

**North Carolina Department of Labor
Division of Occupational Safety and Health**

Raleigh, North Carolina

Field Information System

Operational Procedure Notice 131A

Subject: Enforcement Procedures for Respiratory Protection Against *M. tuberculosis*; Suspended enforcement of the provisions of 29 CFR 1910.134(f)(2), fit-testing

A. Purpose.

This notice announces the suspended enforcement of the annual fit-testing requirement in paragraph (f)(2) of the respiratory protection standard for respirators used to protect against occupational exposure to *M. tuberculosis* in those facilities formerly subject to compliance with 29 CFR 1910.139, Respiratory Protection for *M. tuberculosis* (TB).

B. Discussion.

Public Law 108-447 (H.R. 4818, the FY 2005 Consolidated Appropriations Act), which was signed into law on December 8, 2004, prohibits OSHA from using any FY 2005 appropriated funds to administer or enforce the provisions of 29 CFR 1910.134(f)(2) regarding annual fit-testing of respirators worn to protect against occupational exposure to tuberculosis.

This prohibition only affects annual fit testing of respirators used for protection against tuberculosis. It does not apply to the requirement for initial fit-testing of TB respirators, nor does it apply to the requirement to conduct annual fit-testing for all other required respirator usage in the affected facilities (i.e., the five occupational settings previously identified as having a higher than normal incidence of occupational exposure to *M. tuberculosis*: healthcare settings; correctional institutions; facilities for the long term care of the elderly; drug treatment centers; and homeless shelters).

In addition, outreach and assistance activities (e.g., education and training, and compliance assistance) cannot state or imply that annual fit testing of respirators for protection against tuberculosis is required, or recommend that employers implement annual fit testing if their sole use of respirators is to protect employees against tuberculosis.

C. References.

- Memorandum from Paula O. White, Director of Cooperative and State Programs, to State Designees and Consultation Project Managers, December 23, 2004 (attached).
- Public Law 108-447, FY 2005 Consolidated Appropriations Act, December 8, 2004.
- 29 CFR 1910, "North Carolina Occupational Safety and Health Standards for General Industry," with amendments through April 1, 2003.

- 29 CFR 1910.134, Respiratory Protection.
- Federal Register, Vol. 68, December 31, 2003, pages 75776-75780, Final Rule; Revocation: Respiratory Protection for M. Tuberculosis.
- CPL 2-0.120, Inspection Procedures for the Respiratory Protection Standard, September 25, 1998.
- CPL 2.106, Enforcement Procedures and Scheduling for Occupational Exposure to Tuberculosis, February 9, 1996.

D. Action.

During FY 2005, employers may not be inspected or cited for the requirement to do annual fit testing of respirators worn for occupational exposure to tuberculosis. This applies to all OSHNC compliance inspections, including programmed inspections, employee complaints, and imminent danger situations. (See CPL 2.106 for circumstances when respirators are required to be worn for protection against occupational exposure to tuberculosis.) This prohibition includes referrals for potential violations of the annual fit testing requirements for respirators and occupational exposure to tuberculosis that result from investigations conducted under the North Carolina Retaliatory Employment Discrimination Act (REDA).

No other provisions of the respiratory protection standard as it applies to occupational exposure to tuberculosis are affected by the appropriations restriction, including the provisions of 29 CFR 1910.134(f)(2) for the lack of initial fit testing or whenever a different respirator facepiece is used. This restriction also does not affect 29 CFR 1910.134(f)(3) which requires additional fit testing whenever facial changes have occurred which could affect the proper fit of the respirator.

Moreover, the prohibition against annual fit testing of respirators applies only to protection against tuberculosis. All requirements of the respiratory protection standard, including annual fit testing, may continue to be cited for respirator use against other hazards, including Severe Acute Respiratory Syndrome (SARS) or other bioaerosols.

E. Expiration.

This OPN is effective January 1, 2005 and expires on September 30, 2005. A subsequent renewal or revision of this policy will be issued if the appropriations restrictions are continued for administering and enforcing the provisions of 29 CFR 1910.134(f)(2) for respirators worn to protect against occupational exposure to tuberculosis.

Signed on Original

J. Edgar Geddie, Ph.D.
Health Standards Officer

Signed on Original

Kevin D. Beauregard
Assistant Director, OSHNC

1/04/05

Date of Signature

U.S. Department of LaborOccupational Safety and Health Administration
Washington, D.C. 20210

DEC 23 2004

Reply to the attention of:

MEMORANDUM FOR:

STATE DESIGNEES
CONSULTATION PROJECT MANAGERS

FROM:

Paula O. White/11
PAULA O. WHITE, Director
Cooperative and State Programs

SUBJECT:

Tuberculosis and Respiratory Protection

Following is guidance that has been provided to OSHA's Regional Administrators regarding recent Congressional action in the FY 2005 budget restricting OSHA's enforcement of the respiratory protection standard as it applies to tuberculosis exposure. The restrictions apply to the use of all Federal funds including Federal grant and State matching funds. You should immediately implement comparable policies in your programs:

Congress has passed, and the President has signed, the Consolidated Appropriations Act (the "CAA") for fiscal year (FY) 2005. Included in the CAA is an appropriations restriction that provides "[t]hat none of the funds appropriated under this paragraph shall be obligated or expended to administer or enforce the provisions of 29 CFR 1910.134(f)(2) . . . to the extent that such provisions require the annual fit testing (after the initial fit testing) of respirators for occupational exposure to tuberculosis."

Therefore, during FY 2005, employers may not be inspected or cited for the requirement to do annual fit testing of respirators for occupational exposure to tuberculosis. This prohibition applies to all OSHA compliance inspections, including programmed inspections, employee complaints, and imminent danger situations. The appropriations restriction also prohibits referrals for potential violations of the annual fit testing requirements for respirators and occupational exposure to tuberculosis that result from Section 11C investigations. The appropriations restriction, however, does not prohibit OSHA from conducting Section 11C investigations.

If inspection activity regarding the annual fit testing of respirators for tuberculosis has already taken place, the Area Director shall ensure that no citations are issued and no penalties proposed. If already issued, but not yet contested, any citation or proposed penalty shall be withdrawn. If an employer has already filed a notice of intent to contest, the Area Director shall inform the Regional Solicitor who shall take appropriate action to ensure that the specific citation regarding annual fit testing of respirators and tuberculosis is not pursued before the Occupational Safety and Health Review Commission.

No other provisions of the respiratory protection standard are affected by this appropriations restriction. We may continue to cite the remainder (non-annual fit testing requirements) of 29 CFR 1910.134 as it relates to tuberculosis, including the provisions of 29 CFR 1910.134(f)(2) for the lack of initial fit testing or whenever a different respirator facepiece is used. The appropriations restriction also does not affect 29 CFR 1910.134(f)(3) requiring an additional fit test when facial changes have occurred that could affect the proper fit of the respirator. Examples of conditions which would require additional fit testing of an employee include (but are not limited to) the use of a different size or make of respirator, weight loss, cosmetic surgery, facial scarring, and the installation of dentures or absence of dentures that are normally worn by the individual. Employers must also be following one of the fit testing methods detailed in Appendix A to the standard and maintaining records of each fit test performed.

In addition, the appropriations restriction affects only annual fit testing of respirators used for protection against tuberculosis. All requirements of the respiratory protection standard, including annual fit testing, may continue to be cited for respirator use against other hazards, such as Severe Acute Respiratory Syndrome (SARS) or other bioaerosols.

With respect to outreach and assistance activities (e.g., education and training, and compliance assistance), the appropriations restriction prohibits OSHA from stating that 29 CFR 1910.134(f)(2) requires annual fit testing of respirators for tuberculosis, or recommending to employers that they implement an annual fit testing program for respirators if their only use of respirators is for the protection of employees against tuberculosis. If asked in the course of providing training or compliance assistance what the Agency's position is on the annual fit testing of respirators for tuberculosis, we should explain that our FY 2005 appropriations prevent us from obligating or expending funds "to administer or enforce the provisions of 29 CFR 1910.134(f)(2)," to the extent that they require annual fit testing of respirators for occupational exposure to tuberculosis.

In addition, OSHA may not require annual fit testing of respirators for tuberculosis as a condition for participation in OSHA's recognition programs (i.e., SHARP and VPP) or strategic partnerships. The appropriations restriction does not prohibit employers who participate in those programs from adopting on their own annual fit testing of respirators for tuberculosis. OSHA's onsite Consultation program must also abide by the applicable appropriations restrictions in the CAA during Consultation visits and other compliance assistance activities.

The restrictions above apply to the use of Federal funds appropriated under the CAA. State plan States and Consultation projects may not expend Federal or State matching funds to perform activities prohibited by the appropriations restriction. State plan States may use 100% State funds to continue to conduct prohibited activities regarding tuberculosis and the respiratory protection standard provided they maintain auditable accounting systems to document the separation of funding sources.

If you have any questions, please contact your Regional Administrator or Barbara Bryant (202 693-2211) or Jay Arnoldus (202 693-2226).

cc: Regional Administrators
R. Davis Layne
Steve Witt
Richard Fairfax