

Know Your Rights

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



Disclosure at work

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1. Do I have to tell my employer that I have HIV?

In most cases, you do not have to tell your employer or anyone you work with that you have HIV. Whether or not you disclose your HIV status at work, and to whom, should be entirely up to you. Your personal health information, including your HIV status, is private, personal information.

Almost all jobs pose no real risk of transmitting HIV to anyone else. Therefore, you

have no legal obligation to disclose your status and it would be unlawful discrimination for your employer to request this information as a condition of employment. But be aware that, if you work in a health care setting, there may be some exceptions to this general rule that you don't have to disclose (see below).

2. When I apply for a job, can an employer ask me if I have HIV or require me to take an HIV test?

No. Employers cannot legally ask your HIV status as a condition of employment, including on a job application or during an interview.

In one of the first legal cases about HIV-related discrimination, an arbitration board decided in 1987 that dismissing a flight attendant from his job because he had HIV was unlawful discrimination. Courts and tribunals have also ruled that firing or refusing to hire a person living with HIV as a cook, as a nurse, and as a member of the armed forces was prohibited discrimination.

As a result of these sorts of cases, the general rule is now well established across Canada: the law that prohibits discrimination based on disability includes HIV status. An employer cannot request to know your HIV status, just as an employer cannot ask about your sexual orientation, marital status, religion, or other similar personal characteristics.

A prospective employer can ask questions in order to assess your ability to perform the duties of the job. In some cases, employers can require a medical exam after making an offer of employment in order to determine if you are able

to perform specific tasks (e.g., if you are physically able to lift heavy objects), or if you may require accommodation for a disability. An HIV test should not be included in such medical testing because a positive test result would not indicate whether or not you are able to perform specific job duties.

However, even though it's against the law, some job applications do ask about specific medical conditions, including HIV, and some interviewers do ask questions regarding your health status and specific conditions. How you choose to answer these questions is a personal decision. You may skip the question on a form, lie or say something general about your health or that you have a disability, but without specifying that you have HIV. Think ahead of time about how you will handle such questions if they come up, because not only may your response affect your chances of getting the job, there may be repercussions later on if the employer finds out that you were not honest.

If you do choose to reveal that you have HIV and you are not hired because of this, it would likely be considered unlawful discrimination on the basis of disability.

3. What about if I work in the health care field? Do I have to tell my employer that I have HIV?

As noted above, the general rule is that there is no legal obligation to disclose in the workplace that you have HIV. However, in some health care-related jobs there may be a (small) risk of HIV transmission in carrying out certain job tasks, such as performing certain kinds of medical procedures.

Because of this, in some cases, there may be some special, limited requirements about HIV disclosure that are set out by your profession's regulatory body (such as a College of Physicians and Surgeons or a College of Nurses). These rules are specific to each profession and may also vary between provinces/territories. Any such legal requirements to disclose can only be justified if your specific job duties pose a real risk of HIV exposure to someone else (e.g., co-workers, clients or patients).

If you work in one of these jobs where you may be required to disclose, it's not always the case that you have to disclose directly to your employer. For example, doctors living with HIV who perform certain "exposure-prone procedures" (invasive procedures where there is a possibility of direct contact between the skin of the health care worker and a sharp instrument or tissue inside a body cavity or wound) are generally required to disclose their HIV status to the applicable College of Physicians and Surgeons, rather than having to disclose directly to their employer (see below).

If you work in health care or are considering a career in health care, contact the relevant regulatory bodies to find out the specific rules that would apply to you.

4. Do I need to disclose that I have HIV to my professional regulatory body?

Professional regulatory bodies provide guidance for professionals in the conduct of their practice (e.g., nurses, social workers, etc.). These standards are binding obligations on professionals. Not complying can result in discipline such as a suspension or removal of your licence to practise. For most jobs, there is little risk of exposing anyone to HIV. Therefore, in most circumstances there is no legal obligation to disclose your HIV-positive status to the body that regulates your profession.

However, the professional regulatory bodies for some health care workers may require that members of that profession disclose their HIV-positive status in certain circumstances where there is a risk of HIV exposure. The most

common example is surgeons, nurses or dentists performing what are labelled "exposure-prone procedures." While the risk for transmitting HIV to a patient is exceedingly small (in fact, there have been no documented cases of transmission of either HIV or hepatitis C from a Canadian physician to his or her patient), colleges and others entrusted with protecting the safety of the public have a role to play in managing risk, while also protecting the privacy of the professional. Colleges may put certain monitoring requirements and practice restrictions in place for members who have HIV (or another communicable disease). For example, physicians and nurses may be restricted from performing "exposure-prone procedures."

5. Do I need to disclose that I have HIV to my patients or clients?

Generally speaking, there is no legal obligation to disclose that you have HIV to your patients or clients. For health professionals, universal precautions to prevent exposure to blood-borne infections should be part of regular practice in all workplaces.

In the unlikely event that a possible HIV exposure occurs (e.g., you bleed onto the broken skin of a patient or client), the patient or client should be informed so that he or she can seek medical advice about testing and whether to consider post-exposure treatment with anti-HIV drugs ("post-exposure prophylaxis") to reduce the chance of getting infected. It is possible that you could be sued if the person is not informed of the possible exposure. You should consult a lawyer or legal clinic immediately if you find yourself in this circumstance.

If your professional practice is governed by a regulating body (such as a College of Physicians and Surgeons or a College of Nurses), that body

may be able to assist you as well. The regulatory body may be able to inform the patient of the exposure without revealing your identity.

For sex workers, the possibility of criminal charges for not disclosing HIV (and possibly other sexually transmitted infections) to a client is a factor to consider. According to a 2012 decision of the Supreme Court of Canada, a person living with HIV must disclose this fact to a sexual partner before having (vaginal) intercourse, unless the person living with HIV has a low or undetectable viral load *and* condoms are used. (It seems likely that these same requirements apply in the case of anal sex, but this is not certain in the law. Nor is it clear whether a person can be convicted for not disclosing before oral sex.) Therefore, a sex worker who does not disclose his or her HIV-positive status to a client might face criminal prosecution. (For further information about the criminal law and HIV disclosure, see www.aidslaw.ca/criminallaw.)

6. Do I need to disclose that I have HIV to my co-workers?

You do not need to disclose that you have HIV status to your co-workers. HIV cannot be transmitted through casual contact. It is up to

you to decide whether you want to share that information with your co-workers.

7. Can I be fired because I have HIV?

No. In Canada, human rights laws at both the federal and provincial/territorial level protect people against discrimination based on disability, whether the disability is real or perceived. These laws have been interpreted to include people living with HIV. Under these laws, it is considered discrimination to refuse to hire, or to fire, a person because of a disability, including HIV. Also, an employer is not allowed to treat an employee in a different, negative way because of his or her disability, or to tolerate harassment or other discriminatory treatment of a person in the workplace because of a disability.

Under Canadian human rights laws, there is also a legal *duty of accommodation*. Accommodation in the workplace means that reasonable adjustments are made in order to remove barriers that prevent persons with disabilities from participating fully. Employers are required to take such steps to accommodate difference, as long as they don't create "undue hardship" on the employer. Some examples include providing flexible work hours, allowing frequent breaks throughout the work day, physically modifying a work station and providing assistive equipment or technology. For more

information on the duty to accommodate, see "**Accommodation in the workplace**" in this series.

However, refusing to hire someone, suspending them, placing limitations on their work, or firing them is not considered unlawful discrimination if the employer can show that the decision is based on a *bona fide* ("good faith") occupational requirement. A *bona fide* requirement is something that is necessary in order to operate the business safely, efficiently and economically. A requirement that an employer puts in place simply because it is convenient or makes things easier for the employer will not meet this test. To be considered *bona fide*, the employer must show that the requirement is necessary as part of the essential functions of the particular job. It must be based on up-to-date medical, scientific and statistical information.

If your HIV-positive status (or other disability) limits the type of work you are able to do, and, despite the employer providing you with reasonable accommodation, you are still unable to meet a *bona fide* requirement of the job, then it is not considered discrimination if an employer lets you go.

8. Can my employer (or my employer's insurance company) refuse to provide me with health or disability benefits because I have HIV?

Your employer, or the insurance company providing benefits coverage, cannot refuse to provide health or disability benefits because you have HIV as opposed to some other health condition.

However, sometimes benefits may be lawfully restricted in ways that exclude some employees with HIV. Many group insurance plans that provide benefits for all employees in a workplace contain clauses regarding "pre-existing conditions." These are illnesses or health conditions that existed

before the employee signed up to the plan. These plans may require employees with pre-existing conditions to pay an additional charge for coverage, may require a specific period of time to pass before making a health claim related to a pre-existing condition, or may exclude any coverage at all for expenses related to pre-existing conditions. If you were HIV-positive before you started working for the employer, your benefits might be limited by such a clause.

9. Do I have to disclose I have HIV to claim benefits under my workplace insurance?

The privacy of personal information, including HIV status, may also be a concern for employees using benefit programs provided through their employer. While an employee is not required to reveal that he or she has HIV in order to apply for health or disability benefits under an insurance plan, an employee will need to provide medical documentation. Your doctors may therefore need to reveal specific conditions and diagnoses to insurance companies when you are applying for benefits or submitting a claim form.

If your paperwork passes through the hands of your employer or someone in your human resources department, they are legally obliged to keep all information about your medical condition

strictly confidential. However, you may also prefer to submit medical documentation in a sealed envelope that is addressed to the insurer and is labelled "confidential." Or you might send the claim forms directly to the insurance company rather than through the human resources personnel at your place of employment. Call the insurance company directly to find out their requirements.

All insurance companies have strict policies regarding confidentiality of client information and are required by law to keep claim information private. Insurance companies must have written permission from the insured person to discuss medical information with anyone who works outside of the insurance company.

10. If I request accommodations at work or need time off, do I need to tell my employer it is because I have HIV?

If you require accommodation at work, you do not need to provide a specific diagnosis to your employer. You will likely need to provide medical documentation explaining the specific limitations or requirements that you have in order to be able to fulfill the essential duties of your job.

If you are requesting a medical leave from your job because you are no longer able to perform the work, you may be able to apply for sick leave benefits or short-term or long-term disability benefits through a group plan sponsored by your

union or employer. To apply for disability benefits, you will need to submit more detailed medical information demonstrating that you are unable to fulfill the essential duties of your occupation. While you are not required to disclose your HIV status to your employer, your physician will have to advise the insurance company of your status if it has any bearing on your ability to maintain employment.

For more information, see "**Accommodation in the workplace**" in this series.

11. Does my employer have to keep my HIV status confidential?

Yes. If you choose to disclose that you have HIV to your employer or to a co-worker acting on behalf of your employer (e.g., a human resources manager), those people are obliged to keep this information confidential. Legally, your employer cannot 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.

In practice, however, it is often difficult to control the flow of information in the workplace and legal remedies are limited if a breach of privacy occurs.

Finally, be aware that if you tell a co-worker other than someone who acts in an official capacity as a representative of your employer, then that co-worker does not have the same legal duty of confidentiality.

12. What protection do I have against discrimination and harassment at work?

Under human rights laws and certain other laws that apply to the workplace, you are protected at work from HIV-related discrimination and harassment (which is considered a form of discrimination). The *Canadian Charter of Rights and Freedoms*, which is part of the Constitution, protects individuals against discrimination by governments, at whatever level, throughout the country. This includes the government's treatment of you as an employee if you work for the government.

In addition, human rights codes require equal treatment without discrimination in the workplace. These codes apply to both government employers and private sector employers (e.g., private individuals, corporations, associations). Each province and territory has its own human rights code, and there is also a federal human rights act that applies at the federal level.

All of the human rights codes in Canada prohibit discrimination against you because you have HIV or AIDS (or even if you are just perceived to have HIV or AIDS). Employers are not allowed to discriminate against employees based on the personal characteristics that are listed in whichever human rights code applies in the circumstances, such as race, sex, disability, sexual orientation, religion, etc. The duty not to discriminate also means that employers are legally required to provide reasonable accommodation to employees with disabilities.

You are also entitled to equal protection and benefits, without discrimination, under any other applicable laws protecting your rights in the workplace. For example, employment standards laws outline basic standards that apply to all workers (e.g., hours of work, public holidays, minimum wages and vacation entitlements, pregnancy and parental leave, etc.). Occupational health and safety laws are aimed at ensuring minimum standards for workplace safety. In some jurisdictions, these laws include specific protections against workplace harassment or violence. There are separate laws with these sorts of workplace protections in each province and territory, as well as at the federal level. You cannot be denied these protections because of your HIV status, as this would be discrimination contrary to the human rights code.

If you belong to a union, another source of protection is your union's collective agreement with the employer, which incorporates the human rights code that applies to that employer. This means that discrimination can also be challenged by your union through a grievance under the collective agreement.

Which laws apply to your situation depends on where you live and for whom you work. Consult a lawyer, legal clinic or your union representative for guidance.

See "**Remedies for discrimination and privacy violations in the workplace**" in this series for more information on what steps you can take if you suffer discrimination or a breach of privacy at work.

In most cases, you do not have to tell your employer or anyone you work with that you have HIV. Whether or not you disclose your HIV status at work, and to whom, should be entirely up to you.

For further information

- AIDS Calgary, "HIV/AIDS and Employer Rights/Responsibilities," Briefing Document (January 2008). On-line: www.aidscalgary.org
- AIDSLEX, "Employment, Labour and the Workplace" resource collection: www.aidslex.org
- Canadian Human Rights Commission, *Policy on HIV/AIDS* (2010). On-line: www.chrc-ccdp.ca
- Episodic Disabilities Employment Network (EDEN) website: edencanada.ca
- Canadian Medical Protective Association, "Physicians with blood borne viral infections: Understanding and managing the risks" (undated), and "Physician personal health information: Supporting public safety and individual privacy" (2010). On-line: www.cmpa-acpm.ca
- COCQ-SIDA, "Le dévoilement en milieu de travail" (Quebec law). On-line: www.cocqsida.com
- Interagency Coalition on AIDS and Development (ICAD), "Employment Information for PHAs," *HIV/AIDS and the Workplace: Information Sheets for PHAs* (2009). On-line: www.icad-cisd.com