

# Client Alert

Tort Litigation &amp; Environmental Practice Group

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## D.C. Circuit Upholds OSHA Silica Rule

The U.S. Occupational Safety and Health Administration (OSHA) recently promulgated a new rule for respirable crystalline silica, with compliance obligations for the general industry beginning on June 23, 2018.<sup>1</sup> Some industries particularly impacted by the rule include foundries, concrete manufacturers, and support activities for oil and gas operations. The rule imposes significant and potentially expensive requirements for engineering and work practice controls to reduce exposure to respirable crystalline silica.

Industry groups challenged the rule via lawsuits in six federal Courts of Appeal, which were consolidated into one case that was decided by the Circuit Court of Appeals for the D.C. Circuit on December 22, 2017.<sup>2</sup> Industry groups argued that OSHA's alleged connections between silica exposure and health risks were unsupported by substantial evidence and that the requirements of the new rule were not technologically or economically feasible for the foundry, hydraulic fracturing, and construction industries. For example, the American Foundry Society estimates costs to the foundry industry of more than \$2.2 billion dollars annually, representing 9.9% of the industry's revenue and 276% of its profits.<sup>3</sup> The D.C. Circuit, however, upheld the rule, rejecting both of these challenges.

OSHA's new rule imposes myriad new requirements for businesses that potentially have respirable silica present in the workplace. The rule's major focus is a significant reduction of the permissible exposure level (PEL) for employees in these workplaces. Under the old rule, the PEL for airborne crystalline silica was 100 micrograms per cubic meter of air (100  $\mu\text{g}/\text{m}^3$ ) for general industry and between 250 and 500  $\mu\text{g}/\text{m}^3$  for construction and maritime. The new rule sets a PEL of 50  $\mu\text{g}/\text{m}^3$  for all industries and an action level at 25  $\mu\text{g}/\text{m}^3$ , which requires employers to monitor for silica exposure at or above that level. In addition to these significant reductions, some of the more significant requirements of the rule include:

- Limiting worker access to areas of respirable silica exposure and demarcating these areas from the rest of the workplace.
- Developing written plans to limit exposure and provide additional employee training.

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- Providing medical exams to certain exposed workers at least every three years.
- Ceasing housekeeping practices which might contribute to silica exposure, such as dry sweeping.

Industry groups argued that the new exposure limits would not reduce the risk of health issues and that OSHA's claims of individual health risks were not supported by substantial evidence. The Court ruled that OSHA's findings that long-term exposure to silica above the new limits presents a significant risk of silicosis, lung cancer, and death were all supported by substantial evidence. While OSHA claimed a link between silica exposure and kidney disease, the Court did not rule on this possible health risk.

Industry groups also argued that the stringent new requirements of the rule are not technologically or economically feasible for the foundry, hydraulic fracturing, and construction industries. The Court ruled that "OSHA has demonstrated technological feasibility for the typical firm in most operations and has supported that finding with substantial evidence," and thus the Court "must defer to [OSHA's] conclusions."<sup>4</sup> Further, the Court found that the agency's reasoning fulfilled the requirement of a "reasonable likelihood that [the rule's] cost will not threaten the existence or competitive structure of an industry, even if it does portend disaster for some marginal firms."<sup>5</sup> The Court therefore upheld the rule even though it recognized certain businesses in the regulated industries would be significantly impacted.

With the June 23, 2018, deadline looming and the D.C. Circuit upholding OSHA's new limits, companies will need to make substantial efforts to come into compliance in the very near future.

King & Spalding has significant experience across the country in occupational health and safety matters including advising clients on compliance with new and existing OSHA standards, performing privileged health and safety audits of facilities, as well as challenging OSHA citations and negotiating settlements. If you have questions about how this rule or other OSHA regulations may affect you or your business, please contact any of our lawyers noted in the contact section on the first page.

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<sup>1</sup> 29 C.F.R. § 1910.1053 (2016). For a summary of the new rule requirements, see King & Spalding, *New OSHA Silica Rule Deadline Is Rapidly Approaching – Are You Ready?* (December 1, 2016), available at <https://s3.amazonaws.com/kslaw-staging/attachments/000/003/999/original/ca120116b.pdf?1494907309>.

<sup>2</sup> *North America's Building Trades Unions v. Occupational Safety and Health Admin., et al.*, No. 16-1105 (D.C. Cir. Dec. 22, 2017), available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/03C747A5AB141C90852581FE0055A642/\\$file/16-1105-1710179.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/03C747A5AB141C90852581FE0055A642/$file/16-1105-1710179.pdf).

<sup>3</sup> American Foundry Society, "OSHA's Proposed Crystalline Silica Rulemaking Threatens US Foundry Industry" (2016), <https://afsinc.s3.amazonaws.com/Documents/EHS/Impact-OSHA-Silica-Rule-US-Foundries.pdf>.

<sup>4</sup> D.C. Circuit Decision at 24.

<sup>5</sup> *Id.* at 34 (quoting *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1272 (D.C. Cir. 1980)).