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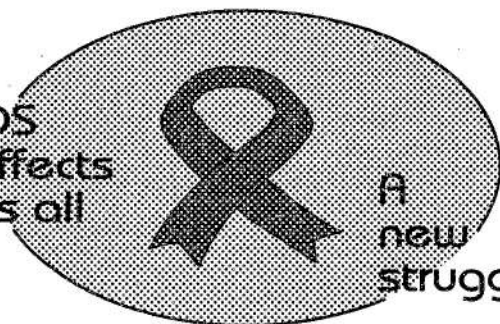
Vol. 418

PRETORIA, 25 APRIL 2000

No. 21089

**We all have the power to prevent AIDS**

AIDS  
affects  
us all



A  
new  
struggle

Prevention is the cure

**AIDS  
HELPLINE**

**0800 012 322**

DEPARTMENT OF HEALTH

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## GOVERNMENT NOTICE

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### DEPARTMENT OF LABOUR

No. R. 390

25 April 2000

1. The Minister of Labour is publishing a draft Code of Good Practice on key aspects of HIV/AIDS and employment for public comment.
2. It is the intention of the Minister that this Code will be issued jointly by the Commission for Employment Equity (CEE) and the National Economic, Development and Labour Council in terms of Section 54 of the Employment Equity Act and Section 203 of the Labour Relations Act.
3. Submission of proposals:
  - (a) All interested parties are invited to submit written comments on the draft policy proposals.
  - (b) Such comments should be addressed to **Employment Equity Registry**, Department of Labour, Private Bag X117, Pretoria, 0001, or faxed to **(012) 320-2059** or **(012) 322-0413** or e-mailed to **ee@labour.gov.za**
  - (c) Comments should reach the Department of Labour not later than 30 days after publication of the draft code.
  - (d) The name, telephone number or fax number and address of a person who may be contacted in regard to the comments should also be stated clearly.
4. The comments will be considered by the Commission for Employment Equity (CEE) and the National Economic, Development and Labour Council (NEDLAC).

## FOREWORD

The Human Immunodeficiency Virus (HIV) and the Acquired Immune Deficiency Syndrome (AIDS) are serious public health problems that have socio-economic, employment and human rights implications.

The HIV/AIDS epidemic will affect every workplace, with prolonged staff illness, absenteeism, and death impacting on productivity, employee benefits, occupational health and safety, production costs and workplace morale.

The Department of Labour has been working in conjunction with the Department of Health on this issue. The Commission for Employment Equity (CEE) who is responsible for advising the Minister of Labour on Codes of Good Practice, has also been consulted.

The Commission has recommended that this draft Code of Good Practice on key aspects of HIV/AIDS and employment be published for public comment.

The comments received from the public will be analysed and forwarded to the Commission for Employment Equity (CEE) and NEDLAC.

The proposals have been presented in a manner that we hope is easy to read and understand. We take this opportunity to express our hope that the public will take advantage of participating in this important aspect of labour policy.

M.M.S. Mdladlana (MP)

Minister of Labour

**EMPLOYMENT EQUITY ACT NO 55, OF 1998**  
**DRAFT**  
**CODE OF GOOD PRACTICE ON**  
**KEY ASPECTS OF**  
**HIV/AIDS AND EMPLOYMENT**  
**FOR PUBLIC COMMENT**

**1. INTRODUCTION**

- 1.1 The Human Immunodeficiency Virus (HIV) and the Acquired Immune Deficiency Syndrome (AIDS) are serious public health problems which have socio economic, employment and human rights implications.
- 1.2 The HIV/AIDS epidemic will affect every workplace, with prolonged staff illness, absenteeism, and death impacting on productivity, employee benefits, occupational health and safety, production costs and workplace morale.
- 1.3 HIV knows no social, gender or racial boundaries, but it is accepted that socio-economic circumstances do influence disease patterns. HIV thrives in an environment of poverty, rapid urbanisation, violence and destabilisation. Transmission is exacerbated by disparities in resources and patterns of migration from rural to urban areas. Women, particularly are vulnerable to infection in cultures and economic circumstances where they have little control over their lives.
- 1.4 Furthermore HIV/AIDS is still a disease surrounded by ignorance, prejudice, discrimination and stigma. In the workplace unfair discrimination against people Living with HIV and AIDS has been perpetuated through widespread practices such as pre-employment HIV testing, dismissals for being HIV positive and the denial of employee benefits.
- 1.5 One of the most effective ways of reducing and managing the impact of HIV/AIDS in the workplace is through the implementation of an HIV/AIDS policy and programme. In the light of this, the Code has been developed as a guide to employers, trade unions and employees.<sup>1</sup>
- 1.6 Furthermore the Code seeks to assist with the attainment of the broader goals of :

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<sup>1</sup> The Code will be accompanied by *Technical Assistance Guidelines on Managing HIV/AIDS in the Workplace*. It is envisaged that these will be developed in the second half of 2000 and published during 2001.

- eliminating unfair discrimination in the workplace based on HIV status;
- promoting a non-discriminatory working environment in which People Living with HIV or AIDS are able to be open about their HIV status without fear of stigma or rejection;
- promoting appropriate and effective ways of managing HIV in the workplace;
- creating a balance between the rights and responsibilities of all parties; and
- giving effect to the regional obligations of the Republic as a member of the Southern African Development Community.

## **2. OBJECTIVE**

2.1 The Code's primary objective is to set out guidelines for employers and employees to implement so as to ensure individuals with HIV infection are not unfairly discriminated against in the workplace. This includes provisions regarding :

- (i) creating a non-discriminatory work environment;
- (ii) dealing with HIV testing, confidentiality and disclosure;
- (iii) providing equitable employee benefits;
- (iv) dealing with dismissals; and
- (v) managing grievance procedures.

2.2 The Code's secondary objective is to provide guidelines for employers and employees on how to manage HIV/AIDS within the workplace. Since the HIV/AIDS epidemic impacts upon the workplace and individuals at a number of different levels, it requires a holistic response which takes all of these factors into account. The Code therefore includes guidelines on :

- (i) creating a safe working environment for all employers and employees;
- (ii) developing procedures to manage occupational incidents and claims for compensation;
- (iii) introducing measures to prevent the spread of HIV;
- (iv) developing strategies to reduce the impact of the epidemic upon the workplace; and
- (v) supporting those individuals who are infected or affected by HIV/AIDS so that they may continue to work productively for as long as possible.

## **3. APPLICATION**

3.1 This Code does not impose any legal obligations in addition to those in the Employment Equity Act or in any other Act referred to in the Code. Failure to observe it does not, by itself, render an employer liable in any proceedings, except where the Code refers to obligations set out in law.

3.2 The Code should be read in conjunction with other codes of good practice that may be issued by the Minister of Labour.<sup>2</sup>

3.3 Employers, employees and their respective organisations are encouraged to use this Code to develop, implement and refine their HIV/AIDS policies and programmes to suit the needs of their workplaces.

#### 4. LEGAL FRAMEWORK

4.1 The Code is issued in terms of Section 54(1)(a) of the Employment Equity Act, No 55 of 1998 and is based on the principle that no person may be unfairly discriminated against on the basis of their HIV status. In order to assist employers and employees apply this principle consistently in the workplace the Code makes reference to other pieces of legislation.

4.2 Section 6(1) of the Employment Equity Act provides that no person may unfairly discriminate against an employee, or an applicant for employment, in any employment policy or practice, on the basis of his or her HIV status. In any legal proceedings in which it is alleged that any employer has discriminated unfairly, the employer must prove that any discrimination or differentiation was fair.

4.3 No employee, or applicant for employment, may be required by their employer to undergo an HIV test in order to ascertain their HIV status. HIV testing by or on behalf of an employer may only take place where the Labour Court has declared such testing to be justifiable in accordance with Section 7(2) of the Employment Equity Act.

4.4 In accordance with Section 187(1)(f) of the Labour Relations Act, No. 66 of 1995, an employee with HIV/AIDS may not be dismissed simply because he or she is HIV positive or has AIDS. However where there are valid reasons related to their capacity to continue working and fair procedures have been followed, their services may be terminated in accordance with Section 188(1)(a)(i).

4.5 In terms of Section 8(1) of the Occupational Health and Safety Act, No. 85 of 1993; an employer is obliged to provide, as far as is reasonably practicable, a safe working environment. This may include ensuring that the risk of occupational exposure to HIV is minimised.

4.6 Section 2(1) and Section 5(1) of the Mine Health and Safety Act, No. 29

<sup>2</sup> The Code should also be read with the *Technical Assistance Guidelines on Managing HIV/AIDS in the Workplace* for detailed guidance on the implementation of these principles.

of 1996 provides that an employer is required to create, as far as is reasonably practicable, a safe working environment. This may include ensuring that the risk of occupational exposure to HIV is minimised.

- 4.7 An employee who is infected with HIV as a result of an occupational exposure to infected blood or bodily fluids, may apply for benefits in terms of Section 22(1) of the Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993.
- 4.8 In accordance with the Basic Conditions of Employment Act, No. 75 of 1997, every employer is obliged to ensure that all employees receive certain basic standards of employment, including a minimum number of days sick leave [Section 22(2)].
- 4.9 In accordance with Section 24(2)(e) of the Medical Schemes Act, No 131 of 1998, a registered medical aid scheme may not unfairly discriminate directly or indirectly against its members on the basis of their "state of health". Further in terms of s 67(1)(g) regulations may be drafted stipulating that all schemes must offer a minimum level of benefits to their members.
- 4.10 In accordance with both the common law and Section 14 of the Constitution of South Africa Act, No. 108 of 1996, all persons with HIV or AIDS have a right to privacy, including privacy concerning their HIV or AIDS status. Accordingly there is no general legal duty on an employee to disclose his or her HIV status to their employer or to other employees.

## **5. PROMOTING A NON-DISCRIMINATORY WORK ENVIRONMENT**

- 5.1 No person may unfairly discriminate against an employee, or an applicant for employment, on the basis of his or her HIV status. This means that no person with HIV or AIDS shall be treated unfairly within the employment relationship or within any employment policies or practices, including with regard to:

- (i) recruitment procedures, advertising and selection criteria;
- (ii) appointments and the appointment process;
- (iii) job classification or grading;
- (iv) remuneration, employment benefits and terms and conditions of employment;
- (v) job assignments;
- (vi) the working environment and facilities;
- (vii) training and development;
- (viii) performance evaluation systems;
- (ix) promotion, transfer and demotion;
- (x) disciplinary measures short of dismissal; and

- (xi) termination of services.

5.2 Employers and employees should adopt appropriate measures to ensure that employees with HIV and AIDS are not unfairly discriminated against and are protected from victimisation through positive measures such as :

- (i) the development of HIV/AIDS policies and programmes for the workplace;
- (ii) awareness, education and training on the rights of all persons with regard to HIV and AIDS;
- (iii) mechanisms to promote acceptance and openness around HIV/AIDS in the workplace;
- (iv) support for all employees infected or affected by HIV and AIDS; and
- (v) grievance procedures and disciplinary measures to deal with HIV-related complaints in the workplace.

## **6. HIV TESTING, CONFIDENTIALITY AND DISCLOSURE**

### **6.1 HIV Testing**

6.1.1 No employer may require an employee, or an applicant for employment, to undertake an HIV test in order to ascertain that employee's HIV status, unless authorisation has been obtained from the Labour Court. This includes HIV testing :

- (i) during an application for employment;
- (ii) as a condition of employment;
- (iii) during procedures related to termination of employment;
- (iv) as an eligibility requirement for training or staff development programmes. and
- (v) as an access requirement to obtain employee benefits.

6.1.2 Where HIV testing has been authorised by the Labour Court it should be carried out in terms of the conditions prescribed by the Court with regard to :

- (i) the provision of counselling;
- (ii) the maintenance of confidentiality;
- (iii) the period during which the authorisation for HIV testing applies;
- (iv) the category or categories of jobs or employees in respect of which the authorisation for HIV testing applies.

6.1.3 HIV testing, where permissible and where a court order has not specifically prescribed the conditions under which such testing may take place, should be carried out after obtaining voluntary, informed consent. It should further be accompanied by pre- and post-test counselling.

## 6.2 Confidentiality and Disclosure

- 6.2.1 All persons with HIV or AIDS have the legal right to privacy. An employee is therefore not legally required to disclose his or her HIV status to their employer or to other employees.
- 6.2.2 Where an employee chooses to voluntarily disclose his or her HIV status to the employer, this information may not be disclosed to others without the employee's express consent.
- 6.2.3 Mechanisms should be created to encourage openness, acceptance and support for those employers and employees who voluntarily disclose their HIV status within the workplace, including :
- (i) the use of persons openly living with HIV or AIDS in education, prevention and awareness programmes;
  - (ii) encouraging the development of support groups for employees living with HIV or AIDS; and
  - (iii) ensuring that persons who are open about their HIV or AIDS status are not unfairly discriminated against or stigmatised.

## 7. PROMOTING A SAFE WORKING ENVIRONMENT

- 7.1 An employer is obliged to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of its employees.
- 7.2 The risk of HIV transmission within most workplaces is minimal. However occupational accidents involving bodily fluids may occur, particularly within the health care profession. Every workplace should ensure its policy deals with :
- (i) the risk, if any, of the occupational transmission of HIV within that particular workplace;
  - (ii) appropriate training, awareness, education and on the use of universal infection control procedures so as to identify, deal with and reduce the risk of HIV transmission at work;
  - (iii) providing appropriate equipment and materials to protect employees from the risk of exposure to HIV;
  - (iv) the steps that must be taken following an occupational accident including the appropriate management of occupational exposure to HIV and other blood borne pathogens, including access to post exposure prophylaxis;
  - (v) the procedures to be followed in applying for compensation for occupational infection;

- (vi) the reporting of all occupational accidents; and
- (vii) adequate monitoring of occupational exposure to HIV to ensure that the requirements of possible compensation claims are being met.

## **8. COMPENSATION FOR OCCUPATIONALLY ACQUIRED HIV**

- 8.1 An employee may be compensated if he or she becomes infected with HIV as a result of an occupational accident. For example if an employee became infected with HIV through a needle stick injury.
- 8.2 Employers should take reasonable steps to assist employees with the application for benefits including :
- (i) providing information to affected employees on the procedures that will need to be followed in order to qualify for a compensation claim;
  - (ii) assisting with the collection of information which will assist with proving that the employees were occupationally exposed to HIV infected blood; and
  - (iii) ensuring that all compensation testing is carried out in accordance with section 7(2) of the Employment Equity Act.

## **9. EMPLOYEE BENEFITS**

- 9.1 Employees with HIV or AIDS may not be unfairly discriminated against in the allocation of employee benefits.
- 9.2 Employees who become ill with AIDS should be treated like any other employee with a comparable life threatening illness with regard to access to employee benefits.
- 9.3 Information from benefit schemes on the medical status of an employee should be kept confidential and should not be used by the employer or any other party.
- 9.4 Where an employer offers a medical scheme as part of the employee benefit package it must ensure that this scheme does not unfairly discriminate, directly or indirectly, against any person on the basis of his or her HIV status.

## **10. DISMISSAL**

- 10.1 Being HIV positive or having AIDS is not a sufficient reason to dismiss a person. Employees with HIV/AIDS may not be dismissed solely on the basis of their HIV status.
- 10.2 Where an employee has become too ill to work, an employer is obliged to follow accepted guidelines regarding dismissals for incapacity before terminating an employee's services. These include attempts to adapt the employee's duties, to accommodate the employee's disability and to find alternative employment for the employee.

- 10.3 The employer should ensure that as far as possible, the employee's right to confidentiality regarding his or her HIV status is maintained during any incapacity proceedings. An employee cannot be compelled to undergo an HIV test or to disclose his or her HIV status as part of such proceedings unless the Labour Court authorised such a test.

## **11. GRIEVANCE PROCEDURES**

- 11.1 Employers should ensure that the rights of employees with HIV/AIDS, and the remedies available to them in the event of a breach of such rights, become integrated into existing grievance procedures.

- 11.2 Employers should create an awareness and understanding of the grievance procedures and how employees can utilise them.

- 11.3 Employers should develop special measures to ensure the confidentiality of the complainant during such proceedings, including ensuring that such proceedings are held in private.

## **12. MANAGEMENT OF HIV IN THE WORKPLACE**

### **12.1 A Workplace HIV/AIDS Policy**

- 12.1.1 Every workplace should develop a specific HIV/AIDS Policy in order to ensure that employees affected by HIV/AIDS are not unfairly discriminated against in employment policies and practices. This policy should cover :

- (i) the organisation's position on HIV/AIDS;
- (ii) an outline of the HIV/AIDS programme;
- (iii) details on employment policies (eg position regarding HIV testing, employee benefits and performance management);
- (iv) express standards of behaviour expected of employers and employees;
- (v) set out the means of communication within the organisation on HIV/AIDS issues;
- (vi) details of employee assistance available to persons affected by HIV/AIDS;
- (vii) details of implementation responsibilities; and
- (viii) monitoring and evaluation mechanisms.

- 12.1.2 It is recommended that the following principles guide the development of an HIV/AIDS Workplace Policy:

- (i) all policies should be developed in consultation with key stakeholders within the workplace including trade unions, employee representatives, occupational health staff and the human resources department;
- (ii) the policy should reflect the nature and needs of the particular workplace.

## **12.2 Managing HIV Positive Employees**

- 12.2.1 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.
- 12.2.2 Employers should work to maximise the performance of all employees. This includes reasonable accommodation for employees who develop conditions associated with HIV/AIDS to help ensure that they maintain their employment for as long as possible.
- 12.2.3 Employees with HIV or AIDS have the same rights to sick leave as other employees, and a joint investigation by the employer and employee should be undertaken to consider alternative sick leave allocations, in accordance with the Basic Conditions of Employment Act, No 75 of 1997
- 12.2.4 Employers should take all reasonable steps to assist employees with referrals to appropriate health, welfare and psycho-social facilities within the community, if such services are not provided at the workplace.

## **13. WORKPLACE HIV/AIDS PROGRAMME**

- 13.1 It is recommended that every workplace works towards developing and implementing a workplace HIV/AIDS programme aimed at preventing new infections, providing care and support for employees who are infected or affected, and managing the impact of the epidemic on the organisation.
- 13.2 The nature and extent of a workplace programme should be guided by the needs and capacity of each individual workplace. However, it is recommended that every workplace programme should attempt to address the following:
- (i) hold regular HIV/AIDS awareness programmes;
  - (ii) conduct education and training on HIV/AIDS;
  - (iii) promote condom distribution and use;
  - (iv) encourage health seeking behaviour for STDs;
  - (v) establish a wellness programme for employees affected by HIV/AIDS;
  - (vi) enforce the use of universal infection control measures;
  - (vii) create an environment that is conducive to openness, disclosure and acceptance amongst all staff;
  - (viii) provide access to counselling and other forms of social support for people affected by HIV/AIDS; and
  - (ix) regularly monitor, evaluate and review the programme.
- 13.3 Regular programme evaluation and reviews should be carried out and, where necessary, changes to the workplace programme should be agreed upon and implemented by all parties.

**GLOSSARY**

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|--|---|
| <i>Affected employee :</i>             | an employee who is affected in any way by HIV/AIDS eg if they have a partner or a family member who is HIV positive.  |
| <i>AIDS :</i>                          | AIDS is the acronym for "acquired immune deficiency syndrome".<br>AIDS is the clinical definition given to the onset of certain life-threatening infections in persons whose immune systems have ceased to function properly as a result of infection with HIV.   |
| <i>HIV :</i>                           | HIV is the acronym for "human immuno deficiency virus". HIV is a virus which attacks and may ultimately destroy the body's natural immune system.   |
| <i>HIV positive :</i>                  | having tested positive for HIV infection.   |
| <i>HIV testing :</i>                   | taking a medical test to determine a person's HIV status. This may include written or verbal questions inquiring about previous HIV tests; questions related to the assessment of 'risk behaviour' (for example questions regarding sexual practices, the number of sexual partners or sexual orientation); and any other indirect methods designed to ascertain an employee's or job applicant's HIV status. |
| <i>Infected employee :</i>             | an employee who has tested positive for HIV or who has been diagnosed as having AIDS.   |
| <i>Informed consent :</i>              | a process of obtaining consent from a patient which ensures that the person fully understands the nature and implications of the test before giving his or her agreement to it.   |
| <i>Policy</i>                          | a document setting out an organisation's position on a particular issue.  |
| <i>Pre and post test counselling :</i> | a process of counselling which facilitates an understanding of the nature and purpose of the HIV test. It examines what advantages and disadvantages the test holds for the person and the influence the result, positive or negative, will have on them.   |
| <i>STDs :</i>                          | acronym for "sexually transmitted diseases". These are infections passed from one person to another during sexual intercourse, including syphilis, gonorrhoea and HIV.  |

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