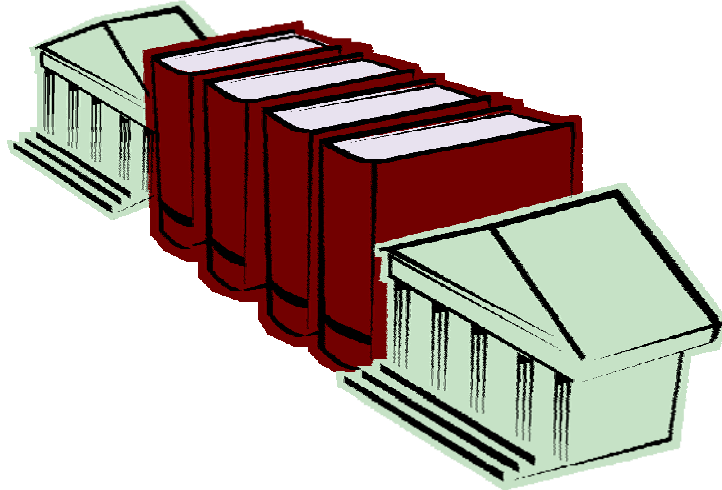


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HIV Rules & Statutes:

A GUIDE FOR OREGON HIV SERVICE PROVIDERS AND ADVOCATES



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HIV Care and Treatment Program
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If you would like this guide in an alternate format,
please call the program at 971-673-0144.

This guide discusses HIV testing, the manner in which HIV related information can be disclosed, and legal protections of HIV infected persons regarding employment and insurance.

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Introduction

The Department of Human Services, HIV Care and Treatment Program is pleased to provide *HIV Rules & 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 of HIV infected persons regarding employment and insurance. It draws from federal and Oregon state law, from statutes and from case law.

This guide is intended to provide helpful information for providers serving persons living with HIV/AIDS. It is not intended to be legal advice, and in no way is a substitute for consulting with an Oregon attorney.

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

The Oregon State Bar may be reached at:

(503) 620-0222

(800) 452-8260

<http://www.osbar.org>



Abbreviations

DHS: Department of Human Services

ELISA: Enzyme Linked Immunosorbent Assay

HIV: Human Immunodeficiency Virus

OAR: Oregon Administrative Rules

ORS: Oregon Revised Statutes

OYA: Oregon Youth Authority

PLWH: Person Living with HIV

SOSCF: State Office of Services to Children and Families

HIV TESTING

Informed consent

Generally, informed consent must be obtained from an individual before performing an HIV test. ORS 433.045(1). Physicians must follow the informed consent procedures in ORS 677.097. ORS 433.045(2). An insurer, insurance producer or insurance-support organization who wants an applicant for insurance to take an HIV test has to tell the applicant how the results of the test will be used, and written consent must be obtained. ORS 433.045(7); OAR 836-050-0250(2). The consent form shall disclose the purpose of the test and the persons to whom the results may be disclosed *Id.* Pregnant women are to be tested for HIV and permission for the blood test must be obtained. ORS 433.017.

Testing without consent

However, there are several situations in which a person can be tested without his or her consent. A court order is usually necessary.

a. exposure of health care worker or patient

If a health care worker or patient receives a ‘substantial exposure’¹ to bodily fluids during the provision or receipt of health services, a court may order mandatory testing of the possible ‘source person’² under certain limited circumstances, including the agreement of the exposed person under HIV testing and the fact that the results of the mandatory test must influence the decision regarding medical treatment of the exposed person. *See* ORS 433.065; ORS 433.080; OAR 333-012-0264; OAR 333-012-0269.

¹“Substantial exposure” means 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. Substantial exposure includes contact with other body fluids only if they are visibly contaminated with blood. In situations at accident sites and in other uncontrolled environments with poor lighting where it is not possible to evaluate if the fluids were visibly contaminated with blood, contact with fluids that reasonably may have been so contaminated constitutes substantial exposure. OAR 333-012-0260(16).

²“Source person” means a person who is the source of the blood or body fluid in the instance of a substantial exposure of another person. ORS 433.060(9).

b. occupational exposure of public health and safety worker

Law enforcement officers, parole officers, employees of the Department of Corrections, emergency medical technicians, firefighters and paramedics who have been exposed to bodily fluids while on duty may request a court order to test the source person for HIV (and Hepatitis). ORS 433.085; OAR 333-018-0035(6).

c. minors in state custody

The Oregon Department of Human Services (DHS) may petition the court for an order to test a minor in DHS custody who is old enough to consent to an HIV test, but refuses to consent. OAR 413-040-0420.

d. person accused of specific crime(s)

The district attorney may ask the court to order a criminal defendant to submit to testing if it appears that the exchange of bodily fluids has taken place in the course of crime. ORS 135.139(1).

e. defendant convicted of specific crime(s)

If an HIV test has not been performed under ORS 135.139(1), upon conviction the court may order testing if the victim so requests. ORS 135.139(3).

f. prisoners in custody of Department of Corrections

If the Department of Corrections has evidence that a prisoner convicted of sex or drug related crimes may have been exposed to HIV, the prisoner's informed consent to test is not required. No court order is needed. OAR 333-012-0265(3)(b).

g. anatomical gifts

HIV testing may be performed upon donated organs without consent as necessary to assure that the organs are not HIV infected. ORS 97.964(1).

Special consent issues

a. minor

A minor under 15 may consent to an HIV test, including a minor in the custody of the Oregon Department of Human Services (DHS) or the Oregon Youth Authority (OYA). OAR 333-012-0265(2)(b); OAR 413-040-0430(2); OAR 416-600-0030(2).

b. infants in DHS custody

Under the direction of a physician an infant may be HIV tested if the mother was known to have engaged in high risk behavior. OAR 413-040-0420(2).

c. victim of sexual abuse in DHS custody

DHS may arrange for HIV testing of a minor in its custody if the minor has been the victim of sexual abuse and the child is too young to give informed consent. OAR 413-040-0420(3).

d. developmentally disabled person

A health care representative who has the authority to consent to medical care under ORS 127.505 to 127.660 or OAR 309-041-1500 to 309-041-1610 may consent to an HIV test on behalf of the disabled person, but only if medically necessary for care or treatment. OAR 309-041-1580(2).

e. licensed health care workers

There is no requirement that licensed health care workers be tested for HIV. OAR 333-012-0320(1). Additionally, a health care worker may not be required to be tested for HIV as a condition of practice by any employer.

f. boxers, wrestlers and referees

Boxers, wrestlers, and referees must be HIV tested in order to achieve licensure or to have a license renewed. Evidence of a negative test within 30 days of application or renewal is required. OAR 230-020-0300(5).

CONFIDENTIALITY OF HIV RELATED INFORMATION

The general rule is that Oregon law prohibits disclosure of results of HIV testing without the consent of the person tested or as authorized by a statute or rule. ORS 433.045. Without either, HIV information cannot be released in a way which identifies the person tested, regardless of how the information was obtained. ORS 433.045(3). Therefore, an individual who learns, for example, the HIV status of a person tested under mandatory testing provisions is prohibited from disclosing such information to others without specific consent or authorization. However, when a licensed physician, other licensed health care provider, or licensed health care facility obtains an HIV test or HIV diagnosis of an individual, the test result, documentation of informed consent, and HIV diagnosis may be entered into the routine medical record of that individual maintained by that licensed physician, other licensed health care provider, or licensed health care facility. OAR 333-012-0270(3). The information in the record may be disclosed in a manner consistent with ORS 192.518 to 192.526 to persons who must review the record for the purpose of treatment, payment or health care operations as those terms are defined in ORS 192.519. ORS 192.518 to 192.526 is Oregon's version of HIPAA.



Duty to comply

The duty of confidentiality rests with any person, health care provider or facility, laboratory, blood or sperm bank, insurance industry employee, government agency, researcher, and employer. A person acting in an individual capacity, rather than in an employment, occupational or professional capacity, is *not* subject to the duty of confidentiality. ORS 433.045(6)(b).

In addition, there is a prohibition against the disclosure of the HIV status of a prior or current owner or occupant of real estate during the course of a rental or sale. ORS 659A.421(8).

Disclosure to or for tested person

Test results may be disclosed to the individual ordering the test and any other person authorized to give consent to medical procedures for the individual. OAR 333-012-0270(2).

Disclosure with consent of tested person

As stated above, HIV test information can be disclosed with the consent of the tested person. OAR 333-012-0270(1) and (7); ORS 433.045(3).

Disclosure without consent/authorization by law**a. disclosures made after testing without consent**

If testing is performed under ‘testing without consent’ in the above section, test results will be disclosed without consent of the individual tested.

b. disclosure to person who may have had ‘substantial exposure’

A physician may notify a person who has had a ‘substantial exposure’ to an other person whether that person has had an HIV test and the results of the test if (1) the identity of the tested individual is not explicitly disclosed; and (2) the individual whose results are released is notified in writing of the disclosure. OAR 333-012-0270(4).

c. reporting of HIV test results to public health authorities

The identity and test results of HIV positive persons must be reported to public health authorities or on a death certificate. OAR 333-012-0270(5); OAR 333, Division 18; OAR 333-019-0031.

d. anatomical gifts

The identity and HIV test results of a deceased individual may be released to licensed health care providers and health care facilities to the minimum extent necessary to prevent transplantation of HIV infected organs. 333-012-0270(6).

HIV AND THE WORKPLACE

Discrimination in hiring, firing or promoting

An employer or prospective employer may not discriminate against an employee solely on the basis of HIV positivity. OAR 839-006-0240(2).

Disability

HIV positivity is 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).



Workers compensation

If a claim for workers compensation is made based on HIV positivity or AIDS, the worker must consent of release of relevant medical records in order to evaluate the claim. However, if an employee files a workers compensation claim for other than HIV or AIDS any HIV related information in the employee's files remain confidential. OAR 436-010-0240(1)(b).

Body piercing technicians, tattoo artists, permanent color technicians, and electrologists

A person licensed as a body piercing technician is prohibited from providing body piercing services while having a disease or condition that has been diagnosed by a physician to be a communicable or transmissible disease. OAR 331-220-0040(1); See also OAR 331-205-0020(6). However, a technician, after having been diagnosed with HIV or AIDS, may provide services if they follow the CDC standards for public service workers regarding personal protection equipment. OAR 331-220-0040(3).

These standards also apply to services provided to a client with HIV or AIDS. The Health Licensing Agency has the following statement in its rules:

It is the position of the Health Licensing Office that human immunodeficiency virus (HIV) is the cause of acquired immunodeficiency syndrome (AIDS) and related immunodeficiency conditions. This virus, as well as Hepatitis B virus (HBV), Hepatitis C virus (HCV) and Hepatitis D virus (HDV), may be transmitted by sharp instruments contaminated by blood or other body fluids, if proper precautions are not followed. As the carriers of these viruses may have no symptoms, the most prudent course to follow is to treat body fluids from all persons with the same high standards of caution and to rigorously follow established safety and sanitation practices as required by the law and rules of the Agency. There is no published evidence to support casual transmission of HIV, by sneezing or touching, even in close household settings involving AIDS patients and family members caring for them at home. Because HIV is not spread by casual means and because of the inadequacies of the HIV antibody test, there is no reason for the Agency to require blood tests prior to registration and/or licensure. Good hand washing after glove removal and between each client is imperative and the most important procedure for prevention of all infections, including HIV. Uniform body fluid precautions are ample to prevent transmission of HIV or HBV, HCV and/or HDV in a facility setting. OAR 331-220-0040.

Permanent color technicians, tattoo artists, and electrologists with HIV or AIDS must also follow the CDC guidelines for public service workers. OAR 331-535-0020; 331-575-0040.

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 infection including AIDS, as they would for any other serious medical condition. OAR 836-050-0210(1).

a. **asymptomatic HIV infection not 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).

b. **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 PRINCIPALS APPLICABLE TO BOTH LIFE AND HEALTH
INSURANCE**

a. application for coverage

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

b. 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.

c. inquiries about past HIV testing

An insurer may inquire about past testing but 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).

APPENDIX

Oregon Revised Statutes:

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

- ORS 135.139
- ORS 433.045 (1)
- ORS 433.080
- ORS 433.085

Oregon Administrative Rules:

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

- OAR 230-020-0300
- OAR 309-041-1580
- OAR 333-012-0265
- OAR 333-012-0266
- OAR 333-012-0269
- OAR 333-012-0270
- OAR 333-012-0320
- OAR 333-012-0390
- OAR 336-050-0207
- OAR 413-040-0420
- OAR 413-040-0430
- OAR 436-010-0240
- OAR 416-600-0000
- OAR 416-600-0030
- OAR 437-001-0700
- OAR 582-030-0010
- OAR 582-030-0040
- OAR 836-050-0210
- OAR 836-050-0215
- OAR 836-050-0240
- OAR 836-050-0245
- OAR 836-050-0250
- OAR 836-050-0255
- OAR 839-006-0240

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