

Excavator Exemptions in State One Call Laws

Issue

It is known that most state damage prevention laws exempt certain types of excavators from the requirement to call 811 to have underground facilities located and marked before excavating. It is also known that underground facility damage incidents have been caused by excavators that are exempt from the one-call requirements. What isn't known is to what extent excavator exemptions in state one-call laws impact pipeline safety. This needs to be determined so that information can be provided to regulators and states to enable them to make informed decisions in determining if any or all excavator exemptions should be removed from the state damage prevention laws.

Related Federal Law

The Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Public Law 112-90, January 3, 2012), amended Title 49 of the United States Code (49 U.S.C.) to improve safety and environmental protection in pipeline transportation. Included were changes that address pipeline damage prevention.

The Act directed that 49 U.S.C. Section 6103(a) be amended, effective two years after Jan. 3, 2012, to read as follows:

(a) Minimum Standards -

(1) In general – In order to qualify for a grant under [49USC] section 6106, a State one-call notification program shall, at a minimum, provide for –

(A) appropriate participation by all underground facility operators, including all government operators;

(B) appropriate participation by all excavators, including all government and contract excavators; and

(C) flexible and effective enforcement under State law with respect to participation in, and use of, one-call notification systems.

(2) Exemptions prohibited – A state one-call notification program may not exempt municipalities, state agencies, or their contractors from its one-call notification system requirements.

Thus, the Act directed that the Secretary of Transportation may not award damage prevention assistance grants to states that exempt municipalities, state agencies, or their contractors from the state's one-call notification system requirements.

The Act also directed the Secretary of Transportation to conduct a study of the impact of exemptions on pipeline safety, including the impact of removing all exemptions for mechanized equipment from state one-call laws, as indicated below:

(d) Excavation Damage —

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- (1) Study — The Secretary of Transportation shall conduct a study on the impact of excavation damage on pipeline safety.
- (2) Contents — The study shall include—
 - (A) an analysis of the frequency and severity of different types of excavation damage incidents;
 - (B) an analysis of exemptions to the one-call notification system requirements in each State;
 - (C) a comparison of exemptions to the one-call notification system requirements in each State to the types of excavation damage incidents in that State; and
 - (D) an analysis of the potential safety benefits and adverse consequences of eliminating all exemptions for mechanized excavation from State one-call notification systems.
- (3) Report — Not later than 2 years after the date of enactment of this Act, the Secretary shall submit to the Committee on Transportation and Infrastructure and the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report on the results of the study.

This requirement is being implemented by the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA).

One-Call Process

“Call before you dig” and “one-call” are phrases synonymous with the practice of notifying the operators of underground facilities before any excavation or digging is begun so that the operators may determine if they have facilities in the area of the planned excavation and, if so, accurately determine and mark the locations of those facilities so that the excavator can avoid damaging them during the excavation.

All states have damage prevention laws requiring that an excavator notify underground facility operators before digging. A one-call notification center serves as a clearinghouse for excavators to request that underground facilities be located and marked before beginning excavation. Generally, the excavator may make a single call to the one-call center, which will subsequently notify all underground facility operators with facilities in the excavation area. Each state is served by at least one one-call center.

In 2007, the damage prevention community and the Federal Communications Commission established a nationwide, toll-free, three-digit telephone number—“811”—that enables an excavator to more easily reach the appropriate one-call center regardless of where the excavation is to occur. However, there is no national “call before you dig” or “one-call” law.

Each state damage prevention law is unique in the particular state’s approach to requiring excavators to provide notification to affected facility operators of their intent to excavate. Most laws require the excavator to notify the operators two to three days before beginning excavation. Many states require hand-digging or “soft excavation” when excavating around locations where underground facilities are known to exist.

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However, these and other requirements vary considerably by state. Perhaps among the most significant of these differences though, is that to a varying degree states may have language that exempts certain types of excavation activities or entities from full participation in the one-call process.

The types of exemptions that can be found in one-call laws include:

- Exemptions from the notification requirements for certain types of excavating entities, such as state, county, and municipal transportation departments; pipeline and other underground facility operators; property owners; ranchers; and farmers. Often, these exemptions are constrained by certain requirements that must be met for the exemption to be valid.
- Exemptions from the notification requirements for certain types of excavating activities, such as landscaping, gardening, tilling of soil for agricultural purposes, routine road grading, maintenance, mining, and grave digging. Virtually all states exempt emergency excavations from the one-call notification requirement. These and other excavation activities may be further defined by the specification of a maximum depth at which the activity can occur and still be exempt.
- Exemptions for underground facility owners from participation as members of the one-call center. Some states have what is recognized as “mandatory participation.” In these states, entities that own or operate underground facilities must become members of the one-call center that covers the geographic areas in which the operators have facilities. Other states may have what is recognized as “voluntary membership.” In these states, underground facility operators may, but are not required to, be members of the one-call center. There are variations for each of these approaches. For example, states that do have mandatory membership requirements may exempt certain types of facility operators from participating as members.

If an underground facility operator is not a member of the one-call center, either through exemption or because the state does not require mandatory membership, that operator will not receive a notification from the one-call center when an excavator notifies the center about plans to excavate. Thus, the operator will have to conduct its own notification process, independent of the one-call center’s process, and the excavator will have to notify the operator individually. It will be incumbent upon the excavator to determine which operator may have facilities in the area and/or which operators to contact.

Examples of facility operators that may be exempt from mandatory membership requirements include municipal utilities, farmers and other property owners that operate systems located entirely within the boundaries of the property they own, state transportation departments, and railroads. Other exemptions may be granted *de facto* in the definition that some states apply to “underground facility.”

PHMSA Initiatives Regarding Exemptions in State One Call laws

PHMSA has Federal regulatory authority over natural gas and hazardous liquid pipeline operators to ensure the safety of our Nation’s energy pipeline system. Federal pipeline safety regulations address pipeline design, construction, operations and maintenance, and other considerations deemed critical to pipeline safety. Accordingly, pipeline operators are required to develop and implement continuing damage prevention programs and public awareness programs. Each operator is required to meet the

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damage prevention requirements, in part, through participation in qualified one-call systems. PHMSA does not have regulatory jurisdiction over other underground facility operators or one-call centers.

As directed by Congress, PHMSA is conducting a study on the impact of excavation damage on pipeline safety. As a part of that study, PHMSA is conducting a public forum seeking input from stakeholders regarding the impacts that exemptions in state one-call laws have on damage prevention. PHMSA is also seeking input on the potential safety benefits and adverse consequences of eliminating all exemptions for mechanized excavation from state one-call notification systems.

Ancillary to this study, PHMSA has other ongoing initiatives underway that are relative to state damage prevention laws as they impact pipeline safety. These include:

- Federal Enforcement of Minimum Damage Prevention Requirements – The Pipeline Inspection, Protection, Enforcement, and Safety (PIPES) Act of 2006 grants enforcement authority to the Secretary of Transportation over excavators that damage pipelines in states that do not have adequate damage prevention law enforcement programs. In those states deemed to not have effective enforcement, PHMSA will take Federal enforcement action against excavators who damage pipelines and are determined to have done so by failing to comply with Federal damage prevention requirements. As proposed in a notice of proposed rulemaking (NPRM) issued by PHMSA (Pipeline Safety: Pipeline Damage Prevention Programs, Docket No. PHMSA–2009–0192), a significant criterion that will be used to determine if states have adequate enforcement programs involves exemptions in the states’ damage prevention laws.
- Damage Prevention Grants – Ten states have been identified as at risk for being ineligible State Damage Prevention and One Call grants effective January 2014 based on grant criteria related to exemptions in their one-call laws. PHMSA is in the process of notifying those states and providing them with an opportunity to respond.

PHMSA has a number of additional initiatives underway that relate to damage prevention but are not specific to one call exemptions. To find out more information about PHMSA’s damage prevention initiatives, go to <http://primis.phmsa.dot.gov/comm/DamagePrevention>.