

Unlocking labour laws

Over time we have received a number of queries around HIV and the workplace. **Dan Pretorius** and **Chloe Hardy** from the AIDS Law Project will be answering these questions over the next few *Bulletins*. In this edition they focus on workers' rights to confidentiality and protection against forced HIV testing at work.



Can an employer force a worker to take an HIV test?

No. An employer cannot force a job applicant to take an HIV test before offering them a job. An employer cannot ask a worker already in a job to take an HIV test for any reason, including before being promoted or being offered training, or at regular intervals.

Should all workers take an HIV test to know their status?

Yes. But this must be your own choice. No employer is allowed to force you to take a test.

Nevertheless, it is a good idea to know your HIV status because:

- You can plan your future like making decisions about having children.
- You can learn to protect yourself and others by for example using condoms for safer sex to make sure you protect your partner from HIV.
- You can access treatment to prevent illnesses like pneumonia.
- Your doctor will be able to

tell you if you need to start ARV treatment (drugs used to treat HIV).

- You can get support by for example joining or setting up an HIV support group in your area. At the end of these questions and answers you will find a list of organisations that can give you information on getting support and knowing your rights.

How does the law protect workers from employers trying to force them to take an HIV test?

The Employment Equity Act says that the Labour Court can give special permission to employers to ask workers to volunteer to test for HIV under certain circumstances. Employers must apply to the court for this permission, and the court will decide if their request is fair.

The Labour Court will look at factors including the need and purpose for the testing, the medical facts, employment conditions, social policy and the inherent requirements of the job.

The Labour Court in previous

cases has already set conditions for voluntary testing, including:

- pre- and post-test counselling must be provided to employees who undergo testing
- the workplace must consider and implement procedures to make sure that the results are confidential. For example, the results of a survey of prevalence in a small department in the workplace should not be so detailed that anyone reading them can identify which workers are living with HIV
- limits on the length of time for testing, such as one year
- setting out exactly who can be tested. For example, only those workers who come forward to be tested of their own free will.

Are there any circumstances when employers do not need the Labour Court's permission to test workers for HIV?

There have been several cases in the Labour Court on HIV testing in workplaces. Two key cases, set out

below, have established that employers do not have to apply for permission if they want to provide voluntary testing services or if they want to do anonymous testing. Anonymous testing tells how many workers in the workplace are living with HIV, but does not tell which individuals are living with HIV.

In *PFG Building Glass (Pty) Ltd v CEPPWAWU & Others* (2003), *Irvin & Johnson Ltd v Trawler and Line Fishing Union & Others* (2003), the companies wanted to provide voluntary counselling and testing to all their employees. In *I & J*, the company developed good procedures to make sure HIV tests would be based on informed consent, with pre- and post-test counselling, and that the results would be anonymous and confidential. The court agreed. This means in future employers only need to apply to the Labour Court for permission where the HIV testing may be discriminatory, for example HIV testing as a condition of employment or promotion or access to benefits.

What does "informed consent" mean?

Consent has two parts to it - information and permission.

With an HIV test, the person must know what the test is, why it is being done, and what the result will mean for him or her before agreeing to the test.

Pre-test counselling is a counselling session which is held before the HIV test is done. It

helps you to look at the effect the test will have on you and your family.

Post-test counselling is counselling the person gets after the HIV test result. If the result is negative, then the counsellor should advise the person on how to stay negative and about the possibility of the window period. Most people who are living with HIV will test positive for HIV antibodies within a few weeks of transmission. In a few cases, a person may not test HIV positive for up to three months. This is called the window period.

Useful contact telephone numbers:

- AIDS Law Project
011 356 4100
- Treatment Action Campaign
011 339 8421
- AIDS Consortium
011 403 0265
- AIDS helpline 0800 012 322

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The AIDS Law Project (ALP) has been taking up issues around HIV/AIDS in the workplace since 1993. The ALP provides a free information and advice service to people facing discrimination because of their HIV status. Dan Pretorius and Chloe Hardy are employed by the AIDS Law Project.

Send queries you have around labour law issues that you want answered to: The Editor, SA Labour Bulletin, PO Box 3851 Johannesburg 2000 or to: salbeditor@icon.co.za

Thandiswa Molete (not her real name) was employed by a large supermarket chain as a baker. After she was off sick for a few weeks, her manager told her that she would have to go for a medical check-up. He sent her to his own doctor, and the doctor tested her for HIV without giving her any counselling. The doctor then phoned the manager to tell him that Ms Molete had tested HIV positive.

The next day, the manager called her and a shop steward from her union to a meeting. The manager said that since she was living with HIV, she could no longer work with food in the bakery, and she would therefore be transferred from being a baker to being a cleaner in the supermarket. The shop steward did not know that HIV cannot be transmitted through food, and he agreed that she should be transferred to the cleaning staff.

Thandiswa referred the case to the CCMA, and the company later agreed to pay her a large sum of money as compensation for discriminating against her. She used the money to open her own bakery.