



Vermont

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.

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Anti-Discrimination Law

● Discrimination Based on HIV Status

Does Vermont have laws protecting people with HIV from discrimination?

Yes. Vermont 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 Vermont 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 a person with HIV*

- Employment

ADVERSE TREATMENT

What laws protect people with HIV from discrimination in employment?

There are two general sources of law that protect people with HIV and AIDS from discrimination in employment. First, Vermont has a specific law prohibiting an employer from discriminating on the basis of a person's HIV-positive test result.¹ This law also prohibits any employer from requiring an HIV test as a condition of employment.

More generally, people with HIV are protected under the federal Americans with Disabilities Act (ADA) and the Vermont Fair Employment Practices law, both of which prohibit discrimination on the basis of a person's disability. For purposes of these laws, the word "disability" refers to a wide range of health conditions. The ADA covers employers with 15 or more employees. The Vermont law covers employers with one or more persons performing services in the state.²

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.

¹ Vt. Stat. Ann. tit. 21, § 495 (a) (6)-(7)

² Vt. Stat. Ann. tit. 21, § 495d (1)

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?

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 get 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 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?

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?

Under the ADA, 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 a conditional offer of employment, an employer may 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, an employer may only require a physical examination if it is job-related and consistent with business necessity.

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 they pose 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.

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 Circ. 1995).

ASSESSING DISCRIMINATION

How does an employee determine whether they have 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, 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?

● Public Accommodations

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

Yes. Under Vermont 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.

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.

Does Vermont have public accommodation laws that specifically pertain to schools?

Yes. In addition to the general prohibition against discrimination in places of public accommodation, Vermont has a specific law that

⁴ Vt. Stat. Ann. tit. 9, § 4502

prohibits a school district or educational institution from discriminating against any applicant or student based on HIV status.⁵ In addition, school districts and educational institutions may not request or require that an applicant or student take an HIV test. A student or applicant who is harmed by a violation of this statute may bring a lawsuit in Superior Court for injunctive relief and damages.

Does Vermont have public accommodations laws that specifically pertain to health care?

Yes. Vermont also has a specific law prohibiting discrimination by health care providers or facilities against people with HIV. In addition, health care providers and facilities may not require an HIV test as a “condition for receiving unrelated treatment or service.”⁶ An individual may bring a lawsuit in Superior Court for injunctive relief and damages based on violations of this statute.

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

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.

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

⁵ Vt. Stat. Ann. tit. 18, § 1127

⁶ Vt. Stat. Ann. tit. 18, § 1128

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 Vermont 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.⁷

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.

⁷ 524 U.S. 624 (1998)

(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.⁸ 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.

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

Under Title III of the ADA⁹, 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

⁸ 898 F. Supp. 1157 (E.D. La 1995)

⁹ 42 U.S.C. §§12181-12188

“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.
- 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 that 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 Vermont law compare with the ADA?

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

● Housing

What Vermont laws prohibit discrimination in housing?

It is illegal under both Vermont law,¹⁰ 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 their HIV or AIDS status, or because they are regarded as having HIV or AIDS.

Are there any exceptions to these laws?

An exception exists under Vermont law for rentals in buildings that consist of three or fewer units, where the owner or a member of the owner's immediate family resides in one of the units.¹¹ 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.

¹⁰ Vt. Stat. Ann. tit. 9, § 4503

¹¹ Vt. Stat. Ann. tit. 9, § 4504

● Pursuing a Claim Under Vermont Law

How do I file a complaint of discrimination?

Where you file a complaint depends on the type of discrimination you have experienced (i.e. employment, housing, credit, etc.) and whether the party you are complaining against is a state agency. Sometimes you have more than one option about where to file. This chart provides a quick guide, and the details are discussed afterwards.

Types of Claims	<ul style="list-style-type: none"> • Employment claims against the state • Public Accommodations • Housing 	Employment claims against parties other than the State of Vermont	<ul style="list-style-type: none"> • Employment (against state or private parties) • Public Accommodations • Housing 	<ul style="list-style-type: none"> • Credit Services • Retail Installment Contracts • Insurance 	Agricultural Finance Leases
Where to File?	Human Rights Commission	Civil Rights Unit of Attorney General's Office	Superior Court	Dep't of Banking, Insurance, Securities & Health Care Admin.	Consumer Protection Division of Attorney General's Office

State Employment, Public Accommodations, or Housing

- If you believe you have been discriminated against in employment by a state agency, or if you believe you have been discriminated against in public accommodations (for example, denial of service in a retail establishment or other business), or in housing, you may file a complaint with:

The Vermont Human Rights Commission
 153 State Street, Drawer 33
 Montpelier, VT 05633-6301

(800) 416-2010
human.rights@state.vt.us

A complaint may be filed under oath in person, by telephone, in writing or by e-mail stating the facts concerning the alleged discrimination.

- You may also file your case directly in the Superior Court of the county where the alleged discrimination occurred.

General Employment

- If you believe you have been discriminated against by a party other than the state (for example, a private business or a town), you may file a complaint under oath with the

Civil Rights Unit
Office of the Attorney General (CRU)
109 State Street
Montpelier, VT 05609-1001
(888) 745-9195
civilrights@atg.state.vt.us

Complaining parties must complete a questionnaire, which the Civil Rights Unit will send to you or you can find at <http://ago.vermont.gov/wp-content/uploads/2018/05/Employment-Discrimination-Complaint-Form.pdf>

- You may also file your case directly in the Superior Court of the county where the alleged discrimination occurred.

Credit or Services

- If you believe you have been discriminated against in the provision of credit services, retail installment contracts, or insurance, you may file a complaint in writing with the

Department of Banking, Insurance, Securities and
Health Care Administration:
89 Main Street, Drawer 20
Montpelier, VT 05620-3101

You can contact the Banking Division for complaints involving credit services or installment contracts at (802) 828-3307, and the Insurance Division for complaints involving insurance at (802) 828-3301. In addition, you may want to contact the Vermont Human Rights Commission.

- If you believe you have been discriminated against with regard to an agricultural finance lease, you may file a complaint with the

Consumer Protection Division of the Office of the
Attorney General
Consumer Assistance Program:
104 Morrill Hall-UVM
Burlington, VT 05405
(800) 649-2424
consumer@uvm.edu
<https://www.uvm.edu/consumer>

Do I need a lawyer?

No. The processes at all of these agencies are designed to allow people to represent themselves. However, GLAD strongly encourages people to find lawyers to represent them throughout any of these proceedings, as well as if you choose to file a claim directly in the Superior Court. Not only are there many legal rules governing these

processes, but employers and other defendants are likely to have legal representation.

What are the deadlines for filing a complaint of discrimination?

Complaints of discrimination with the Vermont Human Rights Commission must be filed within one year of the last discriminatory act or acts.¹² The CRU also has a policy of requiring complaints to be filed within one year. If you are going to bring a case directly in Superior Court, you should file within three years of the last discriminatory act, although under certain circumstances you may be able to file after that time. 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 Commission or the CRU?

If you file with the Commission, Commission staff will review your complaint to see if it meets the basic requirements for filing a discrimination claim. If they decide to investigate, a copy of your complaint is sent to the party against whom the complaint has been filed -- the respondent -- who has to respond to the allegations within ten days. The Commission then assigns an investigator, who will look into your claims to see if there are reasonable grounds to believe that you have been discriminated against. In doing so, the investigator may examine and copy records and documents, and conduct interviews of all relevant parties and witnesses. The Commission staff then decides whether there are reasonable grounds to credit your allegations.¹³

If you file a complaint with the CRU, the process is very similar, and is described in detail on the CRU's website:

<http://ago.vermont.gov/civil-rights-unit-process/>.

¹² Vt. Code R. 80 250 001, Rule 1.

¹³ Vt. Stat. Ann. tit. 9, § 4554 (a) – (c).

The CRU allows the parties to engage in voluntary settlement discussions to resolve the case at any point during the investigative process. If these efforts fail, at the end of the investigation the CRU issues findings stating whether there was a violation of law.

If reasonable grounds are found, the Commission will send the case for “conciliation” or settlement proceedings, unless the Commission finds an emergency. If negotiations fail to produce a settlement agreeable to all parties within six months, the Commission will either file a claim against the respondent in the Superior Court or dismiss the proceedings, unless the parties agree to an extension in order to complete ongoing negotiations.¹⁴

Similarly, if the CRU finds a violation of law, the respondent will be asked to engage in settlement negotiations to try to resolve the case. If these negotiations fail, the CRU may file a complaint against the respondent in Superior Court.

If reasonable grounds or a violation of law are not found, the case is over within the Commission¹⁵ or the CRU.

At this point, or at any point in the process at the Commission or CRU, you may decide to file a case in court. It is crucial to always keep in mind the deadlines for filing such a case, as discussed above. If you do so while an investigation is pending at either of these agencies, the agency may close the investigation, unless it determines that there is good cause to continue it and make a final determination.¹⁶ If the agency continues its investigation and finds reasonable grounds, the agency may try to intervene in a case you have filed in order to pursue the state’s interest in enforcing the antidiscrimination laws.

¹⁴ Vt. Stat. Ann. tit. 9, § 4554 (e).

¹⁵ Vt. Stat. Ann. tit. 9, § 4554 (d).

¹⁶ Vt. Code R. 80 250 001, Rule 23.

What are the legal remedies the court may award for discrimination if an individual wins their case?

Employment

The remedies for a successful complainant may include, for employment cases, hiring, reinstatement or upgrading, back pay, front pay, restitution of wages or other benefits, damages, including those for emotional distress, civil penalties (where applicable), and punitive damages.¹⁷

Public Accommodations and Housing

In public accommodations and housing cases, remedies may include injunctive relief, compensatory damages (expenses actually incurred because of unlawful action), and punitive damages.¹⁸ In addition, criminal penalties of fines up to \$1000 may be imposed.¹⁹

In all of these cases, the court may grant attorney's fees, costs and other appropriate relief that is consistent with the purposes of the anti-discrimination laws (*e.g.* training programs, posting of notices, allowing person non-discriminatory access to and use of public accommodation).

Are there other ways to pursue a complaint for discrimination?

Possibly, depending on the facts of your particular situation. This publication concerns only Vermont anti-discrimination law, and you may well have other rights.

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

¹⁷ Vt. Stat. Ann. tit. 21, § 495b.

¹⁸ Vt. Stat. Ann. tit. 9, § 4506.

¹⁹ Vt. Stat. Ann. tit. 9, § 4507.

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 representative 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 fair representation.

● Pursuing a Claim 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, the employer must have at least 15 employees. A person must file a claim with the Equal Employment Opportunity Commission (EEOC) within 180 days of the date of the discriminatory act, but if a person initially institutes their complaint under the Vermont anti-discrimination statute, then the time limit is extended to the earlier of 300 days or 30 days after Vermont 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

What laws in Vermont govern informed consent for HIV testing?

Vermont does not have a statute mandating specific and written informed consent for an HIV test. An HIV test may therefore be taken based on a general medical consent. Vermont, however, does have a specific law requiring that insurers who test applicants for HIV follow specific procedures, including obtaining HIV-specific written consent.

What procedures must an insurer follow when testing an applicant for HIV?

An insurer in Vermont cannot require that a person reveal having taken HIV tests in the past. The insurer, however, can request that an applicant or insured take an HIV test. In addition to obtaining HIV-specific written informed consent for an HIV test, the insurer must provide specific information to every applicant. This information includes:

- (1) An explanation of the HIV test, and its relationship to AIDS;
- (2) The limitations on the accuracy and meaning of the test results, and the importance of seeking counseling about the test results;
- (3) The insurer's purpose in seeking the test;

- (4) An explanation that the individual is free to consult with a personal physician or counselor about HIV testing and may obtain an anonymous test before being tested by the insurer;
- (5) An explanation that the person has the choice to receive the test results directly or through another person designated in writing; and
- (6) A statement that the insurer may disclose the test results to others -- such as its medical personnel -- in order to make underwriting decisions.

An insurer may disclose to the Medical Information Bureau, a centralized insurance industry database, that an individual who tested HIV-positive received an abnormal blood test result, but may not specify HIV-positivity. In addition, an insurer may not disclose HIV-related information to any insurance broker or agent.

The information required to be provided to the applicant or insured must be read aloud to the insured as well as provided in writing.²⁰

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

Yes. Vermont law provides for HIV testing under one unique circumstance. A court may order that a person convicted of an offense involving a sexual act be tested for HIV and that the result be disclosed to the victim.²¹ Records of any court proceedings are sealed.

In addition, the law provides that a defendant who has been charged with a sexual act offense, but has not yet been convicted, may offer to be tested for HIV and other sexually transmitted diseases. The test result

²⁰ Vt. Stat. Ann. tit. 8, § 4724 (20) (B) (i)

²¹ Vt. Stat. Ann. tit. 13, § 3256. The term sexual act, defined in Vt. Stat. Ann. tit. 13, § 3251, is focused on sexual conduct that creates a risk of transmission of HIV as determined by the U.S. Centers for Disease Control.

may not be used as evidence at the defendant's criminal trial, but if the defendant is ultimately convicted, the court may consider the offer for testing as a mitigating factor.²²

● Privacy

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

Under general common law principles, physicians, health care providers and institutions cannot disclose private medical information to others without the patient's consent.

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 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.

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.

²² Vt. Stat. Ann. tit. 13, § 3256 (f)

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

Yes. Vermont law provides for disclosure of HIV status under specifically prescribed circumstances.

(1) Court Ordered Disclosure

Under Vermont law, a court may order that an individual disclose HIV-related testing or counseling information if it finds that the person seeking the information has “demonstrated a compelling need for it that cannot be accommodated by other means.”²³ In making such a determination, the court weighs the need for the disclosure of a person’s HIV status against the privacy interest at stake. In recognition of the importance of maintaining the privacy of HIV status, the Vermont Legislature has also directed courts in such cases to consider whether the public interest may be disserved by a disclosure of HIV status that deters future testing and may lead to discrimination.

The law contains numerous procedural safeguards, including a requirement that the name of the test subject not be disclosed, the right of the test subject to participate in the court hearing, and a requirement that any court order specify who may have access to the HIV-related information and prohibitions on future disclosure.

(2) HIV and AIDS Reporting for Epidemiological Tracking

All states require that numerous health conditions be reported to state health officials in order to assess trends in the epidemiology of diseases and develop effective prevention strategies. Vermont law requires that a broad range of health care providers, hospitals, and managed care organizations report a diagnosis of HIV infection or

²³ Vt. Stat. Ann. tit. 12, § 1705 (a)

AIDS to the Department of Health.²⁴ The patient's name is included in the report. Vermont law specifies that:

- An individual must be informed prior to an HIV test that a positive test will require reporting of the individual's name to the Department of Health and that there are testing sites that provide anonymous testing that are not required to report positive results.
- The Department of Health is prohibited from disclosing a public health record identifying a person as having HIV or AIDS without the individual's voluntary written authorization, including to other states, the federal government or other Vermont state agencies.
- Department of Health records identifying a person as having HIV or AIDS may not be used in a civil, criminal or administrative legal proceeding, or for employment or insurance purpose.

²⁴ Vt. Stat. Ann. tit. 18, §1001 (a)

Other HIV-Related Laws

- HIV Services for Survivors of Sexual Assault

What services does Vermont law require be provided to survivors of sexual assault crimes?

Vermont law requires that, upon request of the victim of a crime involving a sexual act²⁵, the state must provide the victim with: (1) counseling regarding HIV; (2) testing for HIV and other sexually transmitted diseases; (3) counseling by a medically trained professional on the accuracy of the testing, and the risk of HIV and other sexually transmitted diseases as a result of the crime; (4) antiviral medication prophylaxis treatment, crisis counseling, and support services; and (5) monthly follow-up testing for six months.

- Syringe Access and Needle Exchange Programs

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

Yes. In light of the clear scientific evidence that programs offering access to clean needles: (1) decrease new HIV and hepatitis B and C infections; and (2) increase the number of injection drug users referred to substance abuse treatment, the Vermont Legislature in 1999 passed a law permitting community-based needle exchange programs.²⁶

Under this law, an AIDS service organization, substance abuse provider, or licensed health care provider or facility may apply to the department of health to operate a needle exchange program. Importantly, a person who possesses needles obtained through such a

²⁵ See footnote 21 for definition of “sexual act.”

²⁶ Vt. Stat. Ann. tit. 18, §§ 4475, 4476 & 4478

program is not in violation of the laws making it a crime to possess drug paraphernalia.

How does a person show that they lawfully obtained needles through an authorized exchange program?

Needle exchange programs provide identification cards for consumers who are enrolled in the program. Regulations of the department of health mandate that the cards shall not identify the consumer by name, but rather use a confidential identifier system.²⁷

Am I able to purchase a syringe over-the-counter at a pharmacy?

Yes. Vermont has no legal barrier to the purchase of a syringe at a pharmacy.

²⁷ See Vermont Department of Health, Operating Guidelines for Organized Community-Based Needle Exchange Programs, July 2010

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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