



CALIFORNIA STATE ASSEMBLY
Committee on Labor and Employment
Paul Koretz, Chair

**"Worker Health and Safety
in the Adult Film Industry"**

POST-HEARING REPORT

On June 4, 2004, the Assembly Committee on Labor and Employment conducted an informational hearing entitled, "Worker Health and Safety in the Adult Film Industry." The hearing was held in Van Nuys, California at the Van Nuys State Office Building.

The hearing was held in response to recent incidence of HIV infection among performers in the adult film industry. It was reported that five performers were infected and that over 50 performers were exposed. Government and the industry responded to identify the infected and control the spread of the disease. Major production companies in the industry halted filming while the industry's health care foundation cleared performers before filming resumed. Despite various efforts, the infections call into question the adequacy of current screening methods as well as the need for enhanced prevention.

The goal of the hearing was to explore whether state and local regulators have the authority needed to deal with the problem. A core issue, which will influence any public policy response, is whether performers in the industry are employees or independent contractors. The Committee also considered the viability and legality of mandated testing, reporting, and mandated condom use.

The following report will summarize the testimony presented at the hearing by many of the witnesses from government, industry, health organizations, and more. The report also highlights specific suggestions that were offered by the witnesses to improve working conditions in the industry.

Vicky Heza, Deputy Chief for Enforcement, California Division of Occupational Safety and Health (Cal/OSHA)

Ms. Heza was accompanied by Len Welsh, Acting Chief of Cal/OSHA. She began her testimony by explaining the jurisdictional parameters that govern Cal/OSHA's enforcement of workplace safety and health standards. Cal/OSHA's jurisdiction is limited to events that take place in the context of an employer-employee relationship.

Where there is an employer-employee relationship, Cal/OSHA has the authority and the obligation to take reasonable measures to enforce the law in order to remove a hazard and protect employees. Cal/OSHA's involvement will ultimately be guided and restricted by the mandate to focus on the employer-employee relationship when enforcing standards. Cal/OSHA's legal counsel has determined that the employer-employee relationship must be done on a case-by-case basis. Ms. Heza stated that the Labor Code presumes an employee-employer relationship and Cal/OSHA will operate on that assumption unless indicated otherwise during the investigative process.

In response to an inquiry by Los Angeles County Supervisor Yvonne Brathwaite-Burke, two OSHA standards were identified as providing authority for state regulation of the adult film industry: the Injury and Illness Program Standard and the Bloodborne Pathogens Standard.

Ms. Heza argued that the most effective approach to preventing the transmission of diseases carried by blood and other body fluids is to minimize contact with them. Screening methods like periodic blood testing for HIV infection may help to reduce disease transmission, but is not permitted by the Bloodborne Pathogens Standard as a substitute for universal precautions. The standard provides that if employees engage in work practices that result in the contact of their skin, eyes, or mucous membranes with blood or other body fluids known to transmit bloodborne disease, they are required to be provided with barrier protection. As stated in the Bloodborne Pathogens Standard, these diseases include but are not limited to HIV, hepatitis B virus, and hepatitis C virus. The Bloodborne Pathogens Standard also reads, in part, as follows:

Universal precautions are an approach to infection control. According to the concept of universal precautions, all human blood and certain human body fluids are treated as if known to be infectious for HIV, HBV, HCV, and other bloodborne pathogens.

Upon informing Supervisor Brathwaite-Burke of the state's authority, the Los Angeles County Department of Health Services (County DHS) was contacted to inform them of Cal/OSHA's compliant process so they could provide it to any performers wishing to file a complaint. Also at the request of County DHS, Cal/OSHA has attempted to coordinate its investigative efforts with county staff.

Ms. Heza testified that to be successful, Cal/OSHA's investigation will need performers to come forward. If violations are found in any investigation, Ms. Heza testified that citations will be issued.

In conclusion, Ms. Heza stated that modifications to workplace requirement to observe universal precautions in the adult film industry should be done by medical authorities who specialize in the transmission of bloodborne diseases. Also, Cal/OSHA seeks to partner with county and state health officials to conduct outreach and education programs.

Jonathan Fielding, M.D., Director of Public Health, Los Angeles County
Department of Health Services

Dr. Fielding began his testimony by declaring that we should not allow an adult film industry worker to have a high risk sexual encounter as part of their work without a condom. County DHS endorses legislation for the adult film industry that would (1) require condom use for all high risk sexual encounters; (2) have screening requirements for sexually transmitted diseases set by the state with screening costs paid by the industry, and offer vaccinations for appropriate preventable conditions; (3) mandate education and training of all adult film industry performers; and (4) assure monitoring to ensure compliance by state and local health departments paid for by the industry.

According to Dr. Fielding, the workplace circumstances of the adult film industry create ideal conditions for effective transmission and acquisition of HIV and other sexually transmitted diseases (STDs). Episodes of HIV transmission in the industry have occurred before. The Adult Industry Medical Healthcare Foundation (AIM), the primary provider of screening for industry performers, has identified other individuals with HIV before they exposed others in the industry, but what is not known is where they may have acquired HIV.

Dr. Fielding highlighted what he described as the inadequacy of screening and testing to prevent HIV and other STD transmission. He argued that a performer who was infected with HIV a week ago can test negative today and transmit HIV to a sexual partner tomorrow. For HIV, the period immediately after infection is the time when an individual can be highly infectious.

According to the testimony, County DHS has taken the following action:

- 1) Initiated dialogue with Cal/OSHA on existing standards, and working with Cal/OSHA to develop a model Exposure Control Plan. County DHS has also initiated discussion with the state Labor and Workforce Development Agency to develop educational outreach plans and materials for both producers and performers.
- 2) Requested that Cal/OSHA conduct an accident investigation of the recent incidents of presumed workplace infection with HIV. According to Dr. Fielding, this investigation is now open and ongoing.
- 3) Initiated an investigation into the recent outbreak, offered additional HIV and STD testing services to performers, provided counseling and medical referrals for those performers who were infected with HIV, and offered partner contact and referral services to their private sex partners.
- 4) Sought technical assistance from the National Institute of Occupational Safety and Health (NIOSH), to investigate workplace hazards in this industry, and issue recommendations. On May 18th and 19th of this year, representatives of NIOSH and of the National Center for HIV/STD and TB Prevention met with County DHS, AIM,

and members of the industry.

- 5) Initiated dialogue with producers and performers in both straight and gay male parts of the industry, as well as with other relevant agencies, including the California Department of Health Services, STD Control Program and the State Office of AIDS to better understand health and safety issues in this industry, and develop appropriate screening recommendations and interventions.

County DHS sees four key areas where action is needed:

- 1) **Changes in work conditions and practices:** Condom use should be mandated by the state and not left to voluntary compliance by producers. The county's position is that in an occupational context, oral sex should also be protected sex, because infection from this sexual act is a preventable risk.
- 2) **Education and training:** County DHS is working with the state Labor and Workforce Development Agency to develop an educational outreach program for the industry. AIM has also recently expanded its own ongoing educational efforts. However, there is no set training requirement in this industry. Also, a comprehensive education and training program must be created for workers to know their prerogatives and producer/employers to know their obligations.
- 3) **Vaccination:** Currently, hepatitis B is the only STD that can be prevented through vaccination. However, vaccines may become available in the future for HSV-2 (herpes) and human papillomavirus (HPV). All workers potentially exposed to this virus through work, should receive hepatitis B evaluation and vaccination as needed, at employer expense. When other STD vaccines become available, these should be offered as well.
- 4) **Testing and treatment:** While regular screening for HIV and other STDs is not sufficient as the sole method of worker protection for this industry, it still constitutes a necessary part of a worker health and safety system for this industry. Producers should carry the financial responsibility for testing and related monitoring and treatment, as appropriate. County DHS recommends that the state have the responsibility for defining testing requirements, with refinements as disease trends and the advances in science dictate.

**Gail Bolan, M.D., Chief STD Control Branch, Prevention Services, California
Department of Health Services**

Dr. Bolan is a trained infectious disease physician and has extensive experience in caring for persons with STDs, including HIV.

Dr. Bolan discussed three areas of work in which the state Department of Health Services (DHS) believes is relevant to the situation in the adult film industry.

- 1) **Counseling and testing of persons who may have STDs:** Dr. Bolan stated that DHS reviews the usefulness and limitations of testing programs. No testing strategy is 100 percent effective, meaning that it would need to find 100 percent of persons infected, immediately after infection occurred. Using clinically approved HIV testing, it typically takes 12-15 weeks before an infection can be detected. For syphilis it is 4-12 weeks. Tests processed appropriately will detect 99 percent of HIV infections when they exist, and almost 100 percent of syphilis. DHS's message, however is that monogamous relationships is the most effective way to prevent STD infection.
- 2) **Ascertaining the likelihood of infection from certain sexual behaviors:** DHS collects and reviews information on the efficiency, or likelihood, of transmission of HIV and other STDs through different sexual acts. DHS has determined that transmission of HIV and STDs is highly efficient through vaginal and anal sex. Non-HIV STDs can be transmitted through oral sex, however, the likelihood of transmission depends on a number of factors. In general, the likelihood of transmission is less through oral sex. Transmission of HIV through oral sex is far less likely than through vaginal or anal sex.
- 3) **Population data:** According to Dr. Bolan, HIV is still acquired primarily through, men who have sex with men, and through injection drug use. The majority of HIV positive women are infected by bi-sexual partners or by partners who inject drugs. Chlamydia is the most commonly reported communicable disease in California, and mostly affects women age 25 or younger. Gonorrhea is the second most reported, and most common in minority and ethnic communities. Syphilis is less commonly reported and mainly affects men having sex with men.

By way of recommendations, Dr. Bolan stated that DHS, both state and county, are available to assist other parties as they work to review and improve testing. She also stated that education protocols be developed so that performers are aware of the risks associated with their work. DHS also encourages AIM to advocate for condoms in all productions, particularly for vaginal and anal intercourse.

Jeffrey J. Douglas, Esq., Chair of the Board, Free Speech Coalition.

Mr. Douglas was introduced by Kat Sunlove, the Executive Director of the Free Speech Coalition, an adult entertainment association. She notified the Committee that the Coalition provided the initial funding for AIM. She advocated for self-regulation through peer pressure, talent education and sound medical protocols. She also mentioned that the Board of Directors of the Coalition has drafted a Code of Best Practices which outlines standards being followed by the major producers, and which they see as a desirable model for the entire adult entertainment industry.

Mr. Douglas testified that, while universal condom usage in the adult film industry is highly desirable, legally-mandated usage threatens to drive the industry into the underground economy. As an example of this risk, Mr. Douglas pointed to attempts in

the 1980s to prosecute adult filming as prostitution and pandering. During the several years that the legality of sexually explicit filmmaking was in doubt, much of the industry was forced underground. Mr. Douglas warned that going underground is relatively simple for the adult film industry, because the very nature of the content requires discretion so as to avoid offending the public.

Mr. Douglas testified that, on each of the occasions in which there has been a concern regarding HIV within the adult film industry, the number of condom-mandatory production rises. The fact that numerous companies do require condom usage without being required to do so by threatened criminal sanctions establishes that there are economic forces that favor such voluntary conduct.

Mr. Douglas concluded by urging the Legislature and appropriate regulatory authorities to work with the responsible institutions within the adult film industry to think creatively and increase incentives for condom use, testing and safer practices.

Dr. Sharon Mitchell, Administrator, AIM Healthcare Foundation

Dr. Mitchell started her testimony with a brief historical outline of AIM. In 1998 the Adult Industry Medical Healthcare Foundation was formed in response to an actress testing positive for the HIV. After protocols were implemented in response, AIM Healthcare Foundation found four other women positive at that time, and a male patient zero, who was forging tests from County facilities, and knowingly spreading the HIV virus. It became apparent that talent needed other services, like STD testing, and treatment, hepatitis vaccinations, drug and alcohol treatment, prevention educational services, “life after porn” scholarship programs, medical check ups and group counseling. AIM devised a mechanism to care for the industry, which has operated on a harm reduction model, dispensing information appropriately, to both producers and talent.

In 1999, the system was put to the test, when a popular male actor was diagnosed positive with HIV. The actor had 17 partners in three different countries. All parties were identified in two hours, contacted by the end of the day, after 60 days, no further HIV was detected in the industry or the public health sectors.

In 2003, AIM started implementing monthly testing for HIV, chlamydia, and gonorrhea. As a result, according to Dr. Mitchell, STD rates for chlamydia, and gonorrhea are 2.8%, 10% less than the general population. In 2001, AIM started screening all talent with the County DHS for syphilis with the RPR methodology. AIM's HIV statistics show that in over 80,000 tests performed on talent only 16 cases of HIV have been found in nearly seven years. Additionally, six were found positive who never worked in porn, due to the fact that the protocols of negative status were followed by producers.

Dr. Mitchell then described how AIM handled the current outbreak. After a male actor came back from Brazil complaining of fatigue and viral symptoms, AIM screened him by the PCR/DNA method for HIV and found him to be negative. He was, however, about seven- ten days into the infection of the HIV Virus. AIM tested him three weeks later

and found him positive for HIV by PCR/DNA. A blood specimen was taken for confirmation, and when it was showing pending, the industry was notified, and made a list of primary partners, which took about four hours. AIM then contacted those people and obtained a list of who they worked with, which was 60 people in total. Within two days the industry was virtually shut down, while AIM investigated. All talent had come in for their first emergency testing sequence within a few days. AIM found four cases of HIV in all.

County DHS demanded AIM's confidential records for a parallel investigation. According to Dr. Mitchell, many performers were concerned about their privacy, and felt that their records were not private. AIM felt that this would not help the investigation.

Dr. Mitchell then testified about what has been done since the HIV infections to improve the system. All records kept at AIM Healthcare regarding HIV and monthly STD screening can be accessed by producers and directors. They can download clean bills of health by 10:00 a.m. the following morning, and can go back as far as seven years for testing data on each patient. All other six-month requested check ups are kept confidential, as well as medications for herpes, wart removal, and birth control. All talent can call in to check up and make sure tests are valid, up to date and not forged.

AIM has also contacted the non-condom companies to push the testing window period to two weeks, and to pay for testing. All travelers and new talent will test, wait two weeks, and then have an additional test at the end of two weeks. They must either use condoms during the two-week waiting period, or refrain from working.

AIM has also been given a donation of Adult Dat, software which allows production managers to input the individual encounters in each scene they have shot that day. With this technology, AIM can make a quarantine list in a matter of minutes, rather than the typical four hours. Also as of late, all new talent will be required to view a 20 minute informational video tape on HIV, and STDs and prevention education specific to adult films before their first blood draw. Talent also takes home with them an established one-hour Porn 101 4th edition informational videotape.

Dr. Mitchell believes that a mandatory condom policy would drive most companies underground in LA County. Those performers would not even come in for testing, for fear of government intervention, and, of sharing confidential information.

The industry culture, according to Dr. Mitchell, is becoming more and more condom compliant day by day. She believes it will not help to legislate. The altering of AIM protocol will result in more HIV and STDs.

Dr. Mitchell closed her testimony by saying that the industry's system works very well, and with the new improvements, and more and more producers moving toward safer sex and condom use, it is costing no government money at this time.

Gill Sperlein, General Counsel, Titan Media

Mr. Sperlein testified that all the major gay studios require the use of condoms. According to his testimony, this voluntary method of protecting performers has been highly effective. There are no known cases of HIV transmission in the making of a gay adult film, and approximately 80-90% of the gay adult films released and distributed yearly use condoms.

Testing of HIV for gay performers would be ineffective, Mr. Sperlein argued, because the talent pool is not as limited and discrete as in the straight adult industry. Gay performers often only appear in one or two movies. Few performers work in the industry regularly for an extended period of time.

Mr. Sperlein further argued that testing for HIV in the gay community would have no value. Studios could not discriminate against actors who are HIV positive. Moreover, a negative test on Friday does not mean a person is negative on Monday and thus sets up a false sense of security.

Testing, Mr. Sperlein added, may violate the United States and California constitutions. Additionally, mandatory testing could cause gay production companies to leave the state, resulting in a loss of revenue to the state, as well as, a lost ability to positively impact the health and safety of Californians working in the industry.

Mr. Sperlein suggested that if legislation is passed requiring testing, an exemption should be given to adult companies that require the use of condoms, thereby encouraging this highly-effective prevention technique and providing a positive message for the use of condoms to the viewing public and consumers of adult films. He stated that the use of condoms in adult films provides more beneficial impact for both performers and the public than ineffective testing.

In conclusion, Mr. Sperlein argued that legislation requiring the use of testing as a means of prevention will send the signal that it is an effective means of prevention. Individuals outside the industry, including many young people, would undoubtedly get the message that if testing is good enough to protect adult film performers who are highly sexually active, it is certainly sufficient for the average person.

Nina Hartley, R.N., Performer

Ms. Hartley argued that mandatory condom requirements would increase the demand of "bareback" productions, or films depicting sexual acts without the use of a condom. Such a requirement, she continued, would not be enforceable. If performers wish to use condoms, she stated, they can always "say no" to productions requiring unprotected sex. She further testified that she has refused to work on productions where a male performer declined to use a condom, and noted that AIM is working to educate young performers that they have the right to leave the set if asked to work under certain conditions.

Chairman Koretz inquired whether younger performers are willing to assert those rights. Ms. Hartley responded that some performers may have done things on the set they have regretted later. Underground production, she added, will only increase if condoms were made mandatory. A better method of protection would be to inform performers that they have the right to say no to dangerous requests by producers.

Thomas J. Coates, Ph.D., Professor, Department of Medicine, Division of Infectious Diseases, David Geffen School of Medicine, University of California, Los Angeles

Dr. Coates has been involved in the HIV epidemic since 1983, and has devoted his professional career to HIV prevention.

Dr. Coates testified that worker safety in the adult film industry should be taken seriously. A fundamental question needs to be raised, and that is whether the adult film industry adopt the same standard as other industries wherein workers are potentially exposed to infectious diseases.

While applauding the work of AIM, Dr. Coates testified that more can or should be done and believes that a condom-only code is helpful but shifts the debate from "a harm elimination to a harm reduction strategy." Condoms reduce, but do not eliminate, HIV transmission and acquisition. The only foolproof way to avoid transmission is to avoid intercourse altogether.

Dr. Coates further testified that in addition to a harm reduction strategy policy makers and the industry should also be re-conceptualizing the issue of safety in adult films to include "combination prevention," as may be necessary in order to control transmission of HIV during the risky situations that define the content of adult films. A menu of options that should be considered in combination in order to maximize prevention of transmission could include:

1. No ejaculation into a body cavity, especially not in the anal or vaginal cavity.
2. No ejaculation on mucosal surfaces.
3. Use of the female condom.
4. Use of a condom for intercourse beyond the filming of initial penetration.
5. Liberal use of lubricant to avoid, as much as possible, abrasions in the anal and vaginal cavities.
6. More frequent testing.
7. Mandatory testing for gonorrhea, chlamydia, and syphilis.
8. Mandatory chronic use of herpes-suppressing medications.
9. Use of the diaphragm for vaginal intercourse.
10. Pre-exposure prophylaxis.
11. A fund to pay for all of these expenses.

Dr. Coates also suggested that perhaps all adult films should carry a disclaimer: "Do not try this at home as it could be hazardous to your health and that of your loved ones."

He concluded his testimony by stating that the main barrier to reform is usually cited as economic or market driven. But legitimacy often requires industries to take steps that might cut into profits or market share. Advancing public health cannot occur on the basis of legislation or regulation alone.

Martha Matthews, Attorney, American Civil Liberties Union (ACLU)

Martha Matthews is the David Bohnett Attorney at the American Civil Liberties Union (ACLU) of Southern California.

Ms. Matthews testified that the ACLU generally opposes involuntary, government-mandated HIV testing as a serious invasion of privacy under both federal and state law. Such a requirement would be lawful only if it were the least restrictive way to achieve a compelling state interest. While California has a compelling interest in preventing HIV transmission, the ACLU argues that mandatory testing probably is not the most effective or least restrictive way to achieve this goal.

The ACLU identified other less invasive measures to address this problem, such as mandatory education requirements or the use of condoms for all activities involving a significant risk of HIV transmission. When asked to comment on whether the mandated use of condoms in adult films would violate the First Amendment, the ACLU responded that this may be one of the rare circumstances where a restriction on expressive activity would be permissible under a "strict scrutiny" constitutional analysis. Requiring safer sex practices is an effective way of addressing the state's interest without restricting more expressive activity than is necessary.

Finally, the ACLU urged policymakers to support the significant progress that has been made by the industry itself in terms of education and voluntary testing and disclosure.

Michael Weinstein, President, AIDS Healthcare Foundation

Mr. Weinstein made the point that there are thousands of HIV infections occurring all over the country and the world and yet the media and Legislature are now focused on the handful of infections that have recently occurred in the porn industry. He also stated that AIM may be best suited to deliver HIV testing and prevention services to the porn community rather than other HIV related organizations like AIDS Healthcare Foundation.

Public Comment

In addition to invited panelists, the Committee heard from various interested parties during the hearing's public comment section. The speakers included interested citizens, industry performers, and producers. Of particular interest was testimony by individuals from the industry supporting government protection of performer's health and safety. Some also challenged the assertion that the porn industry would move out of state if the government imposed any requirements. Adult film producer Adam Glasser stated "I

don't think the threat of companies leaving California is as real as we perceive.... Where am I going to go, where is this safe haven? You have to balance the threat against reality. The number one thought should be the safety of the people working."

Summary of Witness Recommendations

The following is a list of recommendations provided by the witnesses for this particular hearing and are not the official policy recommendations of the Assembly Committee on Labor and Employment.

- No government involvement. Government regulation may drive the industry underground or out of state, leading to further health risks among performers.
- Modify workplace requirements to observe universal precautions in the adult film industry according to medical authorities who specialize in the transmission of bloodborne diseases.
- Require condom use for all high-risk sexual encounters.
- Screening requirements for sexually transmitted diseases set by the state with screening costs paid by the industry.
- Exemption from any testing or screening requirements those production companies that require the use of a condom during filming.
- Vaccinations for appropriate preventable conditions.
- Mandate education and training of all adult film industry performers to make them aware of the risks associated with the industry.
- Monitoring by state and local health departments to ensure compliance with any mandates or requirements.
- Industry encouragement of condom only policies.
- Require condoms for certain sexual activities.
- Require safe sex messages or disclaimers at the beginning of each adult video or DVD.
- Industry or government required "combination prevention" practices.
- Legislature and appropriate regulatory authorities to work cooperatively with the responsible institutions within the adult film industry to think creatively and increase incentives for condom use, testing and safer practices.
- Support the industry-initiated programs and systems that resulted in education and voluntary testing and disclosure.