

ENROLLED

COMMITTEE SUBSTITUTE

FOR

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FOR

Senate Bill No. 488

(SENATORS STOLLINGS, FOSTER, HALL, WILLS, SNYDER, KESSLER
(ACTING PRESIDENT), JENKINS, PLYMALE AND MILLER, *original sponsors*)

[Passed March 12, 2011; in effect ninety days from passage.]

AN ACT to repeal §16-3C-7 of the Code of West Virginia, 1931, as amended; and to amend and reenact §16-3C-1, §16-3C-2 and §16-3C-3 of said code, all relating to HIV testing generally; repealing the authority of the Department of Corrections to conduct AIDS-related study; providing for AIDS-related testing and confidentiality of records; providing definitions; providing who may request testing; providing when testing may be mandated; providing for confidentiality of records; providing enforcement mechanism for orders of the Commissioner of the Bureau of Public Health; eliminating requirements for counseling in certain circumstances; eliminating requirement for information regarding HIV and AIDS be provided to persons applying for marriage licenses; and providing when disclosure is permitted.

Be it enacted by the Legislature of West Virginia:

That §16-3C-7 of the Code of West Virginia, 1931, as amended, be repealed; and that §16-3C-1, §16-3C-2 and §16-3C-3 of said code be amended and reenacted, all to read as follows:

**ARTICLE 3C. AIDS-RELATED MEDICAL TESTING AND RECORDS
CONFIDENTIALITY ACT.**

§16-3C-1. Definitions.

1 When used in this article:

2 (a) "AIDS" means acquired immunodeficiency syndrome.

3 (b) "Bureau" means the Bureau for Public Health.

4 (c) "Commissioner" means the commissioner of the Bureau
5 for Public Health.

6 (d) "Convicted" includes pleas of guilty and pleas of nolo
7 contendere accepted by the court having jurisdiction of the
8 criminal prosecution, a finding of guilty following a jury trial
9 or a trial to a court and an adjudicated juvenile offender as
10 defined in sections two and four, article one, chapter forty-
11 nine of this code.

12 (e) "Department" means the State Department of Health
13 and Human Resources.

14 (f) "Funeral director" has the same meaning ascribed to
15 such term in section three, article six, chapter thirty of this
16 code.

17 (g) "Funeral establishment" has the same meaning as-
18 cribed to that term in section three, article six, chapter thirty
19 of this code.

20 (h) "HIV" means the human immunodeficiency virus
21 identified as the causative agent of AIDS.

22 (i) “HIV-related test” means a test for the HIV antibody or
23 antigen or any future valid test approved by the bureau, the
24 federal drug administration or the Centers for Disease
25 Control and Prevention.

26 (j) “Health facility” means a hospital, nursing home,
27 physician’s office, clinic, blood bank, blood center, sperm
28 bank, laboratory or other health care institution.

29 (k) “Health care provider” means any physician, dentist,
30 nurse, paramedic, psychologist or other person providing
31 medical, dental, nursing, psychological or other health care
32 services of any kind.

33 (l) “Health Information Exchange” means the electronic
34 movement of health-related information in accord with law
35 and nationally recognized standards.

36 (m) “High risk behavior” means behavior by a person
37 including, but not limited to: (i) Unprotected sex with a
38 person who is living with HIV; (ii) unprotected sex in
39 exchange for money or drugs; (iii) unprotected sex with
40 multiple partners; (iv) anonymous unprotected sex; (v) or
41 needle sharing; (vi) diagnosis of a sexually transmitted
42 disease; or (vii) unprotected sex or sharing injecting equip-
43 ment in a high HIV prevalence setting or with a person who
44 is living with HIV.

45 (n) “Medical or emergency responders” means paid or
46 volunteer firefighters, law-enforcement officers, emergency
47 medical technicians, paramedics, or other emergency service
48 personnel, providers or entities acting within the usual
49 course of their duties; good samaritans and other nonmedical
50 and nonemergency personnel providing assistance in emer-
51 gencies; funeral directors; health care providers; commis-
52 sioner of the Bureau for Public Health; and all employees
53 thereof and volunteers associated therewith.

54 (o) “Patient” or “test subject” or “subject of the test”
55 means the person upon whom a HIV test is performed, or the

56 person who has legal authority to make health care decisions
57 for the test subject.

58 (p) "Permitted purpose" is a disclosure permitted by the
59 Health Insurance Portability and Accountability Act of 1996
60 as amended, or a disclosure consented to or authorized by a
61 patient or test subject.

62 (q) "Person" includes any natural person, partnership,
63 association, joint venture, trust, public or private corpora-
64 tion or health facility.

65 (r) "Release of test results" means a permitted or autho-
66 rized disclosure of HIV-related test results.

67 (s) "Significant exposure" means:

68 (1) Exposure to blood or body fluids through needlestick,
69 instruments, sharps, surgery or traumatic events; or

70 (2) Exposure of mucous membranes to visible blood or
71 body fluids, to which universal precautions apply according
72 to the national Centers for Disease Control and Prevention,
73 and laboratory specimens that contain HIV (e.g. suspensions
74 of concentrated virus); or

75 (3) Exposure of skin to visible blood or body fluids, when
76 the exposed skin is chapped, abraded or afflicted with
77 dermatitis or the contact is prolonged or involving an
78 extensive area.

79 (t) "Source patient" means any person whose body fluids
80 have been the source of a significant exposure to a medical
81 or emergency responder.

82 (u) "Targeted testing" means performing an HIV-related
83 test for sub-populations at higher risk, typically defined on
84 the basis of behavior, clinical or demographic characteris-
85 tics.

86 (v) "Victim" means the person or persons to whom trans-
87 mission of bodily fluids from the perpetrator of the crimes of
88 sexual abuse, sexual assault, incest or sexual molestation
89 occurred or was likely to have occurred in the commission of
90 such crimes.

§16-3C-2. Testing.

1 (a) HIV-related testing on a voluntary basis should be
2 recommended by any healthcare provider in a health facility
3 as part of a routine screening for treatable conditions and as
4 part of routine prenatal and perinatal care. A physician,
5 dentist, nurse practitioner, nurse midwife, physician assis-
6 tant or the commissioner may also request targeted testing
7 for any of the following:

8 (1) When there is cause to believe that the test could be
9 positive. Persons who engage in high risk behavior should be
10 encouraged to be screened for HIV at least annually;

11 (2) When there is cause to believe that the test could
12 provide information important in the care of the patient; or

13 (3) When there is cause to believe that the results of HIV-
14 testing of samples of blood or body fluids from a source
15 patient could provide information important in the care of
16 medical or emergency responders or other persons identified
17 in regulations proposed by the department for approval by
18 the Legislature in accordance with the provisions of article
19 three, chapter twenty-nine-a of this code: *Provided*, That the
20 source patient whose blood or body fluids is being tested
21 pursuant to this section must have come into contact with a
22 medical or emergency responder or other person in such a
23 way that a significant exposure has occurred;

24 (4) When there is no record of any HIV-related testing
25 during pregnancy and the woman presents for labor and
26 delivery.

27 (b) A patient voluntarily consents to the test as follows:

28 (1) The patient is informed either orally or in writing that
29 HIV-related testing will be performed as part of his or her
30 routine care, that HIV-related testing is voluntary and that
31 the patient may decline HIV-related testing (opt-out); or

32 (2) The patient is informed that the patient's general
33 consent for medical care includes consent for HIV-related
34 testing.

35 (c) A patient refuses to consent to the test if a patient opts-
36 out of HIV-related testing, the patient is informed when the
37 health care provider in the provider's professional opinion
38 believes HIV-related testing is recommended, and that HIV-
39 related testing may be obtained anonymously at a local or
40 county health department.

41 (d) Any person seeking an HIV-related test in a local or
42 county health department or other HIV test setting provided
43 by the commissioner who wishes to remain anonymous has
44 the right to do so, and to be provided written informed
45 consent through use of a coded system with no linking of
46 individual identity to the test request or results.

47 (e) No option to opt-out of HIV-related testing is required
48 and the provisions of subsection (a) and (b) of this section do
49 not apply for the following:

50 (1) A health care provider or health facility performing an
51 HIV-related test on the donor or recipient when the health
52 care provider or health facility procures, processes, distrib-
53 utes or uses a human body part (including tissue and blood
54 or blood products) donated for a purpose specified under the
55 uniform anatomical gift act, or for transplant recipients, or
56 semen provided for the purpose of artificial insemination and
57 such test is necessary to assure medical acceptability of a
58 recipient or such gift or semen for the purposes intended;

59 (2) The performance of an HIV-related test in documented
60 bona fide medical emergencies, as determined by a treating
61 physician taking into account the nature and extent of the

62 exposure to another person, when the subject of the test is
63 unable or unwilling to grant or withhold consent, and the
64 test results are necessary for medical diagnostic purposes to
65 provide appropriate emergency care or treatment to a
66 medical or emergency responder, or any other person who
67 has come into contact with a source patient in such a way
68 that a significant exposure necessitates HIV-testing or to a
69 source patient who is unable to consent in accordance with
70 rules proposed by the department for approval by the
71 Legislature in accordance with article three, chapter twenty-
72 nine-a of this code: *Provided*, That necessary treatment may
73 not be withheld pending HIV test results: *Provided, however*,
74 That all sampling and HIV-testing of samples of blood and
75 body fluids, without the opportunity for the source patient or
76 patient's representative to opt-out of the testing, shall be
77 through the use of a pseudonym and in accordance with rules
78 proposed by the department for approval by the Legislature
79 in accordance with article three, chapter twenty-nine-a of
80 this code; or

81 (3) The performance of an HIV-related test for the purpose
82 of research if the testing is performed in a manner by which
83 the identity of the test subject is not known and may not be
84 retrieved by the researcher.

85 (f) Mandated testing:

86 (1) The performance of any HIV-related testing that is or
87 becomes mandatory by court order or other legal process
88 described herein does not require consent of the subject but
89 will include counseling.

90 (2) The court having jurisdiction of the criminal prosecu-
91 tion shall order that an HIV-related test be performed on any
92 persons charged with any of the following crimes or offenses:

93 (i) Prostitution; or

94 (ii) Sexual abuse, sexual assault, incest or sexual molesta-
95 tion.

96 (3) HIV-related tests performed on persons charged with
97 prostitution, sexual abuse, sexual assault, incest or sexual
98 molestation shall be confidentially administered by a
99 designee of the bureau or the local or county health depart-
100 ment having proper jurisdiction. The commissioner may
101 designate health care providers in regional jail facilities to
102 administer HIV-related tests on such persons if he or she
103 determines it necessary and expedient.

104 (4) When the Commissioner of the Bureau of Public Health
105 knows or has reason to believe, because of medical or
106 epidemiological information, that a person, including, but
107 not limited to, a person such as an IV drug abuser, or a
108 person who may have a sexually transmitted disease, or a
109 person who has sexually molested, abused or assaulted
110 another, has HIV infection and is or may be a danger to the
111 public health, he or she may issue an order to:

112 (i) Require a person to be examined and tested to deter-
113 mine whether the person has HIV infection;

114 (ii) Require a person with HIV infection to report to a
115 qualified physician or health worker for counseling; and

116 (iii) Direct a person with HIV infection to cease and desist
117 from specified conduct which endangers the health of others.

118 (5) If any person violates a cease and desist order issued
119 pursuant to this section and, by virtue of that violation, the
120 person presents a danger to the health of others, the commis-
121 sioner shall apply to the circuit court of Kanawha County to
122 enforce the cease and desist order by imposing any restric-
123 tions upon the person that are necessary to prevent the
124 specific conduct that endangers the health of others.

125 (6) A person convicted of the offenses described in this
126 section shall be required to undergo HIV-related testing and
127 counseling immediately upon conviction and the court
128 having jurisdiction of the criminal prosecution may not
129 release the convicted person from custody and shall revoke

130 any order admitting the defendant to bail until HIV-related
131 testing and counseling have been performed and the result is
132 known. The HIV-related test result obtained from the
133 convicted person is to be transmitted to the court and, after
134 the convicted person is sentenced, made part of the court
135 record. If the convicted person is placed in the custody of the
136 Division of Corrections, the court shall transmit a copy of the
137 convicted person's HIV-related test results to the Division of
138 Corrections. The HIV-related test results shall be closed and
139 confidential and disclosed by the court and the bureau only
140 in accordance with the provisions of section three of this
141 article.

142 (7) The prosecuting attorney shall inform the victim, or
143 parent or guardian of the victim, at the earliest stage of the
144 proceedings of the availability of voluntary HIV-related
145 testing and counseling conducted by the bureau and that his
146 or her best health interest would be served by submitting to
147 HIV-related testing and counseling. HIV-related testing for
148 the victim shall be administered at his or her request on a
149 confidential basis and shall be administered in accordance
150 with the Centers for Disease Control and Prevention guide-
151 lines of the United States Public Health Service in effect at
152 the time of such request. The victim who obtains an HIV-
153 related test shall be provided with pre and post-test counsel-
154 ing regarding the nature, reliability and significance of the
155 HIV-related test and the confidential nature of the test. HIV-
156 related testing and counseling conducted pursuant to this
157 subsection shall be performed by the designee of the commis-
158 sioner of the bureau or by any local or county health depart-
159 ment having proper jurisdiction.

160 (8) If a person receives counseling or is tested under this
161 subsection and is found to be HIV infected and the person is
162 not incarcerated, the person shall be referred by the health
163 care provider performing the counseling or testing for
164 appropriate medical care and support services. The local or
165 county health departments or any other agency under this
166 subsection may not be financially responsible for medical
167 care and support services.

168 (9) The commissioner of the bureau or his or her designees
169 may require an HIV test for the protection of a person who
170 was possibly exposed to HIV infected blood or other body
171 fluids as a result of receiving or rendering emergency
172 medical aid or who possibly received such exposure as a
173 funeral director. Results of such a test of the person causing
174 exposure may be used by the requesting physician for the
175 purpose of determining appropriate therapy, counseling and
176 psychological support for the person rendering emergency
177 medical aid including good Samaritans, as well as for the
178 patient, or individual receiving the emergency medical aid.

179 (10) If an HIV-related test required on persons convicted of
180 prostitution, sexual abuse, sexual assault, incest or sexual
181 molestation results in a negative reaction, upon motion of the
182 state, the court having jurisdiction over the criminal prose-
183 cution may require the subject of the test to submit to further
184 HIV-related tests performed under the direction of the
185 bureau in accordance with the Centers for Disease Control
186 and Prevention guidelines of the United States Public Health
187 Service in effect at the time of the motion of the state.

188 (11) The costs of mandated testing and counseling provided
189 under this subsection and pre and postconviction HIV-
190 related testing and counseling provided the victim under the
191 direction of the bureau pursuant to this subsection shall be
192 paid by the bureau.

193 (12) The court having jurisdiction of the criminal prosecu-
194 tion shall order a person convicted of prostitution, sexual
195 abuse, sexual assault, incest or sexual molestation to pay
196 restitution to the state for the costs of any HIV-related
197 testing and counseling provided the convicted person and the
198 victim, unless the court has determined the convicted person
199 to be indigent.

200 (13) Any funds recovered by the state as a result of an
201 award of restitution under this subsection shall be paid into
202 the State Treasury to the credit of a special revenue fund to
203 be known as the "HIV-testing fund" which is hereby created.

204 The moneys so credited to the fund may be used solely by the
205 bureau for the purposes of facilitating the performance of
206 HIV-related testing and counseling under the provisions of
207 this article.

208 (g) Nothing in this section is applicable to any insurer
209 regulated under chapter thirty-three of this code: *Provided*,
210 That the commissioner of insurance shall develop standards
211 regarding consent for use by insurers which test for the
212 presence of the HIV antibody.

213 (h) Whenever consent of the subject to the performance of
214 HIV-related testing is required under this article, any such
215 consent obtained, whether orally or in writing, shall be
216 considered to be a valid and informed consent if it is given
217 after compliance with the provisions of subsection (b) of this
218 section.

**§16-3C-3. Confidentiality of records; permitted disclosure; no duty
to notify.**

1 (a) No person may disclose or be compelled to disclose the
2 identity of any person upon whom an HIV-related test is
3 performed, or the results of such a test in a manner which
4 permits identification of the subject of the test, except to the
5 following persons:

6 (1) The subject of the test;

7 (2) The victim of the crimes of sexual abuse, sexual assault,
8 incest or sexual molestation at the request of the victim or
9 the victim's legal guardian, or of the parent or legal guardian
10 of the victim if the victim is a minor where disclosure of the
11 HIV-related test results of the convicted sex offender are
12 requested;

13 (3) Any person who secures a specific release of test results
14 executed by the subject of the test;

15 (4) A funeral director or an authorized agent or employee
16 of a health facility or health care provider if the funeral

17 establishment, health facility or health care provider itself is
18 authorized to obtain the test results, the agent or employee
19 provides patient care or handles or processes specimens of
20 body fluids or tissues and the agent or employee has a need
21 to know that information: *Provided*, That the funeral
22 director, agent or employee shall maintain the confidential-
23 ity of this information;

24 (5) Licensed health care providers or appropriate health
25 facility personnel providing care to the subject of the test::
26 *Provided*, That such personnel shall maintain the confidenti-
27 ality of the test results and may redisclose the results only for
28 a permitted purpose or as permitted by law. The entry on a
29 patient's chart of an HIV-related illness by the attending or
30 other treating physician or other health care provider shall
31 not constitute a breach of confidentiality requirements
32 imposed by this article;

33 (6) The Bureau or the Centers for Disease Control and
34 Prevention of the United States Public Health Service in
35 accordance with reporting requirements for HIV and a
36 diagnosed case of AIDS, or a related condition;

37 (7) A health facility or health care provider which pro-
38 cures, processes, distributes or uses: (A) A human body part
39 from a deceased person with respect to medical information
40 regarding that person; (B) semen provided prior to the
41 effective date of this article for the purpose of artificial
42 insemination; (C) blood or blood products for transfusion or
43 injection; or (D) human body parts for transplant with
44 respect to medical information regarding the donor or
45 recipient;

46 (8) Health facility staff committees or accreditation or
47 oversight review organizations which are conducting
48 program monitoring, program evaluation or service reviews
49 so long as any identity remains anonymous;

50 (9) Claims management personnel employed by or associ-
51 ated with an insurer, health care service contractor, health

52 maintenance organization, self-funded health plan, state-
53 administered health care claims payer or any other payer of
54 health care claims, where the disclosure is to be used solely
55 for the prompt and accurate evaluation and payment of
56 medical or related claims. Information released under this
57 subsection is confidential and may not be released or
58 available to persons who are not involved in handling or
59 determining medical claims payment;

60 (10) Persons, health care providers or health facilities
61 engaging in or providing for the exchange of protected
62 health information among the same in order to provide
63 health care services to the patient, including, but not limited
64 to, disclosure through a health information exchange,
65 disclosure and exchange within health care facilities, and
66 disclosure for a permitted purpose, including disclosure to a
67 legally authorized public health authority; and

68 (11) A person allowed access to the record by a court order
69 that is issued in compliance with the following provisions:

70 (i) No court of this state may issue the order unless the
71 court finds that the person seeking the test results has
72 demonstrated a compelling need for the test results which
73 cannot be accommodated by other means. In assessing
74 compelling need, the court shall weigh the need for disclo-
75 sure against the privacy interest of the test subject and the
76 public interest;

77 (ii) Pleadings pertaining to disclosure of test results shall
78 substitute a pseudonym for the true name of the test subject
79 of the test. The disclosure to the parties of the test subject's
80 true name shall be communicated confidentially in docu-
81 ments not filed with the court;

82 (iii) Before granting any such order, the court shall, if
83 possible, provide the individual whose test result is in
84 question with notice and a reasonable opportunity to
85 participate in the proceedings if he or she is not already a
86 party;

87 (iv) Court proceedings as to disclosure of test results shall
88 be conducted in camera unless the subject of the test agrees
89 to a hearing in open court or unless the court determines that
90 the public hearing is necessary to the public interest and the
91 proper administration of justice; and

92 (v) Upon the issuance of an order to disclose test results,
93 the court shall impose appropriate safeguards against
94 unauthorized disclosure, which shall specify the person who
95 may have access to the information, the purposes for which
96 the information may be used and appropriate prohibitions on
97 future disclosure.

98 (b) No person to whom the results of an HIV-related test
99 have been disclosed pursuant to subsection (a) of this section
100 may disclose the test results to another person except as
101 authorized by said subsection.

102 (c) Notwithstanding the provisions set forth in subsections
103 (a) through (c) of this section, the use of HIV test results to
104 inform individuals named or identified as spouses, sex
105 partners or contacts, or persons who have shared needles
106 that they may be at risk of having acquired the HIV infection
107 as a result of possible exchange of body fluids, is permitted:
108 *Provided*, That the Bureau shall make a good faith effort to
109 inform spouses, sex partners, contacts or persons who have
110 shared needles that they may be at risk of having acquired
111 the HIV infection as a result of possible exchange of body
112 fluids: *Provided, however*, That the Bureau has no notifica-
113 tion obligations when the Bureau determines that there has
114 been no likely exposure of these persons to HIV from the
115 infected test subject within the ten-year period immediately
116 prior to the diagnosis of the infection. The name or identity
117 of the person whose HIV test result was positive is to remain
118 confidential. Spouses, contacts, or sex partners or persons
119 who have shared needles may be tested anonymously at the
120 State Bureau for public Health's designated test sites, or at
121 their own expense by a health care provider or an approved
122 laboratory of their choice confidentially should the test be
123 positive. A cause of action may not arise against the Bureau,

124 a physician or other health care provider from any such
125 notification.

126 (d) There is no duty on the part of the physician or health
127 care provider to notify the spouse or other sexual partner of,
128 or persons who have shared needles with, an infected
129 individual of their HIV infection and a cause of action may
130 not arise from any failure to make such notification. How-
131 ever, if contact is not made, the Bureau will be so notified.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....
Chairman Senate Committee

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Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

.....
Clerk of the Senate

.....
Clerk of the House of Delegates

.....
Acting President of the Senate

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Speaker of the House of Delegates

The within this the
Day of, 2011.

.....
Governor