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Subject: US Court of Appeals Rejects Court Case Challenging TLVs Under Haz Comm

To All:

FYI - From Occupational Hazards at www.occupationalhazards.com

Appeals Court: Petition Was 2 Decades Late

The U.S. Court of Appeals for the District of Columbia dismissed a petition made by the National Association of Manufacturers (NAM) and other industry groups claiming that OSHA amended its Hazard Communication (hazcom) standard without notice or comment. The coalition of industry trade groups in March 2006 filed a suit against OSHA challenging the hazcom standard provision on how chemicals are deemed hazardous, which the court of appeals dismissed, calling the petition "untimely."

According to the petition, several changes were made to the American Conference of Governmental Industrial Hygienists' (ACGIH) threshold limit values (TLV) list in January 2006, when five new substances – three kinds of calcium sulfate, coumaphos, and monochloroacetic acid – were added to the list of "hazardous substances" covered under the standard. In addition, the list established a TLV for propylene and lowered pre-existing TLVs for nine other substances.

As a result of the changes, the groups claimed that OSHA amended the hazcom standard without notice or chance for stakeholder comment, which violates requirements in the Occupational Safety and Health Act (OSH Act) and the Administrative Procedure Act.

According to the plaintiffs, when the 2006 list was published, "OSHA ... effectuated a new standard that imposes both new and modified compliance obligations on employers ... and subjects them to the threat of enforcement actions and sanctions for failure to comply with those obligations. Because OSHA imposed these new obligations without notice and comment, NAM claims that the agency has violated Section 655."

But the court ultimately found OSHA's argument to be the more persuasive one. Given that petitions for review of the standards are to be brought within 60 days of promulgation and the final rule was issued in 1983, the agency claimed that NAM "missed the statutory deadline by two decades."

OSHA also argued that the OSH Act defines a standard as one that "requires conditions, or the adoption or use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment," which means that employers, manufacturers and importers are required to treat a substance listed in the latest edition of the ACGIH TLV list as hazardous. According to the agency, the conditions of regulated parties did not change in 2006.

The court concluded that because "the 2006 amendments to ACGIH's TLV list did not modify the [hazcom standard] and because the [hazcom standard] has remained unchanged in relevant respects for approximately 20 years, NAM's petition for review is untimely."

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