



OSHA 30/30

A thirty minute update on OSHA law every thirty days

with Manesh Rath

THE OSHA SILICA RULE

March 30, 2016

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MANESH K. RATH

Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. On developing legal issues, he has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," WAVY-TV and C-SPAN. He was listed in *Smart CEO Magazine's* Readers' Choice List of Legal Elite.

Mr. Rath has extensive experience representing industry in OSHA rulemakings. He has successfully represented employers—including some of the largest in the country—in OSHA citations and investigations before federal OSHA in regions across the country and in state plan states.

Mr. Rath currently serves on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. He served on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years. He is the editor and co-author of the OSHA chapter of the *Employment and Labor Law Audit* (9th and 10th Editions) and a co-author of the book *Occupational Safety and Health Law Handbook* (2001).



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Lawrence Halprin is a partner in Keller and Heckman's workplace safety and health, chemical regulation and litigation practice groups. He is nationally recognized for his work in workplace safety and chemical regulation. His workplace safety and health practice covers all aspects of legal advocacy, including: representing clients in OSHA and MSHA investigations and enforcement actions; providing compliance counseling and training; conducting incident investigations, compliance audits and program reviews; participation in federal (OSHA, MSHA and NIOSH) and state rulemakings and stakeholders processes; bringing and intervening in pre-enforcement challenges to final agency rules; advising on legislative reform and oversight; and participation in the development of national consensus standards under the ANSI process, and TLVs under the ACGIH process.



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Mr. Halprin's engineering and financial background and extensive knowledge of OSHA rulemakings have greatly enhanced his ability to: provide compliance counseling and represent clients in enforcement actions; and evaluate and critique rulemaking proposals and suggest alternative approaches. On behalf of one or more clients, Mr. Halprin has participated in almost every major OSHA rulemaking over the past 25 years as well as numerous Cal-OSHA rulemakings.

TOPICS TO BE DISCUSSED

- Overview of the newly published rule
- Comparison with the proposed rule
- Practical tips on what employers should do
- Potential post-rule challenges



OVERVIEW OF THE NEWLY PUBLISHED RULE

- Respirable Crystalline Silica
 - Crystalline Silica: common component in sand, stone, rock, concrete, brick, mortar, paints, fillers
 - Potential exposure occurs in:
 - Processing: cutting, sawing, drilling, and crushing materials
 - Handling
 - Manufacturing: glass, foundries, pottery, and jewelry
 - Exploration: hydraulic fracturing



OVERVIEW OF THE NEWLY PUBLISHED RULE

- Respirable Crystalline Silica
 - Respirable: up to 10 um, not visible, 1/100 size of ordinary sand
 - Associated with diseases: Per OSHA, associated with silicosis, lung cancer, COPD, kidney disease



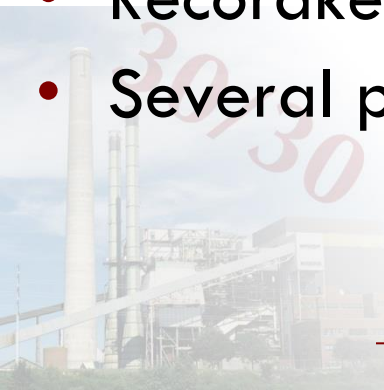
OVERVIEW OF THE NEWLY PUBLISHED RULE

- Under discussion at OSHA for decades
- SBREFA panel: December 2003 report
- Proposed Rule: September 2013
- Comments: February 2013
- Hearings: March-April 2013
- Over 2,000 comments
- Final rule published last Friday (3/25/2016)



OVERVIEW OF THE NEWLY PUBLISHED RULE

- PEL and Action Level (AL)
- Exposure assessment (or alternative approach)
- Written exposure control plan
- Control Measures
 - (1) Engineering and Work Practices; (2) PPE
- Employee information and training
- Ongoing exposure monitoring (or alternative approach)
- Medical surveillance (30 day trigger)
- Recordkeeping
- Several phase-in dates

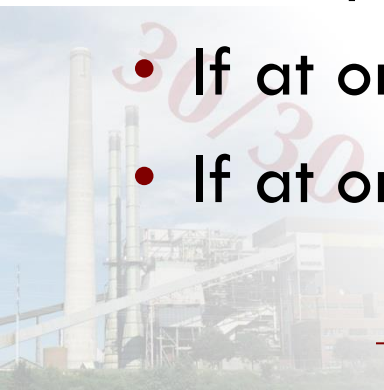


OVERVIEW OF THE NEWLY PUBLISHED RULE

- PEL and AL
 - Construction, General Industry, Maritime
 - Uniform PEL: Change to 50 micrograms/m³
 - Uniform Action level: 25 micrograms/m³
 - Per proposal
- Significant risk:
 - OSHA: generally 1/1000 over working lifetime
- Residual risk:
 - OSHA: over 1/1000, but lowest PEL that is feasible for most of regulated industry (follows chromium)

OVERVIEW OF THE NEWLY PUBLISHED RULE

- Exposure Assessment:
 - If workers are or may be exposed at or above action level over an 8 hour TWA, then employer must make an exposure determination
 - Initial monitoring OR
 - Objective data
 - Specified type of sampling device
 - Use qualified labs for analysis
 - If at or above PEL, triggers all requirements
 - If at or above AL, triggers some requirements



OVERVIEW OF THE NEWLY PUBLISHED RULE

- Exposure Control Plan
 - Employers must develop a written exposure control plan (not in proposed rule) in both Gen Ind./Maritime & Construction
 - Construction: Employer must use a competent person to implement the plan
 - Frequent and regular inspections
 - Job site
 - Materials
 - Equipment



OVERVIEW OF THE NEWLY PUBLISHED RULE

- Control Methods
 - Engineering Controls
 - Traditional
 - Required even if still need respirators to achieve PEL
 - Table 1 control banding approach
 - Construction
 - Also for Gen. Ind./Maritime for irregular tasks covered by Table 1
 - Avoids exposure assessment and monitoring, but need to verify effective implementation of controls



OVERVIEW OF THE NEWLY PUBLISHED RULE

- Control Methods
 - Work Practices
 - Housekeeping:
 - If would “contribute to exposure,” limits use of dry sweeping and compressed air to situations where other methods are infeasible
 - Proposal: prohibited use of dry sweeping and compressed air
 - IS THIS A REAL CHANGE?



OVERVIEW OF THE NEWLY PUBLISHED RULE

- Regulated Areas
 - General Industry:
 - Regulated areas where exposures exceed PEL
 - Posting warning signs at entrance
 - Construction
 - Restrict access to work areas in a written exposure control plan
 - Too dynamic to set up regulated areas
- Employee Information and Training
 - Ensure employees “can demonstrate knowledge and understanding” of the silica exposure control program

OVERVIEW OF THE NEWLY PUBLISHED RULE

- Medical Surveillance
 - Gen Ind.: Make available to employees exposed above the action level (not just PEL) for 30 or more days per year
 - Construction: make available to employees required to use respirators for 30 or more days per year
 - Both a generalist and a specialist (if recommended by generalist)
 - At least every 3 years



OVERVIEW OF THE NEWLY PUBLISHED RULE

- PPE - Respirators
 - Only permitted:
 - If engineering and work practice controls cannot maintain exposures at or below PEL
 - During implementation of engineering controls and work practices
 - In restricted work areas
- PPE – Clothing – no requirements



OVERVIEW OF THE NEWLY PUBLISHED RULE

- Implementation Dates
 - Gen Ind./Maritime:
 - Effective: June 23, 2016
 - Primary compliance deadline: June 23, 2018
 - Medical surveillance deadline:
 - If above PEL for 30 days/year, June 23, 2018
 - If above action level for 30 days/year, June 23, 2020
 - Hydraulic fracturing: 2018 through 2021
 - Construction:
 - Effective: June 23, 2016
 - Compliance deadline
 - Other than methods of sample analysis: June 23, 2017
 - Methods of sample analysis: June 23, 2018 (analyzed by a lab in accordance with Appx A)



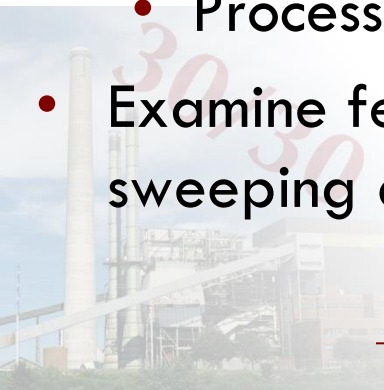
OVERVIEW OF THE NEWLY PUBLISHED RULE

- State Plan States
 - Have six months to adopt standards that are “at least as effective as” the federal standard.



PRACTICAL TIPS ON WHAT EMPLOYERS SHOULD DO

- Determine what tasks qualify for Table 1
- Determine what changes would be needed to qualify for use of Table 1 (engineering, process)
- Determine exposure assessment plan
- Assess potential engineering controls and work practices (experiment – trial and error?)
 - Wetting down work operations
 - Wetting down cleaning operations
 - Using local exhaust ventilation
 - Process isolation
- Examine feasible alternatives (experiment) to use of dry sweeping and compressed air



PRACTICAL TIPS ON WHAT EMPLOYERS SHOULD DO

- Reliable collection of samples?
 - Appendix A procedures
- Reliable methods of measuring silica at PEL or action level?
 - Appendix A
 - OSHA: 40 laboratories that meet requirements for sample analysis



POTENTIAL POST-RULE CHALLENGES

- Validity of OSHA risk assessment
- Validity of OSHA technical feasibility analysis
 - Controlling exposures to PEL
 - Exposure assessment at 25 ug/m³
 - Sample collection
 - Availability of laboratory resources
 - Variability in conditions, esp. in construction
- Validity of OSHA economic analysis
 - Feasibility
 - Cost effectiveness

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Please join us
at 1:00 PM Eastern U.S.
Wednesday, April 27, 2016

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