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# Health and Welfare

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## Health and Welfare; anatomical gifts—donor liability

Health and Safety Code § 7155.5 (amended).
AB 2652 (Connolly); 1994 STAT. Ch. 160

Under existing law, designated persons may make anatomical gifts[1] to certain entities upon the death of the donor.[2] Under existing law, the individual making the anatomical gift, and the individual's estate, may not be held liable for damage or injury associated with the use of the anatomical gift.[3] Under Chapter 160, the estate or heirs of the person making the anatomical gift also will not be held liable for the costs associated with harvesting the anatomical gift.[4]

INTERPRETIVE COMMENT

The purpose of Chapter 160 is to preclude the billing of individuals who make anatomical gifts or their heirs or estates for the costs associated with harvesting the gift.[5] Further, the author of Chapter 160 believes that the donee, or his or her insurer, should bear the full costs associated with the donation and receipt of the gift.[6] It is believed that the failure to place the costs on the donee or another party instead of the donor or his or her heirs would have a chilling effect on future donations.[7]

Most states with anatomical gift laws similar to those of California have not addressed the potential liability of heirs or estates of donors of anatomical gifts for the costs associated with the organ donation.[8] This may, in part, be due to

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1. *See* CAL. HEALTH & SAFETY CODE § 7150.1(a) (West Supp. 1994) (defining an anatomical gift as all or part of a human body donated upon or after death).

2. *Id.* § 7150.5 (West Supp. 1994); *see id.* § 7150.5(a) (West Supp. 1994) (providing authorization to persons over the age of 18 to designate their organs as anatomical gifts); *id.* § 7151 (West Supp. 1994) (designating persons authorized to make anatomical gifts of another individual's organs); *see also id.* § 7153 (West Supp. 1994) (listing entities which may be donees of anatomical gifts). *But see id.* § 7152 (West Supp. 1994) (prohibiting others from making an anatomical gift of an organ when the donor's religious beliefs forbid it).

3. *Id.* § 7155.5(d) (amended by Chapter 160).

4. *Id.*

5. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2652, at 2 (June 27, 1994); *see id.* (stating that the author was concerned that persons who made anatomical gifts were billed large amounts of money for the costs associated with harvesting the organs).

6. *Id.*

7. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2652, at 2 (June 14, 1994).

8. *See e.g.*, CONN. GEN. STAT. ANN. § 19a-279j (West Supp. 1994); HAW. REV. STAT. § 327-11 (1993); IDAHO CODE § 39-3412 (Michie 1993); MINN. STAT. ANN. § 525-9221 (West Supp. 1994); MONT. CODE ANN. § 72-17-207 (1993); NEV. REV. STAT. ANN. §451.582 (Michie 1991); N.D. CENT. CODE § 23-06.2-11 (1991); R.I. GEN. LAWS § 23-18.6-11 (1989); VT. STAT. ANN. tit. 18, § 5247 (1993); WASH. REV. CODE ANN. § 68.50.620 (West Supp. 1994) (immunizing donors and their estates from liability resulting from injury or damage caused by the use of their anatomical gift). *But see e.g.*, ALASKA STAT. § 13.50.60(a) (1993) (stating that organ donors and their estates may not be held liable for the costs associated with organ procurement); MO. ANN. STAT. § 194.233 (Vernon Supp. 1994) (providing that hospitals may not be held liable for organ

federal rules which allow for reimbursement of such costs to hospitals and organ procurement organizations[9] by Medicare or Medicaid.[10] It may also be because it appears counter-intuitive to bill someone who has made a life-saving gift.[11]

The event which triggered Chapter 160, the billing of the family of a young girl who donated several organs, was reportedly accidental and her family was not required to pay the charges.[12] There have, however, reportedly been other instances where donor families have received bills for the cost of the organ procurement.[13] Although this may not be a regular occurrence, if people fear that they or their heirs or estates will be billed for the costs, they may be less willing to allow their organs to be donated.[14] With the large number of people on waiting lists to receive organs, a decrease in organ donations could detrimentally affect countless lives.[15] Thus, to alleviate these fears, it is necessary to state clearly that the donor or his or her estate or heirs may not be charged for the costs associated with obtaining organs for transplant.[16] This amendment will result in the fair allocation of organ procurement costs by placing the burden where it should lie—on the person receiving the benefit of the organ transplant.[17]

*T. Scott Belden*

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procurement costs).

9. *See* 42 C.F.R. § 485.302 (1993) (defining organ procurement organization); *see also* 42 U.S.C.A. § 273 (West Supp. 1994) (granting the Secretary of Health and Human Service the authority to establish and provide grants to organ procurement organizations).

10. *See* 42 C.F.R. § 485.301 (1993) (allowing for payment of organ procurement costs by Medicare and Medicaid).

11. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2652, at 2 (June 14, 1994) (arguing that it is unfair to hold the donor's estate liable for the costs associated with harvesting the organs).

12. Lorie Hearn, *Amid the Sorrow of Death, There's the Pain of a Huge Bill: Bereaved Dad is Charged for Organ Donation Costs,* SAN DIEGO UNION-TRIB., Aug. 8, 1993, at B-1; *see id.* (quoting officials of the procurement agency who stated that an administrative error caused the donor's family to receive a bill for the costs).

13. *Id.*; *see id.* (stating that a 1991 survey disclosed that 10%-15% of survivors of organ donors in the San Diego area had been charged for services that included organ procurement).

14. *See id.* (stating that the myth that donors will have to pay the costs of the procurement is a great concern of organ donation officials); *see also* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2652, at 2 (June 27, 1994) (providing that donors and their estates should not have to bear the costs of organ procurement because to do so would discourage persons from making donations).

15. *See* Hearn, *supra* note 12 (relating that in 1993, there were over 31,000 people on waiting lists in the United States to receive organs).

16. *See id.* (relating that a great concern for officials involved in the organ donation program is straightening out problems that could discourage people from signing donor cards).

17. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2652, at 2 (June 27, 1994) (stating that donation costs should be borne entirely by the organ recipient, donee, or the donee's insurer).

**Health and Welfare; care facilities—criminal history information of applicant for licensure**

Education Code § 8172 (amended); Health and Safety Code §§ 1555.1, 1568.0651, 1569.511, 1596.8871 (new); §§ 1522, 1568.09, 1569.17, 1596.871, 1596.877 (amended).
SB 1984 (Bergeson); 1994 STAT. Ch. 1267

Existing law regulates the licensing of persons operating, employed at, or otherwise in contact with clients of certain care facilities.[1] Under existing law, the State Department of Social Services[2] has the authority to contact an appropriate law enforcement agency to determine whether a person seeking licensure has been convicted[3] of, or is currently awaiting trial for, a crime other than a minor traffic violation.[4]

Chapter 1267 no longer requires the Department of Social Services to ascertain whether a person seeking licensure is currently awaiting trial for certain crimes,[5] but instead must determine whether the person has ever been arrested for the specified crimes.[6]

Additionally, Chapter 1267 prohibits the Department of Social Services from denying, revoking, or terminating any application or license for, or employment

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1. CAL. HEALTH & SAFETY CODE §§ 1522, 1568.09, 1569.17, 1596.871 (amended by Chapter 1267); *see id.* § 1522 (amended by Chapter 1267) (regulating community care facilities); *id.* § 1568.09 (amended by Chapter 1267) (regulating residences for persons with chronic life-threatening illnesses); *id.* § 1569.17 (amended by Chapter 1267) (regulating facilities for the elderly); *id.* § 1596.871 (amended by Chapter 1267) (regulating child day care facilities).

2. *See* CAL. WELF. & INST. CODE §§ 10550-10618 (West 1991 & Supp. 1994) (detailing the duties and responsibilities of the State Department of Social Services).

3. *See* CAL. PENAL CODE § 689 (West 1985) (specifying the manner of conviction); *see also* People v. Banks, 53 Cal. 2d. 370, 390-91, 348 P.2d 102, 116, 1 Cal. Rptr. 669, 683 (1960) (specifying that a conviction will generally include a plea of guilty); *Ex Parte* Brown, 68 Cal. 176, 182, 8 P. 829, 832 (1885) (stating that a conviction indicates a finding of a guilty verdict).

4. CAL. HEALTH & SAFETY CODE §§ 1522(a), 1568.09(a), 1569.17(a), 1596.871(a) (amended by Chapter 1267); *cf.* CONN. GEN. STAT. § 19a-87a (1994); HAW. REV. STAT. § 346-19.6 (1985); OHIO REV. CODE ANN. § 2151.86 (Anderson 1994); TEX. GOV'T CODE ANN. § 411.114 (West 1994); VA. CODE ANN. § 19.2-389 (Michie 1994) (outlining similar criminal history reporting procedures).

5. *See* 1991 Cal. Legis. Serv. ch. 888, sec. 1, at 3453-56 (amending CAL. HEALTH & SAFETY CODE § 1522); 1991 Cal. Legis. Serv. ch. 937, sec. 1.5, at 3714-16 (amending CAL. HEALTH & SAFETY CODE § 1522); 1991 Cal. Legis. Serv. ch. 888, sec. 4, at 3459-61 (amending CAL. HEALTH & SAFETY CODE § 1568.09); 1991 Cal. Legis. Serv. ch. 937, sec. 2.5, at 3718-20 (amending CAL. HEALTH & SAFETY CODE § 1568.09); 1993 Cal. Legis. Serv. ch. 526, sec. 1, at 2260-62 (amending CAL. HEALTH & SAFETY CODE § 1569.17); 1992 Cal. Legis. Serv. ch. 1113, sec. 2, at 4430-33 (amending CAL. HEALTH & SAFETY CODE § 1596.871).

6. CAL. HEALTH & SAFETY CODE §§ 1522(a), 1568.09(a), 1569.17(a), 1596.871(a) (amended by Chapter 1267); *see id.* §§ 1522(c)(4), 1568.09(c)(5), 1569.17(c)(5), 596.871(c)(4) (amended by Chapter 1267) (exempting certain persons, if they can show that their criminal history indicates that they are of good character); *see also* Loder v. Municipal Court, 17 Cal. 3d 859, 864-65, 553 P.2d 624, 628, 132 Cal. Rptr. 464, 468 (1976) (holding that the interest in permitting law enforcement agencies to consult arrest records outweighs the constitutional right to privacy), *cert. denied*, 429 U.S. 1109 (1977). *Contra* Central Valley Chapter v. Younger, 214 Cal. App. 3d 145, 151, 262 Cal. Rptr. 496, 499 (1989), *reh'g denied*, (holding that dissemination of arrest records for employment, licensing and certification purposes significantly affects a person's right to privacy).

or residence at, any care facility without first conducting an investigation of the incident and securing evidence.[7]

Existing law allows an individual to transfer a criminal record clearance from one care facility to another.[8] In addition, prior law provided that for child care facilities, the State Department of Social Services is required to hold the criminal record clearances for a minimum of one year after an employee is no longer employed at a licensed facility.[9] Chapter 1267 expands this requirement to now require the Department to hold such records for all community care facilities, residential care facilities for persons with a chronic life-threatening illness, residential care facilities for the elderly, as well as child day care facilities for a minimum of two years after the employee has no longer been employed at the licensed facility.[10]

Under existing law, proceedings may be held for the suspension, revocation, or denial of a license to operate certain care facilities.[11] Under Chapter 1267, such proceedings are modified so that certain witnesses in some circumstances may testify outside of the presence of the respondent.[12]

In addition, existing law establishes a trustline registry for individuals responsible for the care and supervision of children.[13] Chapter 1267 requires the Department of Justice[14] to obtain specified information, including a criminal record, if any, in order to enter a child care provider's name into the registry.[15]

## INTERPRETIVE COMMENT

By providing for a closer examination of a care facility applicant's background, Chapter 1267 is attempting to decrease the number of abuse

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7. CAL. HEALTH & SAFETY CODE §§ 1568.0651(e) (enacted by Chapter 1267), 1522(e), 1569.17(e), 1569.871(e) (amended by Chapter 1267).

8. *Id.* §§ 1522(h), 1568.09(g), 1569.17(g), 1596.871(h)(1) (amended by Chapter 1267); *see id.* (indicating that the transfer must be processed through a state licensing district office and be transferred to another state licensing district office).

9. 1992 Cal. Legis. Serv. ch. 1113, sec. 2, at 4430-33 (amending CAL. HEALTH & SAFETY CODE § 1596.871).

10. CAL. HEALTH & SAFETY CODE §§ 1522(h)(2), 1568.09(g)(2), 1569.17(g)(2), 1596.871(h)(2) (amended by Chapter 1267).

11. *Id.* §§ 1551, 1568.065, 1569.51 (West Supp. 1994); *id.* § 1596.877 (amended by Chapter 1267).

12. *Id.* §§ 1551.1, 1568.0651, 1569.511, 1596.8871 (enacted by Chapter 1267); *see id.* (indicating that children or similarly vulnerable witnesses may testify outside the presence of the respondent if: (1) It is necessary to ensure truthful testimony; (2) the witness is likely to be intimidated by the respondent's presence; or (3) the witness is afraid to testify in front of the respondent).

13. *Id.* § 8172(a) (amended by Chapter 1267); *see* Ed Mendel, *Wilson Signs Gotch Bill for Child-Care Registry*, SAN DIEGO UNION-TRIB., Oct. 9, 1993, at A-20 (explaining that the Trustline Registry is a toll free number available for parents to do background checks on care providers for their children); *see also Can Parents Trust Trustline?*, BUS. WIRE, May 11, 1994, *available in* LEXIS, News Library, Curnws File (indicating that according to the Bay Area Nanny Agency Association (BANAA), children may still be at risk even if the care provider clears Trustline).

14. *See* CAL. GOV'T CODE §§ 15000-15204 (West 1992 & Supp. 1994) (listing the duties and responsibilities of the Department of Justice).

15. CAL. HEALTH & SAFETY CODE § 8172(a) (amended by Chapter 1267).

incidents occurring within the care facility system.[16] In addition, Chapter 1267 facilitates testimony among vulnerable witnesses who may be swayed by the presence of the respondent in a care facility suspension or revocation hearing.[17]

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## Health and Welfare; Cigarette and Tobacco Product Surtax Programs

Education Code § 49466 (new), §§ 49460, 49461, 49463, 49465 (amended); Health and Safety Code § 1189.105 (repealed and new), §§ 424.10, 424.20, 424.30, 424.40, 424.55, 424.60, 424.70, 424.80, 424.90, 424.97 (new and repealed), § 1189.107 (new), §§ 1189.101, 1189.103, 1189.109, 1189.113, 24162, 24163, 24164, 24167, 24168.6, 24168.7, 24168.8, 24169.8 (amended); Insurance Code §§ 12696.05, 12698, 12699, 12699.50, 12733 (amended); Welfare and Institutions Code § 16954 (repealed), § 16935.5 (new), §§ 14148.5, 14148.99, 16809.5, 16909, 16918, 16930, 16931, 16934.5, 16935, 16936, 16937, 16938, 16941.1, 16942, 16945, 16948, 16952, 16970, 16980, 16981, 16997.1 (amended).
AB 816 (Isenberg); 1994 STAT. Ch. 195
*(Effective July 11, 1994)*

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16. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1984, at 4, (May 12, 1994); *see id* (indicating that the Department of Social Services needs arrest information to conduct the extensive investigations of care facility applicants); *see also* Peter Eisler, *For Many, the Sin is Omission*, USA TODAY, Feb. 21, 1994, at 5A (stating that in the United States, nursing home background checks are rare and reference checks ineffective); *Nursing Home Aide Screening Considered*, SACRAMENTO BEE, Apr. 3, 1994, at A3 (indicating that in the United States, 20,000 to 30,000 nursing home aides have criminal records involving violence or theft).

17. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1984, at 6 (Apr. 19, 1994); *see* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1984, at 4, (May 12, 1994) (stating that administrative judges did not have the authority to exclude spectators from hearings prior to Chapter 1267); *see also* Karen Fernau, *Courts To Get Closed-Circuit TV Rooms for Abuse Cases; Facilities Ease Trauma for Children Taking Stand*, PHOENIX GAZETTE, Nov. 1, 1993, at B1 (illustrating that because some abuse victims are so overwhelmed by the perpetrator's presence, they become confused or have gaps in their memory); Robin Topping, *Overcoming Obstacles In Child Abuse Cases*, NEWSDAY, June 29, 1994, at A29 (indicating that in most child sex abuse cases, children are reluctant to testify and in one instance the child testified with her back to the accused); *cf.* U.S. CONST. amend. VI (providing that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him); Maryland v. Craig, 497 U.S. 836, 849-50 (1990) (holding that a face-to-face confrontation is not an indispensable element of the sixth amendment's guarantee to confront one's accusers); Gail D. Cecchettini-Whaley, Note, *Children as Witnesses After* Maryland v. Craig, 65 S. CAL L. REV. 1993, 1994-95 (1992) (finding that in the debate on whether the Confrontation Clause guarantees the defendant the right to a literal face-to-face confrontation with the accuser or whether it is to ensure that evidence admitted in court will be reliable; the United States Supreme Court favored the latter).

Under prior law, appropriations from the Cigarette and Tobacco Products Surtax revenue generated by Proposition 99[1] which were distributed to the Health Education, Hospital Services, Physician Services, and Unallocated accounts, ceased as of July 1, 1994.[2]

Chapter 195 re-enacts and extends the sunset on these appropriations, as well as the program authorizations which control the use of these funds, to July 1, 1996.[3] Furthermore, Chapter 195 re-authorizes the Research Account for tobacco-related diseases,[4] establishes the University of California as the coordinating

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1. *See* The Initiative Constitutional Amendment and Statute—Cigarette and Tobacco Tax Benefit Fund, Prop. 99, § 3 (codified at CAL. CONST. art. XIIIB, § 12) (enacting Article XIIIB of the California Constitution); *id.* § 4 (codified at CAL. REV. & TAX. CODE § 30122) (enacting the Cigarette and Tobacco Products Surtax Fund); *see also* CAL. REV. & TAX. CODE § 30122(a)(1)-(4) (West 1994) (providing that the revenue generated by the Cigarette and Tobacco Products Surtax Fund is to be directed toward tobacco-related disease research and health education, health care for those otherwise unable to pay, and environmental protection and conservation programs); *id.* § 30125 (West 1994) (allowing the funds created by this surtax to be spent only for the purposes mentioned in California Revenue and Taxation Code § 30122); Kennedy Wholesale, Inc. v. State Bd. of Equalization, 53 Cal. 3d 245, 253-54, 806 P.2d 1360, 1366, 279 Cal. Rptr. 325, 330-31 (1991) (ruling that voter initiative Proposition 99 did not violate the single-subject rule of the California Constitution because all appropriations from the surtax would be in regard to the use of tobacco); *id.* (noting that failure by the voters to specify exactly how spending would be directly relevant to tobacco-related problems did not invalidate the measure).

2. 1991 Cal. Legis. Serv. ch. 278, sec. 2, at 1496-97 (amending CAL. HEALTH & SAFETY CODE § 1189.109); *id.* sec. 4, at 1497 (amending CAL. HEALTH & SAFETY CODE § 1189.113); *id.* sec. 11, at 1511 (amending CAL. HEALTH & SAFETY CODE § 24169.8); *see id.*, sec. 2, at 1496-97 (amending CAL. HEALTH & SAFETY CODE § 1189.109); *id.* sec. 4, at 1497 (amending CAL. HEALTH & SAFETY CODE § 1189.113); *id.* sec. 11, at 1511 (amending CAL. HEALTH & SAFETY CODE § 24169.8) (declaring that the operative periods for these sections were previously due to end July 1, 1994); *see also* 1991 Cal. Legis. Serv. ch. 1330, sec. 1, at 5376 (repealing CAL. HEALTH & SAFETY CODE §§ 424.10-424.97) (establishing medical research programs that were funded by the initiative which created the Cigarette and Tobacco Products Surtax); 1991 Cal. Legis. Serv. ch. 278, sec. 11.1, at 1517 (enacting CAL. INS. CODE § 12699.50) (listing the operative date for Insurance Code sections dealing with the Access for Infants and Mothers Program).

3. CAL. HEALTH & SAFETY CODE § 424.97 (enacted and repealed by Chapter 195); *id.* § 1189.113 (amended by Chapter 195); *id.* § 24169.8 (amended by Chapter 195); CAL. INS. CODE § 12699.50 (amended by Chapter 195); CAL. WELF. & INST. CODE § 14148.5(e) (amended by Chapter 195); *id.* § 14148.99 (amended by Chapter 195); *id.* § 16809.5(e) (amended by Chapter 195); *id.* § 16997.1 (amended by Chapter 195); *see* CAL. HEALTH & SAFETY CODE § 424.97 (enacted and repealed by Chapter 195); *id.* § 1189.113 (amended by Chapter 195); *id.* § 24169.8 (amended by Chapter 195); CAL. INS. CODE § 12699.50 (amended by Chapter 195); CAL. WELF. & INST. CODE § 14148.5(e) (amended by Chapter 195); *id.* § 14148.99 (amended by Chapter 195); *id.* § 16809.5(e) (amended by Chapter 195); *id.* § 16997.1 (amended by Chapter 195) (providing for an automatic repeal of statutes on January 1, 1997 unless a later enacted statute further extends operational dates); *see also* CAL. HEALTH & SAFETY CODE § 424.10 (enacted by Chapter 195) (declaring legislative findings and intent behind research programs created by the Cigarette and Tobacco Products Surtax, such as a statewide decline in tobacco consumption, a drop in revenue generated by the surtax due to the decline in consumption, and the goal to fund only the most successful anti-smoking programs and activities); *id.* § 424.20 (enacted by Chapter 195) (requesting the University of California to continue overseeing a grant program in the research of tobacco-related diseases); *id.* § 424.70 (enacted by Chapter 195) (describing the University's responsibilities as the agency in charge of tobacco-related disease programs); *id.* § 424.90 (enacted by Chapter 195) (stating legislative intent that only 5% of the Research Account be used for administrative purposes); CAL. WELF. & INST. CODE § 14148.5 (amended by Chapter 195) (providing state funded perinatal services to pregnant women and children under one year of age under existing Medi-Cal and public health programs).

4. *See* CAL. HEALTH & SAFETY CODE § 424.10(b)(1) (enacted by Chapter 195) (ordering the research programs to adhere to the 1988 initiative's goal of funding the research of tobacco-related disease).

agency in regard to the standardized health assessment program of public school children,[5] and makes various changes to other surtax funded programs.[6]

INTERPRETIVE COMMENT

Essentially, Chapter 195 extends existing law in regard to Proposition 99 appropriations relating to health education in the area of tobacco dangers, health and physician services for low-income and indigent persons, and research conducted by the University of California into tobacco-related diseases.[7]

The twenty-five cent excise tax on each pack of cigarettes created by Proposition 99 was approved by state voters in November of 1988 to be used by the state to fund the services mentioned above.[8] Declarations made in regard to smoking reflect the Legislature's goal to further research the diseases caused by tobacco products,[9] but it is also noted that in order to more accurately disburse resources to deserving educational programs, the Legislature intends to determine

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5. *See* CAL. EDUC. CODE § 49460 (amended by Chapter 195) (including participation in the health assessment by the State Departments of Education, Health Services, and Social Services, with further contributions from California medical schools and the California State University).

6. *Id.* § 49460 (amended by Chapter 195); CAL. HEALTH & SAFETY CODE § 424.10 (enacted by Chapter 195); *id.* § 1189.101 (amended by Chapter 195); *id.* § 1189.105 (amended by Chapter 195); CAL. WELF. & INST. CODE § 14148.5 (amended by Chapter 195); *see* CAL. EDUC. CODE § 49460 (amended by Chapter 195) (establishing a standardized health assessment of California children); CAL. HEALTH & SAFETY CODE § 1189.101 (establishing the Expanded Access to Primary Care Program); *id.* § 1189.105 (amended by Chapter 195) (listing directives under the California Health Care for the Indigent Program for the State Department of Health Services to conduct the reimbursement program for selected clinics which provide medical attention to eligible recipients); CAL. WELF. & INST. CODE § 14148.5 (amended by Chapter 195) (creating the Access for Infants and Mothers Program which provides state-funded perinatal care to pregnant women and medical service to infants under one year of age as long as they meet financial eligibility requirements).

7. CAL. HEALTH & SAFETY CODE § 424.97 (enacted and repealed by Chapter 195); *id.* § 1189.113 (amended by Chapter 195); *id.* § 24169.8 (amended by Chapter 195); CAL. INS. CODE § 12699.50 (amended by Chapter 195); CAL. WELF. & INST. CODE § 14148.5(e) (amended by Chapter 195); *id.* § 14148.99 (amended by Chapter 195); *id.* § 16809.5(e) (amended by Chapter 195); *id.* § 16997.1 (amended by Chapter 195); *see* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 816, at 2 (May 5, 1994) (stating the applicable extensions of existing law through AB 816).

8. The Initiative Constitutional Amendment and Statute—Cigarette and Tobacco Tax Benefit Fund, Prop. 99, § 3 (codified at CAL. CONST. art. XIIIB, § 12) (enacting Article XIIIB of the California Constitution); *id.* § 4 (codified at CAL. REV. & TAX. CODE § 30122) (enacting the Cigarette and Tobacco Products Surtax Fund); *see id.* (enacting CAL. REV. & TAX. CODE § 30123) (authorizing a tax of $0.0125 upon each cigarette sold); *see also* CAL. REV. & TAX. CODE § 30122(b)(1)-(6) (West 1994) (distributing revenue collected for the Cigarette and Tobacco Products Surtax Fund to the following accounts: Health Education, Hospital Services, Physician Services, Research, Public Resources, and an unallocated account to be used specifically for tobacco-related education, disease research, health care for indigent persons, and environmental protection purposes); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 816, at 2 (May 5, 1994) (noting the purpose and authority of Proposition 99).

9. *See* CAL. HEALTH & SAFETY CODE § 424.10(b)(1)-(4) (enacted by Chapter 195) (ordering the University of California to administer over such research according to certain specified principles).

which funded programs are actually contributing to the reduction of California smokers.[10]

The enactment of Chapter 195 was embroiled in controversy due to opposition that criticized the Legislature for diverting more Proposition 99 funds to health-care programs for the indigent.[11] Opponents claim that Proposition 99 appropriations are not meeting its directive that twenty percent be distributed to health education,[12] and that the Legislature is simply ignoring a voter mandated directive as to how the initiative's revenue is to be spent.[13] The reality behind the

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10. *Id.*; *see id.* § 424.10(a)(5), (6) (enacted by Chapter 195) (stating declarations and findings of the Legislature); *cf.* Paul Jacobs, *Ex-Allies Feud Over Use of Smoking Tax*, L.A. TIMES, June 27, 1994, at A1 (citing Professor John P. Pierce, the person in charge of evaluating anti-smoking programs, in his conclusion that anti-smoking advice given by doctors had ultimately no deterrent effect on the use of tobacco and his recommendation that the $54 million program be abandoned); *id.* (quoting State Assemblymember Phillip Isenberg in his complaint that there were no evaluations done to determine whether school district programs that receive cigarette tax revenue had any deterrent effect on the use of tobacco); Sabin Russell, *Stop-Smoking Programs Feel Pinch*, S.F. CHRON., June 13, 1994, at A1 (noting State Assemblymember Phillip Isenberg's skepticism over the effectiveness of such anti-smoking programs as sponsoring race cars with anti-smoking labels, grants to support tobacco-free skiing in the Sierra, and skits directed at young restaurant employees).

11. Stephen Green, *Assembly OKs Smoking Curbs*, SACRAMENTO BEE, July 8, 1994, at A1; *see id.* (stating that along with the tobacco industry, doctors, hospitals, and poverty groups had also sought for more funds to be distributed to low-income health care programs); *see also* Elaine Herscher, *Actions of Smokers' Rights Group Are Questioned*, S.F. CHRON., Apr. 14, 1993, at A13 (reporting that a Sacramento-based lobbying group had been traversing California to force counties to account for funds received from the cigarette tax); Jacobs, *supra* note 10 (discussing the debate over whether the State should increase spending on health care for the poor at the expense of anti-smoking educational programs); Greg Lucas, *Suit Questions Use of State Fund, Money for Anti-Smoking Program Has Been Misspent, Groups Say*, S.F. CHRON., Mar. 24, 1994, at A19 (describing the lawsuit by Americans for Nonsmokers' Rights and the "Just Say No" To Tobacco Dough Campaign against Governor Pete Wilson and the Legislature over the alleged improper diversion of over $35 million from anti-smoking educational funds to health-care programs for indigent children and pregnant women); Russell, *supra* note 10 (noting the hostility and resentment involved in the debate over diverting cigarette tax funds from educational programs to health-care programs); Debra J. Saunders, *Make Smoke-Free Pork-Free*, S.F. CHRON., Mar. 28, 1994, at A19 (criticizing those anti-smoking groups who are suing to halt funding to health-care programs in need of much more financial support).

12. *See* Jacobs, *supra* note 10 (discussing the debate over the 20% of the cigarette tax that has been allocated for educational purposes); *id.* (interviewing Mark Pertschuk from Americans for Nonsmokers' Rights, and noting that their lawsuit against the state seeks $166 million which was allegedly diverted from educational programs in an illegal manner); Lucas, *supra* note 11 (reporting on the lawsuit filed against the Legislature and Governor Pete Wilson over the alleged misallocation of Proposition 99 revenues and describing the dispute over health-care providers receiving funds meant for educational purposes by simply warning against the dangers of smoking while conducting certain medical services); *cf.* Sabin Russell, *Battle Brewing Over Plan for Tobacco Tax, Funds Would Be Shifted for Services to Poor*, S.F. CHRON., July 29, 1992, at A21 (discussing State budget problems and noting that previous budgetary negotiations had reduced the designated 20% of cigarette tax revenue to only 14%); Saunders, *supra* note 11 (stating that due to California's recession, there has not been one year since Proposition 99 was enacted that educational programs received the allotted 20%).

13. Green, *supra* note 11; *see id.* (noting State Senator Diane Watson's charge that the diversion of educational funds was illegal and contrary to the purpose behind Proposition 99); *see also* Daniel M. Weintraub, *Heat Put on Wilson Over Anti-Smoking Funds*, L.A. TIMES, Feb. 21, 1992, at A3 (reporting accusations that Governor Pete Wilson was breaking the law by not distributing money designated for anti-smoking advertisements). *But see* Green, *supra* note 11 (stating that every other year the Legislature is authorized to revise the allocation of Proposition 99 funds); Jacobs, *supra* note 10 (discussing State Assemblyman Phillip Isenberg's opinion that Proposition 99's provisions for revenue disbursement are exceedingly strict).

funding dispute is that California smokers are declining in number, and accordingly, the tax revenue generated from the cigarette surtax is decreasing.[14]

*Sean P. Lafferty*

**Health and Welfare; county general assistance programs—extension of provisions through 1996**

Welfare and Institutions Code § 17001.5 (amended).
AB 1965 (Goldsmith); 1994 STAT. Ch. 952

Under existing law, each county is required to support all poor, incompetent, indigent persons, and selected others, when those persons are not supported by their own means, their relatives or friends, state hospitals, or other state or private institutions through a county general assistance program.[1]

Prior law, which contained a clause revoking this provision on January 1, 1995, provided that each county was authorized to: adopt general assistance residency requirements; discontinue general assistance benefits; and establish the standard of general assistance for those applicants and recipients, who share

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14. CAL. HEALTH & SAFETY CODE § 424.10 (enacted by Chapter 195); *see id.* § 424.10(a)(1) (enacted by Chapter 195) (stating that although California has reduced its tobacco consumption, the State is not on pace to meet its self-imposed 75% reduction goal by 1999); *id.* § 424.10(a)(2) (declaring that due to successful anti-smoking educational programs, tobacco taxation has declined); *id.* (noting that the reduction in tobacco tax revenue is an indication of the State's success, not an issue of concern); *see also* Bruce Bigelow, *Anti-Tobacco Forces Burning Mad Over Fund Plan*, SAN DIEGO UNION-TRIB., Feb. 3, 1992, at A1 (noting that the number of California adults who smoked had been reduced by 17% between 1987 and 1990); *California in Brief, Cigarette Sales Drop as Tax Income Soars*, L.A. TIMES, June 28, 1990, at A30 (reporting that cigarette sales had been reduced by 14% since the enactment of Proposition 99, a drop in dollar value from $2.54 billion in 1988 to $2.18 billion in 1989); Jacobs, *supra* note 10 (noting statewide decline in tobacco use); Lucas, *supra* note 11 (stating that revenue expected to be generated from Proposition 99 for this fiscal year is at $440 million, down more than $160 million from that accumulated in 1989); Russell, *supra* note 10 (citing research that demonstrates that since the enactment of tobacco education programs, California has lost 1 million smokers, cut cigarette consumption by 1.1 billion packs, which depleted tobacco-industry sales by $1.5 billion, and has saved California nearly $400 million in health care expenditures for tobacco-related diseases); *id.* (suggesting that the success of the statewide goal to cut tobacco use is to blame for the budgetary crisis over cigarette tax appropriations); *id.* (estimating that only $453 million in cigarette tax revenue will be generated during the next fiscal year, less than half that generated during the first year of the tobacco surtax); Mark A. Stein, *Proposition 99 Cigarette Tax Hike; Tobacco Industry, Doctors Battle Over Prop. 99; Cigarette Tax Measure Becomes Burning Issue*, L.A. TIMES, Oct. 9, 1988, at 3 (suggesting that statistics gathered from other states indicate that higher smoking prices will reduce the number of young smokers, as well as those just starting to smoke).

1. CAL. WELF. & INST. CODE § 17000 (West 1991); *id.* § 17000.5 (West Supp. 1994); *see id.* (establishing the general assistance standard of aid); *id.* § 17001 (West 1991) (establishing standards of aid and care); *cf.* ALASKA STAT. § 47.25.300 (1990) (defining the term assistance); WASH. REV. CODE ANN. § 74.04.005 (West Supp. 1994) (discussing eligibility for assistance).

housing with one or more unrelated individuals, or with one or more persons who are not legally responsible for the applicant or recipient of aid.[2]

Chapter 952 extends these provisions until January 1, 1997.[3] However, Chapter 952 eliminates the authority for counties to establish a general assistance standard for those recipients who share housing.[4]

Additionally, Chapter 952 requires the Legislative Analyst to conduct a study on the impact of these residency and benefit revocation provisions.[5]

## COMMENT

General assistance programs are designed to act as a safety net to provide some minimal level of existence for the indigent.[6] However, the applicable assistance grant level may be limited to amounts provided under the Aid to Families with Dependent Children Program.[7] Chapter 952 is intended to provide uniformity between these assistance programs, thereby ensuring some "floor" through which recipients will not be allowed to fall.[8]

Chapter 952 has its potential problems, specifically, the fifteen day residency requirement used to evaluate an individual's eligibility for general assistance.[9] This requirement could be interpreted by the courts as impacting upon the right of all citizens to migrate freely throughout the United States, without that

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2. 1992 Cal. Stat. ch. 719, sec. 14, at 2887-88 (enacting CAL. WELF. & INST. CODE § 17001.5); *see* Oberlander v. County of Contra Costa, 11 Cal. App. 4th 535, 542-43, 15 Cal. Rptr. 2d 182, 186-87 (1992) (stating that the county may apply family unit aid ratios, used in the federal poverty line, to general assistance aid given to unrelated persons living in shared housing without first conducting a Boehm study of minimum subsistence needs, as long as the reductions did not exceed the percentages set forth).

3. CAL. WELF. & INST. CODE § 17001.5(c) (amended by Chapter 952).

4. *Compare* 1992 Cal. Stat. ch. 719, sec. 14, at 2887-88 (enacting CAL. WELF. & INST. CODE § 17001.5) (establishing the authority to impose general assistance standards for those recipients who share housing) *with* CAL. WELF. & INST. CODE § 17001.5 (amended by Chapter 952) (deleting language that established such authority).

5. CAL. WELF. & INST. CODE § 17001.5(b)(1) (amended by Chapter 952); *see id.* § 17001.5(b)(2) (amended by Chapter 952) (stating that the evaluation must include: (1) An analysis of the impact of California Welfare and Institutions Code § 17001.5 on the extent of homelessness for those who are applicants of general assistance programs; (2) consideration of the rate at which recipients of general assistance are sanctioned by county welfare departments; and (3) a study of the impact of the 15-day residency requirement on both applicants and recipients of general assistance, including how often the requirement is invoked); *id.* § 17001.5(b)(3) (amended by Chapter 952) (requiring, while conducting the study, the Legislative Analyst to consult with the State Department of Social Services, the County Welfare Directors Association, and various other organizations that advocate on behalf of those recipients on public assistance).

6. ASSEMBLY COMMITTEE ON HUMAN RESOURCES, COMMITTEE ANALYSIS OF AB 1965, at 2 (May 19, 1994).

7. *Id.*; *see* CAL. WELF. & INST. CODE §§ 11200-11517.2 (West 1991 & Supp. 1994) (outlining every facet of the Aid to Families with Dependent Children Program).

8. ASSEMBLY COMMITTEE ON HUMAN RESOURCES, COMMITTEE ANALYSIS OF AB 1965, at 2 (May 19, 1994).

9. CAL. WELF. & INST. CODE § 17001.5(a)(1)(A) (amended by Chapter 952); *cf.* ME. REV. STAT. ANN. tit. 22, § 4307(3) (West 1992) (declaring that the use of durational residency requirements for the evaluation of general assistance is strictly prohibited). *But cf.* WIS. STAT. ANN. § 49.015(1)(b) (West Supp. 1993) (stating that before an individual is eligible to receive assistance, that person must reside in the state for 60 consecutive days).

migration being inhibited by statutes, rules, or regulations.[10] When evaluating the constitutionality of the residency provisions we must examine the intent behind the invocation of the requirement.[11] In *Shapiro v. Thompson*,[12] the Supreme Court struck down a District of Columbia statutory provision under which persons who had not resided within the jurisdiction for at least one year immediately proceeding their applications were denied welfare assistance.[13] The Court held that the statutory prohibition on welfare benefits during that one-year period created a classification that constituted discrimination because it denied those individuals equal protection under the law.[14] This holding has been followed religiously in subsequent decisions in which the Court struck down similar residency requirements of states which claimed that the residency requirement was needed to conserve scarce economic resources.[15] Specifically, in *Memorial Hospital v. Maricopa County*,[16] the Court stated that "[t]he conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State."[17] Thus, the rule is clearly established that a State may not enact a residency requirement for general assistance with the intent of discouraging outsiders from relocating to the state.[18]

Thus, the question of when a State may impose a residency requirement is a source of much debate.[19] To date, the United State Supreme Court has on only

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10. Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969).

11. *See id.* at 631 (specifying that "[A] State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally."). Thus, the Court rejected a state's economic rationale as sufficient cause for implementing such residency requirements before the issuance of public assistance could be granted. *Id.*

12. 394 U.S. 618 (1969).

13. *Id.* at 627-29.

14. *Id.*; *see* U.S. CONST. amend. XIV, § 1 (providing that no State shall deprive any person within its jurisdiction of equal protection under the laws).

15. *See* Attorney General v. Soto-Lopez, 476 U.S. 898, 911 (1986) (striking down a statute giving civil service preference to current resident veterans who were also residents of New York at the time they entered military service and stating that even if the purpose behind the residency requirement is to conserve state funds, such a purpose, though laudable, is still unconstitutional); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 269-70 (1974) (invalidating an Arizona statute requiring one-year residence in-county as a condition to receiving non-emergency medical care at the county's expense). *But see* Sosna v. Iowa, 419 U.S. 393, 410 (1975) (holding that the State's one-year residency requirement for out-of-state petitioners seeking a divorce decree is constitutional).

16. 415 U.S. 250 (1974).

17. *Maricopa*, 415 U.S. at 263.

18. *Soto-Lopez*, 476 U.S. 898; *Maricopa*, 415 U.S. 250; *Shapiro*, 394 U.S. 618.

19. *See* Green v. Anderson, 811 F. Supp. 516, 521 (E.D. Cal. 1993) (reasoning that given the increase in the cost of living in California as compared with other states, providing newcomers with the same amount of welfare assistance that they received in their previous state of residence has the same impact as totally denying the newcomers access to aid); Mitchell v. Steffen, 504 N.W. 2d 198, 203 (Minn. 1993) (holding that a state residency requirement of six months before allowing an individual to receive full welfare benefits burdens one's fundamental right to travel within the Union, and that the state's argument of conserving limited economic resources is not a compelling one), *cert. denied* Steffen v. Mitchell, 114 S.Ct. 902 (1994); *see also High Court Rejects Welfare Limits On New Residents*, DALLAS MORNING NEWS, Jan. 19, 1994, at 4A (discussing a case in which the United States Supreme Court refused to grant review, *Steffen v. Mitchell*, which held that it is unconstitutional for states to give less welfare assistance to people who relocate from other

one occasion upheld a durational residency requirement.[20] In *Sosna v. Iowa*,[21] a statute provided that out-of-state residents must have lived in the state for at least one year before they are allowed to seek a divorce decree.[22] There, the Court held that the State's interest in regulating domestic relations and protecting its divorce decrees from collateral attack was materially greater than the budgetary and recordkeeping interests advanced in *Shapiro* and *Maricopa*.[23]

Thus, in order for Chapter 952 to withstand a constitutional attack, it must further some compelling state interest beyond a desire to simply discourage an influx of indigent persons.[24] While most of the case law on the subject concerns residency requirements of one year, similar provisions that advocate shorter residency requirements have been upheld.[25] In *Jones v. Milwaukee County*,[26] the Wisconsin Supreme Court, upheld a sixty day residency requirement on the grounds that the sixty day deprivation of welfare benefits was "substantially less onerous" than a denial for an entire year.[27] However, this seems to be in direct conflict with the *Shapiro* line of cases in that newcomers were being "denied welfare aid upon which may depend the ability . . . to obtain the very means to subsist—food, shelter, and other necessities of life."[28] Thus, while residency requirements are allowable in Wisconsin, the very principal of protecting the right of interstate migration would lead one to believe that the *Jones* holding may be overturned if challenged.[29]

In the recently decided case of *Green v. Anderson*,[30] the court struck down a California statute which required that an individual reside in the state for twelve consecutive months before he or she is eligible to receive the full amount of

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states); Reynolds Holding, *Welfare Limit for Newcomers Struck Down; Law Proposed by Wilson had been on Hold for a Year*, S.F. CHRON., May 4, 1994, at A1 (discussing *Green v. Anderson* where a federal appeals court ruled that California could not limit welfare benefits for newcomers to the state). *See generally* Clark Allen Peterson, Comment, *The Resurgence of Durational Residence Requirements for the Receipt of Welfare Funds*, 27 LOY. L.A. L. REV. 305 (1993) (discussing the constitutionality of residency requirements); Matthew Poppe, Comment, *Defining the Scope of the Equal Protection Clause with Respect to Welfare Waiting Periods*, 61 U. CHI. L. REV. 291 (1994) (examining the constitutionality of residency requirements).

20. Sosna v. Iowa, 419 U.S. 393, 410 (1975).

21. 419 U.S. 393 (1975).

22. *Id.*

23. *Id.* at 409.

24. *Soto-Lopez*, 476 U.S. 898; *Maricopa*, 415 U.S. 250; *Shapiro*, 394 U.S. 618; *Green*, 811 F. Supp. at 521-23. *See generally* Peterson, *supra* note 19 (discussing the constitutionality of residency requirements and the state interest behind their creation); Poppe, *supra* note 19 (examining the constitutionality of residency requirements and state interest behind their creation).

25. *See* Jones v. Milwaukee County, 485 N.W.2d 21 (Wis. 1992) (discussing the constitutionality of Wisconsin's 60-day residency requirement, and holding that it was in fact constitutional).

26. 485 N.W.2d 21 (Wis. 1992).

27. *Id.* at 26.

28. *Shapiro*, 394 U.S. at 627.

29. *See id.* (indicating the Court's vehement protection of the right of interstate migration); *Maricopa*, 415 U.S. at 256-61 (supporting the Court's vehement protection of the right of interstate migration first set forth in *Shapiro*).

30. 811 F. Supp. 516 (E.D. Cal. 1993).

public assistance that a California resident receives.[31] In *Green*, the court followed the *Shapiro* line of cases holding the California provision to be unconstitutional claiming that it placed a penalty on migration, and denied one prompt access to the necessities of life.[32]

However, given that Chapter 952 advocates a possible, not mandatory, residency requirement for the "purposes of determining a person's eligibility for general assistance," and given that any residency requirement "shall not exceed fifteen days," there is a strong indication that the motivation of the California Legislature is to simply facilitate the processing of general assistance claims, and not to deter interstate migration.[33] Thus, in the event of a possible constitutional challenge, the State would simply have to argue that the rather minimal residency period is necessary to effectively process the claims, and that it is not an effort to discourage the migration of indigent persons to the State.[34] This would meet the test of satisfying the need for a compelling state interest while not depriving individuals of the necessities of life, especially since Chapter 952's fifteen day requirement is significantly shorter than the previously overturned one year provisions as well as Wisconsin's sixty-day residency requirement.[35] Furthermore, the legislative intent of effectively processing claims as opposed to deterring migration can be inferred from the fact that Chapter 952 requires a study of the impact of the fifteen day residency requirement.[36] Given the recognized test

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31. *Green*, 811 F. Supp. 516, 523 (E.D. Cal. 1993); *see id.* at 521 (stating that given the increase in the cost of living in California as compared with other states, providing newcomers with the same amount of welfare assistance that they received in their previous state of residence has the same impact as totally denying the newcomers access to aid); *see also* Strong v. Collatos, 593 F.2d 420, 423 (1st. Cir. 1979) (stating that the provisions of a Massachusetts statute creating a durational residency requirement as a condition for veterans to receive their welfare benefits, violated the Equal Protection Clause of the Fourteenth Amendment); Burns v. Montgomery, 299 F. Supp. 1002, 1004-05 (N.D. Cal. 1968) (granting an injunction against the enforcement of a residency requirement which raised questions regarding the constitutionality of the residency provision, where the plaintiffs were likely to suffer immediate and irreparable harm if preliminary relief were withheld), *aff'd*, Montgomery v. Burns, 394 U.S. 848 (1969).

32. *Green*, 811 F. Supp. at 523.

33. CAL. WELF. & INST. CODE § 17001.5(a)(1)(A) (amended by Chapter 952).

34. *See Maricopa*, 415 U.S. at 256-61 (stating that in determining whether a residency requirement impinges on the right to travel in an unconstitutional manner, it must be considered whether the waiting period would deter migration and the extent to which the residence requirement serves to penalize those who choose to exercise their right to travel); *Shapiro*, 394 U.S. at 631 (stating that unless the law has a legitimate and significant state purpose, if it acts to deter migration, it is patently unconstitutional); *Green*, 811 F. Supp. at 521-23 (stating that in order for California's residency requirement to be upheld as constitutional, the State must present some compelling state interest).

35. *See Soto-Lopez*, 476 U.S. at 904 (stating that a court must first determine whether the statute operates to penalize those persons who have exercised their right to migrate; if it does, the statute must fail unless the State can demonstrate that its classification is necessary to accomplish a compelling state interest); *id.* at 907 (noting that "even temporary deprivation of very important benefits and rights can operate to penalize migration").

36. CAL. WELF. & INST. CODE §17001.5(b)(1)(C) (amended by Chapter 952).

set forth in cases like *Shapiro* and *Maricopa* it seems that Chapter 952 would be able to successfully withstand a constitutional challenge.[37]

*Christian A. Ameri*

**Health and Welfare; day care providers—training modifications**

Health and Safety Code §§ 1797.113, 1797.191 (new); § 1596.866 (amended).
AB 243 (Alpert); 1994 STAT. Ch. 246
*(Effective July 21, 1994)*

Existing law requires that at least one teacher or director in a child day care facility[1] and each family day care home[2] provider[3] have at least fifteen hours of prescribed preventative health training.[4] Existing law also requires at least one person with training in first aid and cardiopulmonary resuscitation (CPR) to be

37. *Soto-Lopez*, 476 U.S. 898; *Maricopa*, 415 U.S. 250; *Shapiro*, 394 U.S. 618. *See generally* Peterson, *supra* note 19 (discussing the constitutionality of residency requirements and the state interest behind their creation); Poppe, *supra* note 19 (discussing the constitutionality of residency requirements and the state interest behind their creation).

1. *See* CAL. HEALTH & SAFETY CODE § 1596.750 (West 1990) (defining a child day care facility as a facility providing nonmedical care and supervision for less than a 24-hour period to children under 18 years of age).

2. *See id.* § 1596.78 (West 1990) (defining a family day care home as a private residence which provides care for less than a 24-hour period to less than 12 children).

3. *See id.* § 1596.791 (West 1990) (defining a provider as a person licensed to operate a child day care facility).

4. *Id.* § 1596.866(a) (amended by Chapter 246); *see id.* (specifying that the training must include pediatric cardiopulmonary resuscitation, pediatric first aid, recognition, management, and prevention of infectious diseases, including immunizations, and prevention of childhood injuries); *cf.* N.Y. SOC. SERV. LAW § 390-a(3)(b) (McKinney 1992) (requiring that facility operators have an initial 15 hours of training and an additional 15 hours biannually in prescribed areas). *See generally* Hal Mattern, *The Search*, ARIZ. REPUBLIC, June 12, 1994, at F1 (outlining parental concerns with child day care centers and discussing the questions parents should ask, including whether all proper training requirements have been met); *Parents Urged to Check Up on Child Day-Care Services*, SACRAMENTO BEE, May 12, 1994, at N8 (urging parents to make sure that caregivers have completed training that exceeds the minimum requirements).

at the child day care facility at all times when children are present at the facility.[5] Under existing law, the fulfillment of the training requirements may be demonstrated by showing cards issued by either the American Red Cross (ARC) or the American Heart Association (AHA).[6]

Prior law required at least four hours of pediatric CPR training, eight hours of pediatric first aid training, and three hours of preventative health practices training.[7] Chapter 246 eliminates the minimum hour breakdowns while retaining the fifteen hours minimum total preventative health training requirement.[8] Chapter 246 requires that a day care director provide for at least one person with proper training in first aid and CPR to be available when the children are offsite on a facility related activity.[9] It further requires that a large family day care home[10] licensee also see that one such person is available on the site when children are present and when the children are offsite for care related activities.[11]

Chapter 246 requires that family day care home licensees who provide care, as well as day care center personnel, maintain current pediatric CPR and first aid cards.[12] Chapter 246 allows for pediatric CPR and first aid certification cards to be issued by, in addition to the ARC and AHA, any training program approved by the Emergency Medical Services Authority (EMSA).[13] The EMSA must create a process for continual review of training programs and is required to charge fees for the programs in order to offset costs.[14]

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5. CAL. HEALTH & SAFETY CODE § 1596.866(b) (amended by Chapter 246); *see id.* (requiring that such training be proven by a certificate issued by a training program approved by the Emergency Medical Services Authority according to §§ 1596.866 and 1797.191 of the California Health and Safety Code); *cf.* FLA. STAT. ANN. § 402.305(7)(a) (West 1993) (requiring that when children are present at the facility at least one present staff member must be trained in pediatric CPR); ILL. ANN. STAT. ch. 225, para. 10/7(a)(4) (Smith-Hurd 1993) (requiring that at least one staff member certified in first aid, the Heimlich maneuver, and CPR be on the premises during business hours).

6. CAL. HEALTH & SAFETY CODE § 1596.866 (d)(1) (amended by Chapter 246).

7. 1992 Cal. Legis. Serv. ch. 35, sec. 1, at 113 (enacting CAL. HEALTH & SAFETY CODE § 1596.866(a)).

8. CAL. HEALTH & SAFETY CODE § 1596.866(a) (amended by Chapter 246); *see id.* (stating that preventative health training may include the areas of food handling, child nutrition, caring for children with special needs, recognition of child abuse, and preparedness for emergencies); *see also id.* § 1596.866(e) (amended by Chapter 246) (providing that such training may be provided through on-the-job training, workshops, or classes, but not by a home study course).

9. *Id.* § 1596.866(b) (amended by Chapter 246).

10. *See id.* § 1596.78(a) (West 1990) (defining a large family day care home as a private residence which provides care for 7 to 12 children including children under 10 years of age residing in the home).

11. *Id.* § 1596.866(b) (amended by Chapter 246).

12. *Id.* § 1596.866(f) (amended by Chapter 246); *see id.* (requiring that the cards be maintained in accordance with California Health and Safety Code § 1596.866(d)).

13. *Id.* § 1596.866(d) (amended by Chapter 246); *see id.* § 1797.191(a) (enacted by Chapter 246) (establishing the necessity for minimum approval standards for pediatric CPR and first aid); *cf.* FLA. STAT. ANN. § 402.305(7)(a) (West 1993) (allowing pediatric CPR training to be provided by a course approved by the American Heart Association); ILL. ANN. STAT. ch. 225, para. 10/7(a)(4) (Smith-Hurd 1993) (allowing certification to be given by the American Red Cross or any other approved organization).

14. CAL. HEALTH & SAFETY CODE § 1797.191(b) (enacted by Chapter 246); *see id.* § 1797.113 (enacted by Chapter 246) (creating the Emergency Medical Services Training Program Approval Fund for the repository of paid fees).

Existing law mandates that all required training be completed on or before January 1, 1995, as a condition of licensure.[15] Chapter 246 provides that a notice of deficiency will be issued to any licensee who has not met the training requirements.[16] Chapter 246 also provides that the training requirement will be deemed met if the person, prior to July 1, 1994, has a certificate from a program which is subsequently approved by the EMSA.[17]

INTERPRETIVE COMMENT

By enacting Chapter 246 and allowing for training programs other than those of the AHA and the ARC, the Legislature is attempting to compensate for an anticipated rush of day care providers wishing to be licensed for pediatric CPR and first aid before the January 1, 1995, deadline.[18] Such a demand cannot be fulfilled entirely by the AHA and the ARC. Therefore, many licensed day care facilities would be in high risk of being closed merely because they are not able to have their staff trained in alternative programs.[19]

*Mark E. Bellamy*

**Health and Welfare; Disaster Housing Repair Fund—consideration of annual family income**

Health and Safety Code § 50662.7 (amended).
SB 110 (Campbell); 1994 STAT. Ch. 96

Existing law provides for the California Disaster Housing Repair Fund[1] which is administered by the Department of Housing and Community Development.[2] Existing law specifies that money in this fund be continuously appropriated for making deferred-payment loans to provide funding for the repair

15. *Id.* § 1596.866(c) (amended by Chapter 246).
16. *Id.* § 1596.866(c)(2) (amended by Chapter 246); *see id.* (requiring that a licensee in receipt of a notice of deficiency develop a plan to correct the deficiency within 90 days of receipt of the notice); *see also id.* (providing that the facility's license may be revoked if it fails to correct the deficiency within 90 days).
17. *Id.* § 1797.191(d) (enacted by Chapter 246).
18. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 243, at 3-4 (May 4, 1994).
19. *Id.*

1. *See* CAL. HEALTH & SAFETY CODE § 50661.5(a)-(g) (West Supp. 1994) (establishing the Disaster Housing Repair Fund).
2. *Id.* §§ 50400-50408 (West 1986 & Supp. 1994) (providing the organization and general powers of the Department of Housing and Community Development).

of housing damaged or destroyed by natural disaster.[3] Prior law prohibited the Department from considering individual or family income when determining eligibility for a loan from the fund.[4] Chapter 96 rescinds this prohibition and prohibits the Department, when allocating grants and loans, from providing a loan to a family with an annual income in excess of 150% of statewide median income.[5]

INTERPRETIVE COMMENT

The 150% cap was implemented by Chapter 96 because some legislators wanted to reduce the state's expenditure from the California Disaster Assistance Program.[6]

*Cary G. Hipps*

**Health and Welfare; emergency homeless shelters—state armories**

Government Code §§ 15301, 15301.3, 15301.5, 15301.7 (new).
AB 1808 (Areias); 1994 STAT. Ch. 1195

Existing law empowers the Adjutant General,[1] under the direction of the

3. *Id.* § 50662.7 (West Supp. 1994); *see id.* (declaring that the purpose of the fund is to provide disaster relief to the owners of owner-occupied dwellings); *see also id.* § 50661.5(a)(1) (West Supp. 1994) (stating that the money in the fund is also continually appropriated for predevelopment loans); *id.* § 50661.5(a)(4) (West Supp. 1994) (stating that one of the purposes of the fund is to provide loan guarantees for the disaster-related loans made by private institutional lending sources). *See generally* CAL. GOV'T CODE § 8680.3 (West 1992) (defining natural disaster as fire, flood, storm, tidal wave, earthquake, or other similar public calamity resulting from natural causes or, in the case of fire which the Governor determines presents a threat to public safety, by manmade causes); Paul Feldman & Rich Connell, *Relocation Is Bad News For Some, Good For Others*, L.A. TIMES, Feb. 5, 1994, at A1 (stating that applicants must first exhaust insurance and all other state and federal disaster assistance to qualify for the low-interest, deferred payment loans from the Disaster Housing Repair Fund); *id.* (describing vouchers and other forms of assistance available to disaster victims).

4. 1992 Cal. Legis. Serv. ch. 966, sec. 5, at 3953 (amending CAL. HEALTH & SAFETY CODE § 50662.7).

5. CAL. HEALTH & SAFETY CODE § 50662.7(a)(4) (amended by Chapter 96); *see id.* (requiring that the annual income used in this determination be adjusted for family size).

6. CONFERENCE COMMITTEE, COMMITTEE REPORT ON SB 110, at 2 (May 19, 1994); *see id.* at 1-2 (May 19, 1994) (stating that the California Disaster Assistance Program is one of the largest housing programs that the State Department of Housing and Community Development administers, and that there have been 12 disasters which required $200 million of funds to assist in rehabilitating and rebuilding damaged housing from the program since its inception).

1. *See* CAL. MIL. & VET. CODE § 160 (West 1988) (defining Adjutant General as the chief of staff to the Governor, subordinate only to him, and as the commander of all state military forces).

Governor,[2] to make and enforce regulations for the government and control of state armories[3] for use by the state militia.[4] Existing law authorizes the Adjutant General to appoint a Community Advisory Committee[5] to advise the Adjutant General on the use of state armories as shelters for the homeless.[6]

Chapter 1195 requires specified state armories[7] to be made available to certain cities and counties[8] for use by homeless persons for emergency shelter purposes during the period from December 1 through March 15 each year, as a temporary measure until March 15, 1997.[9] However, Chapter 1195 also mandates that if severe weather conditions exist between November 1 through March 31, the Military Department may extend the use of the armories to include November 1 to December 1 and March 15 to March 31.[10]

Chapter 1195 requires participating counties and cities, in consultation with the Community Advisory Committee or, if no committee has been appointed, in consultation with the Adjutant General, to obtain from the Military Department[11] a license to operate state armories as emergency shelters for homeless persons.[12]

Chapter 1195 requires a city or county electing to use a state armory as a homeless shelter to provide a report to the Department of Economic Opportunity[13] describing progress toward a long range, permanent shelter plan for homeless persons to take effect on March 15, 1997.[14] Furthermore, Chapter 1195 requires

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2. *See id.* § 140 (West 1988) (stating that the Governor is the commander-in-chief of the state militia by virtue of his office).

3. *See id.* § 430 (West 1988) (defining armory as any building or portion thereof, rifle range, camp, airport, arsenal, vessel, quarters, accommodations, or training facilities devoted to the use of the militia).

4. *Id.* § 434 (West 1988); *see id.* § 120 (West 1988) (defining state militia as the National Guard, State Military Reserve, and the Naval Militia constituting the active and the unorganized militia).

5. *See id.* § 438(b) (West Supp. 1994) (stating that the Community Advisory Committee must include representation from cities, counties, and organizations or associations that represent the interests of homeless persons).

6. *Id.* § 438(c) (West Supp. 1994).

7. *See* CAL. GOV'T CODE § 15301 (enacted by Chapter 1195) (listing the armories subject to the provisions of Chapter 1195).

8. *See id.* § 15301 (enacted by Chapter 1195) (listing the cities and counties that may utilize the specified armories).

9. *Id.*; *see id.* (stating that Chapter 1195 is a temporary measure designed to allow government entities adequate time to develop other suitable homeless shelter arrangements).

10. *Id.*

11. *See* CAL. MIL. & VET. CODE § 50 (West 1988) (establishing the Military Department).

12. CAL. GOV'T. CODE § 15301.3 (enacted by Chapter 1195); *see id.* § 15301.3(a)-(d) (enacted by Chapter 1195) (mandating that the following requirements apply to any city or county obtaining a license for the use of state armories as homeless shelters: (1) The county or city obtaining a license must be solely responsible for measures and costs required to comply with state and local health and safety codes during the license period; (2) the county or city obtaining the license must be responsible for all legal liabilities during the license periods and the state must be held harmless in each case; (3) the county or city obtaining a license must be responsible for all costs of providing shelter in the state armory or armories to homeless persons during the license periods; (4) the county or city obtaining a license must be solely responsible for alternative housing arrangements for homeless persons housed in state armories during the license periods, upon notification from the Military Department that the armory or armories will be required for military activities or emergency purposes as announced by the Governor).

13. *See id.* § 12085 (West 1992) (establishing the Department of Economic Opportunity).

14. *Id.* § 15301.5 (enacted by Chapter 1195).

the Military Department, the Department of Economic Opportunity, the Department of Housing and Community Development,[15] and a representative of participating cities and counties to prepare an evaluation of the temporary armory shelter program and to report to the Governor and Legislature prior to March 15, 1997.[16]

INTERPRETIVE COMMENT

Chapter 1195 was enacted as a response to the growing need for emergency shelters throughout California during the harsh winter months.[17] Although armories have been used in the past as homeless shelters, they were used only on a temporary basis.[18] Chapter 1195 extends the use of state armories to shelter the homeless until March 15, 1997.[19]

*Lisa R. Brenner*

**Health and Welfare; family home care—developmentally disabled adults**

Health and Safety Code § 1505 (amended); Welfare and Institutions Code §§ 4689.1, 4689.2, 4689.3, 4689.4, 4689.5, 4689.6 (new); §§ 4475, 4476, 4477, 4478, 4535 (amended).
SB 1730 (Russell); 1994 STAT. Ch. 1095
(*Effective September 29, 1994*)

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15. *See* CAL. HEALTH & SAFETY CODE § 50400 (West 1986) (creating the Department of Housing and Community Development and placing it within the Business, Transportation, and Housing Agency).

16. CAL. GOV'T CODE § 15301.7 (enacted by Chapter 1195).

17. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1808, at 2 (May 5, 1994); *see* Jake Henshaw, Gannett News Service, June 1, 1993, *available* in LEXIS, News Library, Curnws File (stating that using the armories as emergency shelters enables local governments to work in cooperation with the state to provide very cost-effective winter overflow shelter); *see also Recessions Pushes up Demand for Homeless Shelters*, Reuter World Service, Dec. 20, 1992, *available in* LEXIS, News Library, Curnws File (reporting that California state shelters turn away hundreds of homeless because of a lack of facilities).

18. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1808, at 2 (May 5, 1994) (stating that Governor Deukmejian in 1987 started the National Guard Temporary Shelter Program whereby armories were opened on evenings when the weather was extremely harsh, and that last year, Governor Wilson expanded the program to a 90-day continuous program, during which the armories were open at night regardless of weather conditions during the winter weather months); *see also* Gannett News Service, *supra* note 17 (stating that the National Guard Temporary Shelter Program is set to expire on July 1, 1995).

19. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1808, at 1 (Aug. 31, 1994).

Existing law, the California Community Facilities Act,[1] requires community care facilities[2] to be licensed by the State Department of Social Services.[3] Existing law also specifies facilities which are exempt from licensure under the California Community Facilities Act.[4] Chapter 1095 expands the list of exempted facilities to include family homes[5] and family home agencies[6] involved with developmentally disabled adults.[7]

Chapter 1095 establishes family homes as a new residential treatment option for adults with developmental disabilities.[8] Chapter 1095 further requires that the State Department of Developmental Services develop regulations for these settings to foster high quality services which provide support and promote inclusion in community life for developmentally disabled adults.[9] Chapter 1095

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1. *See* CAL. HEALTH & SAFETY CODE § 1500 (West 1990) (establishing the California Community Care Facilities Act).

2. *See id.* § 1502(a) (West Supp. 1994) (defining community care facility as any facility, place, or building which is maintained and operated to provide non-medical residential care, day treatment, adult day care, or foster family agency services for children, adults, children and adults, including but not limited to, the physically handicapped, mentally impaired, incompetent persons, and abused or neglected children).

3. *Id.* § 1508 (West 1990); *see id.* § 1503 (West 1990) (requiring a license to operate a community care facility); *see also* CAL. WELF. & INST. CODE § 10550 (West 1991) (creating the State Department of Social Services within the Health and Welfare Agency).

4. CAL. HEALTH & SAFETY CODE § 1505 (amended by Chapter 1095); *see id.* (specifying that the California Community Care Facilities Act does not apply to the following: (1) Health facilities; (2) clinics; (3) specified juvenile placement facilities; (4) child day care facilities; (5) specified facilities conducted by and for religious adherents which depend on prayer and spiritual means for healing of the sick; (6) school dormitories; (7) places which supply only room and board; (8) alcohol and drug abuse recovery facilities; and (9) arrangement by family and friends to care for a person if the arrangement is not for financial profit and occurs only occasionally and irregularly).

5. *See* CAL. WELF. & INST. CODE § 4689.1(b) (enacted by Chapter 1095) (defining family home as a home that is owned, leased, or rented by, and is the family residence of, the family home providers, and in which support and services are provided to no more than two adults with developmental disabilities who do not require continuous skilled nursing care).

6. *See id.* § 4689.1(c) (enacted by Chapter 1095) (defining family home agency as a private not-for-profit agency that is vendored to do all of the following: (1) Recruit, approve, train, and monitor family home providers; (2) provide social services and in-home support to family home providers; (3) assist adults with developmental disabilities in moving into approved family homes).

7. CAL. HEALTH & SAFETY CODE § 1505(m) (amended by Chapter 1095); *see* CAL. WELF. & INST. CODE § 4512(a) (West Supp. 1994) (defining developmental disability as a disability that originates before an individual attains the age of 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual including: mental retardation, cerebral palsy, epilepsy, and autism).

8. CAL. WELF. & INST. CODE § 4689.1(d) (enacted by Chapter 1095); *see* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1730, at 1 (May 19, 1994) (stating that adult family home agencies are a new option for adults with developmental disabilities).

9. CAL. WELF & INST. CODE § 4689.1(d) (enacted by Chapter 1095); *see id.* § 4689.1(d)(1)-(11) (enacted by Chapter 1095) (requiring the State Department of Developmental Services to promulgate standards and requirements related to, but not limited to, all of the following: (1) Specified selection criteria for regional centers to apply in vendoring family home agencies; (2) vendorization; (3) specific areas related to operation of family home agencies; (4) program design; (5) program and consumer records; (6) family homes; (7) rates of payment for family home agencies and approved family home providers, which cannot exceed rates for similar individuals residing in other out-of home settings; (8) monitoring and evaluation designed to ensure the family homes and family home agency are achieving specific levels of service; (9) monthly monitoring visits by family home agency social service staff to approved family homes; (10) procedures to enforce applicable laws and regulations, investigate allegations of abuse or neglect, and impose sanctions on the family home agencies and approved family homes; and (11) appeal procedures); *see also id.* § 4689.1(d)(8)(A)-(F)

declares that adults with developmental disabilities placed in a family home have specified rights.[10]

Chapter 1095 requires the filing of fingerprints of individuals who will have contact with consumers receiving services from family home agencies and family homes, and requires a criminal background check on these persons.[11] In addition, Chapter 1095 prohibits persons with specified types of criminal convictions from providing or being connected to the provision of services in family homes or family home agencies without an issued exemption.[12]

Existing law provides that developmental centers are under the jurisdiction of the State Department of Developmental Services.[13] Prior law mandated that each developmental center have a developmental center advisory board of seven members.[14] Chapter 1095 expands this number to eight members.[15]

Existing law directs the State Council on Developmental Disabilities to perform various duties in the development and review of services and programs

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(enacted by Chapter 1095) (requiring that the monitoring and evaluation be designed to ensure that the services do all of the following: (1) Conform to law and regulations and provide for the consumer's well-being; (2) assist the consumer in understanding and exercising his or her individual rights; (3) remain consistent with the family home agency's program design and the consumer's individual program plan; (4) maximize the consumer's opportunities to have choices involving where he or she lives, works, and socializes; (5) provide a 24-hour a day supportive family home environment that is clean, comfortable, and accommodating to the customer's culture, values, and lifestyle; and (6) satisfy the consumer).

10. *Id.* § 4689.1(f) (enacted by Chapter 1095); *see id.* (providing that such adults have at least the rights specified in California Welfare and Institutions Code § 4503); *see also id.* § 4503 (West Supp. 1994) (listing these rights as: (1) To wear his or her own clothes, keep and use his or her own personal possessions, and to keep and be allowed to spend a reasonable amount of his or her own money for small purchases; (2) to have access to individual storage space for his or her private use; (3) to see visitors each day; (4) to have ready access to letter writing materials and to receive unopened correspondence; (5) to refuse electroconvulsive therapy; (6) to refuse behavior modification techniques which cause pain or trauma; (7) to refuse specified psychosurgery; (8) to make choices in areas including, but not limited to, his or her daily living routines, choice of companions, leisure and social activities and program planning and implementation; and (9) other rights specified by regulation).

11. *Id.* § 4689.2(a)-(c) (enacted by Chapter 1095); *see* CAL. HEALTH & SAFETY CODE § 1522(a) (West Supp. 1994) (providing that persons operating or managing a community care facility must submit fingerprints for a criminal record check); *see also id.* § 1569.17(a) (West Supp. 1994) (providing that persons who operate or manage a residential care facility for the elderly must submit fingerprints for a criminal record check).

12. CAL. WELF. & INST. CODE § 4689.2(d)(3) (enacted by Chapter 1095); *see id.* (requiring that if a person is convicted of, or awaiting trial for, a sex offense against a minor or has been convicted for an offense specified in the California Penal Code §§ 243.4, 273a, 273d, or 368(a)-(b), or convicted of a felony or another crime, except a minor traffic violation, then the person is to be discharged, removed from the family home, or barred from entering the family home unless granted an exemption by the Department of Developmental Services); CAL. WELF. & INST. CODE §§ 4689.2(f), 4689.3, 4689.4, 4689.5, 4689.6 (enacted by Chapter 1095) (setting forth the procedures and standards to determine whether an exemption is to be granted or an exception made to the criminal record check requirement); *see also* CAL. PENAL CODE § 243.4 (West Supp. 1994) (defining sexual battery); *id.* § 273a (West Supp. 1994) (defining willful cruelty or unjustifiable punishment of a child); *id.* § 273d (West Supp. 1994) (defining corporal punishment or injury of a child); *id.* § 368(a)-(b) (West 1988) (relating to infliction of physical pain or mental suffering on an elder or dependant adult).

13. CAL. WELF. & INST. CODE § 4441 (West 1984).

14. 1977 Cal. Stat. ch. 1252, sec. 549, at 4514 (enacting CAL. WELF. & INST. CODE § 4475).

15. CAL. WELF & INST. CODE § 4475(a) (enacted by Chapter 1095); *see id.* (requiring that the eight members of the advisory board be appointed by the Governor from a list of nominations submitted by the boards of supervisors of counties within each developmental center's designated service area).

for persons with developmental disabilities.[16] Prior law required the State Council to meet at least nine times per year.[17] Chapter 1095 decreases the required meetings to six times per year.[18]

INTERPRETIVE COMMENT

Across the United States, there has been a movement towards providing a community living option for the developmentally disabled.[19] Some reports state foster family care has been successful for children with developmental disabilities.[20] Chapter 1095 extends this successful program to apply to adults through the creation of family homes and family home agencies.[21]

*Bonnie M. George*

**Health and Welfare; health care providers—refusal of resuscitative measures**

Health and Safety Code § 1569.74 (new); Probate Code § 4753 (new)
SB 1557 (Thompson); 1994 STAT. Ch. 966

Under existing law, an adult has a right to control the decision to have life-sustaining treatment[1] withheld or withdrawn if he or she is suffering from a terminal condition[2] or permanent unconscious condition[3] and may do so by

16. *Id.* §§ 4520, 4540 (West Supp. 1994); *see id.* § 4520 (West Supp. 1994) (creating the State Council on Developmental Disabilities); *id.* § 4540 (West Supp. 1994) (listing the powers and duties of the state council).

17. 1985 Cal. Stat. ch. 1244, sec. 4, at 4292 (amending CAL. WELF. & INST. CODE § 4535).

18. CAL. WELF & INST. CODE § 4535(a) (amended by Chapter 1095).

19. SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF SB 1730, at 2 (Apr. 13, 1994). *See generally* Philip R. Ziring et al., *Provision of Health Care for Persons With Developmental Disabilities Living in the Community*, 260 JAMA 1439, 1439 (1988) (providing national statistics evidencing the deinstitutionalization of individuals with developmental disabilities).

20. SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF SB 1730, at 2 (Apr. 13, 1994); *see id.* (reporting that the option of foster care for children with developmental disabilities has proven to be a successful family oriented alternative to institutional or group home care).

21. *Id.*

1. *See* CAL. HEALTH & SAFETY CODE § 7186(d) (West Supp. 1994) (defining life-sustaining treatment).

2. *See id.* § 7186(j) (West Supp. 1994) (defining terminal condition); *see also* Bartling v. Superior Court, 163 Cal. App. 3d 186, 193, 209 Cal. Rptr. 220, 223 (1984) (stating that the right to have life-support equipment disconnected is not limited to comatose, terminally ill patients).

3. *See* CAL. HEALTH & SAFETY CODE § 7186(e) (West Supp. 1994) (defining permanent unconscious condition); *see also id.* § 7185.5(a) (West Supp. 1994) (finding a fundamental right to control certain decisions regarding health care).

executing a declaration[4] of instructions to be used in the event he or she is unable to make such a decision.[5] Such a declaration is without effect when made by a patient in a skilled nursing facility[6] or long term health care facility[7] unless one of the witnesses is designated as a patient advocate by the State Department of Aging.[8]

Existing law also authorizes the appointment of an attorney in fact to make health care decisions[9] in the event of incapacitation[10] and provides conditional immunity to a health care provider[11] who acts in good faith reliance on a decision made by an attorney in fact.[12] Existing law also provides conditional immunity to a health care provider who gives effect to a declaration requesting a natural death.[13] However, existing law does not authorize or approve mercy killing,

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4. *See id.* § 7186.5(a)-(b) (West Supp. 1994) (providing the requirements of a declaration concerning life-sustaining treatment). *But see* People v. Adams, 216 Cal. App. 3d 1431, 1438 n.1, 265 Cal. Rptr. 568, 572 n.1 (1990) (commenting that a written directive is not the only method by which one may exercise the right to determine one's own medical treatment).

5. CAL. HEALTH & SAFETY CODE § 7185.5(d) (West Supp. 1994); *see id.* (recognizing the right of an adult to make a written declaration that would provide instructions to a physician to allow the adult to die a natural death without technologically prolonging a terminal condition or vegetative state); Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 278 (1990) (deriving a constitutionally protected liberty interest to refuse unwanted medical treatment); *see also* Conservatorship of Morrison, 206 Cal. App. 3d 304, 306-07, 253 Cal. Rptr. 530, 533-34 (1988) (holding that the conservator of a patient in a persistent vegetative state can authorize the removal of a feeding tube, but cannot force a physician to remove the tube against personal moral objections if the patient can be transferred to another physician who will).

6. *See* CAL. HEALTH & SAFETY CODE § 1250(c) (West Supp. 1994) (defining skilled nursing facility as a place providing skilled nursing and supportive care for patients who require such care for an extended period of time).

7. *See id.* § 1418(a) (West Supp. 1994) (defining long term health care facility).

8. *Id.* § 7187 (West Supp. 1994); *see id.* (providing that the patient advocate may be designated by the State Department of Aging).

9. *See* CAL. CIV. CODE § 2430(b)-(c) (West 1993) (defining health care and health care decision).

10. *See* BLACK'S LAW DICTIONARY 760 (6th ed. 1990) (defining incapacitated person as one unable to make or communicate responsible decisions concerning his or her person); *see also* CAL. CIV. CODE § 2433 (West 1993) (stating that a person retains the right to make health care decisions so long as he or she can give informed consent); *id.* § 2434 (West 1993) (specifying that the durable power of attorney does not give an attorney in fact authority to make a health care decision if the principal can make an informed decision).

11. *See* CAL. CIV. CODE § 2430(d) (West 1993) (defining health care provider as one authorized by law to administer health care).

12. *Id.* § 2438 (West 1993).

13. CAL. HEALTH & SAFETY CODE § 7190.5(a)-(b) (West Supp. 1994); *see id.* (providing that a physician or other health care provider will not be held liable or disciplined for giving effect to a declaration unless the health care provider knew the declaration had been revoked, did not meet reasonable medical standards, or did not believe in good faith that his actions were lawful); *see* Bartling v. Superior Court, 163 Cal. App. 3d 186, 191-92, 209 Cal. Rptr. 220, 222-23 (1984) (discussing physicians' refusal to remove the respirator tube for moral reasons as well as for fear of potential civil and criminal liability, although Bartling and his family released the hospital and physicians from any civil liability). No other hospital was willing to undertake the care of Mr. Bartling. *Id.* at 195 n.7, 209 Cal. Rptr. at 225 n.7; *see also* Bartling v. Glendale Adventist Med. Ctr., 184 Cal. App. 3d 961, 968, 229 Cal. Rptr. 360, 362 (1986) (discussing other institutions' refusals to take Bartling because of both the medical costs they might incur as well as possible litigation expense).

except for the withholding or the withdrawal of health care to allow a natural death.[14]

Under Chapter 966, the Legislature states that a competent adult has the right to refuse resuscitation after cardiac or respiratory arrest whether the need arises in a prehospital setting, a hospital, or other clinical setting.[15] Chapter 966 provides immunity for a health care provider[16] who honors a request to forego resuscitation,[17] provided the decision is made in good faith reliance on the request and is consistent with the law.[18] Under Chapter 966, licensed residential care facilities for the elderly that employ licensed health care providers may establish policies to honor requests to forego resuscitation.[19]

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14. CAL. CIV. CODE § 2443 (West 1993); *see* Barber v. Superior Court, 147 Cal. App. 3d 1006, 1017-18, 195 Cal. Rptr. 484, 491 (1983) (holding that while a physician may have a duty to provide life-sustaining mechanical care immediately after a cardio-respiratory arrest, there is no duty to continue treatment that has proven ineffective; therefore, the defendant physicians were not guilty of murder). *But see* Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1147, 225 Cal. Rptr. 297, 307 (1986) (Compton, J., concurring) (writing that "[t]he right to die is an integral part of our right to control our own destinies so long as the rights of others are not affected" and that it was inhumane for the medical profession not to assist a patient to an easy death but force a patient to suffer the ordeal of starving herself to death to achieve her objective). *See generally* Ian Gentles, *Death and Dignity*, TORONTO STAR, Aug. 8, 1993, at B1 (discussing the popular movement supporting legalized euthanasia and suggesting problems with the concept).

In 1992, the Dutch government, investigating the practice of euthanasia, found that Dutch physicians kill more than 1000 patients a year without the patient's request, a quarter of whom were not incapacitated. *Id.* The study also found that most Dutch physicians working in nursing homes withhold or withdraw life-prolonging treatment without the patient's consent, and that 86% of the "do not resuscitate" decisions made in hospitals were also made without the patient's consent. *Id.* These numbers refer mainly to the elderly. *Id. See generally Dutch Court Won't Punish Suicide Doctor*, S.F. CHRON., June 22, 1994, at A10 (reporting on the Dutch Supreme Court's landmark decision not to punish a psychiatrist who helped a healthy, 50-year-old woman kill herself after she became depressed over her husband's desertion and the loss of her two sons). A Dutch law that passed in 1993 regulates euthanasia and assisted suicide; the Dutch Supreme Court's ruling would allow mercy killings for mental as well as physical pain. *Id.*

15. 1994 Cal. Legis. Serv. ch. 966, sec. 1, at 4757 (declaring the right of a competent adult to control whether or not he or she will receive health care); *see id.* § 1 (a)-(d) (stating that the right to refuse is not limited to cardiac or respiratory arrest emergencies and that it is in the interest of public health and welfare to set up a procedure for honoring an individual's right to refuse heroic resuscitative measures); CAL. PROB. CODE § 4753 (f) (enacted by Chapter 966) (specifying that its provisions apply whether the individual is within or outside of a health care facility).

16. *See* CAL. PROB. CODE § 4753(g) (enacted by Chapter 966) (defining health care provider for the purposes of this section to include emergency response employees and members of specially trained volunteer organizations).

17. *See id.* § 4753(b)-(d) (enacted by Chapter 966) (defining a request to forego resuscitative measures as a written document that must be signed by the individual or a surrogate health care decisionmaker and a physician and surgeon, and requiring that the request include a "do not resuscitate" form, the content and form of which is specified by the section). The request may also be evidenced by a medallion issued by the Emergency Medical Services Authority. *Id.*

18. *Id.* § 4753(a) (enacted by Chapter 966); *see id.* (setting forth the requirement that the health care provider's decision be made in a good faith belief that the decision is consistent with California Probate Code § 4753 and made with no knowledge that the individual who signed the request would have chosen differently under the circumstances); *id.* § 4753(e) (enacted by Chapter 966) (stating that a request may be presumed valid and unrevoked in the absence of any knowledge to the contrary).

19. CAL. HEALTH & SAFETY CODE § 1569.74(a) (enacted by Chapter 966); *see id.* § 1569.74(b)-(c) (enacted by Chapter 966) (establishing the guidelines for such a policy, which include a prohibition against facility staff from signing such a directive as a witness or as the surrogate decisionmaker, and providing that only a licensed health care provider employed by the facility and on the premises at the time of the emergency

INTERPRETIVE COMMENT

Advances in medicine and technology have drawn issues of death and dying into sharp public controversy, presenting difficult legal issues concerning patients' rights that legislators and courts have sought to resolve.[20] Most state courts have found a right to refuse medical treatment based on the common-law right to informed consent, a constitutional right to privacy, or state statutes.[21] In the case of an incompetent, however, the state is entitled to guard against potential abuses by surrogates and to require evidence of the incompetent's wishes.[22] Chapter 966 was enacted to provide immunity to health care workers who honor"

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may make the decision to honor a request to forego resuscitation).

20. *See* Joanna K. Weinberg, *Whose Right Is It Anyway? Individualism, Community, and the Right to Die: A Commentary on the New Jersey Experience*, 40 HASTINGS L.J. 119, 134-40 (1988) (discussing the legal system's response to issues of aging and loss of autonomy, and in particular, the New Jersey Supreme Court's response, which attempted to reconcile the doctrines of best interests and self-determination). *See generally* Barber v. Superior Court, 147 Cal. App. 3d 1006, 1012-13, 195 Cal. Rptr. 484, 487 (1983) (discussing the legal dispute arising from the gap between statutory law and modern medicine); *In re* Guardianship of Browning, 568 So. 2d 4, 8 n.1 (Fla. 1990) (reviewing a moot claim because the issue is of "great public importance and likely to recur"); Ezekiel J. Emanuel, *Who Won't Pull the Plug? It's Not Modern Medicine, But the Families That Won't Give Up*, WASH. POST, Jan. 2, 1994, at C3 (claiming that contrary to popular public perceptions, most physicians today are more willing to stop life-sustaining interventions, including tube feedings and hydration, than are the patients or their family members).

21. *See* Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 269-76 (1990) (reviewing the common law right of self-determination and informed consent, the constitutional right of privacy as balanced against State interests, as well as state statutory law, as the bases upon which courts have found a right to refuse treatment); Conservatorship of Drabick, 200 Cal. App. 3d 185, 200, 245 Cal. Rptr. 840, 849 (1988) (finding that California Probate Code § 2355 gives the conservator of an estate the power to withhold or withdraw consent to medical treatment when that decision is made in good faith and based on medical advice), *cert. denied sub nom* Drabick v. Drabick, 488 U.S. 958 (1988); *In re* Guardianship of Browning, 568 So. 2d 4, 17 (Fla. 1990) (concluding that both competent and incompetent persons have the right to determine their medical treatment, and holding that a surrogate or proxy may exercise that right "for one who has become incompetent and who, while competent, expressed his or her wishes orally or in writing"); Fosmire v. Nicoleau, 551 N.E.2d 77, 80 (N.Y. 1990) (holding that a patient who wished to refuse a blood transfusion after a Caesarian delivery had a common-law and a statutory right to decline the transfusions based on a finding that there were no superior State interests to outweigh the patient's choice); *see also* CAL. HEALTH & SAFETY CODE §§ 7185-7194.5 (West Supp. 1994) (setting forth the provisions of The Natural Death Act); Carol M. Ostrom, *When is it Time to Die? Elderly Look Life and Death in the Eye*, SEATTLE TIMES, June 16, 1993, at A1 (mentioning new guidelines being drafted in the Washington Legislature in accord with Washington's own Natural Death Act, which would allow emergency-medical technicians to honor "do not resuscitate" bracelets issued to persons judged to be terminally ill by a physician, while many wish to broaden the rules to include nonterminal patients); Paula Voel, *Your Decree on Dying a Living Will and Health Care Proxy Make a Patient's Final Wishes on Treatment Perfectly Clear*, BUFFALO NEWS, May 25, 1994, at 11 (discussing health care proxies and mentioning a Health Care Surrogate Bill pending in committee in the New York Legislature which would allow a health care facility to choose an agent if an individual had not done so).

22. *See Cruzan*, 497 U.S. at 280-82 (holding that the Due Process Clause does not require a state to accept the judgment of close family members where there is no evidence of the patient's wishes); Grace Plaza v. Elbaum, 623 N.E.2d 513, 515-16 (N.Y. 1993) (holding that if a nursing home has no clear evidence of the patient's wishes, it may refuse to honor a surrogate's request to forego a patient's treatment); *see also* Conservatorship of Drabick, 200 Cal. App. 3d 185, 217-18, 245 Cal. Rptr. 840, 861 (1988) (finding that where a patient did not employ the statutory mechanisms provided, a conservator was not precluded from making the decision to forego medical treatment for the conservatee, and may do so without prior judicial approval after considering the conservatee's best interests and previously expressed wishes, as well as the physician's advice), *cert. denied sub nom* Drabick v. Drabick, 488 U.S. 958 (1988).

"do not resuscitate" requests, whether within or outside a health care facility, and establishes formal guidelines for the legal form which they are to assume.[23]

*Molly K. Mosley*

**Health and Welfare; health care services—licensure of outpatient surgical settings**

Business and Professions Code §§ 2215, 2216, 2217 (new); Health and Safety Code §§ 1248, 1248.1, 1248.15, 1248.2, 1248.25, 1248.3, 1248.35, 1248.4, 1248.5, 1248.55, 1248.6, 1248.65, 1248.7, 1248.75, 1248.8, 1248.85 (new).
AB 595 (Speier); 1994 STAT. Ch. 1276

Existing law mandates that the State Department of Health Services[1] license and regulate certain health facilities.[2] Chapter 1276 prohibits physicians and surgeons from performing procedures, on or after July 1, 1996, in surgical outpatient settings[3] which use specified anesthesia[4] unless the setting is exempted by law.[5]

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23. SENATE FLOOR COMMITTEE, COMMITTEE ANALYSIS OF SB 1557, at 2 (Apr. 7, 1994); *see* CAL. PROB. CODE § 4753(b)-(c) (enacted by Chapter 966) (defining the form of requests to forego resuscitative measures); *see also* CAL. HEALTH & SAFETY CODE § 1569.74(b)-(d) (enacted by Chapter 966) (establishing the policy guidelines regarding "do not resuscitate" requests for licensed residential care facilities for the elderly).

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1. *See* CAL. HEALTH & SAFETY CODE § 100 (West 1990) (creating the State Department of Health Services within the Health and Welfare Agency).

2. *Id.* § 1250.1 (West Supp. 1994); *see id.* (naming general acute care hospitals, nursing facilities, intermediate care facilities, acute psychiatric, chemical dependency, congregate living health facilities, pediatric day health and respite care facilities, and correctional treatment centers as entities subject to regulation by the Department of Health Services).

3. *See id.* § 1248(c) (enacted by Chapter 1276) (defining outpatient setting as any facility, clinic, unlicensed clinic, center, office, or other setting not part of a general acute care facility and where specified anesthesia is used); *id.* § 1250(a) (West Supp. 1994) (defining general acute care hospital as a facility that has a responsible governing body and organized medical staff that provides 24-hour inpatient care); *see also infra* note 4 (discussing the specified anesthesia).

4. *See* CAL. BUS. & PROF. CODE § 2216 (enacted by Chapter 1276) (excluding settings which administer local anesthesia, peripheral nerve blocks anti-anxiety, and pain-relieving medications which, when administered within the community standard of practice do not have the probability of placing the patient at risk for the loss of life-preserving protective reflexes); *see also* DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL, OEI-07-91-10470, SURGERY IN OUTPATIENT SETTINGS: A FOUR STATE STUDY, at 1 (1991) (copy on file with the *Pacific Law Journal*) [hereinafter OFFICE OF INSPECTOR GENERAL STUDY] (categorizing a procedure as a "risk-associated procedure" by the effects of anesthesia which "compromise a patient's protective reflexes").

5. CAL. BUS. & PROF. CODE § 2216 (enacted by Chapter 1276); *see id.* (forbidding all physicians and surgeons from performing surgery in an outpatient setting using specified levels of anesthesia unless the setting is specified in California Health and Safety Code § 1248.1); *see also infra* note 6 (listing the specified settings of California Health and Safety Code § 1248.1).

Chapter 1276 prohibits any entity from operating an outpatient facility unless it is one enumerated as certified or accredited under federal or state law.[6] Chapter 1276 sets forth minimum standards outpatient settings must meet to be accredited, and procedures for accreditation as well as denial of accreditation.[7] Chapter 1276 also authorizes action to be taken upon discovery of a facility not in compliance.[8]

Chapter 1276 authorizes the Division of Licensing of the Medical Board of California to approve accreditation agencies[9] that meet certain standards.[10] Chapter 1276 further provides for regular evaluation of approved accreditation agencies and a process for the termination of the approval of an agency.[11] Chapter 1276

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6. CAL. HEALTH & SAFETY CODE § 1248.1 (enacted by Chapter 1276); *see id.* (prohibiting any association, corporation, firm, partnership, or person from operating an outpatient setting in California unless it is a(n): (1) Medicare certified outpatient surgical center; (2) clinic operated under a federally recognized Indian Tribe or organization; (3) clinic run by the United States; (4) licensed primary care or surgical clinic; (5) general acute care hospital; (6) outpatient setting in compliance with the law used by dentists, physicians, or surgeons; (7) accredited outpatient setting; or (8) mobile van facility used in close connection with certain of the above settings).

7. *Id.* §§ 1248.15, 1248.2, 1248.25 (enacted by Chapter 1276); *see id.* § 1248.15 (enacted by Chapter 1276) (requiring the Division of Licensing of the Medical Board of California to adopt standards for accreditation and to ensure that the certification program includes standards for the following aspects: (1) Allied health staff to be licensed or certified as required by law; (2) appropriate personnel, medication and equipment on site to handle medical emergencies; (3) a system for transferring patients to an acute care hospital in the event of a medical emergency; and (4) systems for maintenance of clinical records, patient monitoring and quality improvement); *id.* § 1248.2 (enacted by Chapter 1276) (allowing outpatient settings to apply to an accreditation agency for a certificate of accreditation that will be issued solely upon compliance with the specified standards and requiring a list of accredited settings will be maintained and made available to the public); *id.* § 1248.25 (enacted by Chapter 1276) (requiring accreditation agencies to deny accreditation if the outpatient setting does not meet the approved standards).

8. *Id.* § 1248.35(a)-(b) (enacted by Chapter 1276); *see id.* § 1248.35(b)(1)-(3) (authorizing the Division of Medical Quality or an accreditation agency to enter and inspect any accredited setting and, if it is determined the facility is not in compliance with the standards of the accreditation agency, to do any of the following: Issue a reprimand; place the outpatient setting on probation; and, upon proper notice, suspend or revoke the facility's accreditation).

9. *See id.* § 1248(d) (enacted by Chapter 1276) (defining accreditation agency as a public or private organization that is approved to issue certificates of accreditation to outpatient settings).

10. *Id.* § 1248.4 (enacted by Chapter 1276); *see id.* § 1248.4(c)(1)-(10) (enacted by Chapter 1276) (listing the criteria the accreditation agency must meet to be approved). The agency must: (1) Include the Division of Licensing standards as well as patient care and safety standards within its accreditation program; (2) submit its accreditation standards at least every three years to the Division of Licensing; (3)maintain internal quality management programs; (4) have a review and revision process for accreditation standards; (5) have qualified accreditation review teams; (6) have standards for accreditation developed with input from the medical community and outpatient surgery industry; (7) screen and credential its reviewers; and (8) not have an ownership interest in the delivery of health care services to patients. *Id.*

11. *Id.* §§ 1248.5, 1248.55 (enacted by Chapter 1276); *see id.* § 1248.5 (enacted by Chapter 1276) (providing that the division may evaluate approved accreditation agencies at least every three years, or in response to complaints against the agency or against one of the outpatient settings that agency accredits); *see also id.* § 1248.55(b) (enacted by Chapter 1276) (requiring that, before terminating approval of the agency, the agency be notified of the deficiencies and be given time to supply information demonstrating compliance with Chapter 1276); *id.* § 1248.55(c)(1)-(2) (enacted by Chapter 1276) (providing that if approval of the accreditation agency is terminated, then the outpatient settings which it accredited must be notified and be given 12 months to seek accreditation from an approved agency, unless the division has information that the operation of the outpatient setting poses an imminent risk of harm to the health of an individual; in that instance, the division must order the facility to cease operations).

also creates a fund for depositing accreditation fees which are used for implementing and administering these provisions.[12]

Chapter 1276 provides that a willful[13] and knowing violation of its provisions by physicians and surgeons constitutes unprofessional conduct.[14] Chapter 1276 further authorizes the Division of Medical Quality or the local District Attorney to bring an action to enjoin a violation or threatened violation of its provisions.[15] In addition, willful violation of any provision of Chapter 1276 is a misdemeanor, carrying a maximum fine of $1,000 per day of violation.[16]

## INTERPRETIVE COMMENT

Chapter 1276 was enacted to ensure that health care services are safely and effectively performed in outpatient surgical settings.[17] Concern regarding these services comes as a result of the shift in surgeries, traditionally done on a inpatient basis, to outpatient settings.[18] As a result of this shift, there has been concern at both the state and the national level that the growth in outpatient surgeries has outpaced the government's ability to ensure the quality and safety

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12. *Id.* § 1248.6(b) (enacted by Chapter 1276).

13. *See id.* § 1248.8(c) (enacted by Chapter 1276) (defining willfully or willful for purposes of Chapter 1276 to mean that the person doing an act or omitting to do an act intends the act or omission and knows the relevant circumstances connected with the act or omission).

14. *Id.* § 1248.65 (enacted by Chapter 1276); *see* CAL. BUS. & PROF. CODE § 2221 (West Supp. 1994) (allowing the Division of Licensing to deny a physician and surgeon's certificate or issue a probationary certificate if the physician is guilty of unprofessional conduct); *id.* § 2234 (West 1990) (providing that the Division of Medical Quality must take action against a licensed physician or surgeon charged with unprofessional conduct); *see also* Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 73 n.6, 435 P.2d 553, 558 n.6, 64 Cal. Rptr. 785, 790 n.6 (1968) (noting that the purpose of the revocation of a doctor's certificate is not to punish the doctor but rather to protect the public); Shea v. Board of Medical Examiners, 81 Cal. App. 3d 564, 574-75, 146 Cal. Rptr. 653, 659-60 (1978) (holding that the term unprofessional conduct is not overly broad and that it must relate to conduct that indicates an unfitness to practice medicine).

15. CAL. HEALTH & SAFETY CODE § 1248.7 (enacted by Chapter 1276); *see id.* § 1248.75(a) (enacted by Chapter 1276) (requiring that, before the Division of Medical Quality seeks an injunction, the outpatient setting be notified of its violations of Chapter 1.3 (commencing with § 1248) of the California Health and Safety Code and be given a reasonable time to correct the deficiencies); *see also id.* § 1248.75(c) (enacted by Chapter 1276) (allowing the Division of Medical Quality to institute immediate injunction proceedings if it determines that an outpatient setting poses an immediate and substantial hazard to the health and safety of the patient if the hazard may not reasonably be corrected through a plan of correction).

16. *Id.* § 1248.8(a) (enacted by Chapter 1276); *see id.* § 1248.8(b)(1)-(4) (enacted by Chapter 1276) (providing that, in determining the punishment to be imposed, all relevant facts be considered, including, but not limited to, the following: (1) Whether the violation exposed an individual to the risk of death or serious harm; (2) whether the violation had a direct or immediate relationship to the health, safety, or security of an individual; (3) evidence of willfulness in the violation; and (4) good faith efforts by the outpatient setting to prevent the violation).

17. CAL. BUS. & PROF. CODE § 2215 (enacted by Chapter 1276).

18. OFFICE OF INSPECTOR GENERAL STUDY, *supra* note 4, at 1; *see id.* (quoting a Joint Commission on Accreditation of Health Care Organizations estimate that by 1995, 65% of all surgical procedures will be performed outside the hospital); *see also* Mark A. Warner, MD et. al., *Major Morbidity and Mortality Within 1 Month of Ambulatory Surgery and Anesthesia*, 270 JAMA 1437, 1437 (1993) (stating that ambulatory surgical procedures have proliferated in recent years); *Projected Growth in Top Outpatient Procedures*, HOSPITALS, Nov. 20, 1992, at 14 (predicting a growth rate of greater than sixty percent in the outpatient surgical procedures reviewed between 1992 and 2002).

of these procedures.[19] Chapter 1276 responds to the above concerns, and provides that California's outpatient surgical settings, as defined, will be regulated by the Medical Board of California.[20]

*Bonnie M. George*

## Health and Welfare; health service plans—medical disclosure and injection cards

Business and Professions Code §§ 803.3, 4227.4 (new); Health and Safety Code §§ 1363.1, 1373.19 (new); Insurance Code §§ 10123.19, 11512.33 (new).
AB 3260 (Bornstein); 1994 STAT. Ch. 653

Existing law defines health service plan, disability insurance policy, and nonprofit hospital service plan.[1] Chapter 653 requires that any health service plan,

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19. *See* Kathleen Z. McKenna, *Assembly Bill Would Tighten Standards for Surgery at Clinics*, SACRAMENTO BEE, Aug. 17, 1993, at A3 (quoting the author of Chapter 1276 as saying that outpatient clinics operate virtually unregulated as long as a licensed physician is in charge); *see also* OFFICE OF INSPECTOR GENERAL STUDY, *supra* note 4, at 7 (reporting that one third of the surgical outpatient settings in the four-state study, which included California, performing high risk procedures, which were defined by the levels of anesthesia used similar to Chapter 1276, are neither licensed or accredited); *id.* at 10 (recommending that states examine their licensure rules to ensure the quality of surgery performed in outpatient settings). *But see* Warner, et al., *supra* note 18, at 1441 (concluding that overall risk of major injury and death from outpatient surgical procedures with concurrent anesthetic care is very low); *A Medical Dilemma*, COURIER J., Feb. 28, 1993, at D2 (reporting that there is almost no documented evidence that physicians have abused the latitude that they have to perform surgery in an outpatient setting). *See generally House Small Business Regulation, Business Opportunities, and Energy Subcommittee Regarding Consumer Protection in the Health Care Field*, Fed. News Serv., 2359 (June 28, 1993) (quoting Representative Ron Wyden (D-OR) as stating that his subcommittee has been concerned about the lack of oversight of outpatient surgeries and that he hopes to get some oversight for that fast growing area of health care as part of health reform); Warren E. Leary, *Outpatient Surgery on the Rise; Regulation Doesn't Keep Pace*, N.Y. TIMES, July 1, 1992, at C12 (quoting Representative Ron Wyden as saying that he will soon introduce legislation which requires more regulation of outpatient surgeries and that the growth of outpatient surgeries has already outpaced federal and state governments' ability to assure health care quality and safety).

20. CAL. BUS. & PROF. CODE § 2215 (enacted by Chapter 1276); *see* SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF AB 595, at 2-3 (Apr. 6, 1994) (referring to studies showing the trend towards outpatient surgery and quoting the author of Chapter 1276 as saying outpatient surgical facilities now operate virtually without regulation as long as a licensed physician is in charge).

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1. CAL. HEALTH & SAFETY CODE § 1345(f) (West Supp. 1994); CAL. INS. CODE § 106 (West 1993); *id.* §§ 11491-11517 (West 1993 & Supp. 1994); *see* CAL. HEALTH & SAFETY CODE § 1345(f) (West Supp. 1994) (defining health care service plan as any person who undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for or reimburse any part of the cost for such services, in return for a prepaid or periodic charge paid by or on behalf of such subscribers or enrollees); CAL. INS. CODE § 106 (West 1993) (defining disability insurance as including insurance appertaining to injury, disablement, or death resulting to the insured from accidents, and appertaining to disablements resulting to the insured from sickness); *id.* §§ 11491-11517 (West 1993 & Supp. 1994) (providing statutory provisions for the operation of

disability insurance policy, or nonprofit hospital service plan that includes terms that require binding arbitration to settle disputes and that restrict or provide for a waiver of, the right to a jury trial must include a specific disclosure.[2] Chapter 653 also requires that policies or plans which provide for the selection of a single neutral arbitrator by the parties in disputes involving $50,000 or less, or, if the parties are unable to agree on the selection of an arbitrator, the method provided in California Code of Civil Procedure section 1281.6 to select an arbitrator will be used.[3] These requirements may not be waived.[4]

Existing law requires that malpractice judgments in excess of $30,000 against specified licensed health care professionals be reported by the clerk of the court to the licensing agency.[5] As of July 1, 1995, this information may be released to

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nonprofit hospital service plans).

2. CAL. HEALTH AND SAFETY CODE § 1363.1 (enacted by Chapter 653); CAL. INS. CODE § 10123.19 (enacted by Chapter 653); *id.* § 11512.33 (enacted by Chapter 653); *see* CAL. HEALTH AND SAFETY CODE § 1363.1(a)-(d) (enacted by Chapter 653) (requiring health service plans to include a disclosure that meets the following conditions: (1) Disclose whether the plan uses binding arbitration to settle disputes, specifically including medical malpractice claims; (2) cause the disclosure to appear as a separate article in the agreement and to be prominently displayed on the enrollment form signed by each subscriber or enrollee; (3) be substantially expressed in the wording provided in California Code of Civil Procedure § 1295(a); and (4) be displayed immediately before the signature line); CAL. INS. CODE § 10123.19(a)(1)-(3) (enacted by Chapter 653) (listing the same conditions for disability insurance policies as listed above for health care service plans with the exception of the requirement that the language from the California Code of Civil Procedure be used); *id.* § 11512.33(a)(1)-(3) (enacted by Chapter 653) (listing the same conditions for non-profit hospital plans as listed for disability insurance policies); *see also* CAL. CIV. PROC. CODE § 1295(a) (West 1982) (requiring that any contract for medical services containing a provision for arbitration of any dispute as to the professional negligence of a health care provider be disclosed). The disclosure must read as follows:

> It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

*Id.*

3. CAL. HEALTH & SAFETY CODE § 1373.19 (enacted by Chapter 653); CAL. INS. CODE § 10123.19(b) (enacted by Chapter 653); *id.* § 11512.33(b) (enacted by Chapter 653); *see* CAL. CIV. PROC. CODE § 1281.6 (West 1982) (providing that when an agreed method of appointing an arbitrator fails, the court, on petition of a party, will appoint the arbitrator).

4. CAL. HEALTH & SAFETY CODE § 1373.19 (enacted by Chapter 653); CAL. INS. CODE § 10123.19(b) (enacted by Chapter 653); *id.* § 11512.33(b) (enacted by Chapter 653).

5. CAL. BUS. & PROF. CODE § 803 (West Supp. 1994); *see id.* (requiring that the following actions taken by or against a person who holds a license or certificate from the Board of Behavioral Science Examiners, or from an agency listed in California Business and Professions Code § 800(a), be reported to the licensing agency: (1) Conviction of a crime; (2) a judgment of $30,000 caused by the professional's negligence, error or omission; or (3) the rendering of unauthorized professional services); *see also id.* § 800(a) (West Supp. 1994) (listing the licensing agencies to be the Board of Dental Examiners; Osteopathic Medical Board of California; Board of Chiropractic Examiners; California Board of Registered Nursing; Board of Vocational Nurse and Psychiatric Technician Examiners; State Board of Optometry; Board of Examiners in Veterinary Medicine; and State Board of Pharmacy).

members of the public who ask for it.[6] Chapter 653 provides that any arbitration award under a health care service plan contract for death or personal injury that is over $30,000, will be considered a judgment under these provisions, and thus will be reported to the appropriate licensing agency and be available to the public.[7]

Existing law imposes requirements regarding the content and administration of prescription drugs.[8] Chapter 653 authorizes licensed health care facilities[9] to administer controlled substances[10] through the use of an injection card system.[11] Chapter 653 further mandates minimum requirements that must be followed when such a system is put into place.[12] Chapter 653 specifically does not impose new requirements on the use of injection card systems for noncontrolled substances.[13]

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6. *Id.* § 803(b) (West Supp. 1994) (operative July 1, 1995); *see id.* (providing that the information the court provides to the licensing agency regarding felony convictions and judgments in excess of $30,000 against a physician, surgeon or doctor of podiatric medicine will be released to an inquiring member of the public).

7. *Id.* § 803.3 (enacted by Chapter 653); *see id.* (stating that such arbitration awards will be deemed a judgment for purposes of California Business and Professions Code § 803(b)).

8. *Id.* §§ 4030-4049.6 (West 1990); *see id.* (designating these sections as part of the Pharmacy Law); *id.* § 4031(1)-(4) (West 1990) (defining drugs as: (1) Articles recognized in official pharmacopoeias or formulary; (2) articles intended for use in diagnosis, cure, mitigation, treatment, or prevention of disease in man or animal; (3) articles (other than food) intended to affect the structure or function of man or animal; or (4) articles intended to be used as a component in one of the articles listed above); *id.* § 4036 (West Supp. 1994) (defining prescription as an oral or written order given by a physician, dentist, podiatrist or veterinarian for a drug or device for specified individuals or an individual).

9. *See id.* § 4227.4(a) (enacted by Chapter 653) (defining licensed health care facility as a health facility defined in California Health and Safety Code § 1250 or operated by a health care service plan); *see also* CAL. HEALTH & SAFETY CODE § 1250 (West Supp. 1994) (defining health facility to include general acute care hospitals, acute psychiatric hospitals, skilled nursing facilities, intermediate care facilities, and congregate living health facilities).

10. *See* CAL. HEALTH & SAFETY CODE § 11007 (West 1991) (defining controlled substances as a drug, substance, or immediate precursor which is listed in §§ 11054-11058); *id.* § 11054 (West 1991) (listing Schedule I controlled substances); *id.* § 11055 (West 1991) (listing Schedule II controlled substances); *id* § 11056 (West Supp. 1994) (listing Schedule III controlled substances); *id.* § 11057 (West Supp. 1994) (listing Schedule IV controlled substances); *id.* § 11058 (West 1991) (listing Schedule V controlled substances).

11. CAL. BUS. & PROF. CODE § 4227.4(c) (enacted by Chapter 653); *see id.* § 4227.4(b) (enacted by Chapter 653) (defining injection card system as a system which enables a facility to authorize an outpatient to receive injections at the facility, pursuant to a doctor's order, through the use of a card which is maintained at the facility where the injections are administered).

12. *Id.* § 4227.4(b), (d) (enacted by Chapter 653); *see id.* § 4227.4(b) (enacted by Chapter 653) (requiring that the injection card contain at least the date of authorization; number and frequency of injections authorized; name, strength and amount of drug authorized; names of prescribing doctor and the patient; date and time of each injection; and the signature of the person giving the injection); *id.* § 4227.4(d)(1)-(9) (enacted by Chapter 653) (requiring that a facility utilizing injection cards have written protocols for its use which have been developed by at least a doctor, registered nurse, and pharmacist; and that the protocol provides at least for: (1) Identification of drugs to be included in the injection card system; (2) distinction among classes of drugs; (3) periodic review of the efficacy of the injection card system; (4) determination of the availability of a doctor needed for each drug included in the system; (5) a recordkeeping system which allows for the identification of patient abuse of the drug or adverse drug reactions and provides a system for discontinuing the physician's order; (6) retention of the injection card by the facility when a controlled substance is being administered; (7) adequate initial evaluation of patients; (8) ongoing medical evaluation of the patient's response to the injection card system; and (9) injection cards that will become a permanent part of the patient's medical record within 15 days from the administration of the last authorized dose).

13. *Id.* § 4227.4(e) (enacted by Chapter 653).

## INTERPRETIVE COMMENT

Prior to the enactment of Chapter 653, there was concern that plans and policies did not adequately advise consumers that the terms of a health plan restricted or waived the consumer's right to a jury trial in medical malpractice cases.[14] Chapter 653 remedies this concern by requiring prominent notice of binding arbitration requirements in health service plans and disability insurance policies.[15]

Chapter 653 provides for the use of a single neutral arbitrator in cases pleaded at $50,000 or less.[16] The purpose of this provision is to lower the cost and increase the efficiency of resolving disputes in the health care industry.[17]

Chapter 653 treats medical malpractice arbitration awards as judgments, thus requiring arbitration awards over $30,000 to be disclosed to the public.[18] This requirement is an attempt to close a loophole which allowed a health care professional, who works only under contracts requiring binding arbitration, to avoid any public disclosure of malpractice awards against him or her.[19]

Chapter 653 establishes requirements for the use of injection card systems by health care facilities.[20] This provision was enacted in response to a medical

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14. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 3260, at 4 (Apr. 19, 1994); *see* Summary of AB 3260-Medical Disclosure and Shotcards, at 1, provided by the author's (Bornstein) office (copy on file with the *Pacific Law Journal*) [hereinafter Memorandum] (stating that the goal of the arbitration disclosure section of AB 3260 is consumer protection and awareness).

15. CAL. HEALTH & SAFETY CODE § 1363.1 (enacted by Chapter 653); CAL. INS. CODE § 10123.19 (enacted by Chapter 653); *id.* § 11512.33 (enacted by Chapter 653); *see supra* note 3 and accompanying text (describing specific requirements for the disclosure of terms of the plan that restrict or waive the right to a jury trial in medical malpractice cases); *see also* ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 3260, at 4 (Apr. 19, 1994) (explaining the prominent notices of binding arbitration required on the contract forms).

16. CAL. HEALTH & SAFETY CODE § 1373.19 (enacted by Chapter 653); CAL. INS. CODE § 10123.19(b) (enacted by Chapter 653); *id.* § 11512.33(b) (enacted by Chapter 653); *see supra* note 3 and accompanying text (discussing the selection method for an arbitrator).

17. *See* ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 3260, at 5 (Apr. 19, 1994) (stating that three-member arbitration panels are often used in the health care industry and that three-member panels may favor the plan rather than the consumer); *see also* Memorandum, *supra* note 14, at 3 (stating that the use of one arbitrator will ease the cost and increase the efficiency of disputes arising in the health care industry).

18. CAL. BUS. & PROF. CODE § 803 (West Supp. 1994); *id.* § 803(b) (West Supp. 1994); *id.* § 803.3 (enacted by Chapter 653); *see supra* notes 5-7 and accompanying text (specifying the judgments and awards available to the inquiring public).

19. *See* Memorandum, *supra* note 14, at 1 (explaining that for doctors who work solely under contracts that require arbitration to settle malpractice disputes, there is no chance of litigation and only arbitration awards may be imposed against them for malpractice and stating that if information relating to those awards are not available to the public, as they would be for a private physician who had litigated a malpractice claim, the physician is protected from disclosure and the public is left in the dark).

20. CAL. BUS. & PROF. CODE § 4227.4(c)-(e) (enacted by Chapter 653); *see supra* notes 10-13 and accompanying text (explaining the requirements of an injection card system).

malpractice action by a patient who complained that she had become addicted to a painkiller through the use of an injection card.[21]

*Bonnie M. George*

**Health and Welfare; nonconsensual HIV testing of patients**

Health and Safety Code §§ 199.65, 199.66, 199.67, 199.68 (new).
SB 1239 (Russell); 1994 STAT. Ch. 708

Under existing law, it is unlawful to force a person to disclose the identity or personal characteristics of any person who has been tested for the human immunodeficiency virus (HIV).[1] Existing law also prohibits the nonconsensual disclosure of HIV test results in most instances, and imposes civil and criminal penalties for unauthorized disclosure.[2] Furthermore, existing law imposes a written consent requirement in order to test a person's blood for HIV or acquired immune deficiency syndrome (AIDS) antibodies.[3] Chapter 708 adds to existing

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21. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF AB 3260, at 6 (Apr. 19, 1994); *see* Diana Sugg, *State Panel Faults Kaiser in Drug Addiction Case*, SACRAMENTO BEE, Feb. 3, 1994, at A13 (reporting that the Medical Board was planning legislation to address the issues raised by a woman who complained of addiction to a painkiller after taking part in a program utilizing "shot cards").

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1. CAL. HEALTH & SAFETY CODE § 199.20 (West 1990); *see id.* § 199.20 (prohibiting, with exceptions, the compulsion of a person to disclose in any state, county, city, or other local civil, criminal, administrative, legislative, or other proceeding, the identity of any individual tested for AIDS causing antibodies); *see also id.* § 26(b) (West Supp. 1994) (defining HIV as the etiologic virus of AIDS); *id.* §§ 199.45-.46 (West 1990) (setting forth the findings of the Legislature regarding HIV and AIDS). *See generally Projections of the Number of Persons Diagnosed With AIDS and the Number of Immunosuppressed HIV-Infected Persons—United States, 1992-1994*, 269 JAMA 733, 733 (1993) (discussing the projections by the Centers for Disease Control of the number of persons infected with HIV); Richard M. Selik et al., *HIV Infection as Leading Cause of Death Among Young Adults in U.S. Cities and States*, 269 JAMA 2991, 2991 (1993) (stating that HIV infection is the leading cause of death among young adults aged 25 to 44).

2. CAL. HEALTH & SAFETY CODE § 199.21 (West Supp. 1994); *see id.* (prohibiting the negligent or willful disclosure of the results of an HIV test, except as otherwise provided by law, and setting forth penalties for such disclosure); *see also id.* § 199.25(a)-(b) (West 1990) (permitting health care providers to disclose the results of an HIV test to the patient's sexual partners, persons believed to share hypodermic needles with the patient, and the county health officer, but only after counseling the infected patient); *cf.* 42 U.S.C.A. § 300ff-46(a) (West 1991) (stating that for purposes of federal grants, state law must ensure that any entity that conducts HIV testing report the findings of such testing to the state public health officer confidentially for statistical purposes); *id.* § 300ff-46(b) (West 1991) (providing for the development of a partner notification program for those infected with HIV); *id* § 300ff-62 (West 1991) (mandating that persons to be tested for HIV receive pretest counseling).

3. *Id.* § 199.22(a) (West 1990); *see* Cobbs v. Grant, 8 Cal. 3d 229, 244-45, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515 (1972) (establishing the rule in California requiring informed consent for medical treatment); *see also* ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 1239, at 1 (July 13, 1993) (stating that failure to obtain consent for medical treatment could result in an action for battery, negligence, or unprofessional conduct).

law by establishing a procedure for the testing of a patient's blood or other material, in the case of exposure to a health care provider.[4]

Under Chapter 708, available blood or other samples[5] of a source patient[6] may be tested for HIV or AIDS antibodies if an exposed individual[7] has experienced a significant exposure[8] to the blood or other potentially infectious material[9] of a source patient, provided that a specified procedure is followed.[10] Included in the procedure for testing are a certification by another physician of significant exposure, and counseling of the exposed individual.[11] Health care providers who do not adhere to the procedure set forth by Chapter 708 may be guilty of a misdemeanor.[12]

Chapter 708 further provides that, notwithstanding any other provision of law and except as otherwise provided, if the HIV status of the source patient is already known to be positive, the exposed individual may be informed of the source patient's HIV status by the source patient's attending physician, but only after the physician makes an attempt to obtain consent of such disclosure from the source patient.[13] However, if the HIV status of the source patient is not known, and if the exposed individual has tested negative on a baseline HIV test, Chapter 708 allows for the testing of available blood or material without the consent of the

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4. CAL. HEALTH & SAFETY CODE §§ 199.65-.68 (enacted by Chapter 708); *see id.* § 199.65(b) (enacted by Chapter 708) (stating that the intent of the Legislature is to allow an exposed health care provider or emergency first responder to learn the HIV status of the patient); *see also id.* § 199.65(a) (enacted by Chapter 708) (setting forth the concerns of the Legislature regarding HIV infection and the health care profession).

5. *See id.* §199.66(b) (enacted by Chapter 708) (defining available blood or patient sample as blood or material legally obtained before the exposure).

6. *See id.* § 199.66(i) (enacted by Chapter 708) (defining source patient as any person whose blood or material has been the source of a significant exposure to a health care provider or first responder).

7. *See id.* § 199.66(d) (enacted by Chapter 708) (defining an exposed individual as any person who is a health provider, first responder or employee, or volunteer or agent of a health care provider); *see also id.* § 199.66(e) (enacted by Chapter 708) (defining health care provider); *id.* § 199.66(f) (enacted by Chapter 708) (defining first responder to include such persons as police, firefighters, rescue personnel or others who provide similar emergency assistance).

8. *See id.* § 199.66(h) (enacted by Chapter 708) (defining significant exposure as direct contact that meets the applicable guidelines established by the Division of Occupational Safety and Health).

9. *See id.* § 199.66(g) (enacted by Chapter 708) (defining other potentially infectious materials as any bodily fluids that the Division of Occupational Health has determined are capable of transmitting HIV).

10. *Id.* § 199.67 (enacted by Chapter 708). For examples of several other states' provisions providing for nonconsensual HIV testing of a patient's blood in the case of a significant exposure to a health care provider, see CONN. GEN. STAT. ANN. § 19a-582(e)(5) (West Supp. 1994); FLA. STAT. ch. 381.004(i)(10), (11) (West 1993 & Supp. 1994); GA. CODE ANN. § 31-22-9.2(g) (1991); HAW. REV. STAT. § 325-16(b)(6) (Supp. 1992); ME. REV. STAT. ANN. tit. 5, § 19203-A(4) (West 1989); OHIO REV. CODE ANN. § 3701.242(E)(6) (Baldwin 1992); R.I. GEN. LAWS § 23-6-14(d), (e) (Supp. 1993); WIS. STAT. ANN. § 252.15(2)-(5) (West Supp. 1994).

11. CAL. HEALTH & SAFETY CODE § 199.67(a)-(b) (enacted by Chapter 708).

12. *Id.* § 199.68(b) (enacted by Chapter 708); *see id.* (providing that the maximum penalty for failure to adhere to the specified procedure is imprisonment for one year and/or a $10,000 fine).

13. *Id.* § 199.67(c) (enacted by Chapter 708); *see id.* (stating that such a disclosure may be made pursuant to California Heath and Safety Code § 199.24(b),(c) which permits, without written authorization, the disclosure of the results of a blood test administered to detect antibodies that are the probable cause of AIDS to a test subject's health care provider or agent or employee of the health care provider who provides direct care or treatment to the patient).

source patient, but only after making an effort to obtain the patient's informed consent.[14] Chapter 708 also requires the physician seeking consent to make an effort to provide the source patient with medical counseling, regardless of whether the patient consents to testing.[15]

If the blood or other sample is tested, Chapter 708 provides that the source patient must be informed of the results of the HIV test, unless he or she wishes not to be informed.[16] If the source patient refuses to be informed, then the HIV test results will only be provided to the exposed individual.[17] Also, Chapter 708 provides that if an exposed individual is informed of a patient's HIV status, the exposed individual must be informed of confidentiality protections already established by law.[18]

Additionally, Chapter 708 provides for an exemption from civil and criminal liability as well as professional disciplinary action for health care providers acting consistent with the provisions of Chapter 708.[19]

## COMMENT

The intent of the Legislature in enacting Chapter 708 is to provide a limited window in which a patient's blood may be tested without the patient's consent, in order to protect the interests of health care providers.[20] In the event that a patient's test is negative, the exposed individual will be less troubled about the risk of being infected, and if the patient's test is positive, the exposed individual can take precautionary measures not to infect others and to seek necessary prophylactic treatment of the disease.[21]

However, those opposed to Chapter 708 assert that mandatory testing may cause individuals to avoid needed medical care for fear that their HIV status will be disclosed without their consent, and that such nonconsensual testing violates patient autonomy.[22] It is also contended that testing gives a health care provider

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14. *Id.* § 199.67(d)(2) (enacted by Chapter 708); *see id.* (stating that the source patient or legal representative of the source patient must be informed of the testing of available blood samples and that the exposed individual must be informed of the results of the test); *id.* § 199.67(d)(1)(A)-(B) (enacted by Chapter 708) (setting forth the necessary procedure for attempting to obtain consent from the source patient).

15. *Id.* § 199.67(d)(1)(C) (enacted by Chapter 708).

16. *Id.* §199.67(d)(3) (enacted by Chapter 708); *see id.* (providing that if the patient refuses to be informed of the HIV test results, then he or she must sign a form documenting such refusal, and that the patient's refusal to sign the form will constitute refusal to be informed).

17. *Id.* § 199.67(d)(4) (enacted by Chapter 708); *see id.* § 199.67(d)(3) (mandating that the HIV test results be placed in the patient's medical record only when the patient has agreed to be informed of the results).

18. *Id.* § 199.67(e) (enacted by Chapter 708); *see id.* §§ 199.20, 199.21 (West 1990 & Supp. 1994) (providing that it is unlawful to disclose the identity of a person who has been tested for HIV). There are several other states with confidentiality provisions. *See e.g.* CONN. GEN. STAT. ANN. § 19a-583(a)(7) (West Supp. 1994); HAW. REV. STAT. §325-16(c) (Supp. 1992); IOWA CODE § 141.22A(2), (9) (West Supp. 1994) (prohibiting the disclosure of an HIV test patient's identity).

19. CAL. HEALTH & SAFETY CODE § 199.68 (enacted by Chapter 708).

20. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 1239, at 4 (June 28, 1994).

21. *Id.*

22. *Id.* at 4-5.

a false sense of security of not being infected because there is a window period between exposure to the HIV virus and its detectability,[23] and that there is some doubt as to the effectiveness of prophylactic treatment of AIDS.[24] Finally, opponents of Chapter 708 claim that mandatory testing is unnecessary because if a patient does not voluntarily consent to testing, the health care provider should assume that the patient is infected and take the necessary precautionary measures.[25]

Notwithstanding the aforementioned support and opposition, Chapter 708 raises significant constitutional issues.[26] The Fourth Amendment guarantees that people shall be secure from unreasonable searches and seizures.[27] Accordingly, in Justice Harlan's concurring opinion in *Katz v. United States*,[28] the United States Supreme Court set forth the widely followed two-prong test for determining if a search is granted Fourth Amendment protections: first, whether the person has a subjective expectation of privacy, and second, whether society recognizes that expectation as reasonable.[29] The Supreme Court decided the issue of a nonconsensual blood test in *Schmerber v. California*[30] by holding that a blood test without a person's consent unequivocally qualifies as a search for the purposes of the Fourth Amendment.[31]

Nonetheless, the Supreme Court has distinguished between searches pursuant to a criminal investigation and administrative searches.[32] Administrative searches

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23. *See id.* at 5; *see also* Elaine M. Sloand, M.D. et al., *HIV Testing State of the Art*, 266 JAMA 2861, 2862-63 (1991) (stating that the window period between infection and detectability is usually about six to eight weeks).

24. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 1239, at 5 (June 28, 1994); *see also* R. Gordon Douglas, Jr., M.D., *Infectious Diseases*, 263 JAMA 2648, 2648 (1990) (stating that Zidovudine (formerly AZT) is the only available treatment for AIDS and discussing its effectiveness).

25. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS ON SB 1239, at 5 (July 13, 1993). *But see id.* (stating that lack of consent is rare).

26. Candace Crandall, *Will AIDS Guidelines Work?*, WASH. TIMES, July 31, 1991, at G3; *see id.* (discussing the issues involved with HIV testing of patients as well as health care providers); Larry O. Gostin, *Public Health Strategies for Confronting AIDS*, 261 JAMA 1621, 1625 (1989) (discussing the provisions in some states for requiring nonconsensual HIV testing in the case of a significant exposure, and the possibility of an invasion of privacy). *See generally* Kelly A. Bennett, Legislative Note, *Mandatory AIDS Testing: The Slow Death of Fourth Amendment Protection?*, 20 PAC. L.J. 1413, 1422-35 (1989) (discussing the impact of constitutional standards on mandatory AIDS testing legislation); Mary Edmondson, Comment, *Public Health: Private Rights and Public Health: Oklahoma AIDS Legislation and Guidelines for Policy*, 45 OKLA. L. REV. 549, 549-65 (1992) (addressing the issue of nonconsensual testing based on statutory law in Oklahoma and other states); Robert C. Waters, *Florida's Involuntary AIDS Testing Statutes*, 19 FLA. ST. U.L. REV. 369 (1991) (discussing the constitutionality of involuntary AIDS testing).

27. U.S. CONST. amend. IV; *see* CAL. CONST. art. I, § 13 (incorporating the Fourth Amendment into the California Constitution); *id.* § 19 (providing for an express right of privacy).

28. 389 U.S. 347 (1967).

29. *Id.* at 361 (Harlan, J., concurring); *see* California v. Ciraolo, 476 U.S. 207, 211 (1986); Smith v. Maryland, 442 U.S. 735, 740 (1979) (approving and applying the two-prong test set out by Justice Harlan).

30. 384 U.S. 757 (1966).

31. *Id.*; *see id.* at 772 (holding that under the facts of the case, the blood testing did not constitute an unreasonable search).

32. For examples of cases in which the Supreme Court has made this distinction and declared that administrative searches lack the traditional safeguards of the Fourth Amendment, see O'Conner v. Ortega, 480 U.S. 709 (1987); Camara v. Municipal Ct., 387 U.S. 523 (1967).

include searches conducted for the purpose of regulating public health and safety.[33] As Chapter 708 is aimed at public safety[34] and not at criminal investigations, a search conducted pursuant to its provisions would likely be considered an administrative search. In *O'Conner v. Ortega*,[35] the Court restated the test used in *Camara v. Municipal Court*[36] to determine the reasonableness of a search pursuant to an administrative investigation.[37] The test requires a balancing of the government interest and the intrusion on the individual.[38]

In the interests of public health and safety, the Supreme Court has upheld mandatory drug and alcohol testing of employees.[39] In *Skinner v. Railway Labor Executives' Ass'n*,[40] the Court held that the mandatory testing of blood and urine for the detection of drugs is not an unreasonable search upon railroad employees.[41] There, the Court held that the government had a substantial interest in maintaining the safety of the railroads and that this interest outweighed the burden of the drug test upon the employees.[42] On the same day *Skinner* was decided, the Supreme Court also held in *National Treasury Employees Union v. Von Raab*,[43] that mandatory urinalysis for the presence of drugs is not an unreasonable search upon United States Customs personnel.[44] As the Court decided both of these cases in the context of the compelling government interest of public health and safety, it is likely that Chapter 708 will be upheld for similar reasons.

California courts have likewise upheld the reasonableness of an administrative search where the government interest is the protection of public health and safety.[45] For example, at least one California state court has upheld the reasonableness of mandatory testing of prostitutes suspected of being infected

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33. *Camara*, 387 U.S. at 534; *see id.* (stating that a search for housing code violations conducted by a state health department inspector is an administrative search).

34. *See* ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 1239, at 4 (July 28, 1994) (discussing the benefits of a health care provider learning the HIV status of a patient to whom he or she has been exposed).

35. 480 U.S. 709 (1987).

36. 387 U.S. 523 (1967).

37. *O'Conner*, 480 U.S. at 724-25; *Camara*, 387 U.S. at 536-37.

38. *O'Conner*, 480 U.S. at 724-25; *Camara*, 387 U.S. at 536-37; *see* New York v. Burger, 482 U.S. 691, 702-03 (1987) (holding that warrantless searches of a closely regulated industry are not unreasonable as long as the government interest is substantial, the searches are necessary to further a regulatory scheme, the owner is advised of the search, and the searching officers' discretion is limited).

39. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

40. 489 U.S. 602 (1989).

41. *Id.* at 602.

42. *Id.*

43. 489 U.S. 656 (1989).

44. *National Treasury Employees Union*, 489 U.S. at 677; *see id.* (stating that the government has a compelling interest in safeguarding its borders; therefore drug testing is reasonable).

45. *Camara*, 387 U.S. at 535; *see* Ingersoll v. Palmer, 43 Cal. 3d 1321, 1347, 743 P.2d 1299, 1317, 241 Cal. Rptr. 42, 60 (1987) (holding that sobriety checkpoints are not unreasonable because the government interest in maintaining safe roadways outweighs the intrusiveness of the search).

with a communicable disease.[46] However, another California court held that the mandatory testing of persons arrested for violating an ordinance prohibiting sexual intercourse in a hotel with a person not his or her spouse was unreasonable.[47]

While neither the United States nor the California Supreme Court has measured the issue of mandatory AIDS or HIV testing against the *Camara* balancing test, other federal courts have encountered the matter.[48] In *Glover v. Eastern Nebraska Community Office of Retardation*,[49] a Nebraska federal district court held that where the risk of transmission of the HIV virus is extremely low, mandatory testing aimed at maintaining a safe work environment is unreasonable.[50] However, in *Leckelt v. Board of Commissioners*,[51] the Fifth Circuit Court of Appeals upheld a hospital's policy requiring an employee to disclose the results of his HIV test.[52] The *Leckelt* court, seemingly in the spirit of the *O'Conner* and *Camara* balancing test, stated that the policy was justified due to a strong government interest in maintaining a safe workplace.[53]

The survival of Chapter 708 against constitutional scrutiny is uncertain. The provisions of Chapter 708 will invariably be subject to the *O'Conner* and *Camara* balancing test. Under this analysis, the government interest in maintaining a safe work environment for health care providers and emergency medical personnel will very likely outweigh the intrusive nature of the blood test.

*Jonathan P. Hobbs*

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46. *In re* Clemente, 61 Cal. App. 666, 667, 215 P. 698, 698 (1923).
47. *Ex parte* Dillon, 44 Cal. App. 239, 243-45, 186 P. 170, 172 (1919); *see id.* (stating that there must be some suspicion that the person to be tested is infected).
48. Glover v. Eastern Neb. Community Office of Retardation, 686 F. Supp. 243, 250-51 (D. Neb. 1988), *aff'd.* 867 F.2d 461 (8th Cir. 1988), *cert. denied*, 493 U.S. 932 (1989); Leckelt v. Board of Comm'rs, 909 F.2d 820 (1990).
49. 686 F. Supp. 243 (D. Neb 1988).
50. *Id.* at 250-51.
51. 909 F.2d 820 (1990).
52. *Id.* at 832-33.
53. *Id.*

## Health and Welfare; physician assistants—dispensing drugs

Business and Professions Code §§ 3502.1 (new); 4051.6 (amended).
SB 1642 (Craven); 1994 STAT. Ch. 968

Existing law, the Physician Assistant Practice Act,[1] provides for the licensing and regulation of physician assistants[2] and authorizes licensed physician assistants to perform specified medical services.[3] Existing law also prohibits the furnishing of any dangerous drug or device,[4] except by the prescription of specified

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1. *See* CAL. BUS. & PROF. CODE § 3500.5 (West 1990) (providing that Chapter 7.7, commencing with § 3500 of Division 2 of the California Business and Professions Code will be cited as the Physician Assistant Practice Act).

2. *See id.* § 3501(d) (West Supp. 1994) (defining physician assistant as a person who meets the requirements of Chapter 7.7 of the California Business and Professions Code and is licensed by the Physician Assistant Examining Committee); *see also id.* § 3519 (West 1990) (requiring that the Physician Assistant Examining Committee issue a license to all physician assistant applicants who meet the following requirements: (1) Provide evidence of completion of an approved program or medical school; (2) pass any required exam; (3) are not subject to denial of license; and (4) pay all required fees).

3. *Id.* § 3502 (West Supp. 1994); *see id.* (stating that a physician assistant can provide medical services set forth by the regulations of the Division of Allied Health Professions of the Medical Board of California but may not perform services in the following areas: (1) Determination of or treatment of refractive states of the human eye; (2) prescribing or using optical devices for ocular exercises, visual training, or orthoptics; (3) prescribing or fitting contact lenses; or (4) dentistry or dental hygiene); *see also id.* § 3502.5 (West Supp. 1994) (allowing a physician assistant to provide the medical services permitted in California Business and Professions Code § 3502 during war or other emergency, without the physician assistant's approved supervising physician available, as long as a licensed physician is available to supervise the physician assistant); CAL. CODE REGS. tit. 16, § 1399.540 (1992) (limiting a physician assistant to providing only those medical services which she or he is competent to perform and which are consistent with the physician assistant's education, training and experience, and which are delegated in writing by a supervising physician who is responsible for the patients cared for by that physician assistant); *id.* § 1399.541 (1992) (providing that pursuant to delegation, and protocols where present, a physician assistant may do the following: (1) Take a patient history; perform a physical exam and make an assessment and diagnosis from the exam; or initiate and revise treatment and therapy plans; (2) order or transmit an order for various studies, therapies or procedures; (3) instruct and counsel patients regarding their physical and mental health; (4) make referrals to other health facilities and community agencies; (5) administer medication to the patient or transmit orally, or in writing on a patient's record, a prescription from her or his supervising physician to a person who may lawfully furnish such medication or medical device; (6) perform surgery customarily performed under local anesthesia; and (7) act as a first or second assistant in surgery under the supervision of an approved supervising physician).

4. *See* CAL. BUS. & PROF. CODE § 4211(a)-(c) (West Supp. 1994) (defining dangerous drugs as any drug or device bearing the legend: "Caution, federal law prohibits dispensing without a prescription" or a similar warning, or any drug or device that by federal or state law can only be dispensed by prescription or pursuant to California Business and Professions Code § 4240); *id.* § 4240 (West 1990) (authorizing the State Board of Pharmacy to adopt regulations limiting or restricting certain drugs upon finding that unrestricted sale is dangerous to public health or safety).

professionals.[5] Chapter 968 authorizes a licensed pharmacist to dispense drugs or dangerous devices upon the order of a physician assistant.[6]

Chapter 968 provides that a physician assistant may provide medication to a patient, or transmit orally or in writing a prescription from his or her supervising physician to a person who may lawfully furnish the medication or medical device.[7] Prescription transmittal authority may be limited by the supervising physician who delegated the authority.[8] Chapter 968 further mandates that each physician who delegates prescription transmittal authority must have in place a practice specific protocol and formulary.[9] The physician assistant must base any prescription he or she transmits on the protocol and formulary, unless the prescription is based on an order given by the supervising physician for a particular patient.[10] Chapter 968 further limits a physician assistant's prescriptions

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5. *Id.* § 4227 (West Supp. 1994); *see id.* (providing that dangerous drugs or devices be furnished only upon the prescription of a physician, dentist, podiatrist, or veterinarian); *see also id.* § 4036(a) (West Supp. 1994) (defining prescription as an oral or written order given by a physician, dentist, podiatrist, or veterinarian for a drug or device for specified individuals or an individual); *id.* § 4050 (West 1990) (forbidding any person from providing any dangerous drug unless he or she is a registered pharmacist under the provisions of Chapter 9, commencing with California Business and Professions Code § 4000, or otherwise provided for by law); *id.* § 4050.5 (West 1990) (providing that manufacturers, wholesalers, or licensed public health laboratories are exempt from California Business and Professions Code § 4050); *id* § 4051 (West Supp. 1994) (allowing a prescriber, defined as a person who is a certified physician and surgeon or podiatrist and is registered as such by the Medical Board of California or the Osteopathic Medical Board of California, to dispense drugs or dangerous devices only if the following conditions are met: (1) The drugs are dispensed to the prescriber's own patient and not furnished by a nurse or attendant; (2) the drugs or devices are necessary in the treatment of the condition for which the prescriber is treating the patient; (3) the prescriber does not keep a pharmacy or drug store of any kind; (4) the prescriber meets all labeling requirements imposed on pharmacists, as well as record keeping and packaging requirements; and (5) a dispensing device is not used unless personally owned by the prescriber); *id.* § 4051.6 (amended by Chapter 968) (providing that a licensed pharmacist may dispense drugs or devices upon the order of a nurse practitioner); 57 Op. Cal. Att'y Gen. 93, 94 (1974) (concluding that under appropriate supervision by a physician, a registered nurse may assist a physician in the furnishing of drugs to the physician's patients).

6. CAL. BUS. & PROF. CODE § 3502.1 (enacted by Chapter 968).

7. *Id.* § 3502.1(a) (enacted by Chapter 968); *cf.* MASS. GEN. LAWS ANN. ch. 112, § 9E (West Supp. 1994) (allowing physician assistants to issue written prescriptions for patients); OR. REV. STAT. § 677.515 (1993) (providing that, with appropriate approval, physicians may delegate the authority to administer and dispense emergency medications and to prescribe medications).

8. CAL. BUS. & PROF. CODE § 3502.1(a)(1) (enacted by Chapter 968); *see id.* (providing that the supervising physician may specify the manner in which the physician assistant may transmit prescriptions).

9. *Id.* § 3502.1(a)(2) (enacted by Chapter 968).

10. *Id.* § 3502.1(b) (enacted by Chapter 968); *see id.* § 3502.1(b)(1) (enacted by Chapter 968) (providing that at the direction of and under the supervision of a physician, a physician assistant may hand a patient of the supervising physician a properly labeled prescription drug pre-packaged by a physician, a manufacturer as defined in the Pharmacy law, or a pharmacist); *id.* § 4047.5 (West 1990) (mandating that containers of prescription drugs contain the following information: (1) Name of drug and manufacturer; (2) directions for use of drug; (3) patient's name; (4) prescriber's name; (5) date issued; (6) name and address of furnisher and prescription number; (7) strength of drug; (8) quantity of drug; (9) expiration date of drug; and (10) condition for which drug was prescribed); *see also id.* § 3502.1(b)(2) (enacted by Chapter 968) (prohibiting a physician assistant from administering or providing a prescription for Schedule II through Schedule V controlled substances without an order by a supervising physician for the particular patient); CAL. HEALTH & SAFETY CODE § 11055 (West 1991) (listing Schedule II controlled substances); *id.* § 11056 (West Supp. 1994) (listing Schedule III controlled substances); *id.* § 11057 (West Supp. 1994) (listing Schedule IV controlled substances); *id.* § 11058 (West 1991) (listing Schedule IV controlled substances).

to a reasonable quantity consistent with the customary medical practice of the supervising physician's practice.[11]

Chapter 968 provides that when transmitting an order, the physician assistant is acting as an agent of the supervising physician.[12] Chapter 968 requires that specific information be contained on a transmittal order by a physician assistant, including the name of the supervising physician.[13] Chapter 968 further requires that the supervising physician review and countersign the medical record of any patient cared for by the physician assistant for whom the supervising physician's prescription has been transmitted or carried out.[14]

## INTERPRETIVE COMMENT

The physician assistant is a category of health care professional developed to help relieve the shortage and uneven distribution of health care services in California.[15] The prescription transmittal authority granted by Chapter 968 is considered to be critical in enabling the physician to fully utilize the physician assistant and in making full use of the physician assistant's skill and training.[16]

Chapter 968 codified state medical board regulations which authorize physician assistants to administer medication to a patient and to transmit a prescription from his or her supervising physician, orally or in writing, on a patient's medical record.[17] Chapter 968 goes further by authorizing physician assistants to transmit an order on a prescription blank containing specified information.[18]

*Bonnie M. George*

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11. CAL. BUS. & PROF. CODE § 3502.1(b)(3) (enacted by Chapter 968).

12. *Id.* §3502.1(c) (enacted by Chapter 968); *see* CAL. CODE REGS. tit. 16, § 1399.541 (1992) (providing that a physician assistant acts as an agent of his or her supervising physician); *cf.* Washington State Nurses Assoc. v. Board of Medical Examiners, 605 P.2d 1269, 1271 (Wash. 1980) (holding that physician.assistants act as agents of the supervising physician rather than as independent practitioners).

13. CAL. BUS. & PROF. CODE § 3502.1(c) (enacted by Chapter 968); *see id.* (requiring the transmittal order to contain, along with the supervising physician's name, his or her address and phone number, the printed or stamped name and license number of the physician assistant, and the signature of the physician assistant).

14. *Id.* § 3502.1(d) (enacted by Chapter 968).

15. *Id.* § 3500 (West 1990); *see id.* (declaring the legislative purpose in creating the Physician Assistants position).

16. SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 1642, at 2-3 (Apr. 11 1994).

17. *See* CAL. CODE REGS. tit. 16, § 1399.541(h) (1992) (providing that a physician assistant may administer medication to a patient, or transmit orally, or in writing on a patient's record, a prescription from his or her supervising physician to a person who may lawfully furnish such medication or medical device).

18. CAL. BUS. & PROF. CODE § 3502.1(c) (enacted by Chapter 968); *see id.* (requiring the transmittal order to contain, along with the supervising physician's name, his or her address and phone number, the printed or stamped name and license number of the physician assistant, and the signature of the physician assistant).

**Health and Welfare; propane distribution systems—safety inspections**

Public Utilities Code §§ 4451, 4452, 4453, 4454, 4454.5, 4455, 4456, 4457, 4458, 4459, 4460, 4461 (new); Revenue and Taxation Code §§ 42000, 42001, 42003, 42004 (new).
AB 766 (Hauser); 1994 STAT. Ch. 388

Existing law defines a gas plant as all facilities for the production, generation, transmission, delivery, underground storage, or furnishing of natural or manufactured gas except propane for the purposes of regulation by the California Public Utilities Commission (CPUC).[1]

Chapter 388 requires that the CPUC conduct safety inspections for particular propane systems[2] to ensure compliance with federal pipeline standards.[3] The CPUC has the authority to assure compliance with federal regulations by adopting rules and regulations at least as stringent or more so than the federal standards.[4]

INTERPRETIVE COMMENT

Prior to 1979, propane distribution systems were regulated by the CPUC.[5] However due to the existence of federal regulations, the systems were deregulated.[6] Chapter 388 was enacted in response to recent explosions in California that may have been prevented had inspections been performed to ensure compliance with the federal standards.[7]

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1. CAL. PUB. UTIL. CODE § 221 (West Supp. 1994); *see id.* §§ 301-325 (West 1975 & Supp. 1994) (setting forth the provisions of the California Public Utilities Commission (CPUC)); SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES, COMMITTEE ANALYSIS OF AB 766, at 1 (Apr. 19, 1994) (stating that the CPUC is responsible for regulating investor-owned energy utilities and that up until 1979, propane services were regulated by the CPUC).

2. *See* CAL. PUB. UTIL. CODE § 4451(b) (enacted by Chapter 388) (defining distribution system as a system of pipes, operated by a person or corporation other than a public utility, serving 10 or more customers, within a citywide area, an apartment house, a condominium, a cluster of homes, a shopping center, a combination of the above, or a mobilehome park with two or more customers, that is connected to tank or tanks, for the purpose of distribution of propane to the end customers); *see also id.* § 4452(c) (enacted by Chapter 388) (exempting single customers served by single tanks; distribution systems, other than mobilehome parks, that serve less than 10 customers; recreational vehicles and appliances; vehicular fuel; agricultural, industrial, and refinery systems where if commercial, it serves less than 10 customers; and cylinder exchange operations from the CPUC safety inspection and enforcement program).

3. *Id.* § 4452(a) (enacted by Chapter 388); *see id.* (stating that on or before July 1, 1995 the commission must undertake a propane safety inspection and enforcement program); *see also id.* 4451(g) (enacted by Chapter 388) (defining federal pipeline standards as defined in 49 U.S.C. §§ 1671-1688, otherwise known as the Federal Natural Gas Pipeline Safety Act of 1968, and 49 C.F.R. § 190-192 (1993)).

4. CAL. PUB. UTIL. CODE § 4452(a) (enacted by Chapter 388); *see id.* § 4452(b)(1)-(2) (enacted by Chapter 388) (outlining the authority of the CPUC inspectors).

5. *See* SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES, COMMITTEE ANALYSIS OF AB 766, at 1 (Apr. 19, 1994).

6. *Id.*

7. *See id.* at 1-2; *see also* Catherine Gibbs, *Claim Filed in Truckee Explosion*, SACRAMENTO BEE, May 21, 1994, at B5 (indicating that an explosion occurred because a leaky ball valve did not conform to an applicable code); Ed Jahn, *Building, Zoning Code Crackdown Angers Many Residents of Tecate*, SAN DIEGO

Chapter 388's opposition fought the bill arguing that programs of the Division of Industrial Safety,[8] the fire marshall[9], and the programs of the counties and states were sufficient to ensure the safety of propane facilities.[10]

*Marnie I. Smith*

## Health and Welfare; redevelopment agencies—graffiti eradication

Health and Safety Code § 33420.2 (new).
SB 1515 (Hughes); 1994 STAT. Ch. 381

Existing law, known as the Community Redevelopment Law,[1] provides for the establishment of redevelopment agencies[2] to address the effects of blight[3] in

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UNION-TRIB., Apr. 30, 1994, at B4 (explaining that one California town lacks conformation with propane regulations, among other things, because of irregular inspections). *But see* Jennifer Warren, *Winter of Discontent in the High Sierra*, L.A. TIMES, Mar. 29, 1993, at A3 (indicating that at least eight people had died in the winter of 1993 due to propane explosions caused by frozen propane regulators); *cf.* Catherine Gibbs, *Delay in Fuel Plans for Truckee*, SACRAMENTO BEE, May 2, 1994, at B1 (explaining that propane systems have regulators as well as tanks at residences and that both must be kept clear of snow and ice buildup which can cause damage and possible leaks).

8. *See* CAL. LAB. CODE §§ 140-147.2 (West 1989 & Supp. 1994) (setting forth provisions governing the Division of Occupational Safety and Health); *see also id.* § 60.5(e) (West 1989) (indicating that the Division of Industrial Safety has been abolished and the Division of Occupational Safety and Health is its successor).

9. *See* CAL. HEALTH & SAFETY CODE §§ 13100-13135 (West 1984 & Supp. 1994) (outlining the provisions governing the state Fire Marshall).

10. SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES, COMMITTEE ANALYSIS OF AB 766, at 2 (Apr. 19, 1994).

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1. *See* CAL. HEALTH & SAFETY CODE §§ 33000-33738 (West 1973 & Supp. 1994) (providing the Community Redevelopment Law).

2. *See id.* § 33100 (West 1973) (establishing community redevelopment agencies); *see also id.* § 33020 (West Supp. 1994) (defining redevelopment as the planning, development, replanning, redesign, clearance, reconstruction, or rehabilitation of a survey area, and the provision of residential, commercial, industrial, public, or other structures or spaces as appropriate or necessary to the interest of general welfare, including recreational and other facilities incidental or appurtenant to them); Pacific States Enter., Inc. v. City of Coachella, 13 Cal. App. 4th 1414, 1425, 17 Cal. Rptr. 2d 68, 73-74 (1993) (stating that when a dual capacity legislative body is acting as both the governing board of a redevelopment agency and as the legislative body of the community, the redevelopment agency and community are not one in the same governmental entity); Redevelopment Agency of San Francisco v. Cooper, 267 Cal. App. 2d 70, 75-76, 72 Cal. Rptr. 557, 560 (1986) (stating that the elimination of blighted areas by redevelopment finds its constitutional basis in protecting the public health, morals, safety and general welfare).

3. *See* CAL. HEALTH & SAFETY CODE § 33030 (West 1974 & Supp. 1994) (defining blight to include areas which are predominately urbanized and hindered by factors which prevent or substantially impair the economic viability of the area); Gonzales v. City of Santa Ana, 12 Cal. App. 4th 1335,1342-43, 16 Cal. Rptr. 2d 132, 136 (1993) (stating that redevelopment under community redevelopment law requires that the proposed area be blighted); Morgan v. Community Redevelopment Agency of Los Angeles, 231 Cal. App. 3d 243, 254-58, 284 Cal. Rptr. 745, 750-53 (1991) (stating that if a community redevelopment agency and the city decided that a particular area was blighted, the decision would be upheld on judicial review if it is supported by

communities designated as project areas.[4]

Chapter 381 authorizes the redevelopment agency in a project area to take any actions it deems necessary to remove graffiti[5] from public and private property, when it finds that the particular blight is of such magnitude that action must be taken to further the objective of the redevelopment plan.[6]

## INTERPRETIVE COMMENT

Chapter 381 is aimed at stemming the flood of graffiti.[7] The blight caused by the presence of graffiti detracts from the community's welfare and utility.[8] The Legislature maintains that the eradication of graffiti will add to the overall welfare of the community.[9] The gravity of the Legislature's concern in ending graffiti is

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substantial evidence), *cert. denied*, 112 S.Ct. 1476 (1991); Fellom v. Redevelopment Agency of San Francisco, 157 Cal .App. 2d 243, 248, 320 P.2d 884, 888 (1958) (stating that legislative decisions concerning the presence of blight are not binding on the court, but should be given great weight by the court, and that courts should not interfere with such legislative findings unless they clearly appears to be erroneous and without reasonable foundation), *appeal dismissed*, 358 U.S. 56 (1958).

4. CAL. HEALTH & SAFETY CODE §§ 33000-33738 (West 1973 & Supp. 1994); *see id.* § 33320.1 (West 1973 & Supp. 1994) (defining project area as an area that is a predominately urbanized portion of the community which is blighted, the redevelopment of which is deemed necessary to effectuate the public purpose, and which has been selected by the planning commission pursuant to California Health and Safety Code § 33322); *id.* § 33320.1 (West 1974 & Supp. 1994) (defining predominantly urbanized to mean that not less than 80% of the community is in the project area); *id.* § 33322 (West 1973) (setting forth the process of selecting a project area).

5. *See* CAL. EVID. CODE § 1410.5 (West Supp. 1994) (defining graffiti as a writing which consists of written words, an insignia, symbol, or any other marking which conveys a particular meaning); *cf.* N.Y. PENAL LAW § 145.60 (McKinney Supp. 1994) (defining graffiti in a similar manner).

6. CAL. HEALTH & SAFETY CODE § 33420.2(b) (enacted by Chapter 381).

7. SENATE COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF SB 1515, at 1 (Apr. 6, 1994).

8. *Id.* at 2; *see* John Woolfolk, *San Jose Tries Again to Control Graffiti Proposal to Make it Harder to Get Spray Paint*, S.F. CHRON., Apr. 27, 1993, at A15 (reporting that San Jose spends roughly $100,000 per year to clean up graffiti). Additionally, the story reports that Los Angeles incurs costs of $50 million a year to remove graffiti. *Id.*; *see also* Jerry Gillam, *Assembly Bill Would Make Graffiti a Paddling Offense*, L.A. TIMES, May 25, 1994, at A24 (stating that people's frustration with graffiti prompted the sponsorship of a bill making graffiti an offense punishable by paddling); *Lasers May Zap Graffiti*, SACRAMENTO BEE, June 25, 1993, at B3 (reporting that the State's frustration with graffiti is prompting the development of new technologies aimed at removing the visual effects of vandalism); Mary F. Pols, *New Business Can Semigloss Over Your Graffiti Problem*, SEATTLE TIMES, Feb. 11, 1994, at B3 (stating that people are so tired of graffiti that they are beginning to employ private companies to remove the blight from their walls, thus, being individually compelled to incur additional costs).

9. *See* SENATE COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF SB 1515, at 1 (Apr. 6, 1994) (stating the legislative intent of increasing property values, as well as social welfare, through the prevention and removal of graffiti).

seen in Chapter 381's provision giving redevelopment agencies broad authority to take whatever steps they deem necessary to stop its spread.[10]

*Christian A. Ameri*

## Health and Welfare; required emergency procedure information—apartment houses

Health and Safety Code § 13222 (repealed); § 13220 (amended).
SB 1777 (Thompson); 1994 STAT. Ch. 1292

Existing law requires the owner or operator of any privately owned high-rise structure,[1] any office building two stories or more in height, or any hotel or motel, to provide persons entering those buildings with specific emergency procedures to be followed in the event of fire.[2] Existing law also requires that in hotels and motels, the emergency procedure information must be posted in a conspicuous place in every room available for rental, or provided by certain other means.[3] Under existing law, in high-rise structures or office buildings, the emergency procedure information must be made available in an area of the structure which

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10. CAL. HEALTH & SAFETY CODE § 3340.2 (b) (enacted by Chapter 381); *see* Jeff Schnaufer, *East Valley Focus: North Hollywood; Grants to Help New Buyers Fix up Homes*, L.A. TIMES, July 26, 1994, at B2 (stating that the Los Angeles Community Redevelopment Agency approved grants of up to $7500 to first-time home buyers). *But see* Jon. C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 754-55 (1993) (stating that despite the elimination of blight being a noble goal, federal slum clearance and highway projects have resulted in the uprooting of thousands of African-Americans, and has resulted in their relocation to segregated and inferior areas); Richard Simon, *Local Elections / L.A. Mayor; Candidates Cultivate Fine Art of the Spiel*, L.A. TIMES, Mar. 20, 1993, at A20 (speaking critically of Los Angeles' Community Redevelopment Agency, stating that it has simply turned out to be a tax rip-off through the misallocation of funds on useless projects).

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1. *See* CAL. HEALTH AND SAFETY CODE § 13210(b) (West 1984) (defining high-rise structure as every building of any type of construction or occupancy having floors used for human occupancy located more than 75 feet above the lowest floor level having building access, except buildings used as hospitals).

2. *Id.* § 13220(a) (amended by Chapter 1292); *see id.* (mandating that the required emergency information must include procedures for handicapped and nonambulatory persons); *id.* § 13221 (West 1984) (requiring the State Fire Marshal to adopt regulations for the furnishing of emergency procedure information, which may include the general contents of brochures, pamphlets, signs, or videotapes used in furnishing emergency procedure information, but must provide for at least the following: (1) A reference to the posting of exit plans for the structure; (2) a general explanation of the structure's fire alarm system; and (3) other fire emergency procedures).

3. *Id.* § 13220(c) (amended by Chapter 1292); *see id.* (describing other means by which emergency information may be provided, such as through the use of brochures, pamphlets, videotapes, or other methods pursuant to regulations adopted by the State Fire Marshal).

is easily accessible to all persons entering the structure.[4] Any violation of these requirements is a misdemeanor under existing law.[5]

Chapter 1292 adds the requirement that the owner or operator of any apartment house two stories or more in height that contains three or more dwelling units where the front door opens into an interior hallway or lobby area must provide emergency procedure information to persons entering those buildings.[6] Chapter 1292 also requires that in hotels, motels, and apartment houses, the emergency procedure information must be posted in a conspicuous place in every room or apartment house available for rent, or, at the option of the hotel or motel operator, or apartment house owner, it must be provided by certain other means pursuant to regulations adopted by the State Fire Marshal.[7] Chapter 1292 commands that the owner or operator of an apartment house, where more than 25% of the occupants do not read English, is required to provide the emergency procedure information in the language or languages understood by at least 25% of the occupants.[8] Chapter 1292 further requires that an owner, operator, translator, or transcriber who provides emergency procedure information in good faith and without gross negligence will be held harmless for any errors in the translation or transcription of the information.[9]

## INTERPRETIVE COMMENT

Chapter 1292 was enacted in order to allow the dissemination of life-saving information to more people while not overburdening apartment owners and building managers.[10] The information required by Chapter 1292 can reduce the

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4. *Id.* § 13220(d) (amended by Chapter 1292); *see id.* (directing that the emergency procedure information be placed in an area of the structure designated pursuant to the regulations of the State Fire Marshal).

5. *Id.* § 13223 (West 1984); *see id.* (declaring that any person who violates the emergency procedure provisions, relating to hotels and motels, is guilty of a misdemeanor and upon conviction will be punished by a fine not to exceed $10,000 or imprisonment in the county jail not to exceed six months, or both).

6. CAL. HEALTH AND SAFETY CODE § 13220(a)(3) (amended by Chapter 1292); *see id.* § 13220(e) (amended by Chapter 1292) (providing that in the case of apartment houses as described in paragraph (a)(3) of this statute, this section will become operative on July 1, 1995).

7. *Id.* § 13220(c) (amended by Chapter 1292); *see id.* (suggesting that brochures, pamphlets, and video tapes are examples of means that are acceptable for the transmission of emergency procedure information).

8. *Id.* § 13220(b) (amended by Chapter 1292).

9. *Id.* § 13220(f) (enacted by Chapter 1292); *see id.* (noting that this limited immunity will apply only to errors in translation or transcription and not to the failure to provide the information that is required pursuant to this section).

10. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS of SB 1777, at 2 (June 15, 1994); *see id.* (noting that the California State Firefighters Association believes that in the event of a fire or other emergency, persons who do not speak English deserve to have a chance to escape to a place of safety); *see also id.* (stating that the Western Center on Law and Poverty has asserted that nearly all of its clients are impoverished tenants who by necessity live in large, older, poorly maintained rentals which too frequently are the site of tragic fires).

threat of injury during an emergency situation, especially to visitors of the tenants in such buildings.[11]

The United States has consistently had one of the world's highest fire death rates in the last few decades, and it is estimated that 6,000 people die yearly in U.S. fires, while 60,000 are injured and require medical attention.[12] In California, audits of Los Angeles apartment buildings were conducted after the 1993 Westlake apartment building fire killed ten people, and the vast majority of apartments and residential hotels were found to be in violation of fire safety codes.[13] As a result, lawmakers are beginning to focus on more effective fire prevention measures while also realizing that an increase in civil tort litigation cases has contributed to the trend toward implementing life safety and security measures in residential buildings.[14] An array of statutes across the country provides examples of the types of protections that legislatures can create in order to save lives.[15]

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11. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1777, at 2 (Apr. 28, 1994); *see id.* (emphasizing that 10 people, mostly children, perished during the Westlake fire in Los Angeles and that perhaps some of the panic could have been avoided if tenants had been aware of the emergency procedures in advance of the fire).

12. Gina Kolata, *U.S. Leads World in Fire Deaths; Experts Blame Ignorance of the Population and Look to Computers as an Answer*, WASH. POST, Feb. 3, 1987, at Z10; *see id.* (noting that fires cost the country $30 billion a year and kill more Americans than all other natural disasters combined, and that fire injuries typically necessitate an expensive hospital stay of one to two months for serious burns).

13. Robert J. Lopez, *Audits Find Fire Violations in Most L.A. Apartments*, L.A. TIMES, Oct. 7, 1993, at 1; *see id.* (estimating that, based on inspections of 460 randomly selected buildings across the city of Los Angeles, 70% of the multi-unit buildings were in violation of fire codes; 36% had not undergone the required annual inspections; in areas with the most emergency calls, such as Pico Union/Westlake and South-Central Los Angeles, the rate rose to as high as 68%; and firefighters in general needed more fire prevention training).

14. Allan D. Rosenberg, *Life Safety Plans New Residential Priority; Life Safety Building Codes Imposed on Commercial Buildings by New York*, REAL EST. WKLY., July 7, 1993, at 18; *see id.* (stating that cooperative and condominium boards and private building owners are being held liable for accidents and assaults occurring in their buildings that may have resulted from inadequate security, maintenance, or fire procedures).

15. CAL. EDUC. CODE § 32001 (West 1994); *see, e.g., id.* (requiring every public, private, or parochial school building having an occupant capacity of 50 or more students or more than one classroom to be provided with a dependable and operative fire warning system); CAL. HEALTH AND SAFETY CODE § 13113.7 (West Supp. 1994) (mandating that smoke detectors be provided for all dwelling units intended for human occupancy); CONN. GEN. STAT. ANN. § 29-292(a) (West 1990) (requiring that the smoke detection and warning equipment installed in residential buildings must be capable of sensing visible or invisible smoke particles); LA. REV. STAT. ANN. § 14-206 (West 1986) (declaring that the destruction or defacement of fire warning notices or posters is a crime known as fire prevention interference which can result in a fine of not more than $500, or imprisonment for a period of not more than six months, or both); MD. ANN. CODE art. 38A, § 53A(a)(1)-(3) (Michie 1993) (providing that fire safety information in hotels, motels, and lodging houses must state the following: Locations of nearest exits and fire-pull stations; procedures to be followed when the fire or smoke detector gives warning signals; and procedures to be followed in the event of fire or smoke development); NEV. REV. STAT. ANN. § 477.150 (Michie 1994) (dictating that rooms primarily used for sleeping in hotels, motels, offices, or apartment buildings must have posted in a prominent location an explanation of the route to use for evacuation of the building); N.J. STAT. ANN. § 55:13A-7.7(a)(1)-(3) (West Supp. 1994) (listing the information that must be posted in hotels as the following: The location of the nearest exits and fire alarms; the procedures to be followed when a smoke or fire alarm sounds; and the procedures to be followed in the event of fire or smoke); N.Y. EXEC. LAW § 378 (McKinney 1993) (discussing the standards for New York State's uniform fire prevention and building code); OHIO REV. CODE ANN. § 3781.10.4(A)(1) (Anderson 1992) (requiring smoke detectors to be clearly audible in all bedrooms within the dwelling unit when all intervening doors are closed);

Opposition to Chapter 1292 is based on the belief that requiring emergency information to be provided in a language other than English, if a large number of residents speak another language, may not enhance fire safety; some people who are non-English speakers may not be literate in their native tongue, especially recently emigrated young children.[16]

The California Apartment Association argues that Chapter 1292 will not enhance or improve the safety of residents, but the foreign language requirement of the law will instead present difficult, if not insuperable, logistical problems.[17]

*Joseph A. Tommasino*

**Health and Welfare; schoolage day care providers—education requirement alternatives**

Health and Safety Code §§ 1597.20, 1597.21 (new).
SB 1678 (Hart); 1994 STAT. Ch. 848

Existing law sets forth provisions for the licensure and regulation of different types of child care facilities, including day care centers,[1] schoolage child day care centers,[2] and family day care homes.[3] Existing law also sets forth the education

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OR. REV. STAT. §479.080(1) (1987) (describing an electric red or green exit light, of a type approved by the State Fire Marshal, that must be placed in full view of hallways showing the location of fire escapes); R.I. GEN. LAWS § 23-33-22.1 (1989) (providing that a conspicuous warning sign stating "In Case of Fire Do Not Use Elevator" must be placed next to the places of ingress or egress to every elevator used for conveying persons or goods in any building used primarily as a nursing home or as a home for the elderly and or handicapped).

16. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF SB 1777, at 4 (June 15, 1994); *see id.* (noting that some languages do not easily translate into other languages and, thus, the fidelity of the translation may be in question); *id.* (questioning how the owner or operator of an apartment house could perform an accurate survey of all occupants to determine their English language capability for translation purposes); *see also* Gregory C. Parliman & Rosalie J. Shoeman, *National Origin Discrimination or Employer Prerogative? An Analysis of Language Rights in the Workplace*, 9 EMPLOYEE REL. L.J. 51, 51 (1994) (stating that according to the United States Census, more than 31.8 million people in the United States speak languages other than English, and this statistic represents a dramatic rise since the 1980 Census, which revealed 23.1 million non-English speakers). *See generally id.* (noting that, concurrent with this rise in the percentage of non-English and multilingual speakers in this country, a growing trend that seeks to preserve the English language has been born).

17. ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, COMMITTEE ANALYSIS OF SB 1777, at 3 (June 15, 1994); *see id.* (speculating on the potential liability of an apartment owner being substantially increased as SB 1777 creates several new claims which may be asserted).

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1. *See* CAL. CODE REGS. tit. 22, § 101152(d)(1) (1994) (defining day care center as any child day care facility of any capacity, other than a family day care home, in which less than 24-hour per day non-medical care and supervision is provided for children in a group setting).

2. *See id.* § 101452(s)(2) (1994) (defining schoolage child day care center as any facility or part of a facility where less than 24-hour per day non-medical care and supervision are provided in a group setting to schoolage children).

and experience requirements that site directors, teachers, and staff of these facilities must meet.[4] Chapter 848 provides site directors, teachers, and staff of

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3. CAL. HEALTH & SAFETY CODE §§ 1596.70-1596.895 (West 1990 & Supp. 1994); *see id.* (setting forth the provisions of the California Child Day Care Facilities Act); *id.* § 1596.81 (West 1990) (providing that the State Department of Social Services must adopt any rules and regulations necessary to carry out the California Child Day Care Facilities Act); CAL. CODE REGS. tit. 22, § 102352(f)(1) (1994) (defining family day care as regularly provided care, protection, and supervision of children in the caregiver's own home for periods of less than 24 hours per day while the parents or guardians are away); *see also* CAL. HEALTH & SAFETY CODE § 1597.52 (West 1990) (setting forth licensing requirements for family day care homes); *id.* § 1597.52(b) (West 1990) (specifying that the provider of a family day care home must have at least one year of experience as a regulated small family day care home operator, which can be waived if the applicant has sufficient qualifying experience); CAL. CODE REGS. tit. 22, §§ 101151-101239 (1994) (setting forth the licensing regulations and general requirements for child care facilities); *id.* §§ 101251-101339.2 (1994) (setting forth the regulations and general requirements applicable to day care centers); *id.* §§ 101451-101539 (1994) (setting forth the licensing regulations and general requirements applicable to schoolage child day care centers); *id.* §§ 102351.1-102423 (1994) (setting forth the licensing regulations and general requirements applicable to family day care homes for children); *cf.* N.Y. SOC. SERV. LAW § 390-a (McKinney 1992); N.C. GEN. STAT. § 110-91 (Supp. 1993); OHIO REV. CODE ANN. § 5104.01.1 (Anderson 1993); VT. STAT. ANN. tit. 33, § 3502 (1991) (setting forth rules applicable to child day care centers and promulgating the minimum qualifications required of staff of such facilities). *But see* MO. ANN. STAT. § 210.211(4) (Vernon Supp. 1994) (exempting certain establishments from the requirements otherwise imposed on child care facilities, including boarding schools, nursery schools, summer camps, hospitals, sanitariums, and homes which are conducted primarily to provide education, recreation, medical treatment, or nursing or convalescent care for children); VT. STAT. ANN. tit. 33, § 3502(b)(1) (1991) (exempting facilities from day care requirements which provide care for children of not more than two families other than that of the person providing the care); *id.* § 3502(b)(3) (1991) (exempting from day care requirements day care facilities operated by religious organizations). *See generally* Pre-School Owners Ass'n v. Department of Children and Family Serv., 518 N.E.2d 1018, 1025 (Ill. 1988) (holding that the criteria determinative of whether staff at day care centers possess the skill and competence necessary to work effectively with children are the regulations promulgated under the Illinois Child Care Act); 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent & Child* § 18 (9th ed. 1989) (discussing generally child care and development services); Robert Rector, *Fourteen Myths About Families and Child Care*, 26 HARV. J. ON LEGIS. 517 (1989) (discussing the regulation of child care and the dangers that unregulated care poses to children); Lori Baker, *Who's Watching the Kids?, Untrained Day-Care Workers Put Children at Risk, Study Says*, PHOENIX GAZETTE, June 24, 1993, at B1 (stating that the majority of states have minimal standards, or none at all, to regulate the training of child care workers).

4. CAL. HEALTH & SAFETY CODE § 1597.055 (West Supp. 1994); *see id.* (setting forth the qualification requirements for day care center teachers); *id.* § 1597.055(a)(1)-(3) (West Supp. 1994) (providing that a day care teacher must have completed at least 95 hours of classroom instruction in child care and development and child care occupations and at least 150 hours in supervised field experience in a licensed day care center or comparable group child care program); *see also* George Tobin, *Day Care and the Establishment Clause: The Constitutionality of the Certificate Program in S. 5, the "ABC" Bill*, 12 GEO. MASON U. L. REV. 317, 318 (1990) (discussing the Act for Better Child Care Services, passed by the United States Senate in 1989) *cf.* N.C. GEN. STAT. § 110-91(8) (1989) (providing that the Commission for Health Services must adopt standards to establish minimum qualifications for operators, supervisors, caregivers, and other staff who have direct contact with the children); *id.* (providing that these standards must reflect training, experience, education, or credentialing and must be appropriate for the size of the facility being operated); *id.* (stating that the intent of imposing requirements for minimum qualifications for day care workers is to guarantee that all children in day care are cared for by qualified people, and to recognize that qualifications for good child care may not be limited to formal education or training standards). *But see* State Department of Social Serv. v. Emmanuel Baptist Preschool, 455 N.W.2d 1, 3 (Mich. 1990) (holding that the State may not impede the free exercise of religious beliefs by enforcing the accreditation aspects of program director qualification rule against a church-operated day care center). *See generally* Claudia Feldman, *Who's Watching the Kids?; Lax Rules, Spotty Oversight Open Door to Day-Care Abuses*, HOUST. CHRON., July 19, 1992, at A1 (discussing day care centers in Texas and the regulations which govern them, describing them as substandard); Carin Rubenstein, *Solving the Day- Care Puzzle*, N.Y. TIMES, Apr. 8, 1993, at C2 (discussing day care in general and stating that in the absence of any national day care regulations, each state must formulate its own licensing requirements based

schoolage child care centers with an alternative means of meeting these education and experience requirements.[5] Chapter 848 enables site directors of schoolage child care centers to substitute training hours for education and also sets forth additional types of education that may satisfy the educational requirements for site directors.[6] Chapter 848 also provides teachers at schoolage child care centers with an alternative means of meeting educational requirements, allowing for the substitution of training hours for education.[7] Chapter 848 similarly allows staff of schoolage child care centers to meet requirements through training hours rather than through education.[8] Additionally, Chapter 848 specifies procedures for processing applications from organizations already licensed to operate schoolage

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on different factors, including teacher-child ratios, square footage in centers, and health and safety issues).

5. CAL. HEALTH & SAFETY CODE § 1597.21 (enacted by Chapter 848); *cf.* OHIO REV. CODE ANN. § 5104.01.1(B)(4)(b)(i)-(iv) (Anderson 1993) (providing that the child day care center administrator must show the director evidence of at least high school graduation or its equivalent plus evidence of having completed at least two years of training in an accredited college, university, or technical college, including courses in child development or early childhood education, or at least two years of experience in supervising and giving daily care to children attending an organized group program). *See generally* Baker, *supra* note 3 (stating that the failure of states to require training for staff at day care centers is a national disgrace that has serious consequences for the nation's future).

6. CAL. HEALTH & SAFETY CODE § 1597.21(a) (enacted by Chapter 848); *see id.* (providing that the State Department of Social Services must permit the substitution of 20 training hours for each required unit of education); *id.* § 1597.21(b)(1)-(5) (enacted by Chapter 848) (providing that site directors may fulfill existing regulations by completing nine core units or 180 training hours from the following: Recreation; physical education; human services and social welfare; units earned toward an elementary or middle school teaching credential; or early childhood education, child development, or schoolage child units); *id.* § 1597.21(c) (enacted by Chapter 848) (providing that the State Department of Social Services must expand the list of college degrees that satisfy current site director educational requirements to include degrees in recreation, physical education, human services and social welfare, and education); *cf.* Feldman, *supra* note 4 (discussing standards in Texas for site directors, which allow a 21-year-old with a high school degree and minimal experience to qualify as a site director of a day care center).

7. CAL. HEALTH & SAFETY CODE § 1597.21(d) (enacted by Chapter 848); *see id.* (providing that a teacher may substitute 12 units or 240 training hours in recreation, physical education, human services and social welfare, units earned toward an elementary or middle school teaching credential, and early childhood education, child development, or schoolage child units); *cf.* N.C. GEN. STAT. § 110-91(8) (1989) (providing that the standards adopted by the Commission pertaining to training and educational requirements must include a provision that these requirements may be met by informal as well as formal training and educational experience). *But see* Baker, *supra* note 3 (discussing a national study on child care which recommended that states require at least one three credit course for teachers in day care centers); *id.* (stating that university graduates will look for employment in places other than child care centers because of the low wages earned at child care centers and that people can earn more at McDonalds than in day care); Leah Y. Latimer, *Who's Watching Over the Children? Day Care Training Decried; Experts Decry Ignorance in Care Centers*, WASH. POST, May 17, 1989, at C1 (discussing child care centers and stating that 64 hours of classroom instruction is a shallow requirement in comparison to what experts say should be the standard training for those responsible for the care of infants and preschoolers). *See generally* Nick Chiles, *Child Care All Work, No Pay; Low Salaries Push Teachers Out of System*, NEWSDAY, Sept. 25, 1989, at 8 (discussing teachers in day care centers and stating that teachers are much more likely to take their degrees to the public schools, where they can make more money and receive better benefits).

8. CAL. HEALTH & SAFETY CODE § 1597.21(f)(1)-(3) (enacted by Chapter 848). *See generally* Peter Pitegoff, *Symposium: Poverty Law and Policy: Child Care Enterprise, Community Development, and Work*, 81 GEO. L.J. 1987, 1898 (1993) (discussing the child care enterprise and stating that the quality of care for the children substantially depends on the caregivers and on the quality of their work life).

child day care programs for a license to operate such programs at a functioning schoolsite.[9]

INTERPRETIVE COMMENT

As the number of women in the workplace increases, the number of children who are left on their own after school also increases.[10] Because of the prevalence of children being left alone and because of an increasing reliance on day care services, there is a need to relax the requirements in order to provide children and their families with quality daycare.[11] Although there is a need to ensure that individuals employed at day care centers have the appropriate qualifications, including education and experience, there is also a need to ensure that standards

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9. CAL. HEALTH & SAFETY CODE § 1597.21(g) (enacted by Chapter 848); *see id.* (providing that the Department has 30 days to make a final determination of whether to issue a license to operate the program); *id.* § 1597.21(h)(1) (enacted by Chapter 848) (providing that if the department is unable to make a final determination of whether to issue a license, a provisional license will be issued for a period not to exceed six months); *id.* § 1597.21(h)(1) (enacted by Chapter 848) (specifying that provisional licenses are granted only after, *inter alia*, an on-site visit has been conducted and the fire inspection has been verified); Montessori Schoolhouse v. California Dep't of Social Serv., 120 Cal. App. 3d 248, 256, 175 Cal. Rptr. 14, 18 (1981) (holding that whether a facility is subject to the licensing provisions of the Community Care Facilities Act is dependent on whether the facility provides the kind of services intended to be regulated by the Act); *see also* CAL. HEALTH & SAFETY CODE § 1596.73 (West 1990) (indicating that the purpose of the California Child Day Care Facilities Act is to encourage the development of licensing staff with knowledge and understanding of children and child care needs).

10. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1678, at 3 (May 31, 1994); *see id.* (stating that the Children's Advocacy Institute estimated that there were 560,000 latch-key children between the ages of 5 and 14 in California); *see also* Mary Ann McGovern, *Education and Care in Early Childhood*, OECD OBSERVER, Oct. 1993, at 21 (discussing the increasing numbers of mothers of young children in the labor market and the impact this has upon their children and discussing the importance of educational programs for young children).

11. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1678, at 4 (May 31, 1994); *see id.* (stating that SB 1678 will facilitate schoolage day care programs in the hiring of staff with appropriate educational qualifications for working with schoolage youth); *see also* McGovern, *supra* note 10 (stating that when child care is publicly funded, well-planned, resourced, and regulated, its quality is higher and more consistent than in some private arrangements where there can be considerable variations in quality); Rubenstein, *supra* note 4 (stating that the best day care centers not only limit group size, but also employ well-trained staff members). *But see* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1678, at 4 (May 31, 1994) (stating that those in opposition to providing an alternative means of meeting requirements claim SB 1678 cuts in half the number of child development classes a site director needs in order to understand age appropriate activities and curriculum); Baker, *supra* note 3 (stating that it is very important for people to be trained before they start working with children); Joseph Berger, *Teachers in Day Care Questioned*, N.Y. TIMES, May 23, 1988, at B1 (blaming unappealingly low salaries for the unavailability of teachers with full qualifications employed in day care centers). *See generally* JUDITH BEREZIN, THE COMPLETE GUIDE TO CHOOSING CHILD CARE (1990) (providing questions to ask when picking a day care center for your child); Latimer, *supra* note 7 (addressing a concern that requiring college credentials or other specific educational training may alienate a lot of people from the profession who have something to offer children).

for such positions are not set so high as to preclude children from receiving the care that they deserve.[12]

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**Health and Welfare; tobacco sales to minors**

Business and Professions Code §§ 22950, 22951, 22952, 22953, 22954, 22955, 22956, 22957, 22958, 22959 (new); Health and Safety Code § 216 (amended).
SB 1927 (Hayden); 1994 STAT. Ch. 1009

Existing state law prohibits the sale of tobacco to persons under eighteen years of age and provides that violations are punishable by either civil or criminal penalties.[1] Existing federal law states that in order to receive federal grants for the treatment and prevention of substance abuse, states must enforce laws prohibiting the sale of tobacco to minors.[2] Existing state law also provides for inspectors, acting as peace officers,[3] to enforce certain provisions regulating food and drugs.[4]

Chapter 1009 makes a legislative finding that the illegal purchase and consumption of tobacco products by minors must be reduced and eventually eliminated.[5] Chapter 1009 provides that the State Department of Health Services (DHS)[6] must develop a program to reduce the availability of tobacco products to minors.[7] As part of this program, the DHS must establish requirements that retailers of tobacco products post a notice stating that it is illegal for persons

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12. CAL. HEALTH & SAFETY CODE § 1597.20 (enacted by Chapter 848); *see id.* (stating that there is a critical shortage of before and after school programs serving children); *see also* Rubenstein, *supra* note 4 (stating that California is known for supporting high-quality day-care centers).

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1. CAL. PENAL CODE § 308(a) (West Supp. 1994); *see id.* (stating that violations are subject to criminal action as misdemeanors or civil actions punishable by a fine of $200 for the first offense, $500 for the second offense, and $1000 for the third offense); *see also id.* § 19 (West 1988) (setting the maximum punishment for a misdemeanor at six months imprisonment and/or a $1000 fine).

2. 42 U.S.C.A. § 300x-26 (West Supp. 1994); *see id.* § 300x-21 (West Supp. 1994) (setting forth the formula to determine the amount of the federal grant).

3. *See* CAL. PENAL CODE § 830.3(f) (West Supp. 1994) (establishing and defining peace officers for food and drug investigations); *see also id.* § 13510.5 (West Supp. 1994) (setting forth the minimum standards for specified peace officers). *See generally id.* § 7(8) (West 1988) (defining peace officers generally).

4. CAL. HEALTH & SAFETY CODE § 216 (amended by Chapter 1009).

5. CAL. BUS. & PROF. CODE § 22951 (enacted by Chapter 1009); *see id.* § 22950 (enacted by Chapter 1009) (establishing the Stop Tobacco Access to Kids Enforcement (STAKE) Act).

6. *See* CAL. HEALTH & SAFETY CODE §§ 200-223 (West 1990 & Supp. 1994) (setting forth the general powers of the DHS).

7. CAL. BUS. & PROF. CODE § 22952(a) (enacted by Chapter 1009); *see id.* (requiring that the program be in effect by July 1, 1995).

under eighteen years of age to purchase tobacco products.[8] Additionally, the DHS must conduct random on-site sting inspections of retail stores that sell tobacco products.[9] Chapter 1009 also requires that cigarette or tobacco product distributors and wholesalers annually provide the DHS with a list of all names and addresses of the persons to whom they provide tobacco and that cigarette vending machine operators provide the locations of vending machines.[10]

Chapter 1009 also provides that any person, firm, or corporation who furnishes tobacco, cigarette, cigarette papers, or any paraphernalia used to smoke or ingest tobacco, to a person under eighteen years of age will be subject to civil penalties.[11] The funds collected through these penalties will be credited to the Sale of Tobacco to Minors Control Account (STMCA)[12] in the 1995-96 through the 1998-99 fiscal years, and to the General Fund of the State thereafter.[13] However, all funds collected as civil penalties that exceed $300,000 within any one fiscal year will be deposited to the General Fund.[14] Additionally, an annual sum of $1,500,000 for the 1994-95 fiscal year and $2,000,000 for each subsequent fiscal year through 1999 will be transferred to the STMCA from the Federal Substance Abuse and Mental Health Services Administration (SAMHSA) grant.[15]

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8. *Id.* § 22952(b) (enacted by Chapter 1009); *see id.* (mandating that the notice be placed at the point of purchase and that the notice state that the tobacco seller is required to check the identification of all tobacco purchasers who appear to be under the age of 18 and provide for a toll-free number to report unlawful sales); *id.* § 22956 (enacted by Chapter 1009) (requiring all retail tobacco sellers to check the identification of tobacco purchasers who reasonably appear to be under 18 years of age).

9. *Id.* § 22952(c) (enacted by Chapter 1009); *see id.* § 22952(d)(1)-(8) (setting forth guidelines for conducting random inspections); *see also Teens Smoke Out Illegal Tobacco Sales*, SACRAMENTO BEE, June 3, 1994, at SC8 (describing a sting operation conducted by teens to demonstrate the ease of buying cigarettes illegally).

10. CAL. BUS. & PROF. CODE § 22954 (enacted by Chapter 1009); *see id.* (stating that this information will be deemed confidential).

11. *Id.* § 22958(a) (enacted by Chapter 1009); *see id.* (establishing a schedule for the imposition of fines for violations); *id.* § 22958(b) (enacted by Chapter 1009) (providing that a person, firm or corporation against whom a civil penalty was imposed will not be additionally prosecuted under California Penal Code § 308); *id.* § 22958(c) (enacted by Chapter 1009) (establishing procedures for imposing civil penalties on a corporation or business with more than one retail location); *see also id.* § 22952(d)(6), (8) (enacted by Chapter 1009) (providing that defenses to any action brought pursuant to a random inspection will include failure to follow the proper procedure for a random inspection and failure of the minor participating in the inspection to appear as a person under the age of 18); *id.* § 22952(f) (enacted by Chapter 1009) (stating that all civil penalties will be enforced against the owner of the retail business and not the employees).

12. *See id.* § 22953(a) (enacted by Chapter 1009) (establishing the STMCA within the State Treasury).

13. *Id.*

14. *Id.* § 22953(b) (enacted by Chapter 1009).

15. *Id.* § 22959(a) (enacted by Chapter 1009); *see id.* § 22959(b) (declaring that upon appropriation by the Legislature, the funds transferred from the STMCA will be used to administer and enforce these provisions); *see also* 42 U.S.C.A. § 290aa (West Supp. 1994) (establishing the SAMHSA and setting forth its organization, powers, and duties); *id.* § 300x-21 (West Supp. 1994) (setting forth the formula for determining the amount of the federal grant)

Chapter 1009 also states that DHS agents enforcing the provisions of Chapter 1009 will be peace officers entitled to specified powers and immunities granted to them as food and drug inspectors.[16] Additionally, the DHS may enter into contracts with local law enforcement agencies delegating the enforcement of Chapter 1009.[17]

## INTERPRETIVE COMMENT

Chapter 1009 was enacted to comply with new federal law and to strengthen existing law prohibiting the sale of tobacco products to minors.[18] Currently, teens have wide access to tobacco and teen smoking seems to be on the rise.[19] Additionally, the cost of tobacco use is an enormous burden on society.[20] By reducing the availability of tobacco to minors, there should be a reduction in the

16. CAL. BUS. & PROF. CODE § 22955 (enacted by Chapter 1009); *see* CAL. HEALTH & SAFETY CODE § 216 (amended by Chapter 1009) (setting forth the powers and immunities of peace officers acting as inspectors of the Food and Drug Section).

17. CAL. BUS. & PROF. CODE § 22957(a) (enacted by Chapter 1009).

18. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 1927, at 4 (July 5, 1994); *see* 42 U.S.C.A. § 300x-26 (West Supp. 1994) (requiring states to enforce laws prohibiting the sale of tobacco to minors or risk losing federal funding for the treatment and prevention of substance abuse); CAL. PENAL CODE § 308(a) (West Supp. 1994) (prohibiting the sale of tobacco to persons under 18 years of age); *see also* CAL BUS. & PROF. CODE § 22952(e) (enacted by Chapter 1009) (stating that the State Department of Health Services is to be responsible for ensuring and reporting the state's compliance with federal law).

19. *See* ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 1927, at 4-5 (July 5, 1994) (stating that smoking among high school seniors has increased from 28% to 30% from 1992 to 1993 and that studies have shown 72% to 76% of all illegal tobacco sales to minors in California are successful); *see* Jake Doherty, *Community News: Mid-City: Pico-Union; Survey: Minors Can Easily Buy Cigarettes*, L.A. TIMES, May 29, 1994, at 7 (stating that in a recent survey, success rates for minors illegally purchasing cigarettes were as high as 83% in some areas); Doug Levy, *Lighting Up Young*, USA TODAY, June 21, 1994, at 1D (stating that an estimated 3000 teens a day start smoking, and discussing the ineffectiveness of laws prohibiting sales of cigarettes to minors); *Teens Smoke Out Illegal Tobacco Sales*, *supra* note 9 (stating that during a recent sting operation, 60% of the stores approached in the Los Angeles region and 53% of the stores statewide sold cigarettes to persons aged 13 to 17).

20. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 1927, at 5 (July 5, 1994) (stating that annual medical costs due to smoking total more than $3.6 billion in California); *see Nation's Largest Survey Shows California Kids Have Easy Access to Tobacco in Spite of Laws*, BUS. WIRE, May 25, 1994, *available in* LEXIS, News Library, Curnws File [hereinafter *Easy Access to Tobacco*] (stating that a University of California San Francisco study shows that smoking costs Californians over $10 billion annually in medical costs and lost productivity due to death or illness).

number of minors that become addicted, thereby increasing public safety and reducing costs.[21]

*Jonathan P. Hobbs*

21. ASSEMBLY COMMITTEE ON HEALTH, COMMITTEE ANALYSIS OF SB 1927, at 4-5 (July 5, 1994); *see Teens Smoke Out Illegal Tobacco Sales*, *supra* note 9 (stating that a critical part of creating addicts is selling cigarettes to minors); *Easy Access to Tobacco*, *supra* note 20 (stating that according to the Surgeon General's report, a key method for reducing tobacco addiction is to restrict tobacco access to minors); *see also* SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES, COMMITTEE ANALYSIS OF SB 1927, at 2 (May 11, 1994) (stating that virtually the only people who ever begin cigarette smoking start before age 19); *Easy Access to Tobacco*, *supra* note 20 (stating that 60% of smokers in the United States began smoking before age 14 and 80% began before age 18, and stating that young smokers are 15 times more likely to become users of narcotic drugs); *Growing Number of Teens Join the Ranks of Smokers* (CNN television broadcast, Dec. 5, 1993, transcript # 605-6, *available in* LEXIS, News Library, Curnws File) (stating that 90% of smokers today started as teens, and interviewing teenage smokers who started smoking as early as the sixth grade; one teenage smoker commented that he would quit "when I hit, like, 18 or something").