



JOHN D. ROCKEFELLER IV
GOVERNOR

STATE OF WEST VIRGINIA
THE DEPARTMENT OF LABOR
CHARLESTON 25305

List Filed in Red cabinet

December 7, 1983

The Honorable A. James Manchin
Secretary of State
The Capitol
Charleston, West Virginia 25305

Dear Mr. Manchin:

Re: West Virginia Code 21-3-18

Enclosed herewith are seventeen copies of the following:

1. State Register Filing
2. Notice of Second and Final Public Hearing
3. Final Findings and Determinations
4. Administrative Regulations adopted by the West Virginia Department of Labor
5. Fiscal Note pursuant to 29A-3-7(c) of the Code.

Please stamp and return one copy of each of these items to Lawrence Barker, Commissioner, West Virginia Department of Labor.

Very truly yours,

Lawrence Barker

Lawrence Barker
Commissioner of Labor

LB/ab-s

enclosures

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE Dec. 7, 1983
Administrative Law Division



STATE OF WEST VIRGINIA
 OFFICE OF THE SECRETARY OF STATE
 CHARLESTON 25305

A. JAMES MANCHIN
 SECRETARY OF STATE

STATE REGISTER FILING

I, Lawrence Barker, Commissioner,
 Title or Position

Department of Labor, hereby submit to record in
 Department or Division

the State Register on 8 1/2 x 11" paper two (2) copies of

- proposed rules and regulations concerning topics of material not covered by existing rules and regulations;
- proposed rules and regulations superseding rules and regulations already on file;
- notice of hearing;
- findings and determinations (final)
- rules and regulations; or
- other - specify (LEGISLATIVE (X) PROCEDURAL () INTERPRETIVE () RULE

This filing pertains to

Chapter 21
 Article 3
 Series 6
 Section 18
 Page No. 1 - 22

FILED IN THE OFFICE OF
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THIS DATE 12/7/83
 Administrative Law Division

- proposed rules and regulations are required to go to Legislative Rule Making Committee;
- proposed rules and regulations are excluded from Legislative Rule Making Committee;

December 7, 1983
 Date Submitted

Lawrence Barker
 Signature of Person Authorizing
 this Filing

NOTICE OF SECOND
AND
FINAL PUBLIC HEARING

The West Virginia Department of Labor, pursuant to Section 7, Article 3, Chapter 29-A of the Code of West Virginia, 1931, as amended, shall hold a second and final public hearing beginning at 10:00 a.m. on Tuesday, January 17, 1984 at the Department of Welfare Conference Room, Room 617, 1900 Washington Street, East, Charleston, West Virginia.

The Commissioner of Labor invites public comments on the final rules and regulations required by West Virginia Code Chapter 21, Article 3, Section 18. A copy of the rules are attached hereto.

Any person who has previously commented on the substance of the proposed rules during the comment period on the proposed findings and determinations need not repeat such comments.

All interested persons may submit such data, objections, suggested amendments, views, evidence or arguments on that date or in writing at any time prior to the scheduled hearing. The issues to be heard shall be limited to the final rules and regulations.


Commissioner of Labor

December 7, 1983

Date submitted

FILED IN THE OFFICE OF
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SECRETARY OF STATE

THIS DATE DEC. 7, 1983
Administrative Law Division

FINAL FINDINGS AND DETERMINATIONS

The West Virginia Department of Labor originally published these findings and determinations on an emergency basis and filed them in the State Register on August 24, 1983. To comply with the August 3, 1983 decision of Judge Kidd of the United States District Court for the Southern District of West Virginia, and to comply with the Administrative Procedures Act, the Department in order to promulgate the final rules and regulations held a public hearing to receive comments on the findings and determinations on October 31, 1983. Much of the public comment did not revolve around these findings and determinations but rather were substantive comments on the rules. The Department can see no reason to change these findings and determinations; the Department believes they adequately address the issues.

The Department of Labor, therefore, adopts these as the final findings and determinations necessary to promulgate the rules and regulations.

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE

THIS DATE 12-7-83
Administrative Law Division

1. The purpose of the Legislature in passing West Virginia Code 21-3-18 is to protect employees' health and safety when they are working with hazardous chemical substances.
2. This provision of law requires the Department of Labor to list those chemicals designated by the U. S. Secretary of Labor in Regulation 1910.1000, Subpart Z.
3. A chemical is placed on this list by the U.S. Secretary of Labor because of its existing or potential health problems to people.
4. Due to frequency of use, the West Virginia Commissioner of Labor determined to place 427 of the chemicals in Subpart Z on his list of regulated chemicals as a determination by the U. S. Secretary of Labor to place these chemicals on the Subpart Z list is a prima facie determination that they are or may be hazardous to workers.
5. The Commissioner of Labor determined that legislative intent was designed to cover any employer of ten or more employees using or producing any such listed hazardous chemical substance or material shall conspicuously post a warning notice in the work area where any such substance or material is used.
6. The following is a summarization of the decision of the Honorable William M. Kidd, United States District Judge.

Conclusions

Accordingly, the Court finds that:

- (1) The title of W. Va. Code § 21-3-18 is not defective because of failure to inform of possible criminal penalties;
- (2) the Act is not an unconstitutional delegation of legislative authority to the state's commissioner of labor except as it purports to adopt or permit consideration of future regulatory amendments or proposed amendments to 29 C.F.R. 1910.1000, Subpart Z;
- (3) the conduct regulated by W. Va. Code § 21-3-18 has not been preempted by the federal Occupational Safety & Health Act of 1970;
- (4) the Act is not void for vagueness under the Due Process Clause of the Fourteenth Amendment;
- (5) the Act does not deny plaintiff equal protection under the law, and
- (6) the proposed regulations promulgated pursuant to W. Va. Code § 21-3-18 are void for failure of the agency to comply with W. Va. Code §§ 29A-3-5 and =6.

7. Attached is the decision of the United States Court of Appeals for Fourth Circuit Court declining to disapprove Judge William M. Kidd's decision, West Virginia Manufacturers Assoc., a nonprofit West Virginia corporation, Plaintiff, and United Steelworkers of America, AFL-CIO-CIC and Paul Rusen, Director District 23, United Steelworkers of America, AFL-CIO-CIC, Plaintiff-Intervenor, versus State of West Virginia and Lawrence Barker, Commissioner of Labor of the State of West Virginia, Defendants, Civil Action No. 81-2477.
8. Prior to, during and after the previous public hearing, the Commissioner of Labor received a number of comments on the proposed regulations from a variety of people. More significant comments are summarized briefly and the Commissioner's response to them is provided herein.
- A. In our opinion, the state program simply duplicates many of the federal requirements, thereby serving no beneficial purpose and merely increasing the compliance and costs to industry. We believe that the federal Occupational Safety and Health Administration, while not without its flaws, has already fully and adequately regulated the areas of employee safety and health on a national level.

As the litigation in this case has demonstrated, the state program is not duplicative of federal efforts and provides a significantly greater protection to workers than does the federal regulation.

- B. The regulations omit any specific requirements as to size, location and legibility of the warning notices required under the law. We recommend that the Department of Labor follow the standards established by OSHA for the posting of information.

A regulation establishing specific requirements for location, size and legibility of warning notices is not desirable as the variety of work places precludes a single uniform standard.

- C. As currently proposed, list of substances and symptoms is deficient in two primary respects. First, the list does not include a number of substances which are known, through NIOSH research and OSHA regulations, to be toxic. Second, the listing of symptoms is inadequate: long term effects, including cancer, are frequently not included; a number of substances lack a listing of symptoms at all; symptoms are listed in medical and not lay terms, and should be indicated in both. Posting of the list: the regulations should be specific as to size, height and location of posting. Enforcement: the regulations fail to establish a procedure for enforcement. It is essential that an effective enforcement procedure be developed, including how complaints regarding noncompliance are to be processed, investigated and violators prosecuted.

The statute by its terms specifically requires the Commissioner of Labor to draw his list of chemicals from Subpart Z. The statute specifies a mechanism of enforcement using the criminal misdemeanor provisions of law.

- D. Ashland's review of the proposed "Listing of Hazardous Chemical Substances," initially reveals a major discrepancy: The Department of Labor clearly derived the proposed listing from sources other than those authorized by West Virginia law. Ashland respectfully requests the Department of Labor to ensure that its cited source of chemical substances, 29 CFR 1910.1000 is consistent with the list it proposes in Section 18.

Carbon black is listed as a substance under Subpart Z and to date insufficient information has been presented to the Commissioner of Labor for him to make a determination to delist this substance.

STATE OF WEST VIRGINIA
ADMINISTRATIVE REGULATIONS
ADOPTED BY THE
WEST VIRGINIA DEPARTMENT OF LABOR

PURSUANT TO THE WEST VIRGINIA SAFETY AND WELFARE OF EMPLOYEES
(CHAPTER 21, ARTICLE 3, SECTION 18 OF THE WEST VIRGINIA CODE)

ADOPTED November 2, 1981

FILED December 7, 1983

In effect upon passage by the State Legislators and filing
in the Office of the Secretary of State

SUBJECT: Legislative Rules and Regulations to establish and maintain a list of chemical substances and materials which have been determined or are suspected to be hazardous or toxic to the health of employees who may be exposed to them in the course of employment.

SECTION I - HAZARDOUS CHEMICAL SUBSTANCES:

- 1.01 The following list has been selected in accordance with 29 Code of Federal Register 1910.1000, Subpart Z.
- 1.02(a) List of hazardous chemical substances and materials (pages 1 through 22)
- 1.03(b) The preceding list will be updated, at least annually, giving due consideration to any changes made or proposed by the Secretary of Labor of the United States.
- 1.04(c) Warning notice posted in the work area shall be printed or typewritten in letters of sufficient size and contrast as to be readily visible and legible. Such warning notice shall include common symptoms of overexposure.
- 1.05(d) Any producer or user aggrieved by the inclusion or exclusion of any hazardous chemical substance on the list may petition the Commissioner of the State Department of Labor for a possible revision or revisions of said list. The expense of any such determination, if the Commissioner so decides, shall be borne by the party seeking said determination, and the burden of proof shall also be on said party.

FISCAL NOTE
(Submit 4 copies)

HD NO. _____ DRAFT NO. _____

EXPLAIN IN A CLEAR, CONCISE MANNER WHAT EFFECT THIS MEASURE WILL HAVE ON THE COSTS AND REVENUES OF STATE GOVERNMENT.

FISCAL NOTE TO The Honorable A. James Manchin, Secretary of State

(GIVE BILL OR RESOLUTION NUMBER WHEN AVAILABLE. OTHERWISE IDENTIFY BY SUBJECT, CODE REFERENCE, ETC.)

Fiscal note pursuant to 29A-3-7(c) of the Code.

Hazardous Chemical Substances Act
Article 3, Chapter 21, Section 18 of the Code.

- 3. --Occupational Safety Consultants
 (field).....\$ 35,280.00
- 1. --Industrial Hygienist.....\$ 14,724.00
- Current Expenses.....\$ 29,810.00

29A-3-7(c) Objective of Rules and Regulations

The cost required to administer adding new section 18, to Article 3, Chapter 21 of the West Virginia Code.

DATE
12/7/83

AGENCY
LABOR

AUTHORIZED REPRESENTATIVE
Lawrence R. ...