

# Delaware

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## Analysis

### **There is no explicit statute criminalizing HIV exposure except for donations.**

There are no statutes explicitly criminalizing HIV transmission or exposure in Delaware other than in the context of organ, tissue, or semen donations. Under Delaware public health laws, it is a felony to intentionally, knowingly, recklessly or negligently use the semen, corneas, bones, organs or other human tissue of a donor who has not been tested for HIV.<sup>1</sup> It is also a felony to intentionally, knowingly, recklessly or negligently use the semen, corneas, bones, organs, or other human tissues donations of a person who has tested positive for HIV.<sup>2</sup> Violation of this statute is punishable by up to five years in prison.<sup>3</sup>

Though there are no statutes explicitly criminalizing HIV transmission or exposure in Delaware, in some states, PLHIV have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in Delaware.

### **Persons with a sexually transmitted disease (“STD”) may be required to undergo mandatory examination and treatment.**

The Director of the Division of Public Health or authorized deputies may mandate that a person reasonably suspected of being infected with an STD undergo examination or treatment.<sup>4</sup> Designation as a suspect case can occur in three ways: 1) a person has positive laboratory results or clinical findings of an STD; 2) A person for whom there is epidemiologic evidence an STD or; 3) A person identified as a sexual contact of an STD case.<sup>5</sup> A person's failure to cooperate voluntarily may result in restrictive measures, including isolation or quarantine.

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<sup>1</sup> DEL. CODE ANN. tit. 16, §§ 2801(b), 2801(c) (2016).

<sup>2</sup> DEL. CODE ANN. tit. 16, § 2801(c) (2016).

<sup>3</sup> DEL CODE ANN. tit. 11, § 4205 (2016).

<sup>4</sup> DEL. CODE ANN. tit.16, § 703 (2016). STDs are defined as conditions that “shall be designated by the Department of Health and Social Services as reportable through rules and regulations published by the Department of Health and Social Services.” DEL. CODE ANN. tit. 16, § 201 (2016). Delaware's list of designated reportable conditions include the following: AIDS, chancroid, chlamydia, granuloma inguinale gonorrhea, hepatitis B, herpes, HPV, HIV, lymphogranuloma venereum, pelvic inflammatory disease, and syphilis. **16-4000-4202 DEL. CODE. REGS. § 6, Appendix I (2016).**

<sup>5</sup> DEL. CODE ANN. tit.16, § 701(f) (2016).

## **Persons with an STD may be subject to isolation or quarantine and penalized with a fine for non-compliance.**

A person known or suspected to have an STD may be subject to restrictive measures if, in the judgment of public health officials, they are a danger to public health and “reasonable efforts . . . to obtain the voluntary cooperation” of the person have failed.<sup>6</sup> The Director of Health may order that the person be examined or tested to confirm the presence of disease, that they report to a health care professional for counseling on the disease and how to avoid infecting others, or that they cease and desist from specified conduct that “endangers the health of others,” despite counseling.<sup>7</sup> Any such order must notify the person that they have a right to be present at a judicial hearing on the order in the Justice of the Peace Court and that they may have an attorney appear on their behalf in the hearing.<sup>8</sup>

Upon refusal of a person to comply with an order, the Director may petition the Justice of the Peace Court for an order of compliance with such order.<sup>9</sup> A hearing on the request is required within 10 days and notice of the place, date and time of the court hearing is made by personal service or certified mail.<sup>10</sup> The Director bears the burden of proof in demonstrating by clear and convincing evidence that the required grounds for the order have been established and it is necessary to protect the public’s health.<sup>11</sup>

If these procedures cannot be satisfied because the Director knows or has reason to believe that a person with an STD presents an “imminent danger to public health,” the Director may bring an action in the Justice of the Peace Court seeking an emergency injunction prohibiting the person from engaging in conduct which threatens the public health or an order for the person to be taken into custody.<sup>12</sup> The person may only be held in custody for 72 hours and any order issued by the court must be subject to review a hearing within 48 hours after the issuance of the order.<sup>13</sup> Notice of both the order and the review hearing must be provided to the individual under restriction “promptly, personally and confidentially.”<sup>14</sup> As above, the Director bears the burden of proof to demonstrate by clear and convincing evidence that the grounds exist for the order.<sup>15</sup> Any resulting order issued by the court must impose conditions no more restrictive than necessary to protect public health.<sup>16</sup> Isolation or quarantine may occur in a state, county, or city prison if no other suitable place is available.<sup>17</sup> The procedural requirements for imposition of isolation or quarantine are also outlined in Delaware’s Administrative Code.<sup>18</sup>

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<sup>6</sup> DEL. CODE ANN. tit.16, §§ 704(a), 704(b) (2016).

<sup>7</sup> DEL. CODE ANN. tit.16, §§ 704(b)(1), 704(b)(2), 704(b)(3) (2016).

<sup>8</sup> DEL. CODE ANN. tit.16, § 704(d)(1) (2016).

<sup>9</sup> DEL. CODE ANN. tit.16, § 704(d)(2) (2016).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> DEL. CODE ANN. tit.16, §§ 705(a)(1), 705(a)(2) (2016).

<sup>13</sup> DEL. CODE ANN. tit.16, §§ 705(b), 705(c) (2016).

<sup>14</sup> *Id.*

<sup>15</sup> DEL. CODE ANN. tit.16, § 705(d) (2016).

<sup>16</sup> DEL. CODE ANN. tit.16, § 705(f) (2016).

<sup>17</sup> DEL. CODE ANN. tit.16, § 706(b) (2016).

<sup>18</sup> **16-4000-4202 DEL. CODE. REGS. § 6** (2016).

A person who violates an order issued by the Director may be subject to a fine of \$100-\$1000.<sup>19</sup> Each separate day that a violation occurs is considered a separate offense for penalty purposes.<sup>20</sup>

***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.

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<sup>19</sup> DEL. CODE ANN. tit.16, § 713(a) (2016).

<sup>20</sup> DEL. CODE ANN. tit.16, § 713(b) (2016).

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## Delaware Code Annotated

*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.*

### TITLE 16, HEALTH AND SAFETY

#### **DEL. CODE ANN. TIT. 16, § 2801 (2016) \*\***

*Establishment of registry; testing of donors; penalties*

(b) All donors of semen for purposes of artificial insemination, or donors of corneas, bones, organs or other human tissue for the purpose of injecting, transfusing or transplanting any of them in the human body, shall be tested for evidence of exposure to human immunodeficiency virus (HIV) and any other identified causative agent of Acquired Immunodeficiency Syndrome (AIDS) at the time of or after the donation, but prior to the semen, corneas, bones, organs or other human tissue being made available for such use. However, when in the opinion of the attending physician the life of a recipient of a bone, organ or other human tissue donation would be jeopardized by delays caused by testing for evidence for exposure to HIV and any other causative agent of AIDS, testing shall not be required prior to the life-saving measures.

(c) No person may intentionally, knowingly, recklessly or negligently use the semen, corneas, bones, organs or other human tissue of a donor unless the requirements of subsection (b) of this section have been met. No person may knowingly, recklessly or intentionally use the semen, corneas, bones, organs or other human tissue of a donor who has tested positive for exposure to HIV or any other identified causative agent of AIDS. Violation of this subsection shall be a class E felony.

### TITLE 11, CRIMES AND CRIMINAL PROCEDURE

#### **DEL. CODE ANN. TIT. 11, § 4205 (2016) \*\***

*Sentence for felonies*

(a) A sentence of incarceration for a felony shall be a definite sentence.

(b) The term of incarceration which the court may impose for a felony is fixed as follows:

(5) For a class E felony up to 5 years to be served at Level V.

### TITLE 16, HEALTH AND SAFETY

#### **DEL. CODE ANN. TIT. 16, § 701 (2016)**

*Definitions*

(e) "Sexually transmitted diseases" (formerly referred to as "venereal diseases"), abbreviated STD, shall be designated by the Department of Health and Social Services as reportable through rules and regulations published by the Department of Health and Social Services pursuant to § 706 of this title upon finding that such diseases:

(1) Cause significant morbidity and mortality; and

(2) Can be screened, diagnosed and treated in a public health control program, or if not, are a major public health concern such that surveillance of disease occurrence is in the public interest.

(f) Any person falling into 1 or more of the following categories is designated as “suspect”:

(1) A person having positive laboratory results or clinical findings of an STD.

(2) A person in whom epidemiologic evidence an STD may exist; and

(3) A person identified as a sexual contact of an STD case.

**DEL. CODE ANN. TIT.16, § 703 (2016)**

*Examination, investigation and treatment of suspected persons*

The Director shall, when in the Director's own judgment it is necessary to protect the public health, make examinations of persons reasonably suspected of being infected with an STD of a communicable nature; examine medical records of suspect or diagnosed cases which may be maintained by a health facility or health care professional; require persons infected with an STD of a communicable nature to report for treatment to a health care professional, public or private, qualified to provide treatment and continue treatment until cured, if possible, and also, when in the Director's own judgment it is necessary to protect the public health, may issue an order seeking to examine, isolate or quarantine persons infected with an STD of a communicable nature or persons suspected of being infected with an STD.

**DEL. CODE ANN. TIT.16, § 704 (2016)**

*Procedure for apprehension, commitment, treatment and quarantine of an infected person*

a) Orders directed to persons with an STD of a communicable nature or restrictive measures on individuals with a communicable STD, as described in this section and in § 705 of this title shall be used when other measures to protect the public health have failed, including reasonable efforts, which shall be documented, to obtain the voluntary cooperation of the individual who may be subject to such an order.

(b) When the Director knows or has reason to believe, because of medical or epidemiological information, that a person has an STD of a communicable nature and is a danger to the public health, the Director may issue an order to:

(1) Require the person to be examined and tested to determine whether the person has an STD of a communicable nature;

(2) Require the person with an STD of a communicable nature to report to a qualified health care professional for counseling on the disease and for information on how to avoid infecting others;

(3) Direct a person with an STD of a communicable nature to cease and desist from specified conduct which endangers the health of others when the Director has determined that reliable information exists to believe that such person has been ordered to report for counseling as provided in paragraph (2) of this subsection and continues to demonstrate behavior which endangers the health of others.

(c) If a person violates a cease and desist order issued pursuant to paragraph (3) of subsection (b) of this section and it is shown that the person is a danger to others, the Director may enforce the cease and desist order by imposing such restrictions upon the person as are necessary to prevent the specific conduct which endangers the health of others. Any restriction shall be in writing, setting forth the name of the person to be restricted and the initial period of time, not to exceed 3 months, during which the order shall remain effective, the terms of the restrictions and such other conditions as may be necessary to protect the public health. The Director shall review appeals for reconsideration from the subject of the order issued pursuant to this subsection.

(d)

(1) Any order by the Director pursuant to subsection (b) or (c) of this section shall indicate to the subject of the order the grounds and provisions of the order and notify such person that if the person refuses to comply with the order the person has a right to be present at a judicial hearing in the Justice of the Peace Court to review the order and that the person may have an attorney appear on the person's behalf in said hearing. Notice of any order by the Director shall either be by personal service or by prepaid certified mail, return receipt requested, at the subject's last known address.

(2) If the subject of the order refuses to comply with the order the Director may petition the Justice of the Peace Court for an order of compliance with such order. If an order of compliance is requested, the Court shall hear the matter within 10 days after the request. Notice of the place, date and time of the court hearing shall be made by personal service or, if the person is not available, shall be mailed to the subject of the order by prepaid certified mail, return receipt requested, at the person's last known address. The burden of proof shall be on the Director to show by clear and convincing evidence that the specified grounds exist for the issuance of the order and for the need for compliance and that the terms and conditions imposed are necessary to protect the public health. Upon conclusion of the hearing, the Court shall issue appropriate orders affirming, modifying or dismissing the order.

(3) If the Director does not petition the Justice of the Peace Court for an order of compliance within 30 days after the subject of the order refuses to comply, the Director's order shall expire automatically and upon application to the Director by the subject of the order, the fact that the order was issued shall be expunged from the records of the Division of Public Health.

(e) Any hearing conducted pursuant to this section shall be closed and confidential, and any transcripts or records relating thereto shall also be confidential.

**DEL. CODE ANN. TIT.16, § 705 (2016)**

*Emergency public health measures*

(a) When the procedures of § 704 of this title have been exhausted or cannot be satisfied as a result of threatened criminal behavior and the Director knows or has reason to believe, because of medical or epidemiological information, that a person has an STD of a communicable nature and that such person presents an imminent danger to the public health, he may bring an action in the Justice of the Peace Court, seeking the following relief:

(1) An injunction prohibiting such person from engaging in or continuing to engage in specific conduct which endangers the public health;

(2) Other appropriate court orders including, but not limited to, an order to take such person into custody, for a period not to exceed 72 hours, and place him in a facility designated or approved by the Director.

(b) A custody order issued pursuant to subsection (a) of this section for the purpose of counseling and testing to determine whether such person has an STD of a communicable nature shall provide for the immediate release from custody and from the facility of any person who tests negative and may provide for counseling or other appropriate measures to be imposed on any person who tests positive. The subject of the order shall be given notice of the order promptly, personally and confidentially, stating the grounds and provisions of the order and notifying such person that if that person refuses to comply with such order that person has a right to be present at a hearing to review the order and that he may have an attorney appear on that person's own behalf at the hearing. If such person contests testing or treatment, no invasive medical procedures shall be carried out prior to a hearing being held pursuant to subsection (c) of this section. Nothing in this section shall be construed to deny a person, as an exercise of religious freedom, the right to rely solely on spiritual means through prayer to prevent or cure disease, provided that the person complies with all control measures, other than treatment, imposed by the health authority or the department that are reasonable and necessary to prevent the introduction, transmission and spread of the disease.

(c) Any order issued by the Justice of the Peace Court pursuant to subsection (a) or (b) of this section shall be subject to review in a court hearing. Notice of the place, date and time of the court hearing shall be given promptly, personally and confidentially to the subject of the court order by the sheriff of the appropriate county or by special process server appointed by the Court. Such hearing shall be conducted by the Court no later than 48 hours after the issuance of the order. Such person has a right to be present at the hearing and may have an attorney appear on that person's own behalf at the hearing. Upon conclusion of the hearing, the Court shall issue appropriate orders affirming, modifying or dismissing the order.

(d) The burden of proof shall be on the Director to show by clear and convincing evidence that grounds exist for the issuance of any court order pursuant to subsection (a), (b) or (c) of this section.

(e) Any hearing conducted by the Justice of the Peace Court pursuant to subsection (a), (b) or (c) of this section shall be closed and confidential, and any transcripts or records relating thereto shall also be confidential.

(f) Any order entered by the Justice of the Peace Court pursuant to subsection (a), (b) or (c) of this section shall impose terms and conditions no more restrictive than necessary to protect the public health.

**DEL. CODE ANN. TIT.16, § 706 (2016)**

*Examination and treatment of prisoners*

(b) Prison authorities of any state, county or city prison shall make available to the Division of Public Health such portion of any state, county or city prison as may be necessary to isolate or quarantine persons known or suspected to have an STD of a communicable nature under the provisions of §§ 703, 704 and 705 of this title, provided that no other suitable place for such isolation or quarantine is available, and shall cooperate with the Division of Public Health in the provision of care and treatment to such persons.

**DEL. CODE ANN. TIT.16, § 713 (2016)**

*Penalties; jurisdiction*

(a) Except for § 702 of this title, whoever violates this chapter or any lawful rule or regulations made by the Department of Health and Social Services under § 707 of this title, or fails to obey any lawful order issued by the Director under this chapter shall be fined not less than \$ 100 nor more than \$ 1,000.

(c) Each separate day that a violation of 6.7 – 6.9his chapter as defined under subsections (a) and (b) of this section continues shall be deemed a separate offense for penalty purposes.

(d) Justices of the peace shall have jurisdiction of offenses under this chapter.

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## **Delaware Administrative Code**

### **TITLE 16, HEALTH AND SAFETY**

**16-4000-4202 CODE DEL. REGS. § 6, APPENDIX I (2016)**

*Control of communicable and other disease conditions*

**Section 6.0: Quarantine and Isolation**

6.2.1 Persons shall be isolated or quarantined if it is determined by clear and convincing evidence that the person to be isolated or quarantined poses a significant risk of transmitting a disease to others with serious consequences. A person's refusal to accept medical examination, vaccination or treatment shall constitute prima facie evidence that said person should be quarantined or isolated.

6.2.2 Isolation or quarantine of any person shall be terminated when such person no longer poses a significant risk of transmitting a disease to others with serious consequences.

6.7 Procedures for isolation and quarantine. The following procedures shall protect the due process rights of individuals:

6.7.1 The Division shall petition the Superior Court for an order authorizing the isolation or quarantine of an individual or groups of individuals. Said petition shall specify the following:

6.7.1.1 The identity of the individual or group of individuals subject to isolation or quarantine;

6.7.1.2 The premises subject to isolation or quarantine;

6.7.1.3 The date and time at which the Division requests isolation or quarantine to commence;

6.7.1.4 The suspected contagious disease, if known;

6.7.1.5 A statement of compliance with the conditions and principles for isolation and quarantine;

6.7.1.6 A statement of the basis upon which isolation or quarantine is justified.

6.7.1.7 A statement of what effort, if any, has been made to give notice of the hearing to the individual or group of individuals to be isolated or quarantined, or the reason supporting the claim that notice should not be required.

6.7.2 Ex parte orders. Before isolating or quarantining a person, the Division shall obtain a written order, which may be an ex parte order, from the Superior Court authorizing such action. An order, which may be an ex parte order, shall be requested as part of a petition filed in compliance with 6.1 through 6.2. The Court shall grant an order, which may be an ex parte order, upon finding by clear and convincing evidence that isolation or quarantine is warranted pursuant to the provisions of this Section. A copy of the authorizing order shall be given to the person ordered to be isolated or quarantined, along with notification that the person has a right to a hearing under subsection (6.7).

6.7.3 Temporary quarantine or isolation pending filing of a petition. Notwithstanding the preceding subsections, the Division may isolate or quarantine a person without first obtaining a written order, which may be an ex parte order, from the Court if a physician determines that any delay in the isolation or quarantine of the person would pose an immediate and severe danger to the public health. Following such isolation or quarantine, the Division shall file a petition within 24 hours. In addition, if the Division exercises its powers, it must provide a written directive to the individuals or groups under temporary quarantine or isolation indicating the identities of the individuals or groups subject to the directive, the premises subject to isolation or quarantine, the date and time that the directive commences, the suspected contagious disease (if known).

6.7.4 Speedy hearing. The Court shall grant a hearing within 72 hours of the filing of a petition when an individual has been isolated or quarantined.

6.7.5 Consolidation of claims. The Court may order consolidation of individual claims into a group of claims where:

6.7.5.1 The number of individuals involved or to be affected is so large as to render individual participation impractical;

6.7.5.2 There are questions of law or fact common to the individual claims or rights to be determined;

6.7.5.3 The group claims or rights to be determined are typical of the affected individuals' claims or rights; and

6.7.5.4 The entire group will be adequately represented in the consolidation, giving due regard to the rights of affected individuals.

6.8 Relief for isolated and quarantined persons.

6.8.1 On or after 10 days following a hearing, a person isolated or quarantined pursuant to the provisions of this section may request in writing a Court hearing to contest his or her continued isolation or quarantine. The hearing shall be held within 72 hours of receipt of such request, excluding Saturdays, Sundays and legal holidays. A request for a hearing shall not alter the order of isolation or quarantine. At the hearing, the Division must show by clear and convincing evidence that continuation of the isolation or quarantine is warranted because the person poses a significant risk of transmitting a disease to others with serious consequences.

6.8.2 A person isolated or quarantined pursuant to the provisions of this section may request a hearing in the Superior Court for remedies regarding his or her treatment and the terms and conditions of such quarantine or isolation. Upon receiving a request for either type of hearing, the Court shall fix a date for a hearing. The hearing shall take place within 10 days of the receipt of the request by the Court. The request for a hearing shall not alter the order of isolation or quarantine.

6.8.3 If upon a hearing, the Court finds that the isolation or quarantine of the individual is not warranted under the provisions of this section, then the person shall be immediately released from isolation or quarantine. If the Court finds that the isolation or quarantine of the individual is not in compliance with the provisions of this section, the Court may then fashion remedies appropriate to the circumstances of the necessity for the isolation or quarantine and in keeping with the provisions of this section.

6.8.4 No person shall be permanently terminated from employment by a Delaware employer as a result of being isolated or quarantined pursuant to this section. However, this paragraph shall not apply to a person who has been quarantined as a result of refusing to comply with an examination, treatment or vaccination program, nor shall it apply to a person whose conduct caused the necessity for the isolation or quarantine.

6.9 Additional due process protections.

6.9.1 A record of proceedings before the Court shall be made and retained for at least 3 years.

6.9.2 The petitioner shall have the right to be represented by counsel or other lawful representative, and the State shall provide counsel to indigent persons against whom proceedings are initiated pursuant to this section.

6.9.3 The manner in which the request for a hearing is filed and acted upon will be in accordance with the existing laws and rules of the Superior Court or any such rules that are developed by the Court, provided that hearings should be held by any means that will allow all necessary persons to participate in the event that a public health emergency makes personal appearances impractical.