OSHA's Midnight Attempt to Overrule Federal Court's Decision Is Ripe for Rescission

by Eric J. Conn

In the waning days of the Obama Administration, the Occupational Safety and Health Administration (OSHA) promulgated a new rule purportedly "clarifying" employers' continuing duty to correct injury and illness recordkeeping logs for the entire five-year period that logs must be kept. *See* 81 Fed. Reg. 91,792 (Dec. 19, 2016). The final rule, dubbed the "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness," amended OSHA's existing recordkeeping regulations in order to circumvent a 2012 decision of the United States Court of Appeals for the District of Columbia in *AKM LLC v. Secretary of Labor* (*Volks II*), 675 F.3d 752 (DC Cir. 2012). This "clarifying" rule should be repudiated.

OSHA's Injury and Illness Recordkeeping regulations require employers to record certain injuries and illnesses within seven days of the incident and also to preserve a copy of those records for five years. 29 C.F.R. Part 1904 *et seq*. Separately, the Occupational Safety and Health Act of 1970 (OSH Act) authorizes the Secretary of Labor to issue citations alleging violations of regulations adopted under the Act. 29 U.S.C. §§ 651-678. The statute of limitations in the OSH Act states, however, that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c).

Historically, OSHA took a broad interpretation of the five-year record-retention policy, concluding that the duty to first record an injury and to maintain an accurate record of the injury continued for the entire five-year retention period. Accordingly, OSHA cited violations for not recording or improperly recording injuries and illnesses any time within that five-year period that the recordkeeping logs were required to be physically kept, not just those that occurred during the six months prior to the issuance of the citations.

In 2006, OSHA issued more than 60 citations to a construction employer, AKM LLC (doing business as Volks Constructors), for failing to record injuries on its OSHA 300 Logs, many from two or more years before OSHA issued the citations. Volks challenged the citations, which were affirmed by an administrative law judge and upheld by the Occupational Safety and Health Review Commission. On appeal, the DC Circuit ruled that OSHA's reliance on its interpretation of Part 1904 to issue recordkeeping citations for five years was impermissible and violated the OSH Act's six-month statute of limitations.

The majority opinion relied on the legislative text of the OSH Act, not the recordkeeping regulation. The court first noted that OSHA's reading a continuing obligation to record into the recordkeeping provisions of the OSH Act, which delegated to the Secretary the power to require employers to "make, keep and preserve," "leaves little room for Section 658(c)," the provision containing the six-month statute of limitations. *AKM LLC*, 675 F.3d at 755. The court added, "[a]t best, the Secretary's approach diminishes Section 658(c) to a mere six-month addition to whatever retention/limitations period [OSHA] desires." *Ibid*. Second, the court concluded that "the Secretary's interpretation incorrectly assumes that the obligation to maintain an existing record expands the scope of an otherwise discrete obligation to make that record in the first place." *Id*. at 756. The court rejected OSHA's argument that the OSH Act authorizes the imposition of a continuing obligation to make or update records

Eric J. Conn is Co-Founder of and Chairs the OSHA Practice at Conn Maciel Carey PLLC in Washington, DC.

beyond the "discrete" obligation to make a record with a week of a recordable illness or injury. Third, the court found unpersuasive the Secretary's interpretation of overcoming the "standard rule" that a limitations period is triggered by the existence of a complete cause of action. *Id*. at 756-57. Rather than appeal the DC Circuit's decision to the Supreme Court or petition the DC Circuit for rehearing *en banc*, OSHA countered the DC Circuit's decision with a modified recordkeeping regulation.

In the face of *Volks II*, OSHA's new rule reasserts that employers are under a continuing obligation to make and correct their injury and illness records. This is an untenable policy for the nation's employers, which are entitled to a short, fixed period of repose in order to fairly defend OSHA citations. The new rule also undermines the OSH Act's intent to encourage prompt resolution of workplace-safety hazards. Following OSHA's logic, were OSHA to extend the retention period in § 1904.33(a) from five to ten or even 30 years, the statute of limitations for recordkeeping citations would be extended with it, further subverting Congress' intent.

Although the OSH Act does contemplate some continuing obligations that OSHA may cite beyond six months from the initial occurrence of a violation, Congress reserved such ongoing obligations for physical hazards that continuously endanger workers until they are abated. That is obviously not the case for paperwork violations. The new rule paves the way for OSHA to cite other paperwork violations long after six months as "ongoing obligations," which would reset the six-month statute of limitations each day the underlying paperwork violation remains uncorrected, for as long as OSHA may decide such records should be kept. It also creates a staleness problem. In circumstances where OSHA imposes long record-preservation periods, employers would be forced to defend against OSHA claims years or decades after their occurrence. The gathering of evidence and witnesses to defend against claims would be difficult for employers that have constantly changing workforces, retirements, or other factors that foreclose access to evidence.

From a broader perspective, OSHA's brazen invalidation of a court decision through the rulemaking process tramples on constitutional separation of powers. US Court of Appeals for the Tenth Circuit Judge Neil Gorsuch, who has been nominated to the US Supreme Court, spoke to this very conflict in a 2016 opinion:

> We recently confronted the thorny problem what to do when an *executive* agency, exercising delegated *legislative* authority, seeks to overrule a *judicial* precedent interpreting a congressional statute. In our constitutional history, after all, judicial declarations of what the law *is* haven't often been thought subject to revision by the executive, let alone by an executive endowed with delegated legislative authority.

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1143 (10th Cir. 2016) (emphasis in original). Judge Gorsuch wrote quite pointedly that judicial deference to administrative agencies "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Id*. at 1149 (Gorsuch J., concurring).

OSHA's "midnight regulation" exemplifies just such a power grab. It could be overturned in a number of ways. First, because it falls within the statutory timeframe for congressional action, Congress could eliminate it under the Congressional Review Act. The agency's new leadership could also rescind the rule by initiating a new rulemaking. Finally, regulated entities could sue under the Administrative Procedure Act to void the rule. It is vulnerable to challenge for the same reason that the DC Circuit rejected OSHA's position in *Volks II*—the rule is contrary to the plain language of the OSH Act. *Volks II* merely confirmed the obvious—that recordkeeping violations are subject to the OSH Act's six-month statute of limitations, which is unambiguous and not subject to agency interpretation. Thus, any attempt to modify, clarify, or interpret that limitation in a way that would allow a citation outside of six months is not a lawful rulemaking. Only a legislative revision of the OSH Act's statute-of-limitations provision can change the duration of time within which OSHA may cite an employer for recordkeeping violations.