

HIV Rules and Statutes

A Guide for Oregon HIV Service Providers and Advocates



Oregon
Health
Authority

PUBLIC HEALTH DIVISION
HIV/STD/TB Section

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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 is for providers and advocates serving persons living with HIV.

This guide discusses HIV testing, how HIV-related information can be disclosed and legal employment and insurance protections for HIV-infected persons. It draws from federal and Oregon state law and from case law. However, it does not provide legal advice or substitute for consulting with an attorney.

If you need legal help, contact the Oregon State Bar for a referral to an attorney:

Oregon State Bar
503-620-0222
1-800-452-8260
<http://www.osbar.org>

Acronyms

AIDS: acquired immune deficiency 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 notify a patient of an HIV test and give the patient the opportunity to decline (ORS 433.045). This must occur before the patient is tested or sent for testing. The health care provider or designee can notify the patient of the HIV test verbally, or in writing using:

- A consent form for medical treatment
- Brochure
- Fact sheet
- Sign-in sheet
- Signage in a waiting area

The patient can decline the test verbally or in writing.

Insurers, insurance producers or insurance-support organizations that ask applicants to take an HIV test when they apply for insurance must obtain the applicant's written consent. The consent form must disclose the test's purpose 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 (OAR 333-022-0205(4)). Required information and permission for HIV testing varies for certain populations receiving an HIV test as described below:

- Pregnant women*

It is especially important for pregnant women to know their HIV status. HIV-positive women who take recommended HIV medication during pregnancy can reduce the risk of transmitting HIV to their babies to less than 1 percent.

In order to determine status, women 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 substitute for the blood test. A woman must consent to give the blood sample and be told that HIV testing will occur. However, no specific consent for the testing is required. A pregnant woman may decline testing; this must be documented in her medical record.

* ORS 433.017; OAR 333-019-0036

- Persons who are deceased*

If an individual who may have been exposed to a deceased person's blood or bodily fluids requests testing, next of kin may consent to an HIV test.

- If the medical examiner has jurisdiction over a death, he or she can order blood or urine samples for testing without other authorization (ORS 146.113). The medical examiner must investigate and certify the following death circumstances (ORS 146.090):
 - From apparent homicide, suicide or that occurs under suspicious or unknown circumstances
 - Resulting from unlawful use of controlled substances or the use or abuse of chemicals or toxic agents
 - Occurring while incarcerated in any jail, correction facility or in police custody
 - Appearing accidental or that follows an injury
 - From disease, injury or toxic agent during or arising from employment
 - While not under the care of a physician immediately before dying
 - Related to disease that might be a threat to the public health
 - In which a human body apparently has been disposed of in an offensive manner**

Persons who are incapable of consenting†

If the person is not able to consent to an HIV test, that individual's personal representative may consent on his or her behalf.

* OAR 333-022-0205(5)

** "Offensive manner" means a manner offensive to the community's generally accepted standards.

† OAR 333-022-0205(6)

Occupational exposures of health care providers and safety workers*

If a “worker”** has a substantial exposure† to another person’s (the “source person’s”) bodily fluids, knowing whether the source person has HIV can help the worker decide whether to obtain treatment to help prevent HIV infection (post-exposure prophylaxis). The worker should take post-exposure prophylaxis within 72 hours of an exposure for it to be effective.

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). The process to request testing for a source person is found in OAR 333-022-0300. If after following the process to request an HIV test, the source person refuses to consent to the test, the health care provider or safety worker can petition the circuit court to order testing. The petition process is described in OAR 333-022- 0305.

Substantial exposure of a patient‡

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

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

** “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).

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

‡ ORS 433.065; OAR 333-022-0310

Employer programs for HIV prevention, education and testing*

The OHA Public Health Division approves employer programs that provide HIV prevention, education and testing to employees. Such programs must include counseling regarding:

- Preventing HIV infection
- Uniform body fluids precautions
- Sexual/needle-sharing abstinence
- 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.



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 of a health care provider to perform testing. An exposed worker may also seek medical treatment from a health care provider of his or her choice.

* ORS 433.075(4); OAR 333-022-0315

Confidentiality of HIV-related information*

Disclosure of test results

The identity of any individual tested for HIV, or the results of an HIV test that could identify the person tested, may not be disclosed in most cases. The person may only be identified if he or she authorizes it or if federal or state law permits it. This does not apply to an individual acting in a private capacity, such as an infected individual telling a sexual partner.

HIV test results may be disclosed to:

- The tested individual
- The health care provider or licensed health care facility or person ordering the test
- Anyone the tested individual authorizes to receive the results.

Medical records

A health care provider or licensed health care facility may enter HIV test results into an individual's routine medical record. This information must be disclosed per 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 OHA Public Health Division and LPHAs use reported HIV case information to monitor HIV's prevalence in the state. This information also helps determine activities to protect and improve public health. Laboratories and health care providers must report all HIV-positive test results to the LPHA or to OHA (OAR 333, Division 18; OAR 333-019-0031). Anyone may report an individual's identity and HIV test result to the LPHA or to the OHA Public Health Division for public health purposes (OAR 333-022-0210).

* ORS 433.045; OAR 333-022-0210

The OHA Public Health Division or LPHA may inform people if they have had a substantial exposure to HIV. This may only occur if clear and convincing evidence shows that disclosure will avoid an immediate danger to the individual or to the public. The OHA Public Health Division or LPHA may disclose the identity of an individual with an HIV-positive test to a health care provider to aid treatment. These disclosures may include only the minimum amount of information necessary to carry out the disclosure's purposes (OAR 333-022-0210).

Anatomical donations*

An anatomical donor's identity and HIV test results may be released to a health care provider or licensed health care facility. This disclosure may include only the minimum amount of information necessary to prevent contaminated anatomical parts' transplantation into other individuals.



* OAR 333-022-0210(5)

HIV and the workplace

Discrimination in hiring, firing or promoting*

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

Disability

A positive HIV diagnosis may be a disability for employment. Therefore, an HIV-infected employee may be entitled to reasonable accommodation and continued employment. See *Bragdon v. Abbott* 524 US 624, 118 S Ct 2196 (1998).

Workers' compensation

A workers' compensation claim constitutes an authorization for release of medical records. This does not include HIV-related information protected by ORS 433.045, which requires a specific authorization.

HIV and insurance

Life insurance

All life insurance policies, except those covering specific diseases only, must cover HIV infection, including AIDS (OAR 836-050-0210(2)).

Health insurance

Health insurance policies, except those covering specific diseases only, must cover HIV/AIDS infection (OAR 836-050-0210(1)).

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

* OAR 839-006-0240



General principles applicable to both life and health insurance*

- Application for coverage

The insurer may not inquire about an applicant's sexual orientation (OAR 836-050-0240(1)). Asking medical questions about or requiring testing for HIV or AIDS is not allowed unless the applicant is also asked about or tested for other health conditions (OAR 836-050-0240(4)). However, testing for HIV is allowed if an applicant answers "yes" to whether he or she has tested positive for HIV or been diagnosed with HIV or AIDS.

- Testing for HIV

Insurance cannot be denied or rated based on an HIV test unless:

- Two positive test results exist that used a specific testing protocol approved by the state epidemiologist or
- The applicant declines retesting or fails to respond to a request for retesting (OAR 836-050-0250).

- 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 it has followed the testing protocols referred to above 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 schools*

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

The comprehensive plan of instruction shall:

- Be approved by the local school board
- Be balanced† and medically accurate‡
- Avoid shame- or fear-based tactics§
- Include HIV and STD prevention education at least annually to all students grades 6–8 and at least twice during grades 9–12
- Promote abstinence for school-age youth, without stigmatizing students who have had or are having sexual relationships
- Promote 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
- Teach the characteristics of healthy relationships§§

* OAR 581-022-1440

** “Comprehensive plan of instruction” (defined by Oregon education statutes) means K–12 programs that emphasize abstinence but do not exclude condom and contraceptive skills-based education. The human sexuality information provided is complete, balanced and medically accurate. The curriculum encourages young people to develop and understand their values, attitudes, beliefs and decisions about sexuality. It helps young people exercise responsibility in sexual relationships and sexual health decisions.

† “Balanced instruction” provides a variety of information, including whether the information is evidence-based or anecdotal.

‡ “Medically accurate instruction” includes information established by using 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.

§ “Shame- or fear-based tactics” are terminology, activities, scenarios, context, language and/or visual illustrations 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 are fear-based.

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

- Use inclusive materials and language that recognize different cultures, sexual orientations, and gender identities and expressions

See OAR 581-022-1440(6) for additional requirements.

A district school board may establish a course of education about STDs. Any parent may ask the school to excuse his or her child 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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