

Legal Aid Foundation of Los Angeles and L.A. Gay & Lesbian Center

Legal Issues Affecting LGBT Refugees and Asylees

Heartland Alliance Rainbow Welcome Initiative

San Diego, California March 9, 2012, 8:45 am – 10:15 am

Attorney Presenters: Kim Luu-Ng, Natalie Nardecchia, and Terra Slavin

Basics of Wage/Hour Law



Workers' Right to Minimum Wage



- California
 - \$8.00 per hour
- Federal
 - \$7.25 per hour (July 2009)
- Amount promised

Any agreement to waive this is illegal and unenforceable

Overtime

■ You must be paid overtime (time and a 1/2 your regular hourly rate or pay)



- 2. Over 40 hours in one week.
- 3. The first 8 hours of work on the 7th day consecutive day.



Double Time

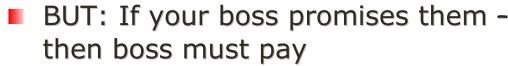
You must be paid double-time for:



- 1. All hours worked over 12 in one day.
- 2. After the first 8 hours of work on the 7th consecutive work day.

Vacation Time / Paid Time Off

- Your Boss DOES NOT have to give you:
 - Holiday Pay
 - Vacation Pay
 - Sick Pay
 - or pay extra for work performed on holic





Meal and Rest Breaks

 Paid 10-minute rest break every 4 hours of work

 Not Paid 30-minute uninterrupted meal break every 5 hours of work Exceptions:

(1) 6 hours or less work day, waiver with mutual consent

(2) On-duty meal break if the employee gives written consent, nature of the work requires such a break and can be revoked at any time



Breaks - Premiums

- If your employer doesn't provide rest or meal breaks:
- Premium = 1 hour wages for each day you don't get your meal or rest break (max: 2 hourly premiums/day)
- Statute of Limitations:3 years

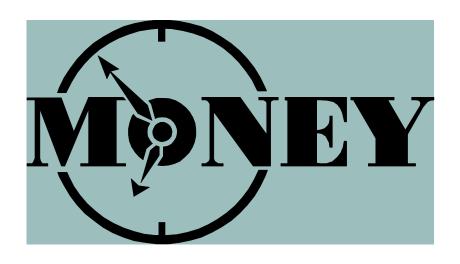


Final Pay



- Last day when laid off or fired
- Last day if you quit and give 3 days notice
- Within 3 days if you quit without notice
- Paycheck must also have unused vacation time, but not unused sick time

Waiting Time Penalty



- 1 day's pay for each day late
- Up to 30 days

Exceptions to Wage/Hour Laws



 The rules regarding overtime and meal/rest breaks apply to private companies, <u>not for</u>:

Exceptions to Wage/Hour Laws (cont.)

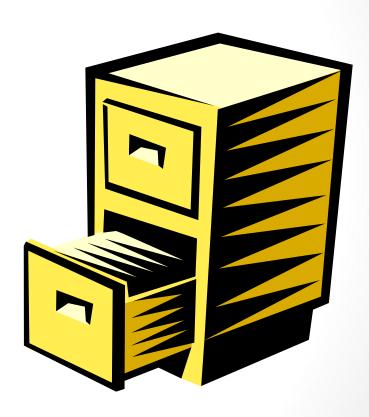
- Independent Contractors
- Exempt Employees
- Collective Bargaining Agreement

Workers' Rights to Wages Regardless of Immigration Status

- State and federal wage/hour protections apply irrespective of immigration status
- Exceptions: Remedies of reinstatement and back pay

How to Protect Your Rights

- Save Copies
 - Time Cards
 - Checks
 - Pay Stubs
 - Employee Manual
 - Union Contract
 - Hand-outs



How to Protect Your Rights

Get information about your employer

Name of Company

Name(s) of supervisors and/or owners

- Address
- Phone
- City License Numbers
- Garment Labels
- Day laborers: employers auto



Recover Unpaid Wages:

 Demand payment: either write a letter or talk to your boss (preferably in a group)

Recover Unpaid Wages:

- File a claim with the Labor Commissioner or Small Claims Court
- Labor Commissioner
 Los Angeles (213) 620-6330



Immigration Related Unfair Employment Practices

Prohibited Conduct Under the Immigration and Nationality Act's (INA) Anti-Discrimination Provision

- Citizenship status discrimination
- National Origin discrimination
 - Discrimination tied to accent, country of origin, ancestry, native language
- Document abuse
- Retaliation



Citizenship/Immigration Status Discrimination

- With respect to hiring, firing, and recruitment
- Coverage: All Employers with more than 3 Employees
- Protected Persons = Work-Authorized Individuals:
 - U.S Citizens, nationals, asylees, refugees, temporary residents, and LPR (Legal Permanent Resident's)

Examples of Citizenship Status Discrimination

Citizen only hiring policies

Green Card only hiring policies

Refusing to Hire Asylees/Refugees

Preferring undocumented workers

Preferring H1-B or other temporary workers

Different hiring procedures for US citizens and immigrants

The I-9 Form:

- Gives employers a way to establish that the individuals they hire are authorized to work in the United States.
- Employer must verify the employment eligibility and identity documents presented by the employee and record the document information on the form.



Document Abuse

- Employers cannot specify or prefer one document over others for purposes of completing the I-9 form
 - (Three lists of documents on I-9 identity and work authorization)
- Refusing to hire an individual because the documents have a future expiration date may also constitute illegal discrimination
- Coverage: All Employers with 3 or more Employees
- Protected Persons:
 - US Citizens, nationals, legal workers

Employer Review and Verification of I-9 form

- Employers must permit employees to present any documents or combination of documents acceptable by law.
- Employer must examine to see if it reasonably appears genuine and related to the employee
- Record documents in appropriate column
- Sign and date certification



Other Civil Rights at Work





At Will Employment

"At Will" Employment – Employer can discharge an employee <u>at any time for any reason</u> (Cal. Labor Code Section 2922)

Exceptions:

Anti-discrimination laws
Breach of contract (written or oral)
Breach of collective bargaining
agreement
Breach of public policy grounded in
statute or state constitution

Discrimination

Race Sexual Orientation Marital Status

Color National Origin/Ancestry Disability

Religion Age (40+) Leave Denial

Sex Genetic Info Medical Condition

Gender Identity

"You need to act less black."

"You need to look more like a man/ woman."

"We don't hire your kind here."

"We don't hire illegals."

"Come back when you're not pregnant."



TYPES OF DISCRIMINATION

- Hiring
- Firing
- Discipline
- Pay
- Benefits
- Accommodation
- Other

Harassment

Unwanted and unwelcome acts or communications
Severe or Pervasive
Objectively and subjectively offensive

Based on a protected class

Verbal Conduct Emails
Innuendos Touching
Sexual Advances "Jokes"
Leering Blocking path





Leave Requirements – CFRA, PDL

- Employers with 50+ employees (in 75 mile radius) must allow eligible employees (1,250 hours in last year) to take up to 12 weeks unpaid leave for:
 - Birth of a child
 - Placement of child in adoption/ foster care
 - Employee's own serious health condition
 - To Care for a parent, spouse, child, domestic partner with serious health condition

Pregnancy disability leave is up to 4 months unpaid (in addition)





Reasonable Accommodation

Religious

Sincere religious belief interferes with job duties.

Disability (Mental, Physical, HIV, Cancer)

Enable to perform essential job functions.

"Interactive process" to determine if reasonable accommodation exists.

- Job restructuring/ modification
- Job Reassignment
- Allowing time off
- Equipment
- Interactive Process

Pregnancy

Advice of healthcare provider – child birth, pregnancy, and related medical conditions

Language Rules

- Business necessity
- Notify workers of circumstances and time when speaking only in English is required and of the consequences



- There is no alternative practice that would achieve the business goals just as effectively
- Not legal example: "No speaking Spanish during your breaks!"

Retaliation



- 1. Protected activity
- Adverse job action (suspension, demotion, termination etc)

3. Causal link

Employer aware of protected activity; and adverse action ensued within a relatively short period in time.

Transgender Rights at Work

- All workers have the right to use a restroom that corresponds to the employee's gender identity (even if different than their assigned sex at birth)
- All workers have the right to be addressed by the name and pronoun that corresponds to their gender identity
- All workers have the right to dress in a manner suitable for their gender identity
- Workers do not need to answer questions about their bodies unless (rarely) anatomy is directly job-related

Tips for Workers

- Document everything. Keep a journal. Keep all documentation of the discriminatory conduct, including emails. Take pictures on phone.
- Talk to other employees.
- Talk to a supervisor or Human Resources.
- Consult an attorney.
- File a complaint with the
 DFEH (800) 884-1684
 Labor Commissioner (888) 275-9243



Legal Rights of Refugees/Asylees and Other Immigration Issues Affecting LGBT Community

Kim Luu-Ng



FORMS OF IMMIGRATION RELIEF

- U.S. Citizenship
- Cancellation
 - Cancellation of Removal for Legal Permanent Residents (LPR)
 - Cancellation of Removal for non-Legal Permanent Residents (Non-LPR)
 - Violence Against Women's Act (VAWA)
- 212(c) Waiver
- Adjustment of Status
 - 212(h) Waivers
- Asylum
- Withholding of Removal
- CAT (Convention Against Torture)
- U-Visa
- T-Visa
- Temporary Protected Status (TPS)
- Voluntary Departure

REFUGEES v. ASYLEES

- What's the difference?
- Refugees conferred status overseas before arrival
- Asylees conferred status in US by DHS or EOIR
- Both have same rights and benefits

LEGAL RIGHTS OF REFUGEES/ASYLEES

- Work
 - I-94
 - Employment Authorization Card ("EAD")
 - IJ's Order
- Derivatives and Family Reunification
- Government Benefits
 - RCA/RMA, Medical, Food Stamps
- Travel
 - RTD and Reentry Permit
- Adjustment
- Citizenship

I-94

00000000000000000000000000000000000000	ADMITTED AS A REFUGE PURSUANT TO SECTION 207 OF THE INA FOR AN INDEFINITE PERIOD OF TIME. IF YOU DEPART THE U.S. YOU WILL NEED PRIOR PERMISSION FROM INS TO RETURN. EMPLOYMENT AUTHORIZED. NYC DATE IMM.OFF. JUN - 7 1995 NYC 000
15. First (Given) Name	16. Birth Dute (Day/Mo/Ye.)
17. County of Citaenship	

Important- Retain thi leave the U.S. Failure	trant who accepts unau is permit in your posse to do so may delay yo	ssion: you m our entry into	the U.S. in	er it when you the future.
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DISCRIMINATION

Employers cannot discriminate against refugees/asylees

Discrimination is **ILLEGAL**.

The Office of Special Counsel for Immigration Related
Unfair Employment Practices (OSC)
1-800-255-7688 (worker hotline)

DERIVATIVES AND FAMILY REUNIFICATION

- Spouse and children are automatic derivatives
- Separate asylum applications are not required
- Familial relationship must exist at the time of grant
- CSPA protects children who have aged out
 - Look at age of children at the time asylum application was submitted, not the date of grant
- If family members are in US, they will receive I-94 cards
- If family members are overseas, need to file I-730
 - "Accompanying or follow to join"
 - Familial relationship must continue until I-730 approved
 - Consular processing

GOVERNMENT BENEFITS

- CashAssistance
- Food Stamps
- Medical









TRAVEL

- Travel anywhere within the US
- <u>MUST</u> have Refugee Travel Document to travel <u>OUTSIDE</u> the US
- You should not return to your home country

ADJUSTMENT OF STATUS

- Apply after one year of asylum grant
 - Can submit application 90 days prior to one year anniversary
- Physical presence requirement
- Refugee status still in tact
- RTD is free if filed with I-485
- Fee waiver

LEGAL RIGHTS OF WITHHOLDING

- Very limited, vulnerable status
- Live and work in US only
- Limited government benefits depending on jdx
- No right to travel
 - Will not be readmitted to US
- No right to adjust status
- No path to citizenship

LEGAL RIGHTS OF DV AND CRIME VICTIMS

- U-visa
 - Victims of domestic violence and serious crimes
- T-visa
 - Victims of trafficking, ie forced labor or sexual exploitation

U-Visa

- Available to victims of serious crimes
- Statutorily-listed crimes
- Helpfulness in a criminal investigation or prosecution
- Substantial physical or mental abuse
- Law enforcement certification of helpfulness INA § 214(p)(1)
- Any credible evidence standard INA § 214(p)(4)

Eligible Crimes for U-Visa

• Rape, torture, trafficking, incest, dom. violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, FGM, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury...

T-Visa

- Available to persons who have been victims of a severe form of trafficking in persons.
- Eligibility:
 - Person must have been a victim of any sex act for which money or something else of value was given in exchange for sex and which was induced by force, fraud, or coercion, or in which you were induced to perform that sex act while you were under 18
 - the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude peonage, debt bondage, or slavery
- Must report to law enforcement, but law enforcement certification not required

INADMISSIBILITY ISSUES

- Common crimes
 - Drug abusers or addicts
 - Communicable diseases (STDs, but not HIV)
 - Mental Disorders
 - Crimes Prostitution, smuggling
 - Prior removals or unlawful presence in US
- Almost all grounds are waivable

BENEFITS OF U and T-VISAs

- EAD for up to four years
- Derivatives
- SB 1569 RCA/RMA, Medical, Food Stamps
 - U-visa: can obtain with proof of U-visa filing
 - T-visa: can obtain immediately with sworn statement
- Adjustment of status after three years physical residence
- Path to citizenship

Crimes and Convictions

- Crimes can lead to arrest, detention, and deportation
- Refugees and Asylees are not protected
 - May be removed b/c of crimes
- Adjustment of status
 - Must be admissible to adjust status
 - Crimes of Moral Turpitude (CMTs) depraved, base
- Naturalization
 - LPRs applying for natz are subject to grounds of deportability
- Good moral character for naturalization

COMMON CRIMES

- Drugs buying or selling
- Prostitution (prostitute and customer)
- Domestic violence
- Fraud
- Aiding someone to cross border

ICE SECURE COMMUNITIES

- Detainer will be imposed if arrested
- Prolonged detention
- Transfer to ICE custody

LEGAL RIGHTS OF DETAINED IMMIGRANTS

- Right to an attorney (the U.S. government will not pay for one)
- Right to present evidence
- Right to examine the government's evidence
- Right to cross-examine witnesses
- Right to appeal (BIA, 9th Cir.)

UNAUTHORIZED PRACTICE OF LAW

- Supervision of attorney required to do legal work
- Bad consequences:
 - Civil and criminal liability
 - Irreparable damage to a client's case
- Notarios are not attorneys
- Ineffective assistance of counsel (IAC)

REPORT IMMIGRATION FRAUD

State Bar of California: 800-843-9053

USCIS: 1-800-375-5283

Case Study

Alexandria is a 25 year old transgender woman from El Salvador. She was frequently harassed and beaten by the local police because of the way she dressed. She decided to flee and tried to enter the US through the Texas border. Just when she was about to cross, Mexican border police arrested her. During detention, two Mexican officers raped her. After three days, they released her and she managed to enter the US. She arrived in San Diego and started to work as a prostitute to make ends meet. One night, one of her customers physically assaulted her and burned her with cigarettes. She was too afraid to go to the police because she does not have papers. She just found out that she has HIV and has walked into Heartland Alliance's office for help. You've been assigned as her case manager, what do you do?

LGBTQ Domestic Violence – Information for Advocates



"You fight like a girl!"

- Feet hammered while asleep.
- Arm wrenched out of socket.
- Hit in the head by a brick.
- Eardrum ruptured by blows to the head with a shovel.
- Gunshot wound to shoulder not allowed to seek medical assistance for hours.
- Ribs broken and then gun held to head for 2 hours.
- Forced to kneel on broken glass.

Domestic Violence

- Current research confirms that battering is just as prevalent (occurring in 25-33% of relationships) and just as harmful and dangerous among LGBTQ people as among non-transgender heterosexual people (NCAVP 2009 National Domestic Violence Report).
- The main differences are that there are fewer resources for individuals experiencing LGBTQ DV, and that the abuser may use threats to reveal their partner's sexual orientation or gender identity in order to gain power and control over their partner.

What is Domestic Violence?

A pattern of behavior where one partner coerces, dominates, and isolates their partner to maintain power and control.

Domestic Violence Can Include

- Physical Abuse
- Sexual Abuse
- Economic Abuse
- Emotional Abuse

- Manipulation
- •Isolation
- Minimizing
- Threatening

Dynamics of LGBTQ Domestic Violence

LGBTQ Survivors face the same tactics of abuse that heterosexual survivors face

But, LGBTQ survivors also face the additional hurdles related to homophobia/biphobia/transphobia and heterosexism/heterocentrism etc.

Batterers are savvy ~ they use these hurdles against survivors in a variety of ways.

Tactics LGBTQ Batterers Use

- Threats to "out" LGBTQ survivors to friends, family, coworkers
- Threats to take children away from non-biological parents
- Telling survivor it cannot be abuse because the couple is LGBTQ
- Leveraging institutional violence against survivors (e.g. telling police survivor is trans)
- Isolating survivor from friends, church, family, other possible supports
- Using society's homophohibia, transphobia, biphobia etc. against survivor

Additional hurdles LGBTQ survivors face

- Survivors may fear continued revictimization by law enforcement, police, courts, or social service workers and thus be less likely to call for help.
- Myths that LGBT domestic violence doesn't happen, that women can't abuse and men can't be abused, and that only the "butch" / masculine partner can be the abuser often make it difficult for survivors to identify abuse or that it is "mutual abuse"
- Small LGBTQ community means it is harder to hide and create safe space
- LGBTQ relationships are often not considered to be an acceptable family or partnership and don't often have the same legal rights and responsibilities.
- LGBTQ community minimizes partner violence within it. The lack of awareness about this issue leaves survivors and abusers without necessary resources within their own communities to help stop the violence.

Reminder

Domestic violence occurs in approximately 1 in 3 relationships regardless of sexual orientation, gender identity, ethnicity, socioeconomic status, education, religious affiliation, political ideology, physical ability etc.

Domestic violence crosses all boundaries and does not discriminate.

Sexual Violence in LGBTQ Communities



Prevalence

Individuals of the LGBTQ community experience sexual assault by someone they know at similar rates to the heterosexual community and are at greater risk for being sexually assaulted by a stranger as a victim of a hate crime.

Waldner-Haugrud, Lisa K., & Vaden Gratch, Linda. (1997). Sexual Coercion in Gay/Lesbian Relationships Descriptive and Gender Differences. Violence and Victims, 1 (1), 87-98. University of Minnesota, Morris Violence Prevention Center. (www.morris.umn.edu/services/ViolencePrevention/Lgbt%20sexual%20assault%20pamphlet.pdf).

What we know...

- It is common for perpetrators to use sexual violence as a way to punish and humiliate someone for being LGBTQ.
 - A common example of this is when individuals who think they can "change" a woman's sexual orientation specifically target lesbians and bisexual women for sexual violence.
- LGBTQ people are at approximately the same risk as nontransgender heterosexuals of being sexually assaulted by someone they know.
 - 52% of participants in a study of sexual coercion in gay/lesbian relationships reported at least one incident of sexual assault/coercion.
 - In this study, gay men reported 1.6 incidents per person on average in comparison to the 1.2 incidents per person reported by lesbians.

Waldner-Haugrud, Lisa K., & Vaden Gratch, Linda. (1997). Sexual Coercion in Gay/Lesbian Relationships Descriptive and Gender Differences. Violence and Victims, 12 (1) 87-98. University of Minnesota, Morris Violence Prevention Center. (www.morris.umn.edu/services/ViolencePrevention/Lgbt%20sexual%20assault%20pamphlet.pdf).

Issues That Are Unique to LGBTQ Sexual Violence Survivors

- Survivors who are not 'out' may find sharing and/or reporting the rape especially difficult or even impossible.
- The uncertainty of knowing the level of sensitivity of resources may make reaching out for support very difficult.
- Fear that they are betraying their LGBTQ community, which is already under attack, by accusing another LGBTQ person of sexual assault.
- Internalized homo/trans-phobia may compound the complexities of strong emotions after rape.
- Gay/bi male survivors may face the fear of not being believed and/or being ridiculed because of the stereotype of men never rejecting a sexual opportunity.
- Lesbian/bi women may face the fear of not being believed if they are raped by a female because of the myth that "women don't do that sort of thing."

A Note About Transgender People

- Questions about a transgender client's sexual organs, sexual reassignment surgery status (many transgender people nevel have sexual reassignment surgery), hormone status or any other clearly private matter as a way to establish a client's identity are inappropriate in all circumstances.
- As in any other situation, these questions are intrusive and embarrassing. If a definition of the transition process is necessary for a legal theory or remedy, practitioners should explain to the client why they are asking an admittedly personal and invasive question.
- Transgender clients face pervasive and often violent discrimination in attempting to go about the everyday business of their lives. They may be understandably wary.



Legal Issues and Challenges for LGBT Survivors

Protection Orders

- In most states, people in same-sex relationships can get protection orders against abusive partners
- In CA Domestic Violence Restraining Orders are governed by the Domestic Violence Prevention Act (§6200 et. seq.).
- LGBT relationships are covered if the people are dating, living together*, or in a registered domestic partnership.
- *Cohabitants: persons who live together as a unit of permanent or domestic character with one head, under one roof, who direct their attention toward a common goal of mutual interests.
- Civil Harassment Orders

Practice Tips...

- Beware of Outing
- Be prepared for mutual arrest or cross filed petitions
- Are there other options where DVRO aren't an option? EX. Civil Harassment Orders, Criminal Advocacy

Practice Tips...Transgender Clients

- Advocate for your client around chosen names or gender pronouns.
 - Make a statement to the judge at beginning of hearing about name and pronoun preference.
 - Use "also known as" or "formerly known as" to incorporate client's chosen and/or legal name into proceedings.
- Learn what is necessary to legally change one's name or gender in your jurisdiction.

Immigration

- Ineligible to apply for self-petitioning VAWA immigration relief if in a "samesex" relationship.
- LGBTQ survivors of certain crimes, including domestic violence and sexual assault may be eligible to apply for a U-VISA – requires that you are helpful to the investigation or criminal prosecution.

Family Law and Custody Overview - tremendous variation by state!!!

- Domestic partnerships
- Marriage and divorce
- Adoption
- Defense of Marriage Act (DOMA) State and Federal
- Legal rights for non-biological parents?
 - oSecond parent adoption
 - oDe facto or implied parentage
 - oRight to child support

Tips for working with LGBTQ survivors

- Be aware that your clients might be out sometimes, but not others. They might be out to you, but not to family; out to their case manager, but not to police. Ask them and respect their answers.
- Ask your clients about the terms they prefer to have used to describe their sexuality and relationship.
- Ask your clients for their preferred pronouns and use them.
- Display LGBTQ-welcoming materials in the office and shelter environments (e.g., rainbow flag, sticker or banner):
- Use gender neutral language on intake forms:
 - Partner rather than boyfriend, husband
 - They, rather than he or she
 - Person rather than man, woman
 - Relationship status rather than marital status
 - Parent or Guardian, rather than Mother, Father

Additional Practice Points

- Partner with LGBTQ organization and domestic violence organization.
- Think about the client's safety is there a plan in place?
- Make alliances with LGBTQ-friendly people in the police department, court system, and other service agencies
- Learn the laws as they affect your LGBTQ clients

REFERRALS

Legal Aid Foundation of Los Angeles 800-399-4529

L.A. Gay & Lesbian Center - Legal Services Department

323-993-7670

Thank you!