



# LEGAL & REGULATORY UPDATE

August  
Eleven  
2010

LRU-10

TO: (New York State)  
Chief Operating Officers  
Medical Directors  
Emergency Medicine Chairs  
Emergency Department Administrators  
Legal Affairs Committee

FROM: Susan C. Waltman, Executive Vice President and General Counsel

RE: Enactment of Bill to Promote HIV Testing

On July 30, 2010, Governor David Paterson signed into law S.8227/A.11487, which allows patients to agree to HIV testing as part of a general signed consent to medical care that remains in effect until it is revoked or expires. The law also requires health care providers, including hospitals and emergency departments, to offer testing to all patients between 13 and 64 years of age, as recommended by the Federal Centers for Disease Control and Prevention (CDC), and facilitates authorization for testing in the case of certain occupational exposures to HIV infection. The new law takes effect September 1, 2010, but authorizes the New York State Commissioner of Health to adopt regulations necessary to implement the law prior to that date.

The law will require a number of operational changes within health settings, including: hospital inpatient areas, emergency departments, outpatient departments, as well as other primary care settings. To assist its members, GNYHA is working with the New York State Department of Health (DOH) to identify and address the barriers and burdens that these requirements will create for providers. GNYHA will keep you apprised of its progress on these efforts.

The law aims to increase HIV/AIDS testing rates so that individuals who are HIV-positive can seek treatment earlier and reduce transmission of the disease to others. The law, therefore, updates New York State's laws to encourage such testing and to reflect medical technologies and advances.

## Overview of Law

**The following provides a summary of the main features of the law:**

**Testing** - Requires that an HIV-related test be offered to every individual between 13 and 64 years of age (or younger/older if there is evidence of risk activity) receiving health services as an inpatient or in the emergency department of a hospital or receiving primary care services in the outpatient department of a hospital or freestanding diagnostic treatment center or from a

physician, physician assistant, nurse practitioner, or midwife providing primary care. Such offering must be “culturally and linguistically appropriate.”

**Consent to Testing** - Authorizes HIV-related testing to be part of a signed general consent to medical care or documented oral consent when the test being ordered is a “rapid HIV test.” Such consents would be durable and remain in effect until they are revoked or expire. Patients must be provided an opportunity to decline HIV testing, and testing may only be done with full patient consent after the patient is provided with pre-test counseling information. In all instances, a physician must provide oral notification to the patient whenever an HIV test is performed and the notification must be noted in the patient's medical record.

**Occupational Exposures** - In situations involving occupational exposures that create a significant risk of someone contracting or transmitting HIV infection, HIV testing will be allowed in cases where: (1) the source person is deceased, comatose, or unable to provide consent, and his or her health care provider determines that mental capacity to consent is not expected to be regained in time for the exposed person to receive appropriate medical care, as determined by the exposed person's health care provider; (2) an authorized representative for the source person is not available or expected to become available in time for the exposed person to provide appropriate medical care; and (3) the exposed person would benefit medically by knowing the source person's HIV test results.

**HIV Counseling** - Require that HIV counseling messages be tailored based upon whether the HIV test indicates infection. Required positive test counseling remains consistent with existent law, but positive test counseling will now require the person ordering the test to provide or arrange for follow-up medical care if the patient consents. In cases with negative test results, counseling can be accomplished via oral or written reference to information previously provided but must emphasize the risks associated with high-risk behaviors.

**Consent Forms** - Designates the informed consent forms for HIV-related testing and disclosure that the Commissioner must develop as “standardized model” forms and removes the requirement that providers obtain prior authorization for the use of alternative consent and release forms, provided that the forms contain information consistent with the standardized model forms.

A copy of the new law is attached. If you have any questions regarding the new law, please contact Maria Woods at (212) 259-0767 or [mwoods@gnyha.org](mailto:mwoods@gnyha.org).

STATE OF NEW YORK

S. 8227

A. 11487

SENATE - ASSEMBLY

June 17, 2010

IN SENATE -- Introduced by Sen. DUANE -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

IN ASSEMBLY -- Introduced by COMMITTEE ON RULES -- (at request of M. A. Gottfried, Towns) -- read once and referred to the Committee on Health

AN ACT to amend the public health law, in relation to HIV testing

The People of the State of New York, represented in Senate and Assem- bly, do enact as follows:

1 Section 1. Section 2781 of the public health law, as added by chapter  
2 584 of the laws of 1988, paragraph (d) of subdivision 6 as added  
by  
3 chapter 220 of the laws of 1996 and subdivision 7 as added by  
chapter  
4 429 of the laws of 2005, is amended to read as follows:  
5 § 2781. HIV related testing. 1. Except as provided in section  
three  
6 thousand one hundred twenty-one of the civil practice law and rules,  
or  
7 unless otherwise specifically authorized or required by a state  
or  
8 federal law, no person shall order the performance of an HIV  
related  
9 test without first ~~[receiving]~~ having received the written or,  
where  
10 authorized by this subdivision, oral, informed consent of the subject  
of  
11 the test who has capacity to consent or, when the subject lacks  
capacity  
12 to consent, of a person authorized pursuant to law to consent to  
health  
13 care for such individual. ~~[A physician or other person authorized~~  
~~pursu-~~  
14 ~~ant to law to order the performance of an HIV related test shall~~  
~~certi-~~

15 ~~fy, in the order for the performance of an HIV related test,~~  
that  
16 ~~informed consent required by this section has been received prior~~  
to  
17 ~~ordering such test by a laboratory or other facility.]~~ When the  
test  
18 being ordered is a rapid HIV test, such informed consent may  
be  
19 obtained orally and shall be documented in the subject of the  
test's  
20 medical record by the person ordering the performance of the test.  
21 2. [~~Informed~~] Except where subdivision one of this section  
permits  
22 informed consent to be obtained orally, informed consent to [~~an~~]  
HIV  
23 related [~~test~~] testing shall consist of a statement consenting to  
HIV  
24 related testing signed by the subject of the test who has capacity  
to  
25 consent or, when the subject lacks capacity to consent, by a  
person

EXPLANATION--Matter in italics (underscored) is new; matter in  
brackets

[-] is old law to be omitted.

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1 authorized pursuant to law to consent to health care for the  
subject  
2 [~~which includes at least the following:~~  
3 (a) ~~an explanation of the test, including its purpose, the meaning~~  
of  
4 ~~its results, and the benefits of early diagnosis and medical~~  
inter-  
5 ~~vention; and~~  
6 (b) ~~an explanation of the procedures to be followed, including~~  
that  
7 ~~the test is voluntary, that consent may be withdrawn at any time, and~~  
a  
8 ~~statement advising the subject that anonymous testing is available;~~  
and  
9 (c) ~~an explanation of the confidentiality protections afforded~~  
confi-  
10 ~~dential HIV related information under this article, including~~  
the  
11 ~~circumstances under which and classes of persons to whom disclosure~~  
of  
12 ~~such information may be required, authorized or permitted under~~  
this  
13 ~~article or in accordance with other provisions of law or~~  
regulation]  
14 after the subject or such other person has received the  
information  
15 described in subdivision three of this section.

16 2-a. Where a written consent to HIV related testing is included  
in a  
17 signed general consent to medical care for the subject of the test or  
in  
18 a signed consent to any health care service for the subject of the  
test,  
19 the consent form shall have a clearly marked place adjacent to  
the  
20 signature where the subject of the test, or, when the subject  
lacks  
21 capacity to consent, a person authorized pursuant to law to consent  
to  
22 health care for such individual, shall be given an opportunity  
to  
23 specifically decline in writing HIV related testing on such  
general  
24 consent.

25 2-b. A written or oral informed consent for HIV related  
testing  
26 pursuant to this section shall be valid for such testing until  
such  
27 consent is revoked or expires by its terms. Each time that an  
HIV  
28 related test is ordered pursuant to informed consent in accordance  
with  
29 this section, the physician or other person authorized pursuant to  
law  
30 to order the performance of the HIV related test, or such  
person's  
31 representative, shall orally notify the subject of the test or, when  
the  
32 subject lacks capacity to consent, a person authorized pursuant to  
law  
33 to consent to health care for such individual, that an HIV related  
test  
34 will be conducted at such time, and shall note the notification in  
the  
35 patient's record.

36 2-c. The provisions of this section regarding oral informed  
consent  
37 for a rapid HIV test shall not apply to tests performed in a  
facility  
38 operated under the correction law.

39 3. Prior to the execution of [a] written, or obtaining and  
documenting  
40 oral, informed consent, a person ordering the performance of an  
HIV  
41 related test shall provide either directly or through a  
representative  
42 to the subject of an HIV related test or, if the subject lacks  
capacity  
43 to consent, to a person authorized pursuant to law to consent to  
health  
44 care for the subject, an explanation [~~of the nature of AIDS and~~  
HIV  
45 ~~related illness, information about discrimination problems that~~  
~~diselo-~~

46 ~~sure of the test result could cause and legal protections against~~  
such  
47 ~~discrimination, and information about behavior known to pose risks~~  
for  
48 ~~transmission and contraction of HIV infection.] that:~~

49 (a) HIV causes AIDS and can be transmitted through sexual  
activities  
50 and needle-sharing, by pregnant women to their fetuses, and  
through  
51 breastfeeding infants;

52 (b) there is treatment for HIV that can help an individual stay  
heal-  
53 thy;

54 (c) individuals with HIV or AIDS can adopt safe practices to  
protect  
55 uninfected and infected people in their lives from becoming infected  
or  
56 multiply infected with HIV;

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1 (d) testing is voluntary and can be done anonymously at a public  
test-  
2 ing center;

3 (e) the law protects the confidentiality of HIV related test  
results;

4 (f) the law prohibits discrimination based on an individual's  
HIV  
5 status and services are available to help with such consequences; and

6 (g) the law allows an individual's informed consent for HIV  
related  
7 testing to be valid for such testing until such consent is revoked  
by  
8 the subject of the HIV test or expires by its terms.

9 Protocols shall be in place to ensure compliance with this section.

10 4. A person authorized pursuant to law to order the performance of  
an  
11 HIV related test shall provide directly or through a representative

to  
12 the person seeking such test an opportunity to remain anonymous and  
to

13 provide written, informed consent or authorize documentation of  
oral

14 informed consent, through use of a coded system with no linking of  
indi-

15 vidual identity to the test request or results. A health care  
provider

16 who is not authorized by the commissioner to provide HIV related  
tests

17 on an anonymous basis shall refer a person who requests an  
anonymous

18 test to a test site which does provide anonymous testing. The  
provisions

19 of this subdivision shall not apply to a health care provider  
ordering

20 the performance of an HIV related test on an individual proposed  
for

21 insurance coverage.  
22 5. At the time of communicating the test result to the subject of  
the  
23 test, a person ordering the performance of an HIV related test  
shall,  
24 directly or through a representative:  
25 (a) in the case of a test indicating evidence of HIV  
infection,  
26 provide the subject of the test or, if the subject lacks capacity  
to  
27 consent, the person authorized pursuant to law to consent to health  
care  
28 for the subject with counseling or referrals for counseling: [~~(a)~~]  
(i)  
29 for coping with the emotional consequences of learning the result;  
[~~(b)~~]  
30 (ii) regarding the discrimination problems that disclosure of the  
result  
31 could cause; [~~(c)~~] (iii) for behavior change to prevent transmission  
or  
32 contraction of HIV infection; [~~(d)~~] (iv) to inform such person of  
avail-  
33 able medical treatments; and [~~(e)~~] (v) regarding the [~~test~~  
subject's]  
34 need to notify his or her contacts; and  
35 (b) in the case of a test not indicating evidence of HIV  
infection,  
36 provide (in a manner which may consist of oral or written reference  
to  
37 information previously provided) the subject of the test, or if  
the  
38 subject lacks capacity to consent, the person authorized pursuant to  
law  
39 to consent to health care for the subject, with information  
concerning  
40 the risks of participating in high risk sexual or needle-sharing  
behav-  
41 ior.  
42 5-a. With the consent of the subject of a test indicating evidence  
of  
43 HIV infection or, if the subject lacks capacity to consent, with  
the  
44 consent of the person authorized pursuant to law to consent to  
health  
45 care for the subject, the person who ordered the performance of the  
HIV  
46 related test, or such person's representative, shall provide or  
arrange  
47 with a health care provider for an appointment for follow-up  
medical  
48 care for HIV for such subject.  
49 6. The provisions of this section shall not apply to the  
performance  
50 of an HIV related test:  
51 (a) by a health care provider or health facility in relation to  
the

52 procuring, processing, distributing or use of a human body or a  
human  
53 body part, including organs, tissues, eyes, bones, arteries,  
blood,  
54 semen, or other body fluids, for use in medical research or therapy,  
or  
55 for transplantation to individuals provided, however, that where  
the  
56 test results are communicated to the subject, post-test counseling,  
as  
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1 described in subdivision five of this section, shall nonetheless  
be  
2 required; or  
3 (b) for the purpose of research if the testing is performed  
in a  
4 manner by which the identity of the test subject is not known and  
may  
5 not be retrieved by the researcher; or  
6 (c) on a deceased person, when such test is conducted to determine  
the  
7 cause of death or for epidemiological purposes[-]; or  
8 (d) conducted pursuant to section twenty-five hundred-f of this  
chap-  
9 ter[-]; or  
10 (e) in situations involving occupational exposures which create  
a  
11 significant risk of contracting or transmitting HIV infection,  
as  
12 defined in regulations of the department and pursuant to  
protocols  
13 adopted by the department,  
14 (i) provided that:  
15 (A) the person who is the source of the occupational exposure  
is  
16 deceased, comatose or is determined by his or her attending health  
care  
17 professional to lack mental capacity to consent to an HIV related  
test  
18 and is not reasonably expected to recover in time for the exposed  
person  
19 to receive appropriate medical treatment, as determined by the  
exposed  
20 person's attending health care professional who would order or  
provide  
21 such treatment;  
22 (B) there is no person available or reasonably likely to become  
avail-  
23 able who has the legal authority to consent to the HIV related test  
on  
24 behalf of the source person in time for the exposed person to  
receive  
25 appropriate medical treatment; and  
26 (C) the exposed person will benefit medically by knowing the  
source



27 person's HIV test results, as determined by the exposed person's  
health  
28 care professional and documented in the exposed person's medical  
record;  
29 (ii) in which case  
30 (A) a provider shall order an anonymous HIV test of the source  
person;  
31 and  
32 (B) the results of such anonymous test, but not the identity of  
the  
33 source person, shall be disclosed only to the attending health  
care  
34 professional of the exposed person solely for the purpose of  
assisting  
35 the exposed person in making appropriate decisions regarding post-  
expo-  
36 sure medical treatment; and  
37 (C) the results of the test shall not be disclosed to the  
source  
38 person or placed in the source person's medical record.

39 7. In the event that an HIV related test is ordered by a physician  
or  
40 certified nurse practitioner pursuant to the provisions of the  
education  
41 law providing for non-patient specific regimens, then for the  
purposes  
42 of this section the individual administering the test shall be deemed  
to  
43 be the individual ordering the test.

44 § 2. The public health law is amended by adding a new section  
2781-a  
45 to read as follows:

46 § 2781-a. Required offering of HIV related testing. 1. Every  
individ-  
47 ual between the ages of thirteen and sixty-four years (or younger  
or  
48 older if there is evidence or indication of risk activity) who  
receives  
49 health services as an inpatient or in the emergency department  
of a  
50 general hospital defined in subdivision ten of section twenty-  
eight  
51 hundred one of this chapter or who receives primary care services in  
an  
52 outpatient department of such hospital or in a diagnostic and  
treatment  
53 center licensed under article twenty-eight of this chapter or  
from a  
54 physician, physician assistant, nurse practitioner, or midwife  
providing  
55 primary care shall be offered an HIV related test unless the health  
care  
56 practitioner providing such services reasonably believes that (a)  
the

the  
HIV  
indi-  
HIV  
1 individual is being treated for a life threatening emergency; or (b)  
2 individual has previously been offered or has been the subject of an  
3 related test (except that a test shall be offered if otherwise  
4 cated); or (c) the individual lacks capacity to consent to an  
5 related test.

of  
medicine,  
to  
6 2. As used in this section, "primary care" means the medical fields  
7 family medicine, general pediatrics, primary care, internal  
8 primary care obstetrics, or primary care gynecology, without regard  
9 board certification.

be  
and  
10 3. The offering of HIV related testing under this section shall  
11 culturally and linguistically appropriate in accordance with rules  
12 regulations promulgated by the commissioner.

health  
professional  
13 4. This section shall not affect the scope of practice of any  
14 care practitioner or diminish any authority or legal or

test  
test.  
15 obligation of any health care practitioner to offer an HIV related  
16 or to provide services or care for the subject of an HIV related

of  
17 § 3. Section 2135 of the public health law, as added by chapter 163  
18 the laws of 1998, is amended to read as follows:

the  
officer  
in  
19 § 2135. Confidentiality. All reports or information secured by  
20 department, municipal health commissioner or district health  
21 under the provisions of this title shall be confidential except: (a)  
22 so far as is necessary to carry out the provisions of this title;

(b)  
infor-  
of  
23 when used in the aggregate, without patient specific identifying  
24 mation, in programs approved by the commissioner for the improvement  
25 the quality of medical care provided to persons with HIV/AIDS; or

(c)  
health  
and  
26 when used within the state or local health department by public  
27 disease programs to assess co-morbidity or completeness of reporting  
28 to direct program needs, in which case patient specific  
identifying  
29 information shall not be disclosed outside the state or local  
health  
30 department.

31 § 4. Subdivision 4 of section 2780 of the public health law, as  
added

32 by chapter 584 of the laws of 1988, is amended and a new subdivision  
4-a  
33 is added to read as follows:  
34 4. "HIV related test or HIV related testing" means any  
laboratory  
35 test, tests or series of tests [~~for any virus, antibody, antigen~~  
~~or~~  
36 ~~etiologic agent whatsoever thought to cause or to indicate the~~  
~~presence~~  
37 ~~of AIDS~~] approved for the diagnosis of HIV.  
38 4-a. "Rapid HIV test or testing" means any laboratory screening  
test  
39 or tests approved for detecting antibodies to HIV, that produce  
results  
40 in sixty minutes or less, and encompasses a confirmatory HIV  
related  
41 test if the screening test is reactive.

42 § 5. Subdivision 1 of section 2130 of the public health law, as  
added  
43 by chapter 163 of the laws of 1998, is amended to read as follows:  
44 1. Every physician or other person authorized by law to order  
diagnos-  
45 tic tests or make a medical diagnosis, or any laboratory performing  
such  
46 tests shall immediately (a) upon [~~initial~~] determination that a  
person  
47 is infected with human immunodeficiency virus (HIV), [~~or~~] (b)  
upon  
48 [~~initial~~] diagnosis that a person is afflicted with the disease known  
as  
49 acquired immune deficiency syndrome (AIDS), [~~or~~] (c) upon  
[~~initial~~]  
50 diagnosis that a person is afflicted with HIV related illness, and  
(d)  
51 upon periodic monitoring of HIV infection by any laboratory tests  
report  
52 such case or data to the commissioner.

53 § 6. Subdivision 1 of section 2782 of the public health law is  
amended  
54 by adding a new paragraph (q) to read as follows:  
55 (q) an executor or an administrator of an estate shall have access  
to  
56 the confidential HIV information of a deceased person as needed  
to

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1 fulfill his or her responsibilities/duties as an executor or  
administra-  
2 tor.  
3 § 7. Paragraph (a) of subdivision 5 of section 2782 of the  
public  
4 health law, as added by chapter 584 of the laws of 1988, is amended  
to  
5 read as follows:  
6 (a) Whenever disclosure of confidential HIV related information  
is

7 made pursuant to this article, except for disclosures made pursuant  
to  
8 [~~paragraph~~] paragraphs (a), (d) and (i) of subdivision one of  
this  
9 section or paragraph (a) or (e) of subdivision four of this  
section,  
10 such disclosure shall be accompanied or followed by a statement in  
writ-  
11 ing which includes the following or substantially similar  
language:  
12 "This information has been disclosed to you from confidential  
records  
13 which are protected by state law. State law prohibits you from  
making  
14 any further disclosure of this information without the specific  
written  
15 consent of the person to whom it pertains, or as otherwise permitted  
by  
16 law. Any unauthorized further disclosure in violation of state law  
may  
17 result in a fine or jail sentence or both. A general authorization  
for  
18 the release of medical or other information is NOT sufficient  
authori-  
19 zation for further disclosure." An oral disclosure shall be  
accompanied  
20 or followed by such a notice within ten days.  
21 § 8. Subdivision 1 of section 2786 of the public health law, as  
added  
22 by chapter 584 of the laws of 1988, is amended to read as follows:  
23 1. The commissioner shall promulgate rules and regulations  
concerning  
24 implementation of this article for health facilities, health  
care  
25 providers and other persons to whom this article is applicable.  
The  
26 commissioner shall also develop standardized model forms to be used  
for  
27 informed consent for HIV related testing and for the release of  
confi-  
28 dential HIV related information and materials for pre-test counseling  
as  
29 required by subdivision three of section twenty-seven hundred eighty-  
one  
30 of this article, and for post-test counseling as required by  
subdivision  
31 five of section twenty-seven hundred eighty-one of this  
article.  
32 Persons, health facilities and health care providers may use forms  
for  
33 informed consent for HIV related testing, and for the release of  
confi-  
34 dential HIV related information other than those forms developed  
pursu-  
35 ant to this section, provided [~~that the person, health facility~~  
or



maintained; (2) tailors counseling information based on HIV test results; (3) updates current testing requirements to reflect medical advances; (4) and facilitates authorization for testing in the case of certain occupational exposures to HIV infection.

#### SUMMARY OF PROVISIONS:

Section 1 of this bill amends Public Health Law (PHL) § 2781 to authorize HIV related testing to be part of a signed general consent to medical care, or documented oral consent when the test being ordered is a rapid HIV test. Such consent would be durable and remain in effect until it is revoked or expires. Patients will be provided an opportunity to decline HIV testing, and testing will only be done with full patient consent after the patient is provided with pre-test counseling information. In all instances, a physician will be required to provide oral notification to the patient whenever an HIV test is performed and this shall be noted on the patient's medical record. The provisions of this section regarding oral informed consent for a rapid HIV test shall not apply to tests performed in a facility operated under the correction law.

Section 1 also provides that HIV counseling messages shall be tailored based on whether the HIV test indicates infection. Counseling with respect to positive tests will remain consistent with existing law. In the case of negative results, counseling will emphasize risks associated with participating in high risk behavior and may be accomplished by oral or written reference to information previously provided. The bill also provides that in the case of a positive test for HIV infection, the person ordering the test must provide or arrange for follow-up medical care if the patient consents.

Section 1 further provides that in situations involving occupational exposures that create a significant risk of contracting or transmitting HIV infection, HIV testing will be allowed in cases where: (1) the source person is deceased, comatose or unable to provide consent, and his or her health care provider determines that mental capacity to consent is not expected to be regained in time for the exposed person to receive appropriate medical care, as determined by the exposed person's health care provider; (2) an authorized representative for the source person is not available or expected to become available in time for the exposed person to provide appropriate medical care; and (3) the exposed person would benefit medically by knowing the Source person's HIV test results. In these limited cases, a provider shall order an anonymous HIV test of the source person and the results of the anonymous test, but not the identity of the source person would be disclosed to the exposed person's provider, solely for the purpose of making appropriate decisions regarding post-exposure medical treatment. The results of the HIV test of the source person would not be disclosed to the Source person or placed in the source person's medical record.

Section 1 also eliminates the requirement that a physician certify that informed consent has been obtained before ordering HIV related testing by a laboratory or other facility.

Section 2 of the bill adds a new PHL § 2781-a to require that an HIV related test be offered to every individual between the ages of 13 and

64 years of age (or younger or older if there is evidence of risk activity) receiving health services as an inpatient or in the emergency department of a hospital or receiving primary care services in the outpatient department of a hospital or in a freestanding diagnostic and treatment center or from a physician, physician assistant, nurse practitioner, or midwife providing primary care. The HIV related testing must be offered unless the health care provider believes: (1) the person is being treated for a life threatening emergency; (2) the individual has been previously offered or been the subject of an HIV related test (except that a test shall be offered if otherwise indicated); and (3) the patient lacks capacity to consent to such testing. Such offering shall be culturally and linguistically appropriate.

Section 3 of the bill amends PHL § 2135 to authorize the Department of Health (DOH) to use HIV testing information (in the aggregate without identifying patient information) for programs approved by the Commissioner of Health (Commissioner) for the improvement of the quality of medical care provided to individuals with HIV/AIDS. This bill also permits DOH to share this information with public health disease programs within DOH or local health departments to access co-morbidity or completeness of reporting and to direct program needs. Information will not be shared outside of DOH or the local health departments.

Section 4 of the bill amends PHL § 2780(4) to update the definition of "HIV related testing" to mean tests approved for the diagnosis of HIV, and to establish the definition of "Rapid HIV test or testing" to mean any laboratory screening test or tests approved for detecting antibodies to HIV, that produce results in sixty minutes or less, and encompasses a confirmatory HIV related test if the screening test is reactive.

Section 5 of the bill amends PHL § 2130(1) to require that data obtained "upon periodic monitoring of HIV infection" be reported to the Commissioner.

Section 6 of the bill amends PHL § 2782(1) to provide limited access to confidential HIV information to the executor or administrator of an estate when needed to fulfill the responsibilities of such a position.

Section 7 of the bill amends PHL § 2782(5)(a) to clarify instances under which disclosure need not be accompanied by a written statement regarding confidentiality and redisclosure requirements and prohibitions. In particular, the written statement would no longer have to be provided for routine disclosures to providers assisting in rendering care or for disclosures made to health insurers in the day to day course of the billing process.

Section 8 of the bill amends PHL § 2786(1) to designate the informed consent forms for HIV related testing and disclosure that must be developed by the Commissioner as "standardized model" forms and removes the requirement that providers obtain prior authorization for the use of alternative consent and release forms, provided that the forms contain information consistent with the standardized model forms.

Section 9 of the bill provides that on or before September 1, 2012, the Commissioner must evaluate the impact of the bill with respect to the number of persons who are tested for HIV infection and the number of persons who access care and treatment. Such report shall be submitted to

the Governor and to the chairs of the Assembly and Senate Health Committees.

Section 10 of the bill provides that the bill will be effective on September 1, 2010, but authorizes the Commissioner to adopt regulations necessary to implement the bill prior to that date.

**EXISTING LAW:**

PHL § 2130 requires health care practitioners and laboratories that determine that a person is infected with HIV or AIDS to report the case to DOH.

PHL § 2135 requires that any HIV information obtained by DOH or any municipal health officer must be maintained as confidential, except as otherwise required by law.

PHL § 2780 defines a number of terms and in particular defines "HIV related test" as "any laboratory test or series of tests for any virus, antibody, antigen or etiologic agent whatsoever thought to cause or to indicate the presence of AIDS."

PHL § 2781 requires written, informed consent before any HIV related test may be ordered, and a physician or other practitioner must certify that consent was received before ordering that such test be performed. The written, informed consent consists of a statement signed by the subject of the test which explains, among other things, the purpose of the test and the applicable confidentiality protections. PHL § 2781 further requires that before execution of the written consent, the practitioner or his or her representative must provide an explanation of the nature of AIDS and HIV related illness; information about discrimination problems that could arise from disclosure of test results, and information about the transmission risks associated with HIV infection. When test results are communicated, the patient must be provided with counseling or referrals for counseling about matters such as the emotional consequences of learning the results and the need to change behavior to prevent transmission of HIV infection. The informed consent requirements do not apply in certain circumstances, such as when a researcher does not know the test subject's identity.

PHL § 2782 prohibits persons who obtain confidential HIV related information from disclosing such information, with certain exceptions. In those circumstances when disclosure is authorized, it must be accompanied by a statement advising that further disclosure without consent is prohibited.

PHL § 2786 requires the Commissioner to develop forms for informed consent for HIV related testing and disclosure of confidential related information.

**JUSTIFICATION:**

Significant advances in the medical treatment of and testing for HIV/AIDS have been made in the last two decades. In the early days of the epidemic (in the 1980's), an HIV/AIDS diagnosis was tantamount to a



death sentence. Today, people with HIV/AIDS are living longer with the help of new and improved treatments and testing/monitoring. It is vital to increase HIV/AIDS testing rates so that people with HIV can seek treatment, earlier and reduce transmission to others, and so that people without HIV can learn to stay that way. This bill updates New York's laws to encourage such testing and reflect new medical technologies and advances.

Recommendations issued by the federal Centers for Disease Control and Prevention (CDC) in 2006 include a recommendation for routine HIV screening for patients between the ages of 13 and 64 in all health care settings, in addition to regular testing for high-risk groups. The bill incorporates this recommendation, with routine screening - meaning that the patient will be offered the opportunity to undergo HIV testing - required for patients between 13 and 64, or for younger or older patients if there is evidence of behavior that increases the risk of infection. Expanded screening will increase the number of individuals who are tested for HIV/AIDS.

The CDC also recommends that states eliminate the requirement of a separate written informed consent for each HIV test, and instead assume that a general consent to medical treatment encompasses consent for HIV testing. This bill relaxes current written consent requirements by providing an option for a durable written general consent that would specifically include HIV testing, or a documented oral consent when the test being ordered is a rapid HIV test. The bill also makes a corresponding technical change to the law requiring that the Commissioner develop forms to be used for informed consent purposes. Specifically, the bill designates such forms as "standardized model" forms, and providers would no longer need to obtain prior authorization for the use of alternative forms that contain information consistent with the standardized model forms. Similarly, the bill removes the requirement that physicians confirm that informed consent has been obtained before ordering HIV related testing.

Currently, the law requires post-test counseling which is the same regardless of the test's results, This legislation will require that counseling be tailored based on whether the HIV test indicates infection. Counseling will remain consistent with existing law with respect to positive tests. For negative results, counseling will emphasize risks associated with participating in high risk behavior and may be accomplished by oral or written reference to information previously provided.

The bill also requires physicians to report HIV data obtained through laboratory tests conducted in conjunction with periodic monitoring of HIV infection, which will enable DOH to monitor the spread of HIV/AIDS and to target program initiatives. This provision reflects the availability of data from HIV tests which was not available when the statute was originally enacted. The bill makes similar technical changes to various provisions of law to update references to testing in accordance with newer testing technologies. In addition, the bill protects individuals who are at risk of acquiring HIV infection due to an occupational event by permitting HIV testing if consent is not available. Finally, the bill makes certain appropriate changes to existing confidentiality provisions, first by allowing limited access to confidential HIV information to the executor or administrator of an estate when needed by such persons to fulfill their responsibilities. Second, under

current law, disclosure of HIV related information must be accompanied by a written statement regarding confidentiality and redisclosure. It is appropriate to exempt from these requirements routine disclosures of information which are made to providers for purposes of treatment and to third party payers for reimbursement purposes.

**LEGISLATIVE HISTORY:**

An earlier version of this bill, A.11461/S.8722, was introduced in 2008 but did not pass. A.9195/S.6326, which addressed some of the issues raised in this bill, was introduced in 2007-08 and was passed by the Assembly in 2007.

**FISCAL IMPLICATIONS:**

This bill will not have a measurable fiscal impact to the State, HIV testing and counseling is already a covered benefit in Medicaid managed care, Family Health Plus and Medicaid fee-for-service. Any additional administrative demands can be accommodated within existing DOH resources.

**EFFECTIVE DATE:**

This bill takes effect on September 1, 2010. The Commissioner is authorized to adopt regulations prior to that date as necessary to implement the bill.