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HAZARD COMMUNICATION IN THE WORKPLACE

Mark L. Goldstein*

I. INTRODUCTION

Recognizing the dangers presented to employees by hazardous substances in the workplace, the Occupational Safety and Health Administration (hereinafter "OSHA") in 1983 promulgated a Hazard Communication Standard (hereinafter "HCS"). The HCS's stated purpose is to ensure that the hazards of all chemicals produced or imported by chemical manufacturers or importers will be evaluated and transmitted to employers and employees. The rationale of the HCS is that an employee who is properly informed and trained will be better able to handle hazardous substances safely than one who is not.

Prior to 1983, numerous states, including New York, had enacted "Right to Know" legislation, requiring manufacturers and other employers to provide hazardous substance information to employees. The HCS purported to preempt these state "Right to Know"

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The end result of much litigation was a court-ordered revision of the HCS to include all employers, and not just manufacturing employers, who have employees exposed to hazardous chemicals in their workplace.


For an in-depth analysis of Proposition 65, see Christenson, Interpreting the Purposes of Initiatives: Proposition 65, 40 HASTINGS L.J. 1031 (1989); DeFranco, California's Toxics Initiative: Making It Work, 39 HASTINGS L.J. 1195 (1988).

5. OSHA, Hazard Communications, 29 C.F.R. § 1910.1200(a)(2) (1984) stating that: "[t]his occupational safety and health standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state . . . pertaining to the subject." Any state which desires to assume responsibility in this area may only do so under the provisions of § 18 of the Occupational Safety and Health Act (29 U.S.C. 651 et. seq.) which deals with state jurisdiction and state plans. See generally Employee Right to Know: Should the Federal Government or the States Regulate the Dissemination of Hazardous Substance Information to Protect Employee Health & Safety? 19 SUFFOLK U.L. REV. 633, 652 (1985) [hereinafter Employee Right to Know] (discussing the preemptive effect of the OSHA Right to Know Rule); infra text accompanying notes 249-303.

6. See New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir. 1985), aff'd, 868 F.2d 621 (3d Cir. 1988), cert. denied, 109 S. Ct. 3246 (1989). In Hughey the plaintiffs, New Jersey State Chamber of Commerce and Fragrance Materials Association claimed that the broad container labeling provisions of New Jersey's Right to Know Act were preempted by OSHA. Id. The defendants were various New Jersey officials charged with implementing the Right to Know Act. Id. The court held that OSHA did not implicitly preempt the provisions of New Jersey's Right to Know Act, finding that they could coexist without obstructing each other. See id. United Steelworkers of Am. v. Auchter, 763 F.2d 728 (3d Cir. 1985); infra text and accompanying notes 209-25 (discussing the Auchter case).

7. United Steelworkers of Am. v. Pendergrass, 819 F.2d 1263 (3d Cir. 1987). In Pendergrass the United Steelworkers of America petitioned the court to enforce the judgment granted in United Steelworkers of America v. Auchter, 763 F.2d 728 (3d Cir. 1985). 819 F.2d at 1264. In Auchter, the court held that "the Hazard Communication Standard . . . [was] valid and may be applied to the manufacturing sector, . . . [and] directed the Secretary 'to reconsider its application to employees in other sectors, and to order its application in those sectors unless he can state reasons why such application would not be feasible.'" Pendergrass, 819 F.2d at 1264 (citing Auchter, 763 F.2d at 743). The petitioners contended that the Secretary had not complied with the judgment in Auchter. Id. The Court of Appeals for the Third Circuit in Pendergrass agreed that the Secretary had not acted in compliance with the court's judgment in Auchter. Id. The court thereby ordered revision of the HCS within sixty days to make the Hazard Communication Standard applicable to all workers covered by OSHA. Id.
Subsequent rulemaking procedures and litigation have produced a performance-oriented standard\(^8\) that covers thousands of chemical substances used in numerous industries.\(^9\) While this revision of the HCS engendered a great deal of controversy and litigation throughout the past few years, the revised HCS is now fully in effect in all industries.\(^10\) Other modifications of the HCS proposed by the Office of Management and the Budget have been rejected by the Supreme Court in \textit{Dole v. United Steelworkers of America}, in which the Court considered OMB's authority to order changes in the HCS.\(^11\)

The revised HCS purports to preempt all state and local laws on evaluating and communicating hazard information to employees.\(^12\)

\(^9\) Final Rule, 52 Fed. Reg. 31852 (1987) (containing rules and regulations to expand the scope of HCS, 29 C.F.R. \S 1910.1200 (1986), to cover all employees under OSHA). For a discussion of the need for better dissemination of information about the numerous chemicals now available in the home and workplace and the failures of both the market and state and federal laws in making this information more accessible, see Lyndon, \textit{supra} note 5.
\(^11\) 110 S. Ct. 929 (1990). The Department of Labor in compliance with the Third Circuit's Court of Appeals ruling in \textit{United Steelworkers of America v. Pendergrass} issued a revised Hazard Communication Standard. \textit{Id.} (citing to 52 Fed. Reg. 31852 (1987)). The Department of Labor submitted the revised standard to the OMB for review. \textit{Id.} The OMB rejected three provisions contained within the revised standard. \textit{See id.; see also} 52 Fed. Reg. 46076 (1987) (containing the OMB's rejection). The OMB offered several modifications. \textit{Id.} However, these were rejected by the Supreme Court in \textit{Dole}. 110 S. Ct. at 929 (rejecting statements by the OMB contained in 52 Fed. Reg. 46076 (1987)); \textit{see also} infra notes 27-33 and accompanying text (discussing the provisions rejected by the OMB).
\(^12\) OSHA, Hazard Communication, 29 C.F.R. \S 1910.1200(2)(2) (1986) (stating that the standard is "intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to prompt any state law pertaining to this subject."). To date, there has been much debate over the preemption issue. \textit{See}, e.g., Carle, \textit{supra} note 8, at 584 n.14 (discussing state provisions which contain more stringent hazard disclosure requirements than the HCS, but which were still preempted by the HCS); \textit{Feitshans, Hazard Substances in the Workplace: How Much Does the Employee Have the "Right to Know"?} 1985 DET. C.L. REV. 697 (1985); \textit{Note, The Extent of OSHA Preemption of State Hazard Reporting Requirements}, 88 COLUM. L. REV. 630 (1988) (authored by J. Manna Jr.) [hereinafter \textit{OSHA Preemption}]; Schroeder & Shapiro, \textit{Responses to Occupational Disease: The Role of Markets, Regulation and Information}, 72 GEO. L.J. 1231, 1288-91 (1984) (arguing that HCS need not preempt state statutes offering workers greater protec-}
Indeed, state Right to Know statutes have been held preempted by the HCS insofar as they pertain to the protection of employee health and safety in the private sector.¹³

This Article will examine the changes made in the HCS and their impact on New York's Right to Know statute. Specifically, Part II will explore the HCS's provision and the revisions made as a result of the litigation challenging the HCS.¹⁴ Part III will discuss parallel provisions of New York's Right to Know law, and the provisions of the two laws will be compared to ascertain the legal duties of New York employers in providing hazardous substance information to their employees.¹⁵ Lastly, Part IV will briefly set forth the principles underlying the Federal Preemption Doctrine and will analyze how the HCS's preemption of substantial portions of the New York Right to Know law will impact upon employers doing business in the state.¹⁶

II. THE FEDERAL HCS

A. Background

Finding that "personal injuries and illnesses arising out of work situations imposed a substantial burden on interstate commerce," Congress enacted the Occupational Safety and Health Act (hereinafter "OSH Act") in 1970.¹⁷ The purpose of the OSH Act is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ."¹十八

Pursuant to Section 655 of the OSH Act, on November 25, 1983, the Secretary of Labor promulgated the HCS to implement the OSH Act's purposes.¹⁹ The HCS was modified in several respects as a result of challenges before the United States Court of Appeals for the Third Circuit.²⁰ First, the trade secret protection af-
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forded to information readily discoverable through reverse engineering was eliminated.\(^2\) Second, a rule was adopted permitting access by employees and their representatives to trade secret chemical identities.\(^2\) Third, the HCS was expanded to cover all employers, not just employers in the manufacturing sector.\(^3\) The revised HCS became effective for chemical manufacturers, importers and distributors on September 23, 1987.\(^4\) It was scheduled to take effect in the non-manufacturing sector on May 23, 1988;\(^5\) however, certain agency and court actions delayed the effective date of the revised HCS.\(^6\)

In September 1987, OSHA submitted the revised standard to the Office of Information and Regulatory Affairs in the Office of Management and Budget (hereinafter “OMB”).\(^7\) In October 1987, OMB, acting under the Paperwork Reduction Act (hereinafter “PRA”),\(^8\) disapproved the revised HCS, conditioning the May 23 effective date of the revised rule on the deletion or modification of the three provisions of the rule which it found objectionable.\(^9\) First, OMB disfavored the provision adopted in the revised HCS which requires that Material Data Safety Sheets (“hereinafter MSDS”)\(^3\) are submitted to the employees and their representatives. Second, a rule was adopted permitting access by employees and their representatives to trade secret chemical identities. Third, the HCS was expanded to cover all employers, not just employers in the manufacturing sector.

- 22. Id.
- 23. Auchter, 763 F.2d at 728 (codified at 29 C.F.R. § 1910.1200(b)(1) (1986)).
- 25. See id.
- 26. See Pendergrass, 819 F.2d at 1263 (ordering the Secretary of Labor to comply with the judgment in Auchter, 763 F.2d at 728, thereby expanding the application of the HCS).
- 27. See Dole, 110 S. Ct. at 929 (citing 52 Fed. Reg. 31852 (1987) (containing the revised standard)).
- 30. 52 Fed. Reg. at 46077. “Material Safety Data Sheet (MSDS)” means “written or
be provided on multi-employer worksites, such as construction sites.\textsuperscript{31} Second, OMB disapproved an exemption from the labeling requirements of the HCS for consumer products used in the same manner and quantities as intended for consumer use.\textsuperscript{32} Lastly, it disapproved an exemption from the labeling of drugs in tablet or pill form regulated by the Federal Drug Administration.\textsuperscript{33}

After a series of negotiations, OMB allowed the revised standard to be implemented on May 23, 1988, as scheduled, but without the "disapproved" portions.\textsuperscript{34} In response to OMB criticism, in early August 1988, OSHA published a proposal, reopening the rulemaking procedure with regard to the revised HCS.\textsuperscript{35}

During this period, OMB's disapproval of the revised HCS was challenged by several states, labor organizations, and public interest groups in the United States Court of Appeals for the Third Circuit.\textsuperscript{36} In August 1988, after a series of rulings by different panels of the Third Circuit, the Court of Appeals finally invalidated OMB's disapproval of the statute, ruling that OMB had exceeded its statutory authority in disapproving portions of the HCS.\textsuperscript{37}

While OMB initiated its review of the HCS, the construction industry brought two separate suits in October of 1987 challenging OSHA's expansion of the HCS.\textsuperscript{38} Those suits were subsequently con-

\textsuperscript{31} 52 Fed. Reg. at 46077 (discussing what is now 29 C.F.R. § 1910.1200(e)(2) (1988)).

\textsuperscript{32} 52 Fed. Reg. at 46078 (discussing what is now 29 C.F.R. § 1910.1200(b)(6)(vii) (1988)).

\textsuperscript{33} 52 Fed. Reg. at 46078-79 (discussing what is now 29 C.F.R. at § 1910.1200(b)(6) (viii) (1988)).

\textsuperscript{34} OSHA, Hazard Communication, 29 C.F.R. § 1926.59 (1988).

\textsuperscript{35} Notice of Proposed Rulemaking [NPRM] and Notice of Public Hearing, 53 Fed. Reg. 29822 (1988). Not only did OSHA invite comment for sixty days following publication of this notice of proposed rulemaking, but it also scheduled a public hearing to provide an opportunity for additional input. Id.

\textsuperscript{36} See Pendergrass, 855 F.2d at 108.

\textsuperscript{37} Pendergrass, 855 F.2d at 114. The Third Circuit reasoned that OSHA's promulgation on August 24, 1987 of the HCS making it applicable to all employees both inside and outside the manufacturing sector was "a good faith compliance" with the orders set forth in Auchter, 763 F.2d at 728 and Pendergrass 819 F.2d at 1263. Id. "The slight changes that were made in the standard were a logical outgrowth of the rulemaking record which we previously reviewed. Withdrawal of the provisions disapproved by OMB was accordingly inconsistent with those orders." Id. (citation omitted).

\textsuperscript{38} See Construction Employers Challenge OSHA's Expanded Hazard Standard, Daily Lab. Rep. (BNA) No. 202, at A-10 (Oct. 21, 1987). In Associated Contractors of Virginia v. OSHA, the AGC, which is an association of construction contractors, filed a petition for review with the U.S. Court of Appeals for the Fourth Circuit. Id. In Contractors of Virginia v.
solidated into one action entitled Associated Builders & Contractors, Inc. v. McLaughlin.\textsuperscript{39} The basis for the construction industry's challenge to the revised HCS was its contention that work sites are too transient and mobile to comply with the same requirements that cover fixed workplaces.\textsuperscript{40}

The construction industry's case was transferred to the Third Circuit, consolidated with other similar actions, and a temporary order staying the effectiveness of the HCS, issued in May 1988, was enforced by an order of the Third Circuit on June 24, 1988.\textsuperscript{41} Then, following its earlier decision in United Steelworkers v. Pendergrass, in November 1988, the Third Circuit denied the petitions for review and vacated the stay.\textsuperscript{42} In considering the consolidated challenges to the sufficiency of OSHA's notice and rulemaking procedures, the Secretary of Labor's significant risk determinations, and OSHA's alleged delegation of rulemaking authority to scientific groups to determine the substances covered by the HCS, the Third Circuit found that, "none of the substantive or procedural challenges for the application of the hazard communications standard to the construction or grain processing and storage industries have merit."\textsuperscript{43} Further requests from other petitioners and intervenors in the case for a continuation of the stay were denied by the Third Circuit and U.S. Supreme Court Justice Brennan and later Chief Justice Rehnquist.\textsuperscript{44} In May, ending the uncertainty concerning the extension of the HCS to the non-manufacturing sector, the Supreme Court declined to review

\textsuperscript{39} No. 87-1582 (D.C. Cir.) (WESTLAW, Allfeds library, CTADC file).
\textsuperscript{41} For an unreported court discussion of the construction industry claims, see Final Rule, Technical Amendments and Notice Regarding Enforcement, 54 Fed. Reg. 6886, 6887 (1989).
\textsuperscript{43} Brock, 862 F.2d at 69.
the petitions of the National Grain and Feed Association and the Associated General Contractors, thus leaving the Third Circuit's decision intact.\textsuperscript{46}

In February 1989, OSHA published a notice in the Federal Register to "advise the public, that, as a result of further court actions, all provisions of the rule are now in effect in all segments of the industry."\textsuperscript{46} The notice also announced technical amendments to the HCS that deleted all notations indicating OMB disapproval in connection with the three provisions at issue in \textit{United Steelworkers v. Pendergrass}.\textsuperscript{47}

The Supreme Court's denial of certiorari in the construction industry lawsuit makes the expansion of the HCS to non-manufacturing industries valid. Furthermore, the controversy between OMB and OSHA, regarding OMB's disapproval of certain provisions of the revised HCS, has been resolved against OMB, further strengthening the ability of OSHA to apply the HCS broadly.\textsuperscript{48} In its petition for review in \textit{Dole}, the government stated that the Third Circuit's holding would seriously disrupt OMB's efforts to reduce the paperwork burdens facing employers and individuals.\textsuperscript{49} The Supreme Court rejected this argument, reasoning that the Paperwork Reduction Act does not authorize OMB "to review and countermand agency regulations mandating disclosure by regulated entities directly to third parties."\textsuperscript{50} In holding that the paperwork law did not give OMB the authority to scrutinize substantive OSHA regulations, the Court noted that no provisions in the PRA expressly indicate whether Congress intended the Act to apply disclosure rules as well as information-gathering rules.\textsuperscript{51} The Court concluded that the language and structure of PRA refer solely to the collection of information by, or for use of, a federal agency; the Act could not "reasonably be interpreted to cover rules mandating disclosure of information to a third party."\textsuperscript{52}

\begin{footnotes}
\textsuperscript{47} 855 F.2d 108 (3d Cir. 1988); see also supra notes, 29-33 and accompanying text.
\textsuperscript{48} Dole v. United Steelworkers of Am., 110 S. Ct. 929 (1989); see Philip, supra note 29.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 929.
\textsuperscript{52} Id. The Supreme Court's decision is expected to have wide implications. "Under the Supreme Court ruling, OMB will have a real hard time regulating labeling, disclosure requirements, hazard communications—any information requirements that the government directs

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B. Scope

1. Definitions.—The revised HCS requires chemical manufacturers or importers to evaluate the hazards of the chemicals they produce or import. In turn, all employers must provide their employees with information concerning the hazardous chemicals to which they are exposed. The scope of the HCS is limited to any 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." It seems logical that no testing need be undertaken to comply with the HCS unless a hazardous chemical is known to be present.

The term "chemical manufacturer" is defined by OSHA as an "employer with a workplace where chemical(s) are produced for use or distribution." "Employer" is now defined as a "person engaged in a business where chemicals are either used, or are produced for use or distribution, including a contractor or subcontractor," reflecting the expansion of the HCS's coverage. Hazardous chemical information must be disseminated by employers to their employees through a hazard communication program, labels, MSDS and training.

The HCS covers situations where employees "may be exposed" to hazardous chemicals. Thus, potential as well as actual exposure is covered by the HCS. OSHA wanted to ensure that employees...
would receive information about all chemical hazards in their workplaces so that they could be prepared to deal with emergencies, in addition to routine exposures.  

Although the HCS covers potential exposures, not all employees of the same employer are entitled to its protection. For example, in a retail department store, maintenance workers may be covered because their job exposes them to hazardous chemicals, whereas an accountant in the billing department might not be likely to experience such exposure and would, therefore, fall outside of the HCS's coverage. Indeed, OSHA defined “employee” as a “worker who may be exposed to hazardous chemicals under normal operating conditions or in foreseeable emergencies.” Workers who encounter hazardous chemicals only in non-routine, isolated instances, such as office workers or bank tellers, are not covered. 

This distinction between workers who encounter routine exposures and workers who encounter non-routine exposures to hazardous substances may be a tenuous one. First, people vary in their susceptibility and exposure history. To say that employee health and safety is only threatened when one is “routinely” exposed to a given hazardous substance assumes, perhaps incorrectly, that a single exposure to a hazardous chemical does not endanger the safety of the employees. 

Notwithstanding such limitations to the coverage of the HCS, it does appear that its coverage is expansive enough to cover many employees who are exposed to hazardous substances on an appreciable level. For example, employers and their employees who only handle sealed containers of chemicals are covered, even if the containers would not be opened under normal, routine use. Thus, employees in warehousing, retail sales, marine cargo handling, and trucking terminals are covered by the HCS. OSHA has assumed that all such containers could possibly leak or break, and thus these employees “may be exposed” to hazardous chemicals in the workplace.

2. Substances Covered.—OSHA set forth a base group of substances that are automatically covered by the HCS. Specifically, any chemical listed in 29 C.F.R. § 1910.1200, subpart z or in Threshold

63. 29 C.F.R. at § 1926.59(c).
64. 29 C.F.R. at § 1926.59(c).
65. See Lyndon, supra note 4, at 1801 (discussing this proposition).
66. 52 Fed. Reg. at 31860.
68. 52 Fed. Reg. at 31861.
Limit Value for Chemical Substances and Physical Agents in the Workroom Environment with Intended Changes for 1979, as amended from time to time, or any chemical proven to be carcinogenic by the National Toxicology Program, the International Agency for Research on Cancer, or 29 C.F.R. Part 1910, Subpart 2, Toxic and Hazardous Substances, OSHA evaluated. The HCS's labeling requirement does not apply to any chemical substance regulated by another federal agency. In addition, the HCS does not apply to substances such as hazardous waste, tobacco or tobacco products, or wood or wood products.

If a chemical does not fall within the base group of substances automatically covered by the HCS, the burden is on the manufacturer or importer to establish whether the chemical poses a health hazard. An employer is not required to evaluate any chemical to determine whether it is hazardous but, rather, he or she may rely on the evaluations made by the supplier. The only time an employer will be required to evaluate a chemical is when he or she chooses not to rely on the supplier's evaluation.

Unless an injured employee can successfully allege that the employer intentionally concealed hazardous information, the employee's remedy against the employer is generally restricted to an action brought under the workers' compensation system. However, there

69. This manual is published by the American Conference of Government Industrial Hygienists.
70. 29 C.F.R. at § 1926.59(d)(4)(i).
71. 29 C.F.R. at § 1926.59(d)(4)(ii).
72. 29 C.F.R. at § 1926.59(d)(4)(iii).
74. 29 C.F.R. at § 1926.59(b)(6)(i), (ii), (iii). Wood dust, however, is subject to the HCS. 52 Fed. Reg. 31852, 31862 (1987).
75. 29 C.F.R. at § 1926.59(d)(1).
76. 29 C.F.R. at § 1926.59(d)(1).
77. 29 C.F.R. at § 1926.59(d)(1); see Carle, supra note 8 (discussing the potential problems associated with reliance on the manufacturer for the data production and assessment). The fact that the HCS is a "performance-oriented standard" places considerable responsibility on the supplier to perform adequate evaluations and to disseminate that data to the next consumer of the hazardous substance, usually the employer. See generally id. at 586-89. Simple problems of economics exist, however, creating disincentives for manufacturers to release product ingredients and to provide careful hazard warnings. Id.
78. Id.
is an intentional harm exception to the workers' compensation scheme which applies where the employer is found to have intentionally concealed health hazard information from the employee. For example, in *Johns-Manville Products Corp. v. Contra Costa Superior Court*, the California Supreme Court permitted tort recovery for exacerbation of initial injuries sustained by an employee as a result of chemical exposure where the exacerbation was caused by the concealment of the health hazard information, including concealment of the diagnosis of the illness by the company physician. The Court refused to allow recovery in tort for the initial injuries allegedly resulting from the concealment of the health hazard information; the employee’s remedy remained within the parameters of the workers' compensation scheme.

Also, the employee may be able to sue the manufacturer under the theory of strict liability, but proving a causal link between the chemical exposure—assuming one can pinpoint the right chemical—and the resulting injury is a substantial obstacle. In addition, even assuming the injured employee can adequately demonstrate causation, he or she must still locate the right manufacturer. Sometimes, depending on the number of manufacturers involved and the type of chemicals involved, this task of locating the proper manufacturer may be difficult to complete. Despite the limited success of seeking relief outside the workers' compensation scheme, the rise of court actions by employees exposed to hazardous substances in the workplace increases an employer's exposure to liability for these

80. *Id.* at 1005 (citing *Johns-Manville Prods. Corp. v. Contra Costa Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980)).

81. 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).

82. 27 Cal. 3d at 473, 612 P.2d at 956, 165 Cal. Rptr. at 866.

83. *Id.* at 471, 612 P.2d at 954, 165 Cal. Rptr. at 864.

84. See generally Carle, *supra* note 8, at 594 (stating that victims would be better able to establish this link if manufacturers were to unveil their products' chemicals and dangers); Annotation, *Employer's Tort Liability to Worker for Concealing Workplace Hazard or Nature or Extent of Injury*, 9 A.L.R. 4th 778, 783 (1988) (stating that in such a state as Arkansas, the courts have ruled that only where an employer acts with a deliberate, specific intent to harm may the employee sue in tort); N.Y. WORK. COMP. LAW §§ 10-11 (McKinney 1990) (stating that obligations may be purely statutory and that often the right to compensation does not depend on the employer's negligence itself).

85. See generally Carle, *supra* note 8, at 588 (claiming that, because workers have trouble identifying the responsible manufacturer, the tort system cannot easily impose liability on them).

86. See *id.* However, some jurisdictions allow joint and several strict liability if the employee can locate the pool of manufacturers potentially liable but cannot allocate percentages of fault. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).
workplace hazards. 87

3. "Article" Exemption.—It is worth noting that the HCS contains an exemption for “articles”. 88 An “article” is defined as a:

manufactured item . . . [w]hich is formed to a specific shape or design during manufacture; . . . which has end use function(s) dependent in whole or in part upon its shape or design during end use; and . . . which does not release, or otherwise result in exposure to, a hazardous chemical, under normal conditions of use. 89

Articles may be: office products, such as pens and pencils, emissions from tires when in use, emissions from toner in pieces of paper, and emissions from newly varnished furniture. 90 The listed emissions fall within the exemptions because the HCS does not encompass releases of small quantities of chemicals that pose no greater hazard in the workplace than they would with normal use at home. 91

It should also be noted that the article exemption only applies to end use. 92 Articles with intermediate uses which result in exposure are covered. 93 An example of an article with an intermediate use is encapsulated asbestos insulation where installation involves hammering the material into openings, thus releasing the asbestos. 94 In this case, the installation is the “normal condition of use” and thus hazard information would be required. 95 Once installed, the encapsulated asbestos insulation would be an article and thus exempted. 96

4. Consumer Products Exemption.—The revised HCS also exempts consumer products where “the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which results in a duration and frequency of exposure which is not greater than exposures experienced by consumers. . . .” 97 OMB has objected to this provision on the ground that “this exemption

87. See generally Carle, supra note 8, at 585-86 (writing that, because unveiling products’ ingredients would identify a warning’s inadequacy, manufacturers would have greater incentive to allow more protective warnings in the face of greater chances of being sued or fined).


89. OSHA, Hazard Communication, 29 C.F.R. § 1926.59(e)(i), (ii), (iii) (1988).


91. Id. OMB has suggested that the definition of “article” be modified to clarify further the exemption for items which release very small quantities of chemicals. 52 Fed. Reg. at 46078. OMB recommends an objective “de minimis” exemption. Id.

92. 52 Fed. Reg. at 46078.

93. Id.

94. Id.

95. Id.

96. Id.

would continue to place under the HCS large numbers of consumer products for which MSDSs would have little practical utility, and for which the burden of compliance would be substantial." Consequently, OMB recommends a broader exemption which would cover "any substance packaged in the same form and concentration as a consumer product whether or not it is used for the same purpose as the consumer product."

There are potential problems with characterizing which products are consumer products under the OMB's approach. It would seem more efficient to follow the HCS because the Consumer Product Safety Act already governs labeling and other information disclosure requirements associated with the majority of widely known consumer products. To broaden the exemption, as OMB suggests, may create gaps in information-gathering and dissemination because not all substances that are packaged in the identical manner as consumer goods are covered by the Consumer Product Safety Act; in fact, there is no proof that by broadening the exemption, duplicative efforts would be minimized.

5. Drug Exemption.—Another exemption to the HCS which OMB believes is not sufficiently broad applies to drugs in "solid, final form for direct administration to the patient . . . ." OMB objects to this exemption, contending that there is no reason why all drugs regulated by the Food and Drug Administration should not be exempted because such regulation would be sufficient protection. Contrary to the suggestion in the previous paragraph addressing the broader consumer product exemption proposed by OMB, it is likely, based on the rather expansive definition of "drug" in the Federal Food, Drug, and Cosmetic Act, that a broad exemption for all

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98. 52 Fed. Reg. at 46078.
99. Id.
101. Id.; see also 29 C.F.R. § 1926.59(b)(5)(iv) (1988) (including within this group those products that are also hazardous substances).
102. 52 Fed. Reg. at 46078.
103. Id.

The term "drug" means (A) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles . . . intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clauses (A), (B), or (C) . . .
C. Disclosure

Every employer covered by the HCS must develop a written hazard communication program that includes the use of labels, MSDSs, and employee information and training. The written hazard communication program must also contain a list of the hazardous chemicals in each work area, and the methods by which the employer will inform employees of the hazards of unusual or unique tasks. The employer may rely on an existing communication program, provided it meets the above requirements. The written hazard communication program must be made available, upon request, to employees, their designated representatives, the Assistant Secretary for Occupational Safety and Health, and the Director of NIOSH.

1. Labels.—Chemical manufacturers, importers and distributors must be sure each container of hazardous chemicals leaving the workplace is properly labeled. The label must include the following information: "i) [the] [i]dentity of the hazardous chemical(s); ii) [a]ppropriate hazard warnings; and iii) [the] [n]ame and address of the chemical manufacturer, importer, or other responsible party." A "hazard warning" is defined as any "words, pictures, symbols, or combination thereof appearing on a label or other appropriate form of warning which convey the hazard(s) of the chemical(s) in the container(s)." At a minimum, the employer is responsible to ensure that each container of hazardous chemicals in the workplace is tagged or marked with the identity of the hazardous chemical and its respective hazard warnings. Labels must be "legible, in English, and prominently displayed on the container, or readily available in the work area. . . ." Employers whose employees speak languages other than English are not required to add the information in the employee's language.

105. 29 C.F.R. at § 1926.59(e)(1).
106. 29 C.F.R. at § 1926.59(e)(1)(i), (ii).
107. 29 C.F.R. at § 1926.59(e)(3).
108. 29 C.F.R. at § 1926.59(e)(4).
109. 29 C.F.R. at § 1926.59(f)(1).
110. 29 C.F.R. at § 1926.59(f)(1)(i), (ii), (iii).
111. 29 C.F.R. at § 1926.59(f)(5)(i), (ii).
112. 29 C.F.R. at § 1926.59(f)(9).
113. 29 C.F.R. at § 1926.59(f)(10).
114. Id. Consequently, there could be a serious problem in training, education, and/or
2. MSDS.—Chemical manufacturers and importers must “obtain or develop an [MSDS] for each hazardous chemical they produce or import,” and must provide the MSDS at the time of the initial shipment to the distributor or employer. Distributors must also ensure that downstream employers are provided with the MSDS. Among other regulations, each MSDS must be in English and include information concerning the specific identity of the hazardous chemicals (subject to the restrictions on trade secrets) and their common names. In addition, the physical and chemical characteristics of the hazardous chemicals, such as known acute and chronic health effects, the fact whether the chemical is considered to be a carcinogen, any precautionary measures, emergency and first aid procedures, and the identification of the party who prepared or distributed the MSDS must be included.

Although downstream employers may rely on upstream suppliers to provide the MSDS, it is every employer’s responsibility to request an MSDS if he has not received one from the supplier. If the label indicates a hazard, the employer will know that an MSDS is needed, and that he should request one. In addition, employers are required to “maintain copies of the required MSDS for each hazardous chemical in the workplace, and shall ensure that the [MSDS is] readily accessible . . . to employees when they are in their work area.”

3. Employee Training and Information.—Employers must provide their employees with information and training on two occasions: when the employees are initially assigned to a work area containing hazardous chemicals, and “whenever a new hazard is in-

115. 29 C.F.R. at § 1926.59(g)(1).
116. 29 C.F.R. at § 1926.59(g)(6).
117. 29 C.F.R. at § 1926.59(g)(7).
118. 29 C.F.R. at § 1926.59(g)(2)(j)(A), (B).
120. 29 C.F.R. at § 1926.59(g)(2)(C)(3)(vii).
121. 29 C.F.R. at § 1926.59(g)(2)(C)(3)(viii).
122. 29 C.F.R. at § 1926.59(g)(2)(C)(3)(X).
123. 29 C.F.R. at § 1926.59(g)(2)(C)(3)(vi).
124. 29 C.F.R. at § 1926.59(g)(6).
125. Id. Furthermore, if the employer later learns of any possible hazards, this information should be added to the MSDS within three months. 29 C.F.R. at § 1926.59(g)(5).
126. 29 C.F.R. at § 1926.59(g)(8). For a discussion of potential problems for employers who place mistaken reliance on the supplier’s information, leading to exposure to tort liability, see supra notes 65-66 and accompanying text.
127. 29 C.F.R. at § 1926.59(h).
introduced into their work area.” The employees must be informed of the requirements of the HCS, any procedures in their work area where hazardous chemicals are located, and the “location and availability of the written hazard communication program. . . .”

Employee training must include the following: 1) methods to discover the presence or release of a hazardous chemical in the workplace; 2) the physical and health hazards of the chemicals found in the workplace; 3) means that employees can use to protect themselves; and 4) “the details of the written hazard communication program developed by the employer, including an explanation of the labeling system and [the MSDS]. . . .”

**D. Trade Secrets**

One potential problem with the formulation and dissemination of hazard information through the MSDS is the disclosure of trade secrets of substances contained within the MSDS. A “trade secret” is defined as any “confidential formula, pattern, process, device, information or compilation of information that is used in an employer’s business, and that gives the employer an opportunity to obtain an advantage over competitors. . . .” The HCS provides that the chemical manufacturer, importer or employer concerned with protecting a trade secret may withhold the specific chemical identity of a hazardous chemical from the MSDS upon the satisfaction of four criteria. The four criteria are: 1) the trade secret claim con-

128. Id.
129. 29 C.F.R. at § 1926.59(h)(1)(i).
130. 29 C.F.R. at § 1926.59(h)(1)(ii).
131. 29 C.F.R. at § 1926.59(h)(1)(iii); see also O'Reilly, supra note 4, at 94-95 (noting that employees who are informed of hazards in the workplace may assume the risk of injury, creating an affirmative defense against products liability claims).
132. 29 C.F.R. at § 1926.59(h)(2)(i).
133. 29 C.F.R. at § 1926.59(h)(2)(ii).
134. 29 C.F.R. at § 1926.59(h)(2)(iii).
135. 29 C.F.R. at § 1926.59(h)(2)(iv). From the employee’s standpoint, the HCS permits “the employee to evaluate what risks he is willing to bear in a particular job and to try to effect changes, e.g., through his union, if he desires. If an employee elects to remain in a particular job that presents potential health or safety risks, an understanding of those risks should lead to his greater care in following suppliers’ handling and industrial hygiene recommendations on labels and MSDSs. . . .” Stillman & Wheeler, supra note 79, at 979. Hence, proper compliance by an employer not only reduces his exposure to legal liability, but also enables employees to help themselves ensure safe and productive working hours.
136. 29 C.F.R. at § 1926.59(c).
137. 29 C.F.R. at § 1926.59(h)(2)(i)(1).
cerning the information can be supported; 138 2) "the information contained in the [MSDS] concerning the properties and effects of the hazardous chemical is disclosed;" 139 3) "the [MSDS] indicates that the specific chemical identity is being withheld as a trade secret;" 140 and 4) "the specific chemical identity is made available to health professionals, employees, and designated representatives [under certain conditions]. . . ." 141

In a situation that is deemed an emergency by the treating physician or nurse, the specific chemical identity of the trade secret chemical must be released to the treating physician or nurse. 142 "The chemical manufacturer, importer or employer, [however], may require a written statement of need and confidentiality agreement . . . as soon as circumstances permit." 143

In a non-emergency situation, and upon request, the specific chemical identity of a trade secret chemical can be disclosed to a physician providing medical care to an exposed employee, and to the employee or his designated representative, if: 1) the request is written; 144 2) it specifies the occupational health need for the request; 145 3) it explains why disclosure of the specific chemical identity is necessary and why other information, such as the properties and effects of the chemical, would not allow the health professional to render needed services; 146 4) it describes the procedures to maintain the confidentiality of the information; 147 and 5) the person making the request agrees to keep the information confidential. 148 These requirements would appear sufficient to maintain confidentiality of the trade secret and, at the same time, to afford disclosure of the necessary information to the inquiring party.

If the chemical manufacturer, importer or employer denies a request for a specific chemical identity, the health professional, employee or designated representative may refer both the request and denial to OSHA for review. 149 OSHA will then determine whether the trade secret claim has been supported by the chemical manufac-

139. 29 C.F.R. at § 1926.59(h)(2)(i)(1)(ii).
140. 29 C.F.R. at § 1926.59(h)(2)(i)(1)(iii).
141. 29 C.F.R. at § 1926.59(h)(2)(i)(1)(iv).
142. 29 C.F.R. at § 1926.59(h)(i)(2).
143. Id.
144. 29 C.F.R. at § 1926.59(h)(i)(3)(i).
145. 29 C.F.R. at § 1926.59(h)(i)(3)(ii).
146. 29 C.F.R. at § 1926.59(h)(i)(3)(iii).
147. 29 C.F.R. at § 1926.59(h)(i)(3)(iii)(D)(iv).
149. 29 C.F.R. at § 1926.59(h)(i)(8).
turer, importer or employer, whether the claim of the medical need by the health professional, employee or designated representative has been supported, and whether the health professional, employee or designated representative has demonstrated sufficient protection of the name’s confidentiality. If OSHA finds for the employee, or the medical personnel, the refusing party will be subject to citation by OSHA. The citation may be contested before the Occupational Safety and Health Review Commission. If the information continues to be withheld during the contest, an “Administrative Law Judge may review the citation and supporting documentation in camera or issue appropriate orders to protect the confidentiality of such matters.”

E. Penalties

The OSH Act has both civil and criminal penalties for the violation of its provisions. If an employer willfully or repeatedly violates any OSHA standard, he may be assessed a maximum civil penalty of $10,000 for each violation. A “willful violation” has been defined as “an act done voluntarily with either an intentional disregard of, or plain indifference to, [OSHA regulations]. . . .” A citation for a “serious” violation carries a mandatory penalty of up to $1,000 for each such violation. A “serious” violation occurs when there is a:

- substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use . . . unless the employer did not, and could not with
the exercise of reasonable diligence, know of the presence of the violation.\textsuperscript{168}

For violations that are not "serious," the employer may be assessed a maximum penalty of $1,000 for each such violation.\textsuperscript{169} If an employer is cited for violating an OSHA standard and fails to correct the violation, he may be assessed a $1,000 penalty each day, if such failure to correct continues.\textsuperscript{160}

Criminal penalties may be incurred upon a willful violation that causes death to an employee,\textsuperscript{161} or upon making false statements in any application, report or document filed or required to be maintained.\textsuperscript{162} Each violation carries a maximum mandatory fine of $10,000 or imprisonment for a maximum of six months, or both.\textsuperscript{163}

A serious problem is that OSHA has too few inspectors to ensure effective compliance.\textsuperscript{164} As of 1988, the number of OSHA inspectors declined to approximately 1,000, making it incapable of inspecting more than two percent of all firms it regulates each year.\textsuperscript{165} "Union officials, members of Congress, and others have roundly complained that the [Reagan] administration [took] the teeth out of OSHA [by] . . . gutting its enforcement efforts."\textsuperscript{166} In fact, "in practice, OSHA has only rarely applied the available criminal sanctions."\textsuperscript{167} As the Bush administration has pushed to maintain the

\textsuperscript{158} 29 U.S.C.A. § 666(k) (West 1985).
\textsuperscript{159} 29 U.S.C.A. § 666(c) (West 1985).
\textsuperscript{160} 29 U.S.C.A. § 666(d) (West 1985).
\textsuperscript{161} 29 U.S.C.A. § 666(e) (West 1985).
\textsuperscript{162} 29 U.S.C.A. § 666(g) (West 1985).
\textsuperscript{163} Id.
\textsuperscript{164} See Carle, supra note 8, at 591 n.66.
\textsuperscript{165} Id.
\textsuperscript{166} See Getting Away with Murder, supra note 155, at 540 (footnote omitted).
\textsuperscript{167} Id. at 538 (footnote omitted). However, a bill has been introduced before Congress in an effort to improve criminal enforcement by OSHA. Statement by Sen. Howard Metzenbaum and Rep. Tom Lantos, Daily Lab. Rep. (BNA) No. 36, at A-10 (Feb. 22, 1990). Senator Howard Metzenbaum and Representative Tom Lantos jointly introduced the proposed OSHA Criminal Penalty Reform Act on February 24, 1990. Id. The proposed act "would strengthen the criminal penalties by expanding the application of criminal sanctions to willful violations that result in serious bodily injury to workers or recklessly endanger human life. . . ." Id.

Under the bill, "the penalty for a willful violation by an employer that leads to loss of human life would be increased from six months' imprisonment to up to 10 years' imprisonment. See id. The measure also would expressly preserve the right of state and local authorities to prosecute violators under state or local law." Id. Further "an employer who willfully violates an OSHA standard that causes serious bodily injury to a worker can be punished by a fine and up to seven years in prison. An employer whose willful violations recklessly endanger human life can be punished by a fine and up to five years in prison." Id.

Senator Metzenbaum notes that OSHA had referred only 42 cases to the Justice Depart-
status quo, it is unlikely that OSHA enforcement efforts and resources will improve, at least in the foreseeable future.168

F. Compliance with the HCS

When OMB disapproved the expanded HCS in October 1987, it suggested the development of “a generic hazard communication program or guidelines suitable for the development of generic programs by the private sector and by States, which could perhaps be certified as meeting the requirements of HCS.”169 In response, OSHA included as an appendix to its proposal non-mandatory compliance guidelines designed to facilitate compliance.170 OSHA also has developed training programs on common workplace hazards which are available on videotape or in person at all OSHA regional and area offices.171 Other resources include the assignment of HCS coordinators in OSHA’s regional offices, on-site consultation programs, and the availability of New Directions grant awards to help industries develop hazard communication materials.172
OSHA's success in ensuring that employers comply with the HCS has been mixed. Under the HCS, employers are required to establish hazard communication programs that transmit information on chemical hazards to workers through container labels, material safety data sheets and training programs. Despite OSHA's efforts to assist employers in complying with the HCS requirements, alleged violations of the HCS have been prevalent. The HCS' requirement that employers develop, implement, and maintain written hazard communication programs was the second most frequently cited OSHA violation by inspectors in fiscal year 1988 and the most frequently cited section under the HCS with a total of 6,342 violations. It appears that employers are either intentionally stalling compliance efforts or they just do not know what to do to create and maintain an acceptable hazard communication program.

Further, in March 1989, OSHA released data covering agency inspections from November 1, 1985 through December 31, 1988. The information collected revealed that employers have been cited for a total of 49,098 violations of the HCS since 1985. The agency has imposed more than $24 million in penalties which has been reduced to slightly more than a half million dollars in post-inspection settlement procedures. According to the OSHA data, the majority of the violations—42,309—were "other than serious," while there were 248 willful violations, 1,472 repeat violations and 6,009 serious violations.

The majority of employers cited were charged with violating four major provisions. Notably, compliance with the HCS was not

173. Id.
175. See Carle, supra note 8, at 586-92.
176. See OSHA Notice Violations, supra note 174.
178. Id.
179. Id.
180. These provisions are:
   1) 29 C.F.R. § 1910.1200(e)(1) (1986), which requires employers to develop, implement, and maintain a written hazard communication program for the workplace;
   2) 29 C.F.R. § 1910.1200(h) (1986), which requires that employers provide workers with new information and training on hazards in their work area when they first begin their jobs, and whenever a new hazard is introduced into the

http://scholarlycommons.law.hofstra.edu/hlelj/vol7/iss2/2
checked during programmed inspections in construction establishments until March 1989. In short, now that the Dole case has been decided by the Supreme Court, all provisions are fully in effect, and employers will be cited if they fail to comply with the three provisions previously disapproved by OMB.

G. The HCS and Anticipated Legislative Reaction

In 1988, Congress began to address concerns about employer compliance with the HCS with respect to the impact of the standard on small businesses. In September 1988, the House Small Business Subcommittee on Exports, Tourism and Special Problems conducted hearings to address the effect of the HCS on small businesses. More recently, in June 1989, Senator Dale Bumpers, chairman of the Senate Committee on Small Business, held hearings on this issue. Representatives of small businesses and trade groups testified that the HCS imposes tremendous paperwork and costs on small businesses. They also stated that many small business employers are not aware of the standard at all, do not have the training to understand it, and do not belong to trade associations that could help them understand it.

In response, OSHA representatives stated that several provisions of the HCS were tailored to small businesses and that small businesses in the manufacturing industry have almost a 52 percent compliance rate, compared to a rate of almost 59 percent for manufacturing businesses of all sizes.
While there has been a call for Congressional action to modify the HCS by small business interests, Senator Bumpers expects that any modifications to the HCS will be handled directly by OSHA and not through legislation.\textsuperscript{189} Both the House and Senate Small Business Committees have requested that the General Accounting Office (hereinafter “GAO”) investigate the effects of the HCS on small business.\textsuperscript{190} The Senate Committee predicts that no substantive action will be taken on the matter until the GAO study is completed, a process that could take up to a year.\textsuperscript{191} At the present time, the committee plans to call for creation of an ombudsman for small businesses, consumer product labeling requirements similar to EPA standards rather than the MSDS, and other modifications similar to those called for by OMB, rather than an outright exemption for small businesses.\textsuperscript{192} OSHA’s position is that, “[w]hile small businesses may at times have difficulty complying with OSHA regulations, the OSH Act is clear that OSHA must use the most protective means feasible to prevent material impairment to employees’ health, even though there are substantial costs associated with compliance.”\textsuperscript{193}

III. NEW YORK RIGHT TO KNOW LAW

A. Background

The New York Right to Know Law (hereinafter “the New York law”) was enacted in 1980 in recognition “that there exists a danger to the health of employees and their families throughout the state because [of] hazardous exposure to toxic substances encountered during the course and scope of employment.”\textsuperscript{194} Indeed, “employees have an inherent right to know about the known and suspected health hazards which may result from working with toxic substances. . . .”\textsuperscript{195} The New York law’s purpose is to “ensure that employees are given information by their employers concerning the nature of toxic substances which they may encounter in the work-

\begin{itemize}
  \item 189. Id.
  \item 190. Id.
  \item 191. Id.
  \item 192. Id.
  \item 193. Id.
  \item 195. Id.
\end{itemize}
place. . . .” Both the Department of Health and the Department of Labor have jurisdiction over toxic substance information in the workplace.197

B. Comparison with the HCS

1. Scope.—The New York law, like the HCS, encompasses all employers.198 However, the term “employer” is not limited under the New York law by any reference to chemical use, distribution or production.199 Rather, “employer” is defined as “any individual, partnership, corporation or association engaged in a business who has employees including the state and its political subdivisions.”200 The New York law thus potentially covers more employers and, hence, offers more employees protection than the HCS.

The New York law covers all substances listed in the National Institute for Occupational Safety and Health registry of toxic effects of chemical substances, or any substance which has yielded positive evidence of acute or chronic health hazards in human, animal or other biological testing.201 More restrictive than the New York law, the HCS allows results of toxicological testing in animal populations only when human epidemiological studies are not available.202

Under the HCS, “hazardous chemicals” are defined as chemicals that are physical or health hazards.203 A “physical hazard” may, for example, be a combustible liquid, a compressed gas or an explosive flammable.204 A “health hazard” is a “chemical for which there is statistically significant evidence . . . that acute or chronic health effects may occur in exposed employees.”205 Unlike the HCS, the New York law does not provide any exemptions for chemicals that meet its definition of a toxic substance.206 Consequently, the

196. N.Y. PUB. HEALTH LAW § 4800 (McKinney 1985).
198. See Feitshans, supra note 12, at 703-07 (comparing provisions of state Right to Know laws and the HCS); see also N.Y. LAB. LAW § 875 (McKinney 1988); N.Y. PUB. HEALTH LAW § 4800 (McKinney 1985).
199. N.Y. LAB. LAW § 875(1) (McKinney 1988); N.Y. PUB. HEALTH LAW § 4801(3) (McKinney 1985).
200. N.Y. LAB. LAW § 875 (McKinney 1988); N.Y. PUB. HEALTH LAW § 4800 (McKinney 1985).
201. N.Y. PUB. HEALTH LAW § 4801(2) (McKinney 1985).
203. 29 C.F.R. § 1910.1200(c) (1986).
204. Id.
205. Id. The term includes chemicals that are carcinogens, reproductive toxins, irritants and corrosives. Id.
206. N.Y. PUB. HEALTH LAW § 4801(2) (McKinney 1985).
New York law is again potentially more protective of employee health than the HCS.

2. Disclosure.—The New York law provides the Department of Health with the authority to implement "outreach programs" as another method to inform employees of their inherent right to information regarding toxic substances. The Department of Health officials are authorized to maintain a supply of information leaflets in public buildings, including union halls, to help ensure that employees are informed of the toxic substance program. In addition, the Department of Health is to distribute periodically, to the print and air media, public service announcements describing the outreach programs. The HCS contains no similar provision for governmental involvement in the dissemination of hazardous chemical information.

Moreover, unlike the HCS, the New York law requires an employer to post signs in the workplace to inform employees of their right to toxic substance information and to describe the toxic effects of these substances, and the circumstances under which these effects are produced. The New York law also contains provisions similar to the HCS for employee education and training. The New York law has an added requirement that the employer maintain medical records for forty years.

a. Right to Strike.—The New York law provides that if an employer does not provide the employee with the requested information within seventy-two hours, the employee is not required to work with the toxic substance until the information is made available. This right is not explicitly guaranteed to employees under the HCS, although OSHA affords them a right to refuse hazardous employment.

207. N.Y. PUB. HEALTH LAW § 4804 (McKinney 1985).
208. N.Y. PUB. HEALTH LAW § 4804(3) (McKinney 1985).
209. Id.
210. Governmental involvement may help minimize some of the disincentives manufacturers have in failing to label certain products and chemicals as "hazardous" and to disclose the health risks associated with those chemicals. See supra text and accompanying notes 65-66. State government agencies act as a check, promoting better disclosure by not relying solely on the professional judgment of the manufacturer as supported by the "performance-oriented" nature of the HCS.
211. N.Y. LAB. LAW § 876(1) (McKinney 1988).
212. N.Y. LAB. LAW § 878 (McKinney 1988).
213. N.Y. LAB. LAW § 879 (McKinney 1988).
215. See 29 U.S.C.A. § 660(c) (West 1985); see also Donovan v. Hahner, Foreman & Harness, Inc., 736 F.2d 1421 (10th Cir. 1984) (holding that the discharge of an employee by reason of his refusal to use equipment he believed was both defective and hazardous violated subsection 3 of section 660).
In comparison, OSHA prohibits an employer from discharging or discriminating against any employee who exercises "any right protected by" the OSH Act.216 The Secretary of Labor has promulgated a regulation providing an employee with the right to choose not to perform an assigned task because of a reasonable apprehension of death or serious injury coupled with a belief that no less drastic alternative is available.217 The Supreme Court has held this regulation to be a valid exercise of the Secretary's authority under the OSH Act.218

The New York law also explicitly states that an employer shall not discipline or discharge an employee exercising any of the rights granted to him.219 These rights include the right to request toxic substance information that the employer is required to provide in the employee education and training program,220 the right to strike, since the employee may not be required to work with such substances,221 and the right to obtain the employer's record of the name of every employee who handles or uses substances listed in 29 C.F.R. § 1910.1200, subparagraph z.222 Indeed, a request by an employer that an employee waive any rights under the New York law as a condition of employment constitutes an act of discrimination.223

b. Trade Secrets.—Like the HCS, the New York law provides broad protection of trade secrets. However, the procedural mechanism to protect or to disclose trade secrets is somewhat differ-

216. Id. This is consistent with the policies underlying the National Labor Relations Act, 29 U.S.C.A. §§ 185-188 (West 1985). See, e.g., NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (stating that an employees' refusal to work in an area subject to poor working conditions and extremely cold temperatures is a protected activity); Akron Paint & Varnish Co., 293 NLRB 97 (1989) (holding that an employer had violated section 8(a)(3) for discharging a union steward for his efforts, as a union spokesperson, to have employer improve safety conditions in work place); Cargill Poultry Co., 292 NLRB 72 (1989) (holding that employer violated section 8(a)(1) by suspending employees for walking out to protest low temperatures in their work area); TLT-Babcock, Inc., 293 NLRB 23 (1989) (holding that an employer violated sections 8(a)(1) and 8(a)(3) by laying off two employees for their role in preparing letters to employer expressing the workers' dissatisfaction with working conditions and stating the possibility of their turning to unionization if the employer failed adequately to address their concerns).


218. Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980) (holding that the regulation was promulgated by the Secretary of Labor in the valid exercise of his authority under the Act and conforms to the Act's fundamental objective of preventing occupational deaths and serious injuries).


220. N.Y. LAB. LAW § 878 (McKinney 1988).

221. N.Y. LAB. LAW § 876(2) (McKinney 1988).

222. N.Y. LAB. LAW § 879 (McKinney 1988).

223. N.Y. LAB. LAW § 880(7) (McKinney 1988).
ent. A New York employer who considers the identity of a toxic substance to be a protected trade secret may register the information as a secret with the Commissioner of Health (hereinafter the "Commissioner"), provided the information is either already registered as a trade secret pursuant to federal law, or the information, though unregistered, is related to a proprietary process that if disclosed, would compromise his competitive position.\footnote{224} Hence, the procedure in New York is executed through the Commissioner and not solely through the employer.

The Commissioner is not allowed to release such information unless he notifies the employer first and gives him thirty days to respond.\footnote{225} The employer is not required to divulge the specific identity of the substance to the employee, only its toxic effects.\footnote{226} Any release by the Commissioner of information disclosing a trade secret must be made pursuant to trade secret law or the Freedom of Information Act.\footnote{227} Notably, the New York law contains no provisions for the release of the specific chemical identity, either in an emergency or non-emergency situation. In contrast, the HCS requires the disclosure of the chemical identity under limited circumstances where the confidentiality of the trade secret is maintained.\footnote{228}

The New York Labor Law also affords employers strong protection against disclosure. Section 877(1) states that "[w]hen a manufacturer, producer, formulator or employer considers the identity of or other information concerning a toxic chemical substance to be a protectable trade secret or a proprietary process whose disclosure would compromise his competitive advantage[,] . . . he may register this information as secret with the commissioner of health."\footnote{229} Thus, the similar language of the New York Labor law and the New York Public Health Law reinforces protection afforded to employers.

The Department of Health (hereinafter the "Department") has also issued administrative regulations concerning trade secrets.\footnote{230} The Department cannot disclose any information likely to jeopardize any trade secret registered with it unless the Department determines that "disclosure is necessary to protect against an unreasonable risk of injury to the health of an employee or of the public."\footnote{231} Similar to

\begin{footnotes}
\footnote{224. N.Y. PUB. HEALTH LAW § 4805(1) (McKinney 1985).}
\footnote{225. N.Y. PUB. HEALTH LAW § 4805(2) (McKinney 1985).}
\footnote{226. N.Y. PUB. HEALTH LAW § 4805(3) (McKinney 1985).}
\footnote{227. N.Y. PUB. HEALTH LAW § 4805(2) (McKinney 1985).}
\footnote{228. See supra text and accompanying notes 137-43.}
\footnote{229. N.Y. LAB. LAW § 877(1) (McKinney 1988).}
\footnote{230. N.Y. COMP. CODES R. & REGS. tit. 10, § 72 (1988).}
\footnote{231. N.Y. COMP. CODES R. & REGS. tit. 10, § 72.4 (1988).}
\end{footnotes}
the New York Public Health Law, the Department may not release any information disclosing a trade secret or proprietary process unless the registrant is first notified of the intent to disclose.\2\3 The registrant must give written consent to release the information; even then, the Department may not release such information until thirty days after the registrant is so notified.\2\3

3. Penalties.—To enforce the mandates of the New York law, the New York Labor Law has both civil and criminal penalties for the violation of its provisions.\2\4 The ceiling in civil penalties is $10,000, exclusive of other damages for which an employer may be liable under other provisions of law.\2\5 A willful and intentional violation constitutes a misdemeanor.\2\6 A first offense conviction carries a maximum fine of $500, or imprisonment for a maximum of thirty days, or both a fine and imprisonment.\2\7

In addition to civil and criminal penalties under the New York Labor Law, New York state prosecutors have brought criminal charges against corporations under the penal laws for failing to prevent exposure of employees to hazardous substances and for concealing health risks from employees.\2\8 Under New York Penal Law, a

\2\233. Id.

In addition, state prosecution for corporate criminal conduct for actions in exposing employees to hazardous chemicals is on the rise. See Magnuson & Leviton, Policy Considerations in Corporate Criminal Prosecutions After People v. Film Recovery Systems, Inc., 62 Notre Dame L. Rev. 913 (1987).

Whether the OSH Act preempts state criminal prosecutions has been much debated, and is still unresolved. Id. at 926-28 & 938 n.119; see Getting Away With Murder, supra note 127; see also Kendall, Criminal Prosecutions at Odds with the OSH Act?, Occupational Hazards, Oct. 1986, at 62-63; Kendall, Criminal Charges on the Rise for Workplace Injuries, Deaths, Occupational Hazards, Dec. 1985, at 49; McClory, Murder on the Shop Floor, Across the Board, June 1986, at 82; Plant Executives for Mercury Poisoning, AFL-CIO News, Oct. 25, 1986, at 6 (discussing the mercury poisoning of a worker in Pymm Thermometer Co., and noting that a set of facts was uncovered that bears a striking resemblance to those in Film Recovery Systems, where "[a]gency failure, a pattern of deception by the employer, and ignorance of the workforce led to permanent brain damage to an employee."). See Magnuson & Leviton, supra, at 938 n.119.

\2\235. Although the New York law contains no overall agency enforcement scheme, and no regulations have been issued by the Department of Labor or the Department of Health to fill that gap, the Attorney General is authorized to enforce the mandates of section 882(1), without prior investigation and determination by the Department of Labor. State v. Consolidated Edison Co., 133 Misc. 2d 57, 59, 506 N.Y.S.2d 819, 821 (Sup. Ct. 1986).

\2\236. N.Y. Lab. Law § 882(1) (McKinney 1988).
\2\237. Id.

\2\238. People v. Pymm, 151 A.D.2d 133, 546 N.Y.S.2d 871, 873 (App. Div. 1989); see N.Y. Penal Law §§ 20.20, 20.25, 105.05, 175.10, 120.20 (McKinney 1987); see also People v.
corporation can be criminally liable when it fails to carry out a specific duty required by law.\textsuperscript{239} In addition, the individual who engages in the conduct for which the corporation can be held liable may also be held criminally liable to the same extent as if the conduct were carried out on his own behalf.\textsuperscript{240} These state enforcement alternatives could prove more effective and damaging to New York employers than OSHA enforcement. Indeed, the lack of administrative enforcement of workplace safety standards, on the state and federal level, is the major factor that led prosecutors to utilize the state criminal laws to protect employees and the public from the misconduct of corporations and their officers.

IV. PREEMPTION

A. The Doctrine

To understand the impact of the revised HCS on the New York Right to Know law, it is necessary to understand the law of federal preemption in general, and how these specific federal and state statutes both support and undercut one another.

In broad fashion, the Supremacy Clause of the United States Constitution\textsuperscript{241} has been interpreted to mean that when a state statute conflicts with a federal statute, the state statute must give way.\textsuperscript{242} In addition, state laws can be preempted by federal regulations as well as by federal statutes.\textsuperscript{243}

B. Standards

Congress may preempt state law either explicitly or implicitly through a statute's structure and purpose.\textsuperscript{244} Explicit preemption occurs when the express language of the federal law conflicts with state

\begin{footnotesize}
\textsuperscript{239} Harris, 74 Misc. 353, 363 (Ct. of Gen. Sess., N.Y. City 1911) (where an employer was indicted for manslaughter after 100 workers died while trapped in his locked building).

\textsuperscript{240} N.Y. PENAL LAW § 20.20(2)(9) (McKinney 1987).

\textsuperscript{241} U.S. CONST. art. VI, cl. 2.

\textsuperscript{242} Maryland v. Louisiana, 451 U.S. 725, 746-47 (1981) (where the plaintiffs argue that the First-Use Tax violates the Supremacy Clause because it interferes with federal regulation of the transportation and sale of gas in interstate commerce, and the Court concurred).

\textsuperscript{243} Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941) (where the Court held that the power to restrict, limit, regulate and register aliens as a distinct group is not a perpetual and equal concurrent power of the state and the nation, but that the power of the state is subordinate to supreme national power).

\textsuperscript{244} Jones v. Rath Packing Co., 430 U.S. 519 (1977) (wherein the Court held that the Constitution does not allow a state law to prevent the implementation of the full purpose and objectives of Congress).
\end{footnotesize}
A conflict can occur in one of two ways: the state law directly contradicts the language of the federal law, or the federal law includes a state law preemptive provision.\textsuperscript{246} Congress's intent to preempt may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.\textsuperscript{247} However, comprehensiveness alone is insufficient to justify preemption.\textsuperscript{248} Preemption of a whole field will be inferred where the field is one in which federal interests are so strong that they presumably preclude the enforcement of state laws on that issue.\textsuperscript{249} Where Congress has not completely displaced state regulation, state law is nullified to the extent that it actually conflicts with federal law.\textsuperscript{250} Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility,"\textsuperscript{251} or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{252}

\section{The HCS}

In \textit{United Steelworkers of America v. Auchter},\textsuperscript{253} New York's petition for review of the HCS in the Second Circuit was consolidated in one case with the petitions of Massachusetts, Illinois and several interest groups.\textsuperscript{254} Before this case, the HCS was restricted to manufacturing employers.\textsuperscript{255} The Third Circuit Court of Appeals

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\bibitem{247} Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (implementing a test that turns on whether the action over which the State claims to have the power to act is in any way regulated by the Federal Act).
\bibitem{248} Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48, 58 (2d Cir. 1988) (holding that the OSH Act and OSHA's Revised Construction Standard allows states to regulate when the purpose is to protect the public, not specific occupational hazards).
\bibitem{249} Pharmaceutical Society of New York v. Lefkowitz, 586 F.2d 953, 958 (2d Cir. 1977).
\bibitem{250} \textit{Id}. at 53.
\bibitem{251} Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (stating that section 792 of the California Agricultural Code was not superseded by the Supremacy Clause because there was no evidence of Congressional preemption in the field, and that there was no conflict between the state and the federal regulations which would not allow them to stand together).
\bibitem{252} \textit{Hines}, 312 U.S. at 67.
\bibitem{253} 763 F.2d 728 (3d Cir. 1985).
\bibitem{254} \textit{Id}. at 736.
\bibitem{255} \textit{Id}. at 731. The panel of judges consisted of Third Circuit Judge Gibbons, Chief Judge Fisher of the United States District Court for the District of New Jersey, and District
\end{thebibliography}
held that the HCS preempted state hazard communication rules as they applied to employees in the manufacturing sector.\footnote{266}

However, because the scope of the HCS has been expanded to include “all employees,”\footnote{287} the areas in which state laws will be preempted have also been expanded.\footnote{288} Indeed, the HCS contains an express preemptive provision. It states that the HCS is “intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state . . . pertaining to the subject.”\footnote{259}

According to the OSH Act, a state may assert jurisdiction over “any occupational safety or health issue with respect to which no standard is in effect . . . ”\footnote{260} On the other hand, where OSHA has issued a standard, the states are preempted from asserting jurisdiction over the issue addressed by that standard, unless a federally approved state plan is in effect.\footnote{261}

In addition, the Third Circuit has held the HCS to be a standard and not a regulation.\footnote{262} The characterization of the HCS as a standard or regulation affects its preemptive effect on state laws.\footnote{263} For example, the preemptive effect of an OSHA regulation is not explicitly dealt with in the OSH Act.\footnote{264} Thus, implied preemption would have to be employed.\footnote{265} As noted above, however, the effect of a standard is the preemption of state law until federal approval is obtained.\footnote{266}

The Third Circuit Court of Appeals based its characterization of the HCS as a standard on the Fifth Circuit’s distinction between

\footnote{254} Judge Kelly of the United States District Court for the Eastern District of Pennsylvania.

\footnote{256} Id. at 743.

\footnote{257} See supra note 37 and accompanying text (discussing the promulgation on August 24, 1987 of the HCS, making it applicable to all employers inside and outside the manufacturing sector).

\footnote{258} For literature discussing the preemption issue, see supra, note 12.

\footnote{259} 29 C.F.R. § 1426.59(a)(2) (1988).


\footnote{262} \textit{Auchter}, 763 F.2d at 735; see also 29 U.S.C.A. § 655 (West 1985). \textit{But see Employee Right to Know}, supra note 5, at 654-61 (1985) (discussing that the HCS is not a standard within the meaning of the OSH Act and thus cannot have preemptive effect).

\footnote{263} \textit{Auchter}, 763 F.2d at 733.

\footnote{264} Id. at 734.

\footnote{265} Id.

an OSHA standard and regulation.\textsuperscript{267} A standard "reasonably purports to correct a particular 'significant risk'" while a regulation is a "[mere] enforcement or detection procedure designed to further the goals of the [OSH] Act generally."\textsuperscript{268} The Third Circuit Court of Appeals found that inadequate communication is itself a hazard which the HCS can mitigate.\textsuperscript{269} The risk of harm from chemicals in the workplace can be diminished by direct warnings to employers.\textsuperscript{270} Finally, the Third Circuit Court of Appeals afforded OSHA "some degree of deference" regarding OSHA's interpretation of the OSH Act.\textsuperscript{271}

In the Summary and Explanation of the Final Standard Section of the Revised Regulations, OSHA states that:

\[\text{[T]}\text{he express preemption provisions of the [OSH] Act apply to all state or local laws which relate to an issue covered by a Federal standard, without regard to whether the state law would conflict with, complement, or supplement the Federal standard, and without regard to whether the state law appears to be 'at least as effective as' the Federal standard.}\textsuperscript{272}

The "at least as effective" test is employed by OSHA in determining whether a state plan should be approved.\textsuperscript{273} Specifically, the Secretary of Labor must approve a state plan if its standards, in her judgment, will be at least as effective in providing safe and healthful employment as the HCS.\textsuperscript{274} The "at least as effective" test thus applies

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only to state standards adopted under an approved state plan.\textsuperscript{275} The exclusive alternative to preemption is federal approval of state plans.\textsuperscript{276} According to the New York State Department of Health, Toxic Substance Division and the New York State Department of Labor, New York has not and does not intend to submit its standard to OSHA.\textsuperscript{277}

The revised HCS defines “an issue covered by a Federal standard” as any of the following: hazard communication, evaluation of the potential hazards of chemicals, written hazard communication programs (including lists of hazardous chemicals present), labeling of containers of chemicals, preparation and distribution of MSDSs, and development and implementation of employee training programs.\textsuperscript{278} The HCS is comprehensive.


While the OSH Act expressly preempts state laws pertaining to occupational safety or health, it does not preempt state laws with other safety or health purposes not pertaining to workplaces.\textsuperscript{279} In \textit{New Jersey Chamber of Commerce v. Hughey},\textsuperscript{280} the Third Circuit found that the provisions of New Jersey’s Right to Know statute which pertained primarily to community or environmental safety and health were not expressly preempted by the OSH Act.\textsuperscript{281} The New Jersey law’s purpose went beyond hazardous chemical communication in the workplace. That law perceived a “growing threat to the public health” and established a “comprehensive program for the disclosure of information about hazardous substances in the work-

\begin{footnotes}
\item[275] \textit{Id.}; Final Rule, 52 Fed. Reg. at 31860.
\item[277] Interviews with a research scientist at the New York State Department of Health, Toxic Substance Division, and the Attorney General’s office in New York City (February 20, 1990). The position taken by these state agencies, including the Department of Labor, is that the New York Right to Know Law is preempted by the HCS as applied to the private sector only. Only provisions dealing with recordkeeping requirements for employees exposed to Subpart Z substances, N.Y. COMP. CODES R. & REGS. tit. 12, § 820.5 (1989), and other public health law provisions providing for public access are not preempted. New York has adopted a federally-approved state plan for public sector workplaces.
\item[278] 29 C.F.R. at § 1926.59(a)(2); see also Final Rule, 52 Fed.Reg. at 31861.
\item[279] See \textit{OSHA Preemption}, supra note 12.
\item[280] 774 F.2d 587 (3d Cir. 1985).
\item[281] \textit{Id.} at 593.
\end{footnotes}
Hazard Communication in the Workplace

...place and the community..."\(^{282}\)

In *Hughey* the appellate court remanded the case to the district court to consider whether the universal labeling provision of the New Jersey state law was preempted by the HCS.\(^{283}\) In February 1989, the Third Circuit affirmed the lower court's decision that the Act's universal labeling requirement, section 14(b), was intended to provide information to police, firefighters, and the public, and was therefore not preempted by the HCS.\(^{284}\)

Similarly, in *Environmental Encapsulating Corp. v. City of New York*,\(^{285}\) the Second Circuit found that OSHA's Revised Construction Standard\(^{286}\) only expressly preempted certain provisions of New York City's regulation requiring a certification program for employees who handle asbestos.\(^{287}\) Specifically, it preempted those provisions which had only one purpose—protection of employees.\(^{288}\) It did not preempt those provisions which had a broader purpose of protecting the community at large.\(^{289}\)

Significantly, the *Environmental* court held that OSHA does not expressly preempt state law where the law has "a legitimate and substantial purpose apart from [protecting employees]."\(^{290}\) Thus, under *Environmental Encapsulating Corp.*,\(^{291}\) to avoid preemption it is not necessary to demonstrate a primary purpose which differs from the OSH Act's purpose; it is only necessary to demonstrate a separate "legitimate and substantial" purpose.\(^{292}\)

Applying the same reasoning, the HCS does not preempt application of state criminal laws to protect employees from exposure to hazardous substances. The court in *Pymm* made clear that the


283. New Jersey State Chamber of Commerce v. Hughey, 774 F.2d at 598.


285. 855 F.2d 48 (2d Cir. 1988).


287. *Environmental Encapsulating Corp.*, 855 F.2d at 55.

288. Id.

289. Id. at 60.

290. Id. at 57.

291. Id.

292. Id.
HCS's "orientation is prophylactic in nature," and was not designed to impose penalties after injuries occurred. Thus, at least in New York, state criminal laws may be used to enforce federal and state health and safety laws against corporate employers.

As to the New York law provisions, it appears that they are concerned primarily with hazard communication in the workplace. As the New York Public Health Law states: "[i]t is the purpose of this article to ensure that employees are given information by their employers concerning the nature of toxic substances which they may encounter in the workplace. . . ." "Workplace" is defined as "any location away from the home . . . where any employee performs any work-related duty in the course of his employment." However, the New York Labor Law does contemplate benefits beyond worker safety in its Declaration of Purpose: "[i]t is further found and declared that the workplace often provides an early warning mechanism for the rest of the environment." Thus, it is still not entirely clear whether the law contains provisions that are severable as applying beyond the employment context and are not preempted by the HCS.

The New York law's definition of toxic substances is more inclusive than the HCS's because it does not provide for any exemptions. For example, the HCS does not apply to hazardous waste.


294. The express language of section 18(b) extends only to the development and enforcement of state standards, not to enforcement of generally applicable state criminal laws. . . . There is no indication that Congress intended the term 'standards' to include general criminal laws or for section 18 to preempt or require federal approval of state enforcement of general criminal laws.


296. N.Y. PUB. HEALTH LAW § 4800 (McKinney 1985).

297. N.Y. LAB. LAW § 875(3) (McKinney 1988); N.Y. PUB. HEALTH LAW § 4801(1) (McKinney 1985).


In addition, the New York law covers any substance listed in the NIOSH registry, while the HCS only covers carcinogens listed by NIOSH. The Commissioner of Health is empowered to make public any information concerning the toxic effects of substances found in the course of employment. Thus, it can be argued that the New York law encompasses a field (i.e. community health) that the HCS does not.

Under Environmental Encapsulating Corp., the provisions of the New York law that have a substantial purpose other than employee protection would probably not be expressly preempted. The difficulty, however, would be in demonstrating that the community purpose under the New York law is substantial, and not merely incidental to the purpose of protecting employees.

With regard to the provisions of the New York law which are arguably not expressly preempted, it is possible that they are impliedly preempted. To be impliedly preempted, the New York law must either stand as an obstacle to the objectives of Congress or it must be impossible to comply with the New York law and the HCS. "[T]he fact that a state law provision increases the regulatory burden on employers does not make the state law provision contrary to congressional intent." To preempt a section, it must be clear that Congress would have intended to preempt such a provision. Concerning the promulgation of health and safety regulations, courts "should hesitate to invalidate such an exercise of traditional state police powers." A presumption exists that unless Congress so states, it does not intend to preempt state law. "Inference and implication will only rarely lead to the conclusion, that it was the 'clear and manifest purpose' of the federal government to supersede the states' historic power to regulate health and safety." In Environmental Encapsulating Corp., the Second Circuit Court of Appeals found that those sections of the New York City

300. N.Y. LAB. LAW § 875(2) (McKinney 1988); 29 C.F.R. § 1910.1200(d)(3), (4) (1986); cf. PUB. HEALTH LAW § 4801(2) (McKinney 1985).
301. N.Y. PUB. HEALTH LAW § 4802(2) (McKinney 1985).
302. See Environmental Encapsulating Corp., 855 F.2d at 48.
303. See supra text and accompanying notes 243-45.
304. Hughey, 774 F.2d at 593.
307. Environmental Encapsulating Corp., 855 F.2d at 58 (citation omitted).
regulations that were not expressly preempted were also not impliedly preempted. In this regard, the court held that OSHA’s comprehensiveness is not itself sufficient to justify preemption. Much more is required to overcome the presumption against implied preemption.

In determining whether OSHA preempts the New York law, a court is likely to analyze each section separately as the Environmental court did. Thus, although it may theoretically be safe for employers to comply only with those provisions of the New York law which are intended to protect the public at large, since this purpose is difficult to discern, and since a court’s action in this unsettled area of law is unpredictable, it is safest for New York employers to continue to comply with the New York law in its entirety.

V. Conclusion

The effective communication of hazards in the workplace to employees is the goal of OSHA’s Hazard Communication Standard. It is also a primary goal of New York’s Right to Know legislation. After years of complex litigation over the breadth of coverage of the HCS, and with the increasing interest of prosecutors, at the state and federal levels, in compelling corporate compliance with laws regulating hazardous substances in the environment, a new era may finally be dawning where compliance with the federal and state hazard communication laws replaces ignorance or disregard of the laws and combative litigation over issues of coverage and preemption.

With the Supreme Court’s recent decision in Dole v. United Steelworkers of America putting to rest some of the technical objections to broad enforcement of the HCS, it is likely that there will soon be developing a “common law of industry” where compliance with the HCS, plus compliance with applicable state statutes, becomes the norm rather than the exception throughout the nation.

308. Id.
309. See id.
310. Id. at 58.
311. Id. at 48.
313. N.Y. LAB. LAW § 875 (McKinney 1988); N.Y. PUB. HEALTH LAW § 4800 (McKinney 1985).
314. Dole v. United Steelworkers of Am., 110 S. Ct. 929 (1990); see supra note 52 (discussing the case in more detail).