, and we are seeking to have a child through surrogacy. What types of legal surrogacy are available?

There are two types of surrogacy, traditional surrogacy and gestational surrogacy. In traditional surrogacy, a woman is often artificially inseminated with you or your partner's sperm and conceives of the child with her own egg. The child will then be related to both the parent who offered the sperm and the surrogate.

In gestational surrogacy, there are two women involved — one is the egg donor and the other is implanted with an embryo fertilized by you or your partner's sperm and the egg donor's egg. The fertilization is usually done by In Vitro Fertilization. Gestational surrogacy is now more common than traditional surrogate, because the gestational surrogate is not biologically related to the child, and so the process prevents potential legal complications in the future.

Using surrogacy ensures that at least one member of the couple is recognized as the biological parent of the child, which means that he does not need to go through adoption to be recognized as the child's legal parent, although his partner still will.

It should be noted that laws concerning surrogacy differ state by state, and some states do not allow surrogacy at all. However, experienced surrogacy agencies can help you proceed through the surrogacy process outside of the state. States generally considered surrogacy-friendly include California, Illinois, Maryland, and New Hampshire among others.

SPOUSAL RETIREMENT BENEFITS

Q: I am legally married to my same-sex spouse. What Social Security benefits am I eligible to claim due to my spouse from the U.S. government?

A: Since the Defense of Marriage Act (“DOMA”), which defined marriage for federal purposes as the union of one man and one woman, was declared unconstitutional by the United States Supreme Court in 2013, a person married to someone of the same sex is eligible to claim the Social Security benefits due to a spouse, including the spousal retirement benefit, the spousal disability benefit, the lump-sum death benefit, and the survivor benefit.

The “spousal retirement benefit”, in particular, is based on the earnings record of your spouse, instead of our own earnings record, and is claimed when both spouses are living. Given that you meet age and other requirements, you, as the spouse of a retired worker, are eligible to receive the greater of either your own Social Security retirement benefits or an amount equal to 50% of your retired spouse’s benefit. You can apply for Social Security benefits in person at your local Social Security Administration (SSA) office. Social Security can also help a worker’s “children” when one or both parents are disabled, retired or deceased.

Q: What spousal retirement benefits am I eligible to claim from my spouse’s employer?

A: Most retirement benefit plans sponsored by the employer offer benefits that relate to the employee’s legal spouse. For example, they might guarantee a share of a pension to the spouse, or provide some form of distribution upon the employee’s death.

If your spouse’s retirement plan is through a **private employer**, federal law already requires your spouse’s retirement plan to provide equal treatment to same-sex spouses. Similarly, if your spouse is a **federal government employee** or a **state or local government employee**, the employer’s spousal retirement policy should be required by the Constitution to treat same-sex spouses equally.

RESOURCES

Immigration Equality:

<http://www.immigrationequality.org>

U.S. Equal Employment Opportunity Commission:

www.eeco.gov

It's Conceivable Now:

<http://itsconceivablenow.com/surrogacy/>

Lambda Legal:

<http://www.lambdalegal.org/your-rights>

GLBTQ Legal Advocates & Defenders:

<http://www.glad.org/rights>