



October 27, 2015

OSHA Docket Office
Docket No. OSHA-2015 -0006
Room N-2625
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness (Docket No. OSHA-2015-0006)

Dear Sir/Dear Madam:

The National Chicken Council, the U. S. Poultry & Egg Association, and the National Turkey Federation, are non-profit trade associations representing the producers and processors of chickens, turkeys, other poultry, eggs and affiliated industry suppliers. Combined, our organizations represent companies that produce 95 percent of the nation's poultry products and employ more than 350,000 workers. We are committed to providing a safe and healthy work environment for our employees. We appreciate the opportunity to submit these comments to OSHA as requested in its notice of proposed rulemaking, *Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness* (80 Fed. Reg. 45116, July 29, 2015).

This rule change would amend OSHA's recordkeeping regulations to provide that the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation that continues for as long as the employer must keep records of the recordable injury or illness, which is a period of five (5) years. These regulations, if they take effect as written, would expand OSHA's 6-month statute of limitations more than ten-fold, to five years plus six months.

On behalf of our members, the associations oppose this change. It would adversely affect all covered U.S. employers by vastly multiplying the period of time during which they are subject to citation for recordkeeping violations without any corresponding improvement in worker safety. This is no "clarification" of an existing obligation. Rather it is a dramatic and unprecedented change that radically expands by a factor of more than 10 the period of time an employer may be liable for recordkeeping violations. This change is contrary to the statutory scheme of the OSH Act, and should not be adopted. Moreover, it is contrary to longstanding Supreme Court precedent rejecting the "continuing violation" theory as inconsistent with canons of statutory interpretation. See *Local Lodge No. 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 419, 80 S.Ct. 822, (1960); *Ledbetter v. Goodyear*, 550 U.S. 618, 127 S.Ct. 2162 (2007).

In proposing this unprecedented expansion of the period of time during which OSHA may issue a citation to an employer for a recordkeeping violation, OSHA takes the position that because there is an ongoing duty to make and preserve records of workplace injury and illness, any failure to comply during the records retention period constitutes a “continuing violation.” A continuing violation exists when there is noncompliance with “the text of . . . [a] pertinent law [that] imposes a continuing obligation to act or refrain from acting.” *Earle v. Dist. of Columbia*, 707 F.3d 299, 307 (D.C. Cir. 2012). This position was squarely rejected by the U.S. Court of Appeals for the D.C. Circuit in *AKM LLC dba Volks Constructors v. Sec’y of Labor*, 675 F.3d 752 (D.C. Cir. 2012), and the proposed regulations are plainly intended to reverse that Court’s opinion. The Court’s opinion was well reasoned, is consistent with longstanding principles of statutory interpretation and administrative law, and should stand.

The Occupational Safety and Health Act (“OSH Act” or “Act”) provides that “[e]ach employer shall make, keep and preserve” records of workplace injuries and illnesses “as the Secretary ... may prescribe by regulation.” 29 U.S.C. § 657(c)(1). The required records retention period has been set at five (5) years. 29 C.F.R. § 1904.33(a). The Act also provides that “[n]o citation may be issued ... after the expiration of six months following the occurrence of any violation,” 29 U.S.C. § 658(c). In the proposed rulemaking, OSHA takes the position that recordkeeping violations under the OSH Act are “continuing violations,” and grafts the notion of continuing violation on to the Act’s five-year records retention period. This is inconsistent with the Act’s 6-month statutory period for issuing citations. 29 U.S.C. § 658(c); see also, e.g., *Sec’y of Labor v. Manganas Painting Co.*, 21 BNA OSHC 2043, 2048 (Rev. Comm’n 2007) (citation was time-barred where the employer abated the violation more than six months prior to the issuance date).

In *Volks*, the D.C. Circuit Court of Appeals considered and rejected the very arguments that OSHA has put forth in this NPRM. The Court held that obligation to maintain existing record did not expand the scope of an otherwise discrete obligation to make that record in the first place. OSHA had cited and fined Volks Constructors for failing to properly record certain workplace injuries and for failing to properly maintain its injury log between January 2002 and April 2006. OSHA issued the citations in November 2006, which was more than six months after the last unrecorded injury occurred. Because “[n]o citation may be issued ... after the expiration of six months following the occurrence of any violation,” 29 U.S.C. § 658(c), the Court found that the citations were untimely and should be vacated.

The Secretary argued that all of the violations for which Volks had been cited were “continuing violations” that prevented the statute of limitations from expiring until the end of the five-year document retention period in 29 C.F.R. § 1904.33(a). Therefore, the Secretary argued, all of Volks’ violations, stretching as far back as January of 2002, were still occurring on May 10, 2006, when the inspection began. The citations were issued two days shy of six months later than that date, so the Secretary argued they were timely.

The question before the D.C. Circuit was whether the Act's record-keeping requirement, in conjunction with the five-year record retention period, permitted OSHA to bypass the Act's six-month statute of limitations. The Court found that it did not. Under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984), the Court should defer to the Secretary's interpretation where a statute is ambiguous and the Secretary's interpretation is reasonable. Here, the Court found that the statute was clear and the agency's interpretation was unreasonable, so agency deference was unwarranted. The Court then considered and rejected the Secretary's "continuing violation" argument, saying "[w]e do not believe Congress expressly established a statute of limitations only to implicitly encourage the Secretary to ignore it." *Volks*, 675 F.3d at 756, citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

The Court considered and rejected the Secretary's implicit request that it conclude that the mere authorization to issue regulations governing the creation and preservation of records justifies an inference that Congress intended violations of record-making requirements to be treated as continuing violations. It found the Secretary's reasoning not persuasive enough to overcome the "standard rule" that the limitations period is triggered by the existence of a complete cause of action, "[u]nless Congress has told us otherwise in the legislation at issue." *See Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201, 118 S.Ct. 542, (1997); *Cherosky v. Henderson*, 330 F.3d 1243, 1248 (9th Cir.2003) ("The Supreme Court has made clear ... that the application of the continuing violations doctrine should be the exception, rather than the rule.").

The D.C. Circuit's decision is consistent with the Supreme Court's ruling in *Local Lodge No. 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 419, 80 S.Ct. 822, (1960). At issue in *Bryan Mfg.* was the National Labor Relations Board (NLRB) six-month statute of limitations, which was designed to prevent lawsuits being filed long after alleged unfair labor practices had occurred. More than six months after execution of the collective bargaining agreement, employees filed unfair labor practice charges challenging the continued enforcement of the union security clause. *See id.* at 414, 80 S.Ct. 822. The Supreme Court held that the charges were time-barred by § 10(b). *See id.* at 415, 80 S.Ct. 822. It rejected the notion that the ongoing enforcement of the agreement was a continuing violation, because "the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed." *Id.* at 417, 80 S.Ct. 822. The Court reasoned that the charges were based on a time-barred occurrence, i.e., the execution of the collective bargaining agreement with a security clause at a time when the union did not have majority status. *See id.* at 417-19, 80 S.Ct. 822. The Court refused to vitiate the policies behind the 6-month limitations period by converting enforcement of a collective bargaining agreement, perfectly lawful on its face, to an unfair labor practice by reference to an event that, because of a time limitation, could not be the subject of an unfair labor practice complaint. *See id.* at 419, 80 S.Ct. 822. *Bryan Mfg.* was not cited in *Volks*, but the reasoning concerning the statute of

limitations is the same: where Congress has enacted a statutory scheme that imposes a limit on the time for challenging an action, an enforcement agency may not evade that limit.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630, 127 S. Ct. 2162, 2170 (2007), *overturned due to legislative action* (Jan. 29, 2009), the Supreme Court observed that statutes of limitations “serve a policy of repose,” and “represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that ‘the right to be free of stale claims in time comes to prevail over the right to prosecute them.’” *Id.* (citations omitted). Noting that the EEOC filing deadline was designed to protect employers from the burden of defending claims arising from employment decisions that are long past, the Court declined to adopt the “continuing violation” theory urged by the petitioner. Two years later, Congress, exercising its legislative prerogative, amended the statute to effect the change that the Executive and Judicial branches lacked the authority to make.

The Secretary’s continuing violations theory would transform every recordkeeping error or omission during the 5-year retention period into a pass from the 6-month limitations clock. The mere existence of a statutory provision authorizing the Secretary to require employers to make and keep records, 29 U.S.C. § 657(c) does not create a continuing obligation that trumps the statute of limitations. Under the Secretary’s interpretation, the statute of limitations Congress included in the Act could be expanded *ad infinitum* if, for example, the Secretary promulgated a regulation requiring that a record be kept of every violation for as long as the Secretary would like to be able to bring an action based on that violation. There is truly no end to such madness. If the record retention regulation in this case instead required, say, a thirty-year retention period (as it does in 29 C.F.R. 1910.1020(d)(1)(i)), the Secretary’s theory would allow him to cite an employer for the original failure to record an injury thirty years after it happened. Congress surely neither intended nor contemplated such a result.

Congress’s aim in creating OSHA was to improve the safety of America’s workplaces, not to arm an agency with the opportunity to hammer employers years after errors or omissions in paperwork are made. *See* 29 U.S.C. § 651(b). Congress evidently thought this goal would be served by mandating that OSHA enforce record-making violations swiftly or else forfeit the chance to do so, as reflected in its requirement that citations not issue later than six months after a violation. *Cf. Mohasco Corp. v. Silver*, 447 U.S. 807, 825, 100 S.Ct. 2486, (1980) (“By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt [pursuit] of all charges...”). Nothing in the statute suggests Congress sought to endow this bureaucracy with the power to hold a discrete record-making violation over employers for years, and then cite the employer long after the opportunity to actually improve the workplace has passed. “An interpretation of a statute purporting to set a definite limitation upon the time of bringing action, without saving clauses, which would, nevertheless, leave defendants subject indefinitely to actions for the wrong done, would, we think, defeat its obvious purpose.” *Reading Co. v. Koons*, 271 U.S. 58, 65, 46 S.Ct. 405, (1926).

As the Court pointed out in *Volks*, the “continuing violation” theory is the exception, not the rule. The proposed new rule offends the original architecture of the OSH Act, and exposes

employers to liability far beyond the period when the discovery of any recordkeeping error or omission could possibly have a beneficial impact on worker safety. For all the reasons articulated by the D.C. Circuit Court in *Volks* and the Supreme Court in *Ledbetter*, this proposed regulation should not be adopted.

Thank you for the opportunity to comment. If you have any questions or require additional information concerning our comments please do not hesitate to contact Paul Pressley of the U.S. Poultry & Egg Association at 678.514.1972, Ashley Peterson, Ph.D., of the National Chicken Council at 202.443.4122, or Lisa Picard of the National Turkey Federation at 202.898.0100.

Sincerely,



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John Starkey

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Joel Brandenberger

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