

By Mr. Bertonazzi, petition (accompanied by bill, Senate, No. 699) of Louis P. Bertonazzi and Joanna Glattley for legislation to provide for informed consent and confidentiality regarding AIDS and HIV related tests. The Judiciary.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Ninety-Three.

AN ACT TO PROVIDE FOR INFORMED CONSENT AND CONFIDENTIALITY
REGARDING AIDS AND HIV RELATED TESTS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 SECTION 1. Chapter 111 of the General Laws is hereby
2 amended by striking out section 70F and inserting in place thereof
3 the following new section: —
4 Section 70F. (1) Definitions. For purpose of this section the
5 following definitions shall apply:
6 (a) "AIDS" shall mean Acquired Immunodeficiency
7 Syndrome.
8 (b) "HIV" shall mean the human immunodeficiency virus
9 identified as the causative agent of AIDS.
10 (c) "HIV related test" shall mean a test for the antibody or
11 antigen to HIV.
12 (d) "Health facility" shall mean a hospital, nursing home,
13 clinic, blood bank, blood center, sperm bank, laboratory, or other
14 health care institution.
15 (e) "Health care provider" shall mean any nurse, physician,
16 dentist and other dental worker, optometrist, podiatrist,
17 chiropractor, laboratory or blood bank technologist or
18 technician, phlebotomist, dialysis personnel, emergency health
19 care provider, including any paramedic, emergency medical
20 technician, law enforcement personnel, or firefighter, and others
21 whose activities involve contact with patients, their blood or
22 corpses.

23 (f) "Legal guardian" shall mean a person appointed by a court
24 to assume legal authority for another who has been found
25 incompetent or, in the case of a minor, a person who has legal
26 custody of the child.

27 (g) "Person" shall mean any natural person, partnership,
28 association, joint venture, trust, public or private corporation, or
29 health facility.

30 (h) "Release of test results" shall mean a written authorization
31 for disclosure of HIV related test results which is signed, dated
32 and which specifies to whom disclosure is authorized and the time
33 period during which the release is to be effective.

34 (i) "Manner known to transmit HIV" shall mean parenteral
35 exposure to blood, blood products, or potentially infectious body
36 fluids, including but not limited to injection through the skin, or
37 as otherwise determined by the Department of Public Health.

38 (2) (a) No health facility, health care provider, or other person
39 shall test or shall cause by any means to have tested, any specimen
40 of any patient for HIV antibody or antigen without the informed
41 consent of the subject of the test or the subject's legal guardian.
42 A health care provider shall ensure that informed consent has been
43 received prior to ordering such testing by a laboratory or other
44 facility. No employer shall require HIV antibody or antigen tests
45 as a condition for employment.

46 Whoever violates the provisions of this section shall be deemed
47 to have violated section two of chapter ninety-three A.

48 (b) Informed consent to an HIV related test shall consist of a
49 voluntary agreement executed by the subject of the test or the
50 subject's legal guardian. Informed consent shall consist of at least
51 the following:

52 (i) an explanation of the test, including its purpose, potential
53 uses, limitations, and the meaning of its results;

54 (ii) an explanation of the procedure to be followed, including
55 that the test is voluntary, that consent may be withdrawn, and
56 the extent and the limitations of the manner in which the results
57 will be confidential;

58 (iii) an explanation of the nature of AIDS and other
59 manifestations of HIV infection and the relationship between the
60 test result and those diseases; and

61 (iv) information about behaviors known to pose risks for
62 transmission of HIV infection.

63 (c) Notwithstanding the foregoing, the provisions of subsec-
64 tion 2(a) and 2(b) shall not apply when:

65 (i) knowledge of such test results is necessary for medical
66 diagnostic purposes or to provide appropriate care or treatment
67 and the subject of the test is unable to grant or withhold consent;

68 (ii) the testing is done for the purposes of research, provided
69 that the test is performed in a manner by which the identity of
70 the test subject is not known and may not be retrieved by the
71 researcher;

72 (iii) a health care provider or health care facility procures,
73 processes, distributes or uses (i) blood, (ii) a human body part
74 donated for a purpose specified under the Uniform Anatomical
75 Gift Act, or (iii) semen provided prior to the effective date of this
76 section for the purpose of artificial insemination, and such test
77 is necessary to assure the medical acceptability of such gift or
78 semen for the purpose intended;

79 (iv) the health of a health care worker has been threatened
80 during the course of a health care worker's duties, as a result of
81 exposure to blood or body fluids of the patient in a manner known
82 to transmit HIV;

83 (v) disclosure is necessary to control the transmission of HIV
84 infection to a person at risk of HIV infection as a result of
85 exposure to blood or body fluids in a manner known to transmit
86 HIV;

87 (vi) testing is ordered by a court of competent jurisdiction
88 within the confines of civil or criminal litigation where the results
89 of an HIV-related test of a party, or a person in the custody or
90 under the legal control of another party, is relevant to the ultimate
91 issue of culpability and/or liability, or where probable cause has
92 been found to issue an indictment against the person to be tested
93 for violation of sections twenty-two, twenty-two A or twenty-three
94 of Chapter two hundred and sixty-five. Any testing so ordered
95 shall be subject to the following conditions:

96 (1) No court of this State shall issue such order unless the court
97 finds that there is a compelling need for such test results which
98 cannot be accommodated by other means. In assessing compelling

99 need, the court shall weigh the need for testing and disclosure of
100 the test results against the privacy interest of the test subject and
101 the public interest which may be harmed by disclosure through
102 deterring future testing or by prompting discrimination.

103 (2) Pleadings pertaining to ordering of an HIV-related test shall
104 substitute a pseudonym for the true name of the subject of the
105 test. The true name shall be communicated confidentially in
106 documents not filed with the court for public inspection or
107 disclosure.

108 (3) Before granting any such order, the court shall provide the
109 individual whose test result is sought with notice and a reasonable
110 opportunity to participate in the proceedings if he or she is not
111 already a party.

112 (4) Court proceedings as to disclosure of test results so ordered
113 shall be conducted in camera unless the subject of the test agrees
114 to a hearing in open court or unless the court determines that a
115 public hearing is necessary to the public interest and the proper
116 administration of justice.

117 (d) Any person on whom an HIV related test was performed
118 pursuant to subsection 2(c) (i), 2(c) (iv) and 2(c) (v) and who did
119 not give informed consent to the test shall be given notice
120 promptly, personally and confidentially that a test sample was
121 taken and that the results of such test may be obtained upon
122 request.

123 (e) At the time of being given the test result, the subject of the
124 test or the subject's legal guardian shall be provided with
125 counseling for coping with the emotional consequences of learning
126 the result, for understanding the interpretation of the test result,
127 for understanding measures for preventing infection to others,
128 and, where appropriate, to urge the voluntary notification of
129 sexual and needle sharing partners of the risk of infection.

130 (f) Notwithstanding any other provision of law, a minor twelve
131 years of age or older may consent or refuse consent to be a subject
132 of HIV related testing and to counseling relevant to the test. The
133 consent or refusal of the minor shall be valid and binding as if
134 the minor had achieved his or her majority, and shall not be
135 voidable, nor subject to later disaffirmance, because of minority.

136 (3) (a) No person may disclose or be compelled to disclose the
137 identity of any person upon whom an HIV related test is

138 performed, or the results of such test in a manner which permits
139 identification of the subject of the test, except to the following
140 persons or under the following circumstances:

141 (i) The subject of the test or the subject's legal guardian.

142 (ii) Any person who secures a legally effective release of test
143 results executed by the subject of the test or the subject's legal
144 guardian.

145 (iii) An authorized agent or employee of a health facility or
146 health care provider if the health facility or health care provider
147 itself is authorized to obtain the test results, the agent or employee
148 provides patient care or handles or processes specimens of body
149 fluids or tissues, and the agent or employee has a medical need
150 to know such information to provide health care to the patient.

151 (iv) Health care providers providing medical care to the subject
152 of the test, when knowledge of the test results is necessary to
153 provide appropriate care or treatment.

154 (v) When disclosure is part of an official report to the
155 department of public health and disclosure is required by
156 regulation of the department.

157 (vi) A health facility or health care provider which procures,
158 processes, distributes or uses: (i) blood, (ii), a human body part
159 from a deceased person donated for a purpose specified under the
160 Uniform Anatomical Gift act; or (iii) semen provided prior to the
161 effective date of this Act for the purpose of artificial insemination.

162 (vii) Health facility staff committees or accreditation or
163 oversight review organizations which are conducting program
164 monitoring, program evaluation or service reviews.

165 (viii) A person allowed access to said record by a court order
166 which is issued in compliance with the provisions of paragraph (vi)
167 of subsection (2) (C) of this section, and where upon the issuance
168 of an order to disclose test results, the court has imposed
169 appropriate safeguards against unauthorized disclosure which
170 specify the persons who may have access to the information, the
171 purposes for which the information shall be used, and appropriate
172 prohibitions on future disclosures.

173 (b) No person to whom the results of an HIV related test have
174 been disclosed pursuant to subparagraph (a) is authorized
175 implicitly or explicitly by such disclosure to redisclose said

176 information except as otherwise would be permitted pursuant to
177 said subparagraph.

178 (c) The provisions in this paragraph shall not interfere with the
179 transmission of information as may be necessary to obtain third-
180 party payment for medical care related to HIV infection or with
181 the documentation of cause of death on death certificates.

182 (4) Any person aggrieved by a violation of this action shall have
183 a right of action in the superior court and may recover for each
184 violation:

185 (a) Against any person who negligently violates a provision of
186 this section, damages of one thousand dollars or actual damages,
187 whichever is greater.

188 (b) Against any person who intentionally or recklessly violates
189 a provision of this section, damages of five thousand dollars or
190 actual damages, whichever is greater.

191 (c) Reasonable attorney fees.

192 (d) Such other relief, including an injunction, as the court may
193 deem appropriate.

194 Action under this subsection is barred unless the action is
195 commenced within three years after the cause of action accrues.
196 A cause of action will accrue when the injured party discovers an
197 unauthorized testing or disclosure under this section.

198 The attorney general may maintain a civil action to enforce this
199 section in which the court may order any relief authorized under
200 this section.

201 Nothing in this Act shall be construed to impose civil liability
202 or criminal sanction for disclosure of an HIV-related test result
203 in accordance with any reporting requirement by the Department
204 of Public Health.

1 SECTION 2. The provisions of this Act are severable. If any
2 part of this shall be declared invalid or unconstitutional, such
3 declaration shall not affect the parts which remain.

