

# OSHA Advisory: D.C. Circuit Upholds OSHA's Authority to Impose Separate Penalties for Each Employee Affected by Violations of Personal Protective Equipment Standards

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Last week, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Occupational Safety and Health Administration (OSHA) has the authority to impose penalties on employers on a per-employee basis for each individual employee affected by an employer's violation of OSHA's Personal Protective Equipment (PPE) rules. *See Nat'l Ass'n of Home Builders, et al. v. OSHA*, No. 09-1053, 2010 WL 1508069 (D.C. Cir. Apr. 16, 2010).

This matter originated in 1998 when a Houston contractor hired 11 workers to remove asbestos from a building but did not provide them training or respirators as required by OSHA's PPE rules. *Sec'y of Labor v. Ho et al.*, Nos. 98-1645, 98-1646, 2003 WL 22232014 (O.S.H.R.C. Sept. 29, 2003), *aff'd, partly on other grounds, Chao v. Occupational Safety & Health Review Comm'n*, 401 F.3d 355 (5th Cir. 2005); *see also* 29 C.F.R. § 1910.9(a), (b); 29 C.F.R. § 1910.132-1910.138. OSHA cited the contractor for 22 separate violations: 11 for not training **each** worker and 11 for not providing a respirator for **each** worker. The Occupational Safety and Health Review Commission, an independent tribunal authorized to hear employers' objections to OSHA citations, overturned the majority of the citations, and found that OSHA only had the authority to issue two citations: one for not training the workers and one for not providing them with respirators.

In response to this decision, OSHA amended the PPE rules in 2008 to clarify its authority to penalize an employer on a per-employee basis for failing to provide training and respirators. *See, e.g.*, 29 C.F.R. 1926.20(f).

The National Association of Home Builders challenged the amended rules and sued OSHA, arguing that OSHA did not have the authority to cite employers on the basis of each employee affected by a violation of the PPE rules. More specifically, the National Association of Home Builders claimed that the authority to set penalties lay exclusively with the Occupational Safety and Health Review Commission, and not OSHA.

The U.S. Court of Appeals for the District of Columbia Circuit disagreed, finding that OSHA has "the authority to define the unit of prosecution" and could treat each worker not trained or provided with respirators as separate violations. While the court's decision appears to be limited to the PPE rules, it may serve as precedent for OSHA to enforce other federal workplace safety and health rules on an individual-employee basis.

## **Action Items for Employers**

This ruling underscores the importance to employers who are subject to the PPE rules of abiding by those rules, and exponentially increases the potential penalties for not doing so. In addition, all employers should recognize that the D.C. Circuit's ruling may presage a broader application by OSHA of "per-employee" violations and penalties.

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