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WEALTH MANAGEMENT

Unique Challenges in Retirement and Estate Planning Facing LGBTQ+ Persons



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Members of LGBTQ+ communities face some significant challenges regarding retirement and estate planning that are not shared by their heterosexual peers.

Primary takeaways:

LGBTQ+ PERSONS SHOULD CONSIDER:

- » Taking special care in considering and documenting caregiving arrangements based on one's "family of choice".
- » Proactively identifying supportive and non-discriminatory long term care settings to avoid potentially hostile situations or being forced back into the closet.
- » Assuming and affirmatively planning for comparatively higher health care and caregiving costs in senior years.
- » "Bulletproofing" estate plans to more effectively repel challenges from unsupportive or hostile family members.





The misconception: “same sex marriage solved everything”.

In the years since same-sex marriage became legal nationwide, it has commonly been thought that legally permissible same-sex marriage meant that retirement and estate planning for the heterosexual and LGBTQ+ communities are now identical—a misunderstanding with potentially dangerous consequences.

The Supreme Court’s *Obergefell* decision in 2015 marked a historic legal and societal change but it never addressed most planning challenges LGBTQ+ persons and families must overcome. Because of the dramatic difference in the way certain laws and some people treat LGBTQ+ community members, the challenges of this community regarding aging are unique. And contrary to public opinion, legalization of same sex marriage did not eliminate these unique concerns: LGBTQ+ persons still contend with discrimination from anti-LGBTQ+ state laws and privately held social stigma in their planning processes.

WHY THIS MATTERS:

The unique aging challenges of LGBTQ+ communities should be highlighted and more widely understood by the general public. There are solutions to some of these planning challenges if the challenges are recognized.

State-sanctioned legal discrimination: some states continue to enact legislation that results in discrimination against the LGBTQ+ community.

There is no comprehensive federal nondiscrimination law expressly protecting LGBTQ+ persons. Nearly two-thirds of LGBTQ+ Americans report having experienced discrimination in their personal lives.¹ Fewer than half of U.S. states have state nondiscrimination protections for LGBTQ+ persons.² Twenty-three states have enacted religious exemption laws to permit people, churches, non-profits and sometimes for-profit businesses to use their religious beliefs as a defense to discrimination against LGBTQ+ persons or to allow those entities to refuse to serve them entirely.³ In just the last several years, many states have enacted laws to ban gender-affirming health care for transgender persons or to prohibit their participation in sports⁵ (even though transgender women have been allowed to compete in women's categories in the Olympics since 2004⁶ and the NCAA since 2010⁷).



¹ <https://www.hrc.org/resources/equality>

² <https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes/>

³ <https://www.lgbtmap.org/equality-maps/religious-exemption-laws>

⁴ <https://williamsinstitute.law.ucla.edu/publications/bans-trans-youth-health-care/>

⁵ <https://www.nytimes.com/article/transgender-athlete-ban.html>

⁶ Sykes, Heather (April 2006). "Transsexual and Transgender Policies in Sport". *Women in Sport and Physical Activity Journal*. 15 (1): 3-13. doi:10.1123/wspaj.15.1.3.

⁷ https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderStudentAthleteParticipationPolicy.pdf



Privately held biases and social stigma are alive and well.

Encouraging movement towards equality under federal or state laws does not change the privately held biases or social stigma that persist in many communities. Supreme Court cases do not automatically change state laws, nor do such court decisions change long-held discriminatory beliefs.

In many cases, families do not support—and sometimes actively reject—their LGBTQ+ children. LGBTQ+ youth experience homelessness at over twice the rate of peers.⁸ In recent years, anti-LGBTQ+ activity has surged in the United States, with anti-LGBTQ+ incidents more than tripling from 2021 to 2022.⁹ LGBTQ+ people are nine times more likely than non-LGBTQ+ people to be victims of violent hate crimes,¹⁰ and four times more

likely than non-LGBTQ+ people to be victims of violent crime in general.¹¹ Highly publicized mass shootings in LGBTQ+ bars are only the tip of the iceberg. And many incidents of bullying, hate speech, and hate crimes go unreported.¹²

IMPACT:

Many LGBTQ+ seniors have been subject of discrimination and have legitimate, deeply held fears and concerns that are not shared by their heterosexual peers.

⁸ <https://www.chapinhall.org/research/lgbtq-young-adults-experience-homelessness-at-more-than-twice-the-rate-of-peers/>

⁹ <https://acleddata.com/2022/11/23/update-fact-sheet-anti-lgbt-mobilization-in-the-united-states/>

¹⁰ <https://williamsinstitute.law.ucla.edu/publications/hate-crimes-against-lgbt-people/>

¹¹ <https://williamsinstitute.law.ucla.edu/press/ncvs-lgbt-violence-press-release/>

¹² <https://publicintegrity.org/politics/lack-of-trust-in-law-enforcement-hinders-reporting-of-lgbtq-crimes/>

LGBTQ+ caregiving frequently depends upon “family of choice,” rather than family.

LGBTQ+ family structures and support networks can be quite different than their heterosexual counterparts, and laws do not recognize these complex webs of relationships.

In the United States, adult children, spouses, and partners are the primary sources of care and support for older people later in life. But older LGBTQ+ persons are twice as likely to live alone in their senior years, depriving them of primary caregivers and making them extremely vulnerable to social isolation.¹³ LGBTQ+ persons are half as likely to have a partner than the general population.¹⁴ LGBTQ+ seniors are four times less likely to have adult children to help with caregiving.¹⁵ To compensate, many LGBTQ+ individuals create and are much closer to their “family of choice,” a dynamic and constantly evolving collection of friends and supportive family members.¹⁶

IMPACT ON PLANNING CONSIDERATIONS:

Caregiving can be more complicated in these circumstances. No law recognizes the concept of a “family of choice.” LGBTQ+ seniors may be unsure if “family of choice” can provide necessary care.

RECOMMENDED ACTIONS:

- » Communicate with “family of choice” members about these concerns. Convene a “family meeting” to discuss.
- » Implement existing legal solutions that can create legal authority for “family of choice” members to act on behalf of the senior, such as **financial and health care powers of attorney**.
- » Create a “family of choice tree” that shows the “family of choice” members who have been granted health care, financial, and other powers and provide the family tree to health care and financial professionals.
- » Execute HIPAA (Health Insurance Portability and Accountability Act of 1996) waivers so that health care providers can legally communicate with “family of choice” members.
- » Name “family of choice” members as “trusted contacts” to whom financial institutions can report questionable activity.

¹³ <https://www.sageusa.org/your-rights-resources/social-isolation/>

¹⁴ https://www.aarp.org/content/dam/aarp/research/surveys_statistics/life-leisure/2020/maintaining-dignity-lgbt-reformatted.doi.10.26419-2Fres.00217.006.pdf

¹⁵ <https://www.sageusa.org/wp-content/uploads/2018/05/sageusa-the-facts-on-lgbt-aging.pdf>

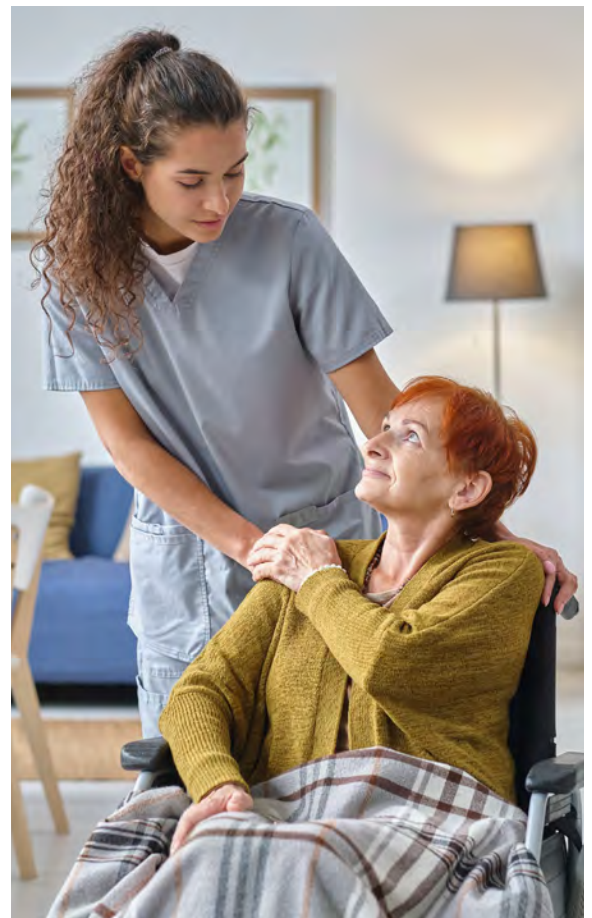
¹⁶ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8363185/>

Supportive long-term care settings require careful consideration and vetting.

LGBTQ+ seniors may have serious difficulty finding a supportive or welcoming living situation as their health deteriorates. Sixty percent of older LGBTQ+ adults are concerned about how they will be treated in long-term care settings, and especially fear having to go back into the closet.¹⁷ Many states lack any legal protections against anti-LGBTQ+ discrimination in public accommodations and housing.¹⁸ Some long-term care facilities may not be welcoming or may even be actively hostile to LGBTQ+ persons and some states legally permit discrimination,¹⁹ especially if the facility claims a religious basis for the discrimination.²⁰

RECOMMENDED ACTIONS:

- » Before there is ever a need, begin researching and interviewing facilities about whether they accept and affirmatively protect LGBTQ+ residents.
- » Interview the administrators and ask to see the institution's written anti-discrimination policies.
- » Create a list of welcoming facilities should the need arise, and update it periodically. Longer term, lobby local and national lawmakers to pass laws to further protect the LGBTQ+ community



¹⁷ <https://news.bloomberglaw.com/social-justice/gay-elders-fear-being-shoved-back-in-closet-in-nursing-care-hunt>

¹⁸ https://www.lgbtmap.org/equality-maps/non_discrimination_laws

¹⁹ https://www.lgbtmap.org/equality-maps/non_discrimination_laws

²⁰ https://www.lgbtmap.org/equality-maps/religious_exemption_laws/

LGBTQ+ health care concerns and costs are more acute and require planning.

LGBTQ+ persons need to take special care in planning for supportive health care as they age and should assume the probability of increased health care and caregiving costs.

Despite existing protections, many LGBTQ+ people face health care discrimination—from harassment by providers to being turned away by hospitals, pharmacists, and doctors. 56% of LGBTQ+ patients and 70% of transgender patients report experiencing discrimination in healthcare settings.²¹

More than a decade of published research indicates that LGBTQ+ seniors consistently report more mental and physical health problems compared to their non-LGBTQ+ counterparts, including greater rates of depression, isolation, cardiovascular disease, and chronic pain.²² LGBTQ+ populations are 68% more likely to smoke than other groups and significantly more likely to consume excessive alcohol²³.

LGBTQ+ populations have more loneliness than their heterosexual peers because of stigma, discrimination, and barriers to care.²⁴ This “epidemic of loneliness” is deadly because it significantly increases a person’s risk of premature death from all causes, a risk that may rival

those of smoking, obesity, and physical inactivity: a 50% increased risk of dementia; a 32% increased risk of stroke; and a 29% risk of heart disease.²⁵



²¹ <https://www.americanprogress.org/article/discrimination-prevents-lgbtq-people-accessing-health-care/>

²² <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8363185/>

²³ <https://www.sageusa.org/wp-content/uploads/2018/05/sageusa-the-facts-on-lgbt-aging.pdf>

²⁴ <https://www.cdc.gov/aging/publications/features/lonely-older-adults.html>

²⁵ <https://www.cdc.gov/aging/publications/features/lonely-older-adults.html>



As of 2019 (the last year for which reliable data is available because of the COVID-19 pandemic), 63% of the approximately 1.2 million Americans who were HIV-positive were gay and bisexual men, with new infections disproportionately affecting Black and Hispanic and Latino gay and bisexual men.²⁶ HIV-positive adults have much more complex health concerns and higher expenses. Studies show that even HIV+ persons in treatment and whose condition is well managed develop diseases commonly associated with the elderly much earlier in life and more severely, shortening average life expectancy by at least 5 years.²⁷

Even though HIV under treatment is not a fatal health condition, most life insurance and long term care insurance companies can deny any coverage to those living with HIV²⁸—and in those rare occasions when coverage is available, the cost for a policy for a person who is HIV+ will typically be **ten times** as much as for someone who is HIV-negative.²⁸ Existing coverage (either individual or group provided) should be maintained in force if at all possible.

RECOMMENDED ACTIONS:

- » Build significantly increased health care costs into retirement planning assumptions.
- » Actively seek out healthcare providers who have express policies protecting LGBTQ+ patients.
- » Work with supportive health care providers.
- » HIV+ persons should make sure existing life insurance and long-term care coverage does not lapse, because it likely cannot be replaced.

²⁶ <https://www.cdc.gov/nchhstp/newsroom/fact-sheets/hiv/HIV-gay-bisexual-men.html>

²⁷ <https://www.healthline.com/health-news/study-finds-hiv-may-speed-up-the-bodys-aging-process>

²⁸ See, for example, <https://www.seattletimes.com/nation-world/many-taking-anti-hiv-drug-cant-get-life-insurance/>, <https://www.policygenius.com/life-insurance/can-you-get-life-insurance-if-you-are-hiv-positive/>, <https://www.nerdwallet.com/article/insurance/hiv-life-insurance>, <https://www.policygenius.com/disability-insurance/disability-insurance-for-people-living-with-hiv/>.

"Bulletproofing" estate planning documents against hostile family members may be necessary.

LGBTQ+ persons may need to take extra care to "bulletproof" estate planning documents from the attacks of family members. In the absence of valid and enforceable estate planning documents, hostile or unsupportive relatives could be deemed a legal heir or default executor, guardian, conservator, or decision-maker.

RECOMMENDED ACTIONS:

- » Create robust estate planning documents, even if legally married and state default laws are currently LGBTQ+ friendly. Laws can be changed or invalidated by courts with little notice, or you could move to another state with fewer protections for LGBTQ+ persons.
- » Consider strong anti-challenge provisions in documents such as "no contest" clauses that severely penalize any legal attack by disgruntled family members. Emphasize with your estate planning attorney the need to be absolutely clear that unsupportive family members are not to be beneficiaries under your plan.
- » When mental capacity could ever be questioned at the time documents or amendments are being drafted, obtain a written medical opinion letter that the patient has adequate capacity to make estate planning decisions. Family members might argue that the LGBTQ+ person had diminished capacity and was being taken advantage of.
- » Carefully review all beneficiary designations and have estate planning documents reviewed and updated on a regular basis assuming they will be challenged.
- » Consider writing a letter to unsupportive family members expressly informing them about your plans, well in advance of incapacity or death and keep a copy of those letters with your planning documents.



LGBTQ+ persons without children may have some advantageous retirement planning options.

LGBTQ+ persons without children or other intended beneficiaries of their assets should consider tax-advantaged estate strategies benefitting charities (such as charitable remainder trusts or charitable gift annuities) that can create attractive income streams for life, possible tax advantages, and support societal causes important to the senior. Similarly, LGBTQ+ persons who are not concerned with leaving assets to beneficiaries may benefit from products that convert retirement assets into high-quality lifetime annuities. These instruments can reduce market exposure risk and guarantee a higher income in retirement years than may be possible with the typical “4% withdrawal rule” many retirees are advised to follow.



ACT SOONER RATHER THAN LATER

Even if you don't think there's a need, it's never too soon to begin planning for yourself and your loved ones. Speak with your estate planning attorney and other advisors about your concerns and how best to address them in your estate and wealth plans. A J.P. Morgan advisor can help you begin these conversations.

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