

New OSHA Regulation Requires Employers to Provide Personal Protective Equipment to Employees at No Cost to Employee

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The Occupational Safety and Health Administration (OSHA) of the Department of Labor has issued its final regulations requiring employers to pay for their employees' personal protective equipment (PPE). These regulations end eight years of speculation, and pressure from courts, Congress, and labor unions, urging OSHA to move forward.

Under the new rule, employers are required to provide all OSHA-required PPE at no cost to full- and part-time workers. There are several exceptions:

- Nonspecialty safety-toe protective footwear, including steel-toe shoes or boots, and nonspecialty prescription safety eyewear, provided that the employer permits those items to be worn off the job site;
- Shoes or boots with built-in metatarsal protection, provided that the employer does provide metatarsal guards for use over regular footwear;
- Logging boots;
- Everyday clothing, including long-sleeve shirts, long pants, street shoes, and normal work boots;
- Ordinary clothes or skin creams used solely for protection from the weather (i.e., winter coats, jackets, gloves, rubber boots, sunglasses, and sunscreen); and
- Equipment that is purchased by the employee, provided that the employer makes available adequate PPE at no cost.

This rule *only* applies to OSHA-required PPE. Employers are not required to pay for items that are not being worn for protection from workplace hazards—items like uniforms or rubber gloves worn by food service employees to protect food products from contamination. Nor are employers required to pay for PPE employees voluntarily decide to wear.

Under the final rule employers are free to choose how they will make PPE available to employees, although OSHA expressed its preference that employers purchase and distribute PPE. Specifically, OSHA approved several programs that many employers have already adopted, including monetary allowances, vouchers, and employer reimbursement after employee purchase. OSHA cautioned, however, that these employee-purchase programs may obligate the employer to follow up and inspect PPE on a more regular basis.

Employers also are obligated under the new rule to pay for replacement PPE, except in situations where

the employee has *lost* or *intentionally damaged* the equipment. OSHA makes clear that the term “lost” is broadly read. PPE may be considered “lost,” for example, even if the employee, *in a single instance*, “comes to work without the PPE that has been issued to him.” In such cases, while the employer cannot allow the employee to work without the PPE, the employer can discipline the employee—possibly by dismissing the employee from his shift or by deeming the equipment “lost” and requiring the employee to pay for a replacement. This final language was an important retreat from OSHA’s original proposal, which contained an exception only for an employee’s “occasional loss” or “regular” failure to bring PPE to work, a standard that would not have allowed employers to respond to single-incident events. It is now clear that single-incident events may result in replacement costs to employees.

With respect to “intentional” damage, a term that is left undefined, OSHA emphasizes only that it does not include “accidental” damage of PPE by an employee. Where the employer finds that an employee is abusing the PPE, an employer may discipline the employee, but *may not* require the employee to replace the PPE at the employee’s cost unless the employer demonstrates that the employee intentionally abused the equipment.

Finally, the new rule also clarifies that employers can, and should, enforce discipline and work rules to ensure overall compliance with safety initiatives, so long as the discipline is uniform, reasonable, and appropriate. Again, although these terms are undefined, the accompanying commentary gives examples of “unreasonable” policies, such as imposing a large financial penalty for losing inexpensive PPE, requiring an employee to repay the full cost of a lost PPE item within days of its expected replacement, and applying policies inconsistently across different ranks of employees.

Conclusion

The new regulation *does not* alter in any way the standards for what PPE is required, be it through broad performance terms for all jobs or through more industry-specific rules. But it may change the way that union-represented employees bargain for PPE. In the past, when employees paid for safety equipment, employees and unions did not have an incentive to press for additional PPE. Now, under the new rule, employees and unions may become more aggressive in seeking safety and PPE standards that require additional employer-supported equipment.

The final rule goes into effect on February 13, 2008, after which employers have three months—until May 15, 2008—to comply. Although the rule making was widely anticipated, employers should work quickly to ensure that their programs are developed and implemented in time for the May 2008 target date.

We encourage all employers to review these materials and to speak with any of the following members of the firm’s OSHA Practice if they have any questions:

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