COSATU

SUBMISSION

ON THE DRAFT CIRCULAR INSTRUCTION REGARDING
COMPENSATION FOR OCCUPATIONALLY ACQUIRED HIV

Submitted to the Office of the Compensation Commissioner

11 March 2005

CONTACT COSATU PARLIAMENTARY OFFICE

021 – 461 3835
1 Introduction
The Congress of South African Trade Unions (COSATU)\(^1\) welcomes government’s decision ‘to clarify the position in regard to compensation of claims for occupationally acquired Human Immunodeficiency Virus (HIV) infection and Acquired Immune Deficiency Syndrome (AIDS)’ in the publication of the Draft Circular Instruction regarding the Compensation for Occupationally Acquired HIV infection and AIDS, No.183. Similarly, we welcome the fact that this Circular Instruction is intended “to supersede all previous instructions”.

However, we are concerned that notwithstanding these objectives, the Circular Instruction seems to have been drafted in isolation from existing relevant and related pieces of legislation and policy documents pertaining to the management of HIV/AIDS in the workplace. Therefore, this submission calls for some coherent cross-referencing between government’s policies and laws representing its overall response to HIV/AIDS in the workplace. In this regard we particularly refer to the Department of Labour’s (DOL) Code of Good Practice on Key Aspects of HIV/AIDS and Employment of 2000 and the related HIV/AIDS Technical Assistance Guidelines as well as the Occupational Health and Safety Act of 1993, as Amended. Interdepartmentally, we refer to the Department of Health’s (DOH) Management of Occupational Exposure to the Human Immunodeficiency Virus (HIV) of 1999 and the Medical Schemes Act of 1998, as Amended.

With regard to the principal Act, the Compensation for Occupational Injuries and Diseases Act of 1993, as Amended (COIDA) - COSATU has previously raised concerns and called for further amendments regarding the fact that benefits provided by Act are structured in a manner that is unfair to lower paid and manual workers, i.e.;

- Firstly, all compensation payments are based on a percentage of the employee’s earnings; thus ensuring that lower paid workers receive less compensation than higher paid workers.
- Secondly, compensations are not based on the loss of worker’s earning capacity but on a percentage assessment of the disease or injury.

\(^{1}\) This submission has been iteratively developed with the Industrial Health Research Group as part of the Public Health Sector Forum that includes COSATU affiliated public health sector unions in the Western Cape and the Aids Law Project; hence, some of our proposals reflect our shared concerns- which are also found in their submissions.
In addition, the Act does not actually cover all workers at risk, hence we accordingly reiterate our call for further amendments around these issues and those that we are raising in this submission in relation to provisions of the Circular Instruction.

2 Definitions

In the absence of definitions pertaining to technical words or concepts used in relation to occupationally acquired HIV in COIDA, it is necessary that the Circular Instruction includes definitions of some of the key words in its provisions to enhance consistency with other related policy and legislative documents. In the following section, we are proposing some amendments to definitions provided as well as additional definitions of words used in the Circular Instruction;

2.1 Occupationally acquired HIV infection

The Draft Circular Instruction defines Occupationally Acquired HIV infection thus;

“Occupationally acquired HIV is an infection contracted as a result of exposure to an HIV infected source [in a workplace]; resulting in progressive weakening of the immune system of an individual leading to AIDS. The HIV infection must have arisen out of and in the course of employment”.

COSATU propose some changes to this definition, because;

• Firstly, it narrowly circumscribes eligibility for compensation coverage to the workplace rather than just exposure “in the course of employment”. In other words, our interpretation is that notwithstanding the fact that the employee could be infected in “the course of employment”, such an infection will fall out of compensation coverage if it did not occur at the workplace. Taking into account a closely related piece of legislation - the Occupational Health and Safety Act (1993); “workplace” is defined as “any premise or place where a person performs work in the course of his employment”. We would argue that an employee could contract HIV in the course of their employment but not necessarily at their workplace. Therefore, COSATU proposes the deletion of the workplace in the definition, since the last sentence stating that the “infection must have been arisen out of and in the course of employment” makes it adequately broad and clear.

• Secondly, we argue that unlike the DOH whose approach in terms of the Management of Occupational Exposure to the Human Immunodeficiency Virus (1999) is referring only to health care workers, the DOL must have a broader application based on the actuality of exposure to HIV infection in the course of employment or execution of employment duties. Workplace contraction of HIV is also a serious risk to employees in other occupations such as the police service, correctional service, domestic employment, etc. The fact that some of these categories of workers are excluded in the application of the principle Act is iniquitous and needs to be reconsidered. Since this Circular Instruction is envisaged to "supersede all previous instructions", COSATU would propose that it should be made unambiguously inclusive of all employees occupationally exposed to the risk of HIV infection in the course of their performance of employment duties. This position is actually

2 For the sake of consistency and coherence in policy, some of these definitions are directly derived from other existing government policies and legislation, in particular the Department of Labour’s HIV/AIDS Technical Assistance Guidelines.

3 Bracketed words in bold should be deleted and underlined bold words should be inserted.
in line with the *Code on Key Aspects on HIV/AIDS* and the *HIV/AIDS Technical Assistance Guidelines* documents.

**2.2 Available medical treatment**

We would propose that “available medical treatment” must be understood in line with “medical aid” as defined in section 1(xxii) of the principle Act, notwithstanding some limitations in this definition regarding HIV infection. Therefore, in order to achieve clarity and consistency we would further propose that available medical treatment should not only have specific inclusion of treatment applicable to HIV/AIDS, including anti-retroviral treatment and laboratory tests (viz. CD4 count and viral load testing) but also be in line with the DOH’s treatment guidelines in the Management of Occupational Exposure to the Human Immunodeficiency Virus (1999) document. 

**2.2 HIV infected source**

An HIV positive person or an object contaminated by HIV positive blood or body fluids that exposed an employee to HIV infection in the course of performance of their employment duties.

**2.3 Sero-conversion**

The point at which the immune system produces antibodies and at which time the HIV antibody test can register an HIV infection.

**2.4 Window period**

The incubation period between infection and detection of HIV.

**2.5 Post-Exposure Prophylaxis**

An antiretroviral medicines reducing HIV infection risk that must be taken immediately after infection, at least no later than 72 hours.

**2.6 HIV exposure**

An instance where there has been percutaneous injury, contact with intact skin or contact with non-intact skin with an HIV contaminated blood or body fluids, including semen, vaginal secretions or other fluids.

**3 Diagnoses**

Below, we propose the following amendments underlined and in bold letters and deletions in bold brackets;

**3.1 Tests for diagnosis and confirmation**

“...The diagnosis of occupationally acquired HIV infection must be **conducted and** confirmed by any internationally acceptable tests at any given time...”

---

*This must be cross-referenced with section 28 of COIDA which accords the Director General some discretion to grant an allowance towards the cost of some constant help of another person where the employee’s disablement is of such a nature that they are unable to perform the essential actions of life.*
3.2 Clause 2(b)

‘Documented (proof of a reported) [work-related] incident/accident that occurred in the course of employment or performance of employment duties involving a potential HIV infected source’

3.3 Clause 2(c)

‘Blood test (laboratory) results of the [affected] exposed employee done within 72 hours of the incident/accident, confirming the absence of HIV antibodies’.

In addition, we recognize the necessity for baseline HIV test that must be conducted within 72 hours for purposes of ensuring that exposed employees have every opportunity to avoid seroconversion by using Post-Exposure Prophylaxis (PEP); however, we believe that this should not affect or prejudice their right to claim compensation. In other circumstances exposed employees would not be in a position to conduct a baseline test within 72 hours. COSATU believes that such employees should still be entitled to claim compensation since according to the principle Act, they are required to report occupational incident/accident within 7 days. Therefore, the employee’s right to claim compensation should not be prejudiced by their failure to take PEP in order to reduce an HIV infection risk.

3.4 Clause 2(d)

“Confirmation that the source was HIV infected as far as reasonably practicable”

This criterion is vague and unclear. COSATU proposes that;

- Where it is not possible/practicable to know the HIV status of the source (e.g. the source patient exercising their right to refuse testing), absence of information on the HIV status of the source should not prejudice the infected employee’s compensation claim5.

3.5 Clause 2(e)

‘Confirmatory blood test (laboratory) results of the [affected] exposed employee confirming HIV infection (seroconversion) at [six and/or twelve weeks or 6 months] baseline (within 24 hours of the injury), at six weeks, followed by another at 12 weeks and lastly at 6 months after the date of the [work-related] occupational exposure to the incident’.

This criterion is vague and unclear. Thus, it may be unnecessarily open to varying interpretation. The criterion must be made consistent with the standard practice with regard to screening and confirmatory test in South Africa. ‘All HIV diagnosis in South Africa is supported by laboratory tests and HIV screening is always followed by two confirmatory tests’.6

COSATU supports the DOH’s clear guidelines; - recommending a documented HIV test on the exposed employee at baseline (within 24 hours of the injury), at six weeks, followed by another at 12 weeks and lastly at 6 months.

---

5 Where it may be impracticable to obtain confirmation as to the HIV status of the (alleged) source, the circumstances or context in which the accident/incident has occurred should be taken into account.

In addition, with regard to incidents or accidents where there has been high-risk exposure as defined by the DOH\(^7\), we propose that a further test should be conducted beyond six months.\(^8\) According to the DOH, “in rare instances sero-conversion can take place over a period longer than 6 months”.\(^9\)

Lastly, we believe that this criterion discriminates against an HIV positive employee re-infected as a result of an occupational exposure to HIV. Second HIV infection/re-infection is detrimental to the immune system of an HIV positive person and therefore impacts on both the efficacy of the available treatment and the progression of the disease\(^10\).

Therefore we propose that this occupational HIV compensation Circular Instruction provide compensation benefits (including access to post-exposure prophylaxis, PEP) to all employees irrespective of their HIV status.

### 4 Benefits

4.1 Eligibility and the extent of cover

With regard to compensation benefits, COSATU rejects the Circular Instruction’s suggestion that “eligibility for benefits will lapse if there is no seroconversion after 6 months from the date of the incident” and that “medical expenses shall be provided for all reasonable treatment from the date of definitive diagnosis”.

- Firstly, incidents in which workers are at risk of occupational HIV infection can result in both physical injury and as well as psychological trauma (the traumatic nature of the incident can include the psychological anxiety of both the possibility of sero-conversion and stigmatisation)\(^11\). Therefore, the Compensation Commissioner must cover benefits (temporary absence from work; medical aid for diagnosis and treatment as well as first aid, VCT, PEP) irrespective of whether sero-conversion occurs.\(^12\)

- Secondly, the exclusion of eligibility for benefits and denial of medical aid where there is no sero-conversion appears to contradict COIDA’s compensation benefits provisions for all occupational injuries and diseases arising from accidents.\(^13\)

---

\(^1\) Management of Occupational Exposure to the Human Immunodeficiency Virus (1999).

\(^2\) This high risk exposure would be in a situation where the injury is deep, there is visible blood on the devise causing the injury and was placed in the exposure source’s vein or artery and the source patient has advanced AIDS.

\(^3\) Management of Occupational Exposure to the Human Immunodeficiency Virus (1999).


\(^6\) Nurses working in AIDS care experience high rates of occupational stress and therefore are vulnerable to emotional exhaustion and occupational burnout. Interventions designed to assist nurses in managing occupational stress and to prevent occupational burnout must include the sources of work-related stress among nurses in AIDS care. [Kalichman SC, Gueritault-Chalvin V, Demi A. - Sources of occupational stress and coping strategies among nurses working in AIDS care. J Assoc Nurses AIDS Care. 2000 May-June;11(3):31-7.]

\(^7\) The COID Act provides workers compensation benefits for all occupational injuries and diseases arising from accidents. The Act defines the term Accident as “an accident arising out of and in the course of an employee’s employment and resulting in personal injury, illness or death of the employee” - Section 1. Definitions of Chapter I. Interpretation of Act, Compensation for Occupational Injuries and Diseases Act, 1993 as amended.
Thirdly, we propose that temporary total disability payment must include absence from work as a result of trauma and psychosocial stressors following the incident and absence from work as a result of the side effects of PEP.

Fourthly, we believe that medical aid must cover the cost of all testing, PEP, first aid, counseling and absence from work irrespective of the final diagnosis. This position is in line with the Medical Scheme Act 131 of 1998 in terms of Amendments of Annexure A of the General Regulations (Government Gazette No. 27055, Government Notice No. R1410, 3 December 2004).

Fifthly, reasonable medical expenses should also include the monitoring of the PEP's side-effects on the employee. This is important in effectively managing and possibly reducing absence from work as a result of side-effects of PEP.

Lastly, the Circular Instruction is silent with regard to the reproductive rights of employees in terms of the necessary support, compensation, and guidance to the exposed or infected employees’ family. The Circular Instruction should address and cover the on-going medical management to prevent mother-to-child-transmission (MTCT) of HIV in the case of a pregnant female worker at risk following a workplace incident.

4.2 Temporary total disablement

The Compensation Commissioner’s limitation of temporary disablement for injuries and diseases (as applicable to other diseases or injuries) to 24 months is inappropriate in the context of HIV/AIDS. Opportunistic infections may occur many years later (more than 24 months) and result in temporary disability caused by the original occupational exposure.

COSATU believes that the provision suggesting that a “confirmed diagnosis of occupationally acquired HIV infection shall equate to 15% permanent disablement” is unacceptably low. HIV/AIDS cannot be put on the same scale as the COIDA’s Schedule providing for the loss of one phalanx of the thumb. The loss of the phalanx of a thumb does not equate in any way to the impairment and negative impact on the quality of life (social, personal and work) as HIV.

COSATU therefore calls for a minimum percentage figure to be explored with the relevant trade union federations nationally.

5 Impairment

Given the progressive nature of HIV, assessment of the employee’s impairment must be undertaken by the treating medical practitioner in relation to the diagnosis of opportunistic infections, the viral load and appropriate medical interventions.
The Circular Instruction's definition of impairment does not take into account the impact on the employee's quality of life and psychosocial impairment, including the impact on his/her sexual relations, impact of stigma, and the impact on reproductive rights. Therefore, any impairment assessment should in addition to the conditions listed in clause 3.2 of the Circular Instruction, take into account the quality of life and psychosocial conditions/impact.

Clause 3 (3.3)
Permanent functional impairment due to residual and permanent sequelae of an HIV/AIDS related condition(s) shall be assessed according to the system and/or organ(s) affected and the available and suitable employment opportunities.

6 Reporting
Whilst 70% of the world’s HIV population live in Sub-Saharan Africa, only 4% of the world’s reported occupational HIV infections come from this region. On the other hand, 4% of the world’s HIV population live in North America and West Europe where 90% of the occupational HIV infections are reported.

As a result of the poor compliance with the Code on Key Aspects on HIV/AIDS and Employment in workplaces, reporting of occupational exposure to HIV continue to be bedeviled by endemic under-reporting, thus contributing to the perpetuation of stigmatization. This Circular Instruction fails to develop a reporting system that ensures the confidentiality and protection of the exposed worker’s identity.

Therefore, COSATU proposes;
- That the Circular Instruction's reporting guidelines should make provision for the use of code names/numbers to replace the names of the exposed or infected worker.
- That only the treating medical practitioner and a senior Compensation Commissioner official should have access to the real identity of the infected worker for the purpose of compensation disbursement. Therefore, personal information regarding the result of the test(s) must remain fully confidential, and may only be disclosed (in the absence of an overriding legal or ethical duty) with the individual's fully informed consent as per the Schedule Draft National Policy on Testing for HIV- Department of Health, National Policy for Health Act (Act No 116 of 1990)

7 Claim processing
Despite the fact that this Circular Instruction is proclaimed in terms of COIDA, we believe HIV/AIDS has its own peculiarities which must be taken into account. We would therefore need the following questions to be clarified;

(a) Who will serve on the assessment panel to determine the degree/level of impairment? How are they appointed?

---

(b) What is/will be minimum required skills and experience in the fields of HIV care and occupational health and safety of the clinicians (and others) on the assessment panel?

COSATU proposes that:
(i) The Circular Instruction should include, or make reference to how an assessment panel (e.g. clinicians and other panel members) are chosen.
(ii) The Circular Instruction must make clear that the claimants should have the right to representation in the impairment assessment process.
(iii) The circular instruction should include reference to the rights of claimants to appeal.

8 Conclusions
Whilst we acknowledge the fact that health care workers are particularly affected by occupationally acquired HIV infections, COSATU believes that eligibility for compensation should be extended to all workers exposed to such a risk. Therefore, compensation should be based on exposure in the course of employment rather than the narrow “workplace” criterion, which seems to refer to health workers only\textsuperscript{17}.

Nonetheless, given their pivotal role in the fight against this pandemic, we are concerned that HIV/AIDS already extremely afflicts health workers – amongst whom there is 15, 7% prevalence and 13% die from HIV/AIDS related illnesses\textsuperscript{18}. In the overall, there is an average prevalence of 14, 5% amongst South Africa’s formally employed\textsuperscript{19}.

Given this gravity of HIV/AIDS in the workforce, COSATU calls on the Compensation Commissioner to ensure that occupationally infected HIV employees’ plight is not exacerbated by bureaucratic inertia currently endemic in the Compensation Fund and responsible for backlogs of up to 50 000 unprocessed reported cases\textsuperscript{20}.

Finally, if the Circular Instruction is meant to supersede the previously existing provisions, then it must be drafted in a manner consistent and compatible to other relevant government policy and legislative documents. HIV/AIDS has its own peculiarities which must be taken into account and which may require some reappraisal of some of the current provisions in the principal Act.

\textsuperscript{17} In this regard we call for corresponding changes in the principal Act.
\textsuperscript{19} AIDS Management and Support and Lifeworks and Department of Community Health, University of the Witwatersrand, Johannesburg – South African Medical Journal 2004; 94: 125-130.
\textsuperscript{20} Business Day: 03/02/2004.