

CR &R

CLEANING & RESTORATION

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A woman with dark hair in a ponytail, wearing a white short-sleeved shirt, is sitting at a desk in a dimly lit office. She is looking at a computer monitor and has her hands on the keyboard. The office has several other desks with computers in the background, and the lighting is focused on the woman's desk.

OVERWORKED

UNDERPAID

DO YOU KNOW HOW TO AVOID AN OVERTIME LAWSUIT OR AUDIT?

**Asbestos Guidance for the
Restoration Industry, Pt. 1**

Coming to A Chemical Near You

International Update

**5 Questions With
J.D. Powers' Chip Lackey**

The image shows two workers in white protective suits and yellow gloves handling a large, dark, wavy sheet of material on a roof. The workers are standing on wooden planks. The background shows a clear sky and some greenery. The text 'THE LETTER OF THE LAW' is overlaid on the right side of the image in large, white, bold letters.

THE LETTER OF THE LAW

Asbestos Regulatory Guidance for
the Restoration Industry, Pt. 1

By David M. Governo, Esq. and Colin N. Holmes, Esq.

RLA recently released a comprehensive fact sheet providing asbestos guidance specifically for the restoration industry. It can be downloaded for free from the RLA website, www.restorationindustry.org.

Author's note: Information in this article is not intended to be and should not be interpreted as legal advice. Each situation is different and you should consult with an attorney licensed to practice in your state about specific legal issues.

Even as the use of asbestos in new materials has waned since the 1970s, it remains in countless products, buildings and materials. To protect employees from health hazards and to avoid potential civil liability and criminal penalties, everyone involved in the cleaning and restoration industry should be aware of the prevalence of asbestos at job sites.

The rules related to restoring a building containing asbestos are complicated and differ depending on a job-site's location. Contractors should familiarize themselves with the relevant laws and the specific local enforcement policies for a jobsite before engaging in such work.

The Environmental Protection Agency (EPA) and the U.S. Consumer Product Safety Commission have banned several asbestos products, and many manufacturers have since voluntarily limited the use of asbestos. Nevertheless, it remains present throughout the country, particularly in buildings constructed before 1980. It is commonly found in insulation, floor tiles, ceiling tiles, roofing, paints and coating materials, fireproofing, and many other materials.

Products can contain widely varying concentrations of asbestos, ranging from 100 percent to trace amounts. Products with less than 1 percent of asbestos generally are not treated as asbestos for regulatory purposes.

In the past few decades, federal and state governments have enacted complicated regulatory regimes by which asbestos abatement is governed. Everyone in the cleaning and restoration industry should understand and comply with these rules or be prepared to face significant fines, civil liability and even criminal penalties. Before starting a project that might disturb asbestos, company owners and managers must be familiar with the full range of federal and state (and even local) regulations that govern licensing, certification, notification, worker safety, and disposal.

In the first part of this two-part article, we will discuss federal regulations. In the May issue of *C&R*, we'll cover state regulations.

THE FEDERAL MANDATE

The federal government regulates asbestos exposure in buildings chiefly through two agencies, the Occupational Safety and Health Administration (OSHA) and the EPA. OSHA sets standards for worker protection involving construction, including the renovation or demolition of buildings, while the EPA sets broader standards to protect workers and the environment from asbestos. Restoration contractors need to comply with regulations promulgated by both agencies when working at a job site where that asbestos-containing material (ACM) may be present.

A. OSHA

OSHA has established a strict permissible exposure limit (PEL) that sets the maximum concentration of asbestos fibers in the air at 0.1 fibers per cubic centimeter (f/cc). This means that a worker cannot be exposed, using an 8-hour time-weighted average, to more than 0.1 asbestos fibers per cubic centimeter of air. OSHA also mandates that employers cannot expose workers to peak concentrations of asbestos that are greater than 1.0 f/cc, averaged over a 30-minute period. *29 CFR 1910.1001*.

1. Construction Industry Asbestos Standard


The OSHA regulation most pertinent to general contractors and the cleaning and restoration industry is the Construction Industry Asbestos Standard, which regulates occupational asbestos exposure during demolition, salvage, abatement, construction, alteration, repair, maintenance or renovation work that involves ACM. *29 CFR 1926.1101*.

OSHA divides construction work into four classes (triggering different requirements), based on the type of work being performed and the type of asbestos present.

Class 1: removal of asbestos insulation and sprayed or troweled ACM.

Class 2: removal of asbestos-containing wall-board, floor tile and sheeting, roofing and siding, shingles, construction mastics, and other non-thermal insulation or surfacing material.

Class 3: repair and maintenance operations where ACM is likely to be disturbed.



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Class 4: maintenance and custodial work where employees come into contact with but do not disturb ACM, and work involving the clean-up of dust, waste and debris from Class 1, 2 and 3 activities.

To assure compliance, it is important to consult the relevant OSHA regulations to determine which class a proposed project might fall under. *29 CFR 1926.1101(b)*

Businesses engaged in construction projects involving asbestos must take a number of actions. OSHA generally requires monitoring, including the performance of worksite exposure assessments, often immediately before or as construction work begins, by a “competent person” certified by the EPA or the state. If asbestos is present, and Class 1 or 2 work is being performed, daily monitoring of workers is required. If Class 3 or 4 work is being performed, “periodic” monitoring is required. OSHA mandates work practices to reduce employee asbestos exposures and compliance with the PEL. *29 CFR 1926.1101(b) and (f)*

OSHA also requires that controlled, regulated work areas be created if Class 1, 2 or 3 work is being performed, or if there is a reasonable possibility that the PEL may be exceeded. Access to such areas must be limited to trained and authorized workers equipped with proper safety equipment. Entry and exit must be through specially equipped decontamination rooms. Warning signs must be posted to prevent unauthorized

entry and activities such as smoking and eating within the area. *29 CFR 1926.1101(e)*

Respiratory protection and protective clothing are generally required for workers performing asbestos work. *29 CFR 1910.134* sets out the type of respirator that must be used depending on the work involved. Employees must receive respirator training and medical clearance to use respirators. OSHA also mandates that dust suppression and other hygiene measures be undertaken, including protective clothing, such as coveralls, gloves and the use of goggles. *29 CFR 1926.1101(i)*

In addition, OSHA requires specific asbestos training. Employees exposed to asbestos above the PEL must have particular asbestos training, depending on the kind of work they are performing. Medical examinations must also be provided for workers who, for more than 30 days a year, engage in Class 1, 2 or 3 work or are exposed to asbestos levels above the PEL. Finally, OSHA’s record-keeping rules impose the duty to maintain particular medical, exposure assessment and training records. *29 CFR 1926.1101(k), (m), and (n)*

2. *Inspections and Penalties*

OSHA ensures compliance by conducting inspections of worksites throughout the country. Compliance with OSHA regulations is crucial not only to protect workers’ health, but also to protect contractors from potentially costly penalties and criminal liability.

If an inspector determines that a worksite has levels of asbestos above the PEL, OSHA may issue thousands of dollars of fines per violation, impose criminal sanctions and, in extreme circumstances, force a business to close its workplace.

In the past few years, OSHA has imposed large fines for asbestos violations. In 2011, OSHA fined an engineering company \$1,247,400 for requiring five unprotected and untrained workers to remove asbestos in Illinois. In 2012, OSHA fined seven construction companies a total of \$148,000 for exposing workers to asbestos at a Texas construction work site. In 2010, OSHA fined a construction contractor \$136,000 for asbestos violations in Massachusetts.

B. EPA

The EPA has a series of regulations that impact cleaning and restoration work in buildings that may contain asbestos. The EPA regulatory scheme is quite broad; it protects not only workers from the



dangers of asbestos, but the public at large. The EPA rules govern some of the same activities as OSHA's regulations, but also impose requirements for the handling, removal and disposal of ACM.

The most important EPA regulation is the Asbestos National Emission Standards for Hazardous Air Pollutants (NESHAP) *40 CFR Part 61, Subpart M*. This regulation governs asbestos measures that must be taken during the renovation and demolition of all structures, installations and buildings, excluding residential buildings with four or fewer dwelling units.

1. National Asbestos Air Pollution Standards

NESHAP requires that an owner or operator of a facility have a certified asbestos consultant thoroughly inspect a building slated for demolition or renovation to determine whether it contains asbestos and, if so, in what amount. A formal notice must be filed with the appropriate state agency before beginning any renovation work that will disturb a certain "threshold" amount of ACM.

The notice must include: the location of asbestos, starting and completion dates, the amount of asbestos present, the identity of asbestos removal contractors, and the methods of removal. *40 CFR Part 61.145(b)* When a building is being demolished, such notification is required even if there is no asbestos present at the site. The agency with which a report must be filed differs depending on the state or local community. It is important to note that work on school buildings is governed by separate regulatory requirements for the management of asbestos under the EPA's Asbestos Hazard Emergency Response Act.

In general, the threshold amount of ACM that triggers a notice requirement in cases of renovation is at least 260 linear feet of ACM on pipes, or 160 square feet of ACM on other facility components, although the regulation sets out additional specific threshold levels. *40 CFR Part 61.145(a)* If a building contains more than the threshold amount, then several additional NESHAP requirements may be triggered.

If demolition or restoration will disturb ACM over the threshold amount, NESHAP requires that contractors use specific work practices for removing asbestos to minimize the release of fibers, including the wetting of regulated ACM, sealing ACM in leak-tight containers, labeling, and disposing of ACM expediently and safely in a landfill licensed to accept asbestos. *40 CFR Parts 61.145 and 61.150*

Furthermore, NESHAP requires at least one supervisor, such as a foreman or management-level person, trained in the provisions of the regulation, to be present at any site where ACM is stripped, removed or otherwise disturbed. The supervisor must complete refresher training every two years. Training includes understanding the applicability of the regulations, notification requirements, material identification, control procedures for removal, waste disposal work practices, reporting and record-keeping requirements, and knowledge of asbestos hazards and worker protection. Evidence that the required training has been completed must be posted and made available for inspection at the site. *40 CFR Parts 61.145(c)*

2. Inspections and Penalties

Contractors should be careful to abide by the EPA regulations to avoid harm to workers and substantial civil and criminal penalties. The EPA has an enforcement arm that maintains and polices its environmental regulations, including those governing asbestos. It sends inspectors to worksites to confirm compliance with NESHAP. If the EPA finds a violation of the regulation, it can issue warnings or civil penalties of up to \$25,000 per day per violation.

In 2013, the EPA fined the U.S. Department of Energy in Washington \$115,000 for violations of asbestos management in building demolitions. In 2012, the EPA fined a company in Ohio \$30,000, and penalized its owner with an additional \$10,000 fine and 36 months of probation, for the improper removal and handling of asbestos during the renovation of a former steel plant. Also in 2012, the EPA fined a flooring contractor in Vermont \$27,500 because of improper asbestos flooring removal.

The EPA can also bring criminal charges that may result in prison terms for particularly egregious violations. For example, in 2012, an asbestos abatement contractor from Rochester, N.Y., was sentenced to six years in prison for knowingly violating the Clean Air Act and making false statements to an EPA inspector. **RIA**

Governo Law Firm is an 18-attorney, Boston-based firm representing individuals, manufacturers, consultants and companies of all sizes in local and national litigation, and counseling in business planning, including risk management and regulatory compliance. David Governo can be reached at dgoverno@governo.com and Colin N. Holmes can be reached at cholmes@governo.com.