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Lessons Learned from Recent OSHA Lead Inspections

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PRESENTER

- Chair of the Greenberg Traurig OSHA Practice Group
- Previously served as the General Counsel of the Occupational Safety and Health Review Commission
- Focus practice exclusively on workplace safety and health-related issues in a broad range of industries across the country
- Litigation, compliance counseling, inspecting counseling, catastrophic management; due diligence reviews; and whistleblower representation for clients.



The Lead Standard

- 1910.1025(c)(1): The Permissible Exposure level
 - The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 ug/m³) averaged over an 8-hour period.



The Lead Standard

- 1910.1025(c)(2): The Permissible Exposure Level
 - If an employee is exposed to lead for more than 8 hours in any work-day, the permissible exposure limit, as a time weighted average (TWA) for that day, shall be reduced according to the following formula:

Maximum permissible limit (in ug/m³)=400 divided by hours worked in the day.



The Lead Standard

- 1910.1025(e)(1)(i) --Engineering and Work Practice Controls
 - Where any employee is exposed to lead above the permissible exposure limit for more than 30 days per year:
 - An employer shall implement engineering and work practice controls (including administrative controls) to maintain employee exposure to or below the PEL, except to the extent that the employer can demonstrate that such controls are not feasible.
 - If feasible engineering and work practice controls do not reduce employee exposure to or below the PEL, an employer shall mandate the use of respiratory protection.



The Lead Standard

- 1910.1025(e)(5): Administrative Controls
 - When administrative controls are used to reduce employee exposure to or below the PEL, the employer shall establish and implement a job rotation schedule.



The Lead Standard

- 1910.1025(h)(i): Housekeeping
 - All surfaces shall be maintained as free as practicable of accumulations of lead.



OSHA Enforcement – Lessons Learned

- In 2003, OSHA issued serious citation items to a lead battery manufacturer alleging that **in certain parts of the building**:
 - (1) Employees were exposed above the PEL (50 micrograms per cubic meter of air),
 - (2) the manufacturer did not implement all feasible engineering, work practice controls, or administrative controls, and
 - (3) the manufacturer did not maintain surfaces as free as practicable of accumulations of lead.



OSHA Enforcement – Lessons Learned

- The manufacturer agreed to accept the serious citation items as part of an informal settlement agreement with OSHA.
- Problem – The manufacturer accepted the serious citation items without knowing how to abate them.



OSHA Enforcement – Lessons Learned

- The manufacturer filed **fourteen** Petitions for Modification of Abatement date, each time asking for a one-year extension of time to abate the citation items.
- OSHA granted all fourteen petitions.
- OSHA did not do the manufacturer any favors by continuing to grant the Petitions.



OSHA Enforcement – Lessons Learned

- In 2017, OSHA inspected **a different part of the building** and issued **three repeats**, alleging that in that part of the building:
 - (1) Employees were exposed above the PEL (33 micrograms per cubic meter of air),
 - (2) the manufacturer did not implement all feasible engineering, work practice controls, or administrative controls, and
 - (3) the manufacturer did not maintain surfaces as free as practicable of accumulations of lead.
- The manufacturer contested the citation items and hired me to defend the company.
- The manufacturer still had not abated the 2003 citation items.



OSHA Enforcement – Lessons Learned

- **2017 Permissible Exposure Limit Citation Item**
 - I convinced counsel for OSHA that the Agency could not issue a citation for simply exceeding the PEL, as the standard allows exposure to be above the PEL when an employer has reached the “lowest feasible level.”
 - OSHA withdrew the Permissible Exposure Limit Item.



OSHA Enforcement – Lessons Learned

- **2017 Engineering, Work Practice, and Administrative Controls Citation Item**
 - The was tough to defend, as the manufacturer was already under a PMA since 2003 for the same issue, which was the basis for characterizing the new citation items as repeat.
 - I relied on the poor sampling methods utilized by OSHA.
 - I also relied on OSHA's involvement regarding the abatement of the 2003 serious citation items to show that the Agency had prior notice of the 2017 alleged violations and therefore the repeat citation items were time-barred.



OSHA Enforcement – Lessons Learned

- **2017 Engineering, Work Practice, and Administrative Controls Citation Item – Poor Sampling**
 - OSHA sampled employees over a period of one day.
 - The results showed that on the day of sampling, two employees had been exposed above the PEL (33 micrograms per cubic meter of air).
 - OSHA removed the sampling devices during lunch and breaks.
 - OSHA did not sample the employees for the full twelve-hour shift.
 - OSHA did not know if the exposure was the same for thirty days.



OSHA Enforcement – Lessons Learned

- **2017 Engineering, Work Practice, and Administrative Controls Item – Statute of Limitations/Notice**
 - Section 9(c) of the Occupational Safety and Health Act of 1970 states: “No citation may be issued under this section after the expiration of six months following the occurrence of any violation.”
 - OSHA has six months from the date in which the Agency knew or should have known of the violation.



OSHA Enforcement – Lessons Learned

- **2017 Engineering, Work Practice, and Administrative Controls Item – Notice**
 - OSHA had six months from the date in which the Agency knew or should have known that
 - (1) the manufacturer’s employees were exposed to airborne concentrations of lead in excess of the PEL, and
 - (2) the manufacturer had not implemented all feasible engineering, work practice, and administrative controls so that exposure was at the lowest feasible level.



OSHA Enforcement – Lessons Learned

- **2017 Engineering, Work Practice, and Administrative Controls Item – Notice Defense**
 - In February of 2015, OSHA began to investigate the manufacturer's abatement efforts regarding the 2003 serious citation items.
 - OSHA compliance officer sent an email to the manufacturer asking for a copy of all documents related to engineering controls the manufacturer had implemented, or intended to implement, at the building.
 - The manufacturer sent the documents to the OSHA compliance officer, showing the engineering controls being implemented **for the entire building**, including the portion of the building at issue in the 2017 citation items.



OSHA Enforcement – Lessons Learned

- **2017 Engineering, Work Practice, and Administrative Controls Item – Notice Defense**
 - In April of 2015, OSHA's Health Response Team from Salt Lake City, Utah and the OSHA compliance officer performed an on-site inspection **of the entire building**, including the portion of the building at issue in the 2017 citation items.



OSHA Enforcement – Lessons Learned

- **2017 Engineering, Work Practice, and Administrative Controls Item – Defense**
 - In May of 2015, the Health Response Team and the OSHA compliance officer sent written recommendations to the manufacturer regarding engineering and work practice controls **for the entire building**, including the portion of the building at issue in the 2017 citation items.



OSHA Enforcement – Lessons Learned

- **2017 Engineering, Work Practice, and Administrative Controls Item – Defense**
 - In August of 2015, the manufacturer contracted with a company to design a new ventilation system and recommend work practice controls **for the entire building.**



OSHA Enforcement – Lessons Learned

- **2017 Engineering, Work Practice, and Administrative Controls Item – Defense**
 - In December of 2015, the manufacturer sent a copy of the design and work practices recommendations **for the entire building** to the OSHA compliance officer.



OSHA Enforcement – Lessons Learned

- **2017 Engineering, Work Practice, and Administrative Controls Item**
 - In June and July of 2016, the OSHA compliance officer conducted follow-up inspections **of the entire building**, including the portion of the building at issue in the 2017 citation items.
 - The OSHA compliance officer **was the same OSHA compliance officer** who recommended issuance of the 2017 engineering, work practice, and administrative controls citation item.



OSHA Enforcement – Lessons Learned

- **2017 Engineering, Work Practice, and Administrative Controls Item**
 - I convinced counsel for OSHA that OSHA knew, or should have known, of the 2017 alleged violations more than six months from the date in which OSHA issued the 2017 citation items to the manufacturer.
 - OSHA withdrew the citation item.



OSHA Enforcement – Lessons Learned

- **2017 Housekeeping Citation Item**
 - OSHA took wipe samples inside the cafeteria.
 - OSHA did not send blank samples to the lab.
 - OSHA contended that because the results were greater than the HUD lead level of 200 micrograms per feet squared, or 21.53 micrograms per centimeters squared, there was a housekeeping violation.



OSHA Enforcement – Lessons Learned

- **2017 Housekeeping Citation Item**
 - Is there a violation of the housekeeping provision simply because an employer does not ensure that surfaces like cafeterias are cleaner than the HUD level of 200-Ug/ft²? **NO**
 - Interpretation Letter Dated January 13, 2003 – “OSHA does not expect surfaces in cafeterias to be any cleaner than the HUD level of 200-ug/ft².”
 - **Note:** OSHA failed to convert the sample results from **total micrograms of lead** to **micrograms per centimeter square** (divide total micrograms of lead by 100).



OSHA Enforcement – Lessons Learned

- **2017 Housekeeping Citation Item**
 - OSHA did not review (1) the cleaning methods the manufacturer used to perform housekeeping, (2) the frequency in which the cleaning methods were used, or (3) the timing in which the cleaning methods were used.
 - OSHA withdrew the housekeeping item.
 - The manufacturer agreed to hire a third-party expert to develop a written housekeeping program, and the manufacturer agreed to implement the new written program.



OSHA Enforcement – Takeaways

- Know the risks
 - The potential failure-to-abate penalty for the 2003 citations could have been in the millions.
 - The client could have been under a PMA for the 2017 citations for many years.
 - Companies should know how to abate citations before accepting them.
- Scrutinize OSHA
 - Review air and wipe sampling methods and conclusions.
- Remember Statute of Limitations Defense
 - Under 9© of the OSH act, OSHA has six months from when it knew, or should have known, of an alleged violation.

