

PENNSYLVANIA AIDS LAW REPORT

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A PUBLICATION OF THE AIDS LAW PROJECT OF PENNSYLVANIA
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Introducing ... *Pennsylvania AIDS Law Report*

Here at the AIDS Law Project of Pennsylvania, we are pleased to issue this first installment of the *Pennsylvania AIDS Law Report*. We hope that this publication will provide useful and timely information to attorneys, health care providers, and social service providers about HIV-related legal issues. Our first issue is devoted primarily to **Act 148: The Confidentiality of HIV-Related Information Act**, the law's most important response to the AIDS epidemic to date in Pennsylvania. Our lead article is accompanied by forms that will be useful to practitioners in understanding and complying with the law. Along with our lead article, we've included an Act 148 quiz (with the answers), and a bibliography of AIDS-related legal resource materials of value to practitioners.

Please note: *Pennsylvania AIDS Law Report* is intended to be solely informational; legal advice regarding specific questions and circumstances is beyond the scope of this publication and should be obtained by consulting legal counsel directly.

Production of the *Pennsylvania AIDS Law Report* is funded by a grant from the **Lawyer Trust Account Board**, which supports provision of civil legal services to low income persons through its "Interest on Lawyers' Trust Accounts" (IOLTA) grant program. IOLTA program participation, which is voluntary for attorneys, generates funds through payment of interest on attorneys' interest-bearing trust accounts. To date, IOLTA has resulted in \$2.8 million

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Act 148: The Confidentiality of HIV-Related Information Act

Pennsylvania's **Confidentiality of HIV-Related Information Act**,¹ popularly known as "Act 148," is the state legislature's most significant response to the AIDS epidemic to date. An understanding of the main features of this legislation is crucial for attorneys, as well as for health care and social service providers, involved in any way in providing services to persons with AIDS/HIV or others affected by the AIDS epidemic. This article is intended to provide an overview of the Act. **Bold typeface** will be used for terms that are specifically defined in the Act. Readers with specific questions about Act 148 should read the text of the Act itself, consult their own legal counsel for interpretation, or contact the AIDS Law Project for more information.

Summary of Act 148

Like HIV confidentiality and informed consent standards that are now the law in approximately 35 states, Act 148 is intended to promote HIV testing and counseling by insuring that information relating to HIV is subject to special confidentiality standards, and not inappropriately disclosed or misused. Along with its broad protections, Act 148 carves out limited, specific exceptions to confidentiality, including a provision allowing for physician notification of third parties at significant future risk of infection by their sex or needle-sharing partners. The Act also sets forth standards for informed consent for HIV testing, providing specific requirements for counseling and disclosing test results, including special rules applicable to HIV testing by insurance companies. Act 148 includes specific procedures for follow-up testing of a source patient's available blood after potential HIV occupational exposure to health care workers. Finally, Act 148 sets forth the limited circumstances in which a court may order HIV testing and disclosure.

Act 148 Enforcement

Individuals who have been harmed by a violation of Act 148 can bring suit for compensatory damages, including claims for economic harm, such as lost wages, as well as claims for emotional distress, against the person who committed the violation. In addition, if the violation of Act 148 included a violation of source patient testing provisions, the harmed individual can also sue for reasonable attorney fees and costs. Violations of Act 148 may also be the basis for complaints to professional licensing boards.

Each unauthorized disclosure of confidential HIV-related information, or each HIV test in violation of Act 148, is a separate violation of Act 148 for civil liability purposes. Accordingly, a breach of confidentiality in violation of the Act, resulting in widespread dissemination of protected information, may involve numerous violations, each one of which can be considered as a basis for civil liability.

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Introducing...

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annually. The AIDS Law Project's IOLTA grant supports our program to increase the availability of civil legal services to low income persons with HIV disease state-wide. We seek to do this by forging closer links between health/social service providers and local legal service providers. Part of our IOLTA-funded activities has included surveys of consumers, health and social service providers, and legal service providers state-wide to assess the current availability of legal services for persons with HIV disease. Upon completion of the survey analysis, we will be announcing our findings here.

Persons seeking legal services from the AIDS Law Project should contact us directly at (215) 587-9377. Potential clients should be advised to request to speak with "Intake" staff when they call. We provide a wide range of services without charge to our clients, including direct services and referrals to volunteer attorneys.

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IN THE NEXT ISSUE ...

- *Discrimination Issues and the Americans with Disabilities Act*
- *Results of the AIDS Law Project Consumer Survey*
- *AIDS Law Project Docket Update*

Act 148 (continued from page 1)

Scope of Confidentiality

The confidentiality provisions of Act 148 apply, in the first instance, to persons providing health or social services. This confidentiality requirement, for example, applies to social service agency employees in receipt of HIV information concerning their clients with HIV disease, or to physicians or hospital staff providing services to persons with AIDS.

In order to release confidential HIV-related information to a third party (not included among specific exceptions, as noted below), the health or social service provider must obtain written permission from the person (or persons) that the information pertains to. Under Act 148, it does not matter whether the HIV-related information is released in a verbal or written form. The written release must conform to specific statutory requirements. A model release is included as **FORM 1**, accompanying this article.

Practitioners should understand when HIV-related information is protected by Act 148 and when it is not, since not all disclosures come within the confines of the law. When a person tells his neighbor, for example, that he has AIDS, that disclosure is not protected under the Act, unless the neighbor is acting in a health care or social service capacity as defined in the Act. HIV-related information, however, may be subject to disclosure limitations other than those contained in Act 148. For example, when an employee tells his employer that he has AIDS, that information may be subject to confidentiality provisions of employment discrimination laws such as the Americans with Disabilities Act. When a parent discloses to a school principal that her child is HIV infected, that information may be protected by school privacy laws. Thus, although the emphasis in Act 148 is in heightened confidentiality standards for health care and social service providers, other limitations may also apply, depending on the circumstances.

The disclosure of HIV-related information pursuant to an Act 148 written release must be accompanied by written notice prohibiting unauthorized subsequent disclosure of the information. A model subsequent disclosure notice is provided as **FORM 2**. In a case in which HIV-related information is disclosed verbally pursuant to a release, subsequent written confirmation, via a form letter or other writing containing the subsequent disclosure notice, is required. The following example illustrates the subsequent disclosure requirement: a local AIDS service organization obtains authorization from its client to release HIV-related information in making a referral to an attorney who will represent the client in appealing the denial of his social security disability claim. The attorney, as well as her staff, are now covered by Act 148's confidentiality provisions, and, like the AIDS service organization in making the referral in the first place, she must obtain specific written permission from the client before releasing HIV-related information regarding the client to any third party. Of course, if the client contacts the attorney directly and discloses the HIV information, Act 148 will not come into play.

Defining "HIV-Related" Information

Act 148 includes all of the following in its definition of **confidential HIV-related information**:

- 1) That an individual has been given an HIV-related test (that is, any test to determine whether the patient is HIV infected);
- 2) That an individual has HIV, an HIV-related illness or AIDS;
- 3) That which "identifies or reasonably could identify an individual as having HIV, an HIV-related illness or AIDS."

Color-coding the charts of HIV infected patients in a unique way, segregating HIV infected inmates from the rest of the prison population, directing Corrections

(continued on page 3)

Act 148 (continued from page 2)

Officers to make use of "blood and bodily fluid precautions" with specific inmates, or merely making a referral from an social service agency that specializes in working with or advocating for persons with HIV disease could reasonably identify an individual as having HIV and, as a result, would constitute an unlawful disclosure in violation of Act 148, if the appropriate consent has not been obtained.

Compliance with this confidentiality standard requires thoughtfulness on the part of service providers. An infant's medical record, which identifies the infant's mother and indicates that the infant has HIV antibodies, for example, contains HIV-related information not just about the infant, but about the mother as well, since it is reasonable to conclude that the mother's HIV infection is the reason that the infant has HIV antibodies.

Permissible Physician Disclosure

Under Act 148, only physicians are granted an exception under the confidentiality protections to notify at-risk partners of patients with HIV infection. The physician may disclose only after five conditions are met:

- 1) The disclosure is made to a known contact of the patient — a "contact" is a sex-sharing or needle sharing partner;
- 2) The physician reasonably believes that disclosure is medically appropriate;
- 3) The physician must reasonably believe that there is a significant risk of future infection to the partner;
- 4) The physician must counsel the patient concerning the need to notify the partner; and
- 5) The physician must reasonably believe that the patient will not inform the partner or abstain from sexual or needle-sharing behavior that poses a significant risk of future infection to the partner.

In making a decision regarding disclosure to a known contact, physicians should carefully document their compliance with these requirements.

In providing notification to the partner, the physician is prohibited from disclosing the identity of the patient. Physician disclosure is entirely discretionary. The Act permits but does not require physicians to notify third parties who are at risk; physicians are immune from liability whether they do or do not notify third parties at significant, future risk. Since the partner notification provision is limited to physicians, other health care or social service professionals are prohibited from making disclosure, even if they can meet the five criteria required of physicians.

Other Exceptions to Confidentiality

In addition to permissible partner notification by physicians, Act 148 contains a series of other exceptions (involving roughly 20 different circumstances) to the confidentiality requirements for HIV-related information.

These exceptions involve disclosure of HIV-related information in circumstances where the disclosure of other confidential medical information is allowed, and, in general, the disclosure is intended to facilitate or enhance availability of care or other services. The exceptions to confidentiality include:

- 1) The physician who ordered the test (that is, the laboratory need not obtain written permission from the patient to disclose the results to the physician who ordered the test);
- 2) Health care providers consulted to determine diagnosis and treatment;
- 3) Funeral directors responsible for preparing the body of the individual for burial or cremation;
- 4) Insurers, to the extent necessary to reimburse the providers of health care or to make payments pursuant to an insurance policy held by the individual;
- 5) State or local vital statistics offices, which maintain or transmit mortality data;
- 6) State or local public health agencies authorized to receive reports of AIDS diagnoses, as required by state law;
- 7) Employees of county mental health/mental retardation agencies, county children and youth agencies, juvenile probation agencies, and residential service providers (such as foster parents) providing residential placement, provided:
 - a) They are generally authorized to receive medical information;
 - b) They are responsible for assuring that the individual receives medical care; and
 - c) They need to know HIV information in order to ensure that proper care is provided.

Court-Ordered Disclosure and Testing

Court-ordered disclosure of confidential HIV-related information is governed by Act 148. Persons seeking HIV-related information must prove to the court that they have a **compelling need** for the information that cannot be accommodated by other means. Similarly, persons requesting court permission to disclose HIV-related information must prove to the court that they have a **compelling need** to do so.² In such court proceedings, the **subject** of the disclosure request is given notice of the proceedings, and the proceedings are to be held in camera, to protect the privacy of that individual. In ordering disclosure, the Court is required to impose "appropriate safeguards" against subsequent unauthorized disclosure.

An individual may petition the court for an order imposing mandatory HIV testing. All of the following

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ISN'T IT TIME YOU WERE TESTED? — AN ACT 148 QUIZ

Pick the one best answer to the following questions. Answers can be found on page 10.

1. In order for a medical facility staff person to make a referral of a person with AIDS to the AIDS Law Project in compliance with Pennsylvania law, the staff person must first:
☐ (a) obtain the client's written consent to disclose his identity to the Law Project;
☐ (b) obtain the client's verbal consent to disclose his identity to the Law Project;
☐ (c) either (a) or (b);
☐ (d) neither (a) nor (b).
2. When a Pennsylvania resident applies for life insurance, the insurance company may test for HIV antibodies:
☐ (a) with the applicant's written informed consent;
☐ (b) without telling the applicant;
☐ (c) only if the insurer will follow up with the applicant if the results are positive;
☐ (d) with the applicant's verbal agreement;
☐ (e) none of the above.
3. If a hospital nurse suffers a needlestick injury, the hospital can have the patient tested for HIV:
☐ (a) on demand of the injured nurse, without the patient's consent;
☐ (b) only if the nurse can first show that he is HIV negative;
☐ (c) only after obtaining a court order authorizing testing;
☐ (d) only after showing that the patient may in fact be at risk for HIV infection;
☐ (e) none of the above.
4. In Pennsylvania, a physician can breach an HIV-infected patient's confidentiality rights only:
☐ (a) if the physician is seeking to warn the patient's spouse who may have been unwittingly infected by the patient;
☐ (b) if the physician is making a report of the patient's HIV positive test result to the local health department;
☐ (c) if the physician first obtained court approval;
☐ (d) if the patient poses a clear and present danger of HIV transmission to others as a result of mental illness;
☐ (e) none of the above.
5. In order to provide consent for HIV testing, consistent with Act 148, an individual must:
☐ (a) be at least 18 years of age;
☐ (b) have signed a written consent;
☐ (c) both (a) and (b);
☐ (d) neither (a) nor (b).
6. Post-test counseling must be:
☐ (a) provided to all persons receiving HIV testing;
☐ (b) provided only on a face-to-face basis;
☐ (c) provided only to persons testing positive;
☐ (d) responsive to social service referral needs of persons testing positive;
☐ (e) none of the above.

7. The definition of "HIV-related information" for confidentiality purposes includes:
- ☐ (a) HIV positive test lab reports;
 - ☐ (b) HIV negative test lab reports;
 - ☐ (c) information pertaining to sexual history that indicates reasonable likelihood of HIV infection;
 - ☐ (d) information expressed verbally as well as in writing;
 - ☐ (e) all of the above.
8. Act 148 confidentiality provisions apply to:
- ☐ (a) psychotherapists, psychologists, and drug and alcohol counsellors;
 - ☐ (b) pharmacists, druggists, and herbalists;
 - ☐ (c) mental health/mental retardation service providers;
 - ☐ (d) oral surgeons, dentists, and dental hygienists;
 - ☐ (e) all of the above.
9. While briefly assisting a dentist during a routine patient examination, a dental hygienist was not wearing gloves, and had direct skin contact with a small amount of the patient's saliva. A week later, the hygienist heard a rumor that the patient is HIV positive. The hygienist's options are:
- ☐ (a) contact a physician, have the incident certified as a "significant exposure," and seek to have the patient tested;
 - ☐ (b) contact a physician, have the incident certified as a "significant exposure," and seek to have a specimen of the patient's available blood tested;
 - ☐ (c) seek a court order requiring HIV testing of the patient;
 - ☐ (d) none of the above.
10. A patient consults his physician for a pre-employment physical. The physician already knows that the patient is HIV positive. The employer's form asks: "Does this individual currently have any infectious or communicable disease or condition?" How should the physician respond to this question?
- ☐ (a) complete the form fully and honestly, by disclosing the HIV status of the patient to the employer;
 - ☐ (b) disclose the HIV information to the employer only if written consent is provided by the patient in conformity with Act 148;
 - ☐ (c) answer the question "yes," but without identifying AIDS/HIV as the infectious disease;
 - ☐ (d) none of the above.

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conditions must be proven before the court may authorize such testing:

- 1) The **subject** whose test is sought must have been afforded informed consent and pre-test counseling procedures as detailed in Act 148 (discussed below) and has refused to consent or cannot be located;
- 2) The applicant requesting the court order must have been exposed to body fluid of the subject, and that exposure must present a significant risk of exposure to HIV infection (this risk must be supported by available medical and epidemiological data);
- 3) The applicant requesting the court-ordered test must have a compelling need to determine the HIV status of the subject.

Informed Consent for HIV Testing

In a significant change to prior law,³ Act 148 prohibits HIV testing without written informed consent. Although Act 148 itself does not provide a definition of "informed consent," that concept is generally viewed as requiring the disclosure of all facts, issues, and alternatives that are significant and material, from the point of view of a reasonably prudent patient, to the patient's decision.⁴ Thus, for example, even though the Act does not specify disclosure of the option of anonymous as opposed to confidential testing, the general informed consent requirement would require the disclosure of such an option as part of obtaining consent, since an understanding of the patient's options regarding anonymous or confidential testing would be material to the patient's decision about being tested. Nor does Act 148 impose an age limit for consent; the only statutory requirement is that the individual undergoing testing provide a valid consent. Accordingly, testing of adolescents on an informed consent basis, but without parental consent, is consistent with Act 148.⁵ The Act does specify that no testing can be carried out without offering the individual pre-test counseling that details, among other things, information concerning means of exposure to and transmission of HIV. **FORM 3** provides a checklist of issues relevant in completing adequate pre-test counseling and obtaining a valid consent.

Positive or negative HIV-related test results may not be released to the patient without an immediate opportunity for face-to-face post-test counseling. Post-test counseling must encompass a number of topics, including:

- 1) The significance of the test results;
- 2) Measures that should be used to prevent HIV transmission;
- 3) The benefits of informing the patient's sexual or needle sharing partners who may have been put at risk for infection from the patient.

If an HIV test result is positive, the post-test counseling must also inform the individual who has tested positive of the availability of appropriate health care and mental health services along with community social support resources.

HIV Testing By Insurers

Act 148 imposes specific standards applicable when an insurer requires insurance applicants to undergo HIV testing.⁶ Like health care providers, insurers must obtain written informed consent prior to testing applicants, although insurers are not required to provide pre-test counseling. The insurer must also disclose, in writing, the following:

- 1) Information explaining AIDS, HIV and HIV-related testing;
- 2) Disclosure of the effect that the HIV-related test result will have on the approval of the application for insurance;
- 3) A description of the insurer's confidentiality standards;
- 4) A statement that, because of the serious nature of HIV-related illness, the insurance applicant may want to undergo counseling prior to being tested for HIV;
- 5) Information about the availability of alternate HIV testing and counseling offered at local HIV test sites, including the telephone number where the applicant could obtain additional information;
- 6) Name and address of a designee to receive notification of a positive HIV test result. (This could be the applicant's physician, a local health department or a local community organization.)

Only if an insurance applicant requests notification does an insurer need to disclose a negative test result. If the test administered on behalf of the insurer is positive the insurer does not inform the applicant directly. Instead, the positive HIV-related test result is to be reported to the designee chosen by the applicant. The designee would then contact the applicant, reveal the test result, and offer appropriate counseling.

Certification of Significant Exposure

One exception to Act 148's almost universal requirement of informed consent for HIV testing is applicable when a health care worker is put at risk for occupational exposure to HIV (from a needle-stick injury, for example), and wishes to find out the source patient's HIV status. When an **individual health care provider** or **first responder** (police officer, firefighter, or emergency medical personnel involved in the provision of first aid and other emergency medical services) experiences an exposure to human blood or body fluids posing a risk of HIV transmission, Act 148 defines the procedure to be followed if the source patient's available blood is to be legally tested without patient consent.

Note that this option applies only to testing available blood; Act 148 does not provide, other than by court order (discussed above), a process for obtaining another specimen for testing. **Available blood** is a blood specimen that is already in the possession of a health care institution or

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FORM 1

[NAME OF SERVICE PROVIDER OR HEALTH CARE ORGANIZATION]
[ADDRESS]

**AUTHORIZATION FOR RELEASE OF
CONFIDENTIAL HIV-RELATED INFORMATION**

HIV or Human Immunodeficiency Virus is the virus which causes or indicates AIDS or HIV infection.

HIV-related information is information which concerns whether a client/patient has been tested for HIV, or has AIDS or an HIV-related illness, or could reasonably identify the client/patient as having one or more of these conditions.

I authorize (Name of Person or Organization) to release confidential HIV-related information pertaining to:
(Client/Patient's Name) (Address) (Client/Patient Identification Number)

Specify how much and the type of information that is to be released: _____

This information is to be released to: (Name of individual or organization who is to be given information)
(Address)

The above mentioned information is to be released only for the following purpose(s): _____
I understand that I may revoke this consent at any time except to the extent information has already been released in reliance on this form.

This consent will expire on: _____

This authorization must be signed and dated

I have read and fully understand the above statements as they apply to me. I consent to the release of records/information for the purpose(s) stated above.

Date: _____
Client/Patient Signature

Date: _____
Witness Signature

Signature of Person Authorized in lieu of Client/Patient

Relationship to Client/Patient

FORM 2

NOTICE OF PROHIBITION OF DISCLOSURE

THIS INFORMATION HAS BEEN DISCLOSED TO YOU FROM RECORDS PROTECTED BY PENNSYLVANIA LAW. PENNSYLVANIA LAW PROHIBITS YOU FROM MAKING ANY FURTHER DISCLOSURE OF THIS INFORMATION UNLESS FURTHER DISCLOSURE IS EXPRESSLY PERMITTED BY THE WRITTEN CONSENT OF THE PERSON TO WHOM IT PERTAINS OR IF AUTHORIZED BY THE CONFIDENTIALITY OF HIV-RELATED INFORMATION ACT, 35 P.S. SECTION 7601, ET SEQ. A GENERAL AUTHORIZATION FOR THE RELEASE OF MEDICAL OR OTHER INFORMATION IS NOT SUFFICIENT FOR THIS PURPOSE.

FORM 3

INFORMED CONSENT FOR HIV ANTIBODY TESTING: PRE-TEST CHECKLIST

Pre-test counseling for HIV testing, as required by Act 148, involves several issues: (1) determination of an appropriate means of communication relative to the patient's education, vocabulary, etc.; (2) assessment of the patient's capacity to provide an informed consent; (3) provision of information pertaining to the testing procedure itself, particularly in regard to the manner of providing the results and post-test counseling; (4) provision of information pertaining to the significance of the test results, including the relationship between HIV infection and AIDS, and related medical issues; and (5) provision of information regarding means and avoidance of HIV transmission.

The following checklist is intended to identify the areas to be covered in regard to the counseling. In applying the checklist in practice, the HIV counselor will need to determine, through the use of open-ended questions and discussion with the patient, that the patient has in fact understood the issues in question.

1. Are the pre-test counseling and the informed consent form provided in a language that is fully comprehensible to the patient?
2. Does the pre-test counseling use appropriate vocabulary, understandable to the patient, and that is sensitive to the patient's cultural background, as well as the degree of literacy and educational level of the patient?
3. Is the patient able to read the informed consent form and understand it?
4. Does the patient have the decisional capacity to understand the consequences of his/her actions in consenting to testing (for example, is the patient's judgment impaired by drug/alcohol use, mental illness/retardation, or other disability)?
5. Is the procedure regarding receipt of the results of HIV testing, including post-test face-to-face counseling, explained to and understood by the patient?
6. Does the counselor avoid assumptions regarding the patient's state of knowledge about the issues to be covered in pre-test counseling (for example, assumptions concerning the patient's risk behaviors, or attitudes and knowledge base regarding AIDS/HIV)?
7. Are other test options (for example, anonymous as opposed to confidential testing), with referrals if appropriate, fully reviewed with the patient?
8. Are the concepts of "HIV positive," and "HIV negative," in regard to HIV antibody test results fully explained to and understood by the patient?
9. Is the concept of "AIDS" and its relation to HIV infection explained to and understood by the patient?
10. Is the concept of HIV infection in relation to infectiousness/transmission of HIV fully explained to the patient?
11. Is the reliability of HIV antibody testing explained to and understood by the patient (for example, confirmatory testing and the potential and significance of indeterminate results)?
12. Are the means of HIV transmission/exposure fully explained to and understood by the patient (for example, including discussion of risk behaviors in language comprehensible to the patient)?
13. Are means of preventing transmission of HIV fully explained to and understood by the patient (for example, avoidance of risk behaviors)?
14. Are the confidentiality standards regarding the test results fully explained to the patient?

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15. Is the importance of notifying sex- or needle-sharing partners of the results of testing explained to and understood by the patient?
16. Are the emotional impact of a positive test result, and the resources available to the patient to deal with that impact, discussed with the patient?
17. Does the patient understand that HIV testing is entirely voluntary, that he/she may decline HIV testing, and that if the test is refused, that refusal will not result in the denial of services or any other benefits?
18. If the patient is being counseled regarding testing as a result of a certification of significant exposure of a health care worker, is the patient informed that testing will only involve available blood, and that if the patient refuses testing of available blood, that fact will be documented in the patient's medical record before the available blood will be tested?

FORM 4

CERTIFICATION OF SIGNIFICANT EXPOSURE TO SOURCE PATIENT BLOOD/BODY FLUID

"Significant exposure" is direct contact with blood, certain body fluids (semen, vaginal secretions, CSF, peritoneal fluid, amniotic fluid, pericardial fluid, pleural fluid, synovial fluid) or any body fluid that contains visible blood.

"Direct contact" includes percutaneous injury (e.g., needlestick or cut with sharp object), contact of mucous membrane, contact of exposed skin that is chapped, abraded, or afflicted with dermatitis, or contact of exposed skin that involves an extensive area or a prolonged period of time.

Name of health care worker requesting certification: _____

Provide description of incident giving rise to request for certification: _____

Date and time of incident: _____

Date and time of request for certification: _____

Based on the foregoing definition, I certify that a significant exposure has occurred.

Signature of physician

Date and time of certification: _____

This Just In ... New EEOC Guidelines on Health Insurance Discrimination

Just last month the Equal Employment Opportunity Commission (EEOC) issued guidelines addressing the issue of disability discrimination under the Americans with Disabilities Act (ADA) in relation to employer-provided health benefits. The guidelines set forth the EEOC position regarding the practice of imposing "AIDS caps" or similar disability-based limitations on benefits. Such disability-based limitations are illegal under the ADA, according to the new interpretation. Copies of the EEOC guidelines, "EEOC Interim Guidance on Application of ADA to Health Insurance," can be ordered directly from the EEOC at 1-800-669-3362.

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physician, pursuant to a valid authorization.

The health care worker who has experienced an blood/body fluid exposure has 72 hours to request that a physician certify the exposure as a **significant exposure**, which is defined as direct contact with blood or body fluids of a patient in a manner which, according to the most current guidelines of the Centers for Disease Control of the U.S. Public Health Service, is capable of transmitting HIV. A physician cannot certify his or her own significant exposure, nor that of the physician's employee. The physician is required to complete the certification within 72 hours of the request by the health care worker. If the exposure is certified as being significant, the **source patient** (or the source patient's **substitute decisionmaker**, if applicable) is informed of this fact, and consent to test an available specimen of blood is requested. If the consent to test is withheld, or if the source patient cannot be located, that information is entered in the source patient's medical record, and the available blood specimen can be tested, notwithstanding the lack of patient consent. If the results of the health worker's own HIV test was negative, he or she will be provided with the results of the test on the source patient's blood.⁷ **FORM 4** is a model certification of significant exposure form.

This statutory process is of little actual value to the health care worker. Even if the source patient's available blood tests positive, that by no means indicates that transmission has occurred; on the other hand, the patient's negative HIV antibody test result does not definitively indicate that the patient is not HIV infected.

Endnotes can be found on page 11.

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Answers to Act 148 Quiz

1. (a). The referral involves disclosure of HIV-related confidential information; the staff person is thus obligated to meet the requirement of written, not verbal, consent.
2. (a). Act 148's written informed consent requirement applies to insurers as well as to medical providers.
3. (c). The next best answer is (c), but the court order is the only way that the patient, as opposed to a specimen of available blood, can be tested. The other answers do not conform to the "significant exposure" procedure standard.
4. (e). Act 148 permits partner notification (without a court order) by a physician in limited circumstances, none of which are correctly described in the other answers.
5. (d). In addition to consent in writing, the consent must be on an informed basis. There is no age requirement in Act 148.
6. (d). The next best answer is (a), but negative HIV test results need not be disclosed to insurance applicants. Medical testing, however, requires disclosure, and for positive results, post-test counseling must be responsive to the social service needs of the patient.
7. (e). The broad definition of "HIV-related" includes all the answers.
8. (e). Confidentiality provisions apply to all persons receiving HIV-related information in the course of providing any "health or social service."
9. (d). Although the hygienist can try getting the exposure certified as significant, or can try going to court, these options are, in reality, pointless. The request for certification of significant exposure needs to be made within 72 hours of the incident. Even if the request had been made within 72 hours, the exposure to saliva does not pose a risk of HIV transmission as defined by the CDC, and thus it should not be certified as a significant exposure by any physician consulted by the hygienist, nor should a court order testing of the patient, for the same reason. Even if a physician certifies the incident as a significant exposure, it is not clear that a specimen of available blood would be available for testing; direct testing of the patient is not permitted under the significant exposure certification provision.
10. (b). This not uncommon situation poses a problem for both the physician and his patient. Under Act 148, the information requested by the employer can only be disclosed with specific written consent by the patient. By complying with this requirement, the physician involves the patient in making a decision about how the question should be answered. (Answering the question "yes," but without mentioning HIV, is tantamount to disclosing HIV information, putting the patient in the untenable situation of explaining the physician's response.) Because this is an employment physical, many physicians would read the question to mean any infectious disease that poses an actual risk of transmission in the workplace, and, since HIV does not fall in that category, would answer the question "no." Depending on the circumstances, the employer's inquiry itself may be illegal, and thus neither the physician nor the job applicant would have any duty to disclose HIV information in response. The Americans with Disabilities Act prohibits an employer from asking whether an employee is infected with HIV or requiring a medical examination before making a job offer. Laws regarding employment discrimination will be covered in the next issue of *Pennsylvania AIDS Law Report*.

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AIDS and the Law: Selected Resource Materials

AIDS Law Project Staff, *AIDS and the Law: Your Rights in Pennsylvania* (28-page handbook in question-and-answer format, covering issues such as employment rights, discrimination, wills, living wills, and other topics — available from the AIDS Law Project of Pennsylvania - order form on back page).

Nan D. Hunter and William B. Rubenstein, eds., *AIDS Agenda: Emerging Issues in Civil Rights* (New Press 1992) (essays on women and HIV, teens and HIV, family law, access to health care, criminalization of HIV, and other issues).

Wiley Law Publications, *AIDS and the Law* (2d ed. 1992 & Supp. 1993) (general treatise on AIDS legal issues, including HIV in contexts of employment, health care, education, family law, criminal law, and other issues — updated with annual supplements).

Scott Burris, Harlon L. Dalton and Judith Miller, eds., *AIDS and the Law: A New Guide for the Public* (Yale AIDS Law Project 1993) (essays on medical background, government responses to the epidemic, federal policies on HIV, AIDS and tort issues, and HIV and reproductive rights, among others).

National Lawyers Guild, *AIDS Practice Manual: A Legal and Educational Guide* (3d ed. 1991 & Supp. 1992) (guide for legal practitioners involved in representing persons with HIV/AIDS).

Thomas P. McCormack, *The AIDS Benefits Handbook* (Yale U. Press 1990) (information on accessing social security, welfare, Medicaid, Medicare, food stamps, drugs, and other benefits).

Robert M. Jarvis, et al., *AIDS Law in a Nutshell* (West Publishing 1991) (summary treatment of AIDS issues in contexts of criminal law, employment, health care law, education and family law, and other areas as well).

Ronald Bayer, *Private Acts, Social Consequences: AIDS and the Politics of Public Health* (Free Press 1989) (overview of AIDS public health issues and their political/legal implications).

Michael Closen, et al., *AIDS: Cases and Materials* (John Marshall Publishing Co. 1989, supplemented annually) (casebook on AIDS legal issues, including many materials documenting the history of the epidemic from legal point of view).

Sharon Rennert, *AIDS/HIV and Confidentiality: Model Policy and Procedures* (American Bar Association 1991) (a guidebook for development of confidentiality policy for service providers; includes useful model policies and checklists, although national in scope, not specific to Pennsylvania law — available from the ABA).

Pa. Bar Association/Pa. Medical Association, *AIDS: A Medical-Legal Handbook* (1991) (summary of medical, public health and social aspects of epidemic, also includes summaries of significant cases, and overview of Pennsylvania Confidentiality of HIV-Related Information Act — available from PA Bar Association).

AIDS Law and Policy Reporting Services:

AIDS Law and Litigation Reporter (University Publishing Group) (monthly)
AIDS Policy and Law (BNA) (twice monthly)

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Endnotes to Act 148 Article

¹ 35 P.S. § 7601, et seq. (West 1992).

² The Courts have been liberal in their interpretation of "compelling need" to disclose HIV-related information. In Application of Hershey Medical Center, 407 Pa.Super. 565, 595 A.2d 1290 (1991), the Pennsylvania Superior Court allowed disclosure to patients of the fact that a hospital resident had testing positive for HIV despite the lack of evidence that the resident posed an identifiable risk to individual patients.

³ Doe v. Dyer-Goode, 389 Pa.Super. 159, 566 A.2d 889 (1989), is a pre-Act 148 case challenging HIV testing without patient knowledge or consent. The patient consented to a premarital (syphilis) blood test. His physician, however, also ordered an HIV antibody test without informing him. The patient was subsequently informed by the physician that he was "positive for AIDS," although subsequent tests determined that the patient was not infected, but that apparently the HIV screening test was a false positive. The Superior Court affirmed dismissal of the case. With respect to the lack of informed consent claim, the court noted that the patient had given his consent to have a sample of his blood drawn for testing and that "[t]he fact that an additional test was performed on this blood sample cannot constitute grounds for (a lack of informed consent) action in battery." Act 148 reverses this court ruling as to HIV testing.

⁴ See, e.g., Gray v. Grunnagle, 423 Pa. 144, 223 A.2d 663 (1966); Cooper v. Roberts, 220 Pa.Super. 260, 286 A.2d 647 (1971).

⁵ Adolescents' right to consent to testing and treatment for sexually transmitted diseases, as well as for reportable diseases (such as AIDS), is set forth in 35 P.S. § 10103 (West 1993).

⁶ Generally, such testing and denial of coverage to persons with HIV infection is lawful in Pennsylvania. New guidelines from the Equal Employment Opportunities Commission, however, limit the extent to which an employer can exclude persons with HIV infection from an employee health benefits plan (see related item in this issue).

⁷ This provision of Act 148 conflicts with Occupational Safety and Health Administration standards that require that the patient's HIV status be disclosed to the health care worker without regard to whether the health care worker's HIV status is known. See 29 C.F.R. § 1910.1030(f)(3) (1992). §§§