

LEGAL PERSPECTIVE

NEW OSHA RULE ON PERSONAL PROTECTIVE EQUIPMENT

BY WILLIAM S. MYERS, ESQ.

The Occupational Safety and Health Administration (OSHA) published a final rule in December on Personal Protective Equipment (PPE) in the construction industry. The rule took effect on January 11, 2025. OSHA State Plans that did not already have a similar rule must implement their own rule within six months of the publication date. It is a small rule change with potentially significant practical effect, being described by some industry commenters as imposing a “monumental task” on employers.

The rule amends the Construction PPE Standard to require that all PPE “properly fits each affected employee.” The driving force for this amendment is the notion that PPE designed for smaller bodies, particularly for women, is not readily available for workers. One example mentioned in the official comments is the size of work gloves, especially gloves used in dangerous work that require dexterity. The official comments also indicate that “properly fits each affected employee” includes PPE that takes into account “workers’ body changes during pregnancy.”

The likely significant impact derives from multiple factors, including the ambiguity of the term “properly fits,” the requirement that PPE must fit “each affected employee,” the difficulty of proving that a particular item of PPE actually fits a particular employee, and the potential for disagreement between employee and employer over whether PPE properly fits that particular employee—an inherently subjective determination in which the employer is at a distinct disadvantage when it comes to proof.

OSHA rejected calls from experts and stakeholders to define the phrase “properly fits,” including a suggestion from National Institute for Occupational Safety and Health (NIOSH), OSHA’s own research arm. To put that in context, OSHA spent 26 pages of three-column, single-spaced, fine print in the Federal Register to explain a rule that results in a net change of 19 additional words in the standard, but it refused to explain what is meant by what is now the core phrase, “properly fits,” or how employers might go about determining the difference between “properly fits” and “comfortably fits” or “perfectly fits.”

OSHA also refused to make any other suggested revisions to its initial proposed language, opting to finalize the rule in the form first published in July 2023.

An additional ambiguity lies in the core requirement of the amended rule, which is framed by the phrase “selected to ensure.” Does that mean “ensures” that the PPE “properly fits,” or does the inclusion of “selected to” allow some room for more standardized decisions by employers about PPE? OSHA ignored this question in the official comments, but its language throughout suggests it will interpret that

phrase to mean “ensures.” When combined with the phrase “properly fits each employee,” it could be construed to mean “tailor made.”

There will be secondary effects of the rule as well. They include the impact on unrelated enforcement action by OSHA, especially following accidents involving employees who were using PPE at the time (compliance officers will be sorely tempted to tack that on as an almost automatic additional violation), as well as employee relations (an enhanced vehicle for alleging employer retaliation), and labor relations (another ambiguity that can become a point of contention with union representatives). All three of those areas have the potential to loom large as tools that can be misused by different players for strategic reasons that have little to do with workplace safety.

The affected standard is 29 C.F.R. Section 1926.95(c). The old and new versions are shown below:

Old rule:

Section 1926.95. Criteria for personal protective equipment. (c) Design. All personal protective equipment shall be of safe design and construction for the work to be performed.

New rule:

Section 1926.95. Criteria for personal protective equipment. (c) Design and selection. Employers must ensure that all personal protective equipment:

- (1) Is of safe design and construction for the work to be performed; and
- (2) Is selected to ensure that it properly fits each affected employee.

OSHA has not issued further interpretations or other guidance for the new rule since promulgating it, and neither statistical nor anecdotal data is yet available as to how OSHA is interpreting and applying the new rule. Of course, a further question is whether the change in Presidential Administration will affect the agency’s interpretation of the key phrases discussed above. **BG**

William Myers is an attorney and member at Eckert Seamans Cherin & Mellott, LLC. He may be reached at wmyers@eckertseamans.com