



Disabilities in the Workplace

PRIVACY ON THE JOB AND IN APPLYING FOR JOBS

State and federal laws guarantee some degree of privacy regarding your disability (including HIV/AIDS) status on the job and during the job application process. This fact sheet provides information about what questions an employer may ask you, whether an employer may require you to submit to medical and/or drug testing, and an employer's obligation to keep your medical information confidential. This fact sheet provides only general information and is not intended to cover every employment situation. If you have specific questions, please contact the Workers' Rights Clinic (see information at the end of this fact sheet).

THE APPLICATION PROCESS: BEFORE THE JOB OFFER



1. I'm looking for a job. What should I reveal about my disability (including HIV/AIDS) status in my resume and cover letter?

You are not legally required to reveal your disability (including HIV/AIDS) status, and disclosing may give a potential employer the opportunity to discriminate.

If you have been out from work on disability, there will be a gap on your resume. If you choose not to state that you were on disability, you might explain this gap by stating that you were on a break and that you had some goals you wanted to accomplish, such as travel or "dealing with a family matter." Do not lie, but think carefully about how you will answer questions about your time away from work. The resume gap won't necessarily prevent you from finding another job, but being unprepared to address it may.



2. May a potential employer ask about my disability status, such as whether I have HIV or AIDS?

No. A potential employer may not ask about your disability (including HIV/AIDS) status or any other health conditions you may have. If they do ask, do not be shaken. It is a personal choice whether to answer the question and how. Decide before the interview how you will handle such a question.

Potential employers also may not ask questions designed to force you to reveal your disability (including HIV/AIDS) status or any other health conditions. For example, a potential employer is prohibited from asking you what medications you take or if you have ever been in the hospital. Again, if those questions are asked, the style of your response is up to you. For example, you may decide to say you are not taking medications, but if your employer later discovers that you lied during an interview, it may use that lie as grounds for firing you.

In some very limited situations, a potential employer may ask questions about your health and/or medications. First, if during the application process, you test "positive" for illegal drug use (the only "medical" test that is permitted before the job offer), the employer may ask if you are taking any lawful medications that might have caused the test result. Second, if your disability (including HIV/AIDS) status is somehow obvious to the

employer or if you have voluntarily disclosed your status, and your employer reasonably believes that you will need a “reasonable accommodation” to do the job, the employer may ask questions about your need for the accommodation. Under no circumstances, however, may an employer ask questions about your medical diagnosis.

A reasonable accommodation is a workplace modification that enables a worker with a disability, such as HIV/AIDS, to perform the essential functions of the job. Employees with disabilities have a right to reasonable accommodation under federal law (if their employer has 15 or more employees) and under state law (if their employer has 5 or more employees). For more information on reasonable accommodation, please read the fact sheet ***Disabilities in the Workplace: Accommodations on the Job***.



3. I think I will need a reasonable accommodation to perform my job. Do I have to disclose my disability (such as HIV/AIDS) status and ask for the accommodation during the application process?

No. You can ask for a reasonable accommodation from your employer at any time—during the application process, the day you begin working, or two years after you have been on the job. You do not give up your right to ask for an accommodation if you do not request it during the application process. If you think you need an accommodation to perform your job effectively, however, you may want to make the request soon after you have begun working. This is because if you have difficulty performing your job without the accommodation, your employer may fire you for performance problems before you get a chance to make the accommodation request.



4. Can I be required to take a drug test as part of my job application? What if my medications cause a “false positive” for illegal drugs?

Potential employers may require that employees take drug tests as part of the application process. Not much is known about whether certain drugs, such as anti-HIV medications, cause “false positives” on tests for illegal drugs, although there have been some stories of certain medications causing a false positive for marijuana. If you are worried, you may want to tell the drug lab conducting the test about the medications you are using. Tell the lab that it is required to keep information about your medications confidential. You should also ask that the lab conduct additional tests to screen out the possibility that your prescription medications—and not illegal drugs—have caused the “positive” reading. On the other hand, you may wish to keep information about your medications private and take your chances on the drug test.

AFTER THE OFFER, BUT BEFORE THE JOB BEGINS



5. I was offered a job, but the employer says I must first take a medical exam and complete a medical questionnaire. Can it do that?

Yes, but only if every applicant for that type of job must undergo the same inquiries and tests. Under federal law, these tests and questions may even be unrelated to your ability to perform your job. In California, the state constitutional right to privacy and a specific state statute require that medical inquiries and tests at this stage be necessary and job-related.



6. Can an employer refuse to hire me because of medical test results?

Maybe. An employer may decline to hire you based on your test results, but only if the employer can show that your condition makes it impossible for you to perform the duties of your job, with or without a reasonable accommodation.



7. What may an employer ask me about my health (such as HIV/AIDS) status after I have started working?

Employers with 15 or more employees are prohibited by the Americans with Disabilities Act (“ADA”) and the California Fair Employment and Housing Act (“FEHA”) from asking employees questions about their disabilities or from requiring medical examinations, unless the questions or examinations are “job related and consistent with business necessity.” Even if you seem sickly or ill, there must be a job-related reason for the question. Additionally, your employer’s request for medical information or documentation must be reasonable and related to the situation justifying the request. For example, if your employer needs to evaluate your current vision problem in order to provide an accommodation, a request for all of your medical files is too broad. In such a situation, you may modify a written release for medical information by writing in a limitation—in this case, restricting the release to those medical records relating to your vision.

The following situations may justify limited medical inquiries:

- **A request for reasonable accommodation:** If you request an accommodation and your disability is not obvious, your employer may request reasonable documentation showing your right to an accommodation. Any medical documentation you give your employer must be confidentially kept in a separate medical file, not your general personnel file.
- **A request for medical leave:** An employee who has worked for more than 1250 hours during the past 12 months at a place that employs 50 or more persons within a 75 mile radius of her or his workplace is entitled to up to 12 weeks of unpaid medical leave to attend to a serious health condition. This time can be taken periodically rather than all at once. If you request this leave under federal or state laws, your employer may request medical documentation indicating that you have a serious health condition that temporarily prevents you from performing your job.
- **Evidence of inability to perform the essential functions of the job:** If your employer reasonably believes that your disability prevents you from performing your job effectively, it may ask limited medical questions or request a medical exam.
- **A workplace injury:** If you have a work-related injury, your employer may ask limited medical questions or request an exam to determine whether it is responsible for costs associated with your injury.

An employer should not require its employees to take HIV tests. If this happens to you, please call the Workers’ Rights Clinic at 415-864-8208. However, even if your employer does not ask you to take an HIV test, it may indirectly discover your status from the results of other tests (for example, a blood test may reveal higher-than-usual levels of a certain chemical, indicating that you are taking HIV medication).



8. My new employer asked me to fill out health insurance forms which ask if I have certain medical conditions (including HIV/AIDS), what types of medications I am taking, and if I have ever had surgery. I answered the questions truthfully, but now my employer is asking for the form. What can I do?

Your employer should not ask you to provide health insurance forms containing detailed medical information. Yet practically speaking, it may be very difficult for you to refuse to turn this form in to your employer without raising a red flag. You can try to bypass your employer and send the form directly to the insurance company.

Obviously, if your employer is “self-insured”—*i.e.*, pays for your healthcare costs directly, rather than through an insurance company—it may require that you return the form to it. Your employer must designate a particular person to whom you should give the form, and that person must keep the form and the information it contains confidential.



9. I have told the head of human resources that I have a disability (specifically that I am HIV-positive), and need a reasonable accommodation to perform my job. Can s/he tell other people at work?

Generally not. Employers must keep such medical information confidential. There are certain narrow exceptions for disclosing specific, limited information to supervisors and managers who have a need to know, first aid and safety personnel, and government officials investigating compliance with federal and state disability laws. This information may not be disclosed to others in your office.



Consult the appropriate agency or an attorney about your rights.

This fact sheet is intended to provide accurate, general information regarding legal rights relating to employment in California. Yet because laws and legal procedures are subject to frequent change and differing interpretations, the Legal Aid Society - Employment Law Center cannot ensure the information in this fact sheet is current nor be responsible for any use to which it is put. Do not rely on this information without consulting an attorney or the appropriate agency about your rights in your particular situation.

For further information about your employment rights, call:

**The Workers' Rights Clinic
(415) 864-8208**

The Legal Aid Society - Employment Law Center is a non-profit organization focusing on the employment-related legal rights of low-income workers and providing free legal information on a wide range of employment-related problems. For information, call the LAS-ELC's 24-hour Direct Services Information Line at (415) 864-8208.

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