

VIRGINIA LGBTQ FAMILY LAW

A Resource Guide for LGBTQ-Headed Families
living in Virginia

September 2020



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INTRODUCTION

This guide was drafted by Family Equality, in collaboration with Equality Virginia. It addresses many of the legal rights and issues that affect LGBTQ families currently living in Virginia. As LGBTQ equality advances across the nation, Virginia has recently enacted a number of new laws to protect LGBTQ families from discrimination in parental recognition, employment, housing, healthcare, public accommodations, and education. In this changing 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 Virginia. 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

In 2004, the Virginia legislature enacted the Affirmation of Marriage Act, which prohibited civil unions in Virginia and stated that a civil union entered into in another state was void in Virginia.¹ In 2006, Virginia voters approved an amendment to the Virginia Constitution that defined marriage as a union solely between one man and one woman.²

In 2013, after the United States Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA), which barred same-sex couples from being recognized as spouses under federal law,³ a U.S. District Court judge in Virginia ruled that the marriage amendment in Virginia's Constitution, as well as the Affirmation of Marriage Act to the extent that it prohibited a person from marrying a person of the same gender, violated the U.S. Constitution.⁴ A federal appeals court affirmed this decision in July 2014,⁵ and the U.S. Supreme Court denied review of the case.⁶ As such, the Commonwealth of Virginia began issuing marriage licenses to

same-sex couples on October 6, 2014.⁷ Civil unions are still not recognized in Virginia, however.

Nationwide recognition of marriages of same-sex couples came in June 2015 with the U.S. Supreme Court's ruling in *Obergefell v. Hodges*.⁸ *Obergefell* not only requires all states in the U.S. to issue marriage licenses to same-sex couples, but also requires them to recognize marriage licenses issued in another state.⁹

Although Virginia's now-void constitutional language prohibiting marriage equality still remains, the Virginia State Code was amended in April 2020 to remove the prohibition on marriages between same-sex persons.¹⁰

In 2016 and 2017, the Virginia legislature attempted to pass laws stating that no person could be required to participate in the solemnization of any marriage or subject to any penalty by the Commonwealth "solely on account of such person's belief, speech, or action in accordance with a sincerely held religious belief or moral conviction that marriage

1 H.B. 751 (2004)(enacted); Va. Code § 20-45.3.

2 [Ballot Question 1 \(voted on Nov 7, 2006\)](#); Virginia Constitution, Article I §15-A; Va. Code § 20-45.2.

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

4 *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va 2014).

5 *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014).

6 *Schaefer v. Bostic*, 135 S.Ct. 308 (2014).

7 Commonwealth of Virginia, Office of the Attorney General, Statement of Attorney General Mark Herring on Marriage Equality in Virginia (October 6, 2014): <https://www.oag.state.va.us/index.php/media-center/news-releases/341-october-6-statement-of-attorney-general-herring-on-marriage-equality-in-virginia>.

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

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

10 H.B. 623 (2020), amending § 20-38.1. The bill also updates numerous provisions of the Virginia Code to substitute "spouse" for "husband" or "wife," and make other statutory terms gender neutral.

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www.equalityvirginia.org

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the U.S.¹³ Following *Obergefell*, all federal 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.

is or should be recognized as the union of one man and one woman."¹¹ Although the Governor of Virginia vetoed both laws, ministers have the right to refuse to marry a couple based on their religious beliefs under the state Religious Freedom Restoration Act.¹²

Federal Benefits After *United States v. Windsor* and *Obergefell v. Hodges*

As discussed above, 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. This case laid the foundation for marriage equality nationwide, which was won two years later.

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

¹¹ H.B. 2025 (2017); S.B. 41 (2016).

¹² Va. Code § 57-2.02.

IMPORTANT:
Because marriages of same-sex couples are now recognized nationwide, married couples living in Virginia 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

¹³ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).



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same-sex couples adopt or use assisted reproductive technologies to build their families together. While there is still some work to be done in Virginia with regard to parental recognition for LGBTQ individuals and couples, there are new state rules and statutes in place that recognize and reflect the evolving landscape of the modern family make-up.

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

- Adoption or Order of Parentage decree
- Birth certificate
- Guardianship or Custody Order or agreement
- Co-parenting agreement
- Marriage License
- Medical Powers of Attorney

ADOPTION

Under Virginia law, any single unmarried adult or married couple who resides in Virginia may petition to adopt.¹⁴ Nothing in Virginia law or regulations explicitly prohibits LGBTQ individuals or couples from adopting, but there also is no explicit statutory protection against discrimination. In 2012, the Virginia state legislature passed a so-called “conscience clause” law, providing that “no private child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or

¹⁴ Va. Code § 63.2-1201; Va. Code § 63.2-1225.

Please consult an attorney experienced in LGBTQ law, or the authors, if you experience discrimination from state 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 Virginia adoption attorney who has experience working with LGBTQ people and couples. It is not enough to simply hire an experienced 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 family law attorney, please contact Family Equality (www.familyequality.org), and we will do our best to help you find one.

policies.”¹⁵ In effect, the law permits private child-placement agencies to discriminate against LGBTQ prospective foster and adoptive parents and youth in their care based on any written “moral” or religious policies or beliefs of the agency. For this and other reasons, it is advisable to contact an adoption attorney experienced in LGBTQ family law in Virginia and to engage with foster and adoption agencies who are welcoming and affirming to LGBTQ people and couples.

Joint Adoption

By Virginia statute, either a single person or a married couple can adopt.¹⁶ After marriage equality was recognized in Virginia in 2014, the Virginia Department of Social Services released a bulletin informing local social services divisions that married couples of the same gender can legally adopt jointly and that “any married couple is a married couple for purposes of adoptive placements.”¹⁷ Moreover, since marriage equality is recognized nationwide, same-sex spouses must be permitted to adopt under the same terms and conditions as different-sex married couples.

Virginia law by statute at present does not permit unmarried couples to petition to adopt jointly, whether same-sex or different-sex.

¹⁵ Va. Code § 63.2-1709.3.

¹⁶ Va. Code § 63.2-1201.

¹⁷ Virginia Department of Social Services Bulletin re Impact of Same-Sex Court Ruling on Adoption and Foster Care (October 10, 2014), <https://governor.virginia.gov/newsroom/newsarticle?articleId=6827> (last visited Sept 26, 2017).

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 legal parents. Virginia law does not currently allow unmarried couples to obtain a second-parent adoption in Virginia.¹⁸ However, validly-granted second-parent adoptions issued in other states should be recognized in Virginia under the 2016 United States Supreme Court ruling in *V.L. v E.L.*, which requires all states to give full faith and credit to adoption orders from other states,¹⁹ as well as the 2005 Virginia Supreme Court decision of *Davenport v Little-Bowser*, which requires the Virginia state registrar to recognize out of state adoption orders for children born in Virginia and issue an amended birth certificate.²⁰

Stepparent Adoption

Married same-sex couples can ensure that both parents are legally recognized by obtaining an adoption decree through the stepparent adoption procedure. Note however that the statute itself does not use the term “stepparent” at all. Stepparent adoption is the adoption of a child by the spouse of the child’s legal parent.²¹ A child

¹⁸ Va. Code § 63.2-1241.

¹⁹ 136 S.Ct. 1017 (2016).

²⁰ 269 Va. 546, 611 S.E. 2d 366 (2005) (involving same-sex adoption order from out of state). Va Code § 32.1-261(1)

²¹ Va. Code § 63.2-1241.

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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.

can be adopted by a stepparent so long as the child only has one legal parent. For LGBTQ families, if one of the spouses already has a child when the couple is married and that parent is the child's only legal parent, then the spouse of the legal parent may adopt the child as a stepparent and share equally in the rights and responsibilities of raising the child.

In Virginia, individuals petitioning to adopt as a stepparent must petition jointly with the spouse who is the legal parent to indicate the legal parent's consent.²² Since the recognition of marriage equality, a spouse of the same gender as the legal parent should be entitled to adopt under this provision just as a spouse of a different gender would. However, as stated above, there are no explicit statutory protections in Virginia preventing discrimination. As such, consultation with a Virginia attorney experienced in working with LGBTQ families is highly encouraged when proceeding with a stepparent adoption. While typically most same-sex married couples can do a stepparent adoption without any issue, there are still some jurisdictions and/or judges that will not proceed directly to a final order but instead will require a "report of investigation" by

²² Va. Code § 63.2-1241.

the local department of social services which requires a background investigation and at least one visit to the adoptive parents' household. Also, while there is nothing in the statute that requires that a hearing take place, a very small number of courts will mandate a hearing, and some will require the appointment of a guardian ad litem to represent the child. As of July 1, 2020, the requirement of a national criminal background check on the adopting parent will be eliminated. However, legislation continues to be introduced each year to keep the requirement.

For lesbian married couples having children via the use of donor sperm, fortunately the Status of Children of Assisted Conception statute in Virginia was amended effective July 1, 2019 to read "The gestational mother of the child is the child's mother" and "The spouse of the gestational mother of a child is the child's other parent."²³ Previously the statute was "The husband of the gestational mother of a child is the child's other parent." The change makes it clear that the spouse, regardless of sex, is the presumed other parent. Also, the Virginia state registrar has a form that is completed at the hospital upon the child's birth that places both mother's on the child's birth

²³ Va. Code § 20-158(A)(1) and (A)(2).

certificate.²⁴ Nonetheless, given that a birth certificate is an administrative record only (that can be subject to challenge - including by the underlying sperm donor) and does not carry the weight of a court order, it is strongly encouraged that all lesbian married mothers obtain a step-parent adoption order to give full force and validity to their legal parentage and to back up the birth certificate.

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mother's on the child's birth certificate.²⁵ Nonetheless, given that a birth certificate is an administrative record only (that can be subject to challenge - including by the underlying sperm donor) and does not carry the weight of a court order, it is strongly encouraged that all lesbian married mothers obtain a step-parent adoption order to give full force and validity to their legal parentage and to back up the birth certificate.

Custody Orders and More than Two Parents

LGBTQ parents who are engaged in co-parenting and are not married should seek to obtain a custody (and support) order to best secure the parenting arrangement and to protect the child. This also better protects the non-legal parent of the child

25 This form actually was put into use after marriage equality was recognized in Virginia in October 2014, but prior to July 1, 2019, had no clear validity.



should something happen to the legal parent. For multi-parent families, where three or more parents are involved in the child's life, custody, support and visitation orders can be used to better secure the role each parent plays in the child's life. While there are no express provisions under Virginia's statutes for more than two parents, an experienced LGBTQ attorney can assist multi-parent families in better securing the parentage arrangement for the child via custody and visitation (and support) orders.

Parental Presumption

Parental presumption is the idea that, when a married woman gives birth, her spouse is the other legal parent. State laws pertaining to parental presumption vary throughout the U.S., but historically they applied exclusively to different-sex spouses and many were written with gendered language. However, with nationwide marriage equality, parental presumption laws should be applied equally to married same-sex couples.

In Virginia, a marriage creates a presumption of paternity. Using gender-specific terminology, the Virginia law provides that a man is presumed to be the father of a child if he and the mother of the child were married in the ten months preceding the birth of the child.²⁶ While Virginia's parental presumption should apply equally to all married couples, it has only been updated to apply specifically to the "spouse" of the gestational mother

²⁶ Va. Code § 63.2-1202.

of a child born via assisted conception as defined by Virginia law.²⁷ In any case, the best way for a same-sex couple to ensure that both parents' rights will be legally recognized and respected throughout the U.S. is to obtain an adoption decree or Order of Parentage or Order of Parentage with stepparent adoption.

SURROGACY, ASSISTED REPRODUCTION AND 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 surrogate carrier. Assisted conception is governed by state laws in Virginia, including both Virginia's parentage statutes²⁸ and assisted reproductive technology statutes, which were amended effective July 1, 2019, so as to clearly be made gender neutral and applicable to LGBTQ families.²⁹

Virginia law defines "assisted conception" as "a pregnancy resulting from any intervening medical technology, whether in vivo or in vitro." The statute governs ART including, but not limited to, artificial insemination by donor, in vitro fertilization, embryo transfer, and other technologies.³⁰ The ability to qualify as an "intended

²⁷ Va. Code §20-158 (A) (2).

²⁸ Va. Code §§ 20-49.1 to -49.10.

²⁹ Va. Code §§ 20-156 et seq, as amended by "Jacob's Law," H.B. 1979 (2019)..

³⁰ Va. Code § 20-156.

parent” now applies to all married couples, regardless of gender, and to an unmarried individual who enters into a surrogacy agreement.

With respect to the parental rights of a donor, a “donor is not the parent of a child conceived through assisted conception, unless the donor is the spouse of the gestational mother.”³¹ Thus, it is essential that anyone using donor sperm or a donor egg have a very clear donor agreement or release in order to properly extinguish any parental rights of the donor, if that is intended. It is equally important for an individual who contributes a gamete (egg or sperm) with the intention of being a parent and not a donor (such as when one lesbian partner contributes her egg to her partner to carry or when an unmarried male contributes his sperm to be combined with donor egg and carried via a gestational carrier) to execute a “non-donor agreement.” This ensures that the parties’ intent is clear that the person intends to be a parent and not merely a donor.

It also is critical that the parties use an “intervening medical technology.” If a single female or same-sex female couple are using an insemination kit purchased at a drug store, it is important to clarify in the donor agreement that they consider that kit to be an “intervening medical technology.” A state court in Roanoke ruled that the use of a “turkey baster” did not constitute an intervening medical technology, and the case was upheld on appeal by the Virginia

31 *Bruce v Boardwine*, 88 Va. Cir. 218 (Roanoke City, May 6, 2014), affirmed on appeal, 64 Va. App. 623, 770 S.E.2d 774 (2015).

Court of Appeals.³² Notably, the parties in that case did not have a donor agreement in place. A single woman using known donor sperm who is not using a medical provider for insemination should have: (a) a donor agreement in place defining the insemination kit as “an intervening medical technology” in the donor agreement, and (b) a third party to serve as a witness to verify that the insemination was artificial and not performed via conjugal relations. Again, to protect the legal rights of the parties and the child, an attorney experienced in LGBTQ assisted reproductive technology law should be consulted.

For married female couples using donor sperm, the Virginia Department of Vital Records issued a form after October 2014 that can be signed upon birth placing both mothers on the birth certificate.³³ While this form has statutory validity due to the July 1, 2019, update to the Virginia Code,³⁴ parties should not rely solely on the issuance of a birth certificate, as it is an administrative document and can be challenged (including possibly by the underlying sperm donor). Accordingly, it is strongly recommended that the couple also do a stepparent adoption to secure the child’s legal parentage by court order.

32 *Bruce v Boardwine*, 88 Va. Cir. 218 (Roanoke City, May 6, 2014), affirmed on appeal, 64 Va. App. 623, 770 S.E.2d 774 (2015).

33 The statutory authority for this, as it pertains to a child born using assisted conception, was finally provided in 2019, by language confirming that the spouse of a gestational mother is the child’s other parent. Va. Code §20-158(A)(2).

34 Va. Code § 20-158(A)(2).

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With respect to surrogacy agreements, Virginia's statutes on the "Status of Children of Assisted Conception"³⁵ provide for both a court approved surrogacy contract route and a non-court approved route. The court-approved route is very rarely used given the additional costs and procedures involved prior to a pregnancy being achieved. Over 99% of surrogacy arrangements in Virginia use the non-court approved route. The court-approved route also should not be confused with a Pre-birth Order. While Virginia courts will recognize Pre-birth Orders from other states in surrogacy arrangements, there is not any established Pre-birth Order process in Virginia for surrogacy arrangements. It is paramount to have a surrogacy contract that meets the statutory requirements to assure that parental rights are established according to the parties' intentions. In Virginia, after the birth, upon presentation of the proper amendment documents to the Virginia state registrar, a new birth certificate will be issued naming the intended parents as the parents. Moreover, for LGBTQ intended parents (and international intended parents), whether married or single, a post-birth Order or Declaration of Parentage also should be obtained.

It is important to note that if a traditional surrogate, also referred to as a genetic surrogate, is used, she can void the surrogacy contract and keep the child.³⁶ Therefore, intended parents should avoid surrogacy arrangements with genetic surrogates. LGBTQ families also need to be

³⁵ Va. Code § 20-156 to - 165.

³⁶ Va. Code § 20-158(E), - 161(B), -162(C).

aware of Virginia's anti-surrogacy broker statute that has both criminal and civil penalties for surrogacy programs operating in Virginia (even if not located in Virginia) and may have criminal implications for parties using such programs.³⁷

The Virginia assisted conception statute, particularly the provisions regarding surrogacy agreements, is very complex and must be interpreted in conjunction with Virginia's parentage and birth certificate issuance statutes. This area of law is continually evolving in Virginia and across the U.S. Therefore, it is imperative that any individual or couple who is considering assisted conception consult with a Virginia attorney who is well-versed in ART law, experienced in working with LGBTQ individuals and same-sex couples, and knowledgeable about the lawful use of surrogacy programs and about the available processes for establishing the parental rights of the intended parent(s).

An adoption decree is irrefutable proof of parentage and is valid throughout the country. As such, regardless of whether a surrogacy agreement is in place and the name(s) of the intended parent(s) appear on the birth certificate, it is strongly recommended to consult with an attorney about also petitioning for an adoption decree for a child conceived through ART. Alternatively, an Order or Declaration of Parentage should be obtained. As previously noted, a birth certificate is an administrative record that can be subject to challenge and should be backed up with the weight and force of a court order.

³⁷ Va. Code § 20-165.

BIRTH CERTIFICATES

While Virginia's statute and administrative code on the issuance of birth certificates still use gendered language for the purposes of issuing birth certificates,³⁸ the current form and birth certificate itself now read "parent" and "parent" for same-sex couples.³⁹ After marriage equality was recognized in Virginia in 2014, the Virginia Department of Health issued a letter informing hospitals that, when there are two female spouses in a marriage, both spouses can be listed on a birth certificate when one is the gestational mother.⁴⁰ The letter did not specify the procedure for two male spouses. 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 *Pavan v. Smith*, 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.⁴¹ Accordingly, states cannot discriminate against same-sex spouses with regard to the naming of each spouse on a child's birth certificate, and same-sex

38 Va. Code § 32.1-257; 12 Va. Admin. Code § 5-550-100

39 See form VS6B found at https://www.vdh.virginia.gov/content/uploads/sites/93/2020/03/VS6B_Birth-application_Fillable_PDF.pdf

40 Commonwealth of Virginia, Department of Health, Letter from Director Rainey (Jan 22, 2015), <https://acluva.org/sites/default/files/wp-content/uploads/2015/02/RaineyLettertoHospitals20150122.pdf>. The form is available as a fillable PDF at this link: <https://www.pdfFiller.com/jsfiller-desk11/?et=l2f&projectId=481039499#a0b08a38ecb6740e358d68d56ab25ffc>

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

parents in Virginia are entitled to the same parental presumption enjoyed by different-sex parents.

Because a birth certificate is not a Court Order but is an administrative record and is only evidence of what the parties intended, it is still strongly recommended that same-sex couples petition for an adoption decree or order of parentage as soon as possible. A court order will ensure that both parents are legally recognized and that no third party (such as a person claiming to be the biological father) can attempt to assert parental rights.

New birth certificates must be issued following an adoption, so a same-sex parent who is not already listed on the birth certificate should be listed after completing an adoption of a child.⁴²

To update a child's birth certificate, send a request to the Virginia Office of Vital Records. Details on how to do so are available at (<http://www.vdh.virginia.gov/vital-records/>).

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

42 12 Va. Admin. Code § 5-550-280.

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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, 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.

APPLYING 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: <http://travel.state.gov/content/passports/english/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>.

NONDISCRIMINATION PROTECTIONS

Until 2020, the Commonwealth of Virginia offered no explicit protections against discrimination based on sexual orientation or gender identity, except for LGBTQ people employed by the state government. In the absence of such protections, some localities adopted Human Rights Codes that include protections from discrimination on the basis of sexual orientation and/or gender identity. These localities include some of the more populated cities and counties in Virginia,

such as Alexandria,⁴³ Charlottesville,⁴⁴ and Arlington County.⁴⁵ Accordingly, LGBTQ individuals in these counties who are discriminated against in employment, housing, public accommodations, or education may file a complaint with the locality's Human Rights Commission.

In April 2020, the General Assembly passed, and Governor Northam signed, the Virginia Values Act, which amended the state civil rights laws to include protections against discrimination on the basis of sexual orientation or gender identity in employment, places of public accommodation, credit transactions, and housing.⁴⁶ This historic change in Virginia law is set forth in more detail below.

EMPLOYMENT

State Law

Even with the arrival of marriage equality in 2014 and its growing acceptance, LGBTQ people in Virginia were still at risk of being subjected to discrimination in the workplace. In the absence of statutory protection, an executive order signed by Governor McAuliffe in 2014, and again by Virginia Governor Northam in 2018, prohibited discrimination against

43 City of Alexandria Code of Ordinances, Title 12, Chapter 4.

44 City of Charlottesville Code of Ordinances, Chapter 2, Article XV.

45 Arlington County Code, Chapter 31, Human Rights.

46 Va. Code § 2.2-520, § 2.2-2901.1, and §2.2-3900, et. seq.

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state employees on the basis of sexual orientation and gender identity. Thus, since 2014, LGBTQ employees of the state may report allegations of sexual orientation- and gender identity-based discrimination to the Office of Equal Employment Opportunity in Virginia's Department of Human Resource Management. The complaint must be filed within 180 days of the last alleged discriminatory act, and the complaint form and contact information to submit the form are available at this website (<http://www.dhrm.virginia.gov/equal-employment-opportunity/complaintofdiscrimination>). 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 Virginia offers no state law prohibiting employers from discriminating against an employee on the basis of sexual orientation and gender identity. In the absence of statutory protection, the first executive order signed by Virginia Governor Terry McAuliffe when he began his term in 2014 prohibits discrimination against state employees on the basis of sexual orientation and gender identity.⁴⁷ Thus, LGBTQ employees of the state may report allegations of sexual orientation- and gender identity-based discrimination to the Office of Equal Employment Opportunity in Virginia's Department of Human Resource Management. The complaint must be filed within 180 days of the last alleged

⁴⁷ Commonwealth of Virginia, Office of the Governor, Executive Order Number One (2014), Equal Opportunity (Jan 11, 2014).



discriminatory act, and the complaint form and contact information to submit the form are available at this website <http://www.dhrm.virginia.gov/equal-employment-opportunity/complaintofdiscrimination>.

Since 2017, Virginians who work for companies that contract or subcontract with the Commonwealth's Executive Branch also have received protection against discrimination based on sexual orientation and gender identity under an Executive Order signed by Governor McAuliffe.⁴⁸ The Order states that, in contracts valued over \$10,000, all Virginia Executive Branch entities must include a prohibition against discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, disability, or veteran status in the contractor's employment and subcontracting practices and its delivery of goods and services.

As of July 1, 2020, LGBTQ Virginians are

⁴⁸ Commonwealth of Virginia, Office of the Governor, Executive Order Number Sixty-One (2017), Executive Action to Ensure Equal Opportunity and Access for All Virginians in State Contracting and Public Services (Jan 5, 2017).

protected from discrimination in both public employment and the private workplace by the amendments to the Virginia Human Rights Act through the Virginia Values Act, which makes it unlawful for any state agency to discriminate and for any private employer to “fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to such individual’s compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, sexual orientation, gender identity, marital status, [etc.]...”⁴⁹ Under the Act, “sexual orientation” means “a person’s actual or perceived heterosexuality, bisexuality, or homosexuality.”⁵⁰ “Gender identity” means “the gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”⁵¹

The discrimination provisions of the Virginia Human Rights Act previously applied only to small employers who employed more than five and less than fifteen employees and provided very limited rights or remedy or recovery. The amended Act not only expands the scope of types of discrimination but expands it to apply to large employers and expands the available remedies. Except for unlawful discharges based on age, an employer now is defined as a person “employing 15 or more employees for each working day in each of 20 or more calendar weeks,” except

49 Va. Code §2.2-2901.1; §2.2-3900 and -3905(B) (1).

50 Va. Code §2.2-3901(C).

51 Va. Code §2.2-3901(B).

for purposes of unlawful discharge, in which case the statute applies to a person “employing more than 5 persons.”⁵²

A person who believes they may have been the victim of an unlawful discriminatory practice may file a complaint with the Division of Human Rights of Virginia’s Department of Law.⁵³ If the complaint is dismissed by the Division, the complainant may file a lawsuit for damages.⁵⁴

Federal Law

Title VII of the Civil Rights Act of 1964 (which applies to employers with 15 or more employees), prohibits discrimination in the workplace on the basis of “sex.” In June 2020, the United States Supreme Court held that the term “sex” in Title VII includes discrimination based on sexual orientation or gender identity, thus securing nationwide protection for LGBTQ people in the workplace.⁵⁵

Victims of employment 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 Virginia can be found at (<https://www.eeoc.gov/field>).

Generally, the Charge of Discrimination in Virginia must be filed within 300 days of

52 Va. Code §2.2-3905(A).

53 Va. Code §2.2-3907(A).

54 Va. Code §2.2-3907 and -3908.

55 *Bostock v. Clayton County, Georgia*, No. 17-1618 (June 15, 2020).

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each instance of discriminatory treatment or else the discriminatory treatment will not be considered. 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.” 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.

Individuals working for the federal government have been explicitly protected against discrimination on the basis of sexual orientation since 1998 through an Executive Order signed by President Clinton.⁵⁶ Protections for the federal workforce against discrimination based on gender identity were added by an Executive Order signed by President Obama in 2014.⁵⁷ In addition, LGBTQ Virginians who are employed by companies that contract with the federal government have access to the same protections against discrimination in employment. These protections stem from the 2014 Executive Order, which prohibits federal contractors from discriminating against current or prospective employees on the basis of sexual orientation or gender identity.

Contractors who do business with the

56 Executive Order 13087 (May 28, 1998)

57 Executive Order 13672 (July 21, 2014)

federal government employ 20% of American workers, all of whom are now covered by non-discrimination protections 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>).

On January 31, 2017, President Trump issued a statement that this Executive Order will remain intact during his presidency.⁵⁸ However, in August 2019, the Trump Administration’s Department of Labor proposed a new rule that would allow any federal contractor -- not just a religious organization -- that holds itself out as “carrying out a religious purpose” to qualify for an exemption from the prohibitions against employment discrimination on the basis of sexual orientation or gender identity.⁵⁹ The Department of Labor received a great many objections to the proposed rule, and a final rule has not yet been issued.

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

58 <https://www.whitehouse.gov/the-press-office/2017/01/31/president-donald-j-trump-will-continue-enforce-executive-order>.

59 84 CFR 41677 (August 15, 2019)

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

Virginia's Fair Housing Law was amended in April 2020 by the Virginia Values Act to protect LGBTQ persons against discrimination on the basis of sexual orientation or gender identity in housing or financial assistance. The law now provides for "fair housing throughout the Commonwealth, to all its citizens, regardless of race, color, religion, national origin, sex, elderliness, familial status, sexual orientation, gender identity, status as a veteran, or disability."⁶⁰ It does not apply, however, to the sale or rental of a single-family house sold or rented by the owner. It also does not prohibit sex-segregated public or private schools, hospitals, nursing homes, or religious

⁶⁰ Va. Code § 36-96.1 (B).



institutions from restricting rooms and bathrooms based on sex.

A person who believes they have been subjected to unlawful housing discrimination may file a complaint with the Real Estate Board or Fair Housing Board within one year of the discriminatory event.⁶¹ A private civil action must be filed within two years of the discriminatory event.⁶²

As mentioned previously, some localities have passed human rights ordinances that prohibit discrimination in housing on the basis of sexual orientation and/or gender identity, so LGBTQ individuals discriminated against in those localities may seek recourse through their local Human Rights Commission.

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

⁶¹ Va. Code § 36-96.8 and -96.9.

⁶² Va. Code § 36-96.18.

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of Housing and Urban Development (HUD), does not explicitly prohibit discrimination against LGBTQ people and their families. However, like Title VII's prohibition on employment discrimination mentioned previously, the Fair Housing Act prohibits discrimination on the basis of "sex." As the U.S. Supreme Court recently held that Title VII's prohibition against sex discrimination includes discrimination on the basis of sexual orientation and gender identity,⁶³ the same logic would seem to apply to the Fair Housing Act, but that has yet to be determined by a court.

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.⁶⁴ 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 is barred from using such criteria in assessing an application. A violation of this rule may result in HUD pursuing a number

63 *Bostock v. Clayton County, Georgia*, No. 17-1618 (June 15, 2020).

64 Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, Final Rule (2012); 24 CFR § 5.106.

of remedies, including sanctions against the violator.

In 2016, HUD issued a supplemental Equal Access Rule that specifically protects transgender and gender non-conforming individuals from discrimination in temporary shelters that receive HUD funding; they must receive equal access in accordance with the individual's gender identity.⁶⁵

HUD allows individuals to submit housing discrimination complaints by telephone at 1-800-669-9777, by mail, or online (http://portal.hud.gov/hudportal/HUD?src=/topics/housing_discrimination). The HUD field offices in Washington DC and Richmond service Virginians, and the contact information for both offices is available at this link: (<https://www.hud.gov/states/virginia/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).

PUBLIC ACCOMMODATIONS

State Law

Up until 2020, the Virginia Human Rights Act (VHRA), which prohibits

65 81 CFR 64763. In 2019, HUD issued notice of a proposed rule that would weaken transgender protections by allowing shelter providers to use various factors, including religious beliefs and gender markers on government documents, in deciding whether to respect the individual's gender identity. RIN: 2506-AC53. This proposed rule has not been finalized.

unlawful discrimination in places of public accommodation (businesses open to the public that provide goods, services, facilities, etc.), did not list sexual orientation or gender identity as protected characteristics.⁶⁶ As of July 1, 2020 (the effective date of the Virginia Values Act), however, the VHRA expressly prohibits any place of public accommodation from refusing service to any person on the basis of “race, color, religion, national origin, sex, pregnancy..., age, sexual orientation, gender identity, marital status, disability, or status as a veteran.”⁶⁷ It does not apply to private clubs, religious organizations, or other establishments that are not in fact open to the public.

A person who believes they have been subjected to unlawful discrimination in a place of public accommodation may file a complaint with the Division of Human Rights of the Department of Law.

66 However, in May 2016, the Attorney General of Virginia issued an advisory opinion interpreting the VHRA, concluding that there is a “strong argument” that sexual orientation and gender identity discrimination constitute discrimination “based on” sex.

VA Attorney General Advisory Op. No 15-070 (May 10, 2016). Additionally, in 2017, the Governor of Virginia issued an Executive Order prohibiting state Executive Branch employees from discriminating on the basis of sexual orientation and gender identity in the provision of public services. Commonwealth of Virginia, Office of the Governor, Executive Order Number Sixty-One (2017), Executive Action to Ensure Equal Opportunity and Access for All Virginians in State Contracting and Public Services (Jan 5, 2017).

67 Va. Code § 2.2-3904(B).

Federal Law

Federal law prohibiting discrimination in places of public accommodation is very limited; the protections afforded under Title II of the Civil Rights Act of 1964 and Title III of the Americans with Disabilities Act of 1990 do not include discrimination based on sex, much less sexual orientation or gender identity. In 1998, however, the U.S. 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.⁶⁸ 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.

SCHOOL POLICIES AND ANTI-BULLYING

State Law

There have been recent changes in Virginia law affecting school employees, students, and parents. In general, because public schools are places of accommodation, they are subject to the same newly-expanded protections from discrimination based on sexual orientation and gender identity discussed above.

All school districts in Virginia are required to implement policies and procedures that

68 *Bragdon v. Abbott*, 524 U.S. 624 (1998).

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prohibit bullying.⁶⁹ Bullying in Virginia is defined as "any aggressive and unwanted behavior that is intended to harm, intimidate, or humiliate the victim; involves a real or perceived power imbalance between the aggressor or aggressors and victim; and is repeated over time or causes severe emotional trauma," and the statute specifically includes cyber-bullying.⁷⁰

While there are no specific policies regarding protecting students subjected to adverse treatment based on their sexual orientation, the Virginia Assembly has recently passed a law that provides specific directions to the Board of Education to develop model policies for the treatment of transgender students, including "prevention of and response to bullying and harassment."⁷¹ The law is meant to ensure that each school district has a policy that complies with Virginia's nondiscrimination laws regarding gender identity.

With respect to the school workplace, most LGBTQ public school teachers and staff in the Commonwealth could, until recently, be "outed" and fired for who they were or who they loved.⁷² With the passage of the Virginia Values Act in April 2020,

Virginia expressly extended employment protections to all LGBTQ employees in the public schools. The Act amends the state education laws to provide that "no school board or any agent or employee thereof shall discriminate in employment on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, sexual orientation, gender identity, or status as a veteran."⁷³

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.

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

⁷³ Va. Code § 22.1-295.2 (B)

⁶⁹ H.B. 1871 (2013); Va. Code §§ 22.1-291.4, 22.1-279.6.

⁷⁰ Va. Code § 22.1-276.01.

⁷¹ H.B. 145 (March 4, 2020); Va. Code §22.1-23.3

⁷² In the absence of state-level protection, some school boards and localities passed non-discrimination ordinances that protect LGBTQ students and employees from discrimination in education based on sexual orientation and gender identity. Currently, these protections cover over 25% of public school students and employees. <http://www.equalityvirginia.org/checklist/inclusive-schools/>.

discrimination is based on a student's sex or gender. While Title IX does not explicitly include sexual orientation or gender identity as independent bases for a claim of discrimination, the law's prohibition against sex discrimination has been applied where a student is mistreated for being sex or gender non-conforming,⁷⁴ meaning the student faces discrimination for not subscribing to the stereotypical notions of femininity or masculinity, to include same-sex attraction and transgender status. While the U.S. Supreme Court has not ruled on the definition of "sex" under Title IX, a federal district court in Virginia concluded that "claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory."⁷⁵ This case is currently on appeal to the U.S. Court of Appeals for the Fourth Circuit, but the lower court's decision is consistent with the U.S. Supreme Court's June 2020 ruling that the prohibition against sex discrimination in employment includes LGBTQ people, as previously discussed.

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

⁷⁴ Whitaker v. Kenosha Unified School District, No. 16-3522 (7th Cir. 2017); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151 (C.D. Cal. 2015); Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015).

⁷⁵ Grimm v. Gloucester County School Board, Case No. 4:15cv53 (E.D. Va, Aug. 9, 2019) (at 15) (as of June 2020, appeal pending to the U.S. Court of Appeals for the Fourth Circuit).

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.⁷⁶ In February 2017, under the Trump Administration, the DOE and DOJ rescinded this guidance.⁷⁷ Despite the DOE and DOJ's withdrawal of the guidance, the underlining law that the guidance interpreted remains, and the case law from federal courts in Virginia remains binding.

The DOE's Office for Civil Rights (OCR)

⁷⁶ United States Dept. of Education Office for Civil Rights, Dear Colleague Letter on Transgender Students (May 2016).

⁷⁷ 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>.



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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>).

For employees of schools, Title VII of the Civil Rights Act of 1964 (which applies to employers with 15 or more employees), prohibits discrimination in the workplace on the basis of “sex.” As previously discussed, in June 2020, the United States Supreme Court held that the term “sex” in Title VII includes discrimination based on sexual orientation or gender identity,⁷⁸ thus securing nationwide protection for LGBTQ people in the workplace. See the previous section on Employment - Federal Law for more information.

More details on drafting a complaint, as

⁷⁸ Bostock v. Clayton County, Georgia, No. 17-1618 (June 15, 2020).

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>

HEALTHCARE

In March 2020, the Commonwealth of Virginia passed legislation prohibiting health insurance carriers from discriminating on the basis of gender identity.⁷⁹ This new law also requires insurers to use non-discriminatory criteria – consistent with current medical standards – to determine whether treatments are medically necessary.

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

⁷⁹ HB 1429 (2020) effective July 1, 2020 as Va. Code § 38.2-3449.1



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) 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.⁸⁰ While the final agency rule issued in 2016 that implemented Section 1557 prohibited 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 individuals consistent with their gender identity⁸¹ and prohibited discrimination based on sex stereotyping⁸², the Trump Administration issued a new final agency rule in June 2020 that removed protections

80 42 U.S.C § 18116.

81 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.

82 45 CFR 92 (2016); 81 FR 31375 (2016).

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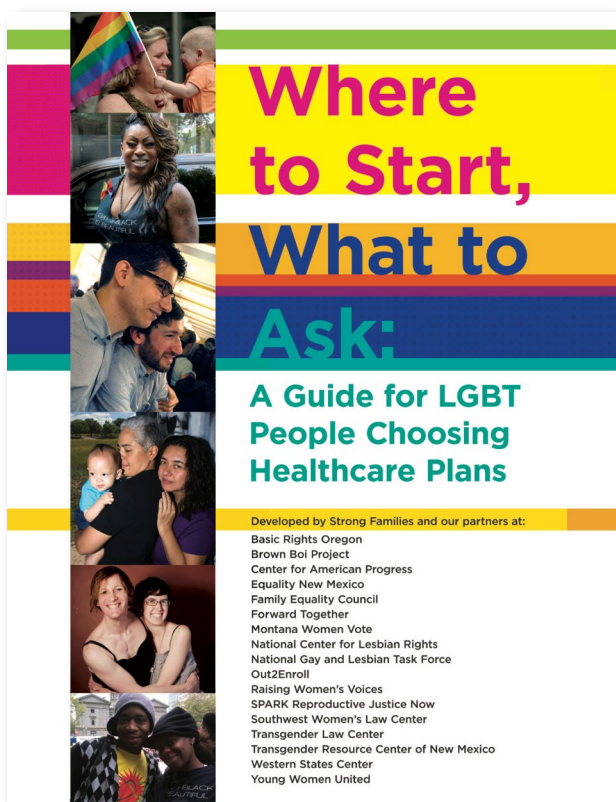
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against discrimination based on sex stereotyping and gender identity.⁸³

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

83 Dep't of Health & Hmn Svcs., Nondiscrimination in Health and Health Education Programs or Activities, Final Rule, available at <https://www.hhs.gov/sites/default/files/1557-final-rule.pdf>.



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.](#)

CONVERSION THERAPY

In March 2020, the Virginia General Assembly passed HB 386, which prohibits any licensed counselor or therapist from engaging in conversion therapy with a person under 18.⁸⁴ That prohibition includes any practice that involves “efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender.” Any licensed person who engages in conversion therapy with a person under 18 is subject to disciplinary action by the Department of Health Professions.

FAMILY AND/OR PARENTING LEAVE

Virginia does not have a state family or medical leave law requiring private employers to provide paid family leave. However, if you are employed by the Commonwealth, you may be eligible for Paid Parental Leave under an Executive Order issued by Governor Northam in 2018. It provides that employees

84 Va. Code § 54.1-2409.5

of executive branch agencies who have been employed at least a year will receive 8 weeks of paid leave following the birth, adoption, or foster placement of a child.⁸⁵

Under the federal Family Medical and Leave Act (FMLA), eligible employees of covered employers are entitled to take unpaid, job-protected leave for specified family and medical reasons.⁸⁶ 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

⁸⁵ Executive Order 12 (June 25, 2018).

⁸⁶ 29 U.S.C. §2601 et seq.



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).

In 2014, following the Windsor decision and

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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

An LGBTQ Virginian may change their name by obtaining a court-ordered name change. To do so, an applicant must submit a notarized Application for Change of Name. The applicant must file the required documents at the local County or City Circuit Courthouse, which are listed here: (<http://www.courts.state.va.us/courts/circuit.html>). Virginia law does not require notice or publication of a petition for name a change, as some states do.⁸⁷

Under Virginia's recently amended birth certificate law,⁸⁸ effective July 1, 2020, a transgender person is not required to obtain a court order for a gender marker change on their Virginia birth certificate, nor are they required to undergo surgery. An applicant may seek a gender marker change by making

⁸⁷ Va. Code § 8.01-217.

⁸⁸ H.B. 1041 (March 20, 2020), amending Va. Code §§ 32.1-261 and 32.1-269.



a request directly to the State Registrar. The request must be made by submitting a form furnished by the state registrar "and completed by a health care provider from whom the person has received treatment stating that the person has undergone clinically appropriate treatment for gender transition." The law makes clear that the Registrar cannot require "evidence or documentation of any medical procedure."⁸⁹

If a person also wishes the Registrar to change the name on the birth certificate, a certified copy of the court order changing the legal name must be submitted with the gender marker change request.

A person may still file a court Petition for Change of Sex, which Petition should include a letter from a licensed medical provider stating the same things as required by the State Registrar.⁹⁰ A court order changing sex is useful when a transgender Virginia was born in another state and is unable to obtain a corrected birth certificate in that state.

⁸⁹ Va. Code § 32.1-261(A)(5).

⁹⁰ National Center for Transgender Equality, ID Documents Center - Virginia, last updated June 5, 2017, <http://www.transequality.org/documents/state/virginia>.

Virginia will update names and gender markers on driver's licenses when provided with a court order certifying the name change and/or a form signed by a licensed provider certifying the applicant's gender identity.⁹¹

Forms to petition the court for a name or gender change can be downloaded here:

- **Name change:** <http://www.courts.state.va.us/forms/circuit/cc1411.pdf>
- **Gender marker change:** <http://www.courts.state.va.us/forms/circuit/cc1451.pdf>

Note: Some jurisdictions have local versions of these forms that they require applicants to use. Applicants should check the website for their local civil circuit court, or call the clerk of court for specific instructions. Unfortunately, the process often still requires consulting with or hiring an attorney to assist.

HATE CRIMES PROTECTIONS

As of April 2020, Virginia law now includes protections for LGBTQ people who are targeted by hate crimes.⁹² The law provides that any person who is subjected

⁹¹ National Center for Transgender Equality, ID Documents Center - Virginia, last updated June 5, 2017, <http://www.transequality.org/documents/state/virginia>.

⁹² S.B. 179 (April 11, 2020), amending Va. Code §§ 8.01-42.1; 8.01-49.1; 18.2-57, 18.2-121, and 52-8.5.

to intimidation or harassment, violence, or vandalism of property motivated by animosity based on the person's race, religion, gender, disability, gender identity, sexual orientation or ethnicity has a right to sue for damages, including punitive damages, and for attorney fees.⁹³ The law does not apply to actions that occur in the workplace, whether between employees or between employee and employer. In some circumstances, threats, harassment, or discriminatory language may be actionable in civil court under Virginia's insulting words statute, which provides that "All words shall be actionable which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace."⁹⁴

In addition, Virginia law now provides for enhanced criminal penalties for the perpetrator of an assault and battery committed based on the victim's "race, religious conviction, gender, disability, **gender identity, sexual orientation**, color, or national origin."⁹⁵ A simple assault is a Class 1 misdemeanor, with at least six months' jail time; an assault and battery resulting in bodily injury is a Class 6 felony with at least six months' jail time. A person who enters the building of another for the purposing of damaging the property or its contents because of the owner's protected status is guilty of a Class 6 felony with at least six months' jail time.

The federal government also offers some protection for LGBTQ victims of hate

⁹³ Va. Code §8.01-42.1

⁹⁴ Va. Code §8.01-45.

⁹⁵ Va. Code §18.2-57

Find more information at:

www.familyequality.org
www.equalityvirginia.org

VIRGINIA LGBTQ FAMILY LAW
A Resource Guide for LGBTQ-Headed
Families

crimes. In 2009, Congress enacted the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which expands federal hate crimes to LGBTQ people.⁹⁶ 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 three field offices in Virginia, which may be found through the following webpage: (<https://www.fbi.gov/contact-us/field-offices>).

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 as well as who should be a trustee to oversee

⁹⁶ 18 U.S.C. § 249.

any funds meant to support the 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 Pour-over Will into a Trust also is useful in facilitating probate and in naming a Trustee for minor children in addition to a Guardian.

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 Virginia State Bar Association at: (<http://www.vsb.org/site/publications/wills-in-virginia/>).

ADVANCE DIRECTIVE FOR HEALTHCARE

An Advance Directive for Healthcare allows Virginians 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 Virginia is available at: (<https://www.vda.virginia.gov/advmedir.asp>).

GENERAL POWER OF ATTORNEY

It is important that partners consider providing each other with the power to handle personal finances and other affairs on their behalf through a “general power of attorney” in the event that a partner becomes unable to manage his/her own finances and other affairs due to sickness or incapacitation. We recommend consulting a Virginia attorney in drafting this document.

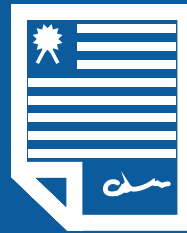
DOMESTIC PARTNERSHIP AGREEMENT

A Domestic Partnership Agreement expresses a 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.

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. Such agreements, in conjunction with custody orders, are especially important for non-married couples who are co-parenting.

Although the Co-Parenting and Partnership agreements are not “standard” and will require the advice of an LGBTQ aware attorney licensed in Virginia (and could still prove to be not legally binding), they are often useful to have. These documents can establish 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.



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.

Find more information at:

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