

REGULATORY MATTERS!

OSHA's New HazCom Standard And Its Potential Impact On Tort Suits

According to the Occupational Safety and Health Administration (“OSHA”), almost a million hazardous chemicals are currently used in the U.S., and over 40 million employees are now potentially exposed to hazardous chemicals in over 5 million workplaces. To further address workplace injuries and illnesses related to chemical exposures, OSHA recently published a final rule modifying its Hazard Communication Standard (“HazCom”) to largely conform to the United Nation’s Globally Harmonized System of Classification and Labeling of Chemicals (“GHS”). This “GHS Amendment” makes substantial changes to requirements governing how chemical manufacturers, employers, and other entities transmit hazard information to in-house and downstream employees. As a result, courts will have to decide how the amendment impacts common law tort suits based on a failure to adequately warn of chemical hazards. Specifically, does the GHS Amendment preempt State failure to warn claims? If not, to what extent will the GHS serve as the standard of care by which a defendant’s conduct is judged? To read more, please [click here](#).

This issue of “Regulatory Matters” was written by [Eric Gotting](#), a litigation attorney at Keller and Heckman LLP who specializes in complex civil and appellate matters, with a focus on toxic tort, environmental, and corporate litigation. To read more about Mr. Gotting, please [click here](#).

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What Are HazCom And The GHS?

Since it was first adopted in 1983, OSHA's HazCom has required chemical manufacturers to determine whether their products pose health or physical hazards and, if so, to communicate those hazards to their own employees, as well as downstream employers and employees, through the use of warning labels and safety data sheets ("SDSs"). Covered employers are obligated to develop a hazard communication program to convey information regarding hazards and protective measures to employees. However, because hazard communication laws adopted by various countries often differ in their requirements, companies operating in more than one country are forced to comply with multiple standards. The United Nations adopted the GHS in an effort to standardize these requirements. In practice, countries may pick and choose portions of the GHS system to integrate into their own programs, and adopt additional requirements. This is the approach taken by OSHA in the recent GHS Amendment. Thus, the GHS will help minimize, but not necessarily eliminate, such differences.

OSHA generally conformed HazCom to selected GHS components, specifically those covering hazard classification, labeling, and SDSs. One important feature of the GHS is that it provides more detailed requirements when compared to HazCom. For instance, the latter takes a performance-oriented approach by providing general parameters for classifying and communicating hazards, but leaves broad discretion to manufacturers and employers on how to comply. By way of example, manufacturers must provide "[a]ppropriate hazard warnings" on labels, but are not required to use specific language or types of symbols to convey the information. On the other hand, the GHS adopts a standardized approach that specifies much of the content and format of labels and SDSs based on the classification of the chemical. For instance, each classification has its own specific label elements, including a signal word (e.g., DANGER), pictogram (e.g., skull and crossbones), and hazard statement(s) (e.g., fatal if swallowed). As noted below, this distinction may have implications for tort litigation.

Does The OSH Act Or The GHS Preempt State Tort Claims?

The Occupational Safety and Health Act ("OSH Act") does not expressly preempt State failure to warn claims. Rather, Section 4 of the OSH Act contains a savings clause that explicitly preserves the right to file such lawsuits, stating that "[n]othing in this Act shall . . . enlarge or diminish or affect . . . the common law . . . with respect to injuries, diseases, or death of employees" related to employment. HazCom also addresses preemption but in a more direct manner. The rule provides that it "is intended to address comprehensively

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the issue of” hazard communication and to “preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject.” HazCom’s language, however, and the phrase “legal requirements” in particular, have led to some confusion in the courts.

To date, the vast majority of courts have held that State tort claims are not preempted. They cite to the savings clause and conclude that “legal requirements” as used in HazCom can mean only “positive enactments” – i.e., State statutes or regulations, not tort suits. Under this interpretation, only conflict preemption – e.g., where it is impossible for a manufacturer to comply with both HazCom and State tort law – might prohibit a tort claim from moving forward. One State court in New Jersey, however, found preemption where it interpreted the phrase “legal requirements” more broadly to include State failure to warn claims, at least where the defendant complied with HazCom’s requirements.

The GHS Amendment, in an attempt to clarify this issue, removes the term “legal requirements” and replaces it with the phrase “legislative or regulatory enactments.” In other words, the amended standard only preempts “positive enactments.” As to conflict preemption, however, the GHS’s standardized approach, with its detailed labeling and SDS requirements, may give rise to conflicts that did not exist under HazCom. For example, the GHS specifies which of two signal words – WARNING or DANGER – must be used to convey the relative degree of risk based on a given hazard classification. If an employee files suit and argues that a GHS label, with the prescribed signal word WARNING, should have instead used the term DANGER or some other phrase, that claim is likely to be preempted. The defendant would argue that it is impossible to comply with both the GHS and State tort law.

Will The GHS Provide The Standard Of Care In Tort Suits?

If a tort claim is not preempted, does compliance with the GHS shield the manufacturer or employer from tort liability? As noted above, the OSH Act cannot “enlarge or diminish or affect” the common law. Many courts hold, therefore, that OSHA regulations, including HazCom, may serve as “some evidence” of the standard of care. Under that approach, the defendant’s compliance or non-compliance is not conclusive and a jury is free to decide how much weight, if any, to give such evidence. Some courts, however, take a more lenient view of the savings clause, holding that non-compliance may constitute negligence per se.

It remains to be seen to what extent the GHS Amendment will be used as a standard of care in tort suits and how compliance or non-compliance plays with a jury. Overall, the

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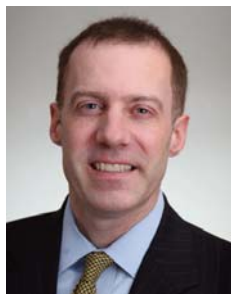
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savings clause will still act as a constraint, meaning that most courts will likely continue treating hazard communication requirements as merely “some evidence” of the standard of care. As a practical matter, however, the detailed GHS provisions are likely to result in juries giving more weight to compliance or non-compliance than under HazCom. Specifically, with HazCom’s generalized, performance-oriented approach, there is more room for plaintiffs and defendants to argue what constitutes compliance. In contrast, the GHS’s standardized approach is, according to OSHA, a “consensus” set of best practices that prescribe in detail what manufacturers and employers must do. From that perspective, a plaintiff may have a more difficult time proving negligence if the defendant has complied with the GHS. Conversely, non-compliance may be more readily considered by a jury as conclusive evidence that the defendant breached the standard of care.

In summary, labor and employment practitioners should pay close attention to future court decisions dealing with the GHS Amendment. Not only might the GHS Amendment result in preemption issues where none existed before, but also impact how a jury will view a defendant’s conduct under the new system.

About the Author



Eric Gotting serves as a partner in Keller and Heckman’s litigation practice group specializing in complex civil and appellate matters, with a focus on toxic tort, environmental, and corporate litigation. He is a former trial attorney at the U.S. Department of Justice’s Civil Division, Environmental Torts Section. Mr. Gotting has handled cases across the country, having tried matters to verdict and argued appeals before federal and state appellate courts. His experience includes class actions, mass tort litigation, and administrative enforcement proceedings. He also has counseled clients in various environmental matters, including Superfund cost-recovery actions, insurance coverage disputes, and compliance issues under the Resource Conservation and Recovery Act, Clean Air Act, Clean Water Act, and the Occupational Safety and Health Act.

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