

SENATE JUDICIARY COMMITTEE
Senator Noreen Evans, Chair
2013-2014 Regular Session

SB 193 (Monning)
As Amended April 9, 2013
Hearing Date: April 23, 2013
Fiscal: Yes
Urgency: No
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SUBJECT

Hazard Evaluation System and Information

DESCRIPTION

This bill would require, upon written request from the repository of the Department of Industrial Relations with the State Department of Public Health, chemical manufacturers, formulators, suppliers, distributors, importers, and their agents to provide the repository with the names and addresses of their customers, who have purchased certain chemicals, or commercial product information. This bill would exempt the names and addresses of these customers from the California Public Records Act.

BACKGROUND

In 1973, the Legislature enacted the California Occupational Safety and Health Act for the purpose of assuring safe and healthful working conditions. In furtherance of this purpose, the Legislature subsequently established comprehensive statutory mandates requiring the Department of Industrial Relations and the Department of Public Health to safeguard the health and safety of California workers. One such mandate requires the Department of Industrial Relations and the Department of Public Health to maintain a repository, which collects and maintains data on toxic materials and harmful physical agents in use or potentially in use in workplaces. The Hazard Evaluation System and Information Service (HESIS), a Department of Public Health program, utilizes the information collected by the repository to evaluate potential hazards to human health and provides information about possible health hazards that may be caused by exposure to toxic materials. HESIS also issues early warnings to various industries concerning potential workplace hazards.

The author of this bill asserts that the repository is unable to gather sufficient information about prospective users of toxic materials to provide HESIS with the capacity to issue early warnings of prospective toxic material hazards. The current

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strategy used by HESIS when mailing out hazard alerts is to identify each business likely to use the targeted chemical by searching commercial databases using standard industry codes. For example, after participating in a workplace fatality investigation last year, HESIS mailed out a hazard alert on the use of methylene chloride-containing paint strippers. To identify employees potentially exposed to the potential hazard of these paint strippers, HESIS searched the commercial databases for businesses classified as furniture refinishers, furniture strippers, or bathtub refinishers.

Additionally, the Occupational Health Branch (OHB) (of which HESIS is a part) maintains a database of businesses, contractors, unions, and advocacy groups. That database is of limited use in directed hazard alert mailings since a search for potential users of toxic materials is based upon the likely relevance of the businesses, contractors, unions, and advocacy groups to the toxic material.

The OHB, in its Summer 2004 Occupational Health Watch publication, indicated that “[a]lthough businesses are required to submit hazardous materials inventories to local agencies, these data are not computerized, easily accessed, nor compiled on a statewide basis. Direct requests to manufacturers and importers to voluntarily submit their client lists for the test chemicals was unsuccessful. Requiring client lists of hazardous chemicals, or making inventory data available on a statewide basis, would help ensure that workers and employers receive OHB alerts in a manner timely enough to keep workers health.” (Cal. Dept. of Health Services, Occupational Health Branch, *Occupational Health Watch* (Summer 2004) <<http://www.cdph.ca.gov/programs/ohb/Documents/ohw3.pdf>> [as of Aug. 10, 2013], p. 5.)

This bill would authorize the repository to gather name and address information of toxic material purchasers so that HESIS can issue early warnings of toxic material hazards to businesses employing people who may be exposed to the potentially hazardous material. This bill would exempt the customer names and addresses from public disclosure under the California Public Records Act.

This bill contains similar provisions as those in AB 815 (Lieber, 2005), which was passed out of the Senate Labor and Employment Committee but held under submission in the Senate Appropriations Committee. This bill is substantially similar to AB 816 (Lieber, 2005), which passed out of the Senate Environmental Quality Committee and ultimately vetoed by Governor Schwarzenegger because he believed the bill was unnecessary and an invasion of privacy.

CHANGES TO EXISTING LAW

1. Existing law recognizes that hazardous substances in the workplace in some forms and concentrations pose potential acute and chronic health hazards to employees who are exposed to these substances. (Lab. Code Sec. 6361(a)(1).)

Existing law provides that employers and employees have a right and a need to know the properties and potential hazards of substances to which they may be exposed, and such knowledge is essential to reducing the incidence and cost of occupational disease. (Lab. Code Sec. 6361 (a)(2).) Further, existing law recognizes that employers do not always have available adequate data on the contents and properties of specific hazardous substances necessary for the provision of a safe and healthful workplace. (Lab. Code Sec. 6361(a)(3).)

Existing law ensures the transmission of necessary information to employees regarding the properties and potential hazards of hazardous substances in the workplace. (Lab. Code Sec. 6361(b).)

Existing law requires the Department of Industrial Relations, by interagency agreement with the State Department of Health Services, to establish a repository of current data on toxic materials and harmful physical agents in use or potentially in use in workplaces. (Lab. Code Sec. 147.2.)

Existing law requires the Department of Public Health to maintain a program, known as the Hazard Evaluation System and Information Service (HESIS), on occupational health and occupational disease prevention. (Health & Saf. Code Sec. 105175.)

Existing law requires the Department of Industrial Relations and the State Department of Health Services to provide reliable information of practical use to employers, employees, representatives of employees, and other governmental agencies on the possible hazards to employees of exposure to toxic materials or harmful physical agents. (Lab. Code Sec. 147.2.) Existing case law settled the authority of HESIS, on behalf of the Department of Health Services, to issue hazard alerts and fact sheets to the public. (*ICN Pharmaceuticals, Inc. v. State of California* (1992) 3 Cal.App.4th 1131.)

This bill, for every product whose final destination may be a place of employment within the state, would require chemical manufacturers, formulators, suppliers, distributors, importers, and their agents, upon written request by the repository, to provide the names and addresses of customers who have purchased certain chemicals, as specified by the repository, or commercial products containing those chemicals and information related to those shipments, including the quantity and dates of shipments, and the proportion of a specified chemical within a mixture containing the specified chemical.

This bill would require, on or after January 1, 2015, the information requested by the repository to include current and past customers for not more than a one-year period prior to the date the request is received. This bill would require the information to be provided within a reasonable timeframe as determined by the State Department of Public Health, not to exceed 30 calendar days from the date the

request is received. This bill would require the information to be provided in a format specified by the State Department of Public Health but consistent with the responding entity's current data system.

This bill would authorize the Department of Public Health to seek reimbursement for attorney's fees and costs incurred in seeking an injunction to enforce these provisions.

This bill would not apply to a retail seller if the sale of the chemical or mixture is in the same form, approximate amount, concentration, and manner as the chemical or mixture is sold to the general public.

This bill would not require employers, other than chemical manufacturers, formulators, suppliers, distributors, importers, and their agents, to report any information not otherwise required by law.

This bill would make conforming changes to reflect the recent reorganization of the Department of Public Health.

2. Existing law, the California Public Records Act, governs the disclosure of information collected and maintained by public agencies. (Gov. Code Sec. 6250 et seq.) Generally, all public records are accessible to the public upon request, unless the record requested is exempt from public disclosure. (Gov. Code Sec. 6254.)

This bill would exempt from disclosure, under the California Public Records Act, the customer lists of chemical manufacturers, formulators, suppliers, distributors, importers, and their agents that are required to be provided pursuant to the repository's request. This bill would authorize disclosure of customer lists only to officers or employees of the state not affiliated with the repository who are responsible for carrying out the purposes of the California Occupational Safety and Health Act of 1973, the Division of Occupational Safety and Health Administration, and the Secretary of Food and Agriculture.

COMMENT

1. Stated need for the bill

The author writes:

In the absence of a robust federal policy on chemicals, California has confronted a number of difficulties when responding to the release of chemical hazards in recent years. Too often, the public is provided protections only after damaging effects to workers' health have become pervasive. Finding information concerning new, unregulated chemicals, such as certain solvents, is often very difficult to track when they are used in many different settings. When it has been able to obtain the

necessary information, [the Hazardous Evaluation System and Information Service (HESIS)] has provided early warnings to various industries concerning prospective hazards, such as alerts on chemicals posing reproductive hazards.

SB 193 would require chemical manufacturers, suppliers, distributors, importers and their agents, when requested to do so by [HESIS] maintained jointly at the Department of Industrial Relations (DIR) and the Department of Public Health (DPH), and under conditions of confidentiality, to provide the names and addresses of their customers who have purchased chemicals or products containing those chemicals, and their proportions, to the repository maintained by the HESIS.

2. Exemption for customer names and addresses from disclosure under the California Public Records Act (CPRA)

Under the CPRA, the public has a right to inspect records maintained by public agencies. (Gov. Code Sec. 6250 et seq.) Generally, all public records are accessible to the public upon request, unless the record requested is exempt from public disclosure. (Gov. Code Sec. 6254.) Although this bill would authorize a public agency (the Department of Industrial Relations and/or the Department of Public Health via the repository) to collect and maintain a database of toxic material customers, this bill would exempt from disclosure under the CPRA the customer lists of chemical manufacturers, formulators, suppliers, distributors, importers, and their agents required to be provided pursuant to the repository's request.

Existing law provides that employers and employees have a right and a need to know the properties and potential hazards of substances to which they may be exposed, and such knowledge is essential to reducing the incidence and cost of occupational disease. (Lab. Code Sec. 6361 (a)(2).) Further, existing law recognizes that employers do not always have available adequate data on the contents and properties of specific hazardous substances necessary for the provision of a safe and healthful workplace. (Lab. Code Sec. 6361(a)(3).) The author argues that this bill, by authorizing the repository to collect the names, addresses, and chemical shipment information so that HESIS can send hazard alerts directly to the purchasers of potentially hazardous material, would better educate employers and employees of potential hazards of substances to reduce the incidence and cost of occupational disease.

The California State Association of Occupational Health Nurses, in support of this bill, asserts that, although the repository "provides information of practical use to employers, employees, and other governmental agencies on the hazards of toxic materials and harmful physical agents used in [the] workplace[,] [c]urrent law however does not require compliance with requests for information on where chemicals are used, and therefore, undermines the ability of HESIS to provide early warnings to various industries regarding prospective hazards. HESIS has been handicapped for years in its ability to do the prevention and dissemination of technical information for best practices."

Further, the Silicon Valley Toxics Coalition argues in support that this bill would allow HESIS "to target those at risk rather than merely posting its valuable guidance to limit exposure and prevent disease on the web with no guarantee it will reach those in need. Workers are the first exposed to toxic chemicals and we must ensure that HESIS can act quickly and efficiently in order to protect them."

To ensure the confidentiality and privacy of businesses that purchase potentially hazardous materials, this bill was recently amended to clarify that the customers lists may only be disclosed to officers or employees of the state not affiliated with the repository who are responsible for carrying out the purposes of the California Occupational Safety and Health Act of 1973, the Division of Occupational Safety and Health Administration, and the Secretary of Food and Agriculture. Since this bill would specifically state that the customer lists are confidential under the CPRA exemptions, the public agencies who receive information from the repository would also be required to keep the information confidential.

Additionally, recent amendments exempt retail stores from this bill. These amendments sought to protect consumers, who shop at retail stores that sell potentially harmful products but who do not have the same toxic material exposure as employees, from being included in the repository database. Further, these amendments sought to protect these consumers from being included in a database maintained by the retail seller, who could potentially utilize the consumer's information for reasons other than to assist in the hazardous material alert process. General public users of toxic materials would still be able to access, via the Internet or by contacting HESIS, the hazard alert information prepared by HESIS. This bill, by maintaining the confidentiality of customer lists while providing the agencies charged with alerting employers and employees of potential toxic material hazards, strikes an appropriate balance between purchaser privacy and the public's need for information.

3. Maintenance of one-year period of customer information

This bill would require information requested by the repository to include current and past customers for not more than a one-year period prior to the date the request is received. Given that the responding party may not have maintained a customer list for the year prior to the date that this bill would be enacted, this bill has been amended to require a one-year customer list on or after January 1, 2015. This provision is intended to protect the responding party from being held in violation of this bill if that party did not begin to compile the customer information until the enactment date of this bill. However, a responding party that has maintained a customer list prior to the enactment date of this bill is not precluded from providing up to one year of customer information.

This bill would also require the responding party to provide the requested information in a format specified by the State Department of Public Health but consistent with the responding entity's current data system. This provision would allow the State Department of Public Health to request the information in electronic or paper format so

as to maximize the utility and efficiency of the information requested. This provision also recognizes the responding entity's potential limitations on electronic formats and arguably protects the responding entity from being overburdened by a specified format request that the responding entity is unable to produce without additional expenditure.

4. Opposition concerns

An opposition coalition argues that "[p]resuming this bill becomes law, [the Department of Industrial Relations] DIR could theoretically on January 1, 2014 issue requests to thousands of businesses requesting customer information on thousands of chemicals without any clear indication as to how this information would be used and to what extent the information will help address a potential public health threat in the workplace. . . . Depending upon the products in question and industries targeted, this bill could result in an enormous cascade of information and data that could easily overwhelm DIR, raising the question of how DIR could put this information to meaningful use in actually enhancing workplace safety." The opposition coalition also raises concerns about ensuring the protection of sensitive information, and asserts that DIR should only be granted access to customer lists through a clearly defined process and under very specific circumstances.

Opponents have requested to amend the bill to narrow its scope as follows: (1) notify regulated businesses in a written request that the repository is seeking information on a specific chemical, specify why the chemical has been identified and the hazard concern being evaluated, explain how the customer list information will help address the potential health concern, and how the issue cannot be addressed through existing health and safety regulations; (2) make reasonable attempts to consult with chemical manufacturers, formulators, suppliers, distributors, importers, and their agents so that the repository can obtain relevant information held by these entities that may not be publicly available but potentially helpful in addressing the repository's concerns or questions; (3) prior to issuing a hazard alert, request the chemical manufacturers, formulators, suppliers, distributors, importers, and their agents to distribute repository materials to its customers within 30 days; and (4) if after 30 days the repository determines that it is unsatisfied with the distribution of information, only then may the repository request the customer lists.

5. Governor Schwarzenegger's veto of AB 816

This bill is substantially similar to the enrolled version of AB 816 (Lieber, 2005). In vetoing AB 816, Governor Schwarzenegger stated:

This bill is unnecessary and an invasion of privacy. Employers are currently required to notify their workers about health hazards and to provide a safe and healthy workplace. Other protective measures that ensure worker safety include the Business Plan Hazardous Materials Inventories; the Air Toxics Program; CalSites Database, Unidocs Hazardous Materials Online Inventory Database; and the

Wastewater Pretreatment and Pollution Prevention Plans. Employers must also inform their employees of the availability of material safety data sheets (MSDS) relating to any chemical to which the employee may be exposed. Further, employers routinely undergo Division of Occupational Safety and Health inspections to ensure that MSDS documents are available for employees.

Assembly Bill 816 imposes an unreasonable, labor intensive and duplicative reporting requirement when there are existing programs and standards in place to ensure that employees are protected from hazardous chemical exposure.

Support: California Conference of the Amalgamated Transit Union; California Conference of Machinists; California Health Nail Salon Collaborative; California Labor Federation; California Nurses Association; California State Association of Occupational Health Nurses; California Teamsters Public Affairs Council; Clean Water Action California; Consumer Attorneys of California; Engineers & Scientists of California, IFPTE Local 20; International Longshore & Warehouse Union; Mujeres Unidas y Activas; Occupational Health and Safety Section of the American Public Health Association; Professional and Technical Engineers, IFPTE Local 21; Silicon Valley Toxics Coalition; UNITE-HERE, AFL-CIO; United Food and Commercial Workers Western States Council; Utility Workers Union of America, AFL-CIO; Western Occupational & Environmental Medical Association; Worksafe

Opposition: American Chemistry Council; American Coatings Association; California Chamber of Commerce; California League of Food Processors; California Manufacturers and Technology Association; California Paint Council; Chemical Industry Council of California; Consumer Specialty Products Association

HISTORY

Source: Author

Related Pending Legislation: None Known

Prior Legislation:

AB 816 (Lieber, 2005) *See* Background; Comment 5

AB 815 (Lieber, 2005) *See* Background.
