



February 8, 2018

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Maryland General Assembly
House Standing Committee on Appropriations
Subcommittee on Education & Economic Development
House Office Building, Room 121
Annapolis, MD 21401

Re: Written Testimony for Feb. 15 Budget Hearing on DLLR Business Regulation

Dear Subcommittee Members:

Thank you for this opportunity to provide written testimony on the budget for the Department of Licensing Labor and Regulation, Division of Labor and Industry, Maryland Occupational Safety and Health (MOSH). As explained in more detail below, our review of MOSH budget materials, federal audits, and MOSH performance reports leads us to conclude that the agency’s limited budget is hampering its ability to carry out its mission of ensuring the health and safety of Maryland workers. Our key findings:

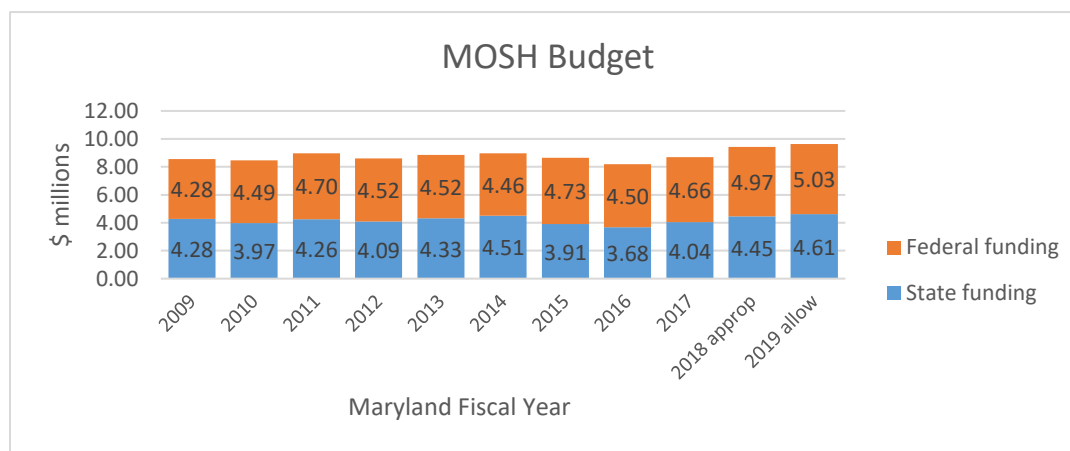
- MOSH struggles with significant turnover among health and safety inspectors – a management challenge compounded by resource shortfalls.
- Without enough inspectors, MOSH is failing to meet inspection targets, leaving too many employers to police themselves.
- MOSH is unable to update its regulatory standards on a timely basis, in part because of insufficient resources.

While we recognize that FY 2018 appropriations provide MOSH with a modest increase in funding, and that a slight increase is proposed for FY 2019, further assessment of MOSH’s performance over the following year is needed to determine whether these funding levels are sufficient for the agency to operate effectively, or whether additional funding is warranted in the future.

As you know, the 2017 JCR required MOSH to submit a performance report, which contains a wealth of information about current staffing levels, challenges, and needs of the agency. Requiring the agency to submit this report again in the year ahead would help identify strategic opportunities to meet MOSH’s critical needs and ensure that Maryland’s workforce remains protected from safety and health hazards that pose a significant risk of illness, injury, and death on the job.

MOSH's Budget

As the state agency tasked with implementing Maryland's federally approved state occupational safety and health program, MOSH gets up to 50 percent of its funding annually from federal OSHA. The chart below shows that from 2009 to 2017, MOSH received only a modest 1.6 percent increase in its overall budget. Notably, the state-funded portion of the budget declined by roughly 6 percent over the same period, despite the fact that the agency has not met its enforcement goals in recent years, which, as we explain below, is due to a need for *additional* staffing.



Source: <http://www.dbm.maryland.gov/budget/Pages/operbudget/historical-operbud-docs.aspx>. For 2019, <http://www.dbm.maryland.gov/budget/Documents/operbudget/2019/Proposed/Volume2.pdf>.

MOSH's Staffing

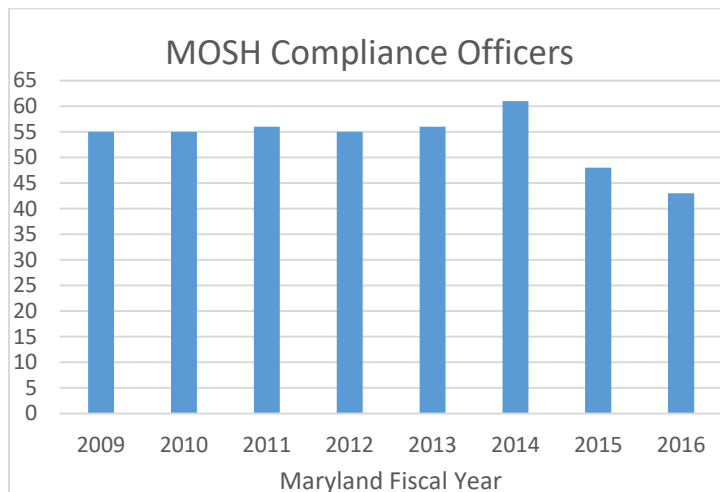
MOSH is responsible for ensuring the health and safety of roughly 2.4 million workers across 160,000 worksites throughout the state. According to MOSH, the agency has a staffing benchmark of 54 compliance officers (36 safety and 18 health) to conduct all inspections throughout the state. This equates to roughly one inspector per 45,000 workers. This is a cause for concern for two reasons.

First, the agency's benchmark is based on levels that have not been revised in more than 30 years – since 1985 – despite that Maryland's workforce has grown substantially over that period. Second, the International Labor Organization (ILO) recommends the benchmark be set at one inspector per 10,000 covered workers. To satisfy that recommendation, MOSH would need at least 250 inspectors on staff; yet, from 2009 to 2016, MOSH employed at most 61 compliance officers, with the fewest compliance officers in 2016 at a mere 43. MOSH not only needs additional funding to hire more compliance officers to meet its own outdated benchmark, but would need a much larger boost in its budget to recruit the number of officers needed for the modern era.

Furthermore, according to information provided by MOSH in its performance report required by the 2017 JCR, the agency's inability to retain compliance officers is directly linked to the overall reduction in inspections and enforcement.¹ Throughout MOSH's report, it states that "MOSH inspections were reduced from projected activities due to the decreased number of inspectors through retirements and those leaving the agency for other positions." Further, the agency

¹ See response to JCR request at [http://dlslibrary.state.md.us/publications/JCR/2017/2017_114-115\(MOSH\).pdf](http://dlslibrary.state.md.us/publications/JCR/2017/2017_114-115(MOSH).pdf).

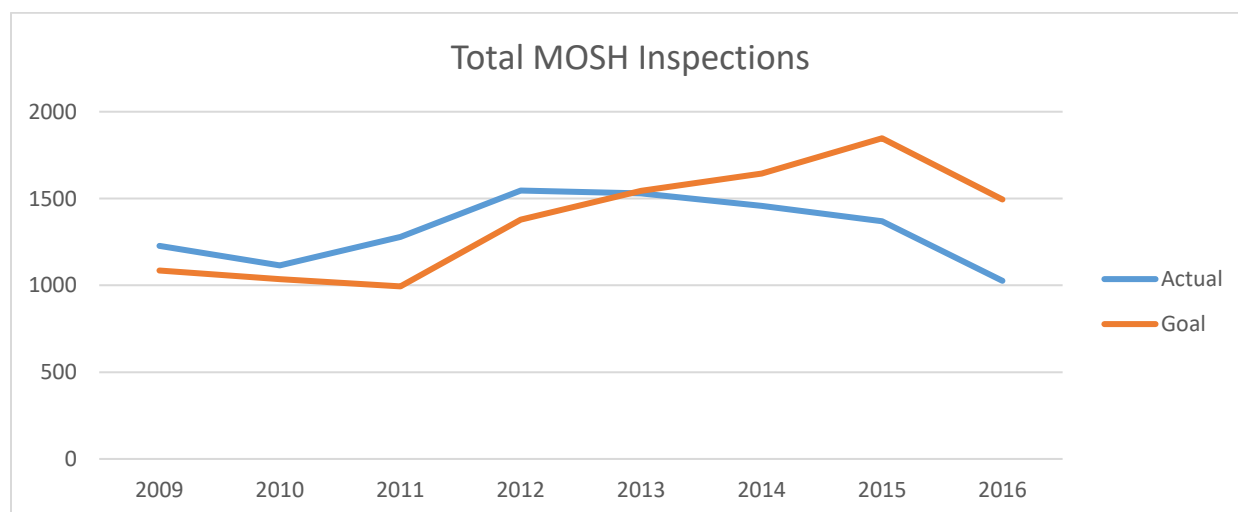
notes, “The challenge of higher-paying federal and private industry for similar positions will continue to affect retention rates.”



Source: [http://mlsd.ent.sirsi.net/client/en_US/default/search/detailno_nmodal/ent:\\$002f\\$002fSD_ILS\\$002f0\\$002fSD_ILS:26565/one](http://mlsd.ent.sirsi.net/client/en_US/default/search/detailno_nmodal/ent:$002f$002fSD_ILS$002f0$002fSD_ILS:26565/one).

MOSH Inspection Data

In 2016, with the lowest staffing levels on record since 2009, MOSH was only able to conduct about 1,100 inspections – meaning the vast majority of Maryland workplaces went uninspected. AFL-CIO has calculated that it would take MOSH 158 years to inspect each workplace within its jurisdiction just once.² In fact, from federal FY 2013 to 2016, MOSH failed to meet its target inspection goal – a goal that MOSH itself is actively involved in negotiating with federal OSHA. Despite cutting the goal for FY 2016, MOSH still dramatically underperformed. We note that Maryland Workers’ Compensation Commission Enforcement statistics suggest that the number of work-related injuries in the state has remained relatively steady since 2009 – with roughly 22,000 to 24,000 workers’ compensation claims filed each year.



Source: <https://www.osha.gov/dcsp/osp/efame/maryland.html>. For 2016, see response to JCR request at [http://dlslibrary.state.md.us/publications/JCR/2017/2017_114-115\(MOSH\).pdf](http://dlslibrary.state.md.us/publications/JCR/2017/2017_114-115(MOSH).pdf).

² AFL-CIO, Death on the Job: The Toll of Neglect 171 (2017), <https://aflcio.org/sites/default/files/2017-04/2017Death-on-the-Job.pdf>.

MOSH's Program Efficiency

Beyond staffing limitations, it is unclear if MOSH is utilizing its resources in the most efficient manner. In AFL-CIO's 2017 *Death on the Job* report, Maryland ranks 49th in the country for average penalty per inspection with violations. Even when a worker dies on the job, the median penalty after MOSH and the employer have settled the case or resolved it through litigation was just \$4,150 in FY 2016. The deterrent effect of an enforcement program is a function of both the likelihood of inspection and the consequences of being caught. With inspection numbers declining and penalties for the most serious cases remarkably low, we question whether MOSH's enforcement program is adequately deterring unsafe employment.

As a condition of its state-plan state status (and federal dollars), Maryland must ensure that MOSH continues to be at least as effective as federal OSHA. As part of this requirement, when federal OSHA adopts a new standard, MOSH is supposed to adopt an identical (or stronger) standard within six months. For example, federal OSHA recently updated its base penalties to account for inflation since penalties were last adjusted in the early 1990s. Federal OSHA has also adopted standards to reduce occupational exposure to crystalline silica and beryllium, which would protect Maryland construction workers from needlessly contracting fatal diseases such as silicosis and chronic beryllium disease.³ Yet, according to information provided by MOSH in response to the report mandated by the 2017 JCR, MOSH has yet to incorporate any of these standards, meaning Maryland workers remain in harm's way.

Conclusion

Common-sense enforcement of Maryland's occupational safety and health laws and regulations protects Maryland workers from on-the-job illnesses, injuries, and fatalities. Because of worker protections, over the past several decades, we've seen fewer work-related incidents. Yet that progress was possible only because the laws and regulations on the books were enforced. Without inspectors and investigators, regulations and permits are mere paper tigers.

Keeping government inspectors in the field, with sufficient resources to carry out MOSH's mission, is the best way to protect Maryland workers and our high-road employers against unfair and unsafe business practices. Competition among businesses is tough, and some low-road employers look to cut corners and save money in the short term by evading their responsibility to follow the law. Government inspectors and investigators play a critical role in policing businesses that cannot be trusted to police themselves.

To better understand MOSH's budgetary needs, we urge you to require MOSH to submit a second annual performance report like that required in last year's 2017 JCR:⁴

The Maryland Occupational Safety and Health Administration shall provide a report including:

- (1) a current organizational chart outlining the current staff, vacant positions, the hierarchy of the department, and the Spanish-speaking employees;*
- (2) the actions that have been or will be taken to attract new employees and improve retention;*
- (3) the metric used to determine the optimum number of health and safety inspectors;*
- (4) the total number of full-time equivalents dedicated to the Voluntary Protection Program and the number of Voluntary Protection Program site visits conducted;*

³ For your reference, we have attached several fact sheets and an article about the protections these standards provide to workers.

⁴ <http://mgaleg.maryland.gov/pubs/budgetfiscal/2017rs-budget-docs-jcr.pdf>.

- (5) a detailed explanation for the decrease in the number of inspections opened and investigated;*
- (6) a detailed explanation for failing to meet the annual enforcement goals described in the Federal Annual Monitoring and Evaluation Reports and what actions the agency is taking or plans to take to improve performance in order to meet these goals;*
- (7) a detailed explanation for the decline in annual inspections and what actions have been or will be taken to address known or foreseeable challenges to performing inspection and enforcement responsibilities;*
- (8) the procedures used to gather, review, and utilize enforcement data, including geographic location and demographic data, to plan enforcement activities for scheduling and prioritizing programmed inspections, including written documentation of the site-specific targeting program; and*
- (9) the procedures for reviewing and adopting federal Occupational Safety and Health Act directives and standards notices and a list of all directives and standards notices received, noting the date received, the action taken, and, if rejected, a reason for the rejection for fiscal 2012 to 2018.*

This report shall be submitted by October 1, 2018, and annually thereafter; and the budget committees shall have 45 days to review and comment. Funds restricted pending the receipt of these reports may be released in the amount of \$250,000 when the report is received but may not be transferred by budget amendment or otherwise to any other purpose and shall revert to the General Fund if the report is not submitted.

Sincerely,

Matthew Shudtz
Executive Director
Center for Progressive Reform

Katherine Tracy
Policy Analyst
Center for Progressive Reform

About the Center for Progressive Reform

The Center for Progressive Reform (CPR) is a 501(c)(3) nonprofit research and advocacy organization comprising a small professional staff of lawyers and a network of 60+ Member Scholars who are professors at institutions of higher learning across the country. CPR specializes in analyzing complex legal, economic, and scientific issues involving federal and state government operations. Our Member Scholars include a number of experts in the field of worker safety and health, two of whom literally wrote the book on the reasons why state and federal agencies struggle to eliminate workplace illnesses, injuries, and fatalities.⁵ One enduring obstacle is that agency resources are grossly outmatched by the sheer number of worksites across the state, as well as the constantly changing nature of the state's workforce.

⁵ See Thomas O. McGarity & Sidney A. Shapiro, *Workers at Risk: The Failed Promise of the Occupational Safety and Health Administration* (1993).

OSHA's Respirable Crystalline Silica Standard for Construction

Workers who are exposed to respirable crystalline silica dust are at increased risk of developing serious silica-related diseases. OSHA's standard requires employers to take steps to protect workers from exposure to respirable crystalline silica.

What is Respirable Crystalline Silica?

Crystalline silica is a common mineral that is found in construction materials such as sand, stone, concrete, brick, and mortar. When workers cut, grind, drill, or crush materials that contain crystalline silica, very small dust particles are created. These tiny particles (known as "respirable" particles) can travel deep into workers' lungs and cause silicosis, an incurable and sometimes deadly lung disease. Respirable crystalline silica also causes lung cancer, other potentially debilitating respiratory diseases such as chronic obstructive pulmonary disease, and kidney disease. In most cases, these diseases occur after years of exposure to respirable crystalline silica.

How are Construction Workers Exposed to Respirable Crystalline Silica?

Exposure to respirable crystalline silica can occur during common construction tasks, such as using masonry saws, grinders, drills, jackhammers and handheld powered chipping tools; operating vehicle-mounted drilling rigs; milling; operating crushing machines; using heavy equipment for demolition or certain other tasks; and during abrasive blasting and tunneling operations. About two million construction workers are exposed to respirable crystalline silica in over 600,000 workplaces.

What Does the Standard Require?

The standard (29 CFR 1926.1153) requires employers to limit worker exposures to respirable crystalline silica and to take other steps to protect workers. Employers can either use a control method laid out in **Table 1** of the construction standard, or they can measure workers' exposure to silica and independently decide which dust controls work best to limit exposures in their workplaces to the permissible exposure limit (PEL).

What is Table 1?

Table 1 matches 18 common construction tasks with effective dust control methods, such as using water to keep dust from getting into the air or using a vacuum dust collection system to capture dust. In

some operations, respirators may also be needed. Employers who follow **Table 1** correctly are not required to measure workers' exposure to silica from those tasks and are not subject to the PEL.

Table 1 Example: Handheld Power Saws

If workers are sawing silica-containing materials, they can use a saw with a built-in system that applies water to the saw blade. The water limits the amount of respirable crystalline silica that gets into the air.

Table 1: Specified Exposure Control Methods When Working With Materials Containing Crystalline Silica

Equipment/ Task	Engineering and Work Practice Control Methods	Required Respiratory Protection and Minimum Assigned Protection Factor (APF)	
		≤ 4 hrs/ shift	> 4 hrs/ shift
Handheld power saws (any blade diameter)	Use saw equipped with integrated water delivery system that continuously feeds water to the blade. Operate and maintain tool in accordance with manufacturer's instructions to minimize dust emissions. <ul style="list-style-type: none"> • When used outdoors. • When used indoors or in an enclosed area. 	None	APF 10
		APF 10	APF 10

Excerpt from Table 1 in 29 CFR 1926.1153

In this example, if a worker uses the saw outdoors for four hours or less per day, no respirator would be needed. If a worker uses the saw for more than four

hours per day or any time indoors, he or she would need to use a respirator with an assigned protection factor (APF) of at least 10, such as a NIOSH-certified filtering facepiece respirator that covers the nose and mouth (sometimes referred to as a dust mask). See the respiratory protection standard (29 CFR 1910.134) for information on APFs.

Alternative Exposure Control Methods

Employers who do not fully implement the control methods on Table 1 must:

- **Determine the amount of silica that workers are exposed to** if it is, or may reasonably be expected to be, at or above the **action level of 25 µg/m³** (micrograms of silica per cubic meter of air), averaged over an 8-hour day;
- Protect workers from respirable crystalline silica exposures above the **PEL of 50 µg/m³**, averaged over an 8-hour day;
- Use **dust controls** and safer work methods to protect workers from silica exposures above the PEL; and
- Provide **respirators** to workers when dust controls and safer work methods cannot limit exposures to the PEL.

What Else Does the Standard Require?

Regardless of which exposure control method is used, all construction employers covered by the standard are required to:

- Establish and implement a **written exposure control plan** that identifies tasks that involve exposure and methods used to protect workers, including procedures to restrict access to work areas where high exposures may occur;
- Designate a **competent person** to implement the written exposure control plan;
- Restrict **housekeeping** practices that expose workers to silica, such as use of compressed air without a ventilation system to capture the dust and dry sweeping, where effective, safe alternatives are available;
- Offer **medical exams**—including chest X-rays and lung function tests—every three years for workers who are required by the standard to

wear a respirator for 30 or more days per year;

- **Train workers** on the health effects of silica exposure, workplace tasks that can expose them to silica, and ways to limit exposure; and
- **Keep records** of workers' silica exposure and medical exams.

Additional Information

Additional information on OSHA's silica standard can be found at www.osha.gov/silica.

OSHA can provide compliance assistance through a variety of programs, including technical assistance about effective safety and health programs, workplace consultations, and training and education.

OSHA's On-Site Consultation Program offers free, confidential occupational safety and health services to small and medium-sized businesses in all states and several territories across the country, with priority given to high-hazard worksites. On-Site consultation services are separate from enforcement and do not result in penalties or citations. Consultants from state agencies or universities work with employers to identify workplace hazards, provide advice on compliance with OSHA standards, and assist in establishing and improving safety and health management systems. To locate the OSHA On-Site Consultation Program nearest you, call 1-800-321-OSHA or visit www.osha.gov/consultation.

How to Contact OSHA

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees. OSHA's role is to ensure these conditions for America's working men and women by setting and enforcing standards, and providing training, education and assistance. For more information, visit www.osha.gov or call OSHA at 1-800-321-OSHA (6742), TTY 1-877-889-5627.



Applying water to the blade of a handheld power saw reduces the amount of dust created when cutting.

This is one in a series of informational fact sheets highlighting OSHA programs, policies or standards. It does not impose any new compliance requirements. For a comprehensive list of compliance requirements of OSHA standards or regulations, refer to Title 29 of the Code of Federal Regulations. This information will be made available to sensory-impaired individuals upon request. The voice phone is (202) 693-1999; teletypewriter (TTY) number: (877) 889-5627.



U.S. Department of Labor



DSG FS-3681 12/2017

Protecting Workers from Exposure to Beryllium and Beryllium Compounds: Final Rule Overview

Background

Beryllium and beryllium compounds are important materials used in the aerospace, electronics, energy, telecommunication, medical, and defense industries. However, beryllium is a highly toxic metal and workers who inhale beryllium are at an increased risk of developing chronic beryllium disease (CBD) or lung cancer.

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has finalized new beryllium standards for general industry, construction, and shipyards that provide commonsense, affordable, and flexible strategies for employers to protect workers from these serious risks. These rules are based on review of peer-reviewed scientific evidence, a model standard developed by industry and labor, current consensus standards, and an extensive public outreach effort that included a public comment period and public hearings.

Compared to other OSHA health standards, the beryllium rule covers a relatively small worker population of approximately 62,000 workers. OSHA estimates that each year the final rule will save the lives of 90 workers from beryllium related diseases and prevent 46 new cases of chronic beryllium disease once its full effects are realized.

What is beryllium?

Beryllium is a lightweight but extremely strong metal used in the aerospace, electronics, energy, telecommunications, medical, and defense industries. Beryllium-copper alloys are widely used because of their electrical and thermal conductivity, hardness, and good corrosion resistance. Beryllium oxide is used to make ceramics for electronics and other electrical equipment because of its heat conductivity, high strength and hardness, and good electrical insulation.

In general industry, exposure to beryllium can occur in the following industries and activities:

- Beryllium Production
- Beryllium Oxide Ceramics and Composites
- Nonferrous Foundries
- Secondary Smelting, Refining, and Alloying
- Precision Turned Products
- Copper Rolling, Drawing, and Extruding
- Fabrication of Beryllium Alloy Products
- Welding
- Dental Laboratories

In construction and shipyards, exposure to beryllium primarily occurs when metal slags that contain trace amounts of beryllium (<0.1% by weight) are used in abrasive blasting operations.

What are the health effects associated with beryllium exposure?

Workplace exposure to beryllium and beryllium compounds can result in the following:

Chronic Beryllium Disease (CBD) is a serious pulmonary disease that can cause serious debilitation or death. Signs and symptoms of CBD can include shortness of breath, an unexplained cough, fatigue, weight loss, fever, and night sweats. Some workers may develop severe symptoms very quickly, while others may not experience signs and symptoms until months or years after their exposure to beryllium. CBD can continue to progress even after a worker has been removed from exposure. An individual must become sensitized to beryllium through inhalation or skin exposure before he or she can develop CBD.

Lung cancer is associated with occupational exposure to beryllium by inhaling beryllium-containing dust, fumes or mist. The International Agency for Research on Cancer (IARC) lists beryllium as a Group 1 carcinogen (causes cancer in humans), and the National Toxicology Program (NTP) lists beryllium as a known human carcinogen.

The need for new beryllium standards

- The health dangers of beryllium exposure have been known for decades. OSHA's current permissible exposure limit (PEL) for beryllium is both outdated and ineffective for preventing disease.
- Over the decades since OSHA adopted the current PEL, a consensus has developed around the science supporting the need for greater protection for workers. Many employers, including the U.S. Department of Energy, are already implementing the necessary measures to protect its workers from beryllium exposure.
- The technology for most employers to meet the new standards is widely available and feasible.

How will the new rule protect workers?

- The rule reduces the PEL for beryllium to 0.2 micrograms per cubic meter of air ($\mu\text{g}/\text{m}^3$) averaged over 8 hours, and establishes a short-term exposure limit (STEL) for beryllium of 2.0 $\mu\text{g}/\text{m}^3$ over a 15-minute sampling period. Employers must use engineering and work practice controls to prevent excessive beryllium from becoming airborne where workers can breathe it in.
- Employers must limit access to high-exposure areas, provide respiratory protection when necessary, and provide personal protective clothing when high exposures or dermal contact is possible.
- Employers must assess exposures, develop and implement written exposure control plans, and provide workers with training specific to beryllium.

- Employers must offer medical examinations to certain exposed workers. If a specified beryllium-related health effect is identified, they must offer additional workplace accommodations to the worker to reduce beryllium exposures.

How will OSHA help employers comply and protect their workers?

The rule provides staggered compliance dates to ensure that employers have sufficient time to meet the requirements and get the right protections in place. Employers have:

- One year after the effective date of the rule to implement most provisions of the standard;
- Two years after the effective date to implement the requirements for change rooms and showers, and;
- Three years after the effective date to implement the engineering control requirements.

Additional information

Additional information on OSHA's beryllium rule can be found at www.osha.gov/beryllium. OSHA can provide extensive help through a variety of programs, including technical assistance about effective safety and health programs, workplace consultations, and training and education. [OSHA's On-site Consultation Program](#) offers free and confidential occupational safety and health services to small and medium-sized businesses in all states and several territories across the country, with priority given to high-hazard worksites. On-site consultation services are separate from enforcement and do not result in penalties or citations. Consultants from state agencies or universities work with employers to identify workplace hazards, provide advice on compliance with OSHA standards, and assist in establishing and improving safety and health management systems. To locate the OSHA On-site Consultation Program nearest you, call 1-800-321-OSHA (6742) or visit www.osha.gov/consultation.

Twenty-eight states and territories operate their own occupational safety and health state plans approved by OSHA. State plans are required to have standards that are “at least as effective” as OSHA’s standards, and may have different or additional requirements. To locate an OSHA-approved state plan, visit www.osha.gov/dcsp/osp.

For more information on this and other health-related issues impacting workers, to report an emergency, fatality, inpatient hospitalization, or to file a confidential complaint, contact your nearest OSHA office, visit www.osha.gov, or call OSHA at 1-800-321-OSHA (6742), TTY 1-877-889-5627.

This is one in a series of informational fact sheets highlighting OSHA programs, policies or standards. It does not impose any new compliance requirements. For a comprehensive list of compliance requirements of OSHA standards or regulations, refer to Title 29 of the Code of Federal Regulations. This information will be made available to sensory-impaired individuals upon request. The voice phone is (202) 693-1999; teletypewriter (TTY) number: (877) 889-5627.

For assistance, contact us. We can help. It's confidential.



www.osha.gov (800) 321-OSHA (6742)



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Maryland Refuses to Protect Construction Workers From Deadly Silica Dust

📅 January 26, 2018

👤 Jordan

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Inhaling silica dust can cause silicosis, lung cancer, chronic obstructive pulmonary disease and kidney disease. OSHA's 45 year old standards were antiquated and did not protect workers, which is why in 2016, OSHA issued two new respirable crystalline silica standards: one for construction, and the other for general industry and maritime. About 2.3 million workers are exposed to silica in their workplaces, including 2 million construction workers and OSHA estimated that the new standards will save over 600 lives and prevent more than 900 new cases of silicosis each year.



But at this point, the new OSHA Standard is not protecting construction workers in Maryland from exposure to silica. Why should Maryland construction workers be exposed to more hazardous silica dust than construction workers across the border in Pennsylvania or New Jersey? Despite a federal regulations that give states six months after OSHA promulgates a new standard to issue their own standard that is "at least as effective" as the

federal standard, Maryland OSHA is dragging its feet, refusing to adopt the new standard and subjecting thousands of construction workers to silica exposure far above what is required for workers in the rest of the country. ^

Background

OSHA is a somewhat bifurcated agency: Federal OSHA enforces the law for the private sector in 29 states while 21 states and Puerto Rico enforce the law for their private sector and public sector workers. An additional five states (and the Virgin Islands) cover their public sector employees, while the feds enforce the law for the private sector employees in those states. Underlying this system is the legal obligation for the state plans to run programs that are “at least as effective as” the federal program. That means that within 6 months of federal OSHA promulgating a standard, the state plans must adopt the identical standard – or they can issue standard more effective than the federal standard. The point is to ensure that workers in, say, Baltimore or Takoma Park, Maryland receive the same – or better – protection than workers in Philadelphia, Pennsylvania or Cleveland, Ohio.

“

Maryland OSHA is refusing to issue the new standard and subjecting thousands of construction workers to silica exposure far above what is required for workers in the rest of the country.

One benefit of allowing states to run their own programs is the opportunity for the states to innovate – to find better, or more effective ways of protecting workers than the federal government. While most states just adopt identical standards to federal OSHA’s, CalOSHA proved (again) this week, with the issuance of its new standard on [Hotel Housekeeping Musculoskeletal Injury Prevention](#), that state plans have the ability to do things that federal OSHA is unable to do. California now has a workplace violence standard, a heat standard, a general ergonomics standard, and an ergonomics standard for hotel housekeepers – all protections that federal OSHA lacks. OSHA’s ergonomics standard, issued in 2000, was repealed by George W. Bush and his Republican Congress and is unlikely to see the light of day again anytime soon.

But state plans have not been problem free. One of the problems with state plans is that they don’t always live up to their commitment to be “at least as effective as” the federal program. At the beginning of the Obama Administration, for example, Nevada OSHA was facing serious problems after a [series of fatalities](#) on a major construction job on the Las Vegas strip. In 2009, OSHA launched a special study of the Nevada program which

found serious deficiencies. OSHA went on to take a closer look at all of the other state programs and launch a number of initiatives to ensure that they were operating in a manner at least as effective as the federal program. OSHA was also forced to confront Arizona which refused to update its residential fall protection requirements, South Carolina which proposed to eliminate its whistleblower program and Hawaii, which required help to reconstruct its program after a previous Governor had catastrophically underfunded the program. OSHA also ordered state plans to adopt National Emphasis Programs and struggled — with mixed success — to ensure that state plans' lower penalty levels were increased to approximate the level of federal OSHA penalties.

The Silica Standard and Maryland Construction Workers

OSHA issued the federal silica standard on March 23, 2016. That started the six-month clock for states to adopt an identical, or more effective standard. The common practice, with very rare exceptions (and none that I know of with silica), is for states to simply adopt identical OSHA standards. Generally it's a relatively quick process, although it often takes states longer than 6 months (and much longer if a state decides to issue a different standard.) OSHA [regulations](#) therefore allow a state to extend that 6-month period as long as the state "makes a timely demonstration that good cause exists for extending the time limitation."

Employers in federal states were required to comply with OSHA's silica standard for construction by June 23, 2017, although the Trump administration extended the federal enforcement date until September 23, 2017. So for the last four months, employers in the federal states have been required to protect workers from silica exposure under the terms of the new standard. Most state plans followed those dates as well. In fact, as of the end of June 2017, most states had completed adoption of the silica standard and most commenced enforcement on or before September 23. Several other states are still in the process of adopting and for a few states (AK, HI and UT) I don't have up-to-date information.

Then we have my state, Maryland, which seems to be holding out until.....hard to say. In response to an inquiry last September from former Laborer's health and safety director Scott Schneider about the state's progress in adopting the standard, Matthew Helminiak, Commissioner of Labor and Industry, responded that Maryland OSHA was waiting to see if federal OSHA would be forced to modify the standard based on the outcome of the legal challenges that the construction industry and others had brought against the standard.

This is a rather dubious excuse to leave workers unprotected. There is nothing in the law or regulations that allow states to delay new standards because of pending legal challenges. Indeed, legal challenges can go on for years, sometimes up to the Supreme Court; but unless the court stays the standard in the meantime, it is still in effect during that period.



Every day that Maryland OSHA delays adopting and enforcing the Silica standard, more Maryland construction workers will be exposed to the deadly dust.

In any case, the industry's legal challenges were dismissed by the court last December. But now Maryland seems to have another excuse. In a response to state delegate David Moon's request for information about the state's progress in adopting the new standard, the state has come up with a new excuse based on the court's order to OSHA to more adequately explain the agency's decision not to include medical removal protection (MRP) in the standard. Medical removal protection is a procedure in several OSHA standards that requires employers to keep workers from exposure when medical findings determine that the employee's health will be further harmed by continued exposure. The employee maintains the right to his or her "normal earnings as well as all other employee rights and benefits."

Maryland Secretary of Labor Kelly M. Schulz told Moon that based on the court's "remand" of medical removal protection, the state will continue to hold off:

Maryland Occupational Safety and Health (MOSH) is still ***awaiting a final rule*** from OSHA before adopting a new rule. Once approved, MOSH will begin the process of adopting the new OSHA standard. Final regulations are expected to be published in the Maryland Register within six months of federal enforcement, which is the normal timeline for revising federal standards. ***Until new regulations are issued***, the existing silica standard is still in effect across Maryland and MOSH stands ready to assist contractors to remain in compliance and enforce any violations. (emphasis added.)

First, there is no final rule to await. OSHA issued a final rule in March 2016 – almost two years ago. And the six month "normal timeline" is long gone. Based on the court's order, OSHA must now go back and improve its justification for not including MRP, or the agency can decide that MRP is needed, and begin new rulemaking. It could be many months before OSHA issues a new justification for not including MRP, and it would be many years before the standard is modified if the agency decides to propose inclusion of MRP. Neither of these options, however, legally justifies Maryland OSHA's failure to issue a new standard to protect construction workers for the months or years it may take for federal OSHA to act on the court's instruction.

States are required to issue a new standard based on the issuance date of a new OSHA standard, not on any pending court decision or possible future changes in the standard. Should OSHA issue a modified standard many

years in the future, Maryland – and all of the other state plan states – would then have six months to adopt the same change. But meanwhile workers would be protected under the standard that is in effect.

What Is To Be Done?

Every day that Maryland OSHA delays adopting and enforcing the Silica standard, more Maryland construction workers will be exposed to the deadly dust. Clearly, if Maryland doesn't begin the process of adopting a standard, OSHA needs to take action to protect construction workers in Maryland.

Unfortunately, OSHA has limited options to force recalcitrant states to follow the law and it is not yet clear whether this administration will take the same hard-line approach to problem states that the Obama administration did.

One option that OSHA has is the “death penalty,” to rescind the state’s authority to operate a state program, a difficult and costly process. During the Obama administration, federal OSHA convinced South Carolina not to eliminate its whistleblower program by reminding them that the whistleblower program was required if they were to continue running a state program. When Arizona passed a law rejecting OSHA’s new residential fall protection requirements, OSHA threatened to take over the state’s construction sector. Arizona backed down at the last minute. These take-over options are effective where the threat is credible. Although OSHA has threatened, the agency has never been forced to rescind a state’s program. Such an action would be costly because federal OSHA would then have to take over enforcement in that state – presumably without additional resources from Congress.

Obama’s OSHA also made heavy use of the “bully pulpit” – ensuring that the media and friendly politicians were aware when a state’s inaction was endangering workers.

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And then there is the fact that Maryland is a very blue state whose Governor, Larry Hogan, is a Republican up for re-election next November.

And then there is the fact that Maryland is a very blue state whose Governor, Larry Hogan, is a Republican up for re-election next November. That fact provides fertile ground for construction workers, unions and concerned citizens to ask Hogan why he continues to let Maryland construction workers get sick and die.

The bottom line is that silica kills and Maryland workers – in violation of federal law – are continuing to be exposed. Federal OSHA must act. And if it doesn't, we need to make sure that the media and Maryland voters know that construction workers in the state are going to get sick and die.

But this is more than a Maryland issue. If Maryland gets away with its refusal to issue a silica standard, other states will take advantage of federal OSHA's weakness in the future. This is an issue that all Americans – not just citizens of Maryland – need to remember next November.

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