



## OSHA Announces Policy for Enforcing Silica Rule Beginning on Sept. 23

On Wednesday afternoon, the Occupational Safety and Health Administration announced that from Sept. 23 through Oct. 22, it will help employers who are trying to comply with its [rule](#) on respirable crystalline silica, which requires construction employers to limit worker exposure to silica and to take other steps to protect workers. During that 30-day period, all citations under the rule will be reviewed by OSHA at the national level. The memorandum from Thomas Galassi, acting deputy assistant secretary for the U.S. Department of Labor, to OSHA regional administrators, states:

*“During the first 30 days of enforcement, OSHA will render compliance assistance and outreach to assure that covered employers are fully and properly complying with its requirements. Given the novelty of the Table 1 approach, OSHA will pay particular attention to assisting employers in fully and properly implementing the controls in the table. OSHA will assist employers who are making good faith efforts to meet the new requirements to assure understanding and compliance.*”

*“If, upon inspection, it appears an employer is not making any efforts to comply, OSHA’s inspection will not only include collection of exposure air monitoring performed in accordance with Agency procedures, but those employers may also be considered for citation. Any proposed citations related to inspections conducted in this time period will require National Office review.”*

Under the OSHA standard, construction employers can either use a control method, as laid out in Table 1 of the standard, or they can measure workers’ exposure to silica and independently decide which dust controls work best to limit exposures to the permissible exposure limit in their workplaces. Regardless of which exposure control method is used, all construction employers covered by the standard are required to:

- Reduce the permissible exposure limit for respirable silica to 50 micrograms per cubic meter of air, averaged over an eight-hour shift.
- Use engineering controls, such as water or ventilation, to limit worker exposure to the PEL.
- Provide respirators when engineering controls cannot adequately limit exposure.
- Establish and implement a written exposure control plan that identifies tasks that involve exposure and methods used to protect workers, including procedures to restrict access to work areas where high exposures may occur.
- Designate a competent person to implement the written exposure control plan.
- Restrict housekeeping practices that expose workers to silica where feasible alternatives are available.
- Offer medical exams, including chest x-rays and lung function tests, every three years for workers who are required by the standard to wear a respirator for 30 or more days per year.
- Train workers on work operations that result in silica exposure and ways to limit exposure.
- Keep records of workers’ silica exposure and medical exams.

ASA, in collaboration with 22 other construction associations, has initiated a lawsuit to prevent OSHA from implementing its rule; oral arguments are scheduled for Sept. 26. In addition, ASA, as part of the Construction Industry Safety Coalition, has filed a petition with OSHA requesting the agency to stay and reopen the rulemaking. For more information, see the ASA [Fact Sheet on OSHA’s Rule on Respirable Crystalline Silica](#), the ASA [Frequently Asked Questions on the OSHA Standard on Respirable Crystalline Silica](#), and the free ASA video-on-demand, “[OSHA Silica Rule—Applications for Subcontractors](#)” (Item #8101), presented by Gary Visscher, Esq., Law Office of Adele L. Abrams, P.C.

## ASA Introduces ‘Mastering Hold Harmless Clauses’ White Paper

Subcontractors are vulnerable to paying large amounts of money for the negligence of others—both on contracts directly with owners, as well as those with prime contractors. Almost all construction contracts include indemnity provisions. Some of these terms represent an equitable allocation of responsibility among the members of the construction team for their negligence. Too often, though, the subcontract makes a subcontractor responsible for the costs of job-related injuries or damages over which it has no control. ASA’s newest white paper, [Mastering Hold Harmless Clauses](#), explains in layman’s terms, how a subcontractor can use subcontract language to minimize exposure to losses beyond the extent of its own negligence. Along the way, it reviews the types of indemnity clauses, provides samples of each, and gives tips on how a subcontractor can respond to typical unfair language. The white paper is a no-cost member benefit available under “[Insurance and Risk Management](#)” in the Member Resources section of the ASA Web site.

## SBA Makes Changes to Surety Bond Program

The U.S. Small Business Administration has made two important changes to its Surety Bond Guarantee Program that will increase contract opportunities for small contractors. Under the new rule, SBA will increase the guarantee percentage in the Preferred Surety Bond Program from no more than 70 percent to no more than 90 percent. SBA's guarantee will be 90 percent if the original contract amount is \$100,000 or less, or if the bond is issued to a small business that is owned and controlled by socially- or economically-disadvantaged individuals, veterans, service-disabled veterans, or certified HUBZone and 8(a) businesses. All other guarantees will be 80 percent. The eligible contract amount for the Quick Bond Application will increase to \$400,000 from \$250,000. The Quick Bond is a streamlined application process, with reduced paperwork requirements, that is used in the Prior Approval Program for smaller contract amounts. SBA's review and approval requires minimal time, allowing small businesses to bid on and compete for contracting opportunities without delay. Through its SBG Program, SBA guarantees bid, payment and performance bonds for contracts that do not exceed \$6.5 million, and up to \$10 million with a federal contracting officer's certification. ASA is a longtime supporter of SBA's SBG Program, which encourages surety companies to issue bonds to small businesses. The changes are effective on Sept. 20. For more information, visit the SBA's [Surety Bond Guarantee Program](#) online.

## Hail ConsensusDocs Best-Practice Documents During 10th Anniversary

Join 40 construction trade and professional associations in celebrating ConsensusDocs' 10th anniversary by taking advantage of a 30 percent discount on subscriptions during September. ASA is part of a community of construction associations addressing the industry's differences through communication and negotiation. Too many in the construction industry persist in business practices that undermine the spirit of teamwork. One-sided contracts force subcontractors to shoulder the risks better managed and borne by others. Privy of contract is used as an excuse to keep subcontractors from sharing their expertise and concerns with both owners and design professionals. Poor management practices lead to confusion on the jobsite and result in unnecessary disputes. These are among the reasons that ten years ago ASA helped found and continues to be a leader in ConsensusDocs, a diverse coalition with members from all stakeholders in the design and construction industry. Go to the ConsensusDocs Web site at [www.ConsensusDocs.org](http://www.ConsensusDocs.org) and use the discount code **ASA30** to obtain your discount.

## Are You Evaluating *The Prime Contractor Factor*

Subcontractors and specialty trade contractors assume the greatest risks and reap the smallest rewards of all the participants in the construction business. In such a hostile environment, subcontractors must take all reasonable precautions to minimize or control risks. One of the surest ways to reduce risks is to be highly selective in choosing its prime contractor partners. Not only is it appropriate for a subcontractor to discriminate when selecting contractors with which it wishes to do business, it is absolutely necessary. ASA's white paper [The Prime Contractor Factor](#) sets forth a process to help an individual subcontractor develop and implement its own program to evaluate and select contracting partners that will treat it reasonably, fairly and honestly in a subcontractor relationship. The white paper addresses:

- Characteristics of quality prime contractors.
- Discusses how a subcontractor can develop criteria for evaluating its potential contracting partners.
- Outlines sources of information.
- Describes procedures to help a subcontractor develop its own rating system.
- Suggests a process for setting up a preferred contractor program.

The white paper is available free for ASA members under "[Bidding and Market Development](#)" in the Member Resources section of the ASA Web site.

## Construction Industry Unites to Prevent Worker Suicide

ASA members work in an industry that is focused on safety and is increasingly aware of the critical role wellness plays in the lives of workers. However, too often employers neglect an important topic that can positively impact the safety, wellness and productivity of employees—mental health. This issue was spotlighted in a [study](#) by the Centers for Disease Control and Prevention, which ranked construction first in the number of suicide deaths and second in the suicide rate. To address this threat, ASA, as a member of the [Construction Industry Alliance for Suicide Prevention](#), is working to reduce suicide in the construction industry. One tool to help you in your own company is [A Construction Industry Blueprint: Suicide Prevention in the Workplace](#), a 15-page handbook that lists danger signs, suggests conversation tips, and provides sample tool box talks. September is National Suicide Prevention Month—a great time for construction firms to explore the [Alliance's Web site](#) for helpful resources.

## Pay-If-Paid v. Pay-When-Paid: Be Clear on the Difference

Pay-if-paid terms typically say the prime contractor will pay the subcontractor only if the owner has paid the prime contractor for the subcontractor's work. Many state court decisions conclude that clearly-stated payment terms mean what

they say. Thus, subcontractors may never have a right to payment if, for any reason, the owner has not paid the prime contractor. A few states, including North Carolina and Wisconsin, have made pay-if-paid laws against public policy. In other states, including California and New York, the courts have ruled that such clauses are unenforceable. Pay-when-paid terms usually refer to the timing when a subcontractor is to be paid. For example, the subcontract may say that payment is due within seven days after the prime contractor receives payment from the owner for the subcontractor's work. Many state courts have ruled the prime contractor can delay payment to the subcontractor only for a reasonable time if the owner fails to pay for properly completed work where there is a pay-when-paid clause in the subcontract. The bad part is that payment can be held up for a very long time before a court or arbitrator rules that a reasonable time has passed. Both pay-if-paid and pay-when-paid are known as contingent payment terms. Thus, until the owner pays the prime contractor for the subcontractor's work, the subcontractor might not be entitled to file a lien in some states or to make a claim against the contractor's payment bond. This is because the subcontractor may legally be owed nothing until the owner has paid the prime contractor for the subcontractor's work. To make matters worse, the owner may be holding up all project payments because of a dispute between the owner and the contractor, or for unsatisfactory work by other trades or not enough project financing. Subcontractors also usually lack the ability to take legal action against the owner because there is no contract between the two of them. One way to limit your risk is by adding wording such as this to your subcontract:

*"Subcontractor's acceptance of the contingent payment terms is conditioned on the understanding that these terms shall apply solely to monies withheld by the owner due to some deficiency on subcontractor's part."*

ASA has many no-cost benefits for ASA members on this topic on its ASA Web site, including ASA's [Contingent Payment Clauses in the 50 States](#) and the ASA Subcontractor's Negotiating Tip Sheet on "[Pay-If-Paid Clauses](#)." For best results when searching the ASA Web site using the "Advanced Site Search" function, be sure to first log-in under "LogIn/Access Member Resources." This will yield all of the resources available only to ASA members, not just the materials available to everyone.

### **Contract Changes and Claims: Schedule Management**

Nowhere is the adage "time is money" more true than in the construction industry. One of the costliest forms of unanticipated change incurred by a subcontractor on a project arises out of delay, disruption or other schedule problems. Consequently, project schedules can take on tremendous significance, not only as tools for effective planning and management of the project, but also as the measuring stick of delays or disruptions resulting from changes and changed conditions. Alternative project scheduling is one of the most beneficial and critical management steps a subcontractor can take and yet it is one of the most frequently ignored tools. Even though a subcontractor cannot control other aspects of project work, a good understanding of how the subcontractor's work fits into the overall picture is essential. ASA's [Contract Changes and Claims](#) is a series of articles providing tips for the management of changes and changed conditions and how to realize full adjustment to the contract price or contract time.

### **Make Your Hotel Room Reservations Online for SUBExcel 2018**

[Make your hotel reservations online](#) at Tempe Mission Palms, 60 East Fifth Street, Tempe, AZ 85281, site of SUBExcel 2018. ASA's annual national convention will take place Feb. 28-March 3, 2018, in Tempe, Ariz. ASA has negotiated the special room rate of \$204 single/double. The cutoff date for the room block is **Feb. 5, 2018**. You can also make hotel reservations by calling (800) 547-8705. Check-in is at 3:00 p.m. and check-out is at noon. Most registrants will plan to arrive on Wednesday, Feb. 28, 2018, in time to attend the ASA President's Welcome Reception that evening. Unless you're planning on staying longer to take a tour of the Grand Canyon, Monument Valley, or Apache Trail, for example, plan on departing on Sunday, March 4, so you can join us on Saturday night for the reception, banquet and awards ceremony. Online registration is coming soon! In the meantime, you can explore [sponsorship](#) and [exhibitor](#) opportunities and peruse ideas for [things to do in Tempe](#) on ASA's [SUBExcel 2018 Web site](#). You can also access the SUBExcel 2018 Web site through our easy-to-remember site, [www.SUBExcel.com](http://www.SUBExcel.com).

### **Learn How to Engage and Excel at Difficult Conversations in Sept. 26 ASA Webinar**

Your ability to engage in difficult conversations with customers, potential clients, project partners, employees, direct reports, and bosses has a massive impact on your career, business, and life success. As a construction subcontractor, specialty trade contractor or supplier, you face a series of difficult conversations, on a weekly, if not daily, basis. In the Sept. 26 ASA webinar, "How to Have a Multi-Million Dollar Impact by Asking 'One More Question'," professional leadership coach and trainer Eric Anderton will share his seven principles of having difficult conversations, including "asking one more question." In the webinar, Anderton will also cover:

- How to have a coaching conversation.
- How to prepare for an individual confrontation.
- How to prepare for a team discussion.

- How to prepare for a one-to-one review.

“Once you learn to excel at these conversations, you will enjoy profit, growth and long-term stability,” Anderton says. This live, 90-minute webinar will begin at 12:00 p.m. Eastern time/9:00 a.m. Pacific time. Registration is \$99 for ASA members and \$179 nonmembers. [Register online](#).

### **Is the Data You Capture Accurate? Learn About ‘Technology & Transparency’ in Oct. 10 ASA Webinar**

“In this generation of construction, we capture more data than ever. That said, how accurate is the data you are capturing and, if it is not, what causes the problem?” asks Stephane McShane, Maxim Consulting Group. “What do you do with that information once compiled and how is it shared?” In the Oct. 10 ASA webinar, “Technology and Transparency, Part II,” McShane will discuss the importance of connecting aligned vision, data collection, and performance management to create measurable, impactful tools that can increase the bottom line. In addition, she will:

- Discuss the bottom-up philosophy of data collection.
- Define data collection solutions designed by level of work.
- Analyze the link between data and performance management.

This live, 90-minute webinar will begin at 12:00 p.m. Eastern time/9:00 a.m. Pacific time. Registration is \$99 for ASA members and \$179 for nonmembers. [Register online](#). In Part I of “Technology and Transparency,” offered in May 2017, McShane identified the tools and technology needed to best position your company for a successful future and explained why these tools are critical to future profitability. “[Technology & Transparency](#)” (Item #8105) is now available as a video-on-demand, available for \$65 for members and \$95 for nonmembers.

### **Superior Prime Contractors and Specialty Trades: Apply for ASA’s Best Practices Awards by Nov. 3**

Prime contractors and specialty trade contractors that have signed, within the past year, a contract directly with a construction owner under which it performs construction services are encouraged to apply for ASA’s National Construction Best Practices Awards. These awards recognize prime contractors who construction subcontractors say are the best to work for—those who are committed to best business practices like safety management, prompt payment, prompt processing of change requests and claims, and effective project scheduling and coordination. The criteria for these awards include the use of a standard subcontract whose provisions substantially reflect the best practices incorporated into the ASA-endorsed ConsensusDocs 750 *Standard Agreement Between Constructor and Subcontractor*, as well as highly favorable evaluations from three specialty trade contractors, based on 20 project management factors. Each applicant must supply three sealed business-practices recommendations from specialty trade contractors that have worked for it in the past year along with a copy of its standard subcontract with its application. A construction attorney will evaluate the standard subcontract, and the ASA Task Force on Ethics in the Construction Industry will evaluate the recommendations from specialty trade contractors. Prime construction contractors that use the ASA-endorsed ConsensusDocs 750 contract form as their standard subcontract automatically pass the subcontract evaluation. The application deadline is **Nov. 3, 2017**, and the application fee is \$495. Awards will be presented during ASA’s annual convention, [SUBExcel 2018](#), which will take place Feb. 28-March 3, 2018, in Tempe, Ariz. Information about these awards is located under “[About ASA](#)” on the ASA Web site.

### **What Happens When an Employee Suffers an Injury at Work and Is Unable to Return?**

Most subcontractors understand that when an employee suffers an injury at work, workers’ compensation insurance will provide coverage for the claim. But when an employee suffers an injury at work and is unable to come back to work, other laws are implicated. In the FASA video-on-demand, “The Devil’s Triangle: Understanding the Overlap Between the FMLA, ADA and Workers’ Compensation Laws,” presenter Philip J. Siegel, Hendrick, Phillips, Salzman & Siegel, provides an overview of the interplay between the Family Medical Leave Act, the Americans with Disabilities Act, and workers’ compensation laws, all of which may come into play when an injured employee will need to miss work. Furthermore, Siegel explains the employer’s compliance obligations under what is often referred to as “The Devil’s Triangle.” Play this on-demand video with a free media player like Windows Media Player, and use it for group training by projecting it onto a screen or wall in a conference room. “The Devil’s Triangle: Understanding the Overlap Between the FMLA, ADA and Workers’ Compensation Laws” (Item #8110) is \$65 for ASA members and \$95 for nonmembers. [Order online](#).

Advertisement

### **Bronze ASA Sponsor Surety One, Inc., Knows Construction—and How to Help You Succeed**

Bronze ASA Sponsor Surety One, Inc. is a surety bond underwriter and managing general agency licensed in all 50 states, Puerto Rico, U.S. Virgin Islands, and the Dominican Republic. Its team of skilled and experienced underwriters is singularly focused on the support of commercial contractors in all industry classes. Surety One clearly understands the

competition between contractors, climatic changes, the volatility of material and equipment costs, the cyclical nature of most industries, the scarcity of a qualified and dependable labor pool, and the softening/hardening of credit terms. Surety One considers these factors carefully as it works to extend contractors as much bonding capacity as possible, under the fairest terms. For more information, visit [www.SuretyOne.org](http://www.SuretyOne.org) or contact Constantin Poindexter at (800) 373-2804 or [Underwriting@SuretyOne.org](mailto:Underwriting@SuretyOne.org).

**Disclaimer of Endorsement and Liability**

The American Subcontractors Association (ASA) does not endorse or recommend any commercial products, processes, or services. Therefore, mention of commercial products, processes, or services should not be construed as an endorsement or recommendation.