

(MATERIAL) SAFETY DATA SHEETS IN TOXIC INJURY CASES



OSHA vs Cal-OSHA

The **Occupational Safety and Health Agency (OSHA)** is a federal agency created in 1971. It is charged with generating and enforcing regulations to protect the safety and health of American workers. The regulations appear in the Code of Federal Regulations (CFR) beginning at 29 CFR §1910.1. OSHA's jurisdiction extends to virtually all private sector workplaces in the United States.

The same act that created OSHA provided individual States with the option to form and operate their own OSHA program. The State OSHA program must incorporate all federal OSHA regulations. It can also create additional regulations, if they are *more* protective than the federal ones.

California elected to form its own agency, **Cal-OSHA**, which essentially operates as a mirror-image of the federal agency. The Cal-OSHA regulations appear in the California Code of Regulations (CCR), and with a few exceptions are word-for-

(Material) Safety Data Sheets

When you begin an investigation into a worker's exposure to hazardous chemicals, you should start by obtaining from the employer the "**Material Safety Data Sheets**" for the chemical products they - *and their coworkers* - used at the workplace. The name for these sheets was shortened in 2012 to "**Safety Data Sheets**", but the terms MSDS and SDS refer to the same thing.

OSHA regulations include a *Hazard Communication Standard* (HCS) (29 CFR §1910.1200(g)) that requires chemical **manufacturers, distributors, or importers** to provide the SDSs (formerly MSDSs) to their customers to communicate the hazards of hazardous chemical products. The earliest version of this requirement dates to about the mid-1980s.

Since 1994, the HCS has required an **employer** who uses hazardous chemicals to obtain and keep copies of the SDSs (and MSDSs) from the supplier, for the benefit of the employees. 29 CFR §1910.1200(g)(8). The Cal-OSHA equivalent is found at 8 CCR §5194.

Required Contents

The current SDSs contain 16 sections of information that are intended to conform to a UN-sponsored "globally harmonized system" for reporting hazards. The SDS (like the prior MSDS) must identify those chemicals in the product that have been designated as hazardous (including carcinogens) by certain agencies and/or organizations. More specifically, if the product consists of 1% or more of a hazardous chemical, or 1/10th of 1% of a carcinogen, it must be listed on the SDS. (See, Appendix A to 29 CFR §1910.1200, at A.1.3 and A.6.3 "*Classification criteria for mixtures*").

What are the implications of this? The listing of a chemical on the MSDS is an admission that it was present, at least in the amounts

OSHA vs Cal-OSHA (cont.)

word duplicates of the federal regulations. There are two main groups of regulations: “Construction Safety Orders” (8 CCR §1502, et seq.) and “General Industry Safety Orders” (8 CCR §3200, et seq.).

A California private sector employer must comply with these regulations. In California, all safety and health inspections, complaints, citations and enforcement proceedings are handled by State employees, working at Cal-OSHA offices. The federal OSHA does maintain offices in California, but they mainly focus on activities conducted by federal employees or on federal land and navigable waterways. For a list of Cal-OSHA regional offices, see <https://www.osha.gov/oshdr/ca.html>.

OSHA vs NIOSH

OSHA was created, and exists, through political compromise. By definition, OSHA is not permitted to issue health and safety regulations based solely on objective science. For example, when it sets the *Permissible Exposure Level* (PEL) for a hazardous chemical, OSHA must also justify its regulations on the basis of the technological and economic feasibility of compliance. If the economic impact of compliance is too

indicated. On the other hand, just because a chemical was not listed on the MSDS, does not mean it was not in the product in some relatively small amount. For example, a thousand gallon tank of a chemical product might include almost a gallon of a known carcinogen, but you would not know this from the MSDS because it need not be listed on the sheet.

In California, there are additional regulations (via Prop 65) which require disclosure of detectable amounts of carcinogens, even if they exist in amounts below 0.1% of the product. See, Health and Safety Code §25249.6. These additional disclosures can appear on the SDS under Section 15: “Regulatory Information”.

How are the chemicals identified? This can often be a source of confusion. Since most chemicals are referenced by a variety of different names, the SDS should list the most common synonyms. For example, the chemical *Tetrachloroethylene* used in dry cleaning is known by more than three dozen other names, but usually only *Tetrachloroethene*, *Perchloroethene*, *Perchloroethylene*, and *PERC* or *PCE* are listed. To reduce confusion, each chemical is also assigned a unique number by the Chemical Abstract Service (e.g. CAS 127-18-4).

Health and Safety Hazards Identified

For each chemical identified, the SDS must include a description of the particular health hazards associated with it. In Section 11, “Toxicological Information”, the SDS must include a description of the delayed, immediate, or chronic effects from short- and long-term exposure.

The SDS must also indicate whether the chemical is listed in the National Toxicology Program (NTP) Report on Carcinogens (latest edition) or has been found to be a potential carcinogen in the International Agency for Research on Cancer (IARC) Monographs (latest editions) or found to be a potential carcinogen by OSHA .

Accuracy and Reliability

Obtaining the MSDSs is an important starting point in an exposure investigation, but they may not always provide the final word on the subject. According to a 2008 review in the American Journal of Industrial Medicine of the scientific literature, between 30 to 100% of products analyzed contained chemicals not declared on a

great, the regulation must be modified.

Fortunately, the Act that created OSHA also created a research and advisory agency known as the **National Institute for Occupational Safety and Health (NIOSH)** that is *not* constrained by economic or technological considerations. The agency is part of the Centers for Disease Control. While NIOSH does not issue regulations, it does issue “Recommended Exposure Levels” (RELs), which are often more protective of workers’ health than PELs.

Who Decides What’s “Hazardous”?

For California MSDS purposes, a “hazardous substance” includes those that appear on California’s “Hazardous Substances List” at 8 CCR 339, the Prop 65 list (<https://oehha.ca.gov/proposition-65/proposition-65-list>), and includes carcinogens identified by **IARC**, NIOSH, and others.

A chemical is deemed hazardous if it produces one or more of the following effects: acute toxicity (any route of exposure); skin corrosion or irritation; serious eye damage or eye irritation; respiratory or skin sensitization; germ cell mutagenicity; carcinogenicity; reproductive toxicity; specific target organ toxicity (single or repeated exposure); or aspiration hazard.

The criteria for determining whether a chemical is classified

MSDS. “Accuracy and completeness were found to be relatively poor, with the majority of studies presenting evidence that the MSDSs under review did not contain information on all the chemicals present, including those known to be serious sensitizers or carcinogens.” Some ingredients, such as those in fragrances, are exempt under patent laws regardless of toxicity. Furthermore, chemicals were also found at higher concentrations than what the MSDS listed. In 2011, violations of OSHA’s hazard communication standard were the third most frequently cited OSHA violation.

Note: *If the case warrants it, you might want to have your own testing done of a particular product to get a more reliable analysis of its contents.*

Employer Record-Keeping Obligations

The employer is required to preserve and maintain the MSDSs for at least **30 years**, together with any chemical monitoring results, employee medical records, and a record of when and where every hazardous chemical was used at the workplace (8 CCR §3204 and 29 Code of Federal Regulations §1910.1020). Unfortunately, most employers ignore these requirements and only retain an incomplete collection of current and some historic MSDSs.

Consequences of an Employer’s Failure to Comply with these Requirements

Because OSHA has always been subject to political influence and resistance, many of its regulations are the result of political “compromise”. Numerous examples exist where OSHA was granted permission to impose a particular requirement on general industry, but was then denied an effective means of enforcement. The maintenance of exposure records is one such example. Employers often ignore the requirement to maintain MSDSs, and there is not much that can be done about it. Pursuant to the OSHA inspection manual, OSHA may consider some failures to comply a “serious violation” - which might have some relevance when considering a “serious and willful” claim in Worker’s Comp - but the designation only results in a modest financial penalty.

In California, the Proposition 65 requirements have more teeth. Health and Safety Code §25249.7 provides for a maximum penalty of **\$2,500 per day** if a person, in the course of doing business, knowingly and intentionally exposes any individual to a chemical

as a health hazard are detailed in Appendix A to 29 CFR §1910.1200.

What is IARC ?

The **International Agency for Research on Cancer (IARC)** is an international cancer research and monitoring agency within the World Health Organization of the United Nations. It produces *Monographs* on known and suspected human carcinogens. The *Monographs* are revised and updated from time to time to reflect the results of more recent research on the subject.

IARC classifies about 200 chemicals and mixtures (i.e., "agents"), as either in Group 1 (*carcinogenic*), or Group 2A (*probably carcinogenic*).

NIOSH's List



This QR Code will take you to a list of occupational carcinogens at the Center for Disease Control (CDC), compiled by the National Institute for Occupational Safety and Health (NIOSH).

known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual. Some exceptions to the requirement apply, but the section does make provisions for a private Attorney General action.

Requesting an Employee's Exposure Records

Every current and former employee has a right to access their chemical exposure records, including the right to obtain copies of the relevant MSDSs. In particular, 8 CCR §3204(e)(1)(A) states: *"Whenever an employee or designated representative requests access to a record, the employer shall assure that access is provided in a reasonable time, place, and manner, but in no event later than fifteen (15) days after the request for access is made"*. **We can provide you with a sample MSDS Demand Letter upon request.**

Employers Cannot Charge for the Copies

The employer is required to provide the employee copies of the MSDSs, together with any chemical monitoring results, employee medical records, and other records of chemical usage, free of charge. See, 8 CCR §3204(e)(C).

Conclusion

If you need help obtaining, understanding or evaluating exposure records, or with any other aspect of a toxic injury case that you are handling, please contact us at heubecklawpc@gmail.com, as soon as possible.

Knowledge and Experience

John C. Heubeck, Esq. has prosecuted hundreds of toxic injury cases over the last 30 plus years, involving exposures to asbestos, benzene, chromium, hydrogen sulfide, talc and numerous other substances. A degree in Chemistry and employment as an Assistant Attorney General prosecuting OSHA violations have provided him with a unique and proven ability to litigate such cases through trial and before the appellate courts. Most plaintiff lawyers - *and defense lawyers* - lack a similar technical background and are usually at a clear disadvantage when handling such cases.

