HIV Confidential

Undercover at your job? Watch those interoffice memos!

September 1, 1998 By Arthur S. Leonard

Since the late 1980s, when states passed HIV confidentiality laws and courts ruled that information about a person's serostatus is covered by the constitutional right of privacy, activists have argued that people with HIV have a right to control who knows and who doesn't know, in bed and at the water cooler. Recent proposals at state and federal levels to mandate names reporting to public health officials of all those who test positive have raised urgent questions of confidentiality for the future. But what about right now? While you're busy fighting Big Brother, you also might want to keep an eye on your boss.

Under the Americans With Disabilities Act, people with disabilities are entitled to reasonable accommodations (workplace modifications, schedule adjustments) that may be necessary for them to perform essential job functions. But courts have ruled that employers kept in the dark about a worker's HIV status have no duty to provide those accommodations.

Some courts have taken an employer's right to information even further. In a ruling denied review by the U.S. Supreme Court, an appeals court in Philadelphia held that a public transit authority did not violate the privacy rights of an employee—we'll call him John Poz—when the agency learned of his HIV status through a review of drugs being used in the company's payment plan.

Mr. Poz, who tried to keep his status secret, confided in the agency's doctor in order to get approval for coverage of AZT. The doctor kept the information confidential, as he had promised. But when the agency head asked the drug company to supply a list of prescriptions filled under the insurance plan, the drug company sent a list that matched employee names with particular drugs. Guess whose name was next to a known HIV med? When the doc told Mr. Poz that the boss knew he was on an "AIDS drug" the cat was out of the bag—and into the courtroom.

A jury awarded the employee substantial damages for violation of privacy, but the appeals court swiftly reversed the judgment. Although the court found that HIV-related information is protected by a right of privacy, it argued that privacy is not absolute and that the employer should be entitled to have that information to monitor insurance usage. Since Mr. Poz did not lose his job or suffer any tangible loss, the court denied him the money that the jury wished to award him for the violation of his privacy.

If you read the fine print in state HIV confidentiality laws, you will see that they are no more absolutely protective of confidentiality than is the U.S. constitutional right of privacy. These laws allow disclosure of information in a variety of circumstances, sometimes—but not always—on court order. Some state laws specifically allow doctors to violate confidentiality in order to alert a spouse or sexual partner that somebody is HIV positive. Many of the laws also authorize courts to order a release of HIV-related information when it becomes relevant in a lawsuit. And some states specifically allow HIV testing of children up for foster placement or adoption and authorize the release of that information to prospective parents. This recent “unblinding” of HIV testing of newborns effectively ends total confidentiality for newborns and their mothers.

Actually, when you think carefully about how HIV-related information can be relevant to a host of decisions, entitlements and obligations, the question of HIV confidentiality begins to look much too complex for a rigid, absolute policy. But the battle must continue to protect the dignity and well-being of people with HIV by restricting such information to the tightest possible “need to know” circle.
