



HIV TESTING

Due to the growing prevalence of HIV in society, employers are experiencing an increasing impact in the workplace. Absenteeism is increasing and speculation about the risks to non-infected persons is rife. Ignorance about the risks related to HIV/Aids poses a real danger of discrimination against employees or applicants for employment. Employers feel that the nature of their business is such that an employee infected with HIV could place others at risk of being infected. The Employment Equity Act of 1998 prohibits medical testing of employees, including prospective employees, unless it is permitted by legislation or where it is justifiable on certain specified grounds.

The Act further prohibits the testing of an employee for his/her HIV status, unless the Labour Court determines that such testing is justifiable. The purpose of these prohibitions and limitations is to prevent employers from discriminating against employees and job applicants on the basis of their medical status. Persons infected with HIV are particularly vulnerable to prejudice, hence the provision that only the court, and not the employer, may determine whether it is justifiable to test an employee for this condition.

In a recent Labour Court case the question arose whether permission from the court was required if testing was done on an anonymous and voluntary basis. Regarding the issue of anonymity, the judge held the view that if the identity of the person being tested remains unknown, the risk of discrimination is absent. The facts of the case in question were such that the purpose of the testing was not to identify the employees who were HIV positive, nor would the effect of such testing reveal the identities of such employees. It was the employer's aim to assess the potential impact of HIV/Aids, to do proper manpower planning, provide support structures for those living with HIV/Aids, to take proactive steps to prevent employees becoming infected, etc. Given these circumstances, the anonymous testing of employees fell outside the ambit of the Act and no permission was required.

In the above-mentioned case, the judge found that the prohibitions and limitations mentioned apply only to compulsory HIV testing. According to this case it is quite in order for employees to undergo voluntary testing without the court's permission, provided that the testing is truly voluntary.

It does not matter whether the initiative for testing has come from the employer or the employee. It would not be considered truly voluntary where a person agrees to be tested for HIV in order to be considered for a job.

The case further refers to the Code of Good Practice pertaining to Key Aspects of HIV/Aids and Employment where workplace HIV/Aids programmes are recommended and voluntary testing is encouraged. According to the Code, the programme must also "create an environment that is conducive to openness, disclosure and acceptance amongst all staff". The employer must, however, respect an employee's right to privacy. Employers must obtain clarity about the conditions under which consent is granted by the employee. Unless an employer has a proper HIV/Aids programme in place, any attempt to encourage voluntary HIV testing of employees or job applicants will cast serious doubt on the motives of the employer.

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