

TLV's and Other Consensus Standards - Can OSHA enforce them?

(Case Study of *International Brominated
Solvents Assoc. et. Al. v. ACGIH*)?

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OSH Act of 1970

■ Section 3 – Definitions

The term "national consensus standard" means any occupational safety and health standard or modification thereof which (1), has been **adopted and promulgated by a nationally recognized standards-producing organization** under procedures whereby it can be determined by the Secretary that **persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption**, (2) was formulated in a manner which **afforded an opportunity for diverse views to be considered** and (3) **has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.**

OSH Act of 1970

- Section 5 – Duties

a) Each employer --

(1) **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;**

(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

OSH Act of 1970

- Sec. 6 – Occupational Safety & Health Standards

(a) Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, **by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard,** unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

Section 5(a)(1) of the Act General Duty Clause

Prima Facie Elements

a) The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;

(b) The hazard was recognized;

(c) The hazard was causing or was likely to cause death or serious physical harm; and

(d) There was a feasible and useful method to correct the hazard.

“Consensus” Organizations

- National Fire Protection Organization (NFPA)
- American Society of Testing Materials (ASTM)
- American Society of Mechanical Engineers (ASME)
- American Petroleum Institute (API)
- **American Conference of Governmental Industrial Hygienists (ACGIH)**

ACGIH

“ACGIH® is a member-based organization that advances occupational and environmental health. Examples of this include our annual editions of the ***TLVs® and BEIs®*** and work practice guides in ACGIH®’s ***Signature Publications.***”

The ACGIH® Threshold Limit Values (TLVs®) for Chemical Substances are developed **to be used as guidelines in the occupational setting to control health hazards.**

ACGIH

TLV®/BEI® Resources

- Threshold Limit Values (TLVs®) and Biological Exposure Indices (BEIs®) are determinations made by a voluntary body of independent knowledgeable individuals. They represent the opinion of the scientific community that has reviewed the data described in the ***Documentation***, that exposure at or below the level of the TLV® or BEI® **does not create an unreasonable risk of disease or injury. TLVs® and BEIs® are not standards. They are guidelines designed for use by industrial hygienists in making decisions regarding safe levels of exposure to various chemical substances and physical agents found in the workplace.** In using these guidelines, industrial hygienists are cautioned that the TLVs® and BEIs® are only one of multiple factors to be considered in evaluating specific workplace situations and conditions.
- TLVs® and BEIs® are health-based values established by committees that review existing published and peer-reviewed literature in various scientific disciplines (e.g., industrial hygiene, toxicology, occupational medicine, and epidemiology). Since TLVs® and BEIs® are based solely on health factors, **there is no consideration given to economic or technical feasibility.**

ACGIH TLV's and BEI's

- TLV's for Chemical Substances – dusts, mists and fumes, including respirable quartz.
- TLV's for physical hazards – ionizing radiation, non-ionizing radiation, vibration, noise, heat/cold stress
- Biological exposure indices

OSHA Standards and TLV's

- 1926.55(a)
Exposure of employees to inhalation, ingestion, skin absorption, or contact with any material or substance at a concentration above those specified in the "Threshold Limit Values of Airborne Contaminants for 1970" of the American Conference of Governmental Industrial Hygienists, shall be avoided.

See Appendix A to this section-1970 American Conference of Governmental Industrial Hygienists' Threshold Limit Values of Airborne Contaminants

MSHA - Health and Safety Standards for Metal/Non-Metal Mines

30 C.F.R. Sec. 56.1001 (Exposure limits for airborne contaminants)- (a) Except as provided in paragraph (b) of this section, the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the **1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973,"** pages 1 through 54, which are hereby incorporated by reference and made a part hereof.

Controversies

- Use of TLV's in the Hazard Communication Standard
1910.1200(d)(3)(ii) - "Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment," American Conference of Governmental Industrial Hygienists (ACGIH) (latest edition). The chemical manufacturer, importer, or employer is still responsible for evaluating the hazards associated with the chemicals in these source lists in accordance with the requirements of this standard.
- General Duty Clause
- Tort Suits – Requires duty owed, breach of duty, damages suffered, breach was proximate caused of damages.

TLV's and Sec. 5(a)(1)

- *Sec. of Labor v. Durriron Co., Inc.*(1983) – extreme heat involving iron and steel casting machines. OSHA invoked GDC based on NIOSH's WBGT for heavy work and TLV's for heat stress. The OSHRC maintained that REL's and TVL's serve as general evidence of the hazard and industry recognition.

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- Plaintiffs represent manufacturers of brominated products, coal, metals, miners and glass.
- Plaintiffs filed suit against Defendants in 1994 alleging violations of the following:
 - Federal Advisory Committee Act
 - Federal Register Act and Administrative Procedures Act (APA)
 - Georgia's UDTPA as to ACGIH
 - Tortious interference with contractual and business relations as to ACGIH
 - Due Process Clause of the 5th Amendment

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- Plaintiffs later amended their complaint and ACGIH and OSHA moved to dismiss the amended complaint, which was granted in part.
- 2 claims survived the motion to dismiss:
 - 1) Georgia Uniform Deceptive Trade Practices Act – Plaintiffs alleged that ACGIH is in the business of creating, marketing, selling and distributing TLV’s and ACGIH violated 3 of provisions of the statute.
 - A) By adopting TLV’s that are not scientifically justified, ACGIH

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- B)The TLV’s are false and misleading as ACGIH incorrectly state that safe levels of substances, products and products and processes are unsafe. b1

ACGIH’s Contentions

- ACGIH averred that its TLV’s contain opinions concerning issues of public concern and are worthy of 1st Amendment Protection.
- ACGIH also contended that UDTPA is inapplicable because it is designed to protect businesses and consumers against unfair competition and deceptive advertising.

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Courts Holdings

1. UDTPA claim – TLV's **do not disparage** the Plaintiff's products since they are opinions and therefore contain no misleading representation of fact – **UDTPA is inapplicable** to ACGIH's TLV's.
2. FACA claim – ACGIH **was not created** by OSHA as an advisory committee despite the fact that federal officials were involved in its creation.
3. APA claim – DOL **does not “utilize”** ACGIH as an advisory committee despite federal support.

Conclusion

- TLV's do not in and of themselves create a *de facto* recognized hazard under the General Duty Clause.
- TLV's do not address hazard control feasibility, which is a *prima facie* element under the General Duty Clause.
- TLV's are one of many tools available to HSE professionals to evaluate and characterize occupational health hazards.