

The California Safer Sex in the Adult Film Industry Act

The People of the State of California do hereby ordain as follows:

Section 1. Title.

This Act shall be known and may be cited as “The California Safer Sex in the Adult Film Industry Act” (the “Act”).

Section 2. Findings and Declarations.

The People of the State of California hereby find and declare all of the following:

- (a) Widespread transmission of sexually transmitted infections associated with making adult films in California has been documented by one or more county departments of public health. All workers in the adult film industry deserve to go to work and not become ill. It is important that safer sex practices in the making of adult films, and in particular the use of condoms by performers, be required so as to limit the spread of HIV/AIDS and other sexually transmitted infections in the adult film industry. Not only is the risk of HIV/AIDS and other sexually transmitted infections among adult film performers of immediate public concern, but so is the risk of transmitting HIV/AIDS and other sexually transmitted infections between adult film performers and the broader population.
- (b) The adult film industry places profits above worker safety and actively prevents and discourages the use of certain essential safer sex methods. Costs of vaccinations, testing, and medical monitoring relative to HIV/AIDS and other sexually transmitted infections are currently unfairly borne by adult film performers, while adult film producers avoid bearing these costs and responsibilities. This Act is necessary and appropriate to address these public concerns.

Section 3. Purposes and Intent.

The People of the State of California hereby declare the following purposes and intent in enacting this Act:

- (a) To protect performers in the adult film industry and minimize the spread of sexually transmitted infections resulting from the making of adult films in California, thus reducing the negative impact on people’s health and improving Californians’ quality of life.
- (b) To require producers of adult films to comply with the law by requiring, among other things, that performers are protected by condoms from sexually transmitted infections.
- (c) To authorize and require the California Division of Occupational Safety and Health (Cal/OSHA) and the California Occupational Safety and Health Standards Board to take appropriate measures to enforce the Act.

- (d) To require the costs of certain vaccinations, testing, and medical monitoring relative to HIV/AIDS and other sexually transmitted infections to be paid by adult film producers and to give adult film performers a private right of action to recover civil damages for economic or personal injury caused by adult film producers' failure to comply with the health, vaccination, testing, and medical monitoring requirements of this Act.
- (e) To hold liable all individuals and entities with a financial interest in the making or distribution of adult films who violate this Act.
- (f) To require adult film producers to provide notice of filming, to maintain certain records regarding filming, to post a notice regarding the required use of condoms for specified scenes, and to fulfill additional health requirements.
- (g) To discourage noncompliance and encourage compliance with the requirements of this Act by requiring adult film producers to be licensed.
- (h) To extend the time in which the State of California may pursue violators of the Act.
- (i) To enable whistleblowers and private citizens to pursue violators of the Act where the State fails to do so.
- (j) To prohibit talent agents from knowingly referring performers to locations where condoms will not be used in the making of adult films.
- (k) To provide for the Act's proper legal defense should it be adopted and thereafter challenged in court.

Section 4. The California Safer Sex in the Adult Film Industry Act shall be codified by adding the following provisions to the California Labor Code:

Section 6720. Health and Employment Requirements: Adult Film Industry.

(a) An adult film producer shall maintain engineering controls and work practice controls sufficient to protect adult film performers from exposure to blood and any other potentially infectious material – sexually transmitted infections (“OPIM-STI”). Engineering controls and work practice controls shall include: (1) Provision of and required use of condoms during the filming of adult films; (2) Provision of condom-safe water-based or silicone-based lubricants to facilitate the use of condoms; and (3) any other reasonable STI prevention engineering controls and work practice controls as required by regulations adopted by the Board through the Administrative Rulemaking process, so long as such engineering controls and work practice controls are reasonably germane to the purposes and intent of this Act.

(b) The costs of all STI prevention vaccinations, all STI tests, and all medical follow-up pursuant to the adult film regulations, or otherwise required by an adult film producer in order for an individual to be an adult film performer, shall be borne by the adult film producer and not by the adult film performer.

(c) An adult film producer's failure to offer, provide, and pay for a STI prevention vaccine, STI test, or medical examination, as required by the adult film regulations or as required in order to be an adult film performer, if such vaccine, test, or examination is consented to by the adult film performer, shall result in a penalty against the adult film producer equal to the cost of each STI prevention vaccine, each STI test, and each medical examination that the adult film producer failed to offer, provide, or pay for on behalf of the adult film performer.

(d) Adult film producers shall maintain as strictly confidential, as required by law, any adult film performer's health information acquired by any means.

(e) Any adult film performer may seek and be awarded, in addition to any other remedies or damages allowed by law, a civil damages award of up to \$50,000, subject to yearly consumer price index increases, if the trier of fact: (1) finds that the adult film performer has suffered economic or personal injury as a result of the adult film producer's failure to comply with Labor Code sections 6720(a), (b), (c), or (d); (2) makes an affirmative finding that the adult film producer's failure to comply was negligent, reckless, or intentional; and (3) finds that an award is appropriate. The court shall award costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section. Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith.

(f) Any adult film performer entitled to bring an action under Labor Code section 6720(e) shall be entitled to bring such an action on behalf of all similarly situated adult film performers, subject to class certification by a court of competent jurisdiction.

(g) An adult film producer shall designate a custodian of records for purposes of this Act. A copy of each original and unedited adult film shall be retained by the custodian of records.

(h) By January 1, 2018, the Board shall adopt regulations to implement and effectuate the provisions and purposes of this Act in accordance with the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code) ("Administrative Rulemaking").

(i) This section shall not be construed to require condoms, barriers, or other personal protective equipment to be visible in the final product of an adult film. However, there shall be a rebuttable presumption that any adult film without visible condoms that is distributed for commercial purposes in the State of California by any means was produced in violation of this section.

(j) Liability under this Act shall not apply to adult film performers, bona-fide employees, individuals providing independent contracting services, or production volunteers of an adult film producer who are acting within the scope of the general services being provided and in accordance with the instruction of the adult film producer, provided that such individuals have no financial interest in the adult film and are not adult film producers.

(k) In the event the amount of any monetary penalty set forth in this Act is found invalid by a court of law, the Division is empowered to and shall develop, and the Board is empowered to and shall adopt, monetary penalties via the Administrative Rulemaking process in a reasonable amount sufficient to deter noncompliance and encourage compliance with the requirements of the provision(s) in which the penalties are found to be invalid.

Section 6720.1. Notice & Disclosure.

(a) Within 10 days after the beginning of filming, an adult film producer must disclose to the Division, in writing, signed under penalty of perjury by the adult film producer, the following information:

(1) The address or addresses at which the filming took, is taking, or will take place, with any changes in location to be disclosed to the Division within 72 hours of such changes;

(2) The date or dates on which the filming took, is taking, or will place, with any changes to the filming date(s) to be disclosed to the Division within 72 hours of such changes;

(3) The name and contact information of the adult film producer;

(4) The name and contact information of the designated custodian of records as required by Labor Code section 6720(g);

(5) The name and contact information of any talent agency who referred any adult film performer to the adult film producer;

(6) A certification signed by the adult film producer, under penalty of perjury, that: (a) condoms will be used at all times during the filming of acts of vaginal or anal intercourse; (b) all STI testing, STI prevention vaccinations, and medical examinations, as required by the adult film regulations or otherwise required by an adult film producer in order for an individual to be an adult film performer, have been offered to the individual prior to the beginning of filming at no charge, and (c) the costs of all administered STI testing, STI prevention vaccination, and medical examinations have been paid by the adult film producer.

(7) Any other documentation or information that the Division or Board may require to assure compliance with the provisions of this Act.

(b) Upon submitting the information required by this section, the adult film producer must pay a fee set by the Division or Board in an amount sufficient for data security, data storage, and other administrative expenses associated with receiving, processing, and maintaining all information submitted under this section. Until the Division or Board sets the fee, the fee shall be \$100.

(c) An adult film producer's failure to timely or truthfully disclose to the Division the information required by this section or to comply with the Labor Code section 6720.1(d) training program requirement and the Labor Code section 6720.1(e) signage requirement shall be punishable by

a penalty of no less than \$5,000 and no more than \$15,000 per violation, as determined by the Division or a court of competent jurisdiction on a case-by-case basis.

(d) An adult film producer shall provide a training program to each adult film performer and employee as required by regulations adopted by the Board in accordance with the Administrative Rulemaking process.

(e) A legible sign shall be displayed at all times at the location(s) where an adult film is filmed in a conventional typeface not smaller than 48 point font, that provides the following notice so as to be clearly visible to performers in said films:

The State of California requires the use of condoms for all acts of vaginal or anal intercourse during the production of adult films to protect performers from sexually transmitted infections and diseases.

Any public health concerns regarding any activities occurring during the production of any adult films should be directed to:

(f) By January 1, 2018, the Division or Board shall adopt regulations to implement and effectuate this section and Labor Code section 6720.2 in accordance with the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code) (“Administrative Rulemaking”).

Section 6720.2. Adult Film Producers: License

(a) Within 10 days following the beginning of filming of an adult film, the adult film’s adult film producer(s) shall pay the required application fee, submit a required application to the Division, and obtain from the Division an Adult Film Production Health License (“License”). The application fee shall be set by the Division via Administrative Rulemaking, in an amount sufficient to provide for the cost of the administration of this section. Until the Division sets the fee, the fee shall be \$100.

(b) A License shall be effective immediately upon the Division’s receipt of the application and fee, and its effect shall be retroactive by 10 days or the day of beginning of filming, whichever is earlier.

(c) Issuance of a License shall be a ministerial task to be performed by the Division. Suspension of a License shall only be permitted upon a stipulation by an adult film producer or upon a proper showing before a Presiding Officer, to be selected by the Division to conduct the hearing, that the License holder has been found, via the administrative enforcement process or a civil action, to have violated Labor Code section 6720(a).

(d) For any adult film producer who is not an individual, no License shall be valid unless all owners and managing agents of such person obtain a License.

(e) A License shall be valid for two (2) years, unless suspended by the Division. Following the

last day of the suspension period, the Division shall inform the suspended licensee of License reinstatement.

(f) Licensing Requirements:

(1) Each applicant and licensee must not have been found, through the administrative enforcement process or by a court of competent jurisdiction, to have violated any of the requirements of Labor Code section 6720(a) for the twelve (12) months preceding the filing of an application with the Division or the duration of the adult film producer's suspension, whichever is lesser. All persons shall be considered in compliance with this Act as of the effective date of this Act.

(g) Whenever the Division determines that a licensee has failed to comply with the requirements of Labor Code section 6720(a), the Division shall issue a written notice to the licensee. The notice shall include a statement of deficiencies found, shall set forth corrective measures, if any, necessary for the licensee to be in compliance with Labor Code section 6720(a), and shall inform the licensee that penalties and/or License suspension may result.

(h) A written request for administrative review, or for a continuance if good cause is shown, must be made by the noticed licensee within fifteen (15) calendar days of the issuance of the notice to comply, or else such review or continuance are waived.

(i) Within ten (10) days following the administrative review or waiver, excluding weekends and holidays, the Division shall issue a written notice of decision to the licensee, specifying any penalties imposed on the licensee. For Licenses that have been suspended, the notice of decision shall specify the acts or omissions found to be in violation of this Act, and, in the case of a suspended License, shall state the length and extent of the suspension. The notice of decision shall also state the terms, if any, upon which the License may be reinstated or reissued.

(j) A License issued pursuant to this Act may be reinstated if the Division determines that the conditions which prompted the suspension no longer exist and any penalties imposed pursuant to this Act has been satisfied. In no event shall this section be construed as limiting a licensee's right to seek mandamus or to appeal an adverse License decision.

(k) Performing the functions of an adult film producer without a License shall result in a fine of up to \$100 per day for any adult film producer who has previously been found to have violated Labor Code section 6720(a). Any adult film producer who fails to register as an adult film producer within 10 days after qualifying as an adult film producer shall be liable for a fine of up to \$50 per day for performing the functions of as an adult film producer without a License.

Section 6720.3. Statute of Limitations.

(a) Notwithstanding Labor Code section 6317, in an action to prosecute any alleged violators of this Act or any adult film regulations now or hereafter adopted, the time for commencement of action

shall be the later of the following: (1) one year after the date of the violation; or (2) one year after the violation is discovered, or through the use of reasonable diligence, should have been discovered.

Section 6720.4. Liability and Penalties.

(a) Notwithstanding Labor Code section 6423, every adult film producer and every officer, management official, or supervisor having direction, management, control, or custody of any employment, place of employment, or of any adult film performer, who does any of the following shall, in an administrative or civil action, be assessed a penalty as defined in subsection (b) of this section:

(1) Knowingly, negligently, or repeatedly violates any provision of Labor Code section 6720, or any adult film regulations;

(2) Fails or refuses to comply with, after notification and expiration of any abatement period, any provision of Labor Code section 6720; or

(3) Aids and abets another to commit any of the acts in paragraphs (1) or (2) of subsection (a) of this section.

(b) Any violation of Labor Code sections 6720.4(a)(1) or (a)(2) is punishable by a penalty of not less than \$10,000 nor more than \$30,000; and any violation of Labor Code sections 6720.4(a)(3) is punishable by a penalty of not less than \$5,000 nor more than \$15,000.

Section 6720.5. Agents of Control; Aiding and Abetting; Multiple Violations.

(a) Every person who possesses, through purchase for commercial consideration, any rights in one or more adult films filmed in California in violation of Labor Code section 6720(a) and who knowingly or recklessly sends or causes to be sent, or brings or causes to be brought, into or within California, for sale or distribution, one or more adult films filmed in California in violation of Labor Code section 6720(a), with intent to distribute, or who offers to distribute, or does distribute, such film(s) for commercial purposes, shall be assessed a penalty of : (1) not less than one-half times, but not more than one-and-one-half times, the total amount of commercial consideration exchanged for any rights in the adult film(s); or (2) not less than one-half times, but not more than one-and-one-half times, the total cost of producing the adult film(s), whichever is greater.

(b) Any person found to have aided and abetted any other person or persons in violating Labor Code section 6720.5(a) shall be found liable for violating Labor Code section 6720.5(a).

(c) Any person found liable for violating Labor Code section 6720.5(a) who has previously been found liable for violating Labor Code section 6720.5(a) shall be assessed a penalty of: (1) not less than two times, but not more than three times, the amount of commercial consideration exchanged for any rights in the adult film; or (2) not less than two times, but not more than three times, the total cost of producing the adult film, whichever is greater.

(d) Any person found liable for violating Labor Code section 6720.5(a) who has been found liable two or more times for violating Labor code section 6720.5(a) shall be assessed a penalty of: (1) not less than three times, but not more than four times, the amount of commercial consideration exchanged for any rights in the adult film; or (2) not less than three times, but not more than four times, the total cost of producing the adult film, whichever is greater.

(e) This section shall not apply to legitimate medical, educational, and scientific activities, to telecommunication companies that transmit or carry adult films, and to criminal law enforcement and prosecuting agencies in the investigation and prosecution of criminal offenses.

Section 6720.6. Enforcement; Whistleblowers; Private Rights of Action.

(a) Any person who violates any provision of this Act shall be liable via the administrative enforcement process, or via a civil action brought by the Division or its designee, a civil prosecutor, an adult film performer aggrieved by a violation of Labor Code section 6720, or an individual residing in the State of California. Any adult film performer or individual, before filing a civil action pursuant to this subsection, must file with the Division a written request for the Division to pursue the alleged violator(s) via the administrative enforcement process or by commencing a civil action. The request shall include a statement of the grounds for believing that this Act has been violated. The Division shall respond to the individual in writing, indicating whether it intends to pursue an administrative or civil action, or take no action. If the Division, within 21 days of receiving the request, responds that it is going to pursue the alleged violator(s) via the administrative enforcement process or a civil action and does so within 45 days of receiving the request, no other action may be brought unless the Division's action is abandoned or dismissed without prejudice. If the Division, within 21 days of receiving the request, responds in the negative, or fails to respond, the person requesting the action may proceed to file a civil action.

(b) The time period within which a civil action shall be commenced shall be tolled from the date of the Division's receipt of the request to either the date the civil action is dismissed without prejudice or the administrative enforcement action is abandoned, whichever is later, but only for a civil action brought by the individual who filed the request.

(c) No civil action may be filed under this section with regard to any person for any violations of the Act after the Division has issued an order consistent with this Act or collected a penalty against that person for the same violation. Although this Act imposes no criminal liability, no civil action alleging a violation of this Act may be filed against a person pursuant to this section if a criminal prosecutor is maintaining a criminal action against that person regarding the same transaction or occurrence. Not more than one judgment on the merits with respect to any particular violation of the Act may be obtained under this section against any person. The court may dismiss a pending action without prejudice to any other action for failure of the plaintiff to proceed diligently or in good faith.

(d) If judgment is entered against one or more defendants in an action brought under this section,

penalties recovered by the plaintiff shall be distributed as follows: 75 percent to the State of California and 25 percent to the plaintiff. The court may award to a plaintiff or defendant other than a governmental agency who prevails in any action authorized by this Act and brought pursuant to this section the costs of litigation, including reasonable attorney's fees. However, in order for a defendant to recover attorney's fees from a plaintiff, the court must first find that the plaintiff's pursuit of the litigation was frivolous or in bad faith.

Section 6720.7. Talent Agency Liability.

(a) It shall be unlawful for any talent agency, as that term is defined in Labor Code section 1700.4(a), to knowingly refer, for monetary consideration, any artist, as that term is defined in Labor Code section 1700.4(b), to any producer, or agent of the producer, including, but not limited to, casting directors, of adult films who are not in compliance with Labor Code section 6720(a). Any talent agency found liable for violating this subsection shall be liable to the artist for the amount of the monetary consideration received by the talent agency as a result of the referral made in violation of this section and for reasonable attorney's fees associated with successfully pursuing the talent agency for liability for violating this subsection.

(b) Any talent agency that obtains written confirmation prior to the beginning of filming, signed under penalty of perjury by the producer of the adult film, that the producer is in compliance with, and will continue to comply with, all requirements of Labor Code section 6720(a) shall not be liable for violating this section.

(c) Violation of this section may be grounds for suspension or revocation of the violator's talent agency license. The Division and the Division of Labor Standards Enforcement shall maintain concurrent jurisdiction over the enforcement of this section.

(d) Upon the finding of liability for violations of Labor Code section 6720(a), the Division shall transmit the information in Labor Code section 6720.1(a)(5) to the Department of Industrial Relations, Division of Labor Standards Enforcement or any successor agency.

Section 6720.8. Definitions.

(a) For purposes of California Labor Code ("Labor Code") sections 6720 through 6720.8, the following definitions shall apply:

(1) "Adult film" means any recorded, streamed, or real-time broadcast of any film, video, multimedia, or other representation of sexual intercourse in which performers actually engage in vaginal or anal penetration by a penis.

(2) "Adult film performer" shall mean any individual whose penis penetrates a vagina or anus while being filmed, or whose vagina or anus is penetrated by a penis while being filmed.

(3) "Adult film producer" means any person that makes, produces, finances, or directs one or more

adult films filmed in California and who sells, offers to sell, or causes to be sold such adult film(s) in exchange for commercial consideration.

(4) “Adult film regulations” shall mean all regulations adopted by the Board in accordance with the rulemaking provisions of the Administrative Procedure Act that are reasonably germane to the purposes and intent of this Act.

(5) “Aided and abetted” or “aids and abets” means knowingly giving substantial assistance to a Person.

(6) “Beginning of filming” means the point at which an adult film begins to be recorded, streamed, or real-time broadcast.

(7) “Board” means the California Occupational Safety and Health Standards Board.

(8) “Commercial consideration” means anything of value, including but not limited to, real or digital currency, or contingent or vested rights in any current or future revenue.

(9) “Commercial purposes” means to sell, offer to sell, or cause to be sold, in exchange for commercial consideration.

(10) “Distribute” or “distributed” means to transfer possession of in exchange for commercial consideration.

(11) “Division” means the California Division of Occupational Safety and Health (Cal/OSHA).

(12) “Filmed” and “filming” means the recording, streaming, or real-time broadcast of any adult film.

(13) “License” means Adult Film Producer Health License.

(14) “Licensee” means any person holding a valid Adult Film Producer Health License.

(15) “Other potentially infectious material - sexually transmitted infections” (“OPIM-STI”) means bodily fluids and other substances that may contain and transmit sexually transmitted pathogens.

(16) “Person” means any individual, partnership, firm, association, corporation, limited liability company, or other legal entity.

(17) “Sexually Transmitted Infection” (“STI”) means any infection or disease spread by sexual conduct, including, but not limited to, HIV/AIDS, gonorrhea, syphilis, chlamydia, hepatitis, trichomoniasis, genital human papillomavirus infection (HPV), and genital herpes.

Section 5. Liberal Construction.

This Act is an exercise of the public power of the People of the State of California for the protection of their health, safety, and welfare, and shall be liberally construed to effectuate its purposes.

Section 6. Conflicting Measures.

This Act is intended to be comprehensive. It is the intent of the People of the State of California that in the event this Act and one or more measures relating to the same subject shall appear on the same statewide ballot, the provisions of the other measure or measures shall be deemed to be in conflict with this Act. In the event that this Act receives a greater number of affirmative votes, the provisions of this Act shall prevail in their entirety, and all provisions of the other measure or measures shall be null and void.

Section 7. Proponent Accountability

The People of the State of California hereby declare that the proponents of this Act should be held civilly liable in the event this Act is struck down, after passage, in whole or in part, by a court of law for being constitutionally or statutorily impermissible. Such a constitutionally or statutorily impermissible initiative is a misuse of taxpayer funds and electoral resources and the Act's proponents, as drafters of the Act, must be held accountable for such an occurrence.

In the event this Act, after passage, is struck down in a court of law, in whole or in part, as unconstitutional or statutorily invalid, and all avenues for appeal have been exhausted, proponents shall pay a civil penalty of \$10,000 to the General Fund of the State of California for failure to draft and sponsor a wholly constitutionally or statutorily permissible initiative law. No party or entity may waive this civil penalty.

Section 8. Amendment and Repeal.

This Act may be amended to further its purposes by statute passed by a two-thirds (2/3) vote of the Legislature and signed by the Governor.

Section 9. Severability.

If any provision of this Act, or part thereof, or the applicability of any provision or part to any person or circumstances, is for any reason held to be invalid or unconstitutional, the remaining provisions and parts shall not be affected, but shall remain in full force and effect, and to this end the provisions and parts of this Act are severable. The voters hereby declare that this Act, and each portion and part, would have been adopted irrespective of whether any one or more provisions or parts are found to be invalid or unconstitutional.

Section 10. Legal Defense.

The People of the State of California desire that the Act, if approved by the voters, and thereafter

challenged in court, be defended by the State of California. The People of the State of California, by enacting this Act, hereby declare that the proponents of this Act have a direct and personal stake in defending this Act from constitutional or statutory challenges to the Act's validity. In the event the Attorney General fails to defend this Act; or the Attorney General fails to appeal an adverse judgment against the constitutionality or statutory permissibility of this Act, in whole or in part, in any court of law, the Act's proponent(s) shall be entitled to assert its direct and personal stake by defending the Act's validity in any court of law and shall be empowered by the citizens through this Act to act as agents of the citizens of the State of California subject to the following conditions: (1) The proponent(s) shall not be considered an "at-will" employee of the State of California, but the Legislature shall have the authority to remove the proponent(s) from their agency role by a majority vote of each house of the Legislature when "good cause" exists to do so, as that term is defined by California case law; (2) The proponent(s) shall take the Oath of Office under California Constitution, Article XX, §3 as an employee of the State of California; (3) The proponent(s) shall be subject to all fiduciary, ethical, and legal duties prescribed by law; and (4) The proponent(s) shall be indemnified by the State of California for only reasonable expenses and other losses incurred by the proponent, as agent, in defending the validity of the challenged Act. The rate of indemnification shall be no more than the amount it would cost the State to perform the defense itself.

Section 11. Effective Date.

Except as otherwise provided herein, this Act shall become effective the day after its approval by the voters.