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BONELA POLICY PAPER ON HIV/AIDS AND EMPLOYMENT

Introduction

On the 7th, 8th and 9th of October 2002 the Botswana Network on Ethics, Law and HIV/AIDS (BONELA) in partnership with the Botswana Federation of Trade Unions (BFTU) held a drafting workshop on HIV/AIDS, human rights issues and employment. Representatives from trade unions; staff associations; the private sector; non-governmental organizations, including Emang Basadi and the Botswana Network of People Living with HIV/AIDS (BONEPWA); several government departments, including the Labour Department, NACA and AIDS/STD Unit, came together at the Botswana National Productivity Center (BNPC) to work on a draft policy framework as well as identification of key principles for future labour legislation that specifically addresses issues of HIV/AIDS and human rights at the workplace.

The idea for this workshop developed out of a previously held workshop on HIV/AIDS, Employment and Human Rights, which was organized by BONELA in May 2002. One of the recommendations from that workshop was to determine the gaps and weaknesses in the existing legislation and policies and formulate a draft policy framework on HIV/AIDS in the workplace that could be transformed to legislation.

On February 18th, 2003 BONELA, in partnership with the Botswana Council of Commerce, Industry and Manpower (BOCCIM) organized a breakfast seminar with several members of the Private Sector in Botswana to garner their input and comments on the draft policy that was produced at the workshop in October 2002. The general comments from the private sector participants on the draft policy were that it was very worker-centered. Their ultimate aim was to have the voice of employers represented in the policy and to ensure that their concerns were adequately represented.

In 1993, Botswana developed the Botswana National Policy on HIV/AIDS, which focuses on prevention and care and adopts a multi-sectoral approach to the HIV/AIDS epidemic in Botswana. The policy, which was revised in 1998, further addresses HIV/AIDS and Employment and acknowledges the workplace as playing a central role in the lives of young and middle aged adults. It formulates principles with respect to the workers infected with HIV such as confidentiality of personal information regarding HIV status and HIV infection to be treated as any other illness in the workplace.

The Botswana National Policy on HIV/AIDS is in the process of being revised and

the experience gained at these workshops by the participants, who are the key stakeholders in developing this policy document, will assist this revision.

The Policy Problem Statement

In a broad sense, HIV/AIDS affects the workplace in many aspects: it affects productivity; it can increase business costs, and affect the national economy. Productivity is reduced because of increased absenteeism and low employee morale. Business costs are increased because of increased benefits, increased amounts of sick pay, as well as the cost of replacing workers as others become too sick to work, or die. The effect of HIV/AIDS on the Botswana economy is speculative. A report by the Botswana Institute for Development Policy Analysis (BIDPA) on the Macroeconomic Impacts of HIV/AIDS in Botswana, suggested that in 25 years time the economy of Botswana will be 31% smaller than it would otherwise have been if AIDS did not exist.

On a smaller scale, employer and employee relations in the work place are constantly being challenged by the HIV/AIDS epidemic. Workers who suffer from HIV related illnesses or who are infected with HIV face undue stigmatization and discrimination in the workplace, by both their fellow employees and their employers. There have been reported cases of arbitrary dismissal on medical grounds, and forced testing of employees by employers. Additionally, workers whose lives are affected by HIV/AIDS have to take increased leave time; both sick leave and compassionate leave as the number of funerals in Botswana continue to rise. If we are to effectively deal with HIV/AIDS in the workplace, there are needs to be a policy that both employers and employees can refer to when they are faced with these issues.

Fear and misunderstanding of HIV has lead to other questionable employment practices in Botswana such as pre-employment testing, screening and shared confidentiality. The concerns of the employer with regards to retaining staff and recruitment of employees who are capable of performing the tasks they are assigned, must be balanced with the concerns of the employees of maintaining confidentiality, protection from discrimination and protection of their employees benefits.

Transmission of HIV in the workplace is very rare even in high-risk professions such as doctors and emergency medical workers. However, there is still a need for all members of the workplace to be aware of how to prevent accidental transmission as well as being equipped (intellectually and practically) to practice universal precautions if a workplace accident should occur. Although transmission at work is rare, there are specific populations and specific types of employment that, due to certain social and environmental factors, carry a higher risk of HIV transmission. Employers need to recognize this and make adjustments in their policies to accommodate for it as well as provide opportunities for their employees to learn more about the virus for education and prevention purposes.

Issues relating to HIV in the workplace are a global problem; it is not specifically a problem for Botswana. However, given the prevalence of HIV in Botswana, it presents a more urgent problem than in other areas of the world. The following key principles have been developed specifically for Botswana given the current context, but they have taken into account a number of policy guidelines and best practices from various other regional and international sources. Through this integrated approach, we have hopefully developed a set of key principles that will work for both employees and employers in Botswana, as well as providing guidelines for organizations and companies to develop their own individual HIV policies.

Problem Areas

The key problem areas that were identified by stakeholders at the Drafting Workshop on Employment and HIV/AIDS are the following:

1. Pre- and post-employment mandatory testing of workers;
2. Breach of confidentiality, shared confidentiality and lack of informed consent;
3. Vulnerable groups at the work place;
4. Discrimination and victimization of HIV infected workers;
5. Lack of job security/employment protection for HIV infected/affected workers;
6. Insufficient care and support for workers;
7. Gender inequality and disempowerment of women; and
8. Prevention of HIV/AIDS at workplace (education and occupational hazards)

The Key Principles

The following are key principles that were identified by stakeholders:

1. Employment protection and job security of infected and affected workers;
2. Prohibition of testing for HIV/AIDS for purposes of recruitment, promotion or other benefits;
3. Confidentiality of personal information including medical information;
4. Non-discrimination of HIV infected workers;
5. Protection of vulnerable groups;
6. Care and support for HIV infected workers;
7. Gender equality and empowerment;
8. Prevention of HIV at the workplace; and
9. Provision of education and awareness programs.

1. **Employment Protection and Job Security of Infected and Affected Workers**

The prevalence of HIV infections in Botswana has led, in a lot of cases to employees overextending their allotted leave days. This is due to illness, visits to medical practitioners, taking care of sick relatives and attending funerals.

There have been limited allowances for people who need to exceed their allowable number of leave days; this is strikingly obvious in the private sector where the leave allowances are less generous than the public sector. There have been instances where such employees have been dismissed from their posts for misconduct because they have missed too many days, or they have been dismissed because they are too ill to continue in the position for which they have been hired.

It is costly for employers to re-advertise, re-hire, and re-train new employees to cover staff losses with regards to HIV/AIDS and other illnesses. This leads to increased operating costs and reduces efficiency and productivity.

Although it is often said that HIV should be treated as any other terminal or chronic illness, this cannot be done at the expense of understanding the unique social situation, which HIV presents. Legislation is required to specifically protect PLWAs because of the stigma associated with HIV/AIDS.

Key Principle: Employers should not terminate the employment of an employee on the diagnosis of a chronic or terminal illness.

Key Principle: Employers should reasonably accommodate leave requirements of workers who are infected and affected by chronic illnesses.

(“Reasonable” would be defined in the regulations after legislation is drafted, but is generally considered to be what a regular man or woman on the street would consider reasonable.)

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Strategies-^[1]:-

These strategies can only be employed if the employer is aware of the status of the employee. If the employee refuses to disclose the reasons for his/her increased absence or leave requirements he cannot reasonably be expected to be protected under this key principle. However, the employer is responsible for creating an environment where the employee would feel safe to disclose his/her status without fear of termination, discrimination, or barred access to promotion and training.

The government should compel the employer to comply with the policies on HIV/AIDS and employment.

Employers should introduce flexible leave policies where possible to accommodate

their workers. They should also consider options such as: flexible work hours, rest time, time-out facilities or job sharing opportunities, where such options are feasible.

Employers should offer an alternative employment opportunity or a transfer to lighter duties where these opportunities are available, in the event that an employee becomes medically unfit to fulfil the agreement of their original contract.

Employers should ensure that they create a safe and open environment in the workplace so employees and employers can communicate their issues and needs with each other to ensure that they are both reasonably accommodated.

There should be an introduction of a medical board under the Employment Act for medical assessments of workers in the private sector for fitness to work. In the absence of a medical board, a medical practitioner should be agreed upon by both parties and there should be an allowance for a second opinion before a decision about retirement on medical grounds can be made.

The employer should consider giving an employee suffering from chronic illness unpaid leave.

[Suggestion from the Private Sector, that a second opinion can be sought at the cost of the employee] What does international law say about this?

(These principles are supported by the ILO Code of Practice on HIV/AIDS in Section 5.2.(j), by the Industrial Court of Botswana's decision [ref. Case No. IC 64/98 and IC 68/97] which state you can not dismiss someone strictly on medical grounds, and the National Industrial Code of Practice, s47.)

2. Testing for HIV/AIDS for purposes of recruitment, promotion or other benefits

Preamble

One of the major barriers in developing an effective response to HIV/AIDS to date, and an area that has been largely neglected within Botswana and internationally, is integrating legal, ethical and human rights issues into the national response.

Recognition of the rights of PLWAs is a fundamentally important principle from a legal perspective, but also from a public health perspective. The public health rationale for the incorporation of human rights into the response to HIV is that it assists in creating an environment within which individuals are more empowered to protect themselves against the infection. By not forcing people to test, we allow them to feel safe and protected and prevention strategies become more effective as people are more apt to access them.

The rationale for mandatory testing is strictly limited, especially in the context of employment. If people are forced to undergo mandatory testing they become frightened and stay away from medical facilities. It creates fear and resistance and is counterproductive to the aims of HIV/AIDS prevention and improved care and does not help control the epidemic.

Mandatory testing is also prohibitively costly on a wide scale and therefore is difficult to justify due to the narrow confines in which HIV is transmitted. There is no risk of acquiring or transmitting HIV between workers except for medical officers and police dealing with emergency accidents, and this risk is negligible if the proper precautions are taken.

A further concern with pre-employment testing, or testing for the purposes of training and promotion is that testing can only determine your present HIV status. It cannot predict that a person will never contract HIV in the future, or could even conceivably be in the window period. Especially, in the context of Botswana where 30% of the entire population is HIV positive, it is not inconceivable that employers who attempt to screen their prospective employees for HIV will still end up with a high HIV prevalence in their workforce.

Key Principle: Testing for HIV for the purposes of consideration for employment or, promotion should not take place.

Testing for training can take place, given the length of the training and the cost of the investment is substantial enough to warrant the precaution. The scale on which cost/time would be weighed will be developed with input from international labour experts and local counterparts. This should be discussed by the legislatures first.

Strategies:

Voluntary testing should be encouraged (preferably outside the workplace) and counseling within the workplace should be made available for workers. The employer should provide pre- and post-test counselling services when a worker consents to undergo testing for the **worker's** benefit.

Employers may conduct anonymous unlinked testing on workers to determine the impact of HIV on the organization's future. In situations, where the business is too small to allow for anonymous unlinked testing, companies could join forces (i.e. the Printing industry) and test all their employees together to allow them to have a more specific idea of the impact that HIV will have on their future.

The public health rationale for the incorporation of human rights into the HIV

response should be incorporated into workplace HIV policies to ensure the creation of a safe and empowering environment for HIV infected employees.

Universal precautions should be standard training for employees in higher risk jobs such as the medical profession and police officers. Universal precautions should also be included in any other workplace training activities and access to gloves and other prevention paraphernalia should be readily available.

(This is supported by the ILO Code of Practice on HIV/AIDS section 4.8, and the International Guidelines on Human Rights and HIV/AIDS, section 16.)

3. Confidentiality of personal information

Preamble

Maintaining strict confidentiality is essential in maintaining healthy working relations between employers and employees and it also reduces the risk of stigma and discrimination. If an employee knows that his/her status will be kept strictly confidential it will be easier for them to disclose their status and by doing so, it will be easier for the employer to adequately address the related issues that arise, such as sick leave and flexible working hours.

Privacy over health matters is a basic human right and is a fundamental principle of ethics in medical practice. As HIV/AIDS is **not** a modifiable disease under the Public Health Act then a person's status cannot be disclosed without his/her consent under ANY circumstances.

Employers have not been keeping the information on the HIV/AIDS status of workers strictly confidential. Medical information regarding some employees is, in some cases, easily accessible to other employees at the workplace.

The principle of shared confidentiality, as purported by the Botswana National Policy and the Medical Practitioners Act, whereby medical practitioners may divulge information to persons having close, regular contact with patient without patient's consent is very open to being abused. There is no effective regulation to ensure that PLWAs are protected from having their confidential matters divulged without their consent. There is no definition of 'close, regular contact' and who would fall under this category. It is conceivable that this provision could be extended to include employers further negating the constitutional right to privacy in Botswana.

Key Principle: An employer should not disclose any information relating to the HIV status of any worker acquired in the course of duties without obtaining the written consent of worker. Shared confidentiality should be restricted to those people to whom the PLWA has agreed to disclose.

Strategies:

All employers should have a HIV/AIDS policy, which protects confidentiality of all personal information including the HIV/AIDS status of the employee.

The practice of shared confidentiality should be removed from public policy and the strictest confidentiality of PLWAs should be maintained.

People should be encouraged to share their HIV status with those people who are in regular, close contact with them and they should be provided with counseling and support on the best way to approach this.

(This is supported by the ILO Code of Practice on HIV/AIDS and the International Guidelines on HIV/AIDS and Human Rights.)

4. Non discrimination of HIV infected Workers

Preamble

The stigma attached to HIV/AIDS as a disease tends to undermine the human rights of people living with HIV/AIDS. Workers living with the virus are affected by discrimination in the workplace because of the stigma attached to HIV/AIDS. There is a need to reaffirm the rights not to be discriminated against in general, and in particular the work place.

Key Principle: There shall be no discrimination based on the real or perceived HIV status of a worker or his or her family. Any prejudice with respect to particular job, based on the inherent requirements of the job, shall not be deemed discrimination.

Strategies:

Employers should develop and implement education programmes on HIV/AIDS at the work place.

The Employment Act should provide for a special provision of non-discrimination based on state of health due to HIV/AIDS and other chronic illnesses.

There should be decisive sanctions or penalties in case of contraventions of non-discrimination.

The employer should not only reasonably accommodate workers living with HIV/AIDS but also create an environment conducive to allowing HIV infected workers to work as long as they are medically fit to work.

(This is supported by the ILO Code of Practice on HIV/AIDS, section 4.2, and the Botswana Public Service Code of Conduct on HIV/AIDS, and the National Policy on HIV/AIDS.)

5. Protection of vulnerable groups

Preamble

The stigma regarding HIV/AIDS undermines the prevention of the spread of the disease. There is a need to offer specific protection to some groups, which for a number of reasons are particularly vulnerable to the pandemic. Vulnerability refers to socioeconomic disempowerment, cultural context, and work situations that make workers susceptible to the risk of infection. This includes physical or mental conditions.

The affected groups are:

- a) Women
- b) Medical personnel
- c) Disabled persons
- d) Uniformed forces or disciplinary forces
- e) Mobile workers
- f) Children*

<p>Key Principle: The most effective policies and strategies should be applied to protect vulnerable people in order to reduce transmission of HIV/AIDS.</p>

Strategies

Work places, which are prone to accidents, should be exposed to medical services and other safety facilities like gloves.

Educational and counseling programmes need to be implemented in the work place. In this case the employers should ensure counseling services to the employees.

Specific programmes, addressing factors, which will increase the risk of infection, need to be developed by the employer in consultation or/and collaboration with the workers organizations.

Ensure, so far as possible and as a priority consideration, that spouses are not separated for long periods of time because of working conditions.

Promote adoption of gender sensitive policies at the workplace and develop programmes that encourage both men and women to question the unequal power

balance in relationships and to encourage wide debate on cultural issues that have a negative effect on the status of women.

Develop sexual harassment policies for the workplace.

6. Care and Support for HIV infected workers

Preamble

Workers infected with HIV do not receive benefits tailored to meet their needs as compared to workers suffering from other illnesses.

Employers do not take responsibility to provide for a social security system and to formulate programmes that provide direct health care to workers suffering from HIV/AIDS.

Employment benefits mean care and support services such as health care services, prevention programmes, provision of protective clothing, counseling and first aid kits.

Key Principle: Employers should make reasonable efforts to make comprehensive, cost-effective and affordable care accessible to people living with HIV/AIDS in all work places including both formal and informal sectors.

Strategies

Medical treatment for the worker, spouse and children should be promoted. Where the worker is single then he/she shall identify a next of kin or any close relations. There is a corresponding duty on the worker to take responsibility to educate his/her partners(s).

The employer should ensure that there is accessibility to condoms in the work place. Apart from that, the employer should organize for treatment of opportunistic diseases on antiretroviral drugs.

Employers should make reasonable efforts to select the most beneficial insurance scheme for their employees. This should depend on the magnitude or size of the business.

(This is supported by the ILO Code of Practice on HIV/AIDS section 4.3.)

7. Gender Equality and empowerment

Preamble

Gender roles and gender relationships make women more vulnerable to infection with HIV. Women and girls are more likely to be victims of sexual violence and are not always able to negotiate safe sex practices, even with their husbands.

Women are vulnerable to sexual harassment in the workplace, including sexual assault.

Cultural practices, including women as the sole caregiver further increases the women's burden in the context of HIV.

Key Principle: Men and women should be given equal opportunity and equal chance for advancement in the sphere of employment. Sexual harassment should not be tolerated.

Strategies

The status of women in skills training and employment should be improved.

The employer should create condition that eliminates customs and traditions that promote the unequal power balance between the sexes in the work place.

Social partners should recognize that women have been marginalized and formulate educational programmes to strengthen the women's confidence in the working world.

The employer should put in place gender sensitive policies and all laws that discriminate on the basis of gender should be reviewed. (Maternity leave and BDF employment policies).

Sexual harassment in employment should be formally prohibited and facilities to report cases should be provided.

8. Prevention of HIV at workplace

Preamble

Occupational transmission of HIV at the workplace is very rare, even in high-risk professions such as the medical profession or emergency health workers.

The biggest challenge for the workplace with regards to HIV/AIDS is not exposure at work, but ensuring a conducive working environment for those who are infected and affected while maintaining an acceptable level of efficiency and productivity.

Employers need to ensure that employees are well informed about how to prevent

accidental exposure and how to protect themselves in their life outside work.

Key Principle: In a workplace where workers are a higher risk to be infected by HIV or have regular contact with human blood *additional* medical services and safety items should be made available. In low risk workplaces, employers should provide information on how to prevent HIV outside of work.

Strategies

Universal precautions for HIV prevention should be taught as a standard procedure in all work places, and especially those that are considered high risk.

The employer should ensure access to safety facilities like surgical gloves in work places

The employer should ensure access to condoms in the work place.

Information about HIV/AIDS should be available at the work place on how to manage understand the impact of HIV/AIDS. There should also be programmes available to modify risky sexual behavior.

Counseling should be provided together with the promotion and distribution of condoms, and voluntary HIV testing should be encouraged.

The government should put in place education programme that gives priority HIV/AIDS control and prevention, and this should be adopted by the stakeholders.

(This is supported by the ILO Code of Practice on HIV/AIDS and the National Policy on HIV/AIDS, section 4.9.)

General Recommendations for HIV/AIDS policy with regards to Employment.

1. The Government of Botswana should expand the scope of the anti-discrimination clause (article 1, paragraph 1(b) of Convention 111 to include PLWAs.
2. The Government of Botswana should sign and ratify the Convention on Economic, Social and Cultural Rights and incorporate second and third generation rights into the Constitution.
3. The Government of Botswana should sign and ratify all of the relevant ILO conventions. (i.e. C.158, C.159, C.155, C.166,)
4. There should be no disclosure/shared confidentiality of another person's HIV status unless required by any other law within the working places.
5. Domestic Workers, Farm Workers be included among vulnerable groups. Should be continued efforts to educate the workers and the employers about

their rights and responsibilities.

6. The rights of children should be protected in the workplace and that age of work be reviewed along with other legislation in Botswana and be made consistent with other pieces of national and international legislation.
7. Surgical gloves and condoms to be made standard issue in all private sector and public sector workplaces.
8. Institutional mechanisms for monitoring standards be strengthened through the Ministry of Labour and Home Affairs, Staff Associations, and Trade Unions.
9. Cost sharing should be introduced with regards to medical aid schemes and treatment between employers and workers
10. A contributory fund should be established to facilitate medical aid scheme.
11. Workers should be encouraged to join medical aid schemes.
12. There should be provisions in counseling services within each on company or through established service providers.
13. Workers should be encouraged to submit to voluntary testing and counseling and that the government provides facilities for this.
14. There is need by the employer to emphasize the issue of social security, which includes more than medical aid or free health care.

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– Children are included because the Employment Act stipulates that children over the age of 15 can work; yet international law still considers them children until they are 18.