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Hazardous Chemicals in the Workplace: The Employer's Obligation to Inform Employees and the Community.

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HAZARDOUS CHEMICALS IN THE WORKPLACE: THE EMPLOYER'S OBLIGATION TO INFORM EMPLOYEES AND THE COMMUNITY

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I. INTRODUCTION

The amended Occupational Safety and Health Administration (OSHA) Federal Hazard Communication Standard now requires virtually all private employers, engaged in a business in which hazardous chemicals are used, to develop, implement and maintain a program to communicate to employees the hazards associated with those chemicals.[1] Prior to August 24, 1987, the Federal Hazard Communication Standard (the "Standard") applied only to employers in the manufacturing section.[2] On August 24, 1987, the Federal Standard was amended to include all employers covered by OSHA.[3] The amended Standard ultimately became effective August 1, 1988.[4] As a result of the amendment of the Federal Hazard Communication Standard, employment sectors which previously had been unaffected by OSHA regulations requiring notice to employees about hazardous chemicals were made part of the community regulated by the Standard. Job descriptions from receptionists[5] to copy machine operators[6] are now subject to the provisions of the Standard.

In addition to the information which employers must supply to employees under the Federal Standard, employers are also required to communicate information about on-premise hazardous chemicals to local committees, to the state and to the EPA, pursuant to the provisions of the Federal Emergency Planning and Community Right-to-Know Act of 1986, commonly referred to as SARA Title III.[7]

Under the Federal Standard, employers are required to give em-

1. Hazard Communication Standard, 52 Fed. Reg. 31,877, 31,878, 31,880 (1987)(to be codified at 21 C.F.R. § 1910.1200(e)(1)).

2. 29 C.F.R. § 1910.12(a)(1), (c) (1987).

3. Hazard Communication Standard, 52 Fed. Reg. 31,877, 31,878 (1987) (to be codified at 29 C.F.R., 1910.1200(a)(1), (c)).

4. 52 Fed. Reg. 27,679 (1987).

5. Hazard Communication Standard, 52 Fed. Reg. 31,864 (1987).

6. Hazard Communication Standard, 52 Fed. Reg. 31,863 (1987).

7. 42 U.S.C. § 11,001 (Supp. 1988).

ployees information about hazardous chemicals, and under SARA Title III, employers are required to give the EPA and their state and local communities information about on-premise hazardous chemicals. Penalties for failure to comply with these right-to-know requirements that concern hazardous chemicals in the workplace can be $25,000 for each violation.[8] The employee and the community right-to-know about hazardous chemicals under the Federal Hazard Communication Standard, and under SARA Title III, is the subject of this article.

II. HAZARDOUS CHEMICALS IN THE WORKPLACE - EMPLOYEE RIGHT-TO-KNOW

A. *The Federal Hazard Communication Standard*

1. Background and Purpose

The Occupational Safety and Health Act of 1970 provides, in part, that it is the purpose and policy of Congress to assure, so far as possible, safe and healthful working conditions for every worker in the country.[9] In order to fulfill such purpose, Congress authorized the Secretary of Labor to set mandatory occupational safety and health standards for employment in the workplaces of those businesses which affect interstate commerce.[10] Under the Act, every employer is required to furnish each of its employees both employment and a place of employment which are free from recognized hazards that cause or are likely to cause death or serious physical harm.[11] Every employer covered by the Act must comply with all occupational

8. 42 U.S.C. § 11,045(c)(1) (Supp. 1988)(penalties associated with failure to comply with certain provisions of Emergency Planning and Communty Right to Know Act of 1986). Penalties for failing to comply with the OSHA Hazard Communication Standard can be $10,000.00 for each violation. 29 U.S.C. § 666(a) (1985).

9. 29 U.S.C. § 651(b) (1985). Notable exceptions to employers covered by OSHA are federal, state and local governments. Under the Act, the term "employer" does not include the United States government or any state or any political subdivision of a state. 29 U.S.C. § 652(5) (1985). Such exclusion is significant when determining whether various aspects of a state hazard communication plan, which has not been approved by OSHA, has been preempted by the Federal Hazard Communication Standard. Ordinarily, a state hazard communication plan would be preempted by the Federal Standard to the extent that it concerns employee right-to-know provisions. However, for employers not covered by the Standard, such as public employees, the state plan would continue to be in effect. See discussion at section II. B. 1, concerning partial preemption of State law by the Federal Standard.

10. 29 U.S.C. § 651(b)(3) (1985).

11. 29 U.S.C. § 654(a)(1) (1985).

safety and health standards promulgated under the Act.[12] The Federal Hazard Communication Standard is an occupational safety and health standard promulgated by the Secretary of Labor pursuant to its authority under the Act.[13] The Standard requires employers to inform employees of hazardous chemicals known to be present in the workplace.[14] The Standard, as originally promulgated, required chemical manufacturers and importers to "evaluate chemicals produced in their workplace or imported by them to determine if they are hazardous."[15] The original Standard was published in final form on November 25, 1983,[16] and was applicable only to employers in the manufacturing sector,[17] that is, the initial Standard only applied to employers with workplaces in Standard Industrial Classification Codes 20-39.[18]

The original Standard addressed the issue of hazard information transmittal in a generic manner. The alternative approach to issuance

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12. 29 U.S.C. § 654(a)(2) (1985).

13. 29 U.S.C. § 655 (1985); 52 Fed. Reg. 31,877 (1987) (to be codified at 29 C.F.R. § 1910.1200).

14. Hazard Communication Standard, 52 Fed. Reg. 31,880 (1987) (to be codified at 29 C.F.R. § 1910.1200(e)(1)(i)).

15. 29 C.F.R. § 1910.1200(d)(1) (1983).

16. 48 Fed. Reg. 53,279 (1983); 29 C.F.R. § 1910.1200 (1984).

17. 29 C.F.R. § 1910.1200(c) (1984).

18. A Standard Industrial Classification (SIC) Code is a four-digit number assigned to all businesses in the United States according to a business activity description system developed by the United States Department of Labor. In Texas, SIC codes are assigned to businesses by the Texas Employment Commission. TEC uses a business's description of its activities to determine the SIC code(s) for that employer. The code for an individual employer appears on Form C-3, the "Quarterly Report of Employment and Wages" from the Texas Employment Commission. The person who manages the employer's payroll account normally has custody of the quarterly report. Prior to August 24, 1987, the day on which regulations expanding the applicability of Federal Hazard Communication Act were promulgated, it was perhaps more pertinent for compliance with Hazard Communication Standards in Texas for an employer to know its SIC code designation. Since expansion of the Federal Hazard Communication Standard, with attendant pre-emption of certain provisions of the State Hazard Communication Standard in Texas (and in other states which do not have federally-approved plans for hazard communication), the determination by a business of its SIC code for the purpose of determining the applicability of either the federal or state requirements for hazard communication, is not as important as it once was. Certain provisions of the Texas Hazard Communication Act, TEX. REV. CIV. STAT. ANN. art. 5182b (Vernon 1985) may arguably still apply only to businesses with certain designated SIC codes. Discussion of those possibilities appear later in the article. For general information concerning Standard Industrial Classification Codes, see Standard Industrial Classification Manual 4101-0066, (EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL 9 (1972)).

of a generic Standard was to promulgate substance-specific rules, which addressed the hazards of particular chemicals rather than hazards in general. That approach was thought to be impractical, given the time-consuming nature of the rule making process and given the fact that as many as 575,000 hazardous chemical products were said to be present in American workplaces.[19] The Standard required that labels, or other appropriate forms of warning, be used on containers of hazardous chemicals in the workplace to apprise employees of all hazards to which there was exposure.[20] It also required that employees of manufacturers be informed about, among other things, any operations in their work area where hazardous chemicals were present.[21] In promulgating the original Standard, it was OSHA's view that:

> [w]hen employees have access to, and understand, the nature of the chemical hazards they are exposed to during the course of their employment, they are better able to participate in their employers' protective programs, and take steps to protect themselves. In addition, providing employers with complete chemical hazard information enables them to better design and implement protective programs. Together, these actions will result in more effective worker protection and the occurrence of fewer illnesses and injuries due to exposure to chemicals.[22]

2. Expansion of the Hazard Communication Standard to Non-Manufacturers

The original Hazard Communication Standard promulgated in 1983 limited the scope of coverage to the manufacturing sector.[23] The basis for the limitation was the finding that the manufacturing sector, while accounting for 32% of total employment, also accounted for more than 50% of the cases of illness due to chemical exposure.[24] The introduction of the Standard first in the manufacturing sector to the exclusion of others was based upon a practical consideration that the workplaces most affected by hazardous conditions should be first

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19. Hazard Communication Standard, 52 Fed. Reg. 31,852 (1987).

20. 29 C.F.R. § 1910.1200(f)(4) (1984).

21. 29 C.F.R. § 1910.1200(H)(1)(ii) (1984).

22. Hazard Communication Standard, 52 Fed. Reg. 31,852 (1987) and authority cited therein.

23. 29 C.F.R. § 1910.1200(a)(1) (1984).

24. 48 Fed. Reg. 53,285 (1983).

included in the Standard. As stated in comments leading to the promulgation of the original Standard:

> It should be emphasized that the Agency (OSHA) does not believe that employees in other industries are not exposed to hazardous chemicals, or that they should not be informed of those hazards. OSHA has merely exercised its discretion to establish rule making priorities, and chosen first to regulate those industries with greatest demonstrated need.[25]

The original Federal Hazard Communication Standard required chemical manufacturers and importers to assess the hazards of chemicals which they produced or imported, and to develop labels and other forms of warning to transmit information about the hazards associated with such chemicals.[26] With these requirements in place, OSHA reasoned that downstream users of the chemicals would be aware of the hazardous characteristics, regardless of whether the users were in the manufacturing sector.[27] In reaction to the promulgation of the original Standard, certain states and interested groups challenged, among other things, OSHA's restriction of the applicability of the federal Standard to only those employers in the manufacturing sector.[28] In *United Steelworkers of America v. Auchter,*[29] the court recounted the history of the Standard by citing those portions of the Occupational Safety and Health Act which required that every worker in the nation be assured of safe and healthful working conditions.[30] It cited the 1974 recommendation to the Secretary of Labor by the National Institute for Occupational Safety and Health[31] that a standard be promulgated requiring employers to inform employees of potentially hazardous materials in the workplace.[32] A trail of proceedings leading ultimately to the 1983 promulgation of the Standard was tracked.[33] Issue was joined on the point that while incidence of

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25. 48 Fed. Reg. 53,286 (1983).

26. 29 C.F.R. § 1910.1200(b)(1) (1983).

27. 48 Fed. Reg. 53,296 (1983).

28. United Steelworkers of Am. v. Auchter, 763 F.2d 728, 731 (3d Cir. 1985).

29. *Id.*

30. *Id.*

31. Created pursuant to 29 U.S.C. § 671 (1985) to, among other things, develop and establish recommended occupational and health standards. 29 U.S.C. § 671(c)(1) (1985).

32. United Steelworkers of Am. v. Auchter, 763 F.2d 728, 731 (3d Cir. 1985), *citing* 47 Fed. Reg. 12,095 (1982).

33. *Id.* at 731-32. The court in *Auchter* noted that "in 1974, the National Institute for Occupational Safety and Health (NIOSH) recommended that the Secretary of Labor promul-

illness due to exposure in the manufacturing sector was amply demonstrated in the administrative record, restriction of the coverage to that sector, to the exclusion of other employment sectors, such as service, construction and agriculture, was not supported by reasons which were consistent with the purpose of the statute.[34] Petitioners also criticized utilization of Standard Industrial Classification (SIC) codes to determine the applicability of the Standard. It was argued that such basis for determining applicability of the Standard employed a criteria which was used for a variety of statistical purposes, chiefly economic, which had little to do with the exposure to hazardous chemicals.[35] As a result, it was contended:

> Spray painters in the manufacturing sector, for example, must be provided with MSDSs [material safety data sheets] and with information on hazardous chemicals in the products they use, while spray painters in the construction industry using the same product are not so protected.[36]

The court concluded that the Standard as originally promulgated was adopted without sufficient explanation why labeling, material safety data sheets, and instructions, which were required under the Standard for employees in the manufacturing sector, were not needed for workers in other sectors who are exposed to similar or the same industrial hazards.[37] The Secretary of Labor was directed to reconsider the application of the Standard to employees in other sectors, and was further directed to order the application of the Standard to other sectors unless reasons could be given why such application would not be feasible.[38]

In response to the decision in *United Steelworkers*, and subsequent to ancillary proceedings relative to implementation of an expanded Standard,[39] an amended Hazard Communication Standard was

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gate a standard requiring employers to inform employees of potentially hazardous materials in the workplace." *Id.* The Secretary appointed a committee to formulate standards for implementing statutes that would require labels on similar appropriate warnings. No action resulted though more committee hearings were held and in 1981, the Department of Labor published a notice of suggested rule making for identification of hazards. Various changes were made to the proposal and the standard was published in final form in 1983. *Id.*

34. *Id.* at 737.

35. *Id.*

36. *Id.*

37. *Id.* at 738-39.

38. *Id.* at 739, 743.

39. On May 29, 1987, the Court of Appeals for the Third Circuit issued its order requir-

promulgated on August 24, 1987, to become effective as to employers in the non-manufacturing sector on May 23, 1988.[40] The effective date of applicability of expansion of the Standard to non-manufacturing sectors was stayed by court order issued May 20, 1988.[41] By subsequent order dated June 8, 1988, the stay was clarified to be applicable only to construction employers in the non-manufacturing sector.[42]

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ing OSHA to issue, within 60 days of the order, either (1) a Hazard Communication Standard applicable to all workers covered by the OSHA, including those workers not previously covered by the initial Hazard Communication Standard, or (2) a statement of reasons to support its position that such Standard was not feasible. United Steelworkers of Am. AFL-CIO-CLC v. Pendergrass, 83-3554 Slip Op. at 19 (3d. Cir. May 29, 1987).

40. Hazard Communication Standard, 52 Fed. Reg. 31,852 (1987).

41. The effective date for compliance with the expanded Standard by the non-manufacturing sector was established by rule to be May 23, 1988. 52 Fed. Reg. 31,852 (1987). The Standard already in effect for employers in the manufacturing sector remained in effect. *Id.* On May 20, 1988, an administrative stay was ordered by the United States Court of Appeals for the District of Columbia Circuit. Associated Builders and Contractors, Inc. v. William E. Brock, Secretary of Labor, No. 87-1582 (D.C. Cir. May 20, 1988) (Order granting stay). The same order consolidated cases which challenged expansion of the Standard to construction industry employers and transferred those cases to United States Court of Appeals for the Third Circuit, the same court that had decided *United Steelworkers of America v. Auchter.* On June 24, 1988, the United States Court of Appeals for the Third Circuit issued its order granting the application for emergency stay brought by the construction industry, and thereby extended the automatic stay ordered May 20, 1988. Associated Builders and Contractors, Inc. v. William E. Brock, Secretary of Labor, No. 88-3345, No. 88-3347, No. 88-3348 (3d Cir. June 24, 1988) (Order granting emergency stay).

42. Hazard Communication Standard, 52 Fed. Reg. 31,852 (1987)(order clarifying stay, June 8, 1988). *Id.* On July 8, 1988, the third circuit issued the following order in the same cause to confirm that the stay of expansion of the amended Standard pertained only to the construction industry:

> The order entered on June 24, 1988, is clarified to make clear that the stay applies only with respect to construction employers in the non-manufacturing sector. (Order Clarifying Stay, June 8, 1988).

Id. By notice published July 22, 1988, OSHA announced, for the purposes of enforcement, that compliance with the amended Standard by the non-manufacturing sector must be accomplished not later than August 1, 1988. 53 Fed. Reg. 27,679 (1988). OSHA clarified, in the following manner, application of the Standard to employers in the non-manufacturing sector:

> OSHA knows that some employers in the non-manufacturing sector are unaware of the Third Circuit Order and clarification, and that others are unsure whether they must comply with the revised Standard at this time. This document provides additional notice to employers and employees in the non-manufacturing sector that the Standard is in effect in all industry sectors except construction. In addition, as a matter of enforcement policy, OSHA will not check non-covered manufacturers for compliance with the Standard during programmed inspections until August 1, 1988.

53 Fed. Reg. 27,679 (1988).

3. Definitions Under the Federal Act

a. Affected Employers and Employees

As previously discussed, the purpose of the Standard is to ensure that "hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees."[43] All employers covered by OSHA are now required to comply with the Standard.[44] The term "employer" means any person doing business where chemicals are used, distributed, or where chemicals are produced for use or distribution.[45] The term "employee" means any "worker who may be exposed to hazardous chemicals under normal operating conditions or in foreseeable emergencies."[46] The term "employee" does not include workers "who encounter hazardous materials only in non-routine, isolated instances," such as office workers or bank tellers.[47] Knowing the job description of the employee at the workplace where hazardous chemicals are used is obviously important in determining the application of the Standard to workers who may be thought to not be included in the Standard's definition of an employee. For example, under an interpretation given by the Department of Labor, "normal operating conditions are those which employees encounter in performing their job duties in their assigned work areas."[48] A receptionist at a facility where hazardous chemicals are present would not necessarily be covered by the Standard where actual or potential exposure to the hazardous chemicals occurred in locations outside the reception area. The receptionist, according to OSHA interpretation, would be an "employee" under the Standard if the job in question involved walking every day (or, perhaps, "routinely") through a production area at which hazardous chemicals are present, thereby potentially exposing the employee to hazardous chemicals in the performance of the regular duties of that job.[49] Similarly, an employee who only occasionally uses a copy

43. Hazard Communication Standard, 52 Fed. Reg. 31,877 (1987) (to be codified at 29 C.F.R. § 1910.1200(a)(1)).

44. Hazard Communication Standard, 52 Fed. Reg. 31,877 (1987) (to be codified at 29 C.F.R. § 1910.1200(b)).

45. Hazard Communication Standard, 52 Fed. Reg. 31,878 (1987) (to be codified at 29 C.F.R. § 1910.1200(c)).

46. *Id.*

47. *Id.*

48. Hazard Communication Standard, 52 Fed. Reg. 31,864 (1987).

49. *Id.*

machine (an office product which may contain hazardous chemicals) may not be an "employee" under the Standard if no other potential source of exposure to hazardous chemicals is considered.[50] However, an employee who is responsible for handling chemicals associated with the use of a copier, and/or an employee who uses the copier frequently, is an individual entitled to information under the Standard.[51] Other examples of exposure to hazardous chemicals which may exist in non-manufacturing sectors were given during testimony received at hearings convened prior to adoption of the original Standard. Hospital workers are exposed to formaldehyde, ethylene oxide and cleaning agents which are often caustic; barbers and beauticians work with hair dyes which may be carcinogenic; dry cleaners may use solvents which would be defined as hazardous under the Standard.[52] If a worker is exposed to hazardous chemicals under normal operating conditions or in foreseeable emergencies, regardless of whether that worker is a stock clerk, mechanic, plumber, or carpenter; whether an administrative, clerical, or professional staff member, that employee, and employer, may be covered by the expanded Standard.[53]

b. Hazardous Chemicals

The hazardous chemicals covered under the Standard are those chemicals which are either a physical hazard or a health hazard, both of which terms are defined by the Standard.[54] The chemical manufacturer or importer is required by the Standard to evaluate any im-

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50. Hazard Communication Standard, 52 Fed. Reg. 31,863 (1987).

51. *Id.*

52. Hazard Communication Standard, 52 Fed. Reg. 31,858 (1987).

53. Hazard Communication Standard, 52 Fed. Reg. 31,878 (1987)(to be codified at 29 C.F.R. § 1910.1200(c)).

54. Hazard Communication Standard, 52 Fed. Reg. 31,879 (1987)(to be codified at 29 C.F.R. § 1910.1200(c)).

> A 'Health hazard' means a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. The term 'health hazard' includes chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents which act on the hematopoietic system, and agents which damage the lungs, skin, eyes, or mucous membranes.

Id.

> A 'Physical hazard' means a chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive.

Id.

ported chemical or chemical produced in the employer's workplace to determine whether the chemical is hazardous.[55] Individual employers are not required to evaluate chemicals unless a choice is made to not rely upon the hazard evaluation conducted by the manufacturer or importer.[56] The chemical manufacturer or importer (or employer, in the case of non-reliance upon evaluation done by a manufacturer or importer) is also required to determine the hazards of mixtures of chemicals.[57] The written procedures utilized to determine the hazards of a chemical, or mixture of chemicals, must be made available to an employee upon request.[58] The chemical manufacturer, importer or distributor of the chemical is required to label, tag or mark every container of hazardous materials which leaves that manufacturer's, importer's, or distributor's workplace.[59] The labeling, tagging or marking must identify the hazardous chemical, must contain appropriate warnings on the container, and must give the name and address of the chemical producer, importer or other responsible party.[60] Every hazardous chemical produced or imported is required to have a Material Safety Data Sheet (MSDS) accompany the shipment of such substance to any user or distributor.[61] The MSDS contains significant information which must be made a part of the written hazard communication program required by the Standard to be implemented by the employer.[62] The written hazard communication program must describe the means by which information, obtained under other provisions of the Standard, is to be communicated. The hazard communication program must identify on-premise chemicals by reference to an MSDS.[63]

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55. Hazard Communication Standard, 52 Fed. Reg. 31,879 (1987) (to be codified at 29 C.F.R. § 1910.1200(d)).

56. *Id.*

57. Hazard Communication Standard, 52 Fed. Reg. 31,880 (1987) (to be codified at 29 C.F.R. § 1910.1200(d)(5)).

58. *Id.* (to be codified at 29 C.F.R. § 1910.1200(d)(6)).

59. *Id.* (to be codified at 29 C.F.R. § 1910.1200(f)).

60. *Id.* (to be codified at 29 C.F.R. § 1910.1200(f)(1)(i)-(iii)).

61. Hazard Communication Standard, 52 Fed. Reg. 31,881 (1987) (to be codified at 29 C.F.R. § 1910.1200(g)(6)).

62. *See* Hazard Communication Standard, 52 Fed. Reg. 31,880 (1987) (to be codified at 29 C.F.R. § 1910.1200(e)(1)).

63. Hazard Communication Standard, 52 Fed. Reg. 31,880 (1987)(to be codified at 29 C.F.R. § 1910.1200(e)(1)(i)).

c. Material Safety Data Sheets

A Material Safety Data Sheet is written or printed material which contains information about the identity of a chemical and the hazards associated with that chemical.[64] The specific information required to be included in the MSDS is broken down into twelve categories.[65] Every MSDS must be in English and must contain, at a minimum, the following information:

> (3) Chemical and common name(s) of all ingredients which have been determined to present a physical hazard when present in the mixture;
>
> (i) The identity used on the label and, depending upon other factors (including whether the trade secrets provisions of the Standard apply), the components of the chemical; the common name(s) of the chemical or its ingredients; and other specified information which advises of hazards known to be associated with the chemical;
>
> (ii) Physical and chemical characteristics of the hazardous chemical (such as vapor pressure, flash point);
>
> (iii) Physical hazards of the hazardous chemical, including the potential for fire, explosion and reactivity;
>
> (iv) The health hazards of the hazardous chemical, including signs and symptoms of exposure and any medical conditions which are generally recognized as being aggravated by exposure to the chemical;
>
> (v) The primary route(s) of entry;
>
> (vi) The OSHA permissible exposure limit, ACGIH Threshold Limit Value, and any other exposure limit used or recommended by the chemical manufacturer, importer, or employer preparing the material safety data sheet where available;
>
> (vii) Whether the hazardous chemical has been found to be a potential carcinogen according to cited authorities;
>
> (viii) Any generally applicable precautions for safe handling and use which are known to the manufacturer, importer or employer preparing the MSDS (including appropriate hygienic practices, protective measures during repair and

64. Hazard Communication Standard, 52 Fed. Reg. 31,879 (1987) (to be codified at 29 C.F.R. § 1910.1200 (c) and (g)).

65. Hazard Communication Standard, 52 Fed. Reg. 31,879 (1987) (to be codified at 29 C.F.R. § 1910.1200(c) and (g)).

maintenance of contaminated equipment and procedures for clean-up of spills and leaks);

(ix) Any generally applicable control measures which are known to the chemical manufacturer, importer or employer preparing the MSDS (such as appropriate engineering controls, work practices or personal protective equipment);

(x) Emergency and first-aid procedures;

(xi) The date of preparation of MSDS or the last change to it; and;

(xii) The name, address, and telephone number of chemical manufacturer, importer, employer or other responsible party preparing or distributing the MSDS who can provide additional information on hazardous chemical and appropriate emergency procedures if necessary.[66]

The burden is upon chemical manufacturers and importers to ensure that distributors and employers are provided appropriate MSDSs with initial shipments of the chemical, and with the first shipment of a chemical after an MSDS is updated.[67] In the event an MSDS is not provided with a shipment that is labeled as a hazardous chemical, the employer is required to obtain the MSDS from the manufacturer, importer or distributor as soon as possible.[68]

Certain employers may act in a dual role as employers who have workplaces at which hazardous chemicals are present, and as distributors of hazardous chemicals. Under the Act, a distributor is a "business, other than chemical manufacturer or importer, which supplies hazardous chemicals to other distributors or to employers."[69] As a "distributor," a retail supplier is required to ensure that MSDSs are provided to other distributors and employers.[70] To account for the practical problem of a retailer not knowing if a sale of a hazardous chemical is to a commercial customer (thereby requiring transmittal of an MSDS under certain circumstances), or to a consumer who uses the substance as a "consumer product" (thereby not requiring trans-

66. Hazard Communication Standard, 52 Fed. Reg. 31,881 (1987) (to be codified at 29 C.F.R. § 1910.1200(g)(2)(i)-(xii)).

67. *Id.* (to be codified at 29 C.F.R. § 1910.1200(g)(6)).

68. *Id.* at 31,881-31,882.

69. Hazard Communication Standard, 52 Fed. Reg. 31,878 (1987) (to be codified at 29 C.F.R. § 1910.1200(c)).

70. Hazard Communication Standard, 52 Fed. Reg. 31,882 (1987) (to be codified at 29 C.F.R. § 1910.1200(g)(7)).

mittal of hazard information under the Standard),[71] the retail "distributor" must post a sign, or otherwise transmit information to such commercial customer, to advise that a MSDS is available for the product.[72] Every employer covered by the Standard is required to maintain a copy of the MSDS for each separate hazardous chemical in the workplace.[73] The employer is also required to ensure that the MSDSs are accessible during each work shift. To resolve the logistical problems posed by maintenance of MSDSs in instances where an employer maintains multiple workplaces, the Act provides that MSDSs may be kept in a central location at the primary workplace facility under circumstances where employees must travel between workplaces during a work shift.[74] For example, employees servicing oil and gas wells will travel to the wells from a central office location, or from well to well, to perform the necessary work. Under such circumstances, MSDSs may be kept by the employer at the primary workplace facility in a central location. Notwithstanding the allowance to accommodate logistical problems in maintaining MSDSs at multiple locations, the Standard nevertheless requires the employer to ensure that employees can gain immediate information from the MSDSs in the event of an emergency.[75]

4. Requirements for Employers Under the Standard

The Standard has a two-prong purpose: one, that the hazards of all chemicals are evaluated; and two, that the information concerning the hazards is transmitted to employers and employees.[76] The transmittal of information to employers is accomplished by chemical manufacturers, importers and distributors providing MSDSs to employers.[77] Information about the hazards of chemicals to which employees are

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71. *Id.*

72. *Id.* See also the discussion at 52 Fed. Reg. 31,866 (1987), for circumstances under which retail distributors who sell hazardous chemicals to employers must provide MSDSs upon request.

73. Hazard Communication Standard, 52 Fed. Reg. 31,882 (1987) (to be codified at 29 C.F.R. § 1910.1200(g)(8).

74. *Id.* (to be codified at 29 C.F.R. § 1910.1200(g)(9)).

75. *Id.*, *see also* Hazard Communication Standard, 52 Fed. Reg. 31,866 (1987).

76. Hazard Communication Standard, 52 Fed. Reg. 31,877 (1987) (to be codified at 29 C.F.R. § 1910.1200(a)(1)).

77. *See* Hazard Communication Standard, 52 Fed. Reg. 31,877, 31,880, 31,881-2 (1987) (to be codified at 29 C.F.R. § 1910.1200(b)(1); (f)(1); (g)(6), (7) and (8)).

exposed must be transmitted by employers through written plans and training programs.

a. Communication of Information

Under the requirements of the Standard, all employers must provide information to their employees about the hazardous chemicals to which they are exposed by means of 1) a Hazard Communication Program, 2) labels and other forms of warning, 3) material safety data sheets, and 4) information and training about hazardous chemicals in the workplace.[78]

i. Written Hazard Communication Program

The written Hazard Communication Program mandated by the Standard must at least describe the manner in which the criteria for labels and other forms of warning, MSDSs, and employee information and training will be met.[79] At a minimum, an employer's written Hazard Communication Program, in addition to the above, must include the following:

1. A list of hazardous chemicals known to be present at each workplace. The list must use an identity of the chemical referenced on the appropriate MSDS; and
2. The method the employer will use to inform the employee of hazards of non-routine tasks.[80]

Of important note is the requirement pertaining to multi-employer workplaces. Any employer who produces, uses or stores hazardous chemicals in a workplace where the employees of another employer may be exposed to such chemicals, shall also ensure that the Hazard Communication Program developed and implemented by that employer includes the following:

1. The method that will be used to provide other employers with either a copy or accessibility to the appropriate MSDS for each hazardous chemical the other employer's employees may be exposed to while working;
2. The method by which the employer may inform the other employers of precautionary measures needed to protect employees

78. *Id.* (to be codified at 29 C.F.R. § 1910.1200(b)).

79. Hazard Communication Standard, 52 Fed. Reg. 31,880 (1987) (to be codified at 29 C.F.R. § 1910.1200(e)).

80. *Id.* (to be codified at 29 C.F.R. § 1910.1200(e)(1)(i)-(ii)).

during the workplace's normal conditions and in reasonably foreseeable emergencies; and

3. The method by which the employer will inform other employers of the labeling system used by such employer at the workplace.[81]

If for example, a general contractor on a work site stores hazardous chemicals to which employees of another employer, a subcontractor for example, may be exposed, the employer-general contractor must provide in its written Hazard Communication Program a stated means by which transfer of information to the subcontractor will be accomplished. Under the referenced provisions, employers must exchange MSDSs, must communicate precautionary measures for the protection of each employer's employees, and must communicate the labeling system used by the employer for hazardous chemicals at the workplace. Under such provisions, for example, the employees of a painting subcontractor using flammable solvents in a work area, in the vicinity of another subcontractor's employees who are welding pipe, should be apprised of hazardous chemical information concerning the work of the other subcontractor's employees, and vice-versa.[82]

The employer must make the written Hazard Communication Program available upon request to an employee.[83] In addition, an employer must post a notice to advise of the requirements of OSHA of Hazard Communication.[84]

ii. Labels and Other Forms of Warning

Every employer covered by the Act is required to ensure that every container of a hazardous chemical in the workplace is labeled, tagged or marked with the identity of the chemical in the container and appropriate hazard warning.[85] Hazard warning is defined as any "words, pictures, symbols or combination thereof appearing on a label or other appropriate forms of warning which convey the hazard(s) of

81. Hazard Communication Standard, 52 Fed. Reg. 31,880 (1987) (to be codified at 29 C.F.R. § 1910.1200(e)(2)(i)-(iii)).

82. *See* Hazard Communication Standard, 52 Fed. Reg. 31,865 (1987).

83. *See id.* (to be codified at 29 C.F.R. § 1910.1200(e)(4)).

84. 29 C.F.R. § 1903.2(a)(1) (1987).

85. Hazard Communication Standard, 52 Fed. Reg. 31,881 (1987) (to be codified at 29 C.F.R. § 1910.1200(f)(5)).

the chemical(s) in the container(s)."[86] In connection with the requirement to provide appropriate hazard warnings on labels, OSHA has commented that some labels are inadequate to confer the requisite information.[87] For example, certain labels contain only precautionary statements rather than provide necessary information about the specific hazards of a substance, such as, for example, the admonition to "Avoid Inhalation." In such instances, the "hazard of the chemical(s) in the container(s)" (a required component of a label)[88] is not stated, i.e., the type or severity of the effect of inhalation which the substance could be expected to produce is not stated. Accordingly, the Standard requires labels to contain the identity of the chemical and hazard information. Conversely, labels which contain very detailed information of the type included in MSDSs will not necessarily aid in fulfilling the purpose of the labeling requirement. The purpose of the label is to serve as an immediate visual warning of the chemical hazards in the workplace.[89]

In order to satisfy the requirements of placing labels on individual stationary process containers, employers may use written materials, such as signs, placards, process sheets, batch tickets, or operating procedures, as long as the alternative method identifies the containers to which it is applicable and conveys the information required to be on the label.[90] There is no requirement for employers to label portable containers into which hazardous materials are transferred from already labeled containers, and which are meant only for the contemporaneous use of the employee who executes the transfer.[91] The employer is prohibited from removing or defacing existing labels on incoming containers of hazardous chemicals unless a substitution satisfying the requirements of the paragraph is immediately made.[92] All labels or warnings must be in English and must be prominently displayed on the label or readily available in the work area during each

86. Hazard Communication Standard, 52 Fed. Reg. 31,879 (1987) (to be codified at 29 C.F.R. § 1910.1200(c)).

87. Hazard Communication Standard, 52 Fed. Reg. 31,864 (1987).

88. Hazard Communication Standard, 52 Fed. Reg. 31,864 (1987). *See generally* 48 Fed. Reg. 53,300-03 (1983).

89. Hazard Communication Standard, 52 Fed. Reg. 31,864 (1987).

90. Hazard Communication Standard, 52 Fed. Reg. 31,881 (1987) (to be codified at 29 C.F.R. § 1910.1200 (f)(1)(ii) and (f)(5)(ii)).

91. Hazard Communication Standard, 52 Fed. Reg. 31,881 (1987) (to be codified at 29 C.F.R. § 1910.1200(f)(6) and (7)).

92. *Id.* (to be codified at 29 C.F.R. § 1910.1200 (f)(8)).

work shift.[93] The warnings may also be translated into other language as long as the information is also maintained in English.[94]

iii. Employee Information and Training

Employers must provide employees with information and training regarding hazardous chemicals in the work area at the time of the employee's initial assignment and when new hazards are introduced in the work area.[95] The term "work area" means a room or defined space in the workplace where hazardous chemicals are produced or used and where employees are present; while a "workplace" means an establishment, job site, or project at one geographical location containing one or more work areas.[96] The information to be supplied to employees shall be, at a minimum:

1. The requirements of the Standard;
2. Any operations in the work area where hazardous chemicals are present; and
3. The location and availability of the written Hazard Communication Program, including the required list of hazardous chemicals and MSDSs.[97]

The training required of employers under the Standard must include, at a minimum:

(i) Methods and observations that may be to detect the presence or release of a hazardous chemical in the work area (such as visual appearance or odor of a hazardous chemical);
(ii) The physical and health hazards of chemicals in the work area;
(iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals; and
(iv) The details of the Hazard Communication Program developed by the employer, including an explanation of labeling system and MSDSs and how employees can obtain and use the appropriate

93. *Id.* (to be codified at 29 C.F.R. § 1910.1200(f)(9)).
94. *Id.* (to be codified at 29 C.F.R. § 1910.1200 (f)(8) and (9)).
95. Hazard Communication Standard, 52 Fed. Reg. 31,882 (1987) (to be codified at 29 C.F.R. § 1910.1200(h)).
96. Hazard Communication Standard, 52 Fed. Reg. 31,879 (1987) (to be codified at 29 C.F.R. § 1910.1200(c)).
97. Hazard Communication Standard, 52 Fed. Reg. 31,882 (1987) (to be codified at 29 C.F.R. § 1910.1200(h)(1)(i, ii, iii)).

hazard information.[98]

The requirements of this section are performance oriented and may either be done for each specific chemical or for categories of hazards.[99] Re-training must occur in the event a new chemical is introduced in the workplace or in the event that a new hazard is associated with a chemical already in the workplace.[100]

5. Exceptions to the Standard

a. Workplaces with Limited Applicability of the Standard

Employers at laboratories and at locations where employees only handle chemicals in sealed containers which are not opened under normal circumstances of use are subject to the following limited requirements under the Act:

1. To ensure that labels on incoming containers of hazardous chemicals are not removed or defaced;
2. To maintain MSDSs obtained with incoming shipments of hazardous chemicals and provide that such MSDSs are readily accessible to employees; and, as to "sealed-container-handling" employees, that MSDSs received with incoming shipments of sealed containers of hazardous chemicals are maintained, or if requested by an employee, are obtained; and are accessible during work shifts to employees while in their work area(s); and
3. To ensure that employees are apprised of the hazards of the chemicals in the workplace in accordance with the employee information and training requirements of the Standard; and, as to sealed-container-handling employees, provide such information to sufficiently protect the employee in the event of an accident involving a chemical from a sealed container.[101]

The rationale for limited application of the Standard to laboratories is that laboratories are different from typical industrial workplaces in that employees in laboratories commonly use small quantities of many different hazardous chemicals for short periods of time; the conditions and purposes of the use of the chemicals frequently change, often unpredictably; and many workers in that field are already highly

98. Hazard Communication Standard, 52 Fed. Reg. 31,882 (1987) (to be codified at 29 C.F.R. § 1910.1200(h)(2)(i)-(iv)).

99. Hazard Communication Standard, 52 Fed. Reg. 31,866 (1987).

100. *Id.* at 31,866-31,867.

101. Hazard Communication Standard, 52 Fed. Reg. 31,877 (1987) (to be codified at 29 C.F.R. § 1910.1200(b)(3)-(4)).

trained in regard to handling such substances.[102]

The rationale for limited coverage of employees with workplaces which involve handling sealed containers, where under normal conditions of use the containers would not be opened, is that exposure to the chemicals would usually be limited under such circumstances. Operations such as warehousing, retail sales, marine cargo handling and truck terminals are typical examples of the possible limited applicability of the Standard under such provisions.[103]

b. Substances/Products Not Covered by the Standard

Significant exceptions to chemicals which are covered by the Standard are tobacco or tobacco products; wood or wood products; articles (a defined term, including, for example, office products such as pens, pencils, typewriter ribbons); food, drugs, cosmetics, or alcoholic beverages in a retail establishment which are packaged for sale to consumers; food, drugs or cosmetics which are intended for personal consumption by employees while in the workplace; and any consumer product or hazardous substance as those terms are defined by the Consumer Product Safety Act,[104] and the Federal Hazard Substance Act,[105] respectively, where the employer can demonstrate that the product or substance "is used in the workplace in the same manner as normal consumer use, and which use results in duration or frequency of exposure which is not greater than exposures experienced by consumers."[106] An employee whose job description entails routine use of hazardous chemicals in the same manner that it would be used for consumer use, but more frequently, e.g., cleaning sinks with abrasive cleaners or using paint stripper for preparation of product, would presumably be covered under the Standard. For the purposes of the exception related to use of a hazardous chemical in manner similar to consumer use, the employer must demonstrate that the duration and frequency of exposure is not greater than the exposure experienced by consumers. For a specific discussion of this exception, see 52 Fed. Reg. 31,862 (1987).

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102. Hazard Communication Standard, 52 Fed. Reg. 31,861 (1987).

103. Hazard Communication Standard, 52 Fed. Reg. 31,863 (1987).

104. Consumer Product Safety Act, 15 U.S.C. § 2052 (1982).

105. Federal Hazard Substance Act, 15 U.S.C. § 1261 (1982 & Supp. II 1984).

106. Hazard Communication Standard, 52 Fed. Reg. 31,878 (1987) (to be codified at 29 C.F.R. § 1910.1200(b)(6)).

B. *Texas Hazard Communication Act*

The Texas Hazard Communication Act, passed in 1985, attempted to bridge any gap in access to information about hazardous chemicals which may have occurred if the Federal Hazard Communication Standard did not take effect or remain in effect.[107] To the extent that the Federal Standard remained in effect, the Federal Standard preempted those portions of the Texas Act which pertained to issues addressed by the Federal Standard, unless the Texas plan for hazard communication had been approved by the Secretary of Labor.[108] Texas is not one of the twenty-five states which utilizes a federally-approved plan for hazard communication in the workplace.[109] Regardless of the preemption by the Standard of State Worker Right-to-Know provisions, the Federal Standard has been found to not expressly preempt those portions of state right-to-know laws which regulate other concerns about communicating hazardous chemicals information.[110] In addition, OSHA has taken the position that state right-to-know laws which address general environmental problems originating in the workplace, but have effects outside the workplace, should not be preempted by the Federal Standard.[111] In *New Jersey State Chamber of Commerce v. Hughey*,[112] the court, while acknowledging the OSHA position on such matters, and declaring certain provisions of the New Jersey Right-to-Know statute not expressly preempted, went on to consider whether those same provisions of the New Jersey Statute not expressly preempted were impliedly preempted.[113] A state statute regulating communication about hazardous substances which is not expressly preempted by the Standard because it treats matters not addressed in the Federal Standard, may nevertheless be preempted by the federal legislation if 1) it is impossible to comply with both the state law and the federal law; or 2) it serves as an obstacle to accomplishment of the object of the Federal

107. TEX. REV. CIV. STAT. ANN. art. 5182b, § 2 (Vernon 1985).

108. *See* United Steelworkers of Am. v. Auchter, 763 F.2d 728, 738 (3d Cir. 1985).

109. *See* 53 Fed. Reg. 27,679 (1988); Hazard Communication Standard, 52 Fed. Reg. 31,870 (1987).

110. New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587, 593 (3d Cir. 1985).

111. *Id.*

112. *Id.* at 587.

113. *Id.* at 593.

Standard to promote safety and healthful working conditions.[114] In order to make the required determination on the question of implied preemption, each section of a State law in which a possible contention of preemption may be made must be examined.[115] The *Hughey* court found that there was not implied preemption of provision in the state right-to-know legislation which required State agencies to a) develop environmental and workplace hazard surveys for employers to report hazardous substances, b) develop environmental and workplace hazardous substance lists, c) develop hazard substance fact sheets for each hazardous substance, d) complete and distribute environmental hazard surveys, and report environmental hazards to state agencies, and e) in light of the "broad community health and safety purposes" expressed in the New Jersey Act, make mandatory assessments against all New Jersey employers to fund the right-to-know Act.[116] Correspondingly, the *Hughey* court found that those portions of the New Jersey right-to-know statute were preempted which required employers to keep workplace hazard surveys and to provide the completed surveys to state agencies and to local emergency response departments (fire and police).[117] That portion of the New Jersey Act which imposed a parallel requirement for completion and distribution of environmental hazard surveys was found not to be preempted since it required reporting of environmental hazards to agencies concerned with public health and safety, a matter not governed by the OSHA Standard. The distinction found by the court apparently rests in the difference between the "workplace hazard," which affects employees and would be governed by the Federal Standard, and the "environmental hazard survey," which affects the community at large and is subject to state regulation.

Also found to be preempted were those portions of the New Jersey statute which directed the State Department of Health to maintain a file of workplace surveys, and required employers covered by the Federal Standard (at that time, applicable only to the manufacturing sector) to maintain a central file of those workplace surveys with access for employees of both workplace "surveys and hazardous substance

114. *See* New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587, 594 (3d Cir. 1985).

115. *Id.* at 594-95.

116. *Id.* at 595.

117. *See id.*

fact sheets for items on the workplace hazardous substance list."[118] The New Jersey requirement was also challenged on the basis that the labeling requirements, intended to furnish information to emergency response personnel and to the community at large, would be an obstacle to the accomplishment of the purposes of the Federal Standard and would lead to confusion among workers.[119] On such point, the court found that a fact question existed as to whether the labeling requirements in the New Jersey statute "posed an obstacle" to accomplishment of the purposes of the Federal Standard, thus preempting those provisions in the State statute.[120]

> In summary, in order to determine which provisions of the State Act may be preempted by the Federal Hazard Communication Standard, it is necessary to know whether the State Act's primary purpose is solely to promote occupational health and safety through hazard communication, or whether the State Act's purpose is to promote both occupational health and safety, and the safety of the general public and emergency response personnel.[121]

1. Partial Preemption of the Texas Act by Federal Hazard Communication Standard

The Texas Act applies to employers in the manufacturing sector[122] and to ten other SIC code workplaces.[123] The Texas Act specifically provides that manufacturing employers and distributors that are regulated by and comply with the provisions of the Federal Standard are exempt from the Texas Act with the exception of those provisions of the Texas Act which relate to certain employers:

1) providing workplace chemical lists (a defined term) to the State Commissioner of Health;
2) maintaining such chemical lists for thirty years, or in the event that the business ceases to operate, forwarding such records to the Commissioner;
3) providing manufacturing and non-manufacturing purchasers of

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118. *Id.*

119. *See* New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587, 596 (3d Cir. 1985).

120. *Id.*

121. *See* Manufacturers Ass'n of Tri-County v. Knepper, 801 F.2d 130, 138 (3d Cir. 1986).

122. TEX. REV. CIV. STAT. ANN. art. 5182b, § 3(3) (Vernon 1985).

123. *Id.* § 3(13).

hazardous chemicals appropriate MSDSs in the event that the employer is a chemical manufacturer and/or distributor;

4) providing to the Commissioner of Health upon request a copy of MSDSs provided to manufacturing and non-manufacturing purchasers of hazardous chemicals;
5) for those who normally store a hazardous chemical in amounts in excess of five hundred pounds, or in such other amount to be determined by the Board of Health for certain highly-toxic or dangerous hazardous chemicals, providing to the fire department in whose jurisdiction the facility is located the names and telephone numbers of knowledgeable representatives of the employer who can be contacted for further information or in the case of an emergency;
6) providing a workplace chemical list to the fire chief upon request and notifying the fire chief of any significant changes that occur in the workplace chemical list;
7) providing the fire chief upon request a copy of an MSDS for any chemical on the workplace chemical list;
8) being subject to procedures for notices of violation and penalties for violation of the Act; and
9) providing information to employees exposed to hazardous chemicals.[124]

The Texas Act, even in its exceptions to exemption from compliance with the Act, would be 1) expressly preempted by the Federal Standard to the extent that it pertains to issues that are addressed by the Federal Standard; and 2) would be impliedly preempted by the Federal Standard to the extent that it is impossible to comply with both the Federal Standard and the provisions of the Texas Act, or to the extent that the Texas Act serves as an obstacle to the accomplishment of the Congressional purposes served by the Federal Standard.[125]

Of importance to determining the Texas Act's present applicability to employers, in light of the expansion of the Federal Hazard Communication Act, is the provision in the Texas Act which declares one of its purposes to be that information be provided to the Commissioner of Health to make information available to the general public through specific procedures and that information be provided to emergency service organizations responsible for dealing with chemical hazards during emergency situations.[126] The Texas Act defines em-

124. *Id.* §§ 4(a), 6(d), 7(a), 7(d), 9, 13(c), 13(d), 13(e), 15 (Vernon 1980).
125. Manufacturers Ass'n of Tri-County v. Knepper, 801 F.2d 130, 135 (3d Cir. 1986).
126. TEX. REV. CIV. STAT. ANN. art. 5182b, § 2 (Vernon 1985).

ployer to include the State of Texas and its political subdivisions and all volunteer emergency organizations, and defines "employee" to include any person working for the State of Texas and its political subdivisions, as well as members of volunteer emergency service organizations.[127] The definition of employer under the Federal Standard does not include a state or any political subdivision of a state.[128] The Federal Standard does not preempt those portions of the Texas Act which do not concern employee right-to-know, which do not cause compliance with the Federal Standard to be rendered impossible, and which do not pose an obstacle to the accomplishment of the purposes served by the Federal Standard.[129] Other state right-to-know legislation has been confronted with the question of partial preemption. In *Ohio Manufacturers' Association v. City of Akron*,[130] the court addressed an ordinance which provided for right-to-know protection for employees and for public health officials and the public in general. The court found that the Federal Standard was, as described by its own terms, a comprehensive hazard communication program intended to address the issue of evaluating and communicating chemical hazards to employees.[131] It reviewed the rationale for preemption of state and local right-to-know programs and cited regulatory comment that preemption by the Federal Standard was appropriate because of the proliferation of state and local right-to-know laws.[132] The court noted that OSHA had found in its rule making process that companies affected by the Standard had business dealings which involved interstate commerce and were accordingly subject to numerous and potentially conflicting right-to-know regulations.[133] The regulations were found to cover different substances with different reporting requirements to serve different purposes.[134] The court found that the Akron ordinance was preempted by the Standard to the ex-

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127. *Id.* § 3(13), (6).

128. 29 U.S.C. § 652(5) (1985).

129. Hazard Communication Standard, 52 Fed. Reg. 31,860 (1987)(to be codified at 29 C.F.R. § 1900.1210 (II)(a)).

130. 801 F.2d 824 (6th Cir. 1986).

131. *Id.* at 831-32.

132. *Id.* at 832. The court noted that OSHA's regulations made clear the intent to preempt state and local regulations primarily to protect employees but also to fulfill a need for a federal standard because many companies deal in interstate commerce and are subject to different and possibly conflicting regulations. *Id.*; *see also* 48 Fed. Reg. 58,283 (1983).

133. *See* Ohio Manufacturers' Ass'n v. City of Akron, 801 F.2d 824, 832 (6th Cir. 1986).

134. *Id.*

tent that it attempted to regulate employee safety in the workplace.[135] The validity of those portions of the ordinance which served the purpose of protecting the general public and public health officials was not reached by the appellate court.[136] The case was remanded to the district court to determine whether the public right-to-know portions of the ordinance were preempted by the Federal Standard and, if not, whether the preempted employee right-to-know provisions in the ordinance could be severed so as to allow the public right-to-know provisions to remain intact.[137]

In *Manufacturers Association of Tri-County v. Knepper*, the Pennsylvania Worker and Right-to-Know Act was found to not be preempted by the Standard as to its provisions requiring employers to conduct hazardous substance surveys and to require those surveys to be furnished to the public and employees through state agencies.[138] The court found that the provisions in the Pennsylvania Act which required employers to conduct surveys to account for hazardous substances was broader than workplace safety which was the sole concern of the Occupational Safety and Health Act.[139] The surveys were to be provided by the employers to emergency, health and safety agencies.[140] The court found that the state statute did not have only as its purpose the promotion of occupational health and safety through hazard communication.[141] Accordingly, State provisions requiring hazard substance surveys to be made available to public safety agencies and interested members of public were found to be valid and not preempted by the Federal Standard.[142]

Review of the Texas Act and authorities addressing the issue of preemption of hazard communication standards in the workplace, demonstrate that the expansion of the Federal Standard to all OSHA employers has preempted the Texas Act to the extent that it deals with employee right-to-know requirements in workplaces of OSHA employers, and to the extent that it makes Federal Standard compli-

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135. *Id.* at 834.
136. *Id.*
137. *Id.*
138. Manufacturers Ass'n of Tri-County v. Knepper, 801 F.2d 130, 135 (3d Cir. 1986).
139. *Id.* at 136.
140. *Id.* at 137.
141. *Id.* at 138.
142. *Id.* at 137-38, *citing* New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587, 594 (3d Cir. 1985).

ance impossible or presents an obstacle to fulfilling the purposes of the OSHA Standard. Therefore, the Texas Act would still presumably be effective as to any provisions relating to communication of hazard material information to public officials or to the public generally, and would remain effective to the extent that the Texas Act pertains to public employees.[143]

2. Reporting Requirements Under the Texas Act

Under the Texas Act, workplace chemical lists must be provided to the Commissioner of Health for every manufacturing employer or other "employer" as defined by the Texas Act within sixty days after the date on which the employer begins operation.[144] Upon request, every chemical manufacturer and distributor must also provide a MSDS for every workplace to the Commissioner.[145] In addition to these requirements under the Texas Act, regulations promulgated pursuant to the provisions of the Emergency Planning and Community Right-to-Know Act of 1986[146] provide that a State Emergency Response Commission (of which the Department of Health is a member) may obtain, upon request, a MSDS from any OSHA employer.[147] The State of Texas has developed a workplace chemical list reporting form to aid employers in their attempt to comply with both the Texas Act and pertinent portions of the Emergency Planning and Community Right-to-Know Act. A copy of the reporting form may be obtained from the Hazard Communication Branch, Division of Occupational Safety and Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

III. COMMUNITY RIGHT-TO-KNOW

A. *The Emergency Planning and Community Right-to-Know Act of 1986 (SARA Title III)*

The Emergency Planning and Community Right to Know Act of

143. TEX. REV. CIV. STAT. ANN. art. 5182b, § 9 (Vernon 1985) (pertaining to providing hazardous chemical lists to local fire chiefs); *id.* § 7(d) (pertaining to providing MSDS to Commissioner of Health upon request); *id.* § 6(d) (providing that workplace chemical lists shall be provided to Commissioner of Health).

144. *Id.* § 6(d).

145. *Id.* § 7(d).

146. 42 U.S.C. § 11,001 (1987).

147. 52 Fed. Reg. 38,366 (1987) (to be codified at 40 C.F.R. § 370.30).

1986, commonly referred to as SARA Title III,[148] establishes requirements for reporting to federal, state and local governments the presence of hazardous chemicals in a facility.[149] Unlike the Federal Standard which explicitly preempts state and local legislation governing issues addressed by workplace hazard communication programs,[150] Title III specifically provides that state and local community right-to-know laws are not preempted by the Act, except with respect to the form in which MSDSs must be submitted by facilities in compliance with Section 311 of the Act.[151]

The most widely applicable reporting provision of Title III, Section 311, pertains to the requirement that any owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the OSHA Standard must submit a copy of each MSDS or list of such chemicals to 1) a local emergency planning committee, 2) a state emergency response commission, and 3) the fire department in whose jurisdiction the facility is located.[152] Expansion of the Standard to the non-manufacturing sector has resulted in all employers covered by OSHA to be subject to Title III, once threshold quantities of hazardous chemicals are reached.[153]

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148. 42 U.S.C. § 11,001 (Supp. 1988). The law was enacted as Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA). Pub. L. No. 99-499, 100 Stat. 1728. References to the provisions of Title III will refer to the numbered sections which are contained in the original SARA legislation. Such references are more commonly used when discussing Title III. For discussion of the Act, see 52 Fed. Reg. 13,378 (1987), which contains comments of the Environmental Protection Agency on implementation of the Act, particularly with regard to regulations promulgated in connection with establishing threshold planning quantities of the originally designated 406 extremely hazardous substances required to be reported under section 302 of the Act.

149. 42 U.S.C. §§ 11,002 (Supp. 1988) (Facilities with Threshold Planning Quantities of "Extremely Hazardous Substances"); *id.* §§ 11,021-11,022 (Emergency and Hazardous Chemical Forms); *id.* § 11,023 (Toxic Chemical Release Forms).

150. Hazard Communication Standard, 52 Fed. Reg. 31,877 (1987) (to be codified at 29 C.F.R. § 1910.1200(a)(2)); 29 U.S.C. § 667 (1985).

151. 42 U.S.C. § 11,041 (Supp. 1988). A state or local law that requires a MSDS must require that the data sheet's content and form be identical to the data sheet that is required pursuant to subsection (a) of section 311 [42 USCS § 11,021(a)]. *Id.*

152. 42 U.S.C. § 11,021 (Supp. 1988).

153. *Id.*; *see also* Hazard Communication Standard, 52 Fed. Reg. 31,877 (1987) (to be codified at 29 C.F.R. § 1910.1200).

B. *Compliance with Section 311 Reporting*

Under the reporting provisions of section 311 of Title III,[154] any owner or operator of a facility which maintains an MSDS under the Federal Hazard Communication Act may be required to submit a MSDS for each chemical, or, in the alternative, may be required to submit a list of all such chemicals, to three emergency response entities.[155] Because of the anticipated burden of imposing a completely new reporting requirement on industry and local and state governments, the Environmental Protection Agency has promulgated regulations which establish threshold quantities to trigger reporting requirements under this particular portion of the Act.[156] Section 311(b) of Title III allows EPA to establish threshold quantities for hazardous chemicals so that facilities not reaching those thresholds may be relieved of the reporting requirements of such section.[157] As a result of the discretion exercised by EPA in establishing threshold requirements, an owner or operator of a facility required to have MSDS available under the Standard is required to submit a Section 311 report if hazard chemicals are present in amounts 1) equal to or greater than 10,000 pounds, or 2) if extremely hazardous substances (a defined term) are present in amounts greater than or equal to five hundred pounds (or in the amount specified in threshold planning quantities established by regulation, whichever is less).[158] The specific provision of the regulation enacted to establish minimum threshold quantities for compliance with Section 311 of the Act is as follows:

> The owner or operator for the facility subject to this subpart shall submit an MSDS:
>
> (i) On or before October 17, 1987 (or three months after the facility first becomes subject of the subpart), for all hazardous chemicals present at the facility in the amounts equal to or greater than 10,000 pounds, or that are extremely hazardous substances present at the facility in an amount greater than or equal to 500 pounds or the TPQ (threshold planning quantity), whichever is less, and

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154. 42 U.S.C. § 11,021(a)(1) (1985).

155. *Id.*

156. 52 Fed. Reg. 38,365 (1987) (to be codified at 40 C.F.R. § 370.20(b)) (minimum threshold levels).

157. 42 U.S.C. § 11,021(b) (Supp. 1988).

158. 40 C.F.R. Part 355 (1987) (establishing the initial list of 406 extremely hazardous substances and establishing threshold planning quantities for such chemicals).

(ii) On or before October 17, 1989 (or two years and three months after the facility first becomes subject to subpart), for all hazardous chemicals present at the facility between 10,000 and zero pounds for which an MSDS has not yet been submitted.[159]

At the time of enactment of SARA Title III, the Standard applied only to the manufacturing sector.[160] Reports required by Section 311 of the Act were to be initially made by owners or operators of covered facilities before the later of October 17, 1987, or three months after the owner or operator of the facility was required to prepare or have available an MSDS under the provisions of the Standard.[161] However, non-manufacturers were not required to report because they were not OSHA employers at the time of the original reporting deadline (October 17, 1987). By notice published August 4, 1988, EPA established September 24, 1988, to be the date for Section 311 compliance by all newly covered employers.[162] The reporting requirements of Section 311 concern hazardous chemicals as that term is defined under OSHA; however, Title III has applied important exceptions to that definition.[163] Any substance to the extent it is used for personal, family or household purposes, or to the extent it is present in the same form and concentration as a product packaged for distribution and use by the general public, is excepted from the term hazardous chemical as it is used in connection with Section 311.[164] Under this exception for household and domestic products, a retailer with a quantity of consumer products in its warehouse, such as lighter fluid packaged for consumer use, may, in fact, possess a hazardous chemical in threshold reporting quantities, but such product would not be one for which reporting under Section 311 is required.[165] To summarize Section 311 reporting requirements, a facility owner or operator which is required to either prepare or have available an MSDS for a hazardous chemical under OSHA, must have reported the presence of that chemical to a local emergency planning committee, the State Emergency Response Commission, and to the fire department in whose jurisdiction the facility is located by the later of October 17, 1987, or

159. 52 Fed. Reg. 38,365 (1987) (to be codified at 40 C.F.R. § 370.20(b)(1)).
160. 29 C.F.R. § 1910.1200 (1984).
161. 42 U.S.C. § 11,021(d) (Supp. 1988).
162. 53 Fed. Reg. 29,331 (1987).
163. 42 U.S.C. § 11,021(e) (Supp. 1988).
164. 42 U.S.C. § 11,021(e)(3) (Supp. 1988).
165. *See* 52 Fed. Reg. 38,348 (1987).

three months after the facility first becomes subject to this section of the Act, if the amount of the chemical present at the facility equals to or is greater than 10,000 pounds, or if any enumerated "extremely hazardous substances" is present at the facility in amounts greater than or equal to five hundred pounds, or in a threshold planning quantity, whichever is less.[166] For example, a gasoline service station, a workplace not originally covered by the Federal Hazard Communication Standard as of October 17, 1987 (the earliest deadline date for reporting under Section 311), would nevertheless now be subject to Section 311 reporting as of September 24, 1988, if the station maintains gasoline in quantities of not less than 1,600 gallons (10,000 pounds).[167] For years subsequent to 1987, there will be different and more stringent reporting requirements.[168] On or before October 17, 1989, or not later than two years and three months after the facility first becomes subject to the regulations promulgated pursuant to Section 311, the owner or operator of the facility must submit an MSDS or, alternatively a list of hazardous chemicals for which the MSDS is required, "for all hazardous chemicals present at the facility between the amounts of 10,000 and zero pounds and for which an MSDS has not yet been submitted."[169] The future reporting requirements, as expressed in the present revision of the rule, would require reporting any amounts of chemicals for which the owner or operator maintains an MSDS. Notwithstanding the terms of the present rules, which provide that the present threshold quantities for reporting to be accomplished not earlier than October 17, 1989, is the amount of zero to 10,000 pounds,[170] the preamble to the rules indicates that the EPA, for future rule setting purposes, apparently favors a minimum threshold limit of five hundred pounds rather than zero pounds.[171]

C. *Compliance with Section 312 Reporting*

Section 312 of Title III requires that any owner or operator of a facility required to prepare or have available an MSDS for a hazardous chemical under OSHA, "prepare and submit an Emergency and

166. 52 Fed. Reg. 38,365 (1987) (to be codified at 40 C.F.R. § 370.20(b)).
167. *Id.*
168. 52 Fed. Reg. 38,365 (1987) (to be codified at 40 C.F.R. § 370.20(b)(1)(ii)).
169. *Id.*
170. 52 Fed. Reg. 38,365 (1987) (to be codified at 40 C.F.R. § 370.20(b)(1)(ii)).
171. 52 Fed. Reg. 38,350 (1987).

Hazardous Chemical Inventory Form."[172] The form must be submitted to: "(A) the appropriate local emergency planning committee; (B) the State Emergency Response Commission; and (C) the fire department in whose jurisdiction the facility is located.[173] The inventory form, now commonly referred to as a Tier I form, must be submitted annually on March 1, to contain data with respect to the preceding calendar year, and must contain estimates of the maximum amount of hazardous chemical in each category of health and physical hazard present at the facility at any time during the preceding calendar year.[174] A copy of the most recent version of the Tier I Report may be obtained from the Hazard Communication Branch, Division of Occupational Safety and Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

IV. CONCLUSION

Significant changes have recently occurred in reporting requirements for employers who have hazardous chemicals in their workplaces. Further regulation in this subject matter is promised, as alluded to by the Environmental Protection Agency in its designation of minimum threshold requirements for Section 311 reporting in years subsequent to 1988. The various and complex provisions relating to employee right-to-know and community right-to-know legislation must be compared and reconciled to assure compliance with all requirements of the respective laws. Sources cited in this article should continue to be referenced in an attempt to know and satisfy the voluminous regulations pertaining to this subject matter of increasing public interest.

172. 42 U.S.C. § 11,022(a) (Supp. 1988).
173. 42 U.S.C. § 11,022(a)(1) (A), (B), (C) (Supp. 1988).
174. 42 U.S.C. § 11,022(a)(2), (d) (Supp. 1988).