

S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N A S S E M B L Y

April 28, 2009

Introduced by M. of A. TOWNS, JEFFRIES, CLARK, CASTRO -- Multi-Sponsored
by -- M. of A. AMEDORE, BOYLAND, BURLING, COOK, CROUCH, REILLY -- read
once and referred to the Committee on Health -- committee discharged,
bill amended, ordered reprinted as amended and recommitted to said
committee

AN ACT to amend the public health law, in relation to testing for the
human immunodeficiency virus

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEM-
BLY, DO ENACT AS FOLLOWS:

1 Section 1. Section 2781 of the public health law, as added by chapter
2 584 of the laws of 1988, paragraph (d) of subdivision 6 as added by
3 chapter 220 of the laws of 1996, and subdivision 7 as added by chapter
4 429 of the laws of 2005, is amended to read as follows:
5 S 2781. HIV related testing. 1. Except as provided in section three
6 thousand one hundred twenty-one of the civil practice law and rules, or
7 unless otherwise specifically authorized or required by a state or
8 federal law, no person shall order the performance of an HIV related
9 test without first receiving the [written,] informed consent of the
10 subject of the test who has capacity to consent or, when the subject
11 lacks capacity to consent, of a person authorized pursuant to law to
12 consent to health care for such individual. A physician or other person
13 authorized pursuant to law to order the performance of an HIV related
14 test shall certify, in the order for the performance of an HIV related
15 test, that informed consent [required by this section] has been received
16 prior to ordering such test by a laboratory or other facility EITHER
17 PURSUANT TO SUBDIVISION TWO OF THIS SECTION OR IN THE EVENT THAT THE
18 INFORMED CONSENT IS ORAL, SHALL DOCUMENT IN THE MEDICAL RECORD OF THE
19 INDIVIDUAL THAT INFORMED CONSENT HAS BEEN GIVEN. SUCH INFORMED CONSENT
20 SHALL BE IN WRITING AND SIGNED BY THE INDIVIDUAL IN THE EVENT THAT THE
21 PERSON ORDERING THE TEST IS ORDERING A RAPID HIV RELATED TEST AND DOES

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 NOT HAVE THE CAPACITY AT THE SITE OF SUCH RAPID TEST TO PERFORM OTHER
2 MEDICAL CARE.

3 2. [Informed consent to an HIV related test shall consist of a state-
4 ment signed by the subject of the test who has capacity to consent or,
5 when the subject lacks capacity to consent, by a person authorized
6 pursuant to law to consent to health care for the subject which includes
7 at least the following:

8 (a) an explanation of the test, including its purpose, the meaning of
9 its results, and the benefits of early diagnosis and medical inter-
10 vention; and

11 (b) an explanation of the procedures to be followed, including that
12 the test is voluntary, that consent may be withdrawn at any time, and a
13 statement advising the subject that anonymous testing is available; and

14 (c) an explanation of the confidentiality protections afforded confi-
15 dential HIV related information under this article, including the
16 circumstances under which and classes of persons to whom disclosure of
17 such information may be required, authorized or permitted under this
18 article or in accordance with other provisions of law or regulation.

19 3.] Prior to [the execution of a written] THE OBTAINING OF informed
20 consent, a person ordering the performance of an HIV related test shall
21 provide ORALLY OR IN WRITING to the subject of an HIV related test or,
22 if the subject lacks capacity to consent, to a person authorized pursu-
23 ant to law to consent to health care for the subject, an explanation of
24 [the nature of AIDS and HIV related illness, information about discrimi-
25 nation problems that disclosure of the test result could cause and legal
26 protections against such discrimination, and information about behavior
27 known to pose risks for transmission and contraction of HIV infection]
28 THE FACTS THAT HIV CAUSES AIDS, THAT THERE IS TREATMENT FOR HIV THAT CAN
29 HELP AN INDIVIDUAL STAY HEALTHY, THAT AN INDIVIDUAL WITH HIV OR AIDS CAN
30 PROTECT THE INDIVIDUALS AROUND HIM OR HER FROM BEING INFECTED, THAT THE
31 TEST IS VOLUNTARY, AND THAT THE RESULTS OF THE TEST WILL BE KEPT CONFID-
32 DENTIAL.

33 3. NOTWITHSTANDING ANY PROVISION OF LAW TO THE CONTRARY, NOTHING SHALL
34 PROHIBIT A HEALTH CARE PROVIDER FROM COMBINING A FORM USED TO OBTAIN
35 INFORMED CONSENT FOR HIV RELATED TESTING WITH FORMS USED TO OBTAIN WRIT-
36 TEN CONSENT FOR GENERAL MEDICAL CARE OR ANY OTHER MEDICAL TEST OR PROCE-
37 DURE. WHERE A WRITTEN CONSENT TO HIV RELATED TESTING IS INCLUDED IN A
38 SIGNED GENERAL CONSENT TO MEDICAL CARE FOR THE SUBJECT OF THE TEST OR IN
39 A SIGNED CONSENT TO ANY HEALTH CARE SERVICE FOR THE SUBJECT OF THE TEST,
40 THE CONSENT FORM SHALL HAVE A CLEARLY MARKED PLACE ADJACENT TO THE
41 SIGNATURE WHERE THE SUBJECT OF THE TEST, OR WHEN THE SUBJECT LACKS
42 CAPACITY TO CONSENT, A PERSON AUTHORIZED PURSUANT TO LAW TO CONSENT TO
43 HEALTH CARE FOR SUCH INDIVIDUAL, SHALL BE GIVEN AN OPPORTUNITY TO
44 SPECIFICALLY DECLINE IN WRITING HIV RELATED TESTING ON SUCH GENERAL
45 CONSENT. AN INFORMED CONSENT FOR HIV RELATED TESTING PURSUANT TO THIS
46 SECTION SHALL BE VALID FOR SUCH TESTING UNTIL SUCH CONSENT IS REVOKED OR
47 EXPIRES BY ITS TERMS. EACH TIME THAT AN HIV RELATED TEST IS ORDERED
48 PURSUANT TO WRITTEN INFORMED CONSENT IN ACCORDANCE WITH THIS SECTION,
49 THE PHYSICIAN OR OTHER PERSON AUTHORIZED PURSUANT TO LAW TO ORDER THE
50 PERFORMANCE OF THE HIV RELATED TEST, OR SUCH PERSON'S REPRESENTATIVE,
51 SHALL ORALLY NOTIFY THE SUBJECT OF THE TEST OR, WHEN THE SUBJECT LACKS
52 CAPACITY TO CONSENT, A PERSON AUTHORIZED PURSUANT TO LAW TO CONSENT TO
53 HEALTH CARE FOR SUCH INDIVIDUAL, THAT AN HIV RELATED TEST WILL BE
54 CONDUCTED AT SUCH TIME, AND SHALL NOTE THE NOTIFICATION IN THE PATIENT'S
55 RECORD.

1 4. A person authorized pursuant to law to order the performance of an
2 HIV related test shall provide DIRECTLY OR THROUGH A REPRESENTATIVE to
3 the person seeking such test an opportunity to remain anonymous and to
4 provide written, informed consent through use of a coded system with no
5 linking of individual identity to the test request or results. A health
6 care provider who is not authorized by the commissioner to provide HIV
7 related tests on an anonymous basis shall refer a person who requests an
8 anonymous test to a test site which does provide anonymous testing. The
9 provisions of this subdivision shall not apply to a health care provider
10 ordering the performance of an HIV related test on an individual
11 proposed for insurance coverage.

12 5. At the time of communicating the test result to the subject of the
13 test, a person ordering the performance of an HIV related test shall,
14 DIRECTLY OR THROUGH A REPRESENTATIVE IN THE CASE OF A TEST INDICATING
15 EVIDENCE OF HIV INFECTION, provide the subject of the test or, if the
16 subject lacks capacity to consent, the person authorized pursuant to law
17 to consent to health care for the subject, with counseling or referrals
18 for counseling: (a) for coping with the emotional consequences of
19 learning the result; (b) regarding the discrimination problems that
20 disclosure of the result could cause; (c) for behavior change to prevent
21 transmission or contraction of HIV infection; (d) to inform such person
22 of available medical treatments; and (e) regarding the [test subject's]
23 need to notify his or her contacts.

24 5-A. WITH THE CONSENT OF THE SUBJECT OF A TEST INDICATING EVIDENCE OF
25 HIV INFECTION OR, IF THE SUBJECT LACKS CAPACITY TO CONSENT, WITH THE
26 CONSENT OF THE PERSON AUTHORIZED PURSUANT TO LAW TO CONSENT TO HEALTH
27 CARE FOR THE SUBJECT, THE PERSON WHO ORDERED THE PERFORMANCE OF THE HIV
28 RELATED TEST, OR SUCH PERSON'S REPRESENTATIVE, SHALL PROMPTLY PROVIDE OR
29 ARRANGE WITH A HEALTH CARE PROVIDER FOR AN APPOINTMENT FOR FOLLOW-UP
30 MEDICAL CARE FOR HIV FOR SUCH SUBJECT.

31 6. The provisions of this section shall not apply to the performance
32 of an HIV related test:

33 (a) by a health care provider or health facility in relation to the
34 procuring, processing, distributing or use of a human body or a human
35 body part, including organs, tissues, eyes, bones, arteries, blood,
36 semen, or other body fluids, for use in medical research or therapy, or
37 for transplantation to individuals provided, however, that where the
38 test results are communicated to the subject, post-test counseling, as
39 described in subdivision five of this section, shall nonetheless be
40 required; or

41 (b) for the purpose of research if the testing is performed in a
42 manner by which the identity of the test subject is not known and may
43 not be retrieved by the researcher; or

44 (c) on a deceased person, when such test is conducted to determine the
45 cause of death or for epidemiological purposes[.]; OR

46 (d) conducted pursuant to section twenty-five hundred-f of this chap-
47 ter[.]; OR

48 (E) IN SITUATIONS INVOLVING OCCUPATIONAL EXPOSURES WHICH CREATE A
49 SIGNIFICANT RISK OF CONTRACTING OR TRANSMITTING HIV INFECTION, AS
50 DEFINED IN REGULATIONS OF THE DEPARTMENT AND PURSUANT TO PROTOCOLS
51 ADOPTED BY THE DEPARTMENT, (I) PROVIDED THAT: (A) THE PERSON WHO IS THE
52 SOURCE OF THE OCCUPATIONAL EXPOSURE IS DECEASED, COMATOSE OR IS DETER-
53 MINED BY HIS OR HER ATTENDING HEALTH CARE PROFESSIONAL TO LACK MENTAL
54 CAPACITY TO CONSENT TO AN HIV RELATED TEST AND IS NOT REASONABLY
55 EXPECTED TO RECOVER IN TIME FOR THE EXPOSED PERSON TO RECEIVE APPROPRI-
56 ATE MEDICAL TREATMENT, AS DETERMINED BY THE EXPOSED PERSON'S ATTENDING

1 HEALTH CARE PROFESSIONAL WHO WOULD ORDER OR PROVIDE SUCH TREATMENT; (B)
2 THERE IS NO PERSON AVAILABLE OR REASONABLY LIKELY TO BECOME AVAILABLE
3 WHO HAS THE LEGAL AUTHORITY TO CONSENT TO THE HIV RELATED TEST ON BEHALF
4 OF THE SOURCE PERSON IN TIME FOR THE EXPOSED PERSON TO RECEIVE APPROPRI-
5 ATE MEDICAL TREATMENT; AND (C) THE EXPOSED PERSON WILL BENEFIT MEDICALLY
6 BY KNOWING THE SOURCE PERSON'S HIV TEST RESULTS, AS DETERMINED BY THE
7 EXPOSED PERSON'S HEALTH CARE PROFESSIONAL AND DOCUMENTED IN THE EXPOSED
8 PERSON'S MEDICAL RECORD; (II) IN WHICH CASE (A) A PROVIDER SHALL ORDER
9 AN ANONYMOUS HIV TEST OF THE SOURCE PERSON; AND (B) THE RESULTS OF SUCH
10 ANONYMOUS TEST, BUT NOT THE IDENTITY OF THE SOURCE PERSON, SHALL BE
11 DISCLOSED ONLY TO THE ATTENDING HEALTH CARE PROFESSIONAL OF THE EXPOSED
12 PERSON SOLELY FOR THE PURPOSE OF ASSISTING THE EXPOSED PERSON IN MAKING
13 APPROPRIATE DECISIONS REGARDING POST-EXPOSURE MEDICAL TREATMENT; AND (C)
14 THE RESULTS OF THE TEST SHALL NOT BE DISCLOSED TO THE SOURCE PERSON OR
15 PLACED IN THE SOURCE PERSON'S MEDICAL RECORD.

16 7. In the event that an HIV related test is ordered by a physician or
17 certified nurse practitioner pursuant to the provisions of the education
18 law providing for non-patient specific regimens, then for the purposes
19 of this section the individual administering the test shall be deemed to
20 be the individual ordering the test.

21 S 2. The public health law is amended by adding a new section 2781-a
22 to read as follows:

23 S 2781-A. REQUIRED OFFERING OF HIV RELATED TESTING. 1. EVERY INDIVID-
24 UAL BETWEEN THE AGES OF THIRTEEN AND SIXTY-FOUR YEARS (OR YOUNGER OR
25 OLDER IF THERE IS EVIDENCE OR INDICATION OF RISK ACTIVITY) WHO RECEIVES
26 HEALTH SERVICES AS AN INPATIENT OR IN THE EMERGENCY DEPARTMENT OF A
27 GENERAL HOSPITAL DEFINED IN SUBDIVISION TEN OF SECTION TWENTY-EIGHT
28 HUNDRED ONE OF THIS CHAPTER OR WHO RECEIVES PRIMARY CARE SERVICES IN AN
29 OUTPATIENT DEPARTMENT OF SUCH HOSPITAL OR IN A DIAGNOSTIC AND TREATMENT
30 CENTER LICENSED UNDER ARTICLE TWENTY-EIGHT OF THIS CHAPTER OR IN OTHER
31 MEDICAL HEALTH CARE SETTINGS LICENSED UNDER ARTICLE TWENTY-EIGHT OF THIS
32 CHAPTER SHALL BE OFFERED AN HIV RELATED TEST UNLESS THE HEALTH CARE
33 PRACTITIONER PROVIDING SUCH SERVICES REASONABLY BELIEVES THAT: (A) THE
34 INDIVIDUAL IS BEING TREATED FOR A LIFE THREATENING EMERGENCY; OR (B) THE
35 INDIVIDUAL HAS PREVIOUSLY BEEN OFFERED OR HAS BEEN THE SUBJECT OF AN HIV
36 RELATED TEST (EXCEPT THAT A TEST SHALL BE OFFERED IF OTHERWISE INDI-
37 CATED); OR (C) THE INDIVIDUAL LACKS CAPACITY TO CONSENT TO AN HIV
38 RELATED TEST.

39 2. AS USED IN THIS SECTION, "PRIMARY CARE" MEANS THE MEDICAL FIELDS OF
40 FAMILY MEDICINE, GENERAL PEDIATRICS, PRIMARY CARE, INTERNAL MEDICINE,
41 PRIMARY CARE OBSTETRICS, OR PRIMARY CARE GYNECOLOGY, WITHOUT REGARD TO
42 BOARD CERTIFICATION.

43 3. THE OFFERING OF HIV RELATED TESTING UNDER THIS SECTION SHALL BE
44 CULTURALLY AND LINGUISTICALLY APPROPRIATE IN ACCORDANCE WITH RULES AND
45 REGULATIONS PROMULGATED BY THE COMMISSIONER.

46 4. THIS SECTION SHALL NOT AFFECT THE SCOPE OF PRACTICE OF ANY HEALTH
47 CARE PRACTITIONER OR DIMINISH ANY AUTHORITY OR LEGAL OR PROFESSIONAL
48 OBLIGATION OF ANY HEALTH CARE PRACTITIONER TO OFFER AN HIV RELATED TEST
49 OR TO PROVIDE SERVICES OR CARE FOR THE SUBJECT OF AN HIV RELATED TEST.

50 S 3. Section 2135 of the public health law, as added by chapter 163 of
51 the laws of 1998, is amended to read as follows:

52 S 2135. Confidentiality. All reports or information secured by the
53 department, municipal health commissioner or district health officer
54 under the provisions of this title shall be confidential except:

55 1. in so far as is necessary to carry out the provisions of this
56 title;

2. WHEN USED IN THE AGGREGATE, WITHOUT PATIENT SPECIFIC IDENTIFYING INFORMATION, IN PROGRAMS APPROVED BY THE COMMISSIONER FOR THE IMPROVEMENT OF THE QUALITY OF MEDICAL CARE PROVIDED TO PERSONS WITH HIV/AIDS; OR

3. WHEN USED WITHIN THE STATE OR LOCAL HEALTH DEPARTMENT BY PUBLIC HEALTH DISEASE PROGRAMS TO ASSESS CO-MORBIDITY OR COMPLETENESS OF REPORTING AND TO DIRECT PROGRAM NEEDS, IN WHICH CASE PATIENT SPECIFIC IDENTIFYING INFORMATION SHALL NOT BE DISCLOSED OUTSIDE THE STATE OR LOCAL HEALTH DEPARTMENT.

S 4. Subdivision 4 of section 2780 of the public health law, as added by chapter 584 of the laws of 1988, is amended to read as follows:

4. "HIV related test" means any laboratory test or series of tests [for any virus, antibody, antigen or etiologic agent whatsoever thought to cause or to indicate the presence of AIDS] APPROVED FOR THE DIAGNOSIS OF HIV.

S 5. Subdivision 1 of section 2130 of the public health law, as added by chapter 163 of the laws of 1998, is amended to read as follows:

1. Every physician or other person authorized by law to order diagnostic tests or make a medical diagnosis, or any laboratory performing such tests shall immediately (a) upon [initial] determination that a person is infected with human immunodeficiency virus (HIV), [or] (b) upon [initial] diagnosis that a person is afflicted with the disease known as acquired immune deficiency syndrome (AIDS), [or] (c) upon [initial] diagnosis that a person is afflicted with HIV related illness, report such case to the commissioner.

S 6. Paragraph (a) of subdivision 5 of section 2782 of the public health law, as added by chapter 584 of the laws of 1988, is amended to read as follows:

(a) Whenever disclosure of confidential HIV related information is made pursuant to this article, except for disclosures made pursuant to [paragraph] PARAGRAPHS (a), (D) AND (I) of subdivision one of this section or paragraph (a) or (e) of subdivision four of this section, such disclosure shall be accompanied or followed by a statement in writing which includes the following or substantially similar language: "This information has been disclosed to you from confidential records which are protected by state law. State law prohibits you from making any further disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. Any unauthorized further disclosure in violation of state law may result in a fine or jail sentence or both. A general authorization for the release of medical or other information is NOT sufficient authorization for further disclosure." An oral disclosure shall be accompanied or followed by such a notice within ten days.

S 7. Subdivision 1 of section 2782 of the public health law is amended by adding a new paragraph (q) to read as follows:

(Q) AN EXECUTOR OR AN ADMINISTRATOR OF AN ESTATE SHALL HAVE ACCESS TO THE CONFIDENTIAL HIV INFORMATION OF A DECEASED PERSON AS NEEDED TO FULFILL HIS OR HER RESPONSIBILITIES/DUTIES AS AN EXECUTOR OR ADMINISTRATOR.

S 8. Subdivision 1 of section 2786 of the public health law, as added by chapter 584 of the laws of 1988, is amended to read as follows:

1. The commissioner shall promulgate rules and regulations concerning implementation of this article for health facilities, health care providers and other persons to whom this article is applicable. The commissioner shall also develop STANDARDIZED MODEL forms to be used for informed consent for HIV related testing and for the release of confi-

1 dential HIV related information and materials for pre-test counseling as
2 required by subdivision [three] TWO of section twenty-seven hundred
3 eighty-one of this article, and for post-test counseling as required by
4 subdivision five of section twenty-seven hundred eighty-one of this
5 article. Persons, health facilities and health care providers may use
6 forms for informed consent for HIV related testing, and for the release
7 of confidential HIV related information other than those forms developed
8 pursuant to this section, provided [that the person, health facility or
9 health care provider doing so receives prior authorization from] THE
10 FORMS CONTAINED INFORMATION CONSISTENT WITH THE STANDARDIZED MODEL FORMS
11 DEVELOPED BY the commissioner PURSUANT TO THIS SUBDIVISION. All forms
12 developed or [authorized] USED pursuant to this section shall be written
13 in a clear and coherent manner using words with common, everyday mean-
14 ings. The commissioner, in consultation with the AIDS institute advisory
15 council, shall promulgate regulations to identify those circumstances
16 which create a significant risk of contracting or transmitting HIV
17 infection; provided, however, that such regulations shall not be deter-
18 minative of any significant risk determined pursuant to paragraph (a) of
19 subdivision four of section twenty-seven hundred eighty-two or section
20 twenty-seven hundred eighty-five of this article.

21 S 9. On or before September 1, 2011 the commissioner of health shall
22 evaluate the impact of this act with respect to the number of persons
23 who are tested for HIV infection and the number of persons who access
24 care and treatment. Such report shall be submitted to the governor and
25 to the chairs of the assembly and senate committees on health.

26 S 10. This act shall take effect September 1, 2009; provided, however,
27 that the commissioner of health is authorized to adopt rules and regu-
28 lations necessary to implement the provisions of this act prior to such
29 effective date.