

The Latest From OSHA on Silica in Construction Enforcement

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On October 19, 2017, the Occupational Safety and Health Administration (OSHA) issued [Interim Enforcement Guidance for enforcing the Respirable Crystalline Silica in Construction Standard, 29 CFR 1926.1153](#). OSHA began enforcing the Silica in Construction Standard on September 23, but announced a 30-day "grace period" for construction employers making good faith attempts to comply with the new standard. With the grace period expiring on October 23, construction employers had little idea how OSHA intended to enforce the standard. The new Interim Enforcement Guidance sheds some new light on the subject.

Is the employer following Table 1?

As expected, OSHA Compliance Safety and Health Officers (CSHOs) will begin by examining whether the construction employer is following Table 1 in the Silica in Construction Standard. If an employer "fully and properly" implements all the engineering controls, work practices, and respiratory protection identified for common construction tasks, the employer does not need to conduct exposure assessments or comply with the Permissible Exposure Limit of 50 µg/m³ for employees engaged in those tasks. The Interim Enforcement Guidance includes a flow chart to help CSHOs evaluate employer compliance with Table 1.

What if the employer is not following Table 1?

The CSHO will begin collecting personal breathing zone samples on the first day of the inspection. Expect a document request for exposure assessment records, including air monitoring records and any other data the employer relied on to assess employee exposure to silica. Note that, according to the guidance, employers are not required to state exposure to a pinpoint precision on exposure records; ranges, e.g., "exposure level is above the Action Level but below the permissible exposure limit," are fine. The Interim Enforcement Guidance includes a second flow chart to help CSHOs evaluate employer compliance with alternative, "non-Table 1" exposure control methods.

CSHOs will also review the engineering controls and work practices employers use to maintain exposure levels below the permissible exposure limit (PEL). Unfortunately, the Interim Enforcement Guidance only restates the words of the standards and does not provide CSHOs or employers any advice on evaluating compliance methods. Presumably, if an employer is below the PEL, the CSHO

will check off this box and move on; if not, whatever engineering controls and work practices methods will cover the gap is up to the CSHO's subjective decision.

Housekeeping practices

Although the standard does not prohibit dry sweeping and dry brushing outright (after much back-and-forth during rulemaking), the Interim Enforcement Guidance advises CSHOs to essentially presume these methods are unacceptable, unless the employer can show alternative methods (e.g., wet sweeping, HEPA vacuums) are not feasible. CSHOs will also pay special attention to the use of compressed air for cleaning, which is permissible but only when used in conjunction with a ventilation system that effectively captures the dust cloud created by the compressed air. The guidance reminds CSHOs that sweeping compounds (e.g., non-grit, oil- or waxed-based) are an acceptable dust suppression practice.

Review of Written Exposure Control Plan

All construction employers with silica exposure, regardless of whether they follow Table 1, must have a Written Exposure Control Plan. Expect a CSHO to request a copy and an interview with the Competent Person identified in the Written Exposure Control Plan. If the plan does not list a Competent Person (e.g., because it could change daily), the CSHO will ask employees to identify the Competent Person.

Medical Surveillance Program

The Interim Enforcement Guidance restates the Silica in Construction Standard's medical surveillance provisions, but does not instruct CSHOs on verifying compliance. Expect the CSHO to request medical surveillance records on any employee required to use a respirator for silica protection for 30 or more days per year.

Hazard Communication

Already a favorite subject for many OSHA inspectors, expect a CSHO to request Hazard Communication program and training records, specifically as to silica. The new Silica in Construction Standard requires employers with silica exposure to incorporate respirable crystalline silica in their hazard communication program and provide updated training to employees about silica exposure. Any shortcomings will be cited under the Hazard Communication Standard (29 C.F.R. 1910.1200).

Citations

The end of the Interim Enforcement Guidance also provides direction to CSHOs on issuing citations for noncompliance. Mainly, the guidance's suggestions revolve around grouping citations. For example, if an employer tried but failed to implement Table 1, there's a violation for not following Table 1 and a second violation for not conducting an exposure assessment (because the employer failed to follow Table 1). The Interim Enforcement Guidance advises CSHOs to recommend both violations but group them together. Grouping helps keep penalty amounts down, as OSHA will only issue one penalty amount for a grouped set of violations (e.g., one \$12,000 penalty for two grouped violations, as opposed to \$12,000 per violation). But grouping is of little solace to construction employers whose ability to bid on new work can often be impaired by OSHA violations on their record. Two violations, regardless of the fact they are grouped, still count as two violations.

Takeaways

The Interim Enforcement Guidance is helpful, but does not give construction employers complete clarity on how to comply with the Silica in Construction Standard. Whether an employer has "fully and properly" implemented a Table 1 requirement may boil down to a debate on the water flow rate on a saw or how "enclosed" the cab on a grading vehicle is (double-check those door seals). For employers relying on "objective data" for exposure assessment, expect some arguments; the Interim Enforcement Guidance provides nothing on which CSHOs can rely except the technical definition from the standard.

On the other hand, the Interim Enforcement Guidance gives construction employers a heads up on OSHA's red flags. Employers that have no choice but to use dry sweeping or dry brushing should be prepared to defend their use to OSHA inspectors, with a plausible analysis of why wet methods, HEPA vacuums, sweeping compounds, and any other method suggested by the CSHO are infeasible. For employers whose exposure assessment shows employee exposure above the Action Level, the employer should be prepared to justify its decision to use respiratory protection, as opposed to implementing additional engineering controls and work methods.

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