

# J. J. KELLER® CONSTRUCTION REGULATORY UPDATE

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News of OSHA, EPA & DOT Activity

## OSHA releases 2015 Fall Construction Regulatory Agenda

On November 19, 2015, OSHA released its Fall Regulatory Agenda. These Regulatory Agendas track the status of federal agency rule-makings and outline the regulations that federal agencies are expected to work on in the immediate future. This month we'll cover just the upcoming Final Rules. Next month we'll include the Proposed Rules. The Final Rules that will impact construction employers include:

### Occupational Exposure to Crystalline Silica (RIN: 1218-AB70)

#### Final Rulemaking — February 2016

Crystalline silica is a significant component of the earth's crust, and many workers in a wide range of industries are exposed to it, usually in the form of respirable quartz or, less frequently, cristobalite.

Chronic silicosis is a uniquely occupational disease resulting from exposure of employees over long periods of time (10 years or more). Exposure to high levels of respirable crystalline silica causes acute or accelerated forms of silicosis that are ultimately fatal.

The current OSHA permissible exposure limit (PEL) for general industry is based on a formula proposed by the American Conference of Governmental Industrial Hygienists (ACGIH) in 1968 (PEL=10mg/cubic meter/(% silica + 2), as respirable dust). The current PEL for construction and shipyards (derived from ACGIH's 1970 Threshold Limit Value) is based on particle counting technology, which is considered obsolete. NIOSH and ACGIH recommend 50µg/m3 and 25µg/m3 exposure limits, respectively, for respirable crystalline silica.

Both industry and worker groups have recognized that a comprehensive standard for crystalline silica is needed to provide for exposure monitoring, medical surveillance,

and worker training. ASTM International has published recommended standards for addressing the hazards of crystalline silica. The Building Construction Trades Department of the AFL-CIO has also developed a recommended comprehensive program standard. These standards include provisions for methods of compliance, exposure monitoring, training, and medical surveillance.

The Notice of Proposed Rulemaking was published on September 12, 2013 (78 FR 56274). OSHA received over 1,700 comments from the public on the proposed rule, and over 200 stakeholders provided testimony during public hearings on the proposal. The Agency is now reviewing and considering the evidence in the rulemaking record. OSHA preliminarily estimated the cost of the proposed rule to be \$664 million per year. OSHA preliminarily estimated that the proposed rule would prevent nearly 700 deaths per year and prevent over 1,600 cases of silicosis annually once the full effect of the rule are realized, and would result in monetized benefits of \$2.8 to \$4.7 billion annually.

### Improve Tracking of Workplace Injuries and Illnesses (RIN: 1218-AC49)

#### Final Rulemaking — March 2016

OSHA is making changes to its reporting system for occupational

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Check our website for the latest OSHA/DOT documents. Go to Construction and then Reference Materials.

- Trenching and excavation safety; OSHA publication OSHA 2226-10R 2015
- Temporary enforcement policy for residential construction work in confined spaces; OSHA enforcement memo
- Fall protection in construction; OSHA 3146-05R 2015

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injuries and illnesses. An updated and modernized reporting system would enable a more efficient and timely collection of data, and would improve the accuracy and availability of the relevant records and statistics.

This rulemaking involves modification to 29 CFR part 1904.41 to expand OSHA's legal authority to collect and make available injury and illness information required under part 1904, and a modification to 29 CFR part 1904.35 to clarify an employee's right to report injury and illnesses to their employer without fear of retaliation.

OSHA estimates that this final rule will have economic costs of \$15 million per year. The Agency believes that the annual benefits, while unquantified, significantly

exceed the annual costs. These benefits include increased prevention of workplace injuries and illnesses as a result of expanded access to timely, establishment-specific injury/illness information by OSHA, employers, employees, employee representatives, potential employees, customers, potential customers, and researchers.

**Updating OSHA Standards Based on National Consensus Standards Eye and Face Protection (RIN: 1218-AC87)**

**Final Rulemaking — March 2016**

The Personal Protective Equipment (PPE) Final Rule, published September 2009, amended the general industry PPE standard



and incorporated by reference a number of updated consensus standards governing the design and testing of certain types of PPE.

The Final Rule did not update PPE standards for the construction industry; these standards currently refer to outdated consensus rules. In addition, while the Final Rule was undergoing final OMB review, ANSI published a 2010 edition of the Eye and Face Protection (ANSI Z-87.1) consensus standard.

OSHA intends to publish a Notice of Proposed Rulemaking to incorporate the 2010 edition of the American National Standard, Z87.1 Eye and Face Protection for general industry, shipyard employment, long shoring, marine terminals, and construction industries.

**OSHA penalties to increase significantly by summer next year**

Congress has been advocating for the Protecting America's Workers Act for over a decade. Among other things, the Act would have increased civil and criminal penalties for certain OSHA violators.

On November 2, 2015, portions of the Protecting America's Workers Act made their way into the Bipartisan Budget Act of 2015, which was signed into law by President Obama. The budget directs federal agencies to adjust their civil

monetary penalties to account for inflation.

A "catch up adjustment" clause in the budget says the agencies must issue an interim final rulemaking by August 1, 2016. Since OSHA's penalties haven't changed since the early 1990s, this means the initial adjustment could amount to a near 80 percent increase in maximum allowable fines. (After the initial adjustment, agencies are directed to make annual adjustments to keep up with inflation.)

Should OSHA choose to increase penalties by 80 percent, the maximum penalty for a serious infraction would go from \$7,000 to \$12,600. The penalty for willful and repeat citations would increase from \$70,000 to \$126,000.

Under the Federal Civil Penalties Inflation Adjustment Act of 1990, OSHA had been exempted from a requirement to increase penalties along with inflation. However, the new budget removed that exemption.

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## Emotional attachment to work may lead to greater well-being, study finds

Workers who feel emotionally attached to and identify with their work have better psychological well-being, reports a study in the November, 2015, *Journal of Occupational and Environmental Medicine*, the official publication of the American College of Occupational and Environmental Medicine (ACOEM).

Efforts to increase affective organizational commitment (AOC) may lead to a happier, healthier workforce — and possibly contribute



to reducing employee turnover, suggests the research by Thomas Clausen of the Danish National Research Centre for the Working Environment, Copenhagen, and colleagues.

AOC is defined as “the employee’s emotional attachment to, identification with, and involvement in the organization.” The study looked at how AOC affected psychological well-being and other health-related outcomes in approximately 5,000 Danish eldercare workers, organized into 300 workgroups.

The results showed significantly higher well-being for employees in workgroups with higher AOC. Workgroups with high AOC also had lower sickness absence rates and fewer sleep disturbances, as reported by workers.

The relationship between group-level AOC and psychological

well-being was completely explained by individual-level AOC. But group AOC contributed to the differences in sick days and sleep problems, independent of individual AOC.

Previous studies have suggested that employees’ emotional attachment to and identification with their work is an important motivating factor that affects absenteeism and other key organizational outcomes. The new study adds evidence that group-level AOC “is an important predictor of employee well-being in contemporary health-care organizations.”

Within workgroups, high AOC may act like an “emotional contagion” — with “effects on individual-level well-being that are relatively independent of the level of AOC of the individual,” Dr. Clausen and colleagues write.

## NIOSH provides tips on protecting workers in ‘moderately cold conditions’

“Moderately cold” work conditions pose health and safety risks for employees, and employers should take steps to improve the work environment, according to the National Institute for Occupational Safety and Health (NIOSH).

The National Safety Council announced that researchers recently presented a case study examining working conditions of airline food preparation employees at the American Public Health Association’s annual conference on November 4, 2015.

Airline food preparation employees and workers in industries such as transportation, cold storage, and supermarkets can spend the majority of their day, up to eight hours,

in rooms at 40 degrees Fahrenheit. Forty degrees is a food safety standard for refrigerated rooms.

The case study stemmed from a 2014 report by NIOSH called Evaluation of Ergonomic Risk Factors, Thermal Exposures, and Job Stress at an Airline Catering Facility. The Agency says cold environments can increase the risk of injury, or aggravate an existing injury. NIOSH made recommendations in the report for employers to help protect employees which includes:

- Training employees on the health effects of exposure to hot and cold temperatures and ways to be more comfortable, such as changing out wet clothes.

- Providing glove alternatives for employees inside cold rooms.
- Rotating employees to different job tasks between warmer and colder work environments.
- Providing warm water or dry air heaters outside of cold rooms for workers to warm their hands.



## OSHA provides guidance on injuries involving personal tasks outside of working hours

In a recently published Letter of Interpretation (LOI) dated November 6, 2015, OSHA provided explanation regarding the recordkeeping requirements contained in 29 CFR Part 1904 — Recording and Reporting Occupational Injuries and Illnesses. Specifically, the employer requested clarification on the exemption to work-relatedness involving personal tasks performed within the work environment.

In the LOI, the employer presented the following scenario: An employee brings a plow to work in his truck that he intends to loan to a co-worker. After the two employees have clocked out for the day, they go to the employee's truck in the company parking lot to get the plow and move it to the co-worker's truck. In the process of moving the plow from one truck to the other, one of the employees injures his back.

The employer also stated in its letter, that OSHA's Frequently Asked Question (FAQ) 5-11 provides that an injury or illness that occurs in the work environment before or after an employee clocks in or out is considered to be work-related.

The employers question was whether the above scenario is a work-related injury?

In response, OSHA said:

No. Section 1904.5(b)(2)(v) provides that an injury or illness is not work-related if it is

- (1) Solely the result of an employee doing personal tasks (unrelated to their employment) at the establishment, and
- (2) Outside of the employee's assigned working hours.

In order for the "personal tasks" exception to apply, the case must

meet both of the stated conditions. The exception allows employers limited flexibility to exclude from the recordkeeping system situations where the employee is using the em-

ployer's establishment for purely personal reasons during his or her offtime. See, the January 19, 2001, preamble to the final rule revising OSHA's recordkeeping regulation at 66 *Federal Register* 5951.

Assigned working hours means "those hours the employee is actually expected to work, including overtime." (See FAQ 5-4.) This encompasses the time between the employee's expected start time of the day and the expected end time of the day, including formal and informal break times. See, OSHA's March 10, 2005 LOI to Milagros Flores. Personal tasks are tasks that are unrelated to the employee's job. (See FAQ 5-5.)

OSHA said the injury described in the scenario meets both conditions in Section 1904.5(b)(2)(v) and is not work-related. Moving the plow was unrelated to the employee's job, and the task was performed after the employee had clocked out for the day. At the time of the event, the injured employee was not present in the work environment as a condition of employment.

OSHA's FAQ 5-11 states:

"An employee experienced an injury or illness in the work environment before they had "clocked-in"



for the day. Is the case considered work-related?

Yes. For purposes of OSHA recordkeeping injuries and illnesses occurring in the work environment are considered work-related. Punching in and out with a time clock (or signing in and out) does not affect the outcome for determining work-relatedness. If the employee experienced a work-related injury or illness, and it meets one or more of the general recording criteria under section 1904.7, it must be entered on the employer's OSHA 300 log."

Please note that FAQ 5-11 addresses injuries and illnesses that take place in the work environment that do not involve purely "personal tasks." Section 1904.5(a) makes clear that a case is presumed work-related if, and only if, an event or exposure in the work environment is a discernible cause of the injury or illness or of a significant aggravation to a pre-existing condition. Section 1904.5(b)(2)(v) provides a narrow exception regarding work-relatedness when employees are on the premises outside their assigned working hours. Accordingly, FAQ 5-11 does not apply to the scenario because, at the time of the injury, the employee was engaged in a personal task unrelated to work.

## OSHA citations reduce workplace injuries, study finds

A new study from the Institute for Work and Health concludes that citations with penalties from inspections reduce workplace injuries.

Researchers performed a systematic review to determine the effectiveness of the enforcement of occupational safety and health regulation in creating incentives for firms to focus on safety and health issues. While mixed evidence was

found on the effectiveness of the general threat of an inspection, the study found strong evidence that actual citations and penalties reduce the frequency or severity of injuries.

The study builds on the findings from several other recent studies showing that injury rates decrease at an establishment in the years following an OSHA inspection.

For more information on the study visit [www.iwh.on.ca/at-work/81/inspections-with-penalties-linked-to-lower-injuries-iwh-review](http://www.iwh.on.ca/at-work/81/inspections-with-penalties-linked-to-lower-injuries-iwh-review).



## Worker killed after fall from third-story balcony

OSHA found that a fall from a third-story balcony killed a 44-year-old man in Dallas, Texas, as he worked on the exterior of an apartment complex on May 14, 2015.

The worker, who had been on the job for one month, was applying stucco underlayment to the balcony walls when the incident occurred. The Agency found that



his employer had not installed scaffolding and had not provided the employee or his co-workers with personal fall protection.

OSHA cited the Phoenix, Arizona, based employer on November 10 for eight egregious willful and four serious violations. Previously, the state OSHA in Arizona had cited the company seven times for allowing fall-related hazards.

Federal safety and health officials have proposed fines totaling \$407,400 for the citations.

The Bureau of Labor Statistics reports that one in five private industry worker deaths in 2014 were in construction. Falls are the leading cause of death for construction workers, accounting for nearly 40 percent of 2014's construction fatalities.

Texas leads the nation in construction fatalities. This is the second egregious case involving fall protection there in recent months. Earlier this year, a construction worker in Houston denied a safety harness suffered severe injuries after falling through a roof.

## OSHA publishes final rule on whistleblower procedures

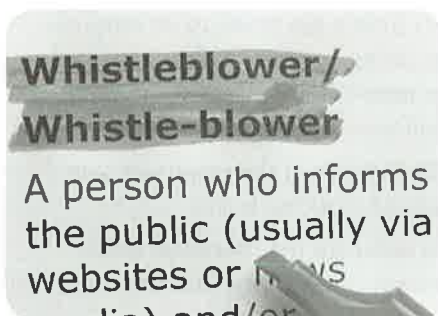
On November 9, 2015, OSHA issued a final rule establishing procedures and time frames for handling employee retaliation complaints under the National Transit Systems Security Act (NTSSA) and the Federal Railroad Safety Act (FRSA). It specifically addresses handling complaints from workers in the railroad and public transportation industries. The rule was effective November 9, 2015.

In 2010, OSHA published an interim final rule and requested public comments. The final rule responds to the comments, incorporates

recent case law under the statutes, and updates the rules to help improve both employees' and employers' access to information about the case during OSHA's investigation and their ability to participate in OSHA's investigation.

Furthermore, the rule establishes the procedures and time frames for the handling of retaliation complaints under NTSSA and FRSA, including procedures and time frames for employee complaints to OSHA, investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ)

for a hearing do novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor), and judicial review of the Secretary of Labor's final decision.



## Public comments sought on OSHA's whistleblower retaliation guidance document

OSHA is seeking comments on a draft document intended to help employers develop a program to protect employees from retaliation when they raise concerns about workplace conditions or activities that could harm workers or members of the public.

*Protecting Whistleblowers: Recommended Practices for Employers for Preventing and Addressing Retaliation* will help employers create a non-retaliatory environment in the workplace and will provide practical guidance on protecting whistleblower rights for public, private, and non-profit employers. The document contains sections on how to ensure leadership commitment, foster an anti-retaliation

culture, respond to reports of retaliation, conduct anti-retaliation training, and monitor progress and program improvement.

The draft document is based on recommendations of the Whistleblower Protection Advisory Committee in its document, *Best Practices for Protecting Whistleblowers and Preventing and Addressing Retaliation*.

Comments on the document will be accepted until January 19, 2016, and will be considered by OSHA when preparing the final document for issuance.



OSHA is especially interested in comments related to ensuring that:

- Anti-retaliation concepts are described clearly,
- Important features of an anti-retaliation program are included,
- Challenges in implementing these practices are addressed, and
- Issues specific to small businesses are addressed.

Comments should be submitted to [www.regulations.gov](http://www.regulations.gov) using the docket number OSHA-2015-0025. Please note that all comments will be publicly posted as written; do not submit personally identifiable information such as Social Security numbers and birthdates.

## NIOSH announces re-organization of respiratory and mining divisions

In the past year, the National Institute for Occupational Safety and Health (NIOSH) submitted two reorganization plans for approval — one involving the Division of Respiratory Disease Studies (DRDS), and the other involving the NIOSH Mine Safety and Health Research Program. Both reorganization plans were recently approved by CDC's Management Analysis and Services Office (MASO).

Formerly known as the NIOSH Division of Respiratory Disease Studies (DRDS) with a focus on protecting workers from respiratory hazards, the newly named NIOSH Respiratory Health Division (RHD) reflects an expansion in vision and scope.



With its new name, RHD will still retain at its core the DRDS mission of protecting workers from diseases caused by respiratory hazards but also plans to expand its efforts to also include the

development and advancement of workplace-based interventions that improve respiratory health.

Details about the Respiratory Health Division (RHD) can be found in a recent *Federal Register* Notice: [www.gpo.gov/fdsys/pkg/FR-2015-09-22/pdf/2015-24006.pdf](http://www.gpo.gov/fdsys/pkg/FR-2015-09-22/pdf/2015-24006.pdf). The NIOSH topic page on RHD can be found here: [www.cdc.gov/niosh/contact/im-drds.html](http://www.cdc.gov/niosh/contact/im-drds.html).

A second reorganization has taken place within the mine safety and health research program to restore two mining research divisions

— the Pittsburgh Mining Research Division (PMRD) and the Spokane Mining Research Division (SMRD).

Recent reports indicate that mine workers have lower quality-adjusted life expectancy than workers in any of the other industry sectors. The recently approved reorganization completes the new structure at Pittsburgh with the formation of the new Workplace Health Branch and, with the previously approved reorganization of the Spokane Mining Research Division, the new structure of the Office of Mine Safety and Health Research (OMSHR) is complete.

### Answers to Safety Selections quiz

1. c, 2. c, 3. a

## Safety Selections for the construction industry

You can use this Safety Selection to conduct periodic safety meetings at your construction site. Your jobsite supervisor or other instructor can use the material as the basis for the safety discussion. J. J. Keller & Associates, Inc grants permission to subscribers to reproduce the Safety Selections page for internal use at one business location only provided that J. J. Keller's copyright notice remains visible on all copies.

### Safety Selection—Lockout and tagging of circuits

Electricity travels in closed circuits; its normal route is through a conductor and load. Employees get shocked when some part of their body becomes part of the circuit. An electric current enters their body at one point and exits at another. Locking and tagging of circuits can help prevent electric shock.

Shock normally occurs in one of three ways. When a person touches: (1) both wires of an electric circuit, (2) one wire of an energized circuit and ground, or (3) a metallic part that is “hot” because it is contacting an energized wire and the person is in contact with the ground.

The severity of the shock depends on three factors: (1) how much current flows through the body (measured in amperes), (2) what path the electric current takes through the body, and (3) how long the body is part of the electric circuit.

Other factors that make a difference are the frequency of the current, the phase of the heart cycle when shock occurs, and the general health of the person prior to shock.



An electrical hazard can be defined as the following:

- Burns
- Electrocution
- Shock
- Arc flash/blast
- Fire
- Explosion

Locking and tagging of circuits can help prevent some of these hazards.

OSHA requires that:

- Equipment or circuits that are deenergized must be rendered inoperative, and
- Tags are attached at all points where such equipment or circuits can be energized.

OSHA uses the term “rendered inoperative” rather than “locked out.” This indicates that methods other than lock-out would be permissible, as long as they rendered the equipment or deenergized circuit inoperative.

There are a variety of such methods and two examples are:

- Removing a fuse or other circuit element for each phase conductor; or
- Disconnecting the circuit conductors (including disabling plugs for equipment that is plug-connected).



### Quiz

For each question, circle the letter of the correct answer.

1. Employees get shocked when some part of their body becomes part of the \_\_\_\_\_.  
 a. conductor                      b. load                      c. circuit
2. Locking and tagging of circuits *will not* prevent \_\_\_\_\_.  
 a. shock                      b. electrocution                      c. building collapse
3. The term “rendered inoperative” is similar to the term \_\_\_\_\_.  
 a. locked out.                      b. fall protection                      c. energized circuit

Name: \_\_\_\_\_ Date: \_\_\_\_\_