



**VOSH PROGRAM DIRECTIVE: 12-127**

**ISSUED: May 15, 2009**

**SUBJECT: Employer Duty to Provide Personal Protective Equipment (PPE) and Train Each Employee; Clarification of Final Rule; Parts 1910, 1915, 1917, 1918 and 1926; and Correction**

**A. Purpose.**

This directive transmits to field personnel federal OSHA's clarification concerning the employer's duty to provide personal protective equipment (PPE) and to train each employee in general industry, Shipyard Employment, Marine Terminals, Longshoring and Construction.

*This Program Directive is an internal guideline, not a statutory or regulatory rule, and is intended to provide instructions to VOSH personnel regarding internal operation of the Virginia Occupational Safety and Health Program and is solely for the benefit of the program. This document is not subject to the Virginia Register Act or the Administrative Process Act; it does not have general application and is not being enforced as having the force of law.*

**B. Scope.**

This directive applies to all VOSH personnel.

**C. References.**

73 FR 75568 (December 12, 2008); and  
74 FR 858 (January 9, 2009)

**D. Cancellation.**

Not Applicable.

**E. Action.**

Directors and Managers shall ensure that field personnel understand the standard clarifications included in this directive.

**F. Effective Date.**

July 15, 2009

**G. Expiration Date.**

Not Applicable.

**H. Background.**

This action, which is in accord with federal OSHA's longstanding position, was taken in response to recent decisions of the federal Occupational Safety and Health Review Commission (OSHRC) indicating that differences in wording among the various Personal Protective Equipment (PPE) and training provisions in federal OSHA safety and health standards affect federal OSHA's ability to treat an employer's failure to provide PPE or training to each covered employee as a separate violation.

The amendment stems largely from a decision of the OSHRC in the case of Mr. Erik K. Ho, a Houston businessman who hired 11 undocumented workers to remove asbestos but failed to provide them with respirators or training.

Mr. Ho originally was charged with separate violations for each employee not provided a respirator, as well as separate violations for each of the employees not offered training. The OSHRC vacated all but one of the respirator violations and all but one of the training violations, claiming that "the plain language of the standard addresses employees in the aggregate, not individually."

OSHRC's decision was later affirmed by the U.S. Court of Appeals for the Fifth Circuit, which found that the Secretary of Labor did not have the authority to charge employers with per-employee citations given the plain language of OSHA's standard (37 OSHR 1100, 12/6/07).

In its preamble to the final rule, federal OSHA stated that the Secretary of Labor believes that the OSHRC majority's analysis in *Ho* is fundamentally flawed for several reasons:

1) The *Ho* majority's analysis is inconsistent with the employee-specific nature of the employer's duty to provide PPE and training. The cited asbestos respirator and training provisions required analytically distinct acts for each employee, and therefore permitted per-employee citations. Therefore, Mr. Ho had to provide eleven separate respirators and ensure that each of the eleven employees used the devices. He also had to ensure that each employee received training on asbestos hazards.

2) The majority's analysis neither reflects Commission cases preceding *Ho*, nor more recent Commission case law. Previous Commission cases reflected the guiding principle distinguishing between requirements that apply individually to each employee, such as respirator provisions, and those that address hazardous conditions affecting employees as a group. Other cases recognize the principle that a requirement to provide respirators should be read in light of the associated provisions requiring individualized actions, such as individual fit-testing. The OSHRC's decision in the case of Mr. Ho did not follow prior precedent because "the requirement to provide respirators because of environmental hazards involves a separate discrete act for each employee exposed to the hazard.

3) The majority's analysis amounts to a "magic words" test for determining the nature of the duty to comply with PPE and training requirements that is at odds with the Secretary of Labor's intention and does not make practical sense. Federal OSHA did not intend that minor wording variations among various PPE and training provisions affect the agency's ability to cite on a per-employee basis.

Furthermore, there is no sound reason for distinguishing among the various PPE and training requirements based on minor differences in wording when all such requirements impose the same basic duty – provision of appropriate respirators and training to each employee covered by the requirements.

## **I. Summary.**

Federal OSHA revised the language of the initial respirator paragraphs, adopted in the 1998 respiratory protection rule, in its general industry, maritime and construction standards (Parts 1910, 1915, 1917, 1918 and 1926) to add language clarifying that the PPE and training requirements in safety and health standards in these parts impose a compliance duty to each and every employee covered by the standards and that non-compliance may expose the employer to liability on a per-employee basis.

The amendments revised the language of those initial training paragraphs that required the employer to institute or provide a training program to explicitly state that the employer must train each employee. This revision added a new section to the introductory Subparts of each Part to clarify that standards requiring the employer to provide PPE, including respirators, or to provide training to employees, impose a separate compliance duty to each employee covered by the requirement and that each instance of an employee who does not receive the required PPE or training may be considered a separate violation. This now allows the option for citing the employer for each individual violation for each employee, but does not require it.

Following the December 12, 2009, publication of the final rule for the Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee (73 FR 75568), federal OSHA discovered an error in the amendatory language of that final rule. The correction, located in §1926.1101 on page 75589, in the first column, Subpart Z, item 44, consisted of substituting “(h)(2)(i)” for “(h)(2)”. The corrected language now reads as follows: “In section 1926.1101, paragraphs (h)(1) introductory text, (h)(2)(i), and (k)(9)(i) are revised to read as follows:...”

The amendments added no new compliance obligations.

*C. Ray Davenport*  
Commissioner

Attachments: 73 FR 75568 (December 12, 2008) or refer to:  
[http://www.osha.gov/FedReg\\_oshapdf/FED20081212.pdf](http://www.osha.gov/FedReg_oshapdf/FED20081212.pdf)

74 FR 858 (January 9, 2009) or refer to:  
[http://www.osha.gov/FedReg\\_oshapdf/FED20090109.pdf](http://www.osha.gov/FedReg_oshapdf/FED20090109.pdf)

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**Clarification of Employer Duty to Provide Personal Protective Equipment (PPE) and  
Train Each Employee; Final Rule;  
Parts 1910, 1915; 1917; 1918; and 1926; and Correction**

As adopted by the  
Safety and Health Codes Board

Date: April 16, 2009



VIRGINIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY

Effective date: July 15, 2009

- 16 VAC 25-90-1910.9, Compliance duties owed to each employee, 1910.9;
- 16 VAC 25-90-1910.95, Occupational noise exposure, 1910.95;
- 16 VAC 25-90-1910.134, Respiratory protection, 1910.134;
- 16 VAC 25-90-1910.156, Fire brigades, 1910.156;
- 16 VAC 25-90-1910.1001, Asbestos, 1910.1001;
- 16 VAC 25-90-1910.1003, 13 Carcinogens (4-Nitrobiphenyl, etc.), 1910.1003;
- 16 VAC 25-90-1910.1017, Vinyl chloride, 1910.1017;
- 16 VAC 25-90-1910.1018, Inorganic arsenic, 1910.1018;
- 16 VAC 25-90-1910.1025, Lead, 1910.1025;
- 16 VAC 25-90-1910.1026, Chromium (VI), 1910.1027;
- 16 VAC 25-90-1910.1027, Cadmium, 1910.1027;
- 16 VAC 25-90-1910.1028, Benzene, 1910.1028;
- 16 VAC 25-90-1910.1029, Coke oven emissions, 1910.1029;
- 16 VAC 25-90-1910.1030, Bloodborne pathogens, 1910.1030;
- 16 VAC 25-90-1910.1043, Cotton dust, 1910.1043;
- 16 VAC 25-90-1910.1044, 1,2-dibromo-3-chloropropane, 1910.1044;
- 16 VAC 25-90-1910.1045, Acrylonitrile, 1910.1045;
- 16 VAC 25-90-1910.1047, Ethylene oxide, 1910.1047;
- 16 VAC 25-90-1910.1048, Formaldehyde, 1910.1048;

16 VAC 25-90-1910.1050, Methylenedianiline, 1910.1050;  
16 VAC 25-90-1910.1051, Butadiene, 1910.1051;  
16 VAC 25-90-1910.1052, Methylene chloride, 1910.1052;  
16 VAC 25-100-1915.9, Compliance duties owed to each employee, 1915.9;  
16 VAC 25-100-1915.1001, Asbestos, 1915.1001;  
16 VAC 25-100-1915.1026, Chromium (IV), 1915.1026;  
16 VAC 25-120-1917.5, Compliance duties owed to each employee, 1917.5;  
16 VAC 25-130-1918.5, Compliance duties owed to each employee, 1918.5;  
16 VAC 25-175-1926.20, General safety and health provisions, 1926.20;  
16 VAC 25-175-1926.60, Methylenedianiline, 1926.60  
16 VAC 25-175-1926.62, Lead, 1926.62  
16 VAC 25-175-1926.761, Training, 1926.76;  
16 VAC 25-175-1926.1101, Asbestos, 1926.1101;  
16 VAC 25-175-1926.1126, Chromium (IV), 1926.1126; and  
16 VAC 25-175-1926.1127, Cadmium, 1926.1127

When the regulations, as set forth in the Clarification to the final rule on Employer Duty to Provide Personal Protective Equipment and Train Each Employee, are applied to the Commissioner of the Department of Labor and Industry and/or to Virginia employers, the following federal terms shall be considered to read as below:

Federal Terms

VOSH Equivalent

29 CFR

VOSH Standard

Assistant Secretary

Commissioner of Labor and Industry

Agency

Department

January 12, 2009

July 15, 2009