

BILL ANALYSIS

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Date of Hearing: June 25, 2013

ASSEMBLY COMMITTEE ON JUDICIARY

Bob Wieckowski, Chair

SB 193 (Monning) - As Amended: April 9, 2013

SENATE VOTE : 21-14SUBJECT : Hazard Evaluation System and Information Service

KEY ISSUE : Should manufacturers and distributors of hazardous workplace chemicals be required to give certain information - including the names and addresses of their California customers - to a state agency that collects information on the use of these products?

FISCAL EFFECT : As currently in print this bill is keyed fiscal.

SYNOPSIS

According to the author, California has confronted a number of difficulties when responding to the release of chemical hazards in recent years. Too often, the author claims, protections are provided only after damaging effects to workers' health have become pervasive. In order to ensure that employers and employees have pertinent information before a problem occurs, this bill would, according to the author, give the Hazardous Evaluation System and Information Service (HESIS) - a state repository of current data on toxic materials - the tools that it needs to effectively implement its existing legislative mandate to provide practical information to employers, employees, and government agencies about hazardous materials in California workplaces. This bill, again according to the author, will give HESIS the ability to provide employers and employees with practical information about possible hazards and ways to avoid them, and, when necessary, to issue "early warnings" to employers and employees if it learns of workplace dangers. Specifically, this bill will require chemical manufacturers, suppliers, and distributors to provide HESIS, upon request, the following information: (1) the names and addresses of customers who have purchased certain chemicals products; (2) information related to shipments to customers, including the quantity and dates of shipments; and (3) the proportion of a specified chemical contained with a specified chemical-based product. The

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bill would not apply to retailers if the chemical or product is one that is sold to the general public. The party receiving the request would be required to respond "within a reasonable time frame" as determined by the DPH, but not to exceed 30 days from the date of the request. Finally, the bill provides that the names and addresses of customers submitted to HESIS pursuant to a request shall be considered "confidential" and generally exempt from disclosure under the California Public Records Act

(PRA). The bill is supported by several labor and environmental groups, among others; it is opposed by several trade associations representing chemical manufacturers and distributors.

SUMMARY : Requires businesses involved in the manufacture or distribution of chemicals used in places of employment within this state to provide the Hazard Evaluation System and Information Service (HESIS or "repository") with the names and addresses of their customers, and other information about their shipments within the state, upon request by the repository. Specifically, this bill :

- 1) Requires, upon written request of the repository (or HESIS), that for every product destined for a place of employment within this state, chemical manufacturers, formulators, suppliers, distributors, importers, and their agents to provide to the repository the names and addresses of their customers who have purchased certain chemicals (or products containing those chemicals) and other information, including the quantity and dates of shipments, and the proportion of a specified chemical within a mixture containing the specified chemical. Specifies that this requirement shall not apply to a retail seller if the sale of the chemical or mixture is sold to the general public. Provides that the DPH shall be entitled to reimbursement of attorney's fees and costs incurred in seeking an injunction to enforce these provisions.
- 2) Specifies that, on or after January 1, 2015, the information requested shall include current and past customers for not more than a one-year period prior to the date the request is received, and requires that the information be provided within a reasonable time period, as determined by the State Department of Public Health, not to exceed 30 calendar days from the date of the request.

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- 3) Provides that the names and addresses of the customers provided to the repository shall be considered confidential and exempt from public disclosure under the California Public Records Act. However, the Department of Public Health may disclose those names and addresses to agencies responsible for carrying out the provisions of the California Occupational Safety & Health Act.

EXISTING LAW :

- 1) 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. (Labor Code Section 6361(a) (1).)
- 2) 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. 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. (Labor Code Section 6361 (a)

(2)-(3).)

- 3) Ensures the transmission of necessary information to employees regarding the properties and potential hazards of hazardous substances in the workplace. (Labor Code Section 6321 (b).)
- 4) Requires the Department of Industrial Relations (DIR), by interagency agreement with the Department of Public Health (DPH), to establish a repository of current data on toxic materials and harmful physical agents in use or potentially in use in workplaces. (Labor Code Section 147.2 (a).)
- 5) Requires the DPH to maintain a program, known as the Hazard Evaluation System and Information Service (HESIS), on occupational health and occupational disease prevention. (Health & Safety Code Section 105175.)
- 6) Requires HESIS 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, and to collect and evaluate toxicological and

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epidemiological data and other pertinent information, as specified. (Labor Code Section 147.2 (b).)

- 7) Recognizes the authority of HESIS, on behalf of DPH, to issue hazard alerts and fact sheets to the public. (ICN Pharmaceuticals v. California (1992) 3 Cal. App. 4th 1131.)
- 8) Governs, under the California Public Records Act, the disclosure of information collected and maintained by public agencies. Provides, generally, that all public records are accessible to the public upon request, unless the record is subject to a specific statutory exemption. (Government Code Sections 6250 et seq.)

COMMENTS : According to the author's office, in the absence of a strong federal policy on the use of chemicals in the workplace, California has confronted a number of difficulties when responding to the release of chemical hazards in recent years. Many existing remedies, the author claims, are provided only after damaging effects to workers' health have become pervasive.

This bill seeks to address this problem by giving the Hazardous Evaluation System and Information Service (HESIS) - a state repository of current data on toxic materials - the tools that it needs to effectively implement its existing legislative mandate to provide early and practical information to employers, employees, and other government agencies about hazardous materials in California workplaces.

Background : The U.S. Occupational Safety and Health Administration (OSHA) was created in 1970 to assure safe and healthy working conditions for working men and women by setting and enforcing standards and providing training, outreach, and education about workplace safety. In 1973, the California Legislature followed suit by enacting the California Occupational Safety and Health Act (Cal OSHA). As part of this larger purpose, the Legislature later required the Department of Industrial Relations (DIR) and the Department of Public Health (DPH) to jointly establish and maintain a "repository" to

collect and maintain data on toxic materials and harmful physical agents used in places of employment in California. This "repository" currently exists as the Hazard Evaluation System and Information Service (HESIS) and is administered by DPH.

In addition to acting as a clearinghouse for current data on

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toxic chemicals and other hazardous materials in the workplace, HESIS is also mandated by statute to perform a number of other tasks, including providing "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 agents or harmful physical agents." (Labor Code Section 147.2 (b)(1).) Currently, HESIS fulfills this mandate by publishing fact sheets, based on the data it has collected, and by posting information on its website identifying dangers and suggesting less harmful alternatives. (See <http://www.cdph.ca.gov/programs/hesis/Pages/default.aspx> .)

This bill, according to the author, will give HESIS an important tool in fulfilling its mandates to collect information about the use of harmful chemicals in California workplaces, provide employers and employees with practical information about possible hazards and ways to avoid them, and, when necessary, to issue "early warnings" to employers and employees if it learns of workplace dangers. Specifically, this bill will require chemical manufacturers, formulators, suppliers, distributors, importers, and their agents to provide HESIS, upon request, with the following: (1) the names and addresses of their customers who have purchased certain chemicals or commercial products containing those chemicals; (2) information related to shipments to customers, including the quantity and dates of shipments; and (3) the proportion of a specified chemical contained with a mixture containing the specified chemical. The bill would apparently only apply to employers who purchase bulk amounts of chemicals and chemical products for use in the workplace. The bill expressly states that it would not apply to retailers if the chemical or product is one that is sold to the general public. The bill specifies that, as of January 1, 2015, the requests shall only include information on past and current customers for the one-year period prior to the date the request is received. The party receiving the request would be required to respond "within a reasonable time frame" as determined by the DPH, but not to exceed 30 days from the date the request is received.

Finally, the bill provides that the names and addresses of customers submitted to HESIS pursuant to a request shall be considered "confidential" and exempt from public disclosure under the California Public Records Act (PRA). However, HESIS and DPH would be permitted to disclose those customer names and addresses to other specified agencies, officials, or employees

who are responsible for carrying out the policies of Cal OSHA. Because the bill only expressly exempts names and addresses, all other information obtained by HESIS through a request would be subject to PRA. This other information would include the quantity and dates of shipments and the proportion of any specified chemical in mixed product.

SUGGESTED OPPOSITION AMENDMENTS. Several business groups and trade associations (mostly representing manufacturers and distributors of chemicals and chemical-based products) oppose this bill unless it is amended. Their arguments are more fully elaborated below, but they have communicated to the Committee that they would consider removing their opposition if a number of their suggested amendments were taken. Specifically, the opponents' suggestions appear to revolve around three major issues, which are treated in turn below.

Create a Triggering Mechanism . Opponents contend that the bill in print would permit HESIS to request customer names and addresses and other information at any time and for any reason. Opponents suggest that HESIS should be permitted to make these requests only when there is some reasonable belief that a hazard exists. For example, opponents suggest that before making a request, HESIS should be required to make some determination based on "the best available scientific evidence" that a substance in use poses an "emerging and substantial threat" to workplace safety.

Cooperate with Industry and Work within Existing Hazard Communication Structures. When some identifiable threat triggers an action by HESIS, opponents recommend that before requesting information and sending communications to employers and employees, HESIS should first cooperate with industry and attempt to provide notice through existing U.S. and California OSHA procedures. Opponents believe that the manufacturer or distributor should be given the first opportunity to distribute information to its customers and their employees. Only if a manufacturer or distributor fails to comply with an order to send a communication would HESIS be permitted to contact customers directly.

Impose More Restrictions on the Use of Information Collected: Finally, opponents would place more restrictions on what and how information can be used. For example, opponents would prohibit HESIS from distributing directly to customers any information on

alternative chemicals or products. Opponents appear to have no objection to the existing HESIS practice of posting information about safer alternatives on its website or in its published fact sheets, but they object to HESIS using customer lists provided by the manufacturers and distributors to send this information directly to customers. In addition, opponents have informed the Committee that they would prefer exempting all submitted information from the PRA (not just names and addresses) or requiring HESIS to destroy submitted information within one year.

The Author's Office Has Communicated To The Committee That It Is

Willing To Consider Some Of These Issues: While the author has stated his willingness to consider some of the opponents' proposed amendments, it seems unlikely that the author would, or should, consider imposing a triggering mechanism on HESIS requests. Opponents claim that "theoretically" HESIS could request "thousands" of businesses to provide information about "thousands" of chemicals, resulting in an "enormous cascade of information and data that could easily overwhelm DIR." However this concern appears very unlikely in practice since it seems unlikely that HESIS, DPH, or DIR would knowingly elect to overwhelm themselves with such data. Moreover, it should be noted that having this information will permit HESIS to carry out its mandate of providing employers and employees with information "of practical use." That is, HESIS is not only required to warn employers and employees about imminent threats, but to provide "practical" information presumably on an on-going basis. Furthermore, in the event of a true emergency, it would seem helpful for HESIS to have ready access to the names and addresses of users, rather than having to make a request and wait for the manufacturer or distributor to respond.

Opponents appear to raise more persuasive points, however, about working through the existing hazard notification channels, or at the very least clarifying the relationship between this provision in this bill and the existing structures. However, these issues shall best be addressed by the Assembly Environmental Safety and Toxic Materials Committee, which has more expertise in this area and will hear this bill next should it move out of this Committee.

Exemptions from PRA : Finally, as to the opponents' desire to keep more rather than less information confidential, and thus exempt more information from the PRA, the Committee may, based

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on its long history supporting transparency under the PRA, instead be inclined to move in the opposite direction. This bill, as noted above, would only exempt the names and addresses of customers from the PRA; members of the public could still obtain access to the other important information about the quantity of use in California workplaces, and the proportions of specified chemicals in specified workplace products. Opponents apparently prefer that all information submitted be exempt from PRA, and they even ask that information collected be made forever inaccessible by destroying it after one year.

However, the Committee may wish to consider whether exempting even the names and addresses from the PRA is a wise policy. After all, the names and addresses of customers, by definition, will be the names and addresses of employers. Therefore, they will most likely be business names and business addresses, not personal names or residential addresses. One could argue that the public potentially has a compelling interest in knowing the kinds of chemicals that particular employers are using in their workplaces. Indeed, rather than recommending that the author amend the bill to make more of the information exempt from public access, the Committee may wish to explore with the author his willingness to consider shielding from the PRA only personal names and residential addresses, while instead amending the measure to allow business names and addresses to be accessible under the PRA. This could be easily achieved as follows: on page 5 line 22 before "names" insert personal and before

"addresses" insert residential. Due to time constraints, such an adopted amendment would technically be made to the measure when it is heard in the next committee.

ARGUMENTS IN SUPPORT : According to the author: "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."

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The American Sustainable Business Council (ASBC) supports this bill because it is concerned that current law "gives HESIS a mandate it cannot fulfill - to provide information of practical use to our members, and other California employers, employees and others about toxic workplace hazards. Our members want HESIS to be able to find out where toxics are used in California, so it can provide the early warnings we need as responsible employers. We contend that there is a strong business case for this bill. Today's business leaders are concerned about the health and business impacts that can arise if the products they use or sell contain toxic chemicals, as well as the toxic chemical exposures that may occur to their employees and others as a result of their supply chains. Dealing with hazardous chemicals is costly to businesses on many fronts. That's why leading companies are highly motivated to identify and use safer alternatives to toxic chemicals. Transparency is the first step in this process." ASBC contends that SB 193 will give HESIS "the ability to request information from manufacturers, suppliers, etc., as needed, to fulfill [its] existing mandate to provide reliable information of practical use to employers, employees, etc., about possible hazards to employees from exposure to toxic materials or harmful physical agents." Finally, ASBC believes that this bill will "contribute toward clarity in the workplace and marketplace, and build trust amongst the public as well as between businesses and their employees; all of which will be good for businesses' financial bottom line. Workers are often exposed to toxics whose health effects are not all known, making HESIS's ability to act quickly and efficiently vital to protect workers' health and safety and prevent disruptions in the supply chains, again providing benefits to business."

ARGUMENTS IN OPPOSITION UNLESS AMENDED : Several associations representing manufacturers and distributors of chemicals, solvents, and other chemical-based industrial products oppose this bill. In a joint coalition letter, the opponents argue that SB 193 will grant DPH "open-ended authority. . . .to require a chemical manufacturer, supplier, distributor, importer or formulator to turn over private and highly coveted customer lists and specific chemical mixture information to the State without any upfront justification or clear explanation of why the information is needed and how it will be used."

Opponents raise several specific concerns about the bill, as noted earlier. But opponents also question the overall need for

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bill, pointing out that California employers are already required "to comply with a variety of state and federal laws to protect employees who come into contact with chemicals in the workplace." Moreover, opponents claim, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) recently issued a final rule relating to its "hazard communication" standard, which according to opponents is "aimed at improving the quality and consistency of information provided to employers and employees regarding chemical hazards in the workplace and associated protective measures. This new standard also requires manufacturers and importers to evaluate the downstream uses of their products, and disseminate the potential hazards to their users." Opponents claim that the California Occupational Safety and Health Administration (Cal OSHA) is currently in the process of "harmonizing its hazard communication program to communicate potential hazards in the workplace in a manner similar to these federal regulations." Opponents argue that rather than permit HESIS to request customer information at will and directly contact customers, it should first work through existing channels and make reasonable attempts to consult with manufacturers, in order to allow them to the first opportunity to distribute information to their customers.

In addition, opponents argue that "customer information is often of great competitive significance and must be held as highly confidential." Opponents express concern that, while the bill exempts names and addresses from the PRA, it apparently leaves other information open to public inspection and does not impose any limit on how state agencies - who will have access to all information, including names and addresses - will use or protect that information.

REGISTERED SUPPORT / OPPOSITION :

Support

American Sustainable Business Council
 Breast Cancer Fund
 California Conference of Machinists
 California Conference of the Amalgamated Transit Union
 California Health Nail Salon Collaborative
 California Labor Federation
 California Nurses Association
 California Rural Legal Assistance Foundation

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California State Association of Occupational Health Nurses

California Teamsters Public Affairs Council
Californians for a Healthy and Green Economy
Central Coast School Food Alliance
Clean Water Action California
Consumer Attorneys of California
Engineers & Scientists of California, IFPTE Local 20
International Longshore & Warehouse Union
Mujeres Unidas y Activas
National Lawyers Guild Labor and Employment Committee
Occupational Health and Safety Section of the American Public Health Association
Physicians for Social Responsibility
Professional and Technical Engineers, IFPTE Local 21
Silicon Valley Toxics Coalition
United Food and Commercial Workers Western States Council
UNITE-HERE, AFL-CIO
Utility Workers Union of America, AFL-CIO
Western Occupational & Environmental Medical Association
Worksafe

Opposition (Unless Amended):

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

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