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BEYOND THE POLISH: AN EXAMINATION OF HAZARDOUS CONDITIONS IN NAIL SALONS AND POTENTIAL SOLUTIONS FOR THE INDUSTRY IN NEW YORK CITY

*Sarah A. Walsh**

I. INTRODUCTION

The nail salon industry as a whole includes the single largest population of licensed professionals in the United States, and, in the last twenty years, the number of nail salons has more than tripled.¹ For comparison, for every one Starbucks retail outlet in the United States, there are more than four nail salons.² Increased attention towards personal grooming, the surge of women into the labor market, and the advent of low-cost nail

* J.D. Candidate, Brooklyn Law School, 2013; B.A., Villanova University, 2010. Many thanks to my family for their continued support during the Note writing process and to the staff of the *Journal of Law and Policy* for their thoughtful comments and edits.

¹ NAT'L ASIAN PAC. AM. WOMEN'S FORUM, THE NAIL SALON INDUSTRY AND THE IMPACT OF COSMETIC TOXINS ON API WOMEN'S REPRODUCTIVE HEALTH 1 (2008), *available at* http://napawf.org/wp-content/uploads/2009/working/pdfs/issuebrief_nailsalon_updated.pdf. For example, between 1997 and 2007, the industry experienced "an increase of 374% in the number of salons and an increase of 327% in the number of nail technicians." ALEXANDRA GORMAN & PHILIP O'CONNOR, WOMEN'S VOICES FOR THE EARTH, GLOSSED OVER: HEALTH HAZARDS ASSOCIATED WITH TOXIC EXPOSURE IN NAIL SALONS 4 (2007), *available at* http://www.womensvoices.org/wp-content/uploads/2010/06/Glossed_Over.pdf.

² NAILS MAGAZINE, 2011-2012 Industry Statistics, *in* NAILS BIG BOOK 2011-2012, at 4, *available at* <http://files.nailsmag.com/Market-Research/NAILSstats11-12.pdf>; Starbucks Corp., Annual Report (Form 10-K), at 3 (Nov. 18, 2011), *available at* <http://www.sec.gov/Archives/edgar/data/829224/000119312511317175/d232803d10k.htm>.

salons have altered the industry, which is now “far from only a luxury niche.”³ Today’s nail salon patrons view the service as a “low-cost, good-feeling thing that’s accessible to everybody,”⁴ with some even viewing inexpensive manicures as an “inalienable right.”⁵ Roughly forty percent of women assert that they get pedicures on an occasional basis⁶ and men also enjoy the service.⁷

With nail salons expanding to new locations, such as supermarkets, drug stores, and airports, individuals can get a manicure or pedicure just about anywhere.⁸ Consequently, the absence of widespread, methodical regulation of the nail salon industry⁹ is becoming increasingly problematic.¹⁰ Unsanitary

³ ANNETTE BERNHARDT ET AL., BRENNAN CTR. FOR JUSTICE, UNREGULATED WORK IN THE GLOBAL CITY 93 (2007); *see also* MILIANN KANG, THE MANAGED HAND: RACE, GENDER & THE BODY IN BEAUTY SERVICE WORK 32–33 (2010); Steve Greenhouse, *At Nail Salons, Beauty Treatments Can Have a Distinctly Unglamorous Side*, N.Y. TIMES (Aug. 19, 2007), <http://www.nytimes.com/2007/08/19/nyregion/19nails.html>; Laura Petrecca, *Shoppers Indulge in Little Luxuries*, USA TODAY (Oct. 3, 2011, 8:14 AM), <http://www.usatoday.com/money/industries/retail/story/2011-10-02/fun-spending/50636908/1>.

⁴ Greenhouse, *supra* note 3; *see also* BERNHARDT ET AL., *supra* note 3, at 93; KANG, *supra* note 3, at 33; Petrecca, *supra* note 3 (noting that while Americans may fear a double-dip recession, many indulge in “pragmatic luxuries,” illustrated by rising “[n]ail salon sales”).

⁵ KANG, *supra* note 3, at 32 (quoting Christine Haughney).

⁶ Laurel Naversen Geraghty, *When a Salon is Unsanitary, a Bad Nail Job is a Customer’s Least Worry*, N.Y. TIMES (May 4, 2006), <http://www.nytimes.com/2006/05/04/fashion/thursdaystyles/04sside.html>.

⁷ Harry Hurt III, *Pedicure Soothes and Tingles, Leaving Manliness Intact*, N.Y. TIMES (Apr. 8, 2006), <http://www.nytimes.com/2006/04/08/business/08pursuits.html>.

⁸ *:10 Minute Manicure Locations*, :10 MINUTE MANICURE, <http://www.10minutemanicure.com/locations.html> (last updated May 1, 2011); Brady Holt, *Safeway Plans to Open More Commercial Space Next Year*, GEORGETOWN DISH (Sept. 27, 2011), <http://www.thegeorgetowndish.com/thedish/safeway-plans-open-more-commercial-space-next-year>; Daniel E. Slotnik, *At Duane Reade’s Newest Outpost, Sushi and Hairstyling*, NYTIMES.COM (July 5, 2011, 1:18 PM), <http://cityroom.blogs.nytimes.com/2011/07/05/at-duane-reades-newest-outpost-sushi-and-hairstyling/>.

⁹ *See e.g.*, CATHERINE A. PORTER, CAL. HEALTHY NAIL SALON COLLABORATIVE, OVEREXPOSED & UNDERINFORMED: DISMANTLING

conditions may lead to infections for patrons,¹¹ which can sometimes become fatal.¹² Moreover, consistent exposure to toxic chemicals, specifically formaldehyde, dibutyl phthalate (“DBP”), and toluene, together identified as the “toxic trio,”¹³ pose a threat to nail technicians,¹⁴ most of whom are female¹⁵ and “half of whom are of child-bearing age.”¹⁶

Although the nail salon industry is regulated in some form at the federal, state, and local levels, the current patchwork regulatory framework is inadequate.¹⁷ Generally, state and local regulations dictate license eligibility and govern the day-to-day business of salons.¹⁸ Inevitably, regulations vary among states,

BARRIERS TO HEALTH AND SAFETY IN CALIFORNIA NAIL SALONS 3 (2009).

¹⁰ Dr. Amy Wechsler, a dermatologist, noted that patients come to her office every week with “really bad foot, fingernail, [and] toenail infections that come from nail salons.” In an on-air conversation with Dr. Oz, she noted that unsanitary conditions in nail salons are “not . . . small issue[s].” *The Dr. Oz Show: The Miracle Pill for Cancer* (May 11, 2010), available at <http://www.doctoroz.com/videos/oz-investigates-nail-salon-danger-pt-1>.

¹¹ *Id.*; ROBERT SPALDING, *DEATH BY PEDICURE* xiii (2006).

¹² See e.g., *Family Sues Salon over Death After Pedicure*, MSNBC (May 19, 2006, 7:55:42 PM), <http://www.msnbc.msn.com/id/12866053/>; *Infections & Outbreaks: Overview, Board of Cosmetology*, OREGON.GOV, http://cms.oregon.gov/ohla/cos/pages/features/bacterial_skin_infections.aspx (last visited Sept. 8, 2012).

¹³ CAL. HEALTHY NAIL SALON COLLABORATIVE, *FRAMING A PROACTIVE RESEARCH AGENDA TO ADVANCE WORKER HEALTH AND SAFETY IN THE NAIL SALON AND COSMETOLOGY COMMUNITIES* 8 (2010).

¹⁴ Nail technicians “provide manicures, pedicures, polishing, and nail extensions to clients.” *Occupational Outlook Handbook, 2010–11 Edition: Barbers, Cosmetologists, and Other Personal Appearance Workers*, U.S. BUREAU OF LABOR STATISTICS (Dec. 17, 2009), <http://web.archive.org/web/20110628200846/http://www.bls.gov/oco/ocos332.htm>.

¹⁵ Approximately ninety-seven percent of nail technicians are female. *NAILS MAGAZINE*, *supra* note 2, at 4.

¹⁶ Bos. Bd. of Health, *Board of Health Approves Nail Salon Regulations*, JAMAICA PLAIN, MA PATCH (Jan. 17, 2011), <http://jamaicaplain.patch.com/articles/board-of-health-approves-nail-salon-regulation-2>.

¹⁷ Kyung Jin Lee, *City Steps in Where State Fails to Regulate Toxic Manis and Pedis*, S.F. PUBLIC PRESS, (May 23, 2011, 3:56 PM), <http://sfpublicpress.org/news/2011-05/city-steps-in-where-state-fails-to-regulate-toxic-manis-and-pedis>; GORMAN & O’CONNOR, *supra* note 1, at 3.

¹⁸ See, e.g., N.Y. GEN. BUS. LAW § 402 (McKinney 1996) (outlining the

with more stringent regulations in some states than in others.¹⁹ Federal regulations focus on the ingredients within products used in nail salons and are primarily handled by the Food and Drug Administration (“FDA”) and the Environmental Protection Agency (“EPA”).²⁰ In some instances, state and local governments enact rules that augment existing federal laws.²¹ Accordingly, an effective examination of conditions in nail salons addresses regulations at the local, state, and federal levels.

While the breadth of the nail care industry may seem narrow, the industry has far-reaching effects on the economy and impacts the health and wellness of nail technicians and patrons. This Note discusses the health and sanitary concerns stemming from nail salons and how these issues may negatively impact nail technicians and nail salon patrons.²² It asserts that

powers of the secretary of state to adopt rules and regulations pertaining to the licensing, investigation, and examination of appearance enhancement workers); *Nail Salon FAQs, What You Need to Know*, MEDICINET.COM, <http://www.medicinenet.com/script/main/art.asp?articlekey=21574> (last visited Sept. 8, 2012).

¹⁹ See, e.g., *NAILS State-by-State Guide to Disinfection Regulations*, NAILS MAG., Aug. 2008, at 124–30, available at <http://files.nailsmag.com/Handouts/NAILSDisinfectionChart.pdf> (describing varying disinfection regulations throughout the country).

²⁰ KAREN HU ET AL., NAT’L ASIAN PAC. AM. WOMEN’S FORUM, REMOVING THE TOPCOAT: UNDERSTANDING FEDERAL OVERSIGHT OF NAIL SALONS 2 (2011); *Nail Care Products*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Cosmetics/ProductandIngredientSafety/ProductInformation/ucm127068.htm> (last updated Apr. 22, 2011).

²¹ For example, New York has passed laws pertaining to the labeling and storage of products in nail salons. N.Y. COMP. CODES R. & REGS. tit. 19, §§ 160.25–26 (1995). For example, these products must be labeled and the owner must keep Material Safety Data Sheets (“MSDS”) on file in the nail salon. *Id.*; see also discussion *infra* Part IV.B.

²² Aside from problems stemming from unsanitary conditions and exposure to toxic chemicals, general employment law issues are present in nail salons. While this Note will not examine employment issues, it is worth noting that since many nail technicians rent stations from nail salons, they are considered private contractor workers, not full-time employees. Thus, they are not afforded the full protections of United States labor laws. BERNHARDT ET AL., *supra* note 3, at 6.

both technicians and patrons face serious health problems resulting from inadequate regulation. It argues that while increased federal legislation may help this situation, alternative solutions at the state and local levels are likely to have a stronger and more immediate effect on the issues inherent in nail salons. Part II of this Note discusses the history of the nail salon industry in the United States and examines the state of the industry today. Part III details the hazardous conditions in nail salons caused by unsanitary conditions and toxic chemicals, as well as their impact on technicians and patrons. Part IV provides an overview of the local, state, and federal regulation of the nail salon industry. Part V discusses current initiatives to make nail salons safer, including recently implemented legislation from various cities and proposed federal legislation. Finally, Part VI presents solutions for combating both unsanitary conditions for nail salon patrons and hazardous working conditions for nail technicians in New York City. Ultimately, this Note concludes that adopting a new regulatory and inspection framework for nail salons in New York City could improve conditions within nail salons for technicians and patrons, thereby reducing illness among workers and infections among patrons.

II. “THERE’S NO BUSINESS LIKE THE NAIL BUSINESS”²³: AN OVERVIEW OF NAIL SALONS IN THE UNITED STATES

To fully understand the breadth of the nail salon industry today, it is useful to examine the historical context from which the industry developed. The foundation of modern-day nail salons in the United States was laid in the early 1900s. In 1910, there were “Pedicure Clinics” in New York City where working-class individuals could have qualified professionals tend to their feet.²⁴ Alternatively, those with larger disposable incomes patronized the Elizabeth Arden Red Door salon, which

²³ KANG, *supra* note 3, at 38 (referring to a headline in a Vietnamese newspaper, *Nguoi Viet*).

²⁴ *Take Your Bunions to the Free Clinic*, N.Y. TIMES, Jan. 6, 1910, available at <http://query.nytimes.com/gst/abstract.html?res=F60616F83C5417738DDDAF0894D9405B808DF1D3>.

opened in the same year.²⁵ At this time, texts about manicuring were published²⁶ and inventors filed patent applications for fingernail “shields,” meant to protect nails from discoloration and give them a clean and neat appearance.²⁷ In the ensuing decades, more immigrant women arrived in the United States and opened up nail salons.²⁸ The absence of formal regulations appealed to immigrant women, many of whom lacked resources to devote to education and training.²⁹ Consequently, these women learned on the job and circumvented the requisite training and licensing requirements faced by beauticians.³⁰

The nail salon industry has been recognized as the fastest growing sector within the beauty industry,³¹ with an estimated market size of \$7.3 billion.³² Projected growth for nail technicians between 2008 and 2018 is 18.8 percent, which exceeds the average rate for all other occupations, estimated to be 10.1 percent.³³ In 2011, there were 51,244 nail salons and

²⁵ *About Elizabeth Arden*, ELIZABETH ARDEN-CORPORATE, <http://corporate.elizabetharden.com/about-elizabeth-arden.php> (last visited Sept. 8, 2012).

²⁶ *See generally* WILLIAM A. WOODBURY, *BEAUTY CULTURE: A PRACTICAL HANDBOOK ON THE CARE OF THE PERSON, DESIGNED FOR BOTH PROFESSIONAL AND PRIVATE USE* (1911); WILLIAM A. WOODBURY, *THE CARE OF THE HAND: A PRACTICAL TEXT-BOOK ON MANICURING AND THE CARE OF THE HAND* (1915).

²⁷ *See* U.S. Patent No. 1,135,382 (filed July 31, 1914).

²⁸ KANG, *supra* note 3, at 44–45. While immigrant women in the early part of the 1900s freely entered the industry and helped it expand, today nail salons have been used to hide victims of human trafficking. Philip Martin, *Human Trafficking in New England, Part 1: The Role of Nail Salons*, WGBH (July 8, 2010), http://www.wgbh.org/897/sex_and_labor_trafficking_in_new_england_part_one.cfm. Today approximately forty-five percent of nail technicians are Vietnamese. NAILS MAGAZINE, *supra* note 2, at 4–6.

²⁹ KANG, *supra* note 3, at 44–45. For example, it was not until 1994 that New York, “the immigrant-receiving capital of the world,” required nail technicians to be licensed. *Id.* at 42–43, 45.

³⁰ *Id.* at 44–45.

³¹ PORTER, *supra* note 9, at 13.

³² NAILS MAGAZINE, *supra* note 2, at 2.

³³ T. Alan Lacey & Benjamin Wright, *Employment Outlook: 2008–18*, MONTHLY LAB. REV., Nov. 2009, at 82, 111.

355,600 nail technicians in the United States; 16,335 of those nail technicians were located in New York.³⁴

Current industry trends contribute to problems plaguing the industry. Since more nail salons have opened, competition has increased and, in line with the principles of supply and demand, prices have decreased.³⁵ While it may appear that low prices benefit consumers, this may not be the case, especially if inferior products and questionable sanitation standards sustain low prices.³⁶

III. HAZARDOUS CONDITIONS IN NAIL SALONS

A. Infections and Diseases due to Unsanitary Conditions

While regulations require nail salons to be clean and instruments to be properly sanitized, surveys show that such regulations are both insufficient and erratic.³⁷ For example, at a

³⁴ NAILS MAGAZINE, *supra* note 2, at 26. The Bureau of Labor Statistics (“BLS”) also records the number of nail technicians in the United States; however, Virginia Postrel argues that its figure is much lower than the *NAILS Magazine* figure. Virginia Postrel, *The Nail File: The Economic Meaning of Manicures*, REASON MAG., Oct. 1997, at 4, available at <http://reason.com/archives/1997/10/01/the-nail-file>. Significantly, the BLS figure excludes self-employed nail technicians in its calculation, which may explain part of the disparity between the two figures. See *Occupational Employment Statistics: National Cross-Industry Estimates*, BUREAU OF LABOR STATISTICS (May 2011), http://www.bls.gov/oes/oes_dl.htm; *Occupational Employment Statistics: State Cross-Industry Estimates*, BUREAU OF LABOR STATISTICS (May 2011), http://www.bls.gov/oes/oes_dl.htm. In reality, it is likely that the actual number of nail technicians falls “in the middle of those two” figures. NAILS MAGAZINE, 2010–2011 Industry Statistics, in NAILS BIG BOOK 2010–2011, at 1–2, available at <http://files.nailsmag.com/Market-Research/bb2010-11stats-reprints.pdf>.

³⁵ Postrel, *supra* note 34, at 6.

³⁶ Kymberli W. Brady, *Pedicure Lawsuits Filed*, ALMADEN TIMES WEEKLY (Aug. 25, 2005), <http://www.almadentimes.com/082505/pedicure.htm>; Greenhouse, *supra* note 3; Evita Ochel, *Nail Salon Health Risks*, EVOLVING WELLNESS (June 3, 2008), <http://evolvingwellness.com/posts/120/nail-salon-health-risks/>; Postrel, *supra* note 34, at 4.

³⁷ Carol A. Kemper, *Can You Guess the Pathogen?*, INFECTIOUS DISEASE ALERT, Sept. 2004, at 143, 143–44; Larry Schuster, *Survey: States’ Nail Industry Regs Fall Short as Litigation Increases*, SKIN & ALLERGY

nail salon in California, researchers found skin and “enough hair to make a toupee” inside of pedicure footbaths, which the nail salon’s owner admitted had never been cleaned.³⁸ Based on situations like this, it is reasonable to conclude that some salons do not follow disinfection and sanitary guidelines all of the time.³⁹ Such unclean conditions expose patrons to harmful and potentially life-threatening infections and diseases.⁴⁰

Even if nail technicians use care while working, patrons may be pinched or cut with instruments, exposing them to diseases in salons.⁴¹ Accordingly, in New York, tools that are “intended to penetrate skin or enter pores” must be sterilized.⁴² One way such tools can be sterilized is with an autoclave,⁴³ which is “a container for sterilizing . . . by superheated steam under pressure.”⁴⁴ Since footbaths and accompanying drains cannot be autoclaved, alternative sterilization techniques should be

NEWS, June 2003, at 5.

³⁸ Lawrence K. Altman, *Microbe in Salon Footbath Is Suspected in Boil Outbreak*, N.Y. TIMES, Apr. 27, 2001, available at <http://www.nytimes.com/2001/04/27/us/microbe-in-salon-footbath-is-suspected-in-boil-outbreak.html>.

³⁹ *Id.*

⁴⁰ Kemper, *supra* note 37, at 143–44; Schuster, *supra* note 37, at 5; Kevin L. Winthrop et al., *The Clinical Management and Outcome of Nail Salon-Acquired Mycobacterium fortuitum Skin Infection*, 38 CLINICAL INFECTIOUS DISEASES 38, 38 (2004); *NAILS State-by-State Guide to Disinfection Regulations*, *supra* note 19.

⁴¹ Jayna Rust, *Full Steam Ahead*, NAILS MAG., Sept. 2006, at 114, 122, available at <http://www.nailsmag.com/article/40170/Full-Steam-Ahead-Understanding-Autoclaving>.

⁴² N.Y. COMP. CODES R. & REGS. tit. 19, § 160.17(b)(3) (1996). The sterilization process kills “all disease producing organisms (including bacteria, viruses, fungi, and spores) and renders an object safe for internal contact or skin penetration.” *Id.* § 106.1(j).

⁴³ *Id.* § 106.17(b). Autoclaves can be expensive, with models costing between \$350 and \$9,000; however, they “provide the highest form of decontamination and cut down on the risk of infecting clients.” Rust, *supra* note 41. Consequently, some states, including Texas, have mandated that all nail salons use autoclaves. *Id.* However, New York has not mandated autoclaves and permits nail salons to use “liquid sterilants.” COMP. CODES R. & REGS. tit. 19, § 160.17(b).

⁴⁴ WEBSTER’S NEW WORLD DICTIONARY 94 (David B. Guralnik ed., 2d ed. 1984).

employed to ensure that hair and skin do not accumulate and transform footbaths into “breeding grounds” for bacteria, which can then enter the body through freshly shaved skin, cuts, or abrasions.⁴⁵ Specifically, patrons may incur *Staphylococcus* (“staph”) infections, hepatitis, and bacterial infections.

1. Staph Infections

Staph is a type of bacteria that frequently houses itself on the skin of healthy individuals.⁴⁶ However, if staph makes its way deep inside one’s body, it can trigger a serious infection.⁴⁷ Nail salon patrons can contract drug-resistant staph infections from manicures or pedicures, including the deadly methicillin-resistant *Staphylococcus aureus* (“MRSA”),⁴⁸ the leading source of bacterial foot infections seen by physicians.⁴⁹ A 2007 study estimated that 90,000 people in the United States contract staph

⁴⁵ STATE OF COLO. OFFICE OF BARBER & COSMETOLOGY LICENSURE, CLEAN THOSE FOOTBATHS! (2004), available at http://www.dora.state.co.us/Barbers_Cosmetologists/news/Footbath.pdf; see also Patrick J. Sniezek et al., *Rapidly Growing Mycobacterial Infections After Pedicures*, 139 ARCHIVES OF DERMATOLOGY 629, 634 (2003) (“[S]having can result in small epidermal and follicular abrasions, potential portals for mycobacterial inoculation from contaminated footbath exposure.”); Sherry Boschert, *Pedicure Whirlpools May Swirl with Mycobacteria*, INTERNAL MEDICINE NEWS, Aug. 1, 2005, at 58 (“[S]haved skin can be a portal of entry for mycobacteria that exist in tap water.”).

⁴⁶ *Staph Infections*, MAYO CLINIC, <http://www.mayoclinic.com/health/staph-infections/DS00973> (last visited Sept. 29, 2012).

⁴⁷ *Id.*

⁴⁸ *Tips to Avoid MRSA Infections: Superbug Hotspots*, SHAPE (June 6, 2011), <http://www.shape.com/lifestyle/mind-and-body/tips-avoid-mrsa-infections-superbug-hotspots?page=3> (stating that “[a]t least 12 states have reported MRSA infections at nail salons”); Kevin L. Winthrop, et al., *An Outbreak of Mycobacterial furunculosis Associated with Footbaths at a Nail Salon*, 346 NEW ENG. J. MED. 1366, 1369 (2002).

⁴⁹ SPALDING, *supra* note 11, at 72. *Staphylococcus* infections may also lead to: “scalded skin syndrome (SSS),” which occurs when large sheets of blistered and infected skin come off of the body; “toxic epidermal necrolysis (TEN)” which results in blisters and rashes and may cause “sheets of tender skin” to fall away from the body “with additional massive tissue destruction and finally, multi organ system failure.” *Id.* at 72–73.

infections each year and that staph-infection-related deaths may exceed AIDS-related deaths.⁵⁰ While this germ has typically been confined to hospitals, its prevalence in other settings is increasing.⁵¹ For example, Kevin Warnke filed a lawsuit in Texas in 2006 in which he claimed that he obtained a staph infection from a nail salon when, during a pedicure, a nail technician cut his toe with an unclean instrument.⁵²

2. Hepatitis

Hepatitis is another disease that can be contracted from nail salons.⁵³ Hepatitis is “contagious, virulent, and has a high rate of transmission.”⁵⁴ The disease’s ability to subsist for approximately seven days on plain surfaces make nail salons prime incubators for hepatitis.⁵⁵ Despite this, little formal research exists on the connection between hepatitis and nail salons⁵⁶ and, due to this, the Occupational Safety and Health Administration (“OSHA”) has not formulated guidelines to prevent the spread of hepatitis in nail salons.⁵⁷ The Virginia

⁵⁰ *Experts: U.S. Deaths from Deadly Drug-Resistant Staph May Surpass AIDS Deaths*, FOXNEWS.COM (Oct. 16, 2007), <http://www.foxnews.com/story/0,2933,302396,00.html>.

⁵¹ *Id.* (“Researchers found that “only [about] one-quarter [of all cases of MRSA in the United States] involve hospitalized patients.”).

⁵² Glenna Herald, *Cy-Fair Salon Blamed for Staph Infection*, ULTIMATE CY-FAIR (Oct. 27, 2011, 3:03 PM), <http://www.ultimatecyfair.com/stories/281199-courts-cy-fair-salon-blamed-for-staph-infection>.

⁵³ SPALDING, *supra* note 11, at 83. The assertion that hepatitis may spread in nail salons is further substantiated by a study by the Virginia Department of Health titled “Assessment of the Risk of Bloodborne Pathogen Transmission in Nail Salons and Barber Shops and Regulatory Requirements in Virginia.” *See Nail Salons May Hold Hepatitis Risk*, UNITED PRESS INT’L (Oct. 31, 2011, 8:09 PM), http://www.upi.com/Health_News/2011/10/31/Nail-salons-may-hold-hepatitis-risk/UPI-20301320106158/.

⁵⁴ SPALDING, *supra* note 11, at 83.

⁵⁵ *Id.*

⁵⁶ *Nail Salons May Hold Hepatitis Risk*, *supra* note 53.

⁵⁷ *Hepatitis Transmission Risk Needs to Be Studied in Nail Salons, Barbershops, Analysis Suggests*, SCIENCE DAILY (Nov. 15, 2011), <http://www.sciencedaily.com/releases/2011/10/11031114947.htm>.

Department of Health, however, has begun to study this issue after an individual reported a case of hepatitis that was “clearly related” to a manicure and pedicure.⁵⁸

3. Mycobacteria Infections

Nail salon patrons are also susceptible to skin and soft tissue infections from various strains of *Mycobacterium* living in nail salon footbaths.⁵⁹ *Mycobacteria* infections may begin as “small non-tender papule[s],”⁶⁰ which some patients describe as an insect bite,⁶¹ and develop over time into large boils and ulcerating lesions.⁶² However, because it may take up to four months for boils to develop,⁶³ by the time one seeks medical attention, he or she may not realize the ailment stemmed from a visit to a nail salon. Further, to identify a *Mycobacterium fortuitum* infection, one usually must undergo a “minor surgical procedure known as a punch biopsy of the skin.”⁶⁴ If specific laboratory procedures are not followed, particularly those dictating the proper surface for growing samples, the bacteria may never be identified or traced back to a nail salon.⁶⁵ Further, since many infections are “treated” by nail technicians or clients without the aid or advice of a physician, many infections are never reported or formally diagnosed.⁶⁶ Therefore, for all of the

⁵⁸ *Id.*

⁵⁹ Kemper, *supra* note 37, at 143–44. “Rapid-grow[ing]” mycobacterium, including *Mycobacterium fortuitum*, *Mycobacterium chelonae*, and *Mycobacterium abscessus*, are the likely culprits. *Id.* at 144.

⁶⁰ *Id.* at 143.

⁶¹ Winthrop et al., *supra* note 40, at 38; Amy K. Gira et al., *Furunculosis Due to Mycobacterium mageritense Associated with Footbaths at a Nail Salon*, 42 J. CLINICAL MICROBIOLOGY 1813, 1813 (2004).

⁶² Kemper, *supra* note 37, at 143.

⁶³ Altman, *supra* note 38. Dr. Kevin L. Winthrop, an epidemiologist who spearheaded the investigation of a 2000 *Mycobacterium fortuitum* outbreak in Watsonville, California noted that the customers infected during that outbreak developed boils “anywhere from [ten] days to four months after a pedicure in the salon.” *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ SPALDING, *supra* note 11, at 69.

reasons noted above, the number of infections that are reported may be artificially low.

Recently, there have been outbreaks of infections in California. In 2000, over 100 women in Watsonville, California suffered from *Mycobacteria* infections.⁶⁷ While all of the infections were traced to a single salon, subsequent inspections of other nail salons in the area revealed that pedicure footbaths were filled with *Mycobacterium fortuitum*.⁶⁸ Month-long courses of antibiotics were prescribed for some victims; however, in some cases, the antibiotics did not clear up the infection.⁶⁹ Accordingly, some of the victims have been left with scars and others have required skin grafts.⁷⁰ In response to this outbreak, seventy-four of the victims sued the nail salon “and manufacturer and suppliers of pedispa chairs used at the salon.”⁷¹ The parties ultimately settled for \$2.919 million.⁷²

In 2004, more than 120 people in San Jose, California fell victim to pedicure-related bacterial infections.⁷³ *Mycobacterium chelonae*, a “microbial cousin” to *Mycobacterium fortuitum*, was the bacteria responsible for the San Jose outbreak.⁷⁴ Further, this outbreak, unlike the Watsonville outbreak, was traced to multiple nail salons.⁷⁵ Some of the victims sued the responsible salons, alleging that they failed to properly disinfect their pedicure footbaths and instruments.⁷⁶ Discovery indicated that one of the owners of Nails National, a nail salon named in the

⁶⁷ Brady, *supra* note 36.

⁶⁸ Altman, *supra* note 38; Brady, *supra* note 36.

⁶⁹ Altman, *supra* note 38.

⁷⁰ *Id.*

⁷¹ \$2.919 Million Recovery for 74 Pedicure Patrons, SETTLEMENTBOARD.COM, <http://www.settlementboard.com/2-919-million-recovery-for-74-pedicure-patrons/> (last visited Oct. 18, 2012).

⁷² *Id.*

⁷³ Schwarzenegger Signs Yee Bill into Law: Manicure, Pedicure and Footspa Disinfection Made High Priority for Salons, PROF'L BEAUTY FED'N OF CAL. (Sept. 22, 2006, 4:22 PM), http://www.beautyfederation.org/news/bills_news/yee/yee_law.html. These individuals suffered from leg lesions and infections. *Id.*

⁷⁴ *Infections & Outbreaks: Overview*, Board of Cosmetology, *supra* note 12.

⁷⁵ Brady, *supra* note 36.

⁷⁶ *Id.*

suit, “repeatedly instructed staff members . . . to use 409, a household cleaner instead of EPA-approved disinfectants.”⁷⁷

4. *Preexisting Medical Conditions and Risk of Infection*

Infections are hazardous to the population at large, and even more detrimental to individuals with underlying health conditions whose immune systems are weakened. In 2006 and 2007, three women, who suffered from preexisting medical conditions, died from infections reportedly contracted from pedicure footbaths.⁷⁸ In Texas, a pumice stone cut Kimberly Jackson’s heel during a pedicure.⁷⁹ Ms. Jackson, a paraplegic, afterwards contracted a staph infection, which ultimately caused her to suffer a heart attack.⁸⁰ In 2006, Jessica Mears, who had Lupus, developed a lesion on her calf after having a pedicure at one of the salons named in the 2004 San Jose outbreak lawsuit.⁸¹ Ms. Mears passed away after suffering from a *Mycobacterium* infection for more than a year.⁸² A pedicure may also be to blame for the 2007 death of Gerry Ann Schabarum.⁸³ Ms. Schabarum died after battling a staph infection that her family members believe she acquired during a pedicure.⁸⁴ Ms. Schabarum, similar to Ms. Jackson and Ms. Mears, had a preexisting illness at the time of the pedicure in question, which may have weakened her immune system.⁸⁵

⁷⁷ *Id.*

⁷⁸ *Infections & Outbreaks: Overview, Board of Cosmetology, supra* note 12.

⁷⁹ *Family Sues Salon over Death After Pedicure*, MSNBC (May 19, 2006, 7:55:42 PM), <http://www.msnbc.msn.com/id/12866053/>.

⁸⁰ *Id.*

⁸¹ Alexa Tondreau, *Legal Troubles Compound for Local Nail Salon*, MOUNTAIN VIEW VOICE, Aug. 11, 2006, at 1, available at http://www.mv-voice.com/morguepdf/2006/2006_08_11.mvv.section1.pdf; *Infections & Outbreaks: Overview, Board of Cosmetology, supra* note 12.

⁸² *Infections & Outbreaks: Overview, Board of Cosmetology, supra* note 12.

⁸³ Joe Piasecki, *Killer Pedicure*, PASADENA WEEKLY (Mar. 15, 2007), <http://www.pasadenaweekly.com/cms/story/detail/?id=4425&IssueNum=63>.

⁸⁴ *Infections & Outbreaks: Overview, Board of Cosmetology, supra* note 12; Piasecki, *supra* note 83.

⁸⁵ *Infections & Outbreaks: Overview, Board of Cosmetology, supra* note 12; Piasecki, *supra* note 83.

B. Exposure to Toxic Chemicals in Nail Salons

While nail salons are potentially harmful for patrons, nail technicians are also at risk. Specifically, regulations pertaining to toxic substances contained in products used in nail salons are inadequate.⁸⁶ Nail technicians are exposed to toxic substances for greater periods of time than nail salon patrons; therefore, the impact on their health may be much more severe.⁸⁷ In 2007, *Time Magazine* placed nail technicians on its “Worst Jobs in America” list because nail technicians are consistently exposed to chemicals deemed carcinogenic by the EPA.⁸⁸ Further compounding this problem is the fact that many nail technicians have little English fluency meaning that they may have even less access to information about the dangerous products than their counterparts who speak English fluently.⁸⁹

Many compounds present in products used in nail salons are thought to be carcinogenic.⁹⁰ While long-term exposure to carcinogens may result in cancer,⁹¹ overexposure to some

⁸⁶ See HU ET AL., *supra* note 20, at 2.

⁸⁷ Jeremy Caplan & Laura Fitzpatrick, *The Worst Jobs in America*, TIME (July 30, 2007), <http://www.time.com/time/business/article/0,8599,1648055,00.html>. While the toxins may only pose a “negligible risk” to consumers, they pose a more serious risk to workers who face continuous exposure. *Id.* Additionally, many of these women are of the child-bearing age and exposure to toxins may have harmful effects on their unborn children. See Momo Chang, *The ‘Greenwashing’ of Nail Polish*, HYPHEN (Apr. 24, 2012), <http://www.hyphenmagazine.com/blog/archive/2012/04/greenwashing-nail-polish>; Steven Greenhouse, *Studies Highlight Hazards of Manicurists’ Chemicals*, N.Y. TIMES (Aug. 19, 2007), <http://www.nytimes.com/2007/08/19/nyregion/19nailside.html>.

⁸⁸ Caplan & Fitzpatrick, *supra* note 87 (stating that since “[c]osmetics ingredients don’t fall under the jurisdiction of either the EPA or the Food and Drug Administration, . . . many such products sold in the U.S. today contain known toxins.”).

⁸⁹ Greenhouse, *supra* note 87.

⁹⁰ Linda Okahara, Dir. of Cmty. Services, Asian Health Services, *Breast Cancer Risks in California Nail Salon Workers: A Community-Research Collaboration 7* (Mar. 11, 2008) (on file with author).

⁹¹ *Known and Probable Human Carcinogens*, AM. CANCER SOC’Y (June 13, 2012), <http://www.cancer.org/Cancer/CancerCauses/OtherCarcinogens/GeneralInformationaboutCarcinogens/known-and-probable-human-carcinogens>.

chemicals may result in other physical ailments.⁹² Specifically, overexposure to ingredients frequently found in products used in nail salons⁹³ may cause “headache[s], dizziness, irritation to skin, eyes, and throat, . . . central nervous system depression, . . . skin rash, confusion and/or haziness, . . . and uncontrollable muscle contractions,” among other things.⁹⁴ Specifically, inhaling “organic solvents [such as toluene⁹⁵ and formaldehyde⁹⁶] and (meth)acrylates can cause a variety of neurologic, neuropsychological, and psychiatric symptoms such as anxiety, depression, psychomotor slowing, and impairments in concentration and memory.”⁹⁷ Findings from a 2002 study

⁹² U.S. ENVTL. PROT. AGENCY, PROTECTING THE HEALTH OF NAIL SALON WORKERS 1 (Mar. 2007), available at <http://www.epa.gov/dfe/pubs/projects/salon/nailsalonguide.pdf>.

⁹³ A table produced by the EPA highlights some chemicals used in nail salon products including acetone, benzoyl peroxide, butyl acetate, butyl methacrylate, camphor, Dibutyl phthalate, ethyl acetate, ethyl cyanoacrylate, ethyl methacrylate, formalin, hydroquinone, isobutyl methacrylate, methacrylic acid, 4-methoxyphenol, methyl ethyl ketone, methyl methacrylate, poly(ethyl/methyl methacrylate), titanium dioxide, toluene, and tosylamide formaldehyde resin. *Id.* at ii–iii.

⁹⁴ *Id.* For example, a nail salon worker in Alameda County, California stated:

Every time I opened a bottle of nail glue to do a silk wrap manicure, my nose would suddenly start to bleed. Even if I was sitting next to a station where nail glue is being applied, my nose would start to bleed. Whoever thought a strong guy like me would get nose bleeds from a tiny little bottle of nail glue.

ASIAN LAW CAUCUS, FACT SHEET: HEALTH AND SAFETY IN THE NAIL SALON INDUSTRY 2, available at [http://nailsalonalliance.org/storage/ALC%20fact sheet.pdf](http://nailsalonalliance.org/storage/ALC%20fact%20sheet.pdf).

⁹⁵ “Toluene is a clear colorless liquid . . . [It is] found in many nail products . . . [because] it helps suspend the pigment throughout the liquid and helps form the smooth finish across the nail.” GORMAN & O’CONNOR, *supra* note 1, at 4.

⁹⁶ Formaldehyde is an odiferous chemical commonly used in resins and as a preservative. *Id.* at 5.

⁹⁷ Gina L. LoSasso et al., *Neurocognitive Sequelae of Exposure to Organic Solvents and (Meth)Acrylates Among Nail-Studio Technicians*, 15 NEUROPSYCHIATRY, NEUROPSYCHOLOGY & BEHAVIORAL NEUROLOGY 44, 45 (2002). Part of the problem, however, is that early side effects of such solvents may be slight and thus, may not be detected or diagnosed until “a

reveal that even “low-level, long-term exposure to solvents . . . can result in observable decrements in neurosensory and cognitive performance.”⁹⁸ Critically, the study established that exposure to neurotoxic substances “is likely to occur with greater frequency and intensity in a nail studio than in most settings.”⁹⁹

Studies have shown that formaldehyde, DBP,¹⁰⁰ toluene, and other toxins are in fact present in the air in nail salons.¹⁰¹ However, the EPA has asserted that when ventilation systems are operating properly, the concentration of formaldehyde in nail salons is similar to the concentration of formaldehyde in general office buildings.¹⁰² Despite this, it is reasonable to assume that some nail salons may not utilize adequate ventilation systems, thus enabling dangerous levels of toxins to lurk in the air in nail salons. Consequently, the Department of Homeland Security Science and Technology division is looking into detecting traces of the toxic trio in nail salons using smartphone technology.¹⁰³ A 2008 study funded by the National Institute for Occupational Safety and Health (“NIOSH”) focused on “occupational

full-blown clinical syndrome occurs.” Studies have found that the best way to detect side effects of exposure to solvents is through “tests of attention and perceptual motor speed” because exposure to neurotoxic solvents typically experience. *Id.*

⁹⁸ *Id.* at 44, 51.

⁹⁹ *Id.* at 45.

¹⁰⁰ DBP is a specific type of phthalate that is used as a plasticizer and is found in personal care products that need additional “flexibility.” GORMAN & O’CONNOR, *supra* note 1, at 5. Studies have indicated a “link between prolonged exposure [to phthalates] and cancer, miscarriages, and infertility.” NAT’L ASIAN PACIFIC AM. WOMEN’S FORUM, *supra* note 1, at 4. Moreover, pregnant women face greater hazards from exposure and “are at an increased risk of various reproductive harms such as spontaneous abortions and birth defects or poorer infant health outcomes due to the transfer of phthalates across the placental barrier to the developing fetus.” *Id.*

¹⁰¹ GORMAN & O’CONNOR, *supra* note 1, at 6.

¹⁰² U.S. ENVTL. PROT. AGENCY, *supra* note 92, at iv.

¹⁰³ Allison Barrie, *Smartphones Take on Silent Killer as Portable Danger Detectors*, FOXNEWS.COM (Sept. 29, 2011), <http://www.foxnews.com/scitech/2011/09/28/cell-phones-take-on-silent-killers/>.

exposures” to various phthalates,¹⁰⁴ including DBP.¹⁰⁵ Researchers collected urine samples from workers in a variety of industries and compared the “end-shift metabolite concentrations” of the samples with samples collected from the population at large.¹⁰⁶ Test results indicated that DBP exposure in nail salons was “2-fold higher” than DBP exposure in the general population.¹⁰⁷

Despite its ability to craft recommended occupational safety and health standards, NIOSH does not have the power to issue or enforce those standards.¹⁰⁸ Alternatively, OSHA is empowered to establish permissible exposure limits (“PELs”).¹⁰⁹ Through PELs, OSHA sets limits on the level or “concentration of a substance in the air” and may set limits on how much of a

¹⁰⁴ “Phthalates are a family of compounds whose primary use is as a vinyl softener. They are colorless, odorless liquids that do not evaporate readily.” *Phthalates Basics*, AM. CHEMISTRY COUNCIL, <http://phthalates.americanchemistry.com/Phthalates-Basics> (last visited Oct. 18, 2012). Phthalates are found in many household products including toys, floor coverings, food packaging, pharmaceuticals, nail polishes, and shampoos. *Phthalates and Cosmetic Products*, U.S. FOOD & DRUG ADMIN. (Feb. 7, 2008), <http://www.fda.gov/cosmetics/productingredientsafety/selectedcosmeticingredients/ucm128250.htm>.

¹⁰⁵ Cynthia J. Hines et al., *Urinary Phthalate Metabolite Concentrations among Workers in Selected Industries: A Pilot Biomonitoring Study*, 53 ANNALS OCCUPATIONAL HYGIENE 1, 2 (2008).

¹⁰⁶ *Id.* at 3–4.

¹⁰⁷ *Id.* at 6–11.

¹⁰⁸ HU ET AL., *supra* note 20, at 13. NIOSH is primarily a research-driven entity. To carry out its mission, “to generate new knowledge in the field of occupational safety and health and to transfer that knowledge into practice for the betterment of workers,” the Institute “conducts research, develops guidance, and authoritative recommendations, disseminates information, and responds to requests for workplace health hazard evaluations.” *About NIOSH*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 12, 2011), <http://www.cdc.gov/niosh/about.html>. However, NIOSH, which is administratively housed within the Centers for Disease Control and Prevention (“CDC”), lacks enforcement power. See Susan Bisom-Rapp, *What We Learn in Troubled Times: Deregulation and Safe Work in the New Economy*, 55 WAYNE L. REV. 1197, 1228–32 (2009).

¹⁰⁹ *Permissible Exposure Limits (PELs)*, U.S. DEP’T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., <http://www.osha.gov/SLTC/pel/> (last visited Sept. 8, 2012).

particular toxin can be exposed to one's skin based on "8-hour time weighted average . . . exposure."¹¹⁰ Specific PELs exist for formaldehyde and toluene,¹¹¹ toxins specifically found in nail salons. Though the levels of toxins found in nail salons are generally within the PELs and are thus deemed "safe" from a regulatory standpoint, this does not mean that the nail salon is a safe environment to work in.¹¹² As the National Healthy Nail Salon Alliance ("NHNSA") notes, most PELs were first established in the 1960s "for industrial settings with an intent to protect against severe acute exposures."¹¹³ Thus, PELs were not primarily aimed at protecting nail salon workers.¹¹⁴ Further, most of the PELs fail to "take into consideration the effects of a combination of multiple chemicals, or the long-term chronic effects of exposure on endpoints such as asthma, cancer or reproductive harm."¹¹⁵ In nail salons specifically, individuals are simultaneously exposed to a variety of toxins.¹¹⁶ Further, NHNSA points out that current PELs fail to "take into account the fact that 'safe' exposure levels may vary based on gender, age, or pregnancy status of the exposed worker."¹¹⁷ Thus, the current PELs are out-of-date and should be updated to protect the health and safety of nail technicians and combat the modest levels of toxins that are in the air in nail salons.¹¹⁸

¹¹⁰ *Id.*

¹¹¹ 29 C.F.R. § 1910.1000 (2012).

¹¹² Letter from Nat'l Healthy Nail Salon Alliance to OSHA Docket Office, U.S. Dep't of Labor (Mar. 31, 2010) (on file with author).

¹¹³ *Id.*

¹¹⁴ Momo Chang, *Mani-Pedis Go Green*, HYPHEN, Summer 2009, at 34, 35, available at http://www.momochang.com/wp-content/uploads/2008/11/18HYPHEN_NailSalon-s.pdf.

¹¹⁵ Letter from Nat'l Healthy Nail Salon Alliance to OSHA Docket Office, *supra* note 112.

¹¹⁶ GORMAN & O'CONNOR, *supra* note 1, at 6; Greenhouse, *supra* note 87.

¹¹⁷ GORMAN & O'CONNOR, *supra* note 1, at 6; Greenhouse, *supra* note 87.

¹¹⁸ GORMAN & O'CONNOR, *supra* note 1, at 6; Greenhouse, *supra* note 87.

IV. CURRENT REGULATIONS AND LEGISLATION PERTAINING TO NAIL SALONS

State governments play an active role in regulating the nail salon industry.¹¹⁹ States have the power to require nail technicians and nail salon owners to hold licenses and can oversee, inspect, and regulate nail salons.¹²⁰ Accordingly, states are best equipped to improve the quality of life of nail salon technicians and safeguard the health and well-being of salon patrons.

In New York, the Division of Licensing Services of the Department of State is responsible for licensing nail technicians and nail salons and for enacting regulations that affect the appearance enhancement industry as a whole.¹²¹

¹¹⁹ In New York, the state has the authority to adopt rules and regulations pertaining to the licensing, investigation, and examination of appearance enhancement workers. “Appearance enhancement” is an umbrella term encompassing cosmetology, esthetics, nail specialty, natural hair styling, and waxing. N.Y. GEN. BUS. LAW §§ 400, 402 (McKinney 1996).

¹²⁰ *Id.* § 402; *id.* § 405 (stating that an individual who holds an appearance enhancement business license “shall operate such business at the location named in the license and in accordance with the rules and regulations promulgated by the secretary”); N.Y. STATE DIV. OF LICENSING SERV., APPEARANCE ENHANCEMENT BUSINESS OR AREA RENTER APPLICATION, DOS 0035, 1 (2011), available at <http://www.dos.ny.gov/forms/licensing/0035-a.pdf> (stating that one “must obtain a license to own, control or operate an Appearance Enhancement Business . . . regardless of whether [one is] a sole proprietor, partner, shareholder, officer or independent contractor”); *Appearance Enhancement*, N.Y. STATE DIV. OF LICENSING SERV., <http://www.dos.state.ny.us/licensing/appearance/appearance.html> (last visited Sept. 8, 2012).

¹²¹ See GEN. BUS. § 402. The Division of Licensing Services also handles licensing matters for barbers, armored car carriers, bail enforcement agents, document destruction contractors, notaries, real estate brokers, and security guards. *What Types of Occupations are Licensed/Registered?*, N.Y. STATE DIV. OF LICENSING SERVS., <http://www.dos.state.ny.us/licensing/index.html> (last visited Sept. 8, 2012). Since the Division of Licensing Services does not specialize in the nail salon industry, it established an advisory committee to represent the appearance enhancement industry, provide advice, and serve as a point of reference. GEN. BUS. § 403.

A. Licensing

Nail technicians, by virtue of bearing a license, signal to patrons that they are capable of performing manicures and pedicures. Therefore, it is crucial that nail technicians comply with licensing procedures. In New York, aside from meeting basic age and health requirements, nail technician candidates must satisfy educational and testing requirements.¹²² Candidates must learn manicure and pedicure techniques and complete courses including Safety and Health, Bacteria and Infectious Diseases, Chemical Methods of Sanitation, and Sanitary Rules and Regulations.¹²³ The candidate then must pass written and practical examinations to ensure that he or she has “sufficient basic skills to safeguard the health and safety of the public.”¹²⁴ So long as a nail technician renews his or her license within five years of its expiration, he or she will not have to complete further training or enroll in continuing education courses.¹²⁵ This appears to be a gap in the current licensing framework that, if filled, could help safeguard patrons.¹²⁶

To operate a nail salon in New York, one must hold a general business license.¹²⁷ The Secretary of State, based on his or her statutory authority to “promulgate rules and regulations which establish standards for practice and operation . . . to

¹²² GEN. BUS. § 406.

¹²³ N.Y. COMP. CODES R. & REGS. tit. 19, § 162.1 (2000).

¹²⁴ GEN. BUS. § 407. Records indicate that in June 2011, many examinations were given in Chinese, Korean, and Spanish, in addition to English. At ABC Beauty Academy, Inc. in Queens, New York, 819 individuals took the June 2011 nail specialty examination in Chinese while only 31 individuals took the examination in English. N.Y. STATE DIV. OF LICENSING SERVS., WRITTEN & PRACTICAL PASS/FAIL REPORT (2011), available at http://www.acces.nysed.gov/bpss/pdf/AppearanceEnhancementStats2010_11.pdf. This figure highlights the prevalence of nonnative English speakers in the nail salon industry.

¹²⁵ GEN. BUS. § 408. If the licensee fails to renew the license within five years, she must take the examinations again. *Id.* This is the closest requirement to a “continuing education” requirement for nail technicians in New York, which is inadequate.

¹²⁶ See *infra* discussion in Part VI.

¹²⁷ GEN. BUS. § 406.

ensure the health, safety and welfare of the public,” can establish rules pertaining to the sanitary conditions of nail salons.¹²⁸ The general standard is that nail salons “shall be kept clean and in good repair.”¹²⁹ Additionally, nail salons in New York are subject to “reasonable inspection” by the Department of Licensing’s inspection staff at any “reasonable time and without notice.”¹³⁰ Random and regular inspections enable the State to certify that nail salons operate in accordance with the law and that such outlets are clean and safe for patrons and workers; however, how frequently nail salons in New York are actually inspected is questionable.¹³¹

B. Regulation of Products Used in Nail Salons

The FDA is authorized by Congress to regulate cosmetic products.¹³² All nail products sold in the country cannot contain poisonous substances that could harm users under “customary conditions of use.”¹³³ Despite this, many products contain potentially harmful materials but remain on the market because they are “safe when used as directed.”¹³⁴

The FDA’s regulation of cosmetics is far less strict than its regulation of drugs, biologics, or medical devices.¹³⁵ Unlike the protocol for regulating drugs,¹³⁶ cosmetics and their ingredients,

¹²⁸ *Id.* § 404.

¹²⁹ N.Y. COMP. CODES R. & REGS. tit. 19, § 160.22 (1995).

¹³⁰ *Id.* § 160.14.

¹³¹ A 2006 article in *Newsday* asserts that between September 2004 and August 2005, 577 “appearance enhancement” businesses were inspected throughout the state and 474 violations were found. Chuck Bennett, *Salon Inspections Drop Dramatically*, N.Y. *NEWSDAY* (Jan. 2, 2006) (on file with author). Further, the article notes that this is a “sharp drop” from the “more than 2,000 statewide inspections during the first six months of 2002 that turned up more than 1,700 violations.” *Id.*

¹³² *FDA Authority Over Cosmetics*, U.S. FOOD & DRUG ADMIN. (Mar. 3, 2005), <http://www.fda.gov/Cosmetics/GuidanceComplianceRegulatoryInformation/ucm074162.htm>.

¹³³ *Nail Care Products*, *supra* note 20.

¹³⁴ *Id.*

¹³⁵ *FDA Authority Over Cosmetics*, *supra* note 132.

¹³⁶ Before a drug can be placed on the market in the United States, a

excluding color additives, are not subject to pre-market approval or testing and cannot be recalled by the FDA.¹³⁷ Without proper testing and the possibility of recall, current regulations cannot satisfactorily protect patrons.¹³⁸ Further, while the Toxic Substances Control Act enables the EPA to regulate toxic chemicals, cosmetics and their ingredients do not fall under its control.¹³⁹ Instead, the FDA “regulates” cosmetics through the Federal Food, Drug, and Cosmetic Act (“FD&C Act”) and the Fair Packaging and Labeling Act (“FPLA”).¹⁴⁰ Since the FD&C Act “prohibits the marketing of adulterated¹⁴¹ or misbranded¹⁴² cosmetics in interstate commerce,”¹⁴³ if a product does not comply with the FPLA, which broadly requires that packages and labels provide accurate information about the contents of the product therein, it is in violation of the FD&C Act.¹⁴⁴ The FDA can inspect cosmetic manufacturers and examine samples of cosmetics to determine whether a product is adulterated or misbranded.¹⁴⁵ However, the FDA generally has little power to prevent dangerous products from entering the marketplace

New Drug Application must be filed detailing the drug’s clinical trials, ingredients, animal studies, manufacturing process, and studies regarding the drug’s effect on humans. *New Drug Application*, U.S. FOOD & DRUG ADMIN. (May 18, 2012), <http://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/NewDrugApplicationNDA/default.htm>.

¹³⁷ *FDA Authority Over Cosmetics*, *supra* note 132.

¹³⁸ *The Safe Cosmetics Act*, THE CAMPAIGN FOR SAFE COSMETICS, <http://www.safecosmetics.org/section.php?id=74> (last visited Sept. 8, 2012).

¹³⁹ HU ET AL., *supra* note 20, at 12.

¹⁴⁰ *FDA Authority Over Cosmetics*, *supra* note 132.

¹⁴¹ In part, a product is “deemed to be adulterated . . . [i]f it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual.” 21 U.S.C. § 361 (2011).

¹⁴² A cosmetic is misbranded if the product’s label is “false or misleading,” if its “package form” does not have a label stating “the name and place of business of the manufacturer, packer, or distributor” and its contents. *Id.* § 362.

¹⁴³ *FDA Authority Over Cosmetics*, *supra* note 132.

¹⁴⁴ *Id.*; 15 U.S.C. §§ 1451–61 (2011).

¹⁴⁵ 21 U.S.C. § 374 (2011).

because proof of adverse health effects is required before the FDA can take regulatory action.¹⁴⁶ The FDA's decision to perform an inspection is based in part on "the type of products, the significance of . . . complaints received, the company's compliance history, FDA surveillance and compliance initiatives, and agency resources."¹⁴⁷

Under the FD&C Act, a product is considered misbranded unless the product bears an adequate warning.¹⁴⁸ Thus, manufacturers themselves must ensure that products are safe. Further, manufacturers may use any ingredient in their products as long as "the ingredient and the finished cosmetic is safe, the product is properly labeled, and the use of the ingredient does not otherwise cause the cosmetic to be adulterated or misbranded under the laws that FDA enforces."¹⁴⁹

The Cosmetic Ingredient Review ("CIR") Panel also fails to properly regulate the cosmetic industry. Approximately thirty-five years ago, industry professionals established the CIR Panel to examine ingredients in cosmetics; however, since its inception, the CIR Panel has only evaluated a fraction of ingredients.¹⁵⁰ Therefore, "the vast majority [of ingredients] have not been assessed for safety by the FDA, CIR [Panel] or any other entity."¹⁵¹

While it appears that ingredients in cosmetics are not being inspected, some nail polish manufacturers claim to have removed toxic chemicals from products.¹⁵² Despite this, some of

¹⁴⁶ MICHAEL J. DiBARTOLOMEIS, CAL. SAFE COSMETICS PROGRAM, CAL. SAFE COSMETICS ACT: A FIRST STEP TOWARD HEALTHIER PERSONAL CARE? 2 (2010), available at <http://www.epa.gov/p2week/pubs/DiBartolomeis.pdf>; NAT'L ASIAN PAC. AM. WOMEN'S FORUM, *supra* note 1, at 2-3.

¹⁴⁷ *Inspection of Cosmetics: An Overview*, U.S. FOOD & DRUG ADMIN. (May 4, 2010), <http://www.fda.gov/Cosmetics/GuidanceComplianceRegulatoryInformation/ComplianceEnforcement/ucm136455.htm>.

¹⁴⁸ 21 C.F.R. § 740.10 (2012); *FDA Authority Over Cosmetics*, *supra* note 132.

¹⁴⁹ *FDA Authority Over Cosmetics*, *supra* note 132.

¹⁵⁰ CAMPAIGN FOR SAFE COSMETICS, THE NEED FOR FEDERAL SAFE COSMETICS LEGISLATION 1 (June 2011), available at http://safecosmetics.org/downloads/SafeCosmeticsAct_Factsheet_June2011.pdf.

¹⁵¹ *Id.*

¹⁵² CAL. ENVTL. PROT. AGENCY, DEP'T OF TOXIC SUBSTANCES

those manufacturers still produce polishes that contain the toxic trio while others have replaced the toxic trio with other harmful chemicals.¹⁵³

Ultimately, the cosmetics industry has “found loopholes in the alphabet soup of government agencies—the FDA, EPA, OSHA—and its own self-monitored . . . CIR [Panel], allowing for an abundance of toxic products like nail polish, acrylics, and disinfectants to still be used today.”¹⁵⁴ Additionally, some states, including New York, have unsuccessfully attempted to ban the manufacture, sale, or use of products with the toxic trio.¹⁵⁵

While federal laws may not adequately regulate the manufacturing and distribution of cosmetic products, federal law does require nail salon owners to keep a Material Safety Data Sheet (“MSDS”) for each product used in the nail salon.¹⁵⁶ MSDSs contain information about the risks of each product and corresponding proper responses in the event of “accidental

CONTROL, SUMMARY OF DATA AND FINDINGS FROM TESTING OF A LIMITED NUMBER OF NAIL PRODUCTS 8 (2012), *available at* http://www.dtsc.ca.gov/PollutionPrevention/upload/NailSalon_Final.pdf.

¹⁵³ *Id.* A study published in April 2012 by the California Environmental Protection Agency, Department of Toxic Substances Control (“DTSC”) found even if polishes claim to be free of the toxic trio, “just the opposite is often true.” To conduct the study, DTSC collected twenty-five products from six distributors, who supply such products to nail salons. Product labels on twelve of the products claimed to be free of at least one of the toxic trio chemicals while seven of the products claimed to be free of the toxic trio. Out of the seven products claiming to be free of the toxic trio, only two were in fact “three-free.” *Id.*; CAL. HEALTHY NAIL SALON COLLABORATIVE ET AL., NAIL POLISH WALLET GUIDE 1 (2010), *available at* http://www.cahealthynailsalons.org/wp-content/uploads/2010/07/TT_walletcard_Eng.pdf.

¹⁵⁴ Momo Chang, *Under the Varnish*, COLORLINES, Winter 2005–06, at 49, 50, *available at* http://www.momochang.com/wp-content/uploads/2009/01/momochang_colorlines_under-varnish.pdf.

¹⁵⁵ A. 1473, 234th Leg., 2011–2012 Reg. Sess. (N.Y. 2011). A bill was introduced in the State Assembly on January 10, 2011 which, if passed, would have prohibited the “manufacture, distribution, or sale of nail polish and nail hardener containing dibutyl phthalates (DBP), toluene, and formaldehyde” as well as their use in nail salons and other appearance enhancement businesses. It was referred to a committee. *Id.*

¹⁵⁶ U.S. ENVTL. PROT. AGENCY, *supra* note 92, at vi.

overexposure.”¹⁵⁷ Distributors and suppliers of cosmetic products containing one or more potentially hazardous ingredient must provide purchasers with the appropriate MSDSs.¹⁵⁸ However, researchers have found that many nail salon owners and technicians do not know about MSDSs and most companies responsible for providing MSDSs have neither websites nor MSDSs posted online.¹⁵⁹ Further, since MSDSs are generally not translated into foreign languages, nail technicians who are not fluent in English may not fully understand them.¹⁶⁰

V. INITIATIVES TO COMBAT INDUSTRY-WIDE PROBLEMS

Recent initiatives to enhance the regulation of the appearance enhancement industry have been targeted at improving sanitary conditions and curbing toxin levels. While the reforms have been well intentioned, they fail to address all of the issues affecting the industry and therefore do not provide a comprehensive solution.

A. Initiatives to Increase Cleanliness

Several states have passed legislation and sanctioned proposals to increase cleanliness in nail salons. While such measures may help reform one of the main issues present in nail salons today, in isolation, these efforts will not reform the industry.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See, e.g.*, TUAN N. NGUYEN & EVELYN TOVAR, SAFETY & HEALTH SERVS. STATE COMP. INS. FUND, NAIL SALON INDUSTRIAL HYGIENE EVALUATION 6 (2010), available at <http://www.cahealthynailsalons.org/wp-content/uploads/2010/07/NailSalonIndustrialHygiene.pdf>.

¹⁶⁰ NAT'L ASIAN PAC. AM. WOMEN'S FORUM, *supra* note 1, at 4. The number of licensure examinations taken in foreign languages indicates that many nail technicians are more comfortable reading in foreign languages; thus, the fact that MSDSs may only be available in English may hinder technicians' understanding of the forms thus inhibiting their ability to protect themselves and salon patrons. *See* WRITTEN & PRACTICAL PASS/FAIL REPORT, *supra* note 124.

In 2006, California enacted an “urgency law,” AB 409, to protect patrons from unsanitary conditions in nail salons.¹⁶¹ Immediately after Governor Arnold Schwarzenegger signed the bill, the law took effect, directing California’s Board of Barbering and Cosmetology to temporarily suspend, without a hearing, license holders from doing business in unsanitary nail salons.¹⁶² In signing the bill into law, Governor Schwarzenegger acknowledged that “unsanitary nail salons pose a serious health threat to consumers.”¹⁶³ Leland Yee, the bill’s author, stated that proper cleaning and sanitary procedures are the first line of defense against infections and that salons that are not up to par “are not innocent businesses, but are irresponsible businesses risking the health of patrons and an entire industry.”¹⁶⁴

In Boston, Massachusetts, the Board of Health sanctioned a proposal in 2011 enabling the Boston Public Health Commission to regulate nail salons in the city.¹⁶⁵ The proposal was aimed at attaining continuity in the operation of nail salons to protect nail technicians and nail salon patrons from acquiring diseases or infections.¹⁶⁶ This decision gave the Boston Public Health

¹⁶¹ CAL. BUS. & PROF. CODE § 7403.2 (West 2010); CAL. CODE REGS. tit. 16, § 973 (2012); *California Enacts Emergency Nail Salon Law*, NAILS MAG. (Sept. 22, 2006), <http://www.nailsmag.com/news/40174/california-enacts-emergency-nail-salon-law>.

¹⁶² BUS. & PROF. § 7403.2; CAL. CODE REGS. tit. 16, § 973; *California Enacts Emergency Nail Salon Law*, *supra* note 161. The following are grounds for immediate suspension:

Pedicure foot spas, basins, or tubs that are not visibly clean; [p]edicure foot spas in which debris has been found upon the removal of screens, jets, foot-plates, or impellers; [i]nadequate cleaning material for the proper disinfection and sanitation of manicuring and/or pedicuring equipment found on-site at the establishment; no pedicure cleaning logs; [a] history of repeated health and safety violations pertaining to manicuring or pedicuring equipment; or [m]anicule and/or pedicure implements that are not visibly clean.

CAL. CODE REGS. tit. 16, § 973.

¹⁶³ *Schwarzenegger Signs Yee Bill into Law*, *supra* note 73.

¹⁶⁴ *Id.*

¹⁶⁵ Bos. Bd. of Health, *supra* note 16.

¹⁶⁶ *Id.*

Commission the authority to require nail salons to apply for annual permits and subjected the salons to regular health inspections.¹⁶⁷

Further, some states, including California and Texas, have passed legislation that permits inspectors to immediately shut down unsanitary salons.¹⁶⁸ However, such laws granting inspectors the authority to shut down salons can only be effective if states have the resources to inspect nail salons.¹⁶⁹

B. Initiatives to Decrease Exposure to Toxins

In addition to proposals focused on increasing cleanliness, initiatives have also centered on decreasing toxin levels in nail salons. Industry-specific groups have formed to combat this issue and individual workers have become activists.¹⁷⁰ NHNSA,

¹⁶⁷ *Id.*

¹⁶⁸ Alisha Cruz, *New Bill to Shut Down Unsanitary Nail Salons*, MYMOTHERLODE.COM (Sept. 23, 2006, 11:00 AM), <http://www.mymotherlode.com/news/local/39163/New-Bill-To-Shut-Down-Unsanitary-Nail-Salons.html>; *Texas Health Inspectors Now Have Power to Shut Down Salons Immediately*, NAILS MAG. (Aug. 3, 2007), <http://www.nailsmag.com/news/40303/texas-health-inspectors-now-have-power-to-shut-down-salons-immediately>.

¹⁶⁹ *See, e.g.*, Tracy Ahrens, *Nail Enhancements Increasing, So Are Risks*, DAILY JOURNAL (Aug. 25, 2000), <http://www.beautytech.info/articles/nailrisks.htm> (stating that the Kankakee County Health Department in Illinois does not have enough resources to inspect nail salons); Bennett, *supra* note 131 (noting that in New York, between September 2004 and August 2005, “577 ‘appearance enhancement’ business” were inspected, marking a “sharp drop” from the “more than 2,000 statewide inspections during the first six months of 2002”); Ginny Graves, *Danger . . . at Your Local Salon*, HEALTH (Dec. 22, 2008), <http://www.health.com/health/article/0,,20411389,00.html> (stating that in California had eighteen inspectors “responsible for 3,500 and 4,000” nail salons, indicating that most nail salons were only inspected “once every six years” *unless* a complaint was made regarding a particular salon.)

¹⁷⁰ *See* Chang, *supra* note 114, at 36, 37. Some manicurists feel strongly about this issue. For example, in response to a survey released by DTCS, Tina Bui, a manicurist for seventeen years, stated:

Physically, I can tell after eight or ten hours working, the chemicals give you very bad headache and affects you mentally. My eyes itch.

which was formed by the National Asian Pacific American Women's Forum ("NAPAWF"), the California Healthy Nail Salon Collaborative ("the Collaborative"), and Women's Voices for the Earth ("WVE"), is a broad umbrella organization working to increase awareness about nail salon safety.¹⁷¹ The Collaborative was established in 2005 because there were concerns about the rights and well-being of nail salon workers and owners.¹⁷² The Collaborative recommends the following: (1) that manufacturers of cosmetic products remove toxic ingredients "of known concern" from products, (2) that the FDA require pre-market testing of cosmetic ingredients, and (3) that the FDA have regulatory control over cosmetic ingredients.¹⁷³

Policymakers have responded to the concerns of patrons, nail technicians, and the NHNSA.¹⁷⁴ In 2011, six counties in Massachusetts collectively established the "Greening Nail Salons for Employees and Communities" project to increase awareness of chemicals prevalent in nail salons and to promote healthier alternatives for nail technicians and patrons.¹⁷⁵ The group intends to hire English- and Vietnamese-speaking consultants to better understand the problems facing the industry and to determine the

My nose itch. But as soon as I walk outside the salon, I feel much better. I hope the state government think about this and make it by law that if you say 'no' [to the toxic trio] and you have it, they have to have punishment or penalty.

Reactions to Toxins in 'Nontoxic' Nail Polish, BUSINESS WEEK (Apr. 10, 2012, 6:05 PM), <http://www.businessweek.com/ap/2012-04/D9U2ATI02.htm>.

¹⁷¹ *Members of the National Healthy Nail and Beauty Salon*, NAT'L HEALTHY NAIL & BEAUTY SALON ALLIANCE, <http://nailsalonalliance.org/members/> (last visited Sept. 8, 2012).

¹⁷² *Mission and History*, CAL. HEALTHY NAIL SALON COLLABORATIVE, <http://www.cahealthynailsalons.org/about/mission-history/> (last visited Sept. 8, 2012).

¹⁷³ *Id.*

¹⁷⁴ NAT'L ASIAN PAC. AM. WOMEN'S FORUM, *supra* note 1, at 5.

¹⁷⁵ Natalie Feulner, *Health Departments of 6 Towns Join to Improve Safety in Nail Salons*, BOSTON.COM (Oct. 18, 2011, 10:00 AM), http://www.boston.com/yourtown/news/dedham/2011/10/norwood_health_departments_par.html.

general level of employee knowledge about potentially hazardous conditions in nail salons.¹⁷⁶ Further, in 2005, California enacted the California Safe Cosmetics Act, requiring cosmetic manufacturers to fully disclose the contents of products sold within the state.¹⁷⁷ Following the passage of the California Safe Cosmetics Act, the state created a list of chemicals that would trigger state notification if present in cosmetic products in any quantity.¹⁷⁸ In 2009, an online reporting system was launched to enable cosmetic manufacturers to report “chemical ingredient[s] suspected of causing cancer or reproductive toxicity.”¹⁷⁹ In August 2010, Colorado followed California’s lead and introduced the Colorado Safe Personal Care Products Act, which

¹⁷⁶ *Id.*

¹⁷⁷ S.B. 484, 2005–2006 Leg., Reg. Sess. (Cal. 2005). Previously, in 2004, California State Assemblywoman Judy Chu “fired the first bullets at the cosmetics industry” and introduced a bill, Assembly Bill 2025, to “ban certain ingredients from all cosmetics sold” within California. It was not passed and supporters of the California Safe Cosmetics Act were conscious of that and “concentrated on the alleged lack of federal regulations for cosmetics and the claim that the industry uses chemicals ‘known or suspected of’ causing cancer and reproductive harm.” David C. Steinberg, *From California to Colorado: Three Battles Against Cosmetics*, COSMETICS & TOILETRIES SCIENCE APPLIED (May 27, 2010), <http://www.cosmeticsandtoiletries.com/regulatory/region/northamerica/95044079.html>.

¹⁷⁸ Shelia M. Kiernan, *Hold That Mascara: California Imposes More Regulations for Cosmetics Manufacturers*, CONSUMER PRODUCTS ALERT (Nixon Peabody LLP, San Francisco, Cal.), Oct. 24, 2005, at 2, *available at* http://www.nixonpeabody.com/linked_media/publications/CPA_10242005.pdf; Steinberg, *supra* note 177. This list, however, appears to be overbroad, including 783 chemicals while approximately 20 of the listed chemicals “have ever been used in cosmetics.” The list was basically modeled after a list of chemicals created in response to Proposition 65, enacted in 1986, which requires California businesses to provide a “clear and reasonable warning” before exposing anyone to a chemical” on a list comprised of “chemicals known to cause cancer, birth defects, or other reproductive harm.” Steinberg, *supra* note 177. Further, there is a carve-out for manufacturers whose “annual aggregate sales of cosmetic products” is less than \$1 million. Cal. S.B. 484.

¹⁷⁹ *California Safe Cosmetics Act Reporting System Goes Live*, SALONSENSE BLOG (Nov. 16, 2009), <http://www.salonsense.com/index.php/salonsense-blog/california-safe-cosmetics-act-reporting-system-goes-live.html>.

was virtually identical to the 2005 California legislation.¹⁸⁰ However, the Colorado legislation was never passed.¹⁸¹ In 2011, the San Francisco Board of Supervisors' Public Safety Committee "passed the country's first Healthy Nail Salon Recognition ordinance."¹⁸² The ordinance, deemed a "groundbreaking first step toward addressing worker health," enables the city of San Francisco to publicly identify nail salons that use nail polishes that do not contain the toxic trio.¹⁸³

On the federal level, inadequate regulation has prompted lawmakers to reintroduce the Safe Cosmetics Act,¹⁸⁴ which, if passed, would confer upon the FDA regulatory power over cosmetics to "ensure that personal care products are free of harmful ingredients and that ingredients are fully disclosed."¹⁸⁵

¹⁸⁰ *Colorado Judiciary Votes No to Safe Products Act*, COSMETICS & TOILETRIES SCIENCE APPLIED (Mar. 4, 2010), <http://www.cosmeticsandtoiletries.com/regulatory/region/northamerica/86352477.html>; Steinberg, *supra* note 177.

¹⁸¹ *Colorado Judiciary Votes No to Safe Products Act*, *supra* note 180; Steinberg, *supra* note 177.

¹⁸² *Local Healthy Nail Ordinance Captures National Attention*, NAILS MAG. (Nov. 15, 2010), <http://www.nailsmag.com/article/1249/local-healthy-nail-ordinance-captures-national-attention>; *San Francisco Passes Healthy Nail Salon Recognition Ordinance*, NAILS MAG. (Feb. 1, 2011), <http://www.nailsmag.com/news/91320/san-francisco-passes-healthy-nail-salon-recognition-ordinance>. Some industry aficionados view this ordinance as the "first legislative step toward encouraging nail salons to use safer products." Lisa Wong Macabasco, *Hyphen Editor Momo Chang Wins Investigative Journalism Award*, HYPHEN (Oct. 31, 2011, 9:55 AM), <http://www.hyphenmagazine.com/blog/archive/2011/10/hyphen-editor-momo-chang-wins-investigative-journalism-award>.

¹⁸³ *Local Healthy Nail Ordinance Captures National Attention*, *supra* note 182; *San Francisco Passes Healthy Nail Salon Recognition Ordinance*, *supra* note 182.

¹⁸⁴ The Safe Cosmetic Act of 2011's formal name is the bill "[to] amend title VI of the Federal Food, Drug, and Cosmetic Act to ensure the safe use of cosmetics, and for other purposes." H.R. 2359, 112th Cong. (2011). It was introduced by Representative Janice D. Schakowsky, on June 24, 2011. *Id.* At that time, it was referred to the Committee on Energy and Commerce, which immediately referred it to the Subcommittee on Health, and the Committee on Education and the Workforce. *Id.* In September 2011, the later Committee referred it to the Subcommittee on Workforce Protections. *Id.*

¹⁸⁵ *The Safe Cosmetics Act*, *supra* note 138.

The proposed Safe Cosmetics Act of 2011 would, among other things, lead to the gradual elimination of harmful ingredients in cosmetics, establish a “health-based safety standard that includes protection for . . . vulnerable populations,” eliminate “labeling loopholes by requiring full ingredient disclosure on product labels and company websites,” and provide greater access to information about the contents of the products.¹⁸⁶

Despite these new measures, recent legislation has overlooked the nail salon industry. In 2008, Congress passed the Consumer Product Safety Improvement Act of 2008 (“CPSIA”), which made it unlawful “for any person to manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children’s toy or child care article that contains concentration or more than 0.1 percent of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP).”¹⁸⁷ CPSIA did not address the removal of phthalates from cosmetic products.¹⁸⁸ In contrast, the European Union has banned phthalates in cosmetic products.¹⁸⁹

Aside from legislative reforms, “eco-friendly” salons and medical spas have also helped combat sanitation problems, albeit on a small scale.¹⁹⁰ In eco-friendly salons, workers use specially

¹⁸⁶ *Id.*

¹⁸⁷ Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 108, 122 Stat. 3015, 3036 (codified at 15 U.S.C. § 2057c (2011)).

¹⁸⁸ *Id.*

¹⁸⁹ NAT’L ASIAN PAC. AM. WOMEN’S FORUM, *supra* note 1, at 3; *see also* Chang, *supra* note 114, at 36 (noting that the European Union has also “banned about 1,000 chemicals from being used in cosmetic products,” while “the U.S. has banned about 10”).

¹⁹⁰ *See, e.g.*, Stephanie Allmon, *Urban Polish: Fort Worth SPAtaneity Nail Salon Is Long on Eco-friendly Procedures and Pampering with a Purpose*, FORT WORTH STAR-TELEGRAM, Oct. 30, 2011, at E05, available at <http://www.star-telegram.com/2011/10/26/3475918/urban-polish-fort-worth-spataneity.html#tvq>; Chang, *supra* note 114, at 39 (describing that Uyen Nguyen, who holds a chemistry degree, opened an eco-friendly nail salon after her sister-in-law, who worked in nail salons for over 15 years, suffered a miscarriage while eight months pregnant); Diedre Couey, *Eco-Friendly Salon Celebrating One-Year Anniversary*, SILVER SPRING, MD PATCH (Oct. 24, 2011), <http://silverspring.patch.com/articles/eco-friendly-salon-opens-its-doors>.

approved products that purportedly do not endanger technician or patron health. Though these products encourage healthier environments, they are not the answer to broader industry problems. First, there is no “green certification” for nail salons, so there is no formal check on actual usage of these products.¹⁹¹ Therefore, false advertising may mislead patrons. Second, services in eco-friendly nail salons are often costlier; thus, individuals looking for an inexpensive “treat” are not likely to frequent such salons.¹⁹² Third, there are higher barriers to entry into the eco-friendly salon business. While opening a typical nail salon may cost between \$40,000 and \$70,000, it can cost between \$250,000 and \$500,000 to open an eco-friendly salon.¹⁹³ Finally, the mere use of eco-friendly products will not altogether alleviate the rampant sanitary issues plaguing nail salons today because using such products will not increase cleanliness. Additionally, medical spas now offer “Medi Pedis,” a more sanitary version of regular spa pedicures.¹⁹⁴ For many of the same reasons that the establishment of eco-friendly salons will not solve industry-wide sanitation problems, medical spas will not either. Medical spas are not as common as nail salons and Medi Pedis are quite expensive, costing between \$150 and \$200

¹⁹¹ Chang, *supra* note 114, at 39. However, in Washington, King County is very active in establishing programs to eliminate “local hazardous waste” and has established a business program known as EnviroStars which “provide[s] assistance and incentives for smaller businesses to reduce hazardous materials and waste, in order to protect public health” *About, ENVIROSTARS*, <http://www.envirostars.org/about.aspx> (last visited Oct. 29, 2011). The county, through its Local Hazardous Waste Management Program’s Voucher Assistance Program, provides matching dollars of up to \$500 per nail salon, to “help nail salons improve ventilation, substitute less toxic products and otherwise reduce employee exposure to harmful chemicals.” *Nail Salons, LOCAL HAZARDOUS WASTE MANAGEMENT PROGRAM IN KINGS COUNTY*, <http://www.lhwmp.org/home/Health/nail-salons.aspx> (last visited Sept. 8, 2012).

¹⁹² See Chang, *supra* note 114, at 39 (noting that Nguyen, the owner of an eco-friendly nail salon charges \$39 for a manicure and pedicure while other salons in the area, that are not eco-friendly, charge \$22).

¹⁹³ *Id.*

¹⁹⁴ See *Medi Pedi Sanitary, But Pricey, Alternative to Regular Pedicure*, NY1 (Oct. 17, 2006, 3:45 PM), http://www.ny1.com/content/top_stories/63530/medi-pedi-sanitary--but-pricey--alternative-to-regular-pedicure.

for a single service.¹⁹⁵ Those who are able to afford Medi Pedis, however, are quite satisfied.¹⁹⁶ Altogether, current legislative and private market responses inadequately address both sanitation issues and toxic threats. There is a clear need for an alternative approach to combating problems facing nail salons.

VI. PROPOSED SOLUTIONS

To ensure adequate protection for nail technicians and patrons, regulations in the industry must be changed and improved upon. In theory, regulations designed to improve sanitation procedures should reduce the number of infections transmitted and diseases contracted in nail salons. In practice, however, technicians may not adhere to these regulations, thus rendering them ineffective. In order to effectively improve nail salon conditions, the existing and evolving legal framework must be supplemented with measures such as increased inspections, incentives to comply with regulations, and safety and sanitation education for technicians and patrons.¹⁹⁷ These objectives could all be efficiently accomplished within the framework of a grading system analogous to the restaurant grading system implemented in New York City in 2010.¹⁹⁸ Notably, a similar

¹⁹⁵ *Id.*

¹⁹⁶ *See, e.g., id.* (quoting a Medi Pedi client, Emily Leidner, who says she thinks that the service is “definitely . . . worth it” and that she “feels safer” getting Medi Pedis); *see also* Frances Womble, *Medical Pedicures Give Clients Peace of Mind*, THE FREE LANCE-STAR (Apr. 29, 2012), <http://blogs.fredericksburg.com/healthyliving/2012/05/04/medical-pedicures-give-clients-peace-of-mind/> (quoting Medi Pedi client Sharon Westerlund, who asserts, “I know I’m never going to have to worry about my health”).

¹⁹⁷ *See generally Understanding Consumer Education*, NAT’L CONSUMER FORUM, <http://www.consumerfair.co.za/show.php?id=104> (last visited Sept. 8, 2012) (positing that “[c]onsumer education is the only single cost effective mechanism that provides and guarantees consumer protection” and that, in addition to aiding individual consumers, the process serves broader societal goals by advocating for “sustainable consumption” and “ethical values”).

¹⁹⁸ *See* Hannah Lee, *On My Mind: Grades Are Important*, NAILS MAG. (Oct. 1, 2010), <http://www.nailsmag.com/article/82009/on-my-mind-grades-are-important> (arguing that salons are already being inspected, and faced with the prospect of having to post a low grade, salons will act quickly to improve

grading system was implemented in North Carolina for nail salons and has increased the amount and availability of information available to patrons.¹⁹⁹

In July 2010, the New York City Department of Health and Mental Hygiene (“NYC DOHMH”) began requiring every restaurant to visibly display a sign bearing a letter grade, which corresponded to the numerical score the restaurant received during its latest inspection.²⁰⁰ Unlike nail salons, each of New York City’s 24,000 restaurants is inspected at least once a year.²⁰¹ The goal of this program was to increase consumer knowledge regarding restaurant conditions, thus enabling consumers to make informed choices.²⁰² One year after the grading system was implemented, studies lauded the program’s success.²⁰³ Specifically, “70 percent of New Yorkers notice[d]

safety and sanitation); *see also* Catherine Q. O’Neill, *My Beauty Protest*, ALLURE DAILY BEAUTY REPORTER (Oct. 12, 2011, 5:27 PM), <http://www.allure.com/beauty-trends/blogs/daily-beauty-reporter/2011/10/occupy-walgreens-my-beauty-pro.html> (stating that “sanitation scores need to be *clearly* posted in every salon window”).

¹⁹⁹ Erin Snyder Dixon, *Making the Grade*, NAILS MAG. (Oct. 1, 2010), <http://www.nailsmag.com/article/1232/making-the-grade>.

²⁰⁰ N.Y.C. DEP’T OF HEALTH & MENTAL HYGIENE, HOW WE SCORE AND GRADE 1 (2012), *available at* <http://www.nyc.gov/html/doh/downloads/pdf/rii/how-we-score-grade.pdf> (“Restaurants with a score between 0 and 13 points earn an A, those with 14 to 27 points receive a B and those with 28 or more a C.” Therefore, the restaurants who receive the least number of points during an inspection are the most sanitary.); *see also* *Restaurant Inspection Information*, N.Y.C. DEP’T OF HEALTH & MENTAL HYGIENE, <http://www.nyc.gov/html/doh/html/rii/index.shtml> (last visited Sept. 8, 2012).

²⁰¹ *Restaurant Inspection Information*, *supra* note 200; N.Y.C. DEP’T OF HEALTH & MENTAL HYGIENE, *supra* note 200.

²⁰² N.Y.C. DEP’T OF HEALTH & MENTAL HYGIENE, LETTER GRADING FOR SANITARY INSPECTIONS: WHAT IT MEANS FOR RESTAURANTS AND CONSUMERS 1 (2010), *available at* <http://www.nyc.gov/html/oath/downloads/pdf/restaurant-grading-faq.pdf>.

²⁰³ Fred Mogul, *A’s Galore for Restaurants, One Year into New Grading Program*, WNYC (Aug. 1, 2011), <http://www.wnyc.org/articles/wnyc-news/2011/aug/01/as-galore-restaurants-one-year-new-grade-program/>; Press Release, N.Y.C. Office of the Mayor, Mayor Bloomberg, Deputy Mayor Gibbs and Health Commissioner Farley Announce Decrease in Foodborne Illness and Increase in Restaurant Revenue Since letter Grading Began (Mar.

the grades posted at restaurant entrances, and 65 percent use[d] the grades to help them decide where to eat all or most of the time.”²⁰⁴ As a result of the new program, the cleanliness of the restaurants has improved.²⁰⁵

The success of the restaurant program in New York City, coupled with the existence of grading programs for the nail salon industry in North Carolina, suggests that a nail salon grading system may be successful in New York City. Currently, the regulation and licensure of nail salons in New York is handled on the state level;²⁰⁶ however, in 2011, a bill was introduced in the New York State Assembly that, if passed, would require all “appearance enhancement businesses,” including nail salons located in New York City, to “be maintained and operated in accordance with the provisions of the city health code.”²⁰⁷ Passage of this bill would effectively shift oversight of New York City nail salons from the state to the city, thus following the nation-wide trend of fighting industry-wide problems at the local level.²⁰⁸ This would also effectively place nail salons within the jurisdiction of the NYC DOHMH,

6, 2012), available at <http://www.nyc.gov/html/om/html/2012a/pr076-12.html>.

²⁰⁴ Patrick Hedlund, *High Inspection Grades Save Restaurants Cash, Says Health Dept*, DNAINFO (Aug. 1, 2011, 3:14 PM), <http://www.dnainfo.com/20110801/manhattan/health-dept-survey-says-high-letter-grades-for-restaurants-saving-owners-money>.

²⁰⁵ *Id.*

²⁰⁶ *Nail Specialty*, N.Y. STATE DIV. OF LICENSING SERV., <http://www.dos.ny.gov/licensing/nails/nails.html> (last visited Sept. 8, 2012).

²⁰⁷ Assemb. 1898, 234th Leg., 2011–2012 Reg. Sess. (N.Y. 2011). Assemblywoman Joan Millman was one of the sponsors of this bill and her Chief of Staff, Anne Strahle, reported that the Assemblywoman sponsored the bill because her office received “several complaints and personal experiences from constituents regarding the cleanliness of nail and hair salons” and because “infections are a very serious health issue.” E-mail from Anne Strahle, Chief of Staff, Assemblywoman Joan Millman, to author (Sept. 20, 2011) (on file with author).

²⁰⁸ See, e.g., Bos. Bd. of Health, *supra* note 16 (describing regulations allowing Boston to have jurisdiction over nail salons in the city); Feulner, *supra* note 175 (describing efforts of various towns in Massachusetts); Jennifer Jiggets, *Virginia Beach to regulate nail salons*, VIRGINIA PILOT (Jan. 17, 2011), <http://hamptonroads.com/2011/01/virginia-beach-regulate-nail-salons>.

the same agency responsible for successfully implementing New York City's restaurant-grading regime.²⁰⁹

From an institutional competence perspective, the NYC DOHMH may be the agency best tasked with the job of improving conditions in nail salons in New York City. This task appears to fit within the agency's mission, to "protect and promote the health of all New Yorkers."²¹⁰ Further, in the past, the agency has implemented "groundbreaking initiatives," which have led to decreased smoking rates and the expansion of primary health care to New Yorkers.²¹¹ The agency's practice of dispersing newsletters and press releases about important ways to remain healthy would also encourage a more informed consumer base.²¹² Therefore, it is highly plausible that the NYC DOHMH could implement a new pilot program, such as the one proposed in this Note.

A nail salon grading system should closely follow the practices of the restaurant grading system. First, inspection of nail salons should increase. Second, like restaurant inspectors,²¹³ nail salon inspectors should score nail salons on a multitude of health and sanitation factors and then convert the score into a letter grade, which the salon would be required to post. The inspection process itself should also closely parallel the one for restaurants. During restaurant inspections in New York City, inspectors "check for compliance in food handling, food temperature, personal hygiene and vermin control."²¹⁴ While nail

²⁰⁹ N.Y. Assemb. 1898; N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, *supra* note 200.

²¹⁰ N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, AGENCY BIENNIAL REPORT 2007-2008 2 (2008), *available at* <http://www.nyc.gov/html/doh/downloads/pdf/report/nycdohmh-biennial07-08.pdf>.

²¹¹ *Id.*

²¹² N.Y.C. Dep't of Health & Mental Hygiene, *Hep B - Management and Referral*, CITY HEALTH INFO., May 2012, at 9, 13, *available at* <http://www.nyc.gov/html/doh/downloads/pdf/chi/chi30-5.pdf>. Further, prior newsletters have even cautioned against sharing nail files and nail scissors with others to prevent the transmission of hepatitis. *Id.* at 13.

²¹³ N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, *supra* note 200.

²¹⁴ *Restaurant Inspection Information*, *supra* note 200.

salon inspections would be dictated by salon-specific factors, a salon's score could be tabulated in the same fashion.

Regardless of industry-specific differences, the inspection and grade posting itself could have the same positive externalities in the nail salon context as it has had in the restaurant context. Specifically, one of the major benefits system in the restaurant industry has been the "successful means of incentivizing restaurant owners to improve and maintain best food-safety practices as well as communicating that information to customers."²¹⁵ Further, the restaurant grading initiative in New York City has increased employee training.²¹⁶ The implementation of this system would likely have similar effects on the nail salon industry, incentivizing owners to improve their practices and to offer increased employee training.

As some researchers believe that education is "[t]he cornerstone of safety in nail salons,"²¹⁷ it would be wise to include continuing education as a component in a holistic assessment of nail salon safety. For example, since the receipt of fewer points would indicate that a nail salon is more sanitary, inspectors could award negative points to a nail salon's score if its nail technicians enrolled in continuing education courses. Several industry-specific groups support the view that continuing education should be mandatory for license renewal because the "lack of education and information hinders nail technicians from following best practices in nail salons."²¹⁸ According to the California Healthy Nail Salon Collaborative, broad-based continuing-education courses can help license holders stay "up to date on health and safety issues ranging from appropriate handling and disposal of products containing toxic chemicals to . . .

²¹⁵ Press Release, N.Y.C. Dep't of Health & Mental Hygiene, Mayor Bloomberg, Deputy Mayor Gibbs, Health Commissioner Farley Announce That One in Three Restaurants in New York City Automatically Saved Money by Earning and Keeping 'A's - Over \$3 Million Fines Waived Over Last Six Months (Aug. 1, 2011), *available at* <http://www.nyc.gov/html/om/html/2011b/pr278-11.html>.

²¹⁶ *See id.*

²¹⁷ Renee McLean Chang et al., *Treating Cosmetically Induced Nail Problems*, 20 *DERMATOLOGY THERAPY* 54, 58 (2007).

²¹⁸ PORTER, *supra* note 9, at 13.

procedures for sanitizing foot spas.” Furthermore, requiring nail technicians to attend additional courses in lieu of monetary fines may be more effective.²¹⁹ In particular, research has demonstrated that certain types of continuing-education programs, such as interactive workshops, can have a positive impact on “professional practice.”²²⁰ Continuing education would provide nail technicians with knowledge to make improvements to ensure their own health and safety in addition to the health and safety of patrons.²²¹

Though New York does not currently require continuing education for nail technicians,²²² the state does impose continuing education requirements or its functional equivalent in many other professions, which suggests that such requirements may be implemented in the cosmetic industry.²²³ In 2011, a bill was

²¹⁹ *Id.* Oregon, for example, recognizes that continuing education is more effective than monetary fines. The Oregon Health Licensing Agency allows licensees who have violated “sanitation and infection control regulations” one time to either take a continuing education course or pay a fine; however, if the licensee takes the course, “the violation does not go on the individual’s record or impact her or his license.” *Id.*

²²⁰ MARY ANN O’BRIEN ET AL., THE COCHRANE COLLABORATION, CONTINUING EDUCATION MEETINGS AND WORKSHOPS: EFFECTS ON PROFESSIONAL PRACTICE AND HEALTH CARE OUTCOMES (REVIEW) 8 (2007), available at <http://apps.who.int/rhl/reviews/langs/CD003030.pdf>. This study examined educational meetings in continuing medical education and found that interactive workshops result in “larger changes in professional practice” than didactic sessions alone. *Id.* at 1. This accords with other research regarding adult education in general which has found that “[a]ctive participation [in the learning process] is the cornerstone for both the style of learning and the principles of adult education” and that such learning “results in longer-term recall, synthesis, and problem-solving skills than learning with verbal instruction only.” Sally S. Russell, *An Overview of Adult Learning Processes*, 26 UROLOGIC NURSING 349, 352 (2006).

²²¹ PORTER, *supra* note 9, at 13 (stating that in Oregon, the program instituted to increase continuing education has “provided licensees with the know-how to correct violations and avoid repeat violations”).

²²² N.Y. GEN. BUS. LAW § 408 (McKinney 1996) (stating that a license “which has not been suspended or revoked, may, upon the payment of a renewal fee, be renewed for additional periods of four years from its application, without further examination . . .”).

²²³ The Division of Licensing Services, the agency that handles licensure of nail technicians, has imposed continuing education requirements on real

reintroduced²²⁴ in the New York State Assembly that proposed amending the state's General Business Law to require mandatory continuing education classes for licensed appearance enhancement professionals, including nail technicians, in the fields of "infection control and transmission."²²⁵ The Committee Report stated that passing a bill of this nature is of "paramount importance," because it is essential to protect New Yorkers from harmful infectious diseases, including infections that can be transmitted in nail salons.²²⁶ This is especially true in light of recent findings regarding the transmission of hepatitis in nail salons.²²⁷ Though the bill was not passed, it should be reintroduced. In the interim, negative points for educational programs in the grading system would incentivize nail salons to introduce such measures, absent a legislative mandate.

The grading system would assist patrons in making informed choices in their nail salon selections. Since nail salons would be

estate professionals, home inspectors, and hearing aid dispensers. *FAQ – Home Inspector, Office of the Professions*, N.Y. STATE EDUC. DEP'T, http://www.dos.ny.gov/licensing/homeinspect/hinspector_faq.html#12 (last visited Sept. 8, 2012); *FAQ – Real Estate Salesperson and Broker*, N.Y. STATE DIV. OF LICENSING SERV., http://www.dos.ny.gov/licensing/re_salesperson/re_sales_broker_faq.html#6 (last visited Sept. 8, 2012); *Hearing Aid Dispenser Continuing Education, Office of the Professions*, N.Y. STATE EDUC. DEP'T, http://www.dos.ny.gov/licensing/hearingaid/hearingaid_coned.html (last visited Sept. 8, 2012). New York State also requires other professionals, including physical therapists, engineers, and land surveyors to satisfy continuing education requirements. *Physical Therapy: Continuing Education, Dep't, Office of the Professions*, N.Y. STATE EDUC. DEP'T, <http://www.op.nysed.gov/prof/pt/ptcnotice.htm> (last visited Sept. 8, 2012); *Professional Engineering & Land Surveying: Continuing Education, Office of the Professions*, N.Y. STATE EDUC. DEP'T, <http://www.op.nysed.gov/prof/pels/peceques.htm#who> (last visited Sept. 8, 2012). This indicates that the state does acknowledge the benefits of continuing education programs for licensees.

²²⁴ On February 12, 2010, New York Assembly Bill No. 9926 was introduced, but it died in committee. Assemb. 9926, 233rd Leg., 2009–2010 Reg. Sess. (N.Y. 2010).

²²⁵ Assemb. 5508, 234th Leg., 2011–2012 Reg. Sess. (N.Y. 2011).

²²⁶ *Id.* See also *supra* Part III (describing infections and communicable diseases that can be acquired from nail salons).

²²⁷ *Hepatitis Transmission Risk Needs to Be Studied in Nail Salons, Barbershops, Analysis Suggests, supra* note 57.

required to post the grade received during inspection, patrons would immediately be privy to greater information regarding the nail salon and its business practices. As illustrated in the restaurant context, individuals actually do consider grades when selecting restaurants; therefore, one could infer that the same would occur in the nail salon context.²²⁸

VII. CONCLUSION

Serious ills can stem from nail salons and can impact the livelihood and well-being of patrons and technicians. This Note has presented practical solutions that could be implemented fairly easily given the preexisting framework for restaurant inspections. Increased inspections result in earlier identification of health and sanitation problems. Since severe side effects from exposure to chemicals generally worsen over time, identifying problems earlier could reduce illness and disease among workers. Increased inspections would also address sanitation issues so that fewer patrons contracted dangerous diseases and infections. Computing and posting nail salon grades is dually beneficial because the grades increase patron knowledge while concurrently incentivizing nail salon owners to comply with rules and regulations. Since the restaurant-grading program has thrived in New York City, it appears that an analogous program in nail salons could be highly successful as well.

²²⁸ Hedlund, *supra* note 204.