



# CHAPTER 2

## WORKPLACE ISSUES FOR LGBT PEOPLE AND PEOPLE WITH HIV

This chapter covers a broad range of workplace issues that lesbians, gay men, bisexuals, transgender people and people living with HIV frequently encounter in the workplace. We encourage you to use these questions and answers in the way that serves you best — feel free to read through them from beginning to end or go directly to the questions that concern you most. If you need further help, or have a question that you don't see listed here, contact Lambda Legal's Help Desk ([www.lambdalegal.org/help](http://www.lambdalegal.org/help) or toll-free 866-542-8336) or check out our Resources Guide at the end of this tool kit.

### THE BASICS

Across the country, LGBT people balance their need to work with their right to honor and express their sexual orientation or gender identity. More than 80 percent of Americans believe that sexual orientation discrimination in the workplace is wrong and 61 percent of Americans believe that transgender people should be protected from discrimination by law. But Lambda Legal's 2005 Workplace Fairness Survey revealed that a large number of lesbian and gay employees still face dis-

crimination. Thirty-nine percent of survey respondents reported experiencing some form of discrimination or harassment in the workplace because of their sexual orientation during the past five years. Clearly, more work is needed before people feel comfortable being out at work.

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#### Why are employee nondiscrimination policies important?

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Employee nondiscrimination policies are a primary way to improve workplace conditions for all LGBT people and people living with HIV. Employers often have nondiscrimination policies that cover characteristics such as race, age and religion. Adding sexual orientation, gender identity or expression and HIV status to this policy is a vital step toward creating a safe, respectful workplace. If you work in a jurisdiction where there are no laws that explicitly protect you against sexual orientation or gender identity discrimination, an employer's policy may be the only thing you can point to in the event of anti-LGBT discrimination.

In recent years, there has been a positive trend among employers towards antidiscrimination policies that prohibit discrimination based on sexual orientation. As of June 2006, the Human Rights Campaign found in its annual State of the Workplace Report that 86 percent of Fortune 500 companies prohibit discrimination based on sexual orienta-

tion. A much smaller number of company policies include gender identity, although that number is rapidly increasing. LGBT activists, allies, employee groups and unions should work together to draft policies, apply pressure and form alliances to make sure an inclusive policy is put in place and enforced.

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### What constitutes a strong nondiscrimination policy?

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There is no standard language for employee nondiscrimination policies. Different policies can be interpreted to cover (or exclude) various forms of discrimination — and, even more importantly, policies often spell out how an employer will respond in the event of discrimination. When examining an employer's nondiscrimination policy, or advocating for the implementation of a new policy, keep in mind that a strong nondiscrimination policy should include the following:

- Clear language that discrimination and harassment based on sexual orientation, gender identity or expression and HIV status will not be tolerated
- Specifics about prohibited behavior
- A description of the penalties for violating the policy
- A clear outline or grievance procedure for an employee who has experienced or witnessed discrimination
- A declaration of the employer's commitment to prompt investigation of complaints of discrimination
- A promise of protection against retaliation
- A commitment by the employer to be legally bound by its policy

When developing inclusive nondiscrimination or equal employment opportunity policies, you and your employers should be attentive to all aspects and stages of employment, from recruitment to termination.

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### What constitutes effective workplace diversity training?

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Workplace diversity trainings provide an opportunity to educate staff about the issues affecting lesbian, gay, bisexual and transgender people and people with HIV. These programs are another way, besides implementing an inclusive nondiscrimination policy, that employers can demonstrate their commitment to fostering diversity and creating a respectful work environment. An effective diversity training will examine hidden as well as overt bias and give people conflict-resolution skills and tips about becoming workplace allies. Attendees should learn how they can make the workplace a more welcoming place for their LGBT co-workers and those living with HIV. Such programs should also include training to allay fears about HIV transmission, educate about HIV prevention and provide resources for employees with HIV or those with family members with HIV. Ideally, the company's diversity trainers will be well versed in sexual orientation and gender identity issues. Check their references and talk to people at other workplaces to see if their workshops are successful and practical.

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### What is an LGBT employee resource group?

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LGBT employee resource groups (ERGs) can start out as lunchtime meetings or listservs for interested workers and develop into powerful agents for change within the workplace.

Often ERGs work to create company nondiscrimination policies or to obtain domestic partner benefits. They may also provide resources and support for LGBT employees or information for management. Some ERGs focus on advocacy and workplace activism, while others primarily provide social networking and support.

Many LGBT employee resource groups — including the LEAGUE at AT&T, the nation's oldest LGBT employee resource group — have implemented safe space programs. Usually, safe space programs are

designed to let all workers know that discrimination will not be tolerated and that their workplace respects and values its LGBT employees. One feature of the safe space may be visual cues such as magnets, stickers or



### MATTER OF MATTHEW CUSICK AND CIRQUE DU SOLEIL

*“When I was fired by Cirque du Soleil, it was the worst day of my life. This kind of discrimination tears people’s dreams and careers apart. While other people in all sorts of professions will still face HIV discrimination, after today they will have a powerful tool with the settlement we reached.”*

— MATTHEW CUSICK

In this landmark HIV discrimination case, Lambda Legal represented Matthew Cusick, who was fired from his job as an acrobat in Cirque du Soleil because he has HIV. Cirque hired Cusick to train for its popular Las Vegas-based show, *Mystere*. Cusick spent months training and cleared exams by Cirque’s doctors, who said he was a healthy athlete, fully capable of performing. But shortly before he was scheduled to start, Cirque told Cusick that because he has HIV, the company would not continue to employ him. Cusick called Lambda Legal’s Help Desk. We filed a federal discrimination complaint charging that Cirque had no reason to fire Cusick, since he does not pose a health risk or safety threat to himself or anyone else. Following a determination by the federal Equal Employment Opportunity Commission that Cirque had likely engaged in illegal discrimination,

Lambda Legal reached a settlement with the company — the largest settlement ever for an HIV-discrimination complaint settled with the EEOC. Cirque paid a record \$600,000 to end the federal disability complaint, initiated companywide antidiscrimination training and altered its employment policies worldwide concerning people living with HIV.

### LAMBDA LEGAL’S IMPACT

This is one of many examples of Lambda Legal’s vigorous efforts to ensure that people with HIV and LGBT people are treated fairly at work. The case upholds the principles of the Americans with Disabilities Act. It also shows that it is the responsibility of employers to be up-to-date on the facts of HIV and treat people with HIV as they would treat other employees — and not rely on myths, fears and stereotypes about the disease.

posters to help LGBT employees feel supported and safe to be out on the job. Even without a formal safe space program, many ERGs are active in creating a welcoming environment for LGBT people.

LGBT professional associations serve a similar networking purpose for LGBT people who may not work in large or centralized workplaces. These associations may be initiated through an LGBT caucus or committee of a larger professional association. In addition to providing support and networking for LGBT professionals, LGBT professional associations may seek to expand the profession's understanding of LGBT issues and elevate their advocacy on behalf of LGBT civil rights.

LGBT people who work alone or in small workplaces can find support in LGBT groups or organizations that are not specifically tied to their workplace or profession. The state groups affiliated with Equality Federation ([www.equalityfederation.org](http://www.equalityfederation.org)) or a local LGBT community center ([www.lgbtcenters.org](http://www.lgbtcenters.org)) may be a good place to look for support. LGBT people with their own businesses may also want to research whether their city has an LGBT business association or chamber of commerce.

## COMING OUT

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### How should I decide whether to come out at work?

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If you've been working at your job for a while and you're thinking about coming out to your co-workers or supervisor, you have the advantage of being familiar with the culture at work. In general, it will be easier to be out if you have a support system in place. Talk it over with family, friends or a supportive co-worker. If your company's nondiscrimination

policy includes sexual orientation or gender identity, it may be safer to come out. Pay attention to your workplace culture. Are other people out? How are they treated? Are you on friendly terms with your co-workers? Depending on your comfort level and the potential repercussions in your workplace, it may be better to come out to only a few people at first.

The practical reality remains that coming out at work may be quite difficult and even dangerous for people living in states and cities without protections against discrimination. This may be especially true for workers in small or hostile workplaces or contractors, freelancers or professionals trying to build their own business or client base. You should evaluate your own situation or seek outside resources to help you make this decision.

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### Why is it important to come out at work?

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Many people see coming out as a positive expression of identity and come out just by being open about their lives in daily conversation, as opposed to making an announcement. For some people, bringing a same-sex date or partner to the company picnic or holiday party — or even being invited to a co-worker's home or party — are important milestones, as hard won as domestic partner benefits or nondiscrimination policies. If you are a transgender person, you may have to deal with issues that make it difficult to maintain your privacy (see pages 19-22), but you should have the right to decide whether or when to share personal information about yourself.

Coming out also has a social dimension that goes beyond the individual. By coming out, you make it easier for co-workers to do the same — or for co-workers with LGBT

family members or friends to come out to you. Many people don't realize how many LGBT people they know because they presume that their co-workers are heterosexual and not transgender. Coming out can also help change people's attitudes. Several studies have shown that when people personally know someone who is gay or lesbian, they are more likely to support LGBT rights. A 2006 report from the Hunter College Center for Sexuality and Public Policy found that heterosexual Americans who have contact with gays and lesbians are 13 percent more likely to support legal recognition of same-sex couples (either through marriage or civil unions). Often employers first have to acknowledge that they have LGBT employees before they become receptive to including sexual orientation and gender identity in their nondiscrimination policy or providing domestic partner benefits.

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### Should I come out on my job search?

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Coming out is always a private decision. You should determine how important it is to you to be out at work and whether or not you will be out on your application, client pitch, contract bid or during your interview. Listing an LGBT affiliation (with relevant applicable skills and accomplishments) on your resume or cover letter may be a way to find out early in the process whether a prospective employer is likely to treat you fairly.

If you are transgender, whether to be out in your job search may be of particular concern to you. For example, you may be unsure how to list your sex or a former name on job application forms, since such disclosure may make you vulnerable to discrimination. There is not a lot of case law in this area, but at least one jurisdiction (Washington, D.C.) has published guidelines stating that it is not fraudulent for trans-

gender people to list their gender identity and consistently used name on job applications. Lambda Legal encourages you to describe yourself in ways that are true to your gender identity when you feel comfortable doing so.

If you fear your otherwise strong application won't get a second look if you're out but you still want to pursue the job, consider organizing your resume to reflect the skills you would bring to a position without listing certain details. For instance, instead of including a long-standing membership in a local LGBT group, some people list additional accomplishments or related skills (i.e., bookkeeper, grant writer, top fundraiser, founding member) without giving the name of the organization. But you should be prepared to answer questions about anything contained in your resume.

Unfortunately, LGBT people and people with HIV may experience employment discrimination prior to getting a job because their sexual orientation, gender identity or HIV status can prevent them from being offered jobs they are qualified for. This is usually difficult to prove, as the hiring process can be subjective and even idiosyncratic. If an employer demonstrates a pattern of hiring only certain kinds of people and never hiring others, the discrimination becomes more obvious. See our discussion in Chapter 1 about the laws and other protections that may help you challenge this type of discrimination.

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### What can an employer ask me in an interview?

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The interview questions below are illegal:

- Are you in good health?
- What prescription drugs are you currently taking?

- Have you ever been treated for mental health problems?
- How many days were you sick last year?
- Do you have HIV or AIDS?
- Do you have a disability?

Depending on the laws in your area, an employer may be free to ask questions about your sexual orientation, marital status or whether you have children. Most employers won't ask for this information since it raises concerns about discrimination if the applicant is not offered a job. Although they can't ask whether you have a disability or require that you take a medical exam prior to a job offer, they can ask about your ability to perform the essential functions of the job and base their decisions on your answers.

## DOMESTIC PARTNERSHIP BENEFITS

Thousands of private and public employers are now offering benefits such as health insurance, family leave and survivor benefits to the domestic partners of LGBT employees. In a small number of states, some employers are required to do so because of state or local laws or policies recognizing marriages, civil unions or domestic partnerships for same-sex couples. Other employers are offering such benefits voluntarily because they recognize that it is a good business decision.

The section below provides helpful information to people who work for employers who are not required by statute or ordinance to recognize marriages, civil unions or domestic partnerships, or for situations where bringing a legal action is not the best strategy. If you live in a state or locality where there is such a law, please consult Lambda Legal's website, Help Desk or an attorney if you need more information about securing benefits at work.

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### What is a domestic partnership?

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A domestic partnership is generally defined as two people who share a primary residence, are financially and emotionally interdependent and have an intimate relationship, including a commitment to caring for each other's needs. The rights and obligations of domestic partnership vary considerably from jurisdiction to jurisdiction. Nevertheless, for many same-sex couples in a committed relationship in the United States, it is the only form of relationship recognition they have.

Federal laws relating to employee benefits are often not friendly to domestic partnerships. For example, the federal Family and Medical Leave Act, which allows employees in large companies to take paid or unpaid sick leave to care for a partner (or child or parent) with a serious medical condition for up to 12 weeks out of a year, does not apply to same-sex partners or to their legal children. The responsibility is left to employers to provide fair and parallel coverage for same-sex couples and their families.

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### Is it burdensome for employers to offer domestic partner benefits?

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In most jurisdictions, employers are not required to offer domestic partner benefits, despite the fact that denying those benefits constitutes a denial of equal pay for equal work. Thousands of private employers have taken the lead and are now offering benefits to domestic partners — and they have not faced administrative problems, fraud issues or excessive costs. Employers that demonstrate their commitment to equality in benefits have an advantage in attracting and retaining qualified employees, consumers, shareholders and clients — and employees who can be open about their lives and have security for their families will be more productive.



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## How can I advocate with my employer for domestic partner benefits?

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Every employer is different, and there is no risk-free or guaranteed formula for securing domestic partner benefits. However you choose to proceed, you will have a greater chance of success if you tailor your plan to your specific work situation and resources. It is good to begin with your employer's nondiscrimination policy. If the policy includes sexual orientation or marital status, you can argue that the lack of domestic partner benefits contradicts this policy. Without an inclusive nondiscrimination policy, it may be difficult to advocate for benefits without fear of discrimination, so you may want to fight for an inclusive nondiscrimination policy first.

Here are a few tips to get you started:

- Talk to your co-workers to find out what level of need and support there is for domestic partner benefits.
- Identify who will ultimately review your proposal and anyone who may be an ally in this process (i.e., human resources officers, union representatives, LGBT employee resource groups).
- Develop a list of the benefits your employer offers married couples and prioritize them by need and likelihood. A “hard benefit” like health insurance may be your most pressing need, but “soft benefits” such as sick leave or bereavement leave may appear less threatening to employers because they do not involve changes to insurance policies.
- Research and contact other employers who provide domestic partner benefits to gain insight into the process. Consult resources such as the National Gay and Lesbian Task Force's *The Domestic Partnership Organizing Manual for Employee Benefits* and *Pride at Work's*

### *Seven Steps to Adding DP Benefits to Your Union Contract.*

- Draft a proposal outlining the who, what, when, where, why and how of domestic partner benefits at your company. Include a general description of what domestic partner benefits are and sample copies of policies from comparable employers or local governments. Provide letters of support from other employers and allies.
- Request a meeting with management to discuss domestic partner benefits. Be prepared to educate your employer about the inequity of policies that exclude domestic partners. Stress that employers that offer domestic partner benefits have an advantage in attracting and retaining qualified employees. You may also want to reference statutory laws that ban discrimination based on marital status and/or sexual orientation.

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## Will health insurance companies honor domestic partnerships for coverage?

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In most cases, employers who want to provide domestic partner coverage that includes health insurance have little difficulty finding an insurer. A domestic partnership affidavit or eligibility standard may help address any concerns an insurance provider may raise about fraudulent claims. If an employee must meet a basic eligibility standard and declare (under penalty of perjury) that he or she is in an “intimate and committed relationship of mutual caring” with his or her domestic partner, the possibility of fraud shouldn't be any higher than it would be for married couples.

If your employer is willing to provide domestic partner benefits but then decides to exclude health coverage because its existing group plan doesn't cover domestic partners, you may be able to persuade your human



### BRINKMAN V. MIAMI UNIVERSITY

*“What’s at stake for us here is simply basic for anyone: the legal and social recognition of the equality of our partnership, and our family, with heterosexual couples and families.”*

— YVONNE KELLER

When a lawsuit by the antigay Alliance Defense Fund and ultraconservative Ohio legislator Thomas Brinkman threatened Miami University’s domestic partner benefits program, Lambda Legal intervened on behalf of Professors Yvonne Keller and Jean Lynch — two university professors whose families stood to lose their medical coverage if the ADF prevailed. The ADF lawsuit claimed that Miami University’s domestic partner benefits violate Ohio’s constitutional amendment, that limits marriage to a man and a woman. Lambda Legal argued that Ohio’s constitutional amendment does not apply to the university because it concerns only marriage and does not address the legality of domestic part-

nership benefits. Lambda Legal also moved to dismiss the case on the ground that Brinkman lacked legal standing to sue, since providing health care to same-sex couples caused him no injury. In November 2006, the court accepted Lambda Legal’s argument and dismissed the ADF lawsuit. The ADF has appealed.

### LAMBDA LEGAL’S IMPACT

The court’s decision frees our plaintiffs from becoming pawns in a politically motivated lawsuit by right-wing extremists. Lambda Legal is taking a stand against antigay forces around the country, defending ground we’ve already gained to protect our relationships and our benefits.

resources managers to let you negotiate directly with the insurance company. In a situation like this, you may have to ask your employer to pay for an individual policy for a domestic partner. This arrangement would require you to contribute the same copayment amount that your employer would have required if you were able to purchase the coverage available for a spouse or dependent under the group plan.

After all of your hard work to obtain these benefits, they may still be unequal, through no fault of your employer. The IRS currently does not treat domestic partners as spouses for tax purposes. This means that unless your domestic partner meets the standards of dependency as defined by the IRS (residency in the employee’s household, dependency on the employee for at least half of his or her support, and yearly earnings that are less than



the cap amount stated in IRS guidelines), the domestic partner coverage offered by your employer is taxable income. You should factor this substantial tax burden into any budget you and your partner create.

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### How do I advocate with my employer to respect my marriage to my same-sex partner?

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Whether you take your vows in Massachusetts, Canada or somewhere else, you are in a unique position to convince your employer to respect your marriage. While there is no guarantee that you and your partner will be granted the same rights and benefits that different-sex married couples receive, you can and should encourage your employer to do the right thing and treat all married couples equally.

You can use the same strategies to advocate for recognition of marriage that you used to obtain equal benefits for domestic partners, but you may want to incorporate the following arguments that are specific to civil marriages.

- You are legally married and can (and in some situations are obligated to) describe yourself that way.
- Employers, particularly corporations, have led the way for other benefits and employment protections for LGBT people — in many cases offering domestic partner benefits before local and state governments began enacting domestic partner registries. As with domestic partnership, employers can take the lead in recognizing marriage for same-sex partners.
- If your employer does international business in the country where your marriage license was issued, it is good public relations for your employer to show respect for that country's laws.
- If your marriage license was issued by the Commonwealth of Massachusetts, and

your employer does business in that state, justice and consistency mandate respect for all marriages conducted by that state.

## GENDER IDENTITY AND EXPRESSION

Although the path has not been easy for transgender people in the workplace, there are indications that the climate is improving. Unions and other advocates are beginning to see transgender rights as a primary battle in the fight for workplace equality. Additionally, more and more people are learning about gender identity and expression issues — sometimes from the transgender people who work with them. According to the Human Rights Campaign, as of March 2007 more than 260 private corporations included written nondiscrimination policies covering gender identity and expression in their employee handbooks. Colleges and universities are also leaders on this issue, with more than 80 institutions across the country providing this form of protection.

Despite these gains, transgender people still frequently encounter workplace problems related to discrimination, harassment, insensitivity, transitioning, health insurance, restroom access and dress codes. Transgender people in regions without statutory workplace protections and those who work in small businesses or companies are the most likely to feel isolated and inhibited.

Transgender people are on the front lines of battles that also affect many other people. As they challenge the rigid stereotypes associated with “male” and “female” characteristics and behavior, they are helping to create a society that is open to a wider spectrum of gender expression, including gender-nonconforming or androgynous gay, lesbian, bisexual, questioning and heterosexual people.

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## Should I transition on the job?

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It is in the best interest of employers to support employees as they transition by maintaining open communication, respecting privacy, informing and educating staff and promoting the usage of the preferred name and pronoun of the transitioning employee. If you plan to transition on the job, you should review your employer's nondiscrimination policy and your state's and city's laws about discrimination based on gender expression and identity. If your workplace or region does not explicitly protect you, you may want to consult an attorney, as many courts have found protection for transgender employees under sex discrimination laws. Also, bear in mind that if you quit your job to transition and then start over elsewhere, your job search may be complicated, especially when it comes to providing a complete work history or personal references.

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## What are some guidelines to keep in mind about transitioning on the job?

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Before you transition and throughout the process, gather and maintain connections with allies such as family, friends, transgender support groups, a therapist and/or an LGBT employee resource group to help you during the transition. You may want to find out if your therapist, doctor or health professional is willing to communicate about your transition to the proper people at your workplace and give them permission to do so.

Acquaint yourself with the process for legally changing your name and other identification documents such as your Driver's License or state ID, and notify your employer if you legally change your name. Many organizations, including the Sylvia Rivera Law Project ([www.srlp.org](http://www.srlp.org)), have a number of resources online to help guide you through

this process. Every state except three (Tennessee, Ohio and Idaho, as of this printing) allows transgender people to amend their birth certificates to reflect a change in gender, but the process varies from state to state and may require proof of sex reassignment surgery and/or a court order.

It is best to talk to your employer at least three months before you plan to transition. Take into account the general climate of your workplace when determining whom you will come out to first (i.e., human resources, employee assistance program representative, union shop steward, union membership assistance program representative, supervisor or corporate diversity specialist). Be sure to gauge the level of confidentiality you can expect (and request) in each situation. It may be helpful to provide your employer with a report and timeline about your transition process, but be sure to mark this information as "personal and confidential." Obtain copies of your performance evaluations and other materials that your company has on file before you transition, just in case you face discrimination down the line. It will also be helpful to keep a record of your transition, including any workplace discrimination you experience, in a journal that you keep at home.

The more support your employer is willing to show for your transition, the faster your co-workers will adjust. You should inform co-workers about your transition in a thoughtful and professional way, consistent with your comfort and any work rules (i.e., hold a meeting or send a personal memo accompanied by a letter from your employer). You may have to educate people by answering their questions or providing them with informational materials. Request that your employer consult a transgender workplace consultant or conduct workplace sensitivity training, if possible.



### LOPEZ V. RIVER OAKS

*“I was shocked when I received the call from human resources taking away the job they’d offered me — it felt as if they’d said to me ‘you’re a monster; we don’t want you here.’”*

— IZZA LOPEZ

In September 2005, Izza Lopez, a 26-year-old transgender woman, accepted a job as a scheduler with River Oaks Imaging and Diagnostic, a medical imaging company in Houston. After resigning from her position with her then-current employer, Lopez received a call from River Oaks rescinding the job offer because of her “misrepresentation” of herself as a woman. Lopez was unable to get her previous job back and was without employment for several months. Lambda Legal has filed a federal discrimination lawsuit on Lopez’s behalf. The case is pending.

### LAMBDA LEGAL’S IMPACT

This case gives the Southern District of Texas the opportunity to follow in the footsteps of other federal courts around the country in recognizing that transgender employees are protected by Title VII, the federal law banning sex discrimination in the workplace. A victory will clarify and advance workplace rights for transgender people while educating employers that discrimination against transgender employees is not permissible under federal law.

### Can I receive health care coverage for my transition?

Employee health insurance plans often explicitly exclude medical procedures that are essential to many transgender people, such as hormone replacement therapy or sex reassignment surgery. Employers who self-insure (pay their employees’ medical claims directly rather than using outside insurance providers) are more likely to extend these health insurance benefits. As part of your advocacy — or your union’s or LGBT

employee resource group’s advocacy — you may also ask employers to provide health and disability leave for transitioning and maintenance procedures and therapies.

### What does the law require about restroom access for transgender people?

The law requires employers to provide a safe and convenient restroom for all employees. There may be laws at the state and local level that will affect how your employer handles the question of restroom access for trans-

gender or transitioning employees. For instance, a state law or local ordinance may require that restrooms be accessible to people based on their gender identity. To maintain consistency and respect throughout and after the transition process, transgender employees should be allowed to use the restroom that corresponds with their gender identity. Some transgender employees might prefer to use single-toilet unisex bathrooms with doors that lock.

Transgender employees should discuss restroom access with their employer before it becomes a major issue in order to address any concerns they may have. If co-workers complain about sharing bathrooms, employers can opt to make special arrangements for the complaining employee rather than for the transgender employee. In 2002, a federal appellate court upheld the right of an employer to allow a transgender staff person to use gender-identity-appropriate restrooms despite complaints from another staff person.

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### What are my rights when it comes to following my employer's sex-specific dress code?

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Some legal decisions state that employers have the right to implement and enforce dress codes with different requirements for male and female employees. However, numerous courts have held that sex-specific dress codes must not place significantly unequal burdens on men and women. To the extent that it is comfortable, transgender employees should dress in accordance with the dress code requirements applicable to their gender identity.

Crossdressers — those who wear clothing associated with another sex but who do not undergo gender transition — face a related

set of issues. If you decide to come out as a crossdresser to your co-workers but do not intend to crossdress at work, you should be aware that confidentiality cannot be guaranteed. If you do crossdress at work, you also may have to avoid clothing that would be considered inappropriate under the sex-specific dress codes that your employer is enforcing. One federal court has gone so far as upholding the termination of an employee who crossdressed off the job. Even workplace nondiscrimination policies that include gender identity and expression might not protect you against such unfair treatment.

## HIV

In the third decade of the epidemic, HIV continues to have a devastating impact on our communities. Over 1 million people nationwide are living with HIV today, and there are approximately 40,000 new infections each year. Among people living with HIV in the United States, 45 percent are men who have had sex with men. The epidemic is having a particularly serious impact on black gay men.

Health care and medical alternatives for people with HIV have improved dramatically since the first years of the epidemic, which means that more and more people with HIV are in the workforce or planning to enter it. Employers are bound by federal laws, and in some cases, state and city laws, to work with people with HIV to ensure job security, privacy, reasonable accommodations and a workplace that is free of harassment and discomfort (see pages 6-8). But many employers do not understand the laws protecting people with HIV. In clear violation of these laws, companies often terminate or refuse to hire employees with HIV because they erroneously perceive them as a risk to co-workers, the public or themselves.

You should familiarize yourself with your rights under the Americans with Disabilities Act (ADA) ([www.ada.gov](http://www.ada.gov) and [www.eeoc.gov/types/ada.html](http://www.eeoc.gov/types/ada.html)), the Rehabilitation Act of 1973 ([www.national-rehab.org](http://www.national-rehab.org)) and find out about any applicable state and city laws in your area. Businesses can learn more by consulting the Centers for Disease Control and Prevention's *Business Responds to AIDS* and *Labor Responds to AIDS* tool kits, the Society for Human Resources Management's *National AIDS Fund Tool Kit* and the website [www.thebody.com](http://www.thebody.com).

People with HIV work in a variety of jobs demanding physical, mental and emotional stamina. Some workers with HIV require reasonable accommodations in order to perform a job; others, with proper diagnosis and medications, may never experience illness that affects their work. HIV infection does not affect each person in all the same ways. Your HIV status alone should not be used to dictate what you can — or cannot — do. Your ability to work is controlled by your specific condition, not by your HIV status.

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### Should I disclose my HIV status to my employer and/or co-workers?

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People living with HIV may not be able to safely disclose their HIV status in the workplace given the persistence of HIV-related stigma and discrimination. The American Bar Association and the Centers for Disease Control and Prevention both have recommended that individuals who test positive for HIV receive legal advice about the importance of maintaining their confidentiality, which helps an individual avoid becoming the victim of discrimination. Revealing your confidential information at work may subject you to discrimination, and remedies for that discrimination may not be available. For these reasons, people with HIV

should carefully consider the risk of discrimination or retaliation before revealing their HIV status to others in their workplace or community.

If your HIV status is known to your employer, the ADA generally requires employers to keep HIV-related information confidential and prohibits employers from discriminating against people with HIV. However, for disclosures made outside of the protections of the ADA (i.e., disclosure to a co-worker or disclosure in a workplace with fewer than 15 employees), there may not be a legal obligation for your employer or other employees to keep all information about your HIV status confidential, and the ADA may not protect against discriminatory conduct. Therefore, you should be careful about whom you discuss your HIV status with and keep in mind that, although there are legal protections against employment discrimination based on HIV status, there are some gaps in what those laws cover, and discrimination may be hard to prove.

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### How do I request a reasonable accommodation as a person living with HIV?

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Approach your immediate supervisor first. You may also need to enlist the support of your human resources department or a union representative. Keep in mind that not everyone you speak to may be held legally accountable to protect your confidentiality. If your employer asks for proof that you are disabled, you may want to consult an attorney before making a disclosure about your HIV status. An employer might consider it sufficient for your doctor to explain in writing that you have a “chronic condition” that causes you to need the accommodation you are requesting, without specifying what that condition is. Other employers may require you to provide a medical diagnosis.

Put your request in writing, and use the word “accommodation.” Always emphasize how productive the accommodation(s) will make you. Be realistic about your request. Your employer’s obligation to accommodate you will depend on the particular facts of your situation, such as the size and type of

business, the job at issue and the type of accommodation you need. Common accommodations for people with HIV include time off for doctor’s visits, flexible work schedules for employees who experience fatigue at certain times of day or access to a refrigerator to store medications. Remind your employer



### SAAVEDRA V. NODAK ENTERPRISES

*“I knew right away that what Nodak did to me was wrong. No one should have to endure the kind of humiliation and disrespect I suffered just because of HIV. I’m glad I fought back.”*

— JOEY SAAVEDRA

Joey Saavedra, a 45-year-old HIV-positive man, was a skilled auto-glass installer who had worked in the industry for nearly 27 years when he was fired from his job because he has HIV. During an interview for a job with Nodak Enterprises for a position installing auto glass, Saavedra disclosed his HIV status to the company’s district manager. After he was hired, Saavedra also told his direct supervisor. Three months later, after news of his HIV status made its way up to the company’s leadership, Saavedra was fired — even though he did his job well and his direct supervisor wanted to keep him on staff. Lambda Legal filed a federal lawsuit in May 2004 on behalf of Saavedra, saying Nodak violated the Americans with Disabilities Act, which prohibits discrimination against qualified people with disabilities. In addi-

tion to our litigation, Lambda Legal launched a national public education campaign against the company, highlighting HIV discrimination in the workplace. Within months of launching the campaign, Lambda Legal reached a settlement agreement with Nodak Enterprises.

### LAMBDA LEGAL’S IMPACT

In the settlement, Nodak Enterprises agreed to adopt a nondiscrimination policy, conduct extensive training on HIV issues for its employees as well as pay an undisclosed amount of money to Saavedra. This settlement not only affects the 42 stores that Nodak operates across seven southern states, but it sends a message to employers across the country that HIV discrimination will not be tolerated.



to address any backlash you receive from co-workers who feel you are getting “special treatment.”

Bear in mind that you will not be in a good position to negotiate if you request reasonable accommodations retroactively. For example, you will be in a better position if you let your employer know that you will need flexibility about your arrival time, rather than wait until you are approached by your supervisor for arriving late to work every day for a month, and then saying, “You need to let me come in late because I have a condition that makes it very difficult for me to be on time.”

## ALLIES AND UNIONS

The LGBT and HIV-affected communities are themselves collections of allies — lesbian, gay, bisexual, transgender and HIV-affected people — who work together for common goals of civil rights. They advocate for each other’s rights, as well as their own. But LGBT people and people with HIV also need the support of individuals and organizations outside their communities. It is hard to achieve lasting changes in workplace conditions and laws without allies and supporters. In order to have the greatest impact, people need to work together and become allies in workplaces, unions and professional associations.

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### How can I be a workplace ally to LGBT people and people living with HIV?

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There are many ways that you can be supportive of your LGBT and HIV-positive co-workers. A good first step is to recognize the individuality of all your co-workers and educate yourself about the forms of discrimination that your LGBT co-workers and co-workers with HIV face, as well as facts about

HIV infection. As an ally, you can take steps to change discriminatory practices and policies in your workplace and encourage others to be allies. One important way to do this is to “interrupt” homophobic, racist and sexist statements and actions. Similarly, don’t participate in or condone speculation or comments about co-workers’ sexual orientation, gender identity or HIV status. Look people in the eye and make simple statements such as “Please don’t use that language around me” or “I don’t agree with that.” If you do not feel comfortable interrupting certain behaviors as they are happening, you can talk to participants afterwards to tell them how you feel. For more ideas on how to take a stand for LGBT people and people living with HIV, check out our worksheet “Rate Yourself as a Workplace Ally” at the end of this kit.

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### Why is it important for my union to support LGBT people and people living with HIV in the workplace?

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Unions are responsible for representing and advocating for their members and can be a powerful resource in fighting all kinds of workplace discrimination. Union collective bargaining agreements contain information about grievance procedures, the right to seek an arbitrator if you can’t reach a resolution and your right to receive assistance from a union representative.

When union fights are successful, they are particularly noteworthy because collective bargaining agreements are legally binding in ways that other kinds of employer policies and protections may not be. Unions can also make a compelling argument to employers with sites in multiple states, because a collective agreement standardizes employment protections for the entire bargaining unit, regardless of a state’s employment protection laws. A local union or chapter may also be

affiliated with a much larger state or international union that can pass member resolutions endorsing the rights and equality of LGBT people and those with HIV.

A union can support LGBT employees and those with HIV by fighting for an inclusive employee nondiscrimination clause, making equal benefits for LGBT people a primary battle during contract negotiations and demanding and enforcing transparent employment, disciplinary and termination practices that protect all workers. Unions can also be instrumental in shaping an employer's workplace diversity program. They can also support statutory protections for LGBT people and people living with HIV through union lobbyists; identify pro-LGBT, pro-union political candidates and help to block anti-LGBT candidates.

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### What steps can my union take to show support for LGBT people and people with HIV?

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There are many ways your union can raise the visibility of LGBT and HIV issues internally. Your union can show respect for same-sex relationships by extending all union benefits (i.e., union pension plans) to same-sex partners and the families of same-sex couples and ensure that membership-assistance programs are sensitive to the issues and concerns of LGBT people and people with HIV. Your union can design and conduct inclusive diversity trainings for union staff and membership and provide a higher level of training for shop stewards and others handling grievances for LGBT and HIV-affected employees, as well as host or sponsor educational forums around LGBT and HIV issues. Your union can negotiate for nondiscrimination clauses, domestic partnership benefits and transgender-inclusive health insurance coverage. Your union can also

increase the visibility of LGBT people and people with HIV within the union by including stories and columns about LGBT and HIV issues in membership publications and websites and elevating LGBT people and people with HIV to leadership positions.

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### What if my union is not sympathetic to LGBT or HIV issues?

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Like some employers, co-workers or governments, unions may not be receptive to the needs of their LGBT and HIV-affected members. The education process may be slow going and a little frustrating at times. Even if your union is doing nothing for LGBT workers specifically, you should make sure they are ensuring that employees are fired only "for cause" as this provides protection against discrimination. Bear in mind that unions can't discriminate against LGBT workers if the union is located in a city or state where LGBT employees are protected from discrimination. For example, if a union hiring hall won't give a construction worker an assignment because she is a lesbian, the worker may have grounds to file a discrimination complaint or a grievance under the procedure outlined in her collective bargaining agreement.

If your union leaders decline to help you with a workplace grievance or if they do so halfheartedly, you have the option of talking directly to an attorney about any discrimination you experience at work. You might also consider forming a caucus within your union to improve the outlook for LGBT and HIV-affected members in the future.