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Health and Welfare

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Health and Welfare

Health and Welfare; AIDS—blood donations

Health and Safety Code § 1621.5 (new); § 1603.3 (amended).
SB 1002 (Doolittle); 1988 STAT. Ch. 1154

Existing law prohibits, except in specified situations,¹ the disclosure² of an Acquired Immune Deficiency Syndrome (AIDS) test result³ without prior written consent from the test subject.⁴ Existing law also prohibits an individual afflicted with a contagious, infectious, or communicable disease from willfully exposing another person to the disease.⁵ Under Chapter 1154, donating blood,⁶ body organs, tissue, semen, or breast milk to a medical center or a breast milk bank with the knowledge that one is infected with AIDS or has tested reactive to the etiologic agent of AIDS or the agent's antibodies is a felony.⁷ In a criminal investigation for violating Chapter 1154, the disclosure of blood test results is permitted only in response to a subpoena,⁸ a search warrant,⁹ or court order.¹⁰ Chapter 1154 also requires all blood banks and plasma centers to notify all donors of

1. See CAL. HEALTH & SAFETY CODE §§ 1603.1(c) (results may be disclosed to the Department of Health Services and the county health officer), 1603.3(f) (results may be disclosed to a public health officer). See generally *Review of Selected 1985 California Legislation* 17 PAC. L.J., 587, 733 (1986) (restrictions on the disclosure of AIDS test results).

2. CAL. HEALTH & SAFETY CODE § 199.21(k) (definition of disclosure).

3. Blood and blood components used for live humans must be tested for the probable causative agent of AIDS. *Id.* § 1603.1(a).

4. *Id.* § 199.21(a)-(c) (punishment provides for a fine and possible imprisonment).

5. *Id.* § 3353. See *id.* § 3354 (punishment is a \$25 to \$500 fine, ninety days imprisonment, or both).

6. Blood is defined to include human whole blood and whole blood derivatives. CAL. HEALTH & SAFETY CODE § 1621.5(b). Donation covers both paid and volunteer donors. *Id.* § 1621.5(a).

7. *Id.* § 1621.5(a) (punishable by imprisonment for two, four, or six years).

8. A judicial subpoena or subpoena duces tecum complying with Code of Civil Procedure sections 1985-88. *Id.* 1621.5(b)(2).

9. *Id.* § 1621.5(b)(1) (issued under Penal Code Section 154).

10. *Id.* § 1621.5(b). Persons who are mentally incompetent or donate their blood for either personal use or self-deferral for research or test purposes are exempt from penalty under this statute. *Id.* § 1621.5(a).

these criminal sanctions and the availability of blood self-deferral.¹¹

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11. *Id.* § 1603.3(b).

Health and Welfare; AIDS disclosure

Health and Safety Code § 199.27 (repealed); § 199.25 (amended).
SB 2788 (Maddy); 1988 STAT. Ch. 1216*

Existing law protects a physician or surgeon from criminal or civil liability for disclosing to the spouse of a patient that the patient has tested positive on a test to detect antibodies to AIDS.¹ Chapter 1216 expands this protection from liability to allow disclosure to a person whom the physician or surgeon reasonably believes to be a sexual partner of the patient, to a person with whom the patient has shared a hypodermic needle, or to a county health officer, when the patient has tested positive to a test to detect infection² by the probable causative agent of AIDS.³ Chapter 1216, however, does not impose on any physician or surgeon a duty to notify any person that a patient is reasonably believed to have been infected by human immunodeficiency virus (HIV).⁴

* See *infra* pp. 668-70 (discussing the constitutional problems created by disclosing AIDS test results).

1. CAL. HEALTH & SAFETY CODE § 199.25.

2. Infection means the state of being infected, a communicable disease, or an infective agent. THE MERRIAM-WEBSTER DICTIONARY 364 (pocket book ed. 1974). Human immunodeficiency virus (HIV), the virus that causes AIDS, attacks white blood cells causing a breakdown in the body's immune system. See Sullivan & Field, *AIDS and the Coercive Power of the State*, 139 HARV. C.R.-C.L. L. REV. 139, 140 (1988). "There are four separate stages to AIDS: (1) infection with HIV; (2) the presence of antibodies to HIV in the blood, as indicated by a positive blood test (seropositivity); (3) AIDS-related complex; and (4) full-blown AIDS." *Id.* at 140.

3. CAL. HEALTH & SAFETY CODE § 199.25(a). The physician or surgeon must not disclose any identifying information about the individual believed to be infected. *Id.* The physician or surgeon must first discuss the test results with the patient and attempt to obtain the patient's consent to notify sexual partners and those with whom the patient has shared hypodermic needles before proceeding to notify those persons. *Id.* § 199.25(b). The doctor must advise the patient that the doctor intends to tell the partner. Both the patient and the person notified of the patient's exposure must be provided with counseling. *Id.*

4. *Id.* § 199.25(c). *But see* Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 457, 551 P.2d 334, 354, 131 Cal. Rptr. 14, 38 (1976) (Clark, J., dissenting) (criticizing the majority for finding a duty to warn under the Lanterman-Petris Short Act, CAL. WELF. & INST. CODE §§ 5000-5464, when the legislature did not intend such a duty).

Prior law allowed a person tested for acquired immune deficiency syndrome (AIDS) to voluntarily disclose to the county health officer the identity of any person with whom the patient had contact, either a sex partner or person with whom the patient shared a hypodermic needle.⁵ The county health officer could therefore alert the person who had contact with the patient without disclosing identifying information about the patient.⁶ Chapter 1216 allows the county health officer, without consent, to notify the spouse, sexual partners, and those who have shared needles with the patient, of the positive result without disclosing any identifying information about the one infected or the doctor.⁷ Upon completion of the attempted notification, the county health officer must expunge all records regarding the contacts of the patient.⁸

KMK

5. CAL. HEALTH & SAFETY CODE § 199.27 (as added by 1987 Cal. Stat. ch. 663, sec. 1(a), at ____).

6. 1987 Cal. Stat. ch. 663, sec. 1(c) at ____ (enacting CAL. HEALTH & SAFETY CODE § 199.27).

7. CAL. HEALTH & SAFETY CODE § 199.25(d).

8. *Id.* The county health officer must also refer the person notified for appropriate care and follow up. *Id.* Chapter 1216 requires confidential record keeping and prohibits compelling anyone to testify as to the identity of either the person tested or the people contacted. *Id.* § 199.25(e),(f).

Health and Welfare; AIDS testing—inmates of the California Youth Authority

Health and Safety Code § 199.221 (new); Welfare and Institutions Code § 1768.9 (new).
SB 2145 (Ayala); 1988 STAT. Ch. 1119

Existing law prohibits both administering a blood test for the detection of Acquired Immune Deficiency Syndrome (AIDS) and the knowing or negligent disclosure¹ of results from a blood test taken to detect AIDS, without the written consent² of the subject of the test.³ Chapter 1119 enables the Chief Medical Officer (CMO) of the

1. CAL. HEALTH & SAFETY CODE § 199.21(k) (definition of disclosure).

2. *Id.* § 199.21(g) (definition of written authorization).

3. *Id.* § 199.22(a). *Id.* § 199.21(a), (b) (penalties for unlawful disclosure include a fine and court costs). See CAL. CONST. art. I, sec. 1 (fundamental right to privacy). See generally *Review of Selected 1985 California Legislation*, 17 PAC. L.J. 427, 733 (1986) (testing and disclosure requirements for AIDS).

California Youth Authority (CYA) to require an AIDS blood test on a CYA ward or inmate if the person evidences clinical symptoms of AIDS or AIDS related complex.⁴ Chapter 1119 requires the CMO to persuade the subject to undergo voluntary testing but, if the subject refuses to submit to a test, the CYA may seek a court order requiring the subject to comply.⁵ Chapter 1119 further requires that: (1) The subject receive pre-test counseling;⁶ (2) only authorized personnel conduct the test in a medically approved manner;⁷ (3) the subject be notified face-to-face of the test results; and (4) the subject receive post-test counseling.⁸ Under Chapter 1119, the CYA may operate separate housing facilities, equivalent to existing facilities, for subjects who have tested positive for human immunodeficiency virus (HIV).⁹ In addition, the CYA must provide appropriate medical services for the diagnosis and treatment of those infected with HIV.¹⁰ Chapter 1119 further allows the CMO to disclose positive results of a blood test to the superintendent or administrator of the facility and the subject's known sexual partners or needle contacts in the CYA, provided that the subject's identity is kept confidential.¹¹ Finally, the test results may be included in the subject's confidential medical record.¹²

SDW

4. CAL. WELF. & INST. CODE § 1768.9(a). The CMO must order that the blood specimens be taken to, and tested at, a licensed medical laboratory that has been approved by the State Department of Health Services for conducting AIDS testing. *Id.* § 1768.9(c)(2). See generally *Miami's Juvenile Court Launches Comprehensive AIDS Program*, 18 CRIM. JUST. NEWSL. No. 22, at 5-6 (Nov. 16, 1987) (Miami's program to combat the spread of AIDS within the juvenile court system). See also CAL. HEALTH & SAFETY CODE § 199.221 (Health and Safety Code sections 199.21(a)-(c) and 199.22(a) do not apply to actions taken under Chapter 1119). *Id.* § 199.21(c) (prohibits the willful or negligent disclosure of an AIDS test).

5. CAL. WELF. & INST. CODE § 1768.9(a), (b).

6. *Id.* § 1768.9(b). The counseling must include: (1) Testing procedures, effectiveness, reliability, and confidentiality; (2) the means of transmission of HIV; (3) symptoms of AIDS and AIDS-related complex; and (4) precautions to avoid transmission. *Id.* § 1768.9(b)(1)-(4).

7. Authorized personnel includes a physician, registered nurse, licensed vocational nurse, licensed medical technician, or licensed phlebotomist. *Id.* § 1768.9(c)(1).

8. *Id.* § 1768.9(b)-(d). All counseling and notification must be conducted by a physician and surgeon, registered nurse, certified health educator, by a psychologist, licensed clinical social worker, or trained volunteer counselor under the purview of a physician and surgeon, registered nurse, or certified health educator. *Id.* § 1768.9(d).

9. *Id.* § 1768.9(3)(e). The inmates must also have access to recreational and educational facilities commensurate with the facilities of the institution. *Id.*

10. *Id.* § 1768.9(f).

11. *Id.* § 1768.9(g)(1), (2). All wards and inmates provided with the test results must be provided with counseling. *Id.* § 1768.9(g)(2).

12. *Id.* § 1768.9(h) (the medical record must be kept separate from other case files and records).

Health and Welfare; appeal procedures for Medi-Cal providers

Welfare and Institutions Code § 14104.5 (amended).
AB 3475 (Filante); 1988 STAT. Ch. 643
Sponsor: California Medical Association
Support: California Medical Association
Opposition: Department of Health Services

Existing law requires the State Director of Health Services create procedures and regulations to review complaints concerning the state's payments or processing of monies to providers of Medi-Cal services.¹ Prior law mandated that if, after exhausting the administrative remedies created by the Director, the provider wished to appeal, the provider present the claim to the State Board of Control.² In contrast, Chapter 643 permits a provider who is not satisfied with the director's decision to go directly to the court for relief.³

RPR

1. CAL. WELF. & INST. CODE § 14104.5. Applicable services are any which are payable under the provisions of California Welfare & Institutions Code sections 14000-14194, including but not limited to health care services. *Id.* See CAL. WELF. & INST. CODE § 14053 (definition of health care services).

2. 1970 CAL. STAT. ch. 1171, sec. 1, at 2079 (enacting CAL. WELF. & INST. CODE § 14104.5).

3. CAL. WELF. & INST. CODE § 14104.5 (the provider must first exhaust the administrative remedies).

Health and Welfare; crematoriums—warrantless inspections

Business and Professions Code § 9719 (new); Health and Safety Code § 7051.5 (new); §§ 7051, 7054.7 (amended).
AB 4233 (Hannigan); 1988 STAT. Ch. 1620

Existing law requires cemeteries to maintain certain records and file an annual report with the Cemetery Board.¹ Chapter 1620 permits the Cemetery Board to enter crematoriums without notice and inspect the books, records, and premises of the crematory.²

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1. CAL. BUS. & PROF. CODE § 9785. Existing law also prohibits the removal of human remains or parts thereof from any place where the remains have been interred or deposited while awaiting interment unless authorized by law. CAL. HEALTH & SAFETY CODE § 7051.

2. CAL. BUS. & PROF. CODE § 9719. The inspection may be during regular business hours or the hours the crematory is in operation, and refusing to give permission for the inspection

may be grounds for disciplinary action, including possible suspension or revocation of the license. *Id.* Certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for the owner of such a business. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978). But a warrantless inspection, even for a pervasively regulated industry, is deemed reasonable only if the following criteria are met: (1) There must be a substantial government interest that gives notice of the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspection must be necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of the certainty and regularity of application, must provide a constitutionally adequate substitute for a warrant. *New York v. Burger*, 107 S. Ct. 2636, 2644, (1987). See CAL. BUS. & PROF. CODE §§ 7051, 7051.5, 7054.7 (Chapter 1620 adds remains awaiting cremation and dental gold or silver extracted from human remains to the list of protected items but allows persons having the right to control the remains to authorize the removal of the dental work from the body). See also *id.* § 7054.7(a)(1) (Chapter 1620 prohibits cremating a person if the cremated remains of another person are still in the cremation chamber).

Health and Welfare; donated food—liability.

Civil Code § 1714.25 (new); Health & Safety Code §§ 27900, 27902, 27904, 27908, 27910 (new).
SB 2427 (Russell); 1988 STAT. Ch. 735

Under existing law, any person who processes, distributes or sells agricultural products¹ is immune from liability for injuries resulting from consumption of donated products.² Chapter 735 provides that a food facility³ that donates food fit for human consumption to any nonprofit charitable organization⁴ or food bank⁵ will not be liable for injuries⁶ caused by consumption of the donated food.⁷ In addition, a nonprofit charitable organization or food bank that distributes

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1. CAL. FOOD & AGRIC. CODE § 58501(a) (definition of agricultural products).
 2. *Id.* § 58505 (the immunity does not apply to injuries caused by gross negligence or a willful act).
 3. CAL. HEALTH & SAFETY CODE § 27521 (food facility includes a food establishment, vehicle, vending machine, produce stand, or farmers' market).
 4. CAL. HEALTH & SAFETY CODE § 27902 (definition of a nonprofit charitable organization).
 5. *Id.* § 27904 (definition of a food bank).
 6. Compare CAL. CIV. CODE § 1714.25 (food facilities are liable for negligent or willful acts) with CAL. FOOD & AGRIC. CODE § 58505 (people who donate agricultural products are liable only for gross negligence or willful acts).
 7. CAL. CIV. CODE § 1714.25(a) (immunity applies regardless of any violation of packaging or labeling laws, regulations, or any violation of storage or handling laws, regulations, or ordinances by the donee after the donation); CAL. HEALTH & SAFETY CODE §§ 27900 (a food facility may donate to any nonprofit charitable organization for distribution without charge), 27908 (food facility is immune from civil or criminal liability or penalty for violating labeling package or other laws, regulations, or ordinances that occur after the time of donation, but the immunity does not apply to negligent or willful misconduct in preparing or handling the donated food).

food fit for human consumption will not be held liable for injuries caused by the donated food that are not a direct result of negligence, recklessness, or intentional misconduct.⁸

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8. CAL. CIV. CODE § 1714.25(b) (the charitable organization must in good faith receive the food and distribute the food free of charge).

Health and Welfare; drug-related nuisance abatement

Health and Safety Code §§ 11573.5, 11575.5 (new); § 11580 (amended).
AB 4347 (M. Waters); 1988 STAT. Ch. 1525

Existing law allows a judge to issue a temporary writ preventing the continuance of a drug related nuisance.¹ Chapter 1525 allows such a writ to provide for closure of the premises on which such a nuisance occurs.² Before deciding whether to close the premises, a court may mandate that rent payments owing to the defendant be placed in escrow by the court.³ If the premises are ordered closed, these funds must be used to offset a tenant's relocation costs,⁴ and an occupant must be given reasonable notice and opportunity to be heard before being forced to vacate the premises.⁵ If proof of the nuisance is based on the affidavits of witnesses who are not police officers, the court may issue protective orders on their behalf.⁶ Chapter 1525 mandates that all evidence admissible under the Evidence Code, including evidence of reputation in a community, is admissible to prove the existence of a nuisance.⁷ Finally, Chapter

1. CAL. HEALTH & SAFETY CODE § 11573.

2. *Id.* § 11573.5(b) (providing that closure pending trial permitted when the nuisance is not abated by a prior writ). *See also id.* (providing that duration of writ within court's discretion, but not to exceed one year).

3. CAL. HEALTH & SAFETY CODE (providing that escrow accounts may last for 90 days or until the nuisance is abated).

4. *Id.* § 11573.5(b),(d). Chapter 1525 further provides for the handling of displaced tenants not actively involved in the nuisance. *Id.* § 11573.5(e)(1)-(4).

5. *Id.* § 11573.5(b)-(d).

6. *Id.* § 11573.5(a) (stating that upon showing of threats or violence toward the witness, the court may order nondisclosure of the name, address, or other information identifying the witness).

7. *Id.* § 11575.5.

1525 increases the fines provided for violation or disobedience of an order or injunction imposed in connection with such nuisance abatement.⁸

ERK

8. *Id.* § 115780. Compare *id.* § 115780 (providing for fines of \$500 to \$10,000) with 1972 Cal. Stat. Ch. 1407, sec. 3, at 3035 (enacting CAL. HEALTH & SAFETY CODE § 11580) (providing for fines of \$200 to \$1000).

Health and Welfare; life care agreements

Health and Safety Code § 1773.6 (new); §§ 1773.8, 1777 (amended).
SB 2467 (Maddy); 1988 STAT. Ch. 1082

Under existing law, obligations incurred pursuant to a life care contract,¹ executed by a provider, are preferred claims against the assets of the provider² in the event of liquidation.³ Chapter 1082 limits these preferred claims by making them subject to any perfected claims secured by mortgage, deed of trust, pledge, deposit as security, escrow, or otherwise secured.⁴

A provider must, under existing law, obtain a permit to sell deposit subscriptions⁵ and a certificate of authority⁶ from the State Department of Social Services (Department).⁷ Chapter 1082 requires the provider to execute a declaration acknowledging the requirement of executing and recording a Notice of Statutory Limitation on Transfer⁸ before obtaining a permit to sell deposit subscriptions.⁹

1. CAL. HEALTH & SAFETY CODE § 1771(i) (definition of life care contract).

2. *Id.* § 1771(v) (definition of provider).

3. *Id.* § 1777.

4. *Id.*

5. *Id.* § 1771(g) (definition of deposit subscription).

6. *Id.* § 1771(d) (definition of certificate of authority).

7. *Id.* § 1773.5.

8. The notice, declaring that the provider intends to use the described property for a life care facility and that the transfer of the property is limited by California Health and Safety Code sections 1786 and 1787, must be recorded. *Id.* § 1773.6(b).

9. *Id.* § 1773.6(a). The notice will remain in effect until notice of release is given by the Department. A release will be given upon proof of complete performance of all obligations to transferors. *Id.* § 1773.6(c). If notice has not been recorded, the provider must give the Department written notice of a proposed encumbrance prior to the date of execution of any trust deed, mortgage, or any other lien or encumbrance, securing or evidencing the payment

Under existing law, if the provider's average performance over any six-month period prior to issuance of a certificate of authority does not substantially equal or exceed the provider's projections for that period, the Department may cancel the permit to sell deposit subscriptions, increase the percentages of completion of construction or the numbers or percentages of deposits on entrance fees, or increase the reserve requirements.¹⁰ Under Chapter 1082, the provider must have an opportunity to submit a feasibility study demonstrating that the project is still viable before the Department takes any action.¹¹

JEP

of money and affecting land on which the provider intends to operate a life care facility. *Id.* § 1773.6(d). After giving notice to the Department, the provider must execute and record the notice in the office of the county recorder in each county in which a portion of the life care facility is located. *Id.* If the provider and the owner of record are not the same entity or individual, the provider must serve a copy of the notice on the owner of record by certified mail, and the recorder will index the notice in the grantor-grantee index to the name of the owner of record and the name of the provider. *Id.*

10. *Id.* § 1773.8(a).

11. *Id.* The feasibility study must be prepared by a consultant in the area of life care, who is approved by the department, to determine whether the project is still viable. *Id.* If the project is still viable, the study must contain a plan of correction acceptable to the Department. *Id.*

Health and Welfare; Medi-Cal—infants and pregnant women

Health and Safety Code § 285 (amended); Welfare and Institutions Code §§ 14148, 14148.1, 14148.2, 14148.3, 14148.4, 14148.5 (new). SB 2579 (Bergeson); 1988 STAT. Ch. 980

Existing law determines eligibility for Medi-Cal services.¹ Chapter 980 extends Medi-Cal eligibility to all infants and pregnant women with family incomes at or under 185 percent of the federal poverty level.² In addition, if an eligible family must pay for medical services,

1. CAL. WELF. & INST. CODE. §§ 14005-14005.16 (general eligibility factors); 14016 (determination of eligibility by county of applicant's residence).

2. *Id.* § 14148(a) (adopting federal options under the Omnibus Budget Reconciliation Act, Pub. L. No. 100-203, § 4101, 101 Stat. 1330, 142 (1987)). The purposes of enacting Chapter 980 include: Providing access to more efficient perinatal care to low-income women, reducing Medi-Cal paperwork, and making maximum use of federal financial participation. 1988 Cal. Stat. ch. 980, sec. 1(c)(1)-(4), at _____. The Legislature recognizes that by providing more perinatal care infant mortality and lifetime disabilities are reduced, and consequently high state health costs are lessened. 1988 Cal. Stat. ch. 980, sec. 1(a), at _____. *See also* 42

Chapter 980 limits the maximum amount payable.³ To enable pregnant women to receive prompt prenatal care, Chapter 980 declares that all pregnant women have immediate need for such care and requires all counties to expedite eligibility determination for all pregnant women.⁴ Chapter 980 also effects certain changes in billing procedures in order to encourage participation by health care providers in the Medi-Cal program.⁵

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U.S.C. § 1396(a)(l) (1965) (concerning state grants for medical assistance and eligibility for pregnant women and young children). *See generally* 42 C.F.R. § 5.2 (1987) (definition of poverty level).

3. CAL. WELF. & INST. CODE § 14148(a) (limiting maximum premium to 10% of the amount the family income (less child care costs) exceeds 150% of federal poverty level).

4. *Id.* § 14148(e) (requiring that upon expedited eligibility determination, Medi-Cal cards be issued immediately).

5. CAL. HEALTH & SAFETY CODE § 285(b). To receive funds from the program, Chapter 980 requires a provider who contracts with Medi-Cal to bill the program directly for services provided to Medi-Cal recipients. *Id.* This process encourages the involvement of health care providers in the Medi-Cal program by reducing administrative paperwork and overhead, and ensures that providers take the steps necessary to seek reimbursement. 1988 Cal Stat. ch. 980, sec. 1(c)(2), (6), at _____. Chapter 980 also permits an increase in reimbursement rates for obstetrical services. CAL. WELF. & INST. CODE § 14148.4(a) (allowing increase up to 18 percent for obstetrical services). The increase may be limited, however, based on fund availability in each budget year. *Id.* § 14148.4(b). *See generally* 1988 Cal. Stat. ch. 980, sec. 1(b), at _____ (stating that the Legislature intends to take measures to reverse trend of diminishing access to perinatal care caused by providers leaving the maternity care system).

Health and Welfare; voluntary AIDS testing of prisoners

AB 806 (Floyd); 1988 STAT. Ch. 168

*(Effective July 13, 1988)**

Support: California Correctional Peace Officer's Association;
American Civil Liberties Union; California Association of Life
Underwriters

Opposition: Department of Finance; Department of Corrections

Existing law prohibits biomedical research¹ on any prisoner.² Chap-

* Chapter 168 is added to the Statutes Other Than Codes.

1. CAL. PENAL CODE § 3500(b) (definition of biomedical research).

2. *Id.* § 3502. *But see* 45 C.F.R. §§ 46.301-46.306 (1984) (federal protection for prisoners involved in biomedical and behavioral research). *See generally* Note, The Constitutional Rights of AIDS Carriers, 99 HARV. L. REV. 1274 (1986) (analysis of First, Fifth, and Fourteenth Amendment constraints on legislation responding to the fear of AIDS and affecting AIDS-carriers and high risk groups); Note, Informed Consent in Human Experimentation: Bridging the Gap Between Ethical Thought and Current Practice, 34 UCLA L. REV. 67 (1986) (calling for more rigorous enforcement of informed consent requirements in research settings due to the high risks involved and the potential conflict of interest between the researcher and the subject).

ter 168 allows medical personnel³ to solicit inmate volunteers to participate in confidential research to test⁴ for the acquired immune deficiency syndrome (AIDS)⁵ virus and to assess the extent of the disease within state penal institutions.⁶

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3. 1988 Stat. ch. 168, sec. 1, at _____ (permits medical researchers operating under approval of the institutional review board, the State Department of Health Services, or the United States Public Health Services Centers for Disease Control to conduct scientific investigations).

4. See CAL. HEALTH & SAFETY CODE §§ 199.22(a) (requiring a test subject to give written consent to blood testing for evidence of AIDS antibodies); 199.27 (as added by 1987 Cal. Stat. ch. 1427, at _____) (consent requirements for AIDS tests when the subject is incompetent); 199.36 (requiring a written explanation of all rights and responsibilities to be given to the research subject in an AIDS project, in compliance with 45 Code of Federal Regulations sections 46.116-46.117). *But see* 1985 Cal. Stat. ch. 1553, sec. 2, at _____ (declaring no biomedical research will be conducted on prisoners and deleting the informed consent requirement from Penal Code section 3502). See generally Banks and McFadden, *Rush to Judgment: HIV Test Reliability and Screening*, 23 TULSA L.J. 1 (1987) (discussing the reliability of present testing methods).

5. CAL. HEALTH & SAFETY CODE § 199.46 (definition of AIDS).

6. 1988 Cal. Stat. ch. 168, sec. 1, at _____ (reporting of the test results must be kept anonymous and confidential). See generally *Woods v. White*, 689 F.Supp. 874 (W.D.Wis. 1988) (constitutional right to privacy exists in the medical records of a prisoner with AIDS); *Glover v. Eastern Nebraska Community Office of Retardation*, 686 F.Supp. 243 (D.Neb. 1988) (mandatory AIDS testing violates the Fourth Amendment prohibition of unreasonable searches and seizures); CAL. HEALTH AND SAFETY CODE §§ 199.20 (no person can be compelled to identify any individual subject of an AIDS test), 199.21(a)-(c) (civil and criminal penalties for willful or negligent disclosures without written consent), 199.31 (written consent requirement for confidential research disclosure), 199.35 (prohibiting production or discovery of confidential research records in civil or criminal proceedings except for material information or evidence of substantial value and no other way of obtaining the information exists, plus for disclosure in a criminal proceeding, further court-applied safeguards), 199.37 (violations and penalties for disclosing confidential research records), 1603.1(c)-(f) (reporting requirements for positive blood tests for AIDS), 1603.4 (liability for inadvertent disclosures).

Health and Welfare; AIDS testing—inmates, probationers, and parolees

Health and Safety Code § 199.222 (new);
Penal Code §§ 7500, 7501, 7502, 7503, 7504, 7510, 7511, 7512, 7512.5, 7513, 7514, 7515, 7516, 7516.5, 7516.8, 7517, 7518, 7519, 7520, 7521, 7522, 7523, 7530, 7531, 7540, 7550, 7551, 7552, 7553 (new).

SB 1913 (Presley); 1988 STAT. Ch. 1579
(Effective September 30, 1988)

Existing law prohibits the testing of a person's blood for Acquired

Immune Deficiency Syndrome (AIDS) antibodies without the written consent of that person.¹ Existing law also prohibits any person from disclosing² the test results without written consent from the test subject.³ Chapter 1579 enacts a scheme designed to regulate the spread of AIDS within correctional institutions.⁴ The legislature, recognizing the grave danger that the spread of AIDS poses to the public health and welfare, intends to preserve the health of public employees, inmates and persons in custody, as well as that of the public.⁵ Under Chapter 1579, law enforcement employees⁶ who believe that they have come into contact with an inmate's,⁷ detainee's,⁸ probationer's, or parolee's bodily fluids must report⁹ the incident to the chief medical officer (CMO)¹⁰ and may request a human immunodeficiency virus (HIV)¹¹ test¹² to be conducted on the

1. CAL. HEALTH & SAFETY CODE § 199.22(a).

2. *Id.* § 199.21(k) (definition of disclosure).

3. *Id.* § 199.21(a)-(c).

4. *See generally* CAL. PENAL CODE §§ 7501-7553 (providing AIDS testing program within correctional institutions).

5. CAL. PENAL CODE § 7500. The spread of AIDS within prison populations presents a grave danger not only to inmates and law enforcement personnel, but also to public health and safety. *Id.* § 7500(b). Law enforcement personnel and prisoners are particularly vulnerable to AIDS due to the high number of violent acts that occur within correctional institutions. *Id.* This testing will provide necessary information to combat the spread of the disease, but is not to be considered the optimal method of AIDS control for the public at large. *Id.* § 7500(f). *See id.* § 7502(a) (definition of correctional institution). *See also* CAL. HEALTH & SAFETY CODE § 199.222 (Chapter 1579 is exempted from the written consent and disclosure prohibitions).

6. CAL. PENAL CODE § 7502(c) (definition of law enforcement employee).

7. *Id.* § 7502(g). An inmate includes: (1) A person in a state prison, or city and county jail, who has either been convicted of a crime or arrested or taken into custody; and (2) a person in a California Youth Authority (CYA), county, or city juvenile facility who has committed a violation of section 602 of the Welfare and Institutions Code. *Id.*

8. A person, under the age of 18, who is detained due to violation of any law, other than a curfew based on age, is considered to be a ward of the court. CAL. WELF. & INST. CODE § 602.

9. CAL. PENAL CODE § 7510(b). The report must be submitted by the end of the employee's shift during which the incident occurred. *Id.* However, if submission of the report is not possible by the end of the day, the report must be submitted no later than two days after the incident. *Id.* The report must include names of any witnesses and all those involved in the incident and, if feasible, written statements from each person. *Id.*

10. *Id.* § 7510(c). A CMO is considered to be one who is: (1) The CMO of a state prison if the report is filed by a state prison staff member; (2) the CMO of the nearest state prison if a parole officer files the report; (3) the CMO of the CYA if the report is filed by an employee of the CYA; (4) the county health officer of the county in which the individual is jailed or charged if the report is filed against a subject who is either: (a) An inmate of a city or county jail or city-operated juvenile facility, (b) arrested or taken into custody whether the person is charged with a crime, or (c) a person detained for or charged with an offense that would make them a ward of the court in accordance with Welfare and Institutions Code section 602; or (5) the county health officer of the county where the probation officer is employed if a probation officer files the report. *Id.* § 7510(c)(1)-(5).

11. *Id.* § 7502(e) (definition of human immunodeficiency virus).

12. The HIV test is any clinical laboratory test for HIV or antibodies of HIV, which has been approved by the federal Food and Drug Administration. *Id.* § 7502(f). Testing procedures

inmate.¹³

Chapter 1579 also provides that inmates at a correctional institution who believe they have come into contact with the bodily fluids of another inmate in certain situations¹⁴ may request HIV testing of the other inmate.¹⁵ An inmate of the California Youth Authority (CYA) also may file a request for a test of another inmate in the same manner.¹⁶ A minor¹⁷ CYA inmate may file the request with a staff member of the facility, or the staff member may file the request on behalf of the minor.¹⁸ When the request is filed on behalf of the minor, the facility must notify the parents or guardian of the minor and seek permission from the parent or guardian for the test request to continue.¹⁹ If the parent or guardian refuses to grant permission, the Director of the CYA may request the governing juvenile court to determine if the test may be conducted.²⁰

The CMO, in deciding whether to require HIV testing, must consider the following factors: (1) Whether there was an exchange of bodily fluids which could result in HIV infection;²¹ (2) whether the person shows medical conditions or clinical findings of AIDS;

must comply with the following: (1) The withdrawing of blood must be performed in a medically approved manner by a physician, registered nurse, licensed vocational nurse, licensed medical technician, or licensed phlebotomist; (2) the CMO must order the specimen be taken to a licensed medical laboratory that has been approved by the Department of Health Services for conducting HIV testing, and that initial and confirmatory tests be conducted on the specimen; (3) the laboratory must send copies of the test results to the CMO and is responsible for protecting the confidentiality as required by Chapter 1579; (4) the test results must be sent with a disclaimer stating, "The tests were conducted in a medically approved manner but tests cannot determine exposure to or infection by AIDS or other communicable diseases with absolute accuracy. Persons receiving this test result should continue to monitor their own health and should consult a physician as appropriate."; (5) copies of the test results must be sent to the parents or guardian of a tested minor; (6) all persons receiving copies must maintain the confidentiality of the test results, except for disclosure necessary to obtain medical or psychological advice; (7) the specimen and results must not be used as evidence in any criminal or disciplinary proceeding; and (8) any person who performs the test, transmits test results, or properly discloses the test results will be immune from civil liability. *Id.* § 7530(a)-(h).

13. *Id.* § 7510(a).

14. These situations may include rape or sexual contact with a potentially infected inmate, tattoo or drug needle sharing, an injury in which bodily fluids are exchanged, or confinement with a cellmate where mingling of bodily fluids may occur. *Id.* § 7512(a).

15. *Id.* § 7512(a). The inmate's request must be filed within two calendar days of the incident, but the CMO may waive this filing requirement for good cause. *Id.*

16. *Id.* § 7512(b).

17. *Id.* § 7502(i) (a person under 15 years of age).

18. *Id.* § 7512(b).

19. *Id.*

20. *Id.*

21. *Id.* § 7511(b)(1) (the decision must be based on the latest written guidelines and standards established by the federal Centers for Disease Control and the State Department of Health Services). The CMO must decide within five calendar days of the filing of the report if testing will be required. *Id.* § 7511(a).

and (3) whether the inmates or institution's staff has been exposed to the AIDS virus.²²

Chapter 1579 permits the subject of the test, or the subject's parent or guardian, to appeal the CMO's decision to a three-person panel.²³ The appeal must be a closed hearing with only the CMO,²⁴ the subject of the CMO's report, a parent or guardian of a minor subject, and the person filing the report permitted to attend.²⁵ The panel may authorize or direct HIV testing by a unanimous vote, and the decision is appealable to the Superior Court.²⁶

In addition, Chapter 1579 allows a custodial officer or staff member, who observes or is informed of certain activities²⁷ known to cause the transmission of the AIDS virus, to file a report with the CMO.²⁸ The CMO must investigate the report to determine if the activity poses a danger of HIV transmission to the staff or inmate population.²⁹ If the CMO determines that a danger of transmission exists, the CMO must authorize HIV testing.³⁰

22. *Id.* § 7511(b)(1)-(3). The CMO must receive written and oral testimony from the law enforcement employee filing the report, the subject of the report, and witnesses to the incident prior to making the decision. *Id.* § 7511(c). The CMO's decision must be in writing and state the reasons for the decision. *Id.* The CMO must give copies of the decision to the law enforcement employee who filed the report and to the subject of the report. *Id.* If the subject is a minor, the parents or guardian must also receive a copy of the decision. *Id.*

23. *Id.* § 7515(a). If a request for appeal is not filed, the CMO's decision is final. *Id.* The panel must consist of: (1) The CMO making the original decision; (2) either, (a) a supervisory representative from the law enforcement agency employing the person filing the report, (b) a supervisory representative of the correctional institution appointed by the institution's superintendent, or (c) a supervisory representative of the law enforcement agency with jurisdiction over the facility; and (3) a physician and surgeon not on the staff of, or under contract with, a state, county, or city correctional institution, or an employer of a law enforcement employee who has knowledge of the diagnosis and treatment of AIDS. *Id.* § 7515(b)(1)-(3). A correctional institution or county may create an ongoing panel or panels to hear appeals, so long as one person on the panel meets the above criteria. *Id.* § 7515(b). Prior to creating the panel, the Department of Health Services and the county health officer must approve the panel. *Id.*

24. *Id.* § 7515(c)(1) (description of who CMO may bring to the hearing).

25. *Id.* § 7515(c)(1)-(3).

26. *Id.* § 7515(e). *See id.* § 7516.5 (either a law enforcement employ, medical officer, the person requesting the HIV test, or the person to be tested may appeal the panel's decision). The court must schedule a hearing as soon as possible to review the decision of the panel. *Id.* The decision of the panel must be upheld if there is substantial evidence that HIV could have been transmitted. *Id.*

27. CAL. PENAL CODE § 7516(b). These activities include: (1) Sexual activity resulting in an exchange of bodily fluids; (2) intravenous drug use; (3) incidents involving injury to inmates or staff where bodily fluids are exchanged; (4) tampering with either medical and food supplies or equipment; or (5) tattooing among inmates. *Id.*

28. *Id.* § 7516(a). The CMO may investigate the report and conduct interviews to determine if a risk of transmission of the AIDS virus exists. *Id.* § 7516(c). This section applies only to situations involving individual inmates or group situations, not the whole inmate population within the correctional institution. *Id.* § 7516(e).

29. *Id.* § 7516(c).

30. *Id.* (this decision may be appealed by the subject). Testing may only be required by

Under Chapter 1579, when a person who was incarcerated but later released from custody,³¹ is required to undergo initial or follow-up testing and refuses to take the test, the person's release may be revoked.³² Chapter 1579 requires the institution, upon an inmate's release, to notify an infected inmate's parole or probation officer (officer) that the inmate is infected with HIV or has been diagnosed as having AIDS or AIDS related conditions.³³ The officer must then notify and ensure that the parolee or probationer of the availability of proper counseling and treatment.³⁴ Furthermore, if the officer discovers that the spouse of parolee or probationer has not been informed of the HIV test results, the officer must ensure that the information is given to the spouse by the CMO of the facility, the spouse's physician, or by the parolee's or probationer's physician.³⁵ When the officer receives information from appropriate sources that the parolee or probationer has AIDS or AIDS-related complex, and the parolee or probationer has a record of assault on peace officers, law enforcement officers who have been requested to assist in taking the parolee or probationer into custody must be notified of the parolee's or probationer's condition.³⁶ Finally, Chapter 1579 prohibits the willful false reporting of a request for testing, as well as disclosure of test results in violation of this Chapter.³⁷

a unanimous vote, and the panel's decision must be rendered within 20 days of the hearing. *Id.* § 7516(d).

31. A person released from custody is any person, including a minor made a ward of the court under Welfare and Institutions Code section 602, who has been: (1) Charged with a crime, but is not being held in a correctional institution due to either release on bail or on the person's own recognizance, or any other reason; or (2) convicted of a crime, but not held due to the imposition of probation, a fine, or other alternative sentence. *Id.* § 7519(a).

32. *Id.* Refusal by a parolee or probationer to submit to testing required may result in a violation of parole or probation. *Id.* § 7519(b).

33. *Id.* § 7520. A medical representative of the institution must notify the officer and convey the latest information concerning precautions which should be taken. *Id.*

34. *Id.* The officer must ensure that contact is made with the parolee's or probationer's county health department to learn of counseling and treatment for AIDS that is available to the general public. *Id.*

35. *Id.* § 7521(a). The parole or probation officer must also ensure that the spouse receives proper counseling. *Id.*

36. *Id.* §§ 7521(b) (parole and probation officer's obligation to inform), 7522(a) (supervisory and medical personnel's obligation to inform). All law enforcement officers receiving this information must maintain confidentiality. *Id.* § 7521(c). A law enforcement officer or parole or probation officer who willfully or negligently discloses such information is guilty of a misdemeanor. *Id.* Chapter 1579 recommends every city and county correctional, custodial and law enforcement agency to have a comprehensive AIDS and HIV prevention and education program containing at least the following components: (1) Education for officers, support staff, and inmates on the prevention and transmission of HIV; (2) body fluid precautions; (3) separate and equivalent housing for infected individuals; and (4) adequate AIDS medical services. *Id.* § 7552(a)(1)-(4). The program must satisfy the requirements of confidentiality as provided by Chapter 1579. *Id.* § 7552(b).

37. *Id.* § 7540 (offenders will be guilty of a misdemeanor).

COMMENT

Chapter 1579 may be vulnerable to constitutional challenges based on the unreasonableness of the act's search and seizure provisions and the provisions that intrude on an individual's right to privacy. Existing law guarantees all citizens the right to be free from unreasonable searches and seizures and requires the government to have probable cause to obtain a search warrant for evidence of criminal conduct.³⁸ However, in the case of an administrative search, neither probable cause nor an administrative warrant is required if the search is aimed at discovering conditions that may pose a serious threat to the health and welfare of society, rather than obtaining evidence of crime.³⁹ In analyzing the validity of an administrative search, a court balances the legislative intent of a statute and the societal interest against the extent of intrusion imposed on the citizen who is searched.⁴⁰

The legislature, recognizing the challenges and concerns brought about by the rapid spread of AIDS within the closed society of correctional institutions, enacted Chapter 1579 which provides for mandatory HIV testing for select inmates to curtail the spread of AIDS.⁴¹ This search and seizure of an inmate's blood may be construed as an unconstitutional evidentiary search because Chapter 1579 does not require probable cause for finding criminal evidence in the inmate's blood; the mere presence of AIDS in a person's blood is not a crime.⁴² If the government demonstrates, however, that the

38. U.S. CONST. amend. IV; CAL. CONST. art. 1, § 13.

39. *Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (concluding that a warrant requirement would impede the specific enforcement needs required by the Mine Safety and Health Act). *But see Camara v. Municipal Court*, 387 U.S. 523, 534 (1967) (an administrative warrant was necessary to prove officer's authority to search plaintiff's home).

40. *Camara* at 536-537. There is no ready test for reasonableness of an administrative search other than by balancing the need to search against the invasion of the search. *Id.* *See Winston v. Lee*, 470 U.S. 753, 760 (1985) (determining that a case-by-case approach, was necessary in determining the reasonableness of a physically intrusive search, where the individual's interests in privacy and security are weighed against society's interests in conducting the search).

41. CAL. PENAL CODE § 7501 (legislature apparently intends to introduce a broad scheme to combat the public health crisis of AIDS). *See generally* Landesman, Ginzburg & Weiss, *Special Report: The AIDS Epidemic*, 312 NEW ENG. J. MED. 521 (1985) (general information about AIDS); Moriarity, *AIDS in Correctional Institutions: The Legal Aspects*, 23 CRIM. L. BULL. 533 (1987) (legal problems and possible resolutions society faces with the AIDS epidemic).

42. *See Illinois v. Gates*, 462 U.S. 213, 238-239 (1983) (a substantial basis for concluding that a search would uncover criminal evidence is necessary for probable cause). *See also* *People v. Browning*, 108 Cal. App. 3d 117, 124, 166 Cal. Rptr. 293, 297 (1980) (when a warrant authorizing bodily intrusion is sought, the issuing authority must find probable cause to believe intrusion will reveal evidence of crime). *But see Winston* at 766 (court ordered surgery to remove a bullet would constitute an unreasonable search due to the substantial nature of the intrusion). *See generally* U.S. CONST. amend. IV; CAL. CONST. art. 1 § 13 (probable cause is required prior to obtaining a search warrant).

search and seizure promotes the health and welfare of society by combating the rapid spread of AIDS within correctional facilities, and that society's interests in stopping the epidemic exceed the violation of the curtailed rights of the inmate, the intrusion may be justified as an administrative search.⁴³

However, the California Constitution also contains an express right to privacy.⁴⁴ The right is limited, and the state may violate this right to further compelling state interests.⁴⁵ When a person is incarcerated, the person's rights as an inmate are greatly diminished.⁴⁶ Since the state's interest in regulating inmates in a correctional institution is greater than regulating persons outside an institution, the disclosure of an inmate's HIV test results to select persons within the institution may further a compelling state interest: the prevention of the spread of AIDS.⁴⁷ An inmate regains some rights after release from a correctional institution; however, the state may require the inmate to waive certain rights providing the waiver is rationally related to the crime.⁴⁸ Although the government's interest in regulating persons outside an institution are considerably less than regulating persons

43. See *Camara* at 534-539 (court instigated less stringent standard of probable cause to search plaintiff's home due to the public's demand that dangerous conditions be prevented or abated). See also *Schmerber v. California*, 384 U.S. 757, 768-771 (1966) (an officer was allowed to administer a blood alcohol test in conjunction with pulling the plaintiff over for suspected driving while intoxicated because the fact that the blood alcohol level would subside with time constituted an emergency).

44. CAL. CONST. art. 1, § 1.

45. See *Comm. to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 265-266, 625 P.2d 779, 786, 172 Cal. Rptr. 866, 873 (1981) (whether the condition imposed relates to the purposes of the legislation, the utility of the conditions clearly outweigh the resulting intrusion, and the availability of viable alternatives all must be considered when determining the government's right to invade a person's privacy). See also *Bagley v. Washington Township Hospital District*, 65 Cal. 2d 499, 501, 421 P.2d 409, 411, 55 Cal. Rptr. 401, 403 (1966) (only a compelling state interest can justify intrusions upon a person's constitutional rights).

46. See *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (while the prisoner's rights are substantially diminished, the prisoner is not wholly stripped of constitutional protections upon imprisonment).

47. CAL. PENAL CODE § 7500(e) (protection of the health and safety of state personnel within correctional institutions is of equal interest to the state as is the protection of the health of those infected with AIDS being held within the institutions). *But see* *Woods v. White and Smith*, 689 F.Supp. 874, (1988) (disclosure to nonmedical staff and other inmates that plaintiff, an inmate, tested positively for AIDS constituted a violation of the plaintiff's right to privacy—a right retained regardless of incarceration).

48. See *People v. Bravo*, 43 Cal. 3d 600, 608, 738 P.2d 336, 341, 238 Cal. Rptr. 282, 287 (1987) (probationer consents to the waiver of Fourth Amendment rights in exchange for the opportunity to avoid serving time in the state prison). *But see* *United State v. Cordova*, 650 F.2d 189, 191 (9th Cir. 1981) (probationer still entitled to enjoy a significant degree of privacy). See generally *People v. Burgener*, 41 Cal. 3d 505, 530-536, 714 P.2d 1251, 1268-1269, 224 Cal. Rptr. 112, 129-132 (1986) (parolee's acceptance of parole is in no sense pursuant to a voluntary agreement to waive privacy rights in exchange for release, rather the parolee's status as a felon and the societal interest in rehabilitation and supervision justify imposing a warrantless search provision on parolees).

within an institution, the potentially devastating discriminatory effect caused by the disclosure of a person's HIV test results may constitute too severe of an intrusion on the limited rights of a parolee or probationer.⁴⁹ Chapter 1579 will pass constitutional scrutiny if: (1) The search and seizure provisions are of sufficient weight to permit the blood test; and (2) disclosure of the HIV test results is a compelling enough interest to justify the intrusion on the inmate's, parolee's, and probationer's privacy rights. Society is understandably concerned with the rapid spread of AIDS. The search and seizure authorized by Chapter 1579 is justified by society's compelling interest in controlling the further spread of the virus without violating the limited constitutional rights of inmates, parolees and probationers. However, disclosure of an inmate's HIV test result to select persons outside of the correctional institution violates the parolee's and probationer's constitutional right to privacy.

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49. See Sullivan, Field, *Coercive Power of the State*, 139 HARV. C.R.-C.L. L. REV. 140, 179-180 (1988) (effects of prejudice and hysteria on AIDS victims when their illness is disclosed to the public). See also Banks and McFadden, *HIV Test Reliability* 23 TULSA L. J. 1, 30-31 (1988) (social stigma that follows disclosure of test results should be considered in light of inaccuracy of testing). But see Loder v. Municipal Court 17 Cal. 3d. 859, 877, 553 P.2d. 624, 637, 132 Cal. Rptr. 464, 477 (1976) (limited retention and dissemination of arrest records does not violate the arrestee's constitutional right to privacy).

Health and Welfare; misuse of nutrition coupons

Health & Safety Code §§ 317.3, 317.5, (new).
AB 4606 (Allen); 1988 STAT. Ch. 1012

Under existing law, the Department of Health (Department) may enter and investigate or audit the place of business of any food vendor¹ authorized to accept nutrition coupons² to ensure compliance with the California Supplemental Food Program for Women, Infants,

1. See CAL. HEALTH & SAFETY CODE § 314(a)-(d) (criteria for authorizing food vendors to accept nutrition coupons).

2. *Id.* § 311.5(d) (a nutrition coupon is a check which is valid for a limited time and restricted to a specified value, food quantity, and food type). See *id.* § 315(a)-(c) (information to be printed on coupons).

and Children (Program).³ With the enactment of Chapter 1012, the Department's director, may file a certificate⁴ requesting the entry of a judgment for the state against a vendor or local agency for funds that are due and payable to the Program, but are unpaid because of an overpayment by the Program to a vendor or local agency.⁵ A vendor or local agency, however, may appeal an audit finding or lower level administrative action to the Department director or seek judicial review of the administrative decision.⁶ Chapter 1012 allows an abstract of judgment to have the effect of a judgment lien on all personal and real property owned by the vendor or local agency at the time of the judgment or acquired before the expiration of the lien.⁷

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3. *Id.* § 315.5. *See id.* § 311(c) (definition of California Special Supplemental Food Program for Women, Infants, and Children). *See generally id.* §§ 311.5-319 (regulations for the California Special Supplemental Food Program for Women, Infants, and Children).

4. A certificate must include the amount due plus interest, a statement that the director has adhered to the specified rules, and a request for judgment against the vendor or local agency for the specified amount. *Id.* § 317.3(a)(1)-(3).

5. *Id.* 317(a). The Department may conduct an audit or examination to discover overpayments to a vendor or local agency. *Id.* The Department may issue to the vendor or local agency an audit finding, examination finding, or administrative decision from a final appeal of an audit finding or examination finding. *Id.* The Department has between 90 days and 3 years to file a certificate of judgment from the date of the final audit, lower administrative decision, or appeal from an audit or administrative decision. *Id.* § 317.3(b)(2). If a vendor does not request judicial review of an appeal, or proper notice has not been served on the director within 90 days of the final decision, the Department may file a certificate and receive a judgment. *Id.* § 317.3(c).

6. *Id.* §§ 317.3(b)(2), 317.3(c). *See CAL. CIV. PROC. CODE* § 1094.5 (review of administrative rulings and orders). *See generally CAL. HEALTH & SAFETY CODE* § 317.3(c) (a certificate may not be filed if a vendor requests a judicial review of an appeal and proper notice has been served on the director within 90 days of the final decision).

7. *Id.* § 317.5. The judgment lien will last for a period of 10 years and may be renewed at any time within the initial 10 year period for another 10 years if not discharged. *Id.*

Health and Welfare; asbestos warnings

Health & Safety Code §§ 25915, 25915.5, 25916, 25917, 25917.5, 25918, 25919, 25920, 25921, 25922, 25923, 25924 (new).
AB 3713 (Connelly); 1988 Cal. STAT. Ch. 1502

In order to protect employees from exposure to asbestos,¹ Chapter

1. It is the declared policy in California that workers whose occupations expose them to asbestos fibers receive workers' compensation benefits promptly and not be subjected to delays

1502 requires an owner² of any building³ constructed prior to 1979 to provide notice of the presence of asbestos containing construction materials⁴ to all employees⁵ and other owners.⁶ The notice must include: (1) Results of any test or survey conducted, (2) specific locations of the asbestos containing construction materials, (3) safety precautions necessary to ensure employee safety, (4) results of any bulk sample analysis air monitoring conducted by the owner, and (5) potential health risks or impacts that may result from exposure to the asbestos.⁷

If the asbestos containing construction material is limited to bonded asbestos and the owner knows that no asbestos fibers are being released, the owner need only give notice of the following: (1) Specified locations of asbestos containing construction materials, (2) the results of any survey conducted, and (3) information regarding the health risks inherent in the disturbance of asbestos containing construction materials by unqualified employees.⁸ The notice may include a description and explanation of health action levels or exposure standards.⁹ If the owner has no special knowledge concerning the presence of asbestos in the building, Chapter 1502 requires

of litigation to determine the responsible employer. CAL. LAB. CODE § 4401. California affords special treatment to workers exposed to asbestos. See, Hanna, *California Law of Employee Injuries and Workmen's Compensation*, § 11.03[d].

2. Cal. Health & Safety Code § 25923 (includes an owner, lessee, sublessee, or operator of a building or part of a building, including, but not limited to, a state or other public entity).

3. *Id.* § 25920 (all public and commercial buildings other than residential dwellings). Chapter 1502 adopts the federal definition of "public and commercial building." *Id.* See 15 U.S.C. 2642(10) (1986) (federal definition of "public and commercial building").

4. CAL. HEALTH & SAFETY CODE § 25915 (defines "asbestos containing structural materials").

5. *Id.* § 25921 (definition of employee). The owner must provide each individual employee a written notice 15 days after receiving information of the presence of asbestos in the building and the owner must notify new employees within 15 days of commencement of work. *Id.* § 25915(b).

6. *Id.* § 25915(a). An owner must give notice to all other owners of the building or part of the building with whom the owner has privity of contract. *Id.* § 25915.5. If a person contracting with an owner receives notice of the existence of asbestos, the contractor must provide a copy of the notice to his or her employees or contractors working within the building. *Id.* § 25915(d).

7. *Id.* § 25915(a)(1)-(5). See also 8 CAL. CODE OF REGS § 5208 (monitoring for asbestos).

8. CAL. HEALTH & SAFETY CODE § 25915(f)(1)-(2).

9. *Id.* § 25915(a). The notice must contain a description and explanation of three action levels or exposure standards. First, the notice describe and explain the "no significant risk level" under the Safe Drinking Water and Toxic Enforcement Act of 1986. *Id.* § 25249.5-25249.13. See also 22 CAL. CODE OF REGS § 12711. Second, the notice must describe and explain the school abatement clearance level. See CAL. EDUC. CODE § 49410.7. Third, the notice must describe and explain the action levels under state and federal Occupational Safety and Health Act regulations. See CAL. LAB. CODE § 6300-6711. See also 29 U.S.C. § 651-678 (1970).

the notice to indicate that the owner lacks the special knowledge regarding potential health hazards and safety instructions necessary to insure employee safety.¹⁰

If the asbestos containing construction material is limited to specified areas within the building,¹¹ Chapter 1502 requires the owner to provide notice only to those employees entering or working within that area.¹² Chapter 1502 also requires the owner to post a clear and conspicuous warning¹³ where any construction, maintenance, or remodeling might result in contact with or exposure to asbestos or asbestos containing construction materials.¹⁴ Chapter 1502 provides for criminal penalties for failure to provide employees with any of the notice provisions.¹⁵

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10. CAL. HEALTH & SAFETY CODE § 25915(c).

11. The limited areas must meet the following criteria: (1) The area must be unique and physically defined, (2) the area must contain asbestos containing construction materials in structural, mechanical, or building materials which are not replicated throughout the building, and (3) the area must not be connected to other areas through a common ventilation system. *Id.* § 25915(e)(1)-(3).

12. *Id.* § 25915(e).

13. The warning must be readily visible and read "CAUTION. ASBESTOS. CANCER HAZARD. DO NOT DISTURB WITHOUT PROPER TRAINING AND EQUIPMENT." *Id.* § 25916.

14. *Id.*

15. *Id.* § 25924 (any owner who knowingly or intentionally fails to comply with the notice provisions is guilty of a misdemeanor and punishable by a fine not to exceed \$1,000 or up to one year in the county jail or both).

