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**PAY TO PLAY: OSHA ISSUES NEW GUIDANCE ON EMPLOYEE
PERSONAL PROTECTIVE EQUIPMENT (PPE) AND EMPLOYER DUTY
TO PAY**

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INTRODUCTION

Since 1974, OSHA has had regulations in effect which required employers to provide personal protective equipment (PPE) to employees as protection for eyes, face, head and extremities, protective clothing, respiratory devices and protective shields and barriers. In addition, the employer was required to ensure that employees used the PPE when exposed to the hazard and that the PPE be maintained in a sanitary and reliable condition so that it would function as intended. Throughout the history of the regulations, there have been ongoing disputes between employers and OSHA over which specific PPE the employer would be required to provide at no cost to the employee. This article discusses new guidance issued by OSHA on **February 10, 2011** that clarifies recent revisions to OSHA's PPE rules.

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OSHA issued new rules clarifying the employer's obligation in 2007. (Federal Register Vol. 72, No. 220, pp. 64342-64430). The final rule became effective on February 13, 2008 and required implementation by May 15, 2008. Now, on February 10, 2011, OSHA issued new guidance to compliance officers to assist them in conducting inspections related to PPE. The guidance clarifies what type of PPE employers must provide at no cost and sets out the Agency's enforcement policies concerning PPE. The guidance can be found at http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-01-050.pdf.

EMPLOYER DUTY TO CONDUCT PPE ASSESSMENT

As a starting point, existing OSHA regulations have long required an employer to conduct a hazard assessment to determine if hazards are present, or likely to be present, which necessitate the use of PPE (29 CFR 1910.132(d)(1)). In that regard, employers are required to conduct a broad assessment of the various aspects of the job to determine whether the following hazards to employees may be present:

- hazards of process or environment
- chemical hazards
- radiological hazards
- mechanical irritants

which are likely to be encountered in the workplace in a manner capable of causing injury or impairment to the body through

- absorption
- inhalation, or
- physical contact.

This assessment requirement has existed since 1994 and employers are already subject to citation for failure to perform it. Many employers are unaware that there is a requirement for a **written certification** that such hazard assessment has been performed (29 CFR 1910.132(d)(2)), which OSHA will request if an inspection is conducted involving PPE compliance and will cite as a violation if it is not forthcoming.

EMPLOYER DUTY TO PROVIDE PPE AND TRAINING

Once the employer has completed the hazard assessment, the employer must provide the PPE to the employee, train the employee in its proper use and enforce the use of PPE through appropriate discipline. This training includes:

- when PPE is necessary
- how to properly don, doff, adjust and wear PPE
- the limitations of the PPE
- the proper care, maintenance, useful life and disposal of PPE

and requires the employee to demonstrate to the employer that the employee understands this training (29 CFR 1910.132(f)(2)). Finally, there is an existing requirement for the employer to generate another **written certification** that the employee has understood the foregoing training (29 CFR 1910.132(f)(4)). OSHA can issue citations for failure to prepare such certification.

EMPLOYER DUTY TO PAY FOR PPE

Obviously, once the employer has determined that PPE is required, the issue arises over who will pay for it – the employer or the employee. In an effort to finally clarify who pays for PPE, OSHA began rule-making in 1999 which resulted in the final rule that took effect in 2008. The final rule adds a new subpart for each industry sector subject to the rule, for General Industry the

new rule is designated as 29 CFR 1910.132(h) *Payment for protective equipment*. This subpart defines the new clarifications regarding payment for PPE. Importantly, while Section 1910.132 generally relates to PPE, there are other OSHA standards that specifically require PPE, including the bloodborne pathogen standard, the grain handling standard, and a host of standards that are specific to regulated airborne contaminants such as lead and asbestos.

The regulation generally requires that all protective equipment used to comply with Section 1910.132, including PPE, must be provided to employees at no cost to them. According to the new guidance document, the employer **must provide the following PPE at no cost to the employee** if used to comply with an OSHA standard:

<p>Metatarsal foot protection. Special boots for longshoremen working logs. Rubber boots with steel toes. Shoe covers-toe caps and metatarsal guards. Non-prescription eye protection. Prescription eyewear inserts/lenses for welding and diving helmets. Goggles. Face shields. Laser safety goggles. Fire fighting PPE (helmet, gloves, boots, proximity suits, full gear). Hard hat. Hearing protection. Welding PPE. Items used in medical/laboratory settings to protect from exposure to infectious agents (Aprons, lab coats, goggles, disposable gloves, shoe covers, etc). Non-specialty gloves:</p> <ul style="list-style-type: none"> • Payment is required if they are PPE, i.e. for protection from dermatitis, severe cuts/abrasions • Payment is not required if they are only for keeping clean or for cold weather (with no safety or health consideration). <p>Rubber sleeves Aluminized gloves. Chemical resistant gloves/aprons/clothing. Barrier creams (unless used solely for weather-related protection). Rubber insulating gloves.</p>
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Mesh cut proof gloves, mesh or leather aprons.
SCBA, atmosphere-supplying respirators (escape only).
Respiratory protection.
Fall protection.
Ladder safety device belts.
Climbing ensembles used by linemen (*e.g.*, belts and climbing hooks).
Window cleaners safety straps.
Personal flotation devices (life jacket).
Encapsulating chemical protective suits.
Reflective work vests.
Bump caps.

It is very important to note, however, that this list is not all inclusive since the employer's PPE hazard assessment (discussed above) will be the determining factor for which PPE is required for the job, thereby imposing an obligation to pay for it upon the employer.

Conversely, the rule and the new guidance identify specific examples of PPE for which the employer is **not required** to pay, as follows:

Non-specialty safety-toe protective footwear (*e.g.*, steel-toe shoes/boots).
Non-specialty prescription safety eyewear.
Sunglasses/sunscreen.
Sturdy work shoes.
Lineman's boots.
Ordinary cold weather gear (coats, parkas, cold weather gloves, winter boots).
Logging boots required under §1910.266(d)(1)(v).
Ordinary rain gear.
Back belts.
Long sleeves shirts.
Long pants.
Dust mask/respirators used under the voluntary use provisions in §1910.134.

Again, this list is illustrative and many other items may be excepted based upon the employer's hazard assessment.

DUTY TO PAY IF PPE LOST OR INTENTIONALLY DAMAGED

While the employer must pay for PPE required within its hazard assessment, the employer has the right to require employees to pay for PPE if the employee loses or intentionally damages the PPE (29 CFR 1910.132(h)(5)). This situation will arise when the employee reports to work without his/her PPE or the employer conducts its walkaround of the worksite and observes that the PPE is so damaged (not due to normal wear and tear) that the employer can determine the damage is intentional. At that point, the employee cannot be allowed to work unless the PPE is replaced and the employer can require the employee to pay for the replacement PPE. The employer can also follow its normal disciplinary policies to discipline the employee for losing or intentionally damaging the PPE which is employer-owned property.

It should be noted that if the PPE is damaged due to normal “wear and tear” caused by the job activities or environment, the employer must replace the PPE at its cost and the employee is not subject to discipline.

EMPLOYEE-OWNED PPE

In many instances, employees may voluntarily provide items which constitute PPE, and if so, the employer has no obligation to pay for the PPE. However, the employer must evaluate and determine that this PPE is at least as effective as that required by the employer’s hazard assessment, and if it is not at least as effective, the employer must provide the PPE. In addition, if at any time the employee-supplied PPE is no longer functional or the employee declines to provide it, the employer’s duty to provide PPE will become effective. Similarly, an employer does not have an obligation to pay for PPE requested by an employee that exceeds the PPE requirement, as long as the employer provides PPE that meets the standards at no cost to the employee. Even if an employee elects to use upgraded or personalized PPE, however, **the employer must nonetheless**

ensure that the PPE is adequate to protect the employee from hazards present in the workplace, properly maintained, and kept in a sanitary condition.

OFF-SITE USE OF PPE

An employer may allow an employee to be used off of the job site. However, the off-site use of the PPE does not relieve the employer of its obligation to pay for the PPE where required. Where PPE is not required to be worn away from the job site, the employer may require employees to keep PPE on-site and secure, as in a locker or locked cabinet, and may also require an employee to turn in his or her PPE at the termination of employment. However, if the employer requires employees to leave non-specialty eyewear or non-specialty footwear at the job site, then OSHA has taken the position that the employer **must provide** those items at no cost to employees.

POTENTIAL CITATION LIABILITY

It is important to note that if the agency determines that a violation has occurred regarding failure to train employees, properly equip them with PPE and to enforce the use of PPE the employer faces liability for citations. This liability can be significant if the agency decides to issue citations on a “**per employee**” basis, that is, a separate citation with a separate monetary penalty for **each employee** found out of compliance (e.g., not wearing hardhat, protective eyewear, hearing protection, etc.). If a number of employees are found out of compliance, the penalties can quickly multiply in thousands of dollars of monetary liability.

CONCLUSION

Since OSHA is now focusing on PPE compliance, employers must now focus on their compliance efforts including:

- (1) verifying their initial PPE hazard assessment and written certification,
- (2) confirming employee training on the use of PPE and written certification,

(3) developing policies on issuance of PPE, use of employee supplied PPE, inspection and replacement program for use of PPE and finally, discipline for loss or intentional damage to PPE.