

LEGAL REPORT

PUBLISHED BY THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SUMMER 1998

The ADA, HIV, and Risk Management Strategies

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If the statistical incidence of HIV/AIDS and the mortality rates among persons aged 25-44 (the age group comprising half the workforce) failed to convince employers that HIV is a serious workplace issue, then the Supreme Court's definitive holding in *Bragdon v. Abbott* (concluding that asymptomatic HIV is a disability under the Americans With Disabilities Act) should. As but one of the Americans With Disabilities Act's ("ADA's") many ambiguities becomes clearer, businesses continue to encounter daily personnel decisions fraught with legal repercussions in managing employees with HIV/AIDS and other disabilities. Most employers realize that firing an employee for having AIDS violates the law. Today, however, reassigning, accommodating, reducing or restructuring benefits, returning employees to work, and still dealing with the fears and concerns of other employees each raise legal and moral issues that chal-

lenge businesses affected by and employees infected with HIV/AIDS.

Recent publicity on protease inhibitors and other medical advances prolonging the lives and productivity of many AIDS patients had led many businesses to question whether the epidemic still warrants the same attention as a workplace issue. These promising developments in some respects complicate the management challenge. First, AIDS remains among the top killers of Americans between the ages of 25 and 44 – the same age group that comprises over half the workforce. The U.S. Centers for Disease Control and Prevention (CDC) estimates that nearly 800,000 Americans are HIV-positive. While death rates decline, the CDC recently confirmed that HIV-infection rates remain high and virtually unchanged. Employers are confronting a new phenomenon from improved AIDS treatments: employees returning to work (either to their former employer

or a new employer) from long-term disability status. Medical advances therefore underscore the challenge to address both ongoing accommodations of disabled employees and acceptance of those employees by the workforce.

Second, the Supreme Court's resolution of one of many conflicts among federal courts in ADA cases illustrates the steep and continuing "learning curve" (suffered by courts, lawyers, employers, unions and employees) in understanding the meaning of just one of many elements of the ADA. Inconsistent interpretations of ADA and the ensuing frustration to employers and employees alike promise to continue.

In the meantime, the remnants of attitudes from the 1980s and early 1990s – fear, panic, and uninformed reactions to a still deadly disease – linger, and promise to emerge with severe and unnecessary consequences if businesses now write-off

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THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

HIV/AIDS as a workplace issue. The momentum of better-informed public attitudes toward the disease is a great ally to employers and employees alike, but that momentum is too fragile to take for granted. Ignoring the issue at this time turns HIV/AIDS (and other disability challenges) into a ticking time bomb for management.

The ADA Applies to Individual With HIV/AIDS

Unlike other anti-discrimination laws, the issue of whether an individual is even protected under the law is a frequently litigated issue under ADA. ADA defines "disability" as (1) a physical or mental impairment that (2) substantially limits (3) a major life activity. This tortured statutory definition has produced widely varying – and often inconsistent – conclusions from courts.

Prior to the Supreme Court's June 1998 decision in *Bragdon*, courts were split over whether asymptomatic HIV met the definition of "disability." Even before *Bragdon*, however, relying only on decisions declining to find "disabled" status and then permitting discrimination or refusing to accommodate an employee with HIV was an extremely risky course of conduct for management, and exposed management with few defenses to claims by employees later held to be protected under the ADA or similar state or local laws.

The Supreme Court decided in *Bragdon* (a public accommodations case involving a dentist's refusal to perform procedures on an HIV-positive patient in his office) that HIV is indeed a "physical impairment." Labeling *asymptomatic* HIV as an optimistic "misnomer," Justice Kennedy traced the virus' immediate effect on the body's immune response system from the moment of infection.

The lower courts in *Bragdon* focused on only one "major life

activity:" reproduction. Limited by the record from the lower courts, some Supreme Court Justices appeared to express frustration in oral arguments that limitations to other "major life activities," such as the ability to care for one's self (voluntarily or, perhaps, *involuntarily* in resisting diseases), could not be addressed. "Given the pervasive, and invariably fatal, course of the disease," the Court commented, "its effect on major life activities of many sorts might have been relevant to our inquiry." The Court then held that reproduction alone was a major life activity, and rejected arguments that "major life activities" only covered public, economic or daily routine aspects of an individual's life. Moreover, "substantial limitations," according to the the Court, are not tantamount to "utter inabilities" or even "insurmountable" difficulties. This portion of the Court's opinion therefore creates the substantial probability of ADA protection far broader than many courts had previously been willing to grant.

Although the Court declined to hold whether HIV at any stage is a disability *per se* (keeping alive in some respects the ADA's case-by-case approach on determining "disability" status), it is difficult to imagine *any* instances in the aftermath of *Bragdon* in which a person living with HIV would *not* be "disabled" and protected under ADA.

Employers tempted to panic over *Bragdon's* strong potential for more widespread ADA coverage (perhaps counteracting a prior trend toward limiting ADA claims) should still note that in spite of who may be covered under ADA, the employer has but three basic categories of duties: (1) non-discrimination against qualified persons with disabilities (or persons regarded as being disabled, with a record of a disability, or associated with disabled persons) in employment and public accommodations; (2) reasonable accommodations

of qualified disabled persons to enable the individual to perform his or her job; and (3) restrictions on obtaining and using individuals' medical information.

Avoid Discrimination

Disability discrimination occurs when a person's disability is a substantial factor underlying adverse employment actions. Refusing to hire, segregating, denying benefits, reassigning, or discharging a person on the basis of that person's HIV-infection (or a decision-maker's perception that the person is HIV-positive) is likely to be held unlawful. In addition, the ADA prohibits discrimination on the basis of a person's use of medication, such as protease inhibitors, to treat the disability (unless the use or side-effect of the medication renders the individual not qualified or able to perform the essential functions of the job).

Emphasize Present Ability To Do The Job

The ADA allows employers to impose job restrictions based on *bona fide* occupational qualifications. The test for treating individuals differently on the basis of *bona fide* occupational qualifications is a purely objective one. A subjective belief that an HIV infected applicant is not strong enough to perform the job, or could pose a danger in the workplace, or would not be accepted by customers or co-workers is not a valid reason for excluding that person from employment. Also, an HIV-infected employee cannot be excluded based on the fear that the employee will someday suffer prolonged absences from work or that he or she could adversely affect group health insurance rates. The focus of the ADA is the employee's *present* condition and ability to do the job.

The ADA protects *qualified* disabled individuals who, with or without a "reasonable accommodation," can perform the "essential functions" of the position that the person

holds or desires. The ADA does not prohibit firing an employee for unacceptable behavior, even if that unacceptable behavior was precipitated by a disability. Moreover, the ADA, like all other anti-discrimination laws, does not mandate employing persons who objectively are not qualified to perform the real functions of a particular position. Although the ADA does not mandate the use of job descriptions, employers should develop a checklist of the objective, essential requirements of a job and evaluate each applicant or employee against that list – making sure the “essential functions” on the list are indeed “essential” – and ensure that decisions are supported by reference to the essential functions of the job (and are properly documented).

With regard to current employees with any degenerative condition, attention to job performance standards needs to be an ongoing exercise requiring guidance throughout because the disease, and its effect on the person’s functional limitations and ability to perform, changes over time. Employers must also be careful, however, not to single-out disabled employees for hypervigilant supervision or more stringent performance standards.

Avoid Stereotyping And Unfounded Fears

Although employers may deny employment to a person – whether disabled or not – who poses a direct threat to the health or safety of other persons or property, that determination must be made on an objective, case-by-case basis and cannot be grounded in generalizations or fears over the person’s disease. The fear of spreading AIDS has not justified denying employment opportunities on the basis of health or safety threats except in the most limited circumstances (*i.e.* performing invasive surgery). HIV is not spread through everyday, non-sexual contact. Adopting a *neutral* practice

of taking universal precautions in the event that any employee – HIV-positive or otherwise – is bleeding should satisfy legitimate interests in guarding the health and safety of other employees and the public. (Some employers may be required to develop a blood exposure control plan under OSHA’s bloodborne pathogens standard).

Address Others’ Concerns and Prevent Harassment

The ADA, like other employment discrimination laws, also prevents workplace harassment (adversely affecting terms and conditions of employment) against employees because of their disabilities. In its recent “companion” decisions on workplace harassment (*Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*), the Supreme Court toughened liability standards and burdens of proof against employers in harassment cases. The 1998 Supreme Court decisions grouped all forms of environmental harassment (sexual, racial, disability, etc.) and gave every indication that its tougher liability standards would apply to all forms of workplace harassment. These two Supreme Court sexual harassment cases, perhaps even more than *Bragdon*, underscore the need for accessible workplace anti-harassment policies and training to cover far more than “traditional” sexual harassment, and to address potential disability-based harassment situations proactively.

Other employees’ attitudes and concerns therefore compound the problem of managing this complex disability. The ADA forces employers to combat their own fears *and* the fears of employees and customers. Whether or not employees have actively *voiced* opinions on the issue, the concerns exist. A nationwide poll of employees in 1992 (updated and further validated in 1997) revealed that:

- 50% identified AIDS as the health problem that most concerned them;
- 67% thought their co-workers would feel uncomfortable working near an HIV-positive employee;
- 32% predicted that an HIV infected colleague would be fired;
- 24% believed their HIV infected colleague should be fired; and
- 75% wanted workplace AIDS education.

These employee attitudes remained essentially unchanged from 1992 to 1997, and yet a growing proportion of employees (now 46%) know someone who is or was HIV-positive. Since 1993, many of these polled employees who were not already supervisors may have become supervisors. Under the Supreme Court’s new harassment cases, if supervisors act upon some of these attitudes and take a “tangible employment action” (discharge, demotion, etc.) against an employee known to be HIV-positive, the employer may be left with few or no viable defenses. Employers should therefore impress upon other employees the need to work and cooperate with HIV infected employees.

Employers may also face a quandary by complying with the ADA if other employees panic at the prospect of working or sharing equipment with someone infected with HIV. For example, a concerted refusal to work may be regarded as protected conduct under federal labor laws, whether the work force is unionized or not. A single employee who refuses to work with an HIV infected co-worker could conceivably assert a claim under the Occupational Safety and Health Act, asserting that the refusal to work is justified by a perceived imminent danger to his or her health and safety. Employers need not be subjected to the tyranny of employees’ fears. Refusals to work based on imminent danger to health and safety must be grounded in a good faith belief *and* be objectively

reasonable. Even if uninfected employees do not assert any legal claims, the practical consequence of a group of fearful and discontented employees, uneasy with working with an HIV infected colleague, provides temptation to break the law and isolate the perceived "problem" – the infected employee. This situation can be avoided through workplace education. Preparing and educating the work force may therefore help avert not only a practical personnel crisis, but also a costly legal Hobson's Choice.

Do not Discriminate in Providing Benefits

Certain denials or restrictions of benefits accorded to other employees also violate ADA. Under EEOC guidelines, health-related distinctions in employee insurance plans may violate the ADA. The EEOC became involved in numerous lawsuits over whether the ADA prevents restricting or eliminating AIDS-related coverage. Almost every case of this type has settled favorably to the HIV-infected plaintiff. Current EEOC guidelines permit employers to make disability-based distinctions for employees covered by health insurance plans, but only if the employer proves that the distinction is justified by cost or actuarial data and is not a subterfuge to evade the ADA. This invites case-by-case analysis and, inevitably, litigation.

Reasonable Accommodations for Disabled Employees

The ADA also requires employers to make "reasonable accommodations" to give otherwise qualified disabled persons equal opportunity to work. This means employers cannot choose a non-disabled applicant over a disabled applicant simply because the disabled applicant needs a reasonable accommodation. Refusal to attempt "reasonable accommodations" for an existing employee, if geared toward

forcing the employee to quit, may even constitute constructive discharge. Moreover, refusing to try in good faith to make a reasonable accommodation (or discuss reasonable accommodations) may allow an aggrieved employee to seek higher levels of damages in litigation.

Effective Accommodations

Whether an accommodation is "reasonable" depends largely on (1) whether it is *effective* (meaning it actually would enable the individual to perform the essential functions of the job) and then (2) whether or not making the accommodation would create an *undue* hardship, in view of cost and degree of disruption associated with the accommodation, compared with your size and type of business, financial strength, and structure of operations. Employers bear the burden of proving "undue hardship," again with objective evidence and not speculation. In the case of an employee with HIV/AIDS, the potential accommodation of modifying or restructuring the individual's schedule, or allowing a rest period, will not likely be considered unduly difficult. The potential reasonable accommodations of reducing an individual's schedule or reassigning that person to a lower-paying position can be accompanied by a reduction in pay *if* that reduction would be made for individuals who are not disabled. Reassignment to a lower-paying position should only be considered, however, if the disabled individual requests it or if reasonable accommodations cannot enable him or her to perform their higher paying job.

Accommodations as a Moving Target

The evolving nature of an individual's infection and functional limitations requires ongoing evaluation – ideally in consultation with the infected employee – of what accommodations are effective, needed, and

reasonable. As with most disabilities, accommodations for HIV/AIDS are a moving target, and not a snapshot.

Also, the duty to make reasonable accommodations applies only with respect to legally "disabled" employees. It does not apply to persons associated with disabled persons, such as caregivers. Moreover, it is incumbent on the disabled employee to raise the issue of disability and request a reasonable accommodation. The law does not require clairvoyance, especially in cases involving "hidden" disabilities that are not obvious unless disclosed. Although an employer *may* ask employees believed to be disabled whether they need a reasonable accommodation, the responsibility to request a reasonable accommodation – and to disclose information on the disability in order to obtain a reasonable accommodation – falls squarely on the employee (though courts are split on whether the employee must specify a particular accommodation). Encouraging communication (with appropriate confidentiality safeguards), however, often prevents disputes over what the employer knew and whether and how the employee requested a reasonable accommodation. Furthermore, even though employers are not obligated to offer accommodations until a disability is known and the employee initiates the accommodation dialogue, sound personnel practices warrant asking any employee with performance problems (particularly if they are suspected of having a disabling condition) whether the employee has any suggestions or needs which could help improve his or her performance.

Avoiding Paternalism

Employers must finally distinguish the need to make reasonable accommodations from paternalism that could lead to inadvertent ADA violations and disrupt morale. A manager may perceive a need to protect an

HIV infected employee, fearing that the employee will be more susceptible to opportunistic infections that accompany contact with the public, bad weather, or even co-workers – but reassigning the employee from public contact may violate the ADA. It is far better to make the employee or applicant responsible for raising concerns over his or her limitations. It is not unlawful, however, to discuss concerns with the employee in making a reasonable accommodation available.

Interactions With Other Laws and Complications in Unionized Settings

Possible conflicts between the goals of ADA, on the one hand, and considerations underlying labor laws complicate implementing reasonable accommodations in an organized workplace. Potential conflict areas include (1) direct dealing with a represented employee on accommodations and (2) possible exceptions to seniority or other collective bargaining agreement provisions involving certain accommodations. Courts are split on this second issue. Another issue is whether a union may be given access to a disabled member's medical information (without the member's consent) if the union becomes involved in the reasonable accommodation process. These potential conflicts are best addressed ahead of time rather than in litigation or grievances.

In addition, the Family and Medical Leave Act (FMLA) interacts with ADA when leave is also a "reasonable accommodation." If a disabled employee exhausts his or her FMLA leave (or never met the eligibility requirements for FMLA leave), that employee *might* be entitled to more leave as a reasonable accommodation. Although a number of courts have held that indefinite or unlimited job-protected leave is not required as a "reasonable accommodation," it becomes difficult for employers to draw

the line on what finite leave requests (beyond 12 weeks or such additional amounts provided under state law) are "reasonable" and what requests are not.

"Light duty" work assignments made for employees injured and covered under state workers compensation laws also have ADA-related consequences. If "light duty" assignments are offered to employees with work-related injuries, the same "light duty" positions must arguably be available to disabled employees. Moreover, if "light duty" assignments are made on a long-term basis, then the disabled employee occupying the light duty job becomes measured against the lighter "essential functions" of the job.

Restrictions On Medical Inquiries and Information

Finally, the ADA restricts medical inquiries of employees and applicants, and mandates keeping known medical information confidential. With few exceptions, the decision on whether to inform co-workers (and for that matter, the employer) of medical condition belongs exclusively to the employee.

Generally, the ADA (1) forbids pre-employment medical inquiries; (2) permits post-offer medical inquiries for all similarly situated employees; and (3) permits medical inquiries of employees incident to reasonable accommodation requests or to resolve objective, job-related concerns over workplace safety and health.

Pre-employment inquiries must be restricted to gauging the applicant's ability to perform job-related functions. Even at the stages when medical inquiries are permitted, there is some information that employers simply may not wish to know – information that confers "protected" status on persons previously not thought to be disabled, and information that

carries an obligation to keep confidential. Also, once an employee comes forward and discloses a disability, it is not always appropriate for every person involved in the decision-making process to know the employee's medical information. As a practical matter, the fewer people who know about an employee's medical condition, the fewer opportunities exist for improper disclosure and improper actions based on the employee's medical condition.

Two recent cases may give employers a false sense of security with respect to medical inquiries. In a 1998 court of appeals decision, *EEOC v. Prevo's Family Market, Inc.*, the court held that it was not unlawful for a grocery store to have dismissed an HIV-positive produce clerk after he refused to submit to a medical examination. The employee disclosed his HIV-positive status in requesting a scheduling accommodation. The grocer became concerned about his use of knives in preparing produce, and also became concerned about his susceptibility to other opportunistic infections, such as tuberculosis. The grocer therefore required him to submit to an examination to confirm his HIV status and to opine on the degree of risk he posed to customers and co-workers in the produce department. He refused to cooperate.

In spite of overwhelming medical evidence from the CDC and other sources on the minuscule risk of HIV transmission, the court held that the medical examination was job-related and consistent with business necessity. The court further held that the grocer had no duty to ascertain the most up-to-date medical knowledge possible as a prerequisite to demanding a medical examination. The issue litigated by the EEOC in *Prevo's* was not *whether* the employer has a right to require a medical examination, but rather, whether the employer in that case had a sufficient, reasonable basis to

proceed with requiring a medical examination. The EEOC had urged a more stringent, "reasonableness" standard looking to accepted medical knowledge. Employers should not necessarily depend on *Prevo's* being adopted in all circuits, and should not look to *Prevo's* as permitting wide-ranging medical inquiries of employees. The safer practice by far is to keep requests for medical information grounded in business necessity and justified by current medical knowledge.

In a second case this year, *Armstrong v. Turner Industries*, a court rejected the EEOC's position and held that a mere violation of the ADA's prohibitions against preemployment inquiries, without an actual injury, is not actionable. It is not clear whether other courts will follow this "no harm, no foul" rule. Given the practical dangers of having unnecessary medical information, employers should continue to refrain from all preemployment medical inquiries.

Justification and Prescription For A Proactive Approach to HIV/AIDS

Uncertainties surrounding the ADA, and the Supreme Court's three June 1998, demonstrate that employers cannot afford *not* to address HIV as a workplace issue. ADA claims contribute substantially to recent growth trends in employment litigation. ADA plaintiffs can recover the same compensatory and punitive damages available to other discrimination plaintiffs under the 1991 Civil Rights Act (and may be able to recover higher damages under state or local anti-discrimination laws). The stakes of not understanding or complying with the ADA are therefore high. Moreover, inconsistent decisions under the "ADA Learning Curve" generate unpredictable results in both court and agency proceedings, and lead to protracted (and costlier) proceedings.

Reactions guided by fear or panic all too often result in mistakes, disruption, and possibly liability. Everyone – the company, the disabled employee, and the entire workforce – loses from not planning ahead. Although no one policy will suit the needs of each employer, the following underlying principles should apply:

- Employment practices should be based on the best scientific evidence available. Current medical evidence shows that persons with AIDS or HIV do not pose a risk to anyone through ordinary workplace contact.
- Management and any union leadership should unequivocally endorse nondiscrimination toward HIV infected employees. When a manager or co-worker is not sure how to respond to an HIV infected employee, he or she should contact the personnel department immediately.
- Medical information must be kept confidential.
- Employee education on HIV infection should be undertaken immediately, before any incidents of HIV infection occur, in order to minimize panic and disruption.
- Education and accommodations require ongoing attention and evaluation.
- Existing employee assistance programs should offer information and referral to agencies and organizations with supportive services for persons with HIV.
- To address the "Lazarus Syndrome" of persons returning to work, long and short term disability insurance plans should be reviewed with an eye toward encouraging qualified persons to return to the workforce while minimizing their risks of losing coverage by attempting to return to productive work.

Viewing AIDS in the work place simply as a legal problem, and not an overall management challenge and public health crisis, sorely misses the

point. Legal considerations alone, however, warrant immediate, proactive approaches. Also, by learning how to manage a disease raising as many complicated issues as HIV/AIDS, businesses can better learn how to manage other disabilities and catastrophic illnesses now almost certain to bear the legal status of "disability."