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Assessing Repeal of OSHA's Injury Reporting Rule

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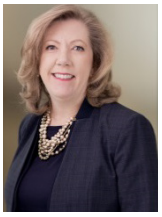


The effects of the regulatory reform initiatives of the Trump administration are beginning to be felt at the Occupational Safety and Health Administration with the formal action by OSHA to finalize withdrawal of one of the Obama administration's midnight regulations. "OSHA, Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness," 82 Fed. Reg. 20,548 (May 3, 2017). The so-called "Volks Rule" was issued to allow OSHA to cite employers for failure to record an injury or illness for up to six months following the five-year record retention period that would have applied to such a record had it been made in the first place — meaning five-and-a-half years after the initial failure to create a record. OSHA had no choice but to formally repeal the Volks Rule because Congress passed, and President Donald Trump signed, a Congressional Review Act authorization directing that this "midnight rule" (a regulation issued in the waning days of the Obama administration) be expunged. The Volks Rule is one of 13 regulations facing the dramatic consequence of being "CRA'd" — as it has come to be called in Washington, D.C.

As background, the CRA provides a streamlined process for overturning final rules issued by a federal agency. For a final rule to be overturned under the CRA, both the House of Representatives and the Senate must pass a resolution disapproving the rule during the six-month period the CRA provides for congressional review. 5 U.S.C. § 801 et seq. If the president signs the resolution, the rule is invalidated and the agency is barred from reissuing the rule in "substantially the same form" or issuing a new rule that is "substantially the same." 5 U.S.C. § 801(b).

Finalized last December, the Volks Rule, "OSHA, Clarification of Employer's Continuing Obligation To Make and Maintain an Accurate Record of Each Recordable Injury and Illness"; Final Rule, 81 Fed. Reg. 91,792 (Dec. 19, 2016), sought to reverse the impact of a 2012 decision by the D.C. Circuit that prohibited OSHA from issuing citations for injury or illness record-keeping violations outside the OSH Act's six-month statute of limitations. AKM LLC dba Volks Constructors v. Secretary of Labor, 675 F.3d 752 (D.C. Cir. 2012).

In interpreting the language of the OSH Act that provides OSHA cannot cite an employer "after the expiration of six months following the *occurrence of any violation*," 29 U.S.C. § 658(c) (emphasis added), the court's opinion rebuked OSHA, observing that Congress did not "expressly establish[ ] a statute of limitations only to implicitly encourage the Secretary to ignore it." 675 F.3d at 756. OSHA's core theory in the case was that when a company fails to create or correct a record of a recordable injury, that violation essentially repeats every day until the record is created or corrected. The industry parties took the view that a record only can be "not created" one time, and that the violation begins and ends when that failure

occurs, meaning that the time for OSHA to discover and enforce against such a violation begins to run immediately. Id. at 754-57.

Seeking to cast the regulation as a mere clarification of companies' existing obligations, OSHA claimed its midnight rule was necessary to "*clarify* that the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation." 81 Fed. Reg. at 91,792 (emphasis added). The suggestion that OSHA was "clarifying" its regulations consistent with what it viewed as its authority is somewhat remarkable in that the majority in the case stated that the "[OSH Act] clearly renders the citations untimely, and the Secretary's argument to the contrary relies on an interpretation that is neither natural nor consistent with our precedents." 675 F.3d at 759.

Notwithstanding this clear statement of the majority, and having not sought rehearing in the D.C. Circuit or certiorari to the U.S. Supreme Court, OSHA cited the concurring opinion filed by Judge Merrick Garland, which found OSHA's action contrary to its own regulations but would have held that the statute allows a continuing violation theory. 81 Fed. Reg. at 91,795 (citing 675 F.3d at 759-64 (Garland, J. concurring).Thus, it is not surprising that critics called OSHA's rule "an outright power grab" and an attempt to "not only ignore the law" but also usurp the power granted to Congress and "rewrite it" by "unilaterally extending the statute of limitations from 6 months to 5 years." 163 Cong. Rec. H1421 (daily ed. March 1, 2017) (statement of Rep. Bradley Byrne, R-Ala.).

Substantively, while the Volks Rule did advance OSHA's ability to collect fines for record-keeping failures, it did very little to advance safety. Supporters of the Volks Rule argued that rolling back the rule "essentially creates a vast safe harbor for noncompliance and creates the perverse incentive for underreporting" injuries which in turn "will undermine workplace safety and health." Id. at H1421-22 (statement of Rep. Bobby Scott, D-Va). This dire prediction cannot reasonably be true. Employers who deliberately underreport injuries/illnesses will do this continuously and can readily be cited for omitted records within the six-month statute of limitations. If OSHA cannot find a violation within that period, it logically follows that the employer is not a bad actor in the first place. Even when OSHA had a "National Emphasis Program on Recordkeeping," OSHA found noncompliance in fewer than 50 percent of investigated employers; and, only a small percentage of the cited employers had widespread noncompliance. Analysis of OSHA's National Emphasis Program on Injury and Illness Recordkeeping (R.K. NEP), ERG (Nov. 1, 2013), OSHA Docket ID OSHA-2013-0023-1835.

President Trump signed the Volks Rule CRA resolution into law on April 3, 2017. Shortly before signing the resolution, the White House released a statement saying that the administration "strongly supports" passage of the resolution because the "Administration is committed to reducing regulatory burdens on America's businesses, and this rule imposes costs on employers resulting from continuing recordkeeping obligations." White House, Statement of Administration Policy, H.J. Res. 83 – Disapproving the Rule Submitted by the Department of Labor Relating to "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness," (Feb. 28, 2017) available here.

The expansive use of the CRA is but one step in the new administration's effort to address what it views as executive branch overreach by the prior administration. As already indicated, the "Tracking Rule" may also be subject to retrenchment. In addition to signing all of the CRA resolutions passed by Congress to date, Trump has issued executive orders, presidential memoranda and notices of reconsideration seeking to review, revoke or revise midnight rules and other regulations and guidance issued by the Obama

administration.

The Volks Rule isn't alone — a dozen other regulations have been "CRA'd" since Trump took office. The window for fast-track Senate action on Obama administration rules is closing under the CRA; but, rules outside the six-month CRA window also are under scrutiny. Even without a current assistant secretary for OSHA, the beryllium rule, the silica rule for construction, and as discussed below, the electronic submission of illness/injury records all have had their effective dates postponed.

Being "CRA'd" means that OSHA can't issue a substantially similar rule — and that prohibition applies to the current administration (in which it is not likely to be a problem) or a future administration. Given the large swath now cut by the CRA, litigation can be anticipated in the future over what is a "substantially similar rule" or more to the point — what is a substantially dissimilar rule?

For now, employers evaluating whether the Volks Rule repeal gives them regulatory relief should remember that OSHA's record-keeping regulations remain comprehensive in scope, even in the absence of the Volks Rule. While OSHA may no longer issue citations outside the OSH Act's six-month statute of limitations, employers still must maintain injury and illness records for five years and update those records. 29 C.F.R. § 1904.33. Moreover, the far more substantial record-keeping rule from the Obama administration remains in place — at least for the time being. That rule, entitled "To Improve Tracking of Workplace Injuries and Illnesses" was finalized in May 2016 — just ahead of the June 13, 2016, date that would have made it subject to CRA action.

It established controversial anti-retaliation provisions as well as electronic reporting requirements. The anti-retaliation provisions became effective on Dec. 1, 2016, after OSHA postponed the original Aug. 16, 2016, effective date in the face of ultimately unsuccessful litigation brought in Texas federal district court by trade associations and workers' compensation insurance providers. They elevate the reporting of workplace illness and injuries to an employee "right" and confirming that taking adverse employment action against an employee solely because that employee has experienced a work-related injury or illness constitutes OSH Act retaliation. The Tracking Rule also requires that employers have "reasonable" reporting procedures, an uncomfortably subjective standard for a legal obligation.

The new electronic reporting requirements created by the Tracking Rule require that employers provide electronic reports of injuries and illnesses to OSHA. OSHA's plan is to publish the records on its website, which it views as beneficial. Many industry advocates argued (and continue to argue) that this publication will have the effect of discouraging consumers from doing business with companies with higher rates of illness/injury, chilling contracting opportunities, scaring off current and prospective employees, and causing other negative business impacts. Although it began some beta testing of the reporting tool and website shortly after the Tracking Rule was issued, OSHA initially delayed the initial compliance date until July 1, 2017, and, in early May, it notified the public through its website that it will propose further delay. This likely indicates that the fate of that provision is being evaluated by the new administration.

The important takeaway from the Volks Rule's repeal and the announcement of delay for the electronic reporting aspect of the Tracking Rule is that the Trump administration is serious about its intent to modify or eliminate regulations that fail to advance worker safety or where safety advances are outweighed by compliance burdens. We can expect continued scrutiny of Obama administration regulations as more employer-friendly leaders are put in place at the U.S. Department of Labor.

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