

April 10, 2003

The Honorable Elaine L. Chao
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2018
Washington DC 20210

Dear Madam Secretary:

RE: **Petition for Completion and Issuance of Final Rule
on Employer Payment for Personal Protective Equipment**

The United Food and Commercial Workers International Union (UFCW) and the undersigned labor organizations hereby petition the Department of Labor to complete and issue the final rule on Employer Payment for Personal Protective Equipment (Regulation Identification Number 1218-AB77) under Section 6(b) of the Occupational Safety and Health Act (OSHA). This regulation, first proposed by OSHA in 1999 to clarify a policy formally adopted by the agency in 1994, is urgently needed to protect workers, and particularly low-wage, immigrant workers, from serious safety hazards. Action on the rule has been unreasonably delayed, and worker protection has suffered as a result. The Department should act immediately to adopt the final rule.

Background and History of the Rule

OSHA places the legal responsibility on employers to provide a safe workplace for employees. 29 USC 654(a). In furtherance of this statutory command, OSHA rules consistently provide that safety measures, such as training and protective equipment, must be provided by the employer at no cost to employees. For example, OSHA standards on lead (29 CFR 1910.1025), cotton dust (29 CFR 1910.1043), and asbestos (29 CFR 1910.1001) all state that where the use of respirators or protective clothing is required, that the employer shall provide them at no cost to the employee.

In 1994, OSHA adopted new rules governing the provision of personal protective equipment (PPE) to workers. The rules direct employers to determine what safety equipment, such as hardhats, protective gloves, and protective eyewear, is needed to protect workers from hazards, and to provide that equipment to workers. The rules are silent, however, on the issue of payment for that safety equipment.

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In 1994, OSHA issued a formal policy memorandum to its field staff setting forth the agency's position that, with limited exceptions, it is an employer's obligation to pay for safety equipment that is mandated by an OSHA standard, including the new PPE standard. That position was restated in a compliance directive on the PPE standard issued in 1995. However, in a 1997 decision, the Occupational Safety and Health Review Commission (OSHRC) rejected OSHA's policy, saying that the agency's position had been inconsistent over the years and was therefore not entitled to deference. Secretary of Labor v. Union Tank Car Co., 18 OSHC (BNA) 1067 (1997).

OSHA then decided to pursue rulemaking to clarify the issue of payment for PPE once and for all. On March 31, 1999, OSHA issued a Notice of Proposed Rulemaking. The comment period ended in June 1999. Public hearings were held in August 1999, and the record closed following submission of post-hearing comments in December 1999.

The rulemaking record overwhelmingly supported OSHA's determination that a rule was needed to clarify this issue and protect workers from the risks posed by their employer's failure to pay for protective equipment. Testimony from the UFCW, United Steelworkers, and other unions documented that without a requirement for employer payment, equipment was often improperly selected, poorly maintained, and used beyond its useful life, putting workers at risk of injury (Transcript of Rulemaking Hearing at pp. 84 - 185, 191, 197, 382-387). The need for employer payment to ensure worker protection was strongly reinforced by OSHA's expert witness, Jeffrey Stull, who as one example, described how the improper selection and care of fire resistant clothing could put petrochemical workers in serious danger, and the need to place the responsibility on the employer to select, maintain, and pay for such equipment. (Docket S-042, Exhibit 13-16-1).

NIOSH, the International Safety Equipment Association, the American Society of Safety Engineers, the State of Minnesota Department of Labor and Industry, and many other groups all strongly supported the issuance of the rule. (Docket S - 042, Exs. 12-130, 12-230, 12-110, 12-20). In addition, the rule was generally supported by a number of employer groups including Shell Offshore Inc. (Ex. 12-9), Southwestern Bell Telephone (Ex. 12-6), Heavy Constructors Association of The Greater Kansas City Area (Ex. 12-4), National Tank Truck Carriers, Inc. (Ex. 12-12), the Mechanical-Electrical-Sheet Metal Alliance (Ex. 12-79), and the American Trucking Association (Ex. 12-171).

Despite the clear demonstrated need and support for this requirement, the rule was not finalized and has lain dormant ever since. The rule has repeatedly slipped on OSHA's Regulatory Agenda, and most recently was listed as a long-term action with the notation "Next Action Undetermined." Thus, there is no indication that the agency intends to finalize this

much-needed rule, notwithstanding our understanding that a final rule is virtually finished and would require very little work to be completed.

Almost a decade has passed since OSHA adopted its revised PPE rules and issued its policy directive regarding an employer's obligation to pay for PPE. Six years have passed since

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OSHRC rejected OSHA's policy. Four years have passed since OSHA proposed a rule clarifying its policy, and almost that much time has passed since the record on this rulemaking closed. Nothing in the intervening years has altered the pressing need for this rule. This is a clear example of unreasonable agency delay, pure and simple, and workers are paying the price of delay.

The Rule is Urgently Needed to Address a Significant Workplace Risk

In proposing the payment for PPE rule, OSHA stated its belief that a rule clearly requiring employers to pay for safety equipment "will better protect employees from work-related illness, injury, and death." (64 FR 15403). The agency found that issuance of a rule requiring employer payment for protective equipment would significantly reduce the risk of injuries, preventing over 47,000 injuries and seven fatalities each year. (64 FR 15407). The agency noted that "[e]mployers are in a better position to identify and select the correct equipment and to maintain it properly. They have the financial resources to purchase PPE of necessary quality and to pay for replacements as necessary." (64 FR 15403). And, the agency pointed out that the rule "reflects the direction of the OSH Act and is consistent with the legislative history. 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." *Id.* The agency concluded that the proposed rule "will increase employee protection." *Id.* OSHA was right.

A rule clarifying an employer's responsibility to pay for safety equipment is particularly important to low-wage, immigrant workers who are at increased risk of injury due to their work in dangerous jobs and industries. Fatalities among immigrant and Hispanic workers are on the rise, while decreasing for other groups of workers. The same is true for lost workday injuries among Hispanic workers. These increases have been particularly acute in the construction industry, where protective equipment is often the primary control measure. These disturbing increases in workplace injuries and fatalities among Hispanic workers demand immediate attention, including the issuance of the final rule requiring Employer Payment for Personal Protective Equipment.

Low-wage workers are most acutely in need of the protection offered by the PPE rule. In the higher-wage industries, most employers routinely supply all required safety gear free of charge. Indeed OSHA found in its PPE Cost Survey (Docket S-042, Ex. 14) that most employer-required PPE is now currently being paid for in full by employers. However, in the low-wage industries, it is a far different story.

As OSHA pointed out in the preamble to the proposed rule, workers who are

required to bear the burden of paying for their own PPE will be less compliant on its use and will use equipment that is worn and less protective. (64 FR 15407). Workers who are required to purchase and pay for their own safety equipment are put in a position of making decisions that may compromise their health and safety to avoid suffering economic loss. The UFCW has observed workers sewing metal mesh gloves in an effort to repair them, in order to avoid purchasing new ones, which cost as much as \$65 to replace. Workers wear ear plugs that are dirty and misshaped. Workers go without rather than purchase a new set if they lose their ear plugs.

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It is primarily low-wage, immigrant workers who speak little English, working in some of the country's most hazardous industries, such as meatpacking and poultry plants, who are at the greatest risk and most need this rule.

Meatpacking remains the most dangerous of manufacturing jobs, with the highest rate of injury and illness. Nearly one in four meatpacking workers is injured on the job each year. Poultry ranks third among industries with the highest number of restricted day cases (a surrogate for significant injuries), as most companies today require injured workers to come to work rather than stay home and heal. And poultry workers are some of the lowest paid in the country, with an average hourly wage of \$7. The work is grueling and repetitious and purposely kept low in skill to keep the wages low.

Many workers in these industries rely on PPE as virtually their only measure of protection. For example, in the meat and poultry industries, metal mesh gloves are used to prevent knife cuts. Workers should not be required to bear the cost of this basic protection.

New immigrants in general, and Latinos in particular, often are employed in the least desirable jobs, in dangerous industries. Latinos often experience more employment insecurity and are therefore reluctant to complain, report workplace illnesses and injuries, or violations of the law. These workers are highly vulnerable to their employers passing along the cost of safety equipment to them, because their employers know they are unlikely to complain or report the violation.

The situation at a non-union meatpacking plant in Omaha, Nebraska, is a case in point. This plant has primarily a Hispanic workforce. The workers are required to wear rubber boots to reduce the risk of falling on slippery floors, but the employer deducts the cost of the boots from their paychecks. If the safety equipment workers wear to prevent knife cuts is lost or stolen, workers must pay for replacements. For some types of PPE, this company, like many others, furnishes only the first set of PPE, and after that, when the item is worn out, the worker must pay for its replacement. Workers faced with such policies frequently do not replace safety equipment when it wears out, because they cannot afford it or elect not to buy it. As a result, workers end up working with holes in their gloves, such that their hands are not protected from knife cuts, or wearing hearing protection that has lost its protective value due to wear.

The Department Professes Concern over Low-Wage Workers, Immigrant Workers, and Hispanic Workers, yet Refuses to Finalize a Rule that will Benefit These Workers Most

As the foregoing discussion demonstrates, low-wage workers, including many of

its most vulnerable, new Spanish-speaking immigrants, are bearing the brunt of OSHA's failure to act. The very group of workers that the Department of Labor has so publicly embraced are the ones who would be most helped by the issuance of this much-delayed rule.

The Bush Administration's FY 2004 budget proposal for OSHA specifically earmarked \$2.2 million in new funding for outreach to Spanish and other non-English-speaking workers. Assistant Secretary Henshaw has spoken of OSHA's commitment to all workers, "regardless of language or their immigration status." And you, Madam Secretary, stated that "We simply must do more for Hispanics in every workplace. Take worker safety. . . I am concerned that Hispanics are more likely than others to be injured on the job." (Speech to National Association of Hispanic Federal Executives, January 24, 2002). You cited many initiatives that OSHA and the Wage and Hour Division are undertaking to address language and pay, and concluded that "The entire Department of Labor . . . every agency is committed to helping the Hispanic workforce realize its full potential in the 21st century economy."

Similarly, in a speech to the National Safety Council, Assistant Secretary Henshaw recounted the initiatives OSHA is undertaking to assist Hispanic workers, and ended with "but we must do a lot more."

Immigrant workers need more than outreach and education. They need protection. We submit to you that completing and issuing this standard is one tangible, concrete step the Department can and should take to protect these workers.

The OSH Act Requires Employers to Pay for Workplace Safety Measures

The OSH Act requires employers to provide a safe and healthy workplace for workers and to comply with safety and health standards. As OSHA recognized in proposing the payment for PPE rule, the language, intent, and legislative history of the Act all support the principle that employers are required to provide and pay for the measures necessary to protect workers by controlling hazards which pose a risk of injury, illness, or death to their employees.

Indeed for more than 30 years in setting a wide variety of safety and health standards, OSHA has routinely required that employers both provide and pay for protective equipment such as respirators, hearing protectors, and protective clothing. The proposed Employer Payment for Personal Protective Equipment rule was properly intended to extend the same requirements to equipment covered by the 1910.132 regulation, so that the agency's regulations and policy on this matter would be consistent.

Just as the OSH Act requires employers to pay for engineering controls, such as ventilation and mufflers to control noisy equipment, the Act requires that the employer pay for personal safety equipment such as safety goggles and protective gloves. There has never been any ambiguity about who pays for engineering and administrative controls, and nor should

there be any question about payment for PPE. It would be totally contrary to the language and spirit of the OSH Act to permit employers to pass along the economic burden of safety controls to workers.

Similarly, many OSHA standards require employers to provide training and medical monitoring to workers. Just as there has never been any question about an employer's

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obligation to provide these measures at no cost to the employee, there should be no question about the employer's obligation to provide PPE.

Conclusion

We ask the Department to issue the final Employer Payment for Personal Protective Equipment rule immediately, and in no case later than 60 days of this petition. We appreciate your attention to this issue and look forward to your prompt response.

Respectfully Submitted,

International President

AFL-CIO

American Federation of State, County and Municipal Employees

United American Nurses/American Nurses Association

Building and Construction Trades Department, AFL-CIO

International Brotherhood of Teamsters

Union of Needletrades, Industrial and Textile Employees

United Automobile, Aerospace and Agricultural Implement Workers of America

United Steel Workers of America

cc: Assistant Secretary Henshaw