



OSHA 30/30®

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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OSHA Proposed Revisions to the Hazard Communication Standard

March 24, 2021

MANESH RATH

PARTNER

1001 G STREET NW STE. 500W
WASHINGTON, DC 20001

202.434.4182
RATH@KHLAW.COM

LAWRENCE HALPRIN

PARTNER

1001 G STREET NW STE. 500W
WASHINGTON, DC 20001

202.434.4177
HALPRIN@KHLAW.COM



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Manesh K. Rath

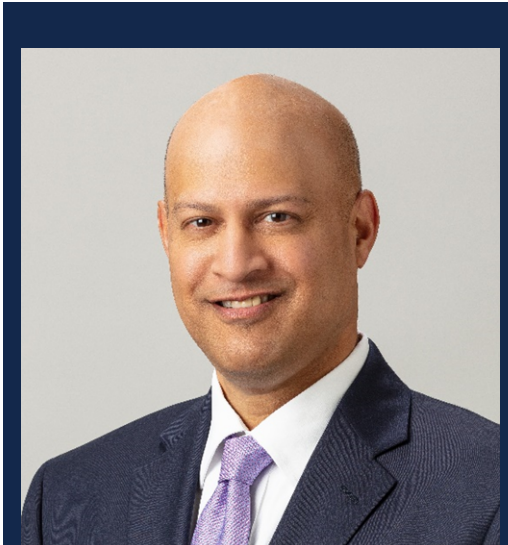


Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. He has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," and C-SPAN.

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 was voted by readers to Smart CEO Magazine's Readers' Choice List of Legal Elite; by fellow members to The Best Lawyers in America 2016, 2017 and 2018; selected by Super Lawyers 2016 – 2017, 2017 – 2018; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.



Manesh Rath
Partner
rath@khlaw.com
202-434-4182

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.



Lawrence Halprin
Partner
halprin@khlaw.com
202-434-4177



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Topics to be Discussed

- ◆ The purpose of OSHA's proposed rule to amend the Hazard Communication Standard
- ◆ Unprecedented scope and approach to hazard classifications
- ◆ Trade secret protection on safety data sheets
- ◆ New flexibility for labeling of bulk shipments, small containers, and containers released for shipment
- ◆ Economic impact
- ◆ Compliance deadlines
- ◆ What employers should do

Purpose of Proposed Rule



- ◆ NPRM published February 16, 2021
- ◆ Purpose:
 - ◇ Align with GHS Revision 7 (current HCS is aligned with Revision 3)
 - ◇ Address implementation issues that came up during 2012 update
 - ◇ Align with other agencies— e.g., DOT, WHMIS
 - ◇ Adopt new requirements affecting implementation

Proposed Revisions: Scope of Hazard Classifications



- ◆ Current HCS: manufacturers/importers must evaluate chemicals and determine hazard classes and category.
- ◆ Proposed HCS: Adds that hazard classification must include any hazards associated with:
 - ◇ A change in the chemical's physical form, or
 - ◇ Resulting from a reaction with other chemicals under normal conditions of use.
 - OSHA example: chemical change and physical effects of adding water to ready-mix concrete or cement. Hazards of water-reactive chemical addressed as HNOC.

Proposed Revisions: Scope of Hazard Classifications



- ◆ Implication of proposal
 - ◇ Manufacturer A produces and sells Chemical 1
 - ◇ Manufacturer B produces and sells Chemical 2
 - ◇ Manufacturer C combines Chemicals 1 and 2; they react to produce Chemical 3, Byproduct 1 and significant heat
- ◆ HCS obligation to classify chemicals produced in your workplace
- ◆ General Duty Clause, PPE Hazard Assessment address assessing hazards of *downstream* chemical reaction that produced the chemical
 - ◇ OSHA proposes to shift these obligations *upstream* to the manufacturer or importer
- ◆ Outcome under OSHA's "clarifying" amendment to HCS
 - ◇ Multiple, redundant classifiers; linking classification to particular use
 - ◇ Difficult and impractical to identify almost infinite combinations of mixtures and downstream reactions
 - ◇ May create potential tort liability for importers and manufacturers

Proposed Revisions: Trade Secret Claims on SDS



- ◆ Current HCS: permits bona fide claim that % concentration of substance in a mixture is a trade secret, exempt from disclosure on SDS
 - ◇ Cannot claim concentration range is trade secret
- ◆ Proposed HCS:
 - ◇ Concentration range of substance in a mixture also can qualify as trade secret, exempt from disclosure on SDS
 - ◇ When concentration or concentration range is omitted from SDS as trade secret, must identify the prescribed concentration range in which it falls
 - ◇ Must use narrowest range or combination of ranges identified
 - ◇ Conforms with WHMIS
 - ◇ Manufacturer input: Does this approach adequately protect the trade secret?

Proposed Revisions: Prescribed Concentration Ranges



- ◆ From 0.1% to 1%
- ◆ From 0.5% to 1.5%
- ◆ From 1% to 5%
- ◆ From 3% to 7%
- ◆ From 5% to 10%
- ◆ From 7% to 13%
- ◆ From 10% to 30%
- ◆ From 15% to 40%
- ◆ From 30% to 60%
- ◆ From 45% to 70%
- ◆ From 60% to 80%
- ◆ From 65% to 85%
- ◆ From 80% to 100%

Proposed Revisions: Trade Secret Claims on SDSs



- ◆ Current HCS: manufacturer, importer, or employer must provide chemical, exact concentration, or concentration range in:
 - ◇ Medical Emergency: to treating physician or nurse
 - ◇ Non-emergency: to health professionals, employees or designated representatives (with justification and confidentiality agreement)
- ◆ Proposed HCS: would expand group of authorized recipients in both scenarios to include the broad category of all physicians or other licensed health care professionals (PLHCPs)
 - ◇ OSHA: Reflects current medical practice
 - ◇ Presents risk of loss of trade secret

Proposed Revisions: Labels for Bulk Shipments



- ◆ Proposed HCS: labels for bulk shipments of hazardous chemicals may be on:
 - ◇ Immediate container
 - ◇ Transmitted with shipping papers, bills of lading, or other technological or electronic means so printed label is readily available
 - ◇ Bulk shipment: where mode of transportation comprises the immediate container (tanker truck, rail car)
 - ◇ Needs to be clarified: palletized items should constitute bulk shipment
- ◆ Intended to codify existing OSHA/DOT guidance

Proposed Rule: Chemicals Released for Shipment



- ◆ Current HCS: Labels must be revised within 6 mos of date newly aware of significant hazard information
 - ◇ Labels on containers shipped after that time must contain the new information
- ◆ Proposed HCS: Chemicals released for shipment and are awaiting future distribution are not required to be re-labeled under revised rule
 - ◇ Must provide the updated label for each individual container with each shipment
 - ◇ Shipped container labels must include “date chemical is released for shipment” (date for compliance with this requirement not specified)

Proposed Rule: Small Container Labeling



- ◆ Proposed HCS: reduced labeling requirements on immediate container if demonstrate infeasibility
 - ◇ Containers ≤ 100 ml
 - Product identifier, pictogram, signal word, manufacturer name and phone number
 - Statement that full label information is on the immediate outer package
 - ◇ Containers ≤ 3 ml and demonstrate that any label interferes with normal use of container
 - NO label required (only product identifier)
 - ◇ Immediate outer package must contain full label for each hazardous chemical (in small container with abbreviated label?)

Revised Hazard Categories and Precautionary Statements



- ◆ Desensitized explosives new hazard (Categories 1-4)
- ◆ Expanded hazard categories
 - ◇ Flammable gases (Categories 1A, 1B, 2)
 - ◇ Aerosols (adding Category 3)
- ◆ New definitions
 - ◇ Skin corrosion/irritation
 - ◇ Serious eye damage/eye irritation
 - ◇ Germ cell mutagenicity
- ◆ Revised precautionary statements will require revisions to every SDS and label of every hazardous chemical distributed in the US

Proposed Rule: Combustible Dust



- ◆ Proposed definition of combustible dust:
 - ◇ Finely divided solid particles of a substance or mixture
 - ◇ Liable to catch fire or explode on ignition when dispersed in air or other oxidizing media
- ◆ Definition from the GHS Rev. 7
- ◆ Ambiguous, presumes ignition

Proposed Rule: Economic Impact

- ◆ The cost of reclassifying affected chemicals and revising the corresponding SDSs and labels to achieve consistency with the reclassifications – significant to enormous depending on scope of chemical reaction coverage
- ◆ The cost of revising SDSs and labels to conform with new precautionary statements and other new mandatory language;
- ◆ The cost of management familiarization and other management-related costs associated with the proposed revisions;
- ◆ The cost of training employees necessitated by the proposed changes to the HCS;
- ◆ The cost savings (if any) resulting from the new released-for-shipment, small container and bulk shipment labeling provisions

Compliance Deadlines

- ◆ For manufacturers, importers, and distributors “evaluating”:
 - ◇ Substances: 1 year from effective date of final rule
 - ◇ Mixtures: 2 years from effective date of final rule
- ◆ What is meant by “evaluating”?
- ◆ Tiered approach is an incomplete attempt to remedy infeasible compliance deadlines.
- ◆ Insufficient time for implementation, especially if upstream manufacturer is responsible for evaluating all downstream chemical reactions of its chemical with other substances and mixtures, and the products of those chemical reactions, and the downstream manufacturer is to rely on those classifications

What Employers Should Do



- ◆ Assess potential impact of rule on company
 - ◇ Identify new requirements
 - SDSs and labels that would need to be revised
 - Re-do hazard classifications
 - ◇ Determine compliance deadlines
 - ◇ Determine utility of small container, bulk shipment and released for shipment provisions and how to take advantage of those changes
 - ◇ Identify elements of proposal that are infeasible, unreasonably burdensome, or needs modification or needs clarification
- ◆ Participate in rulemaking
 - ◇ Request enlargement of comment period
 - ◇ Comments due April 19, 2021
 - ◇ Request informal public hearing

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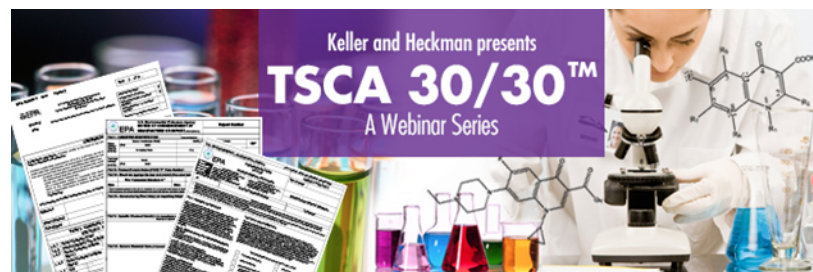
April 21, 2021

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Manesh Rath
Partner

1001 G Street NW Ste. 500W
202.434.4182
rath@khlaw.com

