

HIV/AIDS LEGISLATION

In recent years, most states have enacted laws concerning the testing of criminal offenders and their victims for infection and transmission of the human immunodeficiency virus (HIV). HIV causes acquired immune deficiency syndrome, (AIDS). Such laws were passed in response to the recognized possibility of the transmission of

HIV/AIDS during sexual assault or abuse, as well as other crimes where an exchange of bodily fluids takes place. They were also the result of a new understanding of the added trauma a sexual assault victim endures when faced with the possibility of having contracted a terminal disease. In a study conducted by the National Center for Victims of Crime and the National Crime Victims Research and Treatment Center, 40 percent (40%) of sexual assault victims indicated that the fear of contracting HIV/AIDS was a major concern.

In general, crime victim-related HIV laws require the testing of alleged and convicted sex offenders for HIV/AIDS, and the disclosure of the results of the offenders' tests to the victims. By 1997, 45 states and the District of Columbia had adopted laws requiring HIV/AIDS testing of sexual offenders, if certain conditions are met, in cases involving sexual penetration or other exposure to an offender's bodily fluids. Some of those apply to pre-conviction testing, others to post-conviction testing, and some states have laws that apply both pre-conviction and post-conviction.

Thirty-six states have laws that apply to convicted adult offenders or adjudicated juvenile offenders in sexual assault cases:

Alabama
Arkansas
Arizona
California
Connecticut
District of Columbia
Florida
Georgia
Illinois
Indiana
Iowa
Kansas

Kentucky
Louisiana
Maine
Maryland
Michigan
Minnesota
Mississippi
Missouri
Montana
Nebraska
New Hampshire
New Jersey

New Mexico
New York
Oregon
Pennsylvania
Rhode Island¹
South Carolina
Utah
Virginia
Washington
West Virginia
Wisconsin
Wyoming

1 – Mandatory for persons sentenced to prison.

Eighteen of the states require testing of those arrested or indicted for an offense:

Alaska	Kansas	North Dakota
Arizona	Louisiana	Ohio
Colorado	Michigan	Oklahoma
Delaware	Nevada	Tennessee
Florida	New Jersey	Virginia
Idaho	North Carolina	Wisconsin

Some states require testing both upon arrest and upon conviction, or make testing at one point discretionary and the other mandatory. South Dakota and Texas do not require testing at any stage, but give courts discretion to order testing at the pre-conviction stage.

In most states, the victim must request that the offender be tested. In some states the victim petitions the court directly; in others, the prosecutor files a petition at the request of the victim. Most of the laws mandating the testing of offenders before conviction require a finding of probable cause that the defendant committed the offense, and that the circumstances of the offense resulted in significant exposure of the victim to the semen or other bodily fluids of the offender, placing the victim at risk of transmission of HIV/AIDS.

Even where a state does not have a law specifically relating to the testing of sex offenders, it may have a law that permits any person to seek a court order for disclosure of another person's confidential HIV/AIDS information. The individual seeking the information must be able to demonstrate a compelling need for access to the information.

In nearly every state that allows disclosure of the test results to the victim, where the victim is a minor the information is disclosed to the parents or guardian. Often, in cases where the victim is incompetent, the law specifies that the results shall be disclosed to the victim's guardian. The law may permit the victim to disclose the matter to his or her spouse or sexual partner, or to his or her physician or counselor. Alaska states that the information shall be confidential, but may be used by the victim in any subsequent civil action. Mississippi requires that the victim and the victim's spouse be notified of the test results.

Laws may provide for counseling of the victim, but these vary. For instance, in California and Iowa, victims are to be counseled regarding the transmission of HIV/AIDS and the nature and reliability of the test prior to requesting a hearing on testing or prior to requesting the test results. Such a requirement lessens the possibility that a victim will have unrealistic expectations about the nature of the test results. States may require that test results only be disclosed to a victim by a trained health professional or counselor. In other states, a victim is to be notified of the results of the test by a criminal justice official, and then may be referred to counseling on request. Counseling generally also includes referral to health care and support services, as appropriate.

Many of the laws specify the agency that is required to pay for HIV/AIDS testing and counseling, which may include HIV/AIDS testing of the victim. This is often the public health department, but may be the state victim compensation board, or another governmental branch. In several states, the defendant, upon conviction, may be required to reimburse the state for the costs of testing and counseling.

A 1990 Federal law provides that a state will lose a portion of its grant funds if it does not have a law that requires testing of convicted adult or juvenile sex offenders at the request of the victim, as well as counseling and testing of victims.

At the Federal level, a victim may petition the court for an order requiring pre-conviction HIV testing of a defendant. The law includes provisions for follow-up testing and for confidentiality of the test results.

It should be emphasized that victims who believe there may have been a transfer of bodily fluids to them by the perpetrator of the crime – whether by sexual assault or another crime – should not wait for the offender to be tested, and should not rely solely upon any test of the offender. Instead, victims should be tested themselves at the earliest possible time, and periodically thereafter.

For more information on the laws in your state, please contact the rape crisis center in your area, your local law enforcement or prosecutor's office, your state legislator or Attorney General. You may also want to contact the Centers for Disease Control's National HIV/AIDS Hotline and/or the CDC National AIDS Clearinghouse for more information, assistance, and referrals. Additional information can also be found in the INFOLINK bulletins entitled, Sexual Assault and HIV/AIDS and Victim Services.

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