LOOPTHOLE IN OSHA REGULATIONS LEAVES SOME STATE AND LOCAL EMPLOYEES AT RISK

To the editor:

In the July/August 2005 issue of the *Journal of Emergency Management*, William C. Nicholson discussed various legal aspects of personnel management that are of importance to emergency managers. Part of the discussion focused on worker health and safety and the applicability of federal safety and health standards as enforced by the Occupational Safety and Health Administration (OSHA).

Nicholson states, “OSHA regulations apply to all workplace activities, including those of government entities” (p. 15). I am concerned that this statement is only partially correct, and the applicability of federal safety and health regulations to government entities has significance for emergency managers who must be aware of the nuances involved in such blanket statements. As I am not a lawyer, I would welcome Professor Nicholson’s response to my comments.

The Occupational Safety and Health Administration Act of 1970 specifically excludes “the United States . . . or any state or political subdivision of a state” from the definition of employer subject to these regulations. The term “state” is further defined to include the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

Nicholson correctly reports that states are allowed to establish state plans for occupational safety and health that meet or exceed the federal regulations. States that submit state plans for approval by the Secretary of Labor must extend worker safety and health regulations to employees of state agencies and political subdivisions of the state—and local governments. But he fails to identify that only 26 states and territories have established state plans at this time. Of these 26 states, 22 state plans protect both private and government employees (Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming), while four states (Connecticut, New Jersey, New York, and the Virgin Islands) have adopted state plans that cover only state and local government employees.

The salience of the applicability of OSHA standards to state and local government employees became an important issue for emergency managers and emergency responders when OSHA regulations were promulgated for hazardous waste operations and emergency response (also known as the HAZWOPER standards). Although OSHA intended to protect all public and private workers who respond to hazardous materials (HAZMAT) emergencies, the restrictions incorporated in the OSHAct of 1970 failed to protect state and local government employees in those states without a state plan. The Environmental Protection Agency used its authority to close this loophole by promulgating its own regulations, which apply to employees of all government agencies at the state or local level, as Nicholson notes elsewhere. Although the OSHAct of 1970 required all federal agencies to provide occupational safety and health programs for their workers equivalent to its requirements for nongovernment employers, the Department of Labor (DOL) and its subsidiary agency OSHA have no jurisdiction over other federal agencies.

In 1980, President Carter signed Executive Order 12196, which directed federal agencies to implement the provisions of the OSHAct of 1970. As a
result of this executive order, the Secretary of Labor consults with other agencies “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources”\(^\text{12}\) in federal agencies as well as private workplaces. These consultations result in Memorandums of Understanding (MOUs) between OSHA and specific federal agencies.\(^\text{11}\) The only employees not afforded “safe and healthful working conditions” equivalent to federal regulations are those state and local government employees not covered by state plans approved by the DOL. While some states have enacted their own safety and health regulations for state and local government employees, there is no assurance of uniformity with the federal standards.

Emergency managers should first determine whether their organization is considered a local subdivision of state government. Some fire, emergency medical, and search-and-rescue organizations may be considered as such, while others are considered private employers. Second, emergency managers should determine if their state operates a state plan for occupational safety and health. If covered by a state occupational safety and health plan approved by the DOL, the distinction between private and public employer status is moot (unless operating in the four states with public employment state plans only). If operating in a state without a state plan, public employees will not be covered by OSHA regulations. However, some emergency organizations may be considered private employers (as described above) and fall under the OSHA regulations.

I am a proponent of safety and health programs for all emergency responders, whether regulated by OSHA or by states operating a state plan, and especially for those who are not regulated by either of these two entities. In fact, consensus standards such as the National Fire Protection Association’s NFPA 1500: Standard on Fire Department Occupational Safety and Health Program were developed to provide recommendations for those emergency-response organizations not covered by federal or state safety and health regulations. Emergency managers should be clear about what is required, where it is required, and what is not required, and communicate those differences carefully when questioned. As Professor Nicholson pointed out in his article, “the emergency manager should become familiar with the regulations that exist pertaining to his or her workplace” (p. 15).\(^\text{1}\)

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REFERENCES

2. 29 USC § 652 (5).
3. 29 USC § 652 (7).
4. 29 USC § 667 (c)(6).
6. 29 CFR 1910.120(q).
7. 40 CFR 311.
9. 29 USC § 668.
12. 29 USC § 651 (b).

AUTHOR REPLY

To the editor:

Mr. Hartle has done a fine job of explaining in greater depth the details of occupational safety and health compliance requirements. I compliment him on his good work.

With regard to occupational safety and health standards as well as any other established norms, it is important to note that courts may apply them without regard to whether a particular entity is technically covered by them or not. They do this under the rubric of “commonly accepted business practices.” The more entities that are bound by or that voluntarily utilize such a standard, the more likely a court will be to hold all entities to the norm. Accepted
industry practices may move from *de facto* to *de jure* acceptance through common law adoption in the courts.

Indeed, custom and usage within an industry need not be complete or general where improved safety standards, which occupational safety and health law provides, are involved. See *The TJ Hooper*, 60 F 2d 737 (2d Cir. 1932), certiorari denied, *Eastern Transportation Co. v. Northern Barge Corp.*, 287 US 662 (1932), where, in 1932, despite the absence of statutes, regulations, or even custom with regard to having a radio-receiving set on board, Judge Learned Hand found a vessel unseaworthy for lack of one. In that case, two barges had been lost in a storm, and the tugs and their tows might have sought shelter in time had they received weather reports by radio. For the emergency manager concerned about proactively avoiding possible liability, adherence to occupational safety and health standards, or whatever higher benchmark a state may have in place, makes sense. Further, as a general principle, taking whatever steps may be reasonably available to promote the safety of emergency management workers is simply the right thing to do, from an ethical as well as a liability-avoidance standpoint.

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