

Know Your Rights



Remedies for discrimination and privacy violations in the workplace



Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

The information contained in this publication is information about the law, but it is not legal advice. For legal advice, please contact a lawyer in your region.

Copies of this brochure are available at www.aidslaw.ca



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1. What is HIV-related discrimination?

In the law, discrimination is treating a person differently because of a personal characteristic, or perceived characteristic, where this different treatment denies that person a benefit available to others or imposes some disadvantage on that person. Harassment can be a form of discrimination. In Canada, human rights laws at both the federal and provincial/territorial levels prohibit discrimination in workplaces, housing, services, facilities, and contracts or agreements when the discrimination is based on particular characteristics or “grounds.” These grounds include age, race, ethnicity, colour, religion, sex, marital status, disability (or “handicap” in some laws), sexual orientation and place of origin.

It is well established in Canada that the law that prohibits discrimination based on disability includes HIV. As a result, discrimination based on an individual’s *HIV-positive status* or diagnosis of AIDS is against the law. Similarly, discriminating against someone because

he or she is *perceived* to have HIV or AIDS, whether or not he or she actually does, is also illegal.

Some examples of discrimination in the workplace are:

- asking about your HIV status at a job interview;
- requiring you take an HIV test as a condition of employment;
- harassing you because you have HIV or are perceived to be HIV-positive, or making harassing or discriminatory comments about people with HIV;
- not hiring you or reducing your work hours because you have HIV;
- firing you because you have HIV or because a customer has expressed concerns about your having HIV; and
- refusing to consider your request for reasonable accommodation.

2. What should I do if I experience discrimination at work?

If you believe you are experiencing discrimination or harassment at work, you should try to keep a record of what is happening. If possible, your notes should include:

- the date of the incident(s);
- a description of the incident(s);
- the names and contact information of witnesses, if any;
- what was said or done to you and how you responded;
- copies of all relevant e-mails, text messages, postings on social media (e.g., Facebook, Twitter), letters and documents.

Sometimes, confronting the person who is responsible for the discrimination may resolve the

situation. You might also bring the matter to the attention of a manager or director in the company or organization, as your employer has an obligation to take steps to make sure their employees don’t face discrimination in the workplace. Your local AIDS-service organization may be able to support you if you decide to take such actions.

You may want to contact the appropriate human rights commission for information about initiating a human rights complaint and for other referrals. (See below for more information about this option.) You may also choose to contact a lawyer for legal advice about your particular situation. In some situations, the lawyer may contact your employer in an attempt to stop the discrimination.

To prove that you have been discriminated against, you have to show that:

1. you have HIV or AIDS, or were perceived to have HIV or AIDS by the person that you allege discriminated;
2. you suffered negative treatment of some sort in your employment; and
3. it is reasonable to conclude, based on the evidence, that one of the reasons you were treated this way is that you

have, or were perceived to have, HIV or AIDS.

An employer may say that it did not discriminate because its conduct was based on a *bona fide* (i.e., good faith) occupational requirement. The employer would have to show that:

1. its action which you are challenging (e.g., the rule, job requirement or

decision) was done for a purpose directly linked to doing the job;

2. it was done with an honest and good faith belief that it was necessary for that purpose;
3. the action is reasonably necessary to accomplish that work-related purpose; and
4. there is no way to accommodate the employee without imposing undue hardship on the employer.

3. What legal options do I have if I get harassed or experience other discrimination at work?

There are several possible steps you can take to deal with discrimination or harassment.

- If there is one, you can use the internal dispute resolution procedure of your workplace. Contact the person or office in charge of human resources or handling personnel issues for more information.
- If you belong to a union, you are covered by a collective agreement, which incorporates the applicable human rights laws of your jurisdiction. You can file a grievance under the agreement with the help of your union. Contact your steward or staff representative.
- You can file a complaint with the appropriate human rights commission or tribunal. (See below for more information.) Depending on the jurisdiction and circumstances, you may be required to use other procedures (such as a grievance or other internal procedures) before a human rights complaint can proceed. The human rights commission or tribunal you contact, or a lawyer, can provide further information.
- If your complaint is about discrimination regarding an issue covered by employment standards laws — such as unpaid wages, vacation or severance pay, hours of work, pregnancy or parental leave, or similar issues — you can make a complaint

with the relevant provincial/territorial agency or ministry responsible for the employment standards legislation in your province or territory. This varies across jurisdictions, but is often the Ministry of Labour or a similar ministry. If you work in a federally regulated business or industry, contact the nearest office of the Labour Program of Human Resources and Skills Development Canada. Note that this mechanism is usually not meant to address discrimination or harassment in the workplace but to enforce employment standards. However, this may vary from a province to another. For instance, in Quebec, *la Commission des normes du travail* has the power to order damages in cases of harassment.

- You can sue your employer in court, if your rights as an employee have been violated, such as in a wrongful dismissal case. Note, however, that you cannot use this option to seek redress specifically for discrimination; for such things, you need to pursue a human rights complaint (either through the relevant commission or tribunal or, if you belong to a union, through a grievance under your collective agreement).

For complete information on all your legal options as an employee, speak with a lawyer.

4. How do I file a human rights complaint?

Which human rights legislation applies to your situation depends on where you live and for whom you work.

The federal *Canadian Human Rights Act* applies to you if you work for:

- a federal government department, agency or Crown corporation;
- a federally regulated entity (e.g., a chartered bank, airline, TV or radio station, inter-provincial telephone company, buses and railways that travel between provinces, certain mining operations); or
- a First Nation.

To file a complaint under the *Canadian Human Rights Act*, contact the Canadian Human Rights Commission. Allegations of discrimination are screened to ensure they fall within the Commission's jurisdiction. For those that do, the parties are offered services to assist them in resolving the matter through alternative dispute resolution, such as mediation. Many disputes are settled this way. If a resolution is not found, the case may be assigned to an investigator and a report will be prepared for the Commission to consider. The Commission may ask the Canadian Human Rights Tribunal to hold hearings. The Tribunal is

like a court specifically for discrimination cases under the federal human rights act.

If the *Canadian Human Rights Act* does not apply, then generally you would file your complaint with the human rights commission of the province or territory that you live in. The procedures and services available in each province and territory may be slightly different; contact the appropriate commission for detailed information. The commissions offer information and services to people who believe they have suffered discrimination, including alternative dispute resolution mechanisms (such as mediation). Many complaints are settled without a hearing. If mediation is unsuccessful, the commission will decide whether to refer the case to a tribunal for a hearing. If the commission decides not to refer the case to a tribunal, it will be the end of the complaint.

Note that in British Columbia, Ontario and Nunavut, you file complaints directly with the Human Rights Tribunal, rather than with the Commission.

Also note that there is usually a "limitation period" that means you must file your complaint within a certain period of time after the discrimination takes place. Often this period is one year, but check with the relevant commission.

5. I belong to a union. Is there a different procedure for making a complaint about discrimination or harassment?

As a union member, if you believe that you have been discriminated against by your employer, your union representative may be able to advocate for you and help resolve the issue. Your collective agreement includes the applicable federal or provincial/territorial human rights laws. This means that, if your situation fits under the legal definition of discrimination, your union can file a grievance on your behalf to enforce your rights under the agreement. Your union can assist you with the grievance procedure and represent you, including before an arbitrator. Your union is also

subject to the applicable human rights code.

Note that human rights commissions and tribunals will avoid parallel claims and duplicate proceedings. This means that if you choose to proceed with a grievance, you will not be able to file a human rights complaint based on the same situation. Sometimes a grievance may be your only option. This will be the case if the human rights commission or tribunal defers your complaint or doesn't accept it because a grievance procedure is available and considered more appropriate.

6. Who can support me if I make a human rights complaint?

Human rights commission staff provide assistance and information to people about their rights under the applicable human rights code. In addition, the Canadian HIV/AIDS Legal Network and other human rights organizations across the country can provide you with information and referrals. Some provinces and territories also have specialty legal offices that help people with human rights complaints, such as the British Columbia Human Rights Clinic and the Human Rights Legal Support Centre in Ontario. Your local AIDS-service organization may be able to provide you

with emotional support through the process.

Filing a human rights complaint is free of charge. You do not require a lawyer to represent you through the process, although you may choose to have a lawyer assist you. If you hire a lawyer, it will be at your own expense unless you are able to get free services through a clinic or legal aid service.

Remember that many different people and organizations can provide you with information and support, but *only* a lawyer can give you legal advice, specific to your individual situation.

7. What remedies are possible if I file a human rights complaint?

Human rights settlements or orders try to:

- stop the current discrimination;
- prevent future discrimination; and
- provide compensation for the discrimination.

Remedies can include:

- money to compensate for what you lost or had to spend because of the discrimination (e.g., lost wages and benefits);
- money to compensate for injury to your dignity, feelings and self-respect as a result of the discrimination;

- in some jurisdictions, additional damages to punish the employer for willful and reckless violation of the human rights code;
- non-monetary remedies such as a job reference or an apology, being re-instated to your former position, or getting a chance to compete for a job without discrimination; and
- an order that the employer take steps to prevent similar discrimination in the future (e.g., change hiring practices, develop new policies, or train all staff on human rights policy).

8. What is an HIV-related privacy violation?

Your HIV status is private, personal information. You should be able to control who has this information and what they do with it. If you tell your employer or a co-worker acting on behalf of your employer (e.g., a human resources manager) that you have HIV (or any other personal health information), those people are obliged to keep it confidential. Except in rare circumstances, your employer cannot legally disclose information about your HIV status or other medical information to third parties (e.g., other employees, clients, other companies, friends, etc.) without your consent. This duty of confidentiality continues to apply even if a person changes jobs.

Examples of privacy violations by an employer include:

- asking about your HIV status at a job interview;
- requiring specific information about your health that is not necessary to accommodate a disability;

- telling other employees that you are HIV-positive without your consent; and
- telling a prospective employer that you are HIV-positive without your consent (e.g., if a prospective employer calls to check your employment references).

However, be aware that if you tell a co-worker, other than someone who acts in an official capacity as a representative of your employer, that you have HIV, that co-worker does not have the same legal duty of confidentiality as your employer. If that co-worker shares this information about you with others, unless it was part of a larger pattern of harassment or discrimination against you, there is usually little you can do legally. (In some provinces, the law may allow you to sue that person for invading your privacy, but the legal protection is quite limited.)

9. What can I do if my privacy has been violated at work?

Once your privacy has been breached, it is difficult to undo the damage. However, sometimes speaking with the person who is responsible for the privacy breach — as well as those who now know your personal information — about the importance of keeping that information confidential goes a long way towards resolving the problem. Bringing the matter to the attention of a manager or director in the company or organization may also be useful. Your local AIDS-service organization may be able to support you if you decide to take such actions.

If your company or organization has an internal procedure for handling complaints, you may want,

or be required, to use it before trying legal options. If you are a union member, you can speak with your union representative about filing a grievance under your collective agreement.

The law protecting the privacy of your personal health information is a patchwork of rules that vary from one province/territory to another. When there has been a violation of your privacy, the legal options and available remedies are limited and will depend on where you live and work. The primary options are to file a complaint with a privacy commissioner (or ombudsman) or go to court.

10. Which privacy commissioner or ombudsperson do I contact to file a complaint for a workplace privacy violation?

Part of the role of privacy commissioners is investigating complaints from people who believe that their privacy rights have been violated. Which privacy commissioner or ombudsperson you turn to will depend on where you live and work.

- Federal government employees: Under the federal *Privacy Act*, the Office of the Privacy Commissioner of Canada handles complaints about the practices of federal government departments and agencies in handling personal information, including health information.
- Employees working in the provincial/territorial public sector: Your provincial or territorial Information and Privacy Commissioner (or Ombudsman in Manitoba) handles complaints about workplace privacy violations, which would fall under provincial or territorial legislation on protecting the privacy of personal information. Some jurisdictions have general privacy laws that apply broadly to personal information; others also have additional laws dealing specifically with the privacy of health information.
- Employees working in the private sector regulated under federal law: The Office of the Privacy Com-

missioner of Canada handles these complaints, which fall under the *Personal Information Protection and Electronic Documents Act*.

- Other private sector employees: In Quebec, British Columbia and Alberta, the provincial Information and Privacy Commissioner handles complaints about workplace privacy violations under provincial *Personal Information Protection Acts*. In other provinces and territories, your only option may be to go to court.

Contact a lawyer or your provincial Information and Privacy Commissioner's office for assistance in determining what options you have. The application of privacy laws in Canada is very complicated and you are likely to require expert advice.

Note that if you think that your privacy was violated in a way that resulted in discrimination against you (e.g., you were harassed by co-workers who were told about your HIV-status by your employer) you may choose to pursue a discrimination complaint with a human rights commission or tribunal (see above).

11. What remedies are available if I file a privacy complaint?

The privacy commissioner's office may attempt to resolve a complaint through negotiation or mediation. The commissioner may also investigate a complaint and issue a report with recommendations. Depending on the jurisdiction, a commissioner may make an order aimed at ending the breach, for example requiring the employer to stop collecting or disclosing personal information or

to destroy personal information collected illegally.

But you should be aware that remedies for breaches of privacy are limited and a complaint may not provide you with the redress you are looking for. The process will vary from one jurisdiction to another. Contact the relevant privacy commissioner's office for more information about possible remedies.

12. Can I sue the person or organization who has breached my privacy?

It depends on where you live. Four provinces (British Columbia, Manitoba, Saskatchewan, and Newfoundland and Labrador) have privacy legislation (a *Privacy Act*) that allows you to sue a person who has violated your privacy. These statutes require proof that the person acted willfully in violating your privacy (except in Manitoba), and had no legal excuse for doing so. You will not need to prove that you suffered harm as a result of the privacy violation in order to succeed. You may be awarded monetary damages if you win the case.

In Quebec, you may be able to bring a suit alleging violation of your privacy and obtain damages based on the *Quebec Civil Code* and the *Quebec Charter of Human Rights and Freedoms*.

If you live in another province or territory, it will be more difficult to bring a case to court and obtain damages. A violation of your privacy (e.g., disclosure of your HIV-positive status without your consent)

may not, in itself, be sufficient for a lawsuit against your employer. The law in this area is still uncertain and evolving.

The main advantage of going to court is that you may receive a monetary award if your case is successful (although the amount may be small). You may also be able to sue those against whom you could not make a complaint through the other mechanisms, including a co-worker. But lawsuits can be expensive, complex and lengthy, and may not ultimately provide you with a solution. Note that there are also limitation periods which vary between provinces/territories, restricting the amount of time available for launching a lawsuit after the breach occurs. You should have a lawyer represent you.

For more information about your options, please contact a lawyer.

For further information

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- B.C. Civil Liberties Association, *Privacy Handbook*, 2009.
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- Ontario Human Rights Commission, *Policy on HIV/AIDS-related discrimination* (1996).
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