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NEWSLETTER

Occupational Lead Exposure Regulatory Focus Poised to Move to the States

June 2017

Lead is one of the most heavily regulated chemicals in the United States due to the potential hazards it poses to people exposed to excess levels. To protect adult workers, federal and state occupational health standards regulate worker exposures to lead through two primary interrelated measures along with other controls. First, regulations regulate the amount of lead particulate that can be in the worker's breathing air via a Permissible Exposure Limit (PEL). Second, lead-exposed workers are required to have their blood lead level (BLL) regularly tested. If a worker's BLL exceeds a specified threshold, the worker is reassigned to a non-lead exposed position or sent home (with pay) until their BLL returns to an acceptable level. All current federal and state occupational lead regulations use these two basic measures.

Practice Areas

Environment & Product Regulation
Occupational Health and Safety

The Promised Federal Action Appears to Have Stalled

At a federal level, like all other safety standards promulgated by the U.S. Occupational Health and Safety Administration (OSHA), the Occupational Safety and Health Act (OSH Act) requires that these regulations be set at levels that will "most adequately assure, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." The statute further provides that, in addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards and experience gained under this and other health and safety laws. The tests embodied in this mandate put considerable burden on OSHA to evaluate not only risk,

but also economic and engineering feasibility.

In part, due to the onerous rulemaking process required by the statute, OSHA's track record in establishing PELs for lead and other substances is at best mixed all but a handful of OSHA's substance-specific standards are more than 20 years old, and some, like lead, are nearer to 40 years old. It's not that the agency hasn't tried to update these older standards, it just has not had much success. The agency's most significant attempt to update a large number of PELs at the same time was struck down by a court in 1992. The Obama Administration managed to bring two significant PEL updates for silica and beryllium to a final rule before the transition to the new administration. But both are now facing legal challenges and pressure within the Trump Administration to roll back or delay significant portions of the changes imposed by those rules. It may be some years before anybody sees a truly final version of those rules.

With regard to lead, towards the end of the Obama Administration, in the wake of the publicity that surrounded lead exposure issues in communities such as Flint, MI, OSHA disclosed as part of the agency's Spring 2016 "Regulatory Agenda," that it was reviewing the federal worker protection provisions for lead for a potential update. At that time, the agency disclosed its intention to publish an Advance Notice of Proposed Rulemaking (ANPR) in November of 2016, soliciting open-ended input and comments on potential changes to the lead standard. While the agency appeared focused on medical removal levels, the agency indicated it was open to other changes to the lead standard.

It was no secret that the lead standard was on OSHA's radar for potential updates. In 2007, the U.S. Centers for Disease Control's National Institute for Occupational Safety and Health (NIOSH), in cooperation with OSHA, requested that the U.S. Department of Health and Human Services' National Toxicology Program (NTP) evaluate the state of the science for low level exposures of lead in adults. That effort resulted in an NTP Monograph, published in 2012, which found that there was ''sufficient'' scientific evidence to conclude that blood lead levels below 10 µg/dL may impact certain aspects of adult health.

However, OSHA's promised ANPR did not materialize during the Obama Administration. This may have been partly due to the results of the election, or simply that other priorities absorbed the agency's attention (such as finalizing the beryllium standard). Further, while the Regulatory Agenda item is still listed on reginfo.gov, agency observers have questioned the Trump Administration's appetite for promoting changes to the lead standard, and whether that agenda item will remain once the agenda is updated.

State Regulators Have Been Acting Where OSHA Has Not

In the wake of federal OSHA's likely failure to follow through on its promise to update the lead standard, the focus now turns to the various states that have their own regulations. Under the federal OSH Act, states are generally free to adopt their own versions of federal OSHA standards so long as the state standards are "at least as effective as" the federal counterpart. And efforts are underway in several states to review potential changes to their workplace lead standards.

Leading the pack is California. Regulators there haven't been waiting for federal action, and started working on revisions to their standard several years ago. These efforts began publicly in 2010 when the California Department of Public Health (CDPH) sent a formal recommendation to Cal/OSHA (the state's OSHA counterpart) that the medical removal elements of that standard be revised based on a 2007 report in the journal Environmental Health Perspectives.

The current California standard, which mirrors the federal regulations, requires employees be removed from exposed work locations after three blood lead level tests with an average at or above 50 µg/dL, or a single test at or above 60 µg/dL. Removed workers are either sent home or offered alternative work locations, both with full pay. Workers may return to their position after their blood lead levels are reduced to 40 µg/dL. Under CDPH's 2010 recommendation, workers would be removed after two tests at or above 20 µg/dL, or a single test above 30 µg/dL. Workers would be allowed to return with a blood lead level at or below 15 µg/dL.

Between 2012 to 2015, Cal/OSHA held numerous stakeholder engagement meetings to collaboratively draft potential revisions. Those meetings were well attended by industry and public health advocates alike. Cal/OSHA last held a public meeting on the draft standards in December 2015, and the discussion draft rule package released for that meeting essentially implemented unchanged CDPH's 2010 blood lead removal provisions. Further, Cal/OSHA acted on an air-lead modeling report issued by CDPH and the Office of Environmental Health Hazard Assessment (OEHHA) in 2015, which suggested Permissible Exposure Limits changes. Based on that report, and taking feasibility considerations into account, Cal/OSHA proposed a facility-wide PEL of 10 µg/m3.

One key aspect of the Cal/OSHA draft is the inclusion of "Secondary Engineering Control Air Limits" for certain work areas of lead battery manufacturing facilities. These alternate air limits are higher than the PEL, but require the use of additional personal protection equipment for workers in those areas. Because Cal/OSHA has a statutory obligation to only adopt standards that are actually "feasible," the SECALs were designed as a response to significant feasibility concerns raised by the lead battery industry, which presented feasibility assessments showing that meeting the proposed PEL in those specific areas could drive the industry out of business. SECALs and similar two-tier frameworks have been used at the federal level in a number of standards. OSHA once explained that it believed that the cadmium standard's ""two-tier [SECAL] structure . . . is simultaneously more protective of workers' health and feasible." 57 Fed. Reg. 42,102, 42,343 (Sept. 14, 1992). The SECAL proposal was met with support from both industry and public health advocates as a good compromise to allow Cal/OSHA to adopt a PEL that was aggressive, yet feasible.

Since the December 2015 meeting, Cal/OSHA has reportedly been continuing its work to finalize a formal proposed rule package that would implement the revisions to the occupational lead standards. Based on staff statements, the release of the proposed rule is anticipated for later this year.

Also pursuing changes to lead exposure protection regulations is Washington. The Washington State Division of Occupational Safety and Health (DOSH) began holding stakeholder meetings on its lead standard in 2015 in the wake of a lead-exposure incident at a firing range. In 2016, the state formally announced it would pursue an update to the lead standard. At the various stakeholder meetings, public health advocates have

encouraged the state to adopt the framework under development in California. However, numerous industry stakeholders have suggested that the agency should not rely on another state's work, but, rather, must come to its own conclusions about how best to protect Washington workers.

DOSH has not yet released draft regulations or publicly disclosed what changes it is considering. DOSH has announced that it intends to hold a stakeholder meeting in late June to discuss the agency's first plan for potential revisions to the state's current occupational lead standards. According to agency staff, DOSH likely will release the first discussion draft of a proposed rule at the June meeting. The agency then intends to follow an aggressive schedule of holding two additional stakeholder meetings in the following three months, and DOSH has previously stated it intends to issue a final rule by the end of 2017. Based on the delays the agency has experience so far, that schedule may now be overly optimistic, but with sufficient motivation and resources it may be doable.

In 2016, Oregon OSHA turned its attention to updating the state's various PELs by creating a PEL Advisory Committee (Committee) that was charged with reviewing the state's existing PELs for potential changes. In March, the Committee selected lead and manganese as the first two substances to be reviewed. Battery Council International (BCI) remains in contact with Oregon OSHA staff and will continue to monitor developments, and provide comments and stakeholder input throughout the process. As of last week, there are no scheduled meetings.

The developments in California, Washington, and Oregon clearly indicate that, at least in some states, efforts to update occupational lead standards will not stall if federal OSHA indeed puts lead on the backburner during the Trump Administration. And the example set by these state-based efforts likely will encourage the states to revise PEL for other chemical exposures – as has already been seen with Oregon's wide-ranging PEL effort. Employers with lead-exposed workplaces should be on the lookout for state efforts, and can no longer focus only on federal OSHA's relatively slow pace as providing comfort.