

**Making it “In” to be “Out” – Best Practices for Recruiting & Retaining LGBT Lawyers
Friday, April 29, 2011**

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REPRESENTATION/NUMBERS

Lawyers - NALP Directory of Legal Employers (88% reporting)

2010 – 1.8% or 2,137 lawyers

2.35% (1182) Associates

1.47% (752) Partners

60% from 4 cities: NYC, S.F. (4.8%), L.A and D.C.

2009 – 2.29%

2003 – <1% (1,100 lawyers)

Law Students – NALP Directory of Law Schools

- 2011 is the first year this data will be collected
- LGBT Section prepared Best Practices Memo for accurate collection

CURRENT STATUS/LEGAL DEVELOPMENTS ON LGBT ISSUES¹

- ***Lawrence v. Texas*** – 2003 Supreme Court case that invalidated laws that made homosexual conduct a crime, holding that those laws violated the 14th Amendment’s Due Process Clause

HEALTH

- Hospital Visitation - On January 8, 2011 new regulations regarding a patient’s hospital visitation rights went into effect. These new rules, which apply to hospitals participating in the Medicaid and Medicare programs, require those institutions to permit patients to designate visitors of their choosing and prohibit discrimination in visitation based on a number of factors, including sexual orientation and gender identity. For the first time, lesbian, gay bisexual and transgender (LGBT) people and their families across the country will have federal protections for a simple, yet immeasurably important right – to be able to be together in some of life’s most difficult times. (www.hrc.org)

¹ Facts and figures for “Current Status” section taken from www.hrc.org website.

- *Healthcare Plan Tax Equity - Although employer-provided health coverage for different-sex spouses is excluded from an employee's gross income, domestic partner benefits are not. As a result, an employee who elects domestic partner coverage pays more income and payroll tax than a similarly-situated employee with a different-sex spouse. Moreover, because of this inequitable treatment, employers who offer benefits to domestic partners face the administrative burden of calculating taxes separately, and they also pay additional payroll taxes. Bill to be submitted extending tax exempt status to the health care benefits of domestic partners.
- *Medical Leave - The Family and Medical Leave Act of 1993 grants legally married spouses up to 12 weeks of unpaid leave from work to care for a seriously ill spouse, parent or child. This was recently expanded to allow caregivers to take leave in order to care for a child regardless of biological/legal relationship. However, the law does not cover same-sex partners or spouses, making it impossible for some employees to be with their loved ones during times of medical need. Family Medical Leave Inclusion Act to be introduced in 112th Congress.

International/Immigration

- HIV Travel Ban - In 2009, after more than 20 years, a ban on HIV-positive visitors and immigrants has been lifted. President Obama announced the final regulation reversing the ban on Oct. 30, 2009. The repeal took effect on Jan. 4, 2010. Under the ban, HIV-positive foreign nationals were unable to enter the U.S. unless they obtained a special waiver, which was difficult to obtain and only allowed for short-term travel, and the vast majority were unable to obtain legal permanent residency.
- Reuniting American Families Act - Under the U.S. Immigration and Nationality Act, U.S. citizens and legal permanent residents may sponsor their spouses (and other immediate family members) for immigration purposes. But same-sex partners of U.S. citizens and permanent residents are not considered "spouses," and their partners cannot sponsor them for family-based immigration. The UAFA would change the law by amending the definitions sections of the Immigration and Nationality Act to include definitions for "permanent partner" and "permanent partnership."

Marriage/Relationship Recognition

- *The Defense of Marriage Act (DOMA) - DOMA singles out lawfully married same-sex couples for unequal treatment under federal law. This law discriminates in two important ways. First, Section 2 of DOMA purports to allow states to refuse to recognize valid civil marriages of same-sex couples. Second, Section 3 of the law carves all same-sex couples, regardless of their marital status, out of all federal statutes, regulations, and rulings applicable to all other married people—thereby denying them over 1,100 federal benefits and protections.

For example, legally married same-sex couples cannot: (1) file their taxes jointly; (2) take unpaid leave to care for a sick or injured spouse; (3) receive spousal, mother's and father's, or surviving spouse benefits under Social Security; (4) receive equal family health and pension benefits as federal civilian employees

President Obama and Attorney General Eric Holder have declared recently that the DOJ will no longer defend DOMA believing that classifications based upon sexual orientation deserve "heightened scrutiny"

- State Marriage & Partnership Laws – see HRC's "Marriage Equality & Other Relationship Recognition Laws" Document
- Litigation – *In Re Marriage* (Cal. Prop 8 case); *Gill v. Office of Personnel Management* (challenging DOMA)

Military

- *Don't Ask Don't Tell - On December 22, 2010, President Obama signed into law a bill finally clearing the path for ending the discriminatory "Don't Ask, Don't Tell" policy.

According to the repeal law, DADT is not repealed until the President informs Congress that the Department of Defense has prepared the necessary policies and regulations to implement repeal and those policies and regulations are consistent with military standards for readiness, effectiveness, unit cohesion, and recruiting and retention. After the President does this, a 60 day waiting period must elapse before DADT is repealed once and for all.

In a Pentagon memo released on January 28, 2011, it appears that training for repeal implementation could begin in a matter of months, consistent with President Obama's timeline commitment of months, not years. In response to the memo, HRC urged for the repeal to be carried out expeditiously. HRC also called for additional changes, such as parity in service members' benefits, that could be accomplished through revised regulations that add same-sex committed partners to the definitions of "dependent," "family member," or other similar terms.

- Litigation – *Log Cabin Republicans v. DOD* - In September, U.S. District Court Judge Virginia Phillips found that "Don't Ask, Don't Tell" was unconstitutional and, in October, issued an order that halted enforcement of the law for several days. The Ninth Circuit soon issued a temporary stay, and later halted Phillips's order until the appellate court could review the matter itself. After Obama signed the Don't Ask, Don't Tell Repeal Act into law in December, DOJ asked the Ninth Circuit to hold off on the appeal in order to give the government time, essentially, to render the lawsuit moot by ending DADT. The Ninth Circuit refused and set a February deadline for the DOJ to file its brief defending DADT.

**Advice to Law Schools: NALPcomments! BLOG, February 24, 2011; J. Leipold's Editorial in the NALP Bulletin, February 2011

Workplace

- ***Employment Non-Discrimination** - There is no **federal** law that consistently protects LGBT individuals from employment discrimination; it remains legal in 29 states to discriminate based on sexual orientation, and in 38 states to do so based on gender identity or expression. As a result, LGBT people face serious discrimination in employment, including being fired, being denied a promotion, and experiencing harassment on the job.

Twenty-one **states** and the District of Columbia have passed laws prohibiting employment discrimination based on sexual orientation, and 12 states and D.C. also prohibit discrimination based on gender identity. Although these laws provide important protections, according to a 2002 General Accounting Office (GAO) report, relatively few complaints of discrimination based on sexual orientation have been filed in these states.

Hundreds of **companies** have enacted policies protecting their lesbian, gay, bisexual and transgender employees. As of March 2011, 433 (87 percent) of the Fortune 500 companies had implemented non-discrimination policies that include sexual orientation, and 229 (46 percent) had policies that include gender identity.

ENDA reintroduced in the House and Senate in March and April 2011, respectively.

RETENTION: BEST PRACTICES

*We start with retention and advancement because so much of what you do in those arenas is critical to your recruiting efforts

- Workplace environment / culture
 1. Firm materials
 - Manuals
 - Directories
 - Forms
 - EEOC / non-discrimination statements
 - sexual orientation
 - gender identity
 2. Diversity and inclusion efforts
 - Host/participate in events for LGBT community
 - Visible diversity in management or at least commitment to inclusion / transparency
 3. Diversity / Sensitivity Training
 - Next level of sophistication is inclusion; “working together for success”
 4. If affinity groups exist for other groups, add for LGBT
 - If targeted programming tracks are used, include LGBT
 5. Pro bono work
 6. Charitable contributions
 7. Announce / send press releases for news & events

Policies / procedures

1. Ensure all policies use gender neutral language, including dress code

2. Domestic partner benefits
 - Up-to-date with local / state / federal laws
 - Affidavit requirements should be as flexible as possible (multiple choices)
3. Grossing up for income tax on domestic partner benefits
4. Acknowledge milestone moments similarly to others (e.g., weddings, births)
5. Extend all spousal / parental benefits to domestic partner households
 - Adoption policies
 - Leave policies (FMLA, bereavement, etc.)
6. Work with insurance providers to revise provisions that result in the exclusion of transgender employees, their spouses, partners or other dependents.

Development & Advancement

1. Mentoring programs
 - Assign across differences
 - Consider multiple, overlapping mentor-mentee pairings
2. Work assignments
3. Secondment or rotation programs
4. Target business development efforts (esp. first tier partners)
5. Measure retention and advancement and publish results (internally if not externally)
6. Look at succession plans for all levels of the firm
7. Record time spent on inclusion initiatives and count it somehow
 - Credit for time
 - Criteria for discretionary bonuses
 - Tangible reward

LGBT Recruiting Best Practices

LGBT candidates are most likely to be most attracted to firms with a reputation for having an inclusive (LGBT friendly) environment

Ways to foster such an environment was discussed in depth in prior parts of this session

Ways to showcase an inclusive (LGBT friendly) environment in the recruiting process

- Report LGBT demographics (include information in narrative sections to highlight commitment to LGBT attorneys)
- Participate in LGBT focused career fairs (Lavender Law; LeGal)
- Create recruiting related promotional materials geared toward LGBT candidates (can be as simple as writing a targeted letter to LGBT candidates or as elaborate as creating a special portion of the recruiting website focused on LGBT candidates)
- Circulate targeted press releases highlighting LGBT related activities, awards, or other news (including those announcing the promotion or appointment of LGBT attorneys)
- Offer candidates the opportunity to interview with one or more of the firm's LGBT attorneys
- Sponsor/participate in LGBT student group programs/activities
- Sponsor/support scholarship opportunities with LGBT organizations
- Invite students/potential lateral candidates to in-house or firm sponsored events with an LGBT component to them
- Post lateral openings with LGBT organizations
- Include the partners/spouses/significant others of LGBT lawyers at events where spouses are invited (and strongly encourage their attendance)
- Host dinners for LGBT candidates with LGBT lawyers

Other ways to promote LGBT recruiting efforts

- Participate in the HRC Corporate Equality Index (unless, of course, you would not receive a favorable score)

- Actively include LGBT recruiting issues/perspectives in all “diversity related” recruiting discussions
- Include LGBT attorneys on Recruiting Committee
- Reach out to firm’s LGBT affinity group members to provide input to/assist with recruiting initiatives (form sub-committee to focus on LGBT recruiting?)
- Include discussion of LGBT specific recruiting as part of interviewer training
- Advise Career Services Offices at law schools where you actively recruit that you are interested in LGBT candidates
- Develop relationships with LGBT professors who often counsel LGBT students on employer choices
- Advise agencies with whom you work that you are interested in LGBT candidates (seek out agencies who specialize in diversity placements?)
- Advertise in diversity related publications
- Ensure that Pro Bono opportunities with LGBT related organizations are made available