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I. Introduction

As the shadow of AIDS extends itself across society, the issues it spawns continue to emerge and evolve in a rapid fashion. Some of these issues have already crystallized, others are just beginning to take shape.[1]

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1. From a constitutional perspective, the issues involving AIDS may be divided into three categories: the need to protect public health versus individual liberty, the right to privacy and the right of those with AIDS to equal treatment in matters such as health insurance, hospital care and the like. *See* Dolgin, *Aids: Social Meanings and Legal Ramifications*, 14 HOFSTRA L. REV. 193, 202-04 (1985); *see generally* Comment, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274 (1986). These broad issues arise in a myriad of specific situations. Regarding schools, see generally, Schwarz and Schaffer, *AIDS In The Classroom*, 14 HOFSTRA L. REV. 163 (1985). Regarding insurance, see generally, Oppenheimer and Padgug, *AIDS and Health Insurance: Social and Ethical Issues*, 2 AIDS & PUB. POL'Y J. No. 1, at 11 (1987); Hoffman and Kincaid, *AIDS: The Challenge to Life and Health Insurers' Freedom of Contract*, 35 DRAKE L. REV. 709 (1986); Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782 (1987). Regarding housing, see, e.g., Seitzman v. Hudson River Assocs., 126 A.D.2d 211, 513 N.Y.S.2d 148 (App. Div. 1987) (refusing to sell cooperative apartment to doctors who treat AIDS patients violates state handicap discrimination law). Regarding prisons, at least 14 states test or plan to test all incoming prisoners for AIDS, and 20 states segregate prisoners diagnosed with AIDS. Despite dozens of suits brought to end this practice, the courts "have almost unanimously ruled against them." Applebome, *For AIDS Inmates, a Prison in Prison*, N.Y. Times, Mar. 5, 1989, at A22, col. 4. *Contra* La Rocca v. Dalsheim, 120 Misc. 2d 697, 467 N.Y.S.2d 302 (Sup. Ct. 1983) (trial court refused the request of inmates without AIDS to compel the state to impose greater restrictions on inmates with AIDS). Regarding the workplace, see Turner and Ritter, *AIDS and Employment*, 5 LAB. LAW. 83 (1989). For seminal treatment of employment related issues, see Carey & Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284 (1987); Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11 (1985). Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681 (1985). Apart from disputes rooted in the Constitution and concepts of fundamental human rights, other significant legal issues have surfaced, for example, tort liability of hospitals and blood banks for AIDS transmitted through tainted blood. Blood bank officials estimate that between 200 and 300 such suits are now pending. Of the five

Despite the great number of articles and books on AIDS,[2] including the legal concerns emanating from the workplace, unfurrowed ground remains.[3] This Article proposes that the workplace, although generating many problems, can, when used properly, be an effective weapon in the overall effort to control AIDS. The appropriate instrument to achieve this is federal legislation[4] which would provide incentives to employers along with guarantees for those suffering from AIDS and protection for those who might be at risk. This Article will consider the elements of suggested model legislation. In order to better understand the need for such legislation and the form it should take, it is necessary to first summarize the currently recognized issues in the workplace and briefly explore some issues which have not been fully developed. Any approach to resolving the issues posed by AIDS must be premised on an understanding of the nature of the disease.

A. *Medical*

AIDS, or Acquired Immune Deficiency Syndrome, results from infection by a virus, Human Immunodeficiency Virus (HIV).[5] AIDS is the condition which results when HIV causes

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jury decisions reported, three found liability and two denied recovery. Blakeslee, *Blood Banks Facing Hundreds of AIDS Suits*, N.Y. Times, Apr. 27, 1989, at B18, col. 1. *See also* Coffee v. Cutter Biological and Miles Laboratories, 809 F.2d 191 (2d Cir. 1987) ("blood shield" statutes). Although this Article focuses on the workplace, the foregoing examples illustrate the diverse areas of our society affected by AIDS. For a greater understanding of the number and scope of AIDS related issues, see AIDS REFERENCE & RESEARCH COLLECTION (1987).

2. *See, e.g.*, McDowell, *After a Slow Start, AIDS Books are Coming Out in a Rush*, N.Y. Times, June 11, 1987, at C19, col. 1.

3. *See supra* note 1. A review of the articles confirms that legal scholarship has centered on specific legal issues arising in the workplace, with particular attention to the legal rights of those with AIDS. The contribution made by this body of work is of immense value. However, the concept that the workplace itself can play a powerful role in a comprehensive national strategy has received little attention.

4. Comprehensive federal legislation, the AIDS amendments of 1988, now codified as 42 U.S.C. §§ 300ee-1-300ee-34, was enacted as part of the Health Omnibus Programs Extension of 1988. Pub. L. No. 100-607, §§ 201-56, 102 Stat. 3062-3111 (1988). This legislation, discussed *infra* in text and accompanying notes 158-217, represents an effort to establish a national policy and bring coherence to the AIDS battle. However, it does not adequately address the problems in the workplace nor exploit the strategic possibilities of the workplace.

5. Although it was suspected as early as 1982 that the disease might be blood borne, scientists were unable to identify the etiologic agent responsible for transmitting AIDS

the immune system to break down, allowing opportunistic infections and certain other diseases to spread uncontrolled through the body.[6] Early estimates were that twenty to thirty percent of individuals infected with the virus would develop AIDS.[7] Unfortunately, more recent findings have raised the specter that as many as 100% of those infected with AIDS may eventually get the disease.[8]

The majority of those who develop AIDS will be dead within five years after being diagnosed.[9] It is this great sense of

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until 1984, when it was reported that "[e]vidence implicates a retrovirus as the etiologic agent of acquired immunodeficiency syndrome (AIDS)." *Antibodies to a Retrovirus Etiologically Associated with Acquired Immunodeficiency Syndrome (AIDS) in Populations with Increased Incidences of the Syndrome*, 33 MORBIDITY AND MORTALITY WEEKLY REPORT 377 (1984). Two morphologically similar agents, which subsequently proved to be the same virus, were isolated: lymphadenopathy-associated virus (LAV) and T-lymphotropic retrovirus type III (HTLV-III). *Id.* The current generally accepted nomenclature, Human Immunodeficiency Virus (HIV), was the name adopted by the International Committee for the Taxonomy of Viruses in 1986. The Advocate, Aug. 19, 1986, at 23.

6. *See generally* Sicklick and Rubinstein, *A Medical Review of AIDS*, 14 HOFSTRA L. REV. 5 (1985); *see also Revision of the Case Definition of Acquired Immunodeficiency Syndrome for National Reporting — United States*, 34 MORBIDITY AND MORTALITY WEEKLY REPORT 373 (1985) (expands the narrow definition of AIDS originally adopted by the Centers for Disease Control (CDC) as reported in 31 MORBIDITY AND MORTALITY WEEKLY REPORT 507 (1982)); Kolata, *Fatal Strategy of AIDS Virus Grows Clearer*, N.Y. Times, Mar. 22, 1988, at C1, col. 1.

7. *From Infection to Illness: A Virus' Advancing Toll*, N.Y. Times, Feb. 15, 1988, at A14, col. 5 (official federal government estimate was that between 20% and 30% of those infected with HIV would develop AIDS within five years).

8. Mahar, *AIDS Pitiless Scourge*, Barron's, Mar. 13, 1989, at 6-7, col. 1; *AIDS May Be Part of Complex Disease*, The Reporter Dispatch, Nov. 13, 1988, at 12, col. 4 (a growing body of evidence suggests that almost all of those infected will get sick.)

9. *15% of People with AIDS Survive 5 Years*, N.Y. Times, Nov. 19, 1987, at B1, col. 4 (a study of 5,833 patients diagnosed with AIDS before 1986 found that 15% survived at least five years after diagnosis). A ray of hope was offered by the study, printed in The New England Journal of Medicine, which concluded that "[i]t is perhaps too soon to know whether AIDS is universally fatal." *Id.* As yet, however, no cure or preventive vaccine is in sight. Altman, *Some Optimism Amid Grim Predictions as 87-Nation AIDS Meeting Opens*, N.Y. Times, June 5, 1989, at B4, col. 1. A hopeful note was sounded by Dr. Jonas Salk who reported that tests on chimpanzees indicate a vaccine may be possible. Altman, *Salk Says Tests of Vaccine Show Halt of AIDS Infection in Chimps*, N.Y. Times, June 9, 1989, at A8, col. 1. Several potential vaccines are in the process of being tested on humans. USA Today, May 10, 1989, at D1, col. 6. *But see* Kolata, *Recent Setbacks Stirring Doubts About Search for AIDS Vaccine*, N.Y. Times, Feb. 16, 1988, at A1, col. 2 (quoting scientists from various research groups, including the National Institute of Allergy and Infectious Diseases, the National Cancer Institute, the Merek Institute of Therapeutics and the Southwest Research Foundation, to the effect that it is

finality that adds such poignancy to the plight of those suffering from AIDS, and such legitimacy to the concern of those who fear exposure to the virus.

There is a less severe manifestation of symptoms resulting from infection with HIV known as AIDS related complex (ARC) which does not generally prove fatal.[10] At this time we do not know how many individuals with ARC will develop AIDS.[11] But if recent findings are confirmed, the outlook is grim.

The birthplace of AIDS remains uncertain.[12] The first documented case in the United States occurred in 1978,[13] although recent research indicates it may have occurred as early as 1959.[14]

Complicating the problem further is the fact that there is no test for the AIDS virus itself. All we are able to do is test for the existence of antibodies to HIV in the blood. A positive result indicates exposure to the virus but not the existence of the dis-

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proving extremely difficult to develop a vaccine).

10. "Any disease associated with HTLV-III infection that does not fall far enough into the spectrum to be classified as AIDS is called AIDS-related complex (ARC)." Sicklick and Rubinstein, *supra* note 6, at 6. *See also AIDS May Be Part of Complex Disease*, *supra* note 8 (ARC has made tens of thousands seriously ill and has, itself, killed many); Mahar, *supra* note 8.

11. *See AIDS Incubation Time Often Exceeds 9 Years*, N.Y. Times, Mar. 16, 1989, at B15, col. 5 (study reveals it takes longer than previously thought to develop AIDS after being infected with HIV).

12. It is generally believed that the virus originated in central Africa because the earliest known blood samples containing HIV were taken in Zaire in 1959. Also, a similar immunodeficiency virus has been isolated in monkeys native to Africa. Brooke, *In Cradle of AIDS Theory, a Defensive Africa Sees a Disguise for Racism*, N.Y. Times, Nov. 19, 1987, at B13, col. 1. A number of African leaders and journalists have branded this theory racist. *Id. See also* Schmeck, *Family Tree of AIDS Viruses is Viewed as 37 to 80 Years Old*, N.Y. Times, June 9, 1988, at A32, col. 1; *Study Suggests AIDS Virus Didn't Come From Monkeys*, N.Y. Times, June 2, 1988, at B13, col. 1.

13. *Hepatitis B Virus Vaccine Safety: Report of an Inter-Agency Group*, 31 MORBIDITY AND MORTALITY WEEKLY REPORTS 465 (1982). AIDS was first recognized as a new disease in 1981. *Pneumocystis Pneumonia — Los Angeles*, 30 MORBIDITY AND MORTALITY WEEKLY REPORTS 250 (1981). Observations concerning five patients "suggest the possibility of a cellular immune dysfunction related to a common exposure that predisposes individuals to opportunistic infections such as pneumocystosis and candidiasis." *Id.* at 252.

14. It is likely that cases had occurred at least as early as 1974 and perhaps even earlier. *Early Cases of AIDS*, N.Y. Times, Feb. 2, 1988, at C7, col. 3. There have even been suggestions that it may have been introduced into the country several times before the current epidemic. Kolata, *Boy's 1969 Death Suggests AIDS Invaded U.S. Several Times*, N.Y. Times, Oct. 28, 1987, at A15, col. 1.

ease.[15] Since it may take up to a year or longer for an individual to develop antibodies after becoming infected with HIV, the virus can be transmitted to others by an individual who has tested negative and may have no idea he is carrying the disease.[16]

The disease was originally thought to be confined to the homosexual community and to drug addicts who share contaminated needles.[17] This early perception has had a lingering influence on society's approach to the issue. Homophobic individuals and others who disapprove of the homosexual lifestyle viewed the disease as a "Gay Plague," some going so far as to proclaim it a form of divine retribution.[18] So long as AIDS appeared confined to homosexuals and drug addicts, there was little popular support for an effective early response to the problem.[19] The gay

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15. The currently accepted practice is to administer the ELISA test for antibodies in the blood that indicate the presence of HIV. If the test is positive, a follow up Western Blot test is performed to confirm that it is true and positive. Blaine, *AIDS: Regulatory Issue for Life and Health Insurers*, 2 AIDS & PUB. POL'Y J. No. 1, at 2 (1987). Efforts to develop more reliable tests have yielded, inter alia, tests which amplify and detect DNA from the AIDS virus. *New AIDS Virus Test Reduces Blood Risks*, N.Y. Times, May 18, 1988, at A25, col. 1; Kolata, *Commercial Test Nears For Hidden Virus*, N.Y. Times, June 8, 1988, at A16, col. 1; *New AIDS Test Is Being Offered To Confirm Infection With Virus*, N.Y. Times, Feb. 26, 1988, at A10, col. 5 (test to replace the Western Blot test); *New Test Finds Signs of AIDS at an Earlier Point*, N.Y. Times, July 11, 1989, at C3, col. 3 (tests to detect antigens in the virus).

16. Kolata, *Study of 18 Men With AIDS Virus Finds Delay in Antibody Production*, N.Y. Times, June 14, 1988, at C7, col. 1 (time elapsed before antibody production ranged from six months to 42 months).

17. In 1982, the CDC separated reported AIDS cases into groups based on the following risk factors: homosexual or bisexual males — 75%, intravenous drug abusers — 13%, Haitians - 6%, persons with hemophilia A — 0.5% and others — 5%. *Update on Acquired Immune Deficiency Syndrome (AIDS) - United States*, 31 MORBIDITY AND MORTALITY WEEKLY REPORTS 507 (1982).

18. *See, e.g.*, the oft-quoted comment of noted conservative, Patrick Buchanan, that gays "have declared war upon Nature, and now Nature is exacting an awful retribution," and other examples of this attitude noted in *The Constitutional Rights of AIDS Carriers, supra* note 1, at 1274 n.7. *See also* R. SHILTS, AND THE BAND PLAYED ON 311 (1988) (anti-gay comments by former Nixon speech writer Patrick J. Buchanan); *id.* at 352 (describing an anti gay booklet, *The Gay Plague*, published by the Alert Citizens of Texas; that told of the dissension surrounding the National Gay Rodeo in Reno, Nevada in 1983, including public comments referring to the gay community as a "living, breathing cesspool of pathogens").

19. *See* SHILTS, *supra* note 18, at 158 (cancer center not interested in researching the new disease in 1982); *id.* at 164 (CDC had difficulty in enlisting research support); *id.* at 170 (FDA expressed doubt about the existence of the new disease); *id.* at 186-87 (underfunding by Congress, yet still referred to by one journalist as "the gay pork barrel."); *id.* at 143 Congressman Henry Waxman's statement at earliest Congressional hearings in

community, already well organized to protect the civil liberties of its members, circled the wagons to defend against what was rightly expected to be a renewed onslaught by traditional antagonists.[20]

Some public officials downplayed the potential for AIDS to spread beyond the identified groups at risk.[21] Thus, pre-existing antagonisms, public apathy and lack of vision on the part of public officials have all contributed to our failure to mount as

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April of 1982 concerning what we now know as AIDS. "There is no doubt in my mind that, if the same disease had appeared among Americans of Norwegian descent, or among tennis players, rather than gay males, the responses of both the government and the medical community would have been different." *Id.* at 143.

20. *Id.* at 108 (gay activist, Larry Kramer, who tried to rouse the gay community to protect itself, found himself attacked as an alarmist and homophobic); *id.* at 167 (early denial among gay community that there was any real threat); *id.* at 180, 259, 312 (fierce resistance to closing public bathhouses, seen by many in the gay community as a symbol of sexual liberation and hard won civil rights). *Id.* at 315 ("AIDSpeak", a phrase coined to describe a new semantic designed not to offend). Shilts claims that "[S]ymbolism nearly always triumphed over substance in the world of AIDSpeak." *Id.* at 326. The ultimate AIDSpeak word, according to Shilts, is "AIDSphobia", which was used by the press liaison for the San Francisco AIDS Foundation to characterize a gay policeman who sought to compel AIDS testing of a gay suspect who bit him. The press liaison explained that AIDSphobia was "acting like AIDS is the worst thing that could possibly happen to you." *Id.* at 560.

21. *See, e.g.*, the results of the lobbying efforts of the blood supply industry chronicled in Shilts, *supra* note 18, at 207 (head of the FDA's blood advisory committee's nationally televised statement that there was no evidence that transfusions spread AIDS); *id.* at 410 (president of the Council of Community Blood Centers conceding the possibility of a blood-borne virus, coupled with assurances that it probably was not highly infectious); *id.* at 345 (Health and Human Services Secretary Heckler's statement, "I want to assure the American people that the blood supply is 100 percent safe."). Despite this assurance, it is now estimated that close to half of the 15,000 hemophiliacs in the United States have been infected with HIV through tranfusions. Kolata, *Hemophilia and AIDS: Silent Suffering*, N.Y. Times, May 16, 1988, at A1, col. 3. *See 100 Questions & Answers - AIDS*, published by the New York State Department of Health as reported in AIDS REFERENCE & RESEARCH COLLECTION, at 273 (1987) ("[H]ealth care workers and other occupational groups who come into contact with AIDS patients or specimens have not developed AIDS.") Yet a number of health care workers have been infected with HIV through needle pricks or exposure, sometimes minimal, to infected blood. *Update: Human Immunodeficiency Virus Infections in Health-Care Workers Exposed to Blood of Infected Patients*, 36 MORBIDITY AND MORTALITY WEEKLY REPORT 285 (May 1987); *see also* Pear, *3 Health Workers Found Infected By Blood of Patients With AIDS*, N.Y. Times, May 20, 1987, at A1, col. 3; Kolata, *Tighter AIDS Precautions Urged in Labs*, N.Y. Times, Jan. 1, 1988, at 37, col. 1. Columnist Thomas Sowell captured the widespread disillusionment that has resulted from this misplaced hubris when he wrote: "Just a few short years ago, these confident experts who are continually reassuring us did not know that you could catch AIDS from blood transfusions." *AIDS Testing vs. Special Interests*, The Boston Herald, July 11, 1987, at 19, col. 1.

swift and united a response as such a threat to public health requires.

It should come as no surprise that an issue so entangled with emotion and uncertainty, carrying the potential for personal and even national catastrophe, should give birth to a plethora of problems in that contentious and already highly regulated engine of society, the workplace. Before turning to a consideration of those problems, a brief review of traditional social responses to the risk of a contagion may serve as a useful backdrop and help to place the present crisis in perspective.

B. *Social Reaction To Contagious Diseases*

Recent projections estimate that by 1992 there will be as many as 480 thousand people suffering from AIDS.[22] Within three years, the number killed by AIDS in the United States will reach 263 thousand assuming no preventative or cure is available by then.[23] It is difficult to imagine the amount of human suffering reflected in these stark numbers. But lest myopia cloud our judgment and invest the crisis with mythic proportions, thereby preventing a response proportionate to the dimensions of the problem, let us resort to an historical comparative. The most graphic illustration of the awesome destructive potential of pestilence is the Bubonic Plague, or "Black Death," which scoured Europe in the mid-fourteenth century.[24] Its devastation moved a contemporary commentator to write, "[a]nd people said and be-

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22. A study conducted by the General Accounting Office (GAO) at the request of members of Congress analyzed 13 forecasts, including that of the CDC, and concluded that they all understand the extent of the epidemic in spite of problems with the underlying data. The GAO projects a "realistic" range of 300,000 to 480,000 cases by 1992. *Forecasts of AIDS Fall Short, U.S. Study Says*, N.Y. Times, June 26, 1989, at B5, col. 2.

23. According to projections of the CDC, this is almost five times higher than the number of Americans killed in Vietnam. *AIDS Cases in U.S. Pass 100,000 Mark*, The Reporter Dispatch, July 24, 1989, at 11, col. 2. Recent breakthroughs in drug treatment, particularly with Azidothymidine (AZT), offer hope for delaying the onset of symptoms and extending life. Hilts, *Drug Said To Help AIDS Cases With Virus But No Symptoms*, N.Y. Times, Aug. 18, 1989, at A1, col. 1. However, despite widespread experimentation, no preventative vaccine is likely to reach the market for some years. Kolata, *supra* note 9, at A1. *See generally* Gostin, *Vaccination for AIDS: Legal and Ethical Challenges from the Test Tube, to the Human Subject, through to the Marketplace*, 2 AIDS & PUB. POL'Y J. No. 2, at 9 (1987).

24. *See generally* B. TUCHMAN, A DISTANT MIRROR 92-125 (1978).

lieved, 'This is the end of the world.' "[25]

It is estimated that in Europe some twenty million people died from the Plague,[26] representing approximately one third of the population.[27] For AIDS to have a comparable impact in the United States, it would have to be responsible for a total of 80.7 million deaths before being brought under control.[28] At this point, not even the most pessimistic epidemiologist envisions such a scenario.[29] To say AIDS is unlikely to match the grisly score run up by the Plague is not to deny the seriousness of the problem or the urgency which it presents. It does, however, argue against the need for draconian measures.[30]

The best known response to outbreaks of contagious diseases was the quarantine, which finds support in the law at least back to the time of Moses, when it was imposed in cases of suspected leprosy.[31] It was employed in the Middle Ages during outbreaks of the Plague and through the intervening years to combat other highly contagious diseases such as smallpox, typhus,[32] and yellow fever,[33] with varying degrees of success.

Given the antiquity of quarantine and its success in certain situations, it cannot be dismissed totally from consideration, but

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25. *Id.* at 95.

26. *Id.* at 94.

27. *Id.* at *xiii* (Foreword).

28. *See* THE WORLD ALMANAC AND BOOK OF FACTS 532 (1989). "On January 1, 1988, the estimated resident population of the United States was 244.6 million people, an 8.0 percent increase over the 1980 census count of 226.5 million." *Id.* One third of 246.6 million equals 80.7 million.

29. Altman, *Some Optimism Amid Grim Predictions as 87-Nation AIDS Meeting Opens*, N.Y. Times, June 5, 1989, at B4, col. 1, reporting that epidemiologists at the CDC predict that the cumulative total of AIDS cases in the United States will reach one million by 1998. Dr. Jonathan Mann, head of the World Health Organization's Global AIDS program, estimated that 1.5 million people in the United States will be infected with HIV by 1992.

30. Society has often viewed frightening and little understood diseases through a moral prism. For example, at various times those with tuberculosis, cancer and leprosy have been shunned and denied basic civil rights. Dolgin, *supra* note 1, at 196. *See also Fear Itself: AIDS, Herpes and Public Health Decisions*, 3 YALE L. & POL'Y REV. 479 (1985) (reviewing the recent evolution of the law in this area).

31. *Leviticus* 13:46. "As long as the sore is on him he shall declare himself unclean, since he is in fact unclean. He shall dwell apart, making his abode outside the camp." *Id.*

32. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 68 n.99 (1985).

33. *Id.* at 57. Since 1900, legal challenges to quarantine have centered on tuberculosis and venereal diseases, such as syphilis. *Id.* at 69.

given its potential abuses, neither should it be lightly embraced as a tool in the fight against AIDS.[34] There are significant differences that distinguish AIDS from the other contagious diseases we have mentioned, the key one being the relative fragility of the HIV virus outside a highly specialized environment.[35] This results in a relatively low degree of transmission compared with diseases like airborne plague, measles, and smallpox.[36]

But while the degree of transmission is low, the consequences are dreadful indeed. Thus while not acceptable as a general solution in light of present medical knowledge, quarantine might be appropriate in cases where an AIDS carrier has demonstrated a lack of willingness or ability to conduct himself in a way conducive to minimizing the risk of transmission to others.[37]

There is another form of quarantine, which does not entail confinement, but exclusion — exclusion from school,[38] from the

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34. The evidence respecting the level of contagiousness does not justify serious consideration of a general quarantine. *See, e.g., Summary: Recommendations for Preventing Transmission of Infection With Human T-Lymphotropic Virus Type III/Lymphadenopathy - Associated Virus in the Workplace*, 34 MORBIDITY AND MORTALITY WEEKLY REPORT 681 (1985). Although HIV has been isolated from blood, semen, saliva, tears, breast milk and urine, "and is likely to be isolated from some other body fluids, secretions and excretions . . . , only blood and semen have been implicated in transmission." *Id.*

35. *See, e.g.*, a study by Dr. Nancy Padian of the University of California at Berkeley, of women who were sexual partners of HIV infected men, found that "[e]ight percent of [women] with fewer than 150 sexual contacts became infected, while 29% became infected after 151 to 600 sexual encounters and 36% became infected after more than 600 contacts." *Study Sees Low AIDS Risk For Women in Single Episode*, N.Y. Times, June 6, 1987, at 33, col. 1. *But see*, Lambert, *Unlikely AIDS Sufferer's Message: Even You Can Get It*, N.Y. Times, Mar. 11, 1989, at L 29, col. 2, (the story of a woman who contracted AIDS apparently from a single sexual encounter with a man subsequently discovered to be infected with HIV).

36. *See* Parmet, *supra* note 32, at 72.

37. AIDS carriers have been quarantined, although rarely: Florida (14 year old sexually active homosexual); Mississippi (male prostitute); California, Nevada, and Illinois (female prostitutes). McFadden, *Florida Judge Orders Hospital Quarantine for Youth in AIDS Case*, N.Y. Times, June 12, 1987, at B4, col. 3. The quarantine was lifted in Florida case, but the AIDS carrier was still confined. *Quarantine Lifted in AIDS case, But The Boy Involved is Confined;* N.Y. Times, June 17, 1987, at B9, col. 5. *See also* Elsberry, *AIDS Quarantine in England and the United States*, 10 HASTINGS INT'L & COMP. L. REV. 113, 142 (1986) (discussing quarantine imposed on carriers whose behavior presented a danger to others); *U.S. to Segregate 'Predatory' Prisoners With the AIDS Virus*, N.Y. Times, Oct. 24, 1987, at 34, col. 1.

38. For an excellent overview of the issues surrounding schools and children with

military,[39] from the company of others,[40] and from the workplace.[41] If de jure quarantine by confinement is not supportable, can de facto quarantine by exclusion be justified?

II. Issues In The Workplace

A. *Employment-At-Will*

There may be some who entertain the belief that the doctrine of employment-at-will, where an employer is basically free to discharge an employee with or without reason, still governs the employer/employee relationship.[42] This is not the majority view. Although the doctrine has survived, it has been so eroded by legislation, regulation, and case law that the question is no longer whether an exception should be made to the doctrine of employment-at-will but what further exceptions should be

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AIDS, *see* Schwarz and Schaffer, *supra* note 1.

39. *See* Howe, *Military Physician's Legal and Ethical Obligations to Third Parties when Treating Service Persons Infected with Human Immunodeficiency Virus*, 2 AIDS & PUB. POL'Y J., No. 3, at 46 (1987) (examining the problems unique to the military establishment). *See also Pentagon AIDS Testing Finds 5,890 Infected*, N.Y. Times, Feb. 7, 1988, at 28, col. 1. Under military regulations, applicants testing positive for HIV are denied entry into military service. Those testing positive, who are currently on active duty, may remain until they develop symptoms of AIDS. *Id.*

40. Persons known to have HIV infection "face discriminatory attitudes and even outright hostility from a substantial number of Americans." Blendon and Donelan, *Discrimination Against People With Aids*, 319 NEW ENG. J. MED. 1022, 1026 (1988). For example, 25% of those polled in a survey said they would refuse to work alongside someone with AIDS. The same percentage said an employer should be able to fire an employee who has AIDS.

41. The mere specter of facing fearful fellow employees has caused many with AIDS to "simply disappear from their jobs . . . ." Hamilton, *The AIDS Epidemic and Business*, BUS. WEEK, Mar. 23, 1987, at 122. *See* Rowe, Rusell-Einhorn and Baker, *The Fear of AIDS*, HARV. BUS. REV., July-Aug. 1986, at 28, (reporting on the irrational fear of AIDS in the workplace and the resultant pressure to exclude those with the disease). *See also* Smothers, *Survey Finds a Clash on AIDS in Workplace*, N.Y. Times, Feb. 7, 1988, at L28, col. 1 (reporting results of a survey by the Center for Work Performance Problems at the Georgia Institute of Technology, which found that 66% of those polled would have concerns about using the same bathroom as another employee with AIDS, 40% about using the same cafeteria and 37% about using the same equipment). The exclusion of those with AIDS is particularly damaging in light of indications that people with AIDS who are able to keep working live longer. Singer, *Helping People with AIDS Stay On Job*, N.Y. Times, Apr. 23, 1989, at WC12, col. 3; Brozan, *Concern Seeks Workers With AIDS*, N.Y. Times, Mar. 7, 1989, at B5, col. 4.

42. *See generally* B. SCHLEI AND P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW ch. 18 (1976) (cases cited).

made.[43] Absent this realization, it is difficult to understand the full scope of the difficulties presented by AIDS in the workplace.[44] Certain rights with respect to employment have already been formulated and new ones are being created. The issue evolves into balancing the respective rights of AIDS carriers, non-carriers, employers, and society itself in an effort to attain the greatest common good. In reviewing these rights it is essential to recognize that there is no universal agreement as to what they are or ought to be.

B. *Handicapped Discrimination*

1. *Federal*

The Rehabilitation Act of 1973[45] applies to those who directly receive federal finance assistance, such as schools and federal contractors. The Act prohibits discrimination against job applicants or employees who are handicapped.[46] For purposes of

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43. *See* Nivala, *Fair Dealing In Employment Associations: The Reciprocity of Respect*, 4 HOFSTRA LAB. L.J. 1, 12-30 (1986) (tracing the genesis of employment-at-will and changes in socio-economic conditions that have resulted in its erosion). *See also Individual Rights and Responsibilities in the Workplace*, 1 LAB. LAW. No. 1, at 92 (1985) (reporting recent developments limiting the right to terminate employees at will, including both statutory and judicially imposed restrictions). Statutory modifications include: anti-discrimination laws, labor relation laws, whistleblower laws, veterans reemployment laws, political activity protection, voting time off laws, jury duty and witnesses duty protection, "right-to-work" laws, "anti-Yellow Dog Contract" laws, and anti-black-listing laws. *Id.* at 92-93. The courts have fashioned relief on both tort and contract theories. *Id.* at 93-98. *See also State by State Summary of Common Law Rights of Employees to Their Jobs*, 1 LAB. LAW. No. 1, at 109-21 (1985) (reviewing the law of 27 states: Alabama, Alaska, California, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Washington and Wisconsin).

44. Not only do we have to determine if some of the existing exceptions to the doctrine of employment-at-will afford job protection to individuals with AIDS or infected with HIV, but also whether there exists an exception protecting employees who object to working with such individuals. For example, the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1982) [hereinafter OSH Act] or the National Labor Relations Act, 29 U.S.C.A. §§ 151-169 (1982)[hereinafter NLRA], may arguably allow protest of perceived job related threats to employee safety or health. Finally, if there is not currently an exception to the doctrine of employment-at-will that affords job protection to those with AIDS, should there be? And what should its parameters be? (These issues will be treated subsequently in this Article).

45. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796(i)(1982).

46. The Rehabilitation Act of 1973 prohibits discrimination against handicapped in-

section 504, handicapped individuals are defined as those with "physical or mental impairment."[47] The Office of Federal Contract Compliance Programs (OFCCP) which enforces section 503 has adopted this definition.[48]

Until recently, legal opinion was divided as to whether a contagious disease was covered by the Rehabilitation Act. The question was answered by the Supreme Court in the landmark case of *School Board of Nassau County, Florida v. Arline*[49] and by a 1988 amendment to the Rehabilitation Act.[50]

Arline arose under section 504 of the Act. The plaintiff, a school teacher, was let go after having been diagnosed as having tuberculosis. She sued the school board for reinstatement, and the district court found that contagious diseases were not covered by the Act. The Court of Appeals for the Eleventh Circuit reversed, holding that nothing in the language of the Act, the ensuing regulations, or the original congressional history indicated that contagious diseases were not intended to be included in the definition of handicap.[51] The Supreme Court voted seven to two to uphold the court of appeals. While this decision does not relate specifically to AIDS, it is likely to have its most significant impact in that area.[52]

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dividuals. *Id.* Section 504 of the Act prohibits such discrimination in programs conducted or funded by agencies of the federal government. *Id.* § 794. Section 503 of the Act requires government contractors to engage in affirmative action with respect to the employment of the handicapped. *Id.* § 793.

47. A handicapped individual is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." *Id.* § 706(7)(B).

48. *See* OFCCP Directive On AIDS as reported in the 53 Daily Lab. Rep. (BNA) D-1 (Mar. 21, 1989). [hereinafter OFCCP Directive].

49. 480 U.S. 273, *reh'g denied*, 481 U.S. 1024 (1987).

50. The 1988 amendment provides that an individual with a handicap, as defined in the Rehabilitation Act, "does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job." 29 U.S.C.S. § 706(8)(C) (Supp. 1989). In essence, the amendment codifies the principle enunciated in *Arline*, 480 U.S. at 273.

51. "Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Arline*, 480 U.S. at 284.

52. The Court took note of the underlying AIDS controversy and left itself some

There is an important caveat attached to the Court's ruling. If it can be shown in a given case that the handicapped employee poses a genuine threat of contagion, the Act does not prohibit reasonable steps to protect other employees, including dismissal of the contagious employee.[53]

The Office of the Attorney General[54] and the Ninth Circuit, unlike the Eleventh Circuit, have expressed the opinion that AIDS is a "handicap" within the meaning of section 504 of the Rehabilitation Act.[55] Even absent the symptoms of AIDS, infection with the virus should be sufficient to bring an individual under the protection of the Rehabilitation Act, which applies to those who have a "record of" or are "regarded as having" a

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room to maneuver in the future, stating "[t]his case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act." *Id.* at 282, n.7.

53. The Court remanded the case to the district court for a factual inquiry as to whether the plaintiff was "otherwise qualified" under the Act. The Court believed such inquiry "essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to signficant health and safety risks." *Id.* at 287. The Court went on to state its agreement with amicus American Medical Association's position that such an inquiry should include facts "based on reasonable medical judgments" about the nature, duration, severity and probability of the risk of contagion. *Id.* at 288.

54. The Department of Justice Opinion Regarding HIV Infection (October 6, 1988). The opinion follows *Arline* and the 1988 contagious disease amendment to the Rehabilitation Act, concluding that persons with symptomatic or asymptomatic HIV infection are protected individuals with handicaps provided that they can perform the duties of their jobs and do not present a direct threat to the safety or health of others. This supplants an earlier controversial memorandum to the Department of Health and Human Services, in which Assistant Attorney General Charles Cooper had given a narrow definition under section 504 of the Act. Cooper's memorandum acknowledged that the symptoms associated with AIDS would be considered a handicap. However, discrimination against people who were infected with the virus but displayed no symptoms would not violate the Act if it were based on fear of catching the disease. Memorandum from Assistant Attorney General Cooper, On Application of Section 504 of the Rehabilitation Act to Persons with AIDS (June 23, 1986), *reprinted in* 122 Daily Lab. Rep. (BNA) D-1 (June 25, 1986) [hereinafter MEMORANDUM].

55. Chalk v. United States Dist. Court for the Cent. Dist. of Cal., 832 F.2d 1158 (9th Cir. 1987). The court directed that a preliminary injunction be entered ordering the Superintendent of Schools to restore the plaintiff to his teaching duties; finding that "although handicapped, because of AIDS, appellant is otherwise qualified to perform his job within the meaning of section 504. . . ." *Id.* at 1158.

mental or physical impairment within the meaning of the Act.[56]

Although no reported cases have been found expressly applying this language to those infected with HIV, it is difficult to believe that the courts will not adopt the OFCCP reasoning and take judicial notice of the widespread public belief that being infected with the AIDS virus is equivalent to having AIDS, particularly in light of the reality that asymptomatic AIDS carriers can infect others. It is this ability to infect others which constitutes the major "impairment" as far as most of the public is concerned and will be the principal basis of discrimination. Accordingly, it can be argued that the ability to infect others is in itself a handicap within the meaning of the Act.[57]

If we assume that AIDS (including HIV infection without symptoms) is a handicap under the Act, there may still be a basis on which disparate treatment of AIDS carriers will be permitted. The Act provides that an employer may terminate or refuse to hire a handicapped individual if such action is necessary for the "safe performance of the job."[58] In light of present medical knowledge, there is no basis for concluding that an AIDS carrier threatens the safety of others in the normal performance of job duties in most offices or manufacturing operations, although there may be some exceptions.[59]

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56. 29 U.S.C.S. § 706(8)(B)(iii)(Supp. 1989); OFCCP Directive *supra* note 48; *see also* E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1097 (D. Haw. 1980) (section 503 protects individuals who are "perceived" as having a handicap).

57. *Arline*, 480 U.S. at 284. The Supreme Court, in discussing the scope of section 504, observed that Congress was concerned that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Id. See also id.* at 279 n.4 (citing Southeastern Community College v. Davis, 442 U.S. 397 (1979) for the principle that, under section 504, a person is handicapped if he is regarded by others as having an impairment, even though none actually exists).

58. Affirmative action policy, practices, and procedures, 41 C.F.R. § 60-741.6(c) (1988). *C.f. Southeastern Community College*, 442 U.S. 397; Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985).

59. The CDC has concluded that "[n]o known risk of transmission to co-workers, clients, or consumers exists from HTLV-III/LAV- infected workers in other settings (e.g. offices, schools, factories and construction sites)." *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III-Lymphadenopathy-Associated Virus in the Workplace*, 34 MORBIDITY AND MORTALITY WEEKLY REPORTS 682, 694 (1985). *See also* La Rocca v. Dalsheim, 120 Misc. 2d 697, 467 N.Y.S.2d 302 (1983) (rejecting suit by non-HIV infected prisoners to segregate those who were infected with HIV on grounds that medical evidence indicated that casual contact did

A more intriguing argument suggests that placing an AIDS carrier in the work environment is likely to prove hazardous to his own health, and for that reason, he should not be hired or retained.[60] There is no doubt that AIDS victims are more susceptible to infection and to the serious consequences of such infection. Certain highly populated work environments would certainly increase the risk of infection — the more people, the less space, the greater the risk. An example might be the floor of the stock exchange where people work in such close proximity that exchange of airborne and contact germs are unusually frequent. Other work environments that may lend themselves to this analysis are laboratories and other operations where employees are exposed to chemicals that may be toxic to an AIDS victim, while remaining harmless to noncarriers.

In such instances a decision on an individual case basis, with medical evidence as to susceptibility, would be in order. But certainly no general policy of quarantine by exclusion would be acceptable.[61]

2. *State*

Most states have laws prohibiting discrimination against the handicapped.[62] Some of these laws are patterned after the Federal Rehabilitation Act,[63] while others differ significantly from

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not spread AIDS). *But see* Cordero v. Coughlin, 607 F. Supp. 9 (S.D.N.Y. 1984) (holding that segregation of inmates with AIDS does not violate U.S. Constitution).

60. If it could be shown that there was a "reasonable probability of substantial harm" to the applicant, the Rehabilitation Act may permit exclusion. Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985) (rejecting the district court's test of "elevated risk" in the case of an epileptic excluded from employment).

61. In fact, the courts have demonstrated a reluctance to accept the argument that handicapped employees or applicants must be rejected for their own protection, and "often require a higher level of justification in these cases than in cases in which public safety is at stake." McGarity and Schroeder, *Risk-Oriented Employment Screening*, 59 TEX. L. REV. 999, 1049 (1981). *See also E.E. Black*, 497 F. Supp. at 1103 (relevant inquiry is ability to perform job). *See generally* Burstein and Foster, *Handicap Discrimination: The Available Defenses*, 7 EMPLOYEE REL. L.J. 672 (1982).

62. *See* Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 21 n.52 (1985) (all 50 states plus the District of Columbia, to a greater or lesser extent, have either statutory or executive provisions for equal employment opportunity for the handicapped).

63. *See, e.g.*, CAL. GOV'T CODE § 12926(h) (West Supp. 1989); CAL. ADMIN. CODE tit. 2, div. 4, § 7293 6(J) (1985); GA. CODE ANN., § 34-6A-2(3), (7) (1988); MASS. GEN. LAWS ANN. ch. 151B § 1(17) (West Supp. 1988); R.I. GEN. LAWS § 28-5-6(7) (Supp. 1988).

it.[64] Despite the different definitions of what constitutes a physical or mental handicap, those state agencies and courts which have had occasion to decide if AIDS falls within the respective statutory definitions, have almost universally answered in the affirmative.[65]

In addition to the preexisting state and local laws regarding discrimination against the handicapped, states and municipalities have begun to specifically address the issue of AIDS itself.[66] These statutes have generally been directed at preventing or restricting testing for HIV antibodies.[67] For example, the California statute provides that no person can test an individual's blood for HIV antibodies without written consent.[68] But some states require testing for communicable diseases in certain occupations.[69]

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64. The Texas statute states that "[h]andicapped person means a person who has a mental or physical handicap, including mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment which requires special ambulatory devices or services." TEX. HUM. RES. CODE ANN., § 121.002(4) (Vernon 1980). Under such a definition, it could be argued that asymptomatic persons with AIDS are not covered.

65. *State Labor Law Developments*, 4 LAB. LAW. 349 at 375-77 (1988), (citing, *inter alia*, Shuttleworth v. Broward County Office of Budget and Management, F CHR No. 85-0624 (Dec. 11, 1985), *reaff'd*, April 7, 1986 (Florida); *Department of Fair Employment and Housing v. Raytheon Co.* No. FEP 83-84 L1-031 Op. 1 33-6786,87-04 (Feb. 5, 1987) (California); *Cronan v. New England Tel. Co.* 1 IER Cas (BNA) 658 (D.C. Mass. 1986) (Massachusetts)). *But see id.* at 378 (Tennessee amends its handicap discrimination statute to exclude communicable diseases from definition of handicap).

66. California has enacted extensive legislation with respect to AIDS. Although references to AIDS are "sprinkled" throughout various sections of the California statutes, the principal legislation is concentrated in the California Health and Safety Code. CAL. HEALTH & SAFETY CODE §§ 199.20 - 199.99 (West Supp. 1989). Other references are found in CAL. CIV. CODE § 4300 (West Supp. 1989) (Premarital Examination); CAL. HEALTH & SAFETY CODE §§ 1630-1634 (West Supp. 1989) (Antibody Testing); CAL. HEALTH & SAFETY CODE §§ 1602-1603 (West 1979 and Supp. 1989) (Human Whole Blood and Human Whole Blood Derivative); CAL. PENAL CODE §§ 7500-7553 (Medical Testing of Prisoners); CAL. WELF. & INST. CODE § 1768.9 (West Supp. 1989) (Blood Tests - Youth Authority). New York has recently enacted the HIV and AIDS confidentiality law, N.Y. PUB. HEALTH LAW §§ 2780-2787 (McKinney Supp. 1988); and amendments to the N.Y. INSURANCE LAW § 2611 (McKinney Supp. 1989) (HIV test requires informed consent). Municipalities which have passed regulations with respect to AIDS include Austin, West Hollywood, Los Angeles, San Francisco, Boston, District of Columbia and Denver. *State Labor Law Developments, supra* note 65, at 377.

67. *See State Labor Law Developments, supra* note 65, at 370-72 (discussing general movement toward prohibiting testing for highly communicable diseases).

68. CAL. HEALTH & SAFETY CODE § 199-22(a).

69. *See State Labor Law Developments, supra* note 65 at 372-73 (teach-

We can expect the flow of state and local legislation concerning AIDS to increase. Given the nature and extent of the danger to public health and the attendant threat to civil liberties, it is legitimate to ask whether an issue as complicated, volatile, and significant as AIDS can be left to the states and local communities whose vision in such matters spans the philosophical spectrum.

OSHA superseded existing state safety and health laws in the interest of a consistent uniform approach to a question of overriding concern to society.[70] AIDS presents a similar situation. We cannot afford to permit the effort to defeat AIDS to be hampered and further delayed by incomplete, inconsistent, and inadequate state and local approaches. The danger is too great, and time is increasingly a factor.[71] This is an arena properly preempted by federal law.

Pending preemptive federal legislation, we must be concerned with the impact of the existing laws on the rights of AIDS carriers, their employers, and fellow employees. As previously discussed, with rare exceptions, the current law and regulations have been interpreted and applied to protect the civil rights of AIDS carriers.[72] It should come as no surprise that em-

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ers — Illinois, Indiana, South Dakota, Wisconsin; bus drivers — Indiana, Iowa, Michigan, Tennessee; food processors — Indiana, Iowa).

70. OSH Act did not, strictly speaking, preempt existing state laws. It allowed the states to assert jurisdiction where OSHA had not established a standard. 29 U.S.C. § 667(a) (1982). It also established a procedure whereby states could submit for federal approval plans for "the development and enforcement of safety and health standards . . . which . . . are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under [the Act]." 29 U.S.C. § 667(c)(2).

71. After a brief period of optimism that the number of AIDS cases has stabilized, Lambert, *New York City Cuts Its Estimate in Half for AIDS Infection*, N.Y. Times, July 19, 1988, at A1, col. 1, evidence is growing that original projections actually understated the extent of the problem. *Forecasts of AIDS Fall Short, U.S. Study Says*, N.Y. Times, June 26, 1989, at B5, col. 2 (reporting that a study by the General Accounting Office indicated that AIDS cases in the United States could reach 480,000 by the end of 1991, as opposed to the maximum of 320,000 projected by the CDC). *See also A Tenfold Rise In AIDS Is Seen*, N.Y. Times, May 19, 1989 at D16, col. 3. The World Health Organization predicts that the number of AIDS cases worldwide will increase from 450,000 today, to 5,000,000 by the year 2000. The number of individuals infected with HIV could be as high as 30,000,000 by the year 2000. *Id.*

72. *See supra* notes 49-61 and accompanying text. Leonard, *supra* note 62, at 21. "The initial determination of administrators on this issue have been unanimous in finding AIDS to be a covered condition." *Id.* (under handicap discrimination laws); 53 Daily

ployers have not always agreed with such interpretations and have attempted to justify decisions to treat AIDS carriers differently from other employees.[73] In exploring the arguments that have been or may be made in defense of charges of employment discrimination, it is necessary to analyze cases involving analogous issues, as well as cases involving AIDS, because the issues are still in their infancy.

C. *Possible Employer Defenses*

1. *Not a Handicap*

The most obvious defense to a charge of unlawful employment discrimination is that AIDS, or ARC, or testing positive for HIV antibodies, is not a handicap. As previously discussed, this defense will not prevail under the Federal Rehabilitation Act.[74] However, the defense may prevail under State law.[75]

Those state statutes which are similar to the federal Act, in that they extend protection to persons who are "believed" or "perceived" to have a handicap, do not lend themselves to this defense.[76] It is also to be expected that some state agencies and courts will imply that the mere perception of a handicap constitutes a handicap itself.[77]

Lab. Rep. (BNA) A8-9 (March 21, 1989) (reporting statement of Larry Gostin, Director of the American Society of Law and Medicine, that "In 34 states, the courts, human rights commissions, or attorney general have formally or informally declared that handicap laws apply to AIDS or HIV infection." *Id.*

73. As of March 1989, the OFCCP had received "at least" six discrimination complaints related to AIDS, *id.* at A8; *see also State Labor Law Developments*, *supra* note 65, at 378. "Complaints based on employment discrimination because of AIDS continue to grow in number." *Id.*

74. *See OFCCP Directive on AIDS*, *supra* note 48; the Department of Justice Opinion Regarding HIV Infection, *supra* note 54; Chalk v. United States Dist. Court for the Cent. Dist. of Cal., 832 F.2d 1158 (9th Cir. 1987).

75. *E.g.*, those few states which exclude from coverage: 1) individuals with communicable diseases — *see, e.g.*, Kentucky (KY. REV. STAT. ANN. § 207.140(2)(c) (Baldwin 1981)), and Tennesseee (TENN. CODE ANN. § 8-50-103(c)(Supp. 1987); or 2) individuals disabled by illness — *see, e.g.*, New Hampshire (N. H. REV. STAT. ANN. § 354-A:3 (xiii) (1984); also, those states which only cover public employees, *see, e.g.*, ARK. STAT. ANN. § 82.2901 (Supp. 1985), or have statutes that do not define "handicap" at all, *e.g.*, Virginia.

76. *E.g.*, California (CAL. ADMIN. CODE tit. 2 § 7293.6(j)(1985)); Massachusetts (MASS. GEN. LAWS ANN. ch. 151B, § 1(17) (West Supp. 1985)); Missouri (MO. ADMIN. CODE tit. 4, § 180-3.060(1)(E)(1981)); Rhode Island (R.I. GEN. LAWS § 28-5-6(H)(iv)(Supp. 1984)); New York (N.Y. EXEC. LAW § 292(21)(McKinney 1982)).

77. *But see* Chico Dairy Co. v. West Virginia Human Rights Commission, W. Va.

2. *Not Qualified*

The Act and all state statutes recognize that there is no obligation to hire or retain as an employee a person whose handicap or disability disqualifies him from employment. Therefore, if a person is not qualified for the job because of limitations imposed by his handicap, he is not protected by either the Act or the various state statutes.[78]

The question of qualification is directly related to the handicapped person's ability to perform the job. For example, a color-blind person would not be qualified to perform the job of paint mixer, which requires the ability to detect variations in color. But, it is unlikely that the issue will be so clearly framed. It is more likely to arise in the claim that a person, because of his handicap, presents a danger to himself or others, or that the employment of the handicapped person will have a deleterious effect on the business in the form of customer dissatisfaction, employee unrest, or increased benefit costs, including absenteeism.[79] Regardless of whether these arguments will prevail in the final analysis — and it is almost certain that they will not[80] — they are not frivolous in light of economic realities.

Sup. Ct. App., No. 18317, June 6, 1989 summarized in 132 Daily Lab. Rep. (BNA) A, July 12, 1989, in which the state court invalidated regulations adopted by the West Virginia Human Rights Commission stretching the statutory definition of a handicapped person to include those who are "regarded as having" a handicap. The case involved a woman denied a promotion because of physical appearance (she had lost one eye.) But the court's strict construction rationale could easily be applied to deny coverage to asymptomatic HIV carriers.

78. Section 503 of the Rehabilitation Act refers to "qualified" individuals with handicaps. 29 U.S.C. § 793(a) (1982). Section 504 refers to "otherwise qualified" individuals. 29 U.S.C. § 794 (1982 & Supp. 1987). "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). *See* Schlei and Grossman, EMPLOYMENT DISCRIMINATION LAW (2d ed.) 1983-85 Cumulative Supp. at 49 (Under the Federal Act, "persons who are unable to perform the essential requirements of the job, even with a reasonable accommodation, have been found not to be "otherwise qualified" (Cases cited)). *See Schlei and Grossman, supra* note 42, at 230. (Concluding that state laws require that individuals be evaluated "with respect to their ability to perform a job . . . .")

79. *Asymptomatic Infection with the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973,* 88 COLUM. L. REV. 563 (1988).

80. *Id.* at 576-77. *See also* Rothstein, *Medical Screening of Workers: Genetics, AIDS, and Beyond,* 2 LAB. LAW. 675, 682 (1986).

3. *Danger To Others*

It is well established that a person is not qualified for a job, within the meaning of the federal or state handicapped discrimination laws, if his handicap presents a safety or health hazard to fellow employees.[81] It has been held, for example, that a person who suffers from a spasmodic back condition is not qualified for a job as a truck driver. The risk to himself and others posed by the possibility of a sudden painful seizure, outweighs the loss of a job opportunity.[82] At the same time, the back condition would not have disqualified the applicant from a job as a file clerk.

In the case of AIDS, the alleged risk to other employees is that they will become infected with the HIV virus. Those agencies and courts that have considered this argument have rejected it on the basis of current medical knowledge.[83] Unless further medical research and experience uncovers new and contradictory evidence, it is highly unlikely that this view will change.

4. *Danger To Oneself*

Closely related to the argument that employment of a handicapped person in a particular job will pose a danger to others, is the claim that a handicapped person is disqualified because of the danger to himself. The discussion under the above section is applicable here. The employer must be able to demonstrate a reasonable probability of substantial harm to the individual before this defense will be accepted.[84]

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81. *See supra* notes 60-61 and accompanying text.

82. *Texas Industries*, 28 OFCCP Federal Contract Compliance Manual (CCH) ¶ 21,098 (1981); *see also* Boynton Cab Co. v. Dep't. of Indus., Labor and Human Relations, 96 Wis.2d 396, 291 N.W.2d 850 (1980), where the state court supported the right of an employer not to hire a cab driver with only one hand, since employer had demonstrated "a rational relationship to the safety obligations" inherent in the job. *Id.* at 418, 291 N.W.2d at 861. *But see* Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985), in which the court, interpreting section 501 of the Rehabilitation Act, refused to uphold the employer's decision not to hire an epileptic, because the employer had failed to show "a reasonable probability of substantial harm" to herself or others. *Id.* at 1422.

83. Chalk v. United States Dist. Court for the Cent. Dist. of Cal., 832 F.2d 1158 (9th Cir. 1987); *State Labor Law Developments supra* note 65.

84. *See* E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D.C. Haw. 1980) (federal contractor directed to hire handicapped applicant because it could not show that the safe performance of the job justified exclusion). *See also* McGarity and Schroeder *supra* note 61; Betivegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 1982) (section 504

There is no doubt that AIDS significantly reduces the body's ability to fight disease, thereby increasing susceptibility to infection, and also increasing the consequences of such infection. An otherwise minor illness can become life threatening.[85] Consequently, a person with AIDS might be disqualified from certain jobs that expose him to infection, for example, a nurse in a hospital that treats patients with infectious diseases, like tuberculosis, or even a stock trader on the exchange floor during the influenza season. But it is difficult to envision a great many jobs which fit this description. Nor are the courts anxious to protect people from the effects of their own informed decisions by the expediency of casting them into the ranks of the unemployed.

5. *Adverse Impact On Customers*

Some have described the public reaction to AIDS as one of hysteria.[86] This may overstate the case. But no one can deny that there is a widespread public concern and fear, some of it legitimate, much of it based on misconceptions.[87] This fear could easily translate into strong adverse customer reaction if it became known that a business had in its employ one or more employees suffering from AIDS. While some businesses are naturally more sensitive to this, no business is totally immune, certainly no retail business.[88]

This argument is similar to cases that arose under the sex discrimination provisions of Title VII of the Civil Rights Act of

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employer could not terminate diabetic without showing relationship between job performance and low blood sugar levels).

85. That, of course, is the very nature of the disease. In addition to Kaposi's sarcoma (KS) and Pneumocystis carenii pneumonia (PCP), which have been widely publicized in connection with AIDS, there are a host of other opportunistic infections which may occur. *See e.g., Update on Acquired Immune Deficiency Syndrome (AIDS) - United States*, 31 MORBIDITY AND MORTALITY WEEKLY REPORTS 507-14, (1982). Research continues to reveal how HIV works to destroy immunity exposing carriers to a high level of risk. Kolata, *Fatal Qualities of AIDS Virus Grows Clearer*, N.Y. Times, Mar. 22, 1988, at C1, col. 1.

86. *See, e.g.*, Orland and Wise, *The AIDS Epidemic: A Constitutional Conundrum*, 14 HOFSTRA L. REV. 137 (1985). The exclusion of children with AIDS from schools represents "a hysterical social reaction . . . ." *Id.* at 149; Leonard, *supra* note 62, at 37. "Public hysteria about AIDS" has created problems in the workplace. *Id.*

87. *See supra* note 41.

88. For a discussion of fear of AIDS in the workplace, see *supra* note 41.

1964,[89] where for example airline carriers argued that competitive pressures brought about by customer preference required them to hire women rather than men as attendants.[90] The courts held that gender was not a bona fide occupational qualification within the meaning of Title VII, regardless of the legitimacy or the accuracy of the concern that customers would take their business elsewhere.[91]

The reasoning underlying these decisions would seem to apply with equal force to the issue of customer preference as a defense under the Rehabilitation Act and state handicapped discrimination laws. Thus, the fact that customers might refuse to patronize establishments that are known to employ AIDS carriers would not justify employer discrimination.[92] This might well result in a substantial economic burden being placed on certain businesses, but there does not appear to be any remedy, other than increased educational efforts directed towards consumers of goods and services to correct misconceptions concerning the risks associated with AIDS.

6. *Increased Benefit Costs*

The Center for Disease Control (CDC) estimates the cost of hospitalization attributable to AIDS patients, from the time of diagnosis to death, averages $147,000 per patient.[93] This figure has been challenged as being too high. A study made contemporaneously with the one adopted by the CDC arrived at an estimate of approximately $90,000 per patient from the time of di-

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89. 42 U.S.C. §2000e-2(a) (1982).

90. Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

91. *Id.* Given the current attitudes regarding AIDS, one can envision a patron's response following the discovery that individuals with AIDS are employed in the neighborhood butcher shop, bakery or beauty parlor.

92. It might be argued that the "sex preference" cases are distinguishable from the AIDS situation in that the latter involves a deep-seated customer fear of personal risk rather than a mere preference. The potential competitive disadvantage is more compelling where competitors might not be in the same position, as the airlines were when the earlier cases arose. Given the medical evidence that AIDS is not spread by casual contact and the CDC recommendations, *see supra* note 59, it is unlikely that this employer defense will gain acceptance.

93. Fox, *The Cost of AIDS from Conjecture to Research*, 2 AIDS & PUB. POL. J., No. 1, at 25 (1987) (based on study by A. Hardy, M.D. for the CDC in April, 1985).

agnosis to death.[94] The United States Public Health Service has estimated a patient cost of $46,000 per year by 1991.[95] Others have said the $147,000 figure is conservative because it represents hospital costs only, and does not take into account doctors visits and claims for disability and life insurance payouts.[96] Regardless of which estimate is most accurate, there is a significant benefit cost associated with AIDS, and the employer in many cases must bear it in the form of increased health, disability and life insurance premiums, excessive absenteeism, and additional training costs.[97]

Employers can be expected to argue that increased costs justify refusing to hire AIDS carriers. When this defense was raised in connection with other degenerative diseases, such as cancer and multiple sclerosis, it has been rejected. In *Chrysler Outboard v. Department Industry Labor and Human Relations*,[98] an employer based its refusal to hire an applicant who had leukemia on anticipated increases in insurance costs and concern over future absenteeism. The court held this was an insufficient basis to discriminate under the Wisconsin handicapped discrimination law. The court held further that the likelihood of future problems was immaterial if the applicant could presently do the job.[99]

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94. *Id.* at 26 (citing a study presented by A. Scitovsky to the American Public Health Association in November, 1985).

95. *Id.*

96. Blaine, *supra* note 15, at 3. With respect to the impact on the overall economy, it has been estimated that the total cumulative cost of AIDS could reach as high as $112 billion by the end of 1991. Lord, *The Staggering Price of AIDS*, U.S. NEWS & WORLD REP., June 15, 1987, at 17, col. 2.

97. AIDS claims represented 1.4% of all group health claims in 1987, up from 0.9% in 1986. Mahar, *supra* note 8, at 20, col. 2. AIDS related health insurance claims reached at least $488 million in 1987. Lambert, *Insurance Limits Growing to Curb AIDS Coverage*, N.Y. Times, Aug. 7, 1989, at A1, col. 1. Employers pay 85% of insured health care AIDS claims. This could result in a cumulative cost to companies of $14 billion by the end of 1991. Lord, *supra* note 96, at 17, col. 2. In addition, the annual cost of lost earnings and reduced productivity is estimated to reach $55.6 billion by the end of 1991. *Id.* at col. 3.

98. 14 Fair Empl. Prac. Cas. (BNA) 344 (1976).

99. *See also* State Div. of Human Services *ex rel.* McDermott v. Xerox, 65 N.Y.2d 213, 480 N.E.2d 695, 491 N.Y.S.2d 106 (1985) (under New York law, higher benefit costs are not justification for refusing to hire obese applicant).

7. *Concerns Of Fellow Employees*

One of the principal problems caused by the appearance of AIDS carriers in the workplace is the potentially adverse reaction of fellow employees. In many cases people have demonstrated a heartening maturity and humaneness in their acceptance of a fellow human being's affliction.[100] But in other instances the response has been quite different.[101] It is not denigrating the obvious distress of the AIDS carrier in such an instance to recognize that the employer faces a very difficult situation: the need to manufacture, sell, or deliver a product or service, with a work force in turmoil or perhaps even open revolt. Employee concerns will not constitute a valid defense to allegations that an employer has violated handicap discrimination laws. Again, part of the answer is more effective education of the work force as to the realities surrounding AIDS, preferably before a problem develops.[102] But this still leaves the employer facing a difficult situation, while encumbered by yet additional legal concerns.

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100. *See, e.g.*, Johnson, *AIDS Victim Ends Journey In Hometown*, N.Y. Times, July 7, 1989, at A8, col. 1 (reporting outpouring of support for an individual with AIDS on his return to his small hometown); Lambert, *U.S. Confronting AIDS with Sense of Realism*, N.Y. Times, Feb. 17, 1988, at A1, col. 1 (noting Gallup poll finding that 87% of respondents expressed compassion for those with AIDS and the caring response of residents in Arcadia, Indiana in welcoming a child with AIDS); Dullea, *AIDS Crisis Galvanizes An Army of Volunteers*, N.Y. Times, Dec. 25, 1987, at B10, col. 3 (reporting various support activities rendered by volunteers).

101. *See, e.g., Family in AIDS Case Quits Florida Town After House Burns*, N.Y. Times, August 30, 1987, at 1, col. 1. (recounting the hostile reaction of a town in Florida to three young children with AIDS); Hamilton, *supra* note 41, at 124, col. 1 (employee with AIDS received threatening phone messages from fellow employees); Singer, *supra* note 41, at WC12, col. 5 (noting an instance where a return to work from disability leave of an individual rumored to have AIDS triggered a walkout by 30 fellow employees).

102. An increasing number of employers have instituted programs designed to eliminate employee misconceptions about AIDS and to minimize adverse employee response to the presence of individuals with AIDS in the work force. *See, e.g.*, ALLSTATE FORUM ON PUBLIC ISSUES, AIDS: CORPORATE AMERICA RESPONDS (1988) (a "think tank" document — resulting from meetings in 1987 and 1988 in which 73 major businesses and organizations participated — ,devoted to finding more effective ways to deal with AIDS in the workplace). *See also* CONN. BUS. & INDUSTRY A., AIDS IN THE WORKPLACE, AN EMPLOYER'S GUIDE; Hamilton, *supra* note 41 (seven major companies combined to make a videotape, *An Epidemic of Fear* to be used as an educational tool by employers); Chase, *Corporations Urge Peers to Adopt Humane Policies for AIDS Victims*, Wall St. J., Jan. 20, 1988, at 31, col. 3 (reporting the results of the Allstate Forum).

D. *Other Laws*

The laws prohibiting discrimination against the handicapped are only one source of legal debate concerning AIDS in the workplace. Claims may arise under various other federal and state laws, as well as under traditional and innovative theories of tort.

1. *Occupational Safety and Health Act*

OSHA requires that an employer provide a safe and healthful workplace.[103] The Act itself and regulations interpreting the Act provide that employees may refuse to perform work if it would subject the employee to "serious injury or death" arising from a hazardous condition.[104] In order to fall within the protection of this regulation, an employee must reasonably believe that the hazardous condition represents an imminent risk of serious injury or death.[105] Therefore, although prevailing medical authority maintains that contagion from AIDS carriers is highly unlikely under normal workplace conditions, a protesting em-

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103. The general duty clause of the Act provides in part, that an employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . ." 29 U.S.C. § 654(a)(1) (1982).

104. Section 11 of the Act, provides: "No person shall discharge or in any manner discriminate against any employee because . . . of the exercise by such employee on behalf of himself or others of any right afforded by this [Act]." 29 U.S.C. § 660(c)(1) (1982).

Regulations interpreting the Act provide in essence that, under certain circumstances an employee may refuse to perform assigned tasks:

> If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

29 C.F.R. § 1977.12(b)(2) (1989).

105. Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980) (in which the Supreme Court upheld this interpretive regulation, stating, "[t]he regulation clearly conforms to the fundamental objective of the Act — to prevent occupational deaths and serious injuries."). *Id.* at 11 (footnote omitted).

ployee may still invoke the protection of the OSHA regulation, if he can demonstrate a reasonable belief that an imminent danger exists.[106]

An employer who acts in good faith in disciplining employees who refuse to work with AIDS carriers may still have to expend considerable time and money to have its action vindicated, with success uncertain.[107] This should not be necessary, and if there was a comprehensive federal law directed specifically at AIDS in the workplace it would not be necessary.

2. *National Labor Relations Act*

If the employees are represented by a labor union, there is a whole new set of considerations. First, there is the National Labor Relations Act (NLRA) which protects concerted actions, including work stoppages, to protest unsafe or unhealthy working conditions.[108] Such concerted actions are protected so long as the employees honestly believe that the hazardous condition exists, regardless of whether the condition is truly hazardous or even whether the belief is reasonable.[109]

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106. In summing up the effect of the regulation the Court said "[i]t simply permits private employees of a private employer to avoid workplace conditions that they believe pose grave dangers to their own safety." *Id.* at 21.

107. It might also reasonably be argued that employees who refuse to work with those infected with HIV are, in effect, attempting to persuade the employer to violate federal or state handicapped discrimination laws and as a matter of public policy should not be assisted in this by affording them protection under OSHA. This does not resolve the employer's dilemma. The employer remains at risk. Whether this risk becomes an actuality will depend on the predilection of the investigating agency, the administrative law judge or the court which may ultimately resolve the matter.

108. Section 7 of the NLRA provides, in pertinent part, that "[e]mployees shall have the right . . . to engage in other concerted activities for the purpose of . . . mutual aid or protection . . . ." 29 U.S.C. § 157 (1982). The Supreme Court, in NLRB v. Washington Aluminum, 370 U.S. 9 (1962), upheld the National Labor Relations Board's [hereinafter NLRB] ruling that employees who walked out to protest unhealthy conditions (excessive cold) were exercising a protected right under Section 7, and could not be disciplined by their employer. The Court went on to state that "it has long been settled that the reasonableness of workers decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not." *Id.* at 16. (footnote omitted).

109. *See, e.g., Tamara Foods*, 258 N.L.R.B. 1307 (1981) (employees walked off job because of ammonia spill which caused noxious odor and were fired by the employer). The NLRB held, "[i]t has long been established that Section 7 of the Act protects the rights of employees to engage in protests, including work stoppages, over what the employees believe to be unsafe or unhealthy working conditions." *Id.* at 1308 (citations omitted). The NLRB held further that "[i]nquiry into the objective reasonableness of

There are cases which hold that concerted action is not protected under Section 7 of the Act if it is intended to compel an employer to violate the law.[110] But these cases involve work actions undertaken to advance economic objectives or union goals, not work actions undertaken in the honest belief that employees' lives are being endangered. Whether this reasoning could be applied to problems relating to AIDS in the workplace is open to question.

If the protesting employees insisted that the employer must discharge the AIDS carrier, it is likely that a court would ultimately decide the competing social interests in favor of the AIDS carrier.[111] This result is not as likely if the protesting em-

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the employees' concerted activity is neither necessary nor proper in determining whether that activity is protected." *Id.* Recently the NLRB has indicated that the evidence must demonstrate that the employees' belief is a reasonable one. *See, e.g.*, NLRB v. City Disposal Sys., 465 U.S. 822, 837 (1984) (to be protected, an employee must be acting on a "reasonable and honest belief"); Johnson-Stewart-Johnson Mining, 263 N.L.R.B. 123 (1982). "Protesting an unsafe working condition can be protected activity under the Act if the employee so protesting has a good-faith, reasonable belief that such a condition exists." *Id.* The complaint was dismissed because the driver's refusal to drive the assigned truck "was not based on a reasonable belief that the truck was unsafe . . . ." *Id.* at 124. *See* Daniel Construction, 267 N.L.R.B. 1213 (1983) (although citing Johnson-Stewart-Johnson Mining the NLRB did not emphasize the concept of a "reasonable belief," but found that the employees could not have had an "honestly held belief" that the scaffold was unsafe). *But see* Quality C.A.T.V., 121 L.R.R.M. (BNA) 1297 (1986) (a concerted action that was peaceful, did need to meet the "reasonableness" standard to be protected). Given the current medical evidence, it would be difficult for employees to convince the NLRB that their fears were reasonable. This would be particularly true if the employer conducted an effective education campaign. However, the NLRB could find that the employees were acting on an "honestly held belief."

110. NLRB v. Indiana Desk Co., 149 F.2d 987 (7th Cir. 1945) (strike by employees to compel wage increases prohibited by War Labor Board restrictions was not protected activity under section 7); *See also* ABC Prestress & Concrete, 201 N.L.R.B. 820 (1973) (strike to compel wage increase that would violate Economic Stabilization Act of 1970 was not protected); Local 707, Highway and Local Motor Freight Drivers, Dockmen, and Helpers, 196 N.L.R.B. 613 (1972) (picketing in violation of section 8(b)(7)(B) of the Act not protected activity under section 7).

111. The courts have relied on the available medical evidence. *E.g.*, in Chalk v. United States Dist. Court Cent. Dist. of Cal., 832 F.2d 1158 (9th Cir. 1987), the Ninth Circuit found that the medical evidence "overwhelmingly" indicated that casual contact presented no significant risk of harm to others. *Id.* The inability of the protesting employees to demonstrate potential harm from casual contact viewed against the certain and substantial harm to the person with AIDS, and to the employer caught in the middle, should prove decisive. As the Supreme Court noted in School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987), "Congress' desire to prohibit discrimination based on the effects a person's handicap may have on others [i.e. the reactions of others] was

ployees refrain from such a demand, but rather request some other form of protection from the employer, such as protective clothing, space enclosures, separate facilities for dressing and dining, or isolation of the AIDS carrier.[112]

The NLRA also requires that an employer bargain with the union with respect to significant changes in working conditions, including work rule changes, especially those containing provisions for the administration of discipline. Under this requirement, employers have been required to engage in collective bargaining before implementing absentee control programs, drug testing, employee assistance plans and similar programs.[113] An AIDS policy would fall into this category if it provided for significant changes in existing work rules such as requiring or prohibiting the wearing of protective clothing, modifying seniority rules to accommodate AIDS carriers, or the imposition of discipline for refusal to work with AIDS carriers.

Several remedies are available to unions and employees who believe that an employer has violated the NLRA by refusing to bargain. Section 301 of the Act[114] permits money damage suits for breach of the labor agreement and, in some instances, the issuance of an injunction to restrain the employer from enforcing a unilaterally imposed policy.[115]

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evident from the inception of the Act." *Id.* at 282 n.9.

112. *See, e.g.*, Bernales v. City & County of San Francisco, 184 Daily Lab. Rep. (BNA) A6 (1985). The State Labor Commissioner found that nurses who had insisted on wearing gloves while treating AIDS patients were engaged in protected activity under state law and could not be disciplined. Although not arising under the NLRA, the NLRB might adopt as a reasonable compromise the State Commissioner's finding. But again, the uncertainty serves to confirm the dilemma.

113. *See, e.g.*, Leroy Machine Co., 147 N.L.R.B. 1431 (1964) (an employer may be required to bargain over the requirement that employees undergo a physical examination); Lockheed Shipbuilding and Constr. Co., 278 N.L.R.B. 18 (1986) (employer required to bargain about implementing a medical screening program for new employees). *See generally* THE DEVELOPING LABOR LAW, at 369-70, 375 (2d ed. & 4th Supp. 1982-87) for further examples and discussion of various mandatory subjects of collective bargaining under the NLRA.

114. 29 U.S.C. § 185(a) (1982).

115. Although the Norris-LaGuardia Act, 29 U.S.C. § 104 (1982), generally prohibits federal courts from issuing injunctions in labor disputes, there are exceptions, primarily where the underlying dispute is subject to arbitration under a collective bargaining agreement. The leading case is Boy's Market Inc. v. Retail Clerks Union, 398 U.S. 235 (1970) (strike could be enjoined pending arbitration). Employer actions can also be enjoined. *See also* Technical, Office and Professional Workers Union Local 757 v. Budd

Alternatively, the employees or union could file a charge with the National Labor Relations Board (NLRB), alleging that the employer refused to bargain in violation of Section 8(a)(5) of the Act,[116] refusal to bargain. This is less expensive than private enforcement efforts, and could result in an order directing the employer to bargain. However, in such a case the NLRB is likely to defer the matter to arbitration.[117] Once the matter comes before the arbitrator, the decision will depend upon the language in the collective bargaining agreement.

Most labor agreements have a no strike clause, which may prohibit the particular work action chosen by the employees.[118] Typically, there is a provision protecting the employer's right to manage its business and to discipline employees for cause.[119] There is also often a clause requiring the employer to provide a safe and healthy workplace.[120] In addition, there is likely to be a

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Co., 345 F. Supp. 42 (E.D. Pa. 1972) (employer enjoined, pending arbitration, from laying off 14 employees whose work was being transferred to a new location); *See* Brandenburg v. Capitol Distributors, 353 F. Supp. 115 (S.D.N.Y. 1972) (court held that because the underlying dispute was not subject to arbitration, the Norris-LaGuardia Act prohibited the granting of an injunction to prevent the employer from laying off salesmen). State laws may also permit the issuance of injunctions restricting an employer's right to act unilaterally. United Automobile, Aerospace & Agricultural Implement Workers of America Local 577 v. Hamilton Beach Mfg., 40 Wis. 2d 270, 162 N.W.2d 16 (1972) (state court refused to enjoin an employer from relocating its plant).

116. 29 U.S.C. § 158(a)(5) (1982).

117. *See* Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). The union alleged that the employer had made a unilateral change in wages and working conditions in violation of the collective bargaining agreement. The NLRB deferred the matter to arbitration under the existing labor agreement, while retaining jurisdiction to review the arbitrator's award to ensure that the result was fair and not repugnant to the Act. *Id.* at 843.

118. For a typical no strike clause, see C.S. LOUGHRAN, NEGOTIATING A LABOR CONTRACT 398 (1984).

119. For a typical management's rights clause see *id.* at 395.

120. *See* United States Steel Corporation, 66 Lab. Arb. (BNA) 489 (1976) (Garrett, Arb.) The employee refused to ship steel in an area he believed was unsafe. The employer suspended him. The contract clause read:

> An employee or group of employees who *believe* that they are being required to work under conditions which are *unsafe or unhealthy beyond the normal hazard* inherent in the operation in question *shall have the right to*: (1) [file a grievance] . . . ; (2) *relief from the job or jobs*, without loss to their right to return to such job or jobs, and, at Management's discretion, assignment to such other employment as may be available in the plant.

Id. at 491 (emphasis added). The arbitrator applied the NLRB standard of good faith belief and found that because grievant acted in a good faith belief that the work was unsafe, the grievance would be upheld. *Id.* at 491-92.

clause that prohibits discrimination on the basis of handicap.[121] Finally, there is the ubiquitous clause whereby any disagreement between the parties over the meaning of the labor agreement will be submitted to an impartial arbitrator for resolution.[122]

In trying to reconcile these legal and contractual responsibilities, an employer must tread a difficult and uncharted path. How does the employer assign priority to the potentially competing principles embodied in the safety and health and the nondiscrimination clauses? On the one hand, the employees have rights, expressly recognized in the collective bargaining agreement, to protect themselves from actual and potential safety and health hazards. On the other hand, an employee infected with the AIDS virus is virtually certain to be considered handicapped and, as such, entitled to protection under the typical nondiscrimination or just cause clause. Thus, if the employer disciplines an employee who refuses to work with an AIDS carrier for fear of contagion, it must establish cause. To do this the employer must demonstrate that the insubordinate employee had no right to act as he did in reliance upon the safety and health clause. If the employer bows to employee pressure and discharges an AIDS carrier, the employer will be required to establish cause and to defend itself against charges that it violated the nondiscrimination clause.

Although there have not been many reported cases, the seeds of the dilemma have already begun to sprout. For example, in *Minnesota Dep't of Correction*,[123] the arbitrator ordered

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121. Even in the absence of a handicap discrimination clause, arbitrators have been willing to bar the unjustified discharge of handicapped employees. *Mobil Oil Corp.*, 81 Lab. Arb. 1090 (BNA) (1983) (Taylor, Arb.) Where an agreement provided that the employer could discharge the employee for cause, the arbitrator reinstated an employee discharged for epilepsy. There was conflicting medical evidence over the employee's *ability* to control the epileptic seizures, and the arbitrator found that the employer's medical evidence was insufficient to justify a decision that the employee could not safely perform his job. *Id.* at 1094-95.

122. For a brief discussion of arbitration clauses see, C.S. LOUGHRAN, *supra* note 118, at 399.

123. 85 Lab. Arb. (BNA) 1185 (1985) (Gallagher, Arb.). The arbitrator acknowledged that the guard was required to obey the order, but found mitigating circumstances. The employer contributed to the employee's fear by posting a notice that read, "[n]o one really knows all the ways AID[S] is transmitted, so be careful." *Id.* at 1190. *See also In re* Nursing Home, 88 Lab. Arb. (BNA) 681 (1987) (Sedwick, Arb.). It was held that because AIDS is a communicable disease under state law and because of sever-

the reinstatement of a prison guard who had been discharged for refusing to conduct required searches of prisoners whom he suspected of having AIDS.[124]

In *In re United Airlines*,[125] the arbitrator ordered the reinstatement of a flight attendant who was fired after revealing he had AIDS.[126] Most commentators accept the findings of the CDC that AIDS carriers do not present any danger in the workplace. Therefore, they are quick to concur with the recommendations of the CDC[127] that no extraordinary precautions need be taken to ensure that the rest of the work force does not suffer contagion.[128] While scientific and official pronouncements give a measure of comfort, they are subject to modification. Moreover, there is no guarantee that arbitrators will rely upon them in reaching decisions. The employer has no choice but to act, and must still do so at its peril.

3. *Employee Retirement Income Security Act*

If an employer relies upon increased benefit costs to justify discriminatory action with respect to AIDS carriers and against the odds prevails in a handicapped discrimination suit, it may

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ity of risk, despite low probability of transmission, CDC guidelines on AIDS in the workplace are inadequate for health care workers. Thus, the grievant who was a health care worker cannot return to work, but the employer should have put him on medical leave rather than discharge him. *Id.* at 682.

124. 85 Lab. Arb. (BNA) at 1189-90.

125. *Analysis & Commentary*, AIDS Law and Litigation Rep. 241 (1985) (Wagner, Arb.).

126. *Id. See also Delaware Dep't of Corrections*, 86 Lab. Arb. (BNA) 849 (1986) (Gill, Arb.) (enforcing a contract provision that obligated the employer to notify guards of inmates who tested positive for AIDS).

127. *Recommendations for Preventing Transmission of Infection with [HIV] in the Workplace*, 34 MORBIDITY AND MORTALITY WEEKLY REPORT 682-95 (1985). *See also Update: Universal Precautions for Prevention of Transmission of Human Immunodeficiency Virus, Hepatitis B Virus, and other Bloodborne Pathologens in Health Care Settings*, 37 MORBIDITY AND MORTALITY WEEKLY REPORT, 377 (1988) (clarifying and supplementing the original "CDC Recommendations for Prevention of HIV transmission in Health-Care Settings").

128. *See, e.g.*, Leonard, *supra* note 62, at 33. (CDC recommendations "support the contention that contagion in the workplace is a spurious issue . . . ."); Wilson, *From AIDS to Z: A Primer for Legal Issues Concerning AIDS, Drugs, and Alcohol in the Workplace*, 2 LAB. LAW. 631, 637 (1986). "The present evidence indicates that AIDS victims will not present any danger to others by virtue of the casual, non-intimate conduct characteristic of most work situations." *Id.*

still face sanctions under the Employee Retirement Income Security Act of 1974 (ERISA).[129] Although most people think of ERISA in terms of pension plans, it extends to employee benefit plans,[130] which include medical and life insurance benefits. Section 510 of ERISA[131] prohibits discrimination against a participant "for the purpose of interfering with the attainment of any right to which such participant may be entitled."[132]

A recent case is *Folz v. Marriott Corp.*[133] which involved the discharge of an employee with multiple sclerosis. The court found that the employer's action was motivated by a desire to avoid higher benefit costs and thus constituted a violation of Section 510.[134] ERISA would not prohibit an employer from refusing to hire an applicant with AIDS because the applicant would not be a participant in the plan.[135]

4. *Respondeat Superior, Negligent Hiring, and Retention*

Under several different theories, an employer can be held liable for negligent and intentional torts committed by its employees against third parties, including fellow employees.[136] The employment situations where AIDS might play a part in creating imputed negligence are uncommon but do exist. For example, even under the traditional doctrine of respondeat supe-

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129. 29 U.S.C. §§ 1001-1461 (1982).

130. *Id.* § 1002(1).

131. *Id.* § 1140.

132. *Id.*

133. 594 F. Supp. 1007 (W.D. Mo. 1984).

134. *Id.* at 1014-15. *See also* Kross v. Western Electric, 701 F.2d 1238, 1243 (7th Cir. 1983) (section 510 would protect an employee against being discharged to avoid medical and life insurance costs).

135. West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980) ("The legislative history reveals that the prohibitions [in § 510] were aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights."). *Id.* at 245. On the other hand, it can be argued that the refusal to hire applicants to avoid higher benefit costs would have a chilling effect on current participants and deter them from exercising their rights.

136. The nature and extent of such liability, which derives from common law and state legislation, continues to evolve. Depending on the jurisdiction, various theories may be used to impose liability, such as: respondeat superior (or imputed negligence), vicarious negligence, negligent hiring, negligent retention, and negligent entrustment. *See generally* Silver, *Negligent Hiring Claims Take Off*, A.B.A. J. 72 (May 1, 1987); Reibstein, *Firms Face Lawsuits for Hiring People who then Commit Crimes*, Wall St. J., Apr. 30, 1987, at 33, col. 3.

rior,[137] an employer could be liable if an employee bit a customer in an altercation over a sales dispute.[138] If the employee had AIDS the exposure is greater. If the customer contracts AIDS as a result of the bite, the exposure is magnified almost beyond calculation.[139]

The greater potential for liability, however, is likely to surface in the expanding area of negligent hiring or negligent retention.[140] The reasonable care concept of negligence encompasses

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137. The ancient doctrine of respondeat superior may be stated as follows: "[the] master is responsible for want of care on servant's part toward those to whom master owes duty to use care, provided failure of servant to use such care occurred in course of his employment." BLACKS LAW DICTIONARY 1179 (5th ed. 1979) (citations omitted). Generally, to establish liability under this doctrine, the evidence must show that the employee was acting within the scope of his authority. *See, e.g.*, Rabon v. Guardsmith, Inc. 571 F.2d 1277 (4th Cir.), *cert. denied*, 439 U.S. 866 (1978) (guard service hired to protect building not liable for rape committed by guard while on duty). *But see* Neary v. Hertz Corp., 231 F. Supp. 480 (D.D.C. 1964) (employer liable for assault by its employee after an automobile accident).

138. *See Neary*, 231 F. Supp. at 480. This issue has been raised in a law suit seeking $12 million in damages brought against American Airlines by a woman who was bitten by an employee, who tested positive for HIV, who was attempting to stop the woman from boarding the airplane. Reibstein, *supra* note 136.

139. The AIDS virus has been isolated from saliva. *Provisional Public Health Service Inter-Agency Recommendations for Screening Donated Blood and Plasma for Antibody to the Virus Causing Acquired Immunodeficiency Syndrome*, 34 MORBIDITY AND MORTALITY WEEKLY REPORT 75-76 (1985). However, no cases of transmission of HIV by saliva have been reported. In fact, a recent study found that human saliva may contain substances that actually prevent or impede transmission of HIV. Kolata, *Saliva May Hinder AIDS Transmission*, N.Y. Times, May 6, 1988, at A16, col. 3.

140. A survey of state courts found that the tort of "[n]egligent hiring . . . is a breach of the employer's duty to make an adequate investigation of an employee's fitness before hiring him." Silver, *supra* note 136, at 73. This tort came into existence approximately 10 years ago and is already recognized as a cause of action in most states. *Id.* at 72. "Negligent retention is the breach of an employer's duty to be aware of an employee's unfitness, and to take corrective action . . . or discharge [him]." *Id.* at 73. This is closely related to negligent hiring and a complaint will often contain both claims. *Id. See, e.g.*, Willis v. Dade County School Bd., 411 So. 2d 245 (Fla. Dist. Ct. App. 1982) (respondeat superior does not lie when an employee acts outside the scope of his authority, but an employer could be liable, under the theory of negligent hiring or retention, for the actions of a teacher who assaulted a child); Burch v. A & G Assoc., 122 Mich. App. 798, 333 N.W.2d 140 (1983) (beating of a passenger was not within the scope of driver's employment, thus respondeat superior did not lie, but there may be a higher standard of care for public carriers which would give rise to an action of negligent hiring for failure to conduct a prehire investigation); Di Cosala v. Kay, 91 N.J. 159, 450 A.2d 508 (1982) (respondeat superior was not applicable because a camp ranger was not acting within the scope of his employment when he accidentally shot a child, but negligent hiring theory could be maintained under New Jersey law). *But see* Kassman v. Busfield Enterprises, 131 Ariz. 163, 639 P.2d 353 (Ct. App. 1981) (in the absence of evidence that the em-

not only what the employer knows, but what it should have known.[141] Consequently, an employer which consciously decides not to test so that it may subsequently claim ignorance, may, like the fabled ostrich, find that a large part of its anatomy remains exposed.

Although this writer is unaware of any cases holding an employer liable for negligent hiring or retention in which AIDS is involved, it does not require a great leap of the imagination to envision such a holding, given the right fact pattern.[142]

5. *Failure to Warn*

There has been a long standing rule in common law, encoded in many state laws, that requires an employer to warn employees of dangers attending the employment.[143] While employees are held to assume all the normal risks incident to employment,[144] this does not generally extend to risks of injury

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ployee was known to be a vicious or careless person when hired, action for negligent hiring does not lie under Arizona law, and there is no duty to inquire about an applicant's possible criminal record). In *Kassman*, normal reference checks were made. *Id.* at 167, 639 P.2d at 357.

141. *See, e.g.*, Welsh Mfg., Div. of Textron v. Pinkerton's, Inc., 474 A.2d 436 (R.I. 1984). (A part-time guard employed by Pinkerton to protect plaintiff's property, participated in a major gold theft. The court distinguished the action from one arising under the doctrine of respondeat superior, "where wrongful conduct of the employee is attributable to the master vicariously." *Id.* at 439. The Court stated, "we align ourselves with the majority of jurisidictions that recognize the direct liability of an employer to third parties who are injured by acts of unfit, incompetent, or unsuitable employees." *Id.* at 438. The court went on to hold that the employer's duty of reasonable care included the obligation to conduct a reasonable investigation into the employee's work experience, background, character and qualifications. *Id.* at 440).

142. For example, in Higgins v. Moore, 264 F. Supp. 635 (D.C.S.C. 1967), the husband of an employee sued the employer for wrongful seduction of his wife on the theory, *inter alia*, of "wrongful retention" of the employee after becoming aware of the facts. If the scenario were modified by one additional factor, the transmission of AIDS, we would have our fact pattern. While the court in *Higgins* sustained a summary judgment motion, it implied that the action might lie against the employer, except for plaintiff's failure to prove the South Carolina state law requirement of ratification of the employee action by the employer. *Id.* at 636.

143. "At least with respect to dangers of which the employer knows, or should know, and of which the employee is justifiably ignorant, it is well recognized in the law of master and servant that the employer has a duty to warn the employee of perils attending the employment." Annotation, *Comment Note — Private Person's Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person*, 10 A.L.R.3d 619, 638 (1966) (footnote omitted).

144. *See, e.g.*, Phillips v. Morton Frozen Foods, 313 F. Supp. 228 (E.D. Ark. 1970)

unless the cause is so obvious that the employee must have fully appreciated the danger that might arise.[145] Ordinarily, an employer will be liable for failure to warn where the evidence shows that there was a hidden danger and the employer was in a superior position to know of its existence.[146]

The type of fact patterns that typically give rise to an employer's obligation can be gleaned from the many cases arising under the Federal Employer's Liability Act (FELA).[147] This Act imposes liability on covered employers who fail to safeguard employees against hazards which are reasonably foreseeable. The employer's duty extends to warning employees of such hazards. *Patterson v. Norfolk & Western Railway Co.*[148] illustrates the potential applicability of this reasoning to AIDS in the workplace. In *Patterson*, the plaintiff employee contracted tuberculosis from another employee who had been pale, looked drawn, had recently lost weight, coughed a lot, and otherwise appeared sick. The court held it was for the jury to decide if the employer, who had knowledge of these facts, was negligent under the statute for failure to warn and otherwise protect the plaintiff.[149]

The extent to which this duty to foresee and warn can exist is further demonstrated by the decision in *Gleeson v. Wood*,[150] in which a babysitter, who was playing a game of tag with her young charges, crashed into a sliding glass door to the patio. The baby sitter, who had watched over the children for approximately two weeks, was aware of the open door's existence, but on past occasions the door had been open on the right side. This

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(an employee assumes all normal risks incident to employment, but not those resulting from the employer's negligence).

145. Gobern v. Metals & Controls, Inc., 418 F.2d 290, 296 (1st Cir. 1969) (employer failed to adequately inspect scaffolding from which the employee subsequently fell when bolt broke).

146. Sitarek v. Montgomery, 32 Wash. 2d 794, 203 P.2d 1062 (1949) (baby sitter employed by a maritial community was attacked by a neighbor; the court ruled for the employer defendant in action for failure to warn, but said the employer does have a duty to warn an employee against hazards of which it was aware and employee was not).

147. 45 U.S.C. § 51 (1982).

148. 489 F.2d 303 (6th Cir. 1973).

149. *Id.* at 305. *See also* Anderson v. Pittsburgh & L.E.R. Co., 217 F. Supp. 956 (W.D. Pa. 1962), *aff'd*, 318 F.2d 727 (3d Cir. 1963) (failure to warn of danger around switch); Marmo v. Chicago R.I. & P.R. Co., 350 F.2d 236 (7th Cir. 1965) (failure to warn an inexperienced employee of dangers involved in work on a diesel engine).

150. 321 F. Supp. 118 (E.D. Pa. 1970).

time it was closed on the right side. The babysitter, believing she was running through an open door, crashed into the glass and incurred serious injury. It was held that the employer was required to warn the employee against even such a latent danger.

The available medical documentation indicates that AIDS is not contagious through normal interaction of employees in the workplace. Accordingly, under ordinary circumstances, an employer should have no legal obligation to inform employees that a fellow employee is carrying the HIV virus.[151]

But what of those workplace situations which are atypical? For example, in the health care field, e.g., the plant nurse routinely required to adminisiter first aid to injured fellow employees or to draw blood from them. There have been documented cases of AIDS contracted from exposure to infected blood.[152] Perhaps the answer is that employees who can expect to be exposed to blood spills or errant needle pricks must treat each patient as if he or she were carrying HIV.

Unfortunately, this solution is not applicable to another workplace situation, the inter office affair. What is the extent of any employer's obligation if it has reason to believe that an employee carrying HIV virus is engaging in sex with a fellow employee? Can such an employer legally, or morally, remain silent?[153] The employer's failure to warn the employee at risk could arguably result in liability for injury to such employee, his or her spouse, and children who might be born infected with HIV.[154]

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151. *See Recommendations for Preventing Transmissions, supra*, note 127.

152. *See supra* note 21.

153. For a consideration of moral and ethical questions concerning AIDS see McCormick, *AIDS: The Shape of the Ethical Challenge*, AMERICA, Feb. 13, 1988, at 147. *See also* Dolgin, *supra* note 1, at 192-93, 197-202.

154. It might be argued that an employer cannot be held liable for an employee's actions outside the workplace, and hence the concern over possible liability arising from an affair between employees is unfounded. Leaving aside the not infrequent instances where such affairs are consummated on the employer's premises, and during worktime, there is still an employment nexus that might support the finding of an employer's liability. Such a nexus would exist where an employee, in the course of his or her employment, begins a relationship with another employee as a result of their proximity in the workplace. In such a case, given the employer's duties to provide a safe, healthy workplace and to warn employees of hidden hazards, it is not frivolous to argue that an employer, who knows that one of the employees involved has AIDS, has a duty to warn the other

Asked to balance the privacy rights of the HIV carriers against the rights of the employee, the spouse, and the children not to be exposed to AIDS, a jury's sympathies are unlikely to be with an employer who was aware of the potential tragedy, but did nothing to prevent it.

If the employer does notify the employee at risk, it may well have to defend against an action for defamation,[155] invasion of privacy,[156] and in some states, criminal charges.[157] The law is so unsettled and amorphous in this area as to make reliable predictions impossible. What is needed is a coordinated approach that equitably balances the respective rights of all the interested parties, provides uniform and consistent guidance which can be relied upon in making difficult but necessary decisions, and fits into the larger effort to bring the AIDS crisis under control with the ultimate goal of eliminating AIDS from our society.

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employee. *See supra* notes 143-44 and accompanying text. The employer's liability to his employee might be limited by the applicable state worker's compensation law. *See generally* 99 C.J.S. *Workmen's Compensation* §§ 1-352 (1958). "The general purpose of the workmen's compensation acts is to regulate the relation of employer and employee with respect to compensation for injuries received by the employee in connection with his employment." *Id.* § 5. Worker's compensation would not insulate an employer against claims by those subsequently infected by the unwitting employee. *See, e.g.*, Wojcik v. Aluminum Co. of Am., 18 Misc. 2d 740, 183 N.Y.S.2d 351 (Sup. Ct. 1959) (wife of employee could maintain common-law action against husband's employer when she contracted tuberculosis from husband, and the employer, who knew of the husband's condition, failed to notify the employee).

155. *See, e.g.*, Little v. Bryce, 44 Emp. Prac. Dec. (CCH) ¶ 37, 330 (Tex. Ct. App. 1987) (A cause of action in slander lies for false statements that an employee was exposed to AIDS. The employee was discharged as a result of these statements). *Id. See generally* KEETON, PROSSER & KEETON ON TORTS 773, 790 (5th ed. 1984) (defamation defined and a statement that a person has a venereal disease can be slander).

156. *See, e.g.*, Bratt v. IBM, 467 N.E.2d 126 (Mass. 1984) (disclosure of private medical information about an employee can constitute actionable invasion of an employee's right to privacy). *But see* Valencia v. Duval Corp., 132 Ariz. 348, 645 P.2d 1262 (Ct. App. 1982) (telephone inquiry by employer requesting medical information from employee's doctor did not constitute invasion of privacy). A number of states have statutes which prohibit or restrict disclosure of confidential medical information by an employer. *See, e.g.*, CAL. CIV. CODE § 56.05 *et seq.* (West 1982 & Supp. 1989); CONN. GEN. STAT. ANN. § 31-128f (West 1987 & Supp. 1989); WIS. STAT. ANN. § 103.13 (West 1983). In addition, some states have constitutions which expressly guarantee the right of privacy. *See, e.g.*, CAL. CONST. art. I, § 1.

157. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 199.21(c) (Supp. 1989) (willful disclosure of test results which results in "economic, bodily or psychological harm" to the person tested is a misdemeanor punishable by fine and imprisonment).

III. Existing AIDS Legislation

A. *Federal*

The federal government[158] and many states[159] have passed legislation covering various facets of the AIDS problem. While these laws have many salutary features, they do not adequately address the conflicting rights and needs in the workplace discussed above. In addition, the recently expanded federal provisions do not subsume state enactments thereby leaving potential confusion and conflict between state approaches.[160] This is particularly burdensome on multi-state employers which must modify policies according to jurisdictions. The result is not only inefficiency, but confusion and doubt that can lead to corporate inertia rather that the swift, effective response which is urgently needed.[161]

It is submitted that the Federal Public Health and Welfare

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158. *See supra* note 4.

159. *See supra* note 66 and *infra* notes 165-70; COLO. REV. STAT. § 25-4-1401 (1989); FLA. STAT. ANN. §§ 384.21-.34 and §§ 381.607-.703 (West Supp. 1989); GA. CODE ANN. §§ 31-17A-1 to 31-17A-3 (Supp. 1989); ILL. ANN. STAT. ch. 111 ½, ¶¶ 7301. (Smith-Hurd 1987); IOWA CODE ANN. § 141.1 (West 1989); KAN. STAT. ANN. §§ 65-6001 (Supp. 1988); MONT. CODE ANN. §§ 50-16-1001, (1989); N.Y. PUBLIC HEALTH LAW § 2781 (McKinney Supp. 1989); WIS. STAT. ANN. §§ 103.15, 146.022-.025 (West & Supp. 1989).

160. Some states prohibit testing for HIV, while others require such testing for certain positions. *See supra* notes 67-69; *see also supra* notes 75-79 (illustrating lack of uniformity in state approaches to communicable diseases, including AIDS).

161. Despite the lack of clear governmental leadership and direction, there have been a number of private initiatives by individual employers and employer associations to develop policies and guidelines to address the problems engendered by AIDS in the workplace. *See supra* note 102. *See also* Benezra, *AIDS at Work*, The Reporter Dispatch, Feb. 28, 1988, at H1, col. 2 (reports without detail, general approaches taken by the 10 largest employers in Westchester County in New York State, some of who do not have separate AIDS policies but treat the disease as any other illness or disability); Merritt, *Bank of America's Blueprint For A Policy On AIDS*, BUSINESS WK., Mar. 23, 1987, at 127 (emphasizing a cost effective "case management" approach that provides for home or hospice care along with education to foster preventive behavior and reduce employee hostility toward those with AIDS).

However, despite the initiative shown by some private companies, many others have been slow to address the issue, according to a Harris Executive Poll of 600 major companies. *Id.* at 130. Only 10% of companies surveyed had adopted a special policy to deal with employees with AIDS, although nearly a third of those polled reported that their companies have had employees with AIDS. A more recent study conducted by Foster Higgins, covering 651 employers with 700 or more employees, revealed that "virtually all major firms" report AIDS cases among employees. 21 Daily Lab. Rep. (BNA) A-3-4 (Feb. 2, 1989).

Code[162] ought to be amended to establish a system of protections for HIV carriers, fellow employees, and employers. The Health and Welfare Code[163] is a more appropriate vehicle than the Federal Rehabilitation Act[164] or the National Labor Relations Act[165] because the essence of the AIDS crisis is the threat to public health.[166]

In addition to a system of protections, the amendments should seek to enlist the workplace as a weapon in the battle against AIDS. The workplace offers the largest captive audience for education. It can also serve as a demographic map to track the spread of AIDS in the population at large. The workplace can constitute a pool to gather data for contact tracing by public health authorities. It can also serve as a source of dignity, sustenance, and self-affirmation to those buffeted by the physical and mental assault of this most debilitating virus.[167]

The current legislation facilitates some of these objectives, but leaves others untouched. For purposes of analyzing the deficiencies of current legislation in this regard, let us consider the Federal Act[168] and statutes passed by two states with major AIDS concerns: California[169] and New York.[170]

As previously mentioned, Congress passed up the opportu-

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162. 42 U.S.C. §§ 201-300 (1982 & Supp. 1987).

163. *Id.*

164. 29 U.S.C. §§ 701-794 (1982 & Supp. 1987).

165. 29 U.S.C. §§ 151-169, (1982 & Supp. 1987).

166. The Senate has recently approved a sweeping bill to prevent discrimination against the handicapped, including those with AIDS in employment, public accommodations, transportation, and communications services (currently titled "Americans with Disabilities Act" S. 933). If, as expected, the House passes similar legislation (H.R. 2273) and the President approves, the final Act will, in effect, extend the provisions of the Federal Rehabilitation Act to virtually all employers. *Bill Barring Bias Against Disabled Holds Wide Impact*, N.Y. Times, Aug. 14, 1989, at 1, col. 6. Nothing in the proposed legislation reduces the need for specific, comprehensive legislation directed at AIDS in the workplace. If anything, it highlights the diffusion of government efforts in this regard.

167. "On every level; from those in managerial positions to assembly-line workers, we've observed that people with AIDS who manage to keep working live longer." *Helping People With AIDS Stay On Job*, N.Y. Times, Apr. 23, 1989, at WC12, col. 2. (statement of client director of AIDS Community Services of Westchester County).

168. 42 U.S.C. § 300ee (Supp. 1989).

169. CAL. HEALTH & SAFETY CODE §§ 195-199 (West Supp. 1980).

170. N.Y. PUB. HEALTH LAW §§ 2780-2787 (McKinney Supp. 1980).

nity to establish a uniform AIDS approach.[171] The federal AIDS legislation provides for federal grants to states, municipalities, and non-profit entities to research and train for prevention and control of sexually transmitted diseases (STD),[172] and for STD surveillance activities, screening, diagnostic tests, and case follow-up activities including contact tracing.[173]

There is also specific provision for research with respect to AIDS[174] and for educational programs to "prevent and reduce exposure to and transmission of the etiologic agent for acquired immune deficiency syndrome."[175]

The emphasis is on research and education, clearly crucial areas, but there is only passing reference to testing.[176] Also, an attempt to include provisions guaranteeing confidentiality of blood test results was rejected.[177] Thus, two of the principal controversial issues running through the debate over AIDS are left for state regulation. The issue of discrimination based on AIDS is not mentioned, and is apparently left to the evolution of administrative and judicial interpretation of the Federal Rehabilitation Act and to the states.[178]

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171. *See supra* note 4.

172. 42 U.S.C.A. § 247c (West Supp. 1989) (Sexually transmitted diseases; prevention and control projects and programs).

173. 42 U.S.C.A. § 247c(c) (West Supp. 1989) (Project grants to States). The House Conference Report No. 100-1055, Health Omnibus Programs Extension of 1988, Pub. L. 100-607, 1988 U.S. CODE CONG. & ADMIN. NEWS (100 Stat). 4167, 4234 states that the law includes diseases "such as syphilis, gonorrhea, herpes and chlamydia," which may leave some question if this section is intended to apply to AIDS.

174. 42 U.S.C.A. § 300cc (West Supp. 1989) (Research with Respect to Acquired Immune Deficiency Syndrome Administration of Research Program).

175. 42 U.S.C.A. § 300ee(a) (West Supp. 1989) (Prevention of Acquired Immune Deficiency Syndrome).

176. 42 U.S.C.A. § 247c(c) (West Supp. 1989). "The Secretary is also authorized to make project grants to States . . . , for — (1) sexually transmitted diseases surveillance activities, including the reporting, screening and follow-up of diagnostic tests for, and diagnosed cases of, sexually transmitted diseases . . . ." *Id.*

177. Senator Jesse Helms (R-N.), successfully opposed such a provision, contending "that those who live or work with people infected with the HIV virus have a right to know if someone close to them tests positive." 46 CONG. Q. at 3200 (Nov. 5, 1988).

178. *See, e.g.,* Doe v. Centinela Hospital, (No. CV 87-2514 C.D. Cal. June 30, 1988) (those infected with HIV, but free of symptoms of AIDS itself, are individuals with handicaps within the meaning of section 504 of the Federal Rehabilitation Act). The Office of Federal Contract Compliance (OFCCP) issued a Directive on AIDS, which provides, "4. POLICY: A. OFCCP finds that all HIV-related conditions. —. AIDS, ARC and asymptomatic HIV infection. —. are substantially limiting impairments, and should be

B. *California*

California, a pioneer in AIDS legislation, has adopted an approach consisting of a number of related legislative enactments covering various facets of the AIDS problem. The California Health and Safety Code, entitled Human Whole Blood, Human Whole Blood Derivatives, and Other Biologics, addresses the safety of the blood supply while according confidentiality protections.[179] Chapter 1.11 of the Health and Safety Code addresses the question of HIV testing in general and further emphasizes confidentiality.[180] Social services are expressly encouraged as part of the California AIDS Program set forth in chapter 1.16 of the Health and Safety Code.[181] There is even a

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treated as covered handicapping conditions under Section 503 of the Rehabilitation Act, provided that the individual's condition does not pose a direct threat to the health or safety of others or prevent successful job performance." OFCCP Directive, *supra* note 48, at D-2. In resolving section 503 issues, OFCCP will follow the 1988 Rehabilitation Act Amendment and the 1988 Department of Justice opinion. *See supra* notes 50, 54.

179. "Except as provided in this subdivision, no blood or blood components shall be used in vivo for humans in this state, unless the blood or blood components have been tested and found nonreactive for HIV . . . . "CAL. HEALTH & SAFETY CODE § 1603.1(a) (West Supp. 1990). "The legislature finds . . . it is of great benefit to the public health and essential to the protection of safe blood . . . available for transfusion to provide testing for . . . [AIDS] . . . ." *Id.* § 1630. The testing is confidential. *Id.* § 1632.

180. "Except as provided in Section 1603.1 or 1603.3 . . . no person shall be compelled . . . to identify or provide identifying characteristics which would identify any individual who is subject of a blood test to detect antibodies to the probable causative agent of AIDS." *Id.* § 199.20. For further provisions relating to confidentiality, see *id.* §§ 199.30-40, 199.42-55.

181. *Id.* § 199.70. The intent of the Legislature in enacting this chapter [1.16] is as follows:

(a) To fund specified pilot AIDS education programs.

(b) To fund pilot projects to demonstrate the value of noninstitutional health care services such as hospice, home health, and attendant care in controlling costs and providing humane care to people with AIDS and AIDS related conditions.

(c) To fund clinical research.

(d) To fund the development of an AIDS Mental Health Project.

(e) To fund specified needs assessments, studies and program evaluations.

(f) To authorize the use of funds appropriated by Section 6 of Chapter 23 of the Statutes of 1985 for preventive education for individuals who are seropositive as a result of antibody testing.

(g) To promote broad based support for AIDS programs by encouraging community level networking and coordination of efforts among private sector, nonprofit, and public service agencies as well as health care professionals and providers of essential services.

Id. See also id. § 199.78, which provides, "(a) [t]he state department shall . . . develop a plan which assesses the need for, a program of acquired immune deficiency syndrome

separate act designed to foster the development of a vaccine for AIDS.[182]

Despite the comprehensive nature of the California approach, the problems in the workplace are not addressed beyond making it clear that "no person" can test for AIDS without written consent.[183] Since AIDS is treated as a handicap under the California Fair Employment and Housing Act,[184] an employer cannot discriminate against an applicant or employee who has AIDS or who does not consent to be treated.[185]

C. *New York*

The guiding principle of New York's legislative approach to AIDS is the recognition "that maximum confidentiality protection for information related to HIV infection and AIDS is an essential public health measure."[186] Consistent with this ration-

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(AIDS) primary prevention, health education, testing, and counseling, specifically designed for women and children, which shall be integrated, as the department deems appropriate, into specific programs." *Id.* Section 199.81 provides information to school districts on AIDS. *Id.*

182. *Id.* § 199.55 (Acquired Immune Deficiency Syndrome (AIDS) Vaccine Research and Development Grant Program).

183. *Id.* § 199.22(a)

> Except in the case of a person treating a patient, no person shall test a person's blood for evidence of antibodies to the probable causative agent of AIDS without the written consent of the subject of the test or the written consent of the subject, as provided in Section 199.27 [incompetent person], and the person giving the test shall have a written statement signed by the subject or conservator or other person, as provided in Section 199.27 confirming that he or she obtained the consent from the subject. In the case of a physician and surgeon treating a patient, the consent required under this subdivision shall be informed consent, by the patient, conservator, or other person provided for in Section 199.27.

Id.

184. "The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age is hereby recognized as and declared to be a civil right." CAL. EMPLOYMENT & HOUSING ACT § 12921 (West Supp. 1990).

185. *See* Raytheon Co. v. F.E.H.C., 46 Fair Emply. Prac. Cas. (BNA) 1089 (Cal. Super. Ct. 1988).

186. Act effective Feb. 1. 1989. ch. 584 § 1, 1988 N.Y. LAWS; (as reported in a note appended to N.Y. PUB. HEALTH LAW § 2780 (McKinney Supp. 1989)). The note continues:

> In order to retain the full trust and confidence of persons at risk, the state has an interest both in assuring that HIV related information is not improperly disclosed and in having clear and certain rules for the disclosure of such information. By providing additional protection of the confidentiality of HIV related information,

ale, the new legislation stresses the voluntary nature of AIDS testing,[187] the need for "informed" consent,[188] and confidentiality.[189] A physician may disclose confidential HIV related information under specified circumstances and in compliance with specified conditions.[190] These include disclosure to a "contact or to a public health officer for the purpose of making the disclosure to said contact,"[191] where the physician "reasonably believes disclosure is medically appropriate and there is a significant risk of infection to the contact . . . ."[192] In making such a

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the legislature intends to encourage the expansion of voluntary confidential testing for the human immuno-deficiency virus (HIV) so that individuals may come forward, learn their health status, make decisions regarding the appropriate treatment, and change the behavior that puts them and others at risk of infection.

The legislature also recognizes that strong confidentiality protections can limit the risk of discrimination and the harm to an individual's interest in privacy that unauthorized disclosure of HIV related information can cause. It is the intent of the legislature that exceptions to the general rule of confidentiality of HIV related information be strictly construed.

Id.

187. N.Y. PUB. HEALTH LAW § 2781 (McKinney Supp. 1989).

Except as provided in section three thousand one hundred twenty-one of the civil practice law and rules [action in which mental or physical condition or blood relationship of party in question,] or unless otherwise specifically authorized or required by a state or federal law, no person shall order the performance of an HIV related test without first receiving the written, informed consent of the subject of the text . . . .

Id.

188. For consent to be informed, it must include:

(a) an explanation of the test, its purpose, the meaning of its results, and the benefits of early diagnosis and medical intervention; and (b) an explanation of the procedures to be followed, including that the test is voluntary, that consent may be withdrawn at any time, and a statement advising the subject that anonymous testing is available; and (c) an explanation of the confidentiality protections . . . .

Id.

189. "No person who obtains confidential HIV related information . . . may disclose or be compelled to disclose such information except to [fifteen listed exceptions including the protected individual himself, his health care provider, public health officials, and others with a need to know]." *Id.* § 2782(1).

190. *Id.* § 2782(4)(a).

191. *Id.*

192. *Id.* § 2782(4)(a). Such disclosure may be made provided:

(3) the physician has counseled the protected individual regarding the need to notify the contact, and the physician reasonably believes the protected individual will not inform the contact; and

(4) the physician has informed the protected individual of his or her intent to make such disclosure to a contact and has given the protected individual the opportunity to express a preference as to whether disclosure should be made by the

disclosure, the physician or public health officer "shall not disclose the identity of the protected individual or the identity of any other contact."[193] The law expressly provides that a physician "shall have no obligation to identify or locate any contact."[194] There are civil and criminal penalties for violating section 2781.[195] However, there shall be no criminal sanction or civil liability or cause of action for damages arising against a physician for *failing* to disclose confidential HIV related information to a contact, or for *disclosing* such information "in good faith and without malice, and in compliance with this article."[196]

The law restricts the right of the courts to issue an order compelling disclosure of confidential HIV related information.[197] Where there is a "clear and imminent danger" to a contact, the court may order disclosure, but only after weighing the need for

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physician directly or to a public health officer for the purpose of said disclosure. If the protected individual expresses a preference for disclosure by a public health officer or by the physician, the physician shall honor such preference.

Id.

193. *Id.* § 2782(4)(b). This represents an effort to meet the privacy concerns of those with HIV infection and to encourage disclosure of others exposed to the virus. In addition, "when making such disclosures to the contact, the physician or public health officer shall provide or make referrals for the provision of the appropriate medical advice and counseling for coping with the emotional consequences of learning the information and for changing behavior to prevent transmission or contraction of HIV infection." *Id.*

194. *Id.* § 2782(4)(c).

195. *Id.* § 2782(3).

1. Any person who shall:

(a) perform, or permit or procure the performance of, an HIV related test in violation of section twenty-seven hundred eighty-one of this article; or

(b) disclose, or compel another person to disclose, or procure the disclosure of, confidential HIV related information in violation of section twenty-seven hundred eighty-two of this article; shall be subject to a civil penalty not to exceed five thousand dollars for each occurrence. Such penalty may be recovered in the same manner as the penalty provided in section twelve of this chapter.

Id.

196. *Id.* § 2783(3).

197. *Id.* § 2783(2).

A court may grant an order for disclosure of confidential HIV related information upon an application showing: (a) a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding; (b) a clear and imminent danger to an individual whose life or health may unknowingly be at signficant risk as a result of contact with the individual to whom the information pertains; (c) upon application of a state, county, or local health officer, a clear and imminent danger to the public health; or (d) that the applicant is lawfully entitled to the disclosure and the disclosure is consistent with the provisions of this article.

Id.

disclosure against the "privacy interest of the protected individual and the public interest which may be disserved by disclosure which deters future testing or treatment which may lead to discrimination."[198] AIDS should be considered a "disability" under New York's discrimination law[199] and a job applicant or employee cannot be discriminated against unless he is thereby rendered unable to perform the job without posing a risk to himself or others.[200]

D. *Summary*

Current federal and state legislation is insufficient in two broad respects. First, it fails to maximize the workplace as a tool in the battle to control the spread of AIDS. Second, while it does recognize some of the rights of HIV carriers, it does not accord them all the protection which the situation requires, nor does it sufficiently recognize the needs of their fellow employees and their employers.

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198. "In assessing compelling need and clear and imminent danger, the court shall provide written findings of fact, including scientific or medical findings, citing specific evidence in the record which supports each finding, and shall weigh the need for disclosure . . . ." *Id.* § 2785(5). Section 2785 appears to supersede CPLR 3121 insofar as AIDS is concerned. CPLR 3121 permits a party to a legal action to obtain the results of blood tests in certain cases. N.Y. CIV. PRAC. L. & R. § 3121 (McKinney 1970), provides in part: "(a) Notice of examination. After commencement of an action in which the mental or physical condition or the blood relationship of a party . . . is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician . . . ." *Id.* Defendant had transmitted herpes and there was speculation that CPLR § 3121 would be used where transmission of AIDS was alleged. *See* N.Y. CIV. PRAC. L. & R. § 3121 commentary C3121.6 (McKinney 1970).

N.Y. PUB. HEALTH LAW § 2785(2)(a) gives the court discretion to compel disclosure where there is a "compelling need" in connection with the adjudication of a civil or criminal proceeding.

199. N.Y. EXEC. LAW § 296(1) (McKinney 1982) states that it shall be an unlawful discriminatory practice: "(a) For an employer or licensing agency, because of age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." *Id.*

200. *See* Miller v. Ravitch 60 N.Y.2d 527, 470 N.Y.S.2d 558, 458 N.E.2d 1235 (1983). "The statute [§ 296] bars discrimination against an impaired individual who is reasonably able to do what the position requires." *Id.* at 532, 470 N.Y.S.2d at 560,458 N.E.2d at 1237.

1. *The Workplace as a Tool*

Over 119 million people are employed full or part-time in the United States.[201] Coming from greatly varied ethnic, economic, and educational backgrounds, they constitute the group most representative of our society as a whole.[202] If AIDS is spreading through the population at large, it will become discernible in the workplace. If we are seeking the largest possible captive audience for education concerning AIDS (apart from the school system), it is the workforce. Employers already have systems and procedures in place to comply with a wide variety of government regulations, to conduct physical examinations, and to administer medical insurance benefits. Current legislation fails to exploit these advantages, providing neither direction nor incentive to employers to take a more active role in fighting AIDS.

2. *Increased Protection*

The basic thrust of most current legislation, insofar as the workplace is concerned, is the protection of HIV carriers from invasion of privacy and discrimination.[203] Although paying lip service to the central role of education, the 1988 amendments do not express an adequate level of commitment to education, which is the best way to both eliminate grass roots fears and attitudes which lead to discrimination, and to achieve behavior

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201. THE WORLD ALMANAC, 82 (1988) (As of June 1987, there were 119,517,000 people employed in the civilian workforce.).

202. *See id.* at 82-88 (citing employment statistics by occupation, sex, and race).

203. The California Health and Safety Code is replete with sections either prohibiting or restricting testing. *See, e.g.*, CAL. HEALTH & SAFETY CODE, § 199.22 (prohibiting testing without written consent and prohibiting disclosure of HIV test results); *id.* § 199.20 (prohibition against identification of test subjects); *id.* § 199.21 (penalties for unauthorized disclosure of test results); *id.* § 199.22 (voluntary testing); *id.* § 199.25 (identification of test subject prohibited, disclosure of results restricted); *id.* §§ 199.30.33 (research records protected from disclosure); *id.* § 199.42 (public health records confidential). New York's recent enactment is almost entirely devoted to ensuring voluntary testing, protecting confidentiality, and court authorization of disclosure. N.Y. PUB. HEALTH LAW § 2781-2785 (McKinney Supp. 1989). No matter how important the protection of an individual's right of privacy may be, the emphasis found in these and other similar statutes serve to illustrate the cautious, somewhat narrow, and basically passive approach taken to date.

modification of those at risk.[204] Neither do the 1988 amendments expressly prohibit discrimination in the workplace based on AIDS nor impose penalties to act as an effective deterrent.[205]

These deficiencies have a marked dampening effect on the effort to bring AIDS under control. Consider, for instance, the questions of education and testing. Inadequate education contributes to the reluctance of individuals to undergo testing. As long as ignorance and fear cause a significant portion of the workforce to harbor discriminatory attitudes, and until the law condemns discrimination unequivocally and forcefully, we cannot expect individuals, in or outside the recognized high risk groups, to wholeheartedly accept testing. Yet testing is a *sine qua non* of an effective national approach to controlling AIDS. Widespread testing is essential if the CDC is to have an accurate understanding of the nature and extent of the AIDS epidemic, without which there can be no unified and focused approach.[206]

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204. *See, e.g.*, 42 U.S.C. § 247c (Supp. 1989) (sexually transmitted diseases; prevention and control projects and programs provide: "[T]he Secretary may make grants to States . . . for . . . (3) public information and education programs for the prevention and control of such diseases, and (4) education, training, and clinical skills improvement activities in the prevention and control of such diseases for health professionals . . . . "; 42 U.S.C.A. § 300ee-2 (Supp. 1989) (*information* for health and public safety worker provides that the Secretary of Health and Human Service acting through the Center for Disease Control shall develop and disseminate emergency guidelines for health and public safety workers); 42 U.S.C.A. § 300ee-3 (Supp. 1989) (continuing education for health care providers provides that the Secretary shall make grants to nonprofit organizations to train health care providers in "appropriate infection control procedures" to reduce the risk of transmitting AIDS); 42 U.S.C.A. § 300ee-11 (Supp. 1989) provides that the Secretary may make grants to the states to carry out "public information activities" with respect to AIDS as outlined. Further, 42 U.S.C.A. § 300ee-12 (Supp. 1989) lists a broad spectrum of educational activities for which funds can be expended. The mechanism is cumbersome and unfocused; there is no assurance that a particular state will conduct any educational activity, nor is guidance provided to ensure thoroughness and consistency among states. In sum, it is an inadequate response to a disease that threatens to destroy the hopes and lives of millions of our citizens.

205. Currently, the Rehabilitation Act of 1973 is the federal remedial mechanism for employment discrimination against those with AIDS. *See supra* notes 45-57. If the Americans with Disabilities Act, *see supra* note 166, recently passed by the Senate and now before the House, is adopted, many more individuals will have a federal remedy for handicap discrimination. The new legislation in its present form would eventually apply to all employers with fifteen or more employees. *See* 148 Daily Lab. Rep., (BNA) A-6 (Aug. 3, 1989). But AIDS would be only one of many covered handicaps and is unlikely to receive the emphasis necessary to encourage those with HIV infection to step forward for testing and treatment.

206. *See, e.g.*, the argument offered by Gary L. Bauer, an assistant to President

Further, testing serves to inform the individual of the need for treatment, hopefully at an early stage.[207] Also, along with

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Reagan for policy development,

> [I]t is essential that we have a widespread and systematic program of AIDS testing to protect those Americans who are not yet ill. The reason is fairly obvious. We have to start by learning all the facts about AIDS. We need to know who the victims of AIDS are and how widespread the disease is. We cannot speculate about this. We need sound data.

Bauer, *AIDS Testing*, 2 AIDS & PUB. POL'Y J. 1 (Fall-Winter 1987). The federal Department of Health and Human Services has recently inaugurated a pilot survey in Dallas designed to learn more about the number of AIDS cases and other factors related to AIDS. The government has been wrestling with the issue of how to get more accurate data on AIDS in the United States for the past two years. *See Dallas AIDS Survey is Begun Amid a Furor Over its Worth*, N.Y. Times, Sept. 27, 1989, at 1, col. 4. A spokesman for Research Triangle Institute, the nonprofit agency hired to conduct the survey, explained, "[t]his is the first time somebody has sat down and said, 'Let's try to find out the size of epidemic we're dealing with.' " *Id.* at 21, col. 6. The article notes further that the federal government has been conducting a "family of surveys," by testing special groups, including college students, infants, prisoners, and hospital patients. *Id.*

207. Testing for AIDS has been a continuing subject of controversy. The question of mandatory versus voluntary testing has received voluminous comment. *See, e.g.*, Hunter, *AIDS Prevention and Civil Liberties: The False Security of Mandatory Testing*, 2 AIDS & PUB. POL'Y J. 1 (Summer-Fall 1987) (government compelled testing subject to constitutional challenge and even voluntary testing raises civil liberty concerns with respect to confidentiality); Scherzer, *AIDS and Insurance: The Case Against HIV Antibody Testing*, 2 AIDS & PUB. POL'Y J. 19 (Fall-Winter 1987) (testing required for insurance would result in discrimination based on sexual orientation and would deter many from obtaining insurance, even if not seropositive, because they fear the possibilities inherent in being tested); Bauer, *supra* note 206 (benefit to society of widespread AIDS testing outweighs risk of infringement on individual civil rights). *But see* Fletcher, *AIDS Screening: A Response To Gary Bauer*, 2 AIDS & PUB. POL'Y J. 5 (Fall-Winter 1987) (Bauer fails to offer a coherent plan. The issue is which segment of the population should be targeted for HIV screening.). *See also* Collins, *The Case Against AIDS Testing*, 2 *AIDS & Pub. Pol'y J.* 8 (Fall-Winter 1987). Practically speaking, "testing is neither productive nor scientifically sound public health policy." *Id.* at 9. Cleveland, *Linking Science and Society to Battle AIDS, Mathilde Krim*, Columbia, Feb. 1988, at 23 (profiling Mathilde Krim a respected pioneer in the battle against AIDS and co-founder of the American Foundation for AIDS Research. Krim states "I believe only in voluntary testing."). *Id.* at 27.

One of the few appellate courts to have addressed the constitutionality of mandatory HIV testing found a violation of the fourth amendment's proscription against unreasonable search and seizure. Glover v. Eastern Neb. Community Office of Retardation, 867 F.2d 461, 464 (8th Cir. 1989) (Nebraska agency's policy requiring mandatory HIV and hepatitis B testing for certain job positions "is not reasonable . . . [b]ecause the risk of disease transmission has been shown to be negligible" in the work environment in question.) *Id.* at 464.

But see Local 1812, AFGE v. U.S. Dept. of State, 43 Fair Empl. Prac. Cas. (BNA) 955, 958 (1987) (the court found that mandatory HIV testing for Foreign Service employees, applicants, and dependents did not violate the fourth amendment since the re-

self-identification, it provides the basis for an effective contact tracing program.[208] Finally, it enables an employer to better

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quirement "appears rational and closely related to fitness for duty").

One of the arguments against the importance of testing an overall AIDS strategy has been the unavailability of effective treatment for those who test positive. With the advent of studies concluding that those with HIV infection can realize substantial life prolonging benefits from taking new drugs, especially AZT (azidothymidine), this argument no longer applies. *See* Hilts, *Major Changes for Health System Seen in Wake of the AIDS Finding*, N.Y. Times, Aug. 19, 1989, at 1, col. 1.

> Until now the Federal Government and most States have not established programs to promote widespread testing. In the space of a few weeks, the findings [certifying the effectiveness of new drug treatments] have begun to shift the focus of the AIDS crisis from thousands of people dying of AIDS to a different group, the hundreds of thousands who are infected but still healthy, and who now can benefit from testing and treatment.

Id. at 8, col. 1. *See also* Lambert, *In Shift, Gay Men's Health Group Endorses Testing for AIDS Virus*, N.Y. Times, Aug. 16, 1989, at 1, col. 1. (reporting that the Gay Men's Health Crisis, New York City's largest private organization providing AIDS services, "has reversed a long-held position and endorsed wide-spread voluntary testing" for HIV). This reversal is a result of the finding that new drugs, most particularly AZT, can be of significant benefit, particularly if the virus is detected early. The executive director of the organization was quoted as saying, "[t]here are compelling reasons to get tested." *Id. See also* Lambert, *With Few Tested, AIDS Debate Erupts*, N.Y. Times, July 23, 1989, at 28, col. 3. (New York City Health officials, noting that approximately 90% of the hundreds of thousands of New Yorkers believed to be infected with HIV have *not* been tested, have called for a more aggressive policy of testing).

208. Like testing, contact tracing (the attempt to find or "trace" those who may have been exposed to HIV), has been the subject of intense debate ever since AIDS appeared. For example, four medical societies filed a law suit in New York state court to compel the Health Department to classify AIDS as a communicable sexually transmitted disease, which would trigger mandatory contact tracing procedures. *Medical Groups Sue for Tracing of AIDS Cases*, N.Y. Times, June 14, 1988, at B4, col. 6. The Health Commissioner, although in agreement that AIDS is a communicable and sexually transmitted disease, opposed classifying it as such on the grounds that it would discourage AIDS patients from seeking medical care and would "drive the epidemic underground." *Id.* The state court ultimately declined to force the Health Commissioner to reclassify AIDS. *Judge Refuses to List AIDS as a Sexual Disease*, N.Y. Times, Nov. 16, 1988, at B1, col. 3. For a brief summary of the debate, see Lambert, *In War on AIDS, a Tangle of Rules About Tracing, Testing and Tellings*, N.Y. Times, July 9, 1989, at E6, col. 1. Lambert writes:

> Five years after the AIDS antibody test was developed, governments across the country are still grappling with the issues of testing, confidentiality, and tracing sexual and needle-sharing partners. In the absence of a uniform national policy, states and localities have devised — and are now frequently revising — varied and often contradictory rules . . . . Some states require tracing the partners of infected people and ask them to be tested, while other states prohibit such measures.

Id. The article goes on to note a recent move to a "middle position, called voluntary partner notification," whereby infected patients are encouraged to alert their partners on

identify and evaluate risk situations in order to install preventive and protective measures.

The failure to stimulate education in the workplace is compounded by the decision to leave the important question of testing and confidentiality to the states.[209] Given the disparity of views over these volatile issues, we must expect a disparity in the state and local approaches. Some states may simply choose not to address the issue. Other states may fail to enact adequate anti-discrimination measures or privacy and confidentiality protection for HIV carriers. Still others, in their zeal to protect the civil rights of HIV carriers, may place so many restrictions on the adminisitration of tests and the use of results that opportunities to be tested are actually diminished, and people at risk of exposure to AIDS are condemned to suffer contagion through lack of warning which could have been furnished without sacrificing basic civil rights of AIDS sufferers.[210]

Education and testing are not the only areas inadequately addressed. From the employer's perspective, the current legislation leaves largely untouched the dilemmas discussed in Part II of this Article.[211] An employer doing its best to conform to government legislation and guidelines with respect to AIDS is still left to deal with employees asserting rights allegedly conferred by the National Labor Relations Act, OSHA, and the labor

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their own, or if they prefer, to let public health officials do so. *Id.* The risk inherent in depending on altruism to locate those at risk is illustrated by the results of a survey of sexually active people being tested for HIV in which approximately 25% responded that if they tested positive, they would not warn casual sex partners. *Few Would Warn Partners*, N.Y. Times, Jan. 9, 1988, at 7, col. 3. Recently the New York City Health Commissioner, in advocating more aggressive contact tracing based on the proven benefit of medical treatment, said "we are fast approaching a time when we will have to rethink the wisdom and effectiveness of many of our present public-policy issues." *Health Chief Urges Listing People With the AIDS Virus*, N.Y. Times, June 6, 1989, at B5, col. 1. *See also* Vernon, *The HIV Epidemic: Colorado's Traditional Approach to Disease Control*, 2 AIDS & PUB. POL'Y J. 33, 35 (Summer-Fall 1987) (concluding that Colorado's contact tracing has shown promising results; interviews of 227 persons with HIV identified 360 sex or needle sharing partners of whom 307 were located and notified).

209. As previously noted, Congress passed up an opportunity to establish a uniform national policy on testing, confidentiality, and contact tracing in passing the AIDS Amendments of 1988, which left these issues to State governments. *See supra* notes 4, 159-60.

210. *See supra* notes 63-69, 75-76, for examples of different state approaches.

211. *See supra* notes 42-157 and accompanying text.

agreement.[212] An employer which remains silent is still subject to tort actions by employees for "failure to warn of potential hazards";[213] and an employer who speaks is subject to tort or criminal actions for invasion of privacy and infliction of mental suffering.[214]

If an employee with AIDS places a customer, client, or other third party at risk of exposure, the employer may be sued on some theory of imputed liability, or negligent hiring or retention.[215] Finally, the well intentioned employer who hires and accommodates those with AIDS can expect his health insurance costs to increase, resulting in diminished profits and, in some cases, serious competitive disadvantage.[216]

This is hardly the scenario a reasonable person would design to enlist the enthusiastic support of employers in addressing "the number one public health enemy."[217] If indeed AIDS presents such an ominous threat, and the evidence suggests it does, then we as a society ought to take steps commensurate therewith. We have not yet done so. With respect to the workplace the following proposals are submitted for consideration.

IV. Proposed Federal Legislation

The 1988 amendments represent a reasonable beginning.[218] In order to elevate the level of the response to match the level of the problem, there should be further amendments to the Public Health Act embodying the principles and features set forth in

212. *See supra* notes 103-28 and accompanying text.

213. *See supra* notes 143-57 and accompanying text.

214. *See supra* notes 153-57 and accompanying text.

215. *See supra* notes 136-42.

216. *See supra* notes 93-99 and accompanying text discussing health insurance claims.

217. So designated by Congress in its declaration of "National AIDS Awareness and Prevention Month." *See supra* note 161.

218. *See supra* notes 4, 158-60 and accompanying text.

the following Summary of Key Elements.

A. *Summary of Key Elements of Proposed Amendments*

1. *Pre-emption*

All state and local laws, and other federal laws to the extent inconsistent with the amendments, are pre-empted.

2. *Education*

The Department of Health and Welfare will prepare and distribute to all employers AIDS Education Kits, consisting of a Training Guide, videotapes, and other suitable aids. The employer will conduct training sessions in accordance with the Training Guide, post educational posters, and distribute to employees individual "Employee AIDS Education" material.

3. *Testing*

There should be a stated federal policy of encouraging testing of all job applicants for the HIV virus; inclusion of tests for the HIV virus in all routine employee medical examinations; test results will be reported on an anonymous basis to the CDC for the purpose of evaluating and tracking, on a continuing basis, the nature and extent of the AIDS problem.

4. *Confidentiality*

Strict confidentiality of individual test results will be maintained, with limited exceptions, on a need to know basis with adequate safeguards against unauthorized disclosure.

5. *Discrimination*

A strong prohibition of discrimination against anyone who tests positive, or is perceived as having an AIDS related condition, with appropriate penalties for violators, will be included.

6. *Contact Tracing*

Employers will report positive test results to a newly created division of the Department of Health and Welfare which will endeavor, with the help of state public health officials where possible, to trace and warn those who may have been, or are in present danger of, being exposed to the AIDS virus.

7. *Hold Harmless*

Employers who make a good faith effort to comply with the law will be held harmless for liability arising from: AIDS related violations of any other federal or state act; failure to warn employees of potential exposure to AIDS; invasion of privacy and related actions arising from testing or disclosure; imputed liability or negligent hiring or retention to the extent it is based on the employee's status as an HIV carrier.

8. *Guaranteed Medical Benefits*

Employees with AIDS or an AIDS related condition will be guaranteed coverage under the employer's medical benefit plan.

9. *Employer Reimbursement*

Employers who accept the federal recommendation to establish a testing program will be reimbursed for all expenses related to testing and reporting and for excess medical benefit costs attributable to coverage of employees with AIDS.

10. *Administration and Enforcement*

The law will be administered by the Department of Health and Welfare. Nondiscrimination provisions will be enforced by the Civil Rights Division of the Justice Department.

B. *Discussion of Proposed Federal Legislation*

1. *Pre-emption*

The problem of AIDS is national, indeed global, in scope. By its nature it does not lend itself to local resolution. If we are to avoid paralyzing confusion, conflict, and inefficiency, we must, as a nation, walk to the beat of the same drummer on this issue. The type of broad pre-emption contained in ERISA is appropriate here.[219]

2. *Education*

There ought to be a minimum standard of AIDS information to which all employees are exposed. The proposed legisla-

219. "[T]he provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [section specified]. . . ." 29 U.S.C. § 1144(a) (1982).

tion would assure this. Employers wishing to exceed this standard may do so. There is nothing novel in the requirement that employers must educate their workforce on certain topics, and employers routinely sponsor various training courses in a wide variety of subjects.[220] Everyone must bear a share of the cost of

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220. *See, e.g.*, OSHA requires an employer to educate employees as to job hazards and provide training to avoid them. 29 C.F.R. § 1926.21(b)(2) (1989). *See generally* Marinelli, *Worker Protection and the Law of the Occupational Safety and Health Act*, 21 SUFFOLK U.L. REV. 1053 (1987). *See also* 42 U.S.C. § 9619 (Supp. 1987).

> (b) Proposed standards - The Secretary of Labor shall issue proposed regulations and such standards [hazardous waste operations] which shall include, but need not be limited to, the following worker protection provisions:
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> . . . .
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> (2) Training. Requirements for contractors to provide initial and routine training of workers before such workers are permitted to engage in hazardous waste operations which would expose them to toxic substances . . . .
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> . . . .
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> (7) Informational program. A program to inform workers engaged in hazardous waste operations of the nature and degree of toxic exposure likely as a result of such hazardous waste operations.
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> . . . .
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> (d) Specific training standards -
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> (1) Offsite instruction; field experience. Standards promulgated under subsection (a) shall include training standards requiring that general site workers (such as equipment operators, general laborers, and other supervised personnel) engaged in hazardous substance removal or other activities which expose or potentially expose such workers to hazardous substances receive a minimum of 40 hours of initial instruction off the site, and a minimum of three days of actual field experience under the direct supervision of a trained, experienced supervisor, at the time of assignment. The requirements of the preceding sentence shall not apply to any general site worker who has received the equivalent of such training. Workers who may be exposed to unique or special hazards shall be provided additional training.
>
> (2) Training of supervisors. Standards promulgated under subsection (a) shall include training standards requiring that onsite managers and supervisors directly responsible for the hazardous waste operations (such as foremen) receive the same training as general site workers set forth in paragraph (1) of this subsection and at least eight additional hours of specialized training on managing hazardous waste operations. The requirements of the preceding sentence shall not apply to any person who has received the equivalent of such training.
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> (3) Certification enforcement. Such training standards shall contain provisions for certifying that general site workers, onsite managers, and supervisors have received the specified training and shall prohibit any individual who has not received the specified training from engaging in hazardous waste operations covered by the standard. The certification procedures shall be no less comprehensive than those adopted by the Environmental Protection Agency in its Model Accreditation Plan for Asbestos Abatement Training as required under the Asbestos Hazard Emergency Response Act of 1986 [15 U.S.C. § 2641 (1988).]
>
> (4) Training of emergency response personnel. — Such training standards

combatting AIDS. Consequently reimbursement is recommended as an incentive to encourage testing. With respect to increased medical benefit cost, the lost time costs of education would be borne by employers.

3. *Testing*

While testing is an essential underpinning of a truly effective assault on AIDS (you can't fight what you can't find), it is an issue fraught with considerable emotion. We remember the Nazi dehumanization campaign and other episodes throughout history where society has sought to identify and separate out the "unclean."[221] For this reason testing is not government mandated under the proposed legislation, however, it is such an important tool that it is officially encouraged. Employers are given an incentive to test by the hold harmless and reimbursement provisions which would not be available to employers who elect not to test. In addition, individuals who fear the consequences of testing positive are given the reassurance of strong nondiscrimination provisions, plus the incentive of guaranteed medical coverage under the employer's plan.

These features may not entirely assuage the concerns of HIV carriers, but are designed to provide adequate protection and strike a fair balance between the rights and needs of the many and of the few.

The great concern over testing does not stem from invading the body to take a blood sample. Medical examinations routinely extract and test blood for a variety of diseases. The concern is being identified as someone who is unacceptable in society's eyes, one to be avoided, to be excluded, to be discriminated against. The invasion of privacy is not the testing, it is the identification of the HIV carrier and the consequent reaction of others.

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shall set forth requirements for the training of workers who are responsible for responding to hazardous emergency situations who may be exposed to toxic substances in carrying out their responsibilities.

29 U.S.C. § 655 (Supp. 1987).

221. Remnants of this purgative attitude may be found in judicial opinions justifying testing or quarantine on the perceived moral character of the person suspected of carrying a communicable disease. Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1276-78 (1986).

Absent countervailing considerations, the weight of the stigma of an HIV carrier would be dispositive. We could conclude that testing should be voluntary in all instances and move on. But there is society's need to protect itself from the spread of AIDS, and there is the right of those who may be exposed to protect themselves.

As we have seen, most states which have addressed this issue have opted to stress voluntariness of testing, denying the employer the right to conduct tests and in effect discouraging job related testing.[222] The proposed amendments stop short of mandating job related testing, but encourage it for the reasons stated. Since the most objectionable aspect of testing is the adverse effect of identification, it is important to closely regulate the use of the test results.

4. *Confidentiality*

An essential goal of the proposed legislation is to preserve the highest level of confidentiality compatible with the needs of society and the rights of others potentially at risk. Testing is on a non-selective basis and follow-up tests to confirm positive results of the initial test would be arranged in a manner which preserves anonymity. The testing process itself, as distinguished from test results, would not identify those who carry HIV.

The doctor conducting the tests would maintain the results in his office. The employee's personnel file would contain no reference to test results. Disclosure of the test results by the doctor would be restricted to: the individual tested and his attending physician, if any;[223] the CDC, on an anonymous basis, for pur-

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222. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 199.21(f) (West Supp. 1989) (HIV test results "shall not be used in any instance for the determination of insurability or suitability for employment." *Id.* § 199.22(a) (no test without written consent); N.Y. PUB. HEALTH LAW § 2781(1) (McKinney Supp. 1989) (no test without written consent); MONT. CODE ANN. § 39-2-304 (Supp. 1989) (employer cannot condition employment on taking blood or urine test).

223. In addition to disclosing the results, the physician would provide counseling and make the individual aware of treatment options and support organizations. This is similar to existing provisions in some state laws, which may serve as models. One example is N.Y. PUB. HEALTH LAW § 2781.5 (McKinney Supp. 1989).

> At the time of communicating the test result to the subject of the test, a person ordering the performance of an HIV related test shall provide the subject of the test or, if the subject lacks capacity to consent, the person authorized pursuant to

poses of general evaluation and tracking; the unit in the department of Health and Welfare responsible for contact tracing; the senior official of the employer at the location involved;[224] the employer's life and medical insurance carrier(s) anonymously for purposes of rate setting only, since coverage is guaranteed.

Total non-disclosure would provide the maximum attainable privacy for the HIV carrier, while total disclosure would permit the maximum attainable level of self-help protection by fellow employees. In an imperfect world, we reach for an equitable compromise.

5. *Non-discrimination*

The legislation would contain a clear statement that discrimination in hiring, promotion, and other terms and conditions of employment based on AIDS is prohibited.[225]

As we have seen, AIDS is already considered a handicap under the Federal Rehabilitation Act, but the spectre of a national epidemic of a fatal disease distinguishes AIDS from other conditions that constitute a handicap under the Rehabilitation Act.[226] We are asking AIDS carriers to cooperate in helping re-

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law to consent to health care for the subject with counseling or referrals for counseling: (a) for coping with the emotional consequences of learning the result; (b) regarding the discrimination problems that disclosure of the result could cause; (c) for behavior change to prevent transmission or contraction of HIV infection; (d) to inform such person of available medical treatments; and (e) regarding the test subject's need to notify his or her contacts.

Id.

224. Disclosure to the employer is necessary to enable the employer to install appropriate protective procedures and to conduct reasonable observation of the behavior of the person with AIDS to determine if there is any risk to others. The senior official will be prohibited from revealing the identity of the person with AIDS, with limited exceptions which will be reviewed in the discussion of contact tracing. *See infra* notes 228-31 and accompanying text.

225. The following is a suggested provision: It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions, of privileges of employment, because of such individual's infection with HIV, or the perception that such individual is or may be infected with HIV. The preceding provision is modeled after the Equal Employment Opportunity Act of 1972. 42 U.S.C. § 2000e-3(a) (1982). The legislation would provide that an employer's action does not constitute a violation if it is based on the protected individual's inability to perform the job with reasonable accommodation.

226. *See supra* notes 45-61 and accompanying text.

strict the spread of AIDS. A clear statement that no discrimination will be tolerated should provide some encouragement and reassurance to those who feel vulnerable.

All legal and equitable remedies would be available including punitive damages for willful violations.[227]

6. *Contact Tracing*

Under the proposed regulations the employer's doctor who conducts the tests is required to report positive results to the Department of Health and Welfare unit responsible for tracing contacts. Where a state has established a procedure for contact tracing, the federal unit will work with or through the state. Before communicating with contacts, the HIV carrier will be given an opportunity to explain why such communication is inappropriate as well as the option to notify the contact personally.

Normally, the contact will not be told the identity of the HIV carrier. Where the federal unit believes it is necessary to identify the HIV carrier, it must first obtain a court order permitting it.[228] At the time of notification, the contact will be counseled and advised as to treatment.[229] The employer is required to inform the doctor when he has reasonable grounds to believe a third party may be at risk of exposure.[230]

Employer as informer is an unsettling concept. It conjures up images of peeping through bedroom windows. Yet the situation justifies it. Casual contact in the workplace does not spread

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227. These proposed remedies would include injunctive relief, hiring, re-instatement, promotion, back and front pay and other remedies to restore the individual to the position he otherwise would have occupied. In appropriate cases punitive damages and attorney's fees could be awarded. Criminal sanctions would be reserved for deliberate and aggravated violations. Since an overriding concern is a uniform and consistent response to the AIDS problem, enforcement would reside in the government rather than the individual who has been discriminated against.

228. This is patterned after New York Public Health Law: "A court may grant an order for disclosure of confidential HIV related information upon an application showing . . . (b) a clear and imminent danger to an individual whose life or health may unknowingly be at significant risk as a result of contact with the individual to whom the information pertains. . . ." N.Y. PUB. HEALTH LAW § 2785(2) (McKinney Supp. 1989).

229. *See generally supra* notes 207-08.

230. If there is no physician treating the person with AIDS, the employer will communicate directly with the government office established for this purpose.

AIDS, but sexual contact does. An employer who has reason to believe an employee with AIDS may be engaging in sex with a fellow employee has an obligation to convey a warning. There is a line where one human being's right of privacy meets another human being's right to live.[231]

7. *Hold Harmless*

It is submitted that if an employer acts reasonably and in conformity with the law, in addition to sleeping better at night, it is entitled to be free of certain legal liabilities. Consequently, an employer who undertakes testing, educates the workforce, installs sound protective procedures and equipment, and does what it can to warn employees and other third parties of potential exposure without discrimination against HIV carriers, should be held harmless from liability arising directly or indirectly from having HIV carriers in its employ. This exemption from liability should include claims under the labor agreement, the NLRA, OSHA, and state legislation, as well as tort actions based on invasion of privacy, imputed negligence, negligent hiring or retention, and similar theories.[232] This element of the proposed legislation also provides a powerful incentive to employers to embrace rather than to avoid the burdens otherwise imposed on them.

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231. Probably the most publicized instance of endangerment of a third party by a failure to inform is the Rock Hudson case. A jury awarded the actor's lover $14.5 million, characterizing Mr. Hudson's concealment of his AIDS as "outrageous." *Rock Hudson's Lover Wins Suit*, N.Y. Times, Feb. 6, 1989, at A22, col. 5. The jury also ruled that Mr. Hudson's secretary was liable for conspiring to keep the actor's disease secret. The award was subsequently reduced to $5.5 million. *Jury Award Is Sharply Cut in Hudson's AIDS Suit*, N.Y. Times, Apr. 22, 1989, at 7, col. 4.

As we have noted previously, the stakes are too high and the likelihood of success too remote to rely upon the integrity of those with AIDS to protect third parties. *See Few Would Warn Partners, supra* note 208. *See also* Goleman, *Lies Men Tell Put Women in Danger of AIDS*, N.Y. Times, Aug. 14, 1988, at 29, col. 1 (reporting study which revealed that "the desire to make a good impression on a potential sexual partner leads so many men to lie about their sexual past and drug use that it is virtually pointless for women who are dating them to ask . . . ."). We may debate the legal obligations to throw a drowning person a rope, but the moral obligation seems clear.

232. It is submitted that Workers Compensation laws should continue to apply since they "were intended and enacted as social or remedial legislation, being grounded in social and economic considerations . . . ." 99 C.J.S. *Workmen's Compensation* § 5 (1958).

C. *Guaranteed Medical Benefits*

A substantial number of employers provide medical benefits to their employees.[233] AIDS may or may not be covered under these plans. The proposed amendments would mandate coverage under the employer's plan and would guarantee that HIV carriers would be entitled to coverage if otherwise qualified. This could result in a sizable increase in cost to the employer which would be recoverable under the reimbursement mechanism.[234]

Where the employer does not maintain medical benefits for employees, it may be appropriate to establish a separate fund to provide coverage. This is a broader issue worthy of consideration in the context of government sponsored national health care, but is beyond the reach of this Article.

D. *Reimbursement*

No one segment of society should pay a disproportionate share of the cost of meeting the AIDS threat. The cost of testing for AIDS is between one and eight dollars per initial test. The Western Blot Test used to confirm the results of the ELISA Test[235] costs between thirty and seventy dollars.[236]

The cost of extending medical benefits to include AIDS

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233. *See* Lord, *supra* note 96, at 17 (employers pay for 85% of insured health care).

234. *Id.* (estimated cumulative cost of $14 billion by the end of 1991). One might argue that those with AIDS should not receive more favored treatment than others with similarly terrible afflictions. *See, e.g., AIDS Outlay Nears That on Other Fatal Ailments*, N.Y. Times, June 15, 1989, at B13, col. 1 (experts say current AIDS spending is adequate relative to that for heart disease and cancer). However, viewed as an extraordinary measure to encourage cooperation in fighting a potentially devastating national epidemic and as a form of equitable compensation for the possible loss of privacy for those who cooperate, it does not appear unwarranted. *See AIDS Treatment Costs Put at $5 Billion a Year*, N.Y. Times, Sept. 15, 1989, at A18, col. 3 (reporting that the cost of finding and treating hundreds of thousands of people infected with HIV, but not yet ill, could reach $5 billion or more a year).

235. The ELISA Test is a test in which a blood sample is added to wells containing bits of killed AIDS virus. The Western Blot Test is a more specific antibody test. Blakeslee, *Pressure for Wider AIDS Testing Fuels Search for Better Methods*, N.Y. Times, June 9, 1987, at c14, col. 1.

236. The cost of the test can vary, as little as one dollar for the ELISA test and $30-70 for the Western Blot test. *See id.*; Blaine, *supra* note 15 at 2 ("The 2-ELISA, Western Blot series of tests is now offered by one major testing laboratory . . . at a cost of some $8.50"). *Id.*; *The Spread of Testing*, Barrons', Mar. 13, 1989, at 26, col. 3. (Baxter International is marketing a five minute "fast" test at a cost of $12).

where it is not already covered could be substantial. These costs would be spread over the economy as a whole through tax rebates established under a formula to be determined. Reimbursement would be contingent upon: the employer's adoption of testing of all applicants and inclusion of AIDS testing in all routine employee medical examinations; and compliance with all provisions of the proposed amendments.

E. *Administration and Enforcement*

Underlying the proposed amendments is the premise that the AIDS threat is primarily a public health issue. Accordingly, the Department of Health and Welfare is given the task of administering the amendments. A separate division would be established within the department for this purpose. To ensure a consistent and unified governmental approach, AIDS would be expressly removed from coverage as a handicap under the FRA. The Civil Rights Division of the Justice Department would be responsible for bringing enforcement proceedings on behalf of the government and individuals.

V. Conclusion

The incidence of AIDS has not stabilized, but continues to increase and spread to new populations.[237] In addition to the gay community, drug addicts, their sexual partners, their babies, and hemophiliacs, AIDS has also increased among college students[238] and teenagers.[239] The truth is that we do not really know how

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237. *See A Tenfold Rise In AIDS Is Seen*, N.Y. Times, May 19, 1989, at D16, col. 3. (The World Health Organization projects that the number of AIDS cases worldwide will increase to five million by the year 2,000, up from 450,000 today). *Id.*

238. *Campus AIDS Survey Finds Threat Is Real But Not Yet Rampant*, N.Y. Times, May 23, 1989, at C12, col. 3. The first national survey of HIV infection among college students indicates that 25,000 students may already be infected. While the percentage infected is in line with other 'non-high risk' groups surveyed to date, the results confirm that "HIV infection is an actual, active problem in the colleges and universities of America," according to Dr. R.P. Keeling, President of the American College Health Association which conducted the survey. *Id.*

239. *See* Kolata, *AIDS Is Spreading In Teenagers, A New Trend Alarming To Experts*, N.Y. Times, Oct. 8, 1989, at 1, col. 1. New studies indicate that the infection rate in some teenage groups "is far higher than that for adults." *Id.* The number of cases among teen-agers has increased by 40% in the past two years. The article notes "[n]ot only are teenagers becoming infected with the virus, but it is also being transmitted

widespread AIDS is or will become, but our latest information confirms that AIDS remains a major threat to our society.

After a prolonged period of fumbling about, the federal government has mounted a credible response to AIDS, as have most states. However, these responses overlap and conflict in some respects and fail to use all the weapons available to control and ultimately defeat the disease.

One weapon which remains underutilized is the workplace itself, which has been viewed in the context of a defensive rather than offensive strategy. Current legislation does not seek to enlist the workplace as a positive force for attacking AIDS, as much as it attempts to minimize the adverse effect of AIDS in the workplace.

Legislation along the lines suggested in this Article contemplates a much more active role for the workplace *qua* workplace: to track the spread of AIDS more accurately; to identify those infected with HIV, increasing their chances of benefiting from the new, life-prolonging medications; to facilitate contact tracing, enabling those at risk to protect themselves, to obtain treatment, and to avoid transmitting the disease; to educate a large, representative segment of our society, reducing discriminatory attitudes based on misconceptions, while encouraging preventive measures. The proposed legislation is not *the* answer to the AIDS problem, but it can be a significant component in a multifaceted approach, which will ultimately result in bringing AIDS under control, and as such is worthy of consideration.

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primarily through heterosexual intercourse, and equal numbers of boys and girls are infected." *Id.* Dr. G. R. Strokash, Director of Adolescent Medicine, Rush Presbyterian St. Lukes Medical Center in Chicago, commenting on the extent of AIDS infection among teenagers, said "It's dreadful and it's going to be devastating." *Id.*