

Rule and Regulation 42

STANDARDS TO PREVENT UNFAIR
DISCRIMINATION IN REFERENCE TO THE HUMAN
IMMUNODEFICIENCY VIRUS (HIV)

SECTION

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SECTION 1. PURPOSE

The purpose of this rule is to establish standards for testing for the presence of Human Immunodeficiency Virus (HIV) and to prevent unfair discriminatory practices. By establishing standards to regulate trade practices the public will be protected from unfair acts or practices while at the same time affording insurers a reasonable basis for continued operation in this State.

SECTION 2. AUTHORITY

This rule is issued pursuant to the authority vested in the Insurance Commissioner under Ark. Code Ann. §23-61-108, §23-66-201 et seq. and §25-15-204.

SECTION 3. APPLICABILITY

This rule shall apply to all life insurers, accident and health insurers, fraternal benefit societies, hospital medical service corporations, and health maintenance organizations licensed pursuant to the Arkansas Insurance Code.

SECTION 4. NONDISCRIMINATORY TESTING FOR HUMAN IMMUNODEFICIENCY VIRUS (HIV)

- (a) A proposed insured for life or accident and health insurance or any other coverage with a company licensed under the Arkansas Insurance Code may be required to be tested for the presence of the human immunodeficiency virus (HIV). Requiring such testing is not unfair discrimination provided:
 - (1) The testing is required on a nondiscriminatory basis for all individuals in the same class; and
 - (2) No proposed insured is denied coverage or rated as substandard risk on the basis of such testing unless:

- (A) An initial enzyme linked immunosorbent assay (ELISA) test is administered to the proposed insured, and it indicates the presence of HIV antibodies; and
 - (B) A second ELISA test is conducted and it indicates the presence of HIV antibodies; and
 - (C) A Western Blot test is conducted and the results of such test are not negative.
- (b) The Commissioner may prescribe by Bulletin other tests to be used in complying with Section 4(a)(2). These tests must be recognized by the Director of the Arkansas Department of Health as acceptable for testing for the human immunodeficiency virus.

SECTION 5. UNFAIR DISCRIMINATION

(a) General Propositions

- (1) No inquiry in an application for accident and health or life insurance coverage, or in an investigation conducted by or on behalf of an insurer in connection with an application for such coverage, shall be directed toward determining the proposed insured's sexual orientation.
- (2) Sexual orientation may not be used in the underwriting process or in the determination of insurability.
- (3) Insurers shall not direct, require or request insurance support organizations to investigate, directly or indirectly, the sexual orientation of proposed insured or a beneficiary.

(b) Medical/lifestyle applications questions and underwriting standards.

- (1) No question shall be used which is designed to establish the sexual orientation of the proposed insured.
- (2) Questions relating to the proposed insured having, or having been diagnosed as having, acquired immune deficiency syndrome (AIDS) or AIDS-related complex are permissible if they are factual and designed to establish the existence of the condition.
- (3) Questions relating to medical and other factual matters intending to reveal the possible existence of a medical condition are permissible if they are not used as a proxy to establish the sexual orientation of the

proposed insured, and the proposed insured has been given an opportunity to provide an explanation for any affirmative answers given in the application.

- (4) Questions relating to the proposed insured's having, or having been diagnosed as having, sexually transmitted disease are permissible.
- (5) Neither the marital status, the living arrangements, the occupation, the gender, the medical history, the beneficiary designation, nor the zip code or other territorial classification of a proposed insured may be used to establish, or aid in establishing the proposed insured's sexual orientation.
- (6) For purposes of rating a proposed insured for health and life insurance, an insurer may impose territorial rates, but only if the rates are based on sound actuarial principles or are related to actual or reasonably anticipated experience.
- (7) No adverse underwriting decision shall be made because medical records or a report from any other source shows that the proposed insured has demonstrated acquired immune deficiency syndrome-related concerns by seeking counseling from health care professionals. This paragraph does not apply to a proposed insured seeking or having sought treatment.
- (8) Whenever a proposed insured is requested to take an AIDS-related test in connection with an application for insurance, the use of such a test must be revealed to the proposed insured or to any other person legally authorized to consent to such a test, and his or her written authorization obtained. The form of such authorization must be printed on a separate piece of paper and must contain the specific language in the form, entitled "Notice and Consent for AIDS Virus (HIV) Testing". This form is found in Section 8 of this rule. Other information may be included so long as it is not misleading or violative of any applicable law or rule. Testing may be required only on a non-discriminatory basis. No adverse underwriting decision shall be made on the basis of such a positive AIDS-related test unless the established test protocol as provided herein has been followed.
- (9) Insurers are permitted to ask a proposed insured whether the proposed insured has tested positive on an acquired immune deficiency syndrome-related test.
- (10) The result of an AIDS-related test shall be confidential.

- (A) An insurer may not release or disclose such result or allow it to become known, except in the following circumstances:
- (i) as may be required by law; or
 - (ii) pursuant to the written request or authorization of the proposed insured or other person legally authorized to consent to the test on behalf of the proposed insured, with such release pursuant to written request limited to:
 - (1) the proposed insured;
 - (2) the person legally authorized to consent to the test;
 - (3) a licensed physician, medical practitioner, or other person designated by the proposed insured;
 - (4) an insurance medical information exchange under procedures that are designed to assure confidentiality, including the use of general codes that also cover results of tests for other diseases or conditions not related to AIDS, or for preparation of statistical reports that do not disclose the identify of any particular proposed insured;
 - (5) a reinsurer, if the reinsurer is involved in the underwriting process, under procedures that are designed to assure confidentiality;
 - (6) persons who have the responsibility to make underwriting decisions on behalf of the insurer; or
 - (7) insurer's legal counsel who needs such information to effectively represent the insurer in regard to matters concerning the proposed insured.
- (B) Should a proposed insured or the person legally authorized to consent to the test request that notification of a positive test result be sent to him or her personally, the insurer shall mail the test result to the proposed insured or the person

legally authorized to consent to the test by registered mail with delivery restricted to the addressee. A copy of the brochure entitled "LATEST FACTS ABOUT AIDS - If Your Test for Antibody to the AIDS Virus Is Positive," published jointly by the United States Public Health Service and the American Red Cross, or of a substantially similar publication, shall accompany such notification.

- (C) Should a proposed insured, or the person legally authorized to consent to the test, request that notification of a positive test result be sent to any person other than himself or herself or a physician, the insurer shall mail same to the person designated in the consent form by registered mail with delivery restricted to the addressee.

SECTION 6. EFFECTIVE DATE

This rule shall be effective _____.

SECTION 7. SEVERABILITY

Any section or provision of this rule held by a court to be invalid or unconstitutional shall not affect the validity of any other section or provision.

SECTION 8. FORM

The following form is made a part of this regulation and shall be used when so required by this rule.

NOTICE AND CONSENT FORM FOR AIDS VIRUS (HIV) TESTING

To evaluate your eligibility for insurance or insurance benefits, it is requested that you consent to be tested for the AIDS virus (HIV). By signing and dating this form, you agree that this test may be performed and that underwriting decisions will be based on the test results.

DISCLOSURE OF TEST RESULTS:

All test results will be treated confidentially. The results of the test will be reported to the insurer identified on this form. Results of the tests will not otherwise be disclosed except as allowed by law or as stated below.

MEANING OF TEST RESULTS:

While positive HIV antibody test results do not mean that you have AIDS, they do mean that you may be at increased risk of developing

AIDS or AIDS-related conditions. The test is a test for antibodies to the HIV virus, the causative agent for AIDS, and shows whether you have been exposed to the virus.

Positive HIV antibody test results could adversely affect your application for insurance. This means that your application may be declined, that an increased premium may be charged, or that other policy changes may be necessary.

RELEASE OF RESULTS:

The results of this test may be released to the following:

- (1) the proposed insured;
- (2) the person legally authorized to consent to the test;
- (3) a licensed physician, medical practitioner, or other person designated by the proposed insured;
- (4) an insurance medical information exchange under procedures that are designed to assure confidentiality, including the use of general codes that also cover results of tests for other diseases or conditions not related to AIDS, or for the preparation of statistical reports that do not disclose the identity of any particular proposed insured;
- (5) a reinsurer, if the reinsurer is involved in the underwriting process, under procedures that are designed to assure confidentiality;
- (6) persons who have the responsibility to make underwriting decisions on behalf of the insurer; or
- (7) insurer's legal counsel who needs such information to effectively represent the insurer in regard to matters concerning the proposed insured.

The insurer may contact you for the name of a physician or other health care provider to whom you may authorize disclosure and with whom you may want to discuss the results.

CONSENT:

I have read and I understand this Notice and Consent Form. I voluntarily consent to testing and disclosure as described above.

I understand that I have the right to request and receive a copy of this form. A photocopy of this form will be as valid as the original.

Date: _____

or

Signature of Proposed Insured
Parent/Guardian

MIKE PICKENS
INSURANCE COMMISSIONER
STATE OF ARKANSAS

DATE