



OSHA ANNOUNCES FINAL RULE ON EMPLOYER PAID PERSONAL PROTECTIVE EQUIPMENT

On November 15, 2007, the Occupational Safety and Health Administration of the United States Department of Labor ("OSHA") published a final rule in the Federal Register addressing new requirements that hold employers responsible for the costs of certain employee personal protective equipment ("PPE"). This new rule becomes effective on February 13, 2008, but provides an enforcement deadline of six months from the publication date to provide employers time to amend existing PPE payment policies in accordance with the final rule. Employers must fully comply with the PPE payment requirements no later than May 15, 2008.

REQUIREMENTS UNDER THE NEW PPE RULE

Under OSHA's new rule, employers are now generally required to pay for the minimum level of PPE required by OSHA standards, with no cost to the employee. The new rule is relevant specifically to the issue of who pays for PPE when required by OSHA and does not require employers to provide PPE where none is required by OSHA standards. The rule for employer payment of PPE applies when such equipment is used by an employer to meet PPE compliance under OSHA standards. Employers are required to pay for any upgraded PPE item it uses to comply with OSHA standards. Also, if an employer provides a PPE item at no cost, and an employee requests to use a different PPE item, and the employer consents and provides the different PPE, then the employer is required to pay for the item.

If an employee wishes to use their own personal PPE, and if his or her employer allows such use, the employer is not required to reimburse the employee for the cost. However, the rule specifically notes that employers cannot require employees to provide their own PPE (unless the PPE falls within one of the exceptions noted below). Rather, an employee's use of PPE they own must be voluntary, and an employee must also be permitted to cease using their own PPE at any time. While employee-owned PPE is in use, the employer remains responsible for ensuring that such PPE is adequate, properly maintained, and sanitary under the applicable OSHA standard.

The final rule clarifies payment issues relating to replacement PPE and situations where an employee uses his or her own PPE. The employer must pay for the replacement of PPE, except in those limited situations where an employee has lost or intentionally damaged the PPE. The rule does not address how often PPE is to be replaced, as replacement is already governed by the relevant OSHA standards. The final rule recognizes that employers are free to develop and implement workplace rules and disciplinary systems to ensure that employees responsibly use and maintain employer-provided PPE. However, any such system or rule that is found to circumvent the PPE payment requirements and shift payment to employees in cases where the PPE is not lost or intentionally damaged will be viewed by OSHA as a violation of the standard. Employers should be cautious in the creation and enforcement of any such rules and systems.

Under the new rule, employer payment methods for any PPE required under the OSHA standards may consist of: 1) direct purchase and distribution by an employer; 2) allowances; 3) vouchers; or 4) employer reimbursement to employees. There are a few specific exceptions to the general requirements under the rule which are discussed below.

EXCEPTIONS TO THE PPE RULE REQUIREMENTS

The new PPE rule contains some limited exceptions to the employer-payment requirements for certain items of ordinary clothing and protective equipment. The new rule does not require employer payment for uniforms, caps, or other clothing worn solely to identify a person as an employee. The rule also does not require payment for any items worn to keep employees clean for purposes unrelated to safety or health, or for items worn for product safety, consumer safety, or patient safety and health. (Employers should be aware that other federal or state laws or regulations may require employer payment for such items.)

OTHER SIGNIFICANT EXCEPTIONS TO THE NEW PPE PAYMENT REQUIREMENTS INCLUDE:

- **Logging Boots:** Employers are not required to pay for logging boots required by OSHA's logging standards. The logging standards already exempt logging boots from employer payment requirements.
 - **Non-Specialty Safety-Toe Footwear:** Employers are not required to pay for non-specialty, safety-toe protective footwear if the employer allows the employee to wear such items off the job site. This would include items such as steel-toe shoes or steel-toe boots. If employees are required to keep such items at the workplace, the employer must pay for it. Specialty items like non-skid shoes for floor strippers require employer payment.
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- **Built-In Metatarsal Protection:** When an employer provides metatarsal guards and allows an employee, at his or her request, to use shoes or boots with built-in metatarsal protection, the employer is not required to pay for these shoes or boots.
- **Non-Specialty Prescription Safety Eyewear:** If such items are permitted to be worn by employees off the job site, employer payment is not required. If the employer requires employees to keep non-specialty prescription eyewear at the workplace, the employer must pay for it. Specialty items in this category, such as prescription eyeglass inserts for full-face piece respirators, also require employer payment.
- **Everyday Clothing and Weather-Protective Clothing:** Employers are not required to pay for everyday clothing for their employees, even if the employer requires use of the items to provide hazard protection. An employer is also not required to pay for ordinary clothing used solely for purposes of protection from the weather, such as winter coats, winter gloves, rubber boots, hats, sunglasses or sunscreen. In situations where special equipment or extraordinary clothing is needed to protect an employee from unusually severe weather conditions, or for protection while working in artificial heat or cold, such as freezers, the employer is required to pay for the equipment.

COMPLIANCE WITH THE NEW OSHA RULE MAY NECESSITATE PROMPT ACTION

All employers affected by these new OSHA requirements should commence an immediate review and revision of their existing PPE payment policies and practices to ensure compliance with the final rule prior to the enforcement date of May 15, 2008.

EFFECT OF THE FINAL RULE ON EXISTING UNION CONTRACTS

There is no exception to the requirements under the final rule for employers with employees who are represented under a collective bargaining agreement (CBA). Therefore, any CBA provisions relating to OSHA-mandated PPE items will not be recognized as a defense if an employer is found to be in violation of the final rule.

Many CBAs contain language specifying that employers will provide certain PPE at no cost to employees and in some cases may specify PPE that employees will be responsible for providing (and paying for) themselves. The compliance deadline of May 15, 2008 was intended in part to provide time for pertinent provisions of affected CBAs to be renegotiated to conform to the final rule.



Jaeckle Fleischmann & Mugal, LLP

BUFFALO

12 Fountain Plaza
Buffalo, New York 14202-2292
Phone: 716.856.0600
Fax: 716.856.0432

AMHERST

400 Essjay Road, Suite 320
Amherst, New York 14221-8228
Phone: 716.250.1800
Fax: 716.250.1806

ROCHESTER

190 Linden Oaks
Rochester, New York 14625-2812
Phone: 585.899.2930
Fax: 585.899.2931

PHOENIX

7047 East Greenway Parkway, Suite 250
Scottsdale, Arizona 85254-8113
Phone: 480.659.2213
Fax: 480.659.3419

**LABOR & EMPLOYMENT
ATTORNEYS**

Sean P. Beiter (NY)
sbeiter@jaeckle.com; 716.843.3805

Thomas E. Brydges (NY)
tbrydges@jaeckle.com; 716.843.3812

Elizabeth Fox-Solomon (NY)
efoxsolomon@jaeckle.com; 716.843.3936

Scott P. Horton (NY)
shorton@jaeckle.com; 716.843.3949

John M. Monahan (NY)
jmonahan@jaeckle.com; 716.843.3870

Randall M. Odza (NY)
rodza@jaeckle.com; 716.843.3877

Edward G. Piwowarczyk (NY, IL)
epiwowarczyk@jaeckle.com; 716.843.3834

Matthew C. Van Vessem (NY)
mvanvessem@jaeckle.com; 716.843.3842

ADMISSIONS INFORMATION

by state, follows respective attorney name

Employers with employees who are represented under a CBA are required under the National Labor Relations Act to negotiate, if requested by the labor organization involved, over aspects of compliance with the OSHA final rule where there is employer discretion. For example, negotiations may be required over the means by which the employer will provide the PPE to employees and PPE payment arrangements.

If you have any questions regarding OSHA's final rule on employer payment requirements for personal protective equipment or any other employment-related issues, please contact John Monahan at 716.843.3870 or jmonahan@jaeckle.com, or Randall Odza at 716.843.3877 or rodza@jaeckle.com.