



Via Facsimile and Electronic Mail

April 23, 2014

The Honorable Isadore Hall, III
State Capitol
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Re: AB 1576 (Hall) – Oppose Unless Amended

Dear Assemblymember Hall:

We write to inform you that we **oppose AB 1576 unless amended**. We oppose efforts to authorize state-mandated STD testing, including HIV testing, under Labor Code section 6401.7(i)(1)(B). There is no other place in California law where STD testing is required for all employees as a condition of employment. State-mandated STD testing, as proposed here, raises serious legal and policy concerns.

First, for people living with HIV, state-mandated pre-employment testing necessarily implicates employment protections provided for under the federal Americans with Disabilities Act (“ADA”) and California’s Fair Employment and Housing Act (“FEHA”). Under both the ADA and FEHA, pre-employment medical examinations and inquiries are not entirely prohibited. However, medical examinations must be post-offer. If an employer chooses to revoke a job offer based on the results of the medical examination or inquiry, the employer is required to prove that its reasons are job-related and consistent with business necessity, and to undertake an individualized inquiry to determine whether the person is qualified for the job with or without the benefit of a reasonable accommodation.

Given that there is ample law addressing the terms of pre-employment testing, it sets bad precedent for the state to become further involved in mandating pre-employment testing. Doing so contributes to the possibility of increasing such mandates for testing in other employment contexts.

Second, 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. California Health and Safety Code § 120262.

Continued discrimination and stigma surrounding HIV and other STDs makes protecting an individual's right to privacy and maintaining confidentiality paramount, especially in the employment context. Given these concerns, this bill fails to establish adequate privacy protections.

Companies engaged in producing adult films may be unaware of the myriad of confidentiality and privacy protections for medical and public health records under the California Medical Information Act ("CMIA") and the privacy rule of the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), as well as the penalties for disclosure established under California 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 California 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.

Third, the state has avoided mandatory STD and HIV testing, in particular, as a matter of policy. The legislature has clearly favored voluntary testing as it is proven to improve patient engagement in care. Thus, even in the context of testing vulnerable populations, for example, pregnant women, it has favored, at most, the mandatory *offering* of HIV tests. California Health and Safety Code § 125090. Here, too, in the context of adult films, STD and HIV testing is already being undertaken on a voluntary basis. This is clearly favorable to state-mandated testing.

Finally, should this bill pass into law, the use of personal protective equipment by all adult performers engaged in vaginal and anal sex will be required, thus reducing greatly the possibility of transmission. The required injury prevention programs will also serve to protect all performers. Given these other provisions in AB 1576, and the considerations outlined above, we believe the problems created by state-mandated STD testing are simply not justified by any compelling need.

We urge you to amend AB 1576 and incorporate necessary changes. We look forward to working with you and the sponsor to ensure that protecting adult

performers is done in a thoughtful and responsible manner. In connection with this matter, please contact Walt Senterfitt at WSenterfit@aol.com with the HIV Prevention Justice Alliance or Ivan Espinoza-Madrigal at The Center for HIV Law and Policy at iespinoza@hivlawandpolicy.org or (212) 430-6733.

Respectfully,

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CC: Assembly Committee on Arts, Entertainment, Sports, Tourism & Internet
Media