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Docket Office
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

**Comments on the Limited Reopening of Rulemaking Record
Employer Payment for Personal Protective Equipment
Docket S-042 RIN 1218-AB77**

The International Safety Equipment Association (ISEA) is pleased to provide the following comments on the Employer Payment for PPE rule published in the *Federal Register* on July 8, 2004.

ISEA is the national trade association for personal protective equipment, including head, eye and face, hearing, respiratory and fall protection; protective clothing and gloves; high visibility safety apparel; emergency eyewash and showers; first aid kits, and gas detection instruments. The association is the secretariat for numerous American National Standards for personal protective and safety equipment, including the ANSI standards for head and eye and face protection cited in OSHA's PPE standards.

ISEA submitted comments on the proposed rule in July 1999, and appeared at the public hearing in support of our position that OSHA should require employers to pay for the personal protective equipment required to protect the health and safety of their workers. Nothing in the intervening period has modified the association's views expressed in those comments.

Employers who provide *and pay* for PPE demonstrate their commitment to worker safety because such a systematic PPE program, driven by management through the organization, is an important factor in creating a positive safety culture. These employers recognize that they are not simply incurring a cost for equipment, but rather making an investment by valuing their employees and avoiding the high direct and indirect costs of injury, illness and death.

ISEA believes that it is the responsibility of employers to properly protect their employees from all hazards in the workplace. Employers are already required in OSHA's PPE standards to conduct hazard analyses to determine what PPE is necessary to protect their employees. When employers pay for PPE, ISEA believes that workplaces are safer because they are more likely to select the proper PPE for the hazard, the PPE is more likely to be available and in good condition, and employees are more likely to be trained in using the PPE at the worksite.

PPE is not a "Tool of the Trade"

ISEA believes that OSHA must differentiate between personal protective equipment and tools used by workers on the job. A tool enables a worker to perform a task. PPE protects the worker while using the tool. The definition of PPE could rely on OSHA regulatory text:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact. 29 CFR 1910.132(a); 1926.95(a)

Personal protective equipment is technically sophisticated, designed, built and tested to exacting standards of performance. The equipment must be properly selected and fitted, and workers must be properly trained in its use, application and maintenance. Its selection demands knowledge of the workplace, understanding of the potential hazards, equipment performance and limitations, and professional skill.

PPE serves to protect workers from injury, illness or death. The Occupational Safety and Health Act, and numerous OSHA standards, make it clear that employers are responsible for identifying and assessing recognized hazards in their workplaces and protecting employees from such hazards.

Responses to OSHA Questions Published in the Federal Register

1. If OSHA issues a final rule that generally requires employers to pay for most PPE, should safety equipment considered to be "tools of the trade" be included or excluded from the requirement? On what basis?

ISEA does not believe PPE should be considered a "tool of the trade" as we have stated above. It is the responsibility of employers to properly protect their employees from all hazards in the workplace.

2. Several criteria for treating PPE as a tool of the trade were identified by rulemaking participants. These included: (1) The PPE was expected to be used by only one employee for reasons of hygiene or personal fit, (2) the employee using the PPE typically worked on multiple job sites or for several employers and brought the PPE with them to each job site, and (3) the practice of considering PPE to be a tool of the trade was customary in the industry. Are these reasonable criteria for considering whether or not to require employer payment for PPE regarded as a tool of the trade? Are there other criteria that would justify considering PPE to be a tool of the trade? If so, why?

PPE will always be "personal." To be effective against hazards in the workplace, PPE must properly fit the unique size, shape and condition (i.e. degree of visual acuity) of the user's body. Therefore criterion 1 should not exempt PPE from the requirement for employer payment.

In addition, ISEA believes that a "tool of the trade" category is difficult to define and interpret. Granting exceptions for employer payment when the PPE is "personal in nature" creates a confusing situation that will likely be tested in court. We feel our call for clarity is consistent with Assistant Secretary Henshaw's call for the same, which he made in comments to Congress about the need for this rule. At a May 1, 2003 appropriations committee hearing, Assistant Secretary Henshaw said, in response to a question on the PPE rule, "we realize, and it has to be absolutely clear, that the employer's responsibility is to provide a safe workplace. That includes individuals wearing the appropriate personal protective equipment. That is a key

component of protecting the safety and health of workers. So, we are addressing that seriously. Whether for the Hispanic population or other individuals it is the responsibility of the employer to assure that those workers are protected. We are taking and following every measure that we possibly can to assure that those employers fulfill that obligation.”

Criterion 2 suggests that an employer whose workforce is mobile has less of a responsibility to assess hazards and ensure the adequacy of workers’ PPE. We find this reasoning flawed. It is still the employer’s responsibility to ensure that employees are properly protected no matter the duration of employment. Employees who bring their own PPE to a short term job offer no assurance that the PPE will be adequate to protect them against the hazards they face.

Criterion 3 asks whether PPE should be considered a tool of the trade if such practice is customary in the industry. ISEA believes this is irrelevant. If the customary practice in an industry is to allow employees to wear or use substandard PPE, would OSHA allow it? We believe this rulemaking provides OSHA with the opportunity to unify national workplace safety practices, some of which may have been established before the OSH Act was enacted. While there may be allowable exceptions where collective bargaining agreements have established which PPE employers will provide, ISEA believes that in general OSHA should not rely on what is “customary” when worker health and safety is at stake.

Additional Comments

There are additional issues which ISEA believes OSHA should consider in evaluating the comments on this proposal.

Employer Responsibilities

ISEA asks OSHA to confirm that employers will continue to be responsible to ensure the safety equipment employees bring to the job is appropriate and in working condition. ISEA also asks OSHA what provisions will it establish to make certain an employee is still properly protected should an employee bring to the job PPE or safety equipment that does not comply with recognized performance standards, or safety equipment that is not appropriate for the tasks.

Training

Employees are more likely to be properly trained on PPE that is provided and paid for by the employer. Although the current comment request is silent on the issue of properly trained employees as a benefit of employers paying for PPE, ISEA believes that training employees on the use, proper care, maintenance, useful life, limitations and disposal of PPE is more effective when there is equipment uniformity at a worksite, and when the employer has chosen the equipment and knows these parameters.

Equipment Ensembles

Often a worker has to wear or use more than one type of PPE. It is essential that the types of protective equipment are compatible – for example, the accessory slots on a hard hat may have to accept accessories such as hearing protectors, face shields or welding fronts. An employer can standardize on PPE selection to minimize compatibility issues. We believe OSHA has not accounted for the necessity of equipment compatibility on a job site, no matter the duration of task to be performed.

Defining “Employer”

We believe the “employer” for this rule is the one who actually provides the place where work is conducted, not the organization signing the paycheck. In the case of temporary employment

agencies, we believe the General Duty Clause makes clear that the employer providing the actual place where work is performed has the responsibility to conduct hazard analyses, ensure the workplace is free from recognized hazards, and to provide measures (such as PPE and other safety equipment) to mitigate those hazards.

Low Income Workers Hit Hardest; Regressive System for Safety

ISEA urges OSHA to consider the economic impact of requiring some workers to provide their own PPE. Employers most often purchase PPE from distributors who have negotiated low prices based on volume and other economies of scale. Workers who buy PPE on their own, at retail, may not have this advantage. This particularly affects short-term workers, who may be low income and not able to afford adequate PPE that meets current standards.

OSHA has also not accounted for instances where employers charge employees for PPE if employees come to work without such equipment, if their PPE does not meet current standards, or if their PPE is not appropriate for hazards they face on the job. Should OSHA decide that employers can require that employees pay for their PPE, ISEA asks OSHA to explain the mechanism it would establish to ensure that employers do not overcharge employees.