08/02/2019 – 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):

Washington Retail Association
Building Industry Association of Washington (BIAW)
National Rifle Association (NRA)
Northwest Laborers Training
Battery Council International
Associated General Contractors of Washington (AGC)
Tacoma Power
King County
City of Tacoma
University of Washington (UW)

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. DOSH began a section-by-section review of the draft with stakeholders at a meeting on July 24th. Today's meeting began with section 296-857-30030 of the draft rule (page 20). Stakeholder comments have been summarized below.

WAC 296-857-30030, Selecting a medical physician—General

Stakeholder comment: Section (1)(a) contains a typo. "Of" should be "or".

Stakeholder comment: So this means that employers dictate which doctors employees can use?

> **DOSH response:** Yes, the employer would generally contract with a particular doctor or medical facility to perform examinations and consultations. The workers would also have a right to choose another doctor for a second opinion, and there are provisions for arbitration if there is still disagreement after that point.

Stakeholder comment: Who has the burden of ensuring that the doctor follows correct protocol?

DOSH response: The employer is responsible for hiring a qualified doctor, which generally just means that the doctor is licensed. If providing a review of a second opinion for the purpose of arbitrating a disagreement between the first two doctors, the physician would also have to be board certified in occupational medicine or toxicology.

Stakeholder comment: Could DOSH assist employers by providing a list of acceptable medical providers?

DOSH response: DOSH does not plan to create a specific provider network to perform these evaluations. As previously mentioned, any physician licensed to practice medicine in Washington would be qualified under the rule, with board certification being a requirement for doctors reviewing a disagreement between two previous doctors.

Stakeholder comment: How can a small employer feasibly "make sure" that physicians follow protocol?

DOSH response: The intent here is that employers hire doctors specifically to perform lead evaluations, and as long as this is the case they've done their due diligence. If, however, an employer failed to instruct the doctor to evaluate a patient for lead specifically, or to advise the doctor that the worker works with lead, they wouldn't be in compliance with the rule.

Stakeholder comment: What is the logic behind the progressive increase in credentials?

DOSH response: Only the third doctor, reviewing a disagreement between the first doctor and the doctor who performed a second opinion would require additional credentials, and this is so that we can ensure the matter is resolved by a more specialized subject matter expert.

Stakeholder comment: The wording should be changed to make it clear that the employer is the one who is required to select a physician, for example (1) should say, "the employer must select a medical physician" rather than "select a medical physician. Also, "make sure" isn't clear. In (3) it should say, "The employer must provide the physician with…" rather than "make sure…"

DOSH response: The rule, as all WISHA rules, is directed towards employers, but we can certainly look at wording more clearly, using "plain talk" and reviewing to ensure that we're being consistent throughout.

Stakeholder comment: And the employer pays for all of these examinations, including the second opinion and final arbiter?

DOSH response: Yes. This is consistent with the existing rules not only for lead but other occupational safety and health rules as well.

Stakeholder comment: (3)(d) is not clear.

DOSH response: Would it be more clear if we said, "…PPE 'used by' each worker being evaluated…"?

Stakeholder response: Yes.

Stakeholder comment: (3)(f)(iv) redefines the levels that are defined at the beginning of the rule. It would be preferable to define these levels once, and then refer back to them throughout the rule.

WAC 296-857-30040, Workers may request a second opinion—General

Stakeholder comment: Under (6)(c), why can the third doctor's opinion be disregarded?

DOSH response: This is a provision that is consistent with existing rules. If the worker and employer agree on either of the previous doctor's opinions then they should have the right to abide whatever recommendations are provided under that opinion.

Stakeholder comment: The rule should require employers to explicitly notify workers that under (2)(e) workers have to pay for a second opinion if they fail to request one within 15 days. Perhaps this should be included in the training section.

Stakeholder comment: DOSH should also provide a form for workers to use to request a second opinion.

DOSH response: We will consider providing a sample form, although workers should be able to submit a request with the required information in whatever manner suits them.

Stakeholder comment: Under (4), should "consistent" instead be "the same"? "Consistent" is ambiguous.

DOSH response: The rationale here is that two doctors might provide substantively equivalent analyses, but state their assessments somewhat differently. "The same" could be taken to mean "identical" which would be too restrictive. We could possibly consider "medically consistent" or something along those lines.

Stakeholder comment: Can you quantify the acceptable degree of variation in blood lead tests then?

DOSH response: This section is referring to medical evaluations, which are not the same thing as a blood lead test. Medical evaluations are used to determine medical removal and return to work when there are specific health concerns with a particular worker, whereas blood lead tests provide employers and workers with specific thresholds

determining when rule provisions do or do not apply. And incidentally**,** blood lead tests are generally accurate within about 1-2 µg/dL.

Stakeholder comment: How many doctors in the state are qualified to conduct these examinations?

DOSH response: We do not have hard numbers but this type of medical evaluation is broadly available.

Stakeholder comment: Under (5), who is being required to "work with the worker"?

DOSH response: The employer. As previously mentioned, these rules are directed toward employers, but we will review our wording for clarity and ease of understanding.

Stakeholder comment: Does an employer have a right under this rule to a third opinion?

DOSH response: No.

Stakeholder response: Then you should make that more clear.

Stakeholder comment: Under (6), the word "may" isn't firm enough. If an employer disagrees with a second opinion and wants to pursue arbitration from a third doctor they "must" perform these actions.

Stakeholder comment: Under (6)(b), who is involved in the discussion?

DOSH response: The employer and worker.

WAC 296-857-30050, Medical removal requirements – Action, PEL, SPEL Rules

Stakeholder comment: (1)(b) and (c) assumes that the lead exposure is occupational. If air monitoring and surface sampling indicate that there isn't an elevated exposure, it isn't fair to require employers to pay workers to sit at home for up to 8 months. The worker could've been sucking on fishing sinkers for all we know.

DOSH response: One possibility would be to allow employers to exclude workers based on pre-employment blood lead tests.

Stakeholder response: That wouldn't help if the worker took up a lead-related hobby after initially being hired.

DOSH response: This is why the medical evaluation is critical. It is a doctor's responsibility to determine whether the exposure is work-related or not, and they are

responsible for asking relevant questions to make this determination. This is consistent with existing lead rules as well as other occupational safety and health rules.

Stakeholder comment: Does the doctor determine a percentage of liability the way one does in the case of a workers comp claim?

DOSH response: No. The levels necessary for lead exposure to lead to a compensable workers comp claim would be much higher than the levels set forth in this rule. The doctor's determination in this case would be unrelated to any workers comp claim.

Stakeholder comment: Regarding determining occupational vs. recreational exposure, I can say as someone who has studied this for years that I cannot recall a single case where a worker was medically removed because of elevated blood lead and then sustained these elevated blood leads months later after occupational removal. The levels always decline after removal regardless of hobbies. The fact is that these recreational exposures, although a legitimate concern, are negligible compared to occupational exposures. Additionally, doctors work to educate the workers who are removed, which increases the likelihood that they will take proactive measures to protect themselves on their own.

Stakeholder comment: Under (1)(a), what if a worker has a condition that will never improve?

DOSH response: We expect the condition to be reversible (i.e., pregnancy). Employers can also offer workers other positions to minimize exposure if available.

Stakeholder comment: There is a mismatch between (1)(c) and (3). The employer "must" retest when worker blood levels are 20 µg/dL throughout most of the rule, but (3) says that employers "may" retest.

DOSH response: We will review and make necessary corrections.

Stakeholder response: It would also be helpful if this information could be put in a chart.

Stakeholder comment: Would removing a renovation and remodeling worker from a pre-1978 house be sufficient to satisfy the requirements to remove a worker from lead exposure?

DOSH response: Generally, yes, assuming the worksite has been evaluated and there are no other potential exposures.

Stakeholder comment: Under (2), who "follow[s] any protective measures"?

DOSH response: As previously discussed, the rules are requirements for employers. We will review for clarity and consistency.

Stakeholder comment: Under (2)(a) it should stipulate that the two consecutive tests are held at least two weeks apart.

Stakeholder comment: (4)(b) uses the terms “lead work” and “lead-related” – these should either be defined, or pick one term and use it consistently.

Stakeholder comment: In the note at the top of page 23, are the two bullet points only pertaining to employees who have a collective bargaining agreement?

> **DOSH response:** No, this note is just providing employers with additional information about acceptable options for medical removal and notifying employers that they may adhere to the terms of a collective bargaining agreement to ensure a worker’s position is secured.

Stakeholder comment: The note in the middle of page 23 uses the term “long term” but “multi-test” should be used for consistency.

Stakeholder comment: The same note references 10 µg/dL as the return to work threshold but it should be 15 µg/dL.

Stakeholder comment: The note on the bottom of page 23 should state that employers have the right to terminate a worker who refuses blood lead testing.

WAC 296-857-30060, Medical removal benefits—General

Stakeholder comment: The “off-ramp” for employers should be clarified here in this section.

Stakeholder comment: (3) redefines levels that have previously been defined in the rule. Again, it would be better to define them once and then refer to them throughout the rest of the rule.

Stakeholder comment: Under (5)(a), why would medical removal benefits continue in the case of a temporary project?

> **DOSH response:** In the case of temporary projects, the intent is that employers wouldn’t terminate the project and/or employment simply to avoid paying benefits. A worker who has been medically removed from work on a temporary project, the intent of the rule is to stipulate that benefits continue until the project has been completed.

Stakeholder comment: Is this consistent with workers comp provisions?

> **DOSH response:** As was discussed before, this rule and workers comp are two separate things entirely. The intent of an occupational safety and health rule such as this is to prevent exposure, while a workers comp claim would occur after a worker has been exposed and has health symptoms resulting from elevated blood lead levels. In most cases for a worker to be symptomatic their blood lead levels would have to far exceed the thresholds in this rule.

Stakeholder comment: It seems that in this section L&I is dictating hiring practices for employers, which isn't any of their business. The rule assumes that employers aren't trying to comply with their responsibilities, when in fact it's harder to get around the rule than simply following the rule.

Stakeholder comment: (4) is essentially the same as 296-857-30050 (4)(a). This should only be in one section or the other, and referred back to if necessary.

Stakeholder comment: Is medical removal reported to DOSH?

> **DOSH response:** No, but worker blood lead levels of 10µg/dL or higher are under this draft.
>
> **Stakeholder response:** DOSH should track the number of workers on medical removal to determine how many workers are abusing the system.

Stakeholder comment: Aren't there already reporting requirements for blood leads, making the requirements in this rule duplicative?

> **DOSH response:** Labs are required to report blood lead results to the Department of Health (DOH). DOH transfers this information for adults to the Adult Blood Lead Epidemiology and Surveillance (ABLES) program in the L&I SHARP program. This information isn't reported to DOSH directly, although ABLES will refer cases to DOSH when their investigation has determined that the source of exposure was occupational. Further, no employer information is reported under current law, making it difficult to help employers correct problems and improve worker health and safety.

Stakeholder comment: (7) duplicates note from pages 23-24.

> **DOSH response:** We will review and likely remove the note.

Stakeholder comment: Under (7), does this absolve an employer from their responsibility to provide medical removal benefits if a workers comp claim is filed?

> **DOSH response:** No, however, an employer is required to maintain benefits but can reduce these payments by any amount of time loss payments a worker receives as part of a workers comp claim. This doesn't differ from the current rule.

Stakeholder comment: Under (9)(c) it appears to increase an employer's responsibility to provide medical removal benefits beyond the maximum 18 months?

> **DOSH response:** This section essentially just says that a final medical determination is required to end benefits. So, if an employer wants to ensure that they don't go over the 18 months they need to make sure that the worker sees a doctor for a final medical determination.

Stakeholder comment: There should be a provision that if a worker refuses to see a doctor for a final determination then their benefits stop. Otherwise, a worker could just delay the process and receive payments indefinitely.

DOSH response: This is consistent with the current rule.

Stakeholder response: I disagree. While the language in this section may be similar, the overall effect is different due to the drastically changed structure and requirements of the rule.

Stakeholder comment: This whole rule rewrite isn't really based on addressing an actual problem. Why is DOSH doing this?

DOSH response: As the blood lead levels of the general population have declined from an average of around 20 µg/dL in the 70s, when we were using leaded gas and paint, to below 2 µg/dL today, the research shows that there is no safe level of lead in the body and we're seeing adverse effects even at lower levels, 5 µg/dL or so. Workers in certain industries have consistently been referred from the ABLES program with levels of 25 µg/dL and higher.

There was a highly publicized case a few years ago at a gun range with a deficient HVAC system where several workers had to be removed due to levels that exceed the current rule, which allows for blood lead levels up to 50 µg/dL.

WAC 296-857-30070, Medical records—General

Stakeholder comment: (1)(g) should specify worker complaints from the worker being evaluated, not just any random complaints.

Stakeholder comment: Should employers document verbal comments from workers?

DOSH response: Yes, if it is the basis for the examination.

Stakeholder comment: Should the employer or the doctor maintain these records?

DOSH response: Ultimately, it's the responsibility of the employer to ensure the records are maintained but they can contract with a doctor or medical facility to do this for them. This is consistent with the existing rule. See the note in the middle of the page.

Stakeholder comment: Regarding the note, it doesn't make sense that employers aren't allowed to access their own records without a worker's permission.

DOSH response: We need to review this and ensure that we're complying with the existing medical records rule. It might make sense to simply add a reference here.

Although it should be noted that under the medical records rule not just anyone, even the at the employer's place of business, can access sensitive medical records.

WAC 296-857-400, Employer Requirements for Lead Exposure Control, Work Practices, and Protective Equipment

WAC 296-857-40010, Cleaning practices—Basic Rules

Stakeholder comment: Because this rule now has triggers based on surface lead and material content this would require all employers to purchase HEPA vacuums.

Stakeholder comment: (2) is inconsistent with the housekeeping provisions under 50010, the retail safe harbor section, stating

> **DOSH response:** Yes, in many respects the safe harbor provisions are intended to go above and beyond what is otherwise required under the rule. It's a trade-off; to qualify for the safe harbor no dry sweeping would be allowed.
>
> **Stakeholder response:** Well then perhaps stronger language than "may not" should be used in 50010. "Dry sweeping is prohibited" would be clearer.

Stakeholder comment: Under (1), why specify methods? At least you could add an "e" to include something along the lines of "and other effective methods of capture."

Stakeholder comment: Why does (3) say "may be used"?

> **DOSH response:** This is one method for employers to demonstrate effectiveness but it is not the only method, and is not intended to be a requirement.

Stakeholder comment: Four-sample surface sampling is not effective for a variety of reasons, and can vary greatly depending on who is performing the sampling and how they are doing it. Even the degree of pressure used can change the results.

WAC 296-857-41010, Training – Basic Rules – Awareness training

Stakeholder comment: Is there really a difference between (1) and (4)? These should at least be combined.

Stakeholder comment: Under (2), why make employers provide access to the rule when these days everyone has a cell phone with internet access?

> **DOSH response:** We can review. It might be sufficient to simply advise workers that the information is available and where to access it.

Stakeholder comment: Are these training requirements a one-time thing upon initial hire, annual, or otherwise?

> **DOSH response:** Under the Basic rules this would be required once upon initial hire or prior to exposure if only intermittent lead work is performed.
>
> **Stakeholder comment:** Please make this clearer in the rule language then.

Stakeholder comment: No dates or duration are stipulated for the poster.

> **DOSH response:** The intent is that the poster would be displayed permanently in lead-work areas but we can review and consider more explicit language.

Stakeholder comment: As a fundamental equity issue, the training needs to be provided to workers in the language they're most comfortable with. Simply providing training materials in English won't be sufficient.

> **DOSH response:** As a policy, L&I provides all publications in the top 5 languages used in Washington. This would be the case with the poster, and we will review to ensure that other languages are adequately accommodated.

Stakeholder comment: Under the Basic Rules there should be training requirements related to understanding and awareness of take-home lead exposures and potential harm to families, especially children.

WAC 296-857-42010, Hygiene—Basic and Action Rules – Hand and face washing.

Stakeholder comment: Under (3), "near or next to" is too vague. Be more specific.

Stakeholder comment: At a construction site where there is no running water, are wipes acceptable?

> **DOSH response:** There is a general requirement to provide handwashing facilities. We'll have to review and ensure that this rule is consistent. We will consider proximity and possible alternatives.

Stakeholder comment: (1) and (3) should be combined.

Stakeholder comment: Under (2) and (6), who "provides" these various things?

DOSH response: The employer.