March 16, 2020

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RE: Follow-up to Stakeholder Meeting – February 18, 2020

Dear Ms. Soiza:

Thank you for meeting with various industry stakeholders on February 18, 2020. Per your request at that meeting, this letter is to follow-up on several questions and topics discussed at that meeting, and to document various comments.

Battery Council International ("BCI") appreciates the Washington Department of Labor and Industries' Division of Occupational Safety and Health's ("L&I" or "DOSH") continued efforts to involve stakeholders from industry and public health in drafting revisions to Washington's occupational exposure regulations for lead.

BCI was pleased to hear at that meeting that you have directed staff to rethink the organization and presentation of the current draft rule in response to various stakeholder comments received over the past three years. As BCI and others stated at the February 18 meeting, it is critical that the organization of the rule not introduce unnecessary complexity and confusion among regulated industry and enforcement staff. As presently organized, the draft rule is unduly burdensome to understand, and all of the EHS professionals BCI has consulted have stated that they cannot understand what is actually required of them.

However, we do not believe that mere reorganization will resolve the numerous fundamental issues in the June 2019 draft, which were described in more detail in our November 2019 letter to you. Those issues go well-beyond mere differences of opinion as to the appropriateness of various numerical targets and certain substantive requirements. In this letter, we call your attention to several key logical flaws in the rule that we believe require senior management attention – for a more detailed explanation of each we refer you to our November 2019 letter.

The Mere Presence of Lead Should Not Trigger Affirmative Duties

At the February 18, 2020 meeting, you stated that it was not DOSH's intention that the mere presence of lead in a workplace would trigger affirmative substantive obligations from employers. As we noted, it is likely that literally every workplace in Washington has some small amount of lead "present" but that the vast majority of those workplaces present no measurable risk of lead exposure to workers. This is because most lead "present" in workplaces is safely contained within cast metal products, electronics, building materials, or undisturbed or encapsulated lead paint.

You further stated that DOSH's intention was that a workplace should be required to conduct affirmative steps only when lead presents an unreasonable risk of worker exposure, e.g., through disturbance or intentional manipulation. In general, we agree with this framework for the rule.

Unfortunately, as written the current draft imposes affirmative (citable) obligations on every workplace in the state, and triggers affirmative rule obligations based on the mere "presence" of lead. Namely, Draft Section 10050 requires every employer in the state to conduct and document workplace "survey" to identify potential sources of lead exposure, including an "evaluation" of finish paint and other coatings. Furthermore, Section 10050(1)(f) declares that any such workplace survey shall be deemed invalid if there are "indications" (notably not "facts," "evidence," or "proof") that work may involve materials with lead, and sets the levels of lead which would negate a negative survey at levels which, in some cases, are not measurable without specialized laboratory equipment, and in other cases at levels deemed "lead free" by federal regulatory bodies.

Similarly, the retail "Safe Harbor" inappropriately attempts to impose affirmative obligations on retailers, including intrusive inventory control requirements and cleaning measures, even for employers who would otherwise be exempt from application of the rule because they only carry lead-containing articles – such as electronics, ammunition, or plumbing solder – which pose no risk of exposure to retail employees.

The rule must be clear that employers have no obligation under the lead rule to take affirmative action unless the work conducted by that employer could reasonably be expected to present a meaningful risk of lead exposure to workers.

Employers Should not be Required to Provide Medical Removal Benefits for Non-Occupational Exposures

Under the current federal and state rules, employers are required to provide medical removal protection and up to 18 months of medical removal benefits to any employee whose blood lead levels exceed a specified blood lead level. This rule is strictly based on an employee's blood lead level, and has no provision for allowing an employer to identify a non-occupational source. This means that an employer would be required to provide full-time pay, and maintain seniority, even for employees whose blood lead levels are caused by sources of lead outside of the workplace; this framework has the potential to place a severe undue burden on employers.

Under the current federal and state rules the medical removal level is set at either 50 µg/dL over multiple tests, or a single test of 60 µg/dL. Based on current background levels and typical ambient exposures, those levels are higher than the blood lead levels that would normally be expected from non-occupational or infrequent recreational exposures—though they have been observed. This means that in practice, today it is relatively rare for employers to be required to provide medical removal benefits due to non-occupational sources of lead exposure.

However, this rare situation is likely to become much more regular and common under the draft rules which trigger medical removal at 20 µg/dL and 30 µg/dL. Numerous peer reviewed literature studies have identified individuals with blood leads in excess of those levels due to recreational and/or non-occupational activities—including individuals with no known lead exposures at work.[1] It is therefore not appropriate for DOSH to assume that every blood lead level above those levels must be attributable to workplace exposures.

Employers must be provided a mechanism (for discussion purposes, termed an "off-ramp") to reduce or suspend medical removal benefits for workers whose elevated blood lead levels have been caused or are maintained at an elevated level due to non-occupational exposures.[2] It would be unduly burdensome on industry to require an employer to pay an employee to not perform their job duties for up to 18 months if the employee continues to persist in self-exposing to lead outside the workplace. This would accord to how the worker's compensation program addresses with non-occupational injuries.

Compliance Assistance for Employers Inexperienced with Lead Control Should be Provided in Non-Citable Provisions

At our meeting, we were heartened to hear you acknowledge the great strides our members and other industries have made in implementing voluntary worker lead exposure control programs well ahead of any state or federal requirement—and the success those programs have had in controlling blood lead levels. You stated that the recognition of those successes supported DOSH's decision to include various "safe harbor" provisions, such as the "Well Controlled Blood Lead" safe harbor. We agree and support the continued inclusion of such recognition.

Further, you suggested that a driving motivation for the more "comprehensive" scale of the draft rule, and the large volume of citable requirements was to provide a lead control "recipe" for industries that are less experienced in controlling lead exposures. As everybody in the room appeared to recognize, this has caused the current draft rule to contain an excess of "citable" provisions as staff attempted to address every possible lead exposure condition in Washington workplaces.

We agree that it is important to provide employers that are less experienced in controlling lead exposure with as much compliance assistance as is practicable for the agency to provide. However, we disagree that the "recipes" should be included in the citable provisions of the code.

[1] See, e.g., *Lead exposure at firing ranges—a review*, Laidlaw *et. al.*, Environmental Health (2017) 16:34 at Page 6.
[2] While such an off-ramp is not embodied in the federal rule, we believe a Washington rule that provided an off-ramp for blood lead levels above the state MRP levels, but below the federal MRP levels, would be "at least as effective as" the federal rule.

Doing so creates unnecessary complexity and creates an unpredictable level of enforcement ambiguity by creating a rule under which an employer might be cited under four or more provisions for the same action, even where there is no actual risk of exposure to an employee. We believe the better approach to these rules would be to put the "recipes" into appendices or safe harbors similar to those currently drafted for highly compliant industries; the citable provisions of the rule should be reserved for the key worker-protection elements applicable to all industries.

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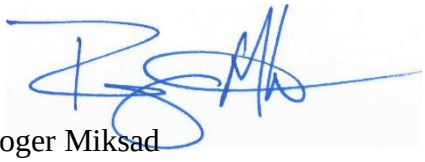
BCI continues to welcome the professionalism of the Washington DOSH staff, and the seriousness with which they have taken this rulemaking. The issues are complex, and attempting to create a novel regulatory approach would be a burdensome task, even at a federal level. BCI remains committed to constructive engagement with DOSH to assist the agency in drafting a rational update to its current rule, but as more fulsomely explained in our November 2019 letter, we believe the most recently released draft rule takes the wrong approach, and will have significant negative consequences for Washington employers and workers.

Sincerely,



Roger Miksad
Executive Vice President and General Counsel