



# Is OSHA's New Silica Rule Dust in the Wind? Likely Not. Court Rejects Several Challenges to the New Standard

Insights

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Nearly 2.3 million people in the United States work in jobs that expose them to silica. The Occupational Safety & Health Administration (OSHA) claims that more than 100,000 of those workers are engaged in “high risk jobs such as abrasive blasting, foundry work, stonecutting, rock drilling, quarry work and tunneling.”

In March of 2016, OSHA published the Occupational Exposure to Respirable Crystalline Silica Rule, placing limits on employees’ workplace exposure to silica. OSHA claimed that the previous permissible exposure limits (PELs) were outdated, inconsistent, and failed to adequately protect worker health.

The new Rule limits worker exposure to an average of 50 micrograms of respirable crystalline silica per cubic meter of air ( $\mu\text{g}/\text{m}^3$ ) in an eight hour workday. For general industry, this level represents a 50% decrease in the PEL. For the construction industry and shipyards, the Rule decreases the PEL by 80%.

## Recent Court Decision on the Silica Rule

After significant comment and speculation about the Rule’s legality, on December 22, 2017, a three judge panel of the United States Court of Appeals for the District of Columbia upheld OSHA’s Rule. In *North America’s Building Trades Unions v. Occupational Safety & Health Administration, et al.*, the Court rejected various challenges to the Rule’s validity and reiterated the deferential standard afforded to OSHA in the rulemaking process. In short, OSHA does not have to support its decisions with the “best” or “newest” evidence. As long as OSHA supports its reasoning with “substantial evidence,” the Court will not “choose a particular side as the ‘right one’ in a scientific dispute.”

Generally, when issuing a health standard, OSHA must establish:

- The hazard presents a “significant risk” to employees;
- The new standard will reduce the risk; and
- The new standard is technologically and economically feasible.

In this case, both industry groups and unions challenged the Rule.

Numerous industry groups claimed that OSHA made the Rule “too stringent.” Industry sought review of five issues: (1) whether limiting workers’ exposure to silica to the level set in the Rule reduces a significant risk of material health impairment; (2) whether “substantial evidence” supported OSHA’s finding that the rule was technologically feasible for the foundry, hydraulic fracking, and construction industry; (3) whether “substantial evidence” supported OSHA’s finding that the rule was economically feasible for the foundry, hydraulic fracking, and construction industry (4) whether OSHA failed to follow the proper procedure in promulgating the Rule; (5) whether the provisions regarding wet cleaning and medical examination requirements were infeasible.

Several unions, on the other hand, complained the Rule was not “stringent enough.” The unions sought review of: (1) the requirement that medical surveillance for construction workers be provided only for employees who wear respirators for 30 days for one employer within a one year period; and (2) the absence of medical removal protections.

The Court rejected all of Industry’s challenges, reasoning that each of OSHA’s conclusions was supported by either substantial evidence, a reasonable explanation, or a combination thereof. The Court explained, “[t]o mount a successful attack on OSHA’s feasibility finding, then, challengers must do more than suggest that compliance will be infeasible for some firms or in a few isolated operations.” It also recognized that the OSH Act is a “technology forcing” statute, so OSHA can force industry to develop new technology to meet its standard.

The Court also rejected the unions’ first challenge, but found merit in the challenge to the absence of medical removal protections. Typically, medical removal protection provisions require employers to (1) temporarily remove an employee from exposure when a written medical opinion recommends removal and (2) maintain the employee’s status quo, including earnings, rights, and benefits during the removal period. The Court reasoned that “OSHA failed to adequately explain its decision to omit medical removal protections from the Rule” and remanded it to OSHA for further explanation.

### **What Does the Decision Mean for Employers?**

Generally, unions hail the decision as a victory for worker health and safety. OSHA anticipates that the Rule will provide net benefits of between \$3.8 and \$7.7 billion over the next 60 years.

On the other hand, industry views the decision as an example the difficulty in overturning or challenging federal regulations. The Rule potentially affects 676,000 establishments, and its total annualized cost is over \$1 billion.

Given this recent decision, employers must take the steps necessary to ensure compliance with the Rule to avoid costly citations. We will keep you updated on any further challenges or developments concerning the rule.

## ***Related People***

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