

comment does not include any sensitive health information, including medical records or other individually identifiable health information. In addition, your comment should not include any “[t]rade secret or any commercial or financial information which is . . . privileged or confidential”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at [www.regulations.gov](http://www.regulations.gov), we cannot redact or remove your comment unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this publication and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before August 21, 2023. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

By direction of the Commission.

**April J. Tabor,**  
Secretary.

[FR Doc. 2023–15415 Filed 7–19–23; 8:45 am]

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## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Part 1926

[Docket No. OSHA–2019–0003]

RIN 1218–AD25

### Personal Protective Equipment in Construction

**AGENCY:** Occupational Safety and Health Administration (OSHA); Labor.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** OSHA is proposing to revise its personal protective equipment standard in construction to explicitly require that the equipment must fit properly. The agency requests comments regarding the proposed revision.

**DATES:** Submit comments and attachments, as well as hearing requests and other information, by September 18, 2023. All submissions must provide evidence of the submission date. (See the following section titled **ADDRESSES** for instructions on making submissions.)

**ADDRESSES:** Comments may be submitted as follows:

*Written comments:* You may submit comments and attachments, as well as hearing requests and other information, identified by OSHA Docket No. OSHA–2019–0003, electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the online instructions for submitting comments.

*Instructions:* All submissions must include the agency’s name and docket number for this rulemaking (Docket No. OSHA–2019–0003). All comments, including any personal information you provide, are placed in the public docket without change and may be made available online at <http://www.regulations.gov>. Therefore, OSHA cautions interested parties about submitting personal information such as Social Security numbers and birthdates.

*Docket:* To read or download comments or other information in the docket, go to <http://www.regulations.gov>. All comments and submissions are listed in the <http://www.regulations.gov> index; however, some information (e.g., copyrighted material) is not publicly available to read or download through that website. All comments and submissions, including copyrighted material, are available for inspection through the

OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2500 (TDY number 877–889–5627) for assistance in locating docket submissions.

#### FOR FURTHER INFORMATION CONTACT:

*Press inquiries:* Frank Meilinger, Director, OSHA Office of Communications, telephone: (202) 693–1999; email: [meilinger.francis2@dol.gov](mailto:meilinger.francis2@dol.gov).

*General and technical inquiries:* Vernon Preston, OSHA Directorate of Construction, telephone: (202) 693–2020; email: [preston.vernon@dol.gov](mailto:preston.vernon@dol.gov).

*Copies of this Federal Register notice and news releases:* Electronic copies of these documents are available at OSHA’s web page at <http://www.osha.gov>.

#### Citation Method

In the docket for the personal protective equipment in construction rulemaking, found at <http://www.regulations.gov>, every submission was assigned a document identification (ID) number that consists of the docket number (OSHA–2019–0003) followed by an additional four-digit number (e.g., OSHA–2019–0003–0002). In this notice of proposed rulemaking, citations to items in the docket are referenced by author or title and date, where appropriate. This information can be used to search for a supporting document in the docket at <http://www.regulations.gov>. For example, the citation for the OSHA Publication *Personal Protective Equipment* is (*Personal Protective Equipment*, OSHA 3151–12R, 2004). Some citations include one or more attachments (see, e.g., NABTU, January 5, 2017, Attachment 1). When citing exhibits in the docket, OSHA references the author or title of the document, the date, the attachment number or other attachment identifier, if necessary for clarity, and page numbers (designated “p.”). In a citation that contains two or more documents, the citations are separated by semicolons. OSHA may also cite items that appear in another docket. When that is the case, OSHA includes the full document ID number for the corresponding docket (e.g., OSHA–2010–0034–4247).

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## I. Executive Summary

OSHA is proposing to revise its Personal Protective Equipment (PPE) standard for construction, at 29 CFR 1926.95(c), to explicitly state that PPE must fit properly to protect workers from workplace hazards. This revision would align the language in the PPE standard for construction with the corresponding language in OSHA's PPE standards for general industry and maritime and affirm OSHA's interpretation of its PPE standard for construction as requiring properly fitting PPE. Properly fitting PPE is a critical element of an effective occupational safety and health program. PPE must fit properly in order to provide adequate protection to employees. Improperly fitting PPE may fail to provide any protection to an employee, may present additional hazards, or may discourage employees from using such equipment in the workplace.

The Preliminary Economic Analysis to this rulemaking demonstrates that this rule is not economically significant or a major rule. Because this proposal clarifies an existing requirement, the agency preliminarily concludes that the rule is not expected to impose new costs on employers as a result of a new regulatory requirement. OSHA normally assumes full compliance with existing requirements when performing its analysis of costs related to a new or amended standard. However, in this case, the purpose of the proposed rule is to clarify an existing requirement about which there may be confusion in the regulated community. OSHA therefore seeks public comment on the impact of this clarification, if any, on current employer behavior.

To the extent the clarification in this rule could result in changes in behavior among some employers, OSHA has provided an estimate of the costs for a specified proportion of employers to come into compliance with the already-existing requirement to provide

properly fitting PPE. This analysis is being provided as a starting point for public comments and to demonstrate that, even if there were costs to this rule as a result of changed employer behavior, the rule would be feasible to implement. OSHA's cost analysis indicates that the one-time cost of this rulemaking to the construction industry, attributable to potential changes in employer behavior, could be approximately \$545,000. To the extent that the rulemaking record indicates there will be changes in employer behavior, and associated costs, as a result of the proposed clarification, OSHA expects that worker safety and health will benefit.

## II. Background

### A. OSHA's PPE Requirements

Section 6(b)(7) of the OSH Act, 29 U.S.C. 655(b)(7), authorizes OSHA to include requirements for protective equipment within its safety and health standards. PPE is worn by employees to minimize exposure to hazards that can cause severe injuries and illnesses in the workplace. These injuries and illnesses may result from contact with chemical, radiological, physical, electrical, mechanical, or other hazards. PPE includes many different types of protective equipment, such as hard hats, gloves, goggles, safety shoes, safety glasses, welding helmets and goggles, hearing protection devices, respirators, coveralls, vests, and full body suits.

OSHA has specific standards that address PPE in general industry, shipyard employment, maritime terminals, longshoring, and construction. These standards require employers to provide PPE when it is necessary to protect employees from job-related injuries, illnesses, and fatalities. With few exceptions, OSHA requires employers to pay for PPE when it is used to comply with an OSHA standard. In addition, the PPE standards for general industry (29 CFR 1910.132(d)(1)(iii)) and maritime (29 CFR 1915.152(b)(3)) include a specific requirement that employers select PPE that properly fits each affected employee.

OSHA's standard at 29 CFR 1926.95 sets out the requirements for PPE in construction. Section 1926.95(a) provides that all types of PPE "shall be provided, used, and maintained in a sanitary and reliable condition whenever it is necessary by reason of hazards." Section 1926.95(b) goes on to provide that, even when employees provide their own PPE, "the employer shall be responsible to assure its adequacy, including proper

maintenance, and sanitation of such equipment." Section 1926.95(c) provides that all PPE "shall be of safe design and construction for the work to be performed." Unlike the general industry and maritime PPE standards, the current PPE construction standard at section 1926.95 does not include an explicit requirement that PPE properly fit each affected employee.

PPE must fit properly in order to provide adequate protection to employees. If PPE does not fit properly, it can make the difference between an employee being safely protected or dangerously exposed. In some cases, ill-fitting PPE may not protect an employee at all, and in other cases it may present additional hazards to that employee, and to employees who work around them. For example, sleeves of protective clothing that are too long or gloves that do not fit properly may make it difficult to use tools or control equipment, putting other workers at risk of exposure to hazards. The legs of protective garments that are too long could cause tripping hazards and impact others working near the worker with improperly fitting PPE. The issue of improperly fitting PPE is particularly important for smaller construction workers, including some women, who may not be able to use standard size PPE. Fit problems can also affect larger workers, especially with regard to the size of certain harnesses.

### B. Rulemaking History

The Advisory Committee on Construction Safety and Health (ACCSH) is a continuing advisory body established by statute (40 U.S.C. 3701 *et seq.*) that provides advice and assistance to the OSHA Assistant Secretary on construction standards and policy matters. The issue of proper PPE fit in construction was discussed at the ACCSH meeting held on July 28, 2011. At that meeting, the committee unanimously passed a motion recommending that OSHA use the Standards Improvement Project-Phase IV (SIP-IV) rulemaking "to update the Construction PPE Standards to mirror the General Industry PPE requirements, specifically that PPE fit the employee who will use it . . . ." (ACCSH Meeting Minutes, July 28, 2011). On December 16, 2011, ACCSH unanimously passed another motion recommending that OSHA consider using the SIP-IV rulemaking to revise the construction standards to include the requirement that PPE properly fit construction workers. (ACCSH Meeting Transcript, December 16, 2011, pp. 144–148).

On December 6, 2013, OSHA issued a SIP-IV Request for Information (RFI)

asking the public “to identify provisions in OSHA standards that are confusing or outdated, or that duplicate, or are inconsistent with, the provisions of other standards, either OSHA standards or the standards of other agencies.” (SIP–IV RFI, December 6, 2013). In response, several commenters, including the AFL–CIO and the International Safety Equipment Association (ISEA), recommended that OSHA use the SIP–IV rulemaking to revise its construction PPE standard to ensure that PPE properly fits all construction employees. (AFL–CIO, February 13, 2013; ISEA, February 4, 2013).

Based on stakeholder suggestions, on October 4, 2016, OSHA published the SIP–IV Notice of Proposed Rulemaking (NPRM) in the **Federal Register**. (SIP–IV NPRM, October 4, 2016). Among other things, OSHA proposed revising 29 CFR 1926.95(c) to include an explicit requirement that PPE must properly fit each affected employee. In the preamble to the SIP–IV NPRM, OSHA stated that the proposed revision would “clarify the construction PPE requirements on this point and make them consistent with general industry PPE requirements.” (SIP–IV NPRM, October 4, 2016). Additionally, OSHA stated that clarifying the requirement would “help ensure employers provide employees with properly fitting PPE, thereby adequately protecting employees exposed to hazards requiring PPE.” (SIP–IV NPRM, October 4, 2016).

OSHA received several comments specifically addressing the proposed revision to section 1926.95(c) in the SIP–IV NPRM. Some commenters fully supported the proposed revision while a coalition of construction industry stakeholders opposed it. OSHA discusses the specific comments received during the SIP–IV rulemaking in the next section of this preamble.

Based on the comments received, and the rulemaking record, on May 13, 2019, OSHA published the SIP–IV final rule in the **Federal Register**. (SIP–IV Final Rule, May 13, 2019). The final rule did not include the proposed revision to the construction standard at section 1926.95(c). Instead, OSHA determined that such a revision to the construction PPE standard should occur in a separate rulemaking outside the SIP process. In the preamble to the final rule, OSHA explained that proposing to revise the PPE requirements separate from the SIP–IV rulemaking “would provide the public with broader notice of the proposal, encourage robust commentary, and better inform OSHA’s approach to employer obligations and worker safety

in relation to PPE used in construction.” (SIP–IV Final Rule, May 13, 2019).

On July 17, 2019, OSHA presented a draft proposed rule to ACCSH for its recommendation, as required by the advisory committee for construction regulation at 29 CFR 1912.3(a). The committee asked OSHA to review enforcement statistics on PPE fit and consider including guidelines for what constitutes “proper fit.” (ACCSH Meeting Transcript, July 17, 2019). One member of ACCSH expressed concern that OSHA would require employers to present a “fit verification” to an OSHA compliance officer during a workplace inspection. In response, OSHA explained that the proposed rule would not change how employers currently assess the PPE needs of their workers. OSHA also explained that the proposed revision had been included in the SIP–IV rulemaking in an effort to make the construction standard consistent with the general industry and maritime PPE standards. In addition, while some ACCSH members did not believe there would be a cost associated with the proposed rule, one member asked OSHA to consider cost closely given the transient nature of the construction industry. After the period for comments and questions ended, ACCSH unanimously passed a motion recommending that OSHA move forward with the proposed rule.

### *C. Comments Received During the SIP–IV Rulemaking*

OSHA received four comments on the proposed revision of § 1926.95(c) in response to the SIP–IV NPRM. The Laborers’ Health & Safety Fund of North America (LHSFNA) and North America’s Building Trades Union (NABTU) both supported the proposed revision to clarify that PPE must properly fit each affected employee. (LHSFNA, January 5, 2017; NABTU, January 5, 2017, Attachment 1). Both commenters also stated that improperly fitting PPE can limit or negate the ability of the PPE to protect employees. According to NABTU, “[t]his is particularly important for women in the construction industry, who often have difficulty obtaining properly fitting PPE.” (NABTU, January 5, 2017, Attachment 1, p. 6). LHSFNA commented that the fit problem can also affect men, including with respect to harness sizes for men who are over certain weight limits. (LHSFNA, January 5, 2017, p. 3). NABTU stated that the proposed revision would not only make the construction standard consistent with the general industry standard, but was also supported by worker organizations, safety associations, and

ACCSH. (NABTU, January 5, 2017, Attachment 1, p. 6).

OSHA also received a comment in support of the proposed revision from Emmanuel Omeike (Omeike, December 4, 2016), a safety professional, which included two studies addressing PPE and women in construction. (Omeike, December 4, 2016, Attachments 3, 4). The comment noted examples of several employees who were wearing PPE, but nonetheless sustained injuries due to improper fit. (Omeike, December 4, 2016, p. 10). Mr. Omeike stated that employees are more likely to remove improperly fitting PPE, thus negating whatever protection the PPE might otherwise provide. (Omeike, December 4, 2016, pp. 11–12). Lastly, the commenter stated that prevention through design can eliminate many costs associated with PPE because PPE designed to be adjustable and customizable can prevent employee exposure to hazards created by improperly fitting PPE.

Additionally, OSHA received comments from the Construction Industry Safety Coalition (CISC) (CISC, January 4, 2017) opposing the proposed revision to section 1926.95(c). This commenter raised concerns about the possible impact the proposed revision would have on the construction industry, the definition of “properly fits,” employer confusion regarding compliance, and whether the SIP–IV rulemaking was the appropriate means to revise the standard. “CISC does not believe that OSHA seriously considered the full impact this revision will have on employers and the construction industry in general. While the proposed revision only adds a few new words, its broad scope covers a wide variety of PPE and situations that are not fully appreciated in the SIP–IV . . . Placing an explicit requirement that employers must ensure that all types of construction PPE ‘properly fits’ all different sized employees in all different situations would be a monumental task which in many cases is not necessary and will not improve safety. Moreover, the proposed revision fails to provide adequate notice to employers as to what ‘properly fit’ would mean. Does this mean that an employee who complains that a hard hat is uncomfortable does not ‘properly fit’ or what about arc-flash clothing that may be too long in the legs for one employee, does this not properly fit?” (CISC, January 4, 2017, p. 7). CISC also commented that revising § 1926.95(c) to include an explicit requirement that all PPE fit properly “greatly changes the dynamic of th[e] standard and places enormous new responsibilities on construction

employers.” The comment went on to state that the proposed revision does not simply clarify the standard, but “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.” (CISC, January 4, 2017, p. 8). CISC added that, in many cases, whether PPE properly fits is subjective and that it would be difficult for employers in construction to assess PPE for many employees of varying sizes in every situation. “[T]he subjective nature of this standard would greatly increase the potential for enforcement actions without giving employers fair notice of what is required.” (CISC, January 4, 2017, p. 8).

CISC also stated that it disagreed with OSHA’s statement in the preamble to the SIP-IV proposed rule that applying the same standard to construction employers will have the same effect or benefit as in general industry. The comment emphasized that the types and need for PPE vary greatly in construction, therefore adding a new fit requirement will create more of a burden for construction employers. (CISC, January 4, 2017, p. 8). CISC also argued that SIP-IV was not the appropriate avenue for making the proposed change, and urged OSHA to embark on “a more thorough and complete rulemaking process which gives fair notice to the regulated community and will allow the agency to receive comments from the regulated community as to the impact and implications that this change would have on employers.” (CISC, January 4, 2017, p. 8).

In response to the comments provided by CISC, OSHA acknowledges that there is a wide variety of PPE and hazards in the construction industry. To protect workers from these varied hazards in the construction industry, it is critical that workers’ PPE fit them properly. OSHA used the phrase “proper fit” in the SIP-IV rulemaking because that is the phrase used in OSHA’s general industry and maritime PPE standards. The agency’s intention throughout the SIP-IV rulemaking was to apply the proposed “properly fits” provision in the same manner as in general industry and maritime. OSHA further notes that the addition of the “properly fits” provision to the general industry standard was made for the same reason it was proposed during the SIP-IV rulemaking—that standard-sized PPE does not fit all employees, particularly women. (See 59 FR 16334 (April 6, 1994)). OSHA’s experience is that

employers in general industry have had no issue understanding the phrase “properly fits” with regard to PPE.

Finally, as stated in the preamble to the SIP-IV final rule, “the purpose of SIP-IV is to remove or revise outdated, duplicative, unnecessary, and inconsistent requirements in OSHA’s safety and health standards.” (SIP-IV Final Rule, May 13, 2019). Given the limited purposes of SIP-IV, and the comments on the PPE revision described above, OSHA determined not to finalize the revision to § 1926.95(c) in the SIP-IV rulemaking. Instead, OSHA concluded that such a change to the PPE construction standard should take place outside the SIP process. OSHA believes that by proposing this change independently of the SIP rulemaking process, the agency in this case is encouraging robust public comment. As a result, OSHA expects that its approach to employer obligations and worker safety in relation to properly fitting PPE in construction will be better informed. In addition, many of the specific issues raised by commenters during the SIP-IV rulemaking have been considered by OSHA and are addressed elsewhere in this preamble.

#### *D. Consideration of National Consensus Standards*

In adopting a standard, section 6(b)(8) of the OSH Act (29 U.S.C. 655(b)(8)) requires OSHA to consider national consensus standards; where the agency decides to depart from the requirements of a national consensus standard, it must explain why the OSHA standard better effectuates the purposes of the OSH Act. OSHA has reviewed national consensus standards on PPE and determined that it would better effectuate the purposes of the OSH Act to revise OSHA’s existing construction standard as described in this proposed rule.

There are many consensus standards that address PPE, with each standard focusing on a different type of equipment. For example, OSHA incorporates by reference American National Standards Institute (ANSI) Z87.1, Occupational and Educational Personal Eye and Face Protection Devices, and ANSI Z89.1, Head Protection, into its construction standards. However, there are several other PPE consensus standards that address not only different types of PPE, but also different uses for that PPE, such as NFPA 2113, Standard on Selection, Care, Use, and Maintenance of Flame-Resistant Garments for Protection of Industrial Personnel Against Flash Fire. Rather than adopting each PPE consensus standard, and whatever

language it may include on proper fit, OSHA proposes to revise its existing construction standard to make it clear that all types of PPE used in the workplace must fit properly. OSHA believes that centralizing the requirement in the OSHA construction standard will make employers more aware of their responsibility to ensure that PPE used to protect workers from hazards must fit properly.

Additionally, many consensus standards do not include mandatory language. For example, both of the ANSI standards discussed above include specific language concerning properly fitting PPE. However, while ANSI Z87.1 discusses the importance of properly fitting eye and face protection, the standard does not include mandatory language regarding its use. Similarly, rather than including mandatory language, ANSI Z89.1 merely refers users of head protection equipment to the manufacturer for advice on proper fit. The revision to section 1926.95(c) outlined in this proposed rule would make properly fitting PPE an enforceable requirement rather than the non-mandatory suggestions contained in these consensus standards. The agency believes that a clear and explicit enforceable requirement will help ensure that employers provide employees with properly fitting PPE. OSHA requests comment on whether this proposal will better effectuate the purposes of the OSH Act than the applicable national consensus standards.

### **III. Discussion of Proposed Changes**

#### *A. Section 1926.95(c)*

Based on the information collected from stakeholders, the recommendations from ACCSH, comments received during the SIP-IV rulemaking, and the important role properly fitting PPE plays in protecting workers, OSHA proposes to amend 29 CFR 1926.95(c) to explicitly require employers to ensure that all PPE that is selected properly fits each affected employee. Current § 1926.95(c) states “All personal protective equipment shall be of safe design and construction for the work to be performed.” However, unlike OSHA’s general industry and maritime standards, the current standard for construction does not contain an explicit requirement that PPE must properly fit each affected employee.

OSHA proposes to amend section 1926.95(c) to include the requirement, in subparagraph (c)(2), that employers select PPE that properly fits each affected employee. OSHA also proposes

to move the current language in section 1926.95(c) regarding safe design and construction to subparagraph (c)(1). As proposed, paragraph (c) would include language requiring employers to ensure that both requirements in subparagraphs (c)(1) and (c)(2) are met. OSHA believes that adding the language explicitly requiring properly fitting PPE in proposed subparagraph (c)(2) will help to ensure that employees are provided with PPE that protects them from workplace hazards.

OSHA requests comment on the proposed language in § 1926.95(c). Specifically, is the proposed language, which is consistent with OSHA's general industry and maritime standards, appropriate? Why or why not? Should subparagraph (c) include different language regarding the proper fit of PPE? If yes, what should the different language be, and why?

#### B. The Existing Standard

Although OSHA is proposing to add clarifying language to the current PPE construction standard to improve awareness of the requirement for properly fitting PPE, OSHA has historically interpreted the language in the current PPE construction standard to require all PPE to properly fit each affected employee. Specifically, 29 CFR 1926.95(a) provides that PPE “shall be provided [and] used . . . [in a] reliable condition wherever it is necessary by reason of hazards.” PPE is thus “necessary” when hazards exist in the workplace, but ill-fitting PPE is not “in a reliable condition” because it risks failing to mitigate the hazards that make the PPE necessary. For instance, if hazardous chemicals make PPE in the form of reliable protective clothing or a face shield necessary, ill-fitting PPE may fail to reliably protect the worker from exposure to those hazardous chemicals.

Similarly, under subsection (b), employers must assure the “adequacy” of employees' own PPE. PPE is manifestly inadequate if the fit is so poor it cannot perform its protective function. Also, it would make little sense to require employee-provided PPE to be adequate, but not to require the same of employer-provided PPE. Lastly, subsection (c) requires that PPE must be “of safe design . . . for the work to be performed.” This provision requires that the specific design of the PPE, which would include its measurements and size, be safe for the work to be performed by each individual worker.

OSHA's PPE standard for construction requires action from the employer to protect each individual worker. Subsection (a) of section 1926.95 requires employers to assess the actual

hazards to employees in their workplaces and provide PPE whenever it is necessary to protect against those hazards, and subsection (b) requires employers to assess the adequacy, including the maintenance and sanitation, of employee-provided PPE—which an employer can only do by reviewing each piece of PPE individually. Finally, it is not logical to read subsection (c) as only requiring that the PPE be safely designed in the abstract. For example, gloves may be safely designed to protect against a particular hazard, but they may not be safely designed for a worker whose hands are so small that the gloves fall off throughout the workday or get caught in the machinery the worker is required to use.

An examination of OSHA's guidance addressing PPE use in the construction industry reinforces OSHA's longstanding position that PPE used in construction must fit properly to protect workers from hazards. These guidance documents expressly state that PPE should fit properly and explain the hazards of ill-fitting PPE. The OSHA publication *Personal Protective Equipment*, which explains that “the information methods, and procedures . . . are based on the OSHA requirements for PPE,” including § 1926.95, states “Employers should take the fit and comfort of PPE into consideration when selecting appropriate items for their workplace. PPE that fits well and is comfortable to wear will encourage employee use of PPE. Most protective devices are available in multiple sizes and care should be taken to select the proper size for each employee. If several different types of PPE are worn together, make sure they are compatible. If PPE does not fit properly, it can make the difference between being safely covered or dangerously exposed. It may not provide the level of protection desired and may discourage employee use.” (*Personal Protective Equipment*, OSHA 3151–12R, 2004, p. 8). OSHA's *Fact Sheet on Personal Protective Equipment*, which refers to § 1926.95, explains that after determining hazards are present that require the use of PPE, an employer must “select personal protective equipment that properly fits your workers.” (*Fact Sheet on Personal Protective Equipment*, April 2006)). Also, *Assessing the Need for Personal Protective Equipment*, a document created by OSHA's Directorate of Training and Education, includes a checklist for various types of PPE. For each type of PPE listed, there is an entry for ensuring “effective fit” of the PPE.

(*Assessing the Need for Personal Protective Equipment*).

Additionally, OSHA has developed guidance for specific types of PPE. For example, OSHA's *Eye and Face Protection eTool* is a comprehensive resource for assessing workplace hazards necessitating the use of eye and face protection and how to choose the appropriate protection. (*Eye and Face Protection eTool*, accessed July 23, 2020). The eTool lists the construction standards under “OSHA Requirements,” and discusses proper fit of eye protection. Also, in the eTool's “FAQs,” the document explains that training should include why improper fit of the eye and face protection can compromise protection.

OSHA requests comment on whether the inclusion of an explicit requirement in § 1926.95(c) would help clarify construction employers' obligations to provide properly fitting PPE to their employees.

#### C. Properly Fitting PPE

PPE is an essential element of an effective safety and health program. While many OSHA standards require employers to control or eliminate safety and health hazards before relying on PPE to protect employees, PPE often provides a critical last line of defense to protect individual employees. PPE that fits improperly not only fails to protect workers from the hazards it is designed to protect against, but it may also create additional hazards for those workers.

In many cases, ill-fitting PPE may not provide any protection at all to an individual employee. For example, ill-fitting gloves may slip and expose an employee's skin to hazardous chemicals. Improperly fitting goggles may have gaps at the temples, and expose the employee to flying debris entering their eyes. Further, there are some cases in which ill-fitting PPE may create additional hazards for employees. For example, improperly fitting protective clothing that is too long in the legs may present a tripping hazard for an employee, or an improperly fitting glove may become caught in machinery being operated by the employee. In *Personal Protective Equipment for Women: Addressing the Need*, a report prepared by the Ontario Women's Directorate (OWD) and Industrial Accident Prevention Association (IAPA), a women stated she suffered a broken finger using a grinder while wearing gloves that were too big for her hands. (OWD & IAPA, 2006, p. 13). A comment described above, from safety professional Emmanuel Omeike, noted several instances of employees who were wearing PPE, but nonetheless

sustained injuries due to improper fit. (Omeike, December 4, 2016, p. 10).

The construction industry includes many high-risk occupations, with various safety and health hazards. It is also comprised of a diverse workforce, including many employees who are not of a certain “standard” size or body type. For these workers, improperly fitting PPE may pose safety or health risks. For example, improperly fitting PPE can be an issue for small-stature construction workers, including some women, who may not be able to use PPE that is only available in a standard size. In the 1999 report *Women in the Construction Workplace: Providing Equitable Safety and Health Protection*, by ACCSH’s Health and Safety of Women in Construction (HASWIC) workgroup, women shared that standard sized PPE was difficult or impossible to use. One woman explained how she was issued a welding jacket with sleeves “a foot longer than her hand,” that she had to roll up, potentially exposing her to burn hazards. (HASWIC, 1999). Additionally, some standard-sized PPE may be too small for larger workers and expose them to hazards as a result.

Access to properly fitting PPE has always been an important safety and health issue for women working in construction. In the past, because women made up a relatively small percentage of the construction workforce, many manufacturers of protective equipment were reluctant to invest in research and development to produce correctly sized and proportioned products for women. Historically, manufacturers and suppliers have produced and sold protective equipment designed to fit average-sized men. As a result, ill-fitting PPE could jeopardize the safety and health of female construction workers.

Based on Bureau of Labor Statistics (BLS) Current Employment Statistics and the Census Bureau’s County Business Patterns (CBP) data, there were approximately 974,000 women working in the construction industry in 2018. (OSHA PEA Spreadsheet, 2023).<sup>1</sup> As a result of more women working in the construction industry, the availability of PPE for women has increased. The ISEA reports that many employers now provide a full range of sizes for PPE. (ISEA, February 4, 2013). Also, ISEA and the Center to Protect Workers’ Rights (CPWR) have developed lists of manufacturers who offer safety and health equipment that is appropriate for women working in construction. (ISEA List of Female PPE Manufacturers,

accessed October 27, 2020; CPWR—Construction Personal Protective Equipment for the Female Workforce, accessed October 27, 2020). OSHA requests comment on the availability of PPE for persons who may be smaller or larger than the average worker in the construction industry or for persons with other physical characteristics that differ from the average worker.

In addition to adversely impacting safety and health, ill-fitting PPE can also reduce an employee’s job efficiency. For example, an ill-fitting glove may cause an employee to use more energy to grip a piece of equipment, resulting in fatigue. In the HASWIC report, a woman shared her experience of using welding gloves that were so large she was unable to pick up anything. (HASWIC, 1999). Also, employees are more likely to remove or not use ill-fitting PPE, negating whatever protection the PPE might otherwise provide. (See Omeike, December 4, 2016, pp. 11–12). In *Personal Protective Equipment for Women: Addressing the Need*, survey participants cited poorly fitting gloves as a major problem, with one woman saying she tended not to use them because they were awkward. (OWD & IAPA, 2006, p. 13).

It is OSHA’s position that “properly fits” means 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. OSHA is not concerned with the cosmetic appearance, or “exact fit” of PPE. The proposed standard does not include the phrase “exact fit” in the regulatory text. Instead, the proposed rule uses the phrase “properly fits,” consistent with the OSHA general industry and maritime PPE standards. The agency believes that providing clear and explicit language in the construction standard on PPE fit will help ensure employers provide employees with properly fitting PPE, thereby ensuring protection for employees exposed to workplace hazards.

#### D. OSHA Enforcement of PPE Fit Requirements

OSHA 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. Sections 1910.132(d)(1)(iii) and 1915.152(b)(3) each explicitly provide that the employer must select PPE that properly

fits each affected employee. Appendix B of 29 CFR 1910, Subpart I (PPE), which provides assistance for employers in selecting PPE, 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.” This same type of guidance would apply to the proposed new requirement for proper fit in section 1926.95(c)(2).

OSHA has reviewed its enforcement data for the general industry and maritime standards that require PPE to properly fit and for the PPE requirements in 29 CFR 1926.95(a)–(c). The enforcement data spans from April 6, 1994, when OSHA promulgated revisions to the PPE requirements in general industry requiring PPE to fit properly (see 59 FR 16334), to July 30, 2021.

During that period of time, OSHA cited employers 51 times for violations of 1910.132(d)(1)(iii) and one time for a violation of 1915.152(b)(3). In many cases, employers were cited for not providing gloves that properly fit employees, exposing them to chemical and physical hazards. In one case, an amputation occurred when a worker’s improperly fitting latex glove was caught between a power steering belt and a pulley. (Inspection No. 908699).<sup>2</sup> An employer was also cited for failing to provide small and medium gloves to workers exposed to numerous chemical hazards. (Inspection No. 896842). Another inspection resulted in a violation of the standard because gloves that were too large for some employees reduced their dexterity. (Inspection No. 1418803). There were also several instances where employers provided workers with personal fall arrest systems that did not fit the employee properly, exposing them to fall hazards. (Inspection Nos. 638178, 1006483, 1346323, 1417821). In one instance, an employer provided workers with improperly fitting conductive booties, leading not only to electrical shock hazards, but also tripping hazards. (Inspection No. 525479). OSHA cited one employer under the general industry standard for inadequate PPE where duct tape was used to secure PPE to spats in an effort to provide protection from burns caused by molten aluminum. (Inspection No. 514938). In

<sup>1</sup> See the Preliminary Economic Analysis, below, for a description of how this figure was derived.

<sup>2</sup> Records for inspections referenced in this document can be found at <https://www.osha.gov/pls/imis/InspectionNr.html>.



maritime, the one violation resulted from a rigger working on a mast without a properly fitting fall protection harness, exposing the rigger to fall hazards. (Inspection No. 894520).

In construction, from April 6, 1994 to July 30, 2021, OSHA issued 1,722 citations for violations of 29 CFR 1926.95(a)–(c); most of the citations were for violations of section 1926.95(a). OSHA cited the inappropriate fit of PPE nine times, all under 29 CFR 1926.95(a). The majority of these instances were for improperly fitting gloves that exposed employees to hazards. (Inspection Nos. 1074915, 1103257, 1255622, 1291644, 1062401, 1062798). In one instance, an employer was cited because their employee did not wear protective eyewear because it did not fit over the employee's prescription eyewear. (Inspection No. 1074380).

These citations help to demonstrate that fit has always been an important part of meeting the PPE requirements in OSHA's construction standards. Without its consideration, workers can be exposed to multiple types of workplace hazards, including physical, chemical, and environmental hazards. The language of this proposed rule will make the requirement for properly fitting PPE clear and increase awareness of employers' obligations when choosing and evaluating PPE for their workers.

#### E. Issues for Comment

In addition to the questions throughout the preamble, OSHA seeks comment on the following issues related to this proposed rulemaking:

- Will this proposal effectuate the purposes of the OSH Act better than the applicable national consensus standards?
- ACCSH recommended that OSHA consider developing additional guidance to explain what "proper fit" 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?
- Is there confusion about what "properly fits" means for PPE used in the construction industry?
- How would the proposed revision impact the construction industry? Specifically, would revising the construction standard to mirror the language in the current general industry and maritime standards change how employers choose PPE for their employees? How?
- Are there differences between general industry and maritime, and the

construction industry, that impact whether OSHA should include the phrase "properly fits" in the construction standard?

- Are there types of PPE that are not available in varying sizes? If yes, please give specific examples of the PPE and how you address this in the workplace.
- Finally, what, if any, burden will the proposed change to section 1926.95(c) impose on employers in the construction industry?

In addition, see the issues for comment in section IV.C of this preamble.

#### IV. Agency Determinations

##### A. Legal Authority

The purpose of the Occupational Safety and Health Act of 1970 ("OSH Act," 29 U.S.C. 651 *et seq.*) is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." (29 U.S.C. 651(b)). To achieve this goal, Congress authorized the Secretary of Labor to promulgate and enforce occupational safety and health standards. (29 U.S.C. 654, 655(b), and 658). A safety or health standard "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." (29 U.S.C. 652(8)). A safety standard is reasonably necessary or appropriate within the meaning of 29 U.S.C. 652(8) if:

- It substantially reduces a significant risk of material harm in the workplace;
  - It is technologically and economically feasible;
  - It uses the most cost-effective protective measures;
  - It is consistent with, or is a justified departure from, prior agency action;
  - It is supported by substantial evidence; and
  - It is better able to effectuate the purposes of the OSH Act than any relevant national consensus standard.
- (See *United Auto Workers v. OSHA*, 37 F.3d 665, 668 (D.C. Cir. 1994) (*Lockout/Tagout*)). In addition, safety standards must be highly protective. (See *id.* at 669).

A standard is technologically feasible if the protective measure it requires already exist, available technology can bring these measures into existence, or there is a reasonable expectation for developing the technology that can produce these measures. (See, e.g., *American Iron and Steel Inst. v. OSHA*, 939 F.2d 975, 980 (D.C. Cir. 1991) (*per curiam*) (*Lead II*)). A standard is

economically feasible when industry can absorb or pass on the cost of compliance without threatening an industry's long-term productivity or competitive structure. (See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 530 n.55 (1981); *Lead II*, 939 F.2d at 980). A standard is cost effective if the protective measures it requires are the least costly of the available alternatives that achieve the same level of protection. (See, e.g., *Lockout/Tagout*, 37 F.3d at 668).

Section 6(b)(7) of the OSH Act (29 U.S.C. 655(b)(7)) authorizes OSHA to include requirements for protective equipment within a standard. It provides that, where appropriate, standards must prescribe suitable protective equipment and control or technological procedures to be used in connection with workplace hazards and must provide for monitoring or measuring employee exposure as necessary to protect employees. (29 U.S.C. 655(b)(7)).

##### B. Significant Risk

Section 3(8) of the OSH Act requires that OSHA standards be "reasonably necessary or appropriate to provide safe or healthful employment" (29 U.S.C. 652(8)), which the Supreme Court has interpreted as requiring OSHA to show that "significant risks are present and can be eliminated or lessened by a change in practices." (*Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 642 (1980) (plurality opinion) (*Benzene*)). The Court clarified that OSHA has considerable latitude in defining significant risk and in determining the significance of any particular risk, noting that "[i]t is the agency's responsibility to determine, in the first instance, what it considers to be a 'significant' risk." (*Id.* at 655).

Although OSHA makes significant risk findings for both health and safety standards, the methodology used to evaluate risk in rulemakings involving safety standards is normally more straightforward. Unlike the risks related to health hazards, which "may not be evident until a worker has been exposed for long periods of time to particular substances," the risks associated with safety hazards "are generally immediate and obvious." (*Benzene*, 448 U.S. at 649, n.54).

OSHA need not make findings on risk for the proposed change to 29 CFR 1926.95(c). This proposed rule involves a clarification of an existing OSHA standard and would not create any new requirements for employers. Accordingly, OSHA is not required to conduct a significant risk analysis for the proposed changes to section

1926.95. (See *Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 620 (D.C. Cir. 1988)).

*C. Preliminary Economic Analysis and Regulatory Flexibility Act Certification*

Executive Orders 12866 and 13563 require that OSHA estimate the benefits, costs, and net benefits of regulations. The Regulatory Flexibility Act (5 U.S.C. 601–612) and the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1532(a)) also require OSHA to estimate the costs, assess the benefits, and analyze the impacts of rules that the agency promulgates. In addition, the OSH Act requires that OSHA show the economic feasibility of standards.

A standard is economically feasible when industries can absorb or pass on the costs of compliance without threatening industry's long-term profitability or competitive structure (*Cotton Dust*, 452 U.S. at 530 n. 55), or “threaten[ing] massive dislocation to, or imperil[ing] the existence of, the industry.” (*United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1272 (D.C. Cir. 1981) (*Lead II*)). “[T]he Supreme Court has conclusively ruled that economic feasibility [under the OSH Act] does not involve a cost-benefit analysis.” (*Pub. Citizen Health Research Grp. v. U.S. Dept. of Labor*, 557 F.3d 165, 177 (3d Cir. 2009)). The OSH Act “place[s] the ‘benefit’ of worker health above all other considerations save those making attainment of this ‘benefit’ unachievable.” (*Cotton Dust*, 452 U.S. at 509). Therefore, “[a]ny standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in” the statute. (*Id.*). This case law arose with respect to health standards issued under section 6(b)(5) of the Act, which specifically require a showing of feasibility; OSHA has also rejected the use of formal cost benefit analysis for safety standards, which are not governed by section 6(b)(5). (See 58 FR 16,612, 16,622–23 (Mar. 30, 1993) (“in OSHA’s judgment, its statutory mandate to achieve safe and healthful workplaces for the nation’s employees limits the role monetization of benefits and analysis of extra-workplace effects can play in setting safety standards.”)).

The purpose of this rule is to revise the language of the PPE requirements in the construction standard to make it consistent with the requirement in

OSHA’s general industry and maritime standards. This rule is not an “economically significant regulatory action” under Executive Order 12866 or UMRA, and it is not a “major rule” under the Congressional Review Act (5 U.S.C. 801 *et seq.*) or § 804 of the Small Business Regulatory Enforcement Fairness Act (SBREFA). In addition, it does not meet any of the other criteria specified by UMRA or the Congressional Review Act for a significant regulatory action or major rule. Finally, this rule complies with Executive Order 13563.

*Preliminary Economic Analysis*

OSHA is amending the construction standard at 29 CFR 1926.95—Criteria for Personal Protective Equipment (PPE), paragraph (c), to clarify that PPE must properly fit each employee. The existing standard states that PPE shall be of safe design and construction for the work to be performed and current paragraph (a) states that PPE shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary. As discussed in more detail elsewhere in this preamble, for PPE to provide protection against the hazards for which it is designed, it must fit properly.

OSHA views the proposed revision to section 1926.95(c) as a clarification of existing requirements and therefore preliminarily concludes that the rule is not expected to impose new costs on employers as a result of a new regulatory requirement. OSHA normally assumes full compliance with existing requirements when performing its analysis of costs related to a new or amended standard. However, in this case, the purpose of the proposed rule is to clarify an existing requirement about which there may be confusion in the regulated community. To the extent the clarification in this rule could result in new changes in behavior among some employers, OSHA has estimated the costs for a specified proportion of employers to come into compliance with the already-existing requirement to provide properly fitting PPE. This analysis is being provided as a starting point for public comments and to demonstrate that, even if there were costs associated with this rule as a result of changed employer behavior, the rule would be feasible to implement.

As discussed above in Section II.C, Comments Received During the SIP–IV Rulemaking, OSHA previously proposed revising the language in

section 1926.95(c) to clarify that PPE must properly fit each employee. During that rulemaking, while several commenters supported the revision to section 1910.95(c), the CISC commented that the proposed revision would increase the costs to employers for providing PPE (CISC, January 4, 2017). Specifically, CISC commented that amending paragraph (c) would result in employers maintaining inventory of PPE that would not otherwise be necessary without the revised language. However, the proposed revision to paragraph (c) contains no such requirement, and employers would only be required to have PPE that properly fits their employees. As OSHA explained above, this is a requirement that already exists under the construction standard; the new language merely clarifies that requirement. In the long run, the cost of inventory should be largely unaffected by this rulemaking as employers will need to use one size or another for each affected employee. In other words, the employer will only need to provide each employee with one set of PPE under the revised regulatory language, which is the case whether the PPE fits properly or not. In addition to safety issues, equipment that is ill fitting may wear out faster or reduce worker productivity on the job. Moreover, it is inherently cost-ineffective to pay for PPE that does not perform its essential function properly or that the worker will not wear consistently.

On November 15, 2007, OSHA published a final rule addressing Employer Payment for Personal Protective Equipment (PPE Payment) (72 FR 64341). In that rulemaking, OSHA identified the various types of PPE that are worn by employees, and the numbers of employees that would typically use each type of PPE, in the construction industries: NAICS 236 (Construction of Buildings), NAICS 237 (Heavy and Civil Engineering Construction), and NAICS 238 (Specialty Trade Contractors). As part of its analysis, OSHA also calculated the cost, and estimated the useful life, of each item of PPE (see 72 FR 64406–64408).

As shown in Table 1, below, OSHA has preliminarily determined that the types of PPE used in construction fall into the following three categories: PPE provided by the employer and not of universal fit, PPE items purchased by the employee and reimbursed by the employer, and PPE of universal fit.



TABLE 1—PPE USED IN THE CONSTRUCTION INDUSTRIES \*

Provided by the employer, not universal fit	Provided by employee and reimbursed	Universal fit
Chemical Protective Clothing, Chemical Protective Footwear, Chemical Splash Goggles, Earmuffs, Face Shields, Gloves for Abrasion Protection, Gloves for Chemical Protection, Non-Prescription Safety Glasses, Safety Goggles, Safety Vests, Splash Aprons.	Prescription Safety Glasses, Protective Electrical PPE, Protective Welding Clothing, Safety Shoes with Metatarsal Guards, Safety Shoes Without Metatarsal Guards, Welding Goggles, Welding Helmets.	Body Harnesses, Body Belts, Ear Inserts, Hardhats, Welding Helmets.

\* Respirators are not included in the table, as fit testing is already required in paragraph 1910.134(f) of the respiratory protection standard (29 CFR 1910.134(f)), which covers the construction industry. (See 29 CFR 1926.103).

Source: OSHA, Office of Regulatory Analysis (OSHA PEA Spreadsheet, 2023).

PPE items of universal fit are those that are completely adjustable and capable of fitting any person. For those items, the employer will be able to continue providing the same items they are already providing to employees and will not have to replace them as a result of this rule. PPE items purchased by the employee and then reimbursed by the employer should already fit properly since the employee should have

selected the size that fits them best. Considering that these employee-purchased PPE items likely already fit, the employer will not have to replace them until they have reached the end of their useful life. As a result, employers would incur no cost for replacing those items under this proposed rule. The remaining PPE items are those provided by the employer that are not universal fit. For these items, the standard size

may not fit all workers—primarily people who are much larger or much smaller than average. Therefore, in cases where employers have provided standard-sized PPE, some workers may not have been provided properly fitting PPE. OSHA has preliminarily determined the average useful life for the PPE items that are provided by the employer and are not universal fit, as presented in Table 2.

TABLE 2—USEFUL LIFE OF SELECTED PPE

Provided by the employer, not universal fit	Useful life (yr.)
Chemical Protective Clothing .....	0.50
Chemical Protective Footwear .....	0.50
Chemical Splash Goggles .....	0.50
Earmuffs .....	0.50
Face Shields .....	1.00
Gloves for Abrasion Protection .....	0.25
Gloves for Chemical Protection .....	0.05
Non-Prescription Safety Glasses .....	1.00
Safety Goggles .....	0.50
Safety Vests .....	0.50
Splash Aprons .....	0.50

Source: OSHA, Office of Regulatory Analysis (OSHA PEA Spreadsheet, 2023).

In order to estimate the potential costs and impacts of this proposed standard, OSHA has taken the PPE items in Table 2 and updated the information that was in the Final Economic Analysis supporting the PPE Payment rulemaking to estimate the current number of employees that might use each type of PPE<sup>3</sup> and the unit cost of each type of PPE. The PPE Payment analysis was published in 2007 as part of the final rule on PPE Payment. Information on PPE use by employees for the 2007 analysis was derived from a statistically representative nationwide telephone survey of 3,722 employers conducted for OSHA. The survey was benchmarked to the whole working

population based on employment data available at that time. (See 72 FR 64391). When the economic analysis for the PPE Payment rule was performed, the most recent data available on numbers of employees was from the U.S. Census' 2004 *County Business Patterns*. OSHA utilized this 2004 data to estimate the number of employees using PPE and the industries they worked in. The most current information on prices for the PPE Payment analysis was from 2007 and was based on the GDP deflator from the Federal Reserve's St. Louis FRED (Federal Reserve Economic Data). In the PPE Payment rulemaking, therefore, the employee numbers were from 2004, based on the CBP's most recent data at that time, and the prices for PPE were from 2007, based on FRED's most recent GDP deflator at the time. These numbers, along with the more recent estimates for the current proposed rule, are presented in Table 3, below.

Similar to the data presented in the PPE Payment rulemaking, OSHA will be relying on data from two different time periods for estimates related to this proposed rule. The most recent data available to estimate the number of employees in the affected industries is from the CBP for 2020; the most recent FRED GDP report, used to make an updated estimate of PPE prices, is from the third quarter of 2022. The total number of PPE items used by employees in 2020 is derived by multiplying the number of employees (based on 2020 CBP data) by the number of PPE items used, per employee, from the Final Economic Analysis supporting the PPE Payment final rule. The agency then uses the unit costs of PPE items (in 2007) from the PPE Payment rule and applies the GDP deflator from the FRED to estimate the unit cost of those PPE items in 2022 dollars. Finally, to get the total potential one-time costs of this proposed standard, OSHA applies those

<sup>3</sup> In the final rule on PPE Payment, OSHA estimated the number of employees in non-State Plan states using any type of PPE (72 FR 64391). OSHA estimates that the proportion of employees who use PPE in the construction industries in all 50 states and territories is the same as the proportion of employees who use PPE in non-State Plan states.

2022 unit costs to the estimated number of PPE items used in 2020 (benchmarked to the updated Census data), based on the proportion of employees that might need replacement PPE.

Using data from the gross domestic product data series (GDP deflator from FRED, <https://fred.stlouisfed.org/series/GDPDEF>, accessed January 20, 2023), OSHA estimates that the average price for PPE in 2022 is 37.4 percent higher than in 2007, the base year for data the agency used when promulgating the PPE Payment rule. Using the most recent data (2020) available from the CBP report (<https://www.census.gov/programs-surveys/cbp/data/tables.html>), OSHA estimates that employment in the construction industries has increased by 8.04 percent

since 2004. As part of the PPE Payment rulemaking, OSHA previously estimated that the total number of PPE items worn by construction employees in 2004 was about 13 million. However, in the PPE payment rulemaking analysis, OSHA did not include safety vests in the list of necessary PPE. For this rulemaking, the agency has estimated the cost and use of safety vests and has included them in the number of PPE items worn by construction workers in 2020, the unit cost in 2022, and the total cost in 2022. Using the estimated construction workforce increase of 8.04 percent, the agency estimates that the total number of PPE items worn by construction employees was about 14.9 million in 2020. Dividing the total number of PPE items in use (14,892,806) by the total number of construction workers in 2020

wearing PPE (5,734,977) yields an estimate that each construction employee wearing PPE provided by the employer, and not universal fit, wears an average of 2.6 items of PPE.

In summary, OSHA is preliminarily estimating that the total cost of PPE that is provided by construction employers, and is not universal fit, has increased since 2007. Driven primarily by the aforementioned 37.4 percent price increase between 2007 and 2022, that cost is now estimated to be just over \$170 million, including an additional estimated \$3.9 million for safety vests. Based on this information, the agency calculates an average per unit PPE cost of \$11.45 and an average cost of \$29.74 to outfit a construction employee in their needed PPE.

TABLE 3—USE AND COST OF SELECTED PPE USED IN THE CONSTRUCTION INDUSTRIES

PPE provided by the employer, not universal fit	Total PPE items used by employees (2004) U.S.	Total PPE items used by employees (2020) U.S.	PPE unit cost 2007\$	PPE unit cost 2022\$	Total cost 2022\$
Chemical Protective Clothing .....	358,089	386,877	\$41.30	\$56.76	\$21,960,279
Chemical Protective Footwear .....	211,871	228,904	21.40	29.41	6,732,595
Chemical Splash Goggles .....	584,797	631,811	6.20	8.52	5,383,851
Earmuffs .....	642,362	694,004	13.60	18.69	12,972,241
Face Shields .....	1,194,399	1,290,422	14.90	20.48	26,426,058
Gloves for Abrasion Protection .....	2,940,764	3,177,183	8.30	11.41	36,243,886
Gloves for Chemical Protection .....	896,173	968,219	3.50	4.81	4,657,537
Non-Prescription Safety Glasses .....	3,485,009	3,765,183	6.20	8.52	32,084,272
Safety Goggles .....	2,506,959	2,708,504	4.65	6.39	17,309,989
Safety Vests * .....	NA	828,178	NA	4.65	3,849,472
Splash Aprons .....	197,632	213,520	10.00	13.74	2,934,632
Total of PPE items used by construction employees .....	13,018,055	14,892,806	.....	.....	170,554,811
Average per Unit PPE Cost 2022 .....	.....	.....	.....	.....	11.45

\* Safety Vests were not included in the 2004 analysis; OSHA Office of Regulatory Analysis has estimated their use in 2020 and their cost in 2022 dollars to be consistent with the use and costs for the other types of PPE. (ERG Cost Analysis for Safety Vests, August 17, 2020).

Source: OSHA, Office of Regulatory Analysis; based on PPE Payment rule (72 FR 64406). (See OSHA PEA Spreadsheet, 2023, tab "PPE Payment—Cost by PPE" for unit costs in 2007 and tab "PPE Payment—PPE Use" for PPE items used in 2004.)

Given the current lack of data on how many employees might be wearing improperly fitting PPE, OSHA estimated this parameter using some general population height and weight distributions. Based on BLS Current Employment Statistics, OSHA estimates that in 2022, the construction industry was made up of 86 percent men and 14 percent women. According to the CBP, there were 7,182,071 employees in the construction industry in 2020. Taken together, these data suggest that employment in the construction industry is comprised of about 6,173,572 men and about 1,008,499 women. Furthermore, OSHA's 2007 PPE Payment Final Rule estimated that only 79.85 percent of construction employees use PPE of any type. Based on this figure, the agency estimates that about

4,929,677 men and about 805,299 women in the construction industry use any type of PPE.

To estimate what proportion of women and men might require non-standard sizes of PPE,<sup>4</sup> the agency referred to the Census Bureau's 2011 National Health and Nutrition Examination Survey (NHNES) (<https://www2.census.gov/library/publications/2010/compendia/statab/130ed/tables/11s0205.pdf>). Using height and weight figures for the general population from NHNES, OSHA preliminarily determines, as shown in Table 4, below, that women and men weighing above 300 pounds and women shorter than

<sup>4</sup> OSHA uses the term "non-standard" to refer to sizes of PPE which are available on the market, but which some construction employers may not routinely order or keep in stock.

five feet tall might require non-standard sizes of PPE and thus could have improperly fitting PPE (the base figure was too small to meet statistical standards of reliability of a derived figure for men shorter than five feet tall).<sup>5</sup> OSHA acknowledges that using the general population height and weight distributions may not align precisely with the profile of construction workers. For example, Hispanic males make up a greater

<sup>5</sup> OSHA's analysis assumes that only construction workers who meet the specified height or weight criteria may require non-standard sizes of PPE. OSHA then draws from this universe of workers when calculating how many workers may actually be using PPE that does not properly fit. OSHA's analysis does not attempt to account for workers who wear standard-sized PPE but may nevertheless have been provided with improperly fitting PPE by their employers.

proportion of the construction workforce than the population in general and are, on average, slightly shorter than, and weigh less than, non-Hispanic white males. It is also possible that there are fewer people who are much smaller or larger than average in the construction industry. OSHA also acknowledges that this estimate is imprecise because it assumes that all workers who weigh more than 300 pounds and all female workers who are

shorter than five feet tall require PPE that is not standard sized; conversely, it assumes that standard-sized PPE is appropriate for all other workers. Given the necessity of estimating these parameters, OSHA seeks comment on what characteristics, and what data sources, should be considered when estimating the proportion of employees that might require non-standard sizes of PPE in the construction industries. Due to data limitations and as a simplifying assumption for this

preliminary analysis, the agency also assumes that construction workers are distributed across age groups in the same proportions as the general population examined in the NHNES. The agency then multiplies those percentages by the total number of men, and the total number of women, in the construction industry that wear any type of PPE. Those results are presented here, in Table 4.

TABLE 4—CONSTRUCTION EMPLOYEES WHO MAY REQUIRE NON-STANDARD SIZES OF PPE

Construction employee characteristic	Ages					Average (%)	Total employees (%)
	20–29 (%)	30–39 (%)	40–49 (%)	50–59 (%)	60–69 (%)		
Men Above 300 pounds .....	2.50	3.10	1.90	1.90	2.20	2.32	114,369
Women Above 300 pounds .....	2.30	1.60	1.70	0.60	0.70	1.38	11,113
Women Under 5 foot tall .....	5.70	8.00	5.00	8.00	9.00	7.14	57,498
Total Employees Who May Require Non-Standard Sizes of PPE .....	.....	.....	.....	.....	.....	.....	182,980

Source: OSHA, Office of Regulatory Analysis (OSHA PEA Spreadsheet, 2023).

The agency estimates that 182,980 construction employees might require non-standard sizes of PPE, but recognizes that not all of those employees are using improperly fitting

PPE. OSHA assumes that up to 10 percent of those workers—or 18,298 workers—are currently being provided with incorrectly fitting PPE. At an average, per-person cost of \$29.74 for

PPE,<sup>6</sup> OSHA preliminarily estimates that replacing the PPE for these 18,298 employees would cost almost \$545,000 for the entire construction industry.

TABLE 5—POTENTIAL PPE REPLACEMENT COST

Assumed percent of employees needing replacement PPE (2020)	Total employees	Total cost
10% of Employees .....	18,298	\$544,172
Average Per-Employee PPE Cost (2.6 items per employee) .....	.....	29.74

Source: OSHA, Office of Regulatory Analysis (OSHA PEA Spreadsheet, 2023).

As presented in Table 5, the agency preliminarily estimates that if 10 percent of employees are provided with properly fitting PPE as a result of this clarifying rule, the rule might have a one-time total cost to the construction industry of \$544,172. After initially replacing improperly fitting PPE, employers would be expected to continue to provide properly fitting PPE as those items reach the end of their useful life. Since employers need to provide replacement PPE, whether properly fitting or not, in the absence of this clarifying rule, OSHA estimates that there will be no additional on-going costs to provide properly fitting PPE as part of the normal process of replacement.

OSHA seeks comment on all aspects of its preliminary economic analysis, including:

- The types of PPE that construction employees use;
- The types of PPE that are available in different sizes;
- The types of PPE that are universal fit (*i.e.*, they can be adjusted to fit any person);
- Whether there are types of PPE that only come in one standard size that is not adjustable. If yes, give examples;
- The extent of employer reimbursement for employee purchases for various types of PPE;
- Whether the agency’s categorization of the various types of PPE into the three categories in Table 1 (provided by the employer, not universal fit; provided by the employee and reimbursed; and

universal fit) is accurate, and why or why not;

- The average useful life of various types of PPE;
- The benefits of, and productivity increases from, wearing properly fitting PPE;
- Workplace accidents related to improperly fitting PPE;
- The average cost for each PPE item, including whether there are price differences for different sizes of PPE, as well as the average cost to outfit an employee in necessary PPE;
- Whether employers will need to provide their workers with different sizes of PPE than they are currently providing them, and what specific changes employers will make to their current practices if this rule is finalized as proposed;

<sup>6</sup> OSHA assumes that larger and smaller sizes of PPE cost the same as the average size PPE of that type.

- Whether there are other significant cost elements that have not been accounted for in OSHA's analysis that extend beyond simply acquiring properly fitting PPE;

- Whether employers have incurred additional costs in fitting employees who need non-standard sizes of PPE with PPE that fits properly;

- Whether there will be ongoing costs to employers to provide correctly sized PPE. In particular, OSHA is interested in what ongoing activities employers anticipate they would need to undertake in response to this rule clarification and how much time and expense those activities would require.

#### Sensitivity Analysis

OSHA believes that instances of employees with improperly fitting PPE are limited given the existing

requirement for proper fit. The primary analysis above assumes that only 10 percent of the employees who may require non-standard sizes of PPE would need to have their PPE replaced. For the first sensitivity analysis, the agency compared the assumed 10 percent of potentially affected employees with a lower rate of 5 percent and, alternatively, a higher rate at each quartile of the group (25, 50, and 100 percent). Additionally, some employees may only need one item of replacement PPE while others might have to replace more items. As discussed above, OSHA has estimated that affected employees in construction wear an average of 2.6 pieces of PPE of the type covered by OSHA's analysis; the main analysis assumes they would all need to be replaced. In reality, for individual employees, some items might need to be

replaced and not others. The second sensitivity analysis examines the cases where employees need replacements for 1, 2, or 3 items of PPE, along with the 2.6 items used in the primary analysis.

In the first sensitivity analysis, OSHA multiplied the total number of employees who may require non-standard sizes of PPE (182,980) by the various assumed non-compliance percentages. Table 6, below, presents a range of 5 percent to 100 percent non-compliance. OSHA believes most companies want to act in the best interest of their employees and are already in compliance with the existing requirement to provide properly fitting PPE. As such, OSHA believes the actual non-compliance rate is towards the lower end of the range presented in Table 6. At most, fewer than 200,000 employees might be affected.

**TABLE 6—EMPLOYEES NEEDING REPLACEMENT PPE**

Assumed percent needing replacement PPE	Total employees
5 .....	9,149
10 .....	18,298
25 .....	45,745
50 .....	91,490
75 .....	137,235
100 .....	182,980

For the second sensitivity analysis, OSHA examined the potential number of pieces of PPE that might need to be replaced for each affected employee. In

Table 7, below, OSHA calculated the total number of PPE items, in the affected construction industries, that might need to be replaced based on

employees needing 1, 2, 3, or the average 2.6 pieces of replacement PPE.

**TABLE 7—PPE ITEMS NEEDING REPLACEMENT**

Percent of employees needing replacement PPE	Total PPE items needing replacement			
	1	2	2.6	3
5 .....	9,149	18,298	23,758	27,447
10 .....	18,298	36,596	47,517	54,894
25 .....	45,745	91,490	118,792	137,235
50 .....	91,490	182,980	237,585	274,470
75 .....	137,235	274,470	356,377	411,705
100 .....	182,980	365,960	475,169	548,940

To complete the sensitivity analysis, OSHA multiplied the cost of the average piece of affected PPE, calculated as

\$11.45 per piece, by the number of total items of PPE needing replacement

(displayed in table 7, above). The results are presented in table 8, below.

**TABLE 8—TOTAL COST OF REPLACEMENT PPE**

Percent of employees needing replacement PPE	Total PPE items needing replacement			
	1	2	2.6	3
5 .....	\$104,776	\$209,552	\$272,086	\$314,327
10 .....	209,552	419,103	544,172	628,655
25 .....	523,879	1,047,758	1,360,429	1,571,637
50 .....	1,047,758	2,095,517	2,720,859	3,143,275
75 .....	1,571,637	3,143,275	4,081,288	4,714,912
100 .....	2,095,517	4,191,033	5,441,717	6,286,550

TABLE 8—TOTAL COST OF REPLACEMENT PPE—Continued

Percent of employees needing replacement PPE	Total PPE items needing replacement			
	1	2	2.6	3
Per Employee Cost .....	11.45	22.90	29.74	34.36

Table 8 shows that, as a worst-case scenario, if no employers are providing properly fitting PPE to employees that need non-standard sizes, and if each employee needs 3 items of replacement PPE (more PPE than the average of 2.6 PPE items), then the total one-time cost to industry to provide that properly fitting PPE would be less than \$6.3 million. Meanwhile, the cost to industry could be as low as only \$105,000.

#### Benefits

As noted above, rather than impose a new requirement, this proposed rule would clarify an existing requirement in 29 CFR 1926.95(c) for PPE to fit properly. The proposed change harmonizes the PPE fit requirements in construction with those in general industry and maritime and should alleviate any confusion that may exist among construction employers, potentially addressing safety and health hazards caused by improperly fitting PPE.

In 2007, OSHA promulgated the PPE Payment rule, which clarified the responsibilities of employers to pay for PPE (72 FR 64342). In that rule, OSHA noted that PPE must fit properly in order to provide the protection it was designed to provide (*e.g.*, 72 FR 64350–51, 64380). Accompanying the PPE Payment rule was a detailed analysis of the types and numbers of injuries that would likely be prevented by the rule, and the value of those benefits. One finding of the analysis, which implicitly assumed employees would be provided with properly fitting PPE, was that PPE is a particularly cost-effective form of injury prevention, particularly in the construction industry. The analysis found that the economic benefits of preventing an injury with PPE in the construction industry were approximately three times the cost of providing the PPE.<sup>7</sup> While there is substantial uncertainty about whether any costs will be generated by this proposed rulemaking on PPE fit, the agency is confident that if the rule results in construction employers

incurring costs for properly fitting PPE, the benefits of the properly fitting PPE will likely exceed the costs. In addition, as has been noted elsewhere, much of the benefit of this rulemaking derives from providing greater clarity in terms of employer obligations.

While OSHA has preliminarily determined that the proposed change will not have quantifiable benefits, the agency requests comment on this preliminary determination. More specifically, if employers were to change the PPE they provide their workers as a result of this rule, what are the anticipated benefits to worker safety and health from these changes? How should OSHA quantify these benefits?

#### Technological Feasibility

The purpose of the proposed amendment to section 1926.95(c) is to improve clarity for the construction sector, as well as ensure consistency with existing OSHA standards for general industry and maritime. Because the requirement for properly fitting PPE already exists in the construction industry, OSHA believes that providing properly fitting PPE is already common practice among construction employers. OSHA does not believe that employers will encounter any significant obstacles acquiring PPE that will properly fit their workers. Therefore, OSHA preliminarily concludes that this proposed rule would be technologically feasible.<sup>8</sup> The agency welcomes comments on the technological feasibility of the proposal.

#### Economic Feasibility

OSHA historically has applied two threshold tests to look at economic feasibility for establishments covered by the rule: whether the rule's average per establishment costs as a percentage of average per establishment revenues, for each industry sector, are below 1 percent, and whether those costs as a percentage of profits are below 10 percent.<sup>9</sup> To determine whether there is

a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, there are also two threshold tests: whether the average costs for small entities are 1 percent of their average revenues or below, and whether those costs are 5 percent or less of the small entities' profits.<sup>10</sup> None of these threshold tests are hard ceilings or determinative; they are guidelines the agency uses to examine whether there are any potential economic impact issues that require additional study.

Because this is a clarification of an existing requirement, OSHA does not expect the proposed revision to the construction PPE standard to impose new costs on employers as a result of a new regulatory requirement. As previously stated, the proposed provision is consistent with the PPE requirements in the agency's general industry and maritime standards, and in agreement with OSHA's longstanding interpretation of the current requirements for PPE in section 1926.95. As noted above, to the extent the clarification in this rule could result in changes in behavior among some employers, OSHA has provided an estimate of the costs for a specified proportion of employers to come into compliance with the already-existing requirement to provide properly fitting PPE. Even assuming these estimated costs will be incurred by employers as a result of the rule the rule easily passes OSHA's threshold tests for feasibility. The average construction industry employer has revenues of \$3.3 million annually<sup>11</sup> and 9 employees.<sup>12</sup> As a worst case scenario, if such an employer had to replace all the PPE at issue in this rulemaking for all of their employees

Rule on Occupational Exposure to Respirable Crystalline Silica, Chapter VI (OSHA–2010–0034–4247).

<sup>10</sup> For example, see OSHA's Final Regulatory Flexibility Screening Analysis in support of the Hazard Communication rule (77 FR 17661).

<sup>11</sup> U.S. 2017 Economic Census. Construction: Summary Statistics for the U.S., States, and Selected Geographies: 2017. Available at <https://data.census.gov>. Table ID EC1700BASIC. (Accessed March 21, 2022.) (OSHA PEA Spreadsheet, 2023).

<sup>12</sup> U.S. 2017 Economic Census. Construction: Summary Statistics for the U.S., States, and Selected Geographies: 2017 reports a total of 715,364 establishments with 6,647,047 employees which averages to 9 employees per establishment. (OSHA PEA Spreadsheet, 2023).

<sup>7</sup> The 2007 analysis estimated that the rule would prevent almost 5,000 injuries (see Table XV–3) in construction, for a total economic value of approximately \$90 million (see Table XV–4), at a cost of approximately \$30 million (NAICS 23) (see Table XV–5) (72 FR 64401–64408).

<sup>8</sup> OSHA notes that it is not required to perform a technological feasibility analysis for this proposed rule because it is simply a clarification of an existing requirement. The technological feasibility analysis presented in this document is for informational purposes only.

<sup>9</sup> For example, see p. VI–14 of the Final Economic Analysis supporting OSHA's rule on Respirable Crystalline Silica. Final Economic Analysis and Final Regulatory Flexibility Analysis for OSHA's

(i.e., 2.6 items per employee), it would cost under \$300, which is less than .01% of an average employer's revenues. Therefore, this proposed rule is clearly economically feasible. The agency welcomes comments on its preliminary economic feasibility analysis and determination.

#### Regulatory Flexibility Screening Analysis and Certification of No Significant Impact on a Substantial Number of Small Entities

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.* (as amended)), OSHA examined the regulatory requirements of this rule to determine whether the proposed requirement would have a significant economic impact on a substantial number of small entities. As discussed above, because this is a clarification of an existing requirement, OSHA preliminarily estimates that this rule would impose zero costs on employers. Even if OSHA assumes that this rule would lead to changes in employer behavior and associated costs, however, the costs are minimal and would not be imposed on an ongoing basis. OSHA estimates that, on average, there will be no more than one worker who might be wearing improperly fitting PPE at any given firm. Given that replacement PPE costs less than \$30 per employee, this proposal would not impose significant costs on small employers. The agency therefore certifies that, if promulgated, this rule will not have a significant economic impact on a substantial number of small entities.

#### D. OMB Review Under the Paperwork Reduction Act

This proposal contains no information collection requirements subject to OMB approval under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320. The PRA defines a collection of information as “the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format.” (44 U.S.C. 3502(3)(A)).

#### E. Federalism

OSHA reviewed this proposed rule in accordance with the Executive Order on Federalism (E.O. 13132, 64 FR 43255, August 10, 1999), which requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when clear constitutional

and statutory authority exists and the problem is national in scope. E.O. 13132 provides for preemption of State law only with the expressed consent of Congress. Any such preemption is to be limited to the extent possible.

Under Section 18 of the OSH Act (29 U.S.C. 667), Congress expressly provides that States and U.S. territories may adopt, with Federal approval, a plan for the development and enforcement of occupational safety and health standards. States and territories that obtain Federal approval for such a plan are referred to as “State Plans” (29 U.S.C. 667). Occupational safety and health standards developed by State Plans must be at least as effective in providing safe and healthful employment and places of employment as the Federal standards and, when applicable to products that are distributed or used in interstate commerce, must be required by compelling local conditions and not unduly burden interstate commerce. (29 U.S.C. 667(c)(2)). Subject to these requirements, State Plans are free to develop and enforce under State law their own requirements for safety and health standards.

In States without OSHA approved State Plans, Congress expressly provides for OSHA standards to preempt State occupational safety and health standards in areas addressed by the Federal standards. In these States, this proposal would limit State policy options in the same manner as every standard or amendment to a standard promulgated by OSHA. In States with OSHA approved State Plans, this rulemaking would not significantly limit State policy options.

The proposed amendment to 29 CFR 1926.95(c) complies with E.O. 13132.

#### F. State Plans

This proposed rule would revise the language in the construction standard, 29 CFR 1926.95(c), to include an explicit requirement that PPE used in the construction industry must fit properly. This change would be consistent with requirements that exist in the general industry and maritime standards and with OSHA's prior interpretation of the construction standard. When Federal OSHA promulgates a new standard or more stringent amendment to an existing standard, OSHA-approved State Plans must either amend their standards to be “at least as effective as” the new standard or amendment, or show that an existing state standard covering this area is already “at least as effective” as the new Federal standard or amendment. (29 CFR 1953.5(a)). State Plan adoption

must be completed within six months of the promulgation date of the final Federal rule. OSHA concludes that this proposed rule, by including an explicit requirement that PPE used in the construction industry must fit properly, will maintain or increase the protection afforded to employees. Therefore, within six months of the final rule's promulgation date, State Plans would be required to adopt amendments to their standards that are “at least as effective,” unless they demonstrate that such amendments are not necessary because their existing standards are already “at least as effective” in protecting workers as the final Federal rule.

The 29 OSHA-approved State Plans are: Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New Jersey, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. The Connecticut, Illinois, New Jersey, New York, Maine, and the Virgin Islands State Plans cover state and local government employees only, while the rest cover the private sector and state and local government employees.

#### G. Unfunded Mandates Reform Act

OSHA reviewed this proposal according to the Unfunded Mandates Reform Act of 1995 (“UMRA”; 2 U.S.C. 1501 *et seq.*). As discussed above in Section IV.C of this preamble, the agency preliminarily determined that this proposal would not impose costs on any private- or public-sector entity. Accordingly, this proposal would not require additional expenditures by either public or private employers. Even to the extent that changes in behavior resulting from the rule would lead to employers expending money for new, properly fitting PPE, these costs are minimal and will only be incurred one time.

As noted above, the agency's standards do not apply to State and local governments except in States that have elected voluntarily to adopt a State Plan approved by the agency. Consequently, this proposal does not meet the definition of a “Federal intergovernmental mandate.” (See Section 421(5) of the UMRA (2 U.S.C. 658(5))). Therefore, for the purposes of the UMRA, the agency certifies that this proposal would not mandate that State, local, or Tribal governments adopt new, unfunded regulatory obligations. Further, OSHA concludes that the rule would not impose a Federal mandate on the private sector in excess of \$100

million (adjusted annually for inflation) in expenditures in any one year.

#### *H. Consultation and Coordination With Indian Tribal Governments*

OSHA reviewed this proposed rule in accordance with Executive Order 13175 (65 FR 67249) and determined that it would not have “tribal implications” as defined in that order. The amendment to the PPE standard for construction, if promulgated, would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

#### **List of Subjects in 29 CFR Part 1926**

Construction, Personal Protective Equipment, Occupational safety and health.

#### **Authority and Signature**

Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, authorized the preparation of this document pursuant to 29 U.S.C. 653, 655, and 657; 40 U.S.C. 3701 *et seq.*; 5 U.S.C. 553; Secretary of Labor’s Order 8–2020, 85 FR 58393 (2020); and 29 CFR part 1911.

Signed at Washington, DC, on July 14, 2023.

**Douglas L. Parker,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

#### **Amendments to Standards**

For the reasons stated in the preamble, OSHA proposes to amend 29 CFR part 1926 to read as follows:

### **PART 1926—SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION**

#### **Subpart E—Personal Protective and Life Saving Equipment**

■ 1. The authority citation for subpart E is revised to read as follows:

**Authority:** 40 U.S.C. 3701 *et seq.*; 29 U.S.C. 653, 655, 657; Secretary of Labor’s Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), 4–2010 (75 FR 55355), 1–2012 (77 FR 3912), or 8–2020 (85 FR 58393), as applicable; and 29 CFR part 1911.

■ 2. Amend § 1926.95 by revising paragraph (c) to read as follows:

#### **§ 1926.95 Criteria for personal protective equipment.**

\* \* \* \* \*

(c) Design and selection. Employers must ensure that all personal protective equipment:

(1) Is of safe design and construction for the work to be performed; and

(2) Is selected to ensure that it properly fits each affected employee.

\* \* \* \* \*

[FR Doc. 2023–15285 Filed 7–19–23; 8:45 am]

**BILLING CODE 4510–26–P**

### **DEPARTMENT OF VETERANS AFFAIRS**

#### **38 CFR Part 36**

**RIN 2900–AR97**

#### **Loan Guaranty: Servicer Regulation Changes**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is proposing to rename and clarify certain loss-mitigation terms used in VA’s regulations. VA is proposing these changes to align the names and definitions with their general use in the housing finance industry. VA believes that these proposed revisions would help avoid confusion and enable servicers and veterans to address loan defaults more quickly and effectively.

**DATES:** Comments must be received on or before September 18, 2023.

**ADDRESSES:** Comments must be submitted through [www.regulations.gov](http://www.regulations.gov). Except as provided below, comments received before the close of the comment period will be available at [www.regulations.gov](http://www.regulations.gov) for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been received: <http://www.regulations.gov>. VA will not post on [Regulations.gov](http://www.regulations.gov) public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm an individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period’s closing date is considered late and will not be considered in the final rulemaking.

**FOR FURTHER INFORMATION CONTACT:**

Andrew Trevayne, Assistant Director for

Loan and Property Management, and Stephanie Li, Assistant Director for Regulations, Legislation, Engagement, and Training, Loan Guaranty Service (26), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 632–8862. (This is not a toll-free telephone number.)

#### **SUPPLEMENTARY INFORMATION:**

#### **I. Background**

VA’s Loan Guaranty Service offers home loan programs that assist eligible veterans, service members, and certain surviving spouses (hereinafter collectively referred to as “veteran”) to buy, build, improve, or refinance a home. When a VA-guaranteed loan goes into default, the servicer may attempt to resolve the default using a loss-mitigation option that enables the veteran to remain in their home (e.g., repayment plan, special forbearance, or loan modification) or avoid foreclosure through compromise sale or deed in lieu of foreclosure.<sup>1</sup>

While regulations in 38 CFR part 36 are specific to VA-guaranteed loans, the loss-mitigation options outlined are typical across the housing finance industry. VA has received feedback that the names of certain servicing terms used in VA regulations are not aligned with how those terms are named in the housing finance industry, occasionally leading to confusion amongst stakeholders and veterans.

Additionally, VA’s inconsistency in using the terms “written” and “documented” to reference various agreements in servicing regulations may be confusing for servicers as to whether new technologies enabling certain loss-mitigation agreements to be established and documented in non-written formats are acceptable to VA. For example, as part of the final rule implementing the VA Loan Electronic Reporting Interface (VALERI) and corresponding regulations, VA updated its regulation pertaining to acceptance of partial payments by removing the requirement for a repayment plan to be “written” and adding that it must be “documented.”<sup>2</sup> However, other

<sup>1</sup> See 38 CFR 36.4319.

<sup>2</sup> See 38 CFR 36.4316(b). As background, VA amended its regulation pertaining to partial payments as part of an overhaul of existing VA loan guaranty program requirements. On February 18, 2005 (70 FR 8472, 8475), VA proposed amendments to then-existing 38 CFR 36.4315. Thereafter, on June 1, 2007 (72 FR 30505), VA published a supplemental proposed rule outlining VA’s plan to phase-in the new 38 CFR part 36 regulations. This plan included temporarily designating then-existing provisions found at 38 CFR 36.4300 through 36.4393 (the “36.4300 series”) as a new subpart B and establishing a new subpart F to include new 38