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David W. Webber

DISCRIMINATION BASED ON HIV/AIDS AND OTHER HEALTH CONDITIONS: "DISABILITY" AS DEFINED UNDER FEDERAL AND STATE LAW*

DAVID W. WEBBER, J.D.**
LAWRENCE O. GOSTIN, J.D., LL.D.***

INTRODUCTION

For many years, the development of legal protections against discrimination based on health conditions has been a public health and social justice legislative goal. The inclusion of individuals with Human Immunodeficiency Virus (HIV) within such non-discrimination protections has been an integral part of this process. The critical problem in developing an effective non-discrimination legal standard, however, has been in establishing the scope and contours of this standard—what health conditions are or are not to be included? The definition of protected health conditions must be capable of reasonable comprehension for compliance purposes, while also being specific enough to allow effective interpretation and enforcement in the administrative agencies and the courts.

Beginning with the enactment of the Rehabilitation Act of 1973,[1] federal legislative efforts have been directed at the development of a statutory definition of *disability*[2] that requires something more than a

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** J.D., Temple University. David W. Webber is the editor of AIDS AND THE LAW (3d ed. 1997).

*** Professor of Law, Georgetown University Law Center; Professor, Johns Hopkins School of Hygiene and Public Health; and Co-Director of the Georgetown/Johns Hopkins Program on Law and Public Health.

1. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-796i (1994)).

2. Although the original enactment of the Rehabilitation Act used the term "handicap," this paper uses the preferred term "disability" throughout. The latter terminology was approved in the Americans with Disabilities Act as well as other federal statutes providing protection against discrimination on the basis of health conditions. *See* 42 U.S.C. § 12102 (1994).

health condition of a trivial or inconsequential nature. At the same time, however, the condition cannot be so serious or severe as to render the individual wholly unable to participate in the program, or to work in the workplace, in question.[3] Also, because the conditions to be protected cannot reasonably be listed, given their variable nature in individuals and the need to allow for identification of additional health conditions in the future, the disability definition is generic in nature, without listing, even for illustrative purposes, any specific health condition as a disability. Although nondiscrimination laws at the state and local levels include some notable deviations from this federal definition, the federal definition has been widely influential in the development of non-discrimination standards at the state level.

HIV infection presents a fundamental question about the extent of protection afforded by this definition. Understanding in what sense this health condition is a disability—it presents no apparent limitations on everyday activities—is invaluable in comprehending the meaning and purpose of federal disability nondiscrimination law more generally and assessing alternative approaches, such as those presented by some state laws. In this Article, we examine the disability definition "problem" from the standpoint of HIV infection, specifically HIV infection in its "asymptomatic" phase. By definition, this phase of the infection does not involve physical limitations or impairments of the sort that are frequently viewed as resulting in disability. Although our discussion focuses on asymptomatic HIV infection, it should be noted that infection with HIV may result in differing assessments of disability at different times for different individuals. Diagnosis with Acquired Immune Deficiency Syndrome (AIDS), for example, has been taken to be the *sine qua non* of a disability under the federal definition, yet "AIDS" is nothing more than a diagnostic definition established by the U.S. Centers for Disease Control and Prevention (CDC) for epidemiological purposes.[4] Although the diagnosis can be based on one or more physical symptoms, the diagnosis does not re-

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3. For a critical assessment of the disability definition used in federal law, see Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 415-34 (1997).

4. *See generally* Centers for Disease Control and Prevention, *1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults*, 41 MORBIDITY & MORTALITY WEEKLY REP. 1, 1-19 (RR-17, 1992). The definition has gone through four revisions since its original promulgation in 1982. For a fuller discussion of the AIDS definition, see AIDS AND THE LAW § 1.6, at 12-13 (David W. Webber ed., 3d ed. 1997 & Supp. 1999).

quire a specific degree of physical or mental limitation or impairment. Indeed, one can be diagnosed with AIDS based solely on laboratory evidence of suppressed immune system function combined with one or more clinical conditions. Subsequent to diagnosis, however, an individual's immune system function may return to normal levels and the clinical conditions may resolve. Therefore, because an individual diagnosed with AIDS may currently have no symptoms, such an individual may face much the same problem in establishing a disability as would an individual who has never had symptoms of the infection. On the other hand, infection with HIV may in some individuals have a profound psychological impact, which may be disabling. Thus, as we explore in more detail below, determining whether someone is an individual with a disability under the federal definition has little dependence on the medical nomenclature used to label the individual's health condition.

We begin by summarizing the need for federal nondiscrimination standards offering protection for individuals with HIV. We then provide a brief discussion of the definition of disability under the resulting legislation, the Americans with Disabilities Act of 1990 (ADA).[5] We summarize the early judicial and administrative views of the ADA as protecting individuals with HIV. We next turn to judicial interpretation of the ADA in cases in which that understanding has been disputed, including, most notably, the Supreme Court's attempt to answer the question in its seminal HIV case, *Bragdon v. Abbott*,[6] as well as the Court's subsequent interpretations of the ADA definition. We then discuss the results of a fifty-state survey of HIV-specific statutes, as well as more general state disability statutes. In our survey, we provide a descriptive and analytical discussion of these laws, offering our views as to whether they provide protection independent of federal provisions. An appendix to this paper provides a table summarizing significant features of these laws, and a separate compilation provides a state-by-state summary of their disability definition as it relates to HIV infection.

I. SOCIAL AND POLITICAL BACKGROUND

From the earliest moments of the Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome (HIV/AIDS) epidemic there emerged an alliance among public health and community-based

5. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 29 U.S.C. § 706, 42 U.S.C. §§ 12101-12102, 12111-12117, 12131-12134, 12141-12150, 12161-12165, 12181-12189, 12201-12213 (1994)).

6. 524 U.S. 624 (1998).

organizations emphasizing the importance of effective legislation prohibiting discrimination. Every major government,[7] medical,[8] public health,[9] legal,[10] and civil liberties[11] organization to issue a report on the epidemic condemned discrimination. The Presidential Commission on the Human Immunodeficiency Virus Epidemic in 1988 was particularly insistent about the transcending importance of federal legislation to safeguard against invidious discrimination:

> As long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination . . . will undermine our efforts to contain the HIV epidemic and will leave HIV-infected individuals isolated and alone.[12]

Although the emphasis on a federal legislative remedy for HIV-based discrimination in the ADA was no doubt a result of the view that state nondiscrimination standards were, at least in some jurisdictions, inadequate,[13] the need for nondiscrimination standards was felt in some localities to be sufficiently urgent that some states and municipalities adopted HIV-specific protections before action was taken on the federal level. Los Angeles, as the west coast epicenter of the epidemic, for example, was in 1985 the first municipality to adopt an HIV-specific nondiscrimination law.[14] In contrast, non-discrimination protec-

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7. *See, e.g.*, Centers for Disease Control, *Public Health Services Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 MORBIDITY & MORTALITY WEEKLY REP. 509, 514 (1987).

8. *See, e.g.*, American Medical Association Board of Trustees, *Prevention and Control of Acquired Immunodeficiency Syndrome: An Interim Report*, 258 JAMA 2097, 2101-02 (1987); INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, CONFRONTING AIDS: DIRECTIONS FOR PUBLIC HEALTH CARE AND RESEARCH 19 (1986).

9. *See, e.g.*, ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICIALS, GUIDE TO PUBLIC HEALTH PRACTICE: AIDS CONFIDENTIALITY AND ANTI-DISCRIMINATION PRINCIPLES 11 (1988).

10. *See, e.g.*, AMERICAN BAR ASSOCIATION, POLICY ON AIDS AND THE CRIMINAL JUSTICE SYSTEM 4 (1989); AMERICAN BAR ASSOCIATION, AIDS COORDINATING COMMITTEE, AIDS: THE LEGAL ISSUES 2 (1988).

11. *See, e.g.*, ACLU AIDS PROJECT, EPIDEMIC OF FEAR: A SURVEY OF AIDS DISCRIMINATION IN THE 1980S AND POLICY RECOMMENDATIONS FOR THE 1990S 1-3 (1990).

12. REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 119 (1988).

13. *See* H.R. REP. NO. 485, pt. 2, 101st Cong., 2d Sess. 47, *reprinted in* 1990 U.S.C.C.A.N. (104 Stat. 303) 329 (noting "[t]oo many States, for whatever reason, still perpetuate confusion" regarding nondiscrimination standards).

14. *See* LOS ANGELES MUNICIPAL CODE § 45.80 (1985), *available at* <http://Cityfolio.ci.la.ca.us/cgi-bi. . .9680}&softpage=Document42&x=19&y=12> (visited Feb. 28, 2000).

tion based on HIV status was first introduced in Congress in 1987 but not adopted until enactment of the ADA in 1990.[15]

Recommendations for anti-discrimination legislation relied on three justifications—discrimination violates basic tenets of individual justice, damages the economic and social fabric of America, and weakens the nation's abilities to prevent and treat HIV/AIDS.

Discrimination based on an infectious condition is just as inequitable as discrimination based on race, gender, or other health condition. In each case, people are treated inequitably, not because they lack inherent ability, but solely because of a status over which they have no control. Complex and often pernicious mythologies develop about the nature, cause, and transmission of disease. As the Supreme Court has recognized, "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness."[16] Persons living with HIV/AIDS have to endure not only archaic attitudes that they present a health threat, but also moral disapproval of their behavior. The fact that HIV/AIDS is associated in the public consciousness with traditionally disfavored groups—gay men, injection drug users, and commercial sex workers—only heightens the concern about prejudicial treatment.

Discrimination against persons living with HIV/AIDS is economically and socially detrimental. By rendering talented individuals unemployable or uninsurable or by impairing their ability to secure housing or receive health care or other services, discrimination tears at the social and economic fabric of the nation.

Finally, discrimination undermines public health efforts to identify infections, prevent transmission, and provide care and treatment for persons living with the HIV disease. The public health strategy is to encourage the population to be tested, to educate the population to avoid risk behaviors such as unprotected sex and the sharing of drug injection equipment, and to provide opportunities for humane care and effective treatment for all persons infected with HIV.[17] From the beginning, it has been clear that if individuals fear the personal,

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15. For a more detailed history of congressional consideration of HIV nondiscrimination standards, see AIDS AND THE LAW, *supra* note 4, § 3.6 (3d ed. 1997).

16. School Bd. v. Arline, 480 U.S. 273, 284 (1987) (footnotes omitted).

17. *See generally*, COMMISSION ON AIDS RESEARCH & THE BEHAVIORAL, SOC. & STATISTICAL SCIENCES, NAT'L RESEARCH COUNCIL, SOCIAL IMPACT OF AIDS IN THE UNITED STATES 23-43 (Albert R. Jonsen & Jeff Stryker eds., 1993) [hereinafter SOCIAL IMPACT OF AIDS IN THE UNITED STATES].

social, and economic consequences of being diagnosed with HIV/AIDS, they may forego testing, fail to discuss their health and risk behaviors with counselors or health care professionals, and refrain from entering the health care system for treatment. Consequently, the need for law reform to protect against discrimination emerged as one of the most important public health strategies in the early years of the epidemic.

The social, economic, and public health effects of the HIV/AIDS epidemic in the 1980s[18] set in motion a series of events that would lead to enactment of the most significant civil rights legislation since the enactment of the Civil Rights Act of 1964.[19] A coalition of organizations and people committed to the rights of persons with HIV/AIDS and persons with other disabilities formed to seek federal legislation designed to proscribe discrimination.[20]

II. THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act became the federal anti-discrimination law that had been so widely and earnestly sought. The National Commission on the Acquired Immune Deficiency Syndrome, in 1991, applauded the passage of the ADA: "The landmark Americans with Disabilities Act (ADA) is a significant step toward protecting the rights of all disabled Americans, including people with HIV disease. The passage of the ADA with the inclusion of protections for people with HIV disease is a victory worth celebrating."[21]

The heart of the ADA is the prohibition, in varying contexts, of discrimination against individuals with a real or perceived disability. Yet the ADA does not identify any specific health conditions as disabilities; there is no statutory listing, whether exclusive or inclusive, of disabilities. Instead, in an effort to ensure broad and flexible coverage, the ADA includes a general definition of what constitutes a disability. This statutory approach is the result of both practical and political considerations. As a practical matter, an adequately inclusive listing of health conditions that results in a finding of disability may well be impossible to formulate. The formulation of such a listing,

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18. *See id.*

19. *See* Chai R. Feldblum, *Medical Examinations and Inquires Under the Americans with Disabilities Act: A View from the Inside*, 64 TEMPLE L. REV. 521, 521-22 (1991).

20. *See* Chai R. Feldblum, *The (R)evolution of Physical Disability Anti-discrimination Law: 1976-1996*, MENTAL & PHYSICAL DISABILITIES L. REP. 613, 617 (1996); Feldblum, *supra* note 19, at 523-31. *See also* SOCIAL IMPACT OF AIDS IN THE UNITED STATES, *supra* note 17.

21. NATIONAL COMMISSION ON ACQUIRED IMMUNE DEFICIENCY SYNDROME, AMERICA LIVING WITH AIDS 113 (1991).

dependent as it would be on specialized medical and scientific knowledge, is certainly not an undertaking appropriate for the legislative process.[22] As a political matter, adoption of a generic definition avoided the problem of considering, comparing, and deciding whether or not to include competing health conditions. At the same time, advocates for legal protection for individuals with disabilities were able to form a successful political coalition that asserted far more influence on the legislative process than would have been possible had advocates for each specific health condition been acting alone. The ADA thus eschews the approach of previous legislative proposals that would have singled out one health condition or another, such as HIV infection[23] or cancer,[24] for protection. So while the generic definition was a legislative success as a result of coalition politics, all individuals with disabilities, including individuals with HIV, are faced with the necessary task, then, of establishing that their health condition meets the generic statutory criteria.

According to the ADA, a *disability* is a physical or mental impairment that substantially limits one or more of the major life activities of an individual, or a record of such impairment, or being regarded as having such an impairment.[25] This definition applies throughout the ADA. Thus, cases concerning the meaning of disability that arise under Title I (employment) are equally applicable to Titles II (public services) and III (public accommodations). The ADA provides, first, a definition of actual disability: an impairment, physical or mental, that imposes a substantial limitation on a major life activity.[26] Second, an individual who has a record of such an impairment is protected, even though the record refers to an impairment in the past which is not

22. Congress might have delegated the responsibility of formulating such a listing, consistent with the generic definition enacted by statute, to the administrative agencies responsible for enforcement of the statute. To a degree, those agencies have sought to provide a more detailed definition in their regulations and interpretative guidance. While the Supreme Court deferred to the Department of Justice's view that HIV is a disability under the ADA in *Bragdon v. Abbott*, in *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), the Court held that Congress had not delegated any authority to the enforcement agencies to interpret the statutory definition. *See Sutton*, 119 S. Ct. at 2145.

23. *See* AIDS Federal Policy Act of 1987, S.1575/H.R. 3071, 100th Cong. (1987) (proposing nondiscrimination for individuals with HIV); 133 Cong. Rec. 21,903 (1987) (text of Senate bill as introduced).

24. *See, e.g.*, Barbara Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 TEMP. L.Q. 1 (1986) (advocating enactment of the Cancer Patients Employment Rights Act, H.R. 1294, 99th Cong. (1985)).

25. *See* 42 U.S.C. § 12102(2) (1994).

26. *See id.*

currently a disability.[27] Third, under the "regarded as" prong of the definition, it is unlawful to discriminate against an individual based on the (mis)perception that the person has a disability.[28] Persons discriminated against because of their association with a person with a disability infection are also protected,[29] as are persons retaliated against because of their opposition to discrimination.[30] In addition to the ADA, the same definition of disability is included in two other federal nondiscrimination laws, which are more limited in scope than the ADA but nevertheless provide significant protection against disability-based discrimination: the Rehabilitation Act of 1973[31] and the Fair Housing Act.[32]

As the foregoing discussion makes clear, the ADA does not explicitly mention HIV. Yet after the ADA's enactment, there existed a sense of complete assurance that strong federal protection was now in force to protect persons at all stages of the disease, ranging from pure asymptomatic HIV infection through to CDC-defined AIDS. This sense of assurance was informed by an understanding of the social and legislative history that gave rise to the ADA, guidance provided by the executive branch, and the interpretation of the statutory definition by the judiciary.

Given the social and political forces that led to the ADA, it is not surprising that there existed a widely held view that the law covered persons living with HIV/AIDS. The HIV/AIDS community, as we have suggested, played a powerful role in enactment of the legislation, and these groups gave no sign of discontent with the coverage provided in the statute. Indeed, among legal commentators on the subject, dissent on this point was virtually nonexistent.[33]

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27. This protection is similar to the laws in some states that protect against discrimination based on an individual having a record of HIV testing, as discussed in the text accompanying notes 156-161 and 180-182.

28. *See* 42 U.S.C. § 12102(2)(c) (1994).

29. *See* 42 U.S.C. § 112(b)(4) (1994) and § 12182(b)(1)(E) (1994); Finley v. Giacobbe, 827 F. Supp. 215, 219-20 (S.D.N.Y. 1993).

30. *See* 42 U.S.C. § 12203; Sherer v. Foodmaker, Inc., 921 F. Supp. 651 (E.D. Mo. 1996).

31. 29 U.S.C. § 706(8)(B) (1994).

32. 42 U.S.C. § 3602(h) (1994).

33. *See* Gary Lawson, *AIDS, Astrology, and Arline: Towards a Causal Interpretation of Section 504*, 17 HOFSTRA L. REV. 237 (1989) (arguing against HIV as a disability under § 504 of the Rehabilitation Act); *cf.* William G. Buss, *Educating Children with Human Immunodeficiency Virus*, *in* AIDS AND THE LAW § 4.10, at 125 (2d ed. 1992) (noting that conclusion that asymptomatic HIV infected individuals are covered under section 504 and the ADA is persuasive but not inevitable); William G. Buss, *Human Immunodeficiency Virus, the Legal Meaning of "Handicap," and Implications for Public Education Under Federal Law at the Dawn of the Age of the ADA*, 77 IOWA L. REV. 1389 (1992) (same).

Throughout the consideration of the ADA during the 101st Congress, protection from discrimination for persons with HIV infection was a stated objective.[34] President Bush, in urging passage of the ADA, did so on the basis that it would protect individuals with AIDS and HIV infection from discrimination.[35] The Senate version of the ADA, S. 933, was referred to the Committee on Labor and Human Resources, which considered the issue of HIV infection as a disability.[36] The House version, H.R. 2273, was introduced in four committees, two of which considered the issue of HIV infection as a disability under the ADA: the Committee on Labor and Education[37] and the Committee on the Judiciary.[38] All legislative reports that addressed the issue concluded that HIV infection is an impairment under the ADA and apparently assumed that the impairment caused by HIV substantially limits one or more major life activity. Furthermore, most of the congressional consideration of HIV focused on the issue of whether HIV, as an infectious disease, should be treated differently from other disabilities under the ADA. Attempts by critics of the proposed ADA to exclude persons with infectious or communicable diseases from coverage were unsuccessful, which again emphasizes congressional intent in extending protection.[39] If HIV infection was not viewed by Congress as a health condition included under the proposed definition of disability, there would have been no reason to attempt to include such a communicable disease exception. Similarly, it

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34. This discussion of the legislative history of HIV in regard to the ADA is derived from AIDS AND THE LAW , *supra* note 4, § 3.6 (3d ed. 1997 & Supp. 1999).

35. *See Bush Endorses Protections for HIV-Positive Contained in Americans with Disabilities Act,* DAILY LAB. REP., Mar. 30, 1990, at A4 (urging passage of ADA "that prohibits discrimination against those with HIV and AIDS").

36. *See* Senate Comm. on Labor and Human Resources, Americans with Disabilities Act of 1989, S. REP. NO. 106-116, at 8 (1989). *See also* statements upon Senate approval, 135 CONG. REC. S10,789 (statement of Sen. Kennedy); 135 CONG. REC. S10,794 (statement of Sen. Moynihan); 135 CONG. REC. S10,800 (daily ed. Sept. 7, 1989) (statement of Sen. Simon).

37. *See* H.R. REP. NO. 101-485, pt. 2, at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333 [hereinafter House Labor Report].

38. *See* H.R. REP. NO. 101-485, pt. 3, at 28 n.18 (1990), *reprinted in* 1990 U.S.C.C.A.N 445, 451 n.18 [hereinafter House Judiciary Report] (citing approvingly 1988 Department of Justice memorandum for conclusion that individuals with HIV infection have an impairment that substantially limits a major life activity and thus are disabled).

39. *See* 136 CONG. REC. H4613 (daily ed. July 12, 1990) (statement of Rep. Dannemeyer in opposition to coverage of persons with communicable diseases); *House Judiciary Committee Begins Markup of Bill to Prohibit Bias Against Disabled,* DAILY LAB. REP., May 2, 1990, at A9 (House Judiciary Committee rejection of amendment offered by Rep. Dannemeyer to exclude homosexuals infected with HIV from coverage under the ADA). Debate on H.R. 2273 was limited in the House under H. Res. 394, 101st CONG. (1990), and thus the general question of whether individuals with infectious diseases should be covered by nondiscrimination standards was not be debated.

is notable that the debate in Congress on the question of whether food service workers with communicable diseases in general, and HIV in particular, should be protected from employment discrimination resulted in floor votes on that question in both the House and the Senate.[40] Again, such votes would not have been necessary if Congress did not believe it was enacting a law that protected individuals with HIV. Perhaps even more significantly, the ADA's disability definition is adopted from the Rehabilitation Act, which at the time of congressional consideration of the ADA was widely viewed as including individuals with HIV infection within its protection. Congress indicated that the ADA is to be read in light of existing standards under the Rehabilitation Act.[41] Indeed, both the House[42] and Senate[43] reports on the ADA approved the Department of Justice's Office of Legal Counsel memorandum, which concluded that a person infected with HIV is covered under the first prong of the definition of the term *disability* because of a substantial limitation to "procreation and intimate personal relationships."[44] In essence, Congress appears to have considered HIV as a per se disability in enacting the ADA. This view of the legislative history has been acknowledged by the courts that have considered the question.[45]

A. Executive Branch Interpretation of the ADA

The administrative agencies charged with enforcing the ADA, the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), both concluded that the statute covered all stages of HIV infection. The EEOC's interpretive guidance, recognizing the unique social history of the disease, sets HIV apart from other disabling conditions. "Some impairments," the EEOC states, "may be disabling for particular individuals but not for others, depending on

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40. For a fuller discussion of the "food handling" controversy during congressional consideration of the ADA, see AIDS AND THE LAW, *supra* note 4, § 3.6, at 112-17.

41. *See* 42 U.S.C. § 12201(a) (1994). *See also* House Labor Report at 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 304.

42. *See* House Labor Report at 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334 (citing approvingly a 1988 U.S. Department of Justice opinion that HIV infection is a disability under the Rehabilitation Act because of substantial limitation on procreation and intimate sexual relationships); House Judiciary Report at 28-29, *reprinted in* 1990 U.S.C.C.A.N. 445, 451.

43. *See* S. REP. No. 101-116, at 22 (1990).

44. Memorandum of Douglas Kamiec, Acting Assistant Attorney General, Office of Legal Counsel, Dep't of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), *reprinted in* DAILY LAB. REP., Oct. 7, 1988, at D1.

45. *See* United States v. Happy Time Day Care Ctr., 6 F. Supp. 2d 1073, 1078 (W.D. Wis. 1998) ("the legislative history behind the ADA indicates that lawmakers understood that the act would cover anyone infected with HIV").

the stage of the disease or disorder. . . . Other impairments, however, such as HIV infection, are inherently substantially limiting."[46] The Department of Justice explicitly includes "HIV disease (symptomatic or asymptomatic)" in its regulations and interpretive guidance as a disability. The DOJ notes: "The phrase 'symptomatic or asymptomatic' was inserted in the final rule after 'HIV disease' in response to commentors who suggested the clarification was necessary."[47]

B. Lower Courts' Interpretation of the Disability Definition

Early judicial opinions similarly presumed, virtually without explanation, that the federal disability definition covered persons with asymptomatic HIV infection.[48] Certainly, this appeared to be the case with respect to the federal Rehabilitation Act of 1973, the precursor to the ADA. Parmet and Jackson note:

> As an initial matter, every reported decision from the mid-1980s up until the passage of the Americans with Disabilities Act in 1990 determined that both AIDS and, when presented, asymptomatic HIV infection constituted disabilities. . . . In fact, it took only a few years for an overwhelming judicial consensus to develop that HIV—and AIDS—infected individuals were properly protected by existing disability discrimination statutes.[49]

The broad consensus established in Rehabilitation Act jurisprudence continued after the ADA's enactment. The early cases continued to see the question of whether asymptomatic HIV infection was a covered disability as a settled matter.[50]

The unquestioned consensus on coverage of persons with asymptomatic HIV infection began to crumble in the mid-1990s, just as the first advancements in the treatment of HIV disease were becoming reality. Emphasizing the ADA's requirement for an "individualized determination,"[51] a concept thoughtfully endorsed by the Supreme

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46. 29 C.F.R. pt. 1630, App. § 1630.2(j) (1999).

47. U.S. Department of Justice, ADA Title II Interpretive Guidance, 28 C.F.R. § 35.104 (1999).

48. *See, e.g.*, Ray v. School Dist., 666 F. Supp. 1524, 1532-33 (M.D. Fla. 1987) (noting HIV infection but absence of symptoms of AIDS in Rehabilitation Act case.).

49. Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7, 16-17 (1997).

50. *See, e.g.*, Robinson v. Henry Ford Health Sys., 892 F. Supp. 176, 180 (E.D. Mich. 1994); Howe v. Hull, 873 F. Supp. 72, 78 (N.D. Ohio 1994); T.E.P. v. Leavitt, 840 F. Supp. 110, 111 (D. Utah 1993).

51. 42 U.S.C. § 12112 (1994)

Court in *School Board of Nassau County v. Arline*,[52] courts began to critically question the premise that asymptomatic HIV infection automatically qualifies as a disability. In particular, the Fourth Circuit ruled that not only is HIV infection not a disability under the ADA[53]—the infection is not even an impairment.[54] In another case in which there was no dispute that the plaintiff's son was infected with HIV, the Fourth Circuit noted that "[t]here is no evidence in the record before us that [the plaintiff's son] is impaired, to any degree, or that he currently endures any limitation, yet alone a substantial limitation, on any major life activity."[55] In yet another case, a federal district court ruled that HIV infection is not a disability for a plaintiff on the basis that his infection imposed no substantial limitation on a major life activity.[56] Cases of this sort raised the question of when and under what circumstances an individual with HIV can invoke the protections of the ADA.

C. The Supreme Court's ADA Disability Definition Decisions

Beginning in its 1997-98 term, the Supreme Court issued the first of a series of decisions defining the protections afforded by the ADA.[57] In *Bragdon v. Abbott*, the Court held that a woman with asymptomatic HIV infection is an individual with a disability.[58] In that case, a dentist, Dr. Bragdon, refused to fill a dental cavity of an HIV-infected patient, Sidney Abbott, in his office on the basis of her HIV infection.[59] Ms. Abbott then brought suit alleging that the refusal violated the Title III public accommodation provisions of the ADA.[60] Dr. Bragdon conceded that his professional office was covered by the ADA, but argued that the plaintiff, who did not have symptoms of HIV illness, was not an individual with a disability under the ADA.[61] Additionally, he argued that providing services to the infected patient, be-

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52. 480 U.S. 273, 287-88 (1987).

53. *See* Runnebaum v. NationsBank, 123 F.3d 156, 174 (4th Cir. 1997).

54. *See id.* at 168. The Supreme Court's decision in *Bragdon v. Abbott* implicitly overruled *Runnebaum*. *See infra* notes 58-71 and accompanying text.

55. Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 60 (4th Cir. 1995).

56. *See* Cortes v. McDonald's Corp., 955 F. Supp. 539, 546-47 (E.D.N.C. 1996).

57. In addition to the four cases directly involving the definition of disability under the ADA discussed *infra* notes 58-93 and accompanying text, the Supreme Court has to date issued two other rulings construing that statute. *See, e.g.*, Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998) (holding that the ADA is applicable to state prisons); Olmstead v. L.C., 524 U.S. 581 (1999) (holding that the ADA requires residential placement in least restrictive environment).

58. *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1998).

59. *See id.* at 629.

60. *See id.*

61. *See* Abbott v. Bragdon, 107 F.3d 934, 939 (1st Cir. 1997).

cause of the risk of HIV transmission, would pose a direct threat to his health.[62] *Bragdon*, however, did not present the question of whether Ms. Abbott was regarded by Dr. Bragdon as having a disability under the third prong of the ADA disability definition.

The Court's ruling that Ms. Abbott was an individual with a disability had three bases. First, her HIV infection imposed a substantial limitation on one of her major life activities—reproduction.[63] Second, the Court relied on the ADA's own construction clause, which requires that it be interpreted to provide no less protection than "the standards applied under the Title V of the Rehabilitation Act . . . or the regulations issued by Federal agencies pursuant" to that Act.[64] Third, the Court ruled that judicial deference, under the doctrine of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[65] is due to the Department of Justice's views that individuals with asymptomatic HIV infection are covered by the ADA.[66]

While the Court's ruling that Ms. Abbott's HIV infection was an impairment that imposed a substantial limitation on one of her major life activities was adequate to dispose of the appeal, the Court nevertheless adduced the two additional arguments in favor of the conclusion that HIV is a disability. Thus, while stating that it was not reaching the issue of whether HIV is a per se disability under the ADA, the Court in effect held that it was. Furthermore, it should be noted, the Court did not state that HIV is *not* a per se disability, simply that it need not reach that issue, despite its grant of certiorari on that question.[67] As a result, *Bragdon* contains an internal tension. Plaintiffs with HIV must be prepared to plead and prove a disability. At the same time federal agency interpretations, to which the courts owe deference, dictate that HIV is "inherently disabling," and the ADA by its own language, by incorporating Rehabilitation Act standards, requires

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62. Discussion of the Supreme Court's ruling on the direct threat issue, see 524 U.S. at 648-55, is beyond the scope of this Article. On remand, however, the First Circuit Court ruled that Dr. Bragdon's evidence of direct threat was "too speculative or too tangential (or, in some instances, both) to create a genuine issue of material fact" and affirmed summary judgment in favor of the plaintiff Sidney Abbott. 163 F.3d 87, 90 (1st Cir. 1998) (quoting *Abbott v. Bragdon*, 107 F.3d 934, 948 (1st Cir. 1997)).

63. *See Bragdon*, 524 U.S. at 639.

64. *Id.* at 631-32 (quoting 42 U.S.C. § 12201(a) (1994)).

65. 467 U.S. 837 (1984). Where Congress has not explicitly asked an administrative agency to clarify a statutory provision by regulation, the necessity of agency guidance may be implicit. *See id.* at 844. "In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* This provides agency guidance roughly the same weight as administrative regulations, which are reviewed using an arbitrary and capricious standard. *See id.*

66. *See Bragdon*, 524 U.S. at 646.

67. *See id.* at 641-42.

nothing less than the conclusion that HIV is a disability. The view that HIV infection is a per se disability also obviates the logical inconsistency that results from determining disability based on actual limitations imposed by the infection. Why should some individuals, such as Ms. Abbott, be able to prevail on their claim that they have an ADA disability because of limitations on reproduction, while others, such as a child with HIV who is denied access to dental care, cannot invoke the ADA's protection when the underlying health condition is the same for both? As we suggest below, there may be other major life activities than reproduction and sexual relations that are substantially limited by HIV infection. But whether one or another major life activity is limited by HIV is not a function of HIV as a health condition itself, it is often a function of the individual's age, personal choices, and other factors independent of HIV.

This view of *Bragdon*—that it establishes, *sotto voce*, HIV infection itself as a disability—is consistent with the views expressed by the lower federal courts in the year after *Bragdon*. On remand from the Supreme Court, for example, the First Circuit noted that "earlier phases of this litigation established that asymptomatic HIV constitutes a disability under the ADA."[68] The Eighth Circuit similarly cited *Bragdon* for the proposition that HIV is a disability under the ADA.[69] The Second Circuit cited *Bragdon* for the view that HIV is a disability under the analogous provisions of the Rehabilitation Act.[70] Only the Fifth Circuit, however, took a narrower, more literal, view of *Bragdon*, interpreting it as holding that HIV inherently limits certain major life activities, but not ruling on HIV as a per se disability.[71]

One year after its ruling in *Bragdon*, the Supreme Court issued a trio of decisions construing the ADA's application to the workplace. First, in *Sutton v. United Air Lines, Inc.*,[72] the Court answered a question not reached in *Bragdon* by holding that corrective or remedial measures are to be taken into account in determining whether an individual has a disability as defined by the ADA.[73] In *Bragdon*, the Court concluded that even with mitigating measures, Ms. Abbott nevertheless had a disability, and thus the issue need not be reached.[74] But in *Sutton*, the Court rejected the interpretation of the EEOC and DOJ,

68. Abbott v. Bragdon, 163 F.3d 87, 88 (1st Cir. 1998).
69. *See* Alsbrook v. City of Maumelle, 156 F.3d 825, 831 n.5 (8th Cir. 1998).
70. *See* Rivera v. Heyman, 157 F.3d 101, 103 (2d Cir. 1998).
71. *See* Deas v. River West, L.P., 152 F.3d 471, 478 n.15 (5th Cir. 1998).
72. 119 S. Ct. 2139 (1999).
73. *See id.* at 2145.
74. *See* Bragdon v. Abbott, 524 U.S. 624, 640-41 (1998).

which both had concluded that the individual's impairment should be assessed without regard to any corrective or remedial measures, as unsupported by the plain text of the ADA itself.[75] Then, in *Murphy v. United Parcel Service, Inc.*,[76] and *Albertsons, Inc. v. Kirkingburg*,[77] the Court applied *Sutton* to similarly conclude that, taking into account mitigating measures, the plaintiffs did not have disabilities as defined by the ADA.[78]

As noted above, *Bragdon* took the mitigating effects of medication into account in determining whether Ms. Abbott's impairment imposed a substantial limitation on her major life activity of reproduction.[79] The Court identified two independent ways in which HIV imposed that limitation: first, the risk of HIV transmission to the individual's sexual partner (the Court cited studies indicating a risk from twenty to twenty-five percent for male partners of HIV-infected women),[80] and, second, the risk of HIV transmission to the child during pregnancy and childbirth (the Court referred to an eight percent risk of transmission).[81] Thus, even taking into account the effects of medication in mitigating the limitation imposed by Ms. Abbott's HIV infection, she was nevertheless found to have a substantial limitation.[82]

The Court's view of administrative agency interpretations of the ADA as expressed in *Sutton* is also pertinent. First, the Court found that the EEOC's regulation that mitigating measures should not be taken into account was without support in the statutory language and thus invalid.[83] Perhaps more significantly, however, the Court noted that "no agency has been delegated authority to interpret the term 'disability'"[84] as it appears in the ADA's definition section.[85] Nevertheless, the Court noted that "[b]ecause both parties accept these regulations as valid, and determining their validity is not necessary to decide this case, we have no occasion to consider what deference they are due, if any."[86] The significance of the conclusion that no agency is authorized by Congress to interpret the term "disability" in the ADA is unclear. It might suggest that the *Bragdon* Court's deference to the

75. *See Sutton*, 119 S. Ct. at 2145.
76. 119 S. Ct. 2133 (1999).
77. 119 S. Ct. 2162 (1999).
78. *See Murphy*, 119 S. Ct. at 2137; *Kirkingburg*, 119 S. Ct. at 2169.
79. *See Bragdon*, 524 U.S. at 640-41.
80. *See id.* at 639-40.
81. *See id.* at 640.
82. *See id.* at 640-41.
83. *See Sutton*, 119 S. Ct. at 2145.
84. *Id.*
85. *See* 42 U.S.C. § 12102(2) (1994).
86. *Sutton*, 119 S. Ct. at 2145.

Department of Justice interpretation of the term was misplaced as a technical matter; because the Department of Justice did not have the authority to promulgate that regulation, it was not entitled to deference under *Chevron*. That does not mean, however, that the agencies' interpretation of the disability definition as to HIV is not entitled to deference. The agencies' interpretation has persuasive authority based on their specialized expertise and experience.[87] Accordingly, the Court's view of the regulations in *Sutton* does not reverse its reliance on them in *Bragdon*.

The Court's determination in *Sutton* of whether an employee or applicant for employment is "regarded as" disabled under the third prong of the disability definition is more troublesome. The Court noted two scenarios that might arise under that sub-definition of disability: in the employment context, the employer must either believe that the individual has an impairment imposing a substantial limitation when in fact the individual does not have an impairment, or the covered entity must believe that the individual has a substantially limiting impairment when in fact the impairment is not substantially limiting.[88] The Court adopted the EEOC's "more than one job" rule, explaining that

> [w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs. Reflecting this requirement, the EEOC uses a specialized definition of the term "substantially limits" when referring to the major life activity of working: 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.'[89]

In noting these two scenarios, the Court did not reference a third theory set forth in the EEOC regulations. Under that theory, the individual may have an "impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment."[90] The EEOC's Interpretative Guidance goes further in

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87. *See* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3, at 242-44 (3d ed. 1994).

88. *See Sutton*, 119 S. Ct. at 2149-50.

89. *Id.* at 2151 (quoting 29 C.F.R. § 1630.2(j)(3)(i) (1999)).

90. 29 C.F.R. § 1630.2(k)(2) (1999).

stating that the employer's perception of the condition need not be shared by others in the field.[91] Furthermore, according to the EEOC, if the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear, or stereotype" can be drawn.[92] Concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers are included among those that frequently result from attitudinal barriers.

Although the *Bragdon* ruling is of historic import as the Court's first and only ruling in response to the HIV/AIDS epidemic, the Court's opinion is noteworthy as a painstaking exercise in statutory construction, interpreting the statutory text with reference only to agency interpretations that "confirm" or "further reinforce" the Court's own interpretation of the statutory language, and referring in passing to the statute's congressional history only insofar as that history, in turn, was the basis for agency interpretation. While the coalition responsible for the passage of the ADA assumed that it would be interpreted with regard to its legislative history and the purpose underlying its enactment, including the need for nondiscrimination standards for individuals with HIV, that assumption collided with the Supreme Court's approach to statutory construction—an approach that concerns itself only with the statute's text, not with the context of its enactment. Thus, many of the "good intentions" behind the ADA, including its attention to HIV as a disability, have been lost as a result of what William Eskridge Jr. has called the Supreme Court's "conservative process statism."[93]

D. The Future of Disability Discrimination

In *Bragdon*, the Court identified only "reproduction" as the major life activity that Ms. Abbott's HIV infection limited;[94] she had testified that she had decided not to have children because of her HIV status.[95] The Court noted, however, that by basing its ruling on reproduction, it was simply ruling on the issue as raised and considered in the lower courts and as stated in the first question on which the Court granted certiorari.[96] Furthermore, the Court indicated that the regulatory list-

91. *See* 29 C.F.R. pt. 1630, app. § 1630.2(*l*) (1999).
92. *Id.*
93. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 298-300 (1994).
94. *See* Bragdon v. Abbott, 524 U.S. 624, 641 (1998).
95. *See id.* at 639.
96. *See id.* at 638.

ing of major life activities should be treated as illustrative, not exhaustive,[97] thus opening consideration of major life activities to more than the nine specific functions listed in the EEOC and Department of Justice regulations.[98] Reproduction itself is not included in the listing. The Court explained that "had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities"[99] and furthermore implied that there are "major life activities of many sorts."[100]

If reproduction is a major life activity, it should follow that nonreproductive sexual relations should also be treated as major life activity. It follows from the Court's holding, which relied on the 1988 Office of Legal Counsel (OLC) Opinion interpreting the Rehabilitation Act, to conclude that "intimate sexual activities," not just reproduction, should be viewed as a major life activity.[101] Both were identified in the OLC Opinion as among the major life activities potentially limited by HIV, and it seems unlikely that any court would reach a contrary conclusion as to sexual relations without procreation as an objective.[102] As a result, there should be no dispute in the future that individuals who experience a substantial limitation on reproduction and/or sexual function (the vast majority of those claiming coverage under Title I of the ADA) can invoke the ADA. Nevertheless, individuals, such as children, whose HIV infection does not impose a substantial limitation on their reproductive or sexual function, would not be covered by this interpretation of the ADA and would need to prove that other major life activities are substantially limited.

Finally, and perhaps most importantly, individuals with HIV can assert that their HIV status imposes a substantial limitation on their social functioning or ability to participate in society, both as a result of their infection and as a result of others' perception of HIV infection. Although "participating in community activities" is not listed in the regulatory definition of major life activity, this category of major life activity was referenced in the ADA's legislative history.[103] This view is

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97. *See id.* at 638-39.

98. *See* 45 C.F.R. § 84.3(j)(2)(ii) (1999) and 28 C.F.R. § 41.31(b)(2) (1999) (stating that major life activities include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

99. *Bragdon*, 524 U.S. at 637.

100. *Id.*

101. *Id.* at 643.

102. *See, e.g.*, McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999) (holding that major life activity includes sexual relations in which disability in question is psychological disorder); Doe v. District of Columbia, 796 F. Supp. 559, 568 (D.D.C. 1992) (including procreation, sexual contact, and normal social relationships as major life activities).

103. *See* House Judiciary Report at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 334.

also expressed by Justice Ginsburg's concurring opinion in *Bragdon*: "HIV infection . . . has been regarded as a disease limiting life itself. The disease inevitably pervades life's choices: education, employment, family and financial undertakings. It affects the need for and, as this case shows, the ability to obtain health care because of the reaction of others to the impairment."[104] The concurrence also cites family relations, employment potential, and ability to care for herself as major life activities.[105] In short, there is some difference between the view of life activities as discrete physical or mental functions, such as walking or learning, and more abstract views of life activities as including a broad range of activities necessary for full social or community participation.

Having established that the impairment of HIV infection imposes some limitation on one or more major life activities, the question remains whether that limitation is substantial. The major life activities typically thought to be limited by HIV infection (reproduction, sexual relations) are the result of the infectious status of the individual with HIV. The *Bragdon* Court had no difficulty concluding that the risk of HIV transmission from mother to child (eight percent) or between sexual partners (twenty percent) was sufficient to meet the substantiality test. While advances in treatment in the future might result in elimination of symptoms of disease, these treatments do not apparently eliminate the infectious nature of HIV. As a result, despite advances in treatment, HIV may continue to be a disability because of the risk of transmission. Looking to other, more general life activities, such as social interaction, assessing the degree of limitation may be more difficult. To a large degree, this limitation is the result of attitudes of individuals towards the illness. These attitudes may vary widely from individual to individual or in differing geographic areas. As a result, absent access to expert witnesses who can assess the community response to HIV infection, it is difficult to determine to what extent the substantial limitation can be posited on this basis. While some individuals with HIV will be able to provide anecdotal evidence of a response from others indicative of such an attitude, extending that to others may be problematic.

Once the individual establishes that the discrimination was premised on myth or stereotype, additional proof that others share that attitude should not be necessary. While the Court explained in *Bragdon* that the ADA "addresses substantial limitations . . . not utter inabil-

104. *Bragdon*, 524 U.S. at 656 (Ginsburg, J., concurring) (citation omitted).

105. *See id.* at 660 (Ginsburg, J., concurring).

ities,"[106] application of the statutory definition does require that the limitation be substantial. Perhaps because harm resulting from transmission is so significant, any chance of transmission will be deemed to be a substantial risk. Furthermore, while noting that "in the end, the disability definition does not turn on personal choice,"[107] *Bragdon* does emphasize Ms. Abbott's decision not to have children as supporting the conclusion that her HIV infection was a limitation on her major life activity of reproduction.[108] Thus, it would follow, if Ms. Abbott had not asserted that HIV was the reason for her declining to bear children, she would not have been able to invoke the protection of the ADA. If this is indeed the intention of the Court, it makes little sense. It would mean that an individual with HIV who does not choose to engage in the activity cannot claim it as a major life activity. This is the problem presented by children with HIV: they cannot invoke protection of the law on the basis of reproduction or sexual relations, which leaves social participation as the only life activity. For very young children, however, social participation itself may be limited. Notably, *Bradgon* did not involve the "regarded as" definition. Ms. Abbott certainly could have argued that Dr. Bragdon "regarded" her as having a disability by treating her as an individual with a condition that poses a direct threat to any dental professional, or, for that matter, any health care professional.

As the foregoing discussion illustrates, however, determining whether an individual has a disability under the ADA is a complex question. Whether individuals with asymptomatic HIV infection will be ruled to be individuals with disabilities in future cases remains unclear, depending on the facts of the case. It is very likely that most, if not all, such individuals would be covered. In any event, the litigation of HIV as a disability may pose significant barriers to plaintiffs who must plead and prove that their infection imposes a substantial limitation on a major life activity. In many cases, this may involve public disclosure of highly private facts. Putting into contention whether the HIV status has restricted the individual's sexual activities, for example, might open that issue for defendants to attempt to refute such a claim with evidence that the individual has in fact engaged in unsafe sexual relations.

106. *Id.* at 641.
107. *Id.*
108. *See id.*

III. OVERVIEW OF STATE LAW ISSUES

The ADA itself envisages that states and localities have provided, and will provide, anti-discrimination protection to persons with disabilities. Congress expressed its will not to interfere with these state statutes and local ordinances, provided they afford as much, or greater, protection against discrimination:

> Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act.[109]

Despite the enactment of the ADA in 1990, and its apparent broad protection of individuals with HIV/AIDS, development of protective legal standards at the state level continued. For example, Florida and New Jersey, both states with significant HIV populations, adopted HIV-specific nondiscrimination laws after adoption of the ADA.[110] Because the New Jersey Superior Court had previously held that AIDS was a disability[111] but did not reach the issue of whether HIV infection was a disability, the New Jersey legislature saw fit to remove "any legal ambiguity with respect to the protection of [persons who are HIV positive] against discrimination."[112] Such enactments are consistent with the argument of some commentators that despite the apparent protection of federal law, states have a significant role in addressing HIV-based discrimination.[113] The adoption of HIV-specific statutes appears to be acceptable to some legislatures because HIV infection, with its significant history of social discrimination, can be comfortably distinguished from other disabilities, thus justifying specialized legislation. Furthermore, state nondiscrimination standards may provide protection that exceeds that of the ADA. For example, the remedies available in the private cause of action created under the ADA's Title III public accommodation provisions are limited to injunctive relief,

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109. 42 U.S.C. § 12201(b) (1994).

110. *See* FLA. STAT. ANN. § 760.50(2) (West 1997); N.J. STAT. ANN. §§ 10:5-4.1 and 10:5-5(q), (gg) (West 1993 & Supp. 1999).

111. *See* Poff v. Caro, 549 A.2d 900 (N.J. Super. Ct. Law Div. 1987).

112. N.J. STAT. ANN. § 10:5-5 (West 1993) (reprinting statement of Assembly Health & Human Services Committee).

113. *See* Karen S. Lovitch, *State AIDS-Related Legislation in the 1990s: Adopting a Language of Hope Which Affirms Life*, 20 NOVA L. REV. 1187, 1193-97 (1996) (recommending state HIV-specific nondiscrimination laws).

not compensatory or punitive damages.[114] As a result, several courts have held that the claims of HIV-positive plaintiffs against health care professionals who have refused to provide services on the basis of the patients' HIV status are moot in cases in which the plaintiff has obtained the needed health care service from another provider.[115] The ADA's Title I employment discrimination provisions are limited to employers of fifteen or more employees.[116] Many state nondiscrimination laws cover smaller workplaces. For example, the Maine Human Rights Act—invoked by Sidney Abbott along with the ADA—covers all employers in the state of Maine without regard to number of employees.[117] Similarly, the federal Fair Housing Act is limited to residential, non-commercial housing opportunities,[118] while the laws of many states are not so limited.[119] State law protection fulfills an important need in supplementing the ADA in these areas.

In reality, however, the majority of state enactments closely track the ADA definition of disability. The federal definition may be attractive to state legislatures for several reasons. That definition has been subject to federal agency and judicial interpretation, and thus state legislatures may consider its meaning to be settled. Additionally, that definition may be viewed as politically noncontroversial, given its previous adoption by Congress and continuous acceptance and use in federal law. Finally, and perhaps most importantly, the use of a definition consistent with federal law makes the state eligible for "deferral agency" status, resulting in work-sharing agreements by which the state agency receives federal funding to investigate and process cross-filed discrimination complaints.

Two kinds of state and local statutes exist throughout the country that afford protection for individuals with HIV infection. The first, state and local disability laws, may include HIV infection within the

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114. *See* 42 U.S.C. § 2000a-3(a), incorporated by reference in 42 U.S.C. § 12188(a)(1) (1994).

115. *See* Atakpa v. Perimeter Ob-Gyn Assocs., 912 F. Supp. 1566 (N.D. Ga. 1994) (dismissal for lack of standing to challenge clinic's mandatory HIV testing requirement); Hoepfl v. Barlow, 906 F. Supp. 317 (E.D. Va. 1995) (dismissal for lack of standing to challenge surgeon's refusal to treat HIV-infected patient); *see also* Jairath v. Dyer, 154 F.3d 1280 (11th Cir. 1998) (noting lack of standing for ADA claim against surgeon for refusal to treat on basis of HIV status; dismissal reversed, and remand to state court directed).

116. *See* 42 U.S.C. § 12111(5)(A) (1994).

117. *See* ME. REV. STAT. ANN. tit. 5, § 4553(4) (West 1989 & Supp. 1999).

118. *See* 42 U.S.C. § 3602(b) (1994). In some cases, however, such claims may be brought under Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181(7) (1994).

119. New York law, for example, covers commercial properties. *See* Seitzman v. Hudson River Assoc., 542 N.Y.S.2d 104, 106 (N.Y. Sup. Ct. 1989) (successful discrimination claim against landlord of physicians whose practice included AIDS patients).

definition of "disability," thus leaving no question as to the coverage of individuals with or regarded as having HIV. The second, HIV-specific laws (relating, for example, to privacy, anti-discrimination, and testing) may include express or implicit references to HIV infection that also could provide effective redress.

All states have adopted statutes that prohibit discrimination on the basis of disability.[120] Development of disability nondiscrimination law at the state level, however, has not been uniform or consistent, and although many state statutes share certain characteristics, in the realm of HIV nondiscrimination standards, state-by-state statutory analysis and classification reveals significant variations in coverage of HIV. Historically, some states premised their definition of disability on the notion that a significant and permanent impairment of ambulatory ability or other physical functioning, which could be verified by medical examination, was required.[121] Many states, however, adopted a definition that is consistent with, if not identical to, the federal statutory definition as set forth initially in the Rehabilitation Act and repeated in the ADA, which provides a less restrictive definition of impairment in terms of severity and duration, as well as extending protection to individuals discriminated against based on a record of disability or the perception of disability. The enactment of the Americans with Disabilities Act in 1990 provided further impetus for state adoption of the federal statutory standard. This definition is now the most widely used, and at least thirty-nine states have at least one statute that contains this definition in some form. Interpreters of these laws frequently reference federal regulations or case law directly interpreting the federal definition of disability. Several states, however, have adopted statutory definitions that are apparently more inclusive than the federal definition, typically by relaxing the requirement that the impairment must substantially limit a major life activity.[122] Some

120. *See* Lovitch, *supra* note 113, at 1196.

121. The South Carolina Bill of Rights for Handicapped Persons, for example, defines "handicap" as "a substantial physical or mental impairment . . . acquired by . . . disease, where the impairment is verified by medical findings and appears reasonably certain to continue throughout the lifetime of the individual without substantial improvement." S.C. CODE ANN. § 43-33-560 (Law. Co-op. 1997).

122. New York, for example, defines "disability" as

> (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, or (b) a record of such an impairment, or (c) a condition regarded by others as such an impairment.

N.Y. EXEC. LAW § 292(21) (McKinney 1993 & Supp. 1998).

state statutes, however, refer to "handicap" or "disability" but do not include any definition of those terms.

In response to the widespread problem of discrimination against individuals with HIV, the lack of clarity regarding coverage under state law, and the Justice Department's interpretation in 1986 against Rehabilitation Act coverage of HIV infection as an infectious disease,[123] some states and many local governments adopted HIV-specific statutes. Many states also adopted HIV testing and confidentiality statutes and included restrictions on the discriminatory use of testing or test results in some of these statutes.

Interpretation and analysis of state law to determine the scope of HIV coverage presents several complex challenges. First, the specific statutory language, on its face, may allow more than one reasonable interpretation or application. Although state nondiscrimination enforcement agencies frequently interpret these statutory provisions, the weight to be given such interpretations is not always clear. Such interpretations may be issued informally and may not be adopted subsequently by a reviewing court. A definitive interpretation of state law by the highest appellate court of the state, on the other hand, might settle questions of interpretation, but as noted below, only one such ruling has emerged that currently stands as a valid precedent. Of course, a ruling by the highest court in the state is itself subject to interpretation, clarification, or modification in subsequent cases. Generalization regarding the status of HIV infection under state law is further confounded by the fact that many states have more than one disability nondiscrimination law. The definitions of disability contained in these laws may not be uniform. Clearly then, for many states, statutory interpretation and classification is more an art than a science. Nevertheless, this survey at least offers conclusions about the general contours of state law addressing HIV.

A. State HIV-Specific Statutes

The issue of whether HIV infection[124] is a protected category for purposes of nondiscrimination statutes is perhaps best answered by inclusion of that term in the statute itself. Only sixteen states (including Puerto Rico), however, have enacted statutes that include the term "HIV infection," or equivalent terminology, that clearly does not

123. *Reprinted in* AIDS AND THE LAW 286 (William H.L. Dornette ed., 1st ed. 1987).

124. Throughout the discussion which follows, all references to "HIV" or "HIV infection" are to asymptomatic infection, unless noted otherwise.

require any disease symptoms.[125] Of these, only seven include HIV as a disability with protection equivalent to that of other disabilities as defined by state law.[126] The other nine states offer protection more limited in scope than that afforded other disabilities.[127] In that regard, HIV is rare among medical conditions to be explicitly named by statute. The general trend in state law, as discussed below, has been not to include reference to specific conditions as disabilities. Assuming that a legislature wishes to extend coverage in this area, there is no logical basis for covering individuals with AIDS but not those with HIV. Narrow legislation, such as that of New Hampshire which prohibits landlords from evicting tenants "solely on the grounds that the [tenant] has [AIDS] or is regarded to have [AIDS],"[128] is unique on the state level.

In five states HIV is defined as equivalent to other disabilities as defined by state law by simply incorporating HIV in the definition of "disability" contained in state nondiscrimination laws.[129] Iowa, for example, provides that the definition of disability in its Civil Rights Act, which protects against discrimination in public and private employment, housing, and public accommodations, includes "the condition of a person with a positive human immunodeficiency virus test result, a diagnosis of [AIDS], a diagnosis of [ARC], or any other condition related to [AIDS]."[130] New Jersey and Nebraska take the same approach. New Jersey's definition of "handicap" includes "AIDS or HIV infection."[131] "HIV infection," in turn, is defined as "infection with the human immunodeficiency virus or any other related virus identified as a probable causative agent of AIDS."[132] The Nebraska Individual Rights Act prohibits discrimination in public and private employment, housing, education, and public accommodations on the basis that the individual discriminated against "is suffering or is sus-

125. Colorado, Florida, Hawaii, Iowa, Kentucky, Maryland, Missouri, Montana, Nebraska, New Jersey, North Carolina, Vermont, Virginia, Washington, and Wisconsin. These states are identified in the accompanying Appendix A, column A.

126. Colorado, Florida, Iowa, Kentucky, Nebraska, New Jersey, and Puerto Rico. Consult the accompanying compilation of state statutes in Appendix B for specific citation to statutory provisions.

127. Hawaii, Maryland, Missouri, Montana, North Carolina, Vermont, Virginia, Washington, and Wisconsin.

128. N.H. REV. STAT. ANN. § 354-A:10.VI (1999).

129. *See* FLA. STAT. ANN. § 760.50(2) (West 1997); IOWA CODE ANN. § 216.2(5) (West Supp. 1999); KY. REV. STAT. ANN. § 207.135 (Banks-Baldwin 1997); NEB. REV. STAT. § 20-167 (1997); N.J. STAT. ANN. § 10:5-5(q) (West Supp. 1999).

130. IOWA CODE ANN. § 216.2(5) (West Supp. 1999).

131. N.J. STAT. ANN. § 10:5-5(q) (West Supp. 1999).

132. *Id.* § 10:5-5(gg).

pected of suffering from human immunodeficiency virus infection or acquired immunodeficiency syndrome."[133] Similarly, Florida provides that "[a]ny person with or perceived as having . . . human immunodeficiency virus shall have every protection made available to handicapped persons."[134] This definition is applicable then to several Florida statutes that provide nondiscrimination standards in public and private employment, housing, and education (including employment by educational facilities). Florida law also specifies two additional contexts in which HIV-based discrimination is unlawful. First, entities receiving state financial assistance may not discriminate against an otherwise qualified individual in housing, public accommodations, or government services on the basis that the individual is "infected with [HIV]."[135] Next, Florida courts are prohibited from denying "shared parental responsibility, custody, or visitation rights to a parent or grandparent solely because that parent or grandparent is or is believed to be infected with [HIV]."[136] Finally, Colorado[137] and Puerto Rico[138] have broad, legislatively declared policies against HIV discrimination. Although these policy declarations do not include a reference to a specific enforcement mechanism, they compel the conclusion that HIV is a disability under general disability non-discrimination laws of those jurisdictions.

Other states that have adopted HIV-specific standards have not done so as broadly. Hawaii, for example, prohibits discrimination in housing on the basis of HIV,[139] but does not extend such explicit protection in other categories, such as employment and public accommodations. Kentucky's HIV-specific statute provides that "[a]ny person with [AIDS], [ARC], or human immunodeficiency virus shall have every protection made available to individuals with disabilities under the employment nondiscrimination provisions of Kentucky Revised Statutes and Section 504 [of] the Rehabilitation Act of 1973."[140] Similarly, both Vermont[141] and Washington[142] limit their HIV protection

133. NEB. REV. STAT. § 20-168 (1997).

134. FLA. STAT. ANN. § 760.50(2) (West 1997).

135. *Id.* § 760.50(4)(a)-(b).

136. *Id.* § 61.13(6).

137. *See* COLO. REV. STAT. ANN. § 25-4-1401 (West Supp. 1999).

138. *See* P.R. LAWS ANN. tit. 1, § 521 (1999).

139. *See* HAW. REV. STAT. ANN. § 515-3 (Michie 1993 & Supp. 1999).

140. KY. REV. STAT. ANN. § 207.135(1) (Banks-Baldwin 1997). Presumably, even if the Rehabilitation Act were interpreted not to cover HIV, individuals with HIV would nevertheless have the same rights as individuals with disabilities under the cross-referenced Kentucky law. Apparently the Kentucky legislature did not anticipate that the Rehabilitation Act could be read not to cover HIV.

141. *See* VT. STAT. ANN. tit. 21, § 495(a)(6)-(7) (Lexis Supp. 1999).

to public and private employment and do not include other settings, such as housing or public accommodations. Discrimination in those settings is covered under another statute that does not specify HIV.[143] Maryland,[144] Virginia,[145] and Wisconsin[146] require public safety personnel not to discriminate on the basis of HIV status. Montana law provides that a "health care facility may not refuse to admit a person to the facility solely because the person has an HIV-related condition."[147] That law provides that "HIV-related condition means any medical condition resulting from an HIV infection, including but not limited to seropositivity for HIV."[148]

North Carolina's HIV-specific statute is unique in that although it specifically references HIV and purports to grant protection from discrimination on that basis, it actually authorizes as lawful as many forms of discrimination as it declares unlawful. The North Carolina Communicable Disease Act (NCCDA) prohibits discrimination in *continued* employment, housing, public services, public accommodations, and public transportation against "any person having AIDS virus or HIV infection on account of that infection."[149] The NCCDA also prohibits the use or requirement of HIV testing to determine *suitability* for continued employment, housing, public services, public accommodations, and public transportation.[150] However, the NCCDA allows HIV testing of job applicants, denial of employment to job applicants based on HIV status, and HIV testing as an annual medical examination routinely required of all employees by an employer. Reassignment or termination of employment is allowed if the employee poses

142. *See* WASH. REV. CODE ANN. § 49.60.172 (West 1990 & Supp. 2000).

143. *See* VT. STAT. ANN. tit. 9, § 4501 (1997); WASH. REV. CODE ANN. § 49.60.010 (West Supp. 2000).

144. *See* MD. CODE ANN., HEALTH-GEN. § 18-213(m) (Supp. 1999) (mandating that fire fighters, emergency medical technicians, rescue squads, law enforcement officers, and correctional officers "may not refuse to treat or transport an individual because the individual is HIV positive"); *Id.* § 18-213.2(h) (mandating that correctional officers, first responders, law enforcement officers, medical care facilities, and physicians performing postmortem exams are prohibited from discrimination in regard to the transportation of HIV positive decedents).

145. *See* VA. CODE ANN. § 32.1-45.2 (Michie 1997) (stating that public safety agencies include the sheriff's office, adult or youth correctional, law enforcement, and fire safety organizations, or any governmental agency or department that employs persons who have law enforcement authority).

146. *See* WIS. STAT. ANN. § 252.14 (West 1999) (prohibiting discrimination by health care providers, peace officers, fire fighters, correctional officers, state patrol officers, jailers, home health agencies, and inpatient health care facilities).

147. MONT. CODE ANN. § 50-5-105(2)(a) (1999).

148. *Id.* § 50-5-105(2)(b)(ii).

149. N.C. GEN. STAT. § 130A-148(i) (1999).

150. *See id.* § 130A-148(i).

a significant risk to himself or others, or if the employee is unable to perform the normally assigned duties of the job. The NCCDA also allows licensed health care providers and facilities to discriminate against patients with HIV infection "to protect the health care provider or employees of the provider or employees of the facility while providing appropriate care" and to refer the patient with HIV to another provider or facility "when such referral is for the purpose of providing more appropriate treatment."[151] The disingenuous nature of this "protective" enactment is obvious.[152] In sum, of the sixteen states with HIV-specific statutes, only seven provide "across the board" protection (although one of these, Florida, does not include public accommodations); eight provide coverage equivalent to other disabilities, but limit that coverage to certain contexts or settings of varying scope; and one state, North Carolina, allows significantly greater discrimination against individuals with HIV than it or federal law allows against individuals with other disabilities.

In light of questions now raised as to whether HIV infection is or is not a disability under the general definition used in federal law, as well as in the laws of many states, HIV-specific legislation takes on a new significance. Depending on how such provisions are drafted, however, HIV-specific statutes may be interpreted to mean that HIV is not included in more general definitions of disability. The explicit inclusion of HIV in one provision indicates, arguably, that HIV is not covered by a general definition included in some other statute or provision. If it were, there would be no need for the HIV-specific enactment. For example, Hawaii's HIV-specific housing provision[153] may be interpreted to mean that HIV is not covered under the general disability definition applicable to employment discrimination. Additionally, inclusion of HIV infection might be construed as an indication that other infectious diseases were intended to be omitted from coverage. To avoid this statutory construction, the Iowa Civil Rights Act provides that the inclusion of positive HIV test results within the definition of disability "does not preclude" the inclusion of other "conditions resulting from other contagious or infectious diseases" within that definition.[154]

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151. *Id.* § 130A-148(j).

152. *See* Jeremy McKinney, Comment, *HIV, AIDS & Job Discrimination: North Carolina's Failure and Federal Redemption*, 17 CAMPBELL L. REV. 115 (1995); Angela Sue Bullard, *North Carolina's New AIDS Discrimination Protection: Who Do They Think They're Fooling*, 12 CAMPBELL L. REV. 475 (1990).

153. *See* HAW. REV. STAT. ANN. § 515-3 (Michie 1993).

154. IOWA CODE ANN. § 216.2 (West Supp. 1999).

Finally, as described above, some HIV-specific statutes cover HIV-infected individuals, but not those perceived to be infected or those with a positive HIV test result. If read literally, this version of the HIV-specific definition would exclude from coverage individuals who have tested or appear to have tested positive but who are not in fact infected with HIV. Such individuals would include infants who have their mother's antibodies to HIV, vaccine trial participants, and individuals with false positive test results or medical records erroneously indicating a positive test result.

B. State Law Limitations on Use of HIV Testing or Test Results[155]

After a reliable test for HIV antibodies became widely available in 1985 and the evils resulting from the misuse of such testing became known, many states adopted informed consent for testing and HIV-related information confidentiality statutes. Because breaches of confidentiality frequently result in discrimination (and in many cases are motivated by an interest in discriminating against an individual with HIV), some states also adopted statutes that prohibit the use of HIV test results to discriminate against any individual who has been tested or has tested positive or that prohibit HIV testing for purposes, such as employment screening where testing is not fully voluntary and the results will be used to discriminate. As a result, these "information restrictive" statutes appear to protect from discrimination based on knowledge of test results, not actual or perceived HIV status.

Twelve states have adopted statutes that impose limitations on the use of HIV testing or HIV test results for discriminatory purposes.[156] Of the twelve states in this category, only three impose broad restrictions on the use of such information in employment, public accommodations, housing, and other areas.[157] Six states impose restrictions

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155. This survey does not include the many state statutes that address the problem of transactions involving "stigmatized" real estate owned or occupied by someone with HIV/AIDS. These statutes frequently abrogate any duty on the part of the seller or realtor to disclose any HIV-related stigmatizing information to potential buyers and thus may limit buyers' ability to discriminate against a seller with AIDS, but they do not address the issue of discrimination directly. Thus, for example, if a potential buyer of such a property chooses not to bid on a property because of stigma, or offers a low bid because of knowledge of the stigma, there is typically no remedy under such statutes. For a general discussion of this issue, see AIDS AND THE LAW, *supra* note 4, § 6.12 (David W. Webber ed., 3d ed. 1997).

156. Arkansas, California, Florida, Hawaii, Kansas, Kentucky, Maine, Maryland, New Mexico, Ohio, Rhode Island and Texas. These states are identified in the accompanying Appendix A, column B.

157. Hawaii, Kansas and Rhode Island.

only in the employment context.[158] Two states impose limits on HIV testing and the use of results do so in the health care context.[159] One state, Ohio, prohibits discrimination by health care providers, public services and publicly-funded services.[160] In the case of some states, such as Florida, it is not clear that the adoption of nondiscrimination standards applicable to HIV information adds or necessarily clarifies nondiscrimination standards, given that the state also has broad nondiscrimination provisions separate from the information restrictive statute.[161] Nevertheless, such enactments may be valuable in enhancing public awareness of the confidentiality provisions applicable to HIV information.

Although these testing and confidentiality statutes may offer protection in many instances, if read literally they provide significantly weaker protection than nondiscrimination enactments that define discriminatory conduct and the protected category more broadly. For example, statutes that restrict use of HIV test results in the employment context may be interpreted by the courts not to protect the job applicant who is discriminated against because the potential employer, who is not aware of a specific test result, is aware only of rumors that the applicant is HIV infected. In that case, the information relied on is not derived (at least directly) from any HIV test result, and to protect that applicant, it could be argued, would not serve the purpose of enhancing confidentiality for HIV test results and prohibiting their misuse. But under a statute that provides protection based on HIV status, either actual or perceived, protection from discrimination is significantly strengthened. As another example of the limited scope of these laws, Maryland's HIV informed consent testing statute provides that refusal to undergo HIV testing may not be used "as the sole basis by an institution or laboratory to deny services or treatment."[162] Such enactments may protect the limited group of individuals who might refuse testing and would not be protected under other nondiscrimination laws, either because they could not successfully claim to have been perceived to be HIV infected or because state law does not protect from discrimination on that basis. On its face, however, the Maryland statute would not reach refusal to treat based on HIV status itself. Some of these information restrictive statutes provide protec-

158. California, Florida, Kentucky, Maine, New Mexico and Texas.

159. Arkansas and Maryland.

160. *See* OHIO REV. CODE ANN. § 3701.245(A) (Anderson 1999).

161. *See* FLA. STAT. ANN. § 760.50 (West 1997).

162. MD. CODE ANN., HEALTH-GEN. § 18-336(c) (Supp. 1999).

tion from inquiries regarding HIV testing or the results of such testing.

There are no reported decisions that interpret these statutes, but in one case in an analogous setting, *Urbaniak v. Newton*,[163] the California Court of Appeals narrowly interpreted the California confidentiality statute, limiting its application to disclosure of HIV test results by individuals having access to the *record* of such results.[164] In that case, at the conclusion of an examination by a physician retained by the plaintiff's worker compensation insurer, the plaintiff disclosed his HIV status to a nurse so that she would comply with infection control precautions and avoid transmission of HIV to herself or others.[165] The physician, however, disclosed the HIV information to several third parties without the plaintiff's knowledge or consent.[166] The Court of Appeals concluded that because the legislature's intent in enacting the statute was to encourage individuals with HIV to seek testing and treatment, the confidentiality statute's application was limited to "persons and institutions that conduct tests for AIDS, assume responsibility for custody or distribution of test results, or use test results in connection with treatment of [sic] affected person."[167] The physician's disclosure of the plaintiff's HIV status thus did not violate the statute.[168]

C. *State Law Incorporation of Federal Disability Standards*

By far, the largest category of states incorporates the federal disability standard as generally set forth in the Americans with Disabilities Act and other federal statutes.[169] Thirty-nine states use this definition

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163. 277 Cal. Rptr. 354 (Cal. Ct. App. 1991). For a criticism of this ruling as a "cramped reading" of the California statute, see Roger Doughty, Comment, *The Confidentiality of HIV-Related Information: Responding to the Resurgence of Aggressive Public Health Interventions in the AIDS Epidemic*, 82 CAL. L. REV. 111, 143-45 (1994).

164. *See Urbaniak*, 277 Cal. Rptr. at 362.

165. *See id.* at 356.

166. *See id.*

167. *Id.* at 362.

168. *See id.*

169. For purposes of this discussion and the accompanying Compilation of State Statutes, the "federal disability standard" defines "disability" as an impairment that imposes a substantial limitation on a major life activity, a record of such an impairment, or the perception of such an impairment, as discussed more fully *supra* at text accompanying notes 22-30. While there is no federal statutory definition of "impairment" or "major life activity," some state statutes in this category incorporate the federal regulatory definitions for these terms, although they stop short of incorporating any of the regulations' specific references to HIV as an impairment or a disability. States using these definitions are identified in the accompanying Appendix A, column C. Delaware's employment discrimination

in one or more statute,[170] and of these states, eighteen states, the District of Columbia, and Guam do not have any specific HIV statutory protection.[171] In these states, protection for HIV infection, if it exists, is based on these statutes. Additionally, among the eighteen states with HIV-specific statutes of limited application or statutes that prohibit discriminatory use of HIV testing or test results in only limited settings,[172] fourteen also use the federal standard to define "disability" for at least some purpose under state law.[173] As a result, the federal disability standard significantly effects the rights of individuals with HIV in at least thirty-two states.

In some states, the state administrative agencies responsible for enforcement at the administrative level have interpreted the statute as including HIV infection. Whether these interpretations would be accepted by a state court interpreting the statute is open to question. Nevertheless, such agency interpretations at least assure potential complainants that a claim of discrimination based on HIV status will be accepted by the enforcement agency.

These state statutory definitions pose difficulties in interpretation in regard to the impact of federal court decisions interpreting analogous provisions under federal law. The California Fair Employment and Housing Act (FEHA), for example, prohibits discrimination based on physical or mental "disability" and "medical condition" in public and private employment, housing, and professional licensure, and incorporates the federal definition of disability.[174] However, no reported California court decision has directly addressed the question of whether asymptomatic HIV infection is a disability under California law, although one trial court has so ruled in an unreported decision.[175] Decisions involving symptomatic HIV illness or other condi-

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law is arguably broader than federal law in its definition of disability, and Indiana's housing discrimination law provides a definition broader than that of federal law.

170. *See* Appendix A, column C.

171. Alabama, Alaska, Arizona, Delaware, Georgia, Idaho, Louisiana, Massachusetts, Minnesota, Nevada, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, and West Virginia. Courts in Minnesota and West Virginia have also held that HIV infection is a disability. *See infra* text and accompanying notes 195 and 199.

172. Arkansas, California, Hawaii, Kansas, Maine, Maryland, Missouri, Montana, New Hampshire, New Mexico, North Carolina, Ohio, Rhode Island, Texas, Vermont, Virginia, Washington, Wisconsin.

173. Arkansas, California, Hawaii, Kansas, Kentucky, Maine, Montana, New Mexico, Ohio, Rhode Island, Texas, Vermont, Virginia, and Wisconsin. *See* Appendix A, column C.

174. CAL. GOV'T CODE §§ 12955.3, 12926(k) (West 1992 & Supp. 1998).

175. *See California Judge Awards $729,000 to HIV-Positive Discharged Employee*, 88 DAILY LAB. REP., May 10, 1994, at A5 (summarizing Perrault v. Educ. Testing Serv., Inc., No. 707306-7 (Cal. Super. Ct., Alameda County May 6, 1994)).

tions shed some light on the interpretation of this concept under California law. Thus, the California Supreme Court has ruled that the potential for a medical condition to become disabling in the future is enough to establish it as a current disability.[176] AIDS itself has been recognized as a disability in part because of the potentially debilitating future effects of the illness,[177] but other rulings suggest that such a reading of the FEHA may be unjustifiably broad.[178] Accordingly, the precise meaning of the FEHA may be open to some question until a definitive ruling is issued by the California Supreme Court. Similarly, California's Unruh Civil Rights Act[179] prohibits discrimination based on "disability" in public accommodations or business establishments, as does the Disabled Persons Act,[180] which incorporates the federal definition of disability. One federal district court has concluded, albeit with little discussion of the issue, that HIV infection is a disability for purposes of the Unruh Act.[181] The FEHA and Unruh Act take the ADA as establishing at least a minimum non-discrimination standard, and thus a violation of the ADA is deemed a violation of these state laws.[182] Yet, as discussed above, given the current state of federal court interpretation of the ADA, the precise contours of its protection of individuals with HIV have not been defined. Furthermore, *Bragdon*-like defenses, challenging HIV as a disability under state disability definitions, could be litigated under state law in any case in which HIV is the claimed disability. *Bragdon*, based as it is exclusively on an interpretation of federal law, might be persuasive but not controlling authority in such cases. Such defenses would be foreclosed only in states such as California and Kentucky, which provide that their statutes are to be interpreted consistently with federal law or in California's case that federal law establishes a minimum standard for nondiscrimination.

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176. *See* American Nat'l Ins. Co. v. Fair Employment & Hous. Comm'n, 651 P.2d 1151, 1155-56 (Cal. 1982) (classifying hypertension as a disability).

177. *See* Raytheon Co. v. California Fair Employment & Hous. Comm'n, 261 Cal. Rptr. 197, 201 (Cal. Ct. App. 1989) (AIDS diagnosis, but noting that condition need not be presently disabling to qualify as a physical handicap).

178. *See* Cassista v. Community Foods, Inc., 856 P.2d 1143 (Cal. 1993) (summarizing legislative history of FEHA disability provisions in regard to federal law and rejecting a claim that obesity is a disability).

179. CAL. CIV. CODE § 51 (West 1982).

180. CAL. CIV. CODE § 54 (West 1982 & Supp. 1998).

181. *See* Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316 (C.D. Cal. 1996) (finding that HIV infection is a disability under the Unruh Act for purposes of establishing a claim of "associational" discrimination).

182. *See* CAL. CIV. CODE §§ 51, 54 (West 1982 & Supp. 1998).

D. State Statutory Definitions of Disability Not Adopting the Federal Standard

Fourteen states employ a definition of disability in at least one nondiscrimination statute that either departs significantly from the federal standard or does not set forth any definition. While these statutes are open to varying interpretation, eight of these states appear to define "disability" more broadly than does federal law,[183] while one state, Texas, appears to define it more narrowly. The remaining five states do not include any comprehensive statutory definition.[184]

Unlike the federal definition, which includes the requirement that the impairment result in a substantial limitation on major life activity, the states that define "disability" more broadly than the federal standard typically do not impose any requirement regarding severity. Instead, these states require that there be a documented impairment. In these states, courts and enforcement agencies may be more likely to regard HIV infection as a disability and less likely to find rulings by federal courts persuasive in interpreting state law. Most notably in this category, the New York Human Rights Law (NYHRL) defines "disability" as

> (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment . . . .[185]

Several New York state court decisions indicate that there is no question that HIV is covered under this definition.[186] Nevertheless, other courts have noted that the NYHRL's definition of disability is stricter, not broader, than that of federal law.[187] These decisions appear to

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183. Connecticut, Delaware, Illinois, Indiana, Maryland, Michigan, New York, and Oregon.

184. Alabama (as to public employment, housing, and public accommodations), Arkansas (as to public accommodations and housing), Mississippi (as to public employment, employment by state-funded employers), Washington (as to public accommodations, housing, and real estate transactions, financing, and credit), and Wyoming (as to public and private employment). Note, however, that the Wyoming Fair Employment Commission Rules of Practice incorporate the federal definition of disability.

185. N.Y. EXEC. LAW § 292(21) (McKinney 1993 & Supp. 1998).

186. *See, e.g.*, Petri v. Bank of New York Co., 582 N.Y.S.2d 608, 611 (1992) (holding that asymptomatic HIV infection, whether actual or perceived, is disability under New York law).

187. *See* Scott v. Flaghouse, Inc., 980 F. Supp. 731 (S.D.N.Y. 1997); Aquinas v. Federal Express Corp., 940 F. Supp. 73 (S.D.N.Y. 1996).

ignore the second element of the definition, which includes impairments that are demonstrable by medically accepted clinical or laboratory diagnostic techniques. Similarly, in terms of broader-than-federal protection, the Connecticut Human Rights and Opportunities Act defines "physical disability" as a "chronic physical handicap, infirmity or impairment, whether congenital or . . . from illness . . . ."[188] Because HIV infection is likely to be deemed a chronic physical impairment resulting from illness,[189] such a statute provides a strong case for coverage of HIV infection. Again, the Illinois Human Rights Act prohibits discrimination on the basis of "handicap," which is defined as a "determinable physical or mental characteristic of a person, . . . the history of such characteristic, or the perception of such characteristic by the person complained against, which may result from disease . . . ."[190] The Illinois Supreme Court has interpreted the Illinois statute to cover HIV infection.[191] The Indiana Equal Access to Housing for Persons with Disabilities Law defines an individual with a disability as "an individual who, by reason of physical or mental defect or infirmity, whether congenital or acquired by accident, injury, or disease, is or may subsequently be totally or partially prevented from achieving the fullest attainable, physical, social, economic, mental and vocational participation in the normal process of living."[192] The Maryland Human Rights Act prohibits discrimination in public and private employment, housing, public accommodations, retail services and by persons licensed or regulated by the State Department of Licensing and Regulations on the basis of physical or mental handicap, or perceived handicap, which is defined as "any physical disability . . . which is caused by . . . illness . . . ."[193]

Texas, however, maintains standards that appear to be narrower than federal law. The Texas Rights and Responsibilities of Persons with Disabilities Act defines "disability" as a "mental or physical disability, including mental retardation, hearing impairment, deafness, speech impairment, visual impairment, or any health impairment that requires special ambulatory devices or services."[194] Thus, asymptomatic conditions would not likely be covered by this definition.

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188. CONN. GEN. STAT. ANN. § 46a-51(15) (West 1995 & Supp. 1999).

189. *See, e.g.*, Raintree Health Care Ctr. v. Illinois Human Rights Comm'n, 672 N.E.2d 1136, 1141 (Ill. 1996), *aff'g* 655 N.E.2d 944 (Ill. Ct. App. 1995).

190. 775 ILL. COMP. STAT. ANN. 5/1-103(I) (West 1993 & Supp. 1999).

191. *See* Raintree Health Care Ctr., 672 N.E.2d at 1141.

192. IND. CODE ANN. § 22-9-6 (West 1997).

193. MD. CODE ANN. art. 49B, § 15(g) (Michie 1957 & Supp. 1991).

194. TEX. HUM. RES. CODE ANN. § 121.002(4) (West Supp. 1998).

E. Judicial Interpretations of State Nondiscrimination Law

Given the considerable ambiguity in state law on the question of coverage of HIV infection, some clarification of standards might be expected from the state courts themselves or from federal courts applying state law. To date, however, the highest courts of appeal in only three states have addressed this issue. Two of those rulings, *Benjamin R. v. Orkin Exterminating Co.*,[195] and *Burgess v. Your House of Raleigh, Inc.*,[196] involved state law issues that were affected by subsequent legislation,[197] and thus those rulings are of limited precedential value. But in a third ruling, *Raintree Health Care Center v. Illinois Human Rights Commission*, the Illinois Supreme Court held that HIV infection is a disability under the Illinois Human Rights Act, given that statute's definition of disability as "a determinable physical characteristic resulting from a disease."[198] Because of the specific state statutory language on which that ruling is based, however, it may be of limited precedential value in most states, especially those that have adopted the federal definition.

Several state intermediate appellate and federal courts, applying state law, have addressed the issue of HIV infection as a disability. In *Beaulieu v. Clausen*,[199] the Minnesota Court of Appeals has interpreted the Minnesota Human Rights Act (MHRA) to cover asymptomatic HIV infection.[200] The MHRA's definition of "disability" follows that of federal law, and the court concluded that individuals with HIV are materially limited in several major life activities, including social participation (because of emotional or psychological problems such as depression as well as ostracism by others), sexual and reproductive activities, and employment.[201] In *Robinson v. Henry Ford Health Systems*,[202] a federal district court noted, albeit with little discussion, that HIV is a disability under Michigan law, which incorporates the federal

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195. 390 S.E.2d 814 (W. Va. 1990) (recognizing that subsequent legislation conformed statute in question more closely to federal law, although court's reasoning in concluding that HIV imposes a substantial limitation on major life activities may be persuasive under the subsequent legislation and that of other states).

196. 388 S.E.2d 134 (N.C. 1990). This case was decided before the adoption of North Carolina's Communicable Disease Act, N.C. GEN. STAT. § 130A-148(i), prohibiting discrimination in continuing employment.

197. *See Burgess*, 388 S.E.2d at 141-42; *Benjamin R.* 390 S.E.2d at 816 n.5.

198. Raintree Health Care Ctr. v. Illinois Human Rights Comm'n, 672 N.E.2d 1136, 1141 (Ill. 1996), *aff'g* 655 N.E.2d 944 (Ill. Ct. App. 1995) (quoting 775 ILL. COMP. STAT. ANN. 5/1-103(I) (West 1993 & Supp. 1997)).

199. 491 N.W.2d 662 (Minn. Ct. App. 1992).

200. *See id.* at 666.

201. *See id.*

202. 892 F. Supp. 176 (E.D. Mich. 1994).

definition of disability.[203] Similarly, in *Kotev v. First Colony Life Insurance Co.*,[204] a federal district court concluded, without discussion, that HIV infection is a disability under the California's Unruh Act for purposes of establishing a claim of "associational" discrimination.[205] In *Rose City Oil Co. v. Missouri Commission on Human Rights*,[206] the Missouri Court of Appeals ruled that an individual discriminated against on the basis of perception of HIV infection was not protected under Missouri law.[207] That decision was reversed by legislation.[208]

Several rulings by New York courts have accepted HIV infection as a disability, given New York's broad definition of that term. In one case, *Petri v. Bank of New York Co.*,[209] the Supreme Court for the County of New York ruled that asymptomatic HIV infection, whether perceived or actual, is a disability under New York state law.[210] More recently, in *Cahill v. Rosa*,[211] the New York Court of Appeals ruled in favor of a patient with HIV infection on the question of whether a dentist's office is a public accommodation.[212] HIV infection has been assumed to be a disability in several other cases reported in the New York Supreme Court, Appellate Division.[213]

Although there is no question that HIV infection is covered by New Jersey's statutory definition of "handicap,"[214] in *Poff v. Caro*,[215] the court held that New Jersey law prohibits housing discrimination based on perception that an individual has AIDS or might be at risk for AIDS, reasoning that there is no logical basis for distinguishing between those with a disability and those so perceived.[216] This reasoning would apply as well in cases of HIV infection.

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203. *See id.* at 180.

204. 927 F. Supp. 1316 (C.D. Cal. 1996).

205. *See id.* at 1320.

206. 832 S.W.2d 314 (Mo. Ct. App. 1992).

207. *See id.* at 317.

208. The Missouri HIV and Public Health Act provides that the Missouri Human Rights Act, MO. ANN. STAT. §§ 213.010-213.137 (West 1996 & Supp. 1998), "shall apply to individuals with HIV infection . . . ." MO. ANN. STAT. § 191.665 (West 1996).

209. 582 N.Y.S.2d 608 (1992).

210. *See id.* at 611.

211. 674 N.E.2d 274 (N.Y. 1996).

212. *See id.* at 277.

213. *See e.g.*, Doe v. Jamaica Hosp., 608 N.Y.S.2d 518 (N.Y. App. Div. 1994) (mem.); Syracuse Community Health Ctr. v. Wendi A.M., 604 N.Y.S.2d 406 (N.Y. App. Div. 1993), *aff'd*, 659 N.E.2d 760 (N.Y. 1995).

214. N.J. STAT. ANN. § 10:5-5(q) (West 1999).

215. 549 A.2d 900 (N.J. Super. Ct. Law Div. 1987).

216. *See id.* at 903.

Finally, in *Abbott v. Bragdon*, the First Circuit noted that its disposition of issues under the ADA was dispositive of those under Maine law as well, given the co-extensive coverage of the two statutes.[217]

F. State Law Exclusion of Coverage for Communicable Diseases

Only Georgia and Idaho include explicit exclusions of communicable or infectious disease from their nondiscrimination standards.[218] Most states have abandoned these provisions in favor of "direct threat" provisions that parallel the "direct threat" provision in the ADA.[219] Other states have retained such exclusions in statutes governing specific occupations, such as food service workers.[220] Generally, these statutes are interpreted as inapplicable in the context of HIV, given the well-established view that there is no risk of HIV transmission in the applicable workplaces. Nevertheless, the Supreme Court of North Carolina interpreted the former North Carolina Handicapped Persons Protection Act[221] as not applying to HIV infection because of the statutory exemption of "communicable diseases" from the definition of handicap.[222] In a more recent case, however, the Supreme Court of Illinois rejected an employer's defense that public health regulations required the dismissal of a food service employee with a "contagious or infectious disease."[223] But in *Sanchez v. Lagoudakis*,[224] the Michigan Supreme Court ruled that an employer can require an employee, who is rumored to have AIDS, to undergo a medical examination to determine whether she can be safely employed as a waitress.[225]

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217. *See* Abbott v. Bragdon, 107 F.3d 934, 937 n.1 (1st Cir. 1997).

218. *See* GA. CODE ANN. § 34-GA-3 (1999); IDAHO CODE § 67-5910 (1999). Kentucky also has a communicable disease exception, but that exception is limited by HIV-specific provisions included in other Kentucky non-discrimination laws. *See* KY. REV. STAT. ANN. § 207.140 (Banks-Baldwin 1997).

219. 42 U.S.C. § 12182(a) (1994).

220. *See, e.g.*, MINN. STAT. ANN. § 363.01, Subd. 35(2) (West 1999).

221. N.C. GEN. STAT. § 168A-1–12 (1987).

222. *See* Burgess v. Your House of Raleigh, Inc., 388 S.E.2d 134, 138, 140 (N.C. 1990). North Carolina law has since been amended, and although its protection is limited, that specific exemption has been deleted.

223. Raintree Health Care Ctr. v. Illinois Human Rights Comm'n, 672 N.E.2d 1136, 1143-45 (Ill. 1996).

224. 581 N.W.2d 257 (Mich. 1998).

225. *See id.* at 265.

G. The Demographics of State HIV Non-Discrimination Standards

Given the foregoing description of HIV protective legal standards, the jurisdictions included in this survey[226] can be placed into three categories. First, eleven states[227] and Puerto Rico have clearly established protection for HIV infection, either from explicit statutory language, judicial precedent, or a combination of both. Second, only four states[228] and the U.S. Virgin Islands provide little or no protection for HIV infection, primarily because of the lack of a disability nondiscrimination law of broad application. Finally, in the third and largest category are the remaining states, in which coverage of HIV cannot be determined with certainty, given the lack of specific statutory language pertaining to HIV and the lack of judicial precedent on the question. In this third category, some states may in practice cover HIV as a disability, and cases involving claims of HIV discrimination may have resulted in successful settlements for plaintiffs with HIV but without reported judicial opinions addressing the question of HIV as a disability. The important point here, however, is the absence of clear, identifiable legal standards. Without such legal standards, persons or entities that might engage in discrimination on the basis of HIV do not have a clear compliance standard, and, perhaps more importantly, individuals with HIV have no assurance that they have legal protection. Public health strategies, such as HIV case reporting, are frequently premised on the assurance of at least adequate nondiscrimination standards. The absence of that assurance for a significant number of individuals with HIV thus can have profound implications for public health policy.

In order to determine roughly the proportionate extent that the population of individuals with HIV is represented within the jurisdictions as grouped in these three categories, comparisons of the proportionate distribution of individuals with AIDS within these categories were calculated.[229] The states in which protection for individuals can be said to be clearly established as a result of explicit statutory language or court precedent include less than one-half (forty-six percent) of the reported cases of AIDS. On the other hand, those

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226. We do not, however, take into account the impact that local legislation may have in protecting against HIV infection discrimination.

227. Colorado, Connecticut, Florida, Iowa, Illinois, Kentucky, Michigan, Minnesota, Nebraska, New Jersey, and New York.

228. Alabama, Georgia, Mississippi, and North Carolina.

229. Because comparative state-by-state HIV infection data are not available, we use the most recent rates of AIDS cases as published in CDC, HIV/AIDS SURVEILLANCE REPORT (mid-year ed., June 1999) (table 1) as a rough estimate of the comparative extent of HIV infection in specific jurisdictions.

jurisdictions that significantly limit or have no protection for HIV infection in major areas include approximately six percent of the reported cases.[230] Most significantly, however, because of the widespread reliance on the federal definition of disability, roughly half (forty-eight percent) of that population is reported in jurisdictions in which the legal standards have a degree of uncertainty regarding protection for individuals with HIV.

Perhaps not surprisingly, the states that do not have clear, identifiable legal standards are almost exclusively those relying on the federal definition of disability. Thus, to the extent that *Bragdon v. Abbott* and the more recent Supreme Court ADA cases can be read as supporting the conclusion that HIV infection is a disability, such cases should influence the interpretation of the disability definition in those states in the direction of inclusion of individuals with HIV. Additionally, there appears to be no trend in the state courts, as there was at one point in the lower federal courts, to question whether HIV infection is a disability. On the contrary, the few precedents in this area indicate a trend towards including HIV as a disability. At this point, however, the question of whether and to what extent individuals with HIV infection are protected from discrimination under these state laws remains a question that is open to dispute. In that sense, now, a dozen years after the Presidential Commission on the Human Immunodeficiency Virus Epidemic called for a "strong national policy"[231] against HIV discrimination, the law has not yet fully embodied that policy.

230. Although this is a relatively small percentage, the actual number of individuals within this category is significant. The states in this category and the U.S. Virgin Islands all provide reports of confidential HIV test results. Based on these reports, the CDC, in its most recent report, reported that a total of 34,740 individuals were living with HIV or AIDS in those jurisdictions. The inadequacy of legal protections in these jurisdictions, it should be noted, is not the result of a failure to include asymptomatic HIV infection; these jurisdictions also fail to provide any protection for AIDS or symptomatic HIV infection.

231. *See supra* note 12.

APPENDIX A:
HIV INFECTION AS PROTECTED BY STATE STATUTE IN THE U.S. (INCLUDING GUAM, PUERTO RICO, AND THE U.S. VIRGIN ISLANDS)

Key to Table:
A = Statute explicitly includes protection for HIV
B = Statute bars discriminatory use of HIV testing or test information
C = Statute uses "federal disability" standard
D = Statute uses disability definition other than federal standard (or does not define term)
E = Judicial precedent interprets statute as covering HIV infection
F = No disability nondiscrimination law in at least one significant category
Arrow symbol (➔) indicates column referred to in comment

STATE	A	B	C	D	E	F	Comments
Alabama			●	●		➔	No disability protection in private employment
Alaska			●				
Arizona			●				
Arkansas		➔	➔	●			Prohibits health care provider discrimination based on HIV test result; uses federal definition minus "regarded as" clause
California		➔	➔				Prohibits employment discrimination based on HIV test result; no "record of" clause
Colorado	➔		●				Legislature has declared policy of HIV nondiscrimination
Connecticut				➔			State definition of disability broader than federal
Delaware			●	➔			State definition of disability broader than federal for employment
District of Columbia			●				
Florida	➔	●	➔				HIV explicitly incorporated in handicap definition; no "regarded as" clause
Georgia			●			➔	No coverage of public accommodations, housing, other areas
Guam			➔				Uses term "classified as" rather than "regarded as"
Hawaii	➔	●	●				HIV protected in housing discrimination statute
Idaho			●				
Illinois				●	➔		Ill. Court of Appeals ruled that HIV is a disability
Indiana				➔			State definition of disability broader than federal for housing
Iowa	➔						HIV explicitly incorporated in handicap definition
Kansas		➔	●				HIV case reporting data may not be used to discriminate
Kentucky	➔	●	●				Prohibits housing, public accommodations, public services and employment discrimination based on HIV status
Louisiana			●				
Maine		●		●	➔		1st Cir. Ct. of Appeals ruled HIV is disability under state law
Maryland	➔	●		●			HIV discrimination by public safety personnel prohibited
Massachusetts			●				
Michigan				●	➔		Federal district court ruled that HIV is protected under state law
Minnesota			●		➔		Court of Appeals ruled HIV a disability
Mississippi				●		➔	No coverage of private employment and other areas
Missouri	➔		●				No coverage for "regarded as" HIV infected
Montana	➔		●				Health care facilities may not refuse to admit persons with HIV

STATE	A	B	C	D	E	F	Comments
Nebraska	➔		●				Broad protection from discrimination based on HIV
Nevada			●				
New Hampshire	➔		●				Statute prohibits evictions based on having AIDS or being regarded as having AIDS, but not based on HIV
New Jersey	●				➔		Superior Ct. ruled persons viewed at risk to develop AIDS covered
New Mexico		➔	●				HIV test results may not be used to discriminate in employment
New York				➔	●		State definition of disability broader than federal
North Carolina	➔					●	Statute offers significantly less protection than federal law
North Dakota			●				
Ohio		➔	●				No HIV discrimination in gov't services & gov't-funded services
Oklahoma			●				
Oregon			●				State definition of disability includes federal definition but is broader
Pennsylvania			●				
Puerto Rico	➔						Legislatively declared policy of non-discrimination
Rhode Island		➔	●				Discrimination based on "positive AIDS test" prohibited
South Carolina			●				
South Dakota			●				
Tennessee			●				
Texas		➔	●	●			HIV testing for employment purposes prohibited
Utah			●				
Vermont	➔		●				HIV discrimination in public and private employment prohibited
Virgin Islands, US						➔	No prohibition against HIV discrimination
Virginia	➔		➔				HIV discrimination by public safety personnel prohibited; no "regarded as" clause
Washington	➔			●			HIV discrimination in public and private employment prohibited
West Virginia			●		➔		W. Va. Supreme Ct. has ruled HIV a disability
Wisconsin	➔		●				HIV discrimination by public safety personnel prohibited
Wyoming				➔			"Federal disability" definition adopted by state agency

APPENDIX B: STATE HIV DISABILITY LAW COMPILATION (INCLUDING GUAM, PUERTO RICO, AND THE U.S. VIRGIN ISLANDS)[1]

For each state, law summaries are provided in this order: (1) HIV specific state nondiscrimination laws; (2) HIV testing or information laws; (3) general disability laws; (4) administrative or judicial interpretations of significance in regard to coverage of HIV infection. State agency interpretations and local ordinances have been included where available.

ALABAMA

Alabama's disability nondiscrimination law prohibits discrimination against the "physically disabled" in public employment, housing accommodations, and public accommodations. ALA. CODE §§ 21-7-2 to 21-7-9 (1997). "Physically disabled" is not defined by statute.

The Alabama Fair Housing Law incorporates the federal definition of disability. ALA. CODE § 24-8-3(6) (1992 & Supp. 1999).

Alabama does not have a disability nondiscrimination law applicable to private employers.

ALASKA

The Alaska Human Rights Law prohibits discrimination in public and private employment, housing, credit and financing, based on "disability," and incorporates the federal definition of disability. ALASKA STAT. § 18.80.300(9),(12)-(13) (Lexis Law Publishing 1998).

ARIZONA

The Arizona Civil Rights Act prohibits discrimination in public and private employment and housing on the basis of "handicap." The definition of handicap incorporates the federal definition of disability. ARIZ. REV. STAT. ANN. § 41-1461.4 (West Supp. 1999). The housing nondiscrimination provisions provide that "[h]andicap shall be defined as the term is defined by the Americans with Disabilities Act." *Id.* § 14-1491.8.

The Arizonians with Disabilities Act of 1992, ARIZ. REV. STAT. ANN. § 41-1492.5 (West Supp. 1999), prohibits discrimination in public ac-

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commodations and commercial facilities on the basis of disability, and incorporates the standards of Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181-12184 (1994).

ARKANSAS

The Arkansas HIV Shield Law provides that "[h]ealth care providers or facilities may not deny appropriate care based upon the results of an HIV test." ARK. CODE ANN. § 20-15-905(d) (Lexis Law Publishing Supp. 1999). The HIV Shield Law does not include any enforcement provisions.

The Arkansas Civil Rights Act prohibits discrimination in public and private employment, public accommodations, property transactions, finance and credit, and voting and participation in the political process on the basis of "any sensory, mental, or physical disability." "Disability" is defined as "a physical or mental impairment that substantially limits a major life function . . . ." ARK. CODE ANN. § 16-123-102(3) (Michie 1987 & Lexis Law Publishing Supp. 1999).

The Arkansas Fair Housing Act prohibits discrimination in housing accommodations and real estate transactions on the basis of "disability." ARK. CODE ANN. § 16-123-202 (Michie 1987 & Lexis Law Publishing Supp. 1999). No statutory definition of "disability" is provided.

The Arkansas disability discrimination law prohibits discrimination in public services, facilities, employment, public accommodations, and housing accommodations on the basis of "physical handicap." ARK. CODE ANN. § 20-14-303 (Michie 1991 & Lexis Law Publishing Supp. 1999). No statutory definition of "physical handicap" is provided.

CALIFORNIA

California law prohibits the use of HIV test results for determining suitability for employment or insurability. CAL. HEALTH & SAFETY CODE § 120980(f) (West 1996). Similarly, participation in an HIV research study may not be used to determine employability or insurability of a research subject. *Id.* § 121115 (West 1996).

California's Fair Employment and Housing Act (FEHA) prohibits discrimination based on "physical disability," "mental disability," or "medical condition" in public and private employment. CAL. GOV'T CODE § 12940 (West Supp. 2000). The definitions for "mental disability" and "physical disability" explicitly use the federal definition as a floor for coverage. *Id.* § 12926(i), (k) (West Supp. 2000). It further prohibits discrimination based on "disability" with regard to housing accommodations. The definition of "disability" incorporates the fed-

eral definition. *Id.* § 12955.3, (West Supp. 2000); *see also* CAL. CODE REGS. tit. 9, § 7025 (1999).

California's Unruh Civil Rights Act prohibits discrimination based on "disability" in public accommodations or business establishments, as does the Disabled Persons Act, CAL. CIV. CODE § 54, which incorporates the federal definition of disability. A violation of the ADA is deemed a violation of these state laws. *Id.* § 51, 54 (West Supp. 2000).

California law prohibits discrimination against individuals with disabilities, as defined by federal law, in programs or activities receiving financial assistance from the state. CAL. GOV'T CODE § 11135 (West 1992 & Supp. 1998).

COLORADO

Colorado's Anti-Discrimination Act prohibits discrimination in public and private employment, housing, and public accommodation on the basis of "disability." The definition of "disability" incorporates the federal definition. COLO. REV. STAT. ANN. § 24-34-301 (West 1990 & Supp. 1999).

The Colorado legislature has issued a legislative declaration that "having . . . HIV infection, being presumed to have the HIV infection, or seeking testing for the presence of such infection should not serve as the basis for discriminatory actions or the prevention of access to services." COLO. REV. STAT. ANN. § 25-4-1401 (West Supp. 1999). No enforcement provisions are included in this provision.

In *Phelps v. Field Real Estate Co.*, 793 F. Supp. 1535, 1544 (D. Colo. 1991), *aff'd* 991 F.2d 645, 650 (10th Cir. 1993), the defendant conceded that HIV infection is a disability under Colorado law.

CONNECTICUT

The Connecticut Human Rights and Opportunities Act prohibits "physical disability" discrimination in public and private employment, housing, public accommodations, and other areas. "Physical disability" is defined as "chronic physical handicap, infirmity or impairment, whether congenital or . . . from illness . . . ." CONN. GEN. STAT. ANN. § 46a-51(15) (West 1995 and Supp. 1999).

Conn. Agencies Regs. § 46a-54-57 (1999) (authorizes use of pseudonym for complaints referring to confidential HIV information); *Id.* § 46a-54-41 (standards for the collection, use, maintenance, and release of confidential HIV-related information).

DELAWARE

The Delaware Handicapped Persons Employment Protections Act (DHPEPA) prohibits discrimination in public and private employment and incorporates the federal definition of disability, but defines "substantially limits" to mean that the "impairment so affects a person as to create a likelihood that such person will experience difficulty in securing, retaining or advancing in employment because of a handicap." DEL. CODE ANN. tit. 19, § 722(4) (1995). The definition of "regarded as having an impairment" includes "a physical or mental impairment that substantially limits major life activities because of the attitudes of others." *Id.* The DHPEPA further provides that the "regarded as" having an impairment provision "is intended to be interpreted in conformity with the federal Rehabilitation Act." *Id.*

The Delaware Fair Housing Act incorporates the federal definition of disability. DEL. CODE ANN. tit. 6, § 4602(14) (1999).

The Delaware Equal Accommodations Law incorporates the federal definition. DEL. CODE ANN. tit. 6, § 4502(8) (1999).

The Delaware Department of Insurance has issued regulations to prevent discrimination against potential insureds by life and health insurers when phrasing questions or requiring tests relating to AIDS. DEL. REGS. § 56-1 to 56-5 (1999).

DISTRICT OF COLUMBIA

The District of Columbia Human Rights Act prohibits discrimination in public and private employment, public accommodations, housing, education, real estate transactions, and the sale of motor vehicle insurance on the basis of "disability." "Disability" incorporates the federal definition of disability. D.C. CODE ANN. § 1-2502(5A) (1992 & Supp. 1997).

Policy Statement, D.C. Office of Human Rights, 8A Lab. Rel. Rep. (BNA) 453:1715 (Oct. 9, 1986).

FLORIDA

The Florida Civil Rights Act provides that "[a]ny person with or perceived as having acquired immune deficiency syndrome, acquired immune deficiency syndrome related complex, or human immunodeficiency virus shall have every protection made available to handicapped persons." FLA. STAT. ANN. § 760.50(2) (West 1997).

The Florida Civil Rights Act, prohibits discrimination in public and private employment the basis of handicap. FLA. STAT. ANN. §§ 760.01-760.11, 509.092 (West 1997 & Supp. 1998).

The Florida Fair Housing Act prohibits housing discrimination on the basis of handicap. FLA. STAT. ANN. § 760.20-760.37 (West 1997 & Supp. 1998).

The Florida Educational Equity Act, prohibits discrimination against students and employees on the basis of handicap. FLA. STAT. ANN. § 228.2001(2) (West 1998).

However, public accommodation, housing accommodations, and public employment nondiscrimination rights are granted to the "physically disabled," which is defined as "any person having a physical impairment that substantially limits one or more major life activities." FLA. STAT. ANN. § 413.08(6)(a) (West 1998).

Persons or entities receiving state financial assistance may not discriminate against an otherwise qualified individual in housing, public accommodations, or government services on the basis that the individual is "infected with human immunodeficiency virus." FLA. STAT. ANN. § 760.50(4)(b) (West 1997).

Florida prohibits the use of HIV testing as a condition of employment and prohibits discrimination against any individual on the basis of "knowledge or belief that the individual has taken an [HIV] test or the results or perceived results of such test." FLA. STAT. ANN. § 760.50(3)(b) (West 1997 and Supp. 1998).

Florida courts are prohibited from denying shared parental responsibility, custody, or visitation rights to a parent or grandparent solely because the parent or grandparent "is or is believed to be infected with human immunodeficiency virus." FLA. STAT. ANN. § 61.13(6) (West 1997 & Supp. 1998).

GEORGIA

The Georgia Equal Employment for Persons with Disabilities Code prohibits discrimination in public and private employment on the basis of "disability." "Disability" incorporates the federal definition. GA. CODE ANN. § 34-6A-2 (1998). Nondiscrimination provisions do not apply to an applicant for employment who has "any communicable disease, either carried by or afflicting an applicant." *Id.* § 34-6A-3(b)(2).

Georgia does not have a nondiscrimination statute covering public accommodations, housing, or other areas.

GUAM

The Guam Employment Relations Act prohibits discrimination in public and private employment on the basis of "disability." Disability incorporates the federal definition and includes "physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others as having such an impairment." 22 GUAM CODE ANN. § 5202(b)(4) (1998).

HAWAII

The Hawaii Confidentiality of HIV Information Act prohibits the compelled release of HIV test results or disclosure of HIV testing "in order to obtain or maintain housing, employment, or education." HAW. REV. STAT. § 325-101(c) (1996 & Supp. 1999).

The Hawaii housing nondiscrimination provisions prohibit discrimination on the basis of "HIV (human immunodeficiency virus) infection" and bar inquiries as to whether an individual has been tested for HIV. HAW. REV. STAT. § 515-3 (1993 & Supp. 1999). The statute also incorporates the federal definition of disability. *Id.* § 515-2.

The Hawaii Civil Rights Act prohibits discrimination in employment, housing, access to state services and public accommodations on the basis of "disability." The definition of disability incorporates the federal definition. HAW. REV. STAT. § 368-1.5(b) (1999).

IDAHO

The Idaho Commission on Human Rights Act prohibits discrimination in public and private employment and real estate transactions and financing on the basis of "disability." The statutory definition of "disability" incorporates the federal definition although "substantial limitation" is not specified as being imposed on a major life activity. IDAHO CODE § 67-5902(15) (1995). Associational discrimination is prohibited in real property transactions. *Id.* § 67-5909 (1995).

ILLINOIS

The Illinois Human Rights Act prohibits discrimination in public and private employment, housing, credit and financing, and public accommodations on the basis of "handicap," which is defined as a "determinable physical or mental characteristic of a person . . . the history of such characteristic, or the perception of such characteristic by the person complained against, which may result from disease . . . ." 775 ILL. COMP. STAT. ANN. 5/1-103(I) (West 1993 & Supp. 1999). *See also* Illinois Interpretative Rules on Handicap Discrimination in Employ-

ment, Ill. Admin. Code tit. 56, § 2500. For purposes of employment, the characteristic must be unrelated to the person's ability to perform the duties of a particular job or position; for purposes of housing, the characteristic must be unrelated to the person's ability to acquire, rent or maintain a housing accommodation; for purposes of credit unrelated to a person's ability to repay and public accommodations, must be unrelated to the person's ability to utilize and benefit from a place of public accommodation.

In *Raintree Health Care Center v. Illinois Human Rights Comm'n*, 672 N.E.2d 1136, 1141 (Ill. 1996), *aff'g* 655 N.E.2d 944 (Ill. Ct. App. 1995), the Illinois Supreme Court held that HIV infection, because it is "a determinable physical characteristic resulting from a disease," is a handicap with the meaning of the Illinois Human Rights Act.

INDIANA

The Indiana Civil Rights Law prohibits discrimination in public and private employment, housing, public accommodations, and education based on "disability." "Disability" is defined as "the physical or mental condition of a person that constitutes a substantial disability." IND. CODE ANN. § 22-9-1-3(r) (West 1997).

The Indiana Equal Access to Housing for Persons with Disabilities Law defines "individual with a disability" as "an individual who, by reason of physical or mental defect or infirmity, whether congenital or acquired by accident, injury, or disease, is or may subsequently be totally or partially prevented from achieving the fullest attainable, physical, social, economic, mental and vocational participation in the normal process of living." IND. CODE ANN. § 22-9-6 (West 1997).

IOWA

The Iowa Civil Rights Act prohibits discrimination in public and private employment, housing, and public accommodations on the basis of disability, which is defined to include "the condition of a person with a positive human immunodeficiency virus test result, a diagnosis of [AIDS], a diagnosis of [ARC], or any other condition related to [AIDS]." IOWA CODE ANN. § 216.2 (West 1994 & Supp. 2000). The inclusion positive HIV test results within the definition of disability is explicitly noted "not to preclude" the inclusion of other "conditions resulting from other contagious or infectious diseases" from that definition. *Id.*

KANSAS

The Kansas Act Against Discrimination prohibits discrimination in public and private employment, public accommodations and services, and housing on the basis of "disability." "Disability" incorporates the federal definition. KAN. STAT. ANN § 44-1002 (1993).

The Kansas HIV reporting statute provides that "[i]nformation regarding . . . HIV infection reported [for epidemiological purposes by physicians and laboratory directors to the state secretary of health] shall not be used in any form or manner which would lead to the discrimination against any individual or group with regard to employment, to provision of medical care or acceptance into facilities or institutions for medical care, housing, education, transportation, or for the provision of any other goods or services." KAN. STAT. ANN. § 65-6004(d) (Supp. 1998).

KENTUCKY

The Kentucky Equal Opportunities Act provides that "any person with [AIDS], [ARC], or human immunodeficiency virus shall have every protection made available to individuals with disabilities under [the employment nondiscrimination provisions of Kentucky Revised Statutes §§] 207.130 to 207.240 and Section 504 [of] the Rehabilitation Act. KY. REV. STAT. ANN. § 207.135(1) (Banks-Baldwin 1997). HIV testing is prohibited in pre-employment examinations and for current employees, unless HIV status is a bona fide occupational qualification. *Id.* § 207.135(2)(a) (Banks-Baldwin 1997). An employer asserting HIV as a bona fide occupational qualification must prove that the test is "necessary to ascertain whether an employee is currently able to perform in a reasonable manner the duties of the particular job or whether the employee will present a significant risk of transmitting human immunodeficiency virus infection to other persons in the course of normal work activities." Additionally, the employer bears the burden of proving that there exists "no means of reasonable accommodation short of requiring the test." *Id.* § 207.135(2)(b). Employers may make pre-employment inquiries concerning the existence of an applicant's disability and about the extent to which that disability has been overcome by treatment or medication. *Id.* § 207.140(1). Nondiscrimination protections do not apply in the case of applicants for employment or housing who have "any communicable disease."

Discrimination based on HIV infection, or perception of infection, is prohibited in housing, public accommodations, and governmental services. KY. REV. STAT. ANN. § 207.135(3)(a)-(b) (Banks-Baldwin

1997). Entities receiving state financial assistance are also prohibited from discriminating on the basis of HIV infection or the perception of HIV infection. *Id.*

Licensed health care professionals who treat patients with HIV are also protected from discrimination. KY. REV. STAT. ANN. § 207.135(3)(d) (Banks-Baldwin 1997).

LOUISIANA

The Louisiana Civil Rights Act for Handicapped Persons prohibits discrimination in employment, education, housing, and public services on the basis of "handicap." "Handicap" incorporates the federal definition of disability. LA. REV. STAT. ANN. § 46-2253(1) (West 1999).

MAINE

Maine law (Ch. 501, *Medical Conditions*), provides that employees or applicants for employment may not be required to submit to HIV testing or to reveal whether they have been tested for HIV, except when based on a bona fide occupational qualification. This provision is enforced by the Maine Human Rights Commission. ME. REV. STAT. ANN. tit. 5, § 19204-B (West Supp. 1999).

The Maine Human Rights Act prohibits discrimination in public and private employment, housing, public accommodations, financing, and education on the basis of "physical or mental disability." "Disability" is defined as "physical or mental condition of a person that constitutes a substantial disability as determined by a physician . . ." ME. REV. STAT. ANN. tit. 5, § 4553 (West Supp. 1999) (definition 7-A).

As noted in *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997), the concept of disability under the Maine Human Rights Act is co-extensive with that of the Americans with Disabilities Act.

MARYLAND

Maryland's HIV informed consent testing statute provides that refusal to undergo HIV testing may not be used "as the sole basis by any institution or laboratory to deny services or treatment." MD. CODE ANN., HEALTH-GEN. § 18-336(c) (Supp. 1999).

Maryland's statute providing for disclosure of HIV information to fire fighters, emergency medical technicians, rescue squadpersons, law enforcement officers, and correctional officers provides that individuals in those occupations "may not refuse to treat or transport an individual because the individual is HIV positive." MD. CODE ANN., HEALTH-GEN. § 18-213(m) (Supp. 1999). Similarly, with regard to the transpor-

tation of HIV positive decedents, the same standard applies to correctional officers, first responders, law enforcement officers, medical care facilities, and physicians performing postmortem exams. *Id.* § 18-213.2(h) (Supp. 1999).

The Maryland Human Rights Act prohibits discrimination in public and private employment, housing, public accommodations, retail services, and by persons licensed or regulated by the State Department of Licensing and Regulations on the basis of physical or mental handicap, or perceived handicap, which is defined as "any physical disability . . . which is caused by . . . illness . . . ." MD. ANN. CODE, art. 49B, § 15(g) (1998 & Supp. 1999).

The Maryland Commission on Human Relations has interpreted the statutory definition as including "infection with Human Immunodeficiency Virus." MD. REGS. CODE tit. 14, § 14.03.02.02 (1999). In its interpretation of the Act, the Commission incorporated the federal definition of disability, including the "perceived-as" disabled element. *Id.* § 14.03.02.03.

Discrimination against public school teachers on basis of "handicap" is prohibited. MD. CODE ANN., EDUC. § 6-104 (1999). "Handicap" is not defined.

Discrimination insurance not allowed for disability unless actuarially justified. MD. CODE ANN., INS. § 27-208 (1997 & Supp. 1999).

MASSACHUSETTS

The Massachusetts Unlawful Discrimination Law prohibits discrimination in public and private employment and real estate transactions on the basis of "handicap." "Handicap" incorporates the federal definition of disability. MASS. GEN. LAWS ANN. ch. 151B, § 1 (West 1998 & Supp. 2000).

MICHIGAN

The Michigan Handicappers' Civil Rights Act prohibits discrimination in public and private employment, public accommodations, public services, housing and real estate, and educational facilities for handicapped individuals. "Handicap" incorporates the federal definition, but instead of impairment, the statute uses the term "determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder." MICH. COMP. LAWS ANN. § 37.1103(d) (West Supp. 1999).

In *Robinson v. Henry Ford Health Systems*, 892 F. Supp. 176, 180 (E.D. Mich. 1994), *aff'd without opinion*, 86 F.3d 1156 (6th Cir. 1996), the

court noted that persons "who have tested positive for AIDS or the AIDS-related HIV virus are covered as handicapped or disabled individuals under both the Michigan and federal [Rehabilitation] acts."

MINNESOTA

The Minnesota Human Rights Act prohibits discrimination in public and private employment, public accommodations, housing, public services, and education on the basis of "disability." MINN. STAT. ANN. § 363.01 (West 1991 & Supp. 2000). The statutory definition of "disability" incorporates the federal definition, although impairment may be "physical, sensory, or mental" and the limitation on one or more major life activities must be "material." *Id.*

The Minnesota Court of Appeals interpreted this provision to apply to asymptomatic HIV infection in *Beaulieu v. Clausen,* 491 N.W.2d 662 (Minn. Ct. App. 1992), on the basis that individuals with HIV are materially limited in several major life activities, including social participation (because of emotional problems as well as ostracism), sexual activities, child-bearing, access to insurance coverage, and limitations on career choices involving extensive training resulting from limited life expectancy, and limitations on ability to work due to need for medical care.

MISSISSIPPI

Mississippi's employment law prohibits discrimination in public employment and by employers receiving state funding on the basis of "handicap." There is no statutory definition of "handicap." MISS. CODE ANN. § 25-9-149 (1999).

Mississippi does not have a nondiscrimination law covering private employment or other areas.

MISSOURI

The Missouri HIV and Public Health Act provides that the Missouri Human Rights Act, MO. ANN. STAT. §§ 213.010-213.137 (West 1996 & Supp. 1998), "shall apply to individuals with HIV infection . . . ." *Id.* § 191.665 (West 1996).

The Missouri Human Rights Act (MHRA) prohibits discrimination in employment, public accommodations, housing, and commercial real estate loans on the basis of "disability." The statutory definition of "disability" incorporates the federal definition. MO. ANN. STAT. § 213.010(10) (West Supp. 2000). The MHRA also includes "associational" discrimination. *Id.* § 213.070(4) (West 1996 & Supp. 2000).

MONTANA

The Montana Hospitals and Related Facilities Law provides that "a health care facility may not refuse to admit a person to the facility solely because the person has an HIV-related condition." "HIV-related condition" means "any medical condition resulting from an HIV infection, including but not limited to seropositivity for HIV." MONT. CODE ANN. § 50-5-105(2) (2000).

The Montana Human Rights Act prohibits discrimination in public and private employment, public accommodations, education, and housing on the basis of "disability." "Disability" incorporates the federal definition. MONT. CODE ANN. § 49-2-101(19) (1997).

NEBRASKA

The Nebraska Individual Rights Act prohibits discrimination in public and private employment, housing, education, and public accommodations on the basis that the individual discriminated against "is suffering or is suspected of suffering from human immunodeficiency virus infection or acquired immunodeficiency syndrome." NEB. REV. STAT. § 20-168 (1997). Each agency of the state government was required to "examine policies and practices within its jurisdiction that may intentionally or unintentionally result in discrimination against a person who has taken a [HIV] antibody or antigen test or who has been diagnosed as having [AIDS] or [ARC] to ascertain the extent and types of discrimination that may exist," and to report its findings to the state legislature by December 1, 1988. *Id.* § 20-167.

The Nebraska Fair Employment Practice Act prohibits discrimination in public and private employment on the basis of "disability." "Disability" incorporates the federal definition. NEB. REV. STAT. § 48-1102(9) (1993).

NEVADA

The Nevada Equal Opportunity for Employment Law prohibits discrimination in public and private employment on the basis of "disability." "Disability" incorporates the federal definition. NEV. REV. STAT. ANN. § 613.310(1) (Michie 1996).

The Nevada Fair Housing Law prohibits discrimination in housing on the basis of "disability." "Disability" incorporates the federal definition. NEV. REV. STAT. ANN. § 118.045 (Michie 1998).

NEW HAMPSHIRE

The New Hampshire Law Against Discrimination prohibits discrimination in public and private employment, housing, and public accommodations on the basis of "physical or mental disability." "Disability" incorporates the federal definition. N.H. REV. STAT. ANN. § 354-A:2.IV (1995).

Landlords are prohibited from evicting a tenant "solely on the grounds that the person has [AIDS] or is regarded to have [AIDS]." N.H. REV. STAT. ANN. § 354-A:10.VI (1995 & Supp. 1999).

NEW JERSEY

The New Jersey Law Against Discrimination prohibits discrimination in public and private employment, public accommodations and facilities (including public and private schools), public and private housing, real estate transactions on the basis of "handicap," which includes "AIDS or HIV infection." N.J. STAT. ANN. §§ 10:5-4.1 and 10:5-5(q) (West 1993 & Supp. 1999). "HIV infection" is defined as "infection with the human immunodeficiency virus or any other related virus identified as a probable causative agent of AIDS." *Id.* § 10:5-5(gg).

Announcement, N.J. Div. Civ. Rights, Empl. Prac. Guide (CCH) ¶ 5026 (July 1986) (AIDS discrimination and testing for AIDS prohibited). Associational discrimination is prohibited in housing. N.J. STAT. ANN. § 10:5-4.1 (West 1993).

In *Poff v. Caro*, 549 A.2d 900, 903 (N.J. Super. Ct. Law Div. 1987), the court ruled that New Jersey law prohibits housing discrimination based on the perception that an individual has AIDS or the "potential" to develop AIDS, noting that there is no rational basis for distinguishing between those with a disability and those so perceived.

NEW MEXICO

New Mexico's Human Immunodeficiency Virus Related Test Limitation Law prohibits employers from requiring disclosure of HIV-related test results for purposes of hiring, promotion, or continued employment. N.M. STAT. ANN. § 28-10A-1 (Michie 1996).

New Mexico's Human Rights Act prohibits discrimination in public and private employment, housing, and public accommodations on the basis of "physical or mental handicap" or "serious medical condition." "Handicap" incorporates the federal definition of disability. N.M. STAT. ANN. §§ 28-1-2.M, 28-1-7.A (Michie 1996).

NEW YORK

The New York Human Rights Law prohibits discrimination in public and private employment, public accommodations, housing, and financing based on "disability." "Disability" is defined as a "physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques," or a record such an impairment, or a condition regarded by others as such an impairment. N.Y. EXEC. LAW § 292(21) (McKinney 1993 & Supp. 1998). This provision has been interpreted by the New York Division on Human Rights to include HIV infection. Policy Statement, N.Y. Div. Human Rights, 8A Lab. Rel. Rep. (BNA) 455:3081 (Dec. 1985).

Petri v. Bank of N.Y. Co., 582 N.Y.S.2d 608, 611 (Sup. Ct. N.Y. County 1992) (asymptomatic HIV infection, whether actual or perceived, is disability under New York law).

Seitzman v. Hudson River Assocs., 542 N.Y.S.2d 104 (Sup. Ct. N.Y. County 1989) (successful discrimination claim under New York law of physician-tenant whose practice included patients with AIDS).

NORTH CAROLINA

The North Carolina Communicable Disease Act (NCCDA) prohibits discrimination in continued employment, housing, public services, public accommodations, and public transportation against "any person having AIDS virus or HIV infection on account of that infection[.]" N.C. GEN. STAT. § 130A-148(i) (1999). The NCCDA also prohibits the use or requirement of HIV testing to determine suitability for continued employment, housing, public services, public accommodations, and public transportation. *Id.* However, the NCCDA allows licensed health care providers and facilities to discriminate against patients with HIV infection "to protect the health care provider or employees of the provider or employees of the facility while providing appropriate care" and to refer the patient with HIV to another provider or facility "when such referral is for the purpose of providing more appropriate treatment." *Id.* § 130A-148(j) (1999).

The North Carolina Persons With Disabilities Act (NCPDA) prohibits discrimination in employment, public accommodations, public services, and public transportation on the basis of handicap. The NCPDA incorporates the federal definition of disability, N.C. GEN. STAT. § 168A-3(7a) & (7b) (1999). However, the NCPDA allows HIV testing of job applicants, denial of employment to job applicants based on

HIV status, and HIV testing as an annual medical examination routinely required of all employees by the employer. Reassignment or termination of employment is allowed if the employee poses a significant risk to the employee or others, or if the employee is unable to perform the normally assigned duties of the job. Does not include "working" among the activities identified as major life activities. *Id.* § 168A-5(b).

In *Burgess v. Your House of Raleigh, Inc.*, 388 S.E.2d 134 (N.C. 1990), the Supreme Court of North Carolina interpreted the North Carolina statute (then titled the North Carolina Handicapped Persons Protection Act) as not applying to HIV infection because (1) the statute exempted "communicable diseases" from the definition of handicap and (2) HIV did not limit a major life activity as defined by the act. At the time of the *Burgess* decision, the North Carolina statute did not include working as a "major life activity."

The North Carolina Handicapped Persons Act prohibits discrimination in public accommodations and conveyances, and housing, on the basis of "handicap." N.C. GEN. STAT. § 168A (1999). The Act has been construed to be limited to a present, non-correctable loss of function that substantially limits a person's ability to function normally. *See* Pressman v. University of North Carolina, 337 S.E.2d 644, 649 (N.C. Ct. App. 1985).

NORTH DAKOTA

The North Dakota Human Rights Act prohibits discrimination in public and private employment, housing, property rights, public services, credit transactions, and public accommodations on the basis of "disability." "Disability" incorporates the federal definition. N.D. CENT. CODE § 14-02.4-02 (1997).

OHIO

The Ohio AIDS and HIV Programs Law provides that disclosure of HIV test results to health care providers "may not be requested or made solely for the purpose of identifying an individual who has a positive HIV test result . . . in order to refuse to treat the individual." OHIO REV. CODE Ann. § 3701.24.3(B)(2) (Anderson 1999). The Ohio AIDS and HIV Programs Law also provides that "no [governmental agency] or private nonprofit corporation receiving state or local government funds shall refuse to admit as a patient, or to provide services to, any individual solely because he refuses to consent to an HIV test or to disclose HIV test results." *Id.* § 3701.24.5(A).

The Ohio Civil Rights Commission Act prohibits discrimination in public and private employment, housing, public accommodations, and granting of credit on the basis of "handicap." The statute incorporates the federal definition of disability (setting forth as major life activities the "functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."). OHIO REV. CODE ANN. § 4112.01(13) (Anderson 1999). "Physical or mental impairment" includes "human immunodeficiency virus infection." *Id.* § 4112.01(16)(a)(iii).

The Ohio Civil Rights Commission has interpreted this law as covering HIV infection. Policy Statement, Ohio Civ. Rights Comm'n, 8A Lab. Rel. Rep. (BNA) 457:275 (Mar. 25, 1987); *see also Lawson v. E.R. Towers Co.*, No. B3112385(13570)-052086 (Ohio Civ. Rights Comm'n, Nov. 14, 1986), *summarized in* 8 Lab. Rel. Rep. (BNA) 421:678.

Ohio Civil Rights Commission regulations include "perceived as" handicapped within the definition. Ohio Admin. Code § 4112-5-02(H) (1997). *See also* Cleveland v. Ohio Civil Rights Comm'n, 648 N.E.2d 516 (Ohio Ct. App. 1994).

OKLAHOMA

The Oklahoma Anti-Discrimination Act prohibits discrimination in public and private employment, public accommodations, and housing on the basis of handicap. Handicap incorporates the federal definition of disability. OKLA. STAT. ANN. tit. 25, § 1301(4) (West 1999).

OREGON

The Oregon Civil Rights of Disabled Persons Act prohibits discrimination in public and private employment, housing, and public accommodations on the basis of "disability." "Disability" generally incorporates the federal definition, but defines "major life activity" as including but not limited to "self-care, ambulation, communication, transportation, education, socialization, employment and the ability to acquire, rent or maintain property." OR. REV. STAT. § 659.400(2)(a) (1996). "Substantially limits" means that the "impairment renders the person unable to perform a major life activity that the average person in the general population can perform . . . or . . . significantly restricts the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity." *Id.* § 659.400(2)(d).

PENNSYLVANIA

The Pennsylvania Human Relations Act covers handicap discrimination, including discrimination on basis of perceived handicap, in employment, housing, and public accommodations on the basis of "handicap or disability." PA. STAT. ANN. tit. 43, §§ 954-955 (1999). "Handicap or disability" incorporates the federal definition of disability. *Id.* § 954(p.1).

Pennsylvania Human Relations Commission regulations provide that a handicap or disability which is not job-related but which may worsen and become job related is covered, subject to the defense of undue hardship. PA. CODE tit. 16, § 44.15 (1998).

The Pennsylvania Human Relations Commission has interpreted the Act to cover AIDS/ARC/HIV. Policy Statement, Pa. Hum. Relations Comm'n, Apr. 10, 1986.

PUERTO RICO

Puerto Rico has enacted a law for the prohibition of all discrimination against persons diagnosed with HIV or AIDS. P.R LAWS ANN. tit. 1 § 521 (1998). The Puerto Rico Discrimination Against Disabled Persons Act prohibits discrimination in public and private employment, access to the physical facilities of public and private entities, public and private education, and by Commonwealth-funded private or public institutions on the basis of physical or mental disabilities. *Id.* §§ 502-508 (Supp. 1997). Disability is defined as "a temporary or permanent condition of a motor or mental nature which hinders or limits [an individual's] inception or ability to work, study or enjoy life fully." *Id.* § 501(d).

RHODE ISLAND

The Rhode Island Prevention and Suppression of Contagious Disease Act prohibits discrimination in employment, housing, granting of credit, public accommodation, or delivery of services on the basis of "a positive AIDS test result, or perception of same . . . ." R.I. GEN. LAWS §§ 23-6-22 (1996). The Act also prohibits the requirement of an "AIDS test" as a condition of employment, "except where nondiscrimination can be shown, on the testimony of competent medical authorities, to constitute a clear and present danger of AIDS virus transmission to others." *Id.*

The Rhode Island Civil Rights of People with Disabilities Act prohibits discrimination employment, housing, and public accommodations on the basis of "disability." R.I. GEN. LAWS § 42-87-1(b)-(c) (Supp. 1999).

The Act incorporates the federal definition of disability and cross-references the federal Rehabilitation Act and Americans with Disabilities Act for its definition of prohibited, discriminatory acts or conduct.

The Rhode Island Equal Opportunity and Affirmative Action Act prohibits discrimination in public and private employment on the basis of "disability." "Disability" incorporates the federal definition and provides that the definition "shall include any disability which is provided protection under the [ADA] and federal regulations pertaining to the [ADA]," citing 28 C.F.R. pt. 35 and 29 C.F.R. pt. 1630. R.I. GEN. LAWS § 28-5-6(9) (Supp. 1999).

The Rhode Island Equal Opportunity and Affirmative Action Act prohibits discrimination in public employment, services, facilities, and educational programs on the basis of "disability." R.I. GEN. LAWS § 28-5.1-1 (1995 & Supp. 1999). "Disability" is not defined.

The Rhode Island Fair Housing Practices Act prohibits discrimination in housing on the basis of disability. R.I. GEN. LAWS § 34-37-3(5), (9) (Supp. 1997).

SOUTH CAROLINA

The South Carolina Human Affairs Law prohibits discrimination in public and private employment on the basis of "disability." "Disability" incorporates the federal definition and provides that the term "must be interpreted in a manner consistent with federal regulations promulgated pursuant to the [ADA]." S.C. CODE ANN. § 1-13-30 (West Supp. 1999).

The South Carolina Bill of Rights for Handicapped Persons prohibits discrimination in public accommodations, public services, and housing on the basis of "handicap." "Handicap" is defined as "a substantial physical or mental impairment . . . acquired by . . . disease, where the impairment is verified by medical findings and appears reasonably certain to continue throughout the lifetime of the individual without substantial improvement." *Id.* § 43-33-560 (West Supp. 1999). The definition also excludes individuals who are only regarded as handicapped. The definition of "handicapped person" for purposes of South Carolina law incorporates the federal definition and "any other definition prescribed by federal law or regulation for use by agencies of state government which serve handicapped persons." *Id.* § 2-7-35 (1986).

SOUTH DAKOTA

The South Dakota Human Rights Act Law prohibits discrimination in public and private employment, housing, public accommodations, and education on the basis of "disability." "Disability" incorporates the federal definition. S.D. CODIFIED LAWS § 20-13-1 (Michie 1995).

TENNESSEE

The Tennessee Human Rights Act prohibits discrimination in public and private employment, public accommodations, and housing on the basis of "handicap." "Handicap" incorporates the federal definition of disability. TENN. CODE ANN. § 4-21-102(9)(A) (1998).

TEXAS

The Texas Communicable Disease Prevention and Control Act prohibits HIV testing for employment purposes, unless the employer can show that HIV status is a bona fide occupational qualification and there is not a less discriminatory means of satisfying the occupational qualification. TEX. CODE HEALTH & SAFETY ANN. § 81.102(a)(4)(A) (West 1992). This provision applies to home collection kits for HIV testing. *Id.* § 85.253(c) (West Supp. 2000).

The Texas HIV Service Act provides that the results of HIV testing conducted by a health department voluntary HIV testing program "may not be used for insurance purposes, to screen to determine suitability for employment, or to discharge a person from employment." TEX. CODE HEALTH & SAFETY ANN. § 82.082(c) (West 1992).

The Texas Commission on Human Rights Act prohibits discrimination in public and private employment based on "disability" and incorporates the federal definition of disability. TEX. LAB. CODE ANN. § 21.002(6) (West Supp. 2000).

The Texas Rights and Responsibilities of Persons with Disabilities Act prohibits discrimination in housing accommodations and public facilities based on "disability." TEX. HUM. RES. CODE ANN. § 121.001–121.011 (West Supp. 2000). "Disability" is defined as a "mental or physical disability, including mental retardation, hearing impairment, deafness, speech impairment, visual impairment, or any health impairment that requires special ambulatory devices or services." *Id.* § 121.002(4).

UTAH

The Utah Anti-Discrimination Act prohibits discrimination in public and private employment on the basis of "handicap." "Handicap" in-

corporates the federal definition of disability. UTAH CODE ANN. § 34A-5-102 (1997).

The Utah Fair Housing Act prohibits discrimination in housing on the basis of "disability." "Disability" incorporates the federal definition. UTAH CODE ANN. § 57-21-2(9)(a) (1997).

VERMONT

The Vermont Fair Employment Practice Act prohibits discrimination in public and private employment on the basis of "a person's having a positive test result from an HIV-related blood test." VT. STAT. ANN. tit. 21, § 495(a)(6) (1999).

The Vermont Discrimination Law prohibits discrimination in public accommodations and housing on the basis of "disability." "Disability" incorporates the federal definition. VT. STAT. ANN. tit. 9, § 4501 (1997).

VIRGIN ISLANDS, U.S.

The Virgin Islands Civil Rights Act does not include HIV or other disability nondiscrimination provisions. V.I. CODE ANN. tit. 10, §§ 1-10, 61-75 (1982 & Supp. 1998).

VIRGINIA

The Virginia Disease Prevention and Control Act provides that "[n]o person known or suspected to be positive for infection with . . . human immunodeficiency virus shall be refused services for that reason by any public safety agency personnel." Public safety agencies include the sheriff's office, adult or youth correctional, law enforcement, and fire safety organizations, or any governmental agency or department that employs persons who have law enforcement authority. VA. CODE ANN. § 32.1-45.2 (Michie 1997).

The Virginians with Disabilities Act prohibits discrimination in public and private employment, education, public accommodations, and housing on the basis of "disability." "Disability" incorporates the federal definition. VA. CODE ANN. § 51.5-3 (Michie 1997).

The Virginia Human Rights Act (VHRA) prohibits conduct "which violates any Virginia or federal statute or regulation governing discrimination on the basis of . . . disability." VA. CODE ANN. § 2.1-716 (Michie Supp. 1999). Nothing in the VHRA "shall be deemed to . . . expand upon any of the provisions of any other state or federal law relating to discrimination because of . . . disability." *Id.* § 2.1-717.

WASHINGTON

The Washington Law Against Discrimination prohibits discrimination in public and private employment on the basis of "HIV infection" (actual or perceived), including requiring HIV testing as a condition of employment, unless absence of HIV infection is bona fide occupational qualification. WASH. REV. CODE ANN. § 49.60.172 (West 1990 & Supp. 1997). Absence of HIV infection as a bona fide occupational qualification exists "when performance of a particular job can be shown to present a significant risk, as defined by the board of health by rule, of transmitting HIV infection to other persons, and there exists no means of eliminating the risk by restructuring the job." *Id.* § 49.60.172(3). Claims of actual or perceived HIV discrimination are to be "evaluated in the same manner" as other claims of disability discrimination. *Id.* § 49.60.174(1).

The Washington Law Against Discrimination prohibits discrimination in public and private employment, public accommodations, housing and real estate transactions, and financing and credit transactions on the basis of "sensory, mental or physical disability." WASH. REV. CODE ANN. § 49.60.010 (West Supp. 1997). No definition of disability is provided.

WEST VIRGINIA

The West Virginia Human Rights Act (WVHRA) prohibits discrimination in employment, public accommodations, and housing on the basis of "disability." "Disability" incorporates the federal definition of disability. W. VA. CODE § 5-11-3(m) (1999).

In *Benjamin R. v. Orkin Exterminating Co.*, 390 S.E.2d 814, 818 (W. Va. 1990), the West Virginia Supreme Court of Appeals ruled that HIV infection is a handicap under the WVHRA on the basis that HIV infection substantially impairs or limits the major life activity of "socialization" because of the psychological impact resulting from knowledge of one's HIV status; the WVHRA was subsequently amended to conform more precisely to federal law.

WISCONSIN

The Wisconsin Communicable Disease Control Law prohibits health care providers, peace officers, fire fighters, correctional officers, state patrol officers, jailers, home health agencies, and inpatient health care facilities from discriminating against an individual who has "a positive test for the presence of HIV, antigen or nonantigenic products of HIV or an antibody to HIV, solely because the individual has

HIV infection or an illness or medical condition that is caused by, arises from or is related to HIV infection." WIS. STAT. ANN. § 252.14(2) (West Supp. 1999).

The Wisconsin Fair Employment Act prohibits discrimination in public and private employment on the basis of "disability." "Disability" incorporates the federal definition of disability. WIS. STAT. ANN. § 111.31-32 (West 1997 & Supp. 1999).

WYOMING

The Wyoming Fair Employment Practices Act prohibits discrimination in public and private employment on the basis of "handicap." The statute provides no definition for handicap. WYO. STAT. § 27-9-105 (1999). The Wyoming Fair Employment Commission Rules of Practice incorporate the federal definition of disability.