

OPINION NO. 95-019

Syllabus:

When the state or a political subdivision owns and operates a facility, as defined in R.C. 3750.01(D), the governmental entity is not subject to the requirements set forth in R.C. 3750.07, R.C. 3750.08, or R.C. 3750.13.

To: Jane Harf, Chair, Ohio State Emergency Response Commission, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, August 29, 1995

You have submitted an opinion request in which you ask, "whether a publicly owned and operated facility is subject to [R.C. Chapter 3750] as a result of the enactment of H.B. 308 and subsequent rulemaking."

Emergency Response Commission and Local Emergency Response Committees

R.C. 3750.02 creates the Emergency Response Commission, which has various rule-making duties, as set forth in R.C. 3750.02(B), and is responsible for the development and distribution of "a state emergency response plan that defines the emergency response roles and responsibilities of the state agencies that are represented on the commission and that provides appropriate coordination with the national contingency plan and the regional contingency plan required by section 105 of the 'Comprehensive Environmental Response, Compensation, and Liability Act of 1980,' 94 Stat. 2767, 42 U.S.C.A. 9601, as amended." R.C. 3750.02(B)(13). R.C. 3750.03(A) requires the Commission to designate, by resolution, "emergency planning districts to prepare and implement district chemical emergency response and preparedness plans under this chapter." The Commission is also required to appoint, by resolution, the members of the local emergency planning committee of each district. R.C. 3750.03(B). Among the duties imposed upon local emergency planning committees is the duty to "[e]stablish and carry out a program to monitor regulated facilities within the district and to conduct compliance and enforcement activities to ensure that the facilities have submitted the information required by [R.C. 3750.05, R.C. 3750.07, and R.C. 3750.08]." R.C. 3750.03(D)(6).

Entities Subject to Reporting and Fee Requirements of Ohio Revised Code Chapter 3750

It is my understanding that your specific concern is whether Revised Code sections 3750.07, 3750.08, and 3750.13 apply to a facility that is owned and operated by the state or a political subdivision of the state. Each of the statutes about which you ask defines the entities that are subject to its terms.

R.C. 3750.07 states in pertinent part:

(A) Except as otherwise authorized in division (E) of this section, *any person* who owns or operates a facility *and* is required to prepare or have available a material safety data sheet for a hazardous chemical under the "Occupational Safety and Health Act of 1970," 84 Stat. 1590, 29 U.S.C. 651, as amended, and regulations adopted under it shall, ... submit to the local emergency planning committee of the emergency planning district in which the facility is located, the emergency response commission, and the fire department having jurisdiction over the facility, a list of any hazardous chemicals that are produced, used, or stored at the facility in an amount that equals or exceeds the threshold quantity applicable to the hazardous chemical established by rules adopted under [R.C. 3750.02(B)(1)(b)]....

(B) The *owner or operator of a facility may meet the requirements of division (A)* of this section for a hazardous chemical that consists of a mixture of hazardous chemicals by doing ... [either of two alternatives].

(C) Upon the request of the committee of the district in which a facility is located or the commission, the *owner or operator of a facility subject to this section shall*, ... submit to the committee or commission the material safety data sheet for any hazardous chemical on the list submitted by the owner or operator under division (A), (D), or (E) of this section....

(D) Except as otherwise authorized in division (E) of this section, within three months after the discovery of new information about a hazardous chemical identified in the list required by division (A) of this section ... the *owner or operator of a facility shall* prepare and submit to the commission and to the committee and the fire department having jurisdiction over the facility a revised list that meets the requirements of that division and contains the new information....

(E) The *owner or operator of any facility* at which no more than ten hazardous chemicals are produced, used, or stored ... may submit to the commission and the committee and fire department having jurisdiction over the facility the material safety data sheets applicable to those chemicals instead of the list required under division (A) of this section. (Emphasis added.)

See generally R.C. 3750.01(D) (defining "facility").

In order to be subject to R.C. 3750.07, the owner or operator of a facility must be a "person," as defined in R.C. 3750.01(K), and must be "required to prepare or have available a material safety data sheet for a hazardous chemical under the 'Occupational Safety and Health Act of 1970,' 84 Stat. 1590, 29 U.S.C. 651, as amended, and regulations adopted under it." For purposes of R.C. Chapter 3750, the word "person" means "the state, any political subdivision, any other state or local body, the United States and any agency or instrumentality thereof, and any person as defined in [R.C. 1.59]."¹ R.C. 3750.01(K). The state or a political subdivision of the state, therefore, qualifies as a "person." In order to be subject to R.C. 3750.07, however, the state or a political subdivision must also be "required to prepare or have available a material safety data sheet for a hazardous chemical under the 'Occupational Safety and Health Act of 1970,' 84 Stat. 1590, 29 U.S.C. 651, as amended, and regulations adopted under it."

Similarly, R.C. 3750.08 imposes various reporting requirements upon "[e]ach owner or operator of a facility who is required to prepare or have available a material safety data sheet for a hazardous chemical under the 'Occupational Safety and Health Act of 1970,' 84 Stat. 1590, 29 U.S.C. 651, as amended, and regulations adopted under it, or who is required to submit a list under division (A), (D), or (E), or is authorized to submit material safety data sheets instead of that list under division (E), of section 3750.07 of the Revised Code and who had present at the facility during the preceding calendar year an amount of a hazardous chemical exceeding the applicable threshold quantity established by rules adopted under [R.C. 3750.02(B)(1)(b) or (C)(5)]." As with R.C. 3750.07, the state or a political subdivision that owns and operates a facility is subject to the terms of R.C. 3750.08 only if it is "required to prepare or have

¹ R.C. 1.59(C) defines "person" as including "an individual, corporation, business trust, estate, trust, partnership, and association."

available a material safety data sheet for a hazardous chemical under the 'Occupational Safety and Health Act of 1970,' 84 Stat. 1590, 29 U.S.C. 651, as amended, and regulations adopted under it."

You also ask about R.C. 3750.13(A), which imposes various fees upon an "owner or operator of a facility required to annually file an emergency and hazardous chemical inventory form under [R.C. 3750.08]." Because R.C. 3750.13 applies only to facilities that are subject to R.C. 3750.08, the state or a political subdivision that owns and operates a facility must pay the fees established by R.C. 3750.13 only if it is "required to prepare or have available a material safety data sheet for a hazardous chemical under the 'Occupational Safety and Health Act of 1970,' 84 Stat. 1590, 29 U.S.C. 651, as amended, and regulations adopted under it."

Whether a publicly owned and operated facility is subject to any of the three sections about which you ask, R.C. 3750.07, R.C. 3750.08, or R.C. 3750.13, depends, therefore, upon whether the state or a political subdivision, as the owner and operator of a facility, is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970.

Scope of Occupational Safety and Health Act

As explained in *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1275 (6th Cir. 1987), *cert. denied*, 484 U.S. 989 (1987):

The Occupational Safety and Health Act's stated purpose is to provide "so far as possible every working man and woman in the Nation safe and healthful working conditions...." Its purpose is neither punitive nor compensatory, but rather forward-looking; i.e., to prevent the first accident. To implement the statutory purpose, Congress imposed dual obligations on employers to comply both with a "general duty clause" requiring that the employer free the workplace of all recognized hazards, 29 U.S.C. § 654(a)(1), and a "special duty clause" which requires compliance with mandatory occupational safety and health standards issued by the Secretary, 29 U.S.C. § 654(a)(2). (Various citations omitted.)

Occupational Safety and Health Standards

In accordance with 29 U.S.C. § 655(b), the United States Secretary of Labor is authorized to adopt occupational safety and health standards. The duty to prepare or maintain material safety data sheets for hazardous chemicals is addressed in the occupational safety and health standard set forth in 29 C.F.R. § 1910.1200, which states in pertinent part: "*Chemical manufacturers and importers* shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. *Employers* shall have a material safety data sheet in the workplace for each hazardous chemical which they use." 29 C.F.R. § 1910.1200(g)(1) (emphasis added). See generally 29 C.F.R. § 1910.1200(c) (defining "chemical manufacturer," "importer," and "employer").

The duty to comply with occupational safety and health standards is imposed upon "employers" by 29 U.S.C. § 654(a)(2). As used in 29 U.S.C. § 654(a)(2), however, the term

"employer" means "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." 29 U.S.C. § 652(5) (emphasis added). Thus, neither a state nor its political subdivisions constitute an "employer" required by 29 U.S.C. § 654(a)(2) to comply with occupational safety and health standards promulgated under the Occupational Safety and Health Act. *See* 29 C.F.R. § 1975.5 (discussing exclusion of states and political subdivisions from coverage under the Act). Accordingly, neither the State of Ohio nor its political subdivisions are "required to prepare or have available a material safety data sheet for a hazardous chemical under the 'Occupational Safety and Health Act of 1970,' 84 Stat. 1590, 29 U.S.C. 651, as amended, and regulations adopted under it," for purposes of R.C. 3750.07, R.C. 3750.08, or R.C. 3750.13.

Creation of Public Employment Risk Reduction Program in Sub. H.B. 308

Your question asks, even assuming that the Occupational Safety and Health Act does not itself regulate the actions of the state and the political subdivisions of the state, whether, as a result of Sub. H.B. 308, the state and the political subdivisions of the state are now "required to prepare or have available a material safety data sheet for a hazardous chemical under the 'Occupational Safety and Health Act of 1970,' 84 Stat. 1590, 29 U.S.C. 651, as amended, and regulations adopted under it," for purposes of R.C. 3750.07, R.C. 3750.08, or R.C. 3750.13. In order to address this concern, it is necessary to examine the provisions of Sub. H.B. 308.

A. General Provisions

Sub. H.B. 308, 119th Gen. A. (1992), eff. April 20, 1993, created the Ohio public employment risk reduction program. The objective of the program is to minimize hazards in employment for public employees. R.C. Chapter 4167 imposes certain obligations upon both public employers and public employees to achieve this objective. For example, R.C. 4167.04(A)(2) requires each "public employer" to "[c]omply with Ohio employment risk reduction standards, rules, and orders adopted or issued pursuant to this chapter." As used in R.C. Chapter 4167, the term "public employer" includes, among others, the state and its instrumentalities and political subdivisions and their instrumentalities. R.C. 4167.01(A). Thus, as a result of the enactment of Sub. H.B. 308, the state and its political subdivisions, as "public employers," are required by R.C. 4167.04(A)(2) to comply with Ohio risk reduction standards and rules adopted under R.C. Chapter 4167.

B. Ohio Risk Reduction Standards

R.C. 4167.07, which requires the Public Employment Risk Reduction Advisory Commission to adopt rules that establish employment risk reduction standards, states in part:

(A) The public employment risk reduction advisory commission shall adopt rules that establish employment risk reduction standards. Except as provided in [R.C. 4167.07(B)], in adopting these rules, the commission shall do both of the following:

(1) By no later than July 1, 1994, adopt *as a rule and an Ohio employment risk reduction standard* every federal occupational safety and health standard then adopted by the United States secretary of labor pursuant to the "Occupational Safety and Health Act of 1970," 84 Stat. 1590, 29 U.S.C.A. 651, as amended;

(2) By no later than one hundred twenty days after the United States secretary of labor adopts, modifies, or revokes any federal occupational safety and health standard, by rule do one of the following:

(a) Adopt the federal occupational safety and health standard *as a rule and an Ohio employment risk reduction standard*;

(b) Amend the existing rule and Ohio employment risk reduction standard to conform to the modification of the federal occupational safety and health standard;

(c) Rescind the existing rule and Ohio employment risk reduction standard that corresponds to the federal occupational safety and health standard the United States secretary of labor revoked.

(B) The commission may decline to adopt any federal occupational safety and health standard *as a rule and an Ohio employment risk reduction standard* or to modify or rescind any existing rule and Ohio employment risk reduction standard to conform to any federal occupational safety and health standard modified or revoked by the United States secretary of labor or may adopt as a rule and an Ohio employment risk reduction standard any occupational safety and health standard that is not covered under the federal law or that differs from one adopted or modified by the United States secretary of labor, if the commission determines that existing rules and Ohio employment risk reduction standards provide protection at least as effective as that which would be provided by the existing, new, or modified federal occupational safety and health standard or if it determines that local conditions warrant a different standard from that of the existing federal occupational safety and health standard or from standards the United States secretary of labor adopts, modifies, or revokes. (Emphasis added.)

Pursuant to the mandate of R.C. 4167.07(A)(1), the Public Employment Risk Reduction Advisory Commission has adopted 9 Ohio Admin. Code 4101:17-3-01, which states:

(A) In accordance with [R.C. 4167.07(A)(1)], the public employment risk reduction advisory commission has adopted occupational safety and health standards [sic] by the United States secretary of labor pursuant to the "Occupational Safety and Health Act of 1970," 84 Stat. 1590, 29 U.S.C.A. 651 as amended.

(B) The public employment risk reduction advisory commission has hereby adopted from the Code of Federal Regulations, Title 29, Subtitle b, Chapter XVII, Part 1910 occupational safety and health standards Subpart C to and including Subpart T and Subpart Z.² In addition, the standards of Part 1926, Subpart C to and including Subpart X are incorporated in the Revised Code as Ohio public risk reduction standards with the exclusion of standards 29 CFR 1910.96, 1910.97, 1926.53, and 1926.54. (Footnote added.)

Through the adoption of rule 4101:17-3-01, the Public Employment Risk Reduction Advisory Commission has established as Ohio employment risk reduction standards the substance of the

² The occupational safety and health standard set forth in 29 C.F.R. § 1910.1200 is contained in Subpart Z of 29 C.F.R. § 1910.

federal occupational safety and health standards described therein, including the standard set forth in 29 C.F.R. § 1910.1200 (material safety data sheet requirements).

Your concern appears to be that because the Public Employment Risk Reduction Advisory Commission has established the material safety data sheet requirements described in 29 C.F.R. § 1910.1200 as an Ohio employment risk reduction standard with which the state and political subdivisions must comply, the state and its political subdivisions are now "required to prepare or have available a material safety data sheet for a hazardous chemical under the 'Occupational Safety and Health Act of 1970,'" as that phrase is used in R.C. 3750.07 and R.C. 3750.08. For the reasons that follow, however, this assumption is not correct.

The Public Employment Risk Reduction Advisory Commission's adoption as Ohio employment risk reduction standards those standards adopted by the Secretary of Labor as occupational safety and health standards does not expand the application of the Occupational Safety and Health Act of 1970 to include regulation of the State of Ohio and its political subdivisions. While the state and its political subdivisions, as "public employer[s]" for purposes of R.C. 4167.04(A)(2), must comply with Ohio employment risk reduction standards, including the same material safety data sheet requirements as are contained in 29 C.F.R. § 1910.1200, the state and political subdivisions of the state are not "required to prepare or have available a material safety data sheet for a hazardous chemical *under* the 'Occupational Safety and Health Act of 1970.'" (Emphasis added.)

Any obligation the state or a political subdivision may have to prepare or maintain material safety data sheets arises from R.C. 4167.04(A)(2), not from the Occupational Safety and Health Act of 1970. Thus, even after the adoption of rule 4101:17-3-01, the state and its political subdivisions are not "required to prepare or have available a material safety data sheet for a hazardous chemical under the 'Occupational Safety and Health Act of 1970,' 84 Stat. 1590, 29 U.S.C. 651, as amended, and regulations adopted under it," as that phrase is used in R.C. 3750.07 and R.C. 3750.08.

Conclusion

Based on the foregoing, it is my opinion and you are hereby advised that, when the state or a political subdivision owns and operates a facility, as defined in R.C. 3750.01(D), the governmental entity is not subject to the requirements set forth in R.C. 3750.07, R.C. 3750.08, or R.C. 3750.13.