Client Alert

September 2013

Department Of Labor Proposes Revised Standard For Occupational Exposure To Respirable Crystalline Silica

The Occupational Safety and Health Administration (OSHA) published a proposed rule last week to lower, by 50% the permissible exposure limits for occupational exposure to respirable crystalline silica (quartz, cristobalite and tridymite) from 0.1 microgram of respirable crystalline silica per cubic meter of air to .05mg/m^3. 78 Fed. Reg. 56273 (Sept. 12, 2013). OSHA is also proposing an action level of 0.025 mg/m^3; and has proposed new regulatory requirements, including exposure monitoring, medical surveillance, and worker training.

OSHA estimates compliance with the new regulations will cost $640 million annually, approximately $1,242 per business. The hydraulic fracturing industry will be particularly hard hit with estimated compliance costs between $24.4 million and $28.6 million annually. Other industries affected by the proposed amendments include sandblasting, mining/quarrying, furnace installation/repair, refinery, construction, abrasive powders, foundry work, glass, ceramics manufacturing, asphalt paving, iron and steel works, railroad repair, and power tool manufacturing.

Comments on the proposed rule are due December 11, 2013. In addition, OSHA announced that it will hold public hearings in Washington, DC on March 4-5, 2014. OSHA's Health Effects Literature Review and Preliminary Quantitative Risk Assessment peer reviewers will be present at the hearing. Anyone interested in presenting information or testifying at the hearing must submit a notice of their intent to do so by November 12. Full text of any testimony or evidence must be submitted by December 11.

Background

The proposed rule has been anticipated for many years. OSHA sought to revise the permissible exposure limit (PEL) in 1989 as part of its Air Contaminants Standard, which would have set PELs for 428 toxic substances, but was struck down by the US Court of Appeals for the Eleventh Circuit. AFL-CIO v. OSHA, 965 F.2d 962 (11th Cir. 1992) (vacating and remanding to OSHA 54 Fed. Reg. 2332 (Jan. 19, 1989)). OSHA began a rulemaking that would have targeted the PEL for RCS in 2003, sending draft standards to a small business review panel, but abandoned the rulemaking shortly thereafter. In February 2011, OSHA sent a draft rule revising the PEL to the Office of Information and Regulatory Affairs at the Office of Management and Budget, where it languished for more than two years until its recent proposal.

Industry has argued a lower PEL is unwarranted. OSHA is authorized to promulgate a new PEL only if it is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *See* 29 U.S.C. § 652(8). The Supreme Court has interpreted this provision to require OSHA to find that "a significant risk of material health impairment exists at current levels of exposure . . . 'and that a new, lower standard is therefore reasonably necessary or appropriate to provide safe or healthful employment and places of employment.'" *AFL-CIO v. OSHA*, 965 F.2d at 972-73 (quoting *Industrial Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 614-15 (1980)).

According to the Center for Disease Control, from 1968-2002, silicosis mortality declined by 92%. Therefore, "a significant risk of material health impairment" does not exist at the current PEL, and OSHA

is not authorized to lower the PEL at this time. Moreover, implementation of a PEL in the range of 0.05 to 0.025 mg/m^3 may not be technically feasible. It is not possible to measure RCS accurately at levels significantly lower than 0.1 mg/m^3 using current analytical techniques. The economic hardship that the terms of the proposed lowered limits would impose on small businesses is also a compelling reason not to lower the PEL for RCS or to impose new requirements at this time. Industry estimated financial impact is $5.45 billion per year.[1]

Additional concerns include the impact of a much-lowered standard on the current legal landscape. The National Institute for Occupational Safety and Health (NIOSH) states that at least 1.7 million US workers are exposed to respirable crystalline silica in a variety of industries and occupations.[2] Inevitably, a lowered PEL will inspire new litigation. The revised PEL will be used to establish standard of care in civil litigation, exposure in excess of the revised PEL will be used as evidence of negligence and, in some jurisdictions, exceeding the PEL will be deemed negligence *per se*.

Finally, OSHA's actions already have prompted other agencies to follow its lead. For example, the Mine Safety and Health Administration (MSHA) announced the intent to use OSHA's work on the health effects and risk assessment to revise MSHA regulations for the mining industry.[3]

Hunton & Williams lawyers have a long history working with clients to file comments and generally prepare arguments in opposition to proposed regulations that are burdensome on industry and/or the means proposed by the government to control risk are infeasible. Here, in addition to such arguments, evidence supports a conclusion that OSHA should shift its focus to enforcement of the current PEL, instead of seeking to implement a lower PEL. Our team of skilled administrative lawyers would be delighted to discuss advocacy in opposition to this proposed rule with any interested affected employers.

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[1] American Chemistry Council Silica Panel presentation, OMB/OIRA Meeting, March 31, 2011.

[2] www.cdc.gov/niosh/topics/silica.

[3] Mine Safety and Health Administration, Unified Agenda, July 2011, available at: http://www.msha.gov/REGS/UNIFIED/July2011/2019-AB36.asp.