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Right-to-know: a guide to
Montana's Employee and
Community Hazardous Chemical
Information Act

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A Guide to Montana's Employee and Community Hazardous Chemical Information Act

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The 1985 Montana Legislature passed the **“Employee and Community Hazardous Chemical Information Act,”** otherwise known as the “right-to-know law.” The law is intended to enhance worker and community safety by requiring employers to make information available on the potential hazards and safe handling of chemicals in the workplace.

Many provisions of the Montana law mesh closely with the Hazard Communication Standard adopted by the federal Occupational Safety and Health Administration (OSHA). Because both laws are effective as of November 25, 1985, Montana employers, workers, citizens and public officials need to become aware of their rights and responsibilities.

This pamphlet summarizes Montana’s right-to-know law, describing in narrative form the detailed legal provisions of the statute. Twelve common right-to-know concerns are addressed in a question-and-answer format. The pamphlet also indicates how to obtain pertinent documents or more information on specific issues.

While this pamphlet will help Montanans understand and comply with the right-to-know law, it is not a definitive legal interpretation. Many states have recently enacted right-to-know laws, and some specific issues are the subject of ongoing litigation in state and federal courts. Also, the extent to which the Federal Hazard Communication Standard may pre-empt state laws is unresolved. Persons seeking specific legal guidance should first refer to the text of the Montana law. Further interpretation may be obtained from the local county attorney, OSHA or, if necessary, private legal counsel.

Montanans can anticipate a transition period as affected parties learn the provisions of this complex new law and take the necessary steps to comply. A cooperative attitude by employers, workers, citizens and government officials should help ensure that the new law achieves its goals without undue burden on Montanans.

RIGHT-TO- KNOW PROVISIONS

Although the Montana right-to-know law is eight pages long, its effect can be summed up in one sentence: The law establishes a method for employers to provide information on hazardous chemicals used in the workplace.

The text of the law details the employers covered, the definition of a hazardous chemical, employer responsibilities, worker rights, trade secret confidentiality, community access to chemical information, and administration of the law by public agencies. Explanation of each of these specific issues provides a guide for how Montanans can comply with and benefit from their right-to-know law.

Employers Covered

Montana's right-to-know (RTK) law applies to any "person, firm, corporation, partnership, association, governmental agency, or other entity engaged in business or providing services that employs workers." This broad definition of employer means that almost everyone who utilizes hazardous chemicals in a workplace and employs workers must comply with RTK provisions.

The RTK law does, however, specifically exempt food sale establishments and other retail trade establishments from compliance, except in portions of the store where chemicals are

actually used or processed. Thus, for example, a hardware store owner need not comply with RTK provisions for pre-packaged chemical goods being sold. However, if the hardware store also contains a work area where employees routinely mix hazardous chemicals (for example, solvents), these employees must be provided with information on the hazards of these chemicals.

The law tempers some information and recordkeeping requirements for medical facilities and research, testing and educational laboratories. These modified requirements are discussed below under the section on "Employer Responsibilities."

A manufacturing employer* is subject directly to OSHA's Hazard Communication Standard which specifies in-plant right-to-know requirements. Although this federal standard was the model for much of Montana's RTK law, there are some differences. Manufacturing employers should consult the OSHA standard to learn their specific RTK responsibilities. All employers, including manufacturing employers, must also comply with provisions of the Montana law described below under "Community Right-to-Know."

Hazardous Chemical Determination

Only those chemicals determined to be "hazardous" are subject to the information provisions of the Montana law. In accord with the federal OSHA standard, the Montana law recognizes two major classes of hazardous chemicals: health hazards and physical hazards.

*"Manufacturing employer" is an employer with a workplace classified in standard industrial code classifications 20 through 39, as defined in the federal Standard Industrial Classification Manual. These industries include food products; apparel; lumber; furniture; paper; printing and publishing; chemicals; petroleum and coal products; rubber and plastics; leather; stone, clay and glass; primary metals; fabricated metal; nonelectrical machinery; electrical equipment; transportation equipment; instruments; and miscellaneous manufacturing.

Health hazards are chemicals for which there is statistically significant evidence that acute or chronic health effects may occur in exposed employees. Health hazards include carcinogens (cancer-causing agents), nerve and reproductive poisons, chemicals which damage tissues on contact, and other short- or long-term toxins. Physical hazards include explosives, compressed gases, combustible liquids, flammable compounds, reactive substances, and oxidizers.

Although the concepts of a physical hazard or a health hazard seem straightforward, hazard determination is probably the most difficult aspect of RTK law. Only a small percentage of the hundreds of thousands of chemicals used in our society have been thoroughly tested for health effects, while hundreds of new chemicals are being developed annually.

Even the identification of a chemical may be a difficult exercise for employers. An individual chemical may be known by a variety of common names or trade names. Additionally, commonly used chemical substances may be mixtures of a number of chemical constituents, thus complicating chemical identification and the determination of potential health effects.

Because of the difficulty of determining whether a chemical is hazardous, the Montana RTK law specifies that hazardous chemicals include those physical or health hazards that have been so identified by OSHA or by the chemical manufacturer. *Thus Montana employers generally are not responsible for making the hazard determination.* This approach reflects the Legislature's belief that the federal government and chemical manufacturers have the resources and expertise to make hazard determinations, while most Montana businesses and state government do not.

Under the federal OSHA standard, a chemical manufacturer must include a material safety data sheet (MSDS) with the first shipment to an employer of any hazardous chemical after November 25, 1985. An MSDS is generally a single-page, two-sided form which presents information on the properties, hazards and safe handling of the chemical.

For Montana employers, receipt of an MSDS with a chemical shipment indicates that the chemical manufacturer has done the evaluation required by the federal OSHA standard and determined that the chemical is hazardous. Thus, it is recommended that any

chemical for which an MSDS is received should be considered hazardous.*

Some employers routinely purchase products containing hazardous chemicals from retail stores, which are not obligated to provide MSDSs. Examples of such products include cleansers, paints, inks, and solvents. If the purchasing employer subsequently requires his employees to work with the chemical product, the employer must learn if it meets the OSHA hazardous chemical definition and, if so, must obtain the appropriate MSDS. The employer should contact the manufacturer of the chemical product for this information. Note that the warning labels often printed on consumer products do not provide enough detail to satisfy the legal requirements for an MSDS.

Employers may not receive MSDSs for certain materials which are not hazardous until subject to an industrial process. Welding compounds, for example, may not be hazardous at room temperature but they do release hazardous metal fumes when heated. These fumes and other workplace-produced hazardous chemicals must be covered under an employer's right-to-know program.

Employers have questioned whether they need to comply with hazard communication requirements for common consumer products used in the workplace. Although no definitive legal interpretation has been issued on this point, OSHA enforcement guidelines address the issue as follows:

“[A] common sense approach should be utilized when [consumer] products are used in a manner similar to which they could be used by a consumer, thus resulting in levels of exposure comparable to consumer exposure. For example, it may not be necessary to have a data sheet for a can of cleanser used to clean the sink in an employee restroom. However, if such cleanser is used in large quantities to clean process equipment, it should be addressed in the Hazard Communication Program.”

*Some chemical manufacturers may include MSDSs as a precaution even for chemicals not meeting the definition of hazardous. An employer who suspects this to be the case could check with the chemical manufacturer to learn if the chemical is actually hazardous under the legal definition. This could, however, be a time-consuming or inconclusive process; as a rule, it is probably easiest for an employer simply to treat as hazardous any chemical for which an MSDS is received.

Many Montana workplaces will have chemicals that were received prior to the requirement that material safety data sheets be provided. Most of these chemicals probably arrived without MSDSs; nevertheless, they may be physical or health hazards meeting the definition of a hazardous chemical in the right-to-know law. For such "pre-RTK" chemicals, employers should contact the chemical manufacturer (or, if name and address are unavailable, contact the distributor who supplied the chemical) and request an MSDS if one has been prepared.

Although definitive answers may not be available for all questions on chemical hazards, a good faith effort to obtain this information is expected of an employer. The law requires employers to keep copies of all correspondence requesting MSDSs.

Montana followed the federal standard in specifying that chemicals included on two specific lists are automatically to be considered hazardous. These lists are the American Conference of Governmental and Industrial Hygienists (ACGIH) Threshold Limit Values for toxic substances and the OSHA sub-part Z list. The two lists together contain the names of about 600 industrial chemicals known to pose health threats to workers exposed to threshold concentrations. Additionally, based on the federal standard, chemical manufacturers must consider the carcinogens or potential carcinogens listed in the National Toxicology Program *Annual Report on Carcinogens* and the International Agency for Research on Cancer *Monographs* as health hazards.

Most pesticides and herbicides are subject to the packaging and labelling requirements of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and are specifically exempt from coverage under Montana's right-to-know law.

Food, drugs and cosmetics are exempt from the RTK law.

Sealed containers of hazardous chemicals during transportation or while in storage at transportation terminals are exempt from Montana's right-to-know law. Employers must retain existing labels and comply with state and federal regulations on hazardous material transportation.

The Montana RTK law requires hazard communication for some radioactive materials that are not regulated by the Nuclear Regulatory Commission. Workplaces where such radioactive compounds may be found include medical facilities and laboratories, hardrock mines and mills, and geophysical exploration operations. Very low hazard radioactive materials (as found, for example, in lamps, watches, smoke detectors, industrial or medical analytic devices, and other commonly used products) are either

exempt or generally licensed under Montana regulations and thus are not subject to RTK provisions.

Employer Responsibilities

The specific responsibilities placed on the employer—what information is to be collected and in what form, how it is to be provided and to whom—are the core of Montana’s right-to-know law. An employer’s responsibility to provide chemical information in the workplace can be divided into four main topics: material safety data sheets, workplace chemical lists, labels, and education and training. The OSHA standard was used as the model for these portions of the Montana law so that employers would not face conflicting state and federal requirements.

Every employer must maintain the most current material safety data sheet for each hazardous chemical in the workplace. The employer must provide an MSDS to any employee (or to the employee’s designated representative) upon request for review or copying. A readily accessible central file or notebook containing all MSDSs and an index is an appropriate way to satisfy this requirement.

Chemical manufacturers and distributors are required to supply MSDSs to Montana employers upon delivery of a hazardous chemical shipment. If an MSDS is not supplied with a hazardous chemical shipment, the employer must request one from the supplier in writing within five working days of receiving the chemical. The employer must maintain a copy of any correspondence sent or received in his effort to obtain an MSDS.

Employers must compile a workplace chemical list that contains the name of each hazardous chemical in the workplace. All generally used common names must be included and must be cross-referenced to the chemical name or to a name that will clearly identify the chemical for the purpose of conducting a hazard

evaluation. The list must indicate the work area in which each hazardous chemical is normally stored or used. The workplace chemical list must be updated as necessary, but not less than once a year.

An employer may not remove or deface any existing label on a container of a hazardous chemical.

Each employer must provide an education and training program for all employees using or handling hazardous chemicals. The program must be given at least once a year. New employees and employees newly subject to an exposure risk must also be trained before working with hazardous chemicals. Employers are required to keep a record of the dates of training sessions given to employees and the names of the employees attending.

The training program must include instruction on:

- interpreting labels and material safety data sheets;
- the acute and chronic health effects of the hazardous chemicals in the workplace; and
- the location, safe handling, protective equipment, first-aid treatment, and cleanup and disposal procedures for these chemicals.

Employers must post a notice at locations where notices are normally posted informing workers about their rights under the law. A sample notice is available at the county office housing right-to-know information.

Finally, employers must record their workplace chemical lists and material safety data sheets with the county clerk and recorder. The details of this requirement are reviewed below under the heading “Community Right-to-Know.”

Medical facilities and research, testing and educational laboratories are subject to reduced recordkeeping requirements under the Montana RTK law. Employers operating medical facilities and labs must make available all MSDs received from chemical suppliers, retain labels on chemical containers, and provide worker education and training. These employers do *not* have to (1) obtain MSDSs for all chemicals, (2) compile a workplace chemical list, or (3) record information with the county clerk. Note that laboratories that produce and distribute hazardous chemicals qualify as chemical manufacturers, and must comply with applicable RTK provisions.

Manufacturing employers are covered by the federal OSHA standard and thus are subject to slightly different RTK provisions. For example, OSHA requires these employers to have a written description of their hazard communication program.

Manufacturing employers are advised to review the specific provisions of the OSHA Hazard Communication Standard because in-plant compliance will be judged by OSHA inspectors.

Worker Rights

The new law specifies a number of rights of Montana workers in relation to hazardous chemicals. Foremost is the worker's right of access to the workplace chemical list and the material safety data sheets. A worker may not be forced to work with a hazardous chemical if the employer does not provide him with an MSDS within five working days of the worker's request for this information. (Workers should note that the OSHA standard does not contain this provision.)

A worker also has the right to effective training on the potential hazards and safe handling of workplace chemicals. An employer must provide workers with personal protective equipment appropriate to the potential chemical hazards.

A worker may file a complaint with the local health officer or the county attorney if he believes his employer is not complying with the provisions of the Montana RTK law. The employer is barred from discharging, disciplining or discriminating against a worker who exercises his rights under the act.

Trade Secrets

The Montana right-to-know law allows employers to keep chemical "trade secrets" confidential. A trade secret is defined as "a confidential formula, pattern, process, device, or information, including chemical name or other unique chemical identifier, which is used in an employer's business and which gives the employer an opportunity to obtain an advantage over competitors."

An employer who believes that the name of a hazardous chemical is a trade secret may withhold the chemical name from the material safety data sheet only if:

- an MSDS, coded to an identifying notation on each container of the hazardous chemical, is available in the work area;
- the MSDS discloses the properties and effects of the chemical; and
- the trade secret determination is judged valid by the Montana Department of Health and Environmental Sciences.

To obtain trade secret protection, the employer must submit a formal claim to the Legal Unit, Montana Department of Health and Environmental Sciences, Helena, MT 59620. The department will then request substantiation from the employer and, based upon the information provided, will determine if the chemical meets the definition of a trade secret and thus merits confidentiality. The department will notify the employer of its decision; the employer has 30 days to appeal an adverse ruling to the district court of Lewis and Clark County.

The employer must provide the specific chemical identity of trade secret chemicals to medical personnel in case of an emergency. In nonemergency situations, occupational health professionals may have access to the chemical identity if necessary to document health effects on exposed workers. The employer may require medical personnel and other health professionals to sign a confidentiality agreement as a condition of access to the trade secret information.

Community Right-to-Know

The Montana law, like many other state RTK statutes, distinguishes between worker right-to-know (i.e., providing chemical information to employees) and community right-to-know (i.e., providing the information to safety officials and the public).