

# TOWARD A MEANINGFUL "RIGHT-TO-KNOW": MODEL LEGISLATION AND COMMENTARY

## *Introduction*

In February 1983, Stephen Golab, a Polish immigrant holding a work visa, suffered acute cyanide poisoning and convulsed to death while working at Film Recovery Systems, Inc. in Elk Grove, Illinois.<sup>1</sup> Golab worked in a room that contained 140 vats filled with 1,000 to 1,500 gallons of a cyanide solution used to extract silver from old film.<sup>2</sup> During this extraction process, the solution released hydrogen-cyanide gas, which filled the room and the lungs of the workers.<sup>3</sup> After Golab's death, the executives of Film Recovery were charged with willfully concealing the hazards posed by the cyanide solution from the workers.<sup>4</sup> Many workers testified that they suffered from recurrent headaches, nausea and other ailments, but they were not given adequate safety equipment or warned of potential dangers.<sup>5</sup> In addition, one employee openly acknowledged that, at his employer's direction, he painted over the skull and crossbones on the containers holding the cyanide residue that remained after the extraction process and hid the containers from inspectors after Golab's death.<sup>6</sup> Ultimately, three company executives were found guilty of murder based on Golab's industrial death.<sup>7</sup>

The death of this worker is a vivid and dramatic illustration of the need for accurate information about chemicals both in the workplace and in the community. In response to this need, twenty-nine states and thirty-six municipalities have enacted laws designed to provide those who work with toxic chemicals, as well as the general public, with access to information regarding the health and environmental effects of exposure to these sub-

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<sup>1</sup> Levine, *Executive Murder*, OMNI, Jan. 1986 at 18 [hereinafter cited as "Levine"]; and Moberg, *Et Al.*, STUDENT LAWYER, Feb. 1986 at 36 [hereinafter cited as Moberg].

<sup>2</sup> Levine, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Moberg, *supra* note 1, at 36.

<sup>6</sup> *Id.*

<sup>7</sup> Levine, *supra* note 1.

stances.<sup>8</sup> Commonly called "right-to-know" laws, these statutes emphasize the right of an individual to know the potential hazards of exposure to chemicals and to make an informed decision as to whether the benefits of the chemical outweigh the potential risks of continued exposure.<sup>9</sup>

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<sup>8</sup> The twenty-nine state right-to-know statutes are: *Alabama*, ALA. CODE §§ 22-33.1-33.15 (Supp. 1985); *Alaska*, ALASKA STAT. §§ 18.60.065-18.60.068 (Supp. 1985); *California*, CAL. LAB. CODE §§ 6360-6399.9 (West Supp. 1985); *Connecticut*, CONN. GEN. STAT. ANN. §§ 31-40j to -40p (West Supp. 1985); *Delaware*, DEL. CODE ANN. tit. 16, §§ 2401-2417 (Supp. 1984); *Florida*, FLA. STAT. ANN. §§ 442.101-442.127 (West Supp. 1985); *Illinois*, Toxic Substances Disclosure to Employees Act, ILL. ANN. STAT. ch. 48, § 1401-1420 (Smith-Hurd 1985); *Iowa*, IOWA CODE ANN. §§ 455D.1-455D.14 (West Supp. 1985); *Louisiana*, LA. REV. STAT. ANN. §§ 30:1150.61-30:1150.79 (West Supp. 1985); *Maine*, ME. REV. STAT. ANN. tit. 26, §§ 1709-1725 (Supp. 1985); *Maryland*, MD. ANN. CODE art. 89, §§ 32A-32N (1985); *Massachusetts*, MASS. GEN. LAWS ANN. ch. 111F, §§ 1-21 (West Supp. 1985); *Michigan*, MICH. COMP. LAWS ANN. §§ 408.1001-408.1094 (West 1985); *Minnesota*, MINN. STAT. ANN. §§ 182.65-182.675 (West Supp. 1985); *Missouri*, MO. ANN. STAT. §§ 292.600-292.620 (Vernon Supp. 1985); *New Hampshire*, N.H. REV. STAT. ANN. §§ 277-A:1 to 277-A:10 (Supp. 1983); *New Jersey*, N.J. STAT. ANN. §§ 34:5A-1 to 34:5A-31 (West Supp. 1986); *New York*, N.Y. PUB. HEALTH LAW §§ 4800-4808 (McKinney 1985); N.Y. LAB. LAW §§ 875-883 (McKinney Supp. 1984); *North Carolina*, N.C. GEN. STAT. § 95-173-218 (Michie Supp. 1985); *North Dakota*, N.D. CENT. CODE §§ 18-01-34, 65-14-01-65-14-04 (Allen Smith Supp. 1985); *Pennsylvania*, 1984 Pa. Legis. Serv. 159 (Purdon) (to be codified at PA. STAT. ANN. tit. 35, §§ 7301-7320); *Rhode Island*, R.I. GEN. LAWS §§ 28-21-1 to 28-21-21 (Supp. 1985); *Tennessee*, TENN. CODE ANN. §§ 50-3-2001-50-3-2019 (Michie Supp. 1985); *Texas*, TEX. VEH. CODE ANN. § 83-5182b (Vernon Supp. 1985); *Vermont*, VT. STAT. ANN. tit. § 18.1721-18.1731 (West 1985); *Virginia*, VA. CODE §§ 32.1-239 to 32.7-245 (1985); *Washington*, WASH. REV. CODE ANN. §§ 49.70.010-49.70.905 (Supp. 1985); *West Virginia*, W. VA. CODE § 21-3-18 (1985); *Wisconsin*, WIS. STAT. ANN. §§ 101.380-101.599 (West Supp. 1985).

There are thirty-six municipalities which have enacted some type of right-to-know legislation, usually as ordinances or fire code regulations. These municipal laws largely focus on making emergency information available to local police and fire officials. Representative municipalities include: Philadelphia (PHILADELPHIA, PA. ORDINANCE § 475 (1981)); Cincinnati (CINCINNATI, OHIO MUNICIPAL CODE ch. 1247 (1982)) (adopted as Ordinance No. 210-1982); and Sacramento (SACRAMENTO, CAL. CITY CODE ch. 71 (1982)).

<sup>9</sup> The New York Legislature, in enacting one of its two right-to-know laws, declared its legislative intent to be based on the fact that:

there exists a danger to the health of employees and their families throughout the state because of hazardous exposure to toxic substances encountered during the course and scope of employment. Sometimes the tragic results of this exposure may not be realized for years or even for generations. Because of this, it is consistent to impose upon employers a duty to give each employee notice as to the known and suspected health hazards involved in their employment and place of

State right-to-know laws vary in their degree of comprehensiveness. Some enactments cover virtually all types of businesses and regulate a large number of chemicals,<sup>10</sup> while others are very limited in scope and only apply to a specific type or number of industries.<sup>11</sup> This note combines features of many state right-to-know statutes into one piece of model legislation. As a model, it is necessarily ambitious. It has not yet been subjected to the compromises that are inherent in the legislative process. Certainly, some of its provisions may not withstand inevitable political pressures. It is offered in the hope that it may serve as the starting place for a strong law that gives adequate protection to all persons who are or may be exposed to toxic chemicals, while at the same time permitting the continued expansion of those businesses and industries that manufacture or utilize chemicals.

This note is divided into four parts. The first contains a discussion of the need for right-to-know legislation, necessitated by the tremendous growth in the manufacture and use of chemicals in the United States. The second is a brief analysis of the strongest possible legal challenge that any state right-to-know legislation may face: preemption by federal chemical safety statutes. The model legislation is found in the third part while the fourth and final part is an analysis of each section of that legislation,

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employment which may cause death or serious physical harm to the employee or members of the employee's family.

It is further found and declared that the employees themselves are frequently in the best position to be aware of the symptoms of toxicity, provided that the employees are aware of the nature of the substances they are working with and that, at a minimum, employees have an inherent right to know about the known and suspected health hazards which may result from working with toxic substances so that they may make more knowledgeable and reasoned decisions with respect to the continued personal costs of their employment and the need for corrective action.

It is further found and declared that the workplace often provides an early warning mechanism for the rest of the environment.

Therefore, the legislature intends by this act to ensure that employees be given information concerning the nature of the toxic substances with which they are working and full information concerning the known and suspected health hazards of such toxic substances.

N.Y. PUB. HEALTH LAW §§ 4800-4808 (McKinney 1985).

<sup>10</sup> See, e.g., S. 3045, 201st Leg., 2d Sess. (New Jersey proposed legislation—introduced June 17, 1985).

<sup>11</sup> See, e.g., DEL. CODE ANN. tit. 16, §§ 2401-2417(Supp. 1984).

including comments regarding the purpose and source(s) for each provision.

### *The Need for Right-to-Know Laws*

The growth of the chemical industry in the United States has been dramatic.<sup>12</sup> There are an estimated 65,000 chemicals in use in the United States today,<sup>13</sup> and, every year, between 400 and 600 new chemicals are introduced into industry and, in turn, to the environment.<sup>14</sup> Yet, there is no information on the toxicity of seventy percent of these new substances.<sup>15</sup> In fact, it has been estimated that over sixty-five percent of existing chemical products remain untested and on the market.<sup>16</sup>

It has been estimated that 100,000 workers die and another 390,000 annually contract<sup>17</sup> occupational diseases<sup>18</sup> as a result of chemical exposure. Such exposure can vary from a limited contact occurring many years ago, to the cumulative effects of chemical exposure over a period of years.<sup>19</sup> Effective prevention or treatment of these diseases is hampered by the lack of adequate

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<sup>12</sup> There are over 12,000 chemical firms in the United States with combined annual sales of more than \$182 billion and total employment of more than one million people. Douglas, *Fear in Unknown Quantities*, STUDENT LAWYER, Mar. 1985, at 18, 23 [hereinafter cited as Douglas].

<sup>13</sup> These 65,000 chemicals are found in various industries and products. Over 48,000 are used in commerce, 3,350 are registered with the U.S. Environmental Protection Agency as pesticides and 1,815 are labeled as prescription and over-the-counter drugs. An additional 8,627 are used as food additives and 3,410 help to formulate cosmetics. *Id.* at 19, 22.

<sup>14</sup> *Toxic America*, STUDENT LAWYER, Mar. 1985, at 13, 14 [hereinafter cited as *Toxic America*].

<sup>15</sup> *Id.*

<sup>16</sup> Douglas, *supra* note 12, at 29.

<sup>17</sup> Hunt, *The Total Gene Screen*, N.Y. Times, Jan. 19, 1986, (Magazine), at 33.

<sup>18</sup> Certain industries are associated with specific occupational diseases, including coal mining (black lung) and talc mining (white lung). Initially, suits by affected employees named employers as the only defendants. Such actions became known as occupational disease or toxic tort suits. The 1970's, however, saw an expansion in products liability litigation when third party suits were brought by employees against their employers and their employer's chemical suppliers. *See, e.g.*, Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (asbestos); Arcell v. Ashland Chemical Co., 152 N.J. Super. 471, 378 A.2d 53 (Law Div. 1977) (chemical suppliers); *In re "Agent Orange"*, 506 F. Supp. 762 (E.D.N.Y. 1980); and Whitehead v. St. Joe Lead Co., 729 F.2d 238 (3d Cir. 1984).

<sup>19</sup> *See Toxic America, supra* note 14, at 14.

employee exposure records.<sup>20</sup> Such records are vital in determining if a link exists between exposure to a chemical and the onset of disease. This type of information is necessary for accurate epidemiological analysis.<sup>21</sup> Without these analyses, potentially toxic chemicals will escape regulation or removal from the marketplace and will continue to cause disease and death.<sup>22</sup>

The model legislation which follows contains a section which enables state health officials to obtain the information necessary for epidemiological studies.<sup>23</sup> The technology presently exists to monitor individual employee's health and chemical exposure levels.<sup>24</sup> For example, computer programs performing such functions are currently being used on a small scale by some chemical manufacturers.<sup>25</sup> Ideally, health officials can use this information to determine if a chemical is so hazardous to human health that it should be more closely regulated or removed from

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<sup>20</sup> Comprehensive employee studies are needed to determine the proper medical treatment for chemical exposure and to establish causal links between exposure and disease that are sufficient to impose liability.

Several congressional hearings have been held by the House Subcommittee on Commerce, Transportation and Tourism to discuss the need for such studies on all types of hazardous chemical contact. See H. REP. NO. 890, 98th Cong., 2d Sess. 49 (Part 1) (1984) (which accompanied the Superfund Expansion and Protection Act of 1984, H.R. 5640, 98th Cong., 2d Sess.); *Hazardous Substance Victim's Compensation Legislation: Hearings on H.R. 2582 Before the Subcomm. on Commerce, Transportation and Tourism of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 89, 91 (statement of James R. Zazzali, discussing the problem of proving causality near hazardous waste sites); and Superfund 301(e) Study Groups, INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENTS OF LEGAL REMEDIES, A REPORT TO CONGRESS IN COMPLIANCE WITH SECTION 301(E) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 (P.L. 96-510, Dec. 11, 1980), at 244-45 (July 1, 1982).

<sup>21</sup> Epidemiology is the study of disease causation. It is defined as "[t]he sum of the factors controlling the presence or absence of a disease." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 762 (1971).

<sup>22</sup> See *supra* note 20.

<sup>23</sup> See *infra* text pp. 643-44 (Model Legislation Section 11).

<sup>24</sup> In 1982, Diamond Shamrock Corp. received a patent on its employee health computer system. The health of employees who work with potentially hazardous materials is monitored through gathered information, such as work location and substances contacted. This information is then fed into the system, analyzed and stored for future reference. Xerox, Mobil Oil and several chemical companies were also granted licenses under the patent. Jones, *Computer Monitors Health of Employees*, N.Y. Times, Sept. 4, 1982 (Patents), at 36, col. 1. See also Maugh, *Tracking Exposure to Hazardous Substances*, SCIENCE, Dec. 7, 1984, at 1183.

<sup>25</sup> See *supra* note 24.

the workplace. Chemicals for which no link to disease has been established can remain in unrestricted use. Individuals who handle or are exposed to these "safe" chemicals will thus be able to derive some degree of security from this knowledge.

In addition to the need for epidemiological data, there is an equally urgent need for emergency information regarding the safe use and handling of chemicals, as well as medical treatment. Recent events, both in this country and abroad,<sup>26</sup> have clearly demonstrated the need for such information to ensure rapid and intelligent response to fires, explosions or accidental chemical releases. The chemical industry itself, recognizing this need for adequate emergency information, recently called for uniform and coordinated standards to assure "the right of communities to know what chemicals used in their vicinity might endanger residents' safety and health."<sup>27</sup>

The need for local health officials, police and firefighters to have this information is not a major point of dispute between proponents and opponents of right-to-know legislation and has received some support in the courts.<sup>28</sup> Indeed, the Chemical Manufacturer's Association<sup>29</sup> has created a unique program called CAER (Community Awareness and Emergency Response Program), the purpose of which is to "develop outreach programs among local plant managers and to improve local emer-

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<sup>26</sup> See *Gas Leak in India Kills at Least 410 in City of Bhopal*, N.Y. Times, Dec. 4, 1984, at A1, col. 6; *Gas Deaths in India Exceed 1,000 with Thousands Hurt; Gandhi Seeks Compensation*, N.Y. Times, Dec. 5, 1984, at A1, col. 6; and *EPA Says Union Carbide Plant in U.S. Had 28 Leaks in Five Years*, N.Y. Times, Jan. 24, 1985, at A1, col. 2.

<sup>27</sup> *Industry Chiefs Back U.S. Curbs on Polluted Air*, N.Y. Times, Mar. 27, 1985, at A1, col. 5 (statement of Warren M. Anderson, Chief Operating Officer of the Union Carbide Corp.).

<sup>28</sup> Telephone interview with Christopher Cathcart, Coordinator of CAER (Oct. 2, 1985) [hereinafter cited as Cathcart telephone interview]. See *New Jersey State Chamber of Commerce v. Hughey*, Nos. 85-5087, 85-5088, 85-5095 (3d Cir. Oct. 10, 1985) [hereinafter cited as Hughey]. This recent decision specifically found that state and local health officials, police and firefighters have a right to know what environmental hazards are located in their jurisdictions. In addition, the reporting of workplace hazards to these agencies by the non-manufacturing sector is not preempted by federal legislation. *Id.* at 18. See also *infra* text Preemption section (beginning at p. 627).

<sup>29</sup> The Chemical Manufacturers Association is a public relations and lobbying group composed of approximately two hundred of the largest chemical manufacturers in the United States. Cathcart telephone interview, *supra* note 28.

gency response measures into an integrated plan.”<sup>30</sup> While such a voluntary program is certainly needed and can complement right-to-know laws, it cannot replace legislation which mandates participation, establishes procedures and utilizes sanctions to ensure compliance. The proposed model legislation has extensive provisions for ensuring that this information is made available to persons who work with chemicals, to local health, police and fire officials and to the general public.<sup>31</sup>

Before proceeding to the model legislation, it is necessary to discuss the preemption of state right-to-know laws by similar federal legislation.<sup>32</sup> This is an important issue because state right-to-know laws may encounter preemption problems during the legislative process or after enactment.

### *The Preemption Problem*

Opponents of right-to-know legislation may attempt to block the passage or implementation of this legislation by claiming that it is preempted by federal law and, more specifically, by the Occupational Safety and Health Act (“OSH Act”).<sup>33</sup> Decisions regarding the preemption issue, however, have been conflicting<sup>34</sup> and the legislative response to this problem has been unique.<sup>35</sup> While a complete discussion of the OSH Act is beyond the scope

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<sup>30</sup> Cathcart telephone interview, *supra* note 28.

<sup>31</sup> See *infra* text pp. 639-41, 644-46 (Model Legislation Sections 6, 8 and 12).

<sup>32</sup> Preemption is accomplished through the Supremacy Clause of the U.S. Constitution. U.S. CONST., art. VI, cl. 2. The supremacy clause has established federal law as the “supreme law of the land.” Thus, any state law in conflict with federal law is preempted by that federal law and has no legal effect.

<sup>33</sup> 29 U.S.C. §§ 651-678 (1982) [hereinafter cited as OSH Act].

<sup>34</sup> See *West Virginia Manufacturers Ass'n v. West Virginia*, 714 F.2d 308 (4th Cir. 1983) [hereinafter cited as *W.Va. Manufacturers*]; and *New Jersey Chamber of Commerce*, *supra* note 28.

<sup>35</sup> See S.3045, 201st Leg., 2d Sess. (New Jersey proposed legislation—introduced June 17, 1985). The New Jersey Senate has attempted to block complete preemption by including a severability provision in recent legislation:

It is the intent of the Legislature that the provisions of Section 1 through 25, inclusive, . . . be liberally construed. . . . [I]f any section, subsection or provision of sections 1 through 25 . . . is held to be unconstitutional or invalid by a court of competent jurisdiction, this holding shall not affect the validity of any other section . . . which can be implemented separately from any section, subsection or provision held to be unconstitutional or invalid.

*Id.* § 26.

of this note,<sup>36</sup> it is necessary to give a brief outline of this federal law. Such an outline will serve as the basis for comparing the OSH Act and the model state legislation, and for determining the parameters of any preemption argument.

The OSH Act was enacted by Congress "to assure . . . every working man and woman in the Nation safe and healthful working conditions. . . ."<sup>37</sup> It encourages employers to reduce recognized hazards within their places of employment<sup>38</sup> while also requiring chemical manufacturers or importers to determine which chemicals they produce or import are hazardous.<sup>39</sup> Manufacturers or importers must also develop a "Hazards Communication Program." This program consists of evaluating a chemical's potential health effects, determining safe methods for handling and working with the chemical, and disseminating this information to employees and persons who purchase the chemical.<sup>40</sup>

Under the OSH Act, the manufacturer or importer bears the burden of chemical testing and evaluation of potential adverse health effects and for determining safe handling procedures.<sup>41</sup> If, after this initial evaluation, a chemical meets certain criteria as outlined in the OSH Act, it is deemed a "hazard."<sup>42</sup> In addition, the OSH Act has a "floor list" of approximately 2,300 chemicals which the Occupational Safety and Health Administration ("OSHA") has already determined to be hazardous.<sup>43</sup> This floor list is comprised of the "subpart Z" list, which is utilized by many current state right-to-know laws to define those chemicals which are regulated. The subpart Z list is also included as one of the source lists for hazardous chemicals regulated under the model legislation.<sup>44</sup>

Following a chemical's designation as a hazard, a Material Safety Data Sheet ("MSDS") must be prepared by the manufac-

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<sup>36</sup> See OSH Act, *supra* note 33.

<sup>37</sup> *Id.* § 651(b).

<sup>38</sup> See *id.* § 651(b)(1).

<sup>39</sup> 29 C.F.R. § 1910.1200(b)(1) (1983).

<sup>40</sup> *Id.* § 1910.1200(e).

<sup>41</sup> *Id.* § 1910.1200(d).

<sup>42</sup> *Id.* § 1910.1200(c).

<sup>43</sup> 29 C.F.R. Part 1910 subpart Z (1982); 29 C.F.R. § 1910.1200(d)(3)(i) (1983).

<sup>44</sup> See *infra* text pp. 634-38 (Model Legislation Section 4).



turer or importer.<sup>45</sup> The formulation of the MSDS is the first phase of the Hazards Communication Program of the OSH Act. The other phases include labeling requirements and employee education provisions. The MSDS must contain the “[p]hysical and chemical characteristics of a hazardous substance,” including symptoms of exposure, control measures, safe handling procedures and special use precautions.<sup>46</sup> Purchasers of such hazardous chemicals, called “downstream” purchasers, are provided with the MSDS for that chemical by the manufacturer or importer.<sup>47</sup> If the downstream purchaser is also an employer under the definition of the OSH Act, they are also required to “ensure that they [the MSDS’s] are readily accessible . . . to all employees.”<sup>48</sup>

The OSH Act expressly declares that its provisions preempt any similar state laws.<sup>49</sup> The OSH Act, however, is also specifically limited to importers and businesses in the manufacturing sector.<sup>50</sup> It does not contain any provisions for access to information by the general public. In essence, the OSH Act applies to a limited class of employers, provides only a limited amount of information to employees and provides no procedures by which the surrounding community can obtain information about the potentially toxic chemicals to which it may be exposed.

Many states found that the “protections” afforded by the OSH Act were inadequate and enacted their own laws, designed to give greater protection to their own citizens.<sup>51</sup> Opponents of these new state laws argued that they were preempted by the OSH Act and litigation followed. In *West Virginia Manufacturers Ass’n v. West Virginia*, the West Virginia statute requiring employers to disclose to employees the dangers of exposure to hazardous or toxic chemicals in the workplace was found not preempted by federal law.<sup>52</sup>

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<sup>45</sup> 29 C.F.R. § 1910.1200(g) (1983).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* § 1910.1200(g)(6).

<sup>48</sup> *Id.* § 1910.1200(g)(8).

<sup>49</sup> *Id.* § 1910.1200(a)(2).

<sup>50</sup> *Id.* § 1910.1200(b)(1). The standard is applicable to all employers with Standard Industrial Classification (“SIC”) Codes 20-39. This covers generally all manufacturing operations. Medical and service employers are excluded.

<sup>51</sup> N.Y. PUB. HEALTH LAW §§ 4800-4808 (McKinney 1985).

<sup>52</sup> W. Va. Manufacturers, *supra* note 34, at 314.

This decision, however, was reached three months before the Occupational Safety and Health Administration ("OSHA") promulgated its final Hazards Communication Standard. Therefore, the Fourth Circuit never reached a decision regarding preemption under the current standard.<sup>53</sup> The West Virginia statute, however, has not been challenged since OSHA issued the final rule. Accordingly, the court's ruling on the preemption issue is still in effect.

The lead litigation concerning federal preemption of state chemical disclosure laws involves New Jersey's right-to-know law. In the case of *New Jersey State Chamber of Commerce v. Hughey*,<sup>54</sup> the Third Circuit held that New Jersey's law, the most comprehensive in the nation,<sup>55</sup> was expressly preempted by OSHA's final Hazards Communication rule only insofar as New Jersey's provisions apply to employee health and safety in the manufacturing sector.<sup>56</sup> The court, however, did not invalidate the workplace regulations as they applied to employees in the non-manufacturing sector, reasoning that since the federal act did not seek to regulate those employers, the state was free to do so if it wished.<sup>57</sup> In addition, it was found that all New Jersey employers, including manufacturers, must provide information on environmental hazards present at their facilities to state and local health, police and fire departments. No parallel federal requirement existed and therefore there was no preemption problem.<sup>58</sup> Certain labeling requirements as applied to manufacturers, however, were preempted by federal law.<sup>59</sup> The Third Circuit left intact the district court's ruling that the dissemination of trade secret information required by the New Jersey law was not a "taking" in violation of due process.<sup>60</sup>

It is interesting to note that the court also determined that

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<sup>53</sup> 48 Fed. Reg. 53,280 (codified at 29 C.F.R. §§ 1910.1200(a)-.1200(j)) (proposed Nov. 25, 1983).

<sup>54</sup> Nos. 85-5087, 85-5088, 85-5095 (3d Cir. Oct. 10, 1985).

<sup>55</sup> Interview with Mark Connolly, Committee Aide to the New Jersey Senate Committee on Energy and Environment (Oct. 7, 1985) [hereinafter cited as Connolly Interview].

<sup>56</sup> See Hughey, *supra* note 28, at 14.

<sup>57</sup> *Id.* at 26.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 20.

<sup>60</sup> *Id.* at 25.

New Jersey's law, which requires the State to develop lists of hazardous chemicals to be regulated (as opposed to the manufacturer-developed list required under the OSH Act), was not preempted.<sup>61</sup> The court ruled that the "federal and State lists may comfortably co-exist."<sup>62</sup> The following model legislation also requires the state to develop the Hazardous Chemical List to be used as the basis for regulation.<sup>63</sup> Following the court's rationale in *Hughey* this provision should withstand any preemption challenge.

The holding in the case clearly permits non-manufacturing employers to be fully regulated by a state without any preemption problems.<sup>64</sup> In addition, safety and emergency information regarding environmental hazards cannot be withheld by any employer on preemption grounds if the state law seeks this type of information.<sup>65</sup> The extent to which manufacturers are exempt from compliance with a state right-to-know law has thus been limited by the case.<sup>66</sup>

In an effort to eliminate, rather than simply limit, the problem of federal preemption of state right-to-know laws, federal legislation has been introduced which would allow states to enact right-to-know laws and prohibit OSHA from preempting these more stringent laws.<sup>67</sup> If one of these bills should become law, the preemption argument will no longer be of use to block comprehensive state right-to-know laws. Federal and state laws could then operate together to provide greater protection to employees and the public.

Further complicating the preemption problem is the fact that those states which do not participate in the federal OSHA program may submit their own proposed chemical disclosure laws

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<sup>61</sup> *Id.* at 18.

<sup>62</sup> *Id.*

<sup>63</sup> See *infra* text pp. 644-46 (Model Legislation section 12).

<sup>64</sup> See *Hughey*, *supra* note 28, at 26.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 25.

<sup>67</sup> See H.R. 963, 99th Cong., 1st Sess. (1985) (introduced by James J. Florio (D-N.J.)). This legislation would prohibit the OSH Act's Hazard Communication Rule from preempting more stringent state laws. See also H. Con. Res. 53, 99th Cong., 1st Sess. (1985) (introduced by Bob Edgar (D-Pa.)). This resolution urges Congress to allow the states to use the OSH Act's Hazard Communication Rules as a minimum standard. States would then be able to enact more restrictive laws.

for OSHA approval. When the OSH Act was created in 1970, states were given the option of participating in the federal program or adopting their own health and safety statutes.<sup>68</sup> Those states that chose to participate in the federal program are still subject to the federal regulations and do not have their own regulations or enforcement procedures.<sup>69</sup> Many states chose to participate because of the desire of unions and employers to have one national set of regulations and because hard-pressed state budgets could not provide the cost of enforcement.<sup>70</sup> Those states that chose not to participate were permitted to propose statutes and regulations of their own which were submitted to OSHA for approval prior to their enactment. These states, however, received reduced federal assistance for the development and implementation of their own programs.<sup>71</sup>

Currently, there are eight states which do not participate in the OSHA program and have enacted their own right-to-know laws.<sup>72</sup> While, presumably, these state statutes would be preempted in the manufacturing sector by the OSH Act, there is some evidence that these states may be able to impose stricter disclosure requirements than those mandated by the current federal standard.<sup>73</sup>

In addition, there are states which started as OSH Act participants but later found the federal law to be inadequate.<sup>74</sup> They responded by enacting their own laws which will stay in effect until such time as federal protections are made equivalent.<sup>75</sup> Whether these laws are preempted involves constitutional questions largely untested by the courts, as well as complex policy judgments about the type and extent of protection that should be provided to workers and the community, balanced against the

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68 Connolly Interview, *supra* note 55.

69 *Id.*

70 *Id.*

71 See EMPL. SAFETY AND HEALTH GUIDE (CCH) ¶ 5021.

72 The states not participating in the OSHA program are: Alaska, California, Connecticut, Iowa, Maine, Maryland, Michigan and Washington. In addition, Oregon has only enacted its own regulations. McElveen and Pastor, *Chemical Hazard Disclosure under Federal and State Right-to-Know Laws*, 31 PRACTICAL LAWYER, June 1, 1985, at 75, 79; and Connolly Interview, *supra* note 55.

73 See Connolly Interview, *supra* note 55.

74 See N.Y. PUB. HEALTH LAW §§ 4800-4808 (McKinney 1985).

75 *Id.*

imposition of multiple burdens on employers.<sup>76</sup>

The preemption issue includes difficult legal and social issues that have not been fully resolved by legislation or litigation. The drafter of right-to-know legislation should be aware of the possibility that a state statute may be preempted and should design the statute with that possibility in mind.<sup>77</sup> The following model legislation seeks to avoid this potential problem by focusing on health and safety issues, especially the epidemiological studies which are not included in the OSH Act, and by the use of a severability clause,<sup>78</sup> designed to save those portions of the legislation that are not held invalid.<sup>79</sup>

### *Model Legislation*

#### Section 1. TITLE

This act shall be known and may be cited as the "Chemical Epidemiology, Emergency Response and Community Right-to-Know Act."

#### Section 2. STATEMENT OF PURPOSE/INTENT

The Legislature finds and declares that each citizen has an inherent right to be informed of the known and suspected health hazards which may result from exposure to chemicals and that the link between exposure to chemicals and subsequent illnesses has not been fully established. This act is designed to ensure that information regarding the health effects of exposure to chemicals is gathered and analyzed and made readily available to all citizens of the State.

#### Section 3. SEVERABILITY

It is the intent of the Legislature that this act be liberally construed. If one portion of this act is found to be unconstitutional or invalid, it shall not affect the validity of any other portion that is not held unconstitutional or invalid.

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<sup>76</sup> See Schroeder and Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L.J. 1231, 1288-91 (1984).

<sup>77</sup> See *supra* note 35.

<sup>78</sup> See *infra* text p. 633 (Model Legislation Section 2).

<sup>79</sup> The severability of a particular piece of legislation is a matter of state law. See *Watson v. Buck*, 313 U.S. 387, 396 (1941). See also *infra* text p. 647 (Section 3, Section-by-Section Analysis).

#### Section 4. DEFINITIONS

As used in this act:

- a. "Chemical Abstracts Service Number" means the unique identification number assigned to chemicals by the Chemical Abstracts Service.
- b. "Chemical name" means the scientific designation of a chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry or the Chemical Abstracts Service nomenclature.
- c. "Common name" means any designation or identification of a chemical such as a code name, code number, trade name, brand name or generic name used to identify a chemical other than by its chemical name.
- d. "Container" means a receptacle used to hold a liquid, solid or gaseous substance, including, but not limited to, bottles, pipelines, bags, barrels, boxes, cans, cylinders, drums, cartons, vessels, vats and stationary or mobile storage tanks. "Container" shall not include a process container.
- e. "Department" means the Department of Health unless otherwise specified.
- f. "Employee" means any person who may be exposed to hazardous chemicals under normal operating conditions or foreseeable emergencies while engaged in service to an employer. For purposes of this subdivision, "emergency" means any occurrence such as, but not limited to, equipment failure, rupture of containers or failure of control equipment which may or does result in an uncontrolled release of a hazardous chemical.
- g. "Employer" means an individual, partnership, corporation or association doing business in this State, including political subdivisions of this State. In the case of a contractor or subcontractor, an "employer" means the person who is directly in control of the chemical(s) that may be used in connection with that particular contract or subcontract.
- h. "Expose or Exposure" means that an employee is subjected to a hazardous chemical in the course of employment through any route of entry into the body, including but not limited to, inhalation, ingestion, skin contact or absorption. Such "exposure" includes potential (e.g., accidental or possible) exposure.
- i. "Hazardous chemical" means any element, substance, chemical compound or mixture of elements, substances, and com-

pounds, except as provided for in subsection (j) of this section, which shall include, but shall not be limited to, the substances found in the latest compilation or issue of any one of the following lists:

(1) United States Environmental Protection Agency (EPA) list of toxic pollutants and hazardous substances prepared pursuant to Sections 307 and 311 of the Federal Clean Water Act of 1977 (33 U.S.C. §§ 1317, 1321);

(2) EPA list of hazardous air pollutants prepared pursuant to Section 112 of the Federal Clean Air Act (42 U.S.C. § 7412);

(3) EPA list of restricted use pesticides found at 40 C.F.R. § 162.30 (relating to optional procedures for classification of pesticide uses by regulation);

(4) EPA Carcinogen Assessment Group's List of Carcinogens;<sup>80</sup>

(5) United States Occupational Safety and Health Administration (OSHA) list of toxic and hazardous substances found in 29 C.F.R. § 1910, subpart Z (relating to toxic and hazardous substances);

(6) United States Department of Transportation (DOT) Optional Materials Table found in 49 C.F.R. §§ 172.101, 172.102 (as amended by publication in 38 Fed. Reg. 50,234-50,279 (Oct. 31, 1983));

(7) National Toxicology Program's list of substances published in their latest Annual Report on Carcinogens;<sup>81</sup>

(8) National Fire Protection Association list found in "Hazardous Chemicals Data (NFPA 49)";<sup>82</sup>

(9) International Agency for Research on Cancer sublist, entitled "Substances found to have at least sufficient evidence of carcinogenicity in animals";<sup>83</sup>

(10) American Conference of Governmental Industrial Hygienists' list found in Threshold Limit Value for Chemical Sub-

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<sup>80</sup> Available from The Office of Health and Environmental Assessment, Technical Information Staff (202) 382-7345. Cost: \$10.00.

<sup>81</sup> The Annual Report on Carcinogens (#PB#83135855) may be ordered through the National Technical Information Service (703) 487-4650. Cost: \$32.50.

<sup>82</sup> National Fire Protection Association (1-800-344-3555). Cost: \$13.50.

<sup>83</sup> IARC, write 150 Cours Albert Thomas, 69372 Lyons, France.

stances and Physical Agents in the Workplace;<sup>84</sup>

(11) National Institute for Occupational Safety and Health Registry of Toxic Effects of Chemicals Substances.<sup>85</sup>

A hazardous chemical shall further include any substance or mixture designated by the Department of Health to be a hazardous chemical because of its known or probable adverse human or environmental effects as determined in the light of new scientific evidence and knowledge or as a result of evidence obtained pursuant to Section 11 of this act.

j. "Hazardous chemical" shall not include:

(1) Any article containing a hazardous chemical, if the hazardous chemical is present in a solid form which does not pose any acute or chronic health hazard to a person;

(2) A hazardous chemical which constitutes less than 1% of a mixture, unless the hazardous chemical is present in an aggregate amount of 500 pounds or more in the work area;

(3) A hazardous chemical which is a special health hazard chemical constituting less than the threshold percentage established by the Department of Health for that special health hazard chemical when present in a mixture;

(4) A hazardous chemical present in the same form and concentration as a product packaged for distribution and use by the general public;

(5) Any article containing a hazardous chemical if the article which is formed to a specific shape or design during manufacture and which does not release or otherwise result in exposure to a hazardous chemical under normal conditions of use;

(6) A hazardous chemical received into a work area in a sealed package and subsequently sold or transferred in that package if the seal remains intact while the chemical is in the work area and if the chemical does not remain in the work area for more than five working days. An employer who has a hazardous chemical in a work area that meets the criteria of this subsection shall remain liable to fulfill the requirements of Sections 7 and 11 of this act;

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<sup>84</sup> American Conference of Governmental Industrial Hygienists, (513) 661-7881. Cost: \$4.00.

<sup>85</sup> National Technical Information Service (703) 487-4650) (#PB#85218071). Cost: \$196.95.



(7) Any food, food additive, drug or cosmetic as such terms are defined in the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 301-392), or distilled spirits, wines or malt beverages as such terms are defined in the Federal Alcohol Administration Act (27 U.S.C. § 201-212).

k. "Label" means a sign, emblem, sticker, or marker affixed to or stenciled onto a container listing the information required pursuant to Section 6 of this act.

l. "Mixture" means a combination of two or more substances not involving a chemical reaction.

m. "Possessor of trade secret" means an owner of a business which developed the trade secret and certain other individuals who, individually or combined, are the only holders of knowledge regarding that trade secret.

n. "Process container" means a container, the contents of which are changed frequently; a container of ten (10) gallons or less in capacity, into which substances are transferred from labeled containers, and which is intended only for the immediate use of the person who performs the transfer; a container on which a label would be obscured by heat, spillage or other factors; or a test tube, beaker, vial, or other container which is routinely used and reused.

o. "Special health hazard chemical" means a chemical, as designated by the Department of Health, which because of its known carcinogenicity, mutagenicity, teratogenicity, flammability, explosiveness, corrosivity, or reactivity poses a special hazard to public health and safety. A chemical designated as a special health hazard chemical shall be ineligible for a trade secret claim.

p. "Trade secret" means any formula, plan, pattern, process, production data, information, or compilation of information, which is not patented, which is known only to the possessor of the trade secret, and which is used in the fabrication and production of an article of trade or service, and which gives such possessor a competitive advantage over businesses who do not possess it, or the secrecy of which is certified by an appropriate official of the federal government as necessary for national defense purposes. The chemical name and Chemical Abstracts Service Number of a substance shall be considered a trade secret only if the possessor establishes that the substance is unknown to competitors.

q. "Trade secret claim" means a written request, made by the possessor of a trade secret pursuant to Section 10 of this act, to withhold the public disclosure of information on the ground that the disclosure would reveal a trade secret.

r. "Trade secret registry number" means a code number temporarily or permanently assigned to identify a hazardous chemical that has been declared to be a protected trade secret pursuant to Section 10 of this act.

s. "Work area" means any room or section of a room or defined space within an employer's place of business where one or more employees are based for the regular performance of their duties. Such term shall also include an outdoor work area if used for the regular performance of duties.

#### Section 5. INFORMATION TO BE PROVIDED BY SUPPLIERS OF HAZARDOUS CHEMICALS

a. Within one year of the effective date of this act, any person who supplies any hazardous chemical to an employer shall provide, in addition to the information required by Section 6(a)(1) of this act, the following information to the employer:

(1) the chemical name, common name, and Chemical Abstracts Service Number of the hazardous chemical;

(2) the level at which exposure to the substance is determined to be hazardous;

(3) the acute and chronic effects of exposure at and above hazardous levels;

(4) the symptoms of such effects, including behavioral symptoms;

(5) appropriate emergency treatment;

(6) proper conditions for safe use and exposure to such hazardous chemical;

(7) procedures for cleanup of leaks and spills of such hazardous chemical;

(8) a label on each container of any such substance which states, in clearly legible and conspicuous form, that a hazardous chemical is contained therein;

(9) If the supplier is also an employer under the terms of this act, the supplier shall also provide copies of Parts One and Three of the Health and Environmental Effects, Emergency Re-

sponse Information Sheet (HEERIS) prepared pursuant to Section 12 of this act.

**Section 6. INFORMATION TO BE SUPPLIED TO EMPLOYEES IN A WORK AREA**

(a)(1) Within one year of the effective date of this act, every employer shall take any action necessary to assure that every container in a work area bears a label indicating the common name, chemical name and Chemical Abstracts Service Number of the hazardous chemical in the container. Such label shall also indicate in clearly legible and conspicuous form that a hazardous chemical is contained therein. If a trade secret claim is granted pursuant to Section 10 of this act, the label shall contain the trade secret registry number assigned by the State.

(2) Existing labels on containers coming into the work area shall not be removed or defaced.

(3) In those cases in which a pipeline is used to convey different chemicals at different times, and in the case of an environmental health and pest control system or other system designed to automatically discharge a chemical from spray-type ports, the employer may develop alternative methods to adequately apprise anyone who may be potentially exposed at any port of the contents of the pipeline.

(4) Employees shall not be required to work with a hazardous chemical from an unlabeled container.

(5) The labeling requirements of this section shall not apply to containers labeled pursuant to the "Federal Insecticide, Fungicide, and Rodenticide Act," (7 U.S.C. §§ 121-136y).

(b) Every employer shall post a sign in every work area at a prominent location or locations where notices to employees are normally posted, to inform employees that they have a right to information from their employer regarding the hazardous chemicals with which they work or to which they may be exposed, a description of the toxic effects of those substances and the circumstances under which the effect will be produced.

(c)(1) Any employee who may be exposed to a hazardous chemical or chemicals shall be informed of such exposure or potential exposure and shall have access to the Health and Environmental Effects, Emergency Response Information Sheet (HEERIS) filed by the employer pursuant to Section 12 of this

act. If the employee so requests, such material shall be supplied in a Spanish translation. An employee shall have the right to refuse to work with a hazardous chemical for which a request for access to information has been made and has not been honored by an employer, without the loss of pay or forfeit of any other privileges until the request is honored.

(2) An employer may require an employee to sign a statement acknowledging receipt of the requested information.

#### Section 7. EMPLOYEE RIGHTS

(a) Any waiver by an employee of the benefits or requirements of this act shall be against public policy and null and void. Any employer's request or requirement that an employee waive any rights under this section as a condition of employment shall constitute a violation of this act.

(b) No employer shall discharge, or cause to be discharged, or otherwise discipline, or in any manner discriminate against any employee because such employee has filed any complaint, or has instituted, or caused to be instituted, any proceeding under or related to the provisions of this act, or has testified, or is about to testify, in any such proceeding, or because the employee has exercised any right afforded to the employee pursuant to the provisions of this act. No employer shall cause pay, position, seniority, or other benefits to be lost as a result of the exercise of any right provided by this act.

(c) The Secretary of the Department of Labor, in cooperation with the Secretary of the Department of Health and the Attorney General, shall promulgate rules and regulations that shall provide procedures for employee complaints of violations of this act, and for civil actions against employers found to be in violation of this act as a result of investigation and subsequent substantiation of those complaints. Such rules and regulations shall provide for civil penalties, reinstatement, and back pay for an employee wrongfully discriminated against under this section.

#### Section 8. EMPLOYEE EDUCATION

(a) Every employer shall provide at a minimum an annual education and training program for employees exposed to hazardous chemicals with respect to the hazardous chemicals found in their normal work area. Additional instruction shall be pro-

vided whenever the potential for exposure to the hazardous chemical is altered or whenever new and significant information is received by the employer concerning the chemical. Employers shall furnish employees who are using or handling hazardous chemicals with information on the Health and Environmental Effects, Emergency Response and Information Sheet (HEERIS) prepared pursuant to Section 12 of this act, or with equivalent information either in written form or through training programs which may be generic to the extent appropriate and related to the job. Content of the program shall include, as appropriate, the following information concerning the hazardous chemical:

- (1) The location of the chemical in the worksite;
- (2) The properties of the chemical;
- (3) The chemical and common name(s);
- (4) The acute and chronic effects;
- (5) The symptoms arising from exposure, including behavioral symptoms;
- (6) The potential for flammability, explosivity and reactivity;
- (7) Appropriate emergency medical treatment;
- (8) Appropriate personal protective equipment and proper conditions for use;
- (9) Emergency procedures for spills, leaks, fires, pipeline breakdowns or other accidents.

(b) The Department of Labor shall develop and maintain an education training and assistance program to aid employers, who, because of size or other practical considerations, are unable to develop such programs by themselves. Such a program would be available to the employer on request.

## Section 9. EMPLOYER LIABILITY

The provision of information to employees or the public under this act shall in no way affect the liability of an employer with regard to the health and safety of an employee or other persons exposed to hazardous chemicals.

## Section 10. TRADE SECRETS

(a) If the possessor of a trade secret believes that disclosing information as required by this act will reveal that trade secret, the possessor may file with the Department of Health a trade se-

cret claim. The Department shall review the claim and rule on the validity of the claim. If the claim is granted, the substance shall be assigned a trade secret registry number. No employee of the Department shall disclose to any person the identity of the substance so registered. Any employee of the Department who violates this provision of this subsection shall be subject to criminal sanctions as provided in Section 14 of this act. When responding to any request for information under the provisions of this act, such possessor may refer to such substance by its registry number and shall not be required to reveal the chemical or common name of such a substance. All other information concerning such substance shall be provided by the possessor as required by the provisions of this act.

(b) In determining whether a trade secret is valid, the Department shall consider material provided by the possessor making the trade secret claim concerning:

(1) the extent to which the information for which the trade secret claim is made is known outside to others;

(2) the extent to which the information is known by persons involved in the possessor's business;

(3) the extent of the measures taken by the possessor to guard the secrecy of the information;

(4) the value of the information, to the possessor or the possessor's competitors;

(5) the amount of effort or money expended by the possessor in developing the information;

(6) the ease or difficulty with which the information could be disclosed or revealed by analytical techniques, laboratory procedures, or other means.

(c) The possessor shall have thirty (30) days after notification by the Department that a trade secret claim is not valid to request an administrative hearing on the determination. At the hearing, the possessor shall have the burden to show that the claim is valid. If the possessor does not file a request within thirty (30) days, the Department shall take action to provide that the information for which the trade secret claim was made is disclosed pursuant to the provisions of this act. The Secretary of the Department of Health, in cooperation with the Attorney Gen-

eral, shall promulgate the rules and regulations necessary to implement the purposes of this subsection.

(d) Notwithstanding any other provision of this act, an employer or supplier shall disclose the chemical identification or other information claimed as a trade secret to a treating physician or nurse when such information is needed for medical diagnosis or treatment of an exposed person. The employer or supplier may require the physician or nurse to sign a confidentiality agreement before disclosing the trade secret. In the case of a medical emergency, the employer or supplier shall first disclose the trade secret to the treating physician or nurse, but may later require a confidentiality agreement when circumstances permit.

### Section 11. EPIDEMIOLOGICAL RESEARCH

(a) Employers shall provide the Department of Health with copies of employee health and exposure records maintained and supplied to the federal government by employers including, those filed pursuant, but not limited to, the following federal statutes and regulations:

(1) Toxic Substances Control Act (15 U.S.C. §§ 2601-2629);

(2) Occupational Health and Safety Act (29 U.S.C. §§ 651-678);

(3) Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. §§ 121-136y);

(4) Nuclear Regulatory Commission (10 C.F.R. §§ 20.102-20.409).

(b) To the extent that the substances covered by this act as listed in the Hazardous Chemicals List prepared pursuant to Section 12 of this act are not included among the substances regulated by subsection (a) of this section, the employer shall provide health and exposure records on employees exposed to these hazardous chemicals to the Department.

(c) The Department shall analyze the data received from employers pursuant to subsection (a) and shall prepare an Epidemiology Report, which shall provide information regarding the link between exposure levels and subsequent health effects. The report shall be used to update the Hazardous Chemicals List, and may be used by the Department in any other way it deems appro-

priate. The Department shall not release any information in a way which identifies individuals.

(d) An employer shall keep records for thirty (30) years on each employee who handles or uses any substance regulated under subsection (a). Upon request by the Department, employers shall provide this information to the Department whenever the Department determines that there is a health risk or disease relating to the exposure of employees to a substance. An employer who dissolves or terminates a business shall turn such records over to the Department at the time of dissolution or termination of the business.

## Section 12. EMERGENCY RESPONSE AND PUBLIC INFORMATION PROGRAMS

(a) The Department of Health shall prepare a Hazardous Chemicals List which shall consist of all hazardous chemicals as defined in Section 4(i) of this act. The Hazardous Chemicals List shall be updated, reduced or expanded by the Department of Health as necessary in light of new scientific evidence and knowledge, or as a result of evidence obtained pursuant to Section 11 of this act. A copy of the list and any modifications thereto shall be provided to every employer subject to this act.

(b) The Department shall prepare a Health and Environmental Effects, Emergency Response Information Sheet (HEERIS), that shall be completed by the employer and returned to the Department. A HEERIS shall be completed for every hazardous chemical which is manufactured, used or stored for more than five days, at the place of business of the employer. A copy of each HEERIS shall be retained by the employer, and employees shall have access to this copy as required by Section 6(c)(1). The employer shall also send a copy to the local police, fire department and county board of health. The county board of health shall send copies to all hospitals in the county, and shall maintain copies that shall be available to the public upon request.

(c) Information to be supplied by the employer on the HEERIS shall include, but shall not be limited to the following:

### (1) Part One - Health Effects

(a) The chemical name, Chemical Abstracts Service Number, common name, and any other name under which the substance is regulated by another state or federal agency;



(b) The level at which exposure to the substance is determined to be hazardous, if known;

(c) The location of the substance to which an employee may be exposed;

(d) The hazards posed by the substance including its toxicity, carcinogenicity, mutagenicity, teratogenicity, flammability, explosiveness, corrosivity, reactivity, including specific information on its reactivity with water;

(e) A description, in nontechnical language, of the acute and chronic health effects of exposure to the substances, including the routes, signs and symptoms of exposure and medical conditions which are generally recognized as being aggravated by exposure to the substance;

(f) The permissible exposure level, threshold limit value, short-term ceiling and other established limit values as set by the Occupational Safety and Health Administration, the National Institute of Occupational Safety and Health, and the American Conference of Government Industrial Hygienists;

(g) The acute and chronic effects of exposure at levels which exceed those described in subsection (c)(1)(f).

(2) Part Two - Environmental Effects

(a) The quantity of the hazardous chemical produced, stored or brought into the facility;

(b) The quantity of the hazardous chemical shipped out of the facility as is or in products;

(c) The maximum inventory of the hazardous chemical stored, the method of storage, and the frequency and method of transfer;

(d) The total stack or point-source emissions of the hazardous chemical;

(e) The total estimated fugitive or non-point source emissions of the hazardous chemical;

(f) The total discharge of the hazardous chemical into the surface or groundwater, the treatment methods, and the raw wastewater volume and loadings;

(g) The total discharge of the hazardous chemical into publicly-owned treatment works;

(h) The quantity, methods of disposal, of any wastes containing a hazardous chemical, the method of on-site storage

of these wastes, the location or locations of the final disposal sites for these wastes, and the identity of the hauler of the wastes.

(3) Part Three - Emergency Information

(a) Proper conditions for the safe use and exposure to the substance, including personal protective equipment to be worn, proper precautions and practices necessary for use and handling of the substance, including recommended engineering controls;

(b) Appropriate medical emergency treatment, including a telephone number to be called at any time, and any special information needed by medical practitioners in treating persons suffering from exposure;

(c) The number and normal working location of employees in each particular work area of the employer's facility;

(d) Appropriate emergency procedures for controlling and extinguishing fires or other types of reactions caused by the accidental release of a hazardous chemical.

Section 13. CITIZEN SUITS

The Attorney General, in cooperation with the Department of Health, shall promulgate rules and regulations for civil suits by citizens, including class actions, for violations of Section 12 of this act. Injunctive relief shall also be provided.

Section 14. CRIMINAL PENALTIES

Any person who willfully violates any provision of this act shall be subject to a fine of \$10,000 or a prison term of one year, or both.

Section 15. APPROPRIATION

(see section-by-section analysis).

Section 16. EFFECTIVE DATE

(see section-by-section analysis).

*Section-By-Section Analysis*

Section 1. TITLE

The title provides an abbreviated manner of reference to the entire act. This model legislation does not include a formal title section, which should be written according to the drafting statutes in each particular state. Careful wording of the title is neces-

sary because an overemphasis on employee protection or rights may lend support to an interpretation that the act is preempted by the federal OSH Act. On the other hand, a title which acknowledges the employee and community provisions contained in the legislation may lead to severability problems. New Jersey, having experienced precisely that problem, has proposed renaming its act the "Community Right to Know and Chemical Safety Act." S.3045, 201st Leg., 2d Sess. § 1. (New Jersey proposed legislation—introduced June 17, 1985).

(Source: Interview with Mark Connolly, Committee Aide to the New Jersey Senate Committee on Energy and the Environment (Oct. 7, 1985)).

## Section 2. STATEMENT OF PURPOSE/INTENT

In addition to the Title (Section 1), this is a critical section that a court will examine when making a decision on the preemption issue.

(Source: Suggested by 1984 Pa. Legis. Serv. 159 (Purdon) (to be codified at PA. STAT. ANN. tit. 35, § 7301 (preamble))).

## Section 3. SEVERABILITY

This section provides that if any portion of the act is declared unconstitutional, only that particular portion will, in fact, become invalid. The unaffected provisions will remain valid and in effect. Severability clauses were once common in legislation<sup>86</sup> and are currently being used with increasing frequency. This revival has been necessary to avoid the harsh result that occurs when an entire act is declared invalid simply because one section or one subsection has been found to be unenforceable.

(Source: S.3045, 201st Leg., 2d Sess. § 26. (New Jersey proposed legislation—introduced June 17, 1985)).

## Section 4. DEFINITIONS

a.-d.: Definitions found in these subsections are self-explanatory.

(Source: Subsection q: S.3045, 201st Leg., 2d Sess. § 3.z. (New Jersey proposed legislation—introduced June 17, 1985)).

Subsection a: *Id.* § 3.a..

Subsection b: *Id.* § 3.b..

Subsection c: *Id.* § 3.c..

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<sup>86</sup> See Connolly Interview, *supra* note 55.

Subsection d: *Id.* § 3.d.

e. "Department": The model legislation designates the Department of Health to implement this legislation. Individual drafters may choose to delegate responsibility for implementation to the state Department of Health or the department or agency with responsibility for the environment.

f. "Employee": This is a broad definition, intended to encompass all persons who may be exposed to hazardous chemicals in the course of their employment. This would cover employees who do not normally work with chemicals, such as office personnel, but who, during an emergency or accident, may be exposed to these chemicals, often in higher concentrations than workers are exposed to under normal operating conditions.

(Source: DEL. CODE ANN. tit. 16, § 2403(f) (Supp. 1984); and CONN. GEN. STAT. ANN. § 31-40j. (West Supp. 1985)).

g. The definition of "Employer," although very broad, is intended to encompass every employer in the state. There is no exception made for schools, hospitals, or research laboratories. Several states, however, exempt employers with fewer than ten (10) employees and these exemptions have not been held to violate equal protection.<sup>87</sup>

The contractor-subcontractor provision was taken from the Cincinnati Ordinance. It had originally been included to avoid problems at construction sites stemming from the presence of many subcontractors. Frequently, the general contractor has no knowledge of, or control over, the hazardous chemicals at the construction site.<sup>88</sup> For example, the owner of a building who subcontracts for roofers would not be considered the "employer" of these roofers. Rather, the subcontractor would be the "employer."<sup>89</sup>

(Source: 1984 Pa. Legis. Serv. 159 (Purdon) (to be codified at PA. STAT. ANN. tit. 35, § 7302); and CINCINNATI, OHIO MUNICIPAL CODE § 1247-07-M (added by amendment Dec. 8, 1982)).

h. "Expose or exposure": This comprehensive definition covers

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<sup>87</sup> W.Va. Manufacturers, *supra* note 34, at 315. This case specifically held that exempting employers with less than ten employees was not a violation of the equal protection clause.

<sup>88</sup> O'Reilly, *Right to Know: Cincinnati's More Righteous, Less Knowing Experiment*, 52 U. CIN. L.R. 337, 341 (1983).

<sup>89</sup> *Id.*

all possible ways in which a person may come into contact with a hazardous chemical. It also encompasses those persons, such as office personnel, not normally "exposed" during the course of employment but who may come in contact with such a chemical during an emergency situation. These employees must also be accounted for and proper precautions must be taken to protect them.

(Source: DEL. CODE ANN. tit. 16, § 2403(g) (Supp. 1984)).

i. "Hazardous chemical": This definition includes statutory definitions of hazardous chemicals from many different states. A conservative estimate of the number of substances covered is about 40,000. The OSHA "subpart Z" list is one of the sources for hazardous chemicals that would be regulated under this legislation. The author has attempted to be as thorough as possible and to include many different sources for names of potentially toxic chemicals.

It is important to note that it is not the number of chemicals covered, or the burden of complying with the state and federal regulation that determines if a state statute is preempted. Rather, it is whether the federal law is so comprehensive so as to preempt the entire field.<sup>90</sup> New Jersey's right-to-know law, which contains a very extensive list of chemicals to be regulated, was held not to be preempted as to the non-manufacturing sector, where there is no comparable federal legislation.<sup>91</sup> Each state must make its own policy judgments as to which source lists to include or exclude.

(Source: 1984 Pa. Legis. Serv. 159 (Purdon) (to be codified at PA. STAT. ANN. tit. 35, §§ 7302-7303); N.Y. LAB. LAW § 875 (McKinney Supp. 1984); and S.3045, 201st Leg., 2d Sess. § 28.b. (New Jersey proposed legislation—introduced June 17, 1985)).

j. "Hazardous chemical shall not include": In this section, chemicals that are currently regulated under different federal laws are exempted as are chemicals present in minute concentrations. An important exemption is permitted for sealed packages, provided that they do not remain in the workplace for more than five days. This will allow chemicals that are being shipped either in intrastate or interstate commerce to be held for a few days

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<sup>90</sup> See Hughey, *supra* note 28, at 11.

<sup>91</sup> *Id.* at 26.

without being subject to the provisions of the legislation. However, employers who hold these sealed packages will still be required to comply with the employee education (Section 8) and emergency response (Section 12) provisions of this legislation.

(Source: S.3045, 201st Leg., 2d Sess. § 27.n. to p. (New Jersey proposed legislation—introduced June 17, 1985); and DEL. CODE ANN. tit. 16, § 2417 (Supp. 1984)).

k.-l.: Definitions found in these subsections are self-explanatory.

(Sources: Subsection k: S.3045, 201st Leg., 2d Sess. § 3.s. (New Jersey proposed legislation—introduced June 17, 1985), and

Subsection l: *Id.* § 3.t.).

m. “Possessor of trade secret”: The definition clearly denotes who is to be considered the possessor of a trade secret for claims made pursuant to Section 10 of this statute.

(Source: Author).

n. “Process container”: A process container is a small (ten (10) gallons or less) container into which a hazardous chemical is immediately transferred by a person using that substance. Such a container is not to be used for the storage of a hazardous chemical. This exception was made because it would be impractical to require labels on such containers, especially when larger containers holding hazardous substances are labeled and the contents of the process container are immediately used.

(Source: S.3045, 201st Leg., 2d Sess. § 3.u. (New Jersey proposed legislation—introduced June 17, 1985)).

o. “Special health hazard chemical”: This section directs the state Department of Health to develop a list of those chemicals that are extremely toxic, hazardous or dangerous. This list is separate from the “Hazardous Chemicals List” and the chemicals on this special list will be ineligible for a trade secret claim. This section is taken largely from a section of New Jersey’s law which was upheld in the *Hughey* case.<sup>92</sup>

(Source: S.3045, 201st Leg., 2d Sess. § 5.b. (New Jersey proposed legislation—introduced June 17, 1985))

p. “Trade secret”: The definition of a trade secret as used here

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<sup>92</sup> *Id.* at 18.

comes in part from a recent federal case which defined a trade secret<sup>93</sup> and partly from state statutes. Trade secret claims have been the chemical industry's major point of opposition to right-to-know legislation. In the *Hughey* case, the court held that revealing trade secrets was not a "taking" under the fifth amendment.<sup>94</sup> Trade secrets will continue to be protected if deemed legitimate, but the standard which must be met will be a high one.

(Sources: S.3045, 201st Leg., 2d Sess. § 3.x. (New Jersey proposed legislation—introduced June 17, 1985); *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286-90 (D.C. Cir. 1983); see also Schroeder and Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L.J. 1231, 1277-91 (1984)).

q. This definition is self-explanatory.

(Source: Subsection q., S.3045, 201st Leg., 2d Sess. § 3.2. (New Jersey proposed legislation—introduced June 17, 1985)).

r. "Trade secret registry number": This is a number given to a hazardous chemical by the Department of Health after it has been determined that revealing the identity of the chemical would also reveal a trade secret. This number is then used to refer to the hazardous chemical in place of its common or chemical name.

(Source: S.3045, 201st Leg., 2d Sess. § 3.y. (New Jersey proposed legislation—introduced June 17, 1985)).

s. "Work area": This section is generally self-explanatory. Special mention is made of outdoor worksites to ensure that they are included in the definition of a work area.

(Source: 1984 Pa. Legis. Serv. 159 (Purdon) (to be codified at PA. STAT. ANN. tit. 35, § 7302); and suggested by CINCINNATI, OHIO, MUNICIPAL CODE § 1247-07-K (1982)).

## Section 5. INFORMATION TO BE PROVIDED BY SUPPLIERS OF HAZARDOUS CHEMICALS

This section gives a detailed explanation of the information that must be provided by a supplier of a hazardous chemical. An

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<sup>93</sup> *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286-90 (D.C. Cir. 1983).

<sup>94</sup> See *Hughey*, *supra* note 28, at 25.

additional provision is added to require that those suppliers who are also employers within the meaning of the bill provide a copy of Parts One and Three of the Health and Environmental Effects, Emergency Response Information Sheet (HEERIS) to the person purchasing the chemicals from the supplier. This will save "downstream" employers from having to go through the expensive and time-consuming process of gathering this information. These suppliers will also be able to include the cost of providing this information to their purchasers in the purchase price, while the purchasers will pass costs on to the ultimate consumer. In this way, the overall cost of compliance will be distributed, thus reducing individual costs.

(Source: CONN. GEN. STAT. ANN. § 31-40m. (West Supp. 1985)).

#### Section 6. INFORMATION TO BE SUPPLIED TO EMPLOYEES IN A WORK AREA

This section delineates the information that an employer must provide to employees. The section sets out requirements for labeling containers, posting notices informing employees of their rights and for providing employee access to information regarding hazardous chemicals.

It is important to note that this section covers all employees. The court in the *Hughey* case, however, held that similar sections in the New Jersey statute could only be applied to employers in the non-manufacturing sector because the OSH Act preempted any state attempt to cover manufacturing employees.<sup>95</sup> Of course, those states that do not participate in the OSH Act program can apply these provisions to all employers.

(Sources: Subsection (a)(1): S.3045, 201st Leg., 2d Sess. § 10.b. (New Jersey proposed legislation—introduced June 17, 1985)

Subsection (a)(2) DEL CODE ANN. tit. 16, § 2408(a) (Supp. 1984)

Subsection (a)(3): 1984 Pa. Legis. Serv. 159 (Purdon) (to be codified at PA. STAT. ANN. tit. 35, § 7306(c))

Subsection (a)(4): DEL. CODE ANN. tit. 16, § 2408(b) (Supp. 1984)

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<sup>95</sup> *Id.* at 18, 19.



Subsection (a)(5): S.3045, 201st Leg., 2d Sess. § 10.c. (New Jersey proposed legislation—introduced June 17, 1985)

Subsection (b): N.Y. LAB. LAW § 876 (McKinney Supp. 1984); and 1984 Pa. Legis. Serv. 159 (Purdon) (to be codified at PA. STAT. ANN. tit. 35, § 7307)

Subsection (c)(1): S.3045, 201st Leg., 2d Sess. § 37.a. (New Jersey proposed legislation—introduced June 17, 1985); DEL. CODE ANN. tit. 16, § 2415 (Supp. 1984); CONN. GEN. STAT. ANN. § 31-40k. (West Supp. 1985); and Author)

Subsection (c)(2): CONN. GEN. STAT. ANN. § 31-40l.(b) (West Supp. 1985)).

## Section 7. EMPLOYEE RIGHTS

This section nullifies any attempt by an employer to request or force an employee to waive the rights granted to that employee under the act. It also provides general rights so that employees will not be discharged, disciplined or in any way discriminated against simply because the employee has exercised any right granted by this legislation. It also directs the Attorney General to develop a complaint process for receiving and acting upon employee complaints regarding employer violations of the legislation. Such procedures should include investigating the complaint, as well as appropriate civil trial procedures to adjudicate valid complaints. Many of the provisions of this section are common in labor legislation and are not unique to the chemical industry.

(Sources: Subsection (a): DEL. CODE ANN. tit. 16, § 2415 (Supp. 1984)

Subsection (b): CONN. GEN. STAT. ANN. § 31-40o. (West Supp. 1985)

Subsection (c): Author).

## Section 8. EMPLOYEE EDUCATION

This section describes the education program that every employer must provide to an employee. It sets out the information that must be provided to the employee and ensures that new employees are given similar training and education as soon as possible after commencing work. The object here is to use this section in conjunction with Section 7 to “saturate” the employee with

information regarding the hazardous chemicals that the employee is or may be exposed.

(Source: 1984 Pa. Legis. Serv. 159 (Purdon) (to be codified at PA. STAT. ANN. tit. 35, § 7308)).

#### Section 9. EMPLOYER LIABILITY

This section makes it clear that an employer, simply by complying with the employee and public information sections of this legislation, is not excused from liability for his acts that would otherwise incur liability. An employer cannot "hide" behind a right-to-know act and claim immunity from liability for the results of his actions or omissions, especially when toxic tort suits are brought by employees.

(Source: N.Y. LAB. LAW § 876.8. (McKinney Supp. 1984)).

#### Section 10. TRADE SECRETS

This section details the procedures that a possessor of a trade secret must follow in order to have a hazardous chemical deemed a trade secret and thereby be given trade secret protections. This section defines the factors that are to be considered by the Department of Health in determining if the trade secret claim is valid, and provides for an appeal process for claims that are denied. It also requires that a physician or nurse who is treating a patient, who has been exposed to a chemical that has been deemed a trade secret, will be given all the information regarding the hazardous chemical, including the common and chemical name, if necessary.

The employer may require the physician or nurse to sign a confidentiality statement in conjunction with the release of this information by the employer. This section also provides for criminal actions against employees who disclose trade secret information.

(Sources: Subsection (a): CONN. GEN. STAT. ANN. § 31-40n. (West Supp. 1985); and S.3045, 201st Leg., 2d Sess. §§ 11.a.-11.c. (New Jersey proposed legislation—introduced June 17, 1985)

Subsection (b): S.3045, 201st Leg., 2d Sess. § 3.x. (New Jersey proposed legislation—introduced June 17, 1985)

Subsection (c): DEL CODE ANN. tit. 16, § 2416(c) (Supp. 1984)

Subsection (d): 1984 Pa. Legis. Serv. 159 (Purdon) (to be codified at PA. STAT. ANN. tit. 35 § 7311(b)).

### Section 11. EPIDEMIOLOGICAL RESEARCH

This section directs the Department of Health to gather and analyze data on exposure to hazardous chemicals to determine the link between exposure to certain chemicals and disease. The Department will develop its findings based on the exposure and health records of employees from all employers in the state. These records are currently required to be provided to the federal government under several federal laws. This section simply requires that such records also be sent to the state Department of Health. When a link has been established, or is suspected, the Department shall add the name to the Hazardous Substance List if studies indicate that it is toxic or hazardous enough to meet the definition of such a chemical.

This section has no precedent in current state right-to-know legislation, but it is vital to the success of such legislation. If a "right-to-know" is to be meaningful, employers, employees and the public must have accurate and current information regarding the known and potential health effects of the thousands of chemicals to which they may be exposed. One of the greatest obstacles to legislation and litigation regarding this type of chemical regulation is the simple fact that the health effects of many chemicals are not known nor have they been adequately studied to establish a link between exposure and disease.<sup>96</sup> Many of the chemicals regulated by this legislation and by state and federal law have no known "safe" level of exposure. Many employees, as well as the public, may unwittingly be receiving exposure to chemicals at very dangerous levels.<sup>97</sup> It is also important to remember that this epidemiological research will also be used to remove chemicals from either the Hazardous Chemicals or Special Health Hazard Chemical Lists if it is determined that these chemicals do not pose a threat to public health. Such research will benefit employees, employers and the general public by increasing awareness of the potential health risks from exposure to chemicals.

(Source: Subsection (a): N.Y. PUB. HEALTH LAW § 4803

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<sup>96</sup> See *supra* note 20.

<sup>97</sup> *Id.*

(McKinney 1985); and 1984 Pa. Legis. Serv. 159 (Purdon) (to be codified at PA. STAT. ANN. tit. 35, § 7309)

Subsection (b): Author

Subsection (c): Author

Subsection (d): N.Y. PUB. HEALTH LAW § 4803 (McKinney 1985)).

## Section 12. EMERGENCY RESPONSE AND PUBLIC INFORMATION PROGRAMS

This section directs the Department of Health to compile the Hazardous Chemicals List from all the sources listed in Section 4(i). The Department shall then distribute a copy of this list to all employers in the state. This is an important difference between the model legislation and the federal OSH Act. Under the federal law, the employer must determine what chemicals meet the Act's definition of a "hazard." Here the burden is shifted to the Department of Health. The employer must simply determine safe handling procedures, while much of the cost is shifted to the state. The state's determination of handling procedures is a viable option that each state may wish to consider.

Subsection (b) defines the information that an employer or supplier must provide on the Health and Environmental Effects, Emergency Response and Information Sheet (HEERIS). The HEERIS is the heart of this legislation. It brings together three distinct types of information and puts them in one document, thus making for quick and easy reference. Worksite accidents, accidental exposure by the public, and other emergency situations are covered under the information requirements of the HEERIS. The HEERIS also provides information on the environmental effects that may occur during normal operating procedures when chemicals in liquid, solid or gaseous form are routinely released. The HEERIS is intended to be widely distributed to employees, hospitals and the general public.

(Source: Author).

## Section 13. CITIZEN SUITS

This section directs the Attorney General to develop procedures for suits by citizens against employers and suppliers for violations of this act. These suits may be class action suits, and provisions for attorney's fees and damages should be included.

No attempt has been made in this model legislation to delineate these procedures. Each state has a different approach to actions by its citizens and the usual state procedures for such actions should be incorporated into its right-to-know legislation.

(Source: Author).

#### Section 14. CRIMINAL PENALTIES

Like the preceding section, this section directs the Attorney General to develop procedures for criminal actions against persons who willfully violate the provisions of this legislation. State law and procedures in this area should be favored.

(Source: Author).

#### Section 15. APPROPRIATIONS

Setting an appropriate level of funding to ensure that the intent of the legislation is carried out is a difficult process and can turn into a guessing game.<sup>98</sup> The drafter should consult with the various departments involved to determine how much funding is needed to carry out their duties under the legislation.

(Source: Author; suggested by interview with Mark Connolly, Committee Aide, New Jersey Senate Committee on Energy and the Environment (Oct. 7, 1985)).

#### Section 16. EFFECTIVE DATE

An effective date of one year after the bill is signed into law is suggested. Longer or shorter periods may also be feasible depending upon the number of employers that will be affected by the act.

(Source: Author).

### **Conclusion**

It is a complex task to draft a law which provides adequate protection for people who work with or risk exposure to hazardous chemicals, and that will also allow for the continued expansion of the chemical industry. The manufacture of chemicals and their use in almost every type of business, from agriculture to medicine, play an important role in the economy of this country. At the same time, these chemicals pose risks to human health and safety, which cannot be measured in economic terms. It is imper-

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<sup>98</sup> See Connolly Interview, *supra* note 55.

ative that such potential dangers be examined and that information regarding such harm be made widely available to interested and affected persons. These individuals can then make informed choices whether to continue to encounter these risks.

Informed choice is the central theme of this note. By gathering, analyzing and distributing this information, through the use of HEERIS statements, the determination of risks should be made simpler and the "informed" choice easier. Firmly establishing a link between chemical exposure and disease is a difficult technological task, but one that must be undertaken in order to adequately protect workers and citizens from the risks that surround them.

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