Opinion No. 73-32

March 26, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Larry J. Gordon Director Environmental Improvement Agency P.O. Box 2348 Santa Fe, Ne Mexico 87501

QUESTIONS

QUESTIONS

Whether the New Mexico Occupational Health and Safety Act, Sections 59-14-1 through 59-14-23, N.M.S.A., 1953 Comp. (1972 Interim Supp.), grants the legal authority necessary to permit the State occupational health and safety implementation plan to satisfy the requirements of the Williams-Steiger Occupational Safety and Health Act of 1970, 84 Stat., 1590-1620, in a manner consistent with the constitution and laws of the State of New Mexico.

CONCLUSION

Yes.

OPINION

*{*54}* **ANALYSIS**

Any state desiring to assume responsibility for the development and enforcement of occupational health and safety standards relating to any occupational health and safety issue with respect to which a federal standard has been promulgated must submit a plan for the development and enforcement of such standards to the Secretary of Labor of the United States for his review. A state may be without jurisdiction to enforce such standards prior to the approval of its implementation plan by the Secretary of Labor. In any event, Section 18(c) of the federal Occupational Safety and Health Act of 1970 specifies that:

(c) The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgment --

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful

employment and places of employment as the standards promulgated under section 6 which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce.

*{*55}* (3) provides for a right of entry and inspection of all workplaces subject to the Act which is at least as effective as that provided in section 8, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

As an elaboration of these criteria, the Secretary of Labor has promulgated regulations which in pertinent part set forth "indices of effectiveness" according to which state implementation plans are to be evaluated by the Secretary. 29 C.F.R. §§ 1902.1-1902.23.

DESIGNATION OF STATE AGENCY. The New Mexico Occupational Health and Safety Act, Sections 59-14-1 to 59-14-23, N.M.S.A., 1953 Comp. (1972 Interim Supp.), delegates to the Environmental Improvement Board and the Environmental Improvement Agency the responsibility to administer the act and the state occupational health and safety implementation plan. Section 59-14-7, **supra,** empowers the Environmental Improvement Board to promulgate regulations designed ". . . to prevent or abate detriment to the health and safety of employees . . ." and Section 59-14-4, **supra,** designates the Environmental Improvement Agency as ". . . the state occupational health and safety agency for all purposes under federal legislation relating to occupational health and safety and [it provides that the agency] may take all action necessary to secure to this state the benefits of that legislation." The duties and powers of the agency are specified in Section 59-14-8, **supra:**

59-14-8. DUTIES AND POWERS OF THE AGENCY. -- The agency shall:

A. prevent or abate detriment to the health and safety of employees arising out of and in the course of employment;

B. develop an effective and comprehensive program for the prevention or abatement of detriment to the health and safety of employees within the state;

C. advise and recommend an effective and comprehensive program of occupational health and safety applicable to all employees of public agencies of the state and its political subdivisions;

D. cause to be instituted legal proceedings to compel compliance with the Occupational Health and Safety Act or any regulation of the board;

E. accept, receive and administer grants or other funds or gifts from public or private agencies, including the federal government;

F. take reasonable steps to inform employees of their protections and obligations under the occupational Health and Safety Act, including the provisions of applicable regulations; and

G. make such reports to the secretary of the United States department of labor in such form and containing such information as the secretary may from time to time require.

Clearly, the New Mexico Occupational Health and Safety Act permits the state implementation plan to satisfy the requirement of Section 18(c)(1) of the federal Occupational Safety and Health Act of 1970, and nothing in the state act prohibits the state plan from containing ". . . assurances that any other responsibilities of the designated agency shall *{*56}* not detract significantly from the resources and priorities assigned to the administration of the plan." 29 C.F.R. § 1902.3(b)(2).

STANDARDS. Section 18(c)(2) of the federal Occupational Safety and Health Act of 1970 specifies that, as a condition to approval, a state plan must provide for the development and enforcement of health and safety standards which ". . . are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated . . ." pursuant to the federal act. Nothing in the state act inhibits the Environmental Improvement Board from adopting regulations which set forth standards that are "as effective" in providing for a safe and healthful work environment as the standards adopted by the Secretary of Labor pursuant to the federal act. Indeed, Section 59-14-7, **supra,** expressly provides that the regulations adopted by the Environmental Improvement Board shall be consistent with federal law, and Section 59-14-12, **supra,** directs that the Board, in its discretion, may adopt regulations specifying standards for the promotion and protection of a safe and healthful work environment which are identical to the standards promulgated by the Secretary of Labor pursuant to the federal act.

Furthermore, Section 59-14-11(A), **supra,** provides a procedure ". . . which allows for the consideration of pertinent factual information and affords interested persons . . . and the public an opportunity to submit information . . ." and to participate in hearings concerning the development or promulgation of new standards or the modification or revocation of existing standards. Notwithstanding these requirements of Section 59-14-11(A), **supra,** the Environmental Improvement Agency is empowered by Section 59-14-11(B), **supra,** to adopt emergency temporary regulations or standards without the necessity of a public hearing if such emergency measures are necessary to protect employees from a grave danger or a new or unforeseen hazard. See 29 C.F.R. §§ **1902.4(b)(2)(iii) and (v).**

Finally, Section 59-14-15, **supra,** provides authority for the granting of a variance from state standards which substantially corresponds to the pertinent provisions of the federal act, and the provisions of that section and those of Section 59-14-9, **supra,** allow for the consideration of the views of interested parties including affected employees with respect to a variance application. See 29 C.F.R. § 1902.4(b)(2)(iv). Further, Section 59-14-6, **supra,** requires the agency to make provision for the education and training of employees with respect to hazards in the work place including ". . . recognition, avoidance and prevention of unsafe working conditions . . . and . . . effective means of preventing occupational injuries and illnesses." See 29 C.F.R. §§ 1902.4(b)(2)(vi) and (vii).

ENFORCEMENT. Section 18(c)(2) of the federal Occupational Safety and Health Act of 1970 requires that the state implementation plan provide a system of enforcement of health and safety standards which is or will be at least as effective in providing safe and healthful places of employment as the system of enforcement specified in the federal act. Neither the federal act nor the regulations promulgated by the Secretary of Labor require, however, that the system of enforcement of state standards be identical to the enforcement procedures specified in the Federal act.

Section 5 of the federal Occupational Safety and Health Act of 1970 imposes a duty on each employer to ". . . furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . ." and it requires that each employer comply with the occupational safety and health standards promulgated pursuant to the federal act. In contrast, the New Mexico Occupational Health and Safety Act requires each employer to ". . furnish and maintain a place of employment that must comply with the health and safety regulations adopted by the [Environmental Improvement] board . . ." The regulations adopted by the Board are required to ". . . provide for the adoption of practices, means, methods, operations, conditions and processes in order to provide safe and healthful employment and places of employment." Section 59-14-5, **supra.** To the extent that the state act does not expressly impose a duty similar to that specified in Section 5 of the federal Occupational Safety and Health Act of 1970, it is clearly within the authority of the Environmental Improvement Board *{*57}* to specify a similar requirement by regulation.

If the Secretary of Labor or his representative determines that an employer has violated a requirement of Section 5 of the federal Occupational Safety and Health Act of 1970 or any standard, rule, order or regulation promulgated pursuant to the act, Section 9 of the federal act requires that a citation describing the nature of the violation and prescribing a reasonable time for the abatement of the violation be issued to the employer. Section 10 of the federal act requires the Secretary to notify the employer of any penalty which the Secretary proposes to assess for the violation. If the employer fails to correct a violation for which a citation has been issued within the remedial action time, the Secretary is required to notify the employer of the failure and the penalty proposed to be assessed by reason of such failure. Pursuant to the federal act, the employer has 15 working days within which to notify the Secretary that he wishes to contest the notification or the proposed assessment of penalty and, in absence of such contest, the Secretary's notification and proposed assessment of penalty shall be deemed a final order not subject to review.

If the employer notifies the Secretary that he intends to contest any such citation or notification, the Secretary shall so advise the Occupational Safety and Health Review Commission which is authorized to review the Secretary's citation, notification or proposed penalty. Upon review the Commission may affirm, modify or vacate the Secretary's action or direct other appropriate relief. Pursuant to Section 11 of the federal act, any person adversely affected or aggrieved by an order of the Commission may seek judicial review of such order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred, or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit. If the employer elects to contest the citation issued by the Secretary, the period permitted for the correction of the alleged violation shall not begin to run until the review procedure has been exhausted.

Section 17(a) of the federal Occupational Safety and Health Act of 1970 specifies a civil penalty of not more than $ 10,000 which may be assessed by the Secretary for each willful or repeated violation of the requirements of Section 5 of the act or any standard, rule, order or regulation promulgated pursuant to the act. Section 17(c) of the federal act specifies a civil penalty of not more than $ 1,000 which may be assessed by the Secretary for each violation of the requirements of Section 5 of the act or any standard, rule, order or regulation promulgated pursuant to the act which is determined not to be of a serious nature. Section 17(d) of the federal act specifies a civil penalty of not more than $ 1,000 which may be assessed by the Secretary for each day during which a violation continues after the period permitted for its correction has expired.

Section 17(b) of the federal act imposes a mandatory civil penalty of up to $ 1,000 for each violation of Section 5 of the act or any standard, rule, order or regulation promulgated pursuant to the act which is deemed to be of a serious nature, and Section 17(i) of the federal act imposes a mandatory civil penalty of up to $ 1,000 for each violation of any of the posting requirements prescribed in the act.

Finally, Section 17(e) of the federal act imposes a criminal penalty upon any employer who willfully violates any standard, rule, order or regulation prescribed pursuant to the act which causes the death of any employee, and Sections 17(f) and 17(g) likewise imposes criminal penalties upon any person who gives unauthorized advance notice of an inspection to be conducted pursuant to the act or who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to the act.

While the system of enforcement of state occupational health and safety standards specified in the New Mexico Occupational Health and Safety Act varies in some particulars from the procedures specified in the federal Occupational Safety and Health Act of 1970, the state act does not depart from the federal system of enforcement in a manner which would render the state system less effective than the federal system in ensuring a safe and healthful place of employment. Section 59-14-16, **supra,** authorizes the Environmental Improvement Agency to notify any person suspected of violating *{*58}* any provision of the New Mexico Occupational Health and Safety Act or any regulation of the Environmental Improvement Board adopted pursuant to it that a violation is believed to have occurred, and such notice is required to specify a period of time in which the alleged violation is to be remedied. The state act, like its federal companion, requires that notice of the alleged violation also be given to affected employees. Section 59-14-16(B), **supra,** provides for agency review of the alleged violation, including the specified remedial action period, upon the request of the person alleged to be in violation of a state standard. Employees affected by the alleged violation or their representative shall have an opportunity to participate in the agency review proceedings before the Occupational Safety and Health Review Commission pursuant to the federal act. According to the state act, the agency, upon review, shall determine whether a violation has occurred and, if so, it shall specify what remedial action must be taken and the time in which such action shall be completed.

If no such review is requested and if the alleged violation has not been remedied within the specified remedial action period, or if the alleged violator fails to comply with any other order of the Environmental Improvement Agency following review, the agency may enforce its order by seeking an injunction or other appropriate relief from the district court of the county in which the violation occurred. In addition, the district court is empowered to impose a civil penalty not exceeding $ 100 for each violation of the state act or any regulation adopted pursuant to it by the Environmental Improvement Board. Each day a violation continues beyond the specified remedial action period constitutes a separate offense with respect to which a civil penalty may be imposed. Any party aggrieved by a final judgment rendered by the district court pursuant to the New Mexico Occupational Health and Safety Act may appeal to the New Mexico Court of Appeals.

Section 59-14-23, **supra,** imposes criminal penalties upon: (1) any employer or employee who knowingly makes a false statement or fails to disclose a material fact in any document, report or other information required to be provided pursuant to the act; (2) any employer who willfully makes a false entry in or conceals, withholds or destroys any books, records or statements required to be provided pursuant to the act; (3) any

employer who discharges an employee or willfully discriminates against an employee because such employee filed a complaint, testified or otherwise acted to exercise rights under the New Mexico Occupational Health and Safety Act. As is the case under the federal act, an employer who has discharged an employee in violation of Section 59-14-23, **supra,** shall be required to reinstate the employee to his former status in all respects.

In addition to the criminal penalties specified in the New Mexico Occupational Health and Safety Act, Section 12-3-1, N.M.S.A., 1953 Comp. (1971 Supp.) imposes a criminal penalty upon any person, firm or corporation which violates any state health law, or order, rule or regulation of the Environmental Improvement Board, and Section 40A-2-3, N.M.S.A., 1953 Comp. defines as a fourth degree felony any conduct resulting in the death of another person:

B. . . . committed in the commission of an unlawful act not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection.

In the judgment of the Office of the Attorney General these statutes are applicable to violations of the New Mexico Occupational Health and Safety Act.

This review of the federal Occupational Safety and Health Act of 1970 and the New Mexico Occupational Health and Safety Act reveals that both systems of enforcement of occupational health and safety standards provide for notice to be issued to an alleged violator of any such standard, and the notice issued under either statute is required to specify a remedial action period within which the violation is to be corrected. The state act, like its federal companion, requires that notice of an alleged violation also be given to affected employees. Administrative review of the alleged violation and the specified remedial action period may be obtained under either system of enforcement, and each statute likewise provides an opportunity for full participation in such review proceedings on the part of affected employees or their representatives. Upon such review under either *{*59}* system of enforcement, the administrative agency may sustain, modify or nullify the notice of violation, the corrective action to be taken, or the time in which remedial action is to be completed.

There are, however, certain procedural differences between the two systems of enforcement. Pursuant to the federal act, the Secretary of Labor may assess a civil penalty for an alleged violation regardless of the corrective action time granted to the employer to remedy the violation. The employer must contest the allegations of the Secretary within a specified period in order to avoid the immediate imposition of the civil penalties that the Secretary may prescribe. In the event of a contest, however, no sanctions may be imposed pursuant to the federal act until the citation and proposed penalty assessment have been confirmed or modified by the Occupational Safety and Health Review Commission or by a United States Court of Appeals. In the absence of such a contest, the civil penalties proposed by the Secretary may be assessed even

though the violation may be remedied within the corrective action period specified by the Secretary.

In contrast, the New Mexico Occupational Health and Safety Act does not provide for the administrative imposition or review of civil penalties in the event of a violation of the statute or of state occupational health and safety standards. Such civil penalties as well as injunctive relief may, however, be ordered by a state district court upon the failure of an employer to remedy a violation within the prescribed remedial action period. Civil penalties may not be imposed for violation of the state act or the state occupational health and safety standards if the violation is remedied within the specified time.

While the New Mexico Occupational Health and Safety Act does not authorize the imposition of civil penalties on the instance of an alleged violation, without regard to a remedial action period, and thus varies from the federal Occupational Safety and Health Act of 1970 in this particular, the state act is not for this reason rendered ineffectual or "less effective" than the federal system in securing a safe and healthful work environment. As a practical matter, this disparity in the two systems of enforcement may, in certain cases, permit the imposition of monetary civil penalties sooner under the federal system than may be imposed pursuant to the state act. It does not necessarily ensure, however, that the violation will be sooner corrected than may be accomplished pursuant to the state act.

In the event that the employer does not contest the Secretary's citation and penalty assessment under the federal act, the order of the Secretary will become final within 15 days, but the employer must nevertheless be given a reasonable period of time within which to correct the condition giving rise to the violation as is the case under the state act. Thus, in this instance, the state and federal statutes operate in the same way with respect to compelling the correction of the condition giving rise to the violation. The only difference between the two systems of enforcement in this instance is the Secretary's authority under the federal act to impose a monetary civil penalty on the instance of a violation even though an employer may correct the condition causing the violation within the specified remedial action period while, under the state act, the Environmental Improvement Agency may not impose such penalties. This factor lends a slightly more coercive dimension to the federal act, but considering the purpose of the legislation and the operation of the federal statutory procedure as a whole, its importance in achieving the goals of the legislation should not be exaggerated.

Indeed, in the event the employer contests the Secretary of Labor's citation and penalty assessment, the penalty may not be imposed until 60 days after the Occupational Safety and Health Review Commission affirms or modifies the Secretary's order or until a United States Court of Appeals sustains the Commission's decision if the employer should seek judicial review. During this period of review the corrective action time within which the employer must remedy the violation is stayed, and it commences to run only after the review process is completed. In contrast, under the New Mexico Occupational Health and Safety Act, the remedial action time commences to run immediately upon the notification of the employer of a violation. This remedial action period is not stayed

during state administrative review. If the violation is not corrected within the specified remedial action period, the district court may enjoin the maintenance of any unlawful, unsafe or substandard *{*60}* practice, condition or facility giving rise to the violation, and it may assess civil penalties upon the violator.

Thus, in the event an employer contests the Secretary of Labor's citation or penalty assessment pursuant to the federal act, it is possible, although not certain, that civil penalties may be imposed sooner under the state act than may be achieved pursuant to the federal act, and it is virtually certain -- assuming the remedial action period will be approximately the same under either act for the same violation -- that the correction of the condition giving rise to the violation can be sooner compelled under the state act than under the federal act.

The purpose of both the federal Occupational Safety and Health Act of 1970 and the New Mexico Occupational Health and Safety Act is to assure, insofar as possible, that every working man and woman has a safe and healthful work environment. See, for example, Section 2(b) of the federal Occupational Safety and Health Act of 1970. This objective is well served by a procedure which compels the expeditious correction of a condition which threatens the safety of the work environment. Considering the procedural routines of the respective acts, it would appear that the federal system of enforcement is less amenable to compelling expeditious remedial action than is the state system despite the lack of so-called "first instance" penalties in the latter system.

Deterring or discouraging departures from the requirements of the legislation or any standards adopted pursuant to it by the imposition or threatened imposition of penalties for any violation of such requirements is another method by which the objective of the legislation may be served.

A review of the maximum monetary amounts which may be assessed as civil penalties for violation of the federal act or any federal occupational safety and health standard indicates that the federal maximums are generally higher than the maximum amount which may be assessed as a civil penalty for violation of the state act or any state occupational health and safety standard. As previously noted, pursuant to the federal act, a maximum civil penalty of $ 10,000 may be assessed for each willful or repeated violation while a maximum penalty of $ 1,000 may be assessed for each violation which is not of a serious nature or for each day a violation continues following the termination of the remedial action period. A mandatory civil penalty of up to $ 1,000 may be imposed pursuant to the federal act for each violation which is deemed to be of a serious nature or which constitutes a violation of any of the posting requirements prescribed in the act. In contrast, pursuant to the state act, a maximum civil penalty of $ 100 may be imposed for any violation of the state act or state occupational health and safety standards as well as for each day a violation continues beyond the remedial action period. The imposition of civil penalties is not made mandatory by the state act for any particular violation. Nevertheless, any violation of a state occupational health and safety standard may also subject the violator to criminal prosecution and a mandatory penalty upon conviction. Notwithstanding any variance in the two statutes

with respect to the maximum civil penalty which may be imposed for a violation of occupational health and safety standards, the threat of a criminal prosecution for such violation must surely be deemed to be a serious sanction and an effective deterrent.

With respect to criminal penalties, as previously described, the federal Occupational Safety and Health Act of 1970 provides a maximum fine of $ 10,000 or a maximum period of imprisonment of six months or both for a willful violation of any federal occupational safety and health standard which causes the death of any employee or for the intentional insertion of a false statement, representation, or certification in any document filed or required to be maintained pursuant to the federal act. The federal act also provides for a maximum fine of $ 1,000 or a maximum period of imprisonment of six months or both to be imposed upon any person who gives advance notice of any inspection to be conducted pursuant to the act without authority from the Secretary or his designees.

In contrast, the New Mexico Occupational Health and Safety Act does not impose a criminal penalty for the willful violation of a state occupational health and safety standard which causes the death of an employee, but such conduct would appear to constitute a violation of Section 40A-2-3(B), **supra,** for which a mandatory sentence of ". . . not less than one [1] year nor more than five [5] years, or to the payment of a fine of not more *{*61}* than five thousand dollars [$ 5,000], or to both . . ." Likewise, the state act does not specify a criminal sanction to be imposed upon any person who gives unauthorized advance notice of an inspection to be conducted pursuant to the act, but the Environmental Improvement Board may prohibit such conduct by regulation and a violation of any such regulation would subject the violator to both the civil and criminal sanctions which may be imposed pursuant to the laws of this state. Finally, the state act specifies a maximum penalty of $ 500 to be imposed upon any employer or employee who knowingly makes a false statement or representation or fails to disclose a material fact in any document required to be filed or maintained pursuant to the act, and it specifies a like penalty to be imposed upon any employer who willfully makes a false entry in or willfully conceals, withholds or destroys any books, records or statements required to be filed or maintained pursuant to the act.

While in the latter two instances the maximum criminal penalties which may be assessed pursuant to the federal Occupational Safety and Health Act of 1970 may be more severe than those provided in the New Mexico Occupational Health and Safety Act, the threat of prosecution and imposition of criminal penalties under the state act would certainly seem to be adequate to discourage any person from committing the particular transgressions to which these provisions relate. To suggest otherwise would exaggerate the notion that an extreme penalty will preclude any transgression, and it would obscure a primary sanction implicit in this legislation. Regardless of the severity of the penalties that may be imposed for a violation of the requirements of the legislation or any standards adopted pursuant to it, few employers will invite the other uncertainties and hardships that a violation may occasion. As former Secretary of Labor Schultz explained in testimony concerning the federal act:

On the subject of penalties, I think that the employers in the vast majority of cases are going to want to conform to these standards, and that if we find a violation, we are going to have a relatively easy time getting the employer to go ahead and correct it. So that our conception of how this would work is primarily that it would work through a kind of voluntary compliance.

I think in a way the greatest penalty that an employer can have in this field is to find himself in litigation about unsafe practices in his workplace. Particularly in the kind of tight labor markets that we have, to become known as an employer with unsafe practices is to have the reputation of operating an undesirable place to work. And this in many ways is the most severe penalty that is involved. Hearings on S.2193 and S.2788 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 91st Cong., 1st and 2d Sess., pt. 1, at 87-88 (1970).

Accordingly, the availability of injunctive relief to terminate an unlawful, unsafe or substandard practice, condition or facility, and the threat of criminal prosecution as well as the imposition of civil penalties would certainly seem to be adequate to encourage adherence to occupational health and safety measures regardless of the severity of the civil or criminal penalties that may be imposed.

Furthermore, it should be noted that the New Mexico Occupational Health and Safety Act contains an important enforcement mechanism that is lacking in the federal Occupational Safety and Health Act of 1970. Employee responsibility and cooperation would seem to be of immense importance in the success of any occupational health and safety program. Accordingly, Section 59-14-16(E), **supra,** provides that any employee who willfully violates any state occupational health and safety standard may be subject to a civil penalty not exceeding $ 100 for each violation. In contrast, although Section 5(b) of the federal Occupational Safety and Health Act of 1970 imposes a duty upon each employee to comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to the act which are applicable to his own actions and conduct, the federal act does not specify a sanction or penalty which may be imposed upon an employee who may depart from this requirement.

Finally, the New Mexico Occupational Health and Safety Act provides the employee with greater protection against employee reprisals than is offered in the federal Occupational Safety and Health Act of 1970. Under the federal act, if an employee is discharged or otherwise discriminated against because he has filed a *{*62}* complaint or instituted a proceeding or testified in any proceeding related to the act, the employer may be required to reinstate the employee to his former position without loss of pay. In a case arising under the New Mexico Occupational Health and Safety Act, the employer shall be required to reinstate the employee without loss of pay, seniority rights, position, fringe benefits or other considerations to which he would have been entitled, and the employer may be criminally prosecuted and, upon conviction, may be fined up to $ 500.

It is the judgment of the Office of the Attorney General that the system of enforcement of state occupational health and safety standards and the various sanctions that may be

imposed for violation of such standards are "as effective" in achieving the purposes of this legislation as the system of enforcement and sanctions specified in the federal act. Accordingly, in this particular, the state occupational health and safety implementation plan fully satisfies the requirements of Section 18(c)(2) of the federal Occupational Safety and Health Act of 1970.

INSPECTIONS. Section 18(c)(3) of the federal Occupational Safety and Health Act of 1970 requires that a state plan provide for a right of entry and inspection of all work places which is at least as effective as that provided in the federal act including a prohibition on advance notice of such inspections.

Section 8(a) of the federal Occupational Safety and Health Act of 1970 grants to the Secretary of Labor the authority:

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Section 59-14-9, **supra,** grants to the Environmental Improvement Agency the authority:

(1) to enter and inspect any place of employment during working hours; and

(2) to question the employer and employees and to inspect and investigate during regular working hours and at other reasonable times and within reasonable limits and in a reasonable manner, the place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein.

Obviously, the authority granted to the Environmental Improvement Agency with respect to right of entry, inspections and investigations pursuant to the New Mexico Occupational Health and Safety Act is virtually identical to the authority granted to the Secretary of Labor pursuant to the federal act.

The state act, like its federal companion, also provides a procedure for the investigation of employee complaints concerning an alleged violation of a regulation or any hazardous condition and for the informal review of decisions not to take compliance action at the request of the complainant. A representative of the employer and a representative of the employees may accompany the inspector on any inspection of a work premises conducted pursuant to either the federal or the state act. Finally, as is the case in the federal Occupational Safety and Health Act of 1970, Section 59-14-17, **supra,** empowers the Environmental Improvement Board or the Environmental

Improvement Agency to compel the attendance and testimony of witnesses and the production of evidence in connection with an investigation or enforcement proceeding by applying to the district court for an appropriate order.

Unlike the federal Occupational Safety and Health Act of 1970, however, the state act does not include a prohibition on advance notice of inspections. Nevertheless, the Environmental Improvement Board, pursuant to the authority delegated to it in Section 59-14-7, **supra,** may adopt a regulation specifying such a prohibition and thus the state plan may fully satisfy the requirements of Section 18(c)(3) of the federal Occupational Safety and Health Act of 1970.

*{*63}* **ASSURANCES.** Section 18(c)(4) of the federal Occupational Safety and Health Act of 1970 requires a state plan to contain ". . . satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of . . ." state occupational health and safety standards.

On the basis of the provisions of the New Mexico Occupational Health and Safety Act, as previously described, and the necessary supplemental regulations adopted pursuant to it by the Environmental Improvement Board, the state plan may contain "satisfactory assurances" that the Environmental Improvement Board and the Environmental Improvement Agency ". . . have or will have the legal authority . . . necessary for the enforcement of . . ." state occupational health and safety standards. Furthermore, none of the provisions of the New Mexico Occupational Health and Safety Act inhibits the state plan from containing "satisfactory assurances" that the board and the agency ". . . have or will have the . . . qualified personnel necessary for the enforcement of . . ." state occupational health and safety standards.

Section 18(c)(5) of the federal Occupational Safety and Health Act of 1970 requires that the state plan give ". . satisfactory assurances that . . . [New Mexico] will devote adequate funds to the administration and enforcement of . . ." state occupational health and safety standards. The New Mexico Occupational Health and Safety Act does not contain an appropriation or impose a limitation on the amount that may be appropriated and expended for the administration and enforcement of state occupational health and safety standards. Accordingly, if the Environmental Improvement Board and the Environmental Improvement Agency determine that the budget approved by the legislature contains an appropriation which is adequate to sustain the administration and enforcement of state standards, the state plan may contain "satisfactory assurances" that adequate funds will be devoted to the operation of the state occupational health and safety program.

Finally, Section 18(c)(6) of the federal Occupational Safety and Health Act of 1970 requires that the state plan contain "satisfactory assurances" that the state will, to the extent permitted by law, establish and maintain an occupational health and safety program applicable to public employees which is "as effective as" the program applicable to private employees.

In the New Mexico Occupational Health and Safety Act the term "employee" includes any individual, except a domestic employee, who is employed by an employer, and the term "employer" means any person who has one or more employees with the exception of the United States. The term "person" is defined in the state act to include any political subdivision or agency of the State of New Mexico. See Section 59-14-3, **supra.** Thus it would clearly appear that the state occupational health and safety program applicable to private employers and employees is likewise applicable to public employers and employees. Accordingly, the state plan may contain "satisfactory assurances" that the State of New Mexico will, to the extent permitted by its law, establish and maintain an occupational health and safety program applicable to public employees which is "as effective as" the program applicable to private employees..

REPORTS. Section 18(c)(7) of the federal Occupational Safety and Health Act of 1970 specifies that the state plan must require employers in the State of New Mexico to make reports to the Secretary of Labor ". . . in the same manner and to the same extent as if the plan were not in effect . . ." or, in other words, in the same manner and to the same extent required by the federal act. Although the federal Occupational Safety and Health Act of 1970 requires employers to maintain such records regarding activities relating to occupational safety and health as the Secretary may prescribe by regulation and to make such records available to the Secretary upon request, it appears that the only records which must be submitted to the Secretary by the employer on a regular basis are records which detail ". . . work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job." Sections 8(c)(1) and 8(c)(2) of the federal Occupational Safety and Health Act of 1970. Similarly, the New Mexico Occupational Health and Safety Act requires every employer to ". . . keep records and submit *{*64}* reports of occupational injuries and illnesses as prescribed by the [environmental improvement] agency . . ." Section 59-14-18(A), **supra.** In addition, Section 59-14-10, **supra,** requires employers to ". . . keep such records and make such reports to the agency as the [environmental improvement] board, by regulation, may require . . ."

While these provisions of the New Mexico Occupational Health and Safety Act do not expressly require employers in the State of New Mexico to submit to the Secretary of Labor periodic reports of occupational injuries and illnesses or work-related deaths, injuries and illnesses or any other records, nothing in the state act prohibits the Environmental Improvement Board from adopting a regulation requiring these reports and any other records to be submitted to the Secretary of Labor on a periodic or regular schedule. Indeed, Section 59-14-18(B), **supra,** would seem to anticipate such a requirement. Thus the state plan may require employers in the State of New Mexico to submit reports to the Secretary of Labor ". . . in the same manner and to the same extent . . ." required by the federal Occupational Safety and Health Act of 1970 or by regulations adopted pursuant to it by the Secretary of Labor.

Section 18(c)(8) of the federal Occupational Safety and Health Act of 1970 requires the state plan to provide that the Environmental Improvement Agency ". . . will make such

reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require." The New Mexico Environmental Improvement Agency is required by Section 54-14-8(G), **supra,** to "make such reports to the Secretary of the United States Department of Labor in such form and containing such information as the Secretary may from time to time require." By virtue of this provision in the state act, the state plan obviously satisfies the requirement of the federal act in this particular.

CONCLUSION. For the foregoing reasons, it is the judgment of the Office of the Attorney General that the New Mexico Occupational Health and Safety Act grants the legal authority necessary to permit the state occupational health and safety program to satisfy the requirements of the federal Occupational Safety and Health Act of 1970 in a manner consistent with the constitution and laws of the State of New Mexico.

By: Thomas L. Dunigan

Assistant Attorney General