

HIV Rules and Statutes

A Guide for Oregon HIV Service Providers
and Advocates



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If you would like this guide in an alternate format, please call the program at
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TABLE OF CONTENTS

INTRODUCTION	5
Acronyms.....	5
HIV TESTING	6
HIV test consent.....	6
Occupational exposures of health care providers and safety workers.....	7
Substantial exposure of a patient.....	8
Employer programs for HIV prevention, education and testing.....	8
CONFIDENTIALITY OF HIV-RELATED INFORMATION	9
Medical records.....	9
Information sharing for public health purposes.....	9
Anatomical donations.....	10
HIV AND THE WORKPLACE	11
Discrimination in discrimination in hiring, firing or promoting.....	11
Disability.....	11
Workers' compensation.....	11
HIV AND INSURANCE	12
Life insurance.....	12
Health insurance.....	12
General principles applicable to both life and health insurance.....	12
HIV-RELATED EDUCATION IN SCHOOLS	14
APPENDIX	16

INTRODUCTION

The Oregon Health Authority, HIV Care and Treatment, HIV Prevention and HIV Data and Analysis programs are pleased to provide HIV Rules and Statutes: A Guide for Oregon HIV Service Providers and Advocates. This guide discusses HIV testing, the manner in which HIV related information can be disclosed, and legal protections for HIV infected persons regarding employment and insurance. It draws from federal and Oregon state law, and from case law.

This guide is intended to provide helpful information for providers and advocates serving persons living with HIV. It is not intended to provide legal advice nor as a substitute for consultation with an attorney.

If you require legal advice or assistance, please contact the Oregon State Bar for a referral to an attorney.

The Oregon State Bar can be reached at:

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Acronyms

AIDS: Acquired Immunodeficiency Syndrome

ELISA: Enzyme Linked Immunosorbent Assay

HIV: Human Immunodeficiency Virus

LPHA: Local Public Health Authority

OAR: Oregon Administrative Rules

OHA: Oregon Health Authority

ORS: Oregon Revised Statutes

OYA: Oregon Youth Authority

PLWH: Persons Living with HIV

HIV TESTING

HIV test consent

In Oregon, a health care provider or his or her designee must, before testing a patient for HIV or sending a patient for testing for HIV, notify the patient that the test is for HIV and give the patient an opportunity to decline. (ORS 433.045, as amended Oregon Laws 2012, Chapter 26). Patients can be notified verbally by the health care provider or designee or in writing using a consent form for medical treatment, brochure, fact sheet, sign-in sheet, or signage in a waiting area. Similarly the patient can exercise his or her opportunity to decline the test verbally or in writing.

Insurers, insurance producers or insurance-support organizations that ask applicants to take an HIV test in connection with an application for insurance must obtain written consent using a consent form that discloses the purpose of the test and to whom the results may be disclosed.

Anyone other than the individuals or entities above that conduct HIV testing must disclose the purpose of the test and obtain written consent from the individual (OAR¹ 333-022-0205(4)). The nature of information that must be provided and permission required for HIV testing also varies for certain populations receiving an HIV test as described below.

1) Pregnant women²

It is especially important for pregnant women to know their HIV status. HIV-positive women who take HIV medication during pregnancy as recommended can reduce the risk of transmitting HIV to their babies to less than one percent. Thus, women who are pregnant must be tested for HIV during pregnancy or at delivery. Tests using bodily fluids other than blood that have equal or better sensitivity and specificity may be substituted for the blood test. A woman must consent to the taking of the blood sample and must be informed that HIV testing will be conducted, but no specific consent for the testing is required. A pregnant woman may decline testing

¹ OAR means Oregon Administrative Rules.

² ORS 433.017; OAR 333-019-0036

and such a declination must be documented in the woman's medical record.

2) Persons who are deceased³

If an individual is deceased and HIV testing is requested because a person may have been exposed to the deceased person's blood or other bodily fluids, next of kin may consent to an HIV test pursuant to ORS 433.075.

3) Persons who are incapable of consenting⁴

If an individual is incapable of consenting to an HIV test, the individual's personal representative may consent on the individual's behalf.

Occupational exposures of health care providers and safety workers⁵

If a health care provider or safety worker's⁶ has a substantial exposure⁷ to another person's (the "source person") bodily fluids, knowing whether the source person has HIV can assist the worker in determining whether to obtain treatment to help prevent HIV infection (post-exposure prophylaxis). In order to be effective, post-exposure prophylaxis should be administered within 72 hours of an exposure. Eligible workers who have experienced a substantial exposure can request HIV testing of the source person if the exposure is determined to be work-related (occupational) and substantial. The process for requesting that a source person be tested for HIV is set out in OAR 333-022-0300. If, after going through the appropriate process the source person refuses to consent to an HIV test, the health care provider or safety worker can petition the circuit court and ask the court to order testing. The petition process is described in OAR 333-022-0305.

³ OAR 333-022-0205(5)

⁴ OAR 333-022-0205(6)

⁵ ORS 433.065 – 433.080; OAR 333-022-0300

⁶ "Workers" include persons licensed or certified to provide health care (under ORS chapters 677, 678, 679, 680, 684 or 685, or ORS 682.216); employees of licensed health care providers, health care facilities or clinical laboratories (defined in ORS 438.010); firefighters; law enforcement officers (defined in ORS 414.805); and corrections, parole or probation officers (OAR 333-022-0300).

⁷ "Substantial exposure" means an exposure to blood or certain body fluids that have a potential for transmitting HIV based upon current scientific information and may include but is not limited to contact with blood or blood components, semen, or vaginal/cervical secretions through percutaneous inoculation or contact with an open wound, non-intact skin, or mucous membrane of the exposed person (OAR 333-022-0300(1)).

Substantial exposure of a patient⁸

If a patient has an exposure to the blood or other bodily fluids of a health care provider or safety worker,⁶ the health care provider or safety worker must report the exposure to a supervisor or employer or other persons specified in state rules. If the exposure is determined to be substantial,⁷ the patient can request information about the health care provider or safety worker's HIV status and, if not known, request that the health care provider or safety worker consent to an HIV test. The process that a health care provider or safety worker and the patient must follow is set out in OAR 333-022-0310.

Employer programs for HIV prevention, education and testing⁹

The OHA Public Health Division approves employer programs that provide HIV prevention, education and testing for its employees. Such programs must include counseling regarding 1) preventing HIV infection, 2) uniform body fluids precautions, 3) sexual/needle-sharing abstinence, and 4) safer sex practices, including advice about how to protect partners from exposure to body fluids while HIV test results are pending. Employers may submit written requests to the OHA Public Health Division for educational materials needed for such a program.

Employers offering HIV testing to employees must use a laboratory certified to perform testing on human specimens under the Clinical Laboratory Improvement Amendments of 1988 (P.L. 100-578, 42 U.S.C. 201 and 263(a))(CLIA).

If an employer does not offer HIV testing and a worker is exposed to body fluids, the employer shall provide the exposed worker with the name and contact information for a health care provider who will perform testing, or an exposed worker may seek medical treatment from a health care provider of his or her choice.

⁸ ORS 433.065; OAR 333-022-0310

⁹ ORS 433.075(4); OAR 333-022-0315

CONFIDENTIALITY OF HIV-RELATED INFORMATION¹⁰

Disclosure of test results

As a general rule, a person may not disclose the identity of any individual tested for HIV or the results of an HIV test in a manner that could identify the person tested, unless authorized by the individual tested or permitted by federal or state law. The prohibitions on disclosure do not apply to an individual acting in a private capacity.

The results of an HIV test may be disclosed to:

- 1) The tested individual;
- 2) The health care provider or licensed health care facility or person ordering the test; and
- 3) Any individual to whom the tested individual has authorized disclosure.

Medical records

When a health care provider or licensed health care facility obtains an individual's HIV test results, the test results may be entered into the individual's routine medical record maintained by the provider or facility. The information in the record may be disclosed in a manner consistent with ORS 192.553 to 192.581 and the Health Information Portability and Accountability Act (HIPAA) regulations, 45 CFR 160 to 164.

Information sharing for public health purposes

The state Public Health Division and local public health authorities (LPHAs) use information reported about HIV cases to monitor the prevalence of HIV in the state and to inform activities that protect and improve public health. Laboratories and health care providers must report all HIV-positive test results to the LPHA or

¹⁰ ORS 433.045; OAR 333-022-0210

to OHA (OAR 333, Division 18; OAR 333-019-0031). Anyone may report the identity and HIV test result of an individual to the LPHA or to the OHA Public Health Division for public health purposes (OAR 333-022-0210).

The state Public Health Division or LPHA may inform an individual who has had a substantial exposure to HIV of that exposure if there is clear and convincing evidence that disclosure is necessary to avoid an immediate danger to the individual or to the public. The Public Health Division or LPHA may disclose the identity of an individual with an HIV-positive test to a health care provider for the purpose of facilitating treatment. These disclosures may include only the minimum amount of information necessary to carry out the purposes of the disclosure (OAR 333-022-0210).

Anatomical donations¹¹

The identity and HIV test results of an anatomical donor may be released to a health care provider or licensed health care facility to the minimum extent necessary to prevent contaminated anatomical parts from being transplanted into other individuals.

¹¹ OAR 333-022-0210(5)

HIV AND THE WORKPLACE

Discrimination in discrimination in hiring, firing or promoting¹²

An employer or prospective employer may not discriminate against an employee because the employee has HIV.

Disability

HIV positivity may be considered a disability for employment purposes. An HIV infected employee therefore may be entitled to reasonable accommodation and continued employment. *See* *Bragdon v. Abbott* 524 US 624, 118 S Ct 2196 (1998); *see also* Oregon Bureau of Labor & Industries, *Civil Rights Laws, A Handbook for Oregon Employers* (2012 ed).

Workers' compensation

A claim for workers' compensation constitutes an authorization for release of medical records, except for the HIV-related information protected by ORS 433.045, which requires a specific authorization.

¹² OAR 839-006-0240

HIV AND INSURANCE

Life insurance

All life insurance policies, except those providing coverage for specific diseases only, must cover HIV infection, including AIDS, as they would death from any other cause (OAR 836-050-0210(2)).

Health insurance

Health insurance policies, except those providing coverage for specific diseases only, must cover HIV/AIDS infection, as they would for any other serious medical condition (OAR 836-050-0210(1)).

1) Asymptomatic HIV infection is not a preexisting condition

For purposes of subsequent claims relating to AIDS, asymptomatic HIV infection is not considered to be a pre-existing condition (OAR 836-050-0215(1)).

2) Period of exclusion for HIV claims

The period of exclusion for HIV infection claims may not be longer than for other pre-existing diseases (OAR 836-050-0215(2)).

General principles applicable to both life and health insurance¹³

1) Application for coverage

No inquiries may be made concerning an applicant's sexual orientation (OAR 836-050-0240(1)). In addition, asking medical questions concerning HIV or

¹³ Changes are anticipated following implementation of the Patient Protection and Affordable Care Act.

AIDS, or requiring testing for HIV infection, is generally prohibited if not done in conjunction with asking questions or testing for other health conditions (OAR 836-050-0240(4)). If, however, an applicant has answered 'yes' that the applicant has tested positive for HIV or has been diagnosed as having HIV or AIDS, testing for HIV is permitted.

2) Testing for HIV

Insurance cannot be denied or rated on the basis of an HIV test unless two positive test results have been obtained using a specific testing protocol approved by the state epidemiologist or unless the applicant declines retesting or fails to respond to a request for retesting (OAR 836-050-0250).

3) Inquiries about past HIV testing

An insurer may inquire whether an applicant has tested positive for HIV but may not inquire generally about whether the applicant has taken an HIV test. An insurer may not rate or deny coverage unless the testing protocols referred to above have been followed or unless the applicant declines retesting or fails to respond to a request for retesting (OAR 836-050-0255(1) and (2)).

HIV-RELATED EDUCATION IN SCHOOLS¹⁴

Each school district in Oregon shall provide an age-appropriate, comprehensive plan of instruction¹⁵ on human sexuality, HIV/AIDS and sexually transmitted disease (STD) prevention in elementary and secondary schools.

The comprehensive plan of instruction shall:

- 1) Be approved by the local school board;
- 2) Be balanced¹⁶ and medically accurate;¹⁷
- 3) Avoid shame- or fear-based tactics;¹⁸
- 4) Include HIV and STD prevention education at least annually, for all students grades 6-8 and at least twice during grades 9-12;
- 5) Promote abstinence for school-age youth, without stigmatizing students who have had or are having sexual relationships, and mutually monogamous relationships with an uninfected partner for adults as the safest and most responsible behavior to reduce the risk of unintended pregnancy and exposure to HIV, hepatitis B/C and other STDs;
- 6) Teach the characteristics of healthy relationships;¹⁹ and
- 7) Use inclusive materials and language that recognize different cultures, sexual orientations, and gender identities and expressions.

¹⁴ OAR 581-022-1440

¹⁵ "Comprehensive plan of instruction" (as defined by Oregon education statutes) means k-12 programs that emphasize abstinence, but not to the exclusion of condom and contraceptive skills-based education. The human sexuality information provided is complete, balanced, and medically accurate. Opportunities are provided for young people to develop and understand their values, attitudes, beliefs and decisions about sexuality as a means of helping young people exercise responsibility regarding sexual relationships and sexual health decisions.

¹⁶ "Balanced" means instruction that provides information with the understanding of the preponderance of evidence.

¹⁷ "Medically accurate" means information that is established through use of the scientific method. Results can be measured, quantified, and replicated to confirm accuracy and are reported or recognized in peer-reviewed journals or other authoritative publications.

¹⁸ "Shame- or fear-based" means terminology, activities, scenarios, context, language, and/or visual illustrations that are used to devalue, ignore, and/or disgrace students who have had or are having sexual relationships. Not all curricula or activities that describe risks of sexual activities can be considered fear-based.

¹⁹ "Healthy relationship" means one in which both people feel a healthy sense of "self." Each person feels comfortable and safe when spending time with the other person. Two individuals try to meet each other's needs, and each can ask for help and support, within and outside of the relationship without fear of criticism or harm.

Additional requirements for the comprehensive plan of instruction are described in OAR 581-022-1440(6).

A district school board may establish a course of education about STDs, and any parent may request that his or her child be excused from the instructional program (ORS 336.035(2)).

APPENDIX

Oregon Revised Statutes:

Available online at: <http://www.leg.state.or.us/ors/>

Oregon Administrative Rules:

Available online at: <http://arcweb.sos.state.or.us/banners/rules.htm>

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