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Unequal treatment in tax law still a hurdle for LGBTQ couples

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LGBTQ couples still face unequal treatment in tax law years after same-sex marriage became legal

Despite the fact that the U.S. Supreme Court **declared same-sex marriage legal** in 2013, unequal treatment in tax law remains a significant burden for many LGBTQ couples.

The first main challenge for LGBTQ couples is that the tax code was written — whether intentionally or not — to *exclude* same-sex couples. “Because the tax code is not gender-neutral, it still uses a lot of *he, she, husband, wife,*” says **Janis Cowhey**, Modern Family & LGBT Services Group Leader at **Marcum**, a national accounting and advisory services firm.

Resolving gaps in tax law

This exclusionary language in the tax code manifests itself in many ways for LGBTQ families, including:

Discrimination in tax law around children — The regulations governing taxes result in disparate treatment between male and female same-sex couples; for example, it discriminates against male same-sex couples who want to have a child via a surrogate because tax law does not allow them to deduct medical expenses related to the pregnancy.

The Internal Revenue Code only allows deductions for pregnancy-related medical expenses for “costs that were incurred for something that happened to you, in your body, or a dependent of yours,” says Cowhey. Because the surrogate is not technically a dependent of the couple, they cannot deduct any

of the medical costs. On the other hand, if one of the partners in a female same-sex couple carries the baby, they *are* allowed to deduct medical expenses.

Another level of unequal treatment occurs when a couple decides to adopt children before marriage. The LGBTQ-married couple cannot claim the \$14,440 adoption credit if a child is from a previous relationship of one of the partners. To get around this, Cowhey advises that the non-biological parent adopt the child the month *before* the couple marries in order to take advantage of the credit.

Differences in treatment for employer health insurance — Another disparity occurs when a dependent partner within an unmarried couple is added to employer-offered health insurance, Cowhey says. Some employers backed-off on extending health insurance to unmarried dependent partners after same-sex couples legally were able to marry. This option was initially used for same-sex couples who could not legally marry, but now, it is a penalty for unmarried couples in general, no matter if they identify as LGBTQ or not.



Janis Cowhey of Marcum

Problems with the tax code's gender language — There are many hurdles for LGBTQ families that are caused by the tax code's gender language. That however, may soon change. One piece of legislation, the PRIDE Act, was passed in the U.S. House of Representatives in July 2019, and is now under consideration in the U.S. Senate. The Act, among other things, endeavors to make the tax code gender neutral.

Among this ways the new legislation could ease these burdens include a provision for same-sex couples who were married at the state level and filing

state taxes as a married couple, but have had to file as single individuals at the federal level because the federal government did not recognize their same-sex marriage. Now that the federal government began recognizing same-sex unions in 2013, the PRIDE Act allows for these couples to amend their tax returns for the years prior to 2013 in which they were married.

Unfortunately, the PRIDE Act in its current form would not solve the unequal treatment between female and male same-sex couples when it comes to adoption and deducting medical expenses.

Creating a safe space for LGBTQ couples to discuss taxes

A further hardship for many LGBTQ families may be the lack of tax professionals who are well-versed in some of the tax issues that impact LGBTQ filers specifically. The website thegaycpa.com states that it wants LGBTQ clients to “have the ability to be out in their tax lives,” a sentiment shared by Cowhey.

In fact, ensuring that LGBTQ feel 100% comfortable being themselves when working with a tax professional and providing psychological safety are two of the most critical elements of her work with LGBTQ couples, Cowhey explains.

Opening up your financial life to a near-stranger is anxiety-producing for anyone, but add in the complex scenarios that many LGBTQ couples face combined with unequal treatment in the tax law, the stress in working with an accountant can be difficult. It is essential for tax advisors to understand this challenge because, in many areas of LGBTQ individual’s lives, there are real consequences for taxpayers being fully out with their LGBTQ identity.

Cowhey recalls how one of her clients cried after she told the client: “Good news. Your tax return this year is pretty simple. You are just like any other married couple.”

The client responded: “I grew up in the farmlands of Idaho. I never thought I could come out of the closet ever, never thought I’d meet somebody and then marry,” he said. “You’ve just told me I’m like every other married couple — that norm is such a sense of relief.”