

LEGAL PROTECTIONS FOR PEOPLE WITH HIV IN THE WORKPLACE

EMPLOYMENT DISCRIMINATION LAWS

People who are HIV-positive or who have AIDS are protected from employment-related discrimination under Massachusetts General Law c. 151B, Section 4 (16) and the federal Americans with Disabilities Act (ADA). Both of these statutes prohibit discrimination in employment on the basis of a person's disability.

Massachusetts law applies to employers with six or more employees; the ADA covers employers with fifteen or more employees.

1. WHO IS PROTECTED?

- | |
|---|
| <ul style="list-style-type: none">a) Persons with AIDS or who are HIV-positive, even if they are asymptomatic and have no present physical impairment.b) Persons who are regarded or perceived as having HIV.c) Under the ADA, but not Massachusetts law, a person who does not have HIV but who "associates" with a person with HIV, such as friends, lovers, spouses, roommates, business associates, advocates and caregivers of persons with HIV. |
|---|

2. WHAT CAN EMPLOYERS LEARN ABOUT YOUR MEDICAL HISTORY?

- a) **Massachusetts General Law c. 111, Section 70F prohibits an employer from requiring that an employee take an HIV test under any circumstances.**
- b) **During the application process:**

Both Massachusetts law and the ADA prohibit an employer from asking a job applicant to submit to a medical exam or answer any medical inquiry.

For example, during the application process, an employer may not ask about:

- Any history of workers' compensation claims or social security disability benefits.
- Whether you have ever been hospitalized or been under the care of a physician.
- Whether you have ever had any medical problems which would make it difficult for you to do your job.

An employer may, however, ask whether an applicant has the knowledge, skill and ability to perform the job functions.

c) **After a conditional offer of employment:**

In Massachusetts, after an employer has made an offer of employment, it may require a medical examination (but not an HIV test) solely for the purpose of determining whether the employee is capable of performing the essential functions of the job with reasonable accommodation.

In addition, if the employer has more than fifteen employees, any medical exam or inquiry must meet the following requirements of the ADA:

- The employer must require the medical exam or inquiry of all applicants in the job category.
- The information must be kept strictly confidential. It must be on separate forms and kept in a segregated file apart from a general personnel file.
- The information may not be shared with others, with a limited exception for supervisors or managers who need to be informed of necessary job restrictions or accommodations, or safety personnel who may be told if the person with a disability requires emergency treatment.
- The results of the medical examination cannot be used to withdraw the job offer unless the results indicate that the individual is not able to perform the essential functions of the job with reasonable accommodation.

d) **After hire:**

An employer may require a medical exam of a current employee only if the employer proves it is "job-related and consistent with business necessity." The employer must demonstrate that the medical examination is necessary to measure the employee's actual performance of job functions.

3. PROTECTIONS FROM HIV-RELATED DISCRIMINATION

There are two types of claims which may be brought against employers under disability discrimination laws.

a) **Treating an applicant or employee differently based on HIV status.**

An employer may not take adverse action against an applicant or employee simply on the basis that the person is HIV-positive or has AIDS. This means that an employer may not terminate, refuse to hire, rehire or promote, or otherwise discriminate in the terms and conditions of employment based on the fact that a person is HIV-positive or has AIDS.

The focus here is whether a person with HIV or AIDS was treated differently than other applicants or employees in similar situations.

Examples of unlawful discrimination:

- An employer may not refuse to hire a person with HIV based on fear that HIV will be transmitted to other employees or to customers or clients.
- An employer cannot refuse to hire or make an employment decision based on the possibility, or even probability, that a person will become sick and will not be able to do the job in the future.
- An employer cannot refuse to hire a person because it will increase health or worker's compensation insurance premiums.

Discrimination in providing insurance benefits:

The ADA prohibits employers from discriminating on the basis of disability in the provision of health insurance to employees. For example, a health insurance plan that capped benefits for treatment of all diseases at \$100,000 per year but for AIDS at \$10,000 per year would distinguish based on disability and violate the ADA. However, distinctions which may be harmful to people with HIV, such as pre-existing condition clauses, which are applied equally to all insured employees are not discriminatory.

b) **An employer's failure to provide "reasonable accommodation" to a person with HIV/AIDS.**

What is a reasonable accommodation?

Persons with disabilities such as AIDS may experience health-related problems which make it difficult to meet some job requirements or duties. For example, a person may be exhausted or fatigued and find it difficult to work a full-time schedule.

In certain circumstances, the employer has an obligation to modify or adjust job requirements or workplace policies in order to enable a person with AIDS to perform the job duties. This is known as a “reasonable accommodation.”

Examples of reasonable accommodations include:

- modifying or changing job tasks and responsibilities.
- establishing a part-times or modified work schedule.
- permitting time off during regular work hours for medical appointments.
- reassigning an employee to a vacant job.
- making modifications to the physical layout of a job site or acquiring devices such as a telephone amplifier to allow, for example, a person with a hearing impairment to do a job.

There is no fixed set of accommodations which an employee may request. The nature of a requested accommodation will depend on the particular needs of an individual employee’s circumstances.

It is the employee’s obligation to inform the employer of the nature of the disability and to request a reasonable accommodation which will allow the employee to perform the job.

If an employee requests a reasonable accommodation, an employer is entitled to documentation of an employee’s disability - usually, a letter from a doctor. The purpose of this type of verification is to permit the employer to implement an appropriate reasonable accommodation by understanding the nature and extent of the employee’s disability.

Does the employer have to grant a request for a reasonable accommodation?

Just because the employee requests a reasonable accommodation does not mean that an employer has a legal obligation to grant it. An employer does not have to grant a reasonable accommodation which will create an “undue hardship” or significant difficulty or expense for the employer’s operation.

When is a “reasonable accommodation” for an employee an “undue hardship” for an employer?

In determining whether a requested accommodation creates an undue burden or hardship for an employer, courts examine a number of factors which include

- the employer’s size, budget, and financial resources
- the cost of implementing the requested accommodation
- how the accommodation affects or disrupts the employer’s business

Again, there are no clear rules here and each situation is examined on a case-by-case basis.

The reasonable accommodation must enable the employee to do the job.

An employer only has an obligation to grant the reasonable accommodation if, as a result of the accommodation, the employee is then qualified to perform the essential job duties. An employer does not have to hire or retain an employee who cannot perform the essential functions of the job, even with a reasonable accommodation.

THE FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act (FMLA) is a federal law passed in 1993. It requires that certain employers permit up to twelve weeks of unpaid leave per twelve month period for:

- the birth or adoption of a child
- recovery from the employee's "serious health condition"; or
- care of an immediate family member with a "serious health condition"

1. WHO IS ELIGIBLE?

An employee is eligible for FMLA if he or she:

- has completed twelve months of total service (not necessarily consecutively)
- has worked more than 1,250 hours during the twelve-month period immediately preceding the leave; and
- the employer has 50 or more employees within 75 miles of the worksite.

2. WHAT IS A "SERIOUS HEALTH CONDITION"?

To be eligible for leave, an employee must have a "serious health condition" rendering him or her incapable of performing job duties. A "serious health condition" includes:

- any period of incapacity or treatment in or consequent to inpatient care in a hospital or residential care facility.
- any period of incapacity requiring absence from work or other regular daily activities of more than three consecutive calendar days or any period of incapacity that involves two or more visits to a healthcare provider or other medical personnel or one visit to a healthcare provider resulting in subsequent supervised continuing treatment.
- any period of incapacity or treatment due to a "chronic" serious health condition which requires periodic visits to a healthcare provider, continues over an extended period of time, and may cause episodic rather than continuing periods of incapacity.

3. WHAT TYPE OF LEAVE ARE YOU ENTITLED TO?

An employee does not necessarily have to take all twelve weeks of leave at one time.

FMLA leave can be taken as “intermittent leave” or reduced schedule leave if it is “medically necessary.”

Intermittent leave is taken in separate “blocks of time” as short as one hour or as long as several weeks for such things as medical appointments or periods of recovery.

If FMLA leave is taken as intermittent leave, the employer has the right to transfer the employee temporarily to an available, alternative position for which the employee is qualified and which better accommodates recurring periods of leave. The position must provide equal pay and benefits, although not necessarily equivalent duties.

4. WHAT INFORMATION CAN AN EMPLOYER REQUIRE ABOUT YOU AS A CONDITION OF FMLA LEAVE?

a) Certification

- An employer can require written certification from a healthcare provider of a “serious health condition.”
- An employer can also challenge certification and, at its own expense, require a physical examination by a second healthcare provider. If there is a conflict between the two providers, a third provider who is agreed upon by both the employer and the employee is consulted and the third opinion is final.

b) Notice

- An employer is entitled to thirty days’ notice for FMLA leave, or as much notice as is “practicable” under the circumstances.

5. COMPENSATION AND BENEFITS DURING FMLA LEAVE

The employer must maintain an employee’s group health insurance coverage for the duration of the FMLA leave at the level and under conditions of coverage that would have been provided if the employee were not on leave.

6. RETURN AND REINSTATEMENT

At the end of FMLA leave, an employee must be returned to the “same” or an “equivalent” position with the same seniority rights and benefits as when the FMLA leave commenced. An equivalent position is defined as “virtually identical pay, benefits, and working conditions” and the “same or substantially similar duties and responsibilities.”

7. ADDITIONAL THINGS TO KNOW ABOUT THE FMLA

- An employer may require that an employee substitute paid vacation, personal leave, or sick or medical leave for the unpaid leave under the FMLA.
- If an employee fails to return from FMLA leave, an employer can obtain reimbursement from the employee for group health insurance premiums if: 1) the reason for not returning is not related to the health condition, or 2) the reason for not returning is within the employee's control.
- An employer who violates the FMLA may be liable in civil court in a civil action for monetary damages and injunctive relief. An employee may also file a complaint with the United States Department of Labor Wage and Hour Division.

PRIVACY OF EMPLOYEE MEDICAL INFORMATION

1. THE STATUTORY RIGHT TO PRIVACY IN MASSACHUSETTS

Massachusetts General Law c. 214, Section 1B provides:

A person shall have a right against unreasonable, substantial or serious interference with his privacy.

Courts have construed this statute to prohibit disclosure of facts about an individual of a highly personal or intimate nature, which will certainly include a person's HIV status or AIDS diagnosis

In analyzing whether there has been a violation of the statute, courts will determine whether there is any legitimate interest in the disclosure of a person's HIV status and then balance the interest against the nature and substantiality of the intrusion into privacy. Any disclosure cannot be broader than necessary to accomplish the legitimate business reason.

For example:

- If an employee reveals his or her HIV status to a supervisor, the supervisor may only reveal that information to others for a necessary business reason. It may be considered a legitimate business reason to discuss an employee's HIV status with other management personnel in connection with making adjustments to a person's job duties as a reasonable accommodation. However, it would not be a legitimate business reason to tell the employee's co-worker or non-essential management personnel.

3. THE CONSTITUTIONAL RIGHT TO PRIVACY

Many courts have found that a person has a Constitutional privacy right to the non-disclosure of HIV status. Courts have based this right on the Due Process Clause of the U.S. Constitution, which creates a “privacy interest” in avoiding disclosure of certain types of personal, intimate information.

- The Constitutional Right to Privacy can only be asserted against a “state actor,” i.e., when the employer is a governmental entity. Courts will balance the nature of the intrusion into a person’s invasion of privacy against the weight to be given the government’s legitimate reason for a policy or practice which results in the disclosure.

Reviewed November 2008