

OCCUPATIONAL SAFETY AND HEALTH  
STANDARD BOARD

PETITION FILE NO. 576

BOARD STAFF EVALUATION

Submitted by:

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## **INTRODUCTION**

Petition 576 was submitted anonymously on April 18, 2019. The Petition seeks standards to address the unique hazards faced by employees in the adult film industry.

## **REQUESTED ACTION**

1. Require Mindgeek Corporation to cover the cost of medical testing for all performers participating in any commercial production that may inevitably be viewed on any website owned by the company, or any of its subsidiaries, or any subsequent owners.
2. Require that Mindgeek, its subsidiaries, or its subsequent owners, ensure that condoms, lubrication, and any other PPE required by the bloodborne pathogens regulation are provided on any commercial set.
3. Require performers be tested within a 14-day period before performing for: HIV-1 HIV-2 qualitative or quantitative assay, HIV-1 and HIV-2 antigen testing, RPR or TREP-SURE syphilis assay, and urine tests, as well as oral and anal swabbing for trichomonas, chlamydia, gonorrhea and mycoplasma genitalium. Performers requesting a shorter testing window (from 1 – 13 days) must be accommodated.
4. Require the Free Speech Coalition (FSC) and the legally recognized adult entertainment union, Adult Performer Advocacy Guild (APAG) provide comprehensive health care plans to all members.
5. Require that all testing be executed by a lab certified by the Centers for Medicare and Medicaid Services (CMS), specifically through the Clinical Laboratory Improvement Amendments (CLIA). The labs should employ at least one licensed medical doctor at each testing facility, including draw facilities.
6. If the FSC continues to use the Performer Availability Screening Services (PASS). The Green Check Mark system must be amended to add an asterisk for on-set communication between all partners if performers have medical concerns (e.g. physical limitations, mental illness, seizures, HIV+ with an undetectable viral load, etc.), have been accused of any misconduct in official complaints, or have any other information that is pertinent to share with their scene partners. The asterisk indicates only that a conversation must happen between that performer and anyone they may work with. No third party, including producers, directors, or agents, may receive the test results of any performer. Performers are encouraged to share their test results privately before filming.
7. Establish a Cal-OSHA hotline specifically dedicated for adult film performers to make legally anonymous complaints.
8. All “go-sees” must be performed in a) an office or registered business location; b) groups not fewer than three.

9. Prior to any commercial adult film production, a contract explicitly detailing the sex act to be expected on set must be sent directly to all performers involved. No third party may receive these contracts on behalf of any adult performer. Third parties may include, but are not limited to, agents, managers, romantic partners, or family members. These contracts are to be signed and paraphrased, with all performers present, on camera before each scene is filmed. The contract must include OSHA information. More details into what the contract should include can be found on page five.
10. Interracial sex scenes may no longer be viewed as a sex act.
11. All complaints received by Cal-OSHA shall be the responsibility of producers, not directors and not performers. Performers who are named in formal complaints must have an asterisk added to their PASS information, or its equivalent.
12. Production holds and moratoriums must be reported to Cal-OSHA immediately. A minimum 14-day abstinence from filming must be observed.

The Petitioner provided suggestions for definitions of: adult film director, adult film producer, employee, and go-see (refer to page 3 for the suggested definition).

The Petitioner provided examples of: consent contract, model bill of rights, and a performer code of conduct.

### **BACKGROUND/HISTORY**

California is one of only two states; the other is New Hampshire, which legally allows the filming of pornography. California Supreme Court decision, California vs. Freeman, 1989, legalized the filming of adults having sex in front of a camera. Freeman paved the way for New Hampshire v. Theriault in 2008.

Petitions numbered 480 and 513 were filed in 2006 and 2009 respectively. The Division held four advisory committee meetings and drafted proposed new Title 8 Section 5193.1 that included protection for employees who are exposed to sexually transmitted infections. The regulation was noticed in 2015 and the Board voted on the proposed regulation in 2016.

Proposed Section 5193.1 included, among other things, a requirement that employees engaged in acts that would expose them to body fluids during filming wear protective equipment, such as condoms and other barrier protection. The Board meeting where the vote took place had over 100 people from the adult film industry say that their industry was not included in the rulemaking process and the protections set forth in Section 5193.1 would make their jobs impossible to perform. A former Division representative who was involved in the rulemaking process disputed the lack of industry involvement. The FSC, an industry group, proposed their own version of a regulation that the Division, evidently, did not incorporate into Section 5193.1.

On February 18, 2016, the Board did not adopt the proposed regulation. The Board suggested the Division should try again and include members of the adult film industry in drafting another proposal addressing the concerns raised in comments to the proposed rule.

On March 2, 2016, the Aids Healthcare Foundation (AHF) submitted a Petition that was numbered 557 and on May 9, 2016 FSC submitted a Petition that was numbered 560. Both Petitions addressed the adult film industry.

The Board granted Petitions 557 and 560 to the limited extent that the Division was requested to proceed in convening an advisory committee, with stakeholder involvement inclusive of AHF, FSC, and a diverse cross section of the adult film industry, to consider amending or expanding upon Title 8, Section 5193, to specifically address risks of employee exposure to bloodborne pathogens and STIs (sexually transmitted infections) in the adult film industry. The Board also requested that the Division provide periodic updates at monthly board meetings on the advisory committee process.

Minutes from the July 20, 2017 Standards Board meeting state the Division reported that they held an advisory committee on January 31, 2017 and that they continued to collaborate with the Petitioners to provide education and outreach about enforcement of existing requirements regarding the use of universal precautions and barrier methods of protection in the adult film industry. The minutes also revealed the Division was not planning to do any rulemaking regarding this issue.

Los Angeles County voters passed Measure B in 2012 that required condoms be worn during sex performed in adult films, the result was a marked decrease in permits sought for filming and for filming to move out of Los Angeles County<sup>1</sup>.

### **PETITIONER'S ASSERTIONS**

Petition 576 consisted of a written portion, as reflected in the itemized requested action portion above, and contained 16 pages of Twitter comments and photos from performers in the pornography industry.

The Twitter printouts were comments/complaints about things employees, or potential employees, in the adult film industry encounter, such as sexual harassment and sexual assault from directors and/or producers during “go-see” appointments.<sup>2</sup>

Employees encountered coercion or threats if they did not agree to do whatever it is that a director expected of them on set with the consequence that if an employee didn't agree, he or she would not continue filming and would not get paid for their time, or would receive substantially less than the agreed upon compensation.

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<sup>1</sup> <https://www.latimes.com/business/hollywood/la-fi-ct-porn-condom-la-20161111-story.html>

<sup>2</sup> The Petitioner defined “go-see” as a meeting between a producer or director and a performer, to determine the employability of the performer. It could be considered a form of interview.

Twitter comments were about directors making rape jokes; threatening to cancel a shoot if a performer asks questions; producers being under the influence on set and cutting off a performer during their “do’s and don’ts”; “If a producer/director bullies/verbally abuses/threatens you in order to get you to “agree” to have sex with him off camera, that’s still assault.”

## **DIVISION OF OCCUPATIONAL SAFETY AND HEALTH (DIVISION) REPORT**

The Division’s evaluation was received on September 11, 2019 and recommended that the petition be granted to the extent that an advisory committee be formed to consider many of the items in the petition.

### **STAFF EVALUATION**

To evaluate the Petition, Board Staff reviewed the FSC website, relevant articles, including both newspaper and scientific journal articles, podcasts, OSHA inspection statistics and other information available on the internet, related to the Petitioner’s request.

#### **Relevant Standards**

##### **Federal Standards**

The Federal OSHA regulation for bloodborne pathogens is Code of Federal Regulations (CFR) 1910.1030. It was adopted in 1991. In the year 2000, Federal OSHA was mandated by the Needlestick Safety and Prevention Act to modify the regulation. The regulation requires, among other things, that employees who have exposure or potential exposure to blood or other potentially infectious body fluids to be protected, trained and offered the Hepatitis B vaccine. The regulation is written primarily with healthcare workers in mind. There is no regulation specifically for the adult film industry.

##### **California Standards**

The California OSHA regulation for bloodborne pathogens is California Code of Regulations, Title 8 Section 5193 and was adopted in 1992 in response to Federal OSHA regulation CFR 1910.1030.

The regulation was amended in 1999 to include requirements for engineered sharps. Similar to the Federal OSHA’s bloodborne pathogen regulation, California’s was enacted primarily to protect healthcare workers.

##### **Consensus Standards**

Board staff is unaware of consensus standards related to bloodborne pathogens or sexually transmitted infections.

### **Other Standards, Guidelines, Codes**

Board staff is unaware of any other standards or codes for bloodborne pathogens or sexually transmitted infections.

### **Staff Analysis**

Each of the Petitioner's requests will be evaluated on and item by item basis. Note that the Division means the California Division of Occupational Safety and Health and is also called Cal/OSHA.

1. *Require MindGeek Corporation cover the cost of medical testing for performers.*

Board Staff used internet research and listened to a podcast to discover MindGeek is a leading purveyor of internet pornography.<sup>345</sup>

It bears noting that the Board does not regulate individual companies. Presently employers are required to pay for medical testing required by Title 8 standards. Examples of such testing are contained in Title 8 Section 5199, Aerosol Transmissible Diseases; Section 5193, Bloodborne Pathogens; Section 5198, Lead; Section 5197, Occupational Exposure to Food Flavorings Containing Diacetyl; and Section 5214, Inorganic Arsenic.

2. *Require MindGeek, its subsidiaries, or its subsequent owners, ensure that condoms, lubrication, and any other PPE required by the bloodborne pathogens regulation are provided on any commercial set.*

Employers are already required to provide and pay for condoms and other personal protective equipment (PPE) consistent with the existing bloodborne pathogens standard. If lubricant were considered PPE, it would also be required to be provided. If it is not determined to be PPE, it could be negotiated through the advisory committee process to be added to a Title 8 standard.

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<sup>3</sup> <https://www.youtube.com/watch?v=G4hm-KLR6PY>

<sup>4</sup> <https://en.wikipedia.org/wiki/MindGeek>

<sup>5</sup> <https://nationalpost.com/news/how-a-canadian-founded-company-youve-never-heard-of-took-control-of-the-porn-industry>

3. *Require performers be tested within a 14-day period before performing for: HIV-1, HIV-2, qualitative or quantitative assay, HIV-1 and HIV-2 antigen testing, RPR or TREP-SURE syphilis assay, and urine tests, as well as oral and anal swabbing for trichomonas, chlamydia, gonorrhea and mycoplasma genitalium. Performers requesting a shorter testing window (from 1 – 13 days) must be accommodated.*

Instead of using condoms and/or other barrier protection, the California adult film industry typically relies on a system called PASS.<sup>6</sup> PASS stands for Performer Availability Screening Service. Performers, who wish to work, must be tested for sexually transmittable infections (STIs) within 14 days of performing. From the FSC website: “Testing facilities screen patients for HIV using the Aptima HIV-1RNA Qualitative Assay test. Other tests on a full performers’ panel also include chlamydia, gonorrhea, hepatitis B & C, trichomoniasis, and syphilis.”

The FSC states that no one has contracted HIV on a filming set since 2004. In 2004, an HIV-positive performer had a false negative test result and infected three female performers with HIV.<sup>7</sup> After that, the testing interval was shortened from 30 days to 14 days. Someone at the contracted laboratory reviews a person’s test results and if the person’s results were negative for all tests, they place a green check mark next to the performer’s name in the PASS database, indicating that they are free to work. A red “X” means a performer is not cleared to work and it could be assumed tested positive for a STI but could be because they did not test within 14 days. Performers with a login to the PASS database can check the status of a film partner’s availability on line.

HIV infection has an “eclipse period”; the number of days after initial infection that it is too early to detect infection by any test, but the infected individual is able to infect others. Following the eclipse period is the test window period. The window period is the number of days after acquiring infection until the virus is detectable and varies depending on the type of test used for detection. The window period mean is 10 days but be can be slightly shorter or significantly longer.<sup>8</sup> Due to the eclipse and window periods for HIV, shortening the testing cycle may not have additional benefit.

According to FSC website, performers are tested using the Aptima® HIV-1 RNA Qualitative Assay test within 14 days of performing. A study reviewing the efficacy of the Aptima® test showed that it was effective in detecting early HIV virus (within a few days of infection), although there were false negatives.<sup>9</sup>

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<sup>6</sup> <https://fscpass.com/>

<sup>7</sup> <https://californiahealthline.org/morning-breakout/adult-film-health-group-gives-los-angeles-county-health-department-actors-medical-records/>

<sup>8</sup> <https://academic.oup.com/cid/article/64/1/53/2194435>

<sup>9</sup> Identification of Acute HIV-1 Infection by Hologic Aptima HIV-1 RNA Qualitative Assay, Manak,,M.M et al

Since performers are required to be tested in order to be in the PASS system, adding tests that includes oral and anal swabbing and urine tests for infections that are not detected through blood, should be part of the required tests. This would be in addition to the requirement for condom usage.

4. *Require the Free Speech Coalition (FSC) and the legally recognized adult entertainment union, Adult Performer Advocacy Guild (APAG) provide comprehensive health care plans to all members.*

Generally requiring healthcare is outside the scope of what the Division enforces and outside the Board's authority. This item would need to be negotiated outside of the rulemaking process, such as through collective bargaining.

5. *Require that all testing be executed by a lab certified by the Centers for Medicare and Medicaid Services (CMS), specifically through the Clinical Laboratory Improvement Amendments (CLIA). The labs should employ at least one licensed medical doctor at each testing facility, including draw facilities.*

Any laboratory that samples and analyzes for infectious diseases should be appropriately certified. Precedence for specifying a laboratory be licensed by the Centers for Disease Control and Prevention (CDC) is contained in Title 8 Section 5198(j)(2)(C), for blood lead sampling and analysis. The certification suggested by the Petitioner is appropriate since the Centers for Medicare & Medicaid Services (CMS) regulates all laboratory testing (except research) performed on humans in the U.S. through the Clinical Laboratory Improvement Amendments (CLIA).<sup>10</sup> Requiring a licensed physician be on site, if not part of the licensing process, could be considered through the advisory committee process.

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<sup>10</sup> <https://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA/index.html>



6. *If the FSC continues to use the Performer Availability Screening Services (PASS). The Green Check Mark system must be amended to add an asterisk for on-set communication between all partners if performers have medical concerns (e.g. physical limitations, mental illness, seizures, HIV+ with an undetectable viral load, etc.), have been accused of any misconduct in official complaints, or have any other information that is pertinent to share with their scene partners. The asterisk indicates only that a conversation must happen between that performer and anyone they may work with. No third party, including producers, directors, or agents, may receive the test results of any performer. Performers are encouraged to share their test results privately before filming.*

This item is difficult to assess since the present PASS system seems to violate the Health Insurance Portability and Accountability Act of 1996 (HIPAA). It might be an issue for discussion outside of the Board's rulemaking process.

7. *Establish a Cal-OSHA hotline specifically dedicated for adult film performers to make legally anonymous complaints.*

There is already a system for anyone to make a complaint to the Division. There is information on the Division's website specifically for the adult film industry. Listed under featured safety programs in a box on the Division's homepage, it is the first item on the list and can be found at the direct link:

<https://www.dir.ca.gov/dosh/adultfilmindustry.html>

Towards the bottom of the page, there is information about filing a complaint. It may be helpful to move this information to the top of the page so that it is more prominent and easily found.

To file a complaint about a workplace hazard

Employees can also file a complaint with Cal/OSHA. Cal/OSHA keeps the identities of complainants confidential, unless the complainant requests otherwise. It is illegal for an employer to retaliate or discriminate against an employee who files a complaint with Cal/OSHA.

To file a complaint about employee exposure to infectious disease, call Regional Manager Peter Riley at (714) 558-4300.

To file a complaint about other types of hazards, call the Cal/OSHA district office serving the location of your job.

8. *All "go-sees" must be performed in a) an office or registered business location; b) groups not fewer than three.*

There are antidotal indication<sup>11</sup> indicated that performers experienced sexual assault and harassment during “go-sees.” This potentially falls under the category of workplace violence and could be covered by an employer’s injury and illness prevention program. The Petitioner contends that directors and/or producers coerce *potential* employees into providing sexual favors. Since a potential (pre-hired) performer would not yet be an employee, the Division would not seem to have jurisdiction. However, since sexual assault is a crime, it is a matter for local jurisdiction law enforcement.

9. *Prior to any commercial adult film production, a contract explicitly detailing the sex act to be expected on set must be sent directly to all performers involved. No third party may receive these contracts on behalf of any adult performer. Third parties may include, but are not limited to, agents, managers, romantic partners, or family members. These contracts are to be signed and paraphrased, with all performers present, on camera before each scene is filmed. The contract must include OSHA information. More details into what the contract should include can be found on page five.*

A contract before any person is hired (and therefore not yet an employee) would seem to be beyond the scope of the Division’s jurisdiction. This is an item that could be subject to collective bargaining.

10. *Interracial sex scenes may no longer be viewed as a sex act.*

This item is not clear, however, no aspects of race are within the Division’s jurisdiction.

11. *All complaints received by Cal-OSHA shall be the responsibility of producers; not directors and not performers. Performers who are named in formal complaints must have an asterisk added to their PASS information, or its equivalent.*

It is incumbent upon the Division to determine the appropriate employer according to legal precedent. It is a violation of the Labor Code to reveal a complainant’s identity without the complainant’s permission. The Petitioner may be referring to an individual performer who was the subject of a complaint by another performer for inappropriate behavior during filming. This should be addressed through the employer’s injury and illness prevention program and/or collective bargaining.

12. *Production holds and moratoriums must be reported to Cal-OSHA immediately. A minimum 14-day abstinence from filming must be observed.*

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<sup>11</sup> Such as Petitioner provided Twitter posting examples.

According to the FSC website, a production moratorium is imposed when a performer tests positive for HIV or when the FSC determines there should be a moratorium for another STI. The moratorium is a self-imposed production hold for all who participate in the PASS system to attempt to prevent the spread of an STI and to locate partners of anyone who tested positive.

Requiring that a production hold or moratorium be reported to Cal/OSHA would need to be considered through the advisory committee process but would provide an opportunity for Cal/OSHA to conduct an inspection and has the potential to benefit employees in the industry.

The Standards Board voted to deny proposed Section 5193.1 at its February 2016 meeting. A large contingent of stakeholders at the meeting expressed relief over the proposal failing to be adopted by the Board. Indications were that many of them and others within the adult film industry are under the misapprehension that condoms are not required to be worn. The perception that condoms and other forms of barrier protection are not required is in conflict with the accepted precepts of occupational health and safety and particularly the existing bloodborne pathogens standard.

An email from the Petitioner asserted that people in the adult film industry know that condoms are required but they still do not use them. The Petitioner believes that if performers were offered them they would likely be used more often.

The Petitioner indicated there was a lack of Division enforcement in the industry and if directors were forced to acknowledge that per existing Section 5193 condoms are to be provided and used there would be a surge in condom use.

Approximately 34 inspections were listed in the Federal OSHA database that likely were in the California adult film industry (North American Industry Classification System, NAICS 512110, Motion Picture and Video Production) from 2009 through 2019.<sup>12</sup> The most recent inspection appears to have been conducted in 2015.

According to sources<sup>13</sup>, there are approximately 1200 - 2000 employees in the adult film industry in California. That number may greatly under-represent the number who would be affected by regulating the industry since turnover is high.

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<sup>12</sup> <https://www.osha.gov/pls/imis/establishment.html>

<sup>13</sup> <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5437a3.htm>

Title 8 Section 5193 requires that employees be protected from exposure to blood borne pathogens and other potentially infectious material (OPIM). In adult film, that translates primarily to the usage of condoms as barrier protection. Exposure can occur from breaks in the skin, through mucous membranes, through eye exposure and through oral contact. Though condoms are sometimes worn in pornography, gloves or protective eyewear are typically not.

A prominent insider<sup>14</sup> reported in 2004 that using condoms ruins the saleability of the films and if they were required, the industry would move out of state and/or underground and testing would not be performed, which would make the industry less safe for performers. Some performers said condoms may break or cause condom rash, which in turn may lead to a break in the skin and thereby increase the likelihood of infection transmission. If so, changing condoms that break and using lubricants to decrease the likelihood of condom rash are reasonable solutions.

A prevalent counter argument to more protective standards or enforcement is that it simply would drive the industry underground or out of state is based on certain perceptions. There is the presumption that viewers do not want to see condoms, and would not view such content. Reports are that most of gay porn uses condoms while much of straight porn does not. Still some companies only shoot with condoms and state that they are successful (i.e. Wicked Pictures). However, if condom usage was the norm it could potentially make a statement that non-usage is irresponsible and risky.

It is widely accepted that condoms, when used correctly, are effective at preventing the transmission of HIV and many other STIs when compared to no condom use. Additionally, it is possible to remove condoms digitally so they are much less noticeable. As was done in a film called, "California Dreamin' I", produced by Falcon Studios. Other producers contend it takes too much time and costs too much money to remove condoms digitally.

Attempts to enforce the use of condoms within the pornography filming industry have been fraught with difficulty due to the nature of the business. Finding filming locations is difficult without a complaint. If a director decided to stop filming and have the performers leave, it would be difficult to establish employee exposure. Without employee exposure, the Division does not have the basis for a citation. A compounding factor is that performers use stage names and may be reluctant to reveal their real names. Furthermore, in order to issue a citation based on a film where no condoms are in use requires that the Division be able to prove that the film was made in California within the past six months, an almost impossible task without actually seeing the film being made. Six months is the statute of limitations from the instance in which a violation occurs until a citation may be issued.

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<sup>14</sup> Los Angeles Times, April 23, 2004, Page B-13.

A current “best available technology” (BAT) for prevention of HIV infection (in addition to using condoms) is antiretroviral pre-exposure prophylaxis, called “PrEP”. It is a Food and Drug approved pill taken by HIV-negative people to reduce their risk of HIV infection. Board staff research shows taking PrEP daily reduces the likelihood of contracting HIV through sex by 99%.<sup>15</sup> It should be offered, in addition to requiring condoms to performers.

### Conclusion

The Division’s most recent attempt to create a new standard specifically for the adult film industry was a highly contentious process, despite that fact that the bloodborne pathogens standard already applied to the adult film industry. Many of the items requested by the Petitioner are either already required or are not within Division’s jurisdiction.

However, Board Staff recommends the Division convene an advisory committee to consider the following:

1. When and how employers could be required to pay for PASS system testing.
2. 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.
3. Require the Free Speech Coalition to report production moratoriums to the Division.
4. Require the testing labs in the PASS system to be certified by Centers for Medicare & Medicaid Services (CMS) through the Clinical Laboratory Improvement Amendments (CLIA).
5. Require employers to educate employees about PrEP and offer it in addition to requiring condom use.

### **STAFF RECOMMENDATION**

Board staff recommends that Petition 576 be conditionally GRANTED to the extent that the Division is directed to convene an advisory committee to explore items 1 through 5 above. The Petitioner should be offered the opportunity for their support to participate in the advisory committee deliberations.

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<sup>15</sup> <https://www.cdc.gov/hiv/risk/prep/index.html>