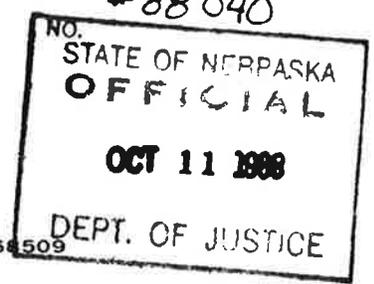


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# 88 040



DEPARTMENT OF JUSTICE

STATE OF NEBRASKA  
TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

ROBERT M. SPIRE  
Attorney General  
A. EUGENE CRUMP  
Deputy Attorney General

DATE: October 7, 1988  
SUBJECT: Scope of Certification of Asbestos Workers  
REQUESTED BY: Gregg F. Wright, M.D., M.Ed.  
Director of Health  
WRITTEN BY: Robert M. Spire, Attorney General  
Marilyn B. Hutchinson, Assistant Attorney General

You have asked whether an employee of a public power district must be certified for an asbestos occupation by the department before such individual may engage in an asbestos project. Yes, as discussed below.

If such a person must be so certified, you have asked whether that employee must comply with all work practice requirements of the Asbestos Control Act. Yes, as discussed below, insofar as those requirements are within that person's control.

1. Certification.

Under the Asbestos Control Act the general rule for a business entity is that it must be licensed by the department before it can engage in an asbestos project. Neb.Rev.Stat. §71-6302 (Supp. 1988). There are several exceptions, including the one for districts identified in Neb.Rev.Stat. §71-6316. The general rule for a worker in an asbestos project is that such individual must be certified by the department. There are no exceptions. Neb.Rev.Stat. §71-6310(1).

Now some public power districts have taken exception to the notice from your department that their workers have to get provisional certificates from the department before they can work on an asbestos project. They rely on the legislative history of Laws 1988, LB 1073 (March 29, 1988), pp. 11114-11135.

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The legislative history itself is brief. The text of §71-6316 was introduced as an amendment to an amendment when most of the senators were in an adjoining room having pizza on the day LB 1073 was advanced for engrossment. There had been no opposition to the bill at public hearing. The introducer of the proposed exemption for public power districts did not say that his proposal would also exempt the workers of such districts. His concern was that the Act added a layer of regulation for such districts and would delay emergency repairs. No one else spoke in favor of his motion.

Three senators spoke against it. Two of them were concerned that the districts' workers would not be protected if the proposal passed. One speculated the proposal might result in the use of uncertified workers by the districts. He also pointed out that OSHA regulations did not apply to public entities (such as power districts) and that a license was not required in emergency situations. (Under §71-6309, licensure may be waived in an emergency. Under §71-6302 neither a license nor a waiver is required if the business entity uses its own employees for an asbestos project for the purpose of renovating, maintaining or repairing its own facilities.) Before a vote could be taken on the measure, the house had to be put under call.

We have applied the following rules of statutory construction: When the language used in a statute is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers. Schutz v. Hunt, 212 Neb. 228, 322 N.W.2d 414 (1982). However, the Legislature's intention must be expressed by written language in the statute. Fitzgerald v. Kuppinger, 163 Neb. 286, 79 N.W.2d 547 (1956). A court will not read into a statute exceptions not made by the Legislature. Farrell v. School Dist. No. 54, 164 Neb. 853, 84 N.W.2d 126 (1957).

In this case neither §71-6316 nor §71-6310(1) is ambiguous. The one exempts from the Act certain business entities, including public power districts; the other does not exempt from certification the individuals who work on asbestos projects for such districts. Thus, this is not a case where recourse to the legislative history is appropriate.

If the legislative history could be considered in this case, it would hardly change the clear impact of §§71-6316 and 71-6310(1) when read together. That is that employees of districts exempted from the Asbestos Control Act must hold a certificate from the department before they can work on an asbestos project.

2. Compliance with work practice and worker protection requirements.

Enforcement of the requirement that all individuals be certified by the department before they work on an asbestos project has been delayed until April 12, 1989. Until then a provisional certificate is required.

Any provisional . . . certificate holder shall comply with all work practice and worker protection requirements of such act and the rules and regulations adopted and promulgated thereunder.

Neb.Rev.Stat. §71-6309.01. That same provision is in 178 NAC 21.003.06 and 003.07, the rule for implementing that section. An applicant for a certificate must so certify on Attachment B or C to that rule. There are no work practice requirements in that rule. On April 12, 1989, all provisional certificates will expire and workers on asbestos projects will need to have a certificate from the department to work on an asbestos project. See, Neb.Rev.Stat. §§71-6309.01, 71-6310, 71-6310.01.

There is no express requirement that a certificate holder comply with all work practice and worker protection requirements of the Asbestos Control Act and rules and regulations adopted thereunder as there was for a provisional certificate holder. However, such a certificate may be denied, refused renewal, suspended or revoked when the certificate holder violates any of the provisions of the act or fails to comply with rules and regulations adopted pursuant to the act. Neb.Rev.Stat. §71-6314.

Since all workers on asbestos projects must hold a provisional certificate or certificate from the department but all business entities are not required to be licensed, some of those workers may be employed by a business which is not licensed and/or not subject to the Act. Such workers will know from the training required for their certificates what the required work practices and worker protection practices are. However, they can hardly be held accountable in a disciplinary action for violation of work practices or worker protection practices which are beyond their control as an employee of an employer who is unregulated by the Act.

Congress in adopting the Occupational Safety and Health Act of 1970 (OSHA) declared that one way to achieve safe and healthful working conditions and to preserve our human resources is "by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions." Thus there is a role a worker can play in achieving safe and healthful working

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conditions even when that individual's employer is unregulated by the Asbestos Control Act. Section 71-6314 keeps such an employee accountable for doing so.

Conclusion

All workers on an asbestos project must hold either a provisional certificate or a certificate issued by the department even though their employer is not subject to the Asbestos Control Act. A certificate holder employed by an employer who is not subject to that Act must comply with those work practices and worker protection practices which are within the control of such individual employee.

Sincerely yours,

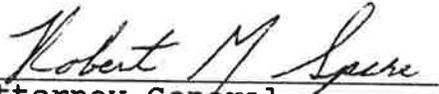
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APPROVED BY:

  
Attorney General