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Reducing Your Legal Liability

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Smart Asbestos Remediation

By F. Stephen Masek

Cleaning and restoration contractors hit with large fines, prison sentences, or litigation by building occupants have learned the hard way, *almost every contractor working on existing buildings is in the asbestos business, like it or not.* Here are some keys to reducing liability, gaining a competitive edge, and increasing profitability:

- Know that asbestos was used in common building materials up through the middle to late 1980s.
- Be familiar with the laws and regulations.
- Be ready to handle the small disturbances often required for rapid response projects.
- Have a well organized exposure assessment program and database; and finally,
- Properly train all field personnel.

Asbestos is Very Common

Many materials commonly used until the middle to late 1980s contained asbestos. The most significant of them are drywall joint compound, exterior stucco (gray base and/or colored top layer), HVAC ducts made of corrugated asbestos covered with aluminum, sheet vinyl flooring, vinyl floor tile, flooring and other mastics (adhesives), and vermiculite. While some people mistakenly believe that 1980 is a cut-off date for asbestos, experienced senior asbestos consultants who have inspected thousands of buildings know otherwise. Assuming that all 9" x 9" vinyl floor tiles contain asbestos, and all 12" x 12" vinyl floor tiles do not is another common mistake.

Due to a court ruling in 1991, it is still legal to sell and install a variety of common building materials which contain asbestos,

such as vinyl floor tile, troweled-on surfacing materials such as exterior stucco, roof coatings and asbestos-cement products. In order to avoid liability for installing a material which contains asbestos, contractors who perform repair or renovation work should check the ingredients list or Material Safety Data Sheet for all such materials being installed.

Assume or Sample

There are only two ways to handle suspect materials disturbed by cleaning and restoration work — assume that they contain asbestos, or have an asbestos consultant sample and analyze suspected materials. Wood, metal, glass, plastic and fiberglass are obviously not suspect, but identifying and sampling other materials is a task for an experienced asbestos consultant. Many states have specific

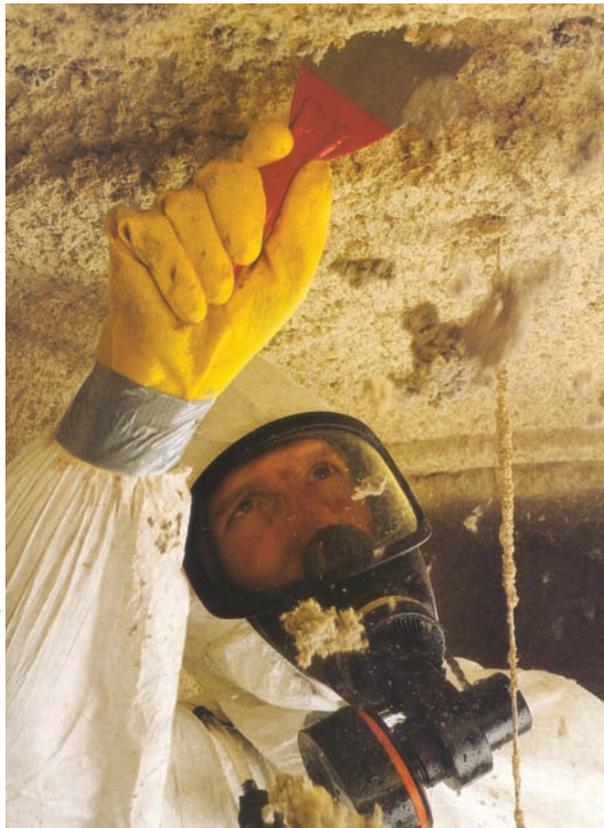
licenses or certifications for asbestos consulting work.

A good asbestos survey or inspection report should separate the samples collected into homogeneous areas — that is, areas of materials which are uniform in color, texture, construction or application date and general appearance. If any of the samples from a homogeneous area are reported to contain asbestos, the entire homogeneous area must be treated accordingly.

For friable materials (those which can be crushed or reduced to powder by hand pressure), sampling requirements are generally well defined. However, when sampling non-friable materials such as drywall joint compound, the judgment and experience of the consultant are very important, as the sampling requirements are vague and analytical laboratories have difficulty detecting asbestos in many of those materials. Such readily identifiable materials as asbestos-cement flue pipes and asbestos paper on ducts are typically assumed to contain asbestos.

An asbestos survey report should be formal, containing a list of homogeneous areas and the samples from each homogeneous area, ratings of the friability, condition and disturbance potential of each homogeneous area, photographs, conclusions, recommendations, information on the background and qualifications of the consultant(s) involved, and the report from the laboratory which analyzed the samples, complete with a chain of custody form. In cases where the consultant also performed a mold inspection, both reports may be combined into one document.

Even under optimal conditions, it is almost impossible for an asbestos consultant to visit a job site, collect samples of suspect materials, have them analyzed by a laboratory, and produce a report in less than one-half to one day.



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Therefore, it will often be necessary to assume that suspect materials contain asbestos and handle them in compliance with the applicable laws and regulations.

Asbestos has Been Highly Regulated for Many Years

Important asbestos regulations have been in place for many years. The federal Occupational Safety and Health Administration (OSHA) asbestos construction industry standard, 29CFR1926.1101, has been in place since 1994. The Asbestos Hazard Emergency Response Act (AHERA) at 40CFR763 regarding asbestos in schools and training for working with asbestos was enacted in 1987, with the training requirements extended to work in other buildings in 1994. The EPA asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP) at 40CFR Part 61, subpart M was first promulgated in 1973, with significant amendments in 1990. All of these regulations and most state and local regulations are readily available on the Internet.

Regulations for Materials Containing Less Than 1 percent Asbestos

Some people mistakenly think that materials containing less than 1 percent asbestos are not regulated, since Asbestos Containing Material (ACM) is defined by the various regulations as any material which contains more than 1 percent asbestos by weight. Letters from OSHA interpreting their regulations make it clear that materials containing less than 1 percent asbestos are still covered by significant portions of their asbestos regulations and employers must exercise due diligence to avoid violations and exposures to asbestos. A letter dated April 17, 1997, to Mr. Leon Petrakis* states that the OSHA standard covers both “asbestos” and “asbestos-containing materials” and that “asbestos that is present in

percentages less than one percent continues to be covered by the OSHA standard.” Another letter dated August 13, 1999 to Mr. Walter Chun contains several key points:

- Unless the contractor produces an initial negative exposure assessment showing that neither the 8-hour time-weighted average nor the 30-minute Permissible Exposure Limit (PEL) will be exceeded, they must comply with the elements of the standard that are applicable when either asbestos PEL is exceeded.
- Even if neither PEL is exceeded or might be exceeded, the use of wet methods, prompt clean-up and disposal of wastes and debris, as well as record keeping requirements associated with negative exposure assessment, all still apply.

Employees who are working while the contractor seeks to produce a negative exposure assessment must be provided with the protective clothing described in 29 CFR 1926.1101(I), at least half-mask air-purifying respirators with high efficiency filters, and training that meets the mandates of 29 CFR 1926.1101(k)(9)(viii).

In California, Asbestos Containing Construction Material (ACCM) is defined as any manufactured construction material which contains more than 1/10th of 1 percent (0.1 percent) asbestos by weight.

Small Disturbances, Big Liability

Contractors routinely hire asbestos abatement subcontractors to perform the removal of significant quantities of materials covered by OSHA Classes I and II, but contractors often need to disturb small amounts of materials which must be assumed to contain asbestos, since an asbestos survey report is not (or not yet) available.

An example of such a situation is making a series of holes in walls to insert air injection tubes as part of a rapid response to a water intrusion. Contractors could have an abatement subcontractor assist with such work, but as long as the amount of material disturbed or removed fits in one standard sized glove bag or asbestos waste bag not to exceed 60 inches in length and width, they can handle it themselves as OSHA Class III work. Liability for exposures to asbestos and violations of laws and regulations occurs when people assume there is no asbestos or no exposure as a third choice.

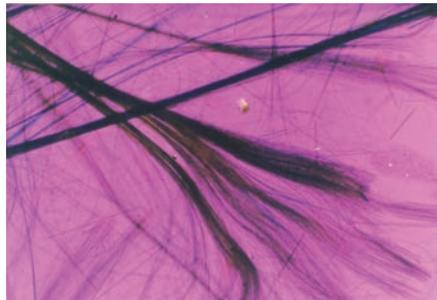
Asbestos is common enough that all field personnel working on existing buildings should have the 16-hour training needed for OSHA Class III asbestos work (two-hour awareness training plus 14 additional training hours). There are numerous companies which provide the necessary training, as AHERA requires that asbestos workers, supervisors, and consultants have initial training and annual refresher training.

Despite the small size of Class III projects, they must be conducted using specified engineering and work practice controls which are designed to minimize the exposure of employees performing the asbestos work and to bystander employees. Most contractors already have much of what they need to perform OSHA Class III work. Their people wear respirators,

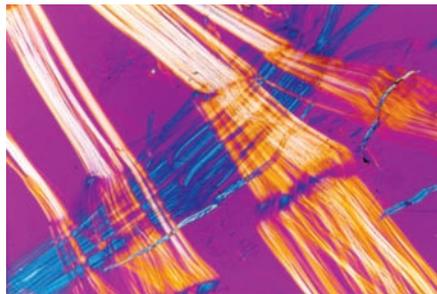
so they have a respiratory protection program. Many routinely use tight-fitting full face piece powered air purifying respirators with P-100 cartridges with a protection factor of 1,000 which is sufficient for 90 percent of routine asbestos removal. They have HEPA vacuums and negative air machines. Although not all are suitable for asbestos work, and some local regulations require that both pieces of equipment be tested and licensed.

The Missing Link — Exposure Assessment Programs

Contractors should have well organized asbestos exposure assessment programs and exposure assessment databases unless only working on non-asbestos materials. Until exposure assessment data is obtained, contractors must provide respiratory protection and other measures as if the work produces exposures which exceed the PEL. Exposure assessment data is generally only good for one year, so its ongoing collection eliminates having outdated



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exposure assessment data. It creates a database of information that shows the contractor is in compliance with the applicable laws and regulations and the workers are being properly protected.

Exposure assessment data is collected for workers with similar experience and training performing similar tasks. It is important to organize the exposure

assessment data in the contractor's database by tasks and experience.

The actual data collection involves placing personal air pumps on the belts of the workers being monitored, with a filter cassette hanging over their shoulder and clipped to their collar so that it is in their "breathing zone." Asbestos exposure assessments require both 30-minute "excursion" (highest exposure) sample and 8-hour samples. It is important to record the sample information — flow rate, the work task being monitored, and the workers' experience. The filter cassettes should be properly labeled and submitted to a laboratory for analysis of the asbestos content. When very dusty work is being performed, it will be necessary to collect multiple subsamples to avoid submitting unreadable "overloaded" samples to the laboratory.

Once the initial exposure assessment data is obtained, the contractor needs to provide the respiratory protection and other measures indicated by the exposure assessment data for each task-experience combination.

A Competitive Edge

Being well organized and equipped to deal with asbestos gives contractors a competitive edge. Contractors who make sure potential clients understand they are handling asbestos issues properly are also making it obvious that their client has chosen a qualified contractor who works to minimize their liability and the potential for costly delays. Such simple steps as obtaining quality asbestos surveys, collecting and managing exposure assessment data, training employees, and being familiar with long-standing regulations help replace worries over asbestos liability with celebration over bids won against less well-prepared competitors. ■

Stephen Masek, is president of Masek Consulting Services, Inc., as well as a California certified asbestos consultant, a Nevada certified asbestos abatement consultant, a California certified lead inspector and risk and environmental assessor. He can be reached at fsmmcsi@cox.net.

*Editor's Note: OSHA files inquiries according to the correspondent's last name.