INDUSTRIAL RELATIONS ACT

CODE OF GOOD PRACTICE: HIV/AIDS IN EMPLOYMENT

1. Introduction

1.1 This code is published in terms of Section 109 of the Industrial Relations Act. The Code recognizes that the Human Immunodeficiency virus (HIV) and the Acquired Immuno Deficiency Syndrome (AIDS) are serious public health problems which have soci economic, employment and human rights implications.

1.2 It is recognized that the HIV/AIDS pandemic, will affect every workplace, with prolonged staff illness, absenteeism, and death impacting on productivity, employee benefits, occupational health and safety, production costs and workplace morale.

1.3 HIV/AIDS knows no social, gender, age or racial boundaries, but it is accepted that socio – economic circumstances do influence disease patterns. HIV thrives in an environmental of poverty, rapid urbanization, violence and destabilization. Transmission is exacerbated by disparities in resources and patterns of migration from rural to urban areas. Women are more vulnerable to infection particularly in cultures and economic circumstances in which they have little control over their lives.

1.4 Furthermore HIV/AIDS is still a disease surrounded by ignorance, prejudice, discrimination and stigma. In the workplace, discrimination against people living with HIV and AIDS has been perpetuated through practices such as pre – employment HIV testing. Dismissals for being HIV positive and the denial of employee benefits.

1.5 One of the most effective ways of reducing and managing the impact of HIV/AIDS in the workplace is through the implementation of an HIV/AIDS policy and programme. Addressing aspects of HIV/AIDS in the workplace will enable employers, trade unions, staff associations and government to actively contribute towards local national and international efforts to prevent and control HIV/AIDS. In light of this, the Code has been developed as a guide to employers, trade unions and employees.

1.6 Furthermore the Code seeks to assist with the attainment of the broader goals of:

1.6.1. eliminating discrimination in the workplace based on HIV/AIDS status;

1.6.2. promoting a non – discriminatory workplace in which people living with HIV/AIDS are able to be open about their status without fear of stigma or rejection;

1.6.3. appropriate and effective ways of managing HIV/AIDS in the workplace;

1.6.4. creating a balance between the rights and responsibilities of all parties; and

1.6.5. giving effect to the regional obligations of the country as a member of the Southern African Development Community.

2. Objectives

2.1. The Code's primary objective is to set out guidelines for employers, employees, trade unions and staff association to implement so as to ensure that individuals with HIV/AIDS are not discriminated against in the workplace. This includes provisions regarding;

2.2 creating a non – discriminatory work environment;

2.3 dealing with HIV/AIDS testing, confidentiality and disclosure;

2.4 providing equitable employee benefits; and

2.5 dealing with dismissals.

2.6 The Code's secondary objective is to provide guidelines for employers, employees, trade unions and staff associations on how to manage HIV/AIDS within the

workplace. Since the HIV/AIDS pandemic impacts upon the workplace and individuals at a number of different levels, it requires a holistic response, which takes all of these factors into account. The Code therefore includes the following principles;

2.1.1. creating a non – discriminatory work environment for all employers and employees;

2.1.2. developing procedures to manage occupational incidents and claims for compensation;

2.1.3. introducing measures to prevent the spread of HIV/AIDS;

2.1.4. developing strategies to assess and reduce the impact of the epidemic upon the workplace; and

2.1.5. supporting those individuals who are infected or affected by HIV/AIDS so that they may continue to work productively for as long as possible.

3. Application and scope

3.1. All employers and employees, and their respective organizations are encouraged to use this Code to develop, implement and refine their HIV/AIDS policies and programmes to suit the needs of their workplaces.

3.2 For the purposes of this code, the term "workplace" should be interpreted broadly to include the working environment of, amongst others, persons not necessarily in an employer – employee relationship, those working in the informal sector and the self employed.

3.3. This Code does not impose any legal obligation in addition to any existing legislation. Failure to observe it does not, by itself, render an employer liable in any proceedings, except where the Code refers to obligations set out in law.

3.4. The Code should be read in conjunction with other codes of good practice that may be issued e.g. Code of Good Practice: Employment Discrmination.

4. **Promoting a non – discriminatory work environment**

4.1 No person with HIV/AIDS may be discriminated against in any employment policy or practice, including –

4.1.1. recruitment procedures, advertising and selection criteria;

4.1.2. appointments and the appointment process;

4.1.3. job classification or grading;

4.1.4. remuneration, employment benefits and terms and conditions of employment;

4.1.5. employee assistance programmes;

4.1.6. job assignments

4.1.7. training and development;

4.1.8. performance evaluation systems;

4.1.9. promotion, transfer and demotion;

4.1.10. disciplinary measures other than dismissals

4.1.11. termination of services.

4.2 To promote a non - discriminatory work environment based on the principle of equality, employers, staff association and trade unions should adopt positive measures such as:-

4.2.1. preventing discrimination and stigmatization of people living with HIV/AIDS through the development of policies and programmes for the workplace.

4.2.2. Awareness programmes, education and training on the rights of all persons with regard to HIV/AIDS.

4.2.3. Mechanism to promote acceptance of HIV/AIDS in the workplace;

4.2.4 Providing support for all employees infected or affected by HIV/AIDS; and

4.2.5 Grievance procedures and disciplinary measures to deal with HIV- related complaints in the workplace.

5. **HIV testing**

5.1. No employer should require an employee, or an applicant for employment, to undertake

an HIV test in order to ascertain that employee's HIV status.

5.2. An employer may, as part of a health care service provided in the workplace, provide testing to an employee who has agreed to a test, subject to the following:

5.2.1. pre - and post test counseling should be provided; and

5.2.2. strict procedures relating to Confidentiality of an employee's HIV status as described in clause 6.2 of this Code should be implemented.

5.3. The agreement referred to in clause 5.2. must be based on informed consent. This means that the employee must be provided with all the necessary information, including what the test is, why it is necessary, the benefits risks, alternatives and any social implications of the outcome of the test, and must understand this.

5.4. Anonymous HIV test in the workplace may occur with the employee's consent, provided the information obtained may not be used to discriminate against individuals or groups of persons. Testing will not be considered anonymous if there is reasonable

possibility that a person's HIV status can be deducted from the results.

6. Confidentiality and Disclosure

6.1. all persons with HIV/AIDS have the legal right to privacy. Subject to Clause 14 of this Code, an employee is therefore not legality required to disclose the employee's HIV/AIDS status to the employer or to other employees.

6.2. If an employee chooses to voluntarily disclose the employee's status to the employer or to other employees, this information may not be disclosed to others without that employee's written consent. Where written consent is not possible, steps should be taken to confirm that the employee wishes to make the disclosure.

6.3. Mechanism should be created to encourage acceptance and support for those employers and employees who voluntarily disclose their status within the workplace, including:

6.3.1. encouraging persons with HIV/AIDS to conduct or participate in education, prevention and awareness programmes.

6.3.2. encouraging the development of support groups for employees with HIV/AIDS; and

6.3.3. ensuring that persons who are open about their HIV/AIDS status are not discriminated against or stigmatized.

7. Promoting a safe workplace and safe society

7.1 An employer is obliged to provide and maintain, as far as is reasonably practical, a workplace that is safe and without risk, to the health of its employees.

7.2 Employers, employees, staff associations and trade unions, as part of their commitment to reducing HIV/AIDS in society generally, should support education and training aimed at reducing the risk of HIV/AIDS outside the workplace. This should include the risks resulting from unprotected sex, sex with more than one partner, and information about the most common ways in which HIV/AIDS is transmitted.

7.3 The risk of HIV transmission in the workplace is minimal. However occupational accidents involving bodily fluids may occur, particularly in the health care professions. Every workplace

should ensure that it has policies dealing with, amongst others:

7.3.1. the risk, if any, of occupational transmission within the particular workplace;

7.3.2. appropriate training and education on the use of infection control measures so as to reduce the risk of HIV transmission outside or in the workplace;

7.3.3. providing appropriate equipment and materials to protect employees from the risk of exposure to HIV at the workplace;

7.3.4. the steps that should be taken following an occupational accident at the workplace;

7.3.5. the procedures to be followed in applying for compensation for occupational infection;

7.3.6. the reporting of all occupational accidents; and

7.3.7. adequate monitoring of occupational exposure to HIV to ensure that the requirements of possible compensation claims are being met.

8. **Employee benefits**

8.1 Employees with HIV/ AIDS may not be

discriminated against in the allocation of employees benefits.

8.2 Employees who become ill with AIDS Should be treated like any other employee with a comparable life threatening illness with regard to access to employee benefits.

8.3 Information from benefit schemes on the medical status of an employee must be kept confidential and should not be used to discriminate.

8.4 If an employer offers a medical scheme as part of the employee benefit package it should ensure that this scheme does not discriminate, directly or indirectly, against any person on the basis of HIV status.

9. **Dismissal**

9.1 Employees with HIV/ AIDS may not be wrongfully dismissed solely on the basis of their HIV/ AIDS status.

9.2 .If an employee becomes too ill to perform the employee's work; an employer should follow accepted guidelines regarding dismissal for incapacity before terminating

an employee's service, as set out in the Code of Good Practice: Dismissal.

9.3. The employer must ensure that as far as possible, the employee's right to confidentiality regarding the employee's HIV status is maintained during any incapacity proceedings.

10. Assessing the impact of HIV/AIDS on the workplace

10.1 Employers, staff association and trade unions should develop appropriate strategies to understand and respond to the impact of HIV/AIDS in their particular workplace and sector. This should be done in co – operation with initiatives by government, civil society and non – governmental organizations.

10.2 Broadly, impact assessments should include risk profiles and assessments of the direct and indirect costs of HIV/AIDS.

10.3 Risk profiles may include an assessment of the following:-

10.3.1. the vulnerability of individual employees or categories of employees to infection.

10.3.2. the nature of the organization's operations and how this may increase susceptibility to HIV infection. For example the reliance on migrant labour, long distance transport etc.

10.3.3. a profile of the communities from which the organization draws its employees;

10.3.4. the profile of the communities surrounding the organization's place of operation; and

10.3.5. an assessment of the impact of HIV/AIDS upon their target markets and client base.

10.4 The assessments should also consider the impact that the HIV/AIDS pandemic may have on:

10.4.1. direct costs to employee benefits, medical costs and increased costs related to staff turnover, retraining and recruitment costs and the costs of implementing an HIV/AIDS programme;

10.4.2. indirect costs incurred as a result of increased absenteeism employee mortality, loss of productivity, a general decline in workplace morale and possible workplace disruption;

10.4.3. the cost effectiveness of any HIV/AIDS interventions should also be measured as part of an impact assessment strategy.

11. A workplace HIV/ AIDS policy

11.1 Every workplace should develop an HIV/AIDS policy in order to ensure that employees affected by HIV/AIDS are not

discriminated against in employment policies and practices. This policy should cover:

11.1.1 an outline of the organization's HIV/ AIDS programme;

11.1.2 details on employment policies that impact on HIV/AIDS such as management and procedures to be followed to determine medical incapacity and dismissals;

11.1..3 standards of behaviour expected of employers and employees in their dealings with employees with HIV/AIDS.

11.1.4 measures to deal with deviations from these standards;

11.1.5 means of communication with the organization on HIV/AIDS issues;

11.1.6 details of employee assistance available to persons affected by HIV/AIDS; and

11.1.7 monitoring and evaluating those mechanisms.

11.2 All policies must be developed in consultation with key stakeholders within the workplace including trade staff associations, occupational health staff and the human resources department.

11.3 The policy should reflect the nature and needs of the particular workplace.

11.4 Policy development and implementation is a dynamic process, so the workplace policy should be :-

11.4.1. communicated to all concerned;

11.4.2. routinely reviewed in light of changing circumstances and new scientific information; and

11.4.3. Monitored for its successful implementation and evaluated for its effectiveness.

12. **Workplace HIV/AIDS support programme**

12.1 Every workplace should implement a Workplace HIV/AIDS support programme aimed at preventing new infections, providing care and support for employees who are infected of affected, and managing the impact of the epidemic in the organization.

12.2. The nature and extent of a workplace support programme should be guided by the needs and capacity of each individual workplace. Every workplace programme should however attempt to promote the following:-

12.2.1. regular HIV/AIDS awareness programmes;

12.2.2. voluntary testing

12.2.3. education and training

12.2.4. condom distribution an use;

12.2.5. risk minimizing social and sexual practices;

12.2.6. the use of infection control measures;

12.2.7. creating an environment that is conducive to openness, disclosure and acceptance amongst all staff;

12.2.8. access to counseling and other forms of social support for people affected by HIV/AIDS;

12.2.9. maximusing the performance of affected employees through reasonable accommodation, such as investigations into alternative sick leave allocation;

12.2.10. developing strategies to address direct and indirect costs associated with HIV/AIDS in the workplace;

12.2.11. regular evaluation and review of the programme.

12.3 Employers should take all reasonable steps to assist employees with referrals to appropriate health, welfare and other support facilities within the community, if such services are not provided at the workplace.

13. Information and education

13.1 The Commission should ensure that copies of this Code are available and accessible.

13.2. Employers and employer organization should include the Code in their orientation, education and training programmes of employees.

13.3. Trade unions and staff associations should include the Code in their education and training programme of shop stewards and employees.

14. HIV/AIDS freee status as an inherent job requirement

14.1 Notwithstanding the contents of this Code, it is recognized that there may be a limited

number of occupations in which HIV/AIDS free status is an inherent job requirement. For example, surgeons with HIV/AIDS who may transmit the virus to patients or emergency care nurses with HIV/AIDS who may place themselves at risk as result of increased likehood of exposure to infection flowing from that job.

14.2. In such instances, it is recognized that:-

14.2.1. it would be fair to regard HIV/AIDS status as a barrier to recruitment or continued employment in that position;

14.2.2. an employer is legitimately entitled to require pre – employment testing and regular employment testing, as a pre – condition of employment;

14.2.3. in the event that an existing employee in such position contracts HIV/AIDS, the employer should consider all reasonable alternatives, for example a transfers,

restructuring of tasks etc, prior to considering the dismissal of the employee concerned for incapacity.