

# CONSTRUCTION INDUSTRY SAFETY COALITION

September 18, 2023

The Honorable Doug Parker  
Assistant Secretary  
Occupational Safety and Health Administration  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

Re: Construction Industry Safety Coalition  
Comments to NPRM on Personal Protective Equipment in Construction  
Docket No. OSHA-2019

## **I. Clarification is Needed on How OSHA Intends to Enforce the Rule in Construction**

In discussing enforcement of the proposed rule, OSHA references historical data on enforcement of the general and maritime PPE standards, along with data concerning enforcement of the present ion of the proposed language requiring properly fitting PPE in the construction standard would be the same as for general (NPRM, 88 Fed. Reg. at 46711.) OSHA appears to take the position that construction industry will track prior enforcement of general industry and maritime PPE regulations which require that employers select PPE that properly fits each affected employee. (*Id.*)

OSHA refers to Appendix B of 29 CFR 1910, Subpart I (PPE), which provides:

5. Fitting the device. Careful consideration must be given to comfort and fit. PPE that fits poorly will not afford the necessary protection. Continued wearing of the device is more likely if it fits the wearer comfortably. Protective devices are generally available in a variety of sizes. Care should be taken to ensure that the right size is selected.

(*Id.*)

it distracts employers from their primary goal of ensuring worker safety and instead imposes regulatory burdens and unnecessary additional costs. If no clarification is added, the CISC anticipates that the subjective nature of the proposed rule will greatly increase the potential for enforcement actions without giving fair notice of what is required.

Another complicating factor impacting enforcement of the proposed rule is that OSHA inspectors themselves have not had a lens towards the issue of improperly fitting PPE. In fact, OSHA acknowledges that from 1994 to 2021, only nine citations have concerned improperly fitting PPE, the majority of which concerned gloves. It is well-known that gloves are only one type of PPE that is used on a construction worksite, but the only data employers can evaluate to determine how the proposed rule could be enforced in the construction industry predominantly concerns gloves. Without any additional guidance on enforcement efforts, employers will face uncertainty as to how investigators will evaluate concerns with the myriad of other PPE that is available on a construction site. Absent a clarification by OSHA, employers will be left trying to comply with vague language that is open to subjective interpretation by inspectors.

Finally, improperly fitted PPE is not always plainly visible. -  
employer enforcement policy as applied to construction sites will result in disparate enforcement. The proposed rule raises several unanswered questions that OSHA must address prior to finalizing any standards on these issues. Some questions the CISC poses to OSHA include:

- (1) Will a controlling employer be cited for failing to identify ill-rement even if the fit is not readily obvious?
- (2) Similarly, when improper fit is the result of improper use, will that result in new or additional liability for the employer?
- (3) Will accident investigations now require a causal determination to determine if improper fit was the citable offense?
- (4) How do employers contend with personal preferences regarding loose fitting clothing and body consciousness?
- (5) Will improper fit of adjustable items result in training violations?
- (6) Will affirmative defenses be available to employers where improper fit is the result of improper use, or will employers be strictly liable for fit issues?

These are serious issues to the construction industry that require clarification, and which are not

rule.

ples, but in order to comply with the proposed rule, employers must know what specific hazards they need to pay attention to. OSHA cannot expect employers to comply with the proposed rule when the position advanced by OSHA -which ill-

(*Id.*

PPE above-and-beyond the equipment that is already provided, which is of safe design and of safe construction for the work to be performed, because failing to have PPE that fits any particular

exists.

comply with the proposed rule, employers will be forced to re-evaluate every single piece of PPE they provide to their employees. Employers will be tasked with identifying additional hazards that could r situation. This is not a reasonable approach, and it does not improve workplace safety. Given that there are more types of PPE in the construction industry besides just gloves, clothes, and eye protection, OSHA should provide notice of specific hazards that are associated with PPE that does not properly fit. OSHA should clarify

efforts to fully comply with the rule and not be subject to arbitrary enforcement by an investigator who may

### **III. OSHA Should Develop Meaningful Guidance Consisting of Specific Criteria**

OSHA identifies existing guidance concerning PPE; however, it is not adequate for purposes of the construction industry. In part, this is because clarification is needed on how OSHA intends to

; it only makes generalized statements about hazard assessment and the importance of proper fit. (*Id.* at 46710.)

For example, the cited *Fact Sheet on Personal Protective Equipment* (April 2006) only specifically addresses fit for pre-molded earplugs and respiratory protection. However, fit for these items is readily and objectively determined by professional testing. Similarly, the cited *Personal Protective Equipment*, OSHA 3151

tion adequate? If not, what type of additional guidance should OSHA provide?

Helpful guidance would consist of specific fit criteria for each type of PPE and factors for measuring the same. In addition, to the extent OSHA can identify PPE where proper fit is less of an additional concern, it would allow employers to focus on those items where OSHA has identified \_\_\_\_\_ as being problematic and related to actual hazards. As it stands, employers are left to guess what OSHA intends when it lists otherwise adjustable safety goggles, earmuffs, \_\_\_\_\_ contention that the new language would not impact how all PPE is selected, guidance identifying *status quo* items would be helpful along with specific fit criteria for those items that are of specific concern.

#### **IV. There is a Lack of Specificity with the Proposed Definition, Likely Resulting in Confusion Among the Regulated Community**

OSHA states \_\_\_\_\_ appropriate size to provide an employee with the necessary protection from hazards, and does not create additional safety and health hazards arising from being either too small or too large. When PPE fits properly, employees are unlikely to discard or modify it because of discomfort or \_\_\_\_\_ (*Id.* at 46712.) This definition neither clarifies the issue nor limits any concern.

For example \_\_\_\_\_ appropriate \_\_\_\_\_ necessary \_\_\_\_\_ additional and open to multiple interpretations. These open-ended terms leave too much discretion to both employers who are purchasing PPE and investigators enforcing the regulation. The CISC is concerned that some \_\_\_\_\_ types of equipment. Without further clarification, employers will not have sufficient information to understand whether they are complying with the regulation. This will undoubtedly create due process issues where employers are able to allege a lack of notice regarding what the regulation requires, and investigators are able to arbitrarily enforce the proposed rule.

#### **V. OSHA Ignores the Unique Characteristics of the Construction Industry in Aligning its PPE Standard with General Industry and Maritime**

Construction sites are fundamentally different than general industry and maritime work environment. The construction industry does not operate in static permanent worksites, where hazards have long since been identified and documented. Every worksite is different and poses an array of potential hazards, which change daily. What PPE is needed and when, can vary from day to day depending on the activities performed on a jobsite. Unlike a static work environment where a worker does the same activity in the same conditions every day, a construction site is dynamic by nature. This is why the current standard, which focuses on the functionality of PPE *vis a vis* a specific work activity, made sense because it was flexible as long as it met the requirements of prote \_\_\_\_\_ result in sites being less safe. The CISC is not taking the position that employees should be forced to struggle with hazardously ill-



Sincerely,

American Road and Transportation Builders Association  
American Subcontractors Association  
Associated Builders and Contractors  
Associated General Contractors  
Association of the Wall and Ceiling Industry  
Concrete Sawing & Drilling Association  
Construction & Demolition Recycling Association  
Distribution Contractors Association  
Independent Electrical Contractors  
Leading Builders of America  
Mason Contractors Association of America  
Mechanical Contractors Association of America  
National Association of Home Builders  
National Association of the Remodeling Industry  
National Electrical Contractors Association  
National Roofing Contractors Association  
National Utility Contractors Association  
Tile Roofing Industry Alliance