

06/22/2018 – Lead Rulemaking Stakeholder Meeting

Washington State Department of Labor & Industries
7273 Linderson Way SW
Tumwater, WA 98501

Attendees included those representing the following organizations (in no particular order):

Associated General Contractors (AGC)
Atkinson Construction
Battery Council International (BCI)
Association of Washington Business (AWB)
Institute of Neurotoxicology and Neurological Disorders (INND)
University of Washington (UW)
Seattle Parks & Recreation

WAC 296-857-60010, Monitoring worker blood lead levels

Stakeholder Question/Comment: Section (8)(a) refers to required actions for employees exposed over the Permissible Exposure Level (PEL) within 6 months. What happens after 6 months?

DOSH Response: (8)(b) would apply after 6 months.

Stakeholder Response: This section could use some clarification. 6 months from when?

Stakeholder Question/Comment: (9) should be amended to require blood lead testing be made available, but we can't force employees to have their blood drawn.

DOSH Response: Do employers commonly encounter this issue with workers refusing blood testing? What about a finger prick rather than venous testing?

Stakeholder Response: We do have employees who refuse, although it is not common.

Stakeholder Response: The current OSHA rule requires venous testing, and there are legitimate concerns regarding the accuracy of the finger prick testing method due to the increased likelihood of contaminated samples.

Stakeholder Question/Comment: Is there an expectation for employers to document cases where employees have refused?

DOSH Response: Currently there is no requirement in the draft, although we may consider adding something to address this.

Stakeholder Question/Comment: From an employer's perspective, it is in our own best interest to document these instances due to liability concerns. Additionally, the medical provider always provides documentation, and indicates when an employee has refused.

WAC 296-857-60015, Blood lead testing protocols

Stakeholder Question/Comment: In (2) the second sentence should be a note, in order to avoid any conflict with Department of Health (DOH) rules.

Stakeholder Question/Comment: Does this apply for all blood leads or just those over a certain threshold?

DOSH Response: This is for all blood leads.

WAC 296-857-60020, Blood lead records

Stakeholder Question/Comment: You should stipulate a schedule under (2). We would suggest quarterly reporting, so as to limit the burden on business and the department. As currently written, employers are required to submit this report every time a blood lead is tested.

Stakeholder Question/Comment: If employers are already required to report to DOH, what is the benefit of reporting duplicative information to DOSH/L&I?

DOSH Response: Currently the information reported to DOH doesn't always provide enough information for us to determine which employers are in compliance, nor does it always include worker contact information that can be crucial for providing education and outreach to better protect these workers from further harm.

Stakeholder Question/Comment: This puts the onus on the employer, assuming employer non-compliance, when it should be up to DOSH to conduct investigations in cases where the department is concerned that an employer may not be in compliance. Where does DOSH derive the statutory authority to create this additional reporting requirement and what benefit does it provide?

DOSH: By revealing where testing isn't being done (but should be based on the kinds of industries involved) DOSH will be better prepared to pinpoint where workers have elevated blood levels and establish trends regarding injury and illness that will aid in

enforcement efforts, which in turn will keep workers safer. We believe this is well within our statutory authority but we will certainly review to ensure that nothing included in the rule oversteps our authority.

Stakeholder Question/Comment: Whatever rules govern reporting to DOH/ABLES should be amended if they are deficient, rather than creating those requirements within this rule.

WAC 296-857-60030, When to make medical examinations available

Stakeholder Question/Comment: How does the trigger for these requirements compare with that of the existing rule?

DOSH Response: The current rule is based on the PEL, and is more prescriptive than the draft.

Stakeholder Question/Comment: (4) should read “be made available” as was the case with the previous comment. We cannot force employees to have their blood drawn.

WAC 296-857-60040, Workers may request a second opinion

Stakeholder Question/Comment: “Worker’s” should be corrected to read “Workers” in the section title.

Stakeholder Question/Comment: This section stipulates a medical physician, whereas other sections include language that would allow other types of healthcare professionals, such as nurse practitioners, physician assistants, or even massage therapists to perform work and make medical determinations. It should be noted that the OSHA rule allows physicians or other healthcare professionals under their supervision.

Stakeholder Response: L&I permits physician assistants and nurse practitioners to perform many actions with respect to workers comp claims. The agency should remain consistent in this regard.

DOSH Response: Assuming that we are meeting our federal obligations to remain “as effective as” OSHA, we would like to be as consistent as possible with what would be required of an employer in the event of a lead-related workers comp claim. However, workers comp is governed by Title 51 RCW, whereas DOSH rules fall under Chapter

49.17 RCW and we cannot, nor do we have any intention to create workers comp requirements with this rule.

WAC 296-857-60050, Selecting a medical physician

Stakeholder Question/Comment: (2)(h)(iv) uses the term “chronic removal level,” which was changed from the previous draft to “multiple test removal level.” This should be corrected.

WAC 296-857-60070, Medical removal requirements

Stakeholder Question/Comment: In order to keep all testing requirements together and avoid duplicative requirements, (1)(c) and (3) should go into section 60010, and reference should be added in this section if necessary.

Stakeholder Question/Comment: The return to work level is 15 µg/dL but (4)(a) indicates 10 µg/dL. This needs to be corrected.

Stakeholder Question/Comment: (4)(a) states “2 consecutive blood tests” whereas the Table 1 (page 3) states 2 “monthly” blood tests. It should be “2 consecutive blood tests” consistently throughout, because there is no valid reason why an employer would have to wait a month and continue to pay a worker.

DOSH Response: We’ll review this section and consider either keeping “2 consecutive blood tests” or including a shorter timeframe of, perhaps, a few days or a week.

Stakeholder Question/Comment: An “off ramp” needs to be included in (5) so that employers won’t have to pay employees for 18 months in cases where their blood lead remains elevated even despite absence from the workplace (meaning that the elevated lead levels are a result of a hobby, or some other non-occupational exposure). Employers shouldn’t be paying employees medical benefits unless their lead levels were elevated by occupational exposure.

Stakeholder Response: It is extremely difficult to parse out where someone may have been exposed to lead, and how much blood lead results from occupational exposure as opposed to a hobby like fishing or reloading ammunition. This would have to include the professional medical opinion of a doctor, and there would need to be appeal rights for employees to challenge such a determination.

DOSH Response: So, to be clear, you’re asking for a provision in the rule that would permit an employer to terminate the employment of a worker due to their prolonged

elevated lead exposure? This would be problematic, but we will review this section to see if we can better ensure that employers aren't unfairly burdened by exposures beyond their control.

Ideally, a worker whose blood lead does not fall to the return to work levels or below within 18 months would be put into another position where they aren't exposed to lead, although we understand this isn't always feasible.

Stakeholder Question/Comment: The draft requires medical removal at levels below what employees would be eligible to file a workers comp claim.

Stakeholder Response: Exposure isn't a medical condition, and therefore wouldn't in itself make a worker eligible for workers compensation. In Washington, there must be either a diagnosable occupational disease or a sudden injury evidenced by specific symptoms.

WAC 296-857-60080, Medical removal requirements

Stakeholder Question/Comment: Again, (4) states "monthly" testing, whereas we don't want to limit employers from more frequent testing.

Stakeholder Response: In cases where a worker is undergoing chelation, blood lead levels can drop and then rebound again, so some span of time between tests might be reasonable.

Stakeholder Response: Yes, but there are very few cases where chelation is used, and in those cases we're talking about much higher blood lead levels than necessary for medical removal under the draft, and further this would fall under the medical exam provisions of the rule, which require physician sign-off.

WAC 296-857-60090, Medical records

Stakeholder Question/Comment: (1)(g) and (1)(d) would require employers to include one worker's private medical information in another worker's medical file, which would likely be a violation of applicable medical privacy laws.

DOSH Response: The intent is that the employer understands and documents exposure for each worker, but we can review the language to ensure no private medical information is used inappropriately.

Stakeholder Question/Comment: Under (1)(d), the use of “LHCP” should be reviewed in light of our previous discussion. It should be consistent with OSHA’s rule, which requires a medical physician or a licensed healthcare professional under their supervision.

Stakeholder Question/Comment: (1)(i) should require only pertinent sections of rule or references to those rules, not entire rule.

Stakeholder Question/Comment: Currently under OSHA requirements, employers are required to keep medical records for 30 years. Has L&I/DOSH conducted any evaluation whether employers are actually doing this? The feasibility is suspect, which is another reason why reporting requirements in this draft would be a good idea, as we can ensure records are kept for the required timeframe.

Stakeholder Question/Comment: What about the transfer of medical records from one employer to another?

DOSH Response: DOSH has a broadly encompassing medical records rule covering the transfer of medical records, so it is not necessary to add a section in each rule.

Stakeholder Response: This medical record rule should be referenced in the note at the top of page 40.

WAC 296-857-700 Definitions

Stakeholder Question/Comment: “Exposure” is included twice.

Stakeholder Question/Comment: Definitions should be alphabetical, and we prefer them to be numbered.

Stakeholder Question/Comment: This would a good place to define what a medical professional is under this rule.

Stakeholder Question/Comment: As we talked about last time, more emphasis on hand-to-mouth exposures needs to be included in the rule, including within the definition of “Exposure Controls.”

WAC 296-857-800 Medical Protocols

DOSH Comment: This section was intended to be a non-mandatory appendix.

Stakeholder Response: There should be a note at the beginning explaining that this section is not mandatory, or it should be moved to the back with other non-mandatory/informational sections.

Stakeholder Question/Comment: Is this an attempt to create best practices?

DOSH Response: We are trying to include information for physicians who may not be familiar with occupational medicine.

Stakeholder Question/Comment: It would appear that some of this should be mandatory.

DOSH Response: Much of what is included in this section provides information related to requirements that exist elsewhere in the rule.

Stakeholder Question/Comment: Under “Information for Physicians” the term “significant material impairment” is used, while simply “material impairment” is used elsewhere. For consistency sake, and to avoid a debate over a subjective term like “significant” this should be changed. This is also consistent with OSHA language/requirements.