



HIV and AIDS Awareness

Handout I

HIV and AIDS Code of Good Practice

The Code of Good Practice on HIV and AIDS in the Workplace Protects Employee Rights

The Human Immunodeficiency Virus (HIV) and the Acquired Immune Deficiency Syndrome (AIDS) are serious public health problems which have socio economic, employment and human rights implications.

Promoting A Non-Discriminatory Work Environment

No person with HIV or AIDS shall be unfairly discriminated against within the employment relationship or within any employment policies or practices, including with regard to:

1. Recruitment procedures, advertising and selection criteria;
2. Appointments and the appointment process, including job placement;
3. Job classification or grading;
4. Remuneration, employment benefits and terms and conditions of employment;
5. Employee assistance programmes;
6. Job assignments;
7. The workplace and facilities;
8. Occupational health and safety;
9. Training and development;
10. Performance evaluation systems;
11. Promotion, transfer and demotion;
12. Disciplinary measures short of dismissal; and
13. Termination of services.

To promote a non-discriminatory work environment based on the principle of equality, employers and trade unions should adopt appropriate measures to ensure that employees with HIV and AIDS are not unfairly discriminated against and are protected from victimisation through positive measures such as:

1. Preventing unfair discrimination and stigmatisation of people living with HIV or AIDS through the development of HIV/AIDS policies and programmes for the workplace;
2. Awareness, education and training on the rights of all persons with regard to HIV and AIDS;
3. Mechanisms to promote acceptance and openness around HIV/AIDS in the workplace;

4. Providing support for all employees infected or affected by HIV and AIDS; and
5. Grievance procedures and disciplinary measures to deal with HIV related complaints in the workplace.

HIV Testing, Confidentiality and Disclosure

HIV Testing

No employer may require an employee, or an applicant for employment, to undertake an HIV test in order to ascertain that employee's HIV status. As provided for in the Employment Equity Act, employers may approach the Labour Court to obtain authorisation for testing.

Whether 7(2) of the Employment Equity Act prevents an employer-provided health service supplying a test to an employee who requests a test, depends on whether the Labour Courts would accept that an employee can knowingly agree to waive the protection in the section. This issue has not yet been decided by the courts.

It is recommended that parties take note of the position set out in below:

1. Authorised testing:

Employers must approach the Labour Court for authorisation in, amongst others, the following circumstances:

- a. during an application for employ;
- b. as a condition of employment;
- c. during procedures related to termination of employment;
- d. as an eligibility requirement for training or staff development programmes; and
- e. as an access requirement to obtain employee benefits.

2. Permissible testing:

a. An employer may provide testing to an employee who has requested a test in the following circumstances:

- (i) As part of a health care service provided in the workplace;
- (ii) In the event of an occupational accident carrying a risk of exposure to blood or other body fluids;
- (iii) For the purposes of applying for compensation following an occupational accident involving a risk of exposure to blood or other body fluids.

b. Furthermore, such testing may only take place within the following defined conditions:

- (i) At the initiative of an employee;
- (ii) Within a health care worker and employee-patient relationship;
- (iii) With informed consent and pre- and post- test counselling, as defined by the Department of Health's National Policy on Testing for HIV; and
- (iv) With strict procedures relating to confidentiality of an employee's HIV status.

All testing, including both authorised and permissible testing, should be conducted in accordance with the Department of Health's National Policy on Testing for HIV issued in terms of the National Policy for Health Act, No. 116 of 1990.

Informed consent means that the individual has been provided with information, understands it and based on this has agreed to undertake the HIV test. It implies that the individual understands what the test is, why it is necessary, the benefits, risks, alternatives and any possible social implications of the outcome.

Anonymous, unlinked surveillance or epidemiological HIV testing in the workplace may occur provided it is undertaken in accordance with ethical and legal principles regarding such research. Where such research is done, the information obtained may not be used to unfairly discriminate against individuals or groups of persons. Testing will not be considered anonymous if there is a reasonable possibility that a person's HIV status can be deduced from the results.

Confidentiality and Disclosure

All persons with HIV or AIDS **HAVE THE LEGAL RIGHT TO PRIVACY**. An employee is therefore not legally required to disclose his or her HIV status to their employer or to other employees.

Where an employee chooses to voluntarily disclose his or her HIV status to the employer or to other employees, this information may not be disclosed to others without the employee's express written consent. Where written consent is not possible, steps must be taken to confirm that the employee wishes to disclose his or her status.

Mechanisms should be created to encourage openness, acceptance and support for those employers and employees who voluntarily disclose their HIV status within the workplace, including:

1. Encouraging persons openly living with HIV or AIDS to conduct or participate in education, prevention and awareness programmes;
2. Encouraging the development of support groups for employees living with HIV or AIDS; and
3. Ensuring that persons who are open about their HIV or AIDS status are not unfairly discriminated against or stigmatised.

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Promoting A Safe Workplace

An employer is obliged to provide and maintain, as far as is reasonably practicable, a workplace that is safe and without risk to the health of its employees.

The risk of HIV transmission in the workplace is minimal. However occupational accidents involving bodily fluids may occur, particularly in the health care professions. Every workplace should ensure that it complies with the provisions of the Occupational Health and Safety Act, including the Regulations on Hazardous Biological Agents, and the Mine Health and Safety Act, and that its policy deals with, amongst others:

1. The risk, if any, of occupational transmission within the particular workplace;
2. Appropriate training, awareness, education on the use of universal infection control measures so as to identify, deal with and reduce the risk of HIV transmission in the workplace;
3. Providing appropriate equipment and materials to protect employees from the risk of exposure to HIV;
4. The steps that must be taken following an occupational accident including the appropriate management of occupational exposure to HIV and other blood borne pathogens, including access to post exposure prophylaxis;
5. The procedures to be followed in applying for compensation for occupational infection;
6. The reporting of all occupational accidents; and
7. Adequate monitoring of occupational exposure to HIV to ensure that the requirements of possible compensation claims are being met.

Compensation for Occupationally Acquired HIV

An employee may be compensated if he or she becomes infected with HIV as a result of an occupational accident, in terms of the Compensation for Occupational Injuries and Diseases Act.

Employers should take reasonable steps to assist employees with the application for benefits including:

1. Providing information to affected employees on the procedures that will need to be followed in order to qualify for a compensation claim; and
2. Assisting with the collection of information which will assist with proving that the employees were occupationally exposed to HIV infected blood.

Occupational exposure should be dealt with in terms of the Compensation for Occupational Injuries and Diseases Act. Employers should ensure that they comply with the provisions of the Act and any procedure or guideline issued in terms thereof.

Employee Benefits

Employees with HIV or AIDS may not be unfairly discriminated against in the allocation of employee benefits.

Employees who become ill with AIDS should be treated like any other employee with a comparable life-threatening illness with regard to access to employee benefits.

Information from benefit schemes on the medical status of an employee should be kept confidential and should not be used to unfairly discriminate.

Where an employer offers a medical scheme as part of the employee benefit package it must ensure that this scheme does not unfairly discriminate, directly or indirectly, against any person on the basis of his or her HIV status.

Dismissal

Employees with HIV/AIDS may not be dismissed solely on the basis of their HIV/AIDS status.

Where an employee has become too ill to perform their current work, an employer is obliged to follow accepted guidelines regarding dismissal for incapacity before terminating an employee's services, as set out in the Code of Good Practice on Dismissal contained in Schedule 8 of the Labour Relations Act.

The employer should ensure that as far as possible, the employee's right to confidentiality regarding his or her HIV status is maintained during any incapacity proceedings. An employee cannot be compelled to undergo an HIV test or to disclose his or her HIV status as part of such proceedings unless the Labour Court authorised such a test.

Grievance Procedures

Employers should ensure that the rights of employees with regard to HIV/AIDS, and the remedies available to them in the event of a breach of such rights, become integrated into existing grievance procedures.

Employers should create an awareness and understanding of the grievance procedures and how employees can utilise them.

Employers should develop special measures to ensure the confidentiality of the complainant during such proceedings, including ensuring that such proceedings are held in private.