



ALAN WILSON
ATTORNEY GENERAL

June 14, 2016

The Honorable Tom Corbin
Senator, District 5
P.O. Box 142
Columbia, SC 29202

Dear Senator Corbin:

Attorney General Alan Wilson has referred your request dated May 4, 2016 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue (as quoted from your letter):

"[Regarding] OSHA [Occupational Safety & Health Administration] Regulation 1910.156 & 1910.134, ... who should bear the medical expense for the physical required of county firemen? Should the firemen be forced to use their own insurance benefits to pay for their physicals to meet these requirements or should each county or municipality pay for this service?"

Law/Analysis:

Your question centers around two OSHA regulations. While we certainly encourage you to seek further guidance from the Occupational Safety and Health Administration, we will examine the regulations you mention in your letter. 29 C.F.R. 1910.156 is too long in its entirety to include in this opinion, so we will quote the most applicable portion. It states:

The employer must ensure that respirators are provided to, and used by, each fire brigade member, and that the respirators meet the requirements of 29 CFR 1910.134 for each employee required by this section to use a respirator.

29 C.F.R. 1910.156 (f)(1)(i). Thus, let us examine 29 C.F.R. 1910.134. It is also too long to include in its entirety in this legal opinion, but the relevant portions state that:

1910.134(c)(1)(ii)

Medical evaluations of employees required to use respirators:

...

1910.134(e)

Medical evaluation. Using a respirator may place a physiological burden on employees that varies with the type of respirator worn, the job and workplace conditions in which the respirator is used, and the medical status of the employee. Accordingly, this paragraph specifies the minimum requirements for medical evaluation that employers must implement to determine the employee's ability to use a respirator.

1910.134(e)(1)

General. The employer shall provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator

in the workplace. The employer may discontinue an employee's medical evaluations when the employee is no longer required to use a respirator.

1910.134(e)(2)

Medical evaluation procedures.

1910.134(e)(2)(i)

The employer shall identify a physician or other licensed health care professional (PLHCP) to perform medical evaluations using a medical questionnaire or an initial medical examination that obtains the same information as the medical questionnaire.

1910.134(e)(2)(ii)

The medical evaluation shall obtain the information requested by the questionnaire in Sections 1 and 2, Part A of Appendix C of this section.

1910.134(e)(3)

Follow-up medical examination.

1910.134(e)(3)(i)

The employer shall ensure that a follow-up medical examination is provided for an employee who gives a positive response to any question among questions 1 through 8 in Section 2, Part A of Appendix C or whose initial medical examination demonstrates the need for a follow-up medical examination.

1910.134(e)(3)(ii)

The follow-up medical examination shall include any medical tests, consultations, or diagnostic procedures that the PLHCP deems necessary to make a final determination.

1910.134(e)(4)

Administration of the medical questionnaire and examinations.

1910.134(e)(4)(i)

The medical questionnaire and examinations shall be administered confidentially during the employee's normal working hours or at a time and place convenient to the employee. The medical questionnaire shall be administered in a manner that ensures that the employee understands its content.

1910.134(e)(4)(ii)

The employer shall provide the employee with an opportunity to discuss the questionnaire and examination results with the PLHCP.

...

1910.134(e)(6)

Medical determination. In determining the employee's ability to use a respirator, the employer shall:

1910.134(e)(6)(i)

Obtain a written recommendation regarding the employee's ability to use the respirator from the PLHCP. The recommendation shall provide only the following information:

1910.134(e)(6)(i)(A)

Any limitations on respirator use related to the medical condition of the employee, or relating to the workplace conditions in which the respirator will be used, including whether or not the employee is medically able to use the respirator;

1910.134(e)(6)(i)(B)

The need, if any, for follow-up medical evaluations; and

1910.134(e)(6)(i)(C)

A statement that the PLHCP has provided the employee with a copy of the PLHCP's written recommendation.

1910.134(e)(6)(ii)

If the respirator is a negative pressure respirator and the PLHCP finds a medical condition that may place the employee's health at increased risk if the respirator is used, the employer shall provide a PAPR if the PLHCP's medical evaluation finds that the employee can use such a respirator; if a subsequent medical evaluation finds that the employee is medically

able to use a negative pressure respirator, then the employer is no longer required to provide a PAPR.

1910.134(e)(7)

Additional medical evaluations. At a minimum, the employer shall provide additional medical evaluations that comply with the requirements of this section if:

1910.134(e)(7)(i)

An employee reports medical signs or symptoms that are related to ability to use a respirator;

1910.134(e)(7)(ii)

A PLHCP, supervisor, or the respirator program administrator informs the employer that an employee needs to be reevaluated;

1910.134(e)(7)(iii)

Information from the respiratory protection program, including observations made during fit testing and program evaluation, indicates a need for employee reevaluation; or

1910.134(e)(7)(iv)

A change occurs in workplace conditions (e.g., physical work effort, protective clothing, temperature) that may result in a substantial increase in the physiological burden placed on an employee.

...

29 C.F.R. 1910.134 (emphasis added). Appendix C to 29 C.F.R. § 1910.134 provides a mandatory medical evaluation questionnaire for the employee to fill out. It provides that the form must go to “the health care professional who will review it.” 29 C.F.R. § 1910.134, App. C. Section 1910.1020 specifies access to employee records, and Appendix A to it provides an optional form for an employee to authorize the release of medical information. 29 C.F.R. § 1910.1020, App. A.

As to who is required to pay for the medical evaluation, OSHA answered that question in a 1998 interpretation, stating that:

The standard does not prohibit an employee from using his own physician to evaluate his or her ability to wear a respirator. This arrangement may work fine for small employers, but can become difficult to administer for larger employers, because the employer would need to maintain contact with each physician and provide each physician with a copy of the supplemental information. If the employer chooses to use the employees' physicians as the PLCHP[physician or other licensed health care provider], then both the physicians' fees and employees' time must be paid for by the employer. For most companies the evaluation would normally be done by the company physician or by an arrangement with a local health care facility. The employer's requirement to provide an evaluation is satisfied when he provides the services of a PLCHP. If an employee chooses not to use the provided PLCHP, the employer would not be required to pay for any duplicate efforts.

The standard does not require all employees who may wear an SCBA respirator to have a physical exam. The standard allows these employees to take the mandatory questionnaire and to answer the additional questions 10 through 15 in Section A. However, due to the additional stress on employees required to use an SCBA, many physicians doing the evaluation will probably want to physically examine most employees who say they will occasionally need to wear an SCBA.

After evaluating the questionnaire and/or any physical examinations, the PLCHP supplies the employer with a written recommendation stating the employee's ability to wear a respirator. The employer must retain a copy of this written recommendation. OSHA will look for this documentation to determine if a PLCHP has evaluated each employee required by the standard to be evaluated. The standard states specifically what should be included in the written recommendation. The recommendation shall provide only the following information:

1. Any limitations on respirator use related to the medical condition of the employee, or relating to the workplace conditions in which the respirator will be used, including whether or not the employee is medically able to use the respirator;
2. The need, if any, for follow-up medical evaluations; and
3. A statement that the PLHCP has provided the employee with a copy of the PLHCP's written recommendation.

All information from the questionnaire and/or the medical exam is confidential, and arrangements must be made by the employer to ensure it is kept confidential. Usually these records are maintained by the PLCHP.

Occupational Safety & Health Administration (OSHA) (November 16, 1998) Standard Interpretations (emphasis added). After analyzing your question and the OSHA standards, we first want to clarify that OSHA's previous interpretation of its own regulation does not require a physical be performed annually only that a medical evaluation (written or physical) be performed before the employee is tested to use or uses a respirator in the workplace. OSHA addressed the issue of payment for the medical evaluation as well as its frequency in a 2004 standard interpretation where it stated that:

Question 1: Does OSHA require the medical questionnaire to be filled out on a yearly basis or may it just be amended as job or health conditions warrant?

Answer: The respiratory protection standard requires an initial medical evaluation to determine the employee's ability to use a respirator before the employee is fit tested or required to use the respirator in the workplace. At a minimum the employer must provide additional evaluations if an employee shows signs or symptoms that are related to their ability to wear a respirator. There is not a specific annual requirement for medical evaluations in the standard. However, the physician or other licensed healthcare provider (PLHCP) may prescribe annual tests to ensure employees' continued ability to wear a respirator.

Question 2: Is it allowable for an employee to go to their own doctor for a medical evaluation of their ability to wear a respirator if the employee is willing to cover the costs?

Answer: The standard requires the employer to select a PLHCP to perform the medical evaluations. Usually the employer has the evaluation performed by a company physician or through an arrangement with a local health care facility. The employer may also choose to use the employee's own physician to evaluate the employee's ability to wear a respirator, in which case, both the physician's fees and the employee's time must be paid by the employer. However, this arrangement is usually

difficult to administer since the employer would need to establish a relationship with each physician and provide each physician with the necessary information. If the employer does not select the employee's own doctor or any physician the employee prefers as the PLHCP and the employee goes to a physician of his own choosing, the employer would not be required to accept the evaluation or pay for the evaluation.

Question 3: What information must the company provide to the employee for the physician to make a medical determination as to the employee's ability to wear a respirator?

Answer: The employer must provide the PLHCP with the information in paragraph (e)(5) of the standard. This information includes: the type and weight of the respirator to be used by the employee; the duration and frequency of respirator use; the expected physical work effort; additional protective clothing and equipment to be worn; and the temperature and humidity extremes that may be encountered. The PLHCP must also be provided with a copy of the company's respiratory protection program and a copy of the standard.

Question 4: Can the company dictate to the employee which type of testing must be done by their doctor in order to determine the employee's ability to wear a respirator?

Answer: Most employers use the medical questionnaire to determine an employee's ability to wear a respirator but the standard also allows employers to use a medical examination instead. OSHA requires that the content of the examination include, at least, the items covered in the questionnaire, but this is considered the minimum requirement for the medical evaluation. Any additional testing would be left to the discretion of the company's PLHCP.

Occupational Safety & Health Administration (OSHA) (October 21, 2004) Standard Interpretations (emphasis added). Thus, OSHA has previously interpreted its own standards, but we would again encourage you to confirm these interpretations are still accurate. As we mentioned above, a medical evaluation may consist of a written form, as illustrated in Appendix C of 29 C.F.R. 1910.134, as long as the form is reviewed by a physician or other licensed healthcare provider ("PLHCP"). 29 C.F.R. 1910.134. Regarding whether the employee or employer must pay for the medical evaluation and review by a physician or other licensed healthcare provider, we presume OSHA would still state as it did in a previous interpretation that:

If the employer chooses to use the employees' physicians as the PLCHP, then both the physicians' fees and employees' time must be paid for by the employer. For most companies the evaluation would normally be done by the company physician or by an arrangement with a local health care facility. The employer's requirement to provide an evaluation is satisfied when he provides the services of a PLCHP. If an employee chooses not to use the provided PLCHP, the employer would not be required to pay for any duplicate efforts.

Occupational Safety & Health Administration (OSHA) (November 16, 1998) Standard Interpretation. Based on OSHA's November 16, 1998 interpretation, it appears the employer would be required to

provide a physician or other licensed healthcare provider for the medical evaluation (whether written or physical). However, the employee is not free to choose their own healthcare provider to perform the medical evaluation. It appears OSHA's standard should be addressed individually by each employer as how to best implement the standard and what options the employee has where the employer will pay for the medical evaluation.

Regarding firefighters, OSHA noted in a 1991 interpretation that:

First, in response to your question concerning intervals at which physical examinations are to be repeated for members performing interior structural firefighting, OSHA specifies in Appendix A of Subpart L, Fire Protection, 1910.156(4) that physical examinations are not the only way members of a fire brigade performing interior structural firefighting can be determined to be physically capable of performing those duties. A physical performance test is another way to make that determination.

Second, OSHA standards do not require that physical examinations be repeated at any particular intervals, but only that employees performing interior structural firefighting be physically capable of performing duties. Employers are responsible for determining the intervals between physical examination. However, Dr. Richard Kuehue, Department of Occupational Health and Safety, International Association of Fire Fighters, informed us that his association follows the recommendation of the National Fire Protection Association (NFPA) 1500, Sections 8-1.1-8.2, which mandates that such examinations be provided on both a preplacement basis and at least annually thereafter. A copy of these sections is provided for your information. With respect to your question concerning compliance with respirator requirements, OSHA does not require employer compliance with NFPA 1981 standards, which are more stringent than OSHA's respirator standards found at 1910.134 and .156.

Occupational Safety & Health Administration (OSHA) (January 29, 1991) Standard Interpretations (emphasis added). Thus, OSHA has previously addressed the question of compliance with other standards for firefighters.

Conclusion:

It is this Office's opinion that the medical evaluation (whether physical or written) as required by the Occupational Safety and Health Administration's (OSHA) standard 1910.134 should be addressed individually by each employer as how to best implement the standard. Moreover, we cannot say definitively whether the employer or employee should pay for a physical examination, as OSHA offers examples where either one could be liable for the cost of the examination. Each employer must make their own determination as to how to comply with OSHA's standards and what physician or other licensed health care provider they will cover the cost of providing the medical examination (whether physical or written) with. We have spoken with a representative from OSHA who stated that OSHA's interpretations of the standards should still be accurate unless noted otherwise on the interpretation as found on their website. Nevertheless, we encourage you to verify with OSHA the accuracy of the standard interpretations cited within this opinion. Though, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the government specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may also petition the

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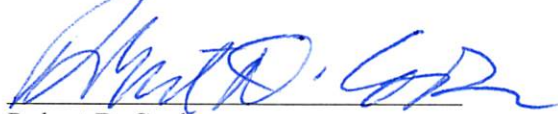
court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,



Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General