



New Hampshire

Overview of Legal Issues
for People with HIV

May 2014

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.

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Anti-Discrimination Law

■ Discrimination Based on HIV Status

Are there laws in New Hampshire that protect people with HIV from discrimination?

Yes, New Hampshire 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 the anti-discrimination laws introduced above?

The following people are 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 are regarded or perceived as having HIV.
- *Under federal law, but not New Hampshire law, a person who does not have HIV, but who “associates” with a person with HIV — such as friends, lovers, spouses, roommates, business associates, advocates, and caregivers of persons with HIV.*

■ Discrimination in Employment

ADVERSE TREATMENT

What laws protect people with HIV from discrimination in employment?

People with HIV are protected under the New Hampshire Law Against Discrimination,¹ and the federal Americans with Disabilities Act (ADA). Both of these statutes prohibit discrimination in employment on the basis of a person's disability. New Hampshire 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 the fact that a person is HIV-positive or has AIDS.

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

¹RSA § 354-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?

Persons 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's Legal InfoLine in order to strategize about ways to address any 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?

No, 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, which include:

- 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

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

Under the ADA and New Hampshire 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?
- What medications do you take?

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

If an employer has 15 or more employees, they must comply with the ADA. After a conditional offer of employment, the ADA permits an employer to require a physical examination or medical history. The job

offer, however, may not be withdrawn unless the results demonstrate that the person cannot perform the essential functions of the job with or without reasonable accommodation. The same medical inquiries must be made of each person in the same job category. In addition, these physical examination and medical history records must be segregated from personnel records, and there are strict confidentiality protections. After employment has begun, the ADA permits an employer to require a physical examination, only if it is job-related and consistent with business necessity.

If an employer has at least six but fewer than 15 employees, only New Hampshire law applies. New Hampshire law allows employers, after making an offer of employment, to inquire into and keep records of existing or pre-existing physical or mental conditions.² New Hampshire law, however, does not mandate the specific requirements and limitations that are contained in the ADA regarding a post-offer exam.

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

²RSA § 354-A:7, III.

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.

However, in the case of HIV-positive health care workers, courts have ignored the extremely remote probability of the risk and 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 ...”³

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.

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

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, a bad reason, or no reason at all. A person can be legally fired for a lot of reasons, 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 your 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?

■ Discrimination in Places of Public Accommodation

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

Yes, under New Hampshire law⁴ 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 1973⁵ 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.

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, yes, people with HIV still face 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.

⁴ RSA § 354-A:1

⁵ 29 U.S.C.A. § 794

What types of arguments do doctors who discriminate against people with HIV make, 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 New Hampshire law.

How have courts and medical experts responded to these arguments?

Courts and medical experts responded to these arguments in the following ways:

- (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 needlesticks 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.⁶

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.⁷ 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.

⁶ 524 U.S. 624 (1998)

⁷ 898 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 ADA⁸, 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.

⁸ 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 even be an ADA violation to 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 New Hampshire law compare with the ADA?

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

■ Discrimination in Housing

What laws prohibit discrimination in housing?

It is illegal, under both New Hampshire law⁹ and the National Fair Housing Amendments of 1989, to discriminate in the sale or rental of housing on the basis of HIV status. A person cannot be evicted from an apartment because of his or her HIV or AIDS status, or because he or she is regarded as having HIV or AIDS.

In addition, a person cannot be discriminated against because of his or her “association” with a person with HIV. This means a person cannot be discriminated against because his or her roommate, lover, relative, or business partner has HIV.

Are there any exceptions to these laws?

Yes, exceptions to New Hampshire law exist for single family homes rented by the owner; for residences of 3 or fewer apartments when the owner occupies one apartment; and for residences of five or fewer rooms when the owner or owner’s family live in one room.¹⁰ In addition, the Fair Housing Act exempts, in some circumstances, owner-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.

⁹ RSA § 354-A:12

¹⁰ RSA § 354-A:13

■ Remedies for Discrimination

PURSUING A COMPLAINT UNDER NEW HAMPSHIRE LAW

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 forbid taking an action against someone because of sexual orientation as well as because of age, sex, race, color, marital status, physical or mental disability, religious creed or national origin.¹¹ (Note, the housing non-discrimination laws also protect people based on their “familial status.”)

How do I file a complaint of discrimination?

You may file a complaint with the New Hampshire Commission on Human Rights (“CHR,” or “Commission”), 2 Chennel Drive, Concord, NH 03301. Information is available from (603) 271-2767. 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.¹²

Do I need a lawyer?

You do not need a lawyer at the CHR because the process is designed to allow people to represent themselves. However, GLAD strongly encourages people to find lawyers to represent them throughout the legal process, whether at the CHR or otherwise. Not only are there many legal rules governing the CHR process, but employers and other defendants are likely to have legal representation.

¹¹ RSA 354-A:7

¹² RSA 354-A:21

What are the deadlines for filing a complaint of discrimination?

A complaint must be filed with the CHR within 180 days of the discriminatory act or acts.¹³ There are very few exceptions for lateness, and GLAD encourages people to move promptly in filing claims. The Attorney General can also file claims of discrimination.

What happens after a complaint is filed with the CHR?

The CHR assigns an investigator to look into your case, who may as part of the investigation send out written questions (interrogatories) to be answered under oath or request documents from the parties. 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, 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 and the respondent will be asked to answer the complaint. After more discovery by the parties of each other’s positions, the Commission can hold a trial type hearing before 3 Commissioners. At that hearing, a person can be represented by a lawyer for the Commission or a private attorney.¹⁴ A losing party can appeal to the Superior Court, and a winning party can file a case in Superior Court requesting enforcement of any CHR orders.

If the Commission does not find probable cause, a complainant may appeal to the Superior Court and must then show that the Commission’s decision is unlawful or unreasonable by a clear preponderance of the evidence.¹⁵

¹³ RSA 354-A:21, III

¹⁴ See generally RSA 354-A:21

¹⁵ RSA 354-A:21, II-a

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

Whether a case involves employment, housing or public accommodations, the Commission may order the respondent to cease and desist from the unlawful conduct. The CHR may also order a respondent to do something affirmatively, such as hire, reinstate or upgrade an employee, restore a person to a labor organization, or extend a person the full advantages of a place of public accommodation. Employees may receive back pay, and all victims of discrimination are eligible for compensatory damages, including emotional distress damages. Finally, the Commission may impose an administrative fine (payable to the State), of up to \$50,000 depending on how many past offenses the respondent has committed.¹⁶

Note that if a person's complaint is dismissed, and deemed frivolous, a respondent may seek to collect its reasonable costs and attorney's fees from the complainant.¹⁷

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

You may have other places to turn, but it depends on the facts of your particular situation. This publication concerns only New Hampshire 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 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

¹⁶ RSA 354-A:21, II-d

¹⁷ RSA 354-A:21 II-f

discrimination action against them for their failure to work with you, or for failure of duty of fair representation.

2. State Court: When claims of discrimination based on state law are removed from the CHR and filed in state superior court, either party may request a jury trial and the court may order the same relief as would the CHR.¹⁸

For cases alleging violation of state non-discrimination laws, once a person has completed the CHR process, a party may file a new case in court to review the CHR decision or to seek enforcement of a CHR order.¹⁹

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 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 for filing 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 oppose unlawful conduct, or who have filed a complaint, testified, or assisted in any proceeding.²⁰

¹⁸ RSA 354-A:21-a

¹⁹ RSA 354-A:22, I

²⁰ RSA 354-A:19. *See also Provencher v. CVS Pharmacy*, 145 F.3d 5 (1st Cir. 1998) (upholding federal retaliation claim of gay man)

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

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 are willing to assume 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). It is also helpful to have a list of witnesses and other possible victims of discrimination. Try to have on hand copies of your employee handbooks or personnel manuals, any 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.

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 and the employer must have at least 15 employees. However, an employee filing a disability case with the CHR does not have to file a separate claim with the EEOC. There is a check-off on the CHR complaint form to have the CHR file the claim with the EEOC. The EEOC will then defer to the CHR's investigation. If a

person initially institutes his or her complaint with the CHR, the time limit for filing a Federal complaint is extended to the earlier of 300 days or 30 days after the CHR 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

CONSENT

Does New Hampshire have a law governing consent for HIV testing?

Yes, New Hampshire has a statute mandating consent for an HIV test, except in certain cases which are enumerated later. A physician, licensed nurse practitioner, employee of a health care facility, or employee of a blood bank, may administer an HIV test when the patient has provided his/her consent.²¹

Does consent for an HIV test have to be in writing?

No, New Hampshire law does not mandate written consent for an HIV test. In order to avoid disputes about whether consent for HIV testing has been obtained, providers may want to document a patient's consent in the record or obtain consent in writing.

What do providers have to inform their patients about, prior to testing a person for HIV or when the results are given to the patient?

In 2007, New Hampshire eliminated any requirement of pretest counseling prior to the administration of an HIV test. New Hampshire law, however, mandates “appropriate counseling” of the individual who was tested.²²

²¹ RSA § 141-F:5.

²² RSA § 141-F:7, II.

MINORS AND CONSENT

Can a physician test a minor for HIV without consent of a parent or guardian?

Yes, any minor over the age of 14 can provide consent to be tested and treated for HIV without the consent or knowledge of a parent or legal guardian.^{23, 24}

In addition, a physician is not obligated to, but may, disclose a positive test result to a parent or legal guardian of a person who is under the age of 18.²⁵ *If confidentiality is important to you, it is a good idea to talk to your doctor up front and understand his or her policies on this issue.*

HIV TESTING WITHOUT CONSENT

Are there circumstances under which New Hampshire law permits HIV testing, even against a person's wishes?

Yes, there are four circumstances under which voluntary consent is not required:

1. Testing of Persons Convicted of Sexual Assault Crimes

All people convicted of a sexual assault crime in NH are tested for HIV. The test results will be disclosed to the person convicted and to the office of victim/witness assistance. The office of victim/witness assistance is authorized to disclose the test results to the victim and the county attorney victim/witness advocates, although this is discretionary. The victim may be notified regardless of whether the victim has requested notification. The

²³ This statute permits a minor over the age of 14 to “voluntarily submit himself to medical diagnosis and treatment for a sexually transmitted disease...without the knowledge or consent of the parent or legal guardian.” While HIV can also be transmitted through other means, it is recognized as a sexually transmitted disease for the purposes of this law.

²⁴ RSA § 141-C:18, II

²⁵ RSA § 141-F:7, III.

state must also provide counseling and referrals to the victim and the person convicted, and offer HIV testing for the victim.²⁶

2. Prisoners

Individuals who are convicted and confined to a correctional facility, or people committed to New Hampshire Hospital (the state psychiatric hospital), “may be tested without obtaining written informed consent to the testing, when the results of such tests are necessary for the placement and management of such individuals in the facility,” in accordance with the written policies and procedures of the chief administrator of the facility.²⁷

In addition, test results of HIV-positive persons committed to a prison or mental health facility are disclosed to the medical director or chief medical officer of such facility. The medical director of the facility “shall” provide the facility’s administrator “whatever medical data is necessary to properly assign, treat, or manage the affected individual.” Similarly, the administrator “may” share this information with other officials who require the information to properly assign, treat, or manage the affected individual.²⁸

3. Person Incapable of Consenting

When a person is incapable of giving informed consent, a physician (or person authorized by a physician) may take an HIV test without informed consent if the test is “immediately necessary to protect the health of: (1) the person; or (2) an individual who has had an occupational exposure to the person’s blood or bodily fluids.”²⁹

²⁶ RSA § 632-A:10-b

²⁷ RSA § 141-F:5, IV

²⁸ RSA § 141-F:7, IV.

²⁹ RSA § 141-F:5, V.

4. Testing of Donated Blood Products

Any agency receiving purchased or donated blood products “shall” test them for HIV prior to their distribution and use.^{30, 31}

What about the testing of patients after occupational exposure when the person is capable of consenting? Can a person in New Hampshire be forced to take an HIV test because of a threat of occupational exposure?

No, New Hampshire law does not provide any authorization for involuntary HIV testing of patients in the event of an exposure to a health care worker or emergency first aid personnel.

However, in the event that an emergency response or public safety worker³² experiences an occupational exposure to an infectious disease, the emergency response worker’s employer must have a medical referral consultant evaluate the exposure and give appropriate care, including prophylactic treatment. The medical referral consultant is required to “make all reasonable efforts to request and obtain a blood specimen from a source individual” for HIV testing when, in his or her opinion, HIV testing is “necessary in order to determine the proper prophylactic treatment or advice for the exposed worker.” Nonetheless, the source individual or their legal guardian must consent to an HIV test and any disclosure of the test results to third persons.³³

³⁰ This statute also includes provisions for HIV testing without consent of donated body parts, fluids, or tissue used for medical or research purposes if the identity of the test subject is not known and cannot be determined by the researcher.

³¹ RSA § 141-F:5, I - III.

³² Includes firefighters, police officers, prison employees, emergency health care providers, and emergency towing personnel.

³³ RSA § 141-G.

HIV TESTING AND INSURERS

Do the laws that pertain to testing done by health organizations pertain to testing done by insurers?

No, New Hampshire law makes a distinction between HIV testing by health organizations and HIV testing done by insurers. A separate set of laws under the state Unfair Insurance Trade Practices Act³⁴ governs HIV testing by insurers, rather than the general HIV testing statute.

Are there privacy laws that pertain to the HIV test results that an insurer obtains from an individual?

Yes, the insurer can disclose the results of a positive HIV test only to the individual tested or any person the individual clearly authorized in writing on the form.

The insurer must maintain all results and records “confidential and protected against inadvertent or unwarranted intrusion.”³⁵

Must an insurance company or agent obtain written consent before testing an insurance applicant for HIV?

Yes, in order to test an insurance applicant for HIV, an insurer must obtain written consent for an HIV test on a form designated by the Department of Health and Human Services, containing information about the medical interpretations of positive and negative test results, disclosure of test results, and the purpose for which the results may be used.³⁶

³⁴ RSA § 417:4, XIX

³⁵ RSA § 141-F:8

³⁶ RSA § 417:4, XIX

What are possible remedies that a consumer may recover, if the insurer violates any of the privacy provisions of this law?

The Commissioner of Insurance enforces these confidentiality provisions. If the Commissioner finds that an insurer violated any confidentiality provision, a consumer may subsequently bring a suit against the insurer.³⁷ If the consumer prevails, he or she may recover damages, costs, and reasonable attorney's fees.³⁸

■ Privacy

CONFIDENTIALITY OF HIV TEST RESULTS

Are there laws in New Hampshire that protect the privacy of medical information, such as HIV?

Yes, according to New Hampshire law, a health care provider may not reveal the identity of any person tested for HIV “to any person or agency except”:

- The individual tested;
- Their parent or legal guardian if they are a minor or a mentally incompetent adult; and
- The physician ordering the test, or the person authorized by the physician.³⁹

New Hampshire law provides privacy protections for HIV+ test results in virtually every context. Under New Hampshire law, “[a]ll records and any other information pertaining to a person’s testing for [HIV] shall be maintained by a health care provider, health or social

³⁷ RSA § 417:19

³⁸ RSA § 417:20.

³⁹ RSA § 141-F:7-8.

service agency, organization, business, school or any other entity, public or private, as confidential, and protected from inadvertent or unwarranted intrusion.⁴⁰

These confidentiality provisions apply to the disclosure of mental health, substance abuse, and other health-related records containing HIV or AIDS status information.

What form of consent must a health care provider obtain from a person before disclosing information about a person's HIV test?

Written consent is required to disclose an individual's HIV test results, or even that a person was the subject of an HIV test. Such written authorization must be HIV-specific and must include the reason for the request to disclose the test result.⁴¹

This requirement, that a doctor obtain written consent before disclosing information about a person's HIV test, is different from the requirement that is necessary for a physician to *test* a person for HIV. As discussed above, consent may be verbal for a physician or health care provider to test a person for HIV.

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

Yes, 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 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.

⁴⁰ In addition, all records or information pertaining to a person's HIV test which are "obtained by subpoena or any other method of discovery shall not be released or made public." RSA § 141-F:8, II.

⁴¹ RSA § 141-F:8.

How do courts determine if a person’s constitutional right to privacy has been violated?

To determine whether there has been a violation of this right to privacy, courts balance the nature of the intrusion into a person’s privacy against the weight to be given to the government’s legitimate reasons for a policy or practice that results in disclosure.

EXCEPTIONS TO THE NEW HAMPSHIRE HIV PRIVACY STATUTE

Are there circumstances under which New Hampshire law permits the disclosure of HIV status, even against a person’s wishes?

Yes, New Hampshire law provides for disclosure of HIV status under two specifically prescribed circumstances.

1. Health of a Patient

A physician may disclose HIV test results to another physician or health care provider “directly involved” in the patient’s health care if the disclosure is “necessary in order to protect the health of the person tested.”⁴²

2. Blood Donations

The identity of a person who tests positive for HIV may be disclosed to an agency who receives blood donations, provided that the information remains confidential and protected from unwarranted intrusion.⁴³

⁴² RSA § 141-F:8, IV.

⁴³ RSA § 141-F:8, V.

REMEDIES

What can happen if the New Hampshire testing and privacy statute is violated?

Any person who violates the HIV confidentiality and disclosure statutes described above⁴⁴ shall be liable for actual damages, court costs, and attorney's fees, plus a civil penalty of up to \$5000.⁴⁵

Violations of the informed consent, test reporting, or confidentiality provisions described above⁴⁶ may also result in criminal liability. Violations are considered misdemeanors if committed by a person, and felonies if committed by a corporate entity.

STATE HIV REPORTING REQUIREMENTS

Do laws exist in New Hampshire that require HIV-positive test results to be reported to the state department of public health?

Yes, New Hampshire regulations require physicians, health care providers, and diagnostic labs to report HIV and AIDS cases to the Department of Public Health within 72 hours.⁴⁷ Local boards of health and individuals in charge of institutions where there is no health care provider in attendance are also required to report cases of communicable diseases to the Department "immediately," including HIV or AIDS.⁴⁸

Both reports of AIDS and HIV diagnoses must indicate the name of the patient⁴⁹

⁴⁴ RSA § 141-F:7-141-F:8

⁴⁴ RSA § 141-F:10

⁴⁵ RSA § 141-F:5-141-F:8

⁴⁶ RSA § 141-F:5-141-F:8

⁴⁷ See Department of Health and Human Services Regulations, NH He-P 301.02.

⁴⁸ This provision includes schools, childcare agencies, hotels, restaurants, workplaces, hospitals, pharmacies, and prisons. NH He-P 301.03.

⁴⁹ NH He-P 301.03 (b).

May the Department of Public Health notify others of my HIV status?

Yes, New Hampshire law includes a general provision permitting the Commissioner of Public Health or his or her designee to do “contact referral” to notify persons who may have been infected with HIV. The law, however, prohibits the Commissioner or his or her designee from disclosing the identity of any HIV-positive individual.⁵⁰ The State’s current practice is to offer assistance to HIV-positive individuals in notifying partners.

DUTY TO WARN

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

A counselor or physician may learn that a client is engaging in unsafe sex without having disclosed his or her HIV-positive status to the partner. Many people have asked whether there is a legal basis to breach client or patient confidentiality under these circumstances. It is the AIDS Law Project’s view that there is no clear justification for such a breach of confidentiality under New Hampshire law. *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 particular situation, a professional should consult with a supervisor or lawyer.*

Does New Hampshire have a “duty to warn” statute?

Yes, New Hampshire has statutes generally addressing a duty by specified health providers to warn of threats of client violence to third parties. When a client has communicated a serious threat of physical violence against a clearly identified victim or a serious threat of substantial damage to real property, covered professionals⁵¹ in New Hampshire have a “duty to warn” of, or take reasonable precautions to

⁵⁰ RSA § 141-F:9.

⁵¹ These statutes also cover those who provide treatment “under the supervision” of covered professionals.

provide protection from, a client's violent behavior. These laws apply to certified mental health professionals,^{52, 53} physicians⁵⁴ and nurses.⁵⁵

The obligation to warn can be fulfilled through:

- Reasonable efforts to communicate the threat to a victim;
- Notification of police; [and/or]
- Civil commitment of the client to the state mental health system. (Note: the client must be in a mental condition “as a result of the mental illness to pose a likelihood of danger to himself or others.”)

A covered professional is not liable for information disclosed to a third party in an effort to discharge the duty described above.

It is important to keep in mind that New Hampshire law does not permit the disclosure of HIV status without written consent. Therefore, although no court has resolved the issue, the applicability of these duty to warn statutes to HIV is doubtful in light of this broad prohibition on the disclosure of HIV status in New Hampshire.

⁵² The statute includes psychologists, clinical social workers, pastoral counselors, medical health counselors, and marriage and family therapists.

⁵³ RSA § 330-A:22

⁵⁴ RSA § 329:31

⁵⁵ RSA § 326-B:31

Other HIV-Related Laws

■ Access to Clean Needles

Do New Hampshire laws provide for access to clean needles for injection drug users to prevent HIV transmission?

Yes, under a New Hampshire law that went into effect on January 1, 2001, a person who is over 18 years of age may legally purchase a hypodermic syringe or needle at a pharmacy without a prescription from a physician. A pharmacy may sell to any such person up to ten syringes or needles at any single purchase.⁵⁶

⁵⁶ RSA § 318:52-C

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.

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