

HIV

in the
Workplace

YOUR LEGAL RIGHTS

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This is one in a series of booklets published by the AIDS LEGAL COUNCIL OF CHICAGO. All are designed to help you understand **YOUR LEGAL RIGHTS** in Illinois. The booklets in this series are:

HIV and Confidentiality

HIV and Discrimination

HIV and Insurance

HIV and Public Benefits

HIV and Undocumented Immigrants

HIV in the Workplace

HIV: Issues for Families with Children

HIV: Issues for Youth and Young Adults

HIV: Returning to Work

HIV: Wills and Powers of Attorney

All of these booklets are free and available at:

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This guide is intended as an overview of HIV-related Illinois and federal law. As with any legal matter, it is always a good idea to consult an attorney concerning the particular circumstances of your case.

HIV IN THE WORKPLACE

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INTRODUCTION

Many people with HIV or AIDS have good jobs, and contribute to society in important ways. People may have told you that because you're HIV positive no one will hire you. This is not true. If you have the right skills and experience, you have as much right to a job as anyone else.

There is one important thing to remember:

DISCRIMINATION AGAINST PEOPLE WITH HIV IS ILLEGAL.

This means that an employer cannot fire you, demote you, or refuse to hire you just because you're HIV positive. Your rights are protected by federal and state laws. Some cities and counties in Illinois (like Chicago and Cook County) also have local ordinances which make discrimination against people with HIV illegal.

This booklet will answer many important questions about HIV in the workplace. If you have more questions after you're done reading, you can call the AIDS LEGAL COUNCIL OF CHICAGO at (312) 427.8990. Someone there will be happy to speak with you.

Chapter One

APPLYING FOR A JOB

1) If I apply for a job, can the person interviewing me ask if I have HIV?

No. An interviewer cannot ask you if you have a disability or a medical condition. **You do not have to tell the employer that you are HIV positive.** An employer *may* ask about your ability to perform certain job-related duties. For example, if you are applying for a job as a stock clerk, and the job requires you to lift heavy boxes, the employer could ask if you are able to lift heavy things.

2) Are there jobs I am not allowed to have because I'm HIV positive?

The only job you would not be allowed to have is one in which you would present a direct threat to the health and safety of others. For example, a hospital could probably refuse to hire someone as a surgeon if she is HIV positive. However, to refuse you a job an employer must show that you would pose a direct threat to the health and safety of others **by carrying out the routine job duties of the position you applied for.** For example, if you were applying for a job as a secretary, an employer could not say that you might accidentally cut yourself and therefore pose a direct threat to others. Cutting yourself accidentally is not part of a secretary's routine job duties.

3) Can an employer ask me to take an HIV test?

Under certain circumstances, an employer may require that a person applying for a job take a medical examination. *But an employer can require this exam only if he has already offered you a job, and if everyone applying for the job has to take the exam*

also. As part of that exam, the employer could legally require you to take an HIV test. However, the employer cannot refuse to hire you based on the result of that HIV test, unless your being HIV positive would pose a direct threat to the health and safety of others. Most employers do not test applicants for HIV because HIV is irrelevant to most jobs, and because HIV typically does not pose a direct threat to others.

4) I am returning to work after a long absence due to illness. How do I explain the gap in my résumé?

This can be a very difficult question to answer. Each person's situation will be different. The most important thing is: prepare an answer for this question, in case it comes up in the interview. Possible answers might be:

- ♦ "I took a leave for personal reasons, and I'm glad I did because I'm more fit to work than ever."
- ♦ "It was time for a break, and now it's time to get back to work."

Did you do something interesting during your break from work? Did you travel, or take a class, or learn a new skill? Did you do some work out of your home? You can focus on those things. If you have to explain a long absence, it's best to explain it quickly and then move on to the positive points on your résumé. Remember, your goal in an interview is to show the employer you are the right person for the job.

Chapter Two

CONFIDENTIALITY ON THE JOB

1) I already have a job. Do I have to tell my boss I'm HIV positive?

No. You do not have to tell your employer you are HIV positive. Some people choose to tell their boss that they are HIV positive because they believe that their employer will be supportive. Some people choose not to tell because they don't want anyone in their company to know. The choice is yours. In general, the AIDS Legal Council does not recommend disclosing your HIV status at work unless there is a very good reason to do so.

2) Is it ever a good idea to tell my boss I'm HIV positive?

The decision to tell your boss you are HIV positive is a very personal one. Most people who disclose their HIV status at work do so for one of two reasons:

- ◆ to ask for an accommodation at work, like more flexible hours
- ◆ to protect their rights, so that an employer who is discriminating cannot say he didn't know the employee was HIV positive.

If you need some sort of accommodation to be able to do your job, you may have a right to that accommodation, according to a federal law called the **Americans with Disabilities Act (ADA)**. Some people with HIV need accommodations such as flexible hours, time off to visit the doctor, or permission to work at home one day a week. If you need an accommodation, you might be able to avoid disclosing your HIV status by instead disclosing the condition that you have (for example, lymphoma). It would be important to get a doctor's note verifying your condition. See Chapter Four for more information on workplace accommodations.

If you feel that your boss is discriminating against you because he suspects you are HIV positive, it might be a good idea to disclose your HIV status to protect your rights. This is a very complicated situation. We recommend that you discuss it with someone from the AIDS Legal Council or another legal organization before doing anything.

3) If I tell my boss I'm HIV positive, does she have to keep that information confidential?

Yes – the Illinois AIDS Confidentiality Act says that it is illegal for any person to disclose your HIV status without your permission. Also, under the Americans with Disabilities Act, an employer must maintain strict confidentiality regarding all medical information. If you tell your boss you are HIV positive, and the next week everyone in the office knows, your boss has probably violated the law.

The law says your boss can tell first-aid personnel about your disability if you might require emergency treatment at work. She can also tell your supervisor about any restrictions on your work or accommodations you might need. If you decide to tell your boss about your HIV status, it is a good idea to stress that you know the law requires that information be kept confidential.

4) If I disclose my HIV status at work, will that information be in my personnel file?

It shouldn't be. The law requires that employees' medical information be kept in separate files.

5) Can my employer get a copy of my medical records?

No. Those records are confidential. The only way your employer can get them is if you sign a release authorizing your doctor to give your records to your company.

Chapter Three

INSURANCE

1) Will I be able to get health insurance at work if I'm already HIV positive?

Generally, yes. If you get a job with a company and are eligible for the company's group health insurance plan, then you cannot be denied coverage. However, in many companies only full-time employees are eligible for health insurance. If you work only part time, then you may not be entitled to join your company's group insurance plan.

Also, employers are not required to offer health insurance to their employees. If your employer chooses not to offer insurance to anyone, you cannot force him to do so.

2) If I get health insurance through work, won't my HIV be excluded as a "pre-existing condition?"

Exclusions for pre-existing conditions can be a serious problem for people with HIV who go back to work. However, not all health insurance policies exclude benefits for pre-existing conditions. Many HMO's, for example, will pay claims for any health condition no matter when you were first diagnosed with it.

A federal law called the **Health Insurance Portability and Accountability Act** of 1996 ("HIPAA") made things easier for people with pre-existing conditions who get insurance through work. Because of this law, it is harder for group health insurance policies to refuse to cover pre-existing conditions. The rules apply to any employer that has at least two employees in its group plan.

HIPAA says that if you already had health insurance for at least 12 consecutive months when you get your new insurance, then your new health insurance has to cover your pre-existing condition right away. (If you're joining the new group insurance late, then you have to have been insured for at least 18 months). In

other words, you'll move from your old policy to the new group policy without a break in coverage. Even people who have been on Medicaid or Medicare are protected under HIPAA. However, HIPAA doesn't apply to you if you have had a gap in your insurance coverage for longer than 63 days before getting your new insurance.

If you go back to work and your new insurance company says it won't pay for your pre-existing condition, check with an attorney to find out if HIPAA can help you.

If your insurance policy does refuse to pay for pre-existing conditions and HIPAA does not apply to you, the policy can only refuse to pay HIV-related claims for one year. After that, the policy must pay for HIV-related claims.

3) I'm applying for insurance through work, and the application asks if I'm HIV positive. If I say yes, will I still get the insurance?

If you are eligible for group coverage through work, then you should not be denied the insurance, even if you disclose your HIV status. The most important thing is: *it is never a good idea to lie on your insurance application.* If you do and the insurance company finds out later, the company may have the right to cancel your policy.

4) I have to fill out an insurance form for my employer that asks me questions about my health. What do I say?

If you work for a very large company (say over 1000 employees), you should be okay, because they probably have other employees with serious health problems and their Human Relations Department probably knows the rules about keeping medical information confidential. But if you have any doubts, or you work for a smaller company, here are three ways that you might handle this:

- ◆ Put a big circle around the whole section that lists all the health conditions and write “various pre-existing conditions – full details available from my

doctor” and give the doctor’s name and phone number. Sign a form at your doctor’s office that it’s okay to tell the insurance company about your HIV, but not your employer.

- ◆ Tell your employer “I know I’ll be in trouble if I leave anything out on this form so I’m just going to take it to my doctor’s office and have them fill it in. My doctor is a nut about privacy, though, and he’ll want to fax it directly to the insurance company. Could you give me their fax number?” Then, whether or not you give it to your doctor, fax the completed form to the insurance company yourself with a note that they must not share the information with your employer (which they already should know).
- ◆ Call the insurance company yourself and tell them your situation. Tell them you are going to fill out two forms – one for them with all the truthful answers, and one for your employer that leaves out your HIV and anything else you might be worried about disclosing (for example, mental illness). Get their fax number. Then tell your employer you need an extra form because you messed up on the first one. Fax the form with the true information to the insurance company. Turn the other one in to your employer.

5) Can the insurance company tell my company I'm HIV positive?

Your employer should not find out about your HIV status. The Illinois Insurance Code generally prohibits an insurance company from disclosing confidential information to your employer. However, the insurance company will probably disclose the claims history to your employer. This means your employer will be told what types of health conditions people have who are insured under the group policy – without being told who those specific people are. So if you work for a small company, and your employer finds out that one person on the group health insurance plan has HIV, your employer may guess who that person is.

Sometimes, though, your employer and your insurer are the same company. This happens when your company is **self-insured**. If your company is self-insured, then it is providing its own health plan to its employees rather than buying an

insurance plan from a separate insurance company. In that case, when you submit an HIV claim, you will be submitting it to your employer. It would be important for you to find out who in the company is allowed to see the information in that claim.

6) Can my new employer refuse to offer me health insurance because he thinks I'll cost him too much money?

No. If you are eligible for group insurance on your job, then it must be offered to you.

Chapter Four

ACCOMMODATIONS AT WORK

1) What is the Americans With Disabilities Act? Why is it important to me?

The **Americans With Disabilities Act** (ADA) is a powerful federal law that makes discrimination against people with disabilities (like HIV) illegal. The ADA prohibits employers *with 15 or more employees* from firing, demoting, refusing to hire, or otherwise discriminating against people solely because they have a disability like HIV. The ADA also protects people associated with a person with HIV, or people believed to be HIV positive. If you are gay, for example, and your boss fires you because he thinks you have AIDS (even though you do not), the ADA would protect you.

The ADA is also important because it gives you the right to a "reasonable accommodation" at work, so that you can keep doing your job.

2) What is a reasonable accommodation?

A reasonable accommodation is a change in your workplace or work routine that makes it possible for you to keep doing your job. One of the most common reasonable accommodations is a flexible work schedule. Here are some examples of flexible work schedules:

- ◆ Starting work at 9 a.m. instead of 8 a.m.
- ◆ Taking one afternoon off each month to visit the doctor.
- ◆ Taking an hour break in the afternoon to rest.
- ◆ Working at home one day a week.

There is no such thing as a "standard" reasonable accommodation. Each accommodation is created for the specific requirement of the person who needs

it. Also, whether a particular accommodation is reasonable depends upon many factors, including the size of your company and the nature of your job duties.

3) Am I entitled to a reasonable accommodation?

The Americans With Disabilities Act says that a person with a disability is entitled to a reasonable accommodation if that person can perform the "essential job functions." In other words, if you satisfy the job requirements (like experience, skills, or education) and if the accommodation will make you able to do all of your essential job functions, you are entitled to that accommodation.

There are only two situations in which an employer can refuse to grant a reasonable accommodation:

- ♦ The company employs fewer than 15 employees, and is not covered by the ADA.
- ♦ The accommodation causes the company "undue hardship."

"Undue hardship" means the accommodation creates an unfair burden on the employer. For example, a small business might not be able to afford to put in an elevator to help an employee reach its second-floor office. Or a small law firm might not be able to function if the only receptionist took an hour-long nap every afternoon.

4) How do I get a reasonable accommodation?

You have to ask for it. An employer does not have to offer you an accommodation unless you ask for one. You should meet with your boss, as well as anyone else you think you need to inform (such as the head of personnel) and explain that you are requesting a reasonable accommodation under the Americans With Disabilities Act. The AIDS Legal Council can help you do this.

Your employer may not have to grant you the exact accommodation that you request. If, for example, you suffer from chronic fatigue and ask to be allowed to come into work any time between 9 and 11 in the morning, your boss may have a

right to insist on a more regular schedule. You might compromise and request to be allowed to come into work each day at 10.

5) Do I have to disclose my HIV status to request a reasonable accommodation?

When an employee asks for a reasonable accommodation, the employer can ask for medical documentation to verify the existence and nature of the disability. This is usually a letter from your doctor. To avoid disclosing your HIV status when requesting an accommodation, you could first try disclosing the actual disabling condition (for example, fatigue or lymphoma). For an employee who is HIV positive and in good health, but who wants an accommodation to take time off to see the doctor regularly, it may be impossible to avoid disclosing HIV status. In any event, if you have to disclose your HIV status make sure you stress to your employer that your HIV status should be kept confidential.

6) Should I ask for a reasonable accommodation in writing?

It is probably a good idea to ask for a reasonable accommodation in writing. Here is a sample request:

Dear Employer,

I am writing to inform you that I have a disability under the Americans With Disabilities Act. As you know, this law entitles me to a reasonable accommodation. I am requesting the following accommodation: [describe the accommodation you need here].

I am fully capable of performing the essential duties of my job. I seek this accommodation so that I can be a more productive employee for this company. Please contact me at your earliest convenience so that we can discuss my request.

Make sure that you date your letter. It is also a good idea to make an extra copy of your letter and have it put into your personnel file.

Chapter Five

FAMILY AND MEDICAL LEAVE ACT

1) What is the Family and Medical Leave Act?

The Family and Medical Leave Act (FMLA) is a federal law that went into effect in 1993. It allows employees to take time off from their jobs in certain circumstances and guarantees their right to return to their job.

2) Why is this law important to me?

The Family and Medical Leave Act might entitle you to up to 12 weeks of unpaid sick leave each year from work. Employees can take FMLA time for their own serious health conditions, or for the serious health conditions of their children, parents or spouse.

During your FMLA leave, your health insurance must be continued, and your company must continue to pay its share of your health insurance premiums. You will have to pay whatever share of the premium you usually pay.

3) Am I eligible for time off under FMLA?

First of all, the Family and Medical Leave Act applies only to companies that have 50 or more employees. Secondly, you are eligible for FMLA leave if:

- ◆ you have worked at your job for at least 12 months, and
- ◆ you have worked an average of at least 25 hours a week.

4) What is a "serious health condition?"

According to the FMLA, a serious health condition is either:

- ◆ a physical or mental condition that requires you to be hospitalized, or
- ◆ a physical or mental condition that requires you to get continuing treatment from a doctor.

Most people with HIV-related symptoms would have a "serious health condition."

5) How do I get FMLA time off?

First, you must make sure you are eligible for FMLA time off (see question 3 in this chapter to determine this). If you are eligible, you must request FMLA time from your employer. The law says that you should ask for FMLA time off at least 30 days in advance if possible. Of course, sometimes that is not possible. If you can't give a 30 day notice, you should ask for FMLA time as soon as you know you're going to need it.

Your employer may ask you and your doctor to fill out a form. Your employer also may request documentation from your doctor to confirm that you have a serious health condition.

6) Do I have to disclose my HIV status to get FMLA leave?

Probably. An employer may require that a request for leave under FMLA be supported by a note from your doctor. To avoid disclosing your HIV status when requesting FMLA time, you could first try disclosing the actual disabling condition (for example, fatigue or lymphoma). If you are HIV positive and in good health, but need FMLA time to see your doctor regularly, it may be impossible to avoid disclosing HIV status. In any event, if you have to disclose your HIV status make sure you stress to your employer that your HIV status should be kept confidential.

7) Will I get paid during my leave?

No. The FMLA does not require an employer to pay you for the time you are not working. However, you may qualify for some pay under your employer's short-term disability plan, if your company offers this benefit.

8) Do I have to take my leave all at once?

No. When medically necessary, leave may be taken on an intermittent or reduced schedule basis. This may include periods such as an hour per day to lie down after taking medication or several days per month for doctor visits.

9) If I take my FMLA time off on an intermittent basis, does my employer have to keep me in the same job?

If you take FMLA time intermittently, your employer may require you to transfer temporarily to an alternative position that better accommodates your recurring periods of absence. The position would have to offer the same pay and benefits.

10) Does the FMLA let me take time off to care for my lover who is dying of AIDS?

Unfortunately, no. The FMLA only lets you take time off to care for a spouse, a child or a parent.

You still might be able to work out some sort of unpaid leave with your boss if he or she is willing to do so. Under the **Chicago Human Rights Ordinance**, an employer may not discriminate against a person on the basis of sexual orientation. So if your employer has a policy of providing personal leave to employees for non-medical reasons, then your request for time off under that policy must be considered on the same basis as all other requests for time off.

11) Can my employer fire me or retaliate in some way against me for taking FMLA time off?

No. If you are entitled to FMLA time off, then your employer cannot retaliate against you for taking that time.

Chapter Six

MAINTAINING YOUR JOB

1) Can my boss fire me because I am HIV positive?

No. The Americans With Disabilities Act and the Illinois Human Rights Act make it illegal for an employer to fire someone because of his or her HIV status. It would also be illegal for your employer to demote you, reduce your pay, or in any way make your job worse based solely on your HIV status.

Of course, an employer can terminate you for good cause, regardless of your HIV status. If you break company policy, or if your performance is unacceptable, you can be terminated just like anyone else.

2) I've been out sick a lot this year, and my boss says that if I miss any more days I'll be fired. Can he do that?

Maybe. It depends on a lot of things. First of all, have you used up all your sick days? If not, your boss probably can't fire you for taking them. Second, did he O.K. your absences? If he did, he shouldn't hold them against you. Third, are you entitled to sick leave under the Family and Medical Leave Act? If so, your boss can't fire you for taking those days (see the previous chapter for more information on the Family and Medical Leave Act).

Nonetheless, keep in mind that any employee who misses too much work can be terminated.

3) I'm a nurse. Can my employer test me for HIV? Can I be fired if I test positive?

You cannot be fired just because you are HIV positive. The only health-care workers who can lose their jobs because they are HIV positive are health-care workers who pose a direct threat of infecting their patients. People like surgeons and surgical staff might pose a direct threat.

4) I work with heavy machinery, and when I told my boss that I'm HIV positive, he said I couldn't do that job anymore because I might cut myself and infect a co-worker. Can he do that?

No. The only way he can remove you from your job is if you pose a direct threat to co-workers by doing your *routine job functions*.

5) I take a lot of pills every morning, and they upset my stomach for an hour or so. I'm supposed to be at work at 8:00, but I usually can't get there until 8:30. My boss is threatening to fire me. What can I do?

This is a good time to ask for a reasonable accommodation. The Americans With Disabilities Act says that a person with a disability (like HIV) is entitled to a reasonable accommodation at work. It is probably reasonable for you to request permission to start work at 8:30 due to your disability. You would have to disclose to your employer that you have a disability and provide a doctor's note backing you up. See Chapter Four for more information.

6) If I feel I've been discriminated against because of my HIV, what can I do about it?

It is always a good idea to discuss your case with an attorney. Contact the AIDS Legal Council or other legal organization to review the details of your case.

Every citizen has a right to file a charge against an employer who is discriminating. Here are the places where you can file a charge:

Equal Employment Opportunities Commission.

500 West Madison Street, Suite 2800

Chicago, Illinois 60661

(312) 353-2713

**To file a charge here, the company you work for must have 15 or more employees*

Illinois Department of Human Rights

100 West Randolph Street, Room 10-100

Chicago, Illinois 60601

(312) 814-6200

Cook County Commission on Human Rights

69 West Washington Street, Suite 2900

Chicago, Illinois 60602

(312) 603-1100

Chicago Commission on Human Relations

740 North Sedgwick Street, 3rd Floor

Chicago, Illinois 60610

(312) 744-4111

These government agencies can investigate your case. At each agency except the Equal Employment Opportunities Commission, you must file your charge within 180 days of the act of discrimination. The Equal Employment Opportunities Commission allows you 300 days to file your charge.

