

By: Zedler

H.B. No. 1466

A BILL TO BE ENTITLED

AN ACT

relating to the regulation of owners, operators, employees, and independent contractors of sexually oriented businesses; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle D, Title 13, Occupations Code, is amended by adding Chapter 2158 to read as follows:

CHAPTER 2158. SEXUALLY ORIENTED BUSINESSES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 2158.001. DEFINITIONS. In this chapter:

(1) "Department" means the Department of State Health Services.

(2) "Executive commissioner" means the executive commissioner of the Health and Human Services Commission.

(3) "License holder" means a person who holds a license issued under this chapter.

Sec. 2158.002. SEXUALLY ORIENTED BUSINESSES DEFINED. (a) In this chapter, a "sexually oriented business" means:

(1) a sex parlor, sexually oriented arcade, sexually oriented bookstore, sexually oriented video store, sexually oriented cabaret, sexually oriented motel, sexually oriented novelty store, sexually oriented theater, sexually oriented motion picture theater, sexually oriented service establishment, nude model business, or sexual encounter center; or

1           (2) any other commercial enterprise:

2                   (A) that devotes a significant or substantial  
3 portion of its business to the offering of a service or to the  
4 selling, renting, or exhibiting of a device or any other item  
5 intended to provide sexual stimulation or sexual gratification to  
6 its customers;

7                   (B) that is distinguished by or characterized by  
8 an emphasis on matter depicting, describing, or relating to  
9 specified sexual activities or specified anatomical areas; or

10                   (C) whose employees or customers appear in a  
11 state of nudity.

12           (b) As used in Subsection (a), "significant or substantial  
13 portion" refers to all relevant factors, including:

14                   (1) whether the business uses advertising or a sign  
15 identifying the business as having sexually explicit merchandise or  
16 services for sale, rental, or viewing, including the use of terms  
17 such as "adult," "sex," or "XXX";

18                   (2) the percentage of the business's overall sales or  
19 revenues attributable to sexually explicit content; and

20                   (3) the percentage of sales or revenues attributable  
21 to sexually explicit content within each category of merchandise,  
22 including books, magazines, movies for rent, movies for sale,  
23 movies for on-site viewing, performances, sexual paraphernalia,  
24 and other similar products or services.

25           (c) As used in Subsection (a), "state of nudity" means:

26                   (1) the appearance of a human bare buttock, a vulva, an  
27 anus, an anal cleft with less than a full opaque covering, male

1 genitals, female genitals, or a female breast; or

2 (2) a state of dress that fails to completely and  
3 opaquely cover a human buttock, a vulva, an anus, male genitals, or  
4 female genitals or a part of the female breast that is situated  
5 below a point immediately above the top of the areola of the female  
6 breast.

7 Sec. 2158.003. ADMINISTRATION BY DEPARTMENT OF STATE HEALTH  
8 SERVICES. The department shall administer this chapter.

9 Sec. 2158.004. MUNICIPAL AND COUNTY REGULATION. This  
10 chapter is in addition to any municipal or county regulation. To  
11 the extent of a conflict between this chapter and a municipal or  
12 county regulation, this chapter controls.

13 Sec. 2158.005. EXEMPTIONS. (a) This chapter does not apply  
14 to:

15 (1) a business operated by or employing a licensed  
16 psychologist, licensed physical therapist, licensed masseuse,  
17 licensed vocational nurse, registered nurse, licensed athletic  
18 trainer, licensed cosmetologist, or licensed barber engaged in  
19 performing the normal and customary functions authorized under the  
20 license;

21 (2) a business operated by or employing a licensed  
22 physician or licensed chiropractor engaged in practicing the  
23 healing arts;

24 (3) a retail establishment whose principal business is  
25 the offering of wearing apparel for sale to customers and that does  
26 not exhibit merchandise on live models;

27 (4) an activity conducted or sponsored:

1           (A) by a proprietary school licensed by this  
2 state or a state-supported junior college or institution of higher  
3 education; or

4           (B) by a private institution of higher education  
5 that maintains or operates educational programs in which credits  
6 are transferable to a state-supported junior college or institution  
7 of higher education;

8           (5) a person licensed as an occupational therapist  
9 under Chapter 454; or

10          (6) a person who is providing a repair, maintenance,  
11 air conditioning, or delivery service on the premises of a sexually  
12 oriented business.

13          (b) An activity conducted or sponsored by an entity  
14 identified in Subsection (a)(4):

15           (1) must be in a structure that does not have a sign or  
16 other advertising visible from the exterior of the structure  
17 indicating that a nude person is available for viewing;

18           (2) must require that, in order to participate in the  
19 activity or conduct of a class, a student must enroll in the class  
20 at least three days in advance of the class; and

21           (3) may not have more than one nude model on the  
22 premises at any time.

23          [Sections 2158.006-2158.050 reserved for expansion]

24           SUBCHAPTER B. POWERS AND DUTIES

25          Sec. 2158.051. FEES. The department shall set fees in an  
26 amount sufficient to cover the cost of administering this chapter.

27          Sec. 2158.052. RULES. The executive commissioner shall

1 adopt rules necessary to administer and enforce this chapter.

2 Sec. 2158.053. RULES RESTRICTING ADVERTISING OR  
3 COMPETITIVE BIDDING. (a) The executive commissioner may not adopt  
4 rules restricting advertising or competitive bidding by a license  
5 holder except to prohibit false, misleading, or deceptive  
6 practices.

7 (b) In the executive commissioner's rules to prohibit  
8 false, misleading, or deceptive practices, the executive  
9 commissioner may not include a rule that:

10 (1) restricts the use of any medium for advertising;

11 (2) restricts the use of a license holder's personal  
12 appearance or voice in an advertisement;

13 (3) relates to the size or duration of an  
14 advertisement by the license holder; or

15 (4) restricts the license holder's advertisement under  
16 a trade name.

17 Sec. 2158.054. RECORDS DISCLOSURE; CONFIDENTIALITY. (a)  
18 The department shall disclose to a criminal justice agency  
19 information contained in its files and records regarding whether a  
20 named individual is licensed under this chapter.

21 (b) Except as otherwise provided by this section, all  
22 records maintained under this chapter regarding an applicant or  
23 license holder are confidential and are not subject to mandatory  
24 disclosure under the open records law, Chapter 552, Government  
25 Code, except that an applicant or license holder may be furnished a  
26 copy of disclosable records regarding that applicant or license  
27 holder on request and the payment of a reasonable fee.

1 [Sections 2158.055-2158.100 reserved for expansion]

2 SUBCHAPTER C. LICENSE REQUIREMENTS

3 Sec. 2158.101. LICENSE REQUIRED. (a) A person may not own,  
4 operate, or work at a sexually oriented business unless the person  
5 holds a license under this chapter.

6 (b) A person may not employ or hire a person to work at, or  
7 contract with an independent contractor to work at, a sexually  
8 oriented business unless the person employed or the independent  
9 contractor entering into the contract holds a license under this  
10 chapter.

11 Sec. 2158.102. ISSUANCE OF LICENSE. (a) The department  
12 shall issue a sexually oriented business license to an applicant  
13 that meets the requirements of this chapter.

14 (b) The department shall establish separate categories of  
15 licenses issued under this chapter for:

16 (1) an owner or operator of a sexually oriented  
17 business; and

18 (2) an employee of or independent contractor for a  
19 sexually oriented business.

20 Sec. 2158.103. FORM OF LICENSE. A license issued to an  
21 individual under this subchapter that the individual is required to  
22 display may not contain any personally identifiable information  
23 about the individual.

24 Sec. 2158.104. LICENSE APPLICATION. (a) A license  
25 applicant must apply to the department on a form and in the manner  
26 the department prescribes.

27 (b) The application must be accompanied by a nonrefundable

1 application fee and any other appropriate fees.

2 Sec. 2158.105. ELIGIBILITY FOR LICENSE; INELIGIBILITY FOR  
3 CERTAIN OFFENSES. (a) To be eligible for a license under this  
4 chapter, an applicant must be at least 18 years of age and meet any  
5 other requirements approved by the department.

6 (b) A person is ineligible to be issued a license under this  
7 chapter if the person has been convicted of:

8 (1) prostitution;

9 (2) promotion of prostitution;

10 (3) aggravated promotion of prostitution;

11 (4) compelling prostitution;

12 (5) obscenity;

13 (6) sale, distribution, or display of harmful material  
14 to a minor;

15 (7) an offense under Section 43.25, Penal Code (sexual  
16 performance by a child);

17 (8) possession of child pornography;

18 (9) public lewdness;

19 (10) indecent exposure;

20 (11) indecency with a child;

21 (12) sexual assault or aggravated sexual assault;

22 (13) incest, including prohibited sexual conduct  
23 under Chapter 25, Penal Code; or

24 (14) harboring a runaway child.

25 Sec. 2158.106. LICENSE EXPIRATION AND RENEWAL. (a) A  
26 license expires on the second anniversary of the date it was issued.

27 (b) A person who is otherwise eligible to renew a license

1 may renew an unexpired license by paying the required renewal fee to  
2 the department before the expiration date of the license. A person  
3 whose license has expired may not engage in activities that require  
4 a license until the license is renewed.

5 (c) A person whose license has been expired for 90 days or  
6 less may renew the license by paying to the department a renewal fee  
7 that is equal to 1-1/2 times the normally required renewal fee.

8 (d) A person whose license has been expired for more than 90  
9 days but less than one year may renew the license by paying to the  
10 department a renewal fee that is equal to two times the normally  
11 required renewal fee.

12 (e) A person whose license has been expired for one year or  
13 more may not renew the license. The person may obtain a new license  
14 by complying with the requirements and procedures for obtaining an  
15 original license.

16 Sec. 2158.107. NOTICE OF RENEWAL. Not later than the 30th  
17 day before the date a person's license is scheduled to expire, the  
18 department shall send written notice of the impending expiration to  
19 the person at the person's last known address according to the  
20 records of the department.

21 [Sections 2158.108-2158.150 reserved for expansion]

22 SUBCHAPTER D. PRACTICE BY LICENSE HOLDER

23 Sec. 2158.151. CONTINUING EDUCATION. (a) The department  
24 may recognize, prepare, or administer continuing education  
25 programs for its license holders under this chapter. A license  
26 holder may not renew the person's license unless the person meets  
27 any continuing education requirements.



1       (b) The department shall:

2           (1) provide to a license applicant, with the  
3 application form on which the person is to apply for a license,  
4 information describing the continuing education requirements; and

5           (2) notify each license holder of any change in the  
6 continuing education requirements at least one year before the date  
7 the change takes effect.

8       Sec. 2158.152. DISPLAY OF LICENSE AND ON-SITE CARD. (a) A  
9 manager or employee licensed under this chapter must conspicuously  
10 display the person's license at the sexually oriented business at  
11 which the person is employed.

12       (b) A manager or employee licensed under this chapter shall  
13 provide an on-site card to the on-site manager in charge of the  
14 sexually oriented business while the employee or manager is on the  
15 premises of the sexually oriented business.

16       (c) In a prosecution for a violation under this section, a  
17 presumption exists that the manager or employee did not have a  
18 license issued under this chapter if the license is not on display  
19 as required by this section.

20       [Sections 2158.153-2158.200 reserved for expansion]

21       SUBCHAPTER E. LICENSE DENIAL AND DISCIPLINARY PROCEDURES

22       Sec. 2158.201. ADMINISTRATIVE SANCTIONS. (a) The  
23 department shall revoke, suspend, or refuse to issue or renew a  
24 license or shall reprimand a license holder for a violation of this  
25 chapter or a rule adopted under this chapter.

26       (b) The department may place on probation a person whose  
27 license is suspended. If a license suspension is probated, the

1 department may require the person:

2 (1) to report regularly to the department on matters  
3 that are the basis of the probation;

4 (2) to limit business activities to the areas  
5 prescribed by the department; or

6 (3) to continue or review professional education until  
7 the person attains a degree of skill satisfactory to the department  
8 in those areas that are the basis of the probation.

9 Sec. 2158.202. COMPLAINTS. Any person may file a complaint  
10 with the department alleging a violation of this chapter or a rule  
11 adopted under this chapter.

12 Sec. 2158.203. PROHIBITED ACTIONS. A license holder may  
13 not:

14 (1) obtain a license by means of fraud,  
15 misrepresentation, or concealment of a material fact;

16 (2) sell, barter, or offer to sell or barter a license;  
17 or

18 (3) engage in unprofessional conduct that endangers or  
19 is likely to endanger the health, welfare, or safety of the public  
20 as defined by an executive commissioner rule.

21 Sec. 2158.204. MONITORING OF LICENSE HOLDER; RULES. (a)  
22 The executive commissioner by rule may develop a system for  
23 monitoring a license holder's compliance with this chapter.

24 (b) Rules adopted under this section may include procedures  
25 to:

26 (1) monitor for compliance a license holder who is  
27 ordered by the department to perform certain acts; and

1           (2) identify and monitor license holders who represent  
2 a risk to the public.

3           Sec. 2158.205. LICENSE DENIAL, REVOCATION, OR SUSPENSION  
4 FOR CRIMINAL CONVICTION. (a) The department may deny a license  
5 application or request for renewal, or may suspend or revoke a  
6 license, if the applicant or license holder has been convicted of:

7           (1) a felony; or

8           (2) a misdemeanor involving:

9                   (A) prostitution;

10                   (B) promotion of prostitution;

11                   (C) obscenity;

12                   (D) sale, distribution, or display of harmful  
13 material to a minor;

14                   (E) public lewdness;

15                   (F) indecent exposure; or

16                   (G) harboring a runaway child.

17           (b) The department may take action authorized by this  
18 section:

19                   (1) after the time for appeal of the person's  
20 conviction has elapsed;

21                   (2) after the judgment or conviction has been affirmed  
22 on appeal; or

23                   (3) on issuance of an order granting probation  
24 suspending the imposition of the person's sentence, without regard  
25 to whether a subsequent order:

26                           (A) allows withdrawal of a plea of guilty;

27                           (B) sets aside a verdict of guilty; or

1 (C) dismisses an information or indictment.

2 (c) A plea or verdict of guilty or a conviction following a  
3 plea of nolo contendere is a conviction for purposes of this  
4 section.

5 Sec. 2158.206. SCHEDULE OF SANCTIONS; RULES. The  
6 department shall use the schedule of sanctions adopted by executive  
7 commissioner rule for any sanction imposed as the result of a  
8 hearing conducted by the department.

9 Sec. 2158.207. REINSTATEMENT. (a) A person may apply for  
10 reinstatement of a revoked license on or after the first  
11 anniversary of the date of revocation.

12 (b) The department may accept or reject the application.

13 Sec. 2158.208. REPRIMAND; CONTINUING EDUCATION. (a) In  
14 addition to other disciplinary action authorized by this  
15 subchapter, the department may:

16 (1) issue a written reprimand to a license holder who  
17 violates this chapter; or

18 (2) require that a license holder who violates this  
19 chapter attend continuing education programs.

20 (b) The department may specify the number of hours of  
21 continuing education that must be completed by a license holder to  
22 fulfill the requirement of Subsection (a)(2).

23 Sec. 2158.209. EMERGENCY SUSPENSION. (a) The department  
24 or a three-member committee of members designated by the department  
25 shall temporarily suspend the license of a license holder if the  
26 department or committee determines from the evidence or information  
27 presented to it that continued practice by the license holder would

1 constitute a continuing and imminent threat to the public health or  
2 welfare.

3 (b) A license may be suspended under this section without  
4 notice or hearing on the complaint if:

5 (1) action is taken to initiate proceedings for a  
6 hearing before the State Office of Administrative Hearings  
7 simultaneously with the temporary suspension; and

8 (2) a hearing is held as soon as practicable under this  
9 chapter and Chapter 2001, Government Code.

10 (c) The State Office of Administrative Hearings shall hold a  
11 preliminary hearing not later than the 14th day after the date of  
12 the temporary suspension to determine if there is probable cause to  
13 believe that a continuing and imminent threat to the public health  
14 or welfare still exists. A final hearing on the matter shall be  
15 held not later than the 61st day after the date of the temporary  
16 suspension.

17 [Sections 2158.210-2158.250 reserved for expansion]

18 SUBCHAPTER F. PENALTIES AND OTHER ENFORCEMENT PROCEDURES

19 Sec. 2158.251. DECEPTIVE TRADE PRACTICE. A violation of  
20 Section 2158.101 is a deceptive trade practice.

21 Sec. 2158.252. INJUNCTION. The department may apply to a  
22 district court in any county for an injunction or another order to  
23 restrain the violation of this chapter by a person other than a  
24 license holder under this chapter.

25 Sec. 2158.253. CRIMINAL OFFENSE. (a) A person commits an  
26 offense if the person violates Section 2158.101.

27 (b) An offense under this section is a Class A misdemeanor.

1       Sec. 2158.254. CIVIL PENALTY. (a) A person who violates  
2 Section 2158.101 is liable to the state for a civil penalty in an  
3 amount not to exceed \$1,000 for each violation. Each day a  
4 violation occurs is a separate violation.

5       (b) The department or the attorney general may institute an  
6 action in a district court in Travis County or in the county in  
7 which the person who is alleged to have violated Section 2158.101  
8 resides.

9       [Sections 2158.255-2158.300 reserved for expansion]

10               SUBCHAPTER G. ADMINISTRATIVE PENALTY

11       Sec. 2158.301. IMPOSITION OF ADMINISTRATIVE PENALTY. The  
12 department may impose an administrative penalty on a person  
13 licensed under this chapter who violates this chapter or a rule or  
14 order adopted under this chapter.

15       Sec. 2158.302. AMOUNT OF ADMINISTRATIVE PENALTY. (a) The  
16 amount of the administrative penalty may not be less than \$50 or  
17 more than \$5,000 for each violation. Each day a violation continues  
18 or occurs is a separate violation for the purpose of imposing a  
19 penalty.

20       (b) The amount shall be based on:

21               (1) the seriousness of the violation, including the  
22 nature, circumstances, extent, and gravity of the violation;

23               (2) the economic harm caused by the violation;

24               (3) the history of previous violations;

25               (4) the amount necessary to deter a future violation;

26               (5) efforts to correct the violation; and

27               (6) any other matter that justice may require.

1       Sec. 2158.303. REPORT AND NOTICE OF VIOLATION AND PENALTY.

2       (a) If the department determines that a violation occurred, the  
3 department may issue a report stating:

4               (1) the facts on which the determination is based; and

5               (2) the department's recommendation on the imposition  
6 of an administrative penalty, including a recommendation on the  
7 amount of the penalty.

8       (b) Within 14 days after the date the report is issued, the  
9 department shall give written notice of the report to the person.

10 The notice must:

11               (1) include a brief summary of the alleged violation;

12               (2) state the amount of the recommended administrative  
13 penalty; and

14               (3) inform the person of the person's right to a  
15 hearing on the occurrence of the violation, the amount of the  
16 penalty, or both.

17       Sec. 2158.304. PENALTY TO BE PAID OR HEARING REQUESTED. (a)  
18 Within 10 days after the date the person receives the notice, the  
19 person in writing may:

20               (1) accept the determination and recommended  
21 administrative penalty of the department; or

22               (2) make a request for a hearing on the occurrence of  
23 the violation, the amount of the penalty, or both.

24       (b) If the person accepts the determination and recommended  
25 penalty of the department, the department by order shall approve  
26 the determination and impose the recommended penalty.

27       Sec. 2158.305. HEARING. (a) If the person requests a

1 hearing or fails to respond in a timely manner to the notice, the  
2 department shall set a hearing and give written notice of the  
3 hearing to the person.

4 (b) An administrative law judge of the State Office of  
5 Administrative Hearings shall hold the hearing.

6 (c) The administrative law judge shall make findings of fact  
7 and conclusions of law and promptly issue to the department a  
8 proposal for a decision about the occurrence of the violation and  
9 the amount of a proposed administrative penalty.

10 Sec. 2158.306. DECISION BY DEPARTMENT. (a) Based on the  
11 findings of fact, conclusions of law, and proposal for decision,  
12 the department by order may determine that:

13 (1) a violation occurred and impose an administrative  
14 penalty; or

15 (2) a violation did not occur.

16 (b) The notice of the department's order given to the person  
17 must include a statement of the right of the person to judicial  
18 review of the order.

19 Sec. 2158.307. OPTIONS FOLLOWING DECISION: PAY OR APPEAL.

20 (a) Within 30 days after the date the department's order becomes  
21 final, the person shall:

22 (1) pay the administrative penalty; or

23 (2) file a petition for judicial review contesting the  
24 occurrence of the violation, the amount of the penalty, or both.

25 (b) Within the 30-day period prescribed by Subsection (a), a  
26 person who files a petition for judicial review may:

27 (1) stay enforcement of the penalty by:



1                   (A) paying the penalty to the court for placement  
2 in an escrow account; or

3                   (B) giving the court a supersedeas bond approved  
4 by the court that:

5                               (i) is for the amount of the penalty; and  
6                               (ii) is effective until all judicial review  
7 of the department's order is final; or

8                   (2) request the court to stay enforcement of the  
9 penalty by:

10                   (A) filing with the court a sworn affidavit  
11 stating that the person is financially unable to pay the penalty and  
12 is financially unable to give the supersedeas bond; and

13                   (B) giving a copy of the affidavit to the  
14 department by certified mail.

15                   (c) If the department receives a copy of an affidavit under  
16 Subsection (b)(2), the department may file with the court, within  
17 five days after the date the copy is received, a contest to the  
18 affidavit.

19                   (d) The court shall hold a hearing on the facts alleged in  
20 the affidavit as soon as practicable and shall stay the enforcement  
21 of the penalty on finding that the alleged facts are true. The  
22 person who files an affidavit has the burden of proving that the  
23 person is financially unable to pay the penalty and to give a  
24 supersedeas bond.

25                   Sec. 2158.308. COLLECTION OF PENALTY. (a) If the person  
26 does not pay the administrative penalty and the enforcement of the  
27 penalty is not stayed, the penalty may be collected.

1       (b) The attorney general may sue to collect the penalty.

2       Sec. 2158.309. DETERMINATION BY COURT. (a) If the court  
3 sustains the determination that a violation occurred, the court may  
4 uphold or reduce the amount of the administrative penalty and order  
5 the person to pay the full or reduced amount of the penalty.

6       (b) If the court does not sustain the finding that a  
7 violation occurred, the court shall order that a penalty is not  
8 owed.

9       Sec. 2158.310. REMITTANCE OF PENALTY AND INTEREST. (a) If  
10 the person paid the administrative penalty and if the amount of the  
11 penalty is reduced or the penalty is not upheld by the court, the  
12 court shall order, when the court's judgment becomes final, that  
13 the appropriate amount plus accrued interest be remitted to the  
14 person.

15       (b) The interest accrues at the rate charged on loans to  
16 depository institutions by the New York Federal Reserve Bank.

17       (c) The interest shall be paid for the period beginning on  
18 the date the penalty is paid and ending on the date the penalty is  
19 remitted.

20       (d) If the person gave a supersedeas bond and the penalty is  
21 not upheld by the court, the court shall order, when the court's  
22 judgment becomes final, the release of the bond.

23       (e) If the person gave a supersedeas bond and the amount of  
24 the penalty is reduced, the court shall order the release of the  
25 bond after the person pays the reduced amount.

26       SECTION 2. Except as required by Section 3 of this Act, this  
27 Act takes effect September 1, 2007.

H.B. No. 1466

1           SECTION 3. Section 2158.101 and Subchapters E, F, and G,  
2 Chapter 2158, Occupations Code, as added by this Act, take effect  
3 September 1, 2008.