OSHA’s Use Of the General Duty Clause To Address Standards It Deems Inadequate

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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 workplace safety and chemical regulation. His workplace safety and health practice covers all aspects of legal advocacy, including: representing clients in OSHA and MSHA investigations and enforcement actions; providing compliance counseling and training; conducting incident investigations, compliance audits and program reviews; participation in federal (OSHA, MSHA and NIOSH) and state rulemakings and stakeholders processes; bringing and intervening in pre-enforcement challenges to final agency rules; advising on legislative reform and oversight; and participation in the development of national consensus standards under the ANSI process, 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.
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 and investigations 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).
Peter de la Cruz

Peter L. de la Cruz joined Keller and Heckman in 1980. Mr. de la Cruz has over 25 years of experience advising clients on antitrust, trade association and regulatory matters. His focus is on chemical regulations, compliance strategies for environmental regulations and product stewardship. His areas of emphasis include statutes on air quality and toxic substance, and occupational safety and health.

Prior to joining Keller and Heckman, Mr. de la Cruz was an attorney in the Antitrust Division of the United States Department of Justice. For his work for the National Commission for the Review of Antitrust Laws and Procedures (Shenefield Commission) in 1978 and 1979, he received the Justice Department's Special Achievement Award for sustained superior performance. Mr. de la Cruz gained substantial knowledge of the workings of the Food and Drug Administration, the Consumer Product Safety Commission and other federal agencies while representing those agencies in litigation during his tenure at Justice. Since joining Keller and Heckman in 1980, his practice has included a variety of environmental, food, antitrust and trade association matters. Much of this work has centered on the needs of companies in the plastics, chemicals, and food sectors. Mr. de la Cruz is AV® Preeminent™ Rated by Martindale-Hubbell.
Topics to be discussed

1. Background on Styrene PEL
2. Understanding the Elements of the General Duty Clause
3. General Dynamics case
4. OSHA’s Citations In Fiberdome
5. What Employers Can Do If OSHA Attempts To Enforce General Duty Clause
Background On Styrene PEL

• Used as a component in: plastics, resins, coatings, paints
• In fiberglass manufacturing, styrene resin is sprayed onto fiberglass fibers in a mold in the shape of the product
• Health hazards:
  • Recognized: nervous system damage, liver damage, hearing loss
  • Disputed: cancer and reproductive toxicity
• About 90,000 US workers in industries with potential styrene exposure
Background On Styrene PEL

• OSHA has permissible exposure limits (PELs) for over 470 hazardous chemicals

• Styrene PEL
  • 100 ppm 8 hr TWA,
  • 200 ppm ceiling, Max duration 5 min in any 3 hrs

• NIOSH REL
  • 50 ppm 8 hr TWA
  • 100 ppm STEL
Background On Styrene PEL

• Generic PELs Rulemaking (1988-89)
  • Final Rule
  • Legal Challenge
    • Settlement on PPE (1989)

• Industry Practice
  • Voluntary multi-association 50 ppm program (1996)
  • OSHA endorsed program and issued news release
  • Cal/OSHA (50 ppm)
Understanding the Role of the General Duty Clause

- Section 6 (a) of the OSH Act
- Section 6 (b) of the OSH Act
- Section 5(a)(1) of the OSH Act – GDC
  - Catch-all provision for hazards not covered by standards
Understanding the Elements of the General Duty Clause

- Elements that OSHA must prove:
  1. Employer failed to render workplace free of a hazard;
  2. the hazard is recognized by the employer or by that industry;
  3. the hazard caused or is likely to cause death or serious physical harm; and
  4. there is a feasible means of eliminating or materially reducing the hazard.
Understanding the Elements of the General Duty Clause

• OSHA Enforcement Policy
  • As a general rule, OSHA will not issue a citation under the General Duty Clause if there is a standard that specifically addresses a hazard

• Section 1910.5:
  • An employer who is in compliance with any standard shall be deemed to be in compliance with Section 5(a)(1) provided that the condition, practice, process are covered by the specific standard
General Dynamics case

- Detroit Arsenal Tank Plant, Detroit, MI
- Freon (solvent) used to clean oil spills, including surfaces inside tanks
- Volatile, with a vapor that is heavier than air
- Employees asphyxiated
- OSHA issued a citation under the general duty clause
- ALJ vacated citation on ground that a specific standard (a PEL) preempted the GDC and no evidence it was violated
General Dynamics case

• US Court of Appeals, D.C. Circuit:
• ALJ erred in applying 1910.5
• If an employer has knowledge that a specific standard is inadequate to protect workers against a specific hazard, it has a duty under the GDC to take whatever measures may be required under the OSH Act.
• Section 1910.5 is invalid, but never revoked
OSHA’s Citations In Fiberdome

• Fiberdome, Inc.: fiberglass factory in Wis.
• Worker hospitalized for lung inflammation, presumed due to styrene exposure
• OSHA inspected, issued GDC citation with $49,000 in fines for high levels of styrene
• OSHA found styrene levels below the PEL of 100 ppm, but above the 50 ppm level established by the settlement agreement
• Employer accepted citation
What Employers Can Do If OSHA Attempts To Apply GDC To Hazard Covered by OSHA Standard

• Develop evidence of compliance with the specific standard.
• Develop evidence as to the generally accepted industry practice.
• Prepare a researched position supporting employer's protective measures and presenting any known challenges to efficacy or operational feasibility of measures proposed by OSHA.
• Make a sound policy argument on impact of OSHA effectively amending standard w/ GDC.
Next OSHA 30/30
Please join us
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Wednesday, September 24\textsuperscript{th}, 2014
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The Employment Law Aftermath
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at 12:00 noon to 1:40 pm Eastern U.S.
Tysons Corner, VA
Web Encore
Thursday, October 9\textsuperscript{th}, 2014
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