Practitioner Insights: Trump Ready to Sign Resolution Voiding OSHA's Recordkeeping Rule

Publication
4.03.17

President Donald Trump is expected to soon sign a Congressional resolution revoking one of several Occupational Safety and Health Administration rules vulnerable to the Congressional Review Act. In response to Dr. David Michaels' argument against Trump signing the resolution in an article previously published by Bloomberg BNA, Partner Edwin G. Foulke has written the following, suggesting that OSHA move away from an enforcement-driven model to a compliance assistance model to help improve safety in the workplace.

President Donald Trump is expected to sign a joint resolution under the Congressional Review Act passed by the House on March 1 (H. J. Res. 83) and approved by the Senate on March 22 (S.J. Res. 27), which will block the changes set forth in OSHA's final rule titled "Clarification of Employers' Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness" to its record-keeping standard. By signing this resolution, the president will effectively cancel the Occupational Safety and Health Administration's rule to extend from six months to five years the time period for citing employees for improper entries on record-keeping injury and illness logs.

This saga started back in May 2006 when OSHA began an inspection at the facility of AKM LLC, doing business as Volk's Constructors. As part of this inspection, OSHA reviewed the company's Form 300 Injury and Illness Logs as well as the 300 A Summaries. On Nov. 8, 2006, OSHA issued a set of citations, which alleged over 100 violations of its record-keeping standard. In contesting the citations, the parties limited the issue on review as to whether the citations were untimely filed since most of the alleged violations had occurred almost five years prior to the inspection. The Occupational Safety and Health Review Commission's administrative law judge accepted the agency's position that the statute of limitations did not start to run until OSHA knew or could have known of the violation and upheld the citations. On appeal to the full review commission, OSHA refocused its legal arguments on a continuing violation theory, which was accepted by the commission, which affirmed the administrative law judge's ruling in a 2-1two-to-one decision.

The company appealed the decision to the U.S. Court of Appeals for for the D.C. Circuit, which, in a unanimous three-judge panel decision, reversed the review commission (*AKM LLC vs. Sec'y of Labor* , 23 OSHC 1886, 2012 BL 84910, D.C. Cir., 675 F.3d 752, 2012). In an unusually strongly worded opinion, the D.C. Circuit rejected OSHA's position that the violations were "continuing" and its long-

opinion, the D.C. Circuit rejected OSHA's position that the violations were "continuing" and its long-standing practice of issuing citations for record keeping going back as far as five years. The 5th Circuit focused on the specific language of the Occupational Safety and Health Act of 1970, which states that "no citation may be issued under this section after the expiration of six months following the occurrence of any violation" (Section 9 (c), 29 U.S.C. Section 658).

In reviewing this language, the court held that there was no ambiguity in the wording of the statute of limitations and found that the cited unrecorded injuries and failure to record violations in the citations were " incidents and events" and that they had all occurred beyond the six-month period of the issuance of the citations. The 5th Circuit rejected OSHA's continuing violation theory and stated that the court did not believe that "...Congress expressly established a statute of limitation only to implicitly encourage [OSHA] to ignore it." The 5th Circuit rejected all of OSHA's arguments and vacated the citations.

Since 2012, OSHA has limited its record-keeping citations in conformity to the *Volk's* decision to only six months from the start of the inspection. While having the legal right to request a full review by the D.C. Circuit or appealing it to the U.S. Supreme Court, OSHA chose neither of those avenues to address this issue. Instead on July 29, 2015, OSHA issued a notice of proposed rulemaking and added its record-keeping standard revisions to its regulatory agenda to address the *Volk's* decision six-month citation limitation. In its notice of proposed rulemaking, OSHA stated that the proposed rule was meant to "clarify that the duty to make and maintain an accurate record of an injury illness continued for as long as the employer must keep and make available records for the year the injury or illness occurred. The duty does not expire if the employer fails to create the necessary records when first required to do so." OSHA published Dec. 19 its final rule, which it claimed clarified an employer's continuing obligation to make and maintain accurate records of each recordable injury and illness. The final rule became effective on Jan. 18. In its press release on the final rule, OSHA reiterated that it had been its long-standing position that the employer's duty to record an injury illness continue for the full five-year record retention period. Specifically, former Assistant Secretary of Labor for Occupational Safety and Health, David Michaels noted that "this rule simply returns us to the standard practice of the last 40 years."

The issuance of this final rule fell within the time periods for review under the Congressional Review Act. The passage of this joint resolution shows Congress's rejection of OSHA regulatory amendment to its recordkeeping standard. While OSHA attempted to invalidate the *Volk's* decision through this regulatory change, there are strong arguments that the new regulation would have met the same fate as the old standard in the *Volk's* decision. Specifically OSHA attempted a regulatory fix to the record-keeping standard by declaring proper maintaining of the records to be an ongoing or continuing duty. However, the 5th Circuit in its decision did not focus on the record-keeping standard itself, but instead focused on the statutory requirement in the act of issuing citations within six months of the occurrence.

Accepting the approach set forth in the revisions to the record-keeping standard arguably would have allowed OSHA to expand that continuing violation definition to a whole host of other standards

thus expanding the congressionally delegated statute of limitations of six months to five years and beyond. Potentially this would have required employers to defend against OSHA citations many years after their occurrence, thus placing them, especially small medium-size employers, at a great disadvantage in defending those claims. It should be noted that while Congress through the CRA will eliminate the continuing duty language in the record-keeping standard, the standard itself will still have the five year record retaining requirements.

Most likely, Michaels and other Obama administration officials will continue to articulate the argument stated in the Dec. 16 press release regarding the importance of keeping accurate records in that they "have… a valuable and potentially life-saving purpose."

While I would agree that the OSHA 300 Logs can provide assistance to employers in identifying potential safety and health issues, obviously records for the last six months will be much more useful in identifying safety and health hazards and issues than the records that were made five years ago. Furthermore, utilizing OSHA record-keeping logs as well as injury and illness rates and DART rates are all lagging indicators which have been shown not to improve a company's safety program.

OSHA needs to move away from its fascination with injury and illness logs and numbers and be more focused on leading indicators in order to assist employers in improving their safety and health program. This is particularly true for small and medium-sized employers who do not have the knowledge and in most cases the resources to have an effective safety and health program or to meet the requirements under the OSHA standards. Moving OSHA away from an enforcement driven model to a more balanced enforcement/compliance assistance model will help particularly those small and medium-size employers to improve their safety programs thus allowing their employees to go home safe and sound each and every night to their family and loved ones. Hopefully the Trump administration will move OSHA back to a more balanced approach and particularly focus on compliance assistance to help small medium-size employers improve their safety and health programs.

This article originally appeared in *Bloomberg BNA* on April 3, 2017.

Related People

Edwin G. Foulke, Jr.
Partner
404.240.4273
Email