



Law Project of Pennsylvania
a non-profit, public interest law firm

Returning to Work

A Helpful Guide

December 2002

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AIDS Law Project of Pennsylvania

Founded in 1988, the **AIDS Law Project of Pennsylvania** is a non-profit, public interest law firm providing free legal services statewide to people with HIV/AIDS and others affected by the epidemic. Each year, the AIDS Law Project receives about 1,700 calls for assistance at its home office in Philadelphia. The AIDS Law Project also educates the public about AIDS-related legal issues, and works at local, state and national levels to achieve fair laws.

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This handbook does not give you specific legal advice. It is not meant to take the place of help from a lawyer.

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Introduction

New medications are helping many people with AIDS feel well enough to go back to work. Newspapers are full of stories about people with AIDS returning to the workforce. However, no one should feel pressured to go back to work until they are ready.

The first step in deciding to return to work is to meet with your doctor to determine if you are physically able to return to work. If you and your doctor decide you are able to work, this guide will tell you what to expect when re-entering the workforce and how to gauge the effect a return to work will have on your Social Security benefits.

**To reach the AIDS Law Project,
call (215) 587-9377.
Intake hours are from 9AM to 1PM.**

8. *ADA Title I, Section 12112(d)(2)(A), ADA Title I EEOC Interpretive Guidance Section 1630.13(a).*
9. *ADA Title I, EEOC Interpretive Guidance Section 1630.14(b). See also A.13.*
10. *ADA Title I, Section 12111(3).*
11. *ADA Title I, Section 12111(9).*
12. *ADA Title I, Section 12112(b)(5)(A).*
13. *ADA Title I, Section 12112(b)(5)(A), ADA Title I EEOC Interpretive Guidance Section 1630.9.*
14. *ADA Title I, Section 12112(d)(3)(B).*
15. *ADA Title I, EEOC Technical Assistance Manual.*
16. *Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. 1320.*
17. *Social Security Act, 42 U.S.C. Section 1619.*
18. *Social Security Act, 42 U.S.C., Section 1619(a).*
19. *Social Security Act, 42 U.S.C., Section 1619(b).*

Source Material

For more information on Social Security Disability Benefits, please read the Red Book on Employment Support, at <http://www.ssa.gov/work/ResourcesToolkit/redbook99.html> or the *Social Security Act*, 42 U.S.C. Section 423.

1. *Americans with Disabilities Act*, 42 U.S.C. Title I, Section 12111(5)(A).
2. *ADA Title I*, Section 12112(b)(5)(A).
3. Pennsylvania Human Relations Act, 42 P.S. Sections 951-963.
4. Philadelphia Commission on Human Relations, Section 9-1102.
5. 42 U.S.C. 1395dd.
6. 29 U.S.C. 2601.
7. *ADA Title I*, Section 12112(d)(2)(A), *ADA Title I EEOC Interpretive Guidance* Section 630.12(a).

Where should I work?

Q.1: What are my rights in the workplace?

While disability-based discrimination in the workplace is illegal, the size of the company you work for will determine which anti-discrimination laws protect you. Each law carries different penalties.

Companies with 15 or more employees must comply with the **Americans with Disabilities Act** of 1990 (ADA). The ADA is a federal law that protects individuals with disabilities from being treated differently from non-disabled people.¹ The ADA requires that employers provide a “reasonable accommodation,” or a change in the way the job is done so the disabled employee can perform the essential functions of the job.² Most people with HIV and AIDS would be protected under the ADA.

Companies with four or more employees must comply with the **Pennsylvania Human Relations Act**, a state law that prohibits discrimination against people with disabilities.³

Companies in Philadelphia with one or more employees must comply with the **Philadelphia Commission on Human Relations**’ anti-discrimination policy, which prohibits discrimination against people with disabilities.⁴

Q.2: What else should I consider when looking for a job?

Other issues to consider when choosing a potential employer is your ability to continue employer-provided health insurance should you have to leave the job. Companies with 20 or more employees must comply with the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). **COBRA** is a federal law that allows an employee to purchase continued group health insurance (for a limited period of time) after the employee leaves his job.⁵

The **Family and Medical Leave Act (FMLA)** requires companies with 50 or more employees to grant an employee who becomes sick, after working at least one year for the company, up to 12 weeks of unpaid leave time. The employee's job is secure and his benefits continue during the unpaid leave.⁶

The larger the company, the more likely it is to offer group insurance benefits without requiring an employee to provide information about his health status.

Conclusion

The AIDS Law Project of Pennsylvania is here for you every step of the way. We can help you read your policies; prepare for an interview; request a reasonable accommodation; disclose your HIV status to an employer; and calculate the effect work will have on your Social Security benefits.

**Call us at:
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Best of luck in your return to work.**

Medicare

SSDI recipients are eligible for **Medicare** 24 months after first becoming eligible for benefits. Medicare has two parts: hospital insurance for hospital stays and care (Medicare A) and medical insurance for doctor visits and other care (Medicare B).

Q.22: Will I lose my Medicare benefits if I return to work?

You will be entitled to Medicare for up to eight and a half years after your nine-month trial work period ends, even if you are earning above SGA.

Preparing for the Interview

Q.3: Do I have to tell an employer that I have HIV or AIDS in a job interview or on an application?

No. An employer cannot ask about your disability during an initial interview.⁷

However an employer may require a physical, exam which can include an HIV test, after a “**conditional job offer**” has been made.⁸ In other words, the employer may offer you a job, conditioned on you passing a medical examination to prove that you are physically able to perform the tasks required by the job. If your HIV diagnosis does not prevent you from performing the requirements of the job, you cannot be lawfully denied the job because of your HIV status.

An employer can only lawfully require you to take a physical exam if the physical exam is required of every other comparable job applicant at the company. Additionally, current employees may only be asked to take a job-related medical examination, i.e. a truck driver may be required to take a vision test each year, but not an HIV test. Examination results are confidential medical records and may not be shared within the company or be used to evaluate your job performance.⁹

Q.4: How do I explain gaps in my resume without revealing my HIV status?

While it is not required that you reveal your HIV status, it is important to be accurate in your answers to questions asked during an interview. Untruthful information in an interview may be grounds for termination if discovered later. We encourage you to prepare your resume with assistance from career counselors such as those at the Philadelphia Free Library or other job readiness programs to help position yourself competitively in the job market.

Q.5: What if an employer asks me questions that might reveal my HIV or AIDS status?

While an employer cannot legally ask about your disability, they may ask you anyway. Do not feel pressured to answer but be prepared to respond in a way that shows that you are qualified and capable of performing the main job duties and that you are interested in the job.

Q.21: What if I earn more than the Break-Even Point?

If you earn more than the Break-Even Point, you may still be eligible for MA as long as

- your earnings are less than approximately \$20,000 per year;
- you need MA in order to work (i.e. you still need the medications that made you feel well enough to return to work in the first place);
- you are disabled;
- you have resources less than \$2,000.¹⁹

MAWD is also available for clients whose health has improved to the point that they are no longer medically disabled must work a minimum of 40 hours per month at minimum wage in order to qualify.

The MAWD applicant can be downloaded from the DPW website:

www.dpw.state.pa.us/oim/pdf/PA%20600WD-single%20sheets.pdf

Clients can also apply through DPW's interactive COMPASS online form:

www.humanservices.state.pa.us/COMPASS/PGM/ASP/SC001.asp

Q.20: Will I lose MA if I return to work?

You can still receive MA even if your earnings and other income become too high for you to receive an SSI cash payment. If the reduction of your countable income makes your SSI check “zero” (referred to as the break-even point), you are still eligible for MA as long as you are still disabled and you have resources less than \$2,000 (resources are your bank account and other things of value, excluding the house you live in and the car you drive).¹⁸

Q.6: Can an employer treat me differently if he thinks my HIV is a threat to the safety of others?

An employer is only allowed to deny you a job or terminate you because of your HIV status if he can show that your HIV or AIDS status poses a “**direct threat**” at the job. A direct threat means that you pose a “significant risk of substantial harm to the health or safety of others that cannot be eliminated or reduced by reasonable accommodations.”¹⁰ Job denial or termination because of “direct threat” most commonly happens in health care jobs.

What to Expect on the Job

Q.7: If hired, should I tell my employer that I have HIV or AIDS?

Consider what it is you want to accomplish by telling your employer about your HIV status. Many times people with AIDS experience an unexpected negative response from their employers when they reveal their HIV status. If you are looking for support, the workplace may not be the best place to look for that. We recommend, instead, support groups, AIDS service organizations, family and friends.

We recommend that you only tell your employer about your HIV status if there is a specific result you are looking for, such as a reasonable accommodation.

Q.8: What is a reasonable accommodation?

A reasonable accommodation is a change an employer makes in how the job is done that allows you to perform the essential functions of your job, such as working from a seated position rather than standing, changing your hours or maybe even working from home.¹¹ Under the ADA, an employer is required to provide a reasonable accommodation unless they can show it is an undo hardship—defined as a “significant

Medicaid

Medical Assistance (MA), also called Medicaid, is a federal health insurance program for low-income individuals. Children, the aged, blind, and/or disabled and other people eligible to receive federally-funded income maintenance programs are eligible for MA.

Q.19: What is the Medical Assistance for Workers with Disabilities (MAWD) program?

Disabled people who work may be eligible for **Medical Assistance for Workers with Disabilities (MAWD)** which provides Medical Assistance, including dental and prescription coverage. To qualify for MAWD, individuals must be: between 16 and 24 years old; working, have a countable income less than 250% of the Federal Poverty Income Guideline (\$1871/month for 2003); with resources less than \$10,000. There are no minimums for income or hours worked. Disabled workers self-employed are eligible. Recipients must pay a monthly premium of 5% of their countable wage.

lose your job because of your disability, you may request an **Expedited Reinstatement of Benefits** (explained above). If more than five years have passed since you got an SSI check or MA and you become disabled again, you may need to reapply for benefits. Keep in mind that the work you were performing may have made you eligible for SSDI instead of SSI. If you are reapplying and are unsure of SSDI eligibility, you should apply for both benefits.

If you were receiving SSDI and are no longer receiving benefits because you are not income eligible (either earning too much or you got to the end of your 36-month EPE and were earning more than SGA), you may be entitled to **Expedited Reinstatement of Benefits**. If, however, more than five years have passed since you were on the SSDI rolls, you will need to reapply for benefits.

difficulty or expense,” taking into account the size and nature of the employer’s business, as well as the cost of the accommodation on the employer.¹²

Unfortunately, the accommodation does not have to be the best accommodation or even one that you requested. The employer is only required to make a “good faith effort” to provide a reasonable accommodation.¹³

If you feel that you need a reasonable accommodation to perform the essential duties of your job, you may want to have an attorney help you write a letter to your employer’s personnel or human resources department. An attorney can help you state only what is necessary for your employer to know. We often advise disclosing symptoms without disclosing the underlying cause of the symptoms—HIV/AIDS.

Q.9: If I decide to tell my employer about my HIV status, how should I do it?

If you want to talk to your employer about your HIV status, we suggest you request a meeting. You

may want to start by just revealing the symptoms, rather than the diagnosis. However, be prepared that when you sit down to talk with your employer about your symptoms, you may need to disclose your diagnosis.

Disclosing your HIV status to your boss can make you a vulnerable employee. As a vulnerable employee you want to be conscious of being a good employee—coming to work on time and not leaving early. You also want to be mindful if you perceive that you are being treated differently after revealing your status.

Q.10: Will my fellow employees then find out about my HIV status?

You should remind your employer of his/her obligation to keep this information confidential. You do not have to discuss your HIV or AIDS status with your fellow employees. The ADA requires that employers keep employee medical records separate from personnel records in order to protect one's privacy. Access to your medical records is restricted to only those who have the need to know about them and an employer must keep your medical records confidential even after you stop working there.¹⁴

more than \$800 a month (SSA calls this amount **Substantial Gainful Activity, or SGA**), you will not get your SSDI check. If you earn less than SGA, you will get your check.

There is one exception, however: The very first time you make SGA (\$800) or more a month while in the EPE, you will still get your check for that month and for the next two months. This is considered a grace period. After that, every time you earn more than SGA you will not get a check.

After the 36-month EPE has passed, the first time you earn SGA you will be removed from the SSDI rolls and will not get SSDI checks anymore. If you become disabled again within five years of being taken off the SSDI rolls, you can get an **Expedited Reinstatement of Benefits** and begin the above process all over again—starting with the trial work months.

Q.18: What if I lose my job or I have to quit because of my disability?

If you are receiving SSI, you must inform the Social Security Administration (SSA) of an income change and they will adjust your check accordingly. If, however, you have not received an SSI check or MA for one year because of excess income and then you

Q.16: What if I want to start my own business?

Workers receiving SSI may submit a **Plan for Achieving Self-Support (PASS)** describing a strategy for achieving self-sufficiency. Such a plan can address education, vocational training or starting a business. If the plan is approved by SSA, you can set aside some income each month for expenses related to that plan without affecting SSI eligibility.

Q.17: What will happen to my SSDI benefits if I return to work?

The SSA work incentive rules allow you to work for 9 months before your earnings affect your SSDI check. Thereafter, the amount you make will determine whether you get a check or not. Unlike SSI, your SSDI check is not reduced by a certain amount. You either get a full check or no check.

If you receive SSDI, any month you earn \$570 or more is called a "trial work" month. There is no affect on your benefits during the first nine trial work months with a rolling 60-month period. Nine trial work months is called a **Trial Work Period**. After completing the trial work period, you automatically begin a 36-month **Extended Period of Eligibility (EPE)**. You may see an effect on your benefits during the EPE: If you earn

Q.11: What should I do if I think that my employer has discriminated against me because of my HIV or AIDS status?

You must first file a complaint with the **Equal Employment Opportunity Commission (EEOC)** within 300 days of the date of the discrimination.¹⁵ Charges may be filed in person, by mail or by telephone by contacting the nearest EEOC office. For information on the nearest EEOC office in Pennsylvania, call 1-800-669-4000.

You may also file a complaint with the Pennsylvania Human Relations Commission. Contact the Pennsylvania Human Relations Commission at 412-565-5395 or the Office of Civil Rights, Department of Health, Education & Welfare at 215-596-6772.

You should also contact the AIDS Law Project for help as soon as you believe that you are being discriminated against.

Health Insurance and Long Term Disability Insurance

Q.12: If I return to work, will I be covered under the employer's health insurance?

Generally yes, although policies vary and there may be a waiting period before coverage begins. According to the ADA, a company with 15 or more employees that provides health insurance may not exclude employees with disabilities from health insurance coverage. Health insurance policies, however, may limit coverage for a "pre-existing condition" (an illness or condition, such as HIV, that you had before you took the job) for up to 12 months while providing coverage for everything else. This is called a "**pre-existing condition exclusion.**" For example, a new policy might not cover your HIV medications for up to 12 months but it will cover treatment for a newly broken leg.

You may be able to eliminate or reduce the length of the pre-existing condition exclusion if you were covered by group health insurance within the last 63 days. This previous period of health insurance coverage would be credited toward your current pre-existing condition exclusion. This is called "**creditable coverage.**"¹⁶

SSI CALCULATION SHEET	
STEP	CALCULATIONS
Unearned Income	
General Income Exclusion (GIE)	-
Countable Unearned Income	=
Gross Earned Income	
Student Earned Income Exclusion	-
Remainder	
GIE (if not used above)	-
Remainder	
Earned Income Exclusion (EIE)	-
Remainder	
Impairment Related Work Experience (IRWE)	-
Remainder	
Divide by 2	
Blind Work Expenses (BWE)	-
Total Countable Earned Income	=
Total Countable Unearned Income	
Total Countable Earned Income	+
PASS Deduction	-
Total Countable Income	=
Base SSI Rate	
Total Countable Income	-
Adjusted SSI Payment	=

- Subtract \$65 from your earned income total. This is your “earned income exclusion.”
- Subtract “Impairment Related Work Expenses” from your earned income. These are expenses that are directly related to your impairment and necessary for you to work (i.e. impairment-related transportation/mileage costs for getting to work, costs of visits to the doctor’s office to obtain regularly prescribed medical treatment that attempts to control the disability, and the costs of the medication itself).
- Divide this number in half.
- Subtract “Blind Work Expenses.” Workers who receive SSI and whose primary diagnosis is blindness can exclude from their income any ordinary and necessary expenses attributable to earning your income.
- Add your “unearned countable income” from above.
- Subtract any deductions from your Plan for Achieving Self-Support (PASS). See next question for more details.
- The total is your “countable income.” This is the amount your SSI check will be reduced.

Q.13: How do I continue my health insurance if I lose my job?

COBRA, a federal law that applies to companies with 20 or more employees, entitles you to purchase continued insurance coverage for 18 months, unless you were fired for gross misconduct. If you were disabled at the time you left your job or within 60 days thereafter, and if timely notice is given to the insurance plan administrator, COBRA can be extended for an additional 11 months for a total of 29 months. You must complete the paperwork and submit premium payments on time to continue the COBRA coverage.

Q.14: Will I lose my Long Term Disability benefits if I return to work?

It depends on how your private long-term disability insurer defines “disability.” Read your policy carefully.

How Will a Return to Work Affect My Public Benefits?

Social Security Disability Benefits

Supplemental Security Insurance (SSI) provides cash assistance and Medical Assistance (MA), also called Medicaid, to people who are low-income and disabled. This is the check you get on the first day of the month. **Social Security Disability Insurance (SSDI)** provides cash assistance and Medicare to people who are disabled and have worked and paid taxes for a required amount of time. This is the check you get on the third day of the month. You may qualify for both SSI and SSDI.

The Social Security Administration (SSA) has a set of special rules called “**work incentives**” that provide financial security to people with disabilities who want to try to go back to work. These rules were developed with the idea that people should be given the opportunity to try to go back to work without penalizing them if they are unable to do so. These rules are flexible, which is very important for people with AIDS, whose health may fluctuate between periods of sickness and health. These rules **ONLY** apply after an individual has received at least one Social Security check. The rules for SSI are different from SSDI. If you are thinking about going back to work, it is important to seek legal advice to find out how your benefits will be affected. The following questions provide information on how returning to work may affect your SSI and SSDI benefits.

Q.15: What will happen to my SSI benefits if I return to work?

SSI is a needs-based program. The amount of your benefits is affected by your income. As your income goes up, your SSI benefits decrease, but it is not a dollar-for-dollar reduction.¹⁷ Instead, your SSI is reduced each month by your “**countable income.**” Below is a formula for calculating your monthly income:

- First, count up your “unearned income” (i.e. disability benefits and veterans benefits; workers’ compensation; annuities, pensions and retirement payments; alimony or support payments).
- Subtract \$20 (“general income exclusion”) from your total unearned income. Set that number aside. This is your “unearned countable income.”
- Next, count your earned income (i.e. wages, salaries and tips). If you haven’t already subtracted the \$20 exclusion, subtract it now.
- Subtract “Student Earned Income Exclusion” if applicable. Working people who regularly attend school and are not married or considered a head-of-household (non-married individuals living alone are not considered head-of-household) can exclude up to \$1,320 of earned income per month (up to \$5,340 per year).