

GUIDELINES ON EMPLOYMENT, HIV/ AIDS AND HUMAN RIGHTS IN ZAMBIA



Building Solidarity Against Injustice

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1. INTRODUCTION

The HIV/AIDS pandemic has affected almost every aspect of people's lives and has created problems of discrimination, loss of dignity and lack of privacy for people living with HIV/AIDS. The pandemic also tends to invoke fear, anxiety in the general populace, which leads to a mixed response. This response is usually based on inadequate information, lack of policies and laws and a lack of knowledge of human rights. In the employment sector companies, individuals and organizations respond differently to the epidemic utilizing various strategies and in the absence of laws and policies to guide these various agencies, there is a real danger that human rights are compromised.

This manual is divided into the following sections.

1. Introduction
2. Purpose
3. How to use the Manual
4. The Right to Work
5. The Right to Privacy
6. Access to Benefits and Emoluments.
7. The Right to Care and Support in the Workplace
8. Stigmatization and Discrimination
9. Seeking Redress
10. Where to get help.

2. PURPOSE

This manual provides guidelines for employers and employees on issues of HIV/AIDS/ and Human Rights in employment. The overall objective this manual is to assist employers, employees and would be employees, to take action and make informed decisions pertaining to employment, HIV/ AIDS and human rights. The manual applies both to the formal and informal sectors.-

Knowledge of human rights in the workplace will assist employers and employees to challenge policies and programmes that violate the rights of people living with HIV/AIDS.

3. HOW TO USE THE MANUAL

The manual is simplified, so that anyone can read it and follow the guidelines provided. There are also case studies used as illustrations to further enhance the user's understanding. It is hoped that the manual will be translated into vernacular languages for wider readership.

4. IMPORTANCE OF DISTINCTION BETWEEN HIV AND AIDS FOR EMPLOYMENT

Mumba aged 26 was diagnosed as HIV positive three years ago. He displays no outward symptoms of being ill. He leads a healthy, normal lifestyle and does not indulge in alcohol and smoking. He has just completed computer training and is looking forward to a working career.

The difference between HIV infection and having AIDS is very important when it comes to issues of employment

A person who is HIV positive is not necessarily sick and may remain well for a long time, showing no symptoms of AIDS. This then means a person can be a productive employee, inspite of being HIV positive. There is no reason why a person who is HIV positive should be discriminated against in terms of getting employment.

The World Health Organisation and the International Labour Organisation consensus on AIDS in the work-place provides that:-

“Workers with HIV infection who are healthy should be treated the same way as any other workers. Workers with HIV related illnesses including AIDS should be treated the same way as any other worker with an illness.

5. REQUIREMENT FOR MEDICAL EXAMINATIONS BY EMPLOYER; SHOULD HIV TEST BE INCLUDED?

The Zambian Constitution does not have any provision which guarantees that every person has a right to work, but one of the provisions of state policy requires that the State should “create conditions under which all

citizens shall be able to secure adequate means of livelihood and opportunities to obtain work.”

The policy also requires the State to recognise the right of every person to fair labour practices and safe and healthy working conditions.

Zambia as part of the international community has also signed the International Covenant on Economic, Social and Cultural Rights. This document states that every individual has a right to work and to just and favourable conditions of work. This means that every individual has a right to get employment without any preconditions except that he/she has the necessary qualifications for that particular job.

a) Pre-employment

Lungowe has applied for a job and has been requested to go for a medical examination by her employer. She would like to know whether such a medical examination will include testing for HIV infection.

Section 28 of the Employment Act requires that every employee shall be medically examined by a Medical Officer before he/ she enters into a contract of service of at least six months duration. The purpose of the examination is to ascertain the fitness of the employee to undertake the work, which he/she is required to do. The Act does not require that prospective employees be tested for HIV/AIDS.

In addition to the provisions in the Law, the policy of the Zambia Federation of Employers is that employers should not require prospective job applicants to undergo an HIV test.

According to this policy, the only relevant criteria of recruitment is whether or not the applicant has the requisite qualifications and is medically fit to do the job.

In the Zambian Law, the medical examination is carried out for the purpose of deciding whether a person is fit enough to do a particular job at the time they are employed. The HIV status of the person is not relevant.

An HIV test done as part of the medical examination should only be done with the full agreement of the employee.

Doctors should not conduct HIV tests as part of medical examinations for employment, without telling the person involved and receiving their consent.

If a person applying for a job refuses to undergo an HIV test and is discriminated against because of the refusal or because of the test result, that person has been discriminated against unfairly.

Currently, the Zambia Defence Force requires all applicants to undergo an HIV test. Should the recruit test positive, the Defence Force will not recruit that applicant. In the absence of legislation or written policy, that position is currently illegal.

b) In Employment

Can an employer ask an existing employee to have an HIV Test?

An employer who forces an employee to have an HIV test is being unfair and is changing the provisions of the employment contract. Even in industries, which require employees to undergo regular medical examinations, an employer cannot include an HIV test, unless the employee has agreed.

An employer is also not permitted to decide on a employee's promotion or training prospects on the basis of HIV test results.

In a situation where an employee is constantly sick and is unable to do his job properly, an employer may request a medical examination to certify whether the employee is capable of doing the job he has been employed to do.

An employer cannot however demand to know if the illness is HIV related. He cannot also ask questions in verbal or written form, which would lead to a person acknowledging their HIV status.

Malimba, a marketeer was forcibly removed from her market stall at City Market after the market officials found her

discussing her HIV status and counselling a group of colleagues.

In the informal sector, people living with HIV/AIDS should not be discriminated against in the allocation of market stands or contracts.

Fair Labour practices require that all employees be treated equally without discrimination on the grounds of disability. An employee in the Public Service, Parastatals or Statutory Corporations, who is denied promotion on account of his or her HIV positive status can complain to the Commission for Investigations created under the Constitution. Moreover, any worker who is treated unfairly by his/her employer can file a complaint with Industrial Relations Court (Section 108 and 85 of the Act).

c) Out of Employment

No employee should be dismissed merely on the basis of their HIV status, nor should their status influence the employer in retrenchment.

In situations where a person living with HIV and AIDS is too sick to do the work he was employed to do, such person should be allowed to carry out lighter duties.

Where an individual is too sick to work even on light duties, such an individual should be allowed to retire on medical grounds, paid full benefits quickly as if he had retired at retirement age.

6. THE RIGHT TO PRIVACY (CONFIDENTIALITY)

Mrs. C. works for a big organisation and is HIV positive. She was unwell for some time and told her Supervisor about her status. Her Supervisor subsequently told the other ladies in the office and she became a subject of scorn and ridicule.

The right to privacy is important particularly for persons with HIV. The prospect of a person who is HIV positive developing full blown AIDS in

the future may in the meanwhile cause anxiety and embarrassment for the individual.

Disclosure of his/her status may also expose the person to stigma, discrimination and rejection by other employees.

It is important that employees should serve their employers in good faith. Good faith would require an employee to notify his employer, if the employee has contracted a serious disease which would cause the employee to be unable to perform their duties properly or if such illness creates significant danger in the workplace.

In the case of HIV infection, an employee may be productive for several years and if his HIV status is known, there may be unnecessary victimisation which may cause anxiety.

Therefore a person who is HIV positive is not obliged to inform the employer about his status, unless his condition is so serious that he cannot work or the nature of the illness poses a risk to other employees.

A medical doctor, who has knowledge of a person's HIV status cannot divulge the employees status to his employer, without the employees consent. Such a doctor who has information of an employees HIV status must treat that information as confidential.

HIV/AIDS is not a notifiable disease under the Public Health Act (Infectious Diseases Regulations) making it notifiable would therefore infringe on the right to an individual's privacy.

HIV is transmitted in specific ways, involving bodily fluids. It is therefore highly unlikely that a person working in a normal working environment, such as an office, would transmit HIV to other employees. It is therefore not justifiable to disclose the HIV positive status of an employee to fellow employees.

In workplaces, where it may be important to disclose an employees status, such as health and food handling institutions, such information should only be disclosed with full consent of the HIV positive employee.

6. ACCESS TO BENEFITS AND EMOLUMENTS COVERED UNDER THE EMPLOYMENT ACT, INDUSTRIAL RELATIONS ACT AND SIMILAR LEGISLATION GOVERNING EMPOWERMENT IN ZAMBIA

What are these benefits and emoluments? These include:-

- Medical and health related benefits
- Group Life Assurance
- Pensions and Provident Funds
- Housing benefits
- Bursaries, training and study subsidies
- Disability relating to spouses, children or partners or dependants

7. IMPORTANCE OF BENEFITS

- They give security to workers
- They are a form of insurance in case of illness.
- They make it possible for an employee to save money for the time when an employee becomes too old to work.

In companies where these benefits apply, all employees must have equal rights to access to benefits.

Denying an employee benefits because of his/her condition is an unfair Labour practice. Group Life Assurance Schemes should regard HIV as comparable to other life threatening conditions when determining benefits.

8. RIGHT TO CARE AND SUPPORT IN THE WORKPLACE

a) Sick leave

Sick leave provisions as contained in the relevant legislation should apply to all employees irrespective of whether they are HIV positive or not.

Employers are encouraged to recognise the principle of compassionate leave. Working mothers/fathers whose children

or spouse are living with HIV/AIDS or have AIDS may require time from work in order to attend to the needs of close family members.

An employee should not be dismissed merely on the basis of HIV status nor should HIV status influence retrenchment procedures.

***Where an employee is no longer fit to perform her/his duties, the employer shall at the earliest opportunity transfer the employee to appropriate light work where it is available.**

Milimo who has TB works for a Milling Company as a Laboratory Analyst. She spends many hours standing and, also, the general environment is dusty. She has been ill and the doctor has recommended that she be transferred to appropriate light work where it is available.

In the Zambia Defence Force, when a serving Officer is unable to perform very vigorous tasks, he/she is transferred to perform lighter duties. This is a positive move that should be encouraged in all industries.

b) Can you be compensated for getting HIV at work?

Health care or emergency service workers who can prove that they were infected with HIV in the course of their duties e.g. doctors, nurses, surgeons, police, can be compensated.

Other employees who believe that they were infected as a result of attending to an accident at work can also claim for compensation. But to get compensation an employee needs:-

- an HIV test immediately after the accident showing that he/she was HIV negative at that time and
- a second test no more than three months later showing that sero-conversion had taken place (in other words, that he/she was now HIV positive) and
- to then prove that the HIV infection was the result of the occupational accident and not from another cause. In the case of a nurse or doctor who has suffered a needle stick injury,

proof that the source patient has HIV should be enough to qualify for compensation.

An employee can demand increased compensation if they can show that protective equipment was not available and his/her infection was due to the negligence of the employer who did not provide a fully safe workplace.

Section 43(1) provides that an employee may as agreed under

- a) a collective agreement registered under the Industrial and Labour Relations Act;
- b) a contract of employment; or
- c) the general conditions of service relating to the organisation or institution; provide an employee with medical attention, and medicines and where necessary, transport to a medical institution during the illness of the employee.

Section 54 provides for payment of wages to an employee who becomes temporarily incapacitated in consequences of sickness or accident. He must be paid for the days absent up to a maximum of twenty-six working days in any period of twelve months. The employer may at his discretion continue to pay such employee for any longer period. The parties can, of course by agreement, provide for more favourable conditions than those stipulated in the Act.

These benefits must be paid regardless of whether the illness is related to HIV/AIDS or not.

The Factories Act and the Public Health Act require employers to maintain safe and hygienic conditions for all workers at the workplace.

9. STIGMATIZATION AND DISCRIMINATION

It is important to advise that AIDS is transmitted primarily in three ways, namely through sexual intercourse, from an infected mother to a foetus or through direct contact with HIV infected blood or fluids. It is the duty and responsibility of the employer

to undertake education at all levels on how AIDS is spread and is not spread in order to avoid discrimination and fear.

Although a person with HIV or AIDS is no risk to other employees, fear and prejudice sometimes leads to demands for the firing of a person who is known or suspected to be HIV positive. But, it is an unfair Labour practice and thus unlawful to dismiss an employee with HIV even if all the employees of a company refuse to work with that person.

11. SEEKING REDRESS

In situations where an individual feels that he has been discriminated against or unfairly treated, because of his HIV status, such an individual should take the following steps:-

1. Complain to the employer using existing grievance handling procedures in the workplace.
2. If dissatisfied, report to the Trade Union in that particular industry or The Labour Office.
3. If the above fails, report the matter to any of the organisations listed below or present the complaint to the Industrial Relations Court.

The Industrial Relations Court is a court where a worker can present a complaint regarding unfair treatment. After forms have been completed and filed with the court, a date of hearing before the court chairperson, deputy chairperson and other members will be given.

There are organisations that can assist with the filing of papers in the court and, also, provide moral support throughout the case.

12. WHERE TO GET HELP

1. Human Rights Referral Centre
Salvation Army Compound
Chishango Road
Off Great North Road
P.O. Box 32717
LUSAKA

Tel./Fax : 237619/223191/ 223152

E-mail: nzprights@zamnet.zm

The Human Rights Referral Centre screens cases and makes referrals to appropriate services for legal redress or social assistance. It is possible to go directly to one of the legal service organisations listed below, however, the Referral Centre helps to ensure an appropriate service response by screening clients and referring them to organisations that have agreed to handle cases of discrimination. As is indicated below, some legal organisations have particular preferences regarding clients. Also, some clients seen in the Referral Centre require social services in addition to or instead of legal assistance.

2. Legal Resources Foundation
2nd Floor, Woodgate House
Cairo Road
LUSAKA

Tel : 221263

Fax : 221287

E-mail : lrf@zamnet.zm

The Legal Resources Foundation prefers to handle cases of a constitutional nature, e.g. cases of discrimination that involve infringement of an individual's constitutional rights.

3. Zambia Civic Education Association
Azikiwe Crescent
Off Manchichi Road
Northmead
LUSAKA

Tel./Fax 236232

The Zambia Civic Education Association is an advocacy organisation that is primarily involved in the promotion of democracy and governance.

4. Women and Law in Southern Africa Research and Educational Trust
House No. 2 Beit Road
Rhodes Park
P.O. Box 34777
LUSAKA

Tel : 253974/ 75

Fax : 255209

E-mail : wlsazam@zamnet.zm

Website : wlsa.org.zm

Women and Law in Southern Africa Research and Educational Trust/Zambia (WLSA) is both a research and activist organisation. The organisation provides legal advice to clients but does not provide court representation.

5. National Legal Aid Clinic for Women
Plot No. 110A/150
Musonda Ngosa Road
Villa Elizabetha
LUSAKA

Tel : 220595

The National Legal Aid Clinic for Women provides legal services to women and children. However, the Clinic will accept men as clients if the case is perceived to be beneficial to the rights of women and children.