Your Rights as an HIV+ Employee

As an employee who is HIV+, you may be concerned with the way your employer and co-workers will respond should they learn of your status. Fortunately, HIV+ employees are granted protection from discrimination under both state and federal laws. If you find yourself in a situation in which you believe you are being discriminated, legal remedies are available.

Both the state of Massachusetts and the federal government have laws which protect disabled individuals (including HIV+ people) from workplace discrimination. In this state, the disability discrimination statute is Massachusetts General Law c. 151B, Section 4(16). Under federal law, the Americans with Disabilities Act (ADA) provides protection. Under both laws, people who have HIV or AIDS are protected, regardless of the presence or absence of symptoms. People who are simply “regarded” as having HIV are also protected. In addition, the ADA protects “associates” of people with HIV. “Associates” include persons who do not have HIV, but may have a personal or business relationship with someone who does.

Disclosure

One concern HIV employees often face regards their right to keep their HIV status private. In Massachusetts, an employer cannot require that an employee take an HIV test under any circumstance, both during the application phase and during employment. During the application process, an employer may not ask an applicant to undergo a medical exam or to answer any questions regarding medical issues. After a conditional offer of employment, however, an employer may request certain medical information or tests (but not an HIV test). This information must be requested of all applicants in the job category and may be used only to determine whether or not the employee may perform essential job functions specific to the job in question. Any information discovered must be kept confidential and cannot be used to withdraw a job offer unless the applicant cannot perform essential job functions with reasonable accommodation. After employment begins, an employer may only request medical examinations that are necessary to measure the employee’s actual job performance.

The Family and Medical Leave Act

The government passed an important federal measure benefiting many HIV+ employees in 1993 called The Family and Medical Leave Act (FMLA). FMLA requires that employers who have 50 or more employees within 75 miles of the job site grant up to twelve weeks of unpaid leave per 12 month period to certain employees experiencing the birth or adoption of a child, recovery from a “serious health condition”, or care of an immediate family member with a “serious health condition”. In order to qualify for FMLA, an employee must have:
1) completed twelve months (not necessarily consecutive) of total service and

2) worked over 1,250 hours during the twelve months prior to the leave.

Under the FMLA, a “serious health condition” which makes persons incapable of performing their job duties includes:

- any period of incapacity or treatment in or following inpatient care at a hospital or residential care facility

- any period of incapacity requiring absence from work of more than three consecutive calendar days or any period of incapacity which involved two or more visits to a health care provider or one visit to a healthcare provider resulting in subsequent supervised continued treatment

- any period of incapacity or treatment due to a chronic health condition continuing over an extended period of time, requiring periodic visits to a healthcare provider, and possibly causing episodic periods of incapacity

In many cases, an employee will not find it necessary to take all twelve weeks of leave at once. Under the FMLA, employees may take “intermittent leave” as short as one hour at a time or a reduced schedule if it is “medically necessary” for them to do so. If an employee takes intermittent leave, the employer does have the right to temporarily transfer the employee to an available alternate position (with equal pay and benefits) which better accommodates the leave.

For many HIV+ individuals, taking advantage of the protections afforded by the FMLA may raise difficult questions regarding disclosure. The FMLA allows an employer to require written certification from a healthcare provider of an employee’s “serious health condition.” The employer may also challenge that medical determination and require an examination by a second healthcare provider.

**Discrimination**

An individual who experiences job discrimination due to HIV status may make two types of claims. The first claim available states than an employer has treated an applicant or employee differently than other employees due to that person’s HIV status. Cases in which an employee might make such a claim include situations in which an employer has terminated or refused to hire, rehire, or promote an employee based on that person’s HIV/AIDS status, the employer’s fear that the employee will transmit HIV to other employees, the employer’s fear that the employee will become too ill to do the job in the future, or the employer’s fear of increases in health or workers’ compensation insurance premiums.
The second type of claim available to an employee who experiences job discrimination due to HIV status states that an employer has failed to provide reasonable accommodation. A reasonable accommodation is an adjustment in job requirements or policies which enables persons to continue to perform the essential functions of their job. You can find more detailed information about reasonable accommodations in question 14 on the Legal Services webpage.

If You Experience Job Related Discrimination

If you are an HIV+ employee who has experienced job discrimination in Massachusetts, you should file a claim with the Massachusetts Commission against Discrimination (MCAD). MCAD may then investigate the case, have a trial, and make an award of damages, which is similar to a court. Alternatively, you can also remove the case from MCAD and pursue it in Massachusetts Superior Court.

If you have questions about your employee rights, please email Legal Services at legalservices@aac.org with your questions or call 617.450.1317. Although we cannot represent you in a claim of discrimination, we can help you understand your rights and refer you to other resources.