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The Intersection of EPA's New TSCA Chemical Exposure Limits and OSHA Enforcement of Workplace Chemical Exposure – Employers Better Look Both Ways

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This is the OSHA Defense Report blog, but today we are blogging about the Environmental Protection Agency's TSCA regulations. What do EPA's TSCA regulation have to do with OSHA and workplace safety? More specifically, what impact might EPA's actions under TSCA have on OSHA's enforcement landscape? Read further to find out what is happening that causes us to be writing about EPA and TSCA!

Over the last year, the Environmental Protection Agency (EPA) has taken several actions under the Toxic Substances Control Act (TSCA) demonstrating the agency's avid interest in regulating chemicals in the workplace, an area traditionally considered within the jurisdictional authority and purview of this Blog's beloved agency, OSHA. EPA seems to be stretching its statutory authority under TSCA to muscle its way into a preeminent role in workplace safety and effectively leapfrog over OSHA in setting more stringent limits than OSHA has established with its Table Z limits for air contaminants in the workplace, found primarily at [29 CFR 1910.1000](#). In fact, EPA is now proposing to revise its TSCA regulations to further increase its authority in the worker safety area by adding a requirement that chemical manufacturers include worker exposure information in the materials that must be submitted for EPA review under TSCA, likely leading to even broader regulation by EPA of chemicals in the workplace. 

First, some background on how revised EPA chemical safety limits might affect OSHA enforcement actions.

OSHA does not have authority under the Occupational Safety and Health Act (OSH Act) to enforce another agency's regulations, even where those regulations are designed to protect employee safety and health. Accordingly, as you might anticipate, the authority that OSHA would have available, at least theoretically, to essentially "reach over" its own regulations and enforce a more stringent regulatory limit set by EPA, is section 5(a)(1) of the OSH Act (commonly referred to as the "General Duty Clause" (GDC)).

In very limited circumstances, OSHA may use the General Duty Clause to cite an employer who has failed to meet exposure limits more stringent than its own standards. The GDC requires employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing

or are likely to cause death or serious physical harm.” OSHA will not issue a GDC citation when a specific standard addresses the hazard identified in a citation. See [Elements necessary for a violation of the General Duty Clause](#). 

However, the existence of a specific OSHA standard (and an employer’s compliance with that standard) does not necessarily discharge an employer of its statutory obligation under section 5(a)(1) to protect its employees from recognized hazards in the workplace. See *Int’l Union UAW v. General Dynamics Land Systems Div.*, 815 F. 2d 1570 (D.C. Cir. 1987) (Employer not absolved of duty under section 5(a)(1) despite the presence of an applicable OSHA standard if that standard is inadequate to protect workers).

In *General Dynamics*, employees regularly used freon to clean up certain spills in the workplace. Although the employer complied with OSHA’s standards regarding permissible exposure limits (“PEL”) for freon, several of its employees had become severely ill and lost consciousness while working with it. Because the freon was being used in confined spaces, the volume of freon permitted by OSHA’s safety standard was too great and employees were being overcome. The Court held that although the employer complied with the safety standard, it had failed to comply with the GDC because it had actual knowledge that the PEL was inadequate to protect its employees given their working conditions. *Id.* at 1578. Employer knowledge is the critical factor. *Id.* Thus, OSHA can only issue a citation under the GDC for a hazard regulated by an OSHA safety standard if it can establish that the “employer knows a particular safety standard [wa]s inadequate to protect his workers against the specific hazard it is intended to address, or that the conditions in his place of employment are such that the safety standard will not adequately deal with the hazards to which his employees are exposed.” *Id.*

As an example, the updated TSCA proposals for Methylene Chloride will revise the Existing Chemical Exposure Limit (ECEL) for airborne concentration to in excess of two parts per million (ppm) based on an 8-hour time-weighted average (TWA). This is significantly lower than the current OSHA PEL for MeCl of 25 ppm. There is obviously a significant distance between the TSCA ECEs and OSHA’s PELs. Still, OSHA’s most recent regulatory review of MeCl, published in 2010 (PDF), found that the standard “[remained] justified and necessary in light of ongoing hazards and fatalities” and that it should continue with no changes.”

Although OSHA could point to the TSCA proposal to argue that its own safety standard is inadequate, the agency must also demonstrate that an employer *knew* the standard was deficient to protect its employees. In *General Dynamics*, that awareness was not an abstract concept. Instead, the employer was put on notice that OSHA’s exposure limits were inadequate when three employees suffered severe ill effects from exposure. While the EPA limits provide some evidence that OSHA’s current PELs for MeCl may be inadequate, until an employer is confronted with first-hand evidence that their exposure limits are insufficient, it is questionable whether OSHA would have sound authority to issue a GDC citation in light of its MeCl standard and determination that the MeCl PEL ought to remain in place with no revisions.

Having said this, the Biden Administration is proving to be among the most aggressive we have seen. The Acting Secretary of Labor, Julie Su, is driving OSHA to “use every tool in its toolbox” to aggressively pursue its mission to keep workers free from hazards. In fact, recent enforcement activity of the agency suggests that, even where there is questionable legal authority to act, OSHA area offices are threatening action as leverage to force change at specific workplaces. Accordingly, while the legal authority to “reach over” OSHA’s own PELs to enforce EPA’s ECEs is questionable, we think there is some possibility that OSHA may attempt to do so. In fact, we saw one

instance of something like this during the Obama Administration, when OSHA issued a GDC citation against an employer for failing to meet a voluntary limit for formaldehyde established by either NIOSH or ACGIH, even though the employer was in compliance with OSHA's PEL. The rationale underlying OSHA's position was apparently that the employer had set its own internal limit at the level of the NIOSH (or ACGIH) limit, and, therefore, it knew that exposures above this limit presented a hazard. This case settled before it was litigated so we don't have the benefit of a court's analysis of OSHA's legal authority to take that action, which is unfortunate. However, the fact that a previous administration pursued this course may provide a foundation for Acting Secretary of Labor Su to encourage OSHA to explore test cases in this area.

There are rumors that the EPA and OSHA are working on a memorandum of understanding that could further detail exactly how the two agencies will coordinate efforts when implementing TSCA regulations relating to existing chemicals. We will continue to monitor that, the EPA rulemaking, and any signals from OSHA about how it intends to transform EPA's work into quasi-new standards for its own enforcement. [Let us know](#) if you have any questions.