

PREVENTING TRANSMISSION OF BLOOD-BORNE DISEASES IN THE WORKPLACE - WORKERS WITH AIDS

SUMMARY

The advent of Acquired Immunity Deficiency Syndrome (AIDS) has raised new questions about employment practices. Also, a new federal OSHA regulation places requirements for employers to help prevent transmission of blood-borne diseases like AIDS and Hepatitis in the workplace.

The BMA discusses general employment laws affecting employees and job applicants with AIDS or infected with the AIDS-causing HIV virus, as well as the new OSHA rule.

PART I - GUIDELINES FOR HANDLING AN EMPLOYEE OR JOB APPLICANT WHO HAS TESTED POSITIVE FOR HIV/AIDS

MEDICAL SUMMARY OF AIDS

Acquired Immunodeficiency Syndrome ("AIDS") is caused by a Human Immunodeficiency Virus ("HIV") which attacks and alters the ability of the immune system to fight infection. An individual does not die from AIDS, but rather, will die from any number of opportunistic infections or malignant conditions which the weakened immune system is incapable of fighting. After infection with HIV, there are several different levels of development which, ultimately affects the victim's ability to function effectively in the workplace. The Center for Disease Control does not diagnose an individual with AIDS until the immune system has been compromised and the individual is suffering from an opportunistic disease or condition which likely will be fatal.

While clinical AIDS is apparently terminal and debilitating, mere infection with HIV is not debilitating and does not otherwise affect an individual's ability to function. HIV infection is much more common, and the incubation period into clinical AIDS may occur over several years. Present medical knowledge is uncertain whether all HIV infected individuals will ultimately develop AIDS or even become ill.

HIV can be found in the bodily fluids of an individual such as blood, semen, saliva, sweat or tears. While saliva, sweat and tears can contain traces of HIV, those traces are not presently believed to be of sufficient concentration to transmit the disease. Typically, HIV can be transmitted only during sexual contact, through the using of contaminated intrave-

nous needles, through blood or blood products, or through an infected pregnant mother to her unborn child.

Presently, the risk of transmission of HIV through casual contact with, or proximity to, infected persons is believed to be virtually non-existent. Based upon medical studies to date, the Centers for Disease Control has concluded that there is no substantial evidence infection with HIV is not debilitating and does not otherwise affect an individual's ability to function. HIV infection is much more common, and the incubation period into clinical AIDS may occur over several years. Present medical knowledge is uncertain whether all HIV infected individuals will ultimately develop AIDS or even become ill.

AIDS AS A HANDICAP - PROTECTION AGAINST DISCRIMINATION

The general consensus to date is that, in the employment context, AIDS is a handicap and/or disability which is protected under both federal and state law. In addition to the prohibition against handicap discrimination on account of AIDS, several states have enacted legislation which either prohibits or regulates the ability of an employer to test its workforce for the presence of HIV.

Federal Handicap Law

Employment decisions regarding an employee or applicant infected with HIV are most likely to be challenged under either Federal or state laws prohibiting discrimination on the basis of handicap. Presently P 504 of the Rehabilitation Act of 1973 prohibits the federal government, federal contractors, and

any other entity which received federal financial assistance from discriminating against a handicapped individual. Any employer which has federal contracts is, therefore, subject to complying with P 504.

A handicapped person may not be discriminated against because of a handicap provided that the person otherwise can perform the essential functions of the job in question. Even if the handicapped person cannot perform the essential job functions, the employer is obligated to provide a reasonable accommodation which would allow the individual to perform the essential functions of the job. An accommodation is not reasonable only if it would either impose an undue financial and administrative burden on the Employer or require a fundamental alteration in the nature of the essential job functions. Where the reasonable accommodation does not overcome the effects of the handicap, the individual is not "otherwise qualified" and the failure to hire, retain or promote is not discriminatory.

While the Supreme Court has specifically declined to address the issue of whether an individual merely infected with HIV (i.e. without further incubation or development to clinical AIDS) was "handicapped", it rejected the reasoning of an earlier federal memorandum that discrimination on the basis of fear of contagiousness was permissible. The Department of Justice subsequently reversed its earlier opinion and now recognizes that even HIV carriers without symptoms are handicapped. The Federal office of Personnel Management has additionally issued its guidelines and mandated that federal employees with AIDS must be treated the same as employees with other illnesses and should be allowed to work so long as they are able to maintain acceptable performance and do not pose a safety or health threat to themselves or others.

The fact that an individual who is an HIV carrier may be protected under the Rehabilitation Act, as well as applicable state prohibitions against handicap discrimination, does not preclude an employer from making an adverse employment decision on the basis of the existence of a contagious disease. The Supreme Court's ruling instructs that an "otherwise qualified" individual is an individual with a contagious disease who does not pose a "significant risk" of transmitting the disease to others. Accordingly, where a significant risk of contamination exists and a reasonable accommodation cannot eliminate the risk, the individual is not "otherwise qualified". Congress reinforced this concept by the Civil Rights Restoration Act of 1989 which provides that an individual with a contagious disease that constitutes a direct threat to the health or safety is, therefore, "unable to perform the duties of the job".

In assessing whether a "significant risk" exists, the Supreme Court emphasized that an individualized inquiry must be conducted. This inquiry should be based on reasonable medical judgements given the state of medical knowledge concerning: (1) the nature of the risk of transmission; (2) the duration of the risk of transmission; (3) the severity of the potential harm to third persons; and (4) the probabilities that the disease will be transmitted.

State Law

State laws on handicap discrimination have generally followed federal laws and practices. All states, with the exception of Alabama, Arkansas and Mississippi prohibit employers from making adverse employment decisions on the basis of a physical handicap or disability so long as the person is otherwise qualified to perform the job.

To date, AIDS is statutorily determined to be a protected physical handicap in Florida, Iowa, Kansas, Main, Missouri, Nebraska, New Mexico, North Carolina, Oregon, Rhode Island, Texas, Vermont, Washington and Wisconsin. Furthermore, several state agencies charged with enforcing state laws against handicap discrimination have concluded that AIDS is protected (California, District of Columbia, Maine, Michigan, Missouri, New York and Ohio). Arizona has reached the same conclusion as announced in an Attorney General opinion and Pennsylvania, by Executive Order, has announced such the existence of a contagious disease. The Supreme Court's ruling instructs that an "otherwise qualified" individual is an individual with a contagious disease who does not pose a "significant risk" of transmitting the disease to others. Accordingly, where a significant risk of contamination exists and a reasonable accommodation cannot eliminate the risk, the individual is not "otherwise qualified". Congress reinforced this concept by the Civil Rights Restoration Act of 1989 which provides that an individual with a contagious disease that constitutes a direct threat to the health or safety is, therefore, "unable to perform the duties of the job".

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In addition to state law including AIDS within the protection from handicap discrimination, several states regulate AIDS testing. The various state requirements will all vary and should be specifically addressed prior to the administration of any HIV test. Again, because the HIV test only detects the presence of the virus, any result would not have any affect on an employer's right to adversely effect an individual's employment because there is no relationship either to the present ability to perform or fear of contagiousness.

All of the states which have enacted testing statutes have generally required that the test be administered only after informed consent of the employee or applicant has been received and that confidentiality is strictly maintained. (California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, New Hampshire, New York, North Dakota, Rhode Island, Texas, Virginia and West Virginia). Further, California, Florida, Hawaii, Iowa, Massachusetts, North Dakota, Ohio, Rhode Island, Texas, Washington and Wisconsin specifically prohibit an employer from ever using an HIV test to make an

adverse employment decision unless the lack of AIDS is a bona fide occupational qualification.

However, to the extent that a state statute allows an employer to test either an applicant or a present employee, Americans with Disability Act of 1990 (“ADA”) prohibits such tests and subjects the employer to potential liability. In the meantime, the various federal agencies in charge of enforcing the ADA will enact further regulations. However, the ADA explicitly prohibits pre-employment medical tests but does allow an employer to conduct a medical examination “after an offer of employment has been made” and when all employees are subjected to the medical examination.

The ADA will apply to all employers with more than 15 employees and protects a “qualified individual with a disability”. The only defense is if the individual poses a “direct threat to the health or safety of other individuals”. Consistent with the Rehabilitation Act, a direct threat must be one which poses a “significant risk” to the health or safety of others that cannot be eliminated by reasonable accommodation.

Finally, the ADA provides guidance regarding what constitutes a reasonable accommodation. Specifically, the ADA indicates that an employer should consider “making existing facilities used by employees readily accessible to and usable by individuals with disabilities” as well as “job restructuring, part-time or modified work schedules, reassignment to vacant positions, acquisition or modification of equipment or devices,” etc.

POTENTIAL EMPLOYER LIABILITY ARISING OUT OF EMPLOYING AN INDIVIDUAL WITH HIV

Based on present medical knowledge, the risk of transmission of HIV at the workplace is not substantiated. However, given the negative perception of AIDS and HIV infection, employers are concerned regarding the potential liability it may incur arising out of the retention (or hiring) of an individual who has tested positive for HIV.

Potential Liability to Co-Worker/Customer

Under common law as well as OSHA, an employer has a duty to provide a safe place of employment. A co-worker potentially could argue that the employer has violated this duty by allowing a contagiously ill employee to work in close proximity to other employees. In order to recover, the employee would have to establish that the employer was aware of the employee with AIDS, took no reasonable steps to protect other employees from transmission and can establish a causal connection between the infected employee and the transmission.

The new federal ADA legislation should help insulate an employer from a “negligent hire” lawsuit because it is doubtful that a plaintiff could establish that the employer violated any duty of law. Furthermore, any argument that an employer violated a duty to warn regarding the presence of an employee with HIV should similarly fail because most state testing statutes (as well as the ADA), strictly limit the right to disseminate such information without specific authorization. An employer may only disseminate such information to

supervisors/managers in order to make necessary restriction and accommodation and to first aid/safety personnel to the extent that emergency treatment may be required. In all other respects, dissemination would violate the ADA.

Potential Liability to Employee Infected with HIV

The presence of an employee with AIDS in the workplace is more likely to subject the employer to liability to the infected employee if the situation is not handled properly. The employee may have several potential causes of action against the employer for violation of the state testing statutes, defamation, invasion of privacy, and intentional or negligent infliction of emotional distress. Violations of state and Federal discrimination statutes are also distinct possibilities. If not properly handled, this is an area fraught with problems.

Potential Liability to Co-Worker/Customer

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RECOMMENDATIONS

1. An Employer cannot discharge, or transfer/segregate an employee, as well as refusing to hire a qualified job application, simply because the employee or applicant has tested positive for HIV.
2. If an employee with HIV develops AIDS and his/her health begins to deteriorate, the Employer must offer the employee a reasonable accommodation so as to enable the employee to continue to perform the job.
3. Once an employee infected with AIDS health deteriorates to the point where he/she is no longer capable of performing the job even with the reasonable accommodation, the employee may be terminated as being “otherwise not qualified”. Be wary, however, that the treatment of a person with clinical AIDS must be consistent with the employer’s past practice with respect to the treatment of employees with long term disability or disease.

CONCLUSION

The rights and responsibilities of employees or applicants who test positive for HIV are complex and far reaching. Before any adverse employment action is taken, you should consult with a knowledgeable labor attorney (see resources at end). The federal or state handicap statutes do not require the retention of an employee with AIDS who cannot, with a reasonable accommodation, perform his/her essential job functions. As the development of AIDS becomes more

debilitating, reasonable action may be taken. However, such action cannot be based on the unsubstantiated fear or risk of transmission from the infected individual to others.

PART II - OSHA'S RULES ON PREVENTING BLOOD-BORNE DISEASES

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has issued proposed regulations (Subpart Z, section 1910.1030) requiring employers to take steps to protect against transmission of blood-borne diseases (such as Hepatitis B and the AIDS-causing HIV virus) in the workplace. The regulations were first intended to apply only to medical facilities and laboratories, but were amended to cover "all occupational exposure to blood or other potentially infectious materials ...".

At this writing, the final OSHA ruling has not yet been released. NTMA will report on the details of the regulations once they are finalized. Meanwhile, prudent employers will want to begin considering the issues discussed here.

For tooling and machining companies, exposure to blood or other infectious substances is likely to occur only when providing first aid to an accident victim or in cleaning up blood after an accident.

Occupational exposure is defined as reasonably expected contact with potentially infectious blood or other substances that may result from an employee's duties. Thus, if you have assigned individuals with first aid responsibilities, these persons would have occupational exposure. The proposed rules would require employers to identify in writing tasks and procedures involving exposure, and all positions with exposure. The exposure determination must be without regard to any personal protective equipment (gloves, masks, etc.) that may be available.

Employers with workers having occupational exposure would be required to establish a written infection control plan. The plan must include the determination of exposures for tasks and positions, a schedule and description of implementation of the plan, and must include provisions for review and updating. The plan must be made available to OSHA.

General methods of compliance can include procedures for washing after contact; removal, disposal, or sterilization of contaminated protective equipment and clothing; prohibition of eating, smoking, applying cosmetics or lip balm, and handling contact lenses in first aid areas or near accident sites where the potential for exposure exists. Controls for handling used needles or other sharp medical or first aid instruments may be required if appropriate.

Employers would be required to make appropriate personal protective equipment (gloves, etc.) to employees with potential exposure.

Requirements would be imposed for cleaning and disinfecting contaminated work areas and equipment.

Other provisions of the proposed rule would required post-exposure medical evaluation and follow-up for affected employees, and would require a structured training program for employees. Another controversial requirement of OSHA's proposed rule involves making Hepatitis B vaccinations available to any employees with an average occupational exposure rate of at least once per month.

SUMMARY AND ANALYSIS

In NTMA's opinion, many provisions of the proposed OSHA rule may be with first aid responsibilities, these persons would have occupational exposure. The proposed rules would require employers to identify in writing tasks and procedures involving exposure, and all positions with exposure. The exposure determination must be without regard to any personal protective equipment (gloves, masks, etc.) that may be available.

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Appropriate for medical labs, hospitals and other health facilities, but are burdensome and overprotective for most smaller manufacturing companies. Even without an OSHA requirement, however, employers must be attentive to the prevention of blood-borne diseases in the workplace. Under the currently-proposed rule, many employers could alleviate much of the compliance burden by relying on a nearby clinic for first aid services (if one is available). Employers will still need to address cleaning and disinfecting contaminated work areas and equipment and in handling the minor "band-aid" cuts that are common in the industry. NTMA has submitted its position on the proposed rules to OSHA, and will report on the details of the final rule once it is released by OSHA.

This BMA was prepared by NTMA's Technical Department. Part I is drawn from a report by NTMA Labor Relations Counsel, Alan Berger, Partner; McMahan, Berger, Hanna, Linihan, Cody & McCarthy, St. Louis, MO.