

March 3, 2015

Hon. Kamala D. Harris
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Ashley Johansson
Initiative Coordinator

Dear Attorney General Harris:

Pursuant to Elections Code Section 9005, we have reviewed the proposed initiative concerning adult film production (A.G. File No. 15-0004, Amendment #1). This measure would place certain requirements for the adult film industry—now described in detail only in state regulations and in a Los Angeles County law—in California state statute. It also would place additional requirements concerning the industry in state statute.

Adult Films Affected by This Proposal

A wide variety of films, videos, and other entertainment may be considered in common usage to be adult films. This proposal would not apply to all adult films. The proposed measure would apply only to specified recorded, streamed, or real-time broadcasts of sexual intercourse. In addition, the proposal would not apply to “legitimate medical, educational and scientific activities.” The proposal also contains language stating that it would not apply to “any film rated by the Motion Picture Association of America unless such film is an adult film” as defined in the proposed measure.

Background

California Is Leading Adult Film Industry Location. Various businesses that produce and distribute adult films are located in California, including some of the largest such businesses in the world. California’s leading position in the adult film industry results from various factors, including the presence of the mainstream film industry’s equipment and crews (some of which also work in the adult film industry) and stronger case law protections than in other states, including state Supreme Court precedent protecting adult film speech.

Thousands of Adult Film Industry Workers in State. Within California, the adult film industry is heavily concentrated in Los Angeles and nearby cities. A smaller part of the industry is located in the Bay Area. The adult film industry employs several thousand people in the state, although many are only employed on a part-time basis. Nearly all of the key businesses producing and distributing adult films are independent contractors, sole-proprietorships, or

privately held firms, which means there is little verifiable data on the size of the industry. Based on the available data, we assume that the economic activity directly related to adult film production in California ranges from hundreds of millions of dollars per year to, at most, a few billion dollars per year.

Adult Film Performers Exposed to Occupational Safety and Health Hazards. Performers are exposed to a variety of occupational health and safety hazards during filming. These include sexually transmitted diseases (STDs) such as the human immunodeficiency virus (HIV), hepatitis B, gonorrhea, chlamydia, herpes, and syphilis. The Los Angeles County Department of Public Health has reported that the incidence of gonorrhea and chlamydia infection among adult film performers is significantly higher than among the general population of Los Angeles County residents aged 18-29. The relative incidence of HIV infection is less clear because of data limitations.

State Laws and Regulations. California state law generally requires employers to provide for a safe workplace. The Division of Occupational Safety and Health (Cal/OSHA) in the California Department of Industrial Relations creates and enforces regulations to protect workers from health and safety hazards in the workplace, including on adult film sets. Employers in the adult film industry are required to comply with all relevant state laws and regulations, including those regulating exposure to STDs like those listed earlier. Current regulations effectively require adult film performers to use condoms or other protective equipment during intercourse.

State officials previously have held advisory discussions with interested parties concerning occupational health and safety in adult film workplaces and are currently drafting a new proposed regulation. As a result, it is possible that by the time this measure could be placed on a statewide ballot there will be new state occupational health and safety regulations for the adult film industry. The Legislature also has considered, but has not approved, laws to impose new statutory requirements on the adult film industry.

Los Angeles County Law. In November 2012, voters in Los Angeles County approved a ballot measure (Measure B) requiring adult film producers to obtain a public health permit and comply with state occupation safety and health regulations. Measure B effectively requires adult film performers to wear condoms when making adult films in that county. The ballot measure was subsequently challenged, and the courts have altered some provisions. A U.S. district court judge, however, found that challenges to Measure B's condom requirement on First Amendment grounds are unlikely to succeed. A federal appellate court upheld the district court decision. Additional litigation related to Measure B seems likely. Whether Measure B will be enforced on a widespread basis is unclear.

Testing Regimen Preferred by Parts of Adult Film Industry. Some adult film productions currently require or allow performers to wear condoms. However, many adult film producers and performers reportedly prefer to make films without condoms or other protective equipment. Parts of the adult film industry instead have developed regular testing protocols intended to demonstrate that all performers in a production are currently free of certain infections.

Proposal

State Statutory Condom Requirement for Adult Films. This measure would place in state statute key provisions of existing regulations that require adult film performers to wear condoms during sexual intercourse when making an adult film. The measure would not require condoms to be visible in the final, edited film released to consumers. Producers, however, essentially would be required to prove that condoms were worn during filming.

Third Parties Allowed to Bring Suit on Regulatory Violations. Several provisions of this measure may allow third parties to bring litigation against adult film producers, talent agents, and distributors for violations of the proposed statute. The measure declares its intent to “hold liable all individuals and entities with a financial interest in the making or distribution of adult films” who violate the proposed law’s provisions. Any adult film performer or any individual residing in California who complains to Cal/OSHA about a potential violation would be able to file a civil action if Cal/OSHA does not initiate an investigation within a specified time period. The proposed measure discusses various other penalties or charges for those who violate its provisions. The initiative would not apply to “telecommunication companies that transmit or carry adult films.”

Adult Film Producers Subject to New Requirements. Adult film producers would be required to apply for a two-year license from Cal/OSHA in order to make adult films. Within 10 days after the beginning of any filming, the producer would have to provide Cal/OSHA with specific information about the filming and certify that condoms were worn at all times as required. The measure requires Cal/OSHA to charge adult film producers various fees to administer these new requirements, but prohibits fee revenue from being used for enforcement costs. In addition, the adult film producer would be required to maintain appropriate records to allow Cal/OSHA to verify compliance with the new regulations. Cal/OSHA may suspend an adult film production license should a producer violate the new requirements. In the event that future regulations require that performers be tested for diseases or vaccinated or examined by medical professionals, the measure would require producers to pay for these items.

Fiscal Effects

Industry Response May Have Economic and Fiscal Implications. Some parts of the adult film industry already comply or will choose to start complying with state and local statutes and regulations. Also, as noted earlier, some adult films made in California would not be affected directly by this measure. Furthermore, in response to Measure B and previous state legislative and regulatory discussions concerning their industry, some adult film production that otherwise would have occurred in California may *already* have been relocated to other states or countries.

Should this proposed statutory measure become state law, other parts of the adult film industry likely would respond by either relocating outside of California in order to avoid or protest the law’s requirements or continuing to make adult films in California while seeking to evade state and local law enforcement.

As a result of such industry responses to the law, tens of millions or hundreds of millions of dollars of annual economic activity and hundreds of full- and part-time adult film industry jobs likely would be (1) eliminated from the California economy or (2) “driven underground” in the

California economy, thereby evading state and local regulation and, potentially, taxation. Some adult film industry employees and contractors may (1) move out of California following the relocation of parts of their industry out of the state, (2) find new jobs, or (3) become unemployed. In total, these changes likely would reduce annual state and local tax revenue by millions or tens of millions of dollars per year.

Regulatory and Enforcement Costs and Revenues. There would be some one-time state costs to implement the measure. The ongoing state government costs to implement and enforce this law are likely to be a few million dollars annually. At least some of the costs would be offset by fees, penalties, and other charges.

Other State and Local Government Costs and Savings. The measure may have other fiscal impacts for California governments. These include potentially lower state and local public health costs if the measure results in fewer STD infections due to its condom requirements or the departure of adult film industry performers from the state. If the measure resulted in a lower number of HIV or other STD infections in California, then there could be state and local public health savings of hundreds of thousands or millions of dollars per year. The loss of employment resulting from the measure could increase state and local costs for certain health and human services benefits, at least temporarily. The ongoing net costs or savings for health and human services programs are difficult to predict.

Summary of Fiscal Effects. This measure would have the following major fiscal effects:

- Potentially reduced state and local tax revenue of millions or tens of millions of dollars per year.
- Likely state costs of a few million dollars annually to administer the law.
- Possible ongoing net costs or savings for state and local health and human services programs.

Sincerely,

Mac Taylor
Legislative Analyst

Michael Cohen
Director of Finance