

**HIV/AIDS EMPLOYEES, THE AMERICANS WITH DISABILITIES ACT,
AND THEIR IMPACT ON SMALL BUSINESS**

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ABSTRACT

This article examines the AIDS epidemic and the Americans with Disabilities Act (ADA) as they impact on small businesses. A recent Supreme Court ruling provides extensive ADA protection for employees with HIV/AIDS. New therapies now allow HIV/AIDS victims to live longer and many want to work. Because some stereotypes about the disease exist, many small businesses are unaware that the ADA protects these employees and may violate their civil rights. The article examines this ADA protection and provides a sample policy for small businesses.

INTRODUCTION

Since the Center for Disease Control (CDC) diagnosed the first United States victim of the HIV virus in 1981, infections from the virus have dramatically increased in the U.S. and worldwide (CDC, 1998). Information from the CDC presented in Table I illustrates the growing problem of HIV/AIDS in our society. Societal problems are mirrored in the work force. With the increase of the HIV/AIDS population in society and with new treatment therapies that are allowing HIV/AIDS patients to live longer, employers, both large and small, will have to deal with the issues that arise from HIV/AIDS employees.

In 1997, there were 1,291,810 new cases of AIDS in both adults and children from 193 countries amounting to an increase of 26% from one year earlier (Miller, Backer & Rogers, 1997). An estimated 33.4 million people worldwide have been infected with the virus with the expectation that this figure will reach 35 to 110 million by the year 2000 (Prewitt, 1993; CDC, 1998). An estimated 13.9 million people worldwide have died from AIDS since the epidemic began. Ten million (10.7 million) of these were adults (including 4.7 million women) and 3.2 million children under the age of 13 (CDC, 1998 Table I). Along with the human suffering other costs associated with the disease range from \$356 to \$514 billion or 1.4% of the world's gross domestic product (Prewitt, 1993).

The Center for Disease Control (CDC) believes that 650,000 to 900,000 Americans, or one out of every 300 U.S. citizens, are now infected with the HIV virus (CDC, 1998 Table I).

From the start of the epidemic through June 1998, 665,357 Americans were diagnosed as having full-blown AIDS, as opposed to being HIV positive. Of this number, 657,078 were adolescents and adults (104,028 of these were women or 15.8%) and 8,280 were children under the age of 13. A total of 401,028 of the 665,357 persons reported to the CDC with AIDS have died (CDC, 1998 Table I).

**TABLE I
BASIC STATISTICS ON HIV/AIDS***

WORLDWIDE STATISTICS ON HIV/AIDS

In 1997 there were 1.2 million new cases of full-blown AIDS worldwide from 193 countries, which was an increase of 26% from one year earlier.

33.4 million people have HIV/AIDS worldwide:

- 32.2 million of these are adults - of this figure 13.8 million are women.
- 1.2 million are children under the age of 15.

An estimated 13.9 million people have died from AIDS since the epidemic began:

- 10.7 million of these are adults - of this 10.7 million are 4.7 million women.
- 3.2 million are children under the age of 15.

More than 95% of all HIV victims live in developing countries.

One in every 3 children orphaned by HIV/AIDS is under the age of 5.

DATA ON HIV/AIDS IN THE UNITED STATES

The total number of infected persons in the U.S. is estimated to be between 650,000 and 900,000. This is one in every 300 Americans.

Through June 1998, a cumulative total of 665,357 persons with AIDS had been reported to the CDC:

- 657,078 were adolescents and adults - of this number 104,028 were women (15.8%).
- 8,280 were children under 13 years of age.

A total of 401,028 of the 665,357 persons reported to the CDC with AIDS have died.

*Source: The Center for Disease Control Web page. Data updated December 1998.
<http://www.cdc.gov>

COSTS TO EMPLOYEES AND AMERICAN BUSINESSES

The impact on American victims and the American economy is staggering in terms of human suffering and medical costs. Many victims go through psychological and physiological changes and spend years searching for medical care and fighting bureaucracies. The costs associated with employing an employee with HIV/AIDS have been the subject of some debate. Some estimates of the total lifetime costs to the individual and society ranged from

\$70,000 to \$140,000 (Paul & Townsend, 1997). However, other authors believe that the costs to employers have been overestimated because they originally included all societal costs, not just those to employers (Green, Oppenheimer & Wintfeld, 1994; Frierson, 1995).

A 1994 study conducted by Farnham and Gorsky specifically addressed the incremental costs to businesses employing an HIV positive employee. The model used by Farnham and Gorsky included health insurance, short and long-term disability benefits, recruiting, hiring, and training costs, employee life insurance, and pension costs. They found the average cost over a five-year time frame to be \$16,639 and the maximum cost to be \$31,702. Farnham and Gorsky used a five-year time frame because that time period represented a typical business decision-making perspective. Using the five-year time frame lowers the cost estimate because of the lower probability of the HIV positive employee moving to the high-cost health state within the five years. They also caution that the model is designed for businesses over 100 employees. Smaller businesses may not offer the same level of benefits as larger companies, but they may also have fewer opportunities to engage in cost-sharing activities. Although the debate about costs will probably continue, it is important for employers to focus on the incremental costs to the business and not focus on the larger societal costs associated with HIV/AIDS.

About two thirds of America's largest businesses have already had employees diagnosed with AIDS or HIV (Miller et al., 1997). Conversely, only 10 percent of small business have had employees with HIV or AIDS; however, that percentage is expected to rise as HIV/AIDS spreads from urban to suburban and rural areas (Miller et al., 1997).

NEW ISSUES WITH HIV/AIDS EMPLOYEES

Recent advances in medicine now allow HIV/AIDS individuals the ability to extend their lives and many want to continue to work (Lucas, 1998; Minehan, 1998; SHRM Explores New HIV/AIDS and Work Challenges, 1998). These new therapies have decreased HIV/AIDS mortality 26 percent in 1997 and decreased it from the leading cause of death to the second leading cause of death for Americans between the ages of 25 to 44 (Lucas, 1998). The groups of workers between ages 25 and 44 constitute more than half of America's 121 million workers (Miller et al., 1997).

An example is Ken Aldrich who was the Congressional Affairs Officer in the White House for Ronald Reagan and George Bush. When diagnosed as HIV positive, Aldrich was very concerned about his life expectancy. Today, the new therapies have decreased the virus to below detectable levels although it is still in his body. His immune system has been restored, he is healthy, and wants to work (Breuer, 1998). There are thousands of employees like Aldrich who are fighting life threatening illnesses such as HIV/AIDS, cancer, and other illnesses and are able to return to work (Breuer, 1998). Another example is an HIV positive American Airlines pilot who was recertified to fly. Although the FAA has strict rules on medication, he runs marathons, is healthy, and capable of flying (Greene, 1998).

Breuer (1998) argues that HIV/AIDS employees make great workers because they had major medical challenges, endured side effects, met with major psychological stress, dealt with political and bureaucratic systems, and developed creative responses to their circumstances. She believes that they are an untapped pool of good employees in this time of labor shortages. However, HIV/AIDS individuals have several workplace issues to surmount including stereotypes, coworker reaction, and health care before returning to work. First is the stereotype that this is a "gay" disease. Information presented in Table II shows AIDS cases by exposure category. This information shows that the percent of people with AIDS who contracted HIV through male homosexual contact decreased from 64% to 51.7% and the

proportion of people who contacted it through heterosexual contact increased from 3% to 10.2%. The percentage of female AIDS victims increased from 8% to 17.5% (Miller et al, 1997; CDC, 1998).

TABLE II
AIDS CASES BY EXPOSURE CATEGORY

<i>Exposure Category</i>	<i>Male/Female</i>	<i>Totals</i>	<i>Percents</i>
Men who have sex with men		317,862	51.7%
Injecting Drug Use			
Male	122,933		
Female	45,075		
Total		168,008	27.2%
Hemophilia/Coagulation Disorder			
Male	4,559		
Female	222		
Total	4,781	4,781	0.8%
Heterosexual Contact			
Male	21,855		
Female	40,744		
Total		62,599	10.2%
Received Blood Transfusion		8,311	1.4%
Risk Not Reported or Identified		53,423	8.7%
Totals		614,984	100.0%

*Source: Center for Disease Control Web page, data updated December 1998
<http://www.cdc.gov>

Many HIV/AIDS individuals are concerned about the reaction of coworkers. Nearly two-thirds of employers say that coworkers would be uncomfortable working along side an HIV positive employee (Greene, 1998). Some non-infected individuals are curious how the coworker got the disease, although no one asks how someone contracted cancer or heart disease. As a result of ignorance, some coworkers are concerned about the disease even though it cannot be transmitted through typical workplace contact except in health care (Paul & Townsend, 1997).

Many victims are concerned about the loss of health care coverage. Health insurance carriers have historically assumed that these employees would not return to work and have not developed policies to cover them (Breuer, 1998; Greene, 1998). Consequently, if HIV/AIDS victims drop their SSI (Government insurance) and get sick before they complete the waiting period for pre existing illnesses in their new employer's health insurance, they would be pushed into a lifetime of poverty (Breuer, 1998). Others are concerned that the ADA will not protect them. Some are suspicious that employers will not keep their medical condition

confidential and others do not trust disability plans (Breuer, 1998). Most are worried about the effects of job stress on their health.

THE AMERICANS WITH DISABILITIES ACT

The growing number of HIV/AIDS employees who want to work and can work longer requires that small businesses know what their and their employees' rights are under the Americans with Disabilities Act (ADA). The following explains the ADA and leads to the questions of whether HIV/AIDS employees are covered, to what extent, and how should small businesses respond.

The ADA covers employers in interstate commerce who have 15 or more employees (42 U.S.C. section 12101). Consequently, those small businesses with fewer than 15 employees are not covered by the federal ADA (although they may be covered by a state law).

Reasonable Accommodations and Undue Hardship

The law requires that these covered small employers make reasonable accommodations to disabled employees or prospective employees who can perform the essential job functions with or without an accommodation. Thus small employers cannot refuse to hire or retain an individual who can do the essential job functions with or without an accommodation. They are required to make "reasonable accommodations" unless the accommodation would present an "undue hardship" upon the small employer.

The act protects any individual with a **physical or mental impairment** including "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder." It includes disabilities such as epilepsy but not physical characteristics that are within "normal ranges" such as eye color, hair color, height or weight. It does not include "characteristic predisposition to illness or disease or personality traits such as a quick temper, poor judgment, poverty, lack of education or a prison record" (EEOC Guidelines, 1992 section 1630.2(h)).

Any individual is disabled under the act if they meet one of the following three definitions: "1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, 2) has a record of such as an impairment, or, 3) is regarded by the covered entity (defined above) as having such an impairment." (EEOC Guidelines, 1992, section 1630.2(g)).

The impairment is a disability only if it "substantially limits one or more of the individual's life activities." The ADA does not cover temporary, non-chronic impairments of short duration with little or no long term impact. Examples of non-covered impairments include obesity, broken limbs, sprained joints, concussions, and influenza. The EEOC Guidelines exclude the inability to perform a certain job or a certain type of job such as flying for the airlines because of a vision problem (EEOC Guidelines, 1992, section 1630.2(j)). The term substantial is determined by the duration of the impairment, the severity, and its impact on the individual's life. The Guidelines specify that the effect on the individual's performance must be the result of the impairment. As an example, "...advanced age, physical or personality characteristics, environment, cultural, and economic disadvantages " are not impairments (EEOC Guidelines, 1992, section 1630.2(j))

The second part of the definition includes someone who has a record of a disability. This "record" may include education, medical, or employment records and individuals that are the target of others' attitudes towards them (EEOC Guidelines, 1992, section 1630.2(i)). Some

individuals are disabled from others' myths, fear, or stereotypes about them (EEOC Guidelines, 1992, section 1630.2(m)). The EEOC states that an employee may be covered if others believe they have HIV/AIDS (EEOC Guidelines, 1992, section 1630.2(1)).

The next task is to identify the **essential job functions**. A function is essential if it is necessary to accomplish the job and other employees doing this job must perform this function. Other factors include the degree of expertise or skill, whether it is included in a job description, how often the function is performed, and how crucial it is to the job (EEOC Guidelines, 1992, section 1630.2(n) Essential Functions). They state that job descriptions are not required but are considered relevant evidence for determining essential job functions.

If the function is essential then the employer must make **reasonable accommodations**. This may include restructuring the work, modifying equipment, or changing work schedules. These accommodations must be made unless they present an **undue hardship** to the employer. Undue hardship is determined by the financial capability of the employer, its geographic dispersion, and the number of employees.

The ADA and the HIV/AIDS Employee

From 1992 to 1997, approximately 2,300 HIV related cases were filed with the EEOC. Nearly 60 percent of these cases were wrongful discharge claims (Armour, 1997). These statistics and the preceding ADA overview raise the following questions. First, does HIV/AIDS meet the requirement that it creates a disability affecting some major life activity? Second if this is a disability, what essential job functions can HIV/AIDS employee do or not do. Finally, what small business accommodations must be made for these individuals?

Since the inception of the HIV/AIDS epidemic, Congress, courts, and regulatory bodies have discussed whether it is a disability that should be protected. Prior to the enactment of the ADA in 1990, every court that addressed the HIV/AIDS issue under the Rehabilitation Act found that the infection created a disability (Bragdon v. Abbott, 1998). Justice Kennedy cited a number of school and fair housing cases that found HIV/AIDS to be disability (Doe v. Garrett, 1990; Ray v. School district of DeSoto County, 1987; Cain v. Hyatt, 1990; Baxter v. Belleville, 1987). Many of these pre-ADA cases ruled that asymptomatic HIV was a handicap.

During discussions on the ADA, Congress was aware of the disease and the Rehabilitation cases. Congressman Owens and Senator Kennedy stated that, "HIV/AIDS is a disability" (136 Cong Rec S9696, July 13, 1990). Both the EEOC and the Department of Justice, which are the two Federal agencies that enforce the act have stated that HIV/AIDS is a disability (McKinney, 1995).

Several courts have addressed the issue of HIV/AIDS students and consistently ruled that AIDS is a disability (McKinney, 1995; Smith vs. Dovenmuehle Mortgage Co. Inc., 1994). The U.S. Supreme Court faced the HIV/AIDS issue for the first time in 1998 with the Bragdon v. Abbott case. In this case a dental patient informed her dentist that she was infected with the HIV virus although she did not show any symptoms and was in the asymptomatic phase of the disease. Upon finding a cavity, the dentist informed her that he could not fix the cavity in his office but would do so in a local hospital where they had other equipment. She sued claiming protection under the public accommodations section of the ADA.

In a split 5-4 decision, the Supreme Court ruled that the infection was a disability protected by the ADA. The majority argued that the HIV virus creates a disability from the moment of infection and causes immediate abnormalities in a person's body, specifically white cells,

hemic systems, and lymphatic systems. They argued that the affected life activity was related to reproduction and dismissed the defendant's request that only an economic or employment life activity qualify as a significant impairment. They found it a significant impairment because it permanently affected her ability to have children because of the risks of transmission to any unborn child and any male partner.

Although the Rehabilitation cases, the pre Bragdon v. Abbott, 1998, ADA cases and the Supreme Court in Bragdon found that the HIV/AIDS infection creates a disability, the courts have not always returned the employee to work depending on whether the individual was otherwise qualified and was not a direct threat to others. A court prior to the ADA found that the mere existence of the HIV infection created enough of a risk to warrant removal of a physician from practice (In Estate of Behringer v. Medical Center of Princeton, 592 A.2d. 1279, 1983). Other courts used a cumulative approach. They argued that an infected health care employee who had contact with a large number of patients would over time create a cumulative risk sufficient to warrant removal of the employee.

Current cases have moved away from these general doctrines and require a specific, factual, individual analysis of the worker, their employment situation, and evidence of a direct threat to others. In health care, the courts have found removal of health care workers warranted where there was evidence of a concrete potential of possible transmission to others. A surgical technician with AIDS was dismissed whose job required placement of his hands inside the body cavities of patients on a daily basis and who had previously had accidents with sharp instruments in the past (McKinney, 1995). The Eleventh Circuit upheld the transfer of a firefighter with AIDS to light duty as a reasonable accommodation. The court argued that there was enough of a possibility to infect others during a rescue attempt that constituted a direct threat to others (McKinney, 1995).

In Bragdon, Justice Kennedy used these previous cases to clarify the term "direct threat." According to Kennedy's majority opinion, disabled individuals cannot be excluded unless there is a direct threat that cannot be eliminated by reasonable accommodations. A direct threat is determined by (1) the duration of the risk, (2) nature and severity of the potential harm, (3) likelihood that the harm will occur, and (4) imminence or immediacy of the potential harm (Bragdon v. Abbott). The Supreme Court then remanded the case to the lower courts to determine if the dentist did have or should have had the necessary training and/or equipment to fix the cavity in his office.

The CDC's opinion is that infected health care workers who do non-exposure prone procedures and who comply with universal precautions do not pose a significant risk and thus cannot be excluded from employment. An example is a favorable administrative law judge ruling for an infected pharmacist who occasionally prepared intravenous materials. The reasoning was that with the right training, equipment, and precautions the pharmacist did not represent a direct threat (Prewitt, 1993). The EEOC now requires valid medical or other objective evidence of a high probability of substantial harm to others (Prewitt, 1993).

In summary, it is still lawful to exclude an HIV/AIDS employee where his or her essential job duties require the performance of exposure prone practices. An example is the surgical technician whose essential job duties required placement of his hands inside the body cavities of patients. Unfortunately, some authors have pointed out that many infected health care workers ignore the CDC's universal precautions. Some infected employees believe that the probability of their transmitting the disease is low and others fear alerting coworkers to their condition (Prewitt, 1993).

THE IMPACT OF BRAGDON ON SMALL BUSINESSES

The ruling in Bragdon v. Abbott, 1998 clarified some points and raised further questions for small employers. First, employers, both large and small, must accept HIV/AIDS as a disability and follow the ADA and Bragdon ruling. The crucial questions with respect to HIV/AIDS are under what circumstances should an infected employee be accommodated and under what circumstances are employers not required to make "reasonable accommodations?"

If an infected employee constitutes a "direct threat" to others, the ADA requires employers to make "reasonable accommodations" unless this creates an "undue hardship." An HIV/AIDS infected employee meets Kennedy's first, second, and fourth criteria of a "direct threat" (Bragdon). First, once an individual contracts the virus *the duration of the threat* is permanent because there is no current cure. *The nature and severity of the potential harm* is a long illness and eventual death to anyone who gets the virus from an infected employee. The fourth, *the imminence or immediacy of the potential harm*, is an immediate impact on the new victim's body. Where questions will occur is Kennedy's third criteria, *the likelihood that the harm will occur*.

Employers will be required to conduct an extensive job analysis that determines the essential job functions and whether any essential functions are "exposure prone." If an infected employee or applicant's essential job functions are "exposure prone" then the question becomes, can the employer make reasonable accommodations and remove these "exposure prone essential job functions" or move the individual to another position where they do not present a direct threat?

This question can only be answered if it is possible to remove some of these functions and or transfer the infected individual to another position without creating undue hardship on the employer. This is where large and small employers may differ in their response. Large employers would have more opportunities for transferring employees. Many small employers would not have other positions and could conceivably release the infected employee if the exposure prone functions were essential to that position and no other position was available for the infected individual. As an example, a small health care provider could refuse to hire or retain an infected physician as an employee if that position's essential job functions required exposure prone essential job functions. However, in larger health care organizations, there might be other positions available such as administrative or counseling positions that did not create a direct threat to patients, and the larger employers would be required to make these accommodations.

Because the EEOC has strongly stated that it will only accept valid medical or scientific evidence and the CDC has limited the essential job functions that would meet the direct threat criteria to only those that are exposure prone, there are few jobs outside of health care that would meet these stringent criteria. Most retail, office, and even production positions have few opportunities for the transmission of infected body fluids to another person except in an accident. If the probability of transmission is low, then the small employer would have difficulty showing how a position warranted exclusion of the infected employee because such jobs would not meet Kennedy's third criterion for a direct threat.

Along with the extensive job analysis mentioned above, small employers will need to document their undue hardship argument. Congress did not heed the suggestions of the small business community to limit accommodations to a set standard such as a certain percentage of the relevant position's annual salary (Harger, 1993). Therefore, some small employers run the risk of believing that an accommodation would be an undue hardship only to discover after

the fact that a jury or judge disagreed. Documentation at the time of the decision covering the company's financial condition, number of employees, positions available and evidence of a direct threat is necessary for any later litigation.

Critics of the ADA argue that the key terms, reasonable accommodations and undue hardship, are ambiguous and will create intended and adverse litigation for many small businesses (Hearings Before the Committee on Small Business, 1990). The EEOC Commissioner supports the current case by case analysis because it provides flexibility by analyzing the individual, the job, the company, and the company's situation (Harger, 1993). The critics endorse a set dollar maximum for a reasonable accommodation beyond which the costs would create undue hardship. A set standard as a maximum would eliminate ambiguity, provide precise guidance to small businesses, and eliminate their fear of inaccurate predictions of a later judge or jury's decision. While most accommodations cost very little ranging from nothing to as little as \$150 per case, even a single lawsuit would bankrupt many small businesses (Harger, 1993).

Although some members of Congress desired a specific standard of what constitutes undue hardship and reasonable accommodation, Congress did not enact it. Consequently, the ADA stands as currently defined by Congress, the courts, and the EEOC. Regardless of one's views on the above debate, small businesses cannot wait for a change; they need to respond affirmatively. While discrimination lawsuits can cost between \$50,000 and \$250,000 in legal fees, big businesses have found that a good policy with a comprehensive employee education program costs between \$5,000 and \$40,000 a year (Greene, 1998). With fewer employees and managers to train and educate, most small businesses could develop a policy and education program for much less cost. The question now becomes what constructive steps have big businesses done that small businesses can adopt?

LARGE EMPLOYERS RESPONSE TO THE HIV/AIDS ISSUE

A group of concerned coworkers at Levi Strauss organized the first corporate response to AIDS in 1982 (Miller et al, 1997). They asked management for permission to set up an information booth in the lobby of Levi Strauss's corporate headquarters. In a show of top management support, the President joined them in the booth when it first opened. Levi Strauss disseminated information and training to managers and employees. The company treated it like any other disability and provided accommodations similar to other life threatening illnesses (Armour, 1997).

American Airlines developed an AIDS education program after a publicized incident in which a group of flight attendants requested new pillows and blankets after a flight on which some passengers were attendees at a large HIV/AIDS awareness gathering because they suspected many of the passengers were HIV/AIDS patients (Greene, 1998). From that incident, American Airlines developed an educational program for their employees which top management views as having the following benefits for the company: greater productivity and higher morale, reduced likelihood of discrimination lawsuits, and reduced health care costs through prevention and early detection of new infections (Greene, 1998).

Eastman Kodak has had an HIV/AIDS policy in place since 1988, which emphasizes that the company will terminate employees who violate the policy by discriminating against employees with HIV/AIDS (Greene, 1998). Kodak also has an educational program, which includes general information about AIDS and specific training for managers of HIV/AIDS employees.

Other companies also have implemented policies or programs regarding HIV/AIDS in the workplace. IBM composed a task force that drafted guidelines for businesses seeking sample AIDS policies. Polaroid offers support groups for employees with AIDS or HIV (Armour, 1997). Bank of America, Digital Equipment Corporation, Pacific Telesis, Syntex Corporation, and Wells-Fargo Bank all have been cited as pioneers in the development of HIV/AIDS workplace policies (Miller, et al, 1997).

A coalition of global employers, which includes corporate leaders in the response to HIV/AIDS in the workplace such as Levi Strauss and Polaroid, has urged businesses to develop policies supporting HIV/AIDS employees (Welch, 1998). The Global Business Council on HIV/AIDS, supported by the United Nations, started an awards program to find organizations with the best practices of non-discrimination and positive action with regard to HIV/AIDS in the workplace (Welch, 1998). In the United Kingdom, the National AIDS Trust has developed a *Statement of Employment Principles for HIV/AIDS*, which has been signed by over 50 organizations (Welch, 1998).

A 1996 CDC survey found that 43 percent of firms with more than 50 employees had a policy regarding employees with any type of disability or life threatening illnesses, but only 16 percent offered employee education on AIDS (Greene, 1998). Although half of companies with over 100 employees generally have a policy addressing HIV/AIDS, only 33 percent of companies with less than 100 employees do so (Greene, 1998). Unfortunately, Greene (1998) found a decline in AIDS education programs from 28 percent in 1992 to 18 percent of corporate respondents in 1997.

Although large employers still have more progress to make in this area, they still outpace small employers. Large employers are more likely to have human resource specialists whose job it is to keep current on new laws governing the workplace, such as the ADA. Larger employers also typically have additional financial resources to provide training for their HR specialists, as well as all employees. These advantages may explain why large employers outpace small employers in their response to the issue of HIV/AIDS employees in the workplace. But it is vitally important that small businesses follow the larger employers by developing their own policies.

STEPS SMALL EMPLOYERS SHOULD TAKE

Small businesses must respond to the growing issue of HIV/AIDS employees. The information outlined earlier shows that the issue is increasing because of the number of new individuals diagnosed with HIV/AIDS coupled with new treatment therapies that allow these patients to work and live longer.

A small business should take the following steps in order to proactively respond to this issue. First, a small employer needs to develop a policy specifically addressing the issue of HIV/AIDS employees. Second, their HR practices related to job analysis, recruitment, and selection must be reviewed in light of ADA considerations. Third, small businesses must develop an education and training program for managers and employees. Lastly, small businesses should evaluate the financial and tax incentives available to them to meet ADA regulations.

The first step is to develop a policy specifically addressing HIV/AIDS in the workplace. Although many small employers do not have any policies at all, the absence of policies in this (and other) areas expose the small business to extensive human resource litigation and its subsequent costs. The small business should adopt the attitude that an adequate policy covers

it from potential losses just as insurance protects it from other sources of possible loss like theft or fire.

The policy should explain that the employer will treat HIV/AIDS as any other life threatening illness. The policy should affirm the employer's compliance with the ADA, explain the consequences for noncompliance on the part of employees or managers, and indicate the internal responsible parties who can deal with an AIDS or illness complaint.

Although many small employers do not have human resource specialists, the owners and managers who perform these functions should carefully review how they conduct job analysis, recruitment, selection, and training. As mentioned above, a thorough job analysis will determine what job functions are essential and which, if any, is exposure prone. Interviewers need to base their questions on these essential functions and not ask about HIV/AIDS or other disabilities. The selection process must be consistent across applicants. While the ADA allows employers to require a medical exam, the exam can only be required after the employer has made a conditional offer of employment. Every applicant for that position must be required to take the same medical exam. The results of the exam should be kept confidential and not include a test for HIV/AIDS.

An education and training program for managers and employers can eliminate stereotypes, myths, and biases about the disease. This reduces the possibility of a manager or coworker discriminating against an infected employee and embroiling the company in expensive litigation. Regardless of how small an employer is, they can access a plethora of free information from the CDC or the Web to build a low cost education program. The CDC's web site at <http://www.cdc.gov> has information and data on how it is transmitted, the number of cases, and other training information (CDC, 1998). CDC's "Business Responds to AIDS Program (BRTA)" was established to develop a partnership between government and business to prevent the spread of HIV through workplace education. It provides information and helps implement policies and communication pieces. The CDC's belief is that businesses are an excellent source of such communication and are seen by employees as credible purveyors of information (Breuer, 1998). Consequently, the CDC is willing to provide information and assistance to any employer.

Because two thirds of all employers believe that negative coworker reactions to HIV/AIDS workers will occur (Greene, 1998), employers can reduce these myths with a good educational program built on the CDC's materials (CDC, 1998). Data provided in Table II show that the main categories of transmission continue to be: 1. Males having sex with other males, 2. Sexual contact with drug users, 3. Heterosexual contact with infected individuals, and 4. Blood transfusions (CDC, 1998). The CDC reports that it has never had a case of transmission in a typical work setting. Although the restaurant industry has never reported a case, the CDC recommends that food handlers take the typical precautions to prevent transmission of any infectious diseases. It does recommend that any professions that use instruments that pierce the skin such as health care and tattoo parlors follow its procedures. They recommend that other occupations that work with instruments that could pierce the skin in an accident such as hair salons take precautions (CDC, 1998).

Small businesses can also take advantage of the financial incentives to provide reasonable accommodations. The Internal Revenue Code section 190 provides for a maximum of a \$15,000 per year deduction for qualified architectural and transportation barrier removal expenses. I.R.C. section 51 provides for a maximum of \$2,400 tax credit for the first year wages of a qualified disabled worker (EEOC Facts About Disability Related Tax Provisions, 1992).

A sample policy built upon these tenets is presented in Table III. The policy is designed so that a small business could simply personalize it by including the name of the person responsible for the policy and providing information related to HIV/AIDS which can be received from the CDC.

**TABLE III
A SAMPLE HIV/AIDS POLICY**

The following policy can be used by small businesses as a guide to the development of their HIV/AIDS policy. As mentioned above, in today's litigious environment small employers need to adopt policies that will protect them as much as possible from costly lawsuits.

The policy should be written and disseminated to the small business's employees. New hires should be required to read the policy and sign a statement that they have read it (and all the other policies, if any). Such signatures provide proof that all employees read and understood the policy. For example, this is evidence that the employer forewarned coworkers who engage in illegal discrimination against an HIV/AIDS coworker.

1. Employees with HIV/AIDS are entitled to the same rights and opportunities as other employees with serious or life threatening diseases.
2. This employer complies with the Federal Americans with Disabilities Act and applicable state laws and regulations. The company will not tolerate any acts of discrimination by its managers or employees. The top management and union (if present) endorse non-discrimination policies and informational programs about AIDS.
3. The employer has provided free brochures explaining the disease and its inability to be transmitted through typical jobs in this company. Information on how to reduce the risk in one's personal life is also available.
4. The employer will keep employee's medical records and information confidential. There will be no exceptions to this policy.
5. Medical exams will not be required except for jobs requiring proof of ability to perform essential functions and in those cases all applicants will be required to take the same medical exams. A test for the HIV virus will not be made part of that exam.
6. Complaints or questions about this policy should be directed to Mr./Mrs. Name and phone number. These individuals can provide referrals to assist any employee.

IMPLICATIONS FOR SMALL EMPLOYERS NOT COVERED BY ADA

The ADA is a federal law that does not cover employers in interstate commerce with less than 15 employees. Thus employers with fewer than 15 employees would have to determine if their state or even local body has a state or local law or regulation covering disabilities. Some states have anti-discrimination statutes covering disabilities and some do not. Many have very different levels of the number of employees it takes to create coverage under the state law. For example, the Colorado statute bars discrimination against individuals with disabilities and covers employers with one employee.

A small employer with less than 15 employees who is not covered by an equivalent state anti-discrimination statute including disabilities, could discriminate against an individual with a disability, including an HIV/AIDS employee. Their only liability would be from possible tort claims based on slander, wrongful discharge, or arbitrary and capricious actions.

Given the litigious society we now face, it still would behoove those very small employers not covered by the federal or their state law to follow the sample policy outlined in Table III. But legally they do not have to do so and would not have a legal liability unless they created an employee tort claim.

CONCLUSION

Many small businesses run the risk of serious legal problems regarding their response to the presence of HIV/AIDS employees simply because they lack awareness of coverage of the ADA and have failed to adopt a policy regarding HIV/AIDS employees. Although small businesses do not often have the financial, legal, and human resources available to them that large businesses do to deal with this issue, they can take advantage of the information provided to them through avenues such as the CDC. Additionally, a sample policy regarding HIV/AIDS in the workplace is provided in Table III that can be adapted and used by small businesses.

Given that hundreds of thousands of Americans and the millions of people worldwide have HIV/AIDS, this is an issue that will impact the work environment in both large and small businesses. Small businesses must take a proactive approach by becoming educated about the issue and developing policies to deal with it.

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APPLICABLE LAWS

The Americans with Disabilities Act (ADA), 42 U.S.C., section 12101

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