

Legal Aspects of the Environmental, Health & Safety Profession

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Introduction

While best management practices and best in class programs may be a goal of many EHS professionals, at the heart of the profession are the requirements and obligations established by law. It is this myriad of legal requirements that EHS professionals must be able to identify in order to achieve the minimum goal of compliance. While it is not expected that anyone can be an expert in all, or even many, areas of the law, a good EHS professional has enough knowledge to identify potential legal requirements which allows for further review and analysis. This paper provides a quick review of the major areas of regulations along with some of their components and triggers. EHS professionals are cautioned to seek local counsel when their analysis identifies complicated legal issues or structures or for areas where the professional does not feel competent to make decisions.

The Law

In the United States each branch of the government (i.e., executive, legislative, and judicial) has a role in establishing the “law”. The powers of the legislative branch are established through the state or federal constitutions. The legislative branch develops and establishes Acts and Statutes. Acts can directly place requirements on the citizenry, such as the Occupational Safety and Health Act’s requirement that “[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees”.² Acts can also establish duties on the executive branch such as the OSH Act’s requirement that “the Secretary shall . . . by rule promulgate as an occupational safety or health standard any national consensus standard . . . unless he determines that the promulgation of such a standard would not result in improved safety or health. . . .”³

¹ Nothing herein should be construed to constitute legal counsel or to impart any rights upon any party. You are urged to seek competent local counsel when seeking to determine your duties and responsibilities under any statute, regulation, or any other agency or governmental action.

² 29 U.S.C. 654(a)(1).

³ 29 U.S.C. 655(b)(1).

The executive branch is provided powers through these Acts and must work within the constraints established by the legislative branch's delegation of power. Executive agencies do not have the freedom to go outside the areas where they have been delegated authority to address other issues. Where required by the act, or as necessary to implement the requirements of the act, these executive agencies develop and implement rules and regulations.

When legislative acts or executive regulations are challenged, it is the judicial branch which rules on the legality of the actions taken. Legislatures must act within the confines of their constitutional powers and similarly the executive agencies must act within the powers delegated them by the legislature; where this is exceeded the judicial branch can invalidate actions of either the legislative or executive branches. Similarly, when the meaning or functioning of the law is challenged, it is the judicial branch which establishes either meaning or parameters of the law.

It is the combination of the legislative acts with the executive regulations that we generally consider the "law". For example, to remain in compliance with the law a company needs to not only be in compliance with the regulations enacted by OSHA but also the OSH Act itself.

For the EHS professional the list of potential laws that may be impacted is extensive, including environmental, medical, and workers compensation. The remainder of this section provides a quick overview of some of major bodies of law that may be incurred upon by the EHS professional.

Occupational Health & Safety

The OSH Act was established "to assure so far as possible every working man and women in the Nation safe and healthful working conditions and to preserve our human resources." As discussed above employers are required to provide employees a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm."⁴ Employer is broadly defined so as to encompass almost all private employers. The OSH Act does not apply to the government as an employer (with the exception of the United States Postal Service); however, the federal government to maintain a comprehensive program consistent with the promulgated rules.⁵ Many state governments have in turn passed acts either extending the protections provided by OSHA to government employees within the state or by establishing a State-OSHA to implement standards for the protection of government workers.

The OSH Act provided for the initial adoption of consensus or federal agency standards, the development of permanent standards, and the issuance of emergency temporary standards.⁶ As most EHS professionals should be aware, OSHA has had a tough time issuing new standards due to the requirements established by the OSH Act and legal challenges to their rule-making methods. Despite that, OSHA has established rules for an extensive amount of physical and chemical hazards that exist in the workplace. In addition to general industry rules⁷ OSHA has

⁴ 29 U.S.C. 651(b).

⁵ 29 U.S.C. 653(b).

⁶ 29 U.S.C. 655(b).

⁷ *See generally* 29 C.F.R. §1910.

also established specific rules for agricultural operations,⁸ construction,⁹ and the maritime industry.¹⁰

Environmental

Unlike the singular nature of the OSHA regulations, there are a large number of environmental regulations, many with a potential to impact an EHS professional's activities. Similar to OSHA, the Environmental Protection Agency and the current environmental regulatory structure began in 1970. However, numerous environmental acts and regulations existed pre-1970; but it is generally recognized that these were largely ineffective at reducing environmental impacts. Throughout the 1970's and 1980's numerous updates to environmental statutes were passed, creating the federal command and control structure that exists now.

One major difference between environmental regulations and occupational and safety regulations is the potential for states to take over and supplement the federal environmental regulations. Professionals are cautioned that environmental regulations can vary from state to state. Where the federal regulations allow states to take over the federal program, the state regulations must at least meet the federal regulations but they can also add additional regulations or create regulations that exceed the federal regulations.

National Environmental Policy Act ("NEPA")¹¹

The passage of NEPA signaled a significant change in environmental policy and philosophy. Not only did it establish national environmental policies and goals but also required that federal agencies consider and implement those goals and policies. This requirement forced federal agencies to identify and consider environmental considerations in their decision-making process. The judicial branch has interpreted NEPA to mean that environmental protection is part of every federal agency's mandate.

While NEPA only applied to federal agencies many states subsequently implemented similar state regulations. Where applicable these typically require a form of assessment of environmental impact for an action proposed by a governmental entity. Note that these can often also apply to actions taken with governmental funding or grants.

Clean Air Act ("CAA")¹²

The CAA is the largest of the environmental statute and regulatory schemes.¹³ This is a specialized area of EHS practice and professionals in this area often specialize and practice in this area only. The CAA includes the establishment of the National Ambient Air Quality Standards ("NAAQS") which are aimed at criteria pollutants (non-toxic) that endanger public health and welfare. The NAAQS are used to establish regional goals and industrial activity allowances but are also useful for EHS professionals working in the area of public health and welfare.

⁸ See generally 29 C.F.R. §1928.

⁹ See generally 29 C.F.R. §1926.

¹⁰ See generally 29 C.F.R. §§ 1915-1918.

¹¹ 42 U.S.C. §§ 4321-4370.

¹² See 42 U.S.C. §§ 7401-7671 and 40 C.F.R. §§ 50-99.

¹³ The statute is more than ten times longer than the OSH Act and the regulations are approximately 5-7 times longer than the complete set of OSHA regulations.

The CAA also establishes a list of hazardous air pollutants and sets National Emissions Standards for Hazardous Air Pollutants (“NESHAPS”) for them. Control measures are mandated by establishing required technology to be implemented based upon industry and pollutant(s).

The CAA also establishes standards and requirements for mobile equipment, vehicles, and vehicle fleets. EHS professionals should be aware of state or local implementation of CAA requirements which may include permitting, registration, and usage/implementation of technology based requirements.

*Clean Water Act (“CWA”)*¹⁴

The CWA established limits for the discharge from industrial sources and publicly owned treatment works (“POTW”) into the navigable waters of the United States. It also established the National Pollutant Discharge Elimination System (“NPDES”) permit program which stemmed from the CWA requirement prohibiting any discharge or addition of a pollutant from a point source into the navigable waters of the United States except as in compliance with the permitting requirements, effluent limitations, and other provisions of the CWA. The EPA, states, and various courts have broadly interpreted and applied these requirements. The permits establish enforceable effluent limitations along with monitoring and reporting, operation and maintenance, recordkeeping, inspection, and other requirements.

Similar to the CAA, the CWA establishes technology and industry based effluent limitations. In addition, the CWA also establishes water quality standards based upon the use classification of a water body. Where industrial discharges are to a POTW rather than direct to navigable waters (i.e., indirect discharger) pretreatment requirements may exist and the POTW will then issue permits and approvals for industrial dischargers.

Under the CWA the EPA, and states where they have taken over the CWA program, have established general permits for common industrial activities. Where general permits cannot be used then dischargers must submit and obtain a facility specific permit.

The CWA also covers the discharge of stormwater within the NPDES program and regulates stormwater discharges from construction activities, municipal separate storm sewer systems (“MS4s”), and industrial activities. Working within wetlands is also covered by the CWA and uses a similar permit system. As with other environmental rules, EHS professionals should be aware of regulatory differences and jurisdictional issues between the states and with the federal government.

While the CWA is predominantly intended to clean and maintain the waters of the United States, EHS professionals should also be aware of the regulations on the “clean water side” such as the Safe Drinking Water Act which establishes standards for the providing of drinking water. Levels and testing requirements are based upon the service level provided.

*Resource Conservation and Recovery Act (“RCRA”)*¹⁵

RCRA establishes the requirements for the management and disposal of solid waste. At the federal level RCRA establishes a comprehensive system in regards to hazardous waste. Hazardous waste is defined within four lists and also by the characteristics of the waste. The

¹⁴ See 33 U.S.C. §§ 1251-1387 and 40 C.F.R. §§ 100-149.

¹⁵ See 42 U.S.C. §§ 6901-6992.

program also includes requirements for mixtures, waste derived from other waste, and waste from releases.

The RCRA program includes requirements for registration, management, recordkeeping, training, etc. for hazardous waste generators, transporters, and treatment, storage & disposal facilities (“TSDF”). RCRA established requirements for generators to make efforts to reduce their hazardous waste generation and on TSDFs to implement technology standards that would be protective of the environment, including groundwater. RCRA also established the idea of “cradle to grave” ownership of hazardous waste; when a facility generates hazardous waste they remain legally responsible for that waste forever, regardless of it being transported and disposed by other persons. To implement these requirements the EPA has established not only a numbered identification system for all persons generating or involved with hazardous wastes but have also implemented an extensive manifesting, reporting, and tax structure.

Within the RCRA hazardous waste program the EPA has defined certain types of hazardous wastes as “universal wastes” with reduced management, handling, and disposal requirements. This includes certain types of batteries, returned unused pesticides, mercury-containing lamps, and mercury-containing equipment.

RCRA leaves the regulation of nonhazardous wastes to the states though the federal requirements establish control and monitoring requirements for solid waste disposal facilities. In addition, EHS professionals should be aware where states have taken over the management of the hazardous waste RCRA requirements and implemented additional requirements to the expected federal requirements.

The implementation of RCRA also included the establishment of an Underground Storage Tank (“UST”) program. This program established standards for the removal and remediation of existing USTs, new USTs, upgrading UST systems, and financial responsibility for owners and operators of petroleum USTs.

*Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)*¹⁶

CERCLA, commonly known as Superfund, was created to deal with inactive and abandoned (i.e., historical) hazardous waste sites, as opposed to RCRA’s regulation of current facilities. CERCLA and its amendments have established the liability and cleanup requirements for current and former landowners of contaminated properties, generators or arrangers, and transporters. It has also established standards to be utilized to establish an innocent landowner defense in real property transactions. EHS professionals working on property transactions or at National Priority List or other CERCLA sites must be familiar with the lengthy and complicated provisions of CERCLA along with any site specific agreements or decisions.

The Superfund Amendments and Reauthorization Act (“SARA”) for CERCLA also added the Emergency Planning and Community Right-to-Know Act (“EPCRA”).¹⁷ Post-Bhopal, the intent of EPCRA was to provide local communities with information regarding the hazardous substances present within those communities and require that state and local governments plan and prepare for potential emergencies. EPCRA includes a number of requirements in regards to the storage, use, or release of extremely hazardous or hazardous substances. These types of

¹⁶ See 42 U.S.C. §§ 9601-9675.

¹⁷ See 42 U.S.C. § 11001, *et seq.*

substances are defined a number of different ways and as such encompass thousands of substances and hundreds of thousands of products. State and local planning boards must include public officials along with emergency responders, public health professionals, and representatives of the regulated communities and as such provide an opportunity for EHS professionals working within one of those areas.

*Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”)*¹⁸

While the federal government has regulated pesticides for more than a century FIFRA has continued to change to strike the proper balance between the various agricultural and environmentalist interests. The core element of FIFRA is the registration of all pesticides before they can be manufactured, distributed, or imported. This process requires the manufacturer or importer to provide all necessary data to obtain the registration.

EHS professionals should be aware of the establishment of training and certification requirements for pesticide applicators which are typically established at a state level. These requirements vary based upon where the pesticide is being applied, business of person performing, and whether it is a restricted-use or general-use pesticide being applied.

*Toxic Substance Control Act (“TSCA”)*¹⁹

TSCA started in 1976 as a method to allow the government to identify and control the introduction of toxic substances into the products, articles, and materials that persons could purchase. This also included the requirement that the EPA regulate poly-chlorinated biphenyls (which allowed the EPA to create one of the most complex and convoluted set of regulations that most EHS professionals will ever read). The EPA has signaled that they intend to discuss and revise their PCB regulations and Congress has repeatedly proposed revisions to the toxic substance sections of TSCA to provide the EPA with proactive powers to regulate substances prior to entry into the stream of commerce (similar to the European Union’s REACH).

TSCA was modified in the 1986 to incorporate an extensive regulation of asbestos in schools. This was later modified to extend the training requirements beyond the realm of schools.

TSCA was modified four more times between 1988 and 2010. These added the Indoor Radon Abatement Act, Residential Lead-Based Paint Hazard Reduction Act, Health High-Performance Schools, and Formaldehyde Standards for Composite Wood Products. While the first three will likely only affect EHS professionals in very specific industries the most recent formaldehyde standard additions has the potential to affect or establish standards affecting multiple fields.

State & Local Government Activities

As discussed above, for environmental law many states have taken over the federal program and may modify those programs from the federal standards. For occupational health and safety law government personnel must recognize how, and if, OSHA regulations have been applied.

But EHS professionals must also be cognizant that many state and local governments have implemented regulations and rules which can be unique to their jurisdiction. This can include such things as:

¹⁸ See 7 U.S.C. § 136 and 40 C.F.R. §§ 150-189.

¹⁹ See 15 U.S.C. §§ 2601-2697 and 40 C.F.R. §§ 700-789.

- California requirement for businesses to provide a “clear and reasonable” warning prior to exposing anyone to a listed chemical.²⁰
- New York State requirement for personnel on a public works project greater than \$250k to have successfully completed the OSHA 10-hour construction safety and health course.²¹
- New Jersey requirement to notify the state, assess the environmental condition of real property, and remediate the property based upon triggers such as property/business type and cessation of business or transaction regarding ownership or real property.²²

Professionals must recognize that their programs and training may need to be particularly tailored to each state or jurisdiction where you have operations or personnel. It may be impossible to develop a single program in some cases which will meet the requirements and obligations of each jurisdiction.

Workers Compensation

Workers compensation insurance and benefits are established by statute and allow workers injured on the job to pay medical expenses, recover lost wages, and compensate, as necessary, for impairments. In turn workers are limited in their ability to sue their employers for responsibility for a worker injury. Additionally, coworkers acting within their employment are also generally protected from litigation. EHS professionals who have responsibilities that include workers compensation should be aware of the differences that may exist between the workers compensation statutes between various jurisdictions.

Medical

EHS professionals are generally not working within the medical industry nor do they typically maintain medical records or files. However, it is possible to trigger a couple of laws aimed at medical information due to your routine EHS activities or the activities of your employer. The two primary laws are the Genetic Information Nondiscrimination Act (“GINA”) and the Health Information Portability and Accountability Act (“HIPAA”).

*Genetic Information Nondiscrimination Act*²³

There are a number of reasons or methods by which an employer or EHS professional could legally obtain genetic information about an employee. This includes such things as just overhearing employees discussing genetic information, requests made by an employee through such laws as the Family Medical Leave Act, or information that might be obtained where an employer offers health services.

GINA prohibits a covered employer from using that information in regards to employment treatment of the employee (i.e., hiring, firing, promoting, etc.) or to any way limit, segregate or otherwise mistreat the employee. Additionally, employers are required to maintain any legally obtained genetic information within a confidential, separate medical record.

²⁰ Safe Drinking Water and Toxic Enforcement Act of 1986.

²¹ 12 N.Y.C.R.R. §220-h.

²² N.J.S.A. 13:1K-6, *et seq.*

²³ P.L. 110-233 (2008).

*Health Information Portability and Accountability Act*²⁴

While the insurance continuation provisions of HIPAA should not involve EHS professionals, those sections involving the keeping and protection of medical records may be intruded upon. HIPAA applies to health care plans, health care clearinghouses, and health care providers that conduct health care transactions electronically. EHS professionals must be careful that their employer does not fall under either the plan or provider provisions. If HIPAA does apply, then the privacy and security provisions of HIPAA must be complied with in regards to electronic medical records.

Contracts

As EHS professionals progress in their career they will almost definitely have to write, negotiate, approve, or otherwise deal with contracts. Whether it is writing proposals as an EHS consultant, negotiating or approving proposals as a client, accepting a “free” trial of some EHS newsletter, or simply ordering a quantity of personal protective equipment, you will likely be exposed to some form of contracting.

While contracting should never be a significant element of a professional’s EHS practice, it can be an element of concern when performed poorly. For contracts that are important, of a significant quantity, or are particularly complicated, counsel should be sought. At a minimum, EHS professionals must ensure that contracts are specific to what will be provided, when, by whom, for what cost, and other terms of importance.

Legal Liabilities

EHS professionals should be very familiar with the typical liability of violations issued against their employers; this also includes orders to correct non-compliance items. But liability doesn’t end with just the employers. The OSH Act and numerous environmental regulations possess personal criminal liability provisions aimed primarily at decision-making evil-doers; and this can and often does include EHS managers. While the OSH Act provisions have been difficult to use and amount to very few prosecutions the environmental provisions yield about 350-400 prosecutions a years with a high success rate.

Additionally, when industrial accidents result in a fatality or fatalities or directly impact the non-industrial environment, local governments are now entering the personal legal liability fray. This has appeared in charges of homicide or manslaughter against owners, managers, and other decision-makers.

Summary

The wide-ranging and vast array of legal issues that potentially impact the practicing EHS professional appears daunting. However, with an understanding of the potential legal issues along with the areas in which they operate, an EHS professional is able to *issue-spot*, allowing further research or consultation with counsel or other EHS professionals.

²⁴ P.L. 104-191 (1996).