

Nebraska

Analysis

PLHIV face enhanced sentences under the Nebraska statute which criminalizes assault with a bodily fluid against a public safety officer.

In Nebraska, it is a Class I misdemeanor, punishable by imprisonment of not more than one year and a fine of up to \$1000¹, to knowingly strike a public safety officer with any bodily fluid.² This charge is elevated to a class IIIA felony if the fluids came from a person living with HIV, Hepatitis B, or Hepatitis C and strike the officer's eyes, mouth or skin.³

"Public safety officer" is a broadly includes medical personnel, law enforcement, and department of correctional services personnel who are performing their official duties at the time of the incident.⁴ "Bodily fluid" is defined as any naturally produced secretion or waste product generated by the human body including saliva, urine, mucus, vomit, seminal fluid, or feces.

The HIV-specific provision of this statute does not require that transmission of disease occur for a conviction.⁵ Contact with saliva and urine does not result in the transmission of HIV, Hepatitis B, or Hepatitis C.⁶

While the Nebraska statute requires intent as an element of this offense, and imposes additional requirements before the sentence enhancement provision can take effect, the facts in these scenarios can be difficult to determine conclusively.

Public safety officers are able to file for an order to compel individuals charged with assault with a bodily fluid to undergo STI testing.

Nebraska law allows a public safety officer who is an alleged victim of assault with a bodily fluid to apply for a court order authorizing the collection of any evidence that may assist in determining if the alleged perpetrator of the assault is infected with HIV, Hepatitis B, or Hepatitis C.⁷ The alleged victim

¹ NEB. REV. STAT. ANN. § 28-106 (2016).

² NEB. REV. STAT. § 28-934 (2016).

³ NEB. REV. STAT. § 28-934 (3) (2016); NEB. REV. STAT. ANN. § 28-105 (2016).

⁴ NEB. REV. STAT. § 28-934 (5b) (2016).; NEB. REV. STAT. § 28-934 (5a) (2016).

⁵ NEB. REV. STAT. § 28-934 (3) (2016).

⁶ CDC, *Body Fluids That Transmit HIV*, (Jul 12, 2021 10:10AM), <https://www.cdc.gov/hiv/basics/hiv-transmission/body-fluids.html>.

⁷ NEB. REV. STAT. § 28-934 (4) (2016).

only needs to show probable cause by filing an affidavit which (1) states that the assault occurred and (2) identifies a probable source of the bodily fluids used in the assault.⁸

Once granted, such an order authorizes the collection of evidence including fluids, medical records, and scientific testing and analysis.⁹ The highly personal nature of the information that can be collected under this order, as well as the relatively low threshold of evidence the public safety officer in question is required to provide, threatens the safety and confidentiality of the defendant.

Nebraska courts can compel individuals convicted of sexual assault to undergo HIV testing.

When an individual is convicted of any offense involving sexual, the subject of the assault may request that the defendant, as part of their sentence, undergo testing for HIV. This request will be granted if the judge finds that the circumstances of the offense represent a possibility of HIV transmission. The results of this test will be shared with the subject of the assault, the person convicted, the court, and the Department of Health and Human Services.¹⁰ If such an order already has been granted, the filing of a notice of appeal will not automatically halt the administration of testing. If the person convicted tests positive for HIV, they will be provided with appropriate counseling and referral to medical care by the Department of Correctional Services.¹¹

The State may quarantine and isolate persons to prevent or limit the spread of communicable disease.

The Nebraska Department of Health and Human Services (the department) has broad authority, “to control and suppress sexually transmitted diseases.”¹² To that end, the department declares STDs to be, “contagious, infectious, communicable, and dangerous to public health.”¹³ Moreover, the department may, upon finding there has been wide-spread exposure to a communicable disease that presents a risk of death or serious long-term disabilities to any person, may quarantine or isolate individuals who may pose a risk of further exposure.¹⁴ For purposes of the applicable regulations, “communicable disease” is defined as, “an illness due to an infectious or malignant agent, which is capable of being transmitted directly or indirectly to a person from an infected person or animal though the agency of an intermediate animal, host, or vector, or through the inanimate environment.”¹⁵

Quarantine and isolation must involve the least restrictive practical means, and should last no longer than necessary, to ensure that the restricted individual no longer poses a public health threat.¹⁶ Orders for such measures must specify information such as statement of facts warranting the confinement, the

⁸ *Id.*

⁹ *Id.*

¹⁰ NEB. REV. STAT. § 29-2290 (2016).

¹¹ NEB. REV. STAT. § 29-2290 (5) (2016).

¹² NEB. REV. STAT. ANN. §§ 71-502.02, 71-501(3) (2016).

¹³ NEB. REV. STAT. ANN. § 71-502.01 (2016). STIs include bacterial vaginosis, candidiasis, chancroid, chlamydia, genital herpes, gonorrhea, granuloma inguinale, hepatitis B, HIV, HPV, lymphogranuloma venerum, syphilis, and trichomoniasis. 173 NEB. ADMIN. CODE § 1-004.06 (2016).

¹⁴ 173 NEB. ADMIN. CODE §§ 6-003, 6-004 (2016).

¹⁵ 173 NEB. ADMIN. CODE § 6-002 (2016).

¹⁶ 173 NEB. ADMIN. CODE § 6-005 (2016).

place and duration of confinement, and conditions for termination of the order.¹⁷ Persons for whom such orders are entered have the right to timely notice of the order, may request a hearing to determine the reasonableness of the measures ordered, and may appeal the hearing decision to the District Court.¹⁸

The Supreme Court of Nebraska has upheld the department's broad authority to act to limit the spread of communicable diseases.¹⁹ In the 1919 case *Brown v. Manning*, the Court denied a habeas corpus petition for a sex worker who was found to have a "communicable venereal virus" and subsequently isolated.²⁰ The petitioner had been arrested for, "being an inmate of an ill-governed house" and was ordered to submit to medical examination.²¹ The Court denied the writ because she was only isolated "for such reasonable time and in such reasonable manner as to prevent the danger of said petitioner from communicating such infection to others, and until the danger of the infection should be removed."²²

Important note: *While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.*

¹⁷ 173 NEB. ADMIN. CODE § 6-006 (2016).

¹⁸ 173 NEB. ADMIN. CODE §§ 6-007, 6-008 (2016).

¹⁹ See, e.g., *Brown v. Manning*, 172 N.W. 522 (Neb. 1919).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

Revised Statutes of Nebraska

*Note: Provisions imposing punitive restrictions or listing criminal sentences are denoted with ** and are generally listed first. Thereafter, provisions within a particular title are listed numerically.*

CHAPTER 28, CRIMES AND PUNISHMENTS

NEB. REV. STAT. § 28-934 (2016) **

Assault with a bodily fluid against a public safety officer; penalty; order to collect evidence

- (1) Any person who knowingly and intentionally strikes any public safety officer with any bodily fluid is guilty of assault with a bodily fluid against a public safety officer.
- (2) Except as provided in subsection (3) of this section, assault with a bodily fluid against a public safety officer is a Class I misdemeanor.
- (3) Assault with a bodily fluid against a public safety officer is a Class IIIA felony if the person committing the offense strikes with a bodily fluid the eyes, mouth, or skin of a public safety officer and knew the source of the bodily fluid was infected with the human immunodeficiency virus, hepatitis B, or hepatitis C at the time the offense was committed.
- (4) Upon a showing of probable cause by affidavit to a judge of this state that an offense as defined in subsection (1) of this section has been committed and that identifies the probable source of the bodily fluid or bodily fluids used to commit the offense, the judge shall grant an order or issue a search warrant authorizing the collection of any evidence, including any bodily fluid or medical records or the performance of any medical or scientific testing or analysis, that may assist with the determination of whether or not the person committing the offense or the person from whom the person committing the offense obtained the bodily fluid or bodily fluids is infected with the human immunodeficiency virus, hepatitis B, or hepatitis C.
- (5) As used in this section:
 - (a) Bodily fluid means any naturally produced secretion or waste product generated by the human body and shall include, but not be limited to, any quantity of human blood, urine, saliva, mucus, vomitus, seminal fluid, or feces; and
 - (b) Public safety officer includes any of the following persons who are engaged in the performance of their official duties at the time of the offense: A peace officer; a probation officer; a firefighter; an out-of-hospital emergency care provider as defined in subsection 28-929.01; an employee of a county, city, or village jail; an employee of the Department of Correctional Services; an employee of the ... secure youth confinement facility operated by the Department of Correctional Services, if the person committing the offense is committed to such facility; an employee of the Youth Rehabilitation and Treatment Center-Geneva or the Youth Rehabilitation and Treatment Center-Kearney; or an employee of the Department of Health and Human Services if the person committing the offense is committed as a dangerous sex offender under the Sex Offender Commitment Act.

NEB. REV. STAT. ANN. § 28-105 (2016) **

Felonies; classification of penalties; sentences; where served; eligibility for probation; post-release supervision; applicability of changes to penalties

(1) For purposes of the Nebraska Criminal Code and any statute passed by the Legislature after the date of passage of the code, felonies are divided into ten classes which are distinguished from one another by the following penalties which are authorized upon conviction:

Class IIIA felony:

Maximum – three years imprisonment and eighteen months post-release supervision or ten thousand dollars, or both

Minimum – none for imprisonment and nine months post-release supervision if imprisonment is imposed

NEB. REV. STAT. ANN. § 28-106 (2016) **

Misdemeanors; classification of penalties; sentences; where served.

(1) For purposes of the Nebraska Criminal Code and any statute passed by the Legislature after the date of passage of the code, misdemeanors are divided into seven classes which are distinguished from one another by the following penalties which are authorized upon conviction:

Class I misdemeanor:

Maximum – not more than one year imprisonment, or one thousand dollars fine, or both

Minimum – none

CHAPTER 29, CRIMINAL PROCEDURE

NEB. REV. STAT. § 29-2290 (2016)

Test, counseling, and reports; when required; Department of Correctional Services; Department of Health and Human Services; duties; cost; appeal; effect.

(1) Notwithstanding any other provision of law, when a person has been convicted of sexual assault pursuant to sections 28-317 to 28-320, sexual assault of a child in the second or third degree pursuant to section 28-320.01, sexual assault of a child in the first degree pursuant to section 28-319.01, or any other offense under Nebraska law when sexual contact or sexual penetration is an element of the offense, the presiding judge shall, at the request of the victim as part of the sentence of the convicted person when the circumstances of the case demonstrate a possibility of transmission of the human immunodeficiency virus, order the convicted person to submit to a human immunodeficiency virus antibody or antigen test. Such test shall be conducted under the jurisdiction of the Department of Correctional Services. The Department of Correctional Services shall make the results of the test available only to the victim, to the parents or guardian of the victim if the victim is a minor or is mentally incompetent, to the convicted person, to the parents or guardian of the convicted person if the convicted person is a minor or mentally incompetent, to the court issuing the order for testing, and to the Department of Health and Human Services.

(2) If the human immunodeficiency virus test indicates the presence of human immunodeficiency virus infection, the Department of Correctional Services shall provide counseling to the convicted person regarding human immunodeficiency virus disease and referral to appropriate health care and support services.

(3) The Department of Correctional Services shall provide to the Department of Health and Human Services the result of any human immunodeficiency virus test conducted pursuant to this section and information regarding the request of the victim. The Department of Health and Human Services shall notify the victim or the parents or guardian of the victim if the victim is a minor or mentally incompetent and shall make available to the victim counseling and testing regarding human immunodeficiency virus disease and referral to appropriate health care and support services.

(4) The cost of testing under this section shall be paid by the convicted person tested unless the court has determined the convicted person to be indigent.

(5) Filing of a notice of appeal shall not automatically stay an order that the convicted person submit to a human immunodeficiency virus test.

(6) For purposes of this section:

(a) Convicted shall include adjudicated under juvenile proceedings;

(b) Convicted person shall include a child adjudicated of an offense described in subsection (1) of this section; and

(c) Sentence shall include a disposition under juvenile proceedings.

(7) The Department of Correctional Services, in consultation with the Department of Health and Human Services, shall adopt and promulgate rules and regulations to carry out this section.

CHAPTER 71, PUBLIC HEALTH AND WELFARE

NEB. REV. STAT. ANN. § 71-501 (2016)

Contagious diseases; local public health department; county board of health; powers and duties.

(3) The local public health department or the county board of health shall make rules and regulations to safeguard the health of the people and prevent nuisances and insanitary conditions and shall enforce and provide penalties for the violation of such rules and regulations for the county or counties under its jurisdiction except for incorporated cities and villages. If the local public health department or the county board of health fails to enact such rules and regulations, it shall enforce the rules and regulations adopted and promulgated by the Department of Health and Human Services.

NEB. REV. STAT. ANN. § 71-502.01 (2016)

Sexually transmitted diseases; enumerated.

Sexually transmitted diseases are declared to be contagious, infectious, communicable, and dangerous to the public health. Sexually transmitted diseases shall include, but not be limited to, syphilis, gonorrhea, chancroid, and such other sexually transmitted diseases as the Department of Health and Human Services may from time to time specify.

NEB. REV. STAT. ANN. § 71-502.02 (2016)

Sexually transmitted diseases; rules and regulations.

The Department of Health and Human Services shall adopt and promulgate such rules and regulations as shall, in its judgment, be necessary to control and suppress sexually transmitted diseases.

Nebraska Administrative Code

TITLE 173. COMMUNICABLE DISEASES (DEPARTMENT OF HEALTH AND HUMAN SERVICES)

173 NEB. ADMIN. CODE § 1-004.06 (2016)

Sexually Transmitted Diseases

For the purpose of implementing NEB. REV. STAT. S 71-502.01, sexually transmitted diseases include, but are not limited to, the following diseases:

- (1) Bacterial vaginosis;
- (2) Candidiasis;
- (3) Chancroid;
- (4) Chlamydia trachomatic infection;
- (5) Genital herpes infection;
- (6) Gonorrhea;
- (7) Granuloma inguinale;
- (8) Hepatitis B;
- (9) Human immunodeficiency virus (HIV) infection;
- (10) Human papilloma virus (HPV) infection;
- (11) Lymphogranuloma venereum;
- (12) Syphilis; and
- (13) Trichomoniasis.

173 NEB. ADMIN. CODE § 6-002 (2016)

Definitions

Communicable disease, illness, or poisoning means an illness due to an infectious or malignant agent, which is capable of being transmitted directly or indirectly to a person from an infected person or animal through the agency of an intermediate animal, host, or vector, or through the inanimate environment.

Isolation means the separation of people who have a specific communicable disease, illness, or poisoning from healthy people and the restriction of their movement to stop the spread of that disease, illness, or poison. In circumstances where animals are agents of spread of communicable disease, illness, or poisoning, isolation may apply to such animals.

Quarantine directed to identified individuals or defined populations means the restriction of, or conditions upon, the movement and activities of people who are not yet ill, but who have been or may have been exposed to an agent of communicable disease, illness, or poisoning and are therefore potentially capable of communicating a disease, illness, or poison. The purpose is to prevent or limit the spread of communicable disease, illness, or poison. Quarantine of individuals or defined populations generally involves the separation of the quarantined from the general population. In circumstances where animals are agents of spread of communicable disease, illness, or poisoning, quarantine may apply to such animals.

173 NEB. ADMIN. CODE § 6-003 (2016)

Findings

6-003.01 Director Informed: When the Director receives information that a member or members of the public have been, or may have been exposed to a communicable disease, illness, or poisoning by biological, chemical, radiological, or nuclear agents, the Director will review all information under the following provisions to determine if any Directed Health Measure should be ordered. This information may come from:

1. The United States Department of Health and Human Services Centers for Disease Control and Prevention;
2. A Local Public Health Department;
3. Communicable disease surveillance conducted by the Department;
4. Treating health care providers or health care facilities; or
5. Other public health, security, or law enforcement authorities.

6-003.02 Director's Findings: Before ordering a Directed Health Measure, the Director:

1. Must find both:
 - a. That a member or members of the public have been, or may have been exposed; and
 - b. That Directed Health Measures exist to effectively prevent, limit, or slow the spread of communicable disease or illness or to prevent, limit, or slow public exposure to or spread of biological, chemical, radiological, or nuclear agents; and
2. Must find one or more of the following:
 - a. That the exposure presents a risk of death or serious long-term disabilities to any person;
 - b. That the exposure is wide-spread and poses a significant risk of harm to people in the general population; or

c. That there is a particular subset of the population that is more vulnerable to the threat and thus at increased risk; and

3. May make further finding, in assessing the nature of the risk presented:

a. Whether the threat is from a novel or previously eradicated infectious agent or toxin;

b. Whether the threat is or may be a result of intentional attack, accidental release, or natural disaster; or

c. Whether any person(s) or agent(s) posing the risk of communicating the disease are non-compliant with any measures ordered by a health care provider.

6-003.03 Affirmative Findings: If affirmative findings are made pursuant to 173 NAC 6-003.02 and the Director further finds that a delay in the imposition of an effective Directed Health Measure would significantly jeopardize the ability to prevent or limit the transmission of a communicable disease, illness, or poisoning or pose unacceptable risks to any person or persons, the Director may impose any of the Directed Health Measures set out in 173 NAC 6-004

173 NEB. ADMIN. CODE § 6-004 (2016)

Directed Health Measures

6-004.01 Directed Health Measures which may be ordered by the Director are:

6-004.01A Quarantine of:

1. Individuals;

6-004.01B Isolation of Individuals:

1. At home;

2. In a health care facility; or

3. In another designated area

173 NEB. ADMIN. CODE § 6-005 (2016)

Procedures

6-005.02 In determining the nature, scope, and duration of the Directed Health Measure ordered, the Director, based on the information available at the time of the determination, will:

1. Assess the situation and identify the least restrictive practical means of isolating, quarantining, or decontaminating an individual that effectively protects unexposed and susceptible individuals;

2. Select a place of isolation or quarantine that will allow the most freedom of movement and communication with family members and other contacts without allowing disease transmission to others and allow the appropriate level of medical care needed by isolated or quarantined individuals to the extent practicable;

3. For communicable diseases, order that the duration of the Directed Health Measure should be no longer than necessary to ensure that the affected individual or group no longer poses a public health threat;
4. Give consideration to separation of isolated individuals from quarantined individuals. However, if quarantine or isolation is possible in the home(s) of the affected individual(s), individuals may be isolated with quarantined individuals; and
5. Give consideration to providing for termination of the Order under the following circumstances:
 - a. If laboratory testing or examination is available to rule out a communicable condition, the Order may provide that proof of the negative result will be accepted to terminate a Directed Health Measure; or
 - b. If treatment is available to remedy a communicable condition, the Order may provide that proof of successful treatment will be accepted to terminate a Directed Health Measure.

173 NEB. ADMIN. CODE § 6-006 (2016)

Issuance of Orders

6-006.01 Upon a finding pursuant to 173 NAC 6-003 and determination pursuant to 173 NAC 6-004, the Director will issue an Order directed to the affected individual, individuals, entity, or entities.

6-006.02 Orders of the Director imposing Directed Health Measures are effective immediately.

6-006.03 Orders will contain the finding and determination and will order the affected person or persons to comply with the terms of the Order, and will also include the following:

6-006.03A Orders of Isolation will contain the following:

1. Name and identifying information of the individual(s) subject to the order;
2. Brief statement of the facts warranting the isolation;
3. Conditions for termination of the order;
4. Duration of isolation period;
5. The place of isolation;
6. Prohibition of contact with others except as approved by the Director or designee;
7. Required conditions to be met for treatment;
8. Required conditions to be met for visitation if allowed;
9. Instructions on the disinfecting or disposal of any personal property of the individual;
10. Required precautions to prevent the spread of the subject disease;
11. The individual's right to an independent medical exam at their own expense;
12. Provisions to ensure and monitor compliance; and

13. Procedure to request a hearing.

6-006.03B Orders of Quarantine will contain the following:

1. Name, identifying information or other description of the individual, group of individuals, premises, or geographic location subject to the order;
2. Brief statement of the facts warranting the quarantine;
3. Conditions for termination of the order;
4. Specified duration of the quarantine;
5. The place or area of quarantine;
6. Prohibition of contact with others except as approved by the Director or designee;
7. Symptoms of the subject disease and a course of treatment;
8. Instructions on the disinfecting or disposal of any personal property;
9. Precautions to prevent the spread of the subject disease;
10. The individual's right to an independent medical exam at their own expense,
11. Provisions to ensure and monitor compliance; and
12. Procedure to request a hearing.

173 NEB. ADMIN. CODE § 6-007 (2016)

Notice of Orders

6-007.01 Orders to Individuals: Orders directed to individuals will be delivered in a manner reasonably calculated to give the individual actual notice of the terms of the Order consistent with the threat of communicable disease, illness, or poisoning. Personal delivery may be attempted, except in cases when personal delivery would present a risk of spread of disease or exposure to agents that cannot be avoided by measures reasonably available. Electronic transmission by e-mail or telefacsimile will be sufficient, provided that any available means of determining and recording receipt of such notice will be made. If electronic transmission is impossible or unavailable under the circumstances, oral communication by telephone or direct transmission of voice will be sufficient, and such communication will be memorialized at the time it is delivered.

173 NEB. ADMIN. CODE § 6-008 (2016)

Hearing Process

6-008.01 Request for Hearing: Any person subject to an Order under [173 NAC 6](#) may request a contested case hearing to contest the validity of the Order, in accord with the Department's rules of practice and procedure adopted pursuant to the Administrative Procedure Act.

6-008.05 Purpose and Decision: The purpose of the hearing is to determine if the factual bases for the Order exist and the reasonableness of the ordered measures. The Director may affirm, reverse or

modify the Order by a written Findings of Fact, Conclusions of Law and Order to be issued as soon as reasonably possible after the hearing.

6-008.06 Appeal of Hearing Decision: An appeal to the District Court may be taken from the decision of the Director in accord with the Administrative Procedure Act.