

# Rights acquired

# by LGBTI workers

# in Latin America



Public Services International  
Internationale des Services Publics  
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Internationell Facklig Organisation för Offentliga Tjänster  
國際公務勞運

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# Text on the rights acquired by LGBTI workers in the countries of Latin America including social security rights and labour rights<sup>1</sup>

Sexual orientation<sup>2</sup> and gender identity<sup>3</sup> issues have become more and more visible. This growing visibility includes the labour sector, especially if one takes into account the labour union actions for LGBTI rights. It is impossible nowadays to think of labour rights claims or collective labour bargaining rounds without including LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex) labour rights .

Based on reflexion on LGBTI workers' rights in the Americas, Public Services International (PSI) would like to assist unions, particularly (but not only) in this part of the world, in becoming aware of the need for this agenda in order to achieve equal rights for workers, whatever their sexual orientation or gender identity. In the knowledge that discrimination and exclusion based on prejudices particularly affects trans people who are marginalized from the labour market and often have to rely on family or friends for income, or become sex workers, PSI would also like its affiliates in the Americas to recognise this mechanism and help trans people to getting access to education and labour market skills and act for full inclusion of trans people in the labour market.

It is important to emphasize that the discussion of LGBTI rights in the labour field is supported by a set of United Nations (UN) actions, based on conventions, resolutions, pacts and documents produced by

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<sup>1</sup> This text was produced with the collaboration of LGBTI groups from the Latin America through answering a brief questionnaire. Unfortunately, we had some difficulty to access the English-speaking Caribbean nations and other countries that did not return the questionnaire.

<sup>2</sup> "We understand sexual orientation as a reference to each person's capacity of having a deep emotional, affectionate or sexual attraction for individuals of a different gender, of the same gender or of more than one gender, as well as having intimate and sexual relations with these persons". The Yogyakarta Principles – Indonesia – November 2006.

<sup>3</sup> "We understand as gender identity the profoundly felt internal and individual experience of each person's gender, which may or may not correspond to the sex attributed at birth, including personal sense of the body (that may involve, by way of free choice, modification of the appearance or body function through medical, surgical or other means) and other expressions of gender, including clothing, speech manner and mannerisms." *Idem*.

the United Nations Office of the High Commissioner for Human Rights (OHCHR), in addition, obviously, to the set of laws that countries have gradually produced based on the advocacy actions by unions and the LGBTI movement.

Therefore, the alignment of the unions' and the LGBTI movement's agendas is essential for the advancement of lesbian, gay, bisexual, transgender and intersex citizenship in all aspects of their lives, especially in the workplace. Furthermore, it is important that LGBTI workers be affiliated to their unions. This awareness is essential for the strengthening and creation of a respectful and stigma- and discrimination-free workplace. It's a two-way street: unions learn from the LGBTI movement and the LGBTI movement from the unions, creating a win-win situation!

The fight for equal rights in the workplace is supported by Convention 111 of the International Labour Organization (ILO), on non-discrimination at work and Recommendation 200, also by the ILO, that establishes the guidelines on HIV and Aids response in the workplace, especially with regard to non-discrimination and gender equality.

Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law<sup>4</sup>, a document produced by the OHCHR, reinforces article 6 of the International Covenant on Economic, Social and Cultural rights, which states:

*The member States of the following Pact recognize the right to work, which includes the right for everyone to the opportunity to earn a living through work, which they will freely choose or accept, and will take appropriate steps to defend this right (...) and that the Pact forbids discrimination in obtaining access to and keeping one's job based on (...) sexual orientation.*

Thus, states have the obligation to guarantee that the right to work be exercised without any form of discrimination. Any barrier imposed with regard to access to the job market and to the means and rights to obtain employment constitutes a violation of the Pact.

The "State Homophobia" Report, published in 2014 by ILGA (International Lesbian, Gay, Bisexual, Trans and Intersex Association), informs that 61 countries prohibit discrimination in the workplace based on sexual orientation. In the Americas this includes: Bolivia,

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<sup>4</sup> "Nascidos Livres e Iguais – Orientação Sexual e Identidade de Gênero no Regime Internacional de Direitos Humanos" – United Nations, 2012.

some cities and provincias in Argentina, parts of Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Mexico, Nicaragua, Venezuela, Uruguay, Canada and some regions of the U.S.A.<sup>5</sup>.

An important example of legislation that regulates the prohibition of discrimination because of sexual orientation and gender identity is the executive order for the protection of LGBTI employees who work for companies with federal contracts in the **United States** signed by president Barack Obama in July 2014. This order will affect around 24.000 companies and according to *UCLA Law School's*<sup>6</sup> it is estimated that this order will extend the protection to around 14 million employees. In the USA approximately 20 states and over 200 local government offices already actively prohibit discrimination in the workplace based on sexual orientation, in addition to most companies ranked among the top 500 in *Fortune* magazine.

In **Cuba**, the only piece of legislation that explicitly recognizes the rights of homosexuals is Law N°.116 of the Labour Code, in force since June 2014. Subsection B of Article 2 refers to discrimination in the workplace: “every citizen that is able to work has the right to obtain employment in accordance with demands of the economy and their decision, in the public as well as in the private sector; without discrimination due to colour of skin, gender, religious beliefs, sexual orientation, place of origin, disability or any difference undermining to human dignity. This inclusion was possible thanks to the demands made by workers and activists all over the country, as part of the ample popular survey to which the draft Labor Code was submitted in 2013. Social security is not denied to any Cuban citizen, it is universal and free. However, there is a legal void with regard to the recognition of homoparental families and the family ties derived from these. This implies that there is no material nor legal support in case of sickness or widowhood for same-sex couples; neither is there the recognition of shared rights and duties for children and teenagers living in these families.

As for LGBTI labour rights in **Chile**, the Law of Non-Discrimination (known as the Zamudio Law)<sup>7</sup> – introduced in the country after a young gay man, Daniel Zamudio, died after he was attacked and bashed in Santiago de Chile in an anti-gay attack by neonazi youngsters in 2012–

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<sup>5</sup> [http://old.ilga.org/Statehomophobia/ILGA\\_SSHR\\_2014\\_Eng.pdf](http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf)

<sup>6</sup> <http://williamsinstitute.law.ucla.edu/>

<sup>7</sup> <http://www.leychile.cl/Navegar?idNorma=1042092>

guarantees them, although further specification is necessary for its incorporation into the Labour Code and the Administrative Statute (public sector). In the post Non-Discrimination Law period many companies and public organizations took action and implemented their own inclusion policies and practises. With regard to social security, specific rights became much better protected under the so-called General Agreement on Cohabiting Partners (*Acuerdo de Vida en Pareja*)<sup>8</sup> a package of legislative measures of which the first portion has been agreed upon and later steps are currently still discussed in parliament. There is no egalitarian marriage law as yet in Chile.

In **Colombia**, after many Constitutional Court sentences, progress was achieved with regard to LGBTI rights, particularly since the new Constitution in 1991. From then on, the path was opened for many new labour-related possibilities as well as for LGBTI community human rights. One that must be mentioned is that LGBTI educators can no longer be dismissed from their jobs because of sexual orientation and gender identity. In another sentence, the Courts supported the LGBTI right to belong to the country's armed forces, based on the right to freedom of personality development and the freedom to choose one's profession, job title or work, sanctioned in the same Magna Carta. The right to register one's partner to receive his/her social security benefits, amongst other rights, was also protected.

In **Argentina**, there is a contradictory situation in LGBTI rights. Despite having very forward thinking laws which support marriage between people of the same gender, adoption and name and sex change for transsexuals and even with the support of Antidiscrimination Law 23.592<sup>9</sup>, the workplace continues to be a problem for the Argentinian LGBTI movement. Activists are still fighting for a change of the anti-discrimination law, which includes sexual orientation and gender identity and expression, because in spite of advances made in the legislative branch of power, instances of violence and prejudice, including in the workplace, are still very much a problem. They continue to negotiate with the Ministry of Labour, Employment and Social Security of the Nation and with the National Institute against Discrimination, Xenophobia and Racism for more clarity regarding the

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<sup>8</sup> [http://www.senado.cl/sala-aprueba-en-general-proyecto-que-crea-el-acuerdo-de-vida-en-pareja/prontus\\_senado/2014-01-07/153814.html](http://www.senado.cl/sala-aprueba-en-general-proyecto-que-crea-el-acuerdo-de-vida-en-pareja/prontus_senado/2014-01-07/153814.html)

<sup>9</sup> <http://www.eco.unrc.edu.ar/wp-content/uploads/2010/06/Bravo-Alliney.2010.pdf>

discrimination against LGBTI employees in the workplace, towards the development of best practise guidelines in companies for preventing and combating LGBTI discrimination, tax benefits for hiring of trans workers, and other issues. In order to work with the difficulties in finding a job, the “Labour Trans Inclusion Program” has been implemented by the Department of Employment. This program includes training services, social economy and connection with employers to search for jobs. The program has about 900 trans people registered. Furthermore, INADI and the Ministry of Labour, Employment and Social Security of the Nation articulate with the unions, as key players in their role to defend and guarantee the rights of workers. With the aim of creating plural, democratic and enabling workspaces to the exercise of rights in equal conditions, the “Inter-union Commitment for Sexual Diversity” minute was signed by at least 60 unions.

**Mexico** is a country constituted as a Federation. There are, therefore, federal, state and local laws. At the federal level there is no piece of legislation with regard to LGBTI workers at their workplace. Nevertheless, at the state level Quintana Roo, Coahuila and at local level the Distrito Federal (Federal District – Mexico City) and a few other regions have legislation allowing same-sex couples either to marry or to register as a couple. That also means that if one of them has a social security grant, he/she may include his/her spouse. Egalitarian marriage has made it possible to unequivocally question the legal landmark for social security relating to families and economic dependents. This brought about a change in the IMSS (Instituto Mexicano de Seguro Social<sup>10</sup> - Mexican Social Security Institute) Law regarding the non-discrimination principle and recognition of the marriage rights in question.

In **Costa Rica** the Ministry of Labour issued a Guide for Preventing and Combating Discrimination based on Sexual Orientation and Gender Identity - No. 025-2012<sup>11</sup>. In addition to that, this year the CCSS – Costa Rican Social Security Bank – approved indirect social security benefits for same-sex couples. Although not yet regulated, this insurance has been approved by the CCSS Administrative Council. Additionally, based on the advocacy of civil society organizations, an article that prohibits discrimination was included in Guideline 002-

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<sup>10</sup> <http://www.imss.gob.mx/>

<sup>11</sup> <http://www.cipacdh.org/pdf/directriz.pdf>

2010 of the Occupational Health Council for the handling and approach to HIV in the workplace . This guideline, however, has been poorly disseminated and many companies are not yet aware of it.

In **Uruguay**, Law N° 17.817 / 2004 – Fight against Racism, Xenophobia and Discrimination, states in Paragraph 2: “For the purposes of this Law, discrimination means any form of distinction, exclusion, restriction, preference or the practice of physical or moral violence based on race, colour, religion, nationality or ethnicity, disability, aesthetic appearance, gender, sexual orientation and identity, with the aim or effect of annulling or restricting the recognition, enjoyment or practice, under equal conditions, of essential human rights and freedoms in the political, economic, social and cultural fields as well as any other sphere of public life”<sup>12</sup>. However, the main purpose of this law is not penalizing this type of discrimination, but creating a *Honorary Commission to Combat Racism, Xenophobia and Discrimination* and providing a framework for its tasks and functions.

In **Venezuela**, the 2012 Labour and Workers’ Organic Law states, under paragraph 21, that it deems any form of discrimination as being in contravention of the principles of this law, prohibiting all types of distinction, exclusion, preference or restriction to access and working conditions based on reasons (...) of sexual orientation (...) preventing the right to work that contests constitutional principals.

In **Ecuador**, the year 1997 – in which homosexuality was decriminalized can be considered as a first turning point in the history of LGBTI rights. A new landmark is in the Constitution of 2008, which includes the recognition of some LGBTI rights, such as equality and non-discrimination on the ground of sexual orientation (already arranged in previous legislation), and joins the list which includes gender identity, with specific recognition for trans people. The latest labour and social security landmark was the formal request before the State for pension fund and unemployment benefit by a same-sex couple, in 2011.

In **Paraguay**, homosexuality is legal, but there is no labour law that includes LGBTI rights. Same-sex couples and families however are not eligible for all social and legal protection that is available to heterosexual couples.

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<sup>12</sup> <http://www.parlamento.gub.uy/leyes/ AccesoTextoLey.asp?Ley=17817&Anchor>

In **Brazil**, the Federal Public Prosecutor's Office filed a public civil lawsuit in Porto Alegre in 2000 petitioning that the INSS (National Social Security Office) recognize the social security rights for LGBTI members of the community; an injunction was issued and the petition was granted obliging the INSS to concede the benefits. The decision extended to the whole country, so that same-sex couples all over Brazil since then benefit from it . Within the scope of State and Municipal Servants' welfare system, many laws have been approved in the last few years guaranteeing equal benefits for same-sex partners. Examples can be found in the States of São Paulo and Paraná and the municipalities of Recife, Rio de Janeiro, Pelotas, João Pessoa, Belo Horizonte, Porto Alegre, Fortaleza and others.

Even before Federal Supreme Court approval of same sex marriage in 2012, many companies, notably those that are state run, recognized the rights for same-sex couples in their private pension plans, such as Petrobrás, Radiobrás, Banco do Brasil, Caixa Econômica Federal and BNDES.

There have been no legislative advances and/or union agreements in **Nicaragua** that protect labour rights for LGBTI workers any further than generally mentioned under the country's Constitution. The (2014 version of the) Constitution only prohibits discrimination based on birth, nationality, political belief, race, gender, language, religion, opinion, national origin, economic or social condition. Homosexuality has been legal since 2008.

In **Guatemala** there are no specific labour rights for the LGBTI community.

**Honduras** lists no achievements or legislation for LGBTI workers. Nor is there social security for LGBTI people. Chances of finding a job as an openly LGBTI worker are very slim and there is a high degree of stigma and discrimination. LGBTI employees are forced to "remain in the closet", with no visibility.

In Central America, religious fundamentalism is growing, and this seems to be the most important development that affects LGBTI people and their rights. The secularity of several states seems to be at risk. There is a need for more support from Central American governments expressed through more concrete actions against discrimination on the grounds of sexual orientation and gender identity.



Human rights are the right of all workers. When someone is harassed or excluded from the workplace because of her or his sexual orientation or gender identity that constitutes a violation of human rights and labour rights.

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***We hope that in a forthcoming publication, we will be able to include more detailed information regarding the situation of LGBTI people in the United States, Canada and the Caribbean, once we will already count on the full integration of names indicated by these regions to the PSI Inter-Americas LGBTI Regional Committee***

