Update On The "Right To Know"

Lawrence S. Ebner
Bonnie A. Sullivan
McKenna, Conner & Cuneo

The chemical industry and organized labor are engaged in an increasingly heated debate over the Occupational Safety and Health Administration's (OSHA's) proposed hazard communication standard and recent proposed modifications to the access to employee exposure and medical records rule. The debate centers on whether these worker "right to know" regulations will adequately protect the interests of workers who are routinely exposed to hazardous substances and harmful physical agents.

Few employers argue with the proposition that workers have a fundamental right to know the identity of hazardous chemicals to which they are exposed in the workplace. The scope and design of a cost-effective "hazard communication" program is another matter, however. It is not surprising that labor and industry differ dramatically on the question of implementation.

Under the aggressive leadership of Thorne G. Auchter, OSHA last March published a proposed federal workplace standard on hazard communication. As one of the administration's first "performance-oriented" regulations, industry rather than government is in the driver's seat. OSHA specifies to employers what level of performance they must achieve; employers are then free to adopt any reasonable methods to achieve that standard of performance.

The philosophy underlying the right to know is that if workers are to protect themselves, they must be made aware of the occupational hazards to which they are exposed. In the preamble to its current proposal, OSHA states:

> Without adequate hazard communication, millions of workers with routine exposures to hazardous chemical substances are unaware of the hazards posed by these substances, and are thus incapable of protecting themselves or ensuring that their employers provide adequate protection . . . to leave workers ignorant of the hazards they face, without the ability to protect themselves, would be incompatible with OSHA's duty under the [Occupational Safety and Health] Act to assure every working man and woman in the nation, so far as possible, safe and healthful working conditions.

OSHA's view, therefore, is that hazard communication must result in a level of awareness that will ensure adequate employee protection.

The current proposal contrasts sharply with the specification-oriented "hazard identification" standard that was proposed as one of the Carter administration's "midnight regulations" and which was withdrawn as one of the Reagan administration's first regulatory reform measures. Had that standard been adopted, it would have imposed rigid labeling and placarding requirements as well as required employers to conduct extensive scientific literature searches.

OSHA conducted public hearings on its proposed hazard communication standard during June and July 1982 in Washington, D.C., Houston, Los Angeles, and Detroit. At

This article revises and updates an article ("Rewriting the 'Right-to-Know'") published in, and reprinted here with permission of, *Chemical Times and Trends* (July 1982).

the hearings, labor and industry clashed repeatedly over the administration's proposal. Labor, of course, recommended a more stringent rule similar to the Carter administration's proposed "hazard identification standard," whereas industry generally supported OSHA's performance-based approach.

OSHA'S REVISED PROPOSAL VS. THE CARTER ADMINISTRATION'S PROPOSAL

The pending hazard communication standard sets forth two basic requirements:

1. Chemical manufacturers must evaluate the chemicals they produce to determine if they are "hazardous"
2. Chemical manufacturers and other manufacturing employers who use hazardous chemicals must develop and implement hazard communication programs for the protection of their employees.

The proposed standard defines "hazardous chemical" as any chemical that is "combustible, a compressed gas, explosive, flammable, a health hazard, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive." Because the standard is performance-oriented, chemical manufacturers "are not required to follow any specific methods of determining hazards, but it is incumbent upon them to demonstrate that they have adequately ascertained the scientifically well-established hazards of the chemicals produced."

In terms of "health hazards," only "scientifically well-established" acute or chronic effects resulting from occupational exposure need be identified. This provision is particularly controversial because chronic health risks such as carcinogenicity, mutagenicity, and teratogenicity are so difficult to establish as a result of the scientific uncertainty inherent in using animal test data to extrapolate human health effects.

Thus, chemical manufacturers have the burden of determining whether the chemicals they produce are hazardous. Each employer covered by the standard must make a list of the hazardous chemicals known to be present in the workplace and develop and implement a hazard communication program. An "employer" is defined as "an establishment in SIC [Standard Industrial Classification] Codes 20-39 (*i.e.*, a manufacturer) that manufactures or uses hazardous chemicals." Hazard communication programs must include labeling and placarding of containers in or leaving the workplace, material safety data sheets (MSDSs), and employee information and training. To the extent that existing hazard communication programs meet the standard's minimum criteria, no new measures need be taken.

The proposed standard's labeling and placarding requirements apply to "containers" of hazardous chemicals (pipes and piping systems are expressly excluded). Employers must ensure that each container of hazardous chemicals in or leaving the workplace is labeled, tagged, or marked with identifying information and hazard warnings. If stationary containers in a work area have similar contents and hazards, signs or placards may be posted in the work area in lieu of individual containers being labeled.

Additionally, every employer must obtain or develop and make available to its employees an MSDS for each hazardous chemical produced or used in the workplace. The MSDSs are to describe chemical and common names (subject to certain trade secret confidentiality protections), physical and chemical characteristics, physical hazards, known acute and chronic effects and exposure to the chemical, exposure routes, precautions and recommendations for safe handling and use, and emergency and first aid procedures. Chemical manufacturers are directed to provide MSDSs to their manufacturing purchasers. OSHA assumes that most downstream employers who use hazardous chemicals will obtain the sheets from chemical manufacturers rather than develop them independently.

Finally, employers must provide employees with "information and training" on hazardous chemicals in the workplace. This is to occur at the time of an employee's initial assignment to a work area and whenever a new hazardous chemical is introduced. Employees are to be provided with information on the location of hazardous chemicals in work areas, and with training on detection and self-protection measures.

OSHA estimates that the short-lived and excessively burdensome Carter administration proposal would have been 10 times as costly to implement as its revised proposal. First, it would have covered all manufacturing industries and importers and repackagers of chemical products. Second, the standard would have specified detailed search and evaluation procedures for hazardous chemicals. Third, labeling or placarding of pipes and piping systems as well as containers would have been required. Furthermore, no provision was made for the protection of trade secrets, and employers would have had to certify that particular chemicals are not hazardous. The Reagan administration has suggested that the earlier proposal, with its emphasis on providing large amounts of technical information to employees, would have resulted in "information overload" and consequently less effective hazard communication.

REGULATORY REFORM AND FEDERAL PREEMPTION

Information overload is one reason why a federal standard on hazard communication in the workplace is needed. A number of state and local governments already have enacted or are considering their own worker right-to-know laws. Multiple or conflicting labeling and other requirements could result in workers being confronted with a maze of confusing, redundant, or inconsistent information. This would defeat the very purpose of effective hazard communication and create an unwarranted cumulative burden on industry.

Adoption by OSHA of a federal standard on hazard communication, however, probably would preempt most state and local right-to-know regulatory activities. Thus, this is one area for which regulatory relief requires (although OSHA has refused to make this explicit in the proposed standard) federal authority and less state and local regulation.

While the proposed standard may avert conflicting state and local requirements, it nevertheless could encroach upon areas already regulated by other federal agencies and in that way result in information overload. For example, because the proposed standard's labeling requirements apply to containers "leaving" as well as "in" the workplace, OSHA's requirements may overlap with those promulgated by the Department of Transportation (DOT) under the Hazardous Materials Transportation Act as well as the extensive labeling regulations promulgated by the Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide, and Rodenticide Act. The extent to which required DOT or EPA labeling and placarding would satisfy (or limit) the OSHA standard is unclear. Importantly, section 4(b)(1) of the Occupational Safety and Health Act expressly precludes OSHA from regulating working conditions of employees with respect to which other federal agencies "exercise statutory authority to prescribe or enforce standards affecting occupational safety and health."

ACCESS TO EMPLOYEE EXPOSURE AND MEDICAL RECORDS

Ensuring access to employee exposure and medical records is an important adjunct to OSHA's right-to-know program. The Carter administration adopted a broad records retention and access rule in May 1980, but that rule was immediately challenged in the courts. On the basis of numerous industry comments and petitions for reconsideration, OSHA on July 13, 1982, proposed substantial revisions to the access rule. These modifications are intended to narrow significantly the rule's scope and to afford greater protection to an employer's trade secrets.

The existing rule applies indiscriminately to general industry, maritime, and construction employees who are "exposed" to toxic substances or harmful physical agents. The proposed modifications, however, cover only employees whose work directly involves exposure to, or who are exposed accidentally to, toxic substances or harmful physical agents.

Additionally, the proposed definition of "toxic" substance has been narrowed to include only those chemical substances or biological agents listed in the National Institute of Occupational Safety and Health (NIOSH) Registry of Toxic Effects of Chemical Substances (RTECS) that meet certain toxicological criteria. OSHA estimates that this revised definition will reduce the list of toxic substances by more than 90 percent.

The current access rule defines toxic substance broadly to include all chemicals listed in RTECS whether or not they may be toxic. For example, sugar and salt are among the over 39,000 substances currently listed in RTECS.

"Employee exposure records" are more narrowly defined in the proposed modification. Only three types of records are included: (1) environmental (workplace) monitoring results, (2) biological monitoring results, which are classified as exposure records under other OSHA standards, and (3) material safety data sheets. This change is intended to "reduce both the possibility of trade secret disclosure and the employer burdens in complying with the regulation."

In consideration of the modified scope of the access rule, OSHA proposes to delete the definition of exposure from the current regulation. OSHA believes that the new definition of employee eliminates "the necessity to separately define 'exposed'."

Employee medical records would not be as broadly defined as under the current rule. Essentially, under the proposed rule, only those medical records relating to occupational diseases would be covered. Thus, for example, first aid reports (which are not otherwise part of an employee's medical record), and X-rays of broken bones would be excluded. Records created solely for purposes of litigation would also be outside the scope of the access rule. The current rule covers all records involving the health of employees, including those related to first aid treatment.

To avoid creating disincentives for employers who conduct research in the occupational health area, OSHA proposes to delete "research" and "other" studies from the

definition of "analysis using exposure or medical records." Such analyses would continue to include data compilations and statistical studies based on information contained in employee exposure or medical records, or information from health insurance claims. This information still would have to be retained for at least 30 years.

Employee exposure records also would have to be retained for 30 years. Employee medical records would have to be retained for at least 30 years from the beginning of employment or the duration of employment plus 5 years, whichever is longer. Separately maintained health insurance claim records would not have to be retained. Two exceptions to this rule are: (1) employers are not required to retain medical records longer than the duration of employment for an employee whose term of employment is less than one year, provided that the employee is given the records upon termination; and (2) employers in the construction industry are not required to retain medical records beyond the term of employment if employees are given their records when they are terminated.

Under the current access rule, medical records have to be retained for 30 years after termination of employment and exposure records for at least 30 years.

Protection of trade secrets has been a particularly controversial subject. The proposed modifications are intended to provide more protection for an employer's trade secrets. An employer would be able to delete certain trade secret information from records, provided that the employee requesting the record was informed of the deletion. Precise chemical identity information could be withheld by the employer under certain conditions, unless the chemical is a carcinogen, a teratogen, or a cause of significant irreversible damage to human organs or body systems, and there is a need to know the precise chemical name. Finally, any trade secrets that could not be withheld under the rule could be protected by a reasonable confidentiality agreement between the employer and the employee. The parties could negotiate the terms of the agreement and provide for compensation or other legally appropriate relief in the event of a breach of confidence.

Many of these safeguards for trade secrets are not contained in the access rule as it is presently written. Although the current access rule permits deletion of trade secret data that disclose manufacturing processes or the percentage of a chemical substance in a mixture, there is no protection of chemical identity information as in the proposed modifications. Moreover, the original rule recognized a much weaker confidentiality agreement that did not provide for compensation to the employer for competitive harm that might result from breach of the agreement.

The current access rule automatically recognizes union bargaining agents as designated representatives of employees without requiring written employee authorization for purposes of access to exposure and analysis records. In this regard, three recent National Labor Relations Board (NLRB) decisions have held that unions do have a right of access to these records since the information they contain is relevant to the collective bargaining process. OSHA acknowledges that the union access provision of the rule may be unnecessary in light of these recent NLRB rulings and has invited comment on the appropriateness of retaining this provision. Individual employee medical records, however, are exempt from disclosure on privacy grounds without the written consent of the employee.

□

The Reagan administration obviously has not turned its back on workers' right-to-know issues. As ongoing rulemaking activities suggest, OSHA is still very much committed to effective hazard communication and records access programs. Furthermore, regulatory relief does not imply diminished industry responsibility. On the contrary, with less burdensome regulations, chemical manufacturers and other employers will have to assume even greater responsibility for ensuring that employees are provided the information they need to protect themselves from occupational hazards.