

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
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In the Matter of a Petition by:)
)
) PETITION FILE NO. 576
) DECISION
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)
_____) Applicant.

The Occupational Safety and Health Standards Board hereby adopts the attached PROPOSED DECISION.

OCCUPATIONAL SAFETY AND HEALTH
STANDARDS BOARD



DAVID THOMAS, Chairman




BARBARA BURGEL, Member




DAVE HARRISON, Member



NOLA KENNEDY, Member



CHRIS LASZCZ-DAVIS, Member



LAURA STOCK, Member

By: 

Christina Shupe, Executive Officer

DATE: October 17, 2019
Attachments

PETITION FILE NO. 576
PROPOSED PETITION DECISION

of the
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

INTRODUCTION

The Occupational Safety and Health Standards Board (Board) received a petition on April 19, 2019 requesting that the Board adopt certain Title 8, General Industry Safety Orders, requirements specific to 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 render a decision no later than six months following receipt.

Further, as required by Labor Code Section 147, any proposed occupational safety or health standard received by the Board from a source other than the Division of Occupational Safety and Health (Division) must be referred to the Division for evaluation. The Division has 60 days after receipt to submit an evaluation regarding the proposal.

SUMMARY

The Petition requests the Board adopt new regulatory requirements including, but not restricted to:

- New definitions specific to the adult film industry
- Establish an adult performers' occupational safety/health complaint hotline
- Establish requirements for the provision of medical monitoring and related testing for adult film performers at no expense to employees
- Require performers to sign a worker consent contract that specifies a scene intensity index
- Establish a code of conduct and performers bill of rights

BACKGROUND

In December, 2009, Michael Weinstein of the AIDS Healthcare Foundation (AHF), submitted a request to the Board designated OSHSB Petition 513. Among its requested rulemaking provisions specific to the adult film industry were mandatory condom use by performers. In March 2010, the Board granted Petition 513, to the extent that the Division of Occupational Safety and Health (Division) was requested to convene advisory committee meetings to further investigate the issue. Subsequently, from March, 2010, through June, 2011, six advisory committee meetings were convened by the Division to develop a proposal supplementing Title 8, General Industry Safety Orders, Section 5193, Bloodborne Pathogens, with a new Section 5193.1.

In November, 2012, Los Angeles County voters passed Measure B, putting in place an ordinance requiring condoms be worn during sex performed in adult films. Among reported affects were a marked decrease in permits being sought for filming of adult entertainment in Los Angeles County.

On February 18, 2016, the Division's rulemaking proposal for a new Section 5193.1, came before the Board, but the motion to adopt Section 5193.1 did not pass. However, immediately after, the Board unanimously adopted a motion requesting that the Division reinstate the rulemaking advisory committee process with a renewed emphasis on stakeholder involvement.

Then in March, 2016, a petition substantially identical to Petition 513, was again submitted to the Board on behalf of AHF, and designated OSHSB Petition 557. And in May, 2016, the Board received a petition submission on behalf of the Free Speech Coalition (FSC), from Eric Paul Leue, subsequently designated OSHSB Petition 560.

Petition 557 and Petition 560 each requested distinctly different changes to California Code of Regulations, Title 8, occupational health standards, potentially impacting the adult filmmaking industry— building upon, or arguably seeking exception to, existing General Safety Order, Section 5193, with its extensively prescribed protections against exposure to blood and other potentially infectious material in the workplace. Among the differences, between what the respective petitions sought, were the request of AHF for an adult film industry specific standard prescribing mandatory condom use, versus the emphasis of the FSC petition upon pre-employment and periodic test screening of performers for absence of detected human immunodeficiency virus (HIV) or certain other sexually transmitted diseases.

On August 18, 2016, the Board granted Petitions 557 and 560 to the limited extent that the Division was requested to proceed in convening a new advisory committee, with stakeholder involvement inclusive of AHF, FSC, and a diverse cross section of the adult film industry, in order to consider amending or expanding upon Title 8, Section 5193, to specifically address risks to adult film performers of exposure to bloodborne and other pathogens during employment.

The Division then convened an advisory committee in late January, 2017 and subsequently engaged with Petitioners in providing education and outreach about enforcement of existing requirements regarding the use of universal precautions and barrier methods of protection in the adult film industry. On July 20, 2017, the Division reported back to the Board that it did not foresee further adult film focused rulemaking development, nor bringing another adult film specific rulemaking proposal to the Board.

DIVISION EVALUATION

In its report concerning the Petition, dated September 11, 2019, the Division reviewed the Petitioner's proposed changes to Title 8, Section 5193. The review included an assessment of information provided in the Petitioner's application, applicable consensus standards and Cal/OSHA enforcement authority.

Division staff evaluation recommends the petition be approved to the extent an advisory committee be convened by Cal/OSHA to create a regulation to protect adult film workers that contains the following elements:

- Adult film employers will provide all safeguards including barriers, personal protective equipment, training, and medical services at no cost to employees.
- All medical tests would be done by laboratories that, at a minimum, are certified to perform moderate complexity testing in accordance with CLIA.

- All personnel conducting and overseeing medical testing would be done by persons that are qualified, at a minimum, to perform moderately complex testing in accordance with CLIA.
- All medical services, including vaccines and tests, would be conducted and their results handled in a manner that protects the privacy and confidentiality of adult film workers.
- Pre-employment “go-sees” and pre-shoot meetings would be done in a manner that minimizes workplace violence risks to adult film workers.
- Verbal and written communication and consent provisions would be established to ensure that adult film workers know the contents of a scene before filming and that adult film workers consent to performing the scene prior to shooting or engaging in sex acts.
- Specific rights of adult film workers would be established including the right to refuse work they are not comfortable with.
- Adult film employers would establish systems for ensuring employees comply with safe and healthful work practices.

BOARD STAFF EVALUATION

The Board staff evaluation dated October 2, 2019, included a review of the Petition and information provided therein, previous petitions for Section 5193 and resulting advisory committee records, and research into industry health and safety practices.

Many of the items requested by the Petitioner were found to either already be required by existing Title 8 regulations, or not within Cal/OSHA’s jurisdiction. However, Board Staff does recommend the Petition be conditionally granted to the extent that an advisory committee be convened to consider the following:

- When and how employers could be required to pay for PASS system testing.
- Require and expand the testing to other types of tests for infections that are not detected in the blood, including swabbing appropriate areas for sexually transmittable infections.
- Require the Free Speech Coalition to report production moratoriums to the Division.
- Require the testing labs in the Performer Availability Screening System (PASS) system to be certified by Centers for Medicare & Medicaid Services (CMS) through the Clinical Laboratory Improvement Amendments (CLIA).
- Require employers to educate employees about HIV preexposure prophylaxis (PrEP) and offer it in addition to requiring condom use.

DISCUSSION

In considering the present petition, the Board is mindful of the three prior petitions within the prior decade calling for an occupational safety and health standard specific to the adult film industry. In each of these prior instances the Board granted the petition in part, an advisory committee process was undertaken, and a Division rulemaking proposal was formally considered, but not adopted by the Board in February 2016. This background would seem to be indicative of the number of challenging issues

associated with potential rulemaking specific to this industry. The Board is also mindful of the extensive protections against occupational exposure to bloodborne pathogens, including barrier protection as necessary, already required in workplaces generally, including those in adult film industry, under existing General Industry Safety Order, Section 5193. This Title 8, bloodborne pathogen standard is modeled after, and must remain as rigorously protective as, the similar Federal-OSHA standard. Therefore any potential standard specific to the adult industry would need to build upon, rather than seek to exempt the industry from, the protection level Section 5193 prescribes. Nonetheless, given the Board's longstanding belief in the value of an advisory committee process, and recommendations of Division and Board staff, it is appropriate that further discussions occur about potential occupational safety order protections specific to the adult industry.

CONCLUSION AND ORDER

Having considered Petition 576 and subsequent evaluations, the Board hereby GRANTS in part the Petitioner's request to the limited extent that Division is requested to convene an advisory committee of stakeholders, inclusive of Petitioner, to further discuss potential development of a proposal for safety order protections specific to the adult film industry. The advisory committee topics for discussion should be restricted to items consistent with the existing requirements of Title 8, Section 5193, the recommendations of the Board and Division evaluations for Petition 576, and the subject matter jurisdiction of the Board.