

HIV Testing and Partner Services Requirements in California

Keeping it Legal (and as simple as possible)

Ronald P. Hattis, MD, MPH
ronhattis@beyondaids.org

Associate Professor of Preventive Medicine,
Loma Linda University
Secretary, Beyond AIDS Foundation

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Slides and checklists posted at
<http://www.beyondaids.org/helpforCA.html>



Clinical question: HIV screening

- A young adult male patient with a history of risky sexual behavior is in your office, and you recommend HIV screening.
 - Should you only consider screening for patients with risk history?
 - Do you need written consent by law in California?
 - Is there any pre and post-test counseling or anything to document that must be done by law?
 - Would anything be different if the patient were a pregnant female?

PART 1: MANDATORY OFFERING OF HIV SCREENING IN CA

(comments in orange, parentheses, italics)

- AB 446 (Mitchell), effective 1/14, requires the offering of HIV testing in designated primary care clinics
 - As defined for purposes of this law, primary care clinics refer to any of following:
 - “Community Clinics,” tax-exempt nonprofit with support from government or donations
 - “Free Clinics”
 - Clinics affiliated with institutions of learning
 - Group practices with “preponderance” of prepaid health service plans

What the law says about whom should be offered screening

- Section 120991 of the *Health and Safety Code*:
- A patient who has blood drawn at a primary care clinic (*as defined*), and who has consented to the HIV test pursuant to Section 120990, shall be offered an HIV test.
- -(Comments: *Consent refers to opt-out testing with patient informed.* More than 8 years after this provision became law, many facilities offering primary care do not yet do this and may not be aware of the law. Meanwhile, AB 789 of 2021, effective January 2022, also requires all primary care providers to offer almost all adults baseline hepatitis B surface antigen & hep C antibody tests when blood is drawn.)

https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/AB789_Dear-Colleague-Letter.pdf

What the law says, contd.

- The primary care clinic shall offer an HIV test consistent with the United States Preventive Services Task Force recommendation for screening HIV infection.
 - This subdivision shall not apply if the primary care clinic has tested the patient for HIV or if the patient has been offered the HIV test and declined the test within the previous 12 months.
 - *(This refers to a baseline test. The 12-month criterion was not ideally worded and could be interpreted to require two tests a year apart.)*

What the law says, contd.

- Any subsequent testing of a patient who has been tested by the primary care clinic shall be consistent with the most recent guidelines issued by the United States Preventive Services Task Force.
- A primary care clinic shall attempt to provide test results to the patient before he or she leaves the facility.
 - If that is not possible, the facility may inform the patient who tests negative for HIV by letter or by telephone, and shall inform a patient with a positive test result in a manner consistent with state law.

So what are these US Preventive Services Task Force Guidelines?

- The USPSTF recommends *(2013, Grade A)* that:
- Clinicians screen for HIV infection in adolescents and adults aged 15 to 65 years. Younger adolescents and older adults who are at increased risk should also be screened.
- Clinicians screen all pregnant women for HIV, including those who present in labor who are untested and whose HIV status is unknown.

– <http://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/human-immunodeficiency-virus-hiv-infection-screening#consider>

Screening intervals (USPSTF)

- “The evidence is insufficient to determine optimum time intervals for HIV screening.”
 - **A suggested approach:** one-time screening of adolescent and adult patients to identify persons who are already HIV-positive, **including sexually active seniors over 65;** with periodic repeat screening of those who are known to be at risk for HIV infection, are actively engaged in risky behaviors, or live or get medical care in a high-prevalence setting.

Screening intervals (USPSTF and CDC) Contd.

- Per CDC, a high-prevalence setting is a geographic location or community with an HIV seroprevalence of at least 1%.
 - Settings include sexually transmitted disease (STD) clinics, correctional facilities, homeless shelters, tuberculosis clinics, clinics serving men who have sex with men, and adolescent health clinics with a high prevalence of STDs.
 - Patient populations that would more likely benefit from more frequent testing include those who are known to be at higher risk for HIV infection, those who are actively engaged in risky behaviors, and those who live in a high-prevalence setting.

Screening: discussion

- What changes would you like to see in California legal requirements for who must do HIV testing?
- Are clinics you have worked with following current California law with respect to routine HIV testing?
- Questions? (Will return to clinical question at end)

PART 2: SPECIAL HIV TESTING LAWS IN CALIFORNIA

(what does the law require for testing?)

- CDC has recommended oral, opt-out consent since 2006
- Since 2008, California has not required written consent; however
 - **Some clinics are still requesting written consent, which can make testing seem non-routine and serves as a barrier to routine screening**
 - Some think no consent or documentation are needed at all, which does not fulfill law

Evolution in the approach to HIV testing

- In early days of HIV epidemic, activists saw risks as well as benefits to HIV testing, if results were positive
 - Discrimination, stigma if results fell into wrong hands
 - Psychological trauma before treatment available
- Many states adopted unique written consent laws for HIV tests
- Pre-test counseling requirements assumed risks and benefits
- Gradually, became evident that these screening measures were a barrier to testing

Evolving recommendations of the Centers for Disease Control (CDC)

- HIV testing first available 1985
 - Main initial goal was protection of blood supply
- 1987 testing became part of prevention strategy
- 2001 recommended as routine for pregnant women, to prevent perinatal transmission
- 2003 value as part of routine health care recognized
- 2004 simplification of screening process recommended

CDC adopts opt-out, oral, no-pre-test counseling approach

MMWR 9/22/06:

<http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5514a1.htm>

- Diagnostic testing and HIV screening should be part of routine care for patients **13-64**
 - Screen all ages if suspect TB, STDs
 - Pregnant patients should be screened early; repeat 3rd trimester if high-risk by exposure or geography
- Consent should be oral and opt-out, not separate or written
- Routine counseling should be post-test and relevant to the test results (not pre-test)
- US Preventive Services Task Force endorsed screening for ages **15-65**, in April 2013

Type of HIV test requirement (Jan. 2014)	# of states	Which states	Reference: http://www.nccc.ucsf.edu/consultation_library/state_hiv_testing_laws/
Written consent required in at least some situations	6	CA (if social worker consents for infant ward of court); OK (all cases); NE (unless specify in general consent); MD (if other than health care setting); NY (if not rapid testing)	
Oral consent, no opt-out	17	AL; CA (non-healthcare settings); CO DE FL GA IA IN MA MO ND NM OR TX WA; MD & NY (when written consent not required)	
Oral opt-out for everyone	13	AZ; CA (only healthcare setting); HI IL LA MI ME NH OA RI WI WV VA	
Oral opt-out only for pregnancy	14	CO CT (l&d) DE FL GA IA IN KS MO NC NM OR TN TX	
Special requirements of any type for pregnancy or labor/delivery	22	AL AR CA CO CT DE FL GA IA IL IN KS MI MD MO NC NJ NM OR RI TX WA	
Post-test counsel. required, all	5	CT CA HI; NE (occupational); NH NY WA	
Post-test counsel. required if pos	12	AL FL GA KY NC NM NV OH OK RI TX VA	
No special consent requirements for HIV testing	14-16 + DC	AL AR CT (exc l&d, doc refus) DC ID KY MI MN NC (non-preg) NJ NV OH SC SD UT VT WY	
No requirement for anonymous	9	AL AR DE IA MI NH SC TN VT	

California law on opt-out oral consent

AB 682 of 2007, Health and Safety Code Secs. 120990, 125090, 125107

- Opt-out applies only to medical care setting
 - Oral or written non-opt-out consent required outside of medical care setting; or if parent, guardian, etc. signs rather than patient
- **Requires specific pre-test informing/ counseling and option to decline (document)**
- **All testing requires post-test counseling**
- Exemption when person requests the test
 - Can skip pre-test requirements, not post-test
 - Requires documentation of the request, if not in medical care setting

California law on opt-out oral consent, contd.

- For non-pregnant patient, documentation of refusal is required
 - May also apply, and highly advisable medicolegally, for pregnant patient
- For pregnant woman, pre-test counseling slightly different from non-pregnant patient
 - Recommend use of separate pre-test information sheet, e.g., as developed by CA Dept. of Public Health (see links, below)
 - Also, a **separate** legal requirement for prenatal HIV counseling (any time in pregnancy) exists for pregnant women

Excerpts from law for non-pregnant patients

AB 682 of 2007, Health and Safety Code Sec. 120990

- 120990. (a) Prior to ordering a test that identifies infection with HIV, a medical care provider shall inform the patient that the test is planned, provide information about the test, inform the patient that there are numerous treatment options available for a patient who tests positive for HIV and that a person who tests negative for HIV should continue to be routinely tested, and advise the patient that he or she has the right to decline the test. **If a patient declines the test, the medical care provider shall note that fact in the patient's medical file.** (b) Subdivision (a) shall not apply when a person independently requests an HIV test from the provider.

Excerpts from law for non-pregnant patients, contd.

AB 446 of 2013, effective January 2014, provides for highlighted changes to Sec. 120990, related to post-test counseling in healthcare settings:

- (h) After the results of a test performed pursuant to this section have been received, the medical care provider or the person who administers the test shall ensure that the patient receives timely information and counseling, as appropriate, to explain the results and the implications for the patient's health. If the patient tests positive for HIV infection, the medical provider or the person who administers the test shall inform the patient that there are numerous treatment options available and identify followup testing and care that may be recommended, including contact information for medical and psychological services. ¹⁹

Excerpts from law for non-pregnant patients, contd.

AB 446, changes to Sec. 120990 (h), *related to post-test counseling in healthcare settings*, contd.

- 12990. (h, contd.) If the patient tests negative for HIV infection and is known to be at high risk for HIV infection, the medical provider or the person who administers the test shall advise the patient of the need for periodic retesting, explain the limitations of current testing technology and the current window period for verification of results, and may offer prevention counseling or a referral to prevention counseling.

Excerpts from law for HIV testing of **pregnant** patients

- 125090. (c) Prior to obtaining a blood specimen collected pursuant to subdivision (b) of Section 125085 or this section, the physician and surgeon or other person engaged in the prenatal care of a pregnant woman, or attending the woman at the time of labor or delivery, shall ensure that the woman is informed of the intent to perform a test for HIV infection, the routine nature of the test, **the purpose of the testing, the risks and benefits of the test, the risk of perinatal transmission of HIV, that approved treatments are known to decrease the risk of perinatal transmission of HIV,** and that the woman has a right to decline this testing.

Excerpts from law for pregnant patients, contd.

- (d) If, during the final review of standard of prenatal care medical tests, the medical records of the pregnant woman do not document a test for rhesus (Rh) antibody blood type, a test for hepatitis B, or a test for HIV, the physician and surgeon or other person engaged in the prenatal care of the woman, or attending the woman at the time of labor or delivery, **shall obtain a blood specimen from the woman for the tests that have not been documented.**

Excerpts from law for pregnant patients, contd.

- Prior to obtaining this blood specimen, the provider shall ensure that the woman is informed of the intent to perform the tests that have not been documented prior to this visit, including a test for HIV infection, the routine nature of the test, the purpose of the testing, the risks and benefits of the test, the risk of perinatal transmission of HIV, that approved treatments are known to decrease the risk of perinatal transmission of HIV, and that the woman has a right to decline the HIV test.

Excerpts from law for pregnant patients, contd.

- The blood shall be tested by a method that will ensure the earliest possible results, and the results shall be reported to both of the following:
 - (1) The physician and surgeon or other person engaged in the prenatal care of the woman or attending the woman at the time of delivery
 - (2) The woman tested

Excerpt from law for pregnant patients, contd.

Post-test requirements:

- (e) After the results of the tests done pursuant to this section and Section 125085 have been received, the physician and surgeon or other person engaged in the prenatal care of the pregnant woman or attending the woman at the time of labor, delivery, or post partum care at the time the results are received shall ensure that the woman receives information and counseling, as appropriate, to explain the results and the implications for the mother's and infant's health,

Excerpts from law for pregnant patients, contd.

Post-test requirements, contd.:

- ...including any followup testing and care that are indicated. If the woman tests positive for HIV antibodies, she shall also receive, **whenever possible, a referral** to a provider, provider group, or institution specializing in prenatal and post partum care for HIV-positive women and their infants. Health care providers are also **strongly encouraged to seek consultation** with HIV specialists who provide care for pregnant and post partum HIV-positive women and their infants. (f) The provisions of Section 125107 for counseling are equally applicable to every pregnant patient covered by subdivisions (c) and (d).

Separate HIV counseling requirement law for pregnant women

(May be done either together with or separately from testing)

- 125107. (b) The prenatal care provider primarily responsible for providing prenatal care to a pregnant patient shall offer human immunodeficiency virus (HIV) information and counseling to every pregnant patient. This information and counseling shall include, but shall not be limited to, all of the following: (1) A description of the modes of HIV transmission. (2) A discussion of risk reduction behavior modifications including methods to reduce the risk of perinatal transmission. (3) If appropriate, referral information to other HIV prevention and psychosocial services including anonymous and confidential test sites approved by the Office of AIDS.

Excerpts from law for non-medical setting or if someone else consents, contd.

AB 446 of 2013, effective January 2014, provides highlighted changes to Sec. 120990, re HIV testing in non-medical settings or if someone else consents:

- (d) Subdivision (c) shall not apply when a person independently requests an HIV test from an HIV counseling and testing site that **employs a trained HIV counselor**, pursuant to Section 120917, provided that the person is provided with information required pursuant to subdivision (a) and his or her independent request for an HIV test is documented by the person administering the test.

Excerpts from law for non-medical setting or if someone else consents

AB 446 of 2013, effective January 2014, provides highlighted changes to Sec. 120990, re HIV testing in non-medical settings or if someone else consents:

- 120990 (c) Except as provided in subdivision (a), a person shall not administer a test for HIV infection unless the person being tested or his or her parent, guardian, conservator, or other person specified in Section 121020 **has provided informed consent for the performance of the test. Informed consent may be provided orally or in writing, but the person administering the test shall maintain documentation of consent, whether obtained orally or in writing, in the client's medical record.** This requirement does not apply to such a test performed at an alternative site pursuant to Sections 120890 or 120895. Nothing in this section shall be construed to allow a person to administer a test for HIV unless that person is otherwise permitted under current law to administer an HIV test.

Checklists for HIV testing to track and document adherence to legal requirements

- BEYOND AIDS FOUNDATION HAS DEVELOPED CHECKLISTS FOR TRACKING FULFILLMENT OF UNIQUE CALIFORNIA LEGAL REQUIREMENTS
 - Combined form 102 for pregnant or non-pregnant patient in medical care settings
 - Separate, shorter (1-sided) forms for pregnant only, for non-pregnant only, and for non-medical settings or if the person consenting is not the patient, are also available
 - All forms are posted at <http://www.beyondaids.org/helpforCA.html>

Links to testing information sheets

Handouts to use as pre-test information sheets are available, free download through California Department of Public Health in multiple languages:

- Non-pregnant: "HIV Testing in Health Care Settings" (13 languages; links labelled "Frequently Asked Questions about HIV Testing")*
- Prenatal: "Protecting Yourself and Your Baby" (14 languages)*

Both available at this time at

https://www.cdph.ca.gov/Programs/CID/DOA/Pages/OA_prev_hivhcv.aspx

Legal references

- 1 . *Health and Safety Code, Section 120991, effective 1/1/14*
2. *Health and Safety Code, Section 120917 describes trained HIV Counselors*
3. *Health and Safety Code, Section 120990, as amended effective 1/1/14*
4. *Health and Safety Code, Section 121020, as amended effective 1/1/14*
5. *Health and Safety Code, Section 125090, as amended effective 1/1/08*

Screening: discussion

- What changes would you like to see in California legal requirements on consent and information for HIV testing?
- Are clinics you have worked with following current California law with respect to consent and information for HIV testing?
- Questions?

Clinical question: HIV partner services

- A patient who has tested HIV positive has a sexual partner who is unaware of having been exposed.
 - Can you legally inform the partner?
 - Can you turn over the task of interviewing the patient for and finding contacts to the local health department?
 - If you determine which partners should be notified, can you ask the local health department to notify them?

PART 3: HIV PARTNER SERVICES IN CALIFORNIA

- Contact tracing and partner notification are now called partner services
- It is legal, but complicated, for a physician to notify a spouse or suspected sexual or needle-sharing partner of a patient with HIV, of possible exposure
- Penalties for unauthorized disclosure, if process is not conducted in accordance with law

Partner services in CA: legalities

- Can a mid-level practitioner perform?
 - Physician assistant can, per PA Committee, California Medical Board (consulted 11/2012)
 - PAs derive their legal authority from the supervising physician
 - Protocols should include mention or implication of this delegation
 - Nurse practitioner cannot, per California Board of Registered Nursing (after consulting CDPH 11/2012)
 - AB 890 of 2020, effective 2023, will likely remove that restriction
- SB 422 (Beyond AIDS spons.), effective 2012, permits referral of services to public health
 - *Revised wording shown in orange italics, below*

CA law, partner services

- **121015.** (a) Notwithstanding Section 120980 or any other provision of law, no physician and surgeon who has the results of a confirmed positive test to detect HIV infection of a patient under his or her care shall be held criminally or civilly liable for disclosing to a person reasonably believed to be the spouse, or to a person reasonably believed to be a sexual partner or a person with whom the patient has shared the use of hypodermic needles, or to the local health officer *or designated local public health agency staff for HIV partner services*, that the patient has tested positive on a test to detect HIV infection, except that no physician and surgeon shall disclose any identifying information about the individual believed to be infected, except as required in Section 121022* *or with the written consent of the individual pursuant to subdivision (g) of Section 120980.*

– (**Comment: Section 121022 relates to reporting of HIV infections*)

CA law, partner services, contd.

- (b) No physician and surgeon shall disclose the information described in subdivision (a) unless he or she has first discussed the test results with the patient and has offered the patient appropriate educational and psychological counseling, that shall include information on the risks of transmitting the human immunodeficiency virus to other people and methods of avoiding those risks, and has attempted to obtain the patient's voluntary consent for notification of his or her contacts. The physician and surgeon shall notify the patient of his or her intent to notify the patient's contacts prior to any notification.

CA law, partner services, contd.

- When the information is disclosed to a person reasonably believed to be a spouse, or to a person reasonably believed to be a sexual partner, or a person with whom the patient has shared the use of hypodermic needles, the physician and surgeon shall refer that person for appropriate care, counseling, and followup. This section shall not apply to disclosures made other than for the purpose of diagnosis, care, and treatment of persons notified pursuant to this section, or for the purpose of interrupting the chain of transmission.
- *(Comment: Testing of contacts, and offering or referring for immediate onset of treatment if positive, is critical; may include source, may not yet be infected, or may be most recently infected.)*

CA law, partner services, contd.

- (c) This section is permissive on the part of the attending physician, and all requirements and other authorization for the disclosure of test results to detect HIV infection are limited to the provisions contained in this chapter, Chapter 10 (commencing with Section 121075) and Sections 1603.1 and 1603.3. No physician has a duty to notify any person of the fact that a patient is reasonably believed to be infected with HIV, except as required by Section 121022.*
 - (**Comment: that is the section on reporting of HIV to public health; **no written consent needed if referral to public health is done at time of reporting of HIV case.***)

CA law, partner services, contd.

- (d) The local health officer *or the designated local public health agency staff for HIV partner services may, without incurring civil or criminal liability*, alert any persons reasonably believed to be a spouse, sexual partner, or partner of shared needles of an individual who has tested positive on an HIV test about their exposure, without disclosing any identifying information about the individual believed to be infected or the physician making the report, and shall refer any person to whom a disclosure is made pursuant to this subdivision for appropriate care and followup.

CA law, partner services, contd.

- Upon completion of the efforts to contact, *alert, and refer* any person pursuant to this subdivision by a local health officer *or the designated local public health agency staff for HIV partner services*, all records regarding that person maintained by the local health officer pursuant to this subdivision, including, but not limited to, any individual identifying information, shall be expunged by the local health officer.
- *(Comment: Expunging is an unfortunate provision from standpoint of public health. If someone is repeatedly identified as a contact, s/he may be the source, but the past notifications will have been expunged.)*

Partner services: discussion

- What changes would you like to see in legal requirements for partner services in California?
- Are the clinics you have worked in performing, or referring to public health to do, partner services when HIV is diagnosed, or when you learn of new sexual or needle-sharing partners?

If you think all this is too complicated...

- So do we!
- You are welcome to work with Beyond AIDS Foundation, to simplify these legal requirements!
- www.beyondaids.org

Reprise of clinical question: HIV screening

- A young adult male patient with a history of risky sexual behavior is in your office, and you recommend HIV screening.
 - Should you only consider screening for patients with risk history? **No, offer to everyone 15-65**
 - Do you need written consent in California? **No**
 - Is there any pre and post-test counseling or anything to document that must be done by law? **Yes, pre and post-test info, and document refusals**
 - Would anything be different if the patient were a pregnant female? **Yes, counseling content different**

Reprise of clinical question: HIV partner services

- A patient who has tested HIV positive has a sexual partner who is unaware of having been exposed.
 - Can a physician legally inform the partner? **Yes, but it is complicated to perform**
 - Can you turn over the task of interviewing the patient for and finding contacts to the local health department? **Yes, if patient signs release, or when first reporting the HIV diagnosis (positive test)**
 - If you determine which partners should be notified, can you ask the local health department to notify them? **Yes, if patient signs release, or when first reporting the HIV diagnosis (positive test)**