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

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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,  
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### 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.

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 \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."  
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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