

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-2019-0003

Dear Mr. Parker:

The Construction Industry Safety Coalition (“CISC” or the “Coalition”) respectfully submits these comments in response to the Occupational Safety and Health Administration’s (“OSHA” or the “Agency”) Notice of Proposed Rulemaking (“NPRM” or the “proposed rule”) concerning Personal Protective Equipment in Construction, 88 Fed. Reg. 46706 (July 19, 2023).

The CISC is comprised of 30 trade associations representing virtually every aspect of the construction industry, including commercial building, heavy industrial production, home building, road repair, specialty trade contractors, construction equipment manufacturers, and material suppliers. The Coalition provides data and information to OSHA on regulatory, interpretive, and policy initiatives. The CISC speaks for small, medium, and large contractors, general contractors, subcontractors, and union contractors alike.

Workplace safety and health is a priority for all members of the Coalition, and each is committed to helping create safer construction jobsites for workers. The myriad of educational materials, training programs and other resources developed by members of the Coalition indicates the CISC’s dedication to taking a proactive approach to worker safety and health.

While CISC agrees that Personal Protective Equipment (PPE) is an essential element of an effective health and safety program, CISC members remain concerned that OSHA’s proposed revisions to the PPE standard for construction (29 CFR 1926.95(c)) will impact its members by imposing a new and wholly vague standard for PPE on the construction industry by including a requirement that PPE “properly fit.” CISC previously submitted comments to the changes imposed in the SIP-IV on July 4, 2017, which specifically addressed OSHA’s proposed revision of the PPE standard. CISC therein raised issues regarding the scope of the proposed change and the lack of adequate notice of what “properly fit” would mean in terms of compliance. While OSHA acknowledged the CISC’s comments, OSHA did not adequately consider the points previously made by the CISC. CISC appreciates the opportunity to submit additional comments and, to supplement what the Coalition has submitted previously, CISC submits these comments to seek clarification on two issues raised by the NPRM, and to address specific questions posed by OSHA within the proposed rule.

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 construction standard, noting that it “anticipates that application of the proposed language requiring properly fitting PPE in the construction standard would be the same as for general industry and maritime.” (NPRM, 88 Fed. Reg. at 46711.) OSHA appears to take the position that its enforcement of “proper fit” in the 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.*) OSHA states that similar guidance would apply to the new construction standard and cites examples of citations issued under the general industry and maritime standards, most of which relate to ill-fitting gloves. (*Id.*) OSHA then states that it found nine instances where a citation was issued for ill-fitting PPE under the current construction standard out of 1,722 citations issued for PPE violations. (*Id.*) These construction citations were limited to ill-fitting gloves and eyewear that did not fit over prescription sunglasses. (*Id.*)

OSHA takes the position that “these [nine] citations” help to demonstrate that fit has always been an important part of meeting the PPE requirements in OSHA's construction standards. (*Id.*) Because less than one percent of all prior PPE citations involved improper fit, it is unclear to the Coalition why revisions to these standards are needed. Furthermore, the information fails to provide meaningful guidance on how the revised standard will be enforced in the construction context. While OSHA has determined fit of PPE to be a problem requiring specific regulatory attention, the examples do not provide clarity on how *improper* fit was determined in these cases. Additionally, the examples involve very limited types of PPE, and fail to provide context as to how the new rule will be enforced going forward.

There is nothing in the discussion on the proposed rule that demonstrates how investigators will be evaluating PPE for compliance. Whether fit will be checked by investigators during inspections or site visits, what factors (subjective or objective) they will consider in determining compliance, what employers can and should be doing in response to concerns about improperly fitting PPE, and any other circumstances that will be evaluated. Instead, OSHA assumes that investigators will evaluate the construction industry the same way they evaluate other industries (including maritime industries). This presents confusion as construction is unique to the other industries being evaluated. In short, there is a substantial and justifiable concern that employers will be held to subjective standards of whether particular PPE fits properly and what steps employers must take to ensure they are in compliance. Being held to subjective standards does not make worksites safer

– 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. CISC is concerned that OSHA’s multi-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-fitting PPE under “plain sight” enforcement 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 resolved by OSHA’s reference to prior enforcement concerning ill-fitting gloves.

II. Clarification is Needed on the “Additional Hazards” Improperly Fitted PPE May Cause

The CISC agrees that PPE is an essential element of an effective health and safety program. The current standard requires that PPE be of safe design and construction for the work being performed. (29 CFR 1926.95.) There is currently a clear correlation to the hazard (*i.e.*, the work) and the PPE’s design. OSHA seeks to justify its rulemaking by making reference to “additional hazards” that result from ill-fitting PPE. (*Id.* at 46710.) OSHA then cites examples concerning improperly fitting gloves, clothes, and eye-protection. (*Id.*) However, it is not entirely clear that the examples given

are “additional hazards.” Moreover, these issues appear to be adequately addressed by the current rule.

The CISC appreciates OSHA’s attempts to provide examples, 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 states “there are some cases in-which ill-fitting PPE may create additional hazards for employees.” (*Id.*) Taking OSHA’s position to its conclusion demonstrates that employers must provide more 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 person may result in there being an “additional hazard” that an investigator can arbitrarily conclude exists.

Without additional clarification on what “additional hazards” employers must address in order to 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 result from their PPE not “properly fitting” in every 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 what “additional hazards” improperly fitting PPE may cause so that employers can take reasonable efforts to fully comply with the rule and not be subject to arbitrary enforcement by an investigator who may think that an “additional hazard” exists in an enforcement proceeding.

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 determine proper fit for enforcement purposes and what constitutes an “additional hazard.” Additionally, the cited “guidance” does not address all categories of PPE; 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 3151–12R, 2004, makes repeated reference to fit, but fails to provide objective criteria. Instead, the guidance makes reference to both fit and comfort equally. For example, head protection should not slip or fall off, but it also must not irritate the skin. There are no meaningful criteria provided to balance these factors, or guidance as to which will lead to a potential citation. Is comfort important because it encourages employees to keep PPE on, or is it a citable offense even if “uncomfortable” PPE is being worn?

The Advisory Committee on Construction Safety and Health (ACCSH) recommended that OSHA consider developing additional guidance to explain what “proper fits” means for PPE used in construction. (ACCSH Meeting Transcript, July 17, 2019). Is existing OSHA guidance

regarding PPE “proper fit” in construction 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 “improper fit” 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, face shields and even aprons as “not universal fit.” If it is OSHA’s 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 that “properly fits” for PPE in the construction industry means that the “PPE is the 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 interference with their work activities.” (*Id.* at 46712.) This definition neither clarifies the issue nor limits any concern.

For example, whether something is of an “**appropriate** size,” provides “**necessary** protection” and does not create “**additional** safety and health hazards” is vague 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 inspectors may read “appropriate size” to mean “exact fit,” which is simply not feasible for 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 protecting employees. Interjecting “proper fit” into this environment is overly complex and may result in sites being less safe. The CISC is not taking the position that employees should be forced to struggle with hazardously ill-fitting PPE. The CISC’s concern is that the application of a “proper

fit” rule in construction is an overly broad action without any demonstrable safety issue apart from the few citations identified above concerning gloves.

Additionally, construction sites have multiple employers onsite, and are uniquely subject to multi-employer enforcement. The CISC is concerned that OSHA has not considered how this rule will be enforced in that context.

The CISC urges OSHA to consider the unique challenges faced by the construction industry before summarily assuming that enforcement and compliance issues will be identical.

VI. CISC is Concerned About Potential Burdens Imposed on Employers

OSHA’s efforts to explicitly require employers to ensure that all PPE properly fits employees greatly changes the dynamic of the prior standard and places enormous new responsibilities on construction employers, thus substantially increasing their regulatory burdens. While OSHA does not expect the change to increase cost or compliance burdens, there is no basis for this expectation. The proposed rule does much more than simply clarify a provision, but instead opens up construction employers to subjective standards of whether particular PPE fits properly and what steps employers must take to ensure that such PPE fits properly, particularly when most PPE does not come in exact sizing for employees.

Other specific and unreasonable burdens placed on construction employers because of the proposed rule include, but are not limited to:

- Requiring employers to make certain generic construction PPE available in all types of different sizes and fits to meet this standard.
- Requiring employers to substantially increase, maintain, and replace the overall stock of available PPE.
- Leaving employers open to enforcement actions without giving fair notice of what is required.
- Imposing new obligations on controlling employers to do more than enforce the use of PPE.
- Forcing employers to engage in compliance efforts in advance of final adoption of the proposed rule without any guarantee that such efforts would ensure compliance with the new requirements.

VII. Conclusion

The CISC remains committed to workplace safety for construction employees. For the foregoing reasons, the CISC urges OSHA to clarify what it means by the terms “properly fit” and “additional hazards” and that the clarification includes specificity so that covered industries better understand their compliance obligations. In addition, the CISC urges OSHA to clarify how it will enforce this regulation and delineate objective measures regarding what constitutes “improper fit.” The CISC appreciates the opportunity to comment on this proposal and looks forward to working with the agency as it continues to develop this regulation.

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