

of Regulations. The petition states that, “According to LA[C]DPH workers in the adult film industry are ten times more likely to be infected with a sexually transmitted disease than members of the population at large. LA[C]DPH documented 2,013 individual cases of Chlamydia and 965 cases of gonorrhea among workers between the years 2003 and 2007.”

Existing Title 8 Regulations

Section 5193 became operative on January 11, 1993, and has been amended several times since.¹ Semen and vaginal secretions are specifically named in this standard as “other potentially infectious materials” (OPIM). This section applies wherever there is occupational exposure, which is defined as “reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties.”

Section 5193 requires employers to:

- Establish, implement and maintain an effective written exposure control plan;
- Eliminate or minimize occupational exposure to blood or OPIM through the use of engineering and work practice controls;
- Provide, and enforce the use of personal protective equipment where exposure remains after the institution of engineering and work practice controls;
- Provide medical services, including post-exposure evaluation and follow-up and provision of hepatitis B vaccinations;
- Provide initial and annual training to employees;
- Keep and make available certain exposure and medical records, in accordance with this section and Section 3204;
- Review the exposure control plan at least annually, and have an effective procedure for involving employees in the evaluation of the plan;

Section 3203, Injury and Illness Prevention Plan, requires employers to identify and evaluate occupational safety and health hazards and to correct hazards in a timely manner. It also requires a means of communication with employees about occupational safety and health matters, investigation of occupational injuries and illnesses, and training of employees and supervisors.

Other standards, such as Section 3204, Access to Employee Exposure and Medical Records also apply in this industry.

Federal Regulations

29 CFR 1910.1030, Bloodborne Pathogens, was adopted on December 6, 1991, and was the basis for California Section 5193. The federal standard requires employers to develop

¹ Notably, hepatitis C was added as a “named pathogen” in 1999, which included requiring the testing of source blood for hepatitis C infection after an exposure incident.

an exposure control plan, to utilize engineering and work practice controls to minimize or eliminate exposures, to provide and ensure that employees use personal protective equipment where hazards remain, and to provide training and medical services to employees who have occupational exposure. Although hepatitis C is considered a bloodborne pathogen in both the federal and California standards, the federal standard does not specifically require the testing of the source individual for hepatitis C after an exposure incident. The federal regulation does not contain the specific requirement for employee participation in review and update of the plan. There are also some differences between the federal and state standard regarding engineered sharps injury protection.

Experience of the Division of Occupational Safety and Health

Prior to 2004, the Division had limited experience in the adult entertainment industry. During that period, the Division conducted several inspections in exotic dance establishments, including one inspection in which a citation was issued regarding exposure to bloodborne pathogens. In 1992 (prior to the effective date of Section 5193), citations were issued in two adult bookstores for sanitation violations. In 1999 an inspection was conducted at an adult bookstore that resulted in citations for violations of Section 5193.

In 2004, there was an outbreak of HIV in the adult film industry. Investigators from the Centers for Disease Control and Prevention (CDC) and LACDPH determined that an employee who had recently become infected with HIV had infected three partners during the course of producing a video. The Division issued citations against two companies (owned by the same individual) alleging violations of Section 5193 and Section 3203. Although these citations were initially appealed, one of the companies ultimately accepted the citations and the Division withdrew the citations issued against the other company. As the result of a subsequent re-inspection, the Division issued citations to that employer for failure to abate the violations. This employer entered into a long-term abatement agreement with the Division. As a long-term abatement measure, the employer petitioned for a variance from Section 5193². That petition was withdrawn prior to Board action.

Since 2004, the Division has responded to complaints and referrals regarding bloodborne pathogens and other hazards in the adult film industry. As of January 1, 2010, in addition to the citations listed above, the Division has conducted approximately 25 investigations in this industry, and has issued citations for violations of Section 5193 and/or 3203 in eight of those investigations. (Some of those cases are still under investigation). Although all citations were initially appealed, most citations have been settled, and no appeal has yet been heard by the Occupational Safety and Health Appeals Board.

In 2004 the Division posted a webpage for employees and employers in the adult film industry to inform them of the requirements of Cal/OSHA regulations in this industry. A

² Permanent Variance Application, OSHSB File No. 08-V-211, Jerome H. Mooney, Evasive Angles, Inc.

dedicated phone line was also established to receive complaints and inquiries from people involved in this industry. The Cal/OSHA Consultation service has received several inquiries regarding this industry.

Infectious disease hazards in the Adult Film Industry

The adult film industry (AFI), sometimes called the adult entertainment industry, produces sexually explicit video, film, and web-based media, still photography and other depictions. Several outbreaks of HIV have been recorded in this industry. Outbreaks of other sexually transmitted infections, such as Chlamydia, gonorrhea, herpes, and human papillomavirus occur periodically. For example, between midyear 2004 and 2008, 2,848 STDs were diagnosed among 1,868 performers who tested at Adult Industry Medical (AIM). Chlamydia was the most frequent diagnosis (57.5%), followed by gonorrhea (34.7%) and co-infection with both STDs (7.8%). Approximately 70% of STD infections occurred in female performers. Several cases of syphilis (a bloodborne pathogen) were also reported. The LACDPH believes that these disease rates are significant underestimates of true disease rates because oral and rectal anatomic sites are not routinely screened, are often asymptomatic and are likely to serve a disease reservoir for repeated infections. Furthermore screening frequency is not appropriate for the incubation periods of the diseases and empiric treatment without diagnostic testing is reportedly common.³ In addition performers in this industry are not routinely tested for fecal-oral pathogens, such as Hepatitis A or other blood borne pathogens such as Hepatitis B and Hepatitis C, and there is no information available regarding hepatitis transmission in this industry. In addition to the HIV transmission in 2004, HIV transmission was also reported in 1995, 1997, 1998 and 1999.

The CDC and the Los Angeles County Department of Health Services (now the LA County Department of Public Health, LACDPH) investigated the outbreak of HIV in 2004. During the 23 day period between the index patient's negative test on March 17, and his positive test on April 9, they found that he "was employed to perform sex acts with 13 female performers." Three of these women tested positive for HIV, after having tested negative within the preceding 30 days. This is a 23% attack rate. Two of the three HIV-infected women performed unprotected oral, anal, and double-anal sex with the index patient on March 24. One of the two also had unprotected vaginal sex with the index patient on March 24. Transmission was documented through molecular analysis of HIV DNA in blood samples from the index patient and the two women who agreed to provide samples for this analysis.⁴

The authors concluded that "The underlying risk for HIV infection and other STDs stems from the basic work practices in the industry, in which performers have multiple sex partners over short periods, with whom they engage in frequent, often prolonged, and

³ Goldstein, Binh. Sexually Transmitted Infections in the Adult Film Industry. Presented at Preventive Medicine 2009.

⁴ Taylor M et al. Epidemiologic Investigation of a Cluster of Workplace HIV Infections in the Adult Film Industry: Los Angeles, California, 2004. HIV/AIDS, CID 2007:44(15 January).

unprotected sex acts. The risk of infection is further increased by the infrequent use of barrier methods to prevent exposure to infectious body fluids, which is of particular concern when internal ejaculation and other high-risk practices, such as double-anal penetration are performed. In addition although current HIV testing methods in this industry may shorten the window period to diagnosis of new HIV infection, they fail to prevent occupational acquisition of HIV in this setting.”⁵

In another article, investigators discussed the basis for the 23% attack rate, which is “considerably higher than the most conservatively estimated risk of less than 0.5% for a single act of receptive anal or receptive vaginal sex with an HIV-infected partner... The HIV transmission risk for the presently investigated cluster was greater for at least three reasons. First, the sexual contact involved in adult film production can be prolonged and traumatic, increasing the opportunity for infection to occur; notably in the case of these infections there was substantially increased risk of trauma to the anorectum (i.e. double-anal penetration). Second, most estimates of transmission risk are ‘per coital act’ calculations. The risk for adult film workers is increased by their multiple coital and other exposures over a short period. The attack rate for this cluster represents a cumulative rather than per-act risk. Finally, the transmission of HIV is greatest within the first months after infection during and near the time of seroconversion. Epidemiological studies in Africa have observed a 12-fold higher risk per coital act for heterosexual transmission within the first 5 months after initial infection.”⁶

LACDPH has also reported frequent and repeated infections with treatable sexually transmitted diseases, including gonorrhea and Chlamydia. These infections may have long-term consequences including pelvic inflammatory disease leading to damage to the reproductive system, infertility and ectopic pregnancy.

Difficulties in Applying Section 5193 in the Adult Film Industry

The Division has opened approximately 25 inspections in the adult film industry during the period January 1, 2004 through December 31, 2009. In several cases no enforcement actions were taken because the Division was unable to locate the actual employing entity. By federal law, adult entertainment products identify a publishing producer of record. However, these publishers often do not directly film the footage they use, and are termed “secondary producers” in the Code of Federal Regulations⁷. These secondary producers may specifically contract for footage to be produced, or they may generally communicate to front-line producers (primary producers) the content they want to buy. The primary producer, who is generally the direct employer of the people who act in the video, is not identified on the published video, and often can not be located without the assistance of

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⁶ Brooks JT et al. Molecular analysis of HIV strains from a cluster of worker infections in the adult film industry, Los Angeles 2004. AIDS 2006 Vol. 20, No. 6.

⁷ 28 CFR 75.1(c)

the secondary producer. Because the secondary producer specifies, through contract or purchasing preference, the content of the video, this producer determines whether employees will be protected against disease transmission during the production of the video.

The Division has had substantial difficulties in locating the front-line employers and employees, and therefore has often been unable to establish the requisite employment relationship, either with the exposing employer or with the secondary producer, who may be a controlling or creating employer, or under some circumstances be in a dual employer relationship. As with other industries that rely largely on subcontractors as employers, although the secondary producers are large and stable entities, the primary producers may use a number of short-term business aliases. In this industry, many primary producers are not incorporated and do not file for business licenses, file tax statements regarding payments to employees, or file for municipal filming permits.

Although producers in this industry are aware, through industry publications and the Division's activities, that Cal/OSHA requires the use of engineering controls such as simulation, or barrier protection (such as condoms), to protect employees, many employers/producers in the heterosexual adult industry have publicly announced that they will not comply with this regulation. Because there is often little capital investment by primary producers, employers easily switch identities, and continue to produce films without complying with regulations. There is no existing requirement for any film producer to maintain records of where raw footage is produced, so the Division also has difficulty establishing that video was produced in California.

Those producers who want to comply with the regulation, at least insofar as requiring barrier protection during anal and vaginal penetration, have expressed to the Division that the standard contains many requirements that are not specific to their industry, such as the requirement to maintain a sharps injury log. These producers, with the support of some public health entities, also believe that a more tailored approach to preventing sexual transmission of disease, could be created, that would focus on effective strategies for protecting employees during high risk activities, such as anal and vaginal penetration.

Another difficulty for compliance with the current standard is that employment in this industry is typically of short duration and may be one time, or intermittent. The hepatitis B vaccination series and post vaccination serology takes seven to eight months to complete. Employees may work for a number of employers during this period, and in any given year. Training is also a challenge in this environment.

Actions requested by the petitioner

The petitioners have requested that the Board amend Section 5193 as follows:

- 1. Renumber subsection (i) Appendix to become subsection (j).*
- 2. Add the following definitions to subsection (b):*

“Adult film” means the production of any film, video, multimedia or other recorded representation of sexual intercourse in which performers actually engage in oral, vaginal, or anal penetration, including but not limited to penetration by a penis, finger, or inanimate object; oral contact with the anus or genitals of another performer; and/or any other activity that may result in the transmission of blood and/or any potentially infectious materials.”

“Sexually Transmitted Disease” means any infection commonly spread by sexual contact, including but not limited to HIV/AIDS, gonorrhea, syphilis, Chlamydia, hepatitis, genital human papillomavirus infection, and genital herpes.”

3. Add new subsection (i) to read:

(i) Adult Film Production:

(1) Each employer engaged in the production of adult films is required to maintain engineering and work practice controls sufficient to protect employees from exposure to blood and/or any potentially infectious materials. Engineering and work practice controls include, but are not limited to:

(A) Simulation of sex acts using acting, production and post-production techniques;

(B) Ejaculation outside workers’ bodies;

(C) Provision of and required use of condoms whenever acts of vaginal or anal sex are filmed;

(D) The provision of condom-safe water-based or silicone-based lubricants to facilitate the use of condoms; and,

(E) Plastic and other disposable materials to clean up sets.

(2) Employers engaged in the production of adult films are required to maintain an exposure control plan in compliance with section (c), but are not required to maintain a sharps injury log under section (g)(3)⁸ and are further exempt from the requirements of section (c)(4) and (5).

(3) Employers engaged in the production of adult films are required to comply with section (f), regarding the pre-exposure provision of hepatitis B vaccine to employees. Any employer engaged in the production of adult films shall make available the hepatitis B vaccine and vaccination for any employee engaged in the production of adult films, at the employer’s expense.

(4) Employers engaged in the production of adult films are required to comply with section (g)(2) regarding information and training to be provided to employees at the employer’s expense. The training requirements of this subsection may be satisfied by proof that the employee has received appropriate training at another workplace or from an appropriate third party in the prior twelve months.

⁸ The Division believes that this is a typographical error and is intended to refer to subsection (c)(3)

Employers engaged in the production of adult films are not required to ensure that employees have received the training specified in section (g)(2)[G](13) regarding signs and labels.

(5) Where any worker engaged in the production of adult films is exposed to any blood or potentially infectious materials, the employer shall provide the employee with access to post-exposure prophylactic treatment for HIV, comprehensive testing for other sexually transmitted diseases, and appropriate treatment for any subsequently diagnosed sexually transmitted diseases.

Discussion of Petitioners Specific Proposal

The Division agrees with the petitioner that there are significant health hazards in this industry, and that the most applicable standard, Section 5193, does not address all of the hazards that may result from sexual activities that occur in the course of employment. The Division has, however, applied this standard in a number of inspections, and believes that the activities described by the petition generally come within the scope of Section 5193. In the course of its inspections, related litigation, and other outreach activities, the Division has determined that even employers who would choose to comply with the regulation find that certain provisions are not optimally constructed for this industry. The Division believes that rulemaking activities, including an advisory committee process may provide an incentive to the parties to develop a rule that will provide protection to employees. Further, compliance in the industry with this standard may improve if the standard clearly and specifically addressed both hazards and control measures in this industry.

The Division agrees with the petitioner that conditions in this industry pose an immediate health concern to employees, and therefore a lengthy advisory process should be avoided. However, the Division has the following concerns regarding the specific proposed language:

Definitions

The petition proposed the following definition for adult film: “*Adult film*” means the production of any film, video, multimedia or other recorded representation of sexual intercourse in which performers actually engage in oral, vaginal, or anal penetration, including but not limited to penetration by a penis, finger, or inanimate object; oral contact with the anus or genitals of another performer; and/or any other activity that may result in the transmission of blood and/or any potentially infectious materials.” The Division believes that the term “recorded” should be omitted from this definition, as there may be video that is streamed and not recorded.

The petitioner has proposed a definition for “adult film” but not a definition for “adult film producer.” The Division believes that it is necessary to define the employers to whom these subsections would apply.

Proposed new subsection (i)

The petition does not state whether new subsection (i) contains all requirements that would be applicable to adult films, and that therefore the employer would not be required to comply with other elements of the standard, including, for example, relevant elements of subsection (d) addressing universal precautions, cleaning and decontamination of the worksite, handling of contaminated laundry, and disposal of regulated waste. Similarly, several elements of subsection (f) are not addressed, including testing the blood of the source individual, and the requirement to maintain a confidential medical record. In order to protect employees, and in order to maintain federal equivalence, if the proposal is to be adopted, language should be included to clarify that unless a specific exception is created, all provisions of Section 5193 apply. Any exceptions that are considered would need to address the issue of federal equivalence.

The proposed language in subsection (i) includes the term “potentially infectious materials,” which is not defined. The term “other potentially infectious materials (OPIM)” is specifically defined in the standard, and the Division believes that term should be used for consistency throughout.

As discussed above, the Division believes that if the standard is to be amended an additional provision should be added to clarify to which entities the standard applies, to increase the efficiency of Division investigations, and to improve the ability of public health agencies to conduct contact tracing and other public health activities. Therefore the Division believes that a subparagraph to proposed subsection (i) should be added to include the following language:

(6) In addition to the recordkeeping requirements in subsection (h), each primary and secondary producer shall maintain for each segment of footage produced or purchased the information listed below. This information shall be furnished to the Chief and/or representatives of the Chief, and to the local public health department upon request. This requirement does not apply to materials purchased from other producers in whole, solely for the purpose of distribution.

(A) The date of the filming,

(B) The street address, city and state of the filming.

(C) The stage name, legal name, residence address, and phone number for each person who participated in the filming, including production crew, actors, and directors.

(D) The name, address, and phone number of the entity responsible for filming the video, and the name, address and phone number of the entity to which the video was sold.

(E) A record of the engineering and work practice controls and personal protective equipment used during the production.

Division Recommendation

The Division believes that it is appropriate for the Board to consider the pros and cons of amending Section 5193 to provide a specific framework for compliance for this industry. The Division believes that this issue is best addressed through an advisory process that could help to clarify issues section 5193 does not currently address with specificity. The advisory process would also aid in addressing any issues of federal equivalence. Therefore the Division recommends that the Board refer the petition to the Division to establish an advisory committee.

Attachments:

Goldstein, Binh. Sexually Transmitted Infections in the Adult Film Industry. Presented at Preventive Medicine 2009.

Taylor M et al. Epidemiologic Investigation of a Cluster of Workplace HIV Infections in the Adult Film Industry: Los Angeles, California, 2004. HIV/AIDS, CID 2007:44(15 January).

Brooks JT et al. Molecular analysis of HIV strains from a cluster of worker infections in the adult film industry, Los Angeles 2004. AIDS 2006 Vol. 20 No. 6.

28 CFR 75.1(c)

cc Deborah Gold
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