

To ACCSH members,

The Assistant Secretary for Occupational Safety and Health requests, pursuant to the Contract Work Hours and Safety Act (40 U.S.C. §3704(b)) and 29 C.F.R. §1911.10, that the Advisory Committee on Construction Safety and Health (ACCSH) consider and provide recommendations on the proposed rule on Clarification Of Remedy For Violation Of Requirements To Provide Personal Protective Equipment And Train Employees. The regulatory text of the proposed rule and a summary of the rule are attached.

Pursuant to §1911.10, the Assistant Secretary is setting May 16, 2008, as the time period for ACCSH to submit its recommendations, which corresponds with the May 15-16, 2008, ACCSH meeting. During the ACCSH meeting, an OSHA representative will give a presentation on the proposed rule and will answer committee members' questions. In the interim, if you have any questions about the proposal or attached documents, you may contact Charles James, Counsel for Appellate Litigation, Office of the Solicitor, Occupational Safety and Health Division. You may reach Mr. James at 202-693-5454 or at [james.charles@dol.gov](mailto:james.charles@dol.gov).

## **PART 1926 – [AMENDED]**

### **Subpart C – [Amended]**

36. The authority citation for subpart C of 29 CFR part 1926 is revised to read as follows:

Sec. 3704, Contract Work Hours and Safety Standards Act (40 U.S.C. 333); secs. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 6-96 (62 FR 111), or 5-2007 (72 FR 31160) as applicable; and 29 CFR part 1911.

37. In section 1926.20, a new paragraph (f) is added to read as follows:

#### **§ 1926.20 General safety and health provisions**

\* \* \* \* \*

(f) Compliance duties owed to each employee. (1) Personal protective equipment Standards in this part requiring the employer to provide personal protective equipment (PPE), including respirators, because of hazards to employees impose a separate compliance duty to each employee covered by the requirement. The employer must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee may be considered a separate violation.

(2) Training. Standards in this part requiring training on hazards and related matters, such as standards requiring that employees receive training or that the employer train employees, provide training to employees, or institute or implement a training program, impose a separate compliance duty to each employee covered by the requirement. The employer must train each affected employee in the manner required by the standard, and each failure to train an employee may be considered a separate violation.

### **Subpart D – [Amended]**

38. The authority citation for subpart D of 29 CFR part 1926 is revised to read as follows:

Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 et seq.); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Orders 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (62 FR 50017), 5-2002 (67 FR 650008); or 5-2007 (72 FR 31160) as applicable; and 29 CFR part 11.

Sections 1926.58, 1926.59, 1926.60, and 1926.65 also issued under 5 U.S.C. 553 and 29 CFR part 1911.

Section 1926.62 of 29 CFR also issued under section 1031 of the Housing and Community Development Act of 1992 (42 U.S.C. 4853).

Section 1926.65 of 29 CFR also issued under section 126 of the Superfund Amendments and Reauthorization Act of 1986, as amended (29 U.S.C. 655 note), and 5 U.S.C. 553.

39. In section 1926.60, paragraph (i) is revised to read as follows:

**§ 1926.60 Methylenedianiline.**

\* \* \* \* \*

(i) Respiratory protection. (1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

\* \* \*

(2) Respirator program. The employer must implement a respiratory protection program in accordance with 29 CFR 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

\* \* \* \* \*

40. In section 1926.62, paragraphs (f) and (l) are revised to read as follows:

**§ 1926.62 Lead.**

\* \* \* \* \*

(f) Respiratory protection. (1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

\* \* \*

(2) Respirator program. (i) The employer must implement a respiratory protection program in accordance with 29 CFR 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

\* \* \* \* \*

(l) Employee information and training –

\* \* \*

(ii) The employer shall train each employee who is subject to exposure to lead at or above the action level on any day, or who is subject to exposure to lead compounds which may cause skin or eye irritation (e.g. lead arsenate, lead azide), in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

\* \* \* \* \*

**Subpart R – [Amended]**

41. The authority citation for subpart R of 29 CFR part 1926 is revised to read as follows:

Sec. 3704, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); Sec. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 3-2000 (65 FR 50017), No. 5-2002 (67 FR 65008), or No. 5-2007 (72 FR 31160) as applicable; and 29 CFR part 1911.

42. In section 1926.761, paragraph (b) is revised to read as follows:

**§ 1926.761 Training.**

\* \* \* \* \*

(b) Fall hazard training. The employer shall train each employee exposed to a fall hazard in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

\* \* \* \* \*

**Subpart Z – [Amended]**

43. The authority citation for subpart Z of 29 CFR part 1926 is revised to read as follows:

Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 et seq.); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Orders 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (62 FR 50017), 5-2002 (67 FR 65008), or 5-2007 (71 FR 31160), as applicable; and 29 CFR part 11.

Section 1926.1102 of 29 CFR not issued under 29 U.S.C. 655 or 29 CFR part 1911; also issued under 5 U.S.C. 553.

44. In section 1926.1101, paragraphs (h) and (k) are revised to read as follows:

**§ 1926.1101 Asbestos.**

\* \* \* \* \*

(h) Respiratory protection. (1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

\* \* \*

(2) Respirator program. (i) The employer must implement a respiratory protection program in accordance with 29 CFR 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

\* \* \* \* \*

(k) Communication of hazards.

\* \* \*

(9) Employee information and training. (i) The employer shall train each employee who is likely to be exposed in excess of a PEL, and each employee who performs Class I through IV asbestos operations, in accordance with the requirements of this section. Such training shall be conducted at no cost to the employee. The employer shall institute a training program and ensure employee participation in the program.

\* \* \* \* \*

45. In section 1926.1126, paragraph (f) is revised to read as follows:

**§ 1926.1126 Chromium (IV).**

\* \* \* \* \*

(f) Respiratory protection – (1) General. Where respiratory protection is required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respiratory protection is required during:

\* \* \*

(2) Respiratory protection program. Where respirator use is required by this section, the employer shall institute a respiratory protection program in accordance with 29 CFR 1910.134 for each employee required to use a respirator.

\* \* \* \* \*

46. In section 1926.1127, paragraphs (g) and (m) are revised to read as follows:

**§ 1926.1127 Cadmium.**

\* \* \* \* \*

(g) Respirator protection- (1) General. For employees who use respirators required by this section, the employer must provide each employee an appropriate respirator that complies with the requirements of this paragraph. Respirators must be used during:

\* \* \*

(2) Respirator program. (i) The employer must implement a respiratory protection program in accordance with 29 CFR 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m) for each employee required by this section to use a respirator.

\* \* \* \* \*

(m) Communication of cadmium hazards to employees -

\* \* \*

(4) Employee information and training. (i) The employer shall train each employee who is potentially exposed to cadmium in accordance with the requirements of this section. The employer shall institute a training program, ensure employee participation in the program, and maintain a record of the contents of the training program.

\* \* \* \* \*

## **Summary of the Draft Proposed Rule Clarifying the Remedy for Violations of Requirements to Provide Personal Protective Equipment and Train Employees**

OSHA is proposing to amend its standards for construction, as well as general industry and maritime to add language clarifying that noncompliance with the personal protective equipment (PPE) and training requirements in safety and health standards in these parts may expose the employer to liability on a per-employee basis. This action, which is in accord with OSHA's longstanding position, is proposed in response to recent decisions of the Occupational Safety and Health Review Commission indicating that differences in wording among the various PPE and training provisions in OSHA safety and health standards affect the Agency's ability to treat an employer's failure to provide PPE or training to each covered employee as a separate violation. The amendments add no new compliance obligations. Employers are not required to provide any new type of PPE or training, to provide PPE or training to any employee not already covered by the existing requirements, or to provide PPE or training in a different manner than that already required. The amendments simply clarify the remedy for violations of these requirements.

### **Background**

Ordinarily, OSHA combines separate violations of a single requirement in a standard and proposes a single penalty. However, under the egregious violation policy, OSHA seeks a separate penalty for each discrete violation in cases where the violations are willful and certain other factors, such as clear bad faith or employee deaths are present. Although the policy is used sparingly, it is critical to OSHA's ability to assess an appropriately high penalty to deter the most severe violations.

In cases involving flagrant violations of PPE and training requirements, OSHA proposes a separate penalty for each individual employee not protected or trained. A variety of construction and other industry standards require employers to provide and ensure the use of appropriate PPE, such as respirators or protective equipment, where necessary because of a workplace hazard. Many standards also require employers to train employees on hazards to which they may be exposed, including hazards requiring PPE. While there are minor variations in the wording of these standards, OSHA has always interpreted them to require the employer to provide PPE and training to each individual employee covered by the requirement, and therefore, to permit per-employee penalties for violations in appropriate cases. Until recently, Occupational Safety and Health Review Commission case law appeared to support OSHA's interpretation that violations of respirator and training requirements could be cited on a per-employee basis. In the 2003 *Eric Ho* case, however, the Commission limited the use of the egregious violation policy for respirator and training violations. *Secretary of Labor v. Erik K. Ho, Ho Ho Ho Express, Inc. and Houston Fruitland, Inc.* 20 O.S.H. Cas. (BNA) 1361, 1371-80 (Rev. Comm'n 2003), *aff'd. Chao v. OSHRC and Erik K. Ho*, 401 F3d. 355 (5<sup>th</sup> Cir. 2005).

The violations at issue in the *Ho* case were particularly flagrant. Erik Ho hired undocumented Mexican workers to chip away asbestos insulation from beams in a vacant building using hand tools, without protective equipment or respirators and without any training on the hazards of asbestos. When a city building inspector shut down the worksite, Ho continued the work at night, behind locked doors, without adequate toilets or access to potable water. OSHA cited Ho for separate violations of the asbestos standard's initial respirator and training paragraphs for each employee not provided a

respirator and each employee not trained. The asbestos paragraph stated in part that the employer must “provide respirators, and ensure that they are used” for certain asbestos jobs, while the training paragraph stated in part that the employer must “institute a training program” for employees exposed to asbestos. The Commission majority ruled that the wording of these paragraphs permitted only one respirator violation and penalty and one training violation and penalty regardless of the number of employees who performed asbestos work without respirators and training.

In subsequent decisions, the Commission has stated that standards that are worded slightly differently from the standards at issue in *Ho* do allow per-employee citations. In *Secretary of Labor v. Manganas Painting Co.*, 21 O.S.H. Cas. (BNA) 1964, 1998-99 (Rev. Comm’n 2007), the Commission indicated that the initial respirator section of the 1993 construction lead standard which states that the employer must provide and assure the use of respirators “which comply with the requirements of this paragraph,” permits per-employee citations because the paragraph as a whole includes fit testing and other individualized requirements. In contrast, in *Ho*, the language requiring fit testing immediately followed the cited initial section, and the Commission declined to read the initial provision in light of the subsequent requirement. However, after stating that the lead standard could be cited on a per-employee basis, the Commission declined to decide whether to affirm separate per-employee violations on the ground that the amount of the total penalty would not be affected under the circumstances of that case. Thus, the precise legal effect of the Commission’s statement as to the availability of per-employee citations under the lead standard is not clear.

In later case the Commission affirmed per-employee violations of the initial training paragraph of the lockout/tagout (LOTO) standard. *Secretary of Labor v. General Motors Corp., CPCG Oklahoma City Plant*, 2007 WL 4350896. That paragraph expressly states that “each authorized employee shall receive training.” The Commission found that the “each employee” language distinguished the LOTO training standard from that in *Ho*, and imposed a specific duty on the employer to train each individual employee on LOTO hazards. Therefore, where the initial provision in a standard states that “each employee” is to be trained, the Commission permits each untrained employee to be considered a separate violation for which a separate penalty may be assessed, whereas if the standard says that the employer must establish a training program and ensure employees’ participation in the program, there can be only one violation and one penalty.

### **The proposed rule**

There are two main components to the proposed rule: (1) new paragraphs added to the introductory section of Part 1926, and (2) revisions to the existing language of the respirator and training paragraphs in some construction standards. The new introductory paragraphs state OSHA’s intent that all PPE and training requirements impose a separate compliance duty to each employee covered by the requirement, and that each employee not protected or trained may be considered a separate violation.

The second component of the proposal includes revisions to some standards that require respirators or training, such as the asbestos and lead standards. The proposal revises these standards to explicitly state that the employer must provide respirators to or train “each employee” covered by the requirement in order to match the language the

Commission has approved as a basis for per-employee citations. For example, the proposal would revise the asbestos respirator provision to state, “[f]or employees who use respirators required by this section, the employer must provide *each employee* an appropriate respirator that complies with the requirements of this paragraph.” See proposed ¶1926.1101 (h) (1). The proposal would revise the training provision of the asbestos standard to state, in relevant part, “[t]he employer shall train *each employee* who is likely to be exposed in excess of a PEL, and each employee who performs Class I through IV asbestos operations, in accordance with the requirements of this section.” See proposed ¶1926.1101 (k) (9) (i). The proposed asbestos revisions are typical of the revisions proposed for other respirator and training requirements. In each case, the proposed language is intended to ensure, consistent with Commission precedent, that respirator and training violations may be cited, in an appropriate case, on a per-employee basis. The proposed amendments will make no difference in most cases; however, they ensure that OSHA will be able to assess an appropriately high penalty where needed. The proposal does not impose any new or different compliance obligations and therefore will not have a significant economic impact on the economy. See Preliminary Economic Analysis at p. 31-32.