# EMPLOYMENT DISCRIMINATION

## Table of Contents

I. INTRODUCTION ...............................................................................................................1
II. A Picture of HIV-Based Discrimination in the Workplace .................................................4
III. Strategies: Before Filing a Lawsuit.....................................................................................6
   A. Disability-based litigation is rare.............................................................................6
   B. Deciding whether to reveal HIV status to an employer...........................................7
   C. Litigation vs. negotiation ........................................................................................8
   D. Non-viable statutory claims .....................................................................................8
   A. Employers Covered by the ADA and the Rehabilitation Act................................10
   B. Employee and applicant coverage .........................................................................10
      1. Disability................................................................................................... 11
      2. Qualified individual .................................................................................. 12
   C. Prohibited practices................................................................................................13
      1. Specific practices ...................................................................................... 13
   D. Issues of association, harassment, and retaliation..................................................15
      1. Association................................................................................................ 15
      2. Harassment and retaliation........................................................................ 15
   E. Reasonable accommodation...................................................................................16
      1. Reasonable accommodation in the application process............................ 16
      2. Reasonable accommodation to perform essential functions of the job................ 16
      3. Family Medical Leave Act Considerations..................................................17
      4. Reasonable accommodations to provide equal benefits and privileges... 18
   F. Employer defenses.................................................................................................18
      1. Undue hardship for the employer ............................................................. 18
      2. Direct threat to health and safety .............................................................. 19
   G. Other provisions relating to hiring and selection...................................................21
      1. Selection criteria and test administration.................................................. 21
      2. Medical history and examinations ............................................................ 22
   H. Remedies................................................................................................................23
   I. Enforcement overview...........................................................................................24
   J. EEOC timeline.......................................................................................................26
      1. Normal filing............................................................................................. 26
      2. Speedy RSL only ...................................................................................... 27
      3. RSL amended complaint........................................................................... 27
V. California Law: The California Fair Employment and Housing Act ...............................27
   A. Employers covered by FEHA ............................................................................28
   B. Employee and applicant coverage .........................................................................28
      1. Definition of employee disability ................................................................ 28
      2. Coverage of HIV ....................................................................................... 29
C. Employment practices prohibited by FEHA
   1. Essential duties
   2. Reasonable accommodation
   3. Pre-employment screening and medical exams
   4. Harassment
D. Employer defenses
   1. Employee’s inability to perform
   2. Danger to health and safety
   3. Bona Fide Occupational Qualification (BFOQ)
   4. Discrimination otherwise required by law
E. Administrative procedures and remedies

VI. Comparison of Enforcement Procedures and Remedies Available Under the ADA and FEHA
A. Enforcement procedures
   1. Choosing to file a state or federal claim
   2. Choosing between state and federal courts
B. Remedies

VII. Local Ordinances Prohibiting Employment Discrimination
A. San Francisco
   1. Covered entities
   2. Prohibited employment practices
   3. Employer defenses
   4. Remedies
B. Contra Costa County
   1. Covered entities
   2. Prohibited practices
   3. Employer defenses
   4. Remedies
C. Alameda County
   1. Covered entities
   2. Prohibited practices
   3. Employer defenses
   4. Remedies
D. San Mateo County

VIII. Other Causes of Action
A. Workplace based rights
   1. Breach of contract and wrongful termination
   2. Insurance/employee benefits
   3. Public policy
B. Right of privacy and constitutional issues

APPENDICES
Appendix A: Letters to obtain reasonable accommodations
Appendix B: Case Summaries
Appendix C: Federal Rehabilitation Act — Filing a Complaint
EMPLOYMENT DISCRIMINATION

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I. INTRODUCTION

Despite a web of federal, state, and local laws prohibiting discrimination in employment on account of disability, persons with AIDS and HIV infections continue to be the victims of illegal employment practices. These practices include failure to hire, illegal testing, demotion, transfer, harassment, failure to stop harassment, denial of leave, and termination. The majority of calls to ALRP come after an employee has been harassed by co-workers, was terminated because of an absence when he was caring for someone else, such as a friend or lover, or was terminated while suddenly absent due to his own illness, especially if he was unable to call in.

During 1994, over 200 clients sought attorney assistance through ALRP to deal with employment discrimination. They accounted for over 7% of ALRP’s total caseload. (This does not include discrimination claims based on work-related Insurance and Employee Benefits, which are discussed in that chapter.) We can only guess at the additional number of people in the Bay Area who were not able to ask for our help.

The consequences of workplace discrimination against people with HIV are severe and far-reaching. When it occurs, the victims, who may also be facing a disabling medical condition, must then cope with the loss of income and medical benefits. Simultaneously, they must deal with the loss of the structure and support available from their jobs. Moreover, our workplaces and communities are deprived of their talents and contributions.

Because of the frequency and high impact of employment discrimination, ALRP attorneys have a big role to play in assisting clients. Beyond learning the basics of laws protecting people with HIV, it is important that our volunteer attorneys educate our clients about their rights. Employment discrimination laws are complicated, and not all cases will be viable. Nonetheless all clients should understand the dimensions of available protection.

HIV-related workplace discrimination covers more than just firing someone known to have AIDS. Examples provided below show that discrimination can range from unintentional bias to outright harassment and retaliation. This can occur anytime in the job cycle, from the filing of an application to the denial of benefits once a job is terminated. We outline the federal and state laws prohibiting this discrimination, and

¹ Employment law changes often, and sources should be consulted if you are unfamiliar with this area of law. Special thanks to the research of Ann Blessing, Esq., and Karen Mandel, and information from ALRP Client Services Director Ron Hypolite, Esq., and Peter Janiak, Esq., at the EEOC. Any misinterpretation of their facts is my own.

The 2004 version of this chapter was updated by Richard D. Schramm, Esq. of Employment Rights Attorneys in San Jose, CA.
discuss important cases. Next we define the terms basic to understanding employment-based disability law, such as “disability” itself and “reasonable accommodation,” and what they mean when someone has HIV.

In order to adequately assist a client, however, an attorney must understand whether the client has a viable case; he must also be able to follow the complicated administrative procedures that pertain to employment law. Thus, this chapter also includes information to help the attorney decide how to use a government investigatory agency to obtain support for his case. We then detail what to expect from the agency after the claim has been filed, and how that agency’s actions relate to a possible lawsuit.

Whether the attorney and the employee end up pursuing their claim as far as the courts, however, may depend on non-legal issues. First, the discrimination may be easy to stop without a lawsuit. If the employer didn’t know she was breaking the law, simple notice of the fact may be sufficient. For that purpose, we include sample letters an attorney can use to alert the employer to the problem. Negotiations subsequent to such notification could provide all that a client needs from the employer, whether that means a reasonable accommodation if he wants to keep on working, or sufficient post-termination benefits if the client does not want to keep his job.

There is a second non-legal reason why lawsuits may not be the answer: they often entail a great deal of stress, which may be too much for an employee who is very ill. The stress may be increased in cases where he is likely to be harassed on the job by co-workers sympathetic to the employer. Moreover, a lawsuit will likely make the plaintiff’s HIV status common knowledge, possibly adding to the stress. The client’s attorney must be able to discuss with him what could happen if he files a claim.

Legal technicalities can also easily forestall suits: anti-discrimination laws have short statutes of limitations, and in many cases it is difficult to prove certain facts or the requisite disability-based motivation. In the face of these difficulties, a wronged client might consider several alternate tort actions, described at the end of the chapter. We will also refer, when relevant, to other chapters in this manual which discuss laws relating to Insurance, Employee Benefits, and Confidentiality.

Despite strong laws to protect workers, discrimination continues in all employment contexts. For this reason, ALRP hopes to recruit increasing numbers of volunteer attorneys to help clients. In addition to written materials such as this chapter, ALRP provides free training sessions taught by experienced attorneys in both government and private practice. With this support, ALRP can help its volunteer attorneys understand the complex law of employment discrimination and choose the best strategy to help their clients.

II. A Picture of HIV-Based Discrimination in the Workplace

Discrimination can occur throughout the employment process: at the time of applying for a job, when seeking training and promotions, during distribution of employee benefits, and in the face of termination. An attorney can assist a client before discrimination has even occurred. For example, she can talk to an asymptomatic client before he informs his employer of his HIV-positive status about the employer’s possible
reactions. Or, she can help a client negotiate for reasonable accommodations. The attorney can also help, of course, by identifying discrimination after it has happened. For example, she can assist a worker whose insurer has revealed confidential medical information, or who is being harassment by a supervisor or co-workers.

Here are some examples of employment discrimination ALRP has come across:

1. Employment Application Process
   (a) An employer asks an applicant whether the applicant has any disabilities that would prevent the applicant from performing the essential duties of the position.
   (b) An HIV-positive applicant is made an offer of employment conditioned on the results of a medical examination. The employer withdraws the offer because HIV-negative status is required by the employer, but the employer cannot show that HIV-negative status is job related and consistent with business necessity.

2. Negotiation of Reasonable Accommodation
   (a) An employer knows that an employee is HIV positive and refuses to modify the employee’s work schedule to accommodate the employee’s medical treatment schedule, even though doing so would cause no undue hardship to the employer.
   (b) A school terminates an administrator with pneumocystis who can no longer work overtime, although she can perform the essential functions of the job.

3. Confidentiality/Privacy
   (a) An employer files a pre-employment medical examination record in the employee’s personnel file and it becomes public knowledge that the employee is HIV positive. A supervisor begins pressuring him to quit his job.
   (b) A restaurant fires a waiter after his physician, while eating in the restaurant, casually tells the owner that the worker has AIDS.
   (c) The ex-lover of an employee who is HIV positive threatens to go to the employee’s boss with the information.

4. Harassment
   (a) An employer learns of an employee’s HIV-positive status and moves the employee to a separate workroom so that the employee does not “infect” other employees or disrupt productivity because of other employees’ concerns.
(b) An employee with HIV disease is constantly harassed by fellow employees on the job and the employer does nothing to prevent the harassment.

(c) An employee begins to wear “protective hospital garb” of mask and rubber gloves into the office each day after learning a co-worker lives with a person with AIDS.

5. Wrongful Termination

(a) An employee who works in the food service industry is fired after his employer discovers that he is HIV positive. The employer states that the employee is a risk to the health and safety of customers because they might be infected with HIV disease through contact with food.

(b) An employee with HIV disease can no longer perform some marginal task of the position and is fired even though the employee can still perform the essential functions of the position.

(c) An employee who does volunteer work with AIDS patients is fired because the employee’s regular employer fears that the virus will be spread to other employees.

(d) A large restaurant terminates its executive chef while he is recuperating in the hospital from a first bout of pneumocystis.

6. Other Scenarios

(a) An employer discovers an employee is HIV positive, and limits only that employee’s health insurance benefits.

(b) An employer adopts an unwritten practice of not training or promoting persons with HIV disease because he believes employees with HIV “won’t be around very long.”

(c) A shop owner denies new clients to a gay hairstylist with herpes out of fear the customers would think the hairstylist has AIDS.

III. Strategies: Before Filing a Lawsuit

A. Disability-based litigation is rare

Despite fears of big business, the courts see relatively few cases asserting employment discrimination based on disability. This is especially true for HIV-infected individuals. Officials of the regional Equal Employment Opportunity Commission (EEOC) note that, nationwide, only a tiny percentage of its current cases relate to people with HIV. Yet each year ALRP encounters hundreds of people in the Bay Area alone who face this problem. It seems this discrimination is going unchallenged, at least in the courts. Several reasons could explain this.

People with HIV may not know laws exist that protect people with disabilities from discrimination in employment, housing, education and public access. When they do
know about the laws, it’s easy to see why they might not realize they apply to people with HIV: these laws initially used the term “physically handicapped,” which doesn’t imply much protection when the disease manifests itself internally. People who are asymptomatic, or have HIV disease but are quite capable of working, face stronger doubts about coverage.

The prejudice against people with AIDS and HIV also discourages them from pursuing their rights. In the face of active abuse from an employer, people with HIV often receive little support from family, community or the government. Without that support, it is difficult to go through the complex and draining rigmarole of filing charges and proceeding to court.

B. Deciding whether to reveal HIV status to an employer

Awareness of the prejudices leads to many ALRP calls with the question of whether an asymptomatic worker should reveal his status. Often a specific situation has arisen that makes this revelation seem advantageous as, for example, when the worker wants to volunteer for an experimental treatment plan that demands time outside of the office. ALRP generally counsels against a worker revealing his status unless necessary. In our experience, employers are usually not as supportive as the situation requires.

In the worst cases, the boss fired the worker immediately upon being told he was HIV positive. This was obviously illegal, as well as cruel. Just as cruel, but perhaps less obviously illegal, were cases where the boss was sympathetic, but still broadcast the news to everyone, and allowed co-workers to harass the employee. A boss who is initially sympathetic may also, as the worker’s needs increased, or as the employer thought further about the situation, decide she has no further use for the worker, and stop providing support and ultimately a job.

Generally, because of the potential for these problems, it is best to refrain from telling the employer until the worker has symptoms that make his illness apparent. People with HIV are living increasingly longer and healthier lives, probably far surpassing the predictions of those unaware of recent medical progress. An employee who is asymptomatic or at least working up to par should not make himself vulnerable to an employer’s unknown prejudices.

But once his HIV disease is at all apparent, the worker needs to reveal his status for several reasons. First, the employer needs to know the nature of any disability before she can devise the legally required “reasonable accommodations,” such as time off from work or a change in job functions. Second, the worker should tell the employer of his condition if he is harassed by co-workers or supervisors, because the employer is required to protect the worker. Third, even if the symptoms are only just beginning to become apparent, the boss may have already figured out that the worker has HIV, and initiated discriminatory actions against him. If the worker ever needs to sue his boss, he has to prove the boss knew of the disability. Lack of this evidence often stops lawsuits. Therefore, if he tells his boss orally the worker should follow up with a written statement. Finally, the employer should also be officially told the worker’s HIV status whenever the
worker takes any legal actions. This construes any future harassment as “retaliation,” which is easier to demonstrate and provides greater remedies than simple discrimination.

C. Litigation vs. Negotiation

Instead of the expected litigation, claims of HIV-based discrimination often end in settlement, initiated by employers, claimants, or third parties. In the simplest case, an employer may have been unaware she was breaking the law. Once notified, she’ll try to solve the problem by providing reasonable accommodations, or granting basic benefits. Appendix A contains a sample demand letter to help an attorney pursue these possibilities.

Anti-discrimination agencies also encourage employers and claimants to settle. Federal law requires the EEOC to actively attempt conciliation when a claimant has filed supportable discrimination charges with that agency. EEOC procedures are discussed in more detail below.

The victimized claimant often also prefers to avoid a prolonged court case. For one thing, if he has an advanced case of AIDS, a lengthy court battle can be very demanding, both physically and mentally, and he may want to devote his energy to preserving his health.

Moreover, settlements offer the opportunity to obtain a reward which, although smaller, is crafted to his individual needs. Extremely high medical bills may make reinstatement of health and disability insurance a higher priority than getting one’s job back, or even receiving deserved compensatory or punitive damages. And, of course, a settlement today is more certain than tomorrow’s uncertain jury award. If he has an advanced case of AIDS, a high reward to his estate provides less security than receiving otherwise unavailable benefits. Thus, even an egregious case of discrimination might lead a claimant and his attorney to pursue litigation solely to negotiate a more just settlement.

Finally, a claimant and his attorney might seek a settlement for more general, political reasons: facing a more conservative government, future laws and regulations may tighten up. It might be better to seek a settlement sooner than risk possible changes that diminish one’s rights later.

But litigation has its place. If facing an intransigent employer, it may be the only option. Litigation is also sometimes supported by third parties. Because of the relative newness of the Americans with Disabilities Act, staff of the Northern California Equal Economic Opportunity Commission are seeking out HIV discrimination cases in order to establish consistent federal case law. If you do have a case, be sure to notify them.

D. Non-viable statutory claims

Unfortunately, disability discrimination laws have short statutes of limitations. Moreover, they often have tough evidentiary requirements: Did anyone else overhear a co-worker’s oral harassment? Can the claimant prove the employer knew about his disability? Will the claimant be able to get hold of some crucial piece of evidence before
his employer destroys it? In these cases, the employee may still prevail under other statutes or a private cause of action with less stringent requirements.

When an ALRP employment attorney consults with a client who does not have a viable legal case, the attorney still has a valuable service to offer. By thoroughly explaining why the case cannot be pursued, the attorney can educate the client about his rights. Few people know the rules of disability law, and although this particular claim may not have merit, other aspects of the law may apply.


It is now accepted that people with disabilities need to have their civil rights safeguarded. The most thorough federal protections lie with the Federal Rehabilitation Act of 1973 and the subsequent and more broadly written Americans with Disabilities Act.

The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., provides comprehensive federal protection for individuals with disabilities. Enacted in 1990, the ADA covers several major areas of employment discrimination, as well as access to public services. Only the sections relating to employment situations will be covered here: Title I of the ADA prohibits discrimination against individuals with disabilities by private employers, unions and employment agencies, when any of these groups has 15 or more employees; Title II prohibits discrimination by all state and local governments. Although the ADA is a federal act, it does not itself cover the federal government.

The ADA gives the Equal Employment Opportunity Commission (EEOC) a broad mandate to enforce and interpret the act. 29 C.F.R. § 1630 et seq. The EEOC’s Americans with Disabilities Handbook (EEOC Book #15, published Sept. 1992) explains the agency’s rules and guidelines and is the primary source of analysis.

Despite the newness of the ADA, interpretation of much of the law is relatively clear because it is modeled after the Federal Rehabilitation Act of 1973 (the Rehabilitation Act or the Act). 29 U.S.C. § 701 et seq. Moreover, the courts have applied the 30 years of regulations and cases developed under the Rehabilitation Act to the ADA. Thus, the definition of “handicapped” established under the Act also applies to the ADA’s “disability.”

In the case of HIV, persons with HIV disease have been established as handicapped for purposes of the Rehabilitation Act. Chalk v. United States District Court, 840 F.2d 701 (9th Cir. 1988). (This important case is summarized in APPENDIX B.) This includes both symptomatic and asymptomatic HIV disease. Doe v. District Of Columbia, 796 F.Supp. 559 (D.D.C. 1992). EEOC guidelines also treat HIV disease as a “substantially limiting impairment” under the ADA definition of disability.

Interpretations of the ADA and the Rehabilitation Act also converge because the Rehabilitation Act Amendments of 1992 require that substantive issues relating to employment discrimination under the ADA and § 501, § 503 and § 504 of the Rehabilitation Act be uniformly resolved. Thus, the following discussion primarily cites
ADA statutes and guidelines, but where the Rehabilitation Act differs, distinctions are pointed out.

A. Employers Covered by the ADA and the Rehabilitation Act

The Rehabilitation Act and the ADA generally cover different types of employers. However, many employers are covered by both laws. A particular employer might also be covered by other federal laws, or state or local law, and these laws might provide a better forum than either the Act or the ADA for certain claims. (State and local laws are covered in later sections of this chapter. See Section VII: Local Ordinances.)

EEOC rules define “covered entity” under Title I of the ADA as “any employer, employment agency, labor organization, or joint labor commission” with 15 or more employees as of July 1994. Title II of the ADA applies to all state and local governments, regardless of size, as well as elected officials and their staffs. 29 C.F.R. § 1630.2(b). Discrimination is barred whether perpetrated directly by the employer or other covered entity, or through an arrangement with a third party such as a union or an insurer. § 12111(2). The law does not cover the United States government or tax-exempt private membership clubs. 29 C.F.R. § 1630.2 (e)(2).

Religious organizations, however, are not exempt and must therefore comply with the ADA. They may not discriminate against a qualified disabled individual who “satisfies the permitted religious criteria.” 29 C.F.R. § 1630.16(a). A religious organization may also require applicants and employees to conform to the particular tenets of the religion, and may give preference to persons who are of that organization’s particular faith when making employment decisions. It should be noted, however, that since volunteers are not employees, they are not covered by the ADA or any other employment law. 42 U.S.C. § 12111(2)(b) and § 12111(4).

The Rehabilitation Act prohibits discrimination on the basis of disability in any aspect of the employment setting by: federal agencies (§ 501 of the Rehabilitation Act); federal contractors having contracts of $10,000 or more with the federal government (§ 503); and recipients of federal financial assistance (§ 504). 29 U.S.C. § 791, § 793, and § 794. Thus the Rehabilitation Act applies only to federal employers, federal contractors, and recipients of federal financial assistance. This covers many employees, however, since the Act covers federal executive agencies, federal subcontractors, and the departments of state and local governments that receive or distribute federal funds. This is particularly important since the ADA only applies to private employers with 15 or more employees. Therefore, small private agencies that receive federal funds are covered by the Rehabilitation Act, even though they are too small to be covered under the ADA.

B. Employee and applicant coverage

Under the ADA, “no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual.” 42 U.S.C. § 12112(a). “Qualified individual” is generally defined as a disabled person who, with or without reasonable accommodation, can perform the essential functions of the job.
1. Disability

Section 12102 of the ADA defines people with a “disability” as:

- those with a physical or mental impairment that substantially limits one or more major life activities of such individual;
- those with a record of such impairment; or
- those regarded as having such impairment.

The EEOC guidelines further clarify the three categories of disability:

“Physical or mental impairment” includes any physiological disorder, condition, cosmetic disfigurement, or anatomical loss affecting one or more of these body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech) organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin or endocrine; or any mental or psychological disorder, including mental retardation, learning disabilities, organic brain syndrome, or mental or emotional illness. (It does not include pregnancy.)

“Substantial limitation” means that the disability impairs or “significantly restricts” the person’s ability to perform a major life activity. An “average person” standard is used to make this determination and medication, assistive devices, or other factors are not considered.

“Major life activities” include, but are not limited to, such functions as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2. EEOC guidelines consider HIV a substantially limiting impairment that affects one or more major life activities, satisfying the criteria of the first definition of disability.

A record of such impairment arises when an individual has been previously treated for a disability and a record of the condition has been produced, or where a person is misclassified as having a disability. For example, an employer who discriminates on the basis of information in a medical, educational, or employment record has violated the ADA whether or not the record is accurate. The intent of this provision is to ensure that individuals are not discriminated against because of a history of a disability. 29 C.F.R. § 1630.2(k).

“Regarded as” having a disability refers to an employee who is discriminated against and can show that an employer erroneously relied on false information or belief in making an employment decision in one of the following ways:

(a) The person has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as having such a limitation.

(b) The person has a physical or mental impairment that substantially limits major life activities only as a result of attitudes of others toward such impairment.
(c) The person has no impairments that substantially limit a major life activity but is treated by an employer as having a substantially limiting impairment.

Definition (c) applies to people who are perceived as high risk for HIV infection. For example, if an employer does not hire, fails to promote, or terminates a gay or bisexual man because he erroneously thinks the man has HIV, the employer has violated the ADA. 29 C.F.R. § 1630.2(1). But if the employer discriminates against the employee because of his sexual preference, regardless of whether the employer thinks the employee has or might get HIV, the employer has not violated the ADA. (The employer might, however, have violated state or local laws banning discrimination based on gender preference.) Homosexuality and bisexuality are specifically excluded from the disability definition, along with transvestitism, transsexualism, sexual behavior disorders, compulsive gambling, and pyromania. 29 C.F.R. § 1630.3(d-e).

The ADA’s protections also do not extend to individuals with current substance-related disorders, who use illegal drugs or who use prescription drugs illegally. However, individuals who no longer use drugs illegally are enrolled in treatment programs, or have completed professionally supervised treatment programs, are not excluded from ADA protection. 29 C.F.R. § 1630.3, guidelines. Also, individuals disabled by alcoholism are entitled to protection under the ADA. 29 C.F.R. § 1630.16(b).

2. Qualified individual

A “qualified individual” is defined as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). These definitions derive originally from the Rehabilitation Act. A two step process determines whether an individual with a disability is a qualified person for employment purposes under the ADA.

(a) Job Criteria First, the individual must meet the prerequisites of the position, including education, employment experience, skills, licenses, and “other job related experience.” The requirements cannot be “pretextual,” so as to exclude those with disabilities. This determination is the same issue as whether a person is “otherwise qualified” for a position under Rehabilitation Act case law. 29 C.F.R. § 1630.2(m).

(b) Essential Job Functions Second, the individual must be able to perform the essential functions of the position. “Essential functions” are defined by EEOC guidelines as “those functions that the individual who holds the position must be able to perform unaided or with the assistance of reasonable accommodation.” (See SECTION E: REASONABLE ACCOMMODATION.)

A job function is essential if:

(1) the position exists to perform the function; or

(2) a limited number of employees are available among whom performance of that job function can be distributed; or
If an employer asserts that a function is essential and is found to actually require the person to perform the function, the inquiry will then focus on whether removing the function would fundamentally alter the position. If it does not, then the function is not essential.

Whether a job function is essential is a question of fact determined on a case-by-case basis. Evidence of essential function includes: the employer’s judgment, written job descriptions prepared prior to interviewing applicants, amount of time spent on the job performing the function, the consequences of not requiring the applicant to perform the function, the terms of collective bargaining agreements, the work experience of past employees in the job, and the current work experience of employees in similar jobs. 29 C.F.R. § 1630.2(n)(3). Other types of evidence are equally relevant. A person may not be discriminated against because he or she cannot perform some marginal task associated with the job. An employer must show that employees in a certain position are actually required to perform duties that the employer asserts are essential.

Qualification for a position is determined at the time of the employment decision. An employer may not refuse to hire an individual for fear that the person may be unable to adequately perform due to future health complications or may lead to a future increase in insurance costs. 29 C.F.R. § 1630.2(m).

EEOC rules do not question an employer’s judgment as to qualitative or quantitative production standards, and do not require employers to lower standards that are actually applied. For example, an employer may require ten units of production per hour and will not be questioned why eight is not sufficient provided the requirement is applied uniformly. If, however, an employee alleges that the employer chose the standard so as to exclude persons with disabilities, the employer may be called upon to produce a nondiscriminatory reason for its standard. 29 C.F.R. § 1630.2(n), guidelines.

C. Prohibited practices

1. Specific practices

   Title I of the ADA applies to all phases of the employment process. 29 C.F.R. § 1630.4. The Title specifies that employers cannot discriminate on the basis of a disability during:

   Recruitment, advertising, and job application.

   Hiring, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring.

   Pay rate or other compensation; changes in compensation.

   Job assignment, classifications, organizational structures, position descriptions, lines of progression, and seniority lists.

   Leave of absence, sick leave, or any other leave.
Fringe benefits, available by virtue of employment, whether or not administered by the employer.

Selection and financial support for training, including: apprenticeships, professional meetings, conferences, and selection for leaves of absence to pursue training.

Sponsored activities including social and recreational programs.

Any other term, condition, or privilege of employment.

Title II (regarding state and local governments) simply prohibits all discrimination in all aspects of the employment setting. 42 U.S.C. § 12131 - § 12164.

Under the ADA, employers are prohibited from limiting, segregating or classifying a job applicant or employee in any way that affects his or her employment opportunities or status. Segregated buildings, offices, bathrooms or lunchrooms are not permitted. Separate tracks of job promotion or progression for employees with disabilities violate the ADA. Employers may not refuse employment to individuals based on fears associated with a person’s disability or speculation that such a person will be absent from the job frequently. 29 C.F.R. § 1630.5.

Benefit plans also may not differ for people with disabilities except where plans, such as insurance coverage, are differentiated based on sound actuarial principles, and there’s a demonstrated relationship between insured risk and level of liability. 29 C.F.R. § 1630.16(f). (See also Carparts v. Automotive Wholesale Assoc., 3 Ad Cases 1237 (1994), where the U.S. Court of Appeals, 1st Circuit, confirmed that a benefits plan administrator was the employer, and thus covered under Title I of the ADA, for the purpose of a challenge to a cap on HIV-related benefits.) (For more discussion of insurance, see CHAPTER 6: INSURANCE.)

An employer may not enter into a contract which has a discriminatory impact on its own applicants or employees. For example, if an employer contracts with another organization to provide a service such as employee training, the employer must also provide reasonable accommodation that enables employees with disabilities to access that training.

The Rehabilitation Act also covers all terms of employment, including recruiting, interviewing, hiring, prerequisites and termination.

It is important to note that it is irrelevant whether the employer intends to discriminate against people with disabilities prior to treating them differently. Discriminatory treatment with intent is clearly illegal. But federal laws also prohibit uniform employment actions that merely result in discriminatory effect or impact on people with disabilities.

An example of discriminatory intent is when an employer refuses to hire anyone who is HIV positive despite their qualifications for the job. The employer might assert a legitimate non-discriminatory reason such as an employee’s poor history of job performance unrelated to the disability. However, this defense can be rebutted if the alleged non-discriminatory reason is shown to be pretextual.
This type of discrimination is known as disparate treatment under Civil Rights law. Defenses against disparate treatment charges under Title VII of the Civil Rights Act may be applicable to the ADA. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). 29 C.F.R. § 1630.15(a), guidelines.

On the other hand, an employer who uses uniformly applied criteria that adversely affect disabled applicants is causing disparate impact. Under the ADA, this kind of selection criteria is only allowed where it is job-related and consistent with business necessity. ADA § 102 (b)(6). For example, if an employer uses criteria that tend to screen out persons with disabilities (such as requiring a driver’s license), the employer will have to show job-relatedness (the position requires driving) and business necessity (the business is a delivery service). Even where the employer satisfies these requirements, she will be required to provide a reasonable accommodation if feasible.

Some uniformly applied policies are not subject to disparate impact challenges, such as “no leave” policies (e.g., no leave allowed during the first six months of employment). However, an employer may be required to consider allowing a leave of absence during a no-leave period as a reasonable accommodation, unless doing so would cause undue hardship. 29 C.F.R. § 1630.15(c), guidelines.

As a final note, case law generated under the Rehabilitation Act and adopted in the ADA jurisprudence defines “business necessity” as more than “mere expediency.” For example, a disqualifying physical standard must substantially promote the performance of the job in order to be consistent with business necessity. School Bd. of Nassau Co., Fla. v. Arline, 480 U.S. 273, 94 L. Ed. 2d 307, 107 S.Ct. 1123 (1987).

D. Issues of association, harassment, and retaliation

1. Association

Title I of the ADA also protects individuals who are associated with a person with a disability. A prospective employer may not discriminate against a person who lives with or is related to a person with a disability for fear they will miss work or have to leave frequently. A person who volunteers time with HIV patients is also protected. 29 C.F.R. § 1630.8.

2. Harassment and retaliation

The ADA also forbids retaliation against individuals because they filed suit under the ADA or opposed discriminatory employment practices. Such opposition includes: making a charge, testifying, or participating in an investigation, proceeding, or hearing to enforce any provision of the ADA. An employer or agent may not coerce, intimidate, threaten, or harass any individual who aided or encouraged the exercise of rights under the ADA. 29 C.F.R. § 1630.12.

This would imply that an employer must maintain a harassment free environment, and would be responsible for prohibiting non-disabled employees from persecuting or molesting an employee with a disability.
E. Reasonable accommodation

An employer is required to attempt reasonable accommodation for a qualified individual prior to making an employment decision, such as hiring, transfer to a different position or termination. An accommodation can consist of a change in the work environment or a procedural variation that allows a disabled person equal access to equal employment opportunities. There are three purposes for a reasonable accommodation:

- to ensure equal opportunity in the application process;
- to enable the employee with a disability to perform the essential functions of the position held or desired; and
- to enable the employee with a disability to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. 29 C.F.R. § 1630.2(o).

Employees may look to the factors below to determine whether an employer met its burden. Primary consideration should be given to the preference of a disabled employee. However, employers have discretion to choose among effective accommodations. The “best” or most expensive accommodation available is not required. 29 C.F.R. § 1630.9.

1. Reasonable accommodation in the application process

A person with a disability requesting an accommodation at the application stage need not demonstrate prior to beginning the process that he or she is capable of performing the job’s essential functions. 29 C.F.R. § 1630.10. “It is unlawful for a covered entity to use qualification standards, employments tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities.” However, the standard or test is exempt if it is consistent with business necessity and is job-related.

2. Reasonable accommodation to perform essential functions of the job

Extensive reasonable accommodations are available to allow a person with a disability to perform the essential functions of the position.

Some examples of reasonable accommodations are:

- Hiring part-time help to perform non-essential functions.
- Restructuring a job by altering when and how an essential function is performed, or rescheduling a work shift.
- Reassigning the disabled individual to a vacant position if that person becomes unable to perform some essential function of a job.
- Permitting use of accrued paid leave or providing additional unpaid leave for necessary treatment.
- Making transportation provided by the employer accessible.
Providing reserved parking spaces.

Providing personal assistants for various reasons.

Permitting an individual with a disability the opportunity to provide and utilize equipment, aids, or services that an employer is not required to provide as a reasonable accommodation. 29 C.F.R. § 1630.2(o).

3. **Family and Medical Leave**

An attorney should consider the interplay between the Family and Medical Leave Act (FMLA) (29 U.S.C. § 2601 *et seq.*; 29 C.F.R. §825 *et seq.*), the California Family Rights Act (CFRA) (Cal. Gov. Code § 12945.2 *et seq.*; 2 C.C.R. § 7297 *et seq.* [Final regulations not available as of 5/30/95.]) and the ADA. A client or family member may be entitled to leave under the FMLA or CFRA. Understanding these rights is important to a client’s strategy for dealing with AIDS or HIV.

The FMLA and CFRA are relatively new statutes with complex regulations and exceptions. (The FMLA became effective in 1993 with important new regulations enacted in 1995.) This section is intended to give an attorney only a basic introduction to them. **Note:** Many exceptions cannot be included here and attorneys must review the statutes, regulations and interpretive case law before advising a client.

Since the enactment of the FMLA, the older CFRA has been modified to conform in large part although some differences remain which should be taken into consideration. Regarding these differences, the FMLA does not preempt state laws that provide greater employee benefits or protections.

The FMLA allows “qualified employees” to take up to twelve weeks of unpaid leave during a twelve month period for: 1) the birth or adoption of a child; 2) to care for a spouse or immediate family member with a “serious health condition” (as defined below); or 3) when unable to work because of the employee’s own serious health condition. 29 C.F.R. §825. The CFRA is basically the same, with some exceptions.

“Qualified employees” under the FMLA and CFRA have: 1) worked for the employer at least 1,250 hours in the preceding 12 months and 2) been employed by that employer for at least twelve months. Further, the employer must have 50 or more employees within 75 miles of the employee’s worksite. 29 U.S.C. §2611(2)&(4). **Note:** There is an exception for so-called “key employees” (salaried employees among the 10% highest paid employees of the employer) when restoring their positions post-leave would cause the employer grievous economic harm.

The FMLA recently redefined “serious health condition” as an “illness, injury, impairment, or physical or mental condition that involves:

(a) inpatient care in a hospital, hospice, or residential medical care facility; or
(b) continuing treatment by a health care provider. 29 U.S.C. §2611(11).

Under the FMLA, an employer may request certification of the “serious health condition” by a “health care provider” (as the FMLA defines one).

Other aspects important to persons with HIV or AIDS are: 1) leave may be taken intermittently; 2) reinstatement is required to the same or an equivalent position (in all terms and conditions); and 3) while leave is unpaid, the employer is required to continue health insurance benefits during the leave.

For a more specific discussion of these interactions, see the regulations enacting the FMLA.

When a reasonable accommodation at the employee’s current job creates an undue hardship for the employer, employers may consider reassignment. However, reassignment cannot be used to limit, segregate, or discriminate against disabled employees to lower grade positions, separate offices or facilities. Employers may reassign to a lower grade position if accommodations for the employee’s current position or vacant positions of equal status for which the employee is qualified are unavailable with or without reasonable accommodation. Here, the employer is not required to maintain the former salary as long as this is a company-wide policy. The employer is not required to promote an employee to make a reasonable accommodation.

To accommodate treatment schedules, persons with HIV disease often need flexible work schedules and the use of accrued sick leave or additional unpaid leave.

4. Reasonable accommodations to provide equal benefits and privileges

The obligation to make reasonable accommodation applies to all services and programs provided in connection with employment, and to all non-work facilities provided or maintained by an employer for use by its employees. The obligation to accommodate is applicable to employer sponsored placement or counseling services, and to employer provided cafeterias, lounges, gymnasiums, auditoriums, transportation and the like. Off-site conference facilities should allow for the participation of employees with disabilities. 29 C.F.R. § 1630.9.

F. Employer defenses

1. Undue hardship for the employer

An employer does not have to provide a reasonable accommodation to a qualified disabled applicant if the accommodation imposes an “undue hardship” on the business. 42 U.S.C. § 12111(10). An undue hardship is “any significant difficulty or expense in, or resulting from, the provision of the accommodation,” taking into consideration the financial state of the employer. Thus, an accommodation that is costly, extensive, or disruptive to the business may be an undue hardship.

Undue hardship is determined on a case-by-case basis. A specific accommodation may place an undue hardship on some employers and not others. 29 C.F.R. § 1630.2(p). Analysis of undue hardship claims includes these factors:
the nature and net cost of the accommodation, including tax credits, deductions, or outside funding;

the facility’s financial resources and personnel characteristics, and the effect of the accommodation on expenses and facility resources;

the employer’s overall financial resources, and business size (number of employees and number, type, and location of facilities);

the employer’s type of operation, including the composition, structure and functions of the work force, and the proximity of any separate facilities, as well as the fiscal and administrative interrelatedness of such facilities;

the accommodation’s impact on facility operations, the ability of other employees to perform their duties and the facility’s ability to conduct business.

29 C.F.R. § 1630.2(p).

An employer cannot show undue hardship by comparing the disabled person’s salary to the cost of the accommodation. The cost of the accommodation must be compared to the business’ overall budget.

An employer who successfully proves undue hardship must still provide the accommodation if funding for it is provided by an external source, such as monies from state vocational rehabilitation agencies and federal, state, and local tax deductions or credits. Employees may also pay for the portion of the accommodation that constitutes undue hardship on the business, or provide the accommodation themselves.

EEOC guidelines state that other employee’s concerns toward an individual’s disability do not constitute undue hardship. However, collective bargaining obligations that could be broken by an accommodation may establish undue hardship.

2. Direct threat to health and safety

Proof that a disabled individual would pose a “direct threat” to the health and safety of others is a defense under the ADA, and would allow the employer to terminate the employee or refuse to hire the applicant. A direct threat is “a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. § 1630.2(r), adapted from School Bd. of Nassau Co., Fla. v. Arline, 480 U.S. 273 (1987).

Employers are required to identify a specific risk posed by a disabled individual. For mental disabilities, a specific behavior must be identified. For physical disabilities, a specific aspect of the disability must be identified. The employer must use reasonable medical judgment, relying on the most current medical knowledge and best objective evidence. Factors to be considered in making a direct threat determination are:

a. duration of the risk;

b. nature and severity of the potential harm;
c. likelihood that the potential harm will occur; and

d. imminence of the potential harm.

If a reasonable accommodation will alleviate or eliminate the direct threat, the employer is obligated to make the accommodation. Speculation as to a direct threat is not good cause for termination or refusal to hire an individual with a disability. Only where there is a direct threat for which no reasonable accommodation is available may the employer assert this defense. The Ninth Circuit has held that people with HIV disease do not pose a direct threat to the health or safety of others. Chalk v. United States Dist. Ct., 840 F.2d 701 (9th Cir. 1988). (See APPENDIX B: CASE SUMMARIES.) An employer may advance the argument that a person with HIV disease poses a direct threat to themselves and others by working in a specific environment (such as a hospital, see below), making themselves susceptible to opportunistic infection. However, ADA legislative history implies that Congress did not intend that a disabled person’s risk to self be the sole basis for the hiring or retaining of an employee.

An employer must demonstrate all of the following factors to establish the existence of a direct threat:

1. the threat is one which cannot be eliminated or reduced by reasonable accommodation;

2. the employer applies the direct threat standard to all individuals, not just those with disabilities;

3. the employer’s conclusion is based on an assessment of the individual’s present ability to safely perform the essential functions of the job;

4. the employer in reaching its conclusion relied upon objective knowledge or evidence, medical or non-medical, which supports a determination that a direct threat exists (past work experiences, opinions of medical doctors or rehabilitation counselors); and

5. the employer considered both the probability of the harm and the imminence of harm created by the risk.

The employer trying to establish a direct threat is required to demonstrate that its decision is not based on speculative risks during an emergency, such as a fire evacuation, or stereotypical or patronizing assumptions, such as transmission of HIV through casual contact, but is instead factually based and supported by evidence. 29 C.F.R. § 1630.2(r), guidelines.

Food handlers with infectious diseases are discussed at 42 U.S.C. 12113(d)(2). HIV infection is not included on the Secretary of Health and Human Services’ list of communicable diseases transmitted through the food supply. Consequently, an employer cannot exclude HIV-positive persons from positions involving food handling. 29 C.F.R. § 1630.16(e), guidelines. However, a prison was able to exclude an HIV-positive cook from the kitchen, even though there was no risk of infection, because of the irrational and
unreasonable reaction of the inmate population. *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994).

One situation where employers may try to establish a direct threat with respect to persons with HIV is in the area of “invasive” medical procedures, i.e., those that take place within the body, especially where sharp instruments are involved. Several recent cases in federal courts have denied claims by medical workers with HIV who had contact with body tissue. See, e.g., *Doe v. U. of Maryland Medical System Corporation, et al.*, 50 F.3d 1261 (4th Cir. 1995).

These employers can even mandate HIV tests. For example, in *Leckelt v. Hospital Dist. No. 1*, 909 F. 2d 820 (5th Cir. 1990), a nurse who refused to submit test results to a hospital employer was not “otherwise qualified.” The employer has a right to take steps necessary to prevent the spread of infectious disease and had a right to determine the need for reasonable accommodation. Similarly, a San Francisco doctor who performed physical exams on FBI agents refused to reveal his HIV status to the FBI when they asked him. He also was not “otherwise qualified” because he did not satisfy the legitimate concerns of the employer regarding infection control procedures. *Doe By Laverly v. Attorney General*, 44 F.3d 715 (9th Cir. 1995).

**G. Other provisions relating to hiring and selection**

1. **Selection criteria and test administration**

   Selection criteria that tend to screen out persons with disabilities violate the ADA unless the employer can demonstrate that the criteria are job-related and consistent with business necessity. The purpose of this requirement is to ensure a close fit between job criteria and an applicant’s ability to do a job.

   Even those criteria consistent with business necessity and related to an essential function cannot be used to exclude an individual with a disability if that individual could satisfy the criteria with a reasonable accommodation.

   The method of the test administration itself may exclude people with disabilities unfairly. Employers will be required to adjust employment test administration practices so that persons with disabilities are not prevented from taking a test or having their disability negatively affect their test result. For example, a dyslexic person who knows the answers to the questions will nonetheless have trouble taking a multiple-choice test requiring filling in small spaces with a pencil. Applicants with disabilities that impair sensory, manual, or speaking skills must have tests that do not require use of the impaired skill. An employer is required to provide reasonable accommodation for a testing procedure only when an applicant for the position requests it. Some examples of reasonable accommodation for testing procedures include braille, sign interpreters, oral instead of written exams (or vice versa), longer completion times, and accessible test sites.

   Tests that measure a sensory, manual, or speaking skill are only exempted from this requirement if these skills are an essential function of the position and no reasonable accommodation is available to allow the person with a disability to perform the function.
This provision does not permit an applicant to select a preferred testing format. The employer need only provide alternate, accessible tests. 29 C.F.R. § 1630.11, guidelines.

2. Medical history and examinations

(a) Prohibited inquiry

An employer may not ask whether an applicant has a disability prior to making an offer of employment, and cannot inquire into his worker’s compensation history. Inquiry is limited to questions about the applicant’s ability to perform essential and marginal job-related functions. These questions may not be phrased in terms of a disability. For example, an employer cannot ask if an applicant has a visual disability if the job requires driving. However, the employer may ask whether the applicant is able to drive a truck. 29 C.F.R. § 1630.13(a), guidelines.

For an applicant with HIV disease, this is an important provision. An employer cannot ask about the nature or severity of the disability or require the applicant to indicate which disabilities he has on an application. The employer cannot inquire how much leave may be necessary for treatment or periods of inability to work because of a disability.

Unless testing is job-related and consistent with business necessity, an employer may not require a current employee to be tested for illness or disability if he or she suddenly uses a large amount of sick leave. Thus, an employer cannot require an HIV test of an employee unless such test is job-related. 29 C.F.R. § 1630.13(b), guidelines. However, the employer may hold the employee to the required attendance standards it imposes on all employees and may be able to discharge the employee if absence is legitimate grounds for discharge. The employer may not use legally protected absences (under the ADA, Rehabilitation Act, FMLA, or CFRA) as the basis for saying that absence is the reason for discharge. An employer may be required to grant additional leave as reasonable accommodation; however, if it would not cause undue hardship for the employer.

(b) Permitted inquiry

An employer may describe or demonstrate a job function and inquire whether the applicant can perform the job function with or without reasonable accommodation. The employer can ask the applicant to describe how, with or without reasonable accommodation, the applicant will be able to perform job-related functions, provided an individual’s known disability may interfere with performance of a job-related function. If the applicant’s disability will not interfere with performance of the job, the employer may ask for a description or demonstration of performance only if the employer routinely asks for this from all applicants for this job. The employer is required to provide reasonable accommodation if such a request is made, and cannot exclude the applicant if he or she fails to perform a non-essential job function.

An employer may inform an applicant of attendance requirements and ask whether the applicant can meet them. Also, on an application or prior to a test, the employer can ask whether an individual will require reasonable accommodation. Physical agility tests are not considered medical examinations and may be given during the application process. If the test screens out or tends to screen out individuals with a disability, the
employer must show job-relatedness and consistency with business necessity. 29 C.F.R. § 1630.14(a), guidelines.

An employer may condition employment on the results of a medical examination once an employment offer has been extended, provided that all employees in a job category are required to have a medical examination. The tests and inquiries need not be job-related or consistent with business necessity. However, if an employer withdraws its offer based on the test results or inquiry, the employer must show that the test results do not screen out individuals with a disability or that the criteria are job-related and consistent with business necessity and that no reasonable accommodation is available.

The information obtained in any entrance medical examination is to be treated as a confidential medical record, i.e., kept apart from regular personnel records. State worker’s compensation laws, however, are not preempted by the ADA. Employers may give information to state worker’s compensation agencies in accordance with the law without violating the ADA. Also, information obtained in post-offer medical exams and inquiries may be used for insurance purposes in a limited way as described in 29 C.F.R. § 1630.16(f). These are discussed in detail in Chapter 6: INSURANCE AND EMPLOYEE BENEFITS.

Examination of current employees is permitted where there is a need to determine if an employee is still able to perform the essential functions of his or her job, or to provide or maintain reasonable accommodation. So, for example, a medical examination may be required if an employee requests an accommodation on the basis of disability (even if the worker has verification from his own physician that he has a disability and needs accommodation). It is not necessary that the worker state the cause of a disability, i.e., that he has HIV disease, only its manifestation, e.g., he has pneumonia. Again, the employer cannot request an HIV test unless it is job related. If the employer wants an independent medical exam because the worker requests an accommodation, the exam must only be to verify the fact and nature of the disability, and the need for accommodation.

Medical exams and physicals required by federal, state, and local law to determine “fitness for duty” are permitted as long as they are job related and consistent with business necessity. All records are to be kept confidential. 29 C.F.R. § 1630.14(c), guidelines.

Testing to determine the presence of illegal drugs is not considered a medical exam and may be administered to applicants or current employees. 42 U.S.C.A. § 12114(d).

For more discussion of testing for HIV, see Chapter 11: CONFIDENTIALITY AND TESTING.

H. Remedies

Strange as it seems, the same act of discrimination results in different remedies, depending on whether the employer violated one of the two sections of the ADA or the three sections of the Rehabilitation Act covering employment discrimination. Enforcement procedures, discussed below, also differ. Not only does the authorizing
language differ, but different sections with the same set of available remedies have received dissimilar interpretations by different federal circuits. With new federal statutes and case law, however, the following is true for all circuits.

Title I of the ADA covers private employers of more than 15 people. Its remedies are derived from Title VII of the Civil Rights Act of 1964. 42 U.S.C.A. § 12117(a). The remedies include injunctive and declaratory relief, back pay, reinstatement, and attorney’s fees. These equitable remedies are available whether the discrimination was intentional or not. When an employer engages in intentional discrimination (i.e., disparate treatment), the ADA complainant may also recover compensatory and punitive damages, based on an expansion of Title VII in 1991. 42 U.S.C. 1981A(a)(2). These additional monetary damages are limited, however. They are completely unavailable when the employer, even though intentionally discriminating against the plaintiff initially, has made a “good faith effort” to provide a reasonable accommodation. 42 U.S.C. 1981A(a)(3). Even when that good faith effort does not exist, certain compensatory (and their derived punitive) damages for emotional losses and future losses are subject to caps. These maximum total awards range from $50,000 to $300,000 depending upon the employer’s total number of employees.

Title II of the ADA covers non-federal public entities. Under its provisions, a complainant may obtain injunctive relief, reinstatement, back pay, attorney’s fees, and compensatory damages. Punitive damages, however, are not available against a government, a government agency or a political subdivision.

Federal employers are covered under § 501 of the Rehabilitation Act. Like the ADA’s Title I, its remedies are derived from Title VII of the Civil Rights Act of 1964. The same requirement of intentional discrimination applies to obtaining certain compensatory and punitive damages, and the same limits apply to the amounts.

Section 504 of the Rehabilitation Act covers any program which receives federal funds. Its remedies include back pay and attorney’s fees and, due to a fairly recent Supreme Court decision, compensatory and punitive damages as well in cases of intentional discrimination. Franklin v. Gwinnett Co. Pub. Schools, 112 Sup. Ct. 1028 (1992). Finally, § 503, covering contractors, does not allow for any personal remedy for the complainant.

I. Enforcement overview

Although the goal in all cases is to discourage discrimination against people with disabilities, the enforcement procedures of the different sections of federal law vary significantly. Some, but not all, of the sections require exhaustion of administrative remedies before the individual may proceed to court. Usually this means first filing a claim with the federal monitoring agency, the EEOC. The EEOC will then investigate. If investigators find sufficient grounds for the claim, they will attempt to negotiate conciliation. If no satisfaction is received through the EEOC, the plaintiff may pursue the matter in court. The EEOC may also refer the case to the Attorney General for enforcement if the employer appears to be engaging in a pattern or practice of discrimination. These steps are discussed in more detail in SECTION VI: COMPARISON OF
Title I of the ADA, which covers private employers with more than 15 employees, is one of the sections that requires this procedure. If an employee intends to sue for a violation of Title I, the plaintiff must file a charge with the EEOC within 300 days of the act of discrimination. 22 C.F.R. § 1601.

Title II of the ADA, which covers non-federal public entities of any size, uses different compliance procedures. Although the statute of limitations is still 180 days, the EEOC is never involved.

Instead, a complainant under Title II may file with one of eight federal agencies, based on subject matter. That agency will then follow either rules established under § 504 or regulations set by the Department of Justice in order to develop the appropriate administrative remedy. 28 C.F.R. § 170. Moreover, Title II complainants are under no requirement to exhaust these administrative procedures, and may proceed with a private suit at any time. 28 C.F.R. § 35.172(b).

Section 501’s enforcement procedure is explicit: complainants must exhaust their administrative remedies which, as noted above, are derived from Title VII of the Civil Rights Act. 29 C.F.R. § 1613.214. Within 45 days of the allegedly discriminatory act, the complainant must file a claim with the federal agency that performed the act. If the agency does not satisfactorily resolve the dispute, the complainant may then either immediately appeal to the EEOC or, 90 days after the agency’s resolution, file suit in federal court. The important point is that the complainant has a short statute of limitations and must begin by notifying the employing federal agency.

Section 504 is unusual in that the statute does not even provide for a private right of action, but a few circuits have interpreted the statute as providing it. The Ninth Circuit is one that does provide this right, allowing the employee of an organization that receives money from a federal agency to sue the funding agency. Doe v. Attorney General, 941 F.2d 780, 785-95 (9th Cir. 1991). (The statute only provides for federal executive agencies, through the Department of Justice, to file suit to enforce § 504.) Because the statute does not provide personal remedies through the administrative procedure and there is no place for individual involvement, there is no point in exhausting administrative remedies.

Section 503, governing discrimination by federal contractors, does not allow for any private right of action. Instead, violations are dealt with after a complaint to the Office of Federal Contract Compliance Programs (OFCCP) of the Labor Department. This may result in government action against the contractor, such as terminating a contract or withholding payment. In addition, if the OFCCP sues, it can obtain injunctive relief based on § 503. In court, the OFCCP can also seek remedies on behalf of the complainant based on the ADA, such as reinstatement, back pay, retroactive seniority and attorney’s fees. See, e.g., OFCCP v. Ozark Air Lines, 40 FEP Cases 1859 (U.S. Dept. of Labor, 1986), and In the Matter of OFCCP v. Commonwealth Aluminum, 1994 WL 59429 (D.O.L.).
J. EEOC timeline

Generally, the EEOC follows this timeline for claims filed under its jurisdiction. When there is a question of whether to file under federal or state law, the attorney should also read the discussion at the end of the section on California law.

1. Normal filing

Usually, the employee who was discriminated against goes to the EEOC and files a complaint, requesting an investigation and a Right to Sue Letter (RSL).

(a) The EEOC has the authority to issue the RSL immediately after a person has filed a complaint. If the EEOC has been investigating for 150 days and has not yet issued the RSL, the EEOC notifies the person of the right to request the RSL immediately at that point without waiting for the investigation to end. Requesting a RSL generally ends the EEOC’s investigation of the matter. Upon filing, the employee should request an expedited investigation based upon one of the above factors, if applicable.

The employee may also request a temporary restraining order or some other form of injunctive relief against the employer. This process, however, takes a great deal of time and is not always as helpful as simply having an expedited investigation and getting into court as soon as possible.

(b) The EEOC has 10 days after the filing to notify the employer of the complaint, and to begin its investigation.

(c) The EEOC conducts its pre-decision investigation, which may include reviewing documents and calling witnesses.

(d) If it determines that no discrimination occurred, it notifies the parties and drops the charges. It also issues an RSL, stating it did not find discrimination. Although the EEOC did not find a basis to support the claim, the employee and his attorney may still file a court complaint. In most cases, the court rules allow the attorney to keep the EEOC’s adverse determination letter (i.e., “no cause determination letter”) from being part of the evidence. In the alternative, the rules should allow the attorney to challenge the accuracy of the EEOC’s letter.

(e) If the EEOC determines that discrimination did occur, then they will issue a letter of determination with a statement of probable cause. Next, it attempts conciliation with the employer, and tries to negotiate some settlement satisfactory to both parties. Many cases of discrimination end with this settlement.

(f) If the employer were a state or local government agency, the EEOC would recommend to the Dept. of Justice that Justice file the action against the employer directly. This is the ideal situation, because then the EEOC is the named plaintiff, and it supplies investigators and trial attorneys to pursue the case.
If the EEOC (or Dept. of Justice) does not bring the suit itself after a finding of discrimination, it will issue the RSL. With this, the employee and his attorney may proceed to court, with the letter’s statement of probable cause.

2. **Speedy RSL only**

   If the attorney is already prepared to go into court, the employee files the claim with the EEOC and requests an immediate RSL. The EEOC issues the RSL, without any statement of determination. The release of the RSL means that the EEOC has relinquished its jurisdiction, and terminated any investigation.

   Because there is no investigation, and no determination of probable cause, the EEOC will not file directly on behalf of the claimant. However, it is the quickest way to get into court.

3. **RSL amended complaint**

   If the attorney is already prepared to file her case in court, but also wishes to have the EEOC determination, the employee files with the EEOC and requests the investigation leading to the RSL. Then, without waiting for the investigation to be complete, the attorney files in court. When the opposing side demands the RSL, the attorney responds she tried to get it, and will amend the complaint later.

   The EEOC may join the lawsuit under its power of permissive intervention if it determines that it is a strong case that it wants to back.

V. **California Law: The California Fair Employment and Housing Act**

   Californians with disabilities need not depend solely on federal law to protect their rights. California has its own comprehensive anti-discrimination statute: the Fair Employment and Housing Act (FEHA). A person with HIV can pursue an employment discrimination claim based on FEHA instead of or in addition to the Federal Rehabilitation Act or the ADA. In some cases, FEHA covers an employment situation that the federal laws do not or provides greater remedies.

   Generally, FEHA prohibits discrimination on grounds of race, religious creed, color, national origin, ancestry, marital status, sex, as well as physical handicap and medical condition, sexual orientation, perceived sexual orientation and gender identity. In 1992, California strengthened FEHA provisions regarding disabilities where they were weaker than the ADA. The state preserved existing language that provided greater protection than the ADA.

   Although this chapter concentrates on FEHA, which covers private sector employers, other California statutes exist for other employers. Moreover, there is a special unit within the State Personnel Board’s Public Employment and Affirmative Action Division which handles affirmative action for people with disabilities. A state civil servant should contact both their particular state agency, to obtain administrative procedures and forms, and the State Personnel Board, for additional ways to complain.

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2 Govt, Code § 19702 protects state civil service employees and applicants.
It should be noted that the state may also cover private sector employers that receive state funding. This section specifically bans discrimination based on physical and mental disability. If your client’s employer receives state funding, consult the employer and the funding agency for complaint procedures.

**A. Employers covered by FEHA**

California’s FEHA covers more private sector employers than does federal law, because it defines as an employer anyone with only five or more employees. An employer under FEHA includes employment agencies, labor organizations, and apprenticeship training programs. The only private employers exempted are religious, non-profit associations and corporations. Govt. Code § 12926. An infamous local case established that nonprofit organizations must be religious to be exempt from FEHA.

For claims of mental disability discrimination, an employer must have at least 15 employees. Govt. Code § 12926(d)(2). Currently, California requests voluntary compliance with the mental disability provisions of the ADA by employers with five to fourteen employees. Govt. Code § 12940.3.

FEHA also covers state government, its political divisions and the municipalities of California. Govt. Code § 12926.

**B. Employee and applicant coverage**

1. **Definition of employee disability**

FEHA defines two types of disability: mental and physical.

“Mental disability” includes psychological disorders such as mental retardation, organic brain syndrome, emotional and mental illnesses, and specific learning disabilities. The definition is not exhaustive, but it specifically excludes most conditions not included in the ADA definition of a disability. ADA § 511, 42 U.S.C. § 12211. The unlawful use of controlled substances or other drugs is excluded from the mental disability definition. Govt Code § 12926(i).

“Physical disability” (known as a “physical handicap” before the 1992 amendment) is defined as a “disadvantage that makes achievement unusually difficult.”

The statutory definition of a physical disability includes any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects both of the following:

(1) one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

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3 Govt. Code § 11135.
(2) an individual’s ability to participate in major life activities. (FEHA does not define “major life activity.”)

Unlike the ADA, FEHA does not require that the disability be “substantial.” FEHA also covers physical impairments not named above but that require special education or related services. (It is unclear whether non-specified mental disabilities are covered.) Moreover, FEHA covers any individual regarded as having or having had any condition, disease, disorder, etc., or who requires special education or services because of the condition or disorder. Individuals presently without a disabling condition but who have one which may become disabling are also included. Govt. Code § 12926(k).

FEHA, as amended, is unclear whether short term disabilities are still covered as they were previously. Medical conditions are covered by the Act, but are not specifically defined. The definition “includes but is not limited to any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured.” As well as any genetically based condition. Govt Code § 12926(h).

2. Coverage of HIV

The inclusion of “immunological” disorders broadens the definition to include illnesses such as HIV disease. However, the unlawful use of controlled substances or other drugs does not constitute a physical disability, although many people acquire HIV through the use of drugs. Labor Code § 1025.

Case law established early on that individuals with HIV disease were considered physically handicapped under FEHA. Raytheon v. Fair Employment & Housing Comm, 212 Cal. App. 3d 1242 (1988), established that asymptomatic persons are covered because of the certainty that the disease would impair future physical ability. For a summary of Raytheon, see APPENDIX B.

In a more recent case, in 1994, a California trial court granted an HIV-positive employee nearly $729,000 in damages after the employer terminated him in violation of FEHA. Upon finding that the employer failed to disclose to the plaintiff an existing company policy dealing with HIV positive employees, the court rejected the employer’s argument that the plaintiff was terminated for performance, attendance and seniority reasons. The plaintiff also prevailed on race discrimination and negligent infliction of emotional distress claims. Perrault v. Educational Testing Services, Inc., No. 707306-7 (Cal. Super. Ct. May 6, 1994), reported in 88 Daily Lab Rep (BNA) at A-5 (May 10, 1994).

C. Employment practices prohibited by FEHA

FEHA states that it is an unlawful employment practice to do any of the following based on an individual’s mental or physical disability:

(1) refuse to hire or employ;
(2) refuse to select for a training program leading to employment;
(3) bar or discharge from employment or training program;
(4) discriminate against the employee in terms, conditions, or privileges of employment or compensation.

Under FEHA, it is an unlawful employment practice for a labor organization to exclude, expel, or restrict from its membership, or provide second-class or segregated membership, to an individual with a disability. Selection of union officers and staff must not be done in a way that discriminates against individuals with a disability. It is unlawful to discriminate in the selection and training of persons in an apprenticeship training program on the basis of an individual’s disability. An employer may not print or circulate any publication or make any job-related inquiry, written or oral (except as provided by the ADA), which expresses any limitation, specification, or discrimination based on an individual’s mental or physical disability. Govt. Code § 12940(b) – (d).

An employer does not violate FEHA by refusing to hire or for discharging an employee with a disability if the individual cannot perform essential job duties with reasonable accommodation in a manner that will not endanger the health and safety of the individual or others. Govt. Code § 12940(a)(1) – (2).

1. Essential duties

Essential duties are those fundamental duties of the position. Marginal job functions are not included. A job function may be essential for many reasons, including but not limited to:

- the reason the position exists is to perform that function;
- only a limited number of employees are available to perform the function;
- the function is highly specialized and the person in the position is hired for their expertise or ability to perform that function.

Evidence of whether a function is essential includes but is not limited to:
- the employer’s judgment as to which functions are essential;
- written job descriptions prepared before advertising or interviewing applicants;
- the amount of time on the job spent performing the function;
- the consequences of not requiring the prior employee to perform the function;
- terms of the collective bargaining agreement;
- the work experiences of past employees in the job; and
- the current work experience of employees in similar jobs. Govt. Code § 12926(f).

2. Reasonable accommodation

Reasonable accommodation may include either of the following:
(1) making existing facilities used by employees readily accessible to individuals with disabilities; or

(2) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modification of exams, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. Govt. Code § 12926(1).

The definition is not limited to those suggested measures and leaves open the possibility of other forms of reasonable accommodation. Reasonable accommodation for persons with HIV disease discussed in the context of the ADA are applicable here.

3. Pre-employment screening and medical exams

Under FEHA, an employer may only inquire into the medical history, physical fitness, or physical condition of a prospective employee if the inquiry or request is directly related to the position the applicant is applying for. An employer may also ask whether the applicant would endanger the health or safety of the applicant or others. The limitations on inquiry during the preemployment stage imposed by the ADA are also applicable under FEHA. The ADA standards concerning pre-employment screening and medical examinations apply to all California employers with five or more employees. Govt. Code § 12926(d).

4. Harassment

FEHA makes it an unlawful practice for an employer employing one or more persons to harass an employee or applicant because of his or her disability. An employer who knows or should know that another employee is harassing an applicant or employee with a mental or physical disability violates FEHA by not taking affirmative steps to stop and prevent the harassment. Govt. Code § 12940(h)(1).

D. Employer defenses

(Information on employer defenses is taken from the Department of Fair Employment and Housing Case Analysis Manual, Volumes I and II.)

1. Employee’s inability to perform

An employer may defend its discriminatory actions against an applicant or employee with a disability if it can prove that person is physically unable to perform the essential duties of the position. A person with a mental disability, however, may have protection in this category after the 1992 amendment. The employer is required to show that the applicant or employee is presently unable to perform the essential duties of the position. Future inability to perform the essential duties or speculation about future performance are not valid defenses to discrimination on the basis of a disability.

The employer is required to show that no reasonable accommodation is available to permit the applicant or employee to perform the essential duties of the position. The FEHC has stated that reasonable accommodation should not alter the essential purpose of the job. DFEH v. Anaheim Police Dept. (Walker), 1982 FEHC Dec. No. 82-08. For
examples of some ways to allow a person with an impairment to perform essential duties, see Government Code § 12926.

A reasonable accommodation is “reasonable” as long as it does not create undue hardship on the employer. Some factors to be considered when determining if undue hardship exists are:

(1) the overall size of the business or facility with respect to the number of employees and total budget;

(2) the overall size of the employer, the number of facilities, and the number of employees;

(3) the type of business operation, including the composition and structure of the workforce;

(4) the nature of the employer’s operation;

(5) the type and cost of the accommodation involved;

(6) the availability of state, federal, and local tax incentives; and

(7) the amount of government assistance available from government agencies or public or private organizations.

Before making an adverse employment decision, an employer is under a duty to consider and explore ways to make reasonable accommodation when it knows or has reason to know that an applicant or employee has a disability.

2. Danger to health and safety

(a) Of the individual
An employer may assert this defense where an applicant or employee presents a danger to himself or herself, or to others, when performing the essential duties of the job.

Four elements are considered when determining whether a danger to self is present:

(1) Identifiable: What kind of injury will occur if the employee or applicant performs the essential duties of the position?

(2) Substantial: How serious will the injury be?

(3) Immediate: When is the injury expected to occur? (An inquiry as to whether the employee or applicant can perform the job over a reasonable length of time is relevant only when medical evidence shows that the individual’s condition will deteriorate over time. DFEH v. City Of San Jose (Jimenez) 1984 FEHC Dec. No. 84-18.

(4) Probable: Is it more likely than not that the applicant or employee will sustain an injury if he or she performs the job?
Speculation concerning risk of future injury is not a valid defense. Likewise, economic concerns of increased insurance costs or increased Worker’s Compensation costs are not valid defenses. *Sterling Transit Co. v. Fair Employment Practices Comm.*, 121 Cal. App. 3d 791 (1981). Even where an employer successfully shows a danger to the applicant or employee, that employer is required to show that no reasonable accommodation is available that would remove the danger to the individual, unless doing so would create an undue hardship.

(b) Of others
An employer may present this defense only where an applicant or employee with a disability presents a danger to others while performing the essential functions of the position. As with danger to the health or safety of the employee, the degree of risk presented by the individual with a disability must be identifiable, substantial, immediate, and probable. The risk of danger must be greater than that posed by a non-disabled person performing the same job. The employer must also show that no reasonable accommodation exists that would reduce the level of danger to others, or that providing the accommodation would create undue hardship on the employer. FEHC Regs. § 7293.8(d).

3. Bona Fide Occupational Qualification (BFOQ)
   A Bona Fide Occupational Qualification is a categorical exclusion or exclusionary policy that bars a class of individuals from consideration for employment. An employer may assert this defense if it can show that all or substantially all (i.e., a very high percentage) of the persons who share the same disqualifying characteristic cannot do the job or that they present a danger to themselves or others. The Department of Fair Employment and Housing (DFEH) and the California Supreme Court construe BFOQ claims narrowly. The exclusionary policy or physical requirement must be “reasonably necessary” to the “essence” of the employer’s business, meaning the business would be undermined if the employer did not have this exclusionary policy. The 1992 amendment may allow for persons with mental disabilities to rebut an employer’s BFOQ defense. FEHC Reg. § 7286.7(a).

4. Discrimination otherwise required by law
   An employer may defend its discriminatory actions if it proves that it is required to make these actions by state or federal law, or by a court decision. FEHC Reg. § 7286.7(f).

E. Administrative procedures and remedies
   There are two administrative agencies that enforce FEHA. The first is the Fair Employment and Housing Commission (FEHC), which has the adjudicatory and rule-making functions. The second is the Department of Fair Employment and Housing (DFEH), which handles investigation, mediation and prosecution of discrimination complaints.

   An employee who experiences an unlawful employment practice covered by FEHA may file a complaint with the DFEH no later than one year after the last date of the unlawful practice. There is a 90 day extension of the deadline if the complainant first
learned of the unlawful employment practice after the expiration of the one year period. Govt. Code § 12960.

After a complaint is filed, the DFEH should investigate the charges. Depending on the outcome of the investigation, the DFEH may try to settle or mediate the case. If that fails, the DFEH may issue a written accusation against the employer within a year of the complaint. The employer must answer the accusation at a hearing before the FEHC. After the hearing the FEHC will issue a decision.

The FEHC is empowered to remedy unlawful employment practices, including (limited) damages and fines. According to Bancroft-Whitney’s California Civil Practice, the FEHC is not the best forum because of the limited damages available. In addition, the editors also note that in reality only a very small number of cases are actually heard by the FEHC. Most of the cases are either mediated and settled by the DFEH or litigated in private civil actions by the complainant after they receive a right to sue letter from the DFEH.

If an accusation is not issued within 150 days of filing a complaint, the DFEH will issue a right-to-sue letter upon request. If the claimant has not yet requested a right-to-sue letter, the DFEH will issue one upon completion of their investigation, not later than one year after the filing of the complaint, regardless of the Commission’s findings.

The person alleging discriminatory employment practices has one year from the date of issuance of a right-to-sue notice to bring a civil action against the employer.

If the Commission issues an accusation seeking emotional damages or administrative fines from the employer, the employer has 30 days from receipt to notify the Commission that they wish to move the matter to court. The Commission then has 30 days to elect a court action or to turn the matter over to the Attorney General.

The DFEH may award damages for emotional injury, and administrative penalties up to $150,000 per aggrieved person per employer. Each complainant can get up to $150,000 from each respondent, or the state can assess penalties of $150,000 per complainant per respondent. Among other remedies, the Commission is also authorized to require reinstatement, rehiring, or upgrade of an employee with or without back pay. The Commission has the authority to assess damages of up to $150,000 for an employer’s violation of Civil Code § 51.7, which protects persons from violence and intimidation by threat of violence committed against their persons or property because of a disability. Govt. Code § 12970. If the employer chooses to take the matter into court, however, there is no longer a limitation on the amount of damages. Govt. Code § 12965.

VI. Comparison of Enforcement Procedures and Remedies Available Under the ADA and FEHA

The statutes governing employment discrimination law are complicated and this section provides a brief comparison of them to help an attorney decide which law to use.
A. Enforcement procedures

1. Choosing to file a state or federal claim

In order to enforce a claim of discrimination under state or federal statutes, you usually must exhaust your “administrative remedies” before filing a claim in court. Generally, that means notifying the employer and filing a claim with the state or federal government agency that monitors discrimination. That agency should investigate your claim and, if it concludes you have adequate grounds for a case, provide approval to proceed to court by issuing a Right to Sue Letter.

The specific administrative remedy you pursue depends in part upon which statute you are charging your employer with violating. If you are suing only under DFEH, you must file with the DFEH before initiating a court action. If you want to sue an employer based only upon Title I of the ADA, you must first file a claim with the EEOC.

If you are planning to sue based on claims arising in both DFEH and Title I, you may file with either agency. Under an agreement between the EEOC and the DFEH, filing with one is considered the equivalent of filing with the other under (“cross filing”). The EEOC and DFEH each issue their own RSL’s permitting lawsuits in either federal or state court, respectively. That RSL will be good in either state or federal court.

Both agencies have a large backlog of cases. Currently, however, the EEOC might produce a faster investigation because it has authority to expedite the investigation if the employee has a life-threatening illness such as HIV. (It can also expedite investigations when there is employer harassment or retaliation, the possibility of destruction of evidence, or the case involves the Equal Pay Act.) Moreover, the EEOC is a federal agency and it is now actively seeking HIV cases in order to establish a consistent national policy regarding HIV-based employment law.

On the other hand, the DFEH is currently dealing with its backlog by quickly issuing Right to Sue Letters. This allows you to move into court much faster than following the EEOC’s full timeline. The negative effect of this choice is that the plaintiff will have to do all his own investigation, and there will be no supportive statements from the administrative agency.

2. Choosing between state and federal courts

Plaintiffs also must choose whether to sue in state or federal court. Assuming that a claim could be made under either state or federal law, many attorneys choose state court. Cases go through faster, the attorney has more control over jury selection, juries are selected from a more local pool and, at least for the time being, state judges tend to be less conservative than federal judges. If you want to file in state court, you have one year after the issuance of a DFEH RSL. You may have even more time if the EEOC has conducted the investigation, because the DFEH RSL is still good until after the EEOC has finished its investigation. However, if the offense occurred in a conservative area, the attorney might prefer a less local jury pool, in which case she might hasten to assert federal venue.
B. Remedies

FEHA has the same or better coverage and remedies than the ADA, because the federal government required all states to bring their laws up to the level of the ADA. As noted above, attorneys may prefer state court. See (f) below for the ADA’s advantages in procedures and regulations.

(a) Employer coverage: FEHA covers employers with as few as five employees for physical disabilities compared to fifteen under the ADA. They both cover employers with fifteen employees for mental disabilities, although California asks for voluntary compliance from employers with five to fourteen employees. Govt. Code § 12926(d) and 42 USC 12111(5).

(b) Definition of mental health coverage: FEHA and the ADA have almost identical definition for mental health disability, except that FEHA does not require that a mental disability limit an individual’s ability to participate in major life activities.

Otherwise, FEHA and the ADA use almost the exact same language to define mental impairment, although FEHA does not, on its face, apply to people with a record of, or who are regarded as having, a mental disability. FEHA covers this omission by incorporating by reference any broader definition available in the ADA.

(c) Punitive damages: Under FEHA, the plaintiff may recover punitive damages, although not against public employers. Govt. Code § 818. To get these punitives, the plaintiff must prove damage “by clear and convincing evidence, to be accompanied by oppression, malice or fraud.” If the acts in question were committed by another employee instead of the employer, the employer will be liable for punitive damages only where the employer knew in advance about the conduct, ratified it or acted with oppression, malice or fraud. Civil Code § 3294(a).

Under the ADA, punitive damages are also not recoverable against public employers. A private employer is liable only in cases of intentional discrimination, and where the employer acted with malice or reckless indifference. Most important, punitive damages are capped under the ADA.

(d) Compensatory damages for mental and emotional suffering: While both FEHA and the ADA provide compensation for mental and emotional suffering, the ADA again caps the amount available and limits such damages to cases of intentional discrimination. Bancroft Whitney’s California Civil Practice §§ 2.83-2.85.

(e) Statute of limitations: Under FEHA, claimant has one year to file with DFEH, and one year after receiving a right to sue letter before getting to court. Govt. Code § 12965(b). The ADA has the same limits as Title VII of the Civil Rights Act: six months (300 days) to the EEOC and 90 days after the right-to-sue letter.
(RSL). 42 USC 12117. Note that there is a cross filing agreement between the EEOC and DFEH.

(f) Case law and regulations as guidelines: The ADA, as the successor to the Federal Rehabilitation Act of 1973 and the Civil Rights Act of 1964, has an enormous amount of case law to use as guidance. Moreover, the ADA regulations (29 CFR section 1601 et seq.) are very specific. FEHA regulations embodied in the California Code of Regulations (2 CCR section 7293.5 et seq.) are less detailed.

VII. Local Ordinances Prohibiting Employment Discrimination

Beginning in the 1970s, various local ordinances provided greater protection than state law against employment discrimination based on sexual orientation, and disabilities like HIV status. Under these local ordinances, some cities and counties had granted the right to bring a civil suit, as well as file with their local human rights commissions. Beginning in 1993, however, with the California Court of Appeal’s Delaney v. Superior Fast Freight, 24 Cal. Rptr.2d 33 (1993), state courts began invalidating the portions providing the right to file a civil suit, declaring it preempted by FEHA. These cases have severely limited the laws, but the California Supreme Court has taken Delaney under review. The local laws, and some of the recent cases, are noted below.

It is still worthwhile to file any case with a local human rights commission; it will lead at least to more accurate statistics and may lead to an investigation. But the preemption issue must be investigated before using the following laws as a basis of legal action.

A. San Francisco

Beginning in 1977, a San Francisco employee subjected to employment discrimination on the basis of sexual orientation could initiate a civil suit against the offending employer based on the following laws. In 1985, discrimination based on HIV status was added. In 1993, the Delaney case invalidated a similar right to sue granted by Los Angeles’s human rights legislation. Soon after, the San Francisco Superior Court struck the portion of the Municipal Code, Articles 33 and 38, that offered the same right. But the remaining portions of Articles 33 and 38 of the Municipal Code, dealing with investigation of complaints, mediation between employees and employers, and gathering evidence, as well as Administrative Code § 12 concerning city and county contractors, have been left untouched. Local cases dealing with this issue, as well as Delaney, are under review by the California Supreme Court.

1. Covered entities

Article 38 covers employers, labor organizations, and employment agencies. There is no minimum number of employees required to be covered by the ordinance. In addition to employers within the city and county of San Francisco, all contractors with the city are required to abide by Article 38. Contractors are required to write in any contract with the city a statement of nondiscrimination against individuals with HIV/AIDS among other groups. If the contractor does not comply with the non-discrimination policy, the Human Rights Commission may assess fines against the
contractor. Also, the contractor may be prevented from entering new contracts with the
city of San Francisco if a material breach of an existing contract is established. San
Francisco Administrative Code § 12B.

2. **Prohibited employment practices**

   An employer may not do any of the following based on an applicant’s or employee’s
HIV-positive status:

   (a) fail or refuse to hire, or discharge;

   (b) discriminate against any individual with respect to compensation, terms,
       conditions, or privileges of employment including promotion;

   (c) limit, segregate, or classify employees in any way that deprives them of
       employment opportunities.

A labor organization may not exclude or expel from its membership or otherwise
segregate, limit, or classify an individual with HIV disease. Nor may a labor
organization fail or refuse to refer for employment any individual in such a way as to
deprieve, limit, or adversely affect the employment opportunities of an individual with
HIV disease. An employment agency may not fail or refuse to refer for employment any
individual or otherwise discriminate against a person with HIV disease.

No covered entity of any type may do any of the following activities:

   discriminate against any individual in admission to or employment in any
   apprenticeship training program;

   print, publish, advertise, or disseminate any notice or advertisement regarding
   employment, training, or membership in an employment-related organization
   which indicates a discriminatory practice. § 3803.

3. **Employer defenses**

   An employer may assert a bona fide occupational qualification (BFOQ) defense to a
charge of discrimination on the basis of HIV disease. In an action brought under § 3811
of Article 38, an employer asserting a BFOQ defense has the burden of showing:

   the discrimination is a necessary result of a BFOQ, and

   there exists no less discriminatory means of satisfying the occupational
   qualification.

The Article recognizes as a specific BFOQ the capacity of an individual to perform duties
without endangering his or her health or safety, or the health and safety of others. § 3803(b).

The language of Article 38 does not include anything about an employer’s duty to
provide reasonable accommodation to an individual with HIV disease. An employer has
no duty to supply reasonable accommodation to allow an employee to perform job duties
or to do away with any risk to the health and safety of the individual with HIV or to others.

The Article has no language to protect applicants or employees “regarded” as being HIV positive as the ADA does. However, it is specifically prohibited for an employer to discriminate against any person who associates with a person with HIV disease. It is also prohibited for an employer to retaliate against any person because that person:

(1) opposes any act or practice made unlawful by Article 38;

(2) supports Article 38 and its enforcement;

(3) files a complaint under Article 38;

(4) testifies, assists, or participates in any investigation, proceeding, or litigation under Article 38. § 3808.

4. Remedies

A person with HIV disease who alleges discrimination by his or her employer may file a request with the San Francisco Human Rights Commission to have the Commission investigate or mediate the complaint in accordance with the San Francisco Administrative Code.

B. Contra Costa County

1. Covered entities

An ordinance prohibiting the discrimination against individuals with HIV disease was adopted by Contra Costa County in 1989. Division 460, Chapter 460-2. Employer is defined as any person regularly employing one or more persons, or any person acting as an agent of an employer.

A person is not required to actually have HIV disease to seek enforcement of this ordinance. A person is considered to have HIV disease for the purposes of this ordinance if that person:

(1) is perceived as having HIV disease;

(2) is believed to be at risk of contracting such condition;

(3) is believed to associate with persons who have HIV/AIDS.

Any person who associates with an individual who is HIV positive or who has any related conditions is protected from discrimination by this chapter. It is a violation of this chapter for an employer to retaliate against a person because that person exercises any rights afforded by this chapter. § 460-2.018.

2. Prohibited practices

The employment practices that are unlawful under this ordinance are substantively identical to San Francisco’s Article 38.
3. Employer defenses

An employer may select or reject a person with HIV disease where the employer can demonstrate that HIV-negative status is a BFOQ. A BFOQ is demonstrated when the qualification is reasonably necessary to the essence of the employer’s business and a person with HIV would be unable to perform the job duties without risk of harm to themselves or others. A second defense is where the employer can demonstrate that an employee with HIV cannot perform the job duties of the position without endangering his or her health and safety or the health and safety of others. The ordinance does require an employer to provide reasonable accommodation to a person with HIV before making a decision to reject or not select that person unless providing reasonable accommodation would be an undue hardship on the employer’s business. § 460-2.004.

No person can require a person to undergo an HIV test or any medical procedure designed to show or help show that a person has HIV disease except as provided by law. This provision does not apply to an employer that can establish that HIV negative status is a BFOQ. § 460-2.016.

4. Remedies

There are several ways to address employment discrimination in Contra Costa County:

(1) An aggrieved person may file with the County Human Relations Commission to have the compliant investigated and mediated by the Commission.

(2) Enjoin the employer from violating the provision in a court of competent jurisdiction. § 460-2.022.

Remedies sought under the provisions of this chapter must be filed within one year of the alleged discriminatory acts.

C. Alameda County

Both the City of Berkeley and the City of Oakland have ordinances that provide essentially the same protection from employment discrimination for individuals with HIV as the Alameda County ordinance provides.

1. Covered entities

Alameda county adopted an ordinance in 1987 to specifically prohibit discrimination against individuals with HIV disease. The definition of persons considered to have HIV disease and related conditions is broad. It includes individuals suspected of or perceived as having HIV disease, anyone who is believed to be at risk of contracting a condition associated with HIV, or anyone who is believed to associate with persons who have HIV disease. For example, the ordinance provides protection to a gay man who is thought to have HIV where an employer believes all gay men have HIV disease.

Employer is defined as any person regularly employing one or more persons, or any person acting as an agent of an employer, including the county of Alameda. Employment agencies and labor organizations are also covered.
2. **Prohibited practices**

   The ordinance makes unlawful the same employment practices prohibited in Article 38 of the San Francisco Code. *See above.*

3. **Employer defenses**

   The Alameda ordinance provides three affirmative defenses. Selection or rejection of an individual with HIV is permitted where an employer can demonstrate a BFOQ of HIV-negative status. This can only be demonstrated where HIV-negative status is reasonably necessary to the essence of the employer’s business and that all or substantially all persons with HIV are unable to perform the duties of the position without harm to themselves or others.

   The second defense is where an employer can show that an individual with HIV disease is unable to perform the duties of the position in a manner that does not endanger his or her health or safety or the health and safety of others. The third defense requires an employer to attempt reasonable accommodation of a person with HIV prior to his or her selection or rejection. If the employer cannot reasonably accommodate the person with HIV, or if doing so would create an undue hardship on the employer’s business, the employer may assert this defense. § 2-190.2(b).

   As in other counties, testing for HIV disease or any medical procedure designed to show whether a person has HIV or associated conditions is prohibited. An employer who can show that HIV-negative status is a BFOQ is exempt from this prohibition. (§ 2-190.8).

4. **Remedies**

   A person alleging discrimination by an employer may enforce the ordinance by seeking an injunction to prohibit violation of this ordinance. Any action sought under this ordinance must be filed within two years of the alleged discrimination. § 2-190.10, 2-190.11.

D. **San Mateo County**

   There is no specific protection from employment discrimination for individuals with HIV disease in San Mateo County. There is a Human Relations Commission which will investigate complaints of discrimination and mediate any disputes that come under its jurisdiction if the parties involved request assistance. There is no statutory authorization for filing a civil complaint in the county code. The Affirmative Action Office of San Mateo County reports that the county relies on the protection of FEHA and the ADA against employment discrimination.

VIII. **Other Causes of Action**

   An employer who has discriminated against an employee with HIV disease may be sued based on other reasons beside violations of anti-discrimination statutes. The worker might file a lawsuit based on the employer’s breach of contract, as a violation of good faith and fair dealing, or as a breach of public policy. Other torts may be based on the concepts of defamation, invasion of privacy, or other causes of action from in
constitutional rights. As discussed above, whether or not remedies are pursued under these bases, a violation may be useful in negotiating a favorable settlement of an employee’s claim. This section mentions a few lines to pursue.

A. Workplace-based rights

1. Breach of contract and wrongful termination

A breach of contract can occur when an employee is terminated without good cause, even when there is no written contract. The concept of good faith and fair dealing is easily applied to the employment relationship. *Foley v. Interactive Data Corp.*, 47 Cal 3d 654, 254 Cal.Rptr.211, 765 P2d 373 (1988); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr.722 (1980). Any written materials in an employment handbook or policy manual may strengthen the implied contract.

2. Insurance/employee benefits

In addition to a salary, jobs also frequently provide insurance and other benefits. Termination of a person with HIV may be motivated by an employer’s desire to avoid the costs associated with future AIDS-related medical treatment, either directly or through increases in group insurance premiums. This issue may be covered under ERISA or state or federal insurance law. Other insurance violations may occur if the employer tries to foil COBRA rights. See Chapter 6: Insurance and Employee Benefits.

But it may also give rise to tort damages. Recently, a man with HIV received $30,000 in damages for wrongful termination, despite the fact that he was an at-will employee. Although the employer said he had violated their “honesty policy,” the jury was convinced this was a pretext to avoid potential future medical claims. *Iglesias v. Stars Restaurant*, No. 948118 (Cal.Sup.Ct. Nov. 24, 1993) reported in AIDS Litig. Rep. (Dec. 14, 1993).

3. Public policy

The traditional doctrine of employment at will may also not stand up when a termination contravenes public policy. This has a long-standing history in California, as exemplified in the case of *Perks v. Firestone Tire 7 Rubber Co.*, 611 F.2d 1363 (CA3 1979), when an employee fought a wrongful discharge action based on his refusal to take a polygraph examination.

Public policy is at issue whenever the employer’s conduct “requires or endorses violations of the law.” *Petermann v. Teamsters*, 179 Cal. App.2d 184, 344 2d 25 (1959). Breaking the law could refer to a discriminatory act that violated state or federal anti-discrimination statutes, thus giving rise to tort damages, such as punitive damages, not available under the statute.

B. Right of privacy and constitutional issues

See Chapter 11: Confidentiality for more details on legal actions covering issues of privacy, including defamation and the invasion of privacy. Equal protection, due process, and freedom from unreasonable searches may also be applicable.
Appendix A: Letters to obtain reasonable accommodations

Dear Employer:

Client has retained me as his attorney in connection with his request that you reasonably accommodate his physical disability and medical condition, AIDS.

You have requested that I let you know what accommodation Client is seeking for his physical disability, and why that accommodation is reasonable.

Client seeks to have his work schedule reduced to no more than a four-day week of no more than eight hours a day. In the future Client may seek to have his work schedule further reduced, as instructed by his physician.

This request is made because Client’s physician ordered Client not to work more than four eight-hour days per week, and also ordered Client to continue working as long as he is physically and mentally able. Please see the attached letter from Dr. Physician.

Please also note Dr. Physician’s statement in the letter that “An abrupt and total separation [of Client] from his professional career could have significant medical consequences.”

Employer can reduce Client’s work schedule without undue hardship. It can do this by either dividing work among the Employer’s several employees, or by having one current or new employee divide Client’s work hours with him (this is often referred to as “job sharing”).

Client is willing to reduce his work schedule to less than four days per week, if this is necessary to find another employee to divide his work hours with him.

There is a large demand for part-time employment in the Bay Area, so it would not be hard to find someone to divide Client’s work hours with him. It would not take long to train someone to perform Client’s job duties. Client would be more than willing to assist in this training.

AIDS is a physical handicap. (DFEH v. Raytheon Company (Chadbourne) 212 Cal. App. 3d 1242, 261 Cal. Rptr.197 (1988).) California and federal law require Employer to reasonably accommodate an employee’s physical handicap.

The California law that requires an employer to reasonably accommodate an employee’s physical handicap is the California Fair Employment and Housing Act. (California Government Code Section 12940.)

A federal law, Section 504 of the Rehabilitation Act of 1973, requires companies receiving federal funds, such as Employer’s, to reasonably accommodate an employee’s physical handicap. (29 U.S.C. Section 794; 45 Code of Federal Regulations Section 84.12.) Another federal law, the Americans with Disabilities Act, covers private companies of Employer’s size to make reasonable accommodations to the known disabilities of employees. (42 USCA §§12,112(b)(5)(A), 12,111(9) (West Supp. 1991).)
By law, **Employer** is required to accommodate a physically handicapped employee such as **Client** by restructuring his job, including putting him on a “part-time or modified work schedule.” (California Administrative Code, Title II, Section 7293.9(a)(2); 45 Code of Federal Regulations, Subtitle A, Section 84.12(b)(2); 12,111(9)(B) (West Supp. 1991).)

In your letter of **Date**, you said that you might not reduce **Client’s** work schedule because the company requires that such positions “be staffed on a full-time basis.”

The California Fair Employment and Housing Commission ruled on a similar issue in *DFEH v. Bay Area Rapid District (Pitson)* (1980) FEHC Dec. No. 80-21. The Commission decided that BART was required to assign an employee a “light duty” job to reasonably accommodate the employee’s physical disability, even though BART had a “no-light duty” policy.

**Client** has been a loyal and dedicated employee of **Employer** for ___ years. He has always received good performance evaluations. He is justifiably proud of his work. In the course of his work at **Employer’s** he has come to know and respect the company and its employees. All **Client** asks for is the opportunity to continue being a productive member of society for as long as possible. It is a simple question of dignity and self respect.

There are also medical consequences. As Dr. **Physician** says in the attached letter, “While **Client** must immediately reduce his work schedule, it is equally important for his medical well-being, that he continue to work as long as he is physically and mentally capable.”

As I am sure you can understand, this is a very difficult time for **Client**. It is vital that **Employer** treat **Client** with compassion and respect, by reasonably accommodating his physical disability as required by law.

**Physician’s Letter**

To Whom it May Concern,

I am writing you concerning **Client**, who has been a patient of mine for X years.

Recently, **Client** has been diagnosed with a life-threatening condition associated with AIDS, a disease for which there is no known cure at this time. He has begun treatment in an effort to improve his state of health.

I have instructed **Client** that it would likely be in his best medical interest to limit his activities, including his professional career. In his present condition, **Client** should be working no more than four days a week, a maximum of eight hours a day. It is clearly possible that this schedule may need to be reduced further as changes in his medical condition warrant.

While **Client** must immediately reduce his work schedule, it is equally important for his medical well-being, that he continue to work as long as he is physically and mentally...
capable. An abrupt and total separation from his professional career could have significant medical consequences.

Client’s continued availability for work poses no medical threat to his co-workers. Neither AIDS nor the specific condition he is being treated for can be transmitted by casual contact.

I would be happy to discuss this matter with you further should you find that necessary.

Sincerely,

Physician, M.D.
The following case summaries of three important employment law cases were excerpted from an article written several years ago by staff of the Legal Aid Society of San Francisco. Case and statute cites noted in these summaries should be updated before use as authority.

**School Board of Nassau County v. Gene H. Arline**

In March 1987, the United States Supreme Court analyzed how federal law governing employment discrimination affect those with serious illnesses and other individuals who are or have been disabled. The case that raised these issues is *School Board of Nassau County v. Gene H. Arline.*[^5] It was brought by Gene Arline, a school teacher discharged from her job as a result of her bouts with tuberculosis.

In *Arline,* the Supreme Court looked at the Rehabilitation Act of 1973 and its legislative history which confirmed that the statutory definition of “physical handicap” was intended to protect disabled individuals “not only from simple prejudice, but from ‘archaic attitudes and laws’ that the American people are simply unfamiliar and insensitive to the difficulties confront[ing] individuals with handicaps.”[^6] To this end, the Court made clear that people fall under the statutory definition if they have a record of or are regarded as having a disability, even if they currently “have no actual incapacity at all.”[^7]

Noting that the federal regulations are an “important source of guidance,” the Court cited a Health and Human Services regulation which includes illnesses like cancer as a disease that would constitute a disability under the federal law.[^8] The Supreme Court also discussed serious illnesses and “contagiousness” in another context. It stated that when enacting the federal law:

> Congress acknowledged that society’s accumulated myths and fear about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious.[^9]

Ultimately, the Court concluded that while “some persons who have contagious diseases may pose a serious health threat to others ...[this] does not justify discrimination against ...all persons with actual or perceived contagious diseases.”[^10] Accordingly, persons with

[^6]:  Id. at 279, 107 S.Ct. at 1126.
[^7]:  Id., at 279, 107 S.Ct. at 1126-1127 (quoting Southeastern Community College v. Davis, 442 U.S. 397, 405 – 406 n.6 (1979)).
[^8]:  Id. at 280, n.5, 107 S.Ct. at 1127 (citing H.H.S. regulations found at 45 C.F.R. pt. 84, App. A, p. 310 (1985)).
[^9]:  Id. at 284, 107 S.Ct. at 1129. AIDS is not transmissible through casual contact common in most workplace settings.
[^10]:  Id. at 285, 107 S. Ct. at 1130.
HIV infection may be considered “handicapped” under the federal law and, if otherwise qualified, are protected against employment discrimination.

**Raytheon Company v. Fair Employment and Housing Commission**

John Chadbourne, a quality control analyst for Raytheon Company, was hospitalized in early December 1983 and diagnosed with AIDS. He was released to return to work by his doctor on January 16, 1984. After an examination by Raytheon’s doctor and a thorough review of medical opinion regarding the transmissibility of AIDS, the doctor and Raytheon’s medical director recommended he be allowed to return to work. Notwithstanding these recommendations, he was never reinstated. In vain, Chadbourne continued to press for a return from medical leave until he died on January 6, 1985. Before he died, he left a legacy to Americans living with AIDS—a complaint of discrimination on the basis of “physical handicap” filed with the California Department of Fair Employment and Housing.

After an extensive hearing, the California Fair Employment and Housing Commission held that Chadbourne had been illegally discriminated against when he was, in effect, terminated by Raytheon. The Commission found that AIDS is a “physical handicap” and there is no danger to the health of co-workers when employees with AIDS continue to work.

Raytheon sought to overturn the Commission’s decision and filed a petition for writ of mandamus with the Santa Barbara County Superior Court. The Commission’s decision was resoundingly affirmed on April 22, 1988 in a 69-page opinion delivered by Judge Patrick J. McMahon.¹¹

The Court found that AIDS is a protected “physical handicap” on the basis of statute, regulation and court interpretation of the Act. The Act prohibits employers from discriminating against employees and applicants because of a “physical handicap. The law and regulations define “physical handicap” as practically any physical condition that interferes with a major life activity.

The leading California case on the question of what the term “physical handicap” means is *American National Ins. Co. v. Fair Employment and Housing Comm.*, 32 Cal. 3d 603, 186 Cal. Rptr. 345 (1982) (hereinafter *ANI*). In *ANI* the California Supreme Court adhered to a broad reading of the statutory language, holding that high blood pressure is a “physical handicap.” The Court stated that a handicap is a disadvantage that makes achievement unusually difficult.

The Santa Barbara Court approved the Commission’s finding that AIDS is clearly a physically “handicapping” condition since “persons infected with the virus may experience a range of physical impairments caused by a dysfunction of one or more body systems, including the reproductive and hemic and lymphatic systems.” Noting that AIDS is invariably fatal, the Court affirmed the Commission’s conclusion that “AIDS thus falls squarely within the physical handicap coverage of the Act.” This ruling has the support of a virtually unanimous judiciary. Citing decisions from around the country, the

Santa Barbara Court commented that even the most politically conservative jurists have affirmed that the plain meaning of the term “physical handicap” must include AIDS.

In its decision, the Commission upheld its long-standing interpretation of the Act requiring an employer to prove by a preponderance of the evidence that a person with a “physical handicap” would endanger the health or safety of others to a greater extent than a non-disabled individual. Raytheon argued that if it had a reasonable belief that there would be some danger, it should be free of liability.

In addition, the Court sustained the Commission’s conclusion that the employer bears the burden regarding and defenses asserted under the Act. It noted that Raytheon was required to prove that John Chadbourne would have endangered the health or safety of co-workers had he returned to work. Both the Commission and the Court found that it failed to do so.

During 1984, while Raytheon was determining how to treat its first employee with AIDS, it made a thorough investigation of the syndrome and how it is transmitted. As early as November 1982, soon after the term “AIDS” was coined, it was thought that transmission would require intimate contact and that spread by casual contact was not likely. This was confirmed in March 1983 by the Centers for Disease Control (CDC), the federal agency responsible for the prevention and control of diseases, including AIDS, in the United States. Again in June 1983 the CDC confirmed that AIDS is not spread through the air.

In his opinion Judge McMahon recounts in some detail the information concerning AIDS gathered by Raytheon. Raytheon consulted with Chadbourne’s treating physician, the Director of Communicable Disease Control for Santa Barbara County, the CDC in Atlanta, Georgia, a State of California public health doctor, and other experts in the field of AIDS transmission. Each of these sources of information confirmed that AIDS is not transmitted by casual contact in the workplace and that John Chadbourne could safely return to work.

On the basis of this unanimous opinion, the company doctor in Santa Barbara and the Medical Director of Raytheon in Massachusetts agreed, in an internal memorandum, that “this individual [John Chadbourne] can return to his job.” Yet Raytheon never allowed Chadbourne to return to work.

Citing the company nurse’s testimony concerning “paranoia” among employees, the Court suggests that fear caused Raytheon to act in direct contradiction to the best medical advice available at the time. The Court rejects fear as an excuse to discriminate against a person with AIDS, or anyone with a “physical handicap.” “In light of these poignant observations, the Commission was well within its power when it rejected the view that a person with a physical disability can be excluded from the work force simply because of the potential risk that fear among co-workers might injure company morale. If these laws are enacted to conquer myths, surely the Commission could not be said to have ignored the legislative mandate when it insisted upon actual evidence, as distinguished from speculation, that co-workers would actually be exposed to a risk.”

In addition to a review of Raytheon’s own medical investigation, the Court summarizes other expert testimony presented at the Commission’s hearing. Eight doctors testified in the case, six for the state and the Estate, and two for Raytheon. Except for one of
Raytheon’s witnesses, whose testimony was not credited by the Commission or the Court, all agreed that AIDS is not transmitted by casual contact. A doctor testifying for Raytheon speculated that other modes of transmission might be discovered in the future, but this evidence did not satisfy Raytheon’s burden of proving danger to others to justify its discriminatory actions against Chadbourne.

Viewing this evidence as a whole, the Court determined that “there is no doubt that the Commission’s decision is supported by substantial evidence.”

Finally, the Court rejected Raytheon’s contention that the Americans with Disabilities Act is preempted by the federal Rehabilitation Act of 1973, which forbids discrimination against persons with physical disabilities by federal contractors. Finding no express or implied preemption, and no conflict between the two statutes, the court held that both the states and the federal government are given a substantial and cooperative role in protecting disabled individuals from discrimination in employment. The Court followed *Muncy v. Norfolk & Western Railway*, 650 F.Supp. 641 (S.D.W.Va. 1986), which also rejected the proposition that federal law preempts state law prohibiting employment discrimination based on physical disability.

The *Chadbourne* decision is important because it is the first time a California court held that AIDS is a “physical handicap” and recognized that individuals with AIDS can work safely with others. It affirms a precedential decision of the Fair Employment Housing Commission which is binding on future Commission decisions and influential before the Courts. It protects Californians with terminal illnesses from further mistreatment on the job.

**Chalk v. U.S. District Court**

The same excellent result has been achieved in a federal appellate court decision delivered in the case of *Chalk v. U.S. District Ct.*, 840 F.2d 701 (9th Cir. 1988). Vincent Chalk, a certified teacher of deaf children with the Orange County Department of Education, was diagnosed with AIDS in February 1987. He was hospitalized with pneumocystis carinii pneumonia, recovered and was cleared to return to work by his own doctor and the Director of Epidemiology and Disease Control of the Orange County Health Care Agency. Nevertheless, the Department transferred Chalk to an administrative position coordinating grant applications after he unsuccessfully sought a court injunction against the transfer.

Chalk filed an emergency appeal with the Ninth Circuit Court of Appeals requesting an injunction against the transfer. On November 18, 1987, the court, in an unusual order, granted the request for an injunction and Chalk returned to the classroom.

In an opinion issued in February 1988, the court followed *School Bd. of Nassau County v. Arline*, the Supreme Court case holding that tuberculosis, a communicable disease, is a protected “physical handicap” under the Rehabilitation Act of 1973.

In determining whether or not Chalk was an “otherwise qualified individual with handicaps” as required by the Act, the court considered whether or not he could safely teach children without exposing them to a risk of contracting AIDS.
Under *Arlene*, the court considered four factors: “(a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.”

Based on an exhaustive body of evidence presented by Chalk, the appellate court found that AIDS is transmitted through intimate sexual contact, exchange of bodily fluids and from infected mother to infant.

Most importantly, the court joined the *Chadbourne* court, the United States Surgeon General and a virtually unanimous judiciary in concluding that AIDS is not transmitted by casual contact in the workplace. Based on this factual finding, the court ruled that the severity of the risk was virtually nonexistent and the probabilities the disease would be transmitted between Chalk and his students insignificant.

Based on these facts, the appellate court reversed the trial court and granted Vincent Chalk’s request for an injunction. Because it acted swiftly, the court insured that Chalk continued to teach while he was healthy enough to do so.
THE FOLLOWING QUESTIONS AND ANSWERS ARE COMMON TO SECTIONS 501, 503 AND 504 OF THE REHABILITATION ACT.

What facts should be included in the written complaint?

The written complaint will be used by the person who investigates your case and may also be introduced as evidence in later proceedings. As such, the complaint should be as specific and detailed as to dates, locations and content of significant discussions or events. It should explain that you are a person with AIDS or HIV infection and should also include a detailed account of all events relevant to your discrimination claim. Also, attach relevant documents (such as favorable medical reports) and identification of witnesses (names, phone numbers, addresses).

In some cases, the agency has a form which is used for written complaints. If you do not receive a form, ask your EEO Counselor if you are required to follow any particular format. In any event, fill out the form as thoroughly as possible, making sure to include all information pertinent to your case. If a written form is supplied, feel free to attach additional pages which contain more information, provided your name is placed at the top of each page. Remember, the complaint is your chance to explain your side of the story fully. Lastly, signing the form is necessary for timely filing.

What else can be done to win a case within the administrative system?

1) Keep in touch with the person who investigates your case.
2) Work cooperatively with the investigator in an effort to have each of your allegations explored and reported since the outcome of your case may depend largely upon the investigator’s report and recommendations.
3) Be aware of new or different complaints which need to be filed. A separate complaint must be filed for each new act of discrimination within 180 days of each discriminatory act.
4) Since either you or the employer can attempt to settle your case at any time, you should always be prepared to discuss terms for settlement. If you reach settlement, make sure the terms of the agreement are in writing and read it carefully before you sign it.

SECTION 501 OF THE REHABILITATION ACT

Which employers are affected by this section of the statute?

All federal agencies, such as the U.S. Postal Service.

How soon must a complaint be filed?

You must notify the EEO Counselor for the agency that made the adverse employment decision within 45 calendar days of the agency’s discriminatory action with additional deadlines after the agency is notified. For more deadline and procedural information, contact your local office of the U.S. Equal Employment Opportunity Commission (EEOC).
Where and how should a complaint be filed?

1) Get in touch with the agency which made the decision about your employment and find out where their EEO office is located.

2) Notify an EEO Counselor of your complaint within 45 days (as discussed above) in writing, over the telephone or in person.

3) After you notify the EEO Counselor, he has 21 calendar days to resolve your complaint informally.

4) If this cannot be done, the EEO Counselor should arrange a final interview with you and give you a letter of final interview telling you the next step for filing a formal complaint.

5) You have 15 days from the date of the final interview to file a written complaint with the correct agency official by delivering the complaint in person (filed on date of delivery) or by mailing it (filed on date postmarked). The final interview letter should name the appropriate official or ask your EEO Counselor for the name and address of the person authorized to receive written complaints.

What is the procedure after a complaint has been filed?

An explanation of procedures and deadlines can be obtained from your local office of the EEOC. Also, the agency which receives and investigates your complaint should notify you by mail at each significant stage in the administrative process.

SECTION 503 OF THE REHABILITATION ACT

Which employers are affected by this section of the statute?

Employers with federal contracts or subcontracts of $2500 or more.

Where and how should a complaint be filed?

Fill out a form entitled “Complaint of Discrimination in Employment Under Federal Government Contracts” available, along with where to send it, directly from the local offices of the OFCCP. Find your local office in the white pages of your phone directory under U.S. Government Offices, Department of Labor, Office of Federal Contract Compliance Programs.

How soon must a complaint be filed?

Within 180 days from the date of the employer’s alleged discriminatory action.

What is the procedure after a complaint has been filed?

1) After OFCCP receives your complaint, it will do an initial screening to make sure it has jurisdiction over your case. A determination will be made as to whether your complaint was filed on time and as to whether the employer in question is a government contractor or subcontractor.

2) If so, OFCCP then determines whether the contractor or subcontractor who took action against you has an internal procedure for reviewing your situation.
a) If not, OFCCP sets a date to begin an investigation of your case.

b) If so, your case is referred to the employer who has 60 days from the referral to resolve your case before OFCCP can begin its investigation.

3) When OFCCP conducts an investigation, an OFCCP investigator will check out a number of informational sources such as: other employees and the employer, personnel records, and doctors who have treated you.

4) To see your investigation file after the investigation is completed, write a letter to the investigator. The letter should simply contain a request to see your investigative file and state that your request is authorized by the Freedom of Information Act (FOIA).

5) After the investigation is completed, your case will take one of several turns.

a) If the investigation reveals a violation of the law or of OFCCP’s regulations and OFCCP decides to continue processing your case, the investigator will next attempt to remedy the situation through informal persuasion and conciliation. If conciliation does not resolve the complaint, OFCCP may impose penalties. An employer is, however, entitled to an administrative hearing if conciliation fails or OFCCP intends to impose penalties. If the decision is not in your favor, you can appeal to the courts.

b) If the investigator found no violation of the law or OFCCP decides not to pursue your complaint, you will be notified of OFCCP’s decision and may request a reconsideration of OFCCP’s decision in writing within 30 days from the decision. To comply, write a short letter saying you intend to request reconsideration of the agency’s decision. Then within another 30 days from the initial 30 day deadline, write a detailed letter explaining why reconsideration is appropriate. Try to see your investigative file. Include any new relevant information and attach signed statements from your own witnesses. All letters requesting review should be sent to OFCCP office in Washington, D.C. They should be addressed to: United States Department of Labor, Director of Office of Federal Contract Compliance, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

SECTION 504 OF THE REHABILITATION ACT

Which employers are effected by this section of the statute?

Programs or activities receiving federal financial assistance and programs or activities conducted by an executive agency or the U.S. Postal Service. Examples of employers who may receive federal funding include public schools, universities, hospitals, vocational rehabilitation agencies and state and local agencies.

How soon must a complaint be filed?

Within 180 days of the employer’s alleged discriminatory action.
Where and how should a complaint be filed?

Section 504 is enforced by the federal agency which supplies federal funds to the employer and each has its own set of regulations for processing complaints. If you have time before filing your complaint, ask the agency for any specific filing requirements. Generally, a complaint must be in writing and filed by mail or by hand delivery to the agency. If you do not know where the agency is located, look up its name and phone number in the white pages of your telephone book, under the U.S. Government Offices section and call them to confirm the appropriate place to send your complaint.

What is the procedure after a complaint has been filed?

As mentioned earlier, each agency has its own set of rules and regulations for processing administrative complaints. These rules usually provide for an investigation and an agency recommendation. Sometimes an administrative hearing may also be held. To know the procedure and deadlines, ask agency officials. This will help you keep tabs on your case and assist you during administrative process.