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## Russian Legislation Regarding Workplace Antidiscrimination and the Rights of HIV-Positive Employees: A Legal Guideline

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AGAINST AIDS

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Transatlantic Partners Against AIDS (TPAA) is an independent, non-governmental organization that leverages the political, civic, scientific, and economic resources of North American, European, and Eurasian partners to combat the rapid and devastating spread of HIV/AIDS in Russia, Ukraine and neighboring countries.

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## TRANSATLANTIC PARTNERS AGAINST AIDS



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This Brief is part of a series of publications for Russian policymakers, legislators, and others concerned with HIV/AIDS and related issues. The briefs are reviewed by a number of specialists representing both State agencies and non-governmental, Russian as well as international organizations.

The opinions expressed in this publication are those of the author and do not necessarily reflect the views of TPAA, its Board of Directors, staff, partners, or donors.

# Russian Legislation Regarding Workplace Antidiscrimination and the Rights of HIV-Positive Employees: A Legal Guideline

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## 1. Summary and recommendations



### 1.1. Summary

This guideline is written for human resource managers and other executives responsible for creating a positive, constructive and healthy work environment, as well as legislators and their staffs, and other government officials concerned with labor law and human rights. The guideline should be read in conjunction with TPAA Policy Brief 2.1 "HIV/AIDS as a Business issue in the Russian Federation: Understanding", available on TPAA's websites at [www.tpaa.net](http://www.tpaa.net) and [www.tpaa.ru](http://www.tpaa.ru). The present document offers an in-depth review of Russian legislative provisions governing HIV management in the workplace relative to international standards developed by the United Nations and other bodies. The publication also presents specific proposed improvements to Russian labor regulations for consideration by government officials and legislators.

### 1.2. Key Facts about HIV/AIDS

The increase in the number of HIV-positive Russian citizens has considerably exceeded the expectations of Russian experts. The HIV/AIDS epidemic now represents one of the most serious threats to the country's future development in nearly all areas:

- HIV is a virus that attacks and suppresses the immune system. AIDS is a condition caused by one or more diseases resulting from weakened immune-system function. HIV transmission occurs when an infected body fluid is introduced into the bloodstream of an uninfected person. Research indicates that there are only four body fluids where the virus concentration is sufficient for transmission to another person: blood, sperm, vaginal secretion and breast milk. The two most common ways that HIV is transmitted are during sexual contact without a condom, especially if mucous membranes have been damaged, or through the use of non-sterile injection equipment. The virus can also be transmitted from mother to child during pregnancy, birth, or via breast milk.
- According to the Russian Federal AIDS Center, a cumulative total of 318,000 people living with HIV/AIDS (PLWHA) have been registered in Russia from 1987 through May 2005. Of those, about 311,000 are alive today. Most experts agree, however, that the actual number of people living with HIV/AIDS is much higher—at least 800,000 (as estimated by the Russian Federal AIDS Centre), which would translate to 1% of the adult population. Nearly 80 percent of Russians living with HIV/AIDS are younger than 30.
- Such a situation has enormous implications not only for individual and public health, but for the health and quality of the economy and workforce. As International Labor Organization (ILO) Director-General Juan Somavia noted in the preface to the ILO Code of Practice on HIV/AIDS and the World of Work, "HIV/AIDS is a major threat to the world of work: it is affecting the most productive segment of the labor force and reducing earnings, and it is imposing huge costs on enterprises in all sectors through declining productivity, increasing labor costs and loss of skills and experience. In addition, HIV/AIDS is affecting fundamental rights at work, particularly with respect to discrimination and stigmatization aimed at workers and people living with and affected by HIV/AIDS."
- It can take 10 years or more after infection for an HIV-positive person to develop AIDS or otherwise become physically incapacitated; this period of time may be even longer for those with access to HIV treatment. Therefore, many people living with HIV do not have any symptoms and are therefore able and willing to work. This raises the question of how the rights of this category of employees are protected.

## 1.3. Recommendations

The guideline's recommendations include:

- Enforcement of the existing elements of Russian antidiscrimination legislation should be more stringent. Better compliance can be ensured by raising awareness among company executives about the impact of HIV/AIDS in the workplace.
- It is imperative that the government, labor unions and human rights groups register and analyze data on workplace discrimination in a timely and systematic manner. Antidiscrimination legislation compliance record cannot be improved without availability of such data.
- The requirement to undergo pre-employment HIV screening, contained in a number of Russian statutes, contradicts both the letter and spirit of the ILO Code of Practice on HIV/AIDS. Companies should cooperate with the government to ensure that there are safeguards in place against unjustified expansion of the list of employment categories in which pre-employment HIV screening is required.

## 2. Legal Provisions Prohibiting Discrimination against People Living with HIV/AIDS



The Constitution of the Russian Federation says that all Russian citizens are entitled to equal opportunity to realize their labor rights. According to sub-section 2 of Article 19, the state shall guarantee the equality of rights and liberties regardless of sex, race, nationality, language, origin, property or employment status, residence, attitude to religion, convictions, membership in public associations or any other circumstance. Sub-section 3 of Article 37 of the Constitution states that all individuals shall have the right to work under conditions meeting the requirements of safety and hygiene, to remuneration for work without any discrimination whatsoever, and also the right to security against unemployment.

Furthermore, Article 2 of the Russian Labor Code prohibits workplace discrimination and guarantees the equality of rights and opportunities of all employees.

Elimination of discrimination in the world of work is vested in the ILO's Declaration on Fundamental Principles and Rights at Work (1998). All ILO members must implement and promote the principles of the declaration even if they have not ratified it.

The ILO's C 111 Discrimination (Employment and Occupation) Convention (adopted in 1958) serves as a universal workplace guideline. Article 1 of the convention defines "discrimination" as:

- a) any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.

Antidiscrimination norms contained in Russian legislation are articulated in the following statutes: Articles 3 and 64 of the Russian Labor Code; Article 17 of the fundamentals of legislation of the Russian Federation on health protection (adopted in July 1993); Articles 5 and 17 of the federal law "On the prevention of the spread in the Russian Federation of disease caused by the Human Immunodeficiency Virus (HIV-infection)," passed by the State Duma in March 1995; and other regulatory legal acts.

- Article 3 of the Labor Code defines what workplace discrimination means, while Article 64 bans employers from refusing to conclude a labor contract for unjustified reasons. According to Article 64, the following shall not be permitted, except in specific circumstances stipulated by federal law: all and any direct or indirect restrictions or granting direct or indirect advantages at concluding a labor contract based on sex, race, skin color, nationality, language, origin, property, social and official status, domicile (including availability or unavailability of registration at the place of residence or lodgment) as well as on any other factors not connected with the professional qualities of employees.
- Article 17 of the statute on the fundamentals of legislation of the Russian Federation on health protection says that the state shall guarantee citizens protection from all forms of discrimination caused by any diseases they may have.
- Special norms concerning the interests of HIV-positive people in the workplace are listed in Articles 5 and 17 of the federal law "On the prevention of the spread in the Russian Federation of disease caused by the Human Immunodeficiency Virus (HIV-infection)." Article 17 of the law bans employees from refusing to hire individuals because of their HIV status.

Although Russian legislation contains statutory provisions banning workplace discrimination against and stigmatization of HIV-positive employees, employers do not always comply with these provisions. In practice, the rights of many HIV-positive individuals are routinely violated. The two main reasons for non-compliance are 1) employers' low awareness of the specifics of the disease and the realistic threats posed to the health of other employees in contact with HIV-positive people, and 2) employers' and their representatives' ignorance of antidiscrimination laws and policies regarding HIV-positive citizens.

### 3. Regular Medical Examinations of Employees and Examinations Prior to Employment



The use of HIV tests in the candidate selection process is a serious concern for HIV-positive jobseekers in Russia. Many fear that their job applications will be turned down because of their HIV status.

The ILO unambiguously states in the Article 8 of its Code of Practice on HIV/AIDS and the World of Work that HIV/AIDS screening should not be required of job applicants or persons already employed. Article 8 clearly says that an HIV test should not be required at the time of recruitment or as a condition of continued employment, regardless of whether the employer demands to see the results. Any routine medical examination, such as testing for fitness carried out prior to the commencement of employment or on a regular basis for workers, should not include mandatory HIV testing.

Russian legislation in this area does not differ from ILO recommendations.

Articles 69, 76, 185, 213, 214, 266 of the Russian Labor Code require that certain categories of job seekers undergo medical examinations at the time of recruitment.

With regards to pre-employment HIV tests, Article 8 of the federal law "On the prevention of the spread in the Russian Federation of disease caused by the Human Immunodeficiency Virus (HIV-infection)" clearly states that these are voluntary.

There are exceptions, however. In sub-section 3, Article 9 of that law, it is stated that workers of specific professions, production, enterprises, institutions and organizations-a list of which is confirmed by the federal government-may be subjected to compulsory HIV tests. Such examinations may be required for all applicants and periodically thereafter for employees.

The most recent list can be found in government regulation N 877, adopted in 1995. Article 1 of the regulation states that the following categories of workers are subject to mandatory HIV tests when applying for work and as part of periodical medical examinations:

- a) doctors, paramedical personnel of HIV/AIDS centers, and specialized departments and structural subdivisions of health institutions dealing with direct examination, diagnostics, treatment, service as well as forensic medical examination and other work with HIV-positive individuals or otherwise having direct contact with them;
- b) laboratory doctors and other personnel that administer HIV tests and/or come into regular contact with the blood and biological material of HIV-positive individuals;
- b) Staff and contractors of research and other facilities involved in the production of immunobiological medical species as well as other organizations focusing on activities connected with materials containing HIV.

Article 2 of the regulation specifies that it is up to managers supervising staff in the above-mentioned categories to determine specific HIV testing procedures, including for whom testing is mandatory. Individuals who refuse to be tested for HIV may be subjected to disciplinary liability or dismissed at the employer's discretion. In accordance with Article 76 of the Russian Labor Code, an employer must dismiss (or at least forbid from performing his expected job function) an employee who has refused to be tested for HIV or undergo other related and relevant medical examinations.

This provision above contradicts Article 8 of the ILO's Code of Practice on HIV/AIDS and the World of Work, which emphasizes that HIV testing cannot be a mandatory part of the recruitment process or be obligatory for employees to retain their jobs. According to Article 8.3, "Anonymous, unlinked surveillance or epidemiological HIV testing in the workplace may occur provided it is undertaken in accordance with the ethical principles of scientific research, professional ethics and the protection of individual rights and confidentiality. Where such research is done, workers and employers should be consulted on and informed that it is occurring. The information obtained may not be used to discriminate against individuals or groups of persons. Testing will not be considered anonymous if there is a reasonable possibility that a person's HIV status can be deduced from the results."

It may be argued that the Russian norm in question was inserted because it was recognized that compulsory HIV testing of medical personnel could become a valuable HIV/AIDS prevention tool. Its effects, however, are problematic. The list of categories of employees required to undergo mandatory HIV tests is too vague and can be easily expanded.

Moreover, some government agencies have questionable policies and rules on HIV testing for job applicants and employees. For example, compulsory HIV testing was mandated in the decree "On the order of medical examinations for the detection of HIV-infection of separate professional groups of railway workers" (N B - 166 U, adopted in February 1996) of the Ministry of Communications of the Russian Federation and the Central Committee of the independent trade union of railroad employees and transportation conductors. This decree is technically illegal under Russian law because it violates the right to labor of people employed in this sector.

## 4. Safeguarding HIV-Positive Employees' Confidentiality and Privacy



Article 4.7 of the ILO's Code of Practice on HIV/AIDS and the World of Work specifies that there is no justification for asking job applicants or workers to disclose HIV-related personal information. Similarly, co-workers should not be obliged to gather or reveal such personal information about fellow workers. Access to personal data regarding a worker's HIV/AIDS status should be bound by rules of confidentiality consistent with the ILO's code of practice on the protection of workers' personal data, as updated in 1997.

In Russia, employee personal data is protected by Part 14 of the Russian Labor Code. According to Article 85 of the Code, an employee's "personal information" is that which is required by an employer to establish a labor relationship and refers to the specific employee only.

Article 11 of the federal law "On information and information protection," adopted in February 1995, stipulates that personal data are considered confidential information. The legislation prohibits the collection, storage, use and dissemination of information concerning an individual's private life. Included in this prohibition are information about family members and contents of personal correspondence (via mail, telegraph, etc.), except when the individual has given specific consent or on the basis of a court order.

The presidential decree "On approval of forms of confidential information," passed in March 1997, further outlines what is considered confidential information under law and therefore cannot be divulged or disseminated. This includes information on facts, events and circumstances of a citizen's private life as well as other personal data that would allow the person's identity to be determined. Exceptions include instances in which federal laws override such restrictions or when authorities release information to the mass media, which can occur in certain circumstances.

In both the federal law and presidential decree, "personal data" includes information on an employee's state of health as well as his HIV status.

Personal medical records considered confidential in Russia. This includes any data shared or obtained during a hospital or clinic visit; diagnoses; and details of medical examination or treatment. Information contained in an individual's medical records is confidential and can only be disclosed with the individual's specific consent or under the limited situations stipulated by Article 61 of the fundamentals of legislation of the Russian Federation on health protection (passed in July 1993).

General requirements regarding employees' personal data and their protection are included in Article 86 of the Russian Labor Code. Among them are the following restrictions and policies that an employer or an employer's representative must follow when processing an employee's personal information:

- 1) Processing of an employee's personal information can be performed only to ensure compliance with laws and other legislative standard acts, to aid employees in performing their job tasks, to assist in education and job-promotion purposes, to ensure the personal safety of employees, to control the quality and quantity of performed work, and to guarantee the safety of the organization's property;
- 2) All personal information about an employee can be received directly from the employee only. If personal information can only be received from a third party, then the employee must be notified in advance and requested to provide written permission. The employer must inform the employee as to the purpose of the need for information; the possible sources and the means of receiving it; the type of necessary personal information sought; and the consequences of the employee's refusal to provide written permission to allow the collection of this information from a third party;
- 3) An employer has no right to demand and obtain personal information about an employee's private life, including his political and religious beliefs. According to Article 24 of the Constitution, an employer

has the right to receive and process personal information about an employee's private life only when the employee has provided written permission or in cases when this information is relevant to the employment relationship;

- 4) Federal law specifies that an employer must guarantee the protection of an employee's personal information from improper usage, damage or loss. The employer is responsible for any expenses incurred should this protection not be upheld;
- 5) Unless specifically indicated otherwise by law, employees are not permitted to renounce their rights to keep personal information to themselves.

The following requirements and restrictions guide employers' ability to share an employee's personal data:

- An employer must not share an employee's personal information with a third party without the employee's written permission, except in cases when it is necessary to do so to prevent threats to employees' health and life or when specified by federal law;
- An employer must warn entities receiving an employee's personal information that it can be used only for the specific purposes requested. The employer must also request a confirmation from the entities in which they agree to meet this restriction. Entities that receive an employee's personal information are required to keep all of it secret and confidential. This requirement does not apply to cases in which the sharing of personal information is mandated under federal laws;
- An employer is required to comply with the organization's internal standards when engaged in sharing an employee's personal information within the organization. Furthermore, the employee must confirm that he or she is aware of the employer's actions;
- An employer can allow access to an employee's personal information only to authorized entities, and these entities are restricted to receiving only the personal information that is required to meet the specific functions;
- An employer must not demand information about an employee's health, except when such information is relevant to considerations concerning the employee's capability of performing job functions (as per Article 88 of the Russian Labor Code).

Employers are required to retain information regarding employees' health and to update this information periodically for the following reasons: to determine whether employees are able to perform their duties, given requirements placed on certain categories of workers and certain kinds of work; to consider transferring workers to less demanding jobs with specified salary adjustments, depending on medical conditions; and to bar employees from performing certain specific labor tasks if they have not undergone mandatory medical examinations or when their medical conditions indicate they are not able to perform these tasks. The employers' actions in this regard must always take into consideration Article 88 of the Russian Labor Code, which prohibits their ability to demand information about an employee's health except when such information is relevant to the employee's capability of performing his job functions.

## 5. Labor Relations and Employee Termination



Article 4.8 of the ILO's Code of Principles on HIV/AIDS and the World of Work clearly states that HIV infection cannot be a cause for termination of employment. Like those living with other conditions, HIV-positive people should be able to work for as long as medically fit in available, appropriate work. Sub-paragraph c of Article 9.1 stipulates that as long as workers are medically fit for appropriate employment, they should enjoy normal job security and opportunities for transfer and advancement.

There is no basis in Russian legislation for the dismissal of an employee due to his HIV status. In fact, dismissing an HIV-positive employee on the basis of HIV status is specifically banned under Article 17 of the federal law "On the prevention of the spread in the Russian Federation of disease caused by the Human Immunodeficiency Virus (HIV-infection)."

Labor relations may be legally terminated should an employee refuse to transfer to a different job position in the wake of a medical examination that indicates his health does not permit him to fulfill the requirements of the current position (as per sub-section 8 of Article 77 of the Russian Labor Code).

An employer must transfer an employee to a different existing position if a medical examination determines that this is necessary. The employee's consent is required for this transition. If the employee does not accept the transition offer or if there is no existing corresponding job in the organization, then the labor agreement may be terminated according to paragraph 8 of Article 77 of the Russian Labor Code (Article 72, Part 2 of the Russian Labor Code).

In accordance with sub-paragraph 3 of Article 81 of the Russian Labor Code, a labor agreement can be terminated by an employer when a medical examination concludes that the employee's health prevents him from performing his job functions capably. Dismissal based on this reason is only allowed if transition of an employee to a different job position with the employee's consent proves impossible.

Paragraph 5 of Article 83 of the Russian Labor Code stipulates that a labor agreement must be terminated when the results of a medical examination conclude that the employee is completely incapable of work.

Furthermore, an employee is required (by Article 214 of the Russian Labor Code) to notify his direct or higher-level supervisor immediately should his health deteriorate.

## 6. Social Partnership and Protection of Rights of HIV-Positive Individuals



According to Article 41 of the Russian Labor Code, a collective contract may include provisions regarding the improvement of working conditions and occupational safety, including those for women and young people; environmental safety and occupational health of production employees; rest and recreation facilities for employees and their dependents; and other matters as determined by the parties involved. A contract may also include mutual obligations of the parties on the following issues: wages and salaries; working conditions and occupational safety; work, rest and leisure routines; the development of a social partnership; and other matters as determined by the parties (as per Article 45 of the Russian Labor Code).

The ILO's Code of Practice on HIV/AIDS and the World of Work recommends that employees, employers and their organizations include provisions on HIV/AIDS protection and prevention in all national, sectoral and workplace/enterprise agreements and collective contracts (Article 5.3).

However, there are no provisions in the Russian Labor Code or the federal law "On collective contracts and agreements" (adopted in November 1995) that stimulate employees and employers to consider such issues during collective talks or to include them in social partnership agreements and collective contracts.

In addition, workplace/enterprise agreements and collective contracts concluded in the Russian Federation on federal and sectoral levels do not include provisions specifically geared to protect the rights of HIV-positive individuals or to encourage HIV prevention efforts.

## 7. Recommendations



- Russian legislation is generally consistent with international labor and human rights standards, including those of the ILO. It contains provisions aimed at reducing stigmatization and discrimination against HIV-positive people. In practice, however, provisions regarding pre-employment HIV screening are often breached. This points to gaps in the legislation itself, and government's inability to enforce it.
- It is clear that the root cause of workplace discrimination, which primarily manifests itself in refusal to hire HIV-infected people or unfair dismissals, reflects a poor understanding of the disease itself and of the existing antidiscrimination regulatory framework. It is, therefore, important that the government of the Russian Federation, labor unions and human rights groups register and analyze data on workplace discrimination in a timely and systematic manner.
- The requirement to undergo pre-employment HIV screening, contained in a number of Russian statutes contradicts both the letter and spirit of the ILO Code of Practice on HIV/AIDS. The Government of the Russian Federation should ensure there are safeguards in place against unjustified expansion of the list of employment categories in which pre-employment HIV screening is permissible.
- The Government of the Russian Federation and the NGO sector should promote cooperation between labor unions and employers' associations on development and implementation of de-stigmatization and anti-discrimination policies. The 2005-2007 General Agreement between Russian labor unions' associations, Russian employers' associations and the Government of the Russian Federation specifically calls on relevant parties to coordinate and integrate their efforts in this area. This process could be facilitated by collecting and processing data related to stigmatization and discrimination, and delivering data analysis to relevant trade unions and employers' associations.

# Annex 1. Options for Improving the Regulatory Framework



The following recommendations are based on the analysis provided previously in this report. They are designed to safeguard the labor rights of HIV-positive employees and to improve working conditions and policies for both employers and employees.

The recommendations would add provisions to Articles 69 and 213 of the Russian Labor Code. These new provisions would oblige employers referring employees to medical examination to inform them of the legal foundation of the examination and explain the employee's rights and responsibilities. These changes would likely reduce the number of illegal medical examinations, thus providing employees with greater job protection.

## Current version of Article 69 of the Labor Code

Entities [individuals] who are less than 18 years old at the conclusion of the labor agreement and other entities, in cases specified by this Code and other federal laws, are subject to obligatory preliminary medical examination.

### Proposed amendment:

**When referring an employee to a preliminary medical examination, the employer must inform the employee of the legal foundations on which the examination is based and provide a clear and thorough explanation of the employee's rights and responsibilities.**

## Current version of Article 213 of the Labor Code

### *Medical Examinations of Some Categories of Employees*

Employees performing hard work and work under harmful and/or dangerous conditions (including work underground), and work related to traffic flow undergo compulsory preliminary (upon taking the job) and periodical (yearly for persons under 21) medical examinations at the employer's expense in order to ascertain their suitability for performing the imposed work and to prevent the onset of diseases or conditions related to the work. The aforementioned employees also undergo urgent medical examinations should a medical professional indicate that it is necessary.

Employees of food industry enterprises, public catering and trade, water works, health and child care institutions, and of some other organizations undergo the aforementioned medical examinations in order to protect public health and prevent the spread of potentially contagious diseases.

Employees who work at potentially harmful and/or dangerous industrial facilities or otherwise engaged in risky or hazardous professions require preliminary and periodical medical examinations. These procedures are defined as normative legal acts and included in statutes of the government of the Russian Federation.

In case of necessity, individual enterprises may introduce, upon approval from local government bodies, additional terms of and indications for employees' medical examinations.

Employees performing certain kinds of work activities, including those related to hazard sources (harmful substances and adverse industrial factors), and employees working under hazardous conditions undergo compulsory psychiatric examination at least once every five years, as indicated in statutes of the government of Russian Federation.

### Proposed amendment:

**When referring an employee to a medical examination, the employer must inform the employee of the legal foundations on which the examination is based and provide a clear and thorough explanation of the employee's rights and responsibilities.**