Case No. 07-1001

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: AMERICAN FEDERATION OF LABOR AND CONGRESSION OF INDUSTRIAL ORGANIZATIONS AND UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL

Petitioners.

ON A ORIGINAL PETITION FOR WRIT OF MANDAMUS

AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN TRUCKING ASSOCIATIONS' RESPONSE TO THE AFL-CIO'S AND UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION'S PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

This case is about economic transference, not employee safety and health. The petitioning unions are asking this Court to compel the Secretary of Labor to issue what purports to be an occupational safety and health standard mandating that employers pay for certain required personal protective equipment, rather than leave the issue where it currently is: the bargaining table. Through employee-employer negotiations, employers already pay for the majority of personal protective equipment used in the workplace. But to mandate that they pay for all of it is pure economic regulation and well beyond the Secretary's authority to enact. Whatever the Secretary's view on this issue of economic *policy*, she simply does not have the *legal* authority to force employers to pay for personal protective equipment. Therefore, the unions should be petitioning Congress on this issue, not the courts or the Secretary.

Even if the Secretary did have authority to require employers to pay for personal protective equipment, mandamus is an extraordinary remedy that is not justified here. The administrative record does not present any duty to act, much less a clear one, and even if it did, the competing issues on the Secretary's docket have a significantly greater impact on workplace safety and health than the economic regulation at issue here. Accordingly, the petition should be dismissed without granting the unions any of the unnecessary relief they request.

FACTUAL BACKGROUND

Personal protective equipment ("PPE") is worn by approximately 20 million workers nationwide. PPE acts as a barrier, protecting employees from workplace hazards that are recognized or covered by specific OSHA standards, but cannot be more effectively eliminated through other means. PPE comprises a wide variety of items—a small sample includes hats; helmets; gloves; aprons; respirators; and coveralls. *See generally* Employer Payment for Personal Protective Equipment, 64 Fed. Reg. 15,402, 15,410-13 (Mar. 31, 1999) (listing the various types of PPE).

The AFL-CIO's and United Food and Commercial Workers International Union's (collectively the "Unions") petition in this case is part of a longstanding effort by organized labor to enlist the Occupational Safety and Health Administration in its collective bargaining efforts. The Secretary of Labor (the "Secretary") promulgated the current version of the general PPE standard—29 C.F.R. § 1910.132(a)—as a national consensus standard shortly after the Occupational Safety and Health Act ("OSH Act" or "Act"), 29 U.S.C. § 651, *et seq.*, was enacted. *See Union Tank Car Co.*, 18 OSHC (BNA) 1067, 1997 WL 658425 (OSHRC 1997). Almost immediately after the standard was promulgated, organized labor sought an interpretation that would require employers to pay for all PPE, rather than simply ensure that their employees used PPE, as the plain language of the standard required.

The union efforts were rebuffed. In *The Budd Company*, 1 OSHC (BNA) 1548, 1974 WL 3996 (OSHRC 1974), the Secretary cited an employer for violating the general PPE standard because its employees were not wearing required toe protection. The employer initially contested the citation, but then moved to withdraw its notice of contest subject to the Secretary finding that it was not required to pay for that toe protection. The Secretary agreed. The United Auto Workers—the authorized representative of the employer's employees—objected to this settlement and insisted, over the objections of the Secretary, that the general PPE standard required employers to provide *and pay for* required PPE. The Occupational Safety and Health Review Commission rejected the union's position, stating that the standard "imposes no duty on the employer to provide or pay for the equipment." *Id.* at *2. The Commission continued:

> Our interpretation comports, not only with settled rules of statutory construction, but, also, with the basic objective of the Act. The purpose of the Act is to 'assure so far as possible every working man and woman in the Nation safe and healthful working conditions.' Unlike other labor statutes with essentially economic purposes (*e.g.*, Fair Labor Standards Act), the Act is concerned solely with safety and health in the work situation. Prescription of cost allocations is not essential to the effectuation of the Act's objectives. It is irrelevant for purposes of the Act who provides and pays for the equipment.

Id. at *2. (internal citation and footnotes omitted) (emphasis added).

The Court of Appeals for the Third Circuit affirmed. "[T]he Commission's interpretation of the regulation," the court held, "does not interfere with the attainment of the congressional purpose. This Act, unlike such legislation as the Fair Labor Standards Act, is not concerned with wage and hours, but rather with reducing the incidence of job-related injuries." *The Budd Co. v. OSHRC*, 513 F.2d 201, 206 (3d Cir. 1975). "[T]he cost of the shoes," the court noted, "may be compensated by other items in the collective bargaining settlement." *Id.* at 206 n.20.

Fifteen years after *The Budd Company*, the Secretary chose to revise the PPE standards to make them "more clearly written" and "more comprehensive." 54 Fed. Reg. 33,832. The Secretary finally issued the revised rule in 1994. "Neither the NPRM nor the final rulemaking addressed any requirement that employers must provide and pay for PPE. Indeed, neither addressed cost allocation at all." *Union Tank Car Co.*, 1997 WL 658425, at *2.

Nevertheless, in 1994 the Secretary issued an interpretative memorandum stating: "OSHA has interpreted its general PPE standard, as well as specific standards, to require employers to provide *and pay for* personal protective equipment . . . ." *Id.* (emphasis added) (quoting Memorandum to Heads of Directorates from James W. Stanley, Deputy Assistant Secretary (Oct. 18, 1994)). After reiterating that interpretation in various interpretation letters and enforcement

guidelines—but without going through notice-and-comment rulemaking—the Secretary attempted to enforce this new interpretation against Union Tank Car Company. *Id.* at *3.

The Commission once again rejected this attempt to require employers to pay for PPE. "The Secretary's new interpretation," the Commission observed, "comes after twenty years of uninterrupted acquiescence in the interpretation the Commission announced in *Budd*." *Id.* Because the Secretary failed to adequately explain her change of position, the Commission refused to give it deference, rejected it, and vacated the citation. *Id.* at *4.

Rather than appeal the Commission's decision in *Union Tank*, the Secretary announced that she would initiate a rulemaking on the issue of employer payment for PPE. *See* News Release, OSHA Decides Not to Appeal Review Commission Ruling on Union Tank Personal Protective Equipment Case (Dec. 12, 1997) (attached as Exhibit D to the Unions' petition). As the News Release demonstrates, the Secretary had a clear idea of what she wanted to do before this rulemaking began. "'OSHA will revise its policy directive to make clear that we expect employers to pay for protective equipment that is not uniquely personal in nature,'" the News Release states. *Id.* (quoting Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health). The Secretary did not expect this initiative to require a significant rulemaking effort because she

"believe[d] that this issue affect[ed] only a small number of employers." *Id.* Accordingly, the Secretary hastily convened an unidentified panel of "experts" that quickly delivered the desired finding: forcing employers to pay for PPE will increase PPE usage and reduce workplace injuries. 64 Fed. Reg. at 15,421.

In fact, the Secretary's estimate of the benefits of the proposed rule relied on the guess of just one of the panel's "experts." *Id.* This mystery "expert" speculated that requiring employer payment would cut PPE non-use or misuse by more than 50%. *See id.* The basis of this statement was not revealed. *Id.* Relying on this speculation, the Secretary proposed a revised PPE standard requiring employer payment for almost all PPE on March 31, 1999. *See generally id.* at 15,402. The implications, complexities, and issues presented by the proposed rule were quickly exposed during the comment period. For example, United Parcel Service's Comments described numerous flaws in the rulemaking and the regulation, such as the complete failure to justify the proposed rule as a health and safety standard under the OSH Act. *See* Comments of United Parcel Service at 4-10 (July 23, 1999) (attached as Exhibit A). Faced with unexpected opposition, the Secretary stepped back from the initially proposed schedule and reconsidered the rule.

In 2003, unconcerned by the Secretary's other priorities—such as dealing with the increased security risks created by the September 11, 2001 terrorist

attacks, anthrax, and the creation of a comprehensive ergonomics initiative—the Unions filed a formal request with the Secretary to finish the proposed PPE rulemaking within 60 days.[1] *See* Petition to the Honorable Elaine Chao, Secretary of Labor (April 10, 2003) (attached as Exhibit F to the Unions' petition). The Secretary appropriately elected to focus on more pressing priorities. In 2004, the Secretary returned briefly to the PPE rulemaking and reopened the notice-and-comment process in order to flesh out certain troublesome issues. *See* 69 Fed Reg. 41,221 (July 8, 2004).

While the Secretary was still considering how to address the difficult and complex issues raised in both the first and second comment periods, the Unions filed a petition for writ of mandamus in this Court on January 3, 2007 seeking to cut short the Secretary's deliberation and compel the completion of the PPE rulemaking within 60 days. Pet. at 18. On February 16, this Court ordered the Secretary to respond by March 19. The Chamber of Commerce of the United

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[1] *See* Statement of John L. Henshaw, Assistant Secretary for Occupational Safety and Health U.S. Department of Labor before the Subcommittee on Labor, Health, and Human Services, and Education House Appropriations Committee (May 1, 2003), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=346 (discussing the ergonomics initiative); Statement of John L. Henshaw, Assistant Secretary for Occupational Safety and Health U.S. Department of Labor before the Subcommittee on Labor, Health, and Human Services, and Education House Appropriations Committee (Feb. 14, 2002) http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=267 (discussing OSHA's response to September 11 and anthrax).

States of America, National Association of Manufacturers, and American Trucking Associations, Inc. have moved to file this Response in support of the Secretary to prevent unlawful regulation and harmful and unnecessary interference in the Secretary's reasonable and appropriate ordering of priorities.

ARGUMENT

The Unions seek a nearly unprecedented and wholly unjustified judicial intrusion into the policy-making decisions of the Executive branch. *First,* the complicated administrative record in this matter is insufficient to establish a clear duty to regulate, eviscerating the key prerequisite to mandamus relief. *Second*, even if a clear duty did exist, the Secretary's actions are not only reasonable, but entirely appropriate in light of the scant health benefits likely to flow from the proposed PPE rule and the serious risks to employee health posed by other hazards that the Secretary is presently attempting to regulate. Even extended deliberation cannot justify re-ordering agency priorities to put less important matters first. *Third,* the Secretary does not have the authority to issue the proposed rule, which is a naked attempt at economic regulation, not an occupational safety and health standard. This Court cannot compel the Secretary via mandamus to do something that she lacks statutory authority to do. For all these reasons, the Unions' petition must be dismissed.

I. The Unions Are Not Entitled To Mandamus Relief Because The Secretary Has No Clear Duty to Act And, Even If She Did, Her Decisions Have Appropriately Balanced Her Competing Priorities.

Not all threats to employee safety and health are of the same magnitude; it is the Secretary's responsibility to identify the most significant risks and allocate her resources accordingly. New hazards, and new information about previously recognized hazards, emerge constantly, forcing the Secretary to re-order her priorities and place in-process, but less compelling standards behind newer, more important concerns. As this Court has stated: "So long as [her] action is rational in the context of the statute, and is taken in good faith, the Secretary has authority to delay development of a standard at any stage as priorities demand." *Nat'l Cong. of Hispanic Am. Citizens v. Marshall*, ("*National Congress* II"), 626 F.2d 882, 888 (D.C. Cir. 1979). Accordingly, "[t]his court should intervene to *override* [the Secretary's] priorities and timetables only in the most egregious of cases." *Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 628 (D.C. Cir. 1987) (emphasis in original).

This case does not approach that demanding standard. As a threshold matter, mandamus relief ordering the Secretary to act is available only where the Secretary has a clear duty to act. Here, the Secretary's tentative conclusion reflected in her proposed standard—that the rule would improve workplace

safety—relied on the unsupported opinion of one unidentified "expert." This "expert" opinion stands in sharp contrast to persuasive empirical evidence that her standard will likely *increase* the risks to employee safety and health. *Compare* 64 Fed. Reg. at 15,421-22 (relying on the guess of one "expert" to estimate the number of injuries potentially avoided by forcing employers to pay for PPE) *with* Comments of United Parcel Service at 15-16 (attached as Exhibit A) (explaining that injury rates in states that require employers to pay for PPE are *higher* than the national average). While we recognize that a dispute about the merits must await a challenge to a final rule, if any, at the very least this dispute highlights the absence of a clear duty to act. Even if the Secretary did have such a duty—and she does not—her reasoned decision to take the time necessary to understand the limitations of her jurisdiction and the complexities of the proposed PPE rule while also working on several other major rulemakings is laudable; it should not be casually labeled unreasonable delay. Moreover, there is no dispute that many of the issues on the Secretary's regulatory agenda have a much more significant impact on employee safety and health than the question of who pays for PPE. For all of these reasons, the Unions' attempt to move their economic regulation to the front of OSHA's regulatory agenda should be rejected.

A. The administrative record before OSHA does not create the clear duty to act necessary for mandamus relief.

The guess of one unidentified "expert" does not create a clear duty to act sufficient to warrant mandamus relief. A writ of mandamus compelling agency action "is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act." *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000). Whether the Secretary has a clear duty to regulate a specific hazard depends on the number of employees exposed and the severity of the hazard—indeed, in this case, whether a hazard exists *at all* simply because employees may be paying in whole or in part for their own PPE while working under hazard-free conditions. *See* 29 U.S.C. § 655(g) (requiring the Secretary to consider the urgency of the need for regulation in determining the priority for establishing standards); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.* ("*Benzene*"), 448 U.S. 607, 639 (1980) (holding that Secretary can regulate *only* if a "*significant* risk of a *material* health impairment" exists (emphases added)). In addition, there must be compelling evidence in the record that the failure to regulate promptly will expose workers to significant hazards because mandamus relief "presupposes . . . that the evidence before the agency sufficiently demonstrates that delay will in fact adversely affect human health to a degree which necessitates a priority response." *Oil, Chemical & Atomic Workers Union v. OSHA*, 145 F.3d 120, 123 (3d Cir. 1998).

This Court has applied these principles to justify granting mandamus only where the Secretary has failed to regulate an obvious and severe hazard—like exposure to a known carcinogen—not in cases where the benefits are speculative at best. For instance, in *In re International Chemical Workers Union*, 958 F.2d 1144 (D.C. Cir. 1992), this Court granted mandamus relief and ordered the agency to complete its rulemaking by a set deadline in light of the "undisputed health risks of cadmium," a known carcinogen. *Id.* at 1148. In contrast, this Court refused to grant mandamus relief in *In re Mine Workers of America International Union*, 190 F.3d 545 (D.C. Cir. 1999), because there was "insufficient record evidence that a substantial health risk [from exposure to diesel gases] would result from some further delay in promulgating the regulation petitioner seeks." *Id.* at 553.

Here, the significant issues raised during the original comment period to this rulemaking justify the Secretary's cautious, deliberate approach. The NPRM asserted three reasons why employer payment would enhance employee protection. The notice-and-comment period exposed serious flaws in all three and further supports the Secretary's deliberate approach to this difficult standard.

1. First, the NPRM asserted that employers should pay for all PPE because they can best "select, order, and obtain the proper type and design of PPE" and "require standardized procedures for cleaning, stor[age], and maint[enance]."

64 Fed. Reg. at 15,409, 15,419. Comments exposed these arguments as *non sequitors*—employers can do all of these things without paying for PPE and can fail to do all of them if they do pay for PPE. *See, e.g.,* Comments of the Texas Association of Builders at 2 (attached as Exhibit B); Comments of Edison Electric Institute at 3 (attached as Exhibit C); Comments of United Parcel Service at 17-18 (attached as Exhibit A). For example, an employer can initially buy PPE and be repaid by employees. Likewise, employers can require standardized maintenance procedures for PPE purchased by employees. Simply, *who pays* has no bearing on the employer's day-to-day obligation to ensure that PPE is properly used and maintained.

2. Second, the NPRM suggested that because employers have ultimate statutory responsibility for safety and health, they must pay for PPE. This argument simply begs the question. *See, e.g.,* Comments of United Parcel Service at 19-20 (attached as Exhibit A). Employers are responsible for ensuring that employees use mandatory PPE. That responsibility is the same whether they pay for PPE or employees pay for it. Accordingly, who is ultimately responsible for violations of the Act has no bearing on who must pay for PPE.

3. Third, and finally, the NPRM posited that "requiring employees to pay for PPE may discourage their use of PPE" because "[t]here is always

reluctance to use one's own funds to pay for replacing or repairing workplace PPE." 64 Fed. Reg. at 15,409, 15,421. The simple response to this assumption lies in the employer's direct and non-transferable responsibility to enforce PPE use regardless of an employee's reluctance to pay for lost, replacement, or discounted PPE; as long as PPE is worn, safety and health are not compromised. In any event, these cost issues are precisely the stuff of collective bargaining and daily employee-employer relationships. The Secretary is wise in carefully deliberating and considering whether the current system of resolving such payment issues is broken before jumping into the fray and issuing a PPE payment requirement.

The nettlesome issues raised during the comment period not only warrant the Secretary's decision to carefully consider them, they obviate any duty to act that might have existed had the NPRM's assumptions gone unopposed. Accordingly, the drastic remedy of mandamus cannot be justified.

B. Even assuming the Secretary had a clear duty to act on the PPE rule, the Secretary's decision to take the time necessary to consider the serious arguments against her proposed PPE rule while advancing other more important rulemakings is entirely appropriate.

Even assuming the Secretary had a clear duty to amend the PPE rule—and she does not—her refusal to prematurely issue the rule without the necessary consideration does not amount to unreasonable delay. As this Court has stated on

numerous occasions, an agency's rulemaking timetables are judged by a "rule of reason." *E.g., Telecomms. Research & Action Ctr. v. FCC* ("*TRAC*"), 750 F.2d 70, 80 (D.C. Cir. 1984). No *per se* rule controls how long is too long for agency rulemaking. Rather, the facts of each case must be judged in light of the consequences of agency delay, any deadlines provided in the statutory scheme, whether the disputed rule addresses human health and welfare versus merely economic concerns, and the importance of competing issues on the agency's docket. *Id.* Here, the Secretary's deliberate prioritizing of more important rules over the proposed PPE standard is entirely appropriate and reasonable because, as even the Secretary admits, the standard is essentially economic regulation that appropriately takes a back seat to more pressing safety concerns. Further, as discussed above, the Secretary must be given the opportunity to grapple with the many complex issues associated with requiring employer payment for PPE.

1. No *per se* rule governs when agency deliberation becomes unreasonable delay; extended rulemakings are regularly accepted when the consequences of agency delay would not be significant.

An agency's timetable for rulemaking is a classic exercise of the agency's sound discretion. *See Nat'l Cong. of Hispanic Am. Citizens v. Usery* ("*National Congress* I"), 554 F.2d 1196, 1200 (D.C. Cir. 1977). The Unions do not seriously contend that the proposed PPE rule is more important than other issues on the

Secretary's docket. Nor do they contend that the Secretary has somehow acted in bad faith with respect to the rule. Rather, the main thrust of their argument is that, irrespective of the specific factual circumstances justifying a longer timetable, an eight-year gap between a notice of proposed rulemaking and the issuance of the final rule is *per se* unreasonable. This position has been expressly rejected by this Court in the past and should be rejected now.

The absence of a *per se* rule is black letter law in this Court. *E.g., In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). Rather, each case must be examined on its particular facts. *See United Mine Workers*, 190 F.3d at 552. Although this Court has found delays less than that at issue here unreasonable, it has done so only where the consequences of agency inaction are severe, *i.e.* the agency is ignoring a significant and pervasive threat to health and safety or the agency's delays create deprivations of property without due process of law. *See, e.g., Auchter*, 702 F.2d at 1157-58 (severe health hazard); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 341 (D.C. Cir. 1980) (deprivation of due process). In contrast, this Court and other courts have regularly countenanced delays of five, seven, and even ten years for economic regulations or safety regulations that are not as urgent. *See, e.g., Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 477 (D.C. Cir. 1998) (ten year delay not unreasonable); *National Congress* II, 626 F.2d at 890 (seven year delay not unreasonable); *In re*

Monroe Comms. Corp., 840 F.2d 942, 947 (D.C. Cir. 1988) (five year delay considered far short of egregious); *Oil, Chemical & Atomic Workers Union*, 145 F.3d at 123-24 (five year delay not unreasonable even though there was a potential risk of serious exposure to carcinogens).

Under this sensible approach, even very extended delay here should not be particularly troubling. The proposed regulation on its face deals only with who pays in whole or in part for PPE, not exposure to any workplace hazards. Irrespective of who pays for PPE, as long as employers are enforcing the use of PPE, court intervention into this tendentious issue would appear to be unjustified.

2. The OSH Act does not contain specific deadlines because the Secretary *should* shift resources to more important problems even if less important rulemakings have already begun.

The Secretary's regulatory timetables are entitled to considerable deference because the OSH Act does not contain specific deadlines. While specific statutory deadlines may supply content to the rule of reason, *TRAC*, 752 F.2d at 80, the absence of such deadlines entitles the agency to "considerable deference" over rulemaking timetables. *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987). In *National Congress* I, this Court expressly rejected the contention that the OSH Act imposes mandatory deadlines on the Secretary's rulemakings. 554 F.2d at 1200. The Court held that the Secretary had the discretion to "process higher-

priority standards more quickly than initiated ones" and "may rationally order priorities and re-allocate [her] resources . . . at any rulemaking stage." *Id.* at 1199-1200. When the same litigation again reached this Court, the Court reiterated its holding: "So long as [her] action is rational in the context of the statute, and is taken in good faith, the Secretary has authority to delay development of a standard at any stage as priorities demand." *National Congress* II, 626 F.2d at 888. Further, the OSH Act itself requires the Secretary to consider the "urgency" of the need for a proposed standard when "determining the priority for establishing standards." 29 U.S.C. § 655(g). Accordingly, under this Court's precedents and the plain text of the Act, the Secretary's rulemaking timetables are unreasonable only if she has irrationally chosen to prioritize less important rulemakings over the PPE standard.

She clearly has not done so. As long as effective PPE programs are in place and enforced, payment issues must be subordinate to other safety and health initiatives where exposure to workplace hazards would be directly affected. Accordingly, to the extent the PPE rulemaking has any place on the Secretary's regulatory agenda—and in fact it is a pure economic regulation that does not belong there at all—it belongs at the bottom of the Secretary's list of rulemakings.

A brief look at the Secretary's pending regulatory agenda—but without conceding that substantial evidence will support any specific final regulation—confirms that her priorities are not only rational, but eminently sensible. Among the dozens of issues on the Secretary's docket are:

- Exposure to crystalline silica
- Exposure to beryllium
- Exposure to ionizing radiation
- Rule for emergency response and preparedness
- Revision of standards regulating power presses
- Exposure to methylene chloride
- A standard to prevent suffocation and explosions in confined spaces; and
- Revisions to the standards regulating explosives.

Semiannual Agenda of Regulations of the Department of Labor, 71 Fed. Reg. 73,359, 73,564-69 (Dec. 11, 2006). Can it possibly be said that any of these issues is *less* important than deciding who pays for what type of equipment?

This Court has made clear that mandamus relief is only appropriate when it is *clear* that the rule in question is more important than other rules on the agency's agenda. *See Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (mandamus relief is inappropriate where competing priorities are more important, "*even [if] all the other factors considered in TRAC*

favor[] it." (emphasis added)); *United Mine Workers*, 190 F.3d at 553 (denying the writ even though the delay was "substantial" because there was "no dispute that the agency's priorities [were] appropriate"). Because that exacting standard cannot be met here, the Secretary's priorities should not be disturbed by mandamus relief.

3. The Secretary's decision to postpone issuing the rule is not unreasonable for the further reason that the payment for PPE rulemaking involves complex issues that may not have been not fully appreciated when the Secretary initially proposed the rule.

The Unions' assertions that that the PPE rulemaking is "uncomplicated" and a "straightforward" issue are simply incorrect. Pet. at 12. The varieties of PPE are virtually limitless. Just a small sample includes gloves; shoes; goggles; aprons; rubber boots; respirators; helmets; coveralls, mouthpieces; and lab coats. *See* 64 Fed. Reg. at 15,410-13 (listing the various types of PPE). Further, the Secretary estimates that almost 20 million employees in industries covered by the rule use one or more forms of PPE. *Id.* at 15,417. A rulemaking that potentially affects so many workers across so many different industries can hardly be considered "uncomplicated."

More importantly, the Secretary has given no indication that she has addressed numerous thorny issues surrounding PPE payment. Just a few of these day-to-day human resource issues include:

- Employee complaints will trigger OSHA inspections regarding the schedule for PPE replacement, with potential work disruption if replacement is not fast enough.

- What happens if an employee forgets his PPE at home? Must the employer provide replacement PPE everyday? Or must employers keep all PPE on site?

- Can an employee be disciplined for failing to bring his PPE to work? Can he be docked pay? What if existing collective bargaining agreements—necessarily negotiated *before* this rule would be issued—allow such punishment? Is the employer then powerless to discipline a recalcitrant employee?

- If the employee loses or destroys his PPE, can the employer bill him for a replacement? If not, is there no limit to the amount of PPE an employer must provide?

- Who is liable for PPE that is stolen? And who makes the final determination over whether PPE was lost, stolen, or simply given away?

Under the current regulatory regime, absent a payment requirement, these issues are resolved on a daily basis and through the collective bargaining process in a manner that does not interfere with the operation of the workplace. Establishing OSHA as the arbiter of such decisions and others deserves very careful scrutiny before the regulatory plunge is finalized.

In light of these difficult outstanding issues, the Secretary has clearly not unreasonably delayed in issuing the rule. As this Court has often noted, forcing the issuance of a rule before it is fully thought out may well *slow down* eventual enforcement of the rule by increasing the chances of litigation, judicial

invalidation, and remand to the agency for further work. *See, e.g., Sierra Club*, 828 F.2d at 798-99. That is particularly true here in light of the importance of the issues yet to be addressed. Accordingly, the Secretary's attempt to carefully consider these issues is proper rulemaking; it is not unreasonable delay.

II. The Court Must Not Compel The Secretary To Issue The Proposed Rule Because She Lacks Authority To Enact Purely Economic Regulations.

If the Court finds that the Secretary's delay is so egregious that it warrants mandamus relief, then it must also determine whether the Secretary has authority to require employers to pay for PPE. In fact, the Secretary does not have such authority. The rule is clearly an economic regulation whose direct effect is to increase wages; it is not directly or immediately related to worker safety and health. Who pays for safety and health is a policy decision for the Congress—one that it has already made under very narrow circumstances in the OSH Act. Without such a Congressional decision to expand OSHA's ambit from safety and health to economic transference, the Secretary lacks statutory authority to act. Accordingly, even if mandamus were warranted here to combat egregious delay—and it is not—the Court cannot require the Secretary to issue the proposed rule.

A. **This Court can only order the Secretary to act within the scope of her authority.**

Basic principles of executive and judicial power prevent this Court from ordering the Secretary to act outside the scope of her authority. Like all other federal agencies, the Secretary's "power to promulgate legislative regulations is limited to the scope of the authority Congress has delegated to [her]." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005). It is axiomatic that a court has no authority to expand or contract that power. *See, e.g., Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (noting that courts cannot assist an agency in expanding its power via a consent decree).

Mandamus relief to cure unreasonable agency delay is no different. As the Supreme Court unanimously held in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), mandamus relief is only available to compel agency relief that is "legally *required*." *Id.* at 63 (emphasis in original). "[A] delay cannot be unreasonable," the Court continued, "with respect to action that is not required." *Id.* at 63 n.1. If an agency does not have authority to engage in an act, then it follows *a fortiori* that that act is not "legally required." Accordingly, this Court cannot order the Secretary to issue the proposed PPE standard unless the Secretary has authority to issue the rule.

B. The Secretary lacks authority to issue the proposed PPE rule because it is an economic regulation that is not reasonably necessary to remedy a significant risk of material impairment to employee safety and health.

The Secretary can issue regulations only for the limited purpose of improving employee safety and health. In *American Textile Manufacturers Institute, Inc. v. Donovan* ("*Cotton Dust Case*"), 452 U.S. 490 (1981), the Supreme Court held that health and safety standards issued by the Secretary under the OSH Act must be justified solely "on the basis of their relation to safety or health." *Id.* at 538. "[T]he Act in no way authorizes OSHA to repair general unfairness to employees," the Court declared. *Id.* at 540. Accordingly, the Court invalidated an OSH Act standard designed to "minimize any adverse economic impact on the employee by virtue of the inability to wear a respirator," because the Secretary's objective in issuing the rule was "unrelated to achievement of health and safety goals." *Id.* at 539-40 (citation omitted).

Further, the Secretary is limited to regulating *significant* risks of *material* impairment of employee safety and health. In the *Benzene Case*, the Supreme Court held that the OSH Act required a threshold determination that a proposed standard "is reasonably necessary and appropriate to remedy a *significant* risk of a *material* health impairment." 448 U.S. at 639 (emphasis added). Under this standard, the burden is on the Secretary to show that it is at least more likely than

not that long-term exposure to a hazard presents a significant risk of material health impairment. *Id.* at 653. The Secretary's conclusions in this regard must be based on "reputable scientific thought," not mere speculation. *Id.* at 656.

Taken together, *Benzene* and the *Cotton Dust Case* require all rulemakings under the OSH Act to be grounded in an effort to remedy significant risks of material health impairment in the workplace and the existence of significant risks of material impairment must be supported by substantial evidence. Simply, the PPE rulemaking cannot meet this standard because the "hazard" of employees being forced to pay for their own PPE will never itself rise to the level of a significant risk of material health impairment.

In *Erie Coke Corporation*, 15 OSHC (BNA) 1561, 1992 WL 82630 (OSHRC 1992), the Occupational Safety and Health Review Commission examined a citation issued by the Secretary under a standard that required the employer to "provide" his employees with flame resistant gloves. The Secretary interpreted "provide" to mean "pay for" and cited the employer for failing to pay for the gloves its employees were admittedly using. The Commission upheld the Secretary's interpretation, but reclassified the citation to *de minimis*—a technical notice with "no direct or immediate relationship to safety or health." 29 U.S.C. § 658(a). "Common sense," the Commission noted, "dictates that Erie's employees have the incentive to wear fully protective gloves because they know

burns could otherwise result." *Erie Coke*, 1992 WL 82630, at *8. Therefore, only a *de minimis* notice—which carries no penalty and requires no abatement—could be found because "Erie's employees [had] not been shown to have suffered any direct impairment of their safety and health as a result of having to pay for the gloves." *Id.* at *12.

After the Secretary appealed, the Court of Appeals for the Third Circuit affirmed the Commission. *Reich v. OSHRC*, 998 F.2d 134, 139 (3d Cir. 1993). "[T]he safety of Erie's employees was not jeopardized by the company's failure to pay for protective gloves," the court explained. *Id.* (The employer's petition was dismissed as untimely, so the court of appeals did not address the Secretary's authority to issue the citation. *Id.* at 137.)

Erie Coke demonstrates that requiring employers to pay for PPE does not address a significant risk of a material health impairment. Currently, employers are liable if their employees are not using required PPE or if the PPE employees are using is not in sufficiently good repair. Under the proposed rule, *employers would be liable under exactly the same sets of facts*. *See* 64 Fed. Reg. at 15,402 ("The proposed rule would not require employers to provide PPE where none has been required before."). Of course, under the proposed rule, employers will also be subject to *de minimis* notices if they refuse to pay for required PPE, see *Erie*

Coke, but such notices carry no penalties *and do not have to be abated*, meaning that even after being cited the employer would not be required to pay for employees' PPE. In short, the proposed rule creates no new protections for employees, it merely transfers wealth. Whatever the merits of that policy, the Secretary does not have authority under the OSH Act to pursue such purely economic goals. Therefore, the Unions' petition should be dismissed.

United Steelworkers of America, AFL-CIO v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980), confirms this result. In that case, this Court upheld provisions of the lead exposure standard that required employers to move workers with high levels of lead in their blood to safer positions and required employers to maintain a worker's salary and seniority rights during removal. *Id.* at 1238. OSHA justified the rule as necessary to maintain the integrity of its lead exposure testing program—another section of the lead exposure standard—by producing substantial evidence that, without wage and seniority protection, workers would consume harmful toxins to defeat the tests and "lie[] to physicians about their subjective symptoms." *Id.* at 1237. Critically, each of these activities would lead to a significant risk of a material health impairment—undetected exposure to toxic levels of lead—in ways that could not be eliminated by employer monitoring. Employers cannot prevent employees from lying to their doctors or from ingesting harmful substances outside the workplace. Accordingly, the Secretary was

justified in imposing an economic regulation on employers because *it was the only way to ensure the viability of the lead exposure testing program.*

Here, however, there is no danger that employee activity outside the workplace will have material health effects in the workplace. Instead, the only risk is the same risk that currently exists: employees may not use required PPE. But employers are already responsible for monitoring this risk because they bear ultimate responsibility for ensuring that employees use required PPE. In addition, the use or non-use of PPE occurs in the workplace and is readily observable by employers. Simply, there is no basis for the Secretary's reliance on a convoluted incentive rationale to justify the proposed PPE rule, especially where that rationale has no empirical support. Accordingly, the PPE rule cannot be justified as reasonably necessary to eliminate a significant risk of material health impairment to employees; thus, the Secretary lacks authority to issue the rule.

C. The Secretary's Assertion Of Authority Also Violates The Plain Text Of The OSH Act.

The plain text of the OSH Act demonstrates that Congress considered the issue of who should pay for OSHA compliance and found it irrelevant to the purposes of the Act except for one narrow circumstance. Section 6(b)(7) of the OSH Act states:

> Any standard promulgated under this subsection shall . . . [w]here appropriate . . . prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests . . . which shall be made available, by the employer or at his cost, to employees exposed to such hazards . . . .

29 U.S.C. § 655(b)(7) (emphasis added). Thus, in the very same provision in which it authorized the Secretary to require personal protective equipment, Congress authorized the Secretary to require medical examinations and *required employers to pay for them.* This limited expression of Congressional intent regarding cost issues resolves the jurisdictional issue regarding a regulation requiring payment for PPE. *First*, when Congress intended the OSH Act to direct who should pay the costs of compliance, it expressly said so. *Second*, Congress must have considered and rejected requiring employers to pay for PPE because it required employers to pay for medical examinations *in the very next sentence. See, e.g., Leatherman v. Tarrant Cty. Narcotics & Intelligence Coordination Unit,* 507 U.S. 163, 168 (1993) (under the rule *expressio unius est exclusio alterius*, the Federal Rules' express requirement of heightened pleading standards for fraud claims means that heightened pleading standards do not apply to other claims). Accordingly, the plain text of the OSH Act confirms

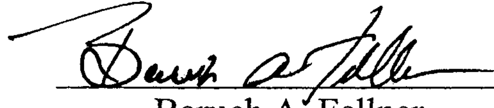
what case law has implied: The Secretary lacks authority to issue a purely cost-shifting rule like the proposed PPE standard.

CONCLUSION

No basis exists for granting the extraordinary remedy of mandamus. The administrative record does not establish a clear duty to act, and, even if it did, the Secretary's conduct has been eminently reasonable and competing rulemakings are more worthy of her attention. Finally, the Secretary does not even have statutory authority to issue the rule that the Unions are seeking. For all of these reasons, the Unions' petition should be dismissed.

Respectfully submitted,

Dated: March 5, 2007



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CERTIFICATE OF SERVICE

I, Peter J. Kreher, certify that on March 5, 2007 I caused a copy of *Amici Curiae* Chamber of Commerce of the United States of America, National Association of Manufacturers, and American Trucking Associations, Inc.'s Response to the AFL-CIO's and United Food and Commercial Workers International Union's Petition for Writ of Mandamus via UPS overnight mail to be served on the parties as follows:

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

1. The full names of the parties that undersigned counsel represents in the case are: *Amici Curiae* Chamber of Commerce of the United States of America, National Association of Manufacturers, and American Trucking Associations, Inc.

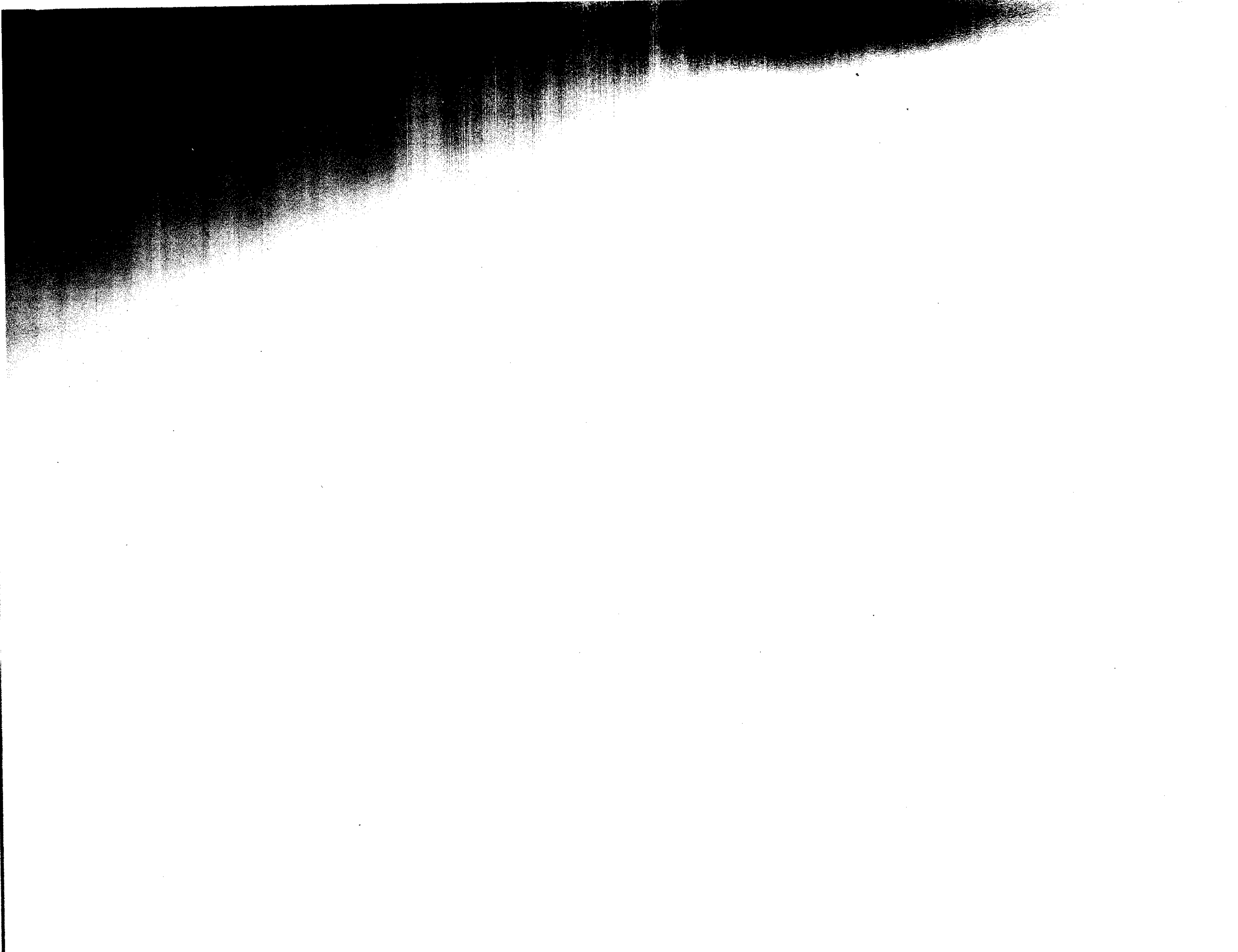
2. *Amici curiae* have no parent corporations, and no publicly held company owns 10% or more of any of the *amici*'s stock.

LIST OF EXHIBITS

EXHIBIT A: Comments of United Parcel Service on the Proposed Rule to Require Employer Payment for Personal Protective Equipment (July 23, 1999).

EXHIBIT B: Comments of the Texas Association of Builders (July 8, 1999).

EXHIBIT C: Comments of the Edison Electric Institute on Proposed Changes to 29 CFR Parts 1910, 1915, et al., Employer Payment for Personal Protective Equipment; Proposed Rule (July 23, 1999).



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July 23, 1999

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OUR FILE NUMBER
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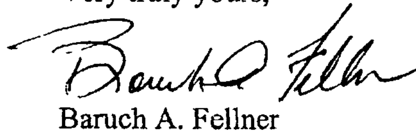
Docket S-042
Room N-2645
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

OSHA
DOCKET OFFICER
DATE JUL 23 1999
TIME

To Whom It May Concern:

Enclosed on behalf of United Parcel Service are comments regarding the Department's proposed Employer Payment for Personal Protective Equipment standard.

Very truly yours,



Baruch A. Fellner

BAF/crk

cc: Allen E. Hill, Esq. (w/encl.)
Mr. Ronald Foster (w/encl.)

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**COMMENTS
OF UNITED PARCEL SERVICE
ON THE PROPOSED RULE
TO REQUIRE EMPLOYER PAYMENT
FOR PERSONAL PROTECTIVE EQUIPMENT**

United Parcel Service ("UPS") submits these comments in response to the Notice of Proposed Rulemaking by the Occupational Safety and Health Administration ("the Administration" or "OSHA") on Employer Payment of Personal Protective Equipment ("personal-PE"), designated as Title 29 of the Code of Federal Regulations, Part 1910, § 1910.132(h). UPS objects to the proposed rule and respectfully requests that the agency withdraw the rule in its entirety.

STATEMENT OF INTEREST

UPS is the leader in the small package industry. It has more than 250,000 employees nationwide, who pick up, sort, distribute, and deliver over 12 million packages a day from more than 1,100 domestic operating locations. UPS operates 100,000 vehicles and planes daily, covering more than 3.5 million square miles of territory. UPS employees use personal-PE for certain tasks and the Company therefore will be affected by the proposed rule.

INTRODUCTION

The proposed rule is a naked allocation of economic benefits and is not a health or safety standard. As the Administration's own preamble correctly notes, the rule has a single effect: "[t]he proposed rule merely shifts some costs previously borne by employees to their

employers."[1] This one sentence sums up the entire impact of the proposed rule and demonstrates that the proposal usurps the province of collective bargaining over terms and conditions of employment. The proposed rule is irrelevant and even harmful to worker protection and is antithetical to the purposes of the Occupational Health and Safety Act.

The proposed rule would not only cause employers to pay for personal-PE they do not currently purchase but would, even more importantly, completely change employers' bargaining positions with respect to personal-PE they now voluntarily provide. The comments make the following points: (i) OSHA's health and safety mandate does not permit it to invade collective bargaining with this purely economic rule; (ii) current collective bargaining works, and employers already provide the optimal amount of personal-PE; and (iii) OSHA provides no studies supporting the rule. The Administration provides no proof or credible argument that the proposed rule will improve health and safety, and in fact, the rule will cause significant economic harm, will not promote health and safety, and may reduce personal-PE compliance by reducing collectively bargained cooperation between union and management in the implementation of personal-PE requirements. The proposed rule is far beyond OSHA's mandate and should be withdrawn.

[1] Employer Payment for Personal Protective Equipment, 64 Fed. Reg. 15,407 (1999) (to be codified at 29 C.F.R. § 1910.132(h).

I

OSHA CANNOT ISSUE A PURELY ECONOMIC RULE

As its name implies, the Occupational Safety and Health Administration has a single mandate: "to assure . . . safe and healthful working conditions."[2] Other essentially economic mandates such as "protecting workers' wages," "promoting equal employment opportunity," "strengthening free collective bargaining," and protecting "employment and pension rights" are missions of other agencies within DOL and the federal government.[3]

The Occupational Safety and Health Act recognizes the benefits of labor and management working together to promote safety and in fact the Act requires OSHA to reinforce employee obligations, not merely employer liability.[4] In short, OSHA is well within its mandate when it sets standards, identifies hazards, and mandates that labor and management meet certain safety goals. It is acceptable if economic implications are a byproduct of that safety and health mission. However, it is unacceptable where, as here, the allocation of costs is the exclusive objective.

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[2] 29 U.S.C. § 651(b). "Th[e Occupational Safety and Health] Act, unlike such legislation as the Fair Labor Standards Act, is not concerned with wages and hours, but rather with reducing the incidence of job-related injuries." *Budd Co. v. OSHRC*, 513 F.2d 201, 206 (3d Cir. 1975) (footnote omitted).

[3] *Compare* DOL Mission Statement. *See* http://www.dol.gov/dol/opa/public/aboutdol/mission.htm.

[4] 29 U.S.C. § 651(b).

II

OSHA HAS FAILED TO PROVIDE THE NECESSARY DOCUMENTATION JUSTIFYING THIS RULE

OSHA promulgates two broad categories of rules, those for safety (to prevent traumatic injuries), and those for health (to prevent illnesses from exposure to toxic substances or harmful physical agents). However, the sweeping nature of this proposed rule's coverage makes categorization of the rule as either a safety or a health rule impossible. The proposed rule applies to safety and health-related personal-PE. Finally, the rule applies to personal-PE that could attempt to prevent both instantaneous and chronic exposure, such as ear plugs to prevent hearing loss. Because the proposed rule is both a health standard and a safety standard it must meet the legal requirements for both such rules.

A. OSHA Has Failed to Justify the Proposed Rule as a Health Standard.

OSHA is required to make a threshold finding "that significant risks are present and can be eliminated or lessened by a change in practices" before it can promulgate a standard under Section 6(b)(5).[5] Specifically, OSHA must determine that significant risks of material impairment are present and can be eliminated or meaningfully lessened by a change in practices or equipment.[6] For a health standard, this requires a significant risk of material impairment of

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[5] 29 U.S.C. § 655(b)(5); *Industrial Union Dep't v. American Petroleum Inst. ("Benzene")*, 448 U.S. 607, 642 (1980)

[6] *See Benzene,* 448 U.S. at 642.

health or functional capacity and a probability of significant benefit from a rule which would guard against such risk.[7]

OSHA has failed to even identify the existence of a significant risk of material impairment resulting from an employee paying for his own personal-PE. The following hypothetical best illustrates how a compliance officer could issue a citation where the employee is not exposed to a safety or health hazard: an OSHA compliance officer visits a worksite and sees that everyone is wearing the appropriate and necessary personal-PE. All the employees are behaving safely and, indeed, are appropriately protected from all workplace hazards. Nevertheless, the compliance officer asks one employee whether the employee or the employer paid for the employee's hard-hat. The employee indicates that he paid for the hat. The employee is not significantly at risk -- indeed, not at risk at all -- because the employee rather than the employer paid for the equipment. The employee was never exposed to any hazard. Accordingly, there was never any safety violation. The compliance officer cannot even explain how the employer paying for the hard hat eliminates or lessens some unidentified significant risk of material impairment. But nevertheless the compliance officer issues a citation. Obviously the compliance officer's citation does not address safety or health, but instead dictates the economic balance between the employee and employer -- a task which is not part of OSHA's mandate.

In addition to failing to identify a significant risk OSHA has failed to provide reliable, objective evidence supporting such a risk. OSHA has never promulgated a health standard

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[7] 29 U.S.C. § 655(b)(5); *Benzene*, 448 U.S. at 644.

without providing scientific studies and evidence proving that a significant risk exists. For instance, when OSHA issued its rule addressing clothing requirements for employees exposed to the hazards of flames or electric arcs it relied heavily on a videotape produced by a private entity that reported on previous tests performed on a variety of treated and untreated fabrics. The video also included a demonstration highlighting the alarming effects of exposure to electrical arcs while wearing synthetics.[8] The court described this video as "powerful and substantial" evidence supporting OSHA's position that a significant risk existed.[9] The court noted that the International Brotherhood of Electrical Workers (IBEW) and the American Society for Testing and Materials (ASTM) also endorsed this video as "exceptionally useful" and as providing "accident prevention and life saving data that is of great importance to the industry."[10]

In contrast to the studies and visual evidence present in the electric power rulemaking, the risk and the benefit identified by OSHA in this rulemaking are purely speculative. OSHA states that it has "concluded" that requiring employers to pay for personal-PE is "necessary" to ensure employees' voluntary cooperation with safety programs.[11] OSHA also claims that "[s]hifting the financial burden to employees, risks losing the necessary control over the organized and consistent selection, issuance, maintenance and use of such equipment."[12] Yet these claims are

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[8] *Alabama Power Co. v. OSHA*, 89 F.3d 740, 745 (11th Cir. 1996).

[9] *Id.* at 745-46.

[10] *Id.* at 745-46, n.6.

[11] 64 Fed. Reg. 15,405.

[12] *Id.* (quotation omitted).

baseless: OSHA provides no scientific, statistical, or survey evidence to explain its view. OSHA does not even claim to have anecdotes to support its asserted nexus between employer payment and employee use of personal-PE.

OSHA's only statistical data come from the untested musings of several members of a liaison committee.[13] OSHA completely fails to explain how it calculates the proposed increases in personal-PE usage, stating only that a single unidentified person -- "the expert panel member's estimate' -- has provided a guess that justifies the entire rule.[14] OSHA has done no more than assume its rule will work. It has not satisfied the requirement of demonstrating significant risk, "in the sense that significant risks are present and can be eliminated or lessened by a change in practices."

Moreover, OSHA simply cannot support its bald assertions because they are demonstrably false: Employees of UPS comply with personal-PE requirements both where

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13 *See generally*, 64 Fed. Reg. 15,419, 15,421. UPS notes that the activities of this liaison committee, which OSHA relies upon so heavily in its preamble, were not conducted in accordance with statutory requirements for such committees. *See* Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. § 1 *et seq.* Both OSHA and ERG describe this panel as "a panel of experts" who provided information and discussed employer payment of personal-PE, which plainly falls within FACA's coverage of a "panel . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies . . . ." *Id.* at § 3. The meetings of this panel were not conducted in accordance with the requirements of the FACA, however: the meeting was not open to the public, but was instead a conference call of members of the committee; no notice of the conference call was published in the Federal Register, and transcripts of the call were not made available. *See id.* at § 10. This in itself is a possibly fatal defect. Further, the entire colloquoy of the conference call should be included in the record for this rulemaking.

14 64 Fed. Reg. 15,422.

employers pay and where employees buy the personal-PE. And UPS has the right, and in fact the statutory duty, to monitor the selection, use, and maintenance of personal-PE regardless of who pays. OSHA has written its preamble as if the question of who pays was somehow linked to the question of who can be held liable for non-compliance. Employers have such liability regardless of payment for personal-PE.

B. OSHA Has Not Justified The Proposed Rule As A Safety Standard.

OSHA must meet all requirements demanded by health standards such as significant risk and therefore a probability of significant benefit before promulgating general safety standards under Section 3(8) of the OSH Act.[15] In addition, OSHA must demonstrate a cost-benefit rationale for the rule.[16] OSHA's citation to the *Benzene* decision but to no other decisions on cost-benefit analysis, suggests OSHA believes that the proposed rule is not a safety standard.[17] As explained above, the proposed rule certainly does apply to safety, since much of the personal-PE it requires is safety-related personal-PE.

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[15] 29 U.S.C. § 652(8).

[16] *See International UAW v. OSHA ("Lockout II")*, 938 F.2d 1310, 1321 (D.C. Cir. 1991). Indeed, according to Section 2, Executive Order 12,291, all regulations must entail a cost-benefit analysis:

> (b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;
> (c) Regulatory objectives shall be chosen to maximize the net benefits to society . . . .

46 Fed. Reg. 13,193 (1981).

[17] *See* 64 Fed. Reg. 15,404-05.

OSHA has included no credible cost-benefit analysis for the current rule. As explained *supra*, OSHA performed a survey on current practices for personal-PE payment, but made no effort to ask the real question: "Are employers who pay for personal-PE safer than those who do not?" OSHA must ask not only that question, but also the cost-benefit corollary: "Are employers who pay for personal-PE not only safer, but so much safer that the cost is justified?" Further, OSHA has not analyzed the costs of the rule caused by the disruption of the collective bargaining relationships, a problem that OSHA apparently evidently never even considered. Accordingly, OSHA must withdraw the proposal and perform an adequate cost-benefit analysis before re-issuing this rule.

C. The Proposed Rule Is Purely An Allocation Of Economic Costs For Which OSHA Has No Mandate.

The preamble to the proposed rule admits that employees already have incentives to use proper personal-PE and the real animating forces behind the rule are two concepts that appear nowhere within OSHA's enabling legislation -- cost-shifting between labor and management and precluding competitive disincentives. According to the preamble:

> OSHA notes that employees, because their own safety is at stake, already have significant incentives to assure that PPE is maintained in a manner that assures that the PPE will function safely.[18]
>
> The proposed rule merely shifts some costs previously borne by employees to their employers.[19]

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[18] *Id.* at 15,405-06.

[19] *Id.* at 15,407.

> Employers must maintain a safe place of work in all its aspects, and may not receive a competitive advantage by failing to pay for necessary safety equipment, including personal protective equipment.[20]

OSHA has exceeded its mandate with this proposed rule: OSHA's own statements in the preamble and the examples provided above illustrate that the reallocation of economic resources, not safety and health, is at the heart of this rule. Yet there is no evidence that the collective bargaining process is broken, i.e., that it is not appropriately allocating the costs of personal-PE, or that payment for personal-PE by the employer would in any way change rates of safety in the transportation industry or any other.

OSHA should not be concerned about who pays for personal-PE provided the key concern -- that the employees are wearing the required personal-PE -- is met. Because OSHA previously implemented rules requiring the use of such personal-PE, placing the additional burden of paying for that personal-PE on the employer is unnecessary.

III

OSHA'S STATISTICAL ANALYSIS AND ARGUMENTS DO NOT SUPPORT THE RULE

OSHA justifies its foray into collective bargaining economics primarily through a statistical analysis that purports to show both an absence of significant economic impact and a substantial reduction of injury and fatality rates. It also offers a series of narrative arguments as further support for the rule. Each of these efforts is fundamentally flawed.

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20 *Id.* at 15,403.

A. The Survey Supports Neither The Questions It Should Have Asked, Nor The Questions It Did.

Do workplaces where employers pay for personal-PE have lower rates of personal-PE-preventable injuries than workplaces where employers do not? This is the obvious question in any survey designed to support an employer payment for personal-PE rule. But inexplicably, OSHA appears never to have attempted such a survey. In fact, the current survey does not inquire into injuries rates at all.

The principal support for OSHA's conclusion that the standard will impose minimal costs is a PPE Cost Survey conducted by Eastern Research Group, Inc. ("ERG"). That study purports to show that (1) most employers currently pay for personal-PE, and (2) therefore, a rule requiring employer-purchased personal-PE would have little or no economic effect. But the survey cannot support the first conclusion because of its flawed methodology, particularly given its extremely high non-response rate. Even if these shortcomings were overlooked, moreover, the study would not support the second conclusion described above, because the survey did not measure the impact of employer-purchased personal-PE on collective bargaining -- or even inquire into collective bargaining considerations.[21]

1. If the survey is correct, then OSHA cannot identify "significant risk or benefits from the proposed rule."

The survey concludes "[o]ver 90% of all employers bear the full costs of personal-PE in seven out of eight equipment categories, the exception being foot protection."[22] For reasons

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[21] *PPE Cost Survey: Final Report*, submitted by Eastern Research Group, Inc., June 23, 1999.

[22] *Id.* at 1.

explained in the next section, UPS disputes these findings. However, even if the survey were correct, the 90-plus percent figure does not support the need for a proposed rule, but instead *disproves* it. Since more than 90% of employers already pay for personal-PE, and since OSHA has come forward with *no* proof indicating that the remaining less-than-10% experiences higher accident rates, then OSHA cannot prove the existence of a "significant risk" that requires the new standard.

2. The high non-response rate is a potential source for bias.

An immediately obvious flaw of the ERG survey is the high non-response rate: the survey response rate for employers that had valid telephone numbers and were not "screened out" was 47.1%.[23] This means that at a minimum ERG failed to interview 52.9% of its targeted survey population. This low response rate will inevitably shift ERG's research toward the minority view, making the survey's findings suspect. Moreover, that more than one-half of the potential respondents may have been excluded because of self-selection bias further adds to the survey's flaws.

ERG's dismissal of potential bias is not convincing. ERG recognized that the high non-response rate could call the results of the survey into question and attempted to analyze this potential bias.[24] But ERG's analysis was incomplete: ERG compared employer size and geographic location of non-respondents to respondents and found no significant disparity.[25] No

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23 *Id.* at 64.

24 *Id.* at 66-69.

25 *Id.* at 67.

variable relevant to the subject matter of the survey -- such as whether employers do or do not pay for personal-PE -- was apparently even considered by ERG in this analysis. Accordingly, ERG's explanation for the low response rate assumes that geography and size are not only the most important variables affecting the response rate, but the only variables.

Knowledgeable employers, especially large employers who employ the bulk of the workforce, are aware of OSHA's demands that employers should purchase personal-PE. OSHA has advocated such a position sporadically at least since 1994, has cited employers for failure to pay, and even litigated the issue (unsuccessfully) in 1997.[26] Further, ERG conducted the 1999 survey *after* it was known that OSHA was promulgating the proposed rule at issue here. Accordingly, employers who do not pay for personal-PE would be less likely to respond to a survey about payment for personal-PE for fear of adverse action by OSHA. This fear is the most obvious potential bias to the survey, yet ERG made no attempt to test it.

ERG's explanation for the low response rate supports this conclusion. The 52.9% of non-respondents included 37.5% of the employers who were "not available."[27] ERG concedes that employers avoided this survey, since "[i]t is the opinion of the survey subcontractor that the increased use of answering machines and voice mail systems over time has negatively impacted response rates obtainable from telephone surveys such as this one";[28] i.e., employers that screen

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[26] *Union Tank Car Co.*, [1997-1999 Transfer Binder] Cas. (BNA) No. 3, at 1067 (Oct. 16, 1997).

[27] The remaining 14.9% explicitly refused to participate.

[28] *PPE Cost Survey: Final Report*, at 66 n.2.

their calls are more likely to screen this particular call out. It is reasonable to expect that a substantial percentage of the "not available" category consists of employers who, if contacted, would have explicitly refused to participate.

B. OSHA's Claim That The Proposed Standard Will Prevent Injuries And Save Lives Is Equally Unsupported.

In considering benefits from the proposed rule, moreover, OSHA failed to address the obvious question that should have been foremost in any review of the rule's effect: Do workplaces where employers pay for personal-PE have lower rates of personal-PE-preventable injuries than workplaces where employers do not? The current survey, in fact, does not inquire into injury rates at all.

Instead, OSHA concludes that the proposed standard will prevent injuries and save lives through a process of wild extrapolation. Beginning from an assumption that personal-PE will be missing or inappropriately used 40% of the time when employees pay but only 17.5% of the time when employers pay, OSHA calculates that "the proposed rule would avert approximately 47,785 injuries annually."[29] These critical 17.5% and 40% assumptions represent nothing more than off-the-cuff surmises from eight "experts," none of whom conducted any type of survey or review to support their impressions.

If OSHA's assumptions were valid, it is reasonable to expect that the conclusion that flows from them could be verified in a review of actual injury rates. Indeed, given that certain states already mandate employer-paid personal-PE injury rates, available statistics should verify

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[29] *Id.* at 15,422.

that injury rates in those states have been diminished by the significant proportions identified in OSHA's analysis.[30] That, however, is emphatically not the case. Minnesota, for example, has mandated for the last 26 years that employers pay for all personal-PE.[31] Yet Minnesota's private industry injury rates and lost workday injury rates have consistently exceeded the national average, as shown in the following table:[32]

	U.S. Private Industry	Minnesota Private Industry
Injury rates (total cases per 100 full-time workers)		
1997	6.6	6.9
1996	6.9	7.6
Lost workday injury rates (total cases per 100 full-time workers)		
1997	3.1	3.2
1996	3.1	3.4

The discrepancy in Minnesota is even more pronounced in the construction sector, which OSHA viewed as its most important stakeholder in the personal-PE regulatory effort:

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30 All other aspects of safety and health regulation in those states, of course, must be assumed to provide a level of protection at least equal to federal standards.

31 Minn. Stat. Ann. § 182.655, subd. 10a (West 1998).

32 All statistics are from U.S. Department of Labor, Bureau of Labor Statistics, *Survey of Occupational Illnesses and Injuries* for the indicated year.

	U.S.	Minnesota
Injury rates (total cases per 100 full-time workers)		
1997	9.3	11.6
1996	9.7	12.3
Lost workday injury rates (total cases per 100 full-time workers)		
1997	4.4	5.1
1996	4.4	5.9

OSHA's conclusion that employer-mandated personal-PE payment will save lives in areas such as head injuries and fall protection[33] also suffers from the same absence of statistical validity. In 1995 -- the last year for which UPS could locate state-by-state breakdowns for data from the Census of Fatal Occupational Injuries -- 36% of all fatalities in Minnesota were attributable to "falls" or "contact with objects and equipment," compared to 25% for the United States as a whole.[34] Real life data, therefore, show that alleged safety benefits, and the estimated economic savings that allegedly will flow from them, have not materialized in more than a quarter-century of experience for a state standard that OSHA wants to impose nationally.

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[33] 64 Fed. Reg. 15,422.

[34] U.S. Department of Labor, Bureau of Labor Statistics, *Census of Fatal Occupational Injuries* (1995).

C. OSHA's Asserted Reasons For Employer Payment Are Weak And Unavailing.

Finally, OSHA advances three basic reasons for requiring employers to pay for personal-PE. Each is fundamentally flawed, and requiring employers to pay for personal-PE on these grounds would be arbitrary and capricious and unsupported by substantial evidence, in violation of the OSH Act and the Administrative Procedure Act.

1. First, OSHA contends that employers are in the best position to provide and care for personal-PE, asserting, for instance, that employers can best "select, order, and obtain the proper type and design of PPE."[35] That has no bearing on who pays, however: An employer can "select, order, and obtain" personal-PE and then require re-payment from employees, for instance; OSHA's premise would be met, but payment would be by employees. Equally, employers can instruct personnel to purchase a particular make, model, and design of equipment from a particular location and then require presentment of the equipment for verification before beginning work. Once again, OSHA's premise is satisfied, but the employee pays. Or, employers can simply inspect a new employee's equipment before permitting him to begin work.

OSHA says employers are in the best position to "keep [personal-PE] in repair," but that is wrong. In fact the user of equipment is most likely to know its deficiencies and -- if he owns the equipment -- to treat it carefully and ensure it is not damaged. OSHA asserts that employers can "require standardized procedures cleaning, stor[age], and maint[enance]"[36], but that also has

[35] 64 Fed. Reg. 15,409.

[36] *Id.* at 15,419.

no bearing on who pays -- employers can do these things equally for equipment paid for by employees. By the same token, an employer could pay for equipment and not clean, store, or maintain the equipment.

Ultimately OSHA's employer-knows-best argument conflicts with positions it has taken previously and indeed in this very rulemaking: Currently OSHA is attempting in another rulemaking to compel employee involvement in safety and health management, on the theory that employees have much valuable information to impart and that their participation is key to safety programs' success.[37] Why in OSHA's view are employees so valuable when it comes to safety management, but so helpless, unreliable, and unable to follow basic instructions when it comes to selecting equipment? Indeed, in the preamble to this rulemaking, where OSHA suggests that workers lack the capacity to choose the right hat or gloves for their own safety, it also asserts that employees rather than employers should be trusted to choose medical doctors.[38] Does OSHA believe that finding the right doctor is easier than finding the right hat? Why does OSHA believe that an employee will prefer a doctor he chooses himself, but will not be more likely to wear a hat or gloves when he was able to select the color and style? One suspects the reason OSHA makes such contrary assumptions -- assumptions, therefore, that are arbitrary and capricious and unsupportable by substantial evidence -- is that it decided to make employers pay

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[37] Draft Proposed Safety and Health Program Rule, available at http://www.osha-slc.gov/SLTC/safetyhealth/nshp.html.

[38] *See* 64 Fed. Reg. 15,405, describing the agency's conclusion in an earlier rulemaking that "employees will be more likely to cooperate in, and improve the accuracy of, medical examinations performed by physicians they trust."

for personal-PE and then scrambled to identify every argument it could conjure to support that position.

2. OSHA repeatedly asserts that because employers have ultimate statutory responsibility for safety and health, they must pay for personal-PE. That does not follow, however. Employers fulfill the vast bulk of their safety responsibilities through their employees-- by instructing personnel to adhere to safe practices, by using them to implement control measures, and by responding to employee suggestions. Indeed, OSHA's reasoning on the point is belied by its simultaneous pursuit of a requirement that employers consult employees in their safety and health programs: if employers' statutory responsibility meant that they bear all responsibility, then OSHA would have no ground to require consulting employees on safety management. (It appears at times that OSHA's objective is to give employees great authority with no responsibility.)

OSHA errs similarly in contending that employers must pay for personal-PE because they ordinarily pay for engineering changes. That employers pay some costs hardly dictates that they pay all costs. The agency sees "no principled distinction" between engineering controls and personal-PE when it comes to who pays, but the distinction is clear and simple: employers own the equipment they make engineering changes to -- it is part of their facility -- but by definition personal-PE typically is owned by employees: that is why it is personal.[39]

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[39] *See Meirriam Webster's Collegiate Dictionary* 867 (10th ed. 1998) ("personal" means 'PRIVATE, INDIVIDUAL . . . of, relating to, or constituting personal property").

Moreover, employers are not required to pay for engineering controls as OSHA asserts. Imagine a situation where engineering controls are purchased from the employees' wages and not by the employer: OSHA could pass a regulation that requires that a new, stronger blast door be installed in all steel plants. But for one plant installing these doors would be too costly and would cause the plant to shut down. Management meets with the employees and explains the situation, adding that the only way the plant can comply with the new regulation and remain open is to reduce wages for a period of time to fully or partly pay for the installation of the necessary blast doors. Nothing in the OSH Act or OSHA regulations prevents the employees from agreeing to take such a reduction in pay for the blast doors rather than to lose their jobs. Indeed, it is unnecessary for OSHA to be concerned about the economics of who pays for the doors because the desired result -- that the employees not be working in an area with ineffective blast doors -- has been achieved.[40]

3. Finally, OSHA asserts that "[r]equiring employees to pay for PPE may discourage their use of PPE"[41] because "[t]here is always a reluctance to use one's own funds to pay for replacing or repairing workplace PPE."[42] But that is equally true for employers, indeed perhaps the greatest weakness of this proposed rule is that in the name of economic incentives it replaces a

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[40] OSHA states that employers should pay for personal-PE because they have the resources to do so. (64 Fed. Reg. 15,403) It cites no data to support this deep-pocket argument, however. Particularly, it cites nothing indicating that employees do not also have the resources to buy personal-PE.

[41] 64 Fed. Reg. at 15,409.

[42] *Id.* at 15,421.

system whose incentives favor compliance with a system that creates incentives against compliance. Currently, to the extent employers are not required to pay for personal-PE they have an economic interest in being personal-PE-compliant (avoidance of fines and penalties) without a countervailing economic incentive not to be compliant, since they may shift or share with employees any costs resulting from vigilance with regard to compliance. Under the proposed rule, by contrast, employers will have an economic motive to disregard personal-PE requirements because observing the requirements will cost them money. It is a simple economic point that OSHA wholly fails to address: increasing the cost of compliance for employers will decrease employer compliance. (Indeed, employers will be encouraged to avoid costs by determining that no hazard exists that requires personal-PE under § 1910.132(d).)

OSHA contends that requiring employees to pay for personal-PE would cause "resentment" and therefore employer payment is "necessary to ensure the employee's voluntary cooperation."[43] It is extraordinary to see the national Occupational Safety and Health Administration taking the position that asking people to pay for safety causes a "resentment" that must be accommodated in rulemaking. As noted, the argument conflicts with OSHA's simultaneous assertion in other contexts that employees want to assume responsibility for safety and health, and employee involvement is key to success. And once again the argument suffers from the false premise that employees will reduce safety compliance if required to pay for it, but employers will not. Perhaps most to the point, the argument wrongly assumes that employee

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43 *Id.* at 15,405.

cooperation is "voluntary." In fact employers have the responsibility to ensure that employees wear personal-PE, whether or not employers pay for it, and accordingly employers have the ability and responsibility to exercise the full range of their managerial authority over employees to ensure compliance with the law. As noted, this is how safety and health requirements commonly are implemented -- by employers issuing instructions and ensuring that employees adhere to them.

It is true that if employees pay a cost for identifying and acknowledging the need for replacement equipment they have some financial incentive to ignore equipment defects. But responsible men and women confront this issue in everyday life -- when they identify something wrong with their car, for instance -- and society trusts them to overcome short-sighted economic considerations and act appropriately. Moreover, an employer could eliminate this short-sighted thinking by employees in any event by purchasing personal-PE and making the equipment available to employees on request, and charging equipment costs on a fixed monthly or annual fee that is unrelated to whether that particular employee requested new equipment. Under this approach employees pay for personal-PE, but they have no financial incentive to use defective equipment because new equipment would be provided at no incremental cost.

In sum, all the agency's asserted reasons for requiring employers to pay for personal-PE fail. The agency has admitted as much. "[T]here is little statutory justification for requiring employers to pay" for safety shoes and prescription safety goggles, the agency writes, so long as the equipment is used away from the workplace and other conditions are met. That is true -- OSHA lacks statutory authority to make employers pay for safety shoes and goggles -- but for the same reasons it is without statutory authority as to other personal-PE: <u>none of the arguments</u>

OSHA gives for requiring employer payment applies to other personal-PE any more than it applies to shoes and goggles. Employees can be trusted to buy the right safety shoes and goggles, OSHA concedes; for the same reasons, they can purchase the proper hard hat, gloves, and other personal-PE. Employees largely put personal safety before short-term economic concerns when it comes to shoes and goggles, and for the same reasons they will with other personal-PE. Employers have ultimate statutory authority for compliance with personal-PE standards concerning shoes and goggles, but nonetheless appropriately may have employees bear the cost; likewise for all other personal-PE, having employees assume some financial responsibility is fully consistent with that statutory authority.

D. *OSHA's Legal Arguments And Analogies Misstate* The Law.

1. *Union Tank Car* was correctly decided.

The preamble casually claims that *Secretary of Labor v. Union Tank Car Co.* merely "declined" to accept a mandate for across-the-board employer-paid-for personal-PE, based on "several earlier letters of interpretation from OSHA that were inconsistent with that policy."[44] In fact, *Union Tank Car* did not merely recognize a few inconsistent letters, but instead recognized and rejected what would have been a startling change in OSHA policy. In *Union Tank Car*, OSHA attempted to impose the policy of the current proposed rule by fiat through a memorandum and subsequent citations to an employer. OSHA lost. The Commission identified OSHA's past statements that, regarding payment for personal-PE "[t]his question normally is

[44] 64 Fed. Reg. 15,403.

settled through discussions between the employer and employees, or through the collective bargaining process."[45] The Commission noted that OSHA has consistently refused to impose employer-pays through a "twenty-year period" (now more) since the Third Circuit's decision in *The Budd Co. v. OSHA*, and therefore the Commission gave OSHA's interpretation no deference and rejected it.[46]

2. The logic of *The Budd Co.* is not limited to shoes.

The proposed rule would exempt safety shoes in efforts to avoid the holding of *The Budd Co.* OSHA badly misreads *The Budd Co.*, however, if it believes the logic of the decision was somehow limited to shoes. The Third Circuit in The Budd Co. limited its holding to the question before it -- shoes -- and indeed did not then decide the question of "other mandatory equipment."[47] However, the Third Circuit did not explicitly or even implicitly conclude that safety shoes were different from all other personal-PE. The Third Circuit rejected the arguments now implied by OSHA, concluding that OSHA may address an issue primarily concerned with wages and economics (and only incidentally concerned with safety) or that an employer's failure to pay for personal-PE diminishes its control over personal-PE or its obligation to enforce compliance:

> [the employee-pays policy] in no way diminishes the employer's obligation to ensure that safety shoes are in fact worn when required. The use of protective equipment is not, as the union implies, made negotiable by the Commission's

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[45] *Union Tank Car Co.*, [1997-1999 Transfer Binder] O.S.H. Cas. (BNA) at 1068.

[46] *Id.* at 1068.

[47] *Budd Co.*, 513 F.2d at 205-06.

ruling. Rather, the only negotiable issue is who will pay for the shoes that must be used.[48]

3. **The approach of the proposed rule is inconsistent with employees' responsibilities as recognized in the OSH Act.**

Section 2 of the OSH Act directs OSHA to pursue safety and health improvements not by placing exclusive responsibility on management, but "by encouraging joint labor-management efforts" to reduce workplace hazards and

> (1) by encouraging employers *and employees* in their efforts to reduce the number of ... hazards ..., and to stimulate employers *and employees* to institute new and to perfect existing programs ....
>
> (2) by providing that employers *and employees* have separate but dependent responsibilities and rights ....
>
> (4) by building upon advances already made through employer *and employee* initiatives for providing safe and healthful working conditions .... [and]
>
> (13) by encouraging *joint labor-management efforts* to reduce injuries and disease arising out of employment.

29 U.S.C. § 651(b) (emphases added). Likewise, Section 5(b) of the Act requires that "[e]ach employee shall comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this chapter . . . ." 29 U.S.C. § 654(b).

The proposed rule has so little room for these concepts of employee responsibility that it runs afoul of the OSH Act. Employers have full responsibility for compliance, the rule evidently supposes, but that is not true. Employees cannot be responsible for safety equipment, the rule presumes, but that also is untrue and conflicts with the statute's indications of employee

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[48] *Id.* at 206 (footnote omitted).

responsibility. Indeed, by signaling to employees that they should not be expected to bear responsibility for safety (and reasonably may feel "resentful" if asked to do so), the proposed rule disserves employee safety generally and the language and spirit of the OSH Act by encouraging employee complacency, even though employee vigilance is one of the most important ingredients to a safe and healthful workplace.

IV

THE PROPOSAL IS PARTICULARLY INAPPROPRIATE FOR UNIONIZED WORKPLACES

The proposed rule applies indiscriminately to union and non-union workplaces, with no evidence whatever that OSHA considered the aspects of a unionized workplace that make mandatory employer payment especially unnecessary and counterproductive.

Requiring employer payment for personal-PE reflects a judgment that negotiation between employer and employee will be ineffective in achieving a safety-maximizing allocation of costs for personal-PE. There is no reason to believe this judgment -- or rather, this assumption by OSHA -- is correct. In fact, equipment that must be tailored to individual employees -- shoes, or prescription goggles, for instance -- is equipment that most effectively promotes safety when owned by the employee, since if the employer supplies it the equipment is particularly likely not to fit the employee and a safety hazard will result. And indeed, it is precisely equipment of this nature that employees most commonly supply themselves. Employer-employee negotiations achieved a safety-maximizing result, without OSHA's interference at all.

One may speculate that some employers enjoy such superior bargaining power over their employees, and are so disinterested in safety, that they will decline to pay for safety equipment even when the interests of safety suggest they do so. If such relationships ever exists, they are

particularly unlikely in a unionized workplace. Rather, the primary rationale for unionism is that by acting collectively employees are able to achieve an equality in bargaining power with their employer. Through their union, employees are believed to be better able to advance their interests, including, of course, workplace safety and health.

In these workplaces where a vigorous union exists that is able to effectively advance the interests of union members, the need is less for direct OSHA regulation. OSHA's own regulations recognize this, providing, for instance, that OSHA may defer sometimes to determinations in a grievance arbitration process of complaints analogous to those under OSH Act Section 11(c).[49] An exemption of unionized workplaces would be particularly appropriate for payment of personal-PE. Payment for personal-PE is not a matter of whether a hazard exists, or what control measure is needed to address it -- these determinations already have been made by the requirement that personal-PE be used. Rather, as framed by OSHA, payment for personal-PE is a question of whether equipment required by law is being provided, used, and maintained. These are matters that a union agent in an individual workplace is far more able to determine than OSHA from Washington. If there are workplaces where an employee-pays system is resulting in unsafe personal-PE practices, the union can raise the issue with the company and bargain for employer payment. (It also can lodge a complaint with OSHA to draw attention to the lack of personal-PE, something that individual employees without union representation often are reluctant to do.)

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[49] *See* 29 C.F.R. §§ 1977.18, 1978.112.

On the other hand, for reasons shown above there are certain to be workplaces where employer payment for personal-PE is not in the interest of employee safety, and where the union recognizes that it would be far preferable for the company to spend the money mandated by OSHA for personal-PE on some other matter not required by OSHA. An employer-pays rule that forces an employer to pay safety and health dollars on personal-PE in these circumstances will be a rule that forces an overall misallocation of resources -- safety and health dollars will be spent where the union knows they are not needed, and therefore will be unavailable to be diverted to a matter the union identifies as important.

It is presumably for these very reasons that some of the states cited by OSHA as requiring employer payment for personal-PE specially allow that in unionized workplaces payment may be resolved by negotiation between employer and union.[50] OSHA, also, should adopt this special rule for unionized workplaces.[51]

V

THIS ONE-SIZE-FITS-ALL RULE SHOULD BE WITHDRAWN

This proposed one-size-fits all-rule would do violence to a proven scheme of private negotiation to fix a "problem" apparent only to the agency and in the process risk actually worsening the plight of both employers and employees. OSHA has long recognized that the

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[50] *See* Exhibit 5 to Record.

[51] A consequence of this approach that is of no concern to OSHA's but nonetheless bears mentioning is that if unionization means avoiding mandatory payment for personal-PE, employers will have a reason to favor unions. This, in turn, could lead to less resistance to organizing efforts and increased unionization over time.

diversity of American workplaces requires a diversity of health and safety standards.[52] Yet the proposed rule is a one-size-fits-all dictate that leaves different industries, or even different firms or labor-management organizations within an industry, absolutely no room to tailor implementation to the peculiar requirements of their workplaces.[53] But employers already have incentives to pay for personal-PE when the equipment would be worn more frequently or be better maintained if employers paid for the personal-PE: improving compliance means reduction of workplace injuries and elimination of potential fines by OSHA. Moreover, OSHA has failed to show that a significant risk --failure to wear personal-PE -- exists in workplaces where employees pay for personal-PE. The current system works and OSHA has provided no evidence -- indeed, nothing but rank speculation -- to suggest that another system is even needed, let alone better.

OSHA concedes that some personal-PE -- such as safety shoes and prescription safety glasses -- should be purchased by employees and the payment of such equipment may "be negotiated between management and labor."[54] But OSHA would deprive whole industries of the right to inquire about anything but shoes and glasses. OSHA would prohibit collective bargaining even if labor and management concluded to a certainty that life jacket use is no less or

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[52] For instance, personal-PE requirements are codified under diverse approaches in the Code of Federal Regulations, Part 1910 (General Industry), Part 1915 (Shipyard), Part 1917 (Marine Terminal), Part 1918 (Longshoring), Part 1928 (Agriculture), and Part 1926 (Construction).

[53] The proposed rule would apply to all of the industries mentioned in the previous footnote, with the sole exception of agriculture. *See* 64 Fed. Reg. 15,402, 15,408.

[54] 64 Fed. Reg. 15,415.

even increases when employees pay. Such a rule would be the simplest paternalism and a poor use of agency resources.

OSHA has advanced neither proof of a significant risk nor proof that the proposed rule would create a benefit. There is no credible argument that the proposed rule would promote health and safety. The only evidence in this case is that labor-management negotiations have already resolved the "problem" that OSHA fears, and the only certain impact of the proposed rule is that OSHA would alter the collective bargaining process. Quite simply, OSHA has no authority to do so. The final justification offered by OSHA -- to level the competitive playing field between firms that do and do not pay for personal-PE -- is paternalism at its most extreme, and must fail because the supposed beneficiaries, such as UPS, oppose this rule. UPS, therefore, respectfully requests that the proposed rule be withdrawn.

July 23, 1999

Respectfully submitted,

United Parcel Service

By: Ronald Foster /cms

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12-24
S-042

July 8, 1999

Docket Clerk
U. S. Department of Labor
Occupational Safety and Health Administration
Room N2625
200 Constitution Avenue, NW
Washington, D. C. 20210

OSHA
DOCKET OFFICER
DATE JUL 8 1999
TIME

Re: Docket S-042

Dear Docket Clerk:

On behalf of the 9,500 members of the Texas Association of Builders, I am submitting these comments on the Occupational Safety and Health Administration's (OSHA) proposed rule for Employer Payment for Personal Protective Equipment (PPE). Our members include firms that construct single family homes, remodelers, apartments and condominiums and their subcontractors. The Texas Association of Builders is therefore concerned with any proposed rule that will affect our industry's ability to provide affordable housing.

Currently, OSHA standards require that employers "provide" their employees with personal protective equipment (PPE) when such equipment is necessary to protect employees from job-related injuries, illnesses and fatalities. Under this proposed revision to the rule, OSHA intends to require employers to pay for the initial issue of PPE and for replacement PPE that must be replaced due to normal wear and tear or occasional loss, with the exception of safety toe shoes, prescription eyewear and logging boots when certain requirements are met.

The issue of who pays for PPE has long been a contentious one in the construction industry. In fact, OSHA issued this proposed revision despite resistance and criticism from its own Advisory Committee on Construction Safety and Health (ACCSH).

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Ultimately, what the proposal offers to employers is more ambiguous requirements imposing the Agency's unwarranted concept of safety in the workplace. In other words, OSHA is attempting to regulate management rather than safety and health. This attempted "control of the workplace" exceeds any statutory authority granted to the Agency through the OSH Act. For this reason, we do not support the proposed rule and offer the following comments:

- The proposed revision to the PPE standard does not allow employers much flexibility in how they manage safety and health on their job sites. OSHA would require each employer to pay for all PPE used by employees with very few exceptions. Only in the rare case involving an employee who regularly fails to bring employer-supplied PPE to the job site, or who regularly loses the equipment, would the employer be permitted to require the employee to pay for replacement PPE. How are we to define "regularly" in these scenarios? This type of real life problem on residential construction sites emphasizes our objections to this proposed rule. If the Agency intends for "regularly" to mean "2 times" or "3 times" or "4 times," then they must clearly state this so that this information can be documented to employers.

- As the proposal is written, the ultimate interpretation of when it can be deemed that an employee "regularly fails to bring employer-supplied PPE to the job site," or "regularly loses the equipment" will be left to the compliance officer. In reality, most employers will have to continually purchase and replace lost or stolen PPE in order to avoid the risk of an OSHA citation.

- OSHA states that if employers pay for the PPE, they will know what kinds of PPE their employees are using and can ensure that it is replaced when needed. In their own words, the Agency is equating paying for PPE with controlling what PPE is used and how it is used. This false assumption is the core of this regulation and holds no merit. Employers can easily select a variety of PPE that is in compliance with OSHA's standards, and make the PPE available to the employees without the employer bearing the cost. Employers must be permitted to establish their own administrative procedures for providing PPE to employees, including the method of payment.

- If required to pay for some PPE, will employers be allowed to take deposits for PPE, wherein they can recoup some of their investment costs when employees do not return equipment upon termination?

- By taking away the flexibility that any employer would have in managing their company, OSHA has effectively given employees the freedom to be irresponsible with company-owned equipment. The employer has been given virtually no recourse for enforcing employee accountability.

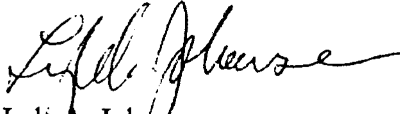
- How will OSHA enforce this standard? When a compliance officer comes on to the job site and sees every employee wearing a hard hat and safety glasses, will he request to see a receipt from the employer for the purchase of the PPE? Will the employer then be cited if he does not have a receipt to prove that he did, in fact, pay for the PPE being used? What basis would OSHA have for this citation if every employee was wearing proper PPE and protected from injury? Is this the type of regulation that the Agency is seeking to promulgate? One with no direct impact on safety and health that merely places more financial burden on employers who are already faced with a myriad of government regulations that add thousands of dollars to the price of a new home?

- OSHA states that requiring employees to pay for PPE may discourage their use of PPE. The Texas Association of Builders disagrees with the Agency's position on this issue. Permitting an employee to pay either in full or in part for PPE will ensure that the PPE is maintained in good working order.

We are opposed to this proposal and to the very concept of OSHA promulgating any rule that interferes with workplace management. If this document were to become a final rule, it would not only allow, but would require, compliance officers to make subjective determinations on the extent of an employer's compliance with OSHA regulations.

The Texas Association of Builders respectfully requests that the proposed revisions not be implemented as written. Your consideration of our comments is appreciated.

Sincerely,



Lyle A. Johansen
Executive Vice President

LAJ/jm
cc: David DeLorenzo, NAHB
Steve Conaway, TAB President
Randy Birdwell, TAB Vice President
Chuck Dennis, TAB Vice President-Treasurer/Secretary
Gary Sheffield, TAB Immediate Past President

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EEI **EDISON ELECTRIC INSTITUTE**

12-150
S042

July 23, 1999

OSHA Docket Office, Docket S-042
Room N-2625
United States Department of Labor
Occupational Safety & Health Administration
200 Constitution Ave., NW
Washington, DC 20210

OSHA
DOCKET OFFICER
DATE JUL 23 1999
TIME

RE: Docket No. S-042: Proposed changes to 29 CFR Parts 1910, 1915, et al. Employer Payment for Personal Protective Equipment; Proposed Rule

The Edison Electric Institute (EEI) is pleased to present these comments on this proposed rulemaking published in the Federal Register / Vol. 64, No. 61 on Wednesday, March 31, 1999.

EEI is the association of the share-holder-owned electric companies, International Affiliates, and Associate Members. Our mission is to assist our membership in competing successfully in the evolving energy marketplace to the benefit of customers, shareholders and employees. This is accomplished by advocating public policies that enable members to compete fairly and effectively, by promoting the value and benefits of electricity and electrotechnologies, and by offering quality products and services.

EEI appreciates the opportunity to comment on OSHA's efforts to address the revisions to its Proposed Rule governing §1910.132 (h) Payment for protective equipment. EEI offers the following comments for consideration by OSHA on the various issues pertaining to this proposed rule.

General Comments

As a general observation EEI would note that the principle of OSHA mandating who pays for work equipment/tools is fundamentally outside of the jurisdiction of the Occupation Safety & Health Administration. The question of who pays for such items (e.g. work gloves, climbing gaffs, body belts, etc.) is not a safety or health issue, but rather an issue of employee relations and should be handled through labor/management

negotiations. While OSHA has left the decision on safety toed shoes and prescription eyewear up to these negotiations, EEI believes that OSHA should carefully review and modify the items in Table 1 for the purpose of eliminating those areas that are clearly negotiated issues.

EEI believes that OSHA's economic impact cost estimate of $61.9 million annually for all industry is grossly underestimated. OSHA seems to be making the assumption that all of the items in Table 1 are currently being paid for by employers. This, in fact, is not the case. Items such as work gloves, climbing gaffs, body belts, some coveralls, some aprons, and are at times either paid for entirely or partially by the employee. The annual cost of work gloves (the least costly item) alone throughout all of industry would significantly exceed the cost estimate. If Table 1 is allowed to remain as written, not only will costs be greatly increased, but it will introduce controversy over payment for many tools and work equipment that have nothing to do with safety & health of the worker.

Scope of the Rule

EEI is also concerned that compliance officers may inadvertently classify the apparel / clothing requirement under §1910.269(l)(6) of the Electric Power Generation, Transmission and Distribution standard as personal protective equipment. Classification of apparel / clothing as PPE would be inconsistent with OSHA's current position stated in two Interpretation Letters by John B. Miles, Jr. - Director (July 28, 1995) and James W. Stanley * Deputy Assistant Secretary (August 10, 1995). In both of these interpretation letters it is stated that the apparel standard is not a PPE requirement. We (EEI) have included them as attachments to our comments for purposes of entering them into the official record. EEI requests that OSHA state in the preamble of the final standard that the apparel / clothing required under §1910.269(l)(6) of the Electric Power Generation, Transmission and Distribution standard is not personal protective equipment. This statement would avoid disagreements of interpretations after the rule is finalized.

EEI supports the proposed concept of the exception for payment of safety-toe protective footwear, for prescription safety eyewear and any other PPE that the employer demonstrates is personal in nature and customarily used off the job. The reasons posed in the preamble supports this position. Determining who pays or who pays what portion of the costs for this type of PPE is best resolved through agreements between employers and their employees.

Issues Pertaining to the Proposed Rule (Preamble - Section V)

Issue 1. OSHA asked for comments on the following alternative regulatory text:
"The employer shall provide at no cost to the employee, all protective equipment and personal protective equipment except for protective equipment which the employer demonstrates is personal in nature and customarily used off the job."

EEI believes that this alternative language expands the limit of payment for PPE and Protective Equipment beyond those items required by OSHA standards and therefore would not support this alternative language. In addition, we would again state that some equipment can be considered to be personal tools, or it may be used for convenience or cleanliness versus protection from hazards such as work gloves, filtering facepiece respirators not required by a specific OSHA standard or coveralls. The question of who pays for this equipment / tools is likewise best handled through agreements between the employer and employee.

Issue 2. Are there other types of PPE, beside safety-toe safety footwear and prescription eyewear that should be exempted from the proposed payment requirement?

EEI believes that the term "protective toe box safety footwear" better describes this type footwear and should be used instead of the term "safety-toe safety footwear."

As mentioned above EEI believes that equipment used for convenience or cleanliness, and tools such as climbers and work gloves are best resolved through agreements between employers and their employees to determine, who pays, the employer, employee, or whether the costs are to be shared.

Issue 5. Is employee-owned PPE less protective than employer-provided PPE?

EEI believes that as long as the employer specifies the specific type, and where appropriate, the brand name and model number of PPE to be used by an employee, the issue of "who pays" is irrelevant to the protection that is provided to the employee. The employer has the ultimate responsibility to specify the correct types of PPE to be used on the job.

The employer also has the responsibility to require and assure that "appropriate" PPE is used when and where it is needed. Thus, the issue of an employee's motivation to use and/or replace PPE because he/she does or does not have to pay for it is irrelevant. Compliance with safety & health work practices, rules and/or regulations is a condition of employment.

Issue 7. If an employee wants to use more costly PPE because of individual preference, should that employee be responsible for any difference in cost?

EEI's position is that the employer has the right and obligation to approve the selection and use of the "non standard" PPE by its employees. If the "non standard" PPE is approved for use by the employer, the employer should not be required to pay any cost towards of this equipment especially when appropriate PPE is already provided to the employee. The additional costs required to purchase and administrate the desires of individual employees should not have to be borne by the employer.

EEI would also suggest that the final rule make clear that the selection of what PPE satisfies OSHA standards is to be left to the sole discretion of the employer unless a contrary agreement is reached with employees or their representative.

Issue 10. Should the standard require the employer to pay for inserts or other articles that are uniquely personalized components of personal protective equipment, such as head coverings under welding helmets and custom prescription lens inserts worn under a welding helmet or a diving helmet?

Again, EEI believes that for this issue best resolved through agreements between employers and their employees to determine, who pays the employer, employee, or whether the costs are to be shared.

Issue 11. OSHA intends to require employers to pay for the initial issue of PPE.

EEI believes that this question is redundant and unnecessary. The answer to who pays really answers the question of initial issue.

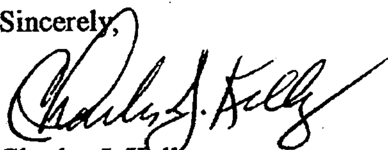
Should employers also be required to pay for PPE that must be replaced due to normal wear and tear or occasional loss?

The resolution here too is best resolved through agreements between employers and their employees to determine who pays for replacement of PPE due to normal wear and tear or occasional loss the employer, employee, or whether the costs are to be shared. In any case there needs to be limitation or parameters on the number and frequency of replacement items.

The Edison Electric Institute appreciates the opportunity to submit these comments, and hopes OSHA will give them careful consideration.

Should you have questions or need further information please contact me directly at 202-508-5155.

Sincerely,



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