



# New Hampshire

Overview of Legal Issues  
For Gay Men, Lesbians, Bisexuals  
and Transgender People

September 2018

This document is intended to provide general information only and cannot provide guidance or legal advice as to one's specific situation. Moreover, the law is constantly changing and evolving and this publication is based upon the information that is known to us as of this printing. For guidance on your particular situation, you must consult a lawyer. You should not act independently on this information. The provision of this information is not meant to create an attorney-client relationship. Check our website, [www.glad.org](http://www.glad.org), for more information.

If you have questions about this publication, other legal issues or need lawyer referrals, contact **GLAD Answers** at [www.GLADAnswers.org](http://www.GLADAnswers.org) or by phone weekdays between 1:30 and 4:30 pm at (800) 455-GLAD (4523).

# Contents

■ <b>ANTI-DISCRIMINATION LAW</b>	1
Employment	2
Public Accommodations	5
Housing	5
Credit	7
Services	7
Pursuing a Complaint	8
■ <b>FAMILY LAW</b>	15
Marriage and Civil Unions	15
Legal Protections for Same-Sex Couples	17
Domestic Partnership	21
Adoption, Surrogacy and Parental Rights	22
Custody and Visitation	27
Domestic Violence	29
■ <b>HATE CRIMES, SEX LAWS &amp; POLICE</b>	33
Hate Crimes & Violence	33
Criminal Sex Laws	35
Police Harassment	38
■ <b>STUDENTS' RIGHTS</b>	41
Harassment and Discrimination at School	41
Gay / Straight Alliances	43
Conversion Therapy	44





# ANTI-DISCRIMINATION LAW

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*Does New Hampshire have an anti-discrimination law protecting gay, lesbian, and bisexual individuals from discrimination?*

Yes. New Hampshire's law banning sexual orientation discrimination in employment, public accommodations and housing has been in effect since January 1, 1998.

*Does the law protect transgender people?*

Yes, on June 8, 2018 Governor Chris Sununu signed into law House Bill 1319, *AN ACT prohibiting discrimination on the basis of gender identity*, which banned discrimination in employment, public accommodations and housing based on gender identity.<sup>1</sup> The law went into effect on July 8, 2018. The law amends NH RSA 354-A by adding "gender identity" to the list of protected characteristics. With the passage of this law, New Hampshire joins the other five New England states in banning transgender discrimination.

In the law, gender identity "means a person's gender-related identity, appearance, or behavior, whether or not that gender-related identity, appearance, or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity, or any other evidence that the gender-related identity is sincerely held as part of a person's core identity provided, however, that gender-related identity shall not be asserted for any improper purpose."

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<sup>1</sup> See [http://www.gencourt.state.nh.us/bill\\_status/billText.aspx?sy=2018&v=SP&id=1022](http://www.gencourt.state.nh.us/bill_status/billText.aspx?sy=2018&v=SP&id=1022).

***Does the law protect people perceived as being gay, lesbian, bisexual, and transgender?***

Yes. New Hampshire non-discrimination law defines “sexual orientation” as “having or being perceived as having an orientation for heterosexuality, bisexuality or homosexuality.”<sup>2</sup> While the courts have not ruled on the meaning of the “perceived” language, it should mean that if a person is fired because they are perceived to be gay, they may invoke the protection of the anti-discrimination law regardless of their actual orientation.

Also, since the non-discrimination law defines “gender identity” as “a person's gender-related identity, appearance, or behavior, whether or not that gender-related identity, appearance, or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth,” the law protects a person who is perceived as transgender.

***Does it protect people associated with gay, lesbian, bisexual, and transgender individuals?***

Not specifically. But in some situations, if a person is discriminated against because of their association with LGBT individuals or causes, it may be possible to show that the discrimination was based on a perception that the person was themselves LGBT.

## ■ Employment

***What does employment anti-discrimination law forbid? To whom does the law apply?***

New Hampshire’s employment anti-discrimination law applies to public or private employers who have at least 6 employees. It forbids employers from refusing to hire a person, or discharging them, or discriminating against them “in compensation, or in terms, conditions or privileges of employment” because of gender identity or sexual

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<sup>2</sup> NH RSA 354-A:2, XIV-c.

orientation.<sup>3</sup> This covers most significant job actions, such as hiring, firing, failure to promote, demotion, excessive discipline, harassment, and different treatment of the employee and similarly-situated co-workers. The law also applies to labor organizations (*e.g.* unions) and employment agencies.<sup>4</sup>

New Hampshire State Division of Personnel also has an equal employment opportunity program which ensures that the state employs qualified people regardless of sexual orientation.<sup>5</sup> Moreover, the State is forbidden from discriminating in the classified service with respect to sexual orientation.<sup>6</sup> While the statute regarding New Hampshire State Division of Personnel has not been updated to include gender identity, New Hampshire non-discrimination law makes it clear that neither public nor private employers can discriminate in hiring qualified people regardless of their gender identity.<sup>7</sup>

As broad as the law is, there are several exemptions:

- The law does not apply to employers with fewer than 6 employees. An employer's spouse, parent, or child does not count as an employee.<sup>8</sup>
- The law does not apply to a non-profit exclusively social club or a non-profit fraternal or religious associations or corporations.<sup>9</sup>
- Any employer, agency, or labor organization may defend against a discrimination claim by arguing that it is a "bona fide occupational qualification" of the job in question to have a non-LGBT employee fill it.<sup>10</sup> Luckily, although this defense is allowed by law, it is strictly applied and very rarely successful.<sup>11</sup>

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<sup>3</sup> NH RSA 354-A:7, I.

<sup>4</sup> NH RSA 354-A:7, II, III.

<sup>5</sup> NH RSA 21-I:42, XVI.

<sup>6</sup> NH RSA 21-I:52, I.

<sup>7</sup> NH RSA 354-A:6 I

<sup>8</sup> NH RSA 354-A:2, VI, VII.

<sup>9</sup> NH RSA 354-A:2, VII.

<sup>10</sup> NH RSA 354-A:7, I, II, III.

<sup>11</sup> *See, e.g., Sarni Original Dry Cleaners, Inc. v. Cooke*, 388 Mass. 611, 447 N.E.2d 1228 (1983).



### ***Does New Hampshire law forbid sexual harassment?***

Yes, New Hampshire law expressly forbids sexual harassment. The law defines sexual harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal or physical conduct of a sexual nature constitutes sexual harassment when:

- a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.<sup>12</sup>

### ***Does this law protect LGBT individuals?***

Yes. It is just as unlawful to sexually harass an LGBT individual as it is to harass anyone else. Some harassment is specifically anti-LGBT and may be more fairly characterized as harassment on the basis of sexual orientation or gender identity. Other harassment is sexual in nature and more appropriately categorized as "sexual harassment." Both types of harassment can happen to the same person, and both are forbidden.

The United States Supreme Court and other federal courts have found same-sex sexual harassment to violate sexual harassment laws.<sup>13</sup> Several state courts have reached the same result under their state non-discrimination laws.<sup>14</sup>

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<sup>12</sup> NH RSA 354-A:7, V.

<sup>13</sup> Compare *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 118 S.Ct. 998 (1998) (man can sue for sexual harassment by other men under federal sexual harassment laws); *Drew v. First Sav. of N.H.*, 968 F. Supp. 762 (D.N.H. 1997) (acknowledging claim under federal law which failed on the facts presented); *King v. Town of Hanover*, 959 F.Supp. 62 (D.N.H. 1996) (acknowledging claim under federal law).

<sup>14</sup> *Melnychenko v. 84 Lumber Co.*, 424 Mass. 285, 676 N.E.2d 45 (1997).

## ■ Public Accommodations

### *What is a “place of public accommodation”?*

A place of public accommodation is a place that caters or offers its services, facilities, or goods to the general public.<sup>15</sup> This definition is intentionally broad and includes motels, restaurants, rest areas, highways and hospitals.

### *What does the law say about discrimination in places of public accommodation?*

Such places may not refuse, withhold, or deny use of accommodations, goods, or facilities because of a person’s sexual orientation or gender identity.<sup>16</sup>

## ■ Housing

### *What is prohibited by the housing anti-discrimination law in New Hampshire?*

The housing laws are intended to prohibit discrimination by those engaged in most aspects of the housing business, including listing, buying, selling, renting, or financing housing or commercial structures, whether for profit or not.<sup>17</sup> Most often, these claims involve a refusal by an owner, landlord, or real estate broker to sell, lease, or even negotiate with a person about the housing they desire to obtain. But other practices are forbidden, too, such as:

- a. misrepresenting the unavailability of a dwelling or commercial structure;<sup>18</sup>

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<sup>15</sup> NH RSA 354-A:2, XIV.

<sup>16</sup> NH RSA 354-A:17.

<sup>17</sup> NH RSA 354-A:10.

<sup>18</sup> NH RSA 354-A:10, IV.

- b. discriminating against a person in the terms, conditions, or privilege of a sale or rental because of their sexual orientation or gender identity;<sup>19</sup>
- c. printing or circulating discriminatory notices or advertisements;<sup>20</sup>
- d. evicting a tenant solely on the ground that they have AIDS or are regarded as having AIDS;<sup>21</sup> and
- e. making mortgage and real estate loans on a discriminatory basis,<sup>22</sup> *i.e.* a form of credit protection.

There are several **exemptions** to the housing laws:

- a. A homeowner who owns only one single family home may discriminate in selling or renting the home so long as they do not use the services of any broker (or like person), and do not circulate any discriminatory ads or notices;<sup>23</sup>
- b. If an owner or family member of an owner lives in 3-family or 2-family unit, the owner may discriminate when renting out the other units;<sup>24</sup>
- c. If an owner rents 5 or less rooms in a housing accommodation, and the owner or members of the owner's family reside in the housing accommodation, then the owner may discriminate in renting out the other rooms;<sup>25</sup>
- d. Religious organizations and organizations supervised by religious organizations which do not rent or sell for profit may

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<sup>19</sup> NH RSA 354-A:10, II.

<sup>20</sup> NH RSA 354-A:10, III.

<sup>21</sup> NH RSA 354-A:10, VI.

<sup>22</sup> NH RSA 354-A:10, VII.

<sup>23</sup> NH RSA 354-A:13, I-a.

<sup>24</sup> NH RSA 354-A:13, I-b.

<sup>25</sup> NH RSA 354-A:13, I-c.

give preference to persons of their same religion (with some exceptions);<sup>26</sup>

- e. Private clubs which provide not-for-profit lodging for their members may give preference to members, or limit occupancy to members-only.<sup>27</sup>

## ■ Credit

There are no specific credit protections other than those related to mortgage and real estate loans discussed above.

## ■ Services

The patient’s bill of rights now includes the right to receive appropriate care without regard to “sexual orientation.”<sup>28</sup> The same protections apply to home health care providers.<sup>29</sup> While this section of the patient’s bill of rights has not been updated yet to include “gender identity,” discrimination against transgender people may be viewed as a form of sex discrimination..

## ■ Pursuing a Complaint

***Can I file more than one type of discrimination complaint at once, for example, if I believe I was fired both because I am a lesbian and Latina?***

Yes. New Hampshire’s employment non-discrimination laws forbid discriminating against someone because of sexual orientation and gender identity as well as age, sex, race, color, marital status, physical or mental

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<sup>26</sup> NH RSA 354-A:13, II.

<sup>27</sup> NH RSA 354-A:13, III.

<sup>28</sup> NH RSA 151:21, XVI.

<sup>29</sup> NH RSA 151:21-b, II-b.

disability, religious creed, or national origin.<sup>30</sup> The housing non-discrimination laws also protect people based on their “familial status.”<sup>31</sup>

### ***How do I file a complaint of discrimination?***

You may file a complaint with the New Hampshire Commission on Human Rights (CHR) by printing out an Intake Questionnaire from the CHR website, <https://www.nh.gov/hrc/howto.html>, and mailing it to:

Intake Department  
NH Commission for Human Rights  
2 Industrial Park Drive  
Concord, NH 03301

Alternatively, you may speak with an intake investigator by calling (603) 271-2767 or 1-800-735-2964 (toll free for NH). The Attorney General can also file claims of discrimination.

Once the Intake Questionnaire is filed, a CHR investigator will decide whether you have the basis to file a formal charge.

### ***Do I need a lawyer?***

No. The process is designed to allow people to represent themselves. However, GLAD strongly encourages people to find lawyers to represent them throughout the process. There are many legal rules governing the CHR process, and employers and other defendants are likely to have legal representation.

### ***What are the deadlines for filing a complaint of discrimination?***

A complaint must be filed with the CHR within 180 days of the discriminatory act or acts.<sup>32</sup> There are very few exceptions for lateness, and GLAD encourages people to move promptly in filing claims.

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<sup>30</sup> NH RSA 354-A:7.

<sup>31</sup> NH RSA 354-A:10.

<sup>32</sup> NH RSA 354-A:21, III.

### ***What happens after a complaint is filed with the CHR?***

The CHR assigns an investigator to conduct an impartial investigation of the charges. The investigator may send out written questions (interrogatories) to be answered under oath, or request documents from either party. If the case is not dismissed for technical reasons, an assigned Commissioner will consult the investigator's final report and decide if there is probable cause to credit your allegations.

If probable cause is found, the case will be sent for "conciliation" (settlement proceedings). If negotiations fail to produce a settlement agreeable to all parties, the CHR will schedule a public hearing before three Commissioners. You can choose to be represented at this hearing by a private attorney or a lawyer for the CHR.<sup>33</sup> After the hearing, the Commission will issue a decision either finding in your favor and ordering appropriate relief, or finding in favor of the responding party and dismissing the charge. Either one of you can appeal the Commission's decision to the Superior Court.

If the CHR does *not* find probable cause, you may also appeal to the Superior Court. In order to be successful, your appeal must show that the CHR's decision is either unlawful or unreasonable by a clear preponderance of the evidence.<sup>34</sup>

### ***What legal remedies can the CHR order if I win my case?***

In all types of cases, the Commission may order the respondent to cease and desist the unlawful conduct. The CHR may also order a respondent to do something affirmatively, such as hire, reinstate, or upgrade an employee; restore a person to a labor organization; or extend to a person the full advantages of a place of public accommodation. Employees may also receive back pay, and all victims of discrimination are eligible for compensatory damages, including emotional distress damages. Finally, the CHR may impose an administrative fine, payable to the State, of up to \$50,000, depending on how many past offenses the

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<sup>33</sup> See generally NH RSA 354-A:21.

<sup>34</sup> NH RSA 354-A:21, II-a.

respondent has committed.<sup>35</sup>

Note that if your complaint is dismissed and deemed frivolous, the defendant may seek to collect reasonable costs and attorney's fees from you.<sup>36</sup>

### ***Can I also file a discrimination complaint with a federal agency?***

Yes, in many cases. Since federal law and state law contain overlapping provisions, someone bringing a discrimination claim may sometimes pursue protections under both. For example, the federal employment non-discrimination law, called Title VII, applies to employers with at least 15 employees and forbids employment discrimination based on race, sex, age, religion, and disability (which includes HIV status).

While Title VII does not expressly forbid discrimination based on sexual orientation or gender identity, a growing number of courts and government agencies have taken the position that its proscription against sex discrimination encompasses both.

For example, in 2018, in the case of *Franchina v. City of Providence*<sup>37</sup>, the U.S. First Circuit Court of Appeals ruled that a lesbian who experienced extensive unchecked harassment from her co-workers at the Providence Fire Department was protected by Title VII. The court ruled that the plaintiff could bring sex-plus claims under Title VII where, in addition to the sex-based charge, the 'plus' factor was the plaintiff's status as a gay or lesbian individual. GLAD submitted an amicus brief<sup>38</sup> in this case.<sup>39</sup>

And, the U.S. Sixth Circuit Court of Appeals recent decision in *EEOC v. RG and GR Harris Funeral Homes, Inc.*<sup>40</sup> allowed the plaintiff to

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<sup>35</sup> NH RSA 354-A:21, II-d.

<sup>36</sup> NH RSA 354-A:21 II-f.

<sup>37</sup> See <https://www.glad.org/wp-content/uploads/2018/01/2018-01-25-Franchina-Opinion.pdf>.

<sup>38</sup> See <https://www.glad.org/wp-content/uploads/2018/01/2017-08-25-Franchina-Amicus-Brief.pdf>.

<sup>39</sup> See also *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (sexual orientation discrimination is sex discrimination under Title VII); *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (same).

<sup>40</sup> See <http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0045p-06.pdf>.

bring claims of discrimination based solely on gender identity. The plaintiff in the case, a funeral home director who was born male, was terminated after informing her employer that she suffered from gender dysphoria and would begin transitioning by dressing and presenting as a woman. The employer admitted that he fired the plaintiff because of her gender identity, but argued that Title VII should not be enforced against the funeral home because it would constitute a substantial burden upon the employer's sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act (RFRA). The court rejected this argument, reasoning that the employer's religious exercise would not be substantially burdened by continuing to employ the plaintiff without discriminating against her on the basis of her gender identity.

In two separate decisions in 2012 and 2016, the EEOC itself concluded that sexual orientation discrimination, gender identity discrimination, and sex discrimination are one and the same, since the first two are based on preferences, assumptions, expectations, stereotypes, and norms associated with masculinity and femininity.<sup>41</sup>

Unfortunately, the Department of Justice (DOJ) under the Trump administration is attempting to roll back this progress. Attorney General Sessions issued a memorandum<sup>42</sup> in which he stated that the position of the DOJ is that "gender identity" discrimination is not protected under Title VII. Also, the DOJ filed an amicus brief<sup>43</sup> with the U.S. Second Circuit Court of Appeals arguing that "sexual orientation" is not protected by Title VII.

LGBT people who are discriminated against in housing may also be able to file a complaint with the federal Department of Housing and Urban Development (HUD) in addition to NHCHR. For more information go to:

[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/LGBT\\_Housing\\_Discrimination](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination).

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<sup>41</sup> See *Macy v. Holder*, EEOC Appeal No. 0120120821 (Apr. 20, 2012); *Baldwin v. Foxx*, EEOC Appeal No. 0120133080 (July 15, 2015).

<sup>42</sup> See <https://assets.documentcloud.org/documents/4067383/Attachment-2.pdf>.

<sup>43</sup> See <https://assets.documentcloud.org/documents/3901661/Brief-Amicus-Brief-Doj.pdf>.



However, given the position of the DOJ and the Trump administration in general, it is possible that this position of HUD may be reversed at some point.

***When should I file a complaint with a federal agency?***

GLAD recommends that, where there may be overlapping state and federal jurisdiction, you explore filing with the CHR first but keep in mind the possibility of pursuing a federal claim as well. Federal complaints must be filed within 180 days of the discriminatory act with the Equal Employment Opportunity Commission (EEOC). However, if you initially institute your complaint with CHR and indicate that you wish to have the complaint cross-filed with the EEOC, then the time limit is extended to the earlier of 300 days or 30 days after CHR has terminated the case.<sup>44</sup> (People who work for federal agencies are beyond the scope of this publication.) If you have a sexual orientation or gender identity complaint, you should check off “sex” as well as “sexual orientation” or “gender identity” as the bases for your claim and request that CHR cross-file your complaint with the EEOC.

***Are there other options for filing a complaint for discrimination?***

Possibly yes, depending on the facts of your particular situation.

**1. Union:** If you are a member of a union, your contract (collective bargaining agreement) may provide additional rights to you in the event of discipline, discharge, or other job-related actions. In fact, if you obtain relief under your contract, you may decide not to pursue other remedies. Get and read a copy of your contract and contact a union steward about filing a complaint. Deadlines in contracts are strict. Bear in mind that if your union refuses to assist you with a complaint, you may have a discrimination action against them for their failure to work with you or for a failure of their duty of fair representation.

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<sup>44</sup> United States Code 42 sec. 2000e-5(e)(1).

**2. State or Federal Court:** After filing with the CHR, EEOC, or both, a person may decide to remove their discrimination case from those agencies and file the case in court. There are rules about when and how this must be done. When claims of discrimination based on state law are removed from the CHR and filed in state Superior Court, either party may request a jury trial and the court may order the same relief as would the CHR.<sup>45</sup> Similarly, once the CHR process is complete, either party may ask a court to review the Commission’s decision.<sup>46</sup>

In addition, you may wish to file a court case to address other claims that cannot be appropriately handled by discrimination agencies. For example, if you are fired in violation of a contract, fired without the progressive discipline promised in a handbook, or fired for doing something the employer doesn’t like but which the law requires, these matters are beyond the scope of what the agencies can investigate and instead the matter should be pursued in court. Similarly, if your claim involves a violation of constitutional rights—for instance, if you are a teacher or governmental employee who believes your free speech or equal protection rights were violated—then those matters must also be heard in court.

***What can I do if my employer fires me or my landlord evicts me for filing a complaint of discrimination?***

It is illegal for your employer or landlord to retaliate or punish you because you filed a complaint. If they do so, you can file an additional complaint against them for retaliation. “Retaliation” protections cover those who oppose unlawful conduct or who have filed a complaint, testified, or assisted in any proceeding.<sup>47</sup>

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<sup>45</sup> NH RSA 354-A:21-a.

<sup>46</sup> NH RSA 354-A:22, I.

<sup>47</sup> NH RSA 354-A:19. *See also Provencher v. CVS Pharmacy*, 145 F.3d 5 (1st Cir. 1998) (upholding federal retaliation claim of gay man).

***What can I do to prepare myself before filing a complaint of discrimination?***

Contact GLAD Answers at [www.GLADAnswers.org](http://www.GLADAnswers.org) or by phone at 1-800-455-4523 (GLAD) any weekday between 1:30 and 4:30 p.m. to discuss options.

As a general matter, people who are still working with, or residing under, discriminatory conditions have to evaluate how filing a case will affect their job or housing, and if they are willing to assume those possible consequences. Of course, even if a person has been fired or evicted, they may decide it is not worth it to pursue a discrimination claim. This is an individual choice that should be made after gathering enough information and advice to make an informed decision.

Some people prefer to meet with an attorney to evaluate the strength of their claims before filing a case. It is always helpful to bring the attorney an outline of what happened, organized by date and with an explanation of who the various players are (and how to get in touch with them). It is also helpful to have a list of witnesses and other possible victims of discrimination. Try to have on hand copies of your employee handbooks or personnel manuals, as well as any contracts, job evaluations, memos, discharge letters and the like. If you are concerned about a housing matter, bring a copy of your lease, along with any notices and letters you have received from your landlord.

# **FAMILY LAW**

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## ■ Marriage & Civil Unions

### *Can same-sex couples marry in New Hampshire?*

Yes. On June 3, 2009, Governor Lynch signed a marriage equality bill<sup>48</sup> that extended the right to marry to same-sex couples. The bill became effective January 1, 2010, simultaneously ending the availability of New Hampshire civil unions on the same date. On January 1, 2011, all existing New Hampshire civil unions were transformed into marriages.

Four years later, in *Obergefell v. Hodges*,<sup>49</sup> the U.S. Supreme Court made marriage equality a reality nationwide when it held that the U.S. Constitution guarantees same-sex couples the right to marry. GLAD's own Mary Bonauto represented the plaintiffs during oral arguments. Post-*Obergefell*, all 50 states are required to issue marriage licenses to same-sex couples, and all states must respect the marriages of same-sex couples performed in other jurisdictions.

For more information about getting married in New Hampshire, see <https://www.visitnh.gov/weddings/getting-married-in-new-hampshire>.

### *Will the federal government respect my marriage?*

Yes. Thanks to the demise of the Defense of Marriage Act (DOMA) in *Windsor v. United States*<sup>50</sup>, the federal government will recognize and respect the legal marriages of same-sex couples.

Unfortunately, one issue that has yet to be definitively resolved by *Windsor* and *Obergefell* concerns spousal benefits and self-insured health plans. While New Hampshire state law prohibits discrimination based on sexual orientation, self-insured health plans are governed by

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<sup>48</sup> House Bill 436, An Act Relative to Civil Marriage and Civil Unions.

<sup>49</sup> 135 S.Ct. 2584 (2015).

<sup>50</sup> 133. S.Ct. 2675 (2013).

federal law. Title VII, the federal anti-discrimination statute, only prohibits discrimination based on race, color, religion, sex, or national origin—sexual orientation is not explicitly included.

As was discussed above in the section on “Pursuing a Complaint,” there have been some rulings by federal courts that “sexual orientation” discrimination is a form of “sex” discrimination and thus covered by Title VII, and the EEOC has also taken this position.<sup>51</sup>

Also, both Section 1557<sup>52</sup> of the Affordable Care Act and implementing regulations of the Obama administration, 45 CFR 147.104(e),<sup>53</sup> were supposed to prohibit discrimination against LGBT people in most public and private health care plans, so that everyone would have access to health care. Unfortunately, these protections are under attack by some states and by the Trump administration.

If your employer is discriminating against you in spousal healthcare benefits on the basis of sexual orientation, contact GLAD Answers.

### ***What happens if we need to end our marriage?***

After *Obergefell v. Hodges*, same-sex spouses everywhere should be able to dissolve their marriages on the same terms as different-sex spouses. New Hampshire explicitly applies its divorce statutes to same-sex couples.<sup>54</sup>

However, spouses should note that when New Hampshire courts divide marital property and award alimony, one of the factors a judge considers is length of marriage.<sup>55</sup> Unfortunately for spouses whose partnership pre-dates marriage equality, the length of the marriage may not accurately reflect the true length of the relationship, resulting in an unbalanced division of assets. A recent New Hampshire Supreme Court case, *In the Matter of Munson & Beal*,<sup>56</sup> addressed this issue and ruled

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<sup>51</sup> See [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm).

<sup>52</sup> See <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>.

<sup>53</sup> See <https://www.ecfr.gov/cgi-bin/retrieveECFR?n=45y1.0.1.2.62.0.27.4>.

<sup>54</sup> See, e.g., *In re Munson & Beal*, 2016 N.H. LEXIS 180 (2016) (applying divorce statute to a same-sex couple).

<sup>55</sup> NH RSA 458:16-a, II(a); 19, IV.

<sup>56</sup> 2016 N.H. LEXIS 180 (2016).

that a judge may consider premarital cohabitation when dividing marital property. GLAD submitted an amicus brief in the case, See <https://www.glad.org/cases/in-the-matter-of-deborah-munson-and-coralee-beal/>

If you are going through divorce proceedings in New Hampshire and believe your division of assets may be unfairly affected by the length of your marriage, contact GLAD Answers.

### ***What is happening with New Hampshire's civil unions?***

Effective January 1, 2010, New Hampshire stopped issuing civil union licenses; and effective January 1, 2011, all existing New Hampshire civil unions were converted into marriages by operation of law.<sup>57</sup> Civil unions from other states were not converted into marriages, but will still be recognized and afforded all the same state protections and responsibilities as marriage.

## ■ Legal Protections for Same-Sex Couples

### ***What steps can a couple take to safeguard their legal relationship in New Hampshire without joining in a marriage?***

**1. Relationship Agreement or Contract:** A couple has the option of drafting a written cohabitation agreement, outlining their respective rights with regards to property, finances, and other aspects of their relationship. Although the New Hampshire Supreme Court has not yet ruled on the subject, these agreements should be enforced like any other contract. A number of states, Massachusetts<sup>58</sup> included, explicitly enforce cohabitation agreements. Although a couple can choose to use a cohabitation agreement to make plans for the custody and support of children, a

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<sup>57</sup> NH RSA 457:46, II.

<sup>58</sup> See *Wilcox v. Trautz*, 427 Mass. 316 (1998).

New Hampshire court will not uphold any agreement it finds to contravene the child's best interests.<sup>59</sup>

**2. Durable Power of Attorney:** A couple can choose to grant each other the durable power of attorney, allowing one partner to make financial decisions on the other's behalf in the event of incapacity or disability. The requirements are minimal: any competent person may appoint another person as their "attorney-in-fact," although the power of attorney form must be signed and notarized.<sup>60</sup> If no appointment is made, a family member will be empowered to make decisions for the incapacitated individual.

**3. Advance Directive for Health Care:** A couple can choose to each create an "advance directive," allowing them to make medical decisions on one another's behalf in the event of an emergency.<sup>61</sup> Absent an advance directive, medical care providers look to next-of-kin to make health care decisions for an incapacitated individual. If an unmarried couple wants to make decisions for one another, they need an advance directive.

An advance directive has two parts: a Durable Power of Attorney for Health Care and a Living Will. In the Durable Power of Attorney for Health Care, you appoint a person to act as your health care agent and make medical decisions for you when you are incapacitated.<sup>62</sup> You may also express your desires about end of life issues, including nutrition, hydration, and other life-sustaining treatments.<sup>63</sup> The Living Will is a short statement about whether you want life-sustaining treatment continued when you are near death or permanently unconscious. You should give a copy of the advance directive to your doctors and may also consider giving it to family members.

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<sup>59</sup> See, e.g., *In re R.A.*, 153 N.H. 82, 94 (2005) (when determining custody and visitation, a court's overriding concern is the best interests of the child).

<sup>60</sup> NH RSA 506:6.

<sup>61</sup> See generally, NH RSA 137-J.

<sup>62</sup> NH RSA 137-J:2, III.

<sup>63</sup> NH RSA 137-J:20.

An advance directive may either be signed by yourself and two witnesses, or signed by just yourself in the presence of a notary public. The following individuals *do not* count as witnesses: your spouse or heir, beneficiaries under any will or trust you may have, and the person you are appointing as your health care agent.<sup>64</sup> Only one witness can be an employee of your health care provider.<sup>65</sup> An advance directive can only be revoked by you.<sup>66</sup>

If you later become incapacitated and a guardian is appointed for you, the appointing court should not revoke your health care agent's authority unless there is clear and convincing evidence that doing so would be in your best interests.<sup>67</sup>

**4. Will:** Without a will, a deceased unmarried person's property passes to: (1) their children; (2) their family; or (3) if next-of-kin cannot be located, to the state. If you wish to provide for others not on this list, such as your partner, a will is essential. Even if you have few possessions, you can name who will administer your estate in your will. If you have children, you can also nominate someone to be their future guardian in a will.

**5. Funeral Planning Documents:** Upon death, a person's body is given to his or her next-of-kin. This can mean that a person's own partner has no right to remove the body or make plans for a final resting place. To avoid confusion and persuade relatives to honor your wishes, you can leave explicit written directions giving another person (such as your partner or a friend) control over the funeral and burial arrangements. While this document is not binding, it should help avoid complications in any but the most adversarial families. Some people include these instructions as part of a will, but since a will may not be found for days after death, it is preferable to give the instructions directly to the person you want to take care of matters, as well as to family members.

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<sup>64</sup> NH RSA 137-J:14.

<sup>65</sup> *Id.*

<sup>66</sup> NH RSA 137-J:15.

<sup>67</sup> NH RSA 137-J:21.



**6. Guardianship:** New Hampshire's broad guardianship laws allow, among other things, an individual to nominate another person as the guardian of their person, estate, or both.<sup>68</sup> The advantage of nominating a guardian in advance is that you are selecting the person to take over all aspects of your financial matters.

***Does a person need an attorney to get these documents?***

GLAD recommends working with an attorney on these documents. Although some forms are available, the form may not be suited to your individual needs and wishes. Moreover, attorneys may be able to help effectuate your goals, for example, by drafting a will in a way which is more likely to deter a will contest by unhappy family members, or drafting an advance directive to fit your specific instructions.

***If an unmarried couple separates, what is the legal status of a Relationship/Partnership Agreement/Contract?***

Upon separation, if the couple has a Relationship or Partnership Agreement/Contract, its terms will be invoked and the couple's assets will be divided as per the agreement. Without an agreement, unmarried couples may be forced to endure costly and protracted litigation over property and financial matters.

**If you change your mind about who should be your attorney-in-fact, health care agent, beneficiary or executor under a will, or funeral planner, then those documents should be revoked – with notice to anyone who was given copies – and new documents should be prepared which reflect your present wishes.**

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<sup>68</sup> NH RSA 464-A:10

## ■ Domestic Partnership

### *What is domestic partnership?*

Although it is a term used in many contexts, “domestic partnership” most often means a status which recognizes an unmarried couple and their children as a family for certain limited purposes, most commonly employee benefits. Some states, cities, and towns have also enacted domestic partner laws. In other contexts, “domestic partner” is a shorthand term for family, replacing “lover,” “friend,” and “roommate.” Some people call cohabitation agreements “domestic partner agreements.”

### *Does New Hampshire provide domestic partner benefits to state employees?*

Yes. Here is a link to the application form:

[https://das.nh.gov/hr/cba/documents/domestic\\_partnership.pdf](https://das.nh.gov/hr/cba/documents/domestic_partnership.pdf).

### *Can cities and towns in New Hampshire provide domestic partner health insurance benefits to their own employees?*

Yes, and some do.

### *What kinds of domestic partner benefits may private employers provide?*

Private employers can provide to domestic partners any benefits they wish – whether health insurance, family medical or bereavement leave, equal pension benefits, relocation expenses, or access to company facilities.

However, even when employers provide these benefits, federal laws sometimes treat domestic partner benefits differently from spousal benefits, often with financial consequences. For example, employees must pay federal income tax on a domestic partner’s health insurance

benefits, but spousal benefits are exempt.<sup>69</sup> Similarly, while spousal consent is required if a married employee decides to name a third party as a pension beneficiary or survivor benefits recipient, an employee with a domestic partner can change these designations freely.

## ■ Adoption, Surrogacy and Parental Rights

### *Can a single gay individual adopt a child in New Hampshire?*

Yes.<sup>70</sup>

### *Can same-sex partners jointly adopt a child together in New Hampshire?*

Yes, but probably only so long as they are married. In a 1987 case involving a straight couple, the New Hampshire Supreme Court ruled that New Hampshire's adoption statute, which permits joint adoption by a "married couple,"<sup>71</sup> does not allow two unmarried adults to adopt together.<sup>72</sup>

### *What is a second-parent adoption? Is it legal in New Hampshire?*

A second-parent adoption is when one partner adopts the other partner's biological child. Although New Hampshire law has no explicit prohibition against second-parent adoptions, the New Hampshire Supreme Court has yet to rule on the issue. While some second-parent adoptions have been granted by the lower courts, others have been denied. If you are an unmarried couple who has been denied the ability to petition for a second-parent adoption, please contact GLAD Answers.

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<sup>69</sup> See Internal Revenue Code, Private Letter Ruling 9603011 (Jan. 19, 1996).

<sup>70</sup> NH RSA 170-B:4, II (permitting an "unmarried adult" to adopt).

<sup>71</sup> NH RSA 170-B:4, I.

<sup>72</sup> *In Re Jason C.*, 129 N.H. 762, 533 A.2d 32 (1987). The court read the absence of any procedure for custody determinations within the adoption process to indicate that the legislature did not intend to grant adoptions under these circumstances. The court's determination also turned on the fact that allowing a divorced couple to adopt jointly would not further the legislature's intent to limit adoption to applicants who would most likely provide a unified and stable household for the child—an intent that would be fulfilled by a committed same-sex couple seeking to adopt together.

However, there is some good news: New Hampshire law explicitly allows for step-parent adoption, whereby one spouse adopts the other's biological child.<sup>73</sup> Married same-sex couples can use this process to effectuate a second-parent adoption.

For more information about both adoption and second-parent adoption see *Adoption Questions and Answers* at <https://www.glad.org/wp-content/uploads/2017/01/adoption.pdf>.

### ***What is the advantage of doing a second-parent or joint adoption?***

Both joint adoptions and second-parent adoptions ensure your child has two legal parents, which often provides greater comfort and security to everyone involved. Depending on your particular family situation, the law may not recognize both partners as legal parents without an adoption. In these cases, the non-legal parent needs special permission to make medical decisions for the child or attend school meetings and is at risk of losing custody if the couple splits up.

Adoption allows a non-legal parent to become a legal parent, entitled to make decisions for the child without special authorization. It also permits the adoptive parent to automatically assume custody of the child if their partner dies. Likewise, if the adoptive parent dies, the child will have the right to inherit from them, even absent a will, and may be able to collect social security survivor benefits.

Finally, if a couple separates, adoption ensures that both parents have the right to custody and visitation, and that any disputes will be decided based on what is in the best interests of the child rather than on who is the legal parent.

### ***Who is a legal parent?***

A biological parent who has a relationship with their child is a legal parent. An adoptive parent is similarly a legal parent.

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<sup>73</sup> NH RSA 170-B:4, IV(a).

Even without a biological or adoptive connection, certain individuals are presumed to be legal parents by law. For instance, a spouse is presumed to be a parent if he/she is married to the child's mother or marries her after the child's birth and acknowledges paternity in writing.<sup>74</sup>

Similarly, parentage is presumed when a person "receives the child into [their] home and openly holds out the child as [their] child."<sup>75</sup> In a groundbreaking 2014 case, *In Re Guardianship of Madelyn B.*,<sup>76</sup> the New Hampshire Supreme Court established that this presumption applies equally to same-sex parents. The court also held that a lack of biological connection did not bar the application of the presumption, since the "presumptions are driven not by biolog[y]...but by the state's interest in the welfare of the child and the integrity of the family."<sup>77</sup> GLAD and co-counsel Kysa Crusco represented the plaintiff in the case, a lesbian non-birth mother seeking to establish legal parentage of her daughter.

While this decision is an incredibly important victory for all LGBT families, having to go through a court to establish parenthood is painful and costly. Couples are strongly encouraged to obtain legal recognition of parent-child relationships outside of court. For more information, see GLAD's publication, *Protecting Families: Standards for LGBT Families*, at <https://www.glad.org/wp-content/uploads/2017/01/protecting-families-standards-for-lgbt-families.pdf>.

### ***Do we need to do a second-parent adoption if we are married?***

A second-parent adoption is the best way to ensure the ongoing parental rights of both partners. Even if New Hampshire law presumes you are a legal parent, another state may not respect that presumption if you or your partner moves. By contrast, adoption is a court judgment creating a parent-child relationship and is very likely to be respected by

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<sup>74</sup> NH RSA 168-B:2, V(a)(c).

<sup>75</sup> NH RSA 168-B:2, V(d).

<sup>76</sup> 166 N.H. 453 (2014).

<sup>77</sup> *Id.* at 462.

other states, even if these states are otherwise hostile to same-sex couples parenting.

***Does New Hampshire have laws that pertain to surrogacy?***

Yes. In 2014, the New Hampshire General Court passed Senate Bill 353, *An Act Relative to Surrogacy*,<sup>78</sup> which updated New Hampshire's surrogacy law to reflect advances in assisted reproductive technologies. Previously, New Hampshire law allowed surrogacy only when the intended mother's eggs were used, and only when the intended parents were married. The new Act, which is one of the most comprehensive and forward-looking surrogacy laws in the country, allows all individuals to become parents via surrogacy regardless of marital status or sexual orientation.

The Act also simplified the legal process for intended parents, establishing standardized criteria for gestational carrier agreements and ensuring that all parties are legally protected. It sets minimum requirements for gestational carrier agreements and recognizes that these agreements are legally enforceable contracts.

***If same-sex parents raise a child together, but only one is the "legal" parent, then what rights does the non-legal parent have vis-à-vis the child?***

These are tricky cases, but a non-legal parent may be able show that they stand *in loco parentis* to their child, entitling them to a limited number of rights, including the ability to intervene in custody proceedings. To establish *in loco parentis*, an individual must show that they admitted the child into their family and treated the child as a family member, forming a "psychological parent-child relationship."<sup>79</sup>

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<sup>78</sup> NH RSA 168-B

<sup>79</sup> See *In re R.A.*, 153 N.H. 82 (2005); see also *In the Matter of Bordalo & Carter*, 164 N.H. 310 (2012).

***Short of second-parent adoption, how can a family protect the interests of the child vis-à-vis their non-legal parent?***

There are a number of steps that can be taken, although none offer the security of a second-parent adoption.

- a) **Co-parenting agreement:** A co-parenting agreement is an agreement setting out the parents' expectations about each other's roles and their plans in the event of separation, disability, or death. While these agreements may not always be given full effect by courts, which are bound to make custody and visitation decisions based on the child's best interests, they are important indicators of what the couple *believed* was in the best interests of the child and may influence a court's ultimate decision.
  
- b) **Co-guardianship:** A legal parent may choose to name the non-legal parent as a co-guardian. This process allows the non-legal parent to make the same kinds of decisions for the child that a legal parent makes, including medical decisions.<sup>80</sup> The best interest of the child standard controls appointments of guardians,<sup>81</sup> and a guardian must file annual reports on the minor's welfare.<sup>82</sup> This status is not permanent and any person, including the legal parent, may petition to have a guardian removed.<sup>83</sup>
  
- c) **Wills:** A legal parent may use their will to nominate a guardian to take custody of the child upon the parent's death. These wishes are given strong preference by courts. However, if the child has another legal parent living, then that person will have priority over the nominated guardian.

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<sup>80</sup> See NH RSA 463:10 (allowing appointment of appropriate persons, including "co-guardians may be appointed when in the best interests of the minor"), 12 (rights of guardian).

<sup>81</sup> NH RSA 463:8.

<sup>82</sup> NH RSA 463:12.

<sup>83</sup> NH RSA 463:14-16.

## ■ Custody and Visitation

***What standards should same-sex couples with children who are breaking up maintain?***

Same-sex couples with children who are breaking up should:

1. Support the rights of LGBT parents;
2. Honor existing relationships regardless of legal labels;
3. Honor the children's existing parental relationships after the break-up;
4. Maintain continuity for the children;
5. Seek a voluntary resolution;
6. Remember that breaking up is hard to do;
7. Investigate allegations of abuse;
8. Not allow the absence of agreements or legal relationships to determine outcomes;
9. Treat litigation as a last resort; and
10. Refuse to resort to homophobic/transphobic laws and sentiments to achieve a desired result.

For more detailed information about these standards see the publication *Protecting Families: Standards for LGBT Families* at: <https://www.glad.org/wp-content/uploads/2017/01/protecting-families-standards-for-lgbt-families.pdf>.

***How does a court generally go about making custody determinations?***

When a married couple divorces or two unwed legal parents separate,<sup>84</sup> a court encourages them to work together to create a “parenting plan” that allows them to share in the rights and responsibilities of raising their children.<sup>85</sup> If the parents are unable to create a parenting plan, the court will create it for them. The court will treat both parents as equals. All decisions a court makes about custody are based solely on the best interests of the child and the safety of the

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<sup>84</sup> NH RSA 461-A:3, II.

<sup>85</sup> NH RSA 461-A:2.



parties.<sup>86</sup> A court may award visitation or custody to step-parents or grandparents,<sup>87</sup> and may also appoint a guardian ad litem to represent the best interests of the child.<sup>88</sup>

***If I have a child from a former straight relationship, and I am now involved with a same-sex partner, can my ex use my sexual orientation against me in custody proceedings?***

As stated above, New Hampshire courts base custody arrangements on the best interests of the child. As a general rule, a parent's sexual orientation or marital status should have no bearing on a child's best interests.

Nevertheless, your former partner may try to argue that your sexual orientation is detrimental to a child. Any number of reasons can be cited, such as that the LGBT parent's sexual orientation is causing other people to tease or ostracize the child, that the parent is a bad role model, or that the parent's new partner is not good for the child. The New Hampshire Supreme Court has not yet squarely addressed this issue. A majority of states decide the question based on whether there is evidence of direct harm to the best interests of the child, but others simply assume harm. As a matter of logic and experience, a parent's sexual orientation should not in itself be grounds for denying custody or visitation. Contact GLAD for further resources for dealing with such a situation.

***Does it matter if my "ex" knew or suspected I was gay or lesbian before we separated?***

It can make a difference with respect to future modification of court orders for custody. People can seek to modify permanent court orders for custody in a number of circumstances, including when "clear and convincing evidence that the child's present environment is detrimental to the child's physical, mental, or emotional health, and the advantage to the child of modifying the order outweighs the harm likely to be caused

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<sup>86</sup> *Place v. Place*, 129 N.H. 252, 525 A.2d 704 (1987); *See also*, NH RSA 461-A:6, I.

<sup>87</sup> NH RSA 461-A:6, V.

<sup>88</sup> NH RSA 461-A:6, VI

by a change in environment.”<sup>89</sup> If a spouse did not know of your sexual orientation at the time of the court proceedings but learns it later, they may argue that the circumstances surrounding the child’s welfare have changed and that the custody issues should be litigated anew. However, as stated above, a parent’s sexual orientation should generally have no bearing on a child’s welfare.

### ***Can a court keep my kids from visiting when my partner is present?***

The standard for restrictions on visitation, and in all matters, is what is in the best interests of the child with no concern for the adults. Courts have enormous discretion in visitation matters and certainly have the power to restrict visitation. But unless the partner is causing harm to the child – a very high standard – visitation *should not* be restricted.

## **■ Domestic Violence**

### ***What is domestic violence?***

New Hampshire defines domestic violence as the commission or attempted commission of one or more of the following:

- a. assault or reckless conduct;
- b. placing another in fear of imminent bodily injury by physical menace or threats;
- c. sexual assault;
- d. kidnapping, criminal restraint, or false imprisonment;
- e. destruction of property;
- f. unauthorized entry onto a person’s property;
- g. repeated communication with the purpose to annoy or alarm;
- h. cruelty to animals.<sup>90</sup>

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<sup>89</sup> NH RSA 461-A:11, I (c).

<sup>90</sup> NH RSA 173-B:1, I

## *Do domestic violence laws apply to people in same-sex relationships?*

Yes. New Hampshire domestic violence law applies to abuse between spouses and ex-spouses, people who are or were residing in the same household, and people who have or have had a sexual or romantic relationship.<sup>91</sup>

## *How do I get a court order protecting me from an abusive partner?*

If a partner or member of your family or household has been abusive, you can file for a protective order in court. New Hampshire issues three kinds of protective orders:

**Temporary (emergency) ex parte protective orders issued via telephone.** If you are in immediate danger of abuse and no court is open, you may get an emergency protective order by contacting the nearest police department. A police officer can help you fill out the forms and will contact a judge by telephone. If the judge believes you are in imminent danger, they will grant you an order that will last until the close of the next business day that the court is open. For the protective order to remain in effect, you must go to the nearest District, Family or Superior Court to ask for a new protective order.

**Temporary ex parte protective orders issued in court.** If the courts are open, you can file for a protective order from the District Court or Superior Court where you or the abuser lives, or, if you have fled your home, the court closest to where you fled. If you live in Rockingham County or Grafton County, you must go to the Family Division Court. If the judge believes there is an immediate danger of abuse, they will order a temporary ex parte order until you can have a full hearing on the order. A copy of the protective order will be sent to the Department of Safety, and the State Police must make information regarding the protective order available to your local police and Sheriff. The local police will promptly serve your abuser with a copy of the temporary protective order. There is

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<sup>91</sup> NH RSA 173-B:1, II

no charge for this service, and the orders are in effect state-wide in New Hampshire.

A full hearing will be held within 30 days of when you filed your petition, or within 10 days of when your petition is served on your abuser, whichever is later.<sup>92</sup> The abuser may also ask for a hearing within 3 to 5 days, which you must attend.<sup>93</sup>

**Final protective orders.** A final protective order can only be issued after a court hearing. You have the right to bring a lawyer to represent you at the hearing. It is a good idea to seek out a lawyer if you think custody or child support will be disputed, or if you have been severely injured or expect an injury to last a long time. A final order can last for up to one year, and can be extended.<sup>94</sup>

### *What does a protective order do?*

Depending on the circumstances, a protective order may compel your abuser to do any number of the following:

- refrain from abusing you further;
- refrain from contacting you;
- refrain from destroying or damaging property belonging to you;
- move out of your home, if they live with you;
- stay away from your residence, workplace, or school, or any other place regularly visited by you or your family;
- stay away from any animal you own;
- relinquish custody of any minor children;
- provide you temporary financial support;
- surrender firearms.

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<sup>92</sup> NH RSA 173-B:3, VII(a).

<sup>93</sup> NH RSA 173-B:4, I.

<sup>94</sup> NH RSA 173-B:5, VI.

### ***Where can I go to get help?***

If you cannot afford a lawyer, a domestic violence program in your area may be able to refer you to a lawyer who will do the case for free. The DOVE (Domestic Violence Emergency) Project of the New Hampshire Bar Association can provide referrals. Contact them at 1-866-644-3574, or <https://www.nhbar.org/for-the-public/free-legal-services.asp>.

You might also contact the New Hampshire Coalition Against Domestic and Sexual Violence, 1-866-644-374 (domestic violence) or 1-800-277-5570 (sexual assault).

### ***Does domestic violence play a role in custody decisions?***

Yes. Evidence that a parent has abused or is currently abusing their child or partner is evidence that said parent is not acting in the best interests of the child. Furthermore, a court will not allow parents to develop their own parenting plan when there is evidence of domestic violence or child abuse.<sup>95</sup>

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<sup>95</sup> NH RSA 461-A:2, I(c).

# **HATE CRIMES, SEX LAWS & POLICE**

## **■ Hate Crimes & Violence**

### ***Does New Hampshire have a hate crimes law?***

Yes. New Hampshire has a law providing for increased criminal penalties for hate-motivated violence.<sup>96</sup> If a defendant was “substantially motivated to commit the crime because of hostility towards the victim’s religion, race, creed, sexual orientation . . . , national origin, or sex,” penalties may be increased. Hopefully, with the addition of gender identity to the anti-discrimination laws, this statute will eventually be amended to include gender identity. Absent that, many instances of hate crimes against transgender people can be characterized as a form of sex or sexual orientation motivated violence. The defendant must be notified of the possibility of an enhanced penalty prior to the trial.

### ***Do other laws provide protection against hate-motivated violence?***

Yes. New Hampshire law permits the Attorney General to bring a civil action against a hate-motivated perpetrator who subjects a victim to actual or threatened violence, actual or threatened trespass to property, or actual or threatened property damage.<sup>97</sup> Any of the following civil penalties can be imposed: a fine of up to \$5,000, paid to the state;<sup>98</sup> restitution to the victim for out-of-pocket expenses;<sup>99</sup> an injunction or temporary restraining against the perpetrator to prevent future hate crimes.<sup>100</sup>

### ***Where can I call if I think I’ve been a victim of a hate crime?***

In addition to contacting the local police, you may contact the 24-hour hotline operated by the Attorney General’s Office at (603) 271-1241.

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<sup>96</sup> NH RSA 651:6 I(f).

<sup>97</sup> NH RSA 354-B:1.

<sup>98</sup> NH RSA 354-B:3

<sup>99</sup> NH RSA 354-B:4

<sup>100</sup> NH RSA 354-B: 3, II.

You may also call the Criminal Division of the Attorney General's office at (603) 271-3658. Be sure to explain all of the factors that make you think this was a hate crime.

For support and advocacy, contact:

New Hampshire Attorney General's Office, Office of Victim/Witness Assistance, 33 Capitol St., Concord, NH 03301-6397, (603) 271-3671.

***In what ways might the federal hate crimes law help to investigate and prosecute hate crimes?***

The *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*<sup>101</sup> was passed by Congress on October 22, 2009 and was signed into law by President Obama on October 28, 2009. It expands the 1969 United States federal hate crime law to include crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity or disability.

First, and perhaps foremost, the Act allows local and state law enforcement agencies to apply for the following federal assistance from the U.S. Attorney General:

- investigative, technical, forensic or prosecutorial support for criminal investigations and prosecutions,
- grants for extraordinary expenses associated with the investigation and prosecution of hate crimes, and
- grants to combat hate crimes committed by juveniles.

In providing assistance to local and state authorities, the priorities are hate crimes:

- where the offender(s) has committed crimes in more than one state, or

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<sup>101</sup> See <https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0>.

- that occur in rural areas which do not have the resources needed to prosecute such crimes.

Second, for hate crimes that in some way involve crossing state or national borders, or involve or affect interstate commerce, and where a state does not have jurisdiction or has requested federal assumption of jurisdiction, or where the federal government feels that justice has not been served or that U.S. prosecution is in the public interest, the Act authorizes the federal government to prosecute the case.

The Act also requires the Federal Bureau of Investigation to track statistics on hate crimes on the basis of gender and gender identity (statistics for the other groups are already tracked) and on crimes committed by and against juveniles. This is the first federal law to explicitly extend legal protections to transgender persons.

## ■ Criminal Sex Laws

*Does New Hampshire have a sodomy law?*

No.

*If it's not illegal for LGBT people to have sex, why are people still getting arrested?*

LGBT people are subject to the same laws as non-LGBT people. Sex in public, with underage persons, without consent, or with force are all illegal acts. Sex for pay – as either the customer or the provider – is also illegal.

New Hampshire also has an “indecent exposure and lewdness” law, which prohibits:

- a. fornication (*i.e.*, intercourse), exposure of the genitals, or “any other act of gross lewdness” if the circumstances are such that a



person should know those acts “will likely cause affront or alarm”; or

b. purposely performed in front of a child less than 16 years old.<sup>102</sup>

As a general matter, a violation of the indecent exposure law is a misdemeanor. However, if a person performs a sex act in front of a child who is 12 years old or younger, or if a person has previous convictions for indecent exposure in New Hampshire or elsewhere, then the person can be prosecuted for a felony.<sup>103</sup>

### ***What kinds of activity does the indecent exposure law prohibit?***

First, it is important to note what kinds of activity the law does **not** prohibit. The law only encompasses sexual activity and nudity: no one should be arrested or hassled for hand-holding, cruising, talking, flirting, toe-tapping, or other non-sexual touching.

Second, sex is not illegal simply because it takes place outdoors, in parked cars, or on public lands. It all depends on the circumstances and whether a person should know their acts “will likely cause affront or alarm.”<sup>104</sup> For example, a couple who desires privacy and takes reasonable steps to secure it can argue that there was no reason to suspect their activities would cause affront. A similar argument can be made about activity taking place in a cruising area, where there is a reasonable expectation that the people present would not be alarmed by or take offense.

As a practical matter, regardless of one’s rights, having sex outdoors is a risky business. For one, based on numerous reports to us, we believe that some police will overlook outdoor sexual activity between straight couples, but arrest LGBT people engaged in the same behavior. Another concern is that some police “hunt” for LGBT people having sex outdoors in park lands and rest areas to arrest them, sometimes in

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<sup>102</sup> NH RSA 645:1

<sup>103</sup> NH RSA 645:1, II, III.

<sup>104</sup> *Id.*

uniform and sometimes as undercover decoys. If a person is caught, they can be charged with a violation of the sex laws.

***What is the age of consent in New Hampshire?***

Generally, the age of consent for sexual activity is 16.<sup>105</sup> However, if the older party is in a position of authority over the younger party, the age of consent is raised to 18.<sup>106</sup>

***Does New Hampshire have a “sex offender registry” type of law?***

Yes. Every state now has such a law, although the terms differ from state to state.

***What types of crimes are deemed to be “sex offenses”?***

As you would expect with a law designed to ensnare dangerous and violent predators, most of the crimes involve violence or sex with children. A single conviction under the indecent exposure law is not a registrable sex offense. However, if you have been convicted of performing a sex act in front of a child who is 12 or younger, or you have previous convictions for indecent exposure in New Hampshire or elsewhere, you will be deemed a sex offender.<sup>107</sup>

***How can I find out what charges I have been convicted of?***

You can contact the New Hampshire Department of Public Safety, Division of State Police, Central Repository for Criminal Records, 10 Hazen Dr., Concord, NH 03305; (603) 271-2538. They have their own form, which you must have notarized, and you must pay a \$25 fee. You may request your records in person or by mail.

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<sup>105</sup> NH RSA 632-A:3 (sexual “penetration” of person under age 16 is a felony); *State v. Berry*, 117 N.H. 352, 373 A.2d 355 (1977)(statutory rape when sexual activity occurs with person under age 16).

<sup>106</sup> NH RSA 632-A:2 I(k).

<sup>107</sup> For a full list of sex offenses, *see* NH RSA 651-B:1.

***What obligations are imposed on “sex offenders”? What information is available about them?***

A sex offender must report their mailing address and residential address within 30 days of release of custody or of moving to New Hampshire, and then again every year. Some will have to do so more often. In addition, sex offenders must inform the Department of Safety whenever they move, change their name, or if they are using an alias.

All convicted offenders are registered with the Department of Safety for a minimum of 10 years.<sup>108</sup> Some may be registered for life, especially if their crime involved children or if they have multiple convictions.<sup>109</sup> The State Police also maintain a separate list of people convicted of certain offenses, including indecent exposure in front of a minor aged 12 or younger, or where a person has multiple indecent exposure convictions. These lists include personal data about the offender, such as their name and address, the crime they were convicted of, and when and where the conviction occurred. Sometimes the list will also include a physical description or photo of the person, information about other convictions, and a profile of their victims.

All of this information is updated and sent monthly to local law enforcement agencies, which make the information available to “interested members of the public upon request.”<sup>110</sup> Among other things, a person may request information about a specific named individual or about all listed individuals residing in a specific city or town.<sup>111</sup>

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<sup>108</sup> NH RSA 106-B:14.

<sup>109</sup> NH RSA 651-B:6.

<sup>110</sup> See generally NH RSA 651-B:7.

<sup>111</sup> NH RSA 651-B:7, IV.

## ■ Police Harassment

*I am often told by police to “move along” from public areas. Is that legal?*

Not necessarily. If the area is public and not posted as having particular hours, you generally have a right to be there as long as you are engaged in lawful activity. Public places belong to everyone. Even if a police officer wants to deter crime, or suspects some kind of unlawful intent, they have no general right to request people to move from one place to another unless there is *actually* unlawful conduct.<sup>112</sup>

*What are the general rules about interaction with police?*

The presence of individuals who appear to be LGBT – whether because such individuals are displaying symbols such as a rainbow flag or pink triangle or for any other reason – should not trigger any special scrutiny by a police officer.

If an officer has “reasonable suspicion” that a crime has been committed or is about to be committed, they may briefly detain an individual, or stop the person for purposes of investigation.<sup>113</sup> According to the New Hampshire Supreme Court, such a detention is only permissible when the police officer can point to specific and articulable facts which, taken together with all rational inferences from those facts, warrant the intrusion. A hunch is not enough.<sup>114</sup>

An arrest can only occur upon “probable cause” that a crime has been committed.<sup>115</sup>

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<sup>112</sup> *Kent v. Dulles*, 357 U.S. 116, 126 (1958); see generally NH Const., pt. 1, art. 19 (Searches and Seizures Regulated).

<sup>113</sup> NH RSA 594:2. See also, *State v. White*, 119 N.H. 567, 571-572 (1979). *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

<sup>114</sup> See e.g. *State v. Maya*, 126 N.H. 390, 493 (1985) (three minute investigative stop in which officer did not more than preserve the status quo did not violate art. 19 since three minutes is the minimal time for establishing identity and assessing the plausibility of a person’s story).

<sup>115</sup> See NH RSA 594:10 (police can arrest without warrant if probable cause to believe misdemeanor offense committed in officer’s presence, or if person will destroy evidence of misdemeanor crime, and may arrest if reasonable grounds to believe a felony has been committed). “Reasonable grounds” is the same as “probable cause.” *State v. Vachon*, 130 N.H. 37, 533 A.2d 384 (1987).

***What can I do if I believe I have been improperly treated by the police?***

There are several places you can call to discuss your options. One is GLAD Answers at 1-800-455-GLAD. Another is the NH Civil Liberties Union at (603) 225-3080.

Complaints may be made to any individual police department for matters concerning its officers. In addition, you may contact the 24-hour hotline operated by the Attorney General's Office at (603) 271-1241.

Complaints to the New Hampshire State Police may be made to State Police Headquarters, over the telephone or in writing. A supervisor will call you back to further process the complaint. If the State Police act further on the complaint, you will have to come into the office to make a written statement. Contact State Police Headquarters, 33 Hazen Dr., Concord, NH 03305, (603) 223-3858. Please let GLAD know whenever you make a complaint so that we can track the responsiveness of the various police departments.

In some cases, you may decide to pursue a lawsuit, either because of injuries, improper detainment, or for some other reason. These matters are highly specialized, and GLAD can make attorney referrals. You can also file complaints with the Attorney General's Office, Criminal Division at (603) 271-3658. They may participate in an investigation or refer a matter back to the chief of the particular police department at issue.

# **STUDENTS' RIGHTS**

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## ■ Harassment and Discrimination at School

### *Are there any laws protecting gay and transgender students in New Hampshire?*

Yes. On July 1, 2010, the New Hampshire General Court enacted a revision to the Pupil Safety and Violence Prevention Act (HB 1523)<sup>116</sup> that specifically recognized that pupils who are LGBT or perceived to be LGBT are one of the groups that have historically been targeted for bullying. New Hampshire now has one of the strongest anti-bullying laws in the country.

The 2010 law requires that each school district and charter school adopt a written policy prohibiting bullying and cyberbullying that includes:

- a procedure for reporting the bullying;
- a procedure for notifying the parents or guardian of a victim within 48 hours of the incident report that can be waived if the school feels that doing so is in the best interests of the victim or perpetrator;
- a procedure for investigating the incident in a timely manner, and, for any substantiated incident of bullying, the school must create a remediation plan that may include appropriate disciplinary action against the perpetrator, steps to reduce future incidents or retaliation and, if appropriate, offer assistance to the victim or perpetrator. The remediation plan must also be communicated to the parents or guardians of all the students involved in the incident;
- a plan for communicating, training and educating students, staff and parents about the anti-bullying policy.

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<sup>116</sup> See HB 1523 at <http://www.gencourt.state.nh.us/legislation/2010/HB1523.html>.

***Are there other laws that may protect me from discrimination and harassment because of my sexual orientation or gender identity?***

Possibly. Federal law prohibits sex discrimination in public schools that receive federal funding. Depending on the situation, harassment of LGBT students may be actionable as sex discrimination.<sup>117</sup> Harassment of transgender students, in particular, is actionable. Several federal courts have held that the federal anti-discrimination law, Title IX, prohibits discrimination based on gender identity.<sup>118</sup> Complaints can be made to your school's Title IX coordinator, as well as to the federal Department of Education, Office of Civil Rights, in Boston. In cases where a school has reacted with deliberate indifference, monetary damages may be available. A student's constitutional rights may be violated by some kinds of discrimination and harassment.

Although the U.S. Departments of Education and Justice released a joint guidance in 2016 taking the position that Title IX protects transgender students from discrimination based on gender identity,<sup>119</sup> that guidance was rescinded by the Trump administration in February 2017.

***What can I do if I'm being discriminated against at school?***

There are many ways to approach the issue. One is to ask for support from a friend, teacher or counselor and talk to the people who are bothering you. That is not an option, however, if you don't feel safe doing so.

Take a look at your school's policies and notify whoever is supposed to be notified – usually a vice principal or Title IX coordinator. You should document any incidents of harassment or discrimination in writing. Once you meet with the right officials, make a note of what you

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<sup>117</sup> See, e.g., *Ray v. Antioch Unified School District*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000) (stating that attacks based on a student's perceived sexuality constitute sex discrimination).

<sup>118</sup> See, e.g., *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. May 30, 2017) (holding that discrimination against transgender students constitutes sex discrimination under Title IX and the Equal Protection Clause of the U.S. Constitution) and *Bd. Of Educ. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016) (preliminary injunction granted to 11-year-old girl to permit her to use the girls' restroom and to be treated "as the girl she is.").

<sup>119</sup> See *Dear Colleague Letter on Transgender Students*, U.S. Department of Justice/U.S. Department of Education, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

told them and on what date and ask when they will be getting back to you with a response. If they don't help you or don't follow through, you may wish to write to the principal and superintendent and ask for them to end the discrimination.

You may also want to contact the State Dept. of Education at (603) 271-3494 or at <http://www.ed.state.nh.us/>. If you want to consider legal action, contact GLAD.

**For additional information about youth and student issues go to:**  
<https://www.glad.org/issues/youth/>.

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## ■ Gay/Straight Alliances

*Do students have the right to form Gay Straight Alliances in their schools?*

Yes, as to high school students; probably, as to middle school students. A federal law known as the "Equal Access Act" requires that all federally funded secondary schools provide equal access to extra-curricular clubs. So long as a school has at least one student-led extra-curricular club, it must allow additional clubs to organize, and must provide them with equal access to meeting spaces, facilities, and funding without discriminating based on a club's purpose, be that purpose religious, philosophical, political, or otherwise.<sup>120</sup> GLAD brought and won a case for students at West High in Manchester, New Hampshire on this very basis.

For more information see GLAD's publication, *The Right to Establish a GSA in Public Schools* at <https://www.glad.org/wp-content/uploads/2017/01/gsa-public-schools.pdf>.

If your school is preventing you from forming a GSA, contact GLAD Answers.

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<sup>120</sup> 20 U.S.C. § 4071.



## ■ Conversion Therapy

***Does New Hampshire have a law banning therapy or treatment to change a minor's sexual orientation or gender identity?***

Yes. On June 8, 2018, Governor Chris Sununu signed into law HB 587, *AN ACT relative to conversion therapy seeking to change a person's sexual orientation*.<sup>121</sup> “Conversion therapy” is defined as “practices or treatments that seek to change an individual's sexual orientation or gender identity, including efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender. Conversion therapy shall not include counseling that provides assistance to a person undergoing gender transition, or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as such counseling does not seek to change an individual's sexual orientation or gender identity,”

With the passage of this law, New Hampshire sends a strong message – supported by every major health and mental health organization – that attempts to change the sexual orientation or gender identity of a minor are dangerous, ineffective and counter to the best interests of these young people.

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<sup>121</sup> See [https://legiscan.com/NH/text/HB587/id/1793865/New\\_Hampshire-2018-HB587-Amended.html](https://legiscan.com/NH/text/HB587/id/1793865/New_Hampshire-2018-HB587-Amended.html).



Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders works in New England and nationally to create a just society free of discrimination based on gender identity, HIV status, and sexual orientation.

**GLAD Answers** and publications are provided *free of charge* to all who need them. We hope that those who are able will make a contribution to ensure that GLAD can continue the fight for equal justice under the law.

To make a tax-deductible contribution, log on to [www.glad.org](http://www.glad.org), or call us at (800) 455-GLAD (4523) with your credit card, or mail your check, payable to GLAD to 18 Tremont Street, Suite 950, Boston, MA 02108. If your workplace has a matching gift program, please be sure to have your donation matched. Please contact us if you would like more information on becoming a GLAD partner.

*Thank You!*



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