



1-1-1987

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## Recommended Citation

Nina G. Stillman, *Expansion of Occupational Safety and Health Law*, 62 Notre Dame L. Rev. 969 (1987).

Available at: <http://scholarship.law.nd.edu/ndlr/vol62/iss5/7>

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# The Expansion of Occupational Safety and Health Law

Nina G. Stillman and John R. Wheeler\*

## I. Introduction

The Industrial Revolution moved the worker of the nineteenth century out of the relative safety of his cottage into large and often unsafe factories where worker health and safety were not a primary focus of either the new industrial pioneers or of society as a whole.<sup>1</sup> The laissez faire economy ultimately gave rise to reform movements which addressed the societal needs that inevitably followed from this new progress. A part of these reform movements was directed to the worker and, as a result, various programs began to deal with the consequences of the appalling number of worker accidents and injuries.<sup>2</sup> Although Germany initiated reforms to safeguard its workers in 1884<sup>3</sup> and England developed a worker's compensation program in 1897,<sup>4</sup> it was not until the first two decades of this century that the various states began to enact worker's compensation statutes<sup>5</sup> and protective legislation.<sup>6</sup> Even then, there were large gaps in coverage of occupations and illnesses and wide variations from state to state.

Nevertheless, worker's compensation was, until the late 1960s, the preeminent occupational health legislation in the United States. In the last two decades, however, a number of forces have expanded occupational health law. This expansion is due to changing social values and perceptions. There were, for example, perceived increases in occupational injuries and compensation costs which indicated a need for a prophylactic approach to employee safety and health.<sup>7</sup> Society has also become more aware of health and healthy environments—an awareness heightened daily by tremendous media attention. Of similar importance is the explosion of occupational disease cases and the often astronomical awards these cases sometimes engender, the mass occupational illness cases arising from the use of substances such as asbestos and dioxin and accidents such as the incident in Bhopal, India. In cases such as these,

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1 OCCUPATIONAL HEALTH LAW 1 (La Dou ed. 1981).

2 *Id.*

3 *Id.*

4 *Id.*

5 Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641 n.1 (1983).

6 Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L. REV. 641, 654 (1981); Note, *supra* note 5, at 1644.

7 Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (1982).

imaginative plaintiffs' attorneys have developed new legal theories to circumvent the worker's compensation exclusive remedy doctrine.<sup>8</sup> This has helped create the social phenomenon called the "toxic tort."<sup>9</sup>

Another factor contributing to the dramatic growth of occupational health law is the changing nature of the work force. In response to new social values (reflected in part in our equal employment opportunity legislation) the number of female, handicapped and older workers has significantly increased.<sup>10</sup> The work force today is also far more mobile than in the past. Employees frequently move from employer to employer and state to state rather than remain with the same employer in the same town for their entire working life.

Finally, organized labor has contributed significantly to the growth of occupational safety and health law through its increased focus on employee health and safety, and its use of that focus in organizing workers, negotiating with employers, and pursuing grievance procedures aimed at furthering the interests of unions and their members.<sup>11</sup>

Advocates of safe and healthy workplaces have generally taken three approaches in pursuing their goals. The prophylactic approach has given birth to the Occupational Safety and Health Act of 1970 ("OSH Act"),<sup>12</sup> it was a consideration in the development of the Toxic Substances Control Act of 1977 ("TSCA")<sup>13</sup> and it has affected the creative application of our labor and employment laws to health and safety issues. The remedial approach historically has been synonymous with worker's compensation statutes, but more recently has encompassed tort litigation aimed at the suppliers of materials to the workplace, and in some circumstances at the immediate employer as well. Finally, the punitive approach, which in its milder forms has involved regulatory monetary penalties, now embraces criminal sanctions to deter employers from creating (or not abating) undue risks to life and health.<sup>14</sup>

State and federal legislatures, regulatory agencies, and the courts have responded to emerging social values by expanding occupational safety and health law. They place the worth of the individual, his life and his health above the worth of the products he manufactures and the processes with which he labors. As the industrial revolution waned, new human rights arose, and within the past two decades the concept of a "right" to a safe and healthy workplace has driven the legislative and regulatory machinery. Because, to a significant degree, the expansion of occupational health law is due to lawmakers' reaction to perceived deficiencies in worker's compensation programs, any discussion of the

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8 See notes 18-20 *infra* and accompanying text.

9 See notes 181-208 *infra* and accompanying text.

10 See notes 103-36 *infra* and accompanying text; see also Hoyman & Stallworth, *Suit Filing By Women: An Empirical Analysis*, 62 NOTRE DAME L. REV. 61, 69-72 (1986).

11 See notes 137-180 *infra* and accompanying text.

12 29 U.S.C. §§ 651-678 (1982).

13 15 U.S.C. §§ 2601-2629 (1982).

14 Because another article in this symposium will address the new application of criminal law to occupational health issues, the authors have deferred discussion of this approach to that article. See Magnuson & Leviton, *Policy Considerations in Corporate Criminal Prosecutions After People v. Film Recovery Systems, Inc.*, 62 NOTRE DAME L. REV. 913 (1987).

“new” law of employee health must begin with an overview of the aspects of worker’s compensation programs that have led to today’s statutes, rules and case law.

## II. Worker’s Compensation

Prior to the enactment of state worker’s compensation statutes, injured employees were entitled only to general damage recovery predicated on employer fault.<sup>15</sup> Moreover, recovery was uncertain at best due to a variety of employer defenses such as contributory negligence, the fellow servant doctrine and the assumption of risk principle.<sup>16</sup> Even if an employee was successful, it could take years for his case to work its way through the state court system and the litigation costs might consume any award.

The worker’s compensation system was developed as an alternative to tort litigation which was previously the only avenue available to injured workers seeking recompense from their employers. The system is predicated on a no fault principle and is designed to provide an adequate and efficient remedy to relieve the economic and social consequences arising from employment related injury and illness. One court described worker’s compensation as:

a great compromise between employers and employe[es]. Both had suffered under the old system; the employers by heavy judgments of which half was opposing lawyers’ booty, the workmen through the defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability, was willing to pay on some claims in the future, where in the past there had been no liability at all. The servant was willing, not only to give up trial by jury, but to accept far less than he had often won in court; provided he was sure to get a small sum without having to fight for it.<sup>17</sup>

Because worker’s compensation is predominantly a function of state law, there are inevitable variations among the many compensation programs throughout the United States. Nevertheless, certain elements are common to all worker’s compensation programs. These are:

- Compulsory application of the worker’s compensation principle to certain specific employments;
- Liability based solely on the work connection and not on fault;
- Benefits according to a prescribed schedule for injury or death;
- Rate of compensation keyed to the earning power of the employee;
- Provision for exclusive employer liability under the program;
- Compulsory insurance for or proof of financial responsibility by the employer; and,
- Administration of the program outside the court system through agency or commission proceedings.

The exclusive remedy doctrine is at the heart of worker’s compensation systems. Under this doctrine, the schedule of benefits in a worker’s

<sup>15</sup> PROSSER AND KEETON ON TORTS § 3, at 568-76 (5th ed. 1984).

<sup>16</sup> *Id.*

<sup>17</sup> *Stertz v. Industrial Ins. Comm’n*, 91 Wash. 588, 590, 158 P. 256, 258 (1916).

compensation statute is the *sole* and *exclusive* remedy of an employee against his employer and certain others such as coworkers and the employer's insurer.<sup>18</sup> In other words, if an employee receives a work related injury, his exclusive remedy will be the benefits scheduled under the applicable worker's compensation program. This is true even if the injured employee never applied for worker's compensation benefits or was time barred from doing so.<sup>19</sup>

Worker's compensation has functioned effectively when injury is traumatic. However, critics claim that while the requisite nexus between the injury and the work which is easily established in the case of the traumatic injury (such as the loss of a finger or death resulting from being crushed by a falling object) it is not as easily established when chronic illness or disease is alleged to result from occupational factors. These critics argue that long latency periods between exposure and symptoms often increase the employees' burden in establishing work relatedness or meeting some state worker's compensation statutes of limitation. They further argue that the potential for synergistic effects from multiple exposures which may be both occupational and nonoccupational further complicates a compensation board's resolution of the questions of liability and damages (consider, for example, the case of a miner who smokes three packs of cigarettes a day). Critics also argue that the mobility of the work force further complicates the worker's burden of proof because he may not be able to identify the specific exposure(s) and thus employer(s) responsible for the illness or disease. This is particularly true in view of long latency periods between exposure and symptoms of chronic diseases. Some critics additionally maintain that even state of the art toxicology and epidemiology studies of chemicals and workplaces are inadequate, thereby complicating an already burdensome situation for employees with alleged occupational disease; the proof problems engendered by lack of exhaustive testing, however, exist equally for other alternatives to compensation.<sup>20</sup>

18 See, e.g., ILL. ANN. STAT. ch. 48, para. 138.5(a) (Smith-Hurd 1986) (emphasis added):

*No common law or statutory right to recover damages from the employer, his insurer, his broker or any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees or any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act, to anyone wholly or partially dependent upon him, the legal representative of his estate, or anyone otherwise entitled to recover damages for such injury.*

However, a number of states provide statutory immunity to the employer only. See 2A A. LARSON, THE LAW OF WORKMAN'S COMPENSATION § 72.10 (1982).

19 Sedore v. Sayre, 119 N.Y.S. 2d 204 (1953). See also Keller v. Dravo Corp., 441 F.2d 1239 (5th Cir. 1971), cert. denied, 404 U.S. 1017 (1972); Woodell v. Washington Steel Corp., 269 F. Supp. 958 (W.D. Pa. 1967); Campbell v. Waggoner, 235 Ark. 374, 360 S.W.2d 124 (1962); Roberts v. Epicure Foods Co., 330 S.W.2d 837 (Mo. 1960); Kane v. Durotest Corp., 37 N.J. 552, 182 A.2d 559 (1962); Rizio v. Globe Trucking Co., 58 N.J. Super. 440, 156 A.2d 481 (1959); Durso v. Modern Biscuit Corp., 11 A.D.2d 1036, 205 N.Y.S.2d 923 (1960); D'Anofrio v. Hatten, 25 Misc. 2d 346, 206 N.Y.S.2d 494 (1960); Brinker v. City of Greensburg, 409 Pa. 110, 185 A.2d 593 (1962).

20 Because the interface between scientific evidence and legal causation is potentially present in every legal proceeding in which causation of a chronic illness is at issue, it deserves particular attention. As noted above, one of the catalysts for the expansion of occupational safety and health law is our society's increasing awareness of health and healthy environments. This awareness has spawned

All states now provide general compensation coverage for occupational diseases. For the most part, an occupational disease means "any disease arising out of exposure to harmful conditions of employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally."<sup>21</sup> Variations do occur, however, from state to state. For example, the concept of compensable occupational disease varies from the following statutory definition:

In this Act the term "occupational disease" means a disease arising out of and in the course of the employment *or which has become aggravated* and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public;<sup>22</sup>

to a list of specific diseases with a final catchall category affording coverage for "any occupational diseases" without further definition.<sup>23</sup>

In some states, there is no recovery for partial disability, *i.e.*, only total disability and death are compensable.<sup>24</sup> In other states, the converse is true; thus, in these states, if benefits are paid for partial disability, no additional benefits will be permitted when further disability arises as a chronic disease (such as asbestosis or byssinosis).<sup>25</sup> In still other states disability must be manifested in a limited period from the date of exposure<sup>26</sup> or there must be a minimum period of exposure before recovery is permitted.<sup>27</sup> Some worker's compensation statutes place upper limits on compensable medical costs which workers argue are unrealistically low for prolonged illness due to occupational disease.<sup>28</sup> Although variations among the states are inevitable with respect to matters traditionally within the purview of state law, it has been, in part, the variety in com-

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regulations requiring health-effects testing which, along with voluntary industry testing programs, have led to increased testing of chemical substances for chronic health effects in laboratory animals. That testing is frequently performed with doses of chemicals that far exceed (*e.g.*, by 100 to 100,000 times) exposures that humans experience in the environment or in the workplace. Our ability to test at relatively huge doses, to detect a chronic effect in animals exposed at those doses (which effect can in some circumstances be due not to a direct effect of the chemical but to stress-related loss of resistance to disease) and our increasing ability to detect smaller and smaller amounts of those chemicals in the environment, including the workplace, has led to a scientific/legal dilemma. Neither the worker's compensation system, the tort system nor any other compensation system was explicitly designed to handle either uncertain scientific interpretation of laboratory test results "from mouse to man," or unknown (and possibly nil) effects of minimal human exposure.

21 1B A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 41.10 (1985).

22 ILL. ANN. STAT. ch. 48, para. 172.36(d) (Smith-Hurd 1986) (emphasis added).

23 *See, e.g.*, N.Y. WORK. COMP. LAW § 15 (McKinney 1965 & Supp. 1987); OHIO REV. CODE ANN. § 4123 (Anderson 1980).

24 *Holtz v. Nevada Indus. Comm'n*, 94 Nev. 257, 578 P.2d 752 (1978); *Buckeye Int'l, Inc. v. Industrial Comm'n*, 70 Ohio St. 2d 200, 436 N.E.2d 553 (1982).

25 Comment, *Relief for Asbestos Victims: A Legislative Analysis*, 20 HARV. J. ON LEGIS. 179, 183 (1983).

26 *See, e.g.*, *Graver v. Peter Lametti Constr. Co.*, 293 Minn. 24, 197 N.W.2d 443 (1972) (Disability did not occur within three years as required by statute). Arizona and Pennsylvania also have statutes of limitation based on time of actual exposure instead of knowledge of exposure, knowledge of illness or appearance of symptoms.

27 *Smith v. Workers' Compensation Court*, 618 P.2d 942 (Okla. 1980); ILL. ANN. STAT. ch. 40, para. 142.36(d) (Smith-Hurd 1986).

28 For example, Arkansas, Illinois, Kansas, Montana, Nevada, North Carolina, Ohio and Vermont expressly restrict the amount of recovery for asbestos and other dust related diseases.

pensation statutes and in other state safety and health legislation that has led employees and their representatives to pursue other legal remedies to address safety and health in the workplace. Their efforts have given rise not only to the enactment of new statutes and the promulgation of new regulations, but also to the development of new legal theories or the revision of old ones to address these issues.

### III. The Occupational Safety and Health Act of 1970

The underlying premise of the OSH Act<sup>29</sup> is "to assure so far as possible every workingman and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ."<sup>30</sup> The Act, which is unquestionably the preeminent prophylactic statutory and regulatory response to worker health and safety,<sup>31</sup> is designed to achieve

<sup>29</sup> 29 U.S.C. §§ 651-678 (1982).

<sup>30</sup> *Id.* § 651(b).

<sup>31</sup> That Congress intended the OSH Act to be a preventive statutory response to occupational safety and health is clear from its statement of purpose as set forth in 29 U.S.C. § 651 (1982):

Congressional statement of findings and declaration of purpose and policy

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to business affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety

its goal of safer workplaces by authorizing the promulgation of health and safety standards, providing the machinery for enforcing those standards, and protecting workers who protest against allegedly unsafe workplace conditions. This protection even applies where such protests do not involve contact with the Occupational Safety and Health Administration ("OSHA"). The OSH Act has broad coverage, encompassing all employers who have one or more employees and who are engaged in a business affecting commerce<sup>32</sup> unless the employer is in a category expressly excluded from the Act's coverage.<sup>33</sup>

Generally, safety and health standards are promulgated under the OSH Act through an administrative rulemaking procedure.<sup>34</sup> The suggestion for promulgation of a standard may come from inside of OSHA itself, from a recommendation by the National Institute of Occupational Safety and Health ("NIOSH"),<sup>35</sup> from a union or from interested parties such as employers and employees.<sup>36</sup> Interested parties are permitted to

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and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problems;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

32 29 U.S.C. § 652(5) (1982). Given the historically broad interpretation of this criterion, as a practical matter the OSH Act covers almost every private employer in any state or territory of the United States unless expressly excluded by the Act.

33 OSHA has excluded from coverage professionals such as doctors and lawyers, charities, churches, household domestics, Indians, agricultural workers and trainees. *See* *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709 (10th Cir. 1982); 29 C.F.R. §§ 1975.1 to 1975.6 (1985). Federal agencies are also excluded from OSH Act coverage although 29 U.S.C. § 668 (1982) requires such agencies to establish and maintain their own occupational safety and health programs. State and political subdivisions are similarly excluded from coverage, 29 U.S.C. § 652(5), as are employers over which other federal agencies "exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1).

34 For a two year period following the effective date of the OSH Act, OSHA was authorized to adopt any national consensus or federal safety and health standard without the necessity of proceeding with formal rulemaking. 29 U.S.C. § 655(a) (1982).

35 NIOSH was established along with OSHA by the OSH Act to function, *inter alia*, as OSHA's research source and to assist in identifying the need for and the development of health and safety standards. 29 U.S.C. § 671 (1982).

36 For example, the American Federation of State, County and Municipal Employees, on September 19, 1986, petitioned OSHA for an emergency temporary standard covering infectious blood-borne diseases, including AIDS and hepatitis B. *See* 16 O.S.H. REP. (BNA) 461 (Oct. 1, 1986). Unions or other employee representatives have also brought actions against OSHA in an attempt to force the Agency to promulgate a standard. For example, in 1972 the National Congress of Hispanic Am. Citizens ("NCHAC") petitioned OSHA for, *inter alia*, a field sanitation standard. When OSHA did not do so, in 1973 the NCHAC brought suit against the agency to compel issuance of the standard. The appellate court ruled that the OSH Act's time limits for standards promulgation were not mandatory and that it was within OSHA's discretion to determine the priorities for standards promulgation so long as the agency acts in good faith. The court did, however, hold that the NCHAC was entitled to some timetable for the field sanitation standard, although such timetable was not binding. *National Congress of Hispanic Am. Citizens v. Marshall*, 626 F.2d 882 (D.C. Cir. 1979). This case was settled in 1982 when OSHA agreed to complete the promulgation process although it did not admit that it had any legally mandated obligation to do so. *National Congress of Hispanic Am. Citizens v. Donovan*, 12 O.S.H. Cas. (BNA) 1353 (D.D.C. 1985). In *Public Citizen Health Research Group v. Aucter*, 702 F.2d 1150 (D.C. Cir. 1983), the appellate court ordered OSHA to expedite issuance of a permanent standard for occupational exposure to ethylene oxide ("EtO"). The court concluded that, in light of the evidence showing a health hazard from EtO exposure, OSHA's delay in promulgating a standard was unreasonable.



express their views on a proposed standard through written submissions as well as oral testimony at hearings.

OSHA enforces its standards through a system of workplace inspections, citations and monetary penalties.<sup>37</sup> The consistent holdings of courts that there is no private right of action permitted under the Act by employees who claim they have been injured due to an employer's violation of the OSH Act or a standard promulgated thereunder are further proof that the statute is preventive in nature.<sup>38</sup>

Despite allegations that the Agency's standard setting procedures are lengthy and cumbersome, or that under some administrations OSHA's activities have not been properly focused, no one can deny that the Agency is a significant and positive force in protecting worker health and safety. Moreover, while the focus of much early activity under the OSH Act was in the area of safety—which encompasses most of the current day to day OSHA enforcement activities—the last decade has seen the Agency shift the emphasis in the standard setting area from safety to employee health.

OSHA's efforts in connection with exposure to potentially toxic substances in the workplace have taken several directions. First, the Agency has published workplace exposure limits for several hundred "Air Contaminants", including eight hour time weighted averages ("TWA") and ceiling levels.<sup>39</sup> Second, OSHA has promulgated comprehensive standards for individual chemicals in an effort to regulate, in a more detailed fashion, other potentially toxic substances.<sup>40</sup> These comprehensive stan-

37 The OSH Act and the U.S. Code also provide for criminal sanctions in the following situations: Willful violations causing death; giving unauthorized advance notice of inspections; giving false information to OSHA; killing, assaulting or hampering the work of an OSHA compliance officer. See OSHA's Field Operations Manual, Chap. VI(B). Criminal penalties are imposed by the courts after trials and are not imposed by OSHA or the Occupational Safety and Health Review Commission, *id.*

38 See, e.g., *Russell v. Bartley*, 494 F.2d 334 (6th Cir. 1974); *Skidmore v. Traveler's Ins.*, 356 F. Supp. 670 (E.D. La.), *aff'd*, 483 F.2d 67 (5th Cir. 1973).

39 29 C.F.R. § 1910.1000 (1986) (Tables Z-1, Z-2, and Z-3).

40 See 29 C.F.R. §§ :

- 1910.1001 Asbestos, tremolite, anthophyllite, and actinolite
- 1910.1003 4-Nitrobiphenyl
- 1910.1004 alpha-Naphthylamine
- 1910.1006 Methyl chloromethyl ether
- 1910.1007 3,3'-Dichlorobenzidine (and its salts)
- 1910.1008 bis-Chloromethyl ether
- 1910.1009 beta-Naphthylamine
- 1910.1010 Benzidine
- 1910.1011 4-Aminodiphenyl
- 1910.1012 Ethyleneimine
- 1910.1013 beta-Propiolactone
- 1910.1014 2-Acetylaminofluorene
- 1910.1015 4-Dimethylaminoazobenzene
- 1910.1016 N-Nitrosodimethylamine
- 1910.1017 Vinyl chloride
- 1910.1018 Inorganic arsenic
- 1910.1025 Lead
- 1910.1028 Benzene
- 1910.1029 Coke oven emissions
- 1910.1043 Cotton dust
- 1910.1044 1,2-dibromo-3-chloropropane

dards articulate engineering, work practice, hygiene, training, personal protective equipment, monitoring, record keeping and/or medical requirements as well as permissible exposure levels. Third, even if a substance is not expressly regulated by a standard, OSHA may cite an employer under the OSH Act's General Duty clause which obligates employers to: "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."<sup>41</sup>

In addition to promulgating a greater number of substance specific health standards in recent years, OSHA has made increasing use of the General Duty clause to cite employers for allowing exposure of workers to potentially toxic substances. It is difficult to determine

whether this proliferation of General Duty clause citations in areas where there has been no effort by OSHA to promulgate a standard stems from OSHA's desire to avoid the lengthy court battle that standard-setting inevitably engenders or whether OSHA questions its ability to withstand a sophisticated industry challenge to a particular proposed standard. However, even assuming OSHA's good intentions in trying to protect employees who may be exposed to toxins, nonetheless, the agency's use of the General Duty clause in this area is often highly questionable and impracticable.<sup>42</sup>

At best, OSHA has had variable success in attempting to use the General Duty clause to regulate what it believes to be employee overexposure to an unregulated potentially toxic substance or to dictate engineering controls and work practices not mandated by any standard.<sup>43</sup>

In *Toms River Chemical Corp.*,<sup>44</sup> OSHA relied on a NIOSH ceiling recommendation for occupational exposure to phosgene gas as the basis for establishing a "recognized hazard" under the General Duty clause. The

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1910.1045 Acrylonitrile

1910.1047 Ethylene oxide

1910.1101 Asbestos

41 29 U.S.C. § 654(a)(1) (1982). Because of the "catch all" nature of the General Duty clause, OSHA bears a far different burden of proof to enforce a citation on that basis than is the case with the more specific safety standards. To establish that an employer has violated the General Duty clause, OSHA must show that an employee was exposed to an existing hazard, that exposure to the hazard was likely to cause death or serious physical harm, that the hazard was foreseeable, and that the hazard is one of which the employer had actual knowledge or which is recognized as a hazard in the employer's industry. See, e.g., *General Dynamics Corp. v. Occupational Safety and Health Review Comm'n*, 599 F.2d 453 (1st Cir. 1979); *National Realty & Constr. Co. v. Occupational Safety and Health Review Comm'n*, 489 F.2d 1257 (D.C. Cir. 1973). The hazard must also be preventable.

42 Stillman and Duffee, *Using the General Duty Clause as a "Super Standard,"* in Vol. XXXIX PERSONNEL MANAGEMENT: LABOR RELATIONS (1981).

43 See, e.g., *Marshall v. Cities Serv. Oil Co.*, 577 F.2d 126 (10th Cir. 1978); *Brennan v. Occupational Safety and Health Review Comm'n*, 494 F.2d 460 (8th Cir. 1974); *Minn-Dak Farmers Coop.*, 7 O.S.H. Cas. (BNA) 1667 (1979); *Spencer Leathers*, 5 O.S.H. Cas. (BNA) 1484 (1977); *Stepan Chem. Co.*, 5 O.S.H. Cas. (BNA) 1367 (1977). See further OSHA's citations of hospitals and dental clinics under the General Duty clause for what the Agency deemed to be overexposure to an anesthetic gas, nitrous oxide. OSHA argued that the justification for these citations arose from reports in the medical and scientific literature concerning excessive miscarriages and birth defects among operating room personnel, and relied on a 1977 NIOSH criteria document that recommended a 25 parts per million ("ppm") TWA per operation exposure limit. *Charles S. Wilson Memorial Hosp.*, OSHRC Doc. No. 80-1758; *Michael Reese Hosp. and Medical Center*, OSHRC Doc. No. 79-7155; *South Suburban Hosp.*, OSHRC Doc. No. 79-5444.

44 OSHRC Doc. Nos. 76-5197 and 76-5282 (1978).

Occupational Safety and Health Review Commission ("OSHRC")<sup>45</sup> rejected this effort, holding that a NIOSH criteria document alone did not prove that exceedence of the ceiling levels it recommended were recognized as hazardous in the defending employer's industry.

One area where OSHA has used the General Duty clause is to cite employers who implemented policies to protect the developing fetus. The Agency took this action because it believed these policies resulted in female employees undergoing surgical sterilizations in order to keep their jobs. Such actions, however, have not met with success.<sup>46</sup> In *Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co.*,<sup>47</sup> the appellate court held that the word "hazard" in the General Duty clause was intended to cover only physical workplace conditions and could not be stretched to reach the consequences of a corporate policy that excluded fertile women from certain workplaces.

In addition to standard setting, enforcement activities in connection with those standards, and the use of the General Duty clause, OSHA's efforts in connection with workplace health risks have taken a fourth direction, *i.e.*, the education of employees by requiring dissemination of information regarding potential occupational health risks. This approach is primarily codified in two Agency standards: The Access to Employee Exposure and Medical Records Standard promulgated in 1980<sup>48</sup> and the Hazard Communication Standard promulgated in 1983.<sup>49</sup> The former authorizes and regulates employee, union, and OSHA access to employer-maintained medical and exposure records. The latter sets out a comprehensive system for communicating information regarding hazardous substances in the workplace to employees through work force training, labeling of materials, and material safety data sheet ("MSDS") preparation and dissemination. These two informational standards are premised on the belief (a) that employees are entitled to know about health risks to which they may be exposed and (b) that given such information, they will be in a position to make informed decisions concerning both the safe handling of workplace chemicals and their willingness to work in potentially harmful environments.

Both employers and employees will probably enjoy favorable long-term results from the two informational standards. From the employer's standpoint, compliance with the Hazard Communication Standard should help ensure satisfaction of the common law duty to adequately warn about product risks—a basic element of many products liability lawsuits<sup>50</sup>—because of the standard's requirements concerning preparation

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45 OSHRC is an independent federal adjudicative agency which hears citation contests brought under the OSH Act. 29 U.S.C. § 661 (1982).

46 *American Cyanamid Co.*, 9 O.S.H. Cas. (BNA) 1596 (1981); *Bunker Hill Company*, OSHRC Doc. No. 80-6139.

47 741 F.2d 444 (D.C. Cir. 1984).

48 29 C.F.R. § 1910.20 (1986).

49 29 C.F.R. § 1910.1200 (1986); see Tyson, *The Preemptive Effect of the OSHA Hazard Communication Standard on State and Community Right to Know Laws*, 62 NOTRE DAME L. REV. 1010 (1987).

50 See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973); *Stromsodt v. Parke-Davis & Co.*, 257 F. Supp. 991 (D.N.D. 1966), aff'd, 411 F.2d 1390 (8th Cir. 1969).

and dissemination to immediate customers of MSDSs containing risk information.<sup>51</sup> Thus, employers will reduce their exposure to legal liability. Similarly, compliance with the medical records access rule should reduce the potential for tort claims from a company's employees based on one of the current "withholding of health hazard information" theories developed in the asbestos litigation.<sup>52</sup> From the employee's standpoint, the two informational standards are educational tools that permit 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; further, such knowledge and understanding may lead him individually, in conjunction with his employer, coworkers, union,<sup>53</sup> or an appropriate government agency such as OSHA,<sup>54</sup> to take action to ameliorate significant risks to the extent technologically and/or economically feasible.<sup>55</sup>

51 Although compliance with government safety standards has historically not been an absolute bar to liability for a third party's negligent conduct, adherence to regulations concerning hazard communication arguably deserve favorable consideration by the judiciary with regard to alleged liability for failure to adequately warn. A chemical supplier that provides his industrial customers with information as required by the standard not only evidences his intention to comply with the law and warn the customer, and thus the customer's employees of his product's dangers, but provides evidence of good corporate citizenship as well. Moreover, the requirement that recipients of MSDSs pass on the risk information to their customers should relieve the manufacturer (who generated the MSDS) of any duty to warn remote users.

52 See notes 192-95 *infra* and accompanying text.

53 See notes 137-80 *infra* and accompanying text.

54 Employees who complain to OSHA about alleged unsafe working conditions are protected from employer retaliation by the OSH Act. 29 U.S.C. § 660(c)(1) (1982). See also *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).

55 The concept of feasibility under the OSH Act comes, in part, from 29 U.S.C. § 655(b)(5) (1982). The statute provides:

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, *the feasibility of the standards*, and experience gained under this and other health safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desires.

*Id.* (emphasis added).

Cases interpreting the meaning of feasibility under the OSH Act have uniformly concluded that the term encompasses *technological* feasibility, although there is disagreement among courts as to whether that means immediately technologically feasible, *i.e.*, achievable, or feasible in the near future through improvements in existing technologies or the development of the new technologies. See, *e.g.*, *AFL-CIO v. Marshall*, 617 F.2d 637 (D.C. Cir. 1979); *American Iron and Steel Inst. v. Occupational Safety and Health Admin.*, 577 F.2d 825 (3d Cir. 1978), *cert. dismissed*, 448 U.S. 97 (1981); *AFL-CIO v. Brennan*, 530 F.2d 109 (3d Cir. 1975); *Society of Plastics Indus., Inc. v. Occupational Safety and Health Admin.*, 509 F.2d 1301 (2d Cir.), *cert. denied sub. nom.*, *Firestone Plastics Co. v. Department of Labor*, 421 U.S. 992 (1975), *aff'd in part, vacated in part sub nom.*, *American Textiles Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981). The component of economic feasibility comes from the legislative history and was endorsed in subsequent decisions. See, *e.g.*, *Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 477-78 (D.C. Cir. 1974). See also statements of Senator Saxbe (116

The enactment of the OSH Act in 1970 was the first major expansion of occupational health and safety law since establishment of worker's compensation in the early part of this century. While the OSH Act's very name suggests its preeminence in the field of occupational health law, its passage did not preempt the field but, rather, opened the door to other statutory, regulatory and common law developments.

#### IV. The Toxic Substances Control Act of 1977

On January 1, 1977 the Toxic Substances Control Act (TSCA)<sup>56</sup> went into effect, and provided the U.S. Environmental Protection Agency (EPA) with broad authority to regulate the manufacture, import, processing, distribution, use, and disposal of chemical substances. Although some chemicals (such as tobacco products, food additives, drugs, cosmetics, and pesticides) are excluded from TSCA coverage,<sup>57</sup> the Act authorizes the Agency under certain circumstances to reach into workplaces and other environments to regulate potentially harmful exposure to nonexcluded chemical substances. The EPA has promulgated rules under TSCA regulating not only certain chemical manufacture and processing, but also affecting other workplaces such as school buildings that contain asbestos.<sup>58</sup> Inasmuch as TSCA prohibits the domestic manufacture or import into the United States of any new commercial chemical substance prior to Agency review<sup>59</sup> the Act is in a sense a "chemical substances control act" rather than merely a "toxic substances control act." Moreover, because the Act permits citizens to petition the Agency to issue, amend, or repeal a TSCA rule or order,<sup>60</sup> and to initiate civil

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CONG. REC. 36,512 (1970)). With respect to economic feasibility, the Supreme Court has held that OSHA is not required to conduct a cost-benefit analysis when promulgating standards under 29 U.S.C. § 656(b)(5) (1982). However, OSHA may conduct such a cost-benefit analysis if it wishes to do so as part of its economic feasibility determination. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980).

56 15 U.S.C. §§ 2601-2629 (1982).

57 TSCA § 3(2); 15 U.S.C. § 2602(2) (1982).

58 In response to public concerns about asbestos, EPA has issued several regulations under TSCA concerning the substance. The first regulation, which became effective on June 28, 1982 was for the purpose of protecting school employees and students. The rule required all local education agencies to inspect all areas of each school building for friable (*i.e.*, crumbly) materials; to take samples of each type of friable material found; and to have those samples analyzed for their asbestos content. Each local education agency was also required to keep a record of the findings of all inspections, samplings, and analyses. If asbestos is found in a school, the local education agency is required to provide information to certain employees, and to notify the parent-teacher association or the parents directly. The "Asbestos in Schools Regulation" was published as a final rule at 47 Fed. Reg. 23,369 (1982) on May 27, 1982, and is codified at 40 C.F.R. § 763.100F (1986).

59 Under TSCA § 5(a)(1), 15 U.S.C. § 2604(a)(1) (1982), a Premanufacture Notification, or "PMN," must be submitted to EPA at least 90 days prior to commercial manufacture or import of any chemical substance that is not on a list of chemicals in commerce that is compiled and maintained by the Agency. This list is known as the "TSCA Inventory of Chemical Substances," and was compiled pursuant to § 8(b) of the Act. The Inventory consists of all commercial chemical substances initially compiled by EPA pursuant to § 8(b), plus all commercial chemicals which have passed PMN review under § 5. With regards to chemicals for which a PMN must be submitted, the Agency can impose restrictions on manufacture, import, processing, and other activities under authority of TSCA §§ 5(e) and 5(f).

60 TSCA § 21, 15 U.S.C. § 2620 (1982) provides, in relevant part, that "[a]ny person may petition the Administrator to initiate a proceeding for the issuance, amendment, or repeal of a rule under section 4, 6, or 8 or an order under section 5(e) or 6(b)(2) . . . ."

suits against employers to restrain violations,<sup>61</sup> labor interests have discovered that TSCA provides a vehicle for initiating action by the federal government and for helping control significant chemical risks in the workplace.

The potential role of TSCA in protecting employees from unreasonable health risks was considered during the Congressional hearings that preceded and helped shape the Act. In addition to hearing reports of cancer deaths related to exposures to certain workplace chemicals,<sup>62</sup> Senate and House committees received testimony from labor organizations concerning the need for legislation to adequately protect health in the workplace. One union representative, for example, addressed chronic health risks in a draconian fashion, and the relationship between TSCA and the Occupational Safety and Health Act:

Unfortunately, at this time our primary method of identifying hazardous substances is counting the bodies that they leave behind. I fear that we will be counting a great deal of bodies in the coming years since the 10- to 30-year latency period that apparently often exists for the manifestation of cancer is coming of age with regard to the chemical barrage we have subjected ourselves to in the past several decades. It is in [the area of] identifying and preventing hazards before injury is done, that we feel the Toxic Substances Control Act is most essential, and in which we feel it should be closely coordinated with the [Occupational Safety and Health Administration] control mechanisms.<sup>63</sup>

The witness further recommended that toxic substances should be controlled before "an investment commitment is made and an industrial process is initiated and before there is loss of human life or health."<sup>64</sup>

Recognizing the increasing reliance by federal agencies on the results of health-effects testing using laboratory animals in the assessment of human risk, the AFL-CIO asked that priority for testing be given to chemicals that may present occupational risks, and that any testing program under TSCA be coordinated with NIOSH and OSHA.<sup>65</sup> The AFL-CIO along with other labor interests also voiced approval of statutory provisions designed to protect employees against discrimination or job loss that might result from employee assistance in enforcing the provi-

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61 TSCA § 20, 15 U.S.C. § 2619 (1982) states, in relevant part, that:

[A]ny person may commence a civil action —

(1) against any person including (A) the United States, and (B) any other government instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution who is alleged to be in violation of this Act or any rule promulgated under section 4, 5, or 6 or order issued under section 5 to restrain such violation, or

(2) against the Administrator to compel the Administrator to perform any act or duty under this Act which is not discretionary.

62 The Senate Subcommittee on the Environment of the Committee on Commerce heard testimony, for instance, concerning cancer deaths of chemical plant workers allegedly resulting from exposure to bis (chloromethyl) ether. The testimony was presented to illustrate the need for pretesting chemicals before allowing exposure during manufacture.

63 Testimony of John J. Sheehan, United Steelworkers of America ALF-CIO, *Hearings on S. 776 Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. (1975), quoted in R. DRULEY & G. ORDWAY, *THE TOXIC SUBSTANCES CONTROL ACT 15 (BNA)* (1977) [hereinafter TOXIC SUBSTANCE CONTROL ACT].

64 TOXIC SUBSTANCE CONTROL ACT, *supra* note 63, at 20.

65 *Id.*

sions of the Act.<sup>66</sup>

Any review of TSCA must necessarily include a discussion of the concept of unreasonable risk. This concept is central to TSCA, and findings concerning unreasonable risk are a prerequisite to most EPA regulatory action under the statute. Although the term "unreasonable risk" is not defined in the Act, section 2(c) and the legislative history make it clear that a balancing approach, including the economic effects of regulation, is to be used in determining what constitutes unreasonable risk.<sup>67</sup> The Act generally requires that before regulatory action under TSCA can be taken with regard to a chemical substance or mixture, the Administrator of the EPA must make certain findings in the administrative record concerning unreasonable risk to health or the environment. Evidence that the Administrator may use to support his findings includes results of laboratory animal toxicology studies and epidemiology studies, even though those types of studies do not prove with certainty that a risk to human health from exposure to the chemical substance or mixture does in fact exist. The degree of certainty that the Administrator must have with regard to whether the risk is unreasonable varies with the type of regulatory action. Congress required less certainty for regulations that it expected to have less adverse impact on affected companies (*e.g.*, requirements promulgated under section four requiring companies to test chemicals they manufacture or process for adverse health or environ-

<sup>66</sup> Employee protection is now ensured by TSCA's § 23, 15 U.S.C. § 2622 (1982), which provides, in relevant part, that:

No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has—

- (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act;
- (2) testified or is about to testify in any such proceeding; or
- (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

<sup>67</sup> Section 2(c), 15 U.S.C. § 2601(c) (1982), of TSCA provides that:

It is the intent of Congress that the Administrator shall carry out this Act in a reasonable and prudent manner, and that the Administrator shall consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this Act.

The Report of the Interstate and Foreign Commerce Committee of the House of Representatives reveals that any definition of "unreasonable risk" was intentionally omitted from the Act: During the hearings, a number of witnesses recommended that the bill include a definition of unreasonable risk. Because the determination of unreasonable risk involves a consideration of probability, severity, and similar factors which cannot be defined in precise terms and is not a factual determination but rather requires the exercise of judgment on the part of the person making it, the Committee did not attempt a definition of such risk. In general, a determination that a risk associated with a chemical substance or mixture is unreasonable involves balancing the probability that harm will occur and the magnitude and severity of that harm against the effect of proposed regulatory action on the availability to society of the benefits of the substance or mixture, taking into account the availability of substitutes for the substance or mixture which do not require regulation, and other adverse effects which such proposed action may have on society. The balancing process described above does not require a formal benefit-cost analysis under which a monetary value is assigned to the risks associated with a substance and to the cost to society of proposed regulatory action on the availability of such benefits. Because a monetary value often cannot be assigned to a benefit or cost, such an analysis would not be very useful.

mental effects), but required more certainty for regulations that it expected would have greater adverse impact (e.g., regulations promulgated under section 6 banning or restricting certain chemical substances and mixtures). Thus, for some regulatory actions the Administrator need only present evidence in the administrative record sufficient to support a finding that a substance or mixture "may present" an unreasonable risk, while for other actions the evidence in the record must support a finding that the substance or mixture "presents or will present" an unreasonable risk.<sup>68</sup>

The EPA uses TSCA to control potential risks from chemicals in the workplace in several ways. First, under TSCA section 5 no person may manufacture a new chemical substance,<sup>69</sup> or manufacture or process an existing chemical substance for a "significant new use," unless that person submits to the EPA a notice of intent to do so at least ninety days prior to commencing such manufacture or processing.<sup>70</sup> The Agency's review of premanufacture and significant new use notifications can reveal health or environmental risks which EPA is empowered to respond to by issuing orders under sections 5(e) or 5(f) of the Act, which can prohibit or restrict the chemical's manufacture, processing, distribution, use or disposal. The "may present" standard is applicable to section 5(e) orders, while the "presents or will present" standard applies to section 5(f) orders.<sup>71</sup> Such orders are applicable only to the person who submitted

68 There is a parallel between TSCA and the OSH Act with regard to the risk determinations that are required prior to regulation. As provided in § 6 of TSCA, 15 U.S.C. § 2605 (1982) ("Regulation of Hazardous Chemical Substances and Mixtures"):

If the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment, the Administrator shall by rule apply . . . requirements to such substance or mixture to the extent necessary to protect adequately against such risk using the least burdensome requirements . . .

The OSH Act, on the other hand, requires that before a health standard can be promulgated, OSHA must demonstrate the existence of a "significant risk," and must also demonstrate that the contemplated standard will reduce that risk. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980).

No court has yet been faced with deciding the relationship between a "significant risk" under the OSH Act and an "unreasonable risk" under TSCA. Thus it is possible that a potential workplace health risk may meet the risk criteria for action under one of the two acts but not under the other.

69 See *supra* text accompanying note 59.

70 The "Premanufacture Notification" rules promulgated under TSCA § 5 apply to all nonexcluded commercial chemical substances and are codified 40 C.F.R. §§ 720.1 to 720.122 (1986). "Significant New Use Rules" (or "SNURs") under § 5 are promulgated for individual chemical substances under criteria that are specified in § 5(a)(2), 15 U.S.C. § 2604(a)(2):

A determination by the Administrator that a use of a chemical substance is a significant new use with respect to which [90-day] notification is required . . . shall be made by a rule promulgated after consideration of all relevant factors, including—

- (A) the projected volume of manufacturing and processing of a chemical substance,
- (B) the extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance,
- (C) the extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance, and
- (D) the reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

All SNURs are codified at 40 CFR §§ 721.1 to 721.1125 (1986).

71 Section 5(e), 15 U.S.C. § 2604(e) (1982) ("Regulation Pending Development of Information") provides, in relevant part, that:



the PMN or the significant new use notice. Several section 5(e) and 5(f) orders have included requirements concerning workplace practices (including hazard communication requirements) and worker exposure. Typically, a new chemical substance that is selected for action under section 5(e) is subsequently regulated with a SNUR that has the same provisions as the section 5(e) order. This procedure assures that all subsequent manufacturers of the new chemical substance are subject to the same restrictions as the manufacturer submitting the original section 5 notice (*i.e.*, the original manufacturer).

In addition to imposing workplace controls on new chemical substances that either may present or do (or will) present an unreasonable risk,<sup>72</sup> the Agency has promulgated regulations (including industrial hygiene sampling requirements and hazard communication rules) to control risks to employees presented by certain existing chemicals. Although the number of existing chemicals regulated under section 6 of the Act ("Regulation of Hazardous Chemical Substances and Mixtures") is far exceeded by the number of new chemicals regulated pursuant to section 5(e) and 5(f) orders, the Agency's section 6 rules designed to reduce chemical risks have had a significant impact on many of the nation's workplaces.<sup>73</sup>

Section 4 of TSCA authorizes the EPA to require testing of chemicals for health and environmental effects, and is thus a powerful agency tool for the development of information that can lead to regulations

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If the Administrator determines that—

- (i) the information available to the Administrator is insufficient to permit a reasoned evaluation of the health and environmental effects of a chemical substance with respect to which [90-day] notice is required . . . ; and
- (ii) (I) in the absence of sufficient information to permit the Administrator to make such an evaluation, the manufacture, processing, distribution in commerce, use, or disposal of such substance, or any combination of such activities, *may present* an unreasonable risk of injury to health or the environment, or
- (II) such substance is or will be produced in substantial quantities, and such substance either enters or may reasonably be anticipated to enter the environment in substantial quantities or there is or may be significant or substantial human exposure to the substance, the Administrator may issue a proposed order, to take effect on the expiration of the notification period applicable to the manufacturing or processing of such substance . . . to prohibit or limit the manufacture, processing, distribution in commerce, use, or disposal of such substance or to prohibit or limit any combination of such activities . . .

*Id.* (emphasis added).

Section 5(f), 15 U.S.C. § 2604(f) (1982) ("Protection Against Unreasonable Risks") states as follows:

If the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance with respect to which [90-day] notice is required . . . or that any combination of such activities, *presents or will present* an unreasonable risk of injury to health or environment before a rule promulgated under Section 6 can protect against such risk, the Administrator shall, before the expiration of the notification period applicable . . . to the manufacturing or processing of such substance, take the action authorized . . . to the extent necessary to protect against such risk.

*Id.* (emphasis added).

<sup>72</sup> See *supra* text accompanying note 71.

<sup>73</sup> Rules under TSCA § 6, 15 U.S.C. § 2605 (1982), promulgated as of December 31, 1986 affect the manufacture, processing, distribution in commerce, use and/or disposal of polychlorinated biphenyls (PCBs), certain metalworking fluids, fully halogenated chlorofluoroalkanes (*i.e.*, CFCs thought to be responsible for some depletion of the earth's ozone layer), and asbestos.

designed to protect employee health, public health, and the environment. Manufacturers, importers and processors of the chemicals for which testing requirements have been promulgated are required to test the chemicals at their own expense or to otherwise ensure that the required testing is done. Congress has specified the criteria which govern the EPA's decisions concerning chemical testing in section 4(a) of the Act.

TSCA establishes a mechanism whereby chemical substances and mixtures are "designated" to the Administrator for testing by an Interagency Testing Committee (ITC), which was established pursuant to section 4(e). The Committee consists of eight members, all of whom are government employees, including one member each from the Department of Labor and NIOSH.<sup>74</sup> Within twelve months following ITC designation, the Administrator of the EPA is required to provide opportunity for public comment on the chemicals that were designated by the Committee and to either (1) initiate a rulemaking proceeding requiring testing or (2) publish in the Federal Register the reasons for not initiating rulemaking.<sup>75</sup> Results of laboratory toxicology testing can be used in Agency risk assessments, and thus can provide part of the factual basis for unreasonable risk determinations that are prerequisite to promulgating regulations or issuing orders.<sup>76</sup>

<sup>74</sup> Pursuant to TSCA § 4(e)(2)(A), 15 U.S.C. § 2603(e)(2)(A) (1982), the ITC's membership is as follows:

- (i) One member appointed by the Administrator from the Environmental Protection Agency.
- (ii) One member appointed by the Secretary of Labor from officers or employees of the Department of Labor engaged in the Secretary's activities under the Occupational Safety and Health Act of 1970.
- (iii) One member appointed by the Chairman of the Council on Environmental Quality from the Council or its officers or employees.
- (iv) One member appointed by the Director of the National Institute for Occupational Safety and Health from officers or employees of the Institute.
- (v) One member appointed by the Director of the National Institute of Environmental Health Sciences from officers or employees of the Institute.
- (vi) One member appointed by the Director of the National Cancer Institute from officers or employees of the Institute.
- (vii) One member appointed by the Director of the National Science Foundation from officers or employees of the Foundation.
- (viii) One member appointed by the Secretary of Commerce from officers or employees of the Department of Commerce.

<sup>75</sup> TSCA § 4(e)(1)(B), 15 U.S.C. § 2603(e)(1)(B) (1982). The ITC can also recommend chemicals without designating them. The list of designated chemicals (*i.e.*, those which are subject to the 12-month response requirement) is limited to 50 substances and mixtures at any one time. TSCA § 4(e)(1)(A), 15 U.S.C. § 2603(e)(1)(A).

<sup>76</sup> In Fiscal Year 1985, EPA took a total of 21 ITC-related actions. These resulted in 3 final test rules, 6 proposed rules, 2 advanced notices of proposed rulemaking, and 10 decisions not to test. Of the 21 actions, 19 addressed designated chemicals, while 2 were actions on chemicals recommended by ITC but not designated for response within 12 months. In an effort to accelerate chemical testing, the Agency undertook during the early years of TSCA to negotiate testing agreements with industry in lieu of going through the lengthy process of promulgating test rules. This practice, however, was not sanctioned under TSCA, in part because the agreements were not enforceable, and in part because they did not result in other requirements under the Act that would have been triggered by regulations requiring testing. *Natural Resources Defense Council, Inc. v. United States Envtl. Protection Agency*, 595 F. Supp. 1255 (S.D.N.Y. 1984). Subsequently, EPA promulgated regulations to provide for enforceable testing consent agreements. 40 C.F.R. §§ 790.20 to 790.28 (1986).

Labor interests have discovered that TSCA not only provides the EPA with broad authority to regulate and require testing of workplace chemicals, but also that Congress has provided a means for employee and union participation in initiating regulatory proceedings and for suing employers who are in violation of the Act or certain of its regulations or orders. Section 21 of TSCA gives any person the right to petition the EPA to initiate a proceeding for the issuance, amendment or repeal of a rule under TSCA sections 4, 6, or 8, or of an order under sections 5(e) or 6(b)(2).<sup>77</sup> The Agency has only ninety days to either grant or deny the petition. If the petition is granted, the EPA is required to promptly commence the appropriate proceeding under sections 4, 5, 6, or 8. If the petition is denied, however, the Administrator must publish the reasons for the denial in the Federal Register.<sup>78</sup> Judicial remedies are available in the event that the EPA does not act within ninety days; remedies are also available if the Agency denies the petition and the petitioner can show the need for the rule or order to the court's satisfaction.<sup>79</sup> Organized labor has successfully used the section 21 petition procedure in connection with asbestos.<sup>80</sup> On November 16, 1983 the Service Employees International Union (SEIU), AFL-CIO, petitioned the EPA under TSCA section 21 to initiate rulemaking proceedings under TSCA section 6. SEIU sought the establishment of standards and requirements for the inspection and abatement of asbestos in schools and other buildings. The Agency substantially granted most of the petitioner's requests; the 1986 TSCA Amendments,<sup>81</sup> however, subsequently addressed many of the SEIU's concerns.

Section 20 of TSCA declares that anyone may file a civil lawsuit against (1) any person (including the U.S. Government) who is alleged to be in violation of the Act or in violation of certain regulations or orders,<sup>82</sup> or (2) against the Administrator of the EPA to compel the performance of any act or duty under TSCA that is not discretionary. A person who intends to file suit to restrain a violation must give notice to the Administrator and to the person alleged to be in violation of the Act at least sixty days prior to commencing the lawsuit.<sup>83</sup> Similarly, a person who intends to file suit to compel the Administrator to perform an act or duty that is not discretionary must notify the Administrator sixty days in advance. However, in the event that the citizen alleges that the Adminis-

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77 TSCA § 21(a), 15 U.S.C. § 2620(a) (1982). TSCA § 8, 15 U.S.C. § 2607 (1982), sets forth recordkeeping and reporting requirements, and provides, *inter alia*, that employers must maintain records of allegations of significant health or environmental effects, submit certain health-effects studies to EPA, and report to EPA substantial risks of injury to health or the environment. Section 6(b)(2), 15 U.S.C. § 2605(b)(2), authorizes the Administrator to take action to prevent the manufacture or processing of a substance or mixture in a manner that unintentionally causes the chemical to present an unreasonable risk to health or the environment.

78 TSCA § 21(b)(3), 15 U.S.C. § 2620(b)(3) (1982).

79 See TSCA §§ 21(b)(4)(A), 21(b)(4)(B), 15 U.S.C. §§ 2620(b)(4)(A), 2620(b)(4)(B).

80 See *supra* note 60.

81 Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519.

82 Specifically, TSCA § 20, 15 U.S.C. § 2619 (1982), authorizes civil actions against any person alleged to be in violation of TSCA, or in violation of any rule promulgated under §§ 4, 5, or 6, or in violation of an order issued under § 5 to restrain the violation.

83 TSCA § 20(b), 15 U.S.C. § 2619(b) (1982). 40 CFR § 702.61 (1986).

trator has failed to file an action under section 7 of TSCA (concerning imminent hazards), only ten days' notice is required. The sixty-day and ten-day notice periods are "waiting periods" between the notification and the actual filing of the civil suit, which allow the EPA time to take action against alleged violators or to perform the act or duty that is not discretionary prior to litigation.<sup>84</sup>

Two provisions of TSCA that have resulted in federal agency review and action with respect to potential chemical risks in the workplace are sections 4(f) and 9(a). Although Congress may not have intended those two sections of the Act to operate together to reduce potential risks to employee health, those authorities (which mandate accelerated or "priority" health risk review and referral of regulatory action to other federal agencies, respectively) have provided OSHA with EPA-generated health risk information that has led to regulatory activity under section 6 of the OSH Act.

Proclaiming its concern with chemicals that may cause cancer, gene mutations or birth defects, Congress has required that the EPA initiate appropriate action to prevent or reduce such risks upon its receipt of information pertaining to those effects. Specifically, section 4(f) of TSCA provides that:

Upon the receipt of—

- (1) any test data required to be submitted under this Act, or
- (2) any other information available to the Administrator, which indicates to the Administrator that there may be a reasonable basis to conclude that a chemical substance or mixture presents or will present a significant risk of serious or widespread harm to human beings from cancer, gene mutations, or birth defects, the Administrator shall, within the 180-day period beginning on the date of the receipt of such data or information, initiate appropriate action under section 5, 6, or 7 to prevent or reduce to a sufficient extent such risk or publish in the Federal Register a finding that such risk is not unreasonable

....<sup>85</sup>

Section 4(f) applies only to a limited number of human health effects and does not apply to environmental effects. This is in contrast to the EPA's authority under other sections of the Act, which address both health and environmental risks without further distinction as to the nature of the risks which the Agency is authorized to address. Moreover, section 4(f) accelerated review is not mandated for all chemicals associated with the three health effects, but only for those for which the available information "indicates . . . that there may be a reasonable basis to conclude" that the substance or mixture "presents or will present a significant risk of serious or widespread harm" from the specified health effects. Although the term "significant risk of serious or widespread harm" is not defined in TSCA, the EPA addressed the meaning of the

<sup>84</sup> 40 C.F.R. § 702.89 (1986). There is no requirement that the notice of intent to file suit specify the harm believed to have been caused by the violation or by the failure of the Administrator to perform a nondiscretionary act or duty. Rather, any allegations of harm that may need to be made are left to the civil action itself. 47 Fed. Reg. 2772 (1982).

<sup>85</sup> TSCA § 4(f), 15 U.S.C. § 2603(f) (1982).

term, as well as the nature of information that can trigger section 4(f) requirements, during its accelerated review of formaldehyde:

In the case of formaldehyde, and as will be the case for many chemicals evaluated by EPA, the Agency has started with data showing that formaldehyde causes cancer in animals at particular dose levels and has applied mathematical models to extrapolate from the animal dose levels to those levels to which humans would likely be exposed. These mathematical models give EPA an objective measurement of the relative risks of different chemicals and, thus, provide a mechanism to allow the Agency to set priorities. Because section 4(f) is a priority-setting provision, EPA believes it is appropriate to use these models to decide whether section 4(f) is triggered by a given chemical.

The application of the mathematical models to the animal data and the extrapolation to human dose levels results in a determination of the potential risk to individuals over their lifetimes. This is generally expressed as a probability. For example, the model extrapolations may show that certain categories of individuals exposed to formaldehyde at a given level over a given period of time could contract cancer with a probability of  $1 \times 10^{-4}$  which is a chance of 1 in 10,000.

The individual risk number derived from the model may then be multiplied by the number of exposed persons believed to be exposed to that dose level. That product provides an indication of how many of these persons could contract cancer.

....

In determining whether a chemical risk may meet either statutory test—"significant risk of serious harm," or "significant risk of widespread harm"—EPA applies the models as described. Under the "significant risk of serious harm" test, the individual risk would be high for a population of significant size. Under the "significant risk of widespread harm" test, the individual risk calculation may be lower, but the large number of persons exposed would lead to a potential for a significant number of persons in the population to be injured by the effect under consideration.<sup>86</sup>

Several chemicals that have been the subject of section 4(f) accelerated review have been referred to OSHA for regulatory consideration pursuant to TSCA section 9(a), which establishes the relationship between TSCA and federal laws not administered by the EPA. Section 9(a) provides that if the Administrator of the EPA determines (1) that there is a reasonable basis to conclude that a chemical substance or mixture presents or will present an unreasonable risk of injury to health or the environment and (2) "in the Administrator's discretion," that the risk may be prevented or reduced "to a sufficient extent" by action under a federal law not administered by the EPA, the Administrator is required to submit to the agency which administers the law a report describing the risk and the activities that the EPA has reason to believe present the risk. The report must include "a detailed statement of the information on which it is based," and must request the other agency (1) to determine if the risk "may be prevented or reduced to a sufficient extent" by agency action taken under the other law and (2) (if the other agency determines that the risk may be prevented or sufficiently reduced) to issue an order

<sup>86</sup> 49 Fed. Reg. 21,871 (1984).

declaring whether or not the activities specified in the EPA's description of the risk do indeed present such a risk. Also, the EPA is required to request that the other agency respond to it with regard to the two matters specified above.<sup>87</sup>

The operation of section 4(f) priority review and of the section 9(a) referral process leading to OSHA rulemaking is illustrated by those agencies' handling of toxicity and exposure information on 1,3-butadiene, a colorless gas with a mildly aromatic odor used predominantly as a monomer in the production of various types of synthetic rubbers, plastics and resins. The present OSHA standard for 1,3-butadiene is an eight-hour time weighted average of one thousand parts per million parts of air<sup>88</sup> (ppm), and was adopted in 1971 under the authority of section 6(a) of the OSH Act.

Faced with two animal toxicology studies demonstrating the potential for 1,3-butadiene to cause cancer in rodents, and with preliminary information that some workers may be exposed to levels of the chemical roughly equivalent to those that produced tumors in the experimental animals, the EPA on January 5, 1984 made the section 4(f) threshold determination that there may be a reasonable basis to conclude that 1,3-butadiene presents or will present a significant risk of serious or widespread harm, thus commencing the 180-day review period specified in the Act.<sup>89</sup> Although not required under TSCA or the OSH Act, OSHA simultaneously published a request for information on the chemical substance.<sup>90</sup>

Within the 180-day time frame, the EPA "initiate[d] appropriate action under section 5, 6, or 7" by issuing an Advance Notice of Proposed Rulemaking (ANPR) for a section 6 rule on May 15, 1984.<sup>91</sup> One pur-

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87 TSCA § 9(a)(1), 15 U.S.C. § 2608(a)(1) (1982). If the agency to which the report was made either (1) issues an order declaring that the activity specified in EPA's description of the risk does not present the risk described in the report, or (2) initiates within 90 days action to protect against the risk, EPA may not take any action under TSCA §§ 6 or 7 with regard to the risk. TSCA § 9(a)(2), 15 U.S.C. § 2608(a)(2).

88 29 C.F.R. § 1910.1000 (1986) (Table Z-1).

89 1,3-Butadiene; Initiation of Accelerated Review, 49 Fed. Reg. 845 (1984).

90 Occupational Exposure to 1,3-Butadiene, 49 Fed. Reg. 844 (1984).

91 49 Fed. Reg. 20,524-28 (1984). In the ANPR the Agency noted that § 6 of TSCA is a vehicle for the control of unreasonable risks, and addressed the question of what constitutes "unreasonable risk" for purposes of regulation under the Act:

A determination of unreasonable risk under TSCA represents an administrative judgment reached by balancing the probability that harm will occur and the magnitude and severity of that harm against the impact of regulation. Regulatory impact is evaluated in terms of benefits provided to society by the chemical under consideration, taking into account the availability of substitutes and reasonably ascertainable economic consequences, including effects on the national economy, small business, and technological innovation. Thus, the existence of potential harm does not in itself constitute unreasonable risk. If the economic or other adverse impacts of regulatory control outweigh the risk of harm, EPA would not find the risk unreasonable.

49 Fed. Reg. at 20,526. See *supra* note 68.

Shortly following the EPA § 4(f) determination published on January 5, 1984, OSHA received petitions for an Emergency Temporary Standard (ETS) of 1 ppm or less for workers exposed to butadiene. The Oil, Chemical and Atomic Workers (OCAW), the United Rubber, Cork, Linoleum and Plastic Workers of America (URW), the International Chemical Workers Union (ICWU), and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) submitted petitions on January 23, 1984. On March 7, 1984 OSHA denied the petitions on the ground that it was

pose of the ANPR was to seek public comment on the various means by which exposures to the chemical could be controlled, and on whether any of the EPA's statutory authorities, or the OSH Act, provided the most appropriate basis for regulation. Comments to the ANPR were filed by four trade associations, two chemical companies, and one public interest group. Generally, the trade associations and companies acknowledged the new animal toxicology risk information, but expressed concern about the potential for over-regulation, while stating that should any regulations concerning workplace exposure be required the appropriate agency to promulgate those regulations is OSHA.<sup>92</sup> The one public interest group that commented, the Natural Resources Defense Council (NRDC), on the other hand, argued for employee health protection through the promulgation of EPA-mandated manufacturing and processing controls under TSCA section 6, and also urged EPA to use its various statutory authorities to address all human exposures to the chemical, including exposures through the atmosphere, soil and groundwater.<sup>93</sup>

On October 10, 1985 the EPA published its findings under TSCA section 9(a), including a determination based on risk assessments that the upper-bound lifetime risk to workers in plants that produce 1,3-butadiene and in plants that process the chemical into polymers range from one in one ( $1 \times 10^0$ ) to one in ten thousand ( $1 \times 10^{-4}$ ), depending on the level of exposure. The EPA concluded that those risk values represent a maximum of nine hundred extra lifetime cases of cancer in the monomer and polymer industries.<sup>94</sup> After examining the societal benefits of butadiene, the costs to industry of controlling exposure, and the evidence that cancer risk could be reduced through relatively inexpensive engineering controls so as to result in less than one hundred extra lifetime cancer cases,<sup>95</sup> the EPA concluded that "current exposures during the

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in the process of evaluating health risk data to determine whether regulatory action was appropriate. 51 Fed. Reg. 12,527 (1986).

<sup>92</sup> See ANPR Public Record OPTS-62034 Chemical Manufacturers Association (CMA), Comments of the CMA's Butadiene Program Panel to EPA's Advance Notice of Proposed Rulemaking (ANPR), July 16 and August 29, 1984; E.I. du Pont de Nemours and Company, Comments on 1,3-Butadiene, Initiation of Regulatory Action, July 16, 1984; International Institute of Synthetic Rubber Producers, Inc. (IISRP), Comments on the ANPR, July 13 and August 29, 1984; Polysar Limited, Comments on the ANPR, June 28, 1984; Rubber Manufacturers Association (RMA), Comments on the ANPR, July 16, 1984; Synthetic Organic Chemical Manufacturers Association, Inc. (SOCMA), Comments on the ANPR, July 16, 1984.

<sup>93</sup> See ANPR Public Record OPTS-62034, Natural Resources Defense Council, Inc. (NRDC), Comments of NRDC on Advance Notice of Proposed Rulemaking Governing Initiation of Regulatory Action on 1,3-Butadiene, July 16, 1984.

<sup>94</sup> 1,3-Butadiene; Decision to Report to the Occupational Safety and Health Administration, 50 Fed. Reg. 41,393 (1985).

<sup>95</sup> An element in the EPA's determination that exposure to 1,3-butadiene presents an unreasonable risk to workers was its calculation of the costs that would be incurred in reducing the risk:

The imposition of more effective engineering controls appears to be capable of reducing all workplace exposures to less than 1 ppm, thereby reducing the cancer risk to 1 in 100 or less and the extra lifetime cases of cancer to less than 100. The Agency's best estimate of the industry-wide total costs of the improved engineering controls is in the range of \$8 million to \$21 million, expressed in current dollars. (On an annualized cost basis, these engineering controls would cost from \$1.3 million to \$3.4 million per year, calculated over a 10-year period at a 10 percent discount rate.) Accordingly, up to 800 cancers could be avoided over a 40-year period at a total cost of \$10,000 to \$26,000 per cancer case avoided.

manufacture of 1,3-butadiene and its processing into polymers present an unreasonable risk of injury to the health of exposed workers."<sup>96</sup> The Agency then proceeded to make the finding required by section 9(a) that the risk may be prevented or reduced to a sufficient extent by action taken under a federal law not administered by the Administrator:

A significant concern about human exposures to 1,3-butadiene relates to inhalation of this chemical in the workplace. The OSH Act is the primary statute for protecting the health and safety of workers, and, as such, provides broad authorities to achieve this objective. As discussed [above] a revised workplace standard may reduce unreasonable risks from the manufacture and processing of 1,3-butadiene to a sufficient extent. The requirement of such a revised workplace standard is clearly within the statutory authority of OSHA. Furthermore, OSHA has experience and expertise in enacting and enforcing these types of regulations. Therefore, EPA has determined that the unreasonable risk of injury to the health of exposed workers may be reduced or prevented by actions taken by OSHA under the Federal law it administers.<sup>97</sup>

Having made the determinations required in order to issue a report to another agency under section 9(a), EPA requested OSHA to (1) determine if the risk described may be prevented or reduced to a sufficient extent by action taken under the OSH Act, and (2) if so, issue an order declaring whether or not the risk is unreasonable. The EPA asked that OSHA respond to its request for the determination and order within 180 days.<sup>98</sup>

After soliciting public comment regarding the EPA's section 9(a) request,<sup>99</sup> OSHA published its response to the request in accordance with section 9(a)'s requirement that "[t]he agency receiving a request under such a report shall make the requested determination, issue the requested order, and make the requested response within such time as the Administrator specifies in the request . . . ."<sup>100</sup>

After reviewing existing health effects studies, data on worker exposure, the EPA's risk assessments, and the EPA's assessments concerning technological feasibility of exposure control, OSHA made the following Determination and Order pursuant to TSCA section 9(a): "'Occupational exposure to BD [butadiene] poses a risk to workers that can be prevented or reduced to a sufficient extent by a workplace standard promulgated and enforced by OSHA.'"<sup>101</sup>

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Thus, through relatively inexpensive engineering controls, which are already in place at some 1,3-butadiene manufacturing and processing facilities, about 90 percent of the cancer risk may be eliminated. Further risk reduction through the use of more stringent engineering control may be possible, but it appears that plant redesign would be required, thus resulting in a significantly higher cost. The Agency does not anticipate that the cost of the controls will have any adverse impact on the national economy or on small businesses.

50 Fed. Reg. 41,397 (1985).

96 *Id.* at 41,398.

97 *Id.*

98 *Id.*

99 Occupational Exposure to 1,3-Butadiene, Request for Comments, 50 Fed. Reg. 52,952 (1985).

100 TSCA § 9(a), 15 U.S.C. § 2608(a) (1982).

101 51 Fed. Reg. 12,528 (1986).



Finally, on October 1, 1986 OSHA announced that it was "initiating action within the meaning of section 9(a) of TSCA" by publishing an ANPR with respect to reducing worker exposures to 1,3-butadiene under section 6(b) of the OSH Act.<sup>102</sup>

The EPA's and OSHA's handling of butadiene risk information under sections 4(f) and 9(a) of TSCA illustrates how those two sections of the Act have operated in tandem to reduce potential risks to employee health. The enactment and implementation of those sections of TSCA are thus further examples of the expansion of occupational safety and health law.

## V. Employment Discrimination Law

The foregoing sections have focused on statutes designed in their entirety (OSH Act) or in part (TSCA) with worker safety and health in mind. However, the recent heightened concern with occupational health and safety issues has "spilled over" into other areas of the law that initially developed without regard to employee health and safety. Nevertheless, as we show below, these other statutes and common law principles have proven sufficiently flexible to encompass these issues and, in so doing, have greatly expanded the scope of occupational health and safety law.

In pursuing the national commitment to equal employment opportunity during the last two decades, Congress has provided extraordinary legal protection to members of our society on the basis of race,<sup>103</sup> religion,<sup>104</sup> sex,<sup>105</sup> pregnancy,<sup>106</sup> handicap,<sup>107</sup> age,<sup>108</sup> veteran status,<sup>109</sup>

<sup>102</sup> Occupational Exposure to 1,3-Butadiene, Advance Notice of Proposed Rulemaking. 51 Fed. Reg. 35,003 (1986).

<sup>103</sup> Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to e-17 (1982); Civil Rights Act of 1866, 42 U.S.C. § 1981; the fair employment practices statutes for the several states. 3 Empl. Prac. Guide (CCH) ¶¶ 8051-10038 (1986) (State Law Guide) [hereinafter State Fair Employment Laws]; Exec. Order No. 11246, 3 C.F.R. § 567 (1966).

<sup>104</sup> *Id.*

<sup>105</sup> Equal Pay Act of 1963, 29 U.S.C. § 206 (1982); Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e to e-17; State Fair Employment Laws, *supra* note 103; Exec. Order No. 11,246, as amended by Exec. Order No. 11,375, 3 C.F.R. § 320 (1967).

<sup>106</sup> 42 U.S.C. § 2000e(k) (1982).

<sup>107</sup> Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1982); State Fair Employment Laws, *supra* note 103.

<sup>108</sup> Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982); State Fair Employment Laws, *supra* note 103.

<sup>109</sup> Vietnam Era Veterans' Readjustment Assistance Act of 1972, 38 U.S.C. §§ 2011-2014 (1982); State Fair Employment Laws, *supra* note 103.

<sup>110</sup> Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981 (1982), as construed in *Guerra v Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974).

<sup>111</sup> Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to e-17; Exec. Order No. 11,246, 2 C.F.R. § 567 (1966); State Fair Employment Laws, *supra* note 103.

<sup>112</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 274B, 100 Stat. 3359, 3374-3380 (to be codified at 8 U.S.C. § 1324b).

<sup>113</sup> State Fair Employment Laws, *supra* note 103.

<sup>114</sup> For example, Illinois prohibits discrimination on the basis of marital status and unfavorable military discharge. Illinois Human Rights Act, ILL. ANN. STAT. ch. 68, paras. 1-101 to 9-102. Florida, Louisiana and North Carolina prohibit discrimination in employment based on sickle cell trait (FLA. STAT. ANN. § 448.075 (West 1981); LA. REV. STAT. ANN. §§ 23:1001 - :1004 (West 1985); N.C. GEN. STAT. § 95-28.1 (1985)).

alienage,<sup>110</sup> ancestry<sup>111</sup> and citizenship.<sup>112</sup> Most states also offer these protections<sup>113</sup> and some states even offer more expanded coverage.<sup>114</sup>

Throughout the last twenty years, occupational health issues have repeatedly and increasingly surfaced in the EEO context. While the interface between occupational safety and health and discrimination principles has been most evident with respect to three of the protected classes—women, handicapped and older workers—one can argue that the protected status of almost all classes are grounds for the development and growth of equal employment opportunity and occupational health and safety obligations.

Perhaps the greatest interplay between occupational health and EEO goals has occurred with respect to female employees. Occupational health and safety issues surrounding the employment of women workers basically fall into two categories. First, there are the issues arising from the differences between the male and female musculo-skeletal systems and their concomitant differences in strength and agility. Second, there are the issues relating to the potential dangers to human reproduction and related protective measures which adversely impact on women. The latter category has fostered significant legal activity. This activity is directly related to perceived deficiencies in other more traditional health and safety legislation such as worker's compensation and the OSH Act.<sup>115</sup>

The last two decades have witnessed a significant increase in concern within the general public and the legislatures regarding the potential health risks of certain workplace chemicals. A specific concern involves the potential effect of occupational exposure to some chemical substances on human reproduction. "Reproductive risk" in the workplace is not limited to female workers as the DBCP incident has demonstrated.<sup>116</sup> With respect to teratogens<sup>117</sup> or transplacental carcinogens,<sup>118</sup> however, only exposure to the mother may result in exposure to the fetus. Accordingly, the problems involved with exposure to teratogenic or transplacental carcinogenic substances are sex specific. Because of these sex specific effects legal questions involving employment discrimination are raised whenever an employer takes action to protect fetal health. Such action necessarily impacts exclusively or predominantly on female employees. These employment policies have the concurrent effect of limiting fertile females' access to certain jobs, or of excluding them entirely

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115 For a discussion of the interface between occupational health and EEO principles with respect to the placement of women in physically demanding jobs, see Stillman and Polk, *Employment Discrimination*, in *OCCUPATIONAL HEALTH LAW* 181-84, *supra* note 1.

116 DBCP or dibromochloropropane is a liquid pesticide. Occupational exposure to DBCP is allegedly associated with infertility in exposed male workers. See, e.g., U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, U.S. GOV'T PRINTING OFFICE PUB. NO. OTA-BA-266, *REPRODUCTIVE HEALTH HAZARDS IN THE WORKPLACE* 199-200 (1985).

117 A teratogen is a chemical substance or other agent that interferes in the normal development of the fetus after conception and may result in miscarriage, visible birth defects (such as missing limbs or cleft palate) or defects not noticeable at birth (such as learning disorders or hormonal imbalance).

118 A carcinogen is any cancer causing substance. A transplacental carcinogen is a cancer causing substance that crosses the placenta and reaches the fetus.

from workplaces that the employer believes may be fetotoxic. These policies are called "exclusionary policies."

In the early years following passage of the OSH Act, OSHA shied away from reproductive hazards issues. Thus, even though evidence regarding alleged transplacental carcinogenic properties of vinyl chloride<sup>119</sup> was adduced at hearings underlying promulgation of OSHA's vinyl chloride standard, the final standard did not address fetotoxicity. The Agency did not come to grips with the reproductive risk issue for several years<sup>120</sup> and, indeed, as of this time OSHA has regulated only three substances which it considers potentially harmful to human reproduction.<sup>121</sup>

Into this vacuum, many employers began to implement fetus protection policies out of concern for the health of the unborn and/or potential tort liability resulting from exposure of an employee's offspring to workplace chemicals that might be fetotoxic.<sup>122</sup> Employers who were considering implementing exclusionary policies generally opted to implement them for several reasons, despite potential EEO liability. First, liability for sex discrimination under Title VII, Executive Order No. 11246 and virtually all state fair employment practices statutes is limited to equitable relief, which in this context, is limited to lost back pay, benefits and reinstatement. Moreover, interim earnings are set off against any pecuniary liability and the employee is obligated to mitigate damages by seeking such employment. By contrast, in a tort case a plaintiff (which in this situation would be an impaired infant and/or its parent(s)) could recover compensatory damages, including awards for pain and suffering, as well

119 This evidence included preliminary test results which indicated that some offspring of test animals exposed to vinyl chloride developed tumors at a rate greater than that of control animals' offspring. On the basis of this preliminary data NIOSH expressly recommended the following to OSHA: "In view of the preliminary results of animal toxicology studies, it is recommended that no woman who is pregnant or who expects to become pregnant should be employed directly in vinyl chloride monomer operations." NIOSH Recommendations for Medical Surveillance of Workers Exposed to Vinyl Chloride at No. vii. The final OSHA standard is found at 29 C.F.R. § 1910.1017 (1986).

120 See, e.g., dialogue between Dr. John Finklea, Director of NIOSH, and Congressman David Obey (D-Wis.) during *Hearings on Dep't of Labor and Dep't Health, Educ. and Welfare Appropriations for 1977 Before the Subcomm. on Dep't of Labor — HEW Appropriations of the House Comm. on Appropriations, 94th Cong., 2d Sess. at 302 (1976)*:

Mr. Obey. Would existing standards protect the unborn?

Dr. Finklea. Most of the consensus standards were not established with the view of protecting women of child bearing age in the workplace.

Mr. Obey. You say they were not?

Dr. Finklea. That is correct. With our recommendations that we are making to the Department of Labor, they do address that issue, but the consensus standards established in the past do not consider that question. We are trying to relook at all of these . . .

Mr. Obey. Most of those chemicals are not regulated at all?

Dr. Finklea. They are regulated but not with this in mind.

In a paper by Dr. Finklea entitled "Women in the Workplace — An Emerging Social Issue" read before University of Cincinnati Seminar on January 28, 1976, Dr. Finklea observed that federal occupational safety and health standards were, by and large, not established with a view towards ensuring the protection of workers who may be especially susceptible.

121 ETO, 29 C.F.R. § 1910.1047 (1984); lead, 29 C.F.R. § 1910.1025 (1978); DBCP, 29 C.F.R. § 1910.1044 (1978).

122 The possibility for tort actions against employers brought by injured offspring of employees is a very real concern. See, e.g., *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977). Although not an employer case, its rationale can be transposed into the employment context.

as punitive damages which in cases of this kind could possibly result in multimillion dollar awards. A second factor leading many employers to address the reproductive risk issue in the EEO forum rather than in tort litigation is the nature of the trial: sex discrimination cases are bench trials whereas tort actions are usually tried to a jury. Most employers and their attorneys would rather avoid the vagaries of jury decision-making when there is an impaired baby plaintiff on one side and a large company defendant on the other.<sup>123</sup>

In earlier years the Equal Employment Opportunity Commission ("EEOC") and the Office of Federal Contract Compliance Programs ("OFCCP"), the federal agencies responsible for enforcing Title VII and Executive Order No. 11246, respectively, attempted to use traditional discrimination analysis to deal with sex discrimination issues arising from exclusionary policies.<sup>124</sup> However, this approach, because of its ad hoc nature, could not sufficiently incorporate and evaluate the rather unique legal and medical issues posed by reproductive risks. Indeed, it was not until the December 1982 decision in *Wright v. Olin Corp.*<sup>125</sup> that an appellate court finally addressed the employment discrimination implications under Title VII of fetus protection policies.

In its *Wright* decision, the Fourth Circuit held that a company fetal protection policy that has the effect of excluding women from certain jobs establishes a prima facie violation of Title VII because, while facially neutral, it clearly has a disparate impact on women. Nevertheless, such a prima facie showing can be rebutted by the employer establishing a business necessity affirmative defense.<sup>126</sup> Of crucial importance was the Fourth Circuit's endorsement of the concept that an employer has a legitimate business interest in protecting the health of its employees' unborn children and that that legitimate business interest can rise to a business necessity affirmative defense. The court set down guidelines for making this business necessity showing, and held that to establish its business necessity affirmative defense, an employer must: (a) prove that there is significant risk of harm to the unborn children of women workers from workplace exposures; (b) show that the risk is, on the best available scientific data, substantially confined to the exposure of women workers; (c) establish by independent, objective evidence the significance of the risk, the extent of its confinement to the unborn children of women as opposed to men workers, the consequent necessity of protective measures confined to women workers, and the effectiveness of the actual program for the intended purposes; (d) present opinion evidence by qualified experts in the relevant scientific fields to support the findings

123 If the parent is the plaintiff, he or she could seek damages for injuries to the child. Direct injury to the parent/employee falls within the scope of worker's compensation.

124 See, e.g., *Forced Resignation of Pregnant X-Ray Technician was Bias*, 1986 E.E.O.C. Dec. (CCH) ¶ 6442 (1974); *Forced Resignation of Pregnant Worker*, 1986 E.E.O.C. Dec. (CCH) ¶ 6443 (1974). See also EEOC-OFCCP Proposed Interpretative Guidelines on Employment Discrimination and Reproductive Hazards which were published on February 1, 1980 at 45 Fed. Reg. 7514 but withdrawn on January 16, 1981 at 46 Fed. Reg. 3916 due to criticism by industry, labor and the medical community.

125 697 F.2d 1172 (4th Cir. 1982), *vacated*, 767 F.2d 915 (4th Cir. 1984).

126 *Id.* at 1189-90.

and conclusions in (c) above; and (e) show that within the qualified scientific community there is a considerable body of opinion that significant risk exists and that it is substantially confined to women workers, that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one. The prima facie business necessity defense may, however, be rebutted by proof that there are acceptable alternative policies or practices which would better accomplish the business purpose (of protecting the fetus) or accomplish it equally well with a lesser differential impact between women and men workers. Whether any alternatives are "acceptable" under *Wright*, in terms of their effectiveness and their economic and technological feasibility, is a factual/legal issue to be addressed by the trial court on the basis of the evidence.<sup>127</sup> Despite the burden these guidelines placed on the employer, on remand to the trial court Olin was able to persuade the fact finder that its policy was justified under the standards articulated by the appellate court.<sup>128</sup>

The Fourth Circuit's analysis in *Wright* was subsequently applied by a state discrimination agency in *Steele v. B.F. Goodrich Chemical Co.*,<sup>129</sup> a 1983 decision of the Illinois Human Rights Commission. In *Steele*, the state agency held that the company had satisfied most of the *Wright* guidelines but concluded that, in light of Steele's age (48), her professed desire not to have children and the availability of a birth control pill program, there was a lesser discriminatory alternative to application of the fetus protection policy to Steele.<sup>130</sup> Thus, the Commission concluded that "in the case of Mrs. Steele," the company's implementation of its otherwise valid policy was "overkill."<sup>131</sup>

In March 1984, the second appellate court case to address reproductive hazards in the EEO context was decided. In *Hayes v. Shelby Memorial Hospital*,<sup>132</sup> an x-ray technician was fired when she became pregnant. The hospital argued that it was unsafe for her to be near radiation while pregnant and that there were no other positions available to her. In *Hayes*, the Eleventh Circuit arrived at a conclusion that was similar to that expressed in *Wright*, although *Hayes* used a somewhat different analysis. The *Hayes* court declared that an exclusionary policy could be legal, stating that: "In those instances in which scientific evidence points to a hazard to women, but no scientific evidence exists regarding men, an employer may be allowed to adopt a suitable policy aimed only at women."<sup>133</sup> The appellate court went on to caution that: "As additional research on men becomes available, however, the employer must adjust its policy or risk running afoul of Title VII."<sup>134</sup>

The *Hayes* decision drew a distinction between what it considered

127 *Id.* at 1190-92; but see Brodin, *Costs, Profits and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 351-53 (1987).

128 585 F. Supp. 1447 (W.D.N.C. 1984), *vacated*, 767 F.2d 915 (4th Cir. 1984).

129 9 Ill. HRC Rep. 5 (1983).

130 *Id.* at 20-21.

131 *Id.* at 21.

132 726 F.2d 1543 (11th Cir. 1984).

133 *Id.* at 1549.

134 *Id.*

reasonable and unreasonable risks of harm to the fetus, and concluded that a policy designed to protect the fetus in a radiation environment below .5 rems was "unreasonable" and, therefore, illegal because the National Council on Radiation Protection and Measurements has concluded that a radiation dose below .5 rems is not harmful to the fetus.<sup>135</sup> The court's rationale may not be widely applicable, however, because dose/response relationships with regard to potential fetotoxic effects have not been established for workplace chemicals with the possible exception of lead.

Although neither the *Wright* nor *Hayes* decision is totally satisfactory as a theoretical construct, they have, nonetheless, provided guidelines for use by other courts, and have focused future litigation on the complex areas of risk assessment and scientific/medical evidence and opinion.

For the last decade the most conspicuous use of EEO laws to address a health issue has been in the area of potential risks to human reproduction. It is for that reason that this section has focused on the EEO law/reproductive risk interface. Trends in the law, however, clearly suggest that there will be continued resort to discrimination statutes in other occupational health contexts. Such resort is inevitable, for example, in the developing area of genetic screening. Already some employers are screening workers to determine whether they possess genetic traits which may indicate susceptibility to diseases that may be associated with workplace exposures. Since the presence of some of those genetic traits are, for example, associated with certain racial, religious or ancestral groups, classic EEO disparate impact and handicap discrimination arguments will arise in the cases challenging such screening practices.<sup>136</sup>

## VI. Federal Labor Law

In 1935, as part of President Roosevelt's New Deal, Congress passed the Wagner Act and, in so doing, enacted the National Labor Relations Act (now known as the Labor Management Relations Act ("LMRA")),<sup>137</sup> which established the National Labor Relations Board ("Board") and set the foundation for this country's regulation of union-management relations.

At the time of its passage, worker health and safety was not a focus of the Act; labor organizers had contended, however, that increased worker safety was part of a union's basic agenda. Thus, in establishing a framework for the protection and growth of unions, the LMRA at least tangentially supported a safer occupational environment. However, it is

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135 *Id.* at 1551.

136 For a detailed discussion of these issues, see M. ROTHSTEIN, *MEDICAL SCREENING OF WORKERS* (1984); Professor Rothstein is a contributing author in this symposium, see Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 *NOTRE DAME L. REV.* 940 (1987).

137 Presently codified, as amended, at 29 U.S.C. §§ 151-168 (1982). The Act was amended in 1947 by the Taft-Hartley Act and in 1959 by the Landrum-Griffin Act. The 1947 amendments changed the statute's name to the Labor-Management Relations Act, which is the current official statutory designation.

only recently that organized labor has resorted to the LMRA as a vehicle for furthering the goal of a safe and healthy workplace.

Use of the LMRA in safety and health matters has largely been in three areas: First, in the application of the principle of protected concerted activities to union and worker safety and health complaints; second, in the assertion of section 502's protection for safety-related work stoppages; and, third, in the interpretation of the LMRA's protection of a union's right to collect health and safety data in order to help ensure a safe workplace.

Section 7 of the Act protects an employee's right to engage in "concerted activities" for the purpose of mutual aid or protection. Although not defined by the LMRA, the term "concerted activities" generally includes the actions of employees who have joined together in order to achieve common goals. A single employee acting alone may also be involved in concerted activity, especially when attempting to induce group activity or acting as a representative of at least one other employee.<sup>138</sup> The Board has long held that an individual's assertion of a right grounded in a collective bargaining agreement is deemed concerted activity and therefore protected under section 7 of the LMRA. In its decision in *Interboro Contractors, Inc.*,<sup>139</sup> the Board reasoned that asserting a right contained in a collective bargaining agreement was an extension of the concerted action that produced the agreement and affected the rights of all employees that it covered. The Supreme Court accepted the *Interboro* doctrine as consistent with the LMRA in *NLRB v. City Disposal Systems, Inc.*,<sup>140</sup> noting that it made no sense for a union to negotiate a collective bargaining agreement where an individual could not unilaterally invoke the rights created against the employer. "A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense."<sup>141</sup>

In *City Disposal Systems*, a truckdriver refused to drive a truck he believed to be unsafe, invoking a section of the collective bargaining agreement that prohibited the employer from requiring an employee to drive a reportedly unsafe vehicle. The driver was discharged, and when the union declined to process his grievance, he filed a charge with the Board, accusing the employer of violating his rights under section 7 of the LMRA. The Board found the driver had been engaged in concerted activity and ordered him reinstated with backpay. The Court of Appeals disagreed, finding that the refusal to drive was not a concerted activity but an action taken on the employee's own behalf and for his own safety concerns.<sup>142</sup> The Supreme Court reversed, holding that "[t]he rationale of the *Interboro* doctrine compels the conclusion that an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been cor-

138 See, e.g., *Aro, Inc. v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979); *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971).

139 157 N.L.R.B. 1295, 1298 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967).

140 465 U.S. 822 (1984).

141 *Id.* at 832.

142 683 F.2d 1005 (6th Cir. 1982), *rev'd*, 465 U.S. 822 (1984).

rect in his belief that his right was violated.”<sup>143</sup> The Court found that the driver had reasonably and honestly invoked his right to avoid driving unsafe trucks, thereby engaging in protected concerted activity, and that the union and the employer had agreed that legitimate safety concerns were important enough to allow the employees to walk off the job. The Court accepted the proposition that the LMRA protects an employee from retaliation when attempting to exercise this right to a safe working environment.

However, Justice O'Connor, joined by Justices Burger, Powell and Rehnquist, stated in dissent that “the fact that the right the employee asserts ultimately can be grounded in the collective-bargaining agreement is not enough to make the individual’s self-interested action concerted.”<sup>144</sup> She noted that under the LMRA not every alleged contract violation, or every safety complaint even if based on a contract provision, can be the basis for an unfair labor practice complaint. “The statutory authority to interpret *some* contract provisions is not authority to resolve *all* labor disputes.”<sup>145</sup> Under Justice O'Connor’s reasoning, the statute authorizes employees who act together expressing a mutual concern to vindicate their rights through the Board’s administrative processes. An employee acting alone, however, expressing a personal concern, must seek vindication through his union or the courts. In *City Disposal Systems*, the dissenters found no evidence that the driver had expressed his safety concerns to any other employees or requested the union’s assistance in protesting to his employer. He merely insisted that the truck was not safe enough for *him* to drive. Accordingly, the dissenters did not believe he had engaged in concerted activity.<sup>146</sup>

*City Disposal Systems* dealt solely with employee safety complaints rooted in express safety provisions of collective bargaining agreements. However, the Board has recently indicated in *Meyers Industries, Inc.*,<sup>147</sup> that safety complaints not expressly covered by collective bargaining agreements are less likely to be considered concerted activities. This is contrary to the Board’s earlier ruling in *Alleluia Cushion Co.*,<sup>148</sup> where an employee in an unorganized plant, acting pursuant to his own concerns about plant safety and without seeking or obtaining support from other employees, attempted to enforce state safety regulations by informing the state’s Occupational Safety and Health Administration of potential safety violations in the plant. The Board found that although the employee acted alone, safe working conditions are of great concern to all workers, thereby making this concerted activity.<sup>149</sup> However eleven years elapsed between *Alleluia Cushion Co.* and *Meyers* and a newly constituted Board saw the issue in a different light.

*Meyers* also concerned a safety complaint by a truck driver. In *Meyers*,

143 465 U.S. at 840.

144 *Id.* at 842 (O'Connor, J., dissenting).

145 *Id.* at 844 (emphasis in original).

146 *Id.* at 846.

147 281 N.L.R.B. 118 (1986).

148 221 N.L.R.B. 999 (1975).

149 *Id.* at 1001.



Kenneth Prill was discharged for refusing to drive an allegedly unsafe vehicle and for complaining to the authorities in two states about the truck. Prill then brought a charge with the Board against his employer, Meyers Industries, Inc., alleging that his actions constituted protected concerted activity. The Board found that Prill's safety concerns did not constitute concerted activity and dismissed the complaint.<sup>150</sup>

In reaching this decision, the Board overruled its earlier decision in *Alleluia Cushion Co.*<sup>151</sup> The *Meyers I* Board rejected the *Alleluia* doctrine because it effectively allowed the Board, not the employees, to determine the existence of a safety issue about which the employees ought to have a group concern. "A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity 'concerted' within the meaning of Section 7."<sup>152</sup> The Board held that since Prill acted on his own behalf and not on the authority of other employees, his safety complaint was not concerted activity.

On appeal, the court remanded the case to allow the Board to reconsider the scope of concerted activities under section 7.<sup>153</sup> The court felt that the Board "erred in assuming that the NLRB mandates its present interpretation of 'concerted activities.'"<sup>154</sup> However, the court expressed no view as to whether, under section 7, the Board may adopt the *Meyers* test as an exercise of discretion.<sup>155</sup> Citing *City Disposal* for the acceptance of a broad definition of concerted activities which included safety and health complaints, the court criticized the Board for its belief that the language and history of section 7 required the term to "be interpreted to protect only the most narrowly defined forms of common action by employees . . . ."<sup>156</sup> "[T]he Board failed even to consider whether the discharge of an employee because of his safety complaints would discourage other employees from engaging in collective activity to improve working conditions."<sup>157</sup> Despite the dissent's arguments that the Board's error here was harmless, the court felt it could not sustain the case under a notion of harmless error "where the agency has failed to exercise its lawful discretion and has provided no rational basis for its determination."<sup>158</sup>

On remand, the Board again adopted—this time as an exercise of discretion—the *Meyers I* definition of concerted activity.<sup>159</sup> The Board initially discussed the consistency of the *Meyers I* standard with *City Disposal*. Noting that *City Disposal* included a collective aspect in its definition, even where only an individual invoked a right to a safe workplace that had been collectively agreed upon, the Board viewed the *Meyers I* defini-

150 *Meyers Industries, Inc. and Kenneth Prill*, 268 N.L.R.B. No. 73 (1984) (hereinafter *Meyers I*).

151 221 N.L.R.B. 999 (1975).

152 268 N.L.R.B. at 496.

153 *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), cert. denied sub nom., *Meyers Indus., Inc. v. Prill*, 474 U.S. 948 (1985).

154 *Id.* at 948.

155 *Id.* at n.46.

156 *Id.* at 952.

157 *Id.* at 953.

158 *Id.* at 957.

159 *Meyers Industries, Inc.*, 281 N.L.R.B. 118 (1986) (hereinafter *Meyers II*).

tion as a reasonable balance. "It is not so broad as to create redundancy in Section 7, but expansive enough to include individual activity which is connected to collective activity, which lies at the core of Section 7."<sup>160</sup>

The Board distinguished the collective activity involved when an employee invokes safety rights granted by federal or state legislation as opposed to those rights granted by a collective bargaining agreement. The invocation of contract rights is "a continuation of the ongoing process of concerted activity, whereas employee invocation of statutory rights is not."<sup>161</sup> While expressing its outrage at the poor safety conditions in *Meyers I*, the Board insisted its limited resources were best used enforcing solely the provisions of the LMRA. The Board concluded that Prill had not engaged in concerted activities and dismissed his complaint.

Despite the waffling with respect to whether individual safety complaints constitute concerted activities under the LMRA, the Board and the courts have agreed that, when a group of employees—even those unrepresented by a union or a collective bargaining agreement—protest a safety hazard in unison, they are engaged in protected concerted activity.<sup>162</sup> In *Tamara Foods*, for example, eleven food preparation workers walked off their jobs together when the plant's ammonia refrigeration system leaked fumes into their work area. After being discharged for disobeying plant rules, the employees filed an unfair labor practice charge against their employer. The Board found that section 7 protects the rights of employees to protest unsafe or unhealthy working conditions, even without prior notice or following established plant rules.<sup>163</sup> On appeal, the court enforced the Board's Decision and Order.<sup>164</sup>

Section 502 of the LMRA<sup>165</sup> also addresses employee safety and health complaints. That section provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike."<sup>166</sup> The effect of this section is to create an exception to a no-strike obligation in a collective bargaining agreement.<sup>167</sup> Section 502 does not modify section 7 and it is applicable only when the employees are covered by a collective bargaining agreement.<sup>168</sup>

Section 502 protects employees from discharge while engaging in a temporary work stoppage due to clearly evident danger. For example, a walkout due to the presence of belligerent, intoxicated former employees at a hazardous job site falls within the protection of the section.<sup>169</sup>

However, an employee seeking to justify a work stoppage under sec-

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160 281 N.L.R.B. No. 118.

161 *Id.*

162 NLRB v. *Tamara Foods, Inc.*, 692 F.2d 1171 (8th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

163 *Id.* at 1176.

164 *Id.* at 1179.

165 29 U.S.C. § 143 (1982).

166 *Id.*

167 *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 385 (1974).

168 The court found § 502 inapplicable in *Tamara Foods* because there was no collective bargaining agreement in that case. 692 F.2d at 1183.

169 *Combustion Engineering, Inc.*, 224 N.L.R.B. 542 (1976).

tion 502 must present "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists."<sup>170</sup> In *Gateway Coal*, the fact that three foremen falsified airflow entries in log books, potentially jeopardizing mining activities, did not suffice to invoke the special protection of section 502. The Court reasoned that absent objective evidence, any employee who believed a fellow worker may at some future time create a safety hazard should not be permitted to walk off the job in the face of a contractual agreement not to do so. The Court was unwilling to extend section 502 so far without explicit statutory direction.<sup>171</sup>

The labor laws have also recently been used by employees in safety and health matters as providing a statutory basis for union demands on employers to share relevant safety and health information.<sup>172</sup> In this regard, it has been argued that the LMRA protects not only an employee's right to a safe workplace, it also accords a union the right to collect health and safety data in order to help ensure a safe workplace. To date, the three Circuit Courts of Appeals that have spoken on this issue have all upheld a union's right to demand such health and safety data from the employer.<sup>173</sup>

A union may only request relevant information; relevance, however, is not dependent on the existence of a particular controversy but is considered to be any data "reasonably necessary to enable unions effectively to administer and police collective bargaining agreements or intelligently to seek their modification."<sup>174</sup> In the *OCAW* decision, where the collective bargaining agreements obligated both management and the unions to take specified actions to safeguard employees' health and safety, the court ordered the release of the requested data, noting that it would "facilitate the identification of workplace hazards [and] promote meaningful bargaining calculated to remove or reduce those hazards . . . ."<sup>175</sup>

Under certain circumstances a union may be entitled to access to the plant in order to collect its own data concerning health and safety. In *Holyoke Water Power Co.*, the court allowed a nonemployee union representative to measure noise levels in a portion of the plant which was alleged to be particularly noisy. The Board, balancing the union's interest in obtaining the information against the employer's interest in preventing an invasion of its property,<sup>176</sup> determined that the union's interest outweighed that of the employer's and ordered access.

Although it granted the Board's petition for enforcement of its order, the First Circuit questioned the balancing test approach.<sup>177</sup> The

170 *Gateway Coal*, 414 U.S. at 387.

171 *Id.* at 386.

172 For a detailed discussion of this topic, see Ashford and Ayers, *Changes and Opportunities in the Environment for Technology Bargaining*, 62 NOTRE DAME L. REV. 810 (1987).

173 *ASARCO, Inc. v. NLRB*, 805 F.2d 194 (6th Cir. 1986); *NLRB v. Holyoke Water Power Co.*, 778 F.2d 49 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 3274 (1986); *Oil, Chem. & Atomic Workers Local Union v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

174 711 F.2d at 360.

175 *Id.* at 361.

176 *See NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

177 *Holyoke Water Power Co.*, 778 F.2d at 52.

court instead found that the information sought was relevant to the union's statutory duty to bargain about conditions of employment. Unlike *OCAW*, this health concern was not already part of the collective bargaining agreement, yet the fact that exposure to high levels of noise could adversely affect employees was enough reason for the Court to require access to the information. In addition, the court found that the employer had provided inadequate information and agreed that the union may gather its own data.<sup>178</sup>

In a similar case, the Court of Appeals for the Sixth Circuit granted a union's request to investigate and photograph the site of a mine accident.<sup>179</sup> The court found that the information requested was relevant and necessary to carry out its duties as bargaining representative. However, the court denied access to an internal self-critical report prepared by the employer for the purpose of its own accident investigation because the union's interest in the information was outweighed by the chilling effect that disclosure of this document would have. Given that all relevant information was available to the union, the court found that "disclosure would seriously thwart the intended primary purpose of the document to the ultimate detriment of both parties' interest."<sup>180</sup>

In conclusion, while not necessarily designed with safety and health in mind, federal labor laws are sufficiently flexible to encompass these issues. By resorting to labor laws to protect (a) employees who make safety and health complaints, (b) employees who refuse to work in "abnormally dangerous conditions" and (c) unions which seek employer-controlled occupational health information, employees and their representatives have discovered a significant vehicle for addressing, from a preventive standpoint, safety and health issues.

## VII. Tort Law

From the employer's standpoint, a significant and disturbing trend away from worker's compensation as the exclusive remedy for occupational illness is the resort to tort litigation by employees.<sup>181</sup> Several legal theories have developed over the last twenty years which seek to circumvent the historical immunity to tort liability accorded by worker's compensation legislation. As we show below, some of these theories have met with greater success than others. Despite the variable successes of these different theories, taken together they make significant inroads in the exclusive remedy doctrine and, in so doing, increase employers' exposure to liability.<sup>182</sup>

One method by which some employers are drawn into tort litigation

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178 *Id.*

179 *ASARCO*, 805 F.2d 194.

180 *Id.* at 200.

181 A tort is a wrong or harm for which the common and statutory law permits the injured party to sue for damages.

182 For example, total liability estimates for the asbestos cases range, incredibly, between \$40 billion to \$150 billion. A portion of those cases are suits brought by employees who were employed by asbestos manufacturers. See Comment, *Relief For Asbestos Victims: A Legislative Analysis*, 20 HARV. J. ON LEGIS. 179, 182 (1983).

for an occupational accident or illness involving its own employees is through contribution or indemnification actions. If, for example, a boiler exploded injuring an employee in the course of his normal work activities, the employer would have worker's compensation liability arising from such an industrial accident. However, if the injured employee brings an action against the boiler manufacturer, grounded in negligence or strict liability (for design or manufacturing defects or failure to adequately warn) the manufacturer could file a third-party action against the employer for contribution, claiming, for example, that it was the employer's negligent operation or maintenance of the equipment which caused the accident.<sup>183</sup> If the injured employee succeeded in his claim against the boiler manufacturer, the manufacturer could then seek contribution from the employer. If the manufacturer succeeds in its contribution action, the employer could be obligated to contribute to or reimburse the manufacturer for the underlying award to the employee.<sup>184</sup>

Thus, in *Dole v. Dow Chemical Co.*,<sup>185</sup> an indemnification action against an employer by a third-party chemical company was allowed. An employee died while cleaning the employer's grain storage bin which had been recently fumigated with a toxic fumigant manufactured by the chemical company. The employee's estate sued the chemical company in tort alleging that the product's label failed to adequately warn of its hazards. The chemical company brought a third-party action against the employer alleging, *inter alia*, that the employer was negligent in using untrained personnel and in taking improper precautions. The employer argued that because it could not be sued directly by the employee it should not be allowed to be sued indirectly. The court, nonetheless, found that the third-party action alleged the employer's breach of an independent duty and therefore allowed the suit.

Another theory that employees use to circumvent the exclusive remedy doctrine is in reality an updated and greatly expanded version of the intentional tort exception.<sup>186</sup> An employer might be held liable for the intentional act of its employee through application of the doctrine of respondeat superior.<sup>187</sup> Over the years, different courts have applied dif-

183 See, e.g., *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 437, cert. denied, 436 U.S. 946 (1978).

We are of the opinion that if the manufacturer's third-party complaint alleges that the employer's misuse of the product or assumption of the risk of its use contributed to cause plaintiff's injuries, the manufacturer has stated a cause of action for contribution. The fact that the employee's action against the employer is barred by the Workmen's Compensation Act would not preclude the manufacturer's third-party action against the employer for indemnification and should not serve to bar its action for contribution.

*Id.* at 15-16, 374 N.E.2d at 443 (citations omitted).

184 However, the employer may be allowed to deduct from such award any worker's compensation award already paid to the employee for the same accident.

185 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

186 The intentional harm exception to many state worker's compensation statutes is expressly stated in some statutes or has arisen through judicial interpretation of others. See ANNOT., 96 A.L.R. 3d 1064, 1071 (1979) (and cases cited therein).

187 Generally, under this doctrine a corporation can be liable for the wrongful acts or omissions of its officers, agents or employees acting within the actual or apparent scope of their authority or course of employment. See 18B AM. JUR. 2D *Corporations* § 2125 (1985).

ferent standards regarding the type of corporate conduct needed to fall within the exception. Generally, recklessness or gross negligence by an employer does not establish the exception.<sup>188</sup> In some states, something approaching criminal intent is required.<sup>189</sup> These states apply the exception only in cases where the employer knowingly intended to cause harm to the employee.<sup>190</sup> In still other states, courts require a showing of willfully reckless misconduct which could reasonably and foreseeably lead to employee injury before they apply the intentional harm exception to the exclusive remedy doctrine's bar to tort litigation.<sup>191</sup>

In the asbestos litigation that has developed during the past twenty years,<sup>192</sup> the anomaly arose that employees of asbestos manufacturers who contracted asbestos related diseases through occupational exposure were restricted to worker's compensation recovery whereas employees of an employer who used that same asbestos could sue in tort for the same types of illnesses. Because tort law permitted claims for pain and suffering and punitive damages and since juries in tort actions were not limited by a preestablished schedule of benefits, the awards in the tort suits could far exceed any worker's compensation benefit for what was viewed by many as virtually identical exposure and illness. Given this perceived inequity, attempts were made by employees of asbestos manufacturers to circumvent the exclusive remedy doctrine. To this end, creative plaintiffs' lawyers looked to the intentional harm exception as a doctrinal underpinning for a revolutionary legal theory. Those attorneys argued, in effect, that the worst case scenario contemplated by the worker's compensation statutes is negligence by the employer, and that when an employer intentionally conspires to withhold from its employees information regarding health hazards to which the employees are exposed, it has gone so far beyond mere negligence as to have committed an intentional tort to which the limitations of worker's compensation do not apply.<sup>193</sup>

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188 See, e.g., *Kittell v. Vermont Weatherboard, Inc.*, 138 Vt. 439, 417 A.2d 926 (1980); *Duk Hwan Chun v. Fred Meyer, Inc.*, 276 Or. 809, 556 P.2d 683 (1976).

189 See, e.g., *Heikkila v. Ewen Transfer Co.*, 135 Or. 631, 297 P. 373 (1931); *Perry v. Beverage*, 121 Wash. 652, 209 P. 1102 (1922).

190 *Evans v. Allentown Portland Cement Co.*, 433 Pa. 525, 252 A.2d 646 (1969); *Castleberry v. Frost-Johnson Lumber Co.*, 283 S.W. 141 (Tex. Civ. App. 1926).

191 See, e.g., *Jones v. VIP Dev. Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984); *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907 (W. Va. 1978).

192 The first products liability asbestos suit was filed in 1968. See Comment, *supra* note 182, at 181-82.

193 See, e.g., *McDaniel v. Johns-Manville Sales Corp.*, 487 F. Supp. 714 (N.D. Ill. 1978) (the failure of the employer to warn its employees of asbestos hazards amounted to the torts of fraud, misrepresentation and conspiracy to deceive which thereby established the intentional harm exception to the otherwise applicable worker's compensation statute). See also *Martin v. Granite City Steel*, 607 F. Supp. 1430 (S.D. Ill. 1985); *Handley v. Unarco Indus.*, 124 Ill. App. 3d 56, 463 N.E.2d 1011 (1984); *Neal v. Carly Canadian Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd*, 760 F.2d 481 (3d Cir. 1985). In *Johns-Manville Prods. Corp. v. Contra Costa Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980), the California Supreme Court did not allow recovery in tort for injuries allegedly resulting from an employer's withholding of health hazard information, but did permit tort recovery for the exacerbation of those initial injuries where the exacerbation was caused by the concealment of health hazard information, including the concealment of diagnosis of illness by the company physician.

This theory, and its various articulations by different courts, has been used in cases involving chemical substances other than asbestos. For example, in one case employees were allowed to proceed in tort against their employer who allegedly concealed information regarding significant risks from exposure to certain workplace chemical vapors and failed to take corrective action.<sup>194</sup> Recently, a senior analytical chemist sued his former employer as well as two company doctors and fifty firms that used or supplied chemicals with which he worked for eight hundred million dollars alleging that the defendants conspired to deceive the plaintiff about the health risks thereby allowing the plaintiff to suffer immune system damage and possibly cancer.<sup>195</sup>

Although numerous courts have refused to adopt this expansion of the intentional harm exception and have, instead, upheld the application of more traditional worker's compensation principles,<sup>196</sup> it is likely that employees will continue to argue the intentional harm theory in its various forms thus seeking damages under tort law instead of worker's compensation.

The intentional harm theory is, however, not the only argument that employees have used to gain access to remedies in tort. The dual capacity doctrine has also posed a challenge to the exclusive remedy doctrine. As Professor Larson describes dual capacity: Under this doctrine,

[a]n employer may become a third person, vulnerable to tort suit by an employee, if—and only if—he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person.<sup>197</sup>

Another commentator has noted:

The dual capacity doctrine is premised on the fact that an employee retains his right to sue a third-party tortfeasor regardless of the existence of the worker's compensation remedy . . . . Thus an employer who causes injury to an employee through acts taken in a capacity outside the employment relationship is likened to a third party. The dual capacity doctrine does not abrogate the exclusivity provision. Instead, the doctrine construes the employer in his second capacity to be "someone other than the employer" for the purposes of the act.<sup>198</sup>

The application of the dual capacity doctrine is perhaps most easily understood in the following context: An employee of a hospital seeks treatment *as a patient* from his employer and such treatment results in a malpractice claim against the hospital. Several courts have held that, under these circumstances, the malpractice claim is actionable in tort be-

194 *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572, *cert. denied*, 459 U.S. 857 (1982).

195 *McClure v. Zoecon Indus., Inc.*, No. 86-3338 (C.D. Ill.) *reported in* O.S.H. Rep. (BNA), vol. 16, no. 29 (Dec. 17, 1986), at 799.

196 *Copeland v. Johns-Manville Prods. Corp.*, 492 F. Supp. 498 (D.N.J. 1980); *Wright v. FMC Corp.*, 81 Cal. App. 3d 777, 146 Cal. Rptr. 740 (Cal. App. 1978); *Kofran v. Amoco Chems. Corp.*, 441 A.2d 226 (Del. 1982); *Hildebrant v. Whirlpool Corp.*, 364 N.W.2d 394 (Minn. 1985).

197 2A A. LARSON, *THE LAW OF WORKMAN'S COMPENSATION* § 72.81 (1982).

198 Comment, *The Dual Capacity Doctrine: Piercing the Exclusive Remedy of Workers' Compensation*, 43 U. PITT. L. REV. 1013, 1017 (1982).

cause the alleged harm was caused in the employer's capacity as a health care provider and not as an employer.<sup>199</sup>

When an employer is also the manufacturer of a consumer product, the dual capacity doctrine may apply. For example, an employee of an auto manufacturer may own, for his personal use, one of his employer's products. If he is involved in a car accident while not on working time or working premises, he may bring a products liability action against his employer in his capacity as a consumer. The doctrine has even been applied successfully in a case against a tire manufacturer which was sued in tort for injuries suffered by an employee truck driver as a result of an on-the-job blowout.<sup>200</sup> In another case, *Douglas v. E. & J. Gallo Winery*,<sup>201</sup> employees were permitted to sue in tort for damages they sustained while working on a scaffold that collapsed. Because the employer also was the scaffold manufacturer, the California Appellate Court held that the employer possessed two capacities: One as employer and one as manufacturer of the scaffold. In its latter capacity, the employer was subject to suit in tort even though the injured plaintiffs were employees injured during the course of employment.<sup>202</sup>

At this time only a few states have adopted the dual capacity doctrine<sup>203</sup> and even those states have limited this approach. For example, Illinois permitted use of the doctrine in *Smith v. Metropolitan Sanitary District*,<sup>204</sup> when an employee was injured by a purportedly defective truck leased by his employer. However, since *Smith*, Illinois has repeatedly rejected application of the doctrine. Thus, for example, in *Sharp v. Gallagher*<sup>205</sup> the Illinois Supreme Court held that an employer who also owns the land on which an employee is injured is one legal entity, even though it may have separate names and federal tax identification numbers, and as such the dual capacity doctrine did not apply. In *McCormick v. Caterpillar Tractor Co.*,<sup>206</sup> an employee's tort action against the company physician for alleged malpractice received in the course of treatment for an on-the-job injury was denied. The Illinois Supreme Court held that the treatment at issue was provided in the context of the state worker's

199 See, e.g., *Duprey v. Shane*, 241 P.2d 78 (Cal. App. 1951), *aff'd.*, 39 Cal. 2d 781, 249 P.2d 8 (1952); *Panagos v. North Detroit Gen. Hosp.*, 35 Mich. App. 554, 192 N.W.2d 542 (1971). In *Tatrai v. Presbyterian Univ. Hosp.*, 497 Pa. 247, 439 A.2d 1162 (1982), the Pennsylvania Supreme Court reached the same result although, instead of using a dual capacity rationale, held that the illness did not arise within the course of employment thereby negating coverage under Pennsylvania's worker's compensation statute.

200 *Mercer v. Uniroyal, Inc.*, 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976).

201 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977).

202 "The decisive dual-capacity test is not concerned with how separate or different the second function of the employer is from the first, but with whether the second function generates obligations unrelated to those flowing from the first, that of employer." *Id.* at 109, 137 Cal. Rptr. at 800 (quoting A. LARSON, *supra* note 197, at § 72.80).

203 These states are California, Illinois, Michigan, Montana and Ohio. A. LARSON, *supra* note 197, at § 72.81. In *Reed v. The Yaka*, 373 U.S. 410 (1963), the Supreme Court, while not expressly referring to the dual capacity doctrine, seemed to endorse its application as an exception to the exclusive remedy clause found in the Longshoreman's Act which provides a recovery scheme comparable to worker's compensation. See Comment, *supra* note 198, at 1019-28.

204 77 Ill. 2d 313, 396 N.E.2d 524 (1979).

205 95 Ill. 2d 322, 447 N.E.2d 786 (1983).

206 85 Ill. 2d 352, 423 N.E.2d 876 (1981).



compensation statute's mandate that employers make provision for medical care for occupational injury and was, therefore, covered by the act's exclusive remedy clause. In another Illinois case, *Olds v. Egnatz and Johnson & Johnson Products, Inc.*,<sup>207</sup> a medical malpractice action was brought against a pharmaceutical company and its medical director under a dual capacity theory. *Olds* differed from *McCormick* in that the underlying injury that sent the employee to the plant clinic did not arise out of work but had occurred at home. The plaintiff presented evidence that about half of all cases treated in the clinic were nonoccupational, and that employee visit records had an "occupational" as well as a "nonoccupational" box to check. The employee was treated for her swollen ankle, but the treatment resulted in second degree burns. She argued that she was not limited to worker's compensation because, by treating nonoccupational injuries the medical director and the company which owned the clinic were functioning as health care providers and were, thereby, liable for malpractice as any other health care provider.

Among the defenses propounded in a motion for summary judgment, the company and its doctor argued that the crucial fact was not where the plaintiff's initial injury, *i.e.*, the swollen ankle, arose, but rather that the injury for which she was seeking recovery (the burn) was received while on working time, on her employer's premises and as a result of action by a fellow employee. It was further argued that the medical services that the employer provided to the plaintiff were offered only to employees, were not available to the general public and were received by the plaintiff only as a consequence of her employment and her status of employee. Finally, the defendants argued that since the employee had already recovered for the same alleged injuries under worker's compensation, the Industrial Commission's holding underlying the benefits award that the injuries arose out of and in the course of employment was *res judicata*. The Illinois Circuit Court ultimately granted the defendants' motion in an unpublished decision,<sup>208</sup> and, in so doing, significantly minimized the risk of malpractice suits for employers who provide health care services to their employees, at least in Illinois.

Cases such as *McCormick* and *Olds* suggest that the more employers provide health care services to their employees beyond immediate aid for on-the-job injuries, the greater the risk that employees will attempt to equate them with health care providers including the attendant potential for malpractice claims. This increased risk could also apply to an employer who elects to provide health care to nonemployee visitors or, possibly, to off duty employees and their families.

The foregoing has been only a brief overview of some of the legal theories that have been utilized by employees attempting to bring actions in tort for occupational illness and injury. While some of these theories have proved more successful than others or have had wider application, and while some courts demonstrate greater receptiveness to these argu-

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207 No. 82 L 19739 (Cir. Ct. Cook Cty. Sept. 12, 1983).

208 *Olds v. Egnatz and Johnson & Johnson Prods., Inc.*, No. 82 L 19739 (Cir. Ct. Cook Cty. Sept. 12, 1983).

ments than others, it is nevertheless clear that as long as juries continue to award toxic tort third-party plaintiffs multimillion dollar awards, employees claiming occupational illnesses will continue to seek ways to break out from what they perceive as the comparative confines of the worker's compensation recovery system.

### VIII. Conclusion

Occupational safety and health law today is a constellation of interrelating and, at times, conflicting laws, regulations and legal theories. The significant expansion of occupational safety and health law over the last two decades is, of course, attributable to a number of factors, not the least of which are: The heightened awareness and understanding of certain occupational diseases; the health risks presented by some environmental chemicals; the perceived inadequacies of worker's compensation as a means of addressing or redressing occupational illness and injury; the difficulty in constructing legal doctrines where state-of-the-art health information does not provide definitive answers with respect to causation and exacerbation of illness; and the lack of a coherent unified national policy to respond to these issues. Given our society's litigious nature; our increasing awareness of health risks; and federal, state and local law makers' response to these social concerns, it was inevitable that occupational safety and health law would expand far beyond worker's compensation.

The statutes, regulations, legal theories and judicial decisions discussed in this Article have developed to address most of today's occupational safety and health issues and concerns. The OSH Act and TSCA are prevention oriented, while the worker's compensation and tort law systems become operative once illness or injury has occurred. Labor laws have been employed to further employees' interests in their safety and health, frequently elevating workplace safety to prominence in labor/management discussions and negotiations. However, because various laws and legal doctrines have developed to serve different goals, we have a quiltwork of processes to further the goal of safe and healthy workplaces, rather than a comprehensive and consistent approach. Thus, there is often duplicative, unnecessary and inconsistent regulation and litigation, which does not serve to further the interests of either employers or employees.