

OSHA's Final Standard Further Regulating Occupational Exposure to Respirable Crystalline Silica: Important Near-Term Considerations for Potential Challengers

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On March 21st, 2016 the Office of Management & Budget ("OMB") completed its review of the Occupational Safety & Health Administration ("OSHA's") silica standard. Publication in the Federal Register could occur in the next few days. Given the high level of interest and stakeholder engagement at the proposed rulemaking stage, we anticipate that a number of groups are likely to challenge the final standard or strongly consider doing so (depending on outcome). We are providing this information to industry stakeholders and potential industry litigants to apprise them of important near-term milestones to consider when evaluating the prospect of litigation. Kelley Drye & Warren is also hosting a **coordination meeting and strategy session at 12:00 p.m. EST Thursday, March 24, 2016.**

Procedure for Challenging OSHA Standards

The Occupational Safety & Health Act ("OSH Act" or "the Act") authorizes the Secretary of Labor to promulgate "standards" and "regulations"—two different types of rules.^[2] The Act grants to any person "adversely affected by a standard" the right to file a petition for judicial review of the standard in a United States Circuit Court of Appeals within 60 days of its promulgation.^[3] The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.^[4]

Not surprisingly, courts have universally viewed new or amended permissible exposure limits ("PELs"), such as the upcoming silica PEL, as "standards." As such, industry stakeholders will have 60 days following publication of the rule in the Federal Register to file a Petition for Judicial Review in an appropriate court of appeals. Petitions for Judicial Review are very simple and consist of only four parts: (1) a concise statement of the rule being challenged; (2) a Corporate Disclosure Statement; (3) copies of the rule; and (4) a Certificate of Service.

Importantly, petitions for judicial review of OSHA standards need not include any substantive legal arguments or assertions of fact. Those more substantive filings are briefed later. The fact that Petitions for Judicial Review of OSHA standards can be drafted and filed quickly has potentially very important strategic value.

While Petitions for Judicial Review of OSHA standards can be filed anytime within 60 days following publication in the Federal Register, there are significant strategic advantages to filing petitions **within 10 days of publication**. Petitions for Judicial Review of OSHA standards can be filed in any court of appeals where the petitioner has impacted operations, a principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit, where OSHA maintains its headquarters.^[5]

If only one Petition for Judicial Review is filed within 10 days of publication of the standard, the judicial proceedings will be initiated in the circuit court selected by the petitioner.^[6] If Petitions for Judicial Review are filed in more than one circuit court within 10 days of publication of the standard, OSHA (which must be served copies of each petition) must notify the Judicial Panel on Multidistrict Litigation (“JPML”).^[7] The JPML will then, “by means of random selection” centralize all challenges in a single circuit court from those petitions filed within the 10-day period.^[8]

Accordingly, if only one party petitions for review within 10 days of publication of the silica standard, barring exceptional circumstances, that party will determine the venue for the action. If more than one petition is filed within 10 days of publication of the silica standard, each circuit court identified in those petitions stands the chance of being randomly selected as the venue for the legal challenge for the silica standard.

As this advisory is not intended to provide a detailed venue analysis, we will note only that the judicial venue that hears a challenge can be immensely important to the outcome of a legal challenge, particularly where, as here, the status of the case law and presumed disposition of courts vary greatly.

Per our experience in the challenge to OSHA’s hexavalent chromium standard, unions and worker health advocates are keenly aware of the narrow 10-day window wherein a party can either establish or protect their prospects for establishing venue. Even if these groups largely support the final silica standard, they may challenge some aspect of it just to secure for OSHA a favorable venue to defend the rule.

Conclusion

Venue will be important to any challenge to the final silica standard and union/worker health groups will be acting quickly following publication of the silica standard to secure a venue they view as favorable. To even attempt to secure a venue viewed as favorable to industry, potential industry petitioners must be prepared to file a petition for judicial review in one or more potentially advantageous circuit courts within 10 days of publication of OSHA’s silica standard.

We recognize that trade associations and industry groups frequently require substantial lead-time to approve the initiation of a legal action. That is why we are sharing this information in advance of the final rule. We urge potentially impacted industries to begin discussing their legal options immediately and consider filing protective petitions within the initial 10-day period. If necessary after more thorough review of the standard, petitions could be withdrawn or used as leverage in settlement negotiations.

^[2]See 29 U.S.C. § 655(b) (granting authority to promulgate “any occupational safety or health standard”); 29 U.S.C. § 657(c)(1) (granting authority to promulgate certain record-keeping requirements by “regulation”).

[3]29 U.S.C. § 655(f) (emphasis added).

[4]29 U.S.C. § 652(8).

[5]29 U.S.C. § 660(a).

[6]28 U.S.C. § 2112(a)(1).

[7]28 U.S.C. § 2112(a)(1).

[8]28 U.S.C. § 2112(a)(3). The “means of random selection” used by the JPML is a rotating drum out of which a circuit court name is blindly drawn (not unlike bingo). *Judicial Panel on Multi-District Litigation Rules of Procedure of the Judicial Panel on Multidistrict Litigation*, 277 F.R.D. 480 at R. 25.5.