

COVID-19 and LGBT Rights

**Suzanne B. Goldberg, Herbert and Doris Wechsler Clinical Professor of Law; Founder,
Sexuality & Gender Law Clinic, Columbia Law School**

Even in the best of times, LGBT individuals have legal vulnerabilities in employment, housing, healthcare and other domains resulting from a combination of persistent bias and uneven protection against discrimination.¹ In this time of COVID-19, these vulnerabilities combine to amplify both the legal and health risks that LGBT people face.

This essay focuses on several risks that are particularly linked to being lesbian, gay, bisexual, or transgender, with the recognition that these vulnerabilities are often intensified by discrimination based on race, ethnicity, age, disability, immigration status and other aspects of identity. Topics include: 1) federal withdrawal of antidiscrimination protections; 2) heightened health risks and vulnerabilities seeking healthcare; 3) family recognition and COVID-19; 4) employment discrimination; and 5) populations at special risk.

It also bears noting at the outset that LGBT people already have close and long-lasting experience with HIV/AIDS, which has been described by many as a pandemic² and which brought with it enduring stigma and many forms of discrimination and other harms.³ Even Dr. Anthony

¹ Although this chapter generally refers to LGBT people, some of the organizations referred to use an extended acronym with additional letters, including Q (queer and questioning), I (intersex), 2S (two-spirit), and “+” to indicate these and other related aspects of identity. For more information on some of these terms, see the GLAAD Media Reference Guide, <https://www.glaad.org/reference/lgbtq> and the Glossary of Terms from Egale, the Canada Human Rights Trust, <https://egale.ca/wp-content/uploads/2017/03/Egales-Glossary-of-Terms.pdf>. My thanks to Jon Davidson, Chief Counsel of Freedom for All Americans, who provided some of the sources that were foundational for the preparation of this chapter.

² Centers for Disease Control, The Global HIV/AIDS Pandemic, 2006, <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5531a1.htm>.

³ Jacob Bernstein, For HIV Survivors, A Feeling of Weary Déjà Vu, NY Times, April 9, 2020, <https://www.nytimes.com/2020/04/08/style/coronavirus-hiv.html>.

Fauci, who is a new hero to many Americans for his clarity in press briefings on COVID-19,⁴ is a familiar presence for AIDS activists because of his role in the 1980s and 90s as a leader of the federal government's response to HIV/AIDS.⁵

Federal withdrawal of antidiscrimination protections

A recent move by the Trump administration's Department of Health and Human Services (HHS) to withdraw important legal protections for LGBT people in key areas of health and human services⁶ has made a challenging situation even more precarious. Some quick background may be useful here to put this withdrawal in perspective:

During the Obama administration, HHS adopted a regulation to prohibit discrimination based on sexual orientation, gender identity and other grounds by entities that receive HHS grant funding.⁷ These entities include homeless shelters, child welfare services that support young adults, and services for aging people that provide nutrition, social connection and care, among many others.

The 2016 regulation provides, in essence, that organizations receiving HHS grants may not discriminate in their programs based on "non-merit factors," including sexual orientation and gender identity. The full text sets these requirements out in detail:

It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the

⁴ Aylin Woodward, The life and rise of Dr. Anthony Fauci, the public-health hero who has become the face of America's coronavirus response team, Business Insider, March 27, 2020, <https://www.businessinsider.com/who-is-anthony-fauci-speech-controlled-by-trump-coronavirus-2020-2>.

⁵ Tim Murphy, America, Meet Tony Fauci. HIV/AIDS Activists Have Known Him a Long Time, The Body Pro, March 20, 2020, <https://www.thebodypro.com/article/tony-fauci-md-coronavirus>.

⁶ Notice of Nonenforcement of Health and Human Services Grants Regulation, 84 Fed. Reg. 63809-01 (Nov. 19, 2019) ("Notice of Nonenforcement"), <https://www.hhs.gov/sites/default/files/hhs-grants-regulation-notice-of-nonenforcement.pdf>.

⁷ Health and Human Services is "the largest grant-making agency" in the United States. See HHS Grants, <https://www.hhs.gov/grants/grants/index.html>.

administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.⁸

At the time, HHS explained that it already had a similar nondiscrimination policy for HHS contractors and that its goal was to make clear that the same policy applied to grant recipients.⁹ The agency also required that all HHS grant recipients “must treat as valid the marriages of same-sex couples.”¹⁰

In November 2019, the Trump administration issued a “Notice of Nonenforcement,” saying that it would not enforce these antidiscrimination protections for HHS-funded grant programs.¹¹ At the same time, HHS issued a notice of proposed rulemaking that would eliminate the list of protections and limit other antidiscrimination protections to those set out specifically in federal laws that authorize grant programs.¹²

While HHS maintains that the purpose of both actions was to “eliminat[e] regulatory burden, including burden on the free exercise of religion,”¹³ the LGBTQ organizations that sued HHS in March 2020 to challenge these changes argue that “HHS’s actions give recipients of federal funds a license to discriminate in their provision of government-funded services to millions of

⁸ Health and Human Services Grants Regulation, 81 Fed. Reg. 89393 (Dec. 12, 2016) (“2016 Grants Rule”). This provision was codified at 45 C.F.R. § 75.300(c).

⁹ 81 Fed. Reg. at 45271. *See also* 45 C.F.R. § 75.300(c).

¹⁰ The provision’s full text linked this requirement to the Supreme Court’s decisions regarding marriage equality for same-sex couples: “In accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, all recipients must treat as valid the marriages of same-sex couples.” 81 Fed. Reg. at 45271. *See also* 45 C.F.R. § 75.300(d)

¹¹ *See supra* n.6.

¹² <https://www.hhs.gov/sites/default/files/hhs-grants-regulation-nprm.pdf>

¹³ HHS Press Office, HHS Issues Proposed Rule to Align Grants Regulation with New Legislation, Nondiscrimination Laws, and Supreme Court Decisions, <https://www.hhs.gov/about/news/2019/11/01/hhs-issues-proposed-rule-to-align-grants-regulation.html> (Nov. 1, 2019).

people.”¹⁴ They argue, too, that HHS’s actions “have strongly signaled that service providers need not concern themselves with understanding and preventing LGBTQ discrimination.”¹⁵

The complaint identifies LGBTQ individuals and families who are most at risk as a result of this withdrawal of legal protection:

Among those most likely to be impacted are *LGBTQ children and youth*. Those children and youth are particularly vulnerable when placed *in out-of-home care or while experiencing homelessness*, where they are dependent on grantees for care and services. In addition, *LGBTQ families interacting with the child welfare system* are likely to be subjected to discrimination. Finally, HHS’s actions invite discrimination against vulnerable *LGBTQ older people who depend on critical aging services* to obtain nutrition, address social isolation, and receive holistic care.¹⁶

The organizations argue that HHS’s notice of nonenforcement is arbitrary and capricious in violation of the Administrative Procedure Act and that the government’s only rationale for withdrawing protections – that the earlier regulations did not provide information required to comply with the Regulatory Flexibility Act, which requires special consideration of regulations’ impact on small businesses – is factually and legally incorrect.¹⁷

In its description of the lawsuit, Lambda Legal explains that the withdrawal of protections creates specific risks related directly to COVID-19, including these:

- Students experiencing homelessness are susceptible to discrimination as they seek shelter through HHS’ Runaway and Homeless Program, at a time when colleges and universities have shut down housing to help halt the spread of COVID-19.
- LGBTQ older adults are now vulnerable to providers that subject them to harassment or refuse to offer services, such as home delivered meals, on the basis of their sexual

¹⁴ See *Family Equality, et al. v. Azar*, Case 1:20-cv-2403 para. 6 (S.D.N.Y., filed Mar. 19, 2020). For a copy of the complaint, see https://www.lambdalegal.org/in-court/legal-docs/family_ny_20200319_complaint

¹⁵ *Id.* at para. 86.

¹⁶ *Id.* at para. 6 (emphasis added).

¹⁷ *Id.* at para. 7.

orientation or gender identity, at a time when senior centers are shutting down in major metropolitan centers to help combat the spread of COVID-19.¹⁸

There is also, as noted above, a harmful signaling effect from the withdrawal of antidiscrimination protections.¹⁹ This effect reverberates not only among grantees, who are newly freed to discriminate but also among LGBT people who may be reluctant to seek necessary help from a federal government that has repeatedly expressed hostility through legal action and by other means.²⁰

Heightened health risks and vulnerabilities in seeking healthcare

Shortly after COVID-19's dangers became clear in the United States, LGBTQ health organizations began to report on the heightened risks faced by LGBTQ people. Notably, these risks are not tied to medical vulnerabilities associated with sexual orientation or gender identity as such, but rather with stigma and discrimination often experienced by people who are LGBTQ that in turn affect health behaviors and access to medical care.²¹

Most basically, as one report explained, LGBTQ Americans are more likely than the general population to live in poverty and lack access to adequate medical care, paid medical leave, and basic necessities during the pandemic.²² These findings were reiterated in a study of

¹⁸ See *Family Equality v. Azar*, <https://www.lambdalegal.org/in-court/cases/family-equality-v-azar>. For more on the experience of transgender students returning home from college, see, e.g., <https://www.buzzfeednews.com/article/mollyhensleyclancy/coronavirus-college-closures-trans-students?ref=hpsplash&origin=spl>

¹⁹ See, e.g., *supra* n.15

²⁰ See, e.g., Lola Fadulu, *Trump's Rollback of Transgender Rights Extends through Entire Government*, N.Y. Times, Dec. 6, 2019, <https://www.nytimes.com/2019/12/06/us/politics/trump-transgender-rights.html>; Michael D. Shear and Charlie Savage, *In One Day, Trump Lands Three Punches Against Gay Rights*, July 27, 2017, <https://www.nytimes.com/2017/07/27/us/politics/white-house-lgbt-rights-military-civil-rights-act.html>.

²¹ For discussion of the negative physical and mental health consequences of stigma on LGBT and other populations, see, e.g., Karen I. Fredriksen-Goldsen, et. all, *The Cascading Effects of Marginalization and Pathways of Resilience in Attaining Good Health Among LGBT Older Adults*, 57 *The Gerontologist* 572 (Feb. 2017), https://academic.oup.com/gerontologist/article/57/suppl_1/S72/2904646; Mark L. Hatzenbuehler et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 *AM. J. PUB. HEALTH* 813, 813, 816 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3682466/>.

²² Human Rights Campaign Foundation, *The Lives and Livelihood of Many in the LGBT Community are at Risk Amidst the COVID-19 Crisis*, https://assets2.hrc.org/files/assets/resources/COVID19-IssueBrief-032020-FINAL.pdf?_ga=2.30688191.1062621009.1585758332-1613644810.1567783041.

Canadian LGBTQI2S individuals, which reported “greater current and expected impacts of COVID-19 on their physical and mental health, and overall quality of life” than in the general Canadian population.²³

To help raise awareness, dozens of U.S. organizations issued an open letter about the coronavirus and LGBTQ+ communities outlining three factors that create increased vulnerability related to COVID-19:²⁴

1. The LGBTQ+ population uses tobacco at rates that are 50% higher than the general population. COVID-19 is a respiratory illness that has proven particularly harmful to smokers.
2. The LGBTQ+ population has higher rates of HIV and cancer, which means a greater number of us may have compromised immune systems, leaving us more vulnerable to COVID-19 infections.
3. LGBTQ+ people continue to experience discrimination, unwelcoming attitudes, and lack of understanding from providers and staff in many health care settings, and as a result, many are reluctant to seek medical care except in situations that feel urgent – and perhaps not even then.

LGBTQ populations also face additional risks related to conditions that are often associated with complications from COVID-19. An analysis of data from the 2018 Behavioral Risk Factor Surveillance System, which collects state-level data about U.S. residents regarding health-related risk behaviors, chronic health conditions, and use of preventive services,²⁵ showed, for example, that one in five LGBTQ adults aged 50 and above has diabetes,²⁶ a factor that raises the risk of complications for individuals diagnosed with COVID-19.²⁷

²³ Egale and Innovative Research Group, Impact of COVID-19, Canada’s LGBTQI2S Community in Focus, April 6, 2020, <https://egale.ca/egale-in-action/covid19-impact-report/>.

²⁴ LGBT Cancer Network, Coronavirus Information, <https://cancer-network.org/coronavirus-2019-lgbtq-info/>.

²⁵ For more information, see Centers for Disease Control and Prevention, on the Behavioral Risk Factor Surveillance System, <https://www.cdc.gov/brfss/index.html>.

²⁶ See *supra* n.22 at 5.

²⁷ Centers for Disease Control and Prevention, Groups at Higher Risk for Severe Illness, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

A brief from The Fenway Institute also identifies special concerns for older LGBT adults who “already experience higher rates of social isolation than straight and cisgender age peers,” adding that the increase in isolation as a result of social distancing can “exacerbate underlying mental health issues such as suicidal ideation and substance use.”²⁸

That report and others recognize, too, that while the interaction between COVID-19 and HIV is not yet known, people with HIV may be at heightened risk from other conditions, including cardiovascular and chronic lung disease and immune suppression.²⁹

In light of these data, and in the midst of the COVID-19 pandemic, the absence of standardized protections against discrimination by healthcare providers is all the more disturbing. While a 2016 report from HHS reinforced the importance of nondiscrimination rules in enabling LGBTQ people to access healthcare,³⁰ federal legal protections against healthcare discrimination based on sexual orientation and gender identity have been substantially diminished, as discussed above. Adding to these challenges, state-based protections are

²⁸ The Fenway Institute, Coronavirus, COVID-19, and Considerations for People Living with HIV and LGBTQIA+ People 7 (footnotes and citations omitted) (March 25, 2020) https://fenwayhealth.org/wp-content/uploads/C19MC-9_COVID-19and-LGBTQIA-and-People-Living-with-HIV-Brief_final2_links.pdf.

²⁹ California Office of AIDS, COVID-19, Information for People Living with HIV, https://www.cdph.ca.gov/Programs/CID/DOA/CDPH%20Document%20Library/COVID19forHIVPoz_ADA.pdf. See also Centers for Disease Control and Prevention, What to Know about COVID-19 and HIV, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/hiv.html>; Scott Schoettes, The Current Pandemic Underscores That We Still Haven’t Resolved the Last One, https://www.lambdalegal.org/blog/20200327_coronavirus-pandemic-hiv.

³⁰ Health and Human Services LGBT Policy Coordinating Committee, *Advancing LGBT Health and Well-Being* 8 (2016) (<https://www.hhs.gov/sites/default/files/2016-report-with-cover.pdf> (observing that “[r]educing barriers to discrimination and helping more LGBT people get access to care and coverage is ultimately only a first step” toward strengthening health outcomes for LGBT people).

inconsistent across the United States,³¹ and discrimination by healthcare providers remains a significant challenge for LGBT individuals and families.³²

Family recognition and COVID-19

Although same-sex couples have had the right to marry anywhere in the United States since the U.S. Supreme Court decided *Obergefell v. Hodges* in 2015,³³ discrimination against same-sex couples – both married and unmarried – continues to be an issue. With some frequency, employers and service-providers have claimed that faith-based exemptions to antidiscrimination laws entitle them to refuse goods or services to same-sex couples.³⁴ Some states have also persisted in refusing to recognize the marriages of same-sex couples, offering an assortment of other reasons when their actions have been challenged in court.³⁵

The special concern around COVID-19 involves situations where one member of a couple may be hospitalized and the other may be unable to obtain information about their partner’s health. This is a particular risk for unmarried same-sex partners. While unmarried different-sex partners are often presumed by hospital personnel to be married and therefore entitled to personal health information about their spouse, the same presumption may not be as likely to be made about same-sex partners.³⁶

³¹ See Movement Advancement Project, Snapshot: LGBT Equality By State, <https://www.lgbtmap.org/equality-maps>. For more specific information about healthcare-related protections, select the “choose an issue” tab and choose among healthcare options there.

³² See Human Rights Watch, “You Don’t Want Second Best” Anti-LGBT Discrimination in US Healthcare (July 23, 2018), <https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care>.

³³ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³⁴ See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); see also Human Rights Watch, “All We Want Is Equality”: Religious Exemptions and Discrimination Against LGBT People in the United States (2018), <https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people>.

³⁵ See, e.g., Mark Joseph Stern, Alaska’s Discrimination Against a Gay Couple Shows the Continued Threats to Marriage Equality, Nov. 23, 2019, <https://slate.com/news-and-politics/2019/11/alaska-marriage-equality-supreme-court.html>; Mark Joseph Stern, Marriage Equality May Soon Be in Peril, July 5, 2017, <https://slate.com/news-and-politics/2017/07/how-the-supreme-court-could-overturn-obergefell-v-hodges.html>.

³⁶ Tara Parker-Pope, Kept from a Dying Partner’s Bedside, N.Y. Times, May 18, 2009, <https://www.nytimes.com/2009/05/19/health/19well.html>. Parker-Pope’s article describes the experience of Janice Langbehn, a woman who was barred from seeing her partner in the hospital and from bringing the couple’s children to see their other mother. In the lawsuit challenging the hospital’s action, Langbehn alleged that a social worker at the hospital told her that she was in an “antigay city and state” and that she would need a health care proxy to get information.” *Id.* For more on the lawsuit, which was ultimately dismissed, see Lambda Legal,

For this reason, LGBT advocacy organizations have offered additional resources to support same-sex couples in planning to secure recognition for their relationship should either partner be hospitalized with complications from COVID-19.³⁷ These resources also provide guidance for couples who are parenting a child together but only one of the two has a legally recognized relationship with the child. This is not uncommon in same-sex couples raising children together, where the “non-legal” parent may not be accorded legal recognition of their parental rights without taking the additional step of obtaining a second-parent adoption.³⁸

At least one advocacy organization is also offering analysis of COVID-19 related legislation that includes attention to the concerns of LGBT families.³⁹

Employment discrimination

The combination of bias toward LGBT people and limited antidiscrimination protections means that LGBT people are also more vulnerable to joblessness in the wake of the dramatic economic downturn as a result of COVID-19’s spread. At least one report has indicated that LGBTQ people “are more likely to work in jobs in highly affected industries, often with more exposure and/or higher economic sensitivity to the COVID-19 crisis.”⁴⁰ Although there have been substantial advances in equality of LGBT people in the past decade, legal protections remain uneven, with many LGBT people living in jurisdictions that do not expressly prohibit discrimination based on sexual orientation or gender identity.⁴¹

Populations at special risk

Langbehn v. Jackson Memorial Hospital,” <https://www.lambdalegal.org/in-court/cases/langbehn-v-jackson-memorial>.

³⁷ See, e.g., National Center for Lesbian Rights, FAQ: Documents and Protections for LGBTQ People and Their Families During COVID-19 Crisis, <http://www.nclrights.org/legal-help-resources/resource/faq-documents-and-protections-for-lgbtq-people-and-their-families-during-covid-19-crisis/>

³⁸ National Center for Lesbian Rights, Family & Relationship Resources, <http://www.nclrights.org/our-work/family-relationships/family-relationships-resources/#parentingnational>.

³⁹ Family Equality, COVID-19 Response Legislation Overview, <https://www.familyequality.org/covid-legislation/>.

⁴⁰ See Human Rights Campaign Foundation Report at 2, *supra* n. 22

⁴¹ Movement Advancement Project, Nondiscrimination Laws, https://www.lgbtmap.org/equality-maps/non_discrimination_laws. See also Sejal Singh and Laura E. Durso, Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways, Center for American Progress, May 2, 2017, <https://www.americanprogress.org/issues/lgbtq-rights/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>.

LGBT youth and elders are among the most vulnerable because of heightened risks related to homelessness, poverty and social isolation, as described at length in the lawsuit that challenges the federal government’s decision not to enforce antidiscrimination protections that cover HHS grant recipients.⁴² Each of these risks, as discussed above, may be exacerbated by the coronavirus pandemic.

Transgender individuals are also among the most vulnerable within LGBT communities to discrimination, violence and other harms. The Transgender Legal Defense and Education Fund has released a special “Know Your Rights Guide for Transgender People Navigating COVID-19” that addresses healthcare needs of transgender individuals, including information on delays to gender-affirming surgery and legal name-changes in this time, along with information about many other issues and concerns.⁴³

LGBTQ immigrants in the United States who may be in detention or needing legal assistance related to their immigration status may also find useful resources from Immigration Equality,⁴⁴ the leading advocacy organization for LGBTQ immigrants in the United States.

Conclusion

Managing the challenges presented by COVID-19 is daunting for nearly everyone in the United States and elsewhere. For many LGBT people in the U.S., the backdrop of stigma and discrimination can make access to healthcare, social services and basic legal protections especially difficult.

At the same time, LGBT communities have developed extraordinary resilience over decades of responding to the pandemic of HIV/AIDS, pushing back against stigma, and making claims for equality and basic human dignity. Legal protections, community-based resources and social support networks exist in 2020 in a way we could not have imagined when our communities first confronted AIDS nearly 40 years ago. Especially in this difficult time, this difficult history and its hard-earned lessons may offer both hope and guidance as we navigate the complex path that lies ahead.

⁴² See Family Equality Council et al. v. Azar, *supra* n. 14

⁴³ Transgender Legal Defense and Education Fund, <https://www.lgbtmap.org/equality-maps/non-discrimination-laws>.

⁴⁴ Immigration Equality, COVID-19 Alert, Information and Updates, <https://www.immigrationequality.org/>.