GLAD ANSWERS
for the LGBTQ Community

Massachusetts

Overview of Legal Issues for People with HIV

January 2015

ABOUT GLAD'S AIDS LAW PROJECT

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders works in New England and nationally to create a just society free of discrimination based on gender identity, HIV status, and sexual orientation.

GLAD's AIDS Law Project was founded in 1984 to protect the rights of *all* people with HIV. Fighting discrimination and establishing strong privacy protections have been important for people with HIV since the beginning of the epidemic. We outline here the basic state and federal laws of particular importance to people with HIV. We want you to understand the current scope of HIV testing, privacy, and anti-discrimination protections -- and the exceptions to these protections. The more information you have about existing laws, the more prepared you will be to stand up for your legal rights.

If you have questions about any of these laws, or believe that your legal rights have been violated, contact GLAD Answers by phone at 800-455-GLAD (4523) or at www.GLADAnswers.org.

Contents

■ ANTI-DISCRIMINATION LAW 1
Discrimination Based on HIV Status 1
Employment 2
Adverse Treatment 2
Reasonable Accommodation 3
Employer Health Inquiries 5
Health Care Workers 7
Assessing Discrimination 8
Public Accommodations 10
Housing 14
Remedies for Discrimination 15
Massachusetts Law 15
Federal Law 20

■ HIV TESTING & POLICY 22
HIV Testing 22
Informed Consent 22
Minors and Informed Consent 23
Privacy 26

■ OTHER HIV-RELATED LAWS 30
Needle Exchange and Syringe Access 30

Anti-Discrimination Law

■ Discrimination Based on HIV Status

Does Massachusetts have laws protecting people with HIV from discrimination?

Yes. Massachusetts has enacted anti-discrimination laws protecting people with HIV from discrimination in employment, housing, and public accommodations. In addition, there are a number of federal laws that protect people from discrimination based on their HIV status.

Who is protected under these anti-discrimination laws?

- People with AIDS or who are HIV-positive, even if they are asymptomatic and have no outward or manifest signs of illness.

- People who have a record of or who are regarded or perceived as having HIV.

- Under federal law, but not Massachusetts law, a person who does not have HIV, but who "associates" with a person with HIV – such as a friend, lover, spouse, roommate, business associate, advocate or caregiver.

■ Employment

ADVERSE TREATMENT

What laws protect people with HIV from discrimination in employment?

People with HIV are protected under Massachusetts General Law Chapter 151B and the federal Americans with Disabilities Act (ADA). Both of these statutes prohibit discrimination in employment on the basis of a person's disability. Massachusetts law covers workplaces with six or more employees. The ADA covers workplaces with 15 or more employees.

What do these anti-discrimination laws prohibit?

An employer may not take adverse action against an applicant or employee simply on the basis that the person has a disability such as HIV or AIDS. This means that an employer may not terminate, refuse to hire, rehire, or promote, or otherwise discriminate in the terms or conditions of employment, based on an individual's HIV/AIDS status.

The focus here is whether a person with AIDS or HIV was treated differently than other applicants or employees in similar situations.

The following are examples of unlawful discrimination:

- An employer may not refuse to hire a person with HIV based on fear that HIV will be transmitted to other employees or to customers.

- An employer may not refuse to hire or make an employment decision based on the possibility, or even probability, that a person will become sick and will not be able to do the job in the future.

- An employer cannot refuse to hire a person because it will increase health or workers' compensation insurance premiums.

REASONABLE ACCOMMODATION

What does it mean that an employer may have to provide a "reasonable accommodation" for an employee with a disability?

People with disabilities, such as HIV/AIDS, may experience health-related problems that make it difficult to meet some job requirements or duties. For example, a person may be exhausted or fatigued and find it difficult to work a full-time schedule.

In certain circumstances, the employer has an obligation to modify or adjust job requirements or workplace policies in order to enable a person with a disability, such as HIV or AIDS, to perform the job duties. This is known as a "reasonable accommodation."

Examples of reasonable accommodations include:

- Modifying or changing job tasks or responsibilities;
- Establishing a part-time or modified work schedule;
- Permitting time off during regular work hours for medical appointments;
- Reassigning an employee to a vacant job; or
- Making modifications to the physical layout of a job site or acquiring devices such as a telephone amplifier to allow, for example, a person with a hearing impairment to do the job.

How can a person obtain a reasonable accommodation?

It is, with rare exception, the employee's responsibility to initiate the request for an accommodation. In addition, an employer may request that an employee provide some information about the nature of the

disability. Employees with concerns about disclosing HIV/AIDS status to a supervisor should contact GLAD Answers at www.GLADAnswers.org in order to strategize about ways to respond to such requests.

There is no fixed set of accommodations that an employee may request. The nature of a requested accommodation will depend on the particular needs of an individual employee's circumstances.

Does an employer have to grant a request for a reasonable accommodation?

An employer is not obligated to grant each and every request for an accommodation. An employer does not have to grant a reasonable accommodation that will create an "undue burden" (i.e. significant difficulty or expense for the employer's operation). In addition, the employer does not have to provide a reasonable accommodation if the employee cannot perform the job function even with the reasonable accommodation.

When is a "reasonable accommodation" for an employee an "undue burden" for an employer?

In determining whether a requested accommodation creates an undue burden or hardship for an employer, courts examine a number of factors, including:

- The employer's size, budget and financial constraints;
- The costs of implementing the requested accommodation; and
- How the accommodation affects or disrupts the employer's business.

Again, each situation is examined on a case-by-case basis.

An employer only has an obligation to grant the reasonable accommodation if, as a result of the accommodation, the employee is then qualified to perform the essential job duties. An employer does not have to hire or retain an employee who cannot perform the essential functions of the job, even with a reasonable accommodation.

EMPLOYER HEALTH INQUIRIES

Can an employer in Massachusetts ever require an applicant or employee to take an HIV test?

No. Massachusetts law[1] prohibits an employer from requiring that an employee take an HIV test *under any circumstances* at any stage of the application or employment process.

What may an employer ask about an employee's health during the application and interview process?

Under the ADA and Massachusetts law, prior to employment, an employer cannot ask questions that are aimed at determining whether an employee has a disability. Examples of prohibited pre-employment questions are:

- Have you ever been hospitalized or under the care of a physician?
- Have you ever been on workers' compensation or received disability benefits?
- Have you ever had any medical problems that would make it difficult for you to do your job?
- What medications do you take?

[1] M.G.L. c. 111, § 70F

An employer may, however, ask whether an applicant has the knowledge, skill and ability to perform the job functions.

After an offer of employment, can an employer require a medical exam? What guidelines apply?

Under the ADA, after a conditional offer of employment, an employer may request a medical examination or any medical information, without limitation. However, the ADA does require the employer to follow certain practices:

- The employer must require the medical exam or inquiry of all applicants in the job category.

- The information must be kept strictly confidential. It must be on separate forms and kept in a segregated file apart from a general personnel file.

- The information may not be shared with others, with a limited exception for supervisors or managers who need to be informed of necessary job restrictions or accommodations, or safety personnel who may be told if the person with a disability requires emergency treatment.

- The results of the medical examination cannot be used to withdraw the job offer unless the results indicate that the individual is not able to perform the essential functions of the job with reasonable accommodation.

After employment has begun, an employer may only require a medical exam of a current employee if it is "job-related and consistent with business necessity." The employer must demonstrate that the medical examination is necessary to measure the employee's actual performance of job functions.

Of course, as noted above, employers in Massachusetts are prohibited from requesting an HIV test at any time.

In general, Massachusetts law limits employer health inquiries more strictly than federal law. Under Massachusetts law, after a conditional offer of employment, an employer may only require a medical examination for the purpose of determining whether the employee is capable of performing the essential functions of the job with reasonable accommodation.

HEALTH CARE WORKERS

How have the courts addressed fears that health care employees who perform invasive procedures, such as surgeons, will transmit HIV to patients?

The risk of HIV transmission from a health care worker to a patient is considered so small that it approaches zero. Nevertheless, in cases where hospitals have sought to restrict or terminate the privileges of HIV-positive health care workers who perform invasive procedures, courts have reacted with tremendous fear and have insisted on an impossible "zero risk" standard. As a result, the small number of courts that have addressed this issue under the ADA have upheld such terminations.

The employment provisions in the ADA provide that an employee is not qualified to perform the job if he or she poses a "direct threat to the health or safety of others." To determine whether an employee poses a "direct threat," a court analyzes:

- The nature, duration and severity of the risk;
- The probability of the risk; and
- Whether the risk can be eliminated by reasonable accommodation.

In the case of HIV-positive health care workers, courts have ignored the extremely remote probability of the risk and instead have focused on

the nature, duration and severity of the risk. The following excerpt from a recent case is typical of courts' approach:

> "We hold that Dr. Doe does pose a significant risk to the health and safety of his patients that cannot be eliminated by reasonable accommodation. Although there may presently be no documented case of surgeon-to-patient transmission, such transmission clearly is possible. And, the risk of percutaneous injury can never be eliminated through reasonable accommodation … Thus, even if Dr. Doe takes extra precautions … some measure of risk will always exist …"[2]

It is important to note that only a small number of courts have addressed the rights of HIV-positive health care workers. The AIDS Law Project believes that these cases have been incorrectly decided and are inconsistent with the intent of Congress in passing the ADA. Because of the unsettled nature of the law in this area, a health care worker who is confronted with potential employment discrimination should consult a lawyer or public health advocate.

ASSESSING DISCRIMINATION

How does an employee determine whether he or she has experienced discrimination?

While it may be useful to consult with a lawyer, the following steps can be helpful in beginning to consider and assess a potential employment discrimination problem.

1) Consider the difference between unfairness and illegal discrimination. The bottom line of employment law is that an employee can be fired for a good reason, bad reason, or no reason at all. A person can be legally fired for a lot of reasons,

[2] *Doe v. University of Maryland Medical System Corporation*, 50 F. 3d 1261 (4th Cir. Md) (1995).

including a bad "personality match." What they cannot be fired for is a discriminatory reason specifically outlawed by a statute.

2) In order to prove a discrimination claim (i.e., that you were fired, demoted, etc. because of discrimination and not because of some legitimate reason), you must be able to show the following:

   - The employer knew or figured out that you are HIV-positive or have AIDS;

   - You were qualified to perform the essential functions of the job with or without reasonable accommodation; and

   - Adverse action was taken against you because of your HIV or AIDS status, and the pretextual reason given by the employer for the adverse action is false.

3) If your employer knows that you have HIV or AIDS, identify exactly who knows, how they know, and when they found out. If you have not told your employer, is there any other way the employer would know or suspect your HIV status?

4) Consider the reasons why you believe that you are being treated differently because of HIV status, including the following areas:

   - Have other employees in similar situations been treated differently or the same?

   - Has your employer followed its personnel policies?

   - Did the adverse treatment begin shortly after the employer learned of your HIV status?

   - Have you been out of work due to illness for any period of time and did the adverse treatment begin upon your return to work?

- What will your employer's version of events be? How will you prove that the employer's version is false?

5) Do you have any difficulty fulfilling the duties of your job because of any HIV-related health or medical issue? Does your condition prevent full-time work, or require time off for medical appointments, lighter duties or a less stressful position? You might want to try brainstorming to create a reasonable accommodation that you can propose to your employer. Here are some points to consider:

   - How does the company operate and how would the accommodation work in practice?

   - Put yourself in the supervisor's shoes. What objections might be raised to the requested reasonable accommodation? For example, if you need to leave at a certain time for medical appointments, who would cover your duties?

■ Public Accommodations

Do Massachusetts laws protect against discrimination by health care providers, businesses, and other public places?

Yes. Under both Massachusetts law[3] and the ADA, it is unlawful to exclude a person with HIV from a public place (what the law refers to as a "public accommodation") or to provide unequal or restricted services to a person with HIV in a public place. Under both statutes, the term "public accommodation" includes any establishment or business that offers services to the public. In addition, the Federal Rehabilitation Act of 1973[4] prohibits discrimination on the basis of disability in any agency or program that receives federal funding, including hospitals, medical or dental offices, and educational institutions.

[3] M.G.L. c. 272, § 98
[4] 29 U.S.C.A. § 794

Therefore, people with HIV are protected from discrimination in virtually every public place or business, including bars, restaurants, hotels, stores, schools, vocational or other educational programs, taxi cabs, buses, airplanes and other modes of transportation, health clubs, hospitals and medical and dental offices, as long as these facilities are generally open to the public.

Is discrimination by health care professionals against people with HIV still a problem?

Believe it or not, persons with HIV are still faced with discrimination by hospitals, doctors, dentists, and other health care providers. This discrimination can take the form of an outright refusal to provide medical services or an illegal referral because of a patient's HIV status.

What types of arguments are made by doctors who discriminate against people with HIV and are they legitimate?

Doctors typically try to justify discrimination against people with HIV with one of two arguments:

1) "Treating People with HIV is Dangerous" (Some doctors refuse to treat people with HIV based on an irrational fear of HIV transmission); and

2) "Treating People with HIV Requires Special Expertise" (Some doctors refer patients to other medical providers based on an inaccurate belief that general practitioners are not qualified to provide care to patients with HIV).

Both an outright refusal to provide medical treatment and unnecessary referrals on the basis of a person's disability are unlawful under the ADA and Massachusetts law.

How have courts and medical experts responded to these arguments?

1) "Treating People with HIV is Dangerous"

Doctors and dentists may claim that a refusal to treat a patient with HIV is legitimate because they fear they might contract HIV themselves through needle sticks or other exposures to blood. However, studies of health care workers have concluded that risk of contracting HIV from occupational exposure is minuscule, especially with the use of universal precautions.

For this reason, in 1998, the United States Supreme Court ruled in the case, *Bragdon v. Abbott*, that health care providers cannot refuse to treat people with HIV based on concerns or fears about HIV transmission.[5]

In addition to the legal perspective, both the American Medical Association and the American Dental Association, and many other professional health care organizations, have issued policies that it is unethical to refuse treatment to a person with HIV.

2) "Treating People with HIV Requires Special Expertise"

In these cases, the merits of a discrimination claim depend upon whether, based on objective medical evidence, the services or treatment needed by the patient require a referral to a specialist or are within the scope of services and competence of the provider.

In *United States v. Morvant*, a federal trial court rejected a dentist's claim that patients with HIV require a specialist for routine dental care.[6] The court agreed with the testimony of experts who said that no special training or expertise, other than that possessed by a general dentist, is required to provide dental treatment to people with HIV. The court specifically rejected the dentist's arguments that he was unqualified because he had not kept up with the literature and training necessary to treat patients with HIV. While this case arose in the context of dental care, it is applicable to other medical settings as well.

[5] 524 U.S. 624 (1998)
[6] 898 F. Supp. 1157 (E.D. La 1995)

What are the specific provisions of the ADA that prohibit discrimination by health care providers?

Under Title III of the ADA[7], and similar provisions of Massachusetts law, it is illegal for a health care provider to:

1) Deny an HIV-positive patient the "full and equal enjoyment" of medical services or to deny an HIV-positive patient the "opportunity to benefit" from medical services in the same manner as other patients.

2) Establish "eligibility criteria" for the privilege of receiving medical services, which tend to screen out patients who have tested positive for HIV.

3) Provide "different or separate" services to patients who are HIV-positive or fail to provide services to patients in the "most integrated setting."

4) Deny equal medical services to a person who is known to have a "relationship" or "association" to a person with HIV, such as a spouse, partner, child, or friend.

What specific health care practices constitute illegal discrimination against people with HIV?

Applying the specific provisions of the ADA above to the practice of health care, the following practices are illegal:

- A health care provider cannot decline to treat a person with HIV based on a perceived risk of HIV transmission or because the physician simply does not feel comfortable treating a person with HIV.

[7] 42 U.S.C. §§ 12181-12188

- A health care provider cannot agree to treat a patient only in a treatment setting outside the physician's regular office, such as a special hospital clinic, simply because the person is HIV-positive.

- A health care provider cannot refer an HIV-positive patient to another clinic or specialist, unless the required treatment is outside the scope of the physician's usual practice or specialty. The ADA requires that referrals of HIV-positive patients be made on the same basis as referrals of other patients. It is, however, permissible to refer a patient to specialized care if the patient has HIV-related medical conditions which are outside the realm of competence or scope of services of the provider.

- A health care provider cannot increase the cost of services to an HIV-positive patient in order to use additional precautions beyond the mandated OSHA and CDC infection control procedures. Under certain circumstances, it may be an ADA violation to even use unnecessary additional precautions which tend to stigmatize a patient simply on the basis of HIV status.

- A health care provider cannot limit the scheduled times for treating HIV-positive patients, such as insisting that an HIV-positive patient come in at the end of the day.

How does Massachusetts law compare with the ADA?

Massachusetts law will be interpreted in a similar manner to the ADA.

■ Housing

What Massachusetts laws prohibit discrimination in housing?

It is illegal under both Massachusetts law[8] and the federal National Fair Housing Amendments of 1989 to discriminate in the sale or rental

[8] M.G.L. c. 151B

of housing on the basis of HIV status. A person cannot be evicted from an apartment because of his or her HIV status, or because he or she is regarded as having HIV or AIDS.

In addition, a person cannot be discriminated against in housing because of their "association" with a person with HIV. This means a person cannot be discriminated against because their roommate, lover, friend, relative, or business partner has HIV.

Are there any exceptions to these laws?

Yes. Massachusetts law exempts owner-occupied two-unit housing. In addition, the Fair Housing Act exempts, in some circumstances, ownership-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker and housing operated by organizations and private clubs that limit occupancy to members.

■ Remedies for Discrimination

PURSUING A COMPLAINT UNDER MASSACHUSETTS LAW

How do I file a complaint of discrimination?

You may file in person or in writing at the Massachusetts Commission Against Discrimination. The MCAD prefers for people to file in person, unless an attorney has prepared the complaint for them. Call in advance to set up an appointment and find out what you need to bring.

Boston: (617) 994-6000, One Ashburton Place, Room 601.
Springfield: (413) 739-2145.
Worcester: (508) 799-8010.
New Bedford: (508) 990-2390.

The complaint must be under oath, state the name and address of the individual making the complaint as well as the name and address of the entity he or she is complaining against (called the "respondent"). The

complaint must set out the particulars of the alleged unlawful acts and (preferably) the times they occurred.

Do I need a lawyer?

No. The process is designed to allow people to represent themselves. However, GLAD strongly encourages people to find lawyers to represent them throughout the process. Not only are there many legal rules governing the MCAD process, but employers and other defendants are likely to have legal representation.

What are the deadlines for filing a complaint of discrimination?

Complaints of discrimination must be filed at the MCAD within 300 days of the last discriminatory act or acts. There are very few exceptions for lateness, and GLAD encourages people to move promptly in filing claims.

What happens after a complaint is filed with the MCAD?

The MCAD assigns an investigator to look into your case. The parties may engage in limited "discovery" – a legal process which allows the other side to examine the basis of your claim and allows you to examine their justifications and defenses. This is conducted through written questions (interrogatories), requests for documents, and depositions. Ultimately, if the case is not dismissed for technical reasons, a Commissioner will decide if there is probable cause to credit your allegations.

If probable cause is found in an employment, credit, services, or public accommodations case, the case will be sent for "conciliation" or settlement proceedings. If negotiations fail to produce a settlement agreeable to all parties, the case proceeds further with more discovery and possibly a trial type hearing.

Even before probable cause is determined in a housing case, the MCAD may go to court to seek an order forbidding the respondent from selling, renting or otherwise disposing of the property at issue while the

case is pending. Once probable cause is found, the respondent must be notified of its right to have its case heard in court rather than at the MCAD.[9]

If probable cause is found lacking, the case is over unless you appeal the "lack of probable cause" finding. There are special rules and time constraints on appeals within the MCAD that must be observed strictly.

What are the legal remedies the MCAD may award for discrimination if an individual wins his or her case there?

The remedies for a successful complainant may include, for employment cases, hiring, reinstatement or upgrading, backpay, restoration in a labor organization, and front pay. In housing cases, remedies may include damages (expenses actually incurred because of unlawful action related to moving, storage, obtaining alternate housing) and civil fines to be paid to the state. In public accommodations cases, the MCAD may also order civil fines to be paid to the state. In all cases, the remedies may also include emotional distress damages, attorneys' fees, cease and desist orders, and other relief that would fulfill the purposes of the anti-discrimination laws (e.g. training programs, posting of notices, allowing person to apply for credit on non-discriminatory terms, allowing person non-discriminatory access to and use of services).

Are there other agencies at which I can file a complaint for discrimination?

Possibly yes depending on the facts of your particular situation. This outline concerns only Massachusetts non-discrimination law, and you may well have other rights.

1) **Union:** If you are a member of a union, your contract (collective bargaining agreement) may provide additional rights

[9] Mass. Gen. Laws, chap. 151B, sec. 5.

to you in the event of discipline, discharge or other job-related actions. In fact, if you obtain relief under your contract, you may decide not to pursue other remedies. Get and read a copy of your contract and contact a union steward about filing a complaint. Deadlines in contracts are strict. Bear in mind that if your union refuses to assist you with a complaint, you may have a discrimination action against them for their failure to work with you, or for failure of duty of their fair representation.

2) **Local Agencies:** Several cities and towns have their own local non-discrimination laws and agencies with which you can file a complaint in addition to filing at the MCAD. Sometimes the MCAD allows the local agency to investigate the case instead of the MCAD, which might produce advantages in time and accessibility of staff. Cambridge and Boston have the most developed local agencies, although Newton, Somerville, Worcester and Springfield also have some staff for certain kinds of complaints. Even if you file with the local agency, you must still file with the MCAD within 300 days of the last act of discrimination in order for your case to be processed at all.

3) **State Court:** After filing with the MCAD, as discussed above, a person may decide to remove his or her discrimination case from those agencies and file the case in court. There are rules about when and how this must be done.[10]

In addition, a person may file a court case to address other claims which are not appropriately handled by discrimination agencies. For example, if a person is fired in violation of a contract, or fired without the progressive discipline promised in a handbook, or fired for doing something the employer doesn't like but which the law requires, then these matters are beyond the scope of what the agencies can investigate and the matter should be pursued in court. If a person has a claim for a violation of constitutional rights, such as a teacher or

[10] *See e.g.,* Mass. Gen. Laws, chap. 151B, sec. 9.

governmental employee who believes his or her free speech or equal protection rights were violated, then those matters must be heard in court.

What can I do if my employer fires me or my landlord evicts me because I filed a complaint of discrimination?

It is illegal to retaliate in these circumstances, and the employee could file an additional complaint against the employer for retaliation. "Retaliation" protections cover those who participate in proceedings, oppose unlawful conduct, or state an objection to discriminatory conduct. If the employer takes action against an employee because of that conduct, then the employee can state a claim of retaliation.[11]

What can I do to prepare myself before filing a complaint of discrimination?

Contact GLAD Answers by phone at 800-455-GLAD (4523) or by live chat or email at www.GLADAnswers.org to discuss options.

As a general matter, people who are still working with or residing under discriminatory conditions have to evaluate how filing a case will affect their job or housing, and if they will be able to handle those possible consequences. Of course, even if a person has been fired, or evicted, he or she may decide it is not worth it to pursue a discrimination claim. This is an individual choice, which should be made after gathering the information and advice to make an informed choice.

Some people prefer to meet with an attorney to evaluate the strength of their claims before filing a case. It is always helpful if you bring to the attorney an outline of what happened on the job that you are complaining about, organized by date and with an explanation of who the various players are (and how to get in touch with them). Try to have on hand copies of your employee handbooks or personnel manuals, any

[11] Mass. Gen. Laws, chap. 151B, secs. 4(4), 4A. See also Provencher v. CVS Pharmacy, 76 F.E.P. Cases (BNA) 1569 (1st Cir. 1998)(upholding federal retaliation claim of gay man).

contracts, job evaluations, memos, discharge letters and the like. If you are concerned about a housing matter, bring a copy of your lease, along with any notices and letters you have received from your landlord.

Can I file more than one type of discrimination complaint at once, for example, if I believe I was fired both because I am gay or lesbian and HIV positive?

Yes. The state non-discrimination laws for employment forbid taking an action against someone because of sexual orientation, race, color, religious creed, national origin, sex, ancestry, age, disability or membership in a uniformed military service of the U.S., including the National Guard. In housing, the criteria are expanded to include marital status, or because the person is a veteran. In public accommodations, marital status and age are not included among the law's protections.

PURSUING A COMPLAINT UNDER FEDERAL LAW

What are some potential remedies for discrimination under federal law?

To pursue a claim under the Americans with Disabilities Act for employment discrimination, a person must file a claim with the Equal Employment Opportunity Commission (EEOC) within 180 days of the date of the discriminatory act. However, an employee filing a disability case with MCAD does not have to file a separate claim with the EEOC. There is a check-off on the MCAD complaint form to have the MCAD file the claim with the EEOC. The EEOC will then defer to the MCAD's investigation. If a person initially institutes his or her complaint with the MCAD, the time limit for filing a Federal complaint is extended to the earlier of 300 days or 30 days after the MCAD has terminated the case. A person may remove an ADA claim from the EEOC and file a lawsuit in state or federal court.

To pursue a claim under the Americans with Disabilities Act for discrimination in a place of public accommodation, a person may, without first going to an administrative agency, file a claim in state or

federal court for injunctive relief only (i.e., seeking a court order that the discriminatory conduct cease). Money damages are not available for violation of Title III of the ADA unless they are sought by the United States Department of Justice. However, a person may recover money damages under the Federal Rehabilitation Act in cases against entities that receive federal funding. To pursue a claim under the Rehabilitation Act, a person may file an administrative complaint with the regional office of the federal Department of Health and Human Services and/or file a lawsuit directly in court.

To pursue a claim under the National Fair Housing Act for discrimination in housing, a person may file a complaint with the United States Office of Housing and Urban Development within one year of the violation. A person may also bring a lawsuit within two years of the violation. A lawsuit may be filed whether or not a person has filed a complaint with HUD.

HIV Testing & Privacy

■ HIV Testing

INFORMED CONSENT

What laws in Massachusetts govern informed consent for HIV testing?

In 2012, Massachusetts changed the HIV testing part of the law[12] to require only "verbal informed consent." However, a physician, health care provider, or health care facility may not do any of the following without first obtaining a person's ***written*** informed consent:

- Reveal to third parties that a person took an HIV test; or
- Disclose to third parties the results of a person's HIV test.

It is important to keep in mind that this law only prohibits the disclosure of HIV status by health care providers.

A competent adult has the right to decide whether he or she wishes to undergo any medical treatment or testing. Without informed consent, the provision of medical treatment is considered to be a "battery," a legal claim based upon nonconsensual physical contact with or intrusion upon a person's body.

What type of consent is considered sufficient?

Consent to an HIV test only needs to be done orally, but disclosure that a person took an HIV test or the results of an HIV test requires written informed consent and must be HIV-specific, not general.

[12] M.G.L. c. 111, § 70F

Written informed consent means that a person must sign a specific release authorizing the health care provider to test for HIV and/or disclose the results of an HIV test.

A general release to a health care provider authorizing the disclosure of medical records and information is insufficient. The release must specifically authorize the disclosure of HIV test results and must state the purpose for which the information is being requested.

What are the possible penalties for health care providers that do not obtain written informed consent?

A health care provider or facility that tests for HIV or discloses an HIV test result without written informed consent violates a Massachusetts law[13] that protects consumers from unfair and deceptive trade practices. Under this law, a person may receive compensatory damages for harm such as emotional distress, attorneys' fees and, under certain circumstances, multiple damages -- damages up to three times the amount of a person's actual damages. A physician may also be liable for medical malpractice or battery.

MINORS AND INFORMED CONSENT

Can minors give informed consent?

Under Massachusetts law, minors (persons under the age of 18) are generally considered to lack the legal capacity to consent to medical treatment. However, given the importance of making HIV testing available to adolescents, there are two sources of law that authorize a minor to consent to medical treatment or testing, such as an HIV test, without the consent of a parent or legal guardian.

Both lawmakers and the courts have acknowledged the importance of minors being able to make independent decisions about their health care in certain circumstances.

[13] M.G.L. c. 93A

What laws govern minors and informed consent?

Massachusetts law[14] provides that a minor may give consent to medical or dental care if he or she is:

- Married, widowed or divorced;
- A parent of a child;
- A member of the armed forces;
- Pregnant or believes herself to be pregnant;
- Living separate and apart from his parents or legal guardian and is managing his own financial affairs; or
- "Reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health [by the Department of Public Health] pursuant to Chapter 111." The list of such diseases includes HIV. The minor may only consent to care relating to the diagnosis or treatment of that disease.

A physician or dentist is not liable for performing a procedure without informed consent if the physician relied in good faith on the patient's statement that he or she is over 18 years of age.

Medical or dental records and other information about a minor who consents to treatment are confidential and may not be released except with the consent of the minor or upon a judicial order. The statute, however, creates an exception to the confidentiality of a minor's medical information when the physician or dentist "reasonably believes" that the minor's condition is "so serious that his life or limb is endangered." In this case, the physician or dentist *must* notify the parents or legal guardian of the minor's condition.

[14] M.G.L. c. 112, § 12F

What do the courts say about minors and informed consent?

In addition to the provisions of Chapter 112, Section 12F, courts have held that minors can provide informed consent for medical treatment if they are sufficiently intelligent and mature to understand the risks and benefits of treatment, regardless of financial independence or living situation. This is known as the "mature minor" rule.

Courts will typically assess the minor's age, experience, education, training, judgment, conduct and demeanor to assess whether under a particular circumstance the minor has the ability to appreciate the nature and consequences of treatment.

Courts will give particular weight to how close the person is to majority (18 years of age), the benefits of the treatment or test (which are significant in the case of an HIV antibody test), and the complexity of the treatment or test.

Does Massachusetts have reporting laws that require HIV or AIDS diagnoses to be reported to the Department of Public Health?

Yes. All states require that certain health conditions be reported to public health authorities in order to track epidemiological trends and develop effective prevention strategies. Massachusetts requires that licensed health care providers and health care facilities licensed by the Department of Public Health report HIV and AIDS cases by name to the Massachusetts HIV/AIDS Surveillance Program. AIDS cases have been reportable by name since 1983. In 1999 HIV cases became reportable using a unique identifier code. Due to funding conditions by the federal government, however, Massachusetts was forced to require HIV reporting by name beginning January 1, 2007.

The Department of Public Health has strong security measures in place to prevent dissemination of HIV/AIDS reporting data. In addition,

state regulations prohibit names from being shared with anyone else, including state or federal government entities.[15]

■ Privacy

What laws in Massachusetts protect the privacy of medical information, such as HIV?

As noted above, the HIV testing statute prohibits a health care provider from disclosing to a third party the results of an HIV test without written informed consent. A more general Massachusetts privacy law applies in other contexts.

Massachusetts law[16] provides:

> **A person shall have a right against unreasonable, substantial or serious interference with his privacy.**

How do courts determine whether there has been a violation of this general privacy law?

As an initial matter, in order to be protected by this law, a person must have a "privacy right" in particular information. Courts have ruled that a person has a privacy right in HIV infection status because:

1) HIV is personal medical information; and

2) HIV is associated with significant social stigma and discrimination.

Simply having a "privacy right" in certain personal information, however, does not mean that every disclosure is a violation of the law.

[15] For more information, see HIV Reporting in Massachusetts for Consumers available at http://www.mass.gov, in the Diseases & Conditions section under Physical Health and Treatment.
[16] M.G.L. c. 214, § 1B

In analyzing whether there has been a *violation* of the statute, courts will determine whether there is any *legitimate countervailing reason* for the disclosure. In other words, a court will balance privacy rights versus other reasons that a defendant articulates as to why a disclosure was necessary in spite of the infringement upon privacy.

For example, if an employee reveals his or her HIV status to a supervisor, the supervisor may only reveal that information to others for a necessary business reason. It may be considered a legitimate business reason to discuss the employee's HIV status with other management personnel in connection with making adjustments to a person's job duties as a reasonable accommodation. It would not, however, be a legitimate business reason to tell the employee's co-workers or non-essential management personnel.

If a day care center or school revealed the identity of a child or student with AIDS to parents or other students, there is a good argument that such conduct violates Massachusetts law. There is no legitimate interest in disclosing the child's HIV status, especially since the risk of transmission to others is minuscule.

Does a person with HIV have a constitutional right to privacy?

Many courts have found that a person has a constitutional privacy right to the nondisclosure of HIV status. Courts have based this right on the Due Process Clause of the U.S. Constitution which creates a "privacy interest" in avoiding disclosure of certain types of personal, intimate information.

The constitutional right to privacy can only be asserted when the person disclosing the information is a state or government actor – e.g., police, prison officials, doctors at a state hospital.

Similar to the Massachusetts privacy statute,[17] courts balance the nature of the intrusion into a person's privacy against the weight to be

[17] M.G.L. c. 214, § 1B

given to the government's legitimate reason for a policy or practice that results in disclosure.

Do health care professionals ever have an obligation to warn a third party about a client's HIV status?

It is the AIDS Law Project's view that there is no clear justification for such a breach of confidentiality under Massachusetts law, even if a counselor or physician learns that a client is engaging in unsafe sex or other risky behavior without having disclosed his or her HIV-positive status to a partner. *Providers and consumers alike, however, should be aware that the case law in this area is still developing and remains unresolved. For a legal opinion on how to handle a specific situation, consult with a supervisor or lawyer.*

Do provisions under Massachusetts law that permit health care providers, under certain limited circumstances, to warn third parties of potential harm apply to HIV status?

It is the AIDS Law Project's position that these provisions should not be understood to apply to HIV.

Take, for example, the Massachusetts statute that permits licensed social workers and licensed mental health professionals to warn third-parties under certain limited circumstances.[18] Under certain circumstances, Massachusetts law provides that a social worker *may*, but is not legally mandated to, disclose confidential communications, including situations when:

- The client has communicated an *explicit threat to kill or inflict serious bodily injury* upon a reasonably identified victim or victims with the apparent intent and ability to carry out the threat;

[18] M.G.L. c. 112, § 135A

- The client has a history of physical violence that is known to the social worker and the social worker has a reasonable basis to believe a client will kill or inflict serious bodily injury on a reasonably identifiable victim.

There are virtually identical statutes for licensed psychologists[19] and licensed mental health professionals.[20]

And, with respect to physicians, the Massachusetts Supreme Judicial Court stated in *Alberts v. Devine* in 1985, that physicians owe patients a legal duty not to disclose confidential patient medical information without the patient's consent, "except to meet a serious danger to the patient or others." The Court did not, and has not since then, articulated the meaning and scope of the words "serious danger."

Neither of these provisions provides clear legal justification to breach the confidentiality of a client's HIV status, in light of the specific Massachusetts statute prohibiting the involuntary disclosure of HIV status by a health care provider.

No court has ever interpreted the relationship between the HIV confidentiality statute and other general provisions permitting disclosure of patient information under limited circumstances by doctors or mental health providers. Therefore, providers who involuntarily disclose a client's HIV status risk liability for invasion of privacy.

However, because this is an evolving area of law, it is crucial to consult an attorney with questions about specific situations.

[19] M.G.L. c. 112, § 129A
[20] M.G.L. c. 123, § 36B

Other HIV-Related Laws

■ Needle Exchange and Syringe Access

Am I able to purchase syringes at a pharmacy without a prescription?

Yes. In 2006, Massachusetts passed a law allowing for pharmacies to sell syringes over the counter to anyone who is 18 years of age or older and decriminalizing possession of needles.[21]

Does Massachusetts have needle exchange programs?

Yes. Massachusetts law permits the Department of Public Health to establish needle exchange programs, but unfortunately requires "local approval" for the siting of a program.[22] To date, only Boston, Cambridge, Northampton, and Provincetown have needle exchange programs.

[21] M. G. L. c. 94c §§27-27A
[22] M. G. L. c.111 §215

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders works in New England and nationally to create a just society free of discrimination based on gender identity, HIV status, and sexual orientation.

GLAD Answers and publications are provided *free of charge* to all who need them. We hope that those who are able will make a contribution to ensure that GLAD can continue the fight for equal justice under the law.

To make a tax-deductible contribution, visit our website, www.glad.org, or call us at (800) 455-GLAD (4523) with your credit card, or mail your check, payable to GLAD to 18 Tremont Street, Suite 950, Boston, MA 02108. If your workplace has a matching gift program, please be sure to have your donation matched. Please contact us if you would like more information on becoming a GLAD partner.

Thank You!

GLBTQ Legal Advocates & Defenders
18 Tremont Street, Suite 950
Boston, MA 02108
Tel 617.426.1350
1.800.455.GLAD (4523)
Fax 617.426.3594

www.glad.org