

LEGALINSIGHT

This Isn't Kansas Anymore: OSHA's Effort to Limit Dust Exposure and Its Willingness to Fork out Significant Penalties for Non-Compliance

BY MATTHEW J. PAVLIDES AND JUSTIN C. ELLER, MILES & STOCKBRIDGE

Unless someone has been living in a vacuum (pardon the dust-related pun), OSHA's effort to address respirable crystalline silica has been something widely anticipated and prepared for by many in the industry. It is common knowledge that OSHA has a fundamental mandate to have all employers provide employees with a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. Employees exposed to respirable crystalline silica have been determined to be at increased risk of developing serious adverse health effects, including silicosis, lung cancer, chronic obstructive pulmonary disease and kidney disease.

OSHA's Crystalline Silica Standard

In order to address these health hazards, OSHA has issued a construction standard for crystalline silica that establishes a new permissible-exposure limit and requires employers to take a number of steps, including:

- Implementing a written exposure-control plan;
- Designating a competent person to implement the exposure-control plan;
- Restricting housekeeping practices that expose workers to silica where feasible alternatives are available;
- Offering certain medical exams for workers who are required by the standard to wear a respirator for 30 or more days per year;
- Training workers on work operations that result in silica exposure and ways to limit exposure; and
- Maintaining records of workers' silica exposure and medical exams.

OSHA has decided to delay its enforcement of the crystalline silica standard until September 23, 2017, in order to conduct additional outreach and provide educational materials and guidance for employers. In the meantime, the agency will continue to regulate exposure to silica through its other standards (e.g., respiratory protection).

OSHA's Crystalline Silica Standard

While OSHA views itself as a source of education, information and enforcement, it has limited resources. Among the most limited of its resources is the number of enforcement officers nationwide—roughly 2,000 or so. Given its limited enforcement resources, OSHA shifted to an enforcement strategy of making an example of its inspections and citations while dramatically increasing its penalties. How dramatic? The maximum penalty for a violation classified as “other than serious” or “serious” has increased from \$7,000 to \$12,471, while the maximum penalty for repeat and willful violations has increased from \$70,000 to \$124,471—increases of more than 75%.

Recent Case Example

For those who think OSHA isn't serious, look no further than a recent citation issued on May 19, 2017, in South Carolina to a contractor whose employees were using pneumatic tools to remove delaminated concrete under a pier. The cited and notified penalties were: \$8,149 for non-use of appropriate respirators; \$8,149 for lack of a qualified program administrator to oversee the use of respiratory protection, lack of hazard evaluation and reasonable estimates of employee exposures, and failure to conduct air monitoring; \$8,149 for failure of a medical evaluation to determine the employee's ability to use a respirator, and lack of fit testing of facepieces prior to initial use and annually thereafter; \$8,149 for not cleaning and disinfecting respirators; \$8,149 for lack of training of employees who were required to wear respirator protection; and other proposed penalties, in the end, totaling up to just over \$55,000. Many of these citations were deemed to be in the category of “serious,” which by OSHA's classification are hazards with a substantial probability of causing death or serious physical harm.

While the citations and amounts may or may not be reduced by follow-up meetings and other procedures—coupled with plenty of promises to do better in the future, skillful negotiation or even the assistance of a lawyer—the impact is likely to be far reaching to a company when OSHA comes calling. And, though it is difficult to embrace change and to navigate through all of the information about controlling dust, it is the new normal. Looking forward, we have a long road ahead that will not be easily bypassed with a click of our heels. ■

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Matthew J. Pavlides is the managing principal in Miles & Stockbridge's Rockville, Maryland, office and a member of the law firm's construction practice, representing owners, contractors, subcontractors, architects/engineers, sureties and vendors on their construction and personal matters.



Justin C. Eller is a principal in the firm's Labor, Employment, Benefits & Immigration practice in Baltimore. Justin advises and represents management in all areas of employment law, including matters before OSHA.

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