

## RIGHT TO WORK - LEGAL ISSUES OF DISCRIMINATION AND STIGMA AT WORKPLACES OF THE PEOPLE AFFECTED WITH HIV/AIDS AS DEALT WITH BY THE ILO RECOMMENDATION NO.200.<sup>1</sup>

### Abstract

Decades after the first clinical evidence of AIDS was reported, it has become the most devastating disease human kind has ever faced. HIV/AIDS is the fourth biggest cause of death worldwide. HIV and AIDS affects economic growth by reducing the availability of human capital.

#### **Impact of hiv/aids on the labour force-ilo report**

The severe impact of HIV/AIDS is manifestly felt with all its effects on the labour force in the Private sector,Public sctor,Agriculture and the Informal economy.

Discrimination against people living with HIV/AIDS('PLHIV') in employment settings remain a major source of HIV-related discrimination and include mandatory testing, dismissal on the basis of HIV status, refusal of promotion or health insurance benefits, and harassment. Some 41 countries have included HIV in their Decent Work Country Programmes.<sup>2</sup> However, much more needs to be done to ensure that HIV in the workplace policies and programmes are rolled out at a necessary scale and that people living with HIV have access to redress mechanisms in cases of discrimination in the workplace.The following paper examines the legal issues of discrimination and stigma at workplaces of people affected with HIV/AIDS and the same thoroughly examines the same as dealt with by the recommendations of ILO vide its

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<sup>2</sup> GB.306/LILS/5, General status report on ILO action concerning discrimination in employment and occupation, 306th Session of the Governing Body International Labour Office, November 2009, Committee on Legal Issues and International Labour Standards.

Recommendation No.200 to remove the same.

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## **Introduction**

HIV/AIDS remains one of the world's most significant public health challenges, particularly in low- and middle-income countries. "HIV/AIDS", are the scariest words in our present day dictionary that makes us turn the page and look away. Decades after the first clinical evidence of AIDS was reported, it has become the most devastating disease human kind has ever faced. HIV/AIDS is the fourth biggest cause of death worldwide. More than half of new infections strike people aged below 25; girls are hit harder than boys. 14 million children are now orphans because of the disease. HIV/AIDS reverses years of development in some countries, especially as it mostly affects the younger generation - our future.

## **What is HIV and AIDS?**

HIV is the human immunodeficiency virus that causes AIDS. A member of a group of viruses called retroviruses, HIV infects human cells and uses the energy and nutrients provided by those cells to grow and reproduce.

AIDS (acquired immunodeficiency syndrome) is a disease in which the body's immune system breaks down and is unable to fight off certain infections, known as "opportunistic infections," and other illnesses that take advantage of a weakened immune system.

When a person is infected with HIV, the virus enters the body and lives and multiplies primarily in the white blood cells. These are the immune cells that normally protect us from disease.

The virus and disease are often referred to together as HIV/AIDS. The disease is a major health problem in many parts of the world, and is considered a pandemic disease outbreak that is not only present over a large area but is actively spreading.

### **Economic impact of HIV/AIDS**

HIV and AIDS affects economic growth by reducing the availability of human capital. Without proper nutrition, health care and medicine that is available in developed countries, large numbers of people are falling victim to AIDS. They will not only be unable to work, but will also require significant medical care. The forecast is that this will probably cause a collapse of economies and societies in countries with a significant AIDS population. Some forms of serious discrimination can arise out of these situations and can include: being expelled from school, being denied housing, having to pay extra rent, and job loss. This article proposes to examine and present the discrimination arising at the place of work for People Living With HIV.(PLHIV).

### **Impact of hiv/aids on the labour force-ilo report**

A majority of the labour force comprising of working age men and women who are HIV positive, eventually become ill with symptomatic HIV related diseases and in the absence of treatment resultantly become unable to work. This impact of HIV/AIDS is manifestly felt with all its effects on the labour force in the Private sector, Public sector, Agriculture and the Informal economy.

The challenge for national policy is to formulate policies that are enabling and supportive to the masses of labour with specific focus on the legal framework, integrating development strategies and reduction of poverty.

The response to the HIV/AIDS epidemic in the world of work is manifold. The ILO established its Programme in 2001 and drafted a Code of Practice the same year to guide response to the epidemic as a workplace issue. Several countries have drafted enlightened legislation in the form of revised or new laws that can play an important role in mitigating the impact of HIV/AIDS in the workplace and protecting the rights of persons who are living with HIV/AIDS.<sup>3</sup> According to ILO estimates, nearly 36.5 million persons worldwide who are engaged in some form of productive activity are HIV positive.<sup>4</sup> HIV/AIDS destroys human capital built up over years and weakens the capacity of workers to produce goods and services for the country.<sup>5</sup>

### **What is discrimination ? How does it affect the people living with AIDS ?**

Discrimination against people living with HIV/AIDS (PLHIV) is the experience of prejudice against PLHIV which falls within the purview of the law. Discrimination is one manifestation of stigma. Stigmatizing attitudes and behaviors may fall under the rubric of discrimination depending on the legislation of a particular country.

HIV/AIDS stigma exists around the world in a variety of ways, including ostracism, rejection, discrimination and avoidance of HIV infected people; compulsory HIV testing without prior consent or protection of confidentiality; violence against HIV infected individuals or people who are perceived to be infected with HIV; the quarantine of HIV infected individuals and, in some cases, the loss of property rights when a spouse dies. Stigma-related violence or the fear of violence prevents many people from seeking HIV testing, returning for their results, or securing treatment, possibly turning what could be a manageable chronic illness into a death sentence and perpetuating the spread of HIV.

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<sup>3</sup> ILO, 2004 HIV/AIDS and Work: Global estimates, impact and response.

<sup>4</sup> Ibid, pg.4

<sup>5</sup> Ibid, pg.15

HIV-related discrimination is grounded in the stigma attached to people living with HIV and marginalized communities who are most at risk of HIV. What is discrimination?<sup>6</sup>

HIV-related discrimination refers to the unfair and unjust treatment (act or omission) of an individual based on his or her real or perceived HIV status. Though HIV-related stigma often leads to discrimination, it is important to note that even if a person feels stigma towards another, s/he can decide to not to act in a way that is unfair or discriminatory. Conversely, a person may discriminate against another without personally holding stigmatizing beliefs, for example, where discrimination is mandated by law.

Discrimination in the context of HIV also includes unfair treatment of key affected persons. Discrimination is a human rights violation and is prohibited by international human rights law and most national constitutions.

In 2010, almost thirty years into the HIV epidemic, HIV-related stigma and discrimination remained highly prevalent around the globe. In the Declaration of Commitment on HIV/AIDS (2001), governments throughout the world made commitments to reduce stigma and discrimination against people living with HIV and groups vulnerable to HIV infection. In 2005-2006, in country and regional consultations on universal access to HIV prevention, treatment, care and support, stakeholders reported that stigma and discrimination against people living with HIV were major barriers to universal access and undermined the effectiveness of national

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<sup>6</sup> Adapted from UNAIDS, 2005. HIV-related Stigma, Discrimination and Human Rights Violations, Case studies of successful programmes and UNAIDS, 2007. Reducing HIV Stigma and Discrimination: a critical part of national AIDS programmes, A resource for national stakeholders in the HIV response.

responses to HIV. In the Political Declaration on HIV/AIDS (2006), in which governments committed to scaling up of programmes to achieve universal access to HIV prevention, treatment, care and support, governments again recognized the harmful effects of stigma and discrimination and made major commitments to reduce them. However, despite the recognition of the pervasiveness of stigma and discrimination and their harmful impact on HIV responses, the reduction of stigma and discrimination has not been given the political commitment, resources and programmatic effort that are required to make an impact.

**UNAIDS**, as a joint UN programme, has a mandate based on the Charter of the United Nations (1945) to promote and encourage respect for human rights and for fundamental freedoms for all. Based on this mandate, UNAIDS has an obligation to support countries to reduce HIV-related stigma and discrimination. UNAIDS also has a mandate to support governments and civil society to achieve universal access and the most effective national responses to HIV – both of which are threatened by stigma and discrimination. In the Joint Action for Results, UNAIDS Outcome Framework, 2009-2011, UNAIDS set out ten priority action areas<sup>7</sup> which have been selected because their realization will contribute to the achievement of universal access and related Millennium Development Goals. Reducing stigma and discrimination is essential for achieving successful outcomes within all the priority areas, but among them, one – “We can remove punitive laws, policies, practices, stigma and discrimination that block effective responses to AIDS” – reinforces the need for UNAIDS to focus on reducing stigma and discrimination and creating an enabling

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<sup>7</sup> UNAIDS/PCB(26)/10.3 3 May 2010 ; 26th Meeting of the UNAIDS Programme Coordinating Board Geneva, Switzerland 22-24 June 2010 Non-discrimination in HIV responses;

legal environment in which the law protects from discrimination, law enforcement practices are human rights based, and individuals affected by HIV have access to justice.<sup>8</sup>

**Workplaces**□: Employment settings remain a major source of HIV-related discrimination and include mandatory testing, dismissal on the basis of HIV status, refusal of promotion or health insurance benefits, and harassment. Some 41 countries have included HIV in their Decent Work Country Programmes.<sup>9</sup> However, much more needs to be done to ensure that HIV in the workplace policies and programmes are rolled out at a necessary scale and that people living with HIV have access to redress mechanisms in cases of discrimination in the workplace.

#### **Promoting non-discrimination in the workplace:**

In 2001 governments, employers and workers agreed on the groundbreaking Code of Practice on HIV/AIDS and the World of Work. The Code of Practice has been translated into 58 languages, and ILO, together with other partners, continues to provide technical assistance to ILO constituencies in the form of legislative and policy advice and training and capacity building for a range of target groups in order to translate the Code into practice. For example, a new training course on “HIV/AIDS and the World of Work” took place at the ILO International Training Centre in Turin in September 2009, and a series of workshops for judges on non-discrimination and HIV were carried out in West Africa. In 2005, UNESCO joined ILO to develop education sector workplace policies to complement the Code of Practice. This

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<sup>8</sup> *ibid.*

<sup>9</sup> GB.306/LILS/5, General status report on ILO action concerning discrimination in employment and occupation, 306th Session of the Governing Body International Labour Office, November 2009, Committee on Legal Issues and International Labour Standards

initiative has been implemented at regional level in the Caribbean and Southern Africa, each resulting in: (1) a workplace policy on HIV and AIDS for the education sector adapted and specific to each region; (2) implementation guidelines; and (3) action plans/strategy outlines for each country participating in the development of the regional policy.<sup>10</sup>

The Code of Practice has now been complemented by a Recommendation on HIV/AIDS and the World of Work, adopted in June 2010 by The General Conference of the ILO in its 99<sup>th</sup> Session. Recommendations provide guidance for States and for employers' and workers' organizations, among others, and form a basis for ILO monitoring and assistance measures. The Governing Body requires periodic reports from member States on the measures they are taking to implement Recommendations.

**Some salient articles in the Recommendation No.2 concerning HIV and AIDS and The World Of Work:**<sup>11</sup>

**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;

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<sup>10</sup> UNAIDS/PCB (26)/10.3 3 May 2010; 26th Meeting of the UNAIDS Programme Coordinating Board Geneva, Switzerland 22-24 June 2010 Non-discrimination in HIV responses; pg.19.

<sup>11</sup> Recommendation concerning HIV and AIDS and the world of work, 2010 (No. 200) International Labour Office, Geneva, 2010, www.ilo.org.

- . (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.

**Preface**<sup>12</sup> - The Recommendation reflects the need to strengthen workplace prevention efforts and to facilitate access to treatment for persons living with or affected by HIV and AIDS. It calls for the design and implementation of national tripartite workplace policies and programmes on HIV and AIDS to be integrated into overall national policies and strategies on HIV and AIDS and on development and social protection. It calls for respect for the fundamental human rights of all workers, including observance of the principle of gender equality and the right to be free from compulsory testing and disclosure of HIV status, while encouraging everyone to undertake voluntary confidential HIV counseling and testing as early as possible. The Recommendation also invites member States to implement its provisions through amendment or adoption of national legislation where appropriate.

Where workers are free from stigma and discrimination on the basis of real or perceived HIV status, they and their dependants benefit from improved access to HIV education, information, treatment, care and support at the national and workplace levels. Such access helps them to lead long and productive lives and to contribute to the national economy and the community.

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<sup>12</sup> *ibid*, preface.

Based on the Recommendation and its accompanying Resolution, the ILO is committed to strengthening its action to support the implementation of international and national commitments to protect the rights and dignity of workers and of all people living with or affected by HIV and AIDS.

**Part III of the Recommendation lays down certain general principles, which may be reproduced as below-**

3. The following general principles should apply to all action involved in the National response to HIV and AIDS in the world of work:<sup>13</sup>

- . (a) The response to HIV and AIDS should be recognized as contributing to the realization of human rights and fundamental freedoms and gender equality for all, including workers, their families and their dependants;
- . (b) HIV and AIDS should be recognized and treated as a workplace issue, which should be included among the essential elements of the national, regional and international response to the pandemic with full participation of organizations of employers and workers;
- . (c) There should be no discrimination against or stigmatization of workers, in particular jobseekers and job applicants, on the grounds of real or perceived HIV status or the fact that they belong to regions of the world or segments of the population perceived to be at greater risk of or more vulnerable to HIV infection;
- . (d) Prevention of all means of HIV transmission should be a fundamental priority;

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<sup>13</sup> Ibid.

- . (e) Workers, their families and their dependants should have access to and benefit from prevention, treatment, care and support in relation to HIV and AIDS, and
  - the workplace should play a role in facilitating access to these services;
- . (f) Workers' participation and engagement in the design, implementation and evaluation of national and workplace programmes should be recognized and reinforced;
- . (g) Workers should benefit from programmes to prevent specific risks of occupational transmission of HIV and related transmissible diseases, such as tuberculosis;
- . (h) Workers, their families and their dependants should enjoy protection of their privacy, including confidentiality related to HIV and AIDS, in particular with regard to their own HIV status;
- . (i) No workers should be required to undertake an HIV test or disclose their HIV status;
- . (j) Measures to address HIV and AIDS in the world of work should be part of national development policies and programmes, including those related to labour, education, social protection and health; and
- . (k) The protection of workers in occupations that are particularly exposed to the risk of HIV transmission.

**Part IV of the Recommendation** enjoins upon the Member States to adopt such National policies and programmes on HIV and AIDS in the world of work so as to provide safety and health, taking into account the ILO Code of practice on HIV/AIDS

of 2001 as to the following issues-

- i) The hiv response to be recognized as contributing to the realization of human rights, fundamental freedoms and gender equality for all;
- ii) Non- discrimination or stigmatization of workers on grounds of real or perceived HIV status.
- iii) Making prevention of all means of transmission of HIV a fundamental priority.
- iv) Facilitating access to HIV prevention, treatment, care and support at workplaces.
- v) Allowing workers to participate in the design, implementation and evaluation of HIV programmes.
- vi) Addressing specific risks of occupational transmission of HIV, Tuberculosis and related diseases in the efforts for prevention.
- vii) Ensuring confidentiality and Privacy with regard to HIV status.
- viii) No mandate as to HIV testing or screening for employment purpose.
- ix) Making the workplace responses part of national policies and programmes, including those related to labour, education, social protection and health.

### **Giving effect to the recommendation**

#### **Governments to take action to –**

- i) Develop and implement national policies and programmes on HIV and AIDS

and the world of work, in collaboration with employer's and worker's organizations and persons living with HIV.

- ii) Collaborate with the national AIDS authorities to integrate workplace policies and programmes into national AIDS strategies.
- iii) Integrate HIV into other relevant national schemes.
- iv) Train labour inspectors, judges and magistrates and set up mechanisms to monitor the policies.

#### **Actions to be taken by the Employers-**

- i) Develop workplace policies and programmes for workers and their families, including contractual workers;
- ii) Facilitate access to HIV prevention, treatment, care, support through their own mechanisms or through relevant partnerships;
- iii) Develop HIV programmes for supply chains and set up public-private partnerships (PPP) to expand HIV programmes.
- iv) Promote HIV education and training at all levels.

#### **Actions that could be taken by Trade Unions-**

- i) Collaborate with governments and employers in the development of workplace policies and programmes at national, sectoral and enterprise levels;
- ii) Promote awareness of HIV and AIDS through education and training among their affiliates;

- iii) Participate in HIV workplace committees and play an active role in the implementation of policies and programmes;
- iv) Engage with affiliates and sectoral unions to expand the programme and to cover workers in the informal economy.

### **Observations-**

The recommendations therefore, constitute a focused commitment of the ILO and the constituent member states and the representatives of workers and employers of collaborating closely with the organizations of people living with HIV and partner International Organizations especially the UNAIDS and thereby tap into the meaningful and the wholesome contribution that the world of work can contribute in ensuring universal access to prevention, treatment, care and support to the people living with HIV/AIDS. The ILO is thus working in earnest with regard to HIV/AIDS in collaboration with the other cosponsors of UNAIDS to respond to the HIV pandemic.

### **Conclusion**

HIV/ and AIDS is not a health problem. Both have had a significant impact on workers, their families, work performance and national economies. Over the last decade, great strides have been made in terms of commitments and efforts to reduce HIV-related stigma and discrimination. The foundation for an expanded and effective response to HIV-related stigma and discrimination is now in place: (a) knowledge of the causes, manifestations and consequences of stigma and discrimination; (b) knowledge and tools on how to measure and reduce them; (c) stigma reduction training materials and information, education and communication materials; (d)

networks of people living with HIV and other stigmatized groups responding to stigma and discrimination in various ways and claiming their rights; (e) practitioners implementing promising small scale projects to reduce stigma and discrimination; and (f) an agenda for legal reform to establish better protection from discrimination and to remove punitive laws, policies and practices.<sup>14</sup>

HIV has not only led to loss of life and livelihood for millions across the globe, but its cruel tentacles have squeezed the life out of mainly men and women of working ages. This is compounded by the stigma and discrimination persistently practiced on the basis of the HIV status of these workers leading to basic human rights violations at the workplace. The Recommendation concerning HIV and AIDS and the World of Work, 2010 (No.200) was adopted by Governments, Employers' and Workers' Organizations in remarkable spirit of consensus seeking during the International Labour Conference in June 2010.

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<sup>14</sup> UNAIDS/PCB (26)/10.3 3 May 2010; 26th Meeting of the UNAIDS Programme Coordinating Board Geneva, Switzerland 22-24 June 2010 Non-discrimination in HIV responses; pg.22.

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