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I. INTRODUCTION

Occupational disease is generally understood as any illness contracted primarily as a result of an exposure to risk factors related to work activity.[1] Workers' right-to-know—the legal principle that individual workers have the right to know the hazardous substances and conditions to which they may be exposed in their workplace—was not recognized as a constitutional or statutory right in the United States for the nation's first two centuries.[2] Nonetheless, the right of workers to know had been well-established at common law, under which employers had a general obligation to provide employees a reasonably safe place to work.[3] Though a concept of occupational diseases was unknown at common law, employees had a right of action for an illness caused by the employment through the negligence of the employers.[4]

Accordingly, employers had a common law duty to inform their employees of foreseeable risks related to their work.[5] However, this type of the worker-

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1 *Occupational Health: Occupational and Work-related Disease*, WORLD HEALTH ORGANIZATION, http://www.who.int/occupational_health/activities/occupational_work_diseases/en/ (last visited on May 27, 2016).

2 James T. O'Reilly, *Worker "Right to Know" in 30-Year Retrospect: Did We Get It Right, with What We Know Today?*, 2 PITT. J. ENVTL PUB. HEALTH L. 1, 8 (2008).

3 Henry David Thoreau, Walden, *Occupational Health Risks and the Worker's Right to Know: The Cost of a Thing Is the Amount of What I Will Call Life Which Is Required to Be Exchanged for It, Immediately for in the Long Run.*, 90 YALE L.J. 1792, 1803 (1981).

4 Steiner v. Spencer, 24 Tenn. App. 389, 145 S.W.2d 547, 550–51 (1940) (finding that the master is liable "if he fails to take the necessary precautions to prevent his employee from contracting a disease incident to or caused by his employment, the master being required to exercise due care to discover the danger of such a disease, and to inform his employee of the danger").

5 *See, e.g.*, Miller v. Paine Lumber Co., 202 Wis. 77, 81, 227 N.W. 933 (1929) (stating that it is common law duty of employer, independent of a specific statute, to warn employees of dangers incident to work activity); Thomas Phillip Germeroth, *Trapped in the Zone: Emotional*

protection was only available in cases where employees could prove all of the elements of common law negligence in a particular case. Proof of causation was especially difficult in that, unless the employees had knowledge of the existing hazard substances related to the occupational activity, they could not easily prove a link between the toxic substance and its adverse health effect resulting from the employment.[6]

An additional hindrance of a negligence claim is its retroactive nature as a remedy that workers would receive upon winning their case. Regardless of the amount of monetary compensation awarded, the workers, who lost their health, were hardly able to retrieve their original health condition before their employment.[7] To overcome this inherent weakness of the *ex post facto* common law remedy, it is therefore crucial for them to have an *ex ante* apparatus to reduce, or even prevent, adverse health effects anticipated to occur because of their employment.

In this regard, this article introduces the existing regulatory schemes related to the worker's right-to-know under the Hazard Communication Standard ("HazCom") and enumerates various insufficiencies within the HazCom's protections. The article then discusses how the community's right-to-know framework established under the Emergency Planning & Community Right-to-Know Act ("EPCRA") serves as a useful tool for expanding workers' protection to fill the regulatory holes left by the HazCom.

Distress Claims Under the Federal Employers Liability Act After Gottshall v. Consolidated Rail Corporation, 40 ST. LOUIS U. L.J. 203, 206 n.26 (1996) (enumerating "specific common law duties of the master for the protection of his servants." The common law duties includes "to provide a safe workplace," to offer "safe appliances, tools, and equipment for work," "to give warning of dangers of which the employee might reasonably be expected to remain in ignorance," "to provide sufficient number of suitable fellow servants," and to promulgate and enforce rules for the conduct of employees which would make the work safer").

[6] *See* Thoreau, *supra* note 3, at 1792 ("The chronic nature of most of the disease that result from exposure to toxic substance makes occupational health hazards difficult to identify and assess."). *See generally* Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117 (1997) (arguing that "the substantive law governing toxic torts must be recast by abolishing proof of general causation as the crucial factor that controls liability," not only because we do not have complete knowledge of "[t]he nature of toxic substance" but also because "the insistence on causation creates incentive on the part of corporations not to know and not to disclose" hazardous substances they handle).

[7] *See* Thoreau, *supra* note 3, at 1794 (explaining that workers typically receive monetary damage).

II. THE WORKER'S RIGHT-TO-KNOW UNDER THE EXISTING REGULATORY SCHEME OF THE HAZCOM

1. An Overview of the HazCom

The HazCom can be divided into four parts: classification, labeling, safety data sheets ("SDSs"), and training.[8] First, employers evaluate and classify the hazards of substances they produce or import.[9] When evaluating chemicals, they must look into "the full range of available scientific literature and other evidence concerning potential hazards."[10] However, the Occupational Safety and Health Administration ("OSHA") does not perform the hazard classification for the employers.[11] Rather, it is the employers' sole determination, based on their consideration of all available scientific research concerning harmful effects of their products that satisfies this provision.[12]

Next, employers must ensure that each container of the hazardous substances is properly "labeled, tagged, or marked" with the identity of the substances and proper hazard warnings.[13] Since the HazCom offers broad flexibility in choosing the means to achieve the end, employers may select any forms of the identity on their own,[14] so long as they use the standard that specifies what information is to be included for each hazard class and category under the revised HazCom of 2012.[15]

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8 *See* 29 C.F.R. § 1910.1200.

9 *Id.* (d).

10 *Id.* (d)(2).

11 *OSHA, We Can Help*, U.S. Dep't of Labor, (last updated on Sept. 6, 1991), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20387.

12 *See* 29 C.F.R. § 1910.1200(d)(2). *But see* OSHA, *Healthcare Wide Hazards: Hazardous Chemicals*, U.S. Dep't of Labor, https://www.osha.gov/SLTC/etools/hospital/hazards/hazchem/haz.html (last visited on Oct. 23, 2015) (noting that although the manufacturers and importers are required to make a decision if materials are hazardous, the OSHA provides numerous characteristics that it considers hazardous, e.g., carcinogens, irritants, and corrosive. More information can be found in the HazCom Appendix A and 29 C.F.R. § 1910.1000 Table 2).

13 29 C.F.R. § 1910.1200(e).

14 OSHA, *Hazard Communication Guidelines for Compliance* 1 (2000), https://www.osha.gov/Publications/osha3111.pdf (suggesting that the employer may use "a common or trade name, or chemical name," and noting that an example of a common or trade name is "Black Magic Formula," and an instance of a chemical name is "1, 1, 1-trichloroethane") [hereinafter *HazCom Guidelines*].

15 Hazard Communication Standard, 77 Fed. Reg. 17,582 (Mar. 26, 2012) (to be codified as29 C.F.R. § 1910.1200) (stating that the OSHA requires "compliance with all of the provisions for preparation of new labels and [SDSs] by June 1, 2015[,]" but noting that "distributors will have an additional six months (by December 1, 2015)" to comply with the final rules and

Third, every employer must maintain copies of SDSs[16] at a job-site in a location where their employees have easy access.[17] Hence, the employees must have ready access to the information of the hazardous chemicals and be able to learn important measures to protect themselves against the toxic substances to which they are actually or potentially being exposed in the course of the employment.[18]

Finally, employers must train their employees both prior to their initial assignment to work and whenever an additional hazardous substance is introduced to their work environment.[19] To satisfy this training requirement, employers must educate and assist their workers in understanding methods that can be used to detect the presence or release of a toxic chemical, in appreciating the nature of risks, and in being familiar with possible measures—"emergency procedures" and "personal protective equipment"— that employees may use to protect themselves from workplace hazards.[20]

Although the OSHA recognizes the importance of the training standard to achieve the primary goal of the HazCom,[21] apart from the above provisions,

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employers will also have "an additional year (by June 1, 2016) to update their hazard communication programs or any other workplace signs, if applicable[ ]"); *Modification of the Hazard Communication Standard (HCS) to conform with the United Nations' (UN) Globally Harmonized System of Classification and Labeling of Chemicals (GHS): Questions and Answers*, U.S. DEP'T OF LABOR (last visited on Nov. 3, 2015), https://www.osha.gov/dsg/hazcom/hazcom-faq.html.

16 29 C.F.R. § 1910.1200 (g)(1). Specific items that must be included in SDSs are explicitly enumerated in the HazCom. *See id.* (g)(2). Manufacturers and importers must ensure that SDSs include sixteen items in English:

> (i) Identification; (ii) Hazard(s) identification; (iii) Composition/information on ingredients; (iv) First-aid measures; (v) Fire-fight measures, (vi) Accidental release measures; (vii) Handling and storage; (viii) Exposure controls/personal protections; (ix) Physical and chemical properties; (x) Stability and reactivity; (xi) Toxicological information; (xii) Ecological information; (xiii) Disposal considerations; (xiv) Transport information; (xv) Regulatory information; and (xvi) Other information, including date of preparation or last revision.

Id. (g)(2)(i)–(xvi).

17 *Id.* (g)(8).

18 *HazCom Guidelines*, *supra* note 14, at 11; *see also* 29 C.F.R. § 1910.1200(g)(2) (listing sixteen items that must be entered into SDSs).

19 29 C.F.R. § 1910.1200(h)(1).

20 *Id.* (3).

21 *See HazCom Guidelines*, *supra* note 14, at 12 ("Information and training are a critical part of the hazard communication program); OSHA, TRAINING REQUIREMENTS IN OSHA STANDARDS (2015), https://www.osha.gov/Publications/osha2254.pdf ("These requirements reflect OSHA's belief that training is an essential part of every employer's safety and health program for protecting workers from injuries and illnesses.") [hereinafter TRAINING REQUIREMENTS IN OSHA STANDARDS].

there is no mandatory requirement to accomplish effective results from the training.[22] The employers can utilize any format of the program they want.[23] The training session does not even have to be conducted by employers; it can be conducted in part by general training program offered by "trade associations, unions, colleges, and professional schools."[24] Moreover, workers' previous experience, education, or knowledge may discharge the employers' burdens of the training duty.[25] Lastly, the employers are not required to keep a record of their training. Indeed, an OHSA inspector can simply accept an affirmative in response to the query: "Did the employee receive adequate training to do the job?"[26]

2. Incomplete Work Protection under the HazCom

Many employees benefit from the HazCom. The enhanced awareness promotes the likelihood that the employees will avoid exposure to hazardous substances, follow safe work practices, and take action in a timely and appropriate manner when they are actually exposed.[27] Nonetheless, there are some shortcomings. First, the HazCom does not vest employees with the legal right to request that their employers include any additional chemicals in their hazard communication program. The classification is solely made by the employers.[28]

In addition, access to SDSs is limited; future and former employees do not enjoy the right of access.[29] The HazCom requires employers to maintain SDSs

22 *See HazCom Guidelines*, *supra* note 14, at 13–15. *See generally* OSHA, *Draft Model Training Program for Hazard Communication*, U.S. Dep't of Labor (last visited on Oct. 24, 2015), https://www.osha.gov/dsg/hazcom/MTP101703.html (providing a guideline instructing how to draft a training program. Because this is a mere administrative guideline, it does not have any force of law); Training Requirements in OSHA Standards, *supra* note 21(providing OSHA's training-related requirements based on the types of industry such as general industry, maritime, construction, agriculture, and federal employee program, and stating that the explained OSHA's training-related requirements are chiefly based on the Title 27 Code of Federal Regulations Part 1910 where the HazCom is in part).

23 *HazCom Guidelines*, *supra* note 14, at 13 (stating that "audiovisuals" and "class room instruction" would be an example).

24 *HazCom Guidelines*, *supra* note 14, at 14.

25 *HazCom Guidelines*, *supra* note 14, at 14.

26 Training Requirements in OSHA Standards, *supra* note 21, at 1; *see also HazCom Guidelines*, *supra* note 14, at 14–15.

27 *But see* Frances L. Edwards, *Worker Right-to-Know Laws: Ineffectiveness of Current Policy-Making and a Proposed Legislative Solution*, 15 B.C. Envtl. Aff. L. Rev. 1 (1987) (criticizing the HazCom in general and discussing costs and benefits of worker right-to-know laws).

28 29 C.F.R. § 1910.1200(d).

29 *See id.* (g)(8).

in the workplace and make sure that they are "readily accessible during each work shift to employees when they are in their work area(s)."[30] This plain language indicates that only those who are currently employed and working at a job-site are entitled to have access to SDSs.[31] However, meaningful protection of workers can be achieved through workers' voluntary job choice, which in turn can be promoted only if all potential workers have knowledge of the health risks associated with their future job. Also, the employers' duty to protect their workers should not end when the employment terminates. Especially when it comes to the chronic nature of occupational disease, former employees must also be allowed to have access to the SDSs. The limited scope of covered employees under the HazCom is a significant obstacle in accomplishing the primary purpose of the HazCom.[32]

Third, if they wish, the employers may withhold the common or generic name of a hazardous chemical from their HazCom program.[33] The decision of whether a chemical's name constitutes a trade secret is entirely at the discretion of the employers.[34] The employers are not required to get an approval from the OSHA.[35] The name of the substance may be revealed to health professionals in limited situations, such as medical emergencies. In non-emergency circumstances, however, the employers are permitted to withhold information.[36] The limited worker's protection linked to the trade secrets provision renders the HazCom program even more powerless.

Finally, the last step—employees' *right-to-understand*—has not yet been achieved. In 2012, when the OSHA announced the update to the HazCom, it stated that the HazCom "in 1983 gave the workers the 'right to know,' but the new Globally Harmonized System gives workers the 'right to understand.'"[37] It also emphasized that studies showed that employees did not understand "approximately one-third of the safety and health information listed on SDSs pre-

30 *Id.*

31 *See id.*

32 *See id.* (c) (noting that the definition provision further restricts a scope of protected employees by defining an employee as "a worker who may be exposed to hazardous chemicals under normal operating conditions or in foreseeable emergencies but excluding a workers "who encounter[s] hazardous chemicals only in non-routine, isolated instances . . .").

33 *See id.* (i).

34 *Id.* (i)(1)(i)–(iii); *see also id.* App. E.

35 *See id.* (i).

36 *Id.* (i)(2)(3).

37 *OSHA Fact Sheet: Hazard Communication Standard Final Rule*, U.S. DEP'T OF LABOR (last visited on Oct. 30, 2015), https://www.osha.gov/dsg/hazcom/HCSFactsheet.html [hereinafter *HazCom New Rule*].

pared in accordance with the [1983] standard" and also noted that "roughly 40% of persons reviewing SDSs found them difficult to understand[.]"[38] During the OSHA rulemaking process, workers testified SDSs were confusing, incomprehensible, and a "nightmare."[39] In spite of the OSHA's recognition of the HazCom's weaknesses, under the new rule, the information required on SDSs remains essentially the same as that mandated by the previous standard.[40] In other words, OHSA's new rule addressed the ancillary issue of formatting but failed to adequately address the principal issue of substance.

III. THE EPCRA AS AN USEFUL TOOL FOR EXPANDING WORKER'S PROTECTION BEYOND THE SCOPE OF THE HAZCOM

1. UNDERSTANDING THE EPCRA

The enactment of the Emergency Planning and Community Right-to-Know Act of 1986[41] was triggered by the 1984 disaster in Bhopal, India caused by an accidental release of toxic gas from a pesticide manufacturing plan.[42] The disaster killed more than 2,000 people and injured approximately 200,000 others.[43] The EPCRA was passed in response to the Bhopal disaster and aims to cope with environmental and safety risks resulting from the storage and handling of toxic chemicals.[44]

The EPCRA's primary purposes are (1) to establish emergency planning and notification requirements to protect in the event of a hazardous chemical release and (2) to inform communities and citizens of information concerning

38 Hazard Communication Standard, 77 Fed. Reg. 17,603 (Mar. 26, 2012) (to be codified at 29 C.F.R. § 1910.1200).

39 *Id.*

40 *See HazCom New Rule, supra* note 37.

41 *See generally* Videotape: Emergency Planning and Community Right-to-Know Act (EPA Oct. 17, 2011), https://www.youtube.com/watch?v=LKXTXjXeyHw&feature=youtu.be (explaining the EPCRA for the general public).

42 *What is EPCRA?*, EPA (last visited on Oct. 25, 2015), http://www2.epa.gov/epcra/what-epcra [hereinafter *What is EPCRA?*]; *see also* Mary Beth Arnett, *Risky Business: OSHA's Hazard Communication Standard, EPA's Toxics Release Inventory, and Environmental Safety*, 22 ELR 10440, 10465 (1992).

43 Kathryn E. Durham-Hammer, *Left to Wonder: Reevaluating, Reforming, and Implementing the Emergency Planning and Community Right-to-Know Act of 1986*, 29 COLUM. J. ENVTL. L. 323, 326(2004).

44 *What is EPCRA?*, *supra* note 42.

the presence of hazardous chemicals in their community.[45] The EPCRA's reporting requirements consist of four parts: Emergency Planning,[46] Emergency Release,[47] Chemical inventories,[48] and Toxic Release Inventory ("TRI").[49]

First, the Emergency Planning requires state and local governments to develop chemical emergency response plans,[50] while local planning committees[51] develop an emergency response plan for their communities that must be made available to the public.[52] Second, the Emergency Release states that when a release of toxic substances occurs from a facility, the facility must immediately report the release to an appropriate governmental body.[53] Third, the EPCRA requires covered facilities to submit annual chemical inventories: SDSs under § 311 and either Tier I or Tier II under § 312. Section 311 requires facilities that are subject to the HazCom to submit SDSs to appropriate local and state authorities and fire departments.[54]

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45 Michael A. Rosenhouse, *Construction and Application of Emergency Planning and Community Right-to-Know Act of 1986 and Regulations Promulgated Thereunder*, 9 A.L.R. FED. 2D 711, 2 (2006); *see also* Durham-Hammer, *supra* note 43, at 333 (noting that the "EPCRA's text does not state Congress's [sic] goals in enacting the statute, but the legislative history and the title of the statute suggest two primary objectives[ ]").

46 42 U.S.C. §§ 11001–03.

47 *Id.* § 11004.

48 *Id.* §§ 11021–22.

49 *Id.* § 11023.

50 *Id.* § 11003(a), (c) (requiring the governments to review plans at least once a year or more).

51 The governor of each state must designate a state emergency response commission to oversee the emergency planning process. *Id.* § 11001(a). Each state emergency response commission is required to designate local emergency planning districts and to appoint local planning committees for each district. *Id.* (b).

52 *Id.* §§ 11003(a), 11044(a) (stating that "[e]ach emergency response plan . . . shall be made available to the general public . . . at the location . . . designated by the [EPA], Governor, State emergency response commission, or local emergency planning committee).

53 *Id.* § 11004(b), (c) (listing required contents of the release notification such as the name or identity of a released substance, an estimate of the quantity of the released substance, the time and duration of the release, any known or anticipated acute or chronic health effects resulting from the release, and appropriate precautions to take).

54 *Id.* § 11021(a) (noting that instead of SDSs, the owners and operators of a facility may submit a list of chemicals for which the facility is required to have SDSs. See § 11021(a)(2) for the required contents of the list). However, unlike SDSs under the HazCom, this requirement only applies to facilities with chemicals in quantities that equal or exceed the thresholds established by the EPA. *Id.* (b); *see also EPCRA Sections 311–312*, EPA (last visited on Oct. 26, 2015), http://www2.epa.gov/epcra/epcra-sections-311-312#covered (enumerating specific thresholds established by the EPA).

Under Section 312,[55] the facilities that are subject to Section 311 must also submit an emergency and hazardous chemical inventory form ("inventory form"): Tier I or Tier II. The default submission is a Tier I, by which the facilities must inform the local community of an estimate of the maximum amount of toxic chemicals and an estimate of the average daily amount of hazardous chemicals.[56] A more detailed form, Tier II, must also be submitted upon request.[57] Tier I reporting does not have to be submitted "on a chemical-by-chemical basis"; indeed, it must be prepared in accordance with five categories, including immediate health hazards, delayed health hazards, fire hazards, pressure hazards, and reactive gases.[58] By contrast, Tier II is chemical-specific reporting and must provide information as to how and where the owners and operators of the facility store each chemical.[59]

Finally, Section 313 creates the TRI program, under which all facilities that meet TRI reporting criteria must submit TRI data to the EPA and appropriate state government each year.[60] Section 313 is intended to make information available to federal, state, and local governments, and the general public, "to inform persons about releases of toxic chemicals to the environment; to assist governmental agencies, researchers, and other persons in the conduct of research and data gathering; to aid in the development of appropriate regulations, guidelines, and standards; and for other similar purposes."[61] To that end, the EPA is required to develop and "maintain a computer data base, a national

55 *See generally* 1 HAZARD COMM. HANDBOOK § 3:7 (2014) (noting that by the final rule of July 12, 2013, the EPA made some changes to Section 312 reporting. For instance, the EPA requires "facilities such as hotels, colleges, and convention centers [to] report an estimate of the maximum number of people that may be present at the facility at any one time, in order to better assist emergency planning and response[ ]") [hereinafter HAZARD COMM. HANDBOOK].

56 42 U.S.C. § 11022(a), (d)(1)(B).

57 *Id.* (d)(2), (e) (stating that a state emergency planning commission, a local emergency planning committee, or a fire department may request Tier II information and noting that a state or local officials and any person may have access to Tier II information by submitting a request to the state emergency response commission or the local emergency planning committee); HAZARD COMM. HANDBOOK, *supra* note 55 at § 6:7 ("Owners and operators of facilities may elect to submit the Tier Two from in lieu of the Tier Once form to satisfy Tier One reporting requirement under § 312.").

58 HAZARD COMM. HANDBOOK, *supra* note 55 at § 6:7; *see also* 42 U.S.C. § 11022(d)(1)(A) ([a]ggregate information by category); 29 C.F.R. § 1910.1200.

59 42 U.S.C. § 11022(d)(2).

60 *Id.* § 11023(a). There are some excluded facilities.

61 *Id.* (h).

toxic chemical inventory based on data submitted by owners and operators of a facility that meets TRI reporting criteria.[62]

2. The EPCRA as a Possible Solution to Fill a Gap in the HazCom Programs

Both the HazCom and the EPCRA are based on the similar, if not nearly identical, concepts—a need- and right-to-know principle. Nonetheless, because of certain distinctions between them, the HazCom's narrow and feeble right-to-know programs can be largely cured and supplemented by the EPCRA.

First, by granting the sole discretion of the classification authority to employers, the HazCom intentionally leaves employees out of the decision-making process.[63] However, this drawback can be supplemented by the EPCRA's TRI program, which makes it possible for *anyone* to petition the EPA to add or delete a chemical from the list of the toxic chemicals.[64] For instance, seven ozone-depleting chemicals were added to the TRI list by a Section 313 petition from the Governors of New Jersey and New York as well as the Natural Resources Defense Council.[65] A successful inclusion of the hazardous chemicals into the TRI list suggests that any employee or labor union may also file a petition to the EPA to add chemicals. Even if the EPA's TRI decision under the EPCRA has nothing to do with employers' determination of the hazard classification, its final ruling may alert the employers to re-consider their hazard classification under the HazCom program.

Next, while the HazCom narrows the scope of protected employees—namely current workers—the EPCRA expands its protection to the general public, including potential and former employees, in two ways. The EPCRA requires a facility to submit its SDSs to an appropriate governmental authority[66] and allows anyone to request SDSs on chemicals that are not initially covered.[67] Therefore, potential workers can make an informed and voluntary

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62 *Id.* (j).

63 While the EPCRA allows anyone to petition the EPA to add or delete a chemical from the list of the toxic chemicals, meaning anyone can be involved in the decision-making process, the HazCom explicitly suggests that no one but employers have power to classify toxic chemicals. *Compare* 42 U.S.C. § 11023(e), *with*29 C.F.R. § 1910.1200(d)(2).

64 42 U.S.C. § 11023(e).

65 Ozone Depleting Chemicals; Toxic Chemical Release Reporting; Community Right-To-Know; Addition of Chemicals, 55 FR 31594 (Aug. 3, 1990).

66 *See* 42 U.S.C. § 11021(a).

67 *See* Hazard Comm. Handbook, *supra* note 55 at § 6:9.

job decision, and former workers, if they wish, are able to get the SDSs under the EPCRA.

Finally, under the HazCom, the determination of whether a substance's name constitutes a trade secret is left to employers' discretion. The EPCRA's trade secret rule, however, does not depend on the employers' sole determination.[68] Indeed, employers who seek to claim a trade secret exception must submit the EPA a copy of a substantiation form promulgated by the EPA[69] and obtain agency's approval to withhold the information.[70] In addition, the EPCRA allows any person to petition for disclosure of the substance identity claimed to be a trade secret, and the EPA may grant the petition if it finds that the identity of the chemical does not constitute a trade secret.[71] Thus, unlike the HazCom, the EPCRA can provide a broader protection to workers by permitting them to petition the EPA's review of the trade secret information and even request judicial review of the EPA's finding.[72]

IV. CONCLUSION:

At the beginning of the chemical age, workers had little reason to seek information as to hazardous substances to which they were exposed during the course of their employment.[73] As public awareness of this risk spread, Congress passed several right-to-know laws imposing reporting requirements on industries.[74] Among other right-to-know laws, the HazCom has been criticized by numerous scholars. Most of the criticism has been focused on the inefficiency of the HazCom as a tool for protecting vulnerable workers in the dangerous workplace.[75] While in theory this problem may be addressed by materially

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68 *See* 42 U.S.C. § 11042.

69 *See* 40 C.F.R. pt. 350.

70 42 U.S.C. § 11042(a)(3) ("The authority . . . to withhold information shall not apply to information which the [EPA] has determined . . . is not a trade secret."); *see also* HAZARD COMM. HANDBOOK, *supra* note 55 at § 8:4. *See generally* EPA, INSTRUCTIONS FOR COMPLETING THE EPCRA TRADE SECRET SUBSTANTIATION FORM (Jan. 2014), http://www2.epa.gov/sites/production/files/2014-01/documents/trade_secret_instructions.pdf.

71 42 U.S.C. § 11042(d); *see also* HAZARD COMM. HANDBOOK, *supra* note 55 at § 8:6 ("[Section 11042(d)] petition is only applicable to a chemical identity claimed as a trade secret. Access to items other than chemical identity claimed as trade secret information must be made pursuant to EPA's Freedom of Information Act . . . .").

72 *See* 42 U.S.C. § 11042(d)(1), (3).

73 *See* Shannon M. Roesler, *The Nature of the Environmental Right to Know*, 39 ECOLOGY L.Q. 989, 990 (2012).

74 *See id.*

75 *See, e.g.*, Frances L. Edwards, *Worker Right-to-Know Laws: Ineffectiveness of Current Policy-Making and a Proposed Legislative Solution*, 15 B.C. ENVTL. AFF. L. REV. 1 (1987); Illise L.

amending the HazCom, in reality, total amendment is practically impossible, as recently demonstrated by the OSHA's approach in 2012.

The EPCRA's facility reporting requirements offer a useful framework to expand the worker's protection beyond the boundary of the HazCom. However, questions remain that cannot be solely addressed by the EPCRA. As discussed in Part II, SDSs are not easily understandable for workers, and the EPCRA is not a solution for the incomprehensibility associated with the SDSs.[76] This is because the Section 311 reporting requirement of the EPCRA is essentially identical to that of the HazCom.[77] Hence, in order to promote worker's right-to-understand, not only the format of the SDSs, but also their contents have to be changed. The HazCom of 2012 helps the employees' understanding of SDSs in some way, but the employees' impression of the SDSs—"nightmare"[78]—should not be simply attributed to inconsistent formats allowed under the old rule. It is a narrow-minded view of the problem.

As recognized by the many employers who commented that labels and SDSs in Spanish are necessary,[79] the OSHA must reconsider to include such requirement to increase workers' awareness of the possible exposure of the toxins during their work activity and to ensure that they understand protective measures to avoid adverse health effect. The mere existence of labels and SDSs at work-sites is not enough. The OSHA must take an every possible step to give the worker's right-to-understand.

With the OSHA's recent amendment to the HazCom, which became effective in 2015, it is unlikely to readdress the HazCom's deficiencies in the near future. Therefore, a more reasonable and realistic way to address these problems is to borrow a tool from other right-to-know laws, such as the EPCRA, to broaden the scope of the worker's protection and empower workers to exercise their legal remedies in toxic workplaces.

Feitshans, *Hazardous Substances in the Workplace: How Must Does the Employee Have the 'Right to Know'?*, 1985 DET. C.L. REV. 697, 712–13 (1985); O'Reilly, *supra* note 2.

76 *See supra* text accompanying notes 36–39.

77 *See supra* text accompanying note 39.

78 *See supra* note 38.

79 Hazard Communication Standard, 77 Fed. Reg. 17, 633.