

## CHAPTER 35

### HIV TESTING AND REPORTING

#### I. INTRODUCTION

Section 381.004, Florida Statutes, provides for an increased level of protection of medical records that contain human immunodeficiency virus (HIV) test results. The super confidentiality requirements imposed by Florida law are viewed as the precautions which must be taken both before an HIV test can be performed and after the HIV test is performed to ensure patient confidentiality.

#### II. PRE-TEST REQUIREMENTS

The administration of an HIV test requires the informed consent of the patient for whom the HIV results will be obtained. No person in Florida may order an HIV test without first obtaining the informed consent of the person upon whom the test is being performed. Section 381.004(3)(a), Florida Statutes. Consent need not be in writing if the medical record documents that consent was given. Section 381.004(3)(a), Florida Statutes. Informed consent must be preceded by an explanation of the right to confidential treatment of information identifying the subject of the test and the results of the test to the extent provided by law. Information must also be provided on the fact that a positive HIV test result will be reported to the county health department with sufficient information to identify the test subject and on the availability and location of sites at which anonymous testing is performed.

#### III. POST-TEST REQUIREMENTS

##### A. NOTIFICATION

Once an HIV test has been administered, there are a number of statutorily prescribed steps that a health care professional must follow. All reasonable efforts must be made to notify the test subject of his or her test result. Section 381.004(3)(c), Florida Statutes. Notification of a person with a positive test result will include information on the availability of appropriate medical and support services, the importance of notifying partners who may have been exposed, and preventing the transmission of HIV. When testing occurs in a hospital emergency department, detention facility, or other facility and the test subject has been released before being notified of positive test results, informing the county health department for that department to notify the test subject fulfills this responsibility.

No test result shall be determined as positive, and no positive test result shall be revealed to any person, without corroborating or confirmatory tests being conducted except in the following situations:

1. Preliminary test results may be released to licensed physicians or the medical or nonmedical personnel subject to the significant exposure for purposes of subparagraphs (3)(h)10., 11., and 12.
2. Preliminary test results may be released to health care providers and to the person tested when decisions about medical care or treatment of, or

recommendation to, the person tested and, in the case of an intrapartum or postpartum woman, when care, treatment, or recommendations regarding her newborn, cannot await the results of confirmatory testing. Positive preliminary HIV test results shall not be characterized to the patient as a diagnosis of HIV infection. Justification for the use of preliminary test results must be documented in the medical record by the health care provider who ordered the test. This subparagraph does not authorize the release of preliminary test results for the purpose of routine identification of HIV-infected individuals or when HIV testing is incidental to the preliminary diagnosis or care of a patient. Corroborating or confirmatory testing must be conducted as followup to a positive preliminary test. Results shall be communicated to the patient according to statute regardless of the outcome. Except as provided in this section, test results are confidential and exempt from the provisions of Section 119.07(1), Florida Statutes. Section 381.004(3)(d), Florida Statutes.

## **B. CONFIDENTIALITY**

Once an HIV test has been performed and the results have been obtained, confidentiality must be preserved. The identity of any person upon whom a test has been performed and test results must be held confidential. Section 381.004(3)(e), Florida Statutes. No person who has obtained or has knowledge of an HIV test result may disclose or be compelled to disclose the identity of any person upon whom a test is performed, or the results of such a test in a manner which permits identification of the subject of the test, except for the following reasons:

1. Patient Release. Consent for disclosure by the subject may be obtained in a “legally effective release.” Section 381.004(3)(e)(1-2), Florida Statutes.
2. Authorized agents or employees of providers and facilities. Personnel within a single facility or provider are authorized to disclose to each other on a “need to know” basis.
3. Health care consultation. Health care providers that are not employees of the same provider or facility may disclose HIV test results to each other without the subject’s consent, provided they are involved in the care or treatment of the test subject and the consultation is for the purpose of the patient’s diagnosis or treatment. 381.004(3)(e)(4), Florida Statutes.
4. Department of Health. The Department may share HIV test results “in accordance with rules for reporting and controlling the spread of disease, as permitted by state law.” 381.004(3)(e)(5), Florida Statutes.
5. Transfer of body parts. Health care facilities and providers who transfer body parts and semen, for the purposes of artificial insemination, may disclose HIV test results to each other. 381.0041, Florida Statutes.

6. Health facility staff committees may disclose HIV test results for the purposes of conducting program monitoring, program evaluation, or service reviews pursuant to Chapters 395 and 766, Florida Statutes.
7. Research. HIV test results may be disclosed to authorized medical and epidemiological researchers who are then prohibited from disclosing any identifying characteristics or information regarding test subjects. Section 381.004(3)(e)(8), Florida Statutes.
8. Court Orders. Subpoenas are not sufficient under Florida law for the release of HIV test results. A court order must be obtained and this process is not easily accomplished. A “compelling need” must be demonstrated by the individual seeking the results and the court must balance this need against the test subject’s privacy rights as well as public’s interests in privacy.
9. Workers’ Compensation. An administrative law judge of compensation claims of the Division of Workers’ Compensation may authorize disclosure of HIV test results, but only upon a finding that the person seeking the test results has demonstrated a compelling need for th results.
10. Custodians of Children. Under Section 381.004(3)(e)(11), Florida Statutes, there are three classes of persons allowed access to HIV test results:
  - a. Department personnel and other employees “directly involved in the placement, care, control or custody” of the tested child who demonstrate a need to know;
  - b. Adoptive parents of the tested subject; or
  - c. An adult custodian, relative or other person responsible for the child’s welfare if the parent or legal guardian cannot be reasonably located and informed of the test result.

### **C. ORAL DISCLOSURE**

Oral disclosure of HIV test results shall be accompanied by oral notice and followed by a written notice within 10 days. This written notice shall include the following statement: “This information has been disclosed to you from records whose confidentiality is protected by state law. State law prohibits you from making any further disclosure of such information without the specific written consent of the person to whom such information pertains, or as otherwise permitted by state law. A general authorization for the release of medical or other information is NOT sufficient for this purpose.” Section 381.004(3)(f).

**IV. PENALTIES**

Any violation of this section by a facility or a licensed health care provider is grounds for disciplinary action contained in the facility's or professional's respective licensing chapter. Any person who violates the confidentiality provisions commits a misdemeanor of the first degree. Any person who obtains information that identifies an individual who has a sexually transmissible disease, including human immunodeficiency virus or acquired immunodeficiency syndrome, who knew or should have known the nature of the information and maliciously, or for monetary gain, disseminates this information or otherwise makes this information known to any other person, except by providing it either to a physician or to a nurse employed by the department or to a law enforcement agency, commits a felony of the third degree. Section 381.004(6), Florida Statutes.

**V. CONCLUSION**

The use of tests designed to reveal a condition indicative of human immunodeficiency virus infection is a valuable tool in protecting the public health. Many members of the public are deterred from seeking such testing because they misunderstand the nature of the test or fear that test results will be disclosed without their consent. The laws imposed on the super confidentiality of HIV testing are intended to benefit the public health and the public will be benefitted by the nursing profession, when those nurses serve by facilitating informed, voluntary, and confidential use of tests designed to detect human immunodeficiency virus infection.