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622 Employment Equity Act (55/1998): Review of the HIV & AIDS Code of Good Practice for public comment: Withdrawal notice

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GENERAL NOTICE

NOTICE 622 OF 2011

WITHDRAWAL NOTICE

REVIEW OF THE HIV & AIDS CODE OF GOOD PRACTICE FOR PUBLIC COMMENT

DEPARTMENT OF LABOUR

EMPLOYMENT EQUITY ACT, 1998 (Act No. 55 of 1998)

This Notice serves to withdraw and replace Notice 584 of 2011 in the Gazette No. 34556 published on 26 August 2011.

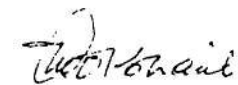
DEPARTMENT OF LABOUR

REVIEW OF HIV/AIDS CODE FOR PUBLIC COMMENT NOTICE

DEPARTMENT OF LABOUR

EMPLOYMENT EQUITY ACT, 1998 (Act No.55 of 1998)

I, Mildred Nelisiwe Oliphant, Minister of Labour, hereby publish the draft Code of Good Practice on Key Aspects of HIV/AIDS and Employment in the attached Schedule in terms of Section 54 of the Employment Equity Act, 1998 (Act No.55 of 1998), which is open for public comment for 30 consecutive days.



MN OLIPHANT
MINISTER OF LABOUR
26/8/2011

Department of Labour

Employment Equity Act, No. 55 of 1998

Draft Revised South African Code of Good Practice on HIV and AIDS in the World of Work

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DEFINITION OF TERMS

HIV	: refers to the human immunodeficiency virus, a virus that damages the human immune system. Infection can be prevented by appropriate measures
AIDS	: refers to the acquired immunodeficiency syndrome which results from advanced stages of HIV infection, and is characterized by opportunistic infections or HIV-related cancers, or both
PLWH	: refers to persons living with HIV and means persons infected with HIV
Stigma	: means the social mark that, when associated with a person, usually causes marginalization or presents an obstacle to the full enjoyment of social life by the person infected or affected by HIV
Discrimination	: means any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation
Affected Persons	: means persons whose lives are changed by HIV or AIDS owing to the broader impact of the pandemic
Reasonable Accommodation:	: means any modification or adjustment to a job or to the workplace that is reasonably practicable and enables a person living with HIV or AIDS to have access to, or participate or advance in, employment
Vulnerability	: means the unequal opportunities, social exclusion, unemployment or precarious employment, resulting from the social, cultural, political and economic factors that make a person more susceptible to HIV infection and to developing AIDS
Workplace	: refers to any place in which workers perform their activity
Worker	: refers to any persons working under any form or arrangement

Draft Revised South African Code of Good Practice on HIV and AIDS in the World of Work

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 It is recognised that the HIV and AIDS epidemic will affect every workplace, with prolonged staff illness, absenteeism, and death impacting on productivity, employee benefits, occupational health and safety, production costs, workplace morale and escalating HIV-TB co-infection.
- 1.3 HIV knows no social, gender, age 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 are particularly more vulnerable to infection in cultures and economic circumstances where they have little control over their lives.
- 1.4 Furthermore HIV and AIDS is still a disease surrounded by ignorance, prejudice, unfair-discrimination and stigma. In the workplace unfair discrimination against people living with HIV and AIDS has been perpetuated through 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 and AIDS in the workplace is through the implementation of an HIV and AIDS policy and programmes. Addressing aspects of HIV and AIDS in the workplace will enable employers, trade unions and government to actively contribute towards local, national and international efforts to prevent and control HIV/AIDS.
- 1.6 Furthermore the Code seeks to assist with the attainment of the broader goals of:
 - eliminating unfair discrimination in the workplace based on real or perceived HIV status;
 - creating a safe-working environment; and
 - *promoting appropriate and effective ways of managing HIV in the workplace.*

2. SCOPE

This Code applies to:

- 2.1 All workers working under all forms or arrangements, and at all workplaces, including:
 - a) persons in any employment or occupation;
 - b) those in training, including interns and apprentices;
 - c) volunteers;
 - d) jobseekers and job applicants; and
 - e) laid-off and suspended workers

- 2.2 All sectors of economic activity, including the private, public sectors and the formal and informal economies; and
- 2.3 Armed forces and uniformed services.

3. KEY PRINCIPLES

The guiding principles in this Code are based on international conventions and recommendations, constitution of the Republic of South Africa and national laws, which include:

3.1 Respect for human rights, fundamental freedoms and gender equality

The response to HIV and AIDS should be recognized as contributing to the realization of human rights, dignity, fundamental freedoms and gender equality for all, including workers, their families and their dependants.

3.2 HIV and AIDS is a workplace issue

HIV and AIDS issues affect the workplace, posing significant obstacles to decent work and sustainable development. The workplace should be included among the essential components of the HIV response, with the active engagement of organizations of employers and workers.

3.3 HIV-related stigma and discrimination— equality of opportunity and treatment

Non discrimination remains a key principle for protection of the rights of individuals. There should be no discrimination against or stigmatization of workers, particularly jobseekers and job applicants, on the grounds of real or perceived HIV status.

3.4 Gender Equality

While HIV affects both men and women, women and girls are at greater risk and more vulnerable to HIV infection and are disproportionately affected by HIV compared to men as a result of gender inequality. Women's empowerment is a key factor in the global response to HIV and AIDS. Measures should be taken in the workplace to ensure gender equality, prevent violence and harassment, protect sexual and reproductive health and rights and involve men and women workers, regardless of their sexual orientation, in the HIV response.

3.5 The right to access and continue in employment

Real or perceived HIV status is not a valid cause for termination of employment. Persons with HIV-related illness should not be denied the possibility of continuing to carry out their work, with reasonable accommodation if necessary, for as long as they are medically fit to do so.

3.6 Prevention

Prevention of all modes of HIV transmission is a fundamental priority. The workplace should facilitate access to comprehensive information and education to reduce the risk of HIV transmission and HIV-TB co-infection.

3.7 Treatment, Care and Support

All workers, their families and dependants are entitled to equal access to prevention, treatment, care and support services in relation to HIV, AIDS and TB. There should be no discrimination against workers, their families or dependants in access to social security systems, insurance schemes or other employment-related benefits. Programmes of care and support should include measures of reasonable accommodation in the workplace for persons living with HIV or HIV-related illnesses.

3.8 Social Dialogue/Consultations

Implementation of policies and programmes on HIV and AIDS should be based on cooperation and trust among employers and workers and their representatives, and governments. Employers and workers should be engaged in the design, implementation and evaluation of national and workplace programmes, with the active involvement of persons living with HIV should also be involved. Organizations of employers and workers should promote awareness of HIV and AIDS, including prevention and non-discrimination, by providing education and information to their members.

3.9 Occupational Health and Safety

The workplace should be safe and healthy for all workers, and they should benefit from programmes to prevent specific risks of occupational transmission of HIV and related transmissible diseases, such as tuberculosis, especially in occupation most at risk.

3.10 Testing, confidentiality, and disclosure

Workers, their families and dependants should enjoy protection of their privacy, including confidentiality related to HIV and AIDS, in particular with regard to their own HIV status. Workers should not be required to undergo HIV testing or other forms of screening. The results of HIV testing should be confidential and not endanger access to jobs, tenure, job security or opportunities for advancement. Workers should not be required to disclose their HIV status or that of any other person.

4. LEGAL FRAMEWORK

4.1 The Code should be read in conjunction with the Constitution of South Africa Act, No. 108 of 1996, and all relevant Legislation as amended, which includes:

- a) Employment Equity Act, No. 55 of 1998;
- b) Labour Relations Act, No. 66 of 1995;
- c) Occupational Health and Safety Act, No. 85 of 1993;
- d) Mine Health and Safety Act, No. 29 of 1996;
- e) Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993;
- f) Basic Conditions of Employment Act, No. 75 of 1997;
- g) Medical Schemes Act, No. 131 of 1998;
- h) Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000;
- i) Unemployment Insurance Act, No. 32 of 2003; and
- j) National Health Act, No 61 of 2003.

4.2 The contents of this code should be taken into account when developing, implementing or reviewing any workplace policies or programmes, and should be read in conjunction with the following legislative provisions:

- 4.2.1 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.

- 4.2.2 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.
- 4.2.3 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.
- 4.2.4 No employee, or applicant for employment, may be required by their employer to undergo an HIV test in order to ascertain their HIV status.
- 4.2.5 In accordance with Section 187(1)(f) of the Labour Relations Act, No. 66 of 1995, an employee with HIV or AIDS may not be dismissed because he or she is HIV positive or has AIDS.
- 4.2.6 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 workplace.
- 4.2.7 Section 2(1) and Section 5(1) of the Mine Health and Safety Act, No. 29 of 1996 provides that an employer is required to create, as far as is reasonably practicable, a safe workplace.
- 4.2.8 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.
- 4.2.9 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 the minimum number of sick leave days [Section 22(2)].
- 4.2.10 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) (9) regulations may be drafted stipulating that all schemes must offer a minimum level of benefits to their members.
- 4.2.11 In accordance with Section 20 of the Amended Unemployment Insurance Act, No.32 of 2003, every employer is obliged to ensure that all employees are able to exercise their right to illness benefits.

5. PROMOTING A NON-DISCRIMINATORY WORKING ENVIRONMENT**5.1 Counselling, HIV Testing, Confidentiality and Disclosure**

- a) Testing must be genuinely voluntary and free of any coercion and testing programmes must respect national guidelines on confidentiality, counseling and consent.
- b) HIV testing or other forms of screening for HIV should not be required of workers, including migrant workers, jobseekers and job applicants.
- c) The results of HIV testing should be confidential and not endanger access to jobs, tenure, job security or opportunities for advancement.
- d) Testing of any employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the labour court in terms section 15(4) of the Act
- e) A person has a right to disclose or not to disclose their HIV status.

5.2 Employee Benefits

- a) Employees with HIV or AIDS may not be unfairly discriminated against in the allocation of employee benefits.
- b) Where an employer offers a medical benefit, that employer must ensure that this benefit does not unfairly discriminate, directly or indirectly, against any person on the basis of their HIV status.

5.3 Termination of Employment

- a) Employees with HIV and AIDS may not be dismissed on the basis of their HIV status.
- b) Where an employee has become too ill to perform their current work, an employer is obliged to explore alternatives, including reasonable accommodation and redeployment
- c) Real or perceived HIV status is not a valid cause for termination of employment. Persons with HIV-related illness should not be denied the opportunity of continuing to carry out their work.

5.4 Grievance Procedures

- a) Grievance mechanisms and procedures should be easily accessible to ensure effective redress in cases of violation.
- b) Employers should make employees aware of the grievance procedures, particularly to address unfair discrimination relating to HIV in the workplace.
- c) Employers should ensure that the rights of employees with regard to HIV and AIDS, and the remedies available to them in the event of a breach of such rights become integrated into existing grievance procedures.

6. PROMOTING A SAFE WORKING ENVIRONMENT**6.1 Prevention**

Prevention strategies should be adapted to national conditions and the type of workplace, and should take into account gender, cultural, social and economic concerns.

6.1.1 Prevention programmes should ensure:

- a) That accurate and up to date relevant and timely information is made available and accessible to all in a culturally sensitive format and language through the different channels of communication available;

- b) Comprehensive education programmes to help women and men understand and reduce the risk of all modes of HIV transmission, including mother-to-child transmission, and understand the importance of changing risk behaviours related to infection;
- c) Measures to encourage workers to know their own HIV status through voluntary counseling and testing;
- d) Access to all means of prevention, including but not limited to guaranteeing the availability of necessary supplies, in particular male and female condoms and where appropriate information about correct use and the availability of post-exposure prophylaxis; and
- e) Effective measures to reduce high-risk behaviours, including for the most at-risk groups with a view to decreasing the incidence of HIV.

6.2 Treatment, Care and Support

- 6.2.1 Employers should ensure that workplace policies and programmes pertaining to health interventions are determined in consultation with workers and their representatives, and are linked to public health services.
- 6.2.2 Employers should ensure that workers living with HIV and their dependants benefit from access to health care, whether this is provided under public health, social security systems or private insurance or other schemes.
- 6.2.3 All persons covered by this Code, including workers living with HIV, their families and their dependants, should be entitled to health services, including access to free or affordable:
 - a) Voluntary counseling and testing
 - b) Antiretroviral treatment and adherence education, information and support
 - c) Proper nutrition consistent with treatment
 - d) Treatment for opportunistic infections and sexually transmitted infections, and any HIV-related illnesses, in particular tuberculosis
 - e) Support and prevention programmes for persons living with HIV, including psychosocial support.
- 6.2.4 There should be no discrimination against workers or their dependants based on real or perceived HIV status in access to social security systems and occupational insurance schemes, or in relation to benefits under such schemes, including for health care and disability, death and survivors' benefits.
- 6.2.5 Programmes of care and support should include measures of **reasonable accommodation in the workplace for persons living with HIV or HIV-related illness.**
- 6.2.6 Employers should **promote the retention in work and recruitment of persons living with HIV.** Employers should consider extending support through periods of employment and unemployment, including where necessary income-generating opportunities for persons living with HIV or persons affected by HIV or AIDS.

6.3 Occupational Health and Safety

6.3.1 The working environment should be safe and healthy in order to prevent transmission of HIV in the workplace.

6.3.2 Health and safety measures to prevent workers' exposure to HIV at work should include universal precautions, accident and hazard prevention strategies, work practice control, personal protective equipment, environmental control measures, Post Exposure Prophylaxis (PEP) to minimize the risk of contracting HIV and TB.

6.4 Children and Young Persons

6.4.1 Employers should take measures to protect young workers against HIV infection and to include the special needs of children and young persons in the response to HIV and AIDS in policies and programmes in the workplace.

7. MANAGEMENT OF HIV AND AIDS IN THE WORKPLACE

7.1 Employers, trade unions and their employees should develop appropriate strategies to understand, assess and respond to the impact of HIV and AIDS in the workplace. In order to manage HIV and AIDS in the workplace you need to consider the following:

- a) Compliance with legal obligations
- b) Management commitment
- c) Consultation with relevant stakeholders
- d) Develop an HIV and AIDS Workplace Policy
- e) Develop and implement an HIV and AIDS Prevention and Wellness programmes
- f) Monitoring and Evaluation

7.2 Assess the impact of HIV and AIDS in the Workplace

7.2.1 Employers should conduct an audit and analysis of HIV and AIDS in the workplace to inform the development and implementation of policies and programmes

7.3 Developing HIV and AIDS Workplace Policies and Programmes

7.3.1 Employers should develop HIV and AIDS Workplace Policies and Programmes in order to ensure that employees infected and affected by HIV and AIDS are not unfairly discriminated against in employment practices.

7.4 Education, training and information

7.4.1 Training, safety instructions and any necessary guidance in the workplace related to HIV and AIDS should be provided in a clear and accessible form for all workers and, in particular, for migrant workers, newly engaged or inexperienced workers, young workers and persons in training, including interns and apprentices.

- 7.4.2 Training, instructions and guidance should be sensitive to gender and cultural concerns and adapted to the characteristics of the workforce, taking into account the risk factors for the workforce.
- 7.4.3 Up to date scientific and socio-economic information and, where appropriate, education and training on HIV and AIDS should be available to employers, managers and workers' representatives, in order to assist them in taking appropriate measures in the workplace.
- 7.4.4 Workers, including interns, trainees and volunteers should receive awareness raising information and appropriate training in HIV infection control procedures in the context of workplace accidents and first aid. Workers whose occupations put them at risk of exposure to human blood, blood products and other body fluids should receive additional training in exposure prevention, exposure registration procedures and post-exposure prophylaxis.
- 7.4.5 Workers and their representatives should have the right to be informed and consulted on measures taken to implement workplace policies and programmes related to HIV and AIDS. Workers' and employers' representatives should participate in workplace inspections in accordance with national practice.

8. MONITORING AND EVALUATION

- 8.1 Employers and Workers, including their organizations, should:
- design and implement an HIV and AIDS workplace M&E plan;
 - Identify the key elements needed to make the M&E system work;
 - Select and make use of indicators that are specific, measurable, attainable, relevant and time-bound (SMART); and
 - Gather and analyze qualitative /quantitative information, and communicate it effectively.