

September 17, 2008

OSHA Docket Office, Docket Number OSHA- 2008-0031  
U.S. Department of Labor  
Room N-2625  
200 Constitution Ave., N.W.  
Washington, DC 20210

**Re: OSHA, Clarification of Remedy for Violation of Requirements to  
Provide PPE and Train Employees Proposed Rule, 73 Federal Register,  
August 19, 2008**

To Whom It May Concern:

The American Health Care Association (AHCA) and the National Center for Assisted Living (NCAL) welcome the opportunity to provide comments to the Occupational Safety and Health Administration (OSHA) on this proposed guidance to clarify remedies for violations of employers' requirements to provide and train employees on personal protective equipment (PPE,) including respirators. AHCA and NCAL represent more than 10,000 non-profit and for-profit providers dedicated to continuous improvement in the delivery of professional and compassionate care for our nation's frail, elderly and disabled citizens who live in long term care (LTC) facilities, including nursing facilities (NFs,) assisted living (AL) residences, sub-acute centers and homes for individuals with developmental disabilities. Our member facilities employ nearly one million workers, the majority of whom are front-line caregivers. On behalf of our more than 10,000 LTC employers, their employees and the patients that they serve, we submit the following comments on this proposed rule.

**Executive Summary**

In this rulemaking, OSHA is proposing to amend its regulations to add language clarifying that noncompliance with the personal protective equipment (PPE) and training requirements in safety and health standards in 29 CFR Parts 1910, 1915, 1917, 1918 and 1926 may expose the employer to liability on a per-employee basis.

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**Bruce Yarwood**  
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The amendments consist of new paragraphs added to the introductory sections of the listed parts and changes to the language of some existing respirator and training requirements. Specifically:

(1) Revise the language of the initial respirator standard paragraphs to explicitly state that the employer must provide each employee an appropriate respirator and implement a respiratory protection program for each employee;

(2) Revise the language of those initial training paragraphs that require the employer to institute or provide a training program to explicitly state that the employer must train each employee; and

(3) Add 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 employee who does not receive the required PPE or training may be considered a separate violation.

### **AHCA/NCAL's Comments and Recommendations**

#### **Instance of Violation**

On p. 48337 of the rule, OSHA states “The Agency interprets its respirator and training provisions to impose a duty upon the employer to comply for each and every employee subject to the requirement regardless of whether the provision expressly states that respirators or training must be provided to “each employee....” OSHA goes on to state: “What constitutes an instance of a violation for which a separate penalty may be assessed depends upon the nature of the duty imposed by the standard or regulation at issue. If the standard “prohibits individual acts rather than a single course of action,” each prohibited act constitutes a violation for which a penalty may be assessed.” OSHA uses this interpretation to justify the violation-by-violation aspect of the rule.

In contrast, on p. 48338, OSHA states that “where a single practice, method or condition affects multiple employees, there can be only one violation of the standard.” As stated in the rule, this is exemplified in the *Hartford Roofing* case, in which the Commission held that abatement of an unguarded roof edge required the single action of installing a motion stopping system or line that would constitute compliance for all employees exposed to a fall. Accordingly, the failure to abate the hazard could be cited only once regardless of the number of exposed employees. OSHA uses this case as an example of why a single citation is not appropriate for PPE infractions.

AHCA/NCAL offer the following comments relating to the above sections of the rule:

- a. Comparing the *Hartford* case, in which the unguarded roof constituted a different type of violation calculation than the Agency’s respiratory training interpretation, regardless of the number of exposed employees, does not make sense. Non-compliance with any standard can place employees at risk of injury or death, regardless of whether the standard(s) require single or multiple actions by the employer.

b. According to OSHA's CPL 2.80 Directive "Handling of Cases to Be Proposed for Violation-by-Violation Penalties," released on October 21, 1990, it is inappropriate for conditions not constituting "a flagrant violation of the Occupational Safety and Health Act (the Act)" to be eligible for violation-by-violation handling. Clearly, not all PPE infractions constitute flagrant violations. Therefore, instituting a blanket violation-by-violation citation system is completely inappropriate unless the violation is in fact deemed flagrant.

c. As LTC facilities are largely funded by Medicaid, financial reserves are limited. In fact, in many states, Medicaid reimbursement is less than the facility's cost to provide care. This violation-by-violation penalty could significantly drain resources that would be better applied to training programs on employee and patient safety, as well as for general patient care.

d. NFs, which undergo federal surveys annually, receive one blanket citation, evaluated for scope and severity of infraction, for a deficient care issue from the Centers for Medicare and Medicaid Services (CMS) and from the National Fire Protection Association's (NFPA) life safety code inspectors. There is a cap to monetary penalties of citations by these agencies. It would make sense then for OSHA to follow that generally accepted system of one citation unless violations are egregious.

Therefore, AHCA/NCAL makes the following recommendations:

- *AHCA/NCAL recommends that one blanket PPE violation be cited to cover all employees who have not received the appropriate PPE or training and education if the violation is not flagrant in nature. We further recommend that there should be a maximum cap to the fines imposed.*
- *If the PPE violation appears flagrant, OSHA must follow the criteria outlined in previously mentioned OSHA's CPL 2.80 Directive "Handling of Cases to Be Proposed for Violation-by-Violation Penalties."*

#### Determination of Non-Compliance

AHCA/NCAL are pleased that OSHA recognizes in this proposed rule that PPE compliance is only mandated for employees that are required to use the PPE due to specific exposures and that this limitation includes respirators. It is difficult to determine whether, when employees are not using PPE or are using it incorrectly, if that is due to insufficient training on the part of the employer or if it is the fault of the employee(s) involved. Notably, LTC facilities regularly train staff on numerous safety measures, including glove use, handling of bloodborne pathogens, etc., and keep records of that training. This documentation that training has occurred, that PPE is supplied, and that employees stated that they understood the training upon its completion should be adequate evidence to OSHA that the employer is in compliance.

It should be noted that most LTC facilities, upon their mandated completion of the Centers for Disease Control and Prevention's (CDC) tuberculosis risk assessment, score

low risk and are not required to have a respiratory program in place. Ultimately, if fit testing is not required, training is not really “employee specific” for respirators, so the violation by violation citations are inappropriate.

Therefore, AHCA/NCAL makes the following recommendation:

- *AHCA/NCAL recommends that OSHA review LTC facilities training records for PPE use, which may include respirator training when appropriate, to evaluate whether the employer is providing employees with PPE and training them on appropriate use.*

### **Conclusion**

The main purpose of PPE training in LTC facilities is to reduce employee exposure to hazards in the workplace, as well as to try to protect patients from illness or injury. AHCA/NCAL believes that the rule, as currently proposed, will not further this effort. Thus, we recommend the above mentioned reasonable and practical changes that would more appropriately penalize employers who fail to provide suitable PPE and training.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Yarwood". The signature is stylized with a large, sweeping flourish at the end.

Bruce Yarwood  
President and CEO

Cc: AHCA Workforce Committee, NCAL Human Resources Committee