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Part II

Department of Labor

Occupational Safety and Health Administration

Use of Personal Sampling Devices During Inspection

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1903

Use of Personal Sampling Devices During Inspection

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

ACTION: Issuance of interpretative and procedural rule.

SUMMARY: This interpretation of 29 CFR 1903.7(b) clarifies the existing regulation concerning sampling of employee exposures during inspection and investigation of workplaces subject to the Occupational Safety and Health Act of 1970. Specifically, the interpretation makes clear that the term "employ other reasonable investigative techniques" includes the attachment of personal sampling devices to employees in order to monitor their exposures. In addition, in today's Federal Register, OSHA is proposing and inviting public comment on an amendment to § 1903.7(b) which would adopt this interpretation as a legislative rule. *See* Notice of Proposed Rulemaking, Docket No. W-300, which appears in Part II of today's Federal Register.

DATES: This interpretation is effective February 12, 1982.

FOR FURTHER INFORMATION CONTACT: James Foster, Office of Information, U.S. Department of Labor, 200 Constitution Avenue NW., Room N-3637, Washington, D.C. 20210, (202-523-8151).

SUPPLEMENTARY INFORMATION:

I. Introduction

The Occupational Safety and Health Administration ("OSHA" or "the agency") has been utilizing personal sampling devices as an aid in workplace inspections throughout its enforcement history. The most common personal sampling devices presently in use are the noise dosimeter and air sampling pump. The dosimeter is designed to measure sound levels in the workplace to determine compliance with the criteria established in the Secretary's occupational noise exposure standard at 29 CFR 1910.95. The device is approximately the size of a pack of cigarettes and weighs approximately 9 ounces. It has a small wire extending from the main unit to the microphone which is about the size of a quarter. The main unit may be attached to the employee's belt or pocket, and the microphone to the shirt lapel. The connecting wire may be attached tightly to the employee by running it across and/or pinning, taping or clipping it to his clothing.

A personal air sampling device is a small—about the size of two packs of cigarettes—battery operated pump which monitors the exposure to air contaminants of the individual wearing it. As with the dosimeter, the main part of the unit, which is a vacuum pump, is attached to the belt and connected by a flexible hose running along the subject's clothing to a silver-dollar-size cassette, impinger or charcoal tube, depending on the substance to be monitored. The pump most commonly used by OSHA weighs approximately 31 ounces.

As discussed below in detail, questions have recently been raised regarding the authority of the Secretary of Labor (Secretary) to use these devices. Accordingly, this interpretation is published to make clear that the authority conferred by the regulation at 29 CFR 1903.7(b) includes the attachment of personal sampling devices to employees in order to monitor their exposures. Of course, as with all regulations that confer authority, implicit in the regulation is the employer's obligation, consistent with his rights under *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), to permit and to take no action to impede the Compliance Officer's exercise of the granted authority.

II. Background

A. *Promulgation of 29 CFR 1903.7.* The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (the Act) was enacted "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." In order to carry out these purposes, section 8(a) of the Act, 29 U.S.C. 657(a), specifically authorizes the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge:

> (1) To enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) To inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein, and to question privately any such employer, owner, operator, agent or employee.

The Act was passed on December 29, 1970 and became effective on April 28, 1971. One week later, the Secretary proposed, pursuant to his rulemaking authority under section 8(g)(2) of the Act, 29 U.S.C. 657(g)(2), to add a new Part 1903 to Title 29 of the Code of Federal Regulations whose purpose was "to provide procedures and policies for the inspection, investigation * * * provisions of the Act." 36 FR 8376 *et seq.* Included among these "procedures and policies" was a provision (proposed § 1903.5(b)) authorizing Compliance Officers "to take photographs and samples, [and] employ other reasonable investigative techniques * * *" during an inspection. 36 FR 8376.

After the close of the comment period, the "Conduct of Inspections" provision (renumbered § 1903.7) was adopted with some changes and made effective immediately upon its publication in the Federal Register on September 4, 1971. 36 FR 17850, 17851. Specifically, § 1903.7 provided in pertinent part:

§ 1903.7 Conduct of Inspections.

* * * * *

> (b) Compliance Safety and Health Officers shall have authority to take environmental samples and to take or obtain photographs related to the purpose of the inspection, employ other reasonable investigative techniques, and question privately any employer, owner, operator, agent or employee of an establishment. (See § 1903.9 on trade secrets.)
>
> (c) In taking photographs and samples, Compliance Safety and Health Officers shall take reasonable precautions to insure that such actions with flash, spark-producing, or other equipment would not be hazardous. Compliance Safety and Health Officers shall comply with all employer safety and health rules and practices at the establishment being inspected, and they shall wear and use appropriate protective clothing and equipment.
>
> (d) The conduct of inspections shall be such as to preclude unreasonable disruption of the operations of the employer's establishment.

* * * * *

Thus, the promulgated regulation specifically authorized OSHA compliance officers "to take environmental samples" and to employ "reasonable investigative techniques" during the conduct of inspections.

B. *The Secretary's interpretation of 29 CFR 1903.7(b).* Shortly after Part 1903 was adopted, the Secretary issued his first OSHA Compliance Operations Manual (COM), a manual of guidelines to assure effective and uniform implementation of the Act. Chapter XIII of the COM, entitled "Industrial Hygiene and Occupational Health," contained instructions regarding sampling methods

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to be used to determine employee exposure to hazardous airborne contaminants. That section provided that air samples must relate directly to the exposure of one employee or more if the samples are to be of use in the compliance program, and that the most satisfactory method of meeting this requirement is to use of a personal sampler with the sampling head as close as is conveniently possible to the employee's head. COM at XIII-12. The section also provided that area samples are useful as an index of general contamination but cautioned that they usually are only remotely related to the actual exposure of the employee. *Id.*

On July 1, 1974, OSHA replaced the COM with the Field Operations Manual (FOM). Department of Labor, OSHA Field Operations Manual (July 1974). Section N of Chapter XIII of the FOM was identical to its predecessor section in the COM and, despite other changes to the FOM, has been essentially retained in every subsequent version of the manual, including the current version.

On August 15, 1978, the Secretary's first Industrial Hygiene Field Operations Manual (IHFOM) became effective. In addition to detailing various standard methods which utilize personal sampling equipment, that manual provided that, before citations for violating air quality standards (29 CFR 1910.1000 and 1010.1001) and the noise standard (29 CFR 1910.95) issue, "[a]n exposure to an employee must occur. This requires the use of personal sampling techniques." IHFOM at IX-1. The version of the IHFOM effective June 4, 1979 also specified that personal sampling is the standard method for measuring air contaminants, IHFOM at X-1, and that breathing zone samples are required to determine compliance with air quality standards. *Ibid.* at II-1. The current version provides that compliance with air quality standards shall be determined by measuring exposures within the breathing zone and states that "OSHA defines the breathing zone to be a sphere approximately 2 feet in diameter surrounding the head." IHFOM at II-1.

Thus, there can be no doubt that since the adoption of 29 CFR 1903.7, which authorized the taking of environmental samples and the use of reasonable investigative techniques, the agency has consistently and unambiguously interpreted that provision to allow and in fact encourage the use of personal sampling devices during OSHA inspections.

C. *The Secretary's policy and practice in monitoring employee exposures.* Consistent with the above interpretation are the Secretary's policy and practice in monitoring employee exposures. In the preamble to his standard regulating exposure to coke oven emissions (29 CFR 1910.1029), the Secretary stated generally that "[i]t is OSHA policy to monitor exposures by taking personal samples whenever possible. Area samples are generally not as direct a measure of employee exposure as are personal breathing zone samples." 41 FR 46758 (October 22, 1976). Several health standards require employers to measure employee exposure by taking personal samples. *See* 29 CFR 1910.1029(e)(1)(iii) (coke oven emissions); 29 CFR 1910.1025(d)(1)(iii) (lead); 29 CFR 1910.1018(e)(1)(iii) (arsenic). The asbestos standard requires samples to be collected from within the breathing zone of employees. 29 CFR 1910.1001(f)(2)(i). Other standards state that breathing zone samples should be taken. *See* 29 CFR 1910.1045 Appendix B (IV)(A)(1) (acrylonitrile); 29 CFR 1910.1044 Appendix B (IV)(A)(1) (1,2-dibromo-3-chloropropane). These Federal Register statements and standards demonstrate that the Secretary has always considered the use of personal sampling devices to be authorized and appropriate. In addition, the Secretary's longstanding practice of using personal sampling devices and the acknowledgement of that practice in various administrative and court decisions, confirms his interpretation that using those devices is included within the authorization of § 1903.7 to employ "reasonable investigative techniques."

D. *Judicial decisions concerning § 1903.7 and the Secretary's authority to use personal sampling devices.* 1. *The Plum Creek decisions.* The first case to address issues concerning the Secretary's authority to require the use of personal sampling devices during OSHA inspections was *Plum Creek Lumber Co.* v. *Hutton,* 452 F. Supp. 575 (D. Mont. 1978), *aff'd,* 608 F. 2d 1283 (9th Cir. 1979). In that case, OSHA attempted on January 17, 1978, to conduct an inspection of Plum Creek's fiber board plant, sawmill and plywood plant in Columbia Falls, Montana. The agency informed the company that employees would be requested to wear personal sampling devices during the inspection. When the company responded that its employees would be forbidden to wear the testing devices, OSHA left the workplace and obtained an inspection warrant from a United States Magistrate. A second inspection was attempted on February 6, 1978, but the company refused to comply with the warrant. OSHA then obtained a second warrant which specifically authorized "air sampling and noise level testing in a reasonable manner and to a reasonable extent."

On February 13, 1978, following a series of court proceedings, OSHA began the inspection of Plum Creek's facilities. At that time, the agency observed a February 10, 1978 notice to employees which stated that the wearing of noise and air sampling devices was against company policy. When OSHA requested twenty-two employees to wear the devices, sixteen refused. Of the six who agreed, three changed work shifts and only three actually wore the samplers. As a result, the inspection produced inconclusive results. OSHA then asked the district court to enjoin Plum Creek from impeding the inspection through its policy prohibiting employee cooperation in sampling.

As a result, a hearing was held on the two separate questions involved: (1) The Secretary's authority to conduct sampling by attaching personal sampling devices to workers and (2) the district court's authority to order the rescission of the company's policy prohibiting employee cooperation with such sampling. The district court upheld the Secretary's authority to conduct personal sampling if the employees agreed to cooperate, 452 F. Supp. at 576, and the United States Court of Appeals for the Ninth Circuit, on appeal, affirmed the district court's order and judgment, 608 F. 2d at 1290. The district court also held that it had no power to order rescission of the company policy, 452 F. Supp. at 577; the Ninth Circuit specifically addressed this issue on appeal and agreed with the lower court, 608 F. 2d at 1289–90. Thus, the *Plum Creek* courts held that, although a court could not order rescission of a company policy prohibiting employees from wearing personal sampling devices absent a regulation or law specifying their use, the Secretary is authorized to conduct such personal sampling and that the use of those devices is a "reasonable" investigative technique.

2. *Subsequent court decisions.* One court of appeals has refused to follow the Ninth Circuit's holding in *Plum Creek* that the court is without authority to order an employer to permit its employees to wear personal sampling devices contrary to the employer's written policy. *In re Establishment Inspection of Keokuk Steel Castings, Division of Kast Metals,* 638 F. 2d 42, 46 (8th Cir. 1981), *aff'g* 493 F. Supp. 842 (S.D. Iowa 1980). Several district courts also have declined to follow the Ninth Circuit's decision and have concluded that personal sampling is a reasonable

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technique which the Secretary can employ. *E.g., In re Establishment Inspection of Cleveland Electric Illumination Co.*, No. M80–2118 (N.D. Ohio), *appeal docketed*, No. 81–3159 (6th Cir. March 20, 1981); *Marshall v. Rochester Shoe Tree Co., Inc.*, Mis. No. 306 (N.D. N.Y. 1981); *Marshall v. Miller Tube Corp.*, 1978 CCH OSHD ¶ 23,212 at 28,059 (E.D. N.Y. 1978).

However, on August 3, 1981, a divided panel of the United States Court of Appeals for the Seventh Circuit reached a different result. *In re Establishment Inspection of Metro-East Mfg. Co.* and *In re Establishment Inspection of Century Casting Corp.*, 655 F. 2d 805 (7th Cir. 1981). The Court agreed that the use of personal sampling devices is reasonable but concluded that 29 CFR 1903.7 did not give employers "fair warning" of what is required or prohibited because it failed to specify the use of personal samplers as a "reasonable investigative technique." 655 F. 2d at 810–12. The Court therefore affirmed two district court orders limiting the terms of inspection warrants so as to preclude the use of personal sampling devices on employees, even if the employees agreed to wear the devices. The Court suggested that the Secretary amend the regulation to clarify its meaning and give employers fair warning of the type of investigation deemed reasonable. *See id.* at 812.

III. Reasons for Issuance of an Interpretative Rule

As discussed above, the Secretary has always interpreted § 1903.7 to permit attachment of personal sampling devices to employees as an aid in workplace inspections. Indeed, the Secretary's practice has been to use such devices whenever possible. However, since a question has been raised about the meaning of the term used in the regulation and to remove any doubt on this matter, this interpretation is being published to make clear that the term "employ other reasonable investigative techniques" includes attachment of personal samplers to employees to monitor their exposures.

Since this rule is an interpretative rule and a rule of agency procedure and practice, general notice of proposed rulemaking, public participation therein and delay in effective date are not required by 5 U.S.C. 553. Specifically, the rule interprets the term "employ other reasonable investigative techniques" as it is used in 29 CFR 1903.7(b) in order to clarify a provision believed by the Seventh Circuit Court of Appeals to be ambiguous. The rule also makes explicit a longstanding and consistently applied agency practice and procedure which is used in the course of an inspection or investigation. Thus, this interpretation does not effect a change in the substantive rights of any person.

In addition, general rulemaking procedures are unnecessary since this rule does not have a substantial impact on the persons regulated under the Act. For example, since the Secretary has always used personal samplers as an aid in OSHA inspections, there can be no justifiable reliance on a contrary prior practice. Furthermore, there is no prior interpretation of § 1903.7(b) which would preclude the use of personal samplers, and the Seventh Circuit did not adopt a contrary interpretation. Additionally, this rule does not alter the criteria used in making the ultimate decision in OSHA enforcement actions, *i.e.*, whether a company has violated the Act. Accordingly, notice and public procedure are unnecessary in this instance. *For the same reasons, under* the "good cause" exceptions to the general rulemaking requirements, 5 U.S.C. 553 (b) and (d), the agency is not required in this instance to provide notice of rulemaking, public participation therein and delay in effective date.

Moreover, notice and comment rulemaking in this instance would create a delay that would be contrary to the public interest. The use of personal sampling devices is necessary to the conduct of effective and efficient OSHA health inspections. The decision in *Metro-East, supra*, renders the agency unable to conduct any non-consensual personal sampling in the Seventh Circuit; under *Plum Creek, supra*, the agency's ability to conduct personal sampling in the Ninth Circuit has been severely restricted. Thus, in these circuits, and perhaps elsewhere, the effective conduct of virtually all OSHA health inspections has been impeded. The consequent health detriment to employees that results from OSHA's inability to effectively monitor their exposure to noise and air contaminants justifies the immediate effective date of this rule.

IV. Regulatory Impact Analysis

In accordance with Executive Order 12291 (46 FR 13193, February 17, 1981), OSHA has carefully assessed the potential impact of the interpretation of 29 CFR 1903.7(b). Based on the guidelines of the Executive Order, OSHA has concluded that the interpretation is not a "major" action which would necessitate further economic impact evaluation and the preparation of a regulatory impact analysis. This conclusion is predicated on several factors. First, as noted above, it has always been the Secretary's practice to use personal sampling devices on employees whenever possible. The Secretary's experience indicates that these devices are compact, take minimal time to attach to the employee, and neither hinder nor obstruct the employee's performance of his job. Thus, there are no substantive adverse labor productivity effects. Second, since OSHA is required to provide the personal samplers for use by its compliance officers, employers are not required to pay for these devices. Third, the Secretary is unaware of any injuries or accidents caused by the use of personal samplers. Therefore, these factors strongly indicate that this amendment would not increase costs to employers and would have little effect on the economy.

Finally, OSHA finds that the provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, which require an assessment of the impact of certain regulatory actions upon small entities, are inapplicable to this interpretative and procedural rule.

V. Authority

This document was prepared under the direction of Thorne G. Auchter, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW., Washington, D.C. 20210. This interpretation is issued pursuant to section 8(g)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(g)(2) and Secretary of Labor's Order No. 8–76 (41 FR 25059) in implementation of the general inspection and investigation authority conferred by section 8(a) of the Act, 29 U.S.C. 657(a).

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PART 1903—INSPECTIONS, CITATIONS AND PROPOSED PENALTIES

In accordance with above, 29 CFR 1903.7 is hereby amended by adding the following interpretative note at the end of § 1903.7(b):

§ 1903.7 Conduct of inspections.

* * * * *

(b) * * *

Interpretative Note: As used herein, the term "employ other reasonable investigative techniques" includes, but is not limited to, the use of devices to measure employee exposures and the attachment of personal sampling equipment such as dosimeters, pumps, badges and other similar devices to employees in order to measure their exposures.

* * * * *

(29 U.S.C. 657(a), 657(g); 5 U.S.C. 553)

Signed at Washington, D.C., this 4th day of February 1982.

Thorne G. Auchter,

Assistant Secretary of Labor.

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