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Re: Washington Workplace Lead Rule—Stakeholder Review Draft (June 2019)

Dear Ms. Soiza:

The Battery Council International ("BCI") appreciates the continued efforts of the Washington Department of Labor and Industries' Division of Occupational Safety and Health ("DOSH") to involve stakeholders from industry and public health in drafting revisions to Washington's occupational exposure regulations for lead.

However, BCI is gravely concerned that DOSH appears likely to abandon the current proven, federally-recognized, and well-understood regulatory framework in favor of an unnecessarily complicated, untested, and unproven regime that will place very high burdens and costs on Washington businesses and put the state at a significant competitive disadvantage. As described in Sections I, II, and III below, DOSH has failed to establish that there is a regulatory need to abandon the present framework instead of adjusting it based on modern science—and BCI believes the law and facts cannot support DOSH's chosen approach. These failures mean that the current proposal is beyond the scope of the agency's authority under the Washington Industrial Safety and Health Act, Wash. Rev. Code ("RCW") § 49.17 et seq. ("WISHA") (specifically the authority granted to DOSH by RCW § 49.17.050 and RCW § 49.17.050(7)). DOSH's current proposal additionally violates the requirements of the Washington Administrative Procedures Act, RCW § 34.05 et seq., because it is unreasonable in view of the attending facts and circumstances. *Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 64 P.3d 606, 616 (Wash. 2003).

BCI is very concerned that the measures currently proposed do not address real-world risks. As an initial matter, DOSH has provided no evidence that the newly imposed requirements address

an unsafe work environment, as is required by law. Indeed, statements from DOSH staff indicate that many of these new elements are based on speculation that a particular practice *might* reduce blood lead levels, rather than concrete science and lead-specific industry Environmental Health and Safety ("EHS") expert knowledge. The proposed rule is also overly prescriptive and attempts to define every action an employer would need to take as part of a lead compliance program. As a result, the current draft overreaches. Industries like the lead battery industry have already demonstrated that the blood lead levels sought by DOSH in the new rule can be achieved without abandoning the present framework.

While BCI opposes DOSH's continued development of the regulatory framework presented in the June 2019 draft, Section IV below provides specific concerns and suggestions regarding the June 2019 draft for DOSH's consideration if it presses forward. But these comments should in no way be interpreted as supporting or endorsing the June 2019 draft's framework even if those changes are included.

BCI welcomes the opportunity to continue to work with DOSH towards a revised lead regulation that will ensure the safety of workers, satisfy DOSH's statutory responsibilities, and keep Washington an attractive location for employers and employees.

I. DOSH HAS NOT ESTABLISHED THAT A DRASTIC OVERHAUL IS NEEDED TO PROTECT WORKERS

WISHA requires DOSH to analyze the current state of worker health and to propose regulations that are supported by the best science, feasible, and sufficient to protect Washington workers. Safety and health standards must employ methods "reasonably necessary or appropriate" to ensure worker safety. RCW § 49.17.020(7). DOSH must establish standards "which most adequately assure[], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health… ." RCW § 49.17.050(4).

Interpreting this provision, the Washington Supreme Court has held that "to the extent feasible" means "to the extent … capable of being economically and technologically accomplished." *Rios v. Washington Dep't of Labor & Indus.*, 39 P.3d 961, 968 (Wash. 2002). *Rios* further held, with reference to *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508–09 (1981) ("*ATMI*"), that economic feasibility relates to effects on the regulated industry's "competitive stability." *Rios*, 39 P.3d at 969. Economic feasibility implicates the requirement that the "probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented." *Id.*, referring to RCW § 34.05.328 (applicable to "significant legislative rules" of DOSH and other specified agencies). The record compiled by the agency must show the data and factors that the agency relied on to determine the need for, and the scope of, the regulatory action it takes. *Neah Bay Chamber of Commerce v. Dep't of Fisheries*, 832 P.2d 1310, 1315 (Wash. 1992).

The *Rios* court employed a useful hypothetical to illustrate the "to the extent feasible" standard. Analogizing to *ATMI,*[1] the court imagined a Washington regulator that wished to control a workplace hazard and could do so to a greater or lesser extent based on how many "respirators" it would require. Adding additional "respirators" would comport with the regulator's duties only so long as adding more would "afford [additional] benefit" and not go beyond what is feasible and "necessary" to prevent "material impairment of health." *Rios*, 39 P.3d at 970. The core issue with the drastic overhaul proposed by DOSH is that it adds many levels of complexity and requirements without any demonstrated nexus between the additional requirements and the ultimate goal – ensuring worker safety.

DOSH also appears likely to violate the requirements of the Washington Administrative Procedures Act. As an initial matter, the APA requires that substantive rules be "the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives" of protecting workers. RCW § 34.05.328(1)(e). As described numerous times below, there are alternative options and approaches—most importantly to work within the existing regulatory framework—that would provide *better* results for Washington workers and employers while also being significantly less burdensome on both groups.

In other words, DOSH proposes to go beyond its statutory authority both because it proposes requirements that it has not demonstrated are economically or technically accomplishable and because it has not established that some of the measures it proposes will afford any benefit at all.

II. DOSH SHOULD FOCUS ON A RATIONAL UPDATE OF THE CURRENT RULE FRAMEWORK

BCI has previously stated that it would likely support a rational update of the medical removal blood lead levels, return-to-work blood lead levels, and related elements contained in the current draft rule. If DOSH were to revise the draft rule to focus on those provisions while retaining the same general framework used at the federal level and in the other 49 states, BCI would support the medical removal and return-to-work blood lead levels DOSH proposes in the June 2019 draft. These levels accord with BCI's members' industry-leading voluntary efforts to maintain all worker blood lead levels below 25 µg/dL by 2020 and 20 µg/dL by 2025.

The procedural and framework changes embodied in June 2019 draft will require all Washington employers to scrap existing lead safety programs and create new ones at a significant cost to the regulated community. Every single EHS professional in Washington—including those

[1] Washington courts have instructed that provisions of WISHA may be interpreted by reference to decisions regarding similar provisions of the Occupational Safety & Health Act of 1970. *Adkins v. Aluminum Co. of Am.*, 750 P.2d 1257 (Wash. 1988). This reliance is well placed: the federal courts have provided occupational safety agencies with a straightforward roadmap of the procedural and legal requirements that must be followed when adopting new workplace safety regulations.

who do not deal with the lead rules today—will likely require significant re-training before new lead programs could be implemented. In contrast, more modest changes within the current framework would allow regulated entities to update existing lead compliance programs and would provide the same benefits to workers sought in the June 2019 draft. Such unnecessary, and nonbeneficial, costs and burdens likely violate the requirement that rules be "the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives" of protecting workers. RCW § 34.05.328(1)(e).

And, the training costs would not be one-time costs. Washington State competes for qualified EHS professionals with employers in other states. Washington employers will be at a competitive disadvantage in hiring EHS professionals from other states because few of those professionals will be prepared to work in Washington without significant retraining. Similarly, Washington will be at a disadvantage in attempting to recruit new businesses from outside the state because those businesses will be forced to rewrite their entire EHS programs solely for Washington.

Furthermore, organizations that have employees in both Washington and neighboring states will be required to subject their employees to two disparate recordkeeping programs and two potentially conflicting and separately managed lead-exposure mitigation plans with different training, blood lead testing, PPE requirements, and other differences. Employees that work for a single employer in two states could be forced to comply with both programs simultaneously, which may simply not be possible.

Washington's approach stands in stark contrast with the efforts of regulators in other states, such as Michigan OSHA ("MI-OSHA"), who chose to work within the existing framework. MI-OSHA focused its efforts on updating the blood lead removal thresholds and return to work levels (and related provisions and guidance). Michigan's new rules use the same removal and return to work levels as currently suggested by the DOSH draft, but MI-OSHA did not attempt to upend the existing framework and therefore was able to adopt its rule changes in about one year. Its updated rule is already in effect and benefiting workers. Employers in Michigan also benefitted from MI-OSHA's focused approach which allowed them to quickly and readily update their worker protection programs to achieve compliance with the new rule.

BCI strongly encourages DOSH to re-focus its efforts to work within the existing state and federal framework. Doing so will provide for a more effective rule, reduce undue burdens on employers, and achieve the same worker protection benefits.

III. THE BREADTH AND COMPLEXITY OF THE DRAFT REVEALS ITS EXCESS

As noted above, DOSH must establish standards "which most adequately assure[], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health… ." RCW § 49.17.050(4). The current proposal goes well beyond DOSH's

statutory authority both because it proposes requirements that DOSH has not demonstrated are economically or technically accomplishable and because it has not established that some of the measures it proposes will afford any benefit at all. *See Rios*, 39 P.3d at 969-70 (noting that even if additional measures were "technologically and economically feasible," they would not be "reasonably necessary or appropriate" if they did not afford more protection than a less burdensome alternative).

DOSH Underestimates the Scope of the Rule.

In the stakeholder meetings, DOSH staff have repeatedly attempted to downplay the potential economic impact by asserting that the new rule will not have a significant impact on most Washington employers. This is materially incorrect, as numerous stakeholders have pointed out in those meetings. Because of the changes in the Action Levels and the increased scope of obligations imposed on employers by the Basic Rules, the obligations and burdens imposed on the relatively large number of employers with low-level exposures will increase dramatically.

DOSH's "Response to Stakeholder Concerns," released in June 2019, states that "[a] significant number of employers with low-level workplace exposures are already covered under the existing rule but are simply unaware that basic requirements apply to them." Even if true, this assertion misstates the concern expressed at the meetings: that the new rule will greatly increase the *regulatory burden* on employers and increase the number of employers subject to substantive obligations under the rule. DOSH's only direct response to this concern in the Response document is to state that the new rule *would* increase the number of employers covered, "but likely not as greatly as some stakeholders have suggested." However, as has been noted numerous times by stakeholders, the June 2019 draft would likely impose substantive compliance burdens on every single employer in the state of Washington. Further, DOSH's responses fail to address whether the draft rule embodies "the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives" of protecting workers. RCW § 34.05.328(1)(e).

The Numerous New Compliance Triggers are Unnecessary, Confusing, and Unsupportable.

The unnecessary complexity and overbreadth of the rule is most clear from the numerous new triggers that have been added. Whereas the current federal and Washington lead rules contain a single threshold for additional restrictions, the "Action Level" for lead in air, the current draft contains at least 15 different thresholds or activities that would subject employers and workers to various provisions of the rule:

- 7 defined "Action Levels" (WAC 296-857-10030, Tables 3, 4, and 5)
- 8 "indications" which void an employer determination of non-applicability, and which use different thresholds than the "Action Levels" (WAC 296-857-10050(f)) (the "Basic Rules thresholds")

- Any work within a structure built prior to 1978 without testing all paint and other coatings (WAC 296-857-10050(1)(a)(ii))

The result of this litany of triggers is that it will be difficult or impossible for most employers to determine and track when their employees are or are not covered by various aspects of the rules. In practice, this likely will result in many employers either unknowingly violating the rule or unnecessarily implementing costly compliance measures. This complexity will dramatically increase the burden on employers and will generate significant confusion among industry.

DOSH is not, and should not attempt to act as, the EHS professional for every facility in Washington. These professionals stand ready to ensure compliance with the regulations DOSH issues. Instead of proposing standards and prescriptive requirements without any verifiable connection to the actual measure of impairment to workers—blood lead levels—DOSH proposes to enact a complex compliance regime with multiple prescriptive overlapping components.

DOSH is required to establish a causal nexus between the practices to be regulated and the resultant material impairment sought to be ameliorated. *Rios v. Washington Dep't of Labor & Indus.*, 39 P.3d 961, 970 (2002) ("to outstrip what is 'reasonably necessary' is to go beyond 'the extent feasible.'"). DOSH thus must establish a nexus between each and every incremental component of its prescriptive program (including the 15 or more thresholds and triggers) and worker blood lead levels. No data or evidence has been presented for any of the new triggers or controls to-date. The only data presented, as part of the "Bibliography" DOSH released in 2018, discusses the potential relationship between air-lead levels and blood lead levels. But that data does not address any other route of exposure, and DOSH may not simply assume, based on its own ad-hoc calculations, that the other routes of exposure have similar impacts.

As an example, DOSH has not substantiated its assumption that the presence of lead in a workplace at or above the Action Levels included in the draft rule package (apart from the air lead levels) might correlate to a blood lead level of concern. With regard to the "aerosolizing" lead-content Action Level (1,000 ppm), DOSH staff at the June 28 meeting indicated that staff had generated ad-hoc estimates that suggested that the level of lead available from dust generated by grinding operations with materials at that ppm would be below a level of concern. Staff has not provided any further details about this estimate, which suggests that the action level for metals content, if necessary at all, should be greater than 1,000 ppm.[2] Similarly, DOSH has provided no basis or information to support the proposition that any of the other non-air lead Action Levels correlate with potential material impairments to worker health.

[2] DOSH has also failed to justify why the air-lead Action Level and Permissible Exposure Limit are insufficient to adequately address these operations if, as staff has stated, the exposure route of concern for these operations is air-lead levels generated by those operations.

The federal approach (and the approach of all other states) that BCI urges DOSH not to abandon is simple and effective. Identify the goal (blood lead levels) and, if necessary, establish air lead controls that will achieve the goal. Industry experts will then develop facility-specific ways to reduce lead levels below the goal using the most effective means, as has been done with great success under today's rules. DOSH has failed to show that it cannot achieve its target blood lead levels within the historically effective framework and risks a finding that elements of its complex, prescriptive regime either afford no benefit or are not technically or economically feasible.

The Proposed "Lead Content" Thresholds Would Impose Significant Unnecessary Compliance Burdens on Entire Industries that Have No Lead Health Risks.

The practical realities of the lead content of common materials has not been adequately addressed in the proposed rule. For example, as described below, the draft rule would force all steel workers and plumbers to assume that their work is covered by the full scope of the rule despite the fact that essentially no risk exists.

Metals, even metals with the same nominal specifications, may vary in terms of their lead content. DOSH should consult with metals industry experts regarding whether the 50 ppm limit is economically or technically feasible. For example, steel is generally ordered using the chemical content disclosures required by ASTM standards for each grade of steel, and many of these standards (including the most common ones) do not require disclosure of lead content. However, because lead is a common scrap steel contaminant and does not affect the properties of steel below de minimis levels, lead content levels regularly exceed 50 ppm in commonly available (or previously installed) steel. BCI understands that steel mills aim to keep the lead content of "standard" grades of steel below either 200 ppm (0.02%) or 400 ppm (0.04%), but some "non-leaded" grades of stainless steel may contain as much as 4,000 ppm lead (0.4%).[3]

This means that commonly available grades of steel are likely to trigger at least the "Basic Rules" under the June 2019 draft. But employers will have no way of knowing whether their steel work subjects their employees to the Basic Rules or even the Action Rules unless they purchase a $20,000+ XRF machine and use it on every batch of steel purchased or send samples for laboratory analysis. Neither approach is economically or technically feasible. The only other option would be to special order steel certified to contain less than 0.005% lead, likely at a price premium. The burdens are unnecessary, and DOSH has presented no evidence that welding, cutting, grinding, or even drilling (which may also "aerosolize" material) metals with lead levels as low as 50 ppm is

[3] *See also* USEPA, Assessing the Management of Lead in Scrap Metal and Electric Arc Furnace ["EAF"] Dust, Final Report, EPA530-R-09-004 at 15, 26, 61 (April 2009) (reporting that "[c]onventional non-leaded steel contains <0.01% [100 ppm] lead"; non-leaded stainless steels may contain 100 to 4000 ppm lead; and that some EAFs control lead in the reclaimed steel to less than 300 ppm, or even as low as 1 ppm). Some types of machine steel, e.g., Grade 12L14, contain by specification 1500 to 3500 ppm lead.

unsafe and must therefore be regulated. BCI believes no such evidence exists and that this portion of the rule is unsupportable.

Similarly, the 50 ppm trigger is defined to apply to welding tasks in any location or surface "where lead *containing* coatings were used" (emphasis added). Under federal law, even after the phase-out of leaded paints, "non-lead" paints were allowed to contain 600 ppm lead (dry weight) from 1977 until 2009. Since 2009, "non-lead" paints have been allowed to contain 0.009% (90 ppm) lead. Therefore, any person welding <u>any</u> painted surface will be required to assume their work is subject to the Basic Rules, because under federal law and regulation most "non-lead" paints may have "contained" lead above 50 ppm. The 50 ppm threshold is meaningless and impossible to comply with both technically and economically.

Finally, federal law allows plumbing solder to be marketed as "lead free" so long as the lead content is at or below 0.2 percent (2,000 ppm). 49 § U.S.C. 1417(c)(1). Further, proposed rules from EPA would require plumbing solder to use the phrase "lead free" on the product's labeling for products below 0.2 percent lead. *See* EPA, *Use of Lead Free Pipes, Fittings, Fixtures, Solder and Flux for Drinking Water*; 82 Fed. Reg. 4,805, 4,823 (January 17, 2017). If EPA adopts this rule as proposed, it would potentially be a violation of federal law for a supplier to label the product as both "lead free" and "not lead free in Washington," preempting the ability for suppliers to warn Washington customers that their use of the lead-free solder might be subject to Washington's workplace lead regulations. This means that most plumbers would be subject to the Washington lead rule despite contrary marketing and federal rules.

As the above discussion highlights, DOSH's proposed venture outside the established regulatory framework may have farther reaching effects than it realizes. Far from simply making many who were, previously, "simply unaware that basic requirements apply to them," it will instead cause vastly larger numbers of employers to have to make determinations about whether they need to comply with certain requirements—and perhaps actually comply with certain requirements—despite the fact that there have been no affirmative findings that their operations expose their employees to any lead-related health risks.

IV. <u>BCI'S PROPOSED CHANGES TO THE OVERHAULED FRAMEWORK</u>

As set forth above, BCI does not believe that DOSH has established, or can establish, that the new framework is appropriate or necessary. Notwithstanding this, to the extent DOSH intends to proceed with the framework in the June 2019 draft, BCI provides the following comments on certain elements of that framework. BCI has raised several of these issues during the stakeholder meetings and documents those concerns here to ensure they are recorded.

"Articles" Should Continue to Be Exempt from the Rule.

DOSH has provided no evidence to support a need to regulate retail establishments that sell articles containing lead (such as electronics, batteries, and packaged ammunition or fishing weights). DOSH has provided no evidence or support for the proposition that the usual retail handling of these products (by workers, customers, or some combination of the two) poses any risk of "material impairment" to the health of retail employees.

An "Article" is defined under Washington regulation as: a manufactured item other than a fluid or particle:

> Which is formed to a specific shape or design during manufacture;
>
> Which has end use function(s) dependent in whole or in part upon its shape or design during end use; and
>
> Which under normal conditions of use does not release more than very small quantities, e.g., minute or trace amounts of a hazardous chemical (as determined under WAC 296-901-14008), and does not pose a physical hazard or health risk to employees.

WAC 296-901-14008 (emphasis added). *See also* 29 C.F.R. § 1910.1200(c) (defining "article" similarly under OSHA Hazard Communication regulations). The basis for the articles exemptions in the state and federal standards, as stated in the respective definitions of "article," is that an article "does not pose a physical hazard or health risk to employees." Federal OSHA, justifiably, has concluded that the presence of chemicals in articles poses no risk of exposure such that there would be a need to disclose that chemical's presence. *See* 29 C.F.R. § 1910.1200(b)(6)(v).[4]

DOSH has provided no reasonable rationale why articles in a retail setting warrant the application of the Basic Rules and the special inventory controls in the safe harbor while simultaneously exempting such articles from the Hazard Communication standard. The only rationale provided at the stakeholder meetings was that DOSH staff have observed lead dust in certain retail areas attached to gun ranges. However, the draft safe harbor explicitly excludes retail areas attached to gun ranges from eligibility for the safe harbor.

The new "Handling lead containing articles in retail settings—Limited" "safe harbor," WAC 296-857-50010, is not a "safe harbor" so much as a new requirement that the Basic Rules and the safe harbor inventory controls (plus additional, somewhat duplicative rules) be used at retail establishments where there is no risk of lead exposure. As described above, DOSH is

[4] By contrast, elsewhere in the draft rules DOSH appears to have recognized that articles are not appropriate for regulation by exempting articles from triggering the "Metals Action Level." E.g., WAC 296-857-10030(4)(c).

required to find that a regulated work environment in fact poses a risk of an impairment; DOSH has made no such finding as to articles generally, or articles in retail environments specifically.

Quantitative Surface Sampling is Subjective, Expensive, and Should Be Eliminated.

The June 2019 draft continues to require employers to conduct expensive and unnecessary quantitative sampling for lead on surfaces as part of their compliance with other sections of the rule. Alternative methods are better and more appropriate. BCI's August 28, 2017, comments to DOSH contained a detailed discussion of the problems associated with quantitative surface sampling, and the "four sample" method in particular, for routine cleaning checks and surface monitoring purposes.[5]

Under the proposed rule, wipe sampling would be required to determine compliance with the surface content Action Level. But wipe sampling results are inherently variable based on the person taking the samples and the surface being sampled. Variables inherent o the person performing sampling, and the surface being sampled cannot be eliminated. A facility EHS professional may—and likely would—get a different result than a DOSH inspector, even if both were correctly following the same sampling procedure. A fixed "free lead" surface lead level is therefore inappropriate for use as a citable regulatory threshold. Because of this inherent variability, wipe sampling methods are only appropriate for qualitative evaluations or comparison purposes, not citable provisions or mandatory rule elements. The Surface Action Level, WAC 296-857-10030(3) and Table 4, should be removed from the draft.

BCI is also disappointed that DOSH's draft still contains mandates for quantitative surface sampling in the "Clean Areas" safe harbor provisions and requires quantitative surface sampling for "lead cleaning validation" purposes. *See* WAC 296-857-50010; WAC 296-857-40010(3). As has been described in our prior comments, the delays between when quantitative surface samples are taken and the results are returned from the laboratory mean that these samples provide no utility to the employer to aid their observation and development of good cleaning practices, and no utility to the employee being trained. For surfaces where lead should not be present above *de minimis* levels, such as break rooms, qualitative testing using colorimetric methods would provide significantly more effective feedback at a lower cost. This is because such testing provides instantaneous feedback to employers and housekeepers on the effectiveness of their cleaning techniques which allows for immediate corrective actions if cleaning was ineffective.

Multi-Employer Provisions are Unnecessary.

The "Response to Stakeholder Comments" states that the new language in WAC 296-857-10040 is "based on settled case law in Washington" that clarifies the approach to dealing with violations at multi-employer worksites. An attempt to re-state "settled case law" is unnecessary and will likely result in confusion. And, the caselaw in Washington is liley not "settled" with

[5] Those comments are reincorporated by reference herein.

regard to each and every question that could arise regarding separate or joint liability for a given violation at a multi-employer worksite. At a minimum, DOSH should provide stakeholders the citations to the specific cases that it believes WAC 296-857-10040 codifies. It would be preferable for DOSH to specify whether general contractors or subcontractors are responsbile for certain tasks in the rule and to further note that the responsibility for those tasks could be redistributed based on contractual arrangements or Washington law.

The New Blood Lead Levels Should Be Phased in Over Time.

The June 2019 draft still contains a placeholder for the phase-in period that will be used to implement the rules. Based on the dramatic and expensive changes the rule will require, BCI strongly supports a phase-in period of at least five years for all of the elements of the draft rule as presently written.

With regard to blood lead levels under the medical removal provisions, under the federal 1978 lead rules, medical removal thresholds were phased in over time (generally declining by 10 µg/dL every one or two years between 1980 and 1983). BCI believes that a similar approach is advisable here to avoid exposing employers to liability as they come into compliance with the new framework.

Additional Definitions are Required.

The inclusion of defined terms is a welcome improvement over the prior drafts. However, there are several key terms used in the rule which still require definitions:[6]

Lead work. This term appears numerous times to denote employee tasks which trigger certain actions. However, other similar terms also appear without explanation. DOSH should clarify whether the terms "lead related work" and "lead related tasks" in WAC 296-857-30050 and 30060 are different. Relatedly, references to otherwise unqualified "work" in the rule that are intended to refer to "lead work" should be updated. E.g., WAC 296-857-30020(1)(b).

Manipulate. This term is used in WAC 296-857-10050(f)(v) in connection with work involving material with lead content above 5,000 ppm. But it is unclear what tasks might involve "manipulating" a material, whether those tasks would include tasks (such as bending) that would not be expected to release any lead particulate, or whether DOSH would consider a material "manipulated" if it is simply moved from one place to another. It is also unclear how this work is different than the types of work described in (f)(iii) or (iv).

Elevated Blood Lead Level. This term is used throughout the rule and should be clearly defined, particularly as an "elevated blood lead level" (or an "elevated test") is frequently the

[6] In general, once definitions are introduced, the definitions do not need to be resupplied at later points in the rule. E.g., WAC 296-857-30030(3)(f)(iv)(A)-(D); WAC 296-857-46030(4).

trigger for other requirements. WAC 296-857-70010 does suggest that "elevated" is defined as more than 5 µg/dL, but it appears to be used more generally in other sections. All references to the 5 µg/dL level should be harmonized under a defined term, whether that be "elevated blood lead level," "advisory level," or otherwise.

Days. The rule uses both calendar, business, and otherwise undefined "days" in different sections. To avoid confusion, "days" should be defined as business days "unless otherwise specified."

Phrases Introducing Ambiguity and References to Non-Mandatory "Best-Practices" Should Be Removed or Placed in a Separate Guidance Document.

The draft rule frequently uses vague terms and unnecessarily incorporates "best practices" and suggested methods into the text of the rule.[7] This will create confusion regarding what actions are required of employers and what provisions of the rule are citable.

First, the phrase "make sure" is used throughout the rule to describe obligations of employers, but this phrase creates unnecessary ambiguity. For example, in WAC 296-857-42010(4), employers are required to "[m]ake sure workers wash their hands and faces at break time and at the end of the work shift."[8] The phrase "make sure" implies an obligation not just to require employee washing, but to be physically present to force a non-compliant worker to wash. This further implies that an employer would be out of compliance in a situation where the worker in-fact does wash, but the employer was not present to "make sure" the washing occurred. A better phrasing would be:

(4) Require workers to wash their hands and faces at break times and at the end of the work shift.

Second, many suggested best practices are included in the regulations and could be interpreted as citable provisions. For example, WAC 296-857-42010(5) describes various methods that "could be" used by workers to effectively wash their hands. It also states that "[o]bjective wipe tests can be used to verify effective handwashing." The use of the phrases "could be" and "can be" in the text implies that these practices are intended to be suggested practices, and not mandatory. That text should be in a note or guidance document, not a citable provision.

[7] E.g., WAC 296-857-42010(5); WAC 296-857-45020(1); WAC 296-857-60010(1) ("This is lead that…").
[8] In some sections, "make sure" and other duty-creating phrases are used without any indication of who is required to perform the action. E.g., WAC 296-857-20070(1) ("establish," "make sure"); WAC296-857-30030 ("select"). The person or entity on which any duties fall should be clearly identified. If the duty created is a discrete act, the timeframe for completing it should be provided whenever possible. E.g., WAC 296-857-30040 (requiring employer to "inform workers of the right to a second opinion," but not specifying when this must be done).

WAC 296-857-40010(3) states that "[f]our-sample surface testing may be used to demonstrate cleaning effectiveness." The use of the word "may" should indicate that the provision is non-mandatory, but no other methods are suggested or expressly allowed to demonstrate cleaning effectiveness. The rule is thus vague: if an employer wishes to demonstrate cleaning effectiveness, must four sample testing be used? Are there alternatives that will be accepted? What does "cleaning effectiveness" mean? A procedure that renders a portion of the workplace "as free as practicable" of lead dust and debris? What does "as free as practicable" mean? As clean as a surface becomes if one of the suggested cleaning methods is used? To the extent that these terms relate to citable infractions as opposed to best practices, they need to be defined or clarified.

Additionally, the word potentially (or similar qualifiers) appears throughout the draft and should be removed where possible and defined where some standard of "potentiality" is required. It also often appears with other words that throw its meaning into question. E.g., WAC 296-857-50030 ("found to potentially contain"); WAC 296-857-50060 ("potentially exposed workers"). Unnecessary uses of the word "may" should also be eliminated. E.g., WAC 296-857-30040(6) ("the employer may need"); WAC 296-857-30010 ("exposure incident which may have resulted in an exposure at or above an action level").

Repair Work Exemption Requires Recognition of Temporary Lead Work Areas.

WAC 296-857-44020 recognizes that exposure control areas may be temporary, for example when repair work on a lead bearing product is performed at a customer site and is to occur again. However, many of the requirements for areas that would be controlled solely by the repair contractor inappropriately impose burdens on the facility-owner employer. For example, the requirements for Exposure Control Plans (WAC 296-857-46030)[9] appear to apply to any employer with a temporary lead control area in their facility. The control area requirements need to be aligned with the bifurcated duties established in WAC 296-857-10040. Relatedly, WAC 296-857-10040 should provide exposure generators with the option of excluding employees not covered by the rules from lead work areas for the duration of any lead work as an alternative means of satisfying the requirements of WAC 296-857-10040.

BLL Reporting Time Frame is Unnecessarily Short.

The current draft requires any BLL above 10 µg/dL to be reported to DOSH within 24 hours. This reporting period is the same as required for a non-hospitalized amputation or the loss of an eye. *See* WAC 296-27-031. This speed of reporting is excessive and unnecessarily burdensome with regard to BLLs that the rules themselves recognize do not require medical

[9] With regard to WAC 296-857-46030(6)(b), BCI agrees that soliciting input regarding Exposure Control Plans from the frontline workforce may be a best practice. But BCI does not believe that the rule should require a request for input absent a more fully defined mechanism in the rule for considering and acting upon that input—particularly as the rule already establishes many procedures that could not be deviated from as a result of feedback received.

removal. The 24-hour requirement also conflicts with the 5-day requirement to inform the employee of their BLL test results, which is a more reasonable period. A more logical reporting period would be for BLLs above 10 µg/dL to be reported to DOSH quarterly in a summary report. This would also reduce the burden on DOSH to convert the data into a useable format and would still allow DOSH to assess employer performance. Quarterly reporting would also allow sufficient time to capture multiple blood lead test results in the event that confirmatory testing is needed.

Employers Should Not Be Held Liable for an Employee's Refusal to Submit to Blood Monitoring.

The draft continues to place liability on the employer for ensuring that blood lead testing is *actually* performed for workers exposed above the Action Levels. DOSH's "Response to Stakeholder Concerns" confirms that the intention is that BLL testing "would be required without exceptions." However, as Federal OSHA has recognized for more than thirty-five years, employers may not force an employee to consent to invasive medical procedures such as blood draws, and an employer cannot be held liable for an employee's refusal to cooperate with blood lead testing.[10]

DOSH should provide a defined mechanism for employers to follow OSHA's suggested policy of documenting an employee's refusal to cooperate with blood lead testing. Suggested language is provided below:

WAC 296-857-30020(10) – Employees may refuse to participate in the blood lead testing required by WAC 296-857-30020 by providing a signed statement of refusal to the employer.

(a) The employer shall have the discretion to remove an employee that refuses blood lead testing from areas where lead exposure is at or above any action level but shall not be required to provide medical removal benefits to an employee removed under this provision.
(b) An employer may condition an employee's employment upon participation in the blood lead testing program by providing written notice of such employment condition to the employee.

V. CONCLUSION

BCI remains committed to working with DOSH to develop a rational update to Washington's occupational lead exposure regulations and supports some of the goals expressed by DOSH. However, the June 2019 draft unnecessarily abandons the well-understood and effective

[10] https://www.osha.gov/laws-regs/standardinterpretations/1983-06-14

federal framework in favor of a novel and complex approach that appears likely to be economically and technically infeasible.

BCI strongly encourages DOSH to rethink its current approach, and BCI would be pleased to cooperate with DOSH's efforts to draft a more streamlined update of its regulations.

Respectfully submitted,

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