



Rhode Island

Overview of Legal Issues
For People with HIV

November 2011

ABOUT GLAD'S AIDS LAW PROJECT

Gay & Lesbian Advocates & Defenders (GLAD) is New England's leading legal rights organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD's AIDS Law Project was founded in 1984 to protect the rights of *all* people with HIV.

Fighting discrimination and establishing strong privacy protections have been important for people with HIV since the beginning of the epidemic. We outline here the basic Rhode Island and federal laws of particular importance to people with HIV. This outline is not intended to judge or evaluate the wisdom of any particular statute. Rather, we want you to understand the current scope of HIV testing, privacy, and anti-discrimination protections -- and the exceptions to these protections. The more information you have about existing laws, the more prepared you will be to stand up for your legal rights.

If you have questions about any of these laws, or believe that your legal rights have been violated, we want to hear from you. Call our toll-free Legal InfoLine 1-800-455-GLAD (4523) Monday through Friday from 1:30 p.m. to 4:30 p.m.

Contents

RHODE ISLAND ANTI-DISCRIMINATION LAW	1
Discrimination Based on HIV Status	1
Employment	2
<i>Adverse Treatment</i>	2
<i>Reasonable Accommodation</i>	3
<i>Employer Health Inquiries</i>	5
<i>Health Care Workers</i>	6
<i>Assessing Discrimination</i>	8
Places of Public Accommodation	10
Housing	14
Credit and Education	15
Remedies for Discrimination	16
<i>Rhode Island Law</i>	16
<i>Federal Law</i>	21
HIV TESTING & PRIVACY	23
HIV Testing	23
<i>Informed Consent</i>	23
<i>Minors and Informed Consent</i>	24
<i>Testing of Pregnant Women</i>	24
<i>Life Insurance Exemption</i>	25
<i>HIV Testing without Consent</i>	25
<i>Results of HIV Testing</i>	27
Privacy	28
<i>Confidentiality of HIV Test Results</i>	28
<i>Exceptions to Rhode Island Privacy Statutes</i>	30
<i>Remedies</i>	31
<i>Constitutional Right to Privacy</i>	31
<i>State HIV Reporting Requirements</i>	32
OTHER HIV-RELATED LAWS	33
Needle Exchange Programs	33

Rhode Island Anti-Discrimination Law

■ Discrimination Based on HIV Status

Does Rhode Island have laws protecting people with HIV from discrimination?

Yes, Rhode Island has enacted two separate laws that prohibit discrimination against people with HIV or AIDS. First, Rhode Island has an anti-discrimination law that explicitly relates to HIV. This law provides that “[n]o person, agency, organization, or legal entity may discriminate against an individual on the basis of a positive HIV test result, or perception of a positive test, in housing, education, employment, the granting of credit, public accommodation, or delivery of services. . .”¹ Second, people with HIV are protected under laws that prohibit discrimination on the basis of disability. This includes the federal Americans with Disabilities Act (ADA),² and analogous Rhode Island disability & antidiscrimination laws.

Disability antidiscrimination laws protect people with AIDS or who are HIV-positive, even if they are asymptomatic and have no outward or manifest signs of illness. They also protect people who are regarded or perceived as having HIV.

Under the ADA, but not Rhode Island law, these laws also prohibit discrimination against a person who does not have HIV, but who “associates” with a person with HIV — such as friends, lovers, spouses, roommates, business associates, advocates, and caregivers of persons with HIV.

¹ RI ST 23-6.3-11

² 42 U.S.C. § 12101

■ Employment

ADVERSE TREATMENT

Rhode Island's HIV-specific antidiscrimination law³ as well as the ADA⁴ and Rhode Island's disability antidiscrimination law⁵ protect people with HIV from discrimination in employment. Rhode Island's explicit HIV antidiscrimination law covers all employers regardless of size. The ADA covers employers with fifteen or more employees while Rhode Island's disability antidiscrimination law covers employers with four or more employees.⁶

What do these anti-discrimination laws prohibit?

An employer may not take adverse action against an applicant or employee simply on the basis that the person has a disability such as HIV or AIDS. This means that an employer may not terminate, refuse to hire, rehire, or promote, or otherwise discriminate in the terms or conditions of employment, based on the fact that a person is HIV-positive or has AIDS.

The focus here is whether a person with AIDS or HIV was treated differently than other applicants or employees in similar situations.

The following are examples of unlawful discrimination:

- An employer may not refuse to hire a person with HIV based on fear that HIV will be transmitted to other employees or to customers.
- An employer may not refuse to hire or make an employment decision based on the possibility, or even probability, that a

³ RI ST 23-6.3-11

⁴ 42 U.S.C. § 12112

⁵ RI ST 28-5-7

⁶ 42 U.S.C. § 12111; RI ST 28-5-6 (6), (7)

person will become sick and will not be able to do the job in the future.

- An employer cannot refuse to hire a person because it will increase health or workers' compensation insurance premiums.

REASONABLE ACCOMMODATION

What does it mean that an employer may have to provide a "reasonable accommodation" for an employee with a disability?

Persons with disabilities, such as HIV/AIDS, may experience health-related problems that make it difficult to meet some job requirements or duties. For example, a person may be exhausted or fatigued and find it difficult to work a full-time schedule.

In certain circumstances, the employer has an obligation to modify or adjust job requirements or workplace policies in order to enable a person with a disability, such as HIV or AIDS, to perform the job duties. This is known as a "reasonable accommodation."

Examples of reasonable accommodations include:

- Modifying or changing job tasks or responsibilities;
- Establishing a part-time or modified work schedule;
- Permitting time off during regular work hours for medical appointments;
- Reassigning an employee to a vacant job; or
- Making modifications to the physical layout of a job site or acquiring devices such as a telephone amplifier to allow, for example, a person with a hearing impairment to do the job.

There is no fixed set of accommodations that an employee may request. The nature of a requested accommodation will depend on the particular needs of an individual employee's circumstances.

How may a person obtain a reasonable accommodation?

It is, with rare exception, the employee's responsibility to initiate the request for an accommodation. In addition, an employer may request that an employee provide some information about the nature of the disability. Employees with concerns about disclosing HIV/AIDS status to a supervisor should contact the AIDS Law Project's Legal InfoLine in order to strategize about ways to address any such requests.

Does an employer have to grant a request for a reasonable accommodation?

An employer is not obligated to grant each and every request for an accommodation. An employer does not have to grant a reasonable accommodation that will create an "undue burden" (i.e., significant difficulty or expense for the employer's operation). In addition, the employer does not have to provide a reasonable accommodation if the employee cannot perform the job function even with the reasonable accommodation.

When is a "reasonable accommodation" for an employee an "undue burden" for an employer?

In determining whether a requested accommodation creates an undue burden or hardship for an employer, courts examine a number of factors, which include:

- The employer's size, budget, and financial constraints;
- The costs of implementing the requested accommodation; and
- How the accommodation affects or disrupts the employer's

business.

Again, each situation is examined on a case-by-case basis.

An employer only has an obligation to grant the reasonable accommodation if, as a result of the accommodation, the employee is then qualified to perform the essential job duties. An employer does not have to hire or retain an employee who cannot perform the essential functions of the job, even with a reasonable accommodation.

EMPLOYER HEALTH INQUIRIES

Can an employer in Rhode Island ever require an applicant or employee to take an HIV test?

Under Rhode Island law, an HIV test shall not be required as a condition of employment.⁷

What may an employer ask about an employee's health during the application and interview process?

Under the ADA and Rhode Island law,⁸ prior to employment, an employer cannot ask questions that are aimed at determining whether an employee has a disability. Examples of prohibited pre-employment questions are:

- Have you ever been hospitalized or under the care of a physician?
- Have you ever been on workers' compensation or received disability benefits?
- What medications do you take?

⁷ RI ST 23-6.3-11

⁸ 42 U.S.C. 12112; RI ST 28-5-7(4)(i)

- An employer may, however, ask whether an applicant has the knowledge, skill and ability to perform the job functions.

After an offer of employment, can an employer require a medical exam? What guidelines apply?

After a conditional offer of employment, an employer may require a physical examination or medical history solely for the purpose of determining if an employee can perform the essential job functions with reasonable accommodation. The job offer, however, may not be withdrawn unless the results demonstrate that the person cannot perform the essential functions of the job with or without reasonable accommodation. The same medical inquiries must be made of each person in the same job category. In addition, these physical examination and medical history records must be segregated from personnel records, and there are strict confidentiality protections.

HEALTH CARE WORKERS

How have the courts addressed fears that health care employees who perform invasive procedures, such as surgeons, will transmit HIV to patients?

The risk of HIV transmission from a health care worker to a patient is considered so small that it approaches zero. Nevertheless, in cases where hospitals have sought to restrict or terminate the privileges of HIV-positive health care workers who perform invasive procedures, courts have reacted with tremendous fear and have insisted on an impossible “zero risk” standard. As a result, the small number of courts that have addressed this issue under the ADA have upheld such terminations.

The employment provisions in the ADA provide that an employee is not qualified to perform the job if he or she poses a “direct threat to the health or safety of others.” To determine whether an employee poses a “direct threat,” a court analyzes:

- The nature, duration and severity of the risk;
- The probability of the risk; and
- Whether the risk can be eliminated by reasonable accommodation.

However, in the case of HIV-positive health care workers, courts have ignored the extremely remote probability of the risk and focused on the nature, duration and severity of the risk. The following excerpt from a recent case is typical of courts' approach:

“We hold that Dr. Doe does pose a significant risk to the health and safety of his patients that cannot be eliminated by reasonable accommodation. Although there may presently be no documented case of surgeon-to-patient transmission, such transmission clearly is possible. And, the risk of percutaneous injury can never be eliminated through reasonable accommodation. Thus, even if Dr. Doe takes extra precautions ... some measure of risk will always exist ...”⁹

It is important to note that only a small number of courts have addressed the rights of HIV-positive health care workers. The AIDS Law Project believes that these cases have been incorrectly decided and are inconsistent with the intent of Congress in passing the ADA. Because of the unsettled nature of the law in this area, a health care worker who is confronted with potential employment discrimination should consult a lawyer or public health advocate.

⁹ Doe v. University of Maryland Medical Systems Corporation, 50 F.3d 1261 (1995).

ASSESSING DISCRIMINATION

How does an employee determine whether he or she has experienced discrimination?

While it may be useful to consult with a lawyer, the following steps can be helpful in beginning to consider and assess a potential employment discrimination problem:

1. Consider the difference between unfairness and illegal discrimination. The bottom line of employment law is that an employee can be fired for a good reason, bad reason, or no reason at all. A person can be legally fired for a lot of reasons, including a bad “personality match.” What they cannot be fired for is a discriminatory reason specifically outlawed by a statute.
2. In order to prove a discrimination claim (i.e., that you were fired, demoted, etc. because of discrimination and not because of some legitimate reason), you must be able to show the following:
 - The employer knew or figured out that you are HIV-positive or have AIDS;
 - You were qualified to perform the essential functions of the job with or without reasonable accommodation; and
 - Adverse action was taken against you because of your HIV or AIDS status and the pretextual reason given by the employer for the adverse action is false.
3. If your employer knows that you have HIV or AIDS, identify exactly who knows, how they know, and when they found out. If you have not told your employer, is there any other way the employer would know or suspect your HIV status?
4. Consider the reasons why you believe that you are being treated

differently because of HIV status, including the following areas:

- Have other employees in similar situations been treated differently or the same?
- Has your employer followed its personnel policies?
- Did the adverse treatment begin shortly after the employer learned of your HIV status?
- Have you been out of work due to illness for any period of time and did the adverse treatment begin upon your return to work?
- What will your employer's version of events be? How will you prove that the employer's version is false?

5. Do you have any difficulty fulfilling the duties of your job because of any HIV-related health or medical issue? Does your condition prevent full-time work, or require time off for medical appointments, lighter duties or a less stressful position? You might want to try brainstorming to create a reasonable accommodation that you can propose to your employer. Here are some points to consider:

- How does the company operate and how would the accommodation work in practice?
- Put yourself in your supervisor's shoes. What objections might be raised to the requested reasonable accommodation? For example, if you need to leave at a certain time for medical appointments, who would cover your duties?

■ Discrimination in Places of Public Accommodation

Do Rhode Island’s laws protect against discrimination by health care providers, businesses, and other public places?

Yes, under Rhode Island’s HIV-specific antidiscrimination statute,¹⁰ Rhode Island’s disability antidiscrimination law,¹¹ as well as the ADA,¹² it is unlawful to exclude a person with HIV from a public place (what the law refers to as a “public accommodation”) or to provide unequal or restricted services to a person with HIV in a public place. Under both statutes, the term “public accommodation” includes any establishment or business that offers services to the public.

Therefore, people with HIV are protected from discrimination in virtually every public place or business, including bars, restaurants, hotels, stores, schools, vocational or other educational programs, taxi cabs, buses, airplanes, and other modes of transportation, health clubs, hospitals, and medical and dental offices, as long as these facilities are generally open to the public.

Is discrimination by health care professionals against people with HIV still a problem?

Believe it or not, people with HIV still face discrimination by hospitals, doctors, dentists, and other health care providers. This discrimination can take the form of an outright refusal to provide medical services or an illegal referral because of a patient’s HIV status.

What types of arguments do doctors who discriminate against people with HIV make, and are they legitimate?

Doctors typically try to justify discrimination against people with HIV with one of two arguments:

¹⁰ RI ST 23-6.3-11

¹¹ RI ST 11-24-2

¹² 42 U.S.C. § 12182

1. “Treating People with HIV is Dangerous” (Some doctors refuse to treat people with HIV based on an irrational fear of HIV transmission); and
2. “Treating People with HIV Requires Special Expertise” (Some doctors refer patients to other medical providers based on an inaccurate belief that general practitioners are not qualified to provide care to patients with HIV).

Both an outright refusal to provide medical treatment and unnecessary referrals on the basis of a person’s disability are unlawful under the ADA and Rhode Island law.

How have courts and medical experts responded to these arguments?

Courts have responded to these arguments in the following ways:

1. “Treating People with HIV is Dangerous.”

Doctors and dentists may claim that a refusal to treat a patient with HIV is legitimate because they fear they might contract HIV themselves through needlesticks or other exposures to blood. However, studies of health care workers have concluded that risk of contracting HIV from occupational exposure is minuscule, especially with the use of universal precautions.

For this reason, in 1998, the United States Supreme Court ruled in the case *Bragdon v. Abbott*¹³ that health care providers cannot refuse to treat people with HIV based on concerns or fears about HIV transmission.

In addition to the legal perspective, both the American Medical Association and the American Dental Association, and many other professional health care organizations, have

¹³ 524 U.S. 624 (1998)

issued policies that it is unethical to refuse treatment to a person with HIV.

2. “Treating People with HIV Requires Special Expertise”

In these cases, the merits of a discrimination claim depend upon whether, based on objective medical evidence, the services or treatment needed by the patient require a referral to a specialist or are within the scope of services and competence of the provider.

In *United States v. Morvant*,¹⁴ a federal trial court rejected a dentist’s claim that patients with HIV require a specialist for routine dental care. The court agreed with the testimony of experts who said that no special training or expertise, other than that possessed by a general dentist, is required to provide dental treatment to people with HIV. The court specifically rejected the dentist’s arguments that he was unqualified because he had not kept up with the literature and training necessary to treat patients with HIV. While this case arose in the context of dental care, it is applicable to other medical settings as well.

What are the specific provisions of the ADA that prohibit discrimination by health care providers?

Under Title III of the ADA, it is illegal for a health care provider to:

1. Deny an HIV-positive patient the “full and equal enjoyment” of medical services or to deny an HIV-positive patient the “opportunity to benefit” from medical services in the same manner as other patients.
2. Establish “eligibility criteria” for the privilege of receiving medical services, which tend to screen out patients who have tested positive for HIV.

¹⁴ 898 F.Supp. 1157 (E.D. La 1995)

3. Provide “different or separate” services to patients who are HIV-positive or fail to provide services to patients in the “most integrated setting.”
4. Deny equal medical services to a person who is known to have a “relationship” or “association” to a person with HIV, such as a spouse, partner, child, or friend.

What specific health care practices constitute illegal discrimination against people with HIV?

Applying the specific provisions of the ADA above to the practice of health care, the following practices are illegal:

- A health care provider cannot decline to treat a person with HIV based on a perceived risk of HIV transmission or because the physician simply does not feel comfortable treating a person with HIV.
- A health care provider cannot agree to treat a patient only in a treatment setting outside the physician’s regular office, such as a special hospital clinic, simply because the person is HIV-positive.
- A health care provider cannot refer an HIV-positive patient to another clinic or specialist, unless the required treatment is outside the scope of the physician’s usual practice or specialty. The ADA requires that referrals of HIV-positive patients be made on the same basis as referrals of other patients. It is, however, permissible to refer a patient to specialized care if the patient has HIV-related medical conditions which are outside the realm of competence or scope of services of the provider.
- A health care provider cannot increase the cost of services to an HIV-positive patient in order to use additional

precautions beyond the mandated OSHA and CDC infection control procedures. Under certain circumstances, it may even be an ADA violation to use unnecessary additional precautions that tend to stigmatize a patient simply on the basis of HIV status.

- A health care provider cannot limit the scheduled times for treating HIV-positive patients, such as insisting that an HIV-positive patient come in at the end of the day.

How does Rhode Island law compare with the ADA?

Rhode Island law will be interpreted in a similar manner to the ADA.

■ Housing Discrimination

What laws prohibit discrimination in housing?

It is illegal under Rhode Island's HIV-specific antidiscrimination law,¹⁵ Rhode Island's disability antidiscrimination law,¹⁶ as well as the National Fair Housing Amendments of 1989,¹⁷ to discriminate in the sale or rental of housing on the basis of HIV status. A person cannot be evicted from an apartment because of his or her HIV or AIDS status, or because he or she is regarded as having HIV or AIDS.

Are there any exceptions to the laws introduced above?

There are no exceptions to housing discrimination on the basis of HIV status under Rhode Island's HIV-specific law.¹⁸ Rhode Island's disability antidiscrimination law exempts residences where there are three or fewer apartments and the owner occupies one of the units.¹⁹ In addition, the federal Fair Housing Act exempts, in some circumstances,

¹⁵ RI ST 23-6.3-11

¹⁶ RI ST 34-37-4

¹⁷ 42 U.S.C. §§ 3601-3619

¹⁸ RI ST 23-6.3-11

¹⁹ RI ST 34-37-4

ownership-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker, and housing operated by organizations and private clubs that limit occupancy to members.²⁰

■ Discrimination in Credit and Education

What laws prohibit discrimination in credit?

It is illegal under Rhode Island's HIV-specific antidiscrimination law²¹ and Rhode Island's disability antidiscrimination law²² to discriminate on the basis of HIV status in the granting of any form of credit or loan.

Under the National Fair Housing Amendments of 1989,²³ it is illegal to discriminate on the basis of HIV status in the financing of housing.

What laws prohibit discrimination in education?

It is illegal under Rhode Island's HIV-specific antidiscrimination law²⁴ and Section 504 of the federal Rehabilitation Act of 1973²⁵ to discriminate on the basis of HIV status in public school programs or activities.

²⁰ 42 U.S.C. § 3604

²¹ RI ST 23-6.3-11

²² RI ST 34-37-4

²³ 42 U.S.C. §§ 3601-3619

²⁴ RI ST 23-6.3-11

²⁵ 29 U.S.C. § 794

■ Remedies for Discrimination

RHODE ISLAND LAW

How do I file a complaint of discrimination?

You may file in person or in writing at the Rhode Island Commission For Human Rights (RICHR), 180 Westminster Street, 3rd floor, Providence, RI 02903. If you plan to go in person, you can call in advance to set up an appointment and find out what you need to bring. Their phone number is (401) 222-2661 (voice) and 401-222-2664 (TTY).

The complaint must be under oath and must state the name and address of the individual making the complaint as well as the name and address of the entity against which he or she is complaining (called the “respondent”). The complaint must set out the particulars of the alleged unlawful acts and (preferably) the times they occurred.

Do I need a lawyer?

No, but GLAD strongly encourages people to find lawyers to represent them throughout the process. Although the process is designed to allow people to represent themselves, there are many legal rules governing the RICHR process, and employers and other defendants are almost certain to have legal representation.

What are the deadlines for filing a complaint of discrimination?

A complaint must be filed with the RICHR within one year of the discriminatory act or acts.²⁶ There are very few exceptions for lateness, and GLAD encourages people to move promptly in filing claims.

²⁶ RI ST 28-5-17 (a); 34-37-5 (b)

***Can I file more than one type of discrimination complaint at once?
For example, can I file multiple complaints if I believe I was fired both
because I am HIV positive and gay?***

Yes, you can file several claims if you have suffered discriminatory treatment based on more than one personal characteristic. The state anti-discrimination laws for employment forbid taking an action against someone because of sexual orientation or gender identity or expression as well as race, color, religion, sex, disability, age, or country of ancestral origin.²⁷

In housing, the criteria are expanded to include marital status, familial status, and whether any member of the household has been a victim of domestic violence.²⁸

In places of public accommodation, the other protected characteristics are race, color, religion, country of ancestral origin, disability, age, sex, but not marital or familial status.²⁹

What happens after a complaint is filed with the RICHR?

The RICHR may initiate a preliminary investigation in an employment, credit, housing, or public accommodations case. If the RICHR determines it is probable that a defendant is or was engaged in unlawful practices, then the RICHR sends for “conciliation” or settlement proceedings in which the offender agrees to cease its unlawful practices and the complainant may be given an additional remedy.³⁰

If conciliation is unsuccessful, or at any time when the circumstances so warrant (including before investigation in egregious cases), the RICHR may serve a complaint and notice of hearing on the respondent. This process involves a trial type hearing but is not as formal as an

²⁷ RI ST 28-5-7 (1) (i)

²⁸ RI ST 34-37-4 (a)

²⁹ RI ST 11-24-2

³⁰ See generally, RI ST 28-5-17, 34-37-5

actual trial in court. This process must be commenced within 2 years of when the complainant first filed his or her complaint with the RICHR.³¹

After the RICHR rules (either because it has found no probable cause to proceed, or because it has ruled on the merits after a hearing), any complainant, intervener, or respondent claiming to be aggrieved by a final order of the commission may obtain judicial review in Superior Court.³²

There are a few times when the case can be taken from the RICHR and filed in court. For example:

- Once the complaint has been pending at the RICHR for at least 120 days, (but less than 2 years and before any conciliation agreement has been made), the complainant may request permission to remove the case from the RICHR. That request should be granted, and the complainant then has 90 days from when he or she receives a “right to sue” letter to file the case in Superior Court.³³
- After the RICHR finds probable cause to credit the allegations in a complaint, either party may elect to terminate the proceedings at the RICHR and file in court as long as they do so within the strict timelines set by the RICHR rules.³⁴
- In addition, in housing cases, the RICHR may go to court to seek an order forbidding the respondent from selling, renting or otherwise disposing of the property at issue while the case is pending.³⁵

³¹ RI ST 28-5-18; 34-37-5

³² RI ST 28-5-28; 34-37-6

³³ RI ST 28-5-24.1 (a); 34-37-5 (l)

³⁴ See RI ST 28-5-24.1 (c); 34-37-5 (n)

³⁵ RI ST 34-37-5(m)

If probable cause is found lacking, the case is over unless you seek judicial review of the “lack of probable cause” finding. There are special rules and time constraints on this process which must be observed strictly.³⁶

What are the legal remedies the RICHR may award for discrimination if an individual wins his or her case there?

In all cases alleging different treatment discrimination, the remedies for a successful complainant in an intentional discrimination case may include compensatory damages (including for emotional distress), attorney’s fees (including expert fees and other litigation expenses), cease and desist orders, and any other action which will effectuate the purpose of the anti-discrimination laws.³⁷

In addition, in employment cases, a successful complaint may be entitled to a remedy involving hiring, reinstatement or upgrading of employment, back pay, and admission or restoration to union membership.³⁸ If the adverse job action was taken against the individual for a variety of reasons, and sexual orientation or gender identity or expression was not the sole motivating factor, the RICHR may limit the damages awarded.

In housing cases, the RICHR is also empowered to impose civil fines, with increasing severity depending on whether the offender has committed other discriminatory acts in the past.³⁹

When complainants prevail in court, the remedies named above may be awarded, as well as punitive damages when the challenged conduct is shown to be motivated by malice or ill will, or when the action involves reckless or callous indifference to the statutorily protected rights of

³⁶ RI ST 28-5-28; 34-37-6

³⁷ RI ST 28-5-24 (b)(employment); 34-37-5(h) (housing cases); 11-24-4 (public accommodations cases)

³⁸ RI ST 28-5-24 (a)(1)

³⁹ RI ST 34-37-5(h)(2)

others.⁴⁰ The only exception is that punitive damages may not be awarded against the State.

Are there other agencies at which I can file a complaint for discrimination?

You may be able to file complaints at other agencies depending on the facts of your particular situation. This outline concerns only Rhode Island anti-discrimination law, and you may well have other rights.

1. **Union:** If you are a member of a union, your contract (collective bargaining agreement) may provide additional rights to you in the event of discipline, discharge or other job-related actions. In fact, if you obtain relief under your contract, you may decide not to pursue other remedies. Obtain and read a copy of your contract and contact a union steward about filing a complaint. Deadlines in contracts are strict. Bear in mind that if your union refuses to assist you with a complaint, you may have a discrimination action against them for their failure to work with you, or for failure of duty of fair representation.
2. **State Court:** After filing with the RICHR, a person may decide to remove his or her discrimination case from those agencies and file the case in court. There are rules about when and how this must be done. An individual can request a right to sue letter from RICHR after a complaint has been pending for at least 120 days but not more than 2 years as long as RICHR has not secured a settlement or commenced a hearing on the case; the right to sue letter must be issued within 30 days after receiving the request, and the Superior Court complaint must be filed within 90 days of when the right to sue letter was issued.⁴¹

In addition, a person may file a court case to address other claims which are not appropriately handled by discrimination agencies. For

⁴⁰ RI ST 28-5-29.1 (employment); 11-24-4 (public accommodations); 34-37-5 (o) (3) (housing)

⁴¹ RI ST 28-5-24.1; 34-37-5(l)

example, if a person is fired in violation of a contract, or fired without the progressive discipline promised in a handbook, or fired for doing something the employer doesn't like but which the law requires, then these matters are beyond the scope of what the agencies can investigate and the matter should be pursued in court. If a person has a claim for a violation of constitutional rights, such as a teacher or governmental employee who believes his or her free speech or equal protection rights were violated, then those matters must be heard in court.

What can I do if my employer fires me or my landlord evicts me for filing a complaint of discrimination?

It is illegal to retaliate in these circumstances, and the employee or tenant could file an additional complaint for retaliation. If an employer, employment agency or labor organization discriminates against a person in any manner because he or she has opposed a forbidden practice or has made a charge, testified or assisted in a complaint filed under the anti-discrimination laws, then the employee can state a claim of retaliation.⁴²

FEDERAL LAW

What are some potential remedies for discrimination under federal law?

To pursue a claim under the Americans with Disabilities Act for employment discrimination, a person must file a claim with the Equal Employment Opportunity Commission (EEOC) within 180 days of the date of the discriminatory act and the employer must have at least 15 employees. However, an employee filing a disability case with the RICHR does not have to file a separate claim with the EEOC. There is a check-off on the RICHR complaint form to have the RICHR file the claim with the EEOC. The EEOC will then defer to the RICHR's

⁴² RI ST 28-5-7 (5); 34-37-4(m). See also RI ST 28-51-2(b)(1)(ii) ("Every employer shall adopt a policy against sexual harassment which shall include a statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation of sexual harassment"); *Provencher v. CVS Pharmacy*, 76 F.E.P. Cases (BNA) 1569 (1st Cir. 1998)(upholding federal retaliation claim of gay man). The U.S. Supreme Court has broadly interpreted the anti-retaliation provisions in federal anti-discrimination laws. See *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

investigation. If a person initially institutes his or her complaint with the RICHR, the time limit for filing a Federal complaint is extended to the earlier of 300 days or 30 days after the RICHR has terminated the case. A person may remove an ADA claim from the EEOC and file a lawsuit in state or federal court.

To pursue a claim under the Americans with Disabilities Act for discrimination in a place of public accommodation, a person may, without first going to an administrative agency, file a claim in state or federal court for injunctive relief only (i.e., seeking a court order that the discriminatory conduct cease). Money damages are not available for violation of Title III of the ADA unless they are sought by the United States Department of Justice. However, a person may recover money damages under the Federal Rehabilitation Act in cases against entities that receive federal funding. To pursue a claim under the Rehabilitation Act, a person may file an administrative complaint with the regional office of the federal Department of Health and Human Services and/or file a lawsuit directly in court.

To pursue a claim under the National Fair Housing Act for discrimination in housing, a person may file a complaint in court with the United States Office of Housing and Urban Development within in one year of the violation. A person may also bring a lawsuit within two years of the violation. A lawsuit may be filed whether or not a person has filed a complaint with HUD.

HIV Testing & Privacy

■ HIV Testing

INFORMED CONSENT

Does Rhode Island have a law governing informed consent for HIV testing?

Yes, while Rhode Island recently eliminated the requirement of *written* informed consent, Rhode Island prohibits the administration of any HIV test without: (1) providing the person with oral or written information and an opportunity for discussion with a health care provider, (2) informing the person of the right to decline testing, and (3) obtaining the *oral consent*⁴³ of the person. The consent and exchange of information must be documented in the person's medical record.⁴⁴ (Note: A distinction is made between confidential and anonymous testing. In confidential testing the health care provider may use written consent as an option, but in anonymous testing only oral consent is allowed).⁴⁵

What information must the person receive?

Under RI ST 23-6.3-3(h)(4), the information given to the patient must, at a minimum, include the following:

1. An explanation of HIV infection;
2. A description of interventions to reduce HIV transmission, including safe-sex practices;
3. What a positive and negative test result mean

⁴³ Prior to the passage of House Bill 5415 Substitute B in November 2009, Rhode Island had required written consent for HIV testing.

⁴⁴ RI ST 23-6.3 (h) (2)

⁴⁵ RI ST 23-6.3 (k)

4. The possibility that a recent infection may not be detected;
5. An opportunity to ask questions and to decline being tested.

Physicians and other health care providers are required to offer HIV testing to any person “with a suspected sexually transmitted disease.”⁴⁶

MINORS AND INFORMED CONSENT

Can a physician test a minor for HIV without consent of a parent or guardian?

Yes, in Rhode Island, persons under 18 may give legal consent for testing, examination, and/or treatment for any reportable communicable disease, which under Rhode Island Department of Health guidelines includes HIV and AIDS.⁴⁷

TESTING OF PREGNANT WOMEN

Rhode Island law provides that a physician or health care provider shall include HIV testing among the routine prenatal tests for all pregnant women unless testing is declined.⁴⁸ In order to be tested for HIV, pregnant women must provide oral consent which must be documented in the medical record. If a pregnant woman has not been tested for HIV, she will be offered testing again at the time of labor and/or delivery.⁴⁹ If the mother refuses all these offers for testing and if the mother also refuses to consent to the testing of the newborn, then the newborn can be tested without the mother’s consent.⁵⁰ If the child’s HIV test is positive, then the mother will be told that she is also infected with HIV.

⁴⁶ RI ST 23-11-17

⁴⁷ RI ST 23-8-1.1

⁴⁸ RI ST 23-6.3-3 (i) (1)

⁴⁹ RI ST 23-6.3-3 (i) (2)

⁵⁰ RI ST 23-6.3-3 (i) (3)

LIFE INSURANCE EXEMPTION

A person applying for a life insurance policy can be required to undergo HIV testing provided *written* consent is obtained, and the results of the test can be used by the insurance company for making decisions about whether to issue a life insurance policy. However, once someone has a life insurance policy, HIV status cannot be used to cancel or refuse to renew the policy.⁵¹

HIV TESTING WITHOUT CONSENT

Are there circumstances under which Rhode Island law permits HIV testing, even against a person's wishes?

Yes, under certain circumstances, enumerated in RI ST 23-6.3-4, Rhode Island law permits, but does not require, a physician or other health care provider to perform an HIV test without the consent of the subject.

PERMITTED BUT NOT REQUIRED TESTING

A) Youth

Rhode Island law permits the involuntary HIV testing of:

- Any person under one year of age;
- Any person between one and thirteen years of age who “appears to be symptomatic for HIV”;
- Any person under the age of eighteen who is “under the care and authority of the department of children, youth, and families, and the director of that department certifies that an HIV test is necessary to secure health or human services for that person.”

⁵¹ RI ST 23-6.3-16

B) Occupational Exposure in a Health Care Facility

Rhode Island law permits involuntary testing in the event of an exposure to a health care provider in a licensed health care facility or private physician's office, if:

- i) a sample of the patient's blood is available and an occupational health representative or physician, nurse practitioner, physician assistant, or nurse-midwife not directly involved in the exposure determines that a health care worker had a significant exposure to the blood or bodily fluids of a patient; and
- ii) the patient refuses to grant consent for an HIV test. The health care worker must have a baseline HIV test within seventy-two hours of exposure before the patient's blood can be tested.

If a sample of the patient's blood is not available and the patient refuses to consent to an HIV test, the health care worker may petition the Superior Court for an order mandating an HIV test.

C) Emergency

An involuntary HIV test is permitted "in an emergency, where due to a grave medical or psychiatric condition, it is impossible to obtain consent from either the patient, or the patient's parent, guardian, or agent." This exception appears by its language to be limited to circumstances in which an HIV test is deemed necessary for the *patient's* health.⁵²

⁵² RI ST 21-6-14 (6)

REQUIRED TESTING

Rhode Island law requires mandatory HIV testing under certain circumstances.

A) Rhode Island law requires an HIV test for any person convicted of:

- 1.) Possession of any controlled substance that has been administered with a hypodermic needle or syringe;⁵³
- 2.) “Violation of any provisions” of the prostitution and lewdness statute;⁵⁴ and
- 3.) Committing “any sexual offense involving sexual penetration,” where “the victim, immediate family members of the victim, or legal guardian of the victim” has petitioned the court to order testing.⁵⁵

B) Rhode Island law requires mandatory testing of “[e]very person who is committed to the adult correctional institutions to answer for any criminal offense, after conviction,” as well as “periodic testing for HIV, including testing at the time of release and when deemed appropriate by a physician.”⁵⁶

C) Rhode Island law requires HIV testing of donated or collected sperm.⁵⁷

RESULTS OF HIV TESTING

All persons who are tested must be informed of their test results.⁵⁸ A positive test result must be communicated in person and the person must be given referrals to HIV-related counseling, health care and support and

⁵³ RI ST 21-28-4.20

⁵⁴ RI ST 11-34-10

⁵⁵ RI ST 11-37-17

⁵⁶ RI ST 42-56-37 & RI ST 23-6.3-4(a)(11)

⁵⁷ RI ST 23-1-38

⁵⁸ RI ST 23-6.3-3 (g)

given priority for state-supported programs, such as substance abuse programs.⁵⁹ All positive results must be confirmed by using a second FDA approved test.⁶⁰

■ Privacy

CONFIDENTIALITY OF HIV TEST RESULTS

What laws in Rhode Island protect the privacy of medical information, such as HIV?

In Rhode Island, there are multiple laws that protect the privacy of medical information such as HIV. For example, under the HIV-Specific Privacy Law, it is “unlawful for *any person* to disclose to a third party the results of an individual’s HIV test without the prior written consent of that individual,”⁶¹ except for certain exemptions that are listed below. Other laws that protect privacy of medical information in various circumstances are discussed below.

What law protects the confidentiality of HIV test results that are recorded in patient files?

Rhode Island law also has a specific provision for protecting records of HIV test results, which states that: “Providers of health care, public health officials, and any other person who maintains records containing information on HIV test results of individuals are responsible for maintaining full confidentiality of this data and shall take appropriate steps for their protection.”⁶²

⁵⁹ RI ST 23-6.3-3 (e) & (f)

⁶⁰ RI ST 23-6.3-14 (d)

⁶¹ RI ST 23-6.3-4 (b) (emphasis added)

⁶² RI ST 23-6.3-8

These steps include:

- Keeping records secure at all times and establishing adequate confidentiality safeguards for any such records electronically stored;
- Establishing and enforcing reasonable rules limiting access to these records; and
- Training persons who handle records in security objectives and techniques.⁶³

Are there additional statutes that can protect the confidentiality of a person's HIV positive test result?

Yes, Rhode Island law expressly prohibits the nonconsensual disclosure of confidential health care information, which is described as “all information relating to a patient’s health care history, diagnosis, condition, treatment, or evaluation obtained from a health care provider who has treated the patient.” This law is referred to as the Confidentiality of Health Care Communications and Information Act.⁶⁴

Under this act, “confidential health care information” cannot be released or transferred without a written consent form containing clear information regarding the proposed uses of the information and the extent of information to be released.⁶⁵

⁶³ RI ST 23-6.3-8

⁶⁴ RI ST 5-37.3-3 (3) (i); RI ST 5-37.3-4 (a)

⁶⁵ RI ST 5-37.3-4 (d)

EXCEPTIONS TO THE RHODE ISLAND PRIVACY STATUTES

Are there circumstances under which Rhode Island law permits the disclosure of HIV status without written informed consent?

Yes, Rhode Island law provides for disclosure of HIV status under specifically prescribed circumstances.⁶⁶

(A) A physician may without the consent of the patient:

- “[E]nter HIV test results in the patient’s medical record.”
- Release confidential medical information, including a patient’s HIV status, pursuant to the exceptions listed in the Confidentiality of Health Care Communications and Information Act⁶⁷ and the Mental Health Law.⁶⁸
- Notify the director of the department of children, youth, and families (DCYF) the results of an involuntary test.⁶⁹
- “Inform third parties with whom an HIV-infected patient is in close and continuous exposure-related contact, including but not limited to a spouse and/or partner, if the nature of the contact, in the physician’s opinion, poses a clear and present danger of HIV transmission to the third party; and if the physician has reason to believe that the patient, despite the physician’s strong encouragement, has not and will not inform the third party that they may have been exposed to HIV.”⁷⁰

(B) Under RI ST 23-5-9, when a person dies with certain enumerated health conditions, including AIDS, a physician or

⁶⁶ RI ST 23-6.3-7

⁶⁷ RI ST 5-37.3-4 (b)

⁶⁸ RI ST 40.1-5-26 (b)

⁶⁹ RI ST 23-6.3-7 (a) (3)

⁷⁰ RI ST 23-6.3-10 (b)

family member (if the person did not die in a health care facility) must notify the person picking up the body that the person died of AIDS. The person picking up the dead body must convey that notification to any embalmer or funeral director.⁷¹

(C) If a first responder (e.g., firefighter, police officer, EMT) treating or transporting a person to a licensed facility is exposed to the blood of a person subsequently diagnosed with an infectious disease, and the exposure is sufficient to create a risk of transmission, the facility shall issue notification of exposure.⁷²

REMEDIES

How can violations of the HIV privacy statutes be addressed?

Under Rhode Island law, a civil suit can be filed for damages.^{73,74} An intentional and knowing violation of these statutes may also result in criminal prosecution.⁷⁵

CONSTITUTIONAL RIGHT TO PRIVACY

Many courts have found that a person has a constitutional privacy right to the nondisclosure of HIV status. Courts have based this right on the Due Process Clause of the U.S. Constitution, which creates a privacy interest in avoiding disclosure of certain types of personal information.

The constitutional right to privacy can only be asserted when the person disclosing the information is a state or government actor -- e.g. police, prison officials, doctors at a state hospital.

To determine whether there has been a violation of this right to privacy, courts balance the nature of the intrusion into a person's privacy

⁷¹ RI ST 23-5-9

⁷² RI ST 23-28.36-3

⁷³ RI ST 5-37.3-9

⁷⁴ RI ST 23-6.3-8 (e)

⁷⁵ RI ST 5-37.3-9

against the weight to be given to the government's legitimate reasons for a policy or practice that results in disclosure.

STATE HIV REPORTING REQUIREMENTS

Does Rhode Island have reporting laws that require positive HIV test or AIDS to be reported to the Rhode Island Department of Health?

All states require that numerous health conditions be reported to state health officials in order to assess trends in the epidemiology of diseases and develop effective prevention strategies. Rhode Island law requires that physicians, health care providers, health care facilities and prisons report the names of persons diagnosed with HIV or AIDS (except in the case of anonymous testing) to the Department of Health,⁷⁶ including those perinatally exposed to HIV as indicated by two positive PCR tests.⁷⁷

All information in connection with HIV or AIDS cases is subject to strong confidentiality provisions under Rhode Island law.

⁷⁶ RI ST 23-6.3-14

⁷⁷ RI ST 23-6.3-14 (4)

Other HIV-Related Laws

■ Needle Exchange Programs

Does Rhode Island law provide for access to clean needles for injection drug users to prevent HIV transmission?

Yes, under Rhode Island law, a pharmacy may sell hypodermic needles and syringes. Possession of a hypodermic needle is no longer illegal in Rhode Island.⁷⁸

Rhode Island law also mandates that the Department of Health maintain a program of needle and syringe exchange for persons 18 and older in order to prevent the transmission of HIV among intravenous drug users. Any site used in the program shall make available educational materials, HIV counseling and testing, and referral services regarding HIV transmission and drug abuse prevention and treatment.⁷⁹

⁷⁸ RI ST 21-28-4.04

⁷⁹ RI ST 23-11-19

Gay & Lesbian Advocates & Defenders (GLAD) is the leading legal rights organization in New England dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression. Through impact litigation, education and public policy work, GLAD seeks to create a better world that respects and celebrates diversity—a world in which there is equal justice under law for all.

GLAD's Legal InfoLine and publications are provided *free of charge* to all who need them. We hope that those who are able will make a contribution to ensure that GLAD can continue the fight for equal justice under the law.

To make a tax-deductible contribution, log on to www.glad.org, or call us at (800) 455-GLAD (4523) with your credit card, or mail your check, payable to GLAD to 30 Winter Street, Suite 800, Boston, MA 02108. If your workplace has a matching gift program, please be sure to have your donation matched. Please contact us if you would like more information on becoming a GLAD partner.

Thank You!



GLAD



EQUAL JUSTICE UNDER LAW

Gay & Lesbian Advocates & Defenders

30 Winter Street, Suite 800

Boston, MA 02108

Tel 617.426.1350

1.800.455.GLAD (4523)

Fax 617.426.3594

www.glad.org