

CHAPTER 7

Your rights
at work

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Employees can experience HIV-related discrimination from employers, supervisors or other employees.

This chapter looks at:

- The laws protecting people living with HIV or AIDS in the workplace.
- Common questions around HIV/AIDS and employment issues.
- How to stand up for your rights at work.



The Labour Court or other **statutory bodies** that **arbitrate** (make decisions) on employment disputes will look at:

- The Constitution, which is based upon the principle of **equality** for everyone in South Africa.
- Labour laws and case law built up in the Labour Courts, the **Commission for Conciliation, Mediation and Arbitration (CCMA)** and the old Industrial Courts, which follow the principles of **non-discrimination**, fair labour practices and the reasonable rights and duties of employers and employees.
- The latest scientific and medical knowledge about HIV/AIDS, especially that:
 - HIV cannot be transmitted by casual contact between people at work.
 - People with HIV are usually as healthy and productive as employees who are not infected.

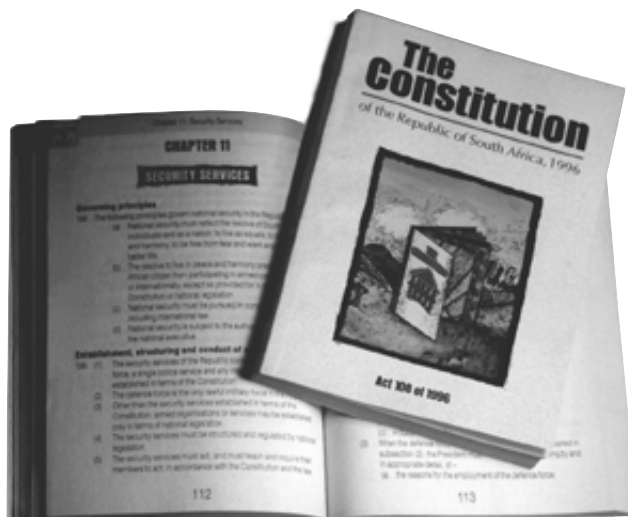
7.2.1 THE CONSTITUTION

The Constitution gives all people the right to equality and **non-discrimination**. It also gives employees the right to be treated fairly at work.

The **Bill of Rights** says:

☞ Everyone has the right to fair labour practices. ☞

This means that in the **private** and **public sector** your employer cannot **unfairly discriminate** against you – for example, this means they can't treat you unfairly just because you're a woman, or just because you have a **disability**.





CASE

HIV TESTING IS UNFAIR DISCRIMINATION

In *Hoffman v South African Airways* (2000), the Constitutional Court was asked to decide if SAA had violated Hoffman's constitutional right to equality, dignity and fair labour practices.

Hoffman applied for a job with SAA as a cabin attendant. He was asked to go for an HIV test, and was refused the job because he was HIV positive.

The Court decided:

- SAA had discriminated against Hoffman.
- The discrimination was unfair, based on the medical evidence.

“ The denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination. ”

- Being HIV negative was not an ‘inherent requirement’ of the job of being a cabin attendant (essential to do the job).

For more on the Bill of Rights, including the Equality Clause, see Chapter 4 on page 63.

The Constitution also places a duty on the courts to use **international law** as a guide when interpreting constitutional rights. The courts need to take note of the international agreements and declarations on HIV and AIDS, such as:

- The 1988 ILO Consensus Statement on HIV/AIDS.
- The SADC Code on HIV/AIDS and Employment (1997).

“ Workers with HIV infection who are healthy should be treated the same as any other worker. Workers with HIV-related illnesses, including AIDS, should be treated the same as any other worker with an illness. ”

World Health Organisation / ILO Consensus Statement on AIDS in the Workplace

To find the ILO and SADC agreements, see References and resource materials on page 179.

For more on international law, see Chapter 5 on page 93.

7.2.2 THE LABOUR RELATIONS ACT

What is the LRA?

In 1995, a new *Labour Relations Act (LRA)* was passed by Parliament. This law **regulates** relations between employers and workers. It governs issues such as the right to join trade unions and employer organisations, and the right to strike and lock out.

The LRA allows employers and employees to decide on rules and regulations for their industry or industrial sector through **collective agreements**, but it also refers to **fundamental rights** that are the same for all employees.

Who does the LRA cover?

The LRA covers all employees and employers, and treats every one the same. This means that domestic workers now have the same rights as factory workers, and people working for government have the same rights as people working in the **private sector**.

The only employees who are not covered by the LRA are people working for the South African National Defence Force (SANDF), the National Intelligence Agency (NIA) and Secret Services. But even these employees are protected by the Constitution and therefore have the right to fair labour practices and equality.

SANDF MEMBERS ARE WORKERS

In *South African National Defence Force Union v Minister of Defence* (1999), the Constitutional Court was asked to look at sections of the Defence Act which prohibited SANDF members from joining trade unions.

The Court decided:

- Certain sections of the Act were **unconstitutional**.
- SANDF members have a constitutional right to join trade unions.

The case is important because the court held that SANDF members are also regarded as workers, and are protected by the constitutional right to fair labour practices.



What protections in the LRA are important for employees with HIV or AIDS?

The LRA protects employees from:

- **Unfair labour practices** (eg a worker is taken off certain work because she has HIV).
- **Unfair dismissals** (eg a worker is dismissed because he has HIV).

Dismissals

The reason for a dismissal must be fair and proper procedures must be followed. There is a *Code of Good Practice: Dismissal* attached to the LRA, which provides practical information on what is a fair reason for a dismissal and what procedures should be followed.

GUIDELINES



REASONS FOR DISMISSAL ALLOWED BY THE LRA

1. *Dismissals for misconduct (bad behaviour)*
2. *Dismissals for incapacity (including inability to do a job due to ill-health)*
3. *Dismissals for operational requirements (eg retrenchment).*

If the reason for a dismissal is not fair, or a fair procedure is not followed, the employee can claim for 'unfair dismissal'.

The LRA says that some dismissals are "automatically unfair dismissals". Usually, this is where the reasons for the dismissal are based on unfair discrimination, for example: where an employee is dismissed as a result of unfair discrimination because of pregnancy or race.



An 'automatically unfair dismissal' is easier for an employee to prove, because here the employee simply has to show that there was a dismissal, and the employer has to give evidence to show that the dismissal was fair.

AN AUTOMATICALLY UNFAIR DISMISSAL

You are HIV positive, fit and well. You tell the company you work for that you have HIV. A month later they dismiss you.

*You believe that you have been dismissed because of your decision to **disclose** your HIV status. You take the case to the CCMA.*

The company argues that your dismissal is lawful because you were dismissed because of incapacity. They say you were unable to do your job properly.

If you can show that you are well, able to do your job and that you were dismissed only because of your HIV status, this is unfair discrimination.

This kind of dismissal is automatically unfair and the employer has to prove that the dismissal was in fact fair.



EXAMPLE

7.2.3 EMPLOYMENT EQUITY ACT

What is the Employment Equity Act?

The Employment Equity Act (EEA) aims at creating an environment of equality and non-discrimination in the workplace.

Who does the EEA cover?

The EEA is the same as the LRA and covers everyone except the South African National Defence Force (SANDF), the National Intelligence Agency (NIA) and Secret Services.

What does the EEA say about HIV/AIDS?

The Act says that no person may unfairly discriminate against an employee or job applicant in any employment policy or practice on the basis of the 20 listed grounds unless it is an inherent (essential) requirement of the job.

AN INHERENT REQUIREMENT

It may be an inherent requirement of a firefighter's job not to have a physical disability as they have to use physical strength to control heavy water pipes, and run up and down ladders.



EXAMPLE

The 20 listed grounds are:

“ race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth. ”

The EEA has 3 extra grounds (compared to the 17 grounds listed in the Constitution and **Equality Act** – see 4.2 on page 67):

- Family responsibility
- HIV status
- Political opinion.

Unfair discrimination



HIV STATUS RECOGNISED IN THE EEA

The EEA was the first law to directly say that employers may not unfairly discriminate against employees because of their HIV status.

For more on HIV/AIDS and discrimination, see Chapter 2 on page 29.

For more on unfair discrimination and the Bill of Rights, see 4.1 – 4.5 from page 66 onwards.

The unfair discrimination may involve using HIV status or one of the other listed grounds to:

- Demote or not promote the employee.
- Block the employee from access to training and development.
- Make an unfair distribution of employee benefits to the employee.

UNFAIR DISCRIMINATION BECAUSE OF HIV STATUS

You have been working for the same company for 5 years. Everyone knows that you are due for a promotion. You tell the company that you have HIV. The following month the person who works under you in your department is promoted to the position you were expecting to get.



You believe the company is discriminating against you because of your HIV status. You can take steps against the company. Because HIV status is a listed ground, the company will have to prove that they were not acting unfairly.

HIV testing

The EEA says that an employer may not force an employee to take an HIV test.



EXAMPLES

WHAT AN EMPLOYER IS NOT ALLOWED TO DO

- Ask a job applicant to take an HIV test when applying for a job.
- Ask existing employees to test for HIV every year.
- Ask employees to take an HIV test before being promoted or offered special training.

For an update on recent HIV testing case law, see *Introducing this manual* on page vi

If an employer wants to test employees for HIV and the employer thinks that HIV testing may be important and reasonable for whatever reason, the employer must ask the Labour Court to allow for HIV testing. The Labour Court will then have to decide whether HIV testing is justified in the employer's workplace.



GUIDELINES

CONDITIONS THE LABOUR COURT CAN SET FOR HIV TESTING

1. *Pre- and post-test counselling*
2. *Procedures to make sure the results are confidential*
3. *The length of time that the employer is allowed to do testing (eg 1 year)*
4. *The kinds of employees who can be tested.*

If the employer does not have an order of court saying that HIV testing is allowed, then as an employee, you can take steps against the employer when you are asked to have an HIV test.



KEY POINTS

CODE OF GOOD PRACTICE ON HIV/AIDS AND EMPLOYMENT

A Code of Good Practice on Key Aspects of HIV/AIDS and Employment has been added to both the LRA and the EEA:

- The Code is a general guide on how employers, employees and trade unions should respond to HIV/AIDS in the workplace.
- The Code encourages all employers to develop a workplace HIV/AIDS policy and programme.

For more on taking legal steps, see 17.5.3 on page 417.

For the Code on HIV/AIDS and Employment, see A5 on page 514.

See *Introducing this manual* on page vi for more on the recent Public Service "Minimum Standards on HIV/AIDS" regulations.

7.2.4 THE OCCUPATIONAL HEALTH AND SAFETY ACT, AND MINE HEALTH AND SAFETY ACT

The *Occupational Health and Safety Act* covers all employees, except those in the mining industry, who fall under the *Mine Health and Safety Act*.

Work-related accidents often happen where there is unsafe machinery, or where employees are not properly trained about how to use machinery. If an accident happens and blood is spilt, there is a very small risk of HIV transmission. This could only happen if blood passed directly from an infected person to another.

These safety laws say that an employer must:

“ Provide and maintain as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees. ”

This means that all employers must make sure that the workplace is safe, and that employees are not at risk of getting infected with HIV at work.

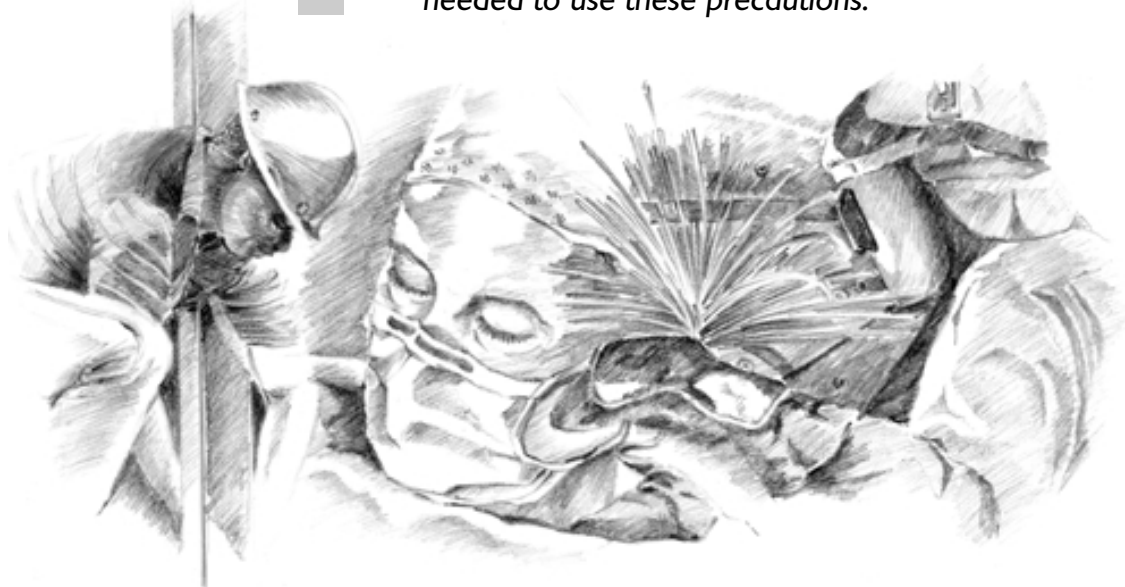


For the new regulations, see References and resource materials on page 179.

NEW REGULATIONS

The Department of Labour has issued new regulations which say:

- Employers have a duty to see that safety equipment such as rubber gloves are in every first aid box.
- All staff must be trained in **universal precautions** and should have access to the equipment needed to use these precautions.



Employers have a duty to provide a safe working environment, including protective clothing where necessary.

GUIDELINES



WHAT WORKERS AND REPRESENTATIVES CAN DO

In every workplace where there are more than 20 people, there must be at least one Health and Safety Representative. Health and Safety Representatives are meant to talk to employers on issues affecting the health and safety of the employees in the workplace. This means that the Health and Safety Representatives can make recommendations to the employer about HIV/AIDS and health and safety in the workplace.

If employees (including health care workers) feel that their work environment is not safe:

- They have the right to refuse to work, and
- They may request an inspector from the Department of Labour to look at their workplace.

7.2.5 THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT

The Compensation for Occupational Injuries and Diseases Act (COIDA) gives every employee the right to compensation for accidents and illness that they get while working. If you get infected with HIV because of a workplace accident, you can claim for compensation.



KEY POINT

THE DEFINITION OF ‘OCCUPATIONAL ACCIDENT’

COIDA says an “occupational accident” is an accident arising out of and in the course of a person’s employment, which results in a personal injury, illness or death.

APPLYING FOR COMPENSATION

Tony injures himself when drawing blood from a patient who tests HIV positive. He can apply for compensation if he later tests HIV positive due to the accident.



EXAMPLE



To get compensation, an employee needs to show that HIV infection was the result of the occupational accident. There are no formal guidelines from the Compensation Commissioner on occupational accidents involving exposure to HIV.

GUIDELINES



STEPS TO TAKE TO SHOW THAT YOU WERE INFECTED WITH HIV AS A RESULT OF AN OCCUPATIONAL ACCIDENT

1. Report the accident.
2. Request counselling and take an HIV test immediately after the accident to show you are HIV negative.
3. Ask the source patient to take an HIV test – for example: if a nurse was injured through a needlestick injury, the source patient would be the person whose blood was on the needle.
4. If the source patient refuses to take a test, make sure that all efforts to ask the source patient to test are written down.
5. Take an HIV test again 6 weeks to 3 months later, to see if you have **sero-converted** (become HIV positive) as a result of the accident.

As an employee, you can demand more compensation if you can show that:

- Personal protective equipment was not available, and
- Your infection was due to the **negligence** (carelessness) of the employer, who did not provide a fully safe workplace.

KEY POINTS



IMPORTANT TIME PERIODS

- If an accident is not reported to an employer or the Compensation Commissioner within 12 months, an employee loses the right to claim for compensation.
- If a person wants to take any action against a hospital, the case must be started within 1 year of the incident.

If the source patient refuses to give their consent to an HIV test after an occupational accident, this must be immediately reported to the head of Occupational Health and Safety in the workplace. This person must then write an **affidavit** saying that attempts were made to try and get information on the source patient's HIV status, but they were unsuccessful.

7.2.6 THE BASIC CONDITIONS OF EMPLOYMENT ACT

The *Basic Conditions of Employment Act (BCEA)* sets out the minimum working standards for all employment relationships, such as:

- How much leave each person may have.
- What hours people may work.
- How often workers should have tea and lunch breaks.

The BCEA says:

- Every employee has a right to 6 weeks paid sick leave over any 3-year cycle.
- In the first 6 months of employment, an employee is allowed 1 day of sick leave for every 23 days worked.
- A doctor's note is needed for absences of longer than 2 days and for repeated absences.

The Act also says that employees have a right to 3 days of family responsibility leave a year, which they can use when:

- A child is born.
- A child is sick.
- There is a death of a **spouse** (husband or wife), life partner, parent, grandparent, child, grandchild, brother or sister.



SICK LEAVE

- *The BCEA sets out the minimum number of days of sick leave employees may claim.*
- *The BCEA also says that employers and employees can renegotiate sick leave to get more sick leave at less pay if they need to.*

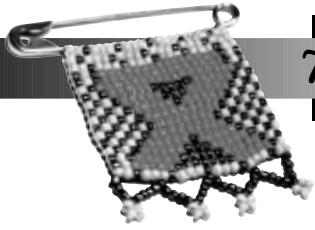
7.2.7 THE MEDICAL SCHEMES ACT

As many companies offer their employees medical aid benefits, the *Medical Schemes Act* affects the workplace.

The Act stops medical schemes from discriminating against people living with HIV or AIDS by saying:

- A medical scheme may not be registered if it discriminates directly or indirectly against any person on the basis of their health status.
- All schemes must offer a minimum level of benefits to employees with HIV or AIDS. At the moment, the minimum benefits say:
 - They must treat all opportunistic infections for HIV or AIDS.
 - They do not have to provide **anti-retroviral treatment**.

For more on medical aid schemes, see 6.4.3 on page 146.



7.3.1 CAN AN EMPLOYER FORCE A JOB APPLICANT TO HAVE AN HIV TEST?

For more details, see 7.2.3 on page 161.

No. An employer cannot force a job applicant to have an HIV test. Companies or government departments that do this are acting unlawfully.

7.3.2 DO YOU HAVE THE RIGHT TO CONFIDENTIALITY AT WORK?

Yes. A person's HIV status is something private. It has nothing to do with your work. You are under no legal duty to tell your employer whether you are HIV negative or positive because HIV is not contagious. Remember: the Bill of Rights in the Constitution says everyone has the right to **privacy**.

For more on the Bill of Rights, see Chapter 4 on page 63.

For more on the ethical rules of the medical profession, see 6.2.2 on page 120.

For more on civil claims, see 17.8 on page 428.

With **confidentiality**, the rules are the same as in the medical profession. If you tell your employer about your HIV status, he/she can only inform other people with your consent. Telling other employees without your consent is a **breach** of confidentiality and means that you can claim **damages** from your employer.

Any doctor or medical professional who tells your employer about your HIV status without your consent or knowledge, is acting against the law.



7.3.3 CAN AN EMPLOYER DEMAND TO KNOW IF THE CAUSE OF AN ILLNESS IS HIV INFECTION?

No. All people have the right to confidentiality around their HIV status.

Most of the **opportunistic infections** that a person may get when they develop AIDS are not spread through ordinary contact.

GUIDELINES



For more on opportunistic infections, see 1.6 on page 22.

For more on AIDS and notification, see 6.2.4 on page 130.

WHEN A WORKER IS ILL

If a person with HIV becomes ill, he/she should be treated in the same way as other employees with any illnesses. An employer has no right to guess or question about the possible causes of the illness, or to treat a person with HIV-related illnesses in a different way to other employees who may become ill.

It is not the cause of the illness that should worry the employer, but the effect of the illness on the employee's ability to work.

It would be an unfair dismissal if an employer fires you as an employee because you refuse to:

- *Have an HIV test, or*
- *Report your HIV status to the employer.*

7.3.4 CAN AN EMPLOYER REFUSE TO EMPLOY YOU BECAUSE YOU HAVE HIV?

No. An employer may refuse to employ a person who is clearly too ill to work (for whatever reason). But to refuse to employ you simply because you are known or suspected to have HIV unfairly discriminates against you on the grounds of HIV status and is therefore unlawful.

An employer could only refuse to employ you as a person with HIV if being HIV negative was an inherent requirement of the job. We cannot think of any jobs that mean that you must be HIV negative, except possibly a 'wet nurse' (a person employed to breast-feed another person's baby).

For more on inherent requirements, see 7.2.3 on page 161.

7.3.5 CAN AN EMPLOYER DISMISS YOU WHEN YOU HAVE HIV BUT ARE STILL HEALTHY?

No. The LRA's Code of Practice: Dismissal sets out correct procedures for dismissal. Dismissing you simply because you are known or suspected to have HIV is clearly unfair.

This is because it **violates** the employee's fundamental rights and has nothing to do with the conduct or capacity of the employee, or the workplace requirements of the employer.

7.3.6 IS IT LEGAL TO DISMISS A PERSON WHO HAS AIDS?

Illness and incapacity

Eventually, many people with HIV start to become ill with AIDS. During this time, an employee may use up a lot of sick leave, and his/her capacity may be affected.

All employees have a right to sick leave and an employer has no right to discriminate against or dismiss an employee who uses these rights. However, 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.

The LRA Code of Good Practice sets out very clear procedures for employers and employees when dealing with dismissals for incapacity. The principle of the Code is that employers and employees "should treat one another with mutual respect".



DISMISSAL WITHOUT INCAPACITY

It is unlawful for an employer to dismiss an employee simply because he/she suspects that you may have AIDS, but cannot show any evidence of incapacity.



DUTIES OF AN EMPLOYER TO MAKE A DISMISSAL FOR INCAPACITY FAIR

1. Investigate the extent of the incapacity or injury.
2. Decide if it is likely to be permanent (long-term) or temporary (short term).
3. Investigate alternatives to dismissal.
4. Consider the possibility of "adapting the duties or work circumstances of the employee to accommodate the employee's disability".

GUIDELINES



YOUR RIGHTS AS A WORKER

1. Get help from a trade union or another employee.
2. Respond to the employer.
3. Ask for ‘reasonable accommodation’ (suitable alternative work).

Reasonable accommodation

Employers are expected to find ways to adapt circumstances to help the employee to continue working. This is called “reasonable accommodation” in the LRA.

EXAMPLE



MAKING REASONABLE ACCOMMODATION

Bernard is no longer physically fit enough to stand on security duty for 5 hours. His employer can make reasonable accommodation for him by giving him a chair to sit on.

Just how far employers are expected to go to accommodate the employee depends on the particular conditions of the workplace. An employer is not expected to have to face “undue hardship” in making it possible for an employee to continue working.

GUIDELINES



FACTORS TO DECIDE IF AN EMPLOYER MADE REASONABLE ACCOMMODATION

1. The size and type of the business.
2. The nature and cost of adapting the employee’s job or in finding alternatives.
3. The effect this will have on other employees.
4. The nature and cause of the employee’s incapacity (eg if it is temporary or permanent).
5. The employee’s position within the company, length of service and work record.
6. The length of time the employee was off sick.

7.3.7 WHAT IF OTHER EMPLOYEES REFUSE TO WORK WITH A PERSON WHO HAS HIV OR AIDS?

Although a person with HIV or AIDS is no risk to other employees, fear and prejudice sometimes lead to demands for the firing of a person who is known or suspected to have HIV.

It is unlawful to dismiss an employee with HIV, even if all the employees of the company refuse to work with that person. The employees discriminating against a worker living with HIV or AIDS should be disciplined for this unacceptable conduct.

DEALING WITH EMPLOYEE OBJECTIONS

In the past, the Industrial Court decided that an employer could not justify the dismissal of several employees, even on the grounds that the rest of the workforce were on strike because they refused to work with this group.

The best way to prevent this kind of situation from happening is for an employer and employees to:

- *Jointly write a company HIV/AIDS policy, and*
- *Organise education at the workplace for employees (and if possible, their families) about HIV and AIDS.*
- *Involve employees living with HIV in company HIV/AIDS education programmes.*



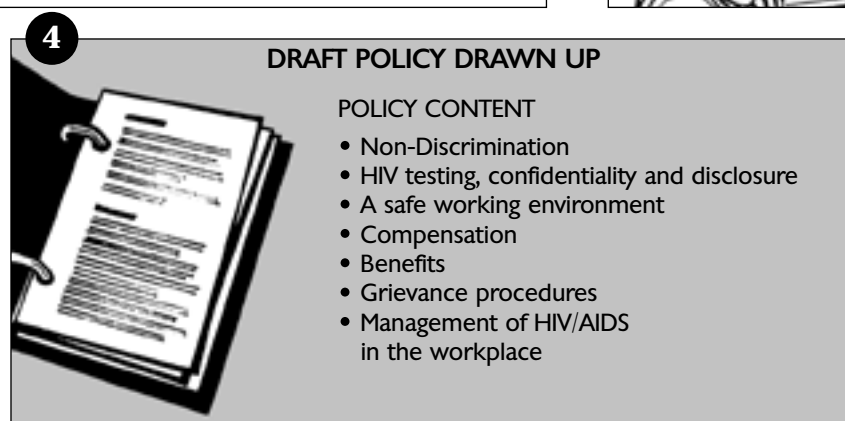
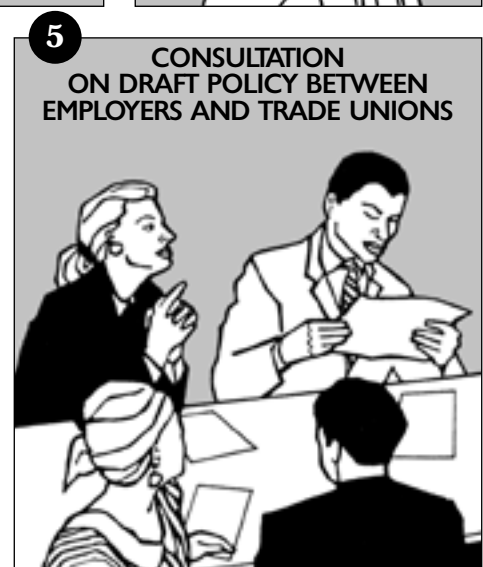
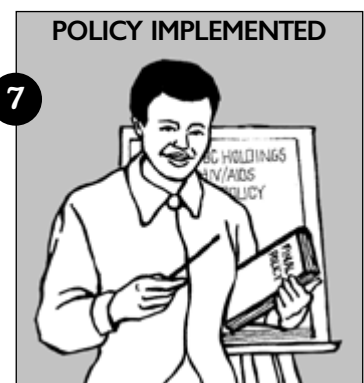
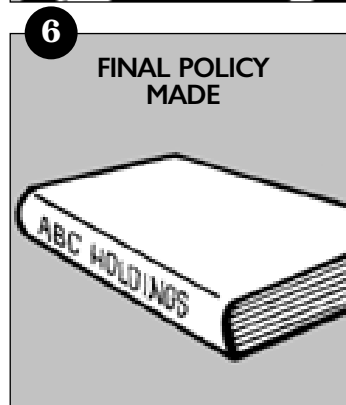
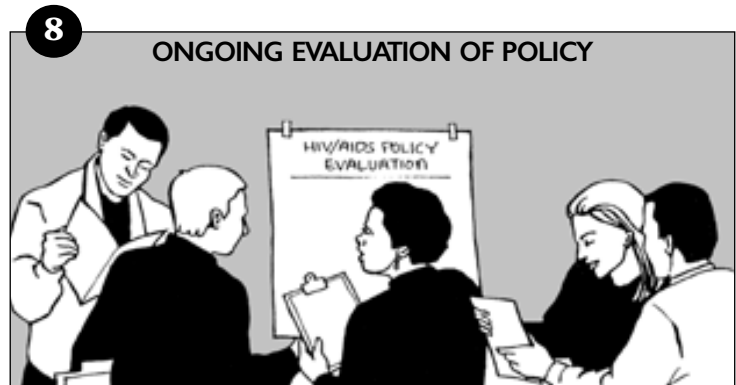
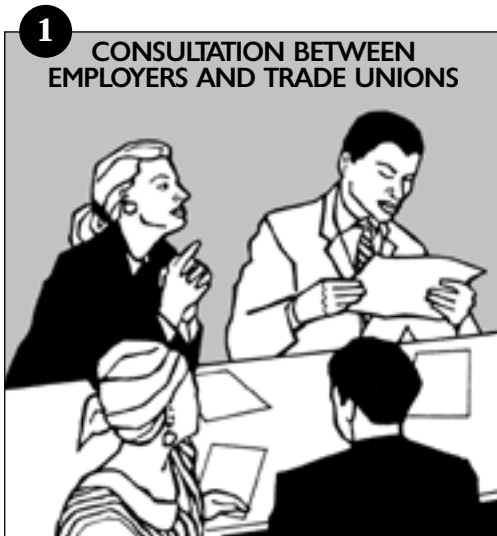
7.3.8 SHOULD COMPANIES DEVELOP A WORKPLACE HIV/AIDS POLICY AND PROGRAMME?

Yes. Every sexually active adult is at some risk of HIV infection. The workplace gives us all an opportunity to educate ourselves about HIV and AIDS, and about how transmission does and does not take place.

This is why it is so important for every workplace (no matter how big or how small) to have an HIV/AIDS policy and programme. Condoms can be easily distributed at work, and education programmes can be organised to teach staff and their families about HIV and AIDS.

For information on HIV/AIDS policies and programmes, see the Code of Good Practice on Key Aspects of HIV/AIDS and Employment in A5 on page 514.

DEVELOPING AN HIV/AIDS POLICY: 8 KEY STAGES



7.3.9 CAN YOUR EMPLOYER REFUSE TO GIVE YOU EMPLOYEE BENEFITS BECAUSE YOU HAVE HIV?

No. Employers may not unfairly deny people with HIV or AIDS access to employee benefit schemes.

There are different types of employee benefits – for example: death benefits, disability benefits, pensions, provident and retirement funds, and medical aid schemes.

In giving additional security to workers, employee benefits:

- Provide for the possibility that an employee can die or become disabled before normal retirement age.
- Are a form of insurance against illness.
- Make it possible to save money for the day when you become too old to work.

Many companies, especially bigger employers, offer these benefits as part of the contract of employment that is agreed to with the employee.

HIV/AIDS will mean increased illness and death amongst employees, and will affect the costs of employee benefit schemes. But this does not make it lawful to discriminate by denying all employee benefits to people with HIV or AIDS. They should receive similar benefits to people with other diseases.



The best solution is for employee benefits to be renegotiated between the employer and employee. In this way, employee benefits can support all employees, including those living with HIV or AIDS, to provide a stable and productive workforce.

HOW THE LAW PROTECTS YOU

- The EEA says that no employer may unfairly discriminate against an employee on the basis of HIV status. This means that they cannot unfairly discriminate against employees in giving employee benefits.
- The EEA says that an employer cannot request an employee to have an HIV test unless they get permission from the Labour Court.
- The Medical Schemes Act say that no medical aid scheme may unfairly discriminate or completely exclude you from the scheme on the basis of health status (including living with HIV or AIDS). This will help to ensure that employees with HIV or AIDS receive proper medical care, and are able to continue working in good health for longer.
- The Code of Good Practice on Key Aspects of HIV/AIDS and Employment says that employees with HIV or AIDS may not be unfairly discriminated against in the allocation of employee benefits. It recommends that workplaces develop a Workplace HIV/AIDS Policy to ensure non-discrimination.



For the Code of Good Practice on HIV/AIDS, see A5 on page 514.

UNFAIR DISCRIMINATION

When Old Mutual employed NS, they asked her to have a test for HIV. When she tested positive, she was refused membership of 3 employee benefits, including the medical aid scheme. NS resigned from Old Mutual and started legal action, claiming that she had suffered unfair discrimination. 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.



However, in *NS v Old Mutual* (1999), the Labour Court:

- Decided the case in favour of NS.
- Said that the right to take legal action arises from the time of the injury – and that her resignation did not affect this.

GUIDELINES



For more detail on using the law to protect employment rights, see 17.5 on page 414.

SOME KEY STEPS FOR TAKING UP WORKPLACE RIGHTS

- Workers can take disputes on issues like dismissals or discrimination to a **Bargaining Council (BC)** or the **Commission for Conciliation, Mediation and Arbitration (CCMA)**.
- The BC or CCMA will try to resolve the dispute by **conciliation, mediation or arbitration**.
- Cases on automatically unfair dismissals and unfair discrimination, will go directly to the Labour Court after conciliation at the BC or the CCMA.
- Workers can appeal against decisions of the Labour Court by going to the Labour Appeal Court.
- Employees must contact the CCMA or BC within 30 days of being unable to resolve their dispute.

STEPS FOR SOLVING WORKPLACE DISPUTES



COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA) or BARGAINING COUNCIL

Disputes about automatically unfair discrimination in the workplace should first be referred to one of these bodies.

THE LABOUR COURT

The dispute will be referred to this court if it is not resolved by the CCMA or Bargaining Council.

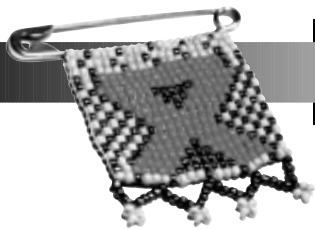


THE LABOUR APPEAL COURT

This court handles appeals against the decisions of the Labour Court.

Summary of rights of employees living with HIV or AIDS

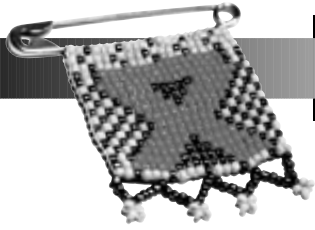
RIGHT	LAW
Right to fair labour practices	Constitution and Labour Relations Act (LRA)
Right not to be unfairly dismissed because you have HIV	LRA
Right not to be unfairly discriminated against on the basis of your HIV status	Employment Equity Act (EEA)
Right not to be tested for HIV unless your employer has applied to the Labour Court for authorisation	EEA
Right to a safe working environment	Occupational Health and Safety Act, and Mine Health and Safety Act
Right to compensation if infected with HIV at work	Compensation for Occupational Injuries and Diseases Act (COIDA)
Right to certain basic standards of employment, including 6 weeks of paid sick leave over a 3-year period	Basic Conditions of Employment Act (BCEA)
Right to no unfair discrimination in giving employee benefits	Medical Schemes Act
Right to privacy about your HIV status at work	Common law right



Talking points



- 1** To date very few employers have approached the Labour Court to ask for permission to test employees for HIV.
 - *What types of HIV testing in the workplace do you think the Labour Court will authorise?*
- 2** A large fruit farm wants to set up a voluntary HIV testing and counselling programme.
 - *Do they need to apply to the Labour Court for authorisation to provide this confidential service to employees and their families?*
- 3** Many domestic workers are being told to have HIV tests by their employers. If they refuse to have a test or to tell their boss the result of the test, they are fired.
 - *Is this legal under the Employment Equity Act?*
 - *What steps can a domestic worker take to protect his/her rights?*
- 4** Thuli works in a chocolate factory where most of the working space is refrigerated. Recently she was very ill and diagnosed with HIV. She is well again now. Her doctor has advised her to go back to work, but to try and avoid working in the cold areas.
 - *What kind of 'reasonable accommodation' could her employer make?*
- 5** Tony is a doctor in a small rural hospital. He tests HIV positive following a needlestick injury.
 - *Can he claim treatment with anti-retroviral drugs (which will keep him fit and at work for longer) from the Compensation Commissioner?*



References & resource materials

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Employment Equity Act, No 55 of 1998.

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Department of Labour: Code of Good Practice: Dismissal, including Incapacity: Ill Health or Injury and Guidelines in Cases of Dismissal Arising from Ill health or Injury, Schedule 8, Labour Relations Act, No 6 of 1995.

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SADC Code on HIV/AIDS and Employment, 1997.

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Joy Mining Machinery v National Union of Metal Workers and Others, 2002, 23 ILJ 391 (LC)

SANDF Union v Minister of Defence and Another, 1999 (6) BCLR 615 (CC).

Woolworths (Pty) Ltd v Whitehead, 2000 (6) BLLR 640 (LAC).

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AIDS Legal Network (ALN): ALQ – The AIDS Legal Quarterly (quarterly magazine).

South African Law Commission: Aspects of the Law Relating to AIDS: Pre-employment HIV testing: Project 85: Discussion Paper 72, 1997.

WEBSITES

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AIDS Legal Network: www.redribbon.co.za/legal

CCMA: www.ccma.org.za

Congress of SA Trade Unions: www.cosatu.org.za

Department of Health resources: www.aidsinfo.co.za

Department of Labour: www.labour.gov.za

International Labour Organisation: www.ilo.org

South African Law Commission: www.law.wits.ac.za/salc/salc.html

UNAIDS: www.unaids.org