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Employment Discrimination Claims Based on Sexual Orientation, Gender Identity, or HIV Status

Navigating the Evolving Legal Landscape and Minimizing Exposure to Claims

WEDNESDAY, MAY 29, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Trends in Employment Discrimination Law Related to Lesbian, Gay, Bisexual, Transgender, and HIV-Affected Individuals



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Topics Covered

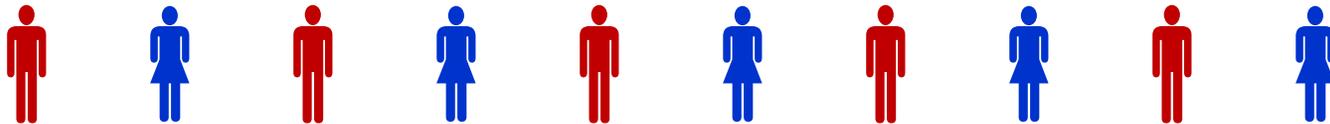
- Introduction & Definitions
- State Anti-Discrimination Law
- Federal Anti-Discrimination Law
- Trends & Best Practices
- ENDA
- HIV-Related Employment Issues
- Questions & Answers

INTRODUCTION & DEFINITIONS

Employment Discrimination against LGBT Individuals

Up to 68% of LGBT individuals report experiencing employment discrimination.

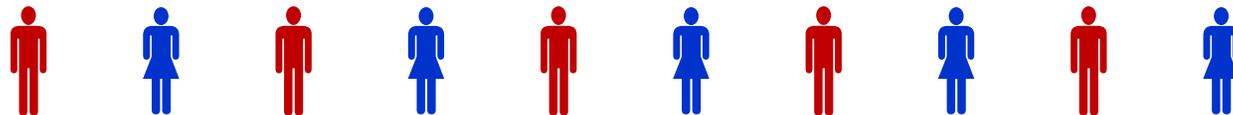
– Williams Institute, “Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination” (2007)



Employment Discrimination against LGBT Individuals

Data from the National Health and Social Life Survey, the General Social Survey, the United States Census, and the National Health and Nutrition Examination Survey show that gay men earn 10% to 32% less than otherwise similarly qualified heterosexual men.

– Williams Institute, “Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination” (2007)



Employment Discrimination against LGBT Individuals

In the first national survey of transgender people:

- Respondents experienced unemployment at twice the rate of the general population.
- 50% of respondents were harassed at work.
- 26% reported losing a job due to being transgender or gender non-conforming.
 - *National Gay and Lesbian Task Force and National Center for Transgender Equality, “Injustice at Every Turn: A Report of the National Transgender Discrimination Survey” (2011)*

LGBT Individuals in the Federal Government

According to the Office of Personnel Management, the Federal Government has approximately 2.6 million civilian employees in the Executive Branch. Approximately 200,000 LGBT individuals work in the Federal Government.

– Williams Institute, “Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination” (2007)

Sexual Orientation – Defined

- “Sexual Orientation” means a person’s actual or perceived homosexuality, heterosexuality or bisexuality.
- A person’s emotional and sexual attraction to the other people based on the gender of the other person.
- Some state and local jurisdictions include “gender identity” within the definition of sexual orientation, but then proceed to define gender identity.

Gender Identity – Defined

- “Gender Identity” means an individual’s gender-related identity, whether or not that identity is different from that traditionally associated with the individual’s assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous.
- An individual’s internal sense of being male, female or something else.
- Someone who was assigned the male sex at birth but who identifies as female is a transgender woman. Likewise, a person assigned the female sex at birth but who identifies as male is a transgender man.

Gender Expression – Defined

- “Gender Expression” means the manner in which an individual’s gender identity is expressed, including, but not limited to, through dress, appearance, manner, or speech, whether or not that expression is different from that traditionally associated with the individual’s assigned sex at birth.

STATE LAW

States That Prohibit Discrimination Based on Sexual Orientation

California

Colorado

Connecticut

Delaware

(District of Columbia)

Hawaii

Illinois

Iowa

Maine

Maryland

Massachusetts

Minnesota

New Jersey

New Hampshire

New Mexico

New York

Nevada

Oregon

Rhode Island

Vermont

Washington

Wisconsin

States That Prohibit Discrimination Based on Gender Identity

California

Colorado

Connecticut

(District of Columbia)

Hawaii

Illinois

Iowa

Maine

Massachusetts

Minnesota

New Jersey

New Mexico

Nevada

Oregon

Rhode Island

Vermont

Washington

The Religious Exemption for Sexual Orientation Discrimination

- Many state jurisdictions provide an exemption for religious employers from the requirement of sexual orientation nondiscrimination.
- Applies to a bona fide church or other religious institution.
- Exemption generally applies where an employment position is directly related to the operation of the religious institution and closely connected with the primary purposes of the religious institution.

Reasonable Accommodation for Gender Identity

- Many state jurisdictions provide for reasonable accommodation for transgender employees.
- Some states provide a dress code or policy exception, and refer to reasonable accommodation based on the “health and safety needs of the individual.”
- Most accommodation issues are likely to relate to dress code or transition to use of the “opposite sex” restroom.
- More limited accommodations for other than transgender employees.
- By analogy, “interactive process” and “undue hardship” standards are likely to apply.

States that Have Marriage Equality and Other Relationship Recognition Laws

State issues marriage licenses to same-sex couples:

Maine *Connecticut* *Delaware*
Iowa *Maryland* *Massachusetts*
Minnesota *New Hampshire* *New York*
Rhode Island *Vermont* *Washington*
District of Columbia

Statewide law providing the equivalent of state-level spousal rights to same-sex couples within the state:

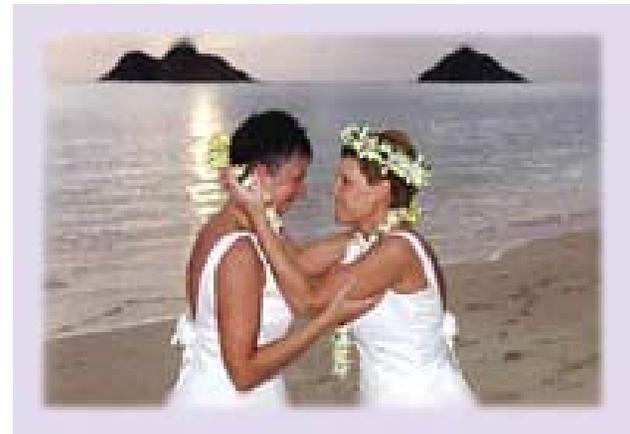
Colorado *California* *Hawaii* *Illinois*
Nevada *New Jersey* *Oregon*

Statewide law providing some statewide spousal rights to same-sex couples within the state:

Wisconsin

State Domestic Partnerships or Civil Unions for Same-Sex Partners

- Some state jurisdictions provide full state marriage rights.
- Other states create and establish requirements and procedures for domestic partnerships or Civil Unions for same-sex partners to provide “any privilege, immunity, right or benefit granted by law to an individual who is or was married.”
- A few states provide reciprocal benefits to same-sex partners only on a limited number of rights such as hospital visitation.



FEDERAL LAW

Title VII of the Civil Rights Act of 1964

- Title VII prohibits discrimination against employees and applicants “because of such individual’s ... sex.” 42 U.S.C. 2000e-2
- Before an individual may bring a claim of sex discrimination against a private employer, a union, or a state or local government in court, the individual must file a charge with the Equal Employment Opportunity Commission (EEOC).
- The EEOC will investigate the charge and determine if there is reasonable cause to believe discrimination occurred. If cause is found, EEOC will attempt to resolve the unlawful action through conciliation. The EEOC has authority to bring litigation if conciliation fails. If the EEOC does not complete its investigation within 180 days, the individual may receive a “right-to-sue” letter.

Title VII of the Civil Rights Act of 1964

- Title VII includes a separate provision that “[a]ll personnel actions affecting employees or applicants for employment [in the federal government] ... shall be made free from any discrimination based on ... sex.” 42 U.S.C. § 2000e-16(a).
- The EEOC enforces this non-discrimination guarantee “through appropriate remedies, including reinstatement or hiring of employees with or without back pay.” 42 U.S.C. 2000e-16(b).
- The EEOC regulations lay out for agencies the complaint process they must make available to employees and applicants. (the “1614 process”)

The Early Years of Title VII

- Courts created the myth that there was little legislative history behind inclusion of sex in Title VII. Early cases dealt with blatant sex-differentiated policies.
- In cases brought by LGBT plaintiffs in the 1970s, courts rejected coverage under Title VII on grounds that: a) sex meant only “biological sex” and b) that Congress did not intend to protect such individuals under Title VII.
- Seventh Circuit in *Ulane*, 1984: It is unlawful “to discriminate against women because they are women and against men because they are men.” And that’s it!

Citations for Old Cases

- Sexual orientation cases: *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325 (5th Cir. 1978); *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979).
- Transgender cases: *Holloway v. Arthur Andersen & Co.* 566 F.2d 659 (9th Cir. 1977); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982)

The Middle Years of Title VII

- Title VII protects both men and women. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983)
- Title VII prohibits harassment as well as adverse actions affecting tangible and economic benefits of employment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)
- Gender stereotyping can be a form of sex discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Price Waterhouse

- Gender stereotyping is a form of sex discrimination.
- “In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.” *Id.* at 239.
- “Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute,” *id.* at 239, and these words “mean that gender must be irrelevant to employment decisions.” *Id.* at 240.

Price Waterhouse

- As to whether gender had been taken into account as part of the company's motive for denying Hopkins the partnership: “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Id.* at 250.
- Justice O'Connor (concurrency): there “is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. As Senator Clark put it, ‘[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote.’” *Id.* at 264.

Price Waterhouse

- Justice Kennedy (dissent w/CJ Rehnquist and Justice Scalia): did not take issue with concept that sex stereotyping might result in a violation of Title VII's sex discrimination prohibition.
- Rather, emphasized that there is “no independent cause of action for sex stereotyping” under Title VII,” but that “[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent,” *id.* at 294 – *i.e.*, whether gender was inappropriately taken into account.

IN OTHER WORDS:

- 1) The term “sex” in Title VII encompasses both biological sex and gender. Gender includes the socially constructed roles, behaviors, and attributes that society considers appropriate for men and women.
- 2) Whenever gender plays a role in an employer’s decision to take an adverse employment action – for example, when an employer believes an applicant or employee has violated appropriate gender roles – the employer has violated Title VII’s prohibition against discrimination on the basis of sex.
- 3) The one exception to not taking sex into account is when sex is a bona fide occupational qualification. (And Court leaves aside the question of affirmative action.)

Statutory Words Really Matter

- *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998). Workplace harassment can violate sex discrimination prohibition even when harasser and harassed are of the same sex.
- Justice Scalia: Nothing in the language of “Title VII necessarily bars a claim of discrimination ‘because of ... sex’ merely because the plaintiff and the defendant ... are of the same sex.”
- Courts have had “little trouble with that principle” in cases where an employee was passed over for a job or promotion, but in cases of sexual harassment, courts had taken “a bewildering variety of stances.”

Oncale (continued)

- Well, of course they had – because they were struggling to decide what the 1964 Congress had *intended* with regard to same-sex harassment.
- But as Justice Scalia explains: while “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII,” statutory prohibitions “often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Id.*

Impact of *Price Waterhouse* & *Oncale*

- Reasoning of *Price Waterhouse* used to protect heterosexual, lesbian, gay or bisexual individuals who did not conform to gender stereotypes with regard to dress or appearance.
- *Lewis v. Heartland Inns of Am*, 591 F.3d 1033, 1041 (8th Cir. 2010); *Prowel v. Wise Business Forms*, 579 F.3d 285 (3rd Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 580-81 (7th Cir. 1997), vacated and remanded on other grounds, 523 U.S. 1001 (1998). (All from footnote 7 in *Macy v. DOJ*, but w/parentheticals removed.)

Impact of Price Waterhouse (cont.)

- Reasoning of *Price Waterhouse* used to protect transgender individuals under sex discrimination laws, with earliest cases not in the employment setting:
- *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000): Because Title VII prohibits “discrimination because one fails to act in the way expected of a man or a woman is forbidden under Title VII,” court will apply Gender Motivated Violence Act to protect transgender prisoner.
- *Rosa v. West Bank & Trust Co*, 214 F.3d 213 (1st Cir. 2000): Because bank’s actions may have been motivated by gender stereotypes, such as the fact that “Rosa’s attire did not accord with his male gender,” case may continue under Equal Credit Opportunity Act.

Continued Impact of PW in Title VII

- * ***Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)**: “*Price Waterhouse* . . . does not . . . provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual . . . [D]iscrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman.” *Id.* at 574-575.
- * ***Schroer v. Billington*, 577 F. Supp.2d 293 (D. D.C. 2008)**: Used gender stereotyping theory as well as plain language: discrimination against a transsexual because he or she is transsexual is “literally” discrimination because of sex. *Id.* at 302-303.

Most Recent Application of PW

- *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011): legislative attorney who had transitioned from male to female and was fired for that reason by the State of Georgia proved a viable equal protection claim as sex discrimination.
- Relying on *Price Waterhouse*, the court stated that “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes . . . [a]ccordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.” *Id.* at 1316-17.

Macy v. Dept of Justice (April 2012)

EEOC Decision

- Complainant, Mia Macy, applies for a job at a crime lab with ATF while she is a man. She is well qualified for the job. Shortly before completing the background check, she informs the hiring contractor that she will begin work as a female. Five days later, she is informed the position will not be filled.
- Macy files a complaint, using the agency's process mandated by EEOC regulations (the "1614 process"), alleging that ATF violated Title VII by discriminating against her on the basis of gender identity.
- ATF responds by stating that "claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated [under the 1614 process]" because the EEOC does not have jurisdiction over such claims.
- Mia Macy appeals that legal decision to the Commission.

Macy v. Dept of Justice - Ruling

- “[C]laims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC’s federal sector EEO complaints process.”

Macy v. Dept of Justice, EEOC DOC 0120120821 (April 20, 2012), 2012 WL 1435995, p. 5 (EEOC).



Gender Stereotyping Basis of *Macy*

- Similar to federal and state courts, the EEOC concludes that the gender stereotyping theory of *Price Waterhouse* protects transgender individuals who have been discriminated against on the basis of their transgender status.
- Like the Eleventh Circuit, EEOC makes clear that no additional proof of gender stereotyping is needed other than proof that discrimination occurred *because of* the person's transgender status or intent to transition. EEOC cites w/approval the Eleventh Circuit: “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”

Plain Language Theory of *Macy*

- Returns to principle on which *Price Waterhouse*'s gender stereotyping analysis had been based: Title VII prohibits employers from taking gender into account.
- Supreme Court explained in *Price Waterhouse* that statements expressing gender stereotypes are *evidence* that gender has been taken into account in violation of the act.
- Thus, as the EEOC made clear in *Macy*, it is possible for a transgender person to make out a claim based on simple, direct evidence that an employer has inappropriately taken gender into account in an employment decision.

Gender Stereotyping Theory in EEOC Federal Sector Decisions re LGBT Cases

- ***Rosa v. Department of Veterans Affairs***, EEOC Appeal No. 0120091318 (August 3, 2009); 2009 WL 2513955 (EEOC) (harassment against a male employee including repeated innuendos about his sexuality and verbal mocking using “very feminine voices” can constitute discrimination based on sex).
- ***Veretto v. U.S. Postal Service***, EEOC Appeal No. 0120110873 (July 1, 2011); 2011 WL 2663401 (EEOC) (discrimination based on sex-stereotype that men should only marry women can constitute discrimination based on sex).
- ***Castello v. U.S. Postal Service***, EEOC Request No. 0520110649 (December 20, 2011); 2011 WL 6960810 (EEOC) (discrimination based on sex-stereotype that women should only have sexual relationships with men can constitute discrimination based on sex).

OFO Guidance to Federal Agencies

- Office of Federal Operations (OFO) July 2012 memo to federal agencies explains the appropriate processing of claims of discrimination by LGB persons under the 1614 process:
- That memo states that:
 - Lesbian, gay and bisexual individuals may also experience sex discrimination, including sexual harassment or other kinds of sex discrimination.
 - Lesbian, gay and bisexual employees who believe they have been discriminated against because of their sexual orientation should be counseled that they have a right to file a complaint under the 1614 process, because they may have experienced sex discrimination under Title VII.

LGBT and EEOC Private Sector

- Because the *Macy* decision was a vote of the full Commission, the opinion's application of Title VII applies to the EEOC's private sector work as well.
- The EEOC's Strategic Enforcement Plan, passed in December 2012, states that coverage of LGBT persons under Title VII is a developing area of the law that will receive focused attention by the agency.
- EEOC offices and FEPAs (state and local Fair Employment Practices Agencies) are aware that claims of sexual orientation discrimination may constitute claims of sex discrimination under Title VII.

Future Actions

- Pending Executive Order Regarding Federal Contractors – stating explicitly that federal contractors may not discriminate on the basis of sexual orientation or gender identity.
- Pending Employment Non-Discrimination Act (ENDA) – stating explicitly that employers with more than 15 employees, unions, and the federal government may not discriminate on the basis of sexual orientation or gender identity.
- Such actions would provide certainty and clarity with regard to protection for LGBT people.

BEST PRACTICES

Best Practices – Appropriate Conduct

- Employees are expected to adhere to acceptable business principles in matter of personal and business conduct, to accept responsibility for the appropriateness of their own conduct, and to exhibit a high degree of integrity at all times.
- Management expects all employees to observe the highest standards of professionalism, to comply with all applicable laws wherever conducted and to treat others, including customers, vendors and coworkers, with dignity and respect.

Best Practices – Non-Discrimination

- A core business objective is to maintain a workplace in which each employee can achieve his or her full potential without being subject to discrimination or harassment based on race, gender, national origin, age, religion, sexual orientation, gender identity or any other status that is protected by applicable non-discrimination law.
- Harassing or other discriminatory conduct is detrimental to every one of us and to our business. Our policy of non-discrimination requires that all employees conduct themselves professionally and appropriately at all times.

Best Practices – Accommodation

- Gender transitions in the workplace should be handled on a case-by-case basis considering the preferences of the transgender employee where possible and, at a minimum, should include:
 - Transition issues such as dress code and restroom use;
 - Informing coworkers; and
 - Informing customers.

Best Practices – Employee Benefits

- Insured and self-funded health plans do not contain transgender exclusions.
- Plan administrator ensures that employees complete beneficiary designations.
- Human resources and benefits employees receive training on benefits issues related to transgender employees and employees in same-sex relationships.

Best Practices – Federal Employers

- All federal agencies prohibit discrimination based on sexual orientation, pursuant to Executive Order 13087.
- A growing number of federal agencies, including a majority of the Cabinet-level departments, prohibit discrimination based on gender identity and list the prohibited basis expressly in their EEO statements.

Best Practices – Federal Employers

- EEOC issued guidance to Federal Agencies regarding *Macy v. Department of Justice*, and how to process claims by LGBT employees.
 - Complaints of discrimination on the basis of transgender status should be processed under Title VII and through the federal sector EEO complaint process at 29 C.F.R. Part 1614 as claims of sex discrimination.
 - Lesbian, gay, and bisexual employees who believe they have been discriminated against because of their sexual orientation should be counseled that they have a right to file a complaint under the 1614 process, because they may have experienced sex discrimination.

Best Practices – Federal Employers

- OPM issued guidance regarding the employment of transgender individuals in the federal workplace.
 - Definitions and Core Concepts
 - Confidentiality and Privacy
 - Dress and Appearance
 - Names and Pronouns
 - Sanitary and Related Facilities
 - Recordkeeping
 - Insurance Benefits

Employment Nondiscrimination Act (ENDA)

- Prohibits employers with 15+ employees and all public employers from basing employment decisions on sexual orientation or gender identity.
- Permits actual, perceived and association claims.
- Same relief as Title VII.
- Enforced by EEOC.

ENDA

- Current version of ENDA contains several major exceptions, including:
 - Religious Organization Exemption
 - No Disparate Impact Claims
 - Bar to Collection of Data regarding Sexual Orientation and Gender Identity
 - Employers not required to recognize same-sex relationships for employee benefits purposes

HIV-Related Employment Issues

- HIV cannot be spread by:
 - Casual contact such as hugging
 - Mosquitoes
 - Participation in sports
 - Touching items that were touched by a person living with HIV
- There is little possibility that HIV could ever be transmitted in the workplace.
- Although there is no cure, medical research has advanced significantly, and HIV is no longer a “death sentence.”
- With medical care and treatment, HIV is now a chronic medical condition. Many people living with HIV can lead normal, healthy lives, and this can include having a job.

HIV as a Disability

- Some people living with HIV may not think of themselves or identify as an individual with a disability.
- Nevertheless, HIV/AIDS is covered by laws that prohibit discrimination and provide protections in the workplace based on disability status. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624 (1998).

ADA

- Americans with Disabilities Act (ADA) protects individuals with disabilities, including HIV, and guarantees equal opportunity for individuals with disabilities in employment and public accommodations.
- These protections are similar to those provided to employees on the basis of race, color, sex, national origin, age, and religion.
- The ADA prohibits discrimination by private employers with 15 or more employees, and prohibits public entities, regardless of their size, from discriminating in employment against qualified individuals with disabilities, including HIV. Some state laws extend disability-related discrimination protections to employees of companies with fewer than 15 employees.

ADA

- An individual has a “disability” under the ADA if he or she has a physical or mental impairment that substantially limits one or more major life activities, **including major bodily functions such as the functions of the immune system**; has a record of such an impairment; or has an actual or perceived mental or physical impairment that is not transitory and minor and is subjected to an action prohibited under the ADA.
- Persons with HIV, both symptomatic and asymptomatic, have physical impairments that substantially limit one or more major life activities or major bodily functions and are, therefore, protected by the ADA.

ADA

- The ADA prohibits employment discrimination against qualified individuals with disabilities. A “qualified individual” means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.
- The essential functions of the job are those core duties that are the reason the job position exists. For example, an essential function of a typist’s position is the ability to type, and an essential function of a bus driver’s position is the ability to drive.
- A “reasonable accommodation” is any modification or adjustment to a job that will enable a qualified employee with a disability to perform the essential functions of the job. Examples of “reasonable accommodations” include: making existing facilities readily accessible; restructuring a job; modifying work schedules; and acquiring or modifying equipment.
- Once an employer determines that an accommodation is reasonable, it is required to provide it, unless the employer can demonstrate that the requested accommodation would impose an undue hardship on the operation of the business. Although an employer is not required to provide an employee’s first choice of accommodation, the employer is required to provide an effective accommodation.

Perceived HIV Status

- ADA would protect a person who was fired or denied an occupational license based on a rumor or assumption that he had HIV/AIDS, even if he does not.
- ADA would also protect employees who are discriminated based on their association or relationship with an HIV-affected individual.
 - For example, the ADA would protect a woman (who does not have HIV) who was denied a job because her roommate or boyfriend is living with HIV/AIDS.

Common Misconceptions

- Employers cannot fire or choose not to hire a qualified person because they fear the worker will become too sick to work in the future. The hiring decision must be based on how well the individual can perform right now.
- Employers cannot decide not to hire qualified people with HIV/AIDS because they are afraid of higher medical insurance costs, workers' compensation costs, or the potential for absenteeism.
- Customer or co-worker attitudes are not relevant factors in determining an undue hardship. The potential loss of customers or co-workers because an employee has HIV or AIDS does not constitute an undue hardship.

Workplace Scenarios

- A restaurant owner may believe that there is a risk of employing an individual with HIV as a cook, waiter or waitress, or dishwasher, because the employee might transmit HIV through the handling of food. However, HIV is not included on the Centers for Disease Control and Prevention (CDC) list of infectious and communicable diseases that are transmitted through the handling of food. Thus, no direct threat exists in this employment context.
- An employer may believe that an emergency medical technician (“EMT”) with HIV may pose a risk to others when performing mouth-to-mouth resuscitation. However, the use of universal precautions among emergency responders means that the EMT will be using a barrier device while performing resuscitation.

Examples of HIV-Related Employment Discrimination

- An automobile manufacturing company that had a blanket policy of refusing to hire anyone with HIV or AIDS.
- An airline that extended an offer to a job applicant and then rescinded the offer after the employer discovered (during the post-offer physical) that the applicant had HIV.
- A restaurant that fired a waitress after learning that the waitress had HIV.
- A university that fired a physical education instructor after learning that the instructor's boyfriend had AIDS.
- A retail store that generally rotated all sales associates between the sales floor (where they could earn commissions) and the stock room (where they processed merchandise) except for the sales associate who was rumored to have HIV, who was never rotated to the floor.
- A call center employee who was denied a promotion to shift manager because his employer believed the employee would be unreliable since he had AIDS.
- A company that contracted with an insurance company that had a cap on health insurance benefits provided to employees for HIV-related complications, but not on other health insurance benefits.

Confidentiality

- Medical information is private and confidential.
- An application cannot seek information about health status or ask disability-related questions.
- Unless the employee requires an adjustment or change at work for a reason related to a medical condition, an employee's medical diagnosis is not part of what an employer needs to know.
- The ADA requires that medical information be kept confidential.

Benefits of Disclosing at Work

- People who disclose their HIV status may feel unburdened.
- They no longer feel as though they are hiding something.
- Some people who have disclosed their HIV status at work find their employer and/or co-workers supportive and helpful, especially when they get ill.
- Once you have disclosed, no one can “out” you at work.
- When employees are open about their HIV or disability status in the workplace, this can contribute to an inclusive work culture and potentially reduce stigma against people with HIV.

Risks of Disclosing at Work

- Some employees continue to report HIV-related workplace discrimination.
- Once you disclose your HIV status to your employer, it may be hard not to see every workplace decision as a reflection of this knowledge.
- Disclosure to an employer can be stressful and an unnecessary complication. Dealing with job stress and legal issues can negatively impact a person's health and well-being.

Licensing

- In April 2011, the Department of Justice issued letters to the attorneys general of all 50 states requesting their assistance in addressing the illegal exclusion of individuals with HIV/AIDS from occupational training and state licensing.
 - Private and public trade schools for barbering, cosmetology, massage therapy, home health care work and other occupations, and state licensing agencies are illegally denying individuals living with HIV/AIDS admission to trade schools and/or occupational licenses.
 - Since HIV cannot be transmitted by casual contact or by the circumstances present in these occupations, HIV status is irrelevant.

Trends

- The nature of HIV/AIDS related employment discrimination is rooted in deeper stigmatization than discrimination against other disability groups.
- In contrast to the general disability group, HIV/AIDS was more likely to be male, ethnic minorities, between the ages of 25-44, in white collar jobs, in the South and West and to work for businesses with 15 to 100 employees.
- Advocacy organizations are increasingly turning to HIV discrimination in the workplace:
 - Lambda Legal lawsuit against Cirque du Soleil settled for \$600,000: <http://www.lambdalegal.org/in-court/cases/matter-of-matthew-cusick-and-cirque-du-soleil>
 - Lambda Legal recently sued the Atlanta Police Department: <http://www.lambdalegal.org/in-court/cases/roe-v-atlanta>
 - MALDEF recently sued The Ivy Restaurant in Los Angeles: http://www.maldef.org/news/releases/la_ivy_discrimination/
 - MALDEF recently sued Burger King: http://www.maldef.org/news/releases/burgerking_hiv_discrimination/