



## Management Alert

# OSHA's Proposed Rulemaking: Increasing Liability for Employers

Many employers have received citations from OSHA for failing to provide personal protective equipment and training to employees. This area of liability will be expanded in the near future. Reacting to differing legal decisions from the Occupational Safety and Health Review Commission relating to its enforcement authority, OSHA has proposed formal revisions to several of its standards that relate to the provision of personal protective equipment (PPE) and training. 73 Fed. Reg. 48,335 (Aug. 18, 2008). The proposed amendments are designed to clarify OSHA's position that an employer may be issued **a separate citation for each and every employee who does not receive training or PPE where required**. This clarification will undoubtedly increase the number of citations issued for training and PPE violations, exposing the employer to greater liability in monetary penalties and the potential for repeat citations.

### The Provision of PPE and Training

Currently, numerous OSHA standards require employers to provide employees with specialized training and/or PPE to protect employees from occupational exposure to hazards. For example, the Lockout Tagout Standard, 29 CFR 1910.147, requires the employer to train employees on the control of sources of hazardous energy. Similarly, nearly all of OSHA's toxic substances standards (e.g., hexavalent chromium, vinyl chloride, asbestos, etc.) require employers to train employees who are or may be exposed to the substance in the workplace. Many standards include the provision of PPE as one of many compliance requirements tailored to a particular hazard or activity. Other standards are more general and require PPE to protect employees wherever necessary.

While PPE and training are required under a number of standards, the particular language differs from standard to standard. For example, the LOTO, Process Safety Management, vinyl chloride, and fall protection standards contain language that specifies that "each employee" shall receive the required training. Other standards, such as electrical power generation, Benzene, and hazard communication, require the employer to generally "provide training to employees," but do not use the words "each employee."

### Review Commission Decisions

The genesis for the proposed revisions are Review Commission decisions that have been unfavorable to OSHA's ability to issue citations to employers on a per-employee basis. In 2003, the Review Commission held that variations in the wording

of training requirements affect OSHA's ability to cite an employer in a per-employee basis. *Secretary of Labor v. Erik K. Ho, Ho Ho Ho Express, Inc.*, 20 O.S.H. Cas. (BNA) 1361 (Review Comm'n. 2003). There, the employer was cited for multiple violations of the construction asbestos training and respirator requirements. OSHA issued eleven citations under the respirator requirement, 29 C.F.R. 1926.1101(h)(1)(i), one for each of the eleven employees who did not receive a respirator. OSHA also issued eleven citations under the training requirement, 29 C.F.R. 1926.1101(k)(9)(i), one for each of the eleven employees who did not receive the requisite training. The Review Commission upheld one respirator citation and one training citation, vacating all the rest, concluding that the way the cited standards were worded addressed employees "in the aggregate, not individually." 20 O.S.H. Cas. (BNA) at 1372.<sup>†</sup>

In two more recent decisions, the Review Commission distinguished *Ho* based on variations in the wording of the cited standards. In *Secretary of Labor v. Manganus, Painting Co.*, 21 O.S.H. Cas. (BNA) 1964, 1998-99 (Rev. Comm'n 2007), the Review Commission upheld per-employee citations under the construction lead standard. The Review Commission reasoned that, unlike the construction asbestos standard, the lead standard required respirators for each affected employee.<sup>‡</sup>

Most recently, in 2007, the Review Commission affirmed twelve citations issued to General Motors under the LOTO standard's training requirement, 29 C.F.R. 1910.147(c)(7)(iii). The Commission held that, unlike the construction asbestos standard in *Ho*, the LOTO standard required training for "each employee." Thus, the Commission held that the LOTO standard imposed an employee-specific duty on employers to train each individual, and OSHA could issue citations under the LOTO training standard on a per-employee basis.

## Proposed Amendments

In its preamble, OSHA cited the Review Commission's "magic words" analysis as its basis for proposing revisions to several training and PPE requirements. 73 Fed. Reg. 48,340. OSHA takes the position that it has always interpreted training and PPE requirements, regardless of the precise wording of the standard, to be enforceable on a per-employee basis. However, in light of the Review Commission's decisions that have vacated citations based on linguistic variations, OSHA proposes to revise the following standards to specify that "each employee" is to receive training and/or PPE where required. OSHA has added general provisions, 29 C.F.R. 1910.9, 29 C.F.R. 1915.9, 29 C.F.R. 1918.5, and 29 C.F.R. 1926.20, that codify the employer's duty to provide PPE and training to each employee where required under any standard. A few of the other affected standards are 29 C.F.R. 1910.95 (Occupational Noise Exposure is amended to require training), 29 C.F.R. 1910.134 (Respiratory Protection), and 29 C.F.R. 1910.156 (Fire Brigades).

---

\* In November 2007, OSHA revised its enforcement policy with respect to PPE to interpret the word "provide" to mean that the employer must pay for required PPE with few exceptions. 72 Fed. Reg. 64,341 (Nov. 15, 2007).

† On appeal, the U.S. Court of Appeals for the Fifth Circuit held that per-employee citations were not necessarily inappropriate under the cited standards, but upheld the Review Commission's decision under the particular circumstances presented. *Chao v. Occupational Safety and Health Review Comm'n*, 401 F.3d 355, 368-376 (5th Cir. 2005).

‡ This analysis was largely academic, however, as the Review Commission declined to decide whether multiple citations were appropriate because the total penalty would not be affected.

## Conclusion and Recommendations

The proposed revisions are very likely to become enforceable regulations. OSHA's proposed revisions are likely to increase the number of citations employers may potentially receive for training and PPE violations. For a complete failure to train or provide PPE, OSHA may have the ability to issue a citation for each employee who did not receive the required training or PPE. For large employers with hundreds of employees at each facility, the number of citations and corresponding penalties could be significant. In order to prepare for the anticipated revised rules, the employer should seriously consider the following actions to avoid liability:

- Ensure that it has developed, conducted, and documented a written comprehensive job hazard assessment to identify all hazards and required PPE;
- Obtain and provide all required PPE to employees;
- Conduct and document training for employees on the necessity to inspect, utilize, and maintain PPE;
- Document employee training that failure to utilize PPE will result in disciplinary action;
- Conduct regular walkaround inspections to observe and confirm that employees are utilizing PPE properly;
- Issue written disciplinary action to employees who fail to utilize PPE properly.

While OSHA's recordkeeping requirements vary from standard to standard, a savvy employer will maintain all records demonstrating the provision of training and PPE for all affected employees for at least three years. Inadequate recordkeeping practices, even for a single employee, may hamper the employer's ability to defend against a citation.

*For more information, please contact the Seyfarth Shaw attorney with whom you work, or any Environmental, Safety & Toxic Torts attorney on our website ([www.seyfarth.com/ESTT](http://www.seyfarth.com/ESTT)).*



**Breadth. Depth. Results.**

[www.seyfarth.com](http://www.seyfarth.com)