



# Maine

## Overview of Legal Issues for People Living with HIV

June 2014

## ABOUT GLAD'S AIDS LAW PROJECT

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders works in New England and nationally to create a just society free of discrimination based on gender identity, HIV status, and sexual orientation.

GLAD's AIDS Law Project was founded in 1984 to protect the rights of *all* people with HIV. Fighting discrimination and establishing strong privacy protections have been important for people with HIV since the beginning of the epidemic. We outline here the basic state and federal laws of particular importance to people with HIV. We want you to understand the current scope of HIV testing, privacy, and anti-discrimination protections -- and the exceptions to these protections. The more information you have about existing laws, the more prepared you will be to stand up for your legal rights.

If you have questions about any of these laws, or believe that your legal rights have been violated, contact GLAD Answers by phone at 800-455-GLAD (4523) or by live chat or email at [www.GLADAnswers.org](http://www.GLADAnswers.org).

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# **Anti-Discrimination Law**

## ■ Discrimination Based on HIV Status

*Does Maine have laws that protect people with HIV from discrimination?*

Yes, Maine has enacted anti-discrimination laws protecting people with HIV from discrimination in employment, housing and public accommodations. In addition, there are a number of federal laws that protect people from discrimination based on their HIV status.

*Who is protected under these anti-discrimination laws?*

The following people are protected under the Maine Human Rights Act (MHRA) and the Americans with Disabilities Act (ADA):

- People with AIDS or who are HIV-positive, even if they are asymptomatic and have no outward or manifest signs of illness.
- People who are regarded or perceived as having HIV.
- A person who does not have HIV, but who has a “relationship” or “associates” with a person with HIV —such as friends, lovers, spouses, roommates, business associates, advocates, and caregivers of a person or persons with HIV.

## ■ Discrimination in Employment

### **ADVERSE TREATMENT**

#### ***What laws protect people with HIV from discrimination in employment?***

People with HIV are protected from employment-related discrimination under the MHRA<sup>1</sup> and the ADA.<sup>2</sup> Both of these statutes, which are almost identical, prohibit discrimination in employment on the basis of a person's disability. Maine law covers state and private employers with one or more persons.<sup>3</sup> The ADA covers employers with 15 or more employees.

#### ***What do these anti-discrimination laws prohibit?***

An employer may not take adverse action against an applicant or employee simply on the basis that the person has a disability such as HIV or AIDS. This means that an employer may not terminate, refuse to hire, rehire, or promote, or otherwise discriminate in the terms or conditions of employment, based on an individual's HIV/AIDS status.

The focus here is whether a person with AIDS or HIV was treated differently than other applicants or employees in similar situations.

The following are examples of unlawful discrimination:

- An employer may not refuse to hire a person with HIV based on fear that HIV will be transmitted to other employees or to customers.
- An employer may not refuse to hire or make an employment decision based on the possibility, or even probability, that a

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<sup>1</sup> 5 M.R.S.A. § 4571 & 4572 (2).

<sup>2</sup> 42 U.S.C §§ 12101, 12112.

<sup>3</sup> 5 M.R.S.A § 4553.

person will become sick and will not be able to do the job in the future.

- An employer cannot refuse to hire a person because it will increase health or workers' compensation insurance premiums.

### **REASONABLE ACCOMMODATION**

*What does it mean that an employer may have to provide a "reasonable accommodation" for an employee with a disability?*

Persons with disabilities, such as HIV/AIDS, may experience health-related problems that make it difficult to meet some job requirements or duties. For example, a person may be exhausted or fatigued and find it difficult to work a full-time schedule.

In certain circumstances, the employer has an obligation to modify or adjust job requirements or workplace policies in order to enable a person with a disability, such as HIV or AIDS, to perform the job duties. This is known as a "reasonable accommodation."

Examples of reasonable accommodations include:

- Modifying or changing job tasks or responsibilities;
- Establishing a part-time or modified work schedule;
- Permitting time off during regular work hours for medical appointments;
- Reassigning an employee to a vacant job; or
- Making modifications to the physical layout of a job site or acquiring devices such as a telephone amplifier to allow, for example, a person with a hearing impairment to do the job.

***How can a person obtain a reasonable accommodation?***

It is, with rare exception, the employee's responsibility to initiate the request for an accommodation. In addition, an employer may request that an employee provide some information about the nature of the disability. Employees with concerns about disclosing HIV/AIDS status to a supervisor should contact GLAD Answers in order to strategize about ways to address any such requests.

There is no fixed set of accommodations that an employee may request. The nature of a requested accommodation will depend on the particular needs of an individual employee's circumstances.

***Does an employer have to grant a request for a reasonable accommodation?***

No, an employer is not obligated to grant each and every request for an accommodation. An employer does not have to grant a reasonable accommodation that will create an "undue burden" (i.e., significant difficulty or expense for the employer's operation). In addition, the employer does not have to provide a reasonable accommodation if the employee cannot perform the job function even with the reasonable accommodation.

***When is a "reasonable accommodation" for an employee an "undue burden" for an employer?***

In determining whether a requested accommodation creates an undue burden or hardship for an employer, courts examine a number of factors, which include:

- The employer's size, budget and financial constraints;
- The costs of implementing the requested accommodation; and

- How the accommodation affects or disrupts the employer's business.

Again, each situation is examined on a case-by-case basis.

An employer only has an obligation to grant the reasonable accommodation if, as a result of the accommodation, the employee is then qualified to perform the essential job duties. An employer does not have to hire or retain an employee who cannot perform the essential functions of the job, even with a reasonable accommodation.

### **EMPLOYER HEALTH INQUIRIES**

***Can an employer in Maine ever require an applicant or employee to take an HIV test?***

No, an employer may not require an applicant or an employee to submit to an HIV test or disclose HIV status as a condition of employment or to maintain employment.<sup>4</sup>

There is an exception, however, permitting an employer to require an HIV test when based on a "bona fide occupational qualification." There are few, if any, employment settings in which an employer could prevail in its view that an HIV test is based on a "bona fide occupational qualification." Nevertheless, one recent legal development merits special attention here. Some courts have ruled that HIV-positive health care workers who perform invasive procedures can be terminated from employment because of the risk of HIV transmission posed to patients. The AIDS Law Project believes that these cases have been wrongly decided. In light of these cases, however, it is critical that a health care worker obtain legal advice or assistance if an employer requires an HIV test as a condition of employment.

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<sup>4</sup> 5 M.R.S.A. § 19204-B.

***What may an employer ask about an employee's health during the application and interview process?***

Under the ADA and Maine law, prior to employment, an employer cannot ask questions that are aimed at determining whether an employee has a disability. Examples of prohibited pre-employment questions are:

- Have you ever been hospitalized or under the care of a physician?
- Have you ever been on workers' compensation or received disability benefits?
- What medications do you take?

***After an offer of employment, can an employer require a medical exam? What guidelines apply?***

After a conditional offer of employment, the ADA and Maine Law permit an employer to require a physical examination or medical history. The job offer, however, may not be withdrawn unless the results demonstrate that the person cannot perform the essential functions of the job with or without reasonable accommodation. The same medical inquiries must be made of each person in the same job category. In addition, these physical examination and medical history records must be segregated from personnel records, and there are strict confidentiality protections. After employment has begun, the ADA and Maine Law permit an employer to require a physical examination only if it is job-related and consistent with business necessity.

## **HEALTH CARE WORKERS**

*How have the courts addressed fears that health care employees who perform invasive procedures, such as surgeons, will transmit HIV to patients?*

The risk of HIV transmission from a health care worker to a patient is considered so small that it approaches zero. Nevertheless, in cases where hospitals have sought to restrict or terminate the privileges of HIV-positive health care workers who perform invasive procedures, courts have reacted with tremendous fear and have insisted on an impossible “zero risk” standard. As a result, the small number of courts that have addressed this issue under the ADA have upheld such terminations.

The employment provisions in the ADA provide that an employee is not qualified to perform the job if he or she poses a “direct threat to the health or safety of others.” To determine whether an employee poses a “direct threat,” a court analyzes:

- The nature, duration and severity of the risk;
- The probability of the risk; and
- Whether the risk can be eliminated by reasonable accommodation.

In the case of HIV-positive health care workers, courts have ignored the extremely remote probability of the risk and instead have focused on the nature, duration and severity of the risk. The following excerpt from a recent case is typical of courts’ approach:

“We hold that Dr. Doe does pose a significant risk to the health and safety of his patients that cannot be eliminated by reasonable accommodation. Although there may presently be no documented

case of surgeon-to-patient transmission, such transmission clearly is possible. And, the risk of percutaneous injury can never be eliminated through reasonable accommodation ... Thus, even if Dr. Doe takes extra precautions ... some measure of risk will always exist ...”<sup>5</sup>

It is important to note that only a small number of courts have addressed the rights of HIV-positive health care workers. The AIDS Law Project believes that these cases have been incorrectly decided and are inconsistent with the intent of Congress in passing the ADA. Because of the unsettled nature of the law in this area, a health care worker who is confronted with potential employment discrimination should consult a lawyer or public health advocate.

### **ASSESSING DISCRIMINATION**

#### ***How does an employee determine whether he or she has experienced discrimination?***

While it may be useful to consult with a lawyer, the following steps can be helpful in beginning to consider and assess a potential employment discrimination problem.

- (1) Consider the difference between unfairness and illegal discrimination. The bottom line of employment law is that an employee can be fired for a good reason, a bad reason, or no reason at all. A person can be legally fired for a lot of reasons, including a bad “personality match.” What they cannot be fired for is a discriminatory reason specifically outlawed by a statute.
- (2) To prove a discrimination claim (i.e., that you were fired, demoted, etc. because of discrimination and not because of some legitimate reason), you must be able to show the following:

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<sup>5</sup> Doe v. University of Maryland Medical System Corporation, 50 F.3d 1261 (1995).

- The employer knew or figured out that you are HIV-positive or have AIDS;
  - You were qualified to perform the essential functions of the job with or without reasonable accommodation; and
  - Adverse action was taken against you because of your HIV or AIDS status and the pretextual reason given by the employer for the adverse action is false.
- (3) If your employer knows that you have HIV or AIDS, identify exactly who knows, how they know, and when they found out. If you have not told your employer, is there any other way the employer would know or suspect your HIV status?
- (4) Consider the reasons why you believe that you are being treated differently because of HIV status, including the following areas:
- Have other employees in similar situations been treated differently or the same?
  - Has your employer followed its personnel policies?
  - Did the adverse treatment begin shortly after the employer learned of your HIV status?
  - Have you been out of work due to illness for any period of time and did the adverse treatment begin upon your return to work?
  - What will your employer's version of events be? How will you prove that the employer's version is false?
- (5) Do you have any difficulty fulfilling the duties of your job because of any HIV-related health or medical issue? Does your condition prevent full-time work, or require time off for medical appointments, lighter duties or a less stressful position? You

might want to brainstorm to create a reasonable accommodation that you can propose to your employer. Here are some points to consider:

- How does the company operate and how would the accommodation work in practice?
- Put yourself in your supervisor's shoes. What objections might be raised to the requested reasonable accommodation? For example, if you need to leave at a certain time for medical appointments, who would cover your duties?

## ■ Discrimination in Places of Public Accommodation

*What laws protect against discrimination by health care providers, businesses, and other public places?*

Under the ADA<sup>6</sup> and MHRA<sup>7</sup>, it is unlawful to exclude a person with HIV from a public place (what the law refers to as a "place of public accommodation") or to provide unequal or restricted services to a person with HIV in a public place. Under both statutes, the term "public accommodation" includes any establishment or business that offers services to the public. In addition, the Federal Rehabilitation Act of 1973<sup>8</sup> prohibits discrimination on the basis of disability in any agency or program that receives federal funding, including hospitals, medical or dental offices, and educational institutions.

Therefore, people with HIV are protected from discrimination in virtually every public place or business, including bars, restaurants, hotels, schools, vocational or other educational programs, taxi cabs, buses, airplanes and other modes of transportation, health clubs,

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<sup>6</sup> 42 U.S.C. § 12182

<sup>7</sup> 5 M.R.S.A. § 4591

<sup>8</sup> 29 U.S.C.A. § 794

hospitals and medical and dental offices, as long as these facilities are generally open to the public.

In addition, Maine law specifically prohibits discrimination in education based on disability.<sup>9</sup>

***Can a physician in Maine require an HIV test as a prerequisite for treatment?***

No, a health care provider may not deny treatment or care based on the refusal to consent to HIV testing.<sup>10</sup>

***Is discrimination by health care professionals against people with HIV still a problem?***

Believe it or not, yes, people with HIV still face discrimination by hospitals, doctors, dentists, and other health care providers. This discrimination can take the form of an outright refusal to provide medical services or an illegal referral because of a patient's HIV status.

***What types of arguments do doctors who discriminate against people with HIV make, and are they legitimate?***

Doctors typically try to justify discrimination against people with HIV with one of two arguments:

1. "Treating People with HIV is Dangerous" (Some doctors refuse to treat people with HIV based on an irrational fear of HIV transmission); and
2. "Treating People with HIV Requires Special Expertise" (Some doctors refer patients to other medical providers based on an inaccurate belief that general practitioners are not qualified to provide care to patients with HIV).

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<sup>9</sup> 5 M.R.S.A. §§ 4601-4602.

<sup>10</sup> 5 M.R.S.A. § 19203-A (3).

Both an outright refusal to provide medical treatment and unnecessary referrals on the basis of a person's disability are unlawful under the ADA and Maine law.

***How have courts and medical experts responded to these arguments?***

Courts and medical experts have responded to these arguments in the following ways:

(1) "Treating People with HIV is Dangerous"

Doctors and dentists may claim that a refusal to treat a patient with HIV is legitimate because they fear they might contract HIV themselves through needle sticks or other exposures to blood. However, studies of health care workers have concluded that risk of contracting HIV from occupational exposure is minuscule, especially with the use of universal precautions.

For this reason, in 1998, the United States Supreme Court ruled in the case *Bragdon v. Abbott* that health care providers cannot refuse to treat people with HIV based on concerns or fears about HIV transmission.<sup>11</sup>

In addition to the legal perspective, both the American Medical Association and the American Dental Association, and many other professional health care organizations, have issued policies that it is unethical to refuse treatment to a person with HIV.

(2) "Treating People with HIV Requires Special Expertise"

In these cases, the merits of a discrimination claim depend upon whether, based on objective medical evidence, the services or treatment needed by the patient require a

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<sup>11</sup> 524 U.S. 624 (1998)

referral to a specialist or are within the scope of services and competence of the provider.

In United States v. Morvant, a federal trial court rejected a dentist's claim that patients with HIV require a specialist for routine dental care.<sup>12</sup> The court agreed with the testimony of experts who said that no special training or expertise, other than that possessed by a general dentist, is required to provide dental treatment to people with HIV. The court specifically rejected the dentist's arguments that he was unqualified because he had not kept up with the literature and training necessary to treat patients with HIV. While this case arose in the context of dental care, it is applicable to other medical settings as well.

***What are the specific provisions of the ADA that prohibit discrimination by health care providers?***

Under Title III of the ADA<sup>13</sup>, it is illegal for a health care provider to:

- (1) Deny an HIV-positive patient the "full and equal enjoyment" of medical services or to deny an HIV-positive patient the "opportunity to benefit" from medical services in the same manner as other patients.
- (2) Establish "eligibility criteria" for the privilege of receiving medical services, which tend to screen out patients who have tested positive for HIV.
- (3) Provide "different or separate" services to patients who are HIV-positive or fail to provide services to patients in the "most integrated setting."

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<sup>12</sup> 898 F. Supp. 1157 (E.D. La 1995)

<sup>13</sup> 42 U.S.C. §§ 12181-12188

- (4) Deny equal medical services to a person who is known to have a “relationship” or “association” to a person with HIV, such as a spouse, partner, child, or friend.

***What specific health care practices constitute illegal discrimination against people with HIV?***

Applying the specific provisions of the ADA above to the practice of health care, the following practices are illegal:

- A health care provider cannot decline to treat a person with HIV based on a perceived risk of HIV transmission or because the physician simply does not feel comfortable treating a person with HIV.
- A health care provider cannot agree to treat a patient only in a treatment setting outside the physician’s regular office, such as a special hospital clinic, simply because the person is HIV-positive.
- A health care provider cannot refer an HIV-positive patient to another clinic or specialist, unless the required treatment is outside the scope of the physician’s usual practice or specialty. The ADA requires that referrals of HIV-positive patients be made on the same basis as referrals of other patients. It is, however, permissible to refer a patient to specialized care if the patient has HIV-related medical conditions which are outside the realm of competence or scope of services of the provider.
- A health care provider cannot increase the cost of services to an HIV-positive patient in order to use additional precautions beyond the mandated OSHA and CDC infection control procedures. Under certain circumstances, it may even be an ADA violation to use unnecessary additional precautions which tend to stigmatize a patient simply on the basis of HIV status.

- A health care provider cannot limit the scheduled times for treating HIV-positive patients, such as insisting that an HIV-positive patient come in at the end of the day.

### ***How does Maine law compare with the ADA?***

Maine law will be interpreted in a similar manner to the ADA.

## **■ Discrimination in Housing**

### ***What laws prohibit discrimination in housing?***

It is illegal under both Maine law<sup>14</sup> and the National Fair Housing Amendments of 1988<sup>15</sup> to discriminate in the sale or rental of housing on the basis of HIV status. A person cannot be evicted from an apartment because of his or her HIV or AIDS status, or because he or she is regarded as having HIV or AIDS.

In addition, a person cannot be discriminated against in housing because of their "association" with a person with HIV. This means a person cannot be discriminated against because their roommate, lover, friend, relative, or business partner has HIV.

### ***Are there any exceptions to these laws?***

Yes, exceptions to Maine law exist for the rental of a room in an owner occupied building where not more than 4 rooms are rented; and for two family owner occupied buildings. In addition, the Fair Housing Act exempts, in some circumstances, ownership-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker and housing operated by organizations and private clubs that limit the occupancy to members.

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<sup>14</sup> 5 M.R.S.A §§ 4581-4582.

<sup>15</sup> 42 U.S.C. §§ 3601-3619.

## ■ Remedies for Discrimination

### MAINE LAW

#### *How do I file a complaint of discrimination? What happens after I file?*

You should contact the Maine Human Rights Commission (MHRC) at (207) 624-6050, or at State House Station #51, Augusta, ME 04333-0051, or on the web at <http://www.state.me.us/mhrc/index.shtml>. The Commission prefers for people to file complaints in writing. For an overview of this process refer to the MHRC regulations, available at <http://www.maine.gov/mhrc/laws/index.html>.

The complaint must be under oath, state the name and address of the individual making the complaint as well as the entity he or she is complaining against (called the “respondent”). The complaint must set out the particulars of the alleged unlawful acts and the times they occurred.<sup>16</sup>

Once a complaint is timely filed, a Commissioner or investigator will seek to resolve the matter. If he or she cannot do so, the Commission will proceed with an investigation to determine if there are reasonable grounds to believe that unlawful discrimination has occurred. The Commission has extensive powers during the course of the investigation. Among other things, it can examine persons, places and documents, and require attendance at a fact-finding hearing, and issue subpoenas for persons or documents.

If the Commissioner or investigator concludes:

- there are no reasonable grounds, it will dismiss the case, and the complainant may file a new case in the Superior Court;<sup>17</sup>

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<sup>16</sup> 5 M.R.S.A. § 4611.

<sup>17</sup> See generally 5 M.R.S.A. § 4612.

- there are reasonable grounds, it will try to resolve the matter through settlement.<sup>18</sup>

Once the Commission process is complete, and if settlement has failed, a person can file an action for relief in court. A person may also request a “right to sue” letter from the MHRC if there has been no court action filed and no conciliation agreement in place within 180 days of filing the complaint.<sup>19</sup> The person may then file an action in the Superior Court.<sup>20</sup> In some situations, the Commission may file an action in court on your behalf.<sup>21</sup>

### ***Do I need a lawyer?***

Not necessarily. The process is designed to allow people to represent themselves. However, GLAD strongly encourages people to find a lawyer to represent them throughout the process.

Not only are there many legal rules governing the MHRC process, but employers and other respondents will almost certainly have legal representation. Please call the GLAD Answers for help or for an attorney referral.

### ***What are the deadlines for filing a complaint of discrimination?***

A complaint must be filed with the MHRC within 300 days of the discriminatory act or acts.<sup>22</sup> There are virtually no exceptions for lateness, and GLAD encourages people to move promptly in filing claims. Actions filed in Superior Court must generally be filed “not more than 2 years after the act of unlawful discrimination complained of.”<sup>23</sup>

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<sup>18</sup> 5 M.R.S.A. § 4612.

<sup>19</sup> 5 M.R.S.A. § 4612 (6).

<sup>20</sup> 5 M.R.S.A. § 4621.

<sup>21</sup> See generally 5 M.R.S.A. § 4612.

<sup>22</sup> 5 M.R.S.A. § 4611.

<sup>23</sup> 5 M.R.S.A. § 4613(2)(C).

### ***What are the legal remedies for discrimination?***

This is a complicated area and depends on a variety of factors, including the type of discrimination and its intersection with federal laws.

As a general matter, the MHRC tries to resolve cases in which reasonable cause is found. It is not empowered to award emotional distress damages or attorney's fees, but the parties may agree to whatever terms are mutually satisfactory for resolving the issue.<sup>24</sup>

As a general matter, if a person has filed with the MHRC, completed the process there, and later files his or her case in court, then a full range of compensatory and injunctive relief is available.<sup>25</sup> If a discrimination complainant takes his or her case to court without first filing at the MHRC, then only injunctive relief is available in court, such as a cease and desist order, or an order to do training or post notices.<sup>26</sup>

The relief ordered by a court may include: (a) hiring, reinstatement and back pay in employment cases; (b) an order to rent or sell a specified housing accommodation (or one that is substantially identical), along with damages of up to three times any excessive price demanded, and civil penal damages, to the victim in housing cases; and (c) in all cases, where the individual has exhausted the MHRC process, an order for attorney's fees, civil penal damages, cease and desist orders, and other relief that would fulfill the purposes of the anti-discrimination laws (e.g. training programs, posting of notices).

### ***Are there other agencies at which I can file a complaint for discrimination?***

You may be able to file complaints with other agencies depending on the facts of your particular situation. This outline concerns only

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<sup>24</sup> 94-348 Rules of Maine Human Rights Com'n secs. 2.07, 2.08, 2.09. Available at <http://www.maine.gov/mhrc/laws/index.html>.

<sup>25</sup> 5 M.R.S.A. §§ 4613, 4614.

<sup>26</sup> 5 M.R.S.A. § 4622.

Maine's state non-discrimination law, and you may well have other rights.

**1. Union:** If you are a member of a union, your contract (collective bargaining agreement) may provide additional rights to you in the event of discipline, discharge or other job-related actions. In fact, if you obtain relief under your contract, you may decide not to pursue other remedies. Get and read a copy of your contract and contact a union steward about filing a grievance. Deadlines in contracts are strict. Bear in mind that if your union refuses to assist you with a complaint, you may have a discrimination action against it for its failure to work with you, or for failure of duty of fair representation.

**2. State Court:** After filing with the MHRC as discussed above, a person may decide to remove his or her discrimination case from those agencies and file in court. There are rules about when and how this must be done.

In addition, a person may file a court case to address other claims that are not appropriately handled by discrimination agencies. For example:

- If a person is fired in violation of a contract, or fired without the progressive discipline promised in a handbook, or fired for doing something the employer doesn't like but which the law requires, then these matters are beyond the scope of what the agencies can investigate and the matter can be pursued in court.
- If a person has a claim for a violation of constitutional rights, such as a teacher or other governmental employee who believes his or her free speech or equal protection rights were violated, then those matters must be heard in court.

***What can I do if my employer fires me for filing a complaint of discrimination?***

It is illegal to retaliate in these circumstances, and the employee could file an additional complaint against the employer for retaliation. “Retaliation” protections cover those who participate in MHRC proceedings or otherwise oppose unlawful conduct, whether as a complainant or as a witness. If the employer takes action against an employee because of that conduct, then the employee can state a claim of retaliation.<sup>27</sup>

***What can I do to prepare myself before filing a complaint of discrimination?***

In evaluating your potential claims, you have the right to request a complete copy of your personnel file at any time.<sup>28</sup> Personnel files are the official record of your employment and are an invaluable source of information.<sup>29</sup>

Whether you leave a job voluntarily or not, be cautious about signing any documents admitting to wrongdoing, or that waive your legal rights, or that are a supposed summary of what you said in an exit interview. Sometimes employees are upset or scared at the time they are terminating employment, but the documents will likely be enforceable against you later. Please be cautious.

As a general matter, people who are still working under discriminatory conditions have to evaluate how filing a case will affect their job or housing, and if they are willing to assume those possible consequences. Of course, even if a person has been fired, he or she may decide it is not worth it to pursue a discrimination claim. This is an individual choice which should be made after gathering enough information and advice to make an informed decision.

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<sup>27</sup> 5 M.R.S.A. § 4572 (1)(E).

<sup>28</sup> 5 M.R.S.A. § 7071 (Employee right to request personnel file).

<sup>29</sup> 5 M.R.S.A. § 7070 (Definition of personnel record).

Some people prefer to meet with an attorney to evaluate the strength of their claims before filing a case. It is always helpful if you bring to your attorney an outline or diary of what happened on the job that you are complaining about. It is best if the information is organized by date and explains who the various players are (and how to get in touch with them), as well as what happened, who said what, and who was present for any important conversations or incidents. Try to obtain and bring copies of your employee handbooks or personnel manuals, any contracts, job evaluations, memos, discharge letters and the like. If you are concerned about a housing matter, bring a copy of your lease, along with any notices and letters you have received from your landlord.

## **FEDERAL LAW**

### ***What are some potential remedies for discrimination under federal law?***

To pursue a claim under the Americans with Disabilities Act for employment discrimination, a person must file a claim with the Equal Employment Opportunity Commission (EEOC) within 180 days of the date of the discriminatory act and the employer must have at least 15 employees. However, an employee filing a disability case with the MHRC does not have to file a separate claim with the EEOC. There is a check-off on the MHRC complaint form to have the MHRC file the claim with the EEOC. The EEOC will then defer to the MHRC's investigation. If a person initially institutes his or her complaint with the MHRC, the time limit for filing a Federal complaint is extended to the earlier of 300 days or 30 days after the MHRC has terminated the case. A person may remove an ADA claim from the EEOC and file a lawsuit in state or federal court.

To pursue a claim under the Americans with Disabilities Act for discrimination in a place of public accommodation, a person may, without first going to an administrative agency, file a claim in state or federal court for injunctive relief only (i.e., seeking a court order that the discriminatory conduct cease). Money damages are not available for

violation of Title III of the ADA unless they are sought by the United States Department of Justice. However, a person may recover money damages under the Federal Rehabilitation Act in cases against entities that receive federal funding. To pursue a claim under the Rehabilitation Act, a person may file an administrative complaint with the regional office of the federal Department of Health and Human Services and/or file a lawsuit directly in court.

To pursue a claim under the National Fair Housing Act for discrimination in housing, a person may file a complaint in court with the United States Office of Housing and Urban Development within in one year of the violation. A person may also bring a lawsuit within two years of the violation. A lawsuit may be filed whether or not a person has filed a complaint with HUD.

# HIV Testing & Privacy

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## ■ HIV Testing

### RIGHT TO DECLINE HIV TESTING

*What type of consent or notice does Maine law require before an HIV test can be done?*

Maine law mandates that an HIV test must be “voluntary and undertaken only with the patient’s knowledge that an HIV test is planned.”<sup>30</sup> Maine, however, has eliminated its requirement that no HIV test may be conducted without a patient’s specific written informed consent.<sup>31</sup> The law now requires only that “[a] patient must be informed orally or in writing that an HIV test will be performed unless the patient declines.”<sup>32</sup> The law also requires that the information given to patients before the test include the meaning of positive and negative test results. In addition, the patient must have the opportunity to ask questions.

Maine law authorizes anonymous HIV testing sites.<sup>33</sup>

Health insurers or healthcare plans requiring an HIV test must still obtain written informed consent to perform an HIV test.<sup>34</sup>

In addition, Maine law prohibits a health care provider from denying medical treatment solely because an individual has refused consent to an HIV test.<sup>35</sup>

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<sup>30</sup> 5 M.R.S.A §19203-A.

<sup>31</sup> 5 M.R.S.A. §19203-A.

<sup>32</sup> 5. M.R.S.A. §19203-A (emphasis added). While the title of § 19203-A is “voluntary informed consent required,” Maine’s law is not an informed consent system. Informed consent, whether oral or written, requires that a patient affirmatively assent before a test can be done. Current Maine law simply requires that a patient be notified that a test will occur and places the burden on the patient to opt out.

<sup>33</sup> 5 M.R.S.A. §19203-B.

<sup>34</sup> 5 M.R.S.A. §19203-A (2).

<sup>35</sup> 5 M.R.S.A. § 19203-A (3).

## **COUNSELING REQUIREMENTS**

### ***What do providers have to inform their patients about before and after testing a person for HIV?***

In 2007, in order to streamline testing procedures, Maine eliminated mandatory pre-test counseling for an HIV test. Patients who test positive for HIV, however, must be offered post-test counseling, unless the patient declines by signing a waiver. The counseling must at a minimum include:

- (1) The reliability and significance of the test results.
- (2) Information about preventive practices and risk reduction.
- (3) Referrals for medical care and support services, as needed.<sup>36</sup>

A provider must offer face-to-face post-test counseling, but may provide an alternative means of providing the information if the client declines face-to-face counseling. In addition, a written memorandum summarizing the contents of the post-test counseling information must be provided to the client.

## **MINORS AND INFORMED CONSENT**

### ***Can a physician test a minor for HIV without consent of a parent or guardian?***

A physician may test a minor for HIV without obtaining the consent of the minor's parent or guardian.<sup>37</sup>

In addition, a physician is not obligated to, but may, inform the minor's guardian or parent of any medical treatment rendered, including HIV test results. *If confidentiality is important to you, it is a good idea*

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<sup>36</sup> 5 M.R.S.A. § 19204-A.

<sup>37</sup> 32 MRSA § 3292 permits a physician to provide medical treatment for venereal disease to a minor without parental consent. The Maine Department of Human Services has classified HIV as a venereal disease.

*to talk to your doctor up front and understand his or her policies on this issue.*

## **HIV TESTING WITHOUT CONSENT**

***Are there circumstances under which Maine law permits HIV testing, even against a person's wishes?***

Yes, Maine law permits involuntary HIV testing in certain limited circumstances, such as testing of a person convicted of a sexual assault crime, and of the source of an occupational exposure:

### **1. Occupational Exposure**

Under Maine law, a person who, while performing his or her job duties, experiences an exposure to potentially infectious blood or body fluids of another person<sup>38</sup> may petition the district court for an order that the source of the exposure submit to involuntary HIV testing and that the results be provided to the employee.<sup>39</sup>

In order for the district court to make such an order, the following conditions must be met:

- The exposure must create a "significant risk of HIV infection," as defined by the Bureau of Health.<sup>40</sup>
- The employer must first attempt to obtain written informed consent to an HIV test from the source of the exposure.

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<sup>38</sup> The statute refers to this as a "bona fide occupational exposure," which means "skin, eye, mucous membrane or parenteral contact of a person with the potentially infectious blood or body fluids of another person that results from the performance of duties by the exposed person in the course of employment." 5 M.R.S.A. § 19201 (1-A).

<sup>39</sup> 5 M.R.S.A. § 19203-C.

<sup>40</sup> The Bureau of Health defines a "significant risk of HIV infection" as exposure to blood, semen, vaginal fluid, cerebrospinal fluid, synovial fluid, pleural fluid, peritoneal fluid, pericardial fluid, or amniotic fluid, resulting from sexual intercourse, mucous membrane contact, parenteral inoculation, or cutaneous exposure involving large amounts or prolonged contact on non-intact skin. See Rules for the Control of Notifiable Conditions, Maine Department of Human Services, Bureau of Health, 1996, p. 15.

- The employee exposed to the blood or body fluids must have consented to and obtained an HIV test immediately following the documented exposure.

The statute sets forth the procedure for obtaining a court order. The employee must file a petition in the district court. The district court must schedule a confidential hearing and, if requested, appoint counsel for any indigent client. The court, however, may order a public hearing or release a report of the hearing to the public upon request from the source of the exposure.

The court may order subsequent HIV testing arising from the same exposure.

If the court orders an involuntary HIV test, the source may appeal the order to the Superior Court.

The employer of the person exposed is responsible for the employee's costs, including the payment of attorneys' fees.

The fact that an HIV test was given as a result of an occupational exposure and the result of the test may not appear in any records of the individual tested. In addition, the subject of the test may choose not to be informed about the test result.<sup>41</sup>

## **2. Occupational Exposure in a Health Care Setting**

When an occupational exposure occurs in a health care setting, and the source patient is not present or cannot be contacted to give authorization for an HIV test, or if the source patient is incapacitated, Maine law authorizes the following people, in descending order of priority, to authorize an HIV test on a blood or tissue sample from the source patient:

- (1) the patient's legal guardian;

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<sup>41</sup> 5 M.R.S.A. § 19203-A.

- (2) an individual who has power of attorney for health care for the patient;
- (3) an adult relative, by blood, marriage, or adoption;
- (4) an adult “with whom the patient has a meaningful social or emotional relationship;” and
- (5) a physician who is familiar with occupational exposures to HIV.<sup>42</sup>

If the person contacted for authorization refuses to authorize the test, then the test may not be conducted without a court order as described in section one, above.

The test result may not be provided to the person authorizing the test and may not appear in the patient’s records without express patient authorization. Test results may be given only to the exposed person or certain limited health care providers managing the exposure.<sup>43</sup>

### **3. After Conviction of Sexual Assault**

A victim of a sex crime (or the parent or guardian, in the case of a minor or an incapacitated adult) may petition the court for an involuntary HIV test of a person who has been convicted of the sex crime. The petition must be filed within 180 days of the conviction.<sup>44</sup>

The results of the involuntary HIV test are disclosed to the victim-witness advocate, who shall disclose them to the petitioner. The petitioner must previously have had HIV test counseling. The court must order that the test results be disclosed to the convicted offender if requested by the victim.

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<sup>42</sup> 5 M.R.S.A. § 19203-A (4-A).

<sup>43</sup> 5 M.R.S.A. § 19203-A (4-A).

<sup>44</sup> 5 M.R.S.A. § 19203-F.

#### **4. Testing of Donated Blood Products**

Informed consent for an HIV test is not required when testing a donated human body part to assure the medical acceptability of an organ donation.<sup>45</sup>

In addition, certain laboratories, researchers, blood banks and health care providers may test blood or tissues for HIV without informed consent for the purpose of research as long as the identity of the test subject is not known.

#### **5. Testing of Pregnant Women and Newborns**

All pregnant women must be informed orally or in writing that an HIV test will be included in the standard panel of prenatal medical tests, unless the woman declines HIV testing. In addition, a health care provider is *mandated* to test a newborn for HIV within 12 hours of birth if the health care provider does not know the mother's HIV status or "believes that HIV testing is medically necessary." There is an exception to such newborn testing if the parent asserts an objection based on religious or conscientious beliefs.<sup>46</sup>

### **■ Privacy**

#### **CONFIDENTIALITY OF HIV TEST RESULTS**

*Are there laws in Maine that protect the privacy of information, such as HIV?*

Yes. Maine law prohibits the disclosure of HIV test results to anyone other than the subject of the test without the subject's authorization.<sup>47</sup> When a medical record contains a person's HIV status,

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<sup>45</sup> 5 M.R.S.A. § 19203.

<sup>46</sup> 5 M.R.S.A. § 19203-A(6)

<sup>47</sup> 5 M.R.S.A. § 19203

the patient must elect in writing whether to authorize the release of that portion of the medical record.<sup>48</sup> A health care provider who has been designated by the subject of the test to receive HIV test result information may make the results available only to other health care providers working directly with the patient and only for purposes of providing direct medical or dental patient care.<sup>49</sup>

### **DISCLOSURE OF HIV STATUS IN A STATEWIDE HEALTH INFORMATION EXCHANGE**

Maine has established a system of electronic health information exchanges. General medical information may be shared in an exchange unless an individual opts-out. HIV-related information, however, may only be shared if an individual consents in writing to the disclosure of HIV-related information through the exchange.<sup>50</sup>

However, if the person has not opted-out of the exchange and has not consented to the disclosure of HIV status, HIV status can still be shared in the event of a medical emergency or certain limited threats to others.<sup>51</sup>

#### ***Does a person with HIV have a Constitutional right to privacy?***

Yes, many courts have found that a person has a constitutional privacy right to the nondisclosure of HIV status. Courts have based this right on the Due Process Clause of the U.S. Constitution, which creates a privacy interest in avoiding disclosure of certain types of personal information.

The constitutional right to privacy can only be asserted when the person disclosing the information is a state or government actor -- e.g. police, prison officials, or doctors at a state hospital.

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<sup>48</sup> 5 M.R.S.A. § 19203-D.

<sup>49</sup> 5 M.R.S.A. § 19203 (2).

<sup>50</sup> 5 M.R.S.A. § 19203-D(4).

<sup>51</sup> Id.

***How do courts determine if a person's constitutional right to privacy has been violated?***

To determine whether there has been a violation of this right to privacy, courts balance the nature of the intrusion into a person's privacy against the weight to be given to the government's legitimate reasons for a policy or practice that results in disclosure.

**Remedy for Unlawful HIV Testing or Disclosure**

A person who violates Maine law regarding HIV testing or the confidentiality of HIV test results is liable to the subject for actual damages and costs plus a civil penalty of up to \$1,000 for a negligent violation and \$5,000 for an intentional violation.<sup>52</sup>

**STATE HIV REPORTING REQUIREMENTS**

***Does Maine have reporting laws that require HIV or AIDS diagnoses to be reported to the Maine Department of Health and Human Services?***

Yes. All states require that certain health conditions be reported to public health authorities in order to track epidemiological trends and develop effective prevention strategies. Maine requires that health care providers and facilities report the names of individuals diagnosed with AIDS or HIV to the Department of Health and Human Services within 48 hours of the diagnosis.<sup>53</sup> Information is kept confidential and may not be disclosed except as permitted by 5 M.R.S.A. § 19203 (Maine's law on confidentiality of HIV tests).

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<sup>52</sup> 5 M.R.S.A. § 19206.

<sup>53</sup> Department of Health and Human Services, Maine Center for Disease Control & Prevention, Chapter 258 (Rules for the Control of Notifiable Disease Conditions), 10-144.

## Other HIV-Related Laws

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### ■ Access to Clean Syringes

*What are Maine laws regarding the purchase and possession of needles?*

Under Maine law, a person who is 18 years of age or older may purchase a “hypodermic apparatus,” such as a hypodermic syringe and needle, from a pharmacist and other authorized sellers.<sup>54</sup> An individual, however, may not lawfully purchase or possess more than ten “hypodermic apparatuses” at any one time, unless otherwise authorized by law (such as a physician acting within the scope of employment).<sup>55</sup>

*Does Maine allow needle exchange programs?*

Yes. Maine law authorizes the Maine Center for Disease Control and Prevention to certify needle exchange programs.<sup>56</sup> There is no limit on the number of hypodermic needles participants in these programs may possess.

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<sup>54</sup> 32 M.R.S.A. § 13787-A.

<sup>55</sup> 17-A M.R.S.A. § 1111.

<sup>56</sup> 22 M.R.S.A. § 1341.

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders works in New England and nationally to create a just society free of discrimination based on gender identity, HIV status, and sexual orientation.

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