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The Occupational Safety and Health Administration (OSHA) recently issued a final rule requiring employers to pay for personal protective equipment (PPE) used to comply with OSHA Standards. The new rule supersedes any collective bargaining agreement terms requiring employees to pay for PPE. The new rule will have the largest effect on those employers in states without OSHA State Plans currently requiring employer payment for PPE. The rule becomes effective on February 13, 2008.

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Workplace Safety

A Littler Mendelson Newsletter

New OSHA Rule: Employers Now Required to Pay for Personal Protective Equipment

By *Steven R. McCown and Jeremy Stewart*

The Occupational Safety and Health Administration (OSHA) recently issued a final rule requiring all employers to pay for personal protective equipment (PPE) used to comply with OSHA Standards, with few exceptions. 72 Fed. Reg. 64341-64440. (Nov.15, 2007). PPE includes equipment such as hard hats, gloves, goggles, safety shoes, and welding helmets and faceshields.

This OSHA action finalizes a proposal that was first issued on March 31, 1999, after OSHA determined that the Occupational Safety and Health Act of 1970 implicitly required employer payment for necessary PPE and that requiring employers to provide PPE at no cost to the employee would have positive effects on employee safety and reduce improper use of PPE. While some OSHA rules have required employers to provide for certain PPE, this rule fills the void of guidance as to who is responsible for paying for the PPE. While many states in their own Occupational Health and Safety (OSH) rules require employer payment for PPE, OSHA's new rule will have the largest impact on the nearly 59% of private-sector workers not employed in states with their own OSH rules.

This final rule does not add requirements as to what PPE is to be provided, or when it must be provided. The rule's purpose is to set forth a scheme in which employers are required to pay for PPE necessary to comply with OSHA standards. OSHA has made it clear that employers must be careful

not to impose rules, requirements, or conditions of employment in an attempt to circumvent this rule. Significantly, the rule supersedes collective bargaining agreements that set forth responsibility for providing certain PPE, and places the burden solely on employers. Additionally, the rule could have significant impact on smaller businesses or businesses with high turnover. The rule will be effective on February 13, 2008 and must be fully implemented by May 15, 2008.

Payment Requirements

The final rule requires employers to pay for the minimum PPE required to satisfy OSHA standards. Replacement PPE must also be provided at the employer's expense unless the employee loses or intentionally damages the PPE. An employer may enter an agreement with employees regarding replacement of lost PPE that is taken from the jobsite. If an employer chooses to use upgraded PPE, they must provide the upgraded items at no cost to the employee. This does not, however, extend to upgraded equipment requested by the employee.

Employers are not limited in the method of payment they choose, so long as the equipment is provided at no cost to the employee. Some methods include purchase and distribution by the employer, allowances, vouchers, and reimbursement. Methods that allow employers to exercise the greatest control over the purchasing of PPE are deemed to be the most effective in ensuring compliance with OSHA standards.

Company stores may be one exception that will be scrutinized if employers are making a profit from the sale of PPE. Only time will tell which payment methods OSHA may frown upon.

PPE that is excluded from the employer payment requirements include such items as nonspecialty safety shoes (unless they are required to be left at the jobsite), everyday and ordinary clothing, clothing used to identify a person as an employee, and items not worn for protection from a workplace hazard. However, employers will be required to pay for components that are not considered PPE, but are needed for the PPE to provide adequate protection. While, ordinary hand tools are not considered PPE within the interpretation of this new rule, OSHA did conclude that electrically insulated tools, while not PPE, are a “protective control measure” requiring employer payment. It is too early to tell what equipment and items this “protective control measure” language may be applied to in the future.

Effect on Small Business and High Turnover Industries

According to 2004 U.S. Census data, more than thirty-five million employees worked in firms of twenty-four or fewer employees. This constitutes approximately 31% of U.S. employees. That number would be substantially higher if firms employing 500 or fewer employees were considered. Smaller firms may feel the effects of this rule more so than larger businesses, especially those smaller companies who will be required to provide PPE in high turnover industries. OSHA took this in to consideration, but concluded that turnover rates and employer size made no difference under this rule. OSHA concluded that the six-month compliance window allows time for small businesses to work with PPE suppliers to negotiate and seek bulk discount prices or to coordinate with other businesses.

While this rule may be felt especially hard by small business and high turnover industries, some options are available. For instance, employers may own the PPE and require employees to return the PPE at the end of each shift. Another option would be

to enter into an agreement with employees that requires return of the equipment if their employment ends. A system in which a deposit is made for equipment is possible, however, employers must be careful not to shift this into a system in which employees are de facto paying for PPE. A variance may also be requested under the Occupational Safety and Health Act’s provisions, which will allow an employer more time to comply. Whatever the case, employer size and employee turnover do not affect application of this rule, thus employers of all sizes must be compliant.

Collective Bargaining Agreements

Workplaces that have collective bargaining agreements with terms governing the payment of PPE will also be impacted by this ruling. Though OSHA recognized that many bargaining agreements specify who must provide certain PPE, OSHA has determined that workplaces with agreements should be treated no differently than those without similar agreements. Thus, provisions in collective bargaining agreements requiring employees to pay for certain items of PPE will no longer be recognized. The six-month compliance time frame was determined to be enough to either allow agreements to expire or allow for renegotiation in compliance with the new rule. While employers will be required to provide PPE at no cost to employees, discretionary aspects, such as how PPE will be provided are still open for negotiation. This rule will be an important point of consideration for many employers and union groups in future negotiations. In the meantime, employers should be focused on compliance with this rule.

Practical Advice for Employers

- Determine what PPE is required in your workplace by OSHA regulations, and if any of these items are exempt from the rule.
- Determine who pays for and provides PPE, and assess the viability of various PPE inventory control systems within your workplace.

- If your company has a collective bargaining agreement in place, determine if there are any provisions that may require employee payment for necessary PPE.
- Consider creating a policy that provides for employer ownership of protective equipment.
- Determine what your company’s rule will be regarding lost or intentionally damaged PPE.

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