DISCRIMINATION AGAINST PEOPLE LIVING WITH HIV

WORKING IN HEALTHCARE SETTINGS

A comparative 6-country report
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ViiV Healthcare

GILEAD

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LIST OF ABBREVIATIONS

AAE	AIDS Action Europe
AIDS	Acquired Immune Deficiency Syndrome
ECHR	The Convention for the Protection of Human Rights and Fundamenal Freedoms
ECtHR	European Court of Human Rights
EHLF	The European HIV Legal Forum
EPP	Exposure Prone Procedures
EU	European Union
HIV	Human immunodeficiency virus
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
MSM	Men who have sex with men
PLHIV	People living with HIV
PID	People who inject drugs
PrEP	Pre-exposure prophylaxis
UN	United Nations
UDHR	Universal Declaration on Human Rights
U=U	Undetectable = Untransmittable
WHO	World Health Organization

EHLF PARTNERS

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BACKGROUND

The Steering Committee of AIDS Action Europe identified tackling stigma and discrimination as a core thematic area that the network should address and work on in the 2018-2021 strategic period. As long as stigma and discrimination are present in the society, both the global and local initiatives will continue to fail to meet the objectives of reducing new infections, increasing voluntary counselling and testing, having better linkages to care, and increasing the number of PLHIV whose viral load is suppressed.

As such, tackling stigma and discrimination stands in the centre of all AAE's activities. Its attention is dedicated also to the topic of **PLHIV working in healthcare settings as possible discrimination may seriously harm the right of PLHIV to fair and just employment.**

Subsequently, **HIV-related stigma** refers to the negative beliefs, feelings and attitudes towards PLHIV, groups associated with PLHIV and other key populations at higher risk of HIV infection (e.g. people who inject drugs, sex workers, MSM and transgender people). It is the prejudice that comes with labelling an individual as part of the HIV+ community. **HIV-related discrimination** refers to the unfair and unjust treatment of an individual based on their real or perceived HIV+ status. HIV-related discrimination is usually based on stigmatising attitudes and beliefs about populations. While stigma refers to internal beliefs and attitudes, discrimination presents itself externally in one's behaviour.

INTRODUCTION

The mission of **AIDS Action Europe's European HIV Legal Forum** is to develop effective means of improving access to HIV prevention, counselling and testing, treatment, care, and support for all those who have limited access to HIV services due to legal obstacles, through the united efforts of legal and policy experts with the aim of bringing into effect a rights-based approach to health as adopted by the European Commission. In 2012, following growing interest within the AAE Steering Committee and the broader AAE network for mutual support and joint action on legal issues related to HIV, AAE developed the first steps towards the EHLF.

The EHLF's interest applies also to access to employment and to ensuring just and fair conditions of work for PLHIV, including those working in health care. Hence, for this year's report, the EHLF chose **the issue of treatment of PLHIV working in health care, applying for a job in the health sector, and studying medicine or related fields.**

Worldwide, the field of employment is one of those where PLHIV often face serious discrimination. Harassment, discriminatory dismissals, or illegitimate extra requirements or conditions are unfortunately common experience.[1] This even intensifies in health care sector. PLHIV working there keep facing strong stigma and variety of prejudices. The misconceptions strengthen up when it comes to PLHIV conducting procedures with risk of exposure. Nevertheless, the myths tend to apply to the whole spectrum of medical profession irrespective of any real or tangible risk of hypothetical contagion.

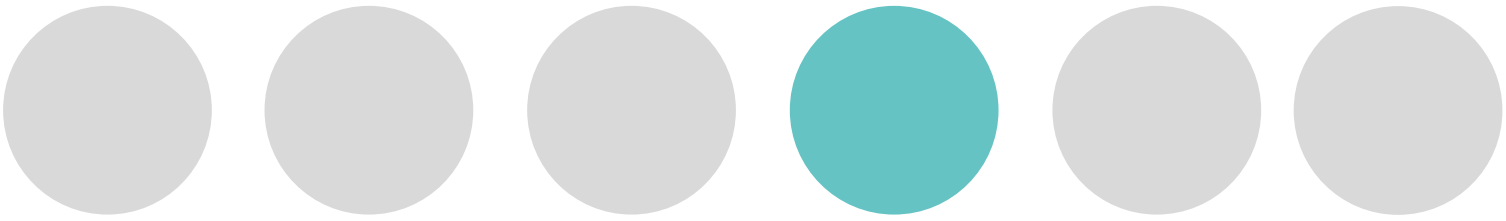
Yet, the data prove that the risk of infection in medical setting is completely rare and negligible.[2] Globally, there was only a handful of cases of **transmission from health care workers to patients registered.[3] Thus, measures, recommendations or regulations** that result in the disclosure of HIV infection are, therefore, of no benefit to patients, but **carry a high risk of discrimination for PLHIV** who work in the healthcare sector. In any case, the occupational health services by the employer play significant role when it comes to employing PLHIV in health care.

1 UN. Labour, HIV and the Workplace: Working to Get the Job Done (2022). Available at: https://www.un.org/en/chronicle/article/labour-hiv-and-workplace-working-get-job-done.

2 Centers for Disease Control and Prevention of the United States. Occupational HIV Transmission and Prevention among Health Care Workers (2015). Available at: https://www.cdc.gov/hiv/pdf/workplace/cdc-hiv-healthcareworkers.pdf.

3 The Association for the Control of Viral Diseases (DVV) and the Society for Virology. Prävention der nosokomialen Übertragung von humanem Immunschwächevirus (HIV) durch HIV-positive Mitarbeiterinnen und Mitarbeiter im Gesundheitswesen. 2012, available at: https://edoc.rki.de/bitstream/handle/176904/1471/23UOZT6sKnns.pdf?sequence=1&isAllowed=y.

Hence, the objective of this survey is to collect legal information on and capture cases of discrimination in the workplace against PLHIV working in healthcare settings in six European countries (Czech Republic, Finland, Germany, Italy, Spain, and the United Kingdom). The report introduces the international and European legal framework and case law concerning employment of PLHIV in health care sector, and, subsequently, country profiles of selected states. After a comparative analysis of all specific national contexts, the report offers a set of main findings concerning similarities and differences among the states. Finally, it concludes with a list of recommendations which could help to support national and regional advocacy efforts to review and reform discriminative legislation and policies, to improve practices, and to reduce discrimination against PLHIV in the workplace.



METHODOLOGY

This study covers six EU countries: Czech Republic, Finland, Germany, Italy, Spain, and the United Kingdom. These countries were chosen because they are considered representative of the epidemiological, political, geographical, and economic diversity of Europe.

Firstly, **data and information were collected from EHLF partners** from selected countries. These served for the creation of individual national profiles. The partners from each country were chosen based on their previous and current work on legal issues in the context of discrimination in healthcare settings from the AAE membership. The information was provided by them via a standardised questionnaire and is based on national information publicly available or requested from different relevant institutions, reflecting the state of affairs during the data collection of spring/summer 2022. The questionnaire is included in Annex 1 and contained the information about the legal regulation, good and poor practices, or case studies.

Secondly, the author of the report conducted a **comparative analysis** of the information concerning selected countries. Primarily, several factors and pieces of information were identified as **the most suitable indicators with significant probative value** concerning the topic. These indicators were put into an Excel table and relevant information from each country profile's section was marked. Finally, this table served as a **basis for formulation of main findings and recommendations**. The comparative table is included in the Annex 2 of this report.

Thirdly, desk research diving into relevant international and EU regulation, policies, and case law **was undertaken.**

MAIN FINDINGS

All six investigated countries vary when it comes to regulations and limitations for PLHIV to work in health care. The comparative analysis of the legal framework of these states brought several principal findings, which follow:

1. Anti-discrimination legislation

Overall, it can be concluded that there is legal basis prohibiting discrimination of PLHIV working in health care, however, there is a lack of **HIV-specific legal framework.** In all the six countries, there are specific constitutional provisions that ensure protection against discrimination of PLHIV as individuals with disability. All states dispose with relevant regulation on primary level. Only in Italy, the applicable regulation is HIV-specific. Protection is ensured mostly and typically by anti-discrimination regulation or labour laws. When it comes to secondary legislation, only Spain and Italy implemented relevant provisions, in both cases HIV-specific. On the contrary, HIV-specific soft law regulation is more common as all countries except Finland and Italy have some.

Thus, accordingly, it can be argued that **the lower level of legislation, the bigger possibility of it being HIV-specific.**

Furthermore, certain **provisions that may have possibly discriminatory character towards PLHIV working in health care were reported.** That applies on the primary legislation (Germany), secondary legislation (Italy), and most often on the level of soft law (Germany, Spain). Details are included in relevant country profile.

2. Prohibitions and limitations for PLHIV to work in health care

Generally, it can be concluded that the typical process of employment starts with the visit of (and a medical check-up by) occupational physician. PLHIV should reveal all their medical information, after which the doctor decides on their fitness for the job. Overall, if PLHIV are not about to conduct EPPs, no further requirements apply.

However, the situation changes when it comes to **PLHIV conducting EPPs** (especially surgeons, anaesthetics). In all countries except Finland, there are **certain restrictions or limitation arising** for such PLHIV, at least minor ones. Specific regulations and approaches will be introduced in individual chapters, but typical measures are

requirements of usage of extra protective material (e. g. Czech Republic, Germany), regular mandatory testing concerning the viral load (e. g. UK, Germany, Italy), inability to perform certain procedure if the viral load temporarily increases (e. g. Germany, Spain, Italy), periodic evaluation of the worker possibly recommending them modifications or limitations in their work practices (e. g. Spain).

3. Obligation of PLHIV working in health care to disclose their HIV status

a) Towards the employer

In **none of the countries, obligation to disclose one's status directly to the employer exists.** Generally, the employer is only entitled to know the conclusion of the occupational physician concerning the person's fitness for the job. It is presumed that PLHIV will only share this information with the occupational physician, who should keep very **strict confidentiality** and protect this data strongly.

b) Towards patients

In none of the examined countries, there is **any obligation to share one's HIV status with patients.** In Italy, the same applies, unless an accident occurs and the patient may have been exposed to a risk.

4. Mandatory testing

Overall, **no country has explicit legal obligation for PLHIV to undertake mandatory tests** (with the exception of certain specific situations like pregnancy, criminal prosecution etc.). This includes HIV-testing and also testing of the viral load. However, as already the previous finding indicated, the practice differs. It was reported that, in practice, PLHIV do not have to be regularly tested (aside from the checks from the occupational physician) only in the Czech Republic and Finland.

In Germany, an HIV test may be offered, it is not compulsory, however, its refusal might **lead to the refusal of employment.** Furthermore, German PLHIV conducting EPPs have to be **regularly checked on their viral load.**

In Italy, the testing of HIV status is not mandatory, nevertheless, it is known that **many Italian hospitals require the healthcare staff to undergo the HIV test annually** and t**hey have to sign the informed consent** before taking the test. Some hospitals oblige like this all of their personnel irrespective of whether a person conducts EPPs.

In the UK, **anyone wanting to undertake EPPs has to test for HIV**, and an eventual positivity is recorded on a **national register**. Simultaneously, people performing EPPs must have **quarterly viral load tests** to indicate that their HIV is suppressed.

In Spain, similarly, the test is **not mandatory, yet, the health personnel may not refuse serology when it comes to HIV**. This approach does not differentiate between people who conduct EPPs and who do not.

5. Situation of students living with HIV

Concerning PLHIV studying medicine or related fields, in **no country, there are legal limitations** to their access to studies. However, there were some **challenges in practice** reported: in Germany, there were registered cases when students were administered HIV tests and faced consequences if they refused it; in Spain, resident medical interns specialising on surgery **do have to reveal their serological status**; in the UK, **medical and dental students are subject to the same rules as other healthcare workers**.

6. Situation of non-medical personnel living with HIV

In none of the countries, non-medical personnel living with HIV faces **any particular restrictions or limitation**. Yet, in practice of some countries, they may face **similar requirements as health care workers** (e. g. indiscriminate mandatory testing in Italy, requirement of a hospital to undertake HIV test for all personnel when hiring in Germany).

7. Health care employer's obligations

Employers in five countries (with the exception of Italy) are **legally bound to react to discrimination and to counteract it**. The same obligation is less common for employee representatives: they are similarly obliged only in half of the countries (Finland, Germany, Spain). Furthermore, obligations concerning occupational safety and providing of occupational medical care to employees arise in all six states.

8. Difference between private and public sector

Generally, there i**s not much difference in rights and obligations in the private and public sector.** Only in the UK and Spain, slight nuances have been reported.

9. Remedies against discrimination

Positively enough, all countries offer **variety of legal instruments to remedy discrimination** of PLHIV in health care. All countries indicated some version of complaint procedures available to PLHIV who become victims of discrimination in healthcare workplace. Subsequently, victims in the Czech Republic, Finland and Italy may turn to local or regional authorities. Aid provided on a national level is provided in four countries (Czech Republic, Finland, Germany, UK) in a variety of forms. On this higher national level, the Ministry of Labour may be directly approach only in Spain. In all countries, help of other authorities or entities is available, this applies particularly to organisations working with victims of discrimination. In all states, victims may initiate legal intervention against discrimination. Finally, in Spain, possible discrimination may constitute a criminal offence.

RECOMMENDATIONS

This report provides an overview of the situation regarding discrimination of PLHIV working in healthcare settings in six EU countries. The information provided suggests that HIV-related discrimination of workers in the healthcare sector is not unusual in majority of the countries.

The previous chapter introduced the main findings and issues detected in the legal framework and also in practice of selected states. To sum up, in the majority of countries PLHIV wanting to work in health sector face limitations, restrictions. This affects all medical professions, but particularly surgeons or anaesthetists performing EPPs. Stigma and judgmental attitudes are unfortunately common.

In light of these results, this report proposes the following list of recommendations. **Attention should be dedicated to possibly the most important recommendation: the necessity to abolish limitations and restrictions for PLHIV to work in health care.** These are not compliant with current scientific knowledge and, oftentimes, there are questions and doubts surrounding their legality, legitimacy, and proportionality. The number of proven cases of HIV transmission in health care-related circumstances is infinitesimal. Hence, no special measures need to be adopted, ordinary hygienic and occupational safety measures are sufficient. This should apply to all medical personnel.

A) Recommendations related to the legal framework

LEGAL FRAMEWORK RECOMMENDATIONS

1. To implement more HIV-specific and sensitive legislation on rights of PLHIV, including those working in health care, on all levels.
2. To explicitly establish the employer's obligations to prevent, tackle, and solve discrimination.
3. To specify and further develop employer's obligations when it comes to occupational health and safety, and employees' well-being.
4. To broaden the scope of possible remedies against discrimination (to include Inspectorates, Ombuds institutions, National Equality Bodies, legal entities helping victims of discrimination etc.).
5. To appropriately derogate or amend legal provisions possibly discriminating PLHIV working in health care.
6. To abolish limitations and restrictions to employment of PLHIV in health care sector arising out of legislation.
7. To prohibit any mandatory HIV-testing of employees in the health care sector.

RECOMMENDATIONS FOR PRACTICE

B) Recommendations for practice

8. To abolish limitations and restrictions to employment of PLHIV in health care sector arising out of practice.

9. To support the position of employee representatives when tackling discrimination (including guidelines, legal regulation, education, necessary resources).

10. To support the role of occupational health specialists when tackling discrimination (including guidelines, legal regulation, education, necessary resources).

11. To make sure that the information about HIV-status shared with the occupational health doctor remains confidential, particularly that it is not shared as such with the employer under any circumstances. Data protection and privacy in all sectors of the healthcare system, relevant education and training should be ensured.

12. To eradicate the practice of imposing requirements related to HIV on non-medical personnel working in health care.

13. To eradicate the practice of imposing requirements related to HIV on students of medicine and related fields.

14. To support PLHIV to use remedies against discrimination, including legal action against discrimination. This should include ensuring better awareness on their rights and principles of equal treatment, and their empowerment.

INTERNATIONAL AND EUROPEAN FRAMEWORK

There are not many international documents specifically talking about rights of PLHIV working in health care, the least legally binding ones. However, **many of existing human rights may apply to the topic of their protection in health care employment.**

Probably the most relevant social right related to the topic of employment of PLHIV, including healthcare, is **the right to work and the right to just and favourable conditions of work.** As the Universal Declaration of Human Rights stated for the first time, **everyone has the right to work, to choose his employment freely and to have just and favourable conditions of work.**[4] The same is backed also by the ICESCR.[5] These documents reflect the internationally accepted importance of rights related to employment. The topic was further enriched by a milestone ILO recommendation, which was the first document specifically aimed at HIV-related provisions in the workplace.[6]

Also, when **the right to work combines with prohibition of discrimination and protection of privacy/private life**, it can strengthen the standard of rights deserved by all PLHIV working in health care. This applies in an even stronger way to people with a medical disadvantage as for them the condition of non-discrimination grows even stronger.[7]

In relation to the topic of HIV as a disability in the sense of a protected discriminatory ground, HIV infection may be referred to as a "health status". Health status, however, is not commonly included in the lists of prohibited discriminatory grounds. Yet, there has been a progress ruling marking HIV as a "disability" or "other status" in the sense of anti-discrimination law. This has been confirmed by the ECtHR[8] and other international documents.[9] Thus, HIV should be considered a prohibited ground of discrimination.

4 Article 23 of UNDHR.

5 Articles 6-7 of ICESCR.

6 ILO. R.200 HIV and AIDS Recommendation no. 200, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:2551501.

7 Article 27 of CRPD.

8 ECtHR. Kiyutin v Russia. App. No. 2700/10; ECtHR. I.B. v Greece. App. No. 552/10.

9 ECOSOC. UN Commission on Human Rights, Resolution no. 1995/44 on The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS), dated 3 March 1995, available at: https://digitallibrary.un.org/record/227158/files/E_1995_23_E_CN.4_1995_176-EN.pdf, para. 1.

This part will now offer an overview of international and European legal basis for the right to just and favourable conditions of work, focusing on hard law as well as soft-law documents.

1. International Framework

1.1 Human rights treaties

HUMAN RIGHTS TREATIES

- UDHR, General Assembly of the United Nations, dated 10 December 1948 [Article 23];
- ILO Convention concerning Discrimination in Respect of Employment and Occupation (no. 111), dated 25 June 1958 [Articles 2-3];
- ICESCR, dated 16 December 1966 [Articles 6-8];
- Convention on the Elimination of All Forms of Discrimination against Women, dated 18 December 18 1979 [Article 11];
- International Convention on the Elimination of All Forms of Racial Discrimination, dated 21 December 1965 [Article 5 (i)];
- The United Nations Convention on the Rights of Persons with Disabilities ("CRPD"), dated December 13th, 2006 – [Article 27].

1.2. Other international documents

INTERNATIONAL DOCUMENTS

- UN Commission on Human Rights, Resolution no. 1995/44 on The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS), dated 3 March 1995;[10]
- The Declaration of Commitment on HIV/AIDS, dated 27 June 2001 [paras. 49, 56, 69]: [11]
- ILO Code of practice on HIV/AIDS and the world of work, 2001;[12]
- General comment no. 18 on art. 6 of the ICESCR (Right to work), dated 24 November 2005;[13]
- The Political Declaration on HIV/AIDS, dated 2 June 2006 [para. 35];[14]
- ILO HIV and AIDS Recommendation no. 200, 2010;
- The European Action plan for HIV/AIDS, 2017.[15]

10 ECOSOC. UN Commission on Human Rights, Resolution no. 1995/44 on The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS), dated 3 March 1995, available at: https://digitallibrary.un.org/record/227158/files/E_1995_23_E_CN.4_1995_176-EN.pdf.

11 UN. Declaration of Commitment on HIV/AIDS. Available at: https://www.hivlawandpolicy.org/resources/declaration-commitment-hivaids-ga-res-s-262-un-doc-aress-262-2001

12 ILO Code of practice on HIV/AIDS and the world of work, 2001, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/publication/wcms_113783.pdf.

13 ECOSOC. Committee on Economic, social and cultural rights. General comment no. 18 on art. 6 of the ICESCR (Right to work), dated 24 November 2005, E/C.12/GC/186, available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQfUKxXVisd7Dae%2FCu%2B13J25Nha7l9NlwYZ%2FTmK57O%2FSr7TB2hbCAidyVu5x7XcqjNXn44LZ52C%2BIkX8AGQrVyIc.

14 UN. Political Declaration on HIV/AIDS. Available at: https://www.hivlawandpolicy.org/resources/political-declaration-hivaids-ga-res-60262-un-doc-ares60262-2006

15 WHO. Action plan for the health sector response to HIV in the WHO European Region. Available at: https://www.euro.who.int/__data/assets/pdf_file/0007/357478/HIV-action-plan-en.pdf

2. European Framework

2.1. ECHR

The ECHR does not directly operate with labour-related rights. That is not surprising as the ECHR focuses on civil and political rights. However, they can derive from other of its provisions. An important role is played by the prohibition of discrimination (Article 14 and Article 1 of Protocol no. 12).

Concerning the right to work and to just and favourable conditions of work, plausible protection of PLHIV may rise out of the right to family and private life (Article 8), right to freedom of thought, conscience and religion (Article 9), right to freedom of expression (Article 10) or even prohibition of torture (Article 3) or slavery and forced labour (Article 4).[16]

Unfortunately, the case law concerning the issue is scarce. In 2013, the ECtHR decided a significant case related to employment of PLHIV (even though not in health care) in I. B. v. Greece. The Court ruled that a **dismissal motivated by a man's HIV positive status was discriminatory** (art. 14 in connection with art. 8) on a basis of his **health status.** In the decision, the ECtHR cited also the abovementioned ILO Recommendation no. 200.

Concerning the right not to be discriminated, the ECHR prohibits discrimination in Article 14 where it provides an open-ended (i.e. non-exhaustive) list of discriminatory grounds, incl. the category of **"other status". That one is found relevant for the topic of disability or HIV/AIDS** and has been used in the described case I. B. v. Greece.

Besides the ECHR, the Council of Europe mention work-related rights and rights of PLHIV in:

- Recommendation of the Parliamentary Assembly of the Council of Europe on AIDS and Human Rights, no. 1116 (1989) [paras. 3-5, 8];[17]
- Recommendation of the Committee of Ministers of the Council of Europe on the Ethical Issues of HIV Infection in the Health Care and Social Settings no. R (89) 14 (1989);[18]
- Recommendation of the Parliamentary Assembly of the Council of Europe on HIV/AIDS in Europe, no. 1536 (2007) [para. 9].[19]

16 I. e. ECtHR Factsheet on Work-related rights, June 2022, available at: https://www.echr.coe.int/Documents/FS_Work_ENG.pdf

17 Recommendation of the Parliamentary Assembly of the Council of Europe on AIDS and Human Rights, no. 1116 (1989), available at: http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=15150&lang=en.

18 Recommendation of the Committee of Ministers of the Council of Europe on the Ethical Issues of HIV Infection in the Health Care and Social Settings no. R (89) 14 (1989), available at: http://hrlibrary.umn.edu/instree/coerecr89.html.

19 Recommendation of the Parliamentary Assembly of the Council of Europe on HIV/AIDS in Europe, no. 1536 (2007), available at: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1536.htm.

2.2. The European Social Charter

The ESC represents a complementing document to the ECHR in the field of economic and social rights. Regarding the right to work, Articles 1 to 3 are the most important ones. They set the base for free choice of employment with reasonable dignified circumstances, which applies equally for PLHIV working in health care. Furthermore, there is also the right to a fair remuneration (Article 4), right to organise or to bargain collectively (Articles 4-6), the right of people with disability to accessible employment (Article 15 para. 2), right related to protection in case of termination of employment (Article 24)

2.3. The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union (hereinafter "EU Charter") is a leading document of the law of the EU, which according to Article 6 of the Treaty on European Union has the same legal value as the founding treaties; and as such belongs to the primary law of the EU.

The Charter guarantees freedom to choose an occupation and right to engage in work (Article 15). Furthermore, it enshrines the right to collective bargaining (Article 28), protection in case of unjustified dismissal (Article 30), right to fair and just working conditions (Article 31). Also, under Article 21, the EU Charter prohibits any discrimination based on stated grounds, which include genetic features and disability.

CZECHIA

SUMMARY

In the Czech Republic, overall, there are almost no limitations for PLHIV working in health care. PLHIV disclose their status only to the occupational health doctor, who is the only one deciding about whether they might conduct the job. If the doctor enables PLHIV to work in health care, they usually face no additional requirements. Yet, in some individual cases depending on the employers' internal regulation, PLHIV may be exceptionally, typically in relation to conducting EPPs, asked to use special protective equipment.

National Context

Czech Republic is a country with roughly 10.600.000 inhabitants which **keeps relatively low HIV/AIDS prevalence both in terms of relative number of new cases (2,18 cases per 100 000 inhabitants) and in terms of cumulative number of HIV infections (4.074 cases since 1985).** After a long-term increase between 2003 and 2016, a significant decrease of new cases was observed in 2017 and 2018. In 2019 and 2020, the decline did not continue, and 222 and 251 cases were identified respectively. In 2020, the 90-90-90 targets were: 83 % for the first, target, 98,5 % for the second target and 97,5 % for the third target.[20]

Latest estimated number of PLHIV was 3.280. In 2021, 233 new cases of HIV infection were detected in the Czech Republic, which is roughly at the level of the previous years. Among the cases of 2021, there were 42 people who already knew about their HIV positive status (previously diagnosed abroad). The highest prevalence rates within the country are reported in the capital city of Prague (44,6 %).
HIV infection in the Czech Republic is still mainly spread through sexual transmission (88,4 %). Around 140 (60,1 %) of new cases were detected among MSM.

Heterosexual HIV transmission occurred in 66 individuals (28,3 %). Transmission through injecting drug use was reported in 6 cases (2,6 %). Only 1 of the newly detected HIV cases (0,4 %) was transmitted through blood transfusion carried out abroad. In 20 cases (8,6 %) the mode of HIV transmission was unknown.

20 These data are regularly released by the Czech Statistical Office and they exclude patients who are out of the health care system.

Regarding AIDS, in 2021, there were 52 new cases of AIDS (28 among Czech citizens, 24 among residents), of which 39 (75,0 %) in patients with newly diagnosed HIV. There were 19 deaths at the AIDS stage and 7 deaths of HIV patients due to different causes.

The Czech Republic does not systematically communicate and report data according to the Global AIDS Strategy 2021-2026. The annual report on the prevalence and spread of HIV/AIDS in the Czech Republic does not include information regarding non-treatment targets.[21] A monitoring and evaluation framework was integrated in the **National HIV/AIDS Programme for 2013-2017**.[22] Evaluation of this Programme was being published in the National AIDS Programme Yearbook every two years. The last yearbook was published for 2017-2018.[23] Unfortunately, this monitoring and evaluation framework was not transferred into the National HIV/AIDS Programme for 2018-2022.[24] Instead, a general obligation to observe and report on structural factors (e.g. the level of stigmatisation) was added.[25] Monitoring the structural factors (e.g. stigmatisation) shall be ensured by the **National Institute of Mental health**.[26] In practice, HIV-related stigma is mainly monitored by local **NGOs and the Public Defender of Rights** in his report on monitoring of stigmatisation of the LGBT+ community.[27] Court proceedings dealing with discrimination of PLHIV are also reported on and summarised by the Public Defender of Rights in his survey on "Decision-Making of Czech Courts in Discrimination Disputes 2015–2019".[28]

2. Legal Background

This chapter focuses on the legal framework governing the topic of employment of PLHIV in health care. Firstly, the general regulation is introduced. Although not HIV-specific, provisions that shall protect PLHIV against discrimination and unequal treatment when working in health care can be found both at the constitutional level and the primary legislation level. This section also mentions a significant soft law document. Secondly, the chapter elaborates on rights and obligations of PLHIV and their employers, and introduces existing remedies against discrimination.

21 Marek Malý, Vratislav Němeček, Hana Zákoucká. The prevalence and spread of HIV/AIDS in the Czech Republic in 2020. National Institute of Public Health [online]. 4. 1. 2021. Available at: http://www.szu.cz/uploads/documents/CeM/HIV_AIDS/rocni_zpravy/2020/Vyrocni_zprava_o_vyskytu_a_sireni_HIV_AIDS_v_CR_v_roce_2020.pdf; the official report for 2021 has not been published yet.

22 National HIV/AIDS programme of 2013-2017. Available at: https://www.mzcr.cz/wp-content/uploads/wepub/7583/17371/N%C3%A1rodn%C3%AD%20program%20%C5%99e%C5%A1en%C3%AD%20HIV-AIDS%202013-2017%20-%20zn%C4%9Bn%C3%AD%20ve%20Vestn%C3%ADku.pdf

23 National AIDS Programme Yearbook for 2017-2018. Available at: https://www.prevencehiv.cz/wp-content/uploads/2019/12/rocenka-2017-2018.pdf

24 National HIV/AIDS programme of 2018-2022. Available at: https://www.infekce.cz/Standardy/NarodProg18.pdf.

25 Section 5.7 of the Programme.

26 National HIV/AIDS programme of 2018-2022. Available at: https://www.infekce.cz/Standardy/NarodProg18.pdf.

27 Being LGBT+ in Czechia. Public Defender of Rights. Ref. No KVOP-20519/2019. Available at: https://www.ochrance.cz/uploads-import/DISKRIMINACE/Vyzkum/Vyzkum-LGBT.pdf

28 Decision-making of Czech Courts in discrimination disputes 2015-2019. Public Defender of Rights. Ref. No. KVOP-40830/2020. Available in English at: https://www.ochrance.cz/uploads-import/ESO/Decision-making%20of%20Czech%20courts%20in%20discrimination%20disputes%202015%E2%80%932019.pdf

2.1. General legal framework relevant for PLHIV working in health care

On **the constitutional level**, the Czech Republic's Charter of Fundamental Rights[29] anchors the right to equal treatment and generally prohibits discrimination. Article 1[30] of the Charter stipulates that all people are free and equal in their dignity and their rights. Their fundamental rights and freedoms are inherent, inalienable, unlimitable, and irrepealable.

Furthermore, Article 3(1)[31] of the Charter guarantees fundamental human rights and freedoms to everybody irrespective of variety of discriminatory grounds, including "other status". This represents a so-called "accessory" equality which is "tied" to other substantial fundamental rights and freedoms (i.e. can only be invoked in conjunction with such a substantial fundamental right or freedom).

These two articles provide grounds for Czech anti-discrimination legislation. The prohibition of discrimination included in the Charter does not explicitly include "medical condition" or "disability" as protected grounds; however, the provided list of grounds is only demonstrative (i.e. non-exhaustive) allowing for the possibility of extensive interpretation.[32] It is commonly understood that discrimination on the grounds of disability is to be protected as "other status" under Article 3(1) of the Charter.

Regarding **the primary legislation**, the main piece of legislation is the **Anti-Discrimination Act** ("ADA").[33] Although the Charter does proclaim the need for equal treatment in connection with the fundamental rights, it is the ADA that has the pivotal role in Czech anti-discrimination legislation. It implements the obligations under EU directives, guarantees the right to equal treatment and bans discrimination in areas including access to employment. Following the example of the Charter, also the ADA provides a list of prohibited grounds of discrimination, which include "disability".[34] It does not explicitly include HIV in its list. Unlike the Charter, however, ADA's list is exhaustive and cannot be extended to include grounds which are not explicitly mentioned. It is therefore necessary to subsume HIV under one of the discriminatory grounds listed. Hence, the courts adjudicated that **HIV falls under the definition of disability**[35] and should be protected as such.[36] In conclusion, **Czech anti-discrimination legislation is not HIV-specific**. Nevertheless, ADA in combination with case law establish the necessary framework for the protection of PLHIV against discrimination.

29 Constitutional Act No. 2/1993 Coll., the Charter of Fundamental Rights and Freedoms.

30 "All people are free and equal in their dignity and rights. Their fundamental rights and freedoms are inherent, inalienable, unlimitable, and irrepealable."

31 Fundamental human rights and freedoms are guaranteed to everybody irrespective of sex, race, colour of skin, language, faith, religion, political or other conviction, ethnic or social origin, membership in a national or ethnic minority, property, birth, or other status."

32 See Article 3 of the Charter "[…] other statuses".

33 Act No. 198/2009 Coll., on equal treatment and legal remedies for protection against discrimination and on amendment to certain laws.

34 Section 2 (3) of ADA.

35 In compliance with Section 5 (6) of ADA.

36 Judgment of the Municipal court in Prague dated November 9th, 2017; File No. 20 Co 343/2017-279

Another significant Act is **the Labour Code**.[37] In addition to the protection provided by ADA, also the Labour Code contains several clauses ensuring the protection of employees against discrimination. Section 16 of the Labour Code anchors the principle of equal treatment and prohibits any discrimination in the workplace.[38] It also provides a list of prohibited grounds of discrimination and directly refers to the ADA.[39] Prohibition of discrimination and the right to equal treatment are also anchored in **the Employment Act**[40] which mainly focuses on the relations between an employer and a person seeking employment in the period before the conclusion of an employment contract.[41] It prohibits employers from making employment offers of a discriminatory character, in violation of labour-law or civil service legislation, or contrary to good morals.[42]

These two acts gain special significance when it comes to **non-disclosure of a person's HIV+ status to a potential employer**. The Labour Code provides additional protection by specifying what information can an employer request from a person seeking employment. Under the Labour Code, an employer may only request information that is directly linked to the conclusion of the employment contract in question.[43] Furthermore, the Labour Code includes a non-exhaustive list of data which an employer may not request, such as information about pregnancy, family and property situation, sexual orientation etc.[44] This list is further expanded by the Employment Act, which states that an employer may not request, among others, information contrary to good morals and personal data which do not serve for fulfilment of the obligations of the employer stipulated by another legal regulation.[45]

Information regarding an individual's health conditions belongs to the category of sensitive personal data – a category of data that, under normal circumstances, an employer may not request. If an employer request such data despite the abovementioned legal rules, an **employee is entitled to lie to the employer**. Such a false answer to a request that an employer is not entitled to make cannot be held against the potential employee and does not affect the validity of the future employment contract. Assessment of medical fitness of employees is **the responsibility of an occupational physician** in relation to whom any **HIV+ person has the legal obligation to disclose their status**. If a potential employee's medical fitness is not sufficient for the employment position in question, such situation will be reflected in the result of the assessment (without communicating the HIV+ status to the employer as all occupational physicians are bound by the obligation of medical secrecy).

37 II. Act No. 262/2006 Coll., the Labour Code.

38 "Any form of discrimination in employment relations is prohibited; in particular on the grounds of sex, sexual orientation, racial or ethnic origin, nationality, citizenship, social origin, gender, language, health condition, age, religion or belief, property, marital or family status, family relationship or responsibilities, political or other opinion, membership and activities in political parties or political movements, trade unions or employers' organisations; discrimination on grounds of pregnancy, maternity, paternity or gender identification is considered to be discrimination on grounds of sex."

39 "The terms, such as direct discrimination, indirect discrimination, harassment, sexual harassment, persecution, an instruction to discriminate and/or incitement to discrimination, and the instances in which different treatment is permissible, are regulated in the ADA."

40 Act No. 435/2004 Coll., on Employment ("Employment Act").

41 Section 4 of the Employment Act.

42 Section 12(1) of the Employment Act.

43 Section 30(2) of the Labour Code.

44 Section 316(4) of the Labour Code.

45 Section 12(2) of the Employment Act.

Alongside the protection guaranteed by the abovementioned acts, the **Labour Inspection Act**[46] establishes mechanisms to protect people who are discriminated against. The labour inspectorates supervise the compliance of employers with the obligations arising from legal regulations (including the obligation to ensure equal treatment).[47] Any employee may file a motion for a review by the regional labour inspectorate. Both legal entities and natural persons may commit a public offense (falling under Czech administrative liability) against equal treatment and be sanctioned by a fine in the amount of up to 1.000.000 CZK.

To proceed with soft law documents, there are the **Methodical guidelines on dealing with the matter of HIV/AIDS infection in the Czech Republic**.[48] In this document, the Ministry of Health summarises the basic knowledge about the characteristics of HIV/AIDS and its transmission. Moreover, the Guidelines include several clauses that emphasise the right to equal treatment. Particularly, PLHIV may (unless restricted by a decision of a public health protection authority) continue carrying out their employment position if their clinical condition allows it.[49] In the case of temporary incapacity for work, the doctor issuing written confirmation of this temporary situation (or any other written confirmation provided for use outside of healthcare services) shall not state the HIV+ status of any patient. If a specification of a diagnosis is required, the doctor uses the code or wording of one of the symptoms. This rule should prevent an employer from acquiring information about the HIV+ status of such patient. The Guidelines also emphasise the necessity to comply with the obligation of secrecy and urges medical professionals to handle information regarding HIV/AIDS with extra diligence.[50]

2.2. Possibly discriminating legislation

When it comes to provisions or legal acts possibly discriminating against PLHIV working in health care, there are **no such regulations recognised in the national law.**

2.3. Rights and obligations of PLHIV

This section summarises the rights and obligation of PLHIV working in healthcare with respect to variety of professions in the field. It is necessary to say that there is no difference between these rights in public and private sector.

2.3.1. Rights and obligations of employees

First of all, it is crucial to say that there is **no legal regulation that would explicitly limit or prohibit PLHIV from performing certain jobs**, even in the healthcare sector (the only exception would relate to armed forces). No legal limits apply to the scope of work, nor

46 Act No. 251/2005 Coll., on Labour Inspection ("Labour Inspection Act").

47 Section 3(1)(a) of the Labour Inspection Act.

48 Methodical guidelines on dealing with the matter of HIV/AIDS infection in the Czech Republic, Issue No. 10/2016 of the Journal of the Ministry of Health; Available at: https://www.mzcr.cz/wp-content/uploads/wepub/13122/36111/V%C4%9Bstn%C3%ADk%20MZ%20%C4%8CR%2010-2016.pdf

49 Article 3(2) of the Guidelines.

50 Article 4 of the Guidelines.

the type of profession. The medical fitness of a particular employee or job applicant must always be assessed individually with regard to the circumstances of their health condition and the type of work performed. The conclusion that an HIV+ person cannot perform a certain job must always be reached in a medical report of an occupational physician that meets all the requirements under the Act on Specific Healthcare Services. **No formal restrictions for the employment of PLHIV are applicable in the healthcare sector**. Nevertheless, it should be noted that PLHIV working in this area will generally come across greater reservations and concerns of others.

The **Methodical guidelines on dealing with the matter of HIV/AIDS infection** in the Czech Republic represent a soft-law instrument dealing with the occupational safety in the healthcare settings. According to the Guidelines, there has been no proven case of HIV transmission in normal social or professional contact.[51] Furthermore, they clarify what hygienic and occupational safety standards are necessary for the protection against HIV transmission. They clearly state that **no special measures need to be adopted for the purposes of dealing with HIV**.[52] On the contrary, *"ordinary hygienic and occupational safety measures"*[53] are stated to be sufficient; the Guidelines explicitly state that such measures protect both situations of transmission: (i) from HIV+ patients to healthcare workers; (ii) from HIV+ healthcare workers to patients. Yet, **in exceptional cases, such as in relation to EPPs in healthcare, it is possible that an HIV+ employee will be required, for example, to use special protective equipment** (double gloving) or maintain increased safety and hygiene habits. Such special protective measures are commonly regulated through **internal regulations of the employer** (e.g. safety directives, working regulations).

If an employee is diagnosed with HIV while already working in a profession, they have **the duty to inform the occupational physician of the diagnosis at the next periodic assessment.** The occupational physician considers the diagnosis in the assessment result. Needless to add, all employees are subject to periodic assessment of medical fitness for work performed by an occupational physician. Depending on the categorisation of employment positions,[54] the periodic assessment may take place once in six years or even as often as once a year.

To conclude, PLHIV working with healthcare are **not obliged to disclose their HIV status to their patients.**

2.3.2. Rights during medical studies

Regarding the situation of medical students living with HIV, in the Czech Republic there are **no limitation for them to study**, no legal requirements for them to be mandatory tested, and there were no issues reported in practice.

51 Article 1(6) of the Guidelines.

52 Article 9(1) of the Guidelines.

53 According to the Methodological Measure of the Ministry of Health of the Czech Republic No. 2/2008 of the Journal of the Ministry of Health (principles for the prevention of HBV transmission); Decree of the Ministry of Health of the Czech Republic No. 306/2012 Coll. (principles for disinfection and sterilization at the health service provider/principles for prevention of infections associated with the provision of healthcare services).

54 Categories 1 - 4 based on multiple factors connected to the nature of a specific employment position.

2.3.3. Rights of non-medical personnel

Since there are no legal limitations for employment of doctors or other medical professionals, there are also **no legal limitations for employment of non-medical staff** with HIV+ positive working in healthcare settings. In addition, unlike in the case of physicians who perform procedures with a high risk of exposure and transmission, in case of non-medical staff, there should no basis for adopting internal regulations stipulating extra hygienic or occupational safety measures in this area.

2.4. Obligations of the employer and employee representative

This section summarises the obligations of the employer and employee representatives not only in relation to ensuring equal treatment of PLHIV working in health care, but also to their duty of ensuring their occupational safety. There is no difference between these rights in public and private sector.

2.4.1. Obligation to counteract discrimination

Overall, **employers have the general obligation to ensure equal treatment** of all employees with regard to their working conditions, remuneration for work and the provision of other monetary benefits, professional training, and the opportunity to achieve a functional or other career advancement.[55] Any discrimination in the workplace is prohibited (including discrimination on the basis of health conditions.[56] Beside this general obligation, the Labour Code also requires the employer to inform a Union (if established) regarding measures in place through which the employer ensures equal treatment of employees and the prevention of discrimination.[57]

When it comes to the duty to counteract discrimination, it is to be emphasised, that there are three possible types of employee representatives exist in the Czech Republic – **Union Organisations, Work Councils, and Representatives for Occupational Safety and Health Protection.** If established (their establishment is not compulsory), all of these bodies have certain competences towards the employer under the Labour Code. Employers have the obligation to inform these bodies (or in specific cases consult them) regarding certain events or actions they are planning to undertake.

If a Union Organisation is established, **an employer must consult the Union regarding all terminations** of employment contracts of both union members and non-union members.[58] Thus, the Union has the option to discover potential unlawful (e.g. discriminatory) dismissals. Furthermore, the Union may issue a statement summarising the unlawfulness of the dismissal. Despite such statement, the employer may (in most cases[59]) proceed and terminate the employment contract. Nonetheless, the review of the

55 Section 16(1) of the Labour Code.

56 Section 16(2) of the Labour Code.

57 Section 279(f) of the Labour Code.

58 Section 61(1) of the Labour Code.

59 Different situation exists for protection of workers who are members of the Union who act as officials in one of the Union bodies. In case of such a termination, the Union must issue an a priori consent. If a Union does not consent, the employer must go to court and request a consent that would replace it.

dismissal by the Union may instigate the employee to start a court litigation and may provide them with the necessary foundation of the arguments in the employee's favour. If a Union uncovers that an employee was discriminated against, it may file a motion with the labour inspectorate to initiate administrative proceedings for a public offense against equal treatment.[60]

Although the main objective of these bodies is guarding and realising rights of employees, the Labour Code does not introduce **any specific obligations** for these bodies to achieve their objective. Unions and similar bodies are commonly only given competences and rights.

2.4.2. Obligations related to provision of health care in the workplace

Generally, a primary responsibility of an employer is ensuring of **occupational safety**, which includes **the obligation to ensure that sufficient measures and protocols** are in place. Generally, the legislation does not specify the exact measures that must be put in place; however, in the healthcare sector there are some more specific guidelines and decrees of the Ministry of Health that deal with certain aspects of health protection.

In relation to this general obligation of occupational safety, **employers do not have to have a medical practitioner present in the workplace.** However, they **must introduce occupational safety measures** including the presence of a sufficient number of employees who have acquired first aid training. First aid training is secured by the employers in cooperation with an occupational healthcare provider/physician.

Yet, **the role of occupational doctor is crucial** when it comes to possible discrimination of PLHIV and their protection from it. Under of the Act on Specific Healthcare Services,[61] most employers have the duty to enter into contract with an occupational healthcare provider.[62] Occupational healthcare providers ensure services necessary for the employment relationship and for the fulfilment of the employers duties (including assessment of the impact of work, working environment and working cyonditions on health; conducting occupational health examinations; health assessment for the purpose of assessing health fitness for work; advice on occupational health and protection against occupational accidents, occupational diseases and work-related illnesses; first aid training; and regular supervision of workplaces and work performance).[63]

Therefore, medical fitness of a particular employee or job applicant must always be assessed individually with regard to the circumstances of his/her health condition and the type of work performed. The **conclusion that an HIV+ person cannot perform a certain job must always be reached in a medical report of an occupational physician** that meets all the requirements under the Act on Specific Healthcare Services. The occupational physician (who previously entered into contract with an employer) **is prohibited** (under the obligation of secrecy) **to inform employers about any medical diagnosis** of patients/employees. The only information they pass onto employers is whether an employee is medically fit to perform the given work. The diagnosis that led

60 According to Section 11 or Section 24 of the Labour Inspection Act.

61 Act No. 373/2011 Coll., on Specific Healthcare Services.

62 Section 54(2)(a) of the Act on Specific Healthcare Services.

63 Section 53(1) of the Act on Specific Healthcare Services.

the occupational physician to the given conclusion must not be communicated. When it comes to temporary incapacity for work, the doctor (potentially an occupational physician) issuing written confirmation of this condition (or any other written confirmation provided for use outside of healthcare services) **shall not state the HIV+ status of an employee**. If a specification of diagnosis is required, the doctor uses the code or wording of one of the symptoms. This rule should prevent employers from acquiring information about the HIV+ status of employees.

2.5. Remedies against discrimination

When PLHIV come across discrimination in healthcare settings, they have several means of protection accessible under Czech law on multiple levels of the administrative and judicial system.

First of all, the PLHIV **may complain to the employer** (in the context of this report to the health care provider). Such complaints are commonly presented to the director, HR or another dedicated body. It aims at ensuring that the discriminatory practices are ceased and redressed. Under Section 276(9) of the Labour Code, employers are obliged to discuss the complaint with the employee and, if requested, also with a Union organisation. These complaints aim to prevent potential court litigation. However, **there is no obligation of an employee to exercise their right to file a complaint** with the employer; therefore, not filing a complaint can in no way be considered to be a condition to start court proceedings. In defending his/her rights, an employee may file a lawsuit directly without having to first follow a complaint procedure.

If an employer fails to fulfil his/her obligation under Section 276(9) of the Labour Code, such failure may constitute a public offense under Section 11(1)(d) or Section 24(1)(d) of the Labour Inspection Act punishable by a fine of up to 400.000 CZK

Furthermore, the employee may turn to **local authorities, typically to Regional Labour Inspectorates**. They need to claim a violation of equal treatment and non-discrimination. Discriminatory practices of an employer may constitute several types of public offenses listed in Sections 11 and 24 of the Labour Inspection Act and are punishable by a fine of up to 1.000.000 CZK.[64]

On the national level, the employee may turn to the **Office of the Public Defender of Rights.** Among other things, the Public Defender has competence in matters of the right to equal treatment and protection against discrimination.[65] His role in enforcing the right to equal treatment lies primarily in the following activities:[66]

64 "An individual commits an offense in the area of equal treatment by: (a) not ensuring equal treatment of all employees regarding their working conditions, remuneration and the provision of other monetary benefits and benefits of monetary value, or training or the opportunity for functional or other career advancements, b) discriminating against employees (Section 16 of the Labour Code), c) penalizing or disadvantaging an employee because he/she has legally claimed his/her rights and claims arising from employment relationships, d) not discussing with the employee or, at his request, with the employees' representatives, his/her complaint about the exercise of rights and obligations arising from the employment relationship."

65 Section 13 of ADA.

66 Article 21b of the Act No. 349/1999 Coll., on the Public Defender of Rights.

a) provision of methodological assistance to victims of discrimination regarding the filing of motions to initiate proceedings on grounds of discrimination:

This competence means that a person who has been discriminated against may turn to the Public Defender through a complaint (in written form / in person into a protocol at the Public Defender's office utilizing the assistance of an employee with legal education). The filing of a complaint is followed by an inquiry carried out by the Public Defender and concluded with a report. The methodological assistance consists in the provision of professional advice on issues related to discrimination (i.e. the Public Defender informs the complainant of the suitable legal steps that he/she may take). As part of his assistance, the Public Defender may neither draw up a lawsuit nor can he represent the complainant in court. However, the Public Defender may (and in many cases does) contact pro bono associations/alliances in order to mediate free legal aid.

b) conducting research (inquiries) and publishing of reports and recommendations on issues related to discrimination:

By conducting inquiries, the Public Defender examines the level of discrimination in potentially problematic pre-selected areas (possibly due to a cumulation of complaints about improper practices in those areas). The Public Defender generalises findings and recommendations into summary reports and formulates standards of treatment. Eventually, the Public Defender also directs proposals for improvement of the ascertained situation both to the facilities themselves and their founders, as well as to the central administrative bodies. The most important findings and recommendations are annually summarized in a final report on the Public Defender's activities and submitted to the Chamber of Deputies.

Also, the employee may seek assistance of **legal entities established for the purpose of protection of victims of discrimination.** These NGOs often provide pro-bono assistance and help resolving the workplace related conflicts in question. The legal basis for such assistance is anchored in Section 11 of the ADA under which such NGOs may provide information and advice regarding the available means of remedying the discriminatory conduct of an employer. Unlike the Public Defender, these NGOs may provide assistance in drafting legal documents, lawsuits and written complaints. They may also assist a discrimination victim throughout the process of mediation with the employer.

Czech AIDS Help Society (in Czech: Česká společnost AIDS pomoc, z.s.) is one of the associations that aid PLHIV in the area of discrimination in the workplace. There are also other associations that provide aid to all discrimination victims (including PLHIV) such as the Poradna pro občanství/občanská a lidská práva, z.s.

Finally, a discriminated employee may initiate a **legal intervention through the Anti-Discrimination action** according to ADA.[67] Accordingly, a person who has been discriminated against has the right to bring an action through which he/she shall be entitled to make the following claims before the court:

67 Section 10 of ADA.

- that the discrimination shall be refrained from;
- that consequences of the discriminatory act shall be remedied;
- that he/she shall be provided with appropriate compensation;
- that he/she shall be awarded monetary compensation for non-material damages.

In this case, it is necessary to mention the matter of the burden of proof. **The Civil Procedure Code**[68] sets out a rule according **to which the plaintiff and the defendant, under certain circumstances, share the burden of proof**.[69] When the plaintiff provides credible statements that indicate the occurrence of discrimination, it is the defendant who must prove the right to equal treatment has not been breached. The principle of the shared burden of proof is largely used in employment disputes where this rule applies to discrimination on various grounds, including disability.

3. Case Studies

Although the Czech law provides the possibility to file an Anti-Discrimination Action, this possibility is not yet widely used in practice. Between 2015 and 2019, there were only 90 lawsuits that resulted in 104 first instance decisions. The overall success rate of these Anti-Discrimination Actions is also very limited at around 15 %: the Anti-Discrimination Action was granted in 4 cases, and partially granted in 12 cases (in total 16 out of 104). In 7 cases, the proceedings concluded with a court-approved amicable settlement.[70]

Out of the 90 lawsuits, 59 were brought in the area of work and employment. Out of the 59-labour law related lawsuits, 6 of them were filed in connection to discrimination on the grounds of disability. The courts accepted the plea of discrimination on its merits in 8 labour-law cases. In 5 additional cases, the parties to the proceedings reached amicable settlement. The low number of labour-law related Anti-Discrimination Actions in general (not only HIV or healthcare specific) poses a difficulty for providing case studies. This is also the reason why there was **no court litigation case regarding the employment of PLHIV in healthcare settings.**

Regarding other issues related to rights of PLHIV in employment, one of the most impactful case was dealing with discrimination of HIV+ employees decided by the Municipal Court in Prague.[71] In its judgment, which dealt with the dismissal of a police officer, the Court clarified the applicability of the Anti-Discrimination Act on matters of unequal treatment of PLHIV. It was adjudicated that **HIV falls under the definition of disability** as defined in ADA and should be protected as such. Although this judgment does not directly involve the healthcare settings, its impact on the protection of PLHIV against discrimination in general is substantial.

68 Act No. 99/1963 Coll., Civil Procedure Code.

69 Section 133a of the Civil Procedure Code.

70 Decision-making of Czech Courts in discrimination disputes 2015-2019. Public Defender of Rights. Ref. No. KVOP-40830/2020. Available at: https://www.ochrance.cz/uploads-import/ESO/Decision-making%20of%20Czech%20courts%20in%20discrimination%20disputes%202015%E2%80%932019.pdf

71 Judgment of the Municipal court in Prague dated November 9th, 2017; File No. 20 Co 343/2017-279.

Furthermore, there were a few instances of discriminatory behaviour of employers in the healthcare sector, most of which date several years or even decades ago. The only quite recent case that could be relevant involved a healthcare professional (a supportive non-medical worker) who was dismissed from employment after his HIV+ diagnosis leaked to the employer. No court litigation was pursued by the dismissed employee.
To conclude, as can be seen from the lack of specific legislation that would deal with the employment of PLHIV in healthcare settings, no instance of discrimination of healthcare workers made a significant impact on legislation/policies and/or practice in the Czech Republic.

4. Current Issues

Last section would like to report on current issues and challenges, especially on impacts of the covid-19 pandemic and also on examples of current good and poor practices.

4.1. COVID-19 impacts on PLHIV

No new public health measures/changes in legislation, guidelines or protocols were introduced regarding employment of PLHIV in the healthcare settings due to the COVID-19 pandemic. There were no reports of disproportionate/discriminatory impact of the pandemic in this field.

4.2. Good and poor practices

Discrimination of PLHIV employed in healthcare settings is not an issue that would be frequently reported on in the Czech Republic. Subsequently, it was never given extensive media coverage, nor did it require direct action for the protection of such employees. This can also be seen from the lack of specific legislation that would deal with the employment of PLHIV in healthcare settings. It is **not possible to report or describe any particular good or bad practices.**

FINLAND

SUMMARY

In Finland, there are no limitations for PLHIV working in health care. This applies to all personnel, irrespective of whether they conduct EPPs. No conditions arise when it comes to testing whatsoever, nobody is tested, unless voluntarily. Not many challenges when it comes to employment of PLHIV in health care have been reported.

National Context

Finland is the smallest of the countries of this report with latest population size of 5.549.807. Estimated number of PLHIV is 3.300. The 90-90-90 targets have been exceeded (92-90-95). Finland does not report data against the other non-treatment related targets.

Although Finland is **a low prevalence country, there are still certain subpopulations that are affected by HIV**. Some AIDS cases are also currently present in the country, but these are strongly connected with late diagnosis. **Only zero to two people die annually** in Finland from AIDS. The number of new cases remains low. In 2021, 161 new diagnoses of HIV were registered, equivalent to 2,9 new cases per 100.000 inhabitants. This approximately corresponds to the average number of cases during the past 10 years. Out of the new diagnoses, 73 % were registered among men. A cumulative total of 4.464 cases of HIV infection were registered in the country.

Approximately half of the newly diagnosed cases occurred among people of foreign origin. An increase in awareness of one's HIV+ status has been observed among immigrants, who are often already on treatment when they enter Finland. Also, comparing to previous years there's been a rise in new infections among injecting drug users.

2. Legal Background

This chapter focuses on the legal framework governing the topic of employment of PLHIV in health care. Firstly, the general regulation is introduced. Although not HIV-specific, provisions that shall protect PLHIV against discrimination and unequal treatment also when working in health care can be found both at the constitutional level and the primary legislation level. Secondly, the chapter elaborates on rights and obligations of PLHIV and their employers, and introduces existing remedies against discrimination.

2.1. General legal framework relevant for PLHIV working in health care

On **the constitutional level**, general principle of equality and prohibition of discrimination is guaranteed in the Section 6 of the Constitution. It states that *"Everyone is equal before the law. No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person. Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development. Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act."*

Regarding **the primary legislation,** there are several relevant pieces of legislation, the most important ones being **the Equality Act** and **the Employment Contracts Act**. These stipulate that the employer may not place employees in an unequal position. Accordingly, the treatment of employees must not be affected variety of discriminatory grounds, including health condition or disability, sexual orientation, or other reason related to the person. This list is rather exhaustive then.

Undisputable importance belong to labour legislation, which includes especially **the Working Time Act, the Annual Holidays Act, the Non-Discrimination Act, the Act on the Protection of Privacy in Working Life, the Collective Agreements Act, the Act on Job Alternation Leave, the Study Leave Act or the Pay Security Act.** Yet, none of these documents is HIV-specific.

2.2. Possibly discriminating legislation

When it comes to provisions or legal acts possibly discriminating against PLHIV working in health care, there are **no such regulations recognised in the national law.**

2.3. Rights and obligations of PLHIV

This section summarises the rights and obligation of PLHIV working in healthcare with respect to variety of professions in the field. It is necessary to say that there is no difference between these rights in public and private sector.

2.3.1. Rights and obligations of employees

First of all, there is **no obligation to disclose one's HIV status to the employer**. The only one having this information usually has the occupational doctor, who can only tell the employer whether the person is fit to the job or not. The same applies to **no duty to disclose one's status to patients.**

Similarly, there is **no mandatory HIV testing in Finland.** The test may be only offered voluntarily.

Overall, it can be concluded that PLHIV wanting to work in health care **do not face any restrictions or limitations.** Even no specific tasks or kinds of jobs are modified for PLHIV. Similarly, nothing would happen if a person got diagnosed when already working in health care. They would just be referred to get proper care and treatment. Most likely, they would not be checked afterwards.

There are no codified rules, guidance or guidelines on this topic and proper approach. The workplaces and occupational health care will **typically decide on a "case by case" basis**. In practice, there is no information that anyone would lose their job or did not get a job because of positive HIV-status.

Almost no issues or obstacles for PLHIV working in health care have been registered. It is only known that **midwifes have had some jobs which they do not conduct.** However, firstly, it tended to be their own decision and choice, and, secondly, no cases were registered that this felt discriminatory.

2.3.2. Rights during medical studies

There are **no limitations or specifics** when it comes to PLHIV studying medicine or related fields. One does not have to disclose their HIV-status anyhow.

2.3.3. Rights of non-medical personnel

There are **no limitations or specifics** when it comes to PLHIV working as non-medical personnel in health care.

2.4. Obligations of the employer and employee representative

This section summarises the obligations of the employer and employee representatives not only in relation to ensuring equal treatment of PLHIV working in health care, but also to their duty of ensuring their occupational safety. There is no difference between these rights in public and private sector.

2.4.1. Obligation to counteract discrimination

Overall, the employer and the employee **are legally obliged to ensure equal treatment in the workplace.** This obligation applies already before the beginning of labour contract during hiring process. Thus, the employer must evaluate and deal with the situation, if an employee or job seeker requests an explanation of the events or acts considered to be discrimination. Based on such investigation, the employer must draw conclusions about the nature of the situation, ideally in written form.

2.4.2. Obligations related to provision of health care in the workplace

Generally, **employer must ensure that a workplace has an occupational doctor**. Typically, medical care for employees is provided by the workplace. Yet, it depends on the workplace: such care might be covering all health care services, or merely the bare minimum.[72] It is up to the employer what they provide.

However, **occupational doctor does not play a significant role in protecting employees against discrimination**. The occupational health care has rather guiding role. But if they find out discrimination, they should act.

2.5. Remedies against discrimination

When PLHIV come across discrimination in healthcare settings, they have several means of protection accessible under the German law on multiple levels of the administrative and judicial system.

PLHIV may **turn to the employer**. If one is discriminated in the workplace, firstly, they might ask the employer to clarify or justify the matter. The employer might intervene. Requests to the employer should be submitted in writing so that you can prove that you have raised the matter with the employer afterwards if necessary. If the discrimination does not stop, they might call the union. One may also ask for help from occupational health care, the occupational safety and health authority, or the workers' representative.

On the regional level, the competence belong to **regional administrative offices, where Labour Protection Authorities** might even report the discrimination to the Police.

72 The minimal standard includes: health examinations as motivated by the health risks at the workplace, investigating health hazards at the workplace through a workplace survey, proposals on how to improve working conditions and promote work capacity, providing guidance, advice and information on improving working conditions and on employee health, contributing to workplace health promotion, providing rehabilitation counselling and referring to rehabilitation if an employee's work capacity declines, monitoring the employee's health, promoting their coping at work, providing, providing first aid readiness instruction at the workplace.

On the national level, subsequently, there is for example the **Nationwide Telephone Service of the Occupational Safety and Health Authorities.** The service can be called confidentially and without needing to mention the name. The Occupational Safety and Health Authority monitors compliance with the prohibition of discrimination in working life. However, the Non-Discrimination representative may, at their discretion, assist persons who have been victims of discrimination in the investigation of complaints of discrimination made by them. Also, the **Commissioner for Equality** may look into cases of harassment based on based on actual or assumed health status; as well as the **Equality Board.** When it comes to the negligence of an authority (official, office holder) to secure the realization of basic and human rights, there is the **Parliamentary Ombudsman.**

3. Case Studies

No particular cases are to be mentioned.

4. Current Issues

Last section would like to report on current issues and challenges, especially on impacts of the covid-19 pandemic and also on examples of current good and poor practices.

4.1. COVID-19 impacts on PLHIV

No new public health measures/changes in legislation, guidelines or protocols were introduced regarding employment of PLHIV in the healthcare settings due to the COVID-19 pandemic.

4.2. Good and poor practices

In Finland, an example of poor practice is the lack of knowledge and empowerment for PLHIV concerning the fact that they may actually work in health care without barriers.

GERMANY

SUMMARY

In Germany, there are certain limitations for PLHIV working in health care. It is recommended that PLHIV conducting EPPs have limited viral load values (up to 50 copies/ml), be regularly checked for their level, and must adhere to special measures. In practice, other health care professions might get tested too.

Also, even though there is no obligation to share one's HIV-status with employer, the amendment of the Infection Protection Act allowed employers to ask employees about the "vaccination and serostatus" and to store corresponding information. This might be potentially discriminatory against PLHIV.

National Context

Germany's population size is currently at 83,2 million people. It is estimated that **there are 91.400 PLHIV. Of these, about 9,500 HIV infections have not yet been diagnosed.** The estimated number of undiagnosed infections has been falling since 2010. The proportion of diagnosed HIV infections has increased and is now **around 90 %**. Current data suggests that the expansion of target group-specific test offers and an earlier start of treatment have also shown success in Germany. However, further measures are required, in particular to further improve the test offerings and to ensure access to therapy for all people living with HIV in Germany. Regarding the 90-90-90 targets, the numbers are 90 % for the first target (81.900), 97 % for the second one (79.300) and 96 % for the third target (76.500).

Concerning current trends, number of new HIV infections in Germany and among people of German origin who became infected with HIV abroad is estimated at 2,000 for 2020 and will thus decrease compared to 2019 (according to current estimates 2,300 new infections). The estimated number of new HIV infections among MSM was around 1,100 in 2020, down 300 new infections from the previous year. In 2020, about 370 people contracted HIV from injecting drug use, a number that has been increasing at a low level since 2010. Around 530 people in Germany have been

infected with HIV through heterosexual routes. In this group, too, there has been an increase from a low level since 2013. In 2020, around 35% of HIV infections were diagnosed with an advanced immunodeficiency and around 18% with full-blown AIDS. Due to the decline in new infections, the proportion of diagnoses of advanced infections has been increasing since 2014.

The observed decrease in new HIV diagnoses and the estimated decrease in new infections could be due to a reduction in the risk of transmission by limiting sexual contacts, fewer routine tests and thus the omission of diagnoses, and certainly thanks to the introduction and frequent prescription of PrEP.

With respect to the fact that HIV diagnoses are often made years after infection, routine surveillance based on laboratory reports provides only limited information on the current spread of HIV in Germany. The number of new HIV infections and the total number of people living with HIV in Germany can only be estimated.

Furthermore, **Germany does report data based on research results from behavioural and other epidemiological surveys which are realized for different key populations** (MSM, sex-workers, migrants, trans and non-binary communities). Germany has data on stigma and discrimination out of the PLHIV: Stigma Index 2.0 in 2021, from EMIS in 2018 (a German based survey will be run in 2024) for the MSM community, from DRUCK in 2018 (DRUCK 2.0. started in 2021) for people who use drugs. A survey in trans and non-binary communities will end in 2022, a survey on sex-workers started in 2020 and will deliver results in 2024. Surveys focus on access to prevention and treatment, barriers to access, social determinants, wellbeing, needs and inequalities combining questionnaires with interviews and focus groups. Intersectional perspectives are taken into account in the surveys.

2. Legal Background

This chapter focuses on the legal framework governing the topic of employment of PLHIV in health care. Firstly, the general regulation is introduced. Although not HIV-specific, provisions that shall protect PLHIV against discrimination and unequal treatment also when working in health care can be found both at the constitutional level and the primary legislation level. This section also mentions a soft law documents. Secondly, the chapter elaborates on rights and obligations of PLHIV and their employers, and introduces existing remedies against discrimination.

2.1. General legal framework relevant for PLHIV working in health care

On **the constitutional level**, general principles are laid down the Basic Law.[73] There is the Section 12 of the Basic Law stating that all people living in Germany have the right to choose their occupation freely. Also, in Article 3, there is prohibition of discrimination for certain characteristics.[74]

Regarding **the primary legislation,** the main role is played by **the General Equal Treatment Act** ("GETA").[75] This Act has existed in Germany since 2006 and *"aims to prevent and eliminate discrimination based on race or ethnic origin, gender, religion or belief, disability, age or sexual identity"*. To achieve this goal, the persons protected by the law are granted the possibility to make legal claims against employers and private individuals if they violate the legal prohibitions of discrimination – claims for compensation or damages. Beyond the main area of its material scope – employment and occupation – the act is also applicable in situations governed by private or civil law (e.g. access to goods and services). There are sections related to employer's organisational duties[76] and employees' rights,[77] relevance belongs also to supplementary provisions.[78]

The GETA does not explicitly mention HIV or other chronic diseases. However, since the Federal Labour Court's 2013 ruling, an HIV+ individual, even if he/she does not show any symptoms, is considered as disabled with the meaning of this act. Although this provision is not HIV-specific, HIV – even if it is symptom-free – falls under the definition of "disability"[79] under German law[80]. Thus, PLHIV have been able to claim protection under the GETA.

The GETA represents an extensive tool of protection in the area of work. Among others, it contains rights and obligations for employers as well as for employees. The entire application process, starting with the job advertisement, must be designed to be non-discriminatory. Workers claim damages or compensation and complain to employers about discrimination. For this purpose, an appropriate complaints office must be set up in all companies, and all employees must be informed of its existence. Employers must ensure that discrimination does not occur. Furthermore, they are obliged to take action against employees who discriminate against other colleagues. The possible measures range from a transfer to a warning to dismissal.

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73 Basic Law, available at: https://www.gesetze-im-internet.de/gg/art_3.htm.

74 Article 3:
(1) All persons are equal before the law.
(2) Men and women have equal rights. The state shall promote the actual implementation of equal rights for women and men and shall work towards the elimination of existing disadvantages.
(3) No one shall be discriminated against or given preferential treatment on the grounds of sex, descent, race, language, nationality and origin, creed, religious or political beliefs. No one may be disadvantaged because of his or her disability.

75 The General Equal Treatment Act, available at: https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/AGG/agg_gleichbehandlungsgesetz.pdf?__blob=publicationFile

76 Sections 11 and 12 of GETA.

77 Sections 13-16 of GETA.

78 Sections 17-18 of GETA.

79 Behinderung".

80 Judgment of the Federal Labour Court No. 6 AZR 190/12, dated 19 December 2013, available at: https://www.anwalt24.de/urteile/bag/2013-12-19/6-azr-190_12

In an important decision on the issue of dismissal and discrimination, the Federal Labour Court[81] found that an ordinary dismissal is invalid if an employee, in this case, is dismissed because of HIV infection. The HIV infection falls under the characteristic of disability because people with HIV are prevented from professional participation due to social avoidance behaviour.

To proceed with soft law documents, there is for example the document "Official examinations of civil servants and civil servant applicants with an HIV infection".[82] It is a circular of the Ministry for Health, Emancipation, Care and Old Age of North Rhine-Westphalia released in 2012 (thus, it applies to the federal state of North Rhine-Westphalia). It states, among other things, that the HIV infection is a "treatable infectious disease according to the current state of medicine". Furthermore, it is stated that someone who is infected with HIV has a life expectancy that can be expected to reach the retirement age, given appropriate medical care according to the current state of knowledge. It notes that "as a rule, the performance of official duties is not impaired.

Moreover, it can be assumed that a transfer to third parties is excluded." Furthermore, it makes it clear that a general HIV test for civil servant applicants is disproportionate and that this also applies to the mere questioning of applicants. Police officers are excluded from this document.

2.2. Possibly discriminating legislation

When it comes to provisions or legal acts possibly discriminating against PLHIV working in health care, there are two points worth mentioning.

Firstly, in May 2020, Section 23a of the Infection Protection Act was changed. In view of the COVID-19 epidemic, new regulations were planned, some of which, however, have an effect far beyond that and can result in discrimination against people with HIV. For example, according to the law, employers in the health sector are to be allowed in future to ask employees about the "vaccination and serostatus" of infectious diseases and to store corresponding information. Employers should thus be able to check whether (potential) employees could pose a risk of transmission or whether they are protected by immunity from acquiring and passing on the pathogens. The law explicitly does not apply to diseases that are no longer transmissible under medical treatment. This is the case with HIV. Accordingly, the question about HIV is still inadmissible. But this addition unfortunately does not completely solve the problem. Firstly, many people still do not know that HIV transmission is not possible under therapy. Above all, however, the addition could be misunderstood by employers as a permission to ask about HIV precisely in order to check the possible therapy status. The reference to guideline-based treatment opens the door to questions about HIV status and also assumes that there is a risk without medication. The German AIDS Federation is aware of a large university clinic that has falsely interpreted the relevant provision as a legal basis to test all employees of the clinic for HIV.

81 Judgment of 19 December 2013, no. 6 AZR 190/12.

82 Ministry for Health, Emancipation, Care and Old Age of North Rhine-Westphalia. Official examinations of civil servants and civil servant applicants with an HIV infection. 26 November 2012, available at: https://www.aids-nrw.de/front_content.php?idcat=2186.

Secondly, there are recommendations by the Association for the Control of Viral Diseases (DVV) and the Society for Virology. In 2012, these entities provided precise recommendations for the management of health care workers ("HCWs") who are infected with HIV.[83] Accordingly, there are certain special requirements for surgeons who perform particularly invasive and injury-prone operations. These activities may only be carried out by surgeons with HIV viral load values ≤ 50 copies/ml; the surgeon must adhere to special measures including the wearing of double gloves. Regular check of the viral load must be performed.

The recommendation aimed to be a good guide for dealing with HIV-positive healthcare workers and not to exclude people with HIV from healthcare professions. The problem is that the recommendation is not known to employers or company doctors, or is not understood correctly, so that an HIV test is not only demanded by surgeons, but also by other doctors or nursing staff. Especially the assessment of which activities the regulation should be applied to is interpreted differently.

2.3. Rights and obligations of PLHIV

This section summarises the rights and obligation of PLHIV working in healthcare with respect to variety of professions in the field. It is necessary to say that there is no difference between these rights in public and private sector.

2.3.1. Rights and obligations of employees

To start with the obligation to disclose one's HIV status to the employer, in Germany, there is no such duty. If the status is disclose at the employer's doctor (either through an HIV test or by asking about it), the duty of confidentiality must be observed. The company doctor must not inform the employer. Diagnoses remain in patient files and must not be accessible to the employer. Similarly, PLHIV working with healthcare are not obliged to disclose their HIV status to their patients.

Regarding HIV testing, a test may be offered, but is not compulsory. A refusal of the HIV test, e.g. in the context of a recruitment examination, may under certain circumstances lead to the refusal of employment. This is possible within the framework of recruitment procedures without justification.

As already mentioned above, there are certain limitations and rules when it comes PLHIV working in health care. There are certain HIV-specific requirements for surgeons who perform particularly invasive and injury-prone operations (individual activities are listed as examples.) These activities may only be carried out by surgeons with HIV viral load values ≤ 50 copies/ml; the surgeon must adhere to special measures including the wearing of double gloves.[84] Regular check of the viral load must be performed. This is set

83 The Association for the Control of Viral Diseases (DVV) and the Society for Virology. Prävention der nosokomialen Übertragung von humanem Immunschwächevirus (HIV) durch HIV-positive Mitarbeiterinnen und Mitarbeiter im Gesundheitswesen. 2012, available at: https://edoc.rki.de/bitstream/handle/176904/1471/23UOZT6sKnns.pdf?sequence=1&isAllowed=y.

84 Furthermore, "if the increased viral load (51 to 500 copies/ml) persists for more than approx. 14 days or if the viral load rises to >500 copies/ml, all surgical and invasive activities can no longer be performed and can only be resumed when the viral load is constantly ≤ 50 copies/ml."

by the recommendations provided by the aforementioned DVV and Society for Virology recommendations. Lack of knowledge and misunderstanding of these recommendations lead to demanding the test also by other doctors or nursing staff, not only surgeons. For example, before training, especially in the nursing sector, it happens that the training institutions require a health certificate in which the family doctor is to confirm that the persons are “free of infectious diseases”. Many doctors see it as a problem to deny this for their HIV-positive patients (although the HIV infection does not play a role for the job and thus the question about it is not permissible) and the applicants have a problem if they cannot present the certificate. Nevertheless, this document is merely a recommendation which does not have to be followed. There is no binding legal basis for practiced approach.

Furthermore, if a person got diagnosed while already working in health care, the subsequent process is assumed. If the HIV infection becomes known to the company doctor, they will not allow the HIV-positive surgeon to perform any activities that could cause injury until the viral load is below the detection limit. For special cases, the recommendation suggests convening an expert commission to advise on the further course of action. It also appeals to the employee's personal responsibility. According to the described recommendations, such “worker must therefore, if he or she works in areas associated with a risk of transmission to patients, take measures to prevent the spread of any infectious agent, not only HIV infection. This means that they should confide in the company doctor or the expert committee. The company doctor and the expert committee are bound to secrecy or meet anonymously in non-critical cases. A risk analysis of the workplace must be carried out and, if necessary, the HIV-positive HCW must continue to be employed in non-critical areas.”

2.3.2. Rights during medical studies

In Germany, officially, there are no limitations for PLHIV to study medicine. However, all students of medicine and dentistry must undergo a company medical examination before entering the practical courses/clinical courses. During that, the vaccination status is checked and advice is given by the company doctor on how to deal with infectious diseases. The focus is always on the protection of the student. Furthermore, laboratory tests are offered and a general medical history is taken. The question about HIV or an HIV test is not required in this examination. The company doctor is bound by professional secrecy and may not disclose any diagnoses to the university.

According to Deutsche Aidshilfe’s 2022 research, many universities offer an HIV test, but the way it is administered varies greatly. Often the test is really voluntary and there are no consequences if the students take the test or not. However, there are a few universities that make it more difficult for students to continue their studies if they refuse the HIV test, or the company doctor does not issue a certificate of suitability for practical work. In the case of HIV-positive test results, there were cases of at least two universities where a student was required to submit the viral load on a regular basis and this was expected to be below the detection limit. Overall, there is no uniform picture and no uniform procedure in Germany (this applies also to cases if a student got diagnosed already during their studies/practical training).

2.3.3. Rights of non-medical personnel

As non-medical personnel does not conduct procedures with a high risk of exposure and transmission, there should be no limitations for PLHIV working in these professions. However, there was a case of a university hospital where the company doctor tested all employees for HIV when they were hired, based on the wrong interpretation of §23a of the Infection Protection Act. The local AIDS support organisation took action against this with the help of the Science Ministry of the federal state.

2.4. Obligations of the employer and employee representative

This section summarises the obligations of the employer and employee representatives not only in relation to ensuring equal treatment of PLHIV working in health care, but also to their duty of ensuring their occupational safety. There is no difference between these rights in public and private sector.

2.4.1. Obligation to counteract discrimination

Overall, there is the employer's obligation to ensure equal treatment deriving from several legal acts. The Civil Code sets the employer's general duty of care is a legal obligation.[85] According to GETA, the employer has the duty to counteract and prevent discrimination. Section 17 of the GETA calls on employee representatives to prevent or help eliminate discrimination on grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual identity within the scope of their duties and scope of action.

This obligation means that the entire application process, starting with the job advertisement, must be designed to be non-discriminatory. In existing employment relationships, workers are entitled to protection against discrimination. They can claim damages or compensation and complain to employers about discrimination. For this purpose, a corresponding complaints office must be set up by the employer in all companies, and all employees must be informed of its existence. Furthermore, they are obliged to take action against employees who discriminate against other colleagues. The possible measures range from a transfer to a warning to dismissal. In this sense, there is a variety of employer's duties under the GETA.[86]

85 Section 241 of the Civil Code.

86 Section 12 of the GETA:

"(1) The employer is obliged to take the necessary measures to protect against discrimination on any of the grounds mentioned in section 1. This protection also includes preventive measures.

(2) The employer shall draw attention to the inadmissibility of such discrimination in an appropriate manner, in particular within the framework of initial and continuing vocational training, and shall work to ensure that it does not occur.

cease. If the employer has trained his employees in a suitable manner for the purpose of preventing discrimination, this shall be deemed to be fulfilment of his obligations under subsection (1).

(3) If employees violate the prohibition of discrimination under Section 7(1), the employer shall take the appropriate, necessary and reasonable measures in the individual case to prevent the discrimination.

such as a warning, reassignment, transfer or dismissal.

(4) If employees are discriminated against in the performance of their duties by third parties in accordance with section 7(1), the employer shall take appropriate, necessary and reasonable measures in individual cases to protect the employees.

of the employees.

(5) This Act and section 61b of the Labour Court Act, as well as information on the bodies responsible for dealing with complaints under section 13, shall be publicised in the enterprise or in the department. The announcement may be made by posting or display in a suitable place or by using the information and communication technology customary in the enterprise or the service."

In this sense, employers and employee representatives must cooperate in reducing discrimination. The work council, as the employee representative body, stands by the employee in the event of discrimination. According to the Works Constitution Act, the works council is obliged to point out unequal treatment and discrimination to the employer and to press for redress. Another practical role of the employee representative in tackling discrimination is the right to conclude company agreements together with the employer and the employee representative body, which address discrimination, define complaint possibilities, name contact persons, enable training possibilities, etc.

2.4.2. Obligations related to provision of health care in the workplace

Generally, there is a medical care for workers at the workplace which is provided by a company doctor. Companies are obliged to provide a company doctor for one or more employees. This doctor does not have to be employed by the company, but can be provided externally by the employer.

Concerning people who work with infectious material, they are required to have special examinations,[87] which are carried out at the start of work, after one year and then every three years. The focus here is on advice on protection against infectious diseases and the recommendation of vaccinations. Blood, urine and stool tests are also offered on a voluntary basis, as well as an ECG and a vision and lung function test. An HIV test is not part of the routine procedure.

In relation to that and to possible discrimination, doctor's task is to protect the worker against illness, whether through counselling, offering vaccinations, occupational health and safety for certain groups of people, prevention of occupational diseases and risk analysis of the workplace with regard to health hazards. In addition, the company doctor carries out the employment examinations. Company doctors may only give advice.

Medical confidentiality towards employees must be observed, as in any doctor-patient relationship. As part of his job profile, namely to protect employees from illness, the company doctor could also become involved in psychologically stressful situations, such as discrimination at the workplace. This does not typically happen in practice. On the contrary, the experience says that company doctors have little knowledge about HIV and transmission routes. Thus, PLHIV are classified as not suitable for medical work, are not employed at all or are dismissed. There are also cases where the duty of confidentiality towards the employer has not been respected.

2.5. Remedies against discrimination

When PLHIV come across discrimination in healthcare settings, they have several means of protection accessible under the German law on multiple levels of the administrative and judicial system.

87 "G 42".

First of all, the PLHIV may complain to the employer. According to the Works Constitution Act,[88] the employer and the work council must ensure that any form of discrimination is avoided. The work council, as the employee representative body, stands by the employee in the event of discrimination. Accordingly, the council is obliged to point out unequal treatment and discrimination to the employer and to press for redress. If there is discrimination under the GETA, the employee has a right of complaint, a right to refuse performance and the right to sue for compensation and damages. The burden of proof is reversed. In this case, the employer must prove that he did not discriminate against the employee.[89] The employer has the duty to counteract and prevent discrimination. The employer must also set up a complaints office, which must be made known to the employees. Employees can turn to this body in the event of a complaint. According to GETA, employers and employee representatives must cooperate in reducing discrimination.

On the national level, the employee may turn to the Federal Anti-Discrimination Agency. It supports and advises people who have experienced discrimination under the GETA, provides information about claims under the GETA, points out possibilities of legal action within the framework of legal regulations for the protection against disadvantages, arranges consultations through other agencies, and generally strives for an amicable settlement between the parties involved

When it comes to authorities or entities working on discrimination, trade unions stand up against discrimination. They offer legal advice for members, have information hotlines for discrimination cases, offer information events and training seminars for works councils on the GETA and on dealing with discrimination in companies. The services offered are not nationwide, not uniform and vary greatly depending on the organisation; in addition to the German Federation of Trade Unions, there are also individual trade unions, depending on the occupational group. HIV does not yet play a major role in the fight against discrimination, but rather issues such as the dismantling of racism. In the LGBTIQ+ departments of the trade unions, the reduction of HIV-related discrimination plays a role. Information material and counselling is provided. Also, non-governmental anti-discrimination bodies advise on discrimination under the General Equal Treatment Act and thus also on discrimination in employment. The Deutsche Aidshilfe and the local Aids organisations provide advice on HIV-related discrimination and support people who are affected by discrimination.

Finally, a discriminated employee may initiate a legal intervention. Lawsuits relating to disputes between workers and employers are brought before the Labour Court. Labour courts deal with disputes between employers and employees and disputes between the parties to collective agreements. For example, in the case of improper dismissal because of HIV, a case can be brought to the Labour Court by the person concerned. The courts have three tiers: Labour Courts (1st instance), Land Courts (2nd instance), Federal Labour Court (3rd instance).

88 Section 75 of the Works Constitution Act.

89 Section 24 of GETA.

3. Case Studies

Firstly, since 2021, the Deutche Aidshilfe has been accompanying a dental student who was denied access to clinical courses by the university because of his HIV infection and who has filed a lawsuit against the university, the proceedings are still ongoing.

The student was urged to take an HIV test at the company medical examination. He then had this done even though he knew he was HIV+. He was then required to submit his viral load every three months and a certificate from his doctor about his medical history. Since the student's history was not always below the detection limit, he was given a requirement to submit his viral load every month for a year, after which the university would decide whether he could attend the practical courses. This condition was imposed by a committee of experts convened on the initiative of the company doctor. The composition was not transparent, the student was not informed about it, it is not certain whether data protection vis-à-vis the university was respected.

The student filed a complaint against this exclusion from the courses, which meant a delay in his studies, and was upheld by the administrative court in an interim injunction. He can attend the courses, according to the court. The university took legal action against this and another court ruled in favour of the university. Accordingly, there is a danger for the students if he attends the courses as an HIV-positive student without showing his viral load. In the practical courses, for example, students take plaster casts of each other. The university claims that the students are doing “injury-prone activities” and, thus, there is a need for the student to be below the detection limit and to document this. They refer to the recommendation of the DVV. The court followed this argumentation, although HIV experts have explained in several expert opinions that there is no risk of transmission in the students’ activities and that HIV infection does not play a role. The proceedings have not yet been concluded. The result may have far-reaching consequences for the treatment of HIV-positive students at German universities.

Secondly, in 2022, there were several cases of possible discrimination registered:

- an anaesthesia nurse was dismissed on probation when her HIV infection was known. A test was carried out during the recruitment process;
- a doctor was not hired afterdisclosing in an interview that he was HIV positive;
- the information about HIV infection of a nurse was passed on to the employer by the company doctor.

4. Current Issues

Last section would like to report on current issues and challenges, especially on impacts of the covid-19 pandemic and also on examples of current good and poor practices and direct testimonies.

4.1. COVID-19 impacts on PLHIV

No new public health measures/changes in legislation, guidelines or protocols were introduced regarding employment of PLHIV in the healthcare settings due to the COVID-19 pandemic.

4.2. Good and poor practices

Good practice

- The German Aids Federation has published a brochure with the German Medical Association on how to deal with HIV positive patients and has jointly produced an e-learning for doctors on HIV. This might pass on more knowledge about HIV and transmission routes and also improve the position of HIV-positive health care workers.[90]
- The German Aids Federation has produced variety of information brochures on HIV and work for employers and works councils and trade unions.[91] There is a flyer supports people with HIV to be open in the workplace and employers are informed about HIV in the workplace[92] and also online information on workplace for PLHIV.[93]
- The German Aids Federation has a counselling centre for HIV-related discrimination. All local Aids centres provide counselling on this topic. Those seeking advice can also contact the online counselling service and the telephone counselling service of the German AIDS Aid.
- Under #positivarbeiten,[94] companies and organisations can sign a declaration in which they commit themselves to a non-discriminatory treatment of people with HIV in their company, including the waiving of an HIV test in the recruitment process. An e-learning on living with HIV today is available for signatory companies and the website offers further information on HIV in the world of work. The declaration has been signed by more than 150 companies, including major hospitals.
- The German Aids Federation advocates for the prohibition of HIV testing in working life and discusses this with political decision-makers.

90 Informationen HIV für medizinische praxis. Available at: https://www.aidshilfe.de/shop/informationen-hiv-fur-medizinische-praxis.

91 I. e. available at: https://www.aidshilfe.de/shop/hiv-arbeit-geht-informationen-fur-arbeitgeberinnen-arbeitgeber-vorgesetzte; https://www.aidshilfe.de/shop/hiv-arbeit-gefragt.

92 Available at: https://www.aidshilfe.de/shop/out-arbeitsplatz-hiv-mehr-mal-war-englisch.

93 I. e. available at: https://magazin.hiv/magazin/neuigkeiten/mit-hiv-arbeiten-na-klar/; https://hiv-diskriminierung.de/content/karriere-und-beruf-mit-hiv-na-klar; https://hiv-diskriminierung.de/content/hiv-positiv-und-im-gesundheitswesen-taetig-wie-umgehen-mit-fragen-arbeitgebender; https://www.aidshilfe.de/hiv-arbeit; https://hiv-diskriminierung.de/diskriminierung-am-arbeitsplatz.

94 Available at: https://www.aidshilfe.de/positivarbeiten.

4.3. Statements from PLHIV working in health care

Statement of the dental student from the mentioned legal intervention who was banned by the court from attending practical courses:

> *I guess it's stop here for me then. My dreams and goals are broken. At the moment I have no drive at all. I don't know what to do. Because even if I were allowed to continue studying, I fear that I would no longer be assessed objectively. All it took was a few damn lab days in practice. If only I had been allowed to take my own impressions of the dentures.*

ITALY

SUMMARY

In Italy, there are no legal limitations to work in health care for PLHIV. First of all, an occupational health doctor decides about the fitness of an employee to work. This decision has to be highly individualised and the main factor being taking into consideration is suppressed viraemia. This applies especially to surgeons or anaesthetists. As a result of that, there is no basis for indiscriminate mandatory HIV testing. However, in practice, in many Italian hospitals, all healthcare staff are requested to undergo the HIV test annually and sign the informed consent before taking the test.

National Context

Italy, having a population size of 58.893.000 people, estimates **the number of PLHIV to be 137.000. Yet, data reported in 2020 have been affected by the COVID-19 pandemic.** In 2020, 1.303 new HIV diagnoses were reported, with an incidence of 2,2 per 100.000 residents. HIV incidence in Italy was lower compared to that reported in the EU (3,3 new diagnoses per 100.000). Since 2018, an evident decrease in the number of new HIV diagnoses is observed, with no relevant differences by transmission mode. In 2020, heterosexual transmission accounted for 42 % (25 % in males, 17 % in females) of reported cases, MSM accounted for 46 %, and injecting drug use accounted for 3 %. Data on AIDS cases are collected since 1982. In 2020, 352 AIDS cases were reported, with an incidence of 0,7 per 100.000 residents; 80% of these individuals discovered being HIV-infected in the six months prior to AIDS diagnosis.[95] Regarding the 90-90-90 targets, the numbers are 91 % for the first target (126.000), 86 % for the second one (119.000) and 75 % for the third target (102.000).

Also, Italy does reports QoL data in the Dublin Declaration Monitoring Questionnaire. For that, the Italian 2017 guidelines suggest to use a standardized methodology to measure health-related QoL of PLHIV.[96]

95 Notiziario dell'Istituto Superiore di Sanità. Volume 34 - Numero 11. Novembre 2021.

96 WHOQOL-HIV-Bref, ISS-QOL, MOS-HIV, EQ-5D.

2. Legal Background

This chapter focuses on the legal framework governing the topic of employment of PLHIV in health care. Firstly, the general regulation is introduced. Provisions that shall protect PLHIV against discrimination and unequal treatment also when working in health care can be found both at the constitutional, primary and secondary legislation level. Some of the documents are even HIV-specific. Secondly, the chapter elaborates on rights and obligations of PLHIV and their employers, and introduces existing remedies against discrimination.

2.1. General legal framework relevant for PLHIV working in health care

On the constitutional level, the principle of equality and non-discrimination are laid down by the **Italian Constitution**. Articles 3 states that *"all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions"*. Articles 32 then adds that it *"safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. No one may be obliged to undergo any given health treatment except under the provisions of the law"*.

Regarding **the primary legislation**, there is a variety of relevant acts, some of them even HIV-specific:

- Workers' Statute[97]

The Workers' Statute provides that **any investigations by employers on the suitability and infirmities of the employees due to illness or injury are prohibited.** The control of absences due to illness can be made only through the inspection services of relevant social security institutions, which perform the check when the employers require it. **Employers have the right to request a check on the physical fitness/health conditions of the workers by public bodies** and specialized institutions governed by public law.[98]

- Law 135/1990

According to the Law 135/1990, **no one can be subjected, without their consent, to analyses aimed at ascertaining an HIV** infection **except for reasons of clinical necessity in their interest**. Analyses for the detection of HIV infections are allowed in the context of epidemiological programs only when the samples to be analysed have been anonymized to the absolute impossibility of identifying the persons concerned.[99] Also, it directly claims that **HIV infection cannot constitute grounds for discrimination**, in particular for enrolling in school, for carrying out sporting activities, **for accessing or maintaining jobs.**[100] It concludes that with the **prohibition for public and private employers to carry out investigations aimed at ascertaining the HIV** status in their employees or in persons considered for employment.[101]

97 L. 300/70.
98 Article 5 of the Workers' Statute.
99 Article 5 (3) of the 135/1990 Law.
100 Article 5 (5) of the 135/1990 Law.
101 Article 6 (1) of the 135/1990 Law.

- GDPR

Since 2016, special relevance is attributed also to the GDPR. The regulation brings with it some important aspects for the healthcare sector and, first of all, greater protection of patients' personal data, to allow for the correct management of personal information at a supranational level.

In particular, GDPR's importance shines regarding definitions.[102] Also, relevance belongs to Article 9 within which the **processing of data becomes necessary for reasons of public interest in the public health sector**, such as protection from serious cross-border threats to health, the guarantee of high standards of quality and safety of healthcare, medicines and medical devices, on the basis of the Union' or Member States' law which foresees appropriate and specific measures to protect the rights and freedoms of the data subject, in particular professional secrecy.

In that light, now, health-related personal data include all information concerning the health conditions of the interested party that reveal data related to his/her past, present or future physical or mental state, namely: genetic data, biological samples, disease, disability, clinical treatment, physiological or biomedical status.

After GDPR, the legislation concerning "data breach" also became more stringent: companies are obliged, within 72 hours from the moment they become aware of it, to notify the supervisory authority of the breach of personal data, except in those cases in which the violation is unlikely to constitute a risk to the rights and freedoms of individuals.

To proceed with **secondary legislation**, there is the HIV-specific **Decree on Electronic Health Records**,[103] which regulates storage and protection of health data. For example, it states that **data and health/social-health records governed by the regulatory provisions for the protection of PLHIV** are made visible only after the **explicit consent** of the patient. In the event that the patient chooses to benefit of services in anonymity, the subjects providing services are not allowed to issue an electronic health record.[104] Responsibility for lies on the health professionals who provide the service to acquire the explicit consent of the client.[105]

2.2. Possibly discriminating legislation

When it comes to possibly discriminating provisions, the Constitutional Court contributed to this discussion.[106] It declared constitutional illegitimacy of art. 5 (3) and (5) of the Law of 5 June 1990, n. 135 ("Program of urgent interventions for the prevention and fight against AIDS"), in the part in which it **does not provide for health controls/checks of the absence of seropositivity to HIV infection** as a condition for carrying out activities that involve health risks of third parties.

102 I. e. "personal data", "health-related data", "genetic data", treatment", "consent", see relevant provisions of GDPR.

103 Decreto del Presidente del Consiglio dei Ministri 29 settembre 2015 n. 178 in GU serie generale 11 novembre 2015 n. 263 Regolamento in materia di fascicolo sanitario elettronico.

104 Article 5 (1) of the Decree no. 263.

105 Article 5 (2) of the Decree no. 263.

106 Sentence of the Constitutional Court no. 218/1994.

This sentence was not the result of a discriminatory decision but of the "reconciliation of opposing interests", where **the interest of healthcare workers living with HIV needed to be balanced with the interest of safeguarding patients' health,** in observance of the general principle that implies the right of each one to find a limit in the mutual recognition and equal protection of the coexisting rights of others. The symmetrical positions of the individuals are further reconciled with the essential interests of the community.

In 2013, the subsequent circular issued by the Ministry of Labour[107] noted in relation to preventive medical examination of suitability for the job and periodic visits that the *"value of these visits is determined by the need to ascertain through health checks of the workers the absence of contraindications to work with respect to the health risks associated with carrying out the specific tasks in that specific working context."* Therefore, where the risk assessment has highlighted a high risk of contracting HIV during a specific task, the competent doctor will have to foresee, adopting predetermined criteria responding to advanced scientific guidelines, the need to carry out/not carry out an individual monitoring.

In the last years, the U=U evidence has made **the content and meaning of this sentence outdated**, since it is acknowledged that healthcare workers living with HIV with suppressed viraemia cannot transmit HIV to their patients, but **there has not been any official pronouncement in such direction.**

2.3. Rights and obligations of PLHIV

This section summarises the rights and obligation of PLHIV working in healthcare with respect to variety of professions in the field. It is necessary to say that there is no difference between these rights in public and private sector.

2.3.1. Rights and obligations of employees

To start with the **obligation to disclose one's HIV** status to the employer, there is no such duty in Italy. HIV testing is not among the compulsory tests required by the Italian health authorities to obtain/maintain ability and suitability to work. Similarly, there is no obligation towards the patient, **unless an accident occurs and the patient may have been exposed to a risk.** However, this, in addition to being an unlikely event, represents a professional and moral duty in addition to being a required step.

Some health workers living with HIV choose to disclose their HIV status to the occupational doctor in order to be "protected" by eventual problems. Such information are then **stored in paper files at the occupational medicine offices**; there is presently no centralized electronic system where data are transferred. Occupational doctors are bound to **absolute confidentiality** and are the only ones who can access the employees' personal health information. They are obliged to keep complete discretion on employees' health conditions.

"Health protection in the workplace: Health surveillance - Pre-employment and periodic HIV positivity checks - Exclusion conditions of the prohibition to carrying out HV positivity checks."

Concerning **HIV-testing, legally it is not mandatory.** Healthcare workers are required to undergo screening for HBV and HCV antibodies, and tests for the main exanthematous infectious diseases in order to get vaccinated if needed, as well as the Mantoux test for TB. Yet, the practice proceeds differently. It is known for sure that in **many Italian hospitals, healthcare staff are requested to undergo the HIV test annually and to sign the informed consent** before taking the test. This happens especially in the case of **specific professions (surgeons, anaesthetists)** but in some hospitals it is normal praxis. From a legal point of view, **there are no interdictions for any medical professions** when the clinical conditions allow for it (suppressed viraemia and compliance to ARV). However, occupational doctors **may temporarily withdraw the ability to work when HIV positive healthcare workers' health conditions worsen**, until they fully recover and undetectability is re-established, especially in the case of duties that might imply a potential risk of HIV transmission. Presently, there are **no specific guidelines** for healthcare workers living with HIV.

To summarise, **legally there are no limitations other than those related to a temporary condition of inability to work, which needs to be certified** by the occupational doctors, if a PLHIV maintain suppressed viraemia. In such case, they might be allowed to perform their duties with no limitations.

2.3.2. Rights during medical studies

In Italy, there no limitations for PLHIV to study medicine and related fields. Students in the medical fields and in postgraduate trainings do not have to disclose their HIV condition and, therefore, **do not encounter any barriers.** HIV testing is not mandatory during medical training at university; the only tests students need to undergo are those that identify antibodies for the main exanthematous infectious diseases, in order to get vaccinated, as well as the Mantoux test for TB. No reports have been received of medical students tested for HIV. Nothing changes even if a student was diagnosed during studies, there is **no obligation to disclose HIV status.** However, medical students living with HIV have **reported to having been discouraged from undertaking the specialty of surgery.** They are apparently advised against the choice of surgery because of possible obstacles and barriers.

2.3.3. Rights of non-medical personnel

There are no specifics or limitations when it comes to non-medical personnel living with HIV.

2.4. Obligations of the employer and employee representative

This section summarises the obligations of the employer and employee representatives not only in relation to ensuring equal treatment of PLHIV working in health care, but also to their duty of ensuring their occupational safety. There is no difference between these rights in public and private sector.

2.4.1. Obligation to counteract discrimination

Overall, there is **no explicit, legally enshrined obligation of the employer to counteract discrimination.** Employers' duties when it comes to tackling discrimination are formulated especially internally, **each institution has its own policy against discrimination,** even if the legal document is not well detailed on each possible case of discrimination. Also, the local policy against discrimination is written by employees and the employers agree to acknowledge such regulations by endorsing the documents. Unfortunately, **sometimes it is just a formal agreement.**

2.4.2. Obligations related to provision of health care in the workplace

As per Italian legislation, each workplace **has the duty to provide medical care for the employees** in case of health issues occurring during the job. There is a dedicated medical doctor that could further request specialist support in case of specific issues. Local occupational doctors are not always aware of the employees' HIV serostatus. Once they know the condition of HIV positivity of employees, they **may choose which task the HIV-positive subjects are allowed to perform.** Most of the times, there is no impact on professional activities HIV individuals can perform. **However in some cases an over-protective decision (or a discriminative decision) is taken:** workers living with HIV are exempted from certain specific activities even if there are no medical reasons for such decisions.

2.5. Remedies against discrimination

When PLHIV come across discrimination in healthcare settings, they have several means of protection accessible under the Italian law on multiple levels of the administrative and judicial system.

First of all, the PLHIV may **complain to the employer.** Any hospital or sanitary institution has their own internal policy against discriminations. It is not generally well detailed, so no explicit mention about HIV is included, but a **local commission** (an internal commission established in some public and private institutions and companies, which can deal with complaints and topics of occupational safety) **would evaluate** each case. Since no specific regulation on HIV is available, this approach could not be always effective.

Regarding local authorities, the Italian legislation provides protection against discriminations during any working activities. Generally, with the support of unions or other stakeholders (i.e., activists and NGOs), a judicial procedure could be started, even if could be a difficult and long procedure. Thus, local **trade unions and work councils** could be involved in any case of discrimination. If local trade unions and work councils fail, the same organizations at regional or national level could be ideally involved in any case of discrimination. There are also the **Labour Inspectorates.** Their function is based on the

directives issued by the Ministry of Labour and Social Policies,[108] they exercise and coordinate the supervisory function on the national territory in matters of labour, including occupational safety. They are also responsible for assessments regarding the recognition of the right to benefits for accidents at work and occupational diseases.

Finally, a discriminated employee may definitely initiate **a legal intervention** claiming remedies. That can be initiated by any person who believes they have been subjected to discrimination. There might be grounds for compensation of damages, or for reinstatement in case of dismissal.

3. Case Studies

There was an order of the Court of Catania (Labour Section). It affirmed the claim of a **health worker who had not been hired by the local health department because of his HIV+ status**, even though he was considered to be fit and suitable for the job position by the occupational doctor.

4. Current Issues

Last section would like to report on current issues and challenges, especially on impacts of the covid-19 pandemic and also on testimonies of PLHIV working in health care.

4.1. COVID-19 impacts on PLHIV

In Italy, all PLHIV have been considered among the populations exposed to possible severe outcomes if infected by SARS-COV-2. In some cases, therefore, healthcare workers operating is specific units (e.g. infectious diseases units) have been exempted from working duties during the emergency in order to safeguard their health conditions. They were reintegrated in their functions when the situation improved. These measures were **not considered as discriminatory**.

4.2. Good and poor practices

There are no particular practices to be reported.

108 Decree of 9 April 2008, n. 81.

4.3. Statements from PLHIV in health care

One of the collaborating healthcare workers living with HIV wanted anyway to report **episodes occurred at his hospital** while he was performing his duties (even though they were **not directed at him as he has not disclosed his HIV status**). His testimony is a proof that discriminatory attitudes and behaviours are still common nowadays towards PLHIV. He registered three particular episodes referring to recent discrimination of PLHIV in healthcare settings, directed to both, the healthcare staff as well as patients:

Excessive Pietism
During pre-hospitalization before a surgery, a patient disclosed he lives with HIV. My senior colleague behaved in a polite and empathetic way, perhaps a little hasty. Once the patient left, she made comments that reminded me of 1999: "These patients must be extremely careful, as the people living with them, in their everyday life, in order to avoid big problems. They are at risk. Poor people…"

Beware of infected material
A patient who had just undergone surgery was taken to the post-surgery control room for vital signs monitoring. While performing the different duties, nurses and doctors continued reminding each other about the patient's HIV-positive status, by doing so in an almost grotesque way, reminding me of it several times. The patient had been HIV positive for years, with no HIV related problems and with controlled viraemia.

"You NEVER know"
In the operating room, during surgery to an HIV positive patient, I was asked/forced to wear double gloves to take venous access. The requests became absurd when, once the potentially "invasive" maneuver was over and after having changed the gloves several times, the chief doctor asked me to wear another pair of gloves before writing the surgery report, because "you never know".

SPAIN

SUMMARY

In Spain, PLHIV conducting EPPs face certain limitations. In their case, the Evaluation Commission carries out a periodic evaluation with the possibility of recommending modifications or limitations in their work practices. These modifications are dependent on their viral load.

HIV-testing is not mandatory, however, it is not possible for health personnel to refuse serology. Usually, the test is only offered, although practice varies. This tends to happen to all medical professions irrespective of whether or not they conduct EPPs.

National Context

Spain is a country with population size of 47.353.590 people. Estimated number of PLHIV is 151.387. According to latest data and regarding the 90-90-90 targets, the latest numbers were: 87 % for the first target, 97.3 % for the second target and 90.4 % for the third target.

According to the report **Epidemiological surveillance of HIV and AIDS in Spain 2020**[109] , in 2020, 1,925 new HIV diagnoses were reported, which represents a rate of 4.07/100,000 inhabitants without correcting for delay in notification. Out of them, 84.3 % were men and the median age was 36 years (interquartile range: 29-46). Transmission in MSM was the most frequent, 55.2 %, followed by heterosexual transmission (27.5 %) and transmission in PID (2.4 %). Around 33 % of new diagnoses of HIV infection were made in people from other countries, 45.9% of the new diagnoses presented a late diagnosis.

109 Ministry of Health. Epidemiological surveillance of HIV and AIDS in Spain 2020. Updated 30 June 2021, available online at: https://www.sanidad.gob.es/ciudadanos/enfLesiones/enfTransmisibles/sida/ vigilance/Informe_VIH_SIDA_WEB.pdf.

Compared to the cases diagnosed in 2019, there is a **41% decrease in new HIV diagnoses in 2020**, reported in 2021. This decrease is not homogeneous between autonomous communities. The reduction in the number of new diagnoses is reflected in the global rates, by sex and mode of transmission and it may be attributed to various factors related to the COVID-19 pandemic: underreporting due to the overload of regional surveillance systems, underdiagnosis of HIV due to difficulties in accessing the health system during 2020, as well as a possible reduction of HIV incidence attributable to the lockdown and social distancing measures put in place to contain the pandemic.

Previously, the trend between 2010 and 2019 in total rates is downward, for men and women. Depending on the mode of transmission, there is a decrease in the rates in PID and in cases of heterosexual transmission globally and in both sexes. The rates of new diagnoses in MSM show a stabilization between 2010 and 2017 and from that year a downward trend is observed. According to the evaluation of Working Positively, the trend of the years prior to the pandemic is characterized by (i) around 4,000 new cases diagnosed annually since 2008, since the data published in the official reports are subsequently corrected and amount to this amount, (ii) more than 50% of the new cases correspond to MSM, (iii) late diagnosis occurs in around 50% of new cases.

The percentage of people diagnosed whose country of origin was not Spain ranged between 42.8% and 39.4% in the period, without showing a clear trend. No significant changes are observed by region of origin. Also, late diagnosis remains unchanged both globally and according to the main modes of transmission.

Spain does report data according to the Global AIDS Strategy 2021-2026. The **HIV, STI, Hepatitis and Tuberculosis Control Division** (under the Ministry of Health) and the **National Epidemiology Centre of the Carlos III Health Institute** (under the Ministry of Science, Innovation and Universities) make reports through the Dublin Declaration on data related to prevention, testing, continuum of care and stigma, in addition to those related to treatment.

2. Legal Background

This chapter focuses on the legal framework governing the topic of employment of PLHIV in health care. Firstly, the general regulation is introduced. Spanish law disposes of variety of provisions relevant for employment of PLHIV in health care. They can be found on constitutional, primary, secondary, and even soft-law level. Some of the regulation is also HIV-specific (on the secondary legislation level). Secondly, the chapter elaborates on rights and obligations of PLHIV and their employers, and introduces existing remedies against discrimination.

2.1. General legal framework relevant for PLHIV working in health care

On **the constitutional level**, several relevant, although not HIV-specific provisions, may be found in the **Spanish Constitution** of 1978. First of all, it enshrines the principle of rules of law, of freedom and equality.[110] That is concretized by Article 14 as *"Spaniards are equal before the law, without discrimination based on birth, race, sex, religion, opinion or any other personal or social condition or circumstance"*. Other articles guarantee the dignity of the person,[111] right to personal privacy and one's own image,[112] on equal access to public functions[113] or on judicial protection[114]. Article 10 further notes that the rules relating to fundamental rights and freedoms that the Constitution recognizes will be interpreted in accordance with the Declaration of Universal Human Rights and relevant ratified international treaties and agreements.

Regarding **the primary legislation,** there is varied legislation related to the right to employment and work, as well as non-discrimination in the workplace, which is applicable to PLHIV. Among the existing legislation, the following stand out:

- Royal Legislative Decree approving the revised text of the Workers' Statute Law[115]

This Decree implements for example the right of the worker not to be discriminated against,[116] the right of the worker to an adequate occupational risk prevention policy,[117] the right of the worker to respect for their privacy and due consideration for their dignity.[118]

- Royal Legislative Decree approving the revised text of the Law on the Basic Statute of Public Employees[119]

This Decree elaborates on individual rights, including respect for privacy, self-image and dignity, among other conditions,[120] on the right of all citizens to access public employment in accordance with the constitutional principles of equality,[121] on the guarantee of constitutional principles in the procedures for the selection of civil servants,[122] on the adequacy between the content of the selection processes and the functions or tasks to be performed,[123] on the need to have the functional capacity to perform the tasks when participating in the selection processes[124] or the provision of jobs through processes based on the principles of equality.[125]

110 Arts. 1.1, 9.2 of the Constitution.

111 Art. 10.1 of the Constitution.

112 Art. 18 of the Constitution.

113 Art. 23 of the Constitution.

114 Art. 24 of the Constitution.

115 Royal Legislative Decree 2/2015 of October 23 (Official State Gazette of 10-24-2015) approving the revised text of the Workers' Statute Law

116Article 4.2.c) of the 2/2015 Decree.

117 Article 4.2.d) of the 2/2015 Decree.

118 Article 4.2.e) of the 2/2015 Decree.

119 Royal Legislative Decree 5/2015 of October 30 (Official State Gazette of 11-20-2015) approving the revised text of the Law on the Basic Statute of Public Employees.

120 Article 14.h) of the 5/2015 Decree.

121 Article 55.1 of the 5/2015 Decree.

122 Article 55.2 of the 5/2015 Decree.

123 Article 55.2.e) of the 5/2015 Decree.

124 Article 56.1.b) of the 5/2015 Decree.

125 Article 78 of the 5/2015 Decree.

- Law of the Framework Statute of statutory personnel of health services[126]

The most important provisions of this act concern the right of statutory staff of health services to receive effective protection in matters of health and safety at work, as well as general risks in the health center or arising from regular work,[127] the right of statutory personnel of health services to have their dignity and personal privacy respected at work and to be treated with correctness, consideration and respect by their bosses and superiors, their colleagues and their subordinates,[128] the right of statutory personnel of health services to non-discrimination for any personal or social condition or circumstance,[129] the principle of equality among the principles to be taken into account in the selection, promotion and mobility of health service personnel, [130] the rule that the selection of permanent statutory personnel will be carried out through a public call and through procedures that guarantee the constitutional principles of equality[131] similarly as the internal promotion,[132] the rule that functional capacity necessary to perform the functions derived from the corresponding appointment must be among the requirements to be met in order to participate in the selection processes for permanent statutory personnel.

- Law on the Prevention of Occupational Risks[133]

This law implements variety of relevant rules: for example, the employer shall adopt the necessary measures so that the work teams are suitable for the work to be carried out and suitably adapted for this purpose, in such a way as to guarantee the safety and health of workers when using them,[134] the employer must provide their workers with adequate personal protection equipment for the performance of their duties and ensure their effective use when, due to the nature of the work performed, they are necessary,[135] or the employer will guarantee the workers in his service the regular surveillance of their state of health based on the risks inherent to the work.[136]

It states that any control measures of the health of the workers will be carried out always respecting the right to privacy and dignity of the person of the worker and the confidentiality of all the information related to their status of health[137] and these results will be communicated to the affected workers,[138] but may not be used for discriminatory

126 Law 55/2003, of December 16, of the Framework Statute of statutory personnel of health services (Official State Gazette of 12-17-2003).
127 Article 17.d) of the 55/2003 Law.
128 Article 17.f) of the 55/2003 Law.
129 Article 17.k) of the 55/2003 Law.
130 Article 29.1.a) of the 55/2003 Law.
131 Article 30.1. of the 55/2003 Law.
132 Article 34.3. of the 55/2003 Law.
133 Law 31/1995, of November 8, on the prevention of Occupational Risks (Official State Gazette of 11-10-1995).
134 Article 17.1. of the 31/1995 Law.
135 Article 17.2. of the 31/1995 Law.
136 Article 22.1. of the 31/1995 Law.
137 Article 22.2. of the 31/1995 Law.
138 Article 22.3. of the 31/1995 Law.

purposes.[139] It specifies that **access to medical information of a personal nature will be limited to medical personnel** and health authorities that carry out surveillance of the health of workers, and it cannot be provided to the employer or to other persons without the express consent of the worker. However, the **employer** and the persons or bodies with responsibilities in matters of prevention **will be informed of the conclusions** derived from the examinations carried out in relation to the aptitude of the worker to perform the job or with the need to introduce or improve protection and prevention measures, so that they can correctly carry out their functions in preventive matters.

Moreover, it indicates that this surveillance may only be carried out when the **worker gives their consent**, except for this voluntary nature, following a report from the workers' representatives, in cases in which carrying out the examinations is essential to assess the effects of the working conditions on the health of the workers or to verify if the state of health of the worker can constitute a danger for the same, for the other workers or for other people related to the company or when it is established in a legal provision in relation to the protection of specific risks and activities of special danger. Furthermore, in any case, those examinations or tests that cause the least inconvenience to the worker and that are proportional to the risk must be chosen.

The act further establishes that, in cases where the nature of the risks inherent in the work makes it necessary, the right of workers to periodic monitoring of their health status must be extended beyond the end of the employment relationship, in the terms determined by regulation.[140] It sets the obligation for the employer to guarantee the protection of workers who, due to their own personal characteristics or known biological state, including those who have a recognized physical, mental or sensory disability, are especially sensitive to the risks arising from work. To this end, it must take these aspects into account in the risk assessments and, based on these, it will adopt the necessary preventive and protective measures.[141]

Finally, it establishes that workers **will not be employed in those jobs in which, due to their personal characteristics, biological state or due to their duly recognized physical, mental or sensory disability,** they, the other workers or other related persons may with the company putting themselves in a situation of danger or, in general, when they are manifestly in transitory states or situations that do not respond to the psychophysical demands of the respective jobs.

139 Article 22.4. of the 31/1995 Law.

140 Article 22.5. of the 31/1995 Law.

141 Article 25.1. of the 31/1995 Law.

- The Penal Code[142]

The criminal implications related to the topic may include criminal offences of serious discrimination,[143] endangerment of workers' life and health due to violation of occupational risk prevention,[144] public promotion of hatred, discrimination or violence[145] or actions entailing humiliation or contempt based on discriminatory ground.[146]

To proceed with **secondary legislation,** there is the **Order on Instructions to update the calls for selective tests of civil servants, statutory and labour, civil and military, in order to eliminate certain medical causes of exclusion in access to public employment.**[147] This document speaks specifically about PLHIV and their needs. It establishes that **it is necessary to eliminate HIV from the causes of medical exclusions required for access to public employment**, so that this measure can be applied to all calls for selective tests of official, statutory and labour personnel, which are called after the date of adoption of this

Agreement and, in any case, from those derived from the Public Employment Offer of the year 2019, adapting them to the scientific evidence at the time of the call, subject to the opinion of the corresponding optional body and without prejudice to the overcoming of the selective tests in each case.[148] It further establishes that it is necessary to limit causes of medical exclusions required in for selective HIV tests of the Armed Forces and State Security Forces and Bodies.[149] It consider as agreed to review and update the remaining causes provided for in the catalogues of medical exclusions required for access to public employment, adapting them to the scientific evidence at the time of the call, and subject to the opinion of the corresponding medical body; so that these measures can be applied to all calls for selective tests of official, statutory and labour

142 Organic Law 10/1995, of November 23, of the Penal Code (Official State Gazette of 11-24-1995).

143 Article 314 of the Penal Code: "those who produce serious discrimination in employment, public or private, against any person due to their ideology, religion or beliefs, their belonging to an ethnic group, race or nation, their sex, sexual orientation, family situation, illness or disability, for holding the legal or union representation of the workers, for the kinship with other workers of the company or for the use of any of the official languages within the Spanish State, and do not restore the situation of equality before the law after a requirement or administrative sanction, repairing the economic damages that have been derived, will be punished with a prison sentence of six months to two years or a fine of 12 to 24 months".

144 Article 316 of the Penal Code: "persons who, in violation of occupational risk prevention regulations and being legally obliged, do not provide the necessary means for workers to carry out their activity with the appropriate safety and hygiene measures, so that thus put their life, health or physical integrity in serious danger, shall be punished with prison sentences of six months to three years and a fine of six to twelve months".

145 Article 510.1.a) of the Penal Code: "those who publicly encourage, promote or directly or indirectly incite hatred, hostility, discrimination or violence against a group, a party of the same or against a specific person by reason of their belonging to it, for racist, anti-Semitic or other reasons related to ideology, religion or beliefs, family situation, the membership of its members to an ethnic group, race or nation, their national origin , your sex, sexual orientation or identity, for reasons of gender, illness or disability, shall be punished with prison sentence one to four years and a fine of six to twelve months".

146 Article 510.2.a) of the Penal Code: "those who harm the dignity of people through actions that entail humiliation, contempt or disrepute of any of the groups to which refers to the previous section, or a part of them, or any person determined by reason of their belonging to them for racist, anti-Semitic reasons or others related to ideology, religion or beliefs, family situation, the membership of its members to an ethnic group, race or nation, their national origin, their sex, sexual orientation or identity, for reasons of gender, illness or disability, or produce, prepare, possess for the purpose of distribution, facilitate third party access, distribute, disseminate or sell writings or any other class of material or supports that, due to their content, are suitable for injuring the dignity of people because they represent a serious humiliation, contempt or discredit of any of the groups mentioned, of a part of them, or of any person determined by reason of their belonging to them, shall be punished by a prison sentence of six months to two years and a fine of six to twelve months".

147 Order PCI/154/2019, of February 2019, which publishes the Agreement of the Council of Ministers of November 30, 2018, which approves instructions to update the calls for selective tests of civil servants, statutory and labor, civil and military, in order to eliminate certain medical causes of exclusion in access to public employment (Official State Gazette of 02-20-2019).

148 First section of the Annex of the Order PCI/154/2019.

149 ibid.

personnel.[150] Finally it concludes to **promote modification of the regulations that contemplate HIV** that should not appear as a cause of generic exclusion from public employment.[151]

To conclude with **soft law documents,** there is the **Social Pact for Non-Discrimination and Equal Treatment associated with HIV.**[152] This document was created with the aim of eliminating the stigma and discrimination associated with HIV and AIDS, guaranteeing equal treatment and opportunities, non-discrimination and the full exercise of fundamental rights of affected people and arises from the principles of co-responsibility, multisectorality, social participation and equity. The document covers all areas of life, both public and private, through the promotion of policies, strategies and lines of action, among which are those aimed at avoiding employment discrimination, such as: updating medical exclusions linked to public employment, establishing mechanisms to improve cooperation between administration, unions and companies, adopting strategies that facilitate the employment of PLHIV, deepening the knowledge of the employment situation of the group, adopting measures to eliminate barriers in private employment. Likewise, other lines of action that are applicable to the labour rights of PLHIV are: monitoring situations of discrimination, ensuring that medical certificates do not include serological status as an indicator of suffering from an infectious-contagious disease, or response to situations of discrimination produced from the health field.

To promote the Pact's actions, the **Agreement[153] between the General Directorate of Public Health, the State Coordinator for HIV and AIDS and the University of Alcalá** concerning the development of actions for non-discrimination and equal treatment associated with HIV was concluded.[154] Particularly important are the clauses regarding: specific collaborations to develop strategies that facilitate the labour insertion of PLHIV, ensuring equal opportunities for women and men both in accessing and maintaining employment; specific collaborations to design research aimed at deepening the labour needs of PLHIV and the difficulties, analysing the differences between men and women, to maintain employment or return to work; collaboration in the development of actions to raise awareness and train professionals in social, health, legal and educational resources to promote equal treatment and the approach of the specific needs of all PLHIV; participation in research aimed at deepening the labour needs of PLHIV and the difficulties, analysing the differences between men and women, to maintain employment or back to work.

150 Fifth section of the Annex of the Order PCI/154/2019.

151 Sixth section of the Annex of the Order PCI/154/2019.

152 Ministry of Health. Social Pact for Non-Discrimination and Equal Treatment associated with HIV. 27 November 2018, available at: https://pactosocialvih.es/wp-content/uploads/ SOCIAL-PACT-English.pdf.

153 Official State Gazette of 03-23-2021.

154 Resolution of 10 March 2021 of the Secretary of State for Health, available at: https://www.boe.es/boe/dias/2021/03/23 /pdfs/BOE-A-2021-4554.pdf.

Along these same lines, in 2021, **Plan for the Prevention and Control of HIV and STI Infection, 2021-2030** was presented.[155] It proposes equal treatment and opportunities, non-discrimination and the full exercise of the human rights of PLHIV, among others. The Plan elaborates on monitoring and incorporation of the measurement of quality of life in clinical practice, progress in measuring the stigma and self-stigma of PLHIV, promoting equal treatment and opportunities for PLHIV, work in favour of social acceptance, reduce the impact of stigma on PLHIV, and generate knowledge that guides policies and actions against discrimination, promotion of psychosocial health in PLHIV and their resilience. It mentions elimination of social and legal barriers and reduce the stigma of PLHIV and people at risk of acquiring HIV, elimination of social and legal barriers that may limit the quality of life and the guarantee of the rights of PLHIV and other STIs, awareness-raising of professionals in social, health, legal, educational resources and the media, to favor equal treatment and address the specific needs of all PLHIV and many other topics.

Worth mentioning is also the **Prevention and Control of Communicable Diseases in Primary Care.**[156] At regional level, it points out that health workers with HIV **can perform invasive procedures with risks of exposure given the minimal risk of existing transmission** and that they must carry out their activity with strict adherence to universal precautions. In addition, it is recommended that health workers are aware of their HIV serology and that they have specialized care.

Furthermore, there are two crucial recommendations governing the precautions for PLHIV in health care. They will be described later in the part related to possibly discriminatory regulation against PLHIV.

2.2. Possibly discriminating legislation

When it comes to potentially discriminatory legislation against PLHIV, there may be **two problematic points, one on the primary legislation level, second on the level of soft law documents.**

Firstly, even though, there is **no legally binding rule that establishes an absolute prohibition for PLHIV to carry out activities in health care** (as will be further elaborated on), however, an erroneous interpretation of Article 22.1 of Law on the Prevention of Occupational Risks[157] could lead to discrimination against PLHIV working in health care.

155 Ministry of Health. Plan for the Prevention and Control of HIV and STI Infection, 2021-2030. December 2021, available at: https://www.sanidad.gob.es/ciudadanos/enfLesiones/enfTransmisibles/sida/planNalSida/Plan_de_Prevencion_y_Control1.pdf.

156 Ministry of Health of the Community of Madrid. Prevention and Control of Communicable Diseases in Primary Care. 2009, available at: http://www.madrid.org/bvirtual/BVCM009209.pdf.

157 Article 22.1. establishes that the employer will guarantee the workers in his service the regular surveillance of their state of health based on the risks inherent to the work. It indicates that this surveillance may only be carried out when the worker gives his consent, except for this voluntary nature, following a report from the workers' representatives, in cases in which carrying out the examinations is essential to assess the effects of the working conditions on the health of the workers or to verify if the state of health of the worker can constitute a danger for themselves, for the other workers or for other people related to the company or when it is established in a legal provision in relation to the protection of specific risks and activities of special danger. It specifies that those examinations or tests that cause the least inconvenience to the worker and that are proportional to the risk must be chosen.

This might happen if the **restrictions** applied on the grounds that one's health may constitute a danger to the health of other people **do not comply with the principles of suitability, necessity and proportionality** and do not respect the person's viral load, their compliance with antiretroviral treatment or their attitude and behaviour in their professional performance.

In the light of this article, the **restrictions would be justified if the health worker was a serious danger to the health of third parties.** However, in the case of HIV, the risk of transmission from healthcare workers to patients during medical, surgical and dental procedures is exceptional and certainly unlikely. In addition, there have been advances in scientific evidence on the conditions of transmission of HIV infection to third parties thanks to antiretroviral treatment. Added to these two aspects are the advances in surgical procedures and in the materials used in health care.

This has been acknowledged also by the State Coordinator for HIV and AIDS,[158] and the Constitutional Court.[159] The Court ruled that when assessing the existence of a 'danger', the existence of a **'material danger' is not enough, but rather it must be a 'significant risk'.** Under this prism, the State Coordinator also highlights that HIV is not a real danger because the transmission of pathogens through blood is extremely rare if universal precautions are used. Accordingly, in addition, two other factors should be taken into account when considering the severity of the risk, which must be real and not merely hypothetical, such as: (i) **its nature**, since the mode of transmission is known and universal prevention measures can be adopted, and (ii) **its probability**, which can be reduced through training (reducing the frequency with which the health professional suffers harm that could represent a risk of transmission to the patient); pharmacological intervention on PLHIV (reducing the circulating viral load) or the use of safer materials and techniques (reducing the frequency and magnitude with which exposure to the pathogenic agent occurs). Regarding **the severity of the damage** as a factor, it is suggested that it could be discussed whether the assessment could take into account the existence, on the one hand, of a post-exposure prophylactic treatment and, on the other hand, of an effective pharmacological treatment that prevents the deterioration of health and grants a life expectancy equivalent to that of a diabetes patient. Finally, regarding **the duration of the damage,** it is pointed out that action could not be taken at the moment since the virus settles permanently in a person's body.

Hence, the **general restrictions on the rights of PLHIV are disproportionate** in the case of those that can be excluded as a result of the application of this article, **without actually constituting a danger to the health of third parties**. This would affect their right not to be discriminated against.

Secondly, there are two recommendations prepared by the Ministry of Health between 1998 and 2001. Both guidelines **do not justify the systematic modification or limitation of the professional activities of a health worker with HIV** in the vast majority of cases.

158 State Coordinator for HIV and AIDS (CESIDA). Report HIV and the health professions: iatrogenic transmission of HIV. 2014, available at: https://www.cesida.org/wp-content/uploads/2013/09/Informe-Clinica -Legal_-EL-VIH-Y-LAS-PROFESIONES-SANITARIAS-2014.pdf.

159 Judgment of the Constitutional Court no. 196/2004, legal basis 6.

The first of them is **Recommendations Regarding Healthcare Professionals Carrying the Human Immunodeficiency Virus (HIV) and Other Viruses Transmitted by Blood, Hepatitis B Virus (HBV) and Hepatitis C Virus (HCV).**[160] This guide states that:

- systematic application of "universal precautions" is the essential part of the prevention measures for blood-borne infections, both from health personnel to the patient and vice versa;
- ethically, it is **not justified to carry out mandatory HIV and HCV screening tests on healthcare personnel;**
- the risk of HIV transmission from healthcare personnel is very remote;
- invasive procedures with the risk of accidental exposure to blood-borne viruses are defined as those in which the **worker's gloved hands may be in contact with sharp instruments, needle points or sharp tissue fragments located within an open body cavity, wound, or anatomical space,** or where the hands or fingertips **may not be fully visible during or part of the procedure;**
- **restrictions** for health personnel with HIV **should be only when it comes to intervening in invasive procedures with risk of accidental exposure.**

In this way, it classifies health workers with HIV into three groups based on their functions and establishes different recommendations depending on them:

a) those who **do not carry out invasive procedures and apply universal precautions** in their work. The recommendation is that **they can continue to carry out their usual work,** performing the appropriate medical check-ups.

b) those who **perform invasive procedures without the risk of accidental exposures and who apply universal precautions** in their work. They will also **be able to continue carrying out their usual work**, following their clinical controls. Their doctor may conduct make the consultations that he/she deems appropriate to the corresponding evaluation commission, maintaining the worker's confidentiality at all times.

c) those who **perform invasive procedures with risk of accidental exposures.** Although a generalized recommendation that all professionals with HIV stop performing such procedures is not considered justified, in application of article 22 of the Law on Prevention of Occupational Risks, **some type of restriction could be justified** since the health of the worker could constitute a health hazard to other people.

In any case, **decisions about these restrictions must be made individually, taking into account the type of activities** of each professional, their physical and mental conditions, and their personal attitude.

160 Ministry of Health. Recommendations Regarding Healthcare Professionals Carrying the Human Immunodeficiency Virus (HIV) and Other Viruses Transmitted by Blood, Hepatitis B Virus (HBV) and Hepatitis C Virus (HCV). Second edition 1998, available at: https://www.sanidad.gob.es/ciudadanos/enfLesiones/enfTransmisibles/sida/publicaciones/profSanitarios/recomendaciones.htm.

This Recommendation furthermore states that a procedure for evaluating and monitoring health workers in relation to HIV is established **through the creation of an Evaluation Commission.** The Evaluation Commission is a body in charge of the individualized study of cases. Its scope of action may be limited to the health center itself or have a greater territorial scope (provincial or regional). Its functions are to serve as a consultative body on problems related to the transmission of viruses through the professional practice of infected health workers, periodically evaluate health workers with HIV, HBV or HCV who perform invasive procedures with risk of accidental exposures and recommend modifications or limitations in their work practices, as well as propose the adoption of measures in cases of serious non-compliance with the recommended modifications or limitations. It concludes that generalized and indiscriminate **information for patients** who have undergone invasive procedures by professionals with HIV **is not considered necessary.**

Currently, there are **three problems** with this guide. In practice, the **individualized response is not guaranteed**, since the person's viral load, compliance with antiretroviral treatment or their attitude and behaviour in their professional performance are not taken into account when assessing the function restriction. Also, it has **become obsolete**, since 1998, the medical advances that have occurred around antiretroviral treatment have caused important changes both in improving the health status of PLHIV and in the conditions of transmission of the infection to third parties. Finally, the guide **was supposed to be periodically updated** in compliance with new scientific knowledge. However, it has not yet been carried out.

The second guide is called **Specific health surveillance protocol for workers exposed to biological agents.**[161] Equally as the previous guide, it contemplates specific measures regarding the fitness to carry out invasive procedures with the risk of accidental exposure to HBV, HCV and HIV, in all three cases as they are infections that can be transmitted by blood pathway. In order to assess the suitability of healthcare personnel with HIV, **it recommends an in-depth study on a case-by-case and individual basis** which takes into account the person's viral load and CD4 count, the type of professional practice (assessing invasive procedures with the risk of accidental exposure) and the capacity and willingness of the worker to apply prevention standards.

Regarding the limitation of activities or tasks, it establishes that this **should never be greater than for other diseases** whose transmission route is parenteral (HBV, HCV, etc.), with the guidelines for action being clearly defined. On the other hand, it also indicates that, **in the case of HIV, refusal to perform serology by health personnel is not possible.** It also recommends a thorough check that the usual preventive measures are carried out. In conclusion, abovementioned documents should be updated in order to adopt more individualized, non-stigmatizing approach to each PLHIV working in health care and to take into account the new scientific data to determine the danger involved.

161 Interterritorial Council of the National Health System. Specific health surveillance protocol for workers exposed to biological agents. 2001, available at: https://www.sanidad.gob.es/ciudadanos/saludAmbLaboral/docs/agentes_biologicos.pdf.

2.3. Rights and obligations of PLHIV

This section summarises the rights and obligation of PLHIV working in healthcare with respect to variety of professions in the field. It is necessary to say that there are slight differences between the private and public sector.[162] Especially, it is estimated that the feeling of pressure on undertaking of HIV tests is more urgent in private sector, as well as the general occurrence of discrimination of PLHIV.

2.3.1. Rights and obligations of employees

PLHIV wanting to work in health care **are facing certain limitations and restrictions.** The legal basis is Article 22 of Law on the Prevention of Occupational Risks which requires *"verification whether the worker's state of health can constitute a danger for himself, for other workers or for other people related to the company"*. The issue is whether a worker might conduct invasive procedures with risk of accidental exposure. Relevant rules are introduced by the abovementioned Recommendations Regarding Healthcare Professionals Carrying the Human Immunodeficiency Virus (HIV) and Other Blood Transmissible Viruses, Hepatitis B Virus (HBV) and Hepatitis B Virus Hepatitis C (VHC). Regarding the scope of professions in the sense of the Recommendation, "health workers" are those doctors, dentists, nurses and students of medicine or nursing, **who may be in contact with patients and perform risky invasive procedures that may predispose to exposures.** Even though the Recommendation stated that decisions on restrictions would have to be made individually and concretely, this **individual response is not currently guaranteed.**

In any case, the intervention of an Evaluation Commission is proposed in the case of HIV+ professionals who carry out invasive procedures. It will carry out a **periodic evaluation of the worker**, with the possibility of recommending modifications or limitations in their work practices, as well as proposing the adoption of measures in cases of serious non-compliance with the recommended modifications or limitations.

If someone was diagnosed with HIV while working in one of the mentioned professions, **it would not**, by itself, **imply any limitation in terms of the tasks** of his job. The exception would appear in cases in which viral load was detected and coincided with the performance of invasive procedures with risk of accidental exposure. In this case, **temporary limitation could be established** for the performance of said procedures until a situation of undetectable viral load returns. But first of all, if a worker suspected that they may be infected with HIV, HBV or other blood-borne viruses, they have the possibility of carrying out, anonymously, tests for the determination of antibodies against these viruses (in respective Occupational Health/Preventive Medicine Unit or any authorized center). The diagnosis must be carried out respecting the confidentiality and privacy.

Also, general attitudes and opinions held about PLHIV in Spanish society can also be considered a limitation for PLHIV working in health care settings. Approximately 46 % of Spaniards believe that PLHIV should not be able to work as health professionals[163] and 25 % would feel uncomfortable in a health center where a person with HIV worked.[164]

162 Especially in the ways of termination of the contract (in the public sector, an employee may be so-called „temporary staff"); see Articles 8, 9 of the 55/2003 Law.

163 International Association of Providers of AIDS Care (IAPAC). Has HIV stopped being a problem? 2018.

164 Trabajando en Positivo, myGwork. Survey on knowledge and attitudes linked to HIV in the business environment. 2020

Having explained that, PLHIV working in healthcare **are not obliged to disclose their HIV-status** to the employer. Such obligation would exist (subject to a report from the workers' representatives) only if it were *"essential to assess the effects of working conditions on the health of workers or to verify whether the state of health of the worker may constitute a danger for himself, for other workers or for other people related to the company or when it is established in a legal provision in relation to the protection of specific risks and activities of special danger"*.[165] This is confirmed also by practice: there is no obligation to notify the serological status, it is up to the professional to communicate it or not.

However, despite this fact, it does raise, in ethical terms, the obligation of care personnel who know that they are infected with HIV **not to hide their status and to communicate it to the health part of the Occupational Risk Prevention Service** of their company so that the appropriate surveillance measures are adopted.[166] Likewise, it is proposed that if a doctor knows that a partner with HIV continues to engage in risky practices, they must be warned about breaching the Code of Ethics and, if they do not pay attention to that, they have the duty to notify the College of Corresponding Physicians.

Yet, there is the issue of HIV testing. **Such testing is not mandatory** as it is not justified.[167] However, the guide **Specific health surveillance protocol for workers exposed to biological agents** indicates that, in the case of HIV, it is not possible for health personnel to refuse serology. This could be scientifically justified only in case of people who provide health services including invasive procedures with the risk of accidental exposure. Similarly as this collision between mentioned norms, the practice is also not unified.

In opinion of experts and PLHIV working in Spanish health care, in the day-to-day practice, the **test is usually offered** regardless of the performance of procedures invaders at risk of accidental exposure. In the cases in which it is not offered, many workers end up requesting it to be carried out, together with the hepatitis B and C virus serology, since blood is always drawn in the health examination. When it is not offered, but is requested by the worker (always with prior signed consent on their part), from the occupational risk prevention sector it is suggested that the main reason for this request may be fundamentally due to doubts about possible exposures to accidental biological injuries. Strictly speaking, **for workers who do not perform invasive procedures with risk of accidental exposure, the test would not be part of the content of the health examination,** although an offer for the test is frequently made (together with those for hepatitis B and C). In practice, different specialties are valued depending on whether or not invasive procedures are carried out,[168] but also on the specific work environment.

165 Article 22 of the 31/1995 Law.

166 Council of Medical Associations of Catalonia. Quaderns de la Bona Praxi: How to act when a person is a carrier of the human immunodeficiency virus or the hepatitis B virus o C. 2016, available at: https://issuu.com/comb/docs/bona_praxi_35.

167 Recommendations Regarding Healthcare Professionals Carrying the Human Immunodeficiency Virus (HIV) and Other Blood Transmissible Viruses, Hepatitis B Virus (HBV) and Hepatitis B Virus Hepatitis C (HCV).

168 Relevant for general surgery, plastic surgery, orthopedic surgery and traumatology, cardiac surgery and vascular surgery, otorhinolaryngology, maxillofacial surgery or stomatology, thoracic surgery, urology, pediatric surgery, neurosurgery, dentistry, obstetrics/gynecology, obstetrics/gynecology nursing (midwifery).

When it comes to disclosure of one´s HIV-status, as specially protected data, it *"may not be used for discriminatory purposes or to the detriment of the worker."*[169] Access to medical information of a personal nature will **be limited to medical personnel and health authorities** that carry out surveillance of the health of workers, and it cannot be provided to the employer or to other persons without the express consent of the worker. However, **the employer and the persons or bodies with responsibilities in matters of prevention will be informed of the conclusions derived from the examinations** carried out in relation to the aptitude of the worker for the performance of the job or with the need to introduce or improve protection and prevention measures, so that they can correctly carry out their functions in preventive matters.

For this reason, **consent must be requested for the processing of data** in which the worker must expressly and clearly express their willingness to accept that said company stores and processes their personal data. This data and its protection is governed by the Organic Law on the Protection of Personal Data and Guarantee of Digital Rights[170] and relevant EU regulations.[171]

On the other hand, according to 664/1997 Decree it is established that the employer must adopt the necessary measures **to keep a record of individual medical records** and to store such record for a minimum of ten years.[172]

Finally, it is not considered necessary to provide general information to patients who have undergone invasive procedures by professionals with HIV.

2.3.2. Rights during medical studies

There are no limitations for PLHIV to study medicine, there are no mandatory tests during studies. However, a delicate situation is that of resident medical interns ("MIR") since they mix training and work. MIRs **do have to reveal their serological status** if their specialty is surgery. This does not mean that they are going to be removed from the service/specialty, but it does mean that viral load control must be more exhaustive. Leaving aside the case of invasive procedures with the risk of accidental exposure, if universal precautionary measures are strictly applied, the disclosure of the serological status should only be a posteriori if a risk situation occurs.

169 rticle 22.4. of the 31/1995 Law.

170 Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (Official State Gazette of 12-06-2018).

171 Regulation EU 2016/679; GDPR Regulation EU 2016/679 of the European Parliament and of the Council, of April 27.

172 This period will be extended up to forty years in the event of exposures that could give rise to an infection in which any of the following characteristics concur: a) Due to biological agents known to cause persistent or latent infections; b) That it is not diagnosable with current knowledge, until the manifestation of the disease many years later; c) Whose incubation period, prior to the manifestation of the disease, is especially long; d) That gives rise to a disease with recurrence phases for a prolonged time, despite treatment; e) That it may have important long-term consequences.

2.3.3. Rights of non-medical personnel

When it comes to non-medical personnel, the abovementioned specifics and limitation apply only to health workers.[173] Therefore, they **do not include non-medical personnel.** Still, PLHIV work as administrative personnel, services or other functions in the health field may be victims of discrimination under the same arguments as health personnel: the risk of transmitting the infection to third parties as a result of their performance, despite not even being included in direct care.

2.4. Obligations of the employer and employee representative

This section summarises the obligations of the employer and employee representatives not only in relation to ensuring equal treatment of PLHIV working in health care, but also to their duty of ensuring their occupational safety. Also, there are slight differences between the private and public sector.[174]

2.4.1. Obligation to counteract discrimination

Overall, there is an **obligation to counteract discrimination.** Employees are legally entitled to the right to non-discrimination by variety of pieces of legislation.[175] For example, any unilateral actions of the employer that was discriminatory is automatically consider null and void.[176] Such acts are considered as serious administrative offences.[177]

2.4.2. Obligations related to provision of health care in the workplace

There is a variety of obligations on the field of prevention belonging **to employers and employee representative**, meaning **Work Councils, Company Committees, Personnel Boards and Personnel Delegates**.

More specifically, Work Councils have the right to be informed and consulted on the adoption of possible preventive measures, especially in the event of a risk to employment[178] and Company Committees may exercise the task of monitoring and controlling health and safety conditions in the development of work in the company.[179] There are also other legal options, such the employer's right to carry out health surveillance without the consent of the worker if a report from workers' representatives is necessary; employer's duty to consult workers about health protection and occupational risk prevention activities and any action with substantial effects on the health of workers; or the obligation to establish the Prevention Delegates in companies with 50 or more workers with specific functions in the area of prevention.[180] Also, Personnel Boards

173 According to the Recommendations Regarding Health Professionals Carrying the Human Immunodeficiency Virus (HIV) and Other Viruses Transmissible by Blood, Hepatitis B Virus (HBV) and Hepatitis B Virus Hepatitis C (HCV): "doctors, dentists, nurses and students of Medicine, Dentistry or Nursing, who may be in contact with patients and perform risky invasive procedures that may predispose to exposures."

174 Especially in the ways of termination of the contract (in the public sector, an employee may be so-called „temporary staff"); see Articles 8, 9 of the 55/2003 Law.

175 Article 14.i) of Royal Legislative Decree 5/2000, of August 4, approving the consolidated text of the Law on Offenses and Sanctions in the Social Order (Official State Gazette of 08-08-2000); Article 17.k) of the 55/2003 Law.

176 Article 17 of the 2/2015 Decree.

177 Article 8.12 of 5/2000 Decree.

178 Article 64.5 of the 2/2015 Decree.

179 Article 64.7.a).2º of the 2/2015 Decree.

180 Articles 33, 34.1, 35 of the 2/2015 Decree.

and the Personnel Delegates have the power to know the statistics on the rate of absenteeism and its causes, accidents in the act of service and professional illnesses and their consequences, accident rates, periodic or special studies of the environment and working conditions, as well as the prevention mechanisms used. They further have the power to know the safety and hygiene conditions at work.[181]

Finally, there is **the requirement of having a staff/occupational doctor**. However, if the medical care is ensure directly in the workplace depends on chosen preventive modality of the workplace. There are following possible regimes:[182]

a. employer might personally assume such activity;
b. it might appoint one or several workers to carry it out;
c. it might set up its own prevention service (choosing the specialty of occupational medicine and nursing), this is obligatory in some cases;[183]
d. it might use a third-party prevention service (hiring that preventive specialty).

In realm of this obligation, the employer also has to implement first aid and emergency plans.[184] If not being able to carry these out, such functions can only be done by an external prevention service.[185]

2.5. Remedies against discrimination

When PLHIV come across discrimination in healthcare settings, they have several means of protection accessible under Spanish law on multiple levels of the administrative and judicial system.

First of all, the PLHIV may **complain to the employer** (in the context of this report to the health care provider). PLHIV working in the private sphere, who face discrimination can inform their union representatives, who are attributed with a surveillance task.[186] PLHIV working in public sector may inform the corresponding Personnel Board or Personnel Delegate, which has the power to monitor compliance with current regulations regarding working conditions and employment, and to exercise, where appropriate, the appropriate legal actions before the competent bodies[187]

181 Articles 9.5 and 9.7. of the Law 9/1987, of June 12, on Representative Bodies, Determination of Working Conditions and Participation of Personnel in the Service of Public Administrations (Official State Gazette of 06-17-1987).

182 Article 10.1 of the Royal Decree 39/1997, of January 17, which approves the Prevention Services Regulation (Official State Gazette of 01-31-1997).

183 Article 14 of the 39/1997 Decree.

184 Article 31.3.e of the Law on the Prevention of Occupational Risks.

185 See article 3.1.d of the Royal Decree 843/2011 of June 17 2011 which establishes the basic criteria on the organization of resources to develop the health activity of prevention services (Official State Gazette of 04-07-2011): "The activity to be carried out by the health services of the occupational risk prevention services will include: Providing first aid assistance and emergency care to workers who need it, in the cases of physical presence of health professionals in the workplace."

186 Article 64.7.a) 1 of 2/2015 Decree.

187 Article 9.6 of Law 9/1987 of June 12 1987, on Representative Bodies, Determination of Conditions of Work and Participation of Personnel at the Service of Public Administrations (Official State Gazette of 06-17-1987).

The role of **unions** can also be pointed out here as it is fundamental to include those aspects that directly affect the fight against discrimination. Some unions have Equality Services that are accessed through union membership. These are specific services for attention to discrimination, and offer different benefits, such as advice and information, as well as specifically watch over those cases in which workers are victims of discrimination. They have legal services that offer comprehensive advice in a case of discrimination.

On the national level and on the level of different autonomous communities, there is the figure of the **Ombudsman** or its equivalent, which has powers of inspection and investigation, which include the legal obligation of all public authorities to provide, on a preferential and urgent basis, the collaboration that you need for your investigations. This institution can supervise the activity of the General State Administration, the Administrations of the autonomous communities and the local Administrations, including the activity of the Ministers themselves. In addition, it can supervise the actions of public companies and agents or collaborators of the Administrations when they carry out public purposes or services. It is an institution without executive powers. Therefore, its force is rather persuasive and political.

Also, discrimination victims may also turn to the **Ministry of Labour and Social Economy, specifically to the State Labour and Social Security Inspection Body.** Its services include surveillance and enforcement of legal and regulatory standards and normative content of collective agreements, or inspection actions derived from the services provided by the Labour and Social Security Inspection (such as initiation of sanctioning procedures through the extension of Infringement Acts or formulation of demands ex officio before the Social Jurisdiction in accordance with the applicable regulations).

Furthermore, the employee may seek assistance of **legal entities established for the purpose of protection of victims of discrimination.** Specifically, it is necessary to highlight, due to its national scope, the HIV and Work Legal Advice Service of Trabajando en Positivo. It offers legal attention and support, personalized and free, to PLHIV residing in Spain for the protection of their rights in the workplace. To do this, it offers legal empowerment. Similarly, there is the Legal Clinic of CESIDA and the University of Alcalá. It provides a free service of information, support and legal literacy to PLHIV, family members by sending a report that includes legal arguments to defend their rights.

Finally, a discriminated employee may initiate a **legal intervention** for violation of fundamental rights both in the social (labour) or contentious-administrative jurisdiction (in the case of public or statutory civil servants). In certain cases, **criminal action** can be taken.[188]

188 See Article 314 of Penal Code.

3. Case Studies

During the year 2021, the organization Trabajando en Positivo has received 6 queries related to the performance of health professions by PLHIV. Five of them were merely for informational purposes and they included:

- pharmacy technician student asking about **the obligation to take an HIV test to work;**
- health care student with **problems accessing vaccination for COVID-19**, this being a requirement to carry out training practices;
- nursing assistant asking about the **obligation regarding the disclosure of HIV to work**;
- recently diagnosed **surgeon asking about the possibility of continuing his future job** and under what conditions, especially related to the obligation to report HIV to his occupational risk prevention service;
- occupational risk prevention service that consults on the **existing scientific evidence on undetectability as a criterion for carrying out risky invasive procedures** that may predispose to exposures.

In one case, the intervention of the organization's legal advice service was necessary. The case concerned a **nursing assistant who, as a consequence of the application of the "Action Procedure for Occupational Risk Prevention Services against exposure to SARS-CoV-2", was considered unfit to work in the COVID area** by the occupational risk prevention service of the hospital where he worked, transferring him to an administrative position and, therefore, relegating him from his patient care duties. The worker considered this decision as an unjustified overprotection that entailed a limitation of his professional aptitude due to a medical diagnosis. Thus, he addressed a letter to the Prevention Service disagreeing with the conclusion of the aptitude report, alleging lack of motivation and requesting information or answers to certain questions related to the objective criteria taken into account to make this decision, based on their high CD4 count, undetectable viral load and absence of comorbidities, these being the factors that the existing scientific evidence at that time linked to the increased risk of severe evolution of COVID in PLHIV.

After different steps, the person concerned received the consideration of "fit without limitations" by his occupational risk prevention service, being able to resume his patient care functions.

4. Current Issues

Last section would like to report on current issues and challenges, especially on impacts of the covid-19 pandemic and also on examples of current good and poor practices or direct testimonies.

4.1. COVID-19 impacts on PLHIV

On April 30 2020, the Ministry of Health, together with different bodies of the Ministry of Labour and Social Economy, and various scientific societies, published the document **Procedure for Action for Occupational Risk Prevention Services against exposure to SARS- CoV-2.**[189] One of the purposes of this document was that these services evaluate the presence of working personnel who are especially sensitive to the new coronavirus. Although it does not specify it explicitly, PLHIV are considered sensitive to COVID-19 because they have a virus that causes immunosuppression. In the first versions of this procedure, in which the vaccination factor was not yet considered as an element of assessment, an action guide was included for the management of vulnerability and risk in the health and social health field.

That established that people with immunodeficiency could only remain in their usual work activity if their work did not involve contact with symptomatic people as it was carried out in non-COVID areas, both for care and strategic support, regardless of whether their pathology was controlled, decompensated or had other comorbidities. However, if the work entailed the probability of contact, assistance or direct intervention with symptomatic people as well as if it was about non-health professionals who must carry out aerosol-generating manoeuvres on COVID+ people, a change of functions should take place and they should continue their work activity in a NO-COVID zone if their pathology was controlled.

On the contrary, in the event that they were decompensated or had other comorbidities, the person would need a job change and, if this was not possible, a temporary disability would be processed as a Particularly Sensitive Worker. In addition, the same action guide was proposed in the case of work in non-health or socio-health areas.

Although this action guide was proposed in order to more specifically protect the health of particularly sensitive workers, its application without taking into account the health professional's own opinion has led to cases such as that of the nursing assistant mentioned above, who was excluded against his will from his regular job. Likewise, another of the implications of considering people with immunodeficiency as a group especially sensitive to COVID-19 was the **limitation of employment opportunities for PLHIV,** since companies (especially those offering temporary work) and, in a timely and isolated manner, the public administration of the Autonomous Community of Andalusia, used these criteria to exclude them from access to employment.

189 The document has been repeatedly updated to the latest version of 1 February 2022, available at: https://www.sanidad.gob.es/profesionales/saludPublica/ccayes/alertasActual/nCov/documentos/Proteccion_ Trabajadores_SARS-CoV-2.pdf.

Finally, by **not including a clear procedure on how to identify particularly sensitive personnel** within companies, some of them used informal channels (physical or online questionnaires, email, telephone or WhatsApp) and non-health personnel to inform their staff about the need to identify sensitive workers and how they should communicate this to the company, requiring in some cases to specify which specific group of sensitivity to COVID-19 they belonged to.

For this reason, although not specifically in the health field but at a general level, many workers with clinically stable HIV and without any other health problem or comorbidity, **questioned the obligation to declare their serological status** in their company. Hence, in July 2020, Trabajando en Positivo led 27 other NGOs to prepare the document **Five Recommendations for Action for Occupational Risk Prevention Services in the Identification of Personnel Sensitive to SARS-CoV-2.**[190]

In this way, some of the health protection measures adopted due to COVID-19, put at risk or violated other labour rights of PLHIV, such as privacy and confidentiality. This meant an increase in queries related to the impact of COVID and HIV at work Trabajando en Positivo legal services, with 30 cases received in 2020 on this issue. Today, these queries have dropped noticeably, with only 2 queries in 2021.

4.2. Good and poor practices

Good practices

- Trabajando en Positivo conducted a campaign "*#YotrabajoPositivo. Without discrimination due to HIV in employment*", whose central motto is *The workplace is not a route of transmission of HIV*. Among the protagonists of this campaign, there are health professionals, both with HIV and without HIV, all of them speaking up in favour of PLHIV working in health care.
- Among the 130 institutions that have supported and participated in the mentioned campaign are the Ministry of Health and the General Councils of Official Colleges of Physicians, Dentists and Nursing of Spain.
- In 2012, the General Council of Dentists of Spain stated that HIV does not justify, a priori and by itself, the modification or limitation of the professional activities of health personnel or the cessation of their clinical activity, although without prejudice to the limitations related to risky invasive procedures that may predispose to exposures.[191]
- *The Plan for the Prevention and Control of HIV infection and STIs 2021-2030* includes the promotion of actions to raise awareness and train the professionals of social, health, legal, educational resources and the media, to favor equal treatment and address the specific needs of all PLHIV. All this within the objective called "Improve the quality of life of PLHIV and people with STIs".

190 Trabajando en Positivo. Five recommendations for Action for Occupational Risk Prevention Services in the Identification of Personnel Sensitive to SARS-CoV-2, available at: http://www.trabajoenpositivo.org/documentos/5_recomendaciones_PRL.pdf.

191 Available at: https://www.consejodentistas.es/el-consejo/declaraciones-oficiales-del-consejo.html.

- The Social Pact for Non-Discrimination and Equal Treatment associated with HIV includes various lines of action and actions which can be considered as good practices. Among them, the following:
    - To monitor situations of discrimination, to detect situations of exclusion or discrimination in the use and enjoyment of social and health services and benefits; to update the table of medical exclusions in relation to public employment based on existing scientific recommendations;
    - To ensure compliance with the guarantees of confidentiality and proportionality of health surveillance, with ensuring equal opportunities for women and men both in accessing and maintaining employment, or adopting measures to eliminate barriers in access to private employment;
    - To respond to situations of discrimination produced from the health field, to train and sensitize health workers to avoid situations of discrimination against PLHIV;
    - To promote the empowerment of PLHIV by making them aware of their rights and available legal mechanisms.
- The Secretary of State for Health[192] called for the development of actions to raise awareness and train professionals in social, health, legal and educational resources; promotion of equal treatment and specific needs of all PLHIV; deepening the research.

Poor practices

The main priority in Spain should be **to update and disseminate the guide** on "Recommendations Regarding Health Professionals Carrying the Human Immunodeficiency Virus (HIV) and Other Blood Transmissible Viruses, Hepatitis B Virus (HBV) and Hepatitis C Virus (HCV)". These outdated recommendations may have led to discrimination of PLHIV in health care due to their blindness towards the advances in the transmission of HIV to third parties, new techniques and new materials in the surgical field. Moreover, the restrictions imposed in said guide do not comply with the criteria of suitability, necessity and proportionality required by the Spanish Constitutional Court, since other measures can be imposed to obtain the same result (protect the health of third parties) without limiting or harming the rights of PLHIV. Therefore, a new guideline of recommendations that protects the rights of patients without unduly restricting the rights of health professionals with HIV is necessary in Spain. Likewise, once updated, it must be ensured that it is disseminated among health professionals, occupational risk prevention services and managers or administrators of hospital centers. The Ministry of Health has promoted a specific Working Group in 2022 to carry out this task.

192 The Resolution of 10 March 2021, of the Secretary of State for Health, available at: https://www.boe.es/boe/dias/2021/03/23/pdfs/BOE-A-2021-4554.pdf.

4.3. Statements by PLHIV working in health care

Do you know the existing legislation in Spain regarding the regulation of health professions and the performance of the same by people with HIV?

First testimony of a doctor (man)
No, although I have a slight idea. I do not know it in depth. I have some general idea, but I don't know the exact content of it and I do not know if there is a specific legislation for the regulation of professions in people with HIV or if regulations based on laws are applied related legal content, regional regulations and/or resolutions courts of individual cases.

Second testimony of a nurse (man)
Honestly, I do not know the legislation itself. Based in what I currently understand, the legislation on this subject does protect us. I have not had any type of problem in the 12 years that I have been in the profession so far, being just in my second contract the moment of my diagnosis.

Third testimony of a nurse (woman)
I do not know the legislation in depth, but I know that work is a right. By applying universal prevention measures do not have to be any risk. The infectivity of the worker must be controlled and when people are medicated and become undetectable people, the risk is deleted in its entirety

Based on what you know, do you think there is any legislative impediment to work as a health professional in Spain if you live with HIV?

First testimony of a doctor (man)
I think there is no legislative impediment to working as health professional if you live with HIV, although I am not very familiar with the legislation.

Second testimony of a nurse (man)
There is no legislative impediment as far as I know. The only thing I know is there are certain bases of competitive examinations in which access is limited, such as "Prison Nursing" for example.

In my 12 years working as a nurse, no one has asked me to take an HIV test to work, neither in the private nor in the public sphere. The differences that may exist about both areas would be that "in the private sector" if they asked you to do so, I think it would condition the contract for which you opt and "in the public field" it would in no case condition the contract (in any case , it would be for the adaptation of the job).

Third testimony of a nurse (woman)
No legally, since the environment of work is not a place where transmissions take place. I think in some cases they would have relevance the positions and the serological status, (surgeons, stomatologists... undetectable/detectable).

Do you think privacy and confidentiality are respected by your work environment if a healthcare professional is known to have HIV?

First testimony of a doctor (man)
No, although it depends on the center where you work. I don't think it's something exclusive to people with HIV, but is generally respected within the scope very little confidentiality and privacy, with frequent Violations of medical secrecy and improper access to medical records (especially through the clinical history itself) and little zeal in the custody of it. In the centers where I work, it is common for the majority of professionals leave your work sessions open in the computer, leaving the stories free clinics to anyone, without real control of who is accessing and that generates impunity. I don't think it's unique to HIV, but anyone with a disease or a specific clinical condition has little protection according to the current system, at least in the public hospital environment of the Region of Murcia, which is where I usually work.

Second testimony of a nurse (man)
In principle, everyone who knows that I am a carrier of HIV in my work environment are friends or colleagues with whom I have a lot of trust. In that environment I have been respected.

Another situation would be that for some reason, any other colleague found out about my condition. In that case, surely, it would not be respected, especially if it occurs in your own workplace.

Third testimony of a nurse (woman)
I think confidentiality should be strict, but despite constituting a crime, it is not respect, since you discover there are people who are aware of the seropositivity of colleagues without having had any health relationship. There is like a halo to protect someone from something you communicate.

Have you made your serological status visible in your work environment by working as a healthcare professional?

First testimony of a doctor (man)
Yes, in several ways. Although it's not something I usually do, I don't do a concealment of serological status. Mainly I have made it public for three ways:
1. as a result of having friendly relationships at work and talking about my private life.
2. being patient with co-workers and,
3. giving an interview in the local television on the occasion of world AIDS day as representative of an association, some colleagues recognized me in screen and we talked about it.

Second testimony of a nurse (man)
In my case very few know and who knows, it is because they are more a friend than a colleague. There are also many others who know this out of necessity, because in my case , I worked for a long time in the same hospital where the Infectious Diseases and Tropical Medicine Unit was(which meant that any test that I had to undergo , was going to be done, performing in the same place where I worked, many times with my own colleagues assisting me). In all these cases I have been respected, in addition to making great friends with these people, especially for the SINCERITY and TRANSPARENCY with which I usually spoke about my situation.

Currently, however, I work in a Health Center where, of all my colleagues, only one doctor knows about it because one day I had to ask him for a favor. The rest of the people do not know, because it is something that I think does not have to interest them as their lives do not interested me.
Currently there is still a lot of ignorance / misinformation, although it may not seem like it. In the health field we speak of many professional categories (Cleaners, Caretakers, Auxiliaries, Nurses, Doctors….) that do not have the same level of information. In a place where so many hours of work are shared, life is shared... and in all the possible common spaces that can be shared, people will think that my condition can affect them.

Third testimony of a nurse (woman)
No, because unfortunately in my case I had the misfortune to witness discrimination and serious faults in the performance of the profession towards patients with HIV and those events took me off radically the visibility initiative.

What wish would you make to improve the situation of people with HIV that you work as health professionals in Spain?

First testimony of a doctor (man)
Firstly courage to become visible when it appropriates. No one has bad experiences, because I think it is still possible that in some cases (it is not my case) can generate rejection. In general, I want normalization for the entire group of people with HIV. Ultimately, it's just a condition in which carrying out a minimum of infection control and overcoming social stigma and self-imposed, does not mean much. But that when one gets carried away by what they will say, it can generate anxiety, isolation and a lot of fear. Psychological suffering is avoidable.

Second testimony of a nurse (man)

I have not encountered any problems when working as a Nurse anywhere so far. It would be necessary for the population in general to learn more about the subject, it is the only way to eradicate the phobia and intolerance to HIV.
There are still people who believe that being a nurse (HIV +), you are going to harm patients, when it is a proven fact that an HIV + person, well medicated, with an undetectable viral load, the virus is UNTRANSMISSIBLE. It would also be necessary for people with HIV+ to value themselves because I think that many of the problems we suffer from are not real, but rather depend a lot on the mentality with which they face the process.

In my case being honest and transparent when I needed it: IT HAS OPENED ME DOORS. Only very few doors have been closed and the ones that did not deserve were the ones that were not worth it.

I would ask that each person be informed and try to empathize with the situation, because you will never know when I can touch you or it can touch those who are by your side. That HIV+ person can be your partner, your brother, your father...
When that happens it will be when you will change your way of thinking.
I wish the day would come when everyone who suffers from it can talk about it as if we were talking about diabetes. Obviously I hope that one day the cure will be found, because I think we are at the beginning of the end.

Third testimony of a nurse (woman)

The rest of the professionals are compulsorily recycled. They update to U = U. They learn a therapeutic relationship and many other areas is based on trust and with fear and misinformation this trust disappears. They should think more about that percentage of the population that does not know their serological status and with which the universal measures are relaxed, redoubling them if possible when the patient is aware of their state. Above all, that our rights be respected, always.

UNITED KINGDOM

SUMMARY

In the United Kingdom, generally, there is no limitations for PLHIV working in health care, unless they are about to conduct EPPs. Anyone wanting to undertake EPPs has to quarterly test for viral loads indicating that their HIV is suppressed. This is established by policy rather than legislation. No other healthcare workers need to test for HIV, no unnecessary testing of workers is happening.

National Context

In the United Kingdom with population size of 67.1 million, **there is approx. 106.890 PLHIV.**[193] It is estimated that 5.150 of them are undiagnosed. According to the latest data from 2019,[194] the 90-90-90 indicators were: 94 % for the first, target, 98 % for the second target and 97 % for the third target.

When it comes to overall trends,[195] **the number of new HIV diagnoses decreased by 33%** (from 3,950 in 2019 to 2,630 in 2020). The number of HIV diagnoses among MSM first made in England (as opposed to people already diagnosed abroad) decreased by 41% from 1,500 in 2019 to 890 in 2020. These declines were not as evident among MSM living outside London, people from BAME groups, and those born abroad. Although the percentage of diagnoses that are late is increasing, the number of people diagnosed late has decreased by 78% from 3,000 in 2005 to 640 in 2020 (statistics were revised in 2020 to account for the 'seroconversion effect' where

193 UK Health Security Agency, HIV testing, new HIV diagnoses, outcomes and quality of care for people accessing HIV services: 2021 report. The annual official statistics data release (data to end of December 2020), 1 December 2021.

194 According to the UK Health Security Agency, data for Scotland for 2020 is unavailable and data completeness and quality were compromised in other nations of the UK.

195 UK Health Security Agency, HIV testing, new HIV diagnoses, outcomes and quality of care for people accessing HIV services: 2021 report. The annual official statistics data release (data to end of December 2020), 1 December 2021

low CD4 counts are recorded among people with recent HIV acquisition). The total number of deaths due to all causes among people with HIV in England has remained stable over the last decade, with 614 deaths (467 men and 147 women) in 2020. Approximately half of these deaths were HIV related. In 2020, 9% of people living with HIV in England had transmissible levels of virus. Also, COVID-19 had significant impact in 2020. There was a 30% decrease between 2019 and 2020 in the number of people accessing HIV tests in sexual health services (SHS). 47% of people testing in 2020 did so online. Fewer people accessed HIV care in 2020. It is estimated that 4,980 to 6,960 people (double that in 2019) with diagnosed HIV were not seen for care (virtually or face to face) in 2020. Delivery of care via telephone consultations increased from 7,910 in 2019 to 59,280 in 2020.

Furthermore, the UK reports data against other non-treatment targets according to the Global AIDS Strategy 2021-2026. Beyond continuum of care data, the UK Health Security Agency ("UKHSA") reports on late diagnosis, mortality, and access to PrEP. For example, in 2020, 42% of people first diagnosed in England were diagnosed late in 2020 (35% in 2016, 40% in 2019), although absolute numbers of late diagnoses are falling. Late diagnosis is higher among heterosexual men (55% of diagnoses) and women (51%) than among gay and bisexual men and other MSM (29%). Up until July 2020, over 24,000 people had access to PrEP in England through the Impact Trial. These were almost exclusively MSM (96%) and predominantly White (76%). Just under 3% identifying as women and 1.5% as Black African. PrEP became available via the National Health Service in the autumn of 2020

2. Legal Background

This chapter focuses on the legal framework governing the topic of employment of PLHIV in health care. Firstly, the general regulation is introduced. It focuses on the legal regulation serving as a basis for protection of rights of PLHIV working in health care. Relevant provision might be found on partly constitutional, primarily primary level, and there is also some soft law. Overall, the legislation stays HIV-neutral, it gets specific only on the level of soft law. Secondly, the chapter elaborates on rights and obligations of PLHIV and their employers, and introduces existing remedies against discrimination.

2.1. General legal framework relevant for PLHIV working in health care

On **the constitutional level**, the UK has no formal written constitution that could overturn legislation. Individual rights are protected in the courts, which balance these rights with respect for the sovereign law-making authority of Parliament. However, the **Human Rights Act incorporates most of the rights** and freedoms contained in the ECHR and, formally, the UK respects the European Court of Human Rights.

Regarding the **primary legislation,** the main piece of legislation is **the Equality Act** ("EA") from 2010. It applies in England, Scotland and Wales, but not Northern Ireland. The EA protects individuals who fall under nine protected characteristics from discrimination by employers (as well as other protections). One of the nine protected characteristics is disability, and people **automatically meet the disability definition from the point of HIV diagnosis** (also cancer and multiple sclerosis). This is **the only sense in which the legislation is HIV specific.**

The EA makes it **unlawful for employers to discriminate against disabled people**, including their terms and conditions, benefits, opportunities for promotion, performance review, the handling of absence, pay, training and development, and the termination of employment. Employers are not allowed to discriminate directly i.e. treat one worse than a non-disabled person (e.g. by denying training opportunities because you are disabled); discriminate due to something arising from a disability (e.g. undertake performance reviews based on absence from work due to disability); or discriminate indirectly (e.g. assess performance or provide bonuses based on attendance at work). It also places a duty on employers (among others) to make 'reasonable adjustments' to prevent disabled people being put at a disadvantage. Reasonable adjustments can apply to practices and policies, the physical work environment, or equipment needs. They may include, for example, allowing disability related leave to manage health conditions, changing work patterns, or allowing breaks.

It is also unlawful to engage in harassment related to disability or allow harassment from colleagues i.e. employers must not create or tolerate an environment that is intimidating and violates the dignity of disabled people. This includes actions like sharing information about an employee's disability or health condition with their colleagues, allowing colleagues to make derogatory remarks, or not taking action if colleagues or customers engage in harassment. Rights also apply prior to employment. For example, people cannot be asked about disability or health conditions on an employment application form, except where that information is used to make the application process equally accessible. Reasonable adjustments also apply to the recruitment process. If an employer denies someone employment because of their disability or health condition, they have to be able to justify the reasons for their discrimination (e.g. a person with visual impairment can legitimately be prevented from being a taxi driver). We know this is not always complied with.

The wording and language of the EA can be difficult for people living with HIV, because they secure rights by meeting criteria to qualify as a disabled person (for people living with HIV, this criterion is met at the point of diagnosis) and commonly people living with HIV do not consider themselves to be disabled.

To proceed with **soft law documents,** in 2021, following the report of an independent commission to end HIV transmission in England, the Government launched the **HIV Action Plan.** Similar processes are underway in the other UK nations. The Action Plan includes an objective to improve the quality of life for people living with HIV and to end HIV stigma and discrimination. This is not specific to labour rights but does include the following action: *"OHID-NHSEI Regional Directors of Public Health will establish a working group with partners across local government, academia and the voluntary and community sector to modernise occupational policies on anti-HIV stigma, promoting their development and dissemination across sectors and become more proactive in ending HIV stigma."* Implementation of the Action Plan has not yet started so it is yet unsure what this will look like in practice.

2.2. Possibly discriminating legislation

When it comes to provisions or legal acts possibly discriminating against PLHIV working in health care, there might be **one issue in soft law instruments, or rather lack thereof.** In general, employment restrictions for people living with HIV have been lifted. The last remaining restrictions on pilots and people working in the armed forces have been removed recently after ongoing campaigning from HIV advocacy organisations like National AIDS Trust and Terrence Higgins Trust.[196]

Historically, dentists and other healthcare workers involved in EPPs, defined as 'invasive procedures where there is a risk that injury to the worker may result in the exposure of the patient's open tissues to the blood of the worker', were prevented from working if they were living with HIV. This has been **successfully challenged**, especially supported by arguments based on U=U and the importance of universal precautions given that any risk that exists is more likely to come from those who are undiagnosed. However, **restrictions remain in place relating to treatment and regular testing from occupational health** to ensure that those performing EPPs are undetectable. This is acknowledged to be a reasonable restriction when implemented properly, but confusion around this policy has led to problems, e.g. people who are not performing EPPs being subjected to employment restrictions. In part this has been due to **poor guidance** (successfully challenged by National AIDS Trust in 2019), but also by lack of understanding and awareness of the policy. Practically, this means that **all health care workers starting a new role involving EPPs are required to be tested.** After that, there is a responsibility on the HCW to self-report if they may have been exposed to HIV. If the HIV test is reactive, there are different actions depending on the viral load and the test need to be repeated every 12 weeks.

196 From 21 June 2022 armed forces personnel living with HIV who are undetectable are recognised as 'fully fit' and therefore eligible for deployment, and can also join the military (previously people diagnosed with HIV were allowed to remain in the services but were prevented from active duty, and people already living with HIV were ineligible to join the military). On 20 June 2022 the Civil Aviation Authority introduced new guidance that allows pilots living with HIV to retain their UK licences, and has created a 6 month embargo to allow those living with HIV who had not disclosed their status to the CAA to now do so without facing enforcement action or having to disclose to their employer. This guidance implements policy agreements made last year. There is still a barrier to military aircrew and air traffic controllers being allowed to take PrEP. Although a policy to facilitate this was agreed in 2020, it has not yet been implemented because of bureaucracy relating to the approval process for medication use in aviation, which is especially thorough given potential risk from side-effects.

This requirement is set by the guidance from the UK Advisory Panel for Healthcare Workers Living with Bloodborne Viruses (UKAP), which is a panel appointed but the CEO of UKHSA.[197] Thus, it is only guidance rather than legislation, yet, it is still a requirement on the employer from the Department of Health and Social Care. In practice, NHS Trusts plausibly have used the guidance to develop their own policies.

2.3. Rights and obligations of PLHIV

This section summarises the rights and obligation of PLHIV working in healthcare with respect to variety of professions in the field. It is necessary to say that rights under the EA and Health and Safety legislation are the same in public and private institutions.

2.3.1. Rights and obligations of employees

Let the section start with the topic of disclosure of one's HIV+ status. Generally, there is **no obligation to disclose HIV status, unless the person is conducting EPPs.** However, most health care workers do not conduct EPPs. Similarly, there is **no obligation of disclosure of PLHIV's status to the patient.**

Yet, **anyone wanting to undertake EPPs has to test for HIV** (also for HBV and HCV). This means that in practice, surgeons are much more likely than mental health staff to be tested, for example. If the test comes back positive, this is recorded on a **national register**. That record is maintained by the occupational health specialist. This record is then held separately from other hospital notes and can be **accessed only by occupational health ("OH") practitioners,** who cannot release records or information without the consent of the employee except in exceptional circumstances e.g. if it is in the public interest.

Subsequently, a person aiming to undertake EPPs must then have **quarterly viral load tests** to indicate that their HIV is suppressed. This is written into policy rather than legislation. No other healthcare workers need to test for HIV. It also does not occur in practice, no unnecessary testing of health care workers is happening.

In case someone already working in health care **got diagnosed with HIV**, they would be advised to seek support from OH but unless they want to practice EPPs they do not need to disclose their status. Importantly, there can be no impediment to their training or development opportunities because of their HIV status.

Just explained rules are set by the UKHSA's **Integrated guidance on health clearance of healthcare workers and the management of healthcare workers living with bloodborne viruses (hepatitis B, hepatitis C and HIV).** This provides guidance on employer and employee responsibilities regarding BBV testing, monitoring, data confidentiality etc. Furthermore, individual health trusts will usually have their own published guidelines, but they must all be compliant with this guidance.

197 UKHSA. Integrated guidance on health clearance of healthcare workers and the management of healthcare workers living with bloodborne viruses (hepatitis B, hepatitis C and HIV). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033571/Integrated_guidance_for_management_of_BBV_in_HCW_November_2021.pdf

Finally, a note on theory and practice of rights of PLHIV working in health care. In theory, the legal context for responding to HIV-related discrimination among people working in healthcare is strong, however there are **concerns about how well it works in practice.**

A report released in 2020 based on surveys with over 900 healthcare practitioners in London revealed prevalent and harmful harassment and discrimination committed by and against NHS staff working in London NHS Trusts. 20 % of the sample reported experiencing workplace discrimination and 41 % reported experiencing bullying, harassment or abuse from colleagues. Furthermore, women, Black ethnic groups and migrant NHS staff were more likely to experience harassment and discrimination.[198] Although this is not specific to HIV, it **provides context for the work environment that healthcare workers living with HIV have to operate in** and, notably, key populations fall into the groups most often reporting discrimination and harassment.

2.3.2. Rights during medical studies

Regarding the situation of medical students living with HIV, **medical and dental students are subject to the same rules as other healthcare workers.** The only difference is that students specialising in certain disciplines (e.g. obstetrics and gynaecology, surgery, dentistry) are likely to perform EPPs within their training, and therefore will need to have a blood-borne viruses test prior to that part of their training, and then follow the same rules on OH supervision if they have a positive test. Nursing students do not perform EPPs in training so do not need to be tested.

If a student got diagnosed during their studies, the procedure would be the same as with other health care workers (reference to the OH services for support, and testing if their training may include EPPs).

2.3.3. Rights of non-medical personnel

As non-medical staff does not conduct EPPs, they **do not have to disclose their status or have testing**. However, they should be offered support from OH services.

2.4. Obligations of the employer and employee representative

This section summarises the obligations of the employer and employee representatives not only in relation to ensuring equal treatment of PLHIV working in health care, but also to their duty of ensuring their occupational safety. Provisions under the EA and Health and Safety legislation apply equally to public and private institutions. However, private employers do not need to comply with the Public Sector Equality Duty (described later).

198 Rhead et al, Impact of workplace discrimination and harassment among National Health Service staff working in London trusts: results from the TIDES study, BJPsych Open , Volume 7 , Issue 1 , January 2021 , e10. DOI: https://doi.org/10.1192/bjo.2020.137.

2.4.1. Obligation to counteract discrimination

Overall, **employers have the general obligation to ensure equal treatment** of all employees. The same may not be told about the NHS Staff Council as its work is more related to agreeing terms and conditions. These will include guidance on local management of bullying and harassment at work, for example, but are not more directly involved in acting to counteract discrimination.

Employers can be responsible if an employee discriminates against someone else ('vicarious liability') if the employee is 'acting in the course of employment' and if the employer does not take all reasonable steps to try to prevent discrimination, harassment and victimisation by their staff. This is general employment law rather than healthcare specific. Furthermore, the **Public Sector Equality Duty** (PSED), which applies to all public sector institutions including the NHS, includes a duty to consider or think about how policies or decisions affect people who are protected under the Equality Act. Under the PSED, employers must eliminate unlawful discrimination but also be proactive, including advancing equality of opportunity and fostering good relations between people who share a protected characteristic and those who do not.

2.4.2. Obligations related to provision of health care in the workplace

There are **legal obligations for employers to ensure the health, safety and welfare at work** of their employees. In relation to discrimination, in practice this will involve implementation of the EA.

There is **no legal obligation for employers to provide OH services**. Everyone legally resident in the UK has access to free healthcare. Yet, in practice, **healthcare providers will provide their own OH services.** They will identify how work impacts an employee's health, whether they are fit for the work they do and what adjustments may need to be made to support people in work. Therefore, they have a practical role in preventing discriminatory practice. OH services will also monitor viral loads of employees living with HIV who are conducting EPPs, in order to make sure they are undetectable.

2.5. Remedies against discrimination

When PLHIV come across discrimination in healthcare settings, they have several means of protection accessible under the UK law on multiple levels of the administrative and judicial system.

First of all, the PLHIV **may complain to the employer** (in the context of this report to the health care provider) under general workplace protections, including employment law[199] and health and safety legislation which places a duty on employers to protect the health, safety and wellbeing of their employees (enforced by the Health and Safety Executive). Generally, the procedure would be to make **an informal complaint with the employer,** and if there is no resolution then a **formal 'grievance'** can be raised. All employers should

199 This includes for PLHIV the specific protections in the Equality Act 2010 as outline above.

have a formal grievance procedure. It is very unlikely that a healthcare provider would not have this, as if a complainant is not satisfied with the resolution of the grievance they can progress their case to mediation or an employment tribunal where the employer would need to show that they had considered the case properly. Healthcare providers may also have locally specific programmes that can respond to workplace complaints. For example, NHS Trusts[200] all have 'Freedom to Speak Up' Guardians, attached to a National Guardian. These essentially facilitate risk-free 'whistleblowing' by NHS employees, for any problem within the NHS which might include, for example, a bullying and intimidatory work culture.

Also, there are a number of different **unions** that can support healthcare workers at any stage of their complaint process – from the informal complaint to the employer right through to an Employment Tribunal. People can be represented or supported by general unions such as Unite or Unison, or by specialist healthcare unions such as the British Medical Association for doctors and the Royal College of Nursing for nurses.

If a formal grievance in the workplace is not resolved to the complainant's satisfactions, the case can be referred to the national level, to the **ACAS (the Advisory, Conciliation and Arbitration Service)**, an independent, but largely government-funded, body. The case can go to early conciliation, which will have a legally binding outcome but is a free service. It is also possible to escalate the case further to an **Employment Tribunal**, where cases will be heard by an Employment Judge, but this is more likely to be for the most serious cases, such as unfair dismissal, and costs are involved.

On the ministerial level, discrimination systems are **not implemented at government department level.** However, the Department for Business, Energy and Industrial Strategy funds ACAS and the Government Equalities Office is responsible for Equality legislation.

3. Case Studies

The **data is very sparse** and relies on contributions from a few people and cases brought to National AIDS Trust's discrimination advocacy service. More importantly, the fact that people living with HIV, who are usually quite vociferous and active in the UK, were largely **not willing to discuss this, is indicative of how damaging is the impact of workplace discrimination against healthcare workers.** People responding to this question generally made reference to poor understanding and discriminatory attitudes among staff, which establishes a context of intolerance, rather than direct examples of discrimination against staff. For example, one person said that there was judgement about PrEP use.

200 The organisational structures in the UK that provide hospital services and other aspects of patient care.

Another reported a colleague saying “but it’s ok, the patient didn’t look like they had AIDS so she’ll be fine” following a third person’s needlestick injury. Another healthcare worker, who was diagnosed in Portugal, was told by their doctor there “You must have done something to have HIV; it doesn't fall from the sky”.

National AIDS Trust supports people living with HIV who experience discrimination. Two cases have been referred to them in recent years. The first of these was previously reported in the EHLF project on discrimination against people living with HIV in healthcare settings.

Healthcare student removed from their course [2017]:
A university student studying to be a mental health nurse contacted National AIDS Trust for support because they were threatened with expulsion (and ultimately removed) from their course for not disclosing their HIV status. There had also been several breaches of confidentiality between the university’s occupational health service and the academic staff concerning the student’s healthcare status.

The student’s viral load was undetectable and they were not performing or training to perform exposure prone procedures (EPPs). It is well established in the UK that under these circumstances healthcare workers are not required to disclose their HIV status. National AIDS Trust supported the student to contest the decision to remove them from their course, and ultimately a satisfactory conclusion was reached. National AIDS Trust also wrote to the UK Advisory Panel for Healthcare Workers Infected with Bloodborne Viruses (UKAP), on the basis that ambiguity in its *Integrated guidance on health clearance and the management of HCWs living with BBVs* led to the university’s decision to discipline the student. The guidance was edited to ensure clarity regarding healthcare workers right not to disclose their HIV status if they are not carrying out EPPs, and to make clear that it is inappropriate to ask healthcare workers specific questions about blood borne viruses in health screening questionnaires.

Healthcare worker denied employment because of uncertainty around OH responsibilities [2020]
NAT was contacted by a healthcare worker living with HIV who had recently been offered a role which involved exposure-prone procedures (EPPs). He had applied for this role via a recruitment agency. In order to take up this role, he needed to have EPP clearance. He had not gained clearance in his previous work as his specialism did not usually involve EPPs, but his viral load was undetectable meaning he was eligible for EPP clearance. The occupational health agency contracted by the recruitment agency stated that they were not able to provide clearance as they do not provide this service. The healthcare worker was told he would have to pay for a private occupational health physician to attain EPP clearance.

He explained that he could not afford to pay for ongoing viral load monitoring as the cost would amount to a significant portion of his wages. The job offer was then withdrawn. The NHS Trust was not aware of the circumstances until the healthcare worker later complained of discriminatory treatment, as the recruitment agency was handling the application.

The healthcare worker lodged a claim for employment discrimination with the Employment Tribunal. His argument was that making healthcare workers living with HIV pay for their own EPP clearance put them at a disadvantage compared to HIV-negative healthcare workers since they would only need to access an HIV test, whereas healthcare workers living with HIV would need to pay for ongoing quarterly blood tests to monitor viral load. Healthcare workers living with HIV who apply for work directly to the NHS are able to access EPP clearance at no additional cost via the Trust's in-house occupational health department. He argued that this treatment amounted to direct discrimination, indirect discrimination, discrimination arising out of disability and a failure to make reasonable adjustments under the Equality Act 2010.

The recruitment agency argued that it was not reasonable to expect locum agencies to fund the occupational health costs that are incurred during the worker-finding service for a client (in this case, the NHS Trust). The NHS Trust argued that they were under no obligation to fund these costs under the terms of its agreement with the recruitment agency nor were they aware of the situation until after the job offer had been withdrawn.

The case settled without admission of liability from either Respondent – although the Trust did agree to review its EPP policy as part of the settlement.

4. Current Issues

Last section would like to report on current issues and challenges, especially on impacts of the covid-19 pandemic and also on examples of current good and poor practices.

COVID-19 impacts on PLHIV

When the COVID-19 pandemic started, there was a lot of uncertainty around risk to people who may be immunocompromised. There wasn't clear guidance around who needed to 'shield', and many people living with HIV were told to do so based on GP records, which exposed a general misunderstanding among some primary care providers that living with HIV necessarily meant being immunocompromised and 'vulnerable'. Given this situation, healthcare workers report that some members of staff (e. g. Emergency Department nurses living with HIV) had prolonged periods working from home and unable to see patients directly because of their HIV status. This was an overinterpretation of national guidance and affected people's physical and mental health and, potentially, career progression.

4.1. Good and poor practices

Good practices

One health care worker living with HIV reported that there are measures being undertaken in some healthcare settings to tackle stigma and discrimination among health care workers, but that what is being done is neither good enough, nor generalised enough. They suggest that appropriate training should be embedded in mandatory training for all NHS workers.

Projects are starting to be developed that tackle HIV-related stigma in healthcare settings. For example, Manchester University NHS Foundation Trust has developed training modules in HIV awareness and HIV-related stigma and discrimination. Although these aren't specifically designed to challenge stigma and discrimination against healthcare workers (as opposed to against people receiving care) one of the objectives include healthcare workers being aware of how to reduce HIV-related stigma and discrimination in their workplace.

Poor practices

As described above, it is difficult to get information on bad practice. It seems that people prefer not to raise issues, rather than challenge stigmatising attitudes. In other words, when people end up losing employment or student places, they are prepared to complain, but otherwise they do not feel confident to complain or discuss the issue. The fact that people are not prepared to discuss the stigma they experience is indicative of it being a significant problem.

As one healthcare worker reported to us: *"I personally have never told my management. Of course I have told occupational health but I know there has never been any training on HIV at my level and I know that many others do not even know about U=U and I would still not feel comfortable telling them".*

Another said *"I don't believe anyone would even mention it to immediate management as I know I wouldn't feel comfortable".*

ANNEX 1 QUESTIONNAIRE

Discrimination against PLHIV working in healthcare settings project – Working Positively – 2021-2022

Legal survey

The objective of this survey is to collect legal information on and capture cases of discrimination in the workplace against PLHIV working in healthcare settings in 6 European countries. The information and data collected will be integrated as country profiles in the EHLF legal report on discrimination against PLHIV working in healthcare settings and the follow-up policy brief and recommendations to support national and regional advocacy efforts to review and reform discriminative legislation and policies, to improve practices, and to reduce discrimination against PLHIV in the workplace. Please fill in the survey to the best of your knowledge – if needed in consultation with relevant stakeholders – latest by April 30th 2022. Please include references and sources of information if available.

General information:

Name:
Organisation:
Country:

Country statistics:
Population size:
Estimate number of PLHIV:
Percentage of PLHIV diagnosed (first 95 target):
Percentage of PLHIV on treatment (second 95 target):
Percentage of PLHIV with undetectable viral load (third 95 target):
Does your country report data against the other non-treatment related targets in the Global AIDS Strategy 2021-2026? If yes, please provide information available
Main epidemiological trends:

PART 1: LEGAL AND POLICY BACKGROUND

1.1. Protection against discrimination in the workplace - relevant to HIV status:

Constitutional level
Is there protection against discrimination at the constitutional level that is applicable to labour rights of PLHIV?
YES/NO Is it HIV-specific? YES/NO Please provide detail: (text etc.)

Primary legislation level - legislation by the parliament (Acts, Statutes etc.)
Is there protection against discrimination at the primary legislation level that is applicable to labour rights of PLHIV?
YES/NO Is it HIV-specific? YES/NO Please provide detail: (text etc.)

Secondary legislation level – legislation by the government or members of government/ministers (Decrees, Orders etc.)
Is there protection against discrimination at the secondary legislation level that is applicable to labour rights of PLHIV?
YES/NO Is it HIV-specific? YES/NO Please provide detail: (text etc.)

Soft law – guidance, protocols, methodology etc.
Is there protection against discrimination at the quasi-legislation level that is applicable to labour rights of PLHIV?
YES/NO Is it HIV-specific? YES/NO Please provide detail: (text etc.)

Legislation that directly or indirectly discriminate against or provides basis for discrimination in the workplace against people living with HIV/AIDS

Constitutional level
Is there any provision at the constitutional level that discriminate against PLHIV or can provide basis for discrimination against PLHIV working in healthcare settings?
YES/NO Please provide detail: (text etc.)

Primary legislation level - legislation by the parliament (Acts, Statutes etc.)
Is there any provision at the primary legislation level that discriminate against PLHIV or can provide basis for discrimination against PLHIV working in healthcare settings?
YES/NO Please provide detail: (text etc.)

Secondary legislation level – legislation by the government or members of government/ministers (Decrees, Orders etc.)

Is there any provision at the secondary legislation level that discriminate against PLHIV or can provide basis for discrimination against PLHIV in healthcare settings?
YES/NO Please provide detail: (text etc.)

Soft law – guidance, protocols, methodology etc.
Is there any provision at the quasi-legislation level that discriminate against PLHIV or can provide basis for discrimination against PLHIV in healthcare settings?
YES/NO Please provide detail: (text etc.)

1.2. Reporting discrimination against PLHIV working in healthcare settings, legal and other remedies in labour rights

In this section, we would like to collect information of the different possibilities for complaints, legal and other remedies, once a discrimination has happened against PLHIV working in the healthcare setting.

Which of the following is a possibility for filing a complaint and seek legal interventions/remedies in your country?
In the workplace (healthcare provider):
YES/NO If yes, please provide details:

At local authorities:
YES/NO If yes, please provide details:

At national authorities:
YES/NO If yes, please provide details:

Other local or national authority working on discrimination and equal treatment issues (for example, unions):
YES/NO If yes, please provide details:

Ministry of Labour:
YES/NO If yes, please provide details:

Legal interventions:
YES/NO If yes, please provide details:

1.3. Obligations of the employer/employee representative in case of discrimination

Does the employee representatives (e.g. work councils) have duties to counteract discrimination?
If yes, please explain what duties they have:

Do employers have duties to counteract discrimination?
If yes, please explain what duties they have:

Is there medical care provided for employees in the workplace?
If yes, how does it look like?

Does a work place require having a staff/occupational doctor?
If yes, what is their role in protecting staff members living with HIV against discrimination?

1.4. Rights and obligations of PLHIV working in healthcare settings

In this section, we would like to collect information on the rights and obligations of PLHIV working in healthcare settings, especially on mandatory testing or disclosure of one´s HIV-status and how the employer handles this information.
Is there a legal obligation for PLHIV working in healthcare to disclose their HIV-status to the employer? If YES, please provide details:

When one´s HIV-status is disclosed in a healthcare setting, who can access this information?
Please provide details of where and how data is stored and who can access it.
Is there a legislation requiring HIV mandatory testing for PLHIV working in healthcare?

Does it happen in practice?
If yes, is it HIV-specific or other infectious diseases are included? YES/NO

Which medical professions are impacted and on what legal ground?
Please provide details:

Are there any guidelines for PLHIV working in healthcare settings? YES/NO
Please provide details

1.5. Prohibition or limitations on working in specific healthcare professions for PLHIV

In this section, we would like to collect information on the existing limitations and prohibitions of for PLHIV to work in healthcare settings.

Are there any limitations for PLHIV working in healthcare settings? YES/NO
If YES, please provide details:

Are these limitations HIV-specific or general for blood-born infections? YES/NO
If yes, which medical professions are impacted and on what legal ground?
Please provide details

Are there any professions in healthcare that PLHIV cannot do/or can only do under certain conditions in your country?
If YES, please provide details: which professions are affected and whether there is total prohibition or limitations subject to certain conditions:

If someone is diagnosed with HIV while working in one of the professions mentioned above, what is happening to them?
Is there mandatory disclosure of HIV status of PLHIV working in healthcare settings to the patient?

1.6. Studying in medical universities and/or trainings

In this section, we would like to collect information on whether rights of PLHIV are effected when it comes to education in medical field including postgraduate trainings.

Are there limitations for PLHIV to study certain medical professions?
If YES, please provide details

Is there a legal requirement for mandatory testing during studying? If yes, is it HIV specific?
Does it happen in practice? Yes.

If a student gets their HIV diagnosis during the study, what is happening to them?
Are there any limitations for PLHIV when it comes to postgraduate trainings?
If YES, please provide details

1.7. Non-medical staff working in healthcare settings

In this section, we would like to learn about rules and limitations of labour rights related to HIV status of people working in healthcare setting in non-medical professions, for example cleaning staff etc.

Are the previously mentioned rules on HIV disclosure and mandatory testing also relevant for non-medical staff?
Please provide details

1.8. Private and public sector

Is there a difference between labour rights of PLHIV in public and private sector?
Please provide details

PART 2: CASE STUDIES

In this section, please share cases of discrimination against PLHIV working in healthcare settings, which you are aware of, and have made an impact on legislation/policies and/or practice in your country.
Please describe the case(s):

PART 3: GOOD PRACTICE

In this section we would like to collect information about good practice, addressing the issue of discrimination against PLHIV working in healthcare settings. These can include but not limited to advocacy work towards changing legislation/policies, strategic litigation, trainings both for healthcare workers and PLHIV, etc.
Please describe the good practice(s), if available, add relevant links/documents, etc.:

PART 4: BAD PRACTICE/ NATIONAL CONTEXT

In this section we would like to collect information about bad practice that do not qualify as direct or indirect discrimination against PLHIV working in healthcare settings. Additionally, we would like to hear from you if there are any particular issues or priorities for your national context.
Please describe bad practice/priorities issues in the national context:

PART 5: SARS-COV-2/COVID-19 PUBLIC HEALTH MEASURES IMPACT ON PEOPLE LIVING WITH HIV

In this section we would like to collect information about public health measures, change of legislation and/or guidelines, protocols etc. in response to the COVID-19 pandemic that have affected PLHIV working in healthcare disproportionately and/or discriminatively.
Please describe these measures/changes, and how they have affected PLHIV:

PART 6 STATEMENTS OF PLHIV WORKING IN HEALTHCARE (OPTIONAL)

In this section, we would like to include 1 to 3 testimonies from PLHIV working in healthcare setting about their experience with stigma and discrimination.

ANNEX 2
COMPARATIVE TABLE

			Czech Republic	Finland	Germany	Italy	Spain	United Kingdom
General antidiscrimination framework	Constitutional level		Yes	Yes	Yes	Yes	Yes	Yes*
	HIV-specific constitutional level		No	No	No	No	No	No
	HIV-specific primary legislation		No	No	No	Yes	No	No
	AD law		Yes	Yes	Yes	No	Yes	Yes
	Labour/Employment law		Yes	Yes	Yes	Yes	Yes	No
	Secondary legislation		No	No	No	Yes	Yes	No
	HIV-specific secondary legislation		No	No	No	Yes	Yes	No
	Soft law		Yes	No	Yes	No	Yes	Yes
	HIV-specific soft law		Yes	No	Yes	No	Yes	Yes
Possibly discriminating legislation	on constitutional level		No	No	No	No	No	n/a
	in primary legislation		No	No	Yes	No	No	No
	in secondary legislation		No	No	No	Yes	No	No
	in soft law		No	No	Yes	No	Yes	Yes
Obligations of the employer or employee representative	Employee representative: Duty to tackle discrimination		No	Yes	Yes	No	Yes	No
	Employer: Duty to tackle discrimination		Yes	Yes	Yes	No	Yes	Yes
	Medical care in the workplace		No	Yes	Yes	Yes	Yes*	Yes
	Having an occupational doctor		Yes	Yes	Yes	Yes	No	No
Obligations of PLHIV	Employees	Obligation to disclose one's HIV-status to employer	No	No	No	No	No	No*
		Mandatory testing of PLHIV	No	No	No	No*	No*	No*
		Guidelines for PLHIV	No	No*	Yes	No	Yes	Yes

			Czech Republic	Finland	Germany	Italy	Spain	United Kingdom
Obligations of PLHIV (cont)	Employees (cont.)	Limitations for PLHIV	No*	No	Yes	No*	Yes	Yes
		HIV-specific limitations	No	Yes	Yes	Yes	Yes	Yes
		Profession-related restrictions	No	No	Yes	No	Yes	No*
		Obligations when working and diagnosed: towards the employer	No	No	No	No	No	No
		Obligations when working and diagnosed: towards the occupational doctor	Yes	Yes	Yes	Yes	Yes	Yes
		Mandatory disclosure to patient	No	No	No	No*	No	No
		Difference between private and public sector	No	No	No	No	Yes*	No*
	Students	Limitations for PLHIV to study	No	No	No	No	No	No
		Mandatory testing during studies	No	No	No*	No	No	No*
		Obligations when studying and diagnosed	No	No	No	No	No*	No*
		Limitations in postgraduate trainings	No	No	No	No	No	No
	Non-medical personnel	Health workers' rules apply	No	No	No	No	No	No
Remedies against discrimination		in the workplace	Yes	Yes	Yes	Yes	Yes	Yes
		at local authorities	Yes	Yes	No	Yes	No	No
		at national authorities	Yes	Yes	Yes	No	No	Yes
		other authorities	Yes	Yes	Yes	Yes	Yes	Yes
		Ministry of Labour	No	No	No	No	Yes	No
		legal intervention	Yes	Yes	Yes	Yes	Yes	Yes

Yes* = yes, BUT (see country profile)
No* = no, BUT (see country profile)