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WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1985



ENROLLED

Committee Substitute for
SENATE BILL NO. 338

(By Mr. *Boethius* & *Mr. Tomlovich*, *President*)



PASSED *April 11,* 1985

In Effect *ninety days from* Passage



ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 338

(MR. BOETTNER AND MR. TONKOVICH, MR. PRESIDENT, *original sponsors*)

(Originating in the Committee on the Judiciary.)

[Passed April 11, 1985; in effect ninety days from passage.]

AN ACT to amend chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article thirty-one, relating to creating the "Community Right to Know Act"; providing short title; providing legislative findings and declarations; providing definitions; stating duties and responsibilities of the director; procedure for residents to request information on hazardous substances; stating information to be provided by employers; providing for notice of violation; civil penalties and injunctions; providing for the protection of proprietary information; criminal penalties for disclosure; providing for expiration of act upon passage of federal legislation; severability.

Be it enacted by the Legislature of West Virginia:

That chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article thirty-one, to read as follows:

ARTICLE 31. COMMUNITY RIGHT TO KNOW.

§16-31-1. Short title.

1 This article shall be known and may be cited as the
2 "Community Right to Know Act."

§16-31-2. Legislative findings and declarations.

1 The Legislature finds that the health and safety of
2 persons living in this state may be improved by providing
3 access to information regarding hazardous substances to
4 which they may be exposed in their daily lives; that
5 individuals have a basic right to the information provided
6 under this article, including the risks presented by
7 hazardous substances, thereby allowing them to make
8 reasoned decisions and to take informed actions with
9 regard to their living conditions; that the manufacturing
10 industry plays a significant role in the economy of this state
11 and the lives of its citizens and that the creation, use and
12 storage of hazardous substances, given the limits of current
13 technology, is inherent in the operations of this industry;
14 and that local fire officials require information about
15 hazardous substances stored in their localities in order to
16 adequately plan for, and respond to, emergencies.

17 The Legislature therefore declares that it is the intent and
18 purpose of this article to establish a program for the
19 disclosure of information about hazardous substances in
20 and near the community, and to provide a procedure
21 whereby residents of this state may obtain access to such
22 information.

§16-31-3. Definitions.

- 1 (a) "Compressed gas" means:
2 (1) A gas or mixture of gases having, in a container, an
3 absolute pressure exceeding 40 psi at 70°F (21.1°C); or
4 (2) A gas or mixture of gases having, in a container, an
5 absolute pressure exceeding 104 psi at 130°F (54.4°C)
6 regardless of the pressure at 70°F (21.1°C); or
7 (3) A liquid having a vapor pressure exceeding 40 psi at
8 100°F (37.8°C) as determined by ASTM D-323-72.
9 (b) "Director" means the director of the state
10 department of health as described in article one of this
11 chapter.

12 (c) "Employer" means a person engaged in a business in
13 this state having a standard industrial classification, as
14 designated by the standard industrial classification manual
15 prepared by the federal office of management and budget,
16 within major group members twenty through thirty-nine
17 inclusive.

18 (d) "Facility" means the building, structure, equipment
19 and contiguous area used for the conduct of business.

20 (e) "Flammable" means a chemical that falls into one of
21 the following categories:

22 (1) "Aerosol, flammable" means an aerosol that, when
23 tested by the method described in 16 Code of Federal
24 Regulations, Section 1500.45, yields a flame projection
25 exceeding eighteen inches at full valve opening, or a flash-
26 back (a flame extending back to the valve) at any degree of
27 valve opening;

28 (2) "Gas, flammable" means:

29 (i) A gas that, at ambient temperature and pressure,
30 forms a flammable mixture with air at a concentration of
31 thirteen (13) percent by volume or less; or

32 (ii) A gas that, at ambient temperature and pressure,
33 forms a range of flammable mixtures with air wider than
34 twelve (12) percent by volume, regardless of the lower limit;

35 (3) "Liquid, flammable" means any liquid having a
36 flash point below 100°F (37.8°C), except any mixture having
37 components with flash points of 100°F (37.8°C) or higher,
38 the total of which make up ninety-nine percent or more of
39 the total volume of the mixture; and

40 (4) "Solid, flammable" means a solid, other than a
41 blasting agent or explosive as defined in 29 Code of Federal
42 Regulations, Section 1910.109(a), that is liable to cause fire
43 through friction, absorption of moisture, spontaneous
44 chemical change, or retained heat from manufacturing or
45 processing, or which can be ignited readily and when
46 ignited burns so vigorously and persistently as to create a
47 serious hazard. A chemical shall be considered to be a
48 flammable solid if, when tested by the method described in
49 16 Code of Federal Regulations, Section 1500.44, it ignites
50 and burns with a self-sustained flame at a rate greater than
51 one tenth of an inch per second along its major axis.

52 (f) "Flash point" means the minimum temperature at

53 which a liquid gives off a vapor in sufficient concentration
54 to ignite when tested as follows:

55 (1) Tagliabus Closed Tester (See American National
56 Standard Method of Test for Flash Point by Tag Closed
57 Tester, Z11.24-1979 (ASTM D 56-79)) for liquids with a
58 viscosity of less than forty-five Saybolt Universal Seconds
59 (SUS) at 100°F (37.8°C), that do not contain suspended
60 solids and do not have a tendency to form a surface film
61 under test; or

62 (2) Pensky-Martens Closed Tester (See American
63 National Standard Method of Test for Flash Point by
64 Pensky-Martens Closed Tester, Z11.7-1979 (ASTM
65 D93-79)) for liquids with a viscosity equal to or greater than
66 forty-five SUS at 100°F (37.8°C), or that contain suspended
67 solids, or that have a tendency to form a surface film under
68 test; or

69 (3) Setaflash Closed Tester (See American National
70 Standard Method of Test for Flash Point by Setaflash
71 Closed Tester (ASTM D 3278-78)): *Provided*, That organic
72 peroxides, which undergo autoaccelerating thermal
73 decomposition, are excluded from any of the flash point
74 determination methods specified above.

75 (g) "Hazardous substance" means any element,
76 chemical compound or mixture of elements and/or
77 compounds which is a physical hazard as defined in this
78 section or a health hazard as defined or listed in (1) the
79 Federal Occupational Safety and Health Administration in
80 29 Code of Federal Regulations Part 1910.1000 through
81 1910.1045, Subpart Z, as in effect January 1, 1985; (2) the
82 American Conference of Governmental Industrial
83 Hygienists (ACGIH) "Threshold Limit Values for Chemical
84 Substances and Physical Agents in the Work
85 Environment", as in effect January 1, 1985; and (3) the
86 National Toxicology Program "Annual Report on
87 Carcinogens" as in effect January 1, 1985.

88 (h) "Hazardous substances fact sheet" means any
89 document containing the information described in section
90 five, subsection (a)(1) through subsection (a)(8) of this
91 article.

92 (i) "Organic peroxide" means an organic compound
93 that contains the bivalent -O-O-structure and which may be
94 considered to be a structural derivative of hydrogen

95 peroxide where one or both of the hydrogen atoms has been
96 replaced by an organic radical.

97 (j) "Oxidizer" means a chemical other than a blasting
98 agent or explosive as defined in 29 Code of Federal
99 Regulations Part 1910.109(a), that initiates or promotes
100 combustion in other materials, thereby causing fire either
101 by itself or through the release of oxygen or other gases.

102 (k) "Person" means an individual, trust, firm, joint
103 stock company, public, private or government corporation,
104 partnership, association, state or federal agency, the United
105 States government, the state of West Virginia or any other
106 state, municipality, county commission or any other
107 political subdivision of a state or any interstate body.

108 (l) "Physical hazard" means a chemical for which there
109 is scientifically valid evidence that it is a combustible
110 liquid, a compressed gas, explosive, flammable, an organic
111 peroxide, an oxidizer, pyrophoric, unstable (reactive) or
112 water reactive.

113 (m) "Proprietary information" means any formula,
114 pattern, device, or compilation of information which is used
115 in an employer's business, and which gives said employer an
116 opportunity to obtain an advantage over competitors who
117 do not know or use it.

118 (n) "Pyrophoric" means a chemical that will ignite
119 spontaneously in air at a temperature of 130°F (54.4°C) or
120 below.

121 (o) "Storage" or "to store" means to hold a hazardous
122 substance for a temporary period, at the end of which the
123 hazardous substance is used on site, transported off site, or
124 treated, stored or disposed of elsewhere.

125 (p) "Unstable (reactive)" means a chemical which in the
126 pure state, or as produced or transported, will vigorously
127 polymerize, decompose, condense, or will become self-
128 reactive under conditions of shocks, pressure or
129 temperature.

130 (q) "Water-reactive" means a chemical that reacts with
131 water to release a gas that is either flammable or presents a
132 health hazard.

**§16-31-4. Duties and responsibilities of the director; procedure
for residents to request information on hazardous
substances.**

1 (a) Within thirty days of the passage of this article, the

2 director shall develop a list of hazardous substances as
3 defined in section three, subsection (g) of this article. The
4 director shall provide this list and the definition of a
5 physical hazard to any employer who may request it.

6 (b) The director shall, by the first day of June, one
7 thousand nine hundred eighty-seven, and every two years
8 thereafter, review the most recent editions of the
9 publications referenced in section three, subsection (g) of
10 this article to determine whether there have been any
11 additions to or deletions of hazardous substances listed in
12 those publications. Where such additions or deletions have
13 been made, and unless the director is presented with clear
14 and compelling reasons to the contrary, the list of
15 hazardous substances covered by section three, subsection
16 (g) of this article shall be revised to reflect the changes made
17 in the referenced publications. Such revisions shall be made
18 in accordance with the administrative procedures act,
19 chapter twenty-nine-a of this code. The director shall make
20 available such revised list and the definition of a physical
21 hazard to any employer who may request it.

22 (c) Any resident of this state may request from the
23 director a copy of any hazardous substance fact sheet and
24 other information submitted by an employer for any
25 facility. The director, subject to the provisions of section six
26 of this article, shall transmit the requested information
27 within ten working days. The director may recover the
28 actual cost of copying the requested information from the
29 person making the request.

§16-31-5. Information to be provided by employers.

1 (a) Any employer who normally stores any hazardous
2 substance in quantities greater than fifty-five gallons or
3 five hundred pounds shall provide to the director, the
4 county sheriff of the county, and to the fire chief of the local
5 fire department most proximate to the facility at which
6 such substance is stored within four months of the effective
7 date of this article and once every two years thereafter
8 during the month of November, the following information:

9 (1) The chemical name or common name used on the
10 material safety data sheet and/or container label;

11 (2) Physical and major chemical characteristics of the
12 hazardous substance (such as vapor pressure, flash point,
13 solubility);

14 (3) The physical hazards of the hazardous chemical,
15 including the potential for fire, explosion and reactivity;

16 (4) The health hazards of a hazardous substance
17 including signs and symptoms of exposure, and any medical
18 conditions which are generally recognized as being
19 activated by exposure to such substance;

20 (5) The primary route(s) of entry (inhalation, physical
21 contact);

22 (6) Any generally applicable precautions for safe
23 handling and use which are known to the employer;

24 (7) Emergency and first-aid procedures and the name
25 and address of the manufacturer of the hazardous
26 substance, if other than the employer, if said manufacturer
27 can provide additional information on the hazardous
28 substance and appropriate emergency procedures, if
29 necessary;

30 (8) Whether the substance is listed in the National
31 Toxicology Program "Annual Report of Carcinogens",
32 referenced in section three, subsection (g) of this article;

33 (9) An average quantity of each hazardous substance on
34 inventory at the facility over the last year to be reported by
35 indicating the applicable range from the following: Five
36 hundred pounds to four thousand nine hundred ninety-nine
37 pounds, five thousand pounds to forty-nine thousand nine
38 hundred ninety-nine pounds, fifty thousand pounds to four
39 hundred ninety-nine thousand nine hundred ninety-nine
40 pounds and five hundred thousand pounds and above:
41 *Provided*, That for purposes of this subsection, "average"
42 shall mean the arithmetic mean; and

43 (10) The amount of such substance, if any: (i) reported as
44 having been managed in the most recent annual hazardous
45 waste report filed with the department of natural resources
46 pursuant to article five-e, chapter twenty of this code; (ii)
47 reported as having been emitted in the most recent air
48 emissions inventory filed with the air pollution control
49 commission pursuant to article twenty, chapter sixteen of
50 this code; and (iii) reported as having been discharged in the
51 most recent discharge monitoring report filed with the
52 department of natural resources pursuant to article five-a,
53 chapter twenty of this code: *Provided*, That the information
54 required in subsection (a)(10) is required to be reported to
55 the director only: *Provided, however*, That if a discharge

56 monitoring report is used to provide the information, an
57 employer shall specify the inclusive time period of the
58 report.

59 (b) Where an employer stores a hazardous substance
60 that is manufactured by some person other than the
61 employer and where the information required in subsection
62 (a)(1) through subsection (a)(8) of this section has not been
63 made available by the manufacturer, the employer shall
64 certify to the director that this information is not available
65 and shall thereafter have an additional sixty days within
66 which to provide such information to the director.

§16-31-6. Notice of violation; civil penalties.

1 (a) An employer who fails to provide the information to
2 the director under subsection (a) of section five of this
3 article within the time period provided shall be deemed in
4 violation of this article. Employers not complying within
5 fourteen days following written notification from the
6 director of such violation shall be subject to civil penalties
7 of not more than two thousand five hundred dollars per
8 violation.

9 (b) An employer who fails to provide to the fire chief
10 information as required in subsection (a) of section five of
11 this article within the time period provided shall be deemed
12 in violation of this article. Employers not complying within
13 fourteen days following written notification from the
14 director of such violation shall be subject to civil penalties
15 not to exceed five thousand dollars per violation.

16 (c) Any person who willfully, knowingly and
17 deliberately makes any false material statement or
18 representation in any document submitted pursuant to
19 section five of this article shall be subject to a civil penalty
20 of not less than one thousand dollars nor more than five
21 thousand dollars per violation.

22 (d) When the director believes that a violation of the
23 provisions of this article has occurred he may request the
24 attorney general to file an action for civil penalties, or
25 injunctive relief as may be necessary to enforce the
26 provisions of this article. Such action may be brought in the
27 circuit court of Kanawha County or the county where the
28 employer's facility or a major portion thereof is located.

§16-31-7. Protection of proprietary information; criminal penalties for disclosure.

1 (a) In submitting the information required under
2 section five of this article, an employer may withhold the
3 specific chemical identity, including the quantity, the
4 chemical name and other specific identification of a
5 hazardous substance, on the grounds that such information
6 is proprietary information as long as:

7 (1) Other information is submitted pursuant to the
8 request which describes the properties and effects of the
9 hazardous substance; and

10 (2) The employer specifically indicates the type of
11 information that is being withheld as proprietary
12 information.

13 (b) The director may request any or all of the data
14 substantiating the proprietary information claim to
15 determine whether a claim made pursuant to this section is
16 valid. The director shall protect from disclosure any or all
17 information coming into his or her possession when such
18 information is marked by the employer as confidential and
19 shall return all information so marked to the employer at
20 the conclusion of his or her determination.

21 (c) The employer shall have thirty days after
22 notification by the director that a proprietary information
23 claim is not valid to request an administrative hearing on
24 the determination. Any such hearing shall be held in a
25 manner consistent with that provided for hearings in
26 contested cases under article five, chapter twenty-nine-a of
27 this code, with the right to appeal such ruling to the circuit
28 court of Kanawha County. No information relating to the
29 proprietary information claim shall be communicated
30 outside the department of health while the director's ruling
31 is being contested.

32 (d) An employer shall provide to a physician any
33 information for which a proprietary information claim is
34 pending or has been approved pursuant to this section when
35 such information is needed for medical diagnosis or
36 treatment. The employer may require that the physician
37 sign an agreement protecting the confidentiality of
38 information disclosed pursuant to this subsection as soon as
39 circumstances permit.

40 (e) The subject of any proprietary information claim
41 pending or approved shall be treated as confidential
42 information.

43 (f) Any person who knowingly and willingly divulges or
44 discloses any information entitled to protection under this
45 section is guilty of a misdemeanor, and, upon conviction
46 thereof, shall be fined not more than five thousand dollars,
47 or imprisoned for not more than six months, or both fined
48 and imprisoned.

§16-31-8. Expiration of act upon passage of federal legislation.

1 The Legislature recognizes that the United States
2 Congress is considering the adoption of legislation relating
3 to the dissemination of information to the public regarding
4 hazardous substances stored in or near their communities.
5 It is the intention of the Legislature that upon the passage of
6 federal legislation which would assure access by citizens of
7 this state to information substantially similar to that which
8 they could obtain under this article, this article shall be
9 subject to expiration, and therefore have no further effect.
10 It shall be the responsibility of the director, upon the
11 passage of such legislation by the United States Congress,
12 to certify to the legislative rule-making review committee
13 that such federal action has occurred. Such certification
14 shall be subject to all of the procedures set out in chapter
15 twenty-nine-a of this code, relating to the promulgation of a
16 legislative rule.

§16-31-9. Severability.

1 Except where this act is declared to have no effect and be
2 void pursuant to section eight of this article, if any section,
3 part or provision of this article or the application thereof to
4 any person or circumstance is held unconstitutional or
5 invalid, such unconstitutionality or invalidity shall not
6 affect any other section, part or provision of this article or
7 its application, and to this end the provisions of this article
8 are declared severable.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Narvel Eddins
.....

Chairman Senate Committee

Floyd Fuller
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Todd C. Wells
.....
Clerk of the Senate

Donald L. Dugg
.....
Clerk of the House of Delegates

Dan Tomlin
.....
President of the Senate

Joseph P. Albright
.....
Speaker House of Delegates

The within *approved* this the *1st*
day of *May* 1985.

Archie A. Massey, Jr.
.....
Governor

PRESENTED TO THE

GOVERNOR

Date 4/19/85

Time 7:59 p.m.

RECEIVED

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OFFICE OF WALL VESCHINA
SECRETARY OF STATE