Labor & Employment | Alert

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The Senate Narrows Employers' Obligation to Accurately Record Work-Related Injury and Illness Records

On March 22, 2017, the Senate passed H.J. Resolution 83, a Congressional Review Act (CRA) resolution (Resolution) that cuts the Occupational Safety and Health Administration's (OSHA) ability to cite an employer for failing to accurately record work-related injuries and illnesses from five years to six months.[1] The resolution blocks and eliminates OSHA's "Volks" final rule, also known as "*Clarification of an Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness*" (Final Rule). The Final Rule, which went into effect Jan. 19, 2017, gave OSHA the authority to fine and cite employers that failed to accurately track and record work-related injuries and illnesses for up to five years after they occur.

If President Trump signs the resolution (which he is expected to do), OSHA will only be permitted to cite employers for failing to keep accurate records of workplace incidents up to six months after the recordkeeping violation occurred. OSHA will also be barred from passing a substantially similar measure; Congress must pass a law instead, which is usually a more difficult process.

How We Got Here…

The Volks Decision

The OSH Act requires that "[e]ach employer shall make, keep and preserve" records of workplace injuries and illnesses."[2] The Act's regulations require, among other things, for employers to prepare an incident report and a separate injury log "within seven (7) calendar days of receiving information that a recordable injury or illness has

[1] On March 1, 2017, the House of Representatives passed a nearly identical measure eliminating OSHA's Final Rule.
[2] 29 U.S.C. § 657(c)(1).

occurred,"[3] and they must also prepare a year-end summary report of all recordable injuries during the calendar year.[4] Employers must save all documents for five years from the end of the calendar year those records cover.[5]
In November 2006, OSHA cited AKM LLC dba Volks Constructors, LLC (Volks) for a variety of recordkeeping violations related to Volks improperly recording injuries on its recordkeeping logs between 2002 and early 2006. The earliest record keeping error occurred 54 months before the issuance of OSHA's citation and the latest occurred six months and 10 days before OSHA issued the citation.[6] In 2012, the D.C. Circuit Court of Appeals ruled that the citations were issued beyond OSHA's six months statute of limitations period and therefore vacated the citations.[7]

The majority held that the OSH Act does not provide authority for the Secretary of Labor to impose a continuing recordkeeping obligation on employers, explaining that "the . . . language in [the OSH Act] . . . which deals with record-keeping is not authorization for OSHA to cite the employer for a record-making violation more than six months after the recording failure."[8] The majority explained that OSHA must cite an employer for failing to record an injury or illness within six months of the first day on which the regulations require the recording; a citation issued later than that is barred by the statute of limitations.[9]

The Final Rule

In an about-face to the D.C. Circuit's decision in *Volks II*, OSHA's Final Rule amended OSHA's recordkeeping regulations to clarify that an employer's duty to maintain accurate records of work-related injuries and illnesses is an ongoing obligation.

"The [Final Rule] clarifies that an employer cannot avoid the five-year maintenance requirement by failing to make the record in the initial seven days; rather, the obligation to make the record continues throughout the five-year maintenance period even if the employer fails to meet its initial obligation."[10] In other words, "if an employer fails to record an injury or illness within seven days, the obligation to record continues on past the seventh day, such that each successive day where the injury or illness remains unrecorded constitutes a continuing 'occurrence' of the ongoing violation."[11]

The Final Rule made clear that OSHA can cite employers "for up to six months after the five-year retention period expires without running afoul of the OSH Act's statute of limitations."[12]

Takeaways

The Senate's Resolution is its first decisive action countering the policies that OSHA implemented under the Obama administration. This Resolution is likely a preview for additional actions from Congress and the Trump administration to roll back or eliminate certain OSHA (and other agency) regulations.

Assuming President Trump signs the Resolution, employers now have certainty regarding their recordkeeping obligations. Namely, employers would no longer have to worry that OSHA will cite them for a recordkeeping error that occurred as many as five years ago. As before the Final Rule, *Volks II* would again limit employers' OSHA liability. Indeed, OSHA would now only be able to cite an employer for the failure to create an accurate injury or illness record if the citation is issued within six months of the inaccurate recording.

[3] 29 C.F.R. § 1904.29(b)(3).
[4] *Id.* at § 1904.32(a)(2).
[5] *Id.* at § 1904.33(a).
[6] *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 753 (D.C. Cir. 2012).
[7] *Id.* at 759.
[8] *Id.* at 756-758.
[9] *Id.* at 753-59.
[10] *Id.* at 91799.
[11] *Id.* at 91798.
[12] *Id.* at 91794.

With that said, OSHA recordkeeping rules are complex and employer recordkeeping errors are generally systemic. Accordingly, employers are encouraged to continue to inform managers, supervisors, and human resources personnel to immediately report and accurately log workplace injuries to mitigate OSHA liability.

This *GT Alert* was prepared by **Adam Roseman**. Questions about this information can be directed to:

- Adam Roseman | +1 215.988.7826 | rosemana@gtlaw.com
- Or, your Greenberg Traurig attorney

Amsterdam
+ 31 20 301 7300

Atlanta
+1 678.553.2100

Austin
+1 512.320.7200

Berlin¬
+49 (0) 30 700 171 100

Berlin-GT Restructuring¯
+49 (0) 30 700 171 100

Boca Raton
+1 561.955.7600

Boston
+1 617.310.6000

Chicago
+1 312.456.8400

Dallas
+1 214.665.3600

Denver
+1 303.572.6500

Fort Lauderdale
+1 954.765.0500

Houston
+1 713.374.3500

Las Vegas
+1 702.792.3773

London*
+44 (0)203 349 8700

Los Angeles
+1 310.586.7700

Mexico City+
+52 55 5029.0000

Miami
+1 305.579.0500

New Jersey
+1 973.360.7900

Northern Virginia
+1 703.749.1300

Orange County
+1 949.732.6500

Orlando
+1 407.420.1000

Philadelphia
+1 215.988.7800

Phoenix
+1 602.445.8000

Sacramento
+1 916.442.1111

San Francisco
+1 415.655.1300

Seoul∞
+82 (0) 2.369.1000

Shanghai
+86 (0) 21.6391.6633

Tallahassee
+1 850.222.6891

Tampa
+1 813.318.5700

Tel Aviv^
+03.636.6000

Tokyo¤
+81 (0)3 4510 2200

Warsaw~
+48 22 690 6100

Washington, D.C.
+1 202.331.3100

Westchester County
+1 914.286.2900

West Palm Beach
+1 561.650.7900