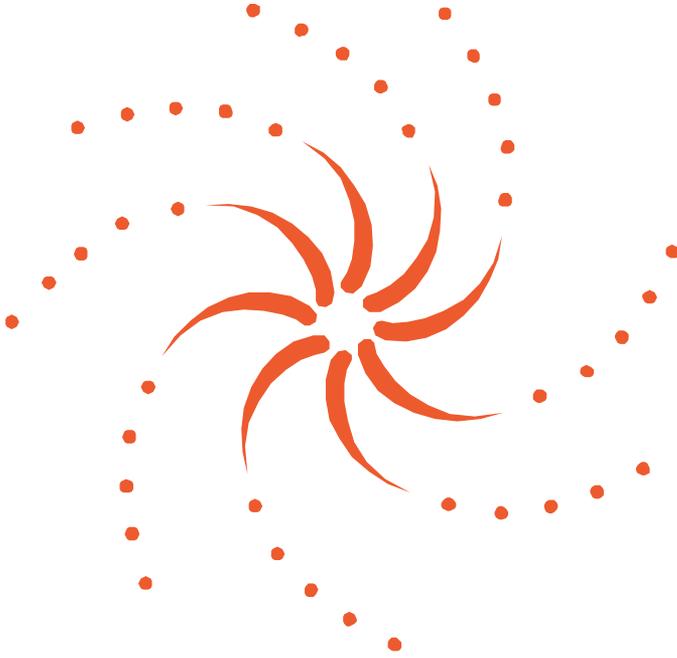


# Working & The Cycle of HIV



**AIDS Legal Referral Panel of the  
San Francisco Bay Area**



**AIDS Legal Referral Panel of the San Francisco Bay Area**

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# Contents

I.	Introduction	1
II.	Looking For A Job	3
	Job Criteria	3
	Resumes & Cover Letters	5
	Planning An Interview	6
	After A Job Offer	9
III.	Thriving On The Job	10
	Legal Protections	10
	On-the-job Medical Inquiries	11
	Reasonable Accommodations Under The ADA And FEHA	12
	Confidentiality Of Medical Information	15
	Medical Leave Under FMLA And CFRA	17
	Discrimination And Harassment On The Job	27
IV.	Transitioning Out Of Employment	31
V.	Maintaining Yourself While Unemployed	35
	Income Benefits	35
	Government Income Benefits	35
	Benefits For Immigrants	39
	Private Income Benefits: Group Or Individual Disability Insurance	43
	Private Income Benefits: Life Insurance	46
	Private Income Benefits: Retirement Plans	47
	Medical Benefits	48
	Government Benefits	48
	Private Benefits — COBRA	49
	Private Benefits — Non-COBRA	51
VI.	Working While Disabled	54
	Income Benefits	55
	Medical Benefits	61
VII.	Resource List	65
	Legal Services	65
	Benefits Management	66
VIII.	Appendices	69

## *I. Introduction*

Sometimes work is what you would give anything to avoid. At other times work is what you would give anything to be able to do again.

After all, the workplace serves many functions. Besides providing income, it can be a source of fulfillment, companionship and health benefits. Yet if you are HIV positive or have been disabled by HIV/AIDS, the workplace can also be a tremendous challenge. For example, you may be currently working but need to ask for a flexible schedule so you can rest, go to doctor's appointments, or maintain your rigorous medication schedule. Alternatively, you may be out on disability, eager to try your hand in the workplace again, but concerned about numerous issues, such as, "What will happen to my current benefits?", "What should I say at interviews?", "Who has the right to know I'm HIV positive?", Or "What will happen if the medications fail once I've started working?"

The availability of drug therapies has increased the opportunity of many people with HIV to work, while still leaving much uncertainty. As a person with HIV, you need to know how to negotiate periods of illness and periods of wellness. In choosing a job, you need to know which health benefits offered by an employer would best protect your health. Because you may need to take a medical leave in the future, you need to know which disability plan benefits best suit your needs. As a person with a disability, you need to know your rights and your employer's obligations in hiring and promotion, and in accommodating your condition in the workplace. For people with HIV, these issues create a "cycle" of work.

Because of the need for information about the workplace and its associated benefits, three organizations initially joined to create this booklet to help you deal with your own cycle of work. Those organizations — the AIDS Legal Referral Panel (ALRP), the Employment Law Center (ELC), and the Positive Resource Center (PRC) — all stand ready to help you when you need it. This booklet, now in its second edition, has been updated to include the most recent information on employment laws and benefits for people with HIV/AIDS. The above agencies, and many more, can be contacted at the numbers in the back of the booklet, or you can contact another AIDS support organization in your community.

This edition of *Working and the Cycle of HIV* was edited by Tanya Reeves, Esq. Client Services Director of the AIDS Legal Referral Panel, Jane Gelfand, Esq. of Positive Resource Center, and Betsy Johnsen, Esq., a private employment and disability rights attorney. The original booklet was edited by Betsy Johnsen, Esq. and Mairi McKeever, Esq. also of PRC. Layout and design were provided by Marianne Gries, ALRP's Office Manager. ALRP would like to thank Carolyn von Behren, ALRP Outreach Advocate, for her assistance in editing this booklet, and all of the Summer 2003 Law Clerks for their help with this project. Additional thanks to ALRP volunteer Chris Migacz. Funding for this project was made possible by the San Francisco Department of Public Health AIDS Office.

## *II. Looking for a Job*

Getting a job is pretty hard work all by itself. It is not any easier if you have spent the last few years fighting an illness full-time. On top of that, the workplace may have changed a lot since you were last employed and your needs have undoubtedly changed as well.

This section discusses what you might need to look for in a job, and how to go about getting it. In addition to the information available here, you can consult with some agencies that help people with HIV train for employment and find jobs. Two such organizations are the Positive Resource Center's Employment Services, and the San Francisco AIDS Foundation (SFAF), both serving San Francisco. See the Resource List at the back of this booklet to contact them or similar agencies in other areas.

### ***JOB CRITERIA***

#### *1) How do I figure out what kind of job is best for me now?*

Ask yourself what kind of job you want, what skills you have, and what type of environment you want to be in, such as professional, non-profit, artistic or technical. Consider whether you have the option of returning to your prior employer and, if so, whether you want to do so.

You may want to consider the level of intensity (e.g., stress) you want. Some people are not ready to take on a heavy-duty job immediately after an extended period of illness or disability. Talk with your doctor about what s/he thinks is a realistic level of responsibility you can accept with your current health situation.

Establish a broad list of criteria of what you want and don't want in a job. Be realistic, taking into account your health status.

#### *2) Besides the kind of job and level of stress, what other job criteria should I use?*

It's your choice, but we suggest that an important criterion is BENEFITS. Based on your current health situation, look at the benefits and insurance plans offered. We have listed several benefits you might look for, along with some criteria to use in evaluating them. Do not ask specific questions about benefits or insurance plans until after a job offer is made. This will raise suspicions. Detailed information can be easily obtained after receiving an offer.

- **Health care plan** — Do you prefer an HMO (Health Maintenance Organization), which offers totally managed care, or a PPO (Preferred Provider Organization), which has fewer controls over when you get to see a doctor but has higher premiums? Which plans do your current doctors accept? How much will you have to contribute towards the health insurance premiums under each plan? Are there limits to the services provided? How

high are co-pays for medications and doctor appointments? Is there a “pre-existing condition” exclusion that prevents you from getting care for any disability you had before you enrolled? (Group HMO’s cannot have any pre-existing condition exclusions; other types of health care plans in California are limited to six months, or and may have none.)

- **Vision plan**
- **Dental plan**
- **Life insurance** — How much is offered? Can you opt for additional coverage? (Life insurance that is provided through an employer’s group benefits package cannot deny coverage for persons with HIV. A policy you acquire on your own can.)
- **Short-term disability** — Does the organization have a short-term disability plan or does it simply rely on the California State Disability Insurance plan (SDI)?
- **Long-term disability** — How good is the plan? Many provide 50% up to 60% of your most recent salary. A really good plan will be 60% -to 80% of that salary. Also, examine how many years , and under what conditions, these payments are available. Some employers offer an option to upgrade your long-term disability plan. See if this option is available and whether or not you would qualify. Also inquire about having your premiums paid out of post-tax earnings. This option can allow you to avoid paying income taxes on your benefits if you go out on a long-term disability leave in the future.
- **Retirement**
- **Education Assistance**
- **Time-off provisions** — What other options are offered, such as vacation, sick leave, bereavement leave, personal time off, and medical leave?

For all of these benefits, look into how long you would have to wait before qualifying. Some employers offer all benefits almost immediately, while others may require you to work a year before qualifying for certain benefits, such as their long-term disability plan.

*3) If I think I might need medical leave in the future, what kinds of things should I look for in a prospective employer?*

Look for an employer that employs at least fifty current employees at your work site or other work sites within seventy-five 75 miles of your own to ensure that you will qualify for medical leave rights under the federal Family and Medical Leave Act (FMLA) and California Family Rights Act (CFRA). You need to work for your employer at least twelve 12 months and have worked at least 1,250 hours during the year before your FMLA/CFRA leave begins.

Although you must have 12 months of service with an employer to qualify for FMLA/CFRA leave, those 12 months do not have to be continuous consecutive. If you are now on medical leave from an employer with whom you have a long record of service, you may want to return to that employer so you can qualify for FMLA/CFRA sooner. (FMLA and CFRA are

discussed in more detail in Section III, Thriving on the Job.)

Alternatively, if your employer is not covered under FMLA/CFRA, or if you think you may not qualify, review your employer's family and medical leave policies in its personnel manual to see what leave your employer voluntarily provides.

## ***RESUMES & COVER LETTERS***

*4) What should I reveal about my HIV status and related issues in my resume and cover letter?*

The resume and cover letter are intended to get you in the door. It is important to remember that it is easy for a prospective employer to discriminate when reviewing resumes. This doesn't mean you should lie, but you may want to be careful about what you disclose. There is no legal requirement to reveal your HIV status, or any other health condition.

Of course, there are several advantages if you conceal nothing. You don't have to worry about accidental revelations in an interview or by anyone you use as a reference. You can be completely open about why you left a previous job and how you've spent your time since then. There may be some facts you feel are important to reveal to get the job, such as volunteer work that indicates or suggests your HIV status. However, disclosing certain information may give the employer the opportunity to discriminate. It is your personal choice whether to reveal or conceal your status.

To avoid any possibility of discrimination, you may choose to not reveal your HIV or health status. You may also wish to conceal your activities in the lesbian, gay, bisexual or transgender community, either because employers may discriminate directly against members of that community or may identify HIV disease with LGBT people. On the other hand, you may feel it is important to disclose your activities, either to show certain accomplishments that you have performed for LGBT organizations, or to be openly gay when you are applying. Again, the choice is yours.

*5) What can I do about a gap in my resume?*

If you have been out from work on disability, there will be a gap in your resume. (A gap may be less obvious if you create a technical resume listing skills, rather than a chronological resume.) If you don't want to state that you were on disability during this break, you might explain that you were on a sabbatical of sorts, and that you had some goals you wanted to accomplish. For example, if you traveled a little during that period, indicate that you took some time off to travel, or you could simply say, "I needed time off to deal with a family matter." Be sure you have thought through what these goals were so that you can talk about

them during your interview. You can even elaborate on one small goal that you accomplished while on your disability leave. For example, if you painted your apartment and organized your closets at home while on leave, say that you decided to take some time off because you had the resources to do it and you decided to remodel your living space. Emphasize that it was a positive experience. If the gap is recent, tell the employer that you're really excited to get back to work. Finally, mention the reason for the gap in your cover letter. By doing so, the employer is less likely to eliminate you from the running before speaking to you. A gap in your resume won't necessarily prevent you from finding another job; being unprepared to address it may.

## *PLANNING AN INTERVIEW*

### *6) What do I do when I get into the interview?*

Be confident in your voice and your gestures. Listen carefully to the questions from the interviewer.

After each question is asked, take a second to think about it. Get your thoughts together and then respond. If HIV or your medications are causing any problems with your short-term memory, do what you need to compensate for this. Take a pad of paper with you and jot down notes if necessary. It will make you look professional and methodical, so don't be afraid to do so.

When asked a question, try to answer by pulling from real life experiences. Real life examples are always far more passionate in their delivery, even if you have to edit the circumstances a bit to avoid revealing confidential information, such as like your health situation. For example, if the interviewer says, "Tell me about a difficult experience you had and how you handled it," you may have a really good example of a difficult situation with a nurse at the hospital or during a home-care visit. Give the example, but you could adapt it to a more generic situation to avoid revealing your health status.

At the end of the interview, the interviewer will generally ask if you have questions. Try to ask one or two questions. One of the questions can be, "As part of your compensation plan, what benefits do you offer?" (Remember to keep the question general so as not to arouse suspicions of any potential disability.) If you are interviewing with the person who would be your supervisor, you could ask, "What is the most important quality you expect from an employee?" Listen to the answer. It may reveal how you will fit in.

### *7) Is a prospective employer allowed to ask me about my HIV status?*

Potential employers are not supposed to ask you about your HIV status or any other health

conditions you may have. Although these questions are illegal, if they do ask you, do not be shaken. It is your choice how to answer. It is always helpful to anticipate these kinds of questions and decide before you go to the interview how to handle them. Then you can give your prepared response and continue with the interview.

A question that relates to your sexual orientation might be designed to uncover your HIV status because of the stereotype that the two are related. California law prohibits questions about your sexual orientation unless the position is subject to state or federal security regulations. (See Section III, question #301 for more information about what to do in case of sexual orientation discrimination.) If the interviewer uses sexual orientation as a way to decide whether you might have HIV, that is illegal under the laws discussed below banning HIV discrimination.

Again, be prepared – questions about your health or HIV status may be subtle. An interviewer might ask, in a warm and friendly manner, “Have you ever been in the hospital?” or “What types of prescription medication do you take, if any?” Even though less direct than an outright question about your HIV status, these questions still seek information you do not have to reveal.

*3) If the employer does ask me an illegal question, how should I respond?*

The style of your response is up to you. You can say you are not taking any medications, for example. However, if the employer later discovers that you lied during an interview, it may assert that it has grounds for termination and further assert that you have no grounds for future legal recovery because you were not truthful.

You could also respond to an illegal question by stating that you do not have to answer it. You might even mention the name of the laws (see Section II, question #9) that prohibit such questions. This method of response may not endear you to the interviewer, however, and it can be hard to prove that you were not offered the job because of unlawful discrimination in the interview stage, and not for some legitimate reason.

A more moderate response would be to state that you aren't taking any drugs that would affect your ability to do your job. This may simply push the interviewer to be even nosier, but you would be answering truthfully. Also, if you say that you aren't taking any drugs that would affect your capabilities, the interviewer might recognize that it has no need or right to further invade your privacy.

Although an employer is not allowed to ask about HIV or health status, it can be very hard to respond when an employer asks anyway. As with all aspects of an interview, come prepared. Think about your possible responses in advance. Also, consider other personal information

you do feel safe revealing, such as your hobbies or interests, so the interviewers have some way to get to know you.

*9) What laws prohibit questions about HIV/AIDS?*

The ban on asking applicants about HIV/AIDS comes from two sources: the Americans with Disabilities Act of 1990 (ADA) and California's Fair Employment and Housing Act (FEHA). The ADA is a federal law that covers all employers who have fifteen or more employees. FEHA covers employers with five or more employees in the case of physical disability, and fifteen or more employees in the case of a mental disability. (These and other laws also cover discrimination by federal, state and local government employers.) These laws bar direct questions about a particular disability (such as, "Are you HIV positive?"), indirect questions designed to elicit disability-related information ("Have you been able to take care of yourself over the past year?"), and most questions about prescription drug use ("What medications are you taking?").

California applicants approaching employers with fewer than five employees may also be covered by local anti-discrimination ordinances. For example, San Francisco Municipal (Police) Code Article 38 bars discrimination and has no limit on the number of employees. No employer that does business in San Francisco or receives money from the city government may discriminate based on health status.

Moreover, California job applicants may be protected by the state constitutional right to privacy that protects them from intrusive and unjustified inquiries into HIV status. Check with an AIDS legal advocacy agency if this occurs.

*10) Are there any exceptions to the ban on questions about HIV/AIDS?*

There are some exceptions. If your HIV/AIDS or health status is somehow obvious to your employer, or if you have voluntarily disclosed your status, and the employer therefore believes that you will need a "reasonable accommodation" to do the job, the employer may ask limited questions. These questions could cover the accommodation and your need for one, but under no circumstances may an employer ask questions about your medical diagnosis.

A "reasonable accommodation" is a workplace modification that enables an otherwise qualified individual with a disability such as HIV/AIDS to perform the essential functions of the job. Employees with disabilities have a right to reasonable accommodation under state and federal law. (For more information about reasonable accommodations see Section III, Thriving on the Job.)

*11) What if I think I may need a reasonable accommodation in order to do the job, or may*

*need an accommodation or medical leave from the employer in the future? Do I have to disclose my HIV/AIDS at the time I apply?*

No. You are not required to disclose your disability at the time you apply for a job, even if you believe you may need an accommodation or medical leave. You may wait until you are actually seeking the accommodation or medical leave, which may be months or years later, before you disclose anything related to your need.

## ***AFTER A JOB OFFER***

*12) Can the employer ask medical-related questions after I have received a “conditional job offer,” but have not yet started working?*

Unfortunately, the ADA and FEHA do not prohibit post-offer, pre-employment medical examinations or inquiries — even those unrelated to job performance — as long as the information is kept confidential, and all entry employees in the same job category are subjected to the same inquiry. Because HIV disease is a protected disability, an employer may not refuse to hire an applicant based solely on HIV status.

These post-offer inquiries can include drug tests. This is one of the few exceptions to the ban on questions about medical status. California law prohibits drug tests for current employees, unless they are strictly related to job performance (for example, testing airplane pilots for drugs that affect their ability to fly). However, during the post-offer stage, the employer may test for drugs. If you test “positive” for illegal drug use, then the employer may ask if you are taking any lawful medications that might have caused the test result. In that case, the employer must give you the opportunity to provide documentation that it is a prescribed drug.

A *required* disclosure of a legitimately prescribed drug may even be constitutionally permissible under California law. At least for public sector employees (e.g., state government workers), disclosure of a legitimately prescribed drug may be permitted if such drug is the cause of the positive result. Public employers typically ask for a list of all prescribed drugs prior to testing, and the absence of a prescribed drug on the list may prompt specific disclosure. The employee, physician, or other medical personnel analyzing the drug test on behalf of the employer may be compelled to disclose the name of the medication if it is necessary to clear an employee.

Although California law attempted to allow for medicinal use of marijuana, federal law still prohibits its use. Therefore, an employer may withdraw an employment offer if you test positive for it.

### *III. Thriving on the Job*

This section discusses your relationship with your employer while you are working. You may have just returned to your old job after being out on disability or recently started a brand new job in a fresh career after being out of the workforce, or you may be considering leaving a job you've held for a while due to illness.

Regardless of where you are in the job cycle, there are laws to ensure that you are not subjected to discrimination due to your HIV status. Additional laws determine what level of support the employer must provide to help you continue to perform your job despite your condition.

#### **LEGAL PROTECTIONS**

*1) What legal protections do I have against on-the-job discrimination based on my HIV status?*

Discrimination based on HIV/AIDS is a type of disability discrimination. Federal and state laws prohibit discrimination based on a person's disability, including his/her HIV status. Under the federal law called The Americans with Disabilities Act of 1990 (ADA), prohibits most private employers with fifteen or more employees cannot from discriminating against qualified individuals with disabilities. California's Fair Employment and Housing Act (FEHA) also prohibits discrimination because of physical disability by employers with five or more employees, and discrimination because of mental disability by employers with fifteen or more employees. These and other laws also apply to employees of federal, state and local governments.

Discrimination based on disability may also be prohibited by local anti-discrimination ordinances. For example, San Francisco Municipal (Police) Code Article 38 bars discrimination and has no limit on the number of employees working for an employer. No employer that does business in San Francisco or receives money from the city government may discriminate based on health status.

*2) If I am HIV positive but asymptomatic (i.e., I currently have no apparent illnesses), do I have a "disability" under the ADA and FEHA?*

Under the ADA, a disability is defined as a physical or mental impairment that substantially limits a major life activity. The U.S. Supreme Court concluded that this definition includes anyone with HIV from the moment they are infected, whether or not they have obvious symptoms. This means that an employer cannot discriminate against any person with HIV, even those who are asymptomatic.

This federal law definition of disability is also used in California to interpret its FEHA law. Moreover, FEHA specifically covers people with HIV whether or not they have apparent symptoms. In general, FEHA's definition of disabilities that are protected from discrimination is broader than the protections offered by the ADA.

Again, local laws may also protect people with HIV in cases where the employer is not covered by federal or state law due to insufficient numbers of employees at the work site.

### *3) What types of discrimination are prohibited?*

Discrimination based on HIV/AIDS can take a wide variety of forms. Under the ADA and FEHA, qualified employees with HIV/AIDS — employees who can perform the essential functions of their jobs, either with or without a reasonable accommodation, — cannot be harassed, demoted, terminated, paid less, or treated worse because of their HIV/AIDS. Disability discrimination against both current workers and job applicants is prohibited.

The section on “Discrimination and Harassment on the Job” at the end of this section discusses what to do if you think your employer acted illegally.

## ***ON-THE-JOB MEDICAL INQUIRIES***

### *4) What may an employer ask me about my health or HIV status after I have started working?*

According to the ADA, employers with fifteen or more employees cannot ask questions about your disability or require a medical examination unless the questions or exam are “job-related and consistent with business necessity.” California statutes provide similar protections regardless of the number of employees. Even if you appear ill, medical exams are only allowed where there is a job-related reason. Most importantly, any medical information the employer does obtain must be kept confidential and stored in a separate medical file — not with your regular personnel file. Apart from the circumstances listed, your employer is probably not entitled to any medical information. The following situations may justify limited medical inquiries:

- **A request for reasonable accommodation**

If an employee requests an accommodation and the disability is not obvious, the employer may request reasonable documentation confirming the employee's right to accommodation. Medical documentation must be confidentially maintained in a separate medical file. (See below for more details on reasonable accommodations, and on confidentiality of medical records.)

- **Evidence of the inability to perform the essential functions of the job**

If an employer has a reasonable belief that the employee's disability impairs his/her

ability to perform the essential duties of the job, the employer may ask limited medical questions or request an exam.

- **Evidence of posing a direct threat to others**

If an employer has a reasonable belief that the employee's disability poses a "direct threat" to others, the employer may ask limited medical questions or request an exam. As discussed below (see Question #29), HIV/AIDS rarely poses a direct threat to others.

- **A workplace injury**

If an employee has a work-related injury, the employer may ask limited medical questions or request an exam to assess whether it is responsible for any costs associated with the injury.

- **To determine fitness to perform a particular job**

Even if there is a job-related justification for the inquiry, the employer's request for medical information or documentation still must be reasonable and related to the situation. Requests may not exceed the scope of the employer's need to evaluate the impact of the disability or be unnecessarily burdensome to the employee. Don't hesitate to modify a written release for medical information that is overly broad by writing in limits when you sign the authorization. For example, if your employer only needs to evaluate your current vision problem in order to provide an accommodation, a request for all of your medical files is broader than necessary; in that case you could restrict requested medical records to those relating to your vision.

#### *5) Can my employer test me for drugs once I have been hired?*

The federal ADA protections against intrusive medical exams also cover drug tests. In addition, the California state constitution has a strong provision for a right to privacy, and court cases have established that both public and private employees cannot be required to undergo on-the-job drug testing unless there is a compelling interest, such as a safety-related issue. This would be relevant to operators of heavy equipment, but not to office workers. If you are in such a position and use drugs, including medical marijuana, a drug test could result in your lawful dismissal.

### ***REASONABLE ACCOMMODATIONS UNDER THE ADA AND FEHA***

#### *6) What is a "reasonable accommodation"?*

Reasonable accommodations are adjustments or modifications to the job or to the workplace that enable an employee with a disability such as HIV/AIDS to perform the basic duties of the job. A reasonable accommodation does not change the essential job functions. What constitutes a reasonable accommodation for a particular employee depends upon the situation and the type of job. The accommodation, however, must not unduly burden the

employer, financially or otherwise. The majority of accommodations cost the employer little or nothing, including things like changing schedules or altering office policies. Although the employee initiates the request for a reasonable accommodation, it is ultimately the employer's decision which accommodation to choose if there are alternatives to the one proposed by the employee.

The following modifications may be reasonable accommodations:

- **Modified work schedule**

An employee who takes a regimen of prescription drugs for HIV/AIDS may need frequent breaks and access to drinking water, or a modified schedule to accommodate the side effects of the medications.

- **Part-time work schedule**

An employee with fatigue caused by HIV/AIDS may need a part-time schedule.

- **Time away for treatment**

An employee may need to attend doctor's appointments or receive treatment. (Time off for treatment or unpaid leave may also be provided through FMLA/CFRA leave; see below.)

- **Job restructuring**

An employee with decreased physical strength due to HIV/AIDS might seek to avoid manual tasks, if such tasks are not core duties (essential functions) of the job.

- **Equipment or devices**

An employee with CMV or another vision impairment caused by HIV/AIDS may need a computer with voice recognition or enlarged type.

- **Unpaid leave of absence**

An employee with HIV/AIDS may need an unpaid leave of absence to recover from an episode of HIV-related illness, in the hospital or at home.

- **Training and supervision**

An employee with an HIV-related condition that interferes with concentration or learning may need additional or specialized training or supervision to master new job skills and duties.

- **Modification of policy**

An employee taking medication for HIV/AIDS who experiences mid-day grogginess might need a break to lie down in the employee lounge, despite an employer's policy against napping.

- **Education**

An employee with HIV/AIDS experiencing harassment on the job might seek disability education of coworkers and supervisors to raise awareness and debunk fears and

stereotypes.

- **Transfer to a vacant position**

An employee who is not able to perform the essential job functions of his/her current position may seek a transfer to a vacant position for which the employee is qualified. A transfer may also be appropriate where the employee remains qualified for the current position with an accommodation, but both the employee and the employer agree that a transfer is preferable.

- **Modification of facilities**

An employee with a mobility impairment caused by HIV/AIDS may need a ramp or a special chair to accommodate the disability.

*7) When is an employer required to accommodate an employee?*

An employer is only required to accommodate known disabilities. It is improper for an employer to speculate that an employee may have a disability that requires an accommodation and to suggest so to the employee. Although the employer's knowledge of a disability may be inferred, it is nonetheless the employee's responsibility to request a reasonable accommodation should s/he need one. If the employee fails to request the accommodation, the employer may not be held liable for firing someone for "performance problems" because the employee never gave the employer a chance to comply with the law.

*8) Do I have to put the request for an accommodation in writing?*

No. You can request an accommodation in writing, orally, through e-mail, or any other form of communication. However, you may want to keep records of accommodation requests in case there is a dispute in the future over whether you made the request, or when it was made. For this reason, written requests are strongly recommended.

*9) What happens after I request an accommodation?*

Once you request an accommodation, your employer must make a good faith effort to determine the appropriate accommodation. Likewise, you are expected to participate in the process of developing and implementing the accommodation.

If you fail to fully participate in or cooperate with this process, you may lose your ADA rights. This participation may require you to submit requested medical documentation or attend scheduled meetings. If you or the employer rejects a suggested accommodation, you must take steps to continue the process by proposing an alternative. Remember, this process is a good faith negotiation by both parties.

To protect ADA rights, employees with disabilities who need accommodations should take

proactive steps, such as:

- Requesting accommodations in writing.
- Suggesting alternative accommodations.
- Offering their employer referrals to accommodation specialists like the Job Accommodation Network: 1-800-526-7234, or the Disability and Business Technical Assistance Centers (DBTACs): 1-800-949-4232 .
- When appropriate, enlisting the assistance of a third party advocate.

*10) What do I have to tell my employer in order to get an accommodation?*

Because the ADA defines a disability as a physical or mental impairment that substantially limits a major life activity, you must provide the employer with enough information to show the existence of such impairment and its substantial impact. To be safe, the employee should use words such as “disability,” “impairment,” “substantially limiting,” “major life activity,” and “accommodation.”

FEHA covers a slightly broader range of physical disabilities, but you should still use these words when you request an accommodation due to your limitations.

*11) Do I have to specifically disclose my HIV status to receive an accommodation?*

No. The general rule is that the information provided must be specific enough for the employer to understand that the employee is disclosing a substantially limiting physical or mental impairment. Therefore, the employee may choose to disclose an HIV/AIDS diagnosis, or may simply refer to an “immune disorder.” Likewise, the employee could choose to identify a separate disability (caused by HIV/AIDS) such as cancer, or the effects of medications for an (undisclosed) impairment.

One benefit of disclosing your HIV status is that employers may more readily recognize this condition as an ADA or FEHA-covered disability. A drawback is the risk of stigma or discrimination associated with HIV/AIDS.

If you do tell your employer about your HIV status verbally, consider having the person you tell sign a written statement that confirms that the employer has been notified. This will avoid any confusion in the future as to if or when they were informed. It will also alert your employer that you are aware of your rights as a person with a disability.

## ***CONFIDENTIALITY OF MEDICAL INFORMATION***

*12) Can my employer tell anyone about my disability?*

No. If you are seeking an accommodation, you must inform someone who represents the

employer, such as a supervisor or a human resources person, that you are disabled. Your employer is not permitted to reveal this information to anyone in the workplace whose knowledge is not necessary. Medical information obtained by an employer must be kept confidential, and can be revealed only to supervisors, emergency care personnel or others who need to know about the accommodation and any restrictions on the employee's work or duties. Any medical information held by the employer must be maintained in locked files, and kept separate from personnel records.

We suggest that every letter from you or your doctor state that all medical information must be kept confidential. Continued reminders may help prevent an unknowing slip by your employer.

*13) Do I have to disclose my disability to everyone at work?*

No. No one else needs to know about your disability, and you are not required to inform your coworkers.

In fact, you might consider not telling any coworkers about your medical status. Unlike your employer and other employees who need to know, coworkers have no legal duty to maintain your confidentiality. If you disclose your disability to a coworker, that person could tell others. It would be very difficult to prevent them from doing so or later sue them for revealing your personal information. The employer is responsible for stopping ongoing workplace harassment based on your disability, but is not liable for gossip initiated by your voluntary disclosure to a coworker.

*14) Even if my employer does not reveal my disability or HIV status, won't it be apparent to everyone after I get an accommodation?*

Coworkers may perceive your accommodation as preferential treatment, and they may express curiosity or even resentment. If a coworker asks you about your accommodation, you can explain that the accommodation was necessary for a medical condition so that you could continue performing your job. If s/he probes further, it's OKAY to say that it's personal and you'd rather not discuss it.

*15) Although an accommodation would help me do my job, I am still not sure if I should tell my employer about my disability. What factors should I consider?*

Disclosure of one's disability or HIV status to an employer is an extremely personal decision. Employees considering disclosing their HIV status, or other medical condition requiring accommodation, should consider the costs and benefits, including:

- Whether the modification can be obtained without disclosing the disability.

- Need for accommodation to perform the job.
- Need for accommodation to avoid discipline or termination.
- Need for accommodation to protect health.
- Potential for a more successful and supportive employment experience.
- Risk of loss of privacy.

## ***MEDICAL LEAVE UNDER FMLA AND CFRA***

### *16) Who is eligible for FMLA/CFRA leave?*

If you are too sick to perform your job and need a medical leave of absence, or if you need time off for medical treatment, you may be eligible for job-protected leave under the federal Family and Medical Leave Act (FMLA) or the California Family Rights Act (CFRA). These laws apply to private employers who employ at least 50 people within a 75 mile radius of your work site, and to all public employers (such as the city, state, or federal government). You may qualify for FMLA/CFRA leave if you have worked at least 12 months for the same employer (these do not have to be consecutive months), and you have worked at least 1,250 hours in the year preceding your leave.

If you qualify for FMLA/CFRA leave, your employer cannot deny your leave even if it causes an “undue hardship” to the employer. This is the major difference between requests for medical leave under FMLA/CFRA and requests for reasonable accommodations under ADA/FEHA.

### *17) What does FMLA/CFRA provide?*

You can take up to 12 weeks of unpaid FMLA/CFRA leave per year. Different employers count the FMLA year in different ways, e.g., calendar year, fiscal year, etc. This information is usually contained in your employer’s personnel policies. If you are unsure, ask your employer which method it uses.

The law also entitles the employee to reinstatement to the same or a substantially equivalent position at the conclusion of his/her leave. There are some exceptions, such as when the employee holds a “key position,” or if the job would have been eliminated for legitimate business reasons (such as e.g., downsizing) unrelated to the leave request.

### *18) Do I have to take all 12 weeks of leave at once?*

You do not have to take your leave all at once. The distribution of your leave depends upon what is medically necessary. For example, you may use leave time to reduce the number of hours you work per week. You may also use FMLA/CFRA leave to visit your doctor, get medical tests, or receive treatment, even if it is only on an occasional or periodic basis. Your employer cannot force you to use more leave than you need by requiring you to take your

leave all at once.

*19) What if I need leave but also need continued medical coverage?*

Your employer must continue your health care insurance coverage while you are on medical leave on the same terms as before your leave began. This means that if your employer normally pays your entire monthly insurance premium, it must continue to do so. If you normally pay all or part of the premium, you must continue to pay your share while on leave; your employer should tell you how to do this. Also, if your partner or your dependents receive medical benefits from your employer through you, your employer must continue their benefits too.

*20) How do I request FMLA/CFRA leave?*

You should tell your employer that you have a serious health condition that temporarily prevents you from performing your job, and that you need to take FMLA leave. You should also tell your employer the anticipated starting time and length of your leave, if you know. If you are anticipating a future leave, you must give your employer at least 30 days advance notice, or as much notice as possible if your leave date is sudden and doesn't permit 30 days notice. If you need leave without advance warning, you should tell your employer as soon as possible and no later than one or two days after you learn you need leave.

You can ask for FMLA leave orally, but it is better to make your request in writing if possible. Your employer may also require you to complete forms for FMLA requests, but may not deny or delay your leave because you failed to fill out forms or go through the employer's procedure. As long as you provided sufficient oral or written notice of your need for leave, as discussed in the above paragraph, your employer must cooperate and respond in writing to designate your FMLA leave.

On the following pages are two sample letters: the first can be used to request a block of time for your leave; the second is to request intermittent leave or a reduced schedule. Use the letter and sections that apply to your situation.

*21) Can my employer require me to sign a release disclosing my diagnosis and all of my medical records to them before I can take medical leave?*

You do not have to reveal your diagnosis to your employer or sign a release giving your employer access to your medical records in order to take medical leave under FMLA/CFRA. If you request leave, your employer may ask that you provide medical certification from your doctor, but your employer is only entitled to know the following information:

- The date your serious health condition began.

- The probable duration of your condition.
- A statement that your condition makes you temporarily unable to do your job.
- The probable duration of your need for leave.
- A statement verifying your need for intermittent leave or a reduced schedule, if applicable.

If your doctor's certification (see sample form beginning on page XX) contains all of this information, your employer must accept it as sufficient. Your employer may not request additional information from that health care provider, nor may it contact your doctor directly about your FMLA/CFRA leave without your permission.

*22) What can my employer do if it doesn't accept my doctor's statements?*

If your employer has reason to doubt your doctor's medical certification, your employer can get a second opinion from a doctor of its choice, at its expense. This doctor cannot be regularly employed by your employer. Since you have a right to privacy in your medical records, the employer's doctor may not release medical information to your employer without your consent, but may verify that you are eligible for leave. If your employer requires a second opinion, you should remind the second opinion doctor that s/he may only verify your need for leave and may not release your diagnosis or other private medical information to the employer.

If the first and second opinions differ, the employer may obtain (and pay for) a third opinion from a doctor mutually agreed upon by you and your employer, and the third opinion is final. If you think you may need a third opinion, you should have the name of another doctor ready to propose to your employer. Avoid agreeing to a third opinion doctor who is not experienced in the treatment of HIV/AIDS.

Even if your employer requires a second and third opinion, you are entitled to take leave on a provisional basis while the medical certification process is pending.

## A. Sample Request for FMLA Leave: Block of Time

### MEMORANDUM

To: (1)

*(1) Name of Director of Human Resources, Supervisor or another Manager*

From: (2)

*(2) Your Name, Job Title*

Re: Notice of the Need for FMLA/CFRA Leave

Date: (3)

*(3) Today's Date*

This memo is to notify you of my need for leave under the Family and Medical Leave Act and the California Family Rights Act. I require a leave of absence from (4) \_\_\_\_\_ to \_\_\_\_\_. I have a serious health condition that involves continuing treatment by a health care provider. Because of this serious health condition, I am temporarily unable to work during this period of time.

*(4) Fill in these blanks with the start and end date of your leave of absence.*

[Because this serious health condition is chronic and causes episodic periods of incapacity, it was medically necessary for me to take leave on \_\_\_\_\_.]

(5) [I have attached a completed certification from my doctor documenting my need for leave.] It is my understanding that I am eligible for up to 12 weeks of leave per year under the Family and Medical Leave Act and the California Family Rights Act, and that I will be reinstated to my job after my leave. (6) [It is also my understanding that (7) \_\_\_\_\_ will continue my health insurance during my leave.]

*(5) Although medical certification is not required unless your employer requests it, to fully protect your rights, include this sentence and attach the certification. You do not need to disclose your diagnosis to certify your need to take leave – see the CFRA certification form on page XX.*

*(6) Insert the sentence in brackets if you receive health insurance from your employer.*

*(7) Name of employer*

The Family and Medical Leave Act specifies that employers must provide specific, written notice to an employee of rights and responsibilities regarding leave within a few business days of when that employee gives notice of the need for leave. 29 C.F.R. §825.301. I look forward to receiving this information from you.

Please notify me immediately and in writing if you require anything further from me. I appreciate your assistance with this matter.

The Family and Medical Leave Act specifies that employers must provide specific, written notice to an employee of rights and responsibilities regarding leave within a few business days of when that employee gives notice of the need for leave. 29 C.F.R. §825.301. I look forward to receiving this information from you.

## B. Sample Request for FMLA Leave: Intermittent Leave or Reduced Schedule

### MEMORANDUM

To: (1)

*(1) Name of Director of Human Resources, Supervisor or another Manager*

From: (2)

*(2) Your Name, Job Title*

Re: Notice of the Need for FMLA/CFRA Leave

Date: (3)

*(3) Today's Date*

This memo is to notify you of my need for leave under the Family and Medical Leave Act and the California Family Rights Act. I have a serious health condition that involves continuing treatment by a health care provider. (4) [Because of this serious health condition, it is medically necessary to change my work schedule to \_\_\_\_\_.]

*(4) Include this sentence if you need a reduced schedule. Fill in the blank with the schedule your doctor says is medically necessary (e.g., working Monday, Wednesday, and Friday).*

(5) [Because this serious health condition is chronic and causes episodic periods of incapacity, it was medically necessary for me to take leave on \_\_\_\_\_.]

*(5) Include this sentence if you missed work for a day or two because of your HIV infection or related illnesses. Fill in the blank with the day(s) you missed. Provide this notice as soon as possible, but no later than one or two days after you took your leave*

(6) [Because this serious health condition is chronic and causes episodic periods of incapacity, it is medically necessary for me to take leave when I am temporarily incapacitated due to this condition.]

*(6) Include this sentence if your doctor certifies that in the future, HIV or related illnesses will make you too sick to work for a day or so*

(7) [I have attached a completed certification from my doctor documenting my need for leave.]

*(7) Although medical certification is not required unless your employer requests it, to fully protect your rights, include this sentence and attach the certification. You do not need to disclose your diagnosis to certify your need to take leave – see the CFRA certification form on page 17.*

It is my understanding that I am eligible for up to 12 weeks of leave per year under the Family and Medical Leave Act and the California Family Rights Act, that intermittent leave may be taken in increments as short as one hour, that only the amount of intermittent leave taken may be counted as FMLA/CFRA leave, and that I will be reinstated to my job after my leave. (8) [It is also my understanding that (9) \_\_\_\_\_ will continue my health insurance during my leave.]

*(8) Insert the sentence in brackets if you receive health insurance from your employer.*

*(9) Name of employer*

The Family and Medical Leave Act specifies that employers must provide specific, written notice to an employee of rights and responsibilities regarding leave within a few business days after that employee gives notice of the need for leave. 29 C.F.R. §825.301. I look forward to receiving this information from you. Please notify me immediately and in writing if you require anything further from me. I appreciate your assistance with this matter.

Title 2 Fair Employment and Housing Commission §7297.11  
Fair Employment & Housing Commission  
Certification of Health Care Provider  
(California Family Rights Act of 1993 (CFRA))

1. Employee's Name \_\_\_\_\_
2. Patient's Name (If other than employee) \_\_\_\_\_
3. Date medical condition or need for treatment commenced [NOTE: THE HEALTH CARE PROVIDER IS NOT TO DISCLOSE THE UNDERLYING DIAGNOSIS WITHOUT THE CONSENT OF THE PATIENT]: \_\_\_\_\_
4. Probable duration of medical condition or need for treatment:
5. The attached sheet describes what is meant by a "serious health condition" under both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). Does the patient's condition qualify under any of the categories described? If so, please check the appropriate category.  

(1) (2) (3) (4) (5) (6)
6. If the certification is for the serious health condition of the employee, please answer the following:  

Yes	No	
<input type="checkbox"/>	<input type="checkbox"/>	Is employee able to perform work of any kind? (If "No", skip next question.)
<input type="checkbox"/>	<input type="checkbox"/>	Is employee unable to perform any one or more of the essential functions of employee's position? (Answer after reviewing statement from employer of essential functions of employee's position, or, if none provided, after discussing with employee.)
7. If the certification is for the care of the employee's family member, please answer the following:  

Yes	No	
<input type="checkbox"/>	<input type="checkbox"/>	Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety or transportation?
<input type="checkbox"/>	<input type="checkbox"/>	After review of the employee's signed statement (see Item 10), does the condition warrant the participation of the employee? (This participation may include psychological comfort and/or arranging for third-party care for the family member.)
8. Estimate the period of time care is needed or during which the employee's presence would be beneficial: \_\_\_\_\_

9. Please answer the following question only if the employee is asking for intermittent leave or a reduced work schedule.

Yes      No

      Is it medically necessary for the employee to be off work on an intermittent basis or to work less than the employee's normal work schedule in order to deal with the serious health condition of the employee or family member?

      If the answer to 9 is yes, please indicate the estimated number of doctor's visits, and/or estimated duration of medical treatment, either by the health care practitioner or another provider of health services, upon referral from the health care provider.

**ITEM 10 IS TO BE COMPLETED BY THE EMPLOYEE NEEDING FAMILY LEAVE.**

**\*\*\*\*TO BE PROVIDED TO THE HEALTH CARE PROVIDER UNDER SEPARATE COVER.**

10. When family care leave is needed to care for a seriously-ill family member, the employee shall state the care s/he will provide, and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced work schedule

11. Signature of health care provider: \_\_\_\_\_

Date: \_\_\_\_\_

A "Serious Health Condition" means an illness, injury, impairment, or mental condition that involves one or more of the following:

**1. Hospital Care**

Inpatient care (e.g., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care.

**2. Absence Plus Treatment**

1. A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of absence relating to the same condition), that also involves:

(1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, health care provider, or

(2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

**3. Pregnancy**

Any period of incapacity due to pregnancy or for prenatal care.

[NOTE: An employee's own incapacity due to pregnancy is covered as a serious health condition under FMLA but not under CFRA. Pregnancy disabilities are also covered under the Pregnancy Disability Act.]

**4. Chronic Conditions Requiring Treatment**

A chronic condition which:

- (1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider.
- (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- (3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

**5. Permanent/Long-term Conditions Requiring Supervision**

A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

**6. Multiple Treatments (Non-Chronic Conditions)**

Any period of absence to receive multiple treatments (including any period of recovery thereafter) by a health care provider or by a provider of health care services under order of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity for more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

*23) I used FMLA/CFRA leave to reduce my schedule to twenty hours per week. Now my employer says I no longer qualify for health benefits because I'm not full-time. Is that legal?*

No. Your employer is required to continue your medical coverage while you are on FMLA/CFRA leave. As long as you have sufficient FMLA/CFRA leave available to cover the reduction of hours in your schedule, your employer must continue your benefits as if you were working your regular, full-time schedule.

*24) I requested FMLA/CFRA leave to reduce my schedule to twenty hours per week, and now my employer has transferred me to a different job. Is that legal?*

Probably. If you take leave on an occasional or part-time schedule basis, your employer is allowed to transfer you to an alternative position with the same pay and benefits if that position better accommodates your leave. The alternative position need not have the same duties. However, your employer cannot transfer you (or otherwise create a hardship for you) in order to discourage you from taking leave or continuing to work. For example, your employer may not transfer you from the day shift to the night shift, or reassign you to a work location that is significantly farther from your home, if the purpose is to make it more difficult for you to work.

Once you no longer need a reduced schedule, your employer must reinstate you to the position you held before your leave. (An exception may apply, however, if you are a "key employee" who the employer cannot do without for even a short period of time or if, upon your return, your former position no longer exists.)

*25) What if I need FMLA/CFRA leave now, but I'm not sure if I will ever be able to go back to work?*

Once you tell your employer that you are definitely not coming back to work, your employer is no longer obligated to give you leave nor to continue your health benefits for the 12-week period. If you are not yet sure that you will be able to go back to work, you should tell your employer that you need to begin (or continue) FMLA leave and that you would like to return to work after your leave. Once the 12 weeks under FMLA have ended, however, the employer is no longer required to give you health benefits, or to reinstate you if you extend your leave.

In addition, if you do not return from leave, your employer may recover the cost of the benefits paid by the employer while you were out on leave, UNLESS the reason you cannot return is beyond your control (your health condition continues to prevent you from working, for example).

If at the end of 12 weeks you learn that you will need additional weeks or months off for recovery, you could then request more leave as a reasonable accommodation under the ADA.

*26) I requested FMLA/CFRA leave, and now my employer is forcing me to use all of my vacation and sick days during my leave. Is that legal?*

Yes, if it is designated in the employer's personnel policies. If you take FMLA/CFRA leave for your own serious health condition, your employer may require you to use your accrued sick time and vacation time (during which you would be paid) during your leave.

*27) I don't have any paid vacation or sick time remaining and I can't afford to take unpaid leave. Is there any other way I can take paid leave under FMLA or CFRA?*

Sometimes. Your employer may have a short-term disability policy that will provide you with some income; contact the person at your place of employment who handles employee benefits. If you are receiving short-term disability insurance benefits, your employer may not require you to use vacation and sick time. California also provides short-term disability pay to some individuals who are unable to perform their usual and customary work. Contact the Employment Development Department for information about State Disability Insurance (SDI). (See the Resource List at the back of this booklet.) If you are a member of a union, your collective bargaining agreement may provide for paid medical leave. Check your collective bargaining agreement or contact your union representative.

*28) I missed work on several days to see my doctor or because my HIV-related conditions made me too sick to work. I told my employer why I missed work, but my employer counted each of those days as "points" under their no-fault attendance policy. Now they say I may lose my job if I miss any more work. Can they do that?*

Probably not. Your employer may not assign "points" to any time off that would qualify as protected leave under FMLA/CFRA. You are required, however, to give your employer at least verbal notice that you missed work on those days for a reason protected by FMLA/CFRA. For example, if you told your employer that you were seeing your doctor because you had a serious, life-threatening illness, your employer cannot assign points to your absence even if customarily required by the attendance policy. Furthermore, you must give your employer advance notice of any planned medical treatment: 30 days notice is preferred, or as much notice as you can if that is not possible.

If your time off does not qualify as protected leave under FMLA/CFRA, you can still seek a modification of the employer's attendance policy as a reasonable accommodation under

the ADA.

## ***DISCRIMINATION AND HARASSMENT ON THE JOB***

### *29) Can I be fired by an employer for having HIV/AIDS?*

No, not if you can safely perform the essential functions of your job, with reasonable accommodation if necessary, as discussed at the beginning of this section. There is an exception for safety concerns. People with HIV/AIDS are often viewed as dangerous because of myths regarding the transmission of the virus. However, in order to terminate an employee with HIV/AIDS for safety reasons, an employer must show a “direct threat” — a specific and substantial risk of harm to others posed by the HIV positive employee.

Courts have held that schoolteachers, food service employees, factory workers, pharmacists, firefighters and police officers with HIV/AIDS do NOT pose a direct threat to others and may not be terminated because of their HIV status.

Despite the absence of any confirmed cases of doctor-to-patient transmission of HIV, a few courts outside of California have nevertheless found that HIV positive surgeons, operating room personnel, dental hygienists, and other medical care personnel may pose a “direct threat” and may be terminated. If you work in the medical field and your HIV status affects your ability to obtain or keep a job, or if you have doubts about applying for a job, immediately contact a legal services organization that provides AIDS or employment services.

A person with HIV could face a direct threat to him or herself while on the job. For example, an occupational hazard that is an acceptable risk to healthy employees may pose unique risks to someone with a compromised immune system, such as working in a quarantine for people with infectious diseases. If your employer concludes that your HIV status poses a direct threat of harm to yourself at work, the employer must specifically demonstrate how that particular job would be likely to harm you. Under the ADA this would be very difficult to prove; under California law, HIV/AIDS is specified as a protected medical condition, thereby making it even harder to change your job or fire you. Again, if your HIV status affects your employment in any way, immediately contact a legal services organization that provides employment and/or AIDS related services.

### *30) What if I am not fired, but my employer makes comments about my HIV and treats me badly?*

It is unlawful for employers to harass workers on the basis of their HIV status. A single comment may not be considered harassment, but if an employer’s comments and poor treatment are severe or pervasive such that they create a hostile working environment, then

the conduct is unlawful harassment. Moreover, the employer cannot encourage or permit harassment by coworkers.

*31) Does HIV/AIDS discrimination also include sexual orientation discrimination?*

No. Sexual orientation discrimination is different from disability discrimination. Most notably, no federal laws prevent sexual orientation discrimination, and therefore no federal workers are protected. However, California's FEHA prohibits discrimination based on sexual orientation. FEHA applies to employers with five or more employees when the sexual orientation discrimination includes unequal treatment, firing or failing to hire someone. If the discrimination includes severe and pervasive harassment, no minimum number of employees is necessary. Contact a legal services organization for help filing a claim.

Furthermore, sexual orientation discrimination by an employer is explicitly prohibited by the California Labor Code. If you believe that you are being discriminated against, you should contact the California Labor Commissioner immediately. The law provides you only thirty days in which to file a claim of discrimination with the Labor Commissioner. (See the Resource List at the back of this booklet.)

You should also check local city or county laws for additional protection. Local government agencies such as the San Francisco Human Rights Commission (HRC) can also offer support with your claim.

*32) What should I do if I think my employer is discriminating against me because I have HIV/AIDS?*

If you believe you are being harassed or discriminated against, take the steps below before you consider quitting your job. Although you can bring lawsuits for up to one year (for state claims under FEHA) or 300 days (for ADA claims) after the harassment occurred, it is much more difficult to pursue this remedy after you have left your work place.

**Contact Advocates**

There are several public and private agencies that can provide advice and advocacy should you find yourself in a hostile situation. These organizations include ALRP, ELC and HRC, among others. (See the Resource List at the back of this booklet.)

**Informal Actions**

- Ignoring the HIV/AIDS discrimination usually won't make it go away: to the contrary, it often worsens. Generate a support system for yourself by talking about the discrimination with friends and family.

- Document the discrimination. Keep a journal to record dates, times, places, and details of any incidents, including the names of any witnesses. Keep any letters, e-mails, voice mails, or photographs that provide evidence of the discrimination. By documenting the discrimination, you'll have more than just your word against your employer's. (Of course, don't break any of your employer's rules to obtain this documentation. Documents not legitimately obtained would probably be inadmissible in court, and stealing documents could justify your termination.)
- Talk to sympathetic coworkers. Ask coworkers to keep their eyes and ears open, since witnesses will help strengthen your disability discrimination complaint. Remember, positive statements from fellow employees can be helpful in proving that you were a good worker in case your employer argues that you were treated differently due to work performance, and not due to your HIV status.
- Talk to your supervisor about the discrimination. Make it clear to your supervisor that you believe you are being discriminated against based on your HIV status. If you are uncomfortable having a one-on-one discussion with your supervisor, writing a letter may be a good idea (and also creates more documentation of your complaint in case your employer does not respond favorably to your claim). In your discussion or letter, you should state what happened in as much detail as possible, including dates (or approximate dates), places, and descriptions of the incidents. Clearly state what you want to happen next. (For example: "I want to work without my supervisor referring to my HIV status.") Refusing to respond to a request for a reasonable accommodation is also a form of discrimination, as discussed above. In that case, state that you want the negotiations for accommodations to continue.
- Keep doing a good job. It is important that the employer have no other possible reason for treating you differently or terminating your employment.

### *Company Grievance Procedures*

If your supervisor is unable or unwilling to help you, you should consider talking to another manager, or to someone from human resources or personnel. If you belong to a union, you should also discuss the discrimination with your union representative. Finally, consider using any grievance procedure that the company provides to employees who have a dispute with the employer.

### *Discrimination Claims and Lawsuits*

If none of these actions resolve the problem, you may want to file a formal disability discrimination claim against your employer. You can file a disability discrimination charge with the California Department of Fair Employment and Housing (DFEH) if your employer has at least five employees. You must file the charge of discrimination within one year of the discrimina-

tion. (The date of the discrimination is usually the date the employer failed to accommodate you, disciplined you, or changed the conditions of your job due to your HIV status.) The DFEH investigates your claim and tries to help resolve the dispute. The law also requires that you file a claim with the DFEH in order to sue the employer for violating FEHA.

You can also file a disability discrimination charge with the federal government's Equal Employment Opportunity Commission (EEOC) if your employer has at least 15 employees. You must file your charge with the EEOC within 300 days of the discrimination. You can also file with the EEOC by filing with the DFEH within 300 days and asking the DFEH to cross-file your complaint with the EEOC. You must have a file on record with the EEOC in order to sue your employer for violating the ADA.

If you have exhausted all of the administrative procedures of the DFEH or EEOC, then you may be able to file a disability discrimination lawsuit in state or federal court. You will probably need an attorney in order to bring this kind of lawsuit.

Finally, there may be local ordinances that allow for a complaint; check with your city or county offices, such as the San Francisco Human Rights Commission or the Los Angeles City Attorney's Office.

## *IV. Transitioning Out of Employment*

Part of the cycle of working with HIV may include leaving your job, but that can occur for different reasons. You may be harassed into leaving, be fired outright by your employer, or decide on your own that you don't want to continue working while disabled. What's important is to understand the circumstances prompting your termination and who is deciding whether you stay or leave. Keeping records while you make this decision can be critical to maintaining your legal rights and, in some cases, your job. Many of these topics are also discussed in other sections of this booklet.

*1) If I'm on FMLA leave and I'm too sick to return to work when it ends, can my employer force me to pay back the cost of the health care benefits I received while on FMLA leave?*

No. An employer cannot recover what it paid for your health care benefits if the reason you cannot return to work is beyond your control. The continuation, recurrence, or onset of a serious health condition that qualifies for FMLA leave is considered a circumstance beyond your control.

*2) I was fired while I was on FMLA leave, and I think it was illegal. What should I do?*

It is illegal to fire an employee for leave-related reasons. If you were fired while on leave and

there was no other legitimate reason for your termination (i.e., the elimination of your job as part of general downsizing), then your employer may have violated FMLA and CFRA. Termination because you took an approved leave for your disability is an act of discrimination.

If you believe your employer violated FMLA or CFRA, you should file a claim with the Department of Fair Employment and Housing (see the Resource List at the back of this booklet). You should also contact a lawyer or an advocacy group to discuss filing a lawsuit. Lawsuits are not always easy or practical, but a formal claim may be a good starting point for negotiating a fair settlement regarding your job or benefits. The final outcome, however, may depend upon the records you kept while you were working and on leave, so **START PROTECTING YOURSELF WHILE YOU ARE STILL EMPLOYED.**

*3) What should I do if I think my employer intends to fire me because of my HIV/AIDS?*

As discussed in the previous section, it is illegal to fire a worker solely due to his/her HIV status, or because the worker needs reasonable accommodations. If you think your employer intends to fire you because of your HIV status, you should notify your employer (in writing,

if possible) that you believe that your impending termination is illegal because it is based on your HIV status. If your employer has a human resources department, you should also consider notifying a representative from that department of your belief that your firing is illegal because it is based on your HIV status.

If your employer fires you anyway, you should do as much as possible to document the circumstances of your firing. For example, if your employer calls a meeting to fire you, request a witness (such as a coworker) at the meeting who will be able to verify what the employer said.

*4) Does my employer have to give me a reason for firing me?*

No. In fact, many employers refuse to explain, in writing or otherwise, why they fired an employee. If your employer refuses to tell you why you were fired, but you believe that it was because of your HIV status, you should consider filing a charge against your employer with a public agency (see the previous section). When the agency conducts an investigation of your claim, they will ask your employer to provide them with a reason for your termination.

*5) If my employer claims that I was fired due to my work performance but all of my evaluations have been satisfactory, can I get a copy of my personnel file and use it to disprove my employer's claim?*

California law gives you the right to: (1) inspect your personnel file and (2) get a copy of every document you signed.

To inspect your personnel file, consider writing a letter to your former employer requesting a copy of your personnel file. Be sure to reference California Labor Code Section 1198.5 and offer to pay any copy charges. If your employer is unwilling to send you a copy of your personnel file, make an appointment with your employer to see it at the office where the file is kept. When you view your file, you should take notes, documenting the date, title, substance and signatories of every piece of paper in your file. Your employer is required to provide you with a copy of anything you have signed that your employer has in its possession. If your employer denies you these rights, you should file a claim with the California Labor Commissioner. (See the Resource List at the back of this booklet.)

The contents of your personnel file, including performance evaluations, can be used as evidence in public agency investigations (e.g., Equal Employment Opportunity Commission and California Department of Fair Employment and Housing) and in litigation. Positive evaluations can be very helpful in refuting a claim of substandard performance and establishing a presumption of discriminatory motive for the termination.

*6) What if my employer tries to force me to quit by harassing me or fails to provide a reasonable accommodation for my HIV/AIDS disability?*

If your employer harasses you or fails to reasonably accommodate you because of your HIV status, you should notify the employer (in writing, if possible) that you believe you are being harassed or discriminated against due to your HIV status.

If your employer continues its harassment or discrimination, you may be able to quit your job and still bring a discrimination charge against the employer for “constructively” firing you. In other words, if your treatment was sufficiently unlawful, it is recognized that you had no choice but to quit. Under these circumstances, it may be possible for you to collect unemployment insurance benefits even though you quit your job.

Caution: It is frequently difficult to prove that a constructive firing has occurred. To do so, you must show that the harassment or discrimination was sufficiently pervasive or severe such that any reasonable person would have had no choice but to resign. You must also show that before you quit, you notified the employer of the circumstances of the harassment and gave the employer an opportunity to correct the problem. Proving all of these facts can be difficult after you have quit your job. If at all possible, contact a legal services agency that works with employment or HIV/AIDS issues before you quit. They can evaluate if the circumstances of your harassment or discrimination rise to the level of a constructive firing and, if so, how to comply with the legal requirements of a successful claim.

*7) Can I collect unemployment insurance benefits if I quit my job?*

If you quit your job because you were medically unable to work, you are probably not entitled to unemployment insurance benefits. However, you might be eligible for State Disability Insurance (SDI) benefits. (The California Employment Development Department administers both unemployment insurance benefits and SDI.) If your condition improves while you are collecting SDI, and you are able to return to work, you should consider applying for unemployment benefits if your employer will not give you your old job back. Because of the way unemployment benefits are calculated, you may be entitled to file a claim well after the date you quit your job due to medical reasons.

If you quit your job although you were medically able to work, you will probably not qualify for unemployment insurance benefits unless you can show that you had good cause to quit. Proving constructive firing can be difficult (see above). Those denied unemployment insurance may be able to receive help by immediately contacting the Employment Law Center (see the Resource List at the back of this booklet.)

*8) What do I need to know if I want to quit my job?*

Before you quit a job, you might want to explore other options at work, such as requesting a leave of absence or a modified schedule. If you take a leave of absence or work a modified schedule instead of quitting, you will likely be able to keep other work-related benefits such as health, life, and long-term disability insurance, which may prove to be as important as your salary.

The following section discusses benefits to which you may be entitled if you leave your job voluntarily or involuntarily.

## *V. Maintaining Yourself While Unemployed*

Anyone considering disability leave should first explore the options for income and health care during their unemployment. This section reviews the basic sources of these benefits for people with HIV who are unemployed. The following section (Working While Disabled) addresses how these benefits are affected if you then return to work.

Obtaining income and health care benefits when you are unemployed due to disability may be complicated. Deadlines can be crucial and very short, especially when you are leaving a job. If you miss one of these deadlines, you may lose your entitlement to a benefit. We recommend that you CONSULT A BENEFITS COUNSELOR OR ADVOCATE AS SOON AS YOU BECOME OR THINK YOU WILL BECOME UNEMPLOYED.

### *INCOME BENEFITS*

Income may originate from a variety of sources, both private and governmental. Many people use a combination of several sources to sustain themselves while they are not working. Every program that provides income requires you to report all money you receive during the period you are out on disability. Therefore, it is especially important that you maintain accurate financial records during this time.

#### *Government Income Benefits*

If you are unable to work because of an HIV condition, you may qualify for income benefits under a government program.

The federal Social Security Administration (SSA) administers two separate disability benefit programs. The first of these programs, Social Security Disability Insurance (SSDI) or Title II, is an income insurance program available to claimants who are unable to work because of disability and who have paid into Social Security during their working years. The other program, Supplemental Security Income (SSI) or Title XVI, is a need-based program that provides benefits to all disabled people who qualify financially, regardless of whether they

have contributed to Social Security.

In addition to these federal programs, the California Employment Development Department (EDD) administers the California State Disability Insurance (SDI) program. This program provides you with a portion of your salary for up to one year if you are unable to perform your regular work due to an accident or illness. It covers most California workers, but not

state government employees.

## Social Security

### *1) How do I qualify for federal disability programs like SSDI or SSI?*

You must be “disabled” as defined by the Social Security Administration (SSA). SSA defines disability as a severe physical or mental medical condition that prevents or is expected to prevent you from working for 12 or more months, or will result in death. With the advent of better drug therapies, an AIDS diagnosis does not automatically qualify applicants for Social Security benefits. You must show SSA that you have been diagnosed with one of a number of specific opportunistic infections, or demonstrate that you have repeated symptoms that result in a marked limitation in activities of daily living, social functioning, or concentration, persistence and pace. To do so, you will need to work with your doctor, psychologist or other health care provider to thoroughly document your claim for SSDI or SSI.

- **SSDI** — To receive SSDI benefits, you must be lawfully residing in the United States and show that you have paid into the Social Security system while working. If you worked for an employer, they must have withheld Social Security taxes (FICA) from your paycheck for a sufficient period of time in order for you to qualify. If you were self-employed, you need to have made direct quarterly payments to Social Security through your self-employment tax.
- **SSI** — To receive SSI benefits, you must show a financial need based on limited income and resources. To determine financial need, SSA will take into account all liquid assets, such as bank accounts, stocks, and any cash you receive from any source. Certain property is also in the tabulation. For example, although they don't include the home you own and live in, your second home is considered an asset and any rent you receive is counted as income. You may own a car, even an expensive one, if you need it to get to medical appointments, but additional cars count as resources. SSI benefits are not available to persons who have a felony warrant or who are in violation of their parole or probation. Finally, you must be a United States citizen or a “qualified immigrant” to receive SSI (see page 30 for more information on immigrant rights).

### *2) How do I apply for SSDI or SSI?*

Call the toll free number, 1-800-772-1213, to make an appointment, or go to any Social Security Administration office and file an SSDI or SSI application. Although you can prepare and file an initial application by yourself, we strongly recommend working with a benefits counselor from a local AIDS support organization to increase your likelihood of approval. SSA routinely turns down initial applications, so it's important to expect this and to follow

through with the appeals process. Appeals that are handled by benefits advocates or attorneys are much more likely to be approved.

For both SSDI and SSI, claims processing is often lengthy, requiring at least three months. When applying for SSDI, be sure to provide the date that you became disabled. Once your application has been approved, there is a five-month waiting period after that date before you will qualify to receive benefits. If you waited to apply for SSDI, they may pay up to 12 months of retroactive benefits, going back to the end of your waiting period (i.e., the date of your disability plus five months).

SSI does not pay retroactive benefits for the period of time before the date of the application; therefore you should apply as soon as possible after your disability onset date. If your SSI claim is approved months or even years after you apply (due to a lengthy appeal), they will retroactively pay you for every month following the date of application. In some cases you can obtain presumptive benefits which begin as soon as you apply and cover you while your claim is being processed. If your claim is subsequently denied, you do not have to repay the payments you received while your claim was pending. It's a good idea to ask the person who is processing your SSI application if you qualify for presumptive benefits.

### *3) How much will I receive?*

For SSDI, several factors affect your benefit amount, including how much you earned, the onset date of your disability, and your receipt of Workers' Compensation or SDI (notify SSA if you receive these). You may ask the Social Security Administration to estimate how much your benefit would be if you were to go out on disability.

The SSI amount changes annually due to state and federal budget modifications. As of June 1, 2003, the maximum amount an unmarried individual in the Bay Area may receive is \$778 per month (if you have access to a kitchen). Your benefit level will be affected if you receive additional income from other sources, live in someone else's home, or do not have a kitchen.

You can, in some instances, receive both SSDI and SSI. SSI will supplement your SSDI benefits if your SSDI benefit is sufficiently low and you meet all of the income and asset requirements for SSI. You will be awarded \$20 more if you receive a blended benefit.

## California State Disability Insurance (SDI)

### *4) What is SDI and how do I qualify?*

SDI provides benefits for up to one year after you are absent from work for more than seven calendar days due to an illness or injury. You must have worked for an employer who paid

into the SDI program or, if self-employed, you must have elected to participate in the state program. Assets and other sources of income do not affect SDI eligibility.

Additionally, your doctor or health care provider must certify that you are suffering from a physical or mental disability that prevents you from performing your regular or customary work. Note that SDI's definition of disability is much less restrictive than the Social Security Administration's definition — therefore, you might qualify for SDI even if you do not qualify for SSDI or SSI.

#### *5) How much are SDI benefits?*

This depends on your wages and SDI premiums paid during the 12-month base period that began eighteen months before you stopped working. SDI pays 55% of your monthly earnings determined by your highest quarter during this period.

A person's claim begins on the date his/her disability began. SDI calculates the weekly benefit amount using the person's base period, which is a previous 12-month work period divided into four consecutive quarters. The quarter of the base period in which the person was paid the highest wages is used to determine his/her weekly benefit amount. This 12-month period is not the year immediately preceding the onset date of the disability. Rather, it begins five to seven months before the disability began, and then the year preceding that date is used as the base period. Earnings that are considered when determining the weekly benefit amount are wages earned during the base period that were subject to SDI tax. For a disability claim to be approved, a person must have at least \$300 in wages during the base period and be engaged in the labor force when the disability begins.

**Once the SDI application is accepted for processing, the recipient may not change the beginning date of his/her disability or adjust the base period used to calculate the award.** Therefore, it is recommended to put some thought into the date you and your physician choose as the onset date. Considering the ambiguity of HIV disease, its symptoms, and the medication side effects, there is often not a clear cut moment when a patient becomes disabled. If a person's income in the last couple of years has been sporadic, the benefit amount could significantly change from one onset date to another.

The highest possible SDI award is \$602 per week, based on a quarterly earning exceeding \$14,207 during the base period. The maximum length of time you may receive SDI benefits is 52 weeks. You will receive a check every 14 days.

You may use accumulated sick pay, vacation pay, or the employer's private disability plan benefits to supplement your SDI as long as the total amount you receive does not exceed your regular paycheck.

### *6) How do I apply for SDI?*

Mail a completed claim form to a local California Employment Development Department (EDD) office no later than the 49th day after you stopped work due to your disability. If you've missed that deadline, you may be able to file late if you show "good cause for late filing" (such as symptoms of HIV, hospitalization, or mental health problems that delayed your ability to file). You can call the local EDD office in the phone book to request that a form be sent to you. Many doctors keep claim forms in their offices. Complete everything on the form except for the medical practitioner's section. Your health care provider will need to certify that you are unable to perform your regular job.

### *Other Government Income Benefits*

*7) I have no employer-sponsored or individual benefits and I am not eligible for SSDI, SSI, or SDI. Are there other government assistance programs available?*

Yes. You may be eligible for County Assistance (often called "G.A."), Food Stamps, or Cal Works through your county welfare department. Although eligibility requirements may differ from county to county, each welfare department requires that you have limited income and assets, and that you reside in the county. U.S. veterans may also be eligible for compensation or pension (as well as additional programs such as vocational rehabilitation, free medical and dental care, and free burial); check with the regional office of the Department of Veterans Affairs for details.

### *Benefits for Immigrants*

Immigrants with HIV/AIDS face unique problems in attempting to obtain income and medical benefits when they are unable to work. The laws in this area are complex, and an individual's immigration status may affect his or her ability to obtain certain benefits.

#### *Income Benefits*

*8) I am an immigrant and can't qualify for SSI. Are there any government benefits for immigrants?*

For disabled individuals with HIV/AIDS who are ineligible for Supplemental Security Income (SSI) due to their immigration status, the state's Cash Assistance Program for Immigrants (CAPI) may be available. Since CAPI is an alternative to SSI, immigrants cannot receive both SSI and CAPI benefits.

To qualify for CAPI, immigrants must be ineligible for SSI due to immigration status and meet one of the following requirements:

- Sixty-five or older
- Blind, or
- Disabled

You are eligible only if you are a qualified immigrant or an individual who is “Permanently Residing in the United States Under Color of Law” (PRUCOL). Qualified immigrants include:

- Lawful Permanent Residents
- Refugees
- Asylees
- Persons granted withholding of deportation
- Persons granted conditional entry
- Persons paroled into the United States for at least one year
- Cuban/Haitian entrants
- Certain battered spouses and children

If you are unsure of your immigration status, contact an immigration attorney.

### *9) How do I apply?*

To apply for CAPI you first must show that you have previously applied for SSI (evidence such as a pending application or a denial within the last six months is sufficient). You can apply for CAPI at your county welfare department. Depending on your county of residence, you may be able to submit a phone application or an application via mail.

### *10) How much can I get from CAPI benefits?*

The maximum CAPI benefit amount is \$768 per month (always \$10 less than the maximum SSI benefit) for individuals. Payments to people who are blind are higher. The application process usually takes 60 days, but may take longer. Benefits begin the month after the application was approved, and the first check contains a retroactive payment for the number of months your application was pending prior to approval. Applicants for CAPI may also qualify for Medi-Cal, Food Stamps, and/or IHSS (In-Home Supportive Services), but they may have to apply for those separately.

### *Medical/Health Benefits*

There are various medical benefits available to immigrants. Often times, the availability of these resources depends on an individual’s immigration classification, so it is important to

confirm your status.

*11) I am an undocumented immigrant. Am I eligible for any medical benefits?*

Undocumented immigrants have two possible resources for medical benefits: “Safe Havens” and Restricted Medi-Cal. Safe Havens are non-profit community clinics that provide free and low cost health care but are not required to report undocumented immigrants (see the Resource List at the back of this booklet). Restricted Medi-Cal is a state program that provides medical insurance in certain situations: emergencies (such as broken limbs and giving birth), pregnancy (including doctor’s appointments and medication), nursing home care, kidney dialysis, and treatment for breast and cervical cancer. Restricted Medi-Cal applicants must meet all of the following criteria:

- 1) Have a low income
- 2) Be a child, parent, pregnant, elderly, or disabled individual
- 3) Live in California and plan to stay

Immigration status does not matter for restricted Medi-Cal or ADAP (AIDS Drug Assistance Program, discussed in Section VI, question #19).

Some counties provide other medical services apart from Medi-Cal, such as an assistance dog, Adult Protective Services, mental health services, tuberculosis treatment, and more.

## Medi-Cal

*12) I am a documented immigrant but I am not a U.S. citizen. Am I eligible for unrestricted Medi-Cal?*

The state is required to provide Medi-Cal for specified “categorically needy” individuals: elderly, blind, disabled, the parents of children who are covered by Medi-Cal, and refugees in the United States less than 12 months. Disabled immigrants who are lawfully residing or have PRUCOL status are eligible for unrestricted Medi-Cal. United States citizenship is not a requirement.

Individuals with too much income to qualify under state eligibility guidelines, but with insufficient income or resources to pay for health care coverage also may qualify for Medi-Cal. However, they will have to pay a share of the cost, which is determined by their income.

*13) How do I apply?*

If you receive SSI/SSP (State Supplemental Payment), the Social Security Administration will automatically enroll you in Medi-Cal. If you are not eligible for automatic enrollment, you must complete a series of application forms and meet with a county Eligibility Worker (EW).

You will have to supply certain information, including income and resource information, a list of dependents, employment status, and a statement of immigration status. Citizenship/immigration status is only used to determine if you are eligible for full scope Medi-Cal or restricted Medi-Cal. The processing time for applications is approximately 45 days, though in some cases an individual may be able to request an expedited processing or presumptive approval (you receive benefits while the application is pending).

## Healthy Families

### *14) I am a Lawful Permanent Resident. Am I eligible for Healthy Families?*

Healthy Families is available to children under the age of 19, their parents, stepparents, legal guardians, and caretakers. A child must be a citizen or “qualified immigrant” in order to be eligible (see above). In most cases, it takes approximately 10 days to process an application.

### *15) What benefits are provided by Healthy Families?*

Children can receive health care for \$4 to \$9 per month for each child, with a maximum of \$27 per month for an entire family. The cost of the premiums depends on which health plan you select and the number of children in your household. Some services require a co-payment.

Coverage includes:

- Preventative care
- Doctor visits
- Hospitalizations
- Emergency care
- Mental health
- Vision and dental exams
- Treatment for substance abuse
- Prescription drugs

## Kaiser Permanente Cares for Kids

### *16) I am an undocumented immigrant with a 10-year-old child. Is my child eligible for Kaiser Permanente Cares for Kids?*

This program is administered through the HMO, Kaiser, to provide health care to low income, uninsured children. Immigration status is not considered in determining eligibility. The premiums for one family are \$15 per month per child up to three children. Additional children in your family are covered free of charge.

To use this program, your child must meet the following criteria:

- Be under 19 years of age and uninsured
- Live within the Kaiser Permanente's California Division Service Area
- Not be eligible for public health care coverage such as Medi-Cal or Healthy Families
- Be in a family whose income meets the Federal Income Guidelines for poverty

Families who are currently insured but anticipate loss of public or employer-subsidized insurance within 90 days of the date of application, and who meet the other eligibility requirements, may qualify for Kaiser Permanente Cares for Kids.

*17) What benefits does Kaiser Permanente Cares for Kids offer?*

Coverage includes hospital care, doctor visits, allergy injections, prenatal and well-baby care, hearing and vision tests, laboratory/X-ray services, prescription drugs, emergency services, ambulance services, mental health care, and eyeglasses. Some of these services require a co-payment, which ranges from \$5 to \$125. The majority of co-payments cost \$5. The co-payment maximum per calendar year is \$250 per child and \$500 per family. Contact Kaiser Permanente if you think your child might qualify.

### ***Private Income Benefits: Group or Individual Disability Insurance***

*18) How can I find out if my employer will continue to pay my salary if I am unable to work?*

Check with your human resources department or the person who normally handles personnel and benefit issues. You should ask for a description of the employer-provided benefits. An employee handbook or a Summary Plan Description may answer many of your questions. The law requires employers with disability, pension, or health plans to provide workers with written descriptions and eligibility information. In addition, ask if the employer provides other financial benefits, such as life insurance. You should also ask if the employer would pay your health insurance premiums while you are unable to work.

*19) What kinds of employer plans will continue to pay all or part of my salary if I am unable to work?*

Generally, two types of employer plans continue to pay you a salary-based benefit when you are unable to work: sick leave and disability insurance. Ask your employer for the rules concerning the amount of sick leave you are awarded each year, the amount you can carry over from one year to the next, and your current amount of accumulated sick leave. An employee out on sick leave usually receives regular pay with the same benefits.

The other type of private salary-based benefit is disability insurance. Disability plans usually

kick in after you have exhausted all of your sick leave. Short-term disability plans (called STD, supplemental benefit plans, wage benefit plans or continuation plans) provide benefits for short periods of time (for example, six months.) Long-term disability (LTD) plans start to pay benefits only after you have been disabled for a certain period of time. Some employers have structured their benefits so that the combination of sick leave and STD payments cover you until you meet the time eligibility of your LTD.

Disability payments may or may not be reportable taxable earnings, depending on how the premiums were paid. Consult your employer as soon as you begin receiving any of these benefits to find out how the premiums were paid and whether you will owe taxes on your benefit income.

*20) I don't think my employer has any type of private disability plan that covers me. Doesn't the law require some kind of coverage?*

The law only requires that employers provide minimal disability coverage under the California State Disability Insurance program (see below), or comparable private insurance. Religious organizations (for example, University of San Francisco, Saint Mary's Medical Center, Catholic Charities, etc.) are not required to comply with this law. Those employees cannot receive SDI unless their employer has been voluntarily contributing.

*21) How much of my salary will I receive under my employer-sponsored disability plans?*

There is no uniform formula for calculating disability benefits. Each plan has its own level of salary replacement, and some vary the level depending on your seniority. Typically, an STD provides a fairly high percentage of salary replacement, (e.g., 60% to 80%) while an LTD gives you considerably less (maybe 40% to 60%.) However, employer plans vary, and you need to review the plan descriptions for each one.

*22) When am I considered "disabled" for the purposes of my employer's disability plan?*

Most employer-provided plans consider you "disabled" if you are unable to perform the duties of the job you held when you had to leave work, or of any job for which you have the education, training and experience. Other employer-provided plans, however, may define "disability" as the inability to perform any available job. Furthermore, most plans change their definition of disability after you have received benefits for two or three years. Also, some plans may have a two year maximum benefit for mental health based disabilities. Although you may have met their initial criteria, at some later point they may require a more disabling condition or the inability to perform any job, not merely your former occupation. You need

to review your plan description to find out your insurer's definition of disability and how it changes after you begin receiving benefits.

Regardless of their stated definition, some insurance carriers are harder to convince than others and may routinely deny benefits to all applicants, forcing them to appeal the decision in order to get coverage. The insurance carriers may also routinely cancel coverage during their ongoing medical reviews when they re-evaluate a recipient's medical condition after their initial approval. If they deny or discontinue your disability benefits because you are not disabled "enough" (or for any other reason), you should contact your local AIDS legal services or benefits agency to discuss an appeal. You should do this before attempting to appeal on your own, since proper handling of your appeal at the early stage is critical to the success of a subsequent lawsuit.

*23) I am currently receiving disability payments from my employer's plan. How long will these payments continue?*

It depends. Many plans continue payments for as long as your condition is disabling (according to their particular definition, as discussed above) and until you reach age 65. Other plans (especially ones based on a mental health disability) only provide benefits for a predetermined period, such as two years. Most plans discontinue benefits if you begin a new job and exceed a certain level of income (see the next section, which discusses returning to work). Almost all plans routinely perform a medical re-evaluation to determine if you continue to meet the criteria for their current standard of disability. If a review concludes that you are no longer disabled and results in the loss of your benefits, you may appeal. Contact your local AIDS legal services or benefits agency to discuss an appeal.

*24) I am receiving disability benefits from my employer's plan along with Social Security benefits. My employer wants to reduce the amount of benefits paid from its plan to account for my Social Security benefits. Is this legal?*

Yes. If the plan provides for a Social Security "offset," your employer's insurance plan can legally reduce the benefit it pays you by the amount of your Social Security award. Some plans also offset benefits received from State Disability Insurance (SDI) or from private disability policies you may have acquired outside of work. Ask a benefits counselor to review your plan if you have questions.

*25) My former employer just announced that they are planning to drastically reduce the benefits they will offer under their disability plan. Can they do that?*

If you left your job due to a disability and were awarded benefits under your former employer's

insurance plan at that time, the insurer must continue the benefits that were in effect when you stopped working, even if your former employer changes or indeed cancels benefits for those still working. While you are still working, however, the employer has no obligation to offer disability benefits (beyond the minimum State Disability Insurance, discussed in question #20) and can change its plan at anytime. Although the employer is supposed to notify current and former employees still receiving benefits of any changes, you should periodically review your available benefits.

*26) While I was off work on an approved medical leave, my employer decided to stop offering long-term disability benefits and cancelled the company's insurance plan. Now I realize that I am too disabled to return to my job, but there is no longer any LTD. Can I still get those benefits?*

Probably not. You are still considered an employee while you are on a medical leave (such as a leave available under FMLA/CFRA). You may or may not be receiving a salary, but you are still eligible for any available employee benefits. If those benefits are withdrawn while you are still an employee, you are no longer eligible for them. Therefore, if you think your employer might remove the disability plan, you should apply for the LTD benefits while you are still an employee, whether or not you are on medical leave. Consult a benefits adviser if you think this situation could arise.

### ***Private Income Benefits: Life Insurance***

*27) I am covered by my employer's life insurance plan, and I pay the premiums for the policy. If I leave my job, can I keep this coverage?*

You have limited rights to continue your life insurance. Most employer-sponsored life insurance plans are simple term life insurance. This means that the premiums pay for the life insurance coverage for a limited period of time; often this is only until the next paycheck when the premium is again deducted. If you leave your job, you do have the right to convert your group insurance to an individual policy without having to provide the insurance company with "evidence of insurability" (such as a medical evaluation). This is important since life insurance companies are permitted to require an HIV test of applicants for an individual policy and refuse coverage on that basis. If you fail to convert your group life insurance when you go on disability, you may not be able to obtain life insurance in the future. Under California law, you have ONLY 31 DAYS following termination to exercise this conversion right. Because this is such a short time period, you must act quickly to avoid losing that option. Consult a benefits advocate when you leave your job.

*28) What happens to my life insurance if I go on disability and can no longer afford to*

### *pay my insurance premiums?*

Many insurance policies contain a clause called a “waiver of premiums” provision. This means that if you become disabled, your insurance coverage continues at no cost to you. You should check your policy for this provision and under what circumstances it is triggered.

### *29) I am on disability. Is there any way I can cash in my life insurance policy now?*

Yes. Some life insurance carriers will pay you the face value of your life insurance, or a portion of it, if you are extremely ill. Alternatively, you may be able to receive a certain percentage of your policy now, with the remainder going to your beneficiaries. Ask the carrier if it offers this “accelerated benefit.”

You may also be able to “sell” your insurance policy through a transaction known as a “viatical settlement,” in which a third party investor pays you less than the face value of your policy, and in return it becomes the beneficiary (i.e., you can no longer direct the benefits to another person). Receiving a settlement may jeopardize your eligibility for need-based government benefits, such as SSI and Medi-Cal (see below). If you decide to enter into a viatical settlement, be sure to work with brokers and buyers who are licensed by the California Department of Insurance (DOI). (See the Resource List at the back of this booklet.) Only deals made with California-licensed companies offer government protection and permit you to receive the funds tax-free.

A word of caution: In the 1990's, many people with HIV bought multiple life insurance policies, lied about their HIV status in the application and then sold the policies to viatical companies. This activity constitutes fraud and has serious criminal and civil legal repercussions. If you obtained your life insurance policy by lying about your HIV status, selling it to a viatical company is likely to trigger a government inquiry and result in legal problems.

### ***Private Income Benefits: Retirement Plans***

#### *30) Can I receive benefits from my employer-provided retirement plan if I become disabled?*

Your rights to retirement benefits will depend on the specific terms of your employer's plan. Federal law requires employers to provide you with a summary description of the important terms of the plan. Federal law also allows you to examine and copy all of the documents related to retirement plans.

Retirement plans generally come in two forms: “defined benefit” plans and “defined contribution” plans. Defined benefit plans (e.g., pension plans) pay a predetermined amount of benefits upon retirement after an employee attains a designated retirement age. Your

plan, however, may allow payments to begin if you retire at an earlier age due to disability or other specified reasons. Because these are pension plans, there are no benefits paid to your estate after your death. Some benefit plans may continue payments after your death to your legal spouse until his/her death.

Defined contribution plans (e.g., profit sharing plans, stock bonus plans, 401(k) plans, and 403(b) plans) typically allow easier access to retirement benefits than a defined benefit plan. Some of these defined contribution plans allow you to withdraw your benefits after a certain number of years of participation and under specific circumstances, such as disability. For example, a 401(k) plan may allow you to withdraw your contributions upon reaching age 59 ½, or upon retirement, death, disability or separation from employment. A 401(k) plan may also allow disbursements in case of financial hardship caused by threatened foreclosure on a home, eviction, tuition, or medical expenses. Early withdrawal for reasons other than those allowed by the plan may result in penalties, but there should be no penalty tax if you are disabled. Any withdrawal, even those permitted by the plan, may result in a hefty tax bill. Always check the terms of the plan before withdrawing any funds.

## ***MEDICAL BENEFITS***

### ***Government Benefits***

#### *31) How do I qualify for government medical benefits?*

The government provides Medicare and Medi-Cal benefits for some people who are unable to work due to disability.

Medicare is provided to those who have received SSDI for at least 24 months plus the five-month waiting period (there is no waiting period for those with end stage renal disease or Lou Gehrig's disease). You can continue your Medicare coverage for a period of time even after returning to work (see the next section, Working While Disabled). Social Security will also provide up to 7 ½ years of free hospital coverage under Medicare (Part A).

Everyone becomes eligible for Medi-Cal as soon as they begin to receive SSI benefits. If you are disabled but do not quite fall within the SSI income guidelines, you may still qualify for Medi-Cal by paying a "share of cost," or you may be eligible for a no share of cost plan (e.g., Aged and Disabled Medi-Cal Program). Contact your Social Security office to apply for SSI or your local Medi-Cal office to apply for Medi-Cal.

Medi-Cal is also available for working people with disabilities who are not sufficiently disabled to qualify for SSDI or SSI. Disabled workers are permitted to "buy in" to the Medi-Cal program (this is called "250% Working While Disabled Medi-Cal"). The government saves

money by subsidizing and providing access to medical care when you return to work, rather than forcing you to stay on SSDI or SSI due to lack of medical care. If you wish to find out if you qualify for a “buy-in,” call your local Medi-Cal office.

*32) How do Medicare and Medi-Cal interact with private benefits?*

If you are receiving health benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA), those benefits may end as soon as you become eligible for Medicare coverage. However, if Medicare is obtained prior to COBRA election, COBRA coverage may not be discontinued. Some disabled employees receive non-COBRA health benefits from employers who continue to provide health care coverage to former employees as part of their disability package. These plans may also end when you become entitled to Medicare. If your insurance does not terminate when your Medicare coverage begins, you should then determine if your health insurance coverage will be the “primary” health insurance plan (i.e., it pays first for any covered health care services you receive). A secondary plan pays some expenses not paid by the primary care plan. Refer to your employer-sponsored health plan to see whether Medicare will be the primary or secondary plan. Your Summary Plan Description also indicates which medical services your private plan covers.

Your participation in Medicare and Medi-Cal may disqualify you from participating in a HIPAA-Guaranteed Issue plan (see below).

*33) Can the government help me keep my private health insurance?*

If you have private health care coverage (other than the MRMIP program mentioned below), the state administers two programs that may be able to assist with payment of your premiums.

The CARE/HIPP program pays for your private medical premiums generated by a non-COBRA plan. (COBRA plans are described below.) Qualification depends upon your income. You may contact the CARE/HIPP program through your caseworker.

Medi-Cal can also help you pay premiums. If you are on Medi-Cal, you may qualify to have your COBRA and other private insurance premiums paid for you. Call 1-800-952-5294 to see if you qualify.

*34) Are there any other government programs that provide health care benefits?*

The government supports a program called the AIDS Drug Assistance Program (ADAP). It provides only HIV-related medications. (ADAP is addressed more completely in Section VI, question #19.)

## *Private Benefits — COBRA*

*35) I'm going out on disability, but I have a great health plan through work. Can I keep it?*

Maybe. There is a federal law called COBRA (Consolidated Omnibus Budget Reconciliation Act of 1986) that requires employers with 20 or more employees to offer continued health care coverage to terminated employees and their eligible dependents. Employees who lose eligibility for their health benefits due to a reduction in hours are also eligible for COBRA. Churches and government employers are exempt from this rule. A state law called CAL-COBRA mandates a similar benefit for people who work for small employers (including churches in this case) with two to 19 employees. The laws also differ in that COBRA applies to “self-insured” employers (employers who create a fund to pay workers’ health benefits, instead of buying a group insurance policy) while CAL-COBRA does not cover self-insured employers. (The following discussion of COBRA benefits applies to CAL-COBRA except where noted.)

COBRA is available to all terminated employees with health insurance, including those who quit, go out on disability, or are fired (unless fired for “gross misconduct” such as criminal behavior).

Federal government employees are entitled to continued health benefits under a similar statute. Employees of state and local governments may be eligible for continuation coverage through other programs. Speak with your plan administrator to find out what these programs cover and if you qualify.

*36) What coverage does COBRA provide?*

You receive the same health plan coverage as before you left work. Many companies allow you to switch health insurance providers once a year during “open enrollment.” While you are on COBRA you can partake of this too, as if you were an active employee. However, any changes your former employer or a successor company makes to its health benefits plans, good, bad, or otherwise, apply to you as well. For example, if your former employer drops its group health plan completely, it is under no legal obligation to continue your coverage under COBRA. However, if the employer switches to any other group health insurance, then the new plan must allow you to join.

COBRA coverage lasts for 18 months for terminated employees, but you are responsible for paying the entire premium, at the rate of 102% (110% for CAL-COBRA) of what your employer pays its insurer. This is usually a good deal, because group rates offered to employers are

often lower than individual rates. If you were disabled (based on Social Security standards) at the time you became eligible for COBRA, or within 60 days of that date, you may extend the coverage for eleven additional months, although premiums may increase to 150% of the employer's premium. (This additional coverage for people with disabilities is known as OBRA.) In either case, if you do not pay your premiums, you will lose the coverage.

*37) If my disability leave is only temporary, do I need to go on COBRA to keep my health benefits?*

Not necessarily. Under the federal Family and Medical Leave Act (FMLA), a qualifying employee may take a temporary leave for up to 12 weeks during any 12-month period. The FMLA applies to those with serious health conditions who cannot work, and requires that the employee be reinstated to the same position upon his or her return.

Although the employer does not have to pay your salary during your FMLA leave, it must continue to pay for your group health benefits on the same terms as for active employees. If you decide not to go back to work after the 12-week period, the employer may require you to reimburse it for the health care premiums it paid on your behalf during your leave. You are not required to repay those premiums, however, if the reason you do not return is beyond your control, such as your continued poor health. COBRA coverage would begin when your disability leave was determined to be permanent and your health benefits would otherwise be terminated. (For more on FMLA, see Section II.)

### ***Private Benefits — Non-COBRA***

*38) Are there any other options for continuing lost medical coverage?*

You might be in danger of losing your medical coverage when your participation in COBRA expires, or when your employer or ex-employer stops offering medical benefits. Fortunately, there are several ways to continue that insurance. Continuation is especially important because it prevents the insurer from imposing a new “pre-existing condition exclusion” period. (See question #39 for more on pre-existing condition exclusions.)

First, California law requires that group health insurance policies contain a CONVERSION option. This option allows you to “convert” your participation in the employer's plan into your own individual policy. You are entitled to a conversion policy regardless of your medical condition. Unfortunately, premiums on converted policies are usually quite high and the policies may not cover important expenses, such as prescriptions.

Second, there may be a specific EXTENSION OF BENEFITS provision in your policy. This usually takes effect when your employer cancels its group insurance for all its members and

you are disabled at the time the plan terminates. If your plan contains this provision, you may be entitled to an extension of benefits providing you with up to 12 months of coverage at no cost, although it probably covers the disabling condition only. Consequently, this insurance protection covers all HIV-related claims if that is the reason for your disability, but not claims for unrelated illnesses or injuries. Check your policy for this provision.

Be aware that “self-insured” employers are not required to offer conversion nor extension of benefits. Employers who are self-insured create a fund to pay for employees’ health benefits, instead of buying a group insurance policy. Since self-insured employers often hire an insurance company to administer the self-insured plan, it may not be obvious that your employer is self-insured. Be sure to ask about this if you have questions about continuing your health coverage.

Third, the federal Health Insurance Portability and Accountability Act (HIPAA) requires individual health plans to accept otherwise-eligible applicants into guaranteed issue plans (i.e., plans that will accept people who would otherwise be “uninsurable” because of injury, disease, or some other pre-existing condition that makes them a major risk). They usually have very reasonable premiums considering the level of benefits offered. In California, to be eligible for a HIPAA-Guaranteed Issue plan, you must have had eighteen consecutive months of prior medical coverage, with the most recent coverage having been under an employer group plan. You must also be ineligible for or have exhausted other coverage options, including COBRA, Medicare and Medi-Cal, but not including eligibility for a conversion policy. This is important considering a conversion policy may have a much higher premium than a guaranteed issue plan, and HIPAA allows you to choose. You must apply for this plan within 62 days of losing your last coverage. Once you are covered under a HIPAA-Guaranteed Issue plan, you won’t later lose that coverage if you become eligible for Medicare or Medi-Cal.

*39) How can I avoid “pre-existing condition exclusions” when I get health insurance?*

A “pre-existing condition exclusion” is an imposed period of time when you first join the plan during which you are not covered for your prior conditions. This time period is from zero to 12 months. HMOs are not permitted any exclusion period and most other California insurers can impose no more than six months. A few insurers fall under federal law, which allows a maximum exclusion period of 12 months. You may want to consider this when you have a choice of plans.

Another way to avoid the exclusion period is to maintain group coverage with a gap of only two months between plans (in California, it’s 180 days when you switch from one employer plan to another). HIPAA (see question #38 above) requires that when you join a new group plan (such as when you start a new job with medical benefits), the insurer cannot impose

a pre-existing exclusion period if you provide proof of at least 12 months of prior group coverage. The prior coverage includes most health coverage, such as Medicare or Medi-Cal, COBRA benefits, and most HMO policies. This makes it especially important for you to start searching for new coverage long before your current coverage ends.

*40) Can I lose individual health benefits I already have if I become very sick?*

Your insurance company cannot discontinue you merely because you start turning in very high claims. You have signed a contract with them, and they cannot pull out of that contract unless they go out of business or stop offering your entire category of insurance to everyone to whom it is provided.

## ***VI. Working While Disabled***

This section discusses how your income and health care benefits may be affected if you decide to return to work after being on disability.

Almost all disability benefits programs require notification if you start earning income. Returning to work and earning a salary may have two effects: (1) it may indicate that you are no longer disabled, and (2) it may change the amount of benefit money you receive. Reporting income does NOT NECESSARILY MEAN YOUR BENEFITS WILL BE AFFECTED IMMEDIATELY. You may be allowed to work and earn income for a designated time period before your benefits are affected.

It is important to record all of the money you earn from working. We suggest you keep a calendar with the dates and hours worked and your monthly income. This information will keep you conscious of how long you can work before your benefits may be affected. Some of the information below repeats definitions provided in other sections so as to minimize confusion in understanding this complicated material.

*1) What should I do before I start working?*

**A. Determine your sources of income.** You need to determine where your money is coming from to understand how working will affect your income. Public benefits are subject to very different rules than private benefits. A public benefit is money that you receive from the government, whereas private benefits are policies purchased by either you or your employer.

Many people do not realize that the Social Security Administration (SSA) administers two disability programs, SSDI and SSI. Social Security Disability Insurance (SSDI) issues its checks or directly deposits payments into your account after the first of each month and is available to those with sufficient work histories. Supplemental Security Income (SSI) is a program

for low-income people with disabilities and issues its checks on the first of each month. The State of California also administers a disability program called State Disability Insurance (SDI) and disburses payments every 14 days.

Private benefits can include either Short-term Disability Insurance (STD) or Long-term Disability Insurance (LTD). With all of these acronyms, determining your source of income can be a mind-boggling task.

**B. Determine how medical costs are handled.** It is important to keep in mind how working might affect your eligibility for your current health coverage. Most people on dis-

ability leave receive assistance with medical costs through a combination of the following: Medi-Cal, Medicare, ADAP (AIDS Drug Assistance Program), CARE-HIPP, Medi-Cal HIPP, private health insurance, and COBRA/OBRA. Some programs have financial eligibility requirements, whereas others terminate if you become eligible for another source of medical coverage. See the sections of this booklet that address the medical programs that are relevant to you.

**C. Understand how each benefit is affected by working while disabled.** The sections that follow will discuss how working affects each benefit. Read the sections that are relevant to you. If you have any questions, contact a benefits counselor or your benefit provider for further information. Being fully informed is your best weapon against surprises.

## *INCOME BENEFITS*

### *Calculating Your New Social Security Benefits*

#### *2) I receive SSDI ONLY. How will working affect me?*

The first thing to consider before returning to work is that the Social Security Administration (SSA) defines disability as being unable to work for more than one year. Therefore, it may not be a good idea to work during your first year receiving SSDI.

Once you are past the one year mark, Social Security encourages you to test your ability to re-enter the work force. SSA has a “trial work” program that allows you to work without risking the loss of your benefits. Here’s how it works:

- **Trial Work Period:** The Trial Work Period is a period of nine months (not necessarily consecutive) when you are allowed to receive full benefits while you test your ability to work. A Trial Work Month is any month when your gross (before tax) earnings are more than \$580 or, if you are self-employed, you earn more than \$580 or spend more than 80 hours working in your own business. If you do not use nine Trial Work Months in a five-year look-back period, you may be allocated additional trial work months. After you have used up your nine Trial Work Months, you may be reevaluated for disability. If, after the trial work period, your earnings averaged more than \$810 per month, they will be considered “substantial,” and your full benefits will continue for three more months and then stop. However, if you are still medically disabled and continue to work, your Extended Period of Eligibility automatically begins to run after you complete your ninth trial work month.
- **Extended Period of Eligibility (EPE):** The EPE is the 36 consecutive months directly following the Trial Work Period which includes the three-month grace period before your benefits stop. During EPE, you will not receive any benefits during a month when your earnings are at or above the “substantial gainful activity” level (\$810). During months when your gross earnings are below \$810, you are entitled to receive full

benefits. No new application or waiting period is imposed when earnings fall below \$810. You are eligible for your full benefit after simply notifying Social Security of your change in earnings. If you become unable to work again during the EPE period, your benefits will be reinstated. At the end of the 36 month EPE, if you continue or begin to make \$810 per month, your claim will end. After that, if you become unable to work again you will need to file a new application with Social Security, or file for expedited reinstatement.

- **The “Ticket to Work” Program:** This program allows for expedited reinstatement if you become disabled again due to the same medical impairment that caused your original disability (see question #8). You will be eligible for expedited reinstatement of your benefits if you apply within 60 months after your benefits were terminated due to substantial earnings from work. While Social Security makes a new medical determination in your case, you will receive SSDI income and continued Medicare and Medi-Cal benefits at the same amount you were previously receiving, for up to six months.

Note: SSA deducts Impairment Related Work Expenses or IRWEs (see question #10) from your earnings before they determine continued eligibility for benefits.

*3) I receive SSI ONLY (on the first of the month). How will working affect me?*

To determine how your SSI check will be affected by working, take your gross earnings and subtract \$65 for the “earned income exclusion,” then subtract another \$20 as a “general income exclusion.” Deduct any Impairment Related Work Expenses (see question #10), and divide the result by two. The resulting dollar amount is your Countable Income. This is how much your SSI check will be reduced as a result of your earned income. When your Countable Income is equal to or greater than your SSI cash payments, you have reached the Break-Even Point and your benefits stop for that month and every month that your earnings are high enough to “break even.”

If you are terminated from the SSI program because of your earnings, beginning January 1, 2001, you will have 60 months after your benefits end to have your SSI reinstated. During that 60 month period, if you become unable to work you won’t have to file a new application to begin receiving SSI again. While Social Security makes a new determination in your case, you can receive provisional income and Medi-Cal benefits for up to six months.

*4) I receive BOTH SSI and SSDI. How will working affect me?*

Two sets of rules apply to you — one set for your SSI check and one for your SSDI check. The same rules apply to your SSDI check as apply for people receiving only SSDI. But your SSI check will be calculated a little differently.

To determine how your SSI check will be affected by working, take your gross earnings

(before taxes) and subtract \$65 for the “earned income exclusion.” You may also deduct any Impairment Related Work Expenses (see question #10). Now divide your result by two. This is your Countable Income; your SSI check will be reduced by this amount. When your Countable Income equals or exceeds your SSI cash payments, you have reached the Break-Even Point and your SSI benefits stop.

*5) When will my Social Security check(s) be affected?*

Your SSDI checks will not be affected by working until after you have completed the ninth month of your Trial Work Period and the next three months of your grace period. Then, if you are earning over \$810 per month, you are not entitled to a check. Since SSDI pays you a month late (i.e., you receive a check in July for the month of June), you will know if you are not entitled to a check before Social Security knows. If they send you a check when you are not entitled to one, you should return the check to your local Social Security office. If Social Security overpays you, you will be required to pay them back. If you can prove the overpayment was not your fault and that you cannot afford to pay it back, you may qualify for a waiver. Consult a benefits counselor to see if you qualify.

Your SSI check will reflect the reduction for Countable Income two months after the months worked unless you have reached the Break Even Point. When you reach the Break Even Point, your SSI will be affected that month. You will know if you are not entitled to a check before Social Security knows. Again, if they send you a check when you are not entitled to one, you should return the check to your local Social Security office. If Social Security overpays you, you will be required to pay them back. If you can prove the overpayment was not your fault and that you cannot afford to pay it back, you may qualify for a waiver. Consult a benefits counselor to see if you qualify.

*6) I am receiving California State Disability Insurance (SDI). How will working affect me?*

The combination of earned income from working and SDI payments cannot exceed 100% of your monthly income before you went out on disability. When the combination exceeds 100%, the SDI benefit is reduced by the amount in excess of your pre-disability earnings.

Your SDI benefits will be reduced if you resume working. Under certain circumstances, a person may be ineligible for a period of time during his/her claim or may be entitled only to partial benefits. SDI will determine whether or not your benefits must be reduced. The income listed below should be reported even though they may not always affect your benefits. Failure to report income could result in an overpayment, penalties, and a false statement disqualification.

- Sick leave pay
- Self-employment income
- Military pay
- Commissions
- Wages, including modified duty wages
- Residuals (royalty payments to actors and authors as their work product continues to generate sales)
- Part-time work income
- Bonuses
- Workers' Compensation benefits
- Insurance settlements
- Holiday pay

Your benefits may also be reduced because you received an “overpayment” from prior SDI or unemployment insurance payments. An overpayment occurs when you receive a higher benefit amount than you actually qualify for. Sometimes this happens because the government agency makes a mistake when calculating your monthly payment. It could also happen if you lie on your application in an attempt to qualify for more money, and then they find out about it later. You are required to pay back the overpayment unless you can prove it was their fault and that you can't afford to repay it. This is done by garnishing (called “offsetting”) your monthly payment. Benefit checks issued after an overpayment is discovered may be reduced by 25 percent up to 100 percent. A person will receive a “Notice of Overpayment Offset” if a reduction is taken for either an SDI or Unemployment Insurance overpayment. Therefore, report all earned income or debts you believe may impact your benefits directly to SDI. Benefit checks may also be offset for delinquent court-ordered support payments (such as child support), or other government debts in default (such as U.S. Department of Education student loans, delinquent medical bills to a county hospital, or income taxes).

## Continuing Disability Reviews and Other Important Things to Know About SSA

### 7) *What is a “Continuing Disability Review” (CDR)?*

The Social Security Administration will conduct a CDR to determine if a recipient of either SSDI or SSI is still medically disabled.

### 8) *What prompts Social Security to decide to conduct a CDR?*

The law requires that a CDR be performed at least once every three to seven years, depending on your type of disability impairment. CDRs are likely to occur if a person returns to work before being disabled for at least 12 months from the onset of Social Security disability. This is because Social Security defines disability as not being able to work for more than one

year. If you have received benefits for at least two years and then return to work, a CDR cannot be initiated solely because you returned to work, but can be initiated if the timing is appropriate.

In addition, a CDR is often triggered when a person has engaged in “substantial gainful activity” (SGA) by earning more than \$810 per month. If you are consistently working at SGA levels, Social Security assumes you are able to work. CDRs also usually occur after a person has completed the nine-month Trial Work Period and continues to earn over \$810 per month. A CDR is not performed during the Trial Work Period.

In the year 2001, Social Security began phasing in the new “Ticket to Work” program. People on Social Security will use this “Ticket” to have a local, SSA-approved vocational rehabilitation agency help provide training and job opportunities for them. Anyone employed and earning income while an approved agency is “holding their ticket” will not trigger a CDR based on their earnings or work (to avoid triggering a CDR that person has to have been collecting SSDI for at least 24 months).

*9) How do I prepare for a CDR?*

Whether or not you anticipate a CDR, it is best to be prepared for the possibility that one will occur. Always see a treating physician on a regular basis. Report all symptoms to the doctor by comparing your current health to when you were feeling PERFECTLY well. When you go to the doctor be prepared to report all symptoms that have occurred since your last appointment (i.e., report symptoms during the past month or two, not just how you felt yesterday). Ask the doctor to record the details of your symptoms in your medical chart, including frequency, severity, and duration. Mention any side effects from medication you are taking. Also, be sure to report to your doctor any adverse effects returning to work has had (for example, more fatigue or more frequent symptoms).

*10) What is an “Impairment Related Work Expense” (IRWE)?*

IRWEs are documented expenses for services or items related to one’s impairment that are needed in order to work. These expenses may include the cost that you pay for any item or service you need to work, even if the item or service is also useful to you in your daily living. Examples include specialized work equipment (for example, a voice recognition computer) or prescribed medical expenses (for example, co-payments for prescriptions and doctor visits).

*11) How do I report my earnings or Impairment Related Work Expenses (IRWEs) to Social Security?*

Currently there are no specific “return to work” or “working while disabled” earned income forms. SSA representatives at your local claims office will need to speak with you initially regarding your IRWEs and you will complete a Work Activity Report form. After the initial visit, SSA representatives may obtain follow-up information by mail or phone. Income should be reported to your local SSA District Office by the tenth day of the month following the month the income was earned. IRWEs have to be verified by original receipts and canceled checks.

The information must be given to BOTH an SSI representative and an SSDI representative if you are receiving blended payments. This is VERY IMPORTANT because the two programs will NOT share the information with each other. Otherwise, report your earnings or expenses to the program you receive.

### *12) What if I am, or want to be, self-employed?*

If you are self-employed you must write a letter to SSA and complete a self-employment work activity report stating that you are self-employed and your anticipated net annual income. During the trial work period, SSA will evaluate the business net income and total hours worked. During the Extended Period of Eligibility (EPE), SSA evaluates annual net income (minus business expenses) and divides the total by 12 months to determine monthly income. It is important to always maintain detailed records of each month’s earnings and business expenses including invoices, receipts, and other written documentation to support your monthly income statements. SSA will count any month in which you are self-employed for 80 hours or more for purposes of determining the Trial Work Period (TWP), the Extended Period of Eligibility rules, and the calculations of monthly SSI and/or SSDI benefits.

### *13) What if I am blind?*

If you are legally blind, Social Security has special rules for you. Contact your local Social Security office for Working While Disabled rules for the visually impaired.

### ***Private Benefits Income***

Private benefits are purchased by you or your employer. Since every policy is unique, we cannot predict how working will affect your individual private benefits. The information that follows is merely an attempt to guide you in the right direction. We recommend that you contact a benefits counselor or a lawyer if you need help understanding provisions of your policy.

### *14) How might working affect my short-term disability (STD) benefits?*

Specific provisions in the policy determine the effects of working. You should read and understand the following provisions of your policy:

- Will working delay payments?
- How will working affect future eligibility for STD or LTD?
- Will working reactivate another waiting period or pre-existing condition exclusion period?

### *15) How might working affect my long-term disability (LTD) benefits?*

As with STDs, the effects of working are determined by specific provisions in the LTD policy. Because it potentially covers a much longer period of time, more issues are raised. You should read and understand the following provisions of your policy:

- Definition of Disability, especially the Definition of Disability during the first two years versus subsequent years
- Coordination of Benefits
- Recurrent Disabilities
- Partial Disability
- Continuing Disability
- Residual Disability Benefits - note especially whether working affects all future payments even if you stop working.
- Working While Receiving Benefits — if you return to work full-time, does the policy end or can you re-apply in the future for the same benefit?
- Will working reactivate other waiting periods and pre-existing condition exclusion periods?
- Is going to school considered to be the same as working?

If you are starting a job with a new employer that provides an LTD, find out whether or not there is a waiting period to enroll (often three or 12 months) and if the new policy has a pre-existing condition exclusion (often 12 or 24 months).

If you are returning to work while receiving LTD benefits, consider negotiating a CASH SETTLEMENT with the insurer. A benefits counselor can review your policy with you and help determine what it would be worth to the insurer to exclude you from all possibility of future payments. If you do negotiate this type of settlement, it would mean that you could not receive any benefits in the future from them, even if you become disabled again.

## ***MEDICAL BENEFITS***

### ***Government Benefits***

#### *16) What happens to my Medicare when I work?*

If you are an SSDI recipient entitled to Medicare, you will continue to receive Medicare for 93 months after your ninth trial work month, regardless of your earnings. Even once you resume working, Medicare can continue for up to eight years.

If you are not enrolled in Medicare, you can begin receiving benefits once an “entitlement date” has been assigned. The entitlement date begins twenty-four months after an SSA representative has concluded that an applicant is disabled. Medicare will require you to reestablish your disability by submitting the proper forms and evidence. If the Medicare application is approved and an entitlement date assigned, there is a five-month waiting period before monthly benefits begin.

*17) I am on SSI and have Medi-Cal with NO SHARE OF COST. How does working affect my Medi-Cal?*

If you are an SSI recipient, you are automatically Medi-Cal eligible with no “share of cost” (SOC). People who do not qualify for SSI-linked Medi-Cal may qualify for Medi-Cal with or without a share of cost or a paid premium Medi-Cal program. The amount of their SOC depends on their income (see the next question). If you are not entitled to an SSI check because your current earned income is too high but you were receiving SSI checks before you began working, then you may be able to continue your Medi-Cal at no cost. To do this, you must request Extended Medi-Cal under Section 1619(b) at the Social Security office. You must meet the following requirements to qualify for the cost-free extension:

- Meet the disability requirement
- Have received an SSI cash payment within the previous 12 months
- Still meet other non-disability requirements:
  - A. \$2000 or less in countable assets
  - B. Unearned income is under SSI limits
- Need Medi-Cal in order to continue working
- Annual income is below the “threshold” amount, i.e., insufficient to replace SSI and Medi-Cal (2002 threshold was \$25,701 a year)

*18) I have Medi-Cal with a monthly “share of cost” (SOC). How will working affect my Medi-Cal eligibility?*

If you do not receive SSI, your Medi-Cal eligibility is based on a disabling impairment and having countable assets of \$2000 or less. Your monthly SOC is equal to your unearned (SDI, SSDI) monthly income minus \$620. Earned income will increase your SOC by the gross earnings minus \$65 divided by two (as with SSI, however, IRWEs cannot be used to reduce your earned income amount).

People not eligible for free SSI-linked Medi-Cal and who have a large share of cost may be eligible for a buy-in Medi-Cal program called the “250% Medi-Cal Working While Disabled” program. This program provides disabled workers with eligibility for full-scope services by paying low monthly premiums ranging from \$20 to \$250 (for an individual). The maximum allowable income is much higher than that permitted for regular Medi-Cal qualification and excludes all disability-based income. It also allows you to accumulate more money because retirement plans are not considered assets. Consult a benefits counselor if you think you might qualify.

*19) Will I still be eligible for ADAP (the AIDS Drug Assistance Program) if I go back to work?*

ADAP is a state program that provides free and sliding scale HIV medication. Eligibility depends upon your federal adjusted gross annual income and Medi-Cal eligibility (i.e., you must not be eligible for Medi-Cal). Gross annual income includes both earned and unearned income (earned is from employment and unearned is often from a benefit, such as SSI). The total federal adjusted gross income must be less than \$35,920 per year (for a family of one as of April 2003) to receive free medications. If you make between \$35,921 and \$50,000, you may have co-payment obligations and certain other restrictions.

Please note that LTD (Long Term Disability) plans are considered income regardless of whether it was provided to you as an employee benefit or if you bought a policy on your own. Likewise, it makes no difference whether you or your employer pays the premium. It is calculated as income.

### *Private Benefits*

*20) What happens to my COBRA/OBRA when I start working?*

If you go back to work for the same employer, you may be able to revert back to the old premiums and medical coverage. If a person returns to work at the end of his/her disability leave, s/he is entitled to the same medical benefits available prior to leave, unless business necessities led to a reduction in benefits for all employees. There is no waiting period to resume medical coverage, since during leave the employee remained on the employer’s health insurance without interruption.

If you start working for a new employer, your COBRA/OBRA will end when you become eligible for that employer’s health plan. (For more information on OBRA, see Section V, question #36.) If your new employer does not offer health insurance, COBRA requires your group benefits plan to allow you continued coverage for a set period of time. If the reason you are eligible for COBRA is due to a “qualifying event” such as employment termination

or reduction in work hours, the period of time is usually 18 months. Certain qualifying events, or a second qualifying event during the initial period of COBRA coverage, may permit a beneficiary to receive additional months of coverage (with the total coverage period not to exceed 36 months). Some plans provide longer periods of coverage beyond those required by COBRA, so check your policy or ask a benefits counselor.

A COBRA beneficiary may apply for an extension of the standard 18-month period of coverage. To qualify for additional months of COBRA continuation coverage, the qualified beneficiary must:

- Have a ruling from the Social Security Administration that s/he became disabled within the first 60 days of COBRA continuation coverage.
- Send the health insurance plan a copy of the Social Security ruling letter within 60 days of receipt, but prior to expiration of the eighteen-month period of coverage.

If these requirements are met, the entire family qualifies for an additional eleven months of COBRA continuation coverage. People should note, however, that plans can charge 150% of the premium cost for the extended period of coverage.

Remember, there are no income restrictions to qualify for COBRA. To be eligible for COBRA coverage, the client must have been enrolled in his/her employer's health plan when s/he worked, and the health plan must continue to be in effect for active employees. COBRA continuation coverage is available upon the occurrence of a qualifying event that would, except for the COBRA continuation coverage, cause an individual to lose his/her health care coverage. Qualifying events for an employee are:

- Voluntary or involuntary termination of employment for reasons other than gross misconduct.
- Reduction in the number of hours of employment.

## ***VII. Resource List***

### ***Legal Services***

Also contact your county's Bar Association for information on low cost legal services in your area.

#### **AIDS Legal Referral Panel (ALRP)**

1663 Mission St., Ste. 500

[www.alrp.org](http://www.alrp.org)

San Francisco, CA 94103

(415) 701-1100; (510) 451-5353

*Provides legal services for people with HIV/AIDS or with legal problems related to HIV/AIDS.*

**Bar Association of San Francisco**

465 California St., Ste. 1100  
San Francisco, CA 94104  
(415) 989-1616

- *Volunteer Legal Services Program (VLSP) provides free legal assistance to low-income residents of San Francisco.*
- *Lawyer Referral Service (LRS) provides referrals to attorneys.*

**San Francisco Human Rights Commission (HRC)**

25 Van Ness Ave., Ste. 800 [sfgov.org/site/sfhumanrights\\_index.asp](http://sfgov.org/site/sfhumanrights_index.asp)  
San Francisco, CA 94102 [hrc.info@sfgov.org](mailto:hrc.info@sfgov.org)  
(415) 252-2500

*Investigates and mediates complaints of discrimination based on HIV status in employment, public accommodations and housing in San Francisco. Free.*

**Employment Law Center**

600 Harrison St., Ste. 1200 [www.las-elc.org](http://www.las-elc.org)  
San Francisco, CA 94107  
(415) 864-8848

*Free services for low-income workers.*

**East Bay Community Law Center**

3130 Shattuck Ave. [www.ebclc.org](http://www.ebclc.org)  
Berkeley, CA 94705  
(510) 548-4040

*Legal services to Alameda County's low-income community in Housing, Employment, HIV/AIDS, and Economic Development.*

**AIDS Legal Services**

111 West St. John St., Ste. 315 [www.lawfoundation.org](http://www.lawfoundation.org)  
San Jose, CA 95113  
(408) 293-3135

*Legal services to people with HIV/AIDS in Santa Clara County*

### ***Benefits Management***

#### **Positive Resource Center**

785 Market St., 10th Floor [www.positiveresource.org](http://www.positiveresource.org)  
San Francisco, CA 94103  
(415) 777-0333

*Provides counseling, education and advocacy to assist people in San Francisco with HIV/AIDS to obtain benefits and employment opportunities.*

#### **San Francisco AIDS Foundation**

1 Sixth St. [www.sfaf.org](http://www.sfaf.org)  
San Francisco, CA 94102

*Information and referrals for medical care, financial benefits, substance abuse, mental health services, and housing.*

(415) 487-8000

#### **The Hawkins Center / HIV/AIDS Project**

101 Broadway, Ste. 1 [info@hawkinscenter.org](mailto:info@hawkinscenter.org)  
Richmond, CA 94804  
(510) 232-6611

*Legal services for people with disabilities living in Contra Costa County.*

#### **Tri-City Health Center**

39500 Liberty St. [www.avenir1.com/tchc/](http://www.avenir1.com/tchc/)  
Fremont, CA 94538  
(510) 770-8040

*(Serving Fremont, Newark, Union City, and Hayward) Free and low cost medical care, HIV services, health education, pediatric services and women's health care.*

### **Benefits Providers**

#### **AIDS Drug Assistance Program (ADAP)**

(888) 575-2327  
In San Francisco, through the Dept. of Public Health  
(415) 437-4688

#### **Social Security Administration**

(800) 772-1213 [www.ssa.gov](http://www.ssa.gov)  
*Provides income and medical benefits for people with disabilities.  
Call for forms and to schedule an appointment.*

## Government Agencies

### **Federal**

901 Market St., Ste. 500  
San Francisco, CA 94103  
(800) 669-4000; (415) 356-5100  
(415) 356-5098 (TTY)

*Equal Employment Opportunity Commission (EEOC)*

*Federal agency that investigates complaints of employment discrimination based on HIV.*

### **Civil Service Commission**

EEO Unit  
25 Van Ness Ave., Ste. 720  
San Francisco, CA 94102  
(415) 252-3247

### **Department of Education, Office for Civil Rights**

50 United Nations Plaza, Rm. 239  
San Francisco, CA 94102  
(415) 556-4275

## California Government Agencies

### **California Department of Fair Employment and Housing**

121 Spear St., Ste. 430      [www.dfeh.ca.gov](http://www.dfeh.ca.gov)  
San Francisco, CA 94105  
(800) 884-1684; (415) 904-2303

or

1515 Clay St., Ste. 701  
Oakland, CA 94612  
(510) 622-2941

or

111 N. Market St., 8th Floor  
San Jose, CA 95113  
(408) 277-1277

*Investigates complaints of discrimination based on HIV.*

*Provides information on medical leave.*

### **California Department of Insurance**

(800) 927-4357      [www.insurance.ca.gov](http://www.insurance.ca.gov)  
Provides information on viatical settlements.

### **California Labor Commissioner**

Under the CA Dept. of Industrial Relations, Division of Labor Standards Enforcement  
San Francisco  
(415) 703-4810

Oakland, CA (510) 622-3273  
San Jose, CA (408) 277-1266

**Department of Labor, Wage and Hour Division**

(family/medical leave)

San Francisco

211 Main St., Room 341, 94105

(415) 848-6969

Oakland

1301 Clay St., Ste. 1080-N, 94612

(510) 637-2938

San Jose

60 S. Market St., 95113

(408) 291-7384

IAM CARES Employment Referral

2966 Diamond St.

[www.iamcares\\_sf.org](http://www.iamcares_sf.org)

San Francisco, CA 94133

[info@iamcares-sf.org](mailto:info@iamcares-sf.org)

(415) 537.3990

*Employment services for homeless: career counseling, mentoring, job training and placement, temporary employment, and informational interviews.*

Information and Technical Assistance

**Job Accommodation Network**

(800) 526-7234

*Provides free consultation to employers on designing individualized job accommodations.*

**Pacific Disability and Business Technical Assistance Center**

(800) 949-4232

[www.pacdbtac.org](http://www.pacdbtac.org)

[adatech@pdbtac.com](mailto:adatech@pdbtac.com)

*Provides information, problem solving assistance, and referrals to individuals or entities on implementing the Americans with Disabilities Act.*

**Centers for Disease Control**

**National AIDS Clearinghouse**

(800) 458-5231

(800) 243-7012 TDD

*Provides referral, reference and distribution for HIV-related information, including access to databases and electronic bulletin boards.*

**Department of Fair Employment and Housing**

(800) 884-168

*Provides advice, technical assistance and literature to employers and employees on the Fair Employment and Housing Act.*



## *VIII. Appendices*

- A. Sample Request for FMLA Leave: Block of Time
- B. Sample Request for FMLA Leave: Intermittent Leave or Reduced Schedule
- C. Fair Employment & Housing Commission (Certification of Health Care Provider (California Family Rights Act of 1993 (CFRA)))

## A. Sample Request for FMLA Leave: Block of Time

### MEMORANDUM

To: (1)

*(1) Name of Director of Human Resources, Supervisor or another Manager*

From: (2)

*(2) Your Name, Job Title*

Re: Notice of the Need for FMLA/CFRA Leave

Date: (3)

*(3) Today's Date*

This memo is to notify you of my need for leave under the Family and Medical Leave Act and the California Family Rights Act. I require a leave of absence from (4) \_\_\_\_\_ to \_\_\_\_\_. I have a serious health condition that involves continuing treatment by a health care provider. Because of this serious health condition, I am temporarily unable to work during this period of time.

*(4) Fill in these blanks with the start and end date of your leave of absence.*

[Because this serious health condition is chronic and causes episodic periods of incapacity, it was medically necessary for me to take leave on \_\_\_\_\_.]

(5) [I have attached a completed certification from my doctor documenting my need for leave.] It is my understanding that I am eligible for up to 12 weeks of leave per year under the Family and Medical Leave Act and the California Family Rights Act, and that I will be reinstated to my job after my leave. (6) [It is also my understanding that (7) \_\_\_\_\_ will continue my health insurance during my leave.]

*(5) Although medical certification is not required unless your employer requests it, to fully protect your rights, include this sentence and attach the certification. You do not need to disclose your diagnosis to certify your need to take leave – see the CFRA certification form on page XX.*

*(6) Insert the sentence in brackets if you receive health insurance from your employer.*

*(7) Name of employer*

The Family and Medical Leave Act specifies that employers must provide specific, written notice to an employee of rights and responsibilities regarding leave within a few business days of when that employee gives notice of the need for leave. 29 C.F.R. §825.301. I look forward to receiving this information from you.

Please notify me immediately and in writing if you require anything further from me. I appreciate your assistance with this matter.

The Family and Medical Leave Act specifies that employers must provide specific, written notice to an employee of rights and responsibilities regarding leave within a few business days of when that employee gives notice of the need for leave. 29 C.F.R. §825.301. I look forward to receiving this information from you.

## B. Sample Request for FMLA Leave: Intermittent Leave or Reduced Schedule

### MEMORANDUM

To: (1)

*(1) Name of Director of Human Resources, Supervisor or another Manager*

From: (2)

*(2) Your Name, Job Title*

Re: Notice of the Need for FMLA/CFRA Leave

Date: (3)

*(3) Today's Date*

This memo is to notify you of my need for leave under the Family and Medical Leave Act and the California Family Rights Act. I have a serious health condition that involves continuing treatment by a health care provider. (4) [Because of this serious health condition, it is medically necessary to change my work schedule to \_\_\_\_\_.]

*(4) Include this sentence if you need a reduced schedule. Fill in the blank with the schedule your doctor says is medically necessary (e.g., working Monday, Wednesday, and Friday).*

(5) [Because this serious health condition is chronic and causes episodic periods of incapacity, it was medically necessary for me to take leave on \_\_\_\_\_.]

*(5) Include this sentence if you missed work for a day or two because of your HIV infection or related illnesses. Fill in the blank with the day(s) you missed. Provide this notice as soon as possible, but no later than one or two days after you took your leave*

(6) [Because this serious health condition is chronic and causes episodic periods of incapacity, it is medically necessary for me to take leave when I am temporarily incapacitated due to this condition.]

*(6) Include this sentence if your doctor certifies that in the future, HIV or related illnesses will make you too sick to work for a day or so*

(7) [I have attached a completed certification from my doctor documenting my need for leave.]

*(7) Although medical certification is not required unless your employer requests it, to fully protect your rights, include this sentence and attach the certification. You do not need to disclose your diagnosis to certify your need to take leave – see the CFRA certification form on page 17.*

It is my understanding that I am eligible for up to 12 weeks of leave per year under the Family and Medical Leave Act and the California Family Rights Act, that intermittent leave may be taken in increments as short as one hour, that only the amount of intermittent leave taken may be counted as FMLA/ CFRA leave, and that I will be reinstated to my job after my leave. (8) [It is also my understanding that (9) \_\_\_\_\_ will continue my health insurance during my leave.]

*(8) Insert the sentence in brackets if you receive health insurance from your employer.*

*(9) Name of employer*

The Family and Medical Leave Act specifies that employers must provide specific, written notice to an employee of rights and responsibilities regarding leave within a few business days after that employee gives notice of the need for leave. 29 C.F.R. §825.301. I look forward to receiving this information from you. Please notify me immediately and in writing if you require anything further from me. I appreciate your assistance with this matter.

Title 2 Fair Employment and Housing Commission §7297.11  
Fair Employment & Housing Commission  
Certification of Health Care Provider  
(California Family Rights Act of 1993 (CFRA))

1. Employee's Name \_\_\_\_\_
2. Patient's Name (If other than employee) \_\_\_\_\_
3. Date medical condition or need for treatment commenced [NOTE: THE HEALTH CARE PROVIDER IS NOT TO DISCLOSE THE UNDERLYING DIAGNOSIS WITHOUT THE CONSENT OF THE PATIENT]: \_\_\_\_\_
4. Probable duration of medical condition or need for treatment:
5. The attached sheet describes what is meant by a "serious health condition" under both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). Does the patient's condition qualify under any of the categories described? If so, please check the appropriate category.  

(1) (2) (3) (4) (5) (6)
6. If the certification is for the serious health condition of the employee, please answer the following:

Yes	No	
<input type="checkbox"/>	<input type="checkbox"/>	Is employee able to perform work of any kind? (If "No", skip next question.)
<input type="checkbox"/>	<input type="checkbox"/>	Is employee unable to perform any one or more of the essential functions of employee's position? (Answer after reviewing statement from employer of essential functions of employee's position, or, if none provided, after discussing with employee.)
7. If the certification is for the care of the employee's family member, please answer the following:

Yes	No	
<input type="checkbox"/>	<input type="checkbox"/>	Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety or transportation?
<input type="checkbox"/>	<input type="checkbox"/>	After review of the employee's signed statement (see Item 10), does the condition warrant the participation of the employee? (This participation may include psychological comfort and/or arranging for third-party care for the family member.)
8. Estimate the period of time care is needed or during which the employee's presence would be beneficial: \_\_\_\_\_

9. Please answer the following question only if the employee is asking for intermittent leave or a reduced work schedule.

Yes      No

- Is it medically necessary for the employee to be off work on an intermittent basis or to work less than the employee's normal work schedule in order to deal with the serious health condition of the employee or family member?
- If the answer to 9 is yes, please indicate the estimated number of doctor's visits, and/or estimated duration of medical treatment, either by the health care practitioner or another provider of health services, upon referral from the health care provider.

**ITEM 10 IS TO BE COMPLETED BY THE EMPLOYEE NEEDING FAMILY LEAVE.**

**\*\*\*TO BE PROVIDED TO THE HEALTH CARE PROVIDER UNDER SEPARATE COVER.**

10. When family care leave is needed to care for a seriously-ill family member, the employee shall state the care s/he will provide, and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced work schedule

11. Signature of health care provider: \_\_\_\_\_

Date: \_\_\_\_\_

A "Serious Health Condition" means an illness, injury, impairment, or mental condition that involves one or more of the following:

**1. Hospital Care**

Inpatient care (e.g., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care.

**2. Absence Plus Treatment**

1. A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of absence relating to the same condition), that also involves:

(1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, health care provider, or

(2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

**3. Pregnancy**

Any period of incapacity due to pregnancy or for prenatal care.

[NOTE: An employee's own incapacity due to pregnancy is covered as a serious health condition under FMLA but not under CFRA. Pregnancy disabilities are also covered under the Pregnancy Disability Act.]

#### **4. Chronic Conditions Requiring Treatment**

A chronic condition which:

- (1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider.
- (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- (3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

#### **5. Permanent/Long-term Conditions Requiring Supervision**

A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

#### **6. Multiple Treatments (Non-Chronic Conditions)**

Any period of absence to receive multiple treatments (including any period of recovery thereafter) by a health care provider or by a provider of health care services under order of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity for more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).