Employment Rights of People Living with HIV/AIDS

A Primer

THE CENTER FOR HIV LAW & POLICY

The Center for HIV Law and Policy
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HIV/AIDS and Employment Discrimination: A Primer

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MISSION STATEMENT

The Center for HIV Law and Policy is a national legal and policy resource and strategy center for people with HIV and their advocates. CHLP works to reduce the impact of HIV on vulnerable and marginalized communities and to secure the human rights of people affected by HIV.

We support and increase the advocacy power and HIV expertise of attorneys, community members, and service providers, and advance policy initiatives that are grounded in and uphold social justice, science, and the public health.

We do this by providing high-quality legal and policy materials through an accessible web-based resource bank; cultivating interdisciplinary support networks of experts, activists, and professionals; and coordinating a strategic leadership hub to track and advance advocacy on critical HIV legal, health, and human rights issues.

To learn more about our organization and access the resource bank
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I. Introduction

People living with HIV, or people who have relationships with those living with HIV, often face significant discrimination in the workplace. While employers may attempt to justify this discrimination by referencing the need for safety or by invoking non-discriminatory rationales, HIV status in itself is not a valid basis for limiting an individual's employment options. Employers' exclusions of workers living with HIV typically are based on stigma and significant ignorance about the routes and actual risks of HIV transmission. This ignorance, and the consequent limits on employment and training opportunities, has had devastating effects on the personal and professional lives of people living with HIV.

This primer outlines the essential elements of employment discrimination claims based on HIV status, and the many considerations advocates and people living with HIV should be aware of before and during employment, as well as when pursuing an employment discrimination claim.

A number of the topics addressed here, such as when HIV is a disability under federal and state law, could or have been the subject of additional, extensive analyses. There also are topics, such as how to establish disability when representing a group of individuals with HIV in a class action, that are not addressed here at all. Those more extensive discussions are beyond the scope of this primer, which is intended to arm the advocate with the basic understanding necessary to assess and undertake a case on behalf of individuals who experience unfair treatment in the workplace because they are living with HIV/AIDS.

II. Laws Prohibiting Discrimination Based on HIV/AIDS

People who experience employment discrimination on the basis of their HIV-positive status may seek legal remedies under one or more of the following three sources of anti-discrimination law:

- Americans with Disabilities Act of 1990, *as amended* (ADA)[1]
- Rehabilitation Act of 1973[2]
- State or local employment anti-discrimination statutes

This primer focuses primarily on the ADA and the Rehabilitation Act as the two most important federal nondiscrimination statutes that apply to employment.

A. Workplaces Covered

The ADA and the Rehabilitation Act are federal statutes that protect individuals with disabilities from discrimination in several contexts, including employment. Both statutes prohibit discriminatory conduct by employers, but they apply to different types of employers and workplaces.

The ADA provides broader coverage and applies to employers (both private and state and local governments), employment agencies, labor organizations, and labor-management committees,[3] but

[1] 42 U.S.C. §§ 12101 et seq. (2009).
[2] 29 U.S.C. §§ 701 et seq. (2009).
[3] *See* 42 U.S.C. § 12111(2); *see also* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE ADA: YOUR RESPONSIBILITIES AS AN EMPLOYER, http://www.eeoc.gov/facts/ada17.html (last visited Aug. 30, 2010).

excludes federal agencies that are covered by the Rehabilitation Act.[4] The ADA also limits coverage to employers with 15 or more employees for each working day in each of 20 or more calendar weeks, as well as any agent of such an employer.[5]

The Rehabilitation Act provides narrower coverage and applies to federal contractors, employers receiving federal funding, federal agencies, and the U.S. Postal Service.[6] Within the Rehabilitation Act, Section 501[7] applies to federal executive agencies and the U.S. Postal Service,[8] Section 503 applies to private employers with U.S. government contracts exceeding $10,000,[9] and Section 504 applies to recipients of federal funds, such as educational and healthcare facilities, as well as programs or activities conducted by executive agencies, and the postal service.[10]

Employers that are not covered by federal law (for example, a private employer with less than 15 employees would not be covered under the ADA) may be covered under state or local nondiscrimination statutes, and thus those laws should be considered as well.

B. Federal Administrative Agency Enforcement

The U.S. Equal Employment Opportunity Commission (EEOC) is the federal agency charged with enforcing the employment-related sections of the Rehabilitation Act (§ 501) and ADA's Title I..[11] Title I of the ADA prohibits private and state and local government entities that employ fifteen or more employees from discriminating against qualified individuals with disabilities with respect to recruitment, the application process, hiring, advancement, and other terms, conditions, and privileges of employment.[12] Because the ADA establishes overlapping responsibilities in both the EEOC and the DOJ for employment by state and local governments, the federal enforcement effort of the EEOC and DOJ is coordinated to avoid duplication in investigative and enforcement activities.

Claimants bringing an action against a federal agency under the Rehabilitation Act[13] and all claimants bringing an action under the Rehabilitation Act or Title I of the ADA[14] against private or government employers must file a charge with the EEOC before they can file a private lawsuit in

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[4] 42 U.S.C. § 12111(5)(B).
[5] *Id.* § 12111(5)(A). State laws may cover entities smaller than the those covered by the federal statutes.
[6] 29 U.S.C. §§ 793, 794(a)-(b). *See also* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE REHABILITATION ACT OF 1973: SECTIONS 501 AND 505, http://www.eeoc.gov/policy/rehab.html (last visited Aug. 30, 2010).
[7] Parts of the Rehabilitation Act are colloquially referred to by the section numbers contained in the original legislation, which do not correlate to the section numbers where the Act is codified in the United States Code.
[8] 29 U.S.C. § 791(b).
[9] *Id.* § 793.
[10] *Id.* § 794(a), (b).
[11] 42 U.S.C. §§ 12111, 12116. Under Title I, covered employers, including state and local government employers, must have at least 15 employees.
[12] *See* 42 U.S.C. § 12102. The Equal Employment Opportunity Commission has issued regulations implementing Title I of the ADA. Those regulations can be found at 29 C.F.R. Part 1630.
[13] 29 C.F.R. § 1614.105(a)(1); *see, e.g.*, Raines v. U.S. Dep't of Justice, 424 F. Supp. 2d 60, 66 (D.D.C. 2006). Non-federal employees may file a charge with the EEOC, but are not required to do so. *See* CHARLES R RICHE, MANUAL ON EMPLOYMENT DISCRIMINATION § 6:1 (Supp. June, 2009); U.S. Department of Justice, Civil Rights Division, A Guide to Disabilities Rights Laws (Sept. 2005), http://www.ada.gov/cguide.htm#anchor65610 (last visited Aug. 30, 2010).
[14] 42 U.S.C. § 2000e-5; *see* FEDERAL PROCEDURE, LAWYERS EDITION. § 50:205 (Supp. 2009).

court. The EEOC website provides information on how to file a charge with the EEOC.[15] Advocates considering filing a claim should also review the EEOC regulations implementing the ADA,[16] as well as the EEOC's interpretative guidance. In view of the disagreement among federal courts as to whether employment claims against government entities can be brought under Title II, and the availability of Title I for such claims, advocates are well-advised to rely on Title I for employment claims regardless of what type of defendant -- whether a government or a private entity -- is involved.[17]

Claims of employment discrimination under Title I of the ADA should be filed with the EEOC within 180 days of the alleged violation, although in states with deferral agreements with the EEOC, the time limit for filing charges is 300 days.[18] Advocates should consult applicable regulations for complaint filing deadlines for federal agencies and the U.S. Postal Service.[19]

C. State Law

Although this primer focuses on federal law, advocates should consider bringing claims under state or local employment discrimination laws, which may provide advantages not available under federal law. For example, state laws may cover workplaces not covered by federal law and provide broader remedies, including declaratory relief,[20] punitive damages,[21] damages for emotional distress,[22] or attorney's fees and costs.[23] Also, some state laws are more favorable to people living with HIV/AIDS, essentially declaring that HIV/AIDS is a *per se* disability, which is a condition that always qualifies as a disability under the statute at issue.[24] State laws may also prohibit discrimination on the basis of sexual orientation or gender identity and provide additional claims against the

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[15] EEOC, Filing a Charge of Employment Discrimination, http://www.eeoc.gov/facts/howtofil.html (last visited Aug. 30, 2010).

[16] *See* 29 C.F.R. pt. 1630.

[17] *University of Alabama v. Garrett,* 531 U.S. 356, 360 n. 1 (2001)(recognizing the split between the 11th and 9th Circuits and declining to address the issue of "whether Title II of the ADA, dealing with the 'services, programs, or activities of a public entity, 42 U.S.C. § 12132, is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject"). Also *compare Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 820 (11th Cir.) (holding that Title II covers employment discrimination), cert. denied 525 U.S. 826, 119 S.Ct. 72, 142 L.Ed.2d 57 (1998),FN5 with *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1173 (9th Cir.1999) (holding that a public employee cannot bring a claim of employment discrimination under Title II). For a fuller discussion of how different federal district and appeals courts have ruled on employment claims under the different titles of the ADA, see *Brettler v. Purdue University* 408 F.Supp.2d 640 (N.D.Ind.2006).

[18] 42 U.S.C. § 2000e-5(e)(1). *See generally* 29 C.F.R. pt. 1601 (2009).

[19] *See generally* 29 C.F.R. pt. 1614 (2009).

[20] *See, e.g.*, "X" Corp. v. "Y" Person, 622 So. 2d 1098 (Fla. Dist. Ct. App. 1993) (per curiam) (declaring that employer was able to seek a declaratory judgment to determine applicability of HIV nondiscrimination law); *see also* AIDS AND THE LAW 3-149 (David Webber ed., 4th ed. Supp. 2010).

[21] *See, e.g.*, Cain v. Hyatt, 734 F. Supp. 671, 686-88 (E.D. Pa. 1990) (awarding plaintiff $50,000 in punitive damages under Pennsylvania Human Relations Act); *see also* Webber, *supra* note 20, at 3-149.

[22] *See, e.g.*, Club Swamp Annex v. White, 167 A.2d 400, 403-03 (N.Y. App. Div. 1990) (upholding $5,000 award for mental anguish as a part of compensatory damage award); *see also* Webber, *supra* note 20, at 3-149.

[23] *See, e.g.*, Racine Unified Sch. Dist. v. Labor & Indus. Review Comm'n, 476 N.W.2d 707, 725 (Wis. Ct. App. 1991) (upholding award of attorney's fees in successful suit against school district for policy of placing staff with AIDS on sick leave); *see also* Webber, *supra* note 20, at 3-149.

[24] *See, e.g.*, Benjamin R. v. Orkin Exterminating Co. Inc., 390 S.E.2d 814 (W. Va. 1990) (holding that any stage of HIV infection, including a person who is tested positive for the antibodies to such virus but who is asymptomatic, is a person with a "handicap" within the meaning of the West Virginia Code).

employer.[25] However, advocates should be aware that some states require the claimant to exhaust all administrative complaint procedures before a state statutory claim may be pursued in court. Consequently, a claimant may forfeit her/his state statutory claim if administrative procedures are not followed.[26] In other jurisdictions, the claimant must choose to bring a claim either under state law or administrative procedures, but not both.[27] Given that a state statutory claim may be advantageous—but possibly foreclosed if an administrative or federal claim is pursued—advocates should thoroughly assess each client's specific circumstances and the applicable state or local laws and procedures in the jurisdiction of the suit to determine the best legal strategy.

III. Proving HIV-Related Employment Discrimination Under Federal Disability Law

In 2008, Congress passed the ADA Amendments Act of 2008 (ADAAA)[28] in response to the many court rulings, including several by the U.S. Supreme Court,[29] that narrowly construed the definition of disability in the ADA and the Rehabilitation Act. The ADA amendments took effect on January 1, 2009.[30]

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[25] Sexual orientation and gender identity employment discrimination are not prohibited by federal law at the time of publication of this primer but may be covered by state law. A lesbian, gay, bisexual, or transgender (LGBT) claimant may have both a disability discrimination claim based on his/her HIV-positive status and a separate sexual orientation discrimination claim under state or local laws. Currently twelve states and the District of Columbia have statewide protection against both sexual orientation and gender identity employment discrimination: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. An additional nine states prohibit discrimination based on sexual orientation: Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin. Some states that do not have transgender-specific laws have had commissions, agencies, or attorney generals that have interpreted existing law to include some protection for transgender individuals: Connecticut, Florida, Hawaii, Massachusetts, and New York. HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS & POLICIES (2009), http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf (last visited Aug. 30, 2010). State-specific laws may change and thus advocates should confirm the laws in their state.

[26] *See, e.g.*, Finley v. Giacobbe, 827 F. Supp. 215 (S.D.N.Y. 1993) (dismissing plaintiff's state law claim for failure to comply with state notice-of-claim statute, but allowing federal statutory and constitutional claims to proceed); M.A.E. v. Doe, 566 A.2d 285 (Pa. Super. Ct. 1989) (dismissing claim for failure to exhaust administrative remedies). *See also* Webber, *supra* note 20, at 3-149.

[27] *See, e.g.*, Hermann v. Fairleigh Dickinson Univ., 444 A.2d 614 (N.J. Super. Ct. 1982) (dismissing claim because plaintiff chose in first instance to pursue administrative remedy and abandoned her appeal from its finding, thus barring her from judicial remedy). *See also* Webber, *supra* note 20, at 3-149.

[28] Pub. L. No. 110-325, 2008 U.S.C.C.A.N. (122 Stat.) 3553. For a detailed discussion of the ADA Amendments Act in regard to HIV discrimination claims, including its legislative history, see AIDS AND THE LAW § 3.2[D], at 3-32 to 3-38 (David W. Webber ed., 4th ed. Supp. 2010).

[29] The ADAAA explicitly overruled the Supreme Court's decisions in *Sutton v. United Airlines, Inc.,* 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Inc. v. Williams,* 534 U.S. 184 (2002).

[30] As of the time of this primer's publication, few cases have had the opportunity to apply the ADAAA. *See, e.g.*, Franchi v. New Hampton Sch., No. 08-cv-395-JL, 2009 WL 2997625 at *4 (D.N.H. Sept. 18, 2009) (ADAAA specifies that major life activities include, but are not limited to eating); Green v. American Univ., No. 07-cv-52, 2009, WL 2569776 at *5 (D.D.C. Aug. 21, 2009) (ADAAA states that major life activities include, but are not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions); Chiesa v. N.Y. State Dep't of Labor, No. 1:06-CV-1549, 2009 WL 2344766 at *4 (N.D.N.Y. July 31, 2009) (under the ADAAA, standards of "significant restriction" or similar raised standards may not be used when determining the existence of a disability); Kemppainen v. Arkansas County Detention Ctr., 626 F.Supp.2d 672, 679 (S.D. Tex. 2009) (interpreting the ADAAA to amend the ADA to require the determination of whether an individual is disabled "without regard to the ameliorative effects of mitigation measures" but nevertheless to require the court to consider the ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses in determining whether an impairment substantially limits a major life activity); Menchaca v. Maricopa Community College Dist., 595 F.Supp.2d 1063, 1068-69 (D. Ariz. 2009) (construing the definition of disability broadly under the ADA and

For claims arising *on or after* January 1, 2009 – the effective date of the 2008 ADA Amendments Act – there should be no dispute that individuals with HIV are covered under the ADA and the Rehabilitation Act, which prohibit most employers from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.[31]

For claims arising *before* January 1, 2009, individuals with HIV should also be covered under the ADA and the Rehabilitation Act, although in several cases courts have ruled that persons with HIV are not covered. Advocates should thus consider which legal standard applies, based on the facts of the case, with proper consideration given to whether a discriminatory act taken before the effective date is continuing or ongoing, thus bringing it within the enhanced coverage. Employment applicants or employees seeking job benefits or advancement who were unlawfully discriminated against before January 1, 2009, may consider re-applying and thus potentially accruing a claim under the ADA as amended in the event that they are again discriminated against. The following discussion of these statutes will thus distinguish between the ADA and Rehabilitation Act pre- and post-amendment.

When interpreting either the ADA or the Rehabilitation Act, advocates should look to case law on both statutes. The ADA itself requires that it be interpreted not to apply less protection than the Rehabilitation Act or the regulations issued by the agencies in charge of enforcing it,[32] and many courts have interpreted the ADA consistently with interpretations of the Rehabilitation Act.[33] At the same time, the Rehabilitation Act was amended by the ADAAA so that the standards of proof for employment discrimination are the same as those laid out in the ADA.[34]

A. Elements of a Disability Discrimination Claim

The ADA and the Rehabilitation Act have the same elements of proof of unlawful discrimination. The crucial consideration for both statutes, however, is whether the claim is analyzed under the law before or after the effective date (January 1, 2009) of the ADA Amendments Act of 2008.

To establish a *prima facie* case of employment discrimination, a plaintiff must prove that he:

- has a disability;
- is a qualified individual; and

ADAAA). While several cases have acknowledged the passage of the ADAAA and even commented on its effects, most of these cases have not applied the ADAAA because it was not yet in effect when the facts at issue took place. *See, e.g.*, Hohider v. United Parcel Service, 574 F.3d 169, 188 n.17 (3d Cir. 2009) (not applying the ADAAA, but describing how the ADAAA amends the scope of being "regarded as" having a disability under the ADA); Rohr v. Salt River Project Agricultural Imp. & Power Dist, 555 F.3d 850 (9th Cir. 2009) (not applying the ADAAA, but noting that the ADAAA expands the class of persons who are entitled to protection under the ADA).

[31] 42 U.S.C. § 12112(a), (b)(1)-(4); *see also* U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, A GUIDE TO DISABILITY RIGHTS LAW (2005), *available at* http://www.ada.gov/cguide.htm (last visited Aug. 30, 2009).

[32] 42 U.S.C. § 12201(a).

[33] *See, e.g.*, Ennis v. Nat'l Ass'n of Bus. and Educ. Radio, Inc., 53 F.3d 55, 57 (4th Cir. 1995) (stating that to the extent possible, the court will adjudicate ADA claims in a manner consistent with decisions interpreting the Rehabilitation Act); *see also* Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261, 1264 n.9 (4th Cir. 1995).

[34] 29 U.S.C. § 794(d).

- was discriminated against because of the disability.[35]

1. HIV as a Disability Under the ADA/Rehabilitation Act

No specific health or medical condition, including HIV or AIDS, is identified as a disability in the ADA or the Rehabilitation Act.[36] Instead, these statutes rely on the same generic definition of disability, although the ADA also protects persons with a known "relationship or association" with a person with a disability.[37]

The disability definition includes three elements (frequently referred to as "prongs"):

- a physical or mental impairment that substantially limits one or more major life activities;
- a record of such an impairment; or
- being regarded as having such an impairment.[38]

a. Post-ADA Amendments Act Claims

Establishing that a potential plaintiff is covered by the ADA is substantially easier for claims arising on or after the effective date (January 1, 2009) of the ADA Amendments Act of 2008 (ADAAA) than it is for claims under the ADA prior its amendment. The amendments change both the first (actual disability) and third ("regarded as" disabled) prongs, and plaintiffs with HIV should rely on both in proving their claims.

Under the first prong of the disability definition, plaintiffs must prove that they have a *physical* or *mental impairment*[39] that substantially limits a *major life activity*. The amended ADA significantly broadens this definition by adding an illustrative and nonexclusive list of major life activities, including "the operation of a major bodily function," which in turn is defined by a nonexclusive list of functions including "immune system" and "reproductive functions." Because of the effect of HIV infection on immune system function, and, for some plaintiffs, on reproductive function, all individuals with HIV infection should be able to prove that they have a substantial limitation on a major life activity. Next, because the amended ADA removes the effects of mitigating measures such a medications from consideration in determining whether an individual with HIV has a

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[35] AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL § 1:237 (2003 Supp. 2009). As discussed *supra* notes 114-117 and accompanying test, the Rehabilitation Act has been interpreted by most courts to require that the disability be the sole reason for discrimination, whereas the ADA does not. *But see* Powell v. City of Pittsfield, 221 F. Supp. 2d 119, 149 (D. Mass. 2002).

[36] When the ADA was enacted in 1990, four of the six congressional committees that reviewed the law as a bill had considered the issue of HIV infection as a disability and all legislative reports that considered the issue concluded that HIV infection is an impairment under the ADA and assumed that the impairment caused by HIV is substantial. *See* Senate Comm. on Labor and Human Resources, Americans with Disabilities Act of 1989, S. REP. NO. 116, 101st Cong., 2d Sess. 8 (1989); *see also* H.R. Rep. No. 485, pt. 2, 101st Cong., 2d Sess. 51, *reprinted in* 1990 U.S.C.C.A.N. 303, 333; H.R. REP. NO. 485, pt. 3, 101st Cong., 2d Sess. 28, n.18. *See also* Webber, *supra* note 20, at 3-19 to -24. However, despite the discussions and intentions to include HIV/AIDS as conditions protected under the ADA and Rehabilitation Act, no reference to HIV/AIDS was included in those statutes.

[37] 42 U.S.C. § 12102; *compare* 29 U.S.C. § 705(20)(B).

[38] 42 U.S.C. § 12102(1).

[39] Prior to the enactment of the ADA Amendments Act, the U.S. Supreme Court held that HIV infection is an impairment. *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998). The amendments thus resolve in the affirmative the remaining question of whether the impairment affects a major life activity and whether it is substantial in nature.

disability, the courts must view a plaintiff's HIV infection as though it were medically untreated. Similarly, if an individual with HIV illness experiences disabling symptoms that are "episodic or in remission," under the amended ADA, the courts must assess whether such an individual has an impairment that "would substantially limit a major life activity when active." Accordingly, even if an individual's HIV infection is asymptomatic, and thus did not impose a substantial limitation on any major life activity, evaluating it without regard to medical treatment or the episodic nature of life-threatening opportunistic infections should compel the conclusion that it is a disability. In sum, plaintiffs with HIV should specifically plead and be prepared to prove, through expert testimony if necessary, that they meet the amended disability definition, although in many if not all cases, there will be no reasonable basis to dispute whether a plaintiff with HIV is disabled and thus covered under the ADA.

The ADA amendments also make it considerably easier to establish a claim of discrimination based on the third, "regarded as" disabled, prong by requiring that for a valid claim, the plaintiff need only prove that discrimination resulted from an impairment or from the employer's perception that the employee has an impairment. Because there is no question that HIV infection is an impairment under the ADA,[40] if an employer discriminates on the basis of actual or perceived HIV status, then the employee can make a valid ADA claim without regard to whether the impairment limits or is perceived to limit a major life activity. This third prong remains important because a plaintiff who is *not* HIV positive, but is discriminated against solely because of an employer's erroneous suspicion or perception that she is, can make a claim under the ADA. Under the ADA amendments, however, employees who qualify as disabled solely under the "regarded as" prong are not entitled to reasonable accommodations.[41]

Because the ADA amendments did not directly change the second, "record of impairment," prong of the disability definition, that prong is covered below in the pre-ADA Amendments Act discussion. Advocates should note, however, that any record of HIV infection would constitute a disability, given the broadened definition of disability discussed above; there is no question that HIV infection, without more, is an impairment under the ADA and Rehabilitation Act.

Advocates for persons with HIV should also rely as a general matter on the direction given in the ADA amendments that the courts should construe the ADA "in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."[42]

The EEOC's proposed regulations for implementing the ADA amendments identifies HIV/AIDS, in effect, as a *per se* disability by stating that there are "impairments that will consistently meet the definition [of disability]" such as "HIV or AIDS, which substantially limit functions of the immune system."[43] Similarly, in its proposed definition of "major life activity," the EEOC stated that "the link between particular impairments and various major bodily functions should not be difficult to identify. For example . . . the Human Immunodeficiency Virus (HIV) affects functioning of the immune system."[44] Although the federal agency rule-making authority to define "disability" under

[40] *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998).
[41] 42 U.S.C. § 12201(h).
[42] 42 U.S.C. § 12102.
[43] EEOC, *Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended*, 74 Fed. Reg. 48,431 at 48,441 (Sept. 23, 2009), *amending* 29 C.F.R. § 1630.2.
[44] 74 Fed. Reg. at 48,446.

the ADA was unclear, the amended ADA provides an explicit grant of rule-making authority to the EEOC to define that term.[45]

That HIV infection is a disability under the ADA was also the conclusion reached in *Horgan v. Simmons,*[46] one of the first reported HIV discrimination cases decided under the amended ADA. The court concluded that the plaintiff's HIV status was sufficient to bring him under the ADA's amended disability definition because the plaintiff's "HIV positive status substantially limits a major life activity: the function of his immune system."

b. Pre-ADA Amendments Act Claims

Although the 2008 amendments to the ADA and Rehabilitation Act make it easier to establish that HIV is a disability, there were many cases decided before the amendments that concluded that HIV is a disability. In light of the amendments, however, and the strong congressional disapproval of the handful of judicial rulings that interpreted the ADA narrowly on the question of HIV as a disability, cases under the ADA that arose prior to its amendment may now benefit from a broadened judicial view of the law, even though the amendments are not directly applicable to pre-amendment cases.

Proving that the claimant's HIV/AIDS status is a disability under the first prong of the disability definition is a three-step process that requires the claimant to show that he:

(1) has a *physical* or *mental impairment* that
(2) limits a *major life activity* and that
(3) the limitation is *substantial*.[47]

1) HIV Infection as an Impairment

Under *Bragdon v. Abbott*, HIV infection, whether symptomatic or asymptomatic, is always considered a physical impairment.[48] Although the Court held that HIV is always an impairment, it did not explicitly rule that HIV is in all cases a substantial limitation on a major life activity, but instead emphasized that ADA claims must be evaluated on a case by case basis.[49]

2) Major Life Activities Limited by HIV

Prior to its amendment, the ADA did not provide a definition of *major life activity*. In lieu of a statutory definition, federal enforcement agencies issued an illustrative, non-exhaustive list of major life activities: caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[50] A Congressional committee report accompanying the ADA, however, included three additional activities in its list: participating in community activities; sexual

[45] Pub. L. No. 110-325, § 6(a)(2).
[46] No. 09 C 6796, 2010 U.S. Dist. LEXIS 36915, 2010 WL 1434317 (N.D. Ill. Apr. 12, 2010).
[47] 42 U.S.C. § 12102(2). *See also Bragdon*, 524 U.S. at 631. For a detailed discussion of HIV as a disability under the ADA prior to its amendment in 2008, see AIDS AND THE LAW § 3.2[E] at 3-38 to 3-75 (David W. Webber ed., 4th ed. Supp. 2010).
[48] *Id.* at 637 ("HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.").
[49] *Id.* at 617-42.
[50] 45 C.F.R. § 84.3(j)(2)(ii); 28 C.F.R. § 41.31(b)(2); 29 C.F.R. § 1630.2(i).

functioning; and reproduction, procreation, and child bearing.[51] One of the disputed issues in ADA interpretation prior to its amendment is thus the meaning of this term.

The courts have primarily relied on three potentially interrelated major life activities as being limited by HIV: reproduction and sexual functioning;[52] social functioning and participation;[53] and caring for oneself.[54] Although reproduction and sexual functioning are well-established in case law as major life activities, the other activities are less well established. Additionally, some plaintiffs have successfully relied on working as a major life activity,[55] although there is a significant risk that a court will conclude that although working is a major life activity, the plaintiff's ability to work is not substantially limited.[56] Plaintiffs thus should develop their case theories in reliance on more than one major life activity.

3) HIV as a Substantial Limitation

The final step in establishing that a claimant has a disability under the first prong of the ADA's definition is proof that the impairment substantially limits the identified major life activity or activities. Reproduction has been the most frequently referenced major life activity that is substantially limited by HIV/AIDS. The plaintiff in *Bragdon*, for example, testified that her HIV infection controlled her decision not to have a child, and the Court agreed that this was a substantial limitation.[57] In regard to the major life activities of social functioning and participation, and caring for oneself, advocates should rely on the growing body of social science research that supports the

[51] House Labor Report at 52, 1990 U.S.C.C.A.N. at 334.
[52] *Bragdon*, 524 U.S. at 638 ("reproduction and the sexual dynamics surrounding it" identified as a major life activity).
[53] Hernandez v. Prudential Ins. Co., 977 F. Supp. 1160, 1163–65 (M.D. Fla. 1997) (identifying "fear [HIV] inspires in others" as limiting major life activities); Doe v. District of Columbia, 796 F. Supp. 559, 568 (D.D.C. 1992) (HIV as a substantial limitation on normal social relationships). *See also* Bragdon v. Abbott, 524 U.S. 624, 656 (Ginsburg, J., concurring) (HIV limits social functioning, accessing health care, and maintaining family relations).
[54] United States v. Happy Time Day Care Ctr., 6 F. Supp. 2d 1073, 1084 (W.D. Wis. 1998) (major life activity of caring for oneself substantially limited by HIV infection); Hernandez v. Prudential Ins. Co., 977 F. Supp. 1160, 1163–65 (M.D. Fla. 1997) (caring for oneself as major life activity); *see also* 524 U.S. 624, 656 (Ginsburg, J., concurring) (ability to care for oneself identified as a major life activity). *Cf.* St. John v. NCI Bldg. Sys., Inc., 537 F. Supp. 2d 848, 862 n.10 (S.D. Tex. 2008) (rejecting plaintiff's claim that having a regularly functioning lymphatic system is a major life activity that was substantially limited by HIV; limitations on lymphatic system function viewed as impairment, not major life activity).
[55] Giebeler v. M & B Assocs., 343 F.3d 1143, 147–48 (9th Cir. 2003) (in housing discrimination case, holding that an individual with AIDS was a person with a disability because of inability to work); MX Group, Inc. v. City of Covington, 106 F. Supp. 2d 914, 918 (E.D. Ky. 2000) (recovery from heroin addiction is accompanied by medical problems, including HIV infection, that are substantial impairments of major life activities including working), *aff'd,* 293 F.3d 326 (6th Cir. 2002); Wallengren v. Samuel French, Inc., 39 F. Supp. 2d 343, 347 (S.D.N.Y. 1999) (relying on EEOC regulation defining work as a major life activity and *Bragdon* as identifying substantial limitations resulting from HIV and AIDS); DiSanto v. McGraw-Hill, Inc., 97 Civ. 1090 (JGK), 1998 U.S. Dist. LEXIS 12382, 1998 WL 474136 (S.D.N.Y. Aug. 11, 1998) (plaintiff's allegation that his HIV illness was a substantial limitation on his major life activity of working, but required a reasonable accommodation, adequate to survive employer's summary judgment motion in HIV discrimination case); Byrd v. BT Foods, Inc., 948 So. 2d 921 (Fla. Dist. Ct. App. 2007) (reversing grant of summary judgment for the defendant employer, applying Florida law as consistent with that of the federal ADA and finding that the plaintiff's HIV illness, apparently as a result of the side effects of the plaintiff's medications, resulted in a substantial limitation on the major life activity of working).
[56] Doe v. Kohn, Nast, & Graf, P.C., 862 F. Supp. 1310 (E.D. Pa. 1994) (concluding that plaintiff's HIV infection imposed a substantial limitation on reproduction, but not on his ability to work).
[57] *Bragdon*, 524 U.S. at 641.

view that people with HIV experience significant limitations on their social participation and ability to care for themselves.[58]

The issue of whether an individual's choice not to engage in a major life activity – such as the employee whose HIV infection would substantially limit her ability to conceive and bear children, but who has decided not to engage in those activities for reasons other than her HIV infection – means that the major life activity in question is not substantially limited has been addressed in several conflicting rulings.[59]

4) Record of Impairment

The second ("record of impairment") prong of the disability definition is intended to protect people who have an error in their health care records or other documents, indicating that they have a disability when in fact they do not, or someone who has recovered from a disabling condition, but references to the condition remain in their records.[60] This definition of disability was relied on in *School Board of Nassau County v. Arline*,[61] where the Supreme Court held that claimant's hospitalization for tuberculosis in 1957 established that she had a "record of … impairment" and was therefore a handicapped individual under the Rehabilitation Act.[62] There is no requirement that the record of impairment reflect that the individual has a history of impairment. [63]

[58] *See, e.g.,* Lambda Legal Defense & Education Fund, The State of HIV Stigma and Discrimination in 2007: An Evidence Based Report (2007), *available at* http://www.lambdalegal.org/our-work/publications/general/2007-hiv-stigma-discrimination.html; Deborah Ho & Brad Sears, HIV Discrimination in Health Care Services in Los Angeles County: The Results of Three Testing Studies (2006), *available at* http://www.escholarship.org/uc/item/1bm2p4gv (documenting significant percentages of health care professionals refusing to provide services to patients with HIV); Deborah L. Brimlow et al., Stigma and HIV/AIDS: A Review of the Literature (2003), *available at* http://hab.hrsa.gov/publications/stigma/front.htm; Gregory M. Herek et al., *HIV-Related Stigma and Knowledge in the United States: Prevalence and Trends, 1991–1999,* 92 Am. J. Pub. Health 371 (2002), *available at* http://psychology.ucdavis.edu/rainbow/html/stigma_02_press.html (concluding that AIDS is stigmatized condition in the United States, based factors such as misapprehension of risk of transmission by casual social contact); CDC, *HIV-Related Knowledge and Stigma—United States, 2000,* 49 MMWR 1062 (2000) (documenting substantial minority of survey respondents with stigmatizing attitudes about HIV in correlation to level of misinformation about risk of casual transmission); Aaron G. Buseh & Patricia E. Stevens, *Constrained But Not Determined by Stigma: Resistance by African American Women Living with HIV,* 44 Women & Health 1 (2006) (describing HIV stigma experienced by African-American women); Debra A. Murphy et al., *Correlates of HIV-Related Stigma Among HIV-Positive Mothers and Their Uninfected Adolescent Children,* 44 Womens Health 19 (2006) (describing mothers with HIV experiencing high levels of HIV-related stigma).

[59] *Compare* Blanks v. Southwestern Bell Communications, Inc., 310 F.3d 398, 401 (5th Cir. 2002) (concluding that because plaintiff did not plan on having children, his major life activity of reproduction was not limited); Worster v. Carlson Wagon Lit Travel, Inc., 353 F. Supp. 2d 257 (D. Conn. 2005) (same), *aff'd on other grounds,* No. 05-0716-CV, 2006 WL 328289 (2d Cir. Feb. 13, 2006); Gutwaks v. Am. Airlines, Inc., No. 3:98-CV-2120-BF, 1999 U.S. Dist. LEXIS 16833, 1999 WL 1611328 (N.D. Tex. Sept. 2, 1999) (same) *with* Teachout v. N.Y. City Dep't of Educ., No. 04 Civ. 945 (GEL), 2006 U.S. Dist. LEXIS 7405, 2006 WL 452022 (S.D.N.Y. Feb. 22, 2006) (rejecting view that plaintiff's personal choices are relevant to determining substantial limitation on reproduction, but instead considering whether the plaintiff is biologically capable of reproduction and whether HIV infection is a limitation on that capability).

[60] Webber, *supra* note 20, at 3-66.

[61] 480 U.S. 273 (1987). *Arline* was decided under the Rehabilitation Act, but the same reasoning applies to ADA cases.

[62] 480 U.S. at 281.

[63] *Compare* Doe v. Kohn, Nast, & Graf, P.C., 862 F. Supp. 1310, 1322 (E.D. Pa. 1994).

5) Regarded As Having a Disability

Prior to the ADA amendments, an employee or applicant had to demonstrate that the employer regarded him as having an impairment that substantially limited a major life activity in order to establish a *prima facie* claim of a perceived disability under the ADA.[64] An individual is regarded as having an impairment when others treat him as having such an impairment.[65] The claimant does not have to show that he actually has HIV/AIDS, just that he was treated as if he had HIV/AIDS. At least one court has held that speculation that an employer knew or suspected the employee's HIV status based on rumors among employees is insufficient to establish the link.[66] It is therefore important to develop evidence that the employer suspected or "knew" that the claimant was HIV-positive or had AIDS, even if the knowledge is incorrect.

2. Qualified for the Job

Once the claimant has established that he has a disability under one or more of the three definitions discussed in detail above, either under the ADA as amended or prior to its amendment, he must show that he is a qualified individual who "with or without reasonable accommodation, can perform the *essential function* of the employment position."[67] The employer's description of the essential job functions is given consideration, but any written description used in advertising or interviewing applicants for the job will also be considered evidence of the essential functions of the job.[68] If the employer asserts that that a qualification is an essential function, he bears the burden of proof that its criteria are "job-related and based on business necessity."[69]

a. Individualized Inquiry Requirement

An employer's determination that the plaintiff is not qualified must be based on an individualized inquiry into the capabilities of the plaintiff.[70] In the context of HIV, an employer may not rely on generalized conclusions about the affect HIV could have on job performance. Rather, "the employer must conduct an individualized inquiry into the individual's actual medical condition, and the impact, if any, the condition might have on that individual's ability to perform the job in question."[71] This was precisely the type of inquiry that the Sixth Circuit found lacking in *Holiday v. Chattanooga*, in which a city withdrew its offer of a police officer position on the basis of a single doctor's opinion that the applicant was not strong enough to withstand the rigors of police work simply because of his HIV status.[72]

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[64] *See* Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir.1995) (quoting 42 U.S.C. § 12102(2)(C)).
[65] *See* Webb v. Mercy Hospital, 102 F.3d 958, 960 (8th Cir. 1996).
[66] *See* Roberts v. Unidynamics Corp., 126 F.3d 1088, 1093 (8th Cir. 1997) (citing Hedberg v. Indiana Bell Tel. Co., Inc., 47 F.3d 928, 932 (7th Cir. 1995)).
[67] 42 U.S.C. § 12111(8).
[68] *Id.*
[69] 42 U.S.C. § 12112(d)(4)(A). *See* Webber, *supra* note 30, at 3-77.
[70] *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987); *see also* Holiday v. Chattanooga, 206 F.3d 637, 643 (6th Cir. 2000); Harris v. Thigpen, 941 F.2d 1495, 1525 (11th Cir. 1991) (stating that an "individualized inquiry" is necessary to determine whether plaintiffs are "otherwise qualified").
[71] *Holiday*, 206 F.3d at 643.
[72] *Id.* at 641. Reversing summary judgment in favor of the city, the court noted that the physician's report in question provided no evidence that the doctor even attempted to determine whether the plaintiff experienced fatigue, sluggishness, or any other symptom of physical weakness; rather, it cited only the plaintiff's HIV-positive status for the conclusion that the plaintiff was not strong enough for police work. *Id.* at 644. Moreover, the plaintiff had provided

b. The Direct Threat Defense

An employer may also argue that an HIV-positive applicant or employee is not qualified based not on the person's particular skills or ability, but rather on the supposed risk that person poses to himself or to others. If a plaintiff's employment would pose "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation," then the plaintiff is not considered qualified for employment.[73] Workplaces in which there is a significant risk of HIV transmission are indeed rare; employers that might wish to argue that there is a risk of transmission – for example, to first aiders in the event of an injury posing exposure to an HIV positive employee's blood – are foreclosed from doing so by the Occupational Safety and Health Administration blood-borne pathogens standard,[74] which requires that employers provide a reasonably safe workplace by complying with "universal precautions" to prevent exposure to HIV or other blood-borne infections.

In the unusual case in which OSHA standards do not resolve the workplace safety issue, the risk of transmission will be analyzed under *School Board of Nassau County v. Arline*, in which the Supreme Court set forth four factors courts should consider when determining whether a person with a contagious disease poses a significant threat to the health and safety of others:

- the nature of the risk (how the disease is transmitted);
- the duration of the risk (how long is the carrier infectious);
- the severity of the risk (what is the potential harm to third parties); and
- the probability the disease will be transmitted and will cause varying degrees of harm.[75]

The Court affirmed the requirement that an individualized determination must be made, and cautioned courts to avoid conclusions based on generalizations and stereotypes.[76] Moreover, it instructed courts to rely on "the reasonable medical judgments of public health officials."[77]

While parties often agree on the first three factors, courts often must resolve parties' conflicting claims regarding the likelihood that the plaintiff could transmit HIV in the course of performing the

evidence that he was fit to perform the job; the plaintiff passed the physical agility and strength test administered by state law, and served as a police officer without any limitations on his job performance in another location after being rejected by the city. *Id.*

[73] 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15 (2009). In *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002), the Court held that the direct threat defense applies to health or safety threats to the individual employee or applicant for employment, not just to others in the workplace.

[74] 29 C.F.R. § 1910.1030 (2009).

[75] *Arline*, 480 U.S. at 288.

[76] "Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious.…The fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified.' Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent." *Id.* at 284-86.

[77] *Id.* at 288.

duties of the job.[78] The court's analysis of the risk of transmission must focus on the specific characteristics of the job at issue, rather than the general risk of transmission.[79] Thus the conclusion each court will reach will vary depending on the facts at hand, particularly the requirements and risks of the job and the most current scientific findings and medical recommendations with regard to HIV transmission.

Although each case is fact-specific, a few insights can be gleaned from past cases. Courts have found no significant threat where an HIV-positive employee would be engaging in mouth-to-mouth breathing during CPR, or would be engaged in the contact involved in child care.[80] Advocates should also find support in cases concerning the rights of HIV-positive children to attend schools or other programs that have held that the theoretical or remote possibility of transmission does not present a significant risk in a classroom setting, even where bleeding or biting have occurred.[81] Also, past cases can be distinguished based on new knowledge demonstrating that lower viral loads significantly decrease risk of transmission, allowing individuals, such as health care workers, with low viral loads to argue more persuasively that they are not a direct threat.[82]

Even though some case law in the context of food service is deferential to the employer,[83] the EEOC has published guidance for restaurants on complying with the ADA that makes clear that

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[78] *See* Estate of Mauro, 137 F.3d at 403 (focusing court's analysis on the probability of transmission); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1265-66 (4th Cir. 1995) (plaintiff did not dispute the first three factors, but argued that the risk of transmission was so small that it could not be considered significant); Bradley v. Univ. of Texas M.D. Anderson Cancer Ctr., 3 F.3d 922, 924 (5th Cir. 1993) ("The disputed issue is the probability of transmitting the virus."); Doe v. Dist. of Columbia, 796 F. Supp. 559, 568-69 (D.D.C. 1992) (focusing on risk of transmission); Doe v. Washington Univ., 780 F. Supp. 628, 632 (E.D. Mo. 1991) ("The Court believes that it is the fourth factor, the probability the disease will be transmitted, that is really at issue.").

[79] *See* Harris v. Thigpen, 941 F.2d 1495, 1526-27 (11th Cir. 1991).

[80] *See, e.g.*, Chalk v. U.S. Dist. Court, 840 F.2d 701, 710-11 (9th Cir. 1988) (in context of school teacher); *Dist. of Columbia*, 796 F. Supp. 559, 563-64, 568-70 (in context of firefighter).

[81] *See, e.g.*, Doe v. Deer Mt. Day Camp, Inc., 682 F. Supp. 2d 324 (S.D.N.Y. 2010) (granting motion for summary judgment on direct threat defense in favor of 10-year old boy with HIV who sought access to a summer basketball camp); Martinez v. Sch. Bd. of Hillsborough County, 711 F. Supp. 1066, 1070-72 (M.D. Fla. 1989) (risk of transmission from saliva did not support segregation of HIV-positive child from classroom); Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440, 445 (N.D. Ill. 1988); Ray v. Sch. Dist. of DeSoto County, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376, 380 (C.D. Cal. 1987); Dist. 27 Community Sch. Bd. v. Bd. of Educ., 502 N.Y.S.2d 325, 332 (N.Y. Sup. Ct. 1986); *but see* Montalvo v. Radcliffe, 167 F.3d 873, 878 (4th Cir. 1999) (HIV-positive child would pose a direct threat to the health and safety of classmates in a "hard style" martial arts class that involved frequent bloody injuries and body contact).

[82] Centers for Disease Control and Prevention, *Investigation of Patients Treated by an HIV-Infected Cardiolothoracic Surgeon—Israel, 2007: Editorial Note*, 57 MMWR 1413, 1415 (2009).

[83] *See* EEOC v. Prevo's Family Market, Inc., 135 F.3d 1089 (6th Cir. 1998). In *Prevo's*, the Sixth Circuit reversed a trial court judgment and vacated an award of punitive damages for an HIV-positive employee who was reassigned from his position in a produce department and whose continued employment was conditioned on his submission to a medical examination. As Judge Moore's dissent notes, however, the majority's opinion contradicts public health authorities as well as the intent of the ADA. The ADA requires that employers have relevant objective medical evidence that a food-handling employee poses a direct threat to others before reassigning the employee. Here, the employer obtained no such evidence, demonstrating that the employer acted out of the very fear and prejudice the ADA prohibits. Moreover, there was no need for the employer to conduct a medical examination to make a direct threat determination because there was ample objective medical evidence from public health authorities and expert testimony that an individual living with HIV working in the food service industry poses no threat of transmission and needs no restriction in employment. Furthermore, it was undisputed that any risk of transmission could have been further reduced with reasonable accommodations such as gloves and separate knives, which expert testimony supported undertaking among all employees to reduce the spread of all infectious diseases.

HIV cannot be transmitted through food, and an individual's HIV-status is not a valid basis on which to deny them employment in food service.[84] Similarly, in 2009, the U.S. Justice Department stated its position that the ADA prohibits Title II public entities from denying a person with HIV an occupational license or admission to a trade school because of his or her HIV status. To comply with the ADA, state licensing boards, if they require certification that licensees are free of any contagious, communicable, or infectious disease, they must be clear that such a certification excludes diseases, such as HIV, that are not transmitted through casual contact or through the usual practice of the occupation for which a license is required.[85]

In one line of cases limited to specific facts involving health care workers (HCWs), the courts have held that there is a significant threat in circumstances where the employee's job involves surgical procedures that put the employee in direct contact with both sharp objects and exposed areas of patients' bodies.[86] In resolving such claims in the future, one source of guidance courts should rely on are national and state guidelines for HIV-positive health care workers. In 1991, the Centers for Disease Control and Prevention (CDC) published *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*.[87] The CDC HCW Guidelines state that there is no basis to restrict the practice of HCWs infected with HIV who perform invasive procedures unless those invasive procedures fall into the smaller category of "exposure prone" invasive procedures, but fails to define "exposure prone." It recommends that HCWs living with HIV should seek counsel from an expert review panel before performing exposure prone procedures, but does not recommend mandatory testing of HCWs for HIV. Unfortunately, the CDC has not updated its HCW Guidelines since 1991, despite repeated calls revision in light of advances in medicine and science.[88] After the CDC published its HCW Guidelines, Congress required states to adopt either the CDC HCW Guidelines or equivalent standards.[89] Thus, advocates should consult and argue for reliance on the applicable state laws if they are more progressive and accommodating of an individual health care worker's situation.

3. Reasonable Accommodation

Even if a plaintiff is unable to perform the essential functions of the job—either as a direct result of the individual's disability or because doing so would present a significant risk of harm to others—the employer does not necessarily escape liability. An individual in these circumstances is still a qualified individual if the employer could make an accommodation that would allow an employee with a disability to perform the required job duties, as long as the requested accommodation is reasonable.

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[84] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HOW TO COMPLY WITH THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR RESTAURANTS AND OTHER FOOD SERVICE EMPLOYERS (2004). As required by the ADA, the U.S. Department of Health and Human Services annually publishes a list of diseases that can be transmitted by the food supply, and HIV has never been on it. *See* U.S. Department of Health and Human Services, Diseases Transmitted Through the Food Supply, 74 Fed. Reg. 61,151 (Nov. 23, 2009).

[85] U.S. JUSTICE DEPARTMENT, THE AMERICANS WITH DISABILITIES ACT AND THE RIGHTS OF PERSONS WITH HIV/AIDS TO OBTAIN OCCUPATIONAL TRAINING AND STATE LICENSING, *available at* http://www.ada.gov/qahivaids_license.pdf (last visited Aug. 30, 2010).

[86] *See supra* note 81 *e.g.*, *Estate of Mauro*, 137 F.3d at 406-07; *Univ. of Md.*, 50 F.3d at 1266; *Bradley*, 3 F.3d at 924-25; *Washington Univ.*, 780 F. Supp. at 633-34.

[87] 40 MMWR RR-08 (1991).

[88] *See, e.g.*, Lawrence O. Gostin, A Proposed National Policy on Health Care Workers Living with HIV/AIDS and Other Blood-Borne Pathogens, 284 JAMA 1965 (2000).

[89] *See* CENTER FOR HIV LAW & POLICY, GUIDELINES FOR HIV-POSITIVE HEALTH CARE WORKERS (2008) *available at* http://www.hivlawandpolicy.org/resources/view/167 (providing a state-by-state description of guidelines).

The term "reasonable accommodation" may include changing existing facilities to be usable by individuals with disabilities,[90] job restructuring, part-time or modified work schedules, or reassignment to a vacant position.[91] An employer's duty to provide reasonable accommodation is only triggered when the employee requests one.[92] Thus, while many claimants fear that disclosure will provoke discriminatory treatment, disclosure can strengthen a potential discrimination case by establishing a factual record that the employer knew about his HIV/AIDS status and refused to provide reasonable accommodation.

A reasonable accommodation is not necessarily limited to requests that are directly related to the essential job function. In *Buckingham v. United States*, a postal worker with AIDS sued the U.S. Postal Service under the Rehabilitation Act for its refusal to transfer him to another location where he could obtain better medical treatment for his illness.[93] The Ninth Circuit Court of Appeals held that transfer for medical treatment was not a *per se* unreasonable accommodation, affirming the judgment of the lower court.[94]

If a plaintiff cannot perform all the job duties due to his or her disability, an employer is required to modify the non-essential duties of the position to accommodate the plaintiff.[95] Courts have held that one way an employer may accomplish this by reassigning an employee to a position that offers similar pay, benefits, and opportunities for advancement.[96] However, if there is no vacant position available for which the disabled employee is qualified, employers are not required to create a new position or bypass placement practices based on seniority to accommodate the disabled employee.[97]

An accommodation is *not* reasonable if it either imposes "undue hardship on the operation of the business"[98] of the employer or requires "a fundamental alteration in the nature of [the] program."[99] Whether an accommodation would require an undue financial and administrative burden is determined by considering the following four factors:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness,

[90] 42 U.S.C. § 12111(9)(A).
[91] *Id.* § 12111(9)(B).
[92] *See, e.g.*, Jones v. United Parcel Serv., 214 F.3d 402, 407-08 (3d Cir. 2000).
[93] 998 F.2d 735 (9th Cir. 1993).
[94] *Id.* at 739-40.
[95] *See* Taylor v. Rice, 451 F.3d 898, 909-10 (D.C. Cir. 2006).
[96] *See, e.g.,* Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1452 (11th Cir. 1998); Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 99 (2d Cir. 1999).
[97] *See, e.g.,* Buskirk v. Apollo Metals, 307 F.3d 160, 169 (3d Cir. 2002).
[98] Southeastern Cmty. College v. Davis, 442 U.S. 397, 412 (1979); 42 U.S.C. § 12112(b)(5)(A).
[99] *Southeastern Cmty. College*, 442 U.S. at 410.

administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[100]

4. Discriminatory Action

Once a claimant's HIV/AIDS status is established as a disability and the claimant shows that he is a qualified individual, the final step in establishing employment discrimination is demonstrating an adverse action that is based on the claimant's disability.[101] A plaintiff may demonstrate an adverse action in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.[102] Moreover, although the ADA and the Rehabilitation Act do not explicitly provide for hostile work environment claims, several federal courts of appeal have either explicitly held or implied that plaintiffs may bring claims alleging a hostile work environment under the ADA and the Rehabilitation Act.[103]

A plaintiff may also demonstrate a discriminatory action by citing an employer's inquiries about a claimant's disability, depending on the context in which the inquiry was made. An employer is prohibited from asking during the interview process whether the applicant has a disability, but the employer can ask whether the applicant can perform essential job functions.[104] After an offer is made, the employer can require an HIV test if it is standard protocol to test all candidates, but the employer cannot single out some applicants to take an HIV test.[105] Additionally, employers must treat all test results as confidential medical records and maintain the records in separate files from the employee's main records.[106] Medical information about the employee can only be disclosed to:

- the employee's supervisors regarding necessary restrictions on the work or duties or necessary accommodations;
- first aid and safety personnel when appropriate, if the disability might require emergency treatment; and/or
- government officials investigating compliance.[107]

While post-hire examinations are allowed, an employer cannot inquire into the employee's HIV status or AIDS diagnosis unless it is "job-related and consistent with business necessity."[108] In *Gajda v. Manhattan and Bronx Surface Transit Authority*,[109] a transit employee indicated on his request for leave application that his health may not allow him to perform his job duties. The Second Circuit Court of Appeals held that the Transit Authority's need to determine whether a bus driver's declining health would interfere with his ability to perform his duties justified the Transit Authority's request for

[100] 42 U.S.C. § 12111(10)(B).
[101] As mentioned earlier, the Rehabilitation Act requires that the disability be the sole reason for the adverse action, whereas the ADA allows for a mixed-motive theory.
[102] 42 U.S.C. § 12112(a), (b)(1)-(4).
[103] *See* Lanman v. Johnson County, 393 F.3d 1151, 1155-56 (10th Cir. 2004); Neudecker v. Boisclair Corp., 351 F.3d 361, 364-65 (8th Cir. 2003); Shaver v. Indep. Stave Co., 350 F.3d 716, 719 (8th Cir. 2003); Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 234-35 (5th Cir. 2001); Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir. 2001); Walton v. Mental Health Ass'n, 168 F.3d 661, 666 (3d Cir. 1999); Silk v. City of Chicago, 194 F.3d 788, 803-04 (7th Cir. 1999).
[104] 42 U.S.C. § 12112(d)(2).
[105] *Id.* § 12112(d)(3)(A).
[106] *Id.* § 12112(d)(3)(B).
[107] *Id.* § 12112(d)(3)(B)(i)-(iii).
[108] *Id.* § 12112(d)(4)(A).
[109] 396 F.3d 187, 189 (2d. Cir. 2005) (per curiam).

information regarding the driver's HIV status.[110] Conversely, an employer may not seek out medical information regarding and employee's HIV status or make an employee submit to an HIV test merely to confirm suspicions that the employee has HIV or AIDS.[111]

In addition, failure to provide a reasonable accommodation that would allow an employee with a disability to perform the job functions, or refusal to hire an otherwise qualified individual in order to avoid providing reasonable accommodations are in themselves discriminatory actions.[112] The concept of reasonable accommodation and what qualifies as "reasonable" is discussed in the previous section.

One difference between the ADA and Section 504 of the Rehabilitation Act is that the latter statute includes a provision that no qualified person shall be discriminated against "solely by reason of her or his disability."[113] A few courts have interpreted this element literally and required an employee to prove that the individual's disability was the *only* reason for the discrimination.[114] Consequently, those courts hold that if an employer can show a nondiscriminatory motive for an employee's adverse treatment, the employee's disability discrimination claim fails.[115] Other courts, however, including the First Circuit Court of Appeals, have analyzed employer liability under the Rehabilitation Act when adverse treatment is "in whole or in part" due to an employee's disability, a view consistent with that of Congress in amending the statute in 1992.[116] The ADA does not have the "solely by reason of" language of the Rehabilitation Act and, as a result, courts have allowed for a mixed-motive theory for proof of discrimination under the ADA.[117] In reality, however, in cases in which the employer can offer a nondiscriminatory rationale for its decision, even when there is some evidence of discrimination, if the plaintiff cannot show that the nondiscriminatory rationale is pretextual, there is a significant risk that a court will grant summary judgment for the employer.

An employee may also demonstrate that he or she experienced discrimination in the workplace by reason of the employee's relationship or association with another person who has, or is perceived to have, a disability.[118]

5. Prior Claims for Disability Benefits

[110] *See id.* at 188-89. It is important to note that the court did not hold that the Gajda's HIV status in itself provided a reason to doubt his capacity to perform his job—rather it was Gajda's comments specifically calling his ability to work into question.
[111] *See* Doe v. Kohn Nast & Graf, P.C., 866 F. Supp. 190, 197 (E.D. Pa. 1994).
[112] *Id.* § 12112(b)(5).
[113] 29 U.S.C. § 794(a). *See also* Leckelt v. Bd. of Comm'rs of Hosp. Dist. No. 1, 909 F.2d. 820, 825-26 (1990). Courts are divided on whether to read "solely" into claims brought against federal employers under section 501 of the Rehabilitation Act. *See* Pinkerton v. Spellings, 529 F. 3d 513, 516 (5th Cir. 2008) (per curiam).
[114] *See, e.g.,* Parker v. Columbia Pictures Indus., 204 F.3d 326, 337 (2d Cir. 2000) (holding that employers can be liable for disability-based discrimination under the ADA when an employee's disability is one factor causing her adverse treatment, whereas liability lies under the Rehabilitation Act when disability is the "only factor" causing her adverse treatment).
[115] *See, e.g.*, Dratz v. Johnson, No. Civ-92-190-B, 1994 WL 846899, at *5 (W.D. Okla. 1994).
[116] *See* Oliveras-Sifre v. Puerto Rico Dept. of Health, 214 F.3d 23, 25 & n. 2 (1st. Cir. 2000); *see also* Powell v. City of Pittsfield, 221 F. Supp. 2d 119, 148-49 (D. Mass. 2002) (holding that Congress's 1992 Amendments to the Rehabilitation Act expressly reject the standard that an employee's disability must be the sole cause of his or her adverse treatment).
[117] *See, e.g.*, Parker v. Columbia Pictures Indus., 204 F.3d 326, 336-37 (2d Cir. 2000) (holding that although the ADA includes no explicit mixed-motive provision, a number of other circuits have held that the mixed-motive analysis available in the Title VII context applies equally to cases brought under the ADA).
[118] 42 U.S.C. § 12112(b)(4); *see also* Trujillo v. PacifiCorp, 524 F.3d 1149 (10th Cir. 2008); Ennis v. Nat'l Ass'n of Bus. and Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995).

One additional factor to consider in evaluating a discrimination claim is whether the claimant has previously sought disability benefits as a result of limitations on his or her ability to work. Individuals pursuing discrimination claims or anticipating doing so should also be aware of the impact of filing a disability benefits claim, and should state, as appropriate depending on their health status, that their ability to work is determined by the availability of accommodations for their disability.

In order to obtain disability benefits, the claimant usually must have demonstrated an *inability* to work.[119] In contrast, a discrimination claim requires that the claimant show she is a "qualified individual" under the ADA by demonstrating the *ability* to perform the essential function of the employment position, with or without an accommodation.[120]

The U.S. Supreme Court addressed this issue in *Cleveland v. Policy Management Systems Corp.*,[121] holding that a claimant is not automatically estopped from pursuing an ADA claim just because the claimant had pursued or received SSDI benefits. The Court thus rejected the approach of some lower courts that had imposed strong presumption that disability claimants are unable to work.[122] As the Court noted, there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side to allow such a presumption against ADA protection.[123] For example, because the Social Security Administration (SSA) does not take into account the possibility of reasonable accommodations in determining disability benefits eligibility, an ADA plaintiff's claim that she can perform her job *with* reasonable accommodation may well prove consistent with an SSDI/SSI claim that she could not perform her own job (or other jobs) *without* it.[124] An individual might qualify for SSDI under the SSA's administrative rules and yet, due to special individual circumstances, be capable of performing the essential functions of her job. Or her condition might have changed over time, so that a statement about her disability made at the time of her application for SSDI/SSI benefits does not reflect her capacities at the time of the relevant employment decision.[125] There also are provisions of the SSA that allow individuals to collect disability benefits while they are working.[126] However, if a claimant is bringing an ADA claim in addition to an SSDI benefit claim, the claimant will be required to reconcile that the two cases are consistent by showing that, despite the SSDI claim, the claimant is a qualified individual under the ADA.[127]

IV. Gender, Race, and Employment Discrimination

In addition to the stigma associated with a positive HIV status, women, transgender individuals, and people of color living with HIV may face additional obstacles to employment. Women living with HIV in the United States are disproportionately low-income women of color with parental

[119] *See* McNemar v. Disney Stores, Inc., 91 F.3d 610, 618 (3d Cir. 1996), *overruled by* Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999).
[120] 42 U.S.C. § 12111(8).
[121] 526 U.S. 795 (1999).
[122] *Id.* at 797-98.
[123] *Id.* at 802-03.
[124] *Id.* at 803.
[125] *Id.* at 805.
[126] I*d.*
[127] *Id.* at 806.

responsibilities.[128] African Americans still face significant employment discrimination, which may be compounded by the fact that HIV disproportionately affects African Americans compared to whites, with African Americans making up roughly half the people living with HIV in the United States.[129] Women still confront workplace discrimination despite legislative efforts to reduce sexual harassment and sex-based discrepancies in wages, benefits, and hiring.[130] Transgender individuals, who face disproportionate HIV rates,[131] may also face barriers to employment due to the severe stigma surrounding their gender identity. A stable job is critical to these individuals' ability to manage their illness and care for their families.[132] Various federal, state, and municipal rules help eliminate—and provide remedies for individuals faced with—race and gender-based employment discrimination.

Title VII of the Civil Rights Act of 1964 prohibits non-federal employers of fifteen or more employees from discriminating against—or engaging in practices that have a discriminatory impact on—an individual because of the individual's sex or race.[133] It prohibits not only overt sex- and race-based discrimination, but also workplace harassment and adverse treatment based on sex- or race-based stereotypes.[134] Adverse treatment under Title VII can also include isolating employees, such as limiting contact with customers.[135] Adverse treatment decisions are not justified even when driven by business concerns (such as concerns about the effect on employee relations or negative reactions of clients or customers).[136] Title VII also prohibits discrimination on the basis of a medical condition which predominantly affects one race unless the practice is job related and consistent with business necessity.[137] For example, because sickle cell anemia predominantly affects African-Americans, Title VII prohibits an employment policy that excludes individuals with sickle cell anemia unless the

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[128] HENRY J. KAISER FAMILY FOUNDATION, HIV/AIDS POLICY FACT SHEET: WOMEN AND HIV/AIDS IN THE UNITED STATES 1, 2 (2008), http://www.kff.org/hivaids/upload/6092-061.pdf (last visited Aug. 30, 2010).
[129] *See* BLACK AIDS INSTITUTE, LEFT BEHIND: BLACK AMERICA: A NEGLECTED PRIORITY IN THE GLOBAL AIDS EPIDEMIC 16 (2008).
[130] In 2008, Women filed 11,662 claims for workplace sexual harassment and 6285 claims of pregnancy-based discrimination with the EEOC. See THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEXUAL HARASSMENT CHARGES: EEOC & FEPAS COMBINED: FY 1997-FY 2008, http://www.eeoc.gov/laws/types/sexual_harassment.cfm (last visited Aug. 30, 2010); THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PREGNANCY DISCRIMINATION CHARGES: EEOC & FEPAS COMBINED: FY 1997-FY 2008, http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm (last visited Aug. 30, 2010).
[131] Jeffrey H. Herbst et al., *Estimating HIV Prevalence and Risk Behaviors of Transgender Persons in the United States: A Systematic Review*, 12 AIDS BEHAV. 1 (2008).
[132] Kenneth C. Hergenrather et al., *Employment-Seeking Behavior of Persons with HIV/AIDS: A Theory-Based Approach*, 70 J. OF REHABILITATION 22 (2004).
[133] Discriminatory practices include refusing to hire, firing, or discriminating "against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment" because of an individual's race or sex or "to limit, segregate, or classify [an employee or applicant] for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee" because of an individual's race or sex. *See* 42 U.S.C. 2000e-2 (2009). The Equal Pay Act also prohibits employers from paying female employees less than male employees on the basis of sex when their jobs require equal skill, effort, and responsibility, and are performed under similar working conditions. *See* 29 U.S.C. § 206(d) (2009).
[134] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), FACTS ABOUT RACE/COLOR DISCRIMINATION (2008), available at http://www.eeoc.gov/facts/fs-race.html; Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989) (recognizing employee's adverse treatment because of her failure to conform to stereotypes about femininity as sex-based discrimination); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 752-54 (1998) (acknowledging that both quid pro quo and hostile work environment sexual harassment are prohibited under Title VII).
[135] *See* EEOC, *supra* note 134.
[136] *See id.*
[137] *See id.*

policy is job related and consistent with business necessity.[138] This may be relevant in the context of HIV, which disproportionately affects African Americans and certain other racial minorities. Included in Title VII's prohibition of sex-based discrimination is discrimination against women based on pregnancy, childbirth, and related medical conditions.[139] Under Title VII, employers may not fire or refuse of hire a woman because she is pregnant or may become pregnant, and they must apply the same standards to pregnant employees who take time off because of their pregnancy as they apply to other "temporarily disabled" employees.[140]

Unfortunately, courts have not consistently provided Title VII protection to transgender individuals. Most courts have interpreted "sex" to mean a person's biological sex rather than gender identity.[141] As a consequence, few courts have held that Title VII protects transgender individuals against discrimination based on their gender-identity.[142] However, some courts have relied on the Supreme Court's holding that Title VII prohibits employment discrimination based on an individual's nonconformity to gender stereotypes and interpreted Title VII to prohibit discrimination against transgender individuals.[143]

Employees of organizations that receive federal financial assistance may also be protected from race- and sex-based discrimination by Title VI and Title IX, respectively. Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance.[144] Title IX prohibits sex-based discrimination in education programs receiving federal financial assistance.[145] Title IX was patterned after Title VI and thus the two are often interpreted similarly, however, some important distinctions remain.[146] For example, unlike Title IX, Title VI statutorily restricts claims of employment discrimination to instances where the "primary objective" of the financial assistance is to provide employment.[147] The U.S. Department of Justice has issued legal guides to both statutes, which are available on its website.[148]

The Constitution also offers some protection in the context of employment. The Equal Protection Clause of the Fourteenth Amendment prohibits governments, including the federal government, from purposefully discriminating against employees on the basis of race, alienage, or national origin unless the government can demonstrate that the discrimination is narrowly tailored to further a

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138 *See id.*

139 *See* 42 U.S.C. 2000e(k) (2009). Pregnancy discrimination has been interpreted to include discrimination against unwed mothers in the hiring process. *See* King v. Trans World Airlines, Inc., 738 F.2d 255 (8th Cir.1984).

140 *See* Susan M. Omilian & Jean P. Kamp, Sex-Based Employment Discrimination § 20:1 (2009); THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FACTS ABOUT PREGNANCY DISCRIMINATION (2008), *available at* http://www.eeoc.gov/facts/fs-preg.html (last visited Aug. 30, 2010).

141 Katie Koch & Richard Bales, *Transgender Employment Discrimination*, 17 UCLA WOMEN'S L.J. 243, 246-47 (2008).

142 *See id.* at 250.

143 *See, e.g.*, Smith v. City of Salem, 369 F.3d 912, 918 (6th Cir. 2004).

144 42 U.S.C. § 2000d.

145 20 U.S.C. §1681 *et seq.*

146 Grove City College v. Bell, 465 U.S. 555, 566 (1984); North Haven v. Bell, 456 U.S. 512, 529-30 (1982) ("The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation.")

147 42 U.S.C. § 2000d-3.

148 U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, TITLE VI LEGAL MANUAL (2001), *available at* http://www.justice.gov/crt/cor/coord/vimanual.php#IX.%20Employment%20Coverage (last visited Aug. 30, 2010); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, TITLE IX LEGAL MANUAL (2001), *available at* http://www.justice.gov/crt/cor/coord/ixlegal.php#82 (last visited Aug. 30, 2010).

compelling state interest—an exceedingly high bar.[149] The Equal Protection Clause also prohibits governments from discriminating against employees based on sex unless the discriminatory action is closely and substantially related to an important government interest.[150] A small number of courts have interpreted the Equal Protection Clause as prohibiting the state from discriminating against transgender individuals in the employment context.[151]

In addition to these federal protections, at least eight states and numerous municipalities have anti-discrimination laws that specifically protect—or that courts have interpreted as protecting—transgender individuals from work place discrimination.[152] Three additional states have executive orders preventing public employees from such discrimination.[153] Furthermore, while the ADA and Rehabilitation Act do not recognize gender-identity-disorder as a disability,[154] some state courts have allowed transgender individuals to bring employment discrimination claims under state disability statutes.[155]

While, at the time of publication, it had not yet been passed, proposed federal legislation may offer additional protections in the future. Versions of the Employment Non-Discrimination Act (ENDA) introduced in Congress for the last several years would explicitly prohibit employment discrimination on the basis of gender identity.[156]

V. International Human Rights Law and Employment Discrimination

International human rights law can be a useful tool to advocate for the employment rights of persons living with HIV/AIDS. The international human rights framework prohibits a person's right to work from being impeded on the basis of their illness. This section provides specific background information and guidance on how international human rights law can strengthen domestic protections of the rights to work and equal treatment in employment.

A. International Human Rights Law in the U.S. Courts

Before discussing substantive international norms, it is necessary to understand how they can be used. This subsection briefly outlines how advocates use these international human rights norms in U.S. courts.

The human rights norms discussed below stem from several sources. Several are derived from

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149 Attorney General of N.Y. v. Soto-Lopez, 476 U.S. 898, 906 n.6 (1986).
150 *See* Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979).
151 *See* Omilian & Kamp, *supra* note 140, at § 28:5; *see, e.g.*, Smith v. City of Salem, 378 F.3d 566, 577-78 (6th Cir. 2004).
152 TRANSGENDER LAW & POLICY INSTITUTE, SCOPE OF EXPLICITLY TRANSGENDER-INCLUSIVE ANTI-DISCRIMINATION STATUTES (2008), http://www.thetaskforce.org/downloads/reports/fact_sheets/TI_antidisc_laws_7_08.pdf; Omilian &. Kamp, *supra* note 140, at § 28:4.
153 *See* Omilian &. Kamp, *supra* note 140, at § 28:4.
154 *See* 42 U.S.C. § 12211(b); 29 U.S.C. § 705(20)(F).
155 *See* Omilian &. Kamp, *supra* note 140, at § 28:6 (listing Florida, Illinois, Massachusetts, New Hampshire, New Jersey, New York, and Washington as states where courts or administrative agencies have ruled that transsexuality is a disability under their state statutes).
156 *See* S.1584, 111th Cong. (2009). The House of Representatives passed a version of ENDA in 2007 that would have prohibited discrimination based on sexual orientation, but the provisions to protect transgender individuals from discrimination based on their gender identity were stricken from the bill. *See* H.R. 3685, 110th Cong. (2007).

treaties, also known as "conventions," which the United States has either signed and ratified or signed without ratifying. Under international law, the United States is bound to uphold obligations under the treaties it has ratified. Where the United States has signed but not ratified a treaty, it is obligated not to act contrary to the purpose of the convention under Article 18 of the Vienna Convention on the Law of Treaties.[157] Another source of international law is "customary international law"—norms established by the customs of nations,[158] which may also be reflected in treaties, declarations, and other international agreements. Finally, this section also cites documents that are non-binding in themselves but that interpret binding treaty obligations or customary international law.

The role of these international obligations in U.S. law is complex and often contradictory. Under U.S. law, treaties and customary international law are binding, but do not necessarily give rise to a private right of action. The Constitution declares that treaties are the "supreme Law of the Land"[159] and federal common law has accorded the same status to customary international law.[160] However, it is difficult to bring private causes of action in U.S. courts under international law because of significant procedural obstacles. For example, the United States has declared most treaties "non-self-executing," meaning that ratification in itself does not create a private cause of action under the treaty. Moreover, the United States often ratifies treaties with "reservations" limiting their legal effect and ability to be enforced through private actions in courts. As a result, while the U.S. is bound by the treaties it ratifies and by customary international law, it is difficult to enforce international law in U.S. courts.

Even without creating a private cause of action, international human rights law may still play a vital role in protecting the employment rights of people living with HIV/AIDS. Public interest lawyers have successfully used international human rights treaties and other documents interpreting international human rights law to inform judges' decisions by framing domestic legal issues in a broader international context.[161] Many courts, including the Supreme Court, have been receptive to domestic legal arguments that incorporate international human rights norms as a source of support. The Supreme Court has cited international human rights standards in finding unconstitutional laws prohibiting sodomy,[162] and laws allowing the imposition of the death penalty for juveniles[163] and defendants with mental retardation,[164] and in upholding race-conscious admissions policies in higher education.[165]

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[157] The Vienna Convention on the Law of Treaties is a separate treaty governing treaty interpretation and adherence that the United States has ratified. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331, 336 (entered into force on Jan., 27, 1980); *see also* Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 969 (2006).

[158] U.N. Charter, art. 38, para. 1(b).

[159] U.S. CONST., art. VI, cl. 2.

[160] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. j. (1987); *see also* Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L. J. 891, 983-84 (2008); *cf.* Beharry v. Reno, 183 F. Supp. 2d 584, 597-601 (E.D.N.Y. 2002) (stating that the Convention on the Rights of the Child is binding on U.S. courts as a source of customary international law), *rev'd on other grounds*, Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003).

[161] *See* Cummings, *supra* note 160, at 985-87.

[162] Lawrence v. Texas, 539 U.S. 558, 573 (2003).

[163] Roper v Simmons, 543 U.S. 551, 575-78 (2005).

[164] Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

[165] Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

The sources of international human rights norms are not limited to treaties that the United States has ratified. While ratification demonstrates the formal incorporation of an international agreement into U.S. law, courts have also relied upon non-ratified treaties, customary international law, and general state practice in their decisions. For example, in *Roper v. Simmons*, the Supreme Court cited the Convention on the Rights of the Child (CRC), a treaty that the U.S. has not ratified but which is widely acknowledged as customary international law,[166] in determining that the execution of minors is unconstitutional.[167] The Court also looked to the practice of other states in making its determination.[168] At least one federal court in the United States has explicitly cited sections of the CRC as customary international law binding on United States courts.[169] Thus, international human rights norms may be particularly useful for framing issues in the context of international practice where a U.S.-based practice falls out of line with the general international consensus.[170]

B. International Human Rights Norms Concerning the Rights to Work and Equal Treatment in Employment

International human rights law supports the rights of persons living with HIV/AIDS to work and protects them from discrimination on the basis of their illness in the work place.[171] These rights are protected by numerous provisions of international human rights instruments, several of which are outlined below:

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166 *See, e.g.*, Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act through Children's Participation*, 50 ARIZ. L. REV. 127, 139-40 (2008) (citing the Convention as the "consensus of world opinion regarding children's rights")

167 543 U.S. at 575-78.

168 *See id.*

169 *See Beharry*, 183 F. Supp. 2d at 600-01.

170 *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 80 (2006) (noting that international human rights norms are relevant to jurisprudence determining whether a particular form of conduct is "arbitrary and conscience-shocking" or is "implicit in the concept of ordered liberty").

171 "The Commission on Human Rights has confirmed that 'other status' in non-discrimination provisions is to be interpreted to include health status, including HIV/AIDS." Office of the High Comm'r for Human Rights & Joint U.N. Programme on HIV/ AIDS (UNAIDS), *International Guidelines on HIV/AIDS and Human Rights*, ¶ 108, U.N. Doc. HR/PUB/06/9 (2006) [hereinafter *International Guidelines*]. UNAIDS brings together ten organizations of the United Nations system: the United Nations High Commissioner for Refugees, the United Nations Children's Fund, the United Nations World Food Programme, the United Nations Development Programme, the United Nations Population Fund, the United Nations Office on Drugs and Crime, the International Labour Organization, the United Nations Educational, Scientific, and Cultural Organization, the World Health Organization, and the World Bank.

Protected Right	International Human Rights Instrument	Corresponding Obligations of the United States
The right to non-discrimination, equal protection, and equality before the law	• Art. 7 of the Universal Declaration of Human Rights ("Universal Declaration")[172] • Art. 3 and Art. 26 of the International Covenant on Civil and Political Rights ("ICCPR")[173] • The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")[174] • Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD")[175] • Art. 5 of the Convention on the Rights of Persons with Disabilities ("CRPD")[176]	• The Universal Declaration is non-binding, but is considered customary international law. • The United States has signed and ratified the ICCPR, making it binding on the United States. • The United States has signed but not ratified the CEDAW, and thus has an obligation not to act contrary to the purpose of the convention under Article 18 of the Vienna Convention. • The United States has signed and ratified the ICERD, making it binding on the United States. • The United States has signed but not ratified the CRPD, and thus has an obligation not to act contrary to the purpose of the convention under Article 18 of the Vienna Convention.
The right to work.	• Art. 23(1) of the Universal Declaration • Art. 6 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") • Art. 11(1)(a) of the CEDAW • Art. 27 of the CRPD • Art. 5(e)(i) of the ICERD • Art. 32 of the Convention on the Rights of the Child ("CRC")	• See Universal Declaration above. • The United States has signed but not ratified the ICESCR, and thus has an obligation not to act contrary to the purpose of the convention under Article 18 of the Vienna Convention. • See CEDAW above. • See CRPD above. • See ICERD above. • The United States has signed but not ratified the CRC, and thus has an obligation not to act contrary to the purpose of the convention under Article 18 of the Vienna Convention.
The right to just and favorable conditions of employment	• Art. 23(1), (2) of the Universal Declaration • Art. 7 of the ICESCR • Art. 11(1)(f) of the CEDAW • Art. 27(1)(b) of the CRPD • Art. 5(e)(i) of the ICERD	• See Universal Declaration above. • See ICESCR above. • See CEDAW above. • See CRPD above. • See ICERD above.

[172] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].
[173] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].
[174] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].
[175] International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD].
[176] Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, U.N. Doc. A/61/611 [hereinafter CRPD]. The CRPD notes that, "[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others," which would include many persons living with HIV/AIDS. *Id.* at Art. 1.

The right to equal pay and benefits for equal work	• Art. 23(2) of the Universal Declaration • Art. 7(a)(i) of the ICESCR • Art. 11(1)(d) of the CEDAW • Art. 27(1)(b) of the CRPD • Art. 5(e)(i) of the ICERD	• See Universal Declaration above. • See ICESCR above. • See CEDAW above. • See CRPD above. • See ICERD above.
The right to protection against harassment on the basis of a disability in employment	• Art. 27(1)(b) of the CRPD	• See CRPD above.
The right to an adequate standard of living, including security in the event of unemployment	• Art. 25(1) of the Universal Declaration • Art. 11(1)(e) of the CEDAW	• See Universal Declaration above. • See CEDAW above.

Because these international human rights instruments are written rather broadly, it is valuable to look to detailed authoritative interpretations of specific provisions from the instruments. These interpretive documents underscore protection of the rights to work and equal treatment in employment by international human rights law. The U.N. Committee on Economic, Social and Cultural Rights, the purpose of which is to provide authoritative guidance on the provisions of the ICESCR, notes that, "[t]he right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity."[177] The Committee also views the right to work as broadly encompassing the rights to choose one's own work,[178] and to safe and prosperous work.[179] The Committee specifically calls upon states to, "take measures enabling persons with disabilities [including HIV/AIDS] to secure and retain appropriate employment and to progress in their occupational field, thus facilitating their integration or reintegration into society."[180] Finally, the Committee notes that all states have an affirmative obligation to respect, protect, and fulfill the right to work of all people.[181]

The rights to work and equal protection in employment are also embodied in the International Guidelines on HIV/AIDS and Human Rights ("International Guidelines"), a document put forth by the Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS ("UNAIDS").[182] Although the International Guidelines are not binding law like a ratified treaty, they are a persuasive interpretation of some of the rights embodied in international treaties. In this way, they are useful for putting the treaties into context. The International Guidelines direct states to ensure that, "persons living with HIV are allowed to work as long as they can carry out the functions of the job," and also that such persons are provided with reasonable accommodations.[183] The International Guidelines also direct states to create anti-discrimination protective laws for persons with HIV/AIDS that apply to both public and private sector employers.[184] The International Guidelines advocate specific protections for employees, such as: freedom from HIV screening prior to employment, promotion, training, or benefits;

[177] U.N. Comm. on Economic, Social and Cultural Rights, General Comment 18: The Right to work (art. 6), ¶ 1, U.N. Doc. E/C.12/GC/18 (Nov. 24, 2005).
[178] *See id.* ¶ 6.
[179] *See id.* ¶ 7.
[180] *Id.* ¶ 17.
[181] *Id.* ¶¶ 22, 23, 25, 26, 27, 28.
[182] *See, e.g.*, *International Guidelines*, *supra* note 171, ¶ 22(a)(i) (noting need for broad anti-discrimination laws that cover, among other things, employment).
[183] *Id.* ¶ 149.
[184] *Id.* ¶ 22.

confidentiality of all medical records; protection against termination for HIV-positive employees; adequate healthcare in or near the workplace; and protection from discrimination by co-workers, unions, employers, and clients.[185] For example, no type of employer could lawfully harass or refuse to promote an employee on the basis of the employee's HIV/AIDS status. The International Guidelines also call for employers to ensure that their employees have healthcare benefits that cover HIV-related treatments.[186]

These international instruments and accompanying interpretive documents demonstrate that international law requires nations to provide a broad range of protections for the rights of all persons, including those who are living with HIV/AIDS, to work and equal treatment in employment. As outlined in the chart above, these rights are derived from various international instruments, many of which are binding on the United States, and all of which obligate the United States, at a minimum, not to act in a contrary manner.

[185] *See id.* ¶ 22(d)(i-xii).
[186] *See id.* ¶ 34.