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Occupational Safety and Health Legislation: Part 1 — Public Law 91-956

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Several representative State occupational health and safety acts are discussed in terms of relevant provisions of Public Law 91-596, the Occupational Safety and Health Act of 1970.

Introduction

This discussion will be presented in two parts. Part I will be concerned with Public Law 91-596, the Occupational Safety and Health Act of 1970, approved by President Nixon on December 29, 1970, to take effect April 28, 1971. This is referenced hereafter as the Act. Part II of the discussion will be devoted to certain State acts and selected provisions of the Act, particularly relevant to State legislation. The selected provisions relate to the State, the employer and the employee.

The following parameters previously used in reviews[1,2] of State legislation are discussed in the light of referenced sections of the Act:

1. Agency. Section 18 of the Act stipulates as one requirement for approval of a "State plan" that the State designate an agency or agencies for development of occupational safety and health standards and for administering the plan throughout the State.

2. Power. Section 18 of the Act specifically requires that the agency or agencies have the power to develop and enforce standards, to effect right of entry to inspect, and to administer the standards program.

3. Penalty. Section 17 of the Act provides for both specific and general penalties and also for civil and criminal penalties.

4. Employer's Duty. Section 5(a) of the Act provides that each employer not only

"(1) shall furnish to each of his employees employment and a place of employment which are free from *recognized* hazards that are causing or *are likely* to cause death or serious physical harm to his employees;" but also

"(2) shall comply with occupational safety and health standards promulgated under the Act."

5. Employee's Duty. Section 5(b) of the Act creates a statutory duty in the employee to comply "with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct." However, no penalty is provided for violation of this section by an employee.

6. Occupational Health Entity. Congress has by statute recognized the separate and distinct entity of occupational safety and health through enactment of the Occupational Safety and Health Act of 1970 (PL 91-596), the establishment of a National Institute for Occupational Safety and Health in the Department of Health, Education, and Welfare (Section 22), the establishment of The Occupational Safety and Health Review Commission (Section 12), the establishment of a National Advisory Committee on Occupational Safety and Health (Section 7), and the provision for national, uniform occupational safety and health standards (Section 6) to be promulgated and enforced by the Department of Labor.

At the state level the Act is not so specific, but it does provide that "Any State which, at

A report containing the full text of PL 91-596 and the several State acts discussed in Part II is available from the author.

any time, desires to assume responsibility for . . . (any) occupational safety and health . . . issue with respect to which a Federal standard has been promulgated . . . shall submit a State plan . . ." And as previously indicated the State plan can name one agency or more, and may or may not centralize responsibility for occupational safety and health.

7. Occupational Disease Reporting. In Section 2(b) (12) Congress indicates the need "for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem."

Furthermore Section 24(e) requires that, "employers shall file such reports with the Secretary (of Labor) as he shall prescribe by regulation, as necessary to carry out his functions under this Act." Section 8(c) (2) provides that, "The Secretary (of Labor) in cooperation with the Secretary of Health, Education, and Welfare shall prescribe regulations requiring employers . . . to make periodic reports on work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job."

8. Labeling of Hazardous Substances. The Act includes labeling as one of the requirements of a standard. Section 6(b) (7) provides, "Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure 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."

9. Health Services. The Act considers health services, directly or by implication, in several sections of the bill. Previously referenced Section 6(b) (7) also provides, *"where appropriate,* any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health, Education, and Welfare, such examinations may be furnished at the expense of the Secretary of Health, Education, and Welfare . . . The Secretary (of Labor) . . . with the Secretary of Health, Education, and Welfare may . . . make appropriate modification in the . . . requirement relating to the use of. . .medical examinations, as may be warranted by. . .developments . . .subsequent to the promulgation of the relevant standard.[11]

Section 18(c) (6) interestingly enough requires a State plan to contain "satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan." In effect any national provisions for medical examinations for employees would thus also by virtue of the approved state plan be made available to state employees of public agencies inasmuch as "program" would of necessity be construed to include medical services wherever the referenced standard included medical examinations as part of the standard.

Included in research responsibilities of the Department of Health, Education, and Welfare is the authorization (Section 20(a) (5) ". . . to establish such programs of medical examinations and tests as may be necessary for determining the incidence of occupational illnesses and the susceptibility of employees to such illnesses." Such programs are subject to the proviso that "Nothing in this or any other provision of this Act shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such

is necessary for the protection of the health or safety of others."

Of more interest and probably more directly related to the consideration of health services are the specific charges in two sections of the Act. Section 20(a) (7) states:

> "Within two years of enactment of this Act, and annually thereafter the Secretary of Health, Education, and Welfare shall conduct and publish industrywide studies of the effect of chronic or low-level exposure to industrial materials, processes, and stresses on the potential for illness, disease, or loss of functional capacity in *aging* adults."

Section 21(c):

> (the Secretary of Labor) "shall consult with and advise employers and employees, and organizations representing employers and employees as to effective means of preventing occupational injuries and illnesses."

These sections could be in effect a base for the provision of a federal medical program of preventive health services. (Note charges are to both the Department of Labor and the Department of Health, Education, and Welfare.)

And finally, as relating to health services, in statement of intent the reference to "medical criteria which will assure insofar as practicable that no employee will suffer diminished health functional capacity, or life expectancy as a result of his work experience."

10. Hazard Source. The Act does not classify hazard sources as biological, chemical, or physical. It refers to "work situations" in the first sentence in Section 2 where it speaks of "personal injuries and illnesses arising out of work situations." In various other sections, the Act refers to other classifications of hazards: psychological factors in Section 2(b) (5) and Section 20(a) (1); recognized hazards in Section 5(a) (1); potentially toxic substances/materials or harmful physical agents (and substances) in Section (b)(5) and Section 20(a)(3) and (5); substances or agents determined to be toxic or physically harmful in Section 6(c) (1); the all encompassing listing "place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein" in Section 8(a) (2); "new problems . . . which may require ameliorative action beyond (that) . . . provided for in operating provisions of this Act" in Section 20(a) (4); industrial materials, processes and stresses in Section 20(a) (7).

11. Ventilation. The Act refers in Section 6(b) (7) to "control or technological procedures." Also in Section 6(a) (6) (A) the Act states "Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard."

12. Personal Protective Measures. The Act refers in Section 6(b) (7) to "Where appropriate such standard shall also prescribe suitable protective equipment."

13. Specific Industry Codes. Generally, recognition of specific industries is contained in Section 6(g) regarding determining priority for establishing standards: "the Secretary (of Labor) shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments."

Otherwise, specific industry requirements, *per se,* are not considered. However, there is specific federal industry legislation such as that contained in the Coal Mine Health and Safety Act of 1969 (PL 91-173); in the Construction Safety Act (PL 91-54); and in the Atomic Energy Act of 1954 as amended (42 USC 2021 *et seq.*).

Of interest to the States that have promulgated special industry codes is the intent of Congress as to the effect of PL 91-596 on other federal law. Except for those working conditions covered under the exception as stated in Section 4(b) (1) in the Act, it appears that safety and health standards promulgated under other federal acts are to be superseded on the effective date of corresponding standards promulgated under the Act (Section 4(b) (2).)

14. Use of Standards. The Act is primarily concerned with the setting of standards that "whenever practicable, the standard promulgated shall be expressed in terms of objec-

tive criteria and of the performance desired." (Section 6(b) (5).)

There is provision for the Secretary of Labor to promulgate "as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, . . . as an occupational safety or health standard any national consensus standard and any established federal standard . . ."

Provisions Directly Relating to States

One of the stated purposes of the Act is to encourage "the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith . . ." (Section 2(b) (11).)

Of interest in assessing the effect of the Act are certain definitions:

1. Employer "means a person engaged in a business affecting commerce who has employees, but does not include: The United States or any State or political subdivision of a State." (Section 3 (5).) There is no exclusion *per se* of agricultural, domestic, or casual employees.

2. Occupational safety and health standard "means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." (Section 3 (8).)

3. National consensus standard "means any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized public or private standards-producing organization under procedures whereby it can be determined by the Secretary (of Labor) that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies."

The sections of the Act applicable to State jurisdiction and State plans are quoted as follows (with emphasis added by italics): (Secretary "means the Secretary of Labor.")

STATE JURISDICTION AND STATE PLANS

Sec. 18. (a) Nothing in this Act 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 section 6.

(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which *a Federal standard* has been promulgated under *section 6* shall submit a State plan for the development of such standards and their enforcement.

(c) The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgment—

(1) designates *a State agency or agencies* as the agency or agencies responsible for administering the plan *throughout the State,*

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least *as effective* in providing safe and healthful employment and places of employment *as* the standards promulgated under section 6 which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, *are required* by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a *right of entry and inspection* of all workplaces subject to the Act which is at least as effective as that provided in section 8, and includes a *prohibition on advance notice* of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and *qualified personnel* necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote *adequate funds* to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by

law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of *public agencies of the State* and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires *employers* in the State to make *reports to the Secretary* in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the *State agency* will make such *reports to the Secretary* in such form and containing such information, as the Secretary shall from time to time require.

(d) If the Secretary *rejects* a plan submitted under subsection (b), he shall afford the State submitting the plan due notice and opportunity for a *hearing* before so doing.

(e) After the Secretary approves a State plan submitted under subsection (b), he *may*, but shall not be required to, exercise his authority under sections 8, 9, 10, 13, and 17 with respect to comparable standards promulgated under section 6, for the period specified in the next sentence. The Secretary *may* exercise the authority referred to above *until* he determines, on the basis of actual operations under the State plan, that the criteria set forth in subsection (c) are being applied, but he shall *not make such determination for at least three years after the plan's approval under subsection (c)*. Upon making the determination referred to in the preceding sentence, *the provisions* of sections 5(a) (2), 8 (except for the purpose of carrying out subsection (f) of this section), 9, 10, 13, and 17, and standards promulgated under section 6 of this Act, *shall not apply* with respect to any occupational safety or heatlh issues covered under the plan, but the Secretary may retain jurisdiction under the above provisions in any proceeding commenced under section 9 or 10 before the date of determination.

(f) The *Secretary* shall, on the basis of reports submitted by the State agency and his own inspections make a *continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan*. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

(g) The State may obtain a review of a decision of the Secretary withdrawing approval of or rejecting its plan by the United States court of appeals for the circuit in which the State is located by filing in such court within thirty days following receipt of notice of such decision a petition to modify or set aside in whole or in part the action of the Secretary. A copy of such petition shall forthwith be served upon the Secretary, and thereupon the Secretary shall certify and file in the court the record upon which the decision complained of was issued as provided in section 2112 of title 28, United States Code. Unless the court finds that the Secretary's decision in rejecting a proposed State plan or withdrawing his approval of such a plan is not supported by substantial evidence the court shall affirm the Secretary's decision. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(h) The Secretary may enter into *an agreement with a State* under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State *until final action is taken by the Secretary with respect to a plan* submitted by a State under subsection (b) of this section, or *two years from the date of enactment of this Act, whichever is earlier.*

Grants to the States will be provided under Section 23 quoted as follows:

GRANTS TO THE STATES

Sec. 23. (a) The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years, to make grants to the States which have designated a State agency under section 18 to assist them—

(1) in *identifying* their *needs and responsibilities* in the area of occupational safety and health,

(2) in *developing State plans under section 18*, or

(3) in developing plans for—

(A) establishing systems for the *collection of* information concerning the nature and frequency of occupational injuries and diseases:

(B) increasing the expertise and enforcement capabilities of their *personnel* engaged in occupational safety and health programs; or

(C) otherwise *improving* the administration and enforcement of State occupational safety and health laws, including standards thereunder, consistent with the objectives of this Act.

(b) The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years, to make grants to the States for *experimental and demonstration projects* consistent with the objectives set forth in subsection (a) of this seciton.

(c) The Governor of the State shall designate the appropriate *State agency for receipt of any grant* made by the Secretary under this section.

(d) Any State *agency designated* by the Governor of the State desiring a grant under this section *shall submit* an application therefor to the Secretary.

(e) The Secretary shall review the application, and shall, after consultation with the Secretary of Health, Education, and Welfare, approve or reject such application.

(f) The Federal share for each State grant under subsection (a) or (b) of this section may *not exceed 90 per centum of* the total cost of the application. In the event the Federal share for all States under either such subsection is not the same, the differences among the States shall be established on the basis of objective criteria.

(g) The Secretary is authorized to make grants to the States to assist them in *administering and enforcing programs* for occupational safety and health contained in State plans approved by the Secretary pursuant to section 18 of this Act. The Federal share for each State grant under this subsection may not exceed 50 per centum of the total cost to the State of such a program. The last sentence of subsection (f) shall be applicable in determining the Federal share under this subsection.

(h) Prior to June 30, 1973, the Secretary shall, after consultation with the Secretary of Health, Education, and Welfare, transmit a report to the President and to the Congress, describing the experience under the grant programs authorized by this section and making any recommendations he may deem appropriate.

*Workmen's Compensation**

Section 4(b) (4) indicates the intended effect or non-effect on workmen's compensation laws: "Nothing in this Act shall be construed to . . . affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory right, duties, or liabilities of employers and employees under any law with respect to injuries, illnesses, or death of employees arising out of, or in the course of, employment."

Records

Section 25(a) states, "Each recipient of a grant under this Act shall keep such records as the Secretary of the Secretary of Health, Education, and Welfare shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such grant, the total cost of the project or undertaking in connection with which such grant is made or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit."

In addition, reports are required of employers and state agencies as indicated in Sections 18(c) (7) and (8) quoted above.

Conclusions

From a review of legislation in the field of occupational safety and health and in the light of the litigation that has taken place in the field of public environmental law, certain broad generalizations of relevance in the area of occupational health law may be derived:

1. The growing acceptance that the 9th Amendment reserving unexpressed powers to the people provides a constitutional base for a right in the people to a liveable environment, which for the environmentalist means a right to pure air and water, to a clean earth, and to reasonable quiet, has been projected as a statutory right (PL 91-596) in the worker to a liveable environment at his place of employment.

2. There is already class action litigation in which the direct and immediate aggrievement of the party has not been required as a necessary element of "party in interest" and thus such litigating party has been considered a party with standing to sue. A similar concept is embodied in the National Act in the references such as "representative of employees" (Sections 8(e) and 20(a) (6) so that the labor union can represent individual workers in litigation to effect a solution to an occupational health environmental problem by invoking the necessary provisions of PL 91-596. Of a more optimistic nature is the growing concern of unions to negotiate health and safety matters with management and so arrive at a resolution

**Congressional Record* of August 1, 1972, carried summary of the report of the National Commission on State Workmen's Compensation Laws which indicated the recommended criteria for evaluation as follows: compulsory coverage, no occupational or numerical exemptions to coverage, full coverage of work-related diseases, full medical and physical rehabilitation services without arbitrary limits, employee's choice of jurisdiction for filing an interstate claim, adequate weekly cash benefits for temporary total, permanent total, and death cases, and no arbitrary limits on duration or sum of benefits.

that will benefit labor and management. See Congressional Record for December 22, 1970, p. E 10657 for comments on clauses being considered by one labor union.

3. There is recognition that the problem of environmental pollution, whether industrial or community, is not one that can be solved piecemeal and that its solution will require uniform legislation and standards. With the National Act and other federal legislation as the basic reference, the State can enact necessary legislation regarding duties and responsibilities, particularly through the utilization of uniform model laws and national consensus standards.

4. There is no agreement among the experts as to what is "good" and what causes "harm." Although this is not inherently a legal problem, the condition causes legal problems when it becomes necessary to adjudicate an issue and experts are offered in support of both sides with the result that the validity of the entire scientific effort is affected. This possibility has been recognized in the National Act with the provision for advisory committees, the utilization of consensus standards, and the charging of the National Institute for Occupational Safety and Health in the Department of Health, Education, and Welfare with authority to develop and establish recommended occupational safety and health standards (Section 22(c) (1).)

5. Although the necessity for provisions for enforcement and penalties is obvious, the litigation course is considered to be the last resort for reaching a solution. The consensus is that health problems should not be solved in court. The utilization of standards, the acceptance of incorporation by reference, the recognition of the need for uniformity of legal standards nationally, and the absolute necessity that the law result in cooperative efforts of labor, management, and government are an encouraging basis for an effective national effort to achieve a good occupational safety and heatlh program.

In addition there have emerged two concepts of importance in developing occupational health and safety legislation and in administering an effective program.

A. Effective drafting of and implementing occupational health and safety legislation requires efforts from at least five sectors: (1) Professional expertise must come from the disciplines involved (whether publicly, privately, or academically supported) and must be expressed as standards based on documented and validated evidence. (2) Promulgation of standards must come from the appropriate governmental jurisdiction after public hearings so that there is equal and clear application. (3) Implementation of the standards must come from *management* who within the context of "running a successful" operation must include the cost of protecting the worker and from *labor* who must voluntarily and positively comply with the applicable portions of rules and regulations applying the standards. (4) Supplementation of industry resources must come from governmental and other community resources, particularly for small business. (5) When necessary, enforcement must come through expeditious and enlightened administration with resort to the courts on proper petition as an exceptional action.

B. In the overall activity of protecting the worker in the context of the larger community health program, it is necessary that safety and health functions in the occupational environment be separately recognized, but coordinated activities. Occupational safety programs are directed mainly towards educating the worker to utilize safe practices, particularly in the operation of machinery. They also seek to bring about utilization of safe equipment and promulgation of safe operational practices by management. Occupational health is directed toward establishing limits within which management must plan, design, and install a process which, if so planned, designed, and installed, precludes the possibility of the worker becoming ex-

posed to hazardous materials except for the occurrence of a "true accident." It is directed primarily toward management. The responsibility of the worker, however, is also recognized not only for complying with rules and regulations but also for showing good faith cooperation in exercising good judgment in timely reporting to management any hazardous working conditions that he notices.

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Air Sampling Instruments

The new 4th Edition (1972) of *Air Sampling Instruments* has been published by the American Conference of Governmental Industrial Hygienists (ACGIH). It provides up-to-date descriptions of available sampling equipment and accessories, and professional guidance on applications and uses for specific sampling tasks. New technical papers, written specifically for this edition, discuss source sampling, community air sampling, sampling in mines and explosive atmospheres, sampling for particle size analysis, and respirable dust sampling. Other technical discussions have been up-dated and expanded.

This volume in durable hard-cover sells for $12.40 per copy. Books are mailed postage prepaid by surface parcel post. For shipment other than parcel post, additional postage must be paid by the purchaser. Orders with remittance should be directed to Secretary-Treasurer, American Conference of Governmental Industrial Hygienists, P.O. Box 1937, Cincinnati, Ohio 45201.

New Information Service

The National Technical Information Service of the U.S. Department of Commerce has announced the institution of publication of a new series, *Weekly Government Abstracts.* This will be a new weekly subscription series reporting on technical information in areas of interest to business and technology. Initially, only five areas will be covered, but included in these will be one of particular interest to the industrial hygienist. The *Weekly Government Abstracts –Environmental Pollution and Control* may be purchased for an annual subscription fee of $22.50. It will report on publications produced by over 225 U.S. Government agencies and by leading private organizations, or individuals with Federal grants and contracts. Each newsletter reports on such technical advances as testing of materials and processes, development of new techniques and methods, ways to improve existing products, and modification of materials and processes. The former *Government Reports Topical Announcements* (GRTA) will gradually be reformed and published as categories of the *Weekly Government Abstracts* series. The *NTIS Information Services* booklet, available on request, describes in detail all other NTIS products and services. Requests should be directed to the National Technical Information Service, Springfield, Virginia 22151.