

**WEST VIRGINIA CODE**  
**CHAPTER 16. PUBLIC HEALTH.**  
**ARTICLE 3C. AIDS-RELATED MEDICAL TESTING AND RECORDS**  
**CONFIDENTIALITY ACT.**

**§16-3C-1. Definitions.**

When used in this article:

- (a) "AIDS" means acquired immunodeficiency syndrome.
- (b) "ARC" means AIDS-related complex.
- (c) "Bureau" means the bureau of public health.
- (d) "Commissioner" means the commissioner of the bureau of public health.
- (e) "Department" means the state department of health and human resources.
- (f) "Funeral director" shall have the same meaning ascribed to such term in section four, article six, chapter thirty of this code.
- (g) "Convicted" includes pleas of guilty and pleas of nolo contendere accepted by the court having jurisdiction of the criminal prosecution, a finding of guilty following a jury trial or a trial to a court, and an adjudicated juvenile offender as defined in section three, article five-b, chapter forty-nine of this code.
- (h) "Funeral establishment" shall have the same meaning ascribed to such term in section four, article six, chapter thirty of this code.
- (i) "HIV" means the human immunodeficiency virus identified as the causative agent of AIDS.
- (j) "HIV-related test" means a test for the HIV antibody or antigen or any future valid test approved by the bureau, the federal drug administration or the centers for disease control.
- (k) "Health facility" means a hospital, nursing home, clinic, blood bank, blood center, sperm bank, laboratory or other health care institution.
- (l) "Health care provider" means any physician, dentist, nurse, paramedic, psychologist or other person providing medical, dental, nursing, psychological or other health care services of any kind.
- (m) "Infant" means a person under six years of age.
- (n) "Medical or emergency responders" means paid or volunteer firefighters, law-enforcement officers, emergency medical technicians, paramedics, or other emergency service personnel, providers or entities acting within the usual course of their duties; good samaritans and other

nonmedical and nonemergency personnel providing assistance in emergencies; funeral directors; health care providers; commissioner of the bureau of public health; and all employees thereof and volunteers associated therewith.

(o) "Patient" or "test subject" or "subject of the test" means the person upon whom a HIV test is performed, or the person who has legal authority to make health care decisions for the test subject .

(p) "Person" includes any natural person, partnership, association, joint venture, trust, public or private corporation or health facility.

(q) "Release of test results" means a written authorization for disclosure of HIV-related test results that is signed, dated and specifies to whom disclosure is authorized and the time period the release is to be effective.

(r) "Significant exposure" means:

(1) Exposure to blood or body fluids through needlestick, instruments, sharps, surgery or traumatic events; or

(2) Exposure of mucous membranes to visible blood or body fluids, to which universal precautions apply according to the national centers for disease control, and laboratory specimens that contain HIV (e.g. suspensions of concentrated virus); or

(3) Exposure of skin to visible blood or body fluids, when the exposed skin is chapped, abraded or afflicted with dermatitis or the contact is prolonged or involving an extensive area.

(s) "Source patient" means any person whose body fluids have been the source of a significant exposure to a medical or emergency responder.

(t) "Victim" means the person or persons to whom transmission of bodily fluids from the perpetrator of the crimes of sexual abuse, sexual assault, incest or sexual molestation occurred or was likely to have occurred in the commission of such crimes.

### **§16-3C-2. Testing.**

(a) HIV-related testing may be requested by a physician, dentist or the commissioner for any of the following:

(1) When there is cause to believe that the test could be positive;

(2) When there is cause to believe that the test could provide information important in the care of the patient; or

(3) When there is cause to believe that the results of HIV-testing of samples of blood or body fluids from a source patient could provide information important in the care of medical or

emergency responders or other persons identified in regulations proposed by the department for approval by the Legislature in accordance with the provisions of article three, chapter twenty-nine-a of this code: *Provided*, That the source patient whose blood or body fluids is being tested pursuant to this section must have come into contact with a medical or emergency responder or other person in such a way that a significant exposure has occurred;

(4) When any person voluntarily consents to the test.

(b) The requesting physician, dentist or the commissioner shall provide the patient with written information in the form of a booklet or pamphlet prepared or approved by the bureau or, in the case of persons who are unable to read, shall either show a video or film prepared or approved by the bureau to the patient, or read or cause to be read to the patient the information prepared or approved by the bureau which contains the following information:

(1) An explanation of the test, including its purpose, potential uses, limitations, the meaning of its results and any special relevance to pregnancy and prenatal care;

(2) An explanation of the procedures to be followed;

(3) An explanation that the test is voluntary and may be obtained anonymously;

(4) An explanation that the consent for the test may be withdrawn at any time prior to drawing the sample for the test and that such withdrawal of consent may be given orally if the consent was given orally, or shall be in writing if the consent was given in writing;

(5) An explanation of the nature and current knowledge of asymptomatic HIV infection, ARC and AIDS and the relationship between the test result and those diseases; and

(6) Information about behaviors known to pose risks for transmission of HIV infection.

(c) A person seeking an HIV-related test who wishes to remain anonymous has the right to do so, and to provide written, informed consent through use of a coded system with no linking or individual identity to the test requests or results. A health care provider who does not provide HIV-related tests on an anonymous basis shall refer such a person to a test site which does provide anonymous testing, or to any local or county health department which shall provide for performance of an HIV-related test and counseling.

(d) At the time of learning of any test result, the patient shall be provided with counseling or referral for counseling for coping with the emotional consequences of learning any test result. This may be done by brochure or personally, or both.

(e) No consent for testing is required and the provisions of subsection (b) of this section do not apply for the following:

(1) A health care provider or health facility performing an HIV-related test on the donor or recipient when the health care provider or health facility procures, processes, distributes or uses

a human body part (including tissue and blood or blood products) donated for a purpose specified under the uniform anatomical gift act, or for transplant recipients, or semen provided for the purpose of artificial insemination and such test is necessary to assure medical acceptability of a recipient or such gift or semen for the purposes intended;

(2) The performance of an HIV-related test in documented bona fide medical emergencies, as determined by a treating physician taking into account the nature and extent of the exposure to another person, when the subject of the test is unable or unwilling to grant or withhold consent, and the test results are necessary for medical diagnostic purposes to provide appropriate emergency care or treatment to a medical or emergency responder, or any other person who has come into contact with a source patient in such a way that a significant exposure necessitates HIV-testing or to a source patient who is unable to consent in accordance with regulations proposed by the department for approval by the Legislature in accordance with article three, chapter twenty-nine-a of this code: *Provided*, That necessary treatment may not be withheld pending HIV test results: *Provided, however*, That all sampling and HIV-testing of samples of blood and body fluids, without the expressed written consent of the test subject, shall be through the use of a pseudonym and in accordance with regulations proposed by the department for approval by the Legislature in accordance with article three, chapter twenty-nine-a of this code: *Provided further*, That the department shall propose emergency rules pursuant to the provisions of section fifteen, article three, chapter twenty-nine-a of this code on or before the first day of September, one thousand nine hundred ninety-eight, addressing such matters as, but not limited to:

(A) Sampling and testing of blood and body fluids for HIV-related infections including: (i) The taking of samples from source patients; (ii) testing samples; (iii) confidentiality; (iv) documentation; (v) post-test counseling; and (vi) notices to the department by health care providers of: (I) Test results found to be positive and situations where sampling; and (II) testing was performed without the written consent of the test subject; and

(B) Costs associated with sampling, testing, counseling, initial prophylactic treatment and compliance with this article: *Provided*, That: (i) The ordering of samples of blood or body fluids for HIV-test or testing of available samples by: (I) A treating physician of a medical or emergency responder; or (II) a treating physician of the source patient; and (ii) the disclosure of the results of HIV-testing of the source patient, in accordance with regulations proposed by the department for approval by the Legislature pursuant to article three, chapter twenty-nine-a of this code, shall be deemed within acceptable standards of medical care in the state of West Virginia and shall not create a legal cause of action on the part of the source patient against: (i) The treating physician of the medical or emergency responder; or (ii) the treating physician of the source patient; or (iii) any health care provider or laboratory assisting such treating physicians.

(3) The performance of an HIV-related test for the purpose of research if the testing is performed in a manner by which the identity of the test subject is not known and may not be retrieved by the researcher.

(f) Mandated testing:

(1) The performance of any HIV-related testing that is or becomes mandatory shall not require consent of the subject but will include counseling.

(2) The court having jurisdiction of the criminal prosecution shall order that an HIV-related test be performed on any persons convicted of any of the following crimes or offenses:

(i) Prostitution; or

(ii) Sexual abuse, sexual assault, incest or sexual molestation.

(3) HIV-related tests performed on persons convicted of prostitution, sexual abuse, sexual assault, incest or sexual molestation shall be confidentially administered by a designee of the bureau or the local or county health department having proper jurisdiction. The commissioner may designate health care providers in regional jail facilities to administer HIV-related tests on such convicted persons if he or she deems it necessary and expedient.

(4) When the director of the department knows or has reason to believe, because of medical or epidemiological information, that a person, including, but not limited to, a person such as an IV drug abuser, or a person who may have a sexually transmitted disease, or a person who has sexually molested, abused or assaulted another, has HIV infection and is or may be a danger to the public health, he may issue an order to:

(i) Require a person to be examined and tested to determine whether the person has HIV infection;

(ii) Require a person with HIV infection to report to a qualified physician or health worker for counseling; and

(iii) Direct a person with HIV infection to cease and desist from specified conduct which endangers the health of others.

(5) A person convicted of such offenses shall be required to undergo HIV-related testing and counseling immediately upon conviction and the court having jurisdiction of the criminal prosecution shall not release such convicted person from custody and shall revoke any order admitting the defendant to bail until HIV-related testing and counseling have been performed. The HIV-related test result obtained from the convicted person is to be transmitted to the court and, after the convicted person is sentenced, made part of the court record. If the convicted person is placed in the custody of the division of corrections, the court shall transmit a copy of the convicted person's HIV-related test results to the division of corrections. The HIV-related test results shall be closed and confidential and disclosed by the court and the bureau only in accordance with the provisions of section three of this article.

(6) A person charged with prostitution, sexual abuse, sexual assault, incest or sexual molestation shall be informed upon initial court appearance by the judge or magistrate responsible for setting

the person's condition of release pending trial of the availability of voluntary HIV-related testing and counseling conducted by the bureau.

(7) The prosecuting attorney shall inform the victim, or parent or guardian of the victim, at the earliest stage of the proceedings of the availability of voluntary HIV-related testing and counseling conducted by the bureau and that his or her best health interest would be served by submitting to HIV-related testing and counseling. HIV-related testing for the victim shall be administered at his or her request on a confidential basis and shall be administered in accordance with the centers for disease control guidelines of the United States public health service in effect at the time of such request. The victim who obtains an HIV-related test shall be provided with pre- and post-test counseling regarding the nature, reliability and significance of the HIV-related test and the confidential nature of the test. HIV-related testing and counseling conducted pursuant to this subsection shall be performed by the designee of the commissioner of the bureau or by any local or county health department having proper jurisdiction.

(8) If a person receives counseling or is tested under this subsection and is found to be HIV infected, the person shall be referred by the health care provider performing the counseling or testing for appropriate medical care and support services. The local or county health departments or any other agency providing counseling or testing under this subsection shall not be financially responsible for medical care and support services received by a person as a result of a referral made under this subsection.

(9) The commissioner of the bureau or his or her designees may require an HIV test for the protection of a person who was possibly exposed to HIV infected blood or other body fluids as a result of receiving or rendering emergency medical aid or who possibly received such exposure as a funeral director. Results of such a test of the person causing exposure may be used by the requesting physician for the purpose of determining appropriate therapy, counseling and psychological support for the person rendering emergency medical aid including good Samaritans, as well as for the patient, or individual receiving the emergency medical aid.

(10) If an HIV-related test required on persons convicted of prostitution, sexual abuse, sexual assault, incest or sexual molestation results in a negative reaction, upon motion of the state, the court having jurisdiction over the criminal prosecution may require the subject of the test to submit to further HIV-related tests performed under the direction of the bureau in accordance with the centers for disease control guidelines of the United States public health service in effect at the time of the motion of the state.

(11) The costs of mandated testing and counseling provided under this subsection and pre- and postconviction HIV-related testing and counseling provided the victim under the direction of the bureau pursuant to this subsection shall be paid by the bureau.

(12) The court having jurisdiction of the criminal prosecution shall order a person convicted of prostitution, sexual abuse, sexual assault, incest or sexual molestation to pay restitution to the state for the costs of any HIV-related testing and counseling provided the convicted person and the victim, unless the court has determined such convicted person to be indigent.

(13) Any funds recovered by the state as a result of an award of restitution under this subsection shall be paid into the state treasury to the credit of a special revenue fund to be known as the "HIV-testing fund" which is hereby created. The moneys so credited to such fund may be used solely by the bureau for the purposes of facilitating the performance of HIV-related testing and counseling under the provisions of this article.

(g) Premarital screening:

(1) Every person who is empowered to issue a marriage license shall, at the time of issuance thereof, distribute to the applicants for the license, information concerning acquired immunodeficiency syndrome (AIDS) and inform them of the availability of HIV-related testing and counseling. The informational brochures shall be furnished by the bureau.

(2) A notation that each applicant has received the AIDS informational brochure shall be placed on file with the marriage license on forms provided by the bureau.

(h) The commissioner of the bureau may obtain and test specimens for AIDS or HIV infection for research or epidemiological purposes without consent of the person from whom the specimen is obtained if all personal identifying information is removed from the specimen prior to testing.

(i) Nothing in this section is applicable to any insurer regulated under chapter thirty-three of this code: *Provided*, That the commissioner of insurance shall develop standards regarding consent for use by insurers which test for the presence of the HIV antibody.

(j) Whenever consent of the subject to the performance of HIV-related testing is required under this article, any such consent obtained, whether orally or in writing, shall be deemed to be a valid and informed consent if it is given after compliance with the provisions of subsection (b) of this section.

**§16-3C-3. Confidentiality of records; permitted disclosure; no duty to notify.**

(a) No person may disclose or be compelled to disclose the identity of any person upon whom an HIV-related test is performed, or the results of such a test in a manner which permits identification of the subject of the test, except to the following persons:

(1) The subject of the test;

(2) The victim of the crimes of sexual abuse, sexual assault, incest or sexual molestation at the request of the victim or the victim's legal guardian, or of the parent or legal guardian of the victim if the victim is an infant where disclosure of the HIV-related test results of the convicted sex offender are requested;

(3) Any person who secures a specific release of test results executed by the subject of the test;

(4) A funeral director or an authorized agent or employee of a health facility or health care provider if the funeral establishment, health facility or health care provider itself is authorized to

obtain the test results, the agent or employee provides patient care or handles or processes specimens of body fluids or tissues and the agent or employee has a need to know such information: *Provided*, That such funeral director, agent or employee shall maintain the confidentiality of such information;

(5) Licensed medical personnel or appropriate health care personnel providing care to the subject of the test, when knowledge of the test results is necessary or useful to provide appropriate care or treatment, in an appropriate manner: *Provided*, That such personnel shall maintain the confidentiality of such test results. The entry on a patient's chart of an HIV-related illness by the attending or other treating physician or other health care provider shall not constitute a breach of confidentiality requirements imposed by this article;

(6) The bureau or the centers for disease control of the United States public health service in accordance with reporting requirements for a diagnosed case of AIDS, or a related condition;

(7) A health facility or health care provider which procures, processes, distributes or uses: (A) A human body part from a deceased person with respect to medical information regarding that person; (B) semen provided prior to the effective date of this article for the purpose of artificial insemination; (C) blood or blood products for transfusion or injection; or (D) human body parts for transplant with respect to medical information regarding the donor or recipient;

(8) Health facility staff committees or accreditation or oversight review organizations which are conducting program monitoring, program evaluation or service reviews so long as any identity remains anonymous; and

(9) A person allowed access to said record by a court order which is issued in compliance with the following provisions:

(i) No court of this state may issue such order unless the court finds that the person seeking the test results has demonstrated a compelling need for the test results which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the need for disclosure against the privacy interest of the test subject and the public interest;

(ii) Pleadings pertaining to disclosure of test results shall substitute a pseudonym for the true name of the test subject of the test. The disclosure to the parties of the test subject's true name shall be communicated confidentially in documents not filed with the court;

(iii) Before granting any such order, the court shall, if possible, provide the individual whose test result is in question with notice and a reasonable opportunity to participate in the proceedings if he or she is not already a party;

(iv) Court proceedings as to disclosure of test results shall be conducted in camera unless the subject of the test agrees to a hearing in open court or unless the court determines that the public hearing is necessary to the public interest and the proper administration of justice; and

(v) Upon the issuance of an order to disclose test results, the court shall impose appropriate

safeguards against unauthorized disclosure, which shall specify the person who may have access to the information, the purposes for which the information may be used and appropriate prohibitions on future disclosure.

(b) No person to whom the results of an HIV-related test have been disclosed pursuant to subsection (a) of this section may disclose the test results to another person except as authorized by said subsection.

(c) Whenever disclosure is made pursuant to this section, except when such disclosure is made to persons in accordance with subdivisions (1) and (6), subsection (a) of this section, it shall be accompanied by a statement in writing which includes the following or substantially similar language: "This information has been disclosed to you from records whose confidentiality is protected by state law. State law prohibits you from making any further disclosure of the information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. A general authorization for the release of medical or other information is NOT sufficient for this purpose."

(d) Notwithstanding the provisions set forth in subsections (a) through (c) of this section, the use of HIV test results to inform individuals named or identified as spouses, sex partners or contacts, or persons who have shared needles that they may be at risk of having acquired the HIV infection as a result of possible exchange of body fluids, is permitted: *Provided*, That the bureau shall make a good faith effort to inform spouses, sex partners, contacts or persons who have shared needles that they may be at risk of having acquired the HIV infection as a result of possible exchange of body fluids: *Provided, however*, That the bureau shall have no notification obligations when the bureau determines that there has been no likely exposure of such persons to HIV from the infected test subject within the ten-year period immediately prior to the diagnosis of the infection. The name or identity of the person whose HIV test result was positive is to remain confidential. Spouses, contacts, or sex partners or persons who have shared needles may be tested anonymously at the state bureau of public health's designated test sites, or at their own expense by a health care provider or an approved laboratory of their choice. A cause of action will not arise against the bureau, a physician or other health care provider from any such notification.

(e) There is no duty on the part of the physician or health care provider to notify the spouse or other sexual partner of, or persons who have shared needles with, an infected individual of their HIV infection and a cause of action will not arise from any failure to make such notification. However, if contact is not made, the bureau will be so notified.

#### **§16-3C-4. Substituted consent.**

(a) If the person whose consent is necessary under this article for HIV-related testing or the authorization of the release of test results is unable to give such consent or authorization because of mental incapacity or incompetency, the consent or authorization shall be obtained from another person in the following order of preference:

- (1) A person holding a durable power of attorney for health care decisions;
  - (2) The person's duly appointed legal guardian;
  - (3) The person's next-of-kin in the following order of preference: spouse, parent, adult child, sibling, uncle or aunt, and grandparent.
- (b) The person's inability to consent shall not be permitted to result in prolonged delay or denial of necessary medical treatment.
- (c) The information required to be provided to the patient pursuant to subsections (b) and (d), section two of this article, shall be provided to the person giving substituted consent hereunder.

**§16-3C-5. Remedies and penalties.**

- (a) Any person aggrieved by a violation of this article has right of action in the circuit court and may recover for the violation:
- (1) Against any person who recklessly violates a provision of this article, liquidated damages of one thousand dollars or actual damages, whichever is greater; or
  - (2) Against any person who intentionally or maliciously violated a provision of this article, liquidated damages of ten thousand dollars or actual damages, whichever is greater; and
  - (3) Reasonable attorney fees; and
  - (4) Such other relief, including an injunction, as the court may consider appropriate.
- (b) Any action under this article is barred unless the action is commenced within five years after the violation occurs.
- (c) Nothing in this article limits the rights of the subject of an HIV-related test to recover damages or other relief under any other applicable law.
- (d) Nothing in this article may be construed to impose civil liability for disclosure of an HIV-related test result in accordance with any reporting guidelines or requirements of the department or the centers for disease control of the United States public health service.

**§16-3C-6. Prohibiting certain acts; HIV tests results.**

- (a) A positive HIV test report, or the diagnosis of AIDS related complex (ARC), or the diagnosis of the AIDS syndrome or disease, may not constitute a basis upon which to deny the individual so diagnosed, access to quality health care: Provided, That this subsection does not apply to insurance.
- (b) No student of any school or institution of higher learning, public or private, may be excluded

from attending the school or institution of higher learning, or from participating in school sponsored activities, on the basis of a positive HIV test, or a diagnosis of ARC, or AIDS syndrome or disease. Exclusion from attendance or participation, as described above, shall be determined on a case by case basis, in consultation with the individual's parents, medical care provider, health authorities, school or institution administrators or medical advisors, in accordance with policies and guidelines which may have been established by the entities. Exclusion may only be based on the student representing an unacceptable risk as agreed to by the department for the transmission of the HIV to others because of the stage or nature of the illness.

**§16-3C-7. Department of corrections to conduct AIDS related study.**

The commissioner of the department of corrections is authorized and directed to conduct a study at penal institutions (including jails administered by counties and municipalities) to determine whether it would be prudent and reasonable to offer or require of each inmate at such institutions testing, educational classes or counseling related to AIDS and HIV infections. This shall be done in consultation with the department of health. The commissioner shall complete the study and present the findings and recommendations in a report to be filed with the director of the department of health, the President of the Senate and the Speaker of the House of Delegates within six months of the effective date of this article.

**§16-3C-8. Administrative implementation.**

(a) The commissioner of the bureau shall immediately implement and enforce the provisions of this article, and shall adopt rules to the extent necessary for further implementation of the article. The rules proposed by the bureau pursuant to this article may include procedures for taking appropriate action with regard to health care facilities or health care providers which violate this article or the rules promulgated hereunder. The provisions of the state administrative procedures act apply to all administrative rules and procedures of the bureau pursuant to this article, except that in case of conflict between the state administrative procedures act and this article, the provisions of this article shall control.

(b) The bureau shall promulgate rules to assure adequate quality control for all laboratories conducting HIV tests and to provide for a reporting and monitoring system for reporting to the bureau all positive HIV tests results.

**§16-3C-9. Individual banking of blood by health care providers for elective surgery or medical procedures.**

Any person may, in contemplation of elective surgery or other elective medical procedures for which a blood transfusion may be required, request the health care provider conducting such surgery or medical procedure, or any private, public or nonprofit blood bank, to make or cause to be made appropriate provisions to store and bank that individual's blood for use during such surgery or medical procedure. The health care provider or the private, public or nonprofit blood bank shall, upon such request, store and bank a person's blood and the health care provider shall use such blood in the elective surgery or medical procedure to the extent such blood is available.

*Note: Code updated with legislation passed through the [2008 2nd Extraordinary Session](#)*