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A Little Good News: OSHA Grants Some Reprieve for Compliance with its New Construction Industry Confined Space Rules

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On May 4, 2015, OSHA issued a final rule setting new standards for workers in confined spaces on construction sites. The new rule requires coordination for multiple employers at the worksite, a competent person to evaluate the worksite and identify confined spaces, continuous atmospheric monitoring and monitoring of engulfment hazards, allowing suspension of a permit in the event of changed conditions, and require employers to (i) prevent exposure to hazards through elimination if a permit system is not in place, (ii) coordinate with emergency personnel in advance of any emergencies and (iii) provide training in a language and vocabulary the worker understands. Notably, the new rule also imposes responsibilities on controlling contractors and host employers with regards to contractors and subcontractors who work on site. These standards become effective August 3, 2015.

In response to numerous employer request that the rule implementation be delayed, OSHA's Directorate of Construction issued a memorandum in July of 2015 postponing full enforcement of the new standard for 60 days - or until October 2, 2015. During this 60-day period, OSHA will not issue citations to an employer making good faith efforts to comply with the new standard, as long as the employer is in compliance with either the training requirements of the new standard, found at 29 CFR 1926.1207, or the training requirements found at former 29 CFR 1926.21(b)(6)(i).

The good news - employers have some additional time to revise confined space policies and continue employee training. The bad news - what are "good faith efforts" and how will OSHA determine if this undefined standard has been met. OSHA's July 2015 memorandum provides the following factors to consider in evaluating whether an employer has made "good faith efforts" to comply:

1. Whether or not the employer has trained its employees as required under the new standard, whether the employer has scheduled such training;
2. Whether or not the employer has the equipment required for compliance with the new standard, including personal protective equipment, whether the employer has ordered or otherwise arranged to obtain such equipment required for compliance and is taking alternative measures to protect employees from confined space hazards; and
3. Whether the employer has engaged in any additional efforts to educate workers about confined space hazards and protect workers from those hazards.

Based on this guidance, it appears OSHA expects that by August 3, employers have begun to comply with the new standards, even if their policies are not fully compliant. Accordingly, in order to avoid exposure from August 3 to October 2 you should take the following steps: (i) complete a review of all policies affecting confined spaces, (ii) conduct an accounting to ensure the employer has all necessary personal protective equipment, or that such equipment has been ordered, and (iii) establish a comprehensive training plan, and begin training employees and workers on a continuing basis.

Although there is some ambiguity as to what OSHA will consider noncompliant from August 3 to October 2, it is clear that after October 2, construction employers must be fully compliant with the new standard. If your

company provides services in the construction industry, make compliance with the new rule a top priority, now and certainly by October 2.