

HIV/AIDS CURRENT LAW & POLICY



Your Rights in the Workplace

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aidslaw
project

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🦏 What are HIV and AIDS?

HIV is the "Human Immunodeficiency Virus". It is the virus that eventually leads to AIDS.

AIDS is "Acquired Immune Deficiency Syndrome". People who have HIV eventually develop AIDS because the virus makes it difficult for their bodies to fight off diseases. It is not one sickness, but is a name given to many different illnesses, which people at this stage of the disease may get (such as TB and pneumonia).

It is very important to note that if you have HIV, it does not necessarily mean that you are sick. It can take years for someone who has HIV to develop AIDS. During this time, people who have HIV can lead totally normal and productive lives.

🦏 1 Introduction

The rights of workers living with HIV/AIDS are often abused in the workplace. Amongst the most common forms of abuse experienced are the following:

- ✓ Being refused employment on the basis of their HIV status.
- ✓ Being refused sick leave and other employment-related benefits, which are enjoyed by other employees.
- ✓ Being dismissed unfairly because of their HIV status.

To deal with these cases of discrimination and abuse, a number of **laws** and **policies** have been put in place to protect workers and their rights.

What is the difference between a *law* and a *policy*?

Laws are rules that must be followed by everyone in the country, unless otherwise specified for certain people or bodies.

Policies are guidelines that should be followed by everyone. They are not as enforceable as laws are, but are largely based on laws, and they can become law in time. It is expected, however, of all government employees to follow and apply government policy.

Policies become law once courts have used them as a basis for their decisions.

2 Not everyone with HIV has AIDS

It is **very important** to know that if you have HIV, it does not mean that you are sick or that you cannot work. In fact, it takes many years for some people with HIV to develop AIDS. During this time, people with HIV can lead normal and productive lives. It is for this reason that your HIV status alone is not sufficient enough reason for you to be discriminated against or believed incapable of performing your job.

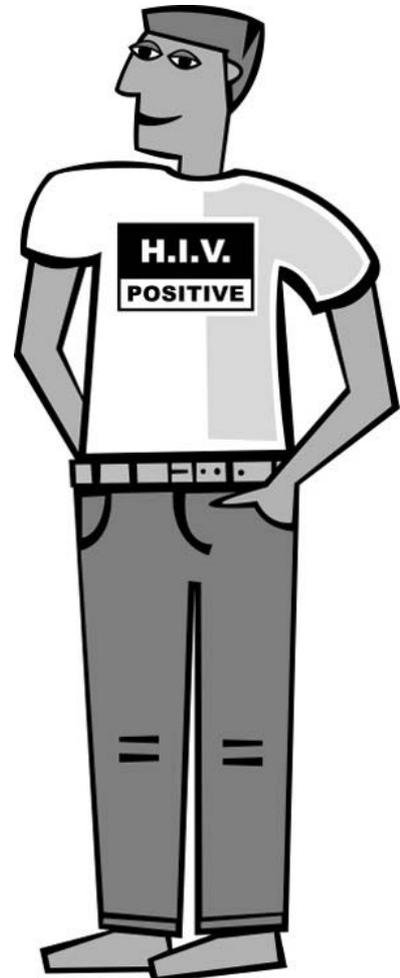
However, many people with HIV/AIDS eventually become so sick that they are unable to work. In such a case, the law and policies are there to protect them and to make sure that they are treated in the same way as anyone else who becomes too sick to work.

How do people become infected with HIV?

Most people are infected with HIV through practicing unsafe sex (having unprotected sex, sex without a condom). Certain people hold untrue beliefs about how HIV infection occurs;

it is therefore important to note that:

- ✓ No one, child or adult can get infected with HIV from normal contact with a worker who has HIV.
- ✓ Workers can not get infected with HIV from sharing toilets, tea cups or showers with people who have HIV.
- ✓ Even where there is a small risk of transmission (for example, nurses looking after people who have HIV or helping a fellow worker who has been injured and is bleeding), the risk can be minimized by treating blood and other body fluids with care (for example, by using gloves).



3 How are workers with HIV or AIDS protected?

Workers who have HIV or AIDS are protected by a number of **laws** and **policies**.

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Laws

a

The Constitution and the Bill of Rights

The Constitution is the highest law in the land and has a list of human rights that it protects in the Bill of Rights. Everyone must follow it and no laws are allowed to go against it.

The following rights are very important:

✓ **Equality**

Everyone is equal and must be treated equally. You may not be unfairly discriminated against for any reason.

Unfair and fair discrimination:

To discriminate against someone means to treat them differently or unequally. While it is usually unfair to discriminate against anyone, circumstances exist where if discrimination can be justified, it is allowed. For example, when an employer needs to hire someone, it is usually unfair to discriminate against him or her because they are disabled. They are expected to make 'reasonable accommodation' to allow a person with a disability to work. However, if an employer needed to employ a driver, it would be considered fair for the employer to discriminate against, and thus not employ, anyone who is blind.

✓ **Freedom and security of the person**

You have the right of control over your body. You cannot be tested for HIV without your consent.

✓ **Privacy**

Only you can decide who should know the results of your HIV test. There is no law that forces you to tell your employer your HIV status.

✓ **Labour relations**

The Constitution lists the basic rights that all workers have. These include your right to fair labour practices (such as not to be dismissed from work because of your HIV status).

✓ **Access to health care**

Some workers are able to afford medical aid but many others cannot. Those workers that can afford it should not be refused membership of any medical aid fund on the basis of their HIV status. It is the government's responsibility to provide access to health care for those people who cannot afford it.

Can your rights be limited?

The rights in the Bill of Rights can never be taken away from you, but they can sometimes be limited if:

- This is done by a law that applies to everyone.
- Sufficient reasons are stated for limiting these rights.

b

Employment Equity Act

(No 55 of 1998)

This Act (Law) states:

- ✓ No one may unfairly discriminate against you because of your HIV status at work, or when you apply for a job.
- ✓ You cannot be asked to take an HIV test by your employer when you apply for a job or anytime during your employment, unless the Labour Court has given your employer permission to do so. If you are asked to take an HIV test, you have the right to ask to see the Court Order that gave your employer permission for the testing.
- ✓ "Medical testing" (like an HIV test) includes any test, question, inquiry or other means of allowing an employer to find out if you have any illness. When you apply for a job, you are often asked to fill in a "health questionnaire". **You do not have to answer any questions on your HIV status.**

If you have been discriminated against because of your HIV status, your employer has to prove that the discrimination was fair.

c

Labour Relations Act

(No 66 of 1995)

You may not be **unfairly** dismissed. However, you can be dismissed if you are not able to work anymore, as long as **fair procedures** are followed. These include your employer trying to find you other work to do or changing the work you do so you can do it even though you are sick.

The Act does **not** cover members of the South African National Defence Force (SANDF), the National Intelligence Agency (NIA) or the South African Secret Service (SASS). These exceptions are dealt with later in this pamphlet.

Cases

The **AIDS Law Project (ALP)** has assisted many people who were unfairly dismissed because of their HIV status, including policemen, domestic workers, teachers and gardeners.

d

Occupational Health and Safety Act

(No 85 of 1993)

Employers have a responsibility to provide as safe a working environment as possible. In all workplaces, employers must introduce measures that reduce the risk of HIV transmission. Employees can refuse to work if the workplace is unsafe.

e

Mine Health and Safety Act

(No 29 of 1996)

Employers of mineworkers have a responsibility to provide as safe a working environment as possible.

f

Compensation for Occupational Injuries and Diseases Act

(No 130 of 1993)

This Act deals with compensation (payment for loss or injury) for people who are injured or infected with a disease as a result of their work. If you are infected with HIV because of a workplace accident, you are entitled to claim compensation.

g

Basic Conditions of Employment Act

(No 75 of 1997)

This Act says all workers are entitled to basic standards such as sick leave. People with HIV or AIDS are also entitled to sick leave.

h

Medical Schemes Act

(No 131 of 1998)

In the past, medical aid schemes could refused membership to people who were already sick or would make them pay more than other people. This practice is no longer allowed. Instead, medical aid schemes must accept anyone who wants to join as long as the person can afford the contributions. The "premium" (the amount you have to pay) is based on how much you earn and how many dependents you want to add as beneficiaries and not on whether you are sick. Therefore if you have HIV, you can get medical aid and not have to pay a higher premium.

This Act says that medical aid schemes must give minimum benefits (which are set by government), including to people who have HIV or AIDS. Many medical aid schemes have special options or programmes for people who have HIV or AIDS. By paying an extra amount, you become part of this option and are entitled to more than the minimum benefits (such as more money each year for medicine). Workers who have HIV should check with their medical aid scheme to see if they can get this extra cover.

If you are a member of a medical aid, you can add your blood relatives, your wife, husband, same sex partner, customary wife or husband, and children as dependents so they can benefit from it as well.

NOTES

- ▶ If you have HIV or AIDS when you join a medical aid scheme, you may have to wait a year before you get any of the extra benefits the scheme offers. So, for the first year, you can only get the minimum benefit.
- ▶ If you change jobs and join a new medical aid scheme within 3 months, and you were a member of your previous scheme for at least 2 years, you will **not** be subject to the late joinder penalty, but you will also not have to wait a year to get all the extra benefits that the scheme offers for pre-existing illness.
- ▶ Unlike before, workers can choose to join any option offered by a medical aid scheme (as long as they can afford it). You too can join any special programmes your medical aid scheme may have to people with HIV or AIDS.
- ▶ You may be required to have a medical exam (including an HIV test) to qualify for extra benefits.

Policies

*The most important policy is the "**Code of Good Practice on key Aspects of HIV and AIDS and Employment**". The Minister of Labour and the Employment Equity Commission developed this policy.*

NOTE

- ▶ The **Code** is a policy, not a law. But much of what it says is covered in other laws dealt with in this booklet.

This **Code** encourages employers to develop their own policies to:

- ✓ Prevent unfair discrimination at work on the basis of employees' HIV status.
- ✓ Encourage people living with HIV or AIDS to be open about their HIV status without fear.
- ✓ Find ways of managing HIV in the workplace.
- ✓ Create a balance between the rights and responsibilities of everyone at work.

The Code says:

a

Unfair discrimination on the basis of HIV status is not allowed

No one can unfairly discriminate against you because of your HIV status at work, or when you apply for a job.

This means (among other things) that:

- ✓ Your HIV status cannot be taken into account when an employer decides whether or not to hire you.
- ✓ People living with HIV/AIDS cannot be paid less, given less benefits, or have different terms and conditions of employment from other employees in the same category as them.
- ✓ People living with HIV/AIDS cannot be forced to use separate facilities such as toilets, showers and tearooms.

Cases

A v SAA
J 1916/99



The **AIDS Law Project (ALP)** dealt with a case where a person applied for a job as a cabin attendant with South African Airways (SAA). SAA refused to hire him because he had HIV. In court, SAA admitted that testing him without his informed consent and refusing to employ him because he had HIV was "unjustifiable". A settlement, including a payment of R100 000 to the person, was drawn up.

Hoffmann v SAA
2001 (1) SA 1 (CC)

In Hoffmann v SAA the Constitutional Court declared that pre-employment HIV testing was a violation of a worker's rights to dignity and equality.

b

What can be done to prevent unfair discrimination?

Employers and employees should try to protect workers with HIV or AIDS from unfair discrimination and victimization by:

- ✓ Providing education and training on basic human rights as well as the rights of workers who have HIV or AIDS.
- ✓ Supporting workers with HIV or AIDS in order to make it possible for more people to be open about their HIV status.

C

HIV testing at work

Because an HIV test is a **medical procedure**, you must give **informed consent** to being tested. That means you must know exactly what the test is and what the consequences will be for you if you test positive or negative. To make sure you know this, you should be given counselling before the test ("**pre-test counselling**").

Pre-test counselling should give you enough information to properly decide whether or not you want to have the test. You must then be given time to decide whether to have the test or not.

During the ordinary scope of employment, an employer **cannot** ask you to have an HIV test **unless** the Labour Court has given them permission to do so. Even so, if you refuse to have the test, you cannot be forced to.

However, if **you** decide to have an HIV at a clinic run by your employer, this is not against the law. You may decide to have a test at work because you want to know, or because you may have been involved in a workplace accident that may have exposed you to HIV.

If you do agree to have the test, you must be given counselling when the results are given back to you, to help you deal with the meaning of the results. This is called "**post-test counselling**".

d

The result of an HIV test is confidential

Because you have a right to privacy, you do not have to tell anyone what your HIV status is, even if you have the test at the clinic at your workplace. This includes your employer and your fellow workers. If you do choose to tell your employer, your employer cannot tell anyone else unless you agree to it.

Greater openness about and discussion of HIV will help to prevent HIV transmission and end the victimization and stigmatization that people with HIV face. Employers should create an environment at work where people can be free to disclose their status if they want to.

Some ways to do this are:

- ✓ Employing people who have HIV or AIDS in education, prevention and awareness programmes (for example, as "peer" educators).
- ✓ Encouraging support groups for employees with HIV or AIDS.
- ✓ Ensuring that persons who are open about their HIV status are not unfairly discriminated against or victimized.

e

Making the workplace safe

Employers must make sure the workplace is safe and that risk to the health of employees is minimized. While the risk of being infected with HIV at work is very low, accidents do happen. There should therefore be training and education on how to deal with and reduce the risk of HIV transmission at work.

Workers, especially health care and emergency workers, should be given equipment and materials (such as disposable gloves) to protect them from exposure to bodily fluids.

Employers should state in their policies, procedures that must be followed in the event that a worker is exposed to HIV, as well as how to get treatment.

Anti-retroviral drugs (known as **post-exposure prophylaxis**) can reduce the risk of being infected with HIV if you have been recently exposed to the virus. To be effective these drugs must be taken within 72 hours of the accident where there may have been a risk of HIV infection.

f

What if you are infected at work – can you get compensation?

Workers who are infected with HIV as a result of a workplace accident can apply for compensation. An employer's policy should say how workers go about claiming compensation. Employers must also assist workers to prove they were infected as a result of a workplace accident (by collecting the relevant information and documentation).

g

What about employee benefits?

Workers with HIV have the right to receive the same employee benefits as all other workers.

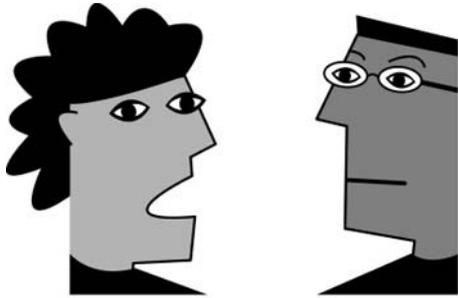
Depending on where you work, the benefits offered by your employer may be:

- ✓ Medical aid
- ✓ Disability and/or death benefits
- ✓ Pension or provident funds

You should remember that **all** employees are entitled to **sick leave** under the Basic Conditions of Employment Act.

h

Grievance procedures



Employers must protect the rights of workers with HIV or AIDS. They must make sure that there are grievance procedures to deal with cases where the rights of a worker with HIV or AIDS are violated. These procedures must protect your right to privacy, including **hearing complaints in private** and **keeping information confidential**.

i

Managing employees who have HIV

Employees with HIV must be allowed to do their job for as long as they are medically fit to do so. Where employees with HIV or AIDS get sick, employers must try to assist them to continue working. This is known as 'reasonable accommodation'.

j

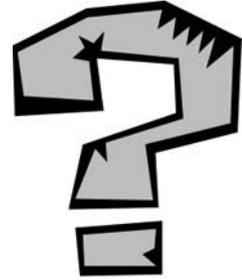
HIV and AIDS workplace programmes

Programmes should be developed at work that will help to prevent new infections, provide care and support for those infected or affected, as well as manage the impact of the HIV epidemic on the organisation.

These programmes could include:

- ✓ Education and training programmes to raise awareness and knowledge of HIV/AIDS.
- ✓ Promoting the use of condoms and respect for sexual rights.
- ✓ Providing access to voluntary counselling, HIV testing and treatment.

8 4 Other common questions



Are domestic and farm workers protected by law?

Yes. The Labour Relations Act, Basic Conditions of Employment Act and the Employment Equity Act cover all workers.

Cases

The **AIDS Law Project (ALP)** has assisted workers from many different types of employment when they have been given HIV tests without knowing or agreeing to them, as well as when they had been dismissed because of their HIV status. Complaints have also been laid against doctors who tested domestic workers without receiving their informed consent.

In all of these cases workers have been re-instated or compensated.

What about the South African National Defence Force (SANDF), National Intelligence Agency and Secret Service?

The Labour Relations Act and Employment Equity Act do not cover members of these government bodies. Recruits to the SANDF are required to take an HIV test before they are allowed to join the army. There are cases of people who have been refused recruitment or dismissed because of their HIV status.

However, two recent cases suggest that the general right to fair labour practices in the Constitution can be used to stop this type of unfair discrimination;

Case 1

South African National Defence Force Union v Minister of Defence and another (CCT 27/98)

This case did not deal with HIV testing or the dismissal of someone because of their HIV status, but it did say that the right to fair labour practices covers members of the SANDF as well.

Case 2

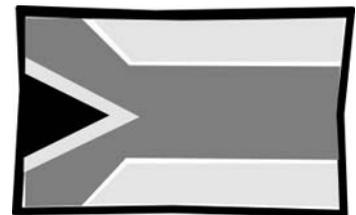
N v Minister of Defence (Namibia – LC 23/98)

Even though this case took place in Namibia, our courts are allowed to look at the decisions of courts in other countries for guidance. In this case a person applied to join the Namibian Defence Force as a soldier and was made to take an HIV test. He tested positive for HIV and his application was turned down. The court decided this was unfair, because the fact that he had HIV did not mean he was unable to perform day-to-day duties of a soldier.

Is there any job from which you can be excluded because of your HIV status?

NO. This is because, with the proper care, the chances of HIV infection at work are almost non-existent. In addition, HIV infection alone does not interfere with a person's capacity to carry out the job for which they are employed.

8 5 Protecting your rights at work



There are **many** ways of protecting your rights at work.

For example, if you are discriminated against because you have HIV or AIDS, you **could** lodge a complaint with the South African Human Rights Commission or you could sue (bring a case against) your employer. However, the **Labour Relations Act (LRA)** and the **Employment Equity Act (EEA)** have easier, quicker and cheaper ways of ensuring your rights are protected.

The **LRA** says that any disputes about work issues (such as unfair dismissals or unfair discrimination) will be dealt with by **Bargaining Councils** or by the **Commission for Conciliation, Mediation and Arbitration (CCMA)**.

However, the **EEA** is even easier to use because (unlike the **LRA**) it says you cannot be unfairly discriminated against because you have HIV or AIDS. "Unfair discrimination" includes unfair testing, dismissal and refusal to give you training or promotion.

1 Bargaining Councils

These cover larger industries, such as the motor and mining industries. If you are a member of an industry that has Bargaining Council, you cannot use the CCMA. Instead, contact your Bargaining Council and they will assist you to sort out your complaint.

2 Commission for Conciliation, Mediation and Arbitration (CCMA)

The CCMA has offices all over South Africa. They are there to assist you to solve any problems you experience at work. However, you must first have used all your "internal remedies". Most employers have "grievance procedures" for dealing with complaints. The CCMA will only assist you if you have used these grievance procedures and have not been successful. The CCMA will not charge you for helping you to resolve your dispute with your employer.

Contact addresses for the CCMA are at the end of this pamphlet.

3 Labour Court

If your Bargaining Council or the CCMA have not been able to sort out your problem, it will be sent to the Labour Court.

4 Department of Labour

The Department of Labour can also assist you to sort out complaints. They have offices all over the country where you can go for advice or assistance.

5 Trade Unions

If you are a member of a trade union, you can ask your trade union for advice and assistance.

6 Non-Governmental Organisations (NGOs)

There are many NGOs assisting people with HIV and AIDS. They offer advice, provide information and can also assist you to sort a matter out at work. A good example of an NGO that deals with discrimination against people with HIV is the **AIDS Law Project (ALP)**. We have assisted many employees, including the most vulnerable category of employees such as **domestic workers**, who were dismissed by their employers because of their HIV status.

Our address and telephone numbers are on the back of this pamphlet.

Commission for Conciliation, Mediation and Arbitration (CCMA)

Eastern Cape

Private Bag X22500, Port Elizabeth 6000
Tel: 041 505 4300 Fax: 041 586 4585/6

Free State

Private Bag X20705, Bloemfontein 9300
Tel: 051 505 4000 Fax: 051 448 4468/9

Gauteng

Private Bag X096, Marshalltown 2107
Tel: 011 377 6600 Fax: 011 834 7331

KwaZulu Natal

Private Bag X54363, Durban 4000
Tel: 031 362 2300 Fax: 031 306 5402

Mpumalanga

Private Bag X7290, Witbank 1035
Tel: 013 656 2800 Fax: 013 656 2885/6

Northern Cape

Private Bag X6100, Kimberley 8300
Tel: 053 831 6780 Fax: 053 831 5947/8

Limpopo

Private Bag X9512, Pholokwane 0700
Tel: 015 297 5010 Fax: 015 297 1649

North West

Private Bag X5004, Klerksdorp 2571
Tel: 018 464 0700 Fax: 018 462 4126

Western Cape

Private Bag X9167, Cape Town 8000
Tel: 021 469 0111 Fax: 021 465 7193/7

You can also e-mail the CCMA

infoservices@ccma.org.za

or visit their website

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