

State of California, Department of Industrial Relations
Division of Occupational Safety and Health

Memorandum

To: Marley Hart, Executive Officer
Occupational Safety and Health Standards Board
2520 Venture Oaks Way, Suite 350
Sacramento, CA 95833

Date: May 3, 2016

From: Juliann Sum, Chief
Cal/OSHA



Subject: Evaluation Report, Petition No. 557
Michael Weinstein, AIDS Healthcare Foundation

On February 29, 2016, the Occupational Safety and Health Standards Board (Board) received a petition to revise the California Bloodborne Pathogens standard, signed by Michael Weinstein on behalf of the AIDS Healthcare Foundation. This petition was assigned number 557 and referred to the Division of Occupational Safety and Health (Cal/OSHA) on March 6, 2016. The petition is posted online at <http://www.dir.ca.gov/oshsb/petition-557.html>.

Labor Code Section 142.2 permits interested persons to propose new or revised standards concerning occupational safety and health and requires the Board to consider such proposals and report its decision no later than six months following receipt. Labor Code Section 147 requires the Board to refer to Cal/OSHA any proposed occupational safety or health standard received from a source other than Cal/OSHA and requires Cal/OSHA to submit a report on the proposed standard within 60 days after receiving the proposed standard from the Board.

Petitioner requests the Board to amend the Bloodborne Pathogens standard in section 5193 of the California Code of Regulations, title 8. The express purpose of the request is to clarify existing, required protections for workers in the adult film industry. Cal/OSHA has prepared this memorandum as an evaluation of the petition.

Background

Original Petition Filed by the Petitioner

On December 17, 2009, the AIDS Healthcare Foundation filed a similar petition (number 513), requesting amendments to section 5193 and recommending regulatory language that is nearly identical to that recommended in the current petition. Cal/OSHA and Board staff prepared and submitted evaluations of petition 513 on February 6, 2010, and March 3, 2010, respectively, for consideration by the Board. At its business meeting on March 18, 2010, the Board considered the petition and requested Cal/OSHA to convene an advisory committee representing stakeholders to consider possible amendments of the California Code of Regulations.

Development of a Proposed New Standard

Cal/OSHA convened six advisory committee meetings representing stakeholders to consider a proposed new standard concerning sexually transmitted infections in the adult film industry. The standard was to be numbered as section 5193.1 in the California Code of Regulations, title 8. The advisory committee meetings were held as follows:

- June 29, 2010, in Los Angeles
- August 18, 2010, in Los Angeles
- September 14, 2010, in Oakland
- October 25, 2010, in Oakland
- February 8, 2011, in Oakland
- June 7, 2011, in Los Angeles

Between Fall 2011 and Spring 2015, Cal/OSHA developed the proposed text for a standard based on input from stakeholders received during the advisory committee process, feedback from Board staff, and research on medical issues. The text and proposed rulemaking package were posted for a 45-day public comment period culminating in a public hearing held by the Board on May 21, 2015. Based on comments received in the 45-day period including the public hearing, modifications were made to the text, which was posted for a minimum 15-day public comment period ending on November 3, 2015. Final revisions were made prior to the Board's business meeting to vote on the standard.

Decision After Reconsideration Confirming that Section 5193 Applies to the Adult Film Industry

Meanwhile, the Occupational Safety and Health Appeals Board issued a decision after reconsideration holding that section 5193 applies to the adult film industry and that workers were exposed to blood and other potentially infectious material in violation of section 5193 because the employer did not require them to use condoms or other protective barriers. *Treasure Island Media, Inc.*, Decision After Reconsideration, Dockets 10-R6D1-1093 through 1095, August 13, 2015.

Board's Decision on the Proposed New Standard

At the Board's public meeting on February 18, 2016, numerous representatives from the adult film industry spoke in opposition to the proposed standard, and a smaller number of stakeholders spoke in support of the proposed standard. In the business meeting following the public meeting, the Board considered whether to adopt the proposed standard. As provided in Labor Code section 142.3, four "yes" votes were required to adopt the standard, but only three of the five members attending voted in favor of adopting it. Instead, the five members voted unanimously to send the proposal back to Cal/OSHA and reinstate the rulemaking process with stakeholder involvement.

Concerns Expressed By the Board Members Who Voted "No"

The two Board members who voted against adopting the proposed standard expressed the following concerns:

1. Requirements in proposed section 5193.1 were already covered by section 5193.

2. Privacy rights were uncertain concerning employees' medical records to be maintained by employers.
3. The proposed standard might make the industry go underground.

Analysis

The proposed standard considered by the Board would have clarified how the Bloodborne Pathogens standard and other existing standards apply to employers in the adult film industry. Much of the opposition and controversy seen during the Board's public meeting on February 18 centered around the appropriateness of certain requirements in those standards for the adult film industry, particularly the requirement to provide employees with protective barriers to prevent direct contact with potentially infectious material.

The Board, however, lacks the authority to exempt the adult film industry from requirements in the Bloodborne Pathogens standard. This standard was adopted in 1992 following the adoption of the federal OSHA Bloodborne Pathogens standard in 1991, which applies to all occupational exposure to blood or other potentially infectious materials (see Code of Federal Regulations, title 29, section 1910.1030). The Board is required by Labor Code section 142.3 to adopt standards that are at least as effective as the corresponding federal OSHA standards, and may not adopt standards that are less effective.

Regarding concerns expressed over the privacy of employees' medical records, the Bloodborne Pathogens standard already requires employers to ensure that employee medical records are kept confidential and not disclosed or reported without the employee's express written consent to any person within or outside the workplace except as specifically required by the standard or required by law. The proposed standard would not have relaxed those requirements.

Recommendation

Cal/OSHA recommends that the Board request Cal/OSHA to convene an advisory committee representing stakeholders to consider a new draft standard that would accomplish the following:

1. Simply confirm the applicability of existing standards. This would avoid a rehashing of issues already resolved by requirements in existing standards and confirmed by the Occupational Safety and Health Appeals Board.
2. Specify additional requirements not found in existing standards, including, for example:
 - Vaccines for hepatitis A and human papilloma virus
 - Confidential testing and medical exams for HIV, hepatitis C, syphilis, hepatitis B, chlamydia, gonorrhea, and trichomoniasis
 - HIV pre-exposure prophylaxis
 - Training of employees regarding signs, symptoms, modes of transmission, and treatment related to sexually transmitted infections, and vaccines for hepatitis A and human papilloma virus.

Petition No. 557,
Michael Weinstein, AIDS Healthcare Foundation

The stakeholders would review the draft standard and advise on whether Cal/OSHA should propose rulemaking and develop the standard for adoption by the Board. Cal/OSHA staff would then provide the Board with a report of the input received during the advisory process and make recommendations on further action to take, if any.

CC: Christine Baker
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