

**OCCUPATIONAL SAFETY AND HEALTH
STANDARDS BOARD**

BOARD STAFF'S REVIEW OF THE PETITION

Petition File No. 560
Eric Paul Leue



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Date: July 14, 2016

Introduction

The Occupational Safety and Health Standards Board (Board) received a petition dated May 10, 2016, from Eric Paul Leue, of the Free Speech Coalition (Petitioner). The Petitioner requests that the Board amend Title 8 “to promulgate a safety and health standard to address the unique health and safety needs and issues faced by 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 of the AIDS Healthcare Foundation petitioned the Board in December 2009 (see Petition File No. 513 (Weinstein)) and again in March 2016 (see Petition File No. 557 (Weinstein)) on the same topic. Petition 513 was granted 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 modified proposed regulation reached the Board and was considered, however, it was not adopted.

The subsequent petition, Petition 557, has not yet been acted upon by the Board.

Reason Given for the Petition

The Petitioner states that “In a prior attempt at a rulemaking on this subject, the true stakeholders were left to the side without regard to concerns raised by a majority of regulated employers and performers.” Specifically, the Petitioner requests a regulation to address the following:

- The need 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
- Adult film worker access to current and future illness prevention innovations
- Protection against human papilloma virus (HPV) and herpes simplex virus (HSV)
- Exclusive control over which protective methods an employee chooses to protect their personal and sexual health

- Patient / provider confidentiality
- Use of non-derogatory and non-discriminatory terms in the standard

The Petitioner asserts that condoms should not be the only option for providing employee protection from sexually transmitted disease (STD). He also opines that the concept of universal precautions (where all blood or other potentially infectious materials are treated as if known to be infectious) applies only to medical environments where work practices can prevent contact with such substances. He says that applying universal precautions “in an occupational environment where sexual intimacy is present makes [the] occupation and work to be performed impossible.”

The Petitioner provided two samples of proposed regulatory language: one to modify existing Section 5193 and the other to create a new Section 5193.1. The submission to create a new Section 5193.1 appears to be a modified version of the Division’s proposal to address sexually transmitted infections in adult film, which resulted from action on Petition 513.

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 guidance to employees engaged in the production of adult film.

Federal OSHA Standards

Federal OSHA regulation 29 CFR 1910.1030 *Bloodborne Pathogens* (BBP) 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 other potentially infectious materials (OPIM) as if known to be infected with bloodborne pathogens.

Division of Occupational Safety and Health (Division) Report

In its evaluation dated July 8, 2016, the Division recommends that the Board grant the petition to the limited extent that Cal/OSHA convene advisory committee meetings on the substance of the present petition and Petition 557 (Weinstein). The Division recommends that the Petitioner provide quantitative data on the effectiveness of its testing protocol as compared to proper condom use. The Division also highlights an OSHA Appeals Board decision after reconsideration in which the Appeals Board held that Section 5193 applies to the adult film industry.

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, 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.

Universal precautions, in other words, requires that all blood and OPIM be treated as if infectious, even if such blood has been tested or screened for pathogens, or is reasonably believed to be safe.

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's proposal for new Section 5193.1 requests that the Board make amendments to existing BBP protections that would render the California standard less protective than the federal equivalent standard. Among the many suggested changes, the Petitioner proposes to delete the definition of universal precautions from the standard.

The concept of universal precautions is integral to protecting employees from harmful exposures to BBP. With latency periods for sexually transmitted infections, even the industry's intense STD testing protocol is not as protective of employee health as observing universal precautions.

Other issues with the Petitioner's proposal include language that appears to define condoms as engineering controls, and suggests changes to the definitions of "Exposure Incident" and "Occupational Exposure" that would put the California regulation in conflict with its federal counterpart.

Although there are several challenges posed by the Petitioner's proposal, a discussion on protecting workers in the adult film and similar industries should take place to ensure that the employees are being adequately protected from hazards associated with their working environment.

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 the necessary 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 limited extent that an advisory committee is convened to discuss additional protections for workers in adult film and similar industries. The Board should request that the Division convene the advisory meetings.