OSHA SILICA INSPECTION ISSUES

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Now that OSHA's silica standard and accompanying regulations have officially gone into effect in the construction industry, many employers are concerned about possible inspections of their airborne silica levels. Houston employers have some time to prepare: though an inspection may occur in relation to an OSHA complaint or an obvious silica-related incident, OSHA officials in the area have indicated that they will not be conducting programmed silica inspections in the short term.

In the event that an OSHA inspector arrives on an employer's worksite and an inspection *does* occur, there are a couple of steps that employers can take to minimize the potential impact of the inspection.

If an OSHA inspector wants to conduct a silica test, the employer may conduct its own, side-by-side test at the same time. This is analogous to the time-tested advice given to employers for OSHA inspections—when OSHA takes a photograph or sample during an inspection, the best practice is to take a similar photograph or sample for the employer's defense. If the employer does not have a silica air testing kit at the time OSHA wants to test, an employer may tell the inspector to come back at a later time to conduct such a test. An air test without the employer's permission and without a warrant may be an impermissible "search and seizure" under applicable law. So, OSHA would not likely conduct the test then but would come back at a later time. Certain safety consultants plan to maintain these devices for this purpose.

Employers should also remember the general guidelines for an OSHA inspection. For example, OSHA cannot ask employees to do a demonstration of work. Instead, OSHA must monitor actual work being completed; if an alleged silica hazard activity is not being conducted when OSHA arrives, OSHA cannot order that the activity recommence. OSHA can, however, wait for work to commence, or ask for a schedule regarding when such work will be conducted.

During this time, employers that have employees working with or around sand, gravel, ceramics, glass, or dust should conduct an exposure assessment to determine what levels of silica are typically in the air as a result of its work activities. Such tests can show that, at least historically, such activities have not posed a silica hazard (or can otherwise assist employers coming into compliance with the new regulations). Environmental conditions such as humidity, precipitation, wind speed and direction, and temperature will obviously affect test results; as a result, a prior test on work activities will not necessarily prove that the activity did not produce respirable silica above the OSHA standard. The existence of such test results, however, could aid an employer in its defense against any willful and possible serious citations it receives down the road.