

American Federation of Labor and Congress of Industrial Organizations



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April 8, 2013

TO: Cal/OSHA Advisory Meeting, April 9, 2013

RE: Globally Harmonized System (GHS) Update to Section 5194, Hazard Communication

Dear Sir or Madam:

The AFL-CIO is pleased to have the opportunity to provide our comments and perspective on the Cal/OSHA draft language for proposed Section 5194 where it differs from its counterpart federal language.

Our overall position on California's adoption of the GHS update to its existing hazard communication standard is that Cal/OSHA must not weaken existing protections for workers in its harmonizing effort. Doing so is fully consistent with GHS, which states in the Fourth revised edition, 2011 (see attached):

1.1.1.6 (a) the level of protection offered to workers, consumers, the general public and the environment should not be reduced as a result of harmonizing the classification and labeling systems;

In addition to maintaining consistency with GHS, any state standard adopted by an OSHA-approved state-plan must be "at least as effective" as the federal standard and, where the standard applies to products distributed or used in interstate commerce, it needs to be required by compelling local conditions and not pose an undue burden on commerce.

The AFL-CIO believes that the Cal/OSHA draft language to the GHS update, where it differs from its counterpart federal language in the new hazard communication standard, meets all of these criteria. The Cal/OSHA draft language maintains, rather than reduces, the existing level of protections for workers that is consistent with the GHS

framework and those differences with the federal language are at least as effective and pose no undue burden on commerce.

We support Cal/OSHA's efforts to promulgate language that goes beyond the federal provisions and below we provide additional comments and justification on several of the specific items for discussion at this advisory meeting:

Source Lists

Under federal OSHA's previous hazard communication standard, and California's existing rule, various source or reference lists of chemicals were/are used for the purpose of performing hazard determination or classification, by treating all chemicals on these lists as hazardous, carcinogens, or potential carcinogens. These lists include federal OSHA's toxic and hazardous substances found in 29 CFR Part 1910, subpart Z; ACGIH's Threshold Limit Values for Chemical Substances; the National Toxicology Program (NTP) and International Agency for Research on Cancer (IARC) lists of carcinogens. In addition, California's hazard communication standard included the list of hazardous substances prepared by the Director pursuant to labor Code section 6328 (the "Director's List").

The GHS, however, uses a weight of the evidence approach for classifying carcinogens, reproductive hazards, and some health hazards. Federal OSHA adopted this approach in its GHS harmonization of the standard and deleted the source or reference lists for classifying certain hazards.

The AFL-CIO's position is that Cal/OSHA should retain the source lists that are currently used in their rule in order to maintain existing worker protections. Each of these source lists of chemicals are well known, widely used, and fully respected as authoritative determinations of chemicals that are hazardous or carcinogenic to humans. These lists have been and are prepared using weight of the evidence approaches, and it is appropriate and proper for Cal/OSHA to consider these determinations as presumptively meeting the GHS weight of the evidence criteria. Indeed, it is entirely inappropriate to allow chemical manufacturers and employers to ignore or override these determinations. Moreover, these lists have been used for decades under the hazard communication rule in California and will add no undue burden to chemical manufacturers or importers should they continue to be retained in the Cal/OSHA GHS update.

In 1997, federal OSHA approved the incorporation of the occupational requirements of Proposition 65 (California Safe Drinking Water and Toxic Enforcement Act) including the list of chemicals known by the state to cause cancer or reproductive toxicity into the Cal/OSHA hazard communication standard (approval attached). The lists were approved based on California's long history of requirements for generating the Proposition 65 chemicals list and the recognition that the list was being required by compelling local conditions. In our view, the compelling local conditions remain the

same today as they were with the 1997 approval, which provides sufficient justification to retain the Proposition 65 list – and the Directors list as well – in the Cal/OSHA GHS update to the standard. The 1997 approval by federal OSHA also recognized that there was no undue burden on commerce in California by incorporating the Proposition 65 list into its hazard communication standard. We believe that assessment on burden continues to hold today with a GHS update that would include these California lists of chemicals because California will use the GHS/OSHA hazard warnings, SDS formats, labels and other requirements in a harmonized fashion identical to the federal standard.

One Positive Scientifically Valid Study

Cal/OSHA proposes to retain language from its existing standard for classifying a health hazard that includes “evidence which is statistically significant and which is based on at least one positive study conducted in accordance with established scientific principles”. However, the federal OSHA GHS update has deleted the “one positive study” criteria and replaced it instead with a weight of the evidence determination approach that is used by the GHS.

The AFL-CIO supports the Cal/OSHA intention to retain the one positive study requirement in its GHS update because it (a) it is consistent with GHS; (b) maintains existing worker protections; and (c) it is as effective as the federal standard.

- (a) Maintaining the requirement for one positive study is fully consistent with GHS. Several provisions in the Fourth revised edition of GHS (2011) support the use of information garnered from one positive study to be used as Cal/OSHA has proposed: including (see attached):

1.4.6.3. Use of non-standardized or supplemental information (labeling)
1.4.6.3.1.... “Competent authorities may require additional information, or suppliers may choose to add supplementary information on their own initiative”... the use of supplementary information should be limited to the following circumstances:

- (a) the supplementary information provides further detail and does not contradict or cast doubt on the validity of the standardized hazard information; or*
- (b) the supplementary information provides information about hazards not yet incorporated into the GHS*

1.4.7.2 General guidance on updating of information
1.4.7.2.1 “Suppliers should respond to “new and significant” information they receive about a chemical hazard by updating the label and safety data sheet for that chemical.”... “This could include, for example, new information on the potential adverse chronic health effects of exposure as a result of a recently published documentation or test results, even if a change in classification may not yet be triggered.”

Annex 4 Guidance on the Preparation of Safety Data Sheets (SDS)

A4.2.1 Scope and application

“... An SDS is a well-accepted and effective method for the provision of information, and may be used to convey information for substances or mixtures that do not meet or are included in the GHS classification criteria.”

A4.3.11.15 Other information

“Other relevant information on adverse health effects should be included even when not required by the GHS classification criteria.”

The AFL-CIO believes there is substantial justification in GHS, as demonstrated above, for California to require that chemical manufacturers and importers utilize the information from one positive study to impart information to employers and workers. If information obtained from one positive study is sufficient to render a health hazard classification under GHS, then it should be classified. However, if the information is not sufficient for classification, then the information should be used within the framework of the standard, consistent with GHS, to make that information available to workers and employers. For example, if one positive study demonstrates an adverse health effect, then that chemical could be listed on the additional information section of the Safety Data Sheet (section 16) and the adverse health impact noted as well as include the chemical in the listing of the ingredients on the label.

(b) Retaining the one positive study requirement maintains existing worker protections.

The current Cal/OSHA standard includes the use of one positive study for health hazard determination. Its removal from a final updated rule would weaken worker protections by withholding the information from workers and employers. If the chemical is demonstrated to pose an adverse health consequence to exposed workers, it is vitally important that workers and employers have that information so that protective measures can be implemented. If that information is withheld, and protective measures are not used, workers will bear the impact with an adverse consequence.

(c) The Cal/OSHA proposal adopts much of the federal GHS update to the hazard communication standard, including most of its health hazard classification requirements. That makes those provisions at least as effective as the federal standard. By including an additional requirement that is consistent with GHS, namely the use of one positive study, Cal/OSHA would be adding information to its GHS update that improves the protection of workers and maintains a provision from the existing hazard communication standard that has been required under the existing standard for many years.

Statement Regarding Testing

Under the new federal OSHA GHS update to the hazard communication standard, federal OSHA included new language in the hazard classification section, at 1910.1200(d)(2) that states, "There is no requirement to test the chemical to determine how to classify its hazards." This explicit language reflects federal OSHA's position that the previous standard, and the GHS updated version as well, only required chemical manufacturers and importers to use "available" scientific evidence or literature or other evidence to determine or classify hazards, including both health and physical hazards (see 1910.1200(d)(2) in both the previous and current federal hazard communication standards).

Cal/OSHA has likewise included in its proposed GHS update the words that manufacturers, importers or employers who do classify hazards are to use "available scientific literature and other evidence" (language proposed at Section 5194(d)(2)). This is the same language in the new federal OSHA GHS update standard. However, Cal/OSHA has indicated for this April 9, 2013 advisory meeting that it wishes to discuss subsection (d)(2) regarding testing. To us, this provides an indication that the agency has some interest in considering modifying this language that might include a requirement that some testing beyond that which is "available" be performed in the hazard classification process.

While the current federal standard does not require testing to be performed to provide hazard information that is not available, nothing in the existing federal rule would prohibit a manufacturer, importer, or employer from conducting testing on possible hazardous properties (health or physical hazards) of a chemical where such information was not available. Likewise, GHS also does not require testing to be performed (Section 1.3.2.4.1, "The GHS itself does not include requirements for testing substances or mixtures."). But GHS itself does not prohibit testing either. In fact, GHS specifically allows for Competent Authorities to require additional or updated information to supplement that obtained from available sources – see the language from GHS sections 1.4.6.3 and 1.4.7.2.1 above.

As a Competent Authority, we believe Cal/OSHA would have a justification to add some testing requirements in section (d)(2) of its update to Section 5194 and remain consistent with GHS. Likewise, additional testing requirements over that of federal OSHA would still maintain a California standard that is "at least as effective" as the federal rule. Cal/OSHA will, however, need to explicitly state the nature of the testing it wishes to require. For example, would it require the full range of physical hazard testing for a chemical or mixture where physical testing data was not available or unknown? Or would Cal/OSHA, for example, require a more narrow testing requirement for the purpose of testing to determine the identity of chemicals in an unknown mixture?

We urge Cal/OSHA to promulgate language that goes beyond the federal GHS update to the hazard communication standard so that existing worker protections are not weakened. We believe that Cal/OSHA is fully justified in doing so.

Sincerely,



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