

Date of Hearing: April 29, 2014

ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND
INTERNET MEDIA

Ian C. Calderon, Chair

AB 1576 (Hall) – As Amended: April 21, 2014

SUBJECT: Occupational safety and health: adult films.

SUMMARY: Enacts specific requirements related to injury and illness prevention programs in the adult film industry (AFI), as specified. Specifically, this bill:

- 1) Defines "adult film" to mean any commercial film, video, multimedia, or other recorded representation made or distributed for financial gain, during the production of which performers actually engage in sexual intercourse, as specified.
- 2) Requires an adult film employer's injury prevention program to include a log of information for all scenes produced or purchased, including, but not limited to, documentation that:
 - a) Each time an employee performing in an adult film engaged in specified acts, personal protective equipment was used to protect the employee from exposure to bloodborne pathogens. This paragraph shall not be construed to require that the personal protective equipment be visible to the consumer in the finished film.
 - b) Each employee performing in an adult film was tested for sexually transmitted infections according to the recommendations of the Centers for Disease Control and Prevention and the State Department of Public Health current at the time the testing takes place, not more than 14 days prior to filming any scene in which the employee engaged in specified acts and that the employer paid for the test.
- 3) Makes conforming changes to existing law.

EXISTING FEDERAL LAW:

- 1) The First Amendment to the United States Constitution provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
- 2) Producers of books, magazines, periodicals, films, videotapes, or other matter which contain visual depictions of actual, not simulated, sexually explicit conduct are required to maintain records of each performer portrayed in a visual depiction of sexually explicit conduct and to affix a statement to the product describing where the records are located.
- 3) Each employer shall furnish to each of his employees employment in a place of employment which are free from recognized hazards that are causing or likely to cause death or serious

injury or serious physical harm to his employees and shall comply with all occupational safety standards.

EXISTING STATE LAW:

- 1) Creates the Occupational Safety and Health Standards Board (Board) within the Department of Industrial Relations.
- 2) Provides that the Board, by an affirmative vote of at least four members, may adopt, amend or repeal occupational safety and health standards and orders.
- 3) Declares that the Board shall be the only agency in the state authorized to adopt occupational safety and health standards.
- 4) States that the Board shall adopt standards at least as effective as the federal standards for all issues for which federal standards have been promulgated under Section 6 of the Occupational Safety and Health Act of 1970 (P.L. 91-596) within six months of the promulgation date of the federal standards and which, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce.
- 5) Declares that in order to protect the privacy of individuals who are the subject of testing for human immunodeficiency virus (HIV), no person shall be compelled in any state, county, city, or other local civil, criminal, administrative, legislative, or other proceedings to identify or provide identifying characteristics that would identify any individual who is the subject of an HIV test, subject to specified exception.

FISCAL EFFECT: Unknown

COMMENTS:

1) Rational for Legislation: Workplace Safety Concerns In The Adult Film Industry:

- a) Author's Statement of Need for Legislation: According to the author, "Adult film production is a multi-billion dollar industry. California based production of adult films account for the vast majority of this business, employing thousands of Californians and generating millions of dollars in tax revenue.

Workers in agriculture, food service, healthcare, construction and many other industries benefit from stringent work place safety requirements that keep workers' compensation costs down and ensure a safe environment to earn a living. The adult film industry, given the type of work required, disproportionately exposes actors to a range of health and safety risks. The industry is largely self-regulated and has done an inadequate job of protecting its employees from disease infection.

"According to the Los Angeles Department of Public Health (LADPH), workers in adult films are at least seven times more likely to be infected with a sexually transmitted disease (STD), such as HIV, than the population at large. In 2013, there were five documented HIV transmissions of adult film actors, leading to three separate self-

imposed yet unenforced production moratoriums. The result of this unsafe work environment is a public health crisis that would be preventable if reasonable steps were taken to protect these employees in the workplace."

- b) Incidents of Adult Film Performers' Exposure to HIV and Other STD's Gives Rise to Concerns Over Industry Practices: According to information submitted by the supporters of AB 332 (Hall), substantially similar legislation heard by this committee last year, "The US AFI produces 4,000 to 11,000 films and earns an estimated \$9 to \$13 billion in gross revenues annually. California is the largest center for adult film production worldwide, although adult film production occurs throughout the United States. An estimated 200 production companies in Los Angeles employ up to 1,500 workers."

The supporters and opponents of that measure provided the committee with voluminous and often contradictory statistics about the incidence of STDs in the AFI, and the threat that exists for performers in being exposed to these pathogens. There is consensus however, that a number of highly publicized events surrounding outbreaks of the HIV virus within the community of adult performers raised the public profile of this intra-industry issue, and have drawn the attention of various regulatory bodies. A brief recitation of these events includes a 1980's outbreak which led to a number of deaths and led to the current system of testing within the industry. Another outbreak in 2004 saw three actors test positive for HIV, and resulted in a voluntary month long shut down of the industry. In both 2009, and 2010, one person was discovered to be infected by the industry testing process, however according to a Los Angeles Times story, LA County Public Health officials believe unreported incidents may be as high as 16 in 2009.

Outbreaks such as those detailed above have drawn concern from many quarters, including the American Public Health Association, who wrote the following in their position paper entitled: Prevention and Control of Sexually Transmitted Infections and HIV Among Performers in the Adult Film Industry.

"The industry's method for responding to outbreaks of STDs and HIV among performers in the heterosexual segment of the industry is voluntary STD/HIV testing. Although testing can contain the spread of disease, it does not prevent its spread. Another limitation in the industry's use of STD/HIV testing is the time period in which tests are conducted. The current industry practice is to test performers every 30 days; however, a performer could be exposed to an STD infection immediately after testing, have no symptoms, be highly infectious, and unknowingly transmit the infection to others. The 30-day testing requirement is not consistent with incubation periods for most STDs and may therefore miss detection of disease. (It should be noted that the current industry protocol is testing every 14 days.)

"Despite repeated recommendations from local public health officials, Cal/OSHA, and a Legislative hearing on how to make the AFI safer, industry practices remain unchanged. ... Flagrant violation of other Cal/OSHA worker protections remains. Performers must still pay all STD screening tests - a violation of Cal/OSHA standards, which requires the employer to pay for medical monitoring. Further, to work, performers must take an STD/HIV test and furnish test results to their employer (production company) who posts and shares these results with other production companies in a database to which production companies and talent agencies subscribe. Performers with a negative test

result can work, and those who are positive cannot work until they receive a negative test. This practice violates a worker's right to medical confidentiality and is not consistent with the Cal/OSHA Blood-borne Pathogen Standard, which requires employers to maintain a confidential medical record for each employee." American Public Health Association Policy Statement 20102, 11/9/2010.

- 2) Existing State Law: Blood Borne Pathogen Standard: The regulations covering occupational health and safety require employers to develop and implement an Illness and Injury Prevention Program (IIPP, Title 8 of the California Code of Regulations § 3203). Where the work environment includes risk of disease transmission, the Division of Occupational Safety and Health (DOSH) has required employers to address control methods in their IIP. Many industries develop industry-wide IIPs that individual businesses can follow in good faith and be deemed in compliance with the regulation.

DOSH also regulates workplace exposure to blood and other potentially infectious materials controlled by employers through an existing bloodborne pathogen standard (Title 8 of the California Code of Regulations § 5193).

Among other requirements, the existing standard provides the following with respect to personal protective equipment:

"Where occupational exposure remains after institution of engineering and work practice controls, the employer shall provide, at no cost to the employee, appropriate personal protective equipment such as, but not limited to, gloves, gowns, laboratory coats, face shields or masks and eye protection, and mouthpieces, resuscitation bags, pocket masks, or other ventilation devices."

Some have argued that this existing standard, as applied to the adult film industry, would therefore already allow the required use of condoms or similar barrier protections.

- 3) Industry Response to Performer Exposure Events: Self-Regulation Through Testing: The AFI has implemented voluntary compliance with CalOSHA's requirement for employers to have an exposure control plan (ECP) to minimize the risk of employee exposure to blood-borne pathogens. The following are excerpts from the AFI Blood-borne Pathogens Exposure Control Plan, which was provided to the committee by the Adult Protection Health and Safety Services (APHSS).

Exposure Control Plan: This ECP is a key document to assist our company in implementing and ensuring compliance with the CalOSHA standard for blood-borne pathogens, thereby protecting our employees and contractors. This ECP contains the following:

- Determination of employee and contractor exposure
- Implementation of various methods of exposure control including:
 - Universal precautions
 - Work practice controls
 - Personal protective equipment
 - Housekeeping
- Post exposure evaluation and follow-up
- Communication of hazards to employees and contractors

- Employee and contractor training/education
- Recordkeeping
- Procedures for evaluating circumstances surrounding exposure incidents

Testing: APHSS Testing Protocols require each performer to submit to regular testing for STDs, including HIV. According to information supplied by APHSS, performers must be tested at a minimum of every 28 days, and must take a blood test for HIV (by “PCR RNA” Aptima) and Syphilis (TREP-SURE™) cascading to RPR, and a urine test for Gonorrhea (by “ultra-sensitive DNA amplification”) and Chlamydia (by “ultra-sensitive DNA amplification”). Following the results of these tests, the performers are listed as “Available” or “Unavailable” to work on an APHSS database.

Additional testing is recommended for performers new to the industry, and includes the following for female performers (re-examinations recommended every 6 months): Pelvic exam that includes, evaluation for herpes, genital warts, Rectal Pap smear (thin-prep with reflex HPV), PAP smear (“thin-prep with reflex HPV”), Vaginal culture for bacterial vaginosis, trichomonas, Hepatitis A, B & C, and Syphilis (an “RPR” and Trep-Sure test). For male performers (re-examinations recommended every 6 months), a genital exam including an evaluation for herpes and genital warts and rectal pap smear if you are a “bottom” (thin-prep with reflex HPV) is recommended.

- 4) Supporters: Statewide Law is Needed to Protect AFI Workers from STDs including HIV: The AIDS Healthcare Foundation, sponsors of both Measure B and AB 1576, write the committee in support to say, "The adult film industry accounts for thousands of workplace disease infections in California every year. During the production of adult films, workers, including but not limited to performers, are exposed to a number of sexually transmitted diseases. While these exposures fall under California's regulatory definition of 'bloodborne pathogens,' the statute that directs the execution of worker safety protections is unclear about the obligations of adult film employers to document their adherence to the law.

"At any given time, there are approximately 2,000-3,000 Californians who are employed as performers, but the roll call of performers is constantly shifting. The LADPH has documented an epidemic of sexually transmitted diseases among workers in the adult film industry. It attributes the epidemic to a variety of high-risk acts which workers are required to engage in, and to a lack of protective equipment for performers, including condoms.

"LADPH estimates that condoms and other protection are used in less than 20% of hardcore heterosexual adult film. And in a study of STDs in the Los Angeles adult film industry published last December in Sexually Transmitted Diseases, researchers found that consistent use of condoms on set was as low as 1%. Aggravating the situation is the tragic decision by some producers in the gay adult film industry to abandon decades of condom-only production in favor of films in which no protection is afforded to the performers.

"According to LADPH, 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. Also, the study noted above found that 2/3 of the female study subjects and 1/3 of the male subjects had an STD, vastly exceeding the STD rates in the general population, and that 69% of them had worked in an adult film in the previous 30 days.

"The adult film industry has steadfastly refused to take appropriate steps to protect its workers from diseases spread by bloodborne pathogens. Therefore, [this bill] defines without ambiguity the records that must be kept by the employer to document compliance with the requirements that condoms and other protective barriers have been used in any scene in which exposure to bloodborne pathogens might occur and that employees performing in scenes are tested for STIs frequently."

In addition, Planned Parenthood supports AB 1576, based upon their belief that, "Increasing condom use is good for the public health of California. During the recession, STI education and other public health programs were cut down to the bone and many county health clinics shut their doors due to lack of funding. Lack of access to these services has profoundly impacted Californians and has resulted in an alarming rise of STIs throughout the state. This measure seeks to address a small population of workers who are disproportionately affected by STIs, including HIV. AB 1576 will provide statewide uniformity needed to ensure that the thousands of actors employed throughout the state in this multi-billion dollar industry are given reasonable workplace safety protections needed to reduce exposure to HIV and other communicable diseases."

Finally, the California Medical Association (CMA) supports this measure and states, "CMA has long been engaged in efforts to prevent the spread of and to encourage early detection and treatment of HIV. [This bill] is an important public health bill that aligns with that historic body of work. Adult entertainment workers are at high risk for being infected with a sexually transmitted disease. Requiring the use of condoms and STI testing are common-sense ways to decrease spread of disease."

- 5) Opposition: This Measure Is Unconstitutional, Unnecessary and Will Harm the Economy: Counsel for Vivid Entertainment, LLC states the following in opposition, "Although the latest version of [this bill] stripped out certain requirements, the remaining provisions still raise the same core constitutional infirmities being addressed by the Ninth Circuit in *Vivid Entertainment, LLC v. Fielding et al.* The additional requirement of a government mandated testing program not only fails to alleviate these constitutional concerns, but, in fact raises substantial additional ones... Given the overlapping legal issues raised by both Measure B and [this bill], Vivid Entertainment respectfully requests that the Legislature forgo any action until litigation has concluded."

The Free Speech Coalition (FSC) opposes for different reasons, namely their belief that the existing protocols are working well, pointing out, "Currently, the adult movie industry does not require any performer to engage in filming with an HIV-positive individual. The industry adopted the blood borne pathogen plan in which EVERY performer is required undergo advanced and regular testing for HIV or wear condoms. Under industry testing protocols, all producers and/or directors require performers to confirm a current negative test panel prior to shooting. Each performer is also entitled to receive confirmation that her partner has current negative test results, thereby protecting EVERY performer from the risk of transmission. The testing protocols are based on recommendations of medical experts. In large part due to the testing protocols, there has not been a single reported incident of on-set transmission in ten years." The FSC point out there is a constitutional distinction between their voluntary testing program that private individuals agree to submit to and a government compelled test mandated as a term of employment, as is proposed by AB 1576. (The constitutional issues are discussed further in comments below.)

Economic harm is another line of opposition as reflected in the comments of the Valley Industry and Commerce Association (VICA), who oppose this measure based upon their belief that, "This bill is clearly fueled by alternative motives to force the adult film industry out of California. Yet, this six billion dollar industry generates millions in state and local tax revenues annually. Adult film production is also responsible for a sizeable number of jobs in the San Fernando Valley and Los Angeles County, including sound technicians, propmasters, costumers and craft services that would otherwise be out-of-work due to runaway mainstream film production. These jobs have depleted since the passage of Measure B, L.A. County's version of this legislation; a statewide mandate will be the final straw."

Manwin USA raises similar concerns about the potential job and economic impact of this measure, stating the following, "Where the impact of [this bill] will be felt the most is on small businesses and the thousands of workers who work directly or indirectly for California's adult entertainment industry. ... Since the passage of Measure B, film permits dropped in Los Angeles County from 456 to 24 during the same time period last year. This represented a revenue drop in film permits alone of \$450,000, not to mention the millions of dollars lost by those ancillary businesses serving the Los Angeles County adult film productions.

"Fortunately for California, the scope of the job and revenue loss was mitigated by the local nature of Measure B, as many businesses were able to stay in business by following the productions outside of Los Angeles County. However, not all of the businesses that moved out of Los Angeles County stayed in California. Numerous productions jumped state lines to Nevada, where Las Vegas now represents the fastest growing adult film location in the country. Were [this bill] enacted, and restrictions placed on filming anywhere in California, defections would accelerate rapidly."

- 6) Runaway Production: Media Reports Porn Filming Decline Following Passage of Measure B: According to recent media reports, the number of film permits issued to adult film producers decreased by 95% in Los Angeles County following the enactment of Measure B. As of November 19, 2013, only 24 permits for adult films had been filed in Los Angeles County, compared with 480 filed in the same period in 2012¹. Other media reports have indicated that adult film production may have shifted to other jurisdictions² to avoid the reach of Measure B, including to Las Vegas, Nevada³.
- 7) Discussion:
 - a) Constitutional Issues Raised by Proposed Legislation: AB 1576 contains a provision which requires an adult film employer's injury prevention program to maintain "a log of information" which the bill uses as the mechanism for detailing the state mandated procedures and protocols for the Adult Film Industry. The main provisions of the bill are a requirement that employees engaging in defined conduct must wear a "personal protective device," and that each employee performing in an adult film is tested for sexually transmitted infection, regardless of their on-film conduct.

¹ Miles, Kathleen. "LA Porn Industry Disappears After Condom Law." Huffington Post (November 19, 2013).

² Also see the discussion above about related ordinances and other measures in neighboring jurisdictions.

³ Dreier, Hannah. "Porn Production Moves to Vegas After LA's Condom Law." Associated Press (January 1, 2014).

- i) Free Speech Concerns Raised by Mandated Use of Personal Protection Devices in AFI: Most adult entertainment is entitled to some degree of First Amendment protection. For example, in City of Erie, et al. v. Pap's A.M. (2000) 529 U.S. 277, 289, the Supreme Court noted that nude dancing is expressive conduct, although the Court found that it fell "within the outer ambit of the First Amendment's protection".

(It should be noted, however, that there are two types of pornography that receive no First Amendment protection - obscenity and child pornography. Under the Supreme Court's 1973 decision in Miller v. California (1973) 413 U.S. 15, jurors must consider several factors in determining whether matter is obscene. These include whether the average person, applying contemporary community standards, would find that the work, taken together, applies to prurient interests; the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law; and, the work, taken together, lacks serious literary, artistic, political or scientific value.)

The making of non-obscene pornographic films has been found to enjoy constitutional protection as an exercise of free speech. In the seminal case of the People v. Freeman (1988) 46 Cal.3d 419, the California Supreme Court stated, "Regardless of our view of the social utility of this particular motion picture, our analysis must begin with the premise that a non-obscene motion picture is protected by the guaranty of free expression found in the First Amendment."

In Freeman, the court was confronted with the question of whether the "making of a film" could be regulated as conduct apart from the first amendment protections afforded to the "content" of the film. Freeman was an adult film producer charged with pandering in the production of his films. The court held it could not, saying, "the People argue that there is a distinction between 'speech' (e.g., a film), which is constitutionally protected under the First Amendment so long as it is not obscene, and 'conduct' (the making of the film), which may be prohibited without reference to the First Amendment. Such a distinction is untenable in this case."

Here, the author has attempted to avoid constitutional pitfall by providing that "this paragraph (requiring use of personal protective equipment), shall not be construed to require that the personal protective equipment be visible to the consumer in the finished film" suggesting that this language shields the bill from challenge based on the main thrust of the measure, which is the requirement that adult film actors must use personal protective equipment whenever acts of vaginal and anal intercourse are filmed.

In Vivid Entertainment vs. County of Los Angeles, an additional constitutional claim against Measure B is made which could be raised similarly against AB 1576, based upon prior restraint upon protected free speech under 42 U.S.C. Section 1983. In their complaint Vivid asserts, "Measure B pre-emptively prohibits the production of and adult film...if the performers do not use condoms for all acts of anal or vaginal sex, even if in their sound discretion and artistic judgment they would opt to forgo doing so, Measure B thus violates the First Amendment by standing as an unconstitutional prior restraint upon protected expression and the creation and distribution of protected speech."

- ii) Ongoing Litigation: Answers to 1st Amendment Questions Are Still Pending: As widely reported in the press, attorneys for the adult film industry filed a complaint in January 2013 in the United States District Court, Central District of California seeking an order enjoining and restraining Los Angeles County from enforcing Measure B. Similar complaints were filed by other filmmakers as well as individual performers. Among other things, the complaints allege that Measure B violates the First Amendment right to the freedom of speech, the Fourteenth Amendment right to due process, and is preempted under California state law. As summarized in the Assembly Labor Committee analysis:

"The court allowed the official proponents of Measure B to join the case as interveners, and they filed a motion to dismiss the lawsuit. At the same time, the industry asked for a preliminary injunction to prevent Measure B from being implemented.

"On August 16, 2013, District Court Judge Dean Pregerson issued a mixed decision. The court dismissed industry arguments that a ballot initiative cannot implicate First Amendment rights, that state law preempts Measure B, and that Measure B violates their due process rights (with the exception of Fourth Amendments claims related to search and seizure). However, the court refused to dismiss industry prior restraint claims that Measure B does not provide sufficient procedural safeguards, does not have narrowly tailored requirements, and gives the County of Los Angeles unbridled discretion.

"The plaintiffs appealed the court's ruling to the Ninth District Court of Appeals, which heard oral argument in the matter on March 3, 2014. A decision from the Court of Appeal is pending."

- b) Privacy Issues Raised by Government Mandated Testing for STDs and Maintaining Records of Medical Test Results: "The passage of AB 1576 would make the California Assembly the fourth government body in the state to specifically regulate the adult film industry, but it would be the first to mandate testing," so writes civil rights advocate Trevor Boeckmann. "The California Division of Occupational Safety and Health (Cal/OSHA) has attempted to regulate the adult film industry for many years. Rather than requiring employees to be tested, the agency's regulations rely on less-intrusive preventative measures to protect performers from transmission. In fact, Cal/OSHA specifically mentions that medical records are to be kept confidential and the only mention of testing is in a post-exposure context where consent is needed.

"Similarly, the City of Los Angeles and County of Los Angeles have both passed statutes regulating the adult film industry. The latter passed with the support of 1.6 million residents. Both enacted stricter measure to prevent transmission. Neither required testing as a precursor to employment. AB 1576 would be the first bill of its kind to take such an intrusive step." Id.

As pointed out by counsel for Vivid, "Government mandated HIV testing has only been approved in very limited circumstances in California. Generally, the California Health and Safety Code requires informed consent for HIV testing, except in a handful of circumstances, which are prescribed by statute. There are a number of reasons for this

policy most notably that it is long established under both Federal and State law that an HIV test is a 'search' within the meaning of the United States and California constitutions.

"The existing statutory exceptions to the general rule requiring consent to test are generally in the context of involuntary exposure to bodily fluids. See, e.g., Health & Safety Code § 121055 (sex crimes); Health & Safety Code § 121056 (petition by certain forensic scientists coming in contact with biological specimen); Health & Safety Code § 121060 (assault on officer, other law enforcement personnel, or emergency medical personnel); see also Penal Code § 1202.1 (conviction of rape – mandatory HIV testing); Penal Code § 1524.1 (person charged with crime, where victim exposed to fluids).

"The expansion of such government mandated testing into consensual activities plainly raises questions under both the U.S. and California Constitutions. Were the bill to pass, it is certain that this provision would also be challenged in Court on these grounds."

The Positive Justice Alliance and Center for HIV Law and Policy oppose unless the mandated testing provisions are removed, saying, "State-mandated STD testing raises California 1st Amendment and federal 4th Amendment constitutional concerns. In California, a person has a right to privacy in maintaining confidentiality of their HIV status. Urbaniak v. Newton, 277 Cal. Rptr. 354 (Cal. Ct. App. 1991). The right to privacy weighs heavily in favor of the individual and must be balanced with the particular need for testing. This is evident in current law. For example, even when a health worker may have been exposed to a communicable disease, the state is not authorized to draw blood or tissue to test a source patient without his/her consent.

"Companies engaged in producing adult films may be unaware of the myriad of confidentiality and privacy protections for medical and public health records California Medical Information Act ("CMIA") and the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") as well as the penalties for disclosure established under Health and Safety Code §120980 and 121025. They are not regularly in the business of notifying individuals of STD results and may be unaware that notification of HIV and Hepatitis test results, for example, require use of certain procedural protections under Health and Safety Code §123148. Maintaining a centralized 'log' may also violate rules of the ADA with regard to protecting medical confidentiality of employees. Medical records must be kept separate and confidential from other employment records."

- c) Draft AFI Regulations are Currently Before the OSHA Standards Board: According to the sponsors, they petitioned CalOSHA to begin a rulemaking process to address the health and safety needs of the AFI. This process is ongoing, and CalOSHA has held hearings, solicited testimony, and is engaged in the rule-making process to determine an appropriate standard for a specific blood-borne pathogen control plan for the AFI.

It has been reported that the OSHA Standards Board has held a number of advisory meetings, resulting in the circulation of draft language in June 2011. On October 24, 2013, the OSHA Standards Board released a revised draft for circulation. An email announcement accompanying the revised draft stated, "The Division has edited the previous draft, which was provided in June 2011. This draft has been sent to the Board staff for their review. It is not a rulemaking proposal at this time."

The draft language would establish a new standard Section 5193.1 specific to sexually transmitted infections, and would cover "all workplaces in which employees have occupational exposures to bloodborne pathogens and/or sexually transmitted pathogens due to one or more employees engaging in sexual activity with another individual." Among other things, the draft language would require an employer to provide all safeguards required by the proposed section, "including barriers, personal protective equipment, training, and medical services, at no cost to the employee, at a reasonable time and place for the employee, and during the employee's working hours."

Adoption of AB 1576 at this point thus would circumvent the current CalOSHA public input and hearing procedure, substituting its provisions regarding the standard for prevention of the spread of infection and disease for that of the regulatory authority charged with making such determinations.

- d) Potential Loophole: Employees Covered Under Bill, But Not Independent Contractors: This bill would require "employees" performing in an adult film to submit to mandatory testing and use of a personal protective device while performing in an adult film. However, as was discussed in the Labor Committee analysis, just who is an "employee" and who is an "independent contractor" in the AFI is the subject of confusion and controversy. Independent contractors would not be required to comply with AB 1576, as it is only directed at employees covered under the OSHA. Therefore, one could imagine that an unintended consequence might be restructuring the AFI to ensure no performer is an "employee" thereby avoiding AB 1576 altogether.

According to the Labor Committee analysis, "One of the difficulties faced by DOSH in enforcing the existing standard relates to whether the adult film performers are employees or independent contractors. DOSH generally has jurisdiction over occupational health and safety issues only as they relate to employees. Some of the prior citations issued by DOSH were challenged by adult film companies on the grounds that the performers were independent contractors rather than employees, and that therefore DOSH had no jurisdiction."

8) Prior Related Legislation:

- a) AB 332 (Hall), of the 2013-14 Legislative Session, was substantially similar to the instant measure. That bill would have established workplace standards and controls, as specified, for employers engaged in the production of adult films, and mandated that the California Division of Occupational Safety and Health Administration (CalOSHA) adopt these standards as emergency regulations. AB 332 was held in Assembly Appropriations Committee.
- b) AB 640 (Hall), of the 2013-14 Legislative Session, was also substantially similar to the instant measure and AB 332. That bill would have required an employer engaged in the production of an adult film to adopt prescribed practices and procedures to protect employees from exposure to, and infection by, sexually transmitted diseases. AB 640 was held in Senate Rules Committee.

- c) AB 847 (Salas) of the 2009-10 Legislative Session, would have imposed a 20% tax on retailers that operate adult entertainment venues which would be transferred to the Adult Entertainment Venue Impact Fund, which would have been created by this bill. AB 847 was returned to the Chief Clerk pursuant to Joint Rule 62(a).
- d) AB 2914 (Charles Calderon), of the 2007-08 Legislative Session, would have imposed an 8.3% tax on the sale of, or the storage, use, or other consumption of, tangible personal property that is adult material which would be transferred to the Adult Entertainment Impact Fund, which would have been created by this bill. AB 2914 was held on the Assembly Appropriations Suspense File.
- e) AB 1551 (Charles Calderon), of the 2007-08 Legislative Session, would have imposed an 8% tax on the gross receipts of an adult entertainment venue which would be transferred to the Adult Entertainment Venue Impact Fund, which would have been created by this bill. AB 1551 was returned to the Chief Clerk pursuant to Joint Rule 56.
- f) AB 2798 (Leslie), of the 2003-04 Legislative Session, would have required that performers be tested for the presence of sexually transmitted diseases before production begins on a film containing sexual content. AB 2798 was held in the Assembly Rules Committee and returned to the Chief Clerk without further action.
- g) AB 1013 (Charles Calderon) of the 1997-98 Legislative Session, would have imposed a 5% tax on adult entertainment products and services and a comparable excise tax on the storage, use or other consumption of adult entertainment products and services into the Victims of Violent Crime Support Fund, which the bill would have created. SB 1013 was returned to the Secretary of the Senate pursuant to Joint Rule 56.

REGISTERED SUPPORT / OPPOSITION:

Support

AIDS Healthcare Foundation
American Congress of Obstetricians and Gynecologists
Beyond AIDS
California Academy of Preventive Medicine
California Communities United Institute
California Employment Lawyers Association
California Medical Association
California Public Health Association – North
California State Association of Occupational Health Nurses
Honorable Linda Parks, Ventura County Board of Supervisors, 2nd District
Planned Parenthood
Professor Jeffery Klausner, Medicine and Public Health, UCLA
Paula Tavrow, PhD, Director, Bixby Program in Population and Reproductive Health, Fielding
School of Public Health, UCLA
Western Occupational and Environmental Medical Association
Worksafe

Opposition

Center for HIV Law and Policy

Cutting Edge Testing

Cybernet Entertainment, LLC

Free Speech Coalition

HIV Prevention Justice Alliance

Ireland Entertainment

Manwin USA

Positive Justice Alliance

Positive Women's Network - USA

Sean Darcy, MD Profession Corporation

Unsound Labs

Valley Industry and Commerce Association

Vivid Entertainment, LLC

261 private citizens

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