



OSHA 30/30

A thirty minute update on OSHA law every thirty days

with **Manesh Rath**

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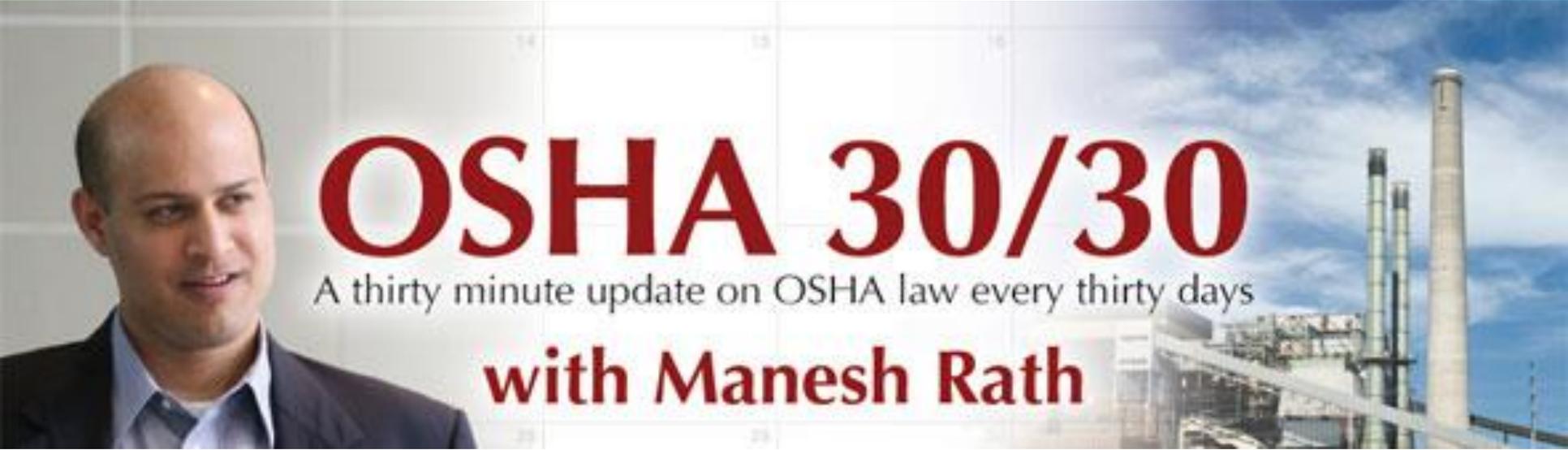
OSHA's EVOLVING INTERPRETATION OF HCS 2012 - - THE GHS UPDATE TO THE HAZARD COMMUNICATION STANDARD

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An audio recording and slide deck will be provided post-webinar on
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LAWRENCE P. HALPRIN

Lawrence Halprin is a partner in Keller and Heckman's workplace safety and health, chemical regulation and litigation practice groups. He is nationally recognized for his work in these areas. He represented the American Petroleum Institute (API) in challenging certain aspects of the GHS Amendment to the OSHA HazCom Standard. That litigation was settled last month and will be a focus of this webinar.

Mr. Halprin's workplace safety and health practice includes representing clients in: OSHA and MSHA enforcement actions and citation contests; compliance counseling and training; incident investigations, compliance audits and program reviews; federal (OSHA, MSHA and NIOSH) and state rulemakings and stakeholder processes; pre-enforcement challenges to final agency rules; legislative reform and oversight initiatives; and the development of national consensus standards through the ANSI, NFPA and ASTM processes, and TLVs under the ACGIH process.

Mr. Halprin's engineering and financial background and extensive knowledge of OSHA rulemakings have greatly enhanced his ability to: provide compliance counseling and represent clients in enforcement actions; and evaluate and critique rulemaking proposals and suggest alternative approaches. On behalf of one or more clients, Mr. Halprin has participated in almost every major OSHA rulemaking over the past 25 years as well as numerous Cal-OSHA rulemakings.



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MANESH K. RATH

Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. On developing legal issues, he has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," WAVY-TV and C-SPAN. He was listed in *Smart CEO Magazine's* Readers' Choice List of Legal Elite.

Mr. Rath has extensive experience representing industry in OSHA rulemakings. He has successfully represented employers—including some of the largest in the country—in OSHA citations, investigations and appellate work before federal OSHA in regions across the country and in state plan states.

Mr. Rath currently serves on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. He served on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years

He is the editor and co-author of the OSHA chapter of the Employment and Labor Law Audit (9th and 10th Editions) and a co-author of the book Occupational Safety and Health Law Handbook (2001).



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TOPICS TO BE COVERED

- **Background**
 - **Essential Requirements**
 - **Covered Employers**
 - **Compliance Phase-In**
- **Implementation Issues**
 - **Classification**
 - **Labeling**
 - **SDS**



BACKGROUND

- ✓ Essential Requirements
 - Hazard classification
 - Safety data sheets
 - Container labeling
 - Employee training
 - Written program



BACKGROUND

✓ Essential Requirements

- Hazard classification
 - Self-classification with some exceptions
 - Substance or Mixture
 - Physical hazards
 - Health hazards
 - A simple asphyxiant, combustible dust, or pyrophoric gas
 - Compare with new small bus. guidelines
 - Guidance continues to ignore the fact that small businesses are chemical manufactures
- Hazards not otherwise classified (HNOCs)

Health Hazard Classification

✓ Substance v. Mixture

- Substance
 - Weight of evidence (WOE) to available data
- Mixture
 - WOE to adequate test data on mixture
 - WOE to adequate data on ingredients and substantially similar mixture
 - Bridging principles
 - Threshold cutoff levels for each hazard

Health Hazard Classification

- ✓ Substance v. Mixture for Complex Petroleum Chemicals (category of UVCBs)
 - Crude oil is created through **a complex series of chemical reactions**
 - Thousands of chemical structures
 - Petroleum industry has health hazard test data on petroleum streams not 1000's individual constituents
 - API: crude oil and all complex petroleum streams derived from crude oil are substances
 - OSHA: crude oil and chemicals extracted from crude oil without a chemical reaction are complex mixtures

Health Hazard Classification

- ✓ Substance v. Mixture for Complex Petroleum Chemicals (category of UVCBs)
 - HCS 1994
 - "Mixture" means any combination of two or more chemicals if the combination **is not, in whole or in part, the result of a chemical reaction** [emphasis added].
 - Therefore, a “substance” would logically be any single chemical or any combination of chemicals that is, in whole or part, the result of a chemical reaction.

Health Hazard Classification

- ✓ Substance v. Mixture for Complex Petroleum Chemicals (category of UVCBs)
 - **HCS 2012**
 - "**Mixture**" means a combination or a solution composed of two or more substances in which they do not react.
 - "**Substance**" means chemical elements and their compounds in the natural state or obtained by any production process, including any additive necessary to preserve the stability of the product and any impurities deriving from the process used, but excluding any solvent which may be separated without affecting the stability of the substance or changing its composition.
 - Different words, but, per OSHA, no change in meaning

Health Hazard Classification

- ✓ Substance v. Mixture for Complex Petroleum Chemicals (category of UVCBs)
 - **API-OSHA Settlement**
 - Hybrid approach to classification
 - Permits reliance on test data from the same and substantially similar chemicals
 - Defines what is meant by a substantially similar chemical
 - Explains the nature of test data that may be relied upon to overcome the presumption that the threshold cutoff values govern streams containing CMRs

SDS “Ingredient” Disclosure

- ✓ Substance v. Mixture for Complex Petroleum Chemicals (category of UVCBs)
 - **API-OSHA Settlement**
 - Where there is “reliable and good quality” data supporting a weight of evidence determination that a constituent in a petroleum stream poses no health risk (as per A.0.4.3.3) in a downstream use of the stream, it need not be disclosed on the SDS.
 - Notwithstanding Section 3 of Appendix D (SDS format) that requires the listing of hazardous ingredients above the threshold cutoff level.

Health Hazard Classification

✓ Substance v. Mixture Issues

- **Unresolved issues**
 - **How to classify an OSHA-recognized “substance” containing preservatives or impurities where the manufacturer does not have data on the substance (as a whole)**
 - **Whether these principles are applicable to other UVCBs**



Hazard Classification

- ✓ Hazards Not Otherwise Classified
 - Challenged by API as open-ended
 - API-OSHA Settlement
 - Material impairment of health or functional capacity
 - Health effect: based on weight of evidence, not just because a single positive test
 - Intrinsic chemical hazard, not one caused by added heat, slippery condition, etc.



Combustible Dust (CD)

✓ API challenged manner in which CD was covered, not whether it was covered

- SDS
 - This product is not hazardous in the form in which it is shipped by the manufacturer, but may become hazardous through downstream activities (e.g. grinding, pulverizing) that reduce its particle size. Those hazards are described below.



Combustible Dust (CD)

- ✓ API challenged manner in which CD was covered, not whether it was covered
 - SDS and Shipped Container Label Hazard Statement
 - *If converted to small particles during further processing, handling, or by other means, may form combustible dust concentrations in air.*
 - *If small particles are generated during further processing, handling or by other means, may form combustible dust concentrations in air.*

Combustible Dust (CD)

- ✓ API challenged manner in which CD was covered, not whether it was covered
 - API-OSHA Settlement Clarified In-Plant Label Requirements Under One-time label Rule
 - Shipped container
 - Stationary process vessel
 - Non-stationary process vessel
 - Processing before being placed in container



Other Issues

- ✓ Complying with HCS 1994, HCS 2012 or both?
- ✓ Dual HCS 2012 and CPSC FHSA labeling?
- ✓ Individual ingredient below threshold cutoff level, but aggregate of ingredient class posing health hazard is above threshold cutoff level?
- ✓ Reliance on supplier's precautionary statements? (v. hazard classification)
- ✓ Use of exclamation point and fonts

Next OSHA 30/30

Please join us
at 1:00 PM Eastern U.S.
Wednesday, April 30th, 2014
www.khlaw.com/osha3030

The Employment Law Aftermath

Web Encore

Thursday, April 10th, 2014
at 12:00 noon Eastern U.S.

Web Encore:

www.khlaw.com/aftermath

The Employment Law Aftermath

Live Lunch Meeting

Tuesday, April 8th, 2014
at 12:00 noon Eastern U.S.
Tower Club in Tyson's Corner, VA



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