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Texas Department of Health

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April 20, 1992

RO-382

The Honorable Dan Morales
Attorney General of Texas
Price Daniel, Sr. Building
209 West 14th Street
Austin, Texas 78701

Attn: Opinion Committee

Re: Request for Attorney General Opinion

Dear General Morales:

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Opinion Committee

The Texas Hazard Communication Act¹ (hereafter, "the Act") was originally passed in 1985 to augment the coverage of the OSHA standards scheduled to take effect that year². The primary purpose of the Legislation, set forth in its "Declaration of Purpose", is to make the standards imposed on manufacturing employers by OSHA, more broadly applicable³. A second goal was to provide to emergency service workers the same type of information provided to employees⁴. The Texas Department of Health (hereafter, "the Department"⁵), is charged with enforcing the act, and permitted to "adopt rules and procedures reasonably necessary to carry out the purposes

¹ Tex. Health & Safety Code Ann., Chapter 502 (Vernon 1992).

² Hazard Communication Act, ch. 194, § 1, 1985 Tex. Gen. and Special Laws 777. Adds TEX. REV. CIV. STAT. ANN. art. 5182b (Vernon 1987), repealed by ch. 678, § 13, 1989 Tex. Gen and Special Laws 3165 (codification of the Texas Health and Safety Code). Though the changes in the wording of the Act at the time of codification are purported to be nonsubstantive, subsequent citation to the "Declaration of Purpose" is to both versions.

³ TEX. REV. CIV. STAT. ANN. art. 5182b Sec. 2 (Vernon 1987), & Tex. Health & Safety Code Ann. §502.002(a &b)(Vernon 1992).

⁴ TEX. REV. CIV. STAT. ANN. art.5182b Sec. 2 (Vernon 1987), & Tex. Health & Safety Code Ann. §502.002(b)(2)(Vernon 1992).

⁵ Tex. Health & Safety Code Ann. §502.003(6)(Vernon 1992).

of this [Act]"⁶. It has interpreted it "to provide **employees** and the public with access to information relating to hazardous chemicals to which they may be **exposed** during their employment"⁷, "in **manufacturing or nonmanufacturing employer workplaces**"⁸, as required by the statutory language.

The Department has been asked to ascertain whether the act covers students in institutions of higher education. It is the interpretation of the Department that it does. Counsel for the University of Texas System has concluded the opposite. The extent of the Act's coverage is indicated in the quoted language above. The terms in bold are defined in the "Definitions" section of the Act:

(9) "Employee" means a person who may be or may have been exposed to hazardous chemicals in the person's workplace under normal operating conditions or foreseeable emergencies, and includes a person working for this state, a person working for a political subdivision of this state or a member of a volunteer emergency service organization. The term does not include an office worker, a ground maintenance worker, security personnel, or a nonresident management unless the person's job performance routinely involves potential exposure to hazardous chemicals.

(10) "Expose" or "Exposure" means that an employee is subjected to a hazardous chemical in the course of employment through any route of entry, including inhalation, ingestion, skin contact, or absorption. The term includes potential, possible, or accidental exposure.

(14) "Manufacturing employer" means an employer with a workplace classified in Standard Industrial Classification (SIC) Codes 20-39 who manufactures or uses a hazardous chemical.

(16) "Nonmanufacturing employer" or "employer" means an employer with a workplace in Standard Industrial Classification (SIC) Codes . . . 82 (educational services), and 84 (museums, art galleries, and botanical and zoological gardens); this state and its political subdivisions; and volunteer emergency service organizations. If the OSHA standard is not in effect, "employer" also includes manufacturing employer.

(18) "Work area" means a room or defined space in a workplace where hazardous chemicals are produced or used and where employees are present.

(19) "Workplace" means an establishment at one geographical location containing one or more work areas⁹.

⁶ *Id.* §502.016(a). See also §12.001(a). Rules adopted under these provisions are in 25 TEX. ADMIN. CODE §295.1 -9 (West 1989 & Supp. 1992).

⁷ 25 TEX. ADMIN. CODE §295.1(a)(West 1989 & Supp. 1992)

⁸ Tex. Health & Safety Code Ann. §502.002(b)(1)(Vernon 1992).

⁹ *Id.* §502.003. Slightly more elaborated definitions of "work area" and "workplace" are provided in 25 TEX. ADMIN. CODE § 295.2 (West 1989).

These slightly circular definitions neither include nor exclude students. An "employee" is someone who might be exposed to hazardous chemicals in a "workplace". A "workplace" is a site that contains one or more "work areas". These are defined as places where both hazardous chemicals and "employees" are present. It is clear from the quoted definitions that neither branches of state government nor educational institutions were to be excluded¹⁰. Further indication that the legislature intended the statute to apply to students may be found in the section entitled "Applicability of Chapter":

This chapter does not apply to . . . a chemical in a laboratory under the direct supervision or guidance of a technically qualified individual if: . . . material safety data sheets received are maintained and made accessible to employees and students; [and other criteria are met]¹¹.

The implication of this language, which creates an exception to the coverage of the Act, is that both employees and students are covered otherwise.

It may be relevant to compare the approach of a federal court to a similar question. The definitions of "employer" and "employee" found in the Occupational Safety and Health Act are also less than helpful¹². The Tenth Circuit Court of Appeals held that these terms should be interpreted broadly to implement the purposes of the legislation, and the interpretation of the agency should be given great weight¹³. The court held that OSHA "was designed to require the employer to provide a safe work place for all persons working on the premises" and not just to those defined as "employees" under narrower common law concepts of employer-employee relationships¹⁴. The department's interpretation of this state legislation is consistent with this approach.

In summary, the legislature has attempted to protect those members of the public who come into contact with hazardous chemicals. This obviously and primarily means employees in workplace settings. For this reason the Act adopts this terminology. However, the Act does not define these terms in an exclusive manner, and the Department was granted the authority to adopt policies which carry out all the purposes of the Act. Consequently, our regulations cover "employees and the public" including students. The legislature explicitly included all branches of State government, and explicitly included educational institutions as facilities. They exempted students (implicitly) only under circumstances set out in §502.004(e)(5)(b) of the Texas Health and Safety Code.

¹⁰ The Federal statute does not cover Federal, State or local government 29 U.S.C. §652(5)(West 1985).

¹¹ Tex. Health & Safety Code Ann. § 502.004(e)(5)(B)(Vernon 1992).

¹² 29 U.S.C. § 652(5&6)(West 1985).

¹³ *Clarkson Construction Company v Occupational Safety and Health Review Commission* 531F2d 451, 457 (1976).

¹⁴ *Id.* 457-8.

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Office of the Attorney General
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Your consideration of this request will be appreciated. Please call Monty Waters in the department's Office of General Counsel at (512) 458-7236 if you have any questions or need additional information. Thank you for your attention.

Sincerely,

A handwritten signature in cursive script that reads "David R. Smith M.D.".

David R. Smith, M.D.
Commissioner of Health