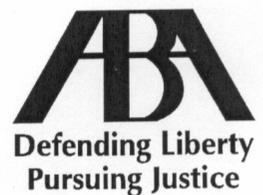


Perspectives on Returning to Work

**Changing Legal Issues
and the HIV/AIDS Epidemic**

Mark E. Rust, Editor

**American Bar Association
AIDS Coordinating Committee**



Acknowledgements

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The materials contained herein represent the opinions of the authors and editors and should not be construed to be the action of the American Bar Association (ABA), the ABA AIDS Coordinating Committee, or the ABA Section of Individual Rights and Responsibilities, unless adopted pursuant to the bylaws of the Association.

Nothing contained in this book is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This book and any forms and agreements herein are intended for educational and informational purposes only.

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Important Note to Readers

This illustrative report contains a glossary that defines each term that appears here either in italics or as an abbreviation or acronym.

Italics indicate a legal term of art that is described generally in the text, but varies from contract to contract, state to state, or is further defined by an associated endnote.

Preface

One of the most significant milestones in the HIV epidemic has been the development of therapies that have enabled many people with HIV disease to live longer, more productive lives. Physicians have been able to give hope to their patients, AIDS deaths have declined, and many people who had been too ill to continue their employment are considering returning to work. However, we still do not know how long these therapies will remain effective, even for those individuals who have already benefited from them.

As this report makes clear, concerns and perspectives on return to work differ. People with HIV disease, employers, and providers of insurance may view a return to work through prisms that at times may conflict. Even when they do not actually conflict, insurance policies, federal and state regulations, and employment policies may appear confusing. It is crucial for those involved in the issues to know the right questions to ask, of whom to ask those questions, and to act appropriately on the answers.

The ABA AIDS Coordinating Committee has tried to understand the various perspectives and to describe the issues in a fair and balanced way so that the results of our work—this report—can be useful to a variety of participants in the process: persons with HIV disease seeking to return to work, employers, insurers, and policy-makers. This has been done through the use of hypothetical case studies to make the information presented as accessible as possible. Our many hours reviewing this report pointed out the complexity of the issues and the pitfalls the different systems present. We have tried to be as accurate and up-to-date as possible. For example, we have included as an appendix to this publication a

summary of the Ticket to Work and Work Incentives Improvement Act of 1999, signed into law on December 17, 1999. However, readers should understand that standards and regulations are fluid, and that requirements may change.

The Committee is grateful for the time spent by its Return to Work subcommittee, chaired by Mark Rust, the liaison to the Committee from the Tort and Insurance Practice Section (TIPS). The Committee was also fortunate that its liaisons from TIPS and the Labor and Employment Law Section involved Terri Sorota, an attorney with considerable insurance background, and Dennis Walsh, of the National Labor Relations Board, as drafters of the report, together with Committee members Paul Hampton Crockett, Chris Herrling, Ross Lanzafame, Jody Odell, and Rita Theisen. They all gave generously of their time and expertise, and the report is better for their efforts. The Committee would also like to thank the George Gund Foundation for its support in helping to meet the costs of publishing and disseminating this report, and the ABA Section of Individual Rights and Responsibilities for its continued support of the AIDS Coordinating Committee and AIDS Coordination Project.

It must be emphasized that while the information presented in this report is believed to be accurate, readers should not view this material as legal advice, but rather as an illustration of the issues raised by the desire of HIV-infected people to return to work and the reactions they may face. A person in that position should seek professional assistance. This report represents the views of the drafters and has been reviewed by the Committee. It does not represent the official views of the American Bar Association. The Committee hopes that the report will be helpful to a wide range of individuals and welcomes comments from readers.

Robert E. Stein, Chair
AIDS Coordinating Committee
April 2000

The American Bar Association AIDS Coordinating Committee

The American Bar Association (ABA) AIDS Coordinating Committee was established in 1987 and charged with developing the ABA's AIDS-related activities, generating policy recommendations, and encouraging new ABA-sponsored AIDS programs. The Committee is composed of a chair appointed by the ABA President, a vice-chair, and representatives of more than 15 other ABA entities and several ABA-affiliated organizations.

ABA Policy

Through the AIDS Coordinating Committee, the ABA adopted policy, beginning in 1988, to address a number of HIV/AIDS-related concerns. Early ABA policies related to HIV/AIDS addressed issues such as voluntary counseling and testing; disclosure of identifying information; discrimination based on real or perceived HIV serostatus against otherwise qualified individuals in employment, housing, public accommodations, and government services; and procedures for dealing with HIV/AIDS in courtrooms and correctional facilities.

In 1989, the ABA adopted an omnibus package of HIV/AIDS-related policies that address access to the legal system and administration of justice, confidentiality, public health law, access to health care, HIV testing and counseling, insurance, drug abuse, immigration, education of the public, and partner notification.

Subsequent policies have addressed a number of additional issues, including long-term planning through legal mechanisms, such as standby guardianship, advance medical directives, viatical settlements, and appropriate consumer safeguards; compassionate release of nonviolent prisoners dying of AIDS or other terminal

illnesses; and removal of legal barriers to implementation of needle exchange programs that include drug counseling and treatment.

Status/Activities

In addition to formulating ABA policies on HIV/AIDS, the AIDS Coordinating Committee and AIDS Coordination Project assist practitioners and others working with HIV/AIDS legal issues through their publications and programs. In addition to this publication, the project currently has available its *Directory of Legal Resources for People with AIDS & HIV* (2nd ed., 1997).

In January 1999, the Committee held a first-of-its-kind, national, invitational symposium to address newly emerging issues in HIV/AIDS law. Titled, *HIV/AIDS and the Law: An Agenda for Beyond the Millennium*, the program assembled experts from a variety of backgrounds to focus on four primary aspects of the future of HIV/AIDS law: prevention, access to medical and legal care, international issues, and discrimination in the workplace and beyond. The symposium identified a number of issues on which the Committee will base its future policy resolutions, publications, and other projects. The Committee plans to publish the proceedings of the symposium.

The ABA has testified before Congress and the National Commission on AIDS, speaking on behalf of Ryan White Act reauthorization and other AIDS-related issues. Most recently, the Association has advocated federal funding for approved needle exchange programs, as defined in the ABA needle exchange policy. The Committee continues to follow this and other HIV/AIDS-related issues closely.

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Introduction

Researchers at the National Center for Health Statistics announced in October 1998 the surprising and welcome news that access to new and effective drug treatments has reduced the AIDS death rate to its lowest level since epidemiologists began tracking the data.¹ Unfortunately, this good news presents a legal system paradox for the estimated 40,000 U.S. citizens who contract HIV annually: the healthier the individual infected with HIV, the less secure his or her future financial protections may be should illness recur. And the more likely it is, as a practical matter, that expectations of both the individual and his or her employer and insurer will be frustrated.

For people infected by the disease, few life decisions raise as thorny and tangled a series of issues as the idea of returning to work. They must face the risk of leaving behind their safety net of disability-related income and health insurance benefits, with no way to predict the potential success of their new attempt at employment or the continued improvement in their health. Meanwhile, insurers and employers, reacting to perceived economic imperatives in the absence of regulation, sometimes see harsh and unexpected practical results for their insureds or employees by applying rules that were not designed for the waxing and waning disease HIV has become.

Unfortunately, no road map is available to guide these parties through the maze. From the perspective of the person infected, certain state and federal laws do offer some important protections, including the *Americans with Disabilities Act* (ADA) and the *Health Insurance Portability and Accountability Act of 1996* (HIPAA), but those protections only supplement and do not replace what is necessarily an individualized strategy based on one's current benefits, ability, and needs. For employers and insurers, planning is made difficult by the unpredictable nature of the disease and the evolving state of the duties imposed on them by law.

This report is an attempt to explain, not resolve, these complex and interrelated issues in a fashion that everyone from policy-makers to infected persons can understand. It illustrates the issues by examining the circumstances of two typical persons infected with HIV, Carmen and Ralph.

- The first section sets forth the relevant facts of their lives after a return to health prompts both of them to examine their financial and medical options.
- The second section explores the type of practical and legal options each might get from a person experienced in counseling those infected with HIV on their rights to disability payments and medical coverage, and their duties under the law.
- The third section sets forth the legal framework that constrains employers in their dealings with Ralph and Carmen upon their return to work.

What emerges is a snapshot of the competing policies, priorities, and prerogatives that make this area so difficult to navigate for all parties involved. It is offered as a basis for exploring, and eventually discovering, a more consistent and complete legal basis for safeguarding the rights of each party involved as the nation enters a new century and looks forward to the return to work of greater numbers of infected, but healthy, individuals.

Section One

Carmen and Ralph

Carmen—Relevant Facts

Carmen is confronted with a dilemma she never expected to face. Not only is she still alive nearly 10 years after her AIDS diagnosis, but she's feeling well enough to think about going back to work.

Prior to her unexpected diagnosis with AIDS-related pneumonia and emergency hospitalization in the fall of 1989, Carmen was very successful in her work with ABC, Inc., a computer software company. She began as a local sales representative, but distinguished herself through excellent job performance. Within a few years, she earned an executive position in the rapidly growing company. At the time illness struck, her duties included extensive travel to regional offices across the country, as well as supervisory responsibility for more than 75 employees.

Her diagnosis changed everything. Hospitalized and fighting for her life, she focused her energies on the daily battle for survival. In the years that followed, she continued to fight an ongoing (if intermittent) battle with various opportunistic infections, leaving her unable to work and with no income, even as her expenses substantially increased. Seeking to replace as much of her lost income as possible, she successfully applied through the *Social Security Administration* for

Social Security Disability Insurance benefits (*SSDI*). Additionally, she received monthly income through a group long-term disability plan provided to her by her employer as an employee benefit.

For the first 29 months after she stopped working, Carmen exercised her legal rights to access and pay for health insurance coverage as part of her employer's group under the federal law often referred to as COBRA because it was passed as part of the *Consolidated Omnibus Budget Reconciliation Act of 1985*. During that time she paid her own monthly premiums as required by the law, but received excellent coverage, including all necessary prescriptions. In late 1991, because she had received *SSDI* benefits for two years, Carmen automatically became eligible for health coverage under *Medicare* and received notice that her COBRA benefits had been terminated. Distressed to learn that *Medicare* did not cover any of the expensive prescription drugs she needed, she researched whether she could maintain and pay for her old insurance benefits. She found that the COBRA insurer had fulfilled its obligations under the law and had acted within its rights in terminating her coverage.² With further effort and research, she was able to patch together a means of meeting her prescription costs on a monthly basis through available state programs.

During the last year and a half, Carmen's health has improved dramatically as a result of newly available drugs and treatments. Despite certain ongoing minor health problems and the need for a complicated regimen of prescription drugs requiring constant medical monitoring, her condition generally appears to have stabilized, and she feels better and more energetic than she has in years. Now she is both hopeful about and frightened by the prospect of restarting a career.

On the one hand, she strongly wishes to resume her role as a productive member of society and is motivated to regain independence and control over her life. Having previously enjoyed a respectable measure of financial success, she is also tired of living under the limits imposed by a fixed income. On the other hand, she is haunted by one troubling possibility: What if she relapses?

Although her safety net of financial and healthcare benefits is far from perfect, she has learned to live with it and fears its loss in whole or in part. She has many unanswered questions about the effect a decision to work might have on her benefits. And, as her doctor honestly informs her, the long-term effectiveness of the drugs currently keeping her healthy is completely unknown, making any predictions about her continued health

useless. She has read in the media about an increasing aggressiveness on the part of disability insurers and the *Social Security Administration* toward beneficiaries of disability payments who may be recovering, as she is, and she is concerned that the length of time she has received benefits could leave her a likely target. She fears that even approaching her disability insurer or the *Social Security Administration* with her questions and concerns might raise a red flag, potentially placing her benefits in jeopardy.

Ralph—Relevant Facts

Now in his late 30s, Ralph worked a series of odd jobs after high school that were mostly paid in cash, under the table. In late 1994 he eventually moved to an urban area and obtained a job in the kitchen of a fine restaurant, which paid him a regular salary and contributed to Social Security on his behalf. After the first few months, Ralph was promoted to a more skilled position and given a small raise. For the first time in his life, he enjoyed his job, began to set aside some savings, and looked forward to his future. Unfortunately, only a few weeks later, he became severely ill overnight and sought emergency medical help. Since the small restaurant offered its employees no insurance coverage, a friend took him to the nearest public hospital.

Tests run there confirmed Ralph's worst fears: he was HIV-positive and was diagnosed with AIDS. Having nowhere else to turn, he applied for benefits with the *Social Security Administration*. Because his earnings record indicated that sufficient taxes had not been paid into the Social Security system on his behalf during the years he'd worked, he did not qualify for *SSDI* benefits. Nevertheless, since he was too weak to stand on his feet and clearly disabled, and met the *Social Security Administration's* strict limitations on income and assets, he was immediately awarded *Supplemental Security Income (SSI)* of approximately \$500 per month.

In qualifying for *SSI*, Ralph was automatically granted *Medicaid* health care coverage. Although he found that most of the best HIV physicians in his area would not see him because of the program's low reimbursement rate, he was able to obtain medical care and, most important, the expensive prescriptions necessary to fight the disease effectively.

Following his discharge from the hospital, Ralph was still far too sick to work and found that his real battle for survival had just begun. No

longer able to work and forced to rely solely on his *SSI* payment to pay his rent and meet all of his other financial needs, Ralph sought advice on other benefits available to him. Eventually he was able to obtain food stamps and a small amount of utility assistance.

Now, a few years later, Ralph is on one of the new HIV cocktail drug combinations, and his energy level and health have improved considerably. Bored with his life on disability and desperately wanting more disposable cash, he is considering for the first time the possibility of looking for work. The idea of losing the lifeline of his benefits frightens him deeply. Understanding that his eligibility for *Medicaid* was based on his qualifying for *SSI*, he is aware of the strict financial guidelines applying to the latter and fears that earning even a few dollars could result in the loss of both. In addition, knowing that many of the jobs for which he could qualify offer no health insurance benefits, and that in all probability he could never earn enough by himself to pay for the expensive drugs required to keep him healthy, he knows that keeping that coverage in force may literally be a matter of survival for him.

Section Two

A Perspective on Disability and Medical Benefits

Carmen's Disability and Medical Benefits

It is essential that Carmen get clear answers to fundamental questions about the potential effect of her decision on her private disability coverage, her *SSDI* benefits, and her *Medicare* coverage. This section explores how her rights and responsibilities with respect to those benefits interrelate.

Carmen's Private Group Disability Coverage

Identifying the Terms of Carmen's Coverage

As a first step, Carmen must read her private long-term disability insurance policy carefully rather than guessing about its terms. The policy language can be extremely difficult to understand; although it is often assumed by insureds to be legalistic boilerplate, it is not. The obligations of the disability insurer to Carmen (and vice versa) are simply a matter of contract, nothing more and nothing less.

Since Carmen is contemplating a return to ABC, and intends to seek her old job, she should inquire first whether the company still offers disability coverage to its employees, and if the coverage has changed in any way. If it has changed, she must read the new policy, too, so that she can understand

the new terms that may apply to her. Benefits under private disability policies vary from policy to policy, and each word, definition, or phrase can make a major difference. In addition, employers often change insurance companies or policies within a company. This change also may affect employees.

Definition of Disability

In reviewing the policy under which she is currently receiving benefits, Carmen will need to pay particular attention to a number of key terms and provisions that may affect her decisions concerning a possible return to work. It is especially important and most basic that she understand how her policy defines “disability” or “total disability.” She is currently receiving private disability benefits, after all, strictly because her insurer has determined that she meets the terms of its definition of disability.

The definition of “disability” varies among private policies. Some define disability as the inability to perform one’s “specific occupation.” If Carmen’s policy has this type of definition, she is entitled to benefits if her medical condition prevents her from performing her pre-disability occupation with her employer or any other employer, even if she is able to engage in another occupation. (It is unlikely that Carmen’s group long-term disability policy would contain this type of definition of disability for more than a few years following a claim for disability.) Other policies define disability as the inability to perform “any occupation” for which one is reasonably qualified. If Carmen’s policy has this type of definition, she is only eligible for private disability benefits if her medical condition prevents her from performing any occupation for which she is reasonably suited (“any occupation”).³

While different policies have different definitions, group disability policies offered by employers often use a combination of “specific occupation” and “any occupation” definitions of disability. Most likely, Carmen’s policy provides an initial period of time (e.g., two years) during which benefits are payable if she is unable to perform her regular occupation (“specific occupation”). Following that initial period, she is eligible for continued benefits only if the disability insurer agrees that her medical condition prevents her from engaging in “any occupation.” That determination will be made based on her level of education, training, and experience. While disability insurers report that they normally would not require a former business executive like Carmen to engage in a menial, task-oriented job, her insurer would likely consider it reasonable for her to return to a position with a lesser status with her former or another employer. Even so, most private disability insurance is considerably more generous than the *Social*

Security Administration, which requires that the disabled person be completely unable to engage in *any* significant gainful employment.

Some long-term disability policies also contain an earnings test as part of the definition of disability. Under such a provision, Carmen would continue to be disabled, and therefore entitled to benefits, if she cannot reasonably be expected to earn more than a specified portion (for example, 80 percent) of her pre-disability earnings.

In reviewing her policy's definition of disability, it is important for Carmen to understand that the policy provides benefits only if she is unable to work because of her medical condition. Private disability insurance benefits are not unemployment benefits and are not intended to protect against economic downturns, layoff, or an inability to find a job. Carmen's benefits will cease when the insurer determines that she is no longer disabled as defined in her policy, whether or not a job is actually available.

Other Key Terms

Like others living with HIV, Carmen must deal with substantial uncertainty about her health and consider the possibility that her medical condition might worsen following a return to work. She must determine, therefore, whether her policy provides benefits for a "recurrent" or "successive disability" or defines "periods of disability" in a way that will permit her to resume receiving benefits if the same medical condition (i.e., AIDS) again prevents her from working. To encourage a return to work, some policies contain such provisions for disabilities that recur within six (or 12) months of resuming employment. Even if her policy contains no "recurrent disability" provision and she no longer meets its definition of disability (which, as discussed above, may include an earnings test), Carmen might nevertheless be entitled to benefits if she becomes disabled during the time she is covered under the terms of the long-term disability policy her employer offers to its new employees. (Most likely, ABC terminated Carmen's employment after she was disabled for a specified period of time, such as one year. Therefore, when she returns to work, she will be a new employee under ABC's current long-term disability coverage, if it is offered.)

ABC's policy may exclude coverage for *pre-existing conditions*. Such provisions typically exclude coverage for disabilities due to medical conditions existing on or before the date of coverage. In Carmen's case, disabilities related to AIDS could be excluded. Most individual and small-group policies contain this type of provision, while policies offered

by large employers generally do not. Also, Carmen may not be entitled to coverage until she has been re-employed and actively at work for a period of time specified in her policy, or by her employer.

If the new policy does not exclude coverage for *pre-existing conditions* and Carmen again becomes disabled, she will still need to determine whether her new disability coverage will require her to satisfy an *elimination* (or waiting) *period* before benefits begin. She will also want to consider the extent to which other benefits offered by her employer, such as sick pay or short-term disability benefits, will provide her with continued income during the *elimination period* for long-term disability benefits.

Carmen should also read carefully any provisions in her current policy defining “residual disability” or “partial disability benefits.” Such provisions may allow her to continue collecting a partial benefit under the policy if she is able to work, but not full-time or at the same earning level as before her disability. Eligibility for benefits under such provisions typically starts when an insured individual can no longer perform certain tasks important to his or her job, or when the individual’s income drops below a specified level as a result of disability. By offering a middle ground between the all or nothing of total disability, residual or partial disability benefits encourage a continuation of, or a return to, work according to the insured individual’s current level of ability.

In addition, Carmen should investigate whether her current policy offers rehabilitation, return to work, or other independent living benefits to help pay for any education, training, or other special services that might be necessary or helpful as she returns to work.

Carmen will also need to examine her policy to make sure she complies with any obligations she may have to the insurer, such as providing notice of any improvement in her medical condition or reporting other sources of income.

Carmen’s Options

Prudence dictates that Carmen proceed with caution in making decisions regarding a return to work. She should discuss the idea with her physician to ensure that he or she agrees that her medical condition has improved sufficiently and that returning to work is not likely to jeopardize that improvement. If her physician does not believe Carmen is able to return to work, she should consider heeding that advice. If her physician agrees that it is reasonable for her to try returning to work, she should discuss any possible limitations on job responsibilities, working hours, or other medically appropriate conditions.

Once Carmen and her physician agree that returning to work is possible, she should consider contacting a local AIDS service organization or AIDS hotline, if there is one in her area, for advice and possible assistance in this process prior to contacting her disability insurer.

If Carmen qualifies for partial or residual disability benefits, she should consider returning to work part-time or in a less demanding position than she held formerly. Since she cannot be sure at what level she will be physically able to work or for how long, it makes sense to leave open any possible options available under the policy. If she continues to meet her current policy's definition of disability, she will not jeopardize her right to receive full benefits once again under that policy if she has a relapse and again becomes totally disabled.

Carmen is fortunate that her former employer offers its employees long-term disability benefits; fewer than half of all employers provide such coverage. If Carmen were considering a position with another employer, it would be prudent for her to determine whether that employer offered long-term disability benefits; and on what terms.

Contacting Her Insurer

Because Carmen has so much to lose if her disability insurer determines that she is no longer disabled, Carmen may be reluctant to contact her insurer about a possible return to work. If she is serious about returning to work, however, her insurer can provide her with resources and support services to assist her. If she is hesitant about contacting her carrier directly, she may want to consider obtaining as much information as possible from any available source, including local AIDS service organizations or her state AIDS hotline. In some areas benefits consultants are available for assistance.

In considering whether to contact her insurer, Carmen should take into account that her insurer will not necessarily continue to make payments indefinitely and without question, or until she believes she is able to return to work. Unlike the *Social Security Administration*, which typically does not initiate significant efforts to return disability benefit recipients to work, private insurers often actively seek to return the individuals they cover to the work force. If Carmen's insurer feels it has sufficient evidence that she is able to return to work, it will likely initiate a return-to-work discussion with her (or, in some cases, simply terminate her disability benefits) whether or not she contacts the insurer. No matter how long she has received benefits, a decision not to contact her insurer by no means will ensure that she will

continue to maintain the status quo and keep receiving benefits until she believes she is ready to re-enter the work force.

If Carmen chooses to contact her disability insurer, she may be surprised at the additional assistance available to her. Disability insurers are often extremely cooperative in this regard, since every month that Carmen works is one less month the insurer will have to pay full benefits. Many insurers report that they are genuinely interested in working with those they cover to ensure a successful transition back to the workplace, and some are developing increasingly sophisticated programs, using rehabilitation professionals to help individuals return to work.

Once presented with the question, the insurer will evaluate Carmen's medical condition and review the kinds of functions she can perform. If she and her insurer agree that she cannot return to work on a full-time basis but that part-time employment may be an option, she may be eligible for partial disability benefits. Even if Carmen's policy contains no such specific provisions for partial benefits, an insurer may be willing to work out an agreement with her for a transition period. Her insurer may also consider providing vocational rehabilitation services or workplace modifications.⁴

If her insurer determines that she is no longer disabled, Carmen will not necessarily lose her public disability and medical benefits. Because public and private programs serve different purposes, each defines the critical term "disability" differently. A decision by Carmen's insurer that she is no longer disabled under its policy is not necessarily adopted by the *Social Security Administration* or state disability programs. If Carmen's private disability benefits stopped, she would continue to receive *SSDI* benefits as long as she met Social Security's definition of disability. It must be noted, however, that the *Social Security Administration* does review all claims periodically to evaluate continued disability.

If Carmen Had Individual Disability Income Insurance

Carmen is covered under a disability insurance policy provided by her former employer. If, instead, her coverage derived from an "individual" disability income policy, some of her concerns about returning to work would be different, and a new analysis would apply.

While group and individual disability policies share a number of similarities, they are also different in some ways. An employer "group" policy is a contract between an employer and an insurer; individual employees are beneficiaries under the policies and typically have no right to continue

coverage once their employment ends (except, of course, that coverage will continue for any disability that existed on the day employment terminated). In Carmen's case, for example, although she is entitled to benefits under the policy as a result of the disabling condition that existed when her employment terminated, she is no longer a "covered employee" under the policy. Instead, she is simply a beneficiary of the employer's contract with the insurer. Except to the extent her policy provides coverage for a "recurrent" or "successive" disability after she returns to work, Carmen has no right to continued benefits under that policy once her condition no longer meets the policy's definition of disability. Her rights may then be completely severed.

In contrast, an individual policy is a direct contract between an individual and an insurer. Had Carmen purchased an individual disability income insurance policy before she developed AIDS, she would be able to continue her coverage under that policy following a return to work, provided she continued to pay her premiums. Employers' policies often include a "waiver of premium" provision. Under a typical "waiver of premium" provision, she would not be required to pay premiums to keep the policy in force during the period of her disability. As long as she could afford to pay her premiums, she would not have to be as concerned about whether her prospective employer offered disability coverage, or whether any such employer's policy might exclude a *pre-existing condition*.

Employers often contribute some or all of the cost of any group disability benefits they offer their employees. Individual policies can be prohibitively expensive and typically exclude coverage for disabilities arising from *pre-existing conditions*. Nevertheless, individual policies can offer significant advantages. Because individuals pay their own premiums for such coverage, the benefits paid under such policies are typically not taxable, whereas benefits received under employer group policies often are taxable to the individual.

Carmen's SSDI Benefits

By law, once Carmen was deemed disabled by the *Social Security Administration* and eligible for *SSDI*, payments began five full months after the reported starting date of her disability. This is called the waiting period. After she had been receiving *SSDI* for 24 months, she automatically qualified for *Medicare* health insurance coverage, which generally covers the elderly only but has special coverage provisions for the disabled of any age. Since

the *Social Security Administration* wants to encourage a return to work, it has built in various work incentives designed to keep people's benefits and *Medicare* coverage in place for certain periods of time while they give employment a try.⁵

The most important work incentive Carmen must understand is the trial work period. Even though she currently receives *SSDI*, Carmen has the right to work at any job, and earn any amount of money doing so, for a nine-month period without fear of losing her benefits. Under *Social Security Administration* rules, she is required to inform the agency that she has returned to work, and the *Social Security Administration* identifies her as having begun a trial work period. (Even if she does not report officially, the *Social Security Administration* will ultimately find out through payroll reporting and immediately notify her that she has begun a trial work period.) If she earns less than \$200 in a month, that month will not count as one of the nine. The nine months need not be consecutive, allowing Carmen some important flexibility, and they can take place during any ongoing five-year period of benefits. Until those nine months have been tallied by the *Social Security Administration*, Carmen's benefits cannot be disturbed.

At the end of the nine-month (non-consecutive) trial work period, the *Social Security Administration* will review Carmen's record and assess whether she is still qualified for benefits under applicable guidelines. Social Security focuses primarily on whether her earnings have consistently reached a level of *substantial gainful activity*, basically \$700 a month, and not the question of whether she is still disabled. This is an important distinction, and one that presumably will provide Carmen with some peace of mind as she thinks about returning to work. After all, the work incentives are in place to provide her with a comfort zone to experiment with work rather than to strip her of benefits. Even if her benefits stop after the end of the trial work period, that does not constitute a finding that she is no longer disabled. That is an important distinction, because a series of safety nets still remain open to her.

The determination of whether Carmen is earning enough for a long enough time takes her expenses into account in calculating *substantial gainful activity*. The *Social Security Administration* permits deduction of a wide variety of disability-related expenses if paid by the covered individual and necessary to allow him or her to work, including medical equipment and prescription drugs. Even if Carmen's income has reached the *substantial gainful activity* level during the trial

work period, and upon review she is found to be no longer eligible for benefits, she will still receive an additional *grace period* of payments for the following three months, guaranteeing 12 months of benefits, even if she does not return to work fully.

If Carmen becomes sick again and at some point is forced to return to the disability rolls, she may have more coverage. (See the timeline on next page illustrating these possibilities.) First, if she loses her job or her income again drops below the level of *substantial gainful activity* within five years, no new waiting period for benefits will be imposed. Second, the end of her trial work period, when her *SSDI* payments have stopped, triggers an *extended period of eligibility* of 36 consecutive months, or three years. If she has a disability relapse during that time and her income plummets, she will be eligible to start receiving full benefits again with no new application, disability determination, or waiting period. To restart benefits, she need only call her local Social Security office and let officials know that her illness has reduced or eliminated her ability to earn money. Even though Carmen must file a new application for benefits after 36 consecutive months, there still will be no waiting period if it has been five years or less since her last disability payment.

SSDI Eligibility Time Line

Carmen's Medicare Coverage

Since Carmen is covered by *Medicare* (meaning that she has been receiving monthly *SSDI* benefits for 24 consecutive months) at the time her Social Security payments stop, she will remain covered for 39 months without paying premiums after she has entered the *extended period of eligibility*. After that time, if she is still working but remains disabled, she can keep *Medicare* coverage in force indefinitely by paying premiums herself.⁶

If Carmen had returned to work before completing the 24-consecutive-month waiting period for *Medicare* and her disability, she would have been given full credit toward the 24-month period for the months she had received benefits at any time she again became disabled, as long as the cause of her prior and current disability were the same. However, if the new period of disability were caused by an impairment unrelated to her HIV, and began more than five years after her initial disability, the five-month waiting period would begin again.

However, since *Medicare* does not provide the coverage she needs for her prescription drugs, Carmen needs to investigate whether the state programs that currently fund her prescriptions will continue after she returns to work. Her eligibility for the state programs may depend on her income, which will likely increase if she returns to work.

Carmen's Opportunity to Obtain Private Health Insurance

If Carmen takes a job with an employer that provides health insurance coverage for its employees, HIPAA requires that she be included in the plan and that the time she was covered under *Medicare* be credited toward the satisfaction of any waiting periods for *pre-existing conditions*. However, these protections are of no benefit to Carmen if her new employer does not offer health insurance coverage, or if the coverage offered provides limited or no prescription drug coverage. This could pose a difficult dilemma for Carmen; she may be healthy enough to return to work if she has health coverage, but without coverage for the medications she needs, she will become disabled again.⁷

If she returns to work, it will be important for her to find a job, if possible, with an employer that provides comprehensive medical and disability insurance. If health coverage is not available through her employer,

she may want to consider purchasing an individual medical insurance policy. Because she has maintained continuous health insurance coverage, most recently through *Medicare*, her state is required to have a method for ensuring that her existing medical condition does not preclude her from obtaining coverage.⁸ The method for doing so varies from state to state. Some states have established *high-risk pools*, with premiums often capped at 150% to 200% of standard rates. Other states require private carriers to provide coverage; however, a 1998 General Accounting Office (GAO) study reports that this coverage can be prohibitively expensive for some.⁹

Carmen's Options in the Event of a Relapse

To know what might happen to benefits in the event of a relapse, Carmen must know how long after she returns to work the relapse may occur, and what benefits her then-current employer offers. If she returns to work but with a different employer, her former carrier's coverage stops altogether. There would be little chance that she could go back on disability benefits with her former carrier. (That would not be the case if Carmen was covered under an individual disability income insurance policy that she purchased before she tested HIV-positive and continued to maintain that coverage. Individual policies and newer policies issued to employers typically provide immediate coverage for a relapse that occurs within six months of returning to work, as long as premiums have been paid when due.)

If her new employer offers disability coverage, and she has become eligible for the coverage, she will be eligible for benefits under the terms of the new policy. Just as she did with her previous employer, she would need to file a claim and submit appropriate medical documentation. If she meets the policy's definition of "total disability" and satisfies the policy's *elimination period* (or what the *SSA* calls the "waiting period") from the time a disability begins until benefits start, she will begin receiving private disability benefits.

If her disability relapse starts before her *SSDI* trial work period ends or within five years thereafter, she will be immediately eligible to resume *SSDI* benefits and be eligible for *Medicare* coverage. If the relapse occurs more than five years after the end of the trial work period, she will need to begin anew the arduous process of qualifying for *SSDI* benefits.

Ralph's Disability and Medical Benefits

Unlike Carmen, Ralph's level of benefits is dependent on his financial condition. In Carmen's case, neither the private disability insurer nor *Medicare* administrators care whether she has one dollar or a million dollars in assets. Those benefits are not available to Ralph, however, so he faces a different series of challenges, all based on his level of income or assets and the degree to which they are limited.

Ralph's Supplemental Security Income ("SSI")

SSI is a benefit one qualifies for because one's income is below a certain level ("means-based benefit") paid through the *Social Security Administration*, meaning that to qualify, one not only must be disabled, but also must meet strict asset and income limitations. No waiting period is imposed for *SSI*, and *Medicaid* coverage automatically follows these benefits. Again, work incentives have been put in place to encourage people receiving *SSI* to experiment with trial work periods without fear of losing their benefits or *Medicaid* coverage. Ralph does have some options.

If Ralph goes back to work and starts earning an income, his monthly *SSI* benefits will be affected differently from Carmen's *SSDI* benefits. No matter how much Carmen earns during the trial work period, her benefits will not be reduced at all. In contrast, the amount of the *SSI* check received by Ralph generally will decrease immediately as the amount he earns increases. The amount will not be reduced dollar for dollar by the amount of his income, but instead adjusted according to the following formula: the *Social Security Administration* will ignore the first \$85 of his job income and will reduce his benefit by one-half of the remaining amount earned.

For example, let's assume that Ralph's *SSI* check every month is \$500, and that he earns \$300 in income during one month back at work. The first \$85 of the \$300 will not be counted, leaving \$215 in income. One-half of that amount, or \$107.50, will also be ignored, but the remaining half will be applied to reduce his benefit dollar for dollar. Thus, the adjusted benefit Ralph receives from *SSI* for that month would be \$392.50 (\$500 minus \$107.50), but the total amount in his pocket would increase to \$692.50 (the \$300 earned, plus \$392.50). Obviously, if his income reaches a certain amount, his *SSI* benefit would be suspended completely. However, if Ralph relapses into

disability in the future and his income decreases accordingly, his monthly benefit will be adjusted upward.

At some point, if Ralph's income increases, his benefit payment will cease. If that happens more than 12 months after his *SSI* payments have stopped, he must file a new application to be entitled again to benefits.

If Ralph is able to come up with an individual plan that might allow him to return to work (such as starting a new business, training for a new job, or some specific proposal), and the *Social Security Administration* approves that plan, some of his earnings used for that purpose could be disregarded.¹⁰ In that event, the additional earnings will not be counted by Social Security so they will not reduce his *SSI* benefit. If appropriate "vocational rehabilitation" (generally defined as any training or education that qualifies an individual for a job) might help Ralph return to work, financial assistance may be available from his state. Once Ralph has entered an approved program, his benefits will not stop until he completes it. If Ralph is able to stay employed in his job for a sufficient period so that a Social Security contribution record is established, he may become eligible for *SSDI* (like Carmen) rather than *SSI*.

Ralph's Medicaid Coverage

Even if he earns enough to cause his benefits to stop, however, Ralph will not lose his *Medicaid* coverage as long as he is still disabled under *Social Security Administration* rules and continues to need *Medicaid* to cover his costs for the medical care he depends on to work. Each state has established its own method for determining this "need" for *Medicaid*, after which coverage is terminated. Ralph should be aware that if he exceeds the applicable level of income and assets defined in his state, he will no longer qualify and will lose all his benefits.

If Ralph relapses into illness after he has been off *Medicaid* for 12 months or more, he must apply again to be entitled to benefits.

Section Three

Perspective on Employment

Additional Facts

Carmen's Potential Employment

Although Carmen has been away from her job for several years, she hopes to be able to return, perhaps on a part-time basis, so she contacts Chris, the human resources director at her former employer, ABC, to explore the possibility. Chris handles all of the hiring for ABC. She remembers that Carmen was an outstanding employee and had excelled before she took her medical leave of absence. Although Chris is glad to know that Carmen is feeling better and does not doubt her desire to have a successful career once again, Chris is concerned with the state of Carmen's health and her company's legal obligations upon Carmen's return to work.

ABC, Inc., has experienced rapid growth since Carmen left in 1989. However, in recent months, upper management has been communicating the

need to control costs and improve profitability. The sales force at ABC, for example, has had its sales quotas increased significantly. The position Carmen formerly held is a flexible, yet extremely demanding one, requiring an extensive amount of travel and stamina. In addition, the field has changed tremendously while Carmen has been on medical leave. To become an effective sales person again, Carmen would need a great deal of training. New sales people who join ABC, despite their level of experience, often need four to six months before they are thoroughly familiar with ABC's product lines, customer services, marketing strategies, and pricing policies. Chris anticipates that Carmen also would need that much time to become familiar with ABC's product lines, several of which were introduced during her absence. She is concerned that a sales position may be too demanding for Carmen. Chris wants to discuss these issues with Carmen as candidly as possible, but does not want to violate the *Americans with Disabilities Act (ADA)* in doing so.

Chris is also concerned about the potential costs associated with bringing Carmen back to work. Although Carmen is feeling better and is enthusiastic about returning to work, Chris wonders about the long-term effectiveness of Carmen's current treatment and medications. ABC invests a tremendous amount of time and resources in training its sales force and, as a result, does not want to hire an individual who will leave ABC after only a short time. Chris also needs to know what type of accommodations Carmen might require and what ABC's obligations are under the *ADA*.

Several other issues factor into Chris's decision. She knows that it is important to Carmen that her condition not be publicized. Carmen wants to return to employment in as normal a fashion as possible. Also, although Chris knows Carmen's experience and strengths were in sales, she wonders if Carmen would be interested in a non-sales position. Chris believes she could create a suitable reduced-schedule position. Although the position would offer fringe benefits, including health and disability insurance, it would pay substantially less than Carmen's former sales job.

All of these questions need to be resolved if Carmen is to return to ABC:

- May Chris discuss with Carmen her concerns about Carmen's health (i.e., her need for extended absences, her ability to perform the job) without violating the *ADA*?
May Chris require a doctor's certification assessing Carmen's ability to perform the sales position?

- Who may be informed about Carmen's medical condition and her need for certain accommodations?
- What if it becomes clear, after several months, that Carmen cannot perform the sales position? Must Chris reassign her to a different position? Must Chris create a new position for Carmen?
- What are ABC's responsibilities to provide Carmen with a leave of absence, if she should require one in the future?

Ralph's Potential Employment

Through a friend in the Machinists Union, Ralph learns of an opening at the XYZ Widgets plant near where he lives. His friend tells him that it is for an entry-level job as an assembler. XYZ needs a full-time employee on the second shift, which runs from 3:00 p.m. to 11:00 p.m., Monday through Friday, with the possibility of a significant amount of overtime, particularly on the weekends. The job is not backbreaking, but it is tedious, involving standing at an assembly line for eight hours a day, with 15-minute coffee breaks at 4:30 p.m. and 8:30 p.m., and a half-hour for dinner at 6:30 p.m. The hours and the breaks are prescribed in a collective bargaining agreement between XYZ and the Machinists, the union that represents the assemblers. The agreement also specifies the hourly wage rates for the assembler position, which are significantly higher than the wages Ralph was receiving as a restaurant worker. Most important, the agreement provides for significant benefits, including sick days, health insurance coverage, and a disability insurance plan. However, a new employee must complete a probationary period of 90 days before becoming eligible for any of the benefits, including health insurance. The probationary employee must satisfy the plant supervisors that he or she can perform the job adequately before passing probation and becoming eligible for the benefits.

Ralph decides to go to XYZ and apply for this position. He fills out a job application and is scheduled for an interview with XYZ's personnel department. Ralph's union friend says he will vouch for him, and the XYZ management respects his friend, so it appears that Ralph has a pretty good chance of getting the job. Several issues face both Ralph and XYZ, however, as Ralph sits down for his job interview:

- Is there information about his medical condition or history that Ralph should discuss during his job interview? What questions can the interviewer ask Ralph?

- If Ralph is offered a job, should he ask for an accommodation of his work schedule? Is XYZ obligated to provide it to him? How does the union fit into the picture? If the union opposes the accommodation, does XYZ have to provide the union with information concerning Ralph's medical condition?
- Can XYZ monitor Ralph's work performance during his probationary period? What if XYZ discovers that Ralph cannot do the job? Can he be terminated? Can Ralph contest his termination under the union contract or under the ADA? What if he has passed his probationary period? Can he be terminated then, and, if so, what are his rights under the union contract and the ADA?

Answering the Issues under the Law

Issues Involving Carmen

Carmen and Chris face a variety of issues regarding confidentiality, job requirements, accommodations, and the intersection of the rights and obligations under the ADA and the *Family and Medical Leave Act* ("FMLA").

The Hiring Process: Carmen

The ADA has several provisions that are designed to focus employment decision-making exclusively on applicants' qualifications, not on their disabilities. As a general rule, an employer is prohibited from asking disability-related questions or conducting medical examinations until after making a conditional offer of employment. However, employers may seek information that reveals whether an applicant is qualified for the job and can perform its specific functions. For example, during the initial interview Chris may describe the amount of traveling required for the sales position or the average length of the work week and ask Carmen whether she believes she could satisfy those requirements.

Another general rule is that employers may not ask applicants if they need accommodations to perform specific job functions. However, when an employer reasonably believes that an applicant may need an accommodation to perform the job, the employer may ask questions limited

to whether the applicant would require a *reasonable accommodation* to perform specific job functions and what type of *reasonable accommodation* would be needed.¹¹ In Carmen's situation, Chris clearly is aware of Carmen's medical condition because of Carmen's past employment with ABC.¹² At the interview stage, therefore, Chris could discuss what accommodations, if any, would assist Carmen in performing the specific requirements of the sales position. Chris's decision to offer Carmen a job should be based, however, on her assessment of Carmen's qualifications and abilities. The ADA prohibits employers from taking disabilities into consideration. If Carmen had indicated she needed a *reasonable accommodation* and the need for that accommodation were not obvious, however, Chris could ask her to provide reasonable documentation describing her disability and the functional limitations it imposed.¹³

After a conditional offer of employment is made to Carmen, Chris may ask disability-related questions or conduct a medical examination, but only if it is ABC's practice to do so for all incoming employees. The information obtained cannot be used for discriminatory purposes.

Confidentiality

Carmen's expressed concern about maintaining her privacy is protected by the ADA, which mandates that employers take steps to protect the confidentiality of employees' medical information. Employers are prohibited from disclosing confidential information regarding an individual's medical condition, with certain limited exceptions.¹⁴ This prohibition applies even to information voluntarily disclosed by employees or applicants. Therefore, even though Carmen may initiate a discussion with Chris about her treatment for HIV and her need for certain accommodations, Chris is still obligated to maintain the confidentiality of that information. If Carmen's co-workers ask questions about her disability or accommodations, Chris should respond by emphasizing ABC's policy of assisting any employee who encounters difficulties in the workplace and its commitment to protecting the privacy of its employees and their personal situations.¹⁵

Furthermore, the ADA sets forth specific guidelines for handling confidential medical documentation. All information Chris receives about Carmen's condition (or that of any other ABC employee) must be maintained in separate files and kept in a separate, locked cabinet, accessible only to designated individuals.

Reasonable Accommodation

To perform the essential functions of her position, Carmen may need some type of *reasonable accommodation*. ABC has a duty under the ADA to provide a *reasonable accommodation* to Carmen if it will enable her to perform her job. Accommodation, however, is a two-way street: although employers are obligated to provide disabled employees with *reasonable accommodations*, employees generally have the responsibility to make such requests.¹⁶ Under the ADA, the employer's duty to extend *reasonable accommodation* is limited by the *undue hardship* involved.

Once an employee requests a *reasonable accommodation*, the ADA contemplates both the employer and the employee engaging in an "interactive process" to determine what accommodation the employee needs to enable him or her to perform the job.¹⁷ This interaction is meant to identify the individual's functional limitations and the potential accommodations needed.¹⁸ Although the preferences of the individual with a disability should be given primary consideration, an employer is not required to simply defer to the employee's preferred accommodation; rather, the "reasonableness" of an effort to accommodate an employee depends on a "good-faith effort to assess the employee's needs and to respond to them."¹⁹ However, an employer's obligation to accommodate is not limitless. Employers are not required to provide any accommodation that would cause *undue hardship*.²⁰

The duty to accommodate under the ADA can take a variety of forms, depending on the employee, the employee's disability, and the requirements of the position.²¹ The job may be restructured in some fashion as an accommodation.²² For example, if Carmen feels nauseated immediately after taking her medications in the morning, it may be reasonable to schedule her regular work day to begin later and end later. During the day, Carmen may need time to take additional medication and a refrigerator in which to store it. Providing both to her may be a *reasonable accommodation* and may help her to perform her responsibilities. Non-essential functions of a position may be eliminated or reassigned as a *reasonable accommodation*. For example, from time to time, sales personnel may be expected to lift and carry heavy boxes of promotional material. If Carmen has a lifting restriction that prohibits her from doing so, that task may be reassigned to someone else, or she may be provided with a wheeled cart to eliminate the need to carry the boxes.

Alterations to Carmen's work environment may also be a *reasonable accommodation*. If, for example, Carmen has experienced significant weight

loss, extra padding for her chair may allow her to sit more comfortably for longer periods of time. If her medications cause her to use the restroom more frequently, her work area may be relocated closer to the restroom.

If Carmen's condition deteriorates, but she is still able to perform the essential functions of her job, a *reasonable accommodation* may involve working part-time or working from her home. *Reasonable accommodation* may also include holding the employee's job open during a leave of absence.²³

If Carmen becomes unable to perform the essential functions of the sales position at some point, reassignment to a vacant position within her abilities may be a *reasonable accommodation*.²⁴ Chris has contemplated creating a suitable reduced-schedule position that would not involve any travel. Although employers are not required to create new jobs for employees as an accommodation, nothing in the ADA prevents Chris from doing so. If by creating a new position Chris is able to retain a valuable employee, both ABC and Carmen may benefit from the change.

Family and Medical Leave Act

Another federal law that may assist Carmen is the *FMLA*. After Carmen has worked for ABC for 12 months and 1,250 hours, she becomes eligible for certain rights under the *FMLA*. According to the *FMLA*, an employee with a "serious health condition" is entitled to 12 weeks of unpaid medical leave within a 12-month period.²⁵ Furthermore, during an *FMLA* leave, the employer must maintain the employee's existing level of coverage under a group health plan, but it may require that the employee pay his or her portion of the health insurance premiums. At the end of *FMLA* leave, an employer must return the employee to the same job or to one equivalent to the job held before the employee left.

An *FMLA* leave need not be taken all at once. If, for example, Carmen needs two hours of leave from her job each week to attend a doctor's appointment, she may do so under the *FMLA*.²⁶ Also, *FMLA* leave may be used to change an employee's schedule for a period of time, such as from a full-time schedule to part-time. The *FMLA* does not prevent employers from offering more generous leave benefits than those required by the *FMLA*. For example, ABC, Inc., may allow employees to take up to a year of unpaid medical leave. If so, Carmen may have more options for medical leave under ABC's policies, in addition to the leave mandated by the *FMLA*.

Issues Involving Ralph

The Hiring Process: Ralph

Although Carmen's employer is fully aware of her condition, Ralph may be considering what, if anything, he should tell his prospective employer about his medical condition. The short answer is that he is not obligated to tell XYZ anything, and he probably should not. The ADA prohibits XYZ from refusing Ralph employment because of disability. As long as Ralph is able to perform the essential functions of the employment position that he is applying for, XYZ cannot refuse to hire him because of a disability. The Supreme Court has held that an "asymptomatic" HIV-positive individual is "disabled" within the meaning of the ADA.²⁷ The Equal Employment Opportunity Commission (EEOC) has also consistently held that HIV infection is "inherently substantially limiting" and thus is "disabling" within the meaning of the ADA.²⁸ An applicant for employment is "qualified" to perform a job if the applicant can perform it "with or without" *reasonable accommodation* of the disability, as long as such a *reasonable accommodation* does not require the prospective employer to undergo *undue hardship*.

Thus, Ralph may be tempted to tell his prospective employer about his disability, so that they can discuss *reasonable accommodations* that might be necessary before Ralph can accept the position. For example, he may not feel that he can withstand the long hours of standing without more frequent breaks, and he may want an accommodation of that schedule. If he has a disability within the meaning of the law, and he is qualified to do the job with that accommodation, XYZ cannot legally refuse to give him the job without making the accommodation. From a practical standpoint, however, Ralph would probably be better advised not to reveal any possible limitations on his ability to do the job at this stage, so as not to jeopardize his chances of being hired. Under the union contract, he will have a probationary period during which his ability to perform the job will be evaluated. If, during that probationary period, he finds that he cannot do the job without some accommodation of his work schedule, he can request such an accommodation at that time. Having already been hired, he will be in a much better position to negotiate the terms of any necessary accommodation with XYZ. Ralph is not obligated to reveal his medical condition during his job interview, however, because, as explained above, the ADA puts strict limits on the types of things an employer can ask about at different stages of the pre-employment process.

Confidentiality

Like Carmen, Ralph may be concerned about maintaining the confidentiality of his HIV-positive status. Questions may arise, however, if Ralph's co-workers observe the accommodations he uses on the job and question the reasons for them. In such a case, the EEOC's position is that, although an employer may not tell employees that it is providing a *reasonable accommodation* for an employee, the employer may "explain that it is acting for legitimate business reasons or in compliance with federal law."²⁹

As described in more detail below, the union may also be involved in working with XYZ to provide certain accommodations to Ralph. Because of this, the union may need to know of Ralph's medical status and the physical limitations, if any, that affect his ability to perform his job.

Accommodations

The process of requesting and obtaining an accommodation may be different for Ralph than for Carmen because the job he would be offered is in a position that is represented by a union. Under the National Labor Relations Act (NLRA), an employer whose employees are represented by a union is obliged to bargain with the union over any changes in terms and conditions of employment. In addition, if XYZ and the union have a collective bargaining agreement that defines the terms and conditions of employment, such as the hours of the shift and the prescribed breaks, the union may take the position that XYZ cannot change Ralph's hours of work or his breaks because that would be unfair to other employees. In these circumstances, questions may arise for XYZ about how much it has to tell the union and what its obligations are to negotiate with the union over accommodations to Ralph's work schedule.

The union, just like XYZ, has a legal obligation to provide *reasonable accommodation* to an employee with a disability who cannot perform the job without it. Accordingly, the union cannot simply stand on the collective bargaining agreement and refuse to allow XYZ to change Ralph's work schedule. Likewise, XYZ cannot claim that an accommodation of Ralph's schedule would be an *undue hardship* simply because it would violate the terms of its agreement with the union. Because unions and employers are covered entities under the ADA, the EEOC has taken the position that they are obligated to negotiate a variance to the collective bargaining agreement if necessary to accommodate a disabled employee.³⁰ And because the NLRA requires employers to negotiate with

unions over all changes in terms and conditions of employment, it may be advisable in any event for XYZ to seek the union's approval before making changes to Ralph's work schedule, even if the accommodation would not technically be in conflict with the collective bargaining agreement. Once Ralph passes his probationary period and is protected by the union contract, it would be advisable for him to seek the assistance of his union before requesting an accommodation from XYZ Widgets.

If the union questions the need for such changes, it may be entitled to some documentation of the need for an accommodation. ADA regulations allow covered entities, such as unions, to make inquiries necessary to the accommodation process, and the union may require reasonable documentation of the need for an accommodation. The NLRA requires employers to provide unions with information that is relevant and necessary to the bargaining process. Thus, if the union and XYZ negotiate possible changes to Ralph's working conditions as part of the accommodation process, XYZ may be required to provide the union with medical documentation concerning Ralph. However, because of the confidentiality issues involved, XYZ should not make any disclosures until it reviews this situation carefully with its legal counsel.

This issue may arise for XYZ either before or after the accommodation has been made for Ralph. It could arise beforehand if the union disputed the need for the accommodation or the extent of the accommodation, or if the union and XYZ were required to negotiate a change in the collective bargaining agreement to accommodate Ralph. It could arise after the accommodation was made if either the union or another employee who may have been disadvantaged in some way by the accommodation were to file a grievance against XYZ for making the accommodation for Ralph. The NLRA requires employers to provide unions with information that is relevant and necessary to resolution of grievances. Thus, consistent with the confidentiality requirements of the ADA, XYZ may be required to provide the union with reasonable medical documentation showing the necessity and the extent of the accommodation, in connection with a grievance filed under the collective bargaining agreement.³¹

If the union and XYZ are unable to reach agreement on an accommodation for Ralph, XYZ is not without recourse under the NLRA. After the union and XYZ have reached an "impasse" over the issue,³² XYZ can make the accommodation without violating its duty to bargain under the NLRA.

Reasonable accommodation under the ADA may include "reassignment to a vacant position."³³ An employer is not obligated, however, to "bump" an employee from a job to create a vacancy.³⁴ Several courts have held that, in the

union context, a position is not “vacant” if another employee is entitled to it and, therefore, it cannot be a position to which reassignment may be made.³⁵

The collective bargaining agreement between the union and XYZ may provide that XYZ can terminate Ralph before he passes his 90-day probationary period, and that Ralph has no right to file a grievance over the termination. Thus, XYZ would be within its legal rights to monitor Ralph’s work performance during this 90-day period to determine whether he can perform the essential functions of his position, with or without a *reasonable accommodation*. Under the ADA, XYZ is allowed to make inquiries into the ability of an employee to perform job-related functions. Thus, unless Ralph can show that XYZ has refused to provide him with a *reasonable accommodation* of his work schedule, or some other accommodation that might be reasonably required for him to do his job, he can be terminated if he cannot do the job, and he would have no recourse under either the ADA or the collective bargaining agreement.

If Ralph passes his probationary period and is covered fully by the collective bargaining agreement with the union, he will be able to file a grievance under the provisions of the agreement if XYZ seeks to terminate him for inability to perform his job, or for any other reason. The agreement may even entitle him, usually with the consent of the union, to seek arbitration of the grievance by a third-party arbitrator if it remains unresolved. Questions have arisen over whether an employee may actually be required to use a contractual grievance procedure and to arbitrate the grievance before seeking to file an action claiming discrimination under the ADA. This issue only arises if the grievance and arbitration provision of the contract is broad enough to cover a claim of discrimination.³⁶

Section Four

Conclusion

While the United States has developed a system of rights and duties governing working conditions and safety nets for social needs, that system is imperfect and complex. It may not satisfy all the competing priorities and demands introduced by the return to work of a substantial number of healthy but infected individuals and raises difficult legal issues for everyone involved.

This report was intended to illustrate these issues so that policy-makers, HIV-infected individuals, and their employers and insurers might have a frame of reference to begin discussing their resolution. The American Bar Association's AIDS Coordinating Committee hopes that by highlighting and illustrating the relevant issues, this report will assist people with HIV/AIDS, their employers and insurers, and their advocates and experts in better understanding the context and issues of returning to work with HIV/AIDS.

Appendix

On December 17, 1999, President Clinton signed the Ticket to Work and Work Incentives Improvement Act of 1999, which provides Social Security disability recipients who want to return to work greater access to rehabilitation services and public health care benefits. Most of the provisions of the new law will not take effect until late 2000 or 2001 and are, therefore, not reflected in the text of this paper. The *Social Security Administration* has prepared several summaries and a question and answer document concerning the new law, which are available on its Web site, <http://www.ssa.gov>. Over the next year, the *Social Security Administration* is expected to develop regulations to implement the new law.

Glossary

Americans with Disabilities Act (ADA): A federal law passed in 1990 that prohibits employers of at least 15 people from discriminating against people with disabilities (including HIV). Also prevents discrimination with respect to public accommodations, including restaurants, stores, public transportation, etc. Requires employers to make *reasonable accommodations*, if necessary, to allow people with disabilities to keep working. *See* 42 U.S.C. §§ 12101 *et seq.*; *see also* 28 C.F.R. Parts 35 and 36; *see also* 29 C.F.R. 1602, 1627, 1630.

Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA): A federal law requiring employers of at least 20 people to offer to keep in force group health insurance coverage for at least 18 months for people who have left their jobs or who would otherwise no longer qualify to remain covered as part of the group. (People who leave their jobs as a result of disability may be entitled to 29 months, and others losing their coverage as dependents, 36 months). During the time coverage is extended, it remains the responsibility of the covered individual to make his or her own premium payments. Under COBRA, an individual's health benefit premiums are capped at 102% of the premium in place during the individual's time of employment, and disability insurance premiums are capped at 150% of the premium in place during the individual's time of employment. Some states have adopted *mini-COBRA laws*, requiring companies of fewer than 20 people to provide similar benefits. *See* Public Law 99-272, Title X, codified as Section 4980B of the Internal Revenue Code of 1986, as amended, and at Title 6 of the *Employee Retirement Income Security Act of 1974 (ERISA)*, as amended.

Disability waiver of premium: Provisions in insurance policies (typically life or disability coverage) allowing the coverage to remain in force without payment of additional premiums after the individual has been disabled for a certain time.

Elimination period: In disability policies, the time the individual

must be disabled before benefits start. Also referred to as *qualification period*.

Employee Retirement Income Security Act (ERISA): A federal law enacted in 1974 to regulate and protect retirement plans, retirement income, and welfare and benefit plans for employees. ERISA was enacted to protect employee rights to employer-sponsored retirement, benefit, and welfare plans. *See* 29 U.S.C., Title 18 § 1001 *et seq.*

Extended period of eligibility: The period of time following a trial work period during which *SSDI* benefits can be reinstated, as long as the individual's income does not exceed the specified limit. The current extended period of eligibility is 36 months.

Family and Medical Leave Act of 1993 (FMLA): A federal law requiring employers of a certain size to allow their employees to take up to 12 weeks of unpaid leave per year if a serious health condition of the employee or the employee's child, spouse, or parent arises. During the time of absence, benefits must be preserved intact, and no demotion or other sanctions can result from the time off. The 12 weeks need not necessarily be taken consecutively. *See* Public Law 103-3, codified as 29 U.S.C. § 2601; *see also* 29 C.F.R. Part 825 *et seq.*

Grace period: The extra time (often 30 days) provided under an insurance policy to make premium payments after their due date to keep coverage in force.

Health Insurance Portability and Accountability Act of 1996 (HIPAA): A federal law enacted in 1996 to reduce the number of individuals with claims denied due to *pre-existing condition* limitations within insurance contracts. Prior to HIPAA, an individual who was terminated from employment would have to satisfy a period of time (typically from three to 12 months) before claims due to *pre-existing conditions* would be covered. HIPAA allows the individual to reduce or eliminate this *pre-existing condition* limitation by

providing proof of past coverage to the new insurer. *See* Section 9801 of the Internal Revenue Code of 1986, as amended, and Section 701 of *ERISA*.

High-risk pool: Programs certain states have established to make health insurance available to people who would be uninsurable otherwise. Such programs typically are administered by private insurance companies, but are heavily subsidized by the state. Coverage varies in quality, and premiums are often expensive.

Medicaid: A means-tested, joint federal-state public assistance program that provides payment for medical services for the poor, disabled, and certain others. Means-tested means that strict asset and income limitations apply. Program coverage, medical benefit, and eligibility levels vary from state to state, but are no less than the federally mandated minimum standards. Medicaid covers prescriptions and hospitalizations, but its limited reimbursement levels paid to participating health care providers often result in problems with access to treatment and receipt of lesser-quality care. *See* 42 U.S.C. § 1396 *et seq.*

Medicare: The federally funded, federally regulated health care coverage program for which eligibility is determined based on age, renal failure, or certain standards for disability and *SSI* eligibility. Eligibility generally requires that the individual have paid into the Social Security fund for a minimum number of years. *See* 42 U.S.C. § 1395 *et seq.*

Mini-COBRA laws: *See Consolidated Omnibus Budget Reconciliation Act of 1984.*

Portability: The ability to move from one job to another with no gaps in insurance (and associated health insurance) coverage resulting from *pre-existing condition* exclusion provisions in the new coverage.

Pre-existing condition: In health or disability insurance, a medical condition for which benefits are delayed or excluded because it existed within a certain time prior to the effective date of the coverage.

Reasonable accommodation: If an employee with a disability requests that appropriate changes be made either to his or her job structure (such as changed hours, time off, etc.) or to the physical structure of the workplace to allow the employee to keep on working, the *ADA* requires that such changes be made as long as the accommodation does not impose an *undue hardship* upon the employer.

Social Security Administration (SSA): The federal agency that administers *SSI* and *SSDI*, among other programs.

Social Security Disability Insurance (SSDI): A federally sponsored disability insurance program operated by the *SSA* paying individuals who have a qualifying disability cash assistance on a monthly basis during the period of disability. To qualify, the individual must have paid in to the system sufficiently through Social Security payroll taxes (*FICA*), and the amount of the cash assistance benefit depends on the individual's work history. In contrast to *SSI*, not a means-based asset and, therefore, no income or asset limitations apply. After two years, leads to qualification for *Medicare* coverage. *See* 42 U.S.C. § 401 *et seq.*; *see also* 20 C.F.R. § 404 *et seq.*

Substantial gainful activity: A level of work activity that is both substantial and gainful. Substantial work activity involves the performance of significant physical or mental duties, or a combination of both, that are productive in nature. Gainful work activity is work performed for remuneration or profit; work of a nature generally performed for remuneration or profit; or work intended for profit, whether or not a profit is realized. For work activity to be substantial, it need not necessarily be performed on a full-time basis; work activity performed on a part-time basis may also be substantial. Substantial gainful activity encompasses

the ability to perform any substantial, gainful work, including work of a physically or emotionally lighter type than the individual previously performed.

Supplemental Security Income (SSI): A federal cash assistance program operated by the *Social Security Administration* providing fixed monthly payments to persons who are disabled, blind, or aged with low incomes and assets below a specified level. SSI automatically leads to *Medicaid* coverage, and possibly other means-based benefits, as well. *See* 42 U.S.C. § 1381 *et seq.*; *see also* 20 C.F.R. § 416 *et seq.*

Undue Hardship: The ADA defines an “undue hardship” as “an action requiring significant difficulty or expense” taking several factors into account, including the nature and cost of the accommodation; the overall financial resources and size of the employer making the accommodation; and the type of operation involved. 42 U.S.C. § 11211(10). An employer must assess on a case-by-case basis whether a particular accommodation would cause undue hardship.

Endnotes

1. Steven A. Holmes, *AIDS Deaths in U.S. Drop by Nearly Half As Infections Go On*, N.Y. TIMES, Oct. 8, 1998, at A1, A22.
2. She might have similar rights under state law.
3. As further discussed in the following paragraph of the text, such definitions are necessarily more ambiguous than those based upon an inability to perform one's specific occupation. Policy language often varies, but eligibility for benefits under these more general provisions is triggered by an inability to perform any job for which the applicant is reasonably suited by age, level of education, training, and experience. The ambiguity of such provisions can make proof of disability difficult if coverage is denied or otherwise challenged by the insurer.
4. As discussed in Section Three, under the *Americans with Disabilities Act*, her employer may be required to provide any reasonable workplace accommodations she needs. A disability insurer typically would not pay for workplace modifications that an employer is required to make under the ADA.
5. For more specific information on how those incentives might work, one may contact a local Social Security office or visit the SSA's Web site at <http://www.ssa.gov>, and search the site using the term, *trial work period*.
6. In some cases, if the individual meets certain income and asset limitations, state financial assistance may be available to help pay the *Medicare* premiums, and other related "out-of-pocket" expenses (such as deductibles or co-insurance charges). One may find the applicable state rules by contacting a state or local welfare office or *Medicaid* agency. For more general information, contact a local Social Security office and ask for HCFA publication number 02184, *Medicare Savings for Qualified Beneficiaries*.

7. Several pending federal bills would expand *Medicare* and *Medicaid* eligibility (including prescription drug coverage) for those returning to work.
8. 26 U.S.C.A. § 9801.
9. Health Insurance Standards, Implications of New Federal Law for Consumers, Insurers, Regulators: Testimony Before the Senate Committee on Labor and Human Resources, General Accounting Office, GAO/T-HEIS-98-114, (1998), available through <http://www.gao.gov>.
10. As noted in the text, SSI benefits differ from those offered by SSDI in that job earnings are immediately applied so as to reduce the monthly benefit amount once a disabled person has returned to work. A “disregard” simply means that any funds officially agreed to be applied toward an approved vocational rehabilitation program will not be counted as income, and therefore not reduce the SSI benefit to that extent.
11. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA, question 12 (Mar. 1, 1999) [hereinafter EEOC Guidance].. However, when an employer asks questions about an applicant’s need for a *reasonable accommodation* before an offer of employment has been made and then subsequently rejects the applicant, the EEOC will carefully scrutinize whether the need to provide accommodation was a reason for rejecting the applicant. EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, (Oct. 10, 1995). The Guidance issued by the EEOC is available on its Web site at <http://www.eeoc.gov>.
12. *Grenier v. Cyanamid Plastics*, 70 F.3d 667, 675-77 (1st Cir. 1995) (holding that an employer had knowledge of the applicant’s medical condition where the applicant was a former employee who had been receiving long-term disability benefits).

13. EEOC Guidance, *supra* note 11, at, question 6. Chris could also ask Carmen to sign a limited release allowing Chris to submit a list of specific questions to Carmen's physician. *See Grenier, at 675-77.*
14. For example, an employer may tell an employee's manager or supervisor about any work restrictions or accommodations the employee requires. An employer may also share otherwise confidential medical information with health insurance or worker's compensation carriers as necessary. First aid and safety personnel may also be informed of an employee's disability if it may require emergency treatment. *See* 29 C.F.R. § 1630.14(b).
15. EEOC Guidance, *supra* note 11 at question 41.
16. *Id.*
17. *Id.* at question 5.
18. 29 C.F.R. § 1630.2(o).
19. EEOC Guidance, *supra* note 11 at question 9.
20. The ADA defines an *undue hardship* as "an action requiring significant difficulty or expense" taking several factors into account: the nature and cost of the accommodation; the overall financial resources and size of the employer making the accommodation; and the type of operation involved. 42 U.S.C. § 12111(10) (1999). An employer must assess on a case-by-case basis whether a particular accommodation would cause *undue hardship*. *See* EEOC Guidance, *supra* note 11, at Undue Hardship Issues.
21. A resource available to assist with ideas for possible accommodations is the Job Accommodation Network (JAN), which is funded by the Department of Labor. JAN may be reached by telephone at (800) 232-9675, or on the Internet at <http://janweb.icdi.wvu.edu>.

22. EEOC Guidance, *supra* note 11 at question 16.
23. ABC, Inc. does not have to provide paid leave beyond that which is provided to non-disabled employees. For example, if Carmen needs 15 days of leave and she has accrued only 10 days of paid leave under ABC's policies, ABC should allow her to exhaust her 10 days of paid leave and then provide an additional five days of unpaid leave as a *reasonable accommodation*. *Id.* at question 16. Not only may the *ADA* require that an employer provide unpaid medical leave, but the *Family and Medical Leave Act* [hereinafter *FMLA*] does, as well. The specific requirements of the *FMLA* are discussed further in the next section.
24. EEOC Guidance, *supra* note 11 at question 24.
25. A "serious health condition" under the *FMLA* is different from a "disability" under the *ADA*. A "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves . . . [i]npatient care . . . or [c]ontinuing treatment by a health care provider." 29 C.F.R. § 825.114(a)(1)–(2) (2000). An employer may verify an employee's serious health condition by asking the employee's physician to complete an *FMLA* certification form.
26. Under the *FMLA*, this is known as "intermittent leave," or leave taken in separate blocks of time due to a single reason. 29 C.F.R. § 825.203 (2000).
27. *Bragdon v. Abbott*, 524 U.S. 624, (1998).
28. 29 C.F.R. § 1630.2(j) (2000).
29. EEOC Enforcement Guidance on the *ADA* and Psychiatric Disabilities, No. 915.002, at 18 (Mar. 25, 1997).
30. EEOC Guidance, *supra* note 11 at question 45. A number of federal courts of appeals have disagreed with the EEOC's position. They have held instead that employers

are not obligated to provide any accommodation that violates the provisions of a collective bargaining agreement. *See, e.g.,* Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995); Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996); Kralik v. Durbin, 130 F.3d 76 (3rd Cir. 1997); Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997); Willis and Gomez v. Pacific Maritime Assoc., 162 F.3d 561 (9th Cir. 1998); Aldrich v. Boeing Co., 146 F.3d 1265 (10th Cir. 1998).

31. To accommodate any confidentiality concerns that Ralph may have, the employer would be required to obtain Ralph's written permission, or the employer and the union would be required to bargain about appropriate restrictions on the use of the information to accommodate Ralph's confidentiality concerns.
32. Under the NLRA, whether the parties have reached an "impasse" as defined under case law is a complicated factual question, but, essentially, a legal impasse is reached when the parties are so far apart that further negotiations would be futile.
33. 42 U.S.C. § 12111(9)(B) (1999).
34. Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678 (7th Cir. 1998).
35. *See, e.g.,* Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996).
36. The Supreme Court considered this issue in Wright v. Universal Maritime Service Corp., decided on November 16, 1998. The Court reviewed a lower court decision holding that a stevedore who had failed to file a timely grievance under a collective bargaining agreement was barred from suing in federal court under the ADA. The stevedore claimed that several stevedoring companies refused to provide him work because he had a past history of a disability. The grievance and arbitration clause under the applicable collective bargaining agreement applied to

“all matters affecting wages, hours, and other terms and conditions of employment.” Despite the fact that the clause did not specifically apply to *ADA* or discrimination claims, the lower court held that it covered such claims, and the stevedore could not pursue his *ADA* claim in federal court because he had failed to use the contractual grievance and arbitration procedure.

The Supreme Court reversed the lower court and held that the collective bargaining agreement did not clearly and unmistakably waive covered employees’ rights to bring employment discrimination claims. Therefore, the stevedore could pursue his *ADA* claim in federal court without first exhausting the grievance and arbitration procedures under the collective bargaining agreement.