

son who has received a job offer to be tested for HIV; however, unless the person is unable to perform the essential functions of the job or poses a direct threat to his or her safety or to the safety of others in the workplace, that person may not be fired on the basis of a positive HIV test.

To the extent that employers and providers of housing, public accommodations and services are not covered by federal law, state law will determine what constitutes unfair discrimination. North Carolina law prohibits discrimination against individuals infected with HIV in the areas of housing, public services, use of places of public accommodations, or continued employment. Currently, the North Carolina Communicable Diseases Act does not prohibit employment discrimination against job applicants infected with HIV. Although denial of employment may be based on a positive HIV test, it should be noted that informed consent is required for testing, and that an individual has the right to refuse to be tested. As noted, pre-employment HIV screening is restricted by the ADA, which supersedes any lower or conflicting state laws or standards.

Protection against the spread of HIV in the workplace has been addressed by the Occupational Safety and Health Administration (OSHA), which has issued final rules regarding occupational exposure to HIV. OSHA's rules are intended to protect employees who are likely to come in contact with blood and body fluids at work. Under these rules, employers must identify those job-related duties that may result in an occupational exposure and develop written infection control procedures, protective occupational and engineering controls, and requirements for personal protective equipment. Additionally, OSHA's rules contemplate that employers will provide HIV testing and counseling, along with confidential medical evaluations for all employees experiencing occupational blood and body fluid exposures. North Carolina's Administrative Code provides guidelines regarding all exposures, including those governed by OSHA.

What are the Rights to Public Services?

The ADA also prohibits discrimination against HIV-infected persons in the areas of public service and places of public accommodation. State and local governments and their agencies are prohibited from discriminating in the provision of services to people on the basis of their disabilities, including HIV infection. Public accommodations, whether operated by governmental or private entities, include hotels, restaurants, health care provider offices, mental health agencies, substance abuse treatment centers, hospitals, public transportation, schools, day care centers, and exercise or recreational facilities, among others.

Do Any Restrictions Apply to HIV-Infected Health Care Workers?

Yes. Health care workers who know that they are HIV infected and who perform certain invasive procedures have a responsibility to take steps to avoid transmission to patients and will be required to notify, in writing, Chief, Communicable Disease Branch, 1902 Mail Service Center, Raleigh, NC 27699-1902. The health care worker's infection status will be held in confidence, and may be disclosed only to the extent necessary to obtain vital information. Upon finding that a significant risk of transmission to patients exists, the state health director appoints an expert panel to evaluate the worker's practice and patient environment. If the expert panel recommends restrictions as necessary to prevent transmission from the worker, the state health director may restrict the health care worker's practice. If, prior to the panel's report, the director perceives the need for immediate practice restrictions, the director may issue an isolation order. Patients exposed to HIV through the health care worker may be contacted to be tested.

To protect themselves and patients (regardless of HIV status), health care workers who perform invasive or other procedures which create a risk of transmission must use "universal" precautions to prevent the spread of blood borne pathogens, such as AIDS, HIV or hepatitis B, with all patients. The Centers for Disease Control and Prevention recommends the use of examination, procedure or surgical gloves as a barrier to such diseases, as well as other sterilizing procedures. Finally, health care workers should know their HIV antibody status, in addition to that of their patients.

What Estate Planning and Other Arrangements Should be Made?

At a minimum, a health care power of attorney, a durable power of attorney, and, if desired, a living will should be executed. Preparing a standard will may be important, particularly if the person owns real property. If minor children are involved, HIV-infected individuals should also consider making custody arrangements and establishing trusts for the children in the event of death.

See the *This is the Law* pamphlets "Protecting Your Assets: Wills, Trusts and Powers of Attorney" and "Living Wills and Health Care Powers of Attorney" for more information.



This pamphlet was prepared as a public service by the Communications Committee and is not intended to be a comprehensive statement of the law. North Carolina laws change frequently and could affect the information in this pamphlet. If you have specific questions with regard to any matters contained in this pamphlet, you are encouraged to consult an attorney. If you need an attorney, please contact the North Carolina Lawyer Referral Service, a nonprofit public service project of the North Carolina Bar Association, via phone (1-800-662-7660; local 677-8574) or online (www.ncfind-alawyer.org).

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AIDS AND THE LAW



AIDS/HIV Infection and the Law

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What is AIDS?

Acquired Immune Deficiency Syndrome (AIDS) is the end stage of a disease caused by the human immunodeficiency virus (HIV). Although not everyone infected with the virus will develop AIDS, and though it may take a period of time for others to show symptoms of AIDS, everyone who is infected with HIV can transmit the virus to others. Once infected with HIV, the immune system is compromised and one eventually loses the ability to fight illnesses, which can ultimately lead to death. At this time, there is no cure for AIDS or vaccine for HIV.

How is HIV Transmitted?

HIV is transmitted through contact with bodily fluids carrying the virus (i.e., blood, semen, breast milk, vaginal fluid). Medical cases have documented transmission through sexual contact, exposure to infected blood (as through sharing needles or receiving contaminated blood products), and transmission from a pregnant woman to her baby. There is no medical evidence that HIV can be spread through casual contact (such as handshaking, kissing or using the same dishes). Nevertheless, the fear and stigma associated with AIDS has led to instances of discrimination in housing, education, employment and medical care.

May You be Tested for HIV Without Consent?

As a general rule under North Carolina law (N.C.G.S. Section 130A-148), you must provide informed consent before you can be tested for HIV. In limited situations, however, you can be tested without providing informed consent. Such recognized exceptions include: (1) testing of donated blood or semen, which is mandatory; (2) testing for research or epidemiological purposes is permissible if your identifying information is removed; (3) the Commission for Health Services can require testing without consent when necessary to protect the public health; (4) children under 18 may be tested without a parent's consent in some instances; and (5) if you are unable to provide consent, and there is no one who can provide it on your behalf, a physician may order an HIV test if it is necessary to diagnose or care for you appropriately.

Furthermore, the victim of a sexual offense may request HIV testing of an alleged perpetrator. There must be probable cause to believe that a sexual offense has been committed against the victim or the perpetrator must have been indicted for the sexual offense. If these conditions are met and the victim requests testing, the district attorney must petition the court for an order requiring the perpetrator to be tested. The court will issue the order upon finding probable cause to believe that contact between the victim and the perpetrator posed a significant risk of transmitting the disease. The results of the test will be communicated to both the victim and the perpetrator.

What is Informed Consent?

Informed consent generally requires health care personnel to provide the patient with information regarding the HIV test, the implications for testing and the meaning of test results (N.C.G.S. Section 90-21.13). The goal is to provide enough information for the person to make an informed decision about whether or not to be tested. Although the law permits oral consent, some physicians or health care facilities may require a signed statement indicating that the person has consented to the test.

Does a Physician Have to Report HIV Infection?

Yes. If a physician or medical facility has reason to suspect that a patient is infected with HIV, the physician must report the name and address to the local health director (N.C.G.S. Section 130A-135). Once this information is reported, a trained specialist from the Health Department may contact the patient to provide additional counseling. The physician is also required to relay information on specific measures (called "control measures") that one should take to reduce the risk of transmission. Also, if the physician knows the identity of the patient's spouse and has not notified and counseled him or her (with the patient's consent), the physician must report the spouse's name to the Health Department's Division of Epidemiology as well. The spouse will then be contacted and counseled by a trained specialist. Furthermore, a physician who has reason to believe that a patient is not following control measures and poses a significant risk of transmission must notify the local health director.

What Responsibilities Are There for Those Diagnosed With AIDS or HIV?

Sexual and needle-sharing partners must be notified. North Carolina has criminalized the failure to do so (N.C.G.S. Section 130A-25). Future partners must be notified prior to sexual activity. Those diagnosed with AIDS or HIV must comply with the physician-provided control measures, which are established by the State Health Department. For example, the infected person must use condoms during sexual intercourse and cannot share needles or syringes. Donations of blood or blood products, organs, tissues, plasma, platelets, semen, ova or breast milk are prohibited. Failure to comply with any of the established control measures can result in an isolation order from the state or local health director which requires compliance with an individual plan established to reduce the risk of transmission.

Is HIV Status Confidential?

All HIV-positive persons have a qualified right to have their HIV status kept confidential under the general principles of physi-

cian/patient confidentiality. In fact, North Carolina law requires strict confidentiality of medical information, except under limited circumstances (N.C.G.S. Section 130A-143). The information, however, may be disclosed if you or your guardian consent to the release of your medical information. In the absence of consent, disclosure is permissible in some circumstances, including: (1) for medical or epidemiological purposes provided no identifying information is given; (2) for purposes of providing proper medical care; (3) when necessary to protect public health, if disclosure is made in the manner mandated by state regulations; (4) by the Department of Health Services for bona fide research purposes; and (5) when required by a court order or subpoena.

The release of medical information is permissible and sometimes mandated under state health department regulations. Under those regulations, the physician of an HIV-infected source patient must notify the physician of a person who has been exposed to the patient's blood or body fluids. The regulations also require written notice to be given to all individuals handling the body of a deceased HIV-infected patient. Any person who reports confidential medical information pursuant to these rules and regulations is immune from any civil or criminal liability for releasing the information.

Can an Insurer Screen for HIV?

Federal and state laws prohibit group health plans and most major insurance companies from denying coverage based on an individual's health status. Additionally, federal and state laws prohibit insurers from charging higher premiums or denying coverage to policy holders or their families due to AIDS or HIV infection, or otherwise poor health. Although most policies do not exclude coverage for AIDS and HIV infection, many have preexisting condition clauses that may exclude coverage for a period of time if an individual is infected when the insurance coverage starts. Federal law prohibits group health plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) from limiting or denying coverage to you for more than 12 months if your illness was diagnosed or treated prior to the effective date of your insurance coverage. Once this 12-month limitation is imposed, however, no other group health plan subject to ERISA can ever impose another limitation on your coverage as long as you maintain insurance coverage with no more than a 63-day gap in coverage. Some states have passed similar laws that apply beyond group health plans subject to ERISA.

What Benefits are Available?

Persons infected with HIV or AIDS may be eligible for Social Security disability benefits and supplemental security income, Medicaid and Medicare, county housing and medical assistance funds, the federal AIDS Drug Reimbursement Program and state AIDS Drug Assistance Programs, home health care, food stamps

and other benefit programs. Although some programs require a person to be disabled, generally no penalties exist for applying too early. Prompt application is an advantage because many benefits are only available from the date the application is filed and are not retroactive. Some programs determine financial need in part based on the amount of medical expenses incurred. Therefore, all medical bills and receipts should be retained.

These benefits extend beyond those suffering from HIV and AIDS. Dependent children may be able to receive disability insurance benefits, as well as Aid For Dependent Children (AFDC). Food stamps also may be available.

Where are Benefit Applications?

Applications for benefits are available through the federal Social Security Administration and the Department of Social Services. For confidential help in applying for benefits, the nearest Social Security office may be reached at 1-800-772-1213. AIDS advocacy groups in local communities can also often assist with the application process for all benefits. Additionally, a local HIV care consortium may be available for assistance. To obtain the number of an area HIV care consortium, call the AIDS Care Unit of the HIV/STD Prevention and Care Branch of the Division of Public Health at (919) 733-7301. If there are difficulties with the application process and with obtaining assistance in applying, the local Legal Services agency may provide some assistance.

What are the Legal Rights Regarding Housing and Employment?

In North Carolina, an HIV-infected person's legal rights regarding housing and employment may be determined by federal law, state law or both. For example, HIV infection may qualify as a handicap under Section 504 of the federal Rehabilitation Act. Section 504 prohibits discrimination against handicapped individuals in providing services and/or employment by agencies and programs receiving federal assistance and by certain federal contractors and subcontractors.

HIV infection may qualify as a disability under the federal Americans with Disabilities Act (ADA). Under Title I, neither AIDS, HIV-positive test result, nor any other condition is automatically considered to constitute a "disability." Otherwise qualified individuals with a disability must be permitted to remain in their jobs so long as they can perform the essential functions of their jobs and do not pose a direct threat to the health or safety of themselves, their co-workers, or other persons in the workplace. Title I also prohibits covered employers from making pre-employment inquiries about an applicant's medical condition, including HIV status and requiring pre-offer medical examinations of any kind. An employer subject to the ADA may require an employee or per-