

Memorandum

Date: July 8, 2016

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

From: Juliann Sum, Chief 
Cal/OSHA

Subject: Evaluation Report, Petition No. 560
Eric Paul Leue, Free Speech Coalition

On May 9, 2016, the Occupational Safety and Health Standards Board (Board) received a petition signed by Eric Paul Leue, on behalf of the Free Speech Coalition, to amend Title 8 of the General Industry Safety Orders contained in the California Code of Regulations. This petition was assigned number 560 and referred to the Division of Occupational Safety and Health (Cal/OSHA) on May 10, 2016. The petition is posted online at <http://www.dir.ca.gov/oshsb/petition-560.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.

The petitioner requests that the Board promulgate a standard to address the unique health and safety needs and issues faced by the adult film industry. More specifically, the petitioner asks for a regulation that addresses the following:

1. Allows for proven, effective options for protection and prevention through testing protocols, medical advances, and other means that do not require the use of barrier protection;
2. Allows adult film workers to take advantage of current or future more effective prevention innovations;
3. Incorporates medical understanding and protection against human papillomavirus (HPV) and herpes simplex virus (HSV) based on sound methods that work in the adult film industry;
4. Allows absolute control by workers over which effective method of prevention they choose to best protect their personal and sexual health;
5. Protects patient-provider confidentiality as afforded other workers in California;
6. Allows performers to make personal medical decisions and have private discussions with their physicians and licensed health care providers without fear of those records being disclosed;

7. Uses terms understood by the industry stakeholders and that are not derogatory in nature or discriminatory toward performers and other employees in the industry.

The petition includes suggested language to amend the Bloodborne Pathogens standard in California Code of Regulations, title 8, section 5193, and suggested alternative language for a new section 5193.1.

Cal/OSHA has prepared this memorandum as an evaluation of the petition.

Background

California and Federal OSHA Bloodborne Pathogens Standards

The Bloodborne Pathogens standard was adopted by the Board in 1992, following the adoption of the federal OSHA Bloodborne Pathogens standard in 1991. (See Code of Federal Regulations, title 29, section 1910.1030.) Both standards apply to all occupational exposure to blood or other potentially infectious materials, not just occupational exposure in medical settings.

Previously Proposed Standard to Prevent Sexually Transmitted Infections (STIs) in the Adult Film Industry

In 2009, the AIDS Healthcare Foundation filed Petition No. 513 for a standard to prevent STIs in the adult film industry. In response to this petition, Cal/OSHA convened six advisory committee meetings involving hundreds of participants (including members of the Free Speech Coalition) and developed a proposed standard based on input from the advisory committee participants, feedback from Board staff, and research on medical issues. The proposal would have clarified existing requirements to protect workers in the adult film industry, including existing requirements in the Bloodborne Pathogens standard.

As provided in Labor Code section 142.3, the adoption or amendment of any occupational safety and health standard requires that four members of the Board vote in the affirmative. However, at the Board's public meeting on February 18, 2016, only three of the five members attending voted in favor of adopting the standard proposed by Cal/OSHA. The five members subsequently voted instead to send the proposal back to Cal/OSHA and reinstate the rulemaking process with stakeholder involvement.

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

Meanwhile, during the formal rulemaking period to adopt the proposed regulation, the Occupational Safety and Health Appeals Board issued a decision after reconsideration holding that section 5193 does apply to the adult film industry and that workers in the case in question 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.

New Petition Filed by the AIDS Healthcare Foundation

On March 6, 2016, the Board referred to Cal/OSHA a new petition filed by the AIDS Healthcare Foundation, designated as Petition No. 557 and posted online at <http://www.dir.ca.gov/oshsb/petition-557.html>. The new petition, which is almost identical to Petition No. 513, again requests the Board to amend the Bloodborne Pathogens standard to clarify existing, required protections for workers in the adult film industry. Cal/OSHA submitted its evaluation of Petition No. 557 to the Board on May 3, 2016. The evaluation recommended that the Board request Cal/OSHA to convene an advisory committee representing stakeholders to consider a new draft standard that would address the following:

1. Simply confirm the applicability of existing standards to the adult film industry. 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.

Analysis

The Bloodborne Pathogens standard requires employers to protect the health and safety of employees through “universal precautions,” an approach to infection control that treats all blood and certain other human body fluids as if they were infectious. In observance of universal precautions, employers must provide and require employees to use protective barriers to prevent contact with blood or other potentially infectious materials.

The main focus of Petition No. 560—to allow the use of alternative methods to prevent STIs instead of protective barriers—is based on the premise that universal precautions are inappropriate in the adult film industry. However, 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. The Board therefore lacks the authority to exempt the adult film industry from the basic requirement in the Bloodborne Pathogens standard to observe universal precautions, unless alternative requirements are as protective as the Bloodborne Pathogens standard.

To analyze whether the alternative methods suggested by the petitioner would be at least as effective as the use of protective barriers such as condoms, Cal/OSHA staff conducted a search and review of available scientific studies and reports on this topic. Findings to date suggest that certain sexually transmitted infections—such as HIV, hepatitis B, hepatitis C, gonorrhea, chlamydia, and trichomoniasis—are effectively prevented by correct condom use and less effectively prevented by the alternative methods identified by the petitioner:

1. Condoms provide nearly complete protection against infection caused by contact with genital and rectal secretions. Studies show that condom failure rates are 1 to 5 percent, and that most condom failures can be reduced or eliminated by proper training and awareness.^{1, 2} Vaginal abrasion (a problem cited by the petitioner) can be reduced or avoided by using appropriate lubrication, using condoms made from materials other than latex, and other methods.³
2. Human immunodeficiency virus (HIV)
 - a. Testing cannot identify infection in the first 2 to 3 weeks.^{4, 5}
 - b. Pre-exposure prophylaxis (PrEP, or Truvada)—adherence to the protocol for using PrEP usually cannot be fully overseen by an employer,^{6, 7} and partial adherence reduces protection proportionately.⁸ The manufacturer of Truvada further recommends that condoms continue to be used to maximize the effectiveness of the drug.⁹

¹ See *Condom Fact Sheet In Brief*, US Department of Health and Human Services, Centers for Disease Control and Prevention (2013), retrieved from <http://www.cdc.gov/condomeffectiveness/brief.html>;

² See “Sexually Transmitted Diseases Treatment Guidelines, 2015,” *Morbidity and Mortality Weekly Report*, US Department of Health and Human Services, Centers for Disease Control and Prevention (June 5, 2015), retrieved from <http://www.cdc.gov/std/tg2015/tg-2015-print.pdf>.

³ See *Clinical Prevention Guidance, Sexually Transmitted Diseases Treatment Guidelines, 2010*, US Centers for Disease Control and Prevention, retrieved from <http://www.cdc.gov/std/treatment/2010/clinical.htm>. (This reference states that synthetic condoms provide protection against STDs/HIV and pregnancy equal to that of latex condoms and advises the use of appropriate water-based lubricants to prevent abrasion.)

⁴ See “Occupational HIV Transmission among Male Adult Film Performers — Multiple States, 2014,” *Morbidity and Mortality Weekly Report*, US Department of Health and Human Services, Centers for Disease Control and Prevention (February 12, 2016), retrieved from <http://www.cdc.gov/mmwr/volumes/65/wr/mm6505a3.htm>.

⁵ See “Testing for sexually transmitted infections,” *Australian Prescriber*, 30, pp. 8-13 (February 1, 2007), retrieved from <https://www.nps.org.au/australian-prescriber/articles/testing-for-sexually-transmitted-infections>.

⁶ See *Pre-Exposure Prophylaxis (PrEP)*, US Centers for Disease Control and Prevention, retrieved from <http://www.cdc.gov/hiv/risk/prep/>; Truvada Medication Information Sheet, US Centers for Disease Control and Prevention (2014), retrieved from http://www.cdc.gov/hiv/pdf/prep_gl_patient_factsheet_truvada_english.pdf.

⁷ See *Fact Sheet 160, Treatment to Prevent HIV Infection (PrEP)*, *AIDS InfoNet* (2014), retrieved from http://aidsinfonet.org/fact_sheets/view/160.

⁸ See Martin M., Vanichseni S., Suntharasamai P., Sangkum U., Mock P.A., Leethochawalit M., Chiamwongpaet S., Curlin M.E., Na-Pompet S., Warapronmongkhokul A., Kittimunkong S., Gvetadze R.J., McNicholl J.M., Paxton L.A., and Choopanya K., “The impact of adherence to pre-exposure prophylaxis on the risk of HIV infection among people who inject drugs,” *AIDS*, 29(7), pp.819–824 (April 24, 2015), abstract retrieved from <https://www.ncbi.nlm.nih.gov/pubmed/25985403?dopt=Abstract>. (This study reported on results of the Bangkok Tenovir study, and stated “the risk of HIV infection decreased as adherence improved, from 48.9% overall to 83.5% for those with at least 97.5% adherence.”)

⁹ Truvada, Gilead Sciences, retrieved from http://www.truvada.com/?utm_source=google&utm_medium=cpc&utm_campaign=dtb_b_truvada%20prep%20branded_desktop&utm_content=truvada%20general_%20phrase&utm_term=truvada&utm_moc=462100030; and Truvada Medical Information Sheet for Patients, US Centers for Disease Control and Prevention (2014) retrieved from http://www.cdc.gov/hiv/pdf/prep_gl_patient_factsheet_truvada_english.pdf.

- c. Treatment as Prevention (TasP)—adherence to the protocol for using TasP usually cannot be fully overseen by an employer. One study showed that the use of TasP only reduced HIV transmission by 26 percent.^{10, 11}
3. Hepatitis infections¹²
 - a. Hepatitis B testing cannot identify infection in the first 4 to 9 weeks, and blood test results take 14 days to be available after the blood is drawn. The hepatitis B vaccination becomes fully effective only after several months. Some individuals do not respond to the vaccine. (Note: The Bloodborne Pathogens standard already requires employers to make this vaccine and vaccination series available, in addition to requiring the employer to provide protective barriers. See subsection (f) of the Bloodborne Pathogens standard.)
 - b. Hepatitis C testing cannot identify infection in the first 2 to 8 weeks. No vaccine exists for hepatitis C.
 4. Bacterial infections^{13, 14}
 - a. Gonorrhea urine and swab tests cannot identify infection in the first 24 hours to 7 days after exposure, and the false negative rate is as high as 9 percent.^{15, 16}
 - b. Chlamydia urine test cannot identify infection in the first 2 to 7 days, and the false negative rate depends on the testing methods used. The most sensitive tests (nucleic acid amplification tests) are more than 99 percent sensitive on specimens taken by endocervical swab; that is, the false negative rate is about 0.5 percent. However, other testing methods and swab specimens taken from other sources, such as the oropharynx and rectum, have false negative rates in the range of 10 to 30 percent.^{17, 18}

¹⁰ See *Guidelines for the Use of Antiretroviral Agents in HIV-1-Infected Adults and Adolescents*, National Institute of Health (2016), retrieved from <http://www.aidsinfo.nih.gov/ContentFiles/AdultandAdolescentGL.pdf>.

¹¹ See Jia, Z. et al. (2013), Antiretroviral therapy to prevent HIV transmission in serodiscordant couples in China (2003–11): A national observational cohort study, *Lancet* 382(9899), pp. 1195–1203, retrieved from <http://www.ncbi.nlm.nih.gov/pubmed/23206835>.

¹² See the sources in footnotes 2, 4, and 5.

¹³ See the sources in footnotes 4, 5, 6, and 7.

¹⁴ See “Sexually transmitted infection testing of adult film performers: is disease being missed?” *Sexually Transmitted Diseases*, 39(12) (December 2012), pp. 989–994, retrieved from <http://www.ncbi.nlm.nih.gov/pubmed/23191956>.

¹⁵ See the sources in footnote 5. See also Zakher B., Canto A.G., Pappas M., Daeges M., and Nelson H.D. (2014), “Screening for Gonorrhea and Chlamydia: A Systematic Review for the U.S. Preventive Services Task Force,” *Ann Intern Med.* 161, pp 884–893; “Testing for sexually transmitted infections,” *Australian Prescriber*, 30, pp. 8–13 (February 1, 2007), retrieved from <http://www.australianprescriber.com/magazine/30/1/8/13/>.

¹⁶ See Zenilman, J., Miller, W., Gaydos, C., Rogers, S., and Turner, C. (2003), “LCR testing for gonorrhoea and chlamydia in population surveys and other screenings of low prevalence populations: coping with decreased positive predictive value,” *Sexually Transmitted Infections*, 79(2), pp. 94–97, retrieved from <http://www.ncbi.nlm.nih.gov/pubmed/12690126>.

¹⁷ References: Black, C. M., Marrazzo, J., Johnson, R. E., Hook III, E. W., Jones, R. B., Green, and T. A., Martin, D. H. (2002), “Head-to-Head Multicenter Comparison of DNA Probe and Nucleic Acid Amplification Tests for Chlamydia Trachomatis Infection in Women Performed with an Improved Reference Standard,” *Journal of Clinical Microbiology*, 40(10), pp. 3757–3763, retrieved from <http://doi.org/10.1128/JCM.40.10.3757-3763.2002>.

- c. Trichomoniasis testing cannot identify infection in the first 4 to 28 days, and the false negative rate is approximately 20 percent.¹⁹

Regarding concerns expressed over the privacy of employees' medical records, the existing Bloodborne Pathogens standard 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. (See California Code of Regulations, title 8, subsection 5193(h)(1)(C).)

Recommendations

Cal/OSHA recommends that the Board request Cal/OSHA to convene an advisory committee representing stakeholders to consider and discuss the suggestions and requests set forth in Petition No. 560. This would be combined with the meeting that Cal/OSHA recommended be held in response to Petition No. 557. If the state ballot initiative requiring condom use in adult films ("The California Safer Sex in the Adult Film Industry Act") is approved by the voters on November 8, 2016, its impact on the two petitions would be included in the discussion.

Cal/OSHA also recommends that the petitioner be invited to provide further scientific data that quantifies and compares the effectiveness of condoms when used correctly and consistently (the method of prevention currently required by the Bloodborne Pathogens standard) and the alternative methods of prevention identified in Petition No. 560. This information would be reviewed and considered prior the advisory committee meeting and included with the materials to be discussed during the meeting.

To address the petitioner's concerns regarding the privacy and confidentiality of workers' medical records, Cal/OSHA recommends that during the advisory committee meeting, Cal/OSHA staff solicit input from the public on how the existing requirements to protect privacy and confidentiality might be clarified or strengthened.

cc: Eric Berg
Steve Smith

¹⁸ See Papp, J. R., Schachter, J., Gaydos, C. A., and Van Der Pol, B. (2014), "Recommendations for the Laboratory-Based Detection of Chlamydia Trachomatis and Neisseria gonorrhoeae," *Morbidity and Mortality Weekly Report, Recommendations and Reports / US Centers for Disease Control*, 63(0), pp. 1–19.

¹⁹ See the source in footnote 2. See also Rivers C.A., Muzny C.A., and Schwebke J.R. (2013), "Diagnostic Rates Differ on the Basis of the Number of Read Days with the Use of the InPouch Culture System for Trichomonas Vaginalis Screening," *J Clin Microbiology*, 51, pp. 3875–3876.