Special Report

COMPLYING WITH OSHA'S HAZARD COMMUNICATION STANDARD

by Richard deC. Hinds
and
Mark N. Duvall
Cleary, Gottlieb, Steen & Hamilton
Washington, D.C.

The Occupational Safety and Health Administration ("OSHA") recently published its long-awaited hazard communication standard. 29 C.F.R. §1910.1200. 48 Fed. Reg. 53280 (Nov. 25, 1983). The standard is intended to ensure that the hazards of all chemicals produced or imported into the United States are identified and that this information, along with information on protective measures, is passed on to users in the manufacturing sector and their employees.

Although the standard does not begin to take effect until November 25, 1985, and some provisions do not take effect until May 25, 1986, covered firms should start planning their compliance strategy now to ensure that they will have adequate time to implement their hazard communication programs. This article provides practical suggestions for a cost-effective program.

I. COMPLIANCE CHECKLIST

The following checklist summarizes steps an employer should take prior to the effective dates of the hazard communication standard to ensure compliance. Each of these steps is discussed in greater detail later in the memorandum.

1. Review the standard and determine the extent to which you are covered. (Now.)

2. Compile a list of chemicals produced or imported by you. Make hazard determinations for each chemical on this list. Prepare or obtain material safety data sheets ("MSDSs") and appropriate container labels for each chemical determined to be hazardous. (Completion before 11/25/85 so that appropriate MSDSs and properly labeled containers are sent to purchasers by that date. Anticipate requests well prior to that date for assurances that MSDSs and container labels comply with the standard.)

3. Compile a list of chemicals used in the workplace which are not produced or imported by you. Obtain an MSDS for each of these chemicals from your supplier. Well in advance of 5/25/86 ask your suppliers to certify that all chemicals which you purchase from them and which are covered by the standard have MSDSs and container labels which comply with the standard. This is particularly important for chemicals which you retain in inventory for long periods of time. (Completion before 5/25/86 so that all hazardous chemicals used in the workplace have appropriate MSDSs and are properly labeled by that date.)

4. Develop procedures for training and providing information to employees on chemical hazards; for informing employees of the hazards of non-routine tasks; and for informing contractors of chemical hazards to which their employees may be exposed in the workplace. (Completion before 5/25/86 so that procedures are in place and initial training of all current employees has been completed by that date.)

5. Review specific chemical identities to determine whether any are trade secrets. For each chemical identity classified as a trade secret, consider preparing a justification of the classification so that it will be available in case the classification is challenged by OSHA. Prepare or obtain a model confidentiality agreement. (Completion before 11/25/85 for hazardous chemicals produced or imported by you so that trade secret identities are withheld from MSDSs for those chemicals by that date; completion before 5/25/86 for other hazardous chemicals used in the workplace.)

6. Obtain the names and addresses of persons to whom MSDSs should be sent with the first shipments of hazardous chemicals produced in the workplace. (Completion before 11/25/85 so that MSDSs are sent by that date.)

7. Provide an MSDS with the initial shipment of each hazardous chemical produced or imported by you and have appropriate labels on all containers of such chemicals shipped out of the workplace. (11/25/85 effective date. Anticipate requests well prior to that date for MSDSs and labels which comply with the standard.)

8. Prepare a written hazard communication program. Have MSDSs available and appropriate labels on every non-exempt container of hazardous chemicals in the workplace. (5/25/86 completion.)

II. THRESHOLD ISSUES

A. *A Suggested Approach to Compliance*

The hazard communication standard is a performance-oriented rule. Most requirements are stated in terms of objectives to be achieved rather than in terms of the methods which employers must use to achieve those objectives. Employers thus have considerable flexibility to design hazard communication programs appropriate for their own workplaces.

This performance orientation also means that employers will have questions on how to comply with the standard. In seeking answers, employers should refer to the standard's requirements and to the extensive preamble to the standard published in the *Federal Register*, 48 Fed. Reg. 53280 (Nov. 25, 1983). Employers may also consult OSHA's enforcement guidelines for the standard once they are written. OSHA regional offices and the headquarters in Washington may provide informal advice, but OSHA has no formal procedures by which an employer may obtain an advisory opinion on which it may rely in an enforcement action. Employers with remaining questions should consult with counsel familiar with the terms and objectives of the standard.

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Careful compliance with the standard is important, not only to avoid OSHA enforcement proceedings, but also to minimize product liability exposure. In some states failure to comply with the hazard communication standard may raise an irrebuttable presumption that a hazard warning was inadequate. Even compliance with the standard may not be an absolute defense to a personal injury or wrongful death action where a reasonable manufacturer would exceed the standard's requirements. Thus, in planning its compliance with the standard, an employer may wish to resolve questions about how much information to disclose in favor of disclosure in order to protect itself from claims that it failed to provide adequate warnings about a chemical's hazards.

B. *Preemption of Right-To-Know Laws*

Right-to-know laws have been adopted by approximately 18 states and 31 localities (including Philadelphia and Cincinnati). Their provisions differ considerably. Many involve aspects of hazard communication not included in the OSHA standard, such as providing information on chemical hazards to employees in sectors other than manufacturing, to fire departments, and to the community at large. A major practical consideration for employers planning their compliance with the OSHA standard is whether it will pre-empt state and local right-to-know laws, or whether they will have to comply with both the federal standard and applicable state and local laws.

The OSHA standard provides that it "is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, *and to pre-empt any state law pertaining to this* subject." To the extent that the standard does pre-empt state law, that law cannot be enforced. A state (or locality) could regulate with respect to the issue covered by the standard only through the adoption and approval by OSHA of a state plan or an amendment to an existing state plan.

It is probable that once the OSHA standard takes effect it will be held to pre-empt right-to-know laws in non-state-plan states, at least to the extent that they regulate the working conditions of employees in the manufacturing sector (SIC Codes 20-39). In state-plan states it is probable that the OSHA standard will pre-empt right-to-know laws to the same extent once the standard takes effect, unless OSHA approves the laws as amendments to the state plans. A good argument can also be made that pre-emption occurred when OSHA published its standard. However, these and related issues are presently the subject of litigation whose outcome cannot be predicted with certainty. Now pending in the U.S. Court of Appeals in Philadelphia is a challenge to the standard filed by the United Steelworkers of America and others in which five states with right-to-know laws (New Jersey, New York, Connecticut, Illinois, and Massachusetts) have intervened to contest the pre-emption provision in particular. No decision is likely from the court before 1985. Even this case may not resolve all pre-emption questions, particularly with respect to right-to-know laws not before the court.

An employer or a group of employers subject to a right-to-know law may want to file a declaratory judgment action challenging the continued effectiveness of that particular law in light of the federal standard's issuance. In this way the employer could obtain a definitive ruling on the extent to which it must comply with both sets of requirements outside the context of a violation. Alternatively, an employer may wait until a state brings an action to enforce its right-to-know law, then defend the action on the grounds of pre-emption.

Until the question of pre-emption is resolved by the courts, employers subject to right-to-know laws should decide whether to comply with them by weighing the cost of compliance against the cost of challenging the laws and any consequences in case they are found not to be pre-empted. To the extent that employers choose to comply, they should design their hazard communication programs so as to comply with applicable right-to-know requirements as well as the OSHA standard.

III. PLANNING FOR COMPLIANCE

A. *Who Must Comply*

An employer's first step should be to identify those provisions of the standard to which it is subject, if any. Covered employers include chemical manufacturers, importers, distributors, and employers in SIC Codes 20-39 which use hazardous chemicals. Those SIC Codes include most activities regarded as manufacturing, but exclude many activities covered by some right-to-know laws.

Chemical manufacturers have special responsibilities under the standard, such as the obligation to make hazard determinations and prepare or obtain MSDSs and container labels. A "chemical manufacturer" is an employer in SIC Codes 20-39 with a workplace where chemicals are produced for use or distribution. "Production" includes manufacture, processing, formulating, and repackaging. Thus, an employer which blends or formulates chemicals would be a chemical manufacturer, as would an employer which repackages chemicals for sale in smaller quantities.

An importer must also make hazard determinations and prepare or obtain MSDSs and container labels. An "importer" is the first business within the United States which receives hazardous chemicals produced in other countries for the purpose of supplying them to distributors or employers in SIC Codes 20-39.

Distributors of hazardous chemicals must pass on to other distributors and to purchasers in SIC Codes 20-39 the hazard information which they receive from their suppliers.

An employer in SIC Codes 20-39 which is not a chemical manufacturer, importer, or distributor but which uses hazardous chemicals must only comply with the portions of the standard relating to written hazard communication programs, in-plant labeling, training and information, and availability of MSDSs. Such an employer is exempt from the requirements for making hazard determinations and preparing MSDSs. However, because of the broad definition of the term "chemical manufacturer," employers should be cautious in assuming that they are merely users of hazardous chemicals. In addition, product liability considerations may suggest the need to review the accuracy of hazard determinations and MSDSs prepared by others.

B. *Chemicals Covered*

An employer's next step is to determine which chemicals are covered by the standard. In general, the standard applies only to those chemicals (defined to include elements, compounds, and mixtures) to which employees may be exposed in the workplace under normal conditions of use or in a foreseeable emergency. For example, intermediates produced and consumed in a reactor vessel are covered if an employee cleaning the vessel or near the vessel in the event of rupture could be exposed to them. Exempt from the standard are hazardous wastes regulated by the Environ-

mental Protection Agency, tobacco, wood, items intended for personal consumption by employees, and articles. Articles are essentially manufactured items of specific shape which do not result in exposure to hazardous chemicals under normal use (*e.g.*, furniture). Also exempt are chemicals which are produced and used only in a manufacturing facility's laboratory, provided that laboratory employees receive appropriate information and training.

Chemicals regulated by other federal agencies (except for hazardous wastes) are covered by most requirements of the standard, although they may be exempted from the labeling provisions.

C. Hazard Determinations

Most of the requirements in the standard apply only to hazardous chemicals. Thus, the next step is to identify those chemicals which are hazardous and to determine what hazards those chemicals pose. The deadline for making hazard determinations for chemicals shipped out of the workplace is November 25, 1985. Hazard determinations for chemicals produced in the workplace but not shipped out of it, such as intermediates created and destroyed in the production process, must be made by May 25, 1986. In practice, hazard determinations should be completed well before these dates, however, because MSDSs and labels based on them must be prepared or obtained by the same dates.

Most covered employers will not have to make hazard determinations. The standard provides that chemical manufacturers and importers must determine whether the chemicals which they manufacture, process, formulate, repackage, or import are hazardous, and if so what the hazards are. (Importers will normally need to have their foreign suppliers make hazard determinations for them. As with all other requirements applicable to importers, however, the importers retain responsibility for their own compliance with the standard.) All other covered employers need only determine the hazards of the chemicals they use if they choose not to rely on the hazard determinations made by the manufacturer or importer of those chemicals.

A person making hazard determinations should first prepare two lists, one of all chemicals shipped outside the workplace, and the other of all chemicals to which employees may be exposed in the workplace. These lists will prove helpful as checklists for complying with the hazard determination, MSDS, and labeling requirements.

Next, the person should see which of the chemicals on these lists are deemed by the standard to be hazardous. The standard deems hazardous those chemicals which are included on one or more of the following four lists (the lists overlap but no one of them includes all the chemicals): (1) OSHA's health standards, appearing in 29 C.F.R. Part 1910, Subpart Z (some 435 permissible exposure limits ("PELS") appear in the Z-tables of 29 C.F.R. §1910.1000, and 21 other specific standards appear elsewhere in Subpart Z); (2) the latest edition (currently 1983-84) of the American Conference of Governmental Industrial Hygienists ("ACGIH") publication "Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment" ("TLVs," some 600 chemicals listed); (3) the latest edition (currently the third, dated December 1982) of the Annual Report of the National Toxicology Program ("NTP") (117 chemicals listed); and the latest editions of Monographs published by the International Agency for Research on Cancer ("IARC") (covering some 135 chemicals and categories). Chemicals listed in the NTP Annual Report or in the IARC Monographs as actual or potential carcinogens and chemicals regulated by OSHA as carcinogens are deemed by the standard to be carcinogens.

The person must determine whether the remaining chemicals on its lists are hazardous, as well as what hazards each chemical found to be hazardous poses. The standard defines a hazardous chemical as any chemical which is a physical hazard or a health hazard. A chemical is considered to be a physical hazard only if there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive), or water-reactive. A health hazard is defined as any chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. Appendix A to the standard defines certain kinds of effects deemed to be health hazards, but the list is not meant to be exhaustive.

A person making hazard determinations must describe in writing the procedures used. These procedures may vary according to the circumstances, particularly for health hazards. Thus, for well-studied chemicals the person may base a hazard determination on review of selected basic reference works, such as those listed in Appendix C to the standard, unless information of which it is aware (such as information in its own files) indicates that additional effects should be reported. For less well-known chemicals, a person may need to consult computer data bases, information in its own files, industry-sponsored studies, or other sources. Testing is not required, however. Appendices A and B to the standard provide mandatory criteria governing the scope of the hazard determination requirement.

The findings of a hazard determination must be reported on an MSDS. The standard requires an MSDS to list all health effects of a hazardous chemical, not just those which pose a significant risk of harm to employees at foreseeable levels of exposure in the workplace. In information given to employees an employer may explain the expected effects at actual exposure levels. To resolve controversy over whether a chemical poses a particular health effect, the standard sets a low threshold favoring disclosure; the effect must be reported on an MSDS if supported by statistically significant evidence based on at least one study conducted in accordance with established scientific principles. In reporting the effect, however, the person need not endorse it. Indeed, the person may note any limitations of the study and may include the results of other studies tending to show that the chemical does not cause that effect.

The requirements for statistical significance and compliance with established scientific principles mean that a person making a hazard determination need not report a health effect on an MSDS simply because a study suggests that one may exist. The person may evaluate the study for compliance with these requirements by using professional judgment.

Special rules govern the determination of hazards posed by mixtures. If a mixture has been tested as a whole for hazards, those results may be used to determine the mixture's hazards. If the mixture has not been tested as a whole, the person making the hazard determination may use whatever scientifically valid information is available, if any, to determine the mixture's physical hazards. The standard irrebuttably presumes the health hazards of an untested mixture to be those of the hazardous chemicals present in the mixture in concentrations of 1.0% or greater (as deter-

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mined by weight or volume), except that an untested mixture is irrebuttably presumed to present a risk of cancer if it contains a component deemed by the standard to be a carcinogen in a concentration of 0.1% or more (*i.e.*, a chemical included in the latest NTP Annual Report, included in the latest edition of an IARC Monograph, or regulated by OSHA as a carcinogen).

To exclude a hazardous component from an MSDS for a mixture, the person preparing the MSDS must ensure that the hazardous component is present in the mixture only in concentrations below applicable thresholds. Furthermore, if the person has evidence indicating that even at concentrations below those thresholds the hazardous component could be released in concentrations which would exceed an OSHA PEL or an ACGIH TLV, or could pose a health hazard to employees, the person must still report the hazardous component on the MSDS.

Persons making hazard determinations should document the steps taken to evaluate the hazards of each chemical evaluated. This documentation will be necessary to demonstrate to an inspector that the person adequately considered the available scientific literature. It may also be relevant in case of a personal injury suit by someone claiming to have been injured by the person's unreasonable failure to disclose particular hazards.

By its terms, the standard does not require a person to repeat hazard determinations from time to time. The person should plan on periodic updating of hazard determinations, MSDSs, and container labels, however, because products liability law generally regards the duty to warn to be a continuing one.

D. *Material Safety Data Sheets*

After determining which of the chemicals which they produce or import are hazardous, chemical manufacturers and importers must prepare or obtain an MSDS for each chemical found to be hazardous which reflects the information collected in making the hazard determination for that chemical. (Importers will normally have to obtain appropriate MSDSs from their foreign suppliers.) Chemical manufacturers and importers must prepare or obtain these MSDSs before November 25, 1985. They must begin sending these MSDSs to purchasers with initial shipments beginning on that date, although they should anticipate requests from purchasers for MSDSs well before then. Before November 25, 1985 they should also have obtained the names and addresses of persons to whom they should send the MSDSs.

Before May 25, 1986 employers in SIC Codes 20-39 must prepare or obtain from their suppliers an MSDS for each hazardous chemical used in their workplace. To ensure the adequacy of the MSDSs, employers should ask their suppliers to certify that the MSDSs which they provide meet the requirements of the standard. The MSDSs must be made available to employees in their work areas during their work shifts by May 25, 1986.

Each MSDS must contain specified information about a hazardous chemical, including the following: (1) its specific chemical identity (subject to the trade secret provision) and other names, or if it is a mixture, its components which contribute to the hazard of the mixture (as determined through testing or through the presumptions discussed previously in the hazard determination section); (2) its physical and chemical characteristics; (3) its physical hazards; (4) its health hazards, including signs and symptoms of exposure and any medical conditions generally recognized as being aggravated by exposure to the chemical; (5) primary routes of exposure; (6) the OSHA PEL, ACGIH TLV, and any other exposure limit used or recommended by the person preparing the MSDS; (7) whether it is deemed by the standard to be a carcinogen; (8) any generally applicable precautions for safe handling and use known to the person preparing the MSDS; (9) any generally applicable control measures known to the person preparing the MSDS; (10) emergency and first aid procedures; (11) date of preparation or latest revision; and (12) the name, address, and telephone number of a responsible party who can provide additional information on the chemical and appropriate emergency procedures, if necessary. If some required information is unavailable, the MSDS must so indicate; blanks are not allowed.

Employers receiving inconsistent MSDSs should review each carefully. The standard contemplates that an employer may rely on any MSDS which it receives for a given hazardous chemical. Products liability considerations, however, suggest that an employer should seek to have the most complete and accurate MSDS available. The employer may want to question the persons who prepared the inconsistent MSDSs about particular entries so as to evaluate which is the more accurate MSDS. Alternatively, the employer may wish to prepare its own MSDS by incorporating elements from each. If it does so, however, it must ensure that the new MSDS accurately reflects the scientific evidence; this may also involve contacting the preparers of the other MSDSs.

The MSDS need not be in any particular form. For example, within a plant an MSDS may be in the form of written operating procedures or manuals. OSHA has prescribed an MSDS for its maritime industry standards, OSHA Form 20. Any covered employer may use this form as a format for its MSDSs only if it supplements the form with additional information required by the standard but not required by the form, such as certain categories of health hazard information. The form also calls for information which the standard does not require to be disclosed, such as percentage of mixture information.

Since MSDSs must be readily accessible to employees, the MSDSs should not be locked in an office overnight if the night shift is to have the required access. Similarly, the employer may not keep the MSDSs in a central location away from the work areas. An employer could computerize the MSDSs so long as an active terminal was available to employees.

A special rule applies to chemicals produced or used only in a laboratory. Employers must maintain MSDSs for any hazardous chemicals received with incoming shipments and ensure that those MSDSs are readily accessible to laboratory employees, but otherwise the MSDS requirement does not apply.

E. *Labels*

Effective November 25, 1985, every chemical manufacturer and importer must ensure that each container of hazardous chemicals leaving its workplace is properly labeled. Importers will normally have to have their foreign suppliers prepare container labels for them. Labels prepared in accordance with European Economic Community labeling requirements are acceptable if they contain the information required by the OSHA standard.

Effective May 25, 1986, every user of hazardous chemicals in SIC Codes 20-39 must ensure that each container of hazardous chemicals in its workplace is properly labeled, unless the container is exempted. Exempted containers include pipes and containers into which an employee transfers hazardous chemicals for his or her use during that work shift. In addition, the only labeling requirement applicable

to containers in laboratories is that labels on containers of hazardous chemicals coming into a laboratory must not be removed or defaced.

None of the standard's labeling requirements apply to chemicals to the extent other federal agencies have promulgated applicable labeling requirements under specified statutes.

The labels must contain chemical names (which can be code numbers or common names if they are keyed to MSDSs), and appropriate hazard warnings. In the case of containers of hazardous chemicals leaving the workplace, the labels must also contain the name and address of a responsible party to contact for more information if necessary and must not conflict with Department of Transportation hazard labeling requirements. For in-plant stationary containers, such as reactor vessels, labels may be in such forms as batch tickets, process sheets, signs, or operating procedures.

A person preparing container labels must decide what hazard warnings are appropriate for particular hazardous chemicals. The person should first check whether OSHA has issued standards containing specific labeling requirements for those chemicals; if so, the labels must contain the warnings called for by those requirements. For any other hazardous chemical, the hazard warnings may be any type of message — words, pictures, or symbols — which effectively conveys the hazards identified on the MSDS for that chemical. Not all hazards need be listed on a label, however. The label's purpose is to give an immediate warning and a summary of the more important information available on the MSDS. While the precise limits of the requirement for "appropriate hazard warnings" are unclear, a label for a chemical mixture containing a trace amount of a carcinogenic component which presents more immediate, direct hazards than cancer should list those other hazards but probably need not list cancer as a hazard.

F. *Employee Information and Training*

By May 25, 1986 employers in SIC Codes 20-39 must provide their employees, including their laboratory employees, with information and training on the hazards of chemicals to which they may be exposed and the means to avoid those hazards. By that date those employers must also provide their employees with information about the requirements of the standard and how they may obtain access to MSDSs and the written hazard communication program.

The first step in complying with this requirement is to gather the necessary information. Much of it should be contained in MSDSs. Other information will relate to the particular workplace.

Next, the employer should plan its training program. OSHA has published voluntary guidelines on employee training about health hazards which may prove useful for some employers, 48 Fed. Reg. 39317 (Aug. 30, 1983).

Once information and training sessions begin, employers should document their actions, so as to be able to prove compliance and to defend against possible suits. They should keep records of subjects covered and materials distributed. They should also require employees to sign attendance lists at training sessions and to state in writing that they understood the material presented.

By its terms, the standard does not require periodic refresher training once employees have been trained, except to the extent that chemical hazards in the workplace change. Refresher training would be helpful, however, to protect against possible worker compensation claims and personal injury suits.

G. *Written Hazard Communication Program*

By May 25, 1986 every employer in SIC Codes 20-39 using or producing hazardous chemicals must develop and implement a written hazard communication program. Early compliance with this requirement will facilitate compliance with the other applicable requirements, as it involves each of them.

The hazard communication program must include a list of all hazardous chemicals in the workplace to which employees may be exposed. Although an employer may rely on the hazard determinations of others for chemicals it does not produce or import, some hazard information may not be available until after November 25, 1985. Therefore, the employer should compile a list of all chemicals in the workplace and treat those for which hazard information is missing as hazardous. Employers can minimize the necessity of taking such action by writing to suppliers well in advance of November 25, 1985 and requesting certification that chemicals supplied are labeled and accompanied by MSDSs in conformity with the standard. The employer should ensure that once compiled the list is updated as soon as new chemicals enter the workplace.

The list need not reveal specific chemical identities, but it must give names which are keyed to MSDSs which provide specific chemical identities, except to the extent that those identities are trade secrets.

In workplaces with several work areas, such as a large plant, the employer should compile the list for each work area. Since employees will have access to the list, it is preferable to specify those hazardous chemicals to which an employee may be exposed in his or her work area, instead of creating the impression that each employee may be exposed to every hazardous chemical in the plant.

The hazard communication program must also include the procedures to be used in complying with the MSDS, labeling, and information and training requirements of the standard. The employer should begin drafting these procedures early so that it may implement them before the effective dates of those requirements. In addition, the program must specify the methods to be used to inform employees of the hazards of non-routine tasks (such as cleaning reactor vessels) and the hazards of chemicals in unlabeled pipes.

Finally, the program must explain the methods to be used to inform contractors of the hazards which their employees working in the employer's workplace may face. Under OSHA law each employer is responsible only for the health and safety of its own employees. For example, an employer need not train the employees of a contractor working in the employer's workplace. However, the employer must provide the contractor with sufficient information to permit it to train its own employees. Sometimes it may be simpler for the employer to provide that training itself for employees of maintenance and other contractors who are regularly in the workplace.

H. *Trade Secrets*

The trade secrets provision attempts to balance an employer's need to protect trade secrets and the need of health professionals to know the specific identity of chemicals to which employees may be exposed. The standard explicitly provides that it does not require the disclosure under any circumstances of process or percentage of mixture information which is trade secret. The only trade secret information which must be disclosed, and then only under certain conditions, is the specific identity of a hazardous chemical. The standard does not permit employees access to trade secret identities; only health professionals may obtain access, and

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they must demonstrate need and agree to sign a confidentiality agreement.

Before November 25, 1985 manufacturers and importers of hazardous chemicals must determine whether the specific identity of any of the hazardous chemicals which they produce or import are trade secrets. (Importers will normally obtain this information from their foreign suppliers.) The MSDSs prepared or obtained for these chemicals, which must be sent to downstream purchasers by that date, must indicate that the specific identities of those chemicals are withheld as trade secrets.

Before May 25, 1986 users of hazardous chemicals in SIC Codes 20-39 must determine whether the specific identities of any of the hazardous chemicals which they use are trade secrets. The MSDSs for those chemicals, which must be made available to employees in their work areas by that date, must also indicate that the specific identities are withheld on trade secret grounds.

The standard considers a confidential chemical identity to be a trade secret if maintaining its secrecy gives an employer an opportunity to obtain an advantage over competitors who do not know it or use the chemical in the same way. Under general trade secret law, from which the standard's definition of "trade secret" was derived, the basic requirements for a trade secret are secrecy and value. An identity may be a trade secret even if a competitor could discover it through reverse engineering.

To protect its trade secret identities, an employer should first determine which specific chemical identities are trade secrets. The employer should take care at this stage to ensure that all trade secret identities are so classified but that no excessive claims are made. Overbroad claims of trade secret status may subject the employer to unnecessary burdens should an OSHA inspector ever challenge the withholding of a particular chemical identity as a trade secret.

Next, the employer should consider preparing a written justification for each specific identity classified as a trade secret. In some circumstances, the employer may need to present a written justification for it within a short period of time (within 30 days if the employer denies a health professional's written request for access to a specific identity withheld as a trade secret). In such a situation advance preparation may prove useful. A written justification may also facilitate compliance with those right-to-know laws which require employers to register their trade secrets with a government agency in advance in order to be able to claim them.

To prove secrecy, the justification might describe the methods which the employer uses to keep the chemical identity from its competitors and to limit internal access to the identity to those who need to know it. To establish value the justification might show that the chemical identity permits the production of a better product than that of competitors, production of the same product at lower cost, or that the employer's competitors do not use the chemical in the novel way in which the employer uses it.

Finally, the employer should obtain a model confidentiality agreement permitting a health professional limited access to trade secret identities. The agreement should include a liquidated damages clause and a method for calculating in advance a reasonable estimate of the damages which the employer would suffer in the event of unauthorized disclosure and which the health professional or his employer or contractor would have to agree to pay.

CONCLUSION

Proper compliance with the hazard communication standard will require extensive preparations by covered employers. This is particularly true for chemical manufacturers, which must make hazard determinations and supply MSDSs and labels. Those time-consuming tasks must be completed by November 25, 1985, while most other requirements take effect on May 25, 1986. The time to begin preparation is now.

Full Text

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION PROPOSAL TO REVISE ACCIDENT PREVENTION TAG CRITERIA [49 FR 17541, April 24, 1984]

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. S-058]

General Environmental Controls: Accident Prevention Tags.

AGENCY: Occupational Safety and Health Administration, U.S. Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: With this notice the Occupational Safety and Health Administration (OSHA) proposes to amend the standards in § 1910.145(f) to require that accident prevention tags be capable of being read from a minimum distance of five feet (1.52 m), and to allow the use of symbols or pictographs on such tags. The purpose of paragraph (f) is to establish performance criteria for tag design and construction. OSHA is also proposing color criteria for certain types of tags to assure compatibility with existing sign criteria and color coding requirements found elsewhere in § 1910.145. This standard addresses the temporary marking of hazardous conditions. The proposed amendments are presented as part of OSHA's continuing effort to review and, as necessary, amend existing standards.

DATES: Comments on the proposal must be received by June 8, 1984. Hearing requests must be received by June 8, 1984.

ADDRESSES: Comments and hearing requests should be sent to the Docket Officer, Docket No. S-058, Room S-6212, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington,