

A Dust in the Wind...

Silica and Construction Industry Challenges: *What Every Construction Lawyer Needs to Know*

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The Occupational Safety and Health Administration (OSHA) has issued a Final Rule limiting workers' exposure to respirable crystalline silica. The Rule, which seeks to curb lung cancer, silicosis, chronic obstructive pulmonary disease and kidney disease, became applicable to Construction Industry employers

(section 1926.1153) on September 23, 2017.¹ Although the Construction Industry participated in a challenge to OSHA's Final Rule in federal court, on December 22, 2017, the DC Court of Appeals issued its decision denying all challenges to OSHA's Final Rule as to silica exposure.²

Construction Industry employers must either (a) comply with the safe harbor flexible compliance option contained in OSHA's **Table 1 Specified Exposure Control Methods When Working With Materials Containing Crystalline Silica**, 1926.1153(c)(1)³, or (b) measure respirable crystalline silica exposures to verify that levels are at or below the permissible exposure limit (PEL) for workers engaged in the *Table 1* tasks. *Table 1*, which addresses 18 common construction tasks that generate high exposures to respirable crystalline silica, and for each task specifies engineering controls, work practices and respiratory protection that effectively protects workers, was developed in response to Construction Industry requests for guidance and a standard that is different from general industry.

Table 1 Tasks and Your Clients

Are we affected? If there is dust associated with your construction clients' work, your clients are likely affected. Crystalline silica is a common mineral found in many naturally occurring materials and used in many industrial

products and at construction sites. Materials like sand, concrete, stone and mortar contain crystalline silica. Glass, pottery, ceramics, bricks, concrete and artificial stone are made with crystalline silica. Inhaling these very small particles is believed to cause multiple diseases, including lung cancer, COPD and kidney disease. Activities like cutting, sawing, grinding, drilling, sweeping, and crushing can create this very small respiratory dust (100 times smaller than ordinary sand).

What do we do? While there are a variety of approaches depending upon the nature of the construction company, its size and practices, most employers are seeking to comply with the OSHA regulations with policies implementing its strategy and training of employees. Compliance with the *Table 1* safe harbor is the most likely approach for most affected employers, although more sophisticated employers may opt to develop specific plans with measured PEL for known tasks, developing respirator use plans and employing medical surveillance. (The Cleveland AGC is believed to be compiling a data base of such measurements which it maintains on its website.)

Regardless of which exposure control method is used, all construction employers covered by the standard are required to:

- Established and implement a **written exposure control plan** that identifies tasks that involve exposure and methods used to protect workers, including procedures to restrict access to work areas where high exposures may occur.
- Designate a **competent** person to implement the written exposure control plan.
- Restrict **housekeeping** practices that expose workers to silica where feasible alternatives are available.

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- Offer **medical exams** — including chest X-rays and lung function tests — every three years for workers who are required by the standard to wear a respirator for 30 or more days per year.
- **Train workers** on work operations that result in silica exposure and ways to limit exposure.
- **Keep records** of workers' silica exposure and medical exams.⁴

What to expect: Since each local OSHA branch is funded by fines it collects, you should expect to be contacted by employers who receive citations alleging that they failed to make a good faith effort at compliance. Good faith attempts to comply are likely no longer an adequate defense. However, limits on availability of equipment for engineered solutions may be proffered, where back orders can be shown. Frankly, you should expect to be contacted by employers who believe they are in compliance but who are failing to meet the rigorous and complex requirements. It will be hard to train all workers, much less train designated **competent persons** for each job site, where activities as elementary as sweeping are affected. Basic engineered solutions including consistently using **wet applications and/or dust collecting devices** will be essential for cutting, grinding, sweeping and similar activities. Fit-tested respirator usage and availability must be employed for **anticipated** exposures even before base levels are met. Medical examinations and record keeping will likely be mandatory in many fields.

Each construction business must analyze its own practices in a more detailed manner. For example, when examining excavation related provisions, fit-tested respirators may be required, even if equipment contains cabs, if doors open, interior is not cleaned of settled dust, seals fail, existence of positive pressure, intake air not 95% efficient, or cabs are not heat and cool capable. Sample exposure control plans are available from the AGC and other agencies but likely will require adaption to specific construction exposures of each business.

Moreover, construction employers must follow *Table 1* in every detail or they are required to conduct air monitoring of employees. Some examples of challenges to following

Table 1: (1) employers must maintain equipment and keep records of maintenance in compliance with manufacturers' recommendations, including filter change frequency for fit-tested respirators and seals for cab maintenance; (2) dust masks are not in compliance and respirators must be 1926.1153 compliant with fit testing; and (3) employees can have no more than one day facial hair growth, so disciplinary policies should likely be adjusted to require compliance with clean shave requirements.

Interacting with OSHA: Finally, knowing the rules of OSHA engagement and how to handle a site inspection will be important, *i.e.*, when and where OSHA is entitled to go on a job site or at the construction facility. In that regard, employers need **competent persons** trained, and employees knowledgeable about the dangers and employer safety rules, so that upon OSHA interview they can confirm their training.

OSHA has indicated that if they see a dust cloud on a jobsite, they will be stopping to take samples for silica. Be courteous with the OSHA inspector, but insist upon having the opportunity to take samples side-by-side with OSHA. Also, an employee is not required to wear a silica sampling pump just because OSHA asks them to do so, and employees should be educated about their rights without advising them to deny OSHA requests.

Summary: The construction industry will be wrestling with silica regulations in the coming years, certainly until protocols, equipment, tools and methodologies have been sorted out and are more readily available. It appears unlikely that further judicial intervention will alter enforcement of the Final Rule as it exists, so construction counsel need to be prepared to meet the challenges. Undoubtedly, employment litigation and worker compensation litigation will also be affected by the Final Rule, which potentially sets employment practice expectations and establishes a basis for causation arguments for work related exposures. The critical first steps for counsel are becoming familiar with the Rule and working with clients to determine the best approach to compliance.

Endnotes

- ¹ 29 CFR Part section 1926 subpart Z Respirable crystalline silica; however, requirements for methods of sample analysis in paragraph (d)(2)(v) become effective June 23, 2018.
- ² *North America's Building Trades Unions v. Occupational Safety & Health Administration*, No. 16-1105 (D.C. Cir. Dec. 22, 2017), Slip Opinion at [https://www.cadc.uscourts.gov/internet/opinions.nsf/.../\\$file/16-1105-1710179.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/.../$file/16-1105-1710179.pdf)
- ³ For the complete **Table 1 Specified Exposure Control Methods When Working With Materials Containing Crystalline Silica**, see https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=1270.
- ⁴ (See the OSHA Fact Sheet for a very basic overview. Additional information on OSHA's silica Final Rule can be found at www.osha.gov/silica).

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Construction Law

Jean has handled many construction disputes including both litigation and arbitration of multimillion dollar construction defect/repair claims, delay damages and lien/bond claims. She counsels owners and contractors as to contract terms, safety policies, and OSHA related concerns. She has is Past-President of Toledo Chapter 282 of the National Association of Women in Construction; and is an active participant with the AGC of NW Ohio.