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Workplace Safety and Health Update

Week of ***June 15, 2015***

OSHA, Easing Compliance for New HazCom Rules, Will Issue Revised Directive

Manufacturers and importers of hazardous chemicals may release their existing stock into commerce under former requirements imposed by the Occupational Safety and Health Administration's Hazard Communication Standard (HCS) for labelling and fact sheets, provided these businesses can show they have made reasonably diligent and good faith efforts to obtain information to comply with new requirements that went into effect June 1, OSHA stated in a May 29 memorandum described as an "interim policy." The agency added that this guidance also applies to distributors if those entities cannot meet their compliance deadline of December 1, 2015. The memorandum can be found at: https://www.osha.gov/dep/enforcement/hcs_guide_052015.html.

OSHA plans to issue a revised HCS compliance directive soon, replacing the May 29 memorandum as well as a policy document the agency released on February 9. The issuance has been delayed to allow OSHA time to provide "additional clarification" following "an overwhelming number of additional questions and requests" the agency has received on behalf of manufacturers, importers, and distributors since the February release. According to OSHA, many of the questions relate to the use of HCS 1994-compliant labels on containers already packaged for shipment.

OSHA industrial hygienist Mike Pannell said on June 10 that the directive has been reviewed and approved and is in "the final signature stages just prior to publication." He did not provide a release date.

OSHA updated its HCS in 2012 to conform to an international standard. The amended, or "globally harmonized," HCS includes provisions requiring chemical manufacturers and importers to apply specific criteria to address health and physical hazards when determining the hazards of the chemicals they produce or import. Container labels also must provide hazard information in designated ways and Safety Data Sheets (SDS) must present hazard information in a consistent format. OSHA set the compliance deadline for June 1, 2015, for chemical manufacturers and importers. Distributors were allowed to ship hazardous chemicals under the old system until December 1, 2015.

According to the May 29 memorandum, manufacturers or importers who have not received classification information from their upstream suppliers by June 1 may continue to use the HCS 1994 label. However, OSHA will only allow this if these entities can provide "persuasive documentation" to an OSHA compliance officer that they have made reasonable efforts to obtain the necessary information from upstream suppliers and attempted to find hazard information from alternative sources, such as chemical registries. This guidance also applies to businesses holding hazardous chemical stock packaged before June 1.

"In these limited situations, manufacturers and importers must promptly create HCS 2012-compliant labels within six months after they develop the updated SDS," the memorandum stated. "All containers shipped after the six-month period must be labeled with an HCS 2012-compliant label."

The agency made clear that after June 1, a manufacturer or importer of hazardous chemicals who packages containers for shipment must label every container with a HCS 2012-compliant label prior to shipment.

The memorandum provides nearly identical guidance to distributors. That is, distributors, including those with existing packaged stock, who are noncompliant by December 1 because a manufacturer or importer could

not meet the June deadline, also must demonstrate reasonable diligence and good faith.

After December 1 or upon request, distributors must provide a HCS 2012-compliant label and SDS for every individual container that is part of any future shipments, unless they can demonstrate reasonable diligence and good faith, the memorandum stated. Additionally, distributors must provide HCS 2012-compliant SDSs to downstream users with the first shipment after a new or revised SDS is provided by the manufacturer or importer. All containers in the control of a distributor after December 1, 2017, must have HCS 2012-compliant labels prior to shipping.

The memorandum repeats nearly verbatim the steps listed in the February 9 memorandum considered by OSHA to represent reasonable and good faith efforts to obtain the necessary classification information.

The business community has criticized OSHA's approach, preferring instead that the agency adopt a policy of accepting labels which were compliant at the time the container holding a hazardous chemical was filled, for the life of the product in that container. This would address what industry sees as an ongoing compliance problem in that the life of products is much longer than the six-month compliance period to update labels and data sheets based on new data from suppliers.

Despite industry's compliance concerns, OSHA has begun exploring another new rule to realign the U.S. hazardous chemicals classification and labelling system with the evolving international system.

Accumulations Violation Not Flagrant, Judge Rules

An alleged violation by an Alabama coal producer was not flagrant because the Mine Safety and Health Administration could not demonstrate the hazard posed could have led directly to death or serious bodily injury, a judge has ruled.

MSHA charged Oak Grove Resources, LLC, with a flagrant violation of the standard on accumulation of combustible material (30 CFR § 75.400) after finding accumulations of combustible coal materials along a 2,100-foot stretch of conveyor belt at the operator's Oak Grove underground mine in Jefferson County in October 2012. The agency levied a $146,400 fine.

A flagrant violation is defined as a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximally caused, or reasonably could have been expected to cause, death or serious bodily injury. The flagrant provision was added to the Mine Act by Congress following a series of coal mine tragedies in 2006 to give MSHA a tough, new enforcement tool against the most notorious operators. Lawmakers gave MSHA authority to assess a maximum penalty of $220,000, now swelled to $242,000, adjusted for inflation.

The alleged infraction at the mine qualified as a repeated failure because Oak Grove had been cited 91 times under the standard over the past two years. However, the agency also contended the violation met the flagrant definition because the associated hazard could reasonably have been expected to cause death or serious injury. In other words, according to MSHA, the hazard could have been a contributing cause of death or serious injury.

In a decision released June 1, Administrative Law Judge Jerold Feldman said MSHA's interpretation that violations producing hazards that might contribute to a seriously harmful outcome was "unreasonable" in this case. He cited the legal definition of "proximate cause" as that which directly produces an event and without which the event would not have occurred. Then, noting that Congress intended the statute to apply only to the most egregious violations, he stated that to be classified as flagrant, all such violations must reflect hazards that could directly lead to death or serious harm.

"In short, to properly designate a violation as flagrant, the Secretary must always demonstrate that the cited condition could *proximally cause* death or serious bodily

injury," Feldman said (emphasis in original). His decision can be found at: http://www.fmshrc.gov/decisions/alj/ALJo_6012015-SE%202013-301352368399.orderdeletingflagrant.pdf.

Feldman added that he found it "significant" that Congress used identical language when defining an imminent danger (i.e., a condition that "could reasonably be expected to cause death or serious [injury]") to distinguish extremely dangerous conditions from all others. Feldman also stated that flagrant violations are not intended to be considered in the context of continued mining operations, as MSHA had contended.

Applying these interpretations, Feldman threw out the flagrant designation because, by the agency's own admission, the accumulations were not near an ignition source, such as a misaligned belt or defective roller. He gave MSHA 45 days to file an amended petition for a monetary assessment based on the agency's order.

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