



## New Requirement on Personal Protective Equipment

By Don Moen, ABC of WI Safety Director

On November 15, 2007, the Occupational Safety and Health Administration (OSHA) issued its final rule regarding employer payment for personal protective equipment (PPE). This rule applies to all industries, including construction. **The final rule becomes effective on February 13, 2008 and must be implemented no later than May 15, 2008.**

OSHA has been working on some form of PPE rule since 1994, when OSHA established its first nationwide policy on payment for required PPE in a memorandum to field staff (“Employer Obligation to Pay for Personal Protective Equipment”, October 18, 1994). The memorandum stated that, “...where PPE is very personal in nature and used by the employee off the job, such as is often the case with steel-toe safety shoes (but not metatarsal foot protection), the issue of payment may be left to labor-management negotiations” (Federal Register / Vol. 72, No. 220 / Thursday, November 15, 2007 / pages 64342-64343). However, the Occupational Safety and Health Review Commission (OSHRC) vacated a citation based on this memorandum, stating that OSHA had failed to adequately explain the policy and that letters of interpretation from OSHA were inconsistent with the outlined PPE policy.

In response to the OSHRC’s rebuttal of the PPE memorandum of 1994, OSHA issued the proposed rule for employer-paid PPE on March 31, 1999 (FR / Vol. 64 / pages 15402-15441). The proposed rule would have required that employers pay for all types of PPE required under OSHA standards, save for certain types of safety-toe shoes and boots, prescription safety eyewear and logging boots. The justification for the proposed rule lay in two main arguments: first, OSHA preliminarily concluded that Congress, through the OSH Act, requires employers to pay for PPE that is necessary for the employee to safely perform his or her job. Second, OSHA preliminarily concluded that the proposed PPE rule would “enhance compliance with existing PPE requirements in several practical ways, thereby significantly reducing the risk of non-use or misuse of PPE” (FR / 64 / pages 15406-15407).

After multiple rounds of public comment, the OSHA rule on employer payment for PPE was issued in its final state in November 2007. The final rule is, in many areas, the same as the proposed rule issued in 1999. However, there are a number of key clarifications contained within the rule that, ultimately, will help reduce the confusion of employer responsibility that has existed since the original OSHA PPE memorandum in 1994.

The final rule, as issued, makes official what many ABC companies have known, and practiced, for many years—while employers are responsible for providing most required PPE to their employees, at no cost, in order to maintain a safe workplace, personal items, such as steel-toe boots, standard prescription safety glasses and common work clothing (including cold / foul weather gear) remain the responsibility of the employee. Furthermore, the final rule provides companies with measures to ensure that the employee is responsible for replacement of PPE due to loss or intentional damage by the employee.

We believe that the impact on ABC of WI members will be limited, due in large part to the fact that many members currently meet or exceed the new rules’ requirements for employer-paid PPE. Ultimately, it is the view of ABC that OSHA’s final rule on employer payment for PPE, while not perfect, provides the necessary clarification on the employer’s responsibilities and

rights pertaining to PPE payment and will assist ABC of WI members' continued efforts to provide a safe workplace for all employees.

### **Excerpts from OSHA's final rulemaking on "Employer Payment for Personal Protective Equipment", issued November 13, 2007**

#### **Effective Dates**

- Rule becomes effective February 13, 2008
  - Employers **must implement the PPE payment requirements by May 13, 2008** (i.e. enforcement begins)
- **Basic Premise of Rule:** Employers are required to pay for the minimum level of PPE required by the standards
    1. **Employer-Owned PPE:** When employers purchase the PPE, they can retain ownership but still allow the employee to use the PPE off-site. OSHA does not object to employers transferring ownership of PPE to employees.
      - If the employer retains ownership of the PPE, they can require the employee return the PPE upon termination.
        - If the employee leaves without returning the PPE, nothing in the final rule prevents the employer from requiring the employee to pay for it or to take reasonable steps to retrieve the PPE.
        - Employers are allowed to use a "deposit" system for PPE to provide an incentive for employees to turn in PPE prior to termination.
        - Employers can require short-term and part-time employees to return all PPE at the end of each work day.
        - Nothing in the final rule requires employers to keep receipts to prove that they paid for PPE. (Generally, PPE payment practices can easily be determined through employee interviews).
    2. **Employee-Owned PPE:** Employees are allowed to use their own PPE (if their employer allows them to).
      - The employer must provide the minimum PPE required. If the employee wishes to use their own PPE, the employer may allow that. In this case, the employer does not reimburse them for the PPE.
      - Use of employee-owned PPE must be completely voluntary.
      - In this case, the employer is still responsible for ensuring the PPE is appropriate, including proper maintenance and sanitation.
      - If an employee is hired who already possesses PPE, and wishes to use them, the employer does not have to reimburse the new hire for the PPE.
      - Employers can not avoid their obligations under the standard by requiring the employees purchase PPE as a condition of employment or placement.

**3. Exempt Items:** The following are **specifically exempted** from this rule: (i.e. The employer **does not** have to pay for these items).

- **Non-specialty safety-toed protective footwear** (if allowed to be worn off the job site)
  - Any protective footwear that has additional protection or is more specialized, such a shoes with non-slip soles, or steel-toed rubber boots, is subject to the employer payment requirement.
- **Non-specialty prescription safety eyewear** (if allowed to be worn off the job site)
  - Also exempt if the employer provides suitable eye protection that fits over the prescription eyewear.
  - If an employee is required to wear a full face respirator or diving helmet, and eyewear inserts are required to ensure adequate protection, the employer must pay for the inserts.
- **Metatarsal protection:** An employer is not required to pay for shoes with integrated metatarsal protection as long as the employer provides and pays for metatarsal guards that attach to the shoes.
- **Logging boots**
- **Everyday clothing:** (jeans, long pants, long-sleeved shirts, coats)
  - OSHA is not requiring employers to pay for everyday clothing even though they may require their employees to use such everyday items such as long pants or long-sleeved shirts.
- **Ordinary clothing,** skin creams or other items used solely for protection from the weather (coats, parkas, cloves, boots).
  - Employees who work outdoors will have weather-related gear to protect themselves from the elements (ordinary cold weather coats, boots, ordinary rain gear). This gear is exempt from the employer payment requirement.
  - Clothing used in artificially-controlled environments with extreme heat or cold, such as freezers, are not considered part of the weather gear exemption and are paid for by the employer.
- **Other specifically exempt items:**
  - Sunglasses/sunscreen
  - Sturdy work boots
  - Lineman's boots
  - Back belts
  - dust masks used under the voluntary use provision)

**4. Items specifically NOT exempt (i.e. employer must pay for)**

- **Welding equipment.** The term “tools of the trade” is not used in this final rule. Regardless of past practices where employees have customarily supplied their own PPE, OSHA has determined that this is not an adequate basis to exempt PPE. Besides, “tools of the trade” can not be clearly defined.
- **Work gloves:** OSHA is requiring employer payment for work gloves when they are used for protection against workplace hazards. When used as PPE – to protect employees from lacerations, burns, chemicals, abrasions- employers must provide them at no cost.
- **Electrical PPE:** OSHA does not require employers to protect employees from electrical arcs through the use of flame-resistant clothing. OSHA simply requires that an employee’s clothing do no greater harm. Thus, 1910.269 does not mandate that employers provide any particular type of PPE to their employees and the payment rule would not apply. (This requirement is being considered in a separate rulemaking for 1910.269)

**5. Replacement:** The employer must pay for the replacement of PPE, unless the employee has lost or intentionally damaged the PPE. (the employer pays for the replacement only if the original PPE was required to be paid for by the employer).

- OSHA wants to be clear that the rule would not require the employer pay for replacement any time the employee requests a replacement. The employer should evaluate the PPE to determine its present condition, adequacy of protection, fit, etc.
- The final rule says all loses of PPE by an employee. This rule does not require employers to bear the cost of replacing PPE that the employee has lost, even if it is a single instance.
- In addition, the PPE may be considered “lost” if the employee comes to work without the PPE that has been issued to him/her.
- OSHA wants to make it clear that the exception applies only if the damage is intentional. Accidental damage of the PPE does not qualify.
- OSHA is very clear on employee payments.
  - You can not fine an employee \$100 for losing a \$10 pair of gloves.
  - You can not charge the employee the full cost of a PPE if it was already nearing the end of its service life.

- 6. At No Cost:** The final rule for PPE continually refers to providing PPE to the employee “at no cost”. This phrase is interpreted differently for the PPE standards than from other standards such as the Blood Borne Pathogen standard. Under the Blood borne Pathogen standard, employers can not require employees to pay first for vaccinations and then be reimbursed. Not can they be required to obtain vaccinations on their own time.

Under the PPE final rule, the phrase “at no cost” allows employers several options.

- Employer Purchase and Distribution
  - Employer buys the PPE and distributes it to the employees.
- Allowances
  - Employer determines the cost of basic PPE and gives the employee a certain amount of money to purchase the PPE. If the employee chooses to spend more, the employer is not required to reimburse the employee for the difference.
- Vouchers
  - Employer has an arrangement with a local distributor and the distributor agrees to accept “vouchers” from the employer. Again, if the employee chooses to spend more, the employer is not required to reimburse the employee for the difference.
- Employer reimbursement to employees
  - Employer determines the cost of basic PPE and reimburses the employee up to that amount. Again, if the employee chooses to spend more, the employer is not required to reimburse the employee for the difference.

**Note:** OSHA does not intend for the rule to cover time and travel expenses an employee might incur while shopping for PPE during non-work hours. OSHA does not believe that requiring employees to shop for PPE on their own outside of work would serve as a disincentive to acquiring the PPE. Employers are not required to reimburse employees for time spent shopping for PPE or related travel expenses.

- 7. Self-Employed Independent Contractors:** Truly self-employed independent contractors are not employees under the OSHA Act and are not covered under the OSHA standards (includes unpaid volunteers, members of farm employers, and domestic employees in a residential setting). Employers are not required to pay for PPE for self-employed independent contractors.
- 8. Subcontractors:** General contractors and subcontractors have an obligation to protect employees of other employers. However, OSHA is making it clear, that general contractors are not responsible for payment of PPE for the employees of subcontractors at multi-employer worksites.

## **9. Temporary Help Services**

- If the utilizing (host) employer controls the manner in which the temporary employees work, then the host employer will usually be responsible under the standard for providing the PPE at no cost.
- The temporary help services firm and the host employer are free to agree on how to coordinate the provisions of the PPE rule but the responsible employer can not escape their ultimate responsibility under the Act by requiring another party to perform them.

## **10. Part-time and Short-Term Employees:** This includes construction work. Nothing in the rule exempts employers from paying for required PPE just because they hire employees on a temporary or short-term basis.

- The PPE payment provision applies to all employers, including those with short-term employees, seasonal help, piece workers, hiring hall employees, labor pool employees or transient employees.
- OSHA does not consider employee turnover as a reasonable basis for excluding the construction industry from the PPE standard.

## **11. Union Contracts:** OSHA recognizes that the compliance deadline (May 13, 2008) is not a long enough window for all existing union contracts to be competed and new ones negotiated. This would take a number of years. However, OSHA has determined that workplaces with collective bargaining agreements should be treated no differently in the final rule than workplaces without collective bargaining agreements. (i.e. **All** employers **must** comply by May 13, 2008)

## **12. PPE Add-Ons:** If the add-on component (such as shoe inserts) is needed for the PPE to fit properly and to adequately protect the wearer, and the employer is required to pay for the PPE in the first place, then the employer must pay for the extra components. However, if the component is not needed for the PPE to provide adequate protection (but is for comfort, aesthetics, etc.) the employer is not required to pay for it.

## **13. Upgrades and Personalized PPE:** An employer may allow an employee to “upgrade” or personalize their PPE beyond what the employer is required to purchase. The employer is not required to pay for these upgrades provided the employer provides adequate “basic” PPE.

**14. Non-PPE Items:** If a particular item is not a PPE, or is not required by an OSHA standard (i.e. voluntary wear), it is not covered by the final rule.

- a. Items worn to keep the employees clean for purposes unrelated to safety or health are not considered to be PPE.
- b. Items worn solely to protect food and other people (hair nets or latex gloves when preparing food, surgical masks worn solely to prevent transmitting organisms to patients) are not covered under the final rule.

**15. Hand Tools:** Ordinary hand tools are not PPE. Some tools may have specialized protective characteristics (electrically insulated handles). These are considered “engineering” controls and not PPE.

If you have any questions regarding the new rule, please do not hesitate to call your ABC of WI Safety Department at (608) 244-5883, or in-state 800 236-2224.