# A Different Approach to Risk Allocation on Construction Sites

## OSHA's crystalline silica rule requires it

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Respirable crystalline silica dust is different from all other contaminants located on a jobsite. There is no other material that makes up so much of the earth's crust and is found in so many construction materials and products. It also can be released in respirable-sized particles by many different tasks. Silica dust is pervasive in how it permeates the jobsite, and how it affects workers of different employers.

When a general contractor uses multiple subcontractors to construct commercial bridges, buildings, warehouses, or outdoor structures, how do the parties allocate the risk of silica dust exposure for each company's employees? This is a significant issue when multiple contractors occupy the same worksite. Some contractors may generate high levels of silica dust from a variety of activities, while others may generate no contributing respirable silica dust themselves, but work downwind from other contractors who create exposures above legal limits for workers.

The new Occupational Safety and Health Administration (OSHA) permissible exposure limit (PEL) is 50 $\mu g/m^3$ for an eight-hour time-weighted average, which is only 20% of the previous limit. The new exposure limitations (OSHA 29 CFR 1926.1153), along with the rest of the silica rule's provisions for training, exposure monitoring, and medical surveillance, are scheduled to take effect for the construction sector on June 23, 2017. OSHA can issue citations to the general contractor, the creating contractor (the entity that generates high levels of silica dust), the exposing contractor (the employer whose workers are exposed above the PEL), and the controlling contractor (the party who, by practice or by contractual agreement, is responsible for eliminating this hazard from the workplace). Often, OSHA will consider contract documents among various employers at a shared worksite in determining who has primary responsibility for hazard mitigation, and this can be reflected in how citations are issued in terms of negligence.

A rigger prepares for installation of a precast concrete element in a common jobsite area. All Photos: Law Office of Adele L. Abrams PC.

The typical approach of being handed a consensus document and asked to sign it does not allocate risk adequately. In our review of several consensus documents, the contract language addressing risk allocation concerning silica dust is not sufficient. These consensus documents can create a Tammany Hall–like ring of employers pointing their fingers at the next employer and not willing to take any claim of responsibility for dust overexposure.

Unfortunately, if OSHA visits a multi-employer jobsite and finds overexposures because the parties have not adequately addressed the responsibility of controlling silica dust, it normally will cite multiple parties and let the courts sort it out. There can also be ripple effects, because once a contractor is documented to have exposed other companies' workers to hazardous levels of silica dust, third-party tort actions for personal injury or wrongful death can follow. To avoid this scenario, controlling silica dust below the PEL is the solution the parties should try to achieve.

The web of contracts on a jobsite in the precast concrete industry might go something like this: The general contractor has a contract with the precast concrete producer, which has a contract with the shipping company to deliver the concrete components, and has another contract with the erector subcontractor to install the concrete components, and yet another contract with a patching and grouting company to make sure every concrete component is acceptably installed. In short, the general contractor will have contracts with as many subcontractors of various

An equipment operator works in a common jobsite area.

trades as are necessary to complete the job. The building owner will have its engineers on the jobsite to ensure the project goes according to plan. Woven into these relationships will be the rental equipment company personnel operating and maintaining the cranes, high lifts, fork lifts, excavators, and crushers, just to name a few.

How then should the parties on a jobsite approach risk allocation with multiple parties involved, many of which will generate silica dust and all of which could have employees exposed? By way of example, let's take the relationship between a general contractor and the precast concrete producer and work through it. Keep in mind that the precast concrete producer will have its own contract with its subcontractors.

First, the contractual language must ensure that all parties comply with the new OSHA silica rule that directly affects the jobsite by having a written exposure control plan and a competent person present at the jobsite to implement the plan. To achieve this, the contract must contain general language about complying with all federal, state, and worksite occupational safety and health rules. That language may be sufficient to ensure that the silica written exposure control plan and competent person requirements are met.

Next, even with exposure control plans and competent persons on the jobsite, the jobsite situations can become murky without contract language to allocate risk. For instance, take the situation wherein a subcontractor's worker is operating a rented high lift that has an exhaust pipe located on the undercarriage of the equipment on a dry roadway, and where a rigger is preparing to offload a precast concrete component. Who is responsible for controlling the silica dust generated in this common area? By the way, the worker operating the high lift was exposed above the OSHA PEL of 50 µg/m$^3$ and the rigger was exposed above the action level of 25 µg/m$^3$.

The contracting parties must allocate risk at the jobsite according to which party has authority to dictate the work activities to control silica dust. In the situation described, there were six or more subcontractors in the general area where these two workers were located. Therefore, the general contractor and its subcontractors must identify which party has the responsibility to control the generation of silica dust. In my opinion, the practical approach is to include language that places the responsibility squarely on the party that has the appropriate authority to control common-area silica dust—the general contractor. Here's an example of the type of language that should be used:

*"The General Contractor shall be responsible for controlling dust (which may include respirable crystalline silica) on a Construction Project regardless of its source(s) including, but not limited to, wind-blown onto the site, generated by truck and equipment travel regardless of who is operating the truck or equipment, or generated by other parties. The Subcontractor shall only be responsible for control of dust generated by the performance of its work activities or the work of its subcontractors, such as cutting, sawing, drilling, grinding, patching, or altering the precast concrete components."*

In addition, the general contractor must ensure that all subcontractors are conducting their work in a manner that minimizes silica dust generation by implementing written exposure control plans and having a competent person on the jobsite.

In summary, risk allocation can be handled by applying a simple approach:

- Ensure that all parties subject to the OSHA silica rule comply with its mandates of maintaining a written exposure control plan and having a competent person on the jobsite.
- Identify which party has the authority to dictate work to control the silica dust exposure and ensure that the contract language places responsibility and accountability clearly on that party.
- Ensure that the contract language is enforced.