OSHA's 'Voluntary' Limits May Circumvent Current Rules

Law360, New York (November 18, 2013, 1:49 PM ET) -- Recently, OSHA announced its adoption of a multitude of new "voluntary" permissible exposure limits ("PELs") for various substances. But are these PELs an attempt by OSHA to, in essence, implement new standards for industry without allowing public comment and participation in the formal rulemaking process? And will the plaintiffs bar find ways to use these new voluntary limits that were never subjected to public or judicial scrutiny as evidence of the levels of exposure that companies should seek to achieve to protect workers and others?

OSHA regulates workplace exposure to chemicals according to PELs — the maximum exposure limits in parts per million or milligrams per cubic centimeter in eight-hour time-weighted averages ("TWAs"). OSHA promulgated the PELs in a set of three tables, Z-1, Z-2 and Z-3, each of which covers different types of chemicals and substances. OSHA set many of these limits when the Occupational Safety and Health Act was adopted in 1970. OSHA's attempts to revise the PELs have been unsuccessful due to lawsuits striking down updated regulations.

For example, in Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980), the U.S. Supreme Court upheld the Fifth Circuit's invalidation of a new benzene PEL. And, in 1994, the Eleventh Circuit invalidated OSHA's inclusion of cadmium pigments to the existing cadmium PEL in Color Pigments Manufacturers Association v. OSHA, 16 F.3d 1157 (11th Cir. 1994).

However, as a catch-all, the Occupational Safety and Health Act includes a "general duty" clause, at 29 U.S.C. § 654(a)(1):

> Each employer ... shall 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 to his employees[.]

Citations issued under this section have been upheld where an employer was aware of the hazard and allowed it to continue to exist. What constitutes a "recognized hazard" is measured by the knowledge of the industry in question, not by the knowledge of the individual employer. See generally Brennan v. Occupational Safety And Health Review Commission, 502 F.2d 1196 (7th Cir. 1974).

Moreover, other cases have held that an activity may be a "recognized hazard" even if the employer did not subjectively know of it, but rather if the existence of such hazard would be within the common knowledge of safety experts who are familiar with the circumstances of the industry in question. See generally National Realty & Construction Company v. Occupational Safety & Health Review Commission, 489 F.2d 1257 (D.C. Circuit, 1973). Thus the Occupational Safety and Health Act imposes a "general duty" on employers to abide by whatever safety practices are needed to avoid hazards known by industry safety experts, whether or not those practices are affirmatively mandated by OSHA.

Ammunition for Plaintiffs? Impact of OSHA's "Voluntary" PELs and Employer Toolkit

On Oct. 24, 2013, OSHA released new voluntary PELs for a number of substances by adding them to a set of "annotated" lists of PELs alongside the "regulatory" PELs in effect. Some of these voluntary PELs are significantly lower than the actual regulatory PELs. For example, OSHA regulatory PEL for toluene is 100 ppm, eight-hour TWA, but one of the voluntary PELs is 10 ppm — a 90 percent decrease. So, an employer could not be fined for exposing a worker to 20 ppm of toluene, eight-hour TWA, because it is far below OSHA's PEL. However, in a non-employee's negligence lawsuit, it would not be a stretch for evidence to be presented showing that (1) safety experts in the employer's field could know that 20 ppm, eight-hour TWA is dangerous; (2) under 29 U.S.C. § 654(a)(1), the employer owes the employee a general duty to prevent exposures above 10 ppm, eight-hour TWA; and (3) the employer was negligent for failing to do so.

There is no question that these voluntary PELs are not the law. An OSHA spokesman stated that while OSHA's existing regulations are "dangerously out of date," the "complex rulemaking process" makes it "extremely difficult" for OSHA to update its safety standards. The extreme difficulty the spokesman refers to is not just the Administrative Procedure Act's requirement of public comment and hearings on proposed rulemaking, but also the immediate lawsuits brought by regulated industries to overturn OSHA's regulations. These efforts have been highly successful in the past, invalidating dozens of PELs OSHA attempted to adopt in the late 1970s and 1980s.

It seems then by publicizing voluntary PELs, OSHA can skip the administrative rulemaking process altogether and substitute tort

plaintiffs — and workers' compensation claimants — for OSHA regulators in enforcing lower PELs.

Along with the voluntary PELs, OSHA also launched a website providing a "toolkit" for employers to voluntarily "transition" to "safer chemicals." While OSHA carefully disclaims on the website that it is "not a standard or regulation, and it neither creates new legal obligations or alters existing obligations created by OSHA's standards or the Occupational Safety and Health Act," the potential for plaintiffs' attorneys to use the voluntary PELs and the "toolkit" as ammunition in negligence lawsuits is clear.

OSHA drafters' attempts to prevent OSHA regulations from becoming evidence in personal injury suits may well have created the problem. 29 U.S.C. § 653(b)(4) states:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases or death of employees arising out of, or in the course of, employment.

OSHA regulations can thus always be admitted as evidence in a personal injury suit between a plaintiff and someone who is not the plaintiff's employer (for example, a person who was an unborn child at the time of his or her parents' exposure). With respect to suits between employees and employers, however, assuming the workers' compensation bar is overcome (by the "fraudulent concealment" exception, for example), OSHA regulations are inadmissible. But the voluntary PELs are not regulations. They are "informational." Thus, the new, more strict voluntary limits are arguably admissible and OSHA's older, less strict regulations would not be. This would seem to violate the spirit of § 653(b)(4).

It remains to be seen how inventive tort plaintiffs will attempt to use the voluntary PELs as evidence of negligence.

—By James G. Scadden and Samuel D. Jubelirer, Gordon & Rees LLP

James Scadden is a partner in the environmental/toxic tort practice group at Gordon & Rees in San Francisco. His practice focuses on defending personal injury suits involving asbestos, benzene and dietary supplements as well as Proposition 65 compliance cases and other toxic exposure suits. Scadden represents clients in all stages of litigation throughout California.

Samuel Jubelirer is an associate with the Environmental/Toxic Tort Practice Group at Gordon & Rees in San Francisco. He defends clients in a variety of industries, including equipment manufacturers and retailers, against asbestos and other toxic exposure personal injury and wrongful death claims.