

LABOR AND ENVIRONMENT—NEW JERSEY WORKER AND  
COMMUNITY RIGHT TO KNOW ACT—N.J. SENATE BILL NO. 1670,  
200th Leg, 1st Sess. (1982)

New Jersey's chemical industry is the largest of all the State's industries, employing approximately 130,000 people and producing about 12.5% of the nation's total chemical output.<sup>1</sup> The pervasiveness of the industry within the State has given rise to a number of concerns over health and the environment, particularly that employees may not be apprised of the hazards to which they are exposed in the workplace. It is this concern which has served as the impetus for New Jersey's proposed Worker and Community Right to Know Act.<sup>2</sup> This bill rests on the premise that "employees . . . have an inherent right to know the dangers to which they may be exposed in their workplace . . . so that they may make knowledgeable and reasoned decisions concerning their employment . . . ." <sup>3</sup>

Labor, industry, and government have all recognized the need for effective hazard communication; however, the nature and form of that communication has been the subject of considerable debate. The remainder of this article will highlight the issues which lay at the heart of that debate through a comparison of the aforementioned New Jersey bill with the recently proposed Occupational Safety and Health Administration's standard for hazard communication.<sup>4</sup>

In 1970, Congress enacted the Occupational Safety and Health Act<sup>5</sup> which empowered the Secretary of Labor "to set mandatory occupational safety and health standards"<sup>6</sup> which are "reasonably necessary or appropriate to provide safe or healthful places of employment."<sup>7</sup> This Act

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<sup>1</sup> See Office of Demographic and Economic Analysis, Division of Planning and Research, Department of Labor, State of New Jersey, *NEW JERSEY COVERED EMPLOYMENT TRENDS* 4 (1980); Chemical Manufacturers Association Publication, *ANALYSIS OF 26 LEADING STATES OF THE CHEMICAL INDUSTRY* 4 (1978).

<sup>2</sup> S. 1670, 200th Leg., 1st Sess. (1982). This legislation deals with the dual concern of worker right to know and community right to know. Unfortunately, the expansiveness of these topics and the limited amount of available space do not allow for adequate consideration of each; therefore, this article will be limited to those provisions of the bill which deal with worker right to know.

<sup>3</sup> *Id.* § 2.

<sup>4</sup> 47 Fed. Reg. 12,092-12,124 (1982) (to be codified at 29 C.F.R. § 1910.1200) (proposed March 19, 1982) [hereinafter cited as OSHA Proposal].

<sup>5</sup> 29 U.S.C. §§ 651-678 (1970).

<sup>6</sup> *Id.* § 651(b)(3).

<sup>7</sup> *Id.* § 652(8).

specifically called for the promulgation of a standard which prescribed the use of labels which 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."<sup>8</sup> It was not until January, 1981, that a comprehensive standard for hazard communication was proposed.<sup>9</sup>

That proposal would have covered all manufacturers, importers, re-packagers, and industrial users of chemical products.<sup>10</sup> Its provisions included very specific search and evaluation procedures for hazard determination; detailed labeling requirements for all containers (including pipes and support systems); extensive recordkeeping on hazard evaluation procedures; certification that a particular substance does not pose a hazard; an extremely narrow trade secret exemption; and a two year phased-in compliance period.<sup>11</sup> However, that proposal was withdrawn for review of its provisions in accordance with Executive Order 12,291<sup>12</sup> on improving regulatory management.<sup>13</sup> A revised standard was proposed in March, 1982.<sup>14</sup>

This new standard, although initially developed with the aim of increasing the cost-efficiency of the earlier proposal, also shifted the focus of the regulation away from communication of specific chemical identities towards communication of the hazards of exposure.<sup>15</sup> This shift is reflected in less stringent labeling requirements; a mandatory comprehensive education and training program; reduced scope of coverage of employers; a substantially more flexible hazard evaluation procedure; less burdensome recordkeeping requirements; and a broad trade secret exemption.<sup>16</sup> Generally, these differences between the two proposals have elicited a favorable response from industry and a hostile reaction from labor and environ-

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<sup>8</sup> *Id.* § 655(b)(7).

<sup>9</sup> 46 Fed. Reg. 4,412-4,453 (1981). There were several selective labeling requirements in effect before this proposal, however, this marked the first attempt at a comprehensive labeling standard. *See id.* at 4,418-4,423.

<sup>10</sup> *Id.* at 4,441.

<sup>11</sup> *See id.* at 4,440-4,453 for the complete text of the proposal.

<sup>12</sup> 46 Fed. Reg. 13,193 (1980).

<sup>13</sup> OSHA Proposal, *supra* note 4, at 12,109.

<sup>14</sup> OSHA Proposal, *supra* note 4.

<sup>15</sup> *See* OSHA Proposal, *supra* note 4, at 12,109-12,113 for a summary of the differences between the two proposals and a cost analysis of the proposed changes.

<sup>16</sup> *See id.* at 12,119-12,124 for the complete text of the revised proposal.

mental groups. This is a marked divergence from the traditional OSHA/labor alliance.<sup>17</sup>

The industry's support for this standard is not so much reflective of its recognition of a need for further regulation in this area as it is of a desire to see more stringent state regulation, such as New Jersey's proposed bill, preempted.<sup>18</sup> Also, under the proposed OSHA standard, chemical manufacturers would wield a great deal of power in their discretionary determination of what constitutes a hazard.<sup>19</sup>

The following summary of the New Jersey bill should clarify the major points of contention between industry and labor on this issue. First, all employers, except those who solely employ domestic servants, are covered by this legislation.<sup>20</sup> This extensive coverage would encompass a wide range of small businesses, such as gas stations and dry-cleaning establishments. Second, there is no flexibility in the area of hazard determination, and the specified criteria for this determination is extremely comprehensive.<sup>21</sup> Third, every employer must obtain a Material Safety Data Sheet (MSDS) for every substance determined to be a hazard.<sup>22</sup> This sheet must contain a myriad of information, including the specific chemical name of the substance and the potential chronic and acute health hazards stemming from exposure.<sup>23</sup> No information required to be present on an MSDS can be withheld on trade secret grounds.<sup>24</sup> Fourth, employers

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<sup>17</sup> See *The Right to Know: Industry Presses for a National Standard*, CHEMICAL WEEK, June 30, 1982, at 36.

<sup>18</sup> See generally *id.*

<sup>19</sup> *Id.* at 36.

<sup>20</sup> S. 1670 § 3(e), 200th Leg., 1st Sess. (1982).

<sup>21</sup> "Chemical" is defined as "any material listed in the latest edition of the National Institute for Safety and Health's [NIOSH] *Registry of Toxic Effects of Chemical Substances* . . ." and is subject to regulation when "regularly stored or handled in the facility in amounts in excess of 500 pounds, or 55 gallons . . . during a twenty-four hour period . . ." Also, any "special health hazard chemical," defined as a "known or suspected carcinogen [may cause cancer], mutagen [may cause chromosomal damage], or teratogen [may cause damage to unborns], . . . or any chemical assigned a toxicity hazard rating of 3 in . . . N. Irving Sax's *Dangerous Properties of Industrial Materials* . . ." are subject to the provisions of this bill. S. 1670 §§ 3(a), 4(a), 3(h), 200th Leg., 1st Sess. (1982).

<sup>22</sup> *Id.* § 4(a).

<sup>23</sup> The MSDS must also include the Chemical Abstract Service (CAS) number, trade and common names, various information on the physical properties of the substance, exposure limits, routes and symptoms of exposure, proper handling techniques and safety precautions, first aid procedures for spills, fires and other unplanned emissions, and appropriate emergency response information. *Id.* § 3(b)(1)-(8).

<sup>24</sup> There is a trade secret exemption for information required to be present on the Public Information Data Sheet which serves as the source document for the community right to know provisions of the bill; however, no mention is made of an analogous exemption for information required to be present on the MSDS. *Id.* § 5.

are responsible for notifying their employees of the availability of the MSDS. Employers must also provide their workers with information, through education and training programs, regarding the nature of the chemicals to which they are exposed, the potential risks associated with exposure, and proper, safe handling procedures under all circumstances.<sup>25</sup> Finally, every container, including pipelines, must be labeled so as to clearly identify the common name, CAS number,<sup>26</sup> and health and safety dangers posed by the chemical.<sup>27</sup>

This bill differs from the OSHA proposal in a number of areas. However, the greatest controversy surrounding the bill has been focused on its expansive coverage, particularly the number of substances implicated, and the lack of a trade secret exemption.

Hazard determination guidelines under the OSHA proposal are extremely flexible and do not require chemical manufacturers to follow any specific method in making these determinations.<sup>28</sup> However, it is incumbent upon them to demonstrate that they have "adequately ascertained the scientifically well-established hazards of the chemical produced."<sup>29</sup> This guideline raises the question of OSHA's statutory authority to delegate its standard-setting function to the chemical manufacturers.<sup>30</sup> Traditionally, OSHA has had the responsibility of determining what is hazardous and what is not.<sup>31</sup> Another perceived weakness of this standard is that it only applies to known as opposed to suspected hazards. The ramification of this "scientifically well-established" guideline is to allow manufacturers to make a determination of no hazard on the basis of a difference of medical (or scientific) opinion.<sup>32</sup> These and other questions will most likely be subject to judicial resolution after final approval of the standard.<sup>33</sup> It seems that industry is more amenable to a case-by-case resolution of these questions than it is to having an all-inclusive list of regulated substances imposed upon them.

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<sup>25</sup> *Id.* § 4(c)-(d).

<sup>26</sup> A unique identification number assigned to a substance by the Chemical Abstract Service.

<sup>27</sup> S. 1670 § 4(e), 200th Leg., 1st Sess. (1982). The current OSHA proposal would impose similar labeling requirements. See OSHA Proposal, *supra* note 4, at 12,123.

<sup>28</sup> OSHA Proposal, *supra* note 4, at 12,123.

<sup>29</sup> *Id.*

<sup>30</sup> See generally *The Right to Know: Industry Presses for a National Standard*, CHEMICAL WEEK, June 30, 1982, at 37.

<sup>31</sup> See *id.*

<sup>32</sup> See generally *id.* at 37-38.

<sup>33</sup> This approval is expected sometime during the Spring of 1983. Telephone conversation with Ms. Jennifer Silk, Office of Special Standards, Occupational Safety and Health Administration, Washington, D.C. (Nov. 5, 1982).

The industry has leveled severe criticism against New Jersey's proposed use of such an all-inclusive list. An example of such criticism is the following excerpt from the statement of Hal Bozarth, Director of Governmental Relations and Public Affairs for the New Jersey Chemical Industry Council, made at public hearings on the proposed bill:

Materials are not listed in the registry because they pose particular hazards, but because toxicological testing has been performed on them. In so providing the toxicological data on chemicals the list demonstrates that many chemicals are not equally hazardous and should not be considered. Therefore, to provide information on all these chemicals on the NIOSH list will not be of any benefit to anyone. Not all chemicals are hazardous.<sup>34</sup>

The New Jersey bill would also cover suspected health hazard chemicals over protests that "mere suspicion is not a sufficient basis for regulatory action."<sup>35</sup>

These criticisms of the proposed scope of the regulation stand in sharp contrast to the New Jersey Public Advocate's statement that:

[t]he choice of the . . . [NIOSH Registry] as the basic list of chemicals covered . . . insures comprehensive recordkeeping. [T]his list is not an unedited compendium of substances bearing no relation to actual industry usage but is comprehensive in scope. The requirement that [MSDSs] be furnished even for some chemicals of unknown toxicity is a reasonable one, since it is not known which of these substances may later prove to have long-term health effects. Such records are extremely important in . . . studies which rely on hindsight.<sup>36</sup>

Although most supporters of the legislation applaud the extensiveness of its coverage, others fear that the cost of enforcement may be prohibitive. The Deputy Commissioner of the New Jersey Department of Environmental Protection, the agency tentatively charged with enforcement of the legislation, made the following observations regarding the coverage of the bill:

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<sup>34</sup> *New Jersey Worker and Community Right to Know Bill: Hearings Before the Senate Comm. on Energy and the Environment*, 200th Leg., 1st Sess. (1982) (statement of Hal Bozarth, Director of Governmental Relations and Public Affairs for the New Jersey Chemical Industry Council) [hereinafter cited as *Hearings*].

<sup>35</sup> *Id.* (statement of the Flavor and Extract Manufacturers Association).

<sup>36</sup> *Id.* (statement of Joseph H. Rodriguez, Public Advocate of the State of New Jersey).

We understand that the list of substances referred to in the bill could require that we deal with up to 40,000 substances. The cost of such a program, while not linear, would be astronomical. We have stopped short of an analysis of the full cost of the bill due to the present budgetary climate and the limited amount of funds that would be available to appropriate for this program. Legislation without financial support would unjustifiably raise the public's expectations.<sup>37</sup>

While there may be some disagreement on the bill's expansive coverage, there is little dissension among the coalition supporting the legislation on the absence of a trade secret exemption. Eileen Senn Tarlau, Industrial Hygienist with the UAW<sup>38</sup> characterized that position in stating that:

[t]rade secrecy is being raised as an objection to this piece of legislation. Uninformative trade names which disclose nothing about chemical hazards are widespread; there are about 90,000 trade names claimed in the United States. The UAW believes it is highly inappropriate for the right to know to be superceded by a chemical company's claim that they might stand to lose sales if they revealed the identity of their materials. Worker protection is simply more important.<sup>39</sup>

Ms. Tarlau also blasted the OSHA proposal as having "trade secret loopholes big enough to drive a truckload of chemicals through."<sup>40</sup>

Industry's support of the OSHA proposal and its reaction to the absence of a trade secret exemption in the New Jersey bill has been equally zealous:

[T]he chemical industry is extremely competitive. The difference between one company's profitability and its maintenance of market share is predicated on maintaining the strictest of confidentiality regarding a product's ingredients, included sub-

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<sup>37</sup> *Id.* (statement of Paul H. Arbesman, Deputy Commissioner of the New Jersey Department of Environmental Protection).

<sup>38</sup> International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America.

<sup>39</sup> *Hearings, supra* note 34. (statement of Eileen Senn Tarlau, Industrial Hygienist, Health and Safety Department, UAW).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (statement of Hal Bozath, Director of Governmental Relations and Public Affairs for the New Jersey Chemical Industry Council).

stances, and the process by which it is manufactured. The only thing guaranteeing a company's continued viability in a market is the imperative that trade secret information be kept exclusive and confidential.<sup>41</sup>

Protection of proprietary information is undoubtedly a legitimate concern, yet the question remains as to whether it can or should be balanced against a worker's right to be informed of the hazards to which he is exposed. Again, this may be an issue subject to judicial resolution.

As the incidence of occupational-related disease, or at least public awareness of it, continues to rise, the issue of worker right to know will remain in the fore of labor issues to be contended with in the 1980's. Labor and other interested groups will continue to lobby for more stringent regulation on the state and local levels until OSHA's authority to preempt such regulation is established, or until OSHA proposes a standard acceptable to them. In the words of Sheldon Samuels, Safety and Health Director for the AFL-CIO, "If the chemical industry doesn't want a fair, thorough remedy, it's going to have to pay through the nose."<sup>42</sup>

The issue of worker right to know is very complex. Tensions caused by such considerations as the proper scope of regulation and trade secret exemptions will not soon abate. Nor do these considerations lend themselves to simple solutions, as was evidenced by the above discussion. It is not likely that any solution which would satisfy the groups currently at odds over these and other issues will be forthcoming in the near future.

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<sup>42</sup> *The Right to Know: Industry Presses for a National Standard*, CHEMICAL WEEK, June 30, 1982, at 37.