

LEGAL PERSPECTIVE

OSHA's Local Enforcement Update: Where Does the Recently Enforceable Crystalline Silica Standard Appear on an Inspector's Radar?

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The Occupational Safety and Health Administration (OSHA) announced its Region 3 campaign for the first quarter of 2018, including Pennsylvania and West Virginia, to raise awareness about the four leading safety hazards in the construction industry. In March 2018, OSHA implemented the Focus Four Hazards campaign to educate employers regarding electrical, struck-by, fall, and caught-in/between hazards, which were identified as the four most frequently cited safety violations against construction employers. OSHA conducted monthly "toolbox talks," each focused on a different hazard.

For the first half of 2018, it was not surprising that falls top the list as the most cited safety hazard in construction in Western Pennsylvania. As compared to national statistics, the data is consistent with incidents related to "slips, trips and falls" comprising more than 50% of the overall citations from October 2016 through September 2017. However, in addition to the obvious attention toward the common and recurrent standards, the agency has also begun enforcement of the recently implemented crystalline silica rule.

Industry and government representatives alike have been unsure of exactly how this new standard will actually be enforced. The pre-2016 Rule was in effect without any changes or updates almost as long as OSHA has been in existence. Replacing the prior exposure limits that were more than 40 years old, the new crystalline silica Rule has two separate standards with one applicable to the construction industry and the other directed to general industry/maritime (encompassing all other enforcement). After years of rulemaking, extensive comment periods, and challenges from both labor and industry, the final Rule took effect in June 2016. Construction industry enforcement was scheduled to begin a year later, in June 2017, but due to a three-month delay, the Rule became officially enforceable on September 23, 2017. The agency determined that additional guidance was necessary due to the "unique nature" of the requirements of the construction industry. OSHA granted employers acting in good faith, an additional 30 days from that time, for implementation efforts.

OSHA published a memorandum for "guidance," for interim enforcement in construction, on October 19, 2017. According to many employers, the memo

created more questions than it answered. Citations started being issued in October 2017, usually in conjunction with other safety standard violations. Experience so far shows that OSHA rarely cites a silica standard as a stand-alone violation.

To date, approximately 117 alleged violations have occurred according to OSHA statistics. Eighty percent of those citations were written as "serious." In particular, the top three standards at play thus far are:

- 29 C.F.R. § 1926.1153(d)(2)(i) for failure to conduct an exposure assessment of worker exposure to respirable crystalline silica (approximately 35 citations)
- 29 C.F.R. § 1926.1153(c)(1) for failing to adhere to the Table 1 list of equipment/tasks and OSHA's required engineering and work control methods and respiratory protection (approximately 30 cited violations)
- 29 C.F.R. § 1926.1153(g)(1) for lack of a written exposure control plan (approximately 20 citations)

The enforcement of §1926.1153(d)(2)(i), addressing the proper exposure limit assessments, qualifying as the most cited of the silica standards comes as no shock. Coming in second, Table 1's adherence can also be described as a predictable violation category (§ 1926.1153(c)(1)) given some of the confusion expressed by industry about what the guidelines mean for workers with minor silica exposure. The third most cited silica standard (§ 1926.1153(g)(1)), however, is somewhat of an unexpected subpart that OSHA inspectors happened to target and cite.

§ 1926.1153(g)(1) can arguably be considered a recordkeeping or "paperwork" type of violation. OSHA's data is unclear as to whether the violations dealt with employers failing to have a plan in place at all, or if the alleged violations had to do with specific elements of a plan that were non-compliant.

Other parts of the Rule have been cited, obviously, but there does not appear to be a systematic approach in terms of what inspectors are seeking or a certain methodology in their inspections. Some employers who have been cited for silica Rule violations indicate

that an alleged “Table 1” violation led to requests for documents showing exposure assessments, written control plans, and medical testing data. It stands to reason that, if those records are not compliant, more citations result.

So what does this mean for day-to-day operations for an employer responsible for a construction site under OSHA’s jurisdiction? As a whole, the industry has been looking at practical ways to meet the standards and advise its workforce—particularly supervisors and on-site management—about the requirements. Because the new enforcement measures have been gaining momentum in 2018, awareness among all workers is key, especially for larger employers and their subcontractors.

Many employers across industry have expressed frustration with the challenge of how to cost effectively comply with the Rule. This is especially true for multi-employer worksites where the general contractor’s silica control plan may not be followed as closely by subcontractors. There could be situations where members of a trade are exposed in excess of the personal exposure limit, even though another subcontractor created the exposure. Both the GCs and the subcontractors face the responsibility of making sure all workers comply with the new exposure limits under the standard. This requires a lot more coordination and communication on the work site, which must be done well in advance of the actual work being performed.

Based on the above, certain requirements outlined in the final Rule should be prioritized. First, it is critical that an employer develop its own written silica exposure control plan. The written exposure control plans must include:

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- (a) a description of the tasks in the workplace that involve exposure to respirable crystalline silica;
- (b) a description of the engineering controls, work practices, and respiratory protection used to limit employee exposure to silica for each task (basically, the employer's customized "Table 1" for the specific tasks);
- (c) a description of housekeeping measures used to limit employee exposure to respirable crystalline silica; and
- (d) a description of the procedures used to restrict access to work areas, when necessary, to minimize the number of employees exposed to silica.

Further, there should be a designated representative or "competent person" assigned to implement the workings of that plan. In addition, employers should adjust their practices, especially related to housekeeping (cleaning clothing, dry sweeping, dry brushing, using compressed air, etc.) to maintain control of areas most affected with silica dust and exposure.

Employers must also keep detailed records of their employees' silica exposure and related medical treatment. In furtherance of that, medical exams should be provided every three years, including lung-function tests and chest x-rays. Finally, it is critical that employers train, educate, and train some more. The silica safety control plans in place, and the effectiveness of an employer's message on its culture in reaching compliance, is one of the most significant mitigating factors OSHA inspectors consider. If an employer has a training program in place and follows through with implementation efforts, that company's good faith effort to comply will likely never be called into question.

OSHA's enforcement is still in the early stages, so there is not much to report as far as actual legal interpretations of challenges to any specific citations just yet. That will undoubtedly be on the horizon very soon. With respect to the actual legal sufficiency of the Rule, in *North America's Building Trades Unions v. Occupational Safety & Health Administration, et al.*, 878 F.3d 271, (D.C. Cir. 2017), on December 22, 2017, the D.C. Circuit Court of Appeals held that OSHA failed to adequately explain its decision to omit medical removal protections ("MRP") from the Rule and remanded the issue for further consideration.

There were numerous challenges to the Rule in this case, but the Court rejected most of them, applying

the high bar set where the Department of Labor and OSHA have a deferential standard afforded them in the rulemaking process. Industry raised five issues, all of which were denied. The Unions' challenge to the construction standard's 30-day trigger for medical surveillance was also found to be without merit. The Court did recognize the North America's Building Trades Unions labor federation's argument, noting that the agency did not offer good reasons for leaving out a "medical removal protection" provision allowing doctors to flag workers at risk for exposure-related injury. The Court noted, "[w]e hold that OSHA was arbitrary and capricious in declining to require MRP for some period when a medical professional recommends permanent removal, when a medical professional recommends temporary removal to alleviate COPD symptoms, and when a medical professional recommends temporary removal pending a specialist's determination."

Labor sees the decision as a positive step in ensuring the health and safety of America's workforce. Industry, conversely, finds the Court's analysis represents another stamp of approval for OSHA's rulemaking and enforcement powers. The new Rule is not going away any time soon, and the time for compliance is yesterday.

On June 8, 2018, OSHA announced its crystalline silica standard enforcement launch for general industry and maritime, which can start to occur on June 23, 2018. Given that OSHA will have the capacity to enforce the silica standards across the board, safety experts are anticipating even more citations overall. The agency has warmed up in enforcing the Rule while citing the construction industry over the past 9 months. Perhaps the silver lining in what the construction world has faced in this early enforcement effort, is that it will hopefully allow OSHA to fill in the gaps in making actual compliance more realistic. **BG**

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