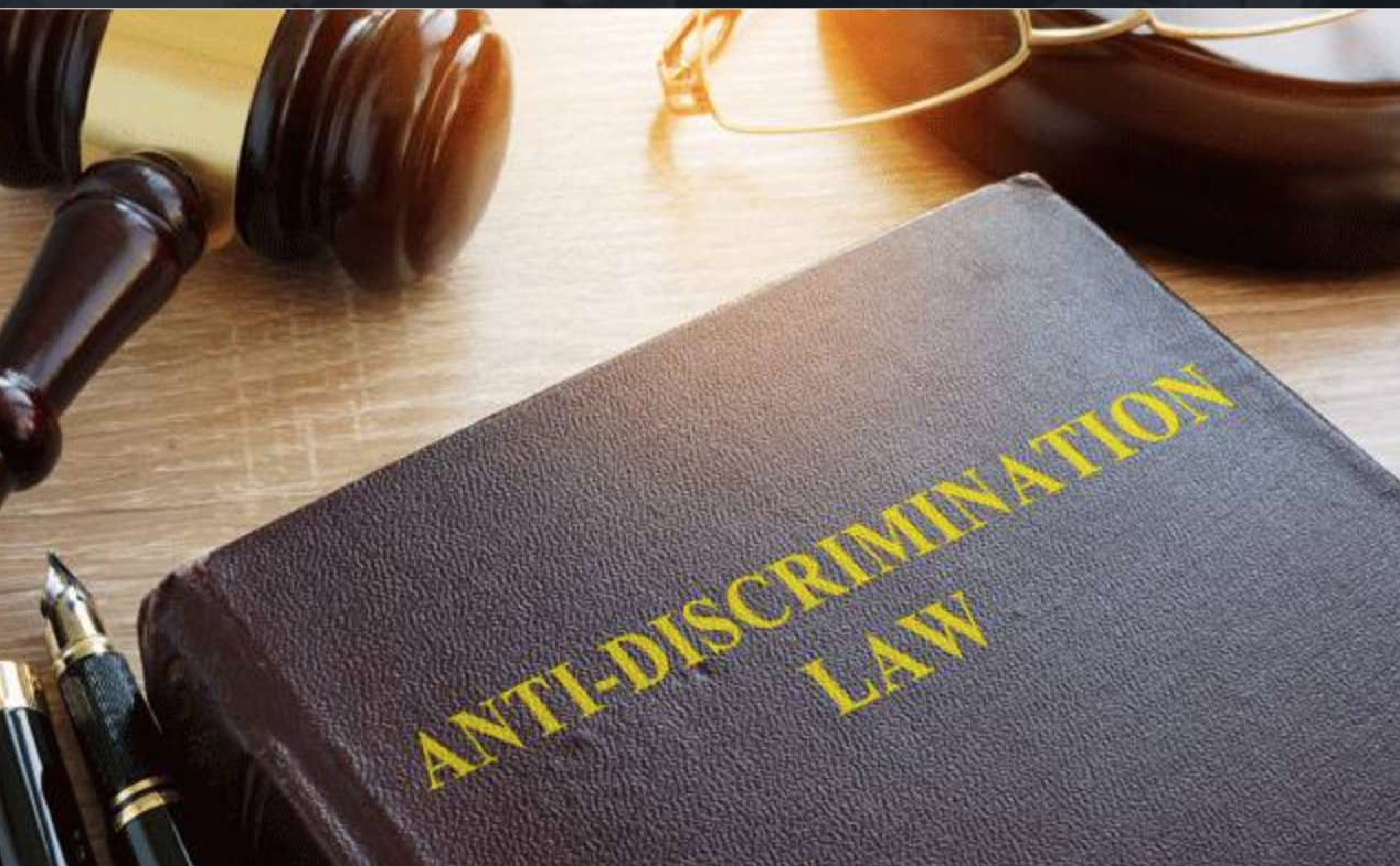


LABOUR & EMPLOYMENT LAW

A Practitioner's Guide

PRE-EMPLOYMENT HIV/AIDS TEST AND TERMINATION ON ACCOUNT OF HIV/AIDS STATUS





PRE-EMPLOYMENT HIV/AIDS TEST AND TERMINATION ON ACCOUNT OF HIV/AIDS STATUS BY BIMBO ATILOLA*



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1.0 INTRODUCTION

People Living With HIV/AIDS (PLWHA) continue to experience stigmatisation and employment discrimination despite the legal protections afforded them by both municipal legislation and international instruments.

People living with HIV/AIDS have had to endure different kinds of discrimination in the world of work over the years. It is either they are denied employment opportunities or sacked on account of their HIV/AIDS status. There have been policy and legal instruments in Nigeria directed towards the protection of PLWHA in employment related matters. Pre-employment HIV/AIDS test is unlawful in Nigeria except it is shown that failure to take such tests for employees in certain roles constitute a clear danger of HIV transmission to others.

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This work summarises the legal protection afforded PLWHA in employment related matters with the aid of case laws from Nigeria and other jurisdictions. It also offers some practical guides on the development and implementation of workplace HIV/AIDS policy.

2.0 PRE-EMPLOYMENT AND POST-EMPLOYMENT TESTS

In labour and employment law, it is long settled that an employer has a legitimate interest in knowing the medical or health status of job applicants for the purpose of determining their suitability or fitness for the proposed roles or job functions, including their continued fitness for the job while in employment. Public health considerations, especially the need to protect the health and safety of others (fellow workers, customers and visitors to the office) is another legal justification for relevant pre and in-employment medical tests. But this is where it ends. An employer may not lawfully carry out or insist on carrying out medical tests or any form of tests on the persons of an employee or prospective employee which test is not connected with the just determination of the physical or mental fitness of the employees for the job roles.

Section 8(1) of the Nigerian Labour Act specifically provides for pre-employment medical examination. It provides that every worker who enters into a contract shall be medically examined by a registered medical practitioner at the expense of the employer. Relevant pre-employment medical tests have become a customary and legally recognised workplace practice and this has become part and parcel of most corporate organisations recruitment policy. Post recruitment medical tests may also be made necessary by industry HSE practices or upon reasonable suspicion of an infectious or contagious disease on the part of an employee and which may expose others to health risks. For instance, standard HSE practices

¹ [The Nigerian Data Protection Regulations 2019 \(NDPR\)](#) is the main data protection regulation in Nigeria. The NDPR was issued by National Information Technology Development Agency (NITDA)



in the hospitality industry require chefs and other kitchen staff in hotels and restaurants to undergo some relevant pre and post employment “food handlers test” on periodic basis while pilots and crew members may be required to undergo some periodic “mental health checks” in the interest of public health and safety respectively. Many Employee Handbooks also assert the right of the employer to request for occasional administration of medical tests on employees in accordance with the relevant industry HSE practices or upon reasonable suspicion of contagious or infectious diseases, substance or drug abuse by an employee. In all of these, the consent of the employee is required. Consent of the employee may be obtained in writing or same may be implied when the employee voluntarily submits himself to the medical tests. It is, however, better that the required consent is obtained in writing. The consent form must state clearly the purpose of the tests. And even where the employee consents to such tests, the results may only be used strictly for employment related purposes and same must be kept strictly confidential. It is unlawful for an employer to use an employee’s test sample or test results for unauthorised purposes or in contravention of the Nigerian Data Protection Regulations (2019)¹. Subjecting an employee to a medical test or procedure without his/her consent is a grave breach of the employee’s constitutional rights to privacy, and the dignity of human person². It is unlawful and an aggrieved employee may sue the employer for damages for the breaches.

3.0 EMPLOYMENT DISCRIMINATION AGAINST PLWHA

The traditional basis for employment discrimination has always been on the ground of sex, colour, race, age, birth, nationality and religion. Discrimination on account of HIV/AIDS status has also become a familiar practice in today’s world of work.

² See *Moore v Regents of the University of California* (1990) 793 P. 2d 479, *Okonkwo v Medical & Dental Practitioners Disciplinary Tribunal* (1999) 6 NWLR (Pt. 756) 1.



PLWHA are now being denied employment opportunities, refused confirmation or sacked on account of their HIV/AIDS status.

The practice of pre-employment HIV/AIDS test, and termination of employment on account of employee's HIV/AIDS status have adverse implications for employee's constitutional right to privacy, and freedom from discrimination guaranteed by sections 37 and 42 of the Constitution of the Federal Republic of Nigeria respectively. Apart from the above constitutional provisions, there are also policy documents and legislation which seek to protect PLWHA against discrimination in employment related matters.

4.0 THE HIV/AIDS (ANTI-DISCRIMINATION) ACT, 2014

Nigeria has responded to the global challenge of protecting the people living with HIV/AIDS against discrimination by enacting the HIV and AIDS (Anti-Discrimination) Act, 2014 ("the Act"). The Act establishes a comprehensive legal framework for the protection of PLWHA against all forms of discrimination. Section 3(1) of the Act provides that:

"people living with or affected by HIV or AIDS have a right to freedom from discrimination on the basis of their real or perceived HIV status, concerning access to and continued employment, conditions of employment, employment benefits, comprehensive health services, education, use of public facilities and other social services provided by the employer, individual community, government or any other establishment".

³ Unreported Suit NO. NICN /LA/265/2015 judgement delivered on the 15th July, 2016.



Section 9 of the Act further provides that “no employer, institution, body or individual shall require an HIV test as a precondition to an offer of employment, access to public or private services or opportunities, except where it is shown, on the certification of two competent medical authorities (working independently) to the Court, that failure to take such tests constitutes a clear and present danger of HIV transmission to others.

Thus, the proviso to Section 9 of the Act recognises the fact that there may be some exceptional circumstances where such pre-employment tests is crucial in the interest of public health. Section 11 of the Act guarantees the right of PLWHA to the confidentiality of their health status and records. It provides that “no person shall, except with the written consent of the individual to whom the information relates, disclose any information relating to the HIV status of that individual unless the disclosure is required by law”. The Act also requires every employer of labour having 5 employees or more to adopt a written workplace policy that is consistent with the National HIV and AIDS Workplace Policy for its working environment. The rights of the employees living with HIV and AIDS and the remedies available to them in the event of a breach of such rights are also required to be integrated into the company's grievance procedures. Prior to the enactment of the HIV and AIDS (Anti-Discrimination) Act, 2014, the Federal Government had earlier released a National Policy on HIV/AIDS in the workplace and this policy was essentially reproduced in the 2014 Act. The Lagos State government had also since 2007 enacted the Lagos State Protection of Persons Living With HIV and Affected By AIDS Law.



The Nigerian Courts have also braced up to the challenge of protecting people living with HIV/AIDS against discrimination at workplace. In *Emmanuel Ejiogu Onuhikemi V Smridu Nigera Ltd*³, the National Industrial Court of Nigeria upheld the constitutional right of the claimant to the dignity of human person, and freedom from discrimination at workplace on account of his HIV/AIDS status. The claimant was employed as a kitchen assistant in the defendant's catering department. The company has a practice of subjecting its staff to routine medical tests including HIV/AIDS test. Following one of those routine medical tests, the claimant was discovered to be HIV positive. His line manager instructed him to go home and take care of himself and that he would be contacted in due course. The claimant was never contacted again nor recalled, and as a result of which he considered himself to be constructively terminated. The Court held that the claimant's employment was constructively terminated on account of his HIV/AIDS status. The Court further held that such compulsory medical tests was an infringement on the claimant's fundamental right to dignity of human person. The Court awarded the claimant 2 years salary as damages and one month salary as payment in lieu of notice. In arriving at its decision, the Court noted that the defendant had also mismanaged the claimant's medical information as his test results had become public knowledge among his colleagues in the company. The judgement, therefore, also underscores the need for employers of labour and their human resources managers to ensure that employees' medical reports in their custody are made confidential. There are, however, two missing points in this case. The Court did not make any reference to the 2014 HIV and AIDS Anti-Discrimination Act.



The defendant did not also canvass the point that the test was necessary having regard to the fact that the claimant was a kitchen assistant in its catering department, a role that makes the claimant susceptible to cuts and with attendant risk of transmission of HIV to co-workers and customers. This was a defence that would have been available to the defendant under Section 9 of the Act. The Court, therefore, lost the golden opportunity of pronouncing on the limited circumstances under which the compulsory HIV/AIDS tests on employees may be necessary for the protection of others especially at the workplace. The Act recognises the fact that public health considerations at the workplace must be balanced against the individual employee's fundamental rights to privacy, and dignity of human person. The right to freedom from discrimination on account of HIV/AIDS is recognised in Nigeria and same has been invoked and enforced by the Nigerian Courts. This right may only be derogated from on the ground of overriding public health interest as prescribed under the HIV and AIDS Anti-Discrimination Act.

5.0 CONCLUSION AND ACTION PLAN FOR HR MANAGERS

Pre-employment HIV/AIDS test is unlawful in Nigeria except where it is shown that failure to take such tests constitutes a clear and present danger of HIV transmission to others. The Act recognises the fact that there are some exceptional circumstances where pre-employment HIV/AIDS test is important in the interest of public health.



Thus, for instance, while a pre-employment HIV/AIDS test will be necessary for some roles such as chefs and kitchen assistants to be employed in a restaurant, care givers in hospitals and creches, and a beautician in a beauty salon because of their susceptibility to cuts and the attendant risk of transmission of the virus to others, same considerations cannot be said of administrative staff, University lecturers, executive drivers, lawyers, accountants and human resources personnel.



The available medical research confirms that the fact that an applicant or an employee is HIV/AIDS positive does not automatically render him/her unfit for employment. People Living With HIV/AIDS can still give many years of active service and ought not to be denied employment opportunities until a certain stage in the progression of the ailment when they are no longer able to cope with work.



The decision to employ (or to continue to employ) or not to employ a person living with HIV/AIDS should rather depend on his/her medical conditions at that material time, the job roles or functions, and not simply on the ground of his/her HIV status.

Human Resources managers must develop a written policy that is consistent with the HIV/AIDS (Anti-Discrimination) Act, 2014, and the National HIV/AIDS Workplace Policy. This policy has to be integrated into the organisations HR policies.

