



HIV/AIDS IN THE WORKPLACE



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1. HIV/AIDS: Basic Facts

HIV is the “Human Immunodeficiency Virus”. The virus causes AIDS by weakening the body’s defence against diseases (the immune system).

AIDS is the “Acquired Immune Deficiency Syndrome”. AIDS is caused by HIV, because the virus reduces the body’s natural ability to fight diseases. AIDS is not one disease, but is the name given to a number of diseases and opportunistic infections that people infected with HIV normally get, such as certain forms of TB, pneumonia and others.

How do people become infected with HIV?

Most people are infected with HIV through practicing unsafe sex (having sex without a condom or femidom). You can also contract HIV through direct contact with infected blood. Babies can get HIV from their mothers during pregnancy or delivery or from infected breastmilk.

In cases where there is a risk of becoming infected in the workplace, such as in the case of doctors or nurses who are exposed to infected blood through syringes or needles, the risk can be greatly reduced if proper precautions are taken. Employers must see to it that employees, like doctors or nurses, or people

who are asked to clean up blood spills or to render first aid, are given gloves before they handle blood and that there are always cleaning materials at the workplace.

You cannot get HIV through:

- normal contact with an employee living with HIV or AIDS.
- sharing toilets, tea cups or showers with people who are HIV positive. HIV is **not** transmitted through sweat or saliva.

Does everyone with HIV have 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 a good enough reason for you to be refused employment or fired.

However, many people with HIV eventually do develop AIDS and 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.

2. Introduction to HIV/ AIDS in the workplace



Why do employees living with HIV or AIDS need protection?

People living with HIV or AIDS face discrimination on a daily basis in a number of different ways. In many cases they are denied access to things like housing loans, insurance policies and medical benefits because of their HIV status. People with HIV or AIDS are also discriminated against at work – by their employers and even by their co-workers. This can take the form of being fired when a person's HIV status is found out. In some cases the people living with HIV are not given promotion at work, or they are denied the same benefits that other employees, who are not HIV positive, have.

Sometimes, the discrimination starts before the person is employed, as in the case where an employer refuses to accept applications from or to employ people living with HIV.

There are many different ways in which people living with HIV are discriminated against. In this booklet we will look at how people living with HIV or AIDS can stand up for their rights at work and how different **laws** and **policies** protect people living with HIV or AIDS from discrimination.

IMPORTANT LAWS

- ⌘ The Constitution
- ⌘ The Labour Act
- ⌘ Employees Compensation Act
- ⌘ Social Security Act

IMPORTANT POLICIES

The National Code on HIV/AIDS in Employment

2.1. The Constitution

Article 10 of the Constitution gives all people the right to equality and protection against discrimination. The right to equality means that employees living with HIV may not be treated unfairly compared to those who do not have HIV. This applies to both the government and to private businesses.

Article 10 reads: *All persons shall be equal before the law. No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.*

The Constitution also protects the rights to dignity and privacy. This means that people living with HIV should be treated with respect and their medical information that happens to be in the hands of the employer should be treated confidentially.

Article 8 reads: *The dignity of all persons shall be inviolable.*

AN IMPORTANT CASE:

In *Hoffman v South African Airways*, the South African Constitutional Court, after considering medical evidence, found that the SAA had unfairly discriminated against Hoffman for not employing him as a cabin attendant after he tested positive for HIV. The refusal of employment, because of HIV, also violated his dignity.

2.2. The Labour Act

The Labour Act protects an employee from:

- ⌘ **Unfair dismissals** (for example, a person is fired as a result of HIV infection)
- ⌘ **Unfair discrimination** (a person is discriminated against because of HIV infection)

Dismissals will be unfair if:

- ⌘ There were no fair and valid reasons for the dismissal
- ⌘ Proper procedures were not followed.

Valid reasons for a dismissal:

- ⌘ **Misconduct** (a person has done something wrong, such as theft)
- ⌘ **Incapacity** (a person is incapable of doing his/her job properly, such as when a person is too sick to work)
- ⌘ **Operational requirements** (for example, in the case of retrenchments)

EXAMPLE



An unfair dismissal

The doctor tells the company that Justus is HIV positive. The company dismisses him, saying that he is not healthy enough to work. Justus knows it is not true, as he has just run a marathon. He can go to the district labour court to claim that this was an unfair dismissal. Justus can also sue the doctor for violating his right to have medical information about him kept confidential.

Unfair discrimination

Section 107 of the Labour Act makes it illegal to discriminate on the grounds of a person's HIV status, or to harass a person because he/she is HIV positive.

The prohibited grounds of discrimination are:

Sex

Colour

Religion

Social status

Race

Ethnic origin

Creed

Economic status

Political opinion

Marital status

Sexual orientation

Family responsibilities

Disability

The last five grounds of discrimination are not mentioned in the Constitution. The Labour Act therefore lists more

grounds of prohibited discrimination. This does not mean that the Constitution offers less protection than the Labour Act. The right to equality contained in the Constitution is still the most important safeguard against discrimination.

HIV/AIDS is not specifically listed as a prohibited ground of discrimination in the Labour Act.

Discrimination on this ground can be dealt with on the grounds that it constitutes unfair discrimination.

AN IMPORTANT CASE:

NANDITUME V MINISTER OF DEFENCE

Mr Nanditume applied for a job with the Namibian Defence Force and was asked to do an HIV test as part of his medical examination. When his test showed that he was HIV positive, the NDF refused to give him employment. Mr Nanditume took the NDF to court and the court decided that the NDF was discriminating against Mr Nanditume. The court said that the refusal to employ a person solely on the basis of their HIV status is discrimination in an unfair manner. The court also said that the fact that a person is HIV positive does not mean that such a person cannot work. What is important, the court said, is whether or not a person is qualified and fit enough to do the work that is required.

Discrimination is not unfair if a person is selected -

'According to reasonable criteria, including the ability, capacity, productivity and conduct of a person or in respect of the operational requirements and needs of the particular occupation or work.'

Employers can therefore require employees to meet certain criteria or standards before they employ them. These criteria must however be reasonable in relation to the requirements of the job. Example: It is reasonable to require an applicant for an engineer's position to have a university degree in engineering.

2.3 THE NATIONAL CODE ON HIV/AIDS IN EMPLOYMENT

In 1998, the Minister of Labour issued the *Guidelines for the Implementation of the National Code on HIV/AIDS in Employment* under the Labour Act. With the Code, the Ministry of Labour hopes to address most of the issues relating to HIV/AIDS in the workplace, in order to prevent new infections and to provide the best care and support for people in the workforce. The code applies to both government and the private sector.

The National Code on HIV/AIDS in Employment states that:

- ⌘ There should be no pre-employment tests for HIV. Normal medical tests, to determine current fitness for work, should not include HIV tests.

- ⌘ There should be no compulsory workplace testing for HIV.
- ⌘ Voluntary testing should be done with the informed consent of an employee.
- ⌘ Employees living with HIV or AIDS have a legal right to confidentiality of all medical information.
- ⌘ HIV status should not be a factor in job status, promotion or transfer.

IMPORTANT POINTS

- ⌘ The National Code on HIV/AIDS in Employment is a guide for all employers.
- ⌘ It encourages employers and employees to jointly develop **information, education, prevention, care and support programmes** for HIV/AIDS in the workplace.

2.4 HEALTH AND SAFETY AT WORK

There is often dangerous machinery and equipment at a workplace, which can lead to injuries and even death of employees. With HIV or AIDS there is an additional risk. As we have seen, HIV is found in the blood of a person with HIV and it can be transmitted through contact with infected blood. If there is an injury at work, resulting in an open wound, there is a possibility that HIV can be transmitted, particularly if there is a lot of blood.

Under the Labour Act, employers have a duty to take all steps to ensure the safety, health and welfare of employees at work (Section 96). This includes having a safety plan, proper training in safety procedures and

information on how to protect oneself from infection when there is a situation like the one mentioned above.

The Labour Act also requires employers to provide protective clothing and equipment. To prevent HIV infection, the employer should provide gloves and disinfectant to clean up the blood. With the use of **universal precautions** in the workplace, the possibility of workplace HIV infection through blood spills and accidents will be greatly minimised.

IMPORTANT POINTS

Health and safety includes:

- ⌘ A safety plan
- ⌘ Information on how to prevent infection
- ⌘ Training
- ⌘ Protective clothing and equipment



Guidelines for Employers

- ⌘ When an employer has 10 and more employees, the employees can elect an employee as their **workplace safety representative**. This person must carry out inspections to look for potential hazards, investigate safety complaints and make representations to the employer and the labour inspector.
- ⌘ **An employer can also establish a workplace safety committee to look at safety issues at work.**
- ⌘ An employee who feels that the working environment is not safe may leave the workplace until the situation has been remedied.

2.5 THE EMPLOYEES COMPENSATION ACT

Under the Employees Compensation Act, employees who get less than N\$72 000,00 per year, have the right to claim compensation from the fund for accidents and industrial illnesses that they get while working.

HIV/AIDS is not recognised as an occupational disease in this law. This means that persons who contract HIV through their employment are not entitled to claim employees' compensation under the Act.

Employees can however sue the employer for HIV infection in the workplace if negligence can be shown on the part of the employer.

Of course, if an employee sues an employer for negligence in respect of HIV infection at work, the employee will have to show that all the legal requirements to establish the employer's negligence were present, and that the accident gave rise to HIV infection. The absence of proper first-aid equipment and the failure to train employees in the use of ***universal precautions** can give rise to liability on the part of the employer.

**Universal precautions are more fully explained at the end of this booklet.*



Proving HIV infection as a result of an accident at work

- 1. Report the accident.**
 - 2. The employee who has been accidentally exposed to potentially HIV infected bodily fluids should be encouraged to voluntarily have an HIV test as soon as possible after the exposure. This is to ascertain the employee's HIV status at the time of the accidental exposure.**
 - 3. To make sure about the employee's status, they should take an HIV test again 6 weeks to 3 months later.**
 - 4. You can claim compensation if you can show that:**
 - ⌘ Personal protective equipment was not available, and**
 - ⌘ Infection was due to the negligence of the employer, who did not provide a safe workplace.**
- ⌘ A safe workplace is one in which universal precautions are taken.**

2.6 Social Security Act

Employees who are paid-up members of the Social Security Fund are entitled to claim sick leave and disability benefits under the Act.

Employees are encouraged to first apply for sick leave benefits, which would give the employee part of her/his salary for two years. A person has to be booked off sick for more than a month before the employee can apply for sick leave benefits.

Disability benefits for HIV/AIDS is a once off payment in the amount of N\$2500, which is paid when the employee is too sick to continue working.

Namibian social security legislation does not provide for unemployment benefits.

Important time periods

- ⌘ A case against an employer must be started within 3 years of the accidental exposure.
- ⌘ A case against a government hospital must be started within 12 months of the accidental exposure.

3. ISSUES RELATING TO HIV/AIDS & EMPLOYMENT



3.1 HIV testing for job applicants

- ⌘ An employer cannot force a person who is applying for work to have an HIV test. (This is also called **pre-employment testing** for HIV).
- ⌘ Companies or government departments requiring this are acting unlawfully.

3.2 Refusal to employ a person as a result of HIV

- ⌘ It is unfair discrimination if an employer refuses to employ a person just because they are HIV positive.
- ⌘ Of course, if the prospective employee is too sick to work, the employer does not have to employ the applicant.

3.3 Confidentiality of medical information at work

- ⌘ An employee is not legally required to tell the employer that he/she is HIV positive. An employee's medical condition is private.

- ⌘ The employer cannot force an employee to disclose his/her HIV status.
- ⌘ If an employee decides to tell an employer about his/her HIV status, the employer has to keep this information confidential. The employer may only inform other people with the employee's written, informed consent. A breach of confidentiality can result in a claim for damages against the employer.
- ⌘ It is unlawful for a health care worker to tell an employer of an employee's HIV status without the consent of the employee.

3.4 Entitlement to sick leave

All employees, including people living with HIV or AIDS, are entitled to sick leave under the Labour Act. This Act sets out the basic conditions of employment, which also covers sick leave.

- ⌘ Employees have 30 working days sick leave over a 3 year period if they work 5 days or less per week.
- ⌘ Other employees have 36 working days leave over a 3 year period.
- ⌘ Employees working for less than a year get leave on a different scale: Persons working 5 days or less a week get 1 day sick leave for every 5 weeks worked, while other employees get 1 day for every month worked.
- ⌘ Sick employees must get their full pay for the days they are off sick.
- ⌘ Sick employees must give a medical certificate to their employer if they are off sick for more than 2

days. The certificate must state the nature and duration of the illness.

- ⌘ If an employee has used up all his/her sick leave, and is booked off for more than a month, he/she may apply to the Social Security Fund for sick leave benefits. As noted above (p.16), the employee is entitled to a portion of their salary for a period of two years.

Employees living with HIV who fall ill should be treated like any other employee. The important thing is what effect the illness will have on the employee's ability to work, and not whether the person is HIV positive.

3.5 Dismissal of employees with HIV or AIDS

- ⌘ It is unfair to dismiss a person with HIV or AIDS who is still fit to do the job.
- ⌘ An employee with HIV or AIDS can only be dismissed if that employee is **incapacitated** (too sick to work).

3.6 Dismissal of employees with AIDS

- ⌘ All employees, including employees living with HIV or AIDS, are entitled to use their sick leave.
- ⌘ During the course of HIV infection a person may get sick with different opportunistic infections and then become better again. The employee may use sick leave during these illnesses.
- ⌘ Eventually, an employee living with HIV may develop AIDS. In this condition, he/she may not be able to work anymore. Such an employee has become **incapacitated**.

- ⌘ An employer is allowed to dismiss an employee on the grounds of incapacity and poor work performance, even if the employee has not used all their sick leave.
- ⌘ Dismissals on the ground of incapacity may only be done in accordance with the Labour Act.

It is unlawful to dismiss an employee on the suspicion that he/she has AIDS. An employee has to be incapacitated before he/she can be dismissed.

3.6 An employer's obligations in cases of dismissal for incapacity

1. Investigate the extent of the incapacity or injury.
2. Is the incapacity permanent or temporary?
3. Investigate alternatives to dismissal, such as shorter working hours or transfer to a less physically demanding position within the company.
4. Consider the possibility of **alternative employment** before terminating the employee's services. Providing alternative employment is also referred to as **reasonable accommodation**.

Employers do not have to create new jobs to provide alternative employment. The particular circumstances of the workplace will tell us how far the employer must go to accommodate the employee. Factors that can be considered in deciding whether there was reasonable accommodation of the employee are:

- ⌘ Nature of the employee's incapacity
- ⌘ The size and type of business

- ⌘ The nature of the employee's job
- ⌘ The possibility of adapting the employee's job or finding alternatives
- ⌘ The effect on other employees
- ⌘ The employee's record with the employer

EXAMPLE

Erastus has to work in a freezing factory, but his health no longer allows it. His employer changed his employment to become the supervisor of the factory at night.

The National Code on HIV/AIDS in Employment also deals with HIV/AIDS and incapacity:

"HIV infected employees should continue to work under normal conditions in their current employment for as long as they are medically fit to do so. When on medical grounds they cannot continue with their normal employment, efforts should be made to offer them alternative employment without prejudice to their benefits. When an employee becomes too ill to perform his/her agreed functions, standard procedures for termination of service for comparable life-threatening conditions should apply without discrimination."

3.7. Refusal of co-workers to work with a person living with HIV or AIDS

- ⌘ Fear and ignorance sometimes leads to other employees refusing to work with a person living with HIV or AIDS.
- ⌘ It is **unlawful** to dismiss an employee with HIV even if colleagues refuse to work with that person.
- ⌘ The best strategy is to have a **workplace policy** on HIV/AIDS, which will provide the workforce with **information** and **education** on HIV/AIDS. A **safety policy** and the application of **universal precautions** in the case of an accident will help to address the fears of the other employees.
- ⌘ Once the workforce has received adequate information, **disciplinary action** should be taken against the workers who refuse to work with the person living with HIV or AIDS.

The *National Code on HIV/AIDS in Employment* requires that employees with HIV or AIDS should be protected from **victimisation**:

"Persons affected by or believed to be affected by HIV or AIDS should be protected from stigmatisation and discrimination by co-workers, employers or clients. Information and education are essential to maintain the climate of mutual understanding necessary to ensure this protection."

3.8 HIV/AIDS and employee benefits

- ⌘ The Labour Act prohibits unfair discrimination between employees, including with regard to employee benefits. Employee benefits include medical aid, pension, death and disability benefits.
- ⌘ HIV/AIDS leads to more illness and death amongst younger employees. As a result it will have an impact on employee benefit schemes.
- ⌘ This is not sufficient reason to discriminate against persons living with HIV or AIDS by denying them all benefits.
- ⌘ The best solution is to renegotiate employee benefits between employers and employees to provide for all employees, including those living with HIV or AIDS.

IMPORTANT CASE

NS v SA Old Mutual Life Assurance Society LTD t/a Old Mutual and Others

NS worked with Old Mutual as a probationary employee. She became a permanent member of the staff, but had to undergo medical examinations to find out if she could become a member of four employee benefit funds. The medical examination showed she was not insurable and excluded her from three funds. She referred the dispute for conciliation but before there was a decision, she resigned. She made a complaint of unfair labour practice in the Labour

Court. Old Mutual tried to have the case dismissed by claiming that her resignation from the company meant that she no longer had a right to sue the company.

The Labour Court decided that NS could sue Old Mutual, because the injury was the result of an unfair labour practice during her employment, which did not fall away with her resignation.

4. ENFORCING EMPLOYEES' RIGHTS IN THE WORKPLACE



When an employee has been unfairly dismissed (for example because of HIV status) or subjected to unfair disciplinary actions, the employee can do the following:

- ⌘ Report the matter to the **district labour court** (DLC). (Each magistrate's court has a district labour court.) The complaint must be filed **within one year** of the incident.
- ⌘ The DLC will refer the matter to a **labour inspector**, who will try to resolve the dispute through negotiations with the parties.
- ⌘ If the matter is not resolved, the case will proceed to court.
- ⌘ The **Labour Court** can be approached to determine whether practices are discriminatory or not, such as the Namibian Defence Force's policy on pre-employment testing for HIV.

- ⌘ Report the matter to the **AIDS Law Unit** of the Legal Assistance Centre, situated at 4 Körner Street, Windhoek. We can be contacted telephonically at 061-223356, or by facsimile at 061-234953. You can also e-mail us at: aidslaw@lac.org.na

5. UNIVERSAL PRECAUTIONS



- ⌘ Blood, especially in large spills such as from nose-bleeds, and old blood or bloodstains, should be handled with extreme caution. Skin accidentally exposed to blood should be washed immediately with soap and running water. All bleeding wounds, sores, breaks in the skin, grazes and open skin lesions should ideally be cleaned immediately with running water and/or other antiseptics and covered with a waterproof dressing. Blood splashes to the face (mucous membranes of eyes, nose or mouth) should be flushed with running water for at least three minutes.
- ⌘ Disposable bags or incinerators must be made available to dispose of sanitary wear.
- ⌘ All open wounds, sores, breaks in the skin, grazes and open skin lesions should be covered completely and securely at all times with a non-porous or waterproof dressing or plaster so that there is no risk of exposure to blood.
- ⌘ Cleaning and washing should always be done with running water and not in containers of water. Where running tap water is not available, containers should be used to pour water over the area to be cleaned. Workplaces without running water should keep a supply on hand specifically for use in emergencies (for instance, in a 25-litre drum). This water can be kept fresh for a long period of time by adding a disinfectant, such as Milton, to it.

- ⌘ All persons should wear protective latex gloves or plastic bags over their hands when attending to blood spills, open wounds, sores, breaks in the skin, grazes, open skin lesions, body fluids and excretions. Doing this will effectively eliminate the risk of HIV transmission. Bleeding can be managed by compression with material that will absorb the blood (for instance, a towel).
- ⌘ If a surface has been contaminated with body fluids and excretions which could include some blood (for instance tears, saliva, mucus, phlegm, urine, vomit, faeces and pus), that surface should be cleaned with running water and household bleach (1:10 solution) using paper or disposable cloths. The person doing the cleaning must wear protective gloves or plastic bags over their hands.
- ⌘ Blood-contaminated material should be sealed in a plastic bag and incinerated or sent to an appropriate disposal firm. Tissues and toilet paper can be flushed down a toilet.
- ⌘ If instruments (for instance scissors) become contaminated with blood or other body fluids, they should be washed and placed in a household bleach solution for at least one hour before drying and re-using.
- ⌘ Needles and syringes should be safely disposed of and not re-used.

RECOMMENDED CONTENT OF FIRST AID KITS:

- ⌘ two large and two medium pairs of disposable latex gloves
- ⌘ two large and two medium pairs of household rubber gloves (for handling blood-soaked material in specific instances such as when

broken glass makes the use of latex gloves inappropriate)

- ⌘ absorbent material
- ⌘ waterproof plasters
- ⌘ disinfectant (such as hypo chloride)
- ⌘ scissors
- ⌘ cotton wool
- ⌘ gauze tape
- ⌘ tissues
- ⌘ water containers
- ⌘ resuscitation mouthpiece or similar device with which mouth-to-mouth resuscitation can be applied without any contact being made with blood or other body fluids
- ⌘ protective eye wear
- ⌘ protective facemask to cover nose and mouth.



For more information contact the **AIDS Law Unit** of the Legal Assistance Centre, situated at 4 Körner Street, Windhoek. We can be contacted telephonically at 061-223356, or by facsimile at 061-234953. You can also e-mail us at: aidslaw@lac.org.na

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