

OSBORN

Revised OSHA Asbestos Standards Expected To Lead To More Environmental Property Assessments

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The Revised OSHA Standard which took effect during the Fall of 1995, may force property owners who failed or refused to conduct environmental assessments, to undergo assessments.

During the 1980's federal legislation, known as the Asbestos Hazard Emergency Response Act ("AHERA"), was passed and mandated an assessment of all schools throughout the country for the presence of asbestos and the formulation of a management plan when asbestos was to be maintained in place. Following on the heels of that legislation was the introduction of legislation - in Congress and in the New York City Council - which would impose similar requirements on all other building owners beyond smaller residential buildings. This legislation is known as "in place" legislation.

The legislation seemed to be on the brink of passage in 1989, but in light of the apparently staggering cost of compliance, significant lobbying efforts were launched by real estate interests, religious and healthcare institutions and the legislation was never passed.

The result of failure to pass "in place" laws is that the treatment of asbestos issues is not measured on an even playing field. To a very large degree, to understand how responsible a building owner's asbestos policy will be, it is necessary to answer a few basic questions about that owner:

- 1 does the owner plan to hold the property for the long term?*
- 2 does the owner have "deep pockets"?*
- 3 do the owner's ethical priorities require an asbestos program which protects all occupants and facilities managers?*

If the answer to any of these three questions is "yes," the owner may adopt responsible asbestos policy even without an "in place" law.

If the answer to any of the three questions is "no," that building owner may be a good candidate for "irresponsible" asbestos management. If this is the case, that building owner may not be impressed when told that of the 900 New York City buildings examined in 1988, 84% had asbestos in poor or fair condition. Even though these building owners were urged to opt for safe, well-supervised, professional removal, when faced with asbestos in "poor" condition, it is doubtful that many followed voluntary programs to do so.

Even though building owners were admonished that the third wave of asbestos deaths were construction and facility managers who came in contact with asbestos, not many have adopted comprehensive programs designed to affect change in this area; again, it is doubtful that many have done much voluntarily.

So what does the Revised OSHA Asbestos Standard have to do with self-assessments?

To make it clear at the outset, somehow, the real estate industry has not watched OSHA vigilantly ~ some regulations have now been adopted which are precisely the type they were able to head off in Congress and in the US EPA. To further clarify, the OSHA Standard does not directly require that the building owner self-assess; it merely encourages it.

How does the Revised OSHA Asbestos Standard "encourage" self assessments?

The Revised OSHA Asbestos Standard has done so quite simply by creating a new category of Asbestos Containing Material ("ACM"); the new category is called Presumed Asbestos Containing Material or "PACM".

What the Revised Standard does is "presume" that surfacing material and thermal system insulation found in buildings constructed no later than 1980 are ACM's.

"Surfacing Material" means material that is sprayed, troweled on or otherwise applied to surfaces (such as acoustical plaster on ceilings and fireproofing materials on structural members, or other materials on surfaces for acoustical, fireproofing and other purposes). "Thermal System Insulation (TSI)" means ACM applied to pipes, fittings, boilers, breeching, tanks, and ducts.

The presumption which creates PACM may be rebutted through the use of an AHERA inspection, or testing of the material worked on by an AHERA accredited inspector or a certified industrial hygienist. A nationally recognized testing program known as the National Voluntary Accreditation Program ("NVLAP") ~ or its equivalent ~ must be used for analysis of the material.

When faced with a presumption that materials are asbestos, the better way to go is to have your premises tested before the presumption is applied. To whom will it matter later if you do not test the PACM and prove that it is not PACM?

It should matter to the building owner, tenants and visitors to the building. Perhaps most of all it should matter to the lender who holds the mortgage at the present time.

What is the lender's concern? First, the lender has heard that if there is a clean up to be undertaken, the lender can be held accountable for payment; and second, as a practical matter, the lender has, over the past 10 years,

been at the helm when environmental decision making takes place. In many cases, the lender will cause a clause to be added making it a default when the borrower discovers contamination and fails to report it. Even more than regulators, the lender is the moving force toward compliance. Nothing short of taking full precautions protects the lender from becoming liable. The largest problem is that "taking full precautions" evolves in meaning and the standard keeps getting higher and higher. It is important to remember that the standard is what is generally the standard in the geographic area for that profession.

The Revised OSHA Standard will make renovation work more expensive and cumbersome. Self assessments of owned property will be the norm. Even a refinancing cannot be accomplished without an environmental study.

Record keeping and retention policies mandate that many records be kept. Notably data to rebut PACM must be retained as long as the party relying upon it continues to rely. The bottom line is that if the building owner does not plan to test to see if the PACM actually contains ACM, a full array of notices must be sent whenever a renovation takes place. Notices go to those well beyond those involved in the renovation, including other trade contractors, adjacent tenants and buildings.

In addition, each employer must have a "competent person" able to identify asbestos, other hazards, unsanitary or dangerous conditions, select control strategies and have the authority to take prompt corrective measures to eliminate hazards.

CONCLUSION

By reviewing just a few of the OSHA Standard's provisions, it is clear that anything other than a "pro-active" asbestos policy is simply asking for trouble. Why wait for a law suit (or even for a financing transaction or a renovation) to make the change? An intricate and potentially incriminating "paper trail" is mandated under the OSHA Standard. Notifications received and communicated about ACM and PACM - and their content - must be maintained by the building/facility owner and transferred to its successive owners. Exposure measurements may be kept by either the employer or by competent organizations such as trade or employee groups.