

MAINE STATE LEGISLATURE

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117th MAINE LEGISLATURE

FIRST REGULAR SESSION-1995

Legislative Document

No. 321

S.P. 129

In Senate, January 31, 1995

**An Act to Implement the Recommendations of the Maine HIV Advisory
Committee Concerning HIV Testing.**

Reference to the Committee on Human Resources suggested and ordered printed.

A handwritten signature in cursive script, reading "May M. Ross".

MAY M. ROSS
Secretary of the Senate

Presented by Senator McCORMICK of Kennebec.

Cosponsored by Senators: BUSTIN of Kennebec, LONGLEY of Waldo, MILLS of Somerset, RAND of Cumberland, Representatives: CHASE of China, DAVIDSON of Brunswick, FITZPATRICK of Durham, SAXL of Bangor, TOWNSEND of Portland, TRUMAN of Biddeford, WATSON of Farmingdale.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 5 MRSA §19201, sub-§§1-A and 1-B are enacted to read:

1-A. Bona fide occupational exposure. "Bona fide occupational exposure" means skin, eye, mucous membrane or parenteral contact of a person with the blood or other body fluids of another person that results from the performance of duties by the exposed person in the course of employment.

1-B. Employer; employer of the person exposed. "Employer" and "employer of the person exposed" include the person exposed to the blood or other body fluids of another person if the person exposed is self-employed.

Sec. 2. 5 MRSA §19201, sub-§4-A, as enacted by PL 1987, c. 811, §1, is amended to read:

4-A. HIV test. "HIV test" means a test for the presence of an antibody to HIV or a test for an HIV antigen or other diagnostic determinants specific for HIV infection.

Sec. 3. 5 MRSA §19201, sub-§5, as repealed and replaced by PL 1987, c. 539, is amended to read:

5. HIV infection; HIV infection status. "HIV infection" means the state wherein HIV has invaded the body and is being actively harbored by the body. "HIV infection status" means the results of an HIV test.

Sec. 4. 5 MRSA §19203, sub-§§2, 4 and 7, as repealed and replaced by PL 1987, c. 811, §3, are amended to read:

2. Designated health care provider. To a health care provider designated by the subject of the test in writing. When a patient has authorized disclosure of HIV test results to a person or organization providing health care, the patient's physician health care provider may make these results available only to other health care providers working directly with the patient, and only for the purpose of providing direct medical or dental patient care. Any physician health care provider who discloses HIV test results in good faith pursuant to this subsection ~~shall--be~~ is immune from any criminal or civil liability for the act of disclosing HIV test results to other health care providers;

4. Certain health care providers. A health care provider who procures, processes, distributes or uses ~~-a-~~ human body-part donated-for-a-purpose tissue, blood or body fluid from a living

2 donor, may perform an HIV test on the donor or the tissue, blood
4 or body fluid to ensure medical acceptability of the gift for the
6 purpose intended only after securing written informed consent
8 from the donor. In the event of a positive HIV test, the health
10 care provider must offer post-test counseling to the donor. A
12 health care provider who procures, processes, distributes or uses
14 human tissue, blood or body fluid from a deceased donor may,
without obtaining informed consent to the testing, perform an HIV
test in order on the tissue, blood or body fluid to assure ensure
medical acceptability of the gift for the purpose intended.
~~Testing pursuant to this subsection does not require pretest and~~
~~post-test counseling~~ Pretest counseling must be made available
upon request of a living donor. The availability of pretest
counseling must be added to the consent form;

16 **7. Other agencies.** To employees of, or other persons
18 designated by, the Department of Corrections, the Department of
Human Services and the Department of Mental Health and Mental
20 Retardation, to the extent that those employees or other persons
are responsible for the ~~treatment~~ medical or therapeutic care of
22 subjects of the test. Those agencies shall ~~promulgate~~ adopt
rules, if needed to conform to statutory amendments, within 90
24 days of the effective date of this subsection or amendments to
this subsection, pursuant to the Maine Administrative Procedure
Act, chapter 375, subchapter II, designating the persons or
26 classes of persons to whom the test results may be disclosed;

28 **Sec. 5. 5 MRSA §19203-A, sub-§§1 and 2,** as amended by PL 1987,
c. 811, §4, are further amended to read:

30 **1. Individual tested.** Except as provided in this section
32 and section 19203, subsections 4 and 5, no person may perform an
HIV test without first obtaining the written informed consent of
34 the person to be tested. Informed consent is not required for
repeated HIV testing by health care providers to monitor the
36 course of established infection. Anonymous test sites under
section 19203-B, are exempt from the requirement that the
38 informed consent be in writing.

40 **2. Insurers.** ~~Persens required to take an HIV test by an~~
~~insurer, non-profit hospital or medical service organization or~~
42 ~~nonprofit health care plan must provide their written informed~~
~~consent on forms approved by the Superintendent of Insurance.~~
44 Pretest An insurer may not require an HIV test except for life
insurance policies with a value greater than \$100,000, in which
46 case pretest and post-test counseling must be provided by the
person or organization requesting the test. A prospective
48 insurer may not in good faith refuse to issue or renew life
insurance to an HIV-tested individual. The Superintendent of

Insurance ~~may promulgate~~ shall adopt rules to define--language requirements-of-the-form carry out this section.

Sec. 6. 5 MRSA §19203-A, sub-§4, as enacted by PL 1987, c. 811, §5, is amended to read:

4. Occupational exposure. Consent need not be obtained when a ~~health-care-provider,--an-employee-of-a-health-care facility-or-a-patient-in-a-health-care-facility-is-exposed-to-the blood-or-body-fluids-of-another-and-the~~ bona fide occupational exposure creates a significant risk of infection provided that a court order has been obtained under section 19203-C. The fact that an HIV test was given as a result of an ~~accidental occupational exposure in-a-health-care-facility~~ and the results of that test shall may not appear in a ~~patient's-medical-record any records of the person whose blood or body fluid is the source of the exposure.~~ Counseling--on--risk--reduction Pretest and post-test counseling must be offered,--~~but--the--patient.~~ The subject of the test may choose not to be informed about the result of the test.

Sec. 7. 5 MRSA §19203-A, sub-§6 is enacted to read:

6. Guardianship. A guardian may consent or withhold consent to HIV testing of the guardian's ward only if the guardian has authority to consent or withhold consent to medical treatment for the ward.

Sec. 8. 5 MRSA §19203-C, sub-§1, as amended by PL 1989, c. 219, §1, is further amended to read:

1. Petition. Any person ~~described-in-subsection-1-A-who has-been-accidentally-exposed-to-blood-or-body-fluid-of-a-patient in--a--health--care--facility~~ who experiences a bona fide occupational exposure may petition the District Court with jurisdiction over the ~~health-care facility~~ or other place where the ~~patient-was-being-treated-at-the-time-of-the-accidental exposure~~ occurred to require the patient person whose blood or body fluid is the source of the exposure to submit to an HIV test provided that the following conditions have been met:

A. The exposure to blood or body fluids creates a significant risk of HIV infection, as defined by the Bureau of Health through the ~~promulgation~~ adoption of rules in accordance with the Maine Administrative Procedure Act, chapter 375;

B. The authorized representative of the ~~health--care facility~~ employer of the person exposed has informed the patient person whose blood or body fluid is the source of the ~~accidental~~ occupational exposure and has sought to

2 obtain written informed consent from the patient person
3 whose blood or body fluid is the source of the exposure; and

4 C. Written informed consent was not given by the patient
5 person whose blood or body fluid is the source of the
6 exposure and ~~the-patient that person~~ has stated-in-writing
7 ~~the-refusal refused~~ to be tested.

8
9 **Sec. 9. 5 MRSA §19203-C, sub-§1-A,** as enacted by PL 1989, c.
10 219, §2, is repealed.

11 **Sec. 10. 5 MRSA §19203-C, sub-§3, ¶¶C and D,** as enacted by PL
12 1987, c. 811, §6, are amended to read:

13
14 C. The report of the hearing proceedings shall ~~must~~ be
15 sealed. No report of the hearing proceedings may be
16 released to the public, except by permission of the patient
17 ~~or-the-patient's person whose blood or body fluid is the~~
18 source of the exposure or that person's counsel and with the
19 approval of the court.

20
21 D. The court may order a public hearing at the request of
22 the ~~patient-or-the-patient's person whose blood or body~~
23 fluid is the source of the exposure or that person's counsel.

24
25 **Sec. 11. 5 MRSA §19203-C, sub-§§4 to 9,** as enacted by PL 1987,
26 c. 811, §6, are amended to read:

27
28 **4. Determination.** The court may require the patient person
29 whose blood or body fluid is the source of the exposure to obtain
30 an HIV test only if the petitioner proves, by a preponderance of
31 the evidence, that:

32
33 A. The exposure to blood or body fluids of the patient
34 person created a significant risk of HIV infection as
35 defined by the Bureau of Health through the ~~promulgation~~
36 adoption of rules in accordance with the Maine
37 Administrative Procedure Act, chapter 375;

38
39 B. An authorized representative of the ~~health-care-facility~~
40 employer of the person exposed has informed the patient of
41 the ~~accidental occupational~~ exposure and has sought to
42 obtain written informed consent from the patient person
43 whose blood or body fluid is the source of the exposure; and

44
45 C. Written informed consent was not given by the patient
46 person whose blood or body fluid is the source of the
47 exposure and ~~the-patient that person~~ has stated-in-writing
48 ~~the-refusal refused~~ to be tested.

2 In determining whether to order the test, the court shall
3 consider the balance of benefit and harm to both individuals if
4 the test is ordered.

5 **5. Consent.** The court may not order a patient person whose
6 blood or body fluid is the source of the exposure to obtain an
7 HIV test unless the ~~health-care-worker-accidentally~~ employee
8 exposed to the blood or body fluids of that patient person has
9 consented to and obtained an HIV test immediately following that
10 documented exposure.

11 **6. Costs.** The ~~health-care-facility-shall-be~~ employer of
12 the person exposed is responsible for the petitioner's reasonable
13 costs related to obtaining the results of an HIV test pursuant to
14 this section, including the payment of the petitioner's
15 attorneys' fees.

16 **7. Appeals.** A patient person required to undergo an HIV
17 test may appeal the order to Superior Court. The appeal is
18 limited to questions of law. Any findings of fact of the
19 District Court may not be set aside unless clearly erroneous.

20 **8. Reporting to bureau and counseling.** The ~~health-care~~
21 ~~facility-where-the-accidental-exposure-took-place~~ employer of the
22 person exposed shall report to the Bureau of Health any case in
23 which a person is tested pursuant to this section. All tests
24 conducted pursuant to this section shall must be accompanied by
25 pretest and post-test counseling as defined in section 19204-A.

26 **9. Subsequent testing.** Subsequent testing arising out of
27 the same incident of ~~accidental~~ occupational exposure shall must
28 be conducted in accordance with this section.

29 **Sec. 12. 5 MRSA §19203-D**, as enacted by PL 1987, c. 811, §6,
30 is amended to read:

31 **§19203-D. Records**

32 When a medical record entry is made concerning information
33 of a ~~patient's~~ person's HIV infection status, including the
34 results of an HIV test, the following shall apply to the release
35 of that information as a part of the medical record.

36 **1. Authorized release.** The patient person who is the
37 subject of an HIV test, at or near the time the entry is made in
38 the medical record, shall elect, in writing, whether to authorize
39 the release of that portion of the medical record containing the
40 HIV infection status information when ~~the-patient's~~ that person's
41 medical record has been requested. A new election may be made
42 when a change in the ~~patient's~~ person's HIV infection status

occurs or whenever the patient person makes a new election. The release form ~~shall~~ must clearly state whether or not the patient person has authorized the release of that information. The ~~patient---shall~~ person must be advised of the potential implications of authorizing the release of that information.

A. When release has been authorized, the custodian of the medical record may release, upon request, the patient's person's medical record, including any HIV infection status information contained in the medical record. Release of HIV infection status information pursuant to this paragraph ~~shall is~~ is not be a violation of any of the confidentiality provisions of this chapter.

B. When release has not been authorized, the custodian of the medical record may, upon request, release that portion of the medical record ~~which that~~ that does not contain the HIV infection status information. Except as otherwise provided in this section, HIV infection status information may ~~only~~ only be released only if the patient person has specifically authorized a separate release of that information. A general release form is insufficient.

2. Authorized disclosure. No A medical record containing results of an HIV test may not be disclosed, discoverable or compelled to be produced in any civil, criminal, administrative or other proceedings without the patient's consent of the person who is the subject of an HIV test, except in the following cases:

A. Proceedings held pursuant to the communicable disease laws, Title 22, chapter 251;

B. Proceedings held pursuant to the Adult Protective Services Act, Title 22, chapter 958-A;

C. Proceedings held pursuant to the child protection laws, Title 22, chapter 1071;

D. Proceedings held pursuant to the mental health laws, Title 34-B, chapter 3, subchapter IV, article III; and

E. Pursuant to a court order upon a showing of good cause, provided that the court order limits the use and disclosure of records and provides sanctions for misuse of records or sets forth other methods for ~~assuring~~ ensuring confidentiality.

3. Utilization review; research. Nothing in this section may be interpreted to prohibit reviews of medical records for utilization review purposes by duly authorized utilization review

committees or peer review organizations. Qualified personnel conducting scientific research, management audits, financial audits or program evaluation with the use of medical records may not identify, directly or indirectly, any individual patient in any report of such research, audit, evaluation or otherwise disclose patient the identities of persons tested in any manner.

4. Access by health care providers. Nothing in this section may prohibit access to medical records by the patient's designated health care provider of the person who is the subject of an HIV test in accordance with section 19203, subsection 2.

5. Confidentiality policy. Health care providers and others with patient access to medical records containing HIV infection status information shall have a written policy providing for confidentiality of all patient information consistent with this chapter. That policy shall must require, at a minimum, termination--of--employment action consistent with disciplinary procedures for violations of the confidentiality policy.

Sec. 13. 5 MRSA §19204-A, as amended by PL 1991, c. 803, §4, is further amended to read:

§19204-A. Counseling

Except as otherwise provided by this chapter, persons who ~~obtain--an~~ are the subjects of HIV test tests must be offered pretest and post-test counseling. Persons who are authorized by section 19203-C or 19203-E to receive test results after exposure must be offered counseling regarding the nature, reliability and significance of the HIV test and the confidential nature of the test.

1. Pretest counseling. "Pretest counseling" means must include:

A. ~~Personal~~ Face-to-face counseling that includes, at a minimum, a discussion of:

(1) The nature and reliability of the test being proposed;

(2) The person to whom the results of the test may be disclosed;

(3) The purpose for which the test results may be used; and

2 (4) Any reasonably foreseeable risks and benefits
resulting from the test; and

4 (5) Information on good HIV preventive practices and
6 HIV risk reduction plans;

8 (6) The potential implications of authorizing the
10 release of HIV test results as required under section
12 19203-D, subsection 1; and

14 (7) Questions and concerns of the person being
16 counseled pertaining to HIV test results and the
18 social, emotional and legal consequences; and

20 B. A written memorandum summarizing the contents of the
22 discussion concerning at least the topics listed in
24 paragraph A, subparagraphs (1) to (6) given to the person
26 being counseled. A written informed consent form may be
used to satisfy the requirement for a written memorandum in
this paragraph if it contains all the required information.
A written consent form does not satisfy the requirement for
personal counseling in paragraph A.

28 The provider of an HIV test may offer group pretest counseling,
30 but individual counseling must be provided if the subject of the
32 test requests it.

34 **2. Post-test counseling.** "Post-test counseling" means must
36 include:

38 A. Personal counseling that includes, at a minimum, a
discussion of:

40 (1) The test results and the reliability and
42 significance of the test results;

44 (2) The social and, emotional and legal consequences
of the information;

46 (3) Information on good preventive practices and risk
reduction plans; and

48 (4) Referrals for medical care and other support
services as needed; and

50 B. A written memorandum summarizing the contents of the
discussion given to the person being counseled; and

C. The offer of face-to-face counseling. If the subject of
the test declines, the provider of the test may provide an

alternative, mutually agreed upon means of providing the
information required by paragraph A.

Sec. 14. 5 MRSA §19204-B, as amended by PL 1989, c. 161, is
further amended to read:

§19204-B. Restrictions on requiring tests or results of tests

1. Employee testing. ~~No health care facility may require that--any~~ An employee or applicant for employment ~~may not be required to~~ submit to an HIV test or reveal whether the employee or applicant for employment has obtained an HIV test as a condition of employment or to maintain employment, except when based on a bona fide occupational qualification. Enforcement of this subsection is assigned to the Maine Human Rights Commission.

2. Employee rights. The employment status of any employee ~~of a health care facility shall~~ may not be affected or changed:

A. If the employee declines to be tested pursuant to section 19203-A;

B. If the employee testifies or assists in any proceeding under this chapter;

C. If the employee asserts any other rights exercised in good faith pursuant to this chapter; or

D. Because of the result of any test taken pursuant to this chapter.

Sec. 15. 5 MRSA §19204-C, as enacted by PL 1991, c. 3, §1, is amended to read:

§19204-C. Restrictions upon revealing HIV antibody test results

~~No~~ An insurer, nonprofit hospital or medical services organization ~~or, nonprofit health care plan or health maintenance organization~~ may not request any person to reveal whether the person has obtained a test for the presence of antibodies to HIV or a test to measure the virus or to reveal the results of such tests taken prior to an application for insurance coverage.

Sec. 16. 5 MRSA §19205, sub-§1, as amended by PL 1989, c. 700, Pt. A, §28, is further amended to read:

1. Policy; services. It ~~shall--be~~ is the policy of the State to provide to persons who test positive for HIV or have been diagnosed as having AIDS ~~or--AIDS-Related--Complex~~ the services of departments and agencies, including, but not limited

2 to, the Department of Education, the Department of Mental Health
and Mental Retardation, the Department of Human Services and the
4 Department of Corrections.

6 **Sec. 17. 5 MRSA §19205, sub-§2,** as amended by PL 1989, c. 502,
Pt. A, §22, is further amended to read:

8 **2. Coordination of services.** A person designated by the
Commissioner of Human Services shall ~~insure~~ ensure coordination
10 of new and existing services so as to meet the needs of persons
with AIDS, ~~AIDS-Related-Complex-and-viral-positivity~~ and identify
12 gaps in programs.

14 The committee established in section 12004-I, subsection 42,
shall work with the person designated in this chapter to ~~insure~~
16 ensure the coordination of services to meet the needs of persons
with AIDS, ~~AIDS-Related-Complex-and-viral-positivity~~.

18 **Sec. 18. 5 MRSA §19206, first ¶,** as amended by PL 1987, c. 811,
20 §10, is further amended to read:

22 Any person violating this chapter is liable to the subject
of the test for actual damages ~~and,~~ costs and attorney's fees
24 plus a civil penalty of up to ~~\$1,000~~ \$2,000 for a negligent
violation and up to ~~\$5,000~~ \$10,000 for an intentional violation,
26 subject to Title 14, chapter 741.

28 **STATEMENT OF FACT**

30 This bill comprises the recommendations of the Maine HIV
32 Advisory Committee in response to a request by the Joint Standing
Committee on Judiciary of the 116th Legislature to review the HIV
34 testing laws. It creates a uniform procedure for determining
when HIV testing may be required by court order following an
36 occupational exposure. It also clarifies HIV testing when
tissue, blood or body fluids are donated.

38 The bill allows testing by insurers for only those life
40 insurance policies with a value greater than \$100,000. It also
makes clear that a guardian can not consent or refuse to consent
42 to testing for a ward unless that guardian has the authority to
consent or withhold consent for medical treatment for the ward.

44 The bill requires that face-to-face post-test counseling be
46 offered. It also increases the sanctions for releasing test
results in violation of the HIV testing laws.