

MICHAEL SOMMER
PRESIDENT
PRÉSIDENT
PRÄSIDENT
PRESIDENTE

SHARAN BURROW
GENERAL SECRETARY
SECRÉTAIRE GÉNÉRALE
GENERALSEKRETÄRIN
SECRETARIA GENERAL

Global Commission on HIV and the Law -
Secretariat
United Nations Development Programme
BDP, HIV/AIDS Practice,
304 East 45th Street – FF1180
New York NY 10017

USA

info@hivlawcommission.org

DGS/ZMG/km

Brussels, 27 October 2011

To the Members of the Global Commission on HIV and the Law

The International Trade Union Confederation (ITUC) would like to express appreciation for the work undertaken by the Global Commission on HIV and the Law. In this context, ITUC would also like to urge the Commission to ensure that workplace-related laws, policies and practices are included in its recommendations on creating enabling legislative environments for people living with or perceived as living with HIV, as well as members of their families and communities.

The (ITUC) represents 175 million workers in 151 countries worldwide and works to ensure coordination between the global labour movement and relevant international organizations. The ITUC is in consultative status with the UN Economic and Social Council (ECOSOC) and together with the International Organization of Employers (IOE) forms an institutional partnership with the International Labour Organization (ILO), a normative UN agency that recently adopted the first international human rights standard on HIV and AIDS – the ILO Recommendation concerning HIV and AIDS and the World of Work, 2010 (No. 200).

The ITUC has a strong record in defence of human rights, and an extensive engagement with HIV- and AIDS- related processes such as the G8/G20 campaign, the World Social Forum and World Economic Forum, the Global Campaign against Poverty, Global March against Child Labour, and many others. The ITUC was recently granted the status of observer in the UNAIDS Programme Coordination Board. In 2011 the ITUC represented the labour movement on the United Nations General Assembly President's Civil Society Task Force (CSTF) for the 2011 High Level Meeting on AIDS as well as on the UNAIDS Universal Access International Advisory Group (IAG) and in the expert consultation for the GFATM Strategy 2012-2016.

This submission consists of two parts:

- a review of laws and practices with a focus on gaps in existing anti-discrimination legislation and policies, mandatory HIV testing and disclosure as well as confidentiality and privacy protections relevant the workplace;
- an annex with a summary of the legal and human rights implications of the ILO HIV and AIDS Recommendation, 2010 (No.200).

Review of laws and practices that in our view impede HIV prevention, treatment, care and support access in the world of work

The workplace remains one of the main settings where human rights violations against people living with or perceived as living with HIV occur.¹ Membership of any at-risk group subject to discrimination increases the risk of HIV transmission, and at the same time reduces access to employment as well as HIV prevention, care and treatment. This is particularly the case when such discrimination results in more difficult access to the formal economy, where HIV/AIDS measures are more readily available. At the same time, the workplace with its consultative and deliberative structures (social dialogue) offers unique opportunities to reach those who are at risk or are infected, as most of the persons vulnerable to or living with HIV (PLHIV) are of working age (between the ages 15-49). Also, other institutional settings such as healthcare facilities, schools, prisons, emergency services and social welfare settings are at the same time workplaces as well.

1. Non- discrimination framework

HIV-related discrimination in the workplace often arises in relation to access to employment and to particular occupations, assignment/relocation, appointment, promotion, terms and conditions of employment, access to vocational training, as well as termination. In legislative terms it can be covered:

- Explicitly - by extending the list of prohibited grounds for discrimination in employment to include HIV status (real or perceived) in constitutional law (e.g., Transitional Constitution of the South Sudan, 2011)², specific AIDS laws, including on labour and employment (e.g. Peru Ley N° 26626 of 1996³ and

¹ Global Survey Results 2010 UNAIDS PCB NGO Delegation Consultation “Stigma and Discrimination: Hindering Effective HIV Responses” available at http://unaidspcbngo.org/wp-content/uploads/2011/03/2010-NGO-Delegation-Consultation_Global-Survey-Results-EN.pdf

²The Transitional Constitution of the Republic of South Sudan, 2011, Arrangement of parts, chapters and articles, available at: http://www.sudantribune.com/IMG/pdf/The_Draft_Transitional_Constitution_of_the_ROSS2-2.pdf

³Peru Ley CONTRASIDA – N° 26626, del 19.06.1996 available at: <http://www.redsidaperu.org.pe/ASPLib/StorageManager.ASP?Mode=D&Name=Ley26626%2Epdf&File=%2FStorage%2FDocumentos%2FArchivo%2F40%2Dg1Ui2Cy4Ml4Me4X%2Epdf&Type=application%2Fpdf&Audit=StorageManager%5FDoc%5FSetD&ID=40>

Decreto Supremo N° 019-2006-TR of 2006);⁴ Dominican Republic Ley de VIH/SIDA No. 135-11 of 2011;⁵ Mozambique Act No. 5 of 2002)⁶, general anti-discrimination laws, or general labour codes or laws (e.g. Bahamas Employment Act of 2001;⁷ Spain Ley del Estatuto de los Trabajadores 11/1994 of 1994;⁸ Zimbabwe Labour Relations Act of 2005 (last amendment)⁹ Namibia Labour Act No. 11 of 2007)¹⁰;

- Implicitly - HIV status, if not explicitly covered, can be protected under other grounds (e.g., health status, disability, sexual orientation) as for example in the United Kingdom (Disability Discrimination Act of 7 April 2005)¹¹ the United States (Americans with Disabilities Act of 1990 as amended up to 2008 by Public Law No. 110-325)¹², New Zealand (New Zealand Human Rights Act 1993 No 82)¹³ Canada (Quebec Charter of Human Rights and Freedom, 1975

⁴ Peru Reglamento de la Ley General de Inspección del Trabajo, Decreto Supremo N° 019-2006-TR, del 29.10.2006 available at: http://www.mintra.gob.pe/archivos/file/normasLegales/DS_019_2006_TR.pdf

⁵ Ley de VIH/SIDA de la Republica Dominicana No. 135-11 of 7.06.2011 available at: <http://copresida.gob.do/sitioweb/PDF/Ley%20de%20VIH%20y%20SIDA%20de%20la%20Rep%C3%BAblica%20Dominicana%20No.135-11.%20promulgada%20por%20el%20Poder%20Ejecutivo%20el%207%20de%20junio%20de%202011.pdf>

⁶ Lei No. 5/2002 de 5 fevereiro de 2002 da República de Mocambique (Boletim da República, quarta-feira, 13 fevereiro de 2002, 1 Serie No. 7) available at: <http://www.hsph.harvard.edu/population/aids/mozambique.aids.02.pdf>.

⁷ Bahamas Employment Act No. 27 of 2001, available at: <http://www.lexbahamas.com/Employment%20Act%202001.pdf>

⁸ Spain Ley del Estatuto de los Trabajadores 11/1994 of 19.05.1994, Articles 4.2(c), 4.2(e) and 17.1, available at: <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/37817/64929/S94ESP01.htm>

⁹ Zimbabwe Labour Relations Act [Chapter 28:01], as amended by the Labour relations Amendment Act, 2005, available at: http://www.kubatana.net/docs/legisl/labact_060201.pdf

¹⁰ Namibia Labour Act No. 11 of 21 December 2007 (*Government Gazette of the Republic of Namibia*, 2007-12-31, No. 3971) available at: http://www.parliament.gov.na/acts_documents/81_3971_gov_notice_act_11.pdf

¹¹United Kingdom Disability Discrimination Act of 07.04.2005, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_127509.pdf

¹² United States Americans with Disabilities Act of 1990 as amended up to 2008 by Public Law No. 110-325, available at: <http://www.ada.gov/pubs/ada.htm>

¹³The New Zealand Human Rights Act 1993 No 82 prohibits discrimination on the basis of “the presence in the body of organisms causing illness” Article 21(1) (h)(vii) <http://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304475.html#DLM304475>. HIV status is covered, see the Human Rights Commission’ on-line guide available at: <http://www.hrc.co.nz/enquiries-and-complaints-guide/what-can-i-complain-about/disability/>

and the Decision of the Supreme Court of Canada 2000 SCC 27 [2000] SCJ No 24 (QL) or Romania (Emergency Ordinance No 137/2000).¹⁴

There is a clear and urgent need to fill in the gap in protections against discrimination on the basis of real or perceived HIV status by non-discrimination law that applies to workplace. Coverage of HIV status under general anti-discrimination legislation may be limited. Some laws that could apply to discrimination on grounds on HIV status may still create specific exemptions concerning, e.g., infectious diseases or migration (Australia Disability Discrimination Act 1992 (amended)¹⁵ - Sections 48 and 52). Even in case of countries that enjoy a comprehensive policy framework on HIV/AIDS or even on HIV/AIDS and the world of work specifically, there might be no legislation protecting the rights of PLHIV. Accordingly, gaps in non-discrimination legal framework, related infringements of human rights and the need for action in this were pointed out in several 2010 UNGASS reports, for instance by Jordan¹⁶, Trinidad and Tobago¹⁷ and Kenya.¹⁸

Recommendations

The national regulation should afford protection equal to that available under the ILO's Discrimination (Employment and Occupation) Convention, 1958 (No 111), for instance by including real or perceived HIV status among prohibited grounds of

¹⁴ Romania Emergency Ordinance No 137/2000 on Preventing and Punishing all Forms of Discrimination, available at: http://www.google.be/url?sa=t&rct=j&q=romanie%20137%2F2000&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.cncd.org.ro%2FFiles%2F%3FFileID%3D83&ei=G5ioTvXDBsmF-wbDw6nZDw&usg=AFQjCNG8a9U_qD4Qlr_W2llnHieZ22_FIw&cad=rja

¹⁵Australia Disability Discrimination Act 1992 (amended) available at: http://www.austlii.edu.au/au/legis/cth/consol_act/dda1992264/

¹⁶ "There are no anti-discrimination laws pertaining to education or the workplace; on the contrary, laws sanctioning the dismissal of "persons with communicable and infectious" diseases, can be, and are, used to deny PLHIV employment and educational opportunities. Testing is mandatory for non-Jordanians applying for work permits in Jordan and Jordanian nationals seeking employment within government agencies." 2010 UNGASS Report Jordan (p.13), available at: http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/jordan_2010_country_progress_report_en.pdf

¹⁷ "The assessment found that PLHIV encounter discrimination based on their HIV status in the workplace, in health care settings and in the provision of goods and services such as credit and insurance services. There is no protection in the law however against discrimination on the ground of 'HIV status or suspected HIV status'. General anti-discrimination legislation (the Equal Opportunity Act 2000) exists, but 'HIV status or suspected HIV status' is not included as a prohibited ground of discrimination." 2010 UNGASS Report Trinidad and Tobago (p.39), available at: http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/trinidadandtobago_2010_country_progress_report_en.pdf

¹⁸ "The Kenya's Public Sector HIV and AIDS Workplace Policy has a component on non-discrimination, however, it is general. The Kenya Public Sector HIV and AIDS Workplace Policy has guidelines for implementation but there are no laws that would facilitate its implementation" 2010 UNGASS Report Kenya (p. 33), available at: http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/kenya_2010_country_progress_report_en.pdf

discrimination provided for under national anti-discrimination laws. Applicability should be clearly stated and gaps in protection should be identified (e.g. whether or not protection of HIV-related discrimination can be covered by disability in case of HIV-positive persons with no health problems).

Discrimination on grounds of perceived HIV status should also be covered under legislation as persons may be discriminated against simply because of their association with HIV-positive persons. For example, the non-discrimination principle of the 1998 Costa Rica General Act on HIV/AIDS (Article 4)¹⁹ covers also relatives and persons closely related to people living with HIV.

Failure to extend protections against discrimination to the informal sector may be equal to systemic discrimination. Coverage of the informal sector should be considered. For example, Mozambique's Act No 5/2002 applies to all workers, including domestic workers, who are often excluded from labour regulations (Article 3).²⁰

One of the possible measures to protect people being subjected to HIV-related discrimination in recruitment or employment could be to adopt procedural rules reversing the burden of proof by placing a primary obligation on employers to prove that they did not discriminate, once a difference in treatment is established by the worker (as in the EU non-discrimination regulation).²¹

2. Mandatory Testing and Disclosure

The ILO Recommendation provides that there should be no mandatory HIV testing and disclosure in the workplace (paragraphs 3(i), 24-29), regardless of sector or type of work. This prohibition applies to workers, job seekers, job applicants, and it also explicitly covers migrant workers (paragraphs 27-28). However, this standard is in reality widely violated.

- Mandatory HIV testing is most commonly found in the contest of certain occupations such as: health personnel - e.g. Indonesia (Decision No. 20/DJPPK/VI/2005);²²

¹⁹ "Artículo 4 "[Prohibición de discriminación o trato degradante] Prohibese toda discriminación contraria a la dignidad humana y cualquier acto estigmatizador o segregador en perjuicio de los portadores del VIC-Sida, así como de sus parientes y allegados" Costa Rica General Act on HIV/AIDS no. 7771, 1998, available at: <http://www.glin.gov/view.action?glinID=89382#>

²⁰ Artigo 3." [Âmbito de aplicação] A presente Lei aplica-se, sem qualquer discriminação, a todos os trabalhadores e candidatos a emprego, na Administração Pública e outros sectores públicos ou privados, incluindo os trabalhadores domésticos". Lei No. 5/2002 de 5 fevereiro de 2002 (Boletim da República, quarta-feira, 13 fevereiro de 2002, 1 Serie No. 7, available at : <http://www.hsph.harvard.edu/population/aids/mozambique.aids.02.pdf>.

²¹See: EC Directive 97/80/EC available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0080:EN:HTML>; EC Directive 2000/43 available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>; EC Directive 2000/78 available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>.

²² Mandatory testing applies to those who may be working in an environment where they will be exposed to the virus; see Decision No. 20/DJPPK/VI/2005 providing technical guidance on the prevention and

- Aviation personnel, particularly pilots – e.g., USA (Code of Federal Regulations),²³ International Civil Aviation Organization (ICAO Manual of civil aviation medicine 2006, Ch. 12)²⁴ as well as Joint Aviation Authority (JAA) of Europe (JAA Manual of civil aviation medicine 2006).²⁵ New Civil Aviation Authority Regulations for Swaziland for 2011 prohibit the granting of pilots' licences to individuals who are HIV-positive or have tuberculosis.²⁶ Good practice is also found (e.g., case Hoffman v. South Africa Airways, 2000).²⁷
- Armed forces and uniformed services (e.g. Indonesia,²⁸ Rwanda,²⁹ Uganda,³⁰ Zambia,³¹ Viet Nam³²) as well as civil service (e.g. China,³³ Jordan);³⁴

control of HIV/AIDS in the workplace, 2005 (Part C, s. 2(c)), available at: http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/publication/wcms_123957.pdf

²³ USA Code of Federal Regulations available at: http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/dec_cons/disease_prot/hiv/

²⁴ ICAO Manual of civil aviation medicine (2006), Ch. 12, available at: http://www.icao.int/icao/net/dcs/8984/8984_chapter_12_en.pdf

²⁵ JAA Manual of civil aviation medicine (2006), available at http://www.jaat.eu/licensing/manual_civil_aviation_2006.html

²⁶ See: PlusNews 25.10 2011 (Mbabane), available at: <http://www.plusnews.org/report.aspx?reportID=94061>. The Aviation Authority Act of 2009 for Swaziland is available at: <http://www.swacaa.co.sz/index.php/component/content/article/25-the-project/61-civil-aviation-authority-act-2009>.

²⁷ In 2000 the Constitutional Court of South Africa found that the SAA regulation excluding people with HIV from recruitment violated equality rights. Instead, even in an occupation at risk medical examination should define the person's ability to work. Constitutional Court of South Africa, Jacques Charl Hoffman v. South African Airways, 28 September 2000, Case No. CCT 17/00 available at: <http://www.saflii.org/za/cases/ZACC/2000/17.pdf>

²⁸ 2010 UNGASS Report Indonesia (p. 108), available at: http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/indonesia_2010_country_progress_report_en.pdf

²⁹ 2010 UNGASS Report Rwanda (p. 100), available at: http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/rwanda_2010_country_progress_report_en.pdf

³⁰ 2010 UNGASS Report Uganda (p. 72), available at: http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/uganda_2010_country_progress_report_en.pdf

³¹ 2010 UNGASS Report Zambia (p. 55), available at: http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/zambia_2010_country_progress_report_en.pdf

³² 2010 National Composite Policy Index Viet Nam (p. 12) available at: http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010nationalcompositepolicyindexncpi-reports-countries/vietnam_2010_ncpi_en.pdf

- Migrant workers.³⁵

Even where mandatory HIV testing in the workplace is prohibited by law, challenges may arise where regulations are issued aiming at scaling-up HIV testing such as the opt-out (provider-initiated) HIV testing rule. In such cases guidance may be unclear and may allow for contradictory interpretations. For instance, in Botswana (the first African country that introduced routine HIV testing in all healthcare settings in 2004) the existing policies - including the National Policy on HIV/AIDS³⁶ - recommend measures to protect against mandatory HIV testing in the workplace. However, these policies are not legally binding, leaving their implementation to the discretion of each employer. While no official statistics have been collected on this issue, acts of discrimination are common and lack of legislation leaves the courts unable to find the employment related HIV testing illegal. Two court cases already underscored an urgent need for specific legislation. Both cases involved employees whose employment was terminated as a result of a positive HIV test³⁷ or as a result of the refusal to undergo a HIV test.³⁸ In the first case the Botswana Industrial Court ruled that the termination was both substantively and procedurally unfair but, in the absence of relevant law, not illegal. In both cases the Court was unable to outlaw HIV testing and it exhorted to the legislature to address this issue.³⁹ For years, this lack of binding legal protection of HIV-related rights at the workplace has been a concern for

³³ ILO/CDC (2010) HIV and AIDS Related Employment Discrimination in China” report by International Labour Organisation (ILO) and China's Centre for Disease Control and Prevention (CDC) (p. 7), available at: http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_150386.pdf

³⁴ 2010 UNGASS Report .Jordan (p. 13), available at: http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/jordan_2010_country_progress_report_en.pdf

³⁵ The issue of HIV related travel restrictions is well researched and the database available at: <http://hivtravel.org/> provides with information on countries that do not support freedom of movement for PLHIV.

³⁶ Botswana Ministry of Labour and Home Affairs Policy in HIV/AIDS in the Workplace, 2003, Article 8.1.1. Available at: http://www.ilo.org/aids/legislation/lang--en/docName--WCMS_125675/index.htm. Draft national policy on HIV/AIDS and employment, 2007. Section 7.5.6 regulates that if for any reason an employer or public authority determines that HIV testing is necessary and is a bona fide occupational requirement, such as the protection of public health and safety, the authorisation of the courts of law must be sought. see: ILO 2007 White Report “HIV/AIDS and the world of work” par 266.

³⁷ Botswana Industrial Court Case No 35 of 2003 (Jimson v Botswana Building Society (2005) AHRLR 3 (BwIC 2003). Excerpts from the case available at: http://www.chr.up.ac.za/undp/domestic/docs/caselaw_30.pdf

³⁸ Botswana Industrial Court Case No 50 of 2003, at 4.(Diau v Botswana Building Society (BBS) 2003 (2) BLR 409 (BwIC). Excerpts from the case available at: http://www.chr.up.ac.za/undp/domestic/docs/caselaw_28.pdf

³⁹ A more detailed review of the cited case law from Botswana can be found in the Canadian HIV/AIDS Policy & Law Review, volume 9, number 2, August 2004, http://www.aidslaw.ca/publications/publicationsEN.php?ty_id=11&l_id=1&sort=date as well as in BONELA (2006) “Challenging HIV-related Discrimination” available at” http://bonela.org/doc/BBS_Booklet_Web.pdf

the national trade union centre, Botswana Federation of Trade Unions (BFTU), which is affiliated to the ITUC. The draft act has been under negotiations since 2006, but still with no conclusion.

In the Czech Republic HIV+ patients are required to disclose their HIV status to a medical practitioner before any procedure, with the sanction of possible criminal charges where they fail to do so (Article 53(1) of the Czech Public Health Protection Act No. 258/2000).⁴⁰ Medical boards may explicitly encourage their members to initiate such prosecution if they find any of their patients failed to inform about their HIV positive status.⁴¹ Laws obliging patients to disclose their HIV status to medical practitioners outside of the employment setting can negatively impact on occupational medicine where workers (including job applicants) are required to recurrently undergo medical examination which may violate mandatory HIV testing prohibition. Accordingly, several national 2010 UNGASS reports expressed concerns about gaps in national legislation that do not allow for unambiguous interpretation of protection concerning mandatory HIV testing in the workplace.⁴²

Recommendations:

Countries need to develop laws and policies that balance the need for disclosure of HIV information with the protection of the privacy and autonomy of individuals with respect to their HIV status. The law should provide for explicit or implied but unambiguous prohibition of mandatory HIV testing or disclosure for employment purposes, regardless of occupation or type of work.⁴³ The coverage of this prohibition should reflect the scope of application of the ILO HIV and AIDS Recommendation (Article 2).⁴⁴

It should be considered that because workers are dependent on their employers, meaningful consent to workplace testing may not be possible. Accordingly, the law

⁴⁰ Czech Public Health Protection Act No. 258/2000, available at: <http://apps.who.int/ihl-rils/ihl/531CR02007.pdf>

⁴¹ This is currently the case of the Czech Dental Society. The text of the Society's recommendation can be found here: http://dent.cz/detail-novinky.php?id_polozka=103&id_strana=4.

⁴² See e.g. 2010 UNGASS Report Kenya "The approach to testing and counseling is officially voluntary; however, there are cases of mandatory testing during recruitment", (p. 32), available at: http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/kenya_2010_country_progress_report_en.pdf

⁴³ The World Medical Association (WMA) in its "Statement on HIV/AIDS and the Medical Profession policy" released in 2006 states that even for public health purposes, mandatory HIV testing of an individual against his or her will is a violation of medical ethics and human rights and therefore exceptions to this rule may be made only in the most extreme cases and should be subject to review by an ethics panel or to judicial review (point 13) <http://www.wma.net/en/30publications/10policies/a25/index.html>.

⁴⁴ ILO HIV and AIDS Recommendation, Article 2: "This Recommendation covers: (a) all workers working under all forms or arrangements, and at all workplaces, including:(i) persons in any employment or occupation; (ii) those in training, including interns and apprentices;(iii) volunteers;(iv) jobseekers and job applicants; and (v) laid-off and suspended workers;(b) all sectors of economic activity, including the private and public sectors and the formal and informal economies; and(c) armed forces and uniformed services".

should provide that the prohibition of HIV testing in the workplace should not be waived solely by the person giving his/her consent (see: opinions of the EU Data Protection Working Party 1999-2002 or ILO 2003).⁴⁵

If testing is offered by the employer, additional safeguards should be put in place. Examples include requirements of data protection regulations concerning the purpose of data collection (EU Data Protection Directive 95/46/EC or OECD Guidelines 1980)⁴⁶ such as legitimacy, specificity and explicit formulation of the purpose of workplace HIV testing as well as consultations with workers' representatives.⁴⁷ Another example of additional requirements comes from South Africa, where HIV testing for employment purposes is prohibited unless determined to be justifiable by the Labour Court, voluntary and anonymous.⁴⁸

Where worker's consent is relied on, consent must always be freely given, written, specific and informed.

Denying testing should result in no negative consequences for the worker.

3. Confidentiality and data protection

Lack of confidence in protection of personal medical information is a threat to public health globally and a core factor in the continued spread of HIV/AIDS, as perceptions of confidentiality determine people's uptake of HIV/AIDS services, also if provided in the workplace.⁴⁹

⁴⁵ Data Protection Working Party Opinion 8/2001 on the processing of personal data in the employment context 5062/01/EN/Final, Opinion 18/2003 on ethical aspects of genetic testing in the workplace, Opinion 13/1999 on opinion on sensitive data in the employment. See also: Shahandeh, B & Caborn J (2003) "Ethical Issues in Workplace Drug Testing in Europe" SafeWork: ILO Geneva (February, 2003).

⁴⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Directive on Data Protection) and Organisation for Economic Cooperation and Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, adopted 23 September 1980.

⁴⁷ 16 See the following provisions of the Directive 95/46/EC and 1980 OECD Guidelines on fair and lawful data processing: Directive 95/46/EC Article 6(1a) (fair processing); Article 8(1) (consent for processing); Articles 10 and 11 (notification principle) and OECD 80 Paragraph 7 (collection limitation). See the following provisions of the Directive 95/46/EC and 1980 OECD Guidelines on purposes of data processing: Directive 95/46/EC Article 6(1b) (collection purpose principle) and OECD 80 Paragraph 9 (purpose specification).

⁴⁸ See: Employment Equity Act, 55 of 1998 (Section 7) as well as Joy Mining Machinery, A Division of Harnischfeger (SA) (Pty) Ltd v NUMSA & others (2002) 23 ILJ 391 (LC) where the Labour Court dealt with the first ever case under Section 7 of the EEA. A similar requirement is considered in the Botswana draft national policy on HIV/AIDS and employment, 2007 which regulates that if for any reason an employer or public authority determines that HIV testing is necessary and is a bona fide occupational requirement, such as the protection of public health and safety, the authorization of the courts of law must be sought.

⁴⁹ See e.g. Mundy, J. & Dickinson, D. (2004) "Factors affecting the uptake of voluntary HIV/AIDS VCT services in the workplace" In: HIV/AIDS in the Workplace Symposium Proceedings, June 2004, Johannesburg, South Africa. See also e.g. 2010 UNGASS Report Montenegro "However, the absence of, or poor, confidentiality in HIV testing and STI services is still considered a major barrier to uptake of this

Realisation of the right to data confidentiality is affected both by the growing demand for data as a part of scaling-up HIV services and improved service monitoring as well as by the dependence of this right on the existence of comprehensive data protection laws and regulations. These laws do not exist in a significant part of the world, including almost all Africa.⁵⁰

In many countries such as Botswana or Zambia, the lack of specific legislation on privacy, confidentiality and data protection relevant to HIV and AIDS in the workplace makes it impossible to safeguard employees from infringement on their privacy and confidentiality rights. In the cited case *Jimson v BBS* from Botswana, an HIV-positive man was forced to undergo an HIV test by his employer 19 days after he finished his pre-employment medical exam. The doctor who performed the test sent the results directly to the employer. The complainant received his test results through the mail, enclosed with a letter of termination. Because of the lack of specific legislation in that country outlawing mandatory HIV testing in the workplace as well as the lack of data protection regulation, it was not possible to address the issue of the unauthorised disclosure. The fact that the doctor sent the results to the employer constituted not only infringement of the right to HIV post-counselling (adequately established in the Botswana national policy on HIV/AIDS in the workplace)⁵¹ but especially it was in breach of privacy and confidentiality rights (also adequately established in the Botswana national policy on HIV/AIDS in the workplace)⁵², rules of medical secrecy as well as data protection standards.⁵³

Accordingly, in the Czech Republic the law requires medical practitioners to disclose the patient's epidemiologic status if referred to another practitioner (Directive of the Czech Ministry of Health No 385/2006 Article 1(1)(j)).⁵⁴ This regulation might have serious consequences if combined with occupational health medicine and the requirements of health check-ups for the employees and result in unauthorised disclosure of person's HIV status to the employer.

service" (p. 12), available at:
http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/montenegro_2010_country_progress_report_en.pdf

⁵⁰ See: Privacy International. Global Map of Data Protection (11.03.2011)
<https://www.privacyinternational.org/article/global-map-data-protection>.

⁵¹E.g., Article 8.1.2. of the Botswana Ministry of Labour and Home Affairs Policy in HIV/AIDS in the Workplace, 2003 http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125675.pdf

⁵² E.g., Article 8.1.1. of the Botswana Ministry of Labour and Home Affairs Policy in HIV/AIDS in the Workplace, 2003 http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125675.pdf

⁵³ See also the 2010 UNGASS Report of Zambia: *"The increase in service demand has not matched the infrastructural development in facilities offering ART. There is inadequate space for storage of patient files, for counselling and indeed for dispensing drugs for ARVs"* (p. 111), available at: http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/zambia_2010_country_progress_report_en.pdf

⁵⁴ Directive of the Czech Ministry of Health No 385/2006 http://www.clk.cz/oldweb/zakpred/vyhl_385-2006_zdrav_dokumentace.html

In South Africa, the country that recognises the right to privacy of personal data as a constitutional right, legislation that deals specifically with data protection (The Protection of Personal Information Bill, 2009)⁵⁵ has only been passed by the parliament in 2009, after 12 years of negotiations and drafting.

Recommendations

Workplace HIV data processing practices⁵⁶ should observe internationally recognised standards (such as data minimisation, period of data maintenance minimisation, data use limitation, data accuracy, data subject's right to access and redress data, security risk arrangements, auditability and sanctions, staff training, separate storage arrangements, etc).⁵⁷ For instance, it is necessary that if HIV-related data is processed in the workplace (e.g., for the needs of management of HIV/AIDS prevention, testing, treatment, care and support program offered to employees), all data processing is required by law to be handled by persons subject to the professional obligation of secrecy equivalent to that applying to health professionals. Access to medical records in the workplace should be restricted, secondary uses should be regulated, application of purpose and proportionality tests should be considered. Otherwise, wrongful disclosures of HIV status, including workplace context, can result in breakdown of family cohesion, social exclusion or even death. Legal regulation cannot limit its application to the formal sector. Lack of coverage of the informal sector with rights framework and measures may equal systemic discrimination.

CONCLUSIONS

There is a clear gap in policy- and law-making and its implementation when it comes to the HIV and AIDS in the world of work. The gap directly affects people vulnerable to or living with HIV and should be addressed. Apart from the issues outlined in this document, other key workplace-related issues include discrimination in award of benefits, sick leave, disability, reasonable accommodation, workplace testing and occupational HIV transmission. These issues need more research and attention as well.

Accordingly, there is a need to install a sense of ownership of workplace-related legislative HIV responses, which should be seen as cross-cutting and multi-sectoral. The ILO HIV and AIDS Recommendation No 200 should be used as widely as possible as a source of inspiration in order to develop judicial principles, interpretation and public policy.

⁵⁵ South Africa Protection of Personal Information Bill of 2009, available at: <http://www.pmg.org.za/bill/20090825-protection-personal-information-bill-b9-2009>

⁵⁶ Definition of data processing is contained in Article 2(b) of the EC Directive 95/46/EC of 24.10.1995 available at: <http://aspe.hhs.gov/DATACNCL/eudirect.htm#ART7>

⁵⁷ See e.g. EC Directive 95/46/EC of 24.10.1995, EC Directive 2002/58/EC of 12.07.2002, OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data of 23.09.1980, UN Guidelines on Computerized Personal Data Files of 14.12.1990, Council of Europe Recommendation No. R (97)5 on the Protection of Medical Data of 1997, Council of Europe Recommendation No. R (89)2 on the Protection of Personal Data Used for Employment Purposes of 1989.

Countries need to develop laws and policies that balance the need for disclosure of HIV information with the protection of the privacy and autonomy of individuals with respect to their HIV status. Correlation of HIV-related privacy and confidentiality rights with the (non-) existence of data protection laws and regulations (and their implementation in practice) at the national level is under-researched. Further attention is needed taking into account a vast gap in regulation worldwide.

Multisectoral consultations in developing national strategies and financing plans for combating HIV and AIDS should be strengthened, ensuring among others, involvement of ministries of labour, labour administrations services and judicial authorities competent in labour issues. Effective labour inspection is vital for promoting national legislation and good practice at the enterprise level, making decent work a reality.

National HIV/AIDS programs rarely include the workplace, and employers and trade unions are rarely included in the national response in spite of the immense potential contribution they can make - so far only about 30 countries worldwide have reported that they have adopted rules regulating HIV/AIDS in the world of work (2009 ILO Report);⁵⁸ Representatives of workers and employers and people living with HIV should be included in National AIDS Councils as it has recently taken place in, e.g., Zimbabwe or the Dominican Republic. All institutions and enterprises should be required to collaborate with the National AIDS Authority to develop HIV workplace education programs and prevention plans for the world of work.

Government ratification and implementation of ILO Conventions 87 (Freedom of Association) and 98 (Collective Bargaining), and full respect for the provisions of these Conventions by employers, are the most effective ways of ensuring that all the employment rights and interests of workers living with HIV and AIDS are protected. All necessary steps need to be taken to ensure that all workers are protected by the realisation of these rights.

We sincerely hope that you will be able to incorporate our recommendations into the final report of the Commission. We are open to discussing these recommendations and exploring ways that civil society, including trade unions, can further contribute to develop recommendations concerning HIV and AIDS and legal change. For additional information or requests, please feel free to contact our HIV/AIDS Coordinator Zuzanna Muskat-Gorska, tel. +32 2 224 02 35, email: zuzanna.gorska@ituc-csi.org.

Yours sincerely,



General Secretary

⁵⁸ ILO (2009) "HIV/AIDS and the world of work" Report IV(1), ILC, 98th Session, Geneva, 2009, para 247, available at: http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/vihsida_en.pdf

Specialist call for submission to the Global Commission on HIV and the Law

International Trade Union Confederation (ITUC)

ANNEX: Legal and human rights implications of the new ILO HIV and AIDS Recommendation, 2010 (No. 200)

The ILO HIV and AIDS Recommendation 2010 (No. 200) is the first international labour standard and first international human rights instrument to focus directly on HIV and AIDS. The Recommendation was adopted in June 2010 after two years of tripartite negotiations. It enjoyed the support of 94,4% governments, employers' and workers' representatives of ILO Member States.

The instrument contains a clear and comprehensive human rights statement (paragraph 3a). It covers the rights of all those who are, or are perceived to be, living with HIV, the rights of those who are stigmatized by association (like family members or healthcare workers) and persons belonging to groups that may be exposed to higher-than-average risk of HIV (such as injecting drug users (IDUs), sex workers or men who have sex with men (MSM)). The Recommendation encompasses all workers working under all forms or arrangements and at all workplaces. It includes the following provisions:

- Non-discrimination (paragraphs 3(c), 9-14, 20,39)
- Prevention, including prevention of occupational exposure (paragraphs 3(d), 39, 42, 45, 47,49, 50)
- Prohibition of mandatory workplace HIV testing and disclosure with no exceptions, regardless of sector or type of work (paragraphs 3(i), 24-29). This prohibition applies to workers, job seekers, job applicants, and it also explicitly covers migrant workers (in countries of origin, transit and destination) (paragraphs 27-28)
- Recognition of AIDS as an occupational disease or accident where a direct link can be established between an occupation and the risk of infection (paragraph 23)
- Gender equality and empowerment of women (paragraphs 3(a), 14(b), 15,37(g), 39, 40)
- Equality of opportunity and treatment (paragraphs 9-14)
- Right of workers with HIV and HIV-related illnesses to continue employment as long as they are medically fit to do so, that is, the prohibition of termination of employment solely on grounds of HIV status (paragraphs 11 and 13)
- Right of workers with HIV and HIV-related illnesses to reasonable accommodation, and to be kept in employment as long as medically fit to do so (paragraphs 13 and 21)
- Involvement and empowerment of workers in the HIV response regardless of sexual orientation or whether or not they belong to a vulnerable group (paragraph 14)

- Right to non-discrimination in access to health care, whether this is provided under public health, social security systems or private insurance or other schemes (paragraph 18)
- Right to non-discrimination in access to occupational insurance schemes or in relation to benefits under such schemes (paragraph 20)
- Right to free or affordable health services that should include antiretroviral treatment and adherence education; proper nutrition consistent with treatment; treatment for HIV-related illnesses, including tuberculosis; and support, including psychosocial support (paragraph 19)

It should be noted that recently an important development took place with regards to political recognition of the role of the world of work in the HIV and AIDS response. The Political Declaration on HIV and AIDS adopted on 10 June 2011 by the UN General Assembly calls on Governments to mitigate the impact of the epidemic on workers, their families, their dependents, workplaces and economies, including by taking into account all relevant ILO Conventions, as well as the guidance provided by the relevant ILO recommendations, including ILO Recommendation No. 200. The Declaration calls on employers, trade and labour unions, employees and volunteers to eliminate stigma and discrimination, protect human rights and facilitate access to HIV prevention, treatment, care and support (Paragraph 85). For the first time in the UNGASS history, the Political Declaration refers to international labour standards, a powerful system for the protection of human rights . Such reference can have positive implications in terms of action in the areas such as HIV and AIDS and social protection, child labour, forced labour, gender equality, migration, OSH and the development of national labour legislation and policies.