10 CFR 851.23 Safety and health standards

Section (a) states: "Contractors must comply with the following safety and health standards that are applicable to the hazards at their covered workplace".

Question:

What is the impact on DOE facilities of OSHA’s updated 29 CFR Part 1910, Subpart D Walking and Working Surfaces standard?

Response:

The revised Walking and Working Surfaces standard addresses new and existing infrastructure. The impact of the revised standard on DOE facilities is summarized as follows:

1. Situations where no action is required and where there are no impacts to safety and health, i.e., de minimis conditions.

   1.1. Stair rails and handrails:

   1.1.1. The revised standard does not require any changes to existing stair rails that OSHA considered to be a de minimis condition for the previous Subpart D. OSHA referred to those stair rails and handrails in the Final Rule preamble at Federal Register / Vol. 81, No. 223 / Friday, November 18, 2016, page 82629 which states “The final rule will not affect existing stair rail systems; therefore, there is no requirement to retrofit stair rail systems. The final rule will continue to allow stair rails installed before the new requirement takes effect to meet the existing requirement.”

   1.1.2. Subsection (A) of the updated standard is the “grandfather” provision stating that stair rail systems installed before January 17, 2017 that OSHA considered to be a de minimis condition for the previous Subpart D need not be changed. The updated standard with Subsection (A) underlined is:

   1.1.2.1. Title 29 CFR 1910.29 (f) “Handrails and stair rail systems. The employer must ensure: (1) Height criteria. (i) Handrails are not less than 30 inches (76 cm) and not more than 38 inches (97 cm), as measured from the leading edge of the stair tread to the top surface of the handrail (see Figure D–12 of this section). (ii) The height of stair rail systems meets the following: (A) The height of stair rail systems installed before January 17,
2017 is not less than 30 inches (76 cm) from the leading edge of the stair tread to the top surface of the top rail; and (B) The height of stair rail systems installed on or after January 17, 2017 is not less than 42 inches (107 cm) from the leading edge of the stair tread to the top surface of the top rail.” (Subpart D does not include in this “grandfather” provision existing stair rail systems installed prior to January 17, 2017 that OSHA had not considered to be a de minimis condition for the previous version of Subpart D.)

1.2. Guardrails

1.2.1. DOE FAQ’s currently state that guardrails meeting defined specifications are classified as de minimis. DOE’s position on this matter remains unchanged.

1.2.2. DOE’s enforcement policy is found in Appendix B to Part 851—General Statement of Enforcement Policy, V. Procedural Framework, (b) “To assess the potential safety and health impact of a particular violation, DOE will categorize the potential severity of violations of worker safety and health requirements as follows: ... (c) De minimis violations, defined as a deviation from the requirement of a standard that has no direct or immediate relationship to safety or health, will not be the subject of formal enforcement action through the issuance of a Notice of Violation.”

1.2.3. This policy as specifically applied to guard railings is found in Example 4 of a DOE FAQ that responds to the following question: Question: “Could DOE describe in more detail, with examples, the three levels of violation severity, Level 1, Level 2 and de minimis?” (https://energy.gov/sites/prod/files/2014/07/f18/10CFR851-FAQ%20Updated%20October%202019%20202010.pdf ) This enforcement policy remains unchanged.

1.3. No action is required where the employer has provided alternative means of ensuring a safe working environment. The recently updated Subpart D provides examples of alternative means of ensuring a safe working environment. That rule allows the use of one or more alternatives for an area, situation or activity. Examples include guardrail systems, safety net systems, personal fall protection systems, personal fall arrest systems, travel restraint systems, ladder safety systems, positioning systems, handrails, and/or designated areas. The DOE Field Element Manager has prerogative to consult subject matter experts and has the authority to determine that an alternative means ensures a safe working environment. Title 10 C.F.R. 851.11, Development and approval of the worker safety and health program, requires contractors to submit to the Field Element Manager a written worker safety and health program in which the Manager can approve the alternative means.
2. **Situations where a variance may be needed**

2.1. Falls from ladders are among the leading causes of injuries and fatalities in the workplace. (The third highest cause of fatalities given in Table V-11 on page 82782 Federal Register / Vol. 81, No. 223 / Friday, November 18, 2016). There may be situations where recognized alternative means of providing a safe work environment are not available and a variance is needed to address requirements for fixed ladders and ensure adequate safety.

2.2. Fixed ladders that represent safety hazards may require a DOE-approved variance to 10 C.F.R. Part 851.23, “Safety and health standards,” that would allow a contractor to use alternative means of ensuring a safe working environment. Contractors may elect to apply for a variance to 10 C.F.R. Part 851.23 to implement an alternative means for meeting some part of a safety and health standard in situations where they are unable to comply with a specific provision of a required standard. A variance to parts of Subpart D may be appropriate for fixed ladders. The alternate means must be identified in an approved variance to 10 C.F.R. Part 851.23 that has been processed according to 10 C.F.R. Part 851.31 Variance process. Information about variances to DOE’s 10 C.F.R. Part 851.23 is available at [https://ehss.energy.gov/HealthSafety/wshp/851variance/default.aspx](https://ehss.energy.gov/HealthSafety/wshp/851variance/default.aspx).

3. **Situations where there may be a need for corrective action.**

3.1. Fixed ladders will need to be properly equipped, as prescribed under the updated Subpart D standard. DOE (except for non-Atomic Energy Act programs), rather than OSHA, regulates contractor worker protection but DOE generally follows OSHA positions concerning OSHA standards. OSHA recognizes that some requirements for existing fixed ladders will require time to comply with an established a deadline of November 18, 2036 to comply for personal fall arrest or ladder safety systems. This deadline does not apply to other fixed ladder requirements such as 24 inch flares and self-closing gates.

3.2. The deadline (underlined) is found at 29 C.F.R. § 1910.28, “Duty to have fall protection and falling object protection, (b) Protection from fall hazards, (9) Fixed ladders (that extend more than 24 feet (7.3 m) above a lower level). (i) For fixed ladders that extend more than 24 feet (7.3 m) above a lower level, the employer must ensure: (D) Final deadline. On and after November 18, 2036, all fixed ladders are equipped with a personal fall arrest system or a ladder safety system.”

3.3. Plans to abate non-compliant fixed ladders should prioritize repair and replacement based on frequency of usage, injury risk, complexity of repair or replacement, and condition of existing ladders. Also, the plans should be included in the DOE-approved
Worker Safety and Health Program pursuant to 10 CFR 851.11 “Development and approval of the worker safety and health program.”

4. **Other aspects of the revised Subpart D.**

   For all other aspects of the revised standard, full compliance with the revised requirements is expected to be achieved within 90 days of the date of issue of the revised standard or within the compliance schedule specified for specific requirements, whichever is greater.

5. **Guidance vs. interpretive ruling.**

   The beginning of 10 CFR 851 FAQs includes: “The responses to the Frequently Asked Questions are not official interpretations, only the Office of General Counsel may issue an interpretive ruling. Please see 10 CFR 851.7 and 851.8 for more information.” Contractors subject to 10 CFR 851 for whom the above FAQ “What is the impact on DOE facilities of OSHA’s updated 29 CFR Part 1910, Subpart D Walking and Working Surfaces standard?” does not meet their needs have the right to file a request to the Office of General Counsel for an interpretive ruling that is binding on DOE. Title 10 CFR 851.7 “Requests for a binding interpretive ruling” provides the procedure for filing the request.