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AIDS IN THE WORKPLACE

By: Matt W. Zeigler, Esq.

What does an employer do when it is learned for the first time that an employee has Acquired Immune Deficiency Syndrome ("AIDS"), the AIDS-Related Complex ("ARC") or is being treated for the HIV virus? This event is occurring more and more frequently with roughly 500,000 persons diagnosed with the disease and another estimated 1 to 1 1/2 million persons who may be infected with the disease but are asymptomatic carriers, according to the United States Center for Disease Control in Atlanta, Georgia. The worst thing that can happen is, if the employer is unprepared to deal with the situation, then the emotions, hysteria and co-worker reaction based on incorrect information may force an employee to quit because of an adverse working environment. All of this can happen so fast that there is little time for the employer to understand all of the ramifications of this event and there may be no chance to take charge of the situation and prevent the worst-case scenario from happening. The employee sues. The potential damages are back pay, so-called "front pay" (i.e. potential future wages earned) and civil court damages for defamation. Also, under the Americans with Disabilities Act, if the employer's actions are determined to be "intentional" or with "reckless indifference" of the victim's rights by the failure to take corrective measures, then some punitive damages may also be available.

Issues that employers may wish to consider before the "worst case scenario" is visited upon them are briefly outlined in this column.

Americans With Disabilities Act. AIDS is now a protected disability under the Americans With Disabilities Act ("ADA") that became effective in July of this year. Further, in Michigan, AIDS is similarly protected as a handicap under the Michigan Handicapper's Civil Rights Act. So a person who has contracted the disease or the virus is protected to the maximum extent under the law. Even the "perception" that an employee has the disease is protected under Michigan law. The effect of an employee leaving his or her employment because of a rumor that he or she has AIDS may result in liability for the employer for back pay, front pay, and other damages.

What duties does an employer have to protect all of the other personnel in his or her workforce against the possible intentional or unintentional exposure to the AIDS virus? What if the infected employee is cut and bleeds?

OSHA Obligation. The Occupational Safety and Health Act ("OSHA") states the affirmative obligation of an employer to provide a safe place for all employees to work. If an employee infected with AIDS is presently working and poses a substantial risk to other employees, then the remaining employees could bring an action against the employer either in civil court under OSHA or with the National Labor Relations Act under a "concerted protected activity" theory where the employees are acting for the safety of all of the employees.

However, according to the present state of knowledge of this disease, in the normal workplace environment, there is little risk to the other employees from possible exposure to the AIDS virus or an AIDS Related Complex. This does not apply to medical facilities where health care services are provided.

Privacy Issues. An employer faced with the information that an employee has AIDS must not disclose that information to more people or employees than those that absolutely must know. Such sensitive information should be disclosed only to the immediate supervisor, the owner of the company, the human resources manager, the medical or first-aid personnel, and the employment relations attorney. Co-workers should definitely not be informed. If the employer were to make a disclosure of a person's disease beyond this very closed circle, the present status of the case law does not protect the employer from a defamation lawsuit brought by the victim alleging that such knowledge portrayed him or her falsely as a drug user or being gay.

Testing Issues. The present state of the law does not permit testing for AIDS in non-health care employment settings because, according to the present state of medical knowledge, there does not seem to be much risk that AIDS will be transmitted in most work environments.

Food Handling Jobs. There is no special prohibition for persons infected with AIDS or the HIV virus from being employed in a place where food is prepared at the present time. The Secretary of Health and Human Services is charged with the responsibility of publishing a list of infectious and communicable diseases that are transmitted through the handling of food. The most current list does not list AIDS or HIV patients. But, for example, hepatitis A virus patients do appear on the list. In the event that an employer does not wish an AIDS infected employee to work in a food handling position, then the employer must make a reasonable accommodation, under the ADA, for the infected employee and make adjustments in the workplace that will take care of the employer's concerns, or transfer that employee to another position, or to a vacant position.

Maintaining Employee Discipline. Generally, AIDS infected employees must be treated as any other medical illness would be treated under the employer's benefit policies and leave of absence procedures. There are no federal or state restrictions on an employer's right to maintain proper work performance and to enforce appropriate disciplinary measures against an employee who may not be performing up to normal job standards even though infected with AIDS. While the balancing between "reasonable accommodation" for such an employee and "undue hardship" upon the employer is still the test under the ADA, if the employee cannot perform the clearly outlined job description (one that meets the ADA standards), then the employer can successfully enforce its disciplinary schedule and survive a charge of or a suit alleging discrimination.

Develop An AIDS Education Policy Now. To prevent hysteria and unintentional discrimination from developing in the workplace for which the employer is ultimately liable, the time to develop an AIDS education or awareness policy is before the situation arises. An employer cannot rely on the other employees' unschooled fear of the disease as a defense to a charge of discrimination. The fear of contagion, by itself, is not an adequate defense. The burden rests upon the employer to educate its employees so that they do not create liability for the employer through their own actions or reactions. An employer may wish to advise and train those persons who perform the first aid function of proper medical prevention procedures. Similarly, an employer may advise its supervisory staff of the potential for defamation actions against the employer for disclosure of sensitive and confidential medical information about any employee, and, especially, HIV patients. The Michigan State Medical Society, and its AIDS Education Project, located in East Lansing, has many speakers who will come and give a talk on these issues. An employer may also invite some other well-known medical organization to come and speak to your employees and supervisory staff about the proper prevention of the spread of AIDS and the treatment of AIDS infected employees.