

# OSHA confined space standards extend to construction industry

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## Introduction

The primary goal for employers at construction worksites –as well as at industry worksites in general – is to protect the health and safety of the workforce. To this end, the Occupational Safety and Health Administration (OSHA) regulates a variety of workplace safety concerns in both the public and private sectors. One of the most complex and heavily regulated areas of concern is confined spaces. While a confined space may seem easily identifiable, OSHA's confined space standards present a web of complex regulations that prove challenging for employers to understand and implement.

Until 2015 OSHA's confined space standards were applied to general industry employers. As construction sites play host to multiple types of employer and the workplace constantly evolves as the mix, degree and stage of the work progresses, the OSHA issued a final standard for construction work in confined spaces, effective August 3 2015.<sup>(1)</sup> The new standard mandates a series of practices and procedures specifically tailored to protect employees engaged in construction activities at worksites with one or more confined spaces. This new standard does not apply to construction work regulated elsewhere in Part 1926 for excavations, underground construction and diving operations.<sup>(2)</sup>

## Confined spaces

The first step is understanding the difference between a 'confined space' and a 'permit-required confined space' (PRCS). OSHA defines a non-permit-required 'confined space' as a space that:

- is large enough and so configured that an employee can bodily enter and perform assigned work;
- has limited or restricted means for entry or exit (eg, tanks, vessels, silos, storage bins, hoppers, vaults and pits); and
- is not designed for continuous employee occupancy.<sup>(3)</sup>

PRCS standards, which went into effect on April 15 1993<sup>(4)</sup>, are limited to those workers who have obtained a proper permit. OSHA imposes heightened requirements due to the inherent hazards within this type of confined space.

## Permit-required confined spaces

A PRCS contains all the criteria of a non-permit confined space, with one or more of the following conditions:

- it contains or has the potential to contain a hazardous atmosphere;

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- it contains material that has the potential to engulf an entrant;
- it has walls that converge inwards or floors that slope downwards and taper into a smaller area which could trap or asphyxiate an entrant; or
- it contains any other recognised safety or health hazard (eg, unguarded machinery, exposed live wires or heat stress).(5)

Employers may find these definitions vague or ambiguous in the context of the unique properties and spaces found at a worksite. For example, many employers believe that a confined space is defined as an enclosed space. This is not the case, and thus many confined spaces are improperly eliminated from the employer's compliance programme. This also leads to the problem of recognising a confined space for compliance purposes, as not all workers are the same physical size and many underestimate their ability to fit into a particular space.

## **New standards**

While there is significant overlap with the general industry standard enacted in 1993, the new construction standards impose some nuanced provisions of which employers should be mindful. For example, before work begins at a worksite, each employer must ensure that a 'competent person' identifies all confined spaces in which one or more of the employees it directs may work, as well as each PRCS, through evaluation of the elements of that space, including testing as necessary.(6) The general industry standard does not require that a 'competent person' perform this role. A 'competent person' is defined under the new standard as someone who is capable of identifying existing and predictable hazards associated with working conditions – including whether a workspace is a PRCS.(7)

In addition to having a competent person evaluate the worksite for the presence of confined spaces, including PRCSs, employers must:

- identify the means of entry and exit, proper ventilation methods and eliminate or control all potential hazards in the space once the space is classified as a PRCS;
- ensure that the air in a confined space is tested before workers enter for oxygen levels, flammable and toxic substances and stratified atmospheres;
- remove or control hazards in the space and determine rescue procedures and necessary equipment if a permit is required for the space; and
- ventilate or use whatever controls or protections are necessary so employees can safely work in the space.(8)

The general industry standard encourages continuous atmospheric monitoring where possible, and requires periodic monitoring only as necessary.(9) The new construction standards now require continuous atmospheric monitoring unless the entry employer can demonstrate that equipment for continuous monitoring is not commercially available or periodic monitoring is sufficient.(10) In other words, continuous monitoring is now the default standard.

Another area in which the construction standards bolster the general industry standard is with regard to training employees. Employers are now required to train employees in the hazards that may be found in confined spaces and PRCSs, at no cost to the employee. Employers must also ensure that employees possess the understanding, knowledge and skills necessary for the safe performance of the duties assigned under this standard. This training must result in an understanding of the hazards in PRCSs and the methods used to isolate, control or otherwise protect employees from these hazards. Those employees who are not authorised to perform entry rescues must be appraised of the dangers of attempting such rescues. This training must also be provided in both a language and vocabulary that the employee can understand. In addition, employers must maintain training records to show that the required training has been accomplished.(11)

In recognition of the fact that construction sites are often a rotating carousel of contractors, suppliers and materialmen, which requires careful coordination, the new OSHA construction standards classify and impose duties on three types of employer(12):

- Entry employer – this is defined as any employer that decides that an employee it directs will enter a PRCS. Entry employers have a duty to inform 'controlling contractors' of any hazards

encountered in a PRCS. Entry employers must also develop safe entry procedures. An employer cannot circumvent the duties of an 'entry employer' by refusing to decide whether its employees will enter a PRCS. OSHA will consider the failure to decide to be an implicit decision to allow employees to enter those spaces if they are working in the proximity of the space.

- Host employer – this is defined as the employer that owns or manages the property where the construction work is taking place. If the host employer has information about PRCS hazards, it must share that information with the 'controlling contractor', which is then responsible for sharing that information with the entry employers. If the host employer has contracted with an entity for the general management of that property (eg, construction manager, programme manager) and has transferred to that entity the information regarding entry of a PRCS, OSHA will treat the contracted management entity as the host employer for as long as that entity manages the property. Otherwise, OSHA will treat the owner of the property as the host employer. In no case can there be more than one host employer.
- Controlling contractor – this is defined as the employer that has overall responsibility for construction at the worksite. The controlling contractor is responsible for the following tasks:
  - coordinating entry operations when there is more than one entry employer;
  - providing any information about any PRCS hazards to all entry employers;
  - coordinating work in and around confined spaces so that no contractor working at the site will create a hazard inside the confined space; and
  - debriefing the entry employer (after the entry employer has performed entry operations) to collect information that the controlling contractor then must share with the host employer and other contractors that enter the space later.

If the controlling contractor owns or manages the property, then it is both a controlling employer and a host employer

## **Comment**

It is apparent from these classifications that there is considerable overlap and coordination of duties and responsibilities among various types of employer. This is intended to reflect the dynamic nature of a construction project, which requires the same level of coordination in order to ensure safe and successful project delivery. The level of complexity and ambiguity that could arise depends on the type of construction project and on whether the project occurs in an unorthodox setting. Employers performing these construction-related activities should be sure to educate themselves on the new construction standards and consult legal counsel to ensure proper compliance.

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## **Endnotes**

(1) 29 CFR § 1926 Subpart AA.

(2) 29 CFR § 1926.1201(b).

(3) See 29 CFR § 1910.146(b).

(4) *Id.*

(5) *Id.*

(6) *Id* § 1926.1203.

(7) *Id* § 1926.1202.

(8) *Id* § 1926.1203.

(9) *Id* §§ 1926 146(d)(5)(i) & (ii).

(10) *Id* § 1926.1203(2)(vi).

(11) *Id* § 1926.1207.

(12) *Id* § 1926.1202.

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