Technical Note #1: Coverage Under the OSH Act

Covered Employers and Employees

Definitions of "employer" and "employee". OSH Act § 3(5) defines "employer" as a "person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State." Section 3(4) defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." Based on these two broad definitions, the Act applies to an estimated 5 million workplaces and 75 million employees. Unlike the National Labor Relations Act and Title VII of the Civil Rights Act of 1964, OSHA coverage is not based on volume of business or number of employees. The duties imposed by § 5(a) of the Act apply to "each employer."

To be covered by the Act, an employer must have employees.[3] All employees are covered under the Act, regardless of their title, status, or classification. Thus, the Act applies to maintenance workers, supervisors, plant managers, "silent partners," stockholders, an employer's family members, and even the company's vice-president and president. The affected individual must be an employee at the time of the alleged violation and it is not necessary that he or she be an employee at the time of the citation or hearing.

OSHA's regulations on "special" employers. The Secretary of Labor has issued interpretive regulations that indicate whether certain types of employers will be considered by the Secretary to be within the Act's coverage. Two of these categories are especially relevant to reproductive hazards in the workplace. Agricultural employers employing one or more employees are considered to be covered by the Act, although members of the immediate family of a farm employer are not considered employees.[6] Domestic household employers who employ in their own residences persons performing household tasks such as cleaning, cooking, and caring for children are not considered to be subject to the requirements of the Act.[7]

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1. Occupational Injuries and Illnesses in the United States, by Industry, U.S. Department of Labor, Bureau of Labor Statistics, vii (1975).
2. U.S. Congress, Office of Technology Assessment, Preventing Illness and Injury in the Workplace (1985) (citing 1979 OSHA estimate).
3. Poughkeepsie Yacht Club, 7 O.S.H. Cas. (BNA) 1725 (1979); 29 C.F.R. § 1975.4(a) (1984).
4. See M. Rothstein, Occupational Safety and Health Law 13 (2d ed. 1983).
5. 29 C.F.R. pt. 1975 (1984).
6. Id. at 1975.4(b)(2). See C.R. Burnett & Sons, 9 O.S.H. Cas. (BNA) 1009 (1980) (residences of migrant workers in temporary camps are subject to regulation under the Act). But see Frank Diehl Farms v. Secretary of Labor, 696 F.2d 1325 (llth Cir. 1983) (the Act only covers housing that is a condition of employment).
7. 29 C.F.R. pt. 1975.6 (1984).

Interstate commerce requirement. Congress' power to pass the OSH Act was based on its authority to act under the commerce clause to the Constitution, and the OSH Act is based on the congressional finding that workplace injuries and illnesses place a burden upon interstate commerce. The Act was therefore written to apply only to employers who are "engaged in a business affecting commerce." The Act defines commerce as "trade, traffic, commerce, transportation, or communication among the several states, or between a state and any place outside thereof ...."

Generally, the courts interpret the Act's definition of interstate commerce very broadly. On one occasion, the Occupational Safety and Health Review Commission held that an employer who was merely clearing land in preparation for grape production was not presently engaged in a business affecting commerce.[8] The Ninth Circuit reversed, finding it "insignificant" that, at the time of the hearing, grapes had bee neither planted nor harvested: "The effeet on interstate commerce nevertheless exists."[9] In another case, it was held that an employer is engaged in a business affecting commerce if it does business with other employers that are engaged in interstate commerce. In that case, the Second Circuit held that a building maintenance service company was engaged in a business affecting commerce because it supplied services to a group of companies engaged in interstate commerce and because it used supplies produced out of state.[10] Similarly, the Tenth Circuit held that it is irrelevant whether the employer itself was engaged in commerce so long as its relationship to commerce was more than minimal.[11] Commerce was based on the use of out-of-state supplies.

Exemption for State and Local Governments. Section 3(5) expressly excludes state and local governments from the definition of employer, but this provision has been narrowly interpreted. Consequently, employers with a contractual or other relationship with a State or political subdivision have been unsuccessful in their attempts to be excluded.

Even though State employees are excluded by virtue of § 3(5), if a State has an approved State plan under § 18, the State plan must cover all employees of public agencies of the State and its political subdivisions.

State Plans

According to § 2(b)(11), one of the express purposes of the Act is to encourage State participation safety and health regulation. Section 18 permits States to assert jurisdiction over job safety and health matters by submitting a plan for OSHA approval. The States, however, are not required to submit a State plan.

Federal OSHA sets the minimum acceptable safety standards in order to ensure that covered employees will be adequately protected and to maintain some semblance of uniformity among the States. Nevertheless, the Federal standards merely serve as starting points for State programs; the Act does not require that State plans be identical to Federal OSHA. There is no requirement that approved State plans contain a general duty clause, though several State plans have provisions similar to a general duty clause.

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8. The Commission's decision is reported at Les Mares Enterp., Inc., 3 O.S.H. Cas. (BNA) 1015 (1975).
9. Godwinv. OSHRC, 540 F.2d 1013, 1016 (9th Cir. 1976).
10. Brennanv. OSHRC, 492 F.2d 1027 (2d Cir. 1974).
11. United Statesv. Dye Constr. Co., 510 F.2d 78 (l 0th Cir. 1975).

The standards prescribed for covered employers may be more stringent under a State plan. In addition, States may issue standards in areas not covered by Federal OSHA. Under § 4(b)(l), the Act does not apply to working conditions regulated by other Federal agencies which are exercising statutory authorityto prescribe or enforce standards or regulations affecting occupational safety and health." Where Federal OSHA is preempted by another agency under § 4(b)(l) the States may, but are not required to, maintain a similar exemption. (See chapter 7 and Technical Note #2.)

The Act preempted, at least temporarily, all State job safety and health legislation except for those in areas not covered by Federal OSHA standards. In accordance with the constitutional doctrine of Federal supremacy, the States are precluded from enacting or enforcing any conflicting law. Under § 18(b), if the Secretary determines that a State has promulgated standards comparable to OSHA's and has an enforcement plan meeting the criteria of § 18(c), jurisdiction may be ceded back to the State.

The Act leaves the choice of submitting a plan to the individual State. If a State does not submit a State plan, it is precluded from" enforcing Stat laws, regulations, or standards relating to issues covered by Federal OSHA standards.[12] This preclusion, however, does not extend to a State's enforcement of a law or standard directed to an issue upon which there is no OSHA standard in effect. An "issue" is defined as "an industrial or hazard grouping contained in any of the subparts to the general industry standards." Boilers and elevators are two issues over which OSHA has not promulgated standards and, therefore, over which State enforcement is not preempted.

States without approved plans also retain jurisdiction in three other areas. First, States may enforce standards, such as State and local fire regulations, which are designed to protect a wider class of persons than employees. Second, States may conduct consultation, training, and safety information activities. Third, States may enforce standards to protect State and local government employees. Connecticut and New York have State plans covering only State and local government employees.

The effect of a State plan is to transfer jurisdiction from Federal OSHA to the State. This transfer process, however, takes place gradually. While a State plan is in the "developmental" stage, State and Federal OSHA have concurrent jurisdiction. If a State plan does not cover an "issue," Federal OSHA will not be preempted as to that issue. The Federal Government also+ retains jurisdiction over areas of exclusive Federal jurisdiction, such as many Indian reservations, even if they are located in a State with an approved State plan.

There are presently 23 jurisdictions with approved State plans for private and public sector employees and two State plans covering only State and local government employees.

When Federal OSHA promulgates a new standard or modifies an existing standard the jurisdictions with their own plans are required to adopt a comparable standard. For emergency temporary standards, the States have thirty days to adopt a State emergency temporary standard;[13] for permanent standards, the State have six months to adopt the Federal standard or "an at-least-as-effective equivalent."[14]

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12. See generally OSHA Instruction STP 2-1.10A (1981) (effects of preemption under § 18).
13. 29 C.F.R. § 1953.22(a)(l) (1984).
14. Id. at § 1953.22(a)(l) (1984).