

# Predicting the Consequences of the High-Risk Occupational Disease Notification and Prevention Act

MARK A. ROTHSTEIN

*Health Law Institute  
University of Houston  
Houston, Texas 77004*

There are three areas in which the High-Risk Occupational Disease Notification and Prevention Act would be likely to affect both health and law. It is difficult to predict with certainty what the consequences of any new law will be. It is less difficult, but equally important, to identify the issues or questions that the new legislation is likely to raise.

The first issue is whether the High-Risk Notification Act will increase prevention of occupational disease. The second is whether the law will facilitate treatment of occupational disease. The third is whether the law will increase compensation for occupational disease.

Starting with the first issue, "prevention" is something that has been addressed to a great extent in the previous presentations. An issue that has not been discussed adequately, however, is whether the law, if enacted, would serve to increase, decrease, or perhaps have no effect on whether employers would be more or less encouraged to conduct epidemiologic studies.

Considerable evidence exists that some employers have, in the past, made a deliberate decision not to undertake such studies. There is currently no legal requirement that employers make any effort to correlate exposure data with mortality or morbidity data that they have. In fact, certain laws may even act to discourage employers from doing so. Many employers fear that if they discover new correlations, the regulators and personal injury lawyers will move in; and for a variety of reasons some employers believe that they may be financially worse off as a result of performing the studies. Would the new law further discourage employer studies or, perhaps under some other possible scenarios, encourage employers to do this?

A second question under the broad topic of prevention is: Will the monitoring of workers serve to prevent occupational disease? Although this specific question has been addressed already, a related question is whether increased monitoring of workers once they are hired will encourage employers to engage in more preemployment screening. Seemingly, every new development in occupational health surveillance and a variety of employment laws have encouraged employers to engage in more extensive preemployment screening. For example, section 510 of the Employee Retirement Income Security Act (ERISA), which prohibits employers from firing employees to deprive them of their health insurance and other benefits, encourages preemployment screening, because if sick workers cannot be fired, employers will want to avoid hiring people considered likely to become sick. Workers' compensation laws, where employers take workers "as is," also encourage preemployment screening. Will the High-Risk Notification Act lead to

further screening because employers will want to avoid hiring people who later may be considered "at risk"?

Section 7(b) of the proposed law prohibits discrimination against an employee or applicant because the employee or applicant is considered to be within the "population at risk," *except* if the individual is being considered for a position with exposure to the same substance that generated the initial notification letter. This could possibly change state and federal handicap discrimination laws in the following way. Suppose an employee who was exposed to asbestos at employer number one's workplace now seeks a job with employer number two. If employer number two were to deny employment to an asymptomatic, otherwise qualified individual because of fear that the individual's prior asbestos exposure could result in illness during the term that the individual is working for employer number two, this may be considered discrimination on the basis of handicap in violation of state or federal law. Section 7(b) of the High-Risk Notification Act, however, would permit the second employer to refuse to hire the individual if the individual had received prior notice that he or she was at risk.

Finally, under prevention, will exposure levels be reduced? It is hard to say. Employees who know of risks in general or of particular risks arguably would be encouraged to engage in more aggressive collective bargaining to reduce levels even below those required by OSHA regulations. Perhaps employers knowing of scientifically valid data would be more likely to reduce levels and prevent further exposures. Perhaps employees would be more likely to wear personal protective equipment and take other measures for their own protection when they had been reluctant to do so in the past. Conversely, the law does not contain any direct regulatory provisions.

The second broad class of issues centers around whether the High-Risk Notification Act will facilitate the treatment of occupational disease. Certainly, it will increase the demand for trained occupational physicians as well as for occupational health training of all physicians. This raises the issue of how physicians, nurses, and other occupational health practitioners are trained. Medical school is merely the starting point. The High-Risk Notification Act would necessitate new programs of continuing medical education in occupational medicine. Many cases of occupational disease are currently not diagnosed as being occupationally related. The treatment of these diseases is likely to be helped if the associations between workplace exposures and the disease state were more clearly understood by the people who are examining and treating the current and former workers.

The third area of issues relates to whether the High-Risk Notification Act will have an effect on compensation for occupational disease. In the legislative history of the proposed Act, the statute is stated to be "liability neutral." For example, section 8(b) of the proposed law expressly provides that risk findings made by the Risk Assessment Board may not be introduced into evidence in any private lawsuit. Similarly, the notification form itself would not be admissible in any lawsuit.

Even if the law is intended to be liability neutral, it is certainly not litigation neutral. The question is not whether it will cause an increase in litigation. The questions are: (1) How much of an increase in litigation will it cause? (2) Will the increase be good or bad? and (3) What, if anything, should be done about it? It is likely that there are many exposed or formerly exposed workers who are currently suffering from an occupational illness who do not know the occupational nature of their illness and will only learn of this on receipt of a notification letter. In addition, some workers and former workers who currently have a nonoccupational illness, as soon as they get a notification letter, will be convinced that their illness is occupationally related. In either instance, these individuals are likely to

get a lawyer to represent them and file a workers' compensation claim on their behalf or to sue under one of the numerous exceptions that are continually being carved out of the exclusivity principle of workers' compensation. These legal actions would include products liability lawsuits, actions for intentional torts, fraudulent concealment, dual capacity medical malpractice, and other theories.

Even if the plaintiffs were to lose some of the lawsuits, because it costs a lot of money to defend a toxic tort case and because there is always the possibility of a substantial recovery, even doubtful cases will have some settlement value. This reality of litigation encourages additional lawsuits.

Is occupational disease litigation a good or a bad thing? Certainly, workers' compensation benefits for occupational illness are too low either to provide adequate compensation or to encourage reductions in exposure levels. Thus, to the extent that companies may be faced with higher payments to workers, private lawsuits may serve as incentives for employers to clean up workplaces. They also may be viewed as a way of reallocating the costs of occupational disease. At the present time, the economic consequences of occupational illness are widely externalized from the employers in whose employment the occupational disease was contracted to the workers themselves, to private health insurers, to Medicare, to general welfare, and to other third parties. Arguably, personal injury litigation results in a redistribution of costs and a reallocation of responsibility back to the source of exposure.

Regardless of whether private lawsuits have these salutary effects, the system is woefully inefficient. It resembles a lottery in both fairness and payout. Most deserving claimants receive nothing; the "transaction costs" are so high that lawyers and expert witnesses receive most of the money paid out by the defendants, with relatively few claimants receiving all of the remaining money. It would be irresponsible to embrace and expand a system that encourages more employees to sue when plaintiff and defense lawyers take nearly two thirds of every dollar paid in compensation. It is also an act of self-delusion to believe that facilitating the recoveries of a relatively few workers eliminates the need for more fundamental reforms in overhauling the compensation system.

In conclusion, the proposed High-Risk Occupational Disease Notification and Prevention Act raises important questions about the way we attempt to prevent, treat, and compensate for occupational disease. The proposed law may be viewed as a beneficial, humane, and essential law; it may be viewed as a potentially complicating factor in a flawed compensation system; or it may be viewed as both.