

**OCCUPATIONAL SAFETY AND HEALTH
STANDARDS BOARD**

BOARD STAFF'S REVIEW OF THE PETITION

Petition File No. 557
Michael Weinstein



Submitted By: David Kernazitskas, MSPH, CIH, CSP
Title: Senior Safety Engineer
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Introduction

On March 2, 2016, the Occupational Safety and Health Standards Board (Board) received a petition from Michael Weinstein, President, AIDS Healthcare Foundation (Petitioner). The Petitioner requests that the Board amend Title 8 to clarify the required protections for employees 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.

History

Michael Weinstein petitioned the Board in December 2009 on a similar topic (see Petition File No. 513 (Weinstein)). The Board granted the petition to the extent that the Division of Occupational Safety and Health (Division) was requested to convene advisory committee meetings to further investigate the issue.

From March, 2010, through June, 2011, six advisory committee meetings were convened by the Division to develop a proposal. In May, 2015, the Board heard public comments on the proposed language and in February, 2016, the proposed regulation failed to obtain the required four affirmative votes in order to pass.

Reason Given for the Petition

The Petitioner states that “the adult film industry has steadfastly refused to take any steps to protect its workers from diseases spread by bloodborne pathogens and other potential infectious materials.” He asserts that the Los Angeles County Department of Public Health has “documented an epidemic of sexually transmitted diseases among workers in the adult film industry.” Although Section 5193, California’s Bloodborne Pathogens (BBP) standard, clearly requires that workers in the adult film industry be protected from bloodborne illnesses, the Petitioner claims that the “vast majority of adult film industry employers do not provide condoms for their workers.”

The Petitioner cites various studies documenting a low prevalence of condom use, thousands of cases of chlamydia and/or gonorrhea between 2004 and 2007, and elevated at-risk factors for sexually transmitted disease (STD) for adult performers in the Los Angeles area, compared to the general population.

He also points out that participation in the industry’s voluntary testing scheme has not prevented several performers from becoming infected with bloodborne illnesses, does not test for all STDs, and may have allowed onset transmission of HIV, according to a study published by the Centers for Disease Control and Prevention.

The Petitioner requests that definitions for “Adult Film” and “Sexually Transmitted Disease” be added to Title 8, Section 5193. He also suggests language for a new subsection, which addresses engineering and work practice controls, to protect workers from exposure to blood or other potentially infectious materials (OPIM) during the production of adult films.

National Consensus Standard

Board staff is unaware of a national consensus standard governing work in the adult film industry; however, the National Institute of Occupational Safety and Health (<https://www.cdc.gov/niosh/>) and other public and private agencies have several resources which can be used to provide safety and health to employees engaged in the production of adult film.

Federal OSHA Standards

Federal OSHA regulation 29 CFR 1910.1030 *Bloodborne Pathogens* closely resembles the California BBP standard. Key elements of the federal standard, which also appear in the California standard, are requirements to use engineering and work practice controls to eliminate or minimize employee exposure to BBP and to observe universal precautions, which require employers to treat all blood and OPIM as if known to be infected with bloodborne pathogens.

Division of Occupational Safety and Health (Division) Report

In its evaluation dated May 3, 2016, the Division addresses concerns brought up by members of the Board during the February 2016 business meeting. The Division cites an Appeals Board Decision After Reconsideration (DAR) from August 2015, which ruled that the BBP standard applies to the adult film industry, and states that “The Board...lacks the authority to exempt the adult film industry from requirements in the Bloodborne Pathogens standard.”

The Division recommends granting the petition to the extent that the Division is requested by the Board to convene an advisory committee meeting to discuss the following:

1. Confirm the applicability of existing standards to adult film as determined in the August 2015 DAR.
2. Specify additional requirements not found in existing standards (e.g. vaccines for hepatitis A and human papilloma virus, confidential medical exams for STDs not included in the BBP standard, pre-exposure prophylaxis for HIV, and additional employee training).

Stakeholders would then review the standard and advise the Division on whether it should propose the new standard to the Board. The Division would also report advisory

committee findings to the Board and make recommendations for further actions if necessary.

Staff Evaluation

California's BBP standard applies to all occupations where employees have reasonably anticipated exposure to blood or OPIM in the course of their work duties. OPIM is defined in the standard as follows:

“Other Potentially Infectious Materials” means:

- (1) The following human body fluids: semen, vaginal secretions, cerebrospinal fluid, synovial fluid, pleural fluid, pericardial fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, any other body fluid that is visibly contaminated with blood such as saliva or vomitus, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids such as emergency response;
- (2) Any unfixed tissue or organ (other than intact skin) from a human (living or dead); and
- (3) Any of the following, if known or reasonably likely to contain or be infected with HIV, HBV, or HCV:
 - (A) Cell, tissue, or organ cultures from humans or experimental animals;
 - (B) Blood, organs, or other tissues from experimental animals; or
 - (C) Culture medium or other solutions.

The standard requires that employers develop an exposure control plan “which is designed to eliminate or minimize employee exposure” to BBP. The first method of compliance listed in the standard requires employers to observe universal precautions, which is defined 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 and work practice controls must be used while observing universal precautions. Where such controls do not eliminate occupational exposure to BBP, personal protective equipment must be furnished to and used by employees to prevent blood or OPIM from reaching “the employee's work clothes, street clothes, undergarments, skin, eyes, mouth, or other mucous membranes.”

The Petitioner rightly points out that adult film is an industry with occupational exposure to BBP and that the employer / employee relationship has been established by the Occupational Safety and Health Appeals Board.

The Division evaluation rightly points out that California must be at least as protective as federal OSHA requirements and therefore may not exempt certain industries from standards for which federal regulations exist. The Petitioner's request to exempt employers engaged in the production of adult film from the requirements for a sharps injury log would not be commensurate with federal regulations because such a requirement exists at the federal level.

The Petitioner also proposes to exempt adult film employers from signage and labeling requirements. Because these requirements exist in the federal BBP standard, California must enforce equivalent safety requirements and may not exempt an industry from an applicable regulation.

The Petitioner mentions several other suggested exemptions, but Board staff is unable to ascertain the Petitioner's intent as the subsections do not exist in Section 5193¹.

Much of the Petitioner's request is redundant to existing language in Section 5193. Additionally, the proposed definition for "Adult Film" is unnecessary as work in the industry is already covered by the standard's scope and application. Board staff recommends against providing specific definitions which could inadvertently limit the scope and applicability of the regulation.

The portion of the Petitioner's request that has merit is adding a definition for "Sexually Transmitted Disease" to Title 8 and requiring employers to perform "comprehensive testing...and appropriate treatment" to employees when diagnosed. Because the industry exposes employees to illnesses which are not always spread through contact with blood or OPIM, the Board should address such STDs with appropriate rulemaking. A new section should be added to Title 8, which addresses the specific hazards associated with work in the adult film and similar industries.

Recommendation

Consistent with the foregoing discussion, Board staff believes the Petitioners' request should be granted to the extent that an advisory committee is convened to discuss additional protections for workers in adult film. The Board should request that the Division convene the advisory meetings.

¹ Subsection (i)(2) of the Petitioner's proposed language references a sharps injury log required under subsection (g)(3) of the BBP standard. The sharps injury log is mentioned in 5193(c)(2). Subsection (g)(3) does not exist. The proposed subsection also mentions exemptions from "the requirements of section (sic) (c)(4) and (5)," but Section 5193 does not contain such subsections. Finally, the petition requests an exemption from training on signs and labels "specified in section (sic) (g)(2)(13)," which likely refers to subsection (g)(2)(G)(13).