

# AIDS Law Project of Pennsylvania

*a nonprofit, public-interest law firm*

## HIV and the Law in Pennsylvania

### I. THE PENNSYLVANIA CONFIDENTIALITY OF HIV-RELATED INFORMATION ACT (Act 148, as amended)

#### A. History of Act 148

In 1988, the Pennsylvania legislature passed the Confidentiality of HIV-Related Information Act, (otherwise known as Act 148) to prevent unauthorized HIV testing and disclosure of HIV-related information without the individual's consent. In 2006, the Centers for Disease Control and Prevention (CDC) issued HIV testing recommendations designed to increase testing. Not all of the recommendations were permissible under Pennsylvania law. In July 2011, Act 148 was amended to allow the CDC recommendations to be legally implemented in Pennsylvania.

#### B. Legislative Intent

1. Testing/counseling reduces HIV transmission
2. Confidentiality standard encourages testing/counseling
3. HIV testing should be a routine part of general medical care

#### C. Informed Consent for HIV-Related Test

1. Required for all HIV-Related testing
2. Informed documented consent: No requirement for written consent. However, the law does not specify how the documentation shall be made.
3. Opt-out HIV testing: A healthcare provider may offer opt-out testing, where the subject is informed they will be tested for HIV unless they refuse.
4. Who can give Consent?
  - a. Subject --yes
  - b. Minor --yes  
Act 148 does not include an age of consent. However, the Minor's Consent to Medical Care statute allows any minor to consent to medical and health services to determine the presence of or to treat pregnancy and diseases reportable under the Disease Prevention and Control Law. The law has been interpreted by a federal court to include consent for preventative services such as condoms, which should also include PReP.
  - c. Biological parent of minor --depends
  - d. Legal guardian or custodian of minor --depends
  - e. Grandparent without legal custody --no
  - f. Foster parent --no
5. Confirmatory test of positive results, if required by generally accepted medical standards.
6. Requires a good faith effort to inform subject of positive and negative results.

7. In-person (face-to-face post-test counseling for positive results, which should include counseling about the benefits of contact tracing and information about how to get health and social services.
8. Negative test results do not have to be given in person and may be given by phone.
9. Court order to test and disclose upon evidence of significant exposure and compelling need to know test result

**D. HIV Testing in Insurance Applications**

1. Insurance companies cannot test a person without consent
2. May require testing before issuing a policy
3. May refuse to issue a life insurance policy to an applicant living with HIV
4. Before testing, insurer must provide written information about the effect of test results on the application, description of insurer's confidentiality standards and information on counseling and alternative test sites
5. Insurer shall not disclose positive test result to applicant. Instead, insurer shall require applicant to identify physician or department of health to inform applicant of positive test result

**E. Certification of Significant Exposure and Testing**

1. When a healthcare provider or first responder experiences a significant risk of exposure to HIV by being exposed to blood/body fluids while rendering health care, the law allows for testing of the source patient's available blood if the source patient refuses to voluntarily consent to testing.
2. Limited time frame to act: Within 72 hours of incident must seek an evaluation from a physician of whether the incident was a "significant exposure" according to CDC guidelines. Within 72 hours of request, the physician must make a determination.
3. Person seeking the testing of source patient must test negative for HIV in order to get source patient's results.

**F. Disclosure of HIV-Related Information**

1. Written consent for disclosure is required. Consent must be HIV specific. Applies to health and social service providers, their employees and agents. There is a civil cause of action for violation of the law.
2. Court ordered release of confidential HIV-related information when compelling need is demonstrated.
3. Permissible disclosure by physician.
  - a. Physician Only
  - b. Disclosure to **known** contact of subject
  - c. Reasonable belief that disclosure is medically appropriate and there is a significant risk of **future** infection to the contact
  - d. Counsel the subject of the need to notify the contact and reasonably believe that the subject will not inform the contact or abstain from sexual or needle-sharing behavior that poses a significant risk of infection.

- e. Inform the subject of intent to make the disclosure
- f. Subject not to be identified to contact
- g. Immune from liability for disclosure or nondisclosure

## **II. HIV RELATED TESTING FOR SEX OFFENDERS ACT**

- A. Procedure.** Victim requests it, the defendant is notified and the prosecutor applies to the court. The court shall order the testing upon probable cause to believe there is probable transmission of bodily fluids between a defendant and victim.
- B. Timing.** The test shall be administered no later than 48 hours after official charges are made. If the victim fails to request a test within the 48 hours after official charges at alternative time to make request is at any point after the 48 hours and up until 6 weeks after within after the date of conviction.
- C. Prohibition.** The test may not be used to establish the guilt of the defendant. Test results may be disclosed only to the victim, the defendant, prosecutor, health care providers treating the victim or defendant, defense attorney, the court and any other individual designated by the court.

## **III. HIV CRIMINALIZATION**

- A. Grading of Prostitution and Related Offenses.** Prostitution is a misdemeanor but is a felony if the person who “committed the offense knew that he or she was HIV positive or manifesting AIDS.” Promoting prostitution, an offense that otherwise would be a misdemeanor, is a felony if the person knowingly promoted prostitution of “another who was HIV positive or infected with the AIDS virus.” Patronizing a prostitute is a misdemeanor but is a felony if the person “who committed the offense knew that he or she was HIV positive or manifesting AIDS.” HIV transmission is not required nor does the law differentiate between sexual acts that carry a risk of transmission and those that do not. Proof of condom use may not be a defense.
- B. Assault by Prisoner.** If a person who is living with HIV (or another infectious disease) intentionally or knowingly exposes another person to his or her bodily fluids by “throwing, tossing, spitting or expelling”, the person living with HIV can face an additional sentence of up to 10 years. If the assault was committed against a correctional facility employee, the sentence must be served consecutively with the person’s current sentence. Likelihood of actual transmission is not a defense to a charge of assault by prisoner.
- C. PA General Criminal Laws Used to Prosecute People Living with HIV.** More than 34 states have an HIV-specific criminal law requiring disclosure of one’s HIV positive status before engaging in intimate sexual contact. Pennsylvania does not have this type of law. Instead, Pennsylvania uses general criminal statutes to charge people living with HIV for conduct that would not be criminal, except for their HIV status.

1. Reckless Endangerment. This is conduct that places or may place another person in danger of death or serious bodily injury. In *Commonwealth v. Cordoba*, the leading Pennsylvania case on HIV criminalization, a man was charged with Reckless Endangerment for failure to disclose his HIV positive diagnosis to his sexual partner. They engaged in oral sex with ejaculation of the face and chest. The complaining party stated that they did not exchange semen. Although oral sex and ejaculation on the chest or face presents a negligible risk, if any, of transmitting HIV and the complaining party did not become infected, the Superior Court sustained the charge of Reckless Endangerment because “there may have been the possibility or risk of harm, regardless of the likelihood of that harm.” Eventually, the case was dismissed when the complaining witness failed to testify.
  
2. Aggravated Assault, Sexual Assault and Simple Assault. In 2014, a woman was charged with these offenses after a man she had consensual sexual activity with accused her of not disclosing her HIV status. The woman’s viral load was undetectable and the man did not contract HIV. The sexual assault charge eventually was withdrawn.