Letter of The Law

Update on OSHA's Hazard Communication Standard

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Perhaps no regulatory initiative undertaken by the Occupational Safety and Health Administration ("OSHA" to friends and foes alike) under the Reagan Administration has generated more controversy than its handling of the previous Administration's "midnight rulemaking" on hazard communication. "Hazard communication" is the name OSHA gave to its efforts to ensure that workers are informed of the physical and health hazards of the chemical substances to which they are exposed in the workplace. ("Right-to-Know laws" are what such requirements have been called when enacted by states.) Because hazard communication could potentially affect virtually every type of hazardous chemical extant in the country, the standard has attracted much more attention than OSHA's more narrowly focused rulemakings concerning individual substances.

In an earlier *Letter of the Law* ("Rewriting the 'Right-to-Know'") (*CT&T*, July 1982) the Reagan Administration's hazard communication proposal was contrasted with the Carter Administration's. Now that a final standard has been promulgated, the implications of the hazard communication program for manufacturers of chemical substances have become clearer. If the standard survives the gauntlet of court challenges and political changes through which it must pass before becoming partially effective in late 1985, chemical manufacturers will be required to conduct comprehensive analyses of the hazards of their products, and to provide downstream users with detailed chemical hazard labels or Material Safety Data Sheets (MSDS). Further, chemical manufacturers, as employers, will be required to implement employee training programs regarding workplace hazards. Hazard communication is therefore of considerable potential significance to CSMA members.

Hazard Communication's Origins

OSHA's authority and duty to concern itself with informing employees of chemical hazards derive from §6(b) (7) of the Occupational Safety and Health Act of 1970 (the "OSH Act"). Section 6(b) (7) requires OSHA, in exercising its general §6 standard-setting authority, to:

> prescribe the use of labels or other appropriate forms of warning as are necessary to ensure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.[1]

"OSHA has now promulgated a hazard communication standard which, unless reversed by the Third Circuit, will become effective in November 1985 . . . . Chemical manufacturers therefore should begin preparations for compliance."

OSHA initially believed that the congressional purpose of §6(b) (7) was to require that such provisions be included in substance-specific standards. It soon became evident, however, that given the lengthy duration of OSHA's rulemaking actions, proceeding to require warning labels on a substance-by-substance basis would take an inordinate amount of time. In addition, in 1974, the National Institute on Occupational Safety and Health (NIOSH) recommended that OSHA issue a

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standard which would require that employers inform employees of chemical hazards to which they might be exposed.

OSHA therefore decided to implement §6(b) (7) by developing a generic standard with respect to warning employees of hazards. Possible ways and means of accomplishing this were studied by special OSHA task forces from 1974 through 1980.

During the course of this consideration, OSHA decided that it would be appropriate to promulgate a separate rule requiring employers to provide employees access to records employers had already generated regarding employees' exposure to workplace hazards. That rulemaking dealt solely with information systems that employers had chosen to create through their own assessments of exposure and medical status. The final rule was published as "Access to Employee Exposure and Medical Records" in 1980.[2] The Employee Access rule requires long-term preservation of employee hazard exposure and medical records, contains provisions requiring employers to inform employees of their access rights, and includes provisions protecting employers' trade secrets.[3]

On January 16, 1981, four days before her legal authority was to expire, former OSHA Administrator Eula Bingham issued a proposed hazard communication rulemaking. The rulemaking was one of several last-minute efforts by the Carter Administration's OSHA management to lock in its assertedly more rigorous approach to OSHA issues. The Bingham proposal would have required employers to assess the hazards of thousands of chemicals normally used in their workplaces, using mandate procedures. It would also have required highly detailed labels to be placed on all containers in the workplace, including pipes. However, on February 12, 1981, as one of its first acts upon assuming control of OSHA, the new Administration withdrew the proposed rule.

OSHA issued the Reagan Administration version of hazard communication through another proposed rulemaking in March 1982. The final standard was published in the *Federal Register*, without substantial change, in late 1983.[4] The final standard incorporated some of the features of the 1981 proposal withdrawn by OSHA, discarded others, and included some completely novel elements.

1983 Standard

The 1983 standard is consistent with one very important aspect of the Bingham proposal: the employer aspects thereof are limited to the manufacturing sector of the economy. (Standard Industrial Classification Codes 20–39).[5] Only employers in manufacturing businesses are required to establish hazard communication programs for their employees.[6] OSHA estimates that the standard will thereby cover more than 14 million workers in 300,000 manufacturing establishments. In addition, chemical manufacturers and importers are required to evaluate the hazards of their chemicals and to affix warning labels to the containers of their products. Evaluation of chemical hazards must be conducted in accordance with mandatory guidelines set forth in the standard and in its appendices.

The standard next requires manufacturing employers to label certain in-plant containers, to make MSDSs available to their employees and to train workers to protect themselves from chemical hazards. The MSDS is required to be written in English and to include the physical and chemical characteristics of substances, the particular health and physical hazards, including symptoms of exposure, maximum exposure limits and generally applicable safe handling and use precautions.[7] Employers are further required to develop written hazard communication programs.

It is important to note that certain chemicals are exempt from the labeling requirements of the standard. Probably the most significant of these exemptions is the one for pesticides as defined by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Those chemical substances are exempt to the extent that they are subject to FIFRA's labeling requirements and to labeling requirements issued thereunder by the EPA.[8]

Although the exact method of determining workplace hazards is largely left up to the employer, a conceptual framework is set forth which divides hazards into physical and health hazards. Physical hazards include chemicals that are combustible liquids, compressed gases, explosive, flamma-

ble and the like. Health hazards include chemicals that are carcinogens, toxic agents, reproductive toxins, corrosives and hepatotoxins. The standard creates a floor of about 600 substances which must be considered health hazards—substances regulated by OSHA and/or listed by the American Conference of Governmental Industrial Hygienists in Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment.[9]

The heart of the hazard communication standard, then, comprises three main elements: labeling, MSDSs and employee training. While, because of the greater employer discretion in determining health hazards, the labeling requirement is arguably less rigorous than that of the Carter Administration, the MSDS and employee training requirements are probably more extensive. At the same time, the standards include a significant amount of lead time before all requirements are to be effective. Chemical manufacturers and importers have until November 25, 1985 to carry out their hazard assessment and labeling obligations.[10] Manufacturing employers will not be required to have their hazard communication program in place until May 27, 1986[11]—two-and-a-half years after the final regulation was issued and more than eight years after the first advance notice of proposed rulemaking was published in January 1977.

Two relatively tangential aspects of the rulemaking, the trade-secret provision and the question of preemption of state right-to-know programs, have garnered as much attention as the main requirements. The trade-secret protection clause is a new element of hazard communication which was not contained in the Carter Administration-Bingham proposal. The provision is simply an exception to the requirement that the MSDS identify the hazardous chemical: where the chemical is a bona fide trade secret, its identity need not be disclosed, although the hazard it creates must still be stated.[12]

The exception to the exception is that where a health professional determines that an emergency exists, he must be told the identity of the chemical.[13] However, in nonemergency situations, the health professional must justify in writing the need for the identity of any chemical that is claimed to be a trade secret and provide written assurance that confidentiality will be maintained. If, after receiving the written request, the chemical manufacturer or importer or employer still refuses to divulge the chemical's identity, the standard provides a method for resolving the dispute. That method can ultimately lead to a decision by the OSHA Review Commission.[14] The trade secret clause is one of the standard's aspects that has drawn the most criticism. Along with certain other hazard communication provisions, it is currently the subject of litigation in the U.S. Court of Appeals for the Third Circuit in Philadelphia. That suit is discussed below.

Preemption of state right-to-know laws is also highly controversial. There are two distinct aspects of this issue: preemption of state right-to-know laws in states which do not have their own OSHA-approved state programs (the non-state-plan states) and preemption in those which do (the state-plan states). As to the non-state-plan states, OSHA takes the position, based on §18 of the OSH Act, that its hazard communication rule definitely does preempt any state right-to-know law. In fact, OSHA officials have stated that one of the purposes of the standard is precisely to establish uniform requirements in order to reduce the burden on interstate commerce of conflicting right-to-know laws. The hazard communication standard states that it is intended ". . . to preempt any state law pertaining to this subject."[15] However, OSHA officials have also observed that it should not be necessary for OSHA to go to court to invalidate state right-to-know laws; they expect, rather, that employers will take states to court which attempt to impose state right-to-know requirements in the shadow of the federal requirements. OSHA was vindicated in this belief in August 1984 when CSMA, along with several other organizations and corporations, filed suit in federal court against the state of New Jersey.[16] The suit squarely asserts that the New Jersey Right to Know Act is preempted by OSHA's hazard communication program.

OSHA views the state-plan states differently. Those states are expected to submit their right-to-know laws to OSHA for its approval. OSHA has stated that such laws will be reviewed using a two-pronged test: only if the state laws are at least as effective as the hazard communication proposal *and* do not burden interstate commerce, will OSHA approve them. Critics have charged that, with respect both to states having and not having state plans, federal preemption of state right-to-know laws amounts to a massive weakening of right-to-know requirements nationwide.

Litigation

As indicated above, the principal elements of the hazard communication standard are currently the subject of litigation in the U.S. Court of Appeals for the Third Circuit in Philadelphia.[17] In addition, in the federal district court for New Jersey, the power of the hazard communication regulation to preempt state right-to-know laws is being tested.

In the Third Circuit litigation, Public Citizen, Inc. (a Nader organization), and 11 union and community actions groups have challenged OSHA's decision to 1)

limit the employer requirements of hazard communication to the manufacturing sector, 2) allow the employer to decide which chemicals are hazardous beyond the required group and 3) afford a trade secrets exemption. Public Citizen and its coplaintiffs vigorously contend that OSHA's decisions to limit the scope of the hazard communication standard both with respect to employers affected and chemicals required to be labeled were arbitrary and capricious. The plaintiffs also argue that OSHA's trade secret exemption creates an "escape hatch" from the requirements of the standard and is contrary to the purpose of the OSH Act.

In defense of it standard, OSHA has several potential arguments. The agency can rely to some extent on the doctrine of judicial deference to administrative agencies' interpretation of their own enabling statutes. Further, in view of the fact that the plaintiffs go to some lengths to reveal the alleged shortcomings of the present hazard communication standard as compared with the Carter-Bingham proposal which the Reagan Administration withdrew, OSHA may be able to persuade the court that its revision of the rule was based primarily on policy (political) differences as to the proper approach, rather than different factual conclusions.

The most vulnerable of the three aspects of the standard attacked by the plaintiffs would seem to be the decision to restrict the rule's employer requirements to the manufacturing sector of the economy. OSHA's explanation of that decision, as set forth in the background material issued when the rule was published, seems remarkably weak. The rationale advanced for the decision seems to boil down to the assertion that manufacturing employees have disproportionate rates of chemical-source injuries and illnesses.[18] That rationale fails to suggest any strong reasons why employees of other industries should be *excluded* from coverage.

In addition, the preemptive aspects of the hazard communication standard have been challenged in a consolidated suit against OSHA which was originally filed by the state of New York in the Second Circuit and is now consolidated with the litigation described above in the Third Circuit.[19] New York argues that OSHA's hazard communication program is in fact not a standard but a regulation. Since §18 of the OSH Act provides that OSHA *standards*, not regulations, can preempt state standards that do not meet certain criteria, New York argues that the hazard communication *regulation* cannot preempt its right-to-know laws. New York further contends that because New York's right-to-know law complements OSHA's hazard communication program, rather than detracts from it, it cannot be said that the hazard communication program *impliedly* preempts New York's law.

As of November 1984, petitioners and respondents' briefs had been filled in the Third Circuit litigation, but oral argument had not yet been scheduled. No decision is expected before early 1985.

Meanwhile, in federal district court in New Jersey, the preemptive aspects of hazard communication, rather than being the object of attack, are being used as a sword. The trade association and corporate plaintiffs in that suit are seeking declaratory and injunctive relief to prevent New Jersey officials from enforcing the New Jersey Worker and Community Right to Know Act.[20] The New Jersey suit fulfills the expectation of OSHA officials that the preemptive aspects of the standard would inspire private litigation against state right-to-know laws.

The plaintiffs argue that the New Jersey law is preempted by the hazard communication standard and by §18 of the OSH Act. The plaintiffs have also moved for a preliminary injunction to prevent New Jersey from enforcing the state's law while the suit is pending.

The dispute is fundamentally over the meaning and effect of §18. That section provides:

> (a) Nothing in this chapter shall prevent any state agency or court from asserting jurisdiction under state law over any occupational safety or health issue with respect to which no standard is in effect under §655 of this title.
>
> (b) Any state which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety or health standard relating to any occupational or safety or health issue with respect to which a federal standard has been promulgated under §655 of this title shall submit a state plan for the development of such standards and their enforcement.[21]

It is very well established that a federal statute may preempt state laws and will certainly do so when the intent of Congress to preempt state laws is manifest and the state laws are clearly in conflict with the federal program.[22] What provides the legal tension with respect to preemption of state right-to-know laws by OSHA's hazard communication standard is, first, the fact that §18 is not an altogether clear statement of Congress' intent to preempt, and second, the disputes over the extent to which New Jersey's right-to-know law is actually in conflict with the federal program.

Plaintiffs in the New Jersey litigation argue forcefully that §18 is definitely intended to be preemptive—a conclusion which they assert is buttressed by OSHA's contemporaneous interpretation of the act and by the hazard communication standard itself. The suit also recites several respects in which the existence of New Jersey's law obstructs the federal hazard communication program and confronts employers with

multiple conflicting and confusing right-to-know requirements.

The New Jersey suit is the first court challenge to a state right-to-know law filed since the hazard communication standard was promulgated. As such, it has tremendous significance for the other states[23] which have enacted their own right-to-know laws in the shadow of the federal standard.

The separate question of preemption of state right-to-know laws by the hazard communication program is, therefore, as yet unresolved. Final resolution of that question is difficult to predict and is probably many months away, given the possibility that the loser of the New Jersey litigation could file an appeal in the federal circuit court of appeals.

In sum, OSHA has now promulgated a hazard communication standard which, unless reversed by the Third Circuit, will become effective in November 1985. While the standard is less rigorous in some respects than was its Carter Administration predecessor, it does contain a myriad of labeling, MSDS and training requirements which chemical manufacturers, importers and manufacturing employers will have to observe. It is possible that those requirements will be broadened to some extent as a result of a court edict. Given the previous history of this OSHA proceeding, there is little chance that the requirements will be weakened. Chemical manufacturers therefore should begin preparations for compliance. □

References

1. 29 U.S.C. §655(b)(7)(1982).
2. 45 *Fed. Reg.* 35212 (May 23, 1980).
3. 29 C.F.R. §1910.20 (1983).
4. 48 *Fed. Reg.* 53280 (November 25, 1983).
5. SIC Codes 20-39 cover manufacturers of food and kindred products (20), tobacco (21), textile mill products (22), apparel and other textile products (23), lumber and wood products (24), furniture and fixtures (25), paper and allied products (26), printing and publishing (27), chemicals and allied products (28), petroleum and coal products (29), rubber and plastic products (30), leather and leather products (31), stone, clay and glass products (32), primary metal products (33), fabricated metal products (34), machinery, except electrical (35), electrical equipment and supplies (36), transportation equipment (37), instruments and related products (38), misc. manufacturing products (39).
6. 29 C.F.R. §1910.1200(b)(1983).
7. *Id.* at (g)(2).
8. *Id.* at (a)(4)(i).
9. *Id.* at (d)(3).
10. *Id.* at (j)(1).
11. *Id.* at (j)(3).
12. *Id.* at (i)(1)(ii).
13. *Id.* at (i)(2).
14. *Id.* at (i)(11).
15. *Id.* at (a)(2).
16. *New Jersey Chamber of Commerce v. Hughey*, C.A. No. 84-3255 (D.N.J. *filed* August 10, 1984)
17. *Public Citizen, Inc. v. Auchter*, C.A. No. 83-3565 (3d Cir *filed* May 25, 1984), and Consolidated Cases.
18. 48 *Fed. Reg.* 53280, 53284-85 (November 25, 1983).
19. *New York v. Auchter*, C.A. No. 84-3128 (3d Cir. *transferred* February 1, 1984).
20. N.J. Rev. Stat. §34.5A-1 *et seq.*
21. 29 U.S.C. §667(a) & (b) (1982).
22. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526 (1977).
23. Delaware, Florida, Iowa, Illinois, Maryland, Pennsylvania.

Introduction to Light Duty Liquids

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ety of products. Bio Terge® LD-100 is an already blended mixture of active ingredients in an optimum ratio. All that needs to be done after diluting the concentrate with water is to add salt, dye or opacifiers to obtain the desired appearance. Bio Terge® LD-100 is a detergent blend based upon AOS.

In conclusion, formulating light duty liquids is an opportunity and a challenge in many ways. Good products require the selection of raw materials to achieve optimum cost performance and then they need to be combined in a way to make a physically acceptable product, again considering final costs. Although cost comparisons could not be included here, it is obvious that cost needs to be considered at each stage of product development, and that in some cases particular combinations of ingredients will be ruled out simply on this basis. Determining performance is no easy matter. It is hoped that this paper will provide the reader with an adequate background to both understand LDLs and perhaps make it a little easier to develop his own products. □

References

1. Matson, T. P.; Berretz, M. *Soap Cosmet. Chem Spec.*, 55(12):41, 1979.
2. Mitchell, S. J.; Spinner, J. European Patent Appl. No. 79,200,801.1, 1979.