The Right-to-Know and the Trucking Industry: Regulating Regulations

ALAN E. SENECZKO*

TABLE OF CONTENTS

* B.S. Northern Illinois University, 1981; J.D. Marquette University, 1984. Intern, National Labor Relations Board, 1983. Member of Wisconsin Bar, presently practicing with Krukowski, Chaet, Beck & Loomis, P.C. of Milwaukee, Wisconsin.

INTRODUCTION

The presence of toxic substances in the workplace is becoming a very popular subject of legislation, federally and on a State and local basis. As a result, numerous laws are now being proposed and enacted regulating the right of both employees and local communities to know what hazardous substances they may be exposed to during the normal course of their employment or as a result of an accident.

The laudable objective of such legislation is to keep workers and communities informed as to the hazards to which they may be exposed, and to provide training in proper handling of hazardous substances. Consistent with this purpose, the laws focus on chemical manufacturers and other employers who regularly maintain a constant inventory of toxic substances, creating a potential hazard for both employees and the community. However, it is now urged that these originally narrow laws be expanded to cover *all* employers, including those in the industry. This rapid expansion has widespread ramifications for employers in the industry.

Although the Department of Transportation ("DOT") currently regulates the transportation of hazardous substances across the nation, trucking companies may now be faced with the regulation of similar matters by other federal agencies (*e.g.*, the Occupational Safety and Health Administration or "OSHA"), by individual states and by local ordinances.

The rapidly expanding scope of these laws, and the ever-growing number of governmental entities seeking to regulate this issue, create serious problems for the trucking industry, pragmatically and logistically. As

the substance of each of these laws is considered, the need for a uniform federal standard preempting all other laws becomes readily apparent.

This article will review the current legislation governing the right-to-know issue, the practical effects of that regulation on the trucking industry and a proposed solution to the problem. Among the issues to be considered are:

1. The Federal Hazard Communication Standard and the difficulties inherent in its application to trucking industry employers;
2. Preemption of state and local laws by the Hazardous Communication Standard;
3. Preemption of the Hazard Communication Standard by other regulatory agencies;
4. Existing Department of Transportation regulations and their effects on similar state or local laws;
5. The relationship between Department of Labor regulations and Department of Transportation regulations; and
6. A proposed right-to-know regulation for the trucking industry.

I. THE FEDERAL HAZARD COMMUNICATION STANDARD

A. PURPOSE

On November 21, 1983 the Assistant Secretary of Labor for Occupational Safety and Health promulgated what has become known as the Federal Hazard Communication Standard ("HCS").[1] This statutorily authorized standard[2] was the response of the Department of Labor ("DOL") to the long-recognized need for apprising workers of the hazards of the chemicals with which they worked.[3] This standard was originally conceived with a very narrow purpose: "[T]o establish uniform requirements for hazard communication in one segment of industry, the manufacturing division."[4] Under the provisions of the standard, manufacturing sector employees who are exposed to hazardous chemicals are to receive information about the chemicals through a comprehensive hazard communication program. This program requires all covered employers to provide hazard information to their employees by means of labels on containers, material safety data sheets and training. For the most part, all of these procedures already exist in the trucking industry.[5] However, to more fully

1. 29 C.F.R. § 1910.1200 (1985).

2. Under 29 U.S.C. § 655(a) (1982) the Secretary of Labor is granted the authority to promulgate standards to assure the greatest protection of the safety and health of employees.

3. 48 Fed. Reg. 53,281 (1983).

4. *Id.*

5. The Secretary recognized the existence of at least some of these requirements in § 1910.1200(f)(2) of the standard, which relates to the labeling requirement:

> Chemical manufacturers, importers, or distributors shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked in accordance with this section in a manner which does not conflict with the Hazardous Materials

understand the similarities between existing Department of Transportation regulations and the provisions of the Department of Labor's Hazard Communication standard, the provisions of the HCS and their implications for the trucking industry must be further examined.

B. Substantive Provisions

1. Hazard Determination

The first substantive provision of the HCS requires chemical manufacturers and importers to evaluate the chemicals produced in their workplace or imported by them to determine if they are hazardous.[6] Employers are not required to evaluate chemicals unless they choose not to rely upon the evaluations performed by the chemical manufacturer or importer. Although this provision is obviously not applicable to employers in the trucking industry, it operates to clearly illustrate the intent of the present OSHA communication standard.

2. Written Hazard Communication Program

The HCS also requires employers to develop and implement a written hazard communication program for their workplace, describing how the labeling, material safety data sheet and training requirements of the standard will be met.[7] This program also requires employers to:

1) List the hazardous chemicals known to be present in the workplace, using an identity that is referenced on the appropriate material safety data sheet;
2) Detail the method the employer will use to inform employees of the hazards of non-routine tasks and the hazards associated with chemicals contained in unlabeled pipes in their work area; and
3) Detail the methods that will be used to inform any contractors and their employees working in the employer's workplace of any hazardous chemicals to which they may be exposed and of any suggested protective measures.

The absurdities created by the application of the above requirements to employers in the transportation industry are glaring. How, for example, is a major trucking firm to maintain a readily available, continuously updated "list" of all hazardous chemicals known to be present in the workplace? Such a list would be hundred of pages long in a matter of months, since literally hundreds of thousands of items of cargo pass through the premises of trucking firms in just a few months.

Transportation Act (18 U.S.C. § 1801 (1982) *et seq.*) and regulations issued under that Act by the Department of Transportation.

6. 29 C.F.R. § 1910.1200(d)(1).
7. 29 C.F.R. § 1910.1200(e)(1). These requirements are discussed in detail *infra*.

3. LABELS AND OTHER FORMS OF WARNINGS

One of the most important provisions of the HCS is its labeling requirement.[8] Under this provision chemical manufacturers, importers, employers and distributors are to ensure that each container of hazardous chemicals found in or leaving the workplace is labeled, tagged or marked with the identity of the hazardous chemical and the appropriate hazard warnings. However, recognizing the preexisting DOT regulation of this area, the HCS provides that the above labeling must be accomplished in a manner that does not conflict with the Hazardous Materials Transportation Act ("HMTA")[9] and with any regulations issued under that Act by the Department of Transportation. By specifically carrying out this exception, the Department of Labor impliedly acknowledged that existing Department of Transportation labeling regulations are sufficient to satisfy the requirements of the HCS.[10]

4. MATERIAL SAFETY DATA SHEETS

The HCS also requires chemical manufacturers, importers and employers to have available a material safety data sheet (MSDS) for each hazardous chemical which they use.[11] Copies of material safety data sheets are required for *each* hazardous chemical in the workplace and must be readily accessible during each work shift to employees when they are in their work areas.[12] Chemical manufacturers and importers are also required to ensure that distributors and purchasers are provided with an appropriate MSDS with each initial shipment, either providing it with

---

8. 29 C.F.R. § 1910.1200(f).

9. 18 U.S.C. § 1801 *et seq.* (1982).

10. However, on September 11, 1985, Jennifer Silk, an occupational health specialist with OSHA, stated that "DOT labeling will not suffice for purposes of hazard communication." *Chemical Makers, Users Urged to Interpret Coverage and Scope of OSHA Standard Broadly*, 15 O.S.H. REP. (BNA) No. 16 at 327 (Sept. 19, 1985).

11. 29 C.F.R. § 1910.1200(g)(1) (1985).

12. 29 C.F.R. § 1910.1200(g)(8). Information required to be found on the MSDS for each hazardous chemical includes, among other minimum requirements:

a) the identity used on the label;
b) the chemical and common names of the substance, mixture and/or any hazardous ingredients of the same;
c) the physical and chemical characteristics of the substances;
d) the physical hazards of the substance;
e) the health hazards of the substance;
f) the primary routes of entry;
g) any generally applicable precautions for the safe handling and use of the substance;
h) any generally applicable control measures;
i) emergency and first aid procedures; and
j) the name of the party responsible for preparing the MSDS and having knowledge of any additional necessary information about the substance.

29 C.F.R. § 1910.1200(g)(2).

the shipped containers or sending it prior to or at the time of shipment.[13] However, if the MSDS is not provided with the shipment, the purchaser is responsible for obtaining one from the manufacturer.

The MSDS requirement is also illustrative of the problems inherent in any attempt to apply HCS to the trucking industry. As will be discussed in greater detail later, the information to be contained in each MSDS is duplicative of much already required to be found on the bill of lading.[14] In addition, the HCS makes no mention of the duties of the shipping company, only those of the shipper (manufacturer) and purchaser/distributor. If the HCS is extended to apply to all employers, it could arguably be a trucking company's duty to ensure that there is a MSDS for every hazardous substance it ships and to determine which items of cargo need material safety data sheets.

5. *Employee Information and Training*

The employee information and training provisions of the HCS are the focal point of the entire standard; they reflect the purpose of the standard and the manner in which employees are to benefit from it. This provision[15] requires employers to provide employees with information[16] and training[17] on the hazardous chemicals introduced into their work environment.

Similar procedures have been implemented by trucking industry employers through existing DOT regulations, although not to the same extent.[18] More disturbingly, the HCS training requirements, as written, could be extremely burdensome. For example, the training provisions re-

---

13. 29 C.F.R. § 1910.1200(g)(6).

14. *See, e.g.*, 49 C.F.R. § 172.200 (1984). In addition, many employers utilize the Emergency Response Guidebook, which provides easily comprehended information regarding the health and physical hazards of substances being transported through commerce. *See infra*, Section IV(B).

15. 29 C.F.R. § 1910.1200(h) (1985).

16. The employee information provisions of the HCS require employees to be informed of:
a) the requirements of the HCS;
b) any operations in their work area where hazardous chemicals are present; and
c) the location and availability of the written hazard communication programs, the required list of hazardous chemicals, and the material safety data sheets.
29 C.F.R. § 1910.1200(h)(1).

17. The training provisions require that employees be trained regarding:
a) the methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area;
b) the physical and health hazards of the chemical in the work area;
c) the measures employees can take to protect themselves from the hazards;
d) the details of the employer's hazard communication program, including explanations of the labeling system, material safety data sheets, and how to obtain and use the appropriate hazard information.
29 C.F.R. § 1910.1200(h)(2).

18. *See infra*, Section IV(C).

quire additional training every time a new hazard is introduced into the work area.[19] Applied literally, this could require trucking industry employers to hold weekly, daily or even hourly training programs.

C. REMEDIES

The Hazard Communication Standard provides employees with certain rights, but no specified remedies. This leaves open a number of questions for the trucking industry; for example, what recourse is available to an employee if an employer refuses to provide him or her with information on a substance believed to be hazardous? Similarly, may an employee unloading trucks refuse to work with or unload any materials not having a required label, but believed to be hazardous? Recourse in any given situation will primarily lie in Section 11(c) of the Occupational Safety and Health Act.[20] However, trucking industry employees might also be allowed to rely upon the more liberal remedies available under the Surface Transportation Act.[21]

1. O.S.H. ACT SECTION 11(C)

Section 11(c) of the Occupational Safety and Health Act prohibits an employer from discriminating against any employee for exercising any right afforded by the Act.[22] Under Section 11(c), employers discharging an employee in violation of the Act can be held liable for reinstatement and back pay. Employees exercising their rights under the HCS would presumably be protected by the provisions of Section 11(c). However, before an employee could refuse to perform work believed to involve hazardous substances, the *Whirlpool* "reasonable person" standard[23] would first have to be met.

---

19. On July 29, 1985 OSHA issued "Clarifications and Interpretations of the Hazard Communication Standard (HCS)," stating that "retraining is to be done when a new *hazard* is introduced into the work area, not a new *chemical*." OSHA Instruction CPL 2-2.38, July 21, 1985, Appendix A, *reprinted in* 21 O.S.H. REP. (BNA) 8320, 8328 (Sept. 19, 1985).

20. 29 U.S.C. § 660(c) (1982).

21. 49 U.S.C. § 2305 (1982).

22. In Whirpool v. Marshall, 445 U.S. 1 (1980), the United States Supreme Court defined the circumstances under which an employee's conduct will be held to be "protected," thereby entitling him or her to the remedies of Section 11(c). Examining the ability of an employee to refuse to perform work believed to be dangerous, the court set forth the following standard: Before an employee can refuse to perform a work assignment, that employee must have a *reasonable fear of death or serious physical harm*, coupled with a reasonable belief that a less drastic alternative is not available to avoid the danger or safety hazard. In refusing to perform the work, the employee must act in good faith and the apprehension must be such that a reasonable person under similar circumstances would conclude that there is a real danger of death or serious injury. Finally, there must have been insufficient time to eliminate the danger by other alternatives.

23. *Id.*

2. Surface Transportation Act Section 405

Another remedy arguably available to a trucking industry employee for a violation of the Hazard Communication Standard lies in Section 405 of the Surface Transportation Assistance Act of 1982.[24] Under Section 405(a), an employer is prohibited from discriminating against employees who have filed complaints or instituted any proceedings relating to the violation of a commercial motor vehicle safety rule, regulation, standard or order. Section 405(b) further prohibits an employer from discriminating against an employee:

> [F]or refusing to operate a vehicle when such operation constitutes a violation of any federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.[25]

Although the above provisions were originally envisioned to encompass situations in which employers required employees to operate unsafe trucks,[26] and this is the way the Act has traditionally been interpreted and applied,[27] Section 405 could be applicable to situations in which employ-

---

24. 49 U.S.C. app. § 2305 (1982).

25. *Id.*

26. An examination of the legislative history of the statute shows that Congress' main concern was reducing the number of fatalities caused by the operation of unsafe vehicles (*e.g.*, accidents involving overloaded, improperly balanced or defective equipment). S. 3044, 97th Cong., 2nd Sess., 128 Cong. Rec. 14028 (1982), Comm. on Commerce, Science and Transportation; 96th Cong., 1st Sess., Report on Truck Safety Act (Comm. Print 1979):

> [I]t is important to note the respective rules of the Departments of Transportation and Labor. The Secretary of Transportation, for example, in protecting the public from unsafe commercial motor vehicles, in assuring that commercial motor vehicles are safely maintained, equipped, loaded, and operated, is responsible for the manner in which brakes are repaired, the manner in which a load is distributed in a vehicle, the design and equipment of the vehicle, and related matters insofar as failure to observe his regulations would adversely affect the safety of the public or the health and safety of operators of commercial motor vehicles. The Secretary of Transportation is not responsible for protecting employees from asbestos fibers, and toxic fumes involved in the course of properly repairing a brake, nor for the protection of employees from slippery walking surfaces or for inadequately braked fork-lift trucks. These activities continue to be the responsibility of the Department of Labor.
>
> . . . .
>
> At the same time, the Committee believes that both Departments must focus more attention upon the hazards that commercial motor vehicle drivers face in the course of their work. As efforts to permanently reduce or eliminate specified health hazards may ultimately require changes in commercial motor vehicle design, which is generally the expertise of the Secretary of Transportation, this bill therefore directs the Secretary of Transportation and the Director of the National Institute for Occupational Safety and Health, in consultation with the Secretary of Labor, to conduct a study of safety and health hazards to drivers. . . . This section requires the Secretaries and the Director to make every attempt to avoid overlap or duplication of activities and to coordinate their efforts. S. 2033, 97th Cong., 2nd Sess., 128 Cong. Rec. 14027 (1982).

27. *See, e.g.*, McKenzie Tank Lines, Inc., No. 4-0280-83-03E (Oct. 20, 1983) (employee refusal to operate vehicle with unsafe tires); Polkville Milk Haulers, Inc., No. 2-6010-84-502 (April

ees refuse to operate or unload trucks containing hazardous substances. This is especially true considering the broad "any proceeding," "safety regulation" and "any federal rules" language contained in Sections 405(a) and (b). An employee might, for example, refuse to operate a truck unless copies of the material safety data sheets are provided for each item of cargo believed to be hazardous.

The availability of a potential Section 405 remedy for violations of the HCS is an important consideration that must be reckoned with when considering the scope of the Hazard Communication Standard. This is because the remedial provisions of Section 405 are much more broad than those of Section 11(c) of OSHA, the existing HCS remedy. For instance, under Section 405 an employee has 180 days to file with the Secretary of Labor a complaint alleging a discriminatory act. Under Section 11(c) an employee has 30 days. More importantly, Section 405 expressly provides for *immediate* reinstatement, back pay, *compensatory damages and attorney fees*, as opposed to the traditional remedies of reinstatement and back pay available under Section 11(c). As a result, any sweeping, short-sighted extension of the HCS to trucking industry employees is destined to create expanded remedial rights, which may force compliance by trucking industry employers with the logistically impossible requirements of the Hazard Communication Standard.

3. *Deferral*

Another issue that must be addressed when considering the scope of the HCS and the remedies available for its violation concerns the matter of deferral. Since a great number of employers in the trucking industry have labor agreements with the International Brotherhood of Teamsters which provide for final and binding arbitration, it would seem patently unfair to require employers to relitigate matters that have already been resolved through the contractual grievance and arbitration procedures. Yet, this is a distinct possibility. Consider the situation of the unionized dock worker who refuses to unload material believed to be hazardous. He is terminated as a result of his refusal and files a grievance contesting the discharge. Although he loses the grievance and arbitration, he subsequently files charges seeking recourse under Sections 11(c) and 405. The entire process is not only duplicated as a result of these charges, but the employee also now gets another "kick at the cat." The question that

12, 1984) (employee refusal to operate vehicle with cracked axle); Roberts Trucking Co., Inc., No. 5-0170-84-501 (Dec. 28, 1984) (employee refusal to operate vehicle with defective brakes); Transport Service Co., No. 5-6850-84-504 (Dec. 28, 1984) (employee refusal to drive in excess of DOT maximum daily driving time); Sun Supply Corp., No. 6-4140-84-501 (employee refusal to falsify driver logs).

arises is whether deference will be paid to the results of the arbitration process.

a. National Master Freight Agreement

Under the National Master Freight Agreement employees are protected from being discharged in retaliation for refusing to drive an unsafe vehicle. An employee may refuse to operate a vehicle not "in safe operating condition," or not equipped with a prescribed "safety appliance."[28] It can be argued that this provision would also apply to situations envisioned by the HCS. Is a vehicle in "safe operating condition" if its drivers are not provided with material safety data sheets for its cargo?

b. Section 11(c) Deferral

Assume a driver is discharged for refusing to accept a load without a material safety data sheet for a questionable substance. He challenges his discharge through the contractual grievance procedure, but ultimately loses in arbitration. He then files a charge with OSHA alleging a violation of the HCS.[29] Under current procedures, OSHA may defer to the decision of an arbitrator,[30] but only under prescribed circumstances, and then on a case-by-case basis.[31]

Similarly, OSHA recognizes that the situation may occur in which a Section 11(c) complaint is filed simultaneously with a grievance or a complaint with another agency.[32] Under such circumstances, OSHA may

28. The National Master Freight Agreement, art. XVI, § 1 provides that

> The employer shall not require employees to take out on the streets or highways any vehicle that is not in *safe operating condition*, including but not limited to acknowledged overweight or not equipped with the safety appliances prescribed by law. It shall not be a violation of this Agreement where employees refuse to operate such equipment *unless such refusal is unjustified*. All equipment refused becaused not mechanically sound or properly equipped, shall be appropriately tagged so that it cannot be used by other drivers until the maintenance department has adjusted the complaint. (Emphasis added).

29. Historically, if an employee entered in good faith into grievance arbitration proceedings, the 30-day limitation period for filing an 11(c) complaint with OSHA would be tolled. This procedure has been changed quite recently. On August 15, 1985, OSHA announced that an ongoing grievance arbitration proceeding will no longer suspend or "toll" the 30-day limitation period, meaning that any employee desiring to file a complaint with OSHA must do so within 30 days of the alleged discriminatory conduct. DAILY LAB. REP. (BNA) No. 154 at A-10 (August 9, 1985).

30. In 29 C.F.R. § 1977.18(a)(2) (1985), the Secretary of Labor "recognizes the national policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements." (Citations omitted).

31. It must be clear that the proceedings dealt adequately with all of the factual issues; the proceedings must have been free of procedural infirmities; and the outcome of the proceeding must not have been repugnant to the purpose and policies of the Act. 29 C.F.R. § 1977.18(c) (1985).

32. 29 C.F.R. § 1977.18(a)(3) provides that "[w]here a complainant is in fact pursuing remedies other than those provided by Section 11(c), postponement of the Secretary's determination and deferral to the results of such proceedings may be in order." (Citations omitted).

postpone its determination of the matter (and later defer), but only if certain procedural requirements are met.[33]

This deferral policy, while satisfying generally accepted standards for deferring to the decisions of other proceedings,[34] creates a practical problem. Frequently, the decisions of the contractually-agreed upon joint grievance committees are not detailed and often only state "grievance denied" or "grievance upheld." This creates a problem when OSHA attempts to examine the procedure and the facts presented to determine whether deferral is appropriate.

c. Section 405

The issues that arise with respect to the HCS, Section 11(c) and deferral will also inevitably arise with respect to any attempted enforcement of the HCS through Section 405 of the Surface Transportation Act. Although there are no existing procedures under Section 405 calling for deferral, the Surface Transportation Act authorizes the Secretary of Labor, not the Secretary of Transportation, to enforce its provisions. Therefore, an argument can be made that the deferral policies set forth by the Secretary of Labor for Section 11(c) deferral also govern claims arising under Section 405.

D. The Application of the HCS to the Trucking Industry

Since the extension of the HCS to all employers has now become a reality,[35] the effects of a sweeping extension of its provisions to the trucking industry become more and more important. If trucking industry employers are required to comply with the requirements of the HCS, freight

33. The factual issues in the proceeding must be substantially the same as those raised by the Section 11(c) complaint; the proceedings must not violate the rights guaranteed by Section 11(c); and the forum hearing the matter must have the power to determine the ultimate issue of discrimination. 29 C.F.R. § 1977.18(b) (1985).

34. *See, e.g.*, United Technologies Corporation, 268 NLRB 557 (1984) (National Labor Relations Board will defer an investigation to the grievance-arbitration procedure upon the satisfaction of certain standards recognizing the validity of the arbitration process and the arbitrability of the dispute); Olin Corporation, 268 NLRB 573 (1984) (NLRB will defer to the award of an arbitrator where the proceedings appear to have been fair and regular, the parties agreed to be bound by the award, the award was not clearly repugnant to the purposes and policies of the Act, the issues addressed were factually parallel and the arbitrator was presented generally with the facts alleged in the "deferred" complaint).

35. On August 20, 1985 the acting Assistant Secretary of Labor stated that OSHA *would*, in fact, be extending the provisions of the HCS to *all* employers. *OSHA Plans to Extend to All Employers Manufacturing Sector Hazard Communication Rule*, DAILY LAB. REP. (BNA) No. 161 at A-7 (August 20, 1985). *See also*, United Steelworkers v. Auchter, 763 F.2d 728 (3rd Cir. 1985) in which the Third Circuit directed OSHA to explain why the HCS should only apply to manufacturing sector employers.

terminals will become largely storage facilities for material safety data sheets.

This raises a number of practical questions. Will these employers be required to keep a file of data sheets for each hazardous substance passing through their terminals? Will these employers be required to update, on a daily basis, the hazardous chemicals list required by the current HCS? Will drivers be responsible for determining which data sheets are to go with each piece of cargo, especially if the data sheets refer to components of existing cargo? Can trucking employers be held responsible for erroneous information? How will the detailed training procedures required by the HCS be implemented? Will trucking industry employees have to be trained on a daily, if not hourly basis, due to the fact that a new hazardous substance may be sitting on the dock?

The above questions illustrate just a few of the unsolved (and perhaps unsolvable) problems created by the extension of the HSC to the trucking industry. The entire situation is further complicated by the fact that the Department of Transportation has already promulgated a number of regulations governing areas covered by the HCS.[36] Recognizing this, OSHA could take the position that the DOT has exclusive jurisdiction to prescribe or enforce hazardous substance standards as they relate to the trucking industry.[37] The solution, however, is not as simple as the statute would make it appear. For instance, the Department of Transportation's preemptive authority is not as strong as that of OSHA.[38] This creates a very serious problem when attempting to deal with state laws having more stringent requirements than the DOT. Will drivers be required to carry material safety data sheets with them in some states, but not in others? In addition, which agency will govern "right-to-know" situations not traditionally regulated by the Department of Transportation? For example, what if a freight handler refuses to unload a substance believed to be hazardous until he is provided with a material safety data sheet relating to that situation?

Herein lies the problem. How many regulations can there be in this area? While one uniform federal standard presents the most desirable solution, which governmental agency is to promulgate and enforce that standard, and what of more demanding state laws? The sections to follow address these questions and culminate in a proposed solution: OSHA adoption and enforcement of existing DOT regulations, but only as they relate to hazardous materials communications.

---

36. *See infra*, Section IV, in which DOT regulation of hazardous substances in the trucking industry is discussed.

37. 29 U.S.C. § 653(b)(1) (1982). *See infra*, Section III, which discusses OSHA deference to other federal agencies.

38. *See infra*, Section V, in which DOT preemption of state laws is discussed.

II. OSHA PREEMPTION OF STATE RIGHT-TO-KNOW LAWS

A. SURVEY OF STATE LAWS

The need for uniform regulation of employee, and community, "right-to-know" is made evident upon an examination of the wealth of state laws currently dealing with this issue.[39] Several states have essentially incorporated the federal hazard communication standard into their own statutory provisions, requiring employee education and training, the provision of material safety data sheets and hazardous chemical labeling.[40] Other states adopt some, but not all of the requirements imposed by the Hazard Communication Standard. Some of these states, for example, require employee training and education, including the provision of information regarding hazardous chemicals, but do not necessarily contain the labeling and/or material safety data sheets requirements of the OSHA standard.[41]

---

39. For a general survey of the various State Right-to-Know laws, *see*, RIGHT-TO-KNOW: A REGULATORY UPDATE ON PROVIDING CHEMICAL HAZARD INFORMATION (BNA, 1985).

40. *See, e.g.*, Illinois, ILL. REV. STAT. ch. 48, §§ 1401-1420 (1983) (employers must label containers of toxic substances used in the workplace and provide chemical information to employees exposed to toxic substances); Iowa, IOWA CODE ANN. §§ 455D.1-455D.19 (West 1985) (federal OSHA standard adopted); Massachusetts, MASS. GEN. LAWS ANN. ch. 111F, §§ 1-21 (West 1985) (employers must maintain material safety data sheets supplied by manufacturers or sellers of toxic or hazardous substances used in the workplace; provide annual education and training programs on the nature and location of the substances; and label each container with the substance's chemical name); and Oregon, OR. REV. STAT. § 654.025(2) and § 656.726(3) (1983) (adopting HCS, but applying it to all employers, except those in construction and agriculture).

41. *See, e.g.*, Alaska, ALASKA STAT. §§ 18.60.065-18.60.068 (1983) (employers required to conduct education programs, post safety posters or a list of chemicals and provide access to information on listed substances); California, CAL. LAB. CODE §§ 6360-6399.9 (West 1985) (employers in manufacturing sector required to provide information on chemical substances); Connecticut, CONN. GEN. STAT. ANN. §§ 31-40j-31-40p (West 1985) (employers required to provide employees with lists of hazardous chemicals used or produced by the employer and to conduct an education program); Florida, FLA. STAT. ANN. §§ 442.101-442.127 (West 1985) (employers required to provide employee education and training, to provide notice regarding toxic substances and to keep material safety data sheets on file); Maine, ME. REV. STAT. ANN. tit. 26, §§ 1709-1725 (Supp. 1985) (employers required to provide information to employees about hazardous chemicals used in the workplace and to institute education programs for those employees exposed to the substances); Minnesota, MINN. STAT. §§ 182.65-182.675 (Supp. 1985) (employers must train employees on a yearly basis and provide material safety data sheets and information to any employees who request it); New Hampshire, N.H. REV. STAT. ANN. § 277-A (1983) (training, material safety data sheets and posting of notices regarding toxic substances required); New York, N.Y. LAB. LAW §§ 875-883 (McKinney 1984) (employers required to provide information on the identity and hazardous effects of toxic substances in the workplace, including a requirement to post notices); Rhode Island, R.I. GEN. LAWS §§ 28-21-1 -28-21-21 (Supp. 1985) (employer required to provide a list of hazardous or toxic materials to the employees and to institute employee education and training programs with regard to those substances); Washington, WASH. REV. CODE ANN. §§ 49.17.050-.080 (Supp. 1986) (employers required to post warning labels on hazardous substances, conduct education and training programs and provide material safety data sheets); West Virginia, W. VA. CODE § 21-3-18 (Supp. 1985) (em-

Conversely, there are states which require the labeling of hazardous chemicals in the workplace and/or the provision of material safety data sheets, but do not contain educational or training requirements.[42] Other states not only adopt some or all of the HCS requirements, but also extend its provisions to employers in the nonmanufacturing sector.[43] Additionally, several states have adopted community right-to-know standards, providing communities with access to workplace hazard information.[44] Finally, two states allow for employee access to company records of em-

---

ployers required to disclose information about hazardous or toxic chemicals used in the workplace and to post warning notices where ten or more employees work); and Wisconsin, WIS. STAT. §§ 101.58-.59 (Supp. 1985) (employers required to inform employees of the right to information on hazardous substances in the workplace and to provide education and training programs to those employees routinely exposed to hazardous materials).

42. *See, e.g.*, Delaware, DEL. CODE ANN. tit. 16, §§ 2401-2417 (1984) (chemical manufacturers and distributors are required to provide material safety data sheets to all companies purchasing hazardous materials); and Michigan, MICH. COMP. LAWS ANN. § 408.1011 (West 1985) (employers are required to post material safety data sheets that specify each substance's chemical name and other relevant information where chemical mixtures are used in a hazardous quantity).

43. *See, e.g.*, Illinois, ILL. REV. STAT. ch. 48, §§ 1401-1420 (1985) (adopts the federal OSHA hazard communication standard but extends coverage to all employees); New Jersey, N.J. STAT. ANN. §§ 34:5A-1 - 34:5A-31 (West 1985) (coverage of state right to know provision extended to non-manufacturing employees); New York, N.Y. LAB. LAW §§ 875-883 (McKinney 1984) (right to know legislation extended to all employers except domestic workers or casual laborers); North Carolina, N.C. GEN. STAT. § 95-126 (1981) (OSHA standard adopted and its provisions extended to encompass non-manufacturing sector employees); North Dakota, N.D. CENT. CODE § 19-21 (1981) (employers who produce, routinely store or sell hazardous substances are required to comply); Oregon, OR. REV. STAT. § 654.025(2) and § 656.726(3) (1983) (all employers except those in construction and agriculture industries); Pennsylvania, PA. STAT. ANN. tit. 35, §§ 7301-7320 (Purdon 1985) (right-to-know coverage extended to all employers except domestic or casual laborers); Rhode Island, R.I. GEN. LAWS §§ 28-21-1 -28-21-21 (1985) (all employers that use, transport, store, or otherwise expose their employees to toxic or hazardous substances required to comply); Texas, TEX. STAT. ANN. art. 5182b (Vernon 1986) (coverage extended to the nonmanufacturing sector); and Wisconsin, WIS. STAT. §§ 101.58-101.599 (1985) (employers that use, study or produce hazardous substances are required to comply).

44. *See, e.g.*, Delaware, DEL. CODE ANN. tit. 16, § 2406 (1984) (employers that store hazardous chemicals in excess of 55 gallons or 500 lbs. must provide the local fire department with names and telephone numbers of knowledgeable company officials who may be contacted if further information is required); Iowa, IOWA CODE ANN. §§ 455D.1-455D.19 (West 1985) (provides for the dissemination of information to the community at large); Maryland, MD. ANN. CODE art. 89, §§ 32A-32N (1985) (information regarding hazardous and toxic substances must be provided to the Maryland Department of Health and Mental Hygiene); Massachusetts, MASS. GEN. LAWS ANN. ch. 111F, §§ 1-21 (West 1985) (copies of data sheets should be made available to citizens where the request is not frivolous or intended to harass employer); North Dakota, N.D. CENT. CODE § 19-21 (1981) (information regarding hazardous substances must be provided to local fire departments, offices of state fire marshalls and other governmental emergency response departments); Oregon, OR. REV. STAT. § 654.025(2) and § 656.726(3) (1983) (State Fire Marshall to conduct survey of employers and compile a list of hazardous chemicals to be distributed to local public health organizations and fire jurisdictions); and Pennsylvania, PA. STAT. ANN. tit. 35, §§ 7301-7320 (1985) (safety data sheets must be provided to employees, the community and the state Department of Health).

ployee exposure to toxic and hazardous substances.[45]

As the above summary of state laws indicates, the abundance and diversity of state right-to-know laws creates serious problems for employers attempting to comply with the requirements of multiple states. In addition to this, many states allow employees to refuse to work with hazardous substances until the identity of the substance is obtained—even absent the traditional Section 11(c) *Whirlpool* "reasonable person" standard.[46] In sum, the difficulties created by attempting to comply with the varying requirements of state law calls into question their efficacy in achieving their purpose. "The fundamental reason for legislating a hazard communication program, i.e. worker safety and health, is lost in the shuffle of attempting to comply (in form) with the multitude of hazard communication regulations."[47]

B. *Local Laws*

Further exacerbating the lack of conformity in right-to-know laws is the increasing number of communities enacting local right-to-know ordinances. A 1983 study conducted by the Chemical Manufacturers Association disclosed 34 communities which have already passed right-to-know laws.[48] Moreover, a Federal District Court recently rejected a claim that a county-wide right-to-know law "irreparably harmed business" and authorized the implementation of Michigan's first *local* right-to-know law.[49] The local enactment of right-to-know ordinances exemplifies the rapid expansion of this area, as well as the swelling public interest in it.

C. *Preemption Analysis*

With the number of governmental entities jumping on the right-to-know bandwagon increasing, and the entire hazard communication area becoming regulated by a growing number of differing laws and agencies, one obvious question arises: Can there be uniform regulation of this subject matter? One possible answer to this question lies in the field of pre-

45. *See, e.g.*, Michigan, MICH. COMP. LAWS ANN. § 408.1011 (West 1985) (employees are permitted access to records of employee exposure to toxic substances or harmful physical agents and employee access is required to be monitored by law); and New Mexico, N.M. STAT. ANN. § 50-9-11 (1978) (employers required to maintain accurate records regarding employee exposure to potentially toxic materials or harmful physical agents and to grant employees access to their own records).

46. *See, e.g.*, North Carolina, N.C. GEN. STAT. § 95-126 (1981); Wisconsin, WIS. STAT. ANN. § 101.595 (West Supp. 1985).

47. 48 Fed. Reg. 53,324 (1983).

48. *Reprinted in, Right to Know Laws Enacted in 17 States, 24 Communities*, PESTICIDE & TOXIC CHEMICAL NEWS, Aug. 31, 1983 at 20.

49. *Right-to-know law upheld in Macomb*, MICHIGAN AFL-CIO NEWS, July, 1985 at 7.

emption. Does OSHA's Hazard Communication Standard preempt any State or local law seeking to regulate right-to-know issue?

1. *Operation of the OSHA Standard and the Effect of Hughey and Auchter*

In promulgating the Hazard Communication Standard, OSHA itself recognized the inconsistent compliance requirements resulting from the wealth of state and local right-to-know laws.[50] To alleviate this problem, OSHA explicitly provided for the preemption of state and local regulation of hazard communications between employer and employee.[51] This preemption is intended "to reduce the burden on interstate commerce produced by conflicting state and local regulations and will ensure that all employees in the manufacturing sector are accorded the same degree of protection."[52]

Under this provision any state or local right-to-know law will be preempted by the federal HCS—at least with respect to employees working in the manufacturing sector. Individual states may still regulate issues covered by OSHA standards, but only if the state's plan is approved by OSHA.[53] In order for OSHA to approve a state's plan, its protections must be *at least* as comprehensive as those contained in the federal standards regulating the same issue.[54] Still, OSHA has stated its reluctance to grant approval to individual state plans: "OSHA will examine carefully any state requests to regulate in this area to determine any potentially burdensome impact on interstate commerce as well as to ascertain whether there is a compelling need for a separate regulation."[55]

It must be remembered, however, that individual states are free to exercise jurisdiction over any occupational safety or health issue where OSHA *has not* asserted its own jurisdiction (i.e., where no valid OSHA

---

50. 48 Fed. Reg. 53,324 (1983) (emphasis added):

> Several state and local right to know laws have been prescribed to deal with [the failure of the marketplace to correct] the problem. *The coverage and requirements of these laws, however, are consistent only in their inconsistency.* The consequent cost and ineffectiveness of this decentralized effort has been well documented in the public record . . .

51. 29 C.F.R. § 1910.1200(a)(2) (1985) (emphasis added):

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and *to preempt any state law pertaining to the subject.* Any state which desires to assume responsibility in this area may only do so under the provisions of Section 18 of the Occupational Safety and Health Act (29 U.S.C. § 651 *et seq.* [1982]) which deals with state jurisdiction and state plans.

52. 48 Fed. Reg. 53,334 (1983).

53. 29 U.S.C. § 667(b) (1982).

54. 29 U.S.C. § 667(c).

55. 48 Fed. Reg. 53,334 (1983).

standard is in effect).[56] For example, individual states may legislate rules pertaining to *community* hazard communications, since the HCS does not regulate this area,[57] or establish regulations protecting employees in the non-manufacturing sector. This "separate" jurisdictional authority creates the exact problem sought to be prevented by the HCS: The creation of a morass of different laws governing the same area, hazard communication. As a result, the need for extending the OSHA standard to cover all employers grows more evident.

The problems of preemption and separate jurisdiction have been examined in two recent decisions, both of which have held that the federal HCS preempts comparable state right-to-know laws, but only with respect to their regulation of the chemical manufacturing sector of the workforce.[58]

In *New Jersey State Chamber of Commerce v. Hughey*, the United States District Court for the District of New Jersey reviewed the constitutionality of New Jersey's Right-to-Know Law,[59] which is considered to be one of the most stringent State laws in the nation. The New Jersey law gave employees the right to obtain information about hazardous chemicals found in the workplace and imposed upon employers the duty to compile and periodically update comprehensive written information on all such chemicals, their storage, production, emissions, etc. Employers were also required to label hazardous chemicals and to conduct educational and training programs for the employees' benefit. Employers had two years from the effective date of the legislation to label *all* chemicals in the workplace, whether they were hazardous or not. More importantly, the New Jersey statute extended its coverage to employers in the non-manufacturing sector, as well as those in the manufacturing sector. Finally, employers had the additional duty to file a list of all hazardous chemicals with State and local health departments and with local fire and police departments; in other words, the law contained a community right-to-know provision.

---

56. 29 U.S.C. § 667(a).

57. The Macomb County, Michigan Community Right-to-Know law, referred to in note 55, *supra*, was held *not* to be preempted by the HCS. In Michigan State Chamber of Commerce v. Macomb County Board of Commissioners, et al., No. 85-CV-71844DT, the Michigan Chamber of Commerce attempted to enjoin enforcement of the community provision, but was denied. Relying upon the New Jersey District Court's *Hughey* decision, the District Court for the Eastern District of Michigan ruled that the Macomb County regulation fell within the perogative of State and local government. This decision is currently being appealed to the Sixth Circuit. *Michigan County Regulation Challenged by Industry Group; Preemption Argued*, 15 O.S.H. REP. (BNA) No. 12 at 258, 259 (Aug. 22, 1985).

58. N.J. State Chamber of Commerce v. Hughey, 600 F. Supp. 606 (D.N.J.), *modified*, 774 F.2d 587 (3d Cir. 1985); United Steelworkers v. Auchter, 763 F.2d 728 (3d Cir. 1985).

59. N.J. STAT. ANN. §§ 34:5A-1 - 34:5A-31 (West 1985).

Analyzing the relationship between the New Jersey law and the Federal Hazard Communication Standard, the court noted that the State of New Jersey failed to submit its right-to-know plan to the Secretary of Labor for approval. Absent the federal approval required by the Occupational Safety and Health Act,[60] the court held that the HCS preempted the New Jersey statute, due to the fact that the New Jersey statute covered the same issues as the federal standard.[61] Since the HCS directly and exclusively dealt with employer-manufacturers, an OSHA-regulated area, the New Jersey Right-to-Know Law was *entirely* preempted—but only as it applied to employer-manufacturers.[62] The court upheld the New Jersey law as it applied to *non-manufacturing* employees, an area *not* regulated by the HCS.[63] Rejecting the plaintiff's argument that OSHA's exclusion of non-manufacturing employers in the HCS represented a deliberate choice by OSHA, the court held that "no OSHA communication standard is in effect for nonmanufacturing employers. Consequently, New Jersey is free to act as to those employers."[64] The lower *Hughey* court did not address the issue of whether its community right-to-know provisions were preempted by the HCS.

In *United Steelworkers of America v. Auchter*,[65] various plaintiffs instituted an action challenging those provisions of the HCS which excluded non-manufacturing employees from its information disclosure protections.[66] Although the Third Circuit concluded that the HCS preempted state right-to-know laws as they applied to the manufacturing sector employees, the court *directed* the Secretary of Labor to explain why the Hazard Communication Standard should only be limited to employees

60. 29 U.S.C. 667(a) (1982).

61. N.J. Chamber of Commerce v. Hughey, 600 F. Supp. 606, 619.

62. The Third Circuit Court of Appeals found the District Court's resolution of the preemption issue overbroad. N.J. State Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir. 1985). The Appeals Court affirmed the earlier ruling preempting the New Jersey right-to-know law, but only as it purported to regulate hazard communication *to employees in the manufacturing sector*. 774 F.2d 587, 592. With respect to community disclosure, the court found OSHA without authority to preempt:

> The Secretary has authority to promulgate standards only as to occupational safety and health and *those standards cannot have preemptive effect beyond that field*. Indeed, the Secretary argued in *Steelworkers* [supra at note 58] that the Hazard Communication Standard should not preempt state laws addressing "general environmental problems originating in the workplace, but whose effects are outside it . . ."

774 F.2d 587, 593 (emphasis added).

Thus, the New Jersey Act was held not preempted as it applied to the community right-to-know aspects of the New Jersey Act, even as it would affect manufacturing sector employers; the New Jersey Act in this respect was severable, and continued in effect. 774 F.2d 587, 598.

63. *Id.* at 621.

64. *Id.*

65. 763 F.2d 728 (3rd Cir. 1985).

66. Plaintiffs in the action included the states of Connecticut, Illinois, Massachusetts, New Jersey and New York, the United Steelworkers of America and Public Citizen, Inc.

in the manufacturing sector.[67] The court indicated that if the Secretary failed to adequately justify this position, it would direct extension of the standard to all employers. The court *did not* conclude that the HCS Standard preempted those portions of state laws which extend coverage beyond the manufacturing sector, nor did it address the question of federal preemption of community right-to-know provisions.

Both the *Hughey* and *Auchter* decisions indicate that the HCS is a standard which entirely preempts state laws which relate to chemical manufacturers, but that states are free to expand hazard communication protection to employees working in other sectors of the economy. This expansion will create the same problems that the HCS was originally intended to remedy: numerous state laws whose primary consistency is their inconsistency. However, until OSHA acts in this respect, the state laws will stand.[68]

Perhaps recognizing this potential, and/or acting upon the *Auchter* court's direction, the Department of Labor has decided to open a public comment period for addressing the issue of extending the provisions of the HCS to all employers.[69]

2. *Importance of the Preemption Issue for Trucking Employers*

Considering the recent activity of the courts, various state and local governments and the Department of Labor itself, extension of the HCS to all employers is inevitable—if not desirable. However, if the standard is extended to all employers in its current form, the trucking industry would be required to comply with the same communication standards that now regulate manufacturers in the chemical industry. This would require trucking industry employers to label hazardous chemicals, conduct informational and training programs for their employees and provide employees with access to material safety data sheets.[70]

As discussed previously, the logistics of complying with the HCS make its application to the trucking industry extremely costly if not completely unfeasible. The standard's record keeping and administrative burdens alone exemplify these concerns. OSHA has also indicated that the scope of the training requirement is intended to be quite broad. Beyond

67. 763 F.2d 728, 736.

68. 29 U.S.C. § 667(a) (1982) provides that "[n]othing in this Act shall prevent any state agency or court from asserting jurisdiction under state law over any occupational safety or health issue with respect to which no standard is in effect under section 6 [29 U.S.C. § 655].

69. *See supra* note 35 and accompanying text.

70. The International Brotherhood of Teamsters has publicly supported the extension of the HCS to all employers, arguing that individual state laws extending right-to-know protection to non-manufacturing sector employees should be supported in the absence of federal protections. *Teamsters Union Initiates Second Attempt for NACOSH Support of State Law Protections*, 15 O.S.H. Rep. (BNA) No. 7 at 107 (July 18, 1985).

simply providing employees with written information, OSHA has stated that employers should use additional training methods such as audio-visual programs, classroom instruction, videos, and training workshops with management, which would include an opportunity for questions and answers.[71] When these points are considered with the fact that compliance costs are already expected to exceed original OSHA estimates,[72] the need for some type of modification of the existing standard becomes readily apparent—at least with respect to its application to the trucking industry. Absent any such reforms and given a broad application of the HCS, the difficulties now being experienced are miniscule compared to those to be expected in the future.

These concerns with federal compliance, however, are only the tip of a regulatory iceberg. Trucking industry employers, in the absence of a uniform federal standard, may be forced to comply with a vast number of differing state and local right-to-know provisions. Given the interstate nature of the trucking industry, the burden of complying with a different law in every state—and quite possibly, every community—would be an exercise in logistical gymnastics. As a result, the issue of federal preemption of state and local laws is of critical importance.

Not only is preemption a critical issue with respect to the actual requirements of the HCS, but it is also of vital concern when potential employee remedies are considered. Under the HCS, an employee is limited to the remedies available under Section 11(c) (reinstatement and backpay) and is also subject to the "reasonable apprehension of death or serious bodily harm" requirements of the *Whirlpool* decision.[73] Trucking industry employers would also be subject to other general enforcement provisions of OSHA.[74]

Thus, assuming employees are not afforded the additional remedies of Section 405 of the Surface Transportation Act[75] for exercising rights under the HCS, only the traditional OSHA remedies would be available. However, if the various state right-to-know laws are *not* preempted, additional remedies may be available to employees and employers may be

71. *OSHA Issues Revised Version of Guidelines for Enforcing Hazard Communication Standard*, 14 O.S.H. REP. (BNA) No. 46 at 918 (April 25, 1985).

72. *Compliance with Federal Standard Could Exceed OSHA Estimates, Meeting Told*, 14 O.S.H. REP. (BNA) No. 35 at 701 (Feb. 7, 1985).

73. *See supra* note 22 and accompanying text.

74. *See, e.g.*, 29 U.S.C. § 658(a) (1982), which authorizes the Secretary, or his representative, to issue citations to an employer when a violation of an OSHA standard has occurred, and 29 U.S.C. § 659(b) (1982), which authorizes the imposition of penalties for failure to correct a violation for which a citation has been issued. The various penalties for violations of OSHA requirements and standards are set forth in 29 U.S.C. § 666 (1982).

75. *See supra* Section I(C)(2).

subjected to even more stringent sanctions.[76] Unless there is a uniform federal standard preempting state and local regulation of the right-to-know issue, trucking industry employers will be subjected to a patchwork of varying substantive, procedural and remedial requirements.

III. PREEMPTION OF THE HCS BY OTHER REGULATORY AGENCIES

The right-to-know issue is not resolved by merely examining OSHA preemption of state and local laws. Even assuming OSHA extends the HCS to all employers, therefore preempting any state law seeking to govern the issue, the trucking industry has another hurdle to overcome: Department of Transportation preemption. Under a provision of the Occupational Safety and Health Act, Section 4(b)(1), Department of Labor jurisdiction over a matter may be preempted by other federal agencies.[77]

While such a provision would appear to exclude OSHA from areas subject to regulation by the Department of Transportation, additional factors must be considered. As will be discussed more fully in a later section, the DOT's preemptive authority over state law is not as strong as OSHA's.[78] Thus, DOT assumption of authority over this matter could still subject trucking industry employers to more stringent state laws in right-to-know areas actually regulated by the DOT. However, in areas *not actually* regulated by the Department of Transportation, OSHA standards would apply.[79] As a result, trucking industry employers could be required to comply with a mass of DOT, OSHA, state and local regulations, depending upon the employee involved, the nature of the work performed, the area regulated and the nature of the regulation.

The scope of § 4(b)(1) and the relationship between OSHA regulations and those of other governmental agencies has been defined by the courts. For example, in *Southern Railway Co. v. OSHA*,[80] the Fourth Circuit held that OSHA's regulative authority extended to employees generally covered by the Federal Railway Safety Act, since the Federal Railway Administration had not exercised its authority to regulate the area of employee safety sought to be governed by OSHA. Where such authority

76. *See, e.g.*, Illinois Toxic Substance Disclosure Act, ILL. REV. STAT., ch. 48, § 1417(17)(e) (Smith-Hurd Supp. 1985), providing for punitive damages of up to $20,000 per violation to be imposed on employers who "knowingly and wilfully" violate the Act.

77. "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health." 29 U.S.C. § 653(b)(1) (1982).

78. *See infra* Section V and 49 U.S.C. § 1811 (1982).

79. *See, e.g.*, Consolidated Freightways Corp., 5 O.S.H. CAS. (BNA) 1481, 1482 (1977) (Section 4(b)(1) interpreted to exempt from coverage of the Act only those working conditions that are actually subject to regulation by a sister agency).

80. 539 F.2d 335 (4th Cir.), *cert. denied* 429 U.S. 999 (1976).

remains unused, the court found § 4(b)(1) inapplicable.[81]

The exclusion of OSHA authority under § 4(b)(1) was further examined in *Southern Pacific Transportation Co. v. Usery*.[82] In this case, the Fifth Circuit restricted OSHA's authority to regulate areas not already regulated by another government agency, holding that an agency need not "encompass every detail" of the OSHA provision in order to displace an OSHA standard. Instead, another agency's "comprehensive" treatment of a general problem regulated by an OSHA standard would be sufficient to exclude OSHA from regulation of that condition.[83]

"Industry-wide" exemptions, however, are not granted, nor was § 4(b)(1) intended to establish industry-wide exemptions for industries otherwise regulated by the federal government.[84] Also defining the scope of § 4(b)(1), the Occupational Safety and Health Review Commission in *Mushroom Transp. Co.*[85] stated that, "§ 4(b)(1) does not require that another agency exercise its authority in the same manner or in an equally stringent manner."[86] In *Herman Forwarding Company*,[87] OSHA issued a citation against an employer whose employees charged that they were required to handle leaking bags of hazardous materials. The citation involved violations of various OSHA standards relating to respirators, but the employer argued that the DOT hazardous substance, loading and broken container regulations already governed the matter, thereby exempting it from the OSHA standards. Finding the employer exempt from OSHA regulation under the above circumstances, the Review Commission set forth a three-part test to determine whether the OSHA exemption is operative: the agency (other than the Labor Department) must have statutory authority to regulate the specific working conditions; the other agency must exercise that authority; and the enabling statute under which

---

81. The court articulated the following reason for so limiting the § 4(b)(1) exclusion:
> While § 4(b)(1) may not be entirely self-defining, it is clear that the exemption applies only where another federal agency has actually exercised its authority. It does not apply where such an agency has regulatory authority but has failed to use it. This is clear not only from the statutory language but from the legislative history as well. Earlier versions of the legislation had provided that the mere existence of statutory authority in another federal agency was sufficient to invoke the exemption, but they were rejected by Congress.

539 F.2d 335, 336.

82. 539 F.2d 386 (5th Cir. 1976), *cert. denied* 429 U.S. 999 (1976).

83. 539 F.2d 386, 391.

84. *Id.* at 390. *See also*, Lee Way Motor Freight, Inc., 4 O.S.H. CAS. (BNA) 1968, 1969 (1977) (Section 4(b)(1) does not exempt entire industries from its coverage); O'Boyle Tank Lines, Inc., 9 O.S.H. CAS. (BNA) 2000, 2002 (1981) (all working conditions in an industry are not exempt under Section 4(b)(1) merely because another federal agency has adopted standards or regulations covering some working conditions in the industry).

85. 1 O.S.H. CAS. (BNA) 1390, 1392 (1973).

86. *Id.*

87. 3 O.S.H. CAS. (BNA) 1253 (1975).

the other agency regulates that working condition must purport to assure safe and healthful working conditions for employees.[88]

Thus, before it can be determined whether the HCS would protect the rights of any particular trucking industry employee in any given situation, it must first be determined whether the Department of Transportation has issued regulations governing the hazard communication area. With respect to the application of the HCS to the trucking industry and the exclusion of § 4(b)(1), the DOT has affirmatively exercised its authority to regulate matters relating to the transportation of hazardous materials.[89] However, both the scope and purpose of this regulation create some very serious questions. The Hazardous Materials Transportation Act ("HMTA"),[90] which governs this area, was enacted "to protect the nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce."[91] Its original intent was not that of hazardous communication to employees, but rather, ensuring the safe passage of hazardous materials through commerce. Under the HMTA, the Secretary of Transportation is authorized to issue "regulations for the safe transportation in commerce of hazardous materials."[92]

Clearly, the DOT has exercised its regulative authority as applied to the *transportation* of hazardous materials and the regulations it has promulgated in this regard have numerous "communicative" aspects.[93] However, it is not clear whether those provisions regulate, for example, the presence of hazardous substance on a loading dock, and whether a dock worker would have the "right-to-know."[94] Questions also arise

---

88. *Id.* at 1254.

89. *See, e.g.*, 49 C.F.R. §§ 170-189 (1985), which will be discussed in more detail in Section IV, *infra*.

90. 49 U.S.C. app. § 1801 *et seq.* (1982).

91. *Id.*

92. 49 U.S.C. app. § 1804 (1982). Any such regulations issued by the Secretary are to be applicable to:

> [A]ny person who *transports, or causes to be transported or shipped*, a hazardous material, or who manufacturers, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials.

Id. (emphasis added). § 1804 further provides that

> such regulations *may* govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate, including, but not limited to, the *packing, repacking, handling, labelling, marking, placarding*, and routing of hazardous materials, and the manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold by such person for use in the transportation of certain hazardous materials.

(emphasis added).

93. 49 C.F.R. §§ 170-189 (1985).

94. For example, in Chief Freight Lines, Inc., 3 O.S.H. CAS. (BNA) 2083 (1976), the Review

whether drivers themselves are entitled to additional information about the materials they transport.

Interestingly, OSHA addressed the dual jurisdiction of the DOT and the DOL in the labeling requirement of the present Hazard Communication Standard. Yet, instead of simply not regulating the "labeling" issue because of preexisting DOT regulations, as § 4(b)(1) might suggest, OSHA mandated that all labels must be *consistent* with DOT requirements.[95]

Recognizing the similar results of regulations promulgated for different purposes, OSHA avoids conflict with the existing, and arguably preemptive DOT regulations by impliedly adopting them.[96] A similar approach could be taken with respect to the entire area of hazard communication and its relationship to DOT requirements and employers in the transportation industry.

IV. Existing Department of Transportation Procedures Relating to an Employee's Right-to-Know

Having discussed the relationship between OSHA standards and existing DOT regulations, it is important to examine just what, if any, DOT regulations govern those areas envisioned by the HCS, therefore excluding OSHA from regulating that area. Existing Department of Transportation regulations, enacted pursuant to the Hazardous Materials Transportation Act, regulate the packaging, labeling, documenting and vehicle placarding of hazardous materials transported in commerce.[97] These regulations parallel the requirements of the HCS in many ways.

Commission refused to apply the Section 4(b)(1) exemption to employees working on the dock of a trucking facility, concluding that the DOT had not acted to regulate the working conditions of freight handlers.

95. 29 C.F.R. § 1910.1200(f)(2) (1985):

> Chemical manufacturers, importers, or distributors shall insure that each container of hazardous chemicals leaving the workplace is labelled, tagged, or marked in accordance with this section *in a manner which does not conflict with the requirements of the Hazardous Materials Transportation Act* (18 U.S.C. 180 *et seq.*) *and regulations issued under that act by the Department of Transportation.*

(Emphasis added). The legislative history of the HCS further illustrates OSHA's recognition of existing DOT regulations:

> No explicit exclusion [in the HCS] is provided for substances regulated by the [DOT] under the [HMTA]. *This standard is directed towards hazard communication within the workplaces of covered employers . . . whereas the [DOT] regulations are directed toward the packaging and labeling of hazardous materials while they are being transported in commerce.* Therefore, although both sets of requirements apply to many, if not all, of the same substances, there *should be no unnecessary duplication of regulatory effort.*

48 Fed. Reg. 53,290 (1983) (emphasis added).

96. OSHA has indicated, however, that DOT labeling requirements will not suffice for purposes of hazard communication. *See supra* note 10 and accompanying text.

97. 49 C.F.R. § 171 *et seq.* (1984).

A. LABELING

Both the DOT regulations and the HCS provide for labeling. Under the HCS, chemical manufacturers, importers or distributors must label containers of hazardous materials with information concerning the identity of the hazardous chemicals, appropriate hazard warnings, and the name and address of the chemical manufacturer, importer or other responsible party.[98] The HCS further provides that the labels or warnings used must not conflict with any DOT labeling requirements.[99]

DOT labeling regulations, on the other hand, are much more extensive, requiring not only the above information, but also requiring, among other things, hazard identification numbers, placards, color codes, special placement and a requirement that they be affixed to a background of contrasting color.[100]

B. SUBSTANCE INFORMATION

Although there is no precise counterpart in the DOT regulations for the HCS requirement of Material Safety Data Sheets, existing provisions regarding labeling and shipping papers, and the availability of Emergency Response Guidebooks (ERG) and the Chemical Transportation Emergency Center (CHEMTREC), provide employees with information pertaining to the hazardous substances present in their work environment.

Under the HCS, employees are provided with information on substances present in the workplace, including the identity of the chemicals, physical and chemical characteristics of the hazardous chemicals, physical hazards associated with the substance, and health hazards of the chemical.[101]

In contrast, under the requirements of the HMTA, "each person who offers a hazardous material for transportation shall describe the hazardous material on the shipping papers in the manner required by this subpart."[102] The description required by this section is composed of the proper shipping name of the material, the hazard class, *i.e.*, key words identifying hazards, the quantity of the hazardous materials shipped, and, the name of the shipper.[103] However, the above DOT regulations provide information primarily relating to the *physical* hazards of the materials

98. 29 C.F.R. § 1910.1200(f)(1) (1985).

99. 29 C.F.R. § 1910.1200(f)(2).

100. These requirements are all set forth in 49 C.F.R. § 172 (1984), the regulations for hazardous materials communication.

101. 29 C.F.R. §§ 1910.1200(g)(1), (2) (1985). For a more detailed discussion of information required on material safety data sheets, *see* Section I(B)(4), *supra*.

102. 49 C.F.R. § 172.200 (1984).

103. *Id.*

(e.g., flammable or corrosive properties), as opposed to the *health* hazards required to be described under the HCS.

Additional information regarding hazardous substances in the workplace is available through the use of CHEMTREC and the Emergency Response Guidebook. CHEMTREC, a public service of the Manufacturing Chemist Association, provides particularized 24-hour, toll-free information on hazardous substances in the event of a major accident or spill. CHEMTREC will also "network" information, contacting the shipper of the substance for detailed assistance and follow-up procedures.

In addition to the immediate information available through CHEMTREC, hazard information is also available in the Emergency Response Guidebook (ERG). The ERG is a DOT publication[104] which provides information critical to the identification of the hazards of various substances and the proper administration of first aid. The ERG uses the DOT's numerical hazard identification system and references it into easily understandable information pertaining to: "health hazards," "fire and explosions," "spill or leaks," and "first aid." The use of the ERG, however, is not mandated by a specific DOT regulation.

C. TRAINING

Comparable to the distinction between the DOT regulations and the HCS with regard to employee information are the differences pertaining to employee training. The HCS requires employers to "provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard is introduced into their work area."[105] Under the information provision of the HCS, employees must be apprised of the requirements of the standard, any operations in the workplace where hazardous chemicals are present, and the location and availability of written hazard communication materials.[106] The training provision of the standard calls for instruction regarding the methods available for the detection of hazardous materials in the workplace, the physical and health hazards of the chemicals in the work area, and the measures employees can take to protect themselves from the hazards.[107]

Under existing DOT regulations, before a driver can be certified, he or she must pass a written examination which requires knowledge of the information contained in the hazardous materials regulations[108] when the

104. 5800.2.
105. 29 C.F.R. § 1910.1200(h) (1985).
106. 29 C.F.R. § 1910.1200(h)(1).
107. 49 C.F.R. § 1910.1200(h)(2).
108. 49 C.F.R. §§ 171-79 (1984).

driver will be transporting hazardous materials.[109] DOT regulations also require instruction for any drivers transporting a flammable cryogenic liquid.[110]

In addition, drivers of trucks transporting radioactive materials are required to receive, every two years, training with regard to general procedures for radioactive material, the properties and hazards of the radioactive materials being transported, and accident procedures.

The above materials provide only a summary of existing DOT regulations and a comparison of their provisions with those of the HCS. Given the clear intent not to grant industry-wide exemptions under § 4(b)(1), it is unlikely that it can be argued that the DOT has already successfully regulated this issue, especially in view of the purpose of the DOT regulations and portions of the regulations themselves. Considering the exhaustive requirements of the HCS, in many areas the DOT regulations would likely be deemed insufficient, if not nonexistent. The result is a patchwork of DOT and OSHA regulations governing the right-to-know.

V. Department of Transportation Preemption of State Laws

Assuming OSHA would grant the trucking industry an exemption to the requirements of the HCS, due to the presence of similar DOT regulations, another problem would still be present: Preemption of state laws seeking to regulate the right-to-know area. As discussed previously, OSHA's preemptive powers are quite strong. In fact, as the court in *Auchter* stated, with respect to state right-to-know laws in the manufacturing sector, they are preempted *in their entirety* by the HCS.[111] A question remains as to whether the DOT's preemptive powers are this strong. In other words, if the DOT assumes regulation of the right-to-know issue, will trucking industry employers still be faced with a plethora of state and local regulations? The current status of the law would indicate that this is a distinct possibility.

Section 1811 of the Hazardous Materials Transportation Act sets forth the preemptive powers of the Department of Transportation with respect to hazardous substance regulation: "Except as provided in subsection (b) of this section, *any requirement, of a state or political subdivision thereof*, which is *inconsistent* with any requirements set forth

109. 49 C.F.R. § 391.35(e) (1985).

110. Such instruction must include information regarding:
1. The properties and potential hazards of the particular material to be transported;
2. The safe operation of the vehicle;
3. Procedures to be followed in case of accident or other emergency; and
4. The requirements contained in the Federal Motor Carrier Safety Regulations, 49 C.F.R. §§ 390-397 (1984).

49 C.F.R. § 177.816 (1984).

111. *See supra* notes 65-67 and accompanying text.

in this title, or in a regulation issued under this title, is preempted."[112] In other words, unlike OSHA, in which the mere presence of an OSHA regulation will preempt all other regulations on that matter, in order for a DOT regulation to preempt a state requirement, there must be a finding that the state regulation is "*inconsistent*" with the federal standard. Are *more stringent* state laws "inconsistent" with a federal standard governing the same issue?

This question is resolved, in part, by the provisions of the statute itself. Section 1811(b) of the Hazardous Materials Transportation Act provides that such a state regulation, if it affords an equal or greater level of protection compared to the federal counterpart and "does not unreasonably burden commerce," is not preempted.[113]

Section 1811(b) therefore establishes a balancing test in which a state regulation deemed to be *inconsistent* may nevertheless be exempted from preemption.[114] As a result, all consistent and exempted inconsistent state laws will remain in effect. In addition, while the *exemption* determination under subsection (b) is expressly delegated to the DOT, it has been held that questions of *inconsistency* under subsection (a) may be resolved by the courts, as well as by the DOT.[115]

In order to more fully understand the scope of the DOT's preemptive powers, it is necessary to review prior case law examining those powers. Upholding a preliminary injunction enjoining the State of Rhode Island from enforcing certain rules pertaining to the transportation of liquid energy gases, the First Circuit Court of Appeals in *National Tank Truck Carriers v. Burke*[116] found that "the word 'inconsistent' in the Act's preemption clause implies that the state laws which merely vary from federal law—as opposed to those which conflict with federal law—are not preempted."[117] However, the court further stated that the legislative history of the Hazardous Materials Transportation Act also suggests that the primary congressional purpose was to secure a general pattern of uniform national regulations and "to preclude a multiplicity of state and local regulations

112. 49 U.S.C. app. § 1811(a) (1982) (emphasis added).

113. 49 U.S.C. app. § 1811(b) (1982) (emphasis added):

> Any requirement, of a state or political subdivision thereof, which is not inconsistent with any requirement set forth in this title, . . . is *not preempted if*, . . . the Secretary determines . . . that *such requirement (1) affords an equal or greater level of protection to the public* than is afforded by the requirement of this title, *and (2) does not unreasonably burden commerce.*

114. National Tank Truck Carriers v. Burke, 608 F.2d 819 (1st Cir. 1979). According to the legislative history of the HMTA, § 1811(b) was enacted to allow state laws to govern in "certain exceptional circumstances" necessitating immediate action. S. REP. NO. 1192, 93rd Cong., 2d Sess. 37, 38 (1974).

115. National Tank Truck Carriers, 608 F.2d 819, 822.

116. 608 F.2d 819 (1st Cir. 1979).

117. *Id.* at 823, 824.

and potential for varying as well as conflicting regulations in the area of hazard materials transportation."[118] The court further recognized that the preempted State standards' *additional* requirements might indeed *conflict* with federal regulations, if the federal regulations were to be construed as embodying a balancing of competing interests.[119]

Later, in *National Tank Truck Carriers v. City of New York*,[120] the Second Circuit *upheld* a New York City regulation prohibiting the transportation of hazardous gases by tank truck within the City of New York. The ruling turned upon the court's determination that the State regulations were entirely "consistent" with and in furtherance of the federal regulations and the underlying purpose of the federal provisions: "to protect against the risks to life and property from the transportation of hazardous materials."[121] Rejecting the argument that the local regulation should be preempted under § 1811(a), the court found that the State regulation was not inconsistent with the federal requirement with the meaning of § 1811(a), since compliance with the State regulation did not render concurrent compliance with the federal regulation an impossibility.[122] The court further held that the local regulations did not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[123]

The scope of DOT authority was further examined in *City of New York v. U.S. Dept. of Transp.*[124] Reviewing the validity of a routing regulation promulgated under the HMTA and challenged by the City of New York, the Second Circuit Court of Appeals was required to analyze the purpose and intent underlying § 1811. Regarding DOT preemption of inconsistent state laws, the Court stated that "Congress included [§ 1811(a)] 'to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation.' "[125] The Court further said that:

> To amelioriate the sweep of Section 1129a), Congress wrote into HMTA a procedure whereby local jurisdictions could apply for non-preemption rulings for their own regulations . . . This non-preemption procedure [of § 1811(b)] was added to the HMTA so that in "certain exceptional circumstances" DOT could limit the preemptive force of federal regulations "*to se-*

118. *Id.* at 824 (citing Senate Committee on Commerce, Report No. 93-1192, September 30, 1974).

119. *Id.*

120. 677 F.2d 270 (2nd Cir. 1982).

121. *Id.* at 274, 275.

122. *Id.* at 275.

123. *Id.*

124. 715 F.2d 732 (2nd Cir. 1983).

125. 715 F.2d at 740 (citing S. REP. NO. 1192, 93rd Cong., 2nd Sess. 37 (1974)). (Citations omitted).

cure more stringent regulations" by local authorities.[126]

In concluding its disposition of the case, the court stated, "[i]n framing HMTA, Congress decided that federal regulations would presumptively preempt inconsistent local regulations and that the local authorities would then have the burden of demonstrating to DOT that their local regulations provided greater safety without burdening interstate commerce."[127]

Thus, while it would appear that the DOT favors uniformity, it is by no means averse to allowing the passage of more strict state and local laws[128]—especially if they do not impose a great burden on commerce.

Tangentially related to the issue of the federal preemption of state laws under § 1811 of the HMTA, and similarly indicative of the court's recognition of Congressional intent to establish uniformity in the regulation of the transportation of hazardous materials, is the court's invocation of the doctrine of primary jurisdiction when an action is brought under the Hazardous Materials Transportation Act. For example, in *Kappelmann v. Delta Air Lines, Inc.*[129] the court refused to issue injunctive relief under the Hazardous Materials Transportation Act, finding that the issue was more properly one to be decided by the Secretary of Transportation—given congressional intent to consolidate authority into one agency in order to promote uniformity of regulation.[130]

All of the above cases lead to two conclusions. First, it is clear that the DOT regulations and its preemptive powers are intended to ensure a uniform body of regulations in the transportation industry. However, it appears equally as clear that the federal regulations are only to be a minimum—if a state can prove that its more stringent regulations do not impede interstate commerce. As a result, placing right-to-know regulation into the hands of the Department of Transportation exposes the trucking industry to one great risk—that the numerous states now passing more stringent laws will be granted non-preemption under § 1811(b), thereby returning trucking employers to their original dilemma—having to deal with the vast body of state and local right-to-know legislation. The only possible solution to this problem would be for the DOT to promulgate

126. *Id.*

127. *Id.* at 752.

128. *See, e.g.*, 49 C.F.R. § 390.30 (1985), which provides that the provisions of the Federal Motor Carrier Safety Regulations are not intended to preclude states or subdivisions thereof from establishing or enforcing state or local laws relating to safety, the compliance with which would not prevent full compliance with the DOT regulations.

129. 539 F.2d 165 (D.C. Cir. 1976).

130. *Id.* at 170. *See also*, Consolidated Rail Corp. v. City of Dover, 450 F. Supp. 966 (D. Del. 1978), in which the court refused to enjoin the "marshalling, storing and switching of [railroad] cars containing hazardous freight and toxic chemicals," in a state court nuisance action. The court found that the regulation of the transportation of hazardous materials was properly within the authority of the Secretary of Transportation.

a separate "inconsistency" regulation, declaring all state right-to-know laws inconsistent.[131]

VI. The Right-to-Know: A Proposed Uniform Federal Standard

Prior to August 20, 1985, the extension of the Hazard Communication Standard to *all* employers was speculative, albeit inevitable. Now, however, extension is certain.[132] The Assistant Secretary of Labor, recognizing there may be "problem areas" in expanding the standard to all employers, has asked for recommendations on how to best accomplish this task.[133] This section, with all of the considerations previously discussed in mind, is intended to present a proposed position with regard to the hazard communication issue.

The goals of hazard communication would be most effectively achieved if OSHA regulates the right-to-know issue, but only if the present HCS is modified to recognize certain existing practices, especially given the difficulties of complying with the HCS in its present state. The purpose of the HCS, hazard communication, is quite different from the purpose of the DOT regulations, assuring the safe transportation of hazardous materials in commerce, although both regulations use similar means to achieve different goals. This fact, already recognized by OSHA, would allow OSHA to evade the preemptive provisions of § 4(b)(1), much like it did when it dealt with labeling requirements.

However, just as it recognized that existing DOT *labeling* requirements are sufficient to satisfy the communicative *purpose* of the HCS, OSHA should recognize that many other existing procedures under the DOT regulations are sufficient to satisfy the provisions of the HCS. For example, certain training requirements already exist under the DOT regulations; they may only need slight modification to ensure that the purposes of the HCS are satisfied. In a similar fashion, the DOT's Emergency Response Guidebook not only provides employees with information paralleling that required to be found in an MSDS, but it would also resolve the logistical problem of having to maintain vast file banks of data sheets and continually having to update hazardous substance lists. As a result, the purpose of the HCS could easily be satisfied by many procedures originally established to ensure safety in another area.

If OSHA takes full responsibility for regulating hazard communication in the trucking industry, the industry will be relieved of one potentially

131. *See, e.g.*, 49 C.F.R. § 177 (1984), Appendix A, wherein the DOT declares particular aspects of state routing requirements "inconsistent" with its regulation.

132. *OSHA Plans to Extend to all Employers Manufacturing Sector Hazard Communication Rule*, Daily Lab. Rep. (BNA) No. 161, p. A-7 (Aug. 20, 1985).

133. *Id.*

costly problem: attempting to comply with scores of differing, more stringent state and local right-to-know laws will be preempted in their entirety—something that DOT regulation could not guarantee. It must also be recognized that simply arguing that DOT preempts OSHA in this matter may not extricate the trucking industry from OSHA jurisdiction. The HCS may still apply to employees *not* subject to DOT regulations (e.g., dockworkers) and to areas *not* regulated by existing DOT rules (e.g. material safety data sheets). This could result in trucking industry employers still having to deal with the logistical and costly problems related to material safety data sheets and other existing HCS requirements.

When considering this position, it is important to recognize the "downside" of OSHA regulation. First, it is clear that all employers will have to adopt the use of the ERG and possibly implement additional, minor training requirements. Furthermore, employees exercising hazard communication rights would be afforded Section 11(c) remedies—but they still would be held to the existing "reasonable person" standards for refusing to perform work (unlike current laws in some states which allow an employee to refuse to handle hazardous substances until hazard information is obtained). Similarly, employers would be required to be in compliance with these standards in the event of an OSHA inspection, but this, again, is nothing new or exceedingly burdensome, especially if OSHA can be convinced to adopt many existing DOT procedures. Overall, the fallout to be expected from the passage of a trucking industry standard would not be that great—particularly if the industry will be relieved of the ominous state law problem.

Another facially attractive alternative would be to argue for the exemption of the trucking industry from the OSHA standard. Such an argument, however, would realistically have to coincide with an expansion of DOT regulation in this area. One such area would be the codification of the ERG requirement in the existing regulations. It may also require expansion of DOT regulation to *all* employees working in the transportation industry. In addition, while such DOT regulation may allow employers to escape the 11(c) remedial provisions of the Occupational Safety and Health Act, it could inevitably lead to the actual expansion or more liberal interpretation of the scope of Section 405 of the Surface Transportation Act—the DOT's remedial arm. The ramifications of such an expansion are severe: potential remedies and procedures available under Section 405 are *much* more broad and are much more burdensome than those available under Section 11(c).

DOT preemption of state law is also not as clear cut as that of OSHA. If the DOT exercised jurisdiction in this area, there is no guarantee that more stringent state laws would not remain in full force and effect. Similarly, absent a DOT regulation defining an "inconsistent" state rule, 50 or

more potential "consistency" rulings may result. The effect of not only the prospect of *consistent* state and local laws, but also inconsistent, *exempted* state and local laws must be considered. Even if many State laws might otherwise be deemed "inconsistent," if their standards were equal to or greater than those of the HCS, and no undue burden was placed upon commerce, an exemption would be granted. Under the HCS, states would have to submit their individual plans to OSHA for approval, and OSHA has already expressed its reluctance to grant approval to more stringent, differing state laws. Thus, the DOT exercise of authority in this area would leave the entire preemption issue unresolved.

Considering these factors, it appears that a well-drafted OSHA regulation applying the Hazard Communication Standard to the trucking industry is the most desirable option to solve the many thorny problems addressed in this article. Such an approach best accomplishes the desirable goals of HCS without excessively burdening trucking employers.