



# A LEGAL GUIDE for people aging with HIV

EXCERPTED AND CONDENSED FROM THE CENTER FOR HIV LAW AND POLICY

EDITOR'S NOTE: The following is condensed from Section 1 of *Aging & HIV: An Introduction to Legal Issues Facing People Living and Aging with HIV*, from the Center for HIV Law and Policy (CHLP), a national abolitionist legal and policy organization.

*"This country's social services and healthcare infrastructure are not prepared to address the needs of the rapidly expanding population of people living and aging with HIV. This primer is focused on not just identifying the legal barriers to aging with dignity and self-determination but identifying avenues for self-advocacy and recommending priority areas for policy work. These excerpts highlight some of the federal antidiscrimination protections that are in place to protect people living and aging with HIV and explain how to access those services and remedies."*

—Kae Greenberg, CHLP STAFF ATTORNEY AND PUBLICATION AUTHOR

The focus of the legal primer *Aging & HIV: An Introduction to Legal Issues Facing People Living and Aging with HIV* is to help people living and aging with HIV identify and overcome legal barriers to aging with dignity. It should serve as a tool to explain existing support systems and as a guide for advocates to identify where policies could be changed or created to provide increased support. ... The primer is geared toward long-term survivors of HIV (people who have been living with HIV for a decade or longer) who are now reaching or are over the age of 50 and are preparing to age with HIV, but also contains information applicable for Dandelions, or lifetime survivors.

#### There are three main sections of the primer:

1. Federal laws such as the Americans with Disabilities Act that protect people with HIV from discrimination and the agencies that can assist with remedying complaints.
2. The criminalization of people living with HIV and the collateral consequences of criminal legal system involvement and criminal records on them.
3. The barriers to and remedies for protecting the power of people living with HIV to make decisions about their health and medical care.

#### Excerpts from Section 1: Federal Anti-Discrimination Laws and Remedies

[C]haracteristics [such as]—age, living with HIV, race, sex, etc.—are special categories known as “protected classes” that are subject to one or more federal laws that protect people from discrimination. ... Discrimination does not necessarily require negative or unfair treatment; it can be, instead, “different treatment for similarly situated parties, especially when no legitimate reason appears to exist.” ... [I]f one can show that they are a member of a “protected class,” they can use these federal statutes for protection or redress and potentially pursue compensation for damages suffered.

Not every federal law protects every identity category from discrimination ... some laws, such as the Fair Housing Act, provide protection only within a specific area. There are also typically exceptions regarding when and to what extent these protections are applicable. ...

Not every component of a person's identity that causes differential or negative treatment is

protected under anti-discrimination law. And not all manifestations of bias, even in one of these categories, may be covered by anti-discrimination law. For example, in most cases it is perfectly acceptable to deny someone a job or housing based on their having a criminal record regardless of what kind of record it is. Demonstrating an explicit bias against people with a criminal record (as long as it is not being used as a proxy for discrimination against people based on race [a blanket ban]) is permitted under various federal anti-discrimination laws.

Regardless of whether a form of discrimination or bias is covered by anti-discrimination laws, many people living and aging with HIV face discrimination because of different aspects of their identities and lives, and those experiences have an impact on their ability to access services as they age. Nearly half of LGBTQ+ residents in long-term care facilities have been mistreated in ways ranging from verbal harassment to expulsion based on their real or perceived sexual orientation and/or gender identity. ... As a result [of potentially a lifetime of battling stigma], they are more likely to have lower incomes and when faced with discrimination, lack the resources to pursue remedies. ...

It is important to note that anti-discrimination laws are almost entirely unresponsive to the ways in which people living and aging with HIV may be targeted due to their intersectional identities. The laws can only address the harms caused by differential treatment based on each characteristic separately. In 1989, law professor Kimberlé Crenshaw coined the term “intersectionality” to describe Black women's multilayered experiences of institutional oppression (manifested in part as discrimination). Since then, the term has become a framework for understanding how a person's identities (race, gender, sexuality, etc.) compound the totality of harm that individuals and communities experience every day. ...

#### What federal protections exist for people living and aging with HIV?

The federal laws outlined here are not all of the federal laws that protect people living and aging with HIV from discrimination, but they represent some of the important ones.

#### The Americans with Disabilities Act (ADA)

The protections of the ADA preempt, or take precedence over, any state law that is in conflict with them, as written, or as applied. Since the ADA's passage in 1990, and through its subsequent updates and amendments, Congress has directed the courts to take an expansive and inclusive view of disability,

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defined as any “physical or mental impairment that substantially limits one or more major life activities” or with a history or perception of such impairment. HIV is a covered disability protected by the ADA, regardless of a person’s viral load or of the impact that living with HIV currently has on their ability to navigate their day-to-day life. ...

The ADA consists of five sections. ... The titles that are most applicable to the issues that people living and aging with HIV may face are Titles I–III.

### **The Americans with Disabilities Act Title I: Employment**

Title I of the ADA ... prohibits discrimination against individuals who can “perform the essential functions of the job, either with or without reasonable accommodation” unless they pose a significant risk to the health or safety of themselves or others that cannot be eliminated by reasonable accommodations. This risk assessment “must be based on medical or other objective evidence,” and even a good faith belief in the existence of such risk does not allow employers to discriminate in the absence of such evidence. ... “[t] may not be based on generalizations or stereotypes about the effects of a particular disability.” Recent case law involving employers who made employment decisions based on the purported risk posed by employing a person living with HIV shows that courts are unlikely to accept an argument that a person living with HIV poses a risk to others if employed.

[Under Title I, a covered individual can request a reasonable accommodation.] Reasonable accommodation can be a physical change to one’s workspace, a change in hours, a change in responsibilities, or even the ability to take time off under the Family Medical Act Leave without a fixed return date. But just because it is determined that an employee or a prospective employee can perform a job activity with the use of a reasonable accommodation does not automatically entitle the individual to one. ...

### **The Americans with Disabilities Act Title II: Public Entities**

Title II of the ADA prohibits government entities from engaging in discriminatory practices either directly, by explicitly excluding or denying someone’s access to programs, or indirectly, by failing to prevent or ameliorate such discrimination. Examples of covered programs and activities include attending public schools, accessing public recreation facilities and receiving healthcare and social services. ... If a government agency or program claims that the discrimination (differential treatment) is justified in the case of a person living with HIV, there is then an inquiry into whether the person is “otherwise qualified” to access the service. ... Essentially, the ADA instructs officials to do an assessment to determine if someone with a communicable disease is actually a direct threat and if such a threat could be ameliorated through reasonable modifications to policies, practices, or procedures.

### **The Americans with Disabilities Act Title III: Public Accommodations**

Public accommodations such as nursing homes are expressly covered in the Title III regulation as

social service center establishments. Other residential facilities, such as congregate care facilities, retirement communities, and independent living centers, are also covered by Title III if they provide significant social services such that they can be considered social service center establishments. ... If a facility meets the criteria of a social services center, the facility must ensure that people living with disabilities are treated equally and that they have equal opportunity to benefit from safe, inclusive communities.

### **The Older Americans Act**

The Older Americans Act (OAA) was first passed in 1965. ... Over the decades since its initial passing it has been reauthorized and updated many times in an effort to improve its services and supports to allow people to live at home as they age. ... [In the 2023 Rule people living and aging with HIV were] mentioned as [a group] that [has] the “greatest social need.” Services funded through Title III of the OAA are supposed to prioritize aiding aging people, and their caregivers, identified as having the greatest social need. This “[a]ffects all levels of Older Americans Act policy, funding, planning, and service delivery.” This provision should translate into the needs of LGBTQ+ people and people living and aging with HIV being explicitly incorporated into State Plans on Aging, or blueprints for state services, expanding resources for and support to people living and aging with HIV.

### **The Age Discrimination in Employment Act of 1967**

The Age Discrimination in Employment Act (ADEA) makes it unlawful for employers to discriminate against any individual employee over the age of 40. ... “[T]he ADEA requires employers to consider individual ability, rather than assumptions about age, in making an employment decision.”

### **The Civil Rights Act of 1964**

The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex or national origin.

In the 2020 case of *Bostock v. Clayton County* the plaintiff, a gay man, sued Clayton County, Georgia, claiming that he had been fired from his county job for being gay. He claimed that under Title VII of the Civil Rights Act, protections against discrimination on the basis of sex, the firing was unlawful. The U.S. Supreme Court agreed, ruling that firing him for being gay amounted to discrimination under Title VII, that he had been fired because of his sex. Thus, the Civil Rights Act of 1964 could be used to combat discrimination that LGBTQ+ people living and aging with HIV face in employment if it is due to their LGBTQ+ identity.

### **The Fair Housing Act**

It applies to all “housing-related transactions” which include: renting, buying, selling, applying for a loan, appraisal services, and homeowners insurance. It “prohibits discrimination by direct providers of housing, such as landlords and real estate companies as well as other entities, such as municipalities, banks



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or other lending institutions and homeowners insurance companies.” Discrimination is broadly defined by the FHA to include all of the kinds of conduct it was passed to combat, such as trying to steer a member of a protected class away from a particular neighborhood.

As of the 1988 amendments, there are seven “protected classes” under the Fair Housing Act: race, color, national origin, religion, sex, disability, and families with children.

### Section 1557 of the Affordable Care Act

The purpose of Section 1557 of the Affordable Care Act (ACA, aka “Obamacare”) is to improve access to healthcare, primarily by reducing barriers and through strengthening protections against discrimination on the basis of race, color, national origin, sex, age, or disability.

Important interpretations and expansions under the Biden rule [interpreting this section] are:

- Healthcare providers and suppliers who receive Medicare Part B payments are subject to the anti-discrimination requirements of Section 1557. ...
- Interprets the definition of “sex” in Section 1557 to include protecting people from discrimination on the basis of gender identity and sexual orientation. ...
- Provides protections on the basis of sex characteristics (including intersex traits), and pregnancy-related conditions, including termination. ...
- Forbids benefit designs that do not provide health insurance coverage for qualified individuals with disabilities (which includes people living with HIV) in integrated (“Olmstead”) settings. What this means, practically speaking, is that covered providers (currently including covered

insurance providers) cannot treat people living and aging with HIV differently from other older people with insurance on the basis of their HIV status, regardless of the cost of their care.

Since HIV is a covered disability under the ADA, as amended in 2008, protections from discrimination based on HIV status are integrated directly into Section 1557 through its explicit incorporation of the definition of disability used by the ADA. But the category of “covered provider,” or who is subject to the nondiscrimination clauses of Section 1557, depends upon the interpretation by different presidential administrations.

### A looming threat: The Religious Freedom Restoration Act

**T**he Religious Freedom Restoration Act (RFRA) as it has been interpreted and applied by the courts, including the Supreme Court, lurks on the horizon as a threat to many of these protections. RFRA was passed ... in an effort to shield ... a person’s sincerely held religious beliefs and practices from even inadvertent infringement by the government. [However] it is currently being wielded by the religious Right to challenge laws with which they do not agree. Challenges have ... been raised to state laws that protect against discrimination in public accommodations for lesbian and gay people, [the contraceptive mandate under the ACA and preventative care—including (HIV) PrEP under the ACA].

What is troubling about these attacks is that even if the Supreme Court does address the RFRA claim, justices have indicated strongly that they believe that RFRA should give people the right to discriminate on the basis of religion. ... As of 2011, 14% of all hospitals in the U.S. were religiously affiliated—meaning 17% of all hospital beds nationally could be impacted by licenses to discriminate under RFRA. **FA**

For CHLP’s 76-page guide, which includes footnotes, **GO TO [bit.ly/aging-and-law-primer](https://bit.ly/aging-and-law-primer).**