



# Understanding HIV TESTING in the Workplace

All employees should be concerned about the personal liberty and privacy implications of HIV testing in the workplace. This fact sheet will review some of the important questions about employee and employer rights and responsibilities regarding such testing.

## I am HIV+. Do I have to disclose my HIV status to my employer?

No. There is no legal duty, statutory or at common law, for a person living with HIV/AIDS to reveal his/her HIV status to employers.

HIV/AIDS status is almost never relevant to one's employment circumstances.

## Why is HIV/AIDS status not relevant at work?

HIV/AIDS status is not relevant for two reasons. First, most people living with HIV are healthy and able to work - just like any other employee. Second, HIV/AIDS is not relevant because HIV is not an easy virus to catch. There is little to no risk of passing on the infection to other employees.

The primary ways of transmission are:

- **Unprotected sexual intercourse (vaginal or anal):** HIV transmission through oral sex is possible but is not as common.
- **Sharing needles:** A small amount of blood remains in a needle after it is used. If the needle is not sterilized after use, infected blood can be injected into the blood of the next person using the needle.
- **Mother to child transmission:** If a woman is pregnant and HIV positive, there is a chance that she will pass the virus to her child during pregnancy, labour, delivery or breastfeeding;
- **Blood transfusions:** If HIV infected blood is not detected during the screening process, HIV can be transmitted during a blood transfusion.

There are sometimes concerns about whether HIV/AIDS can be transmitted through biting, smearing blood, or through saliva. There is **almost no chance** of HIV being transmitted in these ways.

### **What about workplace injuries? Can't HIV be transmitted this way?**

There is almost no chance that HIV can be transmitted this way. If there is a workplace injury and an employee with HIV is injured and bleeding, employees administering first aid are only at a slight risk of infection if they have open wounds themselves. They can also protect themselves from this slight chance of infection by wearing gloves.

### **What about HIV+ health care workers? Won't they spread the virus?**

No. There is almost no chance of this happening. If a person living with HIV is a health care worker, there may be a small risk of transmission if he/she performs highly invasive procedures (for example surgeons or dentists) and he/she sustains an injury (for example, a puncture wound from a needle) during surgery. However, the risk of this happening is very slight.

There is actually a greater risk that an HIV infected patient will infect a health care worker. Therefore, in a health care environment, an employer should ensure that protective equipment like gloves are available and that proper infection control procedures are in place.

### **Can an employer ask for an HIV Test?**

If an employer introduces "voluntary" testing in the course of employment, employees may feel pressured into taking the test for fear of losing their jobs. Therefore "voluntary" testing is never truly voluntary and should be avoided.

Nevertheless, if an employer wishes to offer voluntary HIV testing to all employees in the interests of general health and safety promotion:

- Testing should be done anonymously;
- Test results should be kept in the strictest confidence, preferably with a medical practitioner;
- Test results should not be placed in the employee's personnel file;

- Test results should not have any effect on the employee's employment status; and
- Proper pre and post test counselling should be made available.

## Can an employer demand an HIV test?

This is a difficult question to answer. Although no country in the region has enacted legislation which allows for "mandatory" HIV testing in the workplace, except for in PNG, there is also no legislation preventing it. There are also ways for employers to make an HIV test feel "compulsory".

### (a) Medical Exams

Some countries in the Pacific have employment legislation that requires prospective employees to be examined by a doctor before entering into an employment contract.

See for example:

- s. 36 Fiji *Employment Ordinance*
- s. 59 Tuvalu *Employment Act*
- s. 59 Kiribati *Employment Act*

An employer may demand an HIV/AIDS test as part of the medical exam. Remember, in order for an employer or doctor to perform an HIV test he/she must have your informed consent. For more information, see PIAF's brochure on *HIV Testing in the Pacific*.

### *What happens after I take a medical exam?*

If a medical exam is completed and you, the prospective employee, are deemed "physically unfit" for the work contemplated by the contract, you will be sent back home at the employer's expense.

It is possible to obtain an exemption from the requirement to take a medical exam if the employment in the vicinity of the employee's home and/or the work is the type of work which is not of a dangerous character or likely to be injurious to the health of the employees.

### (b) Prospective Employees

If you are a prospective employee with no contract and you refuse to take the medical exam or, specifically, an HIV test, the employer may simply

decide to hire someone else. The only possible recourse to this type of behaviour would be for you to argue that the prospective employer violated your constitutional right to equality by refusing to hire you (on the grounds of a real or perceived disability).

### (c) Employees on Contract

If you are already employed and refuse to take a “mandatory” HIV test or medical exam, your employer could argue that you are in breach of your duty to “be an obedient employee”. In some circumstances, disobedience can be grounds for dismissal. However, the request or demand being made by the employer should be work-related before dismissal can occur. Since HIV/AIDS status is not relevant to the job, requesting an HIV/AIDS test is not work-related. Therefore an employee should be entitled to refuse an HIV/AIDS test without repercussions.

If you have already signed a contract, have agreed to take an HIV test and then are deemed “unfit” for the work contemplated by the contract because of an HIV positive test result, you will have to argue that being HIV positive does not make you “physically unfit” ergo you were dismissed for an unjustifiable reason.

### Isn't HIV testing a good thing?

Yes of course! HIV testing is an important aspect of health promotion and is an essential component to stopping the spread of HIV. When people know they are HIV+, they can learn how to keep themselves healthy and learn how to protect others from becoming infected.

### Well, why don't employers just test all employees? What's so *bad* about mandatory testing?

For the following reasons, mandatory HIV testing should not be imposed as either part of the pre-hiring medical exam or at any time during the course of employment:

- **Cost:** Testing is expensive in terms of financial and human resources and may unnecessarily limit the number of qualified people available;
- **Performance:** Testing is an inappropriate way to judge present or future performance because a person who is HIV-positive may be well and capable of performing their tasks for many years. HIV positive employees can be healthy and productive members of the workforce just like every other employee.

- **Inaccuracy:** Testing only reveals a “snapshot” profile of a person’s HIV status at any one time and cannot accurately determine the HIV status of all employees at any one time; and
- **Bad standard:** Testing provides an unwelcome precedent for the testing for other diseases or conditions which employers believe may impair work performance now, or in the future.
- **Irrelevance:** In most workplace environments it is highly unlikely that testing for HIV/AIDS is a reasonable requirement for employment. People who are HIV positive are not a risk to other employees.
- **Discrimination:** Mandatory testing should also be avoided because it is coercive and infringes a person’s constitutional rights. For example:

**(a) The right to personal liberty**

An employee has the right to choose whether he/she wants an HIV test. He/she should not be forced.

**(b) The right to privacy**

An employee’s medical condition is his/her own business and he/she has the right to decide who to share that information with.

**(c) The right to equality**

If an employer implements HIV/AIDS testing, there is the possibility that the information will not stay private. People who are diagnosed with HIV/AIDS are at risk of experiencing stigma and discrimination in the workplace if other people know about their status. It is also discriminatory to choose not to hire someone or to sack someone just because they are HIV positive.

**If I do get an HIV test at work, what happens to my test result?**

If you have HIV and choose to disclose your status to your employer or if you choose to take a blood test at work, your medical information (including test results) should be kept confidential.

## Does the law protect my confidentiality?

### (a) Common Law

Where a 'special relationship' exists, there is a common law duty to protect a persons' privacy. The employer - employee relationship is a type of relationship that falls into this category. The employer also owes the employee a duty of mutual trust and confidence. This means that the employer must keep medical information about employees in confidence.

Medical doctors who are hired by employers to conduct medical exams also have a duty of confidentiality that arises from the doctor-patient relationship. If they breach this duty, an employee/patient can complain to the disciplinary committee which regulates the health profession. It may also be possible to sue the doctor for professional negligence.

### (b) Right to Privacy

Some Pacific Island Constitutions recognize a specific right to privacy. However, this usually relates to privacy of the home and the right to be free from unreasonable searches. With the exception of Fiji, constitutional recognition of the right to privacy probably does not extend to unauthorized disclosure of information, including medical information. Nevertheless, acting in accordance with the spirit of the Constitution requires that employers keep medical information confidential.

For more information contact:



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*Special thanks to:*



*-and-*



*University of the South Pacific, School of Law*

*For their support in the creation of this document.*