Chapter XIV

OCCUPATIONAL SAFETY AND HEALTH ACT

The Occupational Safety and Health Act (the "Act"), 29 U.S.C. §§651, *et seq.*, is administered by the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor. The Act establishes a wide range of occupational safety and health standards which only apply in the workplace. It applies to all "employers," broadly defined to include any "person employed in business affecting commerce who has employees," except for the federal or state governments. Act §3(a), 29 U.S.C. §652(a).

While states are allowed to regulate matters for which no OSHA standard is in effect, Act §18(a), 29 U.S.C. §667(a), OSHA must approve a state plan before it can supersede applicable federal standards. §18(b), §667(b). Otherwise, OSHA preempts any regulation of the same subject matter by state law, whether less or more stringent. *United Steelworkers v. OSHA*, 763 F.2d 728 (3d Cir. 1985). OSHA has approved New York's plan to extend federal health and safety standards to employees of state and political subdivisions. *See* 29 C.F.R. §§1956.50, *et seq.*; New York Labor Law §27-a, 12 N.Y.C.R.R. Part 800. Violations of OSHA may result in fines as high as $70,000. Act §17, 29 U.S.C. §666.

A. Workplace Standards

The "general duty" clause of the Act requires that each employer:

> shall furnish to every one 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 employee.

Act §5(a), 29 U.S.C. §654(a). Besides specific OSHA requirements, this general duty encompasses a broad range of potentially unsafe working conditions that must be corrected, even in the absence of a specifically applicable regulation.

The OSHA regulations set general workplace standards, as well as standards on an industry-by-industry basis. Furthermore, individual standards deal with specific toxic substances, such as asbestos, vinyl chloride, arsenic, lead, formaldehyde, cadmium, and benzene, and set maximum workplace exposure levels. *See* 29 C.F.R. §§1910.1001-1910.1050.

Not only do these standards generally require employers to provide "personal protective equipment" for eyes, face, head and extremities, protective clothing, and respiratory devices, but there is a general requirement to do so "wherever it is necessary by reasons of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation, or physical contact." §1910.132(a). Furthermore, hazardous waste operations and emergency response are governed by 29 C.F.R. §1910.120, which sets special standards for hazardous waste workers.

Under 29 C.F.R. §1910.119, requirements are set for process safety management of highly hazardous chemicals ("PSM standard"). This standard applies to processes involving chemicals at or above the threshold quantities listed in Appendix A to §1910.119, as well as processes that involve a flammable liquid or gas in excess of 10,000 lbs., except for hydrocarbon fuels and "flammable liquids stored in atmospheric tanks or transferred which are kept below their normal boiling point without benefit of chilling or refrigeration." 29 C.F.R. §1910.119(a). Employers are required to involve employees in the process, §1910.119(c), gather process safety information, §1910.119(d), perform a process hazard analysis, §1910.119(e), develop operational

procedures for safely conducting the processes, §1910.119(f), train employees, §1910.119(g), investigate incidents, §1910.119(m), establish and implement an emergency action plan for the entire plant in accord with §1910.38(a), §1910.119(n), conduct compliance audits, §1910.119(o), and take other measures.

In Subpart Z of Part 1910, OSHA has established workplace air contamination standards. Tables in the regulations set specific permissible exposure limits for numerous listed toxic chemicals, including 8-hour weighted average limitations and ceiling limitations. These limits must be achieved, "whenever feasible," through administrative or engineering controls. 29 C.F.R. §1910.1000(e). If such controls do not achieve compliance, personal protective equipment, approved "by a competent industrial hygienist or other technically qualified person," must be used. *Id*.

B. Hazard Communication Program

The OSHA Hazard Communication Standard, 29 C.F.R. §1910.1200, is designed to require employers to inform their employees of the hazards of chemicals in the workplace. It applies to all "hazardous chemicals," which are defined as "any chemical which is a physical hazard or a health hazard." §1910.1200(c). A "physical hazard" is "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," while a "health hazard" is 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." §1910.1200(c).

The regulation applies to any hazardous chemical "which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in

a foreseeable emergency." 29 C.F.R. §1910.1200(b)(2). There are partial or complete exemptions for hazardous chemicals governed under other federal acts, including pesticides, food, cosmetics, alcoholic beverages, tobacco, consumer products, hazardous wastes, and wood. 29 C.F.R. §1910.1200(b). Furthermore, "articles," which are defined as any object formed into a specific shape for a use "dependent... upon its shape or design... which does not release... hazardous chemical under normal conditions of use," §1910.1200(i), are exempt. 29 C.F.R. §1910.1200(b)(6)(v). For example, a chair or a machine would be an "article."

The Hazardous Communication Standard sets requirements for chemical manufacturers, importers, and distributors to label, tag or mark chemical containers with the following information:

(i) Identity of the hazardous chemicals;

(ii) Appropriate hazardous warnings; and

(iii) Name and address of the chemical manufacturer, importer or other responsible party.

§1910.1200(f)(1). Further, they must distribute a material safety data sheet ("MSDS") for each hazardous chemical they produce or import, §1910.1200(g)(1), which contains information such as physical and health hazards, necessary precautions for safe use, applicable exposure limits, and emergency and first aid procedures. §1910.1200(g)(2).

In the workplace, employers are responsible to ensure that each container of hazardous chemicals is labeled, tagged or marked with the identity of the chemical and appropriate hazard warnings. §1910.1200(f)(5). Employers must maintain copies of MSDSs for each hazardous chemical in the workplace, and keep the sheets "readily accessible during each work shift to employees when they are in their work area(s)." §1910.1200(g)(8).

Employers must provide employees with information and training with respect to hazardous chemicals in their work area at the time of their initial assignment, or whenever a new hazard is introduced into the work area. §1910.1200(h). In order to implement the various applicable requirements, each employer must have a written hazard communication program. §1910.1200(e). A separate standard applies to the construction industry. 29 C.F.R. §1926.59.