

WAC 296-901-14018 Trade secrets. (1) The chemical manufacturer, importer, or employer may withhold the specific chemical identity, including the chemical name, other specific identification of a hazardous chemical, or the exact percentage (concentration) of the substance in a mixture, from the safety data sheet, provided that:

(a) The claim that the information withheld is a trade secret can be supported;

(b) Information contained in the safety data sheet concerning the properties and effects of the hazardous chemical is disclosed;

(c) The safety data sheet indicates that the specific chemical identity and/or percentage of composition is being withheld as a trade secret; and

(d) The specific chemical identity and percentage is made available to health professionals, employees, and designated representatives in accordance with the applicable provisions of this section.

(2) Where a treating physician or nurse determines that a medical emergency exists and the specific chemical identity and/or specific percentage of composition of a hazardous chemical is necessary for emergency or first-aid treatment, the chemical manufacturer, importer, or employer must immediately disclose the specific chemical identity or percentage composition of a trade secret chemical to that treating physician or nurse, regardless of the existence of a written statement of need or a confidentiality agreement. The chemical manufacturer, importer, or employer may require a written statement of need and confidentiality agreement, in accordance with the provisions of subsections (3) and (4) of this section, as soon as circumstances permit.

(3) In nonemergency situations, a chemical manufacturer, importer, or employer must, upon request, disclose a specific chemical identity or percentage composition, otherwise permitted to be withheld under subsection (1) of this section, to a health professional (i.e., physician, industrial hygienist, toxicologist, epidemiologist, or occupational health nurse) providing medical or other occupational health services to exposed employee(s), and to employees or designated representatives, if:

(a) The request is in writing;

(b) The request describes with reasonable detail one or more of the following occupational health needs for the information:

(i) To assess the hazards of the chemicals to which employees will be exposed;

(ii) To conduct or assess sampling of the workplace atmosphere to determine employee exposure levels;

(iii) To conduct preassignment or periodic medical surveillance of exposed employees;

(iv) To provide medical treatment to exposed employees;

(v) To select or assess appropriate personal protective equipment for exposed employees;

(vi) To design or assess engineering controls or other protective measures for exposed employees; and

(vii) To conduct studies to determine the health effects of exposure.

(c) The request explains in detail why the disclosure of the specific chemical identity or percentage composition is essential and that, in lieu thereof, the disclosure of the following information to the health professional, employee, or designated representative, would not satisfy the purposes described in (b) of this subsection:

(i) The properties and effects of the chemical;

(ii) Measures for controlling workers' exposure to the chemical;

(iii) Methods of monitoring and analyzing worker exposure to the chemical; and

(iv) Methods of diagnosing and treating harmful exposures to the chemical.

(d) The request includes a description of the procedures to be used to maintain the confidentiality of the disclosed information; and

(e) The health professional, and the employer or contractor of the services of the health professional (i.e., downstream employer, labor organization, or individual employee), employee, or designated representative, agree in a written confidentiality agreement that the health professional, employee, or designated representative, will not use the trade secret information for any purpose other than the health need(s) asserted and agree not to release the information under any circumstances other than to the department, as provided in subsection (6) of this section, except as authorized by the terms of the agreement or by the chemical manufacturer, importer, or employer.

(4) The confidentiality agreement authorized under subsection (3) (d) of this section:

(a) May restrict the use of the information to the health purposes indicated in the written statement of need;

(b) May provide for appropriate legal remedies in the event of a breach of the agreement, including stipulation of a reasonable preestimate of likely damages; and

(c) May not include requirements for the posting of a penalty bond.

(5) Nothing in this standard is meant to preclude the parties from pursuing noncontractual remedies to the extent permitted by law.

(6) If the health professional, employee, or designated representative receiving the trade secret information decides that there is a need to disclose it to the department, the chemical manufacturer, importer, or employer who provided the information must be informed by the health professional, employee, or designated representative prior to, or at the same time as, such disclosure.

(7) If the chemical manufacturer, importer, or employer denies a written request for disclosure of a specific chemical identity or percentage composition, the denial must:

(a) Be provided to the health professional, employee, or designated representative, within thirty days of the request;

(b) Be in writing;

(c) Include evidence to support the claim that the specific chemical identity or percent of composition is a trade secret;

(d) State the specific reasons why the request is being denied; and

(e) Explain in detail how alternative information may satisfy the specific medical or occupational health need without revealing the trade secret.

(8) The health professional, employee, or designated representative whose request for information is denied under subsection (3) of this section may refer the request and the written denial of the request to the department for consideration.

(9) When a health professional, employee, or designated representative refers the denial to the department under subsection (8) of this section, the department must consider the evidence to determine if:

(a) The chemical manufacturer, importer, or employer has supported the claim that the specific chemical identity or percentage composition is a trade secret;

(b) The health professional, employee, or designated representative has supported the claim that there is a medical or occupational health need for the information; and

(c) The health professional, employee, or designated representative has demonstrated adequate means to protect the confidentiality.

(10) If the department determines that the specific chemical identity or percentage composition requested under subsection (3) of this section is not a "bona fide" trade secret, or that it is a trade secret, but the requesting health professional, employee, or designated representative has a legitimate medical or occupational health need for the information, has executed a written confidentiality agreement, and has shown adequate means to protect the confidentiality of the information, the chemical manufacturer, importer, or employer will be subject to citation by DOSH.

If a chemical manufacturer, importer, or employer demonstrates to the department that the execution of a confidentiality agreement would not provide sufficient protection against the potential harm from the unauthorized disclosure of a trade secret, the department may issue such orders or impose such additional limitations or conditions upon the disclosure of the requested chemical information as may be appropriate to assure that the occupational health services are provided without an undue risk of harm to the chemical manufacturer, importer, or employer.

(11) A chemical manufacturer, importer, or employer may appeal a citation for a failure to release trade secret information according to WAC 296-900-170.

(12) Notwithstanding the existence of a trade secret claim, a chemical manufacturer, importer, or employer must, upon request, disclose to the department any information which this section requires the chemical manufacturer, importer, or employer to make available. Where there is a trade secret claim, such claim must be made no later than at the time the information is provided to the department so that suitable determinations of trade secret status can be made and the necessary protections can be implemented.

(13) Nothing in this subsection must be construed as requiring the disclosure under any circumstances of process information which is a trade secret.

[Statutory Authority: RCW 49.17.010, 49.17.040, 49.17.050, 49.17.060 and 29 C.F.R. 1910 Subpart Z. WSR 13-06-050, § 296-901-14018, filed 3/5/13, effective 4/15/13.]