



Via Facsimile and Electronic Mail

July 28, 2014

The Honorable Isadore Hall, III
State Capitol
P.O. Box 942849
Sacramento, CA 94249-0064
Tel: (916) 319-2064
Fax: (916) 319-2164

Re: AB 1576 (Hall) – Oppose Unless Amended

Dear Assemblymember Hall:

We write to express our strong **opposition to AB 1576 unless amended**. We strongly oppose efforts to authorize state-mandated STD testing, including HIV testing, under Labor Code section 6401.5. State-mandated STD/HIV testing is a matter of great public concern and raises serious legal and policy issues. We have provided a thorough analysis of such concerns in our previous letters dated April 23, 2014, and June 17, 2014 (see attached).

We believe some concerns must be mitigated through incorporation of several amendments. These amendments address employment and privacy and confidentiality protections that are currently missing from the proposed language of AB 1576.

Because the bill creates a new duty for all individuals applying for employment as adult film actors to be tested for STDs, including HIV, this bill represents an expansion of state-mandated HIV testing in the employment context. That expansion is a change to current law that implicates the need to consider additional employment law protections.

Currently, employment law protections for people living with HIV is limited to employers of a certain size, and protections are specifically tailored to individuals deemed “employees.” From all accounts, the porn industry includes small businesses, and it is common practice to engage actors not as employees, but as independent contractors. Thus, current employment law protections would not

apply to them. For example, the federal Americans with Disabilities Act (ADA) only applies to employees working for an employer that has 15 or more employees. Our first proposed amendment seeks to address this gap in protection.

The amendments also address privacy and confidentiality concerns. The expansion of state-mandated HIV testing in the employment context creates new duties for employers in the adult industry. These duties require that employers collect and/or retain sensitive medical information as part of their records. We want to ensure that all adult film employers are placed on notice regarding the parameters of privacy and confidentiality protections that must be afforded to people living with HIV. Including these protections in this statute sends a clear message about basic expectations under the law. This also ensures that any educational materials created to convey key components of the bill will mention and reflect these important protections.

While this bill as written does not propose to impede current law, it certainly changes existing law by expanding state-mandated HIV testing in the employment context. We want to make sure that such an expansion is coupled with basic legal protections for people living with HIV.

We urge you to amend AB 1576 and incorporate these 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,

J. Walton Senterfitt, PhD, MPH
Founding Co-Chair
HIV Prevention Justice Alliance

Naina Khanna
Executive Director
Positive Women's Network-USA

Ivan Espinoza-Madrigal, Esq.
Legal Director
The Center for HIV Law and Policy

Enclosure: Letter dated April 23, 2014
Letter dated June 17, 2014

CC: Senate Appropriations Committee



Via Facsimile and Electronic Mail

June 17, 2014

The Honorable Isadore Hall, III
State Capitol
P.O. Box 942849
Sacramento, CA 94249-0064
Tel: (916) 319-2064
Fax: (916) 319-2164

Re: AB 1576 (Hall) – Oppose Unless Amended

Dear Assemblymember Hall:

We write to express our strong **opposition to AB 1576 unless amended**. We strongly oppose efforts to authorize state-mandated STD testing, including HIV testing, under Labor Code section 6401.7(i)(1)(B). State-mandated STD/HIV testing is a matter of great public concern and raises serious legal and policy issues. We have provided a thorough analysis of such concerns in our previous letter dated April 23, 2014 (see attached).

While we remain strongly opposed to state-mandated STD testing, including HIV testing, we believe some concerns may be mitigated through incorporation of two amendments.

First, providing minimal employment protections modeled after the federal Americans with Disabilities Act (“ADA”) and California’s Fair Employment and Housing Act (“FEHA”) ensures that state-mandated STD testing in this particular employment context occurs post-offer and prior to commencement of duties. The amendment requires that all applicants in this context be subjected to the same medical examination. The amendment requires that medical records held by employers be handled confidentially and separately from all other records.

An adult film employer may not ask or require a job applicant that will be performing in an adult film engaging in vaginal or anal intercourse to take a medical examination before making a job offer. An adult film employer may require a medical examination or inquiry of said

applicant after an employment offer has been made but prior to commencement of employment duties, provided that:

- (A) medical examination or inquiry is job-related and consistent with business necessity;
- (B) all entering employees in the same job classification are subject to the same examination or inquiry; and
- (C) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.

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.

Second, companies engaged in producing adult films should further be placed on notice regarding the myriad of confidentiality and privacy protections for medical records, including any records documenting an individual's HIV status. While inclusion of the below amendment does not entirely diminish previously stated California 1st Amendment and federal 4th Amendment constitutional concerns, *see Urbaniak v. Newton*, 277 Cal. Rptr. 354 (Cal. Ct. App. 1991), it provides for some measure of confidentiality and privacy protection not currently provided in AB 1576.

Nothing in this section shall be construed to permit an employer to unlawfully disclose confidential medical information including an individual's HIV status, or to otherwise violate provisions of the Confidentiality of Medical Information Act (Part 2.6 (commencing with Section 56) of Division 1 of the Civil Code), the federal Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191), Section 54 of the Civil Code, the Americans With Disabilities Act of 1990 (Public Law 101-336), the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), which prohibit discrimination against individuals who are living with HIV, or who test positive for HIV, or are presumed to be HIV-positive.

We urge you to amend AB 1576 and incorporate these 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-Madriral at The Center for HIV Law and Policy at iespinoza@hivlawandpolicy.org or (212) 430-6733.

Respectfully,

J. Walton Senterfitt, PhD, MPH
Founding Co-Chair
HIV Prevention Justice Alliance

Naina Khanna
Executive Director
Positive Women's Network-USA

Ivan Espinoza-Madrigal, Esq.
Legal Director
The Center for HIV Law and Policy

Enclosure: Letter dated April 23, 2014

CC: Senate Labor and Industrial Relations Committee



Via Facsimile and Electronic Mail

April 23, 2014

The Honorable Isadore Hall, III
State Capitol
P.O. Box 942849
Sacramento, CA 94249-0064
Tel: (916) 319-2064
Fax: (916) 319-2164

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-Madriral at The Center for HIV Law and Policy at iespinoza@hivlawandpolicy.org or (212) 430-6733.

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