



U.S. Department of Labor
Occupational Safety & Health Administration



www.osha.gov

Search Advanced Search | [A-Z Index](#)

Federal Registers
Clarification of Employer Duty To Provide Personal Protective
Equipment and Train Each Employee - 73:75568-75589

[Federal Registers - Table of Contents](#)

- **Publication Date:** 12/12/2008
- **Publication Type:** Final Rules
- **Fed Register #:** 73:75568-75589
- **Standard Number:** [1910](#); [1915](#); [1917](#); [1918](#); [1926](#)
- **Title:** Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee

[Federal Register: December 12, 2008 (Volume 73, Number 240)]
 [Rules and Regulations]
 [Page 75568-75589]
 From the Federal Register Online via GPO Access [wais.access.gpo.gov]
 [DOCID:fr12de08-6]

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918 and 1926

[Docket No. OSHA-2008-0031]
RIN 1218-AC42

Clarification of Employer Duty To Provide Personal Protective
Equipment and Train Each Employee

AGENCY: Occupational Safety and Health Administration (OSHA), U.S.
Department of Labor.

ACTION: Final rule.

SUMMARY: In this rulemaking, OSHA is amending its standards to add language clarifying that the personal protective equipment (PPE) and training requirements impose a compliance duty to each and every employee covered by the standards and that noncompliance may expose the employer to liability on a per-employee basis. The amendments consist of new paragraphs added to the introductory sections of the listed Parts and changes to the language of some existing respirator and training requirements. This action, which is in accord with OSHA's longstanding position, is being taken 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 that the standards apply to each employee.

DATES: This final rule becomes effective on January 12, 2009.

ADDRESSES: In accordance with 28 U.S.C. 2112(a), the Agency designates Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor of Labor, Room S-4004, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, to receive petitions for review of the final rule.

FOR FURTHER INFORMATION CONTACT: Contact Ms. Jennifer Ashley, Director,

Office of Communications, OSHA, U.S. Department of Labor, Room N-3647,
200 Constitution Avenue, NW., Washington, DC 20210; telephone (202)
693-1999 or fax (202) 693-1634.

SUPPLEMENTARY INFORMATION:

I. Table of Contents

- I. Table of Contents
- II. Background
- III. Legal Authority
- IV. Summary and Explanation of the Final Rule
- V. Final Economic Analysis
- VI. Regulatory Flexibility Certificate
- VII. Environmental Impact Assessment
- VIII. Federalism
- IX. Unfunded Mandates
- X. OMB Review Under the Paperwork Reduction Act
- XI. State Plan States
- XII. Authority and Signature

II. Background

A. Personal Protective Equipment (PPE)

The use of personal protective equipment, including respirators, is often necessary to protect employees from injury or illness caused by exposure to toxic substances and other workplace hazards. Many OSHA standards in Parts 1910 through 1926 require employers to provide PPE to their employees and ensure the use of PPE. Some general standards require the employer to provide appropriate PPE wherever necessary to protect employees from hazards. See, e.g., Sec. Sec. 1910.132(a); 1915.152(a); 1926.95(a). Other standards require the employer to provide specific types of PPE or to provide PPE in specific circumstances. For example, the logging standard requires employers to provide cut-resistant leg protection to employees operating a chainsaw, 29 CFR 1910.266(d)(1)(iv); the coke oven emissions standard requires the employer to provide flame resistant clothing and other specialized protective equipment, Sec. 1910.1029(h); and the methylene chloride standard requires the employer to provide protective clothing and equipment that is resistant to methylene chloride, Sec. 1910.1052(h). OSHA's respirator standards follow a similar pattern. Section 1910.134, revised in 1998, requires employers to provide respirators "when such equipment is necessary to protect the health of the employee." Sec. 1910.134(a)(2). The section includes additional paragraphs requiring employers to establish a respiratory protection program, to select an appropriate respirator based upon the hazard(s) to which the employee is exposed, to provide a medical examination to determine the employee's ability to use a respirator, to fit-test the respirator to the individual employee and to take other actions to ensure that respirators are properly selected, used and maintained. E.g., Sec. 1910.134(c) through (m); 63 FR 1152-1300 January 8, 1998 (Respiratory Protection rule). A variety of other standards require the employer to provide respirators when employees are or may be exposed to specific hazardous substances. See, e.g., Sec. 1910.1101(g)(asbestos); Sec. 1910.1027(g)(cadmium). The 1998 Respiratory Protection rule revised the substance-specific standards then in existence to simplify and consolidate their respiratory protection provisions. 63 FR 1265-68. Except for a limited number of respirator provisions unique to each substance-specific standard, the regulatory text on respirators for these standards is virtually the same. The construction industry asbestos standard's initial respirator paragraph, which is virtually identical to the initial respirator paragraphs in most substance specific standards, states that, "[f]or employees who use respirators required by this section, the employer must provide respirators that comply with the requirements of this paragraph." Sec. 1926.1101(h)(1). The standard also states that, "the employer must implement a respiratory protection program in accordance with [certain requirements in Sec. 1910.134]." Sec. 1926.1101(h)(2).

B. Training

Training is also an important component of many OSHA standards. Training is necessary to enable employees to recognize the hazards posed by toxic substances and dangerous work practices and protect themselves from these hazards. Virtually all of OSHA's toxic-substance standards, such as the asbestos, vinyl chloride, lead, chromium, cadmium and benzene standards, require the employer to train or provide training to employees who may be exposed to the substance. Many safety

standards also contain training requirements. The lockout/tagout standard, for example, requires the employer to provide training on the purpose and function of the energy control program, Sec. 1910.147(c)(7), and the electric power generation standard requires that employees be trained in and familiar with pertinent safety requirements and procedures. Sec. 1910.269(a)(2).

The regulatory text on training varies from standard to standard. Some standards explicitly state that "each employee shall be trained" or "each employee shall receive training" or contain similar language that makes clear that the training must be provided to each individual employee covered by the requirement. E.g., process safety management, Sec. 1910.119(g)(i) (each employee shall be trained); lockout/tagout, Sec. 1910.147(c)(7)(A) (each employee shall receive training); vinyl chloride, Sec. 1910.1017(j) (each employee shall be provided training); construction general safety and health provisions, Sec. 1926.20(b) (instruct each employee); construction fall protection, Sec. 1926.503(a) (provide a training program for each employee).

Other standards contain a slight variation; they state that "employees shall be trained" or that the employer must "provide employees with information and training." E.g., Electric power generation, Sec. 1910.269(a)(2) (employees shall be trained); Benzene, Sec. 1910.1028(j)(3)(i) (provide employees with information and training); Hazard communication, Sec. 1910.1200(h) (provide employees with effective information and training).

Finally, some standards state that the employer must "institute a training program [for exposed employees] and ensure their participation in the program" or contain similar language. For example, the asbestos standard's initial training section states that "[t]he employer shall institute a training program for all employees who are exposed to airborne concentrations of asbestos at or above the PEL and/or excursion limit and ensure their participation in the program." Sec. 1910.1001(j)(7). See also, e.g., Sec. 1926.1101(k)(9) (Construction asbestos); Sec. 1910.1025(l) (Lead); Sec. 1910.1027(m)(4) (Cadmium).

The Agency interprets its PPE and training provisions to impose a duty upon the employer to comply for each and every employee subject to the requirement regardless of whether the provision expressly states that PPE or training must be provided to "each employee." Neither the Commission nor any court has ever suggested that an employer can comply with the PPE and training provisions in safety and health standards by providing PPE to some employees covered by the requirement but not others, or that the employer can train some employees covered by the training requirement but not others. The basic nature of the employer's obligation is the same in all of these provisions; each and every employee must receive the required protection.

Therefore, the agency's position is that a separate violation occurs for each employee who is not provided required PPE or training, and that a separate citation item and proposed penalty may be issued for each. However, as discussed in the Legal Authority section, a recent decision of the Review Commission in the Ho case suggests that minor variations in the wording of the provisions affect the Secretary's authority to cite and penalize separate violations. *Secretary of Labor v. Erik K. Ho, Ho Ho Ho Express, Inc. and Houston Fruitland, Inc.*, 20 O.S.H. Cas. (BNA) 1361 (Rev. Comm'n 2003), *aff'd*, *Chao v. OSHRC and Erik K. Ho*, 401 F.3d 355 (5th Cir. 2005). The agency is proposing to amend its standards to make it unmistakably clear that each covered employee is required to receive PPE and training, and that each instance when an employee subject to a PPE or training requirement does not receive the required PPE or training may be considered a separate violation subject to a separate penalty.

Where an employer commits multiple violations of a single standard or regulation, OSHA either groups the violations and proposes a single penalty, or cites and proposes a penalty for each discrete violation. Although "grouping" is the more common method, OSHA proposes separate "per-instance" penalties in cases where the resulting heightened aggregate penalty is appropriate to deter flagrant violators and increase the impact of OSHA's limited resources. Per-employee penalties for violations of PPE and training requirements are no different in kind than other types of per-instance penalties the agency has proposed under this policy. OSHA's current policies for issuing instance-by-instance violations are described in OSHA Instruction CPL 2.80 issued on October 21, 1990. These detailed instructions to OSHA's field offices and the National Office ensure that the policy is only used when a particularly flagrant violation is discovered, and that each case receives careful review by the Agency's senior officials before such citations are issued. Approximately seven instance-by-instance, or egregious, citations are issued each year (Ex. 69).

Accordingly, on August 19, 2008, OSHA proposed to amend the respirator and training provisions in the standards in Parts 1910 through 1926 to: (1) Revise the language of the initial respirator

paragraphs adopted in the 1998 respiratory protection rule to explicitly state that the employer must provide each employee an appropriate respirator and implement a respiratory protection program for each employee, (2) revise the language of those initial training paragraphs that require the employer to institute or provide a training program to explicitly state that the employer must train each employee, and (3) add a new section to the introductory Subparts of each Part to clarify that standards requiring the employer to provide PPE, including respirators, or to provide training to employees, impose a separate compliance duty to each employee covered by the requirement and that each instance of an employee who does not receive the required PPE or training may be considered a separate violation (73 FR 48335-48350).

OSHA received approximately 50 comments on the proposal, and, in response to several requests, held a hearing on October 6, 2008. A 30-day period was established for post-hearing comments and briefs, and seven post-hearing submissions were received by the Agency.

Following the notice and comment period, an informal rulemaking hearing, and careful Agency deliberation, OSHA finds that its preliminary conclusions are appropriate and is therefore issuing this final standard clarifying employers' responsibilities to provide required PPE and training to each and every one of their employees.

Federal Register documents, comments, the transcript from the hearing, and post hearing submissions can be accessed electronically at <http://www.regulations.gov>, docket No. OSHA-2008-0031. Comments received are identified at [regulations.gov](http://www.regulations.gov) as Exhibits "OSHA-2008-0031-XXX". However, in the discussion below, comments will simply be referenced as "Ex. XXX" to shorten the references and make the document more readable.

Please note that the title of the final rulemaking has been changed from the title used in the proposal. The proposed rulemaking title "Clarification of Remedy for Violation of Requirements to Provide Personal Protective Equipment and Train Each Employee" caused some confusion as to the nature of the rulemaking. Therefore, OSHA has changed the title to "Clarification of Employer Duty to Provide Personal Protective Equipment and Training to Each Employee" to show that the rulemaking does not impose penalties, but rather clarifies each employer's duty to provide PPE and training to each and every employee covered by the standards and informs employers that the failure to provide PPE or training to an employee may be considered a separate violation.

III. Legal Authority

A. Introduction

The final rule does not impose any new substantive requirements. The regulatory text clarifies that the duty to provide personal protective equipment of all types, including respirators, and training to employees is a duty owed to each employee covered by the requirement. This adds no new compliance burden; the nature of the employer's duty to protect each employee is inherent in the existing provisions. To comply with existing PPE and training provisions, the employer must provide PPE to each employee who needs it and train each employee who must be informed of job hazards. The employer is not in compliance if some employees are without personal protection or are untrained. The final rule achieves greater consistency in the regulatory text of the various respirator and training provisions in Parts 1910 through 1926, provides clearer notice of the nature of the employer's duty under existing PPE and training provisions, and addresses the Commission's interpretation that the language of some respirator and training provisions does not allow separate per-employee citations and penalties.

Before OSHA can issue a new more protective standard, the agency must find that the hazard being regulated poses a significant risk of material health impairment and that the new standard is reasonably necessary and appropriate to reduce that risk. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980). OSHA must also show that the new standard is technologically and economically feasible, and cost effective. *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1980). These requirements are not implicated in this final rule because the amendments merely clarify the obligations under the existing PPE and training provisions and add no additional requirements. See sections V and VI *infra*. The agency met its burden of showing significant risk, feasibility and cost effectiveness in promulgating the existing PPE and training requirements.

B. General Principles Governing Per-Instance Penalties

Section 9(a) of the Act authorizes the Secretary to issue a citation when "an employer has violated a requirement of * * * any standard." 29 U.S.C. 658(a). A separate penalty may be assessed for "each violation." *Id.* at 666(a), (b), (c). "The plain language of the Act could hardly be clearer" in authorizing a separate penalty for each discrete instance of a violation of a duty imposed by a standard. *Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123, 1130 (DC Cir. 2001).

What constitutes an instance of a violation for which a separate penalty may be assessed depends upon the nature of the duty imposed by the standard or regulation at issue. If the standard "prohibits individual acts rather than a single course of action," each prohibited act constitutes a violation for which a penalty may be assessed. *Secretary of Labor v. General Motors Corp., CPGC Oklahoma City Plant*, 2007 WL 4350896, 35 (GM) (Rev. Comm'n 2007); *Sanders Lead Co.* 17 O.S.H. Cas. (BNA) 1197, 1203 (Rev. Comm'n 1995). Applying this test, the Commission has held that the recordkeeping regulation's requirement to record each injury or illness is violated each time the employer failed to record an injury or illness, *Secretary of Labor v. Caterpillar Inc.*, 15 O.S.H. Cas. (BNA) 2153, 2172-73 (Rev. Comm'n 1993); the machine guarding standard's requirement for point-of-operation guards on machine parts that could injure employees is violated at each unguarded machine, *Hoffman Constr. Co. v. Secretary of Labor*, 6 O.S.H. Cas. (BNA) 1274, 1275 (Rev. Comm'n 1975); the fall protection standard's requirement to guard floor and wall openings is violated at each location on a construction site where appropriate fall protection is lacking, *Secretary of Labor v. J.A. Jones Constr. Co.*, 15 O.S.H. Cas. (BNA) 2201, 2212 (Rev. Comm'n 1993); the trenching standard's shoring or shielding requirement is violated at each unprotected trench, *Secretary of Labor v. Andrew Catapano Enters., Inc.*, 17 O.S.H. Cas. (BNA) 1776, 1778 (Rev. Comm'n 1996) and the electrical safety standard is violated at each location where non-complying electrical equipment is installed. *A.E. Staley Mfg. Co. v. Secretary of Labor*, 295 F.3d 1341, 1343 (DC Cir. 2002).

The failure to protect an employee is a discrete act for which a separate penalty may be assessed when the standard imposes a specific duty on the employer to protect individual employees:

Some standards implicate the protection, etc. of individual employees to such an extent that the failure to have the protection in place for each employee permits the Secretary to cite on a per-instance basis. However, where a single practice, method or condition affects multiple employees, there can be only one violation of the standard.

Secretary of Labor v. Hartford Roofing Co., 17 O.S.H. Cas. (BNA) 1361, 1365 (Rev. Comm'n 1995). In *Hartford Roofing*, the Commission held that abatement of an unguarded roof edge required the single action of installing a motion stopping system or line that would constitute compliance for all employees exposed to a fall. *Id.* at 1367. Accordingly, the failure to abate the hazard could be cited only once regardless of the number of exposed employees. *Ibid.* However, where the employer fails to protect employees from falls at several different locations in the same building, a violation exists at each such location. *J.A. Jones*, 15 O.S.H. Cas. (BNA) at 2212. Thus, what constitutes an "instance" of a violation varies depending upon the standard. "Per-instance" can mean per-machine, or per-injury, or per-location depending upon the nature of the employer's compliance obligation.

Per-employee violations are no different from other types of per-instance violations. Just as the employer must ensure that electrical equipment is safe in each location where it is installed, *Staley*, 295 F.3d at 1343, the employer must ensure that each employee who requires PPE or training receives it. *Hartford Roofing*, 17 O.S.H. Cas. (BNA) at 1366. The failure to provide an individual employee with an appropriate respirator is a discrete instance of a violation of the general respirator standard, 29 CFR 1910.134, because the standard requires an individual act for each employee:

As long as employees are working in a contaminated environment, the failure to provide each of them with appropriate respirators could constitute a separate and discrete violation * * *. [T]he condition or practice to which the standard is directed * * * [is] the individual and discrete failure to provide an employee working within a contaminated environment with a proper respirator.

17 O.S.H. Cas. (BNA) at 1366. *Hartford Roofing* reflects the guiding principle that provisions requiring the employer to "provide" respirators to employees because of environmental or other hazards to

which they are exposed are intrinsically employee-specific because such provisions require protection for employees as individuals. The Commission reaffirmed this principle in subsequent cases. In *Secretary of Labor v. Sanders Lead Co.*, 17 O.S.H. Cas. (BNA) 1197, 1203 (Rev. Comm'n 1995), the Commission held that the lead standard's requirement for semiannual respirator fit-tests could be cited on a per-employee basis because it involved evaluation of individual employees' respirators under certain conditions peculiar to each employee. Furthermore, in *Catapano*, 17 O.S.H. Cas. (BNA) at 1780, the Commission indicated that the general construction training standard, Sec. 1926.21(b)(2), clearly supported per-employee citations for each individual employee not trained. However, the Commission in *Catapano* found that the Secretary had not cited training violations on a per-employee basis, but rather, had impermissibly cited the employer for each inspection in which employees were found not to have been trained. Thus, the Commission affirmed only a single violation of the standard. *Ibid.*

In the *Ho* decision, the Commission veered from these principles and adopted an analysis focused on the presence or absence of certain specific words in the respirator or training provision at issue. 20 O.S.H. Cas. (BNA) at 1369-1380. Under this approach, the agency's ability to enforce respirator and training violations using per-employee citations in appropriate cases turns on minor variations in the wording of the requirements.

Erik Ho, a Texas businessman, was cited for multiple violations of the construction asbestos standard's respirator and training provisions. Ho's conduct was particularly flagrant. He hired eleven undocumented Mexican employees to remove asbestos from a vacant building without providing any of them with appropriate protective equipment, including respirators, and without training them on the hazards of asbestos. Ho persisted in exposing the unprotected, untrained employees to asbestos even after a city building inspector shut down the worksite, at which point Ho began operating secretly at night behind locked gates. The citations charged Ho with separate violations for each of the eleven employees not provided a respirator. The respirator provision then in effect stated, in relevant part, that "[t]he employer shall provide respirators and ensure that they are used * * * [d]uring all Class I asbestos jobs." Sec. 1926.1101(h)(1)(i). Ho was also charged with separate violations for each of the eleven employees not trained in accordance with Sec. 1926.1101(k)(9)(i) and (k)(9)(viii). Paragraph (k)(9)(i) requires the employer to "institute a training program for all [exposed] employees and * * * ensure their participation in the program;" paragraph (k)(9)(viii) states that "[t]he training program shall be conducted in a manner that the employee is able to understand * * * [and] the employer shall ensure that each such employee is informed of [specific hazard information]."

A divided Occupational Safety and Health Review Commission vacated all but one of the respirator and one of the training violations. According to the majority, the requirement to provide respirators and ensure their use involved the single act of providing respirators to the employees in the group performing the specified asbestos work. 17 O.S.H. Cas. (BNA) at 1372. Thus, the majority concluded, "the plain language of the standard addresses employees in the aggregate, not individually." *Ibid.* The majority reached this conclusion despite acknowledging that various subparagraphs immediately following the cited provision required particularly employee-specific actions, such as fit-testing individual employees. *Ibid.* n. 12.

The majority adopted an equally narrow interpretation of the requirement in Sec. 1926.1101(k)(9)(i) to "institute a training program" for all [exposed] employees and ensure their participation in the program." According to the majority, this language requires the employer to have a single training program for all exposed employees and imposes a single duty to train employees generally. *Id.* at 1374. Although paragraph (k)(9)(viii) explicitly states that, "the employer shall ensure that each such employee is informed of [specific hazard information]," the majority found that "the mere use of the terminology 'each such employee' under (k)(9)(viii) does not demonstrate that these [training] provisions define the relevant workplace exposure in terms of exposure of individual employees." *Ibid.* One Commissioner dissented, arguing that the plain wording of the respirator and training provisions authorizes OSHA to treat as a discrete violation each employee not provided and required to use an appropriate respirator, and each employee not trained in asbestos hazards. *Id.* at 1380-86 (Rodgers, Comm'r dissenting).

A divided panel of the U.S. Court of Appeals for the Fifth Circuit affirmed the result reached by the Commission, in part on different grounds than those articulated by the Commission majority. 401 F.3d at 368-376. The majority agreed with the Commission that the language of

the respirator provision did not support per-employee penalties for Ho's failure to provide a respirator to each employee who performed covered asbestos work. Id. at 373-74. Disagreeing with the Commission, the majority found that the language of the training provision permits per-employee citations. Id. at 372. However, the majority concluded that the agency's decision to cite and penalize Ho for each untrained employee was unreasonable absent circumstances showing that different training actions would have been required because of uniquely employee-specific factors. Id. at 373. Judge Garza dissented. He read the respirator provision to require action on a per-employee basis. Id. at 379 (Garza J. dissenting). He also found no support for the majority's "employee-specific unique circumstances" requirement under the training provision and concluded that, in any event, the requirement was met by Ho's failure to train the employees and ensure that they understood the training. Id. at 379-80.

In two subsequent decisions, the Commission stated that respirator and training requirements worded slightly differently from those at issue in Ho may be cited on a per-employee basis. 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 respiratory protection paragraph of the 1993 construction lead standard, Sec. 1926.62(f)(1), authorizes per-employee citations. That paragraph states, in relevant part, "[w]here the use of respirators is required under this section the employer shall provide * * * and assure the use of respirators which comply with the requirements of this paragraph." The Commission distinguished Ho on the ground that the language in the cited provision requiring the employer to provide respirators "which comply with the requirements of this paragraph" means that compliance with paragraph (f)(1) is predicated upon compliance with all of the requirements in paragraph (f), including fit-testing requirements in another section of the paragraph that are uniquely employee-specific.\1\ Ibid. In contrast, in Ho the language requiring compliance with such provisions immediately followed the cited initial provision, and the Commission declined to read the initial provision in light of the subsequent requirements. However, the Commission's interpretation in *Manganas* that the lead standard authorizes per-employee violations may not be part of the holding of the case. After stating that the standard could be cited on a per-employee basis, the Commission then stated that it declined to determine whether *Manganas's* failure to provide respirators to multiple employees constituted a single violation or multiple violations on the ground that the amount of the total penalty would not be affected under the circumstances of that case. Id. at 1999.

 \1\ The current version of Sec. 1926.62(f)(1) is virtually identical to the 1993 version at issue in *Manganas*. The provision now states in relevant part, "[f]or employees who use respirators required by this section, the employer must provide respirators that comply with the requirements of this paragraph."

In December 2007, the Commission decided GM. 2007 WL 4350896. The case involved citations issued in 1991 charging GM, inter alia, with separate violations for each of six employees not trained in accordance with the lockout/tagout (LOTO) standard's initial training paragraph, Sec. 1910.147(c)(7)(i). This paragraph states, in relevant part, that "[t]he employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees * * *. (A) Each authorized employee shall receive training * * *." The citation also charged GM with separate violations for each of twelve employees not retrained in accordance with the standard's retraining provision, Sec. 1910.147(c)(7)(iii)(B), which requires retraining whenever the employer is aware of inadequacies in the employee's knowledge or use of the energy control procedures.

The Commission affirmed all of these per-employee violations. It held that the LOTO training paragraph, unlike the initial paragraph at issue in Ho, states that "each employee" is to be trained and therefore "imposes a specific duty on the employer to train each individual employee." 2007 WL 4350896 at 36. The Commission also noted that other requirements in paragraph (c)(7) clarify the individualized nature of the training duty, such as the requirement to record the employees' names and dates of training; that the preamble indicates that training involves consideration of employee-specific factors, and that "the core concept of lockout/tagout is personal protection." Id. at 37 (emphasis added). The Commission did not refer to the portion of its Ho decision that rejected reliance on "each employee" language in the training requirement at issue there or that refused to consider any requirements in the standard other than the cited initial provision in

deciding the nature of the employer's duty.

For similar reasons, the Commission affirmed separate violations of the requirement to retrain whenever the employer becomes aware of deviations from or inadequacies in the employee's knowledge or use of the energy control procedures. Ho (construing 29 CFR 1910.147(c)(7)(iii)(B)). This provision, the Commission found, "specifically targets deviations from or inadequacies in the employee's knowledge or use of the energy control procedures, an occurrence that would trigger an employer's obligation to retrain only that particular employee." Ibid. (internal quotations omitted).

The Commission held that because the training provisions impose a specific duty on the employer to train each employee, it is irrelevant whether the employer may choose to provide the required training collectively, such as holding a single training session for all employees. Id. at 36. Under the wording of the standard, the Commission concluded, "any failure to train would be a separate abrogation of the employer's duty to train each untrained employee." Ibid. The Commission distinguished the Ho decision on the ground that the language at issue there, requiring "a training program for all employees," pertained to a single group of employees collectively exposed to identical hazards. Ibid.

C. The Agency's Interpretation

The Agency's position is that despite minor differences in their wording, all PPE and training provisions in safety and health standards impose the same basic duty on the employer to protect employees individually--by providing personal protective equipment, such as a respirator, or by communicating hazard information through training. The individualized nature of the duty to comply does not change because of the presence or absence of the words "each employee," or other words explicitly stating that the employer's duty runs to each individual employee. Thus, the existing PPE provisions may be cited separately for each employee who requires PPE but does not receive it, and the training provisions may be cited separately for each employee who requires training but does not receive it.

The employee-specific nature of the employer's duty to provide PPE and training may be demonstrated in several different ways. First, the employer must take a separate abatement action for each individual employee. Where respirators are required, the employer must give a separate respirator to each individual employee. Where training is required, the employer must impart specific hazard information to each individual employee. The employee-specific nature of the training requirements is not altered because the employer may choose to conduct training in a group session. As the Commission held in GM, the duty to provide training is specific to each individual employee subject to the requirement. 2007 WL 4350896. Thus regardless of how the training is conducted, the employer must ensure that each individual employee receives the required information at the appropriate time.

Second, unlike standards that do not permit per-employee citations, the PPE and training requirements logically permit the employer to comply for one employee and not another. In Hartford Roofing, the Commission found that installation of a motion stopping system at a roof edge was a single discrete action unaffected by the number of employees on the roof, and therefore could not be cited on a per-employee basis. 17 O.S.H. Cas. (BNA) at 1368-69. The employer could not have complied for one employee without also complying for all other employees exposed to the hazard.

By contrast, the actions necessary to comply with PPE and training requirements for one employee do not constitute compliance for any other employee. To fully comply with these requirements the employer must take as many abatement actions as there are employees to be protected. The fact that the employer may comply for one or a few employees, while leaving many others unprotected, strongly supports the availability of per-employee citations. Ho, 401 F.3d at 379 (Garza, J. dissenting).

Finally, compliance with PPE and training provisions requires the employer to account for differences among individual employees. To comply with respirator requirements, the employer must, among other things, select respirators based on the specific respiratory hazards to which the employee is exposed and perform individual face-fit tests. E.g., Sec. 1910.134(d), (f). To comply with training requirements, the employer must ensure that each employee receives the required information. E.g., Sec. 1910.1001(j)(7)(iii) (asbestos). The employer must therefore account for factors such as when individual employees commence work subject to the training requirement and when they are available for training. Individual language differences also play a role. For example, if one employee understands only English, and another employee understands only Spanish, training must account for

this difference. The actions necessary to fit a respirator to an individual employee's face and to ensure that hazard information is received by an employee therefore clearly entail consideration of individual factors.

1. The Ho Decision

The Secretary believes that the Commission majority's analysis in Ho is fundamentally flawed for several reasons discussed below. We discuss this issue because it is important to an understanding of the Secretary's interpretation of her standards and of the clarifying amendments to the PPE and training provisions. This final rule confirms the Secretary's interpretation of standards of this kind.

a. The Ho majority's analysis is inconsistent with the proper analytical framework outlined above. The requirement to provide respirators because of environmental hazards involves a separate discrete act for each employee exposed to the hazard. Hartford Roofing, 17 O.S.H. Cas. (BNA) at 1367. Eric Ho had eleven employees performing Class I asbestos work; therefore, he had to provide eleven separate respirators and ensure that each of the eleven employees used the devices. Ho also had to ensure that each employee received training on asbestos hazards. The cited asbestos respirator and training provisions required analytically distinct acts for each employee, and therefore permitted per-employee citations.

b. The majority's analysis does not reflect either Commission precedent preceding Ho, or more recent Commission caselaw. Hartford Roofing reflects the guiding principle distinguishing between requirements that apply individually to each employee, such as respirator provisions, and those that address hazardous conditions affecting employees as a group. 17 O.S.H. Cas. (BNA) at 1366-67. Manganas recognizes the principle that a requirement to provide respirators should be read in light of the associated provisions requiring individualized actions such as individual fit-testing. 21 O.S.H. Cas. (BNA) at 1998. And GM holds that a training requirement containing "each employee" language, which was also contained in the standard cited in Ho, imposes a specific duty to train each individual employee and may be cited on a per-employee basis. 2007 WL 4350896 at 24. Ibid.

c. The majority's analysis amounts to a "magic words" test for determining the nature of the duty to comply with PPE and training requirements that is at odds with the Secretary's intention and does not make practical sense. There is only a minor difference between the language of the respirator requirement in Manganas and that in Ho. In Manganas the requirement to comply with the provisions of the standard as a whole is stated explicitly in the standard's first sentence, while in Ho the requirement was implicit in that sentence and was explicitly stated by the remaining provisions of the standard. Similarly, in GM the "each employee" language was in the first enumerated subsection of the training standard, while in Ho it was in a later subsection. As the preceding discussion makes clear, the agency did not intend that minor wording variations among various PPE and training provisions affect the agency's ability to cite on a per-employee basis. Furthermore, there is no sound reason for distinguishing among the various PPE and training requirements based on minor differences in wording when all such requirements impose the same basic duty--provision of appropriate respirators and training to each employee covered by the requirements. The requirements at issue in Ho were not substantively different than those in Manganas and GM, and there should be no difference in the availability of per-employee citations under these requirements. Moreover, applying the Ho majority's analysis creates perverse incentives in that an employer who provides no respirators at all is eligible for only a single citation under the respirator provision at issue in Ho, while the employer who provides respirators, but fails to comply with the specific fit-test requirements is liable for per-employee violations.

Although the Secretary does not acquiesce in the Ho majority's interpretation of the asbestos respirator and training requirements at issue, the agency is modifying the language of most of the initial respirator provisions adopted in the 1998 rule to expressly state that the employer must provide each employee an appropriate respirator. There are several reasons for this. First, although the Secretary believes that the respirator requirements clearly support per-employee citations, employers may have some uncertainty in light of the Ho decision. Second, although the Commission indicated in Manganas that language similar to that in the 1998 rule permits per-employee penalties, that aspect of the decision could be viewed as dicta. Finally, the 1998 respirator language is virtually the same in all standards with respirator requirements, and the same wording can be used to amend all of the standards. The agency intends the new language to clearly convey that the respirator provisions in all OSHA standards impose a duty to provide an appropriate respirator to each individual employee who

requires respiratory protection. The failure to provide an appropriate respirator to each such employee may expose the employer to per-employee citations.

OSHA also believes that the existing language of the training provisions in safety and health standards makes reasonably clear that the training obligation extends to each individual employee. Some of these provisions explicitly state that "each employee" must be trained. For example, the process safety management standard states that "each employee presently involved in operating a process * * * must be trained." 29 CFR 1910.119(g)(i); 29 CFR 1926.64(g) (construction); the logging standard states that "[t]he employer shall provide training for each employee," Sec. 1910.266(i); the vinyl chloride standard states that "[e]ach employee engaged in vinyl chloride or polyvinyl chloride operations shall be provided training," Sec. 1910.1017(j); and the chromium standard states that "[t]he employer shall ensure that each employee can demonstrate knowledge of [the Sec. 1926.1126(j)(2) (construction)]. The Commission in GM held that provisions that explicitly require training for "each employee" may be cited separately for each employee not trained. 2007 WL 4350896 at 36. Accordingly, these provisions require no amendatory action.

Some standards contain provisions stating that the employer must train "employees" exposed to the hazard addressed by the standard. For example, the hazardous waste operations standard states that "[a]ll employees [exposed to hazardous substances] shall receive training," Sec. 1910.120 (e)(1); while the benzene standard states that "the employer shall provide employees with information and training at the time of their initial assignment to a work area where benzene is present." Sec. 1910.1028(j)(3)(i). There is no substantive difference between the requirement to train "employees" exposed to a hazard and the requirement to train "each employee" exposed to the hazard. Under both formulations, the exposed employee is the subject of the training requirement, and compliance cannot be achieved unless and until each such employee receives the required training. Therefore provisions requiring the employer to provide training to employees exposed to a hazard, or to ensure that employees receive training, or that contain similar language, are plainly susceptible to per-employee citations in appropriate cases. GM, 2007 WL 4350896 at 36. No additional language is needed to clarify the intent of these provisions.

A minority of training provisions state that the employer must "institute a training program for all [exposed] employees and ensure their participation in the program" or contain similar language. See e.g., Sec. 1910.1001(j)(7)(i) (asbestos); Sec. 1910.1018(o)(1)(i) (inorganic arsenic); Sec. 1910.1025(l)(1)(ii) (lead); Sec. 1910.1027(m)(4)(i) (cadmium). The Agency disagrees with the Ho majority's conclusion that this language requires the employer to have a training program, but does not impose a specific duty to train each exposed employee. The requirement that the employer "institute" the training program and ensure employee "participation" indicates that the focus of the provision is on the communication of hazard information to each employee. Furthermore, virtually all of the provisions requiring a training program also contain language explicitly stating that "each employee" must be informed of specific hazard information. See Sec. 1910.1001(j)(7)(iii) (asbestos); Sec. 1910.1018(o)(1)(ii) (inorganic arsenic); Sec. 1910.1025(l)(1)(v) (lead); Sec. 1910.1027(m)(4)(iii) (cadmium). Accordingly, the duty to "institute a training program" runs to each individual employee subject to the training requirement, and a discrete violation occurs for each such employee who does not receive training.

Ho, however, states the Commission's current interpretation as to the meaning of the construction asbestos standard's training provision. The Ho majority considered the language in Sec. 1926.1101(k)(9)(i) to impose a duty to have a training program for employees collectively. The failure to train each of a number of individual employees on asbestos hazards was therefore considered a single violation. Although the Secretary does not accept the Ho majority's interpretation, the decision may be a significant impediment to the consistent and effective enforcement of the asbestos standard and other standards that contain similar wording. Accordingly, OSHA believes it is appropriate to amend those standards that require the employer to "institute a training program" to clarify that the employer's duty is to train each employee in accordance with the training program. The revised language expressly identifies the subject of the training requirement as "each employee" and therefore imposes a "specific duty on the employer to train each individual employee." GM, 2007 WL 430896 at 36. The agency intends the revision to clarify without question that the failure to train each individual employee covered by the training requirement may be considered a separate violation with a separate penalty.

2. Comments of the U.S. Chamber of Commerce

The U.S. Chamber of Commerce, joined by the Associated Builders and Contractors, Inc. and the National Association of Home Builders, submitted comments challenging the Secretary's legal authority to promulgate the final rule. (Exs. 28.1, 40.1, 82.1). The Chamber agrees with OSHA that insubstantial differences in the wording of the PPE and training standards should not affect resolution of the unit of violation, and appears to question the correctness of the Commission's analysis in Ho. (Ex. 28.1 at 1). Nevertheless, the Chamber argues that the Secretary lacks authority under section 6(b) of the Act to issue a rule clarifying that each employee not provided PPE or training as required by the PPE and training standards may be considered a separate violation for penalty purposes. (Ex. 28.1 at 1-3). In the Chamber's view, section 6(b) limits the Secretary's rulemaking authority to defining the conditions or practices required to provide safe and healthful workplaces, while section 17 commits to the Commission alone the determination whether one or more violations of standards have occurred. The Administrative Procedure Act is a further limitation on the Secretary's authority, the Chamber argues, as section 558(b) states that "[a] sanction may not be imposed * * * except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. 558(b) (1994).

The Chamber also disagrees with the proposition in the proposed rule's preamble that a separate violation occurs for each employee who is not provided PPE or training. The Chamber maintains that there might be only one violation if the employer failed to cover a certain point in training a group of employees or failed to provide the right cartridge for the respirators provided a group of similarly exposed employees.

(Ex. 28.1 at 4, 5). In light of these asserted legal defects in the proposed rule, the Chamber recommends that the Secretary address the problem presented by the Ho case by continuing to litigate the issue before the Commission. (Id. at 4).

a. OSHA disagrees with these arguments for the following reasons. First, the Chamber fundamentally misinterprets both the rule and the Act in suggesting that the amendments usurp the Commission's authority under Section 17 to determine the amount of penalties. As the new paragraphs to the introductory sections of the subparts make clear, the final rule does not purport to set penalty amounts. Instead it clarifies that the employer's substantive duty under existing PPE and training standards is to comply with respect to each individual employee who must use PPE or receive training, and it provides clear notice that employers may be cited on a per-employee basis for violations. For example, Sec. 1910.9 states "[s]tandards in this part requiring personal protective equipment (PPE), including respirators and other types of PPE, because of hazards to employees impose a separate compliance duty with respect 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 may be considered a separate violation." (emphasis added).

Section 6(b) of the Act authorizes the Secretary to "promulgate, modify or revoke any occupational safety or health standard" by following certain procedures, and the Secretary is exercising this express authority here. As explained in the preceding subsections, current Commission precedent indicates that the specific wording of some respirator and training provisions may not support per-employee citations while the slightly different wording of other respirator and training provisions does support such citations. While the Secretary believes that the PPE and training standards already support her interpretation, she is amending the standards to conform to the Commission's view that precise language is necessary. The amendments also address the Commission's concern that the current language of some standards may not provide fair notice. Only the Secretary has the authority to amend her standards in this manner.

The Secretary's exercise of her express authority to amend her standards to add language the Commission has indicated is necessary is hardly a usurpation of the Commission's authority. To the contrary, the final rule amendments recognize and respect the Commission's adjudicative role under section 10(c) of the Act.

The Commission's authority under section 17 to assess penalties is not implicated by this final rule. Where the Secretary has cited separate violations of the same standard, the Commission may be required to determine whether the standard authorizes the type of per-instance violations charged. That issue, however, turns entirely on the proper interpretation of the standard's text. *Hartford Roofing*, 17 O.S.H. Cas. (BNA) at 1367. The Commission's role is limited to determining whether the Secretary's interpretation that the standard permits per-instance violations is reasonable. *Martin v. OSHRC*, 499 U.S. 144 (1991). Where a standard is reasonably susceptible to citation on a per-instance basis, the Secretary's authority to propose a

separate penalty for each such violation is clear. "The plain language of the Act could hardly be clearer" in authorizing a separate penalty for each discrete instance of a violation of a duty imposed by a standard. *Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123, 1130 (DC Cir. 2001).

The Commission's authority under section 17(j) to "assess all civil penalties provided in this section" does not permit it to review the Secretary's prosecutorial decision to cite and propose a separate penalty for each discrete violation of a standard. *Chao v. OSHRC (Saw Pipes USA, Inc. and Jindal United Steel Corp.)*, 480 F.3d 320, 324 n. 3 (5th Cir. 2007). The Commission's adjudicative functions are to determine whether the facts support the multiple violations charged, and to apply the statutory criteria to determine the amount of the penalty to be assessed for each proven violation. *Id.* at 325. These functions are not affected by the final rule, which concerns only the Secretary's interpretation that the PPE and training standards are susceptible to per-employee citations.

Reich v. Arcadian Corp., 110 F.3d 1192 (5th Cir. 1997), does not support the Chamber's argument. There, the Fifth Circuit observed that OSHA standards address "conditions" and "practices" and that the unit of violation of a standard must reflect the particular hazardous conditions regulated. 110 F.3d at 1198. While most standards require abatement of hazardous conditions affecting employees collectively, the condition or practice to which the PPE and training standards are directed is the protection of individual employees. *Hartford Roofing*, 17 O.S.H. Cas. (BNA) at 1366-67 ("[T]he condition or practice to which [the general respirator] standard is directed, within the meaning of section 3(8) of the Act, is * * * the individual and discrete failure to provide an employee working in a contaminated environment with a proper respirator."). The Arcadian court expressly recognized that an individual employee may be the unit of prosecution "if the regulated condition or practice is unique to the employee (i.e., failure to train or remove a worker)". 110 F.3d at 1199 (citing *Hartford Roofing*, 17 O.S.H. Cas. (BNA) 1361).

The foregoing discussion plainly disposes of the Chamber's claim that the final rule imposes a sanction without an express authorization, in violation of Sec. 558 of the APA. Nothing in the final rule imposes a sanction. Insofar as the rule addresses penalties, it does so only indirectly, by informing the public that the agency may exercise prosecutorial discretion to cite on a per-employee basis for violations of PPE and training standards. The Secretary's charging decision whether to issue a single citation or separate per-employee citations is not itself a penalty. *Chao v. OSHRC*, 480 F.3d at 325. Moreover, citations reflect only the Secretary's proposed penalty amounts--the Commission, not the Secretary, actually assesses penalties. *American Bus Ass'n v. Slater*, 231 F.3d 1 (DC Cir. 2000), cited by the Chamber, is obviously distinguishable in that the rule at issue there authorized the agency to levy fines in specific amounts directly against regulated entities for violations of bus accessibility requirements. In any event, section 9(a) of the OSH Act expressly authorizes the Secretary to issue a citation for violation of "a requirement * * * of any standard," and section 17 states that a penalty may be assessed "for each violation." Thus, the final rule clearly falls "within jurisdiction delegated to the agency" and does not violate section 558 of the APA.

b. The Chamber's criticisms of isolated statements in the proposal's preamble are irrelevant to the issue of the Secretary's legal authority to promulgate the final rule. (Ex. 28.1 at 4, 5). The Chamber chiefly challenges the proposal's statement that a separate violation occurs for each employee not provided required PPE or training, arguing that in some situations, the employer's failure to provide PPE or training to a class of employees can be considered a single violative condition or practice for which only a single citation could be issued. (Ex. 28.1 at 4, 5). However, the Secretary clearly has the authority to make specific changes to the wording of her PPE and training standards, and to announce her interpretation of the amended rules, by following the procedures in section 6(b). At most, the Chamber's criticisms go to the legal effect of amendments in some specific circumstances. Whether the Secretary's interpretation will be accepted by the Commission or a court in these circumstances, if and when they arise, is a matter to be resolved in an enforcement proceeding.

In any event, the Chamber's arguments are wholly unpersuasive on their merits. The Chamber asserts that there might be only one training violation if the employer fails to cover a certain required element in training a group of employees and there might be only one respirator violation if the employer fails to provide the right cartridge for respirators used by a class of employees exposed to the same hazard. (Ex. 28.1 at 4, 5). In these cases, the Chamber suggests that the violation involves a single action by the employer affecting multiple

employees alike. Id. The Secretary rejects this reasoning for the same reasons she rejects the Commission majority's analysis in Ho.

The hazardous "condition" or "practice" addressed by the PPE and training standards is the failure to protect each individual employee--through personal protective equipment or training--from the hazards of his or her or work environment. Hartford Roofing, 17 O.S.H. Cas. (BNA) at 1367. The hazardous condition addressed by the standards is always the same regardless of the actions taken by the employer to comply or not comply. It does not matter that a single action or decision by the employer results in several employees being exposed to hazardous working conditions without PPE or training--the unit of violation remains the individual unprotected employee. See Chao v. OSHRC, 380 F.3d. at 323 (although multiple recordkeeping violations may stem from a single company policy, each failure to record may represent a separate and distinct violation). Secretary of Labor v. Caterpillar Inc., 15 O.S.H. Cas. (BNA) 2153, 2173 (Rev. Comm'n 1993). For the same reason, the availability of per-employee training violations does not depend upon whether the employer could have conducted a single group training session. GM, 2007 WL 4350896 at 36.

The Chamber's approach is also internally inconsistent. The Chamber appears to acknowledge that per-employee citations should have been available in the Ho case. (Ex. 28.1 at 1, 4). There is no logical distinction between the situation in Ho, where the employer failed to provide any respirators to employees, and a case where the employer provides noncomplying respirators to employees. (Ex. 28.1 at 4). In both cases, employees are not protected. The Chamber asserts that "it all depends upon whether there are different violative conditions," but fails to explain how or why factual differences between Ho and its hypothetical case would support the availability of per-employee citations in one case but not the other.

c. Finally, the Chamber's proposed solution to the problem presented by the Ho case is no answer at all. The Chamber urges the Secretary to continue to litigate the issue by raising the arguments in the proposed rule directly to the Commission in the next appropriate case. Thus, the Chamber posits that while the Secretary lacks statutory authority to issue a rule clarifying her interpretation that the PPE and training standards are susceptible to per-employee citations, the Commission would accept this interpretation as a litigating position and change its doctrine. This appears wholly counterintuitive. The central tenet of the Secretary's position is that the statute supports her approach. To accept the Chamber's comments as a basis for not adopting a final rule would substantially weaken, if not destroy, the legal underpinning of the Secretary's position. For these reasons, the Secretary rejects both the Chamber's legal arguments and its recommendation for a non-regulatory course of action.

IV. Summary and Explanation of the Proposed Rule

In this final standard, OSHA is amending the standards in 29 CFR Parts 1910, 1915, 1917, 1918 and 1926 to provide additional clarity and consistency about the individualized nature of the employer's duty to provide training and personal protective equipment (including eye, hand, face, head, foot and hearing protection, respirators, and other forms of PPE) under standards in these parts. The final rule revises existing regulatory language and adds new sections to the introductory subparts to Parts 1910 through 1926. The following discussion addresses comments to the proposed language, OSHA's response to those comments, the actual final rule language, and how the final rule is to be interpreted.

A number of commenters offered broad support for the revisions (see, e.g., Exs. 3, 5, 18.1, 21.1, 29.1, 32.1, 39.1, 44.1, 83.1, 84.1). ORC Worldwide remarked that the rulemaking is an appropriate action to eliminate confusion and ensure consistent and effective enforcement of OSHA's standards (Ex. 29.1). The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) added that the rule will remove any doubt that employers are obligated to provide required PPE and training to each worker and that employers who fail to do so for each individual employee are subject to per-instance citations for each employee left unprotected (Ex. 32.1). The American Industrial Hygiene Association (AIHA) urged OSHA to "[m]ove forward with the completion of this proposed rule in as timely a manner as possible to avoid any potential delays in the protection of workers" (Ex. 18.1).

A number of commenters also opposed the rulemaking (see, e.g., Exs. 2, 19.1, 20.1, 22, 25.1, 26.1, 27.1, 28.1, 30, 38.1, 40.1, 41.1, 45.1, 48.1, 49.1, 51.1, 79 pp 35-46, 79 pp 73-77, 79 pp 87-92, 80.1, 81.1, 82.1). Several commenters expressed concern about OSHA's authority to promulgate the standards (see, e.g., Exs. 28.1, 40.1, 80.1, 82.1). OSHA's response to these concerns is in the legal authorities section of this preamble. A number of commenters also expressed concerns about

the cost impact of the standards on employers. These concerns are addressed in the economic analysis sections below. Remaining objections and recommendations are discussed in the following sections.

New Sections Added to Subpart A of Parts 1910 Through 1918, and Subpart C of Part 1926

OSHA has added a new section to Subpart A of Parts 1910, 1915, 1917 and 1918, and to Subpart C of Part 1926. These subparts contain general information about the scope and applicability of the standards in each part. The proposed new sections contain two paragraphs, which are identical for each new section. The first paragraph expressly states that, for standards in the part requiring employers to provide PPE, employers must provide PPE to each employee required to use the PPE, and each failure to provide PPE to an employee imposes a separate compliance duty, and thus may be considered a separate violation. The new paragraph applies to all standards in the part that require provision of PPE, regardless of their wording. For example, Sec. 1910.132 requires employers to provide PPE when needed, and also recognizes that an employer may allow an employee who voluntarily provides appropriate PPE he or she owns to use that PPE in place of the employer-provided equipment. See Sec. 1910.132(h)(6). The underlying obligation to provide PPE to each employee is the employer's, and each employee who lacks required PPE may be considered a separate violation. The second paragraph expressly states that standards in the 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. Each failure to adequately train an employee may be considered a separate violation.

The new sections reflect the agency's intent, as discussed in the preceding sections of this preamble, that standards requiring the employer to protect employees by providing personal protective equipment or imparting hazard information through training impose a specific duty to protect each individual employee covered by the requirement. The new sections are placed in the introductory subparts of each part because the principle expressed in each section applies generally to all PPE and training standards in the part. OSHA intends the new sections to apply regardless of differences in wording between the PPE and training provisions in the various parts. The new sections provide unmistakable notice to employers that they are responsible for protecting each employee covered by the PPE and training standards, and consequently, that they may be subject to per-employee citations and proposed penalties for violations.

The AFL-CIO, supported by the Building and Construction Trades Department, proposed two changes to these general language sections (Ex. 32.1, 39.1, 70 pp. 82-83, 83.1, 84.1). As proposed, these sections read as follows:

(a) 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.

(b) 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.

The AFL-CIO's first concern was that the first sentence of paragraph (a), by singling out respirators as an example of the PPE involved, "[c]ould lead to the view that the requirement focuses more narrowly on respirators and not on the employer's more expansive duty to provide all forms of PPE to each worker" (Ex. 32.1). It suggested that new text be inserted after the word "including," which listed various specific types of PPE, such as foot, hand, and eye protection. Second, the AFL-CIO suggested inserting the words "with respect" after the word "duty" in the first sentence of paragraphs (a) and (b) to make clear that the employer's separate compliance duty was owed to each employee.

The Agency agrees with these recommendations in large part and has