

**OCCUPATIONAL SAFETY AND HEALTH
STANDARDS BOARD**

BOARD STAFF'S REVIEW OF THE PETITION

Petitioner: Mr. Michael Weinstein

Petition File No.: 513

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Title: Senior Safety Engineer
Date: March 1, 2008**

STAFF EVALUATION OF PETITION

Introduction

On December 17, 2009, the Occupational Safety and Health Standards Board (Board) received a petition dated December 17, 2009, from Michael Weinstein, President (Petitioner) representing the AIDS Healthcare Foundation. The Petitioner requested that the Board amend Title 8, California Code of Regulations, Section 5193, of the General Industry Safety Orders, concerning Bloodborne Pathogen Protection in the adult film industry.

Labor Code Section 142.2 permits interested persons to propose new or revised regulations concerning occupational safety and health and requires the Board to consider such proposals and to render its decision no later than six months following their receipt. In accordance with Board policy, the purpose of this evaluation is to provide the Board with relevant information upon which to base a reasonable decision.

Reason for the Petition

The Petitioner proposes that Section 5193, Bloodborne Pathogens, be amended to add a new subsection that would clarify required protections for workers in the adult film industry who are exposed to bloodborne pathogens and sexually transmitted diseases. The Petitioner asserts that, although the existing standard provides protection for employees in the adult film industry, the amendments and enhanced enforcement are called for because there is an epidemic of sexually transmitted disease in the industry and the industry refuses to protect its workers from exposure to potentially infectious materials, such as blood and semen, by requiring the use of condoms and implementing other control measures.

Previous Petitions

In February, 2006, the Board received a petition requesting that Section 5193 be amended to distinguish between healthcare and non-healthcare work settings. The Board denied that petition and reasoned in the Petition Decision that amending the standard to distinguish between the different work settings would: 1) require a significant investment of time and resources, 2) be constrained by the State's obligation to be at least as effective as the counterpart federal standard, and 3) not result in a significant increase in the clarity of the existing standard. The Petition Decision also noted that supplemental guidance documents, available since the 1990s at the state and federal level, already adequately address how non-healthcare workplaces and occupations are covered by Section 5193.

Prior to 2006, The Board received three additional petitions to amend Section 5193, none of which were related to the subject of this Petition.

Federal OSHA Standard

Section 5193 was adopted in 1992 in response to the federal Bloodborne Pathogen Standard, 29 CFR Section 1910.1030, which was adopted in 1991. The State standard closely parallels the counterpart federal standard. Both standards apply to all workplaces, except those in the construction industry, where employees are exposed to blood or other potentially infectious materials. Where there is occupational exposure, the employer must: 1) develop an exposure control plan; 2) minimize or eliminate exposure using engineering, work practices and protective equipment; 3) provide hepatitis vaccinations; 4) conduct and document exposure incident evaluations; 5) communicate hazard information in the form of training, signs and labels; and, 6) maintain medical and training records.

Title 8 Standard

Section 5193 applies to all workplaces, except those in the construction industry, where there is occupational exposure to blood or other potentially infectious materials. In the definition of “Other Potentially Infectious Materials” (OPIM) the standard states that OPIM includes semen, vaginal secretions, and any other bodily fluid that is visibly contaminated with blood such as saliva.

Subsection (b) also provides the following definitions:

““*Bloodborne Pathogens*” means pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV), hepatitis C virus (HCV) and human immunodeficiency virus (HIV).”

““*Occupational Exposure*” means reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee’s duties.”

““*Parenteral Contact*” means piercing mucous membranes or the skin barrier through such events as needlesticks, human bites, cuts, and abrasions.”

Subsection (c) requires that each employer having an employee with “occupational exposure”, establish, implement and maintain an effective exposure control plan that is designed to eliminate or minimize employee exposure.

Subsection (d) requires that universal precautions be observed to prevent contact with blood or OPIM, and engineering and work practice controls shall be used to eliminate or minimize employee exposure. The standard defines “Universal Precautions”, “Engineering Controls”, and Work Practice Controls” as follows:

““*Universal Precautions*” is an approach to infection control. According to the concept of Universal Precautions, all human blood and certain human body fluids are treated as if known to be infectious for HIV, HBV, HCV, and other bloodborne pathogens.”

“*Engineering Controls*” means controls (e.g., sharps disposal containers, needleless systems and sharps with engineered sharps injury protection) that isolate or remove the bloodborne pathogens hazard from the workplace.”

“*Work Practice Controls*” means controls that reduce the likelihood of exposure by defining the manner in which a task is performed (e.g., prohibiting recapping of needles by a two-handed technique and use of patient-handling techniques).”

Subsection (d) also requires that where occupational exposure remains after institution of engineering and work practice controls, the employer provide, at no cost to the employee, appropriate personal protective equipment such as, but not limited to, gloves, gowns, laboratory coats, face shields or masks and eye protection, and mouthpieces, resuscitation bags, pocket masks, or other ventilation devices. The subsection also obligates the employer to ensure employees use the required personal protective equipment.

Subsection (e) contains additional requirements that apply to HIV, HBV and HCV research labs and production facilities.

Subsection (f) requires that the employer make available the hepatitis B vaccine and vaccination series to all employees who have occupational exposure, and post-exposure evaluation and follow-up for bloodborne pathogens exposure to all employees who have had an exposure incident. Post exposure evaluation and follow-up includes provisions for testing the blood of the exposed employee and the source individual for HBV, HCV, and HIV; and post exposure prophylaxis. An “exposure incident” is defined as a specific eye, mouth, other mucous membrane, non-intact skin, or parenteral contact with blood or other potentially infectious materials that results from the performance of an employee’s duties.

Subsection (g) contains requirements for communicating hazards to employees, including labels, signs, information, and training.

Subsection (h) contains recordkeeping requirements for medical records and employee training.

Subsection (i) is a mandatory appendix pertaining to documenting employee declination of hepatitis B vaccine.

Board Staff Evaluation

Petitioner’s Request

The Petitioner states that according to the Los Angeles County Department of Public Health (LACDPH): 1) adult film industry (AFI) workers are required to engage in a variety of high-risk acts, 2) condoms are used in less than 20% of heterosexual films, 3) there is an epidemic of sexually transmitted disease (STD) in the AFI, and 4) the infrequent use of condoms is a significant contributing factor in the epidemic of STDs.

The Petitioner attached two documents prepared by the LACDPH which support the Petitioner's statements.

The Petitioner provided proposed text that would amend Section 5193 to add two new definitions for "Adult Film" and "Sexually Transmitted Disease"; and add a new subsection that would apply only to the AFI and would contain, or reference, all of the requirements applicable to that industry.

Proposed new subsection (i)(1) would require engineering and work practice controls be maintained to prevent exposure to blood or OPIM, which would include but not be limited to those listed in subsection (i)(1)(A) through (i)(1)(E). These controls include: A) simulation of sex acts, B) ejaculation outside worker's bodies, C) provision and use of condoms for vaginal and anal sex, D) provision of condom-safe lubricants, and E) plastic and other disposable materials to clean up sets.

Proposed subsection (i)(2) would require the maintenance of an exposure control plan in accordance with existing subsection (c), and would exempt employers from the requirements of existing subsections (g)(3), (c)(4), and (c)(5).

Proposed subsection (i)(3) would require the provision of hepatitis B vaccine at no cost to any employee engaged in production.

Proposed subsection (i)(4) would require the provision of information and training in compliance with existing subsection (g)(2) but would permit training provided by another employer or third party within the previous twelve months. It would also exempt employers from the requirements in existing subsection (g)(2)(13) regarding signs and labels.

Proposed subsection (i)(5) would require that workers exposed to blood or OPIM be provided with 1) prophylactic treatment for HIV, 2) testing for other STDs, and 3) treatment for subsequently diagnosed STDs.

Staff Analysis of Proposed Amendments

On February 10, 2010, Board staff discussed the Petition and the proposed amendments with the Petitioner. The Petitioner stated that he would oppose convening an advisory committee to consider the issues surrounding the Petition because the issues have already been vetted in other arenas. The Petitioner recommended that staff contact Brian Chase, General Counsel for AIDS Healthcare Foundation, to discuss the proposed amendments. Staff then contacted Brian Chase and discussed the Petitioner's proposed amendments. Mr. Chase confirmed that the intent of the proposal was that the AFI would only be required to comply with the requirements contained, or referenced, in proposed subsection (i).

Proposed subsection (i) does not include or reference many of the requirements of the existing standard that currently apply to the AFI, and it specifically exempts employers

from some of these existing requirements; consequently the proposal would not provide employees in the AFI the same level of protection as the existing standard, and it would not be at least as effective as the counterpart federal standard.

Proposed subsection (i)(5) would require that employees exposed to blood or potentially infectious materials be provided prophylactic treatment for HIV, testing for other STDs and treatment for any subsequently diagnosed STDs. Existing subsection (f)(3) provides for testing the blood of both the exposed employee and the source individual for HIV, HBV, and HCV. It also provides for post-exposure prophylaxis, counseling, and evaluation of reported illnesses. The proposal would require testing and treatment for STDs that are not transmitted by blood or OPIM (e.g semen and vaginal fluids), such as syphilis, herpes, human papilloma virus, and hepatitis A, which are transmitted orally or by skin contact. The proposal lacks provisions of existing subsection (f)(3) that instruct the employer on how the medical tests, evaluations, and treatments are to be conducted and documented.

HIV infection in the AFI

In 2004, there was an outbreak of HIV infection in the AFI in California which is described in the attached article produced by the Centers for Disease Control and Prevention.¹ The outbreak and the public health response are also outlined in the LACDPH document attachment to the Petition. Some of the conclusions of the CDC article are:

- The occurrence of HIV transmission in the adult film industry underscores the life-threatening occupational health risks to which adult film workers are exposed as a result of having unprotected sexual intercourse. The underlying risk for HIV infection and other STDs stems from the basic work practices in the industry, in which performers have multiple sex partners over short periods, with whom they engage in frequent, often prolonged, and unprotected sex acts. The risk of infection is further increased by the infrequent use of barrier methods to prevent exposure to infectious body fluids, which is of particular concern when internal ejaculation and other high-risk practices, such as double-anal penetration, are performed.
- Many adult film workers participate in a monthly program of screening for HIV infection by means of polymerase chain reaction–based technology to detect HIV DNA in blood. Although current testing methods may shorten the window period to diagnosis of new HIV infection, they fail to prevent occupational acquisition of HIV in this setting.
- To reduce the occupational risk of HIV/STD acquisition, the LACDPH has recommended the following for inclusion in an exposure control plan tailored to this industry:
 - (1) mandatory condom use for all penetrative sex acts, including oral sex;
 - (2) routine screening of performers for HIV infection and other STDs;

¹ Taylor M et al. Epidemiologic Investigation of a Cluster of Workplace HIV Infections in the adult film Industry: Los Angeles, California, 2004. HIV/AIDS, CID 2007:44(15 January).

- (3) universal vaccination of nonimmune performers against hepatitis A and B;
 - (4) mandatory education and training for all AFI performers on work-related health and safety hazards in this industry; and
 - (5) medical monitoring for HIV infection and other STDs.
- A California Occupational Safety and Health Administration–approved written health and safety program that emphasizes primary prevention is needed for this industry.

DOSH Enforcement and Outreach in the AFI

The following are examples of DOSH inspections of the AFI where citations for violations of Section 5193 were issued.

- On December 5, 2006, DOSH issued a citation to Evasive Angles for failure to abate a violation of Section 5193(c)(1)(A), Exposure Control Plan, with a proposed penalty of \$153,000. On January 21, 2009, DOSH and the employer formally settled the employer’s appeal of that citation, and the penalty was reduced to \$65,000.
- On November 19, 2007 DOSH issued a citation to Naughty America and La Touraine for a violation of Section 5193(c)(1), Exposure Control Plan, with a proposed penalty of \$10,125. On February 17, 2009, DOSH and the employer formally settled the employer’s appeal of that citation, and the penalty was reduced to \$5,400.

In September, 2004, DOSH created a webpage that provides information for AFI workers and employers on compliance and assistance resources.² The webpage clearly states that sex acts performed in AFI are covered by Section 5193. The webpage provides links to the applicable sections of the standard, and examples of engineering and work practice controls and personal protective equipment.

Summary

After review of the Petition and the surrounding issues, staff concludes that employees in the AFI are routinely exposed to bloodborne pathogens and STDs when performing sex acts without the use of exposure controls such as condoms. As a result, these employees have a high incidence of HIV and STDs. These occupationally related diseases could be prevented if the AFI complied with the provisions of Section 5193, but there is a high level of non-compliance in the industry; and, due to the nature of the industry, it is difficult for the Division to identify non-compliant employers and enforce the standard. The Petitioner’s proposal attempts to amend the standard by placing all of the provisions that apply to the AFI in one subsection. Providing prescriptive requirements for the AFI may increase compliance with the standard, but the amendments would need to be carefully crafted; therefore, staff recommends convening an advisory committee to

² www.dir.ca.gov/dosh/adultfilmindustry.html

consider amendments to the standard to specifically address the work place conditions unique to the AFI.

Recommendation

For the reasons stated above, staff recommends that the Petition be granted to the extent that the Division convene an advisory committee to consider amending Section 5193 to specifically address employee exposure to bloodborne pathogens and STDs in the adult film industry.