



# Working Effectively with Individuals who are HIV-Positive

## **Are HIV-Positive Persons or Those Diagnosed with AIDS Considered to Have a Disability?**

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Yes. Those who are known or perceived to be infected with the human immunodeficiency virus (HIV) meet the definition of disability under the Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendments Act of 2008. An individual with a disability under the ADA is an individual with a physical or mental impairment that substantially limits a major life activity. Before the Amendments Act was passed, the Supreme Court held that an individual with asymptomatic HIV had a disability because she was substantially limited in the major life activity of reproduction. The Amendments Act added immune system function to the list of bodily functions that are considered major life activities. Therefore, persons who are HIV-positive or who are diagnosed with AIDS fall squarely within the definition of a disability under the ADA.

## **What Can an Employer Ask About the Medical Condition of an HIV-Positive Person?**

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Prior to making a job offer, employers may not ask job applicants about the existence, nature, or severity of a disability, nor may an employer require any applicant to undergo a medical examination. Thus, an employer cannot ask applicants if they have HIV infection, AIDS, or any opportunistic infection associated with AIDS. Nor can an employer require any applicant to take an HIV antibody test because that is a medical examination. However, employers may ask applicants about their ability to perform specific job functions, without reference to any disability.

The ADA allows an employer to ask individuals whether they have HIV infection or AIDS only after the employer has extended a conditional offer of employment. However, questions must be asked of all individuals entering a job category, not just an individual suspected of HIV infection. In addition, test results and medical history records must be segregated from personnel records and there are strict confidentiality requirements. If a conditional job offer is withdrawn because of the results of such examination or inquiry, an employer must be able to show that:

- the reasons for the exclusion are job-related and consistent with business necessity; and
- there is no reasonable accommodation that will enable this individual to perform the essential functions; or
- that any reasonable accommodation will impose an undue hardship.

A post-offer medical exam may disqualify a person on the basis that he or she poses a direct threat to the health and safety of employees or others in the workplace. In determining whether the applicant or employee imposes a direct threat upon others, the employer's decision must be objectively reasonable, based upon available medical evidence. The employer also must determine that no reasonable accommodation would reduce or eliminate that direct threat.

Information that an individual is infected with HIV will rarely justify withdrawal of a job offer. In most cases, HIV infection and AIDS will not interfere with the individual's ability to perform essential job functions. Moreover, the individual is entitled to a reasonable accommodation to permit performance of essential job functions. Since the mere fact that an individual is infected with HIV almost never justifies revoking a job offer, employers may want to consider whether it is advisable

to make such inquiries. Similarly, employers may not want to conduct HIV testing because the results alone will not justify revocation of a job offer. Asking current employees whether they have HIV infection or AIDS, or requiring employees to take an HIV antibody test, will rarely be permissible under the ADA, unless the employer can show that such inquiries or testing is job-related and consistent with the employer's business necessity.

### **What is Reasonable Accommodation?**

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The critical concept in the employment provisions (Title I) of the ADA is that of "reasonable accommodation." Reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for a qualified individual with a disability to participate in and enjoy an equal employment opportunity. The employer's obligation to provide a reasonable accommodation applies to all aspects of employment, beginning with the application process; the duty is ongoing and may arise any time a person's disability or job changes. An employer is not required to provide an accommodation that will impose an undue hardship on the operation of the employer's business. However, an employment opportunity cannot be denied to a qualified applicant or employee solely because of the need to provide reasonable accommodation.

If the cost of the accommodation would impose an undue hardship on the employer, the employer should determine if financial or technical assistance is available elsewhere, or the individual with a disability should be given the option of paying that portion of the cost that constitutes an undue hardship for the employer.

Since estimates show as many as 1 in 250 Americans is infected with HIV, accommodation in the workplace for infected individuals who can continue to work makes economic sense, as well as common sense. The presence of these individuals in the workplace poses little or no threat of transmission, and their experience on the job is an asset to be retained. In addition, even those HIV-infected individuals who develop full-blown AIDS are able to remain productive members of the workforce for extended periods. These working years are increasing due to new treatments being introduced for HIV infection.

### **What Types of Accommodations Should be Considered for HIV-Positive Employees?**

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It is helpful if employers have established policies on non-discrimination for persons with life-threatening illnesses. These policies should emphasize that employees with illnesses such as cancer, AIDS, and heart disease may wish and be able to work a regular or modified work schedule. Most people infected with HIV do not show any symptoms of disease for many years after infection.

If the HIV-positive employee eventually becomes unable to perform certain essential job functions, the employer must consider whether reasonable accommodation will permit him/her to perform these functions.

Examples include:

- time to allow for medical appointments, treatment, and counseling;
- auxiliary aids and services, for example, large print for someone with AIDS who has developed a vision impairment; and
- additional unpaid leave.

### **Which Employee Records Require Confidential Handling?**

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The ADA imposes very strict limitations on the use of information obtained from medical inquiries and examinations, including information relating to a person's HIV infection/AIDS. Employers must treat all such information as a confidential medical record. They should collect and maintain these records on forms and in medical files separate and apart from employee personnel files. The medical information cannot be shared with others, subject to the following five exceptions: sharing medical information with supervisors and managers about necessary restrictions on the worker, or duties of an employee, and necessary accommodations; performing first aid and informing safety personnel if the individual is in need of emergency medical treatment; sharing information with government officials that are investigating compliance with the ADA or other federal or state disability discrimination laws; disclosing to state workers' compensation offices or "second injury" funds; and disclosing to insurance companies.

### **What if the Employer is Concerned that it May be Unsafe for the Person who is HIV Positive to Remain in the Workplace**

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As previously mentioned, the ADA does not require an employer to hire or retain an individual whose disability poses a "direct threat" to the health or safety of employees and others in the workplace. Direct threat means that an individual poses a significant risk of substantial harm to employees or others, and covers concerns about transmission of infectious diseases, including HIV infection. A direct threat determination must be done on an individualized basis, assessing the individual with a disability, her essential job functions, and the workplace. The assessment of risk must also be based on current, objective medical or

other factual evidence. A risk that is remote or speculative will not constitute a direct threat. If a direct threat is identified, the employer must determine whether a reasonable accommodation will eliminate or reduce the risk so that it is below the level of a direct threat.

Medical and public health authorities have established that HIV infection cannot be transmitted through casual, social contact as exists in the vast majority of jobs and workplaces. Nor is HIV infection transmissible through food or food handling. As a result, HIV infection in the workplace will rarely constitute a direct threat and thus can almost never be the basis for firing or refusing to hire an individual with HIV infection.<sup>1</sup>

An employer will violate the ADA if it treats a person with HIV infection or AIDS differently because of speculative concerns that the individual may have an infectious, opportunistic, and communicable illness and may infect others. The fact that a person has HIV infection or AIDS does not mean the person has, for example, tuberculosis or any other similar illness. Thus, it would be discrimination for an employer to refuse to hire a person with HIV infection because of undocumented concerns that the person might have or might develop in the future one or more infectious diseases. This scenario does not pose a direct threat under the ADA because it is based upon speculation. The employer has the burden of proving that an individual's employment poses a direct threat, and it is important that appropriate

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1 Guidelines for management of healthcare workers have been provided by the Society for Healthcare Epidemiology of American (SHEA). These recommendations can be found in Henderson, D. et. al (2010, March). SHEA guideline for management of healthcare workers who are infected with Hepatitis B virus, Hepatitis C Virus, and/or Human Immunodeficiency Virus. *Infection Control and Hospital Epidemiology*, 31(3).

medical or public health resources and expertise be available to the employer to assist in making such accommodation decisions.

A different scenario arises when an HIV-positive employee works in an environment that poses a risk to his or her own health. For example, a child-care worker with a compromised immune system may consider temporary removal from exposure to children who have measles. In such circumstances, there is no direct threat to the health or safety of others in the workplace and so the direct threat defense to employment discrimination on the basis of disability is not available to the employer.

### **Does The ADA Affect the Employer's Choice of Insurance Benefits Where Coverage of HIV-Positive Persons is Concerned?**

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Employees with HIV infection/AIDS must be given equal access to whatever insurance or benefit plans the employer provides. An employer cannot fire or refuse to hire an individual with HIV infection/AIDS because the individual may increase the employer's future health care costs. Similarly, an employer cannot fire or refuse to hire an individual because the individual has a family member or dependent with HIV infection/AIDS that may increase the employer's future health care costs. However, universal pre-existing condition clauses are permissible.

The EEOC has published guidance on health insurance plans that single out HIV infection, or any other disability for different treatments. Health plans that exclude coverage of HIV infection or place a lower cap on HIV as compared with other disabilities may violate the ADA if the employer cannot justify the differences in coverage.

## **Where Can I Find Resources to Assist in Accommodating the HIV-Positive Employee and Provide General Education on HIV to Our Workplace?**

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Workplace education, which emphasizes that HIV and AIDS are not transmitted by casual contact, may allow such an employee to be accommodated within a supportive atmosphere. It will also serve to reassure co-workers that they are not at risk, and thus help preserve workforce productivity. The following are some possible resources to assist in the design of training for supervisors and co-workers or in the identification of an accommodation for a particular individual.

### **The U.S. Department of Health and Human Services Centers for Disease Control and Prevention provides:**

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- **National AIDS Hotline:** (800) CDC-INFO or 888.232.6348 (TTY). Americans with Disabilities Act Information and Assistance Hotline: 800.514.0301 or 800.514.0383 (TTY). CDC Business and Labor Resource Service: 877.242.9760 or 800.243.7012 (TTY).
- **Business Responds to AIDS Resource Service.** Information, materials, and referrals, for employers on national, state, and local, resources on HIV/AIDS in the workplace. Includes small-business guidelines, sample Workplace Policy on Life-Threatening Diseases and Disabilities, information on the Americans with Disabilities Act, workplace policy and education, and resources. Call 800.458.5231 or visit [www.brta-lrta.org](http://www.brta-lrta.org).

### **Others:**

ADA Disability and Business Technical Assistance Center Hotline -  
800.949.4232 (voice/TTY)

National Leadership Coalition on AIDS,  
1730 M Street, NW, Suite 905,  
Washington, DC 20036, 202.429.0930

Job Accommodation Network:  
800.526.7234 (V) or 877.781.9403 (TTY)

Equal Employment Opportunity Commission  
131 M Street, NE  
Washington, DC 20507  
To be connected to the nearest field office, call  
800.669.4000 (voice), 800.669.6820 (TTY).  
To order publications, call 800.669.3362 (voice),  
800.669.3302 (TTY). For online information:  
<http://www.eeoc.gov>

## Disclaimer

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The U.S. Equal Employment Opportunity Commission has reviewed it for accuracy. However, opinions about the Americans with Disabilities Act (ADA) expressed in this material are those of the author, and do not necessarily reflect the viewpoint of the Commission or the publisher. EEOC interpretations of the ADA are reflected in its ADA regulations (29 CFR Part 1630), Technical Assistance Manual for Title I of the Act, and Enforcement Guidance.

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The Equal Employment Opportunity Commission has issued enforcement guidance which provides additional clarification of various elements of the Title I provisions under the ADA. Copies of the guidance documents are available for viewing and downloading from the EEOC web site at:  
<http://www.eeoc.gov>

## About this Brochure

This brochure is one of a series on human resources practices and workplace accommodations for persons with disabilities edited by Susanne M. Bruyère, Ph.D., CRC, Director, Employment and Disability Institute, Cornell University ILR School.

This publication was written in 1994, updated in 2001 by a representative of the New York State Department of Health AIDS Institute and updated in February 2002 and May 2010 by Nellie J. Brown, M.S., CIH, Statewide Director, Workplace Health and Safety Program, New York State School of Industrial and Labor Relations, Cornell University, 237 Main St. – Suite 1200 Buffalo, New York 14203, 716.852.4191.

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The full text of this brochure, and others in this series, can be found at [www.hrtps.org](http://www.hrtps.org).

More information on accessibility and accommodation is available from the ADA National Network at 800.949.4232 (voice/ TTY), [www.adata.org](http://www.adata.org).

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