07/24/2019 – Lead Rulemaking Stakeholder Meeting

Washington State Department of Labor & Industries
12806 Gateway Drive South
Tukwila, WA 98168

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

Northwest Laborers Training
Tacoma Power
Nucor Steel Seattle
Battery Council International
BP Cherry Point
Adult Blood Lead Epidemiology and Surveillance (ABLES)
Phillips Burgess Law – Government Relations
Partner Industrial
Proano Associates, Inc.
Seattle Parks & Recreation
Building Industry Association of Washington (BIAW)
National Rifle Association (NRA)
Tacoma Water
Association of Washington Business (AWB)

An overview of the latest draft lead rule, including key changes from the existing rule and previous drafts, was provided at the June 28th meeting. Today's meeting begins a section-by-section review of the draft. Stakeholder comments have been summarized below.

WAC 296-857-100, Scope, General Information & Application

WAC 296-857-10010, Scope

Stakeholder comment: Regarding the first note on page 1, there is no explanation of how the minimum threshold numbers have been chosen, and these small amounts of lead would be impossible for many employers to determine without a $20-30,000 XRF (x-ray fluorescence) gun.

Stakeholder comment : We haven't seen any scientific justification or peer reviewed research supporting a correlation between dermal contact and uptake of lead in the body. OSHA case

law has determined that DOSH is required to show that a workplace is unsafe before regulating it.

> **DOSH response:** The current rule regulates all lead in the workplace, but in practice lead levels below these thresholds don't represent a significant risk of harmful exposure. We're trying to make it clear when employers should be concerned with addressing lead in the workplace.
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> **Stakeholder response:** But the current rule doesn't impose obligations for employers to actually do anything until lead meets or exceeds Action Levels.
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> **DOSH response:** No, there are requirements in the existing rule for employers to perform basic housekeeping tasks even at these minimal levels currently.
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> **Stakeholder response:** 1ppm for molten metal and 50 ppm for hot work would include every piece of steel or aluminum in the state and bring any plumber or smelter worker under the rule. "Lead free" solder, for example, contains 2000 ppm lead. So the federal government is certifying a material as being lead free but Washington says that it's harmful and requires regulation, creating a contradiction that would be confusing and unfair for businesses.

Stakeholder comment: As a representative of a major steel supplier in the state, I can tell you that we currently separate out any steel containing 200 ppm or more. We test samples well beyond what we're required to currently and it would be nearly impossible to ensure that steel contains only 1ppm. If the steel industry can't feasibly do it, no industry can.

> **Stakeholder response:** This note simply says that if you're working with materials containing these minimal thresholds of lead then you're covered by the rule. If you're already following a lead safety program that complies with existing standards, the new rule as drafted wouldn't significantly change what you're already doing.
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> **DOSH response:** It is not DOSH's intent for anyone using any steel in the state to fall under the provisions of the rule. We'll review this to determine what changes, if any, should be made. We may pare down the bulleted list to one or two key measurements.

Stakeholder comment: This rule will bring nearly every employer in the state into the lead program. If the intent is to create a lead testing industry in Washington, then this draft will accomplish that. DOSH better be ready to address the tremendous financial burden on employers in its economic analysis.

Stakeholder comment: Because the bibliography only supports a correlation between airborne lead and blood lead, the Action Level should be limited to an airborne lead threshold.

Stakeholder: The note references structures built before 1978, but doesn't exempt structures built after 1978. Why is this?

> **DOSH response:** Structures built before 1978 are included under "suspect coatings" because of the widespread use of leaded paint up to this time. However, just because a structure was built after 1978 doesn't mean that decorative paints containing lead, or even older leaded paints, weren't used. There would still be a potential for lead exposure, so we wouldn't automatically exempt work performed on more recent buildings.
>
> **Stakeholder response:** Related to this, on page 10, section (1)(a)(2) would require a lab analysis simply when a structure built prior to 1978 is present, even if no work is being performed on or in it.
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> **DOSH response:** We will review and make sure that the requirement is limited to situations in which lead is being disturbed.

WAC 296-857-10015, Definitions

Stakeholder comment: "Action Levels" are defined twice; once in the definitions section and again in tables 3, 4, and 5. It would make it easier to understand if it was defined just once and then referred back to throughout the rest of the rule.

Stakeholder comment: There are a few words not defined here for which there should be definitions. "Lead work," "lead related tasks," and "manipulates" come to mind but there are probably others as well.

Stakeholder comment: The phrase "make sure" also appears throughout the rule. This is confusing. Is an employer required to "make sure" that employees wash their hands, or are workers required to wash their hands? Would an employer be cited if they hired someone to make sure workers followed the rules but they didn't? I would recommend simply stating what is required. "Employers must require workers to wash hands," would be sufficient.

WAC 296-857-10020, Rule Structure

Stakeholder comment: It's good that there is a plain language explanation of the rule, but this should be in a note or appendix, not the codified section of the rule, to best ensure that there is only one operative section outlining what the various rule classifications are (Basic, Action, PEL, and SPEL).

Stakeholder comment: Table 1 is useful, but it only serves to highlight how unnecessary it is to reorganize the rule and essentially recreate the wheel. Most of these changes could have been shoe-horned into the existing rule, but instead you're asking every employer in the state to abandon a well understood rule and start from scratch.

> **DOSH response:** If we reorganized the rule to more closely match the existing rule would that be better? Previous stakeholder comments indicated that the existing rule structure was confusing and that employers would benefit from a more logical progression of the rule and its requirements. We have made a sincere attempt to do that here.
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> **Stakeholder response:** No, it's the abandonment of a 40 year-old rule that everyone understands that's the problem. If DOSH simply changed the PEL and perhaps a few other numbers I'd support the effort. Of course, we could argue about appropriate numbers but this current approach is going to make it very hard for employers to comply.

Stakeholder comment: Combining construction rules and general industry rules makes it overly confusing. These should remain separated as they are in the current rule.

Stakeholder comment: The note at the top of page 5 states that "small residual quantities of lead can remain and generate significant exposures" even from metals that have had lead coatings removed when welding or torch cutting. What is the basis for this statement?

> **DOSH response:** DOSH inspection data has shown that in many cases employers have thought that lead coatings were adequately removed but they weren't and workers were exposed to significant amounts of lead, as high as the PEL in some cases.
>
> **Stakeholder response:** It would be instructive if DOSH could provide this data.

WAC 296-857-10022, Following compliance protocols—Application

No comments

WAC 296-857-10030, Assessment Criteria—Application

Stakeholder comment: Table 2, under the Return to Work Level, states "2 consecutive monthly tests at least 14 days apart." This is confusing, is the interval monthly or 14 days?

> **DOSH response:** To clarify we will strike the word "monthly."

Stakeholder comment: Why is TWA_{8e} instead of TWA like the current and OSHA rules?

DOSH response: This provides a dose reading vs. the actual exposure, which we felt would be easier to use, but you ultimately end up with the same number mathematically.

Stakeholder comment: Well, if it's mathematically the same we'd suggest that DOSH use the same equation as OSHA and the other 49 states so that employers, especially those that work across state lines, won't be confused in Washington. Even if TWA_{8e} may offer benefits it would probably be better as an OSHA change when they decided to take on lead rule updates.

Stakeholder comment: Regarding (3)(b), surface sampling as a quantifiable measurement for determining rule triggers and employer obligations is problematic. Two different people performing wipe sampling would likely get varying results depending on the pressure applied, time taken and other factors.

Surface sampling is also problematic because of the previously mentioned lack of data showing a correlation between surface lead dust and uptake in the body. Wouldn't any lead dust be the result of previous airborne lead, and if so, couldn't DOSH just use the airborne Action Level?

DOSH response: There could be cases where lead dusts exists in a work area due to prior activities, representing potential harm for workers who may not be exposed to airborne lead.

Stakeholder response: The City of Seattle often inherits older buildings that contain lead dust and workers can become exposed in this way even without airborne exposure.

Stakeholder comment: In Table 5, again, we don't see documentation supporting the idea that these levels represent an unsafe workplace.

WAC 296-857-10040, Multi-employer worksites - Application

Stakeholder comment: Your Key Changes document [available at https://www.lni.wa.gov/safety-health/safety-topics/search-by-topic?index=Safety_Topics&query=lead] states that this section is an attempt to codify case law. If this is covered by law, then you don't need to include it in the rule. Further, this would create an untenable dissonance in the event that the law is challenged and some other new precedent is set.

Stakeholder comment: What statutory authority does DOSH have to add this? The law may not apply in this case.

DOSH response: We'll review this matter with our Attorney General's office to determine the most appropriate course of action.

Stakeholder comment: A building owner should be able to rely on the expertise of a lead abatement contractor and not be liable if they fail to perform their job adequately. This is why outside contractors are hired.

> **DOSH response:** Our primary concern is building owners who are aware of lead hazards but deliberately or negligently fail to disclose this to contractors or others working in the building. We will review the language in this section to ensure that the rule holds these bad actors accountable without inadvertently punishing others operating by the rules and acting in good faith.

Stakeholder comment: After (2)(b) there needs to be a (c) to clarify that an exposure generator may exclude other workers from a lead area.

Stakeholder comment: Under (3), what does "impacted employer" mean?

> **DOSH response:** This refers to the employer of an exposed worker.

Stakeholder comment: As a general statement, there needs to be a clear statement somewhere in the rule defining what a temporary lead work zone is. For example, if a forklift breaks down in a warehouse and requires soldering, could the immediate area be cordoned off, and how long would rule provisions apply in this area?

WAC 296-857-10050, Determining work is not covered by this rule

Stakeholder comment: The survey requirement under (1) should only apply when the presence of lead is likely. Otherwise, it should be assumed that this rule would not apply.

Stakeholder comment: The one day turnaround time required for employers to provide information on lead content under (1)(b) is likely unfeasible for many employers. Three days would be more feasible, with the possibility that additional time may be permitted if translation into another language is required.

Stakeholder comment: How would an employer determine "no hazard of inhalation" under (2)?

> **DOSH response:** (2)(b) provides criteria for making this determination. We may be able reword this, make (2)(b) more prominent, or combine these subsections for clarity.

WAC 296-857-10060, Implementation Schedule—General

Stakeholder comment: Given all the additional obligations this rule would impose on employers, DOSH should consider at least three years to phase this rule in, and up to five years for expensive engineering controls.

> **DOSH response:** We do plan some sort of phase-in of requirements when the rule is adopted. We'd likely required blood lead testing first, then PEL requirements including engineering controls at a later date.
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> **Stakeholder response:** Workers in compliance with the existing rule, who for example may have a BLL of 49 µg/dL, should be allowed to continue working as the new rule is phased in to give them the opportunity for their blood lead to decline naturally. Otherwise, this would be a significant financial burden on the employer.

WAC 296-857-200, Employer Requirements for Assessing, Classifying, and Monitoring Exposures

WAC 296-857-20010, —Determining which Rule Classification Applies

Stakeholder comment: Section 10020(2) and this section (20010) both create an obligation for employers, which could lead to multiple citeables for the same thing.

Stakeholder comment: (3)(c)(i) requires employers to review work practices and how rules are applied each time air and blood lead testing is conducted. For larger employers this could be multiple times a week. A more appropriate trigger would be "if test results show elevated lead levels."

Stakeholder comment: It should be made more explicit that employers who have followed 10050 and have found no lead exposure do not need to continue on to this section. Section 10010 or 10020 should reference this section as well.

> **DOSH response:** 10020(2) explicitly references this section. We will review the language.

WAC 296-857-20020, Pre-work classification of worker exposure - Application

Stakeholder comment: (2) contains an unnecessary "of" after the first comma.

Stakeholder comment: How does (2) coincide with the "off ramp"? If employers have already done an assessment under 10050 as required and determined the rule doesn't apply, would that assessment suffice, or does this mean that the employer would have to perform yet another assessment?

> **DOSH response:** This section is intended to require employers to perform an assessment when some new task with potential lead exposure is about to be done. We will review how best to word section 10050 and this section to ensure that we're not creating duplicative requirements for employers.

WAC 296-857-20030, Classifying exposure at the start of work – Basic Rules

Stakeholder comment: (1) is duplicative, it creates the same obligation for employers as 10050 and 20020(2).

Stakeholder comment: Here DOSH has redefined the various rule levels yet again, which is unnecessary, and could lead to issues down the road when one section gets updates but another doesn't. It would be best to define these rule levels once and refer back throughout the rule.

> **Stakeholder response:** It seems that during previous stakeholder meetings many of the same people now criticizing the additional, explicit detail in the rule were asking for more specific direction and explicit detail.

WAC 296-857-20040, Monitoring of worker exposure over time – Action Rules

No comments

WAC 296-857-20050, Monitoring of worker exposure over time – PEL and SPEL Rules

No comments

WAC 296-857-20060, Notifying workers of exposure monitoring results - General

Stakeholder comment: (2)(a) and (b) imply that even employers who are completely in compliance with the SPEL rule should have an implementation schedule to reduce levels to the PEL.

DOSH response: We could strike the implementation schedule language in (2)(a).

WAC 296-857-20070, Exposure Records - General

Stakeholder comment: (1) contains "make sure." As previously commented, this should be, "the employer must…"

Stakeholder comment: (1)(a)(i) and (ii) should both include the "and/or job duties…"

DOSH response: The intent is that the employer could use a position for the record, which could potentially include multiple workers. We will review the language to determine if clarifying changes are necessary.

Stakeholder comment: (e) requires documentation of environmental variables. What if the process, including, temperature, etc. is always the exact same?

DOSH response: Then the record could simply indicate no change in variables.

Stakeholder comment: (2) and (3) should be combined.

WAC 296-857-300, Employer Requirements for Blood Lead Monitoring, Medical Removal, and Medical Records

WAC 296-857-30010, Monitoring Worker Blood Lead Levels – Basic Rules – Availability of Blood Lead Testing for Workers

Stakeholder comment: (1) as written applies to all workers. This needs to stipulate that it only applies to workers doing lead work as defined by the minimum thresholds.

Stakeholder comment: (3) creates multiple citeables (see the medical removal section).

WAC 296-857-30020, Monitoring Worker Blood Lead Levels – Action, PEL, SPEL Rules – Monitoring Program

Stakeholder comment: (1)(a)(i) has defined the Action Level yet a third way. Just define it once and refer back to it.

Stakeholder comment: Under (1)(a)(ii), what is the point of a TWA if any task over 30 minutes constitutes a day?

> **DOSH response:** The purpose of this is to ensure workers receive blood lead monitoring when they do isolated high exposure tasks and the employer has not done a full shift assessment of their exposure.

Stakeholder comment: (1)(b) should stipulate "lead work" not just any work.

Stakeholder comment: (1) and (2) should be switched. Initial blood lead monitoring would come chronologically before ongoing monitoring.

Stakeholder comment: (4) should be 5 "working days" not just 5 days.

Stakeholder comment: (5) should clarify that providing a worker with the health information in the appendices of this rule would suffice.

Stakeholder comment: Shouldn't the medical provider be responsible for this [(5)]?

> **DOSH response:** DOSH intends to produce a handout that could be used to fulfill this obligation.

Stakeholder comment: Under (7), it should say that follow up testing is required to be made available but we can't force workers to undergo blood testing.

Stakeholder comment: OSHA acknowledges that it cannot force workers to undergo blood testing.

> **DOSH response:** Yes, but employers can exclude workers from lead work.

Stakeholder comment: The rule should explicitly state that employers can make compliance with blood testing a condition for employment. The cholinesterase rule has a provision like this.

> **DOSH response:** (7)(d) should replace "monthly" with "for the duration of medical removal."

Stakeholder comment: Employers must have a way to avoid paying workers who are self-exposing through hobbies for 18 months.

Stakeholder comment: (8) essentially duplicates the ABLES program, and equates acceptable BLLs (10 µg/dL) with loss of an eye or amputation, which seems extreme. Also, the reporting requirements should be quarterly; within 24 hours would be onerous.

Stakeholder comment: (9)(b) and (d) conflict with one another.

> **DOSH response:** The intent is that the employer would either have to retest or medically remove a worker meeting the criteria within 14 days. We will review the language.