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Client Alert

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OSHA Proposes Further Restriction of Silica Exposures

OSHA has regulated occupational exposures to airborne silica since 1971 and has recently proposed significant revisions to its regulations limiting workers' exposure to airborne silica. These revisions are explicitly intended to extend the scope of the regulation to additional workers, employers and occupations. Because silica is present in virtually all sand, cement, stone and glass products, it is important for all employers, particularly those not subject to the original silica standard, to determine whether the proposed amendments will subject them to regulation and possible fines and penalties.

Proposed Revisions to Permissible Exposure Level

Essentially, OSHA proposes to halve workers' permissible exposure to airborne silica. By reducing the Permissible Exposure Level (PEL), OSHA will subject many more workers and employers to its silica exposure regulations.

Specifically, the proposed regulation reduces OSHA's current PEL for airborne silica from 100 micrograms per cubic meter of air on an eight hour time weighted average (100 μ/m^3 TWA) to 50 μ/m^3 TWA. This proposal is based on OSHA's findings that 1) the reduction will significantly reduce silica-related disease and death, 2) the 50 μ/m^3 TWA level is technologically feasible, and 3) employers' costs of compliance will not be excessive. Further, OSHA proposes eliminating current differences in PELs based on the nature of the employer (industry, maritime or construction), the type of silica (quartz, cristobalite, tridymite) and method of measurement to a single 50 μ/m^3 TWA PEL applicable to all employers. If this proposal becomes final, no employee could be exposed to airborne crystalline silica of any type at levels of greater than 50 μ/m^3 TWA.

Additionally, OSHA proposes reducing the Action Level for silica to 25 μ/m^3 TWA. As discussed in the next section, the Action Level defines which employers will be required to monitor airborne silica levels. Because of the significant costs attendant to mandatory air monitoring and record retention, it is important that employers avoid meeting or exceeding the Action Level unnecessarily.

Exposure Assessments

Employers are required to conduct an Initial Exposure Assessment (IEA) of any employee who may reasonably be expected to be exposed at or above the Action Level. The IEA will most commonly be personal air monitoring performed by a certified industrial hygienist. Employees are entitled to witness any air monitoring. The requirements applicable to the manner in which air monitoring is conducted and the laboratories that assess the results are set forth in the standard.

The employer's obligation to conduct repeat assessments depends on the exposure level determined in the IEA. If the exposure level is at or above the Action Level (25 μ/m^3 TWA) but below the PEL (50 μ/m^3 TWA), repeat assessments must be performed every six months. If the exposure level is at or above the PEL (50 μ/m^3 TWA), periodic assessments must be performed every three months. Repeat assessments may be discontinued if the exposure levels on two consecutive assessments taken at least seven days apart are below the Action Level.

The employer must conduct additional assessments whenever a change in production, process, control equipment, personnel or work practices may reasonably be expected to produce new or additional exposures at or above the action level.

The employer is required to maintain all exposure assessment records.

Remedial Action

If the PEL (50 μ/m^3 TWA) is exceeded, the employer must implement engineering controls and work practices to reduce exposures below the PEL. The employer cannot rely on the use of respirators as a primary method of limiting workers' exposures; use of respirators is allowed only if the employer demonstrates that engineering controls and work place practices cannot reduce exposures below the PEL. In this situation, the employer is still required to implement engineering controls and work practices to reduce exposures as much as possible in addition to using respirators.

Effective engineering controls and work practices described by OSHA include substitution of silica-containing products, isolation, local exhaust ventilation, dilution and wetting techniques. For 13 specific construction tasks, OSHA sets forth specific combinations of engineering controls, work practices and respiratory protection which if employed are deemed to satisfy this requirement without the need to perform an exposure assessment.

Medical Monitoring

For workers exposed above the PEL for 30 or more days per year, the employer must provide an initial and periodic (every three years) medical monitoring consisting of work and exposure history, chest x-ray or equivalent, physical exam focusing on the respiratory system, a pulmonary function test and a tuberculosis test. The proposed standard describes particular information to be provided to the physician, as well as particular information that must be included in the report of the examination. The physician must provide a written report of the examination to the employer within 30 days and the employer must provide a copy to the employee within 15 days of receipt, or within five days of receipt in the construction industry. The employer is required to retain all medical surveillance records.

Communication & Training

Employers must include information concerning the hazards of silica inhalation in their workplace hazard communication program. At a minimum, the hazards to be disclosed are the risks of cancers, lung effects, immune system effects and kidney effects. Employees also must have access to product labels and safety data sheets that must disclose these hazards.

Employers must ensure that employees are knowledgeable of 1) the operations that could result in silica exposure, 2) the procedures implemented by the employer to prevent exposure, 3) the contents of OSHA's silica regulation, and 4) the employer's medical surveillance program.

Effective Dates

Written comments on the proposed standard must be submitted by December 11, 2013. Public hearings are planned to begin on March 4, 2014.

When the final regulation becomes effective, all obligations imposed on employers commence 180 days after the effective date except 1) the requirement for engineering controls commences one year after the effective date, and 2) requirements relating to testing laboratories commence two years after the effective date.

Conclusion

Although a "proposed" standard, OSHA has clearly indicated that it will not consider any modification of the proposed PEL and Action Level. Nor, does it appear open to changing any of the employer requirements. Therefore, employers should anticipate that the final silica regulation will not be significantly different from the current proposal.

Those employers that are subject to the current silica regulation will already have air monitoring, medical programs and training in place. It will be necessary, however, to review those programs to ensure that exposures do not exceed the new PEL and that the medical and training programs meet the requirements of the new regulation.

Of particular concern are those employers who currently use silica or silica-containing products but not in sufficient amounts to subject them to regulation. By halving the acceptable exposure level, OSHA intends to subject many of these employers to regulation. Of note, is a recent joint study of hydraulic fracturing operations by OSHA and NIOSH that found silica exposures generally under the current standard but exceeding the proposed standard. Those employers that are not subject to the current standard but could be subject to the proposed standard should immediately determine whether exposures exceed the Action Level (25 μ/m^3 TWA) and, if so, every effort should be made to reduce exposures below the Action Level through engineering controls and workplace practices to avoid the onerous requirements imposed by this regulation.

—William L. Schuette

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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