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The Medical Costs of AIDS: Abandoning the HIV-Infected Employee

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Comments

The Medical Costs of AIDS: Abandoning the HIV-Infected Employee

> WHEN THEY SAW [JOB] FROM A DISTANCE, THEY COULD HARDLY RECOGNIZE HIM; THEY BEGAN TO WEEP ALOUD. . . . THEN THEY SAT ON THE GROUND WITH HIM FOR SEVEN DAYS AND SEVEN NIGHTS. NO ONE SAID A WORD TO HIM, BECAUSE THEY SAW HOW GREAT HIS SUFFERING WAS.[1]

Our society has placed the onus of health care funding on the employment relationship. Employers currently play a major role in the adequacy of an American's health care. Enter the human immunodeficiency virus (HIV),[2] which has evoked a new era of heightened prejudices and fears.[3] The office of this paper is to identify the means by which an employer can legitimately discriminate and significantly limit the amount of health care benefits afforded to HIV-infected employees, and to highlight the difficulties in the alternatives to such lawful discrimination.

THE VIRUS

The retrovirus HIV attacks the immune system by infecting the white blood cells called T-lymphocytes.[4] An individual is deter-

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1. Job 2:12-13, the Holy Bible, New International Version. Copyright 1973, 1978, 1984. Used by permission of Zondervan Bible Publishers.

2. In addition to the term "HIV," the scientific community also refers to the virus as "HTLV-III" (Human T-Lymphotropic Virus Type III) and "LAV" (Lymphadenopathy Associated Virus). See M. E. Lally-Green, *Is Aids a Handicap under the Rehabilitation Act of 1973 After School Board v Arline and the Civil Rights Restoration Act of 1987?*, 19 U Toledo L Rev 603, 605 (1988); US Department of Health & Human Services, *Surgeon General's Report on Acquired Immune Deficiency Syndrome* 9 (Apr 1987).

3. See notes 15-22 and accompanying text.

4. Miriam G. Waltzer, *Acquired Immune Deficiency Syndrome and Infection with Human Immunodeficiency Virus*, 36 Loyola L Rev 55, 57 (1990). See also *Surgeon Gen-*

mined to have been infected with the HIV virus if he or she tests seropositive for acquired immune deficiency syndrome (AIDS) antibodies; a seropositive result indicates that antibodies to an AIDS-causing virus are present in the blood.[5] One who tests seropositive may outwardly show no signs of the infection but is still capable of transmitting the virus.[6] The latency period for HIV infection may last up to and beyond five years.[7]

Before the HIV infection develops into "full blown" AIDS, an individual may develop AIDS-Related Complex (ARC).[8] ARC symptoms include night sweats, weight loss, enlarged lymph nodes, and diarrhea.[9]

The full AIDS syndrome represents the final stage of HIV complications.[10] This stage results in the occurrence of certain opportunistic infections caused by the virus' active attack on the body's immune system.[11] Symptoms of full AIDS syndrome include chronic diarrhea, skin lesions, weight loss, fever, shortness of breath, fatigue, malaise, confusion, loss of respiratory and digestive functions, and neurologic problems resulting from AIDS dementia.[12] Practically all patients die within five years of being diagnosed with full AIDS syndrome.[13] It has been noted that AIDS has already killed more Americans than the Vietnam War.[14]

To date, medical problems have not been the only difficulties faced by AIDS patients. The impact on American society, in the form of fear, prejudice, and moral judgment is also heavily felt by the HIV-infected individual. Such individuals are often shunned

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eral's Report at 9 (cited in note 2).

5. Lally-Green, 19 U Toledo L Rev at 606 n 12 (cited in note 2).

6. Waltzer, 36 Loyola L Rev at 57 (cited in note 4).

7. Id. There are cases in which HIV infection has not developed into AIDS. It is still undetermined whether these cases simply represent long latency periods or whether these individuals will never get AIDS. Id at 57 n 14.

8. Id at 57.

9. Id.

10. Lally-Green, 19 U Toledo L Rev at 606 (cited in note 2).

11. Id at 606-07. Examples of such infections include a rare form of skin cancer called Kaposi's sarcoma and the lung disease pneumocystis carinii pneumonia. Id at 607.

12. Id.

13. Eric C. Sohlgren, *Group Health Benefits Discrimination Against AIDS Victims: Falling Through the Gaps of Federal Law—ERISA, The Rehabilitation Act and the Americans with Disabilities Act*, 24 Loyola LA L Rev 1247, 1253 (June 1991).

14. Sohlgren, *Group Health Benefits Discrimination against AIDS Victims* at 1247 (cited in note 13). There had been 94,375 American adult AIDS deaths reported through October 1990, compared to nearly 58,000 Americans killed and missing in action in the Vietnam war. Id at 1247 n 1.

by their families.[15] Health care workers have refused to care for AIDS patients.[16] Religious leaders have preached AIDS as a curse from God for sinful behavior.[17] School children have been isolated within and banned from schools.[18] It has been observed that the terror of AIDS has caused rational, charitable, church-going people, who would give their lives to help victims of flood or fire, to turn their backs on neighbors with AIDS.[19]

The prejudices and moral judgments harbored against those infected with HIV will be manifested in the workplace in a variety of forms. A glaring example involving employee health benefits occurred in late 1987. The Circle K Corporation, employer of some 8,000 individuals, informed its workforce that their medical plan would no longer cover health problems resulting from "personal lifestyle decisions."[20] The purpose and result of the policy was to cover AIDS claims resulting from blood transfusions—but not cover the claims of drug users and homosexuals.[21] After extensive adverse publicity and criticism by benefit consultants, Circle K Corporation dropped its "personal lifestyle decision" policy in September, 1988.[22] The remainder of this comment addresses discrimination in the health benefits afforded to employees infected with HIV.

The Employee Retirement Income Security Act

The Employee Retirement Income Security Act of 1974 (ERISA)[23] protects employees and dependents who are directly affected by employee benefit plans.[24] Section 510 of ERISA provides:

> It shall be unlawful for any person to discharge, fire, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the *provisions of an employee benefit plan*, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .[25]

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15. Waltzer, 36 Loyola L Rev at 57 (cited in note 4).
16. Id.
17. Id.
18. Id.
19. Id.
20. Sohlgren, 24 Loyola LA L Rev at 1247 n 5 (cited in note 13).
21. Id.
22. Id. See also John P. Furfaro and Maury B. Josephson, *Health Benefits of Employees with AIDS*, 205 NY L J 3 (May 3, 1991).
23. 29 USC § 1001 (1988).
24. ERISA, § 2(c), 29 USC § 1001(a) (1988).
25. ERISA, § 510, 29 USC § 1140 (emphasis added).

Although ERISA is often thought of as a pension-protector, the statute expressly covers group health insurance plans sponsored by the employer.[26]

An employer cannot discharge an employee from his or her employment in order to deprive the employee of continued participation in an employer-provided health insurance program. In *Folz v Marriott Corp.*,[27] an exemplary employee was diagnosed with multiple sclerosis and informed his employer of such.[28] In less than two months the employee was put on probation and subsequently fired.[29] The court found that the employer's stated reasons for discharge were pretext; the employee had been discharged because of financial motivations, so as to deny the employee the advantages of the employer's benefit plans.[30] This was a clear violation of ERISA.[31]

An employer who provides group health insurance in our society will eventually be faced with this scenario: (1) one or more employees are diagnosed with HIV, ARC, or AIDS, (2) the prospect of paying for the medical care required of this catastrophic illness, for an undetermined number of years, looms large on the financial horizon, and (3) if the employee is fired, the employer will be facing the "inescapable inference . . . that an ulterior motive lay behind its . . . maneuvers."[32] The employer's current solution to this problem is quite simple and, if handled properly, quite legal: change the terms of the company health plan and place a low ceiling on the maximum lifetime benefits for AIDS-related claims.[33]

In *McGann v H & H Music Co.*,[34] H & H Music employee John McGann was diagnosed with AIDS in December, 1987 and soon thereafter submitted his first claims for reimbursement under the

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26. ERISA, § 3(1), 29 USC § 1002(1). An "employee welfare benefit plan" under ERISA encompasses:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . *medical, surgical, or hospital care or benefits, or benefits in the event of sickness, [or] death* . . . .

Id (emphasis added).

27. 594 F Supp 1007 (W D Mo 1984).

28. *Folz*, 594 F Supp at 1011.

29. Id.

30. Id at 1015.

31. Id.

32. Id, quoting *Ursic v Bethlehem Mines*, 556 F Supp 571, 575 (W D Pa 1983).

33. See notes 34-53 and accompanying text.

34. 946 F2d 401 (5th Cir 1991).

employer's medical plan.[35] The plan provided lifetime medical benefits of up to $1,000,000 for all employees.[36] In July, 1988 the employer announced that it would become self-insured, and that the new plan would limit benefits for AIDS-related claims to a lifetime maximum of $5,000.[37] McGann sued his employer, claiming discriminatory treatment under Section 510 of ERISA.[38]

The Fifth Circuit Court of Appeals affirmed a district court order granting summary judgment for defendant-employer H & H Music.[39] The employer had not promised that the $1,000,000 limitation was permanent; the terms of the plan expressly provided that the "sponsor may terminate or amend the Plan at any time or terminate any benefit . . . at any time."[40] The circuit court noted the United States Supreme Court's observance that "ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits."[41]

The circuit court could not reconcile McGann's claim with the "well-settled principle" that ERISA was not intended to circumscribe an employer's control over the content of benefit plans.[42] If ERISA prevented an employer from reducing or eliminating a particular coverage in response to the escalating costs of such coverage, the statute would be in effect changing the terms of the employer's benefit plan.[43]

Finally, the court found that ERISA does not "prohibit welfare plan discrimination between or among categories of diseases."[44] Thus, under ERISA, an employer can elect not to cover AIDS-related claims, and yet continue to cover other catastrophic illnesses—even if that decision stems from a prejudice against AIDS or its victims.[45]

The result in *McGann* is likely unsettling to much of our society, including the courts. In denying an employee's request for a temporary restraining order to stop an AIDS-related benefits limita-

35. *McGann*, 946 F2d at 403.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id at 405.
41. Id at 406, quoting *Shaw v Delta Air Lines, Inc.*, 463 US 85, 91 (1983).
42. *McGann*, 946 F2d at 407.
43. Id at 407-08.
44. Id.
45. Id.

tion similar to *McGann*, District Judge Forrester of the Seventh Circuit was nevertheless "disturb[ed] . . . that an employer under . . . ERISA can modify a plan so as to deny benefits to a member of a plan during the course of a treatment regimen . . . ."[46] In *Owens v Storehouse, Inc.*,[47] Judge Forrester subsequently granted the defendant-employer's motions for summary judgment. The employee in *Owens* had received approximately $116,000 in AIDS-related benefits when the employer changed the plan's $1,000,000 maximum lifetime benefit to $25,000.[48] The employee alleged discrimination in violation of Section 510 of ERISA.[49] Judge Forrester determined that a prerequisite to a Section 510 action is "an allegation that the employer/employee relationship, and not merely the plan, was changed in some discriminatory or wrongful way."[50] Judge Forrester thus concluded that the employer's unilateral modification could not support a Section 510 claim.[51]

In addition, the employee alleged that the employer's actions breached the fiduciary duty owed under the subject ERISA plan.[52] This argument also failed. Judge Forrester found that there may be a fiduciary duty in administering the plan, but not, as here, in modifying or altering non-vested contingent benefits; the employer is free to act in accordance with its own interests when not administering or investing the plan.[53]

The Reach of ERISA

The preemptive effect of ERISA greatly magnifies the significance of the federal decisions interpreting the statute. A normal area of protection for AIDS patients is state law. State laws prohibit employers from discriminating against AIDS-related claims in employee benefit plans.[54] ERISA, however, provides an avenue through which an employer can avoid state law. ERISA expressly

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46. *Owens v Storehouse, Inc.*, 773 F Supp 414, 415 (N D Ga 1990).

47. 773 F Supp 416 (N D Ga 1991).

48. *Owens*, 773 F Supp at 418.

49. Id.

50. Id at 419, quoting *Deeming v American Standard, Inc.*, 905 F2d 1124, 1127 (7th Cir 1990).

51. *Owens*, 773 F Supp at 419.

52. Id.

53. Id, citing *Young v Standard Oil (Indiana)*, 849 F2d 1039, 1044 (7th Cir 1988), and *Phillips v Amoco Oil Co.*, 799 F2d 1464, 1471 (11th Cir 1986).

54. Most states prohibit such discrimination through insurance statutes or employment discrimination statutes. For a discussion and listing of relevant state laws, see Sohlgren, 24 Loyola LA L Rev at 1246-51 nn 6-7 (cited in note 13).

preempts state laws which relate to employee benefit plans if the particular law does not regulate insurance.[55] As a result, if a state law prohibits AIDS discrimination in employee benefit plans and does not purport to regulate insurance, it is pre-empted by ERISA.[56]

Further, state insurance laws which regulate employee benefit plans may also be preempted. The United States Supreme Court has distinguished between insured benefit plans and those which are employer self-insured; a state can indirectly regulate insured benefit plans but not employer self-insured plans.[57] This allows an employer, by funding its benefit plan through self-insurance, to avoid state insurance laws which prohibit AIDS-related discrimination.[58]

Understanding that state insurance and employment discrimination laws can be preempted by ERISA, the attention thus turns to federal employment discrimination statutes.

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55. ERISA, § 514, 29 USC § 1144 (1988). The statute states that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." ERISA § 514(a), 29 USC § 1144(a).

The United States Supreme Court in *Shaw v Delta Air Lines, Inc.*, 463 US 85 (1983), has interpreted this preemption broadly. The preemption can apply to state laws not specifically designed to affect employee benefit plans, and cannot "be interpreted to preempt only state laws dealing with the subject matters covered by ERISA." *Shaw*, 463 US at 98 (1983).

The statutory exception to this preemption states that "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." ERISA, § 514(b)(2)(A), 29 USC § 1144(b)(2)(A) (1988). A state cannot, however, deem that employee benefit plans are insurance and attempt to regulate such plans under this preemption exception. ERISA, § 514(b)(2)(B), 29 USC § 1144(b)(2)(B).

56. See *Pilot Life Ins. Co. v Dedeaux*, 481 US 41, 44-51 (1986).

57. *Metropolitan Life Ins. Co. v Massachusetts*, 471 US 724 (1984). The Court stated:

> We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing we merely give life to a distinction created by Congress [in ERISA], . . . a distinction Congress is aware of and one it has chosen not to alter.

Metropolitan Life Ins. Co., 471 US at 747.

The Court affirmed its *Metropolitan Life* analysis in *FMC Corp. v Holliday*, US , 111 S Ct 403 (1990). ERISA, § 514(b)(2)(B) "exempt[s] self-funded ERISA plans from state laws that 'regulat[e] insurance' within the meaning of" Section 514(b)(2)(A). *FMC Corp.*, 111 S Ct at 409. "On the other hand, employee benefit plans that are insured are subject to indirect state insurance regulation." Id.

58. Sohlgren, 24 Loyola LA L Rev at 1264 n 104 (cited in note 13), lists the following examples: *Mullenix v Aetna Life & Cas. Ins. Co.*, 912 F2d 1406 (11th Cir 1990); *Gonzales v Prudential Ins. Co. of Am.*, 901 F2d 446 (5th Cir 1990); *Baxter v Lynn*, 886 F2d 182 (8th Cir 1989); *Reilly v Blue Cross & Blue Shield United of Wis.*, 846 F2d 416 (7th Cir 1988); *United Food & Commercial Workers v Pacyga*, 801 F2d 1157 (9th Cir 1986).

The Rehabilitation Act

The federal Rehabilitation Act[59] protects against discrimination on the basis of handicap and extends to discrimination in employee benefit plans.[60] The Rehabilitation Act is limited in scope, however, applying only to federal contractors and recipients of federal grants.[61]

The Rehabilitation Act does not expressly identify AIDS as a covered handicap. In *Chalk v United States District Court*,[62] a federal court found that the Rehabilitation Act's coverage does extend to AIDS.[63] The court relied on *School Board of Nassau County v Arline*,[64] where the United States Supreme Court held that a person with the contagious disease of tuberculosis may be a "handicapped individual" under the Rehabilitation Act.[65] Federal legislation passed after *Arline* confirmed that contagious disease may be covered under the Rehabilitation Act.[66] In addition, the federal Office of Contract Compliance Programs has adopted the policy that the Rehabilitation Act covers HIV-infected employees.[67]

It has been persuasively contended, however, that the Rehabilitation Act nevertheless proves ineffective even for the small percentage of employees that it does cover.[68] The Rehabilitation Act does not require an employer to assume an undue financial burden.[69] An employer could thus self-insure an employee benefits program, then limit AIDS-related coverage under the guise of "undue financial burden."[70]

Americans with Disabilities Act

The final and most important piece of existing federal legislation

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59. 29 USC § 701 (1988).

60. 29 USC §§ 793, 794. The employer must act "without discrimination based upon [the individual's] . . . physical or mental handicap in all employment practices such as . . . rates of pay or other forms of compensation." 41 CFR §§ 60-741.1 (1990).

61. Rehabilitation Act, 29 USC §§ 793, 794 (1988).

62. 840 F2d 701 (9th Cir 1988).

63. *Chalk*, 840 F2d 701 (1988). See also *Doe v Dolton Elementary School Dist.*, 694 F Supp 440, 443-45, (N D Ill 1988).

64. 480 US 273 (1987).

65. *Arline*, 480 US at 280-86.

66. Civil Rights Restoration Act, 29 USC § 706(8)(D) (West Supp 1991).

67. Office of Contract Compliance Programs Notice, Ch 6, December 23, 1988.

68. See Sohlgren, 24 Loyola LA L Rev at 1287-88 nn 263-66 (cited in note 13).

69. Id.

70. Id.

which may affect AIDS-related employee benefit coverage is the Americans with Disabilities Act (ADA).[71] The ADA was passed in part to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[72] The Act prohibits employers from:

> discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and *other terms, conditions, and privileges of employment.*[73]

Fringe benefits, such as employee health insurance, are covered by the ADA as "other terms, conditions, and privileges of employment."[74]

A "disability" under the ADA is defined as: (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," (2) "a record of such an impairment," or (3) "being regarded as having such an impairment."[75] The ADA was intended to encompass HIV infection under its "disability" provisions.[76]

The question, therefore, is whether the ADA will prohibit an employer from severely restricting employee health benefits for AIDS-related claims. The insurance provisions of the ADA, which have been described as "cryptic,"[77] do not provide an express answer.[78] In addition, an Equal Employment Opportunity Commission (EEOC) attorney, responsible for drafting the EEOC's regulations implementing the ADA, has indicated that the EEOC regulations

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71. 42 USCA § 12101 (West Supp 1991). The ADA, Subchapter I of which covers employment, becomes effective July 26, 1992 for employers with twenty-five or more employees and two years thereafter for employers with fifteen or more employees. 42 USCA § 12111(5)(A).

72. ADA, 42 USCA § 12101(b)(1) (West Supp 1991).

73. 42 USCA § 12112(a) (emphasis added).

74. See Equal Employment Opportunity for Individuals with Disabilities, 56 Fed Reg 8589 (1991), to be codified at 29 CFR § 1630.4 (proposed Feb 28, 1991).

75. ADA, 42 USCA § 12102(2) (West Supp 1991).

76. See Sohlgren, 24 Loyola LA L Rev at 1288 (cited in note 13), citing House Committee on Education & Labor, Americans with Disabilities Act of 1990, HR Rep No 485(II), 101st Cong, 2d Sess 52 (1990).

77. Furfaro and Josephson, 205 NY L J at 3 (cited in note 22).

78. See notes 80-88 and accompanying text. The Indiana Civil Rights Commission, however, may disagree with this analysis. In *Westhoven v Lincoln Foodservice Prods. Inc.*, No EMha89030350 (Ind Civ Rights Comm, Mar 22, 1991), an employer placed a lifetime cap of $50,000 on AIDS-related claims while other claims retained a lifetime maximum benefit of $1,000,000. In determining that this was an impermissable discrimination under state law, the commission opined that the employer's actions were clearly prohibited by the ADA. Furfaro and Josephson, 205 NY L J at 3 (cited in note 22).

also do not specifically answer this question.[79]

The insurance provisions of the ADA allow "bona fide benefit plan[s]," including employer-funded programs, to be based on "underwriting risks, classifying risks, or [the] administering [of] such risks."[80] Thus, the ADA does not affect employer actions which are consistent with insurance risk classifications.[81] Further, the ADA's insurance provisions do not alter the preemptive effect of ERISA nor an employer's administration of self-insured benefit programs.[82]

The ADA does, however, regulate the motives behind an employer's decision to limit the health benefits available for AIDS-related claims. In an extremely significant provision, the ADA prohibits an employer from using insurance risk classification "as a subterfuge to evade the purposes" of the statute.[83] Within this language lies the answer as to whether the ADA will be effective in protecting employee health benefits for AIDS-related claims. A restriction on AIDS-related coverage based on sound actuarial principles would arguably not violate the ADA;[84] the same restriction, however, would be prohibited if the impetus of such restriction was to evade the purposes of the ADA.[85]

The obvious problem is in determining what constitutes a "subterfuge" to avoid the purposes of the ADA. The statute does not specifically address this question. The EEOC has requested comments regarding insurance, risk classification, and actuarial princi-

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79. Furfaro and Josephson, 205 NY L J at 3 (cited in note 22).

80. ADA, 42 USCA § 12201(c) (West Supp 1991). Section 12201(c) states that the ADA shall not be construed to prohibit or restrict:

> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
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> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
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> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Id.

81. Sohlgren, 24 Loyola LA L Rev at 1290 nn 280-81 (cited in note 13), citing House Committee on Education & Labor, Americans with Disabilities Act of 1990, HR Rep No 485(II), 101st Cong, 2d Sess 52 (1990).

82. Id.

83. ADA, 42 USCA § 12201(c) (West Supp 1991).

84. Sohlgren, 24 Loyola LA L Rev at 1292 (cited in note 13).

85. ADA, 42 USCA § 12201(c) (West Supp 1991).

ples to aid in the development of ADA compliance regulations.[86] The ADA, however, does not provide for much regulatory discretion; thus it has been suggested that EEOC regulations will probably be of little assistance.[87] In addition, interpretation by the courts of similar statutory language would indicate that an AIDS-related coverage restriction may simply satisfy the "subterfuge" requirement if based on proper actuarial and insurance principles.[88]

Conclusion

American society currently relies on the employment relationship to play an integral role in the funding and delivery of health care to its residents. As the rate of HIV infection escalates and as the treatments improve, the health care system and society will face a continually increasing burden. Employers faced with funding for the care of these patients will continue to significantly restrict the amount of AIDS-related coverage available in employee benefit programs. Difficult decisions have to be made.

The "subterfuge" language of the ADA provides an avenue through which HIV-infected employees may find protection.[89] The ambiguity of such language will lead to costly litigation, however, further draining the nation's resources and adding to the trauma of an already horrific disease.[90] Thus, commentators have called for federal legislation or regulation to clearly establish guidelines for employers.[91] An employer, for example, could be prohibited from limiting coverage for AIDS "while continuing to cover other catastrophic or chronic disabilities at normal levels."[92]

More elementary questions still remain. Should the employment

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86. Equal Employment Opportunity for Individuals with Disabilities, 56 Fed Reg 8579 (1991). The EEOC posed the following questions:

1. What are the current risk assessment or classification practices with respect to health and life insurance coverage in the area of employment?
2. Must risk assessment or classification be based on actuarial statistics?
3. What is the relationship between "risk" and "cost?"
4. Must an employer or insurance company consider the effect on individuals with disabilities before making cost saving changes in its insurance coverage?

Id.

87. Sohlgren, 24 Loyola LA L Rev at 1295 n 309 (cited in note 13).

88. See Age Discrimination in Employment Act of 1967, 29 USC § 623(f)(2) (1988); Sohlgren, 24 Loyola LA L Rev at 1293 nn 293-97 (cited in note 13).

89. See notes 83-88 and accompanying text.

90. See Furfaro and Josephson, 205 NY L J at 3 (cited in note 22).

91. See Sohlgren, 24 Loyola LA L Rev at 1294-99 (cited in note 13); Furfaro and Josephson, 205 NY L J at 3 (cited in note 22).

92. Sohlgren, 24 Loyola LA L Rev at 1298 (cited in note 13).

relationship continue to be expected to fill this role, carry this burden, in our society? In an era where American employers are increasingly accused of inferior productivity and efficiency in comparison with their foreign counterparts, should the burden of funding a significant part of the nation's health care be placed on their shoulders? And to what degree should health care providers be expected to absorb a portion of the cost, if any, of their services? These questions represent no small issue in today's society—evidenced by the fact that national health care reform is becoming a potent, effective political weapon.[93]

John F. Dudley

93. See Susan Dentzer, *No More Patient Patients*, 111 US News & World Report 50, 51 (Nov 18, 1991); Michael Kramer, *The Voter's Latest Ailment: Health Care*, 138 Time 51 (Nov 11, 1991).